



John M. Nonna
County Attorney

February 8, 2024

Westchester County Board of Legislators
800 Michaelian Office Building
148 Martine Avenue, 8th Floor
White Plains, New York 10601

Dear Honorable Members of the Board:

I respectfully request that your Honorable Board adopt the attached "A Local Law amending Chapter 780 of the Laws of Westchester County relating to the requirement that the County receive prior written notice of a defective condition to maintain a civil action."

New York State Law provides that the county is liable for damages or injuries to a person or property as a result of property that is "defective, out of repair, unsafe, or dangerous . . . in [a county's] actual physical possession, control or operation" (New York State County Law (County Law) § 53(2)), but every local government is empowered to adopt and amend local laws in regards to the "presentation, ascertainment, disposition, and discharge of claims against it" (New York State Municipal Home Rule Law (MHRL) § 10(1)(ii)(a)(5)).

In an exercise of their home rule power, local governments may choose to limit their liability in regards to "any street, highway, bridge, culvert, sidewalk or crosswalk" in their charge and control by requiring that they receive "prior written notice" of a defective condition within a reasonable time, in order for a claimant to maintain a lawsuit for personal injuries against the municipality. New York State General Municipal Law (GML) § 50-e(4). New York State Law requires, however, that where there is no prior written notice of a defective condition, a local municipality may nevertheless be held liable if it had constructive notice of the defect, but only in regards to highways, bridges, and culverts. New York State Highway Law (HL) § 139(2)).

In 1992, pursuant its home rule power, Westchester County enacted Chapter 780 of the Laws of Westchester County (LWC) to require prior written notice as a condition precedent to any lawsuit against the County for any defect, unsafe or dangerous condition, including the existence of snow or ice, on any "road, street, highway, bridge, culvert, sidewalk or crosswalk." LWC §§ 780.01. The County's prior written notice law also provides a constructive notice exception to the prior notice limitation as required by New York State Law, but the exception was expanded beyond New York State law to include streets, sidewalks, and crosswalks. *Id.*

The County's prior written notice law is expansive, outdated, and should be amended to incorporate favorable developments in decisional law, in addition to placing limitations on the application of constructive notice not mandated by New York State Law.

First, the New York State Court of Appeals has expanded prior written notice protection to include that which is the "functional equivalent" of those categories allowed under New York State Law. *See Woodson v. City of New York*, 93 N.Y.2d 936 (1999) (extending protection to a public stairway or staircase because it "functionally fulfills the same purposes that a standard sidewalk would serve" in providing a passageway for the public); *Groninger v. Village of Mamaroneck*, 17 N.Y.3d 125, 128 (2011) (extending prior written notice protection to a parking lot because it served the functional equivalent of a highway); *Hinton v. Pulaski*, 33 N.Y.3d 931, 932-933 (2019) (stairs from a public road leading down to a local fishing hole); *Walker v. County of Nassau*, 147 A.D.3d 806, 807-08 (2d Dep't 2017) ("landing on the exterior steps of the building where accident occurred provided the public with a general right of passage, and thus served the same functional purpose as a sidewalk, which is one of the locations specifically enumerated in General Municipal Law § 50-e(4)").

Second, while New York State Law requires counties to provide a constructive notice exception with regard to defects or dangerous conditions on highways, bridges, and culverts (except those involving snow and ice), the County's law goes further and has its constructive notice exception apply to streets, sidewalks, and crosswalks as well. (*Compare* LWC § 780.01 *with* HL § 139(2))

As a consequence, the County is and has been needlessly liable over the last thirty years for damages as a result of claims that would otherwise be dismissed for lack of prior written notice, if the constructive notice exception in LWC § 780.01 did not apply so broadly. *See, for example, Sundack v. County of Westchester*, 2019 N.Y. Misc. LEXIS 24350, *1, 3-5, 2019 NY Slip Op. 34666(UJ) (Sup. Ct., West. Cty. Dec. 13, 2019) (constructive notice saved the plaintiff's claims that she tripped and fell on a branch while running on a pathway in a park, which claim would have been dismissed for lack of prior written notice); *Smith v. County of Westchester*, 2021 NY Slip Op. 32929(U), 2021 N.Y. Misc. LEXIS 7328, *3-8 (Sup. Ct., West. Cty. Oct. 15, 2021) (No prior written notice, but lawsuit maintained based on constructive notice of a pothole or divot in a parking lot).


The proposed amendments incorporate the Court of Appeals' expansion of prior written notice protection in *Woodson*, *Groninger*, and *Hinton* to cover stairways, parks, and parking lots, as well as any encumbrances thereon or attachments thereto that are necessary for the functioning of a building, structure, or encumbrance or attachment under the jurisdiction of the County. The proposed amendments also eliminate the constructive notice exception for streets sidewalks, and crosswalks since it is not required by New York State law.

The proposed amendments further eliminate the constructive notice exception language for highways and roadways because it is not necessary to have such a provision since the Courts have routinely read the exception into local municipal laws that do not expressly provide it. *Tanner W. by Leone v. County of Onondaga*, 225 A.D.2d 1074, 1074 (4th Dep't 1996) ("the local law, however, must be interpreted in conjunction with Highway Law § 139 (2) to permit an action against the County based on constructive notice of a dangerous highway condition"); *Bernardo v. County of Nassau*, 150 A.D.2d 320, 320 (2d Dep't 1989) ("the Supreme Court correctly found that Nassau County Administrative Code § 12-4.0 (e) should be construed in accord with Highway Law § 139 (2), which allows for tort recovery based on constructive notice where written notice is lacking"); *Carlino v. Albany*, 118 A.D.2d 928, 930 (3d Dep't 1986) ("there is no clear inconsistency between the statute

and the county's local law; the county's local law does not expressly prohibit civil actions which have their provenance in constructive notice. Accordingly, rather than invalidate the county's local law, we interpret it as providing for constructive notice"). As such, it is recommended that constructive notice be removed from the County's law since it is already a requirement of New York State law for highways and roadways.

These amendments would help to preserve taxpayer dollars and county resources from having to be spent on defending the County against certain personal injury claims. Therefore, I respectfully request that your Honorable Board adopt the attached "A Local Law amending Chapter 780 of the LWC relating to the requirement that the County receive prior written notice of a defective condition to maintain a civil action."

Sincerely,



John M. Nonna
County Attorney

JN/nn

Enclosures

TO: BOARD OF LEGISLATORS
COUNTY OF WESTCHESTER

Your Committee recommends the adoption of “A LOCAL LAW amending Chapters 780 of the Laws of Westchester County relating to the requirement that the County receive prior written notice of a defective condition to maintain a civil action.”

Your Committee is advised that New York State Law provides that the county is liable for damages or injuries to a person or property as a result of property that is “defective, out of repair, unsafe, or dangerous . . . in [a county’s] actual physical possession, control or operation” (New York State County Law (County Law) § 53(2)), but every local government is empowered to adopt and amend local laws in regards to the “presentation, ascertainment, disposition, and discharge of claims against it” (New York State Municipal Home Rule Law (MHRL) § 10(1)(ii)(a)(5)).

Your Committee is further advised that, in an exercise of their home rule power, local governments may choose to limit their liability in regards to “any street, highway, bridge, culvert, sidewalk or crosswalk” in their charge and control by requiring that they receive “prior written notice” of a defective condition within a reasonable time, in order for a claimant to maintain a lawsuit for personal injuries against the municipality. New York State General Municipal Law (GML) § 50-e(4). New York State Law requires, however, that where there is no prior written notice of a defective condition, a local municipality may nevertheless be held liable if it had constructive notice of the defect, but only in regards to highways, bridges, and culverts. New York State Highway Law (HL) § 139(2)).

Your Committee is informed that, in 1992, pursuant its home rule power, Westchester County enacted Chapter 780 of the Laws of Westchester County (LWC) to require prior written notice as a condition precedent to any lawsuit against the County for any defect, unsafe or dangerous condition,

including the existence of snow or ice, on any “road, street, highway, bridge, culvert, sidewalk or crosswalk.” LWC §§ 780.01. The County’s prior written notice law also provides a constructive notice exception to the prior notice limitation as required by New York State Law, but the exception was expanded beyond New York State law to include streets, sidewalks, and crosswalks. *Id.*

Your Committee is further informed that the County’s prior written notice law is expansive and outdated and should be amended to incorporate favorable developments in decisional law, in addition to placing limitations on the application of constructive notice not mandated by New York State Law. The New York State Court of Appeals has expanded prior written notice protection to include that which is the “functional equivalent” of those categories allowed under New York State Law. While New York State Law requires that counties must provide for constructive notice with regard to defects or dangerous conditions on highways, bridges, and culverts (except those involving snow and ice), the County’s law goes further and makes its constructive notice exception apply to streets, sidewalks, and crosswalks as well. (*Compare* LWC § 780.01 with HL § 139(2)).

Your Committee notes that, as a consequence, the County is and has been needlessly liable over the last thirty years for damages as a result of claims that would otherwise be dismissed for lack of prior written notice, if the constructive notice exception in LWC § 780.01 did not apply so broadly.

Your Committee is further notes that the proposed amendments incorporate the Court of Appeals’ expansion of prior written notice protection to cover stairways, parks, and parking lots, as well as any encumbrances thereon or attachments thereto that are necessary for the functioning of a building, structure, encumbrance or attachment under the jurisdiction of the County. The proposed amendments also eliminate the constructive notice exception for streets sidewalks, and crosswalks since it is not required by New York State law.

Your Committee is further informed that the proposed amendments also eliminate the constructive notice exception language because it is not necessary to have such a provision since the Courts have routinely read the exception into local municipal laws that do not expressly provide it. As such, it is recommended that constructive notice be removed from the County's law since it is already a requirement of New York State law.

Your Committee is further informed that the proposed amendments do not meet the definition of an action under New York State Environmental Quality Review Act and its implementing regulations 6 NYCRR Part 617. Please refer to the memorandum from the Department of Planning dated January 8, 2024, which is on file with the Clerk of the Board of Legislators.

Your Committee, after careful consideration, recommends adoption of this Local Law.

Dated: _____, 2024
White Plains, New York

COMMITTEE ON

RESOLUTION NO. ____ – 2024

RESOLVED, that this Board hold a public hearing pursuant to Section 209.141(4) of the Laws of Westchester County on Local Law Intro. No. ____ - 2024, entitled, “A LOCAL LAW amending Chapter 780 of the Laws of Westchester County relating to the requirement that the County receive prior written notice of a defective condition to maintain a civil action.” The public hearing will be held at __.m. on the ____ day of _____, 2024 in the Chambers of the Board of Legislators, 8th Floor, Michaelian Office Building, White Plains, New York. The Clerk of the Board shall cause notice of the time and date of such hearing to be published at least once in one or more newspapers published in the County of Westchester and selected by the Clerk of the Board for that purpose in the manner and time required by law.