After a Natural Disaster: Government Communications and Actions

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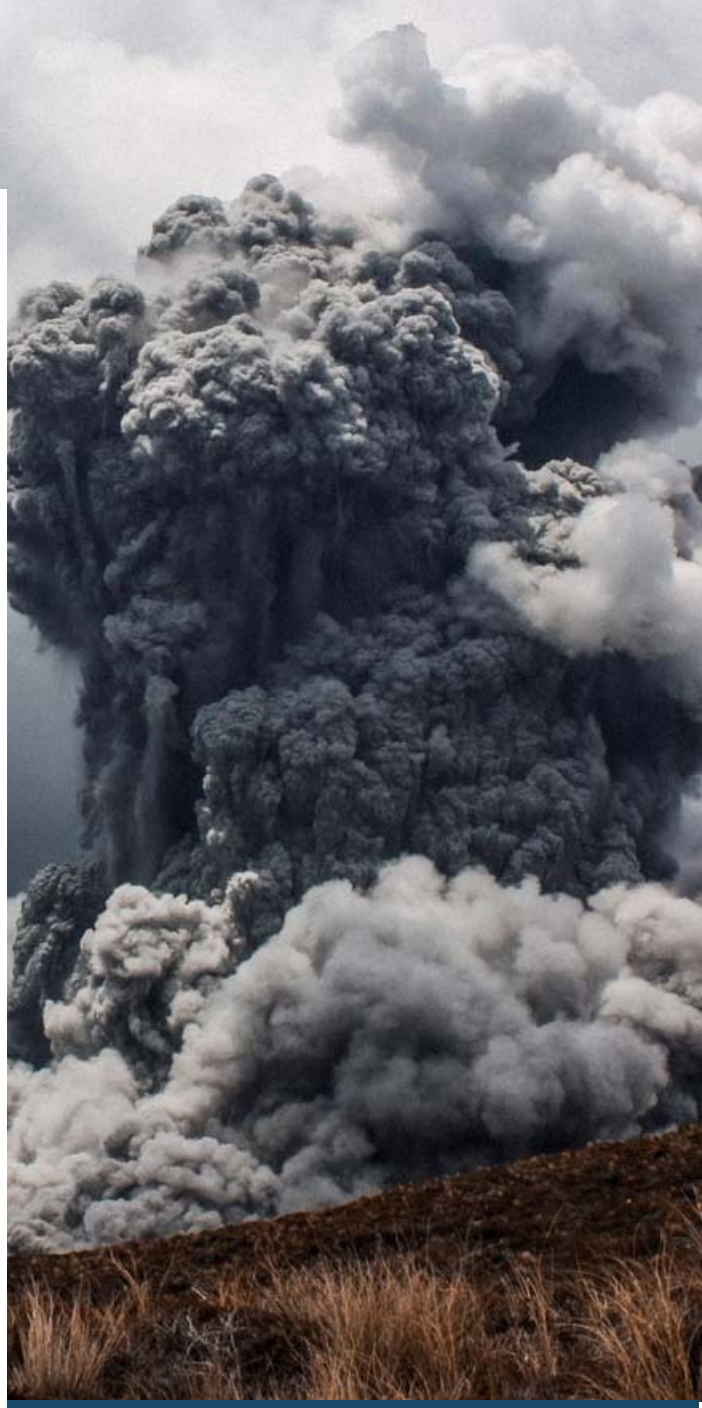

After a Natural Disaster:

Government Communications and Actions

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SOME SAY FIRE, SOME SAY ICE:[1] A PRIMER ON MUNICIPAL RESPONSE TO NATURAL DISASTER IN CALIFORNIA[2]

> Things fall apart; the centre cannot hold;
> Mere anarchy is loosed upon the world.[3]

The "Golden State" is also the state of disaster: floods, fires, and tsunamis; earthquakes and landslides; volcanoes and tempests.[4]

The rock on which we built our firm foundations whirls through the void, rips at the seams, and suffers the lash of the elements. We huddle together in cities but are powerless to prevent natural catastrophe. When the cracks open and the edifice crumbles, when family or neighbors perish in flood or fire, we turn to the government.

And the cavalry comes. In the grip of the maelstrom, municipalities face urgent decisions, and typically try to provide immediate relief and find funding. Section A gives an overview of legal considerations bearing on these issues. Before long, some affected citizens will claim that their local government should compensate their losses. Section B identifies typical claims and provides authority pertinent to key defenses. Finally, as the dust settles, municipalities typically take measures to reduce future risks to the public. Section C provides an overview of these issues.

Presentations on natural disasters often focus on the specific steps that a city must take when responding (*e.g.* activating the Emergency Operations Center, preparing a resolution declaring the emergency, considering other resolutions relating to, for example, curfews, submitting costs to the various agencies for reimbursement when the disaster is over, *et cet.*) Although this paper touches on some of these issues, and while I will address in the live presentation certain communications issues that arise in the immediate wake of disaster, the focus of this paper is on municipal liability issues related to natural disasters, and on the legal concerns presented for municipalities responding to natural disasters and trying to manage natural risk.[5]

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[1] Paraphrasing R. Frost's "Fire and Ice." Some say the whole thing will just slide into the ocean, *e.g.*, S. Goldberg, *Falling into the Pacific: California Landslides and Land Use Controls*, 16 S. Cal. Rev. L. & Soc. Just. 95 (2006).

[2] As to all these issues, the law of California is rich and deep. Discretion being the better part of valor, I do not suggest that a Washington disaster lawyer can teach California law to a convention center full of California city attorneys. This paper only scratches the surface, and with a rather blunt instrument at that.

[3] W.B. Yeats, *The Second Coming*, in MICHAEL ROBARTES AND THE DANCER (1921).

[4] The legal issues discussed in this paper arise from various kinds of natural disasters. Some have been more litigated than others, and not all present the same concerns. Floods, for example, present a set of issues, largely omitted below, arising out of the National Flood Insurance Program, *see generally*, 42 U.S.C. § 4001 *et seq*. Earthquakes do not present these issues. Interestingly enough, and counterintuitively, wildfires may, *see* https://www.fema.gov/wildfires-you-need-flood-insurance.

[5] Natural disasters present many other legal issues not canvassed here. For example, as with any other issue of pressing public concern, municipal actors must take care to stay within the bounds drawn by California's Open Meeting Act, Cal. Gov. Code §§ 11120 – 32; Public Records Act issues can arise, Cal. Gov. Code § 6250, *et seq*.; implementation of a litigation hold is critical in order to avoid later spoliation accusations; and issues about attorney-client privilege, the identity of the client, and intra-client conflicts are not uncommon. I cannot and do not attempt to treat all fine points and particulars. This is an overview of common issues.

A. In the thick of it

1. Decisions under fire

Municipalities are given broad immunity for discretionary actions, including those arising out of an emergency, *see* the California Emergency Services Act ("CESA"), Cal. Gov. Code. § 8550 *et seq*. Section 8655 provides: "[t]he state or its political subdivisions shall not be liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee … in carrying out the provisions of this chapter." The municipal immunity granted by CESA is broad, recognizing that split-second decision making is sometimes required in an unfolding emergency.

Thus, for example, in *Thousand Trails, Inc. v. California Reclamation Dist. No. 17*,[6] campground owners sued the defendant district after a flooded campground was further inundated by a cut in the levee made by the district in the midst of the emergency. In affirming summary judgment for the district, the appellate court noted that: "[i]n situations in which the state must take steps necessary to quell an emergency, it must be able to act with speed and confidence, unhampered by fear of tort liability." The district had declared a state of emergency and took emergency action to cut the levee to prevent massive flooding of the entire district, and was held to be immune for its discretionary decision.

In general, to obtain immunity for discretionary actions (or inactions) during an emergency, the municipality should be able to demonstrate that a state of emergency existed and had been declared, and that its decisions were both reasonable and focused on the primary goal of insuring public safety in a time of crisis.[7]

There also is an emergency exception to the just compensation requirement in inverse condemnation cases where damage to private property is inflicted by government under the pressure of public necessity and to avert impending peril. This emergency exception is based upon proper exercise of a public entity's police power. The California Supreme Court explained: "[t]he state or its subdivisions may take or damage private property without compensation if such action is *essential* to safeguard public health, safety, or morals." However, it also warned of a threshold: "[i]n certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner."[8] As a result, courts tend to narrowly circumscribe the type of emergency that shields public entities from inverse condemnation liability.[9]

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[6] 124 Cal. App. 4th 450, 461, 21 Cal. Rptr. 3d 196, 204 (2004).
[7] *Id*.
[8] *House v. L.A. County Flood Control Dist.*, 25 Cal. 2d 384, 388-89, 153 P.2d 950 (1944).
[9] In *Odello Brothers v. County of Monterey*, 63 Cal. App. 4th 778, 785-86, 73 Cal. Rptr. 2d 903, 907 (1998), the court held that the county was not automatically shielded from inverse condemnation liability in breaching a levee and flooding farm lands where the emergency itself was caused by inadequacy of another levee, which was acknowledged by county six years earlier. The court held that "[i]t would be antithetical to principles of Constitution . . . to permit a public entity to burden private property without compensation, under emergency doctrine, simply because the public entities' inadequate flood control measures threatened other, more populated property."

While not a California disaster, the Mount St. Helens eruption produced cases confirming the discretion vested in government actors trying to cope with natural disaster. Washington's once-conical St. Helens erupted in 1980, killing approximately 57 people, and causing millions, if not billions, in damages. Geologists saw it coming, and prior to the eruption, then-Governor Dixy Lee Ray[10] imposed a restricted "red zone" around the volcano. This both (a) damaged local businesses, and (b) failed to prevent the deaths. Litigation ensued. The Washington Supreme Court held that discretionary immunity barred the business owners' claim, *Cougar Business Owners Association v. State*,[11] and the Washington Court of Appeals reached essentially the same result as to claims brought by the personal representatives of persons killed, *Karr v. State*.[12]

2. Disaster relief

In the immediate aftermath of a disaster, emergency responders will conduct the most urgent disaster relief efforts. Survivors will be rescued and taken to hospitals or local triage or evacuation centers, fires will be contained and extinguished, and other urgent necessities dealt with. Once some semblance of stability returns, citizens and agencies will look to city officials for leadership and help. Accessing funds for clean-up and mitigation efforts is critical, and state and/or federal assistance is often a must.

Declaring a local emergency allows cities to request financial and other assistance from the Federal Emergency Management Agency (FEMA) and from the State. The California Disaster Assistance Act (CDAA) authorizes the Director of the California Governor's Office of Emergency Services (Cal OES) to administer a program that provides financial assistance for costs incurred by local governments resulting from a disaster event, and in certain circumstances will even match FEMA contributions. For more information, see the Cal OES web site, http://www.caloes.ca.gov/, and in particular, its Fact Sheet on the disaster proclamation and CDAA processes, http://www.caloes.ca.gov/RecoverySite/Documents/CDAA%20Fact%20Sheet.pdf. Note the helpful list of factors considered in assessing local government requests for disaster funding.

To be eligible for assistance under the Act, a city or county must proclaim a local emergency within ten days of the actual occurrence of a disaster and the proclamation must be acceptable to the Secretary, or the Governor must make a State of Emergency Proclamation. The application process is set out in detail in Title 19 of the California Code of Regulations, Chapter 6, section 2970.

3. Insurance

The next step is to compile and review the city's most current insurance policies to determine possible coverage, including both primary and excess policies. Every policy should be carefully reviewed, page by page, with a broker or risk manager assisting. Letters must be sent to all the insurance carriers and risk pools notifying them of the disaster.

[10] I swear I am not making up that name, Google™ her.
[11] 97 Wn.2d 466 (1982).
[12] 53 Wn. App. 1 (1988).

Property damage policies cover damage to property owned by the city. Some policies cover business interruption, lost revenue, and public relations costs. Liability policies may cover the damage or injuries to others caused by the city's acts.

Perhaps most important, promptly consult insurance coverage counsel as needed.

B. Claims, damages, and defenses

Property owners affected by natural disaster pursue a variety of claims against municipalities. They seek, in effect, to make the municipality the insurer of last resort: the claims often are brought principally because there is no one else to blame and no other pocket available.

The claims depend in part upon the fact scenario presented and in part upon the creativity of the lawyers involved. We sketch below some of the most typical claims and damages, and discuss certain key defenses.

1. Claims

a. Negligence, failure to warn, and permitting

In some disaster cases, a negligence claim against a municipality may arise out of a public work or project. For example, a municipality might own a dam, and fail to maintain it, leading to a disastrous flood. The municipality would be liable in tort for the damages of those harmed. But these cases – in which the municipality is alleged to have been the primary cause of the harm – are not truly "natural" disaster cases.

Truly natural disasters often raise "failure to warn" claims. Although no one can accurately predict the weather, let alone earthquakes, volcanic eruptions, floods or wildfires, government agencies have made remarkable strides in hazard assessment and risk prediction. But no good deed goes unpunished. Municipalities now typically hold much more information about natural hazards than does any given property owner. And from this imbalance in information arises a legal argument that, among other things, the municipality should be liable for the property owner's damage because it knew the risk and failed to provide an adequate warning.[13]

Another frequent argument is that the government should not have permitted private development which later was destroyed or severely damaged by natural disaster. As we shall see below, this is not a proper theory of liability, but it nonetheless comes up with some frequency.

b. Invasion of property rights: your dirt (or mud, or water) on my property

In some cases, the municipality owns land that is the source or cause of damage to neighboring privately-owned property. This scenario arises in landslide cases in which, for example, the municipality owns steep-slope property that slides onto private property below. The affected property

[13] *See Alvis v. County of Ventura*, 178 Cal. App. 4th 536, 100 Cal. Rptr. 3d 494 (2009) (see *infra* n. 32).

owners likely would assert claims for inverse condemnation,[14] trespass, and nuisance (in addition to negligence).[15] California imposes upon uphill landowners a general duty of reasonableness,[16] even as to natural uphill hazards, but any such claim against a municipality would be limited by Cal. Gov. Code §831.25, discussed below.[17]

c. Land sales liability

Disaster claims against municipalities occasionally arise out of the municipality's former ownership of property where, for example, the municipality sells surplus property to a private developer and eventually homes or other improvements are damaged in a natural disaster.

Under California law, transferors of real property located in designated hazard zones are required to disclose that information to prospective buyers prior to the close of escrow. California Civil Code Section 1103 provides these disclosure requirements for natural and other hazards.[18] Section 1103.2 provides a template form for a Natural Hazard Disclosure Statement and gives guidance on how to determine whether property has a land condition that should be disclosed.

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[14] Inverse condemnation of course arises in other disaster contexts as well, for example, the levee breach cases discussed above. And inverse condemnation, like eminent domain (*see, infra* n. 54), opens a big can of worms. Suffice to say that (a) these claims arise in natural disaster cases, *e.g.*, *Bunch v. Coachella Valley Water Dist*, 15 Cal. 4th 432, 935 P.2d 796 (1997); *Ingram v. City of Redondo Beach*, 45 Cal. App. 3d 628, 45 Cal. Rptr. 688 (1975), and (b) are subject to important defenses and limitations, *e.g.*, *Biron v. Redding*, 225 Cal. App. 4th 1264, 170 Cal. Rptr. 3d 848 (2014) (in order to establish a causal connection between the public improvement and the plaintiff's damages, there must be a showing of 'a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury'); *Tri-Chem, Inc. v. Los Angeles County Flood Control District*, 60 Cal. App. 3d 311, 312, 132 Cal. Rptr. 142, 143 (1976) (the design capacity doctrine provides that the government has no inherent duty to protect property from floods; a public entity cannot be held liable unless it subjects property to more flooding than would have occurred absent construction of an improvement).

[15] *See, e.g.*, *Locklin v. City of Lafayette*, 7 Cal. 4th 327, 967 P.2d 724 (1994) (property owners brought inverse condemnation, negligence, and trespass claims against city for landslide allegedly caused by city's improvements on publicly owned land); *Gutierrez v. County of San Bernardino*, 198 Cal. App. 4th 831, 130 Cal. Rptr. 3d 482 (2011) (homeowners brought action for inverse condemnation against county after their properties were inundated with water, dirt, and debris allegedly caused by public improvements and roads); *Goebel v. City of Santa Barbara*, 92 Cal. App. 4th 549, 111 Cal. Rptr. 2d 901 (2001) (homeowners brought inverse condemnation action against city arising from damage resulting from landslide that was allegedly caused by city's broken water main on nearby public property); *Smith v. County of Los Angeles*, 214 Cal. App. 3d 266, 262 Cal. Rptr. 754 (1989) (homeowners brought action for inverse condemnation, dangerous condition of public property, and nuisance resulting from damage to their property allegedly due to county cutting into hill to create road, thus removing support and causing landslide).

[16] *Sprecher v. Adamson Co.*, 30 Cal. 3d 358, 636 P.2d 1121 (1981). In *Sprecher*, a downhill landowner brought an action against the uphill landowner for damage to his property caused by a natural slide condition existing on the uphill landowner's land. In reversing an order granting summary judgment for the defendant, the California Supreme Court held that an uphill landowner owes a duty of reasonable care to the downhill landowner to protect the latter from harm caused by a natural condition of uphill landowner's land. This is not the traditional rule, and differs from the rule applied in other jurisdictions, *e.g.*, Washington. *See Price v. City of Seattle*, 106 Wn. App. 647, 652 - 56, *rev. den.* 145 Wn.2d 1011 (2001) (rejecting *Sprecher* and holding that duty of possessors of land to prevent landslides is limited to situations where the possessor of land has actual or constructive notice of a hazard produced by an alteration to the natural condition of land).

[17] *See Wildensten v. East Bay Reg'l Park Dist.*, 231 Cal. App. 3d 976, 283 Cal. Rptr. 13 (1991) (declining to extend *Sprecher* rule to a public entity under Cal. Gov. Code §831.25).

[18] *See* 1 Cal. Real Est. § 2:27 (4th ed.) ("[b]y statute, all transferors of real property and their agents are required to disclose whether the property is located in one of several types of areas designated with natural hazard characteristics . . .").

Purchasers of property damaged by natural disaster have sued California sellers for non-disclosure, asserting comparable pre-code common law theories.[19] We have found no California cases addressing allegations that a municipality failed to disclose natural hazards in the sale of real estate, but the issue has arisen elsewhere. The potential claim is akin to a misrepresentation claim, and a California municipality sued on this theory might assert that it is immune by virtue of California Government Code § 818.8 ("[a] public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional.").

2. Damages

Most typically, Plaintiffs suing municipalities over damages arising out of a natural disaster seek compensation for the diminution in the value of their property (and often its total loss); loss of use; damage to other property; and emotional distress.[20] In this regard, *Haggis v. City of Los Angeles*[21] is typical. The 1994 Northridge earthquake caused severe damage to plaintiff's house, and he sought compensation for property damage, loss of use, and emotional distress.

Punitive damages are not available against municipalities. California Government Code § 818 provides "[n]otwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."[22]

[19] *See Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) (appellate court upheld judgment finding real estate brokers and their sellers liable for failure to disclose the property's history of landslides and potential future landslide risks); *Buist v. C. Dudley De Velbiss Corp.*, 182 Cal. App. 2d 325, 6 Cal. Rptr. 259 (1960) (action for fraud in sale of hillside house and lot, where contractor allegedly concealed presence of fill, ancient landslide, and subsurface water).

[20] In *Smith*, *supra* n. 15, 214 Cal. App. 3d 266, the appellate court affirmed the trial court's judgment in favor of homeowners against county in an action for inverse condemnation and nuisance following a landslide. The homeowners claimed that the county had destabilized the hillside where homeowners' residences are located when it cut into the hillside to build roads. The county was found liable for nuisance (among other causes of action), and the court held that homeowners were entitled to recover damages for emotional distress based upon their nuisance claim. *See generally City of San Jose v. Superior Court*, 12 Cal. 3d 447, 464, 525 P.2d 701, 712 (1974) ("damages recoverable in a successful nuisance action for injuries to real property include not only diminution in market value but also damages for annoyance, inconvenience, and discomfort . . ."); *Acadia, California, Ltd. v. Herbert,* 54 Cal. 2d 328, 337, 353 P.2d 294 (1960); *Smart v. City of Los Angeles*, 112 Cal. App. 3d 232, 239-240, 169 Cal. Rptr. 174 (1980).

[21] *Haggis v. City of Los Angeles*, 22 Cal.4th 490, 497, 993 P.2d 983, 986 (2000).

[22] *E.g.*, *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*, 644 F. Supp. 2d 1177 (N.D. Cal. 2009) (holding that under California law, punitive damages cannot be recovered against a public entity); *Marron v. Superior Court*, 108 Cal. App. 4th 1049, 134 Cal. Rptr.2d 358 (2003), *reh. den.* (holding that a plaintiff who alleges injury caused by a public entity may be entitled to actual damages for that injury, but not punitive damages); *But cf., C.N. v. Wolf*, 410 F. Supp. 2d 894 (C.D. Cal. 2005) (holding that the California statute barring punitive damages against public entities did not bar punitive damages claims against individual defendants in their personal capacities).

Plaintiffs sometimes seek both costs of repair and diminution in value. This is a double-count and it is improper, and the cases so hold.[23] Plaintiff must elect a remedy, and of course, if the cost of repair exceeds the diminution in value, plaintiff properly will be limited to the latter.[24]

3. Defenses[25]

a. Government immunity

In keeping with the venerable maxim that the King can do no wrong,[26] the general rule is that municipalities are not liable for torts under California law, unless expressly authorized by statute. California Government Code § 815 provides:

> Except as otherwise provided by statute:
>
> (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.
>
> (b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

The intent of the section is to abolish all liability for public entities, except as required by the Constitution (*e.g.*, inverse condemnation) or the legislature. But beyond that broad statement, as so often in the law, the contours of municipal liability in California are defined by a series of exceptions to the general rule, and by various rules for special cases. We present the most pertinent of these below.

i. Permits, inspections & enforcement: look what you let me do!

The first response to foreseeable natural disaster impacting public property is often: why did the government let them build there? It is a fair question, and the argument might well get traction with a jury.

Fortunately for municipalities and those who defend them, in California (as in many other jurisdictions) there is no such thing as negligent permitting. The Code provides unequivocal and robust immunity for the issuance or denial of a permit, Cal. Gov. Code § 818.4. Similar protections

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[23] *See Safeco Ins. Co. v. J & D Painting*, 17 Cal. App. 4th 1199, 1202, 21 Cal. Rptr. 2d 903 (1993) (in a suit for negligent damage to real property, a plaintiff may recover either the cost of repair or the diminution in value, but not both).

[24] *Id.* at 1202. ("[i]t is ordinarily appropriate to employ the lesser of the two measures [citations omitted]; otherwise plaintiffs might recover large sums for "injury" to property that subtracts little or nothing from – or occasionally even adds to – its value.").

[25] The following discussion omits important points. Claims arising out of natural disasters are subject to the same defenses and limitations as any other claim against a municipality. Plaintiffs must comply, for example, with the California Tort Claims Act, Cal. Gov. Code §§ 810 *et seq.*, and abide by applicable statutes of limitation.

[26] *Rex non potest peccare.*

extend to the failure to inspect property to determine whether it complies with enactments or is hazardous, Cal. Gov. Code § 818.6, *see also* Cal. Gov. Code § 821.4, and also to the failure "to enforce any law." Cal. Gov. Code § 818.2.

The cases test the reach of these rules with reference to the countervailing rule that a municipality is liable for damages proximately caused by the municipality's failure to discharge a mandatory duty with reasonable diligence, *see* Cal. Gov. Code § 815.6. Thus, in *Haggis*,[27] the plaintiff whose home was severely damaged by the Northridge earthquake claimed that the City of Los Angeles should be held liable, notwithstanding the general immunity for failure to inspect, because the City allegedly had failed to comply with various Municipal Code provisions, including one requiring the recording of a certificate stating that property was unstable, if and after the Superintendent of Building had inspected and found a property to be unstable.

The Supreme Court carefully examined the Municipal Code provisions at issue to determine (a) whether the provision created a mandatory duty, and (b) whether it was designed to protect against the kind of injury the plaintiff suffered. The Court determined that while the most pertinent Code provision may have had some warning effect, this was only incidental, that the ordinance was not designed to protect against the kind of injury at issue here, and that the City therefore was immune.[28]

ii. Discretionary acts and the like

As a general rule, public employees (and by extension, municipalities[29]) are not liable for damages resulting from discretionary acts or omissions. Cal. Gov. Code § 820.2. The Mount St. Helens cases discussed above are good examples of the application of discretionary immunity to claims arising out of a natural disaster, and California courts also have examined the defense in the natural disaster context.[30] Hundreds of California cases treat the contours of discretionary immunity, and I will not try to do so here. At the highest level, the issue is whether the complaint is about government policy-making.[31]

And, while the press and public may argue that the government should have taken legislative action to (for example) restrict zoning to prevent development of vulnerable property, California municipalities also are not liable for "any injury caused by adopting *or failing to adopt* an enactment". Cal. Gov. Code § 818.2 (emphasis added).

Design immunity is a related defense that can arise in natural disaster cases if plaintiffs seek to blame their damages on failed government infrastructure. The Code provides for immunity where a municipality exercises design discretion in the planning and design of public works (many other limits apply to this immunity).[32]

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[27] *Haggis*, *supra* n. 21, 22 Cal. 4th 490, 993 P.2d 983.
[28] *See also, Cancun Homeowners Ass'n v. City of San Juan Capistrano*, 215 Cal. App.3d 1352, 264 Cal. Rptr. 288 (1989).
[29] *See* Cal. Gov. Code § 815.2(b).
[30] *See Thousand Trails, Inc*, *supra* n. 6, 124 Cal. App. 4th 450, 21 Cal. Rptr. 3d 196; *Odello Brothers*, *supra* n. 9, 63 Cal. App. 4th 778, 21 Cal. Rptr. 2d 903.
[31] *Johnson v. State*, 69 Cal. 2d 782, 789-90, 447 P.2d 352, 357-58 (1968).
[32] *See Alvis v. County of Ventura*, 178 Cal. App. 4th 536, 100 Cal. Rptr. 3d 494 (2009).

In *Alvis*, plaintiffs who suffered injuries or who had relatives who died in the massive 2005 La Conchita landslide sued the County of Ventura for the allegedly dangerous condition of public property, nuisance, and inverse condemnation. The Court of Appeal affirmed summary judgment in favor of the County and rejected plaintiffs' claims.

As discussed in *Alvis*, design immunity provides a defense if there was: (1) a causal relationship between the plan and the accident; (2) discretionary approval of the plan prior to construction of a retaining wall; and (3) substantial evidence supporting the reasonableness of the plan or design.[33] The Court of Appeal rejected plaintiffs' argument that negligent maintenance, rather than design, caused the slide, concluding that the purported "maintenance" instead was a design factor.[34] As to the second element, the Court concluded that the county's board of supervisors exercised its discretion to approve plans for the project.[35] Finally, there was "ample evidence" to support the reasonableness of the design, and the statute may provide immunity even where the evidence of reasonableness is contradicted.[36]

iii. Government property in natural condition

The land of California is so notoriously unstable that the Legislature has expressly addressed the government's liability for damages that unimproved public property causes *off* public property.[37]

Thus, as a general rule, "neither a public entity nor a public employee is liable for any damage or injury to property . . . off the public entity's property caused by land failure of any unimproved public property if the land failure was caused by a natural condition of the unimproved public property." Cal. Gov. Code § 831.25(a). Section 831.25 is intended to relieve "public entities of the responsibility to protect adjacent properties from its land failures caused by natural conditions."[38] "Land failure" means "any movement of land, including a landslide, mudslide, creep, subsidence, and any other gradual or rapid movement of land." Cal. Gov. Code § 831.25 (c).

[33] *Id*. at 550, citing *Grenier v. City of Irwindale*, 57 Cal. App. 4th 931, 939, 67 Cal. Rptr. 2d 545 (1997).
[34] *Id*. at 551. The "maintenance" at issue was a suggestion to drill weep holes in the wall and install horizontal drain pipes. This addition would have changed the design and was therefore a design factor, not maintenance (*i.e*., unclogging an existing drainage pipe). The plaintiff also attempted to raise other issues as to independent causes, all of which were summarily rejected by the court.
[35] *Id*. at 552.
[36] *Id*. at 554.
[37] Other Code provisions apply to injuries sustained *on* state-owned property, *see, e.g*., Cal. Gov. Code §§ 831.2 and 835 *et seq*.
[38] *Schooler v. State of California*, 85 Cal. App. 4th 1004, 1012, 102 Cal. Rptr. 343 (2000). *Schooler* upheld the dismissal of Schooler's claim that the State of California, which owned the eroding bluff adjacent to his property, should be subject to injunctive relief ordering the State to do something to stabilize its bluff and, hence, Schooler's property. Citing Cal. Gov. Code § 831. 25 (among other things) the Court of Appeal upheld summary judgment dismissing the claim. *Id. See also, Wildensten, supra* n. 17, 231 Cal. App. 3d 976, 283 Cal. Rptr. 13 (rejecting claim that park district should be liable under *Sprecher* as uphill landowner, and applying Section 831.25); *Yunker v. City of San Buenaventura*, 2002 WL 31684975, Not Reported in Cal. Rptr. 2d (2002) (affirming judgment and associated advisory jury verdict and finding evidence sufficient to support finding that slope failure was caused by a combination of human and natural forces).

The Section 831.25 defense is subject to important limitations.[39] The statute provides that its protection is not available to a public entity if (a) it had actual notice of probable damage likely to occur outside the public property, and (b) the public entity failed to give a reasonable warning of the danger to the affected property owners. This language arguably creates a duty to warn under certain circumstances.

iv. Gradual earth movement

In another demonstration of California's geological instability, the legislature enacted Cal. Gov. Code §§ 865 – 867. Recognizing that gradual earth movement "can result in danger to persons or property" the Legislature enacted the referenced Code sections, providing for immunity for damages resulting from municipal action taken to abate perils from gradual earth movement, subject to certain qualifications.

These provisions are not precisely applicable to disaster response, but might immunize measures taken to avert a natural disaster. Section 866 has produced one reported opinion, *City of Pomona v. Superior Court*.[40] A child was killed in a cave on City property. In consultation with a geological engineering firm, the City determined, among other things, that gradual movement made the cave hazardous, and that it should be closed using explosives. The cave then was successfully collapsed, but nearby homes were damaged by the explosion (and/or the collapse). The Court of Appeal held that Section 866 immunity applied to the City and that the trial court erred in holding otherwise.[41]

b. Assumption of risk

Assumption of risk is generally an affirmative defense to personal injury and negligence claims. Primary assumption of risk insulates a defendant from liability where a plaintiff is injured due to a risk or danger that is inherent in an activity in which the plaintiff chooses to participate. The determination of whether assumption of risk bars recovery depends on whether a defendant owed a duty to the injured plaintiff, not on whether the plaintiff acted reasonably or unreasonably in encountering a known risk.[42]

To prove the defense, a municipality should be prepared to show: (1) the plaintiff had *actual knowledge* of the risk involved in the conduct or activity, and (2) the plaintiff *voluntarily accepted the risk*, either expressly through agreement or implied by his words and conduct.[43] We have found no California cases discussing the applicability of the defense to a plaintiff's purchase of property subject to known or apparent natural hazards, but the defense has been successfully applied elsewhere.

[39] In addition to the point treated in text, the practitioner should note carefully important wrinkles with respect to emotional distress damages and minor improvements to the government property.
[40] 182 Cal. App. 3d 1093, 227 Cal. Rptr. 714 (1986).
[41] *Id*.
[42] *Knight v. Jewett*, 3 Cal. 4th 296, 834 P.2d 696 (1992).
[43] *See generally Carr v. Pacific Tel. Co.*, 26 Cal. App. 3d 537, 103 Cal. Rptr. 120 (1972).

c. Acts of God

California has been concerned about acts of God for at least 150 years:

> [T]he earth must be convulsed, the lightning must kindle the fire, the air must blow in tempests or tornadoes, and the water must come in waterspouts or sudden [e]ruptions of the sea . . . by the forces of nature, uncontrolled and unaided by the hand of man . . . [44]

And so it remains today. The act of God defense may be raised to shield liability from damage caused by unforeseeable natural events. The defense applies only when human agency does not participate in proximately causing the harm. As explained in 6 Witkin, Summary of California Law (10th ed. 2005) Torts, Section 1199, page 577: "an 'act of God,' i.e., an extraordinary natural force, that brings about harm different from that threatened by the defendant's negligence is a superseding cause; but if it merely increases or accelerates the results of the defendant's negligence, it is not." If a defendant's negligence combines with an act of God to cause injury, then liability will result.[45]

In *Mancuso v. Southern Cal Edison Co.*,[46] a public utility attempted to raise the act of God defense to defend against a customer who brought an action for the destruction of his business resulting from an electrical fire, where lightning during an unusually intense electrical storm struck the utility's facilities adjacent to the plaintiff's business. The transformer exploded into flames and the lightning-generated electricity sought a path to the ground, traversing the service conductors and wires to plaintiff's building, eventually causing the fire which completely destroyed the premises.

The lower court barred the utility from using the defense, finding plaintiff's argument that the lightning strike was foreseeable persuasive. The appellate court reversed and remanded, holding that the utility should have the opportunity to present evidence that "the lightning, or at least its particular intensity, was so unusual that neither it, nor the harm it caused, could have reasonably been anticipated."[47]

d. Common enemy doctrine

Flooding cases involving government infrastructure historically involved application of the so-called "common enemy doctrine," a common law rule characterizing surface water as a common enemy from which landowners were entitled to protect themselves by, *e.g.*, obstructing the flow of that surface water, regardless of damage to neighboring parcels. The doctrine was first applied to a California government agency in *San Gabriel Valley Country Club v. Los Angeles County*.[48]

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[44] *Polack v. Pioche*, 35 Cal. 416, 417 (1868)(from argument of Appellant).
[45] *Dufour v. Henry J. Kaiser Co.*, 215 Cal. App. 2d 26, 29, 29 Cal. Rptr. 871 (1963).
[46] *Mancuso v. Southern Cal Edison Co.*, 232 Cal. App. 3d 88, 283 Cal. Rptr. 300 (1991).
[47] *Id.*
[48] *San Gabriel Valley Country Club v. Los Angeles County*, 182 Cal. 392, 188 P. 554 (1920).

More recently, the sweep of the common law rule has been ameliorated by a reasonableness rule. In *Locklin v. City of Lafayette*, the California Supreme Court established that even public entities, as property owners, could be held liable when alterations or improvements on upstream property discharged an increased volume of surface water into a natural watercourse, where that increase in volume or velocity of waters caused property damage to other properties.[49] The test set forth in *Locklin* was "whether, under all the circumstances, the upper landowner's conduct was reasonable . . . [t]his rule of reasonableness applies to both private and public landowners, but it requires reasonable conduct on the part of downstream owners as well."[50]

C. Never again – mostly land use

Not long after the peril ebbs, the public and policymakers typically employ a variety of techniques to try to manage or eliminate future risks. We review several of these below.

1. Red-tagging

Identifying uninhabitable and unsafe structures after a disaster is an important step to limit further loss of life or limb. Many communities practice red-tagging to accomplish this. A red tag adhered to the outside of the structure indicates that the property is too hazardous to re-enter. A yellow tag indicates some level of danger but allows residents to re-enter in order to retrieve personal possessions. Cities typically employ a city inspector or other building official to make the determination on a building-by-building basis. Red-tagging after a disaster is an accepted practice in California to communicate the finding of unsafe conditions to property owners and to the general public.

2. Zoning

Natural disasters can spur zoning efforts aimed at restricting development in areas that present risks of future natural disaster.

California law requires that cities and counties have a "general plan" as a broad guideline to future development goals for the community. Cal. Gov. Code § 65302 identifies elements that must be included. Again, California's geological instability is evident: this section includes a safety element which should address risks associated with "the effects of seismically induced surface rupture, ground shaking, ground failure, tsunami . . . slope instability leading to mudslides and landslides . . . and other geologic hazards . . . flooding; and wildland and urban fires." This element of the general plan also should include "mapping of known seismic and other geologic hazards [and] . . . address evacuation

[49] *Locklin*, *supra* n. 15, 7 Cal. 4th at 337, 967 P.2d at 728.
[50] The *Locklin* test built on the reasonableness test stated in *Belair v. Riverside County Flood Control Dist.*, 47 Cal. 3d 550, 764 P.2d 1070 (1988), where owners of property damaged when flood control levee failed brought an action against the state to recover on theory of inverse condemnation. The California Supreme Court held that when the flood control levee failed to retain waters within its designated capacity, property owners who suffered damage from the resulting flooding were not entitled to recover on theory of inverse condemnation without showing that damage was caused by unreasonable conduct on part of public entities charged with construction or maintenance of the levee.

routes, military installations, peak load water supply requirements, and minimum road widths and clearances . . . as those items relate to . . . geologic hazards," and so forth.

For zoning and ordinance considerations generally, public entities should support discretionary decisions with empirical scientific data as much as possible. In reviewing whether an ordinance constitutes a valid exercise of police power, courts look to see if (1) its object is a proper government objective, and (2) whether the means chosen reasonably relates to that objective.[51]

To completely prohibit development, as discussed below, municipalities should be prepared to prove that the area is extremely hazardous and/or unstable. Expect some trouble with takings claims, which will have a higher chance of success the more permanent and complete the prohibition. Other, less injurious alternatives may warrant consideration, including transfer of development rights from the regulated areas to areas with less risks, or permitting construction contingent on strict adherence to engineering mitigation measures.[52]

3. Building moratoria

After disasters, especially landslides and earthquakes, cities may elect to issue building moratoria until stability can be reassessed and plans made to ensure public safety in the future. California cases have upheld moratoria on the issuance of building permits as valid exercises of the police power pending the adoption of a comprehensive zoning ordinance.[53]

Building moratoria and takings[54] came before the U.S. Supreme Court in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*.[55] In that case, an upsurge in development near Lake Tahoe caused damage to the lake. The commission decided to temporarily halt development, passing an ordinance that prohibited new development in affected areas of California and Nevada for two years. The moratorium was extended another eight months, and then a district court injunction further extended it another three years. The Court held that as long as the moratorium was temporary, it was not a taking and did not require just compensation.

[51] *Helix Land Co. v. City of San Diego*, 82 Cal. App. 3d 932, 147 Cal. Rptr. 683 (1978). In *Helix*, a landowner brought an inverse condemnation and nuisance action against city and state to recover for various actions or nonactions in land use control which allegedly resulted in deprivation of all economic use of the property. The Court of Appeal affirmed the case's dismissal, holding that the city's actions in adopting zoning ordinances to establish floodway and floodplain fringe zones did not constitute a taking of land that would entitle landowner to compensation. Similarly, in *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972), the appellate court again affirmed judgment for the defendant. Landowners alleged that the county's zoning of their property under county flood plain ordinance amounted to a taking without compensation. The court held that flood plain zoning ordinance prohibiting specified types of buildings in an area subject to flooding, and limiting use of land in such areas to parks, recreation, and agriculture, did not constitute unlawful taking of property, and was within police power of county board.

[52] Robert B. Olshansky & J. David Rogers, *Unstable Ground: Landslide Policy in the United States*, 13 Ecology L.Q. 939 (1987).

[53] *State of California v. Superior Court*, 12 Cal. 3d 237, 255, 524 P.2d 1281 (1974).

[54] A comprehensive treatment of takings claims is beyond the scope of this paper. *See generally*, *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987).

[55] 535 U.S. 302 (2002).

In *Kopetzke v. County of San Mateo*, lot owners brought an inverse condemnation action against the county for requiring a geological report showing soil stability as a condition to granting a building permit.[56] The county was presented with information from representatives of the United States Geological Survey who, in the course of a nearby mapping project, concluded that there was significant soil instability in the area that plaintiffs' land was located. In response, the county initially issued a building moratorium and before lifting it required owners to conduct and submit a geological report as a condition to any development.

The court held that the restriction was a valid exercise of police power and did not constitute a taking. Notably, the court found that the county's actions were "taken to protect the public health, safety and welfare, upon the information that soil instability in the coastal area could present a danger to both life and property," and that the building moratorium was of a "temporary nature" with "obvious efforts made to lift it as soon as possible." The court also held that the requirement to obtain an evaluation of possible dangers presented by the soil instability was a fully justifiable condition to the issuance of building permits.

Not all building moratoria are equal. More permanent prohibitions are significantly more likely to constitute takings. In *Monks v. City of Rancho Palos Verdes*, the city council enacted an ordinance prohibiting the development of property in an ancient landslide area following land movement in the region.[57] The Court of Appeal reversed the lower court's judgment for the city, finding that the ordinance at issue was, in effect, permanent, and that it therefore deprived the landowners of all economically beneficial use of their land. In relevant part, the court held that "because the city deprived plaintiffs' land of all economically beneficial use without proving a justification therefore under state principles of nuisance or property law, it has violated the state takings clause."

4. Grading ordinances and geotechnical requirements

Many municipalities have grading ordinances and geotechnical requirements intended to reduce geological hazards to private property. California has some statewide statutes requiring municipalities to adopt grading ordinances. For example, Cal. Pub. Res. Code § 2697 provides that all cities and counties in California must require a geotechnical report defining and delineating any seismic hazard for approval of any project located in a seismic hazard zone.

Municipalities may choose to adopt grading ordinances and geotechnical requirements that go beyond statutory requirements. Los Angeles, for example, has grading ordinances and related development regulations for flood hazard areas, general hazards, hillside management areas, coastal zones, watersheds, and more.[58]

[56] 396 F. Supp. 1004 (N.D. Cal. 1975).
[57] *Monks v. City of Rancho Palos Verdes*, 167 Cal. App. 4th 263, 64 Cal. Rptr. 3d 75 (2008).
[58] *See generally Tower Lane Properties v. City of Los Angeles*, 224 Cal. App. 4th 262, 168 Cal. Rptr. 3d 358 (affirming petition for writ to compel city to set aside grading permit condition for hillside area where hillside grading ordinance was written in such a way as to only apply to subdivisions); *Haggis*, *supra* n. 21, 22 Cal. 4th at 507, 993 P.2d at 993; See *also* http://dpw.lacounty.gov/ldd/lddservices/grading/grading.shtml

5. Waivers and exculpatory covenants

Municipalities in some states have required waivers or exculpatory covenants as a condition of issuance of a permit to build in geologically hazardous areas. *E.g., 1515-1519 Lakeview Boulevard Condominium Association v. Apartment Sales Corporation*, 146 Wn.2d 194 (2002) (waiver of claim against the City of Seattle required as a condition of permit issuance for construction on steep slope; waiver held not to violate abolition of sovereign immunity).

A somewhat similar approach was rejected in *Salton Bay Marina, Inc. v. Imperial Irrigation Dist*.[59] In *Salton Bay*, the Court of Appeal held that agreements and an ordinance purporting to exculpate the county and the irrigation district were void as against public policy for lack of bargaining and consideration; the agreements were standardized, property owners could not bargain for terms, and the District paid no consideration for execution of the agreements. The Court of Appeal also noted the existence of mandatory duties relating to the prevention of flooding. It is unclear whether a California court would categorically reject an exculpatory covenant under the somewhat different circumstances presented by the City of Seattle's approach.

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As noted at the outset, this paper only scratches the surface. I hope that it is a helpful reference and, if nothing else, an aid to issue-spotting. I am happy to discuss further. You can reach me at SAVITT BRUCE & WILLEY LLP, dbruce@sbwllp.com, or 206.749.0500.

[59] *Salton Bay Marina, Inc. v. Imperial Irrigation Dis.*, 172 Cal. App. 3d 914, 932-33, 218 Cal. Rptr. 839 (1985). Property owners brought an action against the district for inverse condemnation, negligence, nuisance and trespass after flooding caused substantial damages. The county permitted development in a flood-risk area adjacent to the Salton Sea but required property owners to absolve the county and the district from liability for the sea's rising. Before 1957, this absolution occurred through written agreements. After that period, the requirement was codified into an ordinance requiring property owners to grant the district a flooding easement before a building permit could be obtained.