

Capital Budget Adjustment
Request for matching funds
Retaining Wall, McFarland State Office Building

1. Relevant Legal Concepts

a. Subjacent Support:

- i. Definition: “Subjacent support” refers to the support of the land by the ground underneath.
- ii. Summary of Law:
 - In general, a landowner has an absolute right to subjacent support of his/her land (*See Island Creek Coal Co. v. Rodgers*, 644 S.W.2d 339, 343-344 (Ky. 1982)).
 - The right to subjacent support extends to the surface in its natural condition and structures erected on the surface. (*See Colorado Fuel & Iron Corp. v. Salardino*, 125 Colo. 516, 524 (1952)).
 - The common law rule is that the owner of subjacent support is absolutely liable for damages caused to the surface owner by removal of then natural necessary support. (*See Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co.* 253 Cal. App.2d 83, 89 (1967)).

b. Vermont Law

- i. Fenced Lands: Historically, Vermont law imposed a duty on a landowner to fence in his/her lands and the liability for erecting and maintaining a fence on adjoining land was apportioned equally amongst landowners. Under 24 V.S.A. § 3802, abutting landowners who own no livestock are required to pay a portion of the costs to maintain a fence that separates his or her property from the neighboring parcel.
 - 24 V.S.A. § 3802 provides “Owners or occupants of adjoining lands, where the lands of both parties are occupied, shall make and maintain equal portions of the division fence between their respective lands. The

owner of unimproved and unoccupied land adjoining occupied land of another person shall make his or her proportion of a fence between such lands unless the selectboard of the town where the improved land lies, on request of either party, and on reasonable notice by the selectboard to parties interested, decides that such owner ought not to be compelled to make any part of such fence. The decision of the selectboard in such case shall be recorded in the town clerk's office and shall be final between the parties. The selectmembers shall receive for their services the fees of fence viewers.

- This law was found unconstitutional by the Vermont Supreme Court in 1989 but it is still in statute.
- ii. *Choquette v. Perrault* (153 Vt. 45 (1989)): The Vermont Supreme Court found 24 V.S.A. § 3802 unconstitutional, reasoning that changes in land use patterns in Vermont meant that the fence law more and more often applies to landowners without livestock. The Court concluded that in such situations the fence land is burdensome, arbitrary and confiscatory, and is thus unconstitutional.

2. Open Questions

- a. Did the State make any changes/improvements to its land that could have caused the subjacent support to fail?
- b. Does the State take the position that the landowner is liable in equal portions for the repair under 24 V.S.A. § 3802?
- c. If the landowner does not provide matching funds, will the State pay the entire repair cost?
- d. How does the budget adjustment request impact the State's duty to repair the wall?