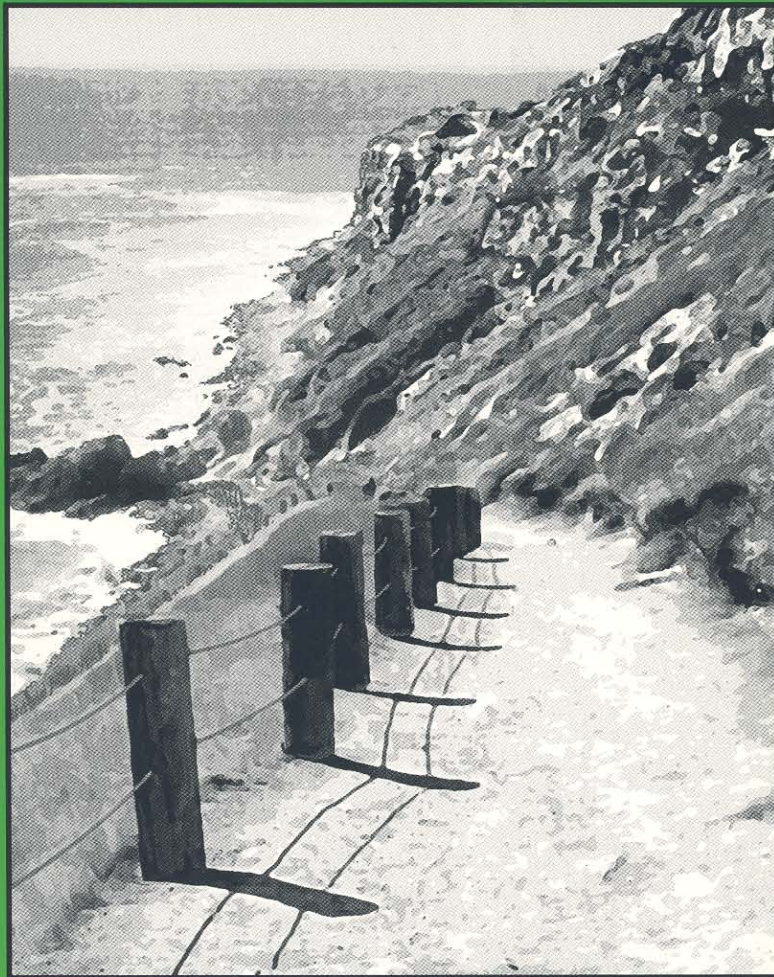


Limitations on Liability for Nonprofit Land Managers



Please recheck telephone numbers contained in this scanned version of the document, as they may have changed.



Coastal Conservancy

1330 Broadway, 11th Floor

Oakland, California 94612

(510) 286-1015

web site: www.coastalconservancy.ca.gov



CALIFORNIA COASTAL COMMISSION

45 Fremont Street, Suite 2000

San Francisco, CA 94105-2229

(415) 904-5200

web site: ceres.ca.gov/coastalcomm



NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

web site: www.noaa.gov

A publication of the California Coastal Commission, pursuant to National Oceanic and Atmospheric Administration Award NA570Z0324, and the California Coastal Conservancy.

CONTENTS

| | |
|---|----|
| Introduction | 2 |
| Section 831.5: Agreements | 5 |
| Section 831.2: Natural Condition of Unimproved Property | 6 |
| <i>"Natural condition"</i> | 6 |
| <i>"Unimproved public property"</i> | 8 |
| <i>Protective services</i> | 9 |
| <i>Warning signs</i> | 9 |
| <i>Section 831.2 guidelines</i> | 9 |
| Section 831.25: Land Failures off Public Property | 10 |
| Section 831.4: Roads, Trails, and Other Pathways | 10 |
| Section 831.7: Hazardous Recreational Activity | 11 |
| <i>Exceptions</i> | 12 |
| Civil Code Section 846.1: Attorneys' Fees | 13 |
| Summary | 13 |
| Attachment A: Model Agreement | 14 |
| Attachment B: Section 831.2 Cases | 16 |
| Attachment C: Pertinent Statutes (as of 1997) | 17 |

INTRODUCTION

T

O ENCOURAGE NONPROFIT PUBLIC LAND TRUSTS to preserve open space and provide public access to natural resources, the California Legislature enacted Government Code Section 831.5¹, which allows qualifying land trusts² to be shielded from certain liabilities to which private

landowners can be vulnerable. To take advantage of this protection, a land trust must enter into an agreement with the Coastal Conservancy or another public agency. Once it has done so, a nonprofit land trust can enjoy immunities that are normally provided only to public entities.

This Technical Bulletin is provided to help nonprofit land trusts understand the benefits of entering into a Section 831.5 agreement with the Coastal Conservancy and to encourage land trusts to take advantage of those benefits.

In general, Section 831.5 allows nonprofit land trusts and governmental entities to enter into written agreements that provide land trusts with immunities normally enjoyed only by public entities. The California Legislature created absolute immunity from certain types of liability for reasons set forth in the Legislative Committee Comment to California Government Code Section 831.2:

1. Unless otherwise specified, all statutory citations are to the Government Code.

2. Section 831.5 uses the term "land trust" without further reference or definition, although it does require that a public land trust meet three conditions to qualify as a "public entity" for purposes of these immunities: (1) it must be a nonprofit organization existing under the provisions of Section 501(c)(3) of the United States Internal Revenue Code; (2) its articles of incorporation must specifically set forth, as among its principal charitable purposes, the conservation of land for public access, agricultural, scientific, historical, educational, recreational, scenic, or open space opportunities; and (3) it must enter into, and comply with provisions of, an agreement with the Conservancy (or other state agencies, as specified) to hold land or to provide nondiscriminatory public access consistent with the protection and conservation of coastal or other natural resources. In this Bulletin, the terms "land trust" and "nonprofit organization" are used interchangeably to refer to an organization that meets all three of these conditions.

It is desirable to permit the members of the public to use public property in its natural condition. . . . But the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved public property in its natural condition to assume the risk of injuries arising therefrom as a part of the price to be paid for benefits received.

When it enacted Government Code Section 831.5 in 1980, the Legislature extended this policy to nonprofit land trusts, declaring that “innovative public access programs, such as agreements with public land trusts, can provide effective and responsible alternatives to public acquisition programs” and that “it is beneficial to the people of this state to encourage private nonprofit entities such as public land trusts to carry out programs that preserve open space or increase opportunities for the public to enjoy access to and use of natural resources.” In short, Section 831.5 provides a way for nonprofit land trusts to “stand in the shoes” of a public entity. When in place, a Section 831.5 agreement allows a nonprofit land trust to enjoy absolute immunity from liability for injuries caused by a natural condition of unimproved property (Section 831.2), for injuries caused by the condition of certain roads, trails, or other pathways (Section 831.4), and for injuries resulting from voluntary participation in a “hazardous recreational activity” (Section 831.7).

Unless it has such an agreement, a nonprofit land trust can be liable to an individual injured on its property in the same way that all other private landowners can be liable. While a discussion of general landowner liability is beyond the scope of this bulletin, nonprofit land trusts should be aware that the Legislature has also extended limited immunity to all private landowners under Civil Code Section 846. This section protects private landowners from liability to a person injured on the property if that person entered or was using the property solely for a recreational purpose. It applies equally to developed and undeveloped land that is used solely for recreation. The immunity is not available in any case where the landowner (1) willfully or maliciously fails to warn or guard against a hazardous condition; (2) grants permission to enter the property in return for payment of a fee or other consideration; or (3) expressly invites the injured person onto the property.¹

1. A more detailed discussion of California Civil Code Section 846 can be found in a publication of the Bay Area Ridge Trail Council, *California's Recreational Use Statute and Landowner Liability* (2d ed., June 1994). To order, contact the Bay Area Ridge Trail Council, 311 California Street, Suite 300, San Francisco, CA 94104; (415) 391-0697.

**Table 1: Comparison of the Immunities Offered to Land Trusts
by Civil Code Section 846 and Government Code Section 831.5**

| | CIVIL CODE SECTION 846 RECREATIONAL USE IMMUNITY | GOVERNMENT CODE SECTION 831.5 PUBLIC ENTITY IMMUNITIES |
|------------------|--|--|
| Interest in land | Applies to possessory or nonpossessory interest | Applies to agreements to hold or manage land |
| Fees | Cannot charge fees or receive other "consideration" | Can charge fees (but not for hazardous recreational activities) |
| Invitation | Cannot expressly invite | Can invite (but cannot recklessly promote hazardous recreational activities) |
| Use | User enters for recreational purposes only | User enters for any purpose |

We believe that the immunities provided by Sections 831.2, 831.4, and 831.7 would *supplement*, not replace, a land trust's immunity under Civil Code Section 846. The question, however, has not been resolved by an appellate court, so land trusts should seek the opinion of their own legal counsel on the issue. While the protections offered by Government Code Section 831.5 and Civil Code Section 846 sometimes overlap, there are some distinct differences (see Table 1): (1) A nonprofit land trust need not hold an interest in land to take advantage of the protection available through Section 831.5; the land trust could merely manage the land, rather than owning or leasing it. (2) A nonprofit land trust may charge users a fee to be on the land (but not to participate in "hazardous recreational activities") and still be protected under Section 831.5, whereas any fee charged to users removes the protection offered through Section 846. (3) The protections of Section 831.5 apply when a nonprofit land trust specifically invites the public to enter the land (unless for purposes of a hazardous recreational activity "recklessly promoted"—see the discussion of exceptions to Section 831.7 immunity below); under Civil Code Section 846, protection is not available if the public is specifically invited onto the land, rather than merely permitted to enter. Although case law under Section 846 suggests that the mere existence of promotional literature or signs does not constitute an express invitation to the public, California cases have implied that an express invitation *can* be made to the general public in some instances (see *Simpson v. United States*, 590 F.2d 297 [1979]), and there are cases of record finding an express invitation to have occurred as a result of active efforts, directed at a wide audience, to encourage public attendance at a specific event (see, e.g., *Coryell v. United States*, 847

F. Supp. 148 [CD Cal., 1994]). Except in the case of hazardous recreational activities as described in Section 831.7 (see p. 11), this somewhat unresolved question is not an issue for land trusts protected by Section 831.5 agreements. Finally (4), unlike Section 846, Section 831.5 provides immunities whether or not the injured party is on the land for a recreational purpose.

The remainder of this bulletin provides greater detail about Section 831.5 agreements and the statutory immunities they confer upon nonprofit land trusts.

Section 831.5—AGREEMENTS

Public land trusts that want broader immunity than that provided in Civil Code Section 846 may find it in Government Code Section 831.5. This Section provides that the immunity available to public entities under Government Code Sections 831.2, 831.25, 831.4, and 831.7 will apply to nonprofit public land trusts that enter into agreements with the Coastal Conservancy, the California Tahoe Conservancy, or the State Public Works Board. In consideration for obtaining "public entity" status for purposes of these immunities, the land trust must agree to preserve open space lands or to provide public access. The Coastal Conservancy is authorized to enter into agreements for projects in the Coastal Zone and nine counties adjacent to San Francisco Bay¹, the Tahoe Conservancy can enter into agreements in the Tahoe Basin², and the State Public Works Board is responsible for agreements in the remainder of the state. A sample agreement between the Coastal Conservancy and a qualifying nonprofit organization is provided as Attachment A of this bulletin.

In general, Section 831.5 agreements grant to nonprofit land trusts the status of a "public entity" so that they may take advantage of the following: immunity for injuries caused by a natural condition of unimproved property (Sections 831.2 and 831.25); immunity for injuries caused by a condition of some roads and trails (Section 831.4); and limited immunity against injury or damage suits brought by a participant in, or a spectator at, a "hazardous recreational activity" (Section 831.7). To date no appellate court cases have tested the government's ability to confer to land trusts the limited liability status of public entities under Section 831.5 or found any limitations on the ability of a nonprofit land trust to enjoy these immunities after an agreement between the land trust and a public entity has been made pursuant to Section 831.5. The Coastal Conservancy is aware of only one trial-level case involving a nonprofit defendant having a Section 831.5 agreement with the Coastal Conservancy. In *Perez v. Mendocino Coast Botanical Gardens Preservation Corp., et al.*, Mendocino County Superior Court action no. 65557 (1994), the court found the immunities did apply to the nonprofit organization.

Each of the immunity sections is summarized in Table 2 and described further below.

1. Public Resources Code Section 31006.

2. Government Code Section 66953(c).

Section 831.2—NATURAL CONDITION OF UNIMPROVED PROPERTY

The language of Section 831.2 is deceptively simple. It states that a public entity is *not liable* for "an injury caused by a *natural condition of any unimproved public property*, including but not limited to any natural condition of any lake, stream, bay, river or beach."

This immunity is in some ways broader than that available to land trusts under Civil Code Section 846, because there is no requirement that the land actually be used for recreational purposes or suitable for that use. This difference was underscored in a 1986 case holding that a city was entitled to immunity under Section 831.2 when a child was killed while playing in a cave located on a "greenbelt" set aside to preserve open space (*Winterburn v. City of Pomona*).¹ *Winterburn* is interesting in that the greenbelt was designated as "non-recreational" land by the City, yet the land was "essentially a public park, merely lacking the usual park-like improvements. . . ." Accordingly, the court rejected the plaintiffs' argument that Section 831.2 was intended to provide immunity only to those lands set aside for recreational purposes, or to lands outside urban areas.

Appellate cases that have addressed the application of this section have focused extensively on the definitions of its two crucial terms: "natural condition" and "unimproved public property." Although the cases have dealt with different factual settings, certain themes emerge to help public land trusts stay within the immunity provided by Section 831.2.

"NATURAL CONDITION"

When deciding whether an injury was caused by a "natural condition," courts have not always interpreted the term "natural condition" literally. Instead, appellate courts have focused on the Legislature's intent in enacting Section 831.2 as explained in the Legislative Committee Comment to the section—to promote public use of public property in its natural condition—and the reasonableness of expecting those "who voluntarily use unimproved public property in its natural condition to assume the risk of injuries arising from that use, as part of the price to be paid for benefits received."

Attempting to read Section 831.2 in a way that effectuates that legislative intent, courts have found a variety of conditions to be "natural" within the context of Section 831.2, even when human activity has altered a condition in some way. Courts have found the following to be "natural conditions":

- 1) A combination of water flow and a snag of trees in the American River, even though the water flow was under human control upstream from the location of the accident (*County of Sacramento v. Superior Court of Sacramento County*).
- 2) A submerged rock at or immediately near the shoreline of Millerton Lake, even though the lake level was under human control (*Eben v. State of California*).
- 3) A man-made lake where a water skier was killed by another motorboat, even though the County actively encouraged the public to use the lake for water skiing (*Osgood v. County of Shasta*).

1. Citations for this and other cases discussed in this section are provided in Attachment B at the end of this bulletin.

**Table 2: Summary of Government Code Section 831.5:
Public Entity Immunities Available to Nonprofit Land Trusts**

| SECTION | PUBLIC ENTITIES AND QUALIFYING LAND TRUSTS ARE NOT LIABLE FOR: | APPLIES | DOESN'T APPLY |
|---------|---|---|--|
| 831.2 | an injury caused by a "natural condition of unimproved public property" | to beach, even if protective services are provided (Section 831.21) | where an improvement made by entity was the cause of injury |
| 831.25 | damage or injury off of the entity's property caused by land failure of any unimproved public property if land failure is caused by a natural condition | where minor improvements made for management of property did not contribute to land failure | where entity had actual notice of probable damage and failed to give warning |
| 831.4 | injuries caused by a condition of 1) any unpaved road or any trail leading to recreational areas | | 1) to public streets or highways |
| | 2) trails used for recreational or scenic purposes | 2) to paved or unpaved trails | 2) on paved trails or paths, if entity fails to give adequate warning of hazards |
| | 3) paved trails, paths, sidewalks on easements providing access to unimproved property | | 3) if entity fails to give warning of hazard |
| 831.7 | injuries to participants, assistants, and spectators engaged in "hazardous recreational activity" | | various exceptions—see statute for details |

- 4) Cliffs located on city property, even though the plaintiff claimed that his accident was caused by the combination of the dangerous cliffs and the city's "ineffective and unprofessional" warning signs (*McCauley v. City of San Diego*).
- 5) An underwater object that the plaintiff struck while diving in the ocean; even though the plaintiff alleged that it was the combination of that natural condition with the County's incomplete or negligent provision of lifeguard services that caused his injury (*Geffen v. Los Angeles County*).
- 6) A rope attached by an unknown third party to a tree on unimproved public property (*Kuykendall v. State*).
- 7) Shallow water where a diver was injured, even though human activity had contributed to a buildup of sand and a decrease in water depth (*Fuller v. State*, *Morin v. County of Los Angeles*, *Tessier v. City of Newport Beach*, *Knight v. City of Capitola*).
- 8) Wild animals are a natural part of the condition of unimproved property, entitling the State to immunity when a mountain lion mauled a child in a state park, even though the natural condition was altered by the enactment of a legislative moratorium on hunting mountain lions in state parks (*Arroyo v. State*).

In contrast to the decision in *Fuller*, the appellate court in *Buchanan v. City of Newport Beach* found that there was evidence to support the claim that the wave action that caused the plaintiff's injuries was the direct result of governmental

dredging and depositing of sand and the resultant 27-foot rise of the beach level. The trial court's dismissal of the plaintiff's suit in *Buchanan* was thus improper because evidence supported the allegation that plaintiff's injuries had been caused by an unnatural or artificial condition.

Kuykendall, *Fuller*, and *Buchanan* all involve injuries resulting from conditions that were affected by human actions; they therefore provide guidance in efforts to categorize different conditions as natural or artificial. One of the important differences between the natural-condition cases, *Kuykendall* and *Fuller*, and the unnatural-condition case, *Buchanan*, is the actor or actors who caused the condition in question. In *Kuykendall*, the rope on which the plaintiff was swinging when he fell had been attached to the tree by an unknown third person.¹ In *Fuller*, someone had undertaken activity that contributed to a decrease in water depth where the plaintiff was diving, but the "someone" had not been the defendant public entity. In *Buchanan*, however, governmental agencies had constructed the beach where the plaintiff was injured, by constructing a jetty, dredging sand from the channel adjacent to the jetty, and depositing that dredged sand on previously submerged sand spits. The plaintiff alleged that the contour of the beach had caused the "plunging" type of wave that led to his injuries.

Another important difference between *Buchanan* and *Fuller* was the location of the human activity that created or contributed to the condition that caused each plaintiff's injuries. In *Buchanan*, the jetty construction and sand dredging and depositing occurred at the location of the plaintiff's accident, but in *Fuller* the activities that may have contributed to sand buildup at the accident site occurred 3,000 feet down the coast and, in addition, "somewhere upstream," according to the court.

"UNIMPROVED PUBLIC PROPERTY"

Since Section 831.2 was enacted it has become a well-established rule that improvements at one location in a public entity's property will not render all of its property "improved" for the purpose of Section 831.2 immunity (*Rendak v. State*, *Fuller v. State*, *Eben v. State*, *Geffen v. County of Los Angeles*). Unless there has been "some form of physical change in the condition of the property at the location of injury, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area," the property will be considered unimproved (*Keyes v. Santa Clara Water District*, quoting Van Alsyne, *California Government Tort Liability Practice*; see also *Eben v. State*, *Mercer v. State*, *Rombalski v. City of Laguna Beach*).

The other issue concerning the definition of "unimproved property" that has been litigated repeatedly is whether a public entity's provision of warning signs or lifeguard or other protective services changes the unimproved character of the property. Initial uncertainty about the effect of providing protective services now seems to have been resolved: the provision of lifeguards or a similar service will not transform unimproved property into improved property. Similarly, the posting of warnings about natural conditions will not alter the unimproved nature of the property, as long as the warnings neither increase the degree of danger on the property nor mislead the public about it.

¹ However, an appellate decision subsequent to *Kuykendall* involving an injury occurring in the same manner and in the same recreational area as was at issue in *Kuykendall* expresses in dicta (i.e., indirectly) a degree of doubt as to whether that property, from which a fire hose swing (as opposed to rope swing) had been hung, would still be in a "natural condition" (*Devito v. State*).

PROTECTIVE SERVICES

One court of appeal ruled in 1982 that the negligent provision of lifeguard services leading to the plaintiff's injuries removed the public entity's 831.2 immunity (*Gonzalez v. City of San Diego*). For five years, *Gonzalez* was frequently cited but almost always distinguished. Then in 1987 a different court of appeal declined to follow the *Gonzalez* rationale (*Geffen v. County of Los Angeles*), and the Legislature abrogated the *Gonzalez* holding by enacting Section 831.21 of the Government Code.¹

WARNING SIGNS

A well-reasoned decision in *McCauley v. City of San Diego* rejected an injured plaintiff's argument that the City's decision to place what he claimed were "ineffective and unprofessional" warning signs on its property deprived the City of its Section 831.2 immunity. In its reasoning the court emphasized that if the warning signs had not existed at all, the City would have been immune. Since the signs were not misleading and did not increase the degree of danger at the cliffs where the plaintiff fell, the court stated, a ruling against the City would actually harm the public interest by discouraging public entities from warning about dangerous areas (see also *Valenzuela v. City of San Diego*).

831.2 GUIDELINES

The cases applying Section 831.2 that are described above and listed in Attachment B imply that several factors should be considered when trying to determine the scope of "public entity" land trusts' potential liability:

- 1) Courts do not require that the site at which an injury occurs be in "the pristine state which it was prior to the population of California" (*Fuller*) for Section 831.2 immunity to apply. Human activity may have an impact on a locale's condition without changing its "natural" character. (Understanding the difference in the facts of *Fuller* and *Buchanan* will help to suggest where courts may draw the line between natural and artificial conditions in cases of human impact.)
- 2) Improvements to one area of a public entity's property will not transform other, undeveloped areas into "improved" areas under Section 831.2.
- 3) Warnings that do not "amount to negligence in creating or exacerbating the degree of danger" associated with a natural condition (*McCauley*) do not prevent a public entity from successfully claiming Section 831.2 immunity.
- 4) A public entity's knowledge of a dangerous natural condition on unimproved public property does not affect the applicability of Section 831.2 (*Fuller; County of Sacramento*).
- 5) In problematic cases, consider whether Section 831.4 or 831.7 immunities would apply instead, or in addition.

1. Section 831.21 of the Government Code provides that public beaches "shall be deemed to be in a natural condition and unimproved notwithstanding the provision or absence of public safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup services, or signs. The provisions of this section shall apply only to natural conditions of public property and shall not limit any liability or immunity that may otherwise exist pursuant to this division."

Section 831.25—LAND FAILURES OFF PUBLIC PROPERTY

Section 831.2 should be read in conjunction with Section 831.25, which provides that 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* resulting from a *natural condition* of the unimproved property. In *Milligan v. City of Laguna Beach* the California Supreme Court held that Section 831.2 immunity is applicable only to users of government property and cannot shield the government from liability to nonusers on adjacent property. During a storm, several eucalyptus trees growing on city property fell and caused damage to the plaintiff's residence on adjacent property. The City claimed immunity for a natural condition of undeveloped property, but the court disagreed, noting that the legislative policy on which the statute is based had nothing to do with injuries to adjacent landowners. The natural condition immunity may be applicable when a tree limb falls on a user of government property, the majority reasoned, but not when it falls upon property or persons on adjacent land, because there is no danger that the government agency will close the property to public use. In response, in 1984 the California Legislature clarified its intent by enacting Section 831.25, thus extending the public immunity doctrine to cover injury occurring off the public property, *except* where the public entity or employee had actual notice of probable damage likely to occur off the public property, and failed to give reasonable warning of the danger (see *Milligan v. City of Laguna Beach*, 196 Cal. Rptr. 38, 670 P.2d 1121, 34 C.3d 829 [1983]).

Section 831.4—ROADS, TRAILS, AND OTHER PATHWAYS

Section 831.4 provides public entities with immunity from liability for injuries caused either by a condition of an *unpaved road* that provides access to a variety of recreational activities, including hiking, camping, and water sports, or by a condition of a *trail* used for any of the same activities. (Immunity is *not* available if the unpaved road is a city street, a city, county, state, or federal highway, or a public street or highway built or maintained by an entity formed for the construction or improvement of public streets or highways.) More limited immunity is available for public entities that hold easements containing paved trails, walkways, paths, or sidewalks. This paved-pathway immunity is limited by the requirement that the public entity "reasonably attempt to provide adequate warnings" of a condition that creates a "hazard to health or safety." This limitation implies another unstated requirement: the public entity holding the easement must make reasonable inspections of a paved trail or other pathway.

In 1993, the issue of exactly what immunities were provided by Section 831.4 was revisited in the decision of *Giannuzzi v. State*, 17 Cal. App. 4th 462, 21 Cal. Rptr. 2d 335 (1993). The court considered three possible interpretations of the language of Section 831.4 and ultimately held, consistent with the above text, that Section 831.4 provides three related immunities: for injuries caused by (1) the condition of unpaved roads providing access to recreational activities and areas; (2) the condition of trails used for recreational activities; and (3) the condition of any paved accessway located on an easement which provides access to unimproved property. The court clarified that whereas the first and third types of immunity pertain to roads or easements, respectively, that provide access to recreation and unimproved areas, the second type applies to any trail on which a recreational activity occurs, not just those providing

access to such recreation. This view was confirmed in *Armenio v. County of San Mateo*, 28 Cal. App. 4th 413, 33 Cal. Rptr. 2d 631 (1994), in which the court ruled that Section 831.4's immunity extends to both a trail leading to a mountain biking area and to the trails where the mountain bike riding actually takes place. Because *Armenio* involved a paved, maintained trail, the case also confirms that Section 831.4's trail immunity is not limited to unpaved or unimproved trails.

In *State v. Superior Court (Young)*, 32 Cal. App. 4th 327, 39 Cal. Rptr. 2d 1 (1995), the court held that the State was entitled to immunity where it was alleged that the condition of an unpaved trail in a state park combined with the actions of a third party (a mountain bicyclist spooked the plaintiff's horse), caused the plaintiff's injury. The "dangerous condition" of the trail alleged in *Young* was the fact that the trail was open for use by both cyclists and equestrians.

Section 831.7—HAZARDOUS RECREATIONAL ACTIVITY

Section 831.7 provides that, with some exceptions, a public entity will not be liable to specified types of people for personal injury or property damage arising from a "hazardous recreational activity." Liability is limited if the person claiming injury or damage is any of the following:

- 1) a *participant* in a hazardous recreational activity
- 2) an *assistant* to a participant in a hazardous recreational activity
- 3) a *spectator* at the activity if the spectator knew or reasonably should have known that the activity created a substantial risk that he or she might be injured and if the spectator was in the place of risk voluntarily or failed to leave despite being able to do so.

The section provides a broad but somewhat vague definition of "hazardous recreational activity" but also lists specific activities that are deemed hazardous. That list, which seems to be the subject of continuing legislative additions, currently includes the following:

- 1) *water contact activities*, except diving, when lifeguards are not provided and either reasonable warning of the absence of lifeguards has been given or the injured party should reasonably have known that there was no lifeguard;
- 2) *diving into water* from anywhere other than a diving board or platform or from any structure from which diving is prohibited and reasonable warning of the prohibition has been given; and
- 3) a wide variety of recreational activities, including *animal riding, archery, bicycle racing or jumping, mountain bicycling* (but not on paved pathways, roadways, or sidewalks), *boating, skiing, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving, orienteering, surfing, wind surfing, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, skydiving, parachuting, paragliding, body contact sports, trampolining, tree climbing, tree rope swinging, waterskiing, and whitewater rafting.*

If the activity from which an injury arose is not one of the listed activities, it is still considered a hazardous recreational activity if it is conducted on a public entity's property and "creates a substantial . . . risk of injury to participant or a spectator."

EXCEPTIONS

Even if the activity leading to the injury was hazardous under the terms of Section 831.7 and the person injured was within one of the three categories of people to whose injuries the section applies, a public entity can be liable under one of five exceptions to the general immunity provided by Section 831.7. These exceptions focus primarily on the actions of the public entity and are described below.

1) Section 831.7 immunity will not be available if the injury or damage arises from the public entity's failure to guard against or warn of (a) a *known dangerous condition* or (b) *another hazardous recreational activity known to the public entity* that the injured participant did not reasonably assume to be an inherent part of the hazardous recreational activity out of which the injury arose.

The second part of this exception is designed to *allow* public entity liability if the injured party, who was engaging in a hazardous recreational activity at the time of the injury, was hurt as a result of a hazardous recreational activity in which he or she was *not* participating. For example, suppose that the public entity was aware that people used the property for pistol and rifle target practice, and the public entity did not guard against or warn of that hazardous recreational activity. Under this provision of Section 831.7, a public entity would *not* be immune from suit if the injured party was engaged in the hazardous recreational activity of horseback riding but was injured because her horse panicked when it heard pistol shots. Unless the injured party was aware of the pistol and rifle practice, she should not be held to have assumed the risk of being injured as a direct or indirect result of that practice.

2) Immunity is not available under Section 831.7 if the injury was suffered when permission to participate in the hazardous recreational activity was granted for a *specific fee*. "Specific fee" does *not* include general fees such as a park admission charge, vehicle entry or parking fee, or a permit fee. A specific fee is, instead, a fee charged for participation in the specific hazardous recreational activity out of which the injury arose.

3) Immunity is also not available to the extent the injury is caused by the *negligent failure* of the public entity to *construct or maintain in good repair* any structure, recreational equipment or machinery, or substantial improvement used in the hazardous recreational activity out of which the injury arose.

4) A public entity cannot claim Section 831.7 immunity if it *recklessly or with gross negligence promoted participation in or observance of a hazardous recreational activity*. Promotional literature, advertisements, and public announcements do not in themselves constitute reckless or negligent promotion.

5) A public entity can also lose its Section 831.7 immunity if an *act of gross negligence* on its part causes the injury.

Civil Code Section 846.1—ATTORNEYS' FEES

The application of any of these statutes to any given factual situation can be complex and difficult to assess in advance, and the defense of a personal injury lawsuit can be costly and time-consuming even if successful. The State of California, apparently recognizing this problem, has underscored its policy of encouraging land trusts and other private owners to make their lands available for public access and recreation in new legislation providing for the State to share in the costs of defending a personal injury lawsuit under certain circumstances. Effective January 1, 1997, owners of property who have agreed to recreational trail use on the property, and public entities (as defined in Government Code Section 831.5, including land trusts who have entered into limited liability agreements with the Conservancy), can present a claim to the State Board of Control to recover reasonable attorneys' fees in such an action (Civil Code Section 846.1). The Board of Control is a state body charged with responsibility for initially hearing all claims brought against the State of California. Civil Code Section 846.1 *directs* the Board to allow payment by the State of eligible claims, within certain limits: the landowner must either succeed in defense of the action or have the case dismissed without making any payment to the plaintiff. The amount payable by the State may not exceed an aggregate of \$25,000 per claim, based on an hourly rate no greater than the rate charged by the Attorney General, and the total amount of claims allowed by the Board may not exceed \$100,000 in any fiscal year. Finally, the Board is not required to allow the claim if the landowner was provided a legal defense by the State pursuant to statute, contract, or other legal obligation.

SUMMARY

Sections 831.2, 831.4, and 831.7 of the Government Code provide immunity to public entities and to nonprofit organizations that qualify for public entity status by entering into agreements with the Coastal Conservancy as described in Section 831.5 of the Government Code. The immunity sections apply when an injury (1) is caused by a "natural condition of unimproved public property," (2) is caused by a condition on certain types of roads, trails, and other pathways, or (3) arises from participation in or watching a hazardous recreational activity. It is the Conservancy's opinion that "public entity" status is an important way for land trusts to *supplement* the limited landowner immunity available under Civil Code Section 846. Because application of the immunities discussed in this Technical Bulletin will vary with the facts of each situation, a land trust's specific questions about potential liability should be addressed to its own legal counsel.

ATTACHMENT A

AGREEMENT TO PROVIDE PUBLIC ACCESS AND TO QUALIFY NONPROFIT ORGANIZATION FOR LIMITED PUBLIC ENTITY TORT IMMUNITY

[Name of property and county]

THIS AGREEMENT is entered into in California this _____ day of _____, 19____ in California, by the State Coastal Conservancy, an agency of the State of California ("the Conservancy"), and _____, a nonprofit corporation ("the nonprofit organization"). The nonprofit organization will provide access as specified, and in consideration will receive limited tort immunity under Government Code §§ 831.2, 831.25, 831.4, and 831.7.

PERTINENT FACTS

- A. California Public Resources Code § 31400.1 authorizes the Conservancy to award grants to a nonprofit organization which is a public land trust having an agreement with the Conservancy under California Government Code § 831.5(b), and having among its purposes development and operation of public accessways along the California coast.
- B. The nonprofit organization is a public land trust having among its purposes development and operation of public accessways along the California coast.
- C. On _____, 19____, the Conservancy authorized a grant to the nonprofit organization to _____.

SCOPE OF AGREEMENT

California Government Code § 831.5 affords to certain nonprofit organizations the benefits of limited "public entity" status for purposes of limiting their tort liability under Government Code §§ 831.2, 831.25, 831.4 and 831.7 (collectively attached as Exhibit A). To secure these benefits, a participating nonprofit organization must (in addition to satisfying other conditions) enter into an agreement with the Conservancy under Government Code § 831.5(b)(3). That section requires the participating organization "to hold the lands or, where appropriate, provide nondiscriminatory public access consistent with the protection and conservation of either coastal or other natural resources or both." The purpose of this agreement is to comply with § 831.5(b)(3).

1. The nonprofit organization hereby certifies that:
 - a. It exists under § 501(c)(3) of the Internal Revenue Code.
 - b. Its articles of incorporation specify as among its principal charitable purposes the conservation of land for scientific, historic, educational, recreational, agricultural, scenic or open space opportunities.
2. The nonprofit organization [owns, controls, manages, is acquiring, etc.] [describe the property; or: real property ("the real property") in _____ County, California, known as _____ and described in Exhibit B, which is incorporated by reference and attached].

The nonprofit organization shall provide nondiscriminatory public access over the real property, consistent with the protection and conservation of either coastal or other natural resources, or both.

[Describe the public access required with respect to the particular property or project.]

3. In consideration for providing access as required above, the nonprofit organization, pursuant to Government Code § 831.5, is qualified with limited status as a public entity for purposes of statutory immunity under Government Code §§ 831.2, 831.25, 831.4 and 831.7 from tort liability on the real property.

4. The nonprofit organization shall have a permanent sign or signs erected on the access-way site or sites subject to this agreement, identifying the accessway. The nonprofit organization shall further make best efforts to have a sign or signs erected between the accessway and the nearest public highway directing the public to the accessway. The number, design, placement and wording of the above signs shall be determined by the Executive Officer of the Conservancy.

AUTHORITY

This agreement was authorized at a duly noticed meeting of the Conservancy held on _____.

FAILURE TO PERFORM

Failure of the nonprofit organization to provide the required access over any portion(s) of the separate properties which it owns shall disqualify the nonprofit organization from treatment as a "public entity" with regard to that property or those properties as to which such access is not provided. Determination of any such failure shall be by majority vote of the Conservancy following a duly noticed public hearing, and disqualification shall not take effect until such a vote has been cast.

TERM OF AGREEMENT

This agreement shall remain in effect until and unless terminated for cause by the Conservancy or at will by the nonprofit organization; provided however, that the nonprofit organization may not terminate this agreement as long as it has not fully performed its obligations under any grant agreement with the Conservancy which was entered into in express reliance on this agreement. Cause for termination means failure by the nonprofit organization to provide access in accordance with this agreement. This agreement shall terminate only upon a majority vote of the Conservancy or at the will of the nonprofit organization.

INSPECTION

The nonprofit organization shall permit the Conservancy, its agents or employees, to visit the project site at reasonable intervals to determine whether access is being provided to the public on a nondiscriminatory basis in accordance with this agreement.

SEVERABILITY

If any provision of this agreement is held by any court to be invalid, void or unenforceable, the remaining provisions shall nevertheless continue in full force and effect.

This agreement is deemed to be entered into in the County of Alameda.

STATE COASTAL CONSERVANCY

[Name of nonprofit organization]

By: _____
Executive Officer

By: _____
Authorized Signature

Print name

Title

ATTACHMENT B

SECTION 831.2 CASES

Arroyo v. State, 34 Cal. App. 4th 755,
40 Cal. Rptr. 2d 627 (1995)

Buchanan v. City of Newport Beach, 50 Cal. App. 3d 221,
123 Cal. Rptr. 338 (1975)

County of Sacramento v. Superior Court, 89 Cal. App. 3d 215,
152 Cal. Rptr. 391 (1979)

Devito v. State, 202 Cal. App. 3d 264,
248 Cal. Rptr. 330 (1988)

Eben v. State of California, 130 Cal. App. 3d 416,
181 Cal. Rptr. 714 (1982)

Fuller v. State of California, 51 Cal. App. 3d 926,
125 Cal. Rptr. 586 (1975)

Geffen v. County of Los Angeles, 197 Cal. App. 3d 188,
242 Cal. Rptr. 492 (1987)

Gonzalez v. City of San Diego, 130 Cal. App. 3d 882,
182 Cal. Rptr. 73 (1982)

Keyes v. Santa Clara Valley Water District, 128 Cal. App. 3d 882,
180 Cal. Rptr. 586 (1982)

Knight v. Capitola, 4 Cal. App. 4th 918,
6 Cal. Rptr. 2d 874 (1992)

Kuykendall v. State of California, 178 Cal. App. 3d 563,
223 Cal. Rptr. 763 (1986)

McCauley v. City of San Diego, 190 Cal. App. 3d 981,
235 Cal. Rptr. 732 (1987)

Mercer v. State, 197 Cal. App. 3d 158,
242 Cal. Rptr. 701 (1987)

Morin v. County of Los Angeles, 215 Cal. App. 3d 184,
263 Cal. Rptr. 479 (1989)

Osgood v. County of Shasta, 50 Cal. App. 3d 586,
123 Cal. Rptr. 442 (1975)

Rendak v. State of California, 18 Cal. App. 3d 286,
95 Cal. Rptr. 665 (1971)

Rombalski v. Laguna Beach, 213 Cal. App. 3d 842,
261 Cal. Rptr. 820 (1989)

Tessier v. Newport Beach, 219 Cal. App. 3d 310,
268 Cal. Rptr. 233 (1990)

Valenzuela v. San Diego, 234 Cal. App. 3d 258,
286 Cal. Rptr. 1 (1991)

Winterburn v. City of Pionoma, 186 Cal. App. 3d 878,
231 Cal. Rptr. 105 (1986)

ATTACHMENT C

PERTINENT STATUTES (AS OF 1997) CALIFORNIA GOVERNMENT CODE, SECTION:

831.2 Natural condition of unimproved public property

Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.

831.21 Public beaches; natural condition of unimproved property notwithstanding public safety services; application of section

- (a) Public beaches shall be deemed to be in a natural condition and unimproved notwithstanding the provision or absence of public safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup services, or signs. The provisions of this section shall only apply to natural conditions of public property and shall not limit any liability or immunity that may otherwise exist pursuant to this division.
- (b) This section shall only be applicable to causes of action based upon acts or omissions occurring on or after January 1, 1988.

831.25 Land failure caused by natural condition; failure to warn; duty of care

- (a) Neither a public entity nor a public employee is liable for any damage or injury to property, or for emotional distress unless the plaintiff has suffered substantial physical injury, 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 if the land failure was caused by a natural condition of the unimproved public property.
- (b) For the purposes of this section, a natural condition exists and property shall be deemed unimproved notwithstanding the intervention of minor improvements made for the preservation or prudent management of the property in its unimproved state that did not contribute to the land failure.
- (c) As used in this section, "land failure" means any movement of land, including a landslide, mudslide, creep, subsidence, and any other gradual or rapid movement of land.
- (d) This section shall not benefit any public entity or public employee who had actual notice of probable damage that is likely to occur outside the public property because of land failure and who failed to give a reasonable warning of the danger to the affected property owners. Neither a public entity nor a public employee is liable for any damage or injury arising from the giving of a warning under this section.
- (e) Nothing in this section shall limit the immunity provided by Section 831.2.
- (f) Nothing in this section creates a duty of care or basis of liability for damage or injury to property or of liability for emotional distress.

831.4 Unpaved access roads to recreational or scenic areas; trails; paved paths on easements of way granted to public entities

A public entity, public employee, or grantor of a public easement to a public entity for any of the following purposes, is not liable for an injury caused by a condition of:

- (a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways.
- (b) Any trail used for the above purposes.
- (c) Any paved trail, walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk which constitutes a hazard to health or safety. Warnings required by this subdivision shall only be required where pathways are paved, and such requirement shall not be construed to be a standard of care for any unpaved pathways or roads.

831.5 Legislative declaration; innovative public access programs

- (a) The Legislature declares that innovative public access programs, such as agreements with public land trusts, can provide effective and responsible alternatives to costly public acquisition programs. The Legislature therefore declares that it is beneficial to the people of this state to encourage private nonprofit entities such as public land trusts to carry out programs that preserve open space or increase opportunities for the public to enjoy access to and use of natural resources if the programs are consistent (1) with public safety, (2) with the protection of the resources, and (3) with public and private rights.
- (b) For the purposes of Sections 831.2, 831.4 and 831.7, "public entity" includes a public land trust which meets all the following conditions:
 - (1) It is a nonprofit organization existing under the provisions of Section 501(c) of the United States Internal Revenue Code.
 - (2) It has specifically set forth in its articles of incorporation, as among its principal charitable purposes, the conservation of land for public access, agricultural, scientific, historical, educational, recreational, scenic or open space opportunities.
 - (3) It has entered into an agreement with the State Coastal Conservancy for lands located within the Coastal Zone, as defined in Section 31006 of the Public Resources Code, with the California Tahoe Conservancy or its designee for lands located within the Lake Tahoe region, as defined in subdivision (c) of Section 66953 of the Government Code, or with the State Public Works Board or its

designee for lands not located within the Coastal Zone or the Lake Tahoe region, on such terms and conditions as are mutually agreeable, requiring the public land trust to hold the lands or, where appropriate, to provide nondiscriminatory public access consistent with the protection and conservation of either coastal or other natural resources, or both. The Conservancy or the board, as appropriate, shall periodically review the agreement and determine whether the public land trust is in compliance with the terms and conditions. In the event the conservancy or the board determines that the public land trust is not in substantial compliance with the agreement, the conservancy or the board shall cancel the agreement, and the provisions of Section 831.2, 831.25, 831.4, and 831.7 shall no longer apply with regard to the public land trust.

- (c) For purposes of Sections 831.2, 831.25, 831.4, and 831.7, "public employee" includes an officer, authorized agent, or employee of any public land trust which is a public entity.

831.7 Hazardous recreational activities; failure to guard or warn; negligence; duty of care

- (a) Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity.
- (b) As used in this section, "hazardous recreational activity" means a recreation activity conducted on property of a public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator.

"Hazardous recreational activity" also means:

- (1) Water contact activities, except diving, in places where or at a time when lifeguards are not provided and reasonable warning thereof has been given or the injured party should reasonably have known that there was no lifeguard provided at the time.
- (2) Any form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning thereof has been given.
- (3) Animal riding, including equestrian competition, archery, bicycle racing or jumping, mountain bicycling, boating, cross-country and downhill skiing, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving of any kind, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, paragliding, body contact sports (i.e., sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants), surfing, trampolining, tree climbing, tree-rope swinging, water

skiing, white water rafting and wind surfing. For the purposes of this subdivision, "mountain bicycling" does not include riding a bicycle on paved pathways, roadways, or sidewalks.

- (c) Notwithstanding the provisions of subdivision (a), this section does not limit liability which would otherwise exist for any of the following:
- (1) Failure of the public entity or employee to guard or warn of a known dangerous condition or of another hazardous recreational activity known to the public entity or employee that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity out of which the damage or injury arose.
 - (2) Damage or injury suffered in any case where permission to participate in the hazardous recreational activity was granted for a specific fee. For the purposes of this paragraph, a "specific fee" does not include a fee or consideration charged for a general purpose such as a general park admission charge, a vehicle entry or parking fee, or an administrative or group use application permit fee, as distinguished from a specific fee charged for participation in the specific hazardous recreational activity out of which the damage or injury arose.
 - (3) Injury suffered to the extent proximately caused by the negligent failure of the public entity or public employee to properly construct or maintain in good repair any structure, recreational equipment or machinery, or substantial work for improvement utilized in the hazardous recreational activity out of which the damage or injury arose.
 - (4) Damage or injury suffered in any case where the public entity or employee recklessly or with gross negligence promoted the participation in or observance of a hazardous recreational activity. For purposes of this paragraph, promotional literature or a public announcement or advertisement which merely describes the available facilities and services on the property does not in itself constitute a reckless or grossly negligent promotion.
 - (5) An act of gross negligence by a public entity or a public employee which is in the proximate cause of the injury.

Nothing in this subdivision creates a duty of care or basis of liability for personal injury for damage to personal property.

- (d) Nothing in this section shall limit the liability of an independent concessionaire, or any person or organization other than the public entity, whether or not the person or organization has a contractual relationship with the public entity to use the public property, for injuries or damages suffered in any case as a result of the operation of a hazardous recreational activity on public property by the concessionaire, person, or organization.

The Coastal Conservancy is a state agency that works with the people of California to preserve, improve, and restore public access and natural resources along the coast and in the San Francisco Bay Area counties. The Conservancy is funded primarily by bonds authorized by California voters.

CALIFORNIA COASTAL CONSERVANCY
1330 Broadway, 11th Floor
Oakland, CA 94612
(510) 286-1015
web site: www.coastalconservancy.ca.gov

Steve Horn
Executive Officer (Interim)

CALIFORNIA COASTAL COMMISSION
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2229
(415)904-5200
web site: ceres.ca.gov/coastalcomm/

Peter Douglas
Executive Director

The second edition of this technical bulletin was prepared by MARCIA GRIMM and JAMES L. PIERCE and published in 1997. The first edition was prepared by NANCY TAYLOR and GLENN ALEX, and published in 1989.

The discussion of law contained in this technical bulletin is for the purposes of general information only. For legal advice, legal counsel should be consulted.

Designed by Seventeenth Street Studios

This publication is funded by a grant from the National Oceanic and Atmospheric Administration. The views expressed herein are those of the authors and do not necessarily reflect the views of NOAA or any of its sub-agencies.