SANNA R. SINGER
ASSISTANT CITY ATTORNEY

MARY T. NUESCA
ASSISTANT CITY ATTORNEY

JEREMY A. JUNG
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

MARA W. ELLIOTT
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

October 3, 2017

REPORT TO RULES COMMITTEE

PROPOSED CHANGES TO COUNCIL POLICY 200-12 REGARDING SIDEWALK MAINTENANCE POLICY

INTRODUCTION

Under state law, every property owner is responsible for maintaining and repairing the portion of the public sidewalk fronting his or her property. Streets and Highway Code section 5810; City Att'y MOL No. 2011-1 (Jan. 28, 2011) (attached). Years ago, however, the City shifted much of that responsibility onto itself through Council Policy 200-12. *Id.*

At the October 4, 2017, Rules Committee meeting, Councilmember Alvarez will propose modification of Council Policy 200-12 (Council Policy) regarding the City's maintenance of sidewalks. Councilmember Alvarez's proposal would have the City assume even greater responsibility for maintenance and would impose a standard requiring the City to replace unsafe sections of sidewalk within 90 days of being reported. This report will provide a brief history on the matter of sidewalk maintenance and outline the potential risk and liability issues from the proposed changes.

DISCUSSION

There are two proposed changes to the Council Policy. The first is to have the City assume maintenance responsibility generally, unless the unsafe condition is caused by the adjacent owner or a third party. The second change requires the City to repair those sidewalk conditions determined to be unsafe within 90 days of being reported. Currently, the City's expedited response consists of temporary repairs or similar interim protective measures to address the immediate hazard and follows up with permanent repairs for those sidewalks that fall within the current Council Policy.

The 90-day repair timeframe will likely expose the City to liability. The timeframe is stated without regard to budgetary constraints or other logistical limitations, such as compliance with contracting laws and requirements, and factors taken into account when prioritizing repairs. Plaintiffs will point to the failure to adhere to the 90-day timeframe and argue the City violated its own clear directive. Additionally, the 90-day timeframe could increase the City's exposure

because the shift of maintenance responsibility to the City generally will make the timeframe even more difficult to meet.[1]

This challenge of how to address the need for sidewalk maintenance is not unique to our City. In response to declining revenues, increased backlogs of deferred maintenance projects, and the potential liability for dangerous condition suits, other California cities have considered new local laws that would emphasize the responsibility of private property owners to maintain and repair sidewalks. *See* City Att'y MOL No. 2011-1; IBA Report No. 15-13 (April 15, 2015) (attached). Similarly, previous San Diego City Council discussions explored the idea of shifting greater responsibility upon the adjacent property owners, rather than onto the City.

In pursuing any proposed changes to the Council Policy, the Committee must consider the full potential fiscal and operational impacts upon the City. Rules of Council 6.5.3 provides, "[b]efore acting on any matter either originated by the standing committee or referred to it, the standing committee shall, through its consultant, make inquiry of the Mayor or appropriate department to determine the fiscal and operational impact of the proposal...." The potential fiscal impact is not limited to the City's operating budget for performing maintenance work, but would include the impact on the general liability fund due to increased liability. This requirement must be achieved before the item, if successful at committee, proceeds to the full Council. We suggest consulting both Financial Management and the Independent Budget Analyst for assistance.

CONCLUSION

The proposed modifications to current Council Policy will likely increase the City's exposure to liability. We suggest further financial and legal analysis before adopting the proposed policy changes. We are available to assist as needed.

MARA W. ELLIOTT, CITY ATTORNEY

By _____
Jeremy A. Jung
Deputy City Attorney

JAJ:cw
RC-2017-4
Doc. No. 1594219
Attachments

[1] The Office raised a similar concern regarding the potential of legal exposure posed by ambitious timeframes in 2013 when the Council was considering whether to undertake a sidewalk condition assessment survey. This Office advised coordinating the schedule of the condition assessment survey with the ability to make any necessary protective measures (e.g. repairs, safeguards, and warnings) because if the inspectors got too far ahead of interim repairs, it could increase the potential for liability. City Att'y MOL No. 2013-16 (Aug. 29, 2013).

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

THOMAS C. ZELENY
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JAN I. GOLDSMITH
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: August 29, 2013

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Assessing the Condition of Sidewalks

INTRODUCTION

During City Council hearings on the Fiscal Year 2014 budget, there was significant discussion about funding an assessment of the condition of sidewalks in the City. A comprehensive condition assessment of sidewalks has not been done in years. The City Council added $1 million to the Fiscal Year 2014 budget to fund a sidewalk condition and needs assessment, which the Mayor approved. San Diego Resolution R-308247 (Jun. 19, 2013). Because a condition assessment will document sidewalk defects, the question has been raised whether this will increase the City's exposure to liability for injuries that occur on sidewalks.

There was also some discussion during the budget hearings about the City's policy of repairing sidewalks even though many such repairs are the responsibility of the adjacent property owners under state law. In 2011, this Office issued a Memorandum of Law (attached) explaining how the City could amend the Municipal Code to provide an incentive for property owners to repair sidewalks consistent with state law. We have been asked whether California Assembly Bill 22 (AB 22), recently introduced in the State Legislature, impacts the conclusion of our 2011 Memorandum of Law.

QUESTION PRESENTED

1. Will conducting a condition assessment of sidewalks increase the City's exposure to liability for injuries that occur on sidewalks?

2. Does AB 22 prevent the City from amending Council Policy 200-12 or the Municipal Code regarding responsibilities for maintaining and repairing sidewalks?

SHORT ANSWERS

1. No, provided the City promptly repairs any dangerous sidewalk conditions it discovers during the condition assessment. The City cannot avoid liability by not inspecting sidewalks because the City could be liable for injuries whether or not the City has actual knowledge of a dangerous sidewalk defect.

2. In its current form, AB 22 does not impact the City's ability to amend Council Policy 200-12 or the Municipal Code as discussed in our 2011 Memorandum of Law.

ANALYSIS

I. THE CITY CANNOT INSULATE ITSELF FROM LIABILITY BY NOT INSPECTING ITS SIDEWALKS.

Generally, a public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition was created by its employee, or if the public entity had actual or constructive notice of the dangerous condition with sufficient time to have protected against it prior to when the injury occurred. Cal. Gov't Code § 835. As we explained in our 2011 Memorandum of Law, the City could be liable for injuries even if a dangerous sidewalk condition was caused by an adjacent property owner's failure to maintain or repair the sidewalk as required by state law. City Att'y MOL No. 2011-01 (Jan. 28, 2011). "A municipality must exercise vigilance in keeping its streets safe and is bound to make reasonable inspections to that end." *Peters v. City and County of San Francisco*, 41 Cal. 2d 419, 427 (1953) (citations omitted). Therefore, the City does not have to have actual knowledge of a dangerous condition to be liable. Constructive notice is enough. Cal. Gov't Code § 835(b).

> A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in *the exercise of due care*, should have discovered the condition and its dangerous character.

Cal. Gov't Code § 835.2(b) (emphasis added).

> The exercise of due care includes consideration of:
>
> (1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

> (2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition.

Cal. Gov't § 835.2(b)(1)-(2).

Many years ago in *Fackrell v. City of San Diego*, 26 Cal. 2d 196 (1945), the California Supreme Court criticized the City for not inspecting unimproved sidewalks. At the time of the injury, West Palm Street was a graded dirt road with a dirt sidewalk that had recently been opened for public use. The plaintiff fell through the sidewalk and into a hole created by subsurface erosion from recent rains. The City's acknowledged policy at the time was to only inspect and repair unimproved sidewalks in response to complaints from the public. The Supreme Court responded:

> We do not think that a city should escape liability for damages caused by hidden defects in its sidewalks where it makes no inspections of such sidewalks and does not repair them . . . . It is to be remembered in this regard that the city, although expecting erosion, made no effort to inspect, maintain, or repair its "unimproved" sidewalks except as dangerous conditions were reported to it by members of the public.

Fackrell, 26 Cal. 2d at 207. The Supreme Court's decision applies to both improved sidewalks and unimproved sidewalks open to the public. *Id.* at 208.

For purposes of constructive notice, state law assumes the City has a sidewalk inspection program in place, whether or not the City actually inspects its sidewalks. In other words, if the City would have found the dangerous sidewalk condition with a reasonable inspection program in place, not having an inspection program will not insulate the City from liability.

II. A SIDEWALK CONDITION ASSESSMENT SHOULD BE COORDINATED WITH INTERIM PROTECTIVE MEASURES OR PERMANENT REPAIRS.

If the City initiates a condition assessment of its sidewalks, it will acquire actual knowledge of potentially dangerous conditions as they are discovered. Once the City has notice of a dangerous condition, it is obligated to make the condition safe within a reasonable period of time. Cal. Gov't Code § 835(b); *Peters*, 41 Cal. 2d at 428. The length of time the City has to remedy the condition depends on the particular facts of each case, but it could be as short as four to five days. *See Wise v. City of Los Angeles*, 9 Cal. App. 2d 364, 366 (1935). We assume that neither the City nor adjacent property owners have the resources necessary to immediately make permanent repairs to all the potentially dangerous sidewalk conditions that may be discovered.

We therefore recommend that temporary or interim protective measures be coordinated with a condition assessment or inspection program to mitigate the City's potential liability. Protective measures include repairs, safeguards, and warnings. Cal. Gov't Code § 830(b). Conducting a sidewalk condition assessment in phases, for example, may provide enough time for City forces or contractors to follow behind and install temporary asphalt patches. If the inspectors get too far ahead of interim repairs, it could increase the potential for liability.

We defer to City staff's judgment and available resources to determine a threshold for how significant a sidewalk defect must be to warrant interim repairs or warnings. We suggest at a minimum, a difference in elevation of ¾-inch or more receives attention because anything less might be considered trivial as a matter of law. *Fielder v. City of Glendale*, 71 Cal. App. 3d 719, 725 (1977). The size of the defect is not the only consideration, however, and smaller defects could be considered dangerous due to circumstances such as the shape of the defect and whether the defect was concealed by debris, grease, water, or darkness. *Caloroso v. Hathaway*, 122 Cal. App. 4th 922, 927 (2004); *Dolquist v. City of Bellflower*, 196 Cal. App. 3d 261, 267-68 (1987) (a steel rebar protruding ¼-inch above the concrete was not considered trivial as a matter of law). Obviously, the more defects that can be addressed, the less likely the City will face liability.

III. AB 22 DOES NOT IMPACT THE CITY'S ABILITY TO CHANGE ITS SIDEWALK MAINTENANCE POLICY.

Introduced on December 3, 2012, AB 22 would add new section 5611.5 to the California Streets and Highways Code prohibiting charter cities like San Diego from repealing ordinances that require them to repair tree-damaged sidewalks without voter approval:

> 5611.5. (a) If a city, county, or city and county has an ordinance in operation that requires the city, county, or city and county to repair or reconstruct streets, sidewalks, or driveways that have been damaged as a result of tree growth, then the city, county, or city and county shall not repeal the ordinance except with the concurrence of the local electorate by majority vote.
>
> (b) The Legislature finds and declares that this section constitutes a matter of statewide concern, and shall apply to charter cities and charter counties. The provisions of this section shall supercede [sic] any inconsistent provisions in the charter of any city, county, or city and county.

Cal. Assembly Bill 22 (2013-2014 Reg. Sess.). AB 22 is similar to a bill held in committee during the prior legislative session, which would have also prohibited local agencies from collecting the cost of sidewalk repairs from property owners. Cal. Assembly Bill 2231 (2011-2012 Reg. Sess.).

In its current form, AB 22 applies specifically to ordinances that require cities and counties to repair tree-damaged sidewalks. The City does not have such an ordinance. The City's sidewalk maintenance policy is expressed in Council Policy 200-12, which was passed by resolution. San Diego Resolution R-212590 (Feb. 6, 1975).

Ordinances and resolutions are different. The City Council acts either by ordinance or resolution. San Diego Charter § 270(c). Ordinances are adopted with the legal formality of statutes because ordinances become local law. *City of Sausalito v. County of Marin*, 12 Cal. App. 3d 550, 565 (1970). Resolutions are distinguishable from ordinances because resolutions do not establish law.

> It has been said that measures that prescribe binding rules of conduct are called "ordinances," while measures that relate to administrative or housekeeping matters are categorized as "resolutions."
>
> . . . .
>
> [A] resolution, generally speaking, is simply an expression of opinion or mind or policy concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality.

McQuillin, *Municipal Corporations* § 15:2, pp. 84-88 (3rd ed. rev. 2004). A local ordinance is considered a "law of the State" but a resolution is not. *Midway Orchards v. County of Butte*, 220 Cal. App. 3d 765, 774 (1990).

AB 22 does not impact the City's ability to change its sidewalk maintenance policy because the policy was adopted by resolution, not by ordinance. Council Policy 200-12 is therefore outside the reach of AB 22 requiring voter approval to repeal ordinances obligating local agencies to repair tree-damaged sidewalks. AB 22 does not prevent the City from changing its sidewalk maintenance policy or amending the Municipal Code as discussed in our 2011 Memorandum of Law.

CONCLUSION

Conducting a condition assessment of sidewalks will not increase the City's exposure to liability for dangerous conditions, provided the assessment is coordinated with prompt interim protective measures or permanent repairs. For purposes of liability, the law assumes the City has a reasonable sidewalk inspection program in place whether or not the City actually conducts a condition assessment. In its current form, AB 22 does not prevent the City from changing its sidewalk maintenance policy or amending the Municipal Code as discussed in our 2011 Memorandum of Law.

JAN I. GOLDSMITH, City Attorney

/s/ Thomas C. Zeleny

By Thomas C. Zeleny
Chief Deputy City Attorney

TCZ:mb
Attachment:1
Memorandum of Law No. 2011-01
cc: Walt Ekard, Interim Chief Operating Officer
Kip Sturdevan, Director, Transportation & Stormwater Department
ML-2013-16
Doc.No:625029

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

THOMAS C. ZELENY
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JAN I. GOLDSMITH
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: January 28, 2011

TO: Mario Sierra, Director, Transportation and Storm Water Department

FROM: City Attorney

SUBJECT: Maintenance and Repair of City Sidewalks

INTRODUCTION

There are over 5,000 miles of public sidewalks in the City, some dating back to the early 1900's. Most property owners assume it is the City's responsibility to repair damaged sidewalks, so they often ignore the problem or call the City to fix it. San Diego Pedestrian Master Plan Report, § 8.2 (Dec. 2006). According to the Transportation and Storm Water Department, the City receives approximately 600-700 requests annually to repair sidewalks. Tree roots are the most common cause of sidewalk damage. The City is in the process of spending $9.5 million in bond funds towards repairing concrete sidewalks, gutters, curbs, and curb ramps, including approximately 3,800 locations of root-damaged sidewalks. The average cost to repair one section of root-damaged sidewalk is about $2,200.

A growing number of California cities have adopted or are considering amendments to their municipal codes regarding sidewalk maintenance and repair. Many of these cities have or had policies to either split the cost of maintenance or repair with owners of property fronting on sidewalks, or for the city to pay the entire cost. Faced with declining revenues, increased backlogs of deferred maintenance, and potential liability for trip and falls, cities are considering new local laws that emphasize the responsibility of private property owners to maintain and repair sidewalks.

QUESTIONS PRESENTED

1. Who is responsible for maintaining and repairing City sidewalks?

2. Who is liable for injuries to the public resulting from the failure to maintain or repair City sidewalks?

SHORT ANSWERS

1. Under state law, every property owner is responsible for maintaining and repairing the portion of the public sidewalk fronting his or her property. The City, however, has shifted much of that responsibility onto itself through Council Policy 200-12.

2. Generally, the City is liable for injuries to the public if the adjacent property owner's failure to maintain or repair the sidewalk creates a dangerous condition, the City has notice of the dangerous condition, and fails to make the sidewalk safe within a reasonable time. Even though the adjacent property owner is responsible for maintenance and repair, the property owner is generally not liable for injuries to the public. To encourage property owners to maintain sidewalks, the City could adopt an ordinance making property owners responsible for injuries to the public resulting from their failure to maintain and repair sidewalks as required by state law.

ANALYSIS

I. RESPONSIBILITY FOR SIDEWALK MAINTENANCE AND REPAIR

Since at least 1935, state law has required the owners of property fronting a public street to maintain sidewalks in a safe condition for use by members of the public.

> The owners of lots or portions of lots fronting on any portion of a public street or place when that street or place is improved or if and when the area between the property line of the adjacent property and the street line is maintained as a park or parking strip, shall maintain any sidewalk in such condition that the sidewalk will not endanger persons or property and maintain it in a condition which will not interfere with the public convenience in the use of those works or areas save and except as to those conditions created or maintained in, upon, along, or in connection with such sidewalk by any person other than the owner, under and by virtue of any permit or right granted to him by law or by the city authorities in charge thereof, and such persons shall be under a like duty in relation thereto.

Cal. Sts. & High. Code § 5610; *see* Stats. 1935, p. 2148, § 31.

This statute imposes a duty on property owners to maintain and repair sidewalks adjacent to their properties. *Jordan v. City of Sacramento*, 148 Cal. App. 4th 1487, 1490 (2007). The only exception in the statute is for unsafe conditions caused by someone other than the property owner, such as the City or a utility company lawfully using the sidewalk for its purposes. This Office has issued a number of opinions over the years all concluding maintenance of City sidewalks is the responsibility of the adjacent property owner. *See* 1952 Op. City Att'y 159 (Oct. 24, 1952); 1984 City Att'y MOL 208 (May 17, 1984); City Att'y MOL No. 88-89 (Oct. 12, 1988); 1993 City Att'y MOL 367 (Jun. 18, 1993).

State law provides a procedure by which the City can recover the cost of sidewalk repairs from property owners who fail to make the repairs themselves, but the procedure is impractical. The City must first notify the property owner of the need to make repairs by mail and by posting a notice on the property itself. Cal. Sts. & High. Code §§ 5612, 5613. If the property owner does not start repairs within two weeks, the City must repair the sidewalk itself and prepare a report for the City Council. Cal. Sts. & High. Code §§ 5615-5617. After a City Council meeting where the property owner is given an opportunity to protest, the City may place a lien on the property for the cost of repairs. Cal. Sts. & High. Code § 5618; City Att'y MOL No. 93-60 (June 18, 1993). Considering the hundreds of sidewalk repairs the City performs annually, the relatively small cost to repair one section of damaged sidewalk, and the time and cost involved with docketing an item for a City Council meeting and placing a lien on property, it is neither practical nor cost effective to pursue cost recovery from property owners for sidewalk repairs.

In 1975, the City adopted its current policy of paying for some or all of the cost to repair sidewalks. The City pays the entire cost to repair sidewalks under the following conditions:

1. Damage caused by parkway trees.
2. Damage due to grade subsidence.
3. Damage due to City utility cuts.
4. Sidewalk fronting City-owned property.
5. Sidewalk at street intersection (no abutting property).
6. Damage due to heat expansion.

Council Policy 200-12. To encourage property owners to repair sidewalks in other situations, the City's policy is to offer to pay for half the cost of repair. *Id.* The policy of paying half of the costs was adopted with the knowledge that the City was not necessarily obligated to share in these costs.[1] The City budgets $200,000 to $300,000 annually for this cost sharing program, but according to City staff demand for the program has declined in the last few years.

Council Policy 200-12 shifts much of the responsibility for sidewalk repairs onto the City which is the responsibility of private property owners under state law. For example, responsibility for sidewalks damaged by parkway trees depends on who historically cared for the trees. If the City planted the parkway trees and performed all necessary maintenance on them, then the City is responsible for repairing the sidewalk if it is damaged by roots from the parkway trees. *Jones v. Deeter*, 152 Cal. App. 3d 798, 805 (1984); 1984 City Att'y MOL 196. If the

[1] "There presently does not exist a written policy regarding sidewalk maintenance. Our uniform practice in this regard has basically been to make interim asphalt repairs to all unsafe conditions and if the original sidewalk was damaged by parkway tree roots or City utility cuts, City forces follow up with permanent concrete replacement. Unsafe conditions which exist because the original sidewalk has deteriorated due only to age, etc., are deemed to be the responsibility of the abutting property owner, in accordance with the State Street and Highway Code, Section 5610. This practice has resulted in numerous instances of aged sidewalk being patched with asphalt but not subsequently replaced with new concrete. In view of the interest in this subject, a draft policy statement on sidewalk maintenance has been prepared which will permit a 50% cost contribution by the City for the replacement of aged, deteriorated sidewalk. This policy was amended and approved by the Public Facilities and Recreation Committee on September 9, 1974." Docket Supporting Information (dated Oct. 16, 1974) for San Diego Resolution R-212590.

parkway trees were planted, trimmed, or cared for by the adjacent property owner, then the property owner is responsible for repairing the sidewalk. *Jones*, 152 Cal. App. 3d at 805. Under Council Policy 200-12, however, the City has assumed responsibility for repairing all sidewalks damaged by parkway trees, regardless of who planted or cared for the trees.

Under Streets and Highways Code section 5610 and the rule in *Jones*, the City is only responsible for repairing sidewalks adjacent to City-owned property and sidewalks that are damaged by City activities or parkway trees planted and maintained by the City. The City is not responsible for repairing sidewalks damaged by grade subsidence, heat expansion, parkway trees planted or maintained by others, or for paying half the cost of repairing sidewalks deteriorated over time. However, the City has assumed responsibility for these repairs and costs through Council Policy 200-12.

Though there is no mention in the records accompanying the adoption of Council Policy 200-12, it may have been adopted in part because of the availability of federal funding. The same year the City drafted its policy, the City of Los Angeles adopted an ordinance requiring it to repair all sidewalks damaged by tree roots. Los Angeles Municipal Code § 62.104(e). Los Angeles is now considering repealing this ordinance because it was originally funded with federal funds which have long since disappeared. City of Los Angeles Report on Sidewalk Repair Options (Apr. 8, 2010). According to the Los Angeles Times, roughly 4,600 miles of Los Angeles' 10,750 miles of sidewalks are in need of repairs, at a projected price of $1.2 billion. Martha Groves, *L.A. May Stop Footing Bills for Sidewalk and Driveway Repairs*, Los Angeles Times, May 9, 2010.

II. LIABILITY FOR FAILING TO MAINTAIN SIDEWALKS

A. Liability of the City

Generally, a public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition was created by its employee, or if the public entity had actual or constructive notice of the dangerous condition with sufficient time to have protected against it prior to when the injury occurred. Cal. Gov't Code § 835. The condition is dangerous if it creates a substantial risk of injury to users exercising due care and using the property in reasonably foreseeable manner. Cal. Gov't Code § 830(a); *Milligan v. Golden State Bridge Highway & Transportation District*, 120 Cal. App. 4th 1, 6-7 (2004). Minor, trivial or insignificant defects are not dangerous. Cal. Gov't Code § 830.2; *Stathoulis v. City of Montebello*, 164 Cal. App. 4th 559, 566 (2008).

Whether a damaged sidewalk is a dangerous condition depends on a number of factors. Courts will consider all the circumstances surrounding the accident, including the size of the defect, whether the sidewalk had broken pieces or jagged edges, and whether the defect was concealed by debris, grease, water or darkness. *Caloroso v. Hathaway*, 122 Cal. App. 4th 922, 927 (2004). Courts also recognize that not all sidewalk cracks are dangerous:

> [I]t is impossible for a city to maintain its sidewalks in perfect condition. Minor defects nearly always have to exist. The city is not an insurer of the public ways against all defects. If a defect will generally cause no harm when one uses the sidewalk with ordinary care, then the city is not to be held liable if, in fact, injury does arise from the defect.

Fielder v. City of Glendale, 71 Cal. App. 3d 719, 725-726 (1977). Changes in elevation of less than three-fourths of an inch may not be dangerous as a matter of law if no aggravating circumstances or facts exist. *Id.* at 725.

The City need not have actual knowledge of a dangerous condition of a sidewalk to be liable because having constructive notice is sufficient. The City has constructive notice if a dangerous condition is obvious and has existed for a sufficient period of time before the accident for City employees to have discovered and remedied the situation had they been operating under a reasonable plan of inspection. Cal. Gov't Code § 835.2; *The State of California v. Superior Court of San Mateo County*, 263 Cal. App. 2d 396, 400 (1968). The City cannot escape liability by not inspecting its sidewalks. *See Fackrell v. City of San Diego*, 26 Cal. 2d 196, 207 (1945). The length of time a dangerous sidewalk condition must exist before the City has constructive notice depends on the facts of the particular case. *Lorraine v. City of Los Angeles*, 55 Cal. App. 2d 27, 30-31 (1942). Constructive notice could be found if a dangerous condition existed for as little as four or five days. *See Wise v. City of Los Angeles*, 9 Cal. App. 2d 364, 366 (1935) [finding Los Angeles had both constructive and actual notice]. The City would probably not have constructive notice of a dangerous sidewalk condition created the night before an accident. *See Kotronakis v. City and County of San Francisco*, 192 Cal. App. 2d 624, 630 (1961).

The City may be liable even if the dangerous condition was caused by the adjacent property owner's failure to maintain or repair the sidewalk. The City has a duty to keep sidewalks safe, even from dangerous sidewalk conditions created by adjacent property owners. *Peters v. City and County of San Francisco*, 41 Cal. 2d 419, 429 (1953). If the City has actual or constructive notice of a dangerous condition, it has a duty to take reasonable steps to protect the public from the danger. *Constantinescu v. Conejo Valley Unified School District*, 16 Cal. App. 4th 1466, 1475 (1993). The negligence of others will not necessarily relieve the City of liability if the condition is dangerous. *Id.* at 1472.

B. Liability of Adjacent Property Owners

Property owners are generally not liable to the public for injuries that occur on sidewalks fronting their property. A property owner's duty under state law to maintain and repair sidewalks is a duty owed to the City, not to members of the public. *Schaefer v. Lenahan*, 63 Cal. App. 2d 324, 327 (1944). A property owner may be liable if he or she alters the sidewalk for the benefit of his or her property. *Sexton v. Brooks*, 39 Cal. 2d 153, 157 (1952). A property owner may also be liable if he or she negligently damages the sidewalk. *Moeller v. Fleming*, 136 Cal. App. 3d 241, 245 (1982). But failure to maintain and repair a sidewalk as required by California Streets and Highways Code section 5610 does not by itself give rise to liability of a property owner. *Williams v. Foster*, 216 Cal. App. 3d 510, 521 (1989).

The City could adopt an ordinance making property owners responsible to the public for injuries that occur from their failure to maintain and repair sidewalks. The City of San Jose was among the first to adopt such an ordinance:

> The property owner required by Section 14.16.2200 to maintain and repair the sidewalk area shall owe a duty to members of the public to keep and maintain the sidewalk area in a safe and nondangerous condition. If, as a result of the failure of any property owner to maintain the sidewalk area in a nondangerous condition as required by Section 14.16.2200, any person suffers injury or damage to person or property, the property owner shall be liable to such person for the resulting damages or injury.

San Jose Municipal Code § 14.16.2205.

San Jose's ordinance was upheld as constitutional and was not preempted by state law. *Gonzales v. City of San Jose*, 125 Cal. App. 4th 1127 (2004). The court in *Gonzales* highlighted the ordinance's important public purpose:

> [I]t provides an additional level of responsibility for the maintenance of safe sidewalks on the owners whose property is adjacent to and abuts the sidewalk. These owners are often in the best position to quickly identify and address potentially dangerous conditions that might occur on the sidewalks, as opposed to San Jose.
>
> Without section 14.16.2205, abutting landowners would have no incentive to maintain the sidewalks adjacent to their property in a safe condition.

Id. at 1139 (citation omitted).

If the City adopts such an ordinance, it would make property owners share liability with the City. *Id.* at 1138; *see* 1984 City Att'y MOL 196. An ordinance going further and requiring adjacent property owners to indemnify the City from all liability would probably be unconstitutional. *Jordan*, 148 Cal. App. 4th at 1491 n. 2.

The City may also require property owners to maintain the parkway trees and parkway areas fronting their property because the sidewalk includes the curb and a park or parking strip. Cal. Sts. & High. Code § 5600; *see Low v. City of Sacramento*, 7 Cal. App. 3d 826 (1970).

> This result [finding the city liable because it maintained the parkway trees] need have no great fiscal impact on the City of Long Beach. Should it tire of its responsibility to care for the magnolias at issue here, this task may be passed on to abutting owners under the procedure established by Streets and Highways Code, section 5600 et seq.

Jones, 152 Cal. App. 3d at 806; *but see Williams*, 216 Cal. App. 3d at 521 [criticizing *Jones* because the California Streets and Highways Code does not establish a "procedure" for "passing on" such responsibility to property owners]. The City of San Jose adopted such an ordinance, which also makes property owners liable to members of the public if their failure to maintain parkway trees or landscaping causes an injury. San Jose Municipal Code § 13.28.190. Such an ordinance would not necessarily give property owners the discretion to remove existing trees because the City may lawfully prevent removal of trees along City streets. *County of Santa Barbara v. More*, 175 Cal. 6, 12 (1917). Trimming or removing parkway trees requires a permit from the City issued at no cost. SDMC §§ 62.0604, 62.0615.

CONCLUSION

Whether the City should adopt an ordinance like San Jose's ordinance is a policy decision for the Mayor and City Council. Under long standing state law, every property owner is responsible for maintaining and repairing the portion of the public sidewalk fronting his or her property. The City, however, has shifted much of that responsibility onto itself through Council Policy 200-12. Private property owners currently have little incentive to repair damaged sidewalks because it is generally just the City that faces liability for injuries that occur from dangerous sidewalk conditions. The City could adopt an ordinance requiring property owners to maintain and repair sidewalks fronting their property, and make them share liability with the City for injuries to the public caused by their failure to do so. This Office stands ready to draft an ordinance for consideration if we are so directed.

JAN I. GOLDSMITH, City Attorney

By
Thomas C. Zeleny
Chief Deputy City Attorney

TCZ:mb
ML-2011-01

THE CITY OF SAN DIEGO

OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

Date Issued: April 15, 2015 **IBA Report Number:** 15-13

Committee on Infrastructure Docket Date: April 23, 2015

Item Number: TBD

Municipal Approaches to Sidewalk Liability and Repairs

OVERVIEW

As presented in the City of San Diego Fiscal Year 2016 through Fiscal Year 2020 Consolidated Multi-Year Capital Planning Report, knowing the current condition of assets is an important step to meeting desired infrastructure service levels and to provide a citywide picture of the current backlog. In Fiscal Year 2015, the City made a substantial investment in funding condition assessments of several infrastructure assets. The assessment of sidewalks within the public way is anticipated to be completed in April 2015 by the Transportation and Storm Water Department.

The City of San Diego currently dedicates three two-person crews to sidewalk maintenance, which includes temporary asphalt patching to alleviate trip hazards. Funding totaling $300,000 was allocated for the City's sidewalk cost sharing program in FY 2015[1]. Historically, approximately $100,000 has been allocated annually for the sidewalk cost sharing program. Funding totaling $800,000 from the General Fund was allocated in FY 2015 for sidewalk removal and replacement of hazardous sidewalk. It is anticipated that an additional $1.0 million will be allocated to Transportation and Storm Water Department near the end of FY 2015 for sidewalk removal and replacement citywide to remedy known tripping hazards. That funding is part of the $120 million DC-3 lease revenue bonds planned to be issued in April 2015.

This report will outline the current sidewalk policy for the City of San Diego and discuss best practices in other California cities.

[1] For more information on the City of San Diego's Sidewalk Cost Sharing Program, see the City of San Diego's website: http://www.sandiego.gov/street-div/services/roadways/sidewalk.shtml

FISCAL/POLICY DISCUSSION

Current Practice

The City of San Diego's practices with respect to sidewalk maintenance were for many years based on the California Streets and Highways Code, Section 5610.

> Section 5610. Maintenance by lot owners
>
> The owners of lots or portions of lots fronting on any portion of a public street or place when that street or place is improved or if and when the area between the property line of the adjacent property and the street line is maintained as a park or parking strip, shall maintain any sidewalk in such a condition that the sidewalk will not endanger persons or property and maintain it in a condition that will not interfere with the public convenience in the use of those works or areas save and except as to those conditions created or maintained in, upon, along, or in connection with such sidewalk by any person other than the owner, under and by virtue of any permit or right granted to him by law or by the city authorities in charge thereof, and such persons shall be under alike duty in relation thereto.

Section 5610 largely places the responsibility for sidewalk concrete replacement and repair on the abutting property owner. However, while property owners are responsible for repair, case law generally does not assign any related liability to property owners, unless they are directly responsible for sidewalk defects.

Based upon its interpretation of Section 5610, the City of San Diego drafted its Sidewalk Maintenance Policy 200-12 to allow the City to provide some funding for replacement of unsafe sidewalks.[2] Historically, unsafe sidewalk conditions brought to the attention of the City have been patched with asphalt as a temporary means to reduce tripping hazards and to assist in protecting the City from liability. However, the resulting patching was deemed unsatisfactory to affected users, largely senior citizens and small children. Policy 200-12 outlines that the cost of replacing unsafe cement concrete sidewalk will be borne by the City under the following conditions:

1. It has been damaged by parkway trees; or
2. It has been damaged by grade subsidence; or
3. It has been damaged by City utility cuts; or
4. It fronts on City-owned property; or
5. It exists at street intersections; or
6. It has failed because of heat expansion.

Under all other conditions, repair costs are borne on a 50/50 matching basis between the City and the property owner, provided that damage being repaired with matching funding has not been caused by the abutting property owners.

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[2] For additional details, see the City's Sidewalk Maintenance Policy which is included as an attachment to this report.

Other Municipal Approaches:

The majority of cities in California have passed ordinances imposing the responsibility for sidewalk repair on adjacent property owners. There is some diversity in the extent of the obligation and how it is imposed, and there are limitations on liability to third parties for a defective sidewalk. Case law indicates local ordinances cannot be inconsistent with state law as established by the Tort Claims Act (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 899-900 citing *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 463.). This precludes a city from absolving itself of all liability, but does allow concurrent or shared liability of adjacent property owners. This allows for both the municipal government as well as the respective property owner to be found liable for resulting personal and/or property damages or injury.[3]

In order for a city to impose concurrent liability on a property owner, it requires "clear and unambiguous language" in their municipal ordinance about their respective sidewalk policy (*Schaefer v. Lenahan* (1944) 63 Cal.App. 2d 324). The City of San Jose, CA created an ordinance with such language and it was approved by the Court in Gonzales v. San Jose (2004) 125 Cal.App.4th1127.

San Jose and Sacramento

The City of San Jose's ordinance establishes that the property owner is obligated to maintain and repair their sidewalks within the public way in a safe and nondangerous condition for members of the public. Their ordinance explicitly assigns liability to property owners for any injury or damage that results from a badly maintained sidewalk.

The City of San Jose sidewalk ordinance does not absolve the city of liability, but does allow concurrent liability of adjacent property owners[4]. Per the City of San Jose Department of Transportation's website[5], the city currently does not have any programs to assist property owners with the cost of sidewalk and tree repairs. Property owners are responsible for the entire cost of these items as well as obtaining the necessary permits for doing construction within the public way. The City of Sacramento's policy[6] on sidewalk maintenance is very similar to the City of San Jose. The minor exception is that property owners can elect to have city crews/contractors perform the sidewalk repair work but the cost is still paid by the property owner.

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[3] For more information on sidewalk repair and liability in California, see "But It's Your Sidewalk! Sidewalk Repair and Liability," a paper prepared by Gerald C. Hicks for the California League of Cities and included as an attachment to this report. The paper focuses on the interplay between responsibility for sidewalk repair and liability for unrepaired sidewalks.

[4] For more information on the City of San Jose's sidewalk ordinance, see Municipal Code: 14.16.2205 - Liability for injuries to public.

[5] For more information on the City of San Jose's sidewalk policy, see the City of San Jose's website: http://www.sanjoseca.gov/index.aspx?NID=275

[6] For more information on the City of Sacramento's sidewalk policy, see the City of Sacramento's website: http://portal.cityofsacramento.org/Public-Works/Maintenance-Services/Sidewalks-Curbs-Gutters

Long Beach

The City of Long Beach, through its Public Works Department, has a multi-year sidewalk program to repair deteriorated sidewalks and curbs in the City. In 2000, Long Beach completed a citywide sidewalk assessment of damaged sidewalks and curbs. It posts a map of its sidewalk inventory on its Public Works Department website. Annually, Long Beach's Public Works Department updates its log based on this map and the quantity and severity of sidewalk damage. Blocks with the most damage are given the highest priority for repairs.

This list is provided annually to Council District offices for final review and approval. Sidewalks, curbs, and gutters within the public way must meet certain criteria to be eligible for scheduled repairs. Long Beach budgets $3.0 million annually for this program, and the funding is equally divided among their nine Council Districts. The City hires private contractors to perform the sidewalk, curb and gutter repair work. Deteriorated and damaged sidewalks and curbs are prioritized by block, and are scheduled for repair each year by Council District based on the amount of funding available. Locations not repaired any given year are scheduled for repairs in future years.

CONCLUSION

Several cities in California have passed ordinances imposing the obligation for sidewalk repair on adjacent property owners, but there is some diversity to the extent of the obligation and how it is imposed. The City of San Jose and the City of Sacramento have placed the entire responsibility of sidewalk repair on their property owners. In addition, they have created clear language in their municipal ordinance regarding the duty of property owners to maintain their sidewalks in a nondangerous condition, and the liability of property owners when another person suffers damage to person or property due to poorly maintained sidewalks.

For the City of San Diego to do likewise would entail repealing the current Council Policy 200-12 regarding sidewalk maintenance and creating a new ordinance with clear and precise language regarding the responsibility of sidewalk repairs on property owners as well as liability if a person suffers damage or injury to person or property. A second approach the City of San Diego could undertake is to allocate funding each fiscal year similar to the City of Long Beach to repair the worst sidewalks and curbs in each of the nine council districts. A third approach for the City of San Diego is to continue to administer a cost sharing program between the City and property owners.

This report has been prepared for information and further discussion by the Infrastructure Committee.

Sarah Miller
Fiscal & Policy Analyst

Charles E. Modica, Jr.
Fiscal & Policy Analyst

APPROVED: Andrea Tevlin
Independent Budget Analyst

CITY OF SAN DIEGO, CALIFORNIA

COUNCIL POLICY

CURRENT

SUBJECT: SIDEWALK MAINTENANCE POLICY
POLICY NO.: 200-12
EFFECTIVE DATE: February 6, 1975

BACKGROUND:

The City's practices with regard to the maintenance of existing Portland Cement Concrete (PCC) sidewalks has for many years been based on the California Streets and Highways Code, Section 5610.

This section essentially places the responsibility for replacement of PCC sidewalk totally on the abutting property owner unless an unsafe condition exists because of some act of the City or some third party, such as allowing parkway trees to damage the sidewalk, permitting poor compaction of soil under a sidewalk, sidewalk damage caused by City utility intrusion, etc. Consequently, PCC sidewalk replacement at City expense is done only under the following conditions:

1. Damage caused by parkway trees.
2. Damage due to grade subsidence.
3. Damage due to City utility cuts.
4. Sidewalk fronting City-owned property.
5. Sidewalk at street intersection (no abutting property).
6. Damage due to heat expansion.

A significant portion of an existing unsafe sidewalk does not fall into any of the above categories, but is in such a condition because of its age. Naturally, these conditions are most prevalent in older parts of the community. Replacement of these unsafe old sidewalks therefore depends on the financial ability and willingness of the abutting property owners to do so. Experience indicates that few citizens avail themselves of the opportunity to replace an unsafe sidewalk. This is probably because they are reluctant to go through the process of obtaining a contractor, bids, permits, etc. All unsafe sidewalk conditions which come to the attention of the City are patched with asphalt to eliminate tripping hazards and assist in protecting the City from liability.

As a result of the aforementioned, there are now many areas of aged sidewalk which have been asphalt parched for safety, but which nevertheless are not satisfactory to the affected users. The problem is particularly acute in areas heavily used by senior citizens and small children.

PURPOSE:

The purpose of this policy is to modify the City's sidewalk maintenance practice to permit greater financial participation in the replacement of unsafe PCC sidewalks by the City.

POLICY:

It is the policy of the City Council that the cost of replacing unsafe Portland Cement Concrete sidewalk:

A. Will be borne entirely by the City when:

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

CURRENT

1. It has been damaged by parkway trees.
2. It has been damaged by grade subsidence.
3. It has been damaged by City utility cuts.
4. It fronts on City-owned property.
5. It exists at street intersections.
6. It has failed because of heat expansion.

B. Will be borne on a 50/50 matching basis under all other conditions; provided, however, that damage to sidewalks which the City Manager determines to have been caused by owners of property abutting damaged sidewalks or by third parties shall not be qualified for the 50/50 matching basis funding.

This policy applies only to conventional sidewalks built on-grade and is not meant to cover special circumstances such as sidewalks constructed over basements, garages or other unique features. Determination as to whether repairs are required shall be made by the City Manager.

HISTORY:

Adopted by Resolution R-212590 02/06/1975

LEAGUE® OF CALIFORNIA CITIES

But It's Your Sidewalk! Sidewalk Repair and Liability

Thursday, May 8, 2014 General Session; 2:15 – 4:15 p.m.

Gerald C. Hicks, Supervising Deputy City Attorney, Sacramento

Notes:

BUT IT'S YOUR SIDEWALK!

This paper and presentation arose out of a desire to create a comprehensive summary of the law concerning an adjacent property owner's obligation to repair a defective sidewalk under Streets and Highways Code section 5610. This effort was motivated to address the numerous objections and threatened lawsuits from angry property owners upon receipt of a repair notice. The title was suggested by the oft heard property owners' mantra and perspective. Research into the history of sidewalk repair for purposes of the paper led to research into the general history of sidewalks and research concerning repair naturally delved into research concerning the interplay between sidewalk repair and liability for unrepaired sidewalks. In sum, the paper and presentation deal with various issues concerning the most pedestrian of infrastructure – sidewalks. Because understanding some of the issues concerning sidewalk repair and liability may best be understood in a historical context, I begin with a brief history of sidewalks.

I

A Brief History of Sidewalks

Sidewalks, perhaps the most ubiquitous yet inconspicuous of critical infrastructure, have a long history. The first evidence of paved pedestrian paths dates from ancient Greece and Rome.[1] Sidewalks, as walkways separated from roads, disappeared during the Middle Ages. They reappeared during the seventeenth century when the first governmental acts calling for the paving of pedestrian paths were passed by Parliament a few years after the 1666 Great Fire of London, apparently as part of Christopher Wren's rebuilding and organization of the City of London.

In the nineteenth century, sidewalks were often constructed by adjacent property owners and businesses and by the end of that century sidewalks had become an important aspect of urban

[1] Loukaitou-Sideris and Ehrenfeucht, *Sidewalks: Conflict and Negotiation over Public Space* (2009) p. 15

infrastructure. Because sidewalks were often the only paved aspect of streets, they were the easiest place to walk, shop and carry out various economic and social activities. "In commercial areas, sidewalks extended the realm of adjacent shops; shopkeepers displayed their merchandise on sidewalks and stored deliveries and overstock on them as well. Street peddlers made a living outdoors while street speakers and newsboys conveyed information to passersby. Sidewalks were also a realm for social encounters where friends, acquaintances, and strangers mixed. The sidewalks were thus both a route and a destination; a way to move through the city, but also a place of commerce, social interaction, and civic engagement."[2] Sidewalks were also critical to the safety of a city and to establishing a sense of community.

As sidewalks became more prevalent, cities moved to standardize their dimensions and the material used to construct them. With standardization came a contraction of their use as cities focused on a singular purpose for sidewalks – to move people. As a result, many cities imposed sidewalk regulations with respect to the storage of material or products; public speaking; vending; and loitering. Jane Jacobs lamented the reduction in value and physical contraction of sidewalks in her 1961 book, *The Death and Life of Great American Cities*, "Sidewalk width is invariably sacrificed for vehicular width, partly because city sidewalks are conventionally considered to be purely space for pedestrian travel and access to buildings and go unrecognized and unrespected as the uniquely vital and irreplaceable organs of city safety, public life, and child rearing that they are."[3] In her book, Jacobs relates numerous examples of how a busy and vibrant sidewalk, even in the less affluent parts of a city, can decrease crime and promote social discourse.

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[2] Loukaitou-Sideris and Renia Ehrenfeucht, *Vibrant Sidewalks in the United States: Reintegrating Walking and a Quintessential Social Realm* (Access Magazine Spring 2010), p. 24

[3] Jacobs, *The Death and Life of Great American Cities* (1961)

In recent years, sidewalks have gained renewed respect as planners seek to restore their status as "public space" as opposed to a simple mode of transportation. The health benefits of walking are patent but have been extolled by the Surgeon General and numerous health professionals as a means to combat obesity, diabetes, and other diseases. In addition, as a result of concerns with climate change, energy conservation and congestion, transportation planners view sidewalks as an important component of sustainable and healthy communities and walking as an inexpensive and enjoyable activity that reduces congestion and conserves energy.[4]

II

Sidewalk repair

A. Approaches to Sidewalk Repair and Maintenance

Despite their long history and ubiquity, sidewalks are often overlooked as non-critical infrastructure. While listing bridges, dams, levees, ports, rails and roads, the American Society of Civil Engineers' Report Card for America's Infrastructure does not mention sidewalks. While it is true that the catastrophic failure of a dam or bridge would undoubtedly have calamitous results, the cumulative injuries and consequent expenditure of municipal funds from the incremental decay of sidewalks can be equally substantial.

The legal and fiscal impact of broken or displaced sidewalks and the responsibility for their repair has been a constant, if inconspicuous, issue in many California cities for some time. The issue of repair responsibility has obvious legal implications: liability for the existence of a dangerous condition and the requirement to maintain an accessible sidewalk under the Americans with Disabilities Act and California

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[4] Loukaitou-Sideris and Renia Ehrenfeucht, *Vibrant Sidewalks in the United States: Reintegrating Walking and a Quintessential Social Realm* (Access Magazine Spring 2010); American Planning Association, *The Importance of Sidewalks* (The New Planner, Fall 2013)

disability access laws. The repair obligation also creates political difficulties - both for those cities which maintain an ordinance placing the repair obligation on property owners (and who consistently deal with surprised and disgruntled property owners) and those cities that have not enacted such an ordinance because of public opposition and which face a steady increase in damaged sidewalks and the potential liability arising from those sidewalks.

Los Angeles provides a singular example. In 1974, as a result of a grant of federal funds, Los Angeles passed an ordinance placing the obligation to repair sidewalks on the City. Since the federal funds dried up a few years later, the City has had difficulty enacting legislation to place the repair obligation back on the property owners. As of 2010, approximately 4,700 of the Los Angeles' 11,000 linear miles of sidewalk (approximately 43%) were in disrepair. The City estimated spending between 4 and 6 million dollars in liability claims and the cost estimate to repair the sidewalks was between 1.2 and 1.5 billion dollars.[5] Los Angeles has been considering repealing the 1974 ordinance to shift responsibility back to the homeowners. This effort has faced opposition from the homeowners and even unsuccessful efforts in the State Legislature to require a public vote prior to placing the obligation back on the homeowner. Sacramento also experimented with assuming the repair obligation. From 1943 through mid-1973, the City's policy was that property owners were responsible for the cost of all repairs except those caused by City street tree roots for which the City shared responsibility. In mid-1973, the City adopted a new policy making the City responsible for all sidewalk repairs. Not surprisingly, sidewalk repair requests increased substantially. In mid-1976, finding the existing policy unworkable, the City elected to adopt a policy making property owners responsible for all sidewalk repairs, including those repairs necessitated by damage caused by City street trees. Other cities have backed away from an ordinance placing the

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[5] Brasuell, *Where the Sidewalk Ends ... In a Tree Root-Related Lawsuit*, (Oct. 20, 2011) <http://la.curbed.com/archives/2011/10/where_the_sidewalk_endsin_a_tree_rootrelated_lawsuit.php>

obligation of sidewalk repair on the property owner after a public outcry. Those cities that do have sidewalk repair ordinances in place nonetheless face fairly consistent questions from the public as to the fairness and legality of asking a property owner to repair the "public" sidewalk.

California, like numerous states, has provisions allowing municipalities to impose a repair obligation for damaged sidewalks on adjacent property owners.[6] Pursuant to these provisions, virtually every major United States city has a sidewalk repair program that places a repair obligation on adjacent property owners to varying degrees. For example, New York, Philadelphia, Phoenix and Cincinnati make the adjoining property owners fully responsible for adjacent sidewalks. Atlanta also makes the adjacent property owner responsible and just faced a public backlash for sending out a number of repair notices prompted by disability access pressures.[7] Chicago operates a "shared cost" responsibility program by limiting the repair cost to a set price per square foot and subsidizing any remainder. Washington D.C. is responsible for repairing the sidewalks but "permanent repairs" may be subject to "available funding."

California's sidewalk repairs provisions are set forth in Streets and Highways Code sections 5600 *et seq*. In 1935, Assembly Bill 1194 amended section 31 of the Improvement Act of 1911 to provide for the repair and maintenance of sidewalks, curbing, parking strips and retaining walls by adjacent property owners. Although the legislative history of Assembly Bill 1194 is no longer available, some possible context for the measure may be gleaned from the time period of its passage. In his Inaugural Address of January 8, 1935, California Governor Merriam, in speaking of the economic upheavals of the Great Depression, said:

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[6] See *Schaefer v. Lenahan*, 63 Cal.App.2d 324 327-328 (1944), and cases cited therein. Research into the statutes referenced in the twenty cited cases (a small and completely unscientific sample) revealed that the earliest enactment date was 1856, the latest was 1937 and the average enactment date was 1903.

[7] http://archive.11alive.com/news/local/story.aspx?storyid=277146 (2/11/13)

> But as fondly as some may believe, and as earnestly as others may hope, government itself cannot indefinitely assume the responsibility for meeting all the demands of this depression and this emergency.
>
> * * *
>
> Of primary importance at this time, from the standpoint of an efficient administration of State functions, is the need for placing the government of California on a sound financial basis. This we must do without imposing intolerable taxes upon the people and without undertaking obligations not absolutely essential to the public service. As the first step in such a direction, we must adopt a program that will enable us to keep out expenditures below our income.

Assembly Member Lyons presented Assembly Bill 1194 a little over two weeks later. Though the Governor's message does not explicitly reference an effort to place the sidewalk repair obligation on adjacent property owners, it is consistent with the tone and content of the Inaugural Address.

The primary provision requiring a property owner to repair a defective sidewalk is Streets and Highways Code section 5610.

> §5610. Maintenance by lot owners
>
> The owners of lots or portions of lots fronting on any portion of a public street or place when that street or place is improved or if and when the area between the property line of the adjacent property and the street line is maintained as a park or parking strip, shall maintain any sidewalk in such condition that the sidewalk will not endanger persons or property and maintain it in a condition which will not interfere with the public

> convenience in the use of those works or areas save and except as to those conditions created or maintained in, upon, along, or in connection with such sidewalk by any person other than the owner, under and by virtue of any permit or right granted to him by law or by the city authorities in charge thereof, and such persons shall be under alike duty in relation thereto.

Pursuant to the authority of section 5610, the majority of cities in California have passed ordinances imposing the obligation for sidewalk repair on adjacent property owners. However, there is some diversity as to the extent of the obligation and how it is imposed. Some cities, like Sacramento, impose the entire repair cost on the property owner regardless of the cause of any damage or displacement. Many cities exempt damage caused by city trees from the repair obligation. Another option followed by many cities is a 50/50 sharing of repair costs.[8] Some cities, in addition to a general sidewalk repair program, have instituted a program which requires a defective sidewalk to be repaired upon the sale of the property.[9] This has the benefit of allowing the cost of repair to be recovered or paid as part of the price of the property. One means of imposing such a requirement is to require that the escrow documents include a certificate of compliance with the sidewalk ordinance. In addition, some cities require the sidewalk to be repaired as a condition of the issuance of a building permit above a set value.

One issue often overlooked is the secondary obligation of section 5610. After setting forth the obligation of adjacent property owners to maintain the sidewalk "in such condition that the sidewalk will not endanger persons or property . . . [or] interfere with the public convenience," section 5610 "except[s] . . . those conditions created or maintained in, upon,

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[8] This diversity appears to be present throughout the nation. A survey of 82 cities in 45 states found that 40 percent of the cities required property owners to pay the full cost of repairing sidewalks, 46 percent share the cost with property owners, and 13 percent pay the full cost of repair. Shoup, *Fixing Broken Sidewalks* (*Access* , No.36, Spring 2010) pp. 30-36

[9] Both Pasadena and Piedmont have such programs in place.

along, or in connection with such sidewalk by any person other than the owner, under and by virtue of any permit or right granted to him by law or by the city authorities in charge thereof , and such persons shall be under a like duty in relation thereto."

There are no reported cases interpreting or applying this language. The purpose appears to be to impose on utilities which maintain facilities (poles, guide wires, vaults, etc.) in or on the sidewalk, the same obligation as imposed on adjacent property owners. This is a somewhat different conceptual obligation than that imposed on adjacent property owners because the source of any defect or interference with the public convenience would be the utility facility, not the sidewalk itself. Potentially, the primary importance of this aspect of section 5610 would be with respect to accessibility issues. In many cities, utility entities maintain facilities, particularly poles, which reduce the sidewalk width below the required three feet of the California Building Code[10] and the four feet required by the ADA draft Public Right-of-Way Guidelines. [11]

B. Legal Issues Involving Sidewalk Maintenance Obligation

One issue that adjacent property owners charged for sidewalk repairs often raise is whether the sidewalk repair obligation of section 5610 applies where the sidewalk is displaced or damaged due to trees located in the public right of way.[12] Though no statistics exist, tree roots are

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[10] Title 24 2013 California Building Code, section 11B-403.5.1 **Clear Width** – ***"Exception 3***. The clear width for sidewalks and walks shall be 48 inches minimum. When, because of right of way restrictions, natural barriers or other exiting conditions, the enforcing agency determines that compliance with the 48-inch clear sidewalk width would create an unreasonable hardship, the clear width may be reduced to 36 inches."

[11] http://www.access-board.gov/guidelines-and-standards/streets-sidewalks/public-rights-of-way/proposed-rights-of-way-guidelines - R302.3 – "Continuous Width. Except as provided in R302.3.1, the continuous clear width of pedestrian access routes shall be 1.2 m (4.0 ft.) minimum, exclusive of the width of the curb."

[12] The issue is one of substantial importance to the City of Sacramento - one of many cities claiming the moniker: "City of Trees." According to some estimates, as of 2005, Sacramento had more trees per capita than any city except Paris. Jason Margolis, *California's Capital Sees Big Benefits in More Trees* (11/25/05) <http://www.npr.org/templates/story/story.php?storyId=5027514>.

undoubtedly the predominate cause of damage to sidewalks.[13] As noted above, many cities do not impose the sidewalk repair obligation on adjacent property owners where trees located in the right of way have damaged the sidewalk. Many do, including those with a 50/50 sharing program.

Though there is a great deal of visceral appeal to the argument that an adjacent property owner should not bear responsibility to repair a sidewalk caused by a tree in the right of way when the property owner has no control over the tree's roots, the statutory language and the reported cases do not support this position.[14]

Initially, it should be noted that section 5610 makes no distinction as to the cause of a damaged sidewalk in imposing a mandatory repair obligation on the adjacent property owner. Though not expressly addressing the issue, *Jones v. Deeter* (1984) 152 Cal.App.3d 798, supports the proposition that the adjacent property owner is responsible where damage is caused by a tree located in the right-of –way. In *Jones*, the plaintiff was injured when she tripped on a break in the sidewalk caused by a Magnolia tree located in the "parkway." [15] The plaintiff brought suit against both the property owner and the city. The plaintiff appealed a judgment for the property owner. The Court, in affirming the judgment, held that while the property owner had a duty of repair, even though the sidewalk had been damaged by a tree in the right-of-way (parkway), liability could not be imposed against the property owner on this basis. "Under section 5610 the abutting owner bears the duty to repair defects in the

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[13] Randup, McPherson and Costello, *A Review of Tree Root Conflicts with Sidewalk, Curbs and Roads*, (Kluwer Academic Publishers) 2003

[14] In *Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, at page 1492 footnote 2 , the court questioned the legality of imposing repair responsibility on property owners for damage caused by city trees and suggested the "City might wish to revisit its ordinance ..."

[15] The *Jones* court defined "parkway" as the area "between the sidewalk and the public street." Streets and Highways Code section 5600 defines "sidewalk" to include "a park or parking strip maintained in the area between the property line and the street line and also includes curbing, bulkheads, retaining walls or other works for the protection of any sidewalk or of any such park or parking strip." This portion of the right of way is also sometimes referred to a as "mow strip."

sidewalk, *regardless of whether he has created these defects*. It was felt, however, that it would be unfair for such an owner to be held liable to travelers injured as a result of sidewalk defects which were not of the owner's making." (*Id.* at 827, italics added.) Thus, the case highlights the absolute nature of the repair obligation (even when caused by trees located in the right-of-way) by contrasting it with the absence of any liability exposure unless the defect is caused by the owner. Putting aside the legal arguments, not all of the equities for imposing the cost of repair on adjacent property owners where damage is caused by a tree in the right of way are on the side of the property owner. While property owners may argue that they have no control over the direction of tree roots; neither does the city. In addition, city trees typically provide great benefits to homeowners and for many the presence of large trees is a factor in the purchase of their home. The trees are aesthetically pleasing and provide shade which cools the home and helps keep other vegetation alive. They also enhance the monetary value of the home. While obtaining these benefits, the homeowners do not incur the costs of maintaining the trees (such as watering, trimming or fertilizing) or suffer the potential of liability for injuries caused by the tree itself (falling limbs; low hanging branches; branches obscuring traffic signs or lights, etc.).

III

Sidewalk Liability

A. Tort Liability for Defective Sidewalks

Nine years after the passage of the predecessor to section 5610, the First Appellate District decided *Schaefer v. Lenahan* (1944) 63 Cal.App. 2d 324 . Florence Schaeffer stepped in a hole in the sidewalk in front of property owned by J.W. Lenahan. Lenahan was notified by the City and County of San Francisco to repair the sidewalk but did not do so. The common law rule was that, in the absence of statute, the owner or occupant of premises abutting a public street had no duty to repair the sidewalk and consequently, no liability to those injured as a result of a

defective sidewalk. Schaefer argued that the predecessor to section 5610 (as it existed in 1944) imposed a duty of repair and a violation of that duty gave rise to a cause of action for those injured by a defective sidewalk. The court rejected the argument, finding that the "obvious purpose of the statute was to provide a means of reimbursing the city for the cost of the repairs. To impose a wholly new duty upon the property owner in favor of third persons would require clear and unambiguous language." (*Id.* at p. 332.)

The limitation on liability to third parties for a defective sidewalk is commonly referred to as the "Sidewalk Accident Decisions Doctrine." (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 195 fn.6.) As noted by *Lenahan*, a liability obligation may be imposed on property owners by "clear and ambiguous language."

An ordinance with such language was approved by the Court in *Gonzales v. San Jose* (2004) 125 Cal.App.4th1127 . The San Jose ordinance approved by *Gonzales* provides that if an abutting property owner fails to maintain a sidewalk in a non-dangerous condition and any person suffers injuries as a result, the property owner is responsible to the person for the resulting damage and injury. (*Gonzales, supra,* 125 Cal.App.4th at p. 1134 citing San Jose Municipal Code §§ 14.16.220 and 14.16.2205.) However, it is important to note the limits of sidewalk liability ordinances. Because municipal liability for torts is a matter of statewide concern, such liability "may not be regulated by local ordinances inconsistent with state law as established by the Tort Claims Act." (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 899-900 citing *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 463.) This precludes a city from absolving itself of liability but does allow concurrent liability of adjacent property owners. Sidewalk liability ordinances "provide[] an additional level of responsibility for the maintenance of safe sidewalks on the owners whose property is adjacent to and abuts the

sidewalk." (*Gonzales, supra* at 1139.) "These owners are often in the best position to quickly identify and address potentially dangerous conditions that might occur on the sidewalks, as opposed to [the city]." (*Id.*) Moreover, as the *Gonzales* court noted, in order to fully protect its citizens, a city would have to have sidewalk inspectors circulating the city, day and night. (*Id.*)

B. Liability for Defective or Narrowed Sidewalks under the ADA and California Disability Access Laws:

In 2002, in *Barden v. City of Sacramento* (9th Cir. 2002) 292 F.3d 1073, the Ninth Circuit, relying in large part on statutory and regulatory interpretation by the United States Department of Justice, determined that sidewalks constituted "programs" under the ADA. While the matter was pending in the United States Supreme Court on a *writ of certiorari*, the parties settled the case and conveyed this information to the Court. *Certiorari* was subsequently denied leaving the Ninth Circuit opinion intact. The legal effect of the decision was that because maintaining sidewalks was a "program" under the ADA and its implementing regulations, sidewalks needed to be made maintained to be immediately accessible. According to the United States Solicitor General, interpreted the holding and the Title II regulations to "require only that the City's system of public sidewalks – when viewed "in its entirety" – be generally accessible to and usable by individuals with disabilities."[16]

Subsequent to the *Barden* decision, federal agencies, particularly the United States Access Board (the entity charged with creating public right of way guidelines) has taken the position in

[16] Brief for the United States as Amicus Curiae of the United States Solicitor General in *City of Sacramento, et al. v. Barden, et al.*(Filed May 2003).

numerous publications, that sidewalks are "facilities."[17] This is also the conclusion reached by the Fifth Circuit in *Frame v. Arlington*, 657 F.3d 215 (5th Cir. 2011 – cert denied 2012).

The drift from sidewalks as "programs" to sidewalks as "facilities" is notable. Under the ADA, "programs" must be made immediately accessible; conversely, "facilities" are subject to a new construction/alteration standard – in essence meaning that only newly constructed or altered sidewalks must be made "accessible." This is also the framework adopted by the ADA draft Public Right of Way Guidelines. Though cities within the Ninth Circuit remain subject to the *Barden* decision, the *Frame* decision, as well as the position taken by federal agencies, may form the basis for a reexamination of the *Barden* decision.

Of course, it is important to recognize that California law has required that new constructed sidewalks, whether constructed using private or public funds, have been required to be accessible since 1971. (Government Code section 4450 and Health and Safety Code section 19956.5). Presumably, this has somewhat softened the impact of the 2003 *Barden* holding.

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[17] *See e.g.* United States Access Board, Proposed Rights-of-way Guideline, Part 1900. "The accessibility guidelines for pedestrian facilities in the public right-of-way are set forth in the appendix to this part." < http://www.access-board.gov/guidelines-and-standards/streets-sidewalks/public-rights-of-way/proposed-rights-of-way-guidelines/part-1190-accessibility-guidelines-for-pedestrian-facilities-in-the-public-right-of-way>

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MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

THOMAS C. ZELENY
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JAN I. GOLDSMITH
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: January 28, 2011

TO: Mario Sierra, Director, Transportation and Storm Water Department

FROM: City Attorney

SUBJECT: Maintenance and Repair of City Sidewalks

INTRODUCTION

There are over 5,000 miles of public sidewalks in the City, some dating back to the early 1900's. Most property owners assume it is the City's responsibility to repair damaged sidewalks, so they often ignore the problem or call the City to fix it. San Diego Pedestrian Master Plan Report, § 8.2 (Dec. 2006). According to the Transportation and Storm Water Department, the City receives approximately 600-700 requests annually to repair sidewalks. Tree roots are the most common cause of sidewalk damage. The City is in the process of spending $9.5 million in bond funds towards repairing concrete sidewalks, gutters, curbs, and curb ramps, including approximately 3,800 locations of root-damaged sidewalks. The average cost to repair one section of root-damaged sidewalk is about $2,200.

A growing number of California cities have adopted or are considering amendments to their municipal codes regarding sidewalk maintenance and repair. Many of these cities have or had policies to either split the cost of maintenance or repair with owners of property fronting on sidewalks, or for the city to pay the entire cost. Faced with declining revenues, increased backlogs of deferred maintenance, and potential liability for trip and falls, cities are considering new local laws that emphasize the responsibility of private property owners to maintain and repair sidewalks.

QUESTIONS PRESENTED

1. Who is responsible for maintaining and repairing City sidewalks?

2. Who is liable for injuries to the public resulting from the failure to maintain or repair City sidewalks?

SHORT ANSWERS

1. Under state law, every property owner is responsible for maintaining and repairing the portion of the public sidewalk fronting his or her property. The City, however, has shifted much of that responsibility onto itself through Council Policy 200-12.

2. Generally, the City is liable for injuries to the public if the adjacent property owner's failure to maintain or repair the sidewalk creates a dangerous condition, the City has notice of the dangerous condition, and fails to make the sidewalk safe within a reasonable time. Even though the adjacent property owner is responsible for maintenance and repair, the property owner is generally not liable for injuries to the public. To encourage property owners to maintain sidewalks, the City could adopt an ordinance making property owners responsible for injuries to the public resulting from their failure to maintain and repair sidewalks as required by state law.

ANALYSIS

I. RESPONSIBILITY FOR SIDEWALK MAINTENANCE AND REPAIR

Since at least 1935, state law has required the owners of property fronting a public street to maintain sidewalks in a safe condition for use by members of the public.

> The owners of lots or portions of lots fronting on any portion of a public street or place when that street or place is improved or if and when the area between the property line of the adjacent property and the street line is maintained as a park or parking strip, shall maintain any sidewalk in such condition that the sidewalk will not endanger persons or property and maintain it in a condition which will not interfere with the public convenience in the use of those works or areas save and except as to those conditions created or maintained in, upon, along, or in connection with such sidewalk by any person other than the owner, under and by virtue of any permit or right granted to him by law or by the city authorities in charge thereof, and such persons shall be under a like duty in relation thereto.

Cal. Sts. & High. Code § 5610; *see* Stats. 1935, p. 2148, § 31.

This statute imposes a duty on property owners to maintain and repair sidewalks adjacent to their properties. *Jordan v. City of Sacramento*, 148 Cal. App. 4th 1487, 1490 (2007). The only exception in the statute is for unsafe conditions caused by someone other than the property owner, such as the City or a utility company lawfully using the sidewalk for its purposes. This Office has issued a number of opinions over the years all concluding maintenance of City sidewalks is the responsibility of the adjacent property owner. *See* 1952 Op. City Att'y 159 (Oct. 24, 1952); 1984 City Att'y MOL 208 (May 17, 1984); City Att'y MOL No. 88-89 (Oct. 12, 1988); 1993 City Att'y MOL 367 (Jun. 18, 1993).

State law provides a procedure by which the City can recover the cost of sidewalk repairs from property owners who fail to make the repairs themselves, but the procedure is impractical. The City must first notify the property owner of the need to make repairs by mail and by posting a notice on the property itself. Cal. Sts. & High. Code §§ 5612, 5613. If the property owner does not start repairs within two weeks, the City must repair the sidewalk itself and prepare a report for the City Council. Cal. Sts. & High. Code §§ 5615-5617. After a City Council meeting where the property owner is given an opportunity to protest, the City may place a lien on the property for the cost of repairs. Cal. Sts. & High. Code § 5618; City Att'y MOL No. 93-60 (June 18, 1993). Considering the hundreds of sidewalk repairs the City performs annually, the relatively small cost to repair one section of damaged sidewalk, and the time and cost involved with docketing an item for a City Council meeting and placing a lien on property, it is neither practical nor cost effective to pursue cost recovery from property owners for sidewalk repairs.

In 1975, the City adopted its current policy of paying for some or all of the cost to repair sidewalks. The City pays the entire cost to repair sidewalks under the following conditions:

1. Damage caused by parkway trees.
2. Damage due to grade subsidence.
3. Damage due to City utility cuts.
4. Sidewalk fronting City-owned property.
5. Sidewalk at street intersection (no abutting property).
6. Damage due to heat expansion.

Council Policy 200-12. To encourage property owners to repair sidewalks in other situations, the City's policy is to offer to pay for half the cost of repair. *Id.* The policy of paying half of the costs was adopted with the knowledge that the City was not necessarily obligated to share in these costs.[1] The City budgets $200,000 to $300,000 annually for this cost sharing program, but according to City staff demand for the program has declined in the last few years.

Council Policy 200-12 shifts much of the responsibility for sidewalk repairs onto the City which is the responsibility of private property owners under state law. For example, responsibility for sidewalks damaged by parkway trees depends on who historically cared for the trees. If the City planted the parkway trees and performed all necessary maintenance on them, then the City is responsible for repairing the sidewalk if it is damaged by roots from the parkway trees. *Jones v. Deeter*, 152 Cal. App. 3d 798, 805 (1984); 1984 City Att'y MOL 196. If the

[1] "There presently does not exist a written policy regarding sidewalk maintenance. Our uniform practice in this regard has basically been to make interim asphalt repairs to all unsafe conditions and if the original sidewalk was damaged by parkway tree roots or City utility cuts, City forces follow up with permanent concrete replacement. Unsafe conditions which exist because the original sidewalk has deteriorated due only to age, etc., are deemed to be the responsibility of the abutting property owner, in accordance with the State Street and Highway Code, Section 5610. This practice has resulted in numerous instances of aged sidewalk being patched with asphalt but not subsequently replaced with new concrete. In view of the interest in this subject, a draft policy statement on sidewalk maintenance has been prepared which will permit a 50% cost contribution by the City for the replacement of aged, deteriorated sidewalk. This policy was amended and approved by the Public Facilities and Recreation Committee on September 9, 1974." Docket Supporting Information (dated Oct. 16, 1974) for San Diego Resolution R-212590.

parkway trees were planted, trimmed, or cared for by the adjacent property owner, then the property owner is responsible for repairing the sidewalk. *Jones*, 152 Cal. App. 3d at 805. Under Council Policy 200-12, however, the City has assumed responsibility for repairing all sidewalks damaged by parkway trees, regardless of who planted or cared for the trees.

Under Streets and Highways Code section 5610 and the rule in *Jones*, the City is only responsible for repairing sidewalks adjacent to City-owned property and sidewalks that are damaged by City activities or parkway trees planted and maintained by the City. The City is not responsible for repairing sidewalks damaged by grade subsidence, heat expansion, parkway trees planted or maintained by others, or for paying half the cost of repairing sidewalks deteriorated over time. However, the City has assumed responsibility for these repairs and costs through Council Policy 200-12.

Though there is no mention in the records accompanying the adoption of Council Policy 200-12, it may have been adopted in part because of the availability of federal funding. The same year the City drafted its policy, the City of Los Angeles adopted an ordinance requiring it to repair all sidewalks damaged by tree roots. Los Angeles Municipal Code § 62.104(e). Los Angeles is now considering repealing this ordinance because it was originally funded with federal funds which have long since disappeared. City of Los Angeles Report on Sidewalk Repair Options (Apr. 8, 2010). According to the Los Angeles Times, roughly 4,600 miles of Los Angeles' 10,750 miles of sidewalks are in need of repairs, at a projected price of $1.2 billion. Martha Groves, *L.A. May Stop Footing Bills for Sidewalk and Driveway Repairs*, Los Angeles Times, May 9, 2010.

II. LIABILITY FOR FAILING TO MAINTAIN SIDEWALKS

A. Liability of the City

Generally, a public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition was created by its employee, or if the public entity had actual or constructive notice of the dangerous condition with sufficient time to have protected against it prior to when the injury occurred. Cal. Gov't Code § 835. The condition is dangerous if it creates a substantial risk of injury to users exercising due care and using the property in reasonably foreseeable manner. Cal. Gov't Code § 830(a); *Milligan v. Golden State Bridge Highway & Transportation District*, 120 Cal. App. 4th 1, 6-7 (2004). Minor, trivial or insignificant defects are not dangerous. Cal. Gov't Code § 830.2; *Stathoulis v. City of Montebello*, 164 Cal. App. 4th 559, 566 (2008).

Whether a damaged sidewalk is a dangerous condition depends on a number of factors. Courts will consider all the circumstances surrounding the accident, including the size of the defect, whether the sidewalk had broken pieces or jagged edges, and whether the defect was concealed by debris, grease, water or darkness. *Caloroso v. Hathaway*, 122 Cal. App. 4th 922, 927 (2004). Courts also recognize that not all sidewalk cracks are dangerous:

> [I]t is impossible for a city to maintain its sidewalks in perfect condition. Minor defects nearly always have to exist. The city is not an insurer of the public ways against all defects. If a defect will generally cause no harm when one uses the sidewalk with ordinary care, then the city is not to be held liable if, in fact, injury does arise from the defect.

Fielder v. City of Glendale, 71 Cal. App. 3d 719, 725-726 (1977). Changes in elevation of less than three-fourths of an inch may not be dangerous as a matter of law if no aggravating circumstances or facts exist. *Id.* at 725.

The City need not have actual knowledge of a dangerous condition of a sidewalk to be liable because having constructive notice is sufficient. The City has constructive notice if a dangerous condition is obvious and has existed for a sufficient period of time before the accident for City employees to have discovered and remedied the situation had they been operating under a reasonable plan of inspection. Cal. Gov't Code § 835.2; *The State of California v. Superior Court of San Mateo County*, 263 Cal. App. 2d 396, 400 (1968). The City cannot escape liability by not inspecting its sidewalks. *See Fackrell v. City of San Diego*, 26 Cal. 2d 196, 207 (1945). The length of time a dangerous sidewalk condition must exist before the City has constructive notice depends on the facts of the particular case. *Lorraine v. City of Los Angeles*, 55 Cal. App. 2d 27, 30-31 (1942). Constructive notice could be found if a dangerous condition existed for as little as four or five days. *See Wise v. City of Los Angeles*, 9 Cal. App. 2d 364, 366 (1935) [finding Los Angeles had both constructive and actual notice]. The City would probably not have constructive notice of a dangerous sidewalk condition created the night before an accident. *See Kotronakis v. City and County of San Francisco*, 192 Cal. App. 2d 624, 630 (1961).

The City may be liable even if the dangerous condition was caused by the adjacent property owner's failure to maintain or repair the sidewalk. The City has a duty to keep sidewalks safe, even from dangerous sidewalk conditions created by adjacent property owners. *Peters v. City and County of San Francisco*, 41 Cal. 2d 419, 429 (1953). If the City has actual or constructive notice of a dangerous condition, it has a duty to take reasonable steps to protect the public from the danger. *Constantinescu v. Conejo Valley Unified School District*, 16 Cal. App. 4th 1466, 1475 (1993). The negligence of others will not necessarily relieve the City of liability if the condition is dangerous. *Id.* at 1472.

B. Liability of Adjacent Property Owners

Property owners are generally not liable to the public for injuries that occur on sidewalks fronting their property. A property owner's duty under state law to maintain and repair sidewalks is a duty owed to the City, not to members of the public. *Schaefer v. Lenahan*, 63 Cal. App. 2d 324, 327 (1944). A property owner may be liable if he or she alters the sidewalk for the benefit of his or her property. *Sexton v. Brooks*, 39 Cal. 2d 153, 157 (1952). A property owner may also be liable if he or she negligently damages the sidewalk. *Moeller v. Fleming*, 136 Cal. App. 3d 241, 245 (1982). But failure to maintain and repair a sidewalk as required by California Streets and Highways Code section 5610 does not by itself give rise to liability of a property owner. *Williams v. Foster*, 216 Cal. App. 3d 510, 521 (1989).

The City could adopt an ordinance making property owners responsible to the public for injuries that occur from their failure to maintain and repair sidewalks. The City of San Jose was among the first to adopt such an ordinance:

> The property owner required by Section 14.16.2200 to maintain and repair the sidewalk area shall owe a duty to members of the public to keep and maintain the sidewalk area in a safe and nondangerous condition. If, as a result of the failure of any property owner to maintain the sidewalk area in a nondangerous condition as required by Section 14.16.2200, any person suffers injury or damage to person or property, the property owner shall be liable to such person for the resulting damages or injury.

San Jose Municipal Code § 14.16.2205.

San Jose's ordinance was upheld as constitutional and was not preempted by state law. *Gonzales v. City of San Jose*, 125 Cal. App. 4th 1127 (2004). The court in *Gonzales* highlighted the ordinance's important public purpose:

> [I]t provides an additional level of responsibility for the maintenance of safe sidewalks on the owners whose property is adjacent to and abuts the sidewalk. These owners are often in the best position to quickly identify and address potentially dangerous conditions that might occur on the sidewalks, as opposed to San Jose.
>
> Without section 14.16.2205, abutting landowners would have no incentive to maintain the sidewalks adjacent to their property in a safe condition.

Id. at 1139 (citation omitted).

If the City adopts such an ordinance, it would make property owners share liability with the City. *Id.* at 1138; *see* 1984 City Att'y MOL 196. An ordinance going further and requiring adjacent property owners to indemnify the City from all liability would probably be unconstitutional. *Jordan*, 148 Cal. App. 4th at 1491 n. 2.

The City may also require property owners to maintain the parkway trees and parkway areas fronting their property because the sidewalk includes the curb and a park or parking strip. Cal. Sts. & High. Code § 5600; *see Low v. City of Sacramento*, 7 Cal. App. 3d 826 (1970).

> This result [finding the city liable because it maintained the parkway trees] need have no great fiscal impact on the City of Long Beach. Should it tire of its responsibility to care for the magnolias at issue here, this task may be passed on to abutting owners under the procedure established by Streets and Highways Code, section 5600 et seq.

Jones, 152 Cal. App. 3d at 806; *but see Williams*, 216 Cal. App. 3d at 521 [criticizing *Jones* because the California Streets and Highways Code does not establish a "procedure" for "passing on" such responsibility to property owners]. The City of San Jose adopted such an ordinance, which also makes property owners liable to members of the public if their failure to maintain parkway trees or landscaping causes an injury. San Jose Municipal Code § 13.28.190. Such an ordinance would not necessarily give property owners the discretion to remove existing trees because the City may lawfully prevent removal of trees along City streets. *County of Santa Barbara v. More*, 175 Cal. 6, 12 (1917). Trimming or removing parkway trees requires a permit from the City issued at no cost. SDMC §§ 62.0604, 62.0615.

CONCLUSION

Whether the City should adopt an ordinance like San Jose's ordinance is a policy decision for the Mayor and City Council. Under long standing state law, every property owner is responsible for maintaining and repairing the portion of the public sidewalk fronting his or her property. The City, however, has shifted much of that responsibility onto itself through Council Policy 200-12. Private property owners currently have little incentive to repair damaged sidewalks because it is generally just the City that faces liability for injuries that occur from dangerous sidewalk conditions. The City could adopt an ordinance requiring property owners to maintain and repair sidewalks fronting their property, and make them share liability with the City for injuries to the public caused by their failure to do so. This Office stands ready to draft an ordinance for consideration if we are so directed.

JAN I. GOLDSMITH, City Attorney

By 
Thomas C. Zeleny
Chief Deputy City Attorney

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