

STATE TRANSPORTATION BOARD SPECIAL MEETING
9:00 a.m., Tuesday, May 26, 2015
Human Resource Development Center (HRDC)
Grand Canyon Room
1130 N. 22nd Ave.
Phoenix, Arizona 85009

Pledge

The Pledge of Allegiance was led by ADOT Director John Halikowski.

Roll call by Board Secretary Mary Beckley

In attendance: Kelly Anderson, Joe La Rue, Deanna Beaver, William Cuthbertson, Jack Sellers, Michael Hammond and Pliny Draper.

Absent: None

Opening Remarks - None

Call to the Audience - None

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I N D E X

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ITEM 1: OVERVIEW OF AZ SUPREME COURT GLAZER DECISION (Fred Zeder)3

ITEM 2: PPAC AGENDA (Michael Kies).....16

1 (Beginning of excerpt.)

2

3 CHAIRMAN ANDERSON: Thank you. At this time I'd
4 like to turn the meeting over to Michelle Kunzman, the ADOT
5 board legal counsel, and we'll go over Item 1. Michelle.

6 MS. KUNZMAN: Thank you, Chairman, members of the
7 board.

8 I had a conversation with the director
9 (inaudible). I had a conversation with the director last week,
10 and we were discussing an important case that's recently been
11 ruled on with the Arizona Supreme Court, and we both agreed, and
12 with the agreement of the Chair, we thought it would be a good
13 idea to have the members of the board really have a little bit
14 better understanding, maybe read the case, but a little bit more
15 understanding about what this case is all about. It does have
16 implications for the department. So what I had suggested to the
17 director is, you know, I've read the case. Obviously I'm
18 familiar with the case, but really I think what would be good
19 would be to hear from the Arizona department -- is that my
20 phone?

21 I thought it would be good to hear from the
22 attorney general who actually argued the case in this matter
23 who can really give you a really good understanding of the
24 actual holding in the case and the implications for the board,
25 because it does have implications for the department, and I

1 (inaudible) too that unfortunately, Mr. Zeder is only going to
2 be here for a brief time because he does have another
3 engagement, but I encourage you to ask questions while he's
4 here, and then obviously if you wanted to have a little bit more
5 discussion, the director can maybe add information as well.

6 So without any more further adieu, I turn it over
7 to Fred Zeder, who is unit chief counsel at the AG's office.

8 MR. ZEDER: Good morning.

9 BOARD MEMBERS: Good morning.

10 MR. ZEDER: The Glazer case came as a surprise, a
11 bad surprise to all of us. It was tried by outside counsel. It
12 involves a crossover accident. In other words, a vehicle leaves
13 his lane of travel, crosses a divided median, in this instance
14 on I-10. Mrs. Glazer was seated in the back seat. Her husband
15 and daughter were in the front seats. They were killed in front
16 of her face, and they sued.

17 We, the State, the attorney who handled the case
18 pled our defense, which is in part (inaudible) ARS Section
19 12-820.03, and it is a key statute in my line of work, which is
20 to defend the Arizona Department of Transportation in highway
21 design cases. And the reason it's key is that it says that a
22 public entity, ADOT, can't be held liable in a highway design
23 case so long as the roadway conformed with generally-accepted
24 engineering stands at the time it was built.

25 In other words, it's a state-of-the-art defense,

1 and it recognizes, the legislature recognizes that we build
2 these highways for decades, and that we can't modify them
3 every time a plaintiff's expert, and I'm going to use the term
4 loosely, declares that there needs to be an upgrade.
5 Upgrades, as I'm sure you all are well aware, are expensive,
6 take years to plan, and if we chase lawsuits around trying to
7 figure out where our roads need to be upgraded, we're simply
8 playing whack-a-mole.

9 Anyway, the case went to a trial. It resulted
10 in a four -- or a \$7.8 million verdict against the State. The
11 trial judge threw that statute out. Basically, he said I
12 don't know what this statute means, just always a little bit
13 worrisome when a judge starts an opinion that way, but it
14 can't mean what it says.

15 I took the case over at this point in time, and
16 we appealed it to Division 1. Division 1 upheld the trial
17 court. The verdict got some notoriety. I now have seven of
18 these cases scheduled for trial. The cases start being tried
19 in November.

20 So we took this up to the Supreme Court, and
21 here's what the Supreme Court did with it. The Supreme Court
22 said, look, the legislature meant what it said. It is
23 impossible for us to upgrade roads in such a disorganized
24 basis that we -- we need to rely on our planning process, and
25 so this state-of-the-art defense continues to exist. However,

1 the statute also provides that if there is an unreasonably
2 hazardous condition, we -- and that develops, we then have to
3 warn about it.

4 The Court did not decide this issue, even
5 though we asked them to. They affirmed the verdict. They
6 didn't turn it over, but they gave us our statute back. So
7 while we paid some money, quite a bit of money, we also made
8 some good case law.

9 Now, the question is what does this case law
10 mean? The Supreme Court decided that because there was not
11 evidence in the trial below about what good a warning would
12 do, they're not going to address that issue. So the next
13 case, which is coming along, will address that issue. We will
14 move for dismissal of all of these crossover cases based upon
15 the Court's holding in the Glazer, the (inaudible) Glazer. It
16 may be that the court -- the courts will consider this and
17 each separate trial court will find that the cases should be
18 dismissed, or they may hold that there needs to be evidence on
19 what benefit the warning would be.

20 It's our position that a warning really doesn't
21 do any good, because it's an open and obvious condition. What
22 are you going to do? Are you going to warn danger, no median
23 barrier? Anyone can see that. So there is a provision in the
24 law that if it is impossible to fulfill a statute duty, then
25 that duty is excused.

1 So long story short, we made an important step
2 forward with the Supreme Court's decision, but the struggle
3 isn't over, and we'll see how we do on these cases that are
4 coming up.

5 If anybody has any questions, I'd be happy to
6 try to answer them.

7 CHAIRMAN ANDERSON: Thank you very much.

8 MR. ZEDER: Sure.

9 CHAIRMAN ANDERSON: Yes.

10 DIRECTOR HALIKOWSKI: I do have a question,
11 Mr. Chairman. There was a dissenting opinion by Justice
12 Bales. Can you talk about that a little bit?

13 MR. ZEDER: Well, yeah. Justice Bales accepted
14 what the Court of Appeals accepted, and basically what it is
15 is it rewrites the statute to include an upgrade exception.
16 Basically, what the court below and the trial court said was
17 that if the conditions on the roadway change so that it
18 becomes more hazardous, then this statute doesn't apply. It's
19 a little difficult, in fact, it's impossible to see what the
20 statute would apply to if that -- if you write that exception,
21 the exception eats -- eats the role in its entirety. So --
22 and this statute stands between us and a fairly chaotic
23 situation in upgrading our roads.

24 We have a very active program here on
25 Interstate 10, and most of these case are on I-10 between

1 Tucson and Phoenix, although not all of them, and we are
2 proceeding a pace with this. But if you then just turn this
3 over to the jury as to when we need to rebuild a road,, it
4 creates a terrible situation for us in managing our assets.
5 There simply isn't enough money in any state's budget to
6 rebuild roadways on the decisions of various juries in civil
7 cases that could be decided for a variety of reasons
8 (inaudible).

9 DIRECTOR HALIKOWSKI: Fred and Mr. Chairman, if
10 I stray into an area that may jeopardize your cases coming up,
11 just let me know. But are the ones that are coming up, are
12 they focused in a certain area on 10?

13 MR. ZEDER: There are -- the Humphrey case is
14 about 500 feet from where the Glazer accident happened. And
15 you say is this particularly dangerous section of roadway?
16 No. These are random events. They can occur on any divided
17 highway, any place in the state. The reason that we're
18 focusing on I-10 is that the ADT, the traffic volume is huge
19 on that roadway, and so quite naturally there are more over
20 there, but so...

21 DIRECTOR HALIKOWSKI: Okay.

22 MR. ZEDER: Yeah, they are -- they're there and
23 south of Picacho Peak. Got one on the other side of Tucson.
24 I've got one to the west of Phoenix on a median that's 170
25 feet wide. They're proposing we need to build a concrete

1 barrier down the center of that median, presumably from
2 (inaudible) California, I guess. So you're talking about a
3 huge amount of money that would be lawsuit driven, and that's
4 just a very chaotic and inefficient way for us to fulfill a
5 duty that we all take very seriously, and that's to present
6 the best roads we can.

7 DIRECTOR HALIKOWSKI: So one last question,
8 Mr. Chairman. The loss of life is tragic, and obviously the
9 department would want to have zero deaths on the system, but
10 if I put the case kind of altogether, basically what the Court
11 said is if we had made improvements, it might have gone the
12 other way, or if we had put some kind of warning out there,
13 which is really hard to define what sort of warning that may
14 be, then we would have fulfilled the terms of the statute.

15 MR. ZEDER: That's correct, but we believe
16 there's a third way. There are situations where a warning
17 would not be of assistance, and we believe that the warning
18 requirement should be excused. It's a little like there's a
19 civil case that talks about the Grand Canyon. It says,
20 warning, very big, deep hole. Don't step into this canyon.
21 Well, you can see there aren't barriers on a lot of these
22 roads. Some of them do have barriers. We have our own
23 standard, but -- so that's what that's -- that's the next
24 case.

25 DIRECTOR HALIKOWSKI: Thanks.

1 MS. BEAVER: Chairman, I would like to ask a
2 question. On these cases, do the dust storms that happen in
3 that area, do they factor in to --

4 MR. ZEDER: No, really they don't. Basically,
5 it's just a function of it takes four seconds, three seconds
6 for a vehicle to cross that median, and some of them are
7 people who've had heart attacks, some of them are tire
8 blowouts. Usually it's somebody who's done something that is
9 inadvisable, to say the least, as far as their driving
10 (inaudible).

11 MR. SELLERS: Mr. Chairman.

12 CHAIRMAN ANDERSON: Mr. Sellers.

13 MR. SELLERS: It seems to me the scary part is
14 if these decisions carry forward is that it could apply to a
15 lot of things on our highway system other than just crossover
16 accidents.

17 MR. ZEDER: Oh, absolutely. It would change
18 totally the way we litigate these cases.

19 DIRECTOR HALIKOWSKI: To that point,
20 Mr. Chairman, wasn't there an amicus brief filed by the League
21 of Cities?

22 MR. ZEDER: Yeah. We -- and most helpfully, by
23 the way. I think the courts kind of think that because we're
24 the State, we have all the money in the world (inaudible)
25 probably should send us (inaudible) meetings like this to

1 disabuse them of that. But, you know, this would apply to
2 Jerome, too. And say, well, you know, your roads over here
3 aren't the best. You need to rebuild everything through town.
4 Well, there's just no way that they can do that. So the
5 cities and the counties filed briefs that helped us very much
6 get the case before the Supreme Court, and the decision was
7 four to one in our favor. So I was pleased with that.

8 DIRECTOR HALIKOWSKI: So that point, Fred,
9 though, the judgment for the 7.8 million was held up and
10 awarded to the family, but the statute, as the way you
11 explained it, was saved?

12 MR. ZEDER: Yes.

13 DIRECTOR HALIKOWSKI: The protection of the
14 statute.

15 MR. ZEDER: We're -- I would (inaudible) that
16 we also saved the \$7.8 million, but that didn't happen.

17 MR. LA RUE: Maybe this is too deep, but who's
18 got the burden of proof? So you said that, you know, it's not
19 a reasonable burden. So is that on the plaintiff to show that
20 that area of the roadway was, you know, dangerous?

21 MR. ZEDER: Yes.

22 MR. LA RUE: And then once they do that, it
23 shifts to ADOT to prove and those other countermeasures they
24 should employ?

25 MR. ZEDER: That's correct. The plaintiff has

1 to show that the road is not reasonably safe for ordinary
2 travel. That's the standard. Then it becomes incumbent upon
3 us to either refute that or prove one of these statutory
4 defenses.

5 These are terrible accidents. I mean, they're
6 very serious crashes. But you should keep in mind that we are
7 responsible for -- as the director said, we don't want anyone
8 to get killed on these highways, and these are a tiny
9 minority, less than 1 percent of the crashes that occur on
10 these roadways, and many of those crashes are fatal for other
11 reasons. So I think you need to look at this in perspective
12 as well.

13 MS. BEAVER: Mr. Chair.

14 MR. LA RUE: One more. So if we did those
15 warnings that you were talking about the Court suggested, I
16 mean, isn't it essentially us admitting it as a dangerous
17 thoroughfare, so then that burden is proved by the plaintiff,
18 now it's really then up to the State as whether the warning is
19 adequate or could they have done something else?

20 MR. ZEDER: That's what we're wrestling with
21 right now. I think the -- you know, when you read a decision
22 like this, you say, oh, great, we'll just go print a bunch of
23 warning signs and stick them around, but you know, the MUTCD
24 tells you not to do that. If a sign doesn't serve any
25 legitimate purpose -- and avoiding lawsuits for us, perhaps,

1 is a legitimate purpose -- but the purpose is does it make the
2 road safer. And I would think, no, it doesn't, because
3 there's just -- it doesn't give you any information that would
4 help you modify your behavior to prevent this kind of an
5 accident.

6 DIRECTOR HALIKOWSKI: Translation,
7 Mr. Chairman. MUTCD, *Manual of Uniform Traffic Control*
8 *Devices*, basically governs the signage, and by statute we
9 adopt the MUTCD.

10 MR. LA RUE: By law.

11 DIRECTOR HALIKOWSKI: Right. By statute.

12 CHAIRMAN ANDERSON: So I guess is there -- do
13 we need statutory help with, you know, changing the statute
14 that's protecting?

15 MR. ZEDER: I would advise against this at that
16 point in time, but we'll -- you know, all of our options are
17 open.

18 DIRECTOR HALIKOWSKI: Yeah. So I think,
19 Mr. Chairman, as Fred said, we're continuing to wrestle with
20 this. I didn't come here with a solution today for you as we
21 continue to work with our attorneys, but just really to
22 outline the Glazer case, the fact that there are more of these
23 coming that we're trying to figure out, you know, based on the
24 Court's decision what's our best course of action. And we
25 will work with the board as we move this forward.

1 CHAIRMAN ANDERSON: (Inaudible) comment I think
2 the last board session we had Commander (inaudible) here from
3 DPS --

4 DIRECTOR HALIKOWSKI: Uh-huh.

5 CHAIRMAN ANDERSON: -- talking about,
6 Ms. Beaver, the traffic congestion on 17 when there's
7 accidents, and so a lot of this driver behavior, error,
8 texting, e-mail, voice mail, whatever. So there's a lot of
9 things that go into this, I think, you know.

10 MR. ZEDER: One of the crossover accidents has
11 possibly a texting driver involved, too.

12 MS. BEAVER: Chairman, I have one more
13 question. And I don't know if it even fits under this, but
14 out of your seven cases that you say you have, are those the
15 I-10 section between Phoenix and Tucson, or are they different
16 areas of the state?

17 MR. ZEDER: Five of them are on -- between
18 Phoenix and Tucson. Two of them are outside. One was south
19 of Tucson, one west of Phoenix. But I have claims now coming
20 in from the I-40. This can happen on any divided highway,
21 pretty much anywhere.

22 MR. OMER: Mr. Chair, I guess one of the things
23 that we (inaudible) thank Mr. Zeder. I mean, we really
24 appreciate him taking his time. He has to go to court. One
25 of the things I wanted to point out is, as you're well aware

1 of, is we had a very (inaudible) amount of resources inside of
2 our capital program, and while this was adjudicated, now we
3 have to look at why these keep coming in. They can have a
4 significant impact on our overall program amounts. So we have
5 quite a few cases that have been filed, more pending out
6 there, I'm sure, so we have to be conscious how that can
7 impact our program in the future.

8 DIRECTOR HALIKOWSKI: So just to put a finer
9 point on it, I think, Mr. Chairman, this section where the
10 four out of five claims are coming in falls within the Greater
11 Arizona area, and as you know, by the financials we've shown
12 you, outside of the MAG and PAG region, we basically have
13 about 25 million a year for capital improvements. That
14 particular section around Picacho, to widen that out and
15 flatten out that curve is probably a \$90-million project.

16 MR. ZEDER: Thank you very much.

17 DIRECTOR HALIKOWSKI: Thank you, Fred.

18 MR. ZEDER: With no more questions, with no
19 more questions, I'll go do something else.

20 CHAIRMAN ANDERSON: Next up, call to the
21 audience, I don't have any speaker cards. Those wishing to
22 speak can do it at the end of the meeting.

23 Item 2, I need to reference that PPAC items
24 were in Item 2, not in Item 1 as referenced in the packets, so
25 that will be an on-the-record correction.

1 Mike, you're up.

2 MR. SELLERS: Mr. Chair, can I ask a question?
3 So what (inaudible)?

4 DIRECTOR HALIKOWSKI: They come out of ADOT's
5 risks management bucket through the Department of
6 Administration. We pay a premium of roughly \$16 million a
7 year for (inaudible) fees.

8 UNIDENTIFIED SPEAKER: (Inaudible.)

9 MR. KIES: Thank you, Mr. Chair.
10 There were 18 projects that PPAC took action on
11 to have a special meeting, and if there are no questions or
12 individual projects, I'd like -- that the board would like to
13 take, I'd like to ask approval of Items 1A through 1G, which
14 are the project modification actions.

15 DIRECTOR HALIKOWSKI: Mr. Chairman.

16 CHAIRMAN ANDERSON: Mr. Sellers.

17 MR. SELLERS: Mike, I'd like to have a little
18 bit of an explanation on the priority of Item 1A. That
19 obviously is not something that contributes a lot to customers
20 in our state, so I just wanted some explanation for that.

21 MR. KIES: Yes, Mr. Sellers, Mr. Chair. Item
22 1A is a pavement preservation project on Interstate 15. Yes,
23 Interstate 15 is up in the northwest corner of the state. It
24 was -- the board did give us action to do this project in the
25 previous program, and the pavement maintenance is needed up

1 there to keep it in good state of repair. The -- there's the
2 opportunity, though, now to move that to fiscal year '15. We
3 have the opportunity of using some funding that's available
4 from leftover sub programs in this current fiscal year, '15.
5 So the action here is to actually move it -- advance it to
6 this fiscal year so that it can be carried out -- it can be
7 awarded here in the next month or so and have that pavement be
8 preserved.

9 DIRECTOR HALIKOWSKI: So Mr. Chairman, board
10 members, to that point, we wrestle with I-15. As you know,
11 we've got eight bridges up there that require about \$300
12 million to replace. We've replaced one partially through a
13 TIGER grant, and I think we're working on the second of the
14 worst of the lot.

15 That is a tough area for us, especially
16 bringing it to the board, because prior board members have
17 said we get no economic benefit from that 30-mile stretch.
18 However, as you can see under the law, we're bound to maintain
19 and preserve that area while we try to figure out how to fix
20 the rest of those bridges from the late '60s, early '70s. So
21 it's a tough issue, I know, because very few Arizona vehicles
22 actually travel on that.

23 We had looked at a P3 several years ago. We
24 applied for an exception with a letter of intent to the
25 Federal Highway Administration. They denied it, but in

1 between the letter and the denial, we had a lot of opposition,
2 not only from Mohave County Board of Supervisors, but the
3 governors of Utah and Nevada were not happy when we talked
4 about charging a toll on that 30-mile stretch to repair those
5 bridges.

6 I don't really want to have a panic ensue, but
7 we're still continuing to figure out how do we fund the
8 remaining six? Because as we can see, as we do these one at a
9 time, traffic control is a real nightmare, because the average
10 ADT of trucks is about 21,000 a day. So...

11 CHAIRMAN ANDERSON: One comment for former
12 member Rogers. As the weight of those trucks, you had a
13 weight (inaudible) the heavy trucks crossing the bridge
14 (inaudible).

15 DIRECTOR HALIKOWSKI: Unfortunately, we --
16 there's nowhere to go. The bridge -- if that stretch isn't
17 open, it's a 260-mile detour on some really bad county roads
18 to get around there. So there's no place to divert them. We
19 do weight control at St. George port of entry. We have a
20 joint facility there with the State of Utah where we make sure
21 the trucks are within legal weight limits.

22 CHAIRMAN ANDERSON: Further questions on
23 modifications? Board's pleasure?

24 MR. CUTHBERTSON: I'll make a motion.

25 MR. SELLERS: Second.

1 CHAIRMAN ANDERSON: Moved by Mr. Cuthbertson,
2 seconded by Mr. Sellers to accept and approve project
3 modifications 2A through 2G as corrected.

4 All in favor?

5 BOARD MEMBERS: Aye.

6 MR. KIES: Thank you, Mr. Chair.

7 The new projects taken action by PPAC are items
8 2H through 2R, and if there are no questions or the board
9 would want to take one individually, I'd like to ask for the
10 approval of Items 2H through 2R.

11 CHAIRMAN ANDERSON: Comments of questions from
12 the board? (Inaudible).

13 MR. SELLERS: Motion to approve.

14 MR. LA RUE: Second.

15 CHAIRMAN ANDERSON: Moved by Mr. Sellers,
16 second by Mr. La Rue to accept and approve new projects 2H
17 through 2R as corrected. Further discussion?

18 All in favor?

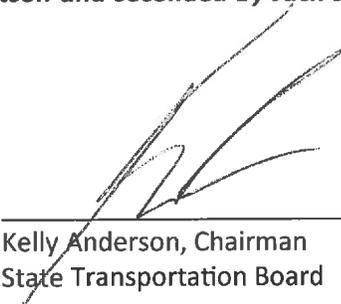
19 BOARD MEMBERS: Aye.

20 CHAIRMAN ANDERSON: Opposed?

21 (End of excerpt.)
22
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24
25

A motion to adjourn was made by Bill Cuthbertson and seconded by Jack Sellers. In a voice vote, the motion carries.

Meeting adjourned at 9:25 a.m. MST



Kelly Anderson, Chairman
State Transportation Board



John S. Halikowski, Director
Arizona Department of Transportation