



WASHINGTON STATE BAR ASSOCIATION

Real Property, Probate and Trust Section

January 30, 2017

Representative Christine Kilduff
110 Legislative Building
Olympia, WA 98504-0600

Senator Mike Padden
110 Legislative Building
Olympia, WA 98504-0600

RE: HB 1131/SB 5080 – An ACT Relating to actions for damage to real property resulting from construction, alteration, or repair on adjacent property

Dear Representative Kilduff and Senator Padden:

We are writing this letter to express concern with respect to HB 1131/SB 5080. The bills attempt to create a solution for a very specific issue but will result in a variety of harmful, unintended consequences.

In 1976, the Washington Supreme Court determined that persons seeking recovery for harm caused by a neighboring construction project have three years from conclusion of the project to file suit. This has been the law for forty years. The Supreme Court's reasoning was sound: an injured party should be entitled to ascertain the full measure of its damages before it is required to file suit and, in most cases, it will only be possible to ascertain all damages after construction is complete.

The bills seek to change the law so that the three year period begins at the *earlier* of completion of construction or the date on which the injured party knew, or by reasonable diligence, should have known, of the injury. A damaged neighbor's claim will be time barred if it is not filed within three years following conclusion of the project or within three years of the date on which the injured party knew, or by reasonable diligence, should have known, of the injury. This difference may seem subtle but it will have significant consequences, favoring builders and contractors at the expense of innocent property owners. Property owners will have little time to assess the cause, identify the total amount of their damages, and commence an action. This could result in innocent property owners being uncompensated or inadequately compensated for their damages and/or unnecessary litigation resulting from immature claims being filed to beat the statute of limitations.

It is helpful to illustrate by example:

Contractor constructs a rail line adjacent to neighbor's property. Contractor cuts into hillside, causing minor sloughage on neighbor's property. Neighbor is aware of sloughage but has no intention of asserting a claim. Years pass while the project continues. Five years later, the contractor lays the rail line and trains begin to run. The reverberation causes the hillside to collapse but neighbor's claim is time barred because neighbor "knew" of the injury more than three years ago. Passage of these bills will require this neighbor to sue contractor when the minor sloughage occurs.

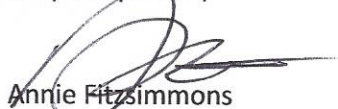
Neighbors will be forced to file premature claims, having to prove damages before their damages are fully evidenced. Contractors will have no opportunity to complete projects to prevent long-term problems (such as retaining the hillside, in the example given). Moreover, concealed trespasses by a contractor (underground utilities) will create permanent rights for the trespasser, after three years of occupation, even if the property owner is unaware of the trespass.

Any change in the law in this area should be intended to limit the reach of these unintended consequences. The benefit of the reduced statute of limitations should not be given to all offending contractors but rather, should be limited, by the Legislature, to the smallest group of beneficiaries possible.

In the spirit of cooperation, the Bar Association's Real Property Probate and Trust Section proposes the attached modification to the bills. It is the opinion of the Section that the bills should not pass in any form. But, if the bills pass, the proposed amendment will limit the number of innocent property owners impacted by the legislation.

Please call on me if I can provide any additional information or assistance to you as you seek to analyze this proposed legislation.

Very Truly Yours,



Annie Fitzsimmons
Director, Real Property Council
WSBA Real Property Probate and Trust Section

NEW SECTION. Sec. 1. The legislature enacts this act to overrule the Washington supreme court decision in Vern J. Oja and Assoc. v. Washington Park Towers, Inc., 89 Wn.2d 72, 569 P.2d 1141 (1977), which held that claims for damage to real property resulting from construction activities on adjacent property do not accrue until the construction project on the adjacent property is complete.

NEW SECTION. Sec. 2. A new section is added to chapter 4.16 RCW to read as follows:

(1) Except as provided in subsection (2) of this section, actions for damage to real property resulting from construction, alteration, or repair on an adjacent property, whether alleging negligence, strict liability, trespass, or any other cause of action against a public entity using funds approved by the registered voters of its jurisdiction for the construction of a transportation project, must be commenced within the earlier of the following periods:

(a) Within three years after the property owner first discovered or reasonably should have discovered the damage; or

(b) Within three years after completion of the construction, alteration, or repair.

(2) Actions for such damage that: (a) Is known or reasonably should have been known as of the effective date of this section; and (b) is caused by a construction, alteration, or repair project that is not complete as of the effective date of this section must be commenced within three years of the effective date of this section.

(3) Nothing in this section may be construed as extending the period for bringing a claim beyond the periods provided in RCW 4.16.300, 4.16.310, and 4.16.320, or barring a cause of action against a public entity for the operation and maintenance of the transportation project.