

## 2. LEGAL ASPECTS

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### 2.1. Overview

The four major sources of legal guidance for pedestrian infrastructure are:

- New York State law
- Tort law
- Americans with Disabilities Act (ADA)
- Municipal ordinances

This chapter is primarily concerned with the first two sources; municipal ordinances are addressed in [Chapter 3](#), and the ADA has been extensively addressed in other readily available resources. New York State law touches on several aspects of pedestrian mobility, including which levels of government construct sidewalks and who is responsible for maintaining sidewalks. State law also relates to the question of whether or not children walk to school, since State law establishes the distance that students must be bused to school.

Tort law related to the accidental injury of pedestrians is a large and ever-shifting body of law, based primarily on rulings in specific cases. Generalizing policy or design standards on the basis of case law can be complicated and should not be done without guidance from a legal professional. However, basic concepts are presented in order to provide an orientation to this type of law.

### 2.2. Disclaimer

The portions of this document relating to liability and legal issues are intended to provide a brief and simple overview of some points of intersection between federal, state and local law and transportation planning. It is not intended to be legal advice, does not constitute legal advice and should not be used as a substitute for qualified legal advice from a competent, experienced attorney licensed to practice law. Any person or entity reading this document should retain a lawyer to seek his or her advice with respect to any information or legal issues discussed in this document.

While every effort is made to ensure accuracy and to keep this information current, agency details, law and procedure outlined herein can change constantly. No responsibility is accepted for any loss, damage or injury, financial or otherwise, suffered by any person or organization acting or relying on this information or anything omitted from it.

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### 2.3. New York State Law

#### 2.3.1 Highway Law

##### *Sidewalk definition*

New York State law defines a sidewalk as “that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians.” *New York State Vehicle and Traffic Law, Title 1, Article 1, Section 144*

State law addresses some, but by no means all, aspects of sidewalk construction and maintenance. Compiling state law for reference can become convoluted, since a given section of the law may be addressing a specific level of government (state, county, city, town or village), a specific type of highway (for example, a state highway outside a city or village), and a specific function (construction or maintenance). No single compilation of state laws related to sidewalks was found as part of the development of this document, but this would be a welcome reference. State laws applicable to sidewalk construction are found primarily in State Highway Law, in a variety of sections.

##### *Sidewalks on State Highways*

#### CONSTRUCTION

The New York State Department of Transportation can build sidewalks adjacent to state highways in towns (outside city and village boundaries) where necessary, as described in [State Highway Law, Article 2 \(State Commissioner\), Section 10.22](#):

The commissioner of transportation shall:

22. Provide for the construction of sidewalks adjacent to state highways outside of cities and incorporated villages, when he is of the opinion the same are necessary. He shall have full authority to determine the type, width, location with respect to the highway, and the general construction details of such sidewalks. The expense of such construction shall be a proper charge against funds available for the construction, reconstruction or maintenance of state highways. *State Highway Law, Article 2 (State Commissioner), Section 10.22*

##### *County Government*

Counties can build “walks or paths” for pedestrians along state highways. [State Highway Law, Article 3, Section 54](#) provides a process whereby a town’s board can request that the county build a sidewalk or path along a state highway. If the county’s board of supervisors agrees to this request, the county then works with the state to develop a plan for the construction of these improvements. Upon state and

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county approval of the project, the county constructs the project on the state's highway. Under this section of state law, the county funds construction and right-of-way acquisition and the requesting town is responsible for reimbursing 35 percent of these costs to the county.

### *Town Government*

Town governments can construct sidewalks along state and county roads, with the permission of the State Commissioner of Transportation or the County Superintendent of Highways, as appropriate. Towns must pay for these sidewalks themselves. [State Highway Law, Article 7, Town Superintendents, Section 151](#)

### MAINTENANCE

As the following examples show, state law places the burden for maintenance on municipal entities. However, these municipalities (towns, villages and cities) are not restricted from then placing the burden for sidewalk maintenance on individual property owners; frequently, this is done through local ordinances. [Chapter 3](#) provides an inventory of local ordinances and discusses their requirements.

### *City Government*

Under State law, cities are charged with the maintenance of sidewalks constructed by the state along state arterial highways. Following construction by the state: "Such sidewalks, facilities and appurtenances shall be maintained or shall be continued to be maintained, as the case may be, by the city in which they are located, or by the agency or unit owning or having control and jurisdiction thereof." [New York State Highway Law, Article 12-B, Section 349-C](#)

### *Town Government*

Under New York State Highway Law, it is the town superintendent's responsibility to ensure maintenance of all sidewalks along state and county roads. The town superintendent shall: "Maintain all sidewalks in the town constructed by the state adjacent to state highways and all sidewalks in the town constructed by the county adjacent to county roads and, when authorized by the town board, cause the removal of snow therefrom, and the cost thereof shall be paid from the miscellaneous or other town funds." [New York State Highway Law, Article 7, Section 140](#)

Read the full text of NYS's Complete Streets Law on the NY Senate Open Legislation web site: <http://open.nysenate.gov/legislation/bills/5411a-2011>

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### *Village Government*

For a state highway in a village, the maintenance of everything along a state highway other than the pavement and drainage facilities falls to the village. Specifically: “Any sidewalks, sewers, water mains, curbs, paved gutters, conduits, facilities and appurtenances ... shall be maintained ... by the village in which they are located, or by the agency or other unit owning or having control and jurisdiction thereof except the state shall maintain any drainage ditches and storm sewer facilities which are constructed primarily to service the state highway facility.” [State Highway Law, Article 3, Section 46](#)

### *Sidewalks on County Highways*

#### COORDINATION REQUIREMENT

County highway superintendents are responsible for determining the type and location of sidewalks along county roads, but they need the consent of the municipality (town, village or city) in which the sidewalk would be constructed. [State Highway Law, Article 5, County Superintendents, Section 102.15](#) states: “No such sidewalk shall be constructed in that portion of a town outside a village unless the town board consents thereto. No such sidewalk shall be constructed within any city or village unless the governing body of such city or village consents thereto.”

### *Town-Village Sidewalk Maintenance*

[State Highway Law Article 7, Section 142-c](#) allows towns to do sidewalk maintenance, including snow removal, in villages, based on terms agreed to by the town board and the village’s board of trustees. This section of the Highway Law also specifies that towns can share tools and equipment with villages located wholly or partly within their boundaries. Villages are not required to pay for these services, nor does state law identify a formula for determining their value: towns and villages must come to an agreement.

#### **2.3.2 Property Maintenance Code**

New York State’s *Property Maintenance Code* states that “The owner of the premises shall maintain the structures and exterior property in compliance with these requirements....” The Code goes on to identify sidewalks (and driveways) as exterior property areas that “shall be kept in a proper state of repair, and maintained free from hazardous conditions.” [New York State Property Maintenance Code, Sections 301 and 302.3](#)

In many cases, local ordinances expand upon this requirement, making individual property owners responsible for maintaining sidewalks (including ice and snow removal) adjacent to their property. See [Chapter 3](#) for more information on local ordinances.

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### 2.3.3 Sidewalk Planning and Construction

New York State's Complete Streets Law (S5411A-2011) states that "it shall be the policy of the state to consider people all ages and abilities and all appropriate forms of transportation when planning roadway projects." This policy applies both to New York State Department of Transportation (NYSDOT) projects, and to county and other local projects that receive state and federal funding. [S5411A-2011, Section 1](#)

New York State's Smart Growth Public Infrastructure Policy Act codifies the state's interest in "minimizing unnecessary costs of sprawl development including environmental degradation, disinvestment in urban and suburban communities and loss of open space." The law identifies publicly supported infrastructure, like roads, sewers, water lines, wastewater treatment facilities and schools, as facilitating sprawling development patterns. To the extent that this law encourages more compact and infill development, it may result in greater demand for and use of pedestrian facilities, since it would promote development at a walkable scale. [Smart Growth Public Infrastructure Policy Act](#)

### 2.4. Town Law

[New York State Town Law, Article 12, Section 198](#) provides for the creation of sidewalk snow removal districts and sidewalk districts for sidewalk construction and maintenance:

7. Snow removal districts. After a snow removal district shall have been established, the town board may contract for a term not exceeding ten years for the removal of snow from all the sidewalks in said district or such portion thereof as the board may determine. Whenever the town board shall have awarded a contract for the removal of snow from a portion of the sidewalks in any such district, the town board may contract for the removal of snow from additional sidewalks in said district from time to time as the said town board in its discretion may determine advisable. Whenever the town board may determine it advantageous so to do, it may employ a sufficient number of persons and provide the necessary equipment to remove snow from sidewalks within the district, at the expense of said snow removal district. NYS Town Law, Section 198, 7

10-b. Sidewalk districts. After a sidewalk district shall have been established, the town board may construct or contract for the construction of sidewalks within the district as it may determine to be necessary or desirable. The board shall also have authority to provide for the maintenance thereof. NYS Town Law, Section 198, 10-b

While some villages in the Study Area will perform sidewalk snow clearance, no instances of a town establishing a sidewalk snow removal district were identified during the preparation of this guidance.

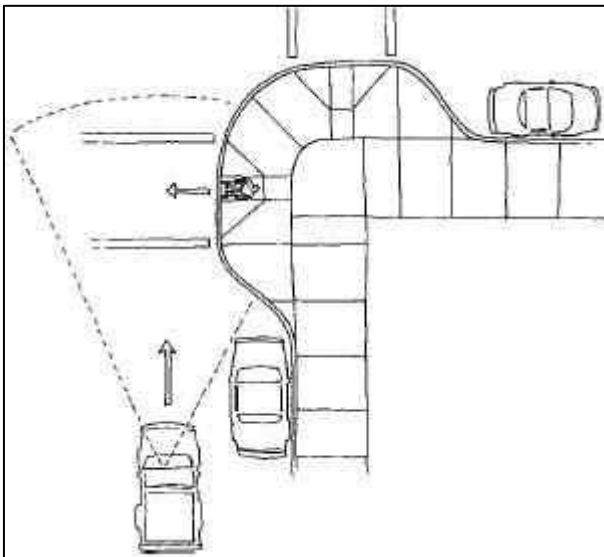
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### 2.5. Americans with Disabilities Act (ADA)

Title II of the Americans with Disabilities Act (ADA), together with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), sets minimum standards for accessibility to buildings, facilities, rail passenger cars, and vehicles for individuals with disabilities.

The ADA requires that all new and altered public sidewalks and street crossings be accessible so that people with disabilities can use the pedestrian routes that connect buildings, facilities and transportation modes. Title II of the ADA specifically requires that curb ramps be provided when sidewalks or streets are newly constructed or altered. Curb ramps should be designed to minimize the grade, cross-slope and changes in level experienced by users. The transition between the ramp and the street surface should be flush, since any height transition can create difficulties for individuals with disabilities.

For more information about ADA standards as they relate to sidewalks, visit FHWA's online guide [Designing Sidewalks and Trails for Access](#)



**Figure 2-1: Full curb extensions improve visibility between pedestrians and motorists** (from "Designing Sidewalks and Trails for Access")

ADAAG requires that sidewalks be designed with a minimum width at any given point of 32 inches, but with a continuous width of 36 inches, in order to accommodate wheelchairs.

The ADA does not require that sidewalks be constructed where none exist. However, it does require that existing sidewalks be retrofitted to include curb ramps. The ADA allows facility owners (including state departments of transportation and municipalities) to phase-in these improvements over time. As the SMTC's *Bicycle and Pedestrian Plan* states: "Each Town and Village within the MPO should have its own schedule or implementation plan for replacing non-ADA compliant sidewalks and curb ramps."

### 2.6. Tort Law and Municipal Liability

Sidewalk and other walkway projects are sometimes opposed by local decision-making bodies because of the fear of municipal liability for accidents that may occur on these facilities. A relatively minor mishap, for example someone slipping in an icy parking lot or tripping on a sidewalk, can lead to expensive medical bills and the possibility of a lawsuit.

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Legally speaking, when an individual suffers harm as a result of someone else's "wrong," that individual has recourse to a lawsuit to attempt to recover damages from the wrongdoer. The "wrong" is known legally as a tort. A lawsuit that results from a tort is a civil lawsuit, as opposed to a criminal action. The goal is to determine the degree of "fault" to assign to the individual or entity who is being accused of causing the tort.

In the case of a publicly owned and maintained sidewalk, where the municipality has not shifted the burden of sidewalk liability to adjacent property owners, the municipality would likely be the subject of tort lawsuits for accidents occurring on those sidewalks, such as tripping or slipping on ice.

There is often an assumption that exposure to a lawsuit would be reduced if there were no sidewalk on which to trip. In general, however, a municipality has greater legal protection when it addresses an accessibility issue than when it does not.

As previously stated, this document is not intended as a substitute for guidance from a qualified attorney. However, the following concepts can be useful in understanding the guidance provided by a qualified attorney and can be helpful to citizens or municipal officials who are interested in learning more on this subject:

- **Qualified immunity:** a highway official's design decisions or highway improvements plan *can* be insulated from tort liability under the "qualified immunity" principle. (Gelormini, 2011)
- **Inaction does not equate to immunity:** municipalities and agencies can be liable for what they do *not* do to accommodate all potential roadway users.
- **Written notice laws limit maintenance liability:** Determining legal liability for problems arising from facility maintenance (as opposed to design or planning) can be extremely complicated and will vary from case to case. Laws requiring written notice of a maintenance issue can limit municipal liability for roadway and sidewalk maintenance.

### 2.6.1 Qualified Immunity

Qualified immunity is a legal concept that assumes that an expert's analysis should not be reversed by a judge or a jury, because these people lack the expert's technical knowledge and experience.

A recent US Supreme Court case described qualified immunity in the following terms: "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." (Pearson v. Callahan, 2009)

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In the context of designing roadway facilities, such as bicycle and pedestrian facilities, the legal theory of qualified immunity in New York State essentially ensures that the court system will not attempt to second-guess design decisions made by engineers. The courts have taken up the question of whether or not adequate study went into a given decision, but if it can be demonstrated that a design solution was properly studied and developed, the design itself will not (generally) be scrutinized by the court.

The following text is from the report *A Highway Department's Legal Liabilities*, prepared by the Cornell Local Roads Program (*A Highway Department's Legal Liabilities*):

"A highway official's decisions about designing or planning highway improvements or implementing operational practices may be insulated from tort liability under the so-called 'qualified immunity' principle first enunciated in *Weiss v. Fote*, 7 NY2d 579, 586-588 (1960).

A municipality may be entitled to this 'qualified immunity' where its highway official has reasonably and properly studied a certain highway safety issue and decided on how to respond to it. *Id.*

The Court of Appeals reasoning was: "that the traditional reliance on a jury verdict to assess fault and general tort liability is misplaced where a duly authorized [public official] has entertained and passed on the very same question of risk as would ordinarily go to the jury." *Weiss*, supra, 7 NY2d at 579.

Therefore, "when [a municipality] studies a dangerous condition and determines as part of a reasonable plan of governmental services that certain steps need not be taken, that decision may not form the basis of liability." *Freidman v. State of New York*, 67 NY2d 271, 286 (1986).

The New York State Court of Appeals case in which this idea was originally developed is the 1960 case of *Weiss v. Fote*. The case involved a collision at a signalized intersection. The plaintiff attributed the accident to a traffic signal's clearance interval being too short and sued the municipality that had set the signal's timing. The Court of Appeals ruled in favor of the municipality out of "a

For a thorough discussion of qualified immunity as it relates to highway departments, see:

- [A Highway Department's Legal Liabilities](#)
- [New York State Qualified Immunity - Complete Streets Primer](#)

"Highway and recreational facilities that fail to fully incorporate the needs of all users increase the likelihood of potential court settlements in favor of those who are excluded."

*FHWA University Course on Bicycle and Pedestrian Transportation*



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regard for sound principles of government administration and a respect for the expert judgment of agencies authorized by law to exercise such judgment.” (Weiss v. Fote, 1960) (Tri-State Transportation Campaign, 2012) The ruling in this case specifies that qualified immunity does not protect a municipality when it can be proven that a plan was developed without adequate study or did not have a reasonable basis.

According to the *New York State Qualified Immunity - Complete Streets Primer*, prepared by the Tri-State Transportation Campaign in October 2012, “A governmental entity implementing Complete Streets designs in traffic planning should be entitled to qualified immunity unless its study and determination is plainly inadequate or there is no reasonable basis for its traffic plan.” (Tri-State Transportation Campaign, 2012)

Challenges to qualified immunity can arise when a municipality has not adequately considered, planned or designed facilities for pedestrians or cyclists. New York State courts have said that “immunity can be overcome by showing that a particular design, signage or signal configuration was built or installed without adequate study or a reasonable basis.” (Kane v. State of New York, 2005) For example, if a municipality claims qualified immunity for the design of an intersection where a pedestrian has been injured, the success of the claim may depend on whether or not the municipality can demonstrate that pedestrians were considered in the intersection’s design.

Often, scarcity of funding will mean a substantial lag time between the identification of a problem and the implementation of a solution. The Court of Appeals has granted qualified immunity when a solution, such as a signal, was identified as necessary but was not implemented at the time of an accident. In this case, immunity was granted because a process and schedule were in place for implementing improvements based on specific criteria for prioritization and funding availability. (Kane v. State of New York, 2005)

In 1982, trial lawyers in New York City started the Big Apple Pothole and Sidewalk Protection Committee to map sidewalk and street defects. These maps put the City on notice of thousands of sidewalk defects, thus circumventing an existing prior written notice law, and attempting to make the City liable for slip and fall accidents.

As many as 5,000 maps per year were created until a 2003 ordinance shifted liability for sidewalk maintenance to adjacent property owners. New York City paid out \$600 million in sidewalk injury cases from 1997 to 2006.

*“Ruling deals a setback to sidewalk injury lawsuits in New York”, New York Times, January 3, 2009*

### 2.6.2 Inaction

As the Federal Highway Administration has put it, “Doing nothing is not an option.... More and more governments are being sued for failing to recognize public needs and taking actions to meet them.” (Federal Highway Administration, 2006) Ignoring maintenance or design issues has not provided municipalities with the same degree of legal protection as studying existing problems and developing a reasonable plan for correcting them.

### 2.6.3 Prior Written Notice

In New York State, qualified immunity applies to the design and planning of facilities, but it typically does not provide protection from liability for accidents caused by improper maintenance. Given that a city, or even a small village, may not be able to maintain all of its street and sidewalk mileage in perfect condition on an annual basis, the exposure to liability seems massive. Municipalities can give themselves some protection by putting laws in place that require prior written notice of a maintenance problem in order to be held liable for it.

As the Cornell Local Roads Program’s *A Highway Department’s Legal Liabilities* states:

A written notice law ‘represents the Legislature’s solution to the vexing problem of municipal street and sidewalk liability’ concerning maintenance of municipal highways and sidewalks. *Barry v. Niagara Frontier Transit System Inc.*, 35 NY2d 629, 633 (1974).

Therefore, in cases based on improper highway maintenance (as opposed to highway design or signage), a written notice law establishes the rule that no liability against a municipality can arise unless a written notice was received by the designated municipal officer and it failed to remedy the condition within a reasonable time after receipt of notice. *Barry v. Niagara Frontier Transit System Inc.*, 35 NY2d 629, 633-634 (1974). (Gelormini, 2011)

The nuances of written notice law are extremely complicated. For example, if a municipality has “actual notice” of a defect, it is probably liable for that defect. Actual notice “means that a responsible municipal employee had actual knowledge of the defective or dangerous condition in that specific information concerning the defect was brought to the attention of the municipality or its agents or employees prior to the occurrence.” (Gelormini, 2011) Similarly, municipalities can be held liable for defects when they have “constructive notice” of the defect. Constructive notice essentially means that a problem was so clearly visible that the municipality *should* have known about it.

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### 2.7. Tort Law & Private Liability

Many of the municipalities in the Study Area have language in their local ordinances stating that proper sidewalk maintenance is the responsibility of the owner of the property adjacent to the sidewalk and that the property owner is liable for injuries sustained to users of the sidewalk. (See [Chapter 3](#) for more details on local ordinances.) In a residential setting, this means that a homeowner is responsible for the sidewalk in front of his house – including removal of snow and ice. Failure to keep up with this maintenance can mean that the property owner is held responsible in the event that someone using the sidewalk is injured. Often, this becomes a negotiation between the holder of the homeowner's property insurance and the injured party.

### 2.8. More Information

#### 2.8.1 Law and Liability

*A Highway Department's Legal Liabilities*, Cornell Local Roads Program, September 2011,  
[http://www.clrp.cornell.edu/workshops/manuals/hwy\\_depts\\_legal\\_liability.pdf](http://www.clrp.cornell.edu/workshops/manuals/hwy_depts_legal_liability.pdf).

*Federal Highway Administration University Course on Bicycle and Pedestrian Transportation*, July 2006.  
Available at: <http://www.fhwa.dot.gov/publications/research/safety/pedbike/05085/>

*New York State Qualified Immunity Complete Streets Primer*, Tri-State Transportation Campaign,  
October 2012, page 1. <http://tstc.org/reports/licsbx/liability-memo.pdf>

*Hausser v. Giunta*, 88 N.Y.2d 449, 669 N.E.2d 470, 646 N.Y.S.2d 490 (1996)  
New York State case law that discusses homeowner's liability for sidewalk maintenance when local ordinance explicitly places onus of responsibility on property owner  
[http://www.law.cornell.edu/nyctap/I96\\_0103.htm](http://www.law.cornell.edu/nyctap/I96_0103.htm)

*Assessing the Fiscal Impact of Lawsuits on New York State Municipalities*, Rockefeller College of Public Affairs and Policy, University at Albany  
<http://www.albany.edu/polis/pdf/Municipal%20Lawsuit%20Report%20One.pdf>

Laws of the State of New York

Highway Law: <http://codes.lp.findlaw.com/nycode/HAY>

Town Law: <http://codes.lp.findlaw.com/nycode/TWN>

Village Law: <http://codes.lp.findlaw.com/nycode/VIL>

#### 2.8.2 Prior Written Notice

"Ruling deals a setback to sidewalk injury lawsuits in New York", *New York Times*, January 3, 2009  
<http://www.nytimes.com/2009/01/04/nyregion/04pothole.html?pagewanted=all>

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### 2.8.3 ADA and Accessibility

*Designing Sidewalks and Trails for Access*, Federal Highway Administration. Available at:  
[http://www.fhwa.dot.gov/environment/bicycle\\_pedestrian/publications/sidewalks/](http://www.fhwa.dot.gov/environment/bicycle_pedestrian/publications/sidewalks/)

2010 ADA Standards for Accessible Design, US Department of Justice  
<http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf>

Guidance on the 2010 ADA Standards for Accessible Design  
[http://www.ada.gov/regs2010/2010ADAStandards/Guidance\\_2010ADAStandards.pdf](http://www.ada.gov/regs2010/2010ADAStandards/Guidance_2010ADAStandards.pdf)

Department of Justice/Department of Transportation Joint Technical Assistance on Title II of the Americans with Disabilities Act Requirements to Provide Curb Ramps when Streets, Roads, or Highways are Altered through Resurfacing  
<http://www.ada.gov/doj-fhwa-ta.htm>