PROCEEDINGS: CONTEXT SENSITIVE DESIGN SYMPOSIUM

Legal Issues in Context Sensitive Design

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You cannot successfully implement any program if there are unresolved fears about the potential impacts of the program. Listening to the presentations at this and other conferences, I hear one fear expressed over and over, by State officials and consultants alike, "Does the use of Context Sensitive Design increase our exposure to tort liability"? The answer I would offer is, no. If done properly, Context Sensitive Design should actually decrease your exposure to tort liability.

That is because there is flexibility in the design standards as currently issued, and as applied in the industry. If you tell a Court only that you have followed the standards, then you are opening yourself to attack by the other side as to how you made your decision. What the Court needs to hear is that you have considered all of the factors applicable to this situation - including the standards and environmental and community considerations - and then exercised your professional judgment in making your decision.

The ideal situation would be to have legislative authority to make Context Sensitive Design decisions. As an example, look at the authority given to the National Park Service. Despite current safety standards, they can design a road with no guardrail, such as on portions of the Blue Ridge Parkway, and sustain that decision in Court due to the broad authority given them by Congress. As stated in the case of Bowman v. United States, 820 F.2d 1393, US Court of Appeals - 4th Circuit, June 30, 1987:

A National Park Service officials have more than safety in mind in determining the design and use of man-made objects such as guardrails and signs along the Parkway. These decisions require balancing many factors: safety, aesthetics, environmental impact and available financial resources. In making each decision these factors must be weighed carefully in accordance with the policies of the National Park Service. ... One can argue that another policy, which places greater emphasis on safety, is more desirable. However, ... it is precisely this type of decision which Congress intended to shield from liability.

The reality is that you have to know what your statutory authority is. You may have broad discretion like the National Park Service or be liable for any variation from "the standard accepted by the industry". It varies from State to State - which is the reason why the AASHTO Policy on Context Sensitive Design was delayed. (It has now been issued under the title of " A Guide for Achieving Flexibility in Highway Design"). But most State statutes recognize the need for the State DOT to exercise professional judgment - or what is referred to at the Federal level as discretionary function.

When the statutory authority is limited to compliance with industry-accepted standards; that does not decide how the project will be designed, because as I mentioned, there is flexibility built into the standards. First you have to determine which standards are relevant to your project. A State Parkway is not Interstate 95. There are functional classifications in the Green Book that recognize these distinctions. In addition, there are tolerances within the standards that the engineer is expected to interpret.

The key to winning a case in Court then is to document the process that you applied in making your decisions. Document the uniqueness of this project - the history of the location, the geotechnical considerations, the
traffic expectations, the pedestrian interactions, and the sociological role that this road takes in the day-to-day life of the community. You need to document how your situation differs from the ideal or "normal" envisioned by the standards.

Do it as an organized package - similar to the Record in an environmental determination - not just a miscellaneous assortment of letters, memos and fact sheets. As you develop the design for the project - balancing safety versus historic and aesthetic considerations - document your considerations and decisions.

You should try to mitigate choices that are outside of the standard with signing, extended merge lanes, etc. The National Park Service, for example, uses built-up grass shoulders in some sections on the Blue Ridge Parkway to mitigate for the fact that there is no guardrail.

And plan for follow-up after construction. Police enforcement and maintenance concerns should be considered in the design.

Work with a multi-disciplinary team in order to identify all potential considerations and solutions, and to ensure the completeness of the documentation. Document their input as part of the design package.

When you are using a consultant, document the directions given to the consultant and the agreements reached between the consultant and the State DOT. If you are working with a consultant, do not simply state in the contract that they are required to design the project in accordance with the standards. Instead, require them to undergo all of the considerations you would do if you were doing it yourself, documenting those considerations, and to give you a recommendation based on their professional judgment.

Treat your consultant as a partner in achieving the goal. Include consultants in your Context Sensitive Design training, so they too can understand the process and the goals.

When you do get a claim arising from an accident, take the following steps:

1. **Identify and protect your documentation.** Matters may not go to Court until 2-3 years after the accident, which will likely take place after the job is "closed out". Files should be properly labeled and stored in an appropriate place. Be careful in your choice of storage of electronic documents. If the equipment or software is upgraded, electronic files may no longer be readable.

2. **Identify the actual causes of the accident.** Do not rely on the Plaintiff's interpretation of the cause. Especially determine the role of any contributory actions by the Plaintiff for those States without joint liability, this may enable you to get rid of the case based on driver negligence. If the matter goes to a jury trial, this information may influence the jury.

3. **Identify who will be telling your story.** Have an expert - especially if you are in an "industry standards" State - to describe and analyze for the Court what you have done. This could be someone on your in-house Staff, if you have someone with the expertise and the experience. Or you could hire an expert to be your spokesperson.

4. **Identify similar cases** if the Court will consider them - including other States.

5. **Most importantly, identify for the Court how this Project is unique**, using the data you collected during the design phase.
To prepare for my presentation today, I looked at the Georgia Code and at a recent decision in Georgia regarding an accident case where the Court ruled against the State DOT. In reading the decision, it became clear to me that the Court was influenced by the fact that the Plaintiff presented an expert witness to describe for the Court what considerations the State should have taken into account with regard to pedestrians. Yet, the State failed to offer rebuttal testimony on this issue. I don’t know if the State failed to consider the potential impact of a redesign on pedestrians - but I do know from the Court's decision that that is how it appeared to the Court. Remember that context includes all users - and context design must take all users into account.

Remember, there is no guarantee that the Court will rule for you just because you "designed to standard". If that is your defense, the Court will allow the other side to try to second guess your interpretation of the requirements of the standard, and then you are facing a battle of the experts. Instead, you must be able to say:

"I looked at the unique characteristics of this project and determined what standards applied to this unique situation. I exercised my professional judgment to determine what was the appropriate design for this job, considering the standards I determined relevant, but also considering the needs of the community, and the purpose and need for this project."

Finally, include your attorney in your preparation. Some people say that your worst enemy in these efforts is the attorney who sues you. I would like to counter that your best friend is the attorney who defends you. A good attorney can advise you how to meet the requirements of your specific State statute. Work with your attorney - as a reviewer of the completeness of your documentation, as a strategist in preparing for court, and as your champion in the legal arena - to ensure the success of the program.