

Memorandum 69-51

Subject: Study 65 - Inverse Condemnation (Interference With Land Stability)

At the March 1969 meeting, the staff was directed to reexamine the area of interference with land stability with relation to the Commission's work on inverse condemnation and to provide the Commission with additional background information to enable formulation of sound principles governing this area. The following attempts to fulfill this direction.

"Interference with land stability" can be conveniently divided into the following categories: (1) imposition of fill; (2) removal of subjacent support; (3) removal of lateral support; and (4) concussion and vibration. "Imposition of fill" covers the situation where the entity by its improvement increases the load on its own land, and these pressures are transferred through the soil, causing disturbances to the property of adjacent or nearby private persons. We are not concerned with "direct" imposition on private property; this would constitute a trespass and presumably be actionable without regard to special rules applicable to a public entity. But it is perfectly clear, in either case, that the public entity is liable without regard to fault. See Albers v. County of Los Angeles, 62 Cal.2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965); Reardon v. City & County of San Francisco, 66 Cal. 492, 6 Pac. 317 (1885).

Similarly, with respect to subjacent support, the common law rule applicable to private persons, and therefore public entities also, imposes absolute liability for interference with subjacent support; that is, the subsurface owner has an absolute duty to support the surface land in its natural condition. See Porter v. City of Los Angeles, 182 Cal. 515, 189 Pac. 105 (1920); Marin Mun. Water Dist. v. Northwestern Pac. R.R.,

253 Cal. App.2d 83, 61 Cal. Rptr. 520 (1967). Civil Code Section 832, which relaxes the common law rule with respect to lateral support, has no application to subjacent support. Marin Mun. Water Dist., supra.

"Support is lateral when the supported and supporting lands are divided by a vertical plane. Support is subjacent when the supported land is above and the supporting land is beneath it." Restatement of Torts, Ch. 39, Scope and Introductory Note, at 183. With respect to lateral support, the common law obligation is also absolute. However, under Civil Code Section 832, the excavating owner is relieved from the absolute duty to provide lateral support to the land of a coterminous surface owner, provided he gives notice of the excavation and then exercises ordinary care in excavating. (This is the essence of Section 832; there are other aspects to the section. See Exhibit II attached.) Wharam v. Investment Underwriters, 58 Cal. App.2d 346, 136 P.2d 363 (1943). Whether Section 832 is applicable to a public entity is simply uncertain. Research has disclosed no case where Section 832 provided a defense to an excavating entity; i.e., no cases were found where an entity successfully defended by showing an exercise of due care. On the contrary, prior cases are entirely consistent with a rule of strict inverse liability. See, e.g., Bellman v. County of Contra Costa, 54 Cal.2d 363, 5 Cal. Rptr. 692, 353 P.2d 300 (1960) (suggests inverse theory supports liability, but case primarily concerned with procedural (claims statute) issues); Kaufman v. Tomich, 208 Cal. 19, 280 Pac. 130 (1929) (Article I, § 14 requires compensation even though no negligence if plans are "inherently wrong"--possibly means if plans directly result in damage); Veteran's Welfare Board v. City of Oakland, 74 Cal. App.2d 818, 169 P.2d 1000 (1946) (Section 832 not cited; complaint based on inverse theory held to state

cause of action). Certainly, application of Section 832 or a fault requirement would contradict the holding in Albers that "any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under Article I, Section 14 of our Constitution whether foreseeable or not." Nevertheless, there appears to be no case holding Section 832 inapplicable to a public entity. While there seems to be no reasonable basis for distinguishing improvements that disturb support and stability by removing support or pressure from those imposing pressure, it is equally difficult to advance any adequate basis for distinguishing between a public entity and a private person with respect to application of Section 832.

With respect to concussion and vibration, at least with regard to damage in developed areas from pile-driving or blasting type activities, strict inverse liability already appears to be the rule. See, e.g., Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App.2d 850, 10 Cal. Rptr. 811 (1961). While California appears generally to require a showing of negligence as a basis of liability where blasting occurs in a remote or unpopulated area (see Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 Pac. 82 (1907)), the issue of inverse liability for damage resulting from such concussion and vibration appears never to have arisen.

It seems the choices are these. The Commission can do nothing in this general area, thus perpetuating existing law. In most, if not all, instances, this means strict inverse liability for damage caused by a public improvement. One major area of uncertainty would, however, exist with respect to lateral support and the application of Section 832. The primary drawback to such an approach is that it ignores at least this one readily identifiable problem.

Alternatively, the Commission could add a section to the proposed chapter relating to inverse condemnation providing inverse liability in each of the areas mentioned. This section would, of course, be subject to the same limitations placed on liability for water damage and should fully implement the constitutional directive of Article I, Section 14, in the areas covered. (See attached Exhibit I, draft section.) Finally, separate treatment could be afforded each of these areas. Strict inverse liability for removal of subjacent support and for imposition of an additional load should be retained; perhaps Section 832 could be applied to public entities although the staff has some doubt that this would be constitutionally permissible. Liability for damage from concussion and vibration might depend on the causative force, e.g., blasting and pile-driving might be distinguished from vibrations resulting from an adjacent bridge or freeway. Moreover, liability in the former areas might be adequately provided for by adoption of a recommendation relating to ultrahazardous activities. It is possible, therefore, that this area could simply be omitted without undue harm.

It is hoped that the above will provide some assistance at the April meeting in establishing the basic principles to be followed here and that some basic decisions and directions can be determined then.

Respectfully submitted,

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EXHIBIT I - DRAFT STATUTE

CHAPTER I

Article 2. Interference With Land Stability

Section 875

875. Except as provided by this chapter, a public entity is liable for damage to property proximately caused by:

- (a) The disturbance of soil stability by an increased load on public property;
 - (b) The removal of subjacent support;
 - (c) The removal of lateral support;
 - (d) Concussion and vibration;
- by an improvement as designed and constructed by the public entity.

Comment. Section 875 states the basic conditions of liability of public entities for damage to property resulting from the disturbance of soil stability by public improvements as deliberately designed and constructed. The section complements the existing statutory liability for dangerous conditions and for negligence generally in the same fashion as Section 870. See the Comment to Section 870. Similarly, this section is qualified by the duty of a property owner to take all reasonable steps available to him to minimize his loss. See Section 870.8 and the Comment thereto.

Section 875 is intended to cover all forms of interference with land stability. Included therefore are situations of removal of both lateral and subjacent support, imposition of fill or other overloads on public property, as well as concussion and vibration. In each of these areas, without regard to fault, and subject only to the owner's duty to

minimize his damage, this section imposes liability on the public entity for damage to property proximately caused by the disturbance of the existing soil stability conditions by a public improvement. The section simply restates former law with respect to the removal of subjacent support (Porter v. City of Los Angeles, 182 Cal. 515, 189 Pac. 105 (1920)); and the imposition of fill (Albers v. County of Los Angeles, 62 Cal.2d 510, 42 Cal. Rptr. 89, 398 P.2d 129 (1965); Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317 (1885)). Similarly, at least with regard to developed areas, strict inverse liability for concussion and vibration damage appeared to be the former rule. See, e.g., Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App.2d 850, 10 Cal. Rptr. 811 (1961). Where lateral support was disturbed by a public improvement, prior cases are consistent with a rule of strict inverse liability (see, e.g., Bellman v. County of Contra Costa, 54 Cal.2d 363, 5 Cal. Rptr. 692, 353 P.2d 300 (1960); Kaufman v. Tomich, 208 Cal. 19, 280 Pac. 130 (1929); Veteran's Welfare Board v. City of Oakland, 74 Cal. App.2d 818, 169 P.2d 1000 (1946)), but fail both to explicitly establish this rule and to make inapplicable the fault requirement of Civil Code Section 832. Section 875 makes clear that any distinction between removal of subjacent and lateral support does not apply in cases involving the deliberate design and construction of public improvements. Similarly, while California appears generally to require a showing of negligence as a basis of liability where blasting occurs in a remote or unpopulated area (see Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 Pac. 82 (1907)), the issue of inverse liability for damage resulting from such concussion and vibration seems never to have arisen and has,

therefore, never been answered. Section 875 makes clear that there is to be no distinction made in the rules governing liability for damage caused by concussion or vibration whether the public improvement be located in a remote or unpopulated area or in a populated, developed area; in both instances, the public entity is liable for direct physical damage proximately caused by the public improvement as deliberately designed and constructed.

EXHIBIT II

CIVIL CODE § 832

§ 832. Lateral and subjacent support; excavations; degree of care; damages; protection of other structures

Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction or improvement, under the following conditions:

1. Any owner of land or his lessee intending to make or to permit an excavation shall give reasonable notice to the owner or owners of adjoining lands and of buildings or other structures, stating the depth to which such excavation is intended to be made, and when the excavating will begin.

2. In making any excavation, ordinary care and skill shall be used, and reasonable precautions taken to sustain the adjoining land as such, without regard to any building or other structure which may be thereon, and there shall be no liability for damage done to any such building or other structure by reason of the excavation, except as otherwise provided or allowed by law.

3. If at any time it appears that the excavation is to be of a greater depth than are the walls or foundations of any adjoining building or other structure, and is to be so close as to endanger the building or other structure in any way, then the owner of the building or other structure must be allowed at least 30 days, if he so desires, in which to take measures to protect the same from any damage, or in which to extend the foundations thereof, and he must be given for the same purposes reasonable license to enter on the land on which the excavation is to be or is being made.

4. If the excavation is intended to be or is deeper than the standard depth of foundations, which depth is defined to be a depth of * * * nine feet below the adjacent curb level, at the point where the joint property line intersects the curb and if on the land of the coterminous owner there is any building or other structure the wall or foundation of which goes to standard depth or deeper than the owner of the land on which the excavation is being made shall, if given the necessary license to enter on the adjoining land, protect the said adjoining land and any such building or other structure thereon without cost to the owner thereof, from any damage by reason of the excavation, and shall be liable to the owner of such property for any such damage, excepting only for minor settlement cracks in buildings or other structures.