



County of Santa Cruz

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OFFICE OF THE COUNTY COUNSEL

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December 14, 1999

Agenda: January 11, 2000

Board of Supervisors
County of Santa Cruz
701 Ocean Street, Room 500
Santa Cruz, California 95060

Re: USAA v. PG&E, et al.
Santa Cruz Superior Court No. CV-134309

Dear Members of the Board:

This is to submit for the Board's approval a proposed settlement in the above-entitled matter. The amount and terms of the settlement are within settlement authority previously granted by the Board and have been accepted by the claimants as settlement in full of this matter.

IT IS RECOMMENDED that the Board approve the settlement in the total amount of \$35,000, authorize the County Auditor-Controller to issue a check totaling \$35,000 as directed by County Counsel, and authorize the Department of Public Works to

remove the stump of one tree located in the County road right of way in front of Plaintiffs' property as indicated in the attached settlement agreement.

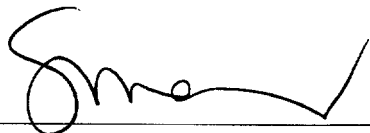
Very truly yours,

DWIGHT L. HERR, COUNTY COUNSEL

By 

DANA McRAE
Assistant County Counsel

RECOMMENDED:



SUSAN A. MAURIELLO
County Administrative Officer

cc: Auditor-Controller
Risk Management
Public Works Department

SETTLEMENT AGREEMENT

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This Settlement Agreement (“Agreement”) is entered into by and among United Services Automobile Association, Richard Zscheile, Judith C. Zscheile and John Kunkle (all collectively referred to as “Plaintiffs”), and the County of Santa Cruz, Pacific Gas and Electric Company and Davey Tree Surgery Company (all collectively referred to as “Defendants”). This Agreement is conditioned upon approval of the Santa Cruz County Board of Supervisors. The parties will be referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

A. Plaintiffs Richard and Judith Zscheile are the owners of real property commonly known as 32 11 Fairway Drive, Soquel, California (the “Property”). Plaintiff United Services Automobile Association insures the Property. Plaintiff John Kunkle is a former tenant of the Zscheiles and resided at the Property until February of 1998.

B. On February 6, 1998, a 150 foot Tasmanian Blue Gum eucalyptus tree fell and struck the residence on the Property. Plaintiffs contend that Defendants are liable to Plaintiffs for the damage to the Property as well as other losses stemming from the tree fall. Each Defendant has denied all liability.

C. There are now pending in the Superior Court of the State of California, County of Santa Cruz, two consolidated lawsuits entitled United Services Automobile Association, et al. v. Pacific Gas and Electric Company, et al., No. CV-134309 and Kunkle v. Pacific Gas and Electric Company, et al., No. CV- 135549 (the “Actions”) in which Plaintiffs claim damages from Defendants in relation to the tree fall.

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D. The parties desire to settle the Actions completely among themselves and to avoid the expense of further litigation.

NOW, THEREFORE, without admitting or implying any fact, responsibility, fault or liability, the Parties agree as follows:

GENERAL AGREEMENT

1. Payments to Plaintiffs.

Within fifteen (15) days of the effective date of this Agreement, Defendants shall pay to Plaintiffs the sum of forty-five thousand dollars (\$45,000.00) in the following manner:

County of Santa Cruz	\$35,000.00
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Pacific Gas and Electric Company	\$10,000.00
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2. Remedial Work.

a. The County of Santa Cruz shall remove and haul away the stump of the eucalyptus tree which fell on February 6, 1998. The stump shall be removed within thirty (30) days of the effective date of this Agreement.

b. Davey Tree Surgery Company shall remove and haul away eight trees located in the Fairway Drive road right-of-way tentatively identified in the report of Barrie D. Coate dated April 10 and 11, 1998, as numbers 3, 5, 6, 7, 8, 9, 10 and 11. A true and correct copy of the Barrie D. Coate report is attached hereto as Exhibit A. The work to be performed by Davey Tree Surgery Company does not include the removal of tree stumps. Davey Tree Surgery Company is solely responsible for the method and means by which the trees will be removed and carried away including but not limited to

any necessary precautions for the safety of the public and Davey Tree Surgery Company⁰⁰⁷⁰ employees. The Zscheiles agree to defend, indemnify and hold harmless Davey Tree Surgery Company and Pacific Gas and Electric against any and all claims, known and unknown, arising out of Davey Tree Surgery Company's removal of the trees referenced in this paragraph. The Zscheiles further agree that should any claims, including but not limited to property damage, trespass, and conversion of property, arise out of said tree removal, the Zscheiles agree to be held personally liable for any and all damages, including attorney's fees and costs.

_____ Initials (Richard Zscheile)

_____ Initials (Judith Zscheile)

It is also understood by and between the parties that:

- i. The remedial work performed by Davey Tree Surgery Company is done at the request and direction of the Zscheiles.
- ii. Davey Tree Surgery Company has not done any soil studies, environmental studies, or other investigation concerning the effects of said tree removal and thus makes no warranties or representations concerning such removal. The Zscheiles are solely responsible for soil engineering studies, environmental studies, or any other requirements necessary to obtain a County permit to remove the aforementioned trees.
- iii. Prior to any tree removal, the Zscheiles will clearly mark and identify the trees to be removed.

iv. Davey Tree Surgery Company shall not perform any work⁰⁰⁷¹ until provided with a Santa Cruz County permit for the removal of the aforementioned trees.

c. The remedial work of the County of Santa Cruz and Davey Tree Surgery Company made pursuant to the terms and conditions of this Agreement shall not be construed to be the acts of a volunteer.

3. Further Obligations of Plaintiffs.

a. The Zscheiles shall execute, prior to or contemporaneously with the execution of this Agreement, a right of entry in favor of the County of Santa Cruz and Davey Tree Surgery Company for the purpose of conducting the remedial work to be done pursuant to this Agreement. The right of entry is attached to this Agreement as Exhibit B.

b. The Zscheiles agree that they and their tenants on the Property will cooperate with the remedial work to be done pursuant to this Agreement. The Zscheiles further agree to provide to the County of Santa Cruz and Davey Tree Surgery Company any assistance needed in communicating with any tenant on the Property regarding any issue which could impact the ability of any party to carry out their obligations pursuant to this Agreement.

c. The Zscheiles consent and will obtain the consent of their tenants to the presence of remediation equipment and activities on the Property while the remediation work is being conducted.

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d. The Zscheiles shall obtain and bear the cost of all permits required to conduct the remedial work to be done pursuant to this Agreement. The Zscheiles' acceptance of this Agreement is contingent upon the issuance of the permits required to conduct the remedial work.

e. Plaintiffs agree to execute all documents necessary to carry out the terms of this Agreement.

f. In return for the consideration listed above, as "Payments to Plaintiffs" and "Remedial Work", Plaintiffs agree to dismiss immediately their complaints in the Actions with prejudice, all Parties to bear their own costs and attorney's fees.

4. Waiver of Claims.

a. Except as otherwise expressly provided in this Agreement, each party waives any further claims, demands, controversies, actions, causes of action, obligations, damages, liabilities, costs, including attorney's fees that they may have against the other Parties that arise or may arise out of the following matters (the "Released Matters"):

i. Any costs or damages, including diminution in value or loss of use of the Property, past, present or future relating to the eucalyptus tree which fell on February 6, 1998;

ii. Any warranties, guarantees or representations, expressed or implied, pertaining to the Property;

iii. Anything referred to in the complaint, interrogatory responses or documents produced in the Actions;

- iv. Any statements, representations or admissions made by the⁰⁰⁷³ Parties with respect to the Released Matters;
- v. All claims made or damages sought by any Party in the Actions;
- vi. The Actions, the prosecution or defense of the Actions, or the attempts, the timing of attempts, the failure to attempt, or the adequacy of attempts to settle the claims released by this Agreement.
- vii. Removal of trees.

5. Release.

Except as otherwise expressly provided in this Agreement, the Parties, on behalf of themselves and their successors and assigns, have agreed to and do hereby release and forever discharge the other Parties and the other Parties' present and former officers, directors, shareholders, agents, heirs, executors, administrators, assigns, employees, attorneys, tenants, representatives, and insurers from any and all claims, demands, controversies, actions, causes of action, obligations, damages and liabilities of any nature whatsoever, whether at law or in equity, that they ever had, now have, or which they or their successors, assigns, or beneficiaries may hereafter have against the other Parties and that arise out of the Released Matters.

Except as otherwise expressly provided in this Agreement, the Parties understand and agree that this Agreement includes all claims for cost, expenses and attorney's fees, taxable and otherwise, incurred in or arising out of the Released Matters,

Except as otherwise expressly provided in this Agreement, the Parties understand and agree that they hereby fully and finally release the others from all unknown and unanticipated injuries, losses, or damages, arising out of the Released Matters, as well as from those now known or disclosed, and the Parties waive with respect to the Released Matters all rights or benefits which they now have, or in the future may have, under the terms of section 1542 of the Civil Code of the State of California, which section reads as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

Except as otherwise expressly provided in this Agreement, the Parties understand that they may have sustained damages that may not have manifested themselves and that are presently unknown, but nevertheless they deliberately intend and do hereby release the other Parties from all such possible future claims with respect to the Released Matters. Furthermore, the Parties understand and agree that if the facts with respect to which this Agreement is executed and the dismissal herein provided for is made or found hereafter to be other than or different from the facts now believed by them to be true, the Parties expressly accept and assume the risk of such possible difference in facts and agree that this Agreement shall be and remain effective notwithstanding such difference in facts.

6. Warranty of Authority.

The Parties represent and warrant that they have the sole right and exclusive authority to execute this Agreement, and that they have not sold, assigned, transferred, conveyed, or otherwise disposed of any claim or demand against the other Parties relating to any matter covered by this Agreement.

7. Covenant Not to Sue.

Except as otherwise expressly provided in this Agreement, the Parties agree that they will not commence, maintain, continue or voluntarily assist in any way in the prosecution by any other person or entity of any claim against the other Parties, any related corporate entity, or any present or former employee or tenant of the other, relating to the Released Matters.

8. Hold Harmless.

Each Party agrees to indemnify and to hold harmless the other Parties from and against any and all claims, demands, causes of action, obligations, demands and liabilities, including court or arbitration costs and attorney's fees, arising from or in connection with any breach of any provision of this Agreement by that Party.

9. No Admission of Liability.

Neither the transfer of any consideration, the doing of any of the acts referred to in this Agreement, nor anything else contained in this Agreement, shall be taken or construed to be an admission on the part of any of the Parties of any claims, demands, causes of action, obligations, damages or liabilities asserted by the other Party or Parties.

The Parties expressly deny any and all claims, demands, causes of action, obligations, damages and liabilities.

10. Agreement Binds and Inures.

This Agreement shall bind and inure to the benefit of each Party and each Parties' agents, representatives, employees, beneficiaries, officers, directors, predecessors, successors, heirs and assigns.

11. Advice of Counsel.

Each Party declares that, prior to the execution of this Agreement each Party or their authorized representatives have apprized themselves of sufficient relevant data, either through experts or other sources of their own selection, in order that they might intelligently exercise their judgment in deciding whether to execute, and in deciding on the contents of, this Agreement. Each Party declares that, except as set forth in writing in this Agreement, the decision to execute this Agreement is not predicated on or influenced by any declarations or representations by any of the other Parties, or any predecessors in interest, successors, assigns, officers, directors, employees or agents of same. Each Party states that the contents of this Agreement have been explained to them by their respective counsel, and that this Agreement is entered into freely and voluntarily, upon the advise and with the approval of counsel. The representations contained in this paragraph shall not be construed to constitute a waiver by any Party of the attorney-client privilege.

12. Agreement Jointly Drafted.

The drafting and negotiation of this Agreement has been participated in by each of the Parties or their counsel and for all purposes this Agreement shall be deemed to have

been drafted jointly by the Parties.

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13. Written Modification.

Each Party understands and agrees that this Agreement shall not be altered, amended, modified or otherwise changed in any respect whatsoever except by a writing duly executed by the authorized representatives of each Party.

14. Integration,

This Agreement supercedes any other prior writings and prior or contemporaneous oral agreements or understandings between the Parties that relate to or arise out of the Released Matters in this Agreement. This Agreement fully integrates the Parties agreement and understanding with respect to all matters covered by this Agreement. The terms of this Agreement are contractual and not a mere recital. Each Party agrees that they have not relied on any fact or statement or representation other than as specifically recited herein. To the extent there were any prior relations between the Parties respecting the Released Matters, those relations are void and all the Parties' rights and duties are found exclusively in this Agreement.

15. Counterparts and Effective Date of Agreement.

This Agreement may be executed in counterparts and shall be effective when fully executed by the Parties. The Parties agree to accept photocopied signatures and signatures transmitted via telecopier.

16. California Law and Partial Invalidity.

Any dispute concerning this Agreement shall be governed by California law.

Should any provision of this Agreement be held invalid or illegal, such invalidity or

illegality shall not invalidate the whole of this Agreement, but, the Agreement shall be⁰
construed as if it did not contain the invalid or illegal part, and the rights and obligations
of the Parties shall be construed and enforced accordingly.

17. Agreement to Mediate.

If any contingency stated in this Agreement is not met, the Parties agree to mediate
the matter with a mediator from the American Arbitration Association.

18. Headings.

The paragraph headings used in this Agreement do not add or impart meaning and
are inserted solely for convenience.

RICHARD ZCHEILE

DATE: _____

JUDITH C. ZCHEILE

DATE: _____

JOHN KUNKLE

DATE: _____

UNITED SERVICES AUTOMOBILE
ASSOCIATION

DATE: _____

BY _____

PACIFIC GAS AND ELECTRIC
COMPANY

DATE: _____

BY _____

DAVEY TREE SURGERY COMPANY

DATE: _____

BY _____

COUNTY OF SANTA CRUZ

DATE: _____

BY _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

STEPHEN COLE & ASSOCIATES
ERIC SCHROEDER
Attorneys for Plaintiffs

COUNTY OF SANTA CRUZ
DANA McRAE
Assistant County Counsel

DATE: _____

DATE: _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

VALERIE C. SHELTON
Attorneys for DAVEY TREE
SURGERY COMPANY

REBECCA BIERNAT
Attorney for PACIFIC GAS AND
ELECTRIC COMPANY

WTNINGHAM, ROBERTS, FAMA
KRAMER & RAMBERG

SEDGEWICK, DETERT, MORAN
& ARNOLD

DATE: _____

DATE: _____



BARRIE D. COATE

and ASSOCIATES

Horticultural Consultants

408-353-1052

Fax 408-354-3767

23535 Summit Road, Los Gatos, CA 95030

0080

AN ANALYSIS OF THE FAILURE OF A
TASMANIAN BLUE GUM TREE AT
3211 FAIRWAY DR.
SOQUEL, CA

Prepared at the request of:
Mr. Stephen Cole, Attorney
3050 Beacon Blvd.
W. Sacramento, CA 95691

For:
Mr. Richard Zscheile
4400 Johanna Rd.
Aptos, CA 95003

Prepared by:
Barrie D. Coate
From site visits on
March 12, 1998
April 07, 1998
April 10, 1998

Job #03-98-052-A

Assignment

I was asked by Mr. Stephen Cole, attorney, on March 12, 1998 to examine a tree stump on county property at Fairway Dr. which fell on the Zscheile home at 3211 Fairway Dr. during the night of February 5, 1998. I was also asked to examine the remainder of the trees in the row of trees at the west margin of Fairway Dr.

I was asked to determine why the tree fell, if possible, and specifically if pruning on the east side of the row of trees by the PG&E line clearing contractor caused or contributed to the failure.

I visited the site on March 12, again on April 07 and April 10, 1998.

Summary

In my opinion, four factors combined to cause the failure of the tree in question plus six other trees which were part of the row immediately adjacent to the west side of Fairway Dr.

The condition which made these seven trees and others which are still standing vulnerable to falling toward the west is the buried root collar, which reduces the trees existing roots and discourages production of new roots on the east side.

The final impetus which resulted in the failure was strong, gusty winds, originating from the southwest, from the side which had no significant roots.

Third, the removal of all significant limbs on the east side of the trunk up to 75' above ground, contributing to the imbalance of the crown toward the west side.

Fourth, the canopies above the 75' height have apparently not been thinned, leaving the canopy between 75' and 120-140', with heavy wind sails.

Since this is the portion of the canopy which would catch the majority of the southeastern wind, this certainly contributed to the leverage applied to the poor root system.

In my opinion, it was merely a matter of time until these four conditions combined to cause failure of the remaining trees.

Mr. Zscheile told me that the line clearing contractor visited the site after the February 5, 1998 tree failure and pruned many of the limbs on remaining trees from the side which faces west.

Description of Site and Subject Tree

There are 43 Tasmanian Blue Gum trees (*Eucalyptus globulus*) in the 490' distance from the entry road to 3105-3211 Fairway Dr. North to the last group of fallen Blue Gum trees

They range in trunk diameter from single stem trees of 12" diameter (at 54" above ground) and 90' in height to multi stem trees with several trunks of 9-14" diameter and 80' height to single stem trees of 35" diameter and 135' in height.

18 of the remaining trees in that 490' distance are 18" diameter (at 54" above ground) or larger.

The subject tree was 61.6" in diameter at 3' \pm above grade at the point at which it was cut off during cleanup operations.

Its height from the base of the trunk, which was approximately 3 1/2' below the adjacent road grade to the tree top was apparently 140' (measured by Mr. Zscheile on February 6).

An annual growth ring count shows the tree to have been 61 years old.

This tree trunk diameter expanded an average of 1.5 inches per year between 1957 and 1967, .8 inches per year between 1967 and 1977, but only .4 inches ~~per year~~ 1977 until 1997.

This implies that in the last 20 years the tree has been much less vigorous than during its first 41 years.

Method of Examination

Mr. Zscheile and I pulled the plastic tarp off of the base of the stump of the subject tree to examine the remaining roots or root parts which are attached to the root collar or whose stubs remain in the bank.

We found only one root larger than 2" diameter emerging from the root collar and the hole from which it was ripped in the vertical face of the bank.

No other roots of that size or larger were encountered in the bank wall. The vertical bank wall at the edge of the road way where the tree fell was composed of a gritty decomposed granite of 6% fine sand, 70% medium sand, 18% clay and 6% silt. Soil of this type provides very little to support a tree with a few roots. We found an almost vertical face of this sandy soil against which the trees root buttress was pressed. Very few roots of any size are seen in this sand face.

Note that no significant trees are seen on the west side of the road in the approximately 550' from the entry way to the Zscheile home toward the north. This includes the area in which all of the trees which failed were located.

Further north, large Blue gums are seen on the east of the road, providing some protection for those on the west side of the road, thus no trees further north, on the west of the road failed.

The grade from the top of the bank (the roadway) and the lower bank 20'-30' toward the west is a 1 to 1 or greater grade leaving very little soil support on the west side.

The remaining tree canopies from 75' to the 120-140' of total height does not appear to have been pruned so I assume the subject tree was not pruned in the upper canopy either, even though they have been stripped of most limbs on the east side below that height.

Remaining **Hazardous Trees**

Of the remaining trees within the 490' distance and to 100' further north, there are 13 large trees which are, in my opinion, hazardous and should be removed. They are shown on the accompanying sketch as trees # 5, 6, 7, 8, 9, 11, 23, 24, 25, 30, 31, 33, and 40.

These are hazardous because their root collars are far below the grade of the adjacent roadway, because they have large canopies at great heights and in most cases, because soil and pavement subsidence are seen adjacent to them.

Soil-Pavement Subsidence

Cracks in the blacktop pavement are seen in some areas parallel to and 6-15' east of the row of trees, indicating that trees in the areas adjacent to the cracks have moved in the soil, no doubt breaking or wounding roots on the east side of the trees.

Where very tall trees, with large canopies, are adjacent to these cracks their hazard level is significantly higher than similar trees adjacent to pavement where no cracks are seen. All of the trees for which I have recommended removal fit that definition.

There are several large trees with root collars which are at road level which do not represent an equivalent level of hazard. Tree # 35 is an example.

Remedial procedures

The only way to reduce or remove the hazard created by many of the large specimens but especially the 13 specifically identified trees will be to cut them down immediately to approximately 40' tall or to remove the trees. Cutting them down to 40' **will** make them too short to strike houses **across the creek area**, and remove the large canopies which are one of the main reasons for the previous failures. The hazard is immediate and present.


If they are topped at 40' as a temporary measure, they should be removed within several years. If they are not removed after topping, a regular procedure of thinning out the water sprouts which result from topping will be necessary and remaining water sprouts should be pruned on a five year cycle.

Trees # 15 and # 27 must have large west or southwest limbs removed.

Conclusion

In my opinion these tree failures are not surprising, given the circumstances, and I would predict more failures with the next several storms if remaining hazardous trees are not removed or their hazard otherwise reduced.

Respectfully submitted,



Barrie D. Coate

BDC:mp

Enclosures:

Assumptions & Limiting Conditions

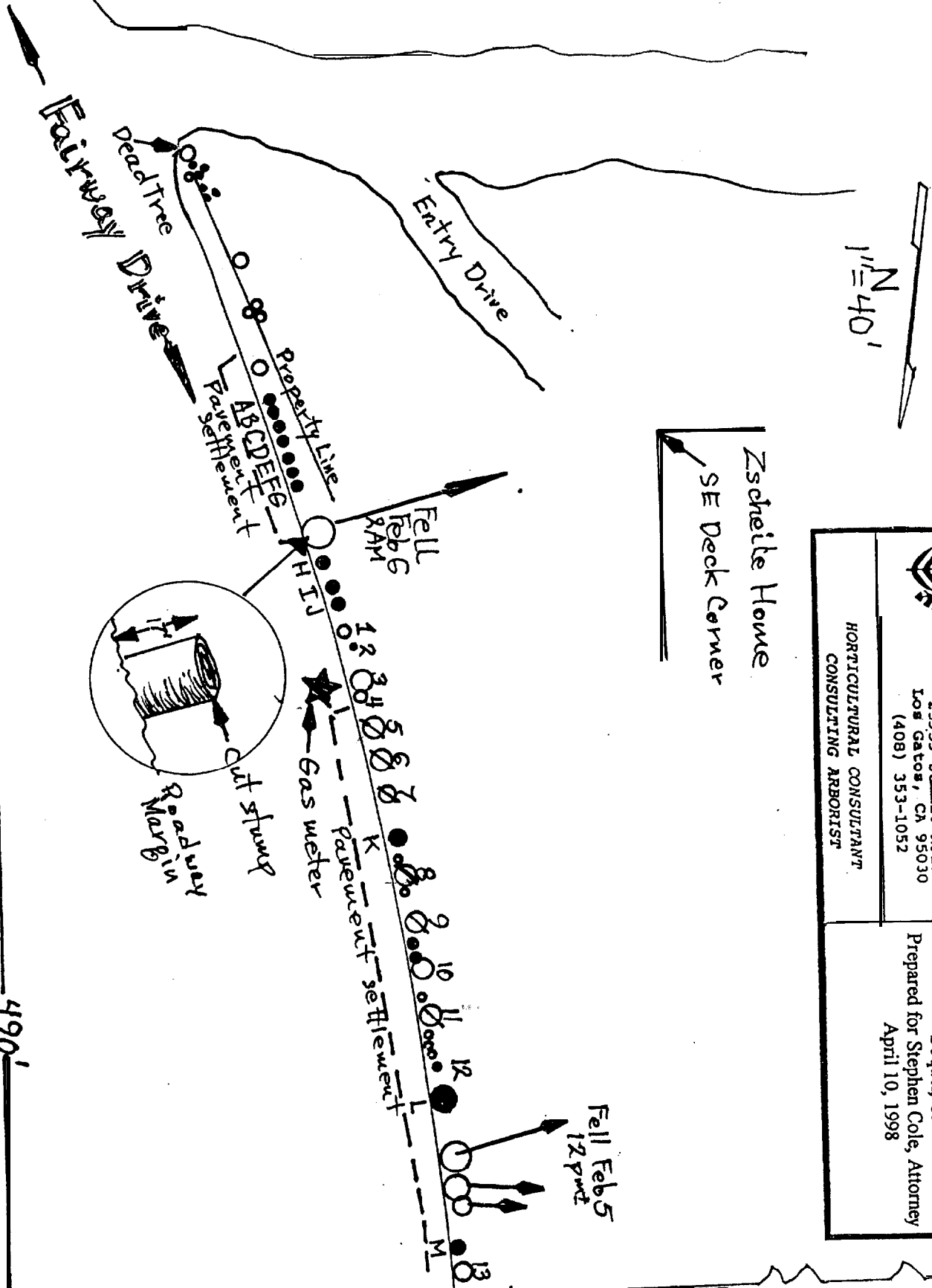
Sketch


Pictures **(to follow)**

CC: Mr. Richard Zscheile

4400 Johanna Rd.

Aptos, CA 95003



 <p>BARRIE D. COATE 23535 Summit Road Los Gatos, CA 95030 (408) 353-1052</p>	<p>Zscheile Property 3211 Fairway Drive Soquel, CA Prepared for Stephen Cole, Attorney April 10, 1998</p>
<p>HORTICULTURAL CONSULTANT CONSULTING ARBORIST</p>	

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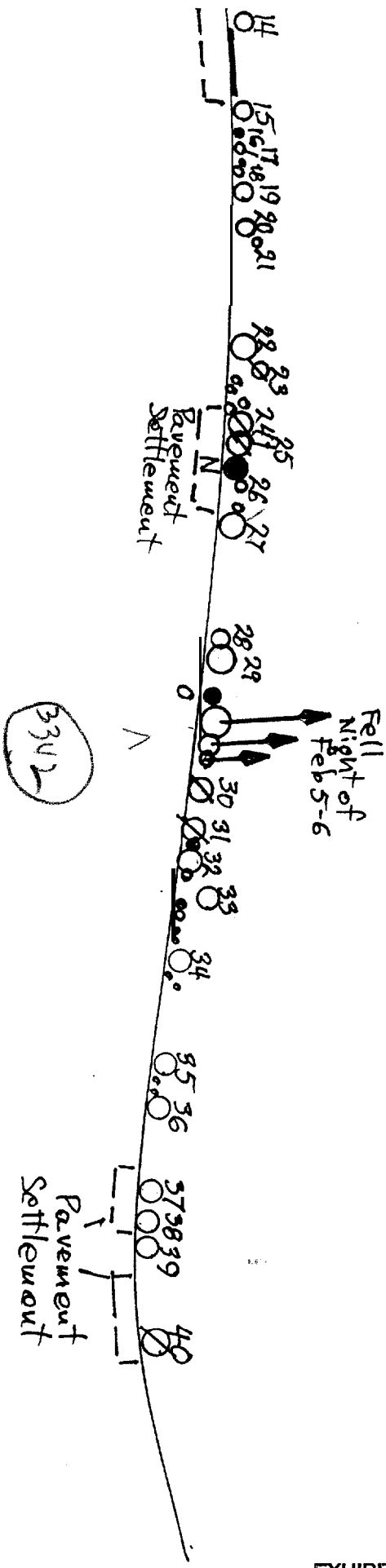


BARRIE D. COATE

23535 Summit Road
Los Gatos, CA 95030
(408) 353-1052

HORTICULTURAL CONSULTANT
CONSULTING ARBORIST

Zscheile Property
3211 Fairway Drive
Soquel, CA
Prepared for Stephen Cole, Attorney
April 10, 1998



- Tree which should be removed or cut at 40'
- Tree cut to stump
- Remaining Tree
- Tree which fell Feb 5-6 with direction of fall

RIGHT OF ENTRY

Property No. n/a
APN: 037-082-18

Date: 0087
Project: REMOVE ONE TREE STUMP

County of Santa Cruz
Public Works Department
701 Ocean Street
Santa Cruz, California 95060

Gentlemen:

Permission is hereby granted to the County of Santa Cruz, its contractors and/or authorized agents, to enter and bring the necessary workmen, tools, materials, and equipment onto the property of the undersigned, where necessary for the purpose of removing the stump of the Tasmanian Blue Gum tree located in front of 3211 Fairway Drive and in the **road** right of way which fell on February 6, 1998, where shown on the attached.

It is understood and agreed that the County shall leave the premises in a clean and orderly condition, and that any existing improvements located on the Grantor's property that may have been disturbed or removed during the course of the work will be restored or replaced in kind.

It is further understood and agreed that permission to perform the acts stated herein shall remain in force **and effect** only until the completion of construction and that all rights hereunder shall cease when said work has been completed.

RECOMMENDED FOR APPROVAL:

Richard Zscheile

Real Property Agent

Judith C. Zscheile

Grantor(s)

ACCEPTED:
County **of Santa** Cruz

'-Property Address:
3211 Fairway Drive
Soquel, CA

Director of Public Works