EXCEPTION DOCUMENTATION GUIDANCE

The preparation of an Exception request is a formidable task. It is fraught with legal and design challenges, and should not be taken lightly. In order to provide a sound basis for Central Office Exception Documentation Requirements, the following excerpts from "A Guide for Achieving Flexibility in Highway Design" May 2004 AASHTO ISBN: 1-56051-259-8 FHD -1 publication is provided. These excerpts are beneficial to understanding our documentation requirements and serve to illustrate that they are in fact based upon FHWA & AASHTO requirements. Through our FHWA Certification Agreement we act on the behalf of the FHWA in assuring that reasonable support documentation exists for every Exception. Hopefully, sharing this information will help resolve any existing or future difference of opinion when the Central Office may request additional support documentation.

4.9 Importance of Fully Evaluating and Documenting Design Decisions

In order to reduce exposure to losses due to liability claims, it is essential that the planning and design process be thoroughly documented. This documentation should demonstrate that the safety aspects of the roadway design were properly considered. If a new or innovative solution is proposed, reference to where it has been applied, how it has performed, and how the circumstances are similar or considered appropriate would be good information to include in project reports. If an exception to an applicable design value is required, documentation should explain the reasons for the exception and show that logical and orderly procedures were followed in obtaining it. Note that this requirement is really no different from best current practices. A thorough assessment of the safety implications of accepting the design value would be essential to good documentation.

When evaluating a proposed design exception, consideration must be given to its expected effect on the safety and operation of the roadway, and its compatibility with adjacent sections of road. Design exceptions should not be approved if it is believed they would result in measurably degrading the relative safety of the road when compared with existing conditions. Often, the best defense in this situation is to demonstrate that the cost-effectiveness of further upgrading a design element does not meet any reasonable criteria, or that unacceptable environmental and/or community impacts would result from further safety improvements. Part of this defense is evidence that special care was taken in determining that an exception was appropriate, and that other appropriate mitigation measures had been considered and, where useful, had been implemented. Finally, all of the above analysis and information would in most cases be of interest to stakeholders. The public supports designers in their efforts to provide safe solutions. The ability to substantively assess the safety, tradeoffs increases public understanding as well as aids documentation of the decision.

In order to receive design immunity for planning and design activities, an agency must thoroughly document the design process in order to defend against challenges. Typically, information that should be included in requests for design exceptions includes items such as the following listed in NCHRP Report 480: A Guide to Best Practices for Achieving Context Sensitive Solutions (19):

- Description of existing highway conditions and proposed improvement project.
- Thorough description of the nontraditional feature(s), providing specific data identifying the degree of deficiency.

- Crash data for at least the latest three-year period, indicating frequency, rate, and severity of crashes. *(Note we require 5 years of data by Rule 14-46.001)*

- Costs and adverse impacts that would result from meeting current design criteria.

- Safety enhancements that will be made by the project to mitigate the effects of the nontraditional feature.

- Discussion of the compatibility of the proposed improvement with adjacent roadway segments.

Many agencies have developed formal processes involving senior staff and chief engineers who are responsible for establishing design exception processes and reviewing and approving specific requests. Senior oversight of context-sensitive decision making and documentation to support it represents good risk management and quality management practices.

4.9.1 Responsibility for Decision Making

Although public involvement in the planning process is often an important part of context-sensitive design, design professionals cannot abrogate their duty to make reasonable and rational decisions. This point requires that the design professional thoroughly understand and then communicate safety issues and concerns to the public, particularly when a necessary but unpopular design decision needs to be made. (Communicating concerns about tort exposure to stakeholders, and linking such concerns to specific design decisions, is a legitimate and indeed important aspect of the design process. Any future claims paid by the agency would ultimately be paid by the taxpayers and system users. It is appropriate for the representatives of the design agency, in explaining their decision, to include any consideration of the long-term risk to the agency's resources stemming from a design decision.)

The context-sensitive design process requires that stakeholders be consulted and involved, and that the decision process be open and honest. It does not require, however, that decision making be simply a referendum or popularity contest. Likewise, decisions that rely on casual observations of traffic conditions, ad hoc contacts with local residents, and intuitive judgments are at legal risk. Decision making should be founded on well-recognized engineering principles and practices.

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EDITOR NOTE: The State of Florida has Sovereign Immunity against tort liability for design and policy decisions. This should not be confused with the ability of an individual employee being sued for inept design decisions or decisions that result from negligent action. Applying the principles contained in "A Guide for Achieving Flexibility in Highway Design" May 2004 AASHTO ISBN: 1-56051-259-8 FHD -1, in general and Chapter 4 in particular, will provide the best safeguard for the engineer as well as the best design overall. One of the most important lessons to learn is the impact and cost of defense can be just as detrimental whether convicted or not. The better the documentation supporting a good decision, the less chance there is of having to defend a decision in court. The basic argument is in any discovery process, the issues will be resolved without a need to go to court.