



THE CITY OF SAN DIEGO

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## OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

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# Review of Proposed Changes to the City's Sidewalk Maintenance Policy

## OVERVIEW

On October 4, 2017 the Rules Committee heard an item presented by District 8 proposing revisions to Council Policy 200-12: Sidewalk Maintenance Policy. The committee approved the staff recommendation that "Council District 8, Independent Budget Analyst, City Attorney and City Staff work collaboratively to report to the Infrastructure Committee with additional financial and legal analysis on a proposal for further discussion after the financial and legal analysis is complete." This report provides information as requested for consideration by the Infrastructure Committee. We note that our Office does not do legal analyses. For this report we incorporated information received from the City Attorney's Office and input from the Risk Management Department regarding the proposal's impacts on liability.

In addition to the information above, we identify several barriers to fixing sidewalks, that if addressed, could result in safer conditions without taking on more responsibility for sidewalk maintenance as proposed. Finally, we discuss lessons that can be learned from other municipalities.

## BACKGROUND

### Current Policy

Since 1935 state law has required property owners to maintain sidewalks fronting their property in a condition that will not endanger people or property and maintain it so that it does not interfere

with public use of the sidewalk. If an unsafe condition was created by someone other than the property owner, that person or entity has the responsibility.

The City's sidewalk maintenance policy was established in 1975 and shifted responsibility of the cost to replace sidewalks to the City under certain circumstances. These include, when the sidewalk:

1. Has been damaged by parkway trees (regardless of who planted or maintains the trees)<sup>1</sup>
2. Has been damaged by grade subsidence (sinking of sidewalk panels)
3. Has been damaged by City utility cuts
4. Fronts City-owned property
5. Exists at street intersections
6. Has defects due to heat expansion

For damage caused by all other circumstances, typically due to age and deterioration, the City offers a 50/50 Cost-Share Program for replacement costs that are the responsibility of the property owner. If it is determined that the sidewalk damage was caused by the property owner or by a third party, those entities are not qualified to take part in the program.

According to the Transportation and Storm Water Department (TSW), from FY 2015 to FY 2018 an average of 29 property owners per year chose to participate in the program. Coming off of a low of 18 participants in FY 2017, the City experienced a spike of program participants totaling 43 in FY 2018. The table below provides the breakdown of costs for the 50/50 Cost-Share Program in FY 2018. It is important to note that participant costs include other work that may be required, such as to driveways and pathways, that is outside the scope of the program. Each program participant paid on average \$4,500 to fix their sidewalk and any other associated work.

<b>FY 2018 Costs for 50/50 Cost-Share Program</b>	
Number of Participants	43
Total Project Costs	\$325,000
City Share of Eligible Costs	\$130,000
Participant Share of Costs	\$195,000
Average Cost Paid per Participant	\$4,500

### **Proposed Policy**

Councilmember Alvarez's office first released proposed revisions to the City's sidewalk policy the day after a settlement was approved for \$4.9 million resulting from an injury sustained by a bicyclist riding over a tree-damaged sidewalk. The office stated in its presentation of the proposal

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<sup>1</sup> City of San Diego Memorandum of Law, "Maintenance and Repair of City Sidewalks," January 28, 2011 <http://docs.sandiego.gov/memooflaw/ML-2011-1.pdf>

at Rules Committee on October 4, 2017 that the revisions are needed because the current policy has partially led to unaddressed unsafe sidewalk conditions and costs for repairs can be too much for many property owners, even with the cost sharing program.

The proposed policy places the cost of replacing unsafe sidewalks entirely on the City except when the damage to the sidewalk is caused by the adjacent property owners or by a third party. Additionally, the proposal eliminates the 50/50 Cost-Share Program as the City would be taking on all costs. Finally, it requires the City to replace an unsafe sidewalk within 90 days of being notified. Due to concerns raised by the City Attorney's Office regarding the 90-day requirement, at this time Councilmember Alvarez wishes to focus this analysis solely on revisions that shift the responsibility of sidewalk repair to the City.

To put into context how much the City spends on claims related to maintenance of sidewalks, from FY 2013 to FY 2018 the City spent \$6.0 million. Of this amount \$4.9 million was related to the claim mentioned on the previous page. Claims related to sidewalk maintenance can derive from a range of hazards including tree grates, manholes, as well as uneven sidewalks. In addition, during the same period of time, the City spent \$6.3 million on claims categorized as "trip and fall". This is a broad category that includes injuries from falls on sidewalks as well as from falls due to potholes and other circumstances throughout the City unrelated to sidewalks. Claims related to non-enterprise assets, such as damaged sidewalks, are paid from the Public Liability Fund (revenue transferred from the General Fund).

## FISCAL/POLICY DISCUSSION

### **Impacts**

If adopted, these revisions would have the following fiscal and liability impacts.

#### *Fiscal Impacts*

##### 2015 Sidewalk Condition Assessment

Under the proposed policy the City would additionally take on sidewalk defects that are due to age and deterioration as these are currently the responsibility of the adjacent property owner. A sidewalk condition assessment was completed in FY 2015 which inventoried and determined the condition of City sidewalks. The assessment identified 85,503 locations with sidewalk damage, of which 52% needed maintenance repairs and 48% needed capital repairs.<sup>2</sup> The total estimated cost

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<sup>2</sup> Typically maintenance repair is done for any uplift or faulting that is less than 1.5 inches by grinding or slicing the surface to make it even. Temporary repairs such as using asphalt to smooth surfaces are included under maintenance work. Capital repairs include replacement of sidewalk panels, installing or replacing side curb ramps, pruning tree roots, and other related services.

to address both maintenance and capital repairs was \$52.7 million in 2015 (\$6.6 million for maintenance and \$46.1 million for capital repairs).

The assessment did not decipher who is responsible for repairing the sidewalk, so it is unknown what exact portion of the identified backlog is the responsibility of the City. Under the current policy, the City is responsible for the costs associated with the six specified categories, plus City costs associated with the 50/50 Cost-Share Program – to the extent property owners use this program. Under the proposed policy, the City would be responsible for a greater share of the backlog since it would be taking on sidewalk defects that would otherwise be eligible for the 50/50 Cost-Share Program (largely defects due to age and deterioration). Both policies hold property owners and third parties responsible for costs related to damage on sidewalks that they cause.

As stated in our Office's Review of the Fiscal Year 2019 Proposed Budget, the costs to address the sidewalk repair backlog have changed since the assessment was conducted due to updated estimated unit costs for capital sidewalk repair and revisions to the number of locations that need to be addressed. According to a memorandum dated September 20, 2018 from TSW, the department is refining sidewalk repair and replacement funding needs and indicates that a report will be presented to the Infrastructure Committee in the third quarter of FY 2019 that will include the updated assessment of needs.

The updated assessment of needs will likely take into account the \$12.3 million investment the City has made since the condition assessment. On the capital side, a total of \$10.5 million has been allocated for contracted sidewalk replacement from FY 2016 to FY 2019. On the maintenance side, the City has allocated \$1.8 million for contracted sidewalk slice and grind repair from FY 2017 to FY 2019 (no allocation was made in FY 2016). In addition, the City uses two 12-person concrete crews that largely do sidewalk panel replacement projects.

### *Liability Impacts*

The Risk Management Department (Risk) receives claims against the City for a variety of situations, including personal injury resulting from damaged sidewalks. Risk investigates each claim to determine whether the City may be liable, and they are either approved, denied, or a settlement is negotiated. According to state law, one way a claim can be denied is by operation of law, which is triggered if no action is taken by the City to approve or deny a claim within 45 days of its filing. A claim can be litigated and forwarded to the City Attorney's Office if it has been denied or if the claimant is not satisfied with settlement negotiations.

Both Risk and the City Attorney's Office have expressed to our Office that the proposed policy would: 1) weaken the City's defense when handling claims and lawsuits, and 2) result in the City taking on a greater share of damages. The magnitude of these impacts is unknown since

determining liability is dependent upon the unique facts of each case.<sup>3</sup> In addition, the City does not track contributions made by property owners or third parties when settling claims or lawsuits. However, our Office received information provided by the City Attorney's Office on cases against the City for personal injury resulting from tripping and falling on public sidewalks between 2013 and 2017. Though not all information was available for every case, a few examples of completed cases can help illustrate the potential for this policy to increase the City's exposure to liability and associated fiscal impacts.

The policy being proposed would make the City responsible for sidewalk replacement costs *in all instances*, except if the damage is caused by the property owner or another third party. It is possible that adoption of the proposed policy would weaken the City's defense as claimants could point to it to support their argument that the City failed to implement its own policy. This was evidenced in one case as the legal complaint specifically referenced the City's sidewalk policy asserting that the City recognizes its responsibility for costs to repair sidewalks damaged by parkway trees. Damage due to parkway trees is one of the instances that the City specifically declares as its responsibility to fix. The City settled this case for \$300,000. If the City's policy assumes responsibility in all instances, it would further weaken the City's defense.

Also included in the case information provided by the City Attorney's Office, were many instances that the City shared damages with other entities. The City can sometimes share liability with a property owner if, for example, the tree is located on their private property. However, some cases cited a general "uneven sidewalk" causing personal injury. These cases will likely be more difficult to share liability if the City assumes full responsibility of sidewalk repair and replacement. Our Office identified nine cases between 2013 and 2017 that fall into this category in which co-defendants paid about \$427,000 in damages, while the City paid about \$380,000. With a weakened defense, the City could potentially take on a greater share of these damages, under the proposed expanded policy.

### **Barriers to Fixing Sidewalks**

Despite assuming much of the responsibility for sidewalk maintenance in the City's current policy, the City still has a large backlog of unaddressed sidewalks needing repair and replacement. Our Office has identified several existing barriers to fixing the sidewalks. We believe addressing these shortcomings, without changes to the City's policy, would result in safer sidewalk conditions without the fiscal and liability impacts from adopting an expanded policy.

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<sup>3</sup> Please refer to City of San Diego Memorandum of Law, "Maintenance and Repair of City Sidewalks," <http://docs.sandiego.gov/memooflaw/ML-2011-1.pdf>, for more information on determining liability for injuries from unsafe sidewalks.

### *Having a Clear Goal and Tracking Progress*

The City has invested significant resources in asset management strategies to effectively manage assets at a desired level of service for the lowest life cycle cost. Conducting condition assessments is one of these strategies and has provided the City with valuable information on its infrastructure needs. Though the sidewalk condition assessment was completed in 2015, the City has not developed a plan and timeline to address the backlog. However, the department has identified a goal in the Five-Year Capital Infrastructure Planning Outlook (Capital Outlook) of repairing and replacing all damaged sidewalks which fall under the City's maintenance responsibility by the end of FY 2024 – ten years after the condition assessment. Given previous funding allocations, the City is likely not on track with achieving this goal.

**We recommend that TSW prepare a plan to address the sidewalk backlog that incorporates updated needs costs, a reasonable timeline, staffing needs, possible funding sources, and an ongoing maintenance plan, including when the City should plan for another condition assessment.** The plan could be used to inform budget decisions as well as have a clearer understanding of trade-offs being made if budget constraints require the backlog to be addressed more slowly. This information could also support the City's broader asset management initiative in the development of departmental asset management plans.

Once a plan is in place and it is known how much sidewalk should be repaired or replaced in a fiscal year, the City will be better able to track its progress towards reducing the sidewalk backlog. In addition, the City should use a consistent metric to track progress and remaining needs. The City's sidewalk network is typically expressed in terms of miles. However, the condition assessment reports deficiencies in terms of "locations" and the metric by which the City tracks the amount of sidewalk repaired or replaced in the budget publication, is in terms of square feet. Consistent terminology will add clarity the status of the City's sidewalk problem.

### *Spending Capital Funds*

The department has indicated that with appropriate staffing, the total time it should take to implement a group of sidewalk capital replacement projects should be between one and two years from project implementation through construction. Activities during this time include going to each location planned for replacement and scoping what needs to be done, bid and award of a construction contract, and implementing construction. The recent TSW memorandum shows that there are three sidewalk replacement group projects that were funded in FY 2016 but are either in construction or have not begun construction. Staff indicate that lack of positions necessary to identify, scope, and plan locations for contracts has led to the delay in getting to the construction contract bid and award phase. Until the FY 2019 Adopted Budget, TSW had two positions to do this work. The FY 2019 budget included two more positions for a total of four.

This delay corresponds with funds carried over from appropriations in prior fiscal years. At the time that our Office released its Review of the Fiscal Year 2019 Proposed Budget in April 2018,

there was \$4.4 million in carried over funds for sidewalk replacement projects. As of October 2018, there was \$3.6 million in funds carried over from FY 2018, not including the \$5.0 million appropriation provided in the FY 2019 Adopted Budget. According to TSW, the carried forward funds are planned to be encumbered by the first half of FY 2019. The \$5.0 million appropriation provided in the FY 2019 Adopted Budget is anticipated to be encumbered by the end of FY 2019 with construction to be completed by the end of FY 2020. The additional positions provided in the FY 2019 budget will help prepare contracts that move projects to construction, allowing for their timely implementation.

### *No Enforcement of Property Owner Fixes*

After the City is notified of a damaged sidewalk and an assessment is made by the City determining that the property owner is responsible for the repair, the City sends a Notice of Liability to the property owner stating that it is their responsibility. The current Council policy does not require follow-up or enforcement activities ensuring that this work has been completed. Without an inspection or enforcement system, there will consistently be a portion of sidewalks that will be left unaddressed.

The City's Mobility Plan includes a policy to "Continue to pursue adequate maintenance of sidewalks by property owners and investigate new approaches to facilitate improved sidewalk maintenance citywide." The City's 50/50 Cost-Share Program offers significant benefits to the public that are not available in many other cities. In addition to splitting eligible costs with the City, the property owner does not need to secure an expensive permit since the work is done by City crews. A permit for a basic sidewalk repair could exceed \$1,600. Better education to the public on the savings achieved when participating in the program could encourage more participation and result in more property owner sidewalk repairs being completed.

## **Lessons Learned from Other Municipalities**

### *Other Municipal Approaches to Enforcement*

There are numerous ways that other cities handle enforcement. Many<sup>4</sup> follow the structure outlined in state law which allows the city to place a lien on the property if the adjacent sidewalk has not been fixed by the property owner. This occurs by directing the county to add the cost of unpaid sidewalk repairs to the owner's property tax bill as a special assessment. Sacramento uses this process if no action is taken by the property owner to begin the repair process.<sup>5</sup> The down side of this approach is the additional administrative work of conducting hearings if the lien is protested and obtaining Council approval to take lien action. In addition, if it is determined that the lien

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<sup>4</sup> San Jose, Sacramento, Oakland, San Francisco for example

<sup>5</sup> Either 60 days after a second notice to repair is sent or 60 days after property owner notifies the city how they will go about addressing the defective sidewalk.

would create a severe financial hardship then the city will work with the property owner to enter into an agreement to pay the costs of the project. San Jose also implements a similar system.

San Francisco has a similar sidewalk maintenance policy as San Diego in that it lists the instances in which the city is responsible, with everything else falling onto the responsibility of the property owner. In contrast with the City of San Diego, San Francisco has a plan in which every twenty-five years sidewalks are inspected and repaired. The city will inform property owners of sidewalk defects with a notice to repair if there is damage. One unique aspect of San Francisco's policy is that property owners can either make the repairs independently or they have the option to take part in a competitively bid sidewalk contract through the Public Works department. This option could reduce the burden for property owners while help the City address defects strategically and in conjunction with other defects that may be in the area.<sup>6</sup>

Other cities, such as Pasadena, have as an enforcement tool that sidewalks be repaired upon the sale of the property. The cost of the repair could be part of the price of the property.<sup>7</sup> City Council could consider exploring a point of sale program as an option available to property owners if they do not participate in the 50/50 Cost-Share Program.

#### *Americans with Disabilities Act (ADA) Settlements*

In addition to liability for personal injury due to defective sidewalks, cities face legal challenges related to compliance with the Americans with Disabilities Act (ADA) regardless of whether the property owner or the city takes responsibility for sidewalk maintenance and repair. Long Beach, Los Angeles, and Sacramento must allocate a certain amount of funds to sidewalks to fulfill 30-year settlement agreements.

Long Beach takes the responsibility for sidewalk repairs and had a program to repair all damaged sidewalks and curbs in the City. However, the city still faced legal challenges and settled an ADA lawsuit in 2017 requiring work valued at about \$200 million over 30 years to fix and install curb ramps and repair inaccessible sidewalks and crosswalks. The city is currently focused on installing missing curb ramps since this must be done within five years. In the meantime, sidewalk repairs are being addressed in conjunction with street construction projects. Even though the city had a program to repair all damaged sidewalks, it was still vulnerable to legal accessibility issues.

Los Angeles' existing sidewalk program is the result of an ADA lawsuit. As required by the settlement, the city will pay \$1.4 billion over 30 years to fix sidewalks and provide other pedestrian improvements.<sup>8</sup> This is part of the city's "fix and release program" established in 2016, in which

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<sup>6</sup> San Francisco Public Works, Sidewalk Inspection and Repair Program, <https://sfpublicworks.org/sirp>.

<sup>7</sup> Advocacy Advance, How Communities are Paying to Maintain Trails, Bike Lanes, and Sidewalks, 2014, [https://www.recpro.org/assets/Library/Trails/how\\_communities\\_pay\\_bike\\_infra\\_maintenance.pdf](https://www.recpro.org/assets/Library/Trails/how_communities_pay_bike_infra_maintenance.pdf).

<sup>8</sup> City of Los Angeles, Willits v. City of Los Angeles Sidewalk Settlement Announced, 2015, <https://www.lamayor.org/willits-v-city-la-sidewalk-settlement-announced>.



it will fix sidewalks citywide and return the responsibility for sidewalk repairs fully to the property owner.

Before 1973, Los Angeles deferred to state law for establishing responsibility for sidewalk repairs, which made property owners responsible. However, in 1973 the city took on the responsibility for sidewalk repairs caused by street tree roots, calling it a “limited exception” to state law. The city made interim repairs to address safety conditions<sup>9</sup> but it went from 1978 to 2000 without any funding allocated for permanent repairs. Funding for permanent repairs varied after 2000. Citing fiscal constraints, the city was unable to support the limited responsibility that the city had for sidewalk repair. Once full responsibility of sidewalk repair is transferred to the property owner, the city is anticipated to focus its efforts on inspection and enforcement to ensure property owners are making proper repairs.<sup>10</sup>

Finally, Sacramento also settled an ADA case in 2004 in which the 30-year agreement requires the city to allocate 20% of its transportation funds on addressing obstacles in the public rights-of-way, including sidewalks.<sup>11</sup> These cases emphasize the importance of maintaining sidewalks so that, not only the City may mitigate personal injury, but to also avoid vulnerability to an ADA lawsuit.

## CONCLUSION AND RECOMMENDATIONS

This report discusses the impacts of Councilmember Alvarez’s proposed revisions to the City’s current sidewalk maintenance policy. The policy would require the City to assume full responsibility of sidewalk repair and replacement (except when damage is caused by property owners or third parties), instead of the City’s current policy in which the City takes responsibility under specified circumstances. In effect, the policy would additionally include responsibility for defects due to the general age and deterioration of sidewalks. These instances are currently eligible for the 50/50 Cost-Share Program. Under the proposed policy, the cost sharing program would be eliminated as the City would assume responsibility.

The proposed policy would result in the City being responsible for a greater portion of the sidewalk backlog, estimated at \$52.7 million in FY 2015, though the exact magnitude of the proposal’s fiscal impact is unknown. In addition, the Risk Management Department and City Attorney’s Office have indicated that this proposal would result in making it more difficult to defend itself

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<sup>9</sup> Bureau of Street Services Interdepartmental Correspondence, Sidewalk Repair Options, 2011, [http://clkrep.lacity.org/onlinedocs/2005/05-1853\\_rpt\\_boss\\_010-019-11.pdf](http://clkrep.lacity.org/onlinedocs/2005/05-1853_rpt_boss_010-019-11.pdf).

<sup>10</sup> City of Los Angeles Office of the City Administrative Officer, New Policy for Repair and Management of Sidewalks Adjacent to Private Property, 2015,

<http://cao.lacity.org/Reports/20150526%20CAO%20NEW%20POLICY%20FOR%20REPAIR%20OF%20SIDEWALKS%20ADJACENT%20TO%20PRIVATE%20PROPERTY.pdf>.


<sup>11</sup> City Council Report, Approval of Americans with Disabilities Act (ADA) Public Right-of-Way Prospective Plan for Fiscal Year 2016/17, <https://www.cityofsacramento.org/-/media/Corporate/Files/HR/Divisions/OCR/ADA/Barden/FY1617ProspectivePlanStaffReport.pdf?la=en>.

when faced with sidewalk injury claims and lawsuits. This would also result in a reduced ability to share damages.


Taking on additional responsibility for sidewalk maintenance through an expanded policy will not necessarily translate to safer sidewalk conditions without additional funding to implement the policy. Our report identifies several barriers to fixing sidewalks that if addressed, could result in improved sidewalk conditions. One key barrier is the lack of a plan that indicates how much funding needs to be allocated to address the backlog and properly maintain sidewalks in the future. Having this information will be helpful for budget decisions and supports the City's asset management efforts. **We recommend that TSW prepare a plan to address the sidewalk backlog that incorporates updated costs, a reasonable timeline, staffing needs, possible funding sources, and an ongoing maintenance plan, including when the City should plan for another condition assessment.**

The City may also wish to explore ways to improve public participation in the 50/50 Cost-Share Program or enforcement activities so that sidewalks under the property owner's responsibility are not left unaddressed. Our report discusses how other municipalities address this issue. We also discuss the importance of addressing the sidewalk backlog to mitigate personal injury and reduce the possibility of being sued for ADA noncompliance, as other cities have experienced.

Ultimately, implementing a plan for sidewalks will be a budget priority issue since Citywide maintenance and capital needs far exceed funding available. The most recent Capital Outlook identified a funding gap of \$1.58 billion to address the City's projected capital needs from FY 2019 to FY 2023. Of this amount, \$458.9 million is attributed to storm water capital needs to comply with the Municipal Storm Water Permit as outlined in the Watershed Asset Management Plan. An additional \$165.1 million is attributed to needs from a draft facilities asset management plan. Though the City has identified a plan for managing these assets, lack of funding prevents needs from being met. To maintain service levels for other programs and assets, and to address the funding gap, Council may wish to consider additional revenue sources in the future.



Jillian Kissee  
Fiscal & Policy Analyst



APPROVED: Andrea Tevlin  
Independent Budget Analyst