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Items W 11 & 12

Staff: Aaron McLendon-SF
Staff Report: June 25, 2009
Hearing Date: July 8, 2009

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STAFF REPORT AND FINDINGS FOR HEARING ON WHETHER A VIOLATION OF THE COASTAL ACT HAS OCCURRED AND ISSUANCE OF A CEASE AND DESIST ORDER

CEASE AND DESIST ORDER:	CCC-09-CD-01
NOTICE OF VIOLATION:	CCC-09-NOV-01
RELATED VIOLATION FILE:	V-4-07-006
PROPERTY LOCATION:	22466 and 22500 Pacific Coast Highway, Malibu, Los Angeles County
DESCRIPTION OF PROPERTY:	Two parcels totaling approximately .95 acres, located between Pacific Coast Highway and the beach, in the Carbon Beach area of Malibu (APN 4452-002-013, 4452-002-011)
PROPERTY OWNER:	Lisette Ackerberg/Lisette Ackerberg Trust
VIOLATION DESCRIPTION:	Unpermitted development obstructing vertical and lateral public access easements including, but not limited to, rock riprap, 9-ft high wall, generator and associated concrete slab, fence, railing, planter, light posts, and landscaping; and violations of the conditions of Coastal Development Permits No. 5-83-360 and 5-84-754, which required vertical and lateral public access easements.

SUBSTANTIVE FILE DOCUMENTS:
1. Public records contained in Notice of Violation File No. CCC-09-NOV-01
2. Public Records contained in Cease and Desist Order File No. CCC-09-CD-01
3. Exhibits 1 through 40.

CEQA STATUS: Exempt (CEQA Guidelines (CG) §§ 15060(c)(2)), and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308, and 15321).

I. SUMMARY OF STAFF RECOMMENDATION AND FINDINGS

The property at issue in this enforcement matter is a .95 acre beachfront parcel located at 22466 and 22500 Pacific Coast Highway in Malibu in Los Angeles County ("the property") and identified by the Los Angeles County Assessor's Office as APNs 4452-002-013 and 4452-002-011 **(Exhibit 1)**.[1] The property is located between Pacific Coast Highway ("PCH") and the beach, in an area of Malibu known as Carbon Beach, where contiguous residential development fronting the highway separates it from the beach both physically (i.e., the public cannot reach the beach from the road) and visually (the public cannot see the beach from the road). There are only two other open vertical public accessways (ones running perpendicular to the coast, providing access from the road to the beach) in the area, one located .3 miles upcoast and one .4 miles downcoast from the property, one of which was also open at the time the California Coastal Commission ("the Commission") determined that vertical coastal access at the property was necessary. In the 1980s, the Commission approved two permits for development on the property, each of which required the permittee to offer to dedicate a public access easement over a portion of the property (one vertical from PCH to the mean high tide line ("MHTL") and one lateral across the width of the property from the toe of the seawall seaward to the MHTL).

Unpermitted development including, but not limited to, the placement of rock riprap, a 9-ft high concrete wall, large generator and associated concrete slab, fence, railing, planter, light posts, and landscaping has occurred on the property. The unpermitted items lie directly within the vertical public access easement and/or the lateral public access easement, both of which were required pursuant to specific permit conditions imposed by the Commission when it issued the two Coastal Development Permits (CDPs) for development on the property. The unpermitted items completely obstruct public access within the vertical easement and partially obstruct access across the lateral easement, and the items are therefore inconsistent with the existing permits and the easements established pursuant to conditions of the existing permits, with the public access policies of Chapter 3 of the Coastal Act, as well as unpermitted under the Coastal Act.

[1] Although the property actually consists of two separate parcels, each with a different address, the two parcels have been in common ownership and held as a single parcel at all times relevant to this action. The property is sometimes referred to by just the 22466 Pacific Coast Highway address and is referred to in previous documents as 22468 Pacific Coast Highway. Mrs. Ackerberg owns both parcels and each of the two CDPs at issue (CDP No. 5-83-360 and CDP No. 5-84-754) apply to the entire site (both parcels) as well. To avoid confusion, the two parcels will be collectively referred to in this report as "the property."

The property lies within the City of Malibu, which has a certified Local Coastal Program (LCP). In this case, the Commission has jurisdiction in this matter because the violations involve actions in conflict with two Commission-issued CDPs, and the development inconsistent with the Commission-issued CDPs would require an amendment of those permits, which must be issued by the Commission, whereas no CDP nor CDP amendment was ever issued for that development at issue. Thus, both prongs of Coastal Act Section 30810(a) conferring enforcement jurisdiction on the Commission are triggered. Staff also notes that in June of 2005, one of the Ackerbergs' attorneys requested a meeting or hearing with the City regarding the "vertical access issues relating to the Ackerbergs' property." In response to this request, the Environmental and Community Development Director of the City of Malibu wrote a letter to the attorney, stating that the Commission has authority over this matter.

In 1983, the Commission issued CDP No. 5-83-360 ("the 1983 permit") to a prior owner of the property. The permit authorized the construction of a 140 linear foot bulkhead along the seaward portion of the property. The permit specifically included a provision for and was conditioned upon an irrevocable Offer to Dedicate (OTD) a lateral public access easement across the full width of the property, extending seaward from the toe of the bulkhead to the mean high tide line, and the property owner recorded such an OTD, in compliance with the permit. The State Lands Commission accepted the OTD in 2002, thereby establishing a valid lateral access easement as envisioned in the permit.

The Commission issued the permit subject to, among other things, a plan that demonstrated that development occur according to specifications set forth in Exhibit 3 of the staff report prepared for the permit hearing. However, after the permit was issued, rock riprap was placed in front of the bulkhead, exceeding the approved specifications, which specifications were designed to ensure adequate room for public access.[2] The placement of the riprap at issue in this matter (in areas and amounts not allowed in the permits) violates the Coastal Act because it constitutes unpermitted development. It also extends into the lateral easement area, effectively decreasing the amount of beach seaward of the Ackerberg residence that the public can use, contravening both the permit and the Coastal Act access policies. The proposed cease and desist order directs Mrs. Ackerberg to remove the riprap within the lateral access easement.

The Ackerbergs purchased the property in 1984 and, soon thereafter, applied for a permit to demolish the existing single-family residence, guest house, and swimming pool on the property, construct a new residence and swimming pool, and renovate an existing tennis court. In 1985, the Commission issued CDP No. 5-84-754 (hereinafter, "the 1985 permit"), finding that the proposed project, as conditioned in the permit approval, would be consistent with Section 30212 of the Coastal Act only if the Ackerbergs recorded an OTD for a vertical public access easement through the property, from PCH to the beach. In April 1985, in accordance with Special Condition 1 of the permit, the Ackerbergs recorded an OTD for a vertical public access easement along the eastern boundary of the property from PCH to the MHTL. After the Ackerberg's OTD

[2] The approved plans called for the removal of existing rock riprap and allowed for the placement of "rock and gravel wastemix" seaward of the wooden bulkhead, with a maximum rock diameter of 12 inches. The permit did not allow placement of rock riprap in front of the bulkhead area within the lateral easement area.

for the vertical public access easement was recorded the development approved in the 1985 permit was installed and construction of the bulkhead was completed.

Access for All (AFA) accepted the OTD for the vertical easement in 2003 and now holds the legal easement. AFA is ready to open and maintain the easement for public use. However, due to the presence of the unpermitted material and structures within the easement area, AFA cannot open the easement to the public, and, thus, the public is precluded from using the public easement to access the beach. The Coastal Act violations at issue have resulted in a loss of public access to the coast. The proposed cease and desist order would direct Mrs. Ackerberg to comply with the CDPs, to remove the unpermitted items located within the easement area, and to cease from placing any solid material or structure into the easement area in the future or otherwise interfering with public access, thereby allowing AFA to open the easement to provide the valuable public access that the Commission found was required when it authorized the construction of the current Ackerberg residence and seawall.

The activities at issue in this matter constitute development as defined in Coastal Act Section 30106 and were undertaken without a CDP, in violation of Coastal Act Section 30600. Moreover, the unpermitted development completely obstructs the use of the vertical public access easement and partially obstructs the lateral public access easement, which is inconsistent with existing CDPs and the easements established in accordance with the terms and conditions of those CDPs; yet these activities were undertaken without obtaining any amendment to those CDPs. Consequently, staff recommends that the Commission find that the cited unpermitted development violates the Coastal Act both directly and by violating the existing CDPs. If the Commission finds that a violation of the Coastal Act has occurred, the Executive Director shall record a Notice of Violation (CCC-09-NOV-01) in the Los Angeles County Recorder's Office in accordance with Coastal Act Section 30812. Staff also recommends that the Commission approve Cease and Desist Order CCC-09-CD-01 ("the Order") as described below, directing Mrs. Ackerberg to: 1) cease and desist from construction and/or maintenance of unpermitted material or structures, 2) remove all unpermitted material and structures from the easement areas of the property, 3) allow public use of the easements, in compliance with the Coastal Act and with the terms and conditions of the existing permits and easements, and 4) cease and desist from unpermitted development activities or non-compliance with conditions of the CDPs.

II. HEARING PROCEDURES

A. Cease and Desist Order

The procedures for a hearing on a proposed Cease and Desist Order are set forth in Section 13185 of Title 14 of the California Code of Regulations (14 CCR).

For a Cease and Desist Order hearing, the Chair shall announce the matter and request that all alleged violators or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, in his or her discretion, to ask of any other party. Commission staff shall then

present the report and recommendation to the Commission, after which the alleged violator or representative may present his or her position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which staff typically responds to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in 14 CCR Section 13185 and 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of the second motion below, per the staff recommendation or as amended by the Commission, will result in issuance of the Order.

B. Notice of Violation

The procedures for a hearing on whether a violation has occurred are set forth in Coastal Act Section 30812 (c) and (d) as follows:

> *(c) If the owner submits a timely objection to the proposed filing of the notice of violation, a public hearing shall be held at the next regularly scheduled commission meeting for which adequate public notice can be provided, at which the owner may present evidence to the commission why the notice of violation should not be recorded. The hearing may be postponed for cause for not more than 90 days after the date of the receipt of the objection to recordation of the notice of violation.*
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> *(d) If, after the commission has completed its hearing and the owner has been given the opportunity to present evidence, the commission finds that, based on substantial evidence, a violation has occurred, the executive director shall record the notice of violation in the office of each county recorder where all or part of the real property is located. If the commission finds that no violation has occurred, the executive director shall mail a clearance letter to the owner of the real property.*

The Commission shall determine, by a majority vote of those present and voting, whether a violation has occurred. Passage of the first motion below will result in the Executive Director's recordation of a Notice of Violation in the Los Angeles County Recorder's Office.

III. STAFF RECOMMENDATION

Staff recommends that the Commission adopt the following two motions:

A.1. Motion - Notice of Violation:

I move that the Commission find that the real property at 22466 and 22500 Pacific Coast Highway, in Malibu, Los Angeles County, has been developed in violation of the Coastal Act, as described in the staff recommendation for CCC-09-NOV-01.

A.2. Staff Recommendation of Approval:

Staff recommends a **YES** vote. Passage of this motion will result in the Executive Director recording Notice of Violation No. CCC-09-NOV-01 against the above-referenced property in the Los Angeles County Recorder's Office. The motion passes only by an affirmative vote of the majority of Commissioners present.

A.3. Resolution to Find that a Violation of the Coastal Act Has Occurred:

The Commission hereby finds that the real property at 22466 and 22500 Pacific Coast Highway in Malibu, Los Angeles County, has been developed in violation of the Coastal Act, as described in the findings below, and adopts the findings set forth below on the grounds that development has occurred without a coastal development permit and that development has occurred that is inconsistent with permits previously issued by the Commission and with those documents recorded pursuant to the existing permits.

B.1. Motion - Cease and Desist Order:

I move that the Commission issue Cease and Desist Order No. CCC-09-CD-01 pursuant to the staff recommendation.

B.2. Staff Recommendation of Approval:

Staff recommends a **YES** vote. Passage of this motion will result in the issuance of the Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

B.3. Resolution to Issue Cease and Desist Order:

The Commission hereby issues Cease and Desist Order No. CCC-09-CD-01, as set forth below, and adopts the findings set forth below on grounds that development has occurred at 22466 and 22500 Pacific Coast Highway, Malibu, Los Angeles County, without a coastal development permit, and in a manner that is inconsistent with permits previously issued by the Commission and easements established pursuant to the existing permits, in violation of the Coastal Act, and that the requirements of the Order are necessary to ensure compliance with the Coastal Act.

IV. FINDINGS FOR NOTICE OF VIOLATION CCC-09-NOV-01 AND CEASE AND DESIST ORDER CCC-09-CD-01[3]

A. Description of Unpermitted Development

The unpermitted development that has occurred on the property includes but is not limited to the erection and/or placement of rock riprap, a 9-ft high concrete wall, concrete slab and generator, fence, railing, planter, light posts, and landscaping (**Exhibits 31-38**). In addition to being unpermitted, these items are located within vertical and lateral public access easements (created in response to permit conditions), obstructing public access to the beach and along the beach seaward of the residence, and the items are therefore inconsistent with the conditions of the CDPs and the terms of the easements established pursuant to the CDPs.

B. Permit History

On June 9, 1983, the Commission approved CDP No. 5-83-360 with conditions, authorizing the construction of a wooden bulkhead along the southern portion of the property located at 22486 Pacific Coast Highway (**Exhibit 2**).[4] The Commission found that the proposed development would cause an increase in shoreline erosion and loss of shoreline sand supply, thereby impacting coastal access due to the degradation or loss of usable beach. Accordingly, the Commission conditioned the permit to require that the applicant offer to dedicate an easement for lateral public access and recreational use along the beach directly seaward of the bulkhead, creating more public beach area, in anticipation of, and to offset, the loss of beach that would result from placement of the bulkhead. The Commission required, as a prior to issuance condition of the permit, recordation of an offer to dedicate (OTD) an easement for lateral public access and passive recreational use from the toe of the bulkhead to the mean high tide line. The permit condition also required that the OTD "restrict the applicant from interfering with present use by the public of the areas subject to the easement prior to acceptance of the offer." The owner recorded the lateral access OTD in July of 1983, and it appeared in the chain of title from that point on (**Exhibit 3**). The State Lands Commission accepted the lateral access easement in March of 2002 (**Exhibit 4**). Although the permit was issued to the Ackerbergs' predecessor as owner of the property, the permit and OTD clearly state that the terms and conditions of the documents run with the land, binding Mrs. Ackerberg as a subsequent purchaser. In addition, the Ackerbergs had constructive notice of the OTD because the offer was recorded in the chain of title to the property. Therefore, Mrs. Ackerberg is required to comply with the permit and the easement and to refrain from taking any action that would impede access to or through the easement.

In November of 1984, the Ackerbergs filed a CDP application seeking authorization for the demolition of the existing single-family residence, guest house and pool, the construction of a new residence and pool, and the renovation of an existing tennis court. In January of 1985, the

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[3] These findings also hereby incorporate by reference Section I of the June 25, 2009 staff report in which these findings appear, which section is entitled "Summary of Staff Recommendation and Proposed Findings."

[4] This property is now identified as 22500 and 22466 Pacific Coast Highway.

Commission unanimously approved the Ackerberg permit with conditions (**Exhibit 5**). In order for the proposed new development to be found consistent with Coastal Act Sections 30210, 30212, and 30214, the Commission required the Ackerbergs to record, prior to issuance of the permit, a vertical public access condition, requiring Mrs. Ackerberg to record an OTD, before the permit would issue, for a 10-foot-wide easement along the eastern property boundary from Pacific Coast Highway to the mean high tide line.[5] The Commission stated in its findings for the permit that "[o]nly if so conditioned would the project be consistent with Section 30212 of the Coastal Act." Mrs. Ackerberg did not challenge that permit condition or the permit, for any reason, within the time prescribed in the Coastal Act (see Cal. Pub. Res. Code §30801). In fact, she recorded the OTD for the vertical accessway as required and signed the permit with the condition (it was issued on April 15, 1985) (**Exhibit 6**).

C. Violation History

Access for All, a non-profit coastal access organization, recorded a Certificate of Acceptance, formally accepting the OTD for the vertical access easement in December of 2003 and sent a letter soon thereafter to inform Mrs. Ackerberg of the acceptance and to request a meeting to schedule an initial survey of the easement area in order to begin the process of opening the easement (**Exhibits 7 & 8**). In March of 2005, AFA had not yet received permission from Mrs. Ackerberg to enter the property to conduct the survey; and therefore, Commission staff sent a letter to Mrs. Ackerberg requesting her to remove all structures blocking the easement and contact Commission staff within 30 days to schedule the survey (**Exhibit 9**). When Mrs. Ackerberg informed Commission staff that she was dealing with important personal matters, as a courtesy, Commission staff decided to delay enforcement action to remove the unpermitted development, and AFA delayed their efforts to open the accessway (**Exhibit 10**).

AFA did eventually conduct the survey in September of 2005 and found that the vertical easement was blocked or otherwise affected or potentially affected by the above-mentioned development, including the slab and generator, 9-ft high wall, planters, fence, landscaping, light posts, and rock riprap. Commission staff sent Mrs. Ackerberg a letter on December 13, 2005, listing the encroachments found by the surveyor, and also stating that the cited unpermitted riprap exceeded the size of the rocks permitted under CDP No. 5-83-360 (**Exhibit 11**). The letter requested the submittal of a removal plan by January, 20, 2006 and requested that the removal of the encroachments from the vertical easement be removed within 120 days from the submittal of a removal plan (by May 22, 2006). In response, Mrs. Ackerberg's attorney sent a letter to staff on January 19, 2006, outlining Mrs. Ackerberg's concerns regarding removal of the development, including whether AFA has adequate liability insurance, and "defenses" to staff's request for removal of the unpermitted development (**Exhibit 12**). The issues raised therein and staff's responses are fully addressed in Section G of these findings. Additional correspondence between staff and Mrs. Ackerberg pertaining to issues raised by Mrs. Ackerberg's attorney

[5] The Commission found that vertical public access in this location was necessary due to the contiguous residential development along Carbon Beach blocking views and the lack of open accessways in the area. The Commission also cited the following facts in support of its decision to impose the vertical access condition: 1) the presence of a crosswalk in close proximity to the property and 2) the presence of on-street parking on both sides of Pacific Coast Highway in the vicinity of the property provide adequate support facilities for the accessway.

followed, including letters dated February 16, 2006, March 23, 2006, and April 3, 2006. (**Exhibits 13 – 15**). Mrs. Ackerberg did not state in any of this correspondence that she was willing to voluntarily remove the cited unpermitted development. Instead, she continued to raise issues and "defenses" asserting why she felt she should not have to remove the unpermitted development, such as questions regarding AFA's ability to operate the easement, the adoption of the Malibu LUP, the benefit of access conferred from private property owners as compared to public agencies, and concerns about relocation of the generator.

Subsequent attempts by Commission staff to resolve the violations amicably have been unsuccessful. On March 5, 2007, Commission staff sent Mrs. Ackerberg a Notice of Violation, alerting her to the possibility of formal enforcement action and monetary penalties if the violations were not resolved (**Exhibit 16**). The letter provided Mrs. Ackerberg with two options: contact Commission staff to discuss resolution of the violations by March 23, 2007, or submit a plan outlining the removal of the unpermitted development by April 6, 2007. Although Mrs. Ackerberg's attorney sent a response to the Notice of Violation on March 22, 2007, the letter did not state that Mrs. Ackerberg was ready to discuss resolution, nor did the requested removal plan accompany the letter (**Exhibit 17**). Instead, the letter stated that because of litigation initiated by Mr. Jack Roth, Mrs. Ackerberg's downcoast neighbor, challenging the easements (which Mr. Roth had already lost in the trial court but which was on appeal), enforcement requiring Mrs. Ackerberg to remove the unpermitted development was premature (as discussed more fully, below).

On April 27, 2007, the Executive Director issued a Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings (NOI) to Mrs. Ackerberg (**Exhibit 18**). A Statement of Defense (SOD) form was sent along with the NOI, affording Mrs. Ackerberg the opportunity to present defenses to the proposed issuance of the Order and the recordation of the Notice of Violation. By statute and regulation, the NOI and the SOD form specified a twenty-day time period for submittal of an SOD, pursuant to Section 13181(a) of the Commissions regulations, and the final date for submittal of the SOD was May 17, 2007. As a courtesy and upon Mrs. Ackerberg's attorney's request, staff granted a 25-day extension of the deadline for submittal of a statement of defense (**Exhibit 19**). The final deadline was June 11, 2007. Mrs. Ackerberg's attorney submitted letters on May 17, 2007 and June 11, 2007 (**Exhibits 20 & 21**). These letters contained objections to the recordation of a Notice of Violation and the issuance of the Order and incorporated by reference a March 22, 2007 letter as part of Mrs. Ackerberg's objection.[6]

During this period of time when communication between Commission staff, Mrs. Ackerberg, and her former counsel, Mr. Reeser, ensued, Jack Roth's appeal to the trial court's decision was still pending. Mr. Roth's litigation sought to invalidate Mrs. Ackerberg's vertical easement and to enjoin the Commission, the State Coastal Conservancy, and Access for All from opening the easement for public use. Mrs. Ackerberg's former lawyer, Mr. Reeser, requested that the Commission postpone the enforcement proceedings until the issuance of a final judgment of Mr.

[6] Mrs. Ackerberg's June 11, 2007 letter incorporated an early letter, dated March 22, 2007, into her objections to the proposed enforcement proceeding. The Commission responds to all of the relevant defenses raised in the three letters in Section G of these findings.

Roth's lawsuit against the Commission, originally filed in Los Angeles County Superior Court, Case No. BS102404, which was then pending on appeal to the Second District Court of Appeal (No. B195748); and, in June of 2007, the Court of Appeals granted a stay of the Commission's proceedings until the appellate court ruled on the appeal. However, the Court of Appeals then ruled in favor of the Commission and against Mr. Roth, and, on July 9, 2008, the California Supreme Court denied Mr. Roth's petition for review and application for stay. Therefore, the dismissal of Mr. Roth's lawsuit has been upheld by the courts, and the stay has been dissolved.

Soon after the ruling in the "Roth" litigation, on August 11, 2008, the Commission's Chief of Enforcement, Ms. Lisa Haage, discussed the possibilities of settling this violation matter with Mrs. Ackerberg's new and current counsel, Ms. Diane Abbitt. During that conversation, Ms. Abbitt did not suggest any willingness to allow Ms. Ackerberg's vertical easement to be opened, and instead suggested that a vertical easement owned by the County and located at 22548 Pacific Coast Highway could be opened in lieu of opening the one on Mrs. Ackerberg's property. Ms. Haage indicated a preliminary reaction that this would not be acceptable to the Commission for a number of reasons, nor would it constitute compliance with the permit conditions of CDP No. 5-84-754. The issues raised during that conversation and staff's responses are fully addressed in Section G of these findings. Even though Ms. Haage indicated she did not believe opening an alternative easement would be an acceptable settlement to this violation matter and was inconsistent with the permit itself, she did agree to discuss the issue internally and review the additional information that Ms. Abbitt said she would send to Ms. Haage regarding a proposal for opening the alternative easement. However, Ms. Abbitt did not send enforcement staff such a proposal regarding the 22458 PCH vertical accessway.

Even though Ms. Abbitt did not send a proposal for opening the alternative easement to Commission staff, as she indicated she would in the August 11, 2008 conversation, Ms. Haage did discuss the matter internally. On September 11, 2008, Ms. Haage and other Commission staff left a voicemail message explaining that future settlement negotiations needed to include compliance with the permit conditions and that Commission staff cannot agree to accepting a proposal that includes opening one existing public access easement as a basis for extinguishing the existing vertical easement on Mrs. Ackerberg's property. Additional responses regarding the issues concerning opening the alternative easement located at 22548 PCH instead of complying with the permits conditions that were required for Mrs. Ackerberg's property appear in detail in Section G of these findings. Ms. Abbitt did not return Commission staff's September 11, 2008 call, and at no time since then has she agreed to discuss a settlement that includes the removal of the unpermitted development located at Mrs. Ackerberg's property, although, as noted below, staff has made subsequent efforts to discuss a settlement of this matter.

On October 2, 2008, Commission staff again notified Mrs. Ackerberg and her current counsel, Ms. Abbitt, of their desire to resolve this matter, and to re-commence attempts to do so, and therefore return to the enforcement proceedings which were postponed in June of 2007 at Mrs. Ackerberg's request. (**Exhibit 22**). In light of Mrs. Ackerberg's change in counsel, Commission staff again requested these violations be resolved, suggested the option of a consent order, and also offered, as a courtesy, an additional opportunity for Mrs. Ackerberg to raise defenses in addition to those previously raised in communications between Commission staff and Mr. Reeser on behalf of Mrs. Ackerberg. This second Statement of Defense deadline was set for October

12, 2008. However, in response to a request by Ms. Abbitt to extend the deadline, Commission staff agreed to extend this deadline to October 22, 2008. (**Exhibit 23**). Commission staff received a letter dated October 21, 2008, which included additional defenses raised by Ms. Abbitt on behalf of Mrs. Ackerberg. (**Exhibit 24**).

In an effort to resolve the violations on Mrs. Ackerberg's property, Commission staff also sent a Draft Consent Cease and Desist Order (hereinafter, "Draft Order") to Ms. Abbitt for her review in a letter dated November 14, 2008. (**Exhibit 25**). Commission staff requested that Ms. Abbitt provide Commission staff with comments regarding the Draft Order by November 19, 2008. In addition, Commission staff notified Ms. Abbitt that staff had tentatively scheduled the matter for the Commission's December 10, 2008 hearing. Ms. Abbitt did provide Commission staff with a response letter dated November 19, 2008; however, the letter did not respond to the settlement proposal. Instead, Ms. Abbitt continued to instead suggest deletion of the easement on Mrs. Ackerberg's property and in exchange provide assistance with opening the easement area located at 22548 Pacific Coast Highway. She indicated that she was not interested in discussing the removal of unpermitted development from the vertical easement area located on her property. (**Exhibit 26**). In addition, the letter notified Commission staff, for the first time, that Ms. Abbitt had scheduled surgery for the morning of the December 10, 2008 hearing, the date that Commission staff had tentatively scheduled the hearing for finalizing the resolution of this violation issue, and that she would be out on medical leave for one month after the surgery. Commission staff contacted Ms. Abbitt to discuss the November 19, 2008 letter that same day; the contents of that discussion were also summarized in a letter sent from Commission staff to Ms. Abbitt, dated November 24, 2008. (**Exhibit 27**).

In the Commission staff's letter to Ms. Abbitt, dated November 24, 2008, Commission staff again expressed their desire to settle this violation amicably and asked that Ms. Abbitt notify Commission staff, by November 26, 2008, as to whether she was interested in continuing to work on reaching a Consent Order agreement on behalf of her client, Mrs. Ackerberg. Commission staff informed Ms. Abbitt that in the event they were able to reach a Consent Order agreement, there would not necessarily be a need to postpone the hearing scheduled for December 10, 2008. Commission staff also informed Ms. Abbitt of their willingness to postpone the hearing if it would assist in settlement discussions, and their desire to continue working amicably to settle the matter prior to a formal hearing. In addition, in a letter dated November 25, 2008, Commission staff responded to Ms. Abbitt's request to clarify their agreement to postpone a formal hearing, which she made during a conversation that took place between her and Commission staff on November 24, 2008. (**Exhibit 28**).

In Ms. Abbitt's November 26, 2008 letter to Commission Staff, Ms. Abbitt did indicate her willingness to continue working amicably with Commission Staff to try to reach a resolution of this violation matter. (**Exhibit 29**). However, Ms. Abbitt again indicated that her client, Mrs. Ackerberg, was not ready to discuss agreement regarding the removal of unpermitted development from the vertical easement area located at her property. Ms. Abbitt again stated Mrs. Ackerberg's desire only to assist with opening the County owned easement area located at 22548 Pacific Coast Highway, instead of agreeing to comply with the permit conditions issued for Mrs. Ackerberg's property and asserted defenses regarding why the unpermitted development on Mrs. Ackerberg's property should not be removed. Commission staff once again, in a

continued effort to work with Mrs. Ackerberg and to try to resolve the matter amicably, responded to Mrs. Ackerberg's defenses in a letter to Ms. Abbitt dated December 2, 2008. (**Exhibit 30**). In that letter, Commission staff asked that Ms. Abbitt call staff to schedule a convenient time to discuss the issues raised in her recent communications with staff as well as settlement options to resolve this violation matter. Commission staff indicated their desire to discuss settlement options prior to her medical leave beginning December 10, 2008. Commission staff did have a conversation regarding settlement with Diane Abbitt on Tuesday, December 9, 2008. However, Ms. Abbitt continued to only discuss the possibility of assisting with opening the County owned easement located at 22548 PCH instead of agreeing to work on reaching a settlement that includes removal of the unpermitted development from within the easement area located at Mrs. Ackerberg's property and compliance with the permit conditions.

After the delay caused by Ms. Abbitt's medical leave, Commission staff again scheduled the matter for the Commission's June 2009 hearing. During this time, Ms. Abbitt requested a meeting with the Executive Director of the Commission to discuss the possibility of a Consent Order; however, the proposal again focused on putting efforts into opening the existing County-owned public accessway in exchange for extinguishing the existing public access easement on the Ackerberg property. Commission staff made it very clear to Ms. Abbitt that any agreement reached between staff and Mrs. Ackerberg had to include the removal of unpermitted development and development that blocked the public access easements. Ms. Abbitt continued to request a meeting with the Executive Director so she and Steve Kaufmann (Mrs. Ackerberg's other legal counsel) could describe, in more detail, the parameters of their proposal. In yet another attempt to resolve this matter amicably, Commission staff agreed to postpone the June 2009 hearing for one month. On June 5, 2009, the Executive Director, Commission staff, Ms. Abbitt, and Mr. Kaufmann met to discuss Mrs. Ackerberg's proposal. Unfortunately, the proposal was still focused on the opening of the County-owned public accessway in exchange for extinguishing the existing public access easement on the Ackerberg property. Commission staff again explained in some detail the legal and practical concerns associated with this proposal, and indicated that they could not accept the proposal and asked that Mrs. Ackerberg's lawyers speak with Mrs. Ackerberg to discuss the possibility of a consent order that includes the removal of development within the easements on the property. As recently as June 23, 2009, Commission staff again contacted counsel for Mrs. Ackerberg to explore settlement options. As of this date, staff has been unable to connect with Ms. Abbitt. To date, Mrs. Ackerberg has not indicated she is willing to remove the unpermitted development from the access easement areas located on her property.

AFA is prepared and ready to open and manage the easement for public access to the beach, so that the area can function as required by the Commission, as set forth in the recorded Certificate of Acceptance. AFA first conveyed this to Mrs. Ackerberg in a December 19, 2003 letter. AFA has been approved by the Commission to hold this easement and has received a grant from the Coastal Conservancy to facilitate access. However, the unpermitted development at issue in this matter is located directly within both AFA's vertical access easement and the lateral access easement held by the State Lands Commission, completely blocking public access. As a result, the vertical accessway remains closed and the public access that the Commission found was necessary for Mrs. Ackerberg's residence and pool to be found consistent with the Coastal Act has not been provided. In addition, the lateral accessway that was also necessary to find the

seawall consistent with the Coastal Act is partially obstructed by the unpermitted development. The benefits of both existing permits, as well as the burdens that were necessary to impose in order to bring the projects into compliance with the Coastal Act, run with the land. Therefore, the Executive Director initiated enforcement proceedings to finally resolve the violations and allow AFA to open and manage the valuable vertical public accessway that the 1985 permit requires. The proposed enforcement actions also direct Mrs. Ackerberg to remove the unpermitted riprap from the lateral accessway, thereby removing the current impediment to use of the lateral public easement, as well.

D. Bases for Issuance of Cease and Desist Order and Recordation of Notice of Violation

The following sections provide the bases for the proposed enforcement actions. The findings listed above are hereby incorporated by reference into this section. Although a showing that unpermitted development is inconsistent with the policies of Chapter 3 of the Coastal Act is not required for either the issuance of a Cease and Desist Order or to record a Notice of Violation, information regarding the inconsistency of the cited development with those policies is provided below as well, both as background and to provide additional information regarding the proposed actions.

1. Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in Coastal Act Section 30810, which states, in relevant part:

> *(a) If the commission, after public hearing, determines that any person…has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person … to cease and desist.*
>
> *(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.*

As is explained below, the activities that have occurred on the property both: (1) lacked required permits from the Commission; and (2) were inconsistent with permits previously issued by the Commission.

a. Development that Required a Permit from the Commission has Occurred on the Property Without a Permit

Development is defined in Coastal Act Section 30106, which states:

> *"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or*

> *of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land... change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes.* (emphasis added)

The activities conducted on the property clearly constitute development as defined in Coastal Act Section 30106, as they constitute the types of development underlined above, and, as such, are subject to the following permit requirements provided in Coastal Act Section 30600(a):

> *(a) Except as provided in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone… shall obtain a coastal development permit.*

No CDP was obtained, including CDP amendments to the 1983 and 1985 CDPs that would have been required for such development, for the cited development on the property, as required under Coastal Act Section 30600(a).[7] Consequently, the Commission has the authority to issue CCC-09-CD-01 pursuant to Section 30810(a) as development without a permit.

b. Development Inconsistent with Existing CDPs has Occurred on the Property

Coastal Act Section 30810(a) also authorizes the Commission to issue a cease and desist order if anyone undertakes development that is inconsistent with a previously-issued CDP. The unpermitted development is located within public access easements, which were established pursuant to the 1983 and the 1985 CDPs. The unpermitted development impedes public use of

[7] The Commission clarified during the 1985 hearing for CDP No. 5-84-754 that the Ackerbergs could, under existing law, continue to use the entire property, including the portion which became the vertical easement area, until such time as the vertical access easement was ready to be opened to the public. The Commission's clarification did not constitute a *de facto* approval of the development and did not waive or exempt the development from Coastal Act permitting requirements and in fact at the same hearing issued the permit with the conditions here at issue. The statement, made as a courtesy to the Ackerbergs and at their request, recognized that locating a qualified organization to accept the offer to dedicate and subsequently opening the easement for public use might not be accomplished quickly. The Ackerbergs were therefore allowed to temporarily use the vertical access easement area, specifically until the OTD was accepted and the accepting organization was prepared to open the easement. AFA accepted the easement and is ready to open it to the public. Thus, pursuant to the existing permit, the vertical easement and the Commission's statement cited above, Mrs. Ackerberg can no longer continue to use the easement area in a manner that is inconsistent with the public access provisions. Moreover, the Commission's recognition of a temporary right to continue to "use" the area did not constitute approval of physical development in the area. Thus, for both reasons, at this time, the development must be removed from the vertical easement area. Also, the Commission's statement did not pertain to use of the lateral easement area, and the Commission did not make an analogous statement regarding the lateral easement. Therefore, it should be noted that even any informal delay in public use of the access easement applied only to the vertical easement, not to placement of unpermitted riprap within the lateral. Moreover, nothing was required to "open" the lateral easement.

the access easements, which is inconsistent with the easements and the express purpose of the conditions of the CDPs. Therefore, the Commission also has authority to issue CCC-09-CD-01 under Section 30810(a), because the development is inconsistent with Commission CDPs.

i. CDP No. 5-84-754

The Ackerbergs applied for and the Commission approved CDP No. 5-84-754 in January, 1985. The permit authorized the demolition and reconstruction of a residence and associated structures on the property as well as the renovation of an existing tennis court. The Commission determined that providing access to the beach in this area of the Malibu coastline was necessary to bring the project into conformity with the public access policies of the Coastal Act and, therefore, included a requirement of recordation of an OTD for a vertical public access easement. The Ackerbergs recorded the OTD for a 10-foot-wide easement along the eastern boundary of the property, extending from the northern property boundary, at its intersection with the seaward sidewalk along Pacific Coast Highway, to the mean high tide line.

At the hearing on this CDP, the Commission clarified that the Ackerbergs could temporarily use the portion of the property within the vertical access easement area until such time as the OTD was accepted and the easement ready to be opened for public use. Since that time, the Ackerbergs have not only continued to use the easement area, but have performed physical development there, placing and maintaining material and structures within it, without any Coastal Development Permits. Currently, at a minimum, the following material and structures are known to lie within the vertical access easement area: rock riprap, 9-ft high wall, concrete slab and generator, fence, railing, planter, light posts, and landscaping. AFA accepted the OTD, thereby establishing the easement, and is ready to open the easement for public use, but cannot because of the presence of the unpermitted development within the easement. AFA initially notified Mrs. Ackerberg of its intent to open the public accessway in December of 2003 and conducted a survey of the easement in September of 2005. Mrs. Ackerberg was notified in March of 2005 that the development placed or maintained within the easement area, allegedly in misplaced reliance upon the Commission's statements made during the Ackerberg permit hearing that the Ackerbergs could temporarily "use" the easement area, must be removed so that AFA could open the easement. Mrs. Ackerberg has not removed the development, and it completely obstructs access through the easement. Therefore, the development is inconsistent with CDP No. 5-84-754 as well as the easement that was established pursuant to the terms and conditions of the permit.

The work that was permitted with conditions by the Commission under CDP No. 5-84-754 was completed and the benefits of the permit have accrued to the property. However, the public access, which the Commission required in order to approve the permit in a manner that was consistent with the Coastal Act and authorize the development that Mrs. Ackerberg now enjoys, has not been provided. The Commission specifically found that providing vertical public access was necessary to finding the permit consistent with the Coastal Act. Without the access condition, the Commission could not have permitted the development that Mrs. Ackerberg now enjoys, namely the new residence and pool and the renovated tennis court. The benefits and the burdens of the permit go hand in hand, and they both run with the land. Therefore, for Mrs.

Ackerberg to enjoy the benefits of the existing permit, she must also bear responsibility for complying with the permit's public access requirements.

ii. CDP No. 5-83-360

The Commission granted CDP No. 5-83-360 to the Ackerbergs' predecessor as owner of the property in June of 1983. The permit authorized the construction of a wooden bulkhead along the southern property boundary, and its conditions expressly run with the land, binding Mrs. Ackerberg, as a successor owner of the subject property. The Commission determined that the bulkhead would negatively impact shoreline sand supply and ultimately the width of the beach that the public could use. To balance these negative effects, the Commission required that the prior owner record an OTD for a lateral access easement extending from the toe of the bulkhead to the mean high tide line, across the entire width of the property. As was the case with the Ackerberg CDP mentioned in the preceding section of these findings, the Commission determined that, but for this provision of access, the proposed development would be inconsistent with the public access provisions of Chapter 3 of the Coastal Act.

The prior property owner recorded the required OTD as an offer to dedicate a public access easement and a Declaration of Restrictions, which stated the following:

> *The Grantor is restricted from interfering with the use by the public of the area subject to the offered easement for public access. This restriction shall be effective from the time of recordation of this Offer and Declaration of Restrictions.*

The State Lands Commission accepted the OTD, thereby establishing the lateral public access easement that the Commission found so vital in its approval of the bulkhead. However, rock riprap has been placed against the toe of the bulkhead, within the lateral access easement area. This unpermitted development impedes public use of the easement area and is therefore inconsistent with the CDP as well as the recorded OTD and the easement that was established pursuant to the CDP.

The Commission specifically found that a lateral public access dedication was necessary to find that the permit was, in its entirety, consistent with the Coastal Act. All the terms of a permit, both the benefits and the burdens, run as to subsequent owners. Therefore, although the permit was issued to the prior owner of the property, Mrs. Ackerberg enjoys the benefits of the existing permit but also bears responsibility for complying with the permit's public access requirements. The unpermitted riprap must be removed in order to comply with the permit, the OTD recorded pursuant to the permit, and the subsequently established easement.

c. Unpermitted Development is Inconsistent with the Goals of the Coastal Act and the LUP

Again, as indicated above, a showing that unpermitted development is inconsistent with the policies of Chapter 3 of the Coastal Act is not required either for the issuance of a Cease and

Desist Order or to record a Notice of Violation. Nevertheless, we provide this information as background and to provide additional information regarding the proposed actions.

i. Access

Access is important in this area, and the easement on the Ackerberg property is an excellent access point, as the Commission found in its approval of the 1985 CDP. The property is adjacent to on-street parking on both sides of Pacific Coast Highway in the vicinity of the property and a crosswalk across PCH near the property that provide adequate support facilities for the accessway. Furthermore, the access is required under the 1983 and 1985 permits and meets the goals set forth in the Coastal Act and the Malibu LCP, which the Commission effectively certified on September 13, 2002. [8]

The Commission attached special conditions to the permits issued for this property, requiring the property owner to offer to dedicate vertical and lateral public access easements, and the Commission clearly stated, in the findings associated with those permits, that the conditions were necessary to bring the proposed development into compliance with the Coastal Act. It should be noted that these conditions were in place and accepted by the applicants, who did not challenge the permit. The time to do so under applicable law has long passed and this discussion about the legal provisions and about the Commission's justifications for the underlying permit conditions that it imposed is provided only as background. Unpermitted development including a 9-ft high wall, concrete slab and generator, fence, railing, light posts, planter, and landscaping is located within the vertical easement, completely obstructing public access between Pacific Coast Highway and the beach seaward of the residence. Additionally, rock riprap has been placed in the lateral and vertical access easement areas, partially obstructing public access within the easements. The unpermitted development does not maximize public access and actually directly interferes with the use of valid public access easements such as the one that extends from the nearest public road, Pacific Coast Highway, to the shoreline and along the coast.

Chapter 2 of the LCP provides policies concerning public access. Policy 2.63 requires that maximum public access from the first public road to the shoreline and along the shoreline be provided with all new development projects unless overriding safety concerns exist, adequate access exists nearby, or agriculture would be impacted. In this case, there are no overriding safety concerns[9] and no agricultural resources are affected. Furthermore, there is no open, vertical, public access nearby within 500 feet. The closest open vertical accessway is approximately 1,545 feet upcoast. Therefore, preventing the use of the vertical public access easement that was created in conjunction with the development of the home is inconsistent with LCP policy 2.63.

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[8] The LCP incorporates all Coastal Act resource protection policies. Therefore, violations of the Coastal Act concurrently violate the LCP.

[9] To the extent Mrs. Ackerberg has concerns regarding her own safety, the Commission staff has repeatedly expressed its interest in working with her to address those concerns and to design the accessway in a manner which would reduce any potential concerns. We understand that AFA is similarly willing to accommodate concerns and Commission staff will actively participate in such discussions.

Section 2.64 of the LCP requires the recordation of an OTD for lateral and vertical access for all new development between the first public road and the sea that impacts public access. In accordance with these sections, under the LCP, lateral easements shall extend from the mean high tide line to a fixed point at the seaward end of the development, and vertical easements shall extend along the side of the property to the extent feasible and be a minimum of 10 feet wide. In addition to the length and width requirements, LCP Section 2.86 provides that requiring or acquiring one vertical accessway every 1,000 feet will fulfill the LCP accessway policies in the Carbon Beach area. As stated above, the nearest vertical accessway is located 1545 feet away. Thus, the lateral easement, which extends from the mean high tide line to the toe of the bulkhead, which is a fixed point at the seaward boundary of the development, only satisfies the minimum requirement of the current LCP policies, and the vertical access easement in this case, which is 10 feet in width and extends along the eastern boundary of the property from PCH to Carbon Beach, does not even do that, since there would still be no accessway for over 1,000 feet; and finally, any obstruction of those easements is inconsistent with this policy as well.

In addition, the "Carbon Beach" Portion of Section 2.86 of the LCP (on Page 36 of the Land Use Plan ("LUP") portion of the LCP), along with LUP Public Access Map 3 and 4, not only depict the Ackerberg easement as a public accessway, but specifically require it to be open for public use.

Upon review of the relevant Coastal Act and LCP policies, it is clear that the easements on the property should be utilized for public access, and the unpermitted development located within the easement areas and completely obstructing public access is inconsistent with the public access goals of both the Coastal Act and the LCP and the existing permits.

ii. Section 30253 – Minimization of Adverse Impacts

The unpermitted development is also inconsistent with Coastal Act Section 30253, which provides in relevant part:

> *New development shall:*
>
> *(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs…* (emphasis added)

When it considered the application for CDP No. 5-83-360, the Commission was concerned that the placement of a shoreline protective device on the beach would adversely impact the shoreline by increasing erosion and affecting shoreline sand supply. In order to balance the need for the proposed development with the requirements of Coastal Act Section 30253, permits issued by the Commission required the offer of a lateral access easement and the recordation of a deed restriction containing an assumption of risk clause. In addition, the Commission's findings for the permit included a diagram showing the height and width specifications of the bulkhead (attached as Exhibit 3 to the staff report prepared for the hearing on the permit). The riprap at

issue in this matter not only lies within the lateral and vertical easement areas, but also exceeds the size specifications approved by the Commission. The 1983 Commission determined that the proposed protective device would increase erosion. The enlargement of the shoreline protective device through the placement of additional riprap in front of the Ackerberg property will increase erosion even more and may in fact magnify the impact of wave energy on adjacent properties, causing increased erosion of those areas. Thus, the riprap is inconsistent with Coastal Act Section 30253(2).

2. Recordation of Notice of Violation

Under the Coastal Act, a Notice of Violation may be recorded against property that has been developed in violation of the Coastal Act. The Notice is recorded in the office of the county recorder where the property is located and appears on the title to the property. The notice serves a protective function by notifying prospective purchasers that a Coastal Act violation exists on the property and that anyone who purchases the property is responsible for the full resolution of the violation. The statutory authority for the recordation of a Notice of Violation is set forth in Coastal Act Section 30812, which states, in relevant part, the following:

> *(a) Whenever the executive director of the commission has determined, based on substantial evidence, that real property has been developed in violation of this division, the executive director may cause a notification of intention to record a notice of violation to be mailed by regular and certified mail to the owner of the real property at issue, describing the real property, identifying the nature of the violation, naming the owners thereof, and stating that if the owner objects to the filing of a notice of violation, an opportunity will be given to the owner to present evidence on the issue of whether a violation has occurred.*
>
> *(b) The notification specified in subdivision (a) shall indicate that the owner is required to respond in writing, within 20 days of the postmarked mailing of the notification, to object to recording the notice of violation. The notification shall also state that if, within 20 days of mailing of the notification, the owner of the real property at issue fails to inform the executive director of the owner's objection to recording the notice of violation, the executive director shall record the notice of violation in the office of each county recorder where all or part of the property is located.*
>
> *(c) If the owner submits a timely objection to the proposed filing of the notice of violation, a public hearing shall be held at the next regularly scheduled commission meeting for which adequate public notice can be provided, at which the owner may present evidence to the commission why the notice of violation should not be recorded. The hearing may be postponed for cause for not more than 90 days after the date of the receipt of the objection to recordation of the notice of violation.*
>
> *(d)* ***If****, after the commission has completed its hearing and the owner has been given the opportunity to present evidence,* ***the commission finds that, based on substantial evidence, a violation has occurred, the executive director shall record the notice of violation*** *in the office of each county recorder where all or part of the real property is*

> *located. If the commission finds that no violation has occurred, the executive director shall mail a clearance letter to the owner of the real property.* (emphasis added)

Mrs. Ackerberg objected in writing to the recordation of a Notice of Violation in this matter in a letter to staff dated May 17, 2007. Accordingly, a hearing was scheduled to determine whether a violation of the Coastal Act has occurred. Commission staff previously attempted to bring this matter to the Commission, but at the request of Mrs. Ackerberg, staff postponed the hearing several times.

As set forth below, the Commission finds that Coastal Act violations have occurred on the property. Thus, the Executive Director shall record a Notice of Violation in the Los Angeles County Recorder's Office. The Notice of Violation will remain in effect until the violations at issue have been completely resolved. Within 30 days of the final resolution, pursuant to Section 30812(f), the Executive Director will record a Notice of Rescission of the Notice of Violation, which will have the same effect of a withdrawal or expungement under Section 405.61 of the Code of Civil Procedure. The Executive Director will also send a letter to the property owner at that time, notifying the owner that the Notice of Violation has been rescinded.

a. Unpermitted Development Has Occurred

Coastal Act Section 30812 authorizes the Executive Director to record a Notice of Violation if real property has been developed in violation of the Coastal Act. As is explained above, in section IV.D.1, the findings from which are hereby incorporated herein by reference, the activities at issue constitute development under Coastal Act Section 30106 and the Malibu LCP, and they are inconsistent with the existing CDPs, yet they were undertaken without obtaining a CDP or an amendment to the existing CDPs, in violation of Coastal Act Section 30600. Therefore, the Commission finds that violations of the Coastal Act have occurred.

b. Requirements For the Recordation of a Notice of Violation Have Been Satisfied

Coastal Act Section 30812(g) states:

> *The executive director may not invoke the procedures of this section until all existing administrative methods for resolving the violation have been utilized and the property owner has been made aware of the potential for the recordation of a notice of violation. For purposes of this subdivision, existing methods for resolving the violation do not include the commencement of an administrative or judicial proceeding.*

After repeated attempts by Commission staff to resolve this matter administratively, the Mrs. Ackerberg has failed to take action to remove the unpermitted development and restore the impacted areas of the property. Staff first sent a letter to Mrs. Ackerberg on March 28, 2005, requesting the removal of the unpermitted development located within the vertical easement. In his April 7, 2005 letter, the Executive Director stated that although staff would afford Mrs. Ackerberg time to tend to private matters, the matter needed to be resolved, especially before any transfer or sale of the property. Additional letters from staff were sent on June 30, 2005,

December 13, 2005, February 16, 2006, April 10, 2006, March 5, 2007, May 30, 2007, and October 2, 2008, in addition to numerous telephone calls and meetings with Mrs. Ackerberg's attorneys. Mrs. Ackerberg has not, in any correspondence or other communication with staff, agreed to resolve the violations on the property and has, in fact, consistently submitted arguments against removal of the unpermitted development within the easement area. Clearly, all existing administrative methods for resolving the violations at issue in this matter have been exhausted, as required by Coastal Act Section 30812(g), before initiating these proceedings.

As noted above, Commission staff informed Mrs. Ackerberg of the potential for recordation of a Notice of Violation in a letter dated March 5, 2007, and the Executive Director notified Mrs. Ackerberg of his intent to record a Notice of Violation on April 27, 2007.[10] In addition, Commission staff notified Mrs. Ackerberg of its intent to proceed with the Notice of Violation proceedings, which were stalled in June of 2007, in a letter dated October 2, 2008. Thus, Mrs. Ackerberg has been made aware of the potential for the recordation of a Notice of Violation as required by Coastal Act Section 30812(g).

3. Provisions of CCC-09-CD-01

As stated in Section D.1.b of these findings, the Commission found it necessary to impose requirements for offers to dedicate lateral and vertical public access easements as part of the approval of the two existing permits to bring the proposed development projects authorized under the permits into compliance with the resource protection policies of Chapter 3 of the Coastal Act. The cited development on the property was conducted without a CDP and obstructs the easements, preventing public use of the easements. Issuance of CCC-09-CD-01 will ensure appropriate removal of the unpermitted items and provision of the required public access, bringing the property into compliance with the Coastal Act, the LUP, and the existing permits.

The proposed Cease and Desist Order will direct Mrs. Ackerberg to: 1) cease and desist from construction and/or maintenance of unpermitted material or structures, 2) remove all unpermitted material or structures from both easement areas on the property, 3) allow public use of the easements, in compliance with the Coastal Act and with the terms and conditions of the existing permits and easements, and 4) cease and desist from any unpermitted development activities or noncompliance with permit conditions.

4. Provisions of CCC-09-NOV-01

A finding that a Coastal Act violation has occurred will result in the recordation of a Notice of Violation, which will notify potential purchasers of the existence of the violations and the responsibility of the property owner, including subsequent owners, to resolve the violations.

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[10] Commission staff received a certified mail delivery receipt signed by Mrs. Ackerberg for the April 27, 2007 Notice of Violation letter. Additionally, Mrs. Ackerberg submitted a specific, written objection to the recordation of a Notice of Violation with the letters that constitute her SOD in response to the NOI. Thus, Mrs. Ackerberg received notification of both the potential for the recordation of a Notice of Violation and the Executive Director's intention to record a Notice of Violation.

E. California Environmental Quality Act (CEQA)

The Commission finds that the issuance of Commission Cease and Desist Order CCC-09-CD-01 to compel removal of the unpermitted development and provision of required public access is exempt from any applicable requirements of the California Environmental Quality Act of 1970, Cal. Pub. Res. Code §§ 21000 *et seq.* (CEQA), and will not have significant adverse effects on the environment, within the meaning of CEQA. The Cease and Desist Order is exempt from the requirement of preparation of an Environmental Impact Report, based on Sections 15061(b)(2), 15307, 15308 and 15321 of the CEQA Guidelines (14 CCR).

F. Summary of Findings of Fact

1. Lisette Ackerberg owns the .95-acre property located at 22466 and 22500 Pacific Coast Highway in Malibu in Los Angeles County, identified as APNs 4452-002-011 and 4452-002-013 ("the Property").

2. The Coastal Commission ("Commission") issued coastal development permit ("CDP") No. 5-83-360 in 1983, authorizing certain development on the Property subject to a condition requiring recordation of an offer to dedicate ("OTD") a lateral public access easement restricting the applicant from interfering with present use by the public of the areas subject to the easement prior to acceptance of the offer. The provisions of the permit run with the land.

3. The Commission issued CDP No. 5-84-754 in 1985 to Lisette Ackerberg and her husband to authorize certain development on the Property subject to a condition requiring recordation of an OTD a vertical public access easement. The provisions of the permit run with the land.

4. The OTD required by CDP 5-83-360 was recorded on July 11, 1983, and has been in the chain of title for the Property since that time. The OTD was accepted by the State Lands Commission on March 20, 2002 and became a legal easement.

5. The OTD required by CDP 5-84-754 was recorded on April 5, 1985, and has been in the chain of title for the Property since that time. The OTD was accepted by the Access for All on December 17, 2003 and became a legal easement. A legal challenge to that OTD failed, as indicated below.

6. The Commission found the access provided by the lateral and vertical access easements necessary to bring the development authorized under the permits into compliance with the Coastal Act.

7. Development that is not authorized by either of the permits listed above (or any other coastal development permit) has occurred on the property, including the erection or placement of rock riprap, a 9-ft high wall, concrete slab and generator, fence, railing, planter, light posts, and landscaping. This development was undertaken without a CDP and is in violation of the Coastal Act.

8. In addition to the violation of the Coastal Act inherent in the conduct of unpermitted development, the nature and location of the development at issue obstructs the vertical and lateral public access easements, which is independently inconsistent with the policies in Chapter 3 of the Coastal Act, the policies in the Malibu Local Coastal Program ("LCP"), and the terms and conditions of the existing permits and the easements.

9. The unpermitted development is inconsistent with the goals of Chapter 3 of the Coastal Act and the Land Use Plan ("LUP") portion of the certified Malibu LCP.

10. Substantial evidence, as that term is used in the Coastal Act (Cal. Pub. Res. Code § 30812), exists that a Coastal Act violation has occurred in the development of the property.

11. All existing administrative methods for resolving the violations at issue have been utilized.

12. The Executive Director made Mrs. Ackerberg aware of his intent to record a Notice of Violation pursuant to Coastal Act Section 30812. Mrs. Ackerberg submitted a written objection to such recordation on May 17, 2007.

13. Commission staff sent letters to Mrs. Ackerberg on March 28, 2005, April 7, 2005, June 30, 2005, December 13, 2005, February 16, 2006, April 10, 2006, March 5, 2007, May 30, 2007, October 2, 2008, November 14, 2008, November 24, 2008, and December 2, 2008, to discuss resolution of the violations.

14. Mrs. Ackerberg sent letters to staff regarding the proposed enforcement action. All of the letters contained defenses to the proposed requirement for the removal of the unpermitted development and requests for the Commission to delay taking action to resolve the violations. The letters were dated April 28, 2005, July 7, 2005, August 4, 2005, December 16, 2005, January 19, 2006, February 27, 2006, March 23, 2006, April 3, 2006, April 17, 2006, October 22, 2008, November 19, 2008, and November 26, 2008. At no time did Mrs. Ackerberg agree to voluntarily comply with staff's requests to comply with the permit conditions and Coastal Act requirements and remove the unpermitted development from the access easement area.

15. The Executive Director issued a Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings (NOI) on April 27, 2007, addressing the unpermitted development and the obstruction of public access.

16. On June 28, 2007 the California Court of Appeals granted a stay of the Commission proceedings listed in the NOI until it ruled on an appeal in a case brought by Mrs. Ackerberg's neighbor, Jack Roth, challenging the vertical access easement discussed in points 2 and 5 above, thus postponing the Notice of Violation of the Coastal Act and Cease and Desist Order Proceedings until resolution of the appeal.

17. On April 23, 2008, the Court of Appeals issued its decision affirming the trial court's sustaining of the Commission's demurrer to Mr. Roth's complaint. On July 9, 2008, the

California Supreme Court denied Mr. Roth's petition for review and application for stay, upholding the Court of Appeals dismissal of Mr. Roth's lawsuit and dissolving the stay.

18. At Mrs. Ackerberg's request Commission staff postponed the December 10, 2008 and the June 11, 2009 hearing on this matter.

19. All of the unpermitted development listed in the NOI and addressed in this report remains on the property.

G. Violators' Defenses and the Commission's Responses

Pursuant to Section 13181(a) of the Commission's Regulations, Mrs. Ackerberg was provided the opportunity to identify her defenses to the proposed issuance of the Order and to object, via a written Statement of Defense, to both the proposed issuance of the Order and the proposed recordation of a Notice of Violation. In fact, she was given multiple opportunities to do so. Mrs. Ackerberg's former lawyer, Mr. Reeser, asserted defenses on her behalf in a June 11, 2007 letter to staff, in which Mrs. Ackerberg stated that the June 11, 2007 letter as well as two previous letters (dated March 22, 2007, and May 17, 2007) and "any further response that may be submitted" all constituted Mrs. Ackerberg's response to the Commission's April 27, 2007 Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings ("NOI"). Commission staff reasonably construed this statement to mean that the letters formed Mrs. Ackerberg's statement of defense, even though the statement of defense form that was sent with the Notice of Intent was not completed and submitted. In addition, Mrs. Ackerberg's present lawyer, Ms. Abbitt, asserted defenses on Mrs. Ackerberg's behalf in letters dated October 22, 2008, November 19, 2008, and November 26, 2008. The October 22, 2008 letter did not include a completed statement of defense form, which had been provided to Ms. Abbitt by Commission staff in its October 2, 2008 letter, extending a second opportunity for Mrs. Ackerberg to submit defenses. We note preliminarily that many of these defenses actually raise issues that appear to be objections to the original permits and their conditions. We again note that the legal time frame for such challenges expired decades ago and such objections are not legally relevant to an action to enforce the terms of a valid permit nor can they provide a defense to complying with 25-year-old permit conditions. However, as a courtesy and by way of explanation, we include responses to many of those issues below. The following paragraphs present quotations taken from all of these letters and the Commission's responses to those statements.

1. Mrs. Ackerberg's Defense:

The vertical access easement here has inherent limitations that seriously affect its utility to provide meaningful or viable public access to the beach… This particular vertical accessway simply may not be viable. Recognizing that this is the case, we have recently been pursuing what we (and we believe the Commission in 1984) believed to be a better solution for the public – opening and funding a dedicated vertical accessway close by that is currently owned by the County of Los Angeles at 22600 Pacific Coast Highway. [October 21, 2008 letter at page 2 and 3.]

Commission's Response:

Contrary to Mrs. Ackerberg's assertion that the vertical access easement area that Access for All ("AFA") is seeking to open "may not be viable," evidence suggests the easement area is very viable. The vertical easement area on Mrs. Ackerberg's property lies in the middle of Carbon Beach, and falls in the middle of the two open and operating easements along Carbon Beach. The Ackerberg easement area is located near the available public parking along both sides of Pacific Coast Highway. Opening the Ackerberg easement will increase the public's options for parking close to an accessway. The Commission made specific findings to this effect in approving CDP No. 5-84-754 in 1985.

The Ackerberg vertical easement is also particularly effective at increasing public access because of its connection to lateral public access easements. The vertical easement complements the lateral easement that lies in front of Mrs. Ackerberg's property and extends from the Mean High Tide Line inland to the bulkhead structure. The upcoast property immediately adjacent to Mrs. Ackerberg's property also has a lateral easement that extends from the Mean High Tide Line inland to a seawall structure, and the downcoast property immediately adjacent to Mrs. Ackerberg's property has a lateral easement in front of the house which extends from the Mean High Tide Line inland 25 feet. In addition, opening the Ackerberg vertical easement area will provide the public with access to a long strip of adjacent lateral accessways downcoast from the Ackerberg property. Opening the Ackerberg easement will provide the public with access to a large area of Carbon Beach that can be used for recreational purposes, not just access to the mean high tide line.

The alternative vertical accessway Mrs. Ackerberg refers to is not located at 22600 Pacific Coast Highway; instead, the easement area is on the neighboring lot, at 22548 Pacific Coast Highway (hereinafter, "22548 PCH"). The easement area referred to was dedicated to and accepted by Los Angeles County in October of 1973. (**Exhibit 39**). The 22548 PCH easement lies approximately 690 feet away from the vertical access easement area on Mrs. Ackerberg's property. Neither the Commission nor Access for All owns the 22548 PCH easement area, and neither one has any authority regarding the opening or controlling of the easement area. Moreover, even if it were opened, the 22548 PCH vertical easement area would not provide the same access to a wide strip of adjoining lateral accessways for public recreational use as the Ackerberg vertical easement area will. There is no lateral easement dedicated between the mean high tide line and the property in front of 22548 PCH, nor are there lateral accessways located along the coast in front of the neighboring properties at 22548 PCH.

Over the past 35 years, during which time Los Angeles County owned the vertical accessway at 22548 PCH, it has not pursued opening the easement area, and recent attempts by Mrs. Ackerberg's counsel to persuade them to do so have not altered this situation. County staff has repeatedly stated to Commission staff that the County has no intentions of opening the specific vertical easement area in the future. County staff has also stated to Commission staff that the County does not intend to open *any* easement areas in the future beyond the 11 that are currently owned and operated by the County. In addition, even if the County did secure funds to open the easement, there is no assurance that the easement at 22548 PCH will remain open in the future, leaving it subject to the possibility that the easement area may close in the future if the County

no longer has the funds for operating and maintaining the easement area. Moreover, as discussed elsewhere, the potential for an additional accessway does not in any way support the elimination of this accessway.

In fact, the vertical accessway owned by the County at 22548 PCH is not a better solution for the public, nor is it superior to the vertical accessway that exists on the Ackerberg property. The 22548 PCH easement area runs through a parking lot attached to a 75-unit condominium association that currently exists on the lot. There are several encroachments within the easement area, the removal of which would be required prior to opening the easement. The encroachments that exist within the 22548 PCH vertical easement include a stucco retaining wall, a planter, a wood gate, a pool equipment area, and the portion of a wood deck. Opening the easement area would not be any more feasible than opening the Ackerberg easement when solely comparing the removal of encroachments within easement areas. Considering the many problems associated with opening the 22548 PCH easement area, as well as the lack of access to lateral easement areas the 22548 PCH easement area will provide, opening the Ackerberg easement area will provide a superior accessway over the alternative easement area Mrs. Ackerberg proposes.

In light of the fact that the County has no plans to open the easement at 22458 and has not expressed any intentions of opening the alternative easement area in the future, the Commission has no reason to believe that the alternative easement area at 22548 Pacific Coast Highway, which Mrs. Ackerberg offers to assist with opening in lieu of opening the vertical easement that lies on her property, will be opened to the public in the future. Therefore, adequate access does not exist near Mrs. Ackerberg's vertical accessway, since the closest open access area is approximately 1,545 feet from the Ackerberg easement area. Furthermore, the Commission does not have the authority to pursue opening the easement area at 22548 since the easement is owned by the County. Moreover, even if that alternative location were available, the Commission could not ensure that it would remain so. In any event, Mrs. Ackerberg's easement area is actually a better location, as it will provide an access point for the public to Carbon Beach in an area that lies between an open accessway upcoast and an open accessway down coast, is easily accessible from public parking spaces on both sides of the street, and connects to lateral public access easements.

Finally, putting aside all of the above policy considerations, the fact remains that the Commission did require that this specific area on the Ackerberg property be opened to public use, and this Commission, acting more than 20 years later, should not second-guess that decision. In fact, technically, this is not even a legal defense, as this "defense" does not present any claim, much less evidence, that the elements necessary for the issuance of the Cease and Desist Order, under Coastal Act section 30810, have not been satisfied.

2. <u>Mrs. Ackerberg's Defense:</u>

The Commission then added a finding to its [1985] decision to provide the Ackerbergs with the future opportunity for extinguishing the condition [requiring dedication of a vertical accessway]. [October 21, 2008 letter at page 2.]

Commission's Response:

The Commission approved the Ackerberg's coastal development permit ("CDP") application (No. 5-84-754) on January 24, 1985. The CDP was approved subject to a condition requiring the Ackerbergs to record an irrevocable offer to dedicate ("OTD") a vertical public access easement. Although the Commissioners discussed whether to allow the Ackerbergs to extinguish their OTD if certain conditions were satisfied in the future, ultimately, the proposed condition language was not altered to provide for such an extinguishment. In fact, Commissioner McInnis made an amending motion proposing such an extinguishment would be allowed so that the approach could be addressed more broadly in the context of Los Angeles County's Land Use Plan ("LUP") for Malibu, which was then pending. Then, Chief Deputy Director Peter Douglas said that a reference to that approach could be included in the findings, and various Commissioners, including Commissioner McInnis, agreed to that approach. Thus, Commission Chair Nutter explained that the main motion (which passed unanimously) was to approve the CDP pursuant to the staff recommendation "with the understanding that we will have a revised finding for our consideration."

However, no revised finding was ever brought back for the Commission's consideration. In February, the staff member assigned to the project sent proposed language (hereinafter referred to as the "Extra Finding") to the Ackerberg's lawyer and then incorporated that language into a new draft of the staff report, but it was never sent to the Commission for its approval. Moreover, in April, when the Ackerbergs had satisfied all of the conditions precedent to the issuance of the permit, and that same staff member sent the permit to the Ackerbergs for their acknowledgement, and thereby effectively issued the permit, the Extra Finding was not included. Therefore, the status of those findings is, at a minimum, subject to serious question.

In any event, even assuming that there were some Extra Finding that was appropriately adopted by the Commission, it would be of little, if any, significance today. The language proposed by Commission staff as the Extra Finding states that if the Malibu LUP is adopted with policy language allowing private property owners to extinguish dedications of public easements on their property should adequate access open nearby, any such LUP provision would apply retroactively to the Ackerberg's CDP and vertical easement area dedication. Moreover, the discussion by the Commission and the Extra Finding included several specific conditions that would have had to be met, none of which has been met. The Extra Findings specifically included the following language:

> *This position assumes that the publicly owned accessway is within 500 feet of the subject property, that it is equally suitable for public use based on management and safety concerns, and that improvements to accomplish public use are feasible.* ***Once a public accessway has been improved and opened for public use, and a suitable policy and mechanism has been developed and adopted to ensure that such a vertical accessway remains open and available for public use and assuming the Commission has approved a policy that outstanding offers to dedicate additional vertical access easements within 500 feet of an opened vertical accessway can then be extinguished****, staff will initiate actions to notify affected property owners that they can take steps to extinguish such*

> *offers to dedicate. As part of the Commission's public access program, procedures will be developed to implement this directive.*

It is clear that a number of pre-conditions were imposed, and none of those have been met, as is discussed below. For example, in the event that a future Malibu LUP, approved by the Commission, were to include such a provision as set forth above, the Commission suggested the Ackerbergs be notified of their right to take necessary legal steps to extinguish their vertical access easement OTD. However, the Commission expressly refrained from making any decision regarding the broader policy at the 1985 Commission hearing reviewing the Ackerberg's CDP application. Instead, the Commission deferred such discussion until a later date when the Malibu LUP was to be decided.[11] Although Commissioners did indicate that they generally favored a public policy that encourages opening publicly owned accessways over requiring the dedication of additional privately owned accessways, they were not willing to make any commitments to the Ackerbergs at that point, certainly not any unconditional ones that were not limited to the criteria listed above. One of those criteria was that adequate access opens nearby (within 500 feet). The 1986 Malibu LUP, approved by the Commission on December 11, 1986, included the following provision:

> *Where several offers with in the standard of separation [1,000 feet] are required over a period of time, the improvement of any one offer will release the need to improve the others, and they could be abandoned. No offer may be abandoned unless an actual accessway is opened, however, and the revised Policy 55d will prevent the abandonment of already opened accessways.*

Malibu/Santa Monica Mountain LUP, page 5-6, 12/11/1986.

However, to begin with, the 1986 Malibu LUP, approved by the Commission, never did adopt the Commission's recommendation for a standard of separation of 500 feet, which was underlying its discussion as noted above. Instead, the 1986 Malibu LUP adopted a standard of separation of 1,000 feet. Therefore, a pre-condition for the Malibu LUP to apply retroactively to the Ackerberg's vertical easement area was not met. In addition, while the 1986 Malibu LUP did include a provision allowing for the abandonment of OTDs should another easement area open within 1,000 feet, no such open easement area currently exists (or has ever existed) within either 500 feet or 1,000 feet of the Ackerberg's lot. Therefore, in this specific case, even if the legal hurdles did not exist, under the very discussion by the Commission relied on by counsel for Mrs. Ackerberg, the factual conditions have never been met, even if the 1986 Malibu LUP were to apply retroactively to their vertical easement area, which it does not.

Secondly, neither the Extra Finding that a planner proposed adding to the 1985 staff report, nor the 1986 Malibu LUP, provided a mechanism by which one could abandon or relinquish an OTD once it was accepted, nor could they, unless the accepting entity were agreeable or had accepted

[11] For instance, Chair Nutter stated "the place ultimately to make our policy stand, I think, is in the context of that LCP," and Commissioner Shipp stated "let's just try not to make this permit into an LUP or an LCP. Let's look at it as what it is, a permit." Commissioner McMurray thought it should not even be in the findings, stating "I don't think we should include in this findings… I think it goes beyond this permit. If we want to start this process in the Malibu LUP that's fine."

the offer subject to such a limitation in the first place. In fact, AFA accepted Mrs. Ackerberg's OTD a vertical access easement in 2003, and as a consequence, AFA now holds a legal interest in the vertical access area. Even if a vertical accessway were to open within 500 feet from the vertical accessway located at the Ackerberg's property and a mechanism were instituted to ensure the accessway remains open, the Ackerbergs do not have the ability to rescind their now accepted easement.

Furthermore, the now controlling Malibu LCP, which was approved by the Commission on September 13, 2002, no longer includes any provision allowing for abandonment of an easement area if adequate access opens within the standard of separation. Instead, Section 4, Policy No. 2.85 of the 2002 Malibu LCP includes a provision that:

> *Improvements and/or opening of public easements already in public ownership or accepted pursuant to a Coastal Permit shall be permitted regardless of the distance of the nearest available vertical accessway.*

Thus, under the current Malibu LCP, the distance between the Ackerbergs' accepted vertical accessway and the nearest vertical accessway is irrelevant, and opening of the accessway must be permitted. Policy No. 2.85 of the Malibu LCP does not prohibit, but rather encourages, opening or improving all accepted easement areas regardless of the distance between one open easement and another.

3. <u>Mrs. Ackerberg's Defense:</u>

The vertical access easement here has inherent limitations that seriously affect its utility to provide meaningful or viable public access to the beach. There is insufficient parking in this area and no crosswalk or stop light near the Ackerberg property. There are no visitor-supporting facilities, <u>i.e.</u>, trash cans, lifeguards, or bathrooms, on or near the beach. [October 21, 2008 letter at page 3.]

<u>Commission's Response:</u>

Initially, we note that Mrs. Ackerberg's statement that there is not a nearby crosswalk is inaccurate. A crosswalk does exist near Mrs. Ackerberg's easement area. The crosswalk is located on Pacific Coast Highway just three lots upcoast from Mrs. Ackerberg's property. In addition, there is public, on-street parking on both sides of the highway at this location. Moreover, the Commission made express findings about what a particularly good location this was for an easement. See, e.g., footnote 5, above.

However, the extent of such amenities is not relevant here. Neither the Coastal Act, the 2002 Malibu LCP, nor the 1986 Malibu LUP require visitor-supporting facilities, public parking areas, crosswalks, or stop lights near a vertical accessway as a pre-condition for opening an easement. While the 2002 Malibu LCP encourages siting accessways near supporting facilities, Section 3, Policy No. 2.65 specifically states that this is not a requirement:

> *No facilities or amenities, including, but not limited to, those referenced above [parking areas, restroom facilities, picnic tables, or other such improvements], shall be required as a prerequisite to the approval of any lateral or vertical accessways Offers to Dedicate or as a precondition to the approval or construction of said accessways.*

Section 30212.5 of the Coastal Act also encourages siting, opening, and maintaining accessways near public facilities when possible; however, nothing in the Coastal Act prohibits or restricts opening accessways that are not near public facilities. Moreover, Section 30212.5 promotes the distribution of public facilities "so as to mitigate against the impacts, social and otherwise, of overcrowding by overuse by the public of any single area." Opening the Ackerberg vertical accessway will further this policy by alleviating the pressure placed upon the available parking near the closest upcoast and downcoast vertical accessways currently opened and operating along Carbon Beach - the Zonker Harris accessway and the Geffen accessway. The vertical accessway area located at Mrs. Ackerberg's property lies approximately 1,545 feet downcoast from the Zonker Harris accessway, and approximately 2,215 feet upcoast from the Geffen accessway. Opening and operating the Ackerberg property's vertical accessway should alleviate some of the parking congestion around the Zonker Harris accessway area and the Geffen accessway area by providing additional access between the two vertical accessways along Carbon Beach. Doing so will spread out the parking pattern, achieving the goals of Section 30212.5 of the Coastal Act by mitigating against the impacts "of overcrowding or overuse by the public of any single area." Opening the Ackerberg accessway will complement the parking along Pacific Coast Highway, where the majority of the public parallel park, then walk to the nearest open vertical accessway.

In addition, the 11 County owned and operated accessways throughout Los Angeles County have been in existence and functioning without any problems for years, regardless of the fact that all of the referred-to accessways generally do not have any supporting facilities nearby, such as trash cans, lifeguards, or restrooms. This is proof that vertical accessways can function as viable accessways to the coast without the need for supporting facilities nearby.

Finally, though most fundamentally, the extent of available amenities at the subject location is not relevant because it has nothing to do with the factors that must be satisfied to justify issuance of a Cease and Desist Order. This defense does not even purport to contest the either of the bases for the Commission's issuance of this Order – that the subject development is both unpermitted and inconsistent with the existing permits for the site.

4. <u>Mrs. Ackerberg's Defense:</u>

The easement area is cramped, sandwiched between two homes, and is not visible from Pacific Coast Highway. [October 21, 2008 letter at page 3.]

<u>Commission's Response:</u>

The easement area on Mrs. Ackerberg's property is the standard 10 feet in width. The minimum width required for a vertical easement area under the Malibu LCP and the 1986 version of the Malibu LUP is10 feet. The easement area is not sandwiched between two homes; it actually borders a tennis court and the neighboring property line. The tennis court separates the easement

area from Mrs. Ackerberg's home. The width and location of the vertical easement area along Mrs. Ackerberg's property meet the requirements of Section 3, Policy No. 2.66 of the 2002 Malibu LCP as well as Section 4.1.2 of the 1986 Malibu LUP.

In addition, the two open and operating vertical accessways along Carbon Beach border two homes. The fact that the two open and operating accessways along Carbon Beach lie between two residential homes does not impact their functionality. Mrs. Ackerberg does not provide any explanation or evidence regarding how an easement area sited between two residential properties will prohibit the easement area from serving its function--providing public access to the public lateral easement areas nearby as well as providing access to the mean high tide line area of the beach.

Furthermore, nothing in the Coastal Act or the Malibu LCP requires that accessways be visible from Pacific Coast Highway. One of the goals of requiring dedication of accessways along Carbon Beach is to mitigate against the loss of visibility of the beach and the coastline which has occurred from the high density in residential development between Pacific Coast Highway and the coast. The 1985 Commission found that without dedication of a public vertical easement, the Ackerberg's CDP No. 5-84-754 would violate the Coastal Act by impacting the public's visibility of the coast as well as restricting the public's access to the coast. Once the vertical accessway on Mrs. Ackerberg's property is opened, access signs will be posted, and access information for Carbon Beach will be made available through various websites, including the California Coastal Commission's website, which provides a Carbon Beach Access Map. AFA assumes all responsibility for operating and maintaining the accessway. AFA will ensure the accessway is kept free of debris, which could clutter the easement area; therefore the 10-foot area will provide sufficient space for public ingress and egress passage.

Finally, as was the case with the prior defense, the allegations raised in this defense do not even purport to contest either of the bases for the Commission's issuance of this Order – that the subject development is both unpermitted and inconsistent with the existing permits for the site.

5. Mrs. Ackerberg's Defense:

There are problems that exist at both ends of the easement area…There are two substantial eucalyptus trees on the land side of the easement but they are located in the City right-of-way, not the easement area… The trees are significant, however, because they are mature and fully obscure the easement area…A problem also exists at the seaward end of the easement… the exposed rock where the easement adjoins the beach makes use of the easement, again, problematic. [October 21, 2008 letter at pages 3-4.]

Commission's Response:

Commission staff will work with the City of Malibu's local agencies to ensure that any obstructions within the City's right-of-way that restrict access to the Ackerberg vertical accessway (including the eucalyptus trees, if necessary) are appropriately addressed. As noted above, the rock riprap that lies within the easement area adjoining the beach is unpermitted rock that was placed some time during or after the construction of the bulkhead and which exceeds the

permitted rock approved by the Commission in 1983 and certainly does not provide a defense to enforcement of the permit conditions. CDP No. 5-83-360 required the removal of the large boulders that existed on the property at that time, and approved the replacement of a rock and gravel waste mix measuring between ¾'' and 12'' in diameter. The 1983 permit does not authorize the large boulders which extend back from the wall and rest on a minimum of 1 foot filter material as described in a letter dated February 15, 1984 from Paul A. Spieler to Ralph W. Trueblood. (**Exhibit 40**) At that time, Paul Spieler was a Project Engineer with Vincent Kevin Kelly and Associates Inc., and conducted periodic surveys of the construction of the bulkhead located on the Ackerberg property, which was then owned by Ralph W. Trueblood. The February 1984 inspection revealed the "man sized boulders" exceed the minimum of ¾ inches or the maximum of 12 inches in height approved in CDP No. 5-83-360. Furthermore, the rock riprap that lies in front of the bulkhead lies within the lateral easement area, and was never included in any permit plans approved by the Commission. The Commission only approved the placement of ¾ inch to 12 inch rocks in the construction of the bulkhead, not separate from and in front of the bulkhead in an area that extends into the lateral easement.

The existing rocks located within the vertical and lateral easement areas were not approved by the Commission and are unpermitted development. Removal of the unpermitted rocks that lie within the vertical and lateral easements on Mrs. Ackerberg's property is required by this cease and desist order in order to open the vertical accessway and increase the beach available for the public's use in the lateral accessway. The unpermitted rocks within the easement area are problematic and the removal of the rocks is required due to the non-compliance with CDP No. 5-83-360.

Finally, as was the case with the prior defense, the allegations raised in this defense do not even purport to contest either of the bases for the Commission's issuance of this Order – that the subject development is both unpermitted and inconsistent with the existing permits for the site.

6. <u>Mrs. Ackerberg's Defense:</u>

Until Mr. Roth's litigation has reached final judgment (that is a judgment that is free from direct attack on appeal), it is premature for the Coastal Commission to demand from Mrs. Ackerberg removal of the alleged "unpermitted development" on her property that you identify in your letter. [March 22, 2007 letter at page 1]

<u>Commission's Response:</u>

The Roth litigation served as the basis of many of the defenses asserted by Mrs. Ackerberg prior to 2008. These defenses are now obsolete, but for the record, the Commission provides a short explanation of the nature of the Roth litigation. Mr. Roth owns the property immediately adjacent to the eastern boundary of Mrs. Ackerberg's property. Although the record clearly shows that Mr. Roth was provided adequate notice of the Ackerberg permit hearing in 1985, he failed to object to the proposed terms of the permit at the hearing or to file a petition for a writ of mandate within 60 days of the Commission's final decision approving the permit, as required by Coastal Act Section 30801 in order to obtain judicial review of the Commission action in granting the permit. Despite this, he filed a petition for writ of mandate on March 29, 2006,

challenging the Commission's action on that permit.[12] In the litigation, Mr. Roth asserted that he was not provided adequate notice of the permit hearing, and he sought to invalidate and revoke the vertical easement on Mrs. Ackerberg's property.[13] Mrs. Ackerberg was a real party in interest in the case. In September, 2006, the trial court ruled in favor of the Commission in the matter (by sustaining the Commission's request for a demurrer in this matter), thus dismissing the case, and Mr. Roth appealed the decision. It was at this point, in early 2007, that Commission enforcement staff began formal enforcement proceedings, and Mrs. Ackerberg began asserting that such action would be premature due to the pending litigation. In June of 2007, the Court of Appeals granted a stay of the pending Commission enforcement proceedings until it ruled on the appeal which was then pending to the Second District Court of Appeal (No. BS102404).

However, these defenses are now obsolete. The Court of Appeals ultimately ruled in favor of the Coastal Commission and against Mr. Roth, and the California Supreme Court denied Mr. Roth's petition for review and application for stay on July 9, 2008. Mr. Roth did not seek a *writ of certiorari* from the United States Supreme Court. Therefore, the dismissal of Mr. Roth's lawsuit has been upheld by the courts, and the stay has been dissolved. Mr. Roth's litigation has reached final judgment, and Mr. Roth did not prevail in his lawsuit. The Coastal Commission, Coastal Conservancy, and AFA have the right to proceed with opening the Public Access Easement for public use. It should be noted that the Roth litigation did not concern the lateral access easement on Mrs. Ackerberg's property, and did not address the fact that the materials and structures in the easement area are not only inconsistent with the easement, but are also the result of unpermitted development, which is the basis of the proposed cease and desist order and notice of violation.

The specific defense stated in Mrs. Ackerberg's previous letters asserting that this action is "premature" due to the pending litigation are moot due to the final judgment of Mr. Roth's litigation. Mr. Roth did not prevail in his litigation, and the resolution of the violations at issue in this enforcement action, namely the removal of the unpermitted materials and structures, are not affected by the outcome of the Roth litigation. The proposed order will direct Mrs. Ackerberg to remove the unpermitted development that lies within the easement area. Therefore, Commission staff finds it redundant to address all of Mrs. Ackerberg's defenses related to Mr. Roth's litigation in which he did not prevail and a final judgment has been issued.

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[12] In his complaint and petition for writ of mandate, Mr. Roth argued that he could not have filed within 60 days of the Commission's final decision because he was not provided with notice of the hearing. However, the Superior Court ruled that even if he had not received adequate notice, which the Commission did not concede (and which the Court did not find), Mr. Roth was barred by the statute of limitations because he filed his petition more than 60 days from the date he states he became aware of the easement. Therefore, the court determined that Mr. Roth did not object to the 1985 permit in a timely manner.

[13] Specifically, he asked the court to order the Commission to "revoke the [vertical] easement (or, to the extent required by law, revoke the easement and related permit) and otherwise rescind the assignment of the easement to AFA." First Amended Verified Complaint and Petition for Writ of Mandate, Prayer for Relief at page 22.

7. Mrs. Ackerberg's Defense:

…the Coastal Commission, in Linda Locklin's March 28, 2005 letter to Mrs. Ackerberg, recognized the Ackerbergs' right to "make full use of [the] entire property, including continued use of the offered strip, until such time as it is developed into an open vertical accessway." Moreover, the plans for the Ackerberg development…in conjunction with the Ackerbergs' coastal development permit application contemplated the erection of items such as the block wall, fences, railings, and landscaping . Accordingly, we object to the Coastal Commission's assertion that any and all of the items on Mrs. Ackerbergs' property within the ten-foot wide easement area are per se unauthorized and unpermitted. [March 22, 2007 letter at page 2]

Commission's Response:

Continued Use of the Property

At the January, 1985 permit hearing, the Ackerberg's lawyer, Edwin Reeser, asked that the Ackerbergs be given the "opportunity to continue to use that strip [the vertical access easement area] for patio or planting or whatever, certainly no improved structure… until the property is picked up." Chairman Nutter asked the staff member who presented the staff recommendation on the permit application "whether that's possible anyway under the staff's recommendation," to which the staff member replied "Yes, there is no prohibition against using these offers. They should just be available to… public agency picking them up." There was no further discussion on that point.

Within days of the hearing at which the Commission approved CDP 5-84-754, Mr. Reeser sent a letter to Commission district staff stating that it was his understanding from the proceedings that staff was instructed to revise its findings in several particulars. In specifying the changes he argued needed to be made, he stated that:

> *"both Commissioners and Staff agreed that the Ackerbergs could make full use of the entire width of their property, including the continuation of use of the offered strip, until such time as it is developed into an open vertical accessway."*

Therefore, even by their own counsel's admission, made at the time of the original permit hearing, the clear understanding of the Ackerbergs was that any agreement to allow any use of the area covered by the OTD by the Ackerbergs was explicitly temporary and subject to removal when an entity had accepted the OTD and was ready to open the accessway. In an attempt to open the accessway for public use, AFA wrote to the Ackerbergs to schedule a meeting and a survey of the area, but when the Ackerbergs still hadn't provided permission for the survey over a year later, Commission staff became involved. Linda Locklin is (and was at the time) the Commission's Coastal Access Program Manager. In her March 28, 2005 letter to Mrs. Ackerberg, Ms. Locklin stated:

> *I am attaching a letter from your attorney Edwin Reeser, dated January 28, 1985, in which he acknowledges that you could make full use of your entire property, including continued use of the offered strip, until such time as it is developed into an open vertical accessway.* (**Exhibit 9).**

Ms. Locklin neither confirmed nor denied the statement in her letter. She paraphrased the statement in Mr. Reeser's 1985 letter to highlight that, in adding the "until such time" phrase onto the end, even he acknowledged a temporal limitation on the asserted right to "make full use of the . . . property, including . . . the offered strip." Her letter was an attempt to prompt action by Mrs. Ackerberg towards the opening of the easement, in part by noting that the time for action – as previously recognized by all interested parties – had arrived.

Even assuming that (1) Ms. Locklin's letter was intended to convey the Commission's position, rather than just reflect Mr. Reeser's, and (2) Ms. Locklin's letter could bind the Commission, neither of which appears to be true, it is not relevant as a defense to these proceedings and in fact supports the action at hand, which is intended to develop this "into an open vertical accessway" as is provided for in the permit and acknowledged in Mr. Reeser's 1985 letter. The statement includes the caveat that as soon as the easement is ready to be opened to the public, the development in the easement must be removed. The easement has been accepted and the owner is ready to open it now. Therefore, the statement does not change the status of the development at issue. The development is unpermitted and is no longer even informally or implicitly authorized by the statement at the 1985 Commission hearing, and it must be removed.

Block Wall, Fences, Railings, Light Posts, and Landscaping

Mrs. Ackerberg also appears to be suggesting that the reference to continued use of the property was an implicit approval of existing or planned development, including, but not limited to, a block wall, fences, railings, light posts, and landscaping. Even if Ms. Locklin's letter could bind the Commission, despite the fact that it was written by staff and was not conceding anything, and even if one ignores the terminal "until such time" phrase, the relevant statement in it only relates to the Ackerbergs' right to "make full use of the . . . property, including . . . the offered strip." The ability to make full use of one's property is an aspect of the nature of real property rights. It does not, however, alleviate the need to comply with land use regulations such as the need to obtain a permit prior to undertaking development in the Coastal Zone. Thus, any right Mrs. Ackerberg has or had to "make full use of" her property did not relieve her of the need for a CDP before installing walls, fences, and the like. All the Commission statement appears to reflect is that the existence of an OTD for a vertical accessway would not preclude the Ackerbergs' exercise of whatever rights for legal uses of that area they had, until such time as the accessway were opened up and such uses might be inconsistent with the public accessway. Moreover, as noted above, even Mr. Reeser, at the Commission meeting, only sought confirmation of the Ackerbergs' ability to "use that strip for patio or planting or whatever, certainly no improved structure."

Finally, Mrs. Ackerberg argues that the plans for the Ackerberg development contemplated the erection of such items, and thus, the Commission's approval of the permit and the plans amounted to an approval of these specific items. However, none of these items appears on the plans submitted to and reviewed by Commission staff in both 1983 and 1985, nor were they listed as part of the permit application or listed in the permit approval staff report or the permit itself. Thus, the Commission's approval did not cover these items. Even if the development had been included in the plans submitted to Commission staff in 1983 and 1985, which it was not,

applicants cannot obtain additional Coastal Act approvals, beyond what the Commission authorized, by depicting additional development not part of the permit application or approval on plans submitted to Commission staff as part of the condition compliance process. Thus, even if other extraneous development appeared on plans approved by Commission staff, that does not mean it was legally granted a permit by the Commission, especially not if it was within the easement area that the Commission did specifically require. Based on the Commission's statement at the 1985 hearing, as acknowledged in the letter from Mrs. Ackerberg's former counsel, the Commission did not render any additional development *per se* permitted at the hearing, and in fact, the plans submitted in 1983 and 1985 did not show such development. Rather, the development was undertaken without a CDP, was unpermitted at the time of the 1985 permit hearing, and remains so today.

8. Mrs. Ackerberg's Defense:

We further object to any characterization by the Coastal Commission that Mrs. Ackerberg has been less than cooperative in working with the Coastal Commission to resolve any outstanding issues concerning the Easement or that she has refused to comply with any legal obligations concerning the Easement. [May 17, 2007 letter at page 1]

Commission's Response:

The word "Easement" as stated in Mrs. Ackerberg's May 17, 2007 letter refers only to the vertical access easement. Whether Mrs. Ackerberg has been "cooperative" is not at issue in this hearing, and the Commission made no finding with respect to Mrs. Ackerberg's level of cooperation, *per se*, in the main findings supporting its action (above), nor is any such finding required for an action under the Coastal Act to ensure compliance with permit conditions or address unpermitted development. Whether she has complied with all legal obligations concerning the easements is, however, before this Commission, at least to the degree that such compliance is relevant to her broader Coastal Act compliance or her performance of development which was performed without a required Coastal Commission permit or in conflict with her existing permit, in that those are criteria for the issuance of a Cease and Desist Order or the recordation of a Notice of Violation.

Mrs. Ackerberg's legal obligations concerning the vertical easement are to allow use of the accessway as required in the permit, and further, to address any development that was unpermitted under the Coastal Act that blocks the public use of the easement or that violates the Coastal Act and to abide by the terms and conditions of existing permits and easements, including not interfering with the provision of the access required under the permits. Mrs. Ackerberg has not agreed to remove the unpermitted development or to comply with the terms and conditions of the permits and easements by removing encroachments into the valid vertical and lateral accessways. In fact, for four years now, correspondence submitted on her behalf has consistently contained requests for staff to delay enforcement and defenses to compliance with the permits and easements based on a variety of arguments, many of which are now clearly moot. In two letters to Commission staff, both dated January 28, 1985, Mrs. Ackerberg raised issues regarding the adoption of the Malibu LUP, which would include specific standards for public beach access, and questioned the benefit of private access easements offered by private property

owners. The Malibu LUP has now been adopted, and in fact, states a standard for Carbon Beach of one vertical accessway per 1,000 feet. The Ackerberg easement is not affected by the Malibu LUP since there is no other open accessway within 1,000 feet.

Subsequent letters from the Ackerbergs requested a delay of enforcement until a decision was reached in the Marine Forest Society case and raised concerns regarding AFA. Commission staff and AFA responded to these concerns in letters dated June 30, 2005, December 13, 2005, and February 16, 2006. Obviously, although not legally relevant to actions taken by the Commission during the pendency of the Marine Forest Society litigation, that case has now been resolved as well. Moreover, many of the defenses raised previously, including a request for an additional delay pending the outcome of the Roth litigation, were raised again in the letters objecting to these enforcement proceedings and are therefore addressed in this section of the report.[14]

Mrs. Ackerberg also asserted that, although not open to the public, an accepted OTD existed at 22548 Pacific Coast Highway, (the easement held by Los Angeles County) and requested that the Commission consider the benefit of seeking to open easements offered by private landowners against the benefit derived from opening publicly held easements.

Stating that one may comply in the future while raising objections to compliance does not constitute compliance. After repeated attempts to work cooperatively with Mrs. Ackerberg and to respond to her concerns, staff finally took the appropriate step of initiating formal enforcement proceedings in order to resolve the violations and prevent further delays in opening the accessway for public use. That said, staff repeatedly expressed its preference for an amicable resolution and sought to work cooperatively with Mrs. Ackerberg to resolve the violations should she have decided to do so. It is hoped that all parties can work cooperatively in the future to resolve this situation and to achieve opening and use of this accessway in the best manner possible.

9. Mrs. Ackerberg's Defense:

Mrs. Ackerberg would be faced with losing the generator altogether if it is removed from its present location, as there are very limited options in the way of relocating the generator on the Property. [May 17, 2007 letter at page 3]

Commission's Response:

Mrs. Ackerberg has not submitted evidence to support the claim that she will lose the generator if it is required to be moved. In fact, the statement, "there are very limited options in the way of relocating the generator on the property," seems to imply that relocation is possible, which seems highly likely on a site that is almost an acre in size. This is a very large residential lot for this area, including what were originally two entire parcels, and the Commission has no reason to doubt that another location for this item somewhere on the property would be feasible.

[14] Staff did agree to wait to formally initiate enforcement proceedings for a reasonable period of time in order to allow Mrs. Ackerberg to address a sensitive personal situation.

However, Mrs. Ackerberg has not provided information as to what the options are. Moreover, for almost a quarter of a century, Mrs. Ackerberg has been aware that the area where the generator is located would have to be cleared if and when the vertical access easement was accepted. The generator was placed on the property after the 1985 permit was issued, and this area had already been identified as the precise location of the public access easement identified in the permit. Mrs. Ackerberg's argument amounts to a claim that the Commission should abandon the accessway that is legally subject to public access rights because the property owner, without the required permit, chose to place an allegedly indispensable and immobile object in an area where it was known it would eventually need to be removed to facilitate access within the easement that was an integral component of the1985 permit. The Commission cannot do so. Moreover, as discussed above, Mrs. Ackerberg also confirmed her understanding that any development in the accessway was to be temporary and that she was aware that it would need to be removed at such time as the accessway was to be opened. However, the Commission staff has indicated that it is willing to explore relocation options with Mrs. Ackerberg, and the Commission will entertain an application for such relocation.

10. <u>Mrs. Ackerberg's Defense:</u>

…the riprap rocks along the seawall are necessary to protect the Property and adjacent properties from the often severe tidal conditions and wave uprush effects… Removal of the riprap rocks along the entire length of seawall, or even just within the portion within the Easement, would compromise the seawall. Since the Ackerberg seawall is tied together with the seawalls of adjoining properties, removal of riprap rocks in front of the Ackerberg seawall could have a detrimental collateral effect on these adjoining properties. [May 17, 2007 letter at page 4]

<u>Commission's Response:</u>

The Commission approved the bulkhead across the seaward boundary of the property in 1983 to protect the residence on the property, which included rocks up to 12 inches. In acting on the permit, the Commission considered whether the proposed bulkhead would be consistent with Coastal Act Sections 30210, 30212, 30214, and 30253(2). The Commission determined that, in order to mitigate for the potential loss of beach and impacts to sand supply that could result from the bulkhead, and the resulting impacts to public access, and to balance those impacts against the need to protect the residence from wave action, a lateral easement was required. The Commission findings for the permit include specific measurements of the bulkhead, including the diameter of the rocks to be used, attached as Exhibit 3. The riprap at issue in this matter was not approved under the 1983 permit or any other permit, exceeds the approved specifications in the 1983 permit, and lies within the lateral access easement that the Commission required to bring the bulkhead into compliance with the Coastal Act. Thus, its placement constitutes unpermitted development and/or development inconsistent with an existing permit, either of which constitutes a violation of the Coastal Act and authorizes the Commission to issue this Cease and Desist Order. Furthermore, the Commission required the lateral easement to mitigate for the shoreline impacts that could result from the bulkhead and specifically required the offer to dedicate the easement to prohibit interference with public use. The riprap extends into the easement, thus taking up public beach and extending the scouring effects from wave uprush of the bulkhead into the seaward extent of the easement area.

If Mrs. Ackerberg believes newly discovered material information that could not have been presented at the time of the original hearing demonstrates a need to modify the plan to add additional and/or larger rocks than were originally approved, the mechanism to make that case is through the submittal of an application for a new permit or a permit amendment. However, Mrs. Ackerberg has not provided evidence that the riprap is necessary and she has not applied for a permit (or permit amendment), emergency or otherwise, for the riprap. Moreover, she has provided no evidence that removal of the riprap will compromise the seawall. In addition, the bulkhead, without the additional unpermitted riprap, was approved to tie into the upcoast bulkhead, and the placement of additional riprap in front of the Ackerberg property may actually magnify the impact of wave energy on adjacent properties, causing increased erosion of those areas.

11. Mrs. Ackerberg's Defense:

Moreover, Mrs. Ackerberg believes that some of these rocks were actually preexisting underneath the sand, and have only been exposed in recent years due to lower sand level at the beach. [May 17, 2007 letter at page 4]

Commission's Response:

Mrs. Ackerberg has provided no evidence that the rocks were preexisting. The Commission approved the 1983 permit for the bulkhead according to the schematic attached to the findings as Exhibit 3. The schematic states that immediately seaward of the bulkhead, boulders were to be "replaced with rock and gravel waste mix," the diameter of which was not to exceed 1 foot in diameter. In addition, as previously discussed, the February 15, 1984 survey of the Ackerberg's bulkhead construction documents the installation of "man sized boulders, extending a minimum of 10-feet 0-inches from the wall," proving at least some of the rocks were placed seaward of the bulkhead, and were not preexisting as Mrs. Ackerberg claims they are.

The proposed order before the Commission in this proceeding requires the submittal of an engineering report that clarifies what, if any, riprap is preexisting and which rocks are within the accessway. Any riprap exceeding the specified diameter or located within the easement must be removed in order to allow full public use of the lateral easement.

Mrs. Ackerberg recommends that the engineering report address impacts from removal. The proposed order is designed to prevent impacts from removal and to establish contingency plans to address impacts should they occur. Removal of rock revetments and rock riprap has been accomplished previously with little or only temporary impacts to the beach environment. However, if the engineer performing work under the proposed order identifies potential impacts from the removal of the unpermitted riprap, the removal plan can be revised to address those impacts through preventative measures or additional contingency plans.

Finally, in her May 17, 2007 letter to staff, Mrs. Ackerberg requested a 30-day extension to "gather the required information and analysis concerning removal of the riprap rocks and other Alleged Encroachments." Staff granted a 25-day extension, but Mrs. Ackerberg did not

subsequently submit additional information regarding removal of the riprap or the other unpermitted development.

12. Mrs. Ackerberg's Defense:

…there is an existing vertical easement open to the public at 22670 Pacific Coast Highway – commonly referred to as the "Zonker Harris Accessway" – approximately one-quarter mile to the west of the Ackerberg Property, and another vertical access easement recently opened to the public in 2005 at 22132 Pacific Coast Highway, less that one-half mile to the east of the Ackerberg Property. … Therefore, immediate enforcement actions concerning the Easement and Property are not necessary to provide public access to beaches in Malibu which otherwise lack public access. [May 17, 2007 letter at page 5]

Commission's Response:

As discussed in this report, public access in this location is extremely valuable. There is very limited access in this location, and Carbon Beach is an extremely popular beach with great demand for access. The Commission has been unable to obtain access by the public to this access easement through attempts at informal resolution of these violations, and, therefore, enforcement action is necessary. Furthermore, the Commission clearly has the right to take enforcement action to enforce the Coastal Act and provisions of the permits issued thereunder, and the existence of the Zonker Harris Accessway does not somehow undercut this. The Commission feels it is important to take enforcement action in this matter to protect public access and to ensure compliance with the Coastal Act and with the conditions of existing Commission-issued permits.

Moreover, the Zonker Harris accessway has been operated by Los Angeles County since 1981 and was in place and considered by the Commission when the Commission conditioned Mrs. Ackerberg's 1985 permit on the provision of vertical public access. It was considered to be too far away to provide adequate public access in this area. In the years since the 1985 permit, only one other accessway has opened on Carbon Beach, the Geffen easement. The Geffen easement is 2215 feet from the Ackerberg easement, an even larger distance than that which exists between the vertical easement area on Mrs. Ackerberg's property and the Zonker Harris accessway. While the Geffen easement is useful to the public, it does not supplant the need for access in this location.

The staff report prepared for the 1985 permit sets forth the proposition that a vertical accessway every 500 feet is adequate. Subsequently, in a January 28, 1985 letter to staff, Mrs. Ackerberg raised the issue of considering the access condition of the permit in light of the pending Malibu LUP, as the LUP would address beach access in the area. The Commission adopted the Malibu LUP in the Malibu 2002 LCP, and it includes the specific standard for access to Carbon Beach of one accessway for every 1,000 feet, as did the previous Malibu LUP adopted by the Commission in 1986. The Zonker Harris easement is located 1,545 feet upcoast of the Ackerberg property, and the Geffen easement is located 2,215 feet downcoast. Thus, neither accessway fulfills the standards set forth in the revised 1985 permit staff report or the Malibu LCP. In fact, the LCP

standards support the conclusion that this access is needed and will be, when opened up, a very significant and valuable public access point.

13. Mrs. Ackerberg's Defense:

Of course, if the dismissal of Mr. Roth's Lawsuit is upheld by the Court of Appeal and final judgment is entered, Mrs. Ackerberg is committed to working with the Coastal Commission – as she had been before the Coastal Commission unilaterally broke off direct communications upon Mr. Roth's filing his Lawsuit – to ensure compliance with any and all legal obligations concerning the Easement. [May 17, 2007 letter at page 6]

Commission's Response:

As previously discussed, final judgment was entered by the Court of Appeals and the California Supreme Court denied review on July 9, 2008. Therefore, the dismissal of Mr. Roth's lawsuit has been upheld by the courts, and the stay has been dissolved. Mrs. Ackerberg has not worked with staff to ensure compliance with the legal obligations concerning the easement, with the exception of allowing AFA to survey of the property, although the survey took place long after AFA and staff requested, but rather, she has repeatedly raised objections to requests for compliance with the Coastal Act, permits, and easements over the last few years. Staff has repeatedly responded to Mrs. Ackerberg's concerns and requests for information, only to receive additional objections and requests for delays as well as reassertions of the earlier objections and proposals offering assistance with opening alternative vertical accessways that had already been responded to. Although the preference is always to resolve violations in a cooperative setting, attempts to do so over several years proved ultimately fruitless. It eventually became necessary to initiate formal enforcement proceedings in an effort to finally resolve the violations and to open the accessway to the public. The April 27, 2007 Notice of Intent and the May 30, 2007, October 2, 2008, November 14, 2008, November 24, 2008, November 25, 2008 and December 2, 2008 letters from staff expressed staff's preference to resolve the violations amicably, but did not result in positive responses from Mrs. Ackerberg. In addition, the conversation that took place between Ms. Abbitt and Commission staff on December 9, 2008 did not lead to reaching an agreement to remove the unpermitted development. Despite this, staff continues to express its willingness to work with Mrs. Ackerberg to resolve the violations in a cooperative manner and to ensure compliance with the permit and the Coastal Act.

The Commission therefore issues the Cease and Desist Order on the following pages.

CEASE AND DESIST ORDER CCC-09-CD-01, Ackerberg

1.0 GENERAL STATEMENT

Pursuant to its authority under California Public Resource Code ("PRC") Section 30810, the California Coastal Commission (hereinafter, "the Commission") hereby orders and authorizes Lisette Ackerberg and the Lisette Ackerberg Trust, their employees, agents, contractors, and anyone acting in concert with the foregoing, and successors in interest and future owners of property located at 22466 and 22500 Pacific Coast Highway in Malibu ("Respondent") to take all actions required by this Order by complying with the following conditions:

A. Immediately cease and desist from maintaining any unpermitted development, as defined and described in Section 4.0, below, on property located at 22466 and 22500 Pacific Coast Highway in Malibu and further defined in Section 3.0, below (hereinafter "the property").

B. Immediately cease and desist from engaging in any further unpermitted development, as defined and described in Section 4.0, below, on the property.

C. Refrain from any attempts to limit or interfere with public use of the public access easements created by the acceptances of Offers to Dedicate recorded July 11, 1983 (Instrument No. 83-950711) and April 4, 1985 (Instrument No. 85 369283), or use by the holder(s) of the easements to maintain the areas and make them available for public use.

D. Remove all unpermitted development located within the lateral and vertical public access easements on the property according to the provisions of this Order.

2.0 PERSONS SUBJECT TO THIS ORDER

Persons subject to this Cease and Desist Order are Respondent, Respondent's agents, contractors, and employees, and any persons acting in concert with any of the foregoing.

3.0 IDENTIFICATION OF PROPERTY

The property that is subject to this Order is described as follows:

> Approximately .95 acres of oceanfront property, located along Carbon Beach at 22466 and 22500 Pacific Coast Highway in Malibu, Los Angeles County, and identified by the Los Angeles County Assessor's Office as APNs 4452-002-011 and 4452-002-013.

4.0 DEFINITION OF UNPERMITTED DEVELOPMENT AND DESCRIPTION OF VIOLATIONS

As used in this Order, the phrase "unpermitted development" refers to any development, as that term is defined in PRC section 30106, that was performed after January of 1973, that required authorization under the Coastal Act or its predecessor, which authorization was not obtained, including any materials and structures existing on the property as a result of such development. The unpermitted development at issue in this case includes, but may not be limited to, rock riprap, a 9-ft high wall, a concrete slab and generator, and a fence, railing, planter, light posts, and landscaping in the area of the property covered by the public access easements described in Section 1.0, paragraph C, of this Order, which were established pursuant to Commission-issued Coastal Development Permit Nos. 5-83-360 and 5-84-754.

5.0 RESOLUTION OF VIOLATIONS

A. Within 30 days of the issuance of this Order, Respondent shall submit a Removal Plan, for the review and approval of the Executive Director, for removal of all unpermitted development located within the vertical and lateral public access easements on the property, including but not limited to: rock riprap, a 9-ft high wall, concrete slab and generator, fence, railing, planter, light posts, staircase, and landscaping. The Removal Plan must be prepared by a certified civil engineer or other qualified professional licensed by the State of California and must contain the following provisions:

1. A detailed description of proposed removal activities.
   Respondent shall utilize removal techniques that, to the extent possible, minimize impacts to the beach.

2. A timetable for removal.

3. Identification of the disposal site for removed development materials. The site must be a licensed disposal facility located outside of the Coastal Zone. Any hazardous materials must be transported to a licensed hazardous waste disposal facility.

4. If mechanized equipment is used, the Removal Plan must specify the following information:

   i. Type of mechanized equipment that will be used for removal activities;

   ii. Length of time equipment will be used;

   iii. Routes that will be utilized to bring equipment to and from the property;

iv. Storage location for equipment when not in use during removal process (mechanized equipment cannot be stored on the sandy beach);

v. Hours of operation of mechanized equipment;

vi. Contingency plan that addresses clean-up and disposal of released materials and water quality concerns in case of a spill of fuel or other hazardous release from use of mechanized equipment;

vii. Measures to be taken to protect water quality.

B. If the Executive Director determines that any modifications or additions to the submitted Removal Plan are necessary, he will notify Respondent by first class mail. Respondent shall complete requested modifications and resubmit a revised Removal Plan for approval within 10 days of date of the receipt of notification.

C. Removal shall commence no later than 10 days after Respondent receives notification from the Executive Director of his approval of the Removal Plan. Notice will be sent by first class mail. Removal shall occur consistent with the terms of the approved plan, including completion according to the time schedule provided in the approved plan.

D. Within 10 days of completion of removal activities, Respondent shall submit evidence of the completion to the Executive Director for his review and approval. After review of the evidence, if the Executive Director determines that the removal activities did not resolve the violations in whole or in part, he shall specify any measures necessary to ensure that the removal complies with the approved Removal Plan, this Order, and the Coastal Act. Respondent shall implement any specified measures, within the timeframe specified by the Executive Director.

6.0 EFFECTIVE DATE AND TERMS OF THIS ORDER

The effective date of this Order is the date of approval by the Commission. This Order shall remain in effect permanently unless and until modified or rescinded by the Commission.

7.0 SUBMITTAL OF DOCUMENTS

All documents submitted to the Commission pursuant to this Order must be sent to:

California Coastal Commission
Attn: Aaron McLendon
45 Fremont St., Suite 2000
San Francisco, CA 94105-2219.

with a copy sent to:
California Coastal Commission
Attn: Pat Veesart
89 S. California Street Suite 200
Ventura, CA 93001-2801

8.0 FINDINGS

This Order is issued on the basis of the findings adopted by the Commission at its July, 2009 hearing, as set forth in the attached document entitled: Staff Report and Findings for Hearing on Whether a Violation of the Coastal Act has Occurred and Issuance of a Cease and Desist Order, as well as the testimony and any additional evidence presented at the hearing.

9.0 COMPLIANCE OBLIGATION

Strict compliance with this Order by all parties subject hereto is required. Failure to comply strictly with any term or condition of this Order including any deadline contained herein will constitute a violation of this Order and may result in the imposition of civil penalties, under PRC Section 30821.6, of up to **SIX THOUSAND DOLLARS ($6,000)** per day for each day in which the violation persists, in addition to any other penalties authorized under Chapter 9 of the Coastal Act (PRC sections 30800-30824), including exemplary damages under Section 30822.

10.0 EXTENSION OF DEADLINES

The Executive Director may extend deadlines specified herein or in documents created pursuant hereto for good cause. Any extension request must be made in writing to the Executive Director and received by Commission staff at least ten days prior to expiration of the subject deadline.

11.0 SITE ACCESS

Respondent shall provide Commission staff and staff of any agency having jurisdiction over the work being performed under this Order with access to the areas of the property described below at all reasonable times. Nothing in this Order is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law. The Commission and other relevant agency staff may enter and move freely about the following areas: (1) the portions of the Subject Property on which the violations are located, (2) any areas where work is to be performed pursuant to this Order or pursuant to any plans adopted pursuant to this Order, (3) adjacent areas of the property, and (4) any other area where evidence of compliance with this Order may lie to view the areas where work is being performed pursuant to the requirements of this Order or evidence of such work is held, for purposes including but not limited to inspecting records, operating logs, and contracts relating to the property and overseeing, inspecting, documenting, and reviewing the progress of Respondent in carrying out the terms of this Order.

12.0 MODIFICATIONS AND AMENDMENTS

Except as provided in Section 10.0 of this Order or for ministerial corrections, this Order may be amended or modified only in accordance with the standards and procedures set forth in Section 13188(b) of the Commission's regulations (in Title 14 of the California Code of Regulations).

13.0 APPEAL

Pursuant to PRC Section 30803(b), any person or entity against whom this Order is issued may file a petition with the Superior Court for a stay of this Order.

14.0 GOVERNMENT LIABILITY

The State of California shall not be liable for injuries or damages to persons or property resulting from acts or omissions by Lisette Ackerberg, including all parties subject to this Order, in carrying out activities required and authorized under this Cease and Desist Order, nor shall the State of California be held as a party to any contract entered into by Respondent or their agents in carrying out activities pursuant to this Order.

15.0 SUCCESSORS AND ASSIGNS

This Cease and Desist Order shall run with the land, binding all successors in interest, future owners of the property, heirs and assigns of Respondent. Respondent shall provide notice to all successors, heirs and assigns of any remaining obligations under this Order.

16.0 NO LIMITATION ON AUTHORITY

Except as expressly provided herein, nothing herein shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act (PRC sections 30800-30824), including the authority to require and enforce compliance with this Cease and Desist Order.

Executed in _____ on _____, on behalf of the California Coastal Commission.

By:_____
Peter Douglas, Executive Director

Click on the links below to go to the exhibits.

Exhibit List

Number Exhibit	Description
1.	Site Map and Location.
2.	CDP No. 5-83-360, approved by the Commission on June 9, 1983 (staff report and permit).
3.	Irrevocable Offer to Dedicate Public Access Easement and Declaration of Restrictions, recorded in the Los Angeles County Recorder's Office on August 17, 1983.
4.	Certificate of Acceptance, recorded in the Los Angeles County Recorder's Office on March 20, 2002.
5.	CDP No. 5-84-754, approved by the Commission on January 24, 1985 (staff report and permit).
6.	Irrevocable Offer to Dedicate, recorded in the Los Angeles County Recorder's Office on April 4, 1985.
7.	Certificate of Acceptance recorded in the Los Angeles County Recorder's Office on December 17, 2003.
8.	Letter from AFA to the Ackerbergs, dated December 19, 2003.
9.	Letter from Commission staff to the Mrs. Ackerberg, dated March 28, 2005.
10.	Letter from Commission staff to the Mrs. Ackerberg, dated April 7, 2005.
11.	Letter from Commission staff to Edwin R. Reeser, III, Mrs. Ackerberg's attorney, dated December 13, 2005.
12.	Letter from Mr. Reeser to Commission staff, dated January 19, 2006.
13.	Letter from Commission staff to Mr. Reeser, dated February 16, 2006.
14.	Letter from Mr. Reeser to Commission staff, dated March 23, 2006.
15.	Letter from Mr. Reeser to Commission staff, dated April 3, 2006.
16.	Notice of Violation letter from Commission staff to Mrs. Ackerberg and Mr. Reeser, dated March 5, 2007.
17.	Letter from Mr. Reeser to Commission staff, dated March 22, 2007.
18.	Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings, from Executive Director of the Commission to Mrs. Ackerberg, dated April 27, 2007.
19.	Letter from Commission staff to Mr. Reeser, dated May 30, 2007.
20.	Letter from Mr. Reeser to Commission staff, dated May 17, 2007.
21.	Letter from Mr. Reeser to Commission staff, dated June 11, 2007.
22.	Letter from Commission staff to Diane Abbitt, Mrs. Ackerberg's present attorney, dated October 2, 2008.
23.	Letter from Ms. Abbitt to Commission staff, dated October 16, 2008.
24.	Letter from Ms. Abbitt to Commission staff, dated October 21, 2008.
25.	Draft Consent Cease and Desist Order from Commission staff to Ms. Abbitt, dated November 14, 2008.
26.	Letter from Ms. Abbitt to Commission staff, dated November 19, 2008.
27.	Letter from Commission staff to Ms. Abbitt, dated November 24, 2008.

28.	Letter from Commission staff to Ms. Abbitt, dated November 25, 2008.
29.	Letter from Ms. Abbitt to Commission staff, dated November 26, 2008.
30.	Letter from Commission staff to Ms. Abbitt, dated December 2, 2008.
31-38.	Aerial and site photographs showing the unpermitted development.
39.	Tract Map No. 29628, Offer to Dedicate Public Access Easement and Acceptance by Los Angeles County, Recorded in the Los Angeles County Recorder's Office on October 29, 1973.
40.	Letter from Paul A. Speiler to Ralph W. Trueblood dated February 15, 1984.