
**California Underground Facilities Safe Excavation Board
("Dig Safe Board")**

January 14, 2019

Agenda Item No. 6 (Information Item) – Staff Report

Legal Counsel Opinion on Government Code Section 4216.4, Subdivisions (a) and (b)

Presenter

Deborah Yang, Legal Counsel

Background

In a letter dated December 5, 2018, the Subsurface Safety Incident Prevention Committee ("SSIP") of the California Regional Common Ground Alliance ("CARCGA") requested a written legal interpretation of Government Code section 4216.4, subdivisions (a) and (b). SSIP stated that "[d]uring discussions of the California Regional Common Ground Alliance (CARCGA) Subsurface Safety Incident Prevention (SSIP) committee meetings there has been concern that California Government Code (CGC) Sections 4216.4 (a) and 4216.4 (b) are at odds with each other" and that "[s]ome members of CARCGA have been told they are not in compliance with 4216 et al. because they did not contact the operator for more information as they did not find the subsurface facility operators' line within the tolerance zone."

Discussion

Government Code section 4216.4, subdivision (a), provides (emphasis added):

(a) (1) Except as provided in paragraph (2), if an excavation is within the tolerance zone of a subsurface installation, the excavator shall determine the exact location of the subsurface installations in conflict with the excavation using hand tools before using any power-driven excavation or boring equipment within the tolerance zone of the subsurface installations. In all cases the excavator shall use reasonable care to prevent damaging subsurface installations.

(2) (A) An excavator may use a vacuum excavation device to expose subsurface installations within the tolerance zone if the operator has marked the subsurface installation, the excavator has contacted any operator whose subsurface installations may be in conflict with the excavation, and the operator has agreed to the use of a vacuum excavation device. An excavator shall inform the regional notification center of his or her intent to use a vacuum excavation device when obtaining a ticket.

(B) An excavator may use power-operated or boring equipment for the removal of any existing pavement only if there is no known subsurface installation contained in the pavement.

(3) An excavator shall presume all subsurface installations to be active, and shall use the same care around subsurface installations that may be inactive as the excavator would use around active subsurface installations.

Government Code section 4216.4, subdivision (b), provides (emphasis added):

(b) If the exact location of the subsurface installation cannot be determined by hand excavating in accordance with subdivision (a), the excavator shall request the operator to provide additional information to the excavator, to the extent that information is available to the operator, to enable the excavator to determine the exact location of the installation. If the excavator has questions about the markings that an operator has placed, the excavator may contact the notification center to send a request to have the operator contact the excavator directly. The regional notification center shall provide the excavator with the contact telephone number of the subsurface installation operator.

As explained in the draft opinion letter to SSIP, considering the express language and apparent purpose of Government Code section 4216.4, which is to prevent damage to subsurface installations, subdivisions (a) and (b) are not contradictory. The statute requires an excavator to (1) determine the exact location of subsurface installations that are in conflict with the excavation; and (2) if the excavator cannot find the exact location of the subsurface installations that are in conflict with the excavation, the excavator has a duty to ask the operator for more information to do so.

Staff believes that an opinion letter from legal counsel in response to SSIP's request will help explain the requirements under Government Code section 4216.4, subdivisions (a) and (b), and resolve confusion among members of CARCGA.¹

Attachments: Draft Opinion Letter to SSIP
Opinion Request Letter from SSIP, December 5, 2018

¹ Past or contemporaneous interpretation by an administrative entity of a provision it is charged with implementing, is accorded considerable weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011.)



California Dig Safe Board

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Tony Marino

**AGENDA ITEM NO. 6 (JANUARY 14, 2019)
ATTACHMENT TO STAFF REPORT
DRAFT OPINION LETTER**

Steve Woo, Co-Chair
Thomas Young, Co-Chair
Subsurface Safety Incident Prevention Committee
California Regional Common Ground Alliance
387 Magnolia Ave., Suite 103-539
Corona, CA 92789

RE: Government Code section 4216.4, subdivisions (a) and (b)

Dear Mr. Woo and Mr. Young,

In your letter dated December 5, 2018, you requested a written legal interpretation of Government Code section 4216.4, subdivisions (a) and (b), stating that “[d]uring discussions of the California Regional Common Ground Alliance (CARCGA) Subsurface Safety Incident Prevention (SSIP) committee meetings there has been concern that California Government Code (CGC) Sections 4216.4 (a) and 4216.4 (b) are at odds with each other” and that “[s]ome members of CARCGA have been told they are not in compliance with 4216 et al. because they did not contact the operator for more information as they did not find the subsurface facility operators’ line within the tolerance zone.”

Government Code section 4216.4, subdivision (a), provides that, except in certain specified situations where power-operated or boring equipment may be used, an “excavator shall determine the exact location of the subsurface installations in conflict with the excavation using hand tools before using any power-driven excavation or boring equipment within the tolerance zone of the subsurface installations” and “[i]n all cases the excavator shall use reasonable care to prevent damaging subsurface installations.” However, “[i]f the exact location of the subsurface installation cannot be determined by hand excavating in accordance with subdivision (a),” the excavator is required under Government Code section 4216.4, subdivision (b), to “request the operator to provide additional information to the excavator, to the extent that information is available to the operator, to enable the excavator to determine the exact location of the installation.”

Government Code section 4216.4 must be construed in a manner consistent with its context and the apparent purpose of the legislation.¹ The statute must also be interpreted to make the statute workable and reasonable.^{2 3} To determine the intent, a court turns first to the words of the statute, attempting to

¹ *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 168.

² A court will apply “common sense ... and interpret a statute to make it workable and reasonable”; and “[a]ccordingly, the statute should be interpreted to avoid an absurd result.” (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122.)

³ “The regulation must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the agency, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity.” (*Aguilar v. Association of Retarded Citizens* (1991) 234 Cal. App. 3d 21, 29.)

give effect to the usual, ordinary import of the language.⁴ The words must be construed in context in light of the nature and obvious purpose of the statute where they appear.⁵ The various parts of an enactment must be harmonized in context of the framework as a whole.⁶

The legislative intent is found in the text of the statute itself, which expressly requires excavators to use reasonable care in all situations to prevent damage to subsurface installations. (Gov. Code, § 4216.4, subd. (a).) The apparent purpose of the statute is to prevent damage to subsurface installations, which may result in injury, death, or damage to other property and the environment.

Subdivision (a) of Government Code section 4216.4 requires an excavator to “determine the exact location of the subsurface installations in conflict with the excavation”. Bearing in mind the apparent purpose of the statute, subdivision (b) of the same section follows that in the event the excavator cannot determine the exact location of the subsurface installation “in accordance with subdivision (a),” the excavator must contact the operator for more information so that the excavator may comply with subdivision (a) to confirm the exact location of any subsurface installations in conflict with the excavation. Subdivision (b) is not an additional and separate requirement to determine the exact location of subsurface installations regardless of whether the subsurface installations are within the tolerance zone and in conflict with the excavation.⁷ Subdivision (b) is intertwined with and pertains to the requirement in subdivision (a) to determine the exact location of subsurface installations in conflict with the excavation by expressly referring to subdivision (a). If an excavator cannot determine the exact location of the subsurface installations in conflict with the excavation (in other words, after hand excavating, the excavator does not know where the subsurface installations in conflict with the excavation are located (e.g., cannot find the subsurface installations within the tolerance zone)), the excavator is required to contact the operator for more information to confirm that there are no subsurface installations in conflict with the excavation or to determine the exact location of the subsurface installations in conflict with the excavation (if they are so indeed present), as the subsurface installations may be marked incorrectly.

This opinion is based exclusively on the facts and circumstances described in your request and is given based upon your representations, express or implied, that you have provided a full and fair description of all facts and circumstances that would be pertinent to our consideration of the questions presented. The existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed in this opinion. You have represented that this opinion is not sought by a party to pending private litigation concerning the issues addressed in this opinion. You have also represented that this opinion is not sought in connection with any other litigation involving or investigation by the California Underground Facilities Safe Excavation Board or other state or local agency with jurisdiction to enforce the Dig Safe Act of 2016 (Government Code section 4216 et seq.).

Thank you for your inquiry.

Sincerely,

Deborah Yang
Legal Counsel
California Underground Facilities Safe Excavation Board

⁴ *Id.* at p.28-29

⁵ *Id.* at p.29

⁶ *Ibid.*

⁷ “Tolerance zone” means 24 inches on each side of the field marking placed by the operator in one of three ways. (Gov. Code, § 4216, subd. (u).)



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December 5, 2018

Tony Marino – Executive Officer
California Underground Facilities Safe Excavation Board
2251 Harvard Street
Sacramento, CA 95815

Dear Mr. Marino:

During discussions of the California Regional Common Ground Alliance (CARCGA) Subsurface Safety Incident Prevention (SSIP) committee meetings there has been concern that California Government Code (CGC) Sections 4216.4 (a) and 4216.4 (b) are at odds with each other. Some members of CARCGA have been told they are not in compliance with 4216 et al. because they did not contact the operator for more information as they did not find the subsurface facility operators' line within the tolerance zone.

At the November 8th Dig Safe Board meeting legal council for the Board stated that since 4216.4 (b) incorporates section (a) even though the exact wording of "in conflict" is not included, by reference it can be presumed it is.

The CARCGA SSIP committee would like to request a written legal interpretation of CGC 4216.4 (a) and 4216.4 (b) that can be shared with our members and the Public at large.

Thank you in advance,

Steve Woo
Co-Chair SSIP Committee

Thomas Young
Co-Chair SSIP Committee