

TECHNICAL PAPER SERIES

## Prior Written Notice

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NEW YORK STATE TUG HILL COMMISSION

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The Tug Hill Commission Technical and Issue Paper Series are designed to help local officials and citizens in the Tug Hill region and other rural parts of New York State. The Technical Paper Series provides guidance on procedures based on questions frequently received by the Commission. The Issue Paper Series provides background on key issues facing the region without taking advocacy positions. Other papers in each series are available from the Tug Hill Commission. Please call us or visit our website for more information.



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# Prior Written Notice

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## Overview

Section 65-a of Town Law provides that the town and its highway superintendent may not be sued for dangerous conditions unless prior written notice of the problem was given or unless the dangerous condition had existed so long that it should have been discovered by reasonable care and diligence. This latter provision is often referred to as a “constructive notice” exception to the prior written notice protection. A similar provision governs ice and snow conditions. State legislation grants written notice protections to villages without the necessity of local legislation. Village Law §6-628 and CPLR §9804 both require written notice if “any street, highway, bridge, culvert, sidewalk or crosswalk” is claimed to be “defective, out of repair, unsafe, dangerous or obstructed” or if injury is “sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert”. The written notice must be given to the village clerk.

Many towns have chosen to strengthen the protection offered by Town Law §65-a by adopting local laws that eliminate the exception and require prior written notice of defective or dangerous conditions in all cases. They do this pursuant to the authority granted in Municipal Home Rule Law §10(1)(ii)(d)(3). Such local laws, which supersede the state statute law sections, have often been adopted in order to eliminate the “reasonable care and diligence” provision.

Such a law must contain a clear statement that it is intended to supersede §65-a of Town Law. It must contain a requirement that any notice be transmitted to the municipal clerk or highway superintendent. And of course, it must comply with the requirements for adoption of local laws generally, such as being filed with the Secretary of State. It should be noted that §65-a (4) of Town Law and §4-402 of Village Law require the municipal clerk to keep a separate indexed record of all such notices. This requirement should be complied with, as the keeping of such a record will demonstrate the town’s intent to comply with statute.

Courts have ruled that local laws may not expand the concept of prior written notice beyond the categories contained in the town and village law sections cited above. The New York Municipal Insurance Reciprocal (NYMIR), which insures many local governments, advises its clients not to adopt laws that go beyond these categories. A model local law drafted by NYMIR can be found in Appendix A.

## Prior Written Notice

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### Important Points

- It is clear that a town may adopt a local law requiring prior written notice of dangerous conditions and defects regarding highways, streets, bridges, culverts, crosswalks, and sidewalks, under the authority of Municipal Home Rule Law §10(1)(ii)(d)(3) and Municipal Home Rule Law §22.
- Such a local law must contain a clear statement that it is intended to supersede §65-a of Town Law.
- Case law prohibits municipalities from expanding prior notice law beyond the listed locations: streets, highways, bridges, culverts, sidewalks, or crosswalks.
- Such a local law must contain a requirement that any prior written notice of dangerous or defective conditions that is submitted pursuant to its terms must be transmitted to the town clerk or highway superintendent.
- The locally adopted law must comply with the requirements for adoption of local laws generally, such as it must be filed with the Secretary of State.
- The municipal clerk must keep a separate indexed (according to location) record of all notices received pursuant to the prior written notice statute or superseding local law.

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## Appendix A: Prior Written Notice Model Local Law

### Notice of Highway Defects

Local Law No. \_\_\_\_\_ of the Year 20\_\_\_\_

A local law providing for written notification of defects and obstructions on town highways, bridges, streets, sidewalks, crosswalks, and culverts in the Town of \_\_\_\_\_.

Be it enacted by the town board of the Town of \_\_\_\_\_.

Section 1. No civil actions shall be maintained against the town or town superintendent of highways for damages or injuries to person or property sustained by reason of any highway, bridge, street, sidewalk, crosswalk, or culvert being defective, out of repair, unsafe, dangerous, or obstructed unless written notice of such defective, unsafe, dangerous, or obstructed condition of such highway, bridge, street, sidewalk, crosswalk, or culvert was actually given to the town clerk or town superintendent of highways, and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger, or obstruction complained of.

No such action shall be maintained for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any highway, bridge, street, sidewalk, crosswalk, or culvert, unless written notice thereof, specifying the particular place, was actually given to the town clerk or town superintendent of highways and there was 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.

Section 2. The town superintendent of highways shall transmit in writing to the town clerk within five days after the receipt thereof all written notices received pursuant to this local law and subdivision 2 of section 65-a of the Town Law. The town clerk shall cause all written notices received pursuant to this local law and subdivision 2 of section 65-a of the Town Law, to be presented to the town board within five days of the receipt thereof or at the next succeeding town board meeting, whichever shall be sooner.

Section 3. This local law shall supersede in its application to the Town of \_\_\_\_\_ subdivisions 1 and 3 of section 65-a of the Town Law.

Section 4. This local law shall take effect immediately upon its filing in the office of the Secretary of State.

**NOTE:** Town Law Section 65-a, Subdivision 4, requires the town clerk to keep a separate indexed record (by location) of all such notices received. In the event of litigation, the Town will be expected to demonstrate compliance with this provision.