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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 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.

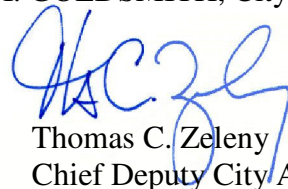
Jones, 152 Cal. App. 3d at 806; *but see Williams*, 216 Cal. App. 3d at 521 [criticizing *Jones* because the California Streets and Highways Code does not establish a “procedure” for “passing on” such responsibility to property owners]. The City of San Jose adopted such an ordinance, which also makes 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.

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By



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