Can a City force me to fix their public sidewalk?

Written by
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I have been asked this question so many times over the past 20 years, I have lost count.
Next to getting sued by an ADA activist, receiving a "Fix It" ticket from the City to repair or replace all driveway aprons and sections of public sidewalk adjacent to your property is the worst.

Questions I've been asked (and you may be asking right now)

— "But the City owns and controls the public way … why do I have to pay for it?"
— "The City planted those trees 25 years ago, and now the roots have lifted and cracked the sidewalk. Why should I be on the hook for the repairs?"
—"The City just told me that they won't allow any new permits to be issued on my property until I fix my driveway aprons and sidewalks! Can they do that?"

Does this sound familiar? If it does, read on!

Most of the cases I help clients with are liability-related due to a trip and fall caused by a lifted and/or damaged sidewalk. But over the last few years a growing number of cities and counties are requiring more and more commercial property owners to bring the sidewalk and aprons that surround their properties into compliance with ADA requirements regardless of any lifted, cracked or damaged areas being present.

What are cities looking for when it comes to sidewalks and aprons?

There are two things a city is looking for.

1) Is the public sidewalk and apron damaged, cracked or lifted thereby causing a hazard?

2) Is the public sidewalk and apron non-compliant with current ADA/ State accessibility requirements for slope and width?

The Streets and Highway Code section 5610 gives each city or county the right to implement ordinances that require private property owners either pay in full or share in the costs to repair portions or all of the public sidewalk and driveway aprons surrounding one's property. Each city and county is different so check with your local agency so that you know what they expect from you.

Here's where ADA-PROS fits into the picture.

For the past twenty years, I have worked with commercial property owners to identify "barriers to disabled" on their property. Then, after creating a common sense budget, I track with them as they remove identified barriers through one or both of the following methods.

1) Budget and remove barriers "voluntarily" without any permits for other improvements, T.I's (tenant improvements) or new construction.

2) Budget and remove barriers based on the 20% ENR threshold to satisfy the city at the time of a permitted T.I or remodel project.

What's the case law regarding sidewalks?

This article addresses the law concerning an adjacent property owner's obligation to repair a defective sidewalk under Streets and Highways Code section 5610.

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 maintained to be immediately accessible.

According to the United States Solicitor General, he interpreted the holding and the Title II regulations to "require only that the City's system of public sidewalks – when viewed "in its entire-

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ty" – be generally accessible to and usable by individuals with disabilities."16

After 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 that sidewalks are "facilities." 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 bottom line on sidewalks as "programs" versus "facilities"

The change from sidewalks being treated as "programs" as opposed to sidewalks being treated as "facilities" is interesting. 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.

So what does this mean to me — the property owner?

Well, it means that you are liable not only for the costs of repairs but also liability for injury to a third-party walking along the sidewalk in front of your property.

"How am I responsible for the cost to repair and the cost of liability from injury" you ask?

"Again, it's not my sidewalk!" you say.

I know, it's frustrating and a bit confusing trying to figure out who is responsible at the end of the day.

Let's look at a case study out of San Jose, California

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!

Cost of repair and the issue of liability

So how do you figure out who is responsible and how much will it cost?

Who Covers 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.

This is where ADA-PROS comes in handy. (Based on the city or county you're in will determine the requirements required by that

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jurisdiction)

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 impose 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.

Here are 5 things you can do to avoid a sidewalk problem tips moving forward.

I know that was a lot to digest. My goal here was to bring clarity to a very frustrating and confusing set of ordinances that change between municipalities' and to give you a solid road map moving forward.

I want you to treat this just like you would your own "On-Site" maintenance and barrier removal programs.

1) Inspect your public sidewalks for damage, cracks, lifting due to tree roots or damaged caused by anything you or your contractors have done recently. (this will help you identify who is actually responsible for specific damage)

2) Inspect your driveway aprons to confirm they have a max 10% run slope from the public street and provide a minimum 48" wide level sidewalk section at 2% max cross slope.

3) Create a separate "barrier removal" program and budget to start addressing the very worst or most non-compliant areas first.

4) Be aware of the "Trigger" rule that happens when either you or one of your tenants pulls a permit for new construction, remodel or tenant improvement. This is the time that the City has you on their radar.

5) Have a plan ready to share with the City inspector that shows you are aware of your responsibilities and you are proactive in preparing to address areas of highest concern first.

If you own property in California or any other state, 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 and will at least force them to remedy the situation or face their own liability.

What you don't want to do is pretend that this is not a duty imposed on you. Sooner or later, a broken or non-compliant sidewalk will create a problem for the owner of property and the sooner it is handled, the better.

If you have any questions, feel free to contact me directly. I can also schedule to meet you on-site to do a "walk- n-talk". We will take a close look at your specific situation, and I will recommend how to proceed. Thanks, Chris.

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