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**Confidential / Attorney – Client Privileged**

**MEMORANDUM**

**TO: The Borough of Chambersburg Council**  
**RE: Sidewalk Policy / Tort Liability**  
**DATE: June 8, 2016**

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The purpose of this memorandum is to provide Council with information regarding the potential liability associated with, exceptions to, or exemptions from the Borough's Sidewalk and Curb Policy, and to discuss whether the Borough is exposed to potential liability for an injury that may occur on a sidewalk within the Borough's right-of-way.

Town Council has established a Sidewalk and Curb Policy, enumerating criteria regarding the repair and installation of sidewalks. At a recent Council meeting, there was discussion regarding a potential exception or exemption from the policy based on an alleged safety issue (not supported by engineering analysis or accepted objective standards). Also, following the Council meeting, questions arose regarding potential liability for injuries that may occur on a sidewalk within the Borough's right-of-way.

**I. THE BOROUGH IS NOT REQUIRED TO HAVE SIDEWALKS, BUT ONCE IT DOES, THE BOROUGH HAS CERTAIN RESPONSIBILITIES.**

Generally, a Borough is not required to construct or order a property owner to construct a sidewalk. *Koerth v. Borough of Turtle Creek*, 49 A.2d 398 (Pa. 1946). However, a Borough has a duty "to maintain its sidewalks in a reasonably safe condition or, rather . . . to see that the property owner performs his duty to make the necessary repairs." *Id.* at 399.

When a municipality adopts an ordinance or policy to require a property owner to build or repair sidewalks within its geographic limits, the municipality's ordinance must not be enforced arbitrarily or in a discriminatory manner.

**II. THE BOROUGH'S SIDEWALK AND CURB POLICY MUST NOT BE FACIALLY ARBITRARY OR ARBITRARILY ENFORCED.**

In *Sweigart v. Borough of Ephrata*, 344 A.2d 766 (Pa. Cmwlth. 1975), a property owner alleged that the Borough's directive to the property owner to install a sidewalk **was arbitrary**. The Commonwealth Court decided that the Borough's directive was proper because (1) the Borough's

“invariable” ordinance expressly required a property owner to install a sidewalk next to a street that was constructed or improved by the Borough, (2) there were no exceptions by the Borough to this express requirement, and (3) the Borough’s directive to the property owner was in pursuance of its ordinance.

This is not to say that there can never be exceptions to the Sidewalk and Curb Policy, but rather, any exceptions must be based on sound, objective criteria applied uniformly. If Council desires to incorporate a safety exception, the criteria for such exception should be developed in conjunction with engineering staff and based on accepted engineering practices. The same would apply to any geographic or grade exceptions. However, Council should not grant exceptions where there is not an objective standard established, as such a subjective act opens the policy to challenge.

### III. IN GENERAL THE BOROUGH IS NOT LIABLE FOR INJURIES THAT MAY OCCUR ON SIDEWALKS WITHIN ITS RIGHT-OF-WAY, UNLESS SPECIFIC EXCEPTIONS ARE PRESENT.

Generally, the Borough is immune from tort liability under the Political Subdivision Tort Claims Act (“PSTCA”) (42 Pa. C.S. § 8541). There are, however, exceptions to this rule for injuries that occur on a Borough-owned street and a sidewalk within the right-of-way of a Borough-owned street if, and only if, the following three conditions exist: (1) The injury must be caused by a **dangerous condition of** the street or sidewalk, (2) the injury must be **reasonably foreseeable** from the nature of the dangerous condition, (3) the Borough must have **actual notice** of the dangerous condition or could **reasonably be charged with notice** at a time sufficiently in advance of the injury to have taken protective action. (42 Pa.C.S.A. § 8542(b)(6)-(7)).

External events that are **not** conditions **of** the sidewalk will not impose liability on the Borough. In *Jenkins v. Kelly*, 498 A.2d 487, 488 (Pa. Cmwlth. 1985), a pedestrian was injured by a stray dog while walking on a city sidewalk and sued the city for damages. The Commonwealth Court determined the city was not liable because a stray dog is not a “reasonable foreseeable risk” of which the city “could reasonably be charged with notice”, and a stray dog cannot be reasonably considered to be a condition **of the sidewalk**.

Even if these exceptions are present, the property owner adjacent to a sidewalk within the right-of-way of a Borough-owned street is **primarily liable** for injuries that are caused by a dangerous condition of the sidewalk. *Restifo v. City of Philadelphia*, 617 A.2d 818 (Pa.Cmwlth. 1992). “A property owner has the **primary duty** of keeping the sidewalk in front of his property in repair, and the city’s liability to see that the sidewalk is left in repair is **secondary**.” *Id.* at 820.

In the Limekiln Drive matter, the Borough has solicited the advice of a traffic engineer regarding the proper design and implementation of sidewalks in order to ensure that dangerous conditions are not presented with the installation of a sidewalk. Therefore, the installation of the sidewalks will not create a liability concern because they do not constitute a dangerous condition. As with any improvements though, proper maintenance and inspections should occur at reasonable intervals to ensure that over time a dangerous condition does not arise.

### IV. CONCLUSION

Council should uniformly enforce its Sidewalk and Curb Policy. If Council desires to create exceptions to the policy regarding the installation of sidewalks and curbs, it should incorporate these exceptions into the policy, provided that such exceptions are based on objective criteria. I would also

suggest that the burden of demonstrating entitlement to an exception should rest with the person or entity requesting the exception.

Finally, as to the Limekiln Drive sidewalk matter, the installation of sidewalks does not create a dangerous condition as advised by the traffic engineer, thereby limiting liability concerns. However, maintenance and inspections should occur at reasonable intervals to ensure that over time a dangerous condition does not develop.