



But It's Your Sidewalk! Sidewalk Repair and Liability

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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.

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

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

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:

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.

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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,

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 Code¹⁰ 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

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 existing 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

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 as a "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.4th 1127. 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.

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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