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MANAGING SIDEWALK LIABILITY

Risk Pool Training Webinar

Sponsored by NCCSIF, PARSAC & SCORE

PURPOSE

Provide an overview of the liability risks associated with sidewalks and what you can do to reduce those risks, including:

- Ordinance(s)
- Inspection & Maintenance Programs
- Economical Repair and Risk Management Services

Presenters

Marcus Beverly
NCCSIF/SCORE Admin

Erike Young
PARSAC Risk Management

David Beal
Sedgwick Risk Management

Joseph Ortega
Precision Concrete Cutting

OUTLINE/AGENDA

- Sidewalk Claims & Ordinance
- Inspection & Maintenance Best Practices
- Repair & Risk Management Services



CLAIMS &
ORDINANCE



Sidewalk Claims for One JPA



- 200 + Total Claims Over last 10 years
- \$3 Million Paid
- 8.5% of All Claims (2nd highest cause)
- 7% of All Paid (4th highest severity)
- \$14,557 Average Paid 2010-2020
- One Claim in 2019 = \$300,000
- Over 30 ADA related sidewalk/access discrimination claims
- Five ADA- Related Claims From Same Person Beginning in 2021 = \$400,000
 - *Does NOT include cost to correct!*
 - *2015 L.A. agrees to spend \$1.3 billion to fix sidewalks in ADA case*



Before

After

The Problem



- Varies by city
 - *Aging infrastructure*
 - *Poor street tree selection*
 - *Rural feel v. developed areas*
 - *Lack of documented inspections*
 - *Budgets strained for repairs*
- Losses are frequent and *add up*
- Most claims are within member deductible

The History

Legal History



- **Common Law** – adjoining property owner had no duty to maintain sidewalks and therefore no liability for mere failure to maintain. Could be liable for other acts of negligence.
- **Streets and Highways Code §5610 (1941)** – property owner has duty to maintain adjacent sidewalk and can be *liable to the municipality* if it is forced to repair or maintain. However, owner not liable for damages to the public for failure to maintain.

Current law unless local ordinance applicable

Current Situation With No Ordinance

THE DOs & DON'Ts
OF RESIDENTIAL PARKWAY LANDSCAPING

Did you know? The parkway is the area between the curb and the sidewalk (if there is no sidewalk, then it is the area between the curb and the property line). The parkway is owned by the City and maintained by the property owner, except for City-installed trees. Landscape improvements to this area require a permit and must comply with City guidelines outlined in Municipal Code 12.20.010.

MAY BE PERMITTED:

- ✓ ROCK
- ✓ SHRUBS UNDER 24 IN. TALL
- ✓ PALM TREES
(So long as property owner signs liability/maintenance waiver)
- ✓ PLANTER BOXES
(At the discretion of the Public Works Director)
- ✓ CALIFORNIA-FRIENDLY PLANTS

NOT PERMITTED:

- ✗ CACTUS
- ✗ FRUIT TREES
- ✗ FICUS OR CYPRESS TREES
(for list of all non-acceptable, damaging trees visit our website BuenaPark.com)
- ✗ PEA GRAVEL OR BARK

NOT IN COMPLIANCE?

TALK TO US TODAY!

- Apply for a no fee permit at the Public Works Counter
- No architectural drawings required

Enforcement will begin June 1, 2019

CITY OF BUENA PARK
PUBLIC WORKS DEPARTMENT
(714) 562-3676
6650 BEACH BLVD.
BUENA PARK, 90620
BUENAPARK.COM

- Property owner has duty to MAINTAIN sidewalk except if City created the problem (tree?)
 - CA Streets & Highways Code § 5610
- City is liable for damages due to property owner's failure to maintain and for hazards the City or third persons create
- Property owner is liable for damages arising from hazards they create or if they exercise dominion or control over the abutting sidewalk.

The “San Jose” Ordinance

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.

Court's Reasoning in Upholding Ordinance



■ Serves important public policy purpose

- Provides an additional level of responsibility
- Owners often in the best position to quickly identify and address potentially dangerous conditions
- Provides incentive for property owners to maintain

Gonzales v. City of San Jose opinion

125 Cal.App.4th 1127 (Cal. Ct. App. 2004)

- Ordinance does not absolve City of liability for dangerous conditions on sidewalks
- *Both* city and property owner could be liable

Pros/Cons



- Fair to *enable* liability arising from city property to owner who has no say in how built or used?
 - *Person who has duty to maintain is normally liable for their failure and such liability is transferred routinely in contracts*
 - *City still retains property owner liability*
- Insurance companies prepared to shoulder?
 - *One more reason to cancel?*
 - *One more pot of money for plaintiffs?*
- How should risk be paid for?
 - *By taxpayers generally or by owner and insurance?*
 - *City not doing its duty if doesn't at least consider ordinance?*

Bottom Line on Ordinance

- You are *enabling* liability against the property owner to third parties for damages arising from failure to maintain
- NOT a free pass on liability or duties of the City
- Risk management best practice – have obligation to transfer?
- Should be part of *public education and outreach program*
 - Provide guidance and **incentives if possible**
- Result is a more effective program for maintaining sidewalks and reducing claims
- Over half PARSAC members transferred with ordinance – dropped to none?

Recommended Best Practices

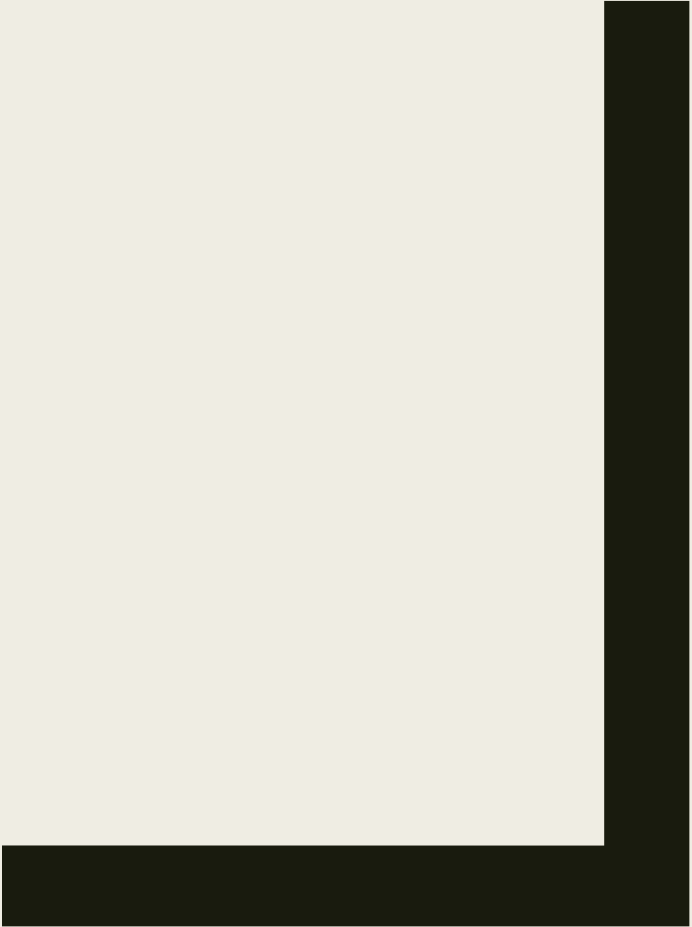


- Local Ordinance at least as broad as S&H code
- Liability transfer ordinance should be considered by Council
- *Look at trees, too!*
- Documented inspection program
- Active maintenance program
 - *Warn, restrict, repair, remove*
 - *Notify property owner of maintenance obligation*
 - *Follow up, repair and bill if needed*
 - *Offer incentives*

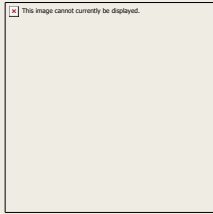


BEST PRACTICES

INSPECTION AND
MAINTENANCE
PROGRAMS

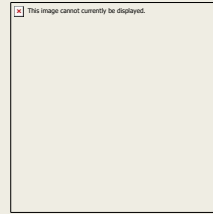


Elements of Sidewalk Inspection/Maintenance Program



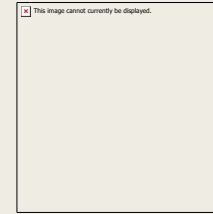
Establish criteria for defective sidewalks

- Measurements
- Location of sidewalk
- Amount of pedestrian traffic
- Resources for repair
- Effectiveness of temporary repair



Develop inspection procedures

- How to measure
- Taking pictures
- Marking Hazards



Conduct Inspections

- Establish schedule and frequency of Inspections

Sidewalk Management Program

All entities should have a Sidewalk Management Program that outlines:

- Scope
- Responsibility
- Inspections
- Inspection Criteria
- Repair and Replacement Procedures
- Repair and Replacement Options
- Priority Levels
- Sidewalk Warnings
- Financial Responsibilities
- Incident/Accident Reporting Procedures
- Recordkeeping

Inspection Criteria

Sidewalks should be inspected based on the following criteria:

- Prescribed annual inspections of zones on a rotating basis
- Areas designated as a safe route to school visually screened annually
- Citizen sidewalk service requests
- Sidewalk service requests involving an injury or accident responded to within 24 hours of notification
- Public Works, Building Inspector, or Code Enforcement employees who identify sidewalk hazards in the course of their duties
- Periodic inspections

Inspection Criteria

- Timely investigations
- Documented inspections
- Documented property owner notification when notification is appropriate
- Development of a corrective action plan
- Documented corrective action

What is Your Inspector Looking For?



Dangerous Condition of Public Property

A condition of property that creates a **substantial 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.

- Step separation
- Badly cracked concrete
- Spalled areas
- Settled areas that trap water
- Tree root damage
- Vegetation overgrowth

Sidewalk Defects

- Generally a sidewalk offset that measures three-fourths of an inch or less, is not a dangerous condition, absent other contributing factors (e.g., shading or lighting or other obstruction that makes the offset difficult to see, or if the displacement is open and obvious).
- A determination of whether the defect involved is a minor or trivial one may be material in that minor defects inevitably occur, both in construction and maintenance, and that their continued existence is not unreasonable. (Gov. Code § 830.2.) In such case, irrespective of the question of notice of the condition, no liability may result. (*Graves v. Roman* (1952) 113 Cal.App.2d 584.)
- California law applies a “**totality of the circumstances**” test to determine what is and what is not a TRIVIAL DEFECT in this context:
 - *If the RAISED EDGE is ½" or less and there was no other aggravating factor(s) (e.g., oil, inadequate lighting, an obstacle, etc.) a TRIVIAL DEFECT defense would likely prevail*
 - *If the trip HAZARD is between ½" and ¾", the injured party has a fighting chance; and*
 - *If the trip hazard is greater than ¾" in height, the defense is more likely to argue that the trip hazard was OPEN AND OBVIOUS and therefore the injured party is either substantially or entirely COMPARATIVELY NEGLIGENT and therefore responsible for their own injuries.*

Existential question – when does a defect go from “Trivial” to “Hazard” to “Open & Obvious”?



Prioritization

- Vertical displacements that exceed $\frac{3}{4}$ inch should be documented and scheduled for repair
- Where a sidewalk deficiency is noted, provide a rating from 1 to 4
 - 1 = displacement less than $\frac{3}{4}$ inch (**LOW**)
 - 2 = displacement between $\frac{3}{4}$ inch and $1\frac{1}{4}$ inch (**MEDIUM**)
 - 3 = displacement is more than $1\frac{1}{4}$ inch (**HIGH**)
 - 4 = deficiency is in the vicinity of a sensitive location (**VERY HIGH**)
such as school zones, senior centers, business districts, high pedestrian zones, etc.
- Sidewalks with slopes exceeding 5:1 ratio should be documented and scheduled for repair
- Cracks less than $\frac{1}{2}$ inch should be filled
- Holes $\frac{1}{2}$ inch or greater in depth should be filled

Prioritization

		Potential Consequences				
		L6	L5	L4	L3	L2
		Minor injuries or discomfort. No medical treatment or measurable physical effects.	Injuries or illness requiring medical treatment. Temporary impairment.	Injuries or illness requiring hospital admission.	Injury or illness resulting in permanent impairment.	Fatality
		Not Significant	Minor	Moderate	Major	Severe
Likelihood	Expected to occur regularly under normal circumstances	Almost Certain	Medium	High	Very High	Very High
	Expected to occur at some time	Likely	Medium	High	High	Very High
	May occur at some time	Possible	Low	Medium	High	High
	Not likely to occur in normal circumstances	Unlikely	Low	Low	Medium	Medium
	Could happen, but probably never will	Rare	Low	Low	Low	Low

- Check for damage around traffic signals, utility poles, ground boxes, streetlights, etc.
- Sidewalk damage around a construction site with heavy equipment should be noted
- Brick or concrete walkways installed by property owners should be level to sidewalk
- Hazards or damage that do not meet requirements for immediate repair should be noted for future inspections
- Take photographs

Examples of Sidewalk Deficiencies

- Cracks



Examples of Sidewalk Deficiencies

- Root Damage



Inspections and Investigations

- Establish a system to receive and record complaints/incidents
- Follow-up on complaints/incidents immediately
 - *Assume a claim is coming*
- Take picture of area (camera has timestamp and GIS capability)
- Take measurements of both sides of sidewalk and take pictures showing measurement
- Establish priority
- Enter repair request into work order system
- Once repaired, take picture showing completed repairs

Sidewalk Warnings



Prior to sidewalk being repaired or replaced, crews may install warnings on or near the damaged area to warn pedestrians.

Warnings may include:

- High-visibility paint
- *CAUTION* cones
- *CAUTION* tape
- Barricades



Not so existential question - My city attorney tells me I shouldn't use paint as a warning on sidewalk hazards because that proves we had notice of hazard. Is attorney correct?

Photographs

Photograph the condition of the sidewalk before the work is started to provide evidence in case a claim for damages occurs from the abutting property owner after the sidewalk is repaired/replaced.

Images of sidewalks should include:

- The surrounding area(s) (i.e., trees, shrubbery, lawn fixtures, driveway approaches, and lawn).
- Utilization of a tape measure or an object for scale.
- A straight edge may be used to help with documenting width and depth. If a straight edge is used, it should be at least 36" in length.

Photograph condition of the sidewalk after repairs are completed







25
ft

1

ft

in

2

3

4

STANLEY

Life Guard

Financial Responsibility



Who PAYS
for WHAT?

Determine financial responsibility for repairs/replacement:

- Property owner
- Entity
- Shared

Property Owner Notification

Send notice of repair to
property owner

SIDEWALK REPAIR NOTICE – FIRST NOTICE

[Name of Property Owner]

[Street Address]

[City, State Zip Code]

RE: Sidewalk Management Program – First Notice to Repair

Dear Property Owner:

Your property located at [ENTER PROPERTY ADDRESS](#) was recently inspected under the [City's/Town's](#) Sidewalk Management Program. As such, portions of the sidewalk have been marked for repair and/or replacement.

The State of California, Streets and Highway Code, Section 5610 states property owners shall maintain any sidewalk fronting their property in such condition that will not endanger persons or property and maintain it so that it will not interfere with public convenience.

Upon receipt of this notice, we are requesting that you take action as soon as possible to correct the hazard. The marked sidewalk area on your property has the potential of tripping pedestrians, resulting in personal injury and possible liability.

You have the following options available to accomplish the repair:

- (A) You may do the work yourself. If you choose to do this, it will be necessary for you to obtain an encroachment permit from the [City/Town](#). The work must be performed in accordance with [City/Town](#) standards. Permits can be obtained at the [INDICATE THE DEPARTMENT AND STREET ADDRESS WHERE PERMITS MAY BE OBTAINED](#).
- (B) You may hire a licensed contractor to perform the work. Permit and work standards are applicable as stated above.
- (C) You may have the [City/Town](#) repair the sidewalk at your expense. Permit and inspection fees are included in the cost of repair.

If the repair, or a response to the [City/Town](#), with intention to repair, is not initiated **within two weeks** of this notice, the [City/Town](#) will add the sidewalk area to a scheduled list of repair work. Any costs incurred for the repair of the sidewalk will be at your expense. Failure to pay may result in a lien being placed on the property.

If you have any questions or concerns regarding this matter, please contact me at [INSERT CONTACT INFORMATION](#).

Sincerely,



REPAIR & RISK
MANAGEMENT
SERVICES

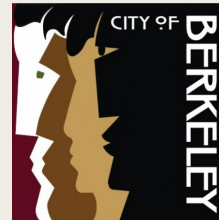


Who We Are

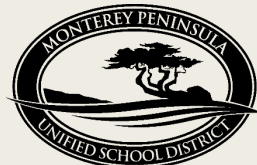
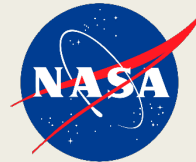


- Global Leader in Sidewalk Repair
- Over 40 Franchise specializes in repairing/inspecting sidewalks
- 7 patents awarded by the U.S. Patent and Trademark Office

100's of Clients in NorCal



FPI MANAGEMENT



Goals

Managing Sidewalk Infrastructure on a Tight Budget



Effectively Manage Sidewalk Inventory/Resources

- Improve Pedestrian Safety
- Reduce Liability
- ADA Compliance
- **Increase Walkability**
- Preserve the City's Sidewalk Infrastructure
- Foster Good-Will Among Residents
- Maintain an Active Program
- Maintain Detailed Records/Tracking in Virtual Setting
- Effective Tool to Leverage Funding

Trip Hazard Causes

Tree Roots –
#1 Cause for lifted sidewalks



Ground Settling –
(or expansive/contractive soils)



FREEZE / THAW-
Mainly affects concrete near
ponds, lakes, rivers



HEAT-
When concrete expands and causes
sidewalk to buckle or heave



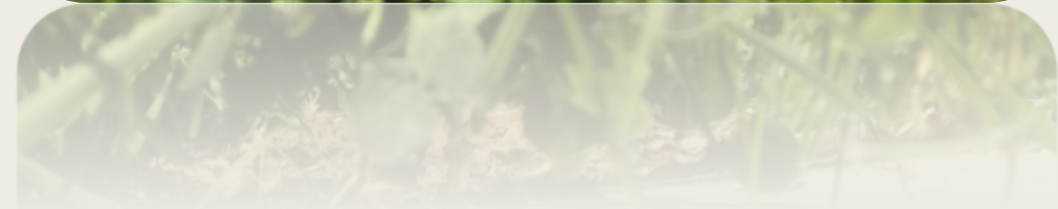
Utility Boxes-
Typically installed by a utility company
but often sink or lift



Curb and Gutter-
People often trip on lifted curb
or gutter when getting out of cars
or crossing the street



Methods of Sidewalk Repair



Asphalt Patch

Ramp up asphalt on sunken panel



PROS

- Quick and Easy
- Low Skill Requirement
- Inexpensive

CONS

- Temporary Fix
- Poor Aesthetics
- Lacks ADA Compliance
- Expansion/Contraction
- Best with hazards that can not be removed

Concrete Grinding

Rotating drum of carbide steel shafts
that pound and grind elevated concrete

PROS

- Commercially available
- Low skill requirement
- Filler project
- Environment
- Other functionality

CONS

- Commercially available (skill level)
- ADA Compliance (domed/full width)
- Some liability remains
- Aesthetics
- Staff avoids it
- Pitting/Micro Cracks
- Hazards > 1"



Removal and Replace

Break up, remove debris, re-form & re-pour



PROS

- Aesthetics
- Removes Liability
- ADA Compliant

CONS

- Increasingly High Cost
- Time/Labor Intensive
- Sidewalk Closure
- Environment (if not recycled)
- Fix underlying issue (tree, drainage, etc.)



Saw Cutting

a better way to repair

PROS

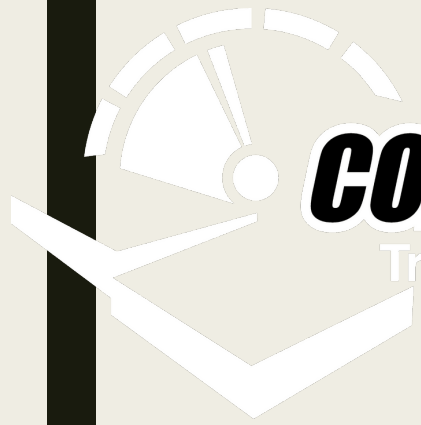
- ADA Compliance
- Removes Liability
- Aesthetics
- Cost Structure (70-90% Savings)
- Speed
- Environment

CONS

- Equipment Not Commercially Available
- Unfamiliarity
- Hazards > 2"

100% ADA COMPLIANT





PRECISION CONCRETE CUTTING

Trip Hazard Removal Specialists

Cost Effective



\$50 – 5ft Repair on average

Fast: ~300 trip hazards in a day

No concrete damage

No sidewalk closures or heavy machinery

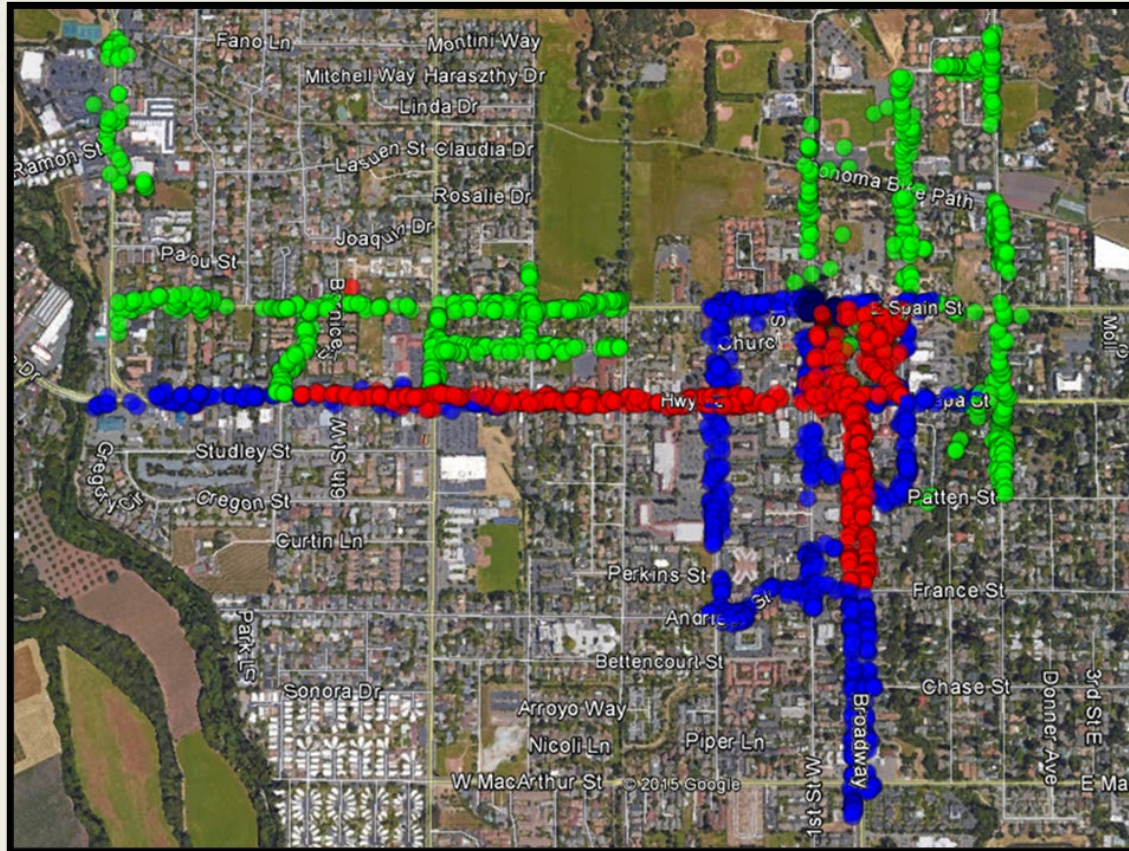
Master Contract with JPAs to get best pricing

Assessment Services

- Performing sidewalk inspections throughout Northern California for the last 15 years
- Delivering Data you need to make critical decisions in real time
- Delivering Data you need to make critical decisions in real time
- Priced by the Mile or Facility
- Determine Priority, Schedule/Plan
- GIS Compatible



Data and Documentation



Confirm City Sidewalk Locations

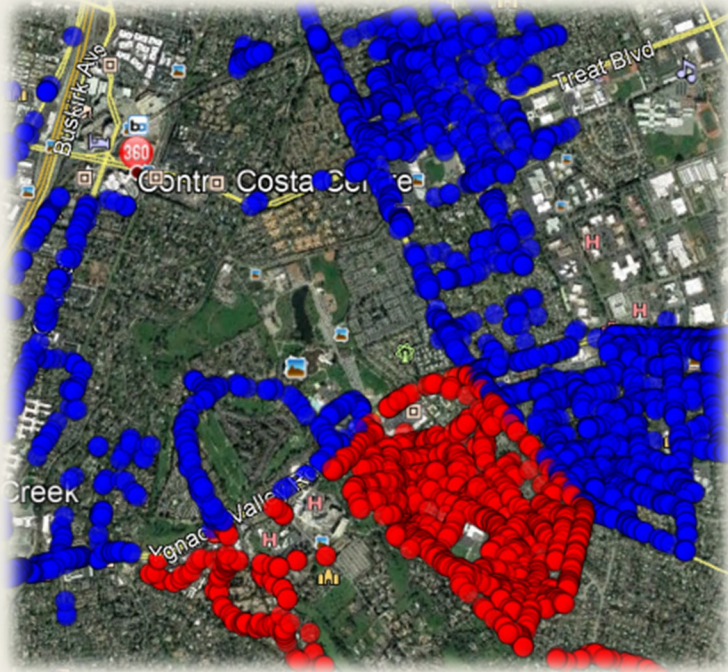
Determine Priority, Schedule/Plan/Budget

Virtual Audit, ideal for Risk Management

Organize Ongoing Sidewalk Maintenance & Completed Repairs

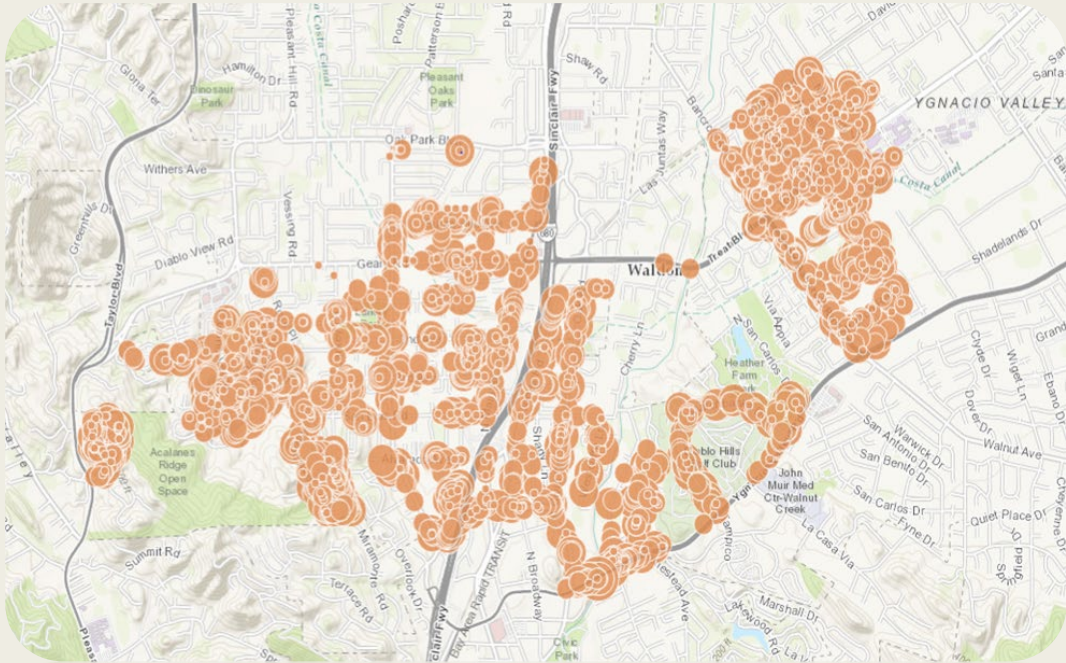
All data is GIS compatible

Programs- Zone Approach



- City Divided into Zones and inspect one zone per year
- Inspect Downtown and high traffic zones annually
- Repair Displacements
- Replace sidewalks that cannot be shaved
- Document information GIS
- Goal inspect and repair all sidewalks every 3-5 years

Case Study - City of Walnut Creek



- City broken into 15 Zones, 5 zones per year, entire city every 3 years
- City funds 100% of sidewalk repairs and inspection
- PCC repaired over 5,000 sidewalk panels, inspected all sidewalks in entire city
- All data integrated into GIS
- Saved city over \$1.6M vs R&R
- Reduced trip and fall claims & payouts by 80%
- PCC cost reduced by 70% second time
- Reduced City staff time and resident complaints

Things to Consider

- Streets and Highway Code specific format for notices of repair to homeowners
- Administrative cost sending notices can be as expensive as repairing hazard. Average cost for PCC to repair property line \$125-150
- Political climate to enforce Streets and Highway Code, lien residents' homes
- Don't forget City owned Property or sidewalk lifted by city trees
- Head in the sand approach doesn't work
- Having a Program in place is best practice to reduce liability

STREETS AND HIGHWAYS CODE SECTION 5610-5618

5610. 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 a like duty in relation thereto.

5611. When any portion of the sidewalk is out of repair or pending reconstruction and in condition to endanger persons or property or in condition to interfere with the public convenience in the use of such sidewalk, the superintendent of streets shall notify the owner or person in possession of the property fronting on that portion of such sidewalk so out of repair, to repair the sidewalk.

5612. Notice to repair may be given by delivering a written notice personally to the owner or to the person in possession of the property facing upon the sidewalk so out of repair, or by mailing a postal card, postage prepaid, to the person in possession of such property, or to the owner thereof at his last known address as the same appears on the last equalized assessment rolls of such city or to the name and address of the person owning such property as shown in the records of the office of the clerk.

Resources



- NCCSIF Sidewalk Liability Best Practices - <https://www.nccsif.org/>
- PARSAC Sidewalk Inspection Program - <https://www.parsac.org/>
- SCORE - <https://www.scorejpa.org/>
- City of Sacramento Sidewalk Maintenance Program Handbook
- City of Pasadena Sidewalk Repair Reimbursement Program
- “But It’s Your Sidewalk” – League of CA Cities
- ADA Best Practices Tool Kit for State and Local Governments

In Summary

- Pass, or at least Council consider, a “San Jose” ordinance
 - *Risk Management Best Practice*
 - *Or provide funding/program/outreach*
 - *Tackle trees, too!*
- Have an Inspection and Maintenance Program
 - *Prioritize areas and hazards*
 - *Don't forget ADA issues*
- Repair and Service Options
 - *Cutting v. Grinding*
 - *Crew Efficiency*

Comments/Questions?

Please reach out to pool
admin contacts for more information

Thank You!