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September 8, 2010

Honorable Ronald M. George, Chief Justice  
And the Associate Justices  
California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102

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CLERK SUPREME COURT

Re: *Bookout v. State of California ex rel. Dept. of Transportation, et al.*  
California Supreme Court No. S185267

Dear Chief Justice George and Associate Justices:

We represent Alexandra and Konstantine Skoumbas, Mark Soloway, R. Todd Nielson as bankruptcy trustee for Cedar Funding, LLC, William and Judith Berkman, Kenneth and Marcia Schneider, Ralph Heron, and Torben Rasmussen, all of whom are parties to inverse condemnation actions now pending in California state courts. We submit this letter pursuant to California Rules of Court, Rule 8.500, subdivision (g), in support of the petition for review filed by the plaintiff and appellant in the above case, and in the alternative to ask the Court to de-publish the decision of the court of appeal.

### I. The Applicants' Interest

Alexandra and Konstantine Skoumbas, Mark Soloway, and R. Todd Nielson (the bankruptcy trustee for Cedar Funding, LLC) are plaintiffs in *Skoumbas v. City of Orinda*, case no. C05-00552 (consolidated with case no. C05-02011) in the Contra Costa County Superior Court. Mr. and Ms. Skoumbas and Mr. Soloway are also petitioners in *Skoumbas v. Superior Court of Contra Costa County* (City of Orinda, real party in interest), case no. A129498 in the First District Court of Appeal. William and Judith Berkman, Kenneth and Marcia Schneider, Ralph Heron, and Torben Rasmussen are parties to *Berkman v. City of Morgan Hill*, case no. H031707 (coordinated with case no. H032205) in the Sixth District Court of Appeal. Each of these cases involves a dispute over whether the statute of limitations has run on inverse condemnation causes of action that arise out of continuous and recurring erosion, flooding and subsidence damage to private property caused by public improvements.

### II. This Court Should Either Grant Review or De-Publish the Decision of the Court of Appeal

Unfortunately, the law of inverse condemnation is not a model of clarity in California jurisprudence. Among other problems, the rules governing when a cause of action accrues for statute of

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limitations purposes, and whether the 3-year or the 5-year statute of limitations applies, are being litigated almost constantly in the trial courts. Much of this litigation is due to a lack of guidance, and frankly to a lack of clarity, from the appellate courts that have addressed these issues. The court of appeal's decision in *Bookout v. State of California ex rel. Department of Transportation*, if it remains published, will add to this confusion.

### **A. Does The Three-Year Or The Five-Year Statute Apply?**

Code of Civil Procedure section 338, subdivision (j), sets a three-year accrual period for actions "to recover for physical *damage to* private property under Section 19, Article I of the California Constitution." (Italics added.) However, for over four decades the courts have held that the five-year statute of limitations of Code of Civil Procedure sections 318 and 319 (for a possessory action involving real property) applies when the public entity's activity amounts to a *taking of* private property for a public use. (See, e.g., *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 867-868; *Hauselt v. County of Butte* (2009) 172 Cal.App.4<sup>th</sup> 550, 564-565; *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 373-374.)

The facts of the case at bar can (and will) be interpreted by defendants in inverse condemnation actions as tantamount to a taking of a flowage easement across the petitioner's land. Such a taking is normally subject to the five-year statute, not the three-year statute. However, the court of appeal below reasoned that, because there was no "physical entry" upon the petitioners' land by a public entity, and only a periodic entry by flood waters allegedly directed onto the private property by public improvements, the three-year statute applied.

This holding appears to be difficult to reconcile with *Baker*, which involved allegations of a continuing nuisance caused by noise, smoke, and vibrations from aircraft taking off and landing at the defendant public entity's nearby airport. Apparently the only way to reconcile these two decisions is to hold that physical invasions by noise, smoke and vibration constitute takings, but physical invasions by water, sewage or mud do not. Such a subtle distinction will generate still more confusion – and, hence, more litigation – over which limitations period applies.

### **B. Does The "Stabilization Rule" Apply?**

The court of appeal's decision also sews confusion as to the applicability of the stabilization rule. Two alternative rules apply in different contexts to determine when an inverse condemnation cause of action accrues for statute of limitations purposes. One standard, often referred to as the "inquiry-notice" rule, is drawn from tort law and applies exclusively to one-time events. The inquiry-notice rule holds that "the plaintiff need only be aware of his or her injury and have knowledge of sufficient facts to place him or her on actual or inquiry-notice that the injury has a negligent cause" in order for the statute of limitations to begin to run. (*Lyles v. State of California* (2007) 153 Cal.App.4<sup>th</sup> 281, 287 [citing *Norgart v. Upjohn Co.* (1999) 21 Cal.4<sup>th</sup> 383, 397-398].)

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The other standard, typically called the “stabilization rule,” derives from and is closely related to the continuing harm doctrine in nuisance and trespass cases, but it is unique to inverse condemnation law. It applies to cases that involve gradual, continuous or repeating damage to private property caused by the operation of a public improvement. The stabilization rule holds that the cause of action does not accrue until “the consequences of [continuing or recurring injury] have so manifested themselves that a final account may be struck.” (*Pierpont Inn, supra*, 70 Cal.2d at p. 292 [quoting *United States v. Dickinson* (1947) 331 U.S. 745, 747-749, 67 S.Ct. 1382, 1384, 91 L.Ed. 1789].)

In this case, the court of appeal upheld a ruling by the trial court that the stabilization rule does not apply even though the facts, as recounted in the decision, appear to establish an ongoing and recurring harm (periodic flooding) of the petitioner’s property. Although we are not fully cognizant of the facts in the appellate record in *Bookout*, this holding appears to be a correct result arrived at through a flawed and unprecedented analysis. Because the evidence established that (in the court of appeal’s words) “the flooding problem was relatively consistent and static for several years prior to the time Bookout purchased his property in 2000,” and because there is apparently no evidence (at least none described in the reported decision) of gradual erosion, subsidence, or other injury manifesting over time, the court should have held that the point of stabilization occurred more than five years prior to the filing of the lawsuit. Instead, the court focused on the *instrumentality of damage* instead of the *nature of the injury* and reached a holding that the stabilization rule *does not apply*.

This decision will certainly be used to argue that whenever the instrumentality of damage is relatively constant, the stabilization rule does not apply even though the injury caused by that instrumentality is gradual, episodic, or intermittent, and even when it manifests only over a long period of time. That is inconsistent with California appellate decisions that have applied the stabilization rule (*see, e.g., Stonewall Ins. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4<sup>th</sup> 1810, 1843), and it compromises the policy objective that underpins the rule:

... [W]hen the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really “taken.”

(*Pierpont Inn*, 70 Cal.2d at p. 293 [quoting *Dickinson v. United States, supra*, 331 U.S. at p. 749; 67 S. Ct. at p. 1385].)

There are few California appellate decisions which clarify the scope and the proper application of the stabilization rule. However, the federal courts, which follow *Dickinson* and apply the same rule, have issued over a dozen such decisions.<sup>1</sup> My colleagues and I have litigated this issue for many years in the

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<sup>1</sup> In situations where California and the federal courts apply the same rule, and where the federal

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trial courts, and we have yet to identify a single federal or state appellate court decision that has ever suggested, let alone adopted, the analysis that the court of appeal applied in this case. Indeed, if such an analysis were applied in the federal courts, nearly all of the federal cases that have applied the stabilization rule over the last two decades would have reached a different result. (See, e.g., *George Family Trust v. United States* (2009) 91 F.Cl. 177, 191-196 [surveying federal case law, holding that claims of riparian owners on White River in Arkansas, filed in 2007, were not time-barred even though dam projects which caused damage were completed in 1960s and instrumentality of injury did not change appreciably thereafter]; *Banks v. United States* (2007) 76 Fed.Cl. 686, 692-693 [gradual beach erosion in Lake Michigan caused by jetties installed in the 1830s and lengthened around the turn of the century did not stabilize until technical reports were issued in the late-1990s which revealed to plaintiffs the full extent and permanence of the taking]; *Forsgren v. United States* (2005) 64 Fed.Cl. 456, 459 [denying dismissal on statute of limitations grounds: “accrual occurs when plaintiffs should have reasonably foreseen the extent of the damage to their property”]; *Boling v. United States* (Fed. Cir. 2000) 220 F.3d 1365, 1371 [suit filed in 1982 alleging gradual erosion caused by tidal and wave action caused by canal excavated during the 1930s: “during the time when it is uncertain whether the gradual process will result in a permanent taking, the plaintiff need not sue, but once it is clear that the process has resulted in a permanent taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run”]; *Applegate v. United States* (Fed. Cir. 1994) 25 F.3d 1579, 1582-1583 [holding that a cause of action for erosion caused by jetties built 40 years earlier on east coast of Florida is not time barred under stabilization rule].)

Of special note among the federal authorities is Judge Vaughn Walker’s recent decision in *Yamagiwa v. City of Half Moon Bay* (N.D. Cal. 2007) 523 F.Supp.2d 1036, because it involved both federal and state inverse condemnation claims and therefore applied both federal and California law. In *Yamagiwa*, public drainage improvements installed under an assessment district gradually converted the plaintiff’s property into wetlands, reducing their development capacity and hence their market value. (*Id.* at pp. 1040-1044.) The defendant city argued that the inverse condemnation claims were time-barred because the improvements had been completed outside of the limitations period, and therefore the instrumentality of damage became static at that time. The district court rejected that argument:

Where, as here, alleged damage to private property results from a “continuous process of physical events,” rather than a single event, the law provides that a claim accrues when the taking has “stabilized.” The stabilization approach derives from *United States v. Dickinson*, 331 U.S. 745, 749, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947), and is followed by California courts as well. (*Pierpont Inn, Inc. v. State of California*, 70 Cal.2d 282, 291-293, 74 Cal.Rptr. 521, 449 P.2d 737 [1969].)

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decisional law is more developed than California law, this Court may consult the federal cases as persuasive authority and use them as guidance in helping to elucidate the parameters of the rule. (*Doe II v. MySpace, Inc.* (2009) 175 Cal.App.4th 561, 571.)

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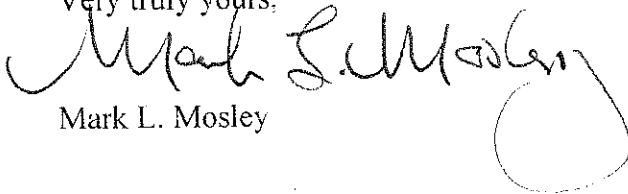
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(*Id.* at p. 1105.)

*Yamagiwa*, like the other federal cases and the few reported state court decisions that have applied the stabilization rule, look to the *nature of the injury*, not the *nature of the instrumentality* that is causing that injury, to ascertain the point of stabilization. Where the injury caused by the public work is gradual, episodic, or intermittent, the inverse condemnation cause of action accrues when the plaintiffs either actually know or have reason to know the full extent of the taking. The fact that the instrumentality that was causing the injury was static or constant is immaterial to this analysis, as it should be. By injecting an alternative and doctrinally dubious analysis into the stabilization doctrine, the court of appeal has needlessly sown the seeds of more confusion – and, hence, more litigation – into what is already a complex and challenging area of the law.

For both of the reasons set forth above, we respectfully ask the Court to either grant review and clarify the law in this area or de-publish the decision of the court of appeal.

Very truly yours,



Mark L. Mosley

cc: Court of Appeal, Second Dist., Div. 6  
John W. Belsher, Esq.  
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