"Design Immunity For Public Entities"

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INTRODUCTION

The design immunity provided by California Government Code section 830.6 exonerates a public entity from liability for injuries caused by a reasonably approved plan or design of public property.[1]

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1. CAL. GOV'T CODE § 830.6 (West 1980). The complete text of this statute appears in the appendix to this Article.

Often asserted in roadway design cases, the immunity also applies to injuries caused by the defective design of buildings, recreational facilities, and other improvements.[2] The immunity reaches allegations of defective design regardless of whether the liability arises out of the California Tort Claims Act or other statutes.[3]

This Article, based on a review of every case decided since the enactment of section 830.6 in 1963, provides a comprehensive discussion of the steps necessary to prove design immunity. It covers the following subjects: The elements of design immunity (§1), substantial evidence of reasonable approval (§2), discretionary approval of the plan, design, or standards prior to construction (§3), the causal relationship between the plan and the accident (§4), notice that the plan is dangerous in operation (§5), and the procedures for establishing design immunity (§6).

1. The Essential Elements Of Design Immunity

The essential elements of design immunity are: (1) A causal relationship between the plan and the accident; (2) discretionary approval of the plan prior to construction; and (3) substantial evidence supporting reasonableness of the plan.[4]

In design immunity cases, the substantial evidence test may allow public entities to easily establish the threshold element of reasonableness. As explained in section two below, the substantial evidence test requires such a low threshold of proof, that the testimony of a public entity's expert witness will usually suffice to establish reasonableness, often by summary judgment, and even if plaintiff presents strong evidence to the contrary.

Although reasonableness may be easily established, several other threshold elements can complicate proof of the design immunity in vigorously contested cases. More specifically, a public entity must establish the discretionary approval of the plan, and the causal relationship between the plan and the accident; and overcome the argument in almost every case that the public entity lost the immunity

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2. *See* Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967) (Overruled by Baldwin v. State, 6 Cal. 3d 424, 491 P.2d 1121, 99 Cal. Rptr. 145 (1972)). *See infra* notes 70-76 and accompanying text.) (glass in doorway); Strongman v. County of Kern, 255 Cal. App. 2d 308, 62 Cal. Rptr. 908 (1967) (concrete floating dock at boat launching facility); Davis v. Cordova Recreation & Park Dist., 24 Cal. App. 3d 789, 101 Cal. Rptr. 358 (1972) (artificial pond in park); Thomson v. City of Glendale, 61 Cal. App. 3d 378, 132 Cal. Rptr. 52 (1976) (handrail on public walkway); Mozzetti v. City of Brisbane, 67 Cal. App. 3d 565, 136 Cal. Rptr. 751 (1977) (improper drainage).

3. Mikkelsen v. State, 59 Cal. App. 3d 621, 130 Cal. Rptr. 780 (1976) (action for nuisance under CAL. CIV. CODE § 3479). However, it does not apply to condemnation. Holtz v. Superior Court, 3 Cal. 3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970).

4. Anderson v. City of Thousand Oaks, 65 Cal. App. 3d 82, 88-89, 135 Cal. Rptr. 127, 130-31 (1976).

because it had actual or constructive notice that the plan was dangerous in actual operation. The courts have treated these elements as issues for the court to determine under the substantial evidence test.[5] However, close reading of section 830.6 suggests that the substantial evidence test may apply only to the reasonableness element, and that a jury must decide the remaining elements of design immunity on the basis of the preponderance of the evidence. If so, the task of proving the immunity will become more complicated.

2. *Substantial Evidence Of Reasonable Approval*

2.1 The "Substantial Evidence" Test

One feature of design immunity is the use of the substantial evidence test to determine whether the public entity reasonably approved a plan, design or standards. "Substantial evidence," undefined in the Government Code, refers to the test applied by appellate courts in reviewing trial court judgments. Pursuant to that test, the appellate courts must view the evidence in the light most favorable for the prevailing party, resolve all conflicts of evidence in the prevailing party's favor, and draw all favorable inferences that may be drawn. The court may not re-weigh the evidence, and may not reverse judgment, even if it believes the evidence favors the losing party.[6] By incorporating the substantial evidence test into section 830.6, the legislature accorded all these advantages, normally reserved for respondents in appellate proceedings, to public entities endeavoring to establish the reasonable approval of a plan at the trial court level.

As a result of the substantial evidence test, the court, not a jury, will decide the issue of reasonable approval. Furthermore, the public entity need not establish this issue by a preponderance of the evidence, and summary judgment may be available to resolve the design immunity defense in the public entity's favor. In addition, recent appellate decisions have liberally construed the substantial evidence test to find reasonable approval even in the face of strong

5. A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 3.34 (1980 & Supp. 1990) (citing Cameron v. State, 7 Cal. 3d 318, 102 Cal. Rptr. 305 (1972) and *Mozzetti*, 67 Cal. 3d at 565, 497 P.2d 777, 136 Cal. Rptr. at 751).

6. *See* Freeman v. Lind, 181 Cal. App. 3d 791, 798-99, 226 Cal. Rptr. 515, 518-19 (1986); Hasson v. Ford Motor Co., 19 Cal. 3d 530, 544, 564 P.2d 857, 866, 138 Cal. Rptr. 705, 714 (1977); and Albaugh v. Mt. Shasta Power Corp., 9 Cal. 2d 751, 773, 4 P.2d 574, 574 (1937).

testimony from plaintiffs' experts to the contrary.[7]

2.2 The Legislative Purpose Behind the Test

The legislative purpose for creating this low evidentiary threshold was twofold. First, the legislature was reluctant to permit the courts to intrude into the executive functions of government agencies. This reluctance stemmed from a belief that reexamination of governmental decisions "would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested."[8]

The second purpose, expressed in the New York State appellate decisions after which section 830.6 was patterned, was a reluctance "to place in inexpert hands what the Legislature has seen fit to entrust to experts."[9] This conclusion, that planning and design functions might exceed the ken of a jury[10] seems surprising in view of the fact that juries routinely decide complicated issues in cases involving the private sector. Nevertheless, the California legislature clearly elected to bar juries from reviewing design decisions when it enacted section 830.6.

2.3 Application of the Substantial Evidence Test

Typically, the design immunity defense is tried on the basis of expert testimony; the public entity's expert attests to the reasonableness of the design and the plaintiff's expert opines to the contrary. Some courts have demonstrated a willingness to weigh these conflicting opinions in an effort to determine the reasonableness of the design.[11] However, recent cases have infused new life into section 830.6

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7. Muffett v. Royster, 147 Cal. App. 3d 289, 195 Cal. Rptr. 73 (1983) (nonsuit in favor of state); Ramirez v. City of Redondo Beach, 192 Cal. App. 3d 515, 237 Cal. Rptr. 505 (1987) (reversal of judgment for plaintiff and entry of new judgment in favor of city on design immunity defense); Hefner v. County of Sacramento, 197 Cal. App. 3d 1007, 243 Cal. Rptr. 291 (1988) (summary judgment in favor of county).

8. RECOMMENDATION RELATING TO SOVEREIGN IMMUNITY, 4 CALIF. L. REV'N COMM'N at 823 (1963) [hereinafter RECOMMENDATION].

9. Weiss v. Fote, 7 N.Y.2d 579, 586, 167 N.E.2d 63, 66, 200 N.Y.S.2d 409, 413 (1960) (cited in RECOMMENDATION at 851).

10. *Weiss*, 7 N.Y.2d at 586, 167 N.E.2d at 66, 200 N.Y.S.2d at 413-14. Further:

> To state the matter briefly, absent some indication that due care was not exercised in the preparation of the design or that no reasonable official could have adopted it—and there is no indication of either here—we perceive no basis for preferring the jury verdict, as to the reasonableness of the "clearance interval" [i.e. the timing of phases of a traffic light], to that of the legally authorized body which made the determination in the first instance. Indeed, as we read the lengthy and involved body of testimony before the jury, there is ample basis for doubting that body's capacity to arrive at a conclusion as to the "clearance intervals' " reasonableness.

11. *E.g.*, Davis v. Cordova Recreation & Park Dist., 24 Cal. App. 3d 789, 101 Cal. Rptr. 358 (1972); Levin v. State, 146 Cal. App. 3d 410, 194 Cal. Rptr. 223 (1983).

by emphasizing that once the public entity has established "*any*" substantial evidence of reasonable approval, the court may not weigh conflicting evidence that would tend to show that the design was unreasonable.[12] Put another way, the court may not substitute its own judgment for that of the public employees responsible for approving the plans on the issue of reasonableness.[13]

Ramirez v. City of Redondo Beach[14] provides practical guidance for establishing "substantial evidence" of reasonable approval. It is generally sufficient to establish reasonable approval if a public entity's legislative body relies on the advice of a competent engineer, whether from a reputable private traffic engineering firm, or from the public entity's staff. Further, once the testimony of a public entity's engineering expert establishes substantial evidence of the plan's reasonableness, the plaintiff cannot defeat the immunity simply by providing expert testimony to the contrary. The court observed,

> we read section 830.6 to mean that as long as reasonable minds can differ concerning whether a design should have been approved, then the governmental entity must be granted immunity. . . . A mere conflict in the testimony of expert witnesses provides no justification for the matter to go to a lay jury.[15]

Another basis for establishing reasonableness is proof that the design conformed to established engineering standards. In *Moritz v. City of Santa Clara*,[16] the city established the design immunity by proving that a crosswalk followed a standard pattern used throughout the state, complied with Vehicle Code section 21368 and conformed to the Cal Trans Traffic Manual.[17] The court stated that: "a design which clearly comports with the provisions of the Vehicle

12. Ramirez v. City of Redondo Beach, 192 Cal. App. 3d 515, 526, 237 Cal. Rptr. 505, 512-13 (1987); Hefner v. County of Sacramento, 197 Cal. App. 3d 1007, 1013-14, 243 Cal. Rptr. 291, 294 (1988); Muffett v. Royster, 147 Cal. App. 3d 289, 306-07, 195 Cal. Rptr. 73, 83 (1983).

13. The recent change in attitude toward the substantial evidence rule is illustrated by the seemingly inconsistent decisions in *Levin*, 146 Cal. App. 3d at 410, 194 Cal. Rptr. at 233 (decided before *Ramirez*) and *Hefner*, 197 Cal. App. 3d 1007, 243 Cal. Rptr. at 291 (decided after *Ramirez*). In both cases, William Neuman, a professor of civil engineering, testified for the plaintiffs; in both cases Neuman criticized the public entities' engineers for failing to conduct a comprehensive "engineering evaluation" before implementing the design and for violating their own written standards. The *Levin* court reversed summary judgment for the state, but the *Hefner* court affirmed the motion for summary judgment for the County of Sacramento, despite the similar approach of plaintiffs and their expert in both cases.

14. 192 Cal. App. 3d 515, 237 Cal. Rptr. 505 (1987).

15. *Id.* at 525, 237 Cal. Rptr. at 512.

16. 8 Cal. App. 3d 573, 87 Cal. Rptr. 675 (1970).

17. *Id.* at 575, 87 Cal. Rptr. at 676.

Code and also with the specifications of the Division of Highways certainly meets this [substantial evidence] test."[18]

Importantly, the standard of reasonableness is *not* retrospective; instead, section 830.6 requires only that a reasonable employee or body could have adopted the plan or design, or the standards, at the time of approval. Therefore the immunity does not dissipate with the passage of time even if design standards have become more stringent.[19]

A collateral rule in defining reasonableness is that improvements made after an accident cannot be admitted into evidence to show that the original design was unreasonable. Such evidence is inadmissible because the issue in design immunity is not whether a better plan is available; rather, the issue is whether the public entity could have reasonably approved the plan at the time of original approval.[20] For this reason, the court in *Moritz* refused to overturn a motion for summary judgment on the basis of evidence that the City posted warning signs after an accident. The court observed that evidence of signs

> at best would create a conflict with the substantial evidence of reasonableness of the design. . . . It is not necessary for the court to withhold summary judgment whenever subsequent improvements are made because of the possibility that a particular witness may be called for the defense and may be subject to cross-examination which, even if successful, would not destroy the "design defense" which has been enacted by statute.[21]

Some trial court judges will continue to have difficulty in applying the substantial evidence test because it contains the troublesome implication that once a public entity submits the favorable testimony of a paid expert, no amount of contrary evidence can defeat the immunity. In order to defeat a motion for summary judgment on the issue of "reasonableness," a plaintiff must introduce not only conflicting expert testimony, but also persuade the court that the public entity's expert testimony is inherently unbelievable.[22] Consequently, this lim-

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18. *Id.* at 577, 87 Cal. Rptr. at 677. *See also, Hefner*, 197 Cal. App. 3d 1007, 243 Cal. Rptr. 291, Pfeifer v. County of San Joaquin, 67 Cal. 2d 177, 430 P.2d 51, 60 Cal. Rptr. 493 (1967).

19. In Thomson v. City of Glendale, the court observed, with respect to the design of a handrail, "[T]he fact that the [then applicable] 1973 Uniform Building Code was changed and that the construction in question did not conform to the new standards, does not establish the existence of a dangerous condition." 61 Cal. App. 3d 378, 387, 132 Cal. Rptr. 52, 58 (1976).

20. *See*, CAL. GOV'T CODE § 830.5(a) (West 1980) and CAL. EVID. CODE § 1151 (West 1966) (barring evidence of subsequent remedial measures).

21. *Moritz*, 8 Cal. App. 3d at 577-78, 87 Cal.Rptr. at 678.

22. In determining whether the evidence is persuasive, the question is whether the public entity has adduced facts that "reasonably [inspire] confidence" and are of "solid value." Ramirez v. City of Redondo Beach, 192 Cal. App. 3d 515, 526, 237 Cal. Rptr. 505, 512-13, citing Davis v. Cordova Recreation & Park Dist., 24 Cal. App. 3d at 789, 798, 101 Cal. Rptr. 358, 364. In some cases, "appellate courts have rejected expert testimony ostensibly supporting design immunity where the testimony has been flawed suffi-

itation confines plaintiffs to a very small playing field when arguing against the "reasonableness" of government approval.

3. Discretionary Approval Of The Plan Before Construction

3.1 The Existence of an "Approval"

Government Code section 830.6 requires that a legislative body of the public entity or "some other body or employee exercising discretionary authority" give advance approval of the plan, design, or standards.[23] The first step in satisfying this element is to document the existence of an "approval." On major construction projects the process of approval is obvious because it culminates in a public entity's engineer's submission of plans and specifications to the legislative body for a vote of approval. The result will be documented in the minutes and agenda material, which may contain the engineer's written recommendation and the plans and specifications. Alternatively, the public entity engineer may have stamped or signed the plans as approved.

However, in many cases, neatly packaged proof of approval is not available. Legislative bodies are not always involved in the approval of important design features. For example, placement of traffic regulatory signs and pavement markings are often determined by someone other than the legislative body. Anyone from the Public Works Director, down to the Maintenance Supervisor, may make the decision. Frequently, documentation of the decision is sparse or altogether missing. However, section 830.6 does not specify that a plan must be proved with any particular formality. In *Bane v. State*,[24] the

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ciently to destroy its substantiality." *Hefner*, 197 Cal. App. 3d at 1015, 243 Cal. Rptr. at 295.

23. CAL. GOV'T CODE § 830.6 (West 1980) defines an "employee" as "an officer, employee or servant, whether or not compensated, but does not include an independent contractor." Therefore, the immunity may be difficult to establish if a public entity delegates the responsibility for design review to an outside contractor and neglects to document ultimate approval by a public entity body or employee. Such problems potentially arise for a smaller city that contracts for design services from a county or outside engineers, and any public entity which submits a design to state or federal agencies for review and approval of the designs. In such cases, the defendant public entity may lack any record that it independently approved the design.

The wording of section 830.6 leaves unclear whether the immunity would extend to a public entity that acquires property from another public entity; for instance when a newly incorporated city acquires roads and other improvements from a county. Arguably, the city, as successor in interest to the county, becomes the beneficiary of any design immunity that would have been available to the county. No case has decided this question.

24. 208 Cal. App. 3d 860, 256 Cal. Rptr. 468 (1989).

court held that highway plans need not be actually signed by an engineer so long as they are approved by an employee exercising discretionary authority.[25] In the absence of local codes or administrative regulations to the contrary, oral proof may suffice to establish approval. "[S]ection 830.6 does not require that the approved plan contain the signature of the preparer or the party approving the plan. It is not the form of the plan or the form of the approval that is critical to design immunity."[26]

3.2 "Authority" to Approve

The second step in proving the element of discretionary approval is to determine that the body or employee actually had the authority to give the approval. Usually, state or municipal law will provide guidance.[27] For instance, most municipal codes specify the scope of authority of city engineers, public works directors and other officials likely to exercise discretionary authority.[28] Further, codes may explicitly authorize such officers to delegate discretionary authority to assistants. On this basis, in *Thompson v. City of Glendale*,[29] the court held that the director of public works for the City of Glendale had delegated to the superintendent of maintenance the authority to approve the design of a handrail.[30]

Once the public entity has verified the authority of the body or employee who approved a plan, the public entity must also ensure that the body or employee did not exceed their authority to evaluate

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25. *Id.* at 868-69, 256 Cal. Rptr. at 473.

26. *Id.* at 869, 256 Cal. Rptr. at 473 (citing Thomson v. City of Glendale, 61 Cal. App. 3d 378, 385, 132 Cal. Rptr. 52, 57 (1976)).

27. As stated in *Johnston v. County of Yolo*, 274 Cal. App. 2d 46, 52, 79 Cal. Rptr. 33, 37-38 (1969), "in the affairs of a public entity (e.g., a county, city or public district) the locus of discretionary authority is fixed by law. . . . One looks to the law fixing the public entity's internal distribution of powers to discern whether the legislative body or, alternatively, some administrative board or officer exercises discretionary approval authority for the purpose of section 830.6." One would think that in every case, the ultimate legislative body (City Council, Board of Supervisors, School Board, etc.) would be vested with appropriate authority. In *Johnston* this analysis led to the conclusion that a board of supervisors' approval of a roadway plan did not support the design immunity because state law placed that decision in the hands of the county's road commissioner who, it so happened, disapproved of the plan.

28. *E.g.* City of Beverly Hills Municipal Code § 2-3.504(g) authorizes the city transportation officer "[t]o plan, design, and construct the City's public works facilities including storm drains, streets, alleys and sewers, and other facilities as may be required, and is designated street Superintendent for purpose of the State Street and Highways Code . . . ."

29. 61 Cal. App. 3d 378, 384, 132 Cal. Rptr. 52, 56 (1976). The municipal code section provided "whenever a power is granted or a duty is imposed upon a city officer by this Code, or any other ordinance of the city, the power may be exercised or the duty performed by an assistant or deputy of the officer or by a person authorized pursuant to law by the officer, unless this Code expressly provides otherwise."

30. *Id.*

the particular plan in question. For example, in *Levin v. State*,[31] the court held that, even though a state deputy highway engineer was authorized to approve a state highway plan, he did not possess the discretionary authority to disregard California Department of Transportation standards which required the use of an eight foot shoulder and guard rails.[32] In the court's opinion, this omission did not involve the exercise of discretion, because "there was no evidence that [he] had discretionary authority to ignore the standards."[33]

3.3 "Discretionary" Authority

The third step in proving the element of discretionary approval is to establish that the approving body or employee exercised "discretionary" authority. Section 830.6 merely refines the broad discretionary immunity afforded to the federal and state governments under the Federal Tort Claims Act[34] and the California Tort Claims Act,[35] especially the so-called "discretionary acts immunity" provided by Government Code section 820.2.[36] Generally, courts have concluded that "discretion" under section 820.2 refers only to "basic policy decisions."[37] However, it is doubtful that this definition applies to the minute details of highway and building designs that are the usual subject of section 830.6. In practice, the courts apply a far less restrictive definition in design immunity cases. For instance, a maintenance supervisor's approval of an informal "shop drawing" for a railing satisfied the requirement of approval by an employee exercising discretionary authority in *Thomson*,[38] and a state architect's decision to use untreated rather than tempered glass was a sufficient exercise of discretion to satisfy the immunity in *Cabell v. State*.[39] These examples, involving relatively low level design decisions, suggest that section 830.6 requires discretion only in the dictionary sense of exercise of individual judgment.

Moreover, the body or employee exercising discretionary authority

31. 146 Cal. App. 3d 410, 194 Cal. Rptr. 223 (1983).
32. *Id.* at 418, 194 Cal.Rptr. at 228.
33. *Id.*
34. 28 U.S.C. §§ 2671-2680(a).
35. CAL. GOV'T CODE § 810-895.8 (West 1980).
36. CAL. GOV'T CODE § 820.2 (West 1980).
37. Johnson v. State, 69 Cal. 2d 782, 793, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968); Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961) (Johnson cites the Lipman holding that it is difficult to establish a definite rule for government agency liability).
38. 61 Cal. App. 3d at 384-85, 132 Cal. Rptr. at 56-57.
39. 67 Cal. 2d 150, 153-54, 430 P.2d 34, 36-37, 60 Cal. Rptr. 476, 478-79 (1967).

need not exercise expert judgment in approving a plan or design. As observed in *Thomson*, section 830.6 contains no requirement that the employee be either a licensed engineer or an architect.[40] An early case held that the design immunity requires approval in two capacities, an official act and, in many cases, a professional act.[41] But recent cases have emphasized that the body or employee's discretionary approval embodies essentially an official act; the professional aspect may be satisfied by the body's or employee's reliance upon the expertise of engineers or architects who prepared the plan.[42]

3.4 "In Advance"

The fourth step in proving the element of discretionary approval is to establish that the plan, design or standard was "approved in advance of construction or improvement."[43] This statutory requirement presents some troublesome problems. One is that construction plans are frequently modified after initial approval. Thus in *Mozzetti v. City of Brisbane*,[44] the design immunity failed because changes made during construction deviated from the approved plan.

Another problem is that "as built" plans constitute a common form of approval that the legislature probably did not consider when it enacted section 830.6. If the public entity approves and accepts completed construction pursuant to "as built" plans that deviate significantly from the original plans, the public entity will have finally approved the deviation only after the fact. In this situation, public entities should argue that the legislative purpose is served when a public entity approves the plan or design in advance of *use*, not literally in advance of *construction* as provided by the statute.

3.5 "Plan or Design" or "Standards"

The last step in proving the element of discretionary approval is to establish the advance approval of the "plan or design" or, alternatively, preparation of a plan or design in conformity with previously approved "standards."[45]

"Plan or Design"

In many cases, the meaning of "plan or design" leaves little to the imagination because the public entity based its construction on

40. 61 Cal. App. 3d at 384, 132 Cal. Rptr. at 56.
41. *Johnston*, 274 Cal. App. 2d at 54-55, 79 Cal. Rptr. at 38-39.
42. Anderson v. City of Thousand Oaks, 65 Cal. App. 3d 82, 89-90, 135 Cal. Rptr. 127, 130-31 (1976); *Ramirez*, 192 Cal. App. 3d at 526, 237 Cal. Rptr. at 512.
43. CAL. GOV'T CODE § 830.6 (West 1980).
44. 67 Cal. App. 3d 565, 136 Cal. Rptr. 751 (1977).
45. CAL. GOV'T. CODE § 830.6 (West 1980).

blueprints and accompanying written specifications that, taken together, clearly constitute a "plan or design." However, the legislative history does not disclose why section 830.6 uses the words "plan or design" in the disjunctive, and whether they are one and the same. The dictionary definition of "plan" is broad; the meaning of "design" is even more inclusive.[46]

The *Thomson* court has interpreted "plan or design" to encompass much more than professionally prepared blueprints; even an informal shop drawing approved during the course of construction may suffice. "There is no requirement that the design be expressed in any particular form. The plan need only be sufficiently explicit to assure that it is understandable to the employee giving the approval."[47] No case has explored the outer limits of the statutory language, and conceivably, it may extend to design decisions made verbally, or by markings on the construction site, so long as an employee with discretionary authority gives approval in advance of actual construction. However, the plan, design or standards are clearly limited to those for "a construction of, or an improvement to, public property."[48] Therefore, the immunity does not embrace a plan or design in the larger sense of operating procedures. In contrast, the somewhat parallel federal discretionary acts immunity for claims arising out of the plan or design of public works projects extends to not only construction plans, but also the establishment of "schedules of operations."[49] Often it is difficult to establish the requirement of a "plan or design," despite the existence of a full set of construction plans and specifications. One problem is that plans may imply, rather than specify, important aspects of construction. In an early and important case interpreting section 830.6, *Cameron v. State*,[50] the California Supreme Court held that a geometric highway design which showed the elevation of the center line of the road, but not the super-elevation of the roadway on curves, did not constitute a sufficient "plan or design" to support the immunity in a case in which the plaintiff

46. WEBSTER'S THIRD NEW INTERNATIONAL WORLD DICTIONARY 1729 (1986) defines "plan" in its most restrictive sense as "a drawing or a diagram on a plane;" but a "design" is defined more broadly as "a mental project or scheme in which means to an end are laid down." *Id.* at 611.

47. *Thomson*, 61 Cal. App. 3d at 385, 132 Cal. Rptr. at 57.

48. CAL. GOV'T CODE § 830.6 (West 1980).

49. Dalehite v. United States, 346 U.S. 15, 36 (1953). In *Dalehite*, the immunized "plan" was an operating procedure that dictated the bagging of fertilizer at a high temperature (a factor in the resulting fatal explosion) and the use of a specific label on the bags (which failed to warn of the inflammable nature of the contents).

50. 7 Cal. 3d 318, 497 P.2d 777, 102 Cal. Rptr. 305 (1972).

claimed that the improper super-elevation was a contributing cause of the accident.[51] The majority did not address the view, logically expressed in the dissenting opinion, that given the geometric plan and the center line elevation, traffic engineers could specify the super-elevations from standard formulae and tables.[52] Because design immunity is an affirmative defense upon which the public entity has the burden of proof, public entities may have difficulty establishing the details of a plan by implication.

A second problem in establishing the requirement of a "plan or design" is that final construction may not actually conform to the plan. It is helpful if public records contain "as built" plans approved by a city engineer verifying that the completed construction conforms to the plans. In the absence of such records, it may be necessary to have the important aspects of the improvement surveyed to establish their conformity with the original plan.

Finally, there is the problem that many public properties, especially streets and highways, are not built on the basis of a single "plan or design." Rather, they are an amalgam of modifications and additions over the years. For example, the "plan or design" for an intersection is seldom contained in one set of plans, and often consists of a crazy-quilt of successive geometric designs, signing and striping plans, overhead lighting designs, and the like. In some instances, the public entity will succeed in splicing these together into one "plan" to establish the immunity.[53] However, the public entity cannot establish the design immunity if some significant feature is not shown on *any* set of plans; this problem is frequently encountered in roadway design cases involving informally installed traffic regulatory signs and street markings.[54] To ensure that a significant feature is approved on a plan or design, the public entity's counsel or claims administrator must carefully review the historical records in an effort to establish approvals of every aspect of the roadway in question. This search may require review of engineering records, legislative body minutes, traffic commission minutes, the records of independent architects, engineers and contractors, and in some cases, antecedent county or state highway records.

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51. *Id.* at 325-26, 102 Cal. Rptr. at 309-10.

52. *Id.* at 330, 102 Cal. Rptr. at 313.

53. *See* Callahan v. City and County of San Francisco, 15 Cal. App. 3d 374, 93 Cal. Rptr. 122 (1971) (original roadway plus later modifications).

54. As stated in De La Rosa v. City of San Bernardino, 16 Cal. App. 3d 739, 748, 94 Cal. Rptr. 175, 181 (1971): "[S]ince the City failed to show that the installation or position of the stop sign was part of an approved design or plan of the intersection, it failed to establish a fact crucial to the design or plan immunity."

"Standards"

If a public entity cannot establish advance approval of a plan or design, it may alternatively prove that the "plan or design is prepared in conformity with standards previously so approved."[55] In *Hefner v. County of Sacramento*,[56] the court recently construed this language, and found that the design immunity applied to the placement of a roadway limit line painted under the supervision of a senior traffic supervisor.[57] Although plans did not exist, the supervisor had discretionary authority to place limit lines pursuant to departmental standards, which required limit lines no less than four feet, nor more than thirty feet from the nearest edge of the intersecting street. Without discussion, the *Hefner* court assumed that a written plan or design is unnecessary if the actual installation conforms with previously approved standards.[58] *Hefner* provides an important basis for establishing design immunity for the placement of traffic regulatory signs and pavement markings, even in the absence of a formal plan or design.

In light of *Hefner*, public entities may be able to assert the design immunity in connection with construction projects if the contract documents contain or refer to standard specifications. Examples include the books of standard specifications for public works construction, which are published by larger counties, special state and federal rules which may be incorporated into construction contracts (e.g., California Administrative Code Title 24, Architectural Barriers Law and the Minimum Standards of the United States Department of Housing and Urban Development), building codes, and zoning codes.

4. Causation

The section 830.6 immunity applies only to an injury "caused by" the plan or design.[59] This requirement poses two problems of concurrent causation. The first arises when the plaintiff alleges that both design and non-design features caused the accident. For instance, in

55. CAL. GOV'T CODE § 830.b (West 1980).
56. 197 Cal. App. 3d 1007, 243 Cal. Rptr. 291 (1988).
57. *Id.* at 1017, 243 Cal. Rptr. at 297.
58. *Id.* at 1012-13, 243 Cal. Rptr. at 293-94. In that case the standards consisted of the County's adoption of the California Department of Transportation TRAFFIC MANUAL and the United States Department of Commerce MANUAL ON UNIFORM TRAFFIC CONTROL DEVICES.
59. CAL. GOV'T CODE § 830.6 (West 1980).

Flournoy v. State,[60] a case involving the design of a bridge which became dangerously icy in cold weather, the appellate court held that even if the immunity barred plaintiffs from asserting an "active negligence theory" (improper design of the bridge), they might proceed on an alternative "passive negligence theory" (failure to warn of a known danger not readily apparent to a reasonably careful highway user).[61] In language reminiscent of "concurrent causation" cases involving liability insurance coverage,[62] the Court noted that section 830.6 immunity is limited to a design-caused accident. The *Flournay* court stated that the design immunity doctrine "does not immunize from liability caused by negligence independent of design, even though the independent negligence is only a concurring, proximate cause of the accident."[63] Because of this limitation on the design immunity, careful plaintiff's counsel should plead as many independent contributing factors as reasonably possible. For instance, in a roadway design case, the plaintiff might allege the existence of potholes, debris or oil on a roadway surface, as well as improper design of the roadway itself. But *Ramirez*,[64] focusing on the design of a roadway median strip, made short-shrift of the contention that the obstruction of vision by shrubbery was a contributing factor to the dangerous conditions. Noting that even plaintiff's experts opined that the shrubbery in and of itself was not the cause of the accident, but rather was "only a factor" when considered in conjunction with the design of the median, the court held that the case must stand or fall on the question of the median design.[65] Although not clearly explaining the basis for its decision, the court apparently meant that a concurring cause must be truly "independent" in order to defeat the design immunity.

The second causation problem arises when the public entity learns that the approved plan or design is dangerous in operation, but fails to correct or warn against the danger. Arguably, there are two independent causes of an accident under these circumstances: One is the public entity's negligence in approving the design, for which it is immune under section 830.6; the other is the public entity's negligent failure to protect the plaintiff from a known danger, for which there is no immunity.[66] Arguably, the design immunity would be completely eviscerated if plaintiff could circumvent it by simply alleging

60. 275 Cal. App. 2d 806, 811, 80 Cal. Rptr. 485 (1969).
61. *Flournoy*, *id.* at 811, 80 Cal. Rptr. at 491.
62. State Farm Mut. Ins. Co. v. Partridge, 10 Cal. 3d 94, 109 Cal. Rptr. 811 (1973).
63. *Flournoy*, 275 Cal. App. 2d at 811, 80 Cal. Rptr. at 489.
64. Ramirez v. City of Redondo Beach, 192 Cal. App. 3d 515, 237 Cal. Rptr. 505 (1987).
65. *Id.* at 521, 237 Cal. Rptr. at 509.
66. *Flournoy*, 275 Cal. App. 3d 806, 80 Cal. Rptr. 485.

that the public entity failed to warn of the dangerous condition created by the design. In *Anderson v. City of Thousand Oaks*,[67] the court explicitly rejected this argument, and held that the public entity loses the design immunity only if it has actual or constructive notice that the roadway is dangerous in operation.[68] The entire question of failure to warn, once the defect is known, is now largely governed by *Baldwin v. State of California*[69] and the California legislature's amendment of section 830.6 in 1979; both are discussed in the next section.

5. Notice That The Plan Is Dangerous In Operation

5.1 The "Baldwin Doctrine"

Early cases construing section 830.6 held that once a public entity constructed an improvement according to a plan, the design immunity would apply perpetually, regardless of a history of accidents in actual operation.[70] These decisions led to an absurd result inconsistent with the broad concept of dangerous condition liability, expressed in Government Code section 835(b), which states that a public entity will be liable for a dangerous condition of which it has actual or constructive notice.[71] In *Baldwin*, the California Supreme Court abandoned its earlier position, and held that "[u]pon reconsideration of this question, we are convinced that the Legislature did not intend that public entities should be permitted to shut their eyes to the operation of a plan or design once it has been transferred from

67. 65 Cal. App. 3d 82, 135 Cal. Rptr. 127 (1976).

68. *Id.* at 90-91, 135 Cal. Rptr. at 131-32. The conclusion that constructive notice will destroy the immunity is troublesome. In reversing summary judgment for the public entity, *Anderson* noted that a roadway design flaw, consisting of a curve too sharp to accommodate anticipated speeds, might be readily ascertainable from the plans themselves. This observation presents a conundrum: If the immunity applies because the plans were "reasonably approved" how can the immunity be lost on the basis of "constructive notice" that the plans were flawed. *Anderson* held that, to avoid constructive notice, the public entity would have to demonstrate the hidden or inconspicuous nature of the defect. *Id.* at 92, 135 Cal. Rptr. at 133. Therefore, *Anderson* would apply the immunity if the defect were "hidden or inconspicuous," but permit an alternative theory of liability based on failure to warn if a patent design defect provided constructive notice of the danger to the public entity. *Id.*

69. 6 Cal. 3d 424, 491 P.2d 1121, 99 Cal. Rptr. 145 (1972).

70. Becker v. Johnston, 67 Cal. 2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967) (state highway in existence since 1927); Cabell v. State, 67 Cal. 2d 150, 60 Cal. Rptr 476 (1967) (repeated accidents involving untempered glass in door).

71. CAL. GOV'T CODE § 835(b) (West 1980).

blueprint to blacktop."[72] In strong language, the court said:

> Having approved the plan or design, the governmental agency may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard."[73]

By changed physical conditions, the court meant, not only changes to the roadway itself, but also changed traffic conditions. In *Baldwin* traffic had doubled since construction of the roadway, and development of surrounding property had altered traffic patterns. In observing that notice might be either actual or constructive, *Baldwin* prepared the way for the subsequent decision in *Anderson* that defects apparent on the face of a plan might provide sufficient constructive notice to defeat the immunity.[74]

Baldwin implied that a combination of both "notice" and "changed physical conditions" effectively dissolves the public entity immunity. Accordingly, *Ramirez* subsequently held that the plaintiff must prove both.[75] However, more recently *Bane* held that the 1979 amendment to section 830.6 nullified the requirement of changed physical conditions.[76] As discussed below, *Bane* construed the amendment to mean that the immunity is lost if the history of the design in actual operation provides the public entity with notice of the dangerous condition and the public entity has a sufficient period of time to remedy it.

5.2 The 1979 Amendment to Section 830.6

In 1979, in the wake of *Baldwin* and *Anderson*, the California Legislature amended section 830.6 for the express purpose of extending immunity until a public entity can remedy a design problem that has come to its attention.[77] The amendment provides in substance that "notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan, design

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72. 6 Cal. 3d at 427, 99 Cal. Rptr. at 146.
73. *Id.* at 434, 99 Cal. Rptr. at 151.
74. *See supra* note 68.
75. Ramirez v. City of Redondo Beach, 192 Cal. App. 3d 515, 527, 237 Cal. Rptr. 505, 513 (1987).
76. Bane v. State, 208 Cal. App. 3d 860, 871, 256 Cal. Rptr. 468, 474-75 (1989). The 1979 amendment is underscored in the appendix to this Article.
77. The Legislative Counsel's Digest to AB 893, 79-80 Sess., (Mar. 15, 1979) (Knox), stated:

> This bill would extend the immunity for injuries in cases where the public property no longer conforms to the plans or designs of a governmental body, to allow such a body to remedy the property and bring it within the specifications of the plans or designs. In the event the governmental body is unable to remedy the public property, this bill would extend the immunity for so long as necessary, provided it provides warnings of the defects in the property.

or standard which reasonably could be approved," the immunity shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds to carry out remedial work necessary to correct the design defect. If the public entity is unable to remedy the dangerous condition because of "practical impossibility" or lack of funds, the immunity will remain in effect so long as the public entity "shall reasonably attempt" to provide adequate warnings.[78]

It is difficult to unravel the statutory interpretation problems posed by the 1979 Amendment. Interpreted literally, the amendment does not define the circumstances under which the design immunity is lost; rather, it specifies the circumstances under which it may be retained. It is unclear what the legislature meant by "public property [that] may no longer be in conformity with a plan . . . which could be reasonably approved." Does this phrase refer to construction that has deviated from the original design?[79] Or does it refer to the obsolescence of the original design under present design standards? *Bane*, the only case to deal with the 1979 amendment, sidestepped the pitfalls of semantic interpretation, and simply held that,

> although the 1979 amendment to section 830.6 could have been drafted with more clarity, a reasonable, common sense interpretation of the quoted language is that once the public entity has actual or constructive notice that its property may no longer be in conformity with a reasonable design or plan, the immunity nonetheless will continue for a reasonable period of time to allow the entity to obtain funds and to carry out remedial work to bring the property into conformity with the *reasonable* design or plan."[80]

In other words, once the public entity is on notice that its design has produced a dangerous condition, the immunity continues only for a reasonable time to allow the public entity to acquire funds and correct the dangerous condition. Consequently, *Bane* abolished any requirement under *Baldwin* that a plaintiff must show both notice and changed physical conditions to defeat the immunity.

Once the plaintiff has alleged that the public entity is on notice that the original design has produced a dangerous condition, the public entity has the burden of proving that the immunity remains in effect.[81] However, neither the 1979 amendment nor *Bane* specified the evidentiary standard for determining whether the original construction still conforms to a plan that could be reasonably approved.

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78. CAL. GOV'T CODE § 830.6 (West 1980).
79. Certainly, this is the thrust of the material in the Legislative Counsel's Digest, quoted in *supra* note 53.
80. *Bane*, 208 Cal. App. 3d at 870, 256 Cal. Rptr. at 474.
81. *Baldwin*, 6 Cal. 3d 424, 439, 99 Cal. Rptr. 145, 155 (1972).

Logically, the substantial evidence test, which applies to the reasonableness of the original approval, should also apply to determine whether the construction still conforms to a reasonable plan or design. The legislative policy in favor of initially immunizing the design of public improvements — insulating governmental design decisions from review by juries[82] is equally applicable to a governmental decision to continue to use an improvement without modification.

The 1979 amendment further provides that if a public entity lacks funds to bring the construction into conformity with a reasonable plan, the immunity remains in effect so long as the public entity "shall reasonably attempt to provide adequate warnings."[83] This provision seemingly paralleled existing section 835.4, which may absolve a public entity from liability if the practicability and cost of protecting against a risk outweighs the probability and gravity of potential injury to the public.[84] The defense of insufficient funds is a touchy subject, difficult to prove, and easily circumvented by evidence that warning signs would have sufficed if the public entity could not afford heavy capital expenditures. The amendment's provision that the immunity shall remain in effect so long as the public entity shall reasonably "attempt" to provide adequate warnings involves a curious choice of words.[85] An attempted warning might fall short of an adequate warning, but it is doubtful that the appellate courts would extend the immunity to cases in which warnings are inadequate.

6. Procedure

Design immunity is an affirmative defense that the public entity must plead in its answer, and prove at trial.[86] However, the public entity will be relieved of the obligation to affirmatively plead the defense if the complaint alleges dangerous condition liability, but fails to fairly inform the defendant that negligent design is an issue in the case.[87]

As mentioned, the unique aspect of design immunity is that "substantial evidence" of reasonable approval is determined by a judge,

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82. *See supra* section 2.2.

83. CAL. GOV'T CODE § 860.5 (West 1980).

84. CAL. GOV'T CODE § 835.4 (West 1980).

85. The Senate Committee on the Judiciary posed the following question regarding the proposed 1979 amendment: "Should not the public entity be required to provide adequate warnings, rather than merely attempt to provide them?" Senate Committee on Judiciary, Comment, AB 893, 79-80 Sess. (May 31, 1989) (Knox) at 3. Apparently this question went unanswered and the Senate approved the Bill without change.

86. Hilts v. County of Solano, 265 Cal. App. 2d 161, 175, 71 Cal. Rptr. 275, 285 (1968).

87. Strongman v. County of Kern, 255 Cal. App. 2d 308, 311, 62 Cal. Rptr. 908, 911 (1967).

not a jury.[88] Because "reasonableness" is an issue of law for the court, the public entity will typically present the defense by a motion for summary judgment, directed verdict, or judgment notwithstanding the verdict. A motion for summary judgment pursuant to California Code of Civil Procedure section 437c,[89] is the preferred approach because it avoids a jury trial on the main liability and damage issues of the case.

In a motion for summary judgment based on the design immunity, to fulfill the required elements of proof, the public entity should present: (1) authentication of a plan approved prior to construction by a legislative body or employee exercising discretionary authority,[90] (2) "as-built" plans or a surveyor's declaration that the improvement was constructed according to plan, (3) an architect or engineer's declaration expressing an expert opinion that the plan could have been reasonably approved, (4) declarations of public officials denying any notice of the alleged danger or change of conditions, and (5) excerpts from plaintiff's complaint, interrogatory answers or deposition testimony showing that the plan was the alleged cause of the accident.[91]

Because the "substantial evidence" test enables public entities to obtain summary adjudication of reasonableness with relative ease, plaintiffs' counsel must emphasize other aspects of their case in order to circumvent the design immunity. Prudence requires pleading that non-design features contributed to the plaintiff's injuries; and arguing that the immunity has dissipated because of notice of the danger and changed conditions. In opposing a public entity's motion for summary judgment, plaintiff's counsel should argue that the preponderance of the evidence standard applies to all elements of the immunity other than reasonableness, and that triable issues of mate-

88. Johnston v. County of Yolo, 274 Cal. App. 2d 46, 56, 79 Cal. Rptr. 33, 40 (1969); Becker v. Johnston, 67 Cal. 2d 163, 430 P.2d 43, 60 Cal. Rptr. 485 (1967); Hilts v. County of Solano, 265 Cal. App. 2d 161, 71 Cal. Rptr. 275. *See supra* note 8 and accompanying text.

89. CAL. CIV. PROC. CODE § 437c (West 1973 & Supp. 1991).

90. The passage of time can complicate proof of the plan and approval. However the public entity can utilize the "Official Records and Recorded Writings" provisions of CAL. EVID. CODE §§ 1530-32 to authenticate public records and prove their contents. One case has suggested, but did not decide, that a public entity might judicially notice legislative or administrative approval of plans. Hilts v. County of Solano, 265 Cal. App. 2d at 175-76 n.6, 71 Cal. Rptr. at 286 n.6 (citing CAL. EVID. CODE §§ 451-59).

91. The findings of fact and conclusions of law quoted in Thomson v. City of Glendale, 61 Cal. App. 3d 378, 382-83, 132 Cal. Rptr. 52, 55-56 (1976), provides practitioners with a concise outline for the presentation of a motion for summary judgment on design immunity.

rial fact remain as to those elements. Public entities can lose motions for summary judgment because of vexing technical problems in conclusively proving the existence of the plan, the approval, discretionary authority to approve, conformity of the improvement to the plan, and causation. Accordingly, if appropriate, plaintiff's counsel can require exact proof of each of the elements required to sustain a summary judgment motion.

A recent amendment to the summary judgment statute has curtailed its usefulness in establishing design immunity in cases where the plaintiff alleges that both design and non-design features contributed to the injury. Formerly, section 437c(f) permitted summary adjudication "as to some but not all of the issues of the action."[92] On this basis the public entity could move for summary adjudication of the design immunity defense — an "issue" within the meaning of the statute — even if the motion did not resolve the non-design features of the case. As amended, effective January 1, 1991, section 437c(f) allows summary adjudication only as to an entire "cause of action."[93] Consequently, if a cause of action for dangerous condition liability alleges both design and non-design features, the presence of a triable issue of fact on non-design features may thwart summary adjudication of the design immunity defense.

If non-design features prevent a public entity from obtaining summary judgment, the public entity may alternatively move for an order under California Code of Civil Procedure Section 598[94] that the trial of the design immunity issue shall precede the trial of the rest of the case. Unlike the recently amended summary judgment statute, section 598 still permits trial on "any issue or any part thereof."[95] This maneuver may be particularly appealing if the trial judge concludes that the immunity issue — and perhaps the entire case — can be resolved in a court trial. Once the public entity establishes the design immunity defense, the court must instruct the jury that the public entity is immune as a matter of law for design related damages. At that point, the trial may proceed on any remaining non-design issues.[96]

CONCLUSION

The design immunity under California Government Code section 830.6 has undergone extensive judicial and legislative modification since its enactment in 1963. Expanded at one end by liberal applica-

92. CAL. CIV. CODE § 437c (West 1973 & Supp. 1991).
93. CAL. CIV. CODE § 437c(f) (West 1973 & Supp. 1991).
94. CAL. CIV. CODE § 598 (West 1976 & Supp. 1991).
95. *Id.*
96. Muffett v. Royster, 147 Cal. App. 3d 289, 306, 195 Cal. Rptr. 73, 73 (1983); Mozzetti v. City of Bristane, 67 Cal. App. 3d 565, 573, 136 Cal. Rptr. 751, 755 (1977).

tion of the "substantial evidence" test and whittled down at the other by the doctrine of notice and changed conditions, design immunity remains a formidable defense. Summary judgment on the design immunity may resolve the whole case; alternatively, a public entity that successfully asserts this defense at trial may obtain a jury instruction eliminating design as a basis for dangerous condition liability. Although the complaint may proceed to trial on any non-design elements that have been alleged as a basis for liability, frequently the allegations of defective design constitute the real substance of the case; the court's decision on the design immunity issue may well determine the outcome of the case as a practical matter.

APPENDIX

GOVERNMENT CODE SECTION 830.6 [Approved plan or design of public property; remedial work; adequate warnings]:
"Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if 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 therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor. *Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by*

this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. However, where a person fails to heed such warning or occupies public property despite such warning, such failure or occupation shall not in itself constitute an assumption of risk of the danger indicated by the warning." (Amended by Stats 1979, ch 481, §1.)

NOTE: The original statute was enacted in 1963. The 1979 amendment is italicized.