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March 12, 2024

Willows City Council
RE: Presentation on Managing Sidewalk Liability

Mayor Hansen and Council Members:

I respectfully request that the Mayor or the City Clerk read this cover letter into the record and that it, along with the attached documents, become included with the minutes of tonight's meeting.

In May of 2014, Gerald C. Hicks, the Deputy City Attorney for Sacramento, composed a legal opinion for the League of California Cities titled, *It's Your Sidewalk! Sidewalk Repair and Liability*. In reference to California's sidewalk repairs provisions set forth in Streets and Highways Code Section 5610, Mr. Hicks wrote:

"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...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, in speaking of the economic upheavals of the Great Depression [the then California Governor] said:"

> ...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* [sic] *expenditures below our income.* (Councilman Sprague's emphasis added)

Mr. Hicks's critique also says that the State Assembly passed a Bill two weeks later. I'll quote Mr. Hicks: "Though the Governor's [1935] 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." However, Mr. Hicks's claim that this Code Section requires a property owner to repair a sidewalk *is not accurate.*

Code Section 5610 says: *The owners of lots* ...fronting on any portion of a public street ...*shall maintain any sidewalk in such condition that the sidewalk will not endanger persons...and maintain it in a condition which will not interfere with the public convenience...* But this particular Code Section **does not** contain the word "repair." (Councilman Sprague's emphasis)

Mr. Hicks rightly said that the legislative history of that 1935 Assembly Bill is no longer available. However, I believe his conjecture that the "primary provision" in Code Section 5610 requires "a property owner to repair a defective sidewalk," his inference of the "possible context of the [1935] measure," and "tone and content" of the 1935 Governor's speech are concocted statements intended to urge a certain decision by ill-informed and poorly advised public officials.

Moreover, I seriously doubt that in 1935 the "legislative intent" was to shift the responsibility and liability of already damaged and deteriorated city sidewalks onto the adjacent property owners.

Rather, I believe in 1935, that because of State budget constraints following the Depression, the State Assembly's legislative intent was to ensure that the State (or a city) did not incur the cost of damages caused by adverse actions or negligence of the property owners bordering government-owned sidewalks.

Furthermore, I believe my assessment is supported in part by the attached opinion by the law firm of Stimmel, Stimmel and Roeser. Yesterday morning, Mr. Steve Roeser, a partner of the firm, gave me permission to reproduce their commentary on this matter for your consideration. I have highlighted their salient points for your review.

Their most noteworthy comment refers to the City of San Jose's lawsuit. The Court of Appeal emphasized, "...the ordinance *did not serve to absolve the city of liability for dangerous conditions on city-owned sidewalks* when the city created the dangerous condition, [and when the city] *knew of its existence and failed to remedy it.* (Councilman Sprague's emphasis)

These are three other significant observations by this law firm that merit emphasis:

1. A property owner may be **liable if he or she alters the sidewalk** for the benefit of the owner's property.

2. A property owner may also be **liable if he or she negligently damages** the sidewalk.

3. An abutting owner can be found **liable for negligence in creating a special hazard** on the sidewalk.

Notice that the word "maintain" –***not repair***– is repeated within Code Section 5610 and this law firm's commentary. The word "maintain" simply means to keep something, like a sidewalk, in a good condition.

"Maintain" does not mean *repairing* pre-existing conditions or prior damages to sidewalks, over which the current property owner didn't have control or responsibility. The present damages to Willows city sidewalks have been caused by city trees, expansive soils, inferior engineering designs, and substandard construction methods—*not none of which are the fault of the property owners.*

I would ask the Council to also consider a letter written by then citizen Richard Thomas on May 11, 2021 in regard to this subject. His point, "Over burden on the citizens and business community is a deterrent to growth," and especially his summary, are spot on as they relate to this issue.

Respectfully,

Law Offices of
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Sidewalk Obligations and Liabilities in California

Introduction: It comes as a surprise to many property owners in California when they discover that under State law the public sidewalks next to their property are their responsibility to maintain in safe condition.

Liability between municipalities and landowners for condition of the sidewalk and for injuries sustained by those using the sidewalk due to defective sidewalk conditions is the subject of lawsuits and statutory provisions. In California, municipalities and counties usually own the sidewalks next to private property, but California state law long enacted states that the landowners are responsible for maintaining the sidewalk fronting their property in a safe and usable manner.

According to Streets and Highways Code 5610:

"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 parking or a 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..."

This article shall discuss the ramifications of this law in California.

The Basic Law is The Cost of Repair:

California state law provides that a municipality may assess landowners for the cost the municipality incurs to maintain sidewalks if the landowner fails to perform his/her duty. Note that this is a choice available to the municipality and not all so assess.

The Issue of Liability:

The law is clear: the property owner must maintain the sidewalks in a safe condition. What happens if the owner does not and there is injury to a third party?

Note that the municipality is required to pass local law if it wants to imposed liability for injuries upon the owner. Although state law provides that abutting landowners are responsible for sidewalk maintenance and may be assessed the cost of repairs, they may not be liable for injuries or damages to third persons who use the sidewalk, unless the municipality enacts an ordinance that addresses liability. Williams v. Foster (1989).

The Williams case occurred after the plaintiff, Dennis Williams, tripped on a raised portion of the sidewalk in the City of San Jose, and thereafter sued the City. In its defense, San Jose argued that under Section 5610, the owner of the property fronting the sidewalk in question was solely liable. Rejecting this contention, the court held that Foster (landowner) owed no legal duty at all to the injured plaintiff.

In reaching the Williams decision, the court held that imposing upon abutting owners a duty of care in favor of third persons "would require clear and unambiguous language," which according to the court, is not contained in 5610. Notably, the court went on to state that the City, "could have enacted an ordinance which expressly made abutting owners liable to members of the public for failure to maintain the sidewalk but did not."

Following the Williams decision, the City of San Jose amended its sidewalk ordinance to include language similar to that suggested by the Williams Court. It is vital for property owners to check the local ordinance to see their level of liability.

In 2001, after adopting a sidewalk liability ordinance that addressed the issues raised in Williams, San Jose was sued by Joanne Gonzalez, who alleged she was injured when she tripped and fell over a raised portion on a public sidewalk. Gonzalez also sued Charles Huang, who owned the property adjacent to the sidewalk on which she fell. Huang was sued on the theory that he had a common law duty to the plaintiff to maintain the sidewalk in a non-dangerous condition, as well as a duty under the San Jose Municipal Code.

The City of San Jose argued that the adjacent property owner was partially liable because he had not maintained the sidewalk as required by the local ordinance. Huang filed a motion for summary judgment arguing in part that the sidewalk liability ordinance enacted by the City of San Jose was unconstitutional. The trial court agreed with Huang and granted his Motion for Summary Judgment. Both Gonzalez and the City of San Jose appealed.

The case proceeded to the Court of Appeal which in 2004 ruled in San Jose's favor. (Gonzales v. City of San Jose (2004.) The primary issue before the court was whether the state law preempted the local measure. The court found that the ordinance was constitutional and was not preempted by state law.

In its holding, the Gonzales court noted that cities are empowered under the California Constitution to enact ordinances and regulations deemed necessary to protect the public health, safety, and welfare, and that the City of San Jose's ordinance was a permissible exercise of that power. Without such an ordinance, the court noted, landowners would have no incentive to maintain adjacent sidewalks in a safe manner.

The court emphasized that the ordinance did not serve to absolve the city of liability for dangerous conditions on city-owned sidewalks when the city created the dangerous condition, knew of its existence and failed to remedy it.

Since the Gonzales ruling, many municipalities have enacted liability shifting ordinances.

Check your local law!

Note that even in jurisdictions which have enacted liability shifting ordinances, one must determine the cause of the defective sidewalk condition. In some ordinances, liability does not shift to the landowner if the landowner did not cause the defective condition to exist.

The city, and sometimes additionally the adjacent property owner, may be generally liable for negligence in causing a dangerous and defective public sidewalk that causes personal injuries. Others might, and times, also be liable.

Consider, for example, a builder or hired contractor negligently repairs a sidewalk resulting in injuries or a landscape architect negligently plants a tree that distorts the sidewalk. Those are parties that may also be brought into the action.

And if the government is at fault, it remains liable despite the duty to maintain imposed upon the landowner. A public entity (typically a city or municipality) is liable for foreseeable injuries caused by a dangerous condition on the public sidewalk negligently (unreasonably) created their employee. See Government Code Section 830, 835(a) and 835.4.

Further, a public entity is liable for foreseeable injuries caused by a dangerous condition on the public sidewalk negligently (unreasonably) created by an adjacent/abutting landowner or other third party *if the public entity had actual or constructive notice (knew or should have known) of the dangerous condition for a sufficient time before the injury to have taken measures to protect against the danger.*

See Government Code Section 830, 835(b), 835.2 and 835.4. Peters v. City and County of San Francisco (1953) 41 Cal. 2d 419, 429. A "dangerous condition" is one that creates a substantial risk of injury when the property is used with due care in a reasonably foreseeable manner. Government Code Section 830(a). Minor, trivial or insignificant defects are not deemed as dangerous. Government Code Section 830(a) and 830.2.

Note that the owner is liable for conditions of danger created by the owner even if on the public sidewalk. "An abutting owner has always had a duty to refrain from affirmative conduct which would render the sidewalk itself or use of the sidewalk dangerous to the public."

See (Selger v. Steven Brothers, Inc. (1990) 222 Cal.App.3d 1585, 1592, 1594; see also Swanberg v. O'Mectin (1984) 157 Cal.App.3d 325, 330; Lompoc Unified School Dist. v. Superior Court (1993) 20 Cal.App.4th 1688, 1693; Peters v. City & County of San Francisco (1953) 41 Cal.2d 419, 423.

But if there is no negligence on the part of the owner and no local ordinance imposing a duty to repair, California Streets and Highways Code § 5610 does not impose on owners tort liability or a duty to indemnify municipalities for pedestrian injuries, except where a property owner created the defect or exercised dominion or control over the abutting sidewalk.

See Williams v. Foster (1989) 216 Cal.App.3d 510, 516-517 & fn. 8; Schaefer v. Lenahan (1944) 63 Cal.App.324, 327-328, 331-332; see Gonzales v. City of San Jose (2004) 125 Cal.App.4th 1127, 1137.

The lack of tort liability to property owners for injuries to sidewalk travelers unless the injuries are caused by the property owner is often referred to as the "Sidewalk Accident Decisions Doctrine." Contreras v. Anderson (1997) 59 Cal.App.4th 188, 195, fn. 6.

But:

1. A property owner may be liable if he or she alters the sidewalk for the benefit of the owner's property.
   See Sexton v. Brooks (1952) 39 Cal. 2d 153, 157.

2. A property owner may also be liable if he or she negligently damages the sidewalk.

   See Moeller v. Fleming (1982) 136 Cal. App. 3d 241, 245 (break in sidewalk caused by the property owner's tree); Alpert v. Villa Romano Homeowners Association (2000) 81 Cal.App.4th 1320, 1335-1336 (issue of liability created where owner planted plants and trees on both sides of the sidewalk allegedly causing a sidewalk trip hazard that injured a person).

3. An abutting owner can be found liable for negligence in creating a special hazard on the sidewalk.

See Kopfinger v. Grand Central Pub. Market (1964) 60 Cal. 2d 852, 857 (Meat product left on the sidewalk for deliveries can create liability to the market even if caused by third persons because it was connected with the business). Lee v. Ashizawa (1964) 60 Cal. 2d 862, 865 (Oil on sidewalk from owner's business activities creates a triable issue for the jury).

Compare Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 577 (Property owner was not liable for oil on sidewalk caused by vandals after close of business).

Defenses to Sidewalk Injuries:

In some locales, the doctrine of governmental immunity from civil liability often shields municipal bodies from liability to sidewalk injury claims. Governmental immunity is not an "all or nothing" proposition. Some states, such as Michigan, have carved out exceptions to governmental immunity when a sidewalk defect is greater than two inches in size. Again, local ordinances must be reviewed to determine if governmental immunity has been sought.

Another common defense to sidewalk injuries is the "open and obvious doctrine," which pins some amount of liability on the injured person if the sidewalk hazard was open, obvious, and easily avoided. Open and obvious law changes from state to state and is constantly in flux. In California, with comparative negligence as a doctrine, the liability is divided among all those who were at fault and would reduce the liability of the owner if the injured party was found negligent.

Common Sense:

If you own property in California, you should take the time to learn the applicable municipal ordinances that possibly impose liability upon you for the condition of the sidewalk. But whether such liability is imposed or not, note that you are required to keep it in good repair. That is a duty every bit as important as making sure your own home or commercial property is in good condition. Ultimately, this will improve the property value as well, so this is one of those instances where your own self-interest and that of the local municipality correspond.

Where it gets complicated is if local property owners are not taking their own responsibility seriously and the aesthetics of the neighborhood as well as safety of the sidewalks suffer due to the irresponsibility of one or two owners on a block. At times, they simply do not have adequate resources to maintain the sidewalk. It is possible they are unaware of the legal duty imposed.

In such instances, communication with neighbors is a good first step. If that does not work, and the condition is dangerous, contacting the municipality so they are on notice will at least force them to remedy the situation or face their own liability.

What one cannot do is pretend that this is not a duty imposed. Sooner or later, a broken sidewalk will create a problem for the owner of property and the sooner it is handled, the better.

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COPY

MAY 11, 2021
CITY OF WILLOWS
MAYOR DOMENIGHINI AND COUNCIL MEMBERS

RE: SIDEWALKS - PROPOSED ORDINANCE FOR OWNER MAINTENANCE.

COUNCIL MEMBERS:

SIMPLY PUT - NO.

REASONS:

1. IS IT LEGAL TO REQUIRE AN INDIVIDUAL OR BUSINESS TO MAINTAIN, REPAIR OR REPLACE IMPROVEMENTS ON LAND THEY DO NOT OWN?
2. IS IT LEGAL TO ATTEMPT TO PUT LIABILITY ONTO AN INDIVIDUAL OR BUSINESS FOR INJURIES ON PROPERTY THEY DO NOT OWN?
3. FAIRNESS, WOULD NOT THE CITY FIRST REPAIR, REPLACE ALL SUB-STANDARD SIDEWALKS SO AS TO NOT OVER BURDEN A FEW LAND OWNERS WHOSE SIDEWALKS ARE IN NEED?

CONTINUED

4. OVER BURDEN ON THE CITIZENS AND BUSINESS COMMUNITY IS A DETERRENT TO GROWTH.

IN SUMMARY, THE CITY IS AND HAS BEEN IN FINANCIAL difficulty for MANY YEARS. I SEE THIS AS A FAILURE OF THE LEADERSHIP to PURSUE REVENUE GENERATING BUSINESS AND COMMERCIAL ECONOMIC DEVELOPMENT. RETAIL SALES TAX LEAKAGE TO NEIGHBORING COMMUNITIES IS HUGE. I WOULD ENCOURAGE YOUR EFFORTS TO BOLSTER SALES TAX REVENUE GENERATING BUSINESSES, AND LESS ON STIFLING GROWTH WITH EXCESS REGULATION AND FEES/TAXATION, SUCH AS THIS PROPOSED ORDINANCE.

RESPECTFULLY

RICHARD M. THOMAS
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