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Mirror Lake Watershed Association
PO Box 1300
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Attn: William Billerman

Dear Bill:

The Mirror Lake Watershed Association has asked us whether the Village of Lake Placid ("Village") or the Town of North Elba ("Town") would face an increased risk of tort liability if those municipalities decreased the use of salt on their streets, highways and sidewalks.

In our opinion, the Village and Town would not face such an increased risk of tort liability – i.e., liability for damages for personal injuries or property damage based on their negligence in the maintenance of their streets, highways and sidewalks.

PRIOR WRITTEN NOTICE STATUTES

Existing State statutes - so-called written notice laws - provide substantial protections to the Village and Town for tort liability arising out of the presence of snow or ice on their streets, highways and sidewalks.

Those protections would not be diminished if a decreased use of salt were to be adopted during snow and ice control operations by the Village or Town under existing case law and the statutes themselves.

The State statutes applicable to the Village are Village Law §6-628 and Civil Practice Law and Rules ("CPLR") §9804, which are identical in wording.

Both statutes prohibit any civil action against a village for damages "sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street highway, bridge or culvert" unless prior to the accident a written notice was received by the village clerk stating the "particular place" of

the snow or ice and the village failed "to cause the snow or ice to be removed, or the place otherwise made reasonably safe" within a "reasonable time." To the same effect is Village Code §206-1.

The State statute applicable to the Town is Town Law §65-a [1] and [2] which prohibit any civil action against a town for damages "sustained solely in consequence of the existence of snow or ice upon any highway, bridge or culvert" [subd. 1] or sustained "in consequence of the existence of snow or ice upon any of its sidewalks" unless a written notice specifying the particular place and condition "was actually given to the town clerk or to the town superintendent of highways, and there was a failure or neglect to cause such .... snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice."

As is evident from the face of these written notice laws, in the absence of a written notice, the Village and Town are effectively immunized from any "civil action ... for damages" based on the presence of snow or ice on their streets, highways and sidewalks.

The case law interpreting these written notice laws confirms this immunity from suit and holds that a claim based on a reduced application of salt to a municipal street, highway or sidewalk is subject to a written notice law.

ANALYSIS OF THE POLICY AND EFFECT OF WRITTEN NOTICE LAWS

Written notice laws "modify the general substantive law of torts" by establishing the requirement that a municipality's duty to care for its streets, highways and sidewalks does not arise at all unless a prior written notice of the condition was received by the municipality. *Barry v. Niagara Frontier Transit System Inc.*, 35 N.Y.2d 629, 633 (1974) (emphasis supplied).

If a written notice law applies, then the fact that the municipality or its agents might have had actual or constructive notice of the unsafe or dangerous condition

is not a substitute for compliance with a prior written notice law. *Amabile v. City of Buffalo*, 93 N.Y.2d 471 (1999).

The policy of these written notice laws is "to enable the [municipality] to prevent accidents by repairing or guarding against defects [in highways, streets and sidewalks], thus protecting the traveling public." *Martin v. City of Cohoes*, 37 N.Y.2d 162, 166 (1975). As the New York Court of Appeals has stated that:

> "The purpose of a prior written notice provision is to place a municipality on notice that there is a defective condition on publicly-owned property which, if left unattended, could result in injury. This ensures that a municipality, which is not expected to be cognizant of every crack or defect within its borders, will not be held responsible for injury from such defect unless given an opportunity to repair it. The policy behind this rule is to limit a municipality's duty of care over its streets and sidewalks 'by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location'. "
> *Gorman v. Town of Huntington*, 12 N.Y.3d 275, 279 (2009) (citation omitted) (emphasis supplied)

Significant for our purposes is the "real world" effect of written notice laws. If a written notice law applies "the practical consequence of this requirement is to prevent any possibility of [municipal] liability for nonfeasance" if the municipality does not receive a written notice. *Barry, supra,* 35 N.Y.2d at 633–634. Nonfeasance is passive inaction or a failure to take steps to protect a person from harm (such as failing to apply more salt), as opposed to active misconduct which causes an injury. *Black's Law Dictionary* (11th ed. 2019)

Simply stated, a municipality "may not be subjected to liability for injuries caused by an improperly maintained street or sidewalk unless it has received written notice of the defect." *Weinstein v. County of Nassau*, 180 A.D.3d 730 (2d Dept. February 5, 2020).

"Practically, prior written notice provisions result in limiting a locality's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location." *Poirier v. City of Schenectady,* 85 N.Y.2d 310, 313–14 (1995).

Even if the municipality received a written notice, a written notice law prohibits tort liability against a municipality unless the municipality failed to remedy the condition within a reasonable time after receipt of the written notice. *Barry, supra,* 35 N.Y.2d at 633-634.

The reality is that in Upstate New York, people simply do not write to municipalities to advise that snow or ice is present on a particular street, highway or sidewalk. Snow or ice in Upstate New York areas is expected during the winter months and oftentimes are temporary conditions that appear and change (or disappear) over short periods of time. See, *Mercado v. City of New York*, 100 A.D.3d 445, 445 (1st Dept. 2012); *Williams v. City of New York,* 229 A.D.2d 114, 116 (1st Dept. 1997); *Dhu v. New York City Hous. Auth.,* 42 Misc. 3d 1226(A) (Sup. Ct. Kings Co. 2014).

It would be an extraordinarily rare instance if a person would write a municipality to advise that snow or ice exists at a particular location. In the past the Village of Lake Placid Clerk and Town of North Elba Clerk have not received written notices of the presence of snow or ice. While phone calls may report such conditions "a verbal or telephonic communication to a municipal body that is reduced to writing [does not] satisfy a prior written notice requirement." Gorman v. Town of Huntington, 12 N.Y.3d 275, 279–80 (2009). In fact, a written notice to a Village or Town officer or employee, other than the Village Clerk, Town Clerk or Town Superintendent of Highways would not satisfy the written notice requirement and thus the municipality would not be subjected to liability. *Id.*

In my over 40 years' experience in representing municipalities in these types of cases, I have never encountered a situation where such a written notice was received complaining of the presence of snow or ice on a street, highway or sidewalk.

Therefore, in reality, if a case claiming injury from a snow or ice condition is within the scope of a written notice law, then a municipality will not be liable because no prior written notice would have been given.

Therefore, for our purposes, the question becomes whether a written notice law applies to a claim that a municipality was negligent in causing an accident because a reduced application of salt resulted in more snow or ice being present than if the municipality applied more salt.

As demonstrated below, such claims are subject to written notice laws and thus the Village and Town would not be subjected to liability because of reduced applications of salt to their streets, highways and sidewalks.

REDUCED SALT APPLICATION AND WRITTEN NOTICE LAWS

"Transitory conditions present on a roadway or walkway such as ... ice [or snow] ... have been found to constitute potentially dangerous conditions for which prior written notice must be given before liability may be imposed upon a municipality." *De Zapata v. City of New York*, 172 A.D.3d 1306, 1307-1308 (2d Dept.2019) (citations omitted); *Burke v. City of Rochester*, 158 A.D.3d 1218, 1218 (4th Dept. 2018) [written notice provision applicable to injuries sustained when stepping into a snow covered area].

Claims asserting that accidents occurred because more snow or ice was present due to reduced applications of salt are based on assertions that a municipality was negligent in some fashion in its application of salt to its streets, highways and sidewalks.

Claims based on negligent salting, or a failure to properly salt are subject to prior written notice laws. *Lugo ex rel. Lugo v. County of Essex*, 260 A.D.2d 711, 712 (3d Dept. 1999) [allegations of negligent sanding or failure to sand a road]

Even where salting is performed on some portions of a municipal highway system but not others, this circumstance does not render a prior written notice law inapplicable. *Argusa v. Village of Liberty*, 291 A.D.2d 620, 621 (3d Dept. 2002) [sanding up to crest of a hill but not the downgrade on the icy hill]. Thus, the Village and Town would not be subjected to liability should the reduced applications of salt be limited to certain streets, highways and sidewalks or portions thereof.

Moreover, where it is claimed that reduced applications of salt were the cause of snow or ice not being completely removed, this circumstance does not render a written notice law inapplicable. "It is well settled that where ... a prior written notice law is in effect, a municipality 'may not be held liable for the mere passive failure to remove **all** snow and ice' from an area (see, *DiPaolo v. Village of Tuckahoe*, 253 A.D.2d 841; *Zwielich v. Incorporated Vil. of Freeport*, 208 A.D.2d 920)." *Alfano v. City of New Rochelle*, 259 A.D.2d 645, 645 (2d Dept. 1999) (emphasis supplied). Nor is a municipality required "to remove all snow off-premises in order to avoid liability." *San Marco v. Vill./Town of Mount Kisco*, 16 N.Y.3d 111, 118 (2010).

A prior written notice law also applies to claims that no salting was performed at all (much less at reduced amounts). *Lang v. County of Sullivan*, 184 A.D.2d 981, 982 (3d Dept. 1992); *Glover v. Botsford*, 109 A.D.3d 1182, 1184 (4th Dept. 2013); *Conroy v. Cattaraugus*, 178 A.D.2d 1228 (4th Dept. 1991); *Buccellato v. County of Nassau*, 158 A.D.2d 440, 442 (2d Dept. 1990) *lv. den.* 76 N.Y.2d 703 (1990); *Ali v. Vill. of Pleasantville*, 95 A.D.3d 796, 797 (2d Dept. 2012).

Therefore, as demonstrated above, in the absence of a written notice, the Village or Town may not be liable based on assertions that they were negligent

because reduced applications of salt caused an accident due to snow or ice being present, or present in greater amounts.

It is true that written notice laws do not apply where the municipality "created the defect or hazard through an affirmative act of negligence." *San Marco v. Village/Town of Mount Kisco*, 16 N.Y.3d 111, 118 (2010); *Oboler v. City of New York*, 8 N.Y.3d 888, 889 (2007).

However, as the following cases show, a policy of reducing salt applications is not an "affirmative act negligence" that creates an exception to a prior written notice law, even if the reduced applications of salt result in more snow or ice being present.

"Failure to remove ice from the road or to salt and sand it ... are acts of omission. They are not acts of affirmative negligence which would exempt the case from the prior written notice requirement." *Buccellato v. County of Nassau,* 158 A.D.2d 440, 442 (2d Dept. 1990) *lv. den.* 76 N.Y.2d 703 (1990).

A municipality's "alleged failure to apply salt or sand to the sidewalk, do not constitute affirmative acts of negligence." *Ali v. Vill. of Pleasantville,* 95 A.D.3d 796, 797 (2d Dept. 2012).

Moreover, if reduced applications of salt caused more snow or ice to be present that circumstance does not constitute an "affirmative act of negligence" or otherwise except the case from written notice requirements. A municipality's "failure to remove any snow or ice from the area where the subject accident occurred was passive in nature and does not constitute an affirmative act of negligence excepting it from prior written notice requirements." *Morreale v. Town of Smithtown*, 153 A.D.3d 917, 918 (2d Dept. 2017).

"[T]he mere failure to remove all snow or ice from a sidewalk is an act of omission, rather than an affirmative act of negligence." *Larenas v. Inc. Vill. of Garden City*, 143 A.D.3d 777, 778 (2d Dept. 2016).

Thus, a reduced application of salt does not entitle an injured party to avoid the effect of a written notice law by claiming an "affirmative act of negligence" exception.

CONCLUSION

A decreased use of salt on municipal streets/highways and sidewalks by the Village of Lake Placid and the Town of North Elba does not increase the risk of tort liability to those municipalities for personal injuries or property damage by reason of the possible increased presence of snow or ice due to such reduced use of salt.

As the case law and discussion above demonstrates, the protections of the written notice laws are not diminished should the Village or Town reduce applications of salt to their streets, highways and sidewalks.

Those protections essentially and practically prohibit tort liability from being imposed against the Village or Town in those circumstances.

Very truly yours,

McCONVILLE, CONSIDINE,
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