STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL
500 CHARLOTTE AVENUE
NASHVILLE, TENNESSEE 37243-0497

September 4, 2001

Opinion No. 01-136

Potential Liability Issues Resulting from Adoption of New Design Criteria for Rock Fallout Areas

QUESTIONS

Tennessee and seven other states have conducted a pooled fund study of rock fall from slopes. Among the data from the study are statistics on the impact location and distance rocks will roll out after falling down slopes of various angles. Design charts have been developed from this information that will allow designers to determine the cumulative percent of rock falls that impact at a distance for a particular slope, angle and ditch design. This information can be used for design decisions concerning the slopes and ditches.

Per the request of the study's Technical Advisory Committee, an opinion is requested addressing questions concerning the implications of using the design charts:

1. For existing slopes, is any level of improvement defensible? For example, if the estimated current ditch retention is 40% and the state elects to only increase that retention to 50% and later a rock fall accident occurs, would the State be able to justify not having increased the retention to greater than 50%?

2. For new construction, given that 100% retention is unrealistic in some cases due to site constraints (research shows that in some cases a fallout area over 100 feet wide may be required to approach 100% retention), expense, etc., what level of retention (risk) is acceptable? Would the acceptable retention levels vary by location, i.e, lower retention levels for lower ADT roads or some other criteria?

OPINIONS

1. Yes, assuming the improved level of retention is within the standard adopted by the state or the result of a particular planning and evaluation process. The determination of a retention rate should be viewed as being within the discretionary function of the state and thus immune to claims.

2. The acceptable level of retention should be determined by the Department of

Transportation based on the information available to it and its expertise. The determination of standards to apply would be within the discretionary function immunity granted to the state. The standards could be flexible to address different types of roads.

ANALYSIS

A. By statute, the State of Tennessee has waived its immunity to suit for some types of claims, including certain claims concerning state highways.

The Constitution of the State of Tennessee provides that "[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct." Tenn. Const. Art. I, Sec. 17. The General Assembly has authorized the bringing of certain actions for money damages against the State. T. C. A. § 9-8-301 *et seq.* Under these statutes, the State has waived its immunity from money damages in negligence actions only to the limited extent provided in T. C. A. § 9-8-307. T. C. A. § 9-8-307(a)(1) provides:

> The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state. . . . falling within one (1) or more of the following categories: . . .

The statute then lists categories (A) through (V). Outside these categories, no jurisdiction exists for claims for money damages against the State. Two categories directly address road construction and maintenance:

> (I) Negligence in planning and programming for, inspection of, design of, preparation of plans for, approval of plans for, and construction of, public roads, streets, highways, or bridges and similar structures, and negligence in maintenance of highways, and bridges and similar structures, designated by the department of transportation as being on the state system of highways or the state system of interstate highways.
>
> (J) Dangerous conditions on state maintained highways. The claimant under this subsection must establish the foreseeability of the risk and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures;

The statute does not waive the common law immunities of state employees. Tenn. Code Ann. §9-8-307(d) & (g). Thus, the discretionary function immunity of state employees may be relied on in defending claims against the State. *Cox v. State of Tennessee,* 844 S.W.2d 173, 176 (Tenn.App. 1992).

B. Planning and policy making decisions by state employees are given discretionary function immunity.

Under the common law, courts have barred claims against state employees for actions involving

planning or policy making, granting employees discretionary function immunity. In *Bowers v. City of Chattanooga*, 826 S.W.2d 427 (Tenn. 1992), the Tennessee Supreme Court adopted a new test to determine whether discretionary function immunity applied to particular actions.[1] Under the "planning-operational test," planning or policy making decisions are given immunity, but operational actions carrying out policies do not fall within the scope of this immunity. *Id.* at 430-31. Not all judgment decisions are considered planning, and the factors to consider in determining whether there is immunity under the test are the decision making process and whether it is appropriate for the judiciary to review the resulting decision. *Id.* at 431. The Court stated:

> A consideration of the decision-making process, as well as the factors influencing a particular decision, will often reveal whether that decision is to be viewed as planning or operational. If a particular course of conduct is determined after consideration or debate by an individual or group charged with the formulation of plans or policies, it strongly suggests the result is a planning decision. These decisions often result from assessing priorities; allocating resources; developing policies; or establishing plans, specifications, or schedules.
>
> On the other hand, a decision resulting from a determination based on preexisting laws, regulations, policies, or standards, usually indicates that its maker is performing an operational act. Similarly operational are those ad hoc decisions made by an individual or group not charged with the development of plans or policies. These operational acts, which often implement prior planning decisions, are not "discretionary functions" within the meaning of the Tennessee Governmental Liability Act. In other words, "the discretionary function exception [will] not apply to a claim that government employees failed to comply with regulations or policies designed to guide their actions in a particular situation." *Aslakson v. United States*, 790 F.2d 688, 692 (8th Cir. 1992).

Bowers, 826 S.W.2d at 431.

The Supreme Court again addressed how to evaluate whether an action was a discretionary function in *Helton v. Knox County*, 922 S.W.2d 877 (Tenn. 1996). Adding to the definitions of planning and operational functions presented in *Bowers*, the Court stated that planning decisions involve "the formulation of basic policy characterized by official judgment, discretion, weighing of alternatives and public policy choices." *Id.* at 885; quoting *Voit v. Allen County*, 634 N.E.2d 767, 769-70 (Ind.Ct. App. 1996).

The second factor to consider in determining whether the discretionary function immunity applies

---

[1]While the *Bowers* case involved the interpretation of discretionary function immunity granted under the Governmental Tort Liability Act, the courts have applied its planning-operation test in determining whether such immunity exists under the common law and thus applies to claims against the State. *Youngblood v. Clepper*, 856 S.W.2d 405, 408 n1 (Tenn.App. 1993).

is the appropriateness of permitting the judiciary to review the decision. This part of the test recognizes that the investigation of issues and balancing of considerations in making social, political or economic decisions are best left to the legislative and executive branches of government. *Bowers*, 826 S.W.2d at 431. In *Helton*, the Court further noted caution was needed on the part of the judicial branch that lacks the expertise of the executive branch and the investigative ability of the legislature. 922 S.W.2d at 877.

After establishing the new test for discretionary function immunity, the Court in *Bowers* then applied it to the facts of the case, in which a child had been struck by a car after getting off a school bus. The Court held that changing a bus route and scheduling is a discretionary function subject to immunity because it involves a balancing of factors, consideration of priorities and allocation of resources. *Bowers*, 826 S.W.2d at 432. However, the specific decision of a bus driver as to where to stop at a particular intersection is an operational act and not immune. *Id*.

Applying the tests and considerations set out in *Bowers*, the courts have found certain road design and construction decisions to be discretionary. In *Helton*, the Court found the decision of Knox County not to put guardrails on a one-lane bridge was the result of a process that included a cost-benefit analysis and held it was a discretionary function. 922 S.W.2d. at 886-7. *See also Kirby v. Macon County*, 892 S.W.2d 403, 408 (Tenn. 1994) (Discretionary function immunity applies to decision not to install guardrails on bridge). In *Helton*, the Court further stated the judiciary should not interfere with decisions involving the allocation of limited resources among competing needs. *Id.* at 887. In *Burgess v. Harley*, the Middle Section of the Court of Appeals found that the decision whether to put up traffic control devices may be immune as a discretionary function. 934 S.W.2d 58, 63 (Tenn.App. 1996). *See also O'Guin v. Corbin*, 777 S.W.2d 697, 701 (Tenn.App. 1989)(Pre-*Bowers* finding that decision on whether to install a stop sign is a discretionary function).

C. The adoption of a standard or policy concerning retention rates for rock fall comes within the planning and policy making type of action protected by discretionary function immunity.

Selecting standards for road construction is one of the duties of the Commissioner of Transportation. Tenn. Code Ann. §54-1-105 states that the commissioner shall:

> collect information and statistics with reference to the mileage, character, and condition of highways and bridges in the counties, and shall investigate and determine the method of road construction best adapted to the various sections [of the state], and shall establish standards for the construction and maintenance of highways in the counties, giving due regard to topography, natural conditions, availability of road material, prevailing traffic conditions, and ways and means of the counties to meet their portion of the cost of building and maintaining roads. . .

Tenn. Code Ann. §54-1-105. *See also* Tenn. Code Ann. §4-3-2304(9), (12) and (13)(listing additional

powers and duties of the commissioner); Tenn. Code Ann. §54-5-109 (giving the Department of Transportation the power to make plans and specifications for the roads and bridges it constructs).

In our view, discretionary function immunity would apply to the adoption of rock fall retention level standards. This is the type of planning action that requires expertise, cost-benefit analysis and other considerations and thus fits well within the Supreme Court's definition of discretionary function action. The selection of separate standards for types of slopes and roads and/or a determination that the appropriate retention level must be made on a case by case basis should also result in the decisions being found to be discretionary.

However, if a strict standard or design requirement is adopted, applying the standard to particular projects could be found to be an operational action and not protected by discretionary function immunity. For example, if the department were to adopt an across the board retention rate of 50% and a project only had a 40% rate, then a claimant could assert the failure to follow the standard was a negligent, operational act. If there was no justification for use of the lower standard, then the act most likely would be found to be operational. However, if the decision to design the project with the lower retention rate was the result of a planning decision -- perhaps based on particular features of the road -- it should still be considered a discretionary planning function. A flexible policy or standard allowing for variations would enhance this argument.

D. Changing the retention rate for an existing slope is justifiable because it would be a planning decision within the discretion of the State.

In response to the first question, it is our opinion that changing the retention rate for an existing slope would be justifiable as long as the decision is the result of planning and analysis. Determining how much to improve the retention rate is the type of planning decision that the courts should leave to the State. If improving the rate from 40% to 50% falls within the standard or policy adopted by the State or is the result of an appropriate decision making process, discretionary function immunity should protect the State against a claim that it should have done more.

E. The acceptable retention rate should be selected by the Department of Transportation and the selection of that rate is protected by discretionary function immunity.

Essentially, the acceptable rate of retention should be whatever the State determines it should be. The Department of Transportation is to determine design standards and the selection of a standard or policy should be protected from suit by discretionary function immunity. The policy behind discretionary function immunity is to allow the executive and legislative branches to make determinations as to how much risk is acceptable, and there is not a formula for risk levels that triggers liability. Thus, in response to the second question, it is our opinion that if the Department of Transportation studies the information on rock fall retention risks and adopts a policy that is flexible to allow for various types of roads and other factors, then

this would also be protected as a discretionary function. Of course, if Tennessee adopts a policy of rock fall retention levels that is equal to a national standard or standard in a number of other states, it would also be evidence that there was no negligence in the design. However, there is no requirement that any such national standard be adopted.

Finally, it should be noted that, just because the State is allowed to adopt its own standards and to have such decisions protected by immunity, this does not mean that the information on retention standards will not be used by claimants against the State. For any retention level under 100%, a claimant could argue the failure to do more was negligent and proof that a dangerous condition existed. Still, the discretionary function immunity should apply.

In conclusion, the Department of Transportation is the appropriate entity to determine the State's policy on rock fall retention rates, and the courts should respect such a policy determination by applying discretionary function immunity to any claim challenging the policy adopted. The key is not a particular level of risk that would be acceptable to the judiciary but rather it is the planning and decision-making process in applying the rock fall rate information that provides an immunity defense against potential claims.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

MICHAEL B. LEFTWICH
Assistant Attorney General

Requested by:

J. Bruce Saltsman, Sr.
Commissioner
Department of Transportation
Suite 700, James K. Polk Building
Nashville, TN 37243-0349