



# Inverse Condemnation A Guide for Risk Managers

February 27, 2020

Presented by: **Saskia T. Asamura and Robert C. Ceccon**



# PART I – Overview of the Law

February 27, 2020

Presented by: Saskia T. Asamura, Esq.

# Common Property Damage Claims Facing Risk Management

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- Sewer backups
- Burst water mains
- Flooding during weather events
- Failed storm drains
- Landslides/Mudslides/Debris flows
- Downed power lines
- Fallen trees

# The trilogy of common claims

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- Inverse Condemnation (Cal. Const. Art. 1, § 19)
- Dangerous condition of public property (Gov. Code §§ 835 et seq.)
- Nuisance (Civil Code. §§ 3479 et seq.)

# Key Practical Differences Between Inverse and Dangerous Condition/Nuisance

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- **No Government Claim required (Gov. Code § 905.1)**
- **Gov. Code § 905.1:**
  - No claim is required to be filed to maintain an action against a public entity for taking of, or damage to, private property pursuant to Section 19 of Article I of the California Constitution.
  - However, the board shall, in accordance with the provisions of this part, process any claim which is filed against a public entity for the taking of, or damage to, private property pursuant to Section 19 of Article I of the California Constitution.

# Key Practical Differences Between Inverse and Dangerous Condition/Nuisance

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- **Longer statute of limitations for inverse condemnation (3 years – CCP § 338 (j))**
  - CCP §338 (j) An action to recover for physical damage to private property under Section 19 of Article I of the California Constitution.
  - Because no Claim is required for inverse, the Gov. Claims Act claims filing periods do not apply (Gov. Code § 911.2 – one year for property damage, six months for injury to personal property or growing crops)
  - No need to sue within six months of rejection of claim as Claims Act does not apply to inverse (Gov. Code § 945.6)

# Key Practical Differences Between Inverse and Dangerous Condition/Nuisance

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- **No Government Claims Act Immunities**

- Because inverse condemnation is not subject to the Gov. Claims Act, the immunities afforded by the Gov. Claims Act don't apply to inverse
- This includes the design defect immunity that is frequently asserted in defense of dangerous condition claims (Gov. Code § 830.6)

# Key Practical Differences Between Inverse and Dangerous Condition/Nuisance

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- **Plaintiff/property owner is entitled to attorneys' fees and expert costs if plaintiff prevails (CCP § 1036)**
  - Code of Civil Procedure § 1036
  - “In any inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of that proceeding, shall determine and award or allow to the plaintiff, as a part of that judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff’s reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding.” (Emphasis added.)



# Key Practical Differences Between Inverse and Dangerous Condition/Nuisance

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- **No right to jury trial on liability - all issues except the amount of just compensation are decided by the judge**
  - In an inverse condemnation proceeding where liability is completely a factual question, does the plaintiff have a right to a jury trial on the issue of liability? We answer, "No."
  - We hold that in an inverse condemnation proceeding, the parties have a right to a jury trial solely on the issue of compensation. All other determinations related to the inverse taking, whether purely factual or a mixture of factual and legal, are nonjury questions.
    - *Marshall v. DWP* (1990) 219 Cal.App.3d 1124, 1140, 1141

# Key Practical Differences Between Inverse and Dangerous Condition/Nuisance

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- **Difficult to resolve in pretrial motions (demurrers or motions for summary judgment)**
  - No immunities
  - Causation is a mixed Q of fact and law
  - Complex expert issues

# On the other hand ...

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- **Property damage only**

- Inverse condemnation only provides compensation for a taking or damaging of property – no recovery for personal injury or emotional distress

- **Public entity only**

- Only the governmental entity can be liable for a taking or damaging of property under the Constitution – individual public officials or employees cannot be liable for inverse condemnation

# Summary of Key Differences

Dangerous Condition/Nuisance	Inverse Condemnation
Gov. Claim required	No Claim required
1 yr. to file Claim, 6 mos. to sue	3 year statute of limitations
Numerous Claims Act immunities	No Claims Act immunities
No attorneys' fees or expert costs	Attorneys' fees & expert costs if Plaintiff prevails
Jury decides liability and damages	No jury trial except just compensation
Personal injury/emotional distress	Property damage only
Public employees subject to suit	Can only sue public entity
Susceptible to dispositive motion	Hard to resolve on pre-trial motion

# California Takings Clause

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- **Article 1, Section 19**

- (a) Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. . . .”

\*Formerly Article 1, Section 14

# Why “inverse”?

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- **Direct condemnation aka eminent domain**
  - Public entity is the plaintiff in direct condemnation
  - Takings clause is not a “personal rights” provision
  - Government has the right to take (or damage) property for a public purpose, it must just pay if it does so
- **Inverse condemnation**
  - Property owner is the plaintiff
  - Must prove that the public entity took or damaged private property within the meaning of the Constitution

# Evolving Law of Inverse Condemnation for Physical Damage to Private Property

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- Pre-1965
- Sea-change #1 – *Albers*
- Maintenance liability explained
- Sea-change #2 – *Belair, Locklin*
- Work of public improvement explained
- Sea-change #3 - *Oroville*

# Key principle – no tort liability

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- Inverse condemnation is the remedy only for such injury to private property as results from “a deliberate act carrying with it the purpose of fulfilling one or another of the public objects of the project as a whole”
- The principle of inverse condemnation will not subject a public entity to general tort liability
- Neither “negligent acts committed during the routine day-to-day operation of the public improvement,” nor “negligence in the routine operation having no relation to the function of the project as conceived” gives rise to a claim in inverse condemnation
  - *Bauer v. County of Ventura* (1955) 45 Cal.2d 276, 286 (emphasis added)



# Pre-1965

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- Prior to 1965, most California appellate decisions sustaining inverse liability for unintended physical injury to property were predicated expressly on a fault rationale that was grounded upon the foreseeability of damages as a consequence of the construction or operation of a public project as deliberately planned
  - *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 698, (emphasis added), citing *Inverse Condemnation: Unintended Physical Damage*, Van Alstyne, 20 Hastings L.J. 431, 438 (1969)

# Albers strict liability rule (1965)

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- “... Any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under article I, section [19] of our Constitution, whether foreseeable or not.”

- *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263-264

# Key words in *Albers*

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- “ ... as deliberately designed and constructed ...”
  - County was liable in inverse for damage to plaintiff’s property when county road construction project triggered a major landslide
  - The damage was not intentional, negligent, or foreseeable
  - But it was the “proximate result” of the “construction of a public work deliberately planned and carried out” by the County

# The *Albers* rule applied

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## ■ Excavation for BART project

- Plaintiffs could bring an inverse action based on subsidence that was proximately caused by excavation for a public subway project as deliberately planned and designed
  - *Holtz v. Superior Court* (1970) 3 Cal.3d 296

## ■ Downed power lines

- DWP was liable in inverse for damage caused by fire from downed power lines as “ ... a public entity may be liable in an inverse condemnation action for any physical injury to real property proximately caused by a public improvement as deliberately designed and constructed ... ”
  - *Marshall v. DWP* (1990) 219 Cal.App.3d 1124

# What about maintenance?

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- *Albers* and other early strict liability inverse cases involved damage caused by the design, planning, or construction of a public improvement.
- But what if damage is allegedly caused by failure to properly maintain a public improvement?
- **McMahon's and Pac Bell answer that question**
  - *McMahan's v. City of Santa Monica* (1983) 146 Cal.App.3d 683
  - *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596

# Liability for “wait until it breaks” plan of water main maintenance

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- *McMahon's* and *Pac Bell* both involved flood damage caused by severely corroded city water mains that ruptured
- Both cities had a “wait until it breaks” plan of maintenance
- Both cities were held liable in inverse condemnation

# McMahon's

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- Water main ruptured and severely damaged plaintiff's furniture store
- Plaintiffs introduced a 1975 city study that showed Santa Monica had a "hundred miles of badly deteriorated" mains
- Testimony at trial that it would take at least 30 years to replace them at an accelerated pace, and 88 years at the city's existing replacement rate
- Water mains had an assumed 40-year lifetime
- Installed in 1924, the water main that ruptured had been in use for 51 years at time of incident
- The city took a calculated risk by adopting a plan of pipe replacement and maintenance that it knew was inadequate

# Negligent maintenance vs. inadequate plan of maintenance

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- *McMahon's* and *Pac Bell* acknowledged that “negligent acts committed during the routine day-to-day operation of the public improvement having no relation to the functioning of the project as conceived” does not create a claim for inverse liability
- Both courts rejected the cities’ argument that the damage was due to negligent maintenance in routine daily operations
- Both courts held the cities liable because they had a defective or inadequate plan of maintenance
- Both courts concluded the cities’ “knowledge of the limited life of such mains and failure to adequately guard against such breaks caused by corrosion is as much a ‘deliberate’ act as existed in *Albers*”



# New Rule: *Belair* (1988)

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- Major change in inverse law in trilogy of California Supreme Court cases
  - *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550
  - *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327
  - *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432

# End of strict liability in flood control cases

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- When a flood control project fails to function as intended, causing damage to properties historically subject to flooding, strict liability for a taking does not apply. Instead, a rule of reasonableness must be applied ...

- *Paterno v. State* (2003) 113 Cal.App.4th 998, 1016, citing *Belair and Locklin*

# Belair's "Reasonableness Rule"

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- Where the public agency's design, construction or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and such unreasonable design, construction or maintenance constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the project's purpose is to contain the "common enemy" of floodwaters.

- *Belair*, 47 Cal.3d at 565 (emphasis added)

# Belair explains “substantial causation”

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- Where a “substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury”
- Where independent forces - such as a rain storm- contribute to the injury, causation is established if the public improvement is a substantial concurring cause, i.e. where the injury occurred in substantial part because the improvement failed to function as it was intended
- The public improvement would cease to be a substantial contributing factor if damage would have occurred even if the project had operated perfectly, i.e., where the storm exceeded the project's design capacity – this would be an intervening cause which supersedes the public improvement in the chain of causation

Belair's substantial causation standard has been extended beyond flood control and applies to all physical damage inverse cases

# Policy reasons for *Belair's* reasonableness rule

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- Public agency that constructs or operates a flood control project “clearly must not be made the absolute insurer of those lands provided protection”
- On the other hand, the damage potential of a defective public flood control project is clearly enormous
- Therefore, the public agency undertaking “privileged activity” such as constructing barriers to protect against floodwaters must at least “*act reasonably and non-negligently*”

*Belair*, 47 Cal.3d at 565 (italics original)

# Locklin's balancing test

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- Inverse condemnation liability ultimately rests on the notion that the private individual should not be required to bear a disproportionate share of the costs of a public improvement
- Because strict liability would discourage construction of needed public improvements which affect surface water drainage, liability exists only if the agency acts unreasonably, with reasonableness determined by balancing the public benefit and private damage in each case
  - *Locklin*, 7 Cal.4th at 367, 368 (emphasis added)

# The *Locklin* Factors

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- 1. Public purpose served by the improvement
- 2. Plaintiff's loss offset by reciprocal benefits
- 3. Feasible alternatives with lower risks
- 4. Severity of P's damages in relation to risk-bearing ability
- 5. P's damages a normal risk of land ownership
- 6. Similar damages distributed to other beneficiaries of the project v. peculiar to plaintiff

# Bunch extension

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- *Belair's* reasonableness rule applies where the public entity diverts and rechannels water under a flood control system of dikes and levees that fail, causing damage to properties historically subject to flooding
  - *Bunch*, 15 Cal.4th at 447



# Does the claim involve a work of public improvement owned by your agency?

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- Plaintiff sues wrong public entity
- Mixed public-private improvements
- Trees

# Mixed public and private improvements

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- Public entity has no duty – or jurisdiction – to maintain or repair private property
- But questions can arise whether roads, culverts, or storm drains on private property are the public entity's responsibility
  - Easements
  - Accepted offers of dedication
  - Public “use” of storm drain on private property

# Exercise of dominion and control

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- **Damage from erosion of a creek on private property that was part of a 40-acre public drainage system did not give rise to inverse liability as the public entities never improved, maintained, repaired, or otherwise exercised dominion and control over the creek**
  - *Ullery v. Contra Costa County* (1988) 202 Cal.App.3d 562, 569-570
- **City's asserted lack of ownership of drain was not a complete defense to inverse claim: the city's ownership and control of a portion of the drainage system makes the city potentially liable for damage substantially caused by its unreasonable diversion of water through the city-owned upper portion of the drain**
  - *Skoumbas v. City of Orinda* (2008) 165 Cal.App.4th 783, 791

# Can trees give rise to inverse liability?

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- Yes, but only if the tree is part of a “work of public improvement”
  - A tree constitutes a work of public improvement if it is “deliberately planted by or at the direction of the government entity as part of a planned project or design serving a public purpose or use,” such as to enhance the appearance of a public road
    - *Mercury v. City of Pasadena* (2017) 14 Cal.App.5th 917, 928
  - Court held city was not liable in inverse because there was no evidence that the city planted the tree as part of a construction project serving a public purpose

# New Rule: Oroville (2019)

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- City was not liable in inverse condemnation for property damage from a sewer backup where the property owner failed to have a legally required backwater valve
- “Public entities are not strictly or otherwise automatically liable for any conceivable damage bearing some kind of connection, however remote, to a public improvement”
  - *City of Oroville v. Superior Court* (2019) 7 Cal.5th 1091, 1098 (emphasis added)

# Evolving standard under Oroville

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- For a public entity to be liable in inverse:
  - Damage to private property must be substantially caused by an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement
    - *Oroville*, 7 Cal.7th at 1105

# Oroville's 2-prong test

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- **Inherent risk**

- The injury to property must arise from the inherent dangers of the public improvement as deliberately designed, constructed, or maintained

- **Substantial causation**

- There must be a “sufficiently meaningful causal relationship” between the damage to private property and the inherent risks of the public improvement as deliberately designed, constructed, or maintained
- The injury to private property must be an “inescapable or unavoidable consequence” of the public improvement as planned and constructed

# Application of the 2-prong test

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- Backwater valve not only would have prevented or drastically mitigated the risk of damage, according to experts, but was legally required
- The sewer backup into plaintiff's property:
  - Was not an inherent risk of the sewer system as deliberately designed and constructed
  - Was not the necessary or probable result of the sewer system's operations
- Lack of legally required backwater valve precluded inverse liability

• *Oroville*, 7 Cal.5th at 1111



# Erosion of strict liability in inverse?

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- Factual context of *Oroville* was a sewer backup where plaintiff lacked a legally required device that would have prevented damage
- But *Oroville*'s 2-prong test almost certainly has broader implications
- *Time will tell . . .*



# PART II – Trial of an Inverse Condemnation Lawsuit

February 27, 2020

Presented by: Robert C. Ceccon, Esq.

# *Albers v. County of Los Angeles*

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- **Elements for inverse condemnation liability:**
  - Work of public improvement
  - Damage must be caused by deliberate design and construction of work of public improvement

## Two Topics:

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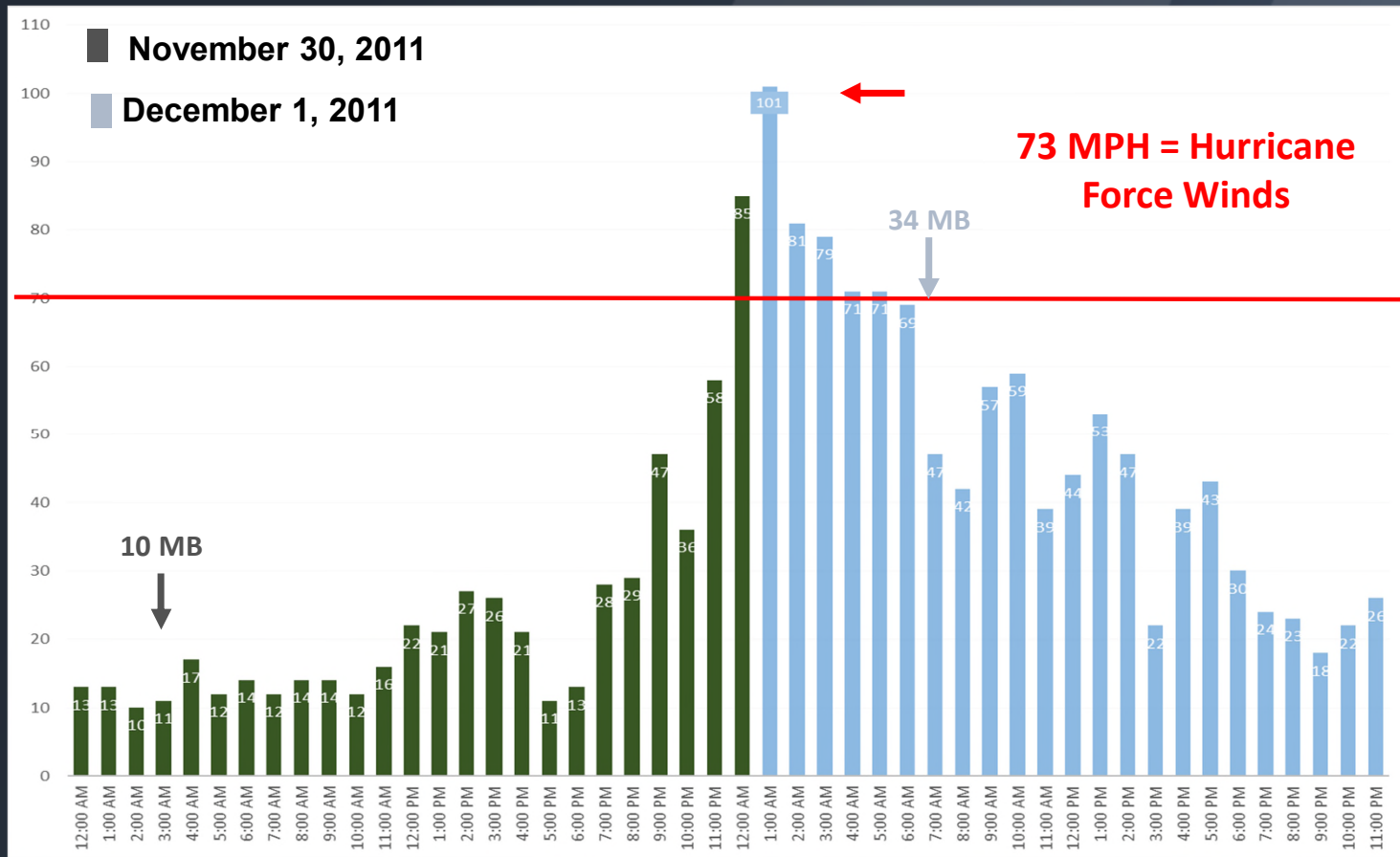
- How does a public entity prove that public property is not a work of public improvement?
- How does a public entity prove that a work of public improvement did not cause damage?

# Two Topics:

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- How does a public entity prove that public property is not a work of public improvement?
- How does a public entity prove that a work of public improvement did not cause damage?

# Mt. Washington Hourly Maximum Wind Gust November 30, 2011 – December 1, 2011



# 2,200 of the 57,000 City Trees - Total Failures

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# Four Lawsuits Filed Against City of Pasadena

CONFORMED COPY OF ORIGINAL FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

JUL 23 2012

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Our File No. 1280.333

John A. Chake, Executive Officer/Clerk  
By *Alison* Deputy  
FILED

CONFORMED COPY OF ORIGINAL FILED  
Los Angeles Superior Court

NGV 2 6 2014

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As Subrogee of SARAH and CHRISTOPHER DUSSEAULT,

Plaintiff,

vs.

CITY OF PASADENA and DOES 1-50, inclusive

Defendants.

CONFORMED COPY OF ORIGINAL FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

SEP 04 20

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Plaintiff,

vs.

CITY OF PASADENA and DOES 1-50, inclusive

Defendants.

CONFORMED COPY OF ORIGINAL FILED  
Superior Court of California  
County of Los Angeles

DEC 01 2014

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Attorneys for Plaintiff's STATE FARM GENERAL INSURANCE COMPANY a/s/o JUAN FLORES, EDWARD FEHRENBACHER, VIA CALIFORNIA HOA, INC., FREDERICK GARCIA, DEBORAH LEFEBVRE, JEFFREY SMITH, BRAD YOUNG, PATRICIA CHAN, EDGAR MUJUKIAN, MICHAEL FULP, EZEQUIEL SEVILLA, SHAKA JAMBAZIAN and MIRIAM HARRINGTON,

Plaintiff,

vs.

CITY OF PASADENA and DOES 1-50, inclusive,

Defendants.

MERCURY CASUALTY COMPANY  
As Subrogee of JAMES O'HALLORAN,

Plaintiff,

vs.

CITY OF PASADENA and DOES 1-50, inclusive

Defendants.

COMES NOW Plaintiff, Mercury Casualty Company as Subrogee of James O'Halloran who by way of this Complaint alleges as follows:

**ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES, CENTRAL-STANLEY MOSK COURTHOUSE

Case No.: **BC 4914**

COMPLAINT FOR:

1) INVERSE CONDEMNATION (CAL CONST. ART 1 SEC 19)

2) DANGEROUS CONDITION OF PUBLIC PROPERTY (GO)

3) NUISANCE (CIV CODE SEC 3479)

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES, CENTRAL-STANLEY MOSK COURTHOUSE

Case No.: **BC 565357**

COMPLAINT FOR:

1) INVERSE CONDEMNATION (CAL CONST. ART 1 § 19)





# \$1,856,063 in Damages Alleged

INSURER	INSURED	AMOUNT
Mercury	Chris and Sarah Dusseaukt	\$ 800,000.00
Mercury	James O'Halloran	\$ 293,000.00
First National	Mark Harris	\$ 87,720.00
Allstate	Christopher Thomas	\$ 178,245.00
	Nicholas Falacci	
Travelers Commercial	Willaim Francis	\$ 28,610.00
Travelers Casualty	Sole Khatcher Kaptanian	\$ 4,079.00
State Farm	Juan Flores	\$ 49,365.00
State Farm	Edward Fehrenbacher	\$ 186,302.00
State Farm	California HOA	\$ 7,991.00
State Farm	Frederick Garcia	\$ 53,434.00
State Farm	Deborah Lefevre	\$ 50,044.00
State Farm	Jeffrey Smith	\$ 10,306.00
State Farm	Brad Young	\$ 12,675.00
State Farm	Patricia Chan	\$ 15,509.00
State Farm	Edgar Mujukian	\$ 9,990.00
State Farm	Michael Fulp	\$ 16,051.00
State Farm	Ezequiel Sevilla	\$ 18,061.00
State Farm	Shake Jambazian	\$ 29,121.00
State Farm	Miriam Harrington	\$ 5,560.00
		\$1,856,063

# Cause of Damage: Mercury Casualty Case

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# Holding of Mercury Casualty Court

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- “In order for a tree to be a work of public improvement, it must be ‘deliberately planted by or at the direction of the government entity as part of a **planned project or design** serving a public purpose, such as to enhance the appearance of a public road.’”
  - ***Mercury Casualty v. City of Pasadena*** (2017)  
15 Cal.App.5th 917, 928

# 3 Decisions Discussing Inverse Condemnation Liability for Damage Caused by Trees

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- ***Regency Outdoor Advertising, Inc. v. City of Los Angeles*** (2006)  
39 Cal.4th 507
- ***City of Pasadena v. Superior Court*** (2014)  
228 Cal.App.4th 1228
- ***Mercury Casualty Co. v. City of Pasadena*** (2017)  
14 Cal.App.5th 917, reh'g denied (Sept. 15, 2017), review denied (Nov. 15, 2017)

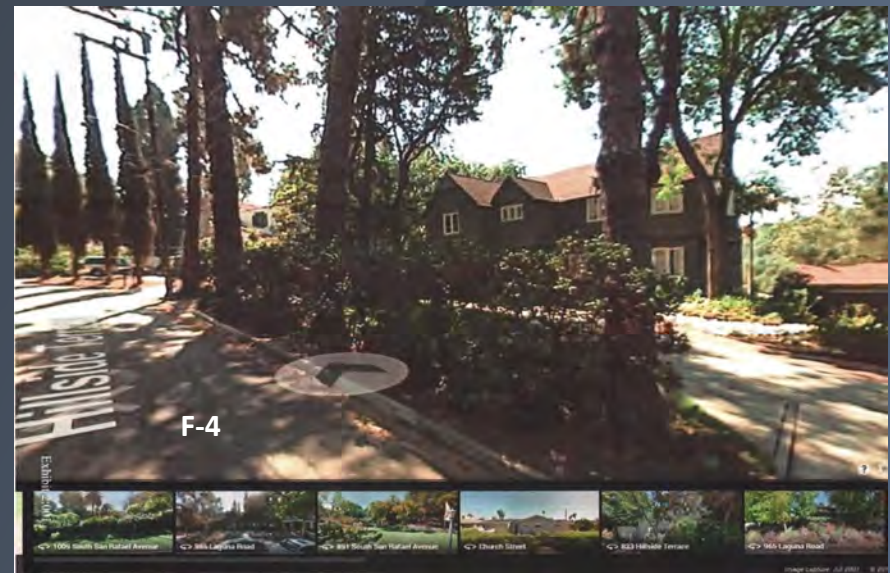
# Trees on Century Boulevard

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# Trees in Front of the Subject Property



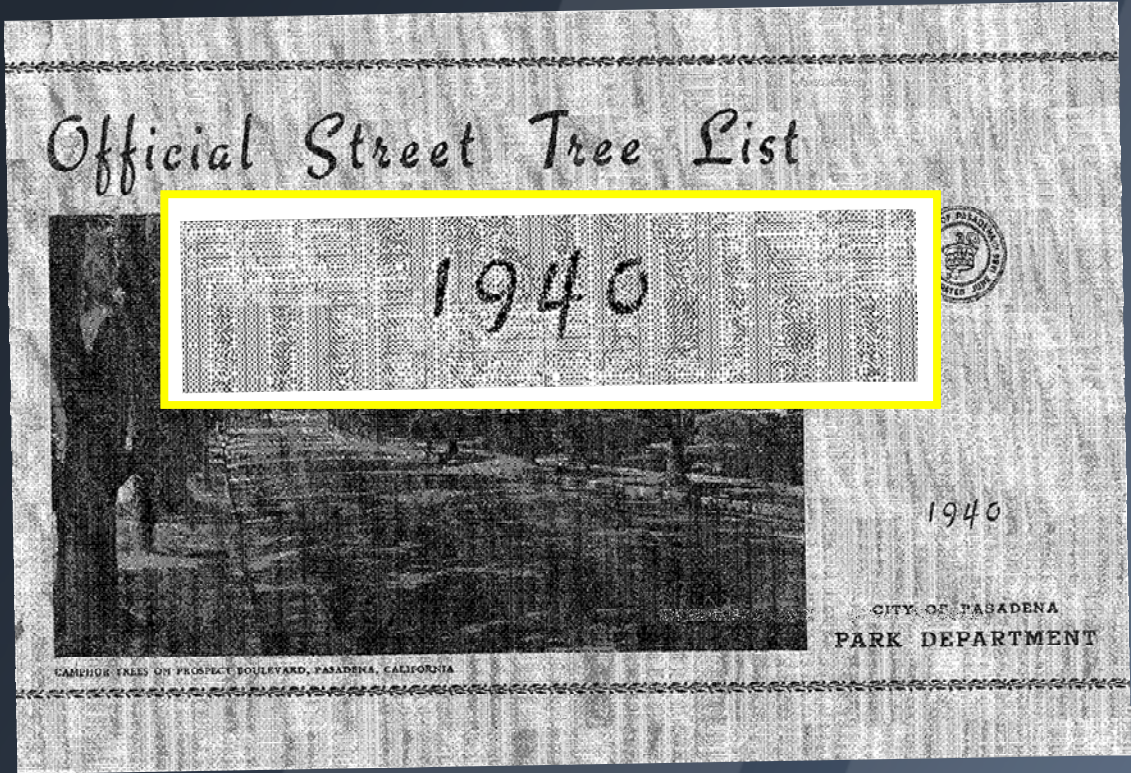


# Subject Tree (Ex. 1080 – 36)





# City of Pasadena's Official Street Tree List – 1940



# City of Pasadena's Official Street Tree List – 1940

Official Street Tree List

Name of Street	P.H.	Parking Width Feet	Street Width Feet	Soil Type	Official Tree	Common Name
Hillside Terrace	6.4	5	36	Al	Eucalyptus polyanthemus	Red Box
Highland			10	R4	Cinnamomum camphora	Cassia
W. of Los Robles	6.6		10	Ro R4	Cinnamomum camphora	Naupha
E. of Los Robles	7.1-6.8		10			
Hill Avenue			10	Ho R4	Quercus agrifolia	Live oak
N. of Colorado	6.6		10	Ho R4	Quercus agrifolia	Live oak
S. of Washington	6.6		10	Ho R4	Quercus agrifolia	Live oak
S. of Colorado	6.6		10	Ho R4	Quercus agrifolia	Live oak
S. of California	6.6		10	Ho R4	Quercus agrifolia	Live oak
Madison Avenue			10	Ho R4	Quercus agrifolia	Live oak
Madison Avenue			10	Ho R4	Quercus agrifolia	Live oak
Hillside Terrace			36	Al	Eucalyptus polyanthemus	Red Box

# Holding of Mercury Casualty Court

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- “Here, there is no record of who planted Tree F-2 or for what purpose it was planted. All we know is that the tree was planted on Hillside Terrace in the late 1940s or early 1950s. At the time the tree was planted, it was **not the same species as the type of tree that the City had designated as the official street tree** for Hillside Terrace. There is therefore nothing to suggest that the City planted the tree as part of a planned project or design to beautify its roads, or to serve some other public purpose.”
  - ***Mercury Casualty Co. v. City of Pasadena*** (2017)  
14 Cal.App.5th 917, 929

# SAT Question

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- Which of these four things is unlike the others?
  - Flood Control Channel
  - Electrical Power Line
  - Tree
  - Sewer System

# Difference between Trees and Traditional Works of Public Improvement

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- Tree provides most benefit to adjacent property owner
- Adjacent property owners often maintain public trees by watering them
- Adjacent property owners often take control over a public right of way

# Difference between Trees and Traditional Works of Public Improvement

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- Tree provides most benefit to adjacent property owner
- Adjacent property owners often maintain public trees by watering them
- Adjacent property owners often take control over a public right of way

# Trial Testimony of Plaintiff's Expert Arborist, Walter Warriner

5 A I DIDN'T READ ANYTHING ABOUT IT, NO.

6 Q WE TALKED A LITTLE BIT ABOUT THE BENEFITS OF  
7 A TREE. WOULD YOU AGREE THAT A TREE PROVIDES MORE  
8 BENEFITS TO THE PERSON LIVING CLOSEST TO THE TREE?

9 A IN GENERAL, YES.

10 Q AND THE PERSON LIVING NEAR THE TREE GETS THE  
11 INCREASED PROPERTY VALUES; CORRECT?

12 A YES.

13 Q AND THE TREE PROVIDES SHADE. THAT SHADE  
14 BENEFITS THE PERSON LIVING NEXT TO THE TREE THE MOST;  
15 CORRECT?

16 A YES.

17 Q NOW, I THINK YOU DESCRIBED A TREE AS A  
18 PUBLIC IMPROVEMENT. BUT UNLIKE OTHER PUBLIC

# Difference between Trees and Traditional Works of Public Improvement

---

- Tree provides most benefit to adjacent property owner
- **Adjacent property owners often maintain public trees by watering them**
- Adjacent property owners often take control over a public right of way



# Sprinklers on Subject Property's Parkway – October 2011



# Trial Testimony of Mercury's expert

77

1 SEE, IF YOU LOOK IN THE DARK CENTER, YOU CAN COUNT THOSE  
2 RINGS THERE. BUT WHEN YOU GET OUT DOWN TOWARDS THE  
3 BOTTOM OR THE OUTER EDGES, YOU CAN SEE THE PATTERN OF  
4 THE SAW BLADE CUTTING THROUGH THOSE LINES THAT GO

20 Q AND BASED ON YOUR ESTIMATE THAT THIS TREE  
21 WAS AT LEAST 60 YEARS OLD, AND BASED ON YOUR TESTIMONY  
22 THAT, WITHOUT IRRIGATION, IT WOULD GROW 6 INCHES TO 12  
23 INCHES AS A YEAR, THAT TREE, WITHOUT IRRIGATION, WOULD  
24 BE 30 TO 60 FEET HIGH; CORRECT?

25 A OKAY. YES.

22 THAT, WITHOUT IRRIGATION, IT WOULD GROW 6 INCHES TO 12  
23 INCHES AS A YEAR, THAT TREE, WITHOUT IRRIGATION, WOULD  
24 BE 30 TO 60 FEET HIGH; CORRECT?  
25 A OKAY. YES.  
26 Q AND SO BY PLACING ARTIFICIAL IRRIGATION ON  
27 THE TREE ON THE CITY'S RIGHT OF WAY THAT THE CITY OWNED,  
28 THE ADJACENT PROPERTY OWNERS CAUSED THAT TREE TO GROW

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# Mercury Casualty Company v. City of Pasadena

---

- “In addition to Trees F-1 through F-4, there were shrubs inside the city-owned parkway that the prior owners of the Dusseaults' home had planted. The Dusseaults maintained the shrubs using a sprinkler system that they owned.
- The sprinkler system also irrigated the city-owned trees, which **may have caused them to grow between 40 to 50 feet taller than they would have grown with only natural irrigation.**”
  - *Mercury Casualty Co. v. City of Pasadena* (2017)  
14 Cal.App.5th 917, 923

# Difference between Trees and Traditional Works of Public Improvement

---

- Tree provides most benefit to adjacent property owner
- Adjacent property owners often maintain public trees by watering them
- Adjacent property owners often take control over a public right of way

# Trial Testimony of Mercury's Expert Arborist, Walter Warriner

10 Q DOES THE FACT THAT THERE ARE OTHER SPECIES  
11 OF TREES ON THE STREET RUN CONTRA TO THAT CONCLUSION?

12 A NO.

13 Q WHY NOT?

14 A WELL, PEOPLE TAKE OWNERSHIP OF THEIR PARKWAY  
15 OR THE STREET RIGHT OF WAY THAT'S ADJACENT TO THEIR  
16 HOMES, AND THEY PLANT -- THEY INTERSPERSE PLANTINGS IN  
17 THAT RIGHT OF WAY. IT'S PRETTY COMMON. EVERYBODY DOES  
18 IT. I SHOULDN'T SAY "EVERYBODY," BUT A LOT OF PEOPLE  
19 DO. AND IT'S COMMON.

# Trial Testimony of Mercury's Expert Arborist, Walter Warriner

11 Q LET'S PHRASE THE QUESTION A LITTLE BIT  
12 DIFFERENTLY. THE ADJACENT HOMEOWNER ACTUALLY HAS SOME  
13 INVOLVEMENT IN IMPACTING THE TREE IN THEIR FRONT YARD,  
14 DON'T THEY?

15 A YES.

16 Q AND I THINK YOU SAID THEY TREAT THE RIGHT OF  
17 WAY AS THEIR OWN, DON'T THEY?

18 A HOMEOWNERS DO, YES. THEY HAVE A TENDENCY  
19 TO.

20 MR. CECCON: I HAVE NO FURTHER QUESTIONS, YOUR  
21 HONOR?

# 976 Hillside Terrace Flower Bed 2009 and 2011

---

May 2009



October 2011



# Deposition Testimony of Neighbor Christel Lang

A PLUS COURT REPORTERS, INC.  
35 EAST ILLION STREET, SUITE 2, DENVER, CO 80202

Q. DO YOU HAVE ANY ESTIMATE AS TO THE LENGTH OF THE LONGEST ROOT THAT YOU BELIEVE WAS CUT FROM THAT PARTICULAR TREE?

A. THERE WERE SOME PIECES THAT WERE AT LEAST TWO FEET LONG.

Q. DO YOU HAVE AN ESTIMATE AS TO THE THICKNESS OF THE THICKEST PIECE?

A. SOME PIECES WERE AS BIG AS MY WRIST. CHOPPED UP.

23 HURT TREES BY THE ONE THAT FELL IS BECAUSE THE EXISTING BED  
24 WAS REMOVED BEHIND IT, AND THEY HAD TO GET HIGH AND LEVEL  
25 THE GROUND AND PREPARE IT FOR THE NEW LANDSCAPING, AND

800.499.7866

APLUSREPORTERSLASS@GLOBAL.NET

202501201046fc948a-2425906a541





# Trial Testimony of Neighbor Christel Lang

131

1 SAW PULLED OUT FROM THE GROUND NEAR TREE F-2.

2 A I THINK IT WAS TWO FEET. THAT WAS WHAT IT  
3 LOOKED LIKE TO ME -- IT WAS IN PIECES; TWO FEET.

4 Q AND HOW THICK?

5 A THE SIZE OF MY WRIST. IT WAS A PRETTY  
6 SUBSTANTIAL --

7 Q DID YOU BELIEVE IT WAS FROM TREE F-2?

8 A I THOUGHT IT WAS.

9 Q WHY?

10 A BECAUSE THERE WAS NOTHING ELSE THERE  
11 ANYMORE. THE OTHER PLANTS -- THE ROSEMARY BUSHES HAD

## From Page 20 of City's Opening Brief

---

- Then, in early 2011, the Dusseaults extensively re-landscaped the City's right-of-way. (4-RT/1027:1-12.) Photographs taken before and after the re-landscaping project show a dramatic change in the area adjacent to Tree F-2. (3-AA-7/689.) The Dusseaults removed and replaced vegetation, and installed a new sprinkler system in the parkway. (3-RT/736:9-737:27.) **Their neighbor, Christel Lang, testified that the Dusseaults' laborers used pickaxes near Tree F-2, and removed roots as large as her wrist.** (4-RT/1029:6-1031:14; 2-AA-7/488.) The trial court found Lang's testimony that workers removed roots near the base of Tree F-2 was "credible." (3-AA-13/822.)

# Mercury Casualty Co. v. City of Pasadena

---

- “In early 2011, the Dusseaults re-landscaped the parkway in front of their property. They replaced some of the existing vegetation with drought-resistant plants and shrubs and installed a new drought-resistant irrigation system. **A neighbor testified that during the landscaping project, one of the workers hired by the Dusseaults removed chunks of tree roots near the base of Tree F-2, the largest of which was about two feet long and the width of a human fist.**”

# Trial Testimony of Mercury's Expert Arborist, Walter Warriner

10 Q DOES THE FACT THAT THERE ARE OTHER SPECIES  
11 OF TREES ON THE STREET RUN CONTRA TO THAT CONCLUSION?

12 A NO.

13 Q WHY NOT?

14 A WELL, PEOPLE TAKE OWNERSHIP OF THEIR PARKWAY  
15 OR THE STREET RIGHT OF WAY THAT'S ADJACENT TO THEIR  
16 HOMES, AND THEY PLANT -- THEY INTERSPERSE PLANTINGS IN  
17 THAT RIGHT OF WAY. IT'S PRETTY COMMON. EVERYBODY DOES  
18 IT. I SHOULDN'T SAY "EVERYBODY," BUT A LOT OF PEOPLE  
19 DO. AND IT'S COMMON.

# Two Topics:

---

- How does a public entity prove that public property is not a work of public improvement?
- How does a public entity prove that a work of public improvement did not cause damage?

## The Wall Identified by Pile Number



Ex. 21277

La Conchita 2005 Slide • Minor and Main Lobes



Ex. 21320

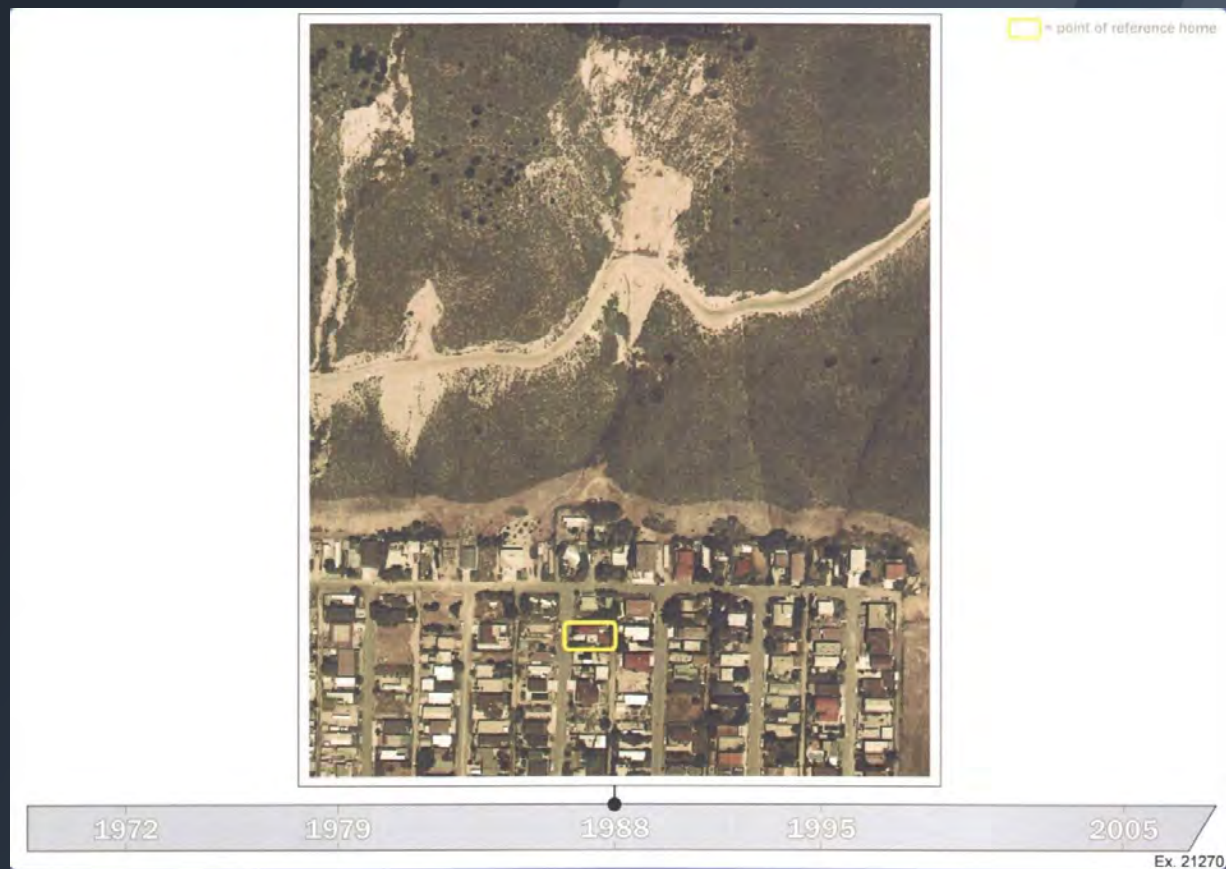
# Overview of Lawsuit

---

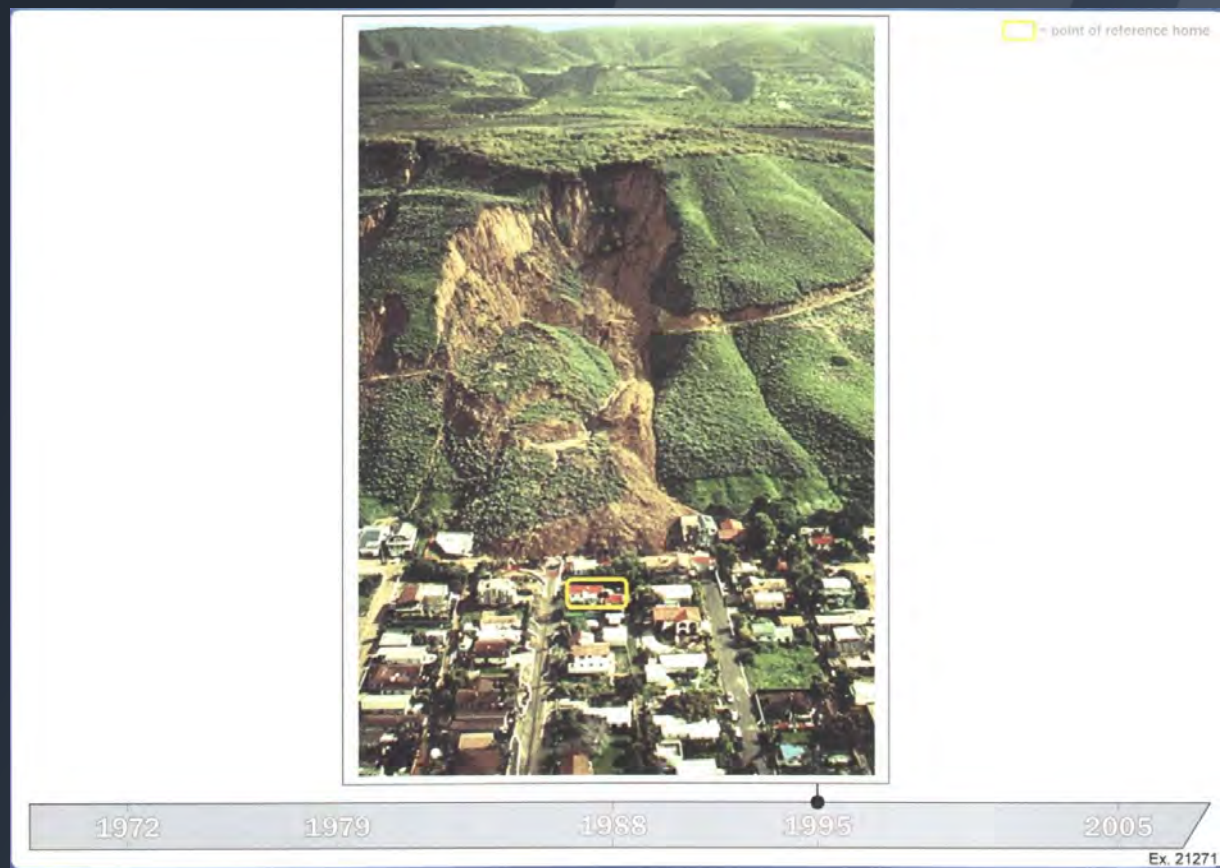
- 90 plaintiffs
- 10 deaths
- 27 homes physically damaged or destroyed
- 4 people rescued after being buried alive
- Claims for dangerous condition, wrongful death, nuisance, and inverse condemnation



# 1988



# 1995



# The 1995 Slides Blocked Vista Del Ricon

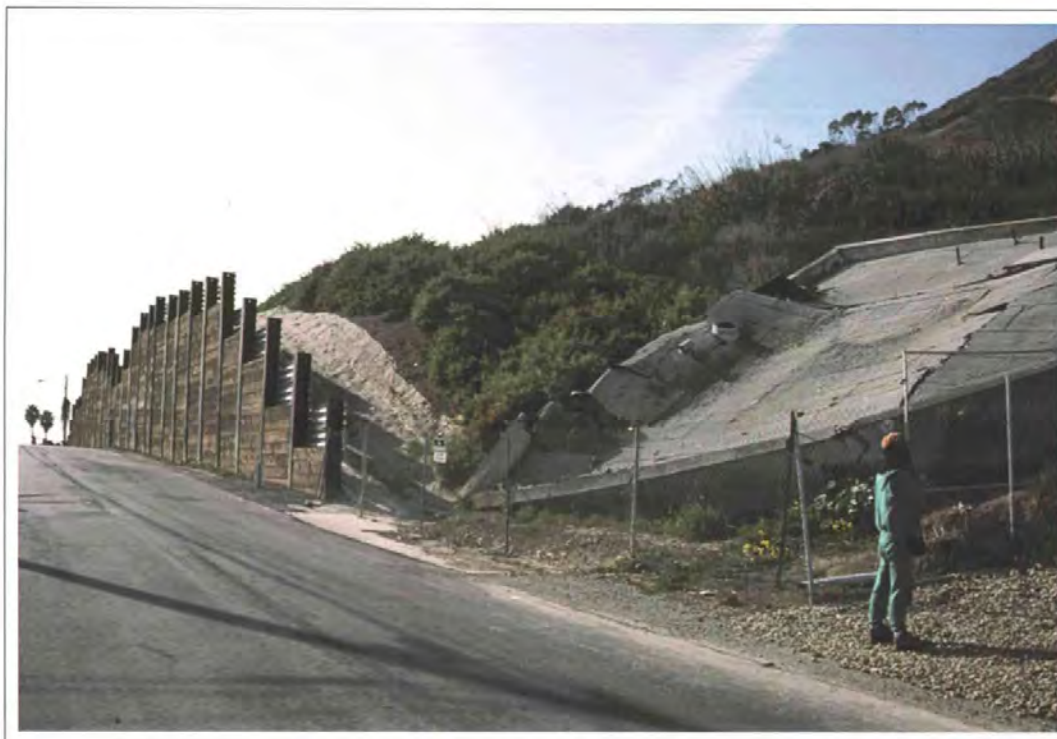
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Ex. 21318

# The Wall Soon After Completion

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Ex. 21303

# PCH: Morning of January 10, 2005

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Ex 21281





# Plaintiffs' Theories

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- Wall caused water to dam up behind the wall, and destabilized the slope
- Wall diverted debris to go to the south



# Evidence re: Causation

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- History of landslides in La Conchita
- Warnings given to La Conchita residents
- Forensic evidence regarding performance of County's wall

# Evidence re: Causation

---

- History of landslides in La Conchita
- Warnings given to La Conchita residents
- Forensic evidence regarding performance of County's wall

# La Conchita Landslide

## January 1909

LANDSLIDE BURIES WORKMEN AND TRAIN.  
Los Angeles Times (1886-Current File); Jan. 24, 1909; ProQuest Historical Newspapers (Los Angeles Times (1881-1986))

### SWALLOWED UP. **LANDSLIDE BURIES WORKMEN AND TRAIN.**

*Side of Mountain Descends Upon  
 Espee Track at Punta Gorda, Near  
 Ventura County Line, Engulfing  
 Cars and Engine—Four Men Dead.*

**L**ANDSLIDES on the Coast Line and a cave-in on Tunnel No. 4, near Tehachas, yesterday, cut off all railroad communication between Los Angeles and San Francisco, blocking both Southern Pacific routes, and tied up the Santa Fe between San Francisco and the East. All trains for the north were stalled before the time for the Owl's departure last evening. The Coast Line, on which a work-train and a number of men were perched under a mountain of earth, will likely not be open before late Tuesday or Wednesday, but it is hoped to resume traffic over the Valley line by tonight. Two local trains have been put on between this city and Ventura, running and returning via Chatsworth and Douglas, respectively, this morning at noon. Passengers on trains held up some time by Coast Line landslides were transferred yesterday and brought in by a special last night. They took advantage of the low tide and walked along the beach around the buried tracks to the Los Angeles train.

**(BY DIRECT WIRE TO THE TIMES.)**  
**SANTA BARBARA, Jan. 23 (AP)—**—A massive landslide against the engine and boiler, and falling up of the window and doors and earth upon the crew, I looked through the window—  
 "I know I was being carried down,"  
 "I don't know how long I was in the water."  
 "Then I got up and ran some distance from the slide."  
 "I don't believe I had more than thirty seconds from the time I heard the first bang until it was all over. I heard men pad as I went over the slide."  
**"BOY I DROVE MY STEERING—"**  
 "Knoxel Stewart, the 16-year-old laborer among the injured, said: "I was with another man. I don't know his name, as the bank above the tracks. We were waiting out for rocks that were falling down the hill earth and rocks, were buried down."  
 "The men below were clearing the way for the train."  
 "We really do not know how many men were on the train. We know the driver is missing and cannot be recovered for, and he may be under the debris. Three Czech laborers also cannot be found. They may have escaped and run away, but they may be under the earth."  
**PARLIED DOWN CLIFF.**  
 "I saw it first all of the sudden," said Stewart. "I got out some where the engine was. It was in the middle of the hill, and I heard the slide. I heard the slide. I heard the slide."  
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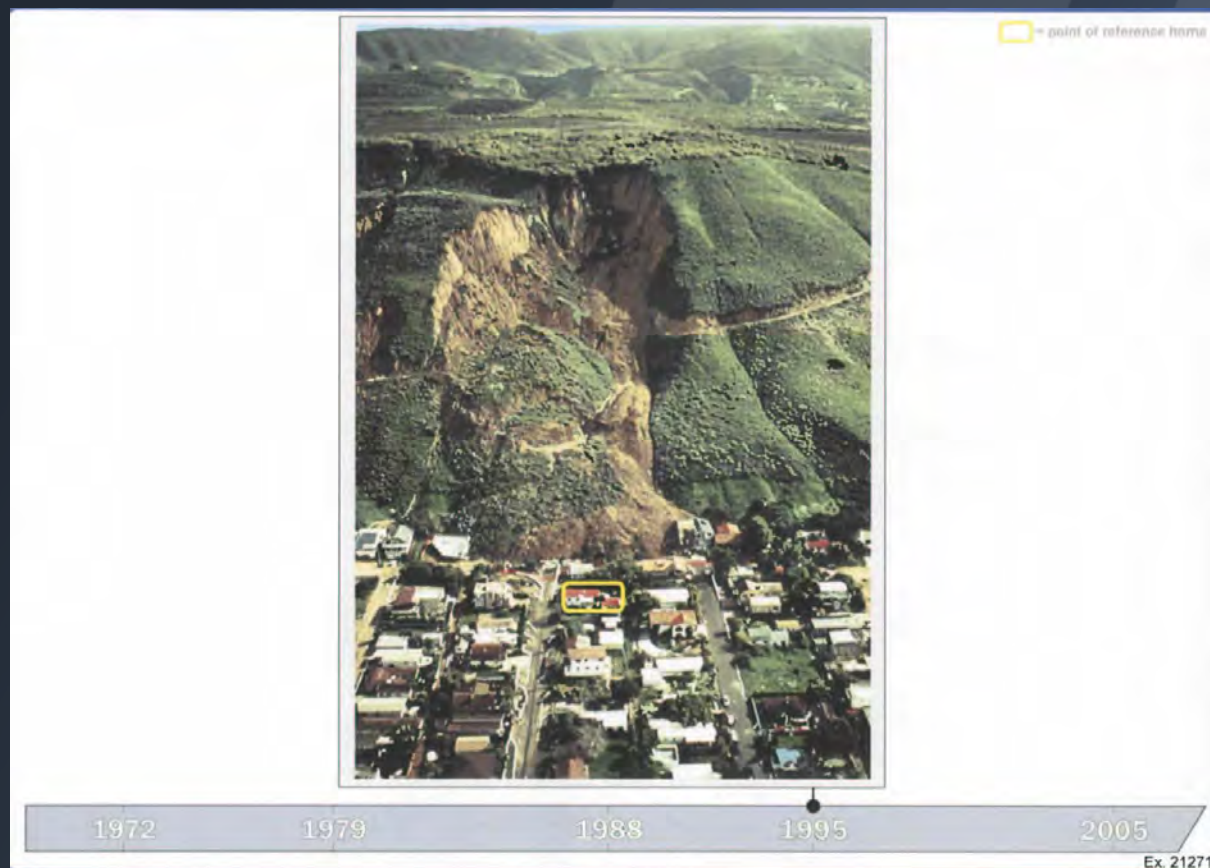
## LANDSLIDE BURIES WORKMEN AND TRAIN.

*Side of Mountain Descends Upon  
 Espee Track at Punta Gorda, Near  
 Ventura County Line, Engulfing  
 Cars and Engine—Four Men Dead.*

LANDSLIDE BURIES WORKMEN AND TRAIN.  
 DIRECT WIRE TO THE TIMES.  
 Los Angeles Times (1886-Current File); Jan. 24, 1909; ProQuest Historical Newspapers  
 Los Angeles Times (1881-1986) pg. 16

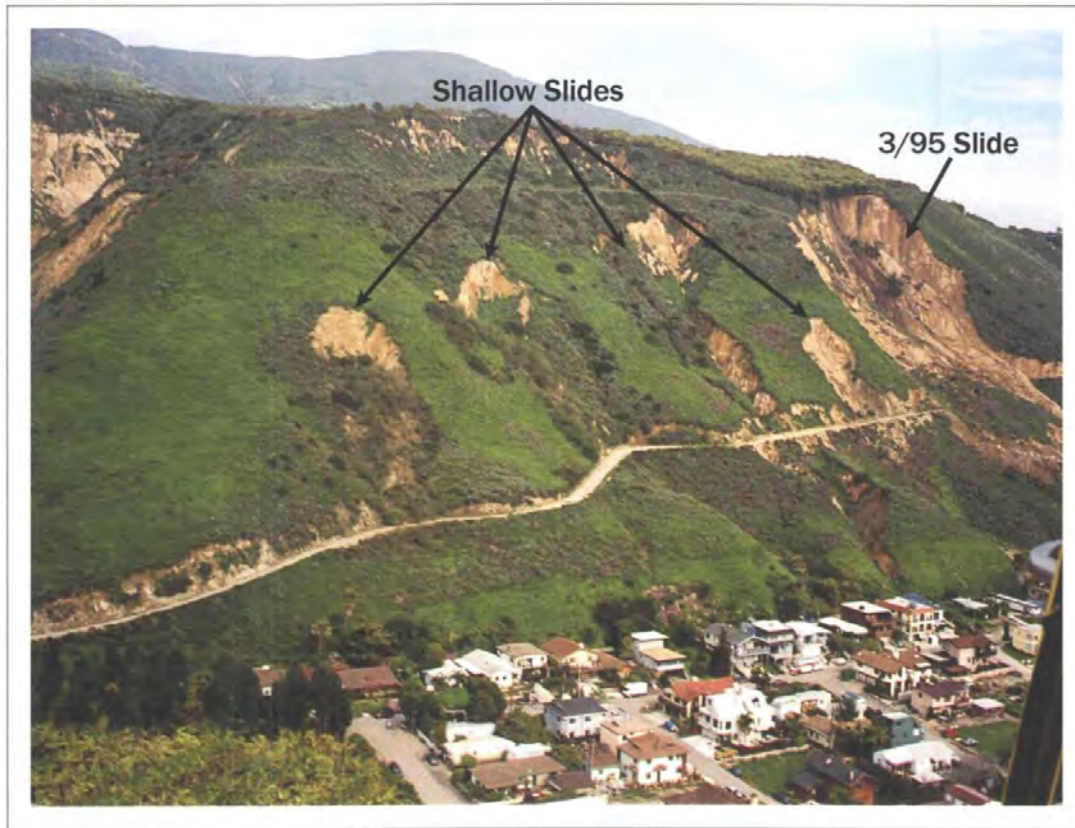
Ex. 21313

# 1995



# Other Slides

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Ex. 21301

# PCH: The morning of January 10, 2005

---



Ex 21281

# Smaller slides on January 10



Ex 21326

# Evidence re: Causation

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- History of landslides in La Conchita
- **Warnings given to La Conchita residents**
- Forensic evidence regarding performance of County's wall



# WARNING

## GEOLOGIC HAZARD AREA

Based on the present information known about the landslide and ancient landslide, the following geologic hazards are present.

1. **Catastrophic Failure.** The large ancient landslide mass west of the existing failure could potentially fail impacting residences along Vista Del Rincon and within the Community. The amount of impact depends on several factors which are unknown at this time. The risk increases closer to Vista Del Rincon.
2. **Mudflows:** Mudflows could potentially impact all residences and access roads within the La Conchita Community. Mudflows will typically occur during or shortly after periods of intense rainfall.
3. **Catastrophic Failure and Mudflows:** Should both events occur simultaneously, the entire Community of La Conchita could be impacted. The overall lack of information precludes determining estimates of potential run-out and existing safety factors for the hillside.

**ENTER AT YOUR OWN RISK.**

**DO NOT REMOVE**

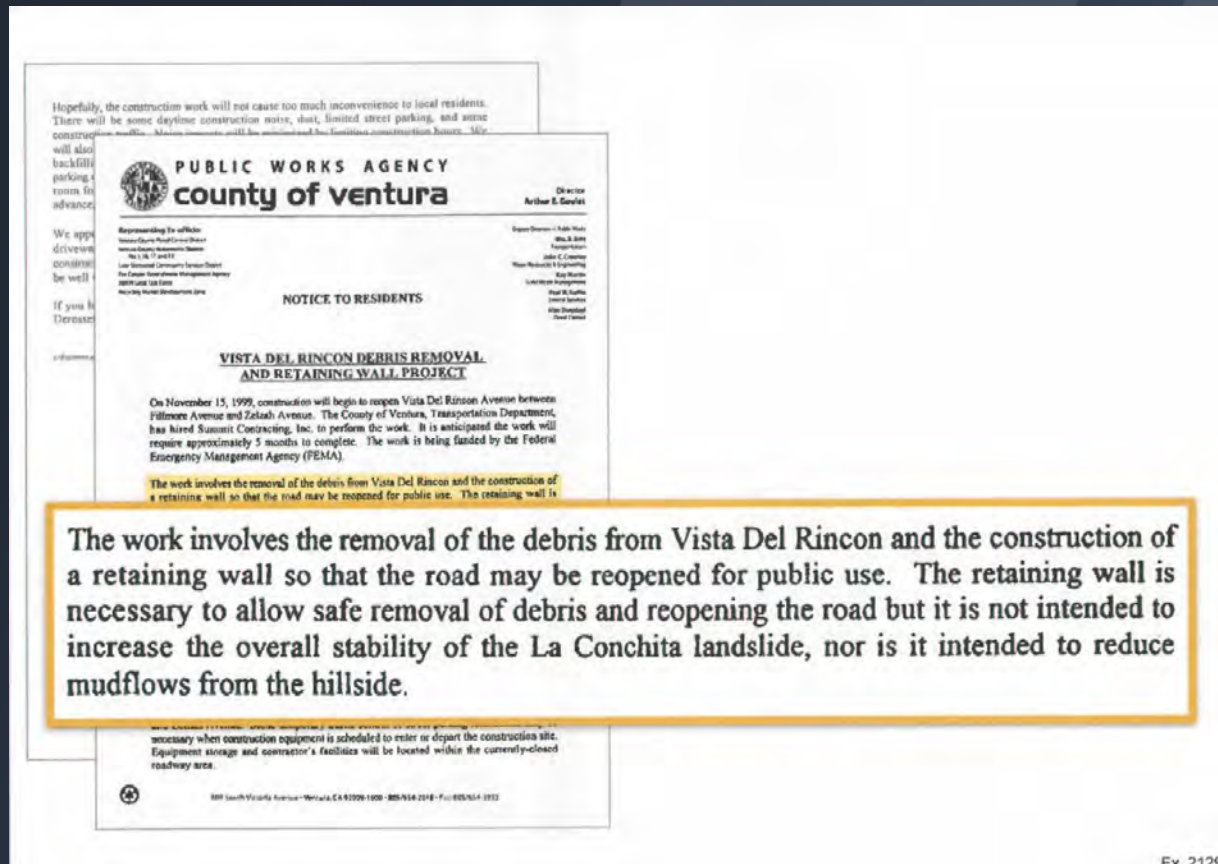


**BUILDING & SAFETY 654-2771**

APR 6, 1995  
PAGO.2

171

# November 3, 1999 Notice to Residents



Ex. 21292

# April 17, 2000 Notice to Residents

Construction equipment will access the site from Fillmore Avenue, San Fernando Avenue, and Zelzah Avenue. Some temporary traffic control or street parking restrictions may be necessary when construction equipment is scheduled to access the site.

We will construct parking, limiting installed. Dust will restrict to allow give res restrictio

We appreciate your patience and please do not complain if you have any concerns.

If you have any questions, please contact the Project Manager at (805) 231-1111.

**PUBLIC WORKS AGENCY  
county of ventura**

2000  
Arturo S. Gonzalez  
District Director of Public Works  
800 South Victoria Avenue  
Ventura, CA 93009-1000

**The work, funded by the Federal Emergency Management Agency (FEMA), involves the removal of debris from Vista Del Rincon and the construction of a retaining wall so that the road may be reopened for public use. It is estimated the work will require approximately 5 months to complete. The retaining wall will allow reopening the road but it is not intended to increase the stability of the La Conchita landslide, nor is it intended to reduce mudflows from the hillside.**

The County of our contractor on Vista Del Rincon originally scheduled to a federal strength steel.

The work, funded by FEMA, involves the removal of debris from Vista Del Rincon and the construction of a retaining wall so that the road may be reopened for public use. It is estimated the work will require approximately 5 months to complete. The retaining wall will allow reopening the road but it is not intended to increase the stability of the La Conchita landslide, nor is it intended to reduce mudflows from the hillside.

The new retaining wall will be 270 feet long, constructed of steel "H" piles spaced 10 feet apart, with timber lagging between the piles. The wall will vary in height to match the soil behind it, as high as 20 feet in some places. After the soil is removed from the road, the pavement will be repaired and the road re-opened. We will also reconnect the existing security fence as part of the project.

Construction activities will be conducted on weekdays between the hours of 7:00 a.m. and 3:30 p.m. Normal contractor non-working days during the spring and summer are: May 25, July 4, and September 4.

Representing: Ex-Officio: Ventura County Board of Supervisors, Board of Supervisors, District 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

800 South Victoria Avenue - Ventura, CA 93009-1000 - 805/231-1111 - FAX 805/231-1112

Ex. 21294

# Court of Appeal Comments on Warnings

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- “[T]he warnings the County gave are sufficient to advise any reasonable person to stay away from [La Conchita], particularly after days of heavy rains.”
  - ***Alvis v. County of Ventura*** (2009) 178 Cal.App.4th 536, 552

# Evidence re: Causation

---

- History of landslides in La Conchita
- Warnings given to La Conchita residents
- **Forensic evidence regarding performance of County's wall**

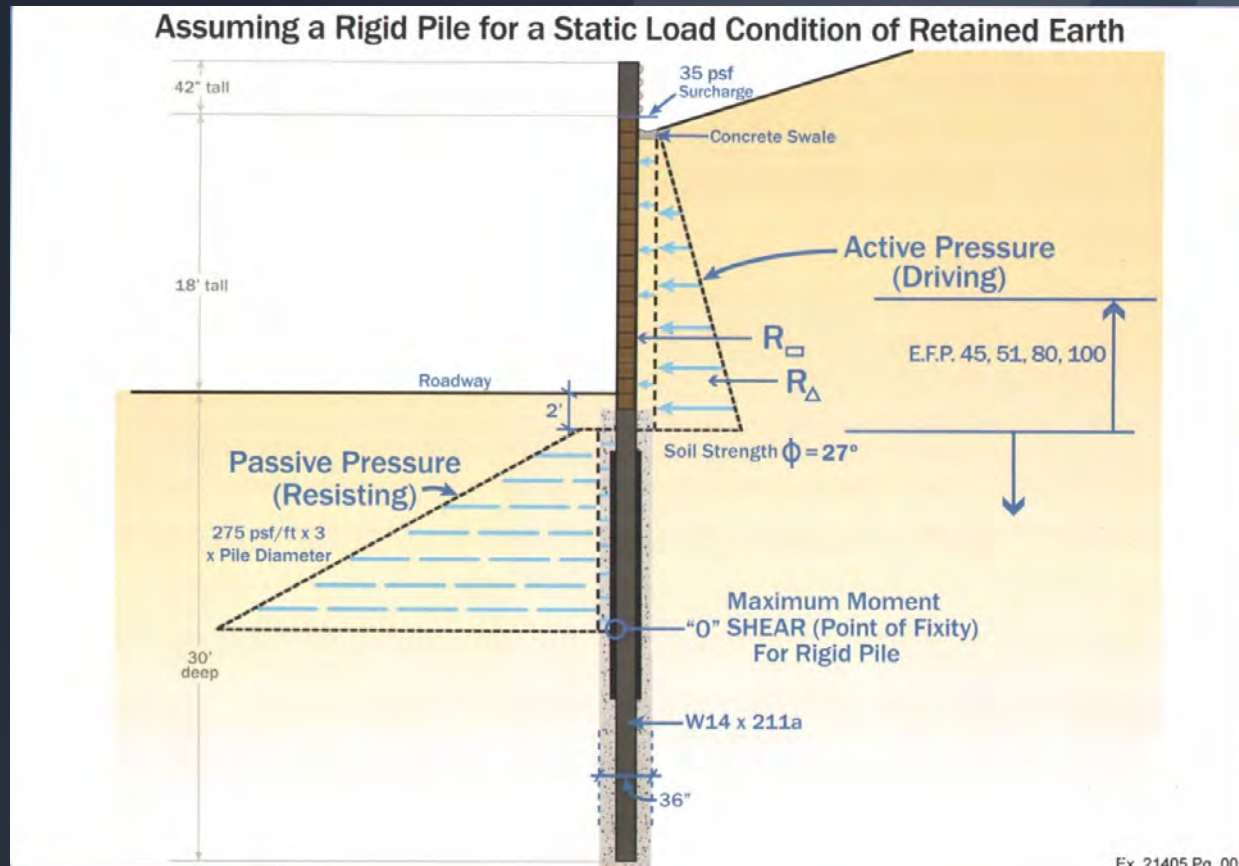
# The Wall Identified by Pile Number

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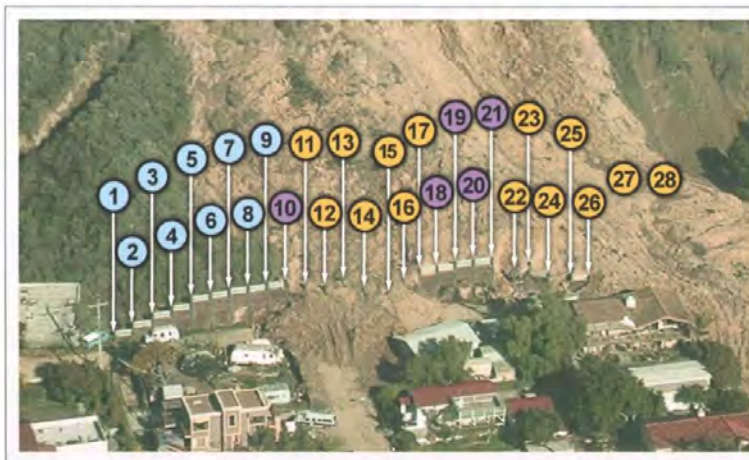
Ex. 21277

# Design Analysis



# Summary of Pile Performance During January 10, 2005 Landslide

General Description of Pile Performance	Piles in this Category	Number of Piles in this Category
 Not impacted by debris; no apparent effect of landslide	1, 2, 3, 4, 5, 6, 7, 8, 9	9
 Not impacted by debris; wall failed	None	0
 Impacted by debris; debris caused some rotation of the pile	10, 18, 19, 20, 21	5
 Impacted by debris; pile failed or buried	11, 12, 13, 14, 15, 16, 17, 22, 23, 24, 25, 26, 27, 28	14

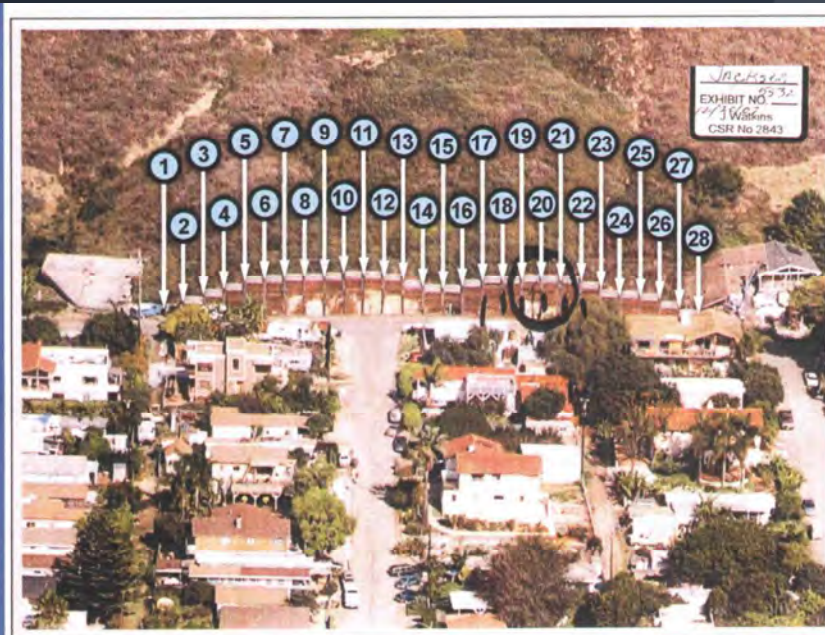


[Source: DSCF0092]

Ex. 21347



# From Jay Jackson's Deposition Exhibit 5532 – Pre and Post Slide

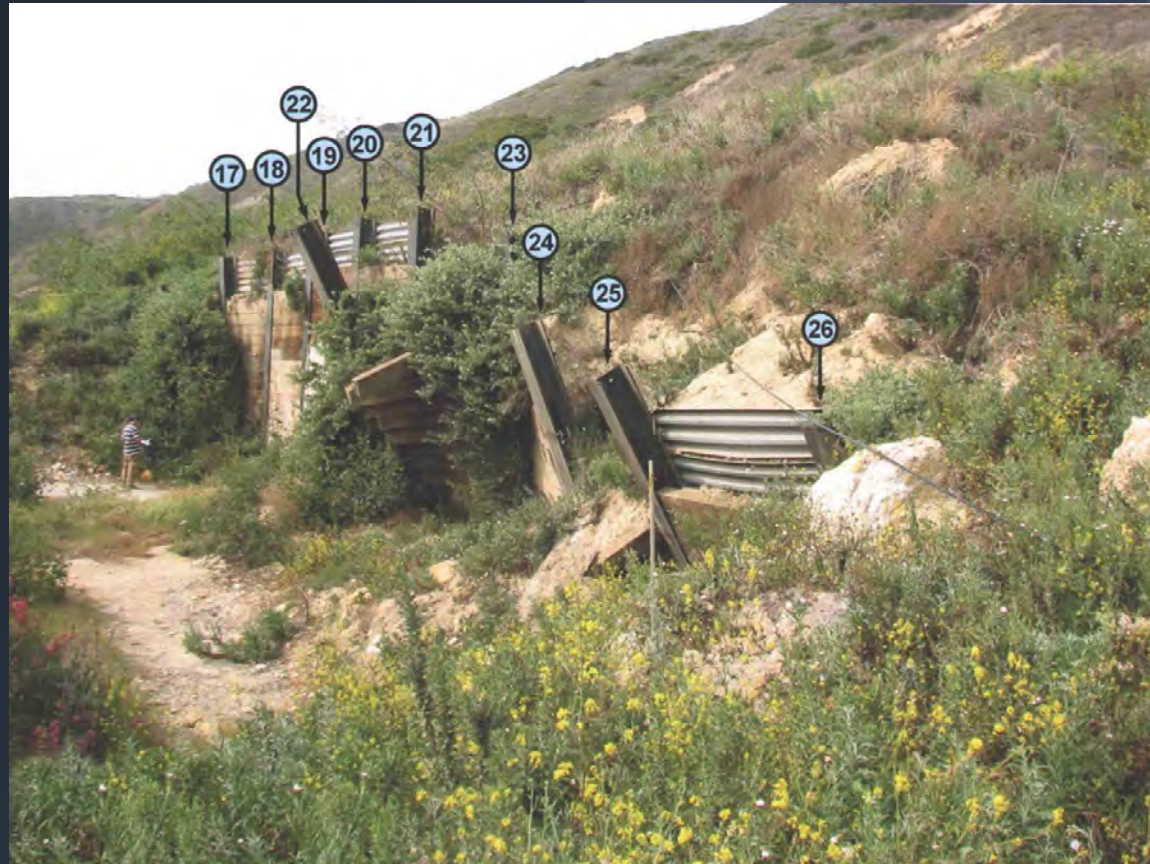


[Source: Jackson Depo. Ex. 5532]



[Source: DSCF0092]

# Photograph of wall following 2005 slide



# The Wall: 30 minutes before slide

---



# Location of Ms. Sonoquie during video filming 10 minutes before slide

---



**Topic: Evidence re Alleged Diversion of Slide**

# La Conchita 2005 Slide Minor and Main Lobes

---

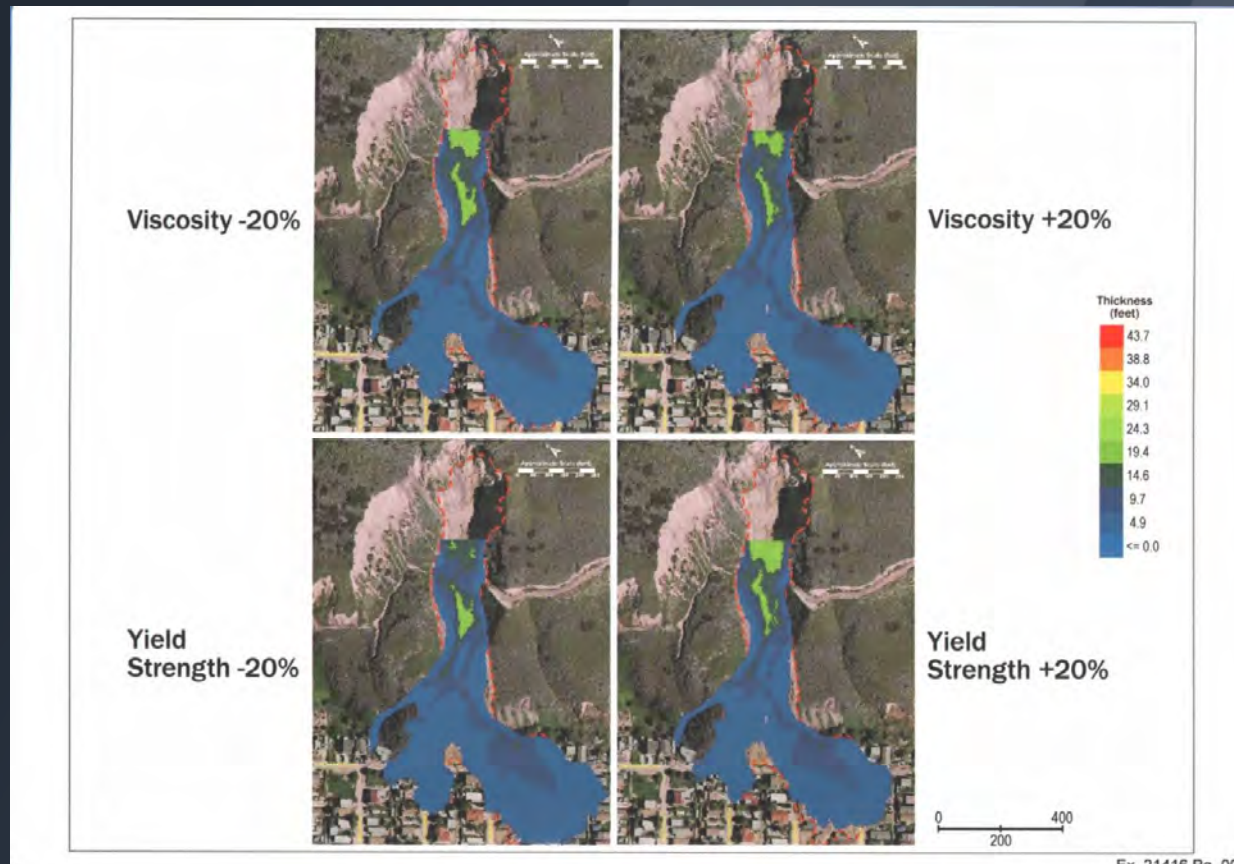


Ex. 21320

# 1995 & 2005 Slide Path

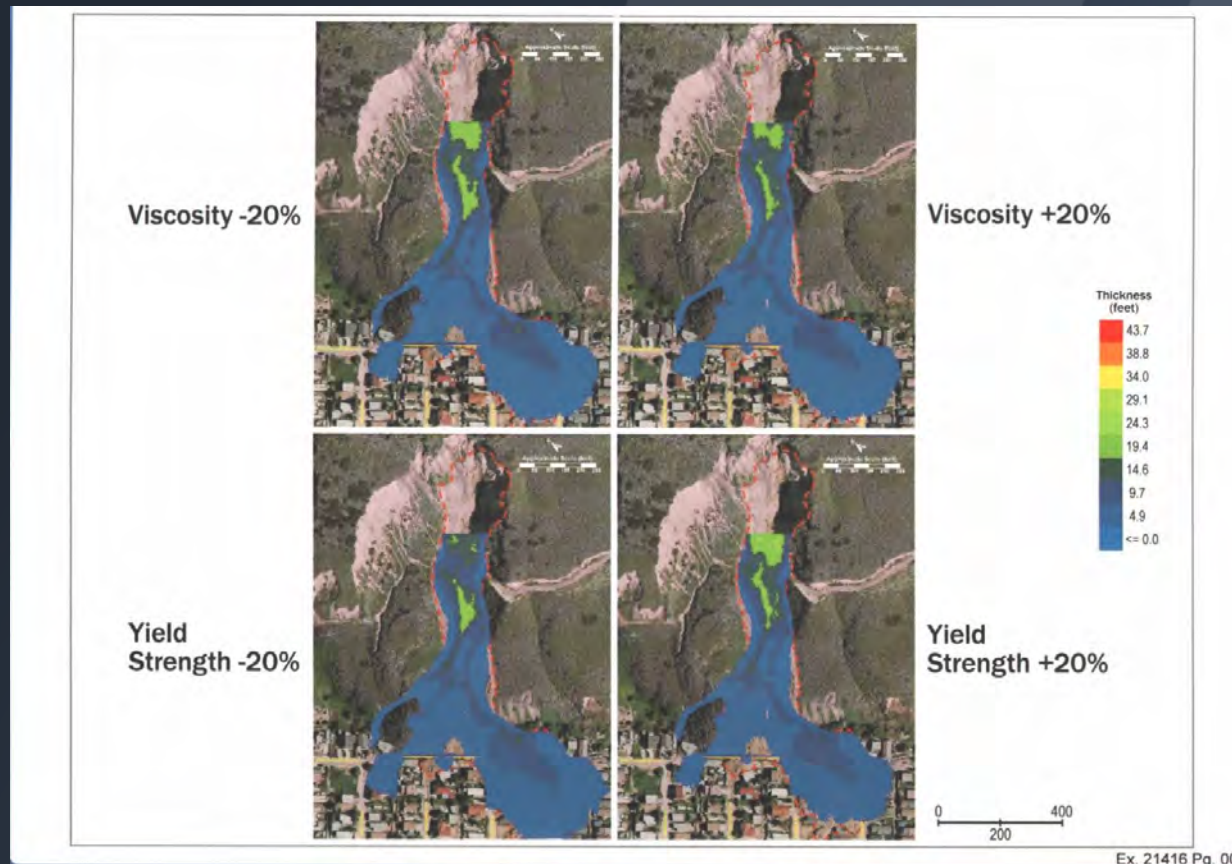


# FLO-2D Analysis: Without Wall

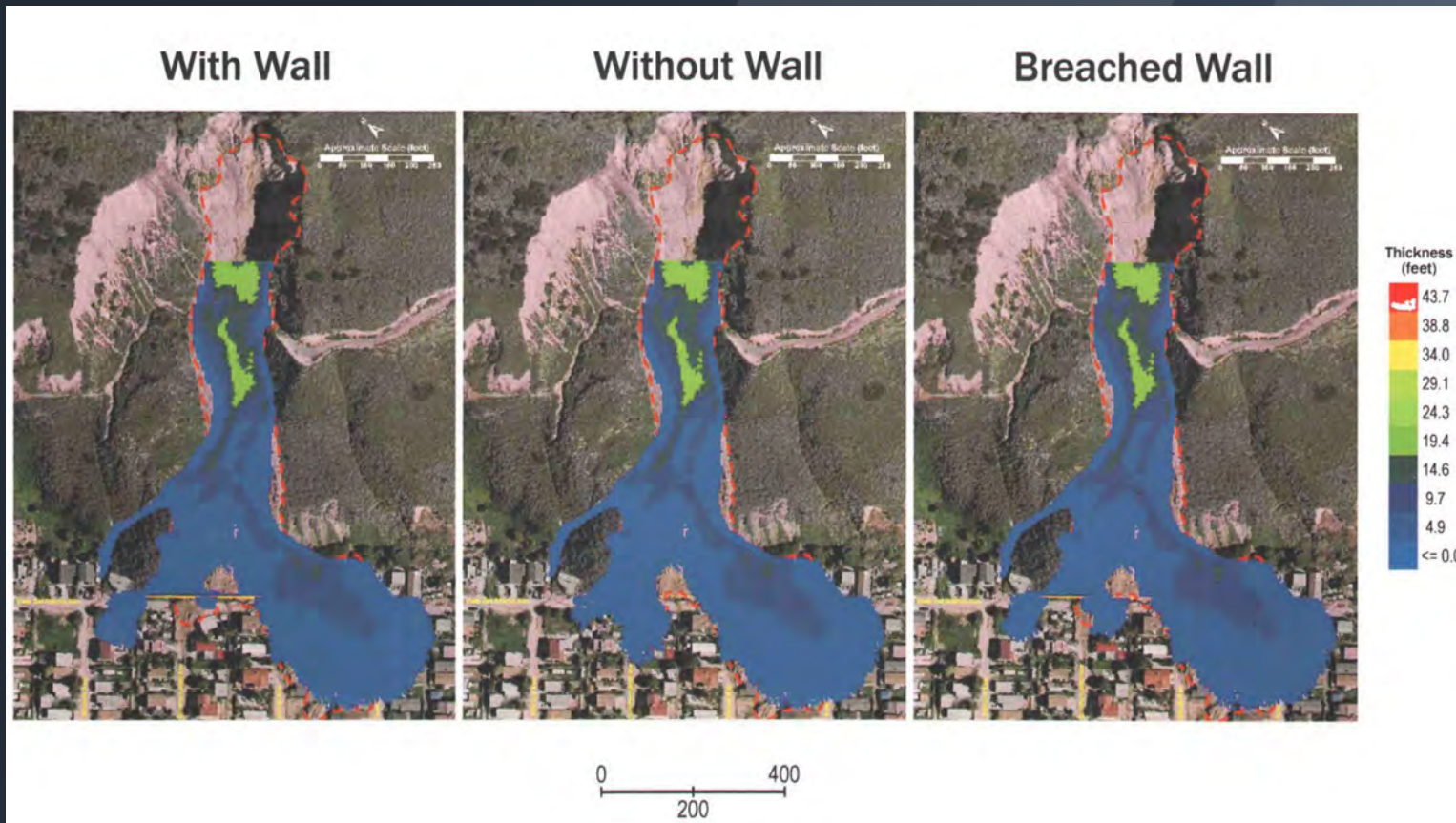




# FLO-2D Analysis: With Wall



# FLO-2D Comparisons



**LOEB&LOEB** LLP

A LIMITED LIABILITY PARTNERSHIP  
INCLUDING PROFESSIONAL  
CORPORATIONS

CLIENT TRUST ACCOUNT  
10100 SANTA MONICA BLVD.  
SUITE 2200  
LOS ANGELES, CA 90067

CITY NATIONAL BANK  
633 W. 5<sup>TH</sup> STREET  
LOS ANGELES, CA 90014  
16-1606  
1220

CHECK NO. 05413

DATE  
03/05/10

AMOUNT

PAY \*\*\*\*US Dollars:\$88,748.00\*\*\*\*

\$ 88,748.00

TO  
THE ORDER  
OF \*\*\*\*County of Ventura\*\*\*\*

LOEB&LOEB LLP  
*Thomas J. Kelly*  
*Ken Benbaust*  
TWO SIGNATURES REQUIRED

⑈005413⑈ ⑆122016066⑆ 210⑈081275⑈

LOEB&LOEB LLP LOS ANGELES, CA 90067

DETACH AND RETAIN THIS STATEMENT  
THE ATTACHED IS IN PAYMENT OF ITEMS DESCRIBED BELOW

VENDOR NO.

INVOICE DATE	INVOICE NO.	DESCRIPTION	VOUCHER NO.	ACCOUNT NO./FILE NO.	AMOUNT
		Client:La Conchita			
<b>TOTAL</b> ➡					



## NEW THIS YEAR – Surveys on the App

Find the App, Click on Events, Click on Browse by Day, Click on the Specific Session, Click on Rate Event. See Below for Screen Shots.

