Legal Aspects of Traffic Calming
Reid Ewing

A. Chilling Effect

The issue of government liability always surfaces in discussions of traffic calming. "What if we close a street and a fire rages on?" "What if we install speed humps and a motorcyclist goes flying?"

Lawsuits and damage claims are not nearly the problem they are made out to be. In legal research by ourselves and others, no lawsuit against a traffic calming program (with one early exception) has been successful. We surveyed about 50 cities and counties with active traffic calming programs, including every major program. Many have had no legal problems at all, and the remainder has experienced more threats than legal actions. The legal maneuvering has more often involved city attorneys, concerned about potential liability, than private attorneys, claiming actual damages.

The legal histories of the 20 featured communities are summarized in Table 1. Where cells are blank, these communities have no experience to report.

Gainesville -- Initial Ban on Humps

Gainesville has been spared lawsuits and damage claims, but the possibility of legal action has still had a chilling effect. The city attorney could see no problem with traffic circles, street closures, or semi-diverters, and these were installed. He was not so sanguine about single-lane devices, which set up conflicts between opposing traffic flows, nor about speed humps, which have been likened to potholes on their backs. His worries caused the city commission to worry, and these measures were rejected initially.

Then came the election of a new city commission, and a visit by a national expert on pedestrianization. The expert convinced the new commission that speed humps would fill a program gap left by circles and semi-diverters. Circles, for example, had proven ineffective in one neighborhood with many T-intersections; vehicle deflection and corresponding speed reduction is difficult to achieve at the top of the T. Humps are not so limited, and thus were chosen by the neighborhood as a replacement for the circles. Less than two years after the first hump was installed, Gainesville now has more humps than circles.
Ineffective Traffic Circle at a T-Intersection
(Gainesville)

New Tool in Gainesville's Toolbox -- Standard Hump
Table 1: Legal Challenges for Featured Communities

<table>
<thead>
<tr>
<th>Location</th>
<th>Legal Threats and Concerns</th>
<th>Lawsuits</th>
<th>Damage Claims</th>
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<tbody>
<tr>
<td>Austin, TX</td>
<td>two threats of litigation, one from a local resident and the one an outsider -- ?</td>
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<tr>
<td>Bellevue, WA</td>
<td>two voter initiatives to rescind citywide traffic management plan failed</td>
<td>lawsuit challenging use of traffic diverters -- successful but decision rendered moot when California legislature made diverters official traffic control devices</td>
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<tr>
<td>Berkeley, CA</td>
<td>concerns about bicyclists about being “squeezed” at traffic circles</td>
<td>lawsuit by motorist injured at temporary circle -- dropped</td>
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<tr>
<td>Boulder, CO</td>
<td>threats of litigation over street closures</td>
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<tr>
<td>Gainesville</td>
<td>opposition from city attorney to one-lane narrowings and speed humps -- humps installed anyway after city council reversed earlier position</td>
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<tr>
<td>Gwinnett County, GA</td>
<td>petition drive to ban speed humps</td>
<td>lawsuit by disabled veteran alleging that speed humps violate Americans With Disabilities Act -- suit dismissed because humps do not deny &quot;meaningful access&quot;</td>
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<tr>
<td>Howard County, MD</td>
<td>concern about the legality of humps on collectors -- litigation threatened by cut-through traffic on local streets</td>
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<td>claim by motorist who bottomed out on raised intersection -- dropped</td>
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<tr>
<td>Montgomery County, MD</td>
<td>petition drive to ban speed humps</td>
<td></td>
<td>claim by motorist who bottomed out on raised intersection -- dropped</td>
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<tr>
<td>Phoenix, AZ</td>
<td>concern about the legality of humps on collectors -- litigation threatened by cut-through traffic on local streets</td>
<td>lawsuit by family of fatal crash victim alleging that city had not done enough to calm traffic -- suit dismissed? because city had ...</td>
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</tr>
<tr>
<td>Portland, OR</td>
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<td>many claims rejected as frivolous -- one claim paid when contractor pulled advisory sign too soon on a traffic circle</td>
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<tr>
<td>San Diego, CA</td>
<td></td>
<td>two claims associated with damage from humps -- one paid</td>
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<tr>
<td>San Jose, CA</td>
<td></td>
<td>two claims associated with damage from humps -- one paid</td>
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<tr>
<td>Sarasota</td>
<td></td>
<td>two claims associated with damage from humps -- one paid</td>
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<tr>
<td>Seattle, WA</td>
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<td>about two claims filed per year -- only three small claims paid over almost 30 years -- two based on inadequate signage and one on a poorly device</td>
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<tr>
<td>Tallahassee</td>
<td></td>
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<tr>
<td>West Palm Beach, FL</td>
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B. Minimizing Liability

Perception is reality, and the perceived threat of liability has a real impact on traffic calming practice. How to minimize it?

Transportation professionals are accustomed to working with guidance documents. The American Association of State Highway and Transportation Officials' *A Policy on Geometric Design of Highways and Streets* and Federal Highway Administration's *Manual on Uniform Traffic Control Devices* (MUTCD) have been characterized as the profession's "bibles." These universally accepted manuals take much of the risk out of roadway design. Follow these manuals and you, the transportation professional, are unlikely to end up on the losing end of a lawsuit.

Traffic calming is far trickier due to the lack of any comparable guidance document on this subject. Traffic calming measures are not simple geometric features of streets, nor are they traffic control devices in the MUTCD sense. Thus, the standard guidance documents are of limited use.

The Europeans, British, and Australians have entire design manuals devoted to traffic calming. The Canadians are developing such a manual as part of a companion project to this one. But in the U.S., a decision has been made to opt for flexibility over standardization. This manual, a toolbox of measures and procedures, reflects this decision.

In the absence of standards, what is to immunize traffic calming programs against legal challenges? The answer is: a *rational planning and implementation process*. Process is important in tort liability cases. Government's exercise of police powers, including the power to control traffic, must not be arbitrary, capricious, or unreasonable. If it is, constitutional guarantees of due process may be violated.

Program features that contribute to reasonableness include:

- documentation of traffic problems via speed measurements, traffic counts, and/or other studies;
- consideration of alternative traffic calming measures and selection of one (with public input) capable of solving documented problems;
- installation of measures on trial basis subject to follow-up performance evaluation; and
- follow-up evaluation of impacts to check that measures have performed as intended.

Traffic calming programs structured as popularity contests, relying exclusively on neighborhood petitions and financial antes to decide what gets build, are inviting litigation. Phoenix's speed hump program is an example. Likewise, programs relying on casual observation of traffic conditions, ad hoc contacts with neighbors, and intuitive judgments, are at legal risk. West Palm Beach's program, though becoming more structured, may fall into this category.
C. Case Law -- Legal Authority

Traffic control is subject to the laws of each state, and each state's laws differ at least a little from all others. In California, the state has preempted the entire field of traffic control. A locality has no right to interfere with the free flow of traffic unless expressly authorized by state statute.

Berkeley Case -- Challenge to Diverters

This fact led to the best known legal challenge to traffic calming, Rumford v. City of Berkeley, 31 Cal.3d 545, 645 P.2d 124 (1982). At the time of the lawsuit, Berkeley had placed large concrete movable bollards on over 40 streets to create full closures, diagonal diverters, and partial closures. The barriers had proven effective in reducing traffic volumes and accidents. Twice, the electorate had voted down ballot measures to remove the barriers.

The California Supreme Court ruled that the diverters and partial closures were traffic control devices not authorized by state law. They were not complete closures, which had been authorized under certain circumstances, nor signs or symbols, which had also been authorized. They were not permanent changes in curb location or median installations, which had been authorized as well. Hence the diverters and partial closures were declared illegal.
6. In an early legal analysis of traffic controls, "reasonableness" in the exercise of police powers was linked to:

- Evidence of Need for Action - Harm to Residents
- Alternative Traffic Control Measures, Attempted or Considered
- Relationship to an Overall Transportation Plan
- Reasonable Access for Emergency Vehicles
- Conduct of Public Hearings


7. A government body may be held liable only if its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan. *Redcross v. State of New York*, 660 N.Y.S.2d 211.


9. To prevail under a theory of negligence, a citizen must demonstrate by a preponderance of evidence that government breached its duty of care, and that he or she suffered damages as a result.


11. Representative access management cases include: *Paradyne Corp. v. Florida Department of Transportation*, 528 So.2d 921 (Fla.App. 1988); *Palm Beach County v. Tessler*, 538 So.2d 846, 850 (Fla. 1989); *Rubano v. Department of Transportation*, 656 So.2d 1264 (Fla. 1995); *State Department of Transportation v. Kreider*, 658 So.2d 548 (Fla.App. 1995). (add cases from other states)


The decision to spend public funds on traffic calming, or to install one set of measures versus another, or to design measures for one speed versus another, is discretionary. The duty to warn motorists of traffic calming measures that require slowing down, or to maintain measures in a safe condition, or to construct measures per design specifications, is ministerial.

Portland Case -- Discretionary Decision

Under sovereign immunity, courts will not second-guess policy, planning, and spending decisions of public officials if there is any reasonable basis for them. A recent case out of Portland is most germane. A young woman died in an accident on a street that was traffic calmed farther down, but not at the accident location. While complicated by drinking and reckless driving, and by the question of whether the exact devices approved by the city council had been installed, the central issue was whether the city had done enough to prevent accidents of this type. The plaintiffs claimed that a diverter should have been used on this particular street to prevent the teenage practice of "hill jumping." Instead, following its standard planning process, the city had installed a traffic island and a couple traffic circles many years before. The neighborhood had specifically considered and rejected a diverter.

A jury found in favor of the city. The verdict is presently under appeal.

One Forbidden Device

There is one exception to government discretion in the choice of traffic calming measures. One physical device has been found by the courts to be patently unsafe when applied to public streets. It is the speed bump, as opposed to the longer speed hump. Speed bumps are abrupt devices that rise and fall 3 to 4 inches over a span of 1 to 3 feet. Bumps have design speeds of 5 mph or less, which relegates them to parking lots and private driveways as opposed to public roadways with their higher posted speed limits. In *Vickburg v. Harrellton*, a landmark case back in 1924, the Mississippi Supreme Court ruled that speed bumps constituted an inherent danger to motorists. The Connecticut courts reached the same conclusion, and had another reason for declaring them a public nuisance: their low design speeds could so delay emergency vehicles as to cause serious injury or loss of life. While one still sees an occasional bump on a public road, jurisdictions using this device are courting legal disaster.

Hump Profile v. Bump Profile

Traffic calming generally improves traffic safety. Favorable impacts are documented in Chapter IV. Yet, unless devices are well-marked and well-signed, they can catch motorists by surprise. Likewise, unless they are well-maintained, devices can be damaged or deteriorate under use to the
San Jose Case -- Ministerial Duty

If government creates a hazardous condition, or knows of one on public property, it has a ministerial duty to either remove the hazard or warn of it. Designing a road with a sharp curve does not create liability in itself. "If, however, the governmental entity knows when it creates a curve that vehicles cannot safely negotiate the curve at speeds of more than twenty-five miles per hour, such entity must take steps to warn the public of the danger."[10]

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point of creating a hazard.

Diverters and chokers in one San Jose neighborhood have such tight geometrics that an occasional large vehicle strikes them while making a turn. A bicyclist was injured when she ran over debris left from one such incident. She sued. While the city had a ministerial duty to clean up the debris, it was absolved of responsibility for the bicycle accident because it happened so soon after the truck incident. The city's maintenance program was found to be adequate overall.

Tight Geometrics that Led to One Accident
(San Jose)

E. Case Law -- Loss of Access

Public streets belong to the public at large, and every citizen has the right to use them. Businesses, in particular, rely on good access to remain viable. Thus, street closures and other severe access limitations have the potential to create causes of legal action against government.

Seattle Case -- Commercial Access

There have been many lawsuits occasioned by access management projects on major roads. The installation of medians, creation of service roads, construction of overpasses, and the like often hurt businesses at the same time they improve traffic flow. These are not traffic calming cases per se, but the same legal principles apply. A taking of property occurs, and businesses are entitled to just compensation, if their right of access is "substantially diminished." Generally, loss of the most convenient access is not compensable where suitable alternatives exist. Nor is a government action that diminishes traffic flow past a business. Only if direct access to an abutting highway is cut off entirely, and no good alternative route exists, is compensation required.11

The only related traffic calming case is Mackie v. Seattle, 19 Wn.App. 464 576 Pacific Reporter 2nd. 414 (1978). Seattle was sued over the inconvenience and potential loss of sales caused by the closure of a through-street. While the street provided the most direct route to the business, the court found no ground for compensation since access had not been completely denied.
Memphis Case -- Residential Access

There have been lawsuits involving the closure of neighborhood streets to outsiders through gating.\textsuperscript{12} If the streets are public to begin with, this kind of closure is discriminatory and illegal. Not so a closure or access limitation that leaves a street open to everyone, but makes it more difficult for everyone to get in and out. This kind of closure -- in response to traffic, crime, or some other threat to public welfare -- is a legitimate use of the police power, constrained only by requirements of equal protection and due process.

In \textit{Memphis v. Greene}, 451 U.S. 100 (1981), the U.S. Supreme Court upheld a street closure against a civil rights challenge. The barrier was erected at the dividing line between black and white neighborhoods. The court ruled the interests of tranquility and safety from traffic "legitimate" and sufficient to justify "an adverse impact on motorists who are somewhat inconvenienced by the street closing." The only injury suffered by black or white residents was that one street rather than another would have to be used for certain trips.

Montgomery County Case -- Access for the Disabled

In a different kind of access-related challenge, \textit{Slager v. Montgomery County}, a disabled veteran with a spinal injury sued the county to prevent the installation of speed humps on his street. His suit was filed under the Americans with Disabilities Act of 1990. The veteran alleged that the proliferation of humps interfered with his use of county streets because of the pain they caused him; that he spent an extra 20 minutes commuting to work just to avoid them; and that he would have no way of avoiding them if they were placed on his own residential street. The court dismissed his lawsuit, concluding that while the humps presented the man with difficulty, they did not "totally bar his use of the roads" nor leave him without "meaningful access."

F. Case Law -- Failure to Act

This discussion ends with a new cause of legal action, alleged government negligence for failure to calm traffic on streets with excessive volumes or speeds. Seattle reports more threats of litigation for failure to act than for acting. This shows how far traffic calming has come since the days when Berkeley had to defend its authority to install barriers.

As already noted, the courts will not interfere with discretionary functions of other branches of government. Perhaps the most important discretionary function is deciding where tax dollars should be spent. Traffic calming is just one of many competing local government priorities, and within the traffic calming budget, a particular project is just one of many competing for funds. Even where a need for traffic calming can be clearly demonstrated, private parties have no direct remedy to abate public nuisances. Traffic is a public, not a private, nuisance.

Sacramento Case -- Environmental Capacity

In \textit{Friends of H Street v. City of Sacramento}, 24 Cal.Rptr.2nd 607 (Cal.App. 3 Dist. 1993), residents filed a nuisance complaint to force the city to do something about freeway-level volumes
and excessive speeds on their street. The relief sought was the designation of their street as a local one, with operational changes to bring volumes down to the street's "environmental capacity" (that is, down to the maximum volume consistent with a good residential environment). The court ruled against the residents, holding that the routing of traffic is at the discretion of the city council, the rerouting of traffic in this case would hurt other streets, and the city council could not please everyone. As the court saw it: "...loss of peace and quiet is a fact of life which must be endured by all who live in the vicinity of freeways, highways, and city streets."

G. Damage Claims

From Table 5.1, it is apparent that damage claims filed with cities and counties are much more common than lawsuits filed with courts (as they must be, since state laws require that administrative remedies be exhausted before lawsuits are filed). But damage claims are still relatively rare, and the number claims paid is minuscule. Given the hundreds of traffic calming devices in place for many years in featured communities, these numbers are surprising small.

Having the longest running program, and the most devices in place, Seattle has the most experience with damage claims. About two claims are filed on average per year. In the almost 30-year life of the program, only three claims have been paid. This is nothing compared to the number of claims filed and paid in connection with, for example, potholes.

Two of the three claims paid to date involved signage. Government's ministerial duty to warn motorists of hazards was breached in both cases. In one case, an object marker sign on a traffic circle had been knocked down and was not replaced for lack of a spare in inventory. $600 in damage was done to the undercarriage of an automobile when it ran onto the center island. In another case, barricades were removed prematurely from a circle under construction. An automobile had to be realigned, at a cost of $30, after it ran over the curb and into the island center as yet unfilled with dirt.

The third claim paid by Seattle involved a poorly constructed speed hump. It was back in the early 1980s, before hump designs had been standardized in the U.S. A hump only slightly longer than a speed bump, and about 6 inches high, took the bottom out of an automobile. Damages were paid, and the offending hump was removed.

These experiences, and lawsuits and damage claims arising from street design and maintenance generally, have made Seattle hyper-sensitive to the potential for liability in its traffic calming program. Going out with the Assistant City Traffic Engineer to photograph traffic calming devices, we came across a choker "landscaped" with some medium-sized rocks. The rocks, placed there by the neighborhood responsible for landscape maintenance, were apparently intended to protect the landscaping from errant vehicles. Having been sued over rocks in a highway median, and paid a fortune to settle the case, the engineer declared that the "foreign objects" would be removed from the island post haste, and they were.
1. A survey of 407 urban traffic agencies found legal liability to be their greatest concern about use of speed humps. Yet, among the dozens of agencies using speed humps at that time, only one had ever paid a damage claim, and this for only $2,500. ITE Technical Council Committee 5B-15, "Road Bumps - Appropriate for Use on Public Streets," ITE Journal, Vol. 56, November 1986, pp. 18-21.


3. The Manual on Uniform Traffic Control Devices (p. 1A-1) contains the following description: "Traffic control devices are used to direct and assist vehicle operators in the guidance and navigation tasks required to traverse safety any facility open to public travel." Speed humps, diverters, and other traffic calming measures are not designed to assist drivers in navigation but rather to divert and/or slow them down.


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