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APPEARANCES :

Panel Lead: HON. NGUYEN DANG

Panel Members: HON. KENNY GAST
HON. SARA HOSEY

For the Appellant: PAUL ROSENKRANZ,
Representative

SASSAN SALEHIPOUR,
Witness

For Franchise Tax Board: DAVID HUNTER,
Tax Counsel

CIRO IMMORDINO,
Tax Counsel

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1 Los Angeles, California; Thursday, February 21, 2019

2 1:21 p.m.

3
4
5 ADMINISTRATIVE LAW JUDGE DANG: Good afternoon, everyone.
6 Welcome to the Office of Tax Appeals. We are opening the record
7 of the appeal of Joseph Michael, Case 18010927, and this hearing
8 is being convened in Los Angeles. Today's date is February 21,
9 2019. The time is 1:21 p.m. Today's case is heard by a panel
10 of three judges, we will all participate actively in rendering
11 the decision, however, for purposes of conducting this hearing,
12 I will be the lead judge. My name is Nguyen Dang. Also with
13 the panel today is Judge Sara Hosey and Judge Kenneth Gast.

14 At this time, will the parties, please, introduce
15 themselves for the record, beginning with Appellant.

16 MR. MICHAEL: Joseph Michael, I am the taxpayer.

17 MR. ROSENKRANZ: Paul Rosenkranz, CPA and representative.

18 MR. SALEHIPOUR: Sassan Salehipour, technical engineer for
19 the project.

20 ADMINISTRATIVE LAW JUDGE DANG: Thank you. Would you,
21 please, spell your last name.

22 MR. SALEHIPOUR: S-A-L-E-H-I-P-O-U-R.

23 ADMINISTRATIVE LAW JUDGE DANG: Could you, please, let me
24 know if I'm pronouncing it correctly.

25 MR. SALEHIPOUR: That's close, but you can say it however.

1 ADMINISTRATIVE LAW JUDGE DANG: I'll try my best.

2 Franchise Tax Board.

3 MR. HUNTER: David Hunter on behalf of the Franchise Tax
4 Board.

5 MR. IMMORDINO: Ciro Immordino on behalf of the Franchise
6 Tax Board.

7 ADMINISTRATIVE LAW JUDGE DANG: Thank you so much.

8 The issue I have today is whether Appellant has established
9 that 2009 is the proper year to claim his casualty loss
10 deduction, and if so, in what amount.

11 Does that sound correct?

12 MR. ROSENKRANZ: Yes, it does.

13 MR. HUNTER: Yes, it does.

14 ADMINISTRATIVE LAW JUDGE DANG: Prior to the hearing today,
15 the parties indicated they wish to submit as evidence in this
16 case the exhibits that were previously attached to their briefs.
17 The Office of Tax Appeal combined it into a PDF electronic file,
18 hopefully sent to you.

19 Did you receive that file?

20 MR. ROSENKRANZ: I did.

21 ADMINISTRATIVE LAW JUDGE DANG: Thank you. Did you have a
22 chance to review that file?

23 MR. ROSENKRANZ: I did. It seems in good order.

24 ADMINISTRATIVE LAW JUDGE DANG: Any objections to that
25 being admitted into the record?

1 MR. ROSENKRANZ: I do not.

2 ADMINISTRATIVE LAW JUDGE DANG: Mr. Hunter, same question.

3 MR. HUNTER: We've received it; we have no objections.

4 ADMINISTRATIVE LAW JUDGE DANG: Thank you very much. With
5 that being said, this file will now be admitted into the record.

6 (Franchise Tax Board's Exhibits were received
7 in evidence by the Administrative Law Judge.)

8 (Appellant's Exhibits were received in evidence
9 by the Administrative Law Judge.)

10 ADMINISTRATIVE LAW JUDGE DANG: Before we begin with the
11 presentations, I would like to place Mr. Michael and
12 Mr. Salehipour under oath. Please, raise your right hand.

13
14 JOSEPH MICHAEL,
15 called as a witness and having been first duly sworn by the
16 Administrative Law Judge, was examined and testified as follows:

17
18 MR. MICHAEL: I do.

19
20 SASSAN SALEHIPOUR,
21 called as a witness, and having been first duly sworn by the
22 Administrative Law Judge, was examined and testified as follows:

23
24 MR. SALEHIPOUR: I do.

25 ADMINISTRATIVE LAW JUDGE DANG: You may be seated.

1 Are you ready to begin with your opening arguments, you
2 will have 20 minutes.

3 MR. ROSENKRANZ: Thank you. As you said, there's two
4 issues, the year of loss, the Franchise Tax Board asserts it's
5 2007 when Mr. Michael's insurance claim is denied, and we
6 believe it is 2009 when the extent of the loss was finally
7 determined. The second point, as you noted, is the amount of
8 loss. We believe the amount we claimed is correct and, in fact,
9 actually low. We believe it did not include improvements to the
10 property as the Franchise Tax Board asserts.

11 Regarding the year of loss. Los Angeles County experienced
12 severe rain storms during the winter of 2004 and 2005.
13 According to the National Oceanic and Atmospheric
14 Administration, Los Angeles received 33.87 inches of rain for
15 the 12 months ending March 1, 2005, the wettest period on record
16 for 115 years, and more than three times the average rainfall in
17 Los Angeles.

18 On February 21, 2005, coincidentally, 14 years ago today,
19 an oak tree fell on the rear hillside of Mr. Michael's residence
20 on Casiano Road in West Los Angles. This was the first sign of
21 trouble on the hillside. Initially, Mr. Michael was advised by
22 a consultant, Vincent Dyer, that restoring a wood retaining wall
23 near the site of the tree would remedy the hillside problem.
24 This work to restore the old wood retaining wall began in 2007
25 and was completed in 2008 at a cost of \$41,863.00.

1 Mr. Michael submitted a claim for reimbursement for this
2 work with his insurance company, State Farm. State Farm denied
3 the request because the insurance policy excluded damage for
4 land instability, earth movement, and subsurface water. It is
5 the Franchise Tax Board's position, as we understand it, that
6 this insurance denial established 2007 as the year of loss.

7 The problem with the Franchise Tax Board's position is that
8 the damage was not limited to the area immediately surrounding
9 the tree. The entire rear hillside was damaged by the heavy
10 rains and it took until 2009 to determine this. The tree
11 falling was really just a symptom of what turned out to be a
12 very large problem.

13 The action of Los Angeles County Department of Building and
14 Safety supports our belief. LADBS -- the initials -- issued
15 orders to comply in 2005 and '06 to repair the hillside, and
16 they also issued a certificate of substandard property in
17 September 2006.

18 The LADBS rejected the restored wood retaining wall as
19 insufficient to cure this slope problem and, in fact, required
20 that it be demolished. The fallen tree was an easily visible
21 sign of slippage because the majority of the hillside was
22 covered by heavy foliage making it impossible to see the damage
23 that occurred to the entire hillside from the record setting
24 rains in 2004 and '05.

25 As part of that, Mr. Salehipour will present some pictures

1 that will depict the hillsides, they're included in the exhibit.
2 The taxpayer first hired the geological consulting firm Mountain
3 Geology, and the engineering firm Cal West, to determine what
4 work was needed to overcome the LADBS's rejection of the wood
5 retaining wall as a fix for the rear slope. Mountain Geology
6 and Cal West recommended to construct concrete pylons in the
7 area surrounding the falling tree to cure the problem.

8 Permits for this work, however, were never issued by the
9 City because this repair was also deemed inadequate. Mountain
10 and Cal West did not do enough investigation to determine the
11 extent of the hillside slippage and because of this the
12 recommended repairs were limited to the area immediately
13 surrounding the tree. So Sangeo Sciences was then hired and
14 determined, and after two years of testing and numerous
15 correspondences with the LADBS, that the entire hillside had
16 been damaged by the rains, and hence, their recommend repair
17 addressed the entire rear slope.

18 There's extensive documentation in the exhibits of the work
19 that was done, so I'm not going to go into that detail unless
20 you request it. The LADBS issued their geology and soils report
21 approval letter on February 9, 2009, eight months later on
22 October 21, 2009, after five additional geotechnical reports
23 were issued, the final building permit was granted by the LADBS.

24 We have cited cases, specifically, Bailey v. Commissioner,
25 an U.S. v. Barrett, that we believe support our position that

1 2009 was the proper year of loss because this is when the full
2 extent of the damage was determined. A particular note is the
3 U.S. Tax Court's decision in Bailey; this was also a case of
4 soil slippage and the issue was also the proper year of loss.

5 In supporting the taxpayer's position, the taxpayer, citing
6 another case, Boenheim v. Commissioner, said that determination
7 of the year the loss was sustained requires a practical, not a
8 legal, approach, the facts and circumstances of the individual
9 case must be considered.

10 It went on to say in cases involving soil movement,
11 assigning the precise moment when damages occurred may be more
12 difficult. The Franchise Tax Board states our reliance on
13 Bailey and Barrett cases are misplaced. They claim Bailey is
14 wrong because, quote, "In this case, Appellant's claimed loss
15 are for remedial repairs and strengthening the slope as well as
16 for unrelated construction of substantial improvements," end
17 quote.

18 The Franchise Tax Board criticized our reliance on Barrett
19 by stating, quote, "The Barrett case is readily distinguishable
20 from this case because the damage to the Casiano property caused
21 as a result of the fallen tree was neither latent nor uncertain.
22 To the contrary, the extent of the damage caused by the fallen
23 tree was known immediately after the storm in February 2005;
24 however, as the insurance claim was not resolved until 2007,
25 Appellant's casualty loss was not closed and completed until

1 2007," end quote.

2 The statement that the extent of the damage caused by the
3 fallen oak tree immediately after the February 2005 storm is
4 unsupportable based on the evidence in this case. There is a
5 clear body of evidence that the entire hillside was damaged by
6 the heavy rains, not just the area immediately surrounding the
7 oak tree. The principle and unstated in the Bailey and Barrett
8 cases for not claiming a casualty loss until the extent of the
9 loss can determine we should be the bellwether for the
10 taxpayer's claim. We ask that you follow Bailey and use a
11 practical approach in evaluating the evidence we previously
12 admitted and in the testimony you will hear today.

13 Regarding the second issue, the amount of loss. The
14 taxpayer used the Cost of Repairs methods to quantify his loss,
15 which is an acceptable method under Treasury Regulations Section
16 1.165-7. We have repeatedly explained and provided records that
17 show the taxpayer segregated the cost to restore the hillside to
18 its original condition from the cost to improve the property by
19 construction of a large game room.

20 Building of the game room was done solely to obtain the
21 financing for the hillside repair because due to the certificate
22 of substandard property placed in 2006 by the LADBS, it was
23 impossible to finance the property. The total incurred to
24 repair the hillside only was \$794,793.00.

25 When the 2009 return was filed, the loss claimed based on

1 information available at that time was \$590,174.00. Admittedly,
2 the distinction between cost incurred to restore a property to
3 its pre-casualty loss condition versus cost to improve a
4 property is an imprecise determination. Courts have struggled
5 with this distinction in many casualty loss cases. The facts
6 and circumstances of each case must be evaluated as noted in the
7 aforementioned Bailey case.

8 In the present case involving the soil slippage, either you
9 have a stable hillside or you do not. Mr. Michael purchased the
10 house on March 4, 2004. And particularly, because he is an
11 experienced real estate developer, had there been any indication
12 that the rear slope was slipping at that time, he would have had
13 it tested before closing escrow. The tree falling, as
14 previously mentioned, alerted Mr. Michael that a problem
15 existed, the scope of which took four years to determine.

16 Much of the repair work was done underground, and the
17 stripping of all vegetation and trees on the hillside degraded
18 the esthetics of the rear yard. When the work was completed, he
19 had a slope that was comparable to what his neighbors had and
20 what he had prior to the rains.

21 If you take an extremely conservative position and one that
22 we don't agree with, but view the \$214,973.00 he paid to the
23 general contractor for construction of concrete pylons as an
24 improvement, this still leaves a substantial casualty loss to
25 investigate the problem and remove and re-compact the soil

1 required to restore the hillside to its pre-casualty loss
2 condition.

3 We offered strictly as corroborating support to the
4 casualty loss claim, the Los Angeles County Tax Assessor's
5 Office reduction in the property's assessed value by \$541,140.00
6 for the 2009 tax year, which is a 39 percent decline in the
7 assessed value.

8 The reassessment was a result of Mr. Michael submitting an
9 application for changed assessment in 2009/2010 for a calamity
10 reassessment due to slope failure. A 39 percent drop for a home
11 in the hills West Los Angeles is a far greater job that can be
12 attributed to the decline in the real estate market in years
13 2007 and 2008.

14 Again, we are not basing our loss on the Assessor's Office
15 decline in value, we simply offer it as third-party evidence
16 that the property suffered a decline in value due to the
17 slippage of the entire rear hillside. We do acknowledge that
18 under the Cost of Repair methods, all costs must be paid by the
19 time the tax return is filed.

20 Not all costs, however, we're paid when the 2009 return was
21 filed on extension in October of 2010, and because of this, we
22 did file a protective claim for refund for future years to
23 report the loss when everything was paid. Everything was paid
24 by 2011. So that is our summary of, I think, the over 1,400
25 pages of evidence on the exhibits what we felt were the high

1 points. And next, we'd like to turn it over to our expert to
2 discuss a little bit more what was done on the entire hillside,
3 which I failed to mention, was about 15,000 square feet.

4 ADMINISTRATIVE LAW JUDGE DANG: Thank you, Mr. Rosenkranz.
5 Franchise Tax Board, would you like to begin with your
6 opening?

7 MR. HUNTER: Thank you. Good afternoon. This is a
8 casualty loss case. In 2004, Appellant purchased a home with
9 several wood retaining walls on the rear slope of the property.
10 The evidence shows that the slope had last been graded in 1963.
11 In 2005, after a heavy rain storm, the wood wall failed and the
12 Appellant was subsequently ordered by the City of Los Angeles to
13 eliminate the slope failure. This called for Appellant to make
14 improvements to his hillside.

15 First, Appellant rebuilt a wood retaining wall to replace
16 the one that existed before. He just said it cost \$41,800.00.
17 In casualty loss cases, the year of loss is a threshold issue.
18 It's a big deal. The loss generally can only be deducted during
19 the proper year, and if the proper year is not before year,
20 there is no need to address the merits of the claimed casualty
21 loss redirection. If the taxpayer suffers a casualty, and a
22 claim for reimbursement exists with respect to the casualty, and
23 it becomes clear that there's no reasonable prospect of
24 recovery, the casualty loss deduction can only be claimed in the
25 year it's ascertained with reasonable certainty whether or not

1 such reimbursement will be received.

2 In 2007, Appellant was notified by his insurance company
3 that he would not be compensated for his cost to restore the
4 wood retaining wall, the wood retaining wall that existed when
5 he bought the house. This fixed the year of loss for tax
6 purposes of 2007, and Appellant's cost to replace this wood
7 retaining wall was \$41,000.00. Because Appellant did not report
8 this casualty loss in the proper tax year 2007, the work on the
9 wall was completed in 2008, plenty of time to amend that 2007
10 return, Respondent's action must be sustained on this basis
11 alone.

12 Additionally, instead of stopping at the \$41,000.00 cost to
13 replace the wood retaining wall that existed on the property
14 pre-casualty when he bought it, and in 2005 when we had this
15 rain storm, the rain storm that was referred to, Appellant also
16 included costs in calculating the casualty loss deduction to
17 make substantial constructional improvements to the slope,
18 constructed a retaining wall along the east of the hillside,
19 constructed another retaining wall or brick wall at the entire
20 rear of the property, constructed foundation support for a fully
21 enclosed recreation room complete with a concrete sports deck.

22 These structures, they came to light -- they were
23 constructed, and you need support for these structures and
24 that's how these were done. None of this even existed when the
25 Appellant purchased the property in 2004, or the day before this

1 rain storm took place. Simply put, you can't lose what you
2 never had. Appellant claimed a casualty loss in 2009, which is
3 not only the incorrect year and independently disposes of this
4 appeal, but in the amount of \$590,000.00, which is far, far
5 beyond the cost to replace the wood retaining wall that existed
6 prior to the rain storm. Whether the City of Los Angeles
7 ordered the Appellant to do the improvements or not, they are
8 improvements that do more than restore the property to its
9 pre-casualty state and nondeductible capital expenditures.

10 As we hear the testimony in this case, I want this panel to
11 keep two concepts in mind. We are dealing with Internal Revenue
12 Code Section 165, in a casualty loss. That is meant to
13 compensate the taxpayer for a loss of property in which they had
14 a prior basis in that they paid for before that existed and
15 that's deductible during the year, the proper year of loss,
16 anything else is an improvement that adds to the taxpayer's tax
17 basis.

18 When you take a casualty loss deduction under 165, the
19 first thing that taxpayers are advised to do is get an
20 evaluation and appraisal by someone that's certified, so you can
21 value the decline of the property immediately and after the loss
22 took place. That didn't happen here. So when a taxpayer
23 reverts to the Cost of Repair method, you have to play by the
24 rules. You cannot deduct anything that improves the property or
25 gives you something that was not there before.

1 So I'll say this, I'm not adding anything to the legal
2 analysis, but it really should be seen as a Cost to Replace
3 method because if you had something before you lose it due to a
4 sudden and unexpected event, then the Cost of Repair method is
5 replacing what you had before, not a Cost to Upgrade method.
6 It's not a cost to upgrade the hillside slope from 1963 Building
7 Code to 2007 Building Code method, it's a method in which you
8 calculate the diminution and the fair market value.

9 Also, gradual hillside slippage, anything that's been going
10 on for years, is not a sudden and unexpected event. One day you
11 have a wood retaining wall and the next day you don't, that's
12 pretty sudden, but not a 40-year time frame.

13 Saying all of that, Respondent is correct in disallowing
14 the Appellants claim of casualty of loss because, A, it was
15 claimed in the improper year in 2009, and two, it is based on
16 costs Appellant incurred to construct substantial improvements
17 to his property. These improvements are capitalized and added
18 to his tax basis. Thank you.

19 ADMINISTRATIVE LAW JUDGE DANG: Thank you, Mr. Hunter.

20 Appellant, Mr. Michael, I believe you will be going first.
21 It's up to you.

22 MR. SALEHIPOUR: Good afternoon.

23 ADMINISTRATIVE LAW JUDGE DANG: Good afternoon.

24 MR. SALEHIPOUR: When I stepped into this project as a
25 consultant, I'm supposed to provide recommendations for the

1 Department of Building and Safety Grading Division, that they
2 can approve, number one; and number two, when it's approved,
3 when it's implemented, they can remove the substandard tag that
4 the house, the property received. So I was hired to follow the
5 repair process and provide different steps for the Department of
6 Building and Safety Grading Division.

7 The first things that my company did, we explored the
8 extent of the failure, the falling tree was just a symptom. The
9 area -- I included some aerial photos that you must have in your
10 records that shows the property in 2004/2005 and several years
11 in a row, and you can see that before this rain storm, the slope
12 was completely covered with trees and shrubs and it was very
13 difficult to even walk on the slope.

14 The first thing I did, I went and looked at the extent of
15 the slippage and the slope failure. The Department insisted on
16 that, that's their job. When I say "Department," the Department
17 of Grading Division of Building and Safety. We did several
18 investigations to determine the extent of the failure because
19 our job is to get rid of and correct the failure before the
20 owner can get the substandard tag on his property removed. That
21 took a while. I believe we submitted at least five
22 investigative reports to the Department.

23 Eventually, we received the approval, and that approval
24 requires certain steps to be taken. You cannot leave -- you
25 cannot bring the slope back to its original condition if the

1 original condition doesn't meet the code. They simply don't
2 allow you to go forward. You cannot do it unless you follow
3 certain steps, and that's what we did. Eventually, we got an
4 approval from the Department and we provided the approval to the
5 structural engineer and came up with set of plans and the plans
6 were implemented and the City finally removed the substandard
7 tag from the house. Now, from the property.

8 If there are any more detailed questions, I will be more
9 than happy to answer, but that was a quick synopsis.

10 ADMINISTRATIVE LAW JUDGE DANG: Thank you, Mr. Salehipour.
11 Will that conclude your testimony for today?

12 MR. SALEHIPOUR: Yes.

13 ADMINISTRATIVE LAW JUDGE DANG: Franchise Tax Board, do you
14 have any questions for Mr. Salehipour?

15 MR. HUNTER: I have a couple of questions.

16 ADMINISTRATIVE LAW JUDGE DANG: Please, proceed.

17 Mr. Salehipour, is it correct that you were retained by
18 Appellant to inspect this subject property at issue in this
19 case?

20 MR. SALEHIPOUR: Yes.

21 MR. HUNTER: When were you retained?

22 MR. SALEHIPOUR: 2008.

23 MR. HUNTER: Okay. Did you review any reports in terms of
24 performing your analysis and preparing your report?

25 MR. SALEHIPOUR: Yes, I did.

1 MR. HUNTER: Do you recall the date of the earliest report
2 that you reviewed in compiling your report?

3 MR. SALEHIPOUR: Yes.

4 MR. HUNTER: How early was that?

5 MR. SALEHIPOUR: They were before my involvement, but I do
6 not memorize the exact dates.

7 MR. HUNTER: Did you have occasion to visit the property at
8 issue in this case in 2004 when Appellant purchased the house?

9 MR. SALEHIPOUR: No.

10 MR. HUNTER: Did you have the opportunity to inspect the
11 property before this rain storm took place in 2005?

12 MR. SALEHIPOUR: No.

13 MR. HUNTER: Were you there after it stopped raining after
14 this rain storm in 2005?

15 MR. SALEHIPOUR: No.

16 MR. HUNTER: I don't have any further questions.

17 ADMINISTRATIVE LAW JUDGE DANG: Thank you, Mr. Hunter.
18 Panel members, Judge Hosey, do you have any questions?

19 ADMINISTRATIVE LAW JUDGE HOSEY: No.

20 MR. HUNTER: Judge Gast?

21 ADMINISTRATIVE LAW JUDGE GAST: I just have one question.

22 You said you were retained in 2008 and you looked at a
23 prior report that was done by the City.

24 MR. SALEHIPOUR: Yes. I am obligated to review all the
25 previous reports and either I concur with the findings or not.

1 We have to put that writing to the City, to the Grading
2 Division, to tell them that we agree with everything or there
3 are items that we do not agree with. In order to do that, we
4 have to do some limited investigation in addition to the work
5 that we reviewed. And after that, we come up with another
6 report, we submit it to the Department, and they can review it,
7 accept it, or they can ask more questions.

8 ADMINISTRATIVE LAW JUDGE GAST: Okay. So your role is to
9 basically figure out the extent of the damage, in terms of how
10 to repair it?

11 MR. SALEHIPOUR: That is correct. A little more than that.
12 First, my role was to review the existing documents, then I
13 should either agree or disagree with them. And then if I
14 disagree with them, I have to give a reason why, and then I have
15 to issue a report to the City, to the Department, and they can,
16 at the time, review my reports. They have the option of
17 accepting it or asking more questions, and that's what they did.

18 ADMINISTRATIVE LAW JUDGE GAST: Okay. No further
19 questions.

20 ADMINISTRATIVE LAW JUDGE DANG: Okay. I don't have any
21 questions either.

22 Mr. Michael, if you're ready?

23 MR. MICHAEL: If I could just explain a bit of the
24 background, I think it would be helpful because I think this is
25 a very simple issue that is somewhat confused because the

1 Franchise Tax Board's lack of physically being to the property
2 and experiencing what I actually experienced.

3 So I purchased a property in 2004 and it's 22,000 square
4 feet of land area, 7,000 square feet flat, the remaining 15,000
5 square feet is on a slope. The slope, from the flat part to the
6 lower portion of the parcel, there's a 70-foot drop. It's more
7 than a seven-story building, so it's very steep. It was heavily
8 covered with trees, multiple oak trees, and protected trees and
9 that's how it was. It was not really usable because it was
10 heavily sloped.

11 So less than a year later, February 21, 2005, an oak tree
12 fell. The oak tree falling, the roots -- basically, it toppled.
13 The area when the roots -- when it toppled, the area of the
14 hillside that it took with it was roughly five feet by five
15 feet, or seven feet by seven feet maximum, where the roots of
16 that oak tree were. And in front of the oak tree was two sets
17 of retaining walls that were three feet high made out of
18 railroad ties.

19 So as the tree fell down, the three-foot retaining walls
20 that were made of railroad ties -- and I have pictures -- it
21 fell and made those drop. So yes, I reported this to State
22 Farm, but if you look at the State Farm response, it
23 specifically is to the February 21 tree failure claim, not of
24 the entire hillside that they denied.

25 The area that was damaged, again, was 49 square feet at the

1 max, with restoring the retaining walls that existed, the wood
2 retaining walls. What eventually happened, and it took until
3 2009 when the permit was issued, they did not make me restore
4 the area in question, which is about 49 square feet, 50 square
5 feet in area, they made me restore 15,000 square feet, my entire
6 slope, the entire downhill slope that was 70 feet of the drop
7 had it be restored.

8 I heard the gentleman from Franchise Tax Board said I've
9 improved, and there's no such thing as improving, it's either
10 you have a condition that is called "Slope failure," where they
11 recorded a certificate on my property. It's a matter of public
12 record that this property has a slope failure and it's recorded
13 and/or, when it's restored, they record another document that
14 this is corrected.

15 That recordation did not take place, I could not get it off
16 my property. You could not finance it, you cannot sell it, you
17 could not do anything with this recorded on your property, until
18 the work that was done, based on the 2009 permit, which is when
19 the City finally got their arms around it, based on
20 Mr. Salehipour's reports, as forcing me to restore the entire
21 hillside. They made me export all the, basically, hillside and
22 import new dirt and re-compact it. And the process, if you can
23 imagine, you cannot just do something like this just like that
24 because there's a house -- the street right below -- there's
25 Casiano on the top, 70 feet of drop, then there's 70 feet that

1 continues to the next street, Moraga, there's 140 feet of drop
2 of this entire hillside, so they make you protect your
3 surrounding homes by shoring it, then they make you remove the
4 dirt and then they make you restore it. Okay. It's a very
5 complicated, extensive project that cannot happen just like
6 that.

7 And as a process -- the Franchise Tax Board is correct,
8 they made me put caissons that went 40 feet in depth underground
9 to the bedrock protecting, several portions of this hillside, in
10 order to stabilize it. So this was not known until -- because
11 the area that I claimed, which State Farm denied was 49 feet,
12 and restoring the wood retaining wall, which I did put in and
13 they made me demolish them afterwards because they did not
14 accept the repair, was the entire hillside at a cost of over
15 \$700,000.00.

16 And I'd like to make another important distinction because
17 the gentleman -- I apologize. I did not hear your name
18 properly.

19 MR. HUNTER: Hunter.

20 MR. MICHAEL: He said that I have improved my property, and
21 I should not have been allowed -- what existed and what did not
22 exist -- but there were two separate spreadsheets presented to
23 the Franchise Tax Board, one totaled \$700-plus thousand dollars,
24 which is slope failure, all these retaining walls,
25 import/export, consulting fees, whatever I did, and the other,

1 the game room, that was a force majeure method because I could
2 not get any bank or any lender to finance the repair of my slope
3 because of the certificate of slope failure, I tried. Nobody
4 would give me money to do this job. The only way I could --
5 because concrete underground is not worth anything to the next
6 buyer, all I have accomplished by doing this restoration job is
7 I made the property equal to the two homes next to me.

8 After restoring it, I'm in no better position because those
9 homes on both sides of me, they never failed. They never had
10 slope failure, so I was only able to restore it to my neighbors'
11 levels. So in order to get my financing, as a result of these
12 caissons, rows of caissons, the City made me -- and they're
13 pictures that are part of the --

14 ADMINISTRATIVE LAW JUDGE DANG: Just to make sure we are
15 looking at these pictures correctly, the slope is declined
16 towards the property?

17 MR. MICHAEL: No.

18 ADMINISTRATIVE LAW JUDGE DANG: It's going away, and then
19 there's a 70-foot drop and then there's that street at the
20 bottom.

21 MR. MICHAEL: No, there's a residence. The residence on
22 Moraga has a 70-foot slope going up to where my property line so
23 they go 70 feet uphill and I go 70 feet drop downhill. The
24 parcel -- if I could explain -- they have about a hundred feet
25 of frontage, 200 feet of depth. Two-thirds of the depths is a

1 slope, all of the parcels on Casiano have this and the Moraga
2 parcels have the same, they have a hundred feet of frontage and
3 200 feet depth and 70 feet elevation.

4 ADMINISTRATIVE LAW JUDGE DANG: Thank you.

5 MR. MICHAEL: So the fact is, yes, I did have a failure, a
6 tree fell, I claimed it. If you look at the State Farm letter
7 it refers to that February 24th event of an oak tree falling
8 bringing down the three-foot railroad ties, but that was not
9 acceptable. It was unknown until the City, actually, in
10 February of 2009, or March 2009, approved Mr. Salehipour's
11 report and then it took me until October to pull a permit. It's
12 a lot of steps you have to go to actually pull a permit based on
13 his report. You have to get Urban Forestry approval. It was
14 very complicated. So you have to go through many steps. So
15 until 2009, when the City had their arms around it, based on
16 invasive investigations of the 15,000 square feet, not the area
17 where the tree fell, they made a determination this entire slope
18 has failed. And two spreadsheets. And they have asked me for
19 backup invoices and checks as they wished, and I provided
20 backups on every little item. They are segregated. One is
21 slope failure, one is improvement. The improvement force
22 majeure because when I went to get financing, I had to show that
23 I made something, which is the slope failure was caissons going
24 40 feet deep, two rows of them, and the City made me collect
25 them on two levels, one on the top and one on the bottom so they

1 don't move. When I connected it at the top and the bottom, I
2 created an enclosed area, back of it is retaining wall on
3 caissons, and the front rows -- and have pictures of that, I'm
4 sure you have seen it. So I technically had an enclosed box
5 that I had to just put windows and make it into the game room.

6 They are correct. I have the accounting for that for a
7 million dollars, and I was able to finance the whole thing, the
8 entire property was purchased less than a year before for
9 \$1,260,000.00. After I got my permit, my neighbors down below
10 sued me, my neighbors next door to me sued me, everybody sued
11 me. Believe me, if I knew I had an issue, I wouldn't have
12 bought this property.

13 I didn't buy the property to get sued and have a
14 certificate recorded against me. And it was absolutely unknown
15 until everybody knew what happened to me. Nobody knew. The
16 hillside was covered for years. You would never know. Nobody
17 knew. And what I did, which is a waste of money, they made me
18 demolish the \$41,000.00 of retaining wall -- and I have pictures
19 of what I built -- instead of two rows, I built three rows per
20 their recommendation. The City said, Demolish it, and I did, so
21 it was force majeure.

22 At the end of the day, after everything was done, they did
23 record when the project was over -- removing the certificate of
24 substandard against my property. So after that was done, the
25 property, for the first time, become marketable. I couldn't

1 finance it or sell it otherwise, I could not.

2 ADMINISTRATIVE LAW JUDGE DANG: Thank you, Mr. Michael,
3 will that conclude your testimony?

4 MR. MICHAEL: Yes.

5 ADMINISTRATIVE LAW JUDGE DANG: Mr. Hunter, do you have
6 questions for Mr. Michael?

7 MR. HUNTER: I do, yes. I have a couple of questions. And
8 in terms of that, Judge Dang, I'd like to ask this Panel's
9 permission to do something because the record is over 1,200
10 pages. We are visual people, and in trying to describe the
11 situation -- the railroad ties and caissons -- evidence was
12 submitted into the record, photos, and they are attached to our
13 opening brief. So instead of blow ups and anything like that, I
14 made copies, and I'd like to pass a copy to each of you and also
15 to Appellant and Mr. Rosenkranz and Mr. Salehipour, if possible.

16 ADMINISTRATIVE LAW JUDGE DANG: Certainly.

17 Please, proceed when ready.

18 MR. HUNTER: Okay. First, Judge Dang, these are all in the
19 record. There's no surprise here. What I did is I tried to
20 lighten up an exhibit that's referred to as Bates-stamped page
21 919.

22 Mr. Joseph?

23 MR. JOSEPH: Yes.

24 MR. HUNTER: Mr. Salehipour testified this afternoon that
25 the slope had some vegetation on it and it was hard to access

1 some areas. Would you agree with that statement?

2 MR. MICHAEL: You could access it. There were wood
3 stairwells made out of retaining railroad ties that went
4 partially downhill, the rest could not. It's a 70-foot drop,
5 but I guess you can access it. It's not impossible to access.
6 Not easy, but you can do it.

7 MR. HUNTER: Okay. This picture comes from my Department's
8 audit file. If you turn to the second page.

9 MR. MICHAEL: This one?

10 MR. HUNTER: The second.

11 MR. MICHAEL: Yes.

12 MR. HUNTER: That's the best one we have. My audit file
13 says this was the state of the Casiano property when you
14 purchased it, and it's the only aerial view I know of unless you
15 took a drone over your own property. Does this look about
16 right?

17 MR. MICHAEL: If I could give you a better picture and show
18 the Panel a better picture from color. It's blurry. It's an
19 exhibit, it's in color. If I present it, it might be easier to
20 understand.

21 ADMINISTRATIVE LAW JUDGE DANG: Yes.

22 MR. HUNTER: Okay. I know what picture you're speaking of.
23 When was this picture taken?

24 MR. MICHAEL: This was taken before the project started,
25 September of 2009 -- October 9th of 2009.

1 MR. HUNTER: Okay.

2 MR. MICHAEL: May I?

3 ADMINISTRATIVE LAW JUDGE DANG: Yes. She'll assist you.

4 MR. MICHAEL: It was after the \$41,000.00 repair -- so part
5 of the wood retaining walls are backfilled and compacted. Is
6 that the area that was repaired?

7 MR. HUNTER: Okay. I have another question for you,
8 Mr. Michael. So in the second stapled group of pictures I
9 handed to you, this is the new wood retaining wall with the
10 railroad ties -- strike that.

11 Let's make sure we're on the same page.

12 MR. MICHAEL: Let me -- yes. This is exactly right.
13 That's the retaining walls that I constructed in 2008 to restore
14 the ones that failed. That is correct.

15 MR. HUNTER: Okay. Now, is that addressing the seven foot
16 by seven foot, overall 49 square foot, area?

17 MR. MICHAEL: Behind the retaining walls is where the
18 failure occurred, where the roots of the trees were. Yes,
19 that's approximately correct.

20 MR. HUNTER: Approximately correct or correct?

21 MR. MICHAEL: Correct. It's 100 percent behind the
22 retaining walls. What I did is I removed the old retaining
23 walls, rather two rows, I built three rows; rather than two
24 feet, I made them five feet and I put a foundation underneath
25 the walls so that they are extremely stable. So what you're

1 looking at is three rows of retaining walls after the trees and
2 everything were removed, that picture that you're looking at,
3 and that was done. But it was ordered by the City for me to
4 demolish what I did to repair the slope, correct.

5 MR. HUNTER: Okay. When you purchased the property, did
6 you order a soils report at that time?

7 MR. MICHAEL: No.

8 MR. HUNTER: A geotechnical engineer report?

9 MR. MICHAEL: No.

10 MR. HUNTER: What did you do to inspect the rear slope of
11 the property in terms of any flood or drainage issues when you
12 purchased the property?

13 MR. MICHAEL: I'm an experienced real estate person. I've
14 been doing real estate all my life, and I did what any typical
15 buyer would do, I had an inspection, mold report, looked at that
16 residence, look at everything. All these homes on Casiano are
17 very similar frontage, it was a subdivision when it was done, it
18 was pretty much similar. So there was nothing that I thought
19 was necessary for me to do. It looked perfect, stable, and
20 right.

21 So I did what any buyer would do, and approved my
22 contingencies because there was nothing wrong. It was a 1960s
23 house, 3,000 square feet. I did my inspection and I approved
24 it, but I did not do a geotechnical, it was not necessary.

25 MR. HUNTER: Who told you it was not necessary?

1 MR. MICHAEL: I had real estate brokers that represented
2 me, and I am experienced myself. I did not -- you just don't
3 think of doing a geotechnical report for buying a house that's
4 7,000 square feet is useable, the rest is not. The 15,000
5 square feet of area was not usable, so I did not see any reason
6 to do anything beyond making sure the 7,000 square feet is
7 acceptable and structure. Basically, the focus was the house.

8 MR. HUNTER: Okay. If you could turn to the final group of
9 photographs here. They are Bates stamped 935, Exhibit F to
10 Respondent's opening brief.

11 MR. MICHAEL: Okay. Yes, this one.

12 MR. HUNTER: Yes, sir.

13 MR. MICHAEL: Okay. Yes, on this page at the bottom.

14 MR. HUNTER: Okay. It looks to be a plan.

15 MR. MICHAEL: Yes.

16 MR. HUNTER: At the bottom of this page on the right-hand
17 side, there is a Section B-B, it looks like a cutaway of a hill
18 side. Do you see that?

19 MR. MICHAEL: Yes.

20 MR. HUNTER: Now, it also looks like a bit of a triangle
21 where the slope is going down into the neighboring property; is
22 that correct?

23 MR. MICHAEL: No, that's not the continuing neighboring
24 property. That depicts -- if you look at that box in the middle
25 of the page, this box. If I could show you.

1 MR. HUNTER: I see it.

2 MR. MICHAEL: So it depicts the portion below that box that
3 are the caissons that -- these caissons were put in, 10 of them,
4 10 and 10, there's 20 caissons that go 40 feet deep that are
5 underground. So that is the area that this is showing right
6 here. And the section, the triangle below, is still my parcel
7 beneath caissons.

8 MR. HUNTER: I understand. Okay.

9 If you turn the page, look at the next two pages. I'm at
10 Bates stamp 926 and 927.

11 MR. MICHAEL: Yes.

12 MR. HUNTER: Is this an accurate depiction of how the
13 Casiano Road property exists today?

14 MR. MICHAEL: 926 and 927? Yes, it is approximately how it
15 looks like today, give and take. It's hard to see these
16 pictures. I would say this is approximately how it looks like
17 today, but it's hard for me to tell.

18 MR. HUNTER: I apologize. This picture had been printed
19 out and scanned and copied.

20 MR. MICHAEL: It's about right.

21 MR. HUNTER: So what is that at the back of your house,
22 behind the pool?

23 MR. MICHAEL: Behind the pool, that's the top of what you
24 want to call a game room, and what was a mandatory requirement
25 for me to enclose the row of 20 caissons that went across the

1 property. I was forced -- maybe Mr. Salehipour can explain this
2 better than I can.

3 MR. SALEHIPOUR: When you have a slope failure, it will
4 look like a wedge, a circular wedge. Here's the surface and
5 this is the wedge that moves. In order to stop this wedge from
6 moving, you put a couple of rows of caissons perpendicular to
7 the direction of the flow. You put usually one in the middle,
8 one near top, and in this case, one at the bottom.

9 So what you are looking at is the space between the upper
10 two rows of caissons. If you have two rows of caissons, it is a
11 smart thing to create some use of out it because you have to put
12 the caissons anyway to fix the slope. To fix the slope, you
13 have to put the caissons. Now you have the caissons, which is a
14 tremendous support naturally and the support vertically. It's
15 only a good thinking to make use out of it. Understand, again,
16 I'm not an attorney here. Understand the reason Mr. Michael did
17 that was to make the deal sweet for people who were going to
18 give him the loan. He could have left it blank.

19 MR. MICHAEL: Can I provide this for you to see exactly?
20 This is a better picture. So the 7,000 square feet being flat,
21 okay -- the 7,000 square feet being flat, immediately when the
22 slope went down, there's a row of caissons, basically, the
23 entire -- 80 feet of the 100 feet of the property width has one
24 row of caissons and retaining wall holding the flat part of the
25 house. So if there is a retaining wall and ten caissons, which

1 is holding this flat part of the house so it doesn't move any
2 more, then there is another row of caissons in front of that and
3 what I understand structurally because ENA was the structural
4 engineer, Mr. Salehipour was the geotechnical engineer, because
5 these rows of caissons, being in the dirt for earthquake and
6 other reasons, you need to connect them because the movement
7 between them, so they don't move.

8 So once you connect them at the bottom and then you connect
9 them at the top, then you created a box that doesn't move. And
10 you've created an enclosure, absolutely correct. And out of
11 that, we labeled it a game room, and we built a game room, that
12 enclosure, that is there, but that cost is segregated.

13 ADMINISTRATIVE LAW JUDGE DANG: Mr. Michael, I appreciate
14 your detailed explanation, but I believe you answered
15 Mr. Hunter's question. Please, limit your responses to answer
16 his questions. But I appreciate the additional detail.

17 MR. MICHAEL: There's a lot of emotion involved. I
18 apologize.

19 ADMINISTRATIVE LAW JUDGE DANG: I understand.

20 Mr. Hunter, do you have anymore questions?

21 MR. HUNTER: Two last questions, Mr. Michael. So this game
22 room, this structure that you speak of, give us the dimensions
23 of the game room.

24 MR. MICHAEL: It's 80 feet in width, the caissons are 80
25 feet, I believe, by 25 feet, rough estimation.

1 MR. HUNTER: Did you get a certificate of occupancy for
2 this structure?

3 MR. MICHAEL: I did.

4 MR. HUNTER: How many square feet, livable square feet?

5 MR MICHAEL: It's 25 by 80, so less than 2,000 square feet.

6 MR. HUNTER: If you could turn to the last of the group of
7 pictures I presented to you and the panel, beginning with 928
8 and it ends with 935. Just stop and take a look at these
9 pictures. Familiarize yourself with these pictures.

10 MR. MICHAEL: Yes.

11 MR. HUNTER: Do these pictures depict the construction that
12 took place at the rear slope of the Casiano Road property?

13 MR. MICHAEL: Yes, it does. Correct.

14 MR. HUNTER: Are you living at the property now?

15 MR. MICHAEL: No.

16 MR. HUNTER: Who is?

17 MR. MICHAEL: My parents.

18 MR. HUNTER: When you purchased the property, did the rear
19 slope of the property have any caissons?

20 MR. MICHAEL: No.

21 MR. HUNTER: When you purchased the property, did it have a
22 retaining wall or any sort of retaining walls that existed?

23 MR. MICHAEL: Anywhere on the parcel, or in the sloped
24 area?

25 MR. HUNTER: In the sloped area.

1 MR. MICHAEL: No.

2 MR. HUNTER: As a result of this construction, are there
3 now brick concrete retaining walls that have a rebar foundation
4 to assist with shoring up the hillside?

5 MR. MICHAEL: There's no brick, there are numerous
6 retaining walls at the perimeter of the parcel. The entire
7 perimeter of the parcel has retaining walls, and in the middle,
8 there are, as depicted in the picture, retaining walls and
9 caissons, as the City was requiring us to install.

10 MR. HUNTER: Made of what?

11 MR. MICHAEL: Concrete and steel.

12 MR. HUNTER: Did these concrete and steel walls exist when
13 you purchased the property?

14 MR. MICHAEL: No.

15 MR. HUNTER: Did they before the rain storm?

16 MR. MICHAEL: No.

17 MR. HUNTER: I have nothing further, Judge Dang.

18 ADMINISTRATIVE LAW JUDGE DANG: Thank you very much,
19 Mr. Hunter.

20 Panel members, Judge Gast, do you have any questions?

21 ADMINISTRATIVE LAW JUDGE GAST: Yeah. I have maybe one or
22 two. Just so I'm clear on the facts, so in February 2005 you
23 had this slope failure and you had the City come out to
24 basically tell you to fix the problem, at that point in time
25 what was the extent -- did you know the full extent of the

1 damage at that time?

2 MR. MICHAEL: Absolutely not. I only had one tree that
3 fell, only one oak tree that fell. I had no idea it fell, the
4 neighbors called the City. I had no idea. It was way down
5 there and I didn't even see it. As a result, the railroad tie
6 retaining walls that were there fell.

7 ADMINISTRATIVE LAW JUDGE GAST: So you are saying it wasn't
8 until 2009 -- I guess in the intervening years you had more
9 inspections and you were told to redo what you had done, more
10 repairs, why didn't you know in 2005? Was that because there
11 was subsurface damage you couldn't tell at that point until you
12 started the repairs?

13 MR. MICHAEL: Yes. They had to do invasive geotechnical
14 testing, take the soil samples to the lab. They would do one
15 and the City would require more. We would do another one and
16 they City says, No, I want one at the bottom of the hill. So
17 there was numerous subsurface testing that was done, and that
18 testing disclosed that the entire hillside had failed, and not
19 just limited to where the tree failure was.

20 ADMINISTRATIVE LAW JUDGE GAST: Was that attributable to
21 2005, or was that continuing, you know, damage through the
22 years?

23 MR. MICHAEL: I cannot answer you. All I can tell you is
24 that in 2005, the limit of the slope failure was that tree
25 failure that occurred. So until Mr. Salehipour did multiple

1 testing and reports -- and everybody from the City was involved
2 because the neighbors were involved. It was at that time after
3 all of this testing was done, the entire slope had failed and
4 you have to repair the whole slope, which was not until 2009.

5 ADMINISTRATIVE LAW JUDGE GAST: So it took four years to
6 figure that out?

7 MR. MICHAEL: Absolutely.

8 ADMINISTRATIVE LAW JUDGE DANG: I'm sorry. You don't mind
9 if I jump in. Just a small clarification following Judge Gast's
10 question. The report you're speaking of today, the invasive
11 testing, the report that reported the slope failure result, did
12 that report attribute the slope failure directly to the rain
13 fall in 2005, or did it merely mention that the slope had failed
14 and it required additional measures to shore it up?

15 MR. MICHAEL: If I could give you based on my -- I'm not an
16 engineer. But all we were able to realize in 2009 when the
17 report was finally approved is that the slope had failed, so the
18 tree was the starting point that caused more testing that was
19 required that disclosed those facts.

20 MR. IMMORDINO: Can we point out that the 2010, the
21 geotechnical report, that's Appellant's F, July 11, 2016 brief,
22 that states the landslide that occurred in 2005 was limited to
23 the central portion of the property.

24 ADMINISTRATIVE LAW JUDGE GAST: What page is that?

25 MR. IMMORDINO: This is on page 3 of the geotechnical

1 report, 2010. And this goes to the point of you have this
2 generally unstable hill, but damage -- it wasn't destroyed, the
3 entire hill, you had this hill that had been there since the
4 1960s and hadn't been touched, and we are looking at what
5 happened with the water, hill slides of the water, and this
6 report kind of contradicts that this failure happened the first
7 time in 2005 as opposed to, you know, what had happened between
8 1960 and the time of the event.

9 MR. HUNTER: Also, the reports from Mountain Geology, it
10 does reference that there was evidence of prior landslide
11 slippage when that report was prepared, it was after the rain
12 storm, so it could have been from the rain storm or years and
13 years, but that was the point that was being made.

14 ADMINISTRATIVE LAW JUDGE DANG: Judge Gast, did you have
15 any further questions?

16 ADMINISTRATIVE LAW JUDGE GAST: No, I think that's it.

17 ADMINISTRATIVE LAW JUDGE DANG: Judge Hosey?

18 ADMINISTRATIVE LAW JUDGE HOSEY: So the wood retaining wall
19 that failed, so you had to -- was it two stages?

20 MR. MICHAEL: The original February 2005 failure of the
21 tree caused the retaining walls to fail, and the picture you're
22 looking at is what I constructed in 2008 to try to get the City
23 to allow this -- yes, and they said no.

24 ADMINISTRATIVE LAW JUDGE HOSEY: Then the steel with the
25 concrete had to happen?

1 MR. MICHAEL: Correct. After they would not accept that
2 and ordered me to demolish, then I do what I have to do.

3 ADMINISTRATIVE LAW JUDGE HOSEY: Were your neighbors
4 affected?

5 MR. MICHAEL: No. Both neighbors are 100 percent, no
6 failure.

7 ADMINISTRATIVE LAW JUDGE HOSEY: They were tested and they
8 were fine?

9 MR. MICHAEL: Only this parcel had the issue. For I can
10 say I'm the lucky buyer of this house and unlucky buyer of this
11 house; both at the same time.

12 ADMINISTRATIVE LAW JUDGE HOSEY: Thank you. That's all.

13 MR. MICHAEL: Can I ask Mr. Salehipour to respond to one
14 point?

15 ADMINISTRATIVE LAW JUDGE DANG: Sure.

16 MR. SALEHIPOUR: One thing that we have to do when we
17 investigate any site, we have to look into the records and find
18 out what was there before for that and the surrounding
19 properties. This property was in a track and this lot was
20 developed in the early 1960s. And that time, the entire
21 hillside, including this one and 30 to 40 other ones, were
22 graded. When they graded it, the entire slope had a certain
23 slope, certain grading.

24 The failure that was mentioned earlier was in one of the
25 neighboring properties and it was very limited. And we have to

1 bring it to the attention of the Department, otherwise they tell
2 us we didn't do our homework right. So the failure is correct,
3 it was on that slope on the track, not on this specific lot; it
4 was about one or two lots away. There was a small failure and
5 they repaired it 20 years ago or 30 years before this event.

6 ADMINISTRATIVE LAW JUDGE DANG: Thank you.

7 Mr. Hunter, Franchise Tax Board, since Mr. Salehipour has
8 continued with his testimony, I'd like to give you an
9 opportunity to ask questions.

10 MR. HUNTER: I don't need to ask any more questions.

11 ADMINISTRATIVE LAW JUDGE DANG: Any response?

12 MR. HUNTER: That particular statement is being used in
13 support of their position, and I'm fine with the testimony I
14 just heard.

15 ADMINISTRATIVE LAW JUDGE DANG: Okay. Thank you. Judge
16 Hosey, do you have any further questions?

17 ADMINISTRATIVE LAW JUDGE HOSEY: No, thank you.

18 ADMINISTRATIVE LAW JUDGE DANG: Judge Gast has one
19 additional question.

20 ADMINISTRATIVE LAW JUDGE GAST: Just going to 2007, the
21 denial of the insurance claim, that was because of subsurface
22 damage?

23 MR. MICHAEL: The insurance company wrote me that my policy
24 does not cover slope failures or earth movement, and what is
25 very critical is that if you look at the insurance company

1 letter, which is hopefully part of the exhibit, it's precisely
2 referring to the February 2, failure, it doesn't address the
3 entire hillside, it is that, and that is the only thing they
4 address in 2007.

5 ADMINISTRATIVE LAW JUDGE GAST: Okay. So the insurance
6 company knew there was damage below the surface stemming from
7 the slope failure?

8 MR. MICHAEL: From the tree failure.

9 ADMINISTRATIVE LAW JUDGE GAST: In 2005.

10 MR. MICHAEL: Exactly. I was trying to recover the cost of
11 the wood retaining wall repair, which was denied.

12 ADMINISTRATIVE LAW JUDGE GAST: Okay. Thank you.

13 ADMINISTRATIVE LAW JUDGE DANG: Mr. Hunter.

14 MR. HUNTER: Mr. Joseph, did my agency's audit Department
15 ask you for a copy of the claim that was submitted to the State
16 Farm?

17 MR. MICHAEL: Yes.

18 MR. HUNTER: The claim that you sent to State Farm? Not
19 the denial letter, the claim. What you wrote them, and said, I
20 need to be paid for this in the scope of that claim.

21 MR. ROSENKRANZ: I don't recall. I know the letter, but I
22 don't know if that was requested.

23 MR. HUNTER: Okay.

24 ADMINISTRATIVE LAW JUDGE DANG: Okay. Thank you. I'm
25 assuming Mr. Rosenkranz, you will be making the closing

1 arguments?

2 MR. ROSENKRANZ: I just have a couple of comments. We've
3 heard today about this loss in 2005 that's undisputed,
4 initially the tree fell, but I just want to emphasize a couple
5 things. Our position is that the loss in 2005 was not limited
6 to that area surrounding the tree, approximately 49 square feet,
7 and it took, unfortunately, four years to determine that the
8 entire slope had failed.

9 Now, none of us in this room can pinpoint a date that it
10 happened. To the best of Mr. Michael's knowledge, it was stable
11 when he bought it. The adjacent homes on both sides don't have
12 a problem. So we believe that based upon the facts and the
13 evidence that's available to all of us, that the damage that the
14 storms -- which were record-setting storms as I mentioned
15 earlier -- affected the entire hillside, but due to the slope
16 and heavy vegetation, it wasn't visible.

17 This tree was just a symptom of it. So we believe that's a
18 very important point. And under the Bailey and Barrett cases,
19 we believe that they allow us to wait until 2009 when we knew
20 the extent of the damage. Regarding the amount of the damage
21 claimed, as I said and Mr. Michael said, he kept two extensive
22 records.

23 The auditor, when he was conducting his audit, looked at
24 the slope repair schedule. He did some testing of that. He
25 looked to invoices. As I recall, he found a couple of invoices

1 where he thought maybe a few dollars were related to that game
2 room construction, but nothing of significance. And he spent a
3 lot of time in looking at the schedule and doing testing and
4 looking at invoices and canceled checks to determine that we
5 weren't trying to deduct improvement costs. I agree with
6 Mr. Hunter, that we first have to overcome the year of loss,
7 otherwise everything is a moot point. So we feel very strongly
8 that 2009 is the appropriate year.

9 And again, the hillside is 15,000 square feet, so that's
10 why in absolute dollars, it was a lot of money, no one can
11 question that. It was a lot of money because the size and the
12 work that was required. And finally, as I said earlier, it's
13 difficult to distinguish between a repair and improvement, and I
14 have looked at a lot of cases, as you probably know.

15 This section of this code is governed by a lot of court
16 decisions and it's difficult to distinguish between the two.
17 But we believe that if you follow the guidelines in these cases
18 that I have cited and take a practical approach, that we had to
19 restore it. And if you wanted to exclude the concrete because
20 we admit the concrete pylons were not there prior to February of
21 2005, and that cost we quantified was \$213,000.00 and change, we
22 still have several large, six-figured loss or reduction, or you
23 want to take the position that only investigating the problem
24 and restoring the dirt the City wouldn't allow you, but if you
25 want to take that position, we still have a very large claim

1 that was not known until 2009.

2 ADMINISTRATIVE LAW JUDGE DANG: Thank you very much.
3 Franchise Tax Board.

4 MR. HUNTER: Thank you, Judge Dang. I'll take this Panel
5 back to the theme of this case, which is you can't lose what you
6 never had. What really happened here is Appellant purchased a
7 property with a rear slope that may have been shifting during
8 annual storms over the passage of time for who knows how long.
9 The evidence has shown the last time a contractor attempted to
10 grade this property or take corrective measures was in 1963, and
11 that's Appellant's Exhibit 7, page 10 of Mountain Geology Inc
12 report.

13 I don't have a Bates stamped number in front of me, but
14 it's clear from the evidence that's in the record and the
15 testimony that you just heard this afternoon is that this
16 property needed to be improved to weather out future storms.
17 Whether the City of Los Angeles ordered Appellant to or not, the
18 property needed to be improved. Whether an additional structure
19 needed to be built to finance these improvements or not, the
20 rear slope needed to be improved.

21 The Appellant hired professionals and obtained soil reports
22 to make these improvements and added a slope-stabilizing wall,
23 caissons that were constructed in the bed rock, and the new
24 structure. These are all capital improvements under Internal
25 Revenue Code Section 1016, and every penny increases Appellant's

1 tax basis in this property.

2 First, the loss was taken in the incorrect year. The
3 Appellant could have obtained an appraisal under the fair market
4 value method in 2005 to claim the casualty loss for tax year
5 2005 and that's under Treasury Regulation 1.165-7, and he failed
6 to do that.

7 The law makes clear that the correct year of loss is when
8 the taxpayer has no reasonable chance at recovery, and if
9 repairs were made later, the taxpayer must amend the return that
10 was filed for the correct year of loss, which in this case, we
11 have established was 2007. He tried. He had another wood
12 retaining wall constructed that would replace the first wood
13 retaining wall that failed in the oak tree failure, and he
14 testified that 49 square feet of dirt was replaced, that's when
15 he had bought the property and that's what he paid to have that
16 replaced.

17 State Farm turned down his claim, on that basis alone,
18 Respondent's actions should not be disturbed because Appellant,
19 unfortunately, claimed this casualty loss in the incorrect year.
20 Second, the loss cleared the expenditures, which improving the
21 property beyond its condition prior to the casualty are not a
22 proper measure of the loss sustained, even though those measures
23 may have been deemed advisable as a result of the casualty.

24 Such expenditures must do more to merely restore the
25 property to its pre-casualty state or its non-deductible capital

1 expenditures. The IRS Service has taken the position the
2 expenditures against protection against future casualties, such
3 as the construction of a dike to prevent future flooding, are
4 not deductible but should be capitalized as permanent
5 improvements.

6 The Appellant testified he did not obtain soils reports and
7 geotechnical reports when he purchased his property. He
8 testified he knew what he was doing because he is a very
9 experienced real estate person, and his purchase of this
10 property was both lucky and unlucky. But before this Panel,
11 there's no evidence that this slope from this rear property
12 could one hundred percent withstand the rain storm of a
13 magnitude that took place in 2005. It's not here.

14 Remedial repairs were undertaken to repair the slope. But
15 a remedial repair strengthens the slope's resistance to erosion
16 in the future and corrects slope instability and protects the
17 structure from future damage and landslides. Mr. Salehipour
18 testified he wasn't there in 2004, he wasn't there in 2005, he
19 showed you all the work he did in order to make substantial
20 improvements to the rear slope and help protect it, but he
21 didn't offer you any evidence to show that this slope could
22 withstand a storm of that magnitude, as a matter of fact, in
23 2004/2005.

24 So the testimony that you have heard does nothing to
25 overturn Respondent's action in this case. What Appellant did

1 testify to is that the rear concrete and steel wall did not
2 exist when he purchased the property, the caissons did not exist
3 the other retaining wall with improved structural materials did
4 not exist, and that benefits him, but that goes on the other
5 side of the ledger. That's not a deductible loss that restores
6 prior basis and property of the expense that he already paid
7 for. It goes on the other side. And if and when the property
8 is ever disposed of, there may be a decrease in amount at that
9 time.

10 So this is not a now-or-never thing before this panel, this
11 is a when thing. And the amount that supported this casualty
12 loss claimed was both excessive, as it's over the \$41,000.00,
13 and unfortunately, it was taken within the wrong year. The
14 evidence that I referred to in this case, the 25 pages, both
15 witnesses, or Mr. Salehipour and Appellant, both testified that
16 these pictures depicted the state of the property in 2004, then
17 a new wood retaining wall that was constructed, but was deemed
18 not sufficient by the City, and then the final product.

19 We believe that the evidence, and now with this testimony,
20 supports Respondent's position in the case because again, you
21 can't lose what you never had. The Chappellet case, which is
22 cited in Respondent's opening brief is precedential in
23 controlling on this body. In Chappellet, the taxpayers have a
24 hilltop home, which sloped off into a canyon -- five minutes
25 away from the Casiano property that we are discussing in this

1 case, same layout -- the taxpayers had a short retaining wall
2 that was installed decades prior, similar to the Casiano
3 property in this case, the taxpayers in Chappellet suffered a
4 landslide after heavy rain, just like Casiano property in this
5 case, and the taxpayers submitted a claim for recovery to their
6 insurance company, but they were denied, just like this case.

7 The taxpayers had an improved wall that was recommended and
8 constructed and used as the basis for their casualty loss
9 deduction. Respondent disallowed \$2,000.00 of the cost of this
10 improvement as the basis for a casualty loss deduction and
11 instead, found it was a capital expenditure because in that
12 case, the taxpayers had a wall of one material, I believe it was
13 brick, and then they had to go to another material, which was a
14 steel rebar-supported wall.

15 The Board of Equalization affirmed Respondent's action in
16 this case and found that taxpayers, just like Appellant,
17 conceded they did not obtain competent appraisal evidence of the
18 value of their house before and after the rain storm. The Board
19 of Equalization found that taxpayers failed to establish that
20 the entire cost of construction for the new and improved steel
21 retaining wall constituted a reasonable measure of casualty
22 loss, which they sustained.

23 From that case, the Chappellet, the board members of the
24 Board of Equalization that heard that case said as follows,
25 quote, "It may well be that the construction of the steel was

1 deemed necessary and wise by the engineers after the severe
2 storms which occurred, however, we believe that upon completion
3 of that wall, Appellants had something more than they had before
4 the casualty, i.e. a hilltop lot that would withstand heavy
5 rainfall. The fact that they may not have known prior to
6 February 1962, when the purchased the property, or when the rain
7 storm occurred, that their land was subject to slippage does not
8 alter the fact that, in truth, it was.

9 By building the retaining wall, Appellants were not only
10 restoring the property to its condition before the storm, they
11 were protecting it against similar damage in the future. To
12 that extent, cost of the wall constituted a non-deductible
13 capital expenditure. So in conclusion, the tax law treats this
14 as a capital improvement to the property, not a casualty loss
15 that can be taken as an ordinary loss to be able to offset
16 ordinary taxable income.

17 And on that authority, on this record, and with the
18 testimony you have before you this afternoon, we urge you to
19 correctly find that Appellant is not entitled to a casualty loss
20 deduction for the 2009 tax year, and not in claim \$590,000.00.
21 Thank you.

22 ADMINISTRATIVE LAW JUDGE DANG: Thank you, Mr. Hunter.

23 Thank you, everyone, for your presentations today. The
24 record is now closed in this appeal. The judges will meet and
25 deliberate and decide your case. You can expect that we will

1 attempt to issue a written decision in this matter within 100
2 days. This hearing is adjourned.

3 (Hearing adjourned at 2:45 p.m.)
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1 REPORTER'S CERTIFICATION

2
3 I, the undersigned, a Hearing Reporter for
4 the State of California, do hereby certify:

5 That the foregoing proceedings were taken before
6 me at the time and place herein set forth; that any
7 witnesses in the foregoing proceedings, prior to
8 testifying, were duly sworn; that a record of the
9 proceedings was made by me using machine shorthand, which
10 was thereafter transcribed under my direction; that the
11 foregoing transcript is a true record of the testimony
12 given.

13 Further, that if the foregoing pertains to the
14 original transcript of a deposition in a federal case,
15 before completion of the proceedings, review of the
16 transcript [] was [] was not requested.

17 I further certify I am neither financially
18 interested in the action nor a relative or employee of any
19 attorney or party to this action.

20 IN WITNESS WHEREOF, I have this date subscribed
21 my name.

22 Dated: February 21, 2019

23
24 

25
Shelby Maaske,
Hearing Reporter