The Basics of Design Immunity: Creating a Paper Trail

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The Basics Of Design Immunity: Creating A Paper Trail That Will Allow A Public Entity To Preserve The Design Immunity Defense If Litigation Arises

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I. INTRODUCTION

Design immunity under Government Code Section 830.6 is one of the most powerful affirmative defenses for public entities. The defense will almost always be raised in a motion for summary judgment. Usually, a summary judgment motion is decided based on whether a "question of fact" exists. If one competent witness to a traffic accident submits a declaration that a light was red, and one competent witness submits a declaration that the light was green, a question of fact exists and the case must proceed to trial. The result is the same if one witness to a traffic accident submits a declaration that a light was red, and *one thousand witnesses* submit a declaration that the light was green.

However, if a public entity moves for summary judgment based on design immunity, the question for the court is whether there is "any substantial evidence" of the reasonableness of the design. The fact that the parties submit conflicting declarations is not grounds to deny the motion. Therefore, if one competent expert witness submits a declaration that a design was reasonable, and one competent expert says that design was a dangerous condition, the public entity should prevail because a civil engineer's opinion that a design was reasonably approved constitutes "any substantial evidence" sufficient to support design immunity. *Sutton v. Colden Gate Bridge, Highway and Transportation Dist.* (1998) 68 Cal.App.4th 1149, 11562. Therefore, public agency attorneys should begin working with staff and litigators knowledgeable about design immunity to create a record memorializing the risks and benefits of new projects that could result in dangerous condition claims. If staff believes that the project is reasonably designed, an engineer should author a memorandum stating the reasons why he or she believes the design is reasonable, and the memorandum should be retained in the agency's permanent project records.

This paper will explain how to create a record containing substantial evidence of the reasonableness of public works designs which can be used to support a motion for

summary judgment. This paper will briefly set forth the general law governing the design immunity defense. It will mostly focus on the third prong -- substantial evidence of the reasonableness of the design.

II. ELEMENTS OF DESIGN IMMUNITY

In order to prevail on a claim of design immunity, a public entity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design. *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 939. This paper focuses primarily on the third element - reasonableness of the design. However, a brief discussion of the other two elements is provided for background.

The **first element** of design immunity simply requires a showing that a feature in the approved design allegedly caused plaintiff's damages. "This element is ordinarily established by allegations in the complaint that the injury occurred as a result of the plan or design." Van Alstyne, *Cal. Govt. Tort Liability Practice* (CEB 2019), §12.69; *Fuller, supra,* 89 Cal.App.4th at 1114 (public entity may rely on plaintiffs' pleadings to establish element of causation.) Therefore, this element is easy to satisfy.

The **second element** of design immunity requires a showing of approval of the design. To establish design immunity, a governmental entity must demonstrate approval of the design by the "legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval." §830.6. Courts consistently hold the approval element requires a simple showing that engineers prepared the plans, and that they were signed by a person or legislative body with discretionary authority to do so. *See, e.g. Alvarez v. State*, 79 Cal.App.4th 720, 734 (1999), *disapproved on other grounds*, *Cornette* v. *Department of Transportation* (2001)26 Cal.4th 65 (approval satisfied by "detailed plan, drawn up by a registered professional

engineer, and approved by district and State officials exercising their discretionary authority"); *Ramirez v. City of Redondo Beach*, 192 Cal.App.3d 515 (1997) (plans signed by city engineers established approval); *Anderson v. City of Thousand Oaks*, 65 Cal.App.3d 82, 89-90 (1976) ("a detailed plan, drawn up by a competent engineering firm, and approved by the city council in the exercise of its discretion, is certainly persuasive evidence of both prior approval and reasonableness for purposes of the design immunity defense.")

If the design is approved by an employee, the employee must have discretionary authority which is delegated to them by law. The basis of the authority could be found in a statute, ordinance, or charter. However, the person with discretionary authority may delegate that authority to another person. For example, in *Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, the city charter and city code conferred authority on the director of public works, and the director then delegated authority to the superintendent of maintenance. *Id*. at 384. The Court of Appeal held that an employee had discretionary authority to approve a plan. Thus, the person exercising discretionary authority does not have to be the person who is granted authority by law.

Practice Pointer: Make sure that the project plans are approved in writing by a person or body authorized to do so. However, the best practice is to have the plans approved directly by the "legislative body of the public entity". Doing so will avoid any argument over whether an employee had "discretionary authority to give such approval."

In controversial cases, a "belt and suspenders" approach would be to have the plans approved by an employee with the proper authority, and then transmit those plans to the legislative body of the public entity for approval. This could be done when plans are sent to the legislative body before soliciting bids. The governing body should also receive a report from staff explaining why the design is reasonable. This memorandum will be an important document if litigation arises, so it should be prepared with the assistance of a lawyer.

III. THE THIRD ELEMENT: SUBSTANTIAL EVIDENCE OF THE REASONABLENESS OF THE DESIGN.

A. Overview of the Law Governing Design Immunity

The **third element** of design immunity requires that the public entity provide "any substantial evidence" of the reasonableness of the design. Under the third prong of §830.6, design immunity applies:

> "[i]f the trial or appellate court determines that there is **any substantial evidence** upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefore or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefore." (Emphasis added.)

Note that the language of the statute is extremely broad, and greatly favors public entities. Generally, if there is any substantial evidence opposing a motion for summary judgment, the court must deny the motion. When a public entity moves for summary judgment based on design immunity, the trial court must only find that there is "any" substantial evidence; it does not have to find that the plans are reasonable by a preponderance of evidence. This is the same substantial evidence standard that a Court of Appeal would apply to a jury verdict. *King v. U.S. Bank National Association* (2020) 52 Cal.App.5th 728, 711 *as modified on denial of reh'g* (Aug. 24, 2020), *review denied* (Nov. 10, 2020)

The end result is that an opposing party cannot avoid the design immunity defense by presenting opposing affidavits alleging an unreasonable design. "That a paid expert witness for plaintiff, in hindsight, found… the design was defective, does not mean, *ipso facto*, that the design was unreasonably approved." *Sutton v. Golden Gate Bridge, Highway and Transportation Dist, supra,* 68 Cal.App.4th at 1158.

Recognizing that design immunity is predicated upon the separation of powers doctrine, and that governmental entities need leeway designing public works, courts have developed liberal rules concerning what constitutes "substantial evidence." Ordinarily, a civil engineer's opinion that a design was reasonably approved constitutes "any substantial evidence" sufficient to support design immunity. *Id.* at 1162 (District Board's reliance on civil engineering opinions regarding median barrier was substantial evidence); *Fuller, supra*, 89 Cal.App.4th at 1118 (speed limits approved by traffic engineer constituted substantial evidence). "The fact of approval by competent professionals can, in and of itself, establish the element of reasonableness." *Higgins v. State* (1997) 54 Cal.App.4th 177, 187, *disapproved on other grounds*, *Cornette v. Dept. of Transportation, supra,* 26 Cal.4th at 73-74. Below are decisions applying the substantial evidence rule.

B. Decisions Finding Design Immunity

1. *Alvis v. County of Ventura*, 178 Cal.App.4th 536 (2009)

Alvis v. County of Ventura arose out of a large landslide that occurred on January 10, 2005 in La Conchita, an unincorporated community in Ventura County ("County"). (2009) 178 Cal.App.4th 536, 53. Ten years before the 2005 landslide, in 1995, another landslide occurred in La Conchita that blocked a County roadway. Following the 1995 landslide, the County constructed a retaining wall to aid in removing debris from the road. *Id.* at 540. A consulting firm specializing in geotechnical engineering drafted the plans relating to the retaining wall. *Id.* at 540. Before construction began, the County's civil engineer concluded that the plans satisfied reasonable design and engineering practices. *Id*. The plans were later approved by the County's Board of Supervisors.

Following a landslide on January 10, 2005, twenty-three consolidated complaints were filed against the county alleging dangerous condition of public property, nuisance, and inverse condemnation. *Id.* at 542. Among other things, plaintiffs alleged that the retaining wall altered and diverted the course of the earth and debris from the slide,

causing it to strike and kill persons named in the actions. *Id.* at 542. The trial court granted the county's summary adjudication on all causes of action except inverse condemnation;[1] the complainants later dismissed their inverse condemnation cause of action and appealed. *Id.* at 539.

Regarding the substantial evidence of the reasonableness of the design element for design immunity, the Court of Appeal stated that there was ample evidence of how the County had satisfied this element. *Id.* at 553. The plans for the wall had been approved by a registered civil engineer, who declared that the project had been designed with reasonable professional engineering judgment. *Id.* at 554.

The most important holding from *Alvis* relates to a claim by plaintiffs that a geologist from one of the consulting firms was a "dissenting voice" who raised issues regarding the design of the wall. *Id*. The Court held that that the geologist's alleged dissent against the wall's construction did not prevent the County from prevailing on design immunity. *Id.* The Court further found that, even if the geologist was a "dissenter" as the appellants claimed, **section 830.6 provides design immunity even if the evidence of reasonableness was contradicted.** *Id.* Importantly, design immunity would apply even if the evidence of reasonableness was contradicted by the county's own consultant during the design phase of the allegedly dangerous public work.

Practice Pointer: *Alvis* is an extremely helpful decision for public entities seeking summary judgment based on design immunity because it holds that even if an agency-retained consultant dissents from the decision to approve the design, that will not prevent summary judgment based on design immunity.

2. *Menges v. Department of Transportation* (2020) 59 Cal.App.5th 13

[1] Design immunity is not a defense to a claim for inverse condemnation because that cause of action arises under the California Constitution, and design immunity only applies to causes of action arising out of the Government Claims Act.

In *Menges v. Department of Transportation* (2020) 59 Cal.App.5th 13, 16, a passenger in a car was seriously injured in a collision, in which a tractor-trailer truck exiting from a freeway off-ramp broadsided the passenger's vehicle. The passenger sued the Department of Transportation ("Caltrans") and alleged negligent design and construction of an interstate off-ramp. *Id*. at 16. Plaintiff contended "confusing" and "deceiving" pavement striping, signage on the I-5 freeway, and striping of the city street intersection at the bottom, caused the accident. *Id*. at 17.

The trial court granted Caltrans' motion for summary judgment based on design immunity. *Id*. Passenger appealed, asserting that design immunity should not apply because the approved plans for the off-ramp were unreasonable and that the constructed ramp did not match the approved plans. *Id.*

The Court of Appeal affirmed the trial court's summary judgment grant, holding that Caltrans was entitled to design immunity. *Id.* at 21. The Court stated that Caltrans provided substantial evidence in support of discretionary approval of the design plans, an expert opinion on the design's reasonableness, and evidence of the design's compliance with California's approved standards. *Id.* The Court held that the *approval of the relevant design plans by the Caltrans civil engineer responsible for engineering the design work on the off-ramp project, was alone sufficient to establish substantial evidence of design reasonableness*. *Id.*

Furthermore, Caltrans' expert witness offered additional substantial evidence of the reasonableness of design. He analyzed evidence including the Highway Patrol's traffic collision report, photographs of the accident scene, a land survey, the as-built design plans, and the California Manual on Uniform Traffic Control Devices ("MUTCD"). The expert concluded that approved plans were consistent with reasonable professional engineering judgment and that they complied with the MUTCD. *Id.* at 21-22.

Practice Pointer: When moving for summary judgment based on design immunity, it is a best practice to retain an expert to submit a declaration in support of the motion. That expert can address the facts of the relevant accident, and offer additional "substantial evidence" why the design was reasonable. The moving party should, if possible, also present a declaration from the employee of the public entity that approved the plans.

3. *Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52

In *Weinstein v. Department of Transportation* (2006) 139 Cal.App.4th 52, plaintiffs were involved in a cross-median highway collision, and they sued Caltrans on grounds that the highway was a dangerous condition. *Id.* at 54. Plaintiffs alleged that a "lane drop" appeared "without warning," that both vertical and horizontal sight distance restrictions existed, and that the highway's cyclone fencing was inadequate to prevent cross-over collisions. *Id.* at 54. The trial court granted Caltrans' motion for summary judgment based design immunity and plaintiffs appealed. *Id.* at 56.

The Court of Appeal affirmed the trial court's ruling. *Id.* at 62. The Court held that Caltrans presented substantial evidence showing that applicable State standards did not require a median barrier at the accident location. *Id.* at 58. First, evidence demonstrated that the median at the crash site was too wide to justify a barrier under relevant guidelines. *Id.* Caltrans also presented evidence that there was no significant history of cross-median accidents. *Id.* In addition, Caltrans submitted evidence that the highway's horizontal alignment was consistent with approved plans. *Id.* The Court held that Caltrans produced substantial evidence that it could have reasonably approved a design with a transition area at the accident location. *Id.* at 59.

Finally, the Court rejected plaintiffs' allegation that the accident location was dangerous due to lack of a median-side sign warning of the lane drop. *Id.* at 59. The Court noted that evidence showed that signage had been installed when the highway was

originally built, and that Caltrans had proffered evidence showing that the signage complied with applicable State standards. *Id.*

Practice pointer: In cases involving roadway design, the fact that the roadway complied with applicable standards when designed should be persuasive evidence of the reasonableness of design. However, an unusual accident history based on increased traffic volumes or other factors may be a "changed condition" which may make it difficult to obtain summary judgment. (See discussion of changes condition below.)

4. *Tansavatdi v. City of Rancho Palos Verdes* (2021) 60 Cal.App.5th 423

In *Tansavatdi v. City of Rancho Palos Verdes* (2020) 60 Cal.App.5th 423, a bicyclist was killed when he was struck by a truck. The decedent's mother sued the City for removing a bicycle lane from the accident area. *Id.* at 527. Plaintiff alleged that removal of the bike lane created a dangerous condition. *Id.* The trial court granted summary judgment based on design immunity. *Id.* at 428.

Plaintiff appealed, and the Court of Appeal affirmed the trial court's ruling. It found that the city introduced substantial evidence of the reasonableness of the design of the road which included the following:

- The approved 2009 plans for resurfacing the road did not include a bicycle lane at the accident location. *Id.* at 430, 439.
- The city's traffic engineering expert opined that the plans were reasonable and complied with applicable guidelines. *Id.* at 439.
- The collision record at the intersection where the accident occurred was "extremely good." *Id.*
- Applicable guidelines provided that bicycle lane markings should stop at least 100 feet before a right turn lane begins. *Id.*
- The expert concluded that a reasonable engineer would have approved the plans without the bicycle lane. *Id.*

- A former engineer for the City opined that the 2009 plans exceeded all applicable standards and approval without the bike lane was reasonable. *Id*.
- The former engineer explained that the City had decided against a bicycle lane in order to keep on-street parking for an adjacent park. *Id*.

Practice pointer: *Tansavatdi* is an excellent example of how a public entity used declarations from both a city employee and an expert to prove that there was substantial evidence of reasonableness of design.

C. Design Immunity Judgment Denied

1. *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722

In *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, about 300 property owners sustained property damage in a storm in March 1995. Plaintiffs alleged that defendants failed to keep a flood control channel clear, which diminished the channel's capacity, which caused a levee to fail. *Id.* at 731, 736. Plaintiffs further alleged that the State's under-highway drainage culverts were too small to properly drain the flooded area. *Id.* at 731. Plaintiffs alleged that the insufficient drainage created a damming effect that caused higher flood levels, ponding of flood water, and the deposition of large amounts of sediment. *Id.* 731, 736-737.

State moved for a directed verdict based on design immunity for its under-highway drainage system. *Id.* at 757. The Superior Court denied the State's motion and found the State liable for a dangerous condition of public property and nuisance. *Id.* at 737, 757. State appealed, and the Court of Appeals affirmed the Superior Court and found that design immunity was not available to the State as a defense. *Id.* at 731, 757.

The Court of Appeal held that since State's engineers never took flooding into consideration when it designed the highway drainage system, so it was questionable whether design immunity applied at all. *Id.* at 759. Nevertheless, the Court found that State had not offered substantial evidence of reasonableness that would entitle it to design immunity anyway. *Id.*

In particular, the State relied on a 1949 statement by the U.S. Army Corps of Engineers ("Corps") that the channel was meant to accommodate the flows from a "100-year storm." *Id.* at 731, 758-759. But in June of 1963, the Corps issued an interim report saying that it was no longer reasonable to rely on its flood control project to contain a 100-year flood. *Id.* Given this, the Court held that State had not offered any substantial evidence upon which a reasonable public employee could have approved a design for the drainage system that did not take extensive flooding into account. *Id.*

Practice pointer: If the county had reexamined the design based on the June 1963 statement from the Corps, and approved the design after that statement, it is possible that it could have prevailed on design immunity. Public entities should reexamine designs after a significant negative statement concerning the design, or after a significant accident or other potential changed condition, and bolster the record to address the potential changed condition to preserve the defense.

2. *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565

In *Mozzetti v. City of Brisbane* (2020) 67 Cal.App.3d 56, plaintiffs sued the city to recover for damage to their property that resulted from flooding allegedly due to a City road resurfacing and sidewalk construction project adjacent to the property. The City asserted the design immunity defense at trial, but the Court entered a judgment on the verdict in favor of the plaintiffs and the City appealed. *Id.* at 571-572. In affirming in part and reversing and remanding in part, the Court of Appeals held that the City was not entitled to design immunity. *Id.* at 575.

The trial record revealed that the engineering plan for the project had been no more than a surface drawing by the City Engineer, which lacked elevations, specifications, cross-sections, and more. *Id.* at 570. Drawings of the plans made by the City Engineer and ones made by a hired civil engineer were never submitted to the City for approval. *Id.* Additionally, several deviations from the project plans were made

during the construction of the project. *Id.* These deviations created the conditions that led to the flooding of Landowners' property. *Id.* 570-571.

IV. PRACTICE POINTER: A PUBLIC ENTITY HAS A BETTER CHANCE OF PREVAILING ON A DESIGN IMMUNITY DEFENSE IF IT SUBMITS APPROVED PLANS. IF YOU ARE INVOLVED IN PREPARING A SET OF PLANS WITH AN EYE TOWARDS PRESERVING A DESIGN IMMUNITY DEFENSE, MAKE THEM AS DETAILED AS POSSIBLE, AND MAKE SURE THAT THEY ARE STAMPED BY AN ENGINEER. IF THE PROJECT AS-BUILT DIFFERS FROM THE APPROVED PLANS, MAKE CERTAIN THAT CHANGE ORDERS ARE ISSUED, AND THAT THOSE CHANGE ORDERS ARE APPROVED BY SOMEONE WITH AUTHORITY TO APPROVE THEM (WHICH WILL USUALLY BE THE SAME PERSON THAT HAS AUTHORITY TO APPROVE THE PLANS). HOWEVER, EVEN IF THE PROJECT AS-BUILT DIFFERS FROM THE APPROVED PLANS, A PUBLIC ENTITY MAY BE ABLE TO RELY ON THE BROAD LANGUAGE OF 830.6, AND ARGUE THAT "(A) A REASONABLE PUBLIC EMPLOYEE COULD HAVE ADOPTED THE PLAN OR DESIGN OR THE STANDARDS THEREFORE OR (B) A REASONABLE LEGISLATIVE BODY OR OTHER BODY OR EMPLOYEE COULD HAVE APPROVED THE PLAN OR DESIGN OR THE STANDARDS THEREFORE." (EMPHASIS ADDED.) LOSS OF DESIGN IMMUNITY DUE TO CHANGED CONDITION

Having created a record of a public works project design that satisfies the elements of design immunity under §830.6, agencies should take appropriate steps to preserve the immunity's validity. Plaintiffs can establish loss of design immunity due to changed conditions. To successfully show loss of design immunity due to changed conditions , a plaintiff must establish: (1) the design became dangerous because of a change in physical

conditions; (2) the public entity had notice thereof; and (3) a reasonable time to obtain funds and carry out remedial work to bring the property into conformity with a reasonable design or, if the agency has been unable to carry out remedial work due to practical impossibility or lack of funds, that the agency has not reasonably attempted to provide adequate warnings. *Cornette, supra,* 26 Cal.4th at 72. A "changed condition" is one that "could not have been contemplated by the government agency or employee who approved the design." *Id.* at 73. The definition of a changed condition that can result in loss of design immunity helps ensure that a changed condition claim will not result in "reweighing the same technical data and policy criteria which went into the original plan or design." *Id.*

Only two courts have found questions of fact regarding changed conditions. Both involved traffic accident histories that clearly placed the entity on notice that road conditions had dramatically changed. *Cornette, supra* (between 1964 freeway construction and plaintiffs' 1992 injury, Caltrans had notice of significant increase in traffic and accidents, decided in 1990 to install a median barrier as a "high priority," but failed to do so before an accident); *Baldwin v. State,* 6 Cal.3d 424 (1972) (no design immunity where Caltrans failed to take remedial action after receiving both a City Council resolution complaining of "very high and critical rate of fatality accidents" at intersection and a letter from a State Assemblyman with the same complaints).

V. CONCLUSION

A public entity that creates the proper record, and has the plans approved by the appropriate body or person, will be able to invoke design immunity if litigation arises involving a public project. Creating that record often involves city attorneys, litigators, and staff working together to create a "paper trail" that clearly and concisely memorializes the thought processes of the person(s) involved in approving the design. The documents should also memorialize any potential problems, and explain why the design is reasonable in light of those concerns.

The plans and documents prepared by staff should be reviewed by a lawyer familiar with design immunity to ensure that the public entity has satisfied the requirements of Section 830.6. The approved plans should then be placed on the agenda of the governing body of the public entity, accompanied by a memorandum from staff explainign why the design is reasonable. That memorandum should also address any negative design aspects of a project, and explain why the design is reasonable notwithstanding those negatives. If the governing body agrees with staff's recommendation, it should approve the plans before they are sent out for bid.

If a public entity follows these steps, it should be able to prevail on a design immunity defense if litigation arises out of the design of the project.