

Introduction

On December 3, 2009, the New Jersey Department of Transportation (NJDOT) adopted a Complete Streets policy (the “NJDOT Policy”) requiring NJDOT to plan, design, construct, operate and maintain new and existing roadways receiving federal and state funding to enable safe access and mobility to pedestrians and transit users.¹ The NJDOT Policy also “strongly encourages” county and municipal jurisdictions to adopt similar policies. In fact, NJDOT awards an extra point for Local Aid applications if a county or municipality has an adopted Complete Streets policy. The NJDOT Policy has been designated as the best state Complete Streets policy in the country by Smart Growth America and the National Complete Streets Coalition.²

Even though it has been said that NJDOT’s Policy “*enhances safety* for all users of our roads by integrating the needs of pedestrians, bicyclists and others into the earliest stages of project planning and design,”³ county and municipal officials and employees continue to express concern that implementation of Complete Streets designs can increase the risk of liability. In response to these concerns, the Tri-State Transportation Campaign has prepared this simple primer on liability related to Complete Streets designs in New Jersey.

Main Conclusions

- Immunity from liability for public entities is the underlying presumption of the New Jersey Tort Claims Act.
- Local streets and county roads designed to accommodate bicyclists and pedestrians are not subject to different legal requirements than any other roadway planning or design decisions. The Tort Claims Act is completely mode-neutral.
- Although it is not part of the liability analysis in New Jersey, the prudence of implementing Complete Streets designs is supported by NJDOT’s Policy and by the Federal Highway Administration (FHWA). Specifically, FHWA has stated that “[h]ighway and recreational facilities that fail to fully incorporate the needs of all users

¹ NJDOT, Policy No. 703 (Dec. 3, 2009), *available at*, <http://www.state.nj.us/transportation/eng/completestreets/pdf/completestreetspolicy.pdf>.

² Smart Growth America and the National Complete Streets Coalition, Complete Streets Policy Analysis 2011, *available at*, <http://www.completestreets.org/webdocs/resources/cs-policyanalysis.pdf>.

³ NJDOT, NJDOT ‘Complete Streets’ Policy receives top ranking from National Complete Streets Coalition (May 15, 2012), *available at*, <http://www.nj.gov/transportation/about/press/2012/051512cs.shtm>.

increase the likelihood of potential court settlements in favor of those who are excluded.”

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Complete Streets Designs

The Policy defines a Complete Street as one that provides “safe access for all users by designing and operating a comprehensive, integrated, connected multi-modal network of transportation options.”⁵ In addition to requiring implementation of Complete Streets designs for all projects funded through the Capital Program, the NJDOT Policy also “strongly encourages” counties and municipalities that apply for funding through Local Aid programs to adopt Complete Streets policies and implement Complete Streets designs.

As discussed below, officials and public entities in New Jersey are entitled to immunity for planning decisions. Complete Streets designs, which research suggests⁶ typically make streets safer, do not create new liability concerns when included in the planning and design process. In addition to full support from NJDOT, the FHWA also encourages such accommodations and has stated on the issue of liability that “[h]ighway and recreational facilities that fail to fully incorporate the needs of all users increase the likelihood of potential court settlements in favor of those who are excluded.”⁷ A design method that does not differ from the ordinary street design method will be protected.

Plan or Design Immunity

In 1972, the New Jersey Legislature passed the Tort Claims Act (TCA) in order to protect government from suit.⁸ The TCA creates an explicit presumption of immunity,⁹ establishes liability only in certain exceptional, defined circumstances and creates specific immunities for public officials and public entities.¹⁰ Put simply, if the governmental entity can prove immunity under the statute, no liability will attach. If not, liability will only be found if all of the circumstances of the situation giving rise to the injury meet the statutory requirements for liability. This document will therefore address immunity first, then liability.

⁴ FHWA, Federal Highway Administration University Course on Bicycle and Pedestrian Transportation, Lesson 22: Tort Liability and Risk Management, *available at*, <http://www.fhwa.dot.gov/publications/research/safety/pedbike/05085/chapt22.cfm>.

⁵ NJDOT, Policy No. 703 (Dec. 3, 2009), *see supra* note 1.

⁶ National Complete Streets Coalition, The Benefits of Complete Streets 9, Safety of Complete Streets, *available at*, <http://www.completestreets.org/complete-streets-fundamentals/factsheets/safety/>; *see also* “Benefits of Complete Streets Designs” *infra*.

⁷ FHWA, University Course on Bicycle and Pedestrian Transportation, Lesson 22: Tort Liability and Risk Management, *see supra* note 4.

⁸ *Manna v. State*, 129 N.J. 341 (1992).

⁹ *Id.*

¹⁰ *Id.*

Regarding roadway planning and design specifically, immunity will attach to any plan or design for construction of, or improvement to, public property that is approved by an official body or a public employee exercising discretion and in conformity with standards previously approved by an authorized person or entity.¹¹ To better understand what this means, we can break down the immunity rule into its key elements:¹²

- What must be approved?
 - A planning or design decision must be approved by the governing body or an official exercising discretion within the scope of his employment.
 - The decision must create the condition that allegedly caused the injury – meaning the defect that caused the injury must be in the plans.
 - For example, a drawbridge was designed with an open-steel-grid deck with raised blocks that were intended to prevent skidding. Even though these blocks eventually wore down and caused the plaintiff’s injuries because they no longer prevented skidding, the original approval of a design that specifically considered the issue of skidding was entitled to immunity.¹³
- The project **MUST** be built in conformance with a previously approved Plan/Design.
 - A public employee exercising discretionary authority to give such approval of the plan or design will be protected from liability.
 - A public entity will be protected from liability where such a plan or design is prepared in conformity with standards previously approved, and built in conformance with the plan.
- The mode of travel is **IRRELEVANT** to liability or immunity.
 - If the design or plan is not in conformance with approved standards and the approved plan or design, then liability may attach **regardless** of whether the street design is unsafe for drivers, pedestrians or cyclists..
 - Conversely, if the relevant project was built in conformance with previously approved standards and plan or design, immunity will attach regardless of which mode the traveler was using – walking, bicycling or driving a car.
 - Accommodating bicycle and pedestrian travel safely is not liability-inducing. Therefore, do not “do nothing.”
- How long does plan/design immunity last?
 - Perpetual.

¹¹ Dorothy Kowal and Tracey Hinson, Liability and Complete Streets, available at, <http://shapiroberzins.com/wp-content/uploads/2012/05/LB-tort-claims-act-super-power-point.pdf>; see also N.J.S.A. 59:4-6.

¹² Id.

¹³ Manna v. State, see supra note 8.

- Cannot be lost even if later knowledge shows a design or plan to be dangerous, or later circumstances render the project dangerous, as long as it was originally built in conformance with the plan or design.
- See Manna v. State, 129 N.J. 341 (1992).
- Who is covered by the plan/design immunity?
 - Public entity.
 - Public employee exercising discretion.
 - Elected Official.
 - Public employee properly carrying out ministerial duties within the scope of his employment.

Liability

Implicit in the above discussion of immunity is that liability can attach in certain exceptional situations. According to the TCA and relevant case law, for liability to attach to a roadway plan or design, a plaintiff must prove:¹⁴

1. The public entity's property was in a dangerous condition;
 - a. which created a substantial risk to any foreseeable user who uses it with due care;
 - b. the kind of injury that occurred was foreseeable based on the risk created;
 - c. the condition proximately caused the injury;

AND

- 2A. A negligent or wrongful act or omission of an employee within the scope of his or her employment created the dangerous condition;

OR

- 2B. The public entity had actual or constructive notice of the dangerous condition in sufficient time to protect against it;

AND

3. The action or inaction of the public entity was palpably unreasonable. "Palpable unreasonableness refers to conduct which is 'plainly, obviously, distinctly or manifestly unreasonable.'"¹⁵

¹⁴ Liability and Complete Streets, see *supra* note 11.

¹⁵ Thompson v. Newark Hous. Auth., 108 N.J. 525, 528 (1987) (quoting *Polyard v. Terry*, 148 N.J. Super. 202, 216 (Law Div. 1977), rev'd on other grounds, 160 N.J. Super. 497 (App.Div. 1978), aff'd, 79 N.J. 547 (1979)).

Meeting all of these conditions is a high burden. All of the elements of part 1, either of the elements of part 2 and part 3 must all be present in order for the liability case to survive a public entity's motion to dismiss the case. Only then will the case proceed to discovery and, possibly, trial.

Complete Streets Design Exceptions

The NJDOT Policy does incorporate some exceptions to the required implementation of Complete Streets designs, but they are “limited to the following:” (1) Nonmotorized users are prohibited on the roadway; (2) Scarcity of population, travel and attractors, both existing and future, indicate an absence of need for such accommodations; (3) Detrimental environmental or social impacts outweigh the need for these accommodations; (4) Cost of accommodations is excessively disproportionate to cost of the project, more than twenty percent (20%) of the total cost; or (5) The safety or timing of a project is compromised by the inclusion of Complete Streets.¹⁶ This list is not binding on projects not covered by the NJDOT Policy but can be useful for understanding the limited instances where Complete Streets designs might not be the optimal choice. Any exception must be supported in writing.

What Does This Mean?

Liability concerns should not stop planners and engineers from incorporating Complete Streets designs into their road or street planning and design process. Transportation planning is a discretionary process and planning and design decisions are afforded immunity where the plan or design meets standards and the project is built in accordance with the plan or design. Immunity should attach to any project – whether or not it incorporates Complete Streets designs – so long as the project is properly approved and conforms to the appropriate design standards and is built in accordance with the plan or design.

Benefits of Complete Streets Designs

Aside from not creating unique liability issues, incorporating Complete Streets designs into roadway projects creates real and tangible benefits. The NJDOT Policy states the “many and varied” benefits of Complete Streets as:

- improved safety for pedestrians, bicyclists, children, older citizens, non-drivers and the mobility challenged as well as those that cannot afford a car or choose to live car free;
- provision of connections to bicycling and walking trip generators such as employment, education, residential, recreation, retail centers and public facilities;

¹⁶ New Jersey Department of Transportation, Policy No. 703, see supra note 1.

- promotion of healthy life styles;
- creation of more livable communities;
- reduction of traffic congestion and reliance on carbon fuels thereby reducing greenhouse gas emissions;
- avoidance of retrofit costs by incorporating sidewalks, bike lanes, safe crossings and transit amenities into the initial design of a project.¹⁷

In addition, there are many specific examples of the benefits of Complete Streets designs. Complete Streets designs can reduce infrastructure costs by 35-40%¹⁸ and reduce injury and crash risks for pedestrians by 28% and bicyclists by 50%.¹⁹ Studies in both the United States²⁰ and United Kingdom²¹ found traffic calming measures resulted in over 20% fewer accidents. More specifically, within two years of implementing Complete Streets designs on Eighth and Ninth Avenues, New York City saw 13-23% fewer crashes in total, 15-56% fewer crashes that cause injuries and 18-58% fewer injuries to all street users.²²

For these reasons, FHWA has clearly stated: “It is no longer acceptable to plan, design, or build roadways that do not fully accommodate use by bicyclists and pedestrians. With every passing year, the courts become less and less sympathetic to agencies that have not understood the message: bicyclists and pedestrians are intended users of the roadway. Transportation staff must be knowledgeable about planning, design, and other aspects of nonmotorized travel. All modes must be taken into account.”²³ FHWA has been particularly vocal about advocating for accommodating all users through implementation of Complete Streets designs. For example, it has said, the “United States Department of Transportation encourages States, local governments, professional associations, other government agencies and community organizations to adopt this Policy Statement as an indication of their commitment to accommodating bicyclists and pedestrians as an integral element of the transportation system”²⁴ and an “FHWA-backed approach [to traffic planning] is applying context sensitive solutions (CSS) to help ensure that

¹⁷ Id.

¹⁸ National Complete Streets Coalition, The Benefits of Complete Streets 1, Costs of Complete Streets, *available at*, <http://www.completestreets.org/complete-streets-fundamentals/factsheets/costs/>.

¹⁹ National Complete Streets Coalition, The Benefits of Complete Streets 9, Safety of Complete Streets, *available at*, <http://www.completestreets.org/complete-streets-fundamentals/factsheets/safety/>.

²⁰ Mayor Mike McGinn, Nickerson Street project improves safety, *available at*, <http://mayormcginn.seattle.gov/nickerson-street-project-improves-safety/>.

²¹ United Kingdom Department of Transport, Traffic Advisory Leaflet 11/00, Village traffic calming - reducing accidents, December 2000, *available at*, <http://assets.dft.gov.uk/publications/tal-11-00/tal-11-00.pdf>.

²² New York City Department of Transportation, Community Board 4 Presentation: Eighth and Ninth Avenues Complete Street Extension, September 21, 2011, *available at*, http://www.nyc.gov/html/dot/downloads/pdf/201109_8th_9th_cb4_slides.pdf.

²³ FHWA University Course on Bicycle and Pedestrian Transportation, Lesson 22: Tort Liability and Risk Management, *see supra* note 4.

²⁴ FHWA, Design Guidance, Accommodating Bicycle and Pedestrian Travel: A Recommended Approach, *available at*, <http://www.fhwa.dot.gov/environment/bikeped/design.htm>.

streets are indeed ‘*complete*’ in the sense of being appropriate for the area in which a project is implemented.”²⁵ And, as noted above, on the question of liability, **FHWA has stated that “[h]ighway and recreational facilities that fail to fully incorporate the needs of all users increase the likelihood of potential court settlements in favor of those who are excluded.”**²⁶

Government officials can rely on the ample planning resources available when formulating Complete Streets designs. In addition to resources provided by the National Association of City Transportation Officials,²⁷ approved “Complete Streets design standards include those from the American Association of State Highway and Transportation Officials (AASHTO Green Book), the Manual on Uniform Traffic Control Devices from the Federal Highway Administration (FHWA), and the Institute of Transportation Engineers.”²⁸ FHWA also maintains a Bicycle & Pedestrian Program resource website²⁹ and the National Complete Streets Coalition provides a particularly helpful Resources page³⁰ for learning more about the benefits of and design guidance specifically related to Complete Streets designs. Finally, NJDOT itself maintains a Complete Streets-related website.³¹

Because of these benefits, many jurisdictions in New Jersey have passed Complete Streets designs policies. A list of these jurisdictions can be found in Appendix A.

Conclusion

- Immunity from liability for public entities is the underlying presumption of the New Jersey Tort Claims Act.
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²⁵ Robin Smith, Sharlene Reed, and Shana Baker, Public Roads, Street Design: Part 1—Complete Streets, Vol. 74, No. 1, (July/August 2010), *available at*, <http://www.fhwa.dot.gov/publications/publicroads/10julaug/03.cfm> (emphasis added).

²⁶ FHWA University Course on Bicycle and Pedestrian Transportation, Lesson 22: Tort Liability and Risk Management, *see supra* note 4.

²⁷ <http://nacto.org>.

²⁸ Alan M. Voorhees Transportation Center, NJ Complete Streets Summit Summary Report, pg. 9, *available at*, <http://policy.rutgers.edu/vtc/bikeped/completestreets/Final%20Complete%20Streets%20Summary%20Report.pdf>.

²⁹ FHWA, Bicycle & Pedestrian Program, *available at*, http://www.fhwa.dot.gov/environment/bicycle_pedestrian/index.cfm.

³⁰ National Complete Streets Coalition, Resources, *available at*, <http://www.completestreets.org/complete-streets-fundamentals/resources>.

³¹ NJDOT, Complete Streets, *available at*, <http://www.state.nj.us/transportation/eng/completestreets>.

“[h]ighway and recreational facilities that fail to fully incorporate the needs of all users increase the likelihood of potential court settlements in favor of those who are excluded.”

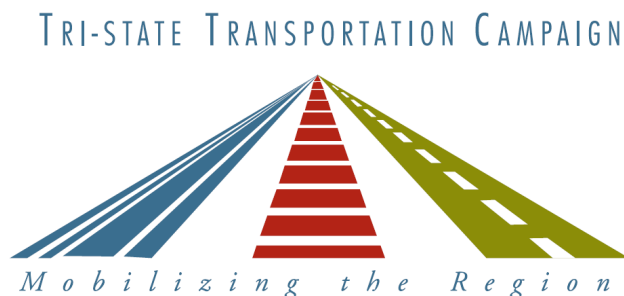
DISCLAIMER:

This document is intended to provide a brief and simple overview of transportation planning law in the state of New Jersey. **It is not intended to be legal advice, does not constitute legal advice and should not be used as a substitute for qualified legal advice from a competent, experienced attorney licensed to practice law in the state of New Jersey. Any person or entity reading this document should retain a lawyer to seek his or her advice with respect to any information or legal issues discussed in this document.**

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This document was researched and authored by Tri-State Transportation Campaign General Counsel Vincent Pellecchia with input from TSTC staff. The legal discussion was adapted from Dorothy Kowal and Tracey Hinson, Liability and Complete Streets, *available at*, <http://shapiroberzins.com/wp-content/uploads/2012/05/LB-tort-claims-act-super-power-point.pdf>. For more information, follow the link or contact:

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APPENDIX A – New Jersey Complete Streets Policies

State

New Jersey Department of Transportation

New Jersey Counties

1. Monmouth County
2. Essex County
3. Mercer County
4. Hudson County

New Jersey Municipalities

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|------------------|-------------------|--------------------|--------------------|
| 1. Atlantic City | 12. Gloucester | 23. Mantua | 34. Point Pleasant |
| 2. Bloomfield | 13. Harvey Cedars | 24. Maywood | 35. Princeton |
| 3. Cape May | 14. Hoboken | 25. Medford | 36. Princeton |
| 4. Chatham | 15. Hopatcong | 26. Montclair | 37. Raritan |
| 5. Denville | 16. Hopewell | 27. Morristown | 38. Red Bank |
| 6. Dover | 17. Irvington | 28. Netcong | 39. Ridgewood |
| 7. Emerson | 18. Jersey City | 29. Newark | 40. Toms River |
| 8. Fair Haven | 19. Lambertville | 30. New Brunswick | 41. Trenton |
| 9. Freehold | 20. Lawrence | 31. North Wildwood | 42. West Windsor |
| 10. Frenchtown | 21. Linwood | 32. Ocean City | 43. Vineland |
| 11. Glen Ridge | 22. Maplewood | 33. Pleasantville | |