

Calculation of Nuisance Damages in Litigation

Slippery Slope: Nuisance Damages Resulting From Storm Water Discharge

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Excessive Stormwater Discharge: The Setting

Keith E. McCullough, Esq.

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The Setting

*Rastegari v. Three Arch Bay
Community Services District*
Orange County Superior
Court Case No. 30-2019-
01061299-CU-OR-CJC

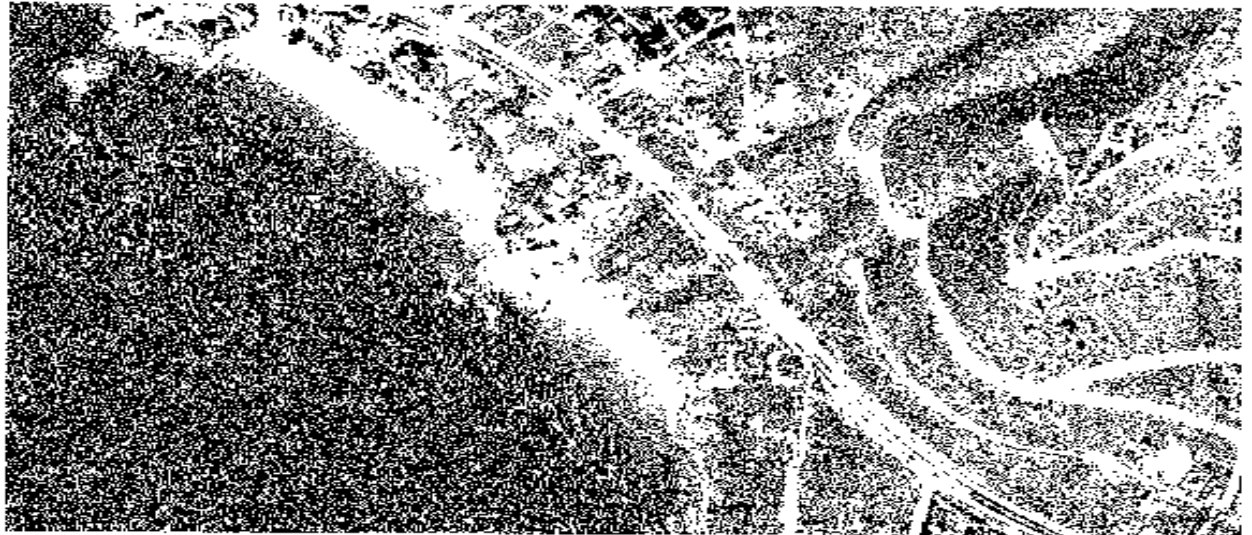
For decades, the affluent Three Arch Bay District (TAB) has continued to approve upslope development without features that would reduce storm water flow to downslope properties that would approximate flows found in an undeveloped condition.

TAB is responsible for storm water drainage within its jurisdiction

Principle: Storm water discharged from one property to another should approximate the water discharged in an undeveloped “state of nature”.

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Overview Aerial



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- In 2004 – 09, TAB, Caltrans and the City of Laguna Beach litigated with Mike Boone, an ocean-side property owner, with the intent to discharge TAB's stormwater through the Boone parcel to the ocean.
- TAB had collected stormwater from what it calls the Stonington Ravine and diverted that water into the Virginia Ravine which is upslope from Boone.
- At trial, Boone was successful in defeating TAB's attempt, with the jury finding that TAB had *not* been discharging to a "natural watercourse" and had acted unreasonably. *TAB v. Boone*, Orange County Superior Court Case No. 01CC15035

Detail Aerial

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- In response to the Boone decision, TAB promptly designed a system to take water that had been diverted to Virginia Way and redivert it to the Stonington Ravine.
- Meanwhile TAB continued to approve upslope development and also gathered and directed additional storm water in a manner that did not adhere to generally accepted engineering principles.

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- TAB now directs *ALL* stormwater from the historic Stonington area toward only the down slope Rastegari property; Rastegari property not in TAB.
- Rastegari sued TAB claiming a continuing nuisance of excess stormwater discharge and continuing damage to property.
- TAB defends stating that it is reasonably discharging to a natural watercourse and therefore is entitled to continue its discharges. TAB asserts that Rastegari should develop a system that would allow TAB's discharge to pass through their property without further damage.

Legal Principles Addressing Damages for Continuing Nuisance

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- Rastegari property cannot be developed unless an until the nuisance is abated
- Evidence indicates it would be more costly to cure the excessive discharge [\$1.48 MM] than would be the diminution in value to the Rastegari parcel
- Does the rule of the lesser of the diminution in value or the cost to cure apply in continuing nuisance cases?
- How are damages to be addressed in an excess storm water/continuing nuisance case?

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- *Keys v. Romley* (1966) 64 Cal.2d 396: upper property owners are liable if they fail to exercise reasonable care in the use of their property so as to avoid injury to the adjacent property through the flow of **surface waters**.
- The **alteration** of natural drainage of **surface waters** creates liability for the damage caused by the discharge of those waters onto adjacent property under a reasonableness of conduct test.
- *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 337-338 extended the rule of reasonableness to apply when a public entity contributes to an increase in volume and velocity in a **natural watercourse** resulting in downstream property damage.

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- Typically, damages associated with a continuing nuisance are limited to the **loss of use** of the property until the nuisance is abated. *Spaulding v. Cameron* (1952) 38 Cal.2d 265
- “[I]n doubtful cases the plaintiff should have an **election** to treat the nuisance as either permanent or not.” In the instance of a permanent nuisance, the aggrieved owner is entitled to **full compensation** for past and anticipated future injuries. *Spaulding v. Cameron* (1952) 38 Cal.2d 265, 268 – 269.

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Subject Property Photograph



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Subject Property Photograph



View looking east along drainage

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Subject Property Photograph



View looking west along drainage

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Scenarios:

- As of January 25, 2021 (current date) while disregarding nuisance (surface water runoff) from the uphill properties, drainage improvements, streets and other hardscape.
- As of January 25, 2021 (current date) while considering the nuisance (surface water runoff) from the uphill properties, drainage improvements, streets and other hardscape.
- Estimation of the fair market value of the loss of use during the holding period

While disregarding the nuisance (surface water runoff), this analysis assumes that the subject is not receiving surface water runoff from the uphill properties. This is contrary to the existing condition, which represents a hypothetical condition.

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- **Hypothetical Condition:** Hypothetical condition is defined as, “a condition, directly related to a specific assignment, which is contrary to what is known by the appraiser to exist on the effective date of the assignment results, but is used for the purpose of analysis. Comment: Hypothetical conditions are contrary to known facts about physical, legal or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in an analysis.”

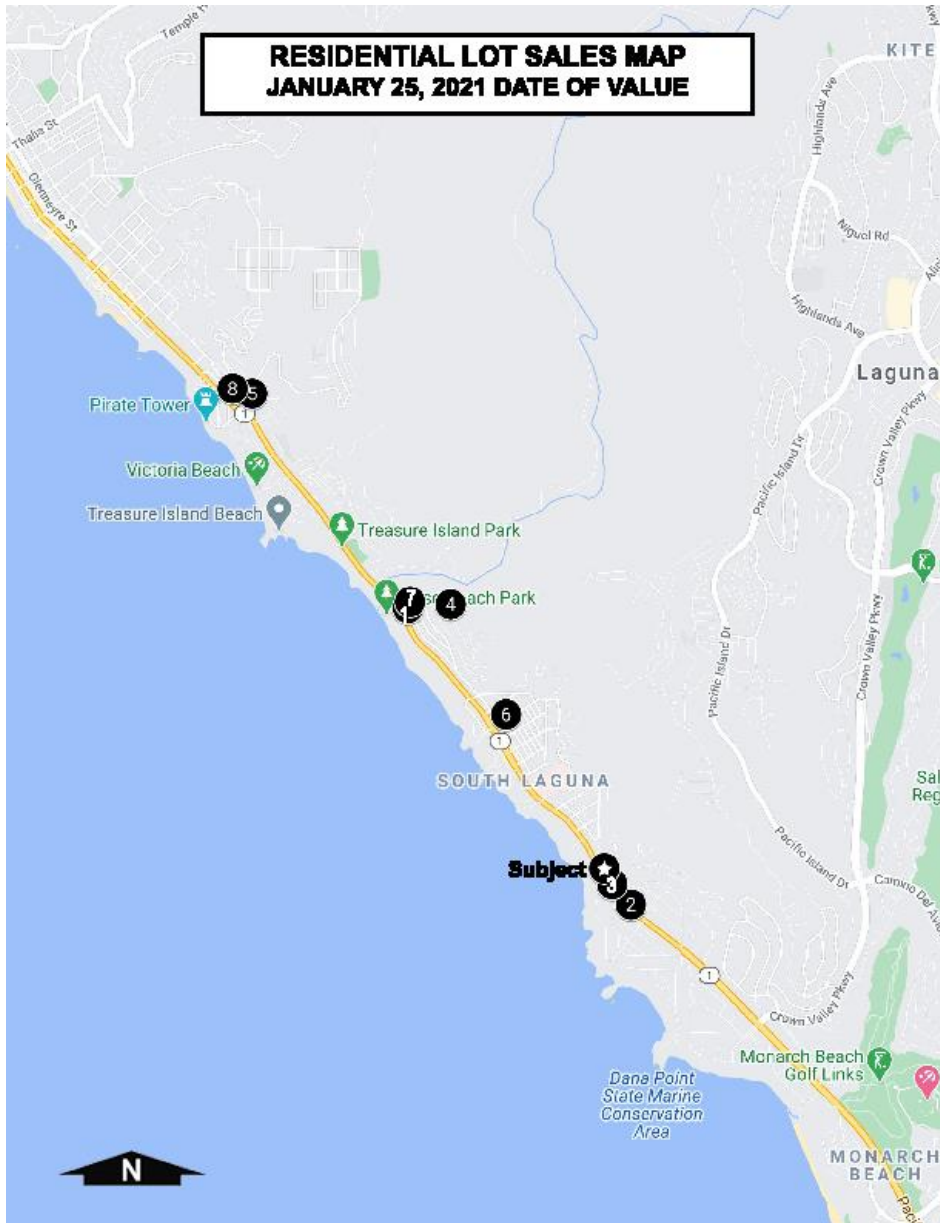
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RESIDENTIAL LOT SALES SUMMARY							
Data No.	Location APN Seller / Buyer	Rec Date Doc No.	Sale Price	Land Area Sq. Ft.	Zoning General Plan	Terrain Views	Unit Price Sq. Ft.
January 25, 2021 Date of Value							
1	31131 Monterey Street, Laguna Beach 056-041-73	1/29/2018 18-31968	\$1,920,000	11,104	R1 VLD	Sloping Beach View	\$173
2	32282 Coast Highway, Laguna Beach 056-211-14	6/29/2018 18-238830	\$825,000	6,534	TAB VLD	Slightly Sloping Ocean View	\$126
3	32231 Stonington Road, Laguna Beach 056-153-25	4/5/2019 19-108893	\$1,268,500	6,098	TAB VLD	Steep Sloping Ocean View	\$208
4	31152 Ceanothus Drive, Laguna Beach 056-051-84	4/25/2019 19-135644	\$1,100,000	7,632	R1 VLD	Steep Sloping Ocean View	\$144
5	375 Nyes Place, Laguna Beach 656-169-26	11/19/2019 19-460289	\$520,000	3,149	R1 VLD	Steep Sloping Ocean View	\$165
6	31565 Eagle Rock Way, Laguna Beach 056-086-20	6/29/2020 20-303879	\$900,000	6,534	VC VMLD	Level No View	\$138
7	31121 Monterey Street, Laguna Beach 056-041-03	8/18/2020 20-416605	\$1,810,000	12,197	R1 VLD	Sloping Beach View	\$148
8	200 Alta Vista Way, Laguna Beach 656-104-05	10/7/2020 20-556236	\$850,000	3,920	R1 VLD	Sloping Ocean View	\$217
AVERAGE			\$1,149,188	7,146			\$165
MINIMUM			\$520,000	3,149			\$126
MAXIMUM			\$1,920,000	12,197			\$217

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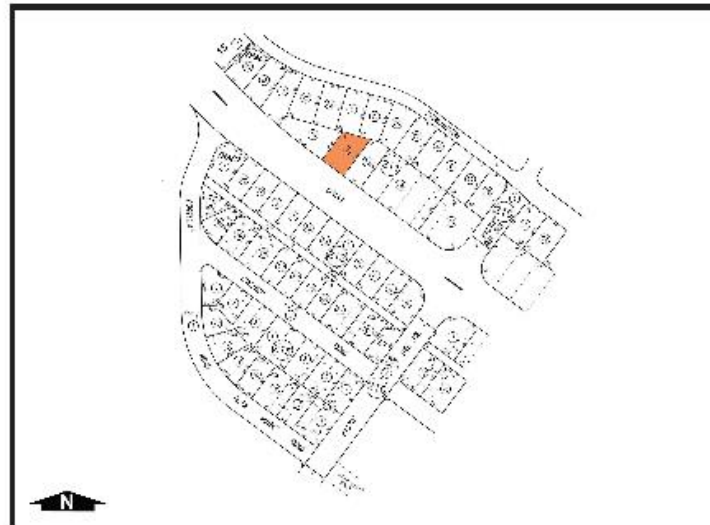
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RESIDENTIAL LOT SALES PHOTOGRAPHS & PLAT MAPS JANUARY 25, 2021 DATE OF VALUE



DATA NO. 2
32282 Coast Highway, Laguna Beach



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Data No.	Sale Price	Comments
No. 5 375 Nyes	\$520,000 - Inferior \$165 psf - Inferior	Inferior land area Inferior topography
No. 2 32282 Coast Highway	\$825,000 - Inferior \$126 - Inferior	Coast Highway frontage Inferior entitlements Inferior market conditions
No. 8 200 Alta Vista	\$850,000 - Inferior \$217 - Inferior	Inferior land area Inferior entitlements
No. 6 31565 Eagle Rock	\$900,000 - Inferior \$138 - Inferior	No view amenity Inferior entitlements
No. 4 31152 Ceanothus	\$1,100,000 - Similar \$144 - Inferior	Inferior entitlements Inferior topography
No. 3 32231 Stonington	\$1,268,500 - Superior \$208 - Similar	Coast highway frontage Inferior entitlements Inferior topography Superior location
No. 7 31121 Monterey	\$1,810,000 - Superior \$148 - Inferior	Superior land area Superior views
No. 1 31131 Monterey	\$1,920,000 - Superior \$173 - Inferior	Superior land area Superior views Inferior market conditions

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- **Concluded full value of the parcel assuming no excessive storm water discharge as of the date of value: \$1,075,000**

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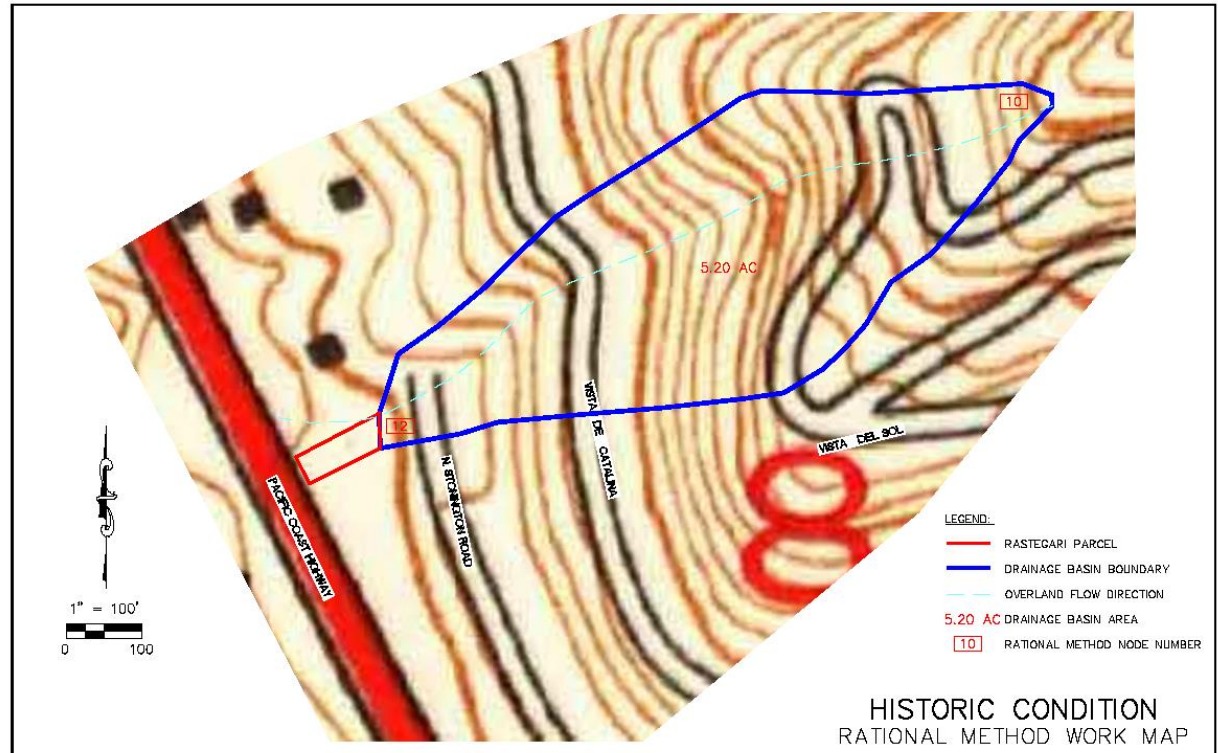
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A third method applied to estimate a proper adjustment for damage is known as the **cost to cure**. This method can be used when the property being appraised has suffered damage that can be physically and economically corrected, e.g., through correction of drainage, replacement of fencing, reestablishment of physical access, or replacement of sewage or water systems. Under no circumstances can the cost to cure measure to damage be applied if the cost to cure exceeds the diminution in value that would result if such a cure were not undertaken. However, if the cost to cure is less than the diminution in the value of the remainder, the cost to cure measure of damage *must* be used.

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Loss of Use

- Until the surface water runoff from the uphill properties is adequately mitigated, the subject property cannot be developed to its highest and best use. As of the date of this report the term of the loss of use represents the period from August 30, 2018, to current date, January 25, 2021. The term is 29± months, or 2.4 years.
 - Interviews with market participants and review of CoStar trend studies to conclude a market derived land capitalization rate to determine the fair market annual rental value, or value of the loss of use to date. Based upon a CoStar trend report that included 305 ground lease transactions, rates of return averaged between 3.87% and 5.14% between January 2016 and current date. Based upon a market rate of 5% adjusted upward 1% to account for property tax burden, a market return of 6% has been applied.
-
- $\$1,075,000 \times 6\% \times 2.4 \text{ years} = \$154,800$

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• Questions?