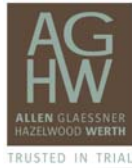


PARMA February 3-5, 2021
The Wild West of Risk

Wanted: A Workable Sidewalk Ordinance

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Risk Manager, City of Fairfield



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Incident of senior apartment corridor low barrier. \$3.5M. Yolo Co. Elderly resident fell and hit her back against low barrier.

Case Name: [redacted] Plaintiff's ER
City of Fairfield
Incident Date: [redacted]

Gym customer's over shoulder. \$1.5M. Yolo Co. Plaintiff's ER
Case Name: [redacted]
City of Fairfield
Incident Date: [redacted]

The Verdict
After an eleven-day trial, the jury... verdict in American history. That verdict included... million for pain and suffering.
The jury also found Kelly 20 percent responsible for the fall, which would result in a verdict award to approximately \$13.1 million.

We the jury in the above entitled action, find for the Plaintiff, and against the Defendants, and without reduction for Plaintiff's contributory negligence, if any, assess the total amount of the Plaintiff's damages as follows:


Future medical and related expenses	\$ 2402,251.00
Past Loss of Earning Capacity	\$ 2,932,105.00
Future Loss of Earning Capacity	\$ 186,498.00
Past Loss of Household Services	\$ 583,571.00
Future Loss of Household Services	\$ 34,659.00
Past pain, suffering, disability, and loss of enjoyment of life	\$ 1,379,083.00
Future pain, suffering, disability and loss of enjoyment of life	\$ 354,533.00
Total	\$ 9,694,335.00

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Possible Solution A Workable Sidewalk Ordinance

- **Government Code section 835**
- **History of Sidewalk Ordinances**
 - Streets and Highways Code section 5610
 - *Gonzales v. City of San Jose* (2004) 125 Cal.App.4th 1127
- **Considerations of a Sidewalk Ordinance**
 - Monetary / Political
 - Case Study: City of Fairfield
- **Examples of Approaches to Sidewalk Ordinance**
 - No ordinance
 - Adopt ordinance
 - Other approaches
 - Case Study: City of Fairfield
- **Key Takeaways**


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Dangerous Condition of Public Property Govt. Code section 835

Plaintiff must prove all of the following elements:

1. The public entity owned or controlled the property at the time of the injury
2. The public property was in a dangerous condition at the time of the injury
3. The injury to plaintiff was legally caused by the dangerous condition
4. The kind of injury that occurred was reasonably foreseeable as a consequence of the dangerous condition
5. Either:
 - The dangerous condition was created by a public employee's negligent or wrongful act or omission within the scope of his/her employment
 - OR
 - The public entity had actual or constructive notice of the condition a sufficient time before the injury occurred to have taken reasonable measures to protect against the injury



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Definition of Dangerous Condition Govt. Code section 830(a)

- **Statutory definition:** "A condition of property that creates a substantial (as distinguished from minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."
- This definition is crucial to liability
- "Condition" has been subject to debate
 - Can include public improvement which has become changed, flawed, damaged or has deteriorated to a state that is potentially dangerous to reasonably foreseeable users
- Potential risks are not sufficient to impose liability
Alexander v. State of California (1984) 159 Cal.App.3d 890, 897



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Ownership and Control History of Sidewalk Ordinances

- **Statutes**
 - Streets and Highways Code section 5610, *et seq.*
- **Case law**
 - *Gonzales v. City of San Jose* (2004) 125 Cal.App.4th 1127



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Streets and Highway Code 5610 – 5618 (1941)

- “Owners of lots fronting on any portion of a public street or place (including park or parking strip) *shall maintain* any sidewalk in such condition as to not endanger persons or property or interfere with the public convenience...”
 - Creates duty to maintain
 - Does not establish duty/liability to third parties
- Enabling statute



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Gonzales v. City of San Jose (2004) 125 Cal.App.4th 1127

- **Background:** Plaintiff injured in slip and fall on sidewalk sued the City of San Jose, which owned sidewalk, and owner of adjacent and property. Plaintiff sued City and adjoining landowner. City cross-complained against adjoining landowner
- **Issues:**
 - Whether state statute which required landowners of adjoining property to maintain sidewalks preempted a local ordinance which provided that adjoining landowner could be liable to third parties
 - Whether, even in the absence of a municipal code section mandating liability, an adjoining landowner has a common law duty to a third party who may be injured on a city-owned sidewalk



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Gonzales v. City of San Jose
(2004) 125 Cal.App.4th 1127

- **Public Policy Considerations:**
- City ordinance does not absolve City of responsibility for dangerous conditions on public sidewalks; rather, it provides an additional level of responsibility for the maintenance of safe sidewalks on the owners whose property is adjacent to and abuts the sidewalk
- Adjoining landowners are often in the best position to quickly identify and address potentially dangerous conditions that might occur on the sidewalks



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What to Remember from *Gonzales*?

- Without a sidewalk ordinance, cannot shift liability to adjoining landowner
 - Default to Streets and Highways Code 5610
- A sidewalk ordinance provides concurrent liability
- It does not relieve a public entity from liability entirely



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Considerations of Sidewalk Ordinance
Monetary

- How many miles of sidewalk?
- Maintenance costs
- Strategy of repair
 - Grinding
 - Cold patch
 - Replacement of select panels
 - Employees or contractor
- Mitigation
 - Allows long term budgeting
 - Cost sharing with landowner
 - Litigation


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Considerations of Sidewalk Ordinance Political

- Citizen response
 - Media
 - Enforcement
 - Cost to repair
 - Litigation
- Beautification of city
- Uniform approach
 - Repair aging sidewalks
 - Standard construction qualities

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OFFICE COMMENTARY

San Rafael's sidewalk law 'mean-spirited, unconstitutional'





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Considerations of Sidewalk Ordinance Case Study: City of Fairfield

- Considerations of City
 - Positive
 - Negative
- Why did City decide to go with sidewalk ordinance ultimately?



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Approaches to Sidewalk Ordinance No Adoption of Ordinance

- Property owner still retains the duty to maintain and repair
- Property owner liable for their own negligence
- City liable for injuries due to failure to maintain hazards
- Litigation impact
 - Unable to bring in adjoining landowner
 - Higher costs



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Approaches to Sidewalk Ordinance Adopt Ordinance: How to Begin

- Review current protocols
 - Gather information (staffing, budget, etc.)
 - Identify issues
- Internal discussion
 - Develop financial plan
 - Develop maintenance plan
- Task force
 - Seek public outreach
 - Input/proposals
- Draft ordinance


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Approaches to Sidewalk Ordinance Adopt Ordinance – Examples City of Richmond

12.36.025 – Property owner responsibility to repair and maintain sidewalk.

- a) The owner of a parcel of real property which fronts on any portion of a sidewalk between the property line of the parcel and the street line, including the parking strip and the curb, is responsible for the repair and maintenance of the sidewalk and shall pay the cost and expense of repair and maintain said sidewalk area whether or not the City has notified the owner of the need for such repairs or maintenance or has performed similar repairs or maintenance in the past.
- b) The owner of a parcel of real property is under a duty to members of the general public, including but not limited to users of the sidewalk, to keep the portion of any sidewalk described in subsection (a) in a safe condition.
- c) The failure of the owner to fulfill the duties imposed by subsections (a) and (b), or the performance of such duties and obligations by the owner in a negligent manner, shall constitute negligence. An owner shall be liable to any member of the general public injured on or by a sidewalk area if the owner's negligence hereunder is a proximate cause of the injury. The City shall not be liable for an injury caused by the negligence of an owner.

(Ord. No. 14-00, N.S., § 1, 5-9-2000)


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Approaches to Sidewalk Ordinance Adopt Ordinance – Examples City of Fremont

12.30.210 – Maintenance of sidewalks

- a) As used in this section, "sidewalk area" includes the sidewalk, any park or parking strip maintained in the area between the property line and the street line, and the curbing, gutter, driveway, bulkheads, retaining walls or other works for the protection of any sidewalk or of any park or parking strip.
- b) The owner of a lot fronting on or adjacent to a public street must maintain any sidewalk area in good repair and condition. This duty includes but is not limited to maintenance and repair of surfaces including performance of grinding, removal and replacement of sidewalks, and repair and maintenance of curb and gutters, so that the sidewalk area will remain in a condition that is not dangerous to property or to persons using the sidewalk area in a reasonable manner and will be in a condition which will not interfere with the public convenience in the use of the sidewalk area.
- c) An owner required by this section to maintain a sidewalk area shall owe a duty to members of the public to keep and maintain the sidewalk area in a safe and nondangerous condition.
- d) If, as a result an owner's failure to maintain a sidewalk area in a safe and nondangerous condition, any person suffers injury or damage to person or property, the owner shall be liable to the person for the resulting damages or injury.
- e) The city of Fremont shall have a cause of action for indemnity against a property owner for any damages it may be required to pay as satisfaction of any judgment or settlement of any claim that results from injury to persons or property as a legal result of the owner's failure to maintain a sidewalk area in accordance with this section.
- f) Failure of the owner to maintain a sidewalk area as set forth in this section shall constitute a public nuisance.


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City of Tulare Sidewalk Ordinance

8.12.168 Replacement—Abutting landowner's duty.


(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 the maintenance and repair, may be done and the proceedings therefor may be had and taken in accordance with this section and the procedure therefor provided in Cal. Streets and Highways Code Chapter 22 of Division 7, Part 3. In the event of any conflict between the provisions of Cal. Streets and Highways Code Chapter 22 of Division 7, Part 3, and this § 8.12.168, the provisions of this section shall control.

(B) The owners of lots or portions of lots adjacent to or fronting on any portion of a sidewalk area or driveway approach between the paving strips, sidewalks, curbs and gutters, and persons in possession of the lots by virtue of any permit or right shall repair and maintain the sidewalk areas and pay the costs and expenses thereof, including a charge for the City of Tulare's costs of inspection and administration whenever the city awards a contract for the maintenance and repair and including the costs of collection of assessments for the costs of maintenance and repair under this section or handling of any lien placed on the property due to failure of the property owner to promptly pay the assessments.

(C) For the purposes of this part, maintenance and repair of sidewalk area or driveway approach 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, tree root pruning and installing root barriers, trimming of shrubs and/or ground cover and trimming shrubs 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 the sidewalk area.

(D) Notwithstanding the provisions of Cal. Streets and Highways § 5614, the Director of Public Works 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 74 days from the time the notice referred to in § 5614 is given.

(1995 Code, § 8.12.168) (Ord. 03-1924, passed - 2003)


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City of Tulare Sidewalk Ordinance

§ 8.12.170 Liability for injuries to public.

The property owner required by § 8.12.168 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 non-dangerous condition. If, as a result of the failure of any property owner to maintain the sidewalk area in a non-dangerous condition as required by § 8.12.168, any person suffers injury or damage to person or property, the property owner shall be liable to the person for the resulting damages or injury and shall be required to indemnify and hold harmless the City of Tulare, its officers, agents and employees.

(1995 Code, § 8.12.165) (Ord. 03-1924, passed - 2003)


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**Approaches to Sidewalk Ordinance
Adopt Ordinance - Examples
City of San Jose**


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 therefor may be had and taken in accordance with this part and the procedure therefor 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 thereof, including a charge for the City of San Jose's costs 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 area.

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.


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Approaches to Sidewalk Ordinance
Adopt Ordinance – Examples
City of San Jose

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 14.16.2200](#), 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.

(Ord. 23389.)



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Approaches to Sidewalk Ordinance
Adopt Ordinance: Examples

- Other Cities with Sidewalk Ordinances
 - Dixon
 - Redding
 - San Rafael
 - Grass Valley
 - Sacramento
 - Oakland
 - Vacaville
 - Vallejo
 - Lodi


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Approaches to Sidewalk Ordinance
Takeaways

- Not the same as the 5610 *et seq.* statute
- Based on *Gonzales v. City of San Jose* (2004)
- Joint and several liability – public policy – not a full transfer of duty or liability
- In addition to duty to maintain, now owner has civil liability to pedestrians (negligent failure to maintain and/or notify the entity)
- Allows plaintiffs to sue owner directly – and for city to cross-complain

DON'T FORGET – SECOND PRONG OF ORDINANCE IS IMPLEMENTATION



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Approaches to Sidewalk Ordinance Case Study: City of Fairfield

- Beginning phases
 - Council hearings
 - Community outreach
 - Drafting of ordinance
- Roll out and planned implementation
- What worked? What did not work?
- What would you change?


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Key Takeaways

- No one-size-fits-all recommendation
- Determine pros and cons for your city
 - Costs
 - Public concerns
 - Feasibility
- Without ordinance, adjoining landowner still has duty to repair
 - No liability to third parties
- Sidewalk ordinance creates joint and several liability
 - Not a full transfer of duty or liability
 - Enforcement


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QUESTIONS?

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