April 17, 1986

Councilmember Judy McCarty
202 "C" Street, 10th Floor
San Diego, CA 92101

Dear Councilmember McCarty:

Rancho Mission Canyon;
potential liability for landslide damage

BACKGROUND

Your memos of March 31 and April 2, 1986, question the City's potential liability for earth movement if the City were to acquire certain Rancho Mission Canyon property. You attached legal analyses by Kenneth H. Levin of Mitchell, Silberberg & Knupp and Richard Schulman of your office which conclude that existing case law would protect the City from liability if the canyon were to remain in its "existing natural condition."

CONCLUSION

Generally, the cases support the proposition, in theory, that mere acquisition or ownership by a city of a natural canyon will not subject the City to liability for damage caused by earth movement without a public project being constructed or some other act or omission by the City or its employees. Practically, it is doubtful that this canyon and adjoining slopes would be considered as "natural" by the courts, however, and there are a number of situations, either existing or potential, which could subject the City to liability.

ANALYSIS

Two types of damage could occur from earth movement of the canyon property--damage to adjoining private property or injury to persons on adjoining private property and injury to persons or property on the proposed publicly owned canyon. There are a number of legal theories which a plaintiff may assert against a city for damage caused by earth movement. They are: inverse condemnation, negligence, dangerous condition of public property, breach of mandatory duty, nuisance, trespass and removal of lateral support.

Inverse Condemnation

Inverse condemnation liability is predicated upon Article I, Section 19, of the California Constitution, which provides that private property shall not be taken or damaged for public use without just compensation being paid to the owner. Fault by a defendant need not be proved. Holtz v. Superior Court, 3 Cal.3d 296, 304, 90 Cal.Rptr. 345, 349, 475 P.2d 441 (1970). There must be some causal connection between conduct on the part of the

defendant public entity and the plaintiff landowner's damage but the public entity need not be the sole cause of the damage--it may be liable even if its project was only one of several "substantial" concurring causes. Souza v. Silver Development Co., 164 Cal.App.3d 165, 171, 210 Cal.Rptr. 146, 149 (1985).

It is true that inverse condemnation cases arise in the context of some public improvement or project. It has been stated by one appellate court that the definition of a "taking" requires an act and the mere risk of future damage is not such an act, Olson v. County of Shasta, 5 Cal.App.3d 336, 341, 85 Cal.Rptr. 77, 80 (1970).

However, the courts have held that construction of a public improvement by a private contractor which is subsequently dedicated and accepted by a public entity may subject the public entity to liability for faulty design on an inverse theory. Sheffet v. County of Los Angeles, 3 Cal.App.3d 720, 734-735, 84 Cal.Rptr. 11, 20-21 (1970). That court reasoned that the basis of liability is its failure, in the exercise of its government power, to appreciate the probability that the project functioning as deliberately conceived would result in damage. Id. The Sheffet case also held that approval of subdivision maps and plans which include public drainage constitute a substantial participation incident to the serving of a public purpose. Id., at p. 735. See Stoney Creek Orchards v. State of California, 12 Cal.App.3d 903, 906, 91 Cal.Rptr. 139, 141 (1970), to the same effect.

Some caution is warranted in reliance on the flood cases cited in the two analyses you attached. The California Supreme Court stated in Holtz v. Superior Court, supra, 3 Cal.3d 296, 306, 90 Cal.Rptr. 345, 351:

> The doctrine of common law "right to inflict damage," emanating from the complex and unique province of water law, has been employed in only a few restricted situations, generally for the purpose of permitting a landowner to take reasonable action to protect his own
>
> property from external hazards such as floodwaters. (Emphasis added.)

Negligence

Negligence liability against public entities is governed by statute (Government Code, Section 810 et seq.). The statutes generally provide liability for injury proximately caused by an act or omission of an employee of a public entity within the scope of his employment if the act of omission would ordinarily give rise to a cause of action against him. Govt. Code, Sec.

815.2. Certain statutory immunities are also provided; e.g., issuance of a permit (Government Code, Section 818.4) or failure to inspect or negligent inspection (Government Code, Section 818.6). However, some of these general principles are rendered inapplicable by other provisions of the Tort Claims Act or case law as noted below.

In the case of Sprecher v. Adamson Companies, 30 Cal.3d 358, 178 Cal.Rptr, 783, 636 P.2d 1121 (1981), the court held that if an owner's land presents a known earth movement danger, he is liable to neighboring property owners for damages proximately caused by failure to correct or control that condition. In so ruling, the court rejected the common law rule of non-liability for a natural condition of the land saying, "(w)hatever the rule may once have been, it is now clear that a duty to exercise due care can arise out of possession alone." (Emphasis added.) Id., at p. 367. The court concluded that the question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. Id., at p. 372. Thus, where a property owner knows or has reason to know of an active slide, and where effective measures for controlling it are available, he may be liable for damage proximately caused to adjoining property by his failure to correct the problem.

Dangerous Condition

Dangerous condition of public property is a statutory species of liability (Government Code, Section 835). Unless a specific statutory immunity provision applies (e.g., Government Code, Section 830.2--trivial defect) a public entity is liable for injury caused by a dangerous condition at the time of the injury, if the injury was proximately caused by the dangerous condition, the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and either a negligent or wrongful act or omission of a public employee created the dangerous condition or the public entity had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have taken measures to protect against it.

Government Code, Section 831.2, provides immunity from liability for injuries caused by a natural condition of any unimproved public property. However, the case of Milligan v. City of Laguna Beach, 34 Cal.3d 829, 196 Cal.Rptr. 38, 670 P.2d 1121 (1983), held that this immunity does not apply to an injury sustained on adjacent private property even though the cause (the fall of a tree limb) was due to a natural condition of public property.

As a result the Legislature enacted Government Code, Section 831.25, which provides immunity for injury off the public

entity's property caused by land failure of any unimproved public property if the failure was caused by a natural condition of the unimproved public property. Minor improvements to the public property that do not contribute to the land failure are allowed but the immunity will not apply where the public entity has actual notice of the probable damage that is likely to occur and fails to give a reasonable warning of the danger.

Mandatory Duty

Mandatory duty is a basis of liability where a public entity fails to perform a duty imposed on it by statute or ordinance which is designed to protect against the risk of the particular type of injury that occurred. Govt. Code, Sec. 815.6. Courts have held that violation of such a mandatory duty will override the immunities such as Government Code, Section 818.4 (issuance of permits), which attaches only to discretionary activities. Morris v. County of Marin, 18 Cal.3d 901, 136 Cal.Rptr. 251, 559 P.2d 606 (1977). Thus, if a public entity causes an injury by its review and permit activity it will be immune, but if it omits part of its required review it will be liable.

Nuisance

Nuisance in the context of earth movement is defined by Civil Code, Section 3479, as anything which is an obstruction to the free use of property so as to interfere with the comfortable enjoyment of property. No showing of negligence is required. Sturges v. Charles L. Harney, Inc., 165 Cal.App.2d 306, 318, 331 P.2d 1072 (1958). The focus is on the creation of an offending condition, not the propriety of conduct. Some cases or authorities imply an act or omission by the defendant creating the nuisance is unnecessary, however, the facts of the cases do not seem to support this contention and no direct case ruling has been found.

Trespass

Trespass will lie when a landowner's soil moves onto the property of another. If an act causing the trespass is intentional, liability may result even though the result is unintentional or unforeseeable. Meyer v. Pacific Employers Insurance Co., 233 Cal.App.2d 321, 326, 143 Cal.Rptr. 542, 546 (1965).

Removal of Lateral Support

Removal of lateral support may result in liability from excavation under Civil Code, Section 832. However, if a public entity is the excavator engaged in a public project, liability may be established under a theory of inverse condemnation without a violation of the express terms of this Civil Code section. Holtz v. Superior Court, supra. Moreover, the statute may be

applicable where the public entity engages in excavation not related to a public project. Generally, the statute requires notice to adjoining landowners prior to excavations and reasonable care in excavating is required.

Application of the Law to Rancho Mission Canyon

We have not been supplied with any details factually as to construction of the adjoining private property or other matters affecting Rancho Mission Canyon. However, John Riess has informed us that fills have been placed in portions of the canyon proposed to acquired by the City which support adjoining developments and that landslide and soils problems are known to exist in the area. Mr. Levin's letter also points out that a portion of the property slopes up to the rim of the canyon where private property adjoins and that a recent geological study has "called into question" the stability of the subject property.

It is possible that some drainage devices were constructed on the fill slopes or other man-made improvements have been made in connection with the fill soils and construction of lots and houses. In view of this and the fills themselves, the courts would probably not categorize the canyon as "natural" for purpose of applying the legal doctrines outlines above. For example, in the Souza case, supra, the court in referring to a stream and drainage improvements stated: "Even though a part of the system was not man-made, the entire system was a public improvement or project which might subject the City to liability in inverse condemnation."

Even though the City did not contemplate acceptance of the canyon as public open space at the time of the private

development and acquires it years later, there exists the likelihood that the courts would treat that situation as indistinguishable in principle. In the context of the Sheffet case, supra, the courts may conclude there was substantial public participation by the City in approving grading and subdivision plans for the private development. If the City were to acquire the canyon, any drainage devices in or on the canyon property and slopes would become a public facility. Any defect in such drainage design which was a substantial cause of a later landslide could be the basis for liability against the City on an inverse condemnation theory. The same theory could apply with respect to any design or construction problems regarding fill soils or cuts in the natural topography.

A practical example of how the City gets brought into this type of litigation exists near the subject area. In 1969-1971, the subdivision Vista Del Cerro No. 4 was built by Pardee Construction Co. Canyon slopes were filled to build residential

lots. Some three years later Pardee graciously gave the City some of the canyon and fill slopes for open space. No improvements were made on the slopes or canyon except for minimal drainage devices at the time of the development. In 1979, a landslide occurred, removing lateral support from five of the homes. Three separate lawsuits resulted. In one, homeowners sued Pardee, its engineers and the City. As to the City it was alleged that it is liable due to negligent inspection, supervision, maintenance and repair in connection with the slope and drainage ditches and asserted theories of inverse condemnation, nuisance and removal of lateral support. In another case by some homeowners, the City was brought in by cross-complaint by developer defendants on a theory of equitable indemnity and comparative fault. The third suit was brought by the City against the developer and his engineers for damages to repair the slope. Although a tentative settlement of these suits has been reached in which the City would pay up to an amount not exceeding $125,000, the matter is still not formally resolved.

Courts are constantly looking for ways to establish liability against potential defendants, especially "deep pocket" public entities. In so doing, immunities for public entities are found not applicable or eroded away by exceptions. One example has been pointed out above by way of the Sprecher case, supra, which rejected the common law rule of non-liability for natural soils conditions.

Another example is found in Hansch v. County of Los Angeles, a case recently decided in Los Angeles Superior Court involving a landslide in the Malibu area.

Before construction, the County required a report on each home site by an independent geotechnical expert concerning stability of the site, another report by an independent expert relating to the propriety of the use of septic tanks on each lot and construction of four different drains in each street to handle runoff and prevent landslides. The property owners were told they must run pumps to eliminate ground water seepage and the evidence was that pumping would have prevented any landslide. The owners turned off the pumps. The landslide occurred.

Despite the measures the County took to protect landowners from their won folly, the trial court stated in its ruling that it intended to "extend" the law of inverse condemnation and found the county to be in the best position to know that septic tanks instead of sewers could cause landslides. In approving a request for city assistance to the County on appeal, the Legal Advocacy Committee of the League of California Cities agreed with San Francisco Deputy City Attorney Andrew W. Schwartz, who wrote in a

memorandum to the Committee that, if affirmed on appeal, the "ruling would . . . make local government the insurer of practically every type of private property damage caused by natural conditions."

Returning to Rancho Mission Canyon, a number of legal theories and factual scenarios exist for a plaintiff to allege and prove liability against the City for damage resulting from earth movement in and about the canyon. Even if theoretically the City should not be liable under existing case law, should a major landslide occur the City is likely to be put to the task of an expensive defense and the risk of liability being established at the trial or on appeal.

Aside from the issue of the City's liability for damages caused by a landslide if the City acquires the Rancho Mission Canyon, the problem of cost to repair and stabilize such a failure gives us cause for concern: As an example, the City Engineering and Development Department estimated the cost to stabilize and repair the Summit Ridge canyon failure to be in the range of $700,000 to over $1,000,000.

Certain legal impediments may make recovery of such an expense difficult or impossible. For example, statutes of limitation may bar any suit against the developer and the lack of

privity of contract between the City and the developer's engineers may be argued as a basis to deny recovery as to them.

Sincerely yours,
John W. Witt
City Attorney

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