

**PUBLIC ENTITY
RISK MANAGEMENT AUTHORITY
BOARD OF DIRECTORS' MEETING
March 2, 2006**

ACTION / DISCUSSION ITEMS

AGENDA ITEM 7E: *Model Sidewalk Ordinance*

PREPARED BY: Scott Ellerbrock
 General Manager

RECOMMENDATION:

Receive and file.

FISCAL IMPLICATIONS:

Not applicable for this report.

BACKGROUND & OVERVIEW:

The January 2006 PERMA Pulse newsletter included an article by Dennis Molloy on the recently tested City of San Jose ordinance regarding maintenance and repair of sidewalks.

The article included the San Jose ordinance as a model; however, Board Counsel recommends the model ordinance also include an indemnity provision for consideration. Attached is the model sidewalk ordinance with the fictitious 14.16.2206 for indemnity, which could be given any number or designation, but must relate to the numbers or designation of the other ordinances.

Streets and Highway Code Section 5610 establishes a property owner's duty to a city to maintain the abutting sidewalk in a condition that will not endanger persons or property and a duty to maintain the sidewalk in a condition that will not interfere with public use.

However, the California Legislature has not specifically imposed upon property owners a duty of care to third parties regarding the condition of abutting sidewalks. Therefore, cities in California, consistent with their police power and case law, are free to adopt local ordinances creating such a duty of care. The courts have determined that these types of ordinances do not conflict with the California Tort Claims Act because they do not attempt to shift liability from the cities to the abutting property owner.

The ordinance provides strong incentive for property owners to make sure their sidewalks are

in good condition and repair any defects, because they would be liable if someone is injured.

In 1941, the State of California enacted Streets and Highways Code Section 5610, which states in part:

"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 or property and maintain it in a condition which will not interfere with the public convenience..."

Section 5610 describes a process whereby the designated Street Superintendent may notify a property owner to repair a damaged sidewalk. If repairs are not made, the Streets Superintendent can perform the work and, after a hearing held before City Council, a lien may be placed on the property for the cost of the repairs. Section 5610 is valuable insofar as it provides a financing mechanism for the repair and maintenance of damaged sidewalk areas.

However, Section 5610 does not change the common law as it pertains to liability for personal injuries occurring on a sidewalk. For many years, cities throughout California assumed the section allowed cities to transfer liability to property owners. It does not. It imposes a duty on the part of the property owner to the city to maintain a sidewalk. It does not impose liability on the property owner should someone be injured on that sidewalk. The City of San Jose's experience changed that incorrect assumption.

Through a series of court cases, the City of San Jose learned that liability cannot be imposed on property owners via Streets and Highways Code Section 5610. Liability can however be imposed through adoption of a properly worded ordinance. The City of San Jose therefore designed, and in April 1990 adopted, a sidewalk repair and maintenance ordinance.

The ordinance expressly provides that property owners owe a duty of care to members of the public to keep and maintain sidewalk areas in a safe, non-dangerous condition. In December 2004, the California Appellate Sixth District Court upheld the validity of San Jose's ordinance finding in part that the imposition of a duty of care on an abutting landowner serves an important public purpose by providing property owners with an incentive to maintain the sidewalks adjacent to their property in a safe condition. The court's ruling that the ordinance is valid - in effect, makes it an even stronger tool for use by cities throughout California.

The court further held that San Jose's ordinance does not absolve the city of responsibility for dangerous conditions on a public sidewalk, rather, it provides an additional level of responsibility for the maintenance of safe sidewalks on the owner whose property is adjacent to and abuts the sidewalk. If, for example, a city were to receive actual notice, or in some instances constructive notice, of a truly dangerous condition and do nothing about it, then the city could still be deemed liable for a portion of the overall liability assessed. Nevertheless, the establishment of this ordinance does accomplish the following:

- The creation of the potential liability provides an additional incentive for property

owners to repair sidewalk areas. Property owners are in the best position to assess the condition of sidewalks on a day-to-day basis. Paying the relatively low cost of sidewalk repair today suddenly appears attractive when compared to the costs which might be presented by an injured pedestrian tomorrow.

- The existence of such an ordinance virtually ensures participation of the adjoining property owner's insurance carrier towards settlement of trip and fall claims.

For the foregoing reasons, your agency may want to consider adoption of a similar ordinance.

REFERENCE MATERIALS ATTACHED:

- Model Sidewalk Ordinance
- PERMA Pulse Newsletter Article

MODEL SIDEWALK ORDINANCE

14.16.2200 Maintenance and repair of sidewalks.

<p>This section of the Streets and Highways Code begins at Section 5600. It provides an alternate procedure for performing maintenance and repair (not initial construction) of sidewalks. (Sections 5601 and 5602.) It requires adjacent property owners to maintain sidewalks, with provisions for notice by the City, and repair by the City if not done by the property owner, and collection of the cost of repairs.</p>	<p>A. Anything in this chapter to the contrary notwithstanding, the maintenance and repair of sidewalk areas and the making, confirming and collecting of assessments for the cost and expenses of said maintenance and repair may be done and the proceedings therefore may be had and taken in accordance with this part and the procedure therefore provided in Chapter 22 of Division 7, Part 3, of the Streets and Highways Code of the state as the same is now in effect or may hereafter be amended. In the event of any conflict between the provisions of said Chapter 22 of Division 7, Part 3, of the Streets and Highways Code of the state and this part, the provisions of this part shall control.</p>
<p>Describes property owners' maintenance responsibilities.</p>	<p>B. The owners of lots or portions of lots adjacent to or fronting on any portion of a sidewalk area between the property line of the lots and the street line, including parking strips, sidewalks, curbs and gutters, and persons in possession of such lots by virtue of any permit or right shall repair and maintain such sidewalk areas and pay the costs and expenses therefore, including a charge for the City's cost of inspection and administration whenever the City awards a contract for such maintenance and repair and including the costs of collection of assessments for the costs of maintenance and repair and under subsection A of this section or handling of any lien placed on the property due to failure of the property owner to promptly pay such assessments.</p>
<p>Defines maintenance and repair.</p>	<p>C. For the purposes of this part, maintenance and repair of sidewalk area shall include, but not be limited to, maintenance and repair of surfaces including grinding, removal and replacement of sidewalks, repair and maintenance of curb and gutters,</p>

	removal and filling or replacement of parking strips, removal of weeds and/or debris, supervision and maintenance of signs, tree root pruning and installing root barriers, trimming of shrubs and/or ground cover and trimming shrubs and/or ground cover within the area between the property line of the adjacent property and the street pavement line, including parking strips and curbs, so that the sidewalk area will remain in a condition that is not dangerous to property or to persons using the sidewalk in a reasonable manner and will be in a condition which will not interfere with the public convenience in the use of said sidewalk areas.
Allows 2-week commencement period to be extended by 90 days.	D. Notwithstanding the provisions of Section 5614 of the state Streets and Highways Code, the director of streets and parks may in his or her discretion, and for sufficient causes, extend the period within which required maintenance and repair of sidewalk areas must commence by a period of not to exceed ninety days from the time the notice referred to in said Section 5614 is given.

14.16.2205 Liability for injuries to public.

Makes the property owners liable to injured persons if the sidewalk is not maintained in a safe condition.	The property owner(s) 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(s) shall be liable to such person for the resulting damages or injury.
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14.16.2206 Indemnity.

<p>Extends property owners duty to defend and indemnify City against claims by injured parties. This shifts much of the risk of loss to the property owners and their insurers.</p>	<p><i>If it is claimed that the City is liable for injury or damage to person or property because of an unsafe or dangerous condition of a sidewalk area, the property owner(s) required by Section 14.16.2200 to maintain and repair that sidewalk area shall owe 100% indemnity and defense to the City in regards to such claims, unless it is proved that the City was actively negligent, in which case the property owner's duty to defend and indemnify the City shall be apportioned equitably. Nothing in this section shall reduce the liability of the property owner under Section 14.16.2205 or reduce the City's liability to an injured person.</i></p>
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CLAIMS CORNER

By: Dennis Molloy

Sidewalk Duty - Public Entity & Adjacent Property Owner Liability

In Gonzales v. City of San Jose (2004) 125 CA4 1127, the 6th Appellate Division considered whether an Ordinance enacted to impose a duty on adjacent landowners to pedestrians injured as a result of dangerous conditions on public sidewalks was preempted or conflicted by any similar state law applicable to the public entity.

In May 2000, Joanne Gonzales, was injured in a fall over a rise in a sidewalk on 7th Street in San Jose, adjacent to a commercial building located at 301 East Santa Clara Street. In May 2001, Gonzales filed a complaint against the City of San Jose and the owner of the commercial building, Charles Huang. The complaint alleged that San Jose "owned the public property on which a dangerous condition existed," and that Huang "negligently owned, maintained, managed and operated" the sidewalk.

Huang filed a motion for summary judgment, asserting that he had no liability because the injuries claimed by Gonzales did not occur on his property, but on property owned by San Jose, and thus there was no duty owed by him to Gonzales. In addition, he claimed that San Jose Municipal Code § 14.16.2205, which makes a landowner liable to third parties who are injured as a result of dangerous conditions on city owned sidewalks, was unconstitutional.

The trial court found for Huang, ruling that San Jose Municipal Code § 14.16.2205 was unconstitutional, because only the State of California has authority to make laws establishing

liability for torts occurring on public property (California Tort Claims Act).

Gonzales and the City of San Jose appealed. The issues presented on appeal were whether state law preempts an ordinance (here San Jose Municipal Code § 14.16.2205), enacted to mandate that an adjacent landowner may be liable to third parties that are injured on a defective city owned sidewalk; and whether, even in the absence of a municipal code section mandating liability, an adjacent landowner has a common law duty to the third party who may be injured on a city owned sidewalk.

On the question of preemption, the court held that San Jose Municipal Code § 14.16.2205, and its imposition of a duty of care on an abutting landowner, does not conflict with the state law imposition of liability on owners of public property for dangerous conditions as set forth within the Tort Claims Act and does not serve to absolve San Jose of liability; nor are any of the several criteria for implied preemptive intent present in either the Act or the enactment of the ordinance. Moreover, the ordinance is silent on the liability of adjacent property owners to San Jose, or San Jose's liability to injured pedestrians, only addressing the property owner's liability to third persons. Hence, the San Jose City Ordinance is not preempted by state law, and, in fact, serves an important public purpose in providing an additional level of responsibility for the maintenance of safe sidewalks on the owners whose property is adjacent to and abuts the sidewalk.

The court further concluded that since it found that San Jose Municipal Code § 14.16.2205 was constitutional, and imposed a duty to third persons using the public sidewalk, the question of common law duty by adjacent property owners need not be addressed. However, the court pointed out that since the enactment does not alter San Jose's potential liability under the Tort Claims Act, that under the two laws both San Jose and the property owner could be held liable to a plaintiff injured as a result of a dangerous condition on a city owned sidewalk, Low v. City of

(Continued on page 12)

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Sacramento (1970) 7 Cal.App.3d 826, 833. [city and private landowner may be joint or concurrent tortfeasors].

This case is important to establishing that a city may enact an ordinance imposing a duty on an adjacent landowner to third parties, to maintain sidewalks in clean, safe condition, so long as the ordinance does not effectively abrogate the city's own liability and thus create a conflict with existing state law.

Following is the City of San Jose's ordinance which was the subject of the appellate review, and which survived the constitutional challenge:

SCHEDULE OF PERMA MEETINGS

Executive Committee

February 2, 2006
March 2, 2006
April 6, 2006
May 4, 2006
June 1, 2006
July 6, 2006
September 7, 2006
October 5, 2006
November 2, 2006
December 7, 2006

Board of Directors

March 2, 2006
June 1, 2006
September 7, 2006
December 7, 2006

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14.16.2200 Maintenance and repair of sidewalks.

- A. Anything in this chapter to the contrary notwithstanding, the maintenance and repair of sidewalk areas and the making, confirming and collecting of assessments for the cost and expenses of said maintenance and repair may be done and the proceedings therefore may be had and taken in accordance with this part and the procedure therefore provided in Chapter 22 of Division 7, Part 3, of the Streets and Highways Code of the state as the same is now in effect or may hereafter be amended. In the event of any conflict between the provisions of said Chapter 22 of Division 7, Part 3, of the Streets and Highways Code of the state and this Part 17, the provisions of Part 17 shall control.
- B. The owners of lots or portions of lots adjacent to or fronting on any portion of a sidewalk area between the property line of the lots and the street line, including parking strips, sidewalks, curbs and gutters, and persons in possession of such lots by virtue of any permit or right shall repair and maintain such sidewalk areas and pay the costs and expenses therefore, including a charge for the city of San Jose's cost of inspection and administration whenever the city awards a contract for such maintenance and repair and including the costs of collection of assessments for the costs of maintenance and repair under subsection A of this section or handling of any lien placed on the property due to failure of the property owner to promptly pay such assessments.
- C. For the purposes of this part, maintenance and repair of sidewalk area shall include, but not be limited to, maintenance and repair of surfaces including grinding, removal and replacement of sidewalks, repair and maintenance of curb and gutters, removal and filling or replacement of parking strips, removal of weeds and/or debris, supervision and maintenance of signs allowed pursuant to Section 23.04.340 and Section 23.04.830, tree root pruning and installing root barriers, trimming of shrubs and/or ground cover and trimming shrubs within the area between the property line of the adjacent property and the street pavement line, including parking strips and curbs, so that the sidewalk area will remain in a condition that is not dangerous to property or to persons using the sidewalk in a reasonable manner and will be in a condition which will not interfere with the public convenience in the use of said sidewalk areas.
- D. Notwithstanding the provisions of Section 5614 of the state Streets and Highways Code, the director of streets and parks may in his or her discretion, and for sufficient cause, extend the period within which required maintenance and repair of sidewalk areas must commence by a period of not to exceed ninety days from the time the notice referred to in said Section 5614 is given.

14.16.2205 Liability for injuries to public.

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 14.16.220, 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.