

Bicycle Advisory Committee Public Comment re: Fell/Masonic-----

This is public comment given to District 5 Supervisor Ross Mirkarimi and the San Francisco Bicycle Advisory Committee. It is not legal advice. It was not written by an attorney.¹

The intersection has lost design immunity

It is fundamentally unreasonable for the Metropolitan Transportation Agency (“MTA”) to continue to ignore the Supervisors’ resolution calling for safety changes at the intersection; and the MTA must mitigate, or at least warn of, the danger. Once the entity has notice that the plan or design has become dangerous under changed physical conditions it must act reasonably to correct or alleviate the hazard. (*Baldwin v. State* (1972) 6 Cal. 3d. 424, 434.) (“*Baldwin*”) Design immunity continues for a sufficient time to permit the public entity to remedy the condition, or if it cannot remedy, to post warnings. (*Cornette v. Dept. of Transportation* (2001) 24 Cal. 4th 63, 79.) (“*Cornette*”)

In *Baldwin*, a man stopped his truck in the northbound inside lane of a four-lane highway to make a left turn. Another driver hit the truck from behind knocking it into oncoming traffic where it was then hit head-on. The driver sustained serious injuries. The State Division of Highways, now State Dept. of Transportation, knew of the danger. Local businesses and the City Traffic Engineer repeatedly identified the problem and urged that design changes be made. The Richmond City Council unanimously passed a resolution asking that an overpass be constructed there. Traffic had intensified since the roadway was built. Crashes occurred often at the intersection. Physical conditions had changed.

The court found that once having planned the intersection, the state was under a continuing duty to review its plan in light of its actual operation. (*Baldwin*, 6 Cal.3d 424, *supra* at p. 433.) “We think that in enacting section 830.6 [Government Code section 830.6, which creates the design immunity defense], the legislature was concerned lest juries be allowed to second-guess the discretionary determinations of public officials.” (*Id.* at p. 434.) However, where experience has revealed the dangerous nature of a public improvement under changed physical conditions there will be objective evidence arising out of the plan’s operation. (*Ibid.*) “No threat of undue interference with discretionary decision-making exists in this situation.” (*Ibid.*)

In *Cornette*, a couple’s car was side-swiped by another car then forced into oncoming traffic where it was hit head-on causing serious injuries. The crash occurred just after the existing median barrier ended. Traffic volume and the number of cross-median accidents had increased significantly since the freeway was built. The Department of Transportation (“Caltrans”) knew the highway had become dangerous, and had decided to install a median there. But the median was still not constructed when the crash occurred. The *Cornette* court found that under *Baldwin* and Government Code section 830.6 as amended, design immunity is lost when: (1) the plan or design has become dangerous under changed physical conditions (2) the public entity had actual or constructive notice of the condition and (3) the public entity had reasonable time and funding remedy the danger, or had not reasonably attempted to provide adequate warnings. (*Cornette*, 24 Cal. 4th 63, *supra* at p. 72.)

Here in the City and County of San Francisco, the physical condition of the City’s streets has changed since the first Bicycle Plan was passed in 1997. Now more people ride bikes. Bicycling is an accepted and encouraged form of everyday transportation. Bicyclists are understood to be reasonably foreseeable bikeway and roadway users. Sections of the City

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Charter and numerous city policies call for the improvement and expansion of bicycle facilities. The City encourages the use of bicycles in public service campaigns, marks bike routes and publishes bicycle maps.

The change in transportation planning, where the bicycle is being integrated into the street design, has resulted in a changed physical condition of the City's streets. Because of citywide promotion and planning of bicycle routes, more people ride bikes. Because more people ride bikes, the physical condition, and literally the physical composition of the streets has changed.

The 2005 design changes made at Fell/Masonic were a response to this change in physical conditions but the changes unfortunately did not fully mitigate the intersection's danger. Cars still turn across two lanes of pedestrian and bicycle traffic without warning. Visibility is still poor. Crashes still occur there regularly. People are still being hit. Here, the specific, known change in physical conditions is that the design changes made in 2005 have not fully solved the safety problem.

Here, the Board of Supervisors ("Supervisors") gave the MTA actual notice of the danger and requested specific design changes. The Supervisors resolved that the fast moving left-hand lane on Fell Street turn[s] directly into bicyclists and pedestrians' right of way." (Fell Masonic res. no. __ p. 1:15-16, July 10, 2007) And further found that that collisions and near collisions between bicyclists, pedestrians and motorists occur almost regularly" (p.1:19-20.); and that design changes made to the intersection in 2005, "improved the safety of the intersection, but have not fully solved the safety problem." (p.1:22-23.)

Unlike *Baldwin*, where the State Division of Highways repeatedly ignored notice from the Richmond City Council and the City Traffic Engineer that conditions had become dangerous; here, the City essentially ignores itself. The Supervisors, the local legislature directly told the MTA that the intersection is dangerous and requested that its design be changed. There is no concern of a jury being allowed to second guess the discretionary determinations of public officials, because the public officials have already decided. Also, *Baldwin* created the first case law exception design immunity in 1972. Now, here, the MTA knows it can be held liable for ignoring a known dangerous condition; and the changed conditions exception to design immunity has been available for over thirty years.

But most directly, as in *Cornette*, where it was unreasonable to maintain the highway in a dangerous condition without a median, or warnings, for multiple years while crashes continued to occur; here it is unreasonable to "study" the intersection for multiple years while crashes continue to occur.

The intersection has become dangerous under changed physical conditions because of increased bike traffic citywide. In 2005, it was unknown whether the new design changes would adequately address the danger. Now, experience has shown that the 2005 design changes have not fully solved the safety problem. Crashes still occur regularly. People are still being hit. The Supervisors' resolution is as actual and direct of a form of notice as is possible. The MTA has the time and money to remedy the danger. It is fundamentally unreasonable for the Metropolitan Transportation Agency to continue to ignore the Supervisors' resolution calling for safety changes at the intersection; and the MTA must mitigate, or at least warn of, the danger.

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The injunction in regards to preventing the design change

Further, the City has plenty of time and money to make its streets safe as is evidenced by a recent MTA consultant agreement awarding a \$500,000 contract to study the environmental impact of improving bicycle safety in the City. As such, the current California Environmental Quality Act (“CEQA”) injunction could only provide a rather odd reasonable time and funding defense in support of design immunity

Here, the MTA somehow managed to have a bicycle plan, a plan to improve bicycling, which may be the most environmentally-friendly form of transportation on earth, be stopped by superior court injunction until the plan undergoes environmental review. Then, instead of using the many options CEQA provides to reasonably analyze the impacts of changing the City’s street design, such as filing a negative declaration, or a mitigated negative declaration, the MTA chose to do a Full Environmental Impact Report. Then, instead of doing the report in a reasonable amount of time, such as six months to a year, the MTA chose to take some four years total to do the report (which apparently may be completed by 2010). **As in *Cornette*, where it was unreasonable to maintain the highway in a dangerous condition without a median, or warnings, for multiple years while crashes continued to occur, here it is unreasonable to “study” the intersection for years while crashes continue to occur.**

Finally, as if to illustrate the outright negligence of the City/MTA in strangely ignoring itself, the San Francisco Bicycle Advisory Committee recently gave a complete model emergency exemption to the MTA. The model shows how an emergency street design change can be exempted from the injunction and CEQA review. Claiming that the intersection’s danger cannot be mitigated because the environmental impact of mitigating the danger has to be “studied” is not a defense of design immunity, but a defense built upon incompetence.

Such assertions also taunt the surreal.