

This paper is a draft for public comment. It is not legal advice.

- 1. Why are the streets so dangerous?
- 2. Can the City be held liable for dangerous street designs?
- 3. Could the City protect itself from liability and make San Francisco streets safer?
- 4. Conclusion

1. Why are the streets so dangerous?

From the 1950's on, many San Francisco streets were re-designed to accommodate high-volume automobile traffic. When the Supervisors and neighborhood groups stopped the super-highway scale designs, traffic engineers compensated by directing highway volumes of vehicles to ground routes via surface highways.

Four-lane, one-way streets are a good example. Oak Street once had a streetcar track in the middle, wider sidewalks (by six feet) and two-way traffic (figures A & B).

Traffic engineers proposed a variety of elaborate highway designs to move cars through this area. At one point, a combination of tunnels, embanked freeways and aerial superstructures was considered (1966 Panhandle Freeway Report to the Board of Supervisors).

The community rejected these plans. Now, Fell and Oak streets carry a freeway's-worth of automobile traffic.

In San Francisco, any four-lane, one-way street lined with Victorian homes is likely to have been specifically re-designed to move more cars faster. At certain points, this type of street design creates dangerous situations for other users of the roadway. For example, double turn-lanes, which increase automobile capacity (Explanation 1), are notoriously hazardous for pedestrians and bicyclists.

The City knows double turn-lanes are dangerous. A bicyclist was killed recently while attempting to travel through a double-

turn lane design. Advocates, City Advisors, and citizens have directly informed the City of this danger (*Attachment A*). Yet, the City continues to use double turn-lane designs.

Why?

Double turn-lanes are used in City traffic engineering because of the level of service standard, which judges a street's service levels by measuring average automobile speed and delay time. Too much delay creates a "failing" service level. There are no such City standards for pedestrians or bicyclists (Explanation 2).

The City maintains dangerous traffic designs, like double turn-lanes, to keep automobile traffic moving at a certain speed. The City also regularly refuses safety requests solely on this basis – even in situations where the surrounding neighborhoods clearly want multi-modal safety improvements. (Explanation 3)

In effect, the movement of cars through the City is considered to be more important than a local citizen's right to have reasonably safe public streets.

2. Can the City be held liable for dangerous street designs?

Public liability law is statutory, and not from common law. The California State Legislature made the City responsible for maintaining its property in a condition reasonably free from danger. These responsibilities are defined in the Government Code.

Much of the code poses questions of reasonableness. Was the dangerous condition reasonable? Was the condition obvious to a reasonable person using the street with due care? Did the City have a reasonable amount of time to fix the condition? Did the City have an adequate inspection system to find the condition?

The California Legislature established dangerous condition liability in the Public Liability Act of 1923. Then it revised the codes in the Tort Claims Act of 1963.

When the Legislature created dangerous condition liability, it also created immunities, or situations that the state could not be held liable for. For example, under Government Code 835, the City is potentially liable for maintaining public property in a dangerous condition. But under Government Code 830.6, the City is not liable for a dangerous condition caused by an approved plan or design, a concept known as "design immunity".

In double turn-lanes, the design's lack of consideration of bicycle movements creates the dangerous condition. Are the designs completely immune to liability?

Design immunity is a legal issue to be decided upon by the judge, when the City moves for summary judgment. A motion for summary judgment is based upon the assertion that by law, under Government Code 830.6, the City is not liable for a crash caused by design. Therefore, there are no issues of fact to be heard in a trial by jury.

Design immunity consists of three elements, which must be proved to engage the immunity:

- 1) a causal relationship between the design and the crash
- 2) discretionary approval of the design prior to construction
- 3) substantial evidence supporting the reasonableness of the design

In *Baldwin v. State* (1972) 6 C.3d 424 the California Supreme court developed the first case law exception to design immunity. In *Baldwin*, a crash happened where there was a history of crashes.

Baldwin alleged the crash was proximately caused by the defective street design. The court evaluated whether the legislature, in developing design immunity, had intended for design immunity to have "eternal life".

Baldwin said the City should not be "permitted to shut its eyes to the operation of a plan or design once it has been transferred from blueprint to black-top". When the City has notice of a dangerous design defect, there is an established history of crashes, or the street's physical conditions have changed, design immunity is no longer applicable.

Subsequent decisions further distinguished the exception, creating the current interpretation that design immunity is lost under changed physical conditions and notice. *Alvarez v. State* (1999) 79 Cal. App. 4th 720.

In double turn-lanes, could the physical change in conditions be the increase in bike traffic on city streets? When these intersections were designed, were bicyclists' movements considered in the design?

There are two types of notice under Government Code 835.2:

- 1) *actual notice*, or when the City is directly told of the danger
- 2) *constructive notice*, or when the danger is so obvious that the City should have known about it in the exercise of due care.

In 1979, the Legislature amended Government Code 835, creating section 835.4, which provides that the City is not liable for dangerous conditions if the act or "omission that created the condition was reasonable". The amendment is now used to

respond to changed-condition arguments against design immunity.

The City actively promotes the use of bicycles for transportation on its streets. Does the City not then assume a duty of care to keep those same streets reasonably safe for bicyclists?

Is the City negligent in not considering bike movements in many traffic designs? Does the City now have both actual notice, since citizens have directly identified the danger and constructive notice, since a cyclist was recently killed in double turn-lanes? Is it reasonable to continue to maintain these designs?

Cameron v. State (1972) 7 C 3d. 318 developed another exception to design immunity, for failure to warn. In *Cameron*, the court found that the City could be held liable for a dangerous condition that was not considered in the design planning process, if the danger was not readily apparent to a reasonable person using due care.

In *Cameron*, a car flipped while traveling through a sharp turn in the road. The road's design plans did not consider the super-elevation of the curve.

Design immunity was not a defense, because the aspect of the design that made the curve dangerous was not considered in the planning process. The County was held liable for failing to warn of the trap-type danger of the curve, under Government Code 830.8.

When a bicyclist enters double turn-lanes and two lanes of traffic suddenly turn across its path, is the fact that this danger is not clearly warned of a matter of negligence, under Government Code 830.8? Does design immunity not apply if the safe passage of bicyclists was not considered in the plan or design?

Both *Baldwin* and *Cameron* are still intact as case law. Government Code 835.4 created the reasonable time and funding exception
5/2/04

to *Baldwin*. *Cameron* continues to be cited in regards to aspects of the design not included in the design plan.

More recently, In *Bonano v. Contra Costa Transit Authority* (2003) 65 P. 3d 618, the Transit Authority was held partially responsible for a crash which occurred on an adjacent property, and was also a more direct result of third party negligence.

In *Bonano*, a driver who had been rear-ended by another driver hit a woman crossing the street in a crosswalk. The woman sued both drivers, the County and the Transit Authority. The other parties settled.

The case was not specifically concerned with design immunity and actually stated that the holding does not subject public entities to broad liability. Design, and other immunities, will still apply in future cases.

The Transit Authority was held to be partially responsible for the crash because the location of its property, a bus stop, created a dangerous condition on another entity's property, the County's street/crosswalk.

However, *Bonano* spoke directly to conditions of public property that contribute to third party negligence. The case stated that a "...a physical condition of public property that increases the risk of injury from third party conduct may be a dangerous condition under the statutes" in reference to Government Code 830, defining dangerous condition; and Government Code 835, codifying the City's liability for maintaining public property in a dangerous condition.

Double turn-lanes have characteristics that fit this description. Under changed physical conditions, such as increased bicycle traffic, the designs have become dangerous. Could design immunity be held to be inapplicable?

Do the defective designs make it more likely for third party drivers to hit cyclists? Do the

designs increase "the risk of injury from third party conduct"?

In many instances, the double turn-lane design did not consider safe bike movements. Bike travel was not a part of the discretionary decision that established design immunity? Did the City then fail to warn of the hidden danger?

The City could claim the dangerous condition was reasonable, under Government Code 835.4, but is it really reasonable to maintain traffic designs that are more likely to trap and kill bicyclists?

How much does a warning sign cost? Is it reasonable to maintain double turn-lanes and other similarly dangerous high-capacity street designs when it becomes increasingly obvious that these designs contribute to, and even cause, crashes on a regular basis?

The California Constitution provides another approach for overcoming design immunity. *Baldwin* included a theory of inverse condemnation [Article 1 Sec. 19 Cal. Const.].

Simplistically put, a person's body is their property. If the City takes someone's body, or diminishes its value, via negligence, then the City should compensate them.

Are San Francisco bicyclists as a class being endangered by dangerous street designs such as double turn-lanes? Is their property (their bodies) being taken systematically without compensation?

In some locations, simple, basic safety improvements, supported by local residents, have taken 10 years to implement. The improvements were delayed by just one factor, increases in automobile delay time.

In these situations, the City refused to make safety improvements because the changes would slow down cars too much (*Explanation 3*).

Maybe, it's time for the City to decide what's really more important: Keeping human hearts beating? Or moving more cars faster?

3. What could be done to protect the City from liability and make San Francisco streets safer?

The Board of Supervisors could pass legislation to create safety standards. Pedestrian and Bicycle Safety Standards could require the accommodation of pedestrian and bicycle movements in all City street design. Currently, bicyclists and pedestrians are not realistically represented in planning and design processes, and if the modes are represented, it's on a case-by-case, almost random, basis.

There's no effective, standardized way of insuring that pedestrian and bicycle movements are considered and provided for. In creating Safety Standards, the Board would make it clear that San Francisco streets should be safe for all roadway users. This intent exists now, an easy majority of the Board supports safer streets, but it is not the law.

When the State Legislature created design immunity, in many respects the intent was to keep the courts out of the business of street design, which is more of a legislative function (*Baldwin*).

4. Conclusion

If the City's current approach at times actually makes the streets more dangerous, then maybe its time to re-think the way the streets are designed?

It is not reasonable to continue to maintain street designs that are obviously dangerous to the public.

Explanation 1 – To the best of my knowledge this statement is true for all three and four lane one-way streets in San Francisco. The designs are known as surface highways and are typically arranged in couplets with two parallel streets, each carrying one direction of traffic. Examples are Fell and Oak, Franklin and Gough, etc. This is a standard traffic engineering practice, which can be found in any of the editions of the Highway Capacity Manual from 1950 onwards.

The manual, as its name would indicate, is a handbook for increasing street automobile capacity. In San Francisco, this meant take out the transit lines, add lanes wherever possible, use double turn-lanes, restrict pedestrian traffic or reduce its right of way; or even remove entire blocks of housing, as occurred in the Fillmore District.

If there are Victorian Houses lining a multi-lane one-way street then it is very likely that the street was re-designed to carry more cars faster. When the Victorian homes and thus the street, were built, there were no cars, and consequently, no such thing as automobile traffic engineering.

Explanation 2 – The double turn-lane design also originates in the Highway Capacity Manual. Double turn-lanes were created to increase automobile capacity and are currently maintained for this same reason. An example would be the double turn-lanes on Howard at 9th street. The City knows this design is dangerous to bike traffic but keeps the double turn-lanes in order to maintain a certain automobile carrying capacity/"level of service".

There are no standards for pedestrians and bicyclists that consider factors related to true travel ability, such as signals and timing, connectivity of routes and general safety. The "pedestrian level of service" only considers sidewalk/crosswalk crowding, not through-movement or pedestrian safety in relation to automobile traffic. Other pedestrian guidelines are commonly ignored and not standardized by law. The automobile level of service does consider bicyclists, but only in regards to how much bicyclists slow down cars.

Because of this lack of standardized representation in planning and design processes, pedestrian and bicycle movements are often neglected and ignored.

Explanation 3 - For the last ten years, pedestrian and bicycle advocates and neighborhood groups have requested safety improvements on Fell Street between Scott and Baker. As far as I know, there was no local opposition to these proposals. The Department of Parking and Traffic (DPT) refused these requests because of "traffic capacity concerns" (DPT 2001 status report on 1997 SF Bike Plan projects). Bicyclists, who felt endangered by Fell's heavy car traffic, were riding on the sidewalk and consequently endangering pedestrians. The design had many characteristics that could be held to have become dangerous under changed physical conditions, such as the increasing presence of bicyclists on city streets.

The DPT finally placed the bike lane on this section of Fell because the removal of the Central Freeway lessened area traffic congestion, making the change possible in regards to street automobile capacity/"level of service". For ten years the City was on notice of the dangerous condition at this point and for 10 years, the City did not make simple, reasonable changes in street design because the changes would slow down cars too much.



Figure A: Oak Street, circa 1910



Figure B: Oak Street, 1996

Figures C - H – South Van Ness, August 2001



Figure C: approaching Division on South Van Ness



Figure D: continuing approach to Division



Figure E: near the intersection of Division & South Van Ness



Figure F: South Van Ness at Division



Figure G: passing under Route 101 superstructure



Figure H: entering into the double turn-lanes

Appendix -----

Table of Authorities

Article 1, Section 19 California Constitution.....4
Government Code 830.....3
Government Code 830.6.....2
Government Code 835.....2,3
Government Code 835.2.....2
Government Code 835.4.....2,3,4

Table of Cases

Alvarez v. State (1999) 79 Cal. App. 4th 720.....2
Baldwin v. State (1972) 6 C.3d 424.....2,3,4
Bonano v. Contra Costa Transit Authority (2003) 65 P. 3d 618.....3
Cameron v. State (1972) 7 C.3d 318.....3

Attachment A, letters 1 and 2:

- 1- DPT response to San Francisco Bicycle Advisory Committee (SFBAC) request for an improved inspection system to be developed in the 2004 SF Bike Plan
- 2- SFBAC letter to the City finding current dangerous condition inspection system to be inadequate

Attachment B, letters 1-3, presented to the SFBAC, November, 2001

Attachment C, intitial claims 1-2, Superior Court case number 02-411963

Attachment D, In Memoriam: Carmen Murrillo August 23, 1974-August 7, 2001 presented to the SFBAC, November 2001

This paper would not exist without the San Francisco Bicycle Advisory Committee and The San Francisco Public Law Library. Special thanks to all the people who travel the streets of San Francisco, and to all the pedestrians, bicyclists, transit users and drivers who are helping to make the City's street safer.

Thank you for your time-----Greg Hayes-----Copyright(2004)-----HAZE

