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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 liabilityfor 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 liabilityfor 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

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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 responsibilityto 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 responsibilityof 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

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[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 FootingBills 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 liabilitywith 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 liabilitywould 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

/s/ *Thomas C. Zeleny*

By Thomas C. Zeleny
Chief Deputy City Attorney

TCZ:mb
ML-2011-01