CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE (415) 904- 5200
FAX (415) 904- 5400
TDD (415) 597-5885

Th8

Staff: A. McLendon-SF
Staff Report: 2/20/13
Hearing Date: 3/7/13

STAFF REPORT: RECOMMENDATIONS AND FINDINGS FOR CONSENT AGREEMENT AND AMENDMENT TO CEASE AND DESIST ORDER

Cease and Desist Order No.:	**CCC-09-CD-01-A**
Related Violation File:	**V-4-07-006**
Property Owner/Person Subject to this Order Amendment:	Lisette Ackerberg, in her individual capacity and as trustee of the Lisette Ackerberg Trust
Location:	Two parcels totaling approximately .95 acres, located between Pacific Coast Highway and the beach, in the Carbon Beach area of Malibu (APNs 4452-002-013, 4452-002-011) with a situs address of 22466 and 22500 Pacific Coast Highway, Malibu, Los Angeles County
Original 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, among other things, vertical and lateral public access easements.
Substantive File Documents:	1. Public Records contained in Cease and Desist Order File Nos. CCC-09-CD-01 and CCC-09-CD-01-A. 2. Exhibits 1 through 11 of this staff report.

CEQA Status: Exempt (CEQA Guidelines (CG) §§ 15060(c)(2) and (3)) and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308, and 15321)

SUMMARY OF STAFF RECOMMENDATION

A. OVERVIEW

The proposed Consent Agreement and Cease and Desist Order Amendment No. CCC-09-CD-01-A ("Consent Agreement and Amended Order") will modify Cease and Desist Order CCC-09-CD-01 ("the Order") previously issued by the California Coastal Commission ("Commission") on July 8, 2009, by incorporating new, mutually acceptable language to the order to settle all Coastal Act related claims, including claims for monetary fines and penalties under Chapter 9 of the Coastal Act. Specifically, through this Consent Agreement and Amended Order, Lisette Ackerberg, in her individual capacity and as trustee of the Lisette Ackerberg Trust, the person originally subject to the Order and now subject to this Consent Agreement and Amended Order ("Respondent"), has agreed to, among other things, 1) remove all unpermitted development and development inconsistent with previously issued coastal development permits ("CDPs"), as described below, 2) provide for public access across a public vertical access easement by paying for and constructing an accessway ("Accessway"), 3) make an annual payment to the Mountains Recreation and Conservation Authority ("MRCA"), the holder of the vertical public access easement, for ten years to fund the operation and maintenance of the Accessway, and 4) settle monetary claims for relief for those violations of the Coastal Act alleged in the Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings dated April 27, 2007 ("NOI"), and occurring prior to the date of the Consent Agreement and Amended Order. By signing the Consent Agreement and Amended Order, Respondent has agreed to not contest the issuance or enforceability of the Consent Agreement and Amended Order. (See **Exhibit #1** for Consent Agreement and Cease and Desist Order Amendment No. CCC-09-CD-01-A).

B. DESCRIPTION OF PROPERTY

The property at issue is two lots totaling .95 acre of beachfront land located at 22466 and 22500 Pacific Coast Highway in Malibu in Los Angeles County and identified by the Los Angeles County Assessor's Office as APNs 4452-002-013 and 4452-002-011 ("the property"). 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 two open vertical public accessways (accessways 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. In the 1980s, the Commission approved two CDPs 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). The vertical

public access easement, which covers a 10-foot wide strip of land along the downcoast edge of the property, is now held by MRCA.[1] The lateral public access easement is held by the State Lands Commission.

C. SUMMARY OF VIOLATION AND PROPOSED RESOLUTION

The violations that originally gave rise to this case and which are the subject of the Order and this amendment proceeding include the placement of rock riprap, a 9-ft high concrete wall, a generator and associated concrete slab[2], fence, railing, planter, light posts, and landscaping on the property. The unpermitted items were placed directly within the vertical public access easement and/or the lateral public access easement, which, as explained above, were both required pursuant to conditions imposed by the Commission when it issued two CDPs for development on the property. To address the Coastal Act violations and require removal of these physical obstructions of the easements, on July 8, 2009, the Commission approved Cease and Desist Order CCC-09-CD-01 (**Exhibit #3**). The adopted findings for the July 8, 2009 Staff Report supporting the issuance of the Order are attached as **Exhibit #2** and are hereby incorporated into this staff report.

On August 4, 2009, Respondent filed, with the Los Angeles County Superior Court, a petition for a writ of administrative mandamus seeking to vacate and set aside the Commission's July 8, 2009 issuance of the Order (the "writ action"). On July 5, 2011, the trial court denied Respondent's request and upheld the Commission's Order (**Exhibit #6 and #7**).[3] In August

[1] On December 17, 2003, Access for All ("AFA") obtained the vertical public access easement and associated rights through the recording of a "Certificate of Acceptance," accepting the Offer to Dedicate a vertical public access easement that Respondent had recorded almost 19 years earlier, pursuant to a requirement of CDP No. 5-84-754. Because of the issues related to AFA entering into a stipulated judgment with Respondent, as discussed in footnote 3, below, on September 22, 2011, the State Coastal Conservancy, through the terms of the 2003 Certificate of Acceptance, divested AFA's interest in the easement from AFA (**Exhibit #4**). On September 27, 2012, the Mountains Recreation and Conservation Authority recorded a Certificate of Acceptance obtaining the legal interest in the vertical public access easement. (**Exhibit #5**).

[2] Respondent has since removed the generator and associated concrete slab pursuant to a permit issued by the City of Malibu.

[3] Prior to the Commission's July 2009 action on the Order, the prior holder of the vertical access easement across Respondent's property, AFA, filed litigation against Respondent to, among other things, force the removal of the encroachments from the easement area (the "AFA enforcement action"). As discussed in the addendum to the Staff Report and Adopted Findings for the Order and during the staff presentation for the Order, on June 19, 2009, AFA and Respondent entered into a settlement agreement and filed a stipulated judgment to purportedly resolve the Coastal Act violations on the property. Respondent argued in the writ action that the stipulated judgment from the AFA enforcement action barred the Commission from issuing the Order, pursuant to the doctrine of *res judicata*. The trial court rejected that argument. In addition, on September 11, 2009, the Commission filed a motion to intervene and vacate the stipulated judgment. On November 28, 2012, after Respondent had exhausted her appeal options in the writ action, and the Court of Appeal had held that the stipulated judgment from the AFA enforcement case was invalid, the court in the AFA enforcement action vacated the judgment between AFA and Respondent, but it continued the Motion to Intervene (**Exhibit #9**). On January 23, 2013, the court granted the Commission's motion to intervene, making the Commission a plaintiff in the enforcement case, but stayed the case until March 29, 2013, to allow time for the Commission and Respondent to reach this Consent Agreement and Amended Order (**Exhibit #10**). As part of the Consent Agreement and Amended Order, Respondent and the Commission agree to cooperate in seeking prompt dismissal of the AFA v. Ackerberg lawsuit by March 29, 2013, if AFA does not seek dismissal of the lawsuit or does not accomplish it by that date.

2011, Respondent appealed the trial court's decision and on August 27, 2012, the Court of Appeal affirmed the trial court's decision in full (**Exhibit #8**). On October 10, 2012, Respondent filed a petition for review with the California Supreme Court; and on November 20, 2012, the State Supreme Court denied the petition for review. The litigation over the Commission's issuance of the Order is final, and the Order has been upheld.

Over the last two years, during and after the conclusion of the litigation over the Order, Respondent and her legal counsel have worked closely and cooperatively with Commission staff to resolve all Coastal Act claims to reach this amicable resolution and staff appreciates Respondent's efforts in coming to this conclusion.

Commission staff recommends **approval** of this amendment since it would fully resolve this case without the need for further litigation, and result in both opening up of the accessway and a resolution of civil penalties.

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EXHIBITS

Exhibit 1 Proposed Consent Agreement and Cease and Desist Order Amendment No. CCC-09-CD-01-A.
Exhibit 2 Adopted Findings for Commission Cease and Desist Order No. CCC-09-CD-01, July 8, 2009.
Exhibit 3 Cease and Desist Order No. CCC-09-CD-01, July 8, 2009.
Exhibit 4 State Coastal Conservancy Staff Report, "Ackerberg Public Access Easement held by AFA: Involuntary Transfer," 9/22/11 (Divesting easement from AFA).
Exhibit 5 Certificate of Acceptance of Vertical Public Access Easement by the Mountains Recreation and Conservation Authority, recorded 9/27/12.
Exhibit 6 Superior Court Decision Denying Petition for Writ of Mandate and Complaint Ackerberg v. California Coastal Commission, Case No. BS 122006 (July 5, 2011).

Exhibit 7 Superior Court Judgment Denying Petition for Writ of Mandate and Complaint Ackerberg v. California Coastal Commission, Case No. BS 122006 (July 28, 2011).
Exhibit 8 Court of Appeal Decision in Ackerberg v. California Coastal Commission, August 27, 2012.
Exhibit 9 Superior Court Decision Granting Motion to Vacate Stipulated Judgment Access for All v. Ackerberg, Case No. BC405058 (Nov. 28, 2012).
Exhibit 10 Superior Court Decision Granting Motion to Intervene Access for All v. Ackerberg, Case No. BC405058 (January 23, 2013)
Exhibit 11 Agreement: Interim Public Access Management Plan for the Ackerberg Easement; MRCA, Coastal Commission, State Coastal Conservancy; July 25, 2012.

I. MOTION AND RESOLUTION

Motion:

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

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

Resolution to Issue Consent Agreement and Cease and Desist Order Amendment:

The Commission hereby issues Consent Agreement and Cease and Desist Order Amendment No. CCC-09-CD-01-A, as set forth below, and adopts the findings set forth below on grounds that (1) development, conducted and maintained by Respondent, has occurred on property owned by Respondent without a coastal development permit, and that development has occurred inconsistent with previously issued coastal development permits, in violation of the Coastal Act; and (2) changes to the Order effected by the Consent Agreement and Cease and Desist Order Amendment do not alter any of the legal bases for, or findings of the Commission in support of, the issuance of the underlying Order, are necessary to ensure compliance with the Coastal Act, and are mutually agreeable to the parties.

II. JURISDICTION

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 Respondent's 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. Finally, the Commission has jurisdiction here because it is amending one of its own orders.

III. COMMISSION'S AUTHORITY

The Commission can issue a Cease and Desist Order under Section 30810 of the Coastal Act in cases where it finds that the activity that is the subject of the order has occurred either without a required CDP or in violation of a previously granted CDP. This criterion is met in this case, as was found by the Commission in its issuance of the underlying Cease and Desist Order No. CCC-09-CD-01, which is being amended by this action, and as summarized briefly below.

The Commission may, after public hearing, modify a cease and desist order that it has issued, under certain enumerated and limited circumstances. The requirements to qualify for and procedures for modifications of Commission cease and desist orders are set forth in California Code of Regulations, Title 14 ("14 CCR"), Division 5.5, Section 13188, which provides for public hearings to be held on such modifications.

IV. HEARING PROCEDURES

The procedures for a hearing on a Cease and Desist Order are outlined in 14 CCR Section 13185.

For a Cease and Desist Order hearing, the Chair shall announce the matter and request that all parties 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, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair shall then recognize any other persons who have indicated a desire to speak concerning the matter by submitting a speaker slip, after which time 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 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 so 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 motion above, per the Staff recommendation or as amended by the Commission, will result in issuance of the Cease and Desist Order.

V. FINDINGS FOR CONSENT AGREEMENT AND CEASE AND DESIST ORDER AMENDMENT NO. CCC-09-CD-01-A[4]

Staff recommends the Commission adopt the following findings of fact in support of its action. As noted above, the findings for the original Order issued in July 2009, Cease and Desist Order No. CCC-09-CD-01, are hereby incorporated by reference and included in this Staff Report, which are attached hereto as **Exhibit #2**. In that original action, the Commission found, *inter alia*, that the development subject to this proceeding occurred without a coastal development permit and inconsistent with Coastal Development Permits No. 5-83-360 and 5-84-754. Therefore, the Commission has found that the criteria for issuance of a cease and desist order under Section 30810 of the Coastal Act has been met and is also met for this Amendment as well.

A. DESCRIPTION OF UNPERMITTED DEVELOPMENT

The violations that originally gave rise to this case and which are the subject of the Order and this amendment proceeding include the placement of rock riprap, a 9-ft high concrete wall, a generator and associated concrete slab[5], fence, railing, planter, light posts, and landscaping. The unpermitted items were placed directly within a vertical public access easement and/or a lateral public access easement, both of which were required pursuant to conditions imposed by the Commission when it issued two CDPs for development on the property.

B. BASIS FOR ISSUANCE AND MODIFICATION OF CEASE AND DESIST ORDERS

The statutory authority for issuance of Cease and Desist Orders under the Coastal Act, including the proposed Consent Agreement and Cease and Desist Order Amendment, is provided in Section 30810 of the Coastal Act, and amendments to such orders are specifically provided for in 14 CCR Section 13188, which sets forth the specific and limited bases for such amendments, which have been met here.

Section 30810 of the Coastal Act states, in 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*

[4] These findings also hereby incorporate by reference the Summary at the beginning of the February 20, 2013 staff report ("Staff Report: Recommendations and Findings for Consent Agreement and Amendment to Cease and Desist Order") in which these findings appear, which section is entitled "Summary of Staff Recommendation."

[5] See *footnote 2*

> *previously issued by the commission, the commission may issue an order directing that person… to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program . . . or any requirements of [the Coastal Act] which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:*
>
> *(1) The local government . . . requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.*

14 CCR Section 13188 states, in part:

> *(b) The commission, after public hearing, may rescind or modify a cease and desist order that it has issued. A proceeding for such a purpose may be commenced by… the executive director…*

Here, the Executive Director, after reaching a settlement with Respondent, has determined that commencing such an amendment proceeding is appropriate and would save both the State and Respondent time, resources and costs by providing an amicable and efficient resolution of this matter. Both Respondent (as the entity to which the Order was directed) and the Executive Director seek Commission approval of the proposed Consent Agreement and Amended Order. As described above, the Commission has already found that the criteria for issuance of a cease and desist order for this matter has been met. The Consent Agreement and Amended Order will modify the previously issued Order to settle, among other things, the Commission's monetary claims for relief for those violations of the Coastal Act that were set forth in the NOI and that occurred prior to the date of the Consent Agreement and Amended Order.

Therefore, staff recommends that the Commission issue the Consent Agreement and Cease and Desist Order Amendment No. CCC-09-CD-01-A attached as **Exhibit #1** of this staff report.

C. ORDERS ARE CONSISTENT WITH CHAPTER 3 OF THE COASTAL ACT

The Consent Agreement and Amended Order attached to this staff report as **Exhibit #1** is consistent with the resource protection policies found in Chapter 3 of the Coastal Act. The Consent Agreement and Amended Order requires Respondent to, among other things, remove unpermitted development from public access easements on the property, construct a public accessway (through a coastal development permit), and pay for operation and maintenance costs of the public accessway for 10 years, in addition to paying fines and penalties to resolve Respondent's civil liabilities under the Coastal Act. The Consent Agreement and Amended Order will provide for significantly improved public access to Carbon Beach in Malibu by requiring removal of physical impediments to public access and construction of a public accessway that will allow the public to reach the shoreline from PCH, where such access was precluded before.

Therefore, the Consent Agreement and Amended Order is consistent with the Chapter 3 policies of the Coastal Act.

D. CALIFORNIA ENVIRONMENTAL QUALITY ACT

The Commission finds that issuance of this Consent Agreement and Amended Order to compel compliance with the Coastal Act are exempt from any applicable requirements of the California Environmental Quality Act of 1970 (CEQA), Cal. Pub. Res. Code §§ 21000 et seq., and will not have significant adverse effects on the environment, within the meaning of CEQA. The Consent Agreement and Amended Order are exempt from the requirement for the preparation of an Environmental Impact Report, based on Sections 15060(c)(2) and (3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines, which are also in 14 CCR.

E. CONSENT AGREEMENT: SETTLEMENT

Chapter 9, Article 2, of the Coastal Act provides that violators may be civilly liable for a variety of penalties for violations of the Coastal Act, including daily penalties for knowingly and intentionally undertaking development in violation of the Coastal Act. Respondent has clearly stated her willingness to completely resolve the violations at issue herein, including any civil liability, administratively and amicably, through a settlement process. To that end, Respondent has committed to comply with all terms and conditions of the Consent Agreement and Amended Order, including the provisions regarding monetary penalties, and not to contest the issuance or implementation of the Consent Agreement and Amended Order.

In summary, through the signing of the Consent Agreement and Amended Order, Respondent has agreed to:

- Perform no further unpermitted development or take actions that would interfere or prevent legal public use of the access easements.
- Remove, through an approved Removal Plan, all unpermitted development in the access easements.
- Develop and submit an Accessway Improvement Plan, submit a CDP amendment application to authorize it under the Coastal Act, and construct, at Respondent's cost, the public accessway.
- Pay to MRCA $35,000 a year for ten years to cover the costs of operating and maintaining the vertical accessway.
- Pay $350,000 to the Violation Remediation Account to go toward the improvement, enhancement, and maintenance of public access elsewhere in the Malibu area.
- Pay $160,000 for each year, or a proportional amount for any fraction of a year, from January 1, 2013 through the date on which the public access easements on the property are open and available to the public (an amount that may likely be in excess of $290,000) (this amount will also go toward the improvement, enhancement, and maintenance of public access elsewhere in the Malibu area).
- Pay $170,000 as a full, complete, and final reimbursement to the Commission for all attorney's fees and costs.
- Dismiss all litigation against the Commission.

Staff recommends that the Commission issue Consent Agreement and Cease and Desist Order Amendment No. CCC-09-CD-01-A attached hereto as **Exhibit #1** of this Staff Report.

EXHIBIT 1

Proposed Consent Agreement and Cease & Desist Order Amendment No. CCC-09-CD-01-A

CCC-09-CD-01-A (Ackerberg)

CONSENT AGREEMENT AND CEASE AND DESIST ORDER AMENDMENT NO. CCC-09-CD-01-A

1.0 AMENDMENT TO CEASE AND DESIST ORDER

Pursuant to its authority under Public Resources Code Section 30810 and California Code of Regulations Title 14, Division 5.5, Section 13188, the Commission, with the consent and agreement of Lisette Ackerberg, in her individual capacity and as trustee of the Lisette Ackerberg Trust, (hereinafter, "Respondent"), hereby amends Cease and Desist Order No. CCC-09-CD-01, which was previously approved by the Commission on July 8, 2009. Effective upon issuance of this Consent Agreement and Cease and Desist Order Amendment No. CCC-09-CD-01-A, the remaining terms of this document shall constitute the terms of Cease and Desist Order No. CCC-09-CD-01, as amended, and shall be referred to as the "Consent Agreement and Amended Order". Through the execution of this Consent Agreement and Amended Order, Respondent agrees to comply with the terms of the Consent Agreement and Amended Order and agrees to accept the terms and conditions herein.

2.0 NO FUTURE UNPERMITTED DEVELOPMENT

Respondent shall not perform, cause to be performed, or permit the performance of any development, as that term is defined in the Coastal Act (Cal. Pub. Res. Code § 30106), on the property located at 22466 and 22500 Pacific Coast Highway in Malibu, Los Angeles County, identified by the Los Angeles County Assessor's Office as APNs 4452-002-011 and 4452-002-013, (the "subject property") without first obtaining authorization under the Coastal Act or the City of Malibu's Local Coastal Program, as appropriate, or written acknowledgment from the appropriate governmental entity that the proposed development is exempt therefrom. Respondent shall refrain from any attempts to limit or interfere with lawful public use of the public access easements created by the acceptances of Offers to Dedicate recorded July 11, 2983 (Instrument No. 83-950711) and April 4, 1985 (Instrument No. 85-369283), or lawful use by the holder(s) of the easement(s) to maintain the areas and make them available for public use.

3.0 REMOVAL PLAN

3.1 Within 60 days of issuance of this Consent Agreement and Amended Order, Respondent shall submit for the review and approval of the Executive Director of the Commission a proposed Removal Plan that provides for the removal of all structures and materials that are located within the vertical and lateral public access easements on the subject property as a result of either development (as that term is defined in the Coastal Act – Cal. Pub. Res. Code § 30106) that lacked the necessary authorization under the Coastal Act or its predecessor (hereinafter referred to as "unpermitted development") and/or development

inconsistent with coastal development permits Nos. 5-83-360 and 5-84-754, including but not limited to: rock riprap, with the exception of any rock riprap for which Respondent has submitted a request for after-the-fact authorization as provided for in Section 3.6, a 9-ft high wall, concrete slab and generator, fence, railing, planter, light posts, staircase, and landscaping. The Removal Plan shall be prepared by a certified civil engineer or other qualified professional licensed by the State of California acceptable to the Executive Director of the Commission ("Executive Director"), and must contain the following provisions:

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

B. A timetable for removal, consistent with sections 8.1 and 8.3, below.

C. Identification of the disposal or recycling site to which removed development materials will be transported, which site must be a licensed disposal facility located outside of the Coastal Zone, and a commitment that any hazardous materials will be transported to a licensed hazardous waste disposal facility.

D. If mechanized equipment is to be used, the Removal Plan must specify the following information:

1) Type of mechanized equipment that will be used for removal activities;
2) Length of time equipment will be used;
3) Routes that will be utilized to bring equipment to and from the property including to and from the sandy beach area where the rock riprap is located;
4) Storage location for equipment when not in use during removal process (mechanized equipment cannot be stored on the sandy beach);
5) Hours of operation of mechanized equipment;
6) 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;
7) Measures to be taken to protect water quality.

3.2 Respondent represents and warrants that the concrete slab and generator addressed in the original Cease and Desist Order (CCC-09-CD-01) have been removed from the vertical easement area and relocated pursuant to a building permit issued by the City of Malibu. The Commission acknowledges that Respondent has provided evidence that the relocation of the concrete slab and generator was completed pursuant to the issued building permit and that the City of Malibu has signed off on the permit.

3.3 If the Executive Director determines that any modifications or additions to the submitted Removal Plan are necessary, he shall notify Respondent and Respondent shall complete

all requested modifications and resubmit a revised Removal Plan for review and approval within 10 days of the date of the notification.

3.4 Respondent shall commence removal activities, complete all removal activities listed in the Removal Plan, and perform all removal activities consistent with the Removal Plan and consistent with the timeline established by Section 8.0, below.

3.5 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 address and resolve the unpermitted development and any other inconsistencies with previously issued coastal development permits in whole or in part and in compliance with the Coastal Act, the Removal Plan, and this Consent Agreement and Amended Order, he shall specify any measures necessary to ensure that the removal complies with the approved Removal Plan, this Consent Agreement and Amended Order, and the Coastal Act. Respondent shall implement any specified measures, within the timeframe specified by the Executive Director.

3.6 COASTAL DEVELOPMENT PERMIT AMENDMENT – AFTER-THE-FACT

A. If Respondent desires to retain any portion of the rock riprap identified in Section 17.0, below, within 30 days of issuance of this Consent Agreement and Amended Order, Respondent shall submit, and not withdraw or impede final Commission action in any way on, a "complete" coastal development permit amendment application for after-the-fact changes to CDP No. 5-83-360 to allow for a change in limits and size of rock to be used as toe protection to ensure structural stability of an existing, approved bulkhead.

1. In any application submitted pursuant to this Section 3.6, Respondent shall propose the minimum amount of rock necessary to ensure structural integrity of the existing, approved bulkhead. Respondent shall also propose to remove any authorized rock that becomes exposed by wind, rain, tide, surf, sea-level rise, or other means.
2. Any application submitted pursuant to this Section 3.6, shall include authorization and/or lease agreements from the California State Lands Commission ("SLC") for the placement of new or retention of existing development, including rock riprap, within the lateral public access easement held by SLC on the subject property. Delays caused by SLC in processing such authorization and/or lease agreements shall be grounds, pursuant to Section 12.0, below, for the Executive Director to extend the deadline in Section 3.6A, above.
3. Respondent agrees that if, at any time in the future, she or her successors in interest, heirs, or assigns proposes to construct a new shoreline protective device, at the time of its construction she or her successors in interest, heirs, or assigns shall remove any rock that remains in the lateral public access easement area and has not been authorized to remain through the approval of

the new shoreline protective device. Respondent agrees to provide notice of and condition transfer upon others agreeing to this requirement and the other terms of this Consent Agreement and Amended Order to any successors in interest, heirs, and/or assigns.

4. Respondents shall comply with the terms and conditions of any permit issued pursuant to the application submitted under this Section within 150 days of final Commission action.
5. Within 30 days of the effective date of this Consent Agreement and Amended Order, Respondent shall submit, for the review and approval of the Commission's Executive Director, a Second Removal Plan for removal of any development listed in Section 3.6.A that Respondents do not apply to retain in the permit application required by that Section. The Second Removal Plan shall be prepared and implemented consistent with the provisions set forth in Section 3.1-3.5, above and 8.1, below.

B. Denial of Development

1. Respondents shall submit, for the review and approval of the Commission's Executive Director, a Third Removal Plan for the removal of any development for which this Consent Agreement and Amended Order provides for application to the Commission, and for which the Commission denies authorization. The Third Removal Plan shall be submitted within 30 days of final action on said denial, and shall be prepared and implemented consistent with the provisions set forth in Section 3.1 – 3.5, above and 8.1, below.

4.0 ACCESSWAY IMPROVEMENT PLAN

4.1 Within 60 days of issuance of this Consent Agreement and Amended Order, Respondent shall submit for the review and approval of the Executive Director a proposed Accessway Improvement Plan that provides for public access across and through the vertical public access easement area on the subject property from Pacific Coast Highway to the sandy beach, including any development required to facilitate public access and any other development proposed for the easement area. Prior to submittal of the Accessway Improvement Plan, Respondent shall consult with the Mountains Recreation and Conservation Authority ("MRCA"), the holder of the subject vertical public access easement, or its successor in interest, to ensure that the Accessway Improvement Plan will provide adequate public access across the public access easement and comply with applicable requirements. If the Executive Director determines that any modifications or additions to the submitted Accessway Improvement Plan are necessary, he will notify Respondent and Respondent shall complete all requested modifications and resubmit a revised Accessway Improvement Plan for review and approval within 14 days from the date of the notification. The Accessway Improvement Plan shall include the following design criteria/constraints:

A. The access easement shall remain 10 feet in width.

B. The accessway may have no more than one gate located at the landward (Pacific Coast Highway) side of the subject property. The gate shall be installed with an automatic locking system. The gate shall incorporate a mechanism that automatically puts the gate into the unlocked and "open" position from one hour before sunrise to one hour after sunset. The gate shall be of an open design, allowing public views from PCH to the ocean and/or beach. No solid or other visually impermeable materials shall be used in the construction of the gate, except as may be required to secure the gate in place. The gate shall provide for the ability to exit the easement area to Pacific Coast Highway 24 hours a day.

C. A ramp at the seaward end of the accessway shall be used in the design to allow for access over the permitted seawall and to account for fluctuations in sand elevations. The ramp shall be designed to not impede lateral public access along the sandy beach.

D. Security lighting may be proposed, however any existing lighting/light posts within the easement area used for illuminating the existing tennis court must be removed as required by Section 3.0, above.

E. Security cameras may be proposed to monitor the subject property not encumbered by the access easements, but in no circumstances shall any security camera or system be located within the access easement. In addition, any proposed security camera/system shall be designed so as not to interfere with or to discourage the public's ability to use and enjoy the access easement.

F. Fences and/or walls may be proposed to separate the public access easement from the area of the subject property not encumbered by the access easement. The height and seaward extension of the fence/wall shall be consistent with the City of Malibu Local Coastal Plan ("City LCP"). Any fence/wall shall not be located within the 10-foot wide easement area.

4.2 Within 14 days of receiving approval of the Accessway Improvement Plan from the Executive Director, Respondent shall submit to the South Central Coast District office of the Commission all materials that are required to complete a coastal development permit ("CDP") amendment application (to amend existing CDP No. 5-84-754), for the proposed Accessway Improvement Plan approved by the Executive Director. At least 21 days prior to the submittal of the CDP amendment application, Respondent shall offer the holder of the vertical access easement ("easement holder") the opportunity to be a co-applicant in the CDP amendment application.

4.3 If, after receiving the CDP amendment application submittal, the Executive Director determines that additional information is required to complete the application, the Executive Director shall send a written request to the Respondent (and any co-applicant(s)) for the information, which request will set forth the additional materials required and provide a reasonable deadline for submittal. Respondent shall submit or

ensure the submittal of the required materials by the deadline specified in the request letter.

4.4 Respondent agrees to not withdraw this application and to allow the application to proceed through the Commission permitting process according to applicable laws and regulations and the standard permitting procedures.

4.5 Respondent shall fully participate and cooperate in the Commission permitting process, provide timely responses, and work to move the process along as quickly as possible, including responding to requests for information.

4.6 If, at any time, Respondent fails to or is otherwise unable to proceed with the CDP amendment application process, Respondent shall authorize the easement holder to assume the primary role in and proceed with processing the CDP amendment application on its own. If this occurs, Respondent agrees to pay the easement holder's costs of processing the CDP amendment application. Respondent shall pay such costs within 15 days of receiving a written request from the easement holder for such payment, accompanied by bona fide invoices and/or contracts documenting such costs. Regardless of who processes the CDP amendment application, all Respondent's obligations under this Consent Agreement and Amended Order remain in effect, and Respondent shall undertake all work required herein to ensure that the Removal and Accessway Improvement Plans are implemented, consistent with the terms and conditions of this Consent Agreement and Amended Order.

4.7 Respondent shall fully implement the Accessway Improvement Plan upon approval by the Commission and based on the timeframe to commence development of the accessway established in Section 8.0, below.

4.8 Pursuant to her offer and agreement and pursuant to this Consent Agreement and Amended Order, Respondent shall pay the costs of constructing the access improvements on the subject property.

5.0 All plans, reports, photographs and any other materials that the Consent Agreement and Amended Order requires Respondent to submit shall be submitted to:

California Coastal Commission
Attn: Aaron McLendon
200 Oceangate, 10th Floor
Long Beach, CA 90802
(562) 590-5071
Facsimile (562) 590-5084

With a copy to:
California Coastal Commission
Attn: Pat Veesart
89 S. California St., Suite 200
Ventura, CA 93001
(805) 585-1800
Facsimile (805) 641-1732

6.0 All work to be performed under this Consent Agreement and Amended Order shall be done in compliance with all applicable laws.

7.0 Nothing in this Consent Agreement and Amended Order will restrict the submittal of any future application(s) by Respondent for coastal development permits and/or amendments to existing permits, for proposed development on the Subject Property outside of the easement areas. Said proposed development may include, but is not limited to, placement of tennis court lighting, fencing, and wind screens, and planters and stairways. Nothing herein provides any assurance of the Commission's approval of any future application(s) by Respondent for coastal development permits and/or amendments to existing permits.

8.0 ADDITIONAL DEADLINES

8.1 Removal Plan

Within 180 days of approval of the Removal Plans produced pursuant to this Consent Agreement and Amended Order, Respondent shall commence removal of the unpermitted development and/or the development inconsistent with CDP Nos. 5-83-360 and 5-84-754, as defined by the approved Removal Plan, with the following exceptions:

i. The 9-foot high wall in the vertical public access easement, located on the Pacific Coast Highway side of the property.

Respondent shall completely remove the unpermitted development and/or the development inconsistent with CDP Nos. 5-83-360 and 5-84-754 (with the exception of items i, above) within 30 days of commencement of removal operations or until such time as provided for in the approved Removal Plans.

8.2 Accessway Improvement Plan

Within 150 days of approval of the CDP amendment application discussed in Section 4.0, above, or within 1 year of the effective date of the Consent Agreement and Amended Order (provided the CDP amendment application has been approved), whichever occurs first, Respondent shall satisfy any permit conditions that must be satisfied to cause the permit to issue and shall commence construction of the public accessway as authorized by the amended CDP. At no time shall construction of the public accessway begin until the CDP amendment has been issued. If the CDP amendment has not been approved within 1 year of the effective date of the Consent Agreement and Amended Order, construction shall commence within 30 days of the date the amended CDP is issued, which Respondent shall use best efforts to secure.

8.3 Construction of Accessway Improvements

Following commencement of construction of the accessway improvements under the CDP amendment, Respondent shall carry out the construction expeditiously and shall finalize construction as promptly as is reasonably possible, but in no event more than

60 days following commencement of construction, unless the Executive Director or his designee, in consultation with the licensed contractor hired to construct the accessway improvement, determines that additional time is warranted. If, at any time, Respondent fails to or is otherwise unable to proceed with the construction of the improvements under the CDP amendment, at the easement holder's written request, Respondent shall authorize the easement holder to assume the primary role in and proceed with construction and to enter the property for that purpose. If this occurs, Respondent agrees to pay the easement holder's costs of construction. Respondent shall pay such costs within 15 days of receiving a written request from the easement holder for such payment, accompanied by bona fide invoices and/or contracts documenting such costs. In the event that construction of some or all of the improvements under the CDP amendment is undertaken by the easement holder under the provisions of this section and provided that the easement holder uses the services of a licensed contractor, Respondent also agrees to indemnify and hold the easement holder harmless against any claims arising out of or related to the construction of improvements. Regardless of who undertakes construction of the improvements under the CDP amendment, all Respondent's obligations under this Consent Agreement and Amended Order remain in effect, and Respondent shall undertake all work required herein to ensure that the Removal and Accessway Improvement Plans are implemented, consistent with the terms and conditions of this Consent Agreement and Amended Order.

8.4 Opening of Public Accessway – Final Removal

A. Within 20 months of the effective date of this Consent Agreement and Amended Order or within 90 days of the date that Respondent no longer occupies the subject property if the construction of the accessway is completed consistent with the Accessway Improvement Plan, whichever occurs first, Respondent shall commence removal of the 9-foot high wall within the vertical public access easement, located on the Pacific Coast Highway side of the subject property, fully install the public accessway gate, consistent with the Accessway Improvement Plan, and open the accessway for public access and use. Respondent shall completely remove the portion of the 9-foot high wall within the vertical public access easement and install the public accessway gate within 15 days of commencement of removal and installation.

B. Within 7 days of completion of final removal/installation 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 not all of the unpermitted development has been removed or that the vertical and lateral public access easements are not open and available to the public, in whole or in part, he shall specify any measures necessary to ensure that the removal complies with the approved Removal Plans, approved Accessway Improvement Plan, this Consent Agreement and Amended Order, the amended CDP(s), and the Coastal Act.

Respondent shall implement any specified measures, within the timeframe specified by the Executive Director.

9.0 OPERATION AND MAINTENANCE COSTS OF ACCESSWAY

Respondent shall pay the holder of the vertical public access easement the costs of operating and maintaining the easement for a period of 10 years, starting from the date the accessway is made open and available to the public. Respondent shall pay the easement holder $35,000 per year for 10 years and shall submit such payments in annual payments no later than December 31 of each year beginning the year the accessway is made open and available to the public. Each $35,000 payment shall include a cover letter indicating that this payment is being made pursuant to this Consent Agreement and Amended Order. Concurrent with the deliverance of the payment, Respondent shall mail a copy of such check and transmittal correspondence to: Aaron McLendon, California Coastal Commission, 200 Oceangate, 10th Floor, Long Beach, CA 90802. If, at any time, the easement holder cannot accept such a payment, Respondent shall submit the annual $35,000 payment amount in accordance with the deadlines set forth above to the attention of Aaron McLendon of the Commission, payable to the California Coastal Commission/State Coastal Conservancy Violation Remediation Account or into such account as authorized by applicable California law at the time of the payment, and as designated by the Executive Director.

10.0 PAYMENT OF MONIES TOWARD PUBLIC ACCESS IN MALIBU

10.1 In light of the intent of the parties to resolve these matters through this Consent Agreement and Amended Order and to help improve public access to the coast, Respondent has agreed to make monetary payments that will go specifically towards the improvement, enhancement, and maintenance of public access elsewhere in the Malibu area. First, Respondent shall pay the sum of $350,000, which shall be divided into three installments as follows: (a) $116,666.67 due on or before ten (10) business days after the effective date of this Agreement; (b) $116,666.67 due on or before December 31, 2013; and (c) $116,666.66 due on or before December 31, 2014. Second, Respondent shall pay $160,000 for each year, or a proportional amount for any fraction of a year, from January 1, 2013 through the date on which the public access easements on the subject property are open and available to the public. Respondent shall pay by December 31, 2015, the amount that has accrued up to that point. If the Accessway Improvement Plan has not been fully implemented and the public access easements are not open and available to the public by December 31, 2015, accrual of days subject to this section will continue and such additional payment shall be paid within 10 days from the date the Accessway Improvement Plan is fully implemented and the public access easements are open and available to the public. Accrual of days for which Respondent is required to make payments as indicated above will cease once the Accessway Improvement Plan is fully implemented and the public access easements are open and available to the public,

with the exception that if Respondent's actions cause the access easements once again to be blocked and/or unavailable for general public use, such accrual of days, and the penalties associated with this accrual, will begin again, in addition to stipulated penalties pursuant to Section 10.3, below, and Respondent shall pay such amount(s) within 10 days of the date the access easements are made open and available to the general public. If delays in opening of the public access easement or subsequent unavailability of the public accessway easement for public use are caused solely as a result of fire, flood, earthquake, storm, hurricane, tsunami, or other natural disaster, or environmental or other concerns determined by the Executive Director that make it impossible to undertake work associated with the opening of the public access easement or that make it impossible for the public accessway to remain open, accrual of days for which Respondent is required to make payments as indicated above will cease until such time as it is possible to continue work on the opening of the public access easement. Respondent shall submit evidence, for the review and written approval of the Executive Director, that such act(s) prevented Respondent from carrying out the terms and conditions of this Consent Agreement and Amended Order.

10.2 The payments described in Section 10.1 shall be deposited in the Violation Remediation Account of the California State Coastal Conservancy Fund (see Public Resources Code section 30823) or into such other public account as authorized by applicable California law at the time of the payment, and as designated by the Executive Director. Respondent shall submit the payment amount in accordance with the deadlines set above to the attention of Aaron McLendon of the Commission, payable to the California Coastal Commission/State Coastal Conservancy Violation Remediation Account or into such account as authorized by applicable California law at the time of the payment, and as designated by the Executive Director.

10.3 Strict compliance with this Consent Agreement and Amended Order by all parties subject thereto is required. Respondent's failure to comply with any term or condition of this Consent Agreement and Amended Order, including any deadline contained in the Consent Agreement and Amended Order, unless the Executive Director grants an extension under Section 12.0, below, will constitute a violation of this Consent Agreement and Amended Order and will result in Respondent being liable for stipulated penalties in the amount of $500 per day per violation. Respondent shall pay stipulated penalties within 10 days of receipt of written demand by the Commission for such penalties regardless of whether Respondent has subsequently complied. If Respondent violates this Consent Agreement and Amended Order, nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available, including the imposition of civil penalties and other remedies pursuant to Public Resources Code Sections 30821.6, 30822 and 30820 as a result of the lack of compliance with this Consent Agreement and Amended Order.

11.0 ACCESS FOR ALL V. ACKERBERG AND THE EASEMENT

Respondent and the Commission shall cooperate in seeking prompt dismissal of the lawsuit captioned Access For All v. Lisette Ackerberg Trust, et al., in Los Angeles County Superior Court, Case Number BC 405058 ("AFA v. Ackerberg") by March 29, 2013, if AFA does not seek dismissal of the lawsuit or does not accomplish it by that date.

12.0 MODIFICATION OF DEADLINES

Prior to the expiration of any of the deadlines established by the Consent Agreement and Amended Order, Respondent may request from the Executive Director an extension of any such deadlines. Such a request shall be made in writing 10 days in advance of the deadline and directed to the Executive Director in the San Francisco office of the Commission. The Executive Director shall grant an extension of deadlines upon a showing of good cause if the Executive Director determines that Respondent has diligently worked to comply with her obligations under the Consent Agreement and Amended Order but cannot meet deadlines due to unforeseen circumstances beyond her control.

13.0. SITE ACCESS

Respondent shall provide Commission staff and staff of any agency having jurisdiction over the work being performed under the Consent Agreement and Amended Order with access to the areas of the property described below at reasonable times upon 24 hour notice. For safety and security purposes, such persons shall make their presence known to the on-site contractor, foreman, or supervisor conducting work under the Consent Agreement and Amended Order before entering such areas. Nothing in the Consent Agreement and Amended 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 and (2) any areas where work is to be performed pursuant to the Consent Agreement and Amended Order or pursuant to any plans adopted pursuant to the Consent Agreement and Amended Order or pursuant to any development approved through a CDP, for purposes including but not limited to inspecting records, operating logs, and contracts relating to the property and overseeing, inspecting, documenting (including by photograph and the like), and reviewing the progress of Respondent in carrying out the terms of the Consent Agreement and Amended Order; provided that, because of security concerns, no photographs shall be taken directly of Respondent's house.

14.0 REVISIONS OF DELIVERABLES

The Executive Director may require revisions to deliverables required under the Consent Agreement and Amended Order, and the Respondents shall revise any such deliverables consistent with the Executive Director's specifications, and resubmit them for further review and approval by the Executive Director, within ten days of receipt of a modification request from the Executive Director. The Executive Director may extend the time for submittals upon a written request and a showing of good cause, pursuant to Section 12.0 of the Consent Agreement and Amended Order.

15.0 PERSONS SUBJECT TO THE CONSENT AGREEMENT AND AMENDED ORDER

Lisette Ackerberg and the Lisette Ackerberg Trust, her and its successors, heirs, assigns, employees, agents, and contractors, and any persons acting in concert with any of the foregoing are jointly and severally subject to all the requirements of this Consent Agreement and Amended Order that are applicable to them, and as applicable shall undertake work required herein according to the terms of this Consent Agreement and Amended Order; provided, however, that this Consent Agreement and Amended Order does not itself subject employees, agents, contractors, and persons acting in concert with them to liability for any monetary amounts or penalties provided for in this Consent Agreement and Amended Order. Notwithstanding the above, Lisette Ackerberg and the Lisette Ackerberg Trust are responsible for all the requirements of this Consent Agreement and Amended Order.

16.0 IDENTIFICATION OF THE SUBJECT PROPERTY

The property that is subject to this Consent Agreement and Amended 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.

17.0 DESCRIPTION OF ALLEGED COASTAL ACT VIOLATION

This Consent Agreement and Amended Order resolves disputed claims. 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. In addition to being unpermitted, these items are located within vertical and/or lateral public access easements (created in response to permit conditions), are obstructing public access to the beach and along the beach seaward of the residence, and are therefore inconsistent with the conditions of the CDPs and the terms of the easements established pursuant

to the CDPs. By entering into this Consent Agreement and Amended Order, Respondent does not concede or admit to any violation of any law or permit, but agrees, for the purposes of resolving this matter amicably, that the factual prerequisites to the Commission's jurisdiction to issue and enforce this Consent Agreement and Amended Order are satisfied.

18.0 COMMISSION JURISDICTION

The Commission has jurisdiction over resolution of these alleged Coastal Act violations under Public Resources Code Section 30810. Respondent has agreed not to and shall not contest the Commission's jurisdiction to issue or enforce this Consent Agreement and Amended Order at a public hearing or any other proceeding by or before the Commission, any other governmental agency, any administrative tribunal, or a court of law.

19.0 SETTLEMENT OF MATTER PRIOR TO HEARING

In light of the intent of the parties to resolve these matters in settlement, Respondent has agreed not to contest the legal and factual bases and the terms and issuance of the Consent Agreement and Amended Order, including the allegations of Coastal Act violations contained in the Notice of Intent letter, dated April 27, 2007.

20.0 EFFECTIVE DATE AND TERMS OF THE CONSENT AGREEMENT AND AMENDED ORDER

The effective date of this Consent Agreement and Amended Order is the date this Consent Agreement and Amendment is issued by the Commission. This Consent Agreement and Amended Order shall remain in effect permanently unless and until rescinded by the Commission.

21.0 FINDINGS

This Consent Agreement and Amended Order is issued on the basis of the findings adopted by the Commission, as set forth in the document entitled "Findings for Consent Agreement and Cease and Desist Order Amendment No. CCC-09-CD-01-A." The activities authorized and required under the Consent Agreement and Amended Order are consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act. The Commission has authorized the activities required in the Consent Agreement and Amended Order as being consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act.

22.0 GOVERNMENT LIABILITIES

Neither the State of California, the Commission, nor its employees shall be liable for injuries or damages to persons or property resulting from acts or omissions by

Respondents in carrying out activities pursuant to the Consent Agreement and Amended Order, nor shall the State of California, the Commission or its employees be held as a party to any contract entered into by Respondents or their agents in carrying out activities pursuant to the Consent Agreement and Amended Order.

23.0 DISMISSAL OF CLAIMS AND ATTORNEY'S FEES

23.1 Respondent will not challenge in any way the Judgment that was entered by the Los Angeles County Superior Court in Case No. BS 122006. Further, in light of the desire to settle this matter and avoid litigation, pursuant to the agreement of the parties as set forth in the Consent Agreement and Amended Order, Respondent hereby waives whatever right they may have to seek a stay or to challenge the issuance and enforceability of this Consent Agreement and Amended Order in a court of law or equity.

23.2 Within five business days of issuance of this Consent Agreement and Amended Order, Respondent shall deliver to Supervising Deputy Attorney General, Jamee Jordan Patterson, California Department of Justice, P.O. Box 85266, San Diego, CA 92186, a certified or cashier's check in the amount of $170,000 as a full, complete, and final reimbursement to the Commission for all attorney's fees and costs, made out to: "California Department of Justice." Within 24 hours of delivering the check, a copy of such check and transmittal correspondence shall be mailed to: Aaron McLendon, California Coastal Commission, 200 Oceangate, 10th Floor, Long Beach, CA 90802.

24.0 SETTLEMENT OF CLAIMS

The Commission and Respondent agree that this Consent Agreement and Amended Order settles the Commission's monetary claims for relief for those violations of the Coastal Act alleged in Section 17.0 of the Consent Agreement and Amended Order (specifically including claims for civil penalties, fines, or damages under the Coastal Act, including under Public Resources Code Sections 30805, 30820, and 30822), with the exception that, if Respondent fails to comply with any term or condition of the Consent Agreement and Amended Order, the Commission may seek monetary or other claims for violation of the Consent Agreement and Amended Order. In addition, the Consent Agreement and Amended Order does not limit the Commission from taking enforcement action due to Coastal Act violations at the subject property or elsewhere, other than those specified herein.

25.0 CONTRACTUAL OBLIGATION

The Consent Agreement and Amended Order constitute both administrative orders issued to Respondent personally and a contractual obligation between Respondent and the Commission, and therefore shall remain in effect until all terms are fulfilled,

regardless of whether Respondent owns or lives in the property upon which the violations exist.

26.0 MODIFICATIONS AND AMENDMENTS

Except as provided in Section 12.0, and for minor, immaterial matters upon mutual written agreement of the Executive Director and Respondents, the Consent Agreement and Amended Order may be amended or modified only in accordance with the standards and procedures set forth in section 13188(b) of the Commission's administrative regulations.

27.0 GOVERNMENTAL JURISDICTION

This Consent Agreement and Amended Order shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California.

28.0 NO LIMITATION OF AUTHORITY

28.1 Except as expressly provided herein, nothing in the Consent Agreement and Amended Order shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with the Consent Agreement and Amended Order.

28.2 Correspondingly, Respondent has entered into the Consent Agreement and Amended Order and agreed not to contest the factual and legal bases for issuance of the Consent Agreement and Amended Order, and the enforcement thereof according to its terms. Respondent has agreed not to contest the Commission's jurisdiction to issue and enforce the Consent Agreement and Amended Order.

29.0 INTEGRATION

The Consent Agreement and Amended Order constitutes the entire agreement between the parties and may not be amended, supplemented, or modified except as provided in the Consent Agreement and Amended Order.

30.0 STIPULATION

Respondent and her representatives attest that they have reviewed the terms of the Consent Agreement and Amended Order and understand that their consent is final and stipulate to its issuance by the Commission.

31.0 EXECUTION IN COUNTERPARTS

The parties agree that this agreement may be executed in counterparts and each shall be treated as the original.

IT IS SO STIPULATED AND AGREED:
On behalf of Respondent:

Lisette Ackerberg — 2-8-13

Lisette Ackerberg
On behalf of herself and as trustee of the
Lisette Ackerberg Trust

Date

Executed in San Diego, CA on behalf of the California Coastal Commission and thereby issued:

Charles Lester, Executive Director
California Coastal Commission

Date

EXHIBIT 2

Adopted Findings for Commission Cease & Desist Order No. CCC-09-CD-01, July 8, 2009

CCC-09-CD-01-A (Ackerberg)

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE (415) 904- 5200
FAX (415) 904- 5400
TDD (415) 597-5885

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

Items W 11 & 12

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.*
>
> *(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 <u>neither create nor contribute significantly to erosion</u>, 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. <u>Recordation of Notice of Violation</u>

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

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[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

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.

Exhibit 1: Map showing location of the Ackerberg property.

State of California, George Deukmejian, Governor

California Coastal Commission
SOUTH COAST DISTRICT
245 West Broadway, Suite 380
P.O. Box 1450
Long Beach, California 90801-1450
(213) 590-5071

FILE COPY

FILED: 5-16-83
49th DAY: 7-3-83
180th DAY: 10-31-83
STAFF: D. Lowell/GG/bp
STAFF REPORT: 5-31-83
HEARING DATE: June 9-10, 1983

A-W/C 12-0
1/24/85 Findings

REGULAR CALENDAR

STAFF REPORT AND RECOMMENDATION

Application No. 5-83-360 (Trueblood)

Applicant: Ralph Trueblood
22486 Pacific Coast Highway
Malibu, CA 90265

Agent: Kevin Kelly & Assoc.

Description: Construction of a 140 foot wood pile-supported, wood-sheeted bulkhead in the Carbon Beach area of Malibu.

Site: 22486 Pacific Coast Highway, Malibu, Los Angeles County.

SUMMARY

Staff recommends the Commission approve the project with conditions addressing public access and wave hazard liability.

STAFF RECOMMENDATION

The staff recommends the Commission adopt the following resolution:

I. Approval with Conditions

The Commission hereby grants, subject to the conditions below, a permit for the proposed development on the grounds that the development, as conditioned will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3 of the Coastal Act, is located between the sea and the first public road nearest the shoreline and is in conformance with the public access and public recreation policies of Chapter 3 of the Coastal Act, and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.

Exhibit 2
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

II. Special Conditions

This permit is subject to the following special conditions:

1. Lateral Access. Prior to transmittal of permit, the Executive Director shall certify in writing that the following condition has been satisfied. The applicant shall execute and record a document, in a form and content approved in writing by the Executive Director of the Commission, irrevocably offering to dedicate to a public agency or a private association approved by the Executive Director, an easement for public access and passive recreational use along the shoreline. The document shall also 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 easement shall include all areas from the mean high tide line landward to the toe of the bulkhead. Such easement shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed.

The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of 21 years, such period running from the date of recording.

2. Applicant's Assumption of Risk. Prior to transmittal of the permit, the applicant shall submit to the Executive Director a deed restriction for recording free of prior liens except for tax liens, that bind the applicant and any successors in interest. The form and content of the deed restriction shall be subject to the review and approval of the Executive Director. The deed restriction shall provide (a) that the applicant understands that the site may be subject to extraordinary hazard from erosion, flooding or wave damage, and the applicant assumes the liability from those hazards; (b) the applicant unconditionally waives any claim of liability on the part of the Commission or any other public agency for any damage from such hazards; and (c) the applicant understands construction in the face of these possible known hazards may make them ineligible for public disaster funds or loans for repair, replacement, or rehabilitation of the property in the event of erosion, flooding, or wave damage.

III. Findings and Declarations

The Commission finds and declares as follows:

A. Project Description. The applicant proposes to construct an approximately 140 foot long wood pile-supported, wood-sheeted bulkhead with a 40 foot long return on the east portion of the parcel (see Exhibit 3 for height specifications). The western end of the bulkhead will tie-in with a previously approved (but not constructed) bulkhead (5-81-521, Sherman).

B. Shoreline Access/Protective Structures. Article X Section 4 of the California Constitution provides:

No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purpose ... and the Legislature shall enact such law as will give the most liberal construction to this provision so that access to the navigable waters of this state shall always be attainable for the people thereof." (emphasis added)

The Coastal Act Sections which carry out the Constitutional direction on public access are 30210, 30211 and 30212, as follows:

Section 30210.

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211.

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30212.

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

(b) For purposes of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

The legislature has also provided guidance as to the time, place and manner of public access.

Section 30214(a) provides:

> Section 30214.
>
> (a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:
>
> (1) Topographic and geologic site characteristics.
>
> (2) The capacity of the site to sustain use and at what level of intensity.
>
> (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.
>
> (4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

Additionally, the legislature expressed its intent that the Commission consider the equities and balance the rights of the individual property owner with the public's constitutional right of access to the coast (Section 30214(b)).

> (b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution.

Finally, Section 30604(c) of the Coastal Act requires that:

> (c) Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that such development is in conformity with the public access and public recreation policies of Chapter 3 (commencing with Section 30200).

The proposed development is for the construction of a "new" bulkhead built on the sandy beach in order to protect existing development on the applicant's parcel. When the Commission determines that a shoreline project constitutes "new development", access is required. In the recent "Sea Ranch Association vs. California Coastal Commission, C-74-1320"

decision, the court ruled that it is within the Commission's power to require dedications of access as a condition of a development permit. The opinion also states, in part, that . . ."It is clear the Commission would be in violation of the policies and its duties as spelled out under the Act if it had not formulated or imposed the challenged conditions. . . ."

In 1979, the Commission began work on the Interpretive Guidelines for public access in order to provide a comprehensive review of the policies developed in permits in the previous 2½ years. These Guidelines were and are intended to provide the public, including permit applicants, with a general description of how the Coastal Act has been applied in previous cases and indicate the general approach the Commission would use in future actions. They are not regulations, do not supercede the statute and need not be followed in any particular case.

The major question presented in this case is how much access is appropriate given the circumstances. The question of the appropriate width and description of lateral accessways was one of the more important issues addressed in the Guidelines. Permit decisions by the State Commission and six Regional Commission decisions had been somewhat inconsistent prior to 1980 when the Guidelines were adopted.

The Coastal Act's basic policy is that maximum access must be provided in new development projects, in a time, place and manner responsive to the facts and circumstances outlined in Section 30214. The Commission, through a long line of permit decisions and in the Guidelines, has developed a policy approach which implements these requirements. Although each permit is reviewed on its own merits, many cases contain similar factual circumstances. The Commission has attempted to provide a uniform and consistent policy approach which protects both private and public interests by ensuring that landowners in similar factual circumstances are treated similarly and ensuring that dedicated accessways can be properly and efficiently managed for the enjoyment of the public and the protection of neighboring private uses.

The Guidelines discuss the general case of development located on the beach when they conclude that: "A 25 foot accessway along the dry, sandy beach for passive recreational use by the public has been found to offset the burden new development projects generally impose on public access". The 25 foot accessway is described as a minimum area for public use. An examination of the permit history in Malibu clearly demonstrates that the most common development is located on an existing parcel or on immediately adjacent to the beach.

However, the Guidelines also state:

> Describing an Accessway From a Fixed Inland Point. The most efficient way to describe an accessway is as a distance from a fixed line landward of and parallel to the mean high tide line and extending seaward to the seaward property line (mean high tide line). When this description is used, the area of dry sand beach may vary from wide areas of sandy beach available for public uses during the low tide conditions, to very narrow stretches of sandy beach resulting in little area for public use during high tide or storms. To account for the potential changes in the waterline, the area included in the accessway should be sufficient to assure that the public will have the ability to use some dry sandy beach at all times of the year. Because the landward boundary of this accessway is fixed, the landowners/residents of the beachfront parcels, are afforded a greater degree of certainty of where public rights exist than that additional beach area may be required to protect the public's right of access to and along

the shoreline. The public also benefits from this approach, since the public and the accepting agency can more readily determine where public rights exist. However, the public trade off for this certainty is that during storms and high tides, the accessways designated may be entirely submerged.

To determine the point at which such an accessway should begin the Commission should consider the variations in the high water line during the year, the topography of the site, the location of other lateral accessways on neighboring lands and the privacy needs of the property owner. Any such fixed point should, however, give the greatest amount of assurance that the public would retain the right of access and use along the shoreline during the majority of the year.

Thus, the discussion in the Guidelines regarding the 25 foot accessway as being generally sufficient unless extraordinary burdens on access are shown, does not announce a rule or standard for application to all circumstances. Rather it describes the Commission's experience in the most frequently encountered circumstances when development is located on or near the beach. In balancing the private and public interest in these cases, the Commission concluded the 25 foot easement for public access is consistent with the Coastal Act.

The guidelines make clear, however, that a lateral access requirement should be meaningful in light of all the circumstances of the site. Most important is the physical characteristics of the beach. Certainty in locating the inland extent of the accessway is primary in importance in reducing potential for conflict between beach users and property owners. Because the location of a 25 foot ambulatory access changes hourly, the guidelines prefer to establish the inland extent by means of a fixed inland point. . ."the most efficient way to describe an accessway is as a distance from a fixed line landward of and parallel to the mean high tide line. . . ."

Only where it is difficult to locate a fixed inland point do the guidelines suggest an ambulatory accessway. Using a fixed inland point creates greater certainty for both public and the landowner. In addition, because a 25 foot ambulatory easement is far more difficult to locate, those members of the public visiting the beach can be more easily intimidated by landowners who wish to exclude the public from use of the state tidelands. A fixed point can be easily mapped or described on signs educating the public to the actual public-private boundary.

In prior actions the Commission has used the fixed inland point to describe accessways: 1) nearly uniformly where a bluff fronts on the beach (See: Goldberg & Fisher A-264-80, Rehberger A-217-79, Auguste A-29-79, Voger A-164-79 and Gershwin A-160-78 and A-259-79); 2) nearly always where a seawall is placed on the beach (See Mussel Shoals A-158-81 to 162-81 and Robertson A-345-79) except where a retaining wall to contain septic systems rather than protect the residence is located under the house or very narrow beaches (See Couson 191-79 and Larronde 199-79) where a 25 foot ambulatory easement was required; and 3) occasionally where terrestrial vegetation clearly demands a significant cahnge in beach features (See Bernfeld 294-79 and Seadrift permits).

Where a beach is bounded on the inland side by bluff, seawall or significant vegetation, the width of the beach is generally defined at some time, often regularly, by this upland barrier. In the case of bulkheads/seawalls designed to protect inland structures from wave damage,

once waves reach the seawall, the reflected energy causes the sand in front of the seawall to be scoured out, thus leaving the seawall to define the upland/ocean boundary for a larger period of time. Vertical seawalls reflect more wave energy and cause greater sand scour, in general, than sloping seawalls or irregular rock walls, bluff faces or vegetation boundaries. All of the boundaries reflect more energy than a steep sandy or cobble beach. Thus, the definition of an inland extent of the beach by a natural or manmade feature is an indication that public access in front of the feature is probably severly limited or non-existant for at least the time of highest water.

If the accessway is defined as or by this inland boundary feature, the landowner is more secure from wave attack behind the barrier, while public access is diminished. Because of these relative benefits and burdens, the Commission finds that the accessway should be defined as an area seaward of the boundary feature so as to ensure greater and off-setting public access if the width of the beach fluctuates from season to season. In this way, the Commission can carry out the Constitutional and statutory mandates that access "always be attainable" and "maximum access. . .be provided for all the people." Private developments which create impediments to public access along the shoreline by eliminating sandy beach areas impose a burden on the ability of the public to enjoy and use of a public resource -- one to which access is guaranteed through Sections 30210 and 30211 of the Coastal Act and Article X Section 4 of the California Constitution.

Given the requirement of Section 30604(c) of the Coastal Act projects located between the first public road and the sea be in conformity with the access policies of the Coastal Act, a shoreline protective work which runs the risk of exacerbating shoreline erosion and loss of shoreline sand supply must mitigate or eliminate such adverse impacts. While it is difficult for such works to wholly eliminate adverse impacts, it has been the experience of the Commission, through many permit actions on similar projects, to mitigate those impacts through the provision of increased public access to and along the shoreline (Appeal No. 2-79, Isla Vista; Apeal No. 165-79, Blue Lagoon Community Association, Inc.; Permit No. 5-81-568, Schafer, et al, to name a few) as a more feasible means of meeting the requirements of the Coastal Act.

In addition to the aforementioned previous permit actions by the Commission on applications or appeals on similarly related projects, the Commission approved a permit with conditions for the reconstruction of a seawall for the Blue Lagoon Community Association, Inc. in South Laguna, Orange County (Appeal No. 165-79). The Commission found that due to the construction of the seawall, public access along the shoreline was adversely affected. Due to the physical impairment to access during periods of low sand supply on the beach, in part created by the seawall, lateral access was required as a condition of approval as well as the provision of enhanced lateral access during periods of low sand supply through the construction of stairways for "emergency public access" to and along the community road for use by the public for the sole purpose of access to the beach when tidal or wave action prevented safe passage along the beach seaward of the approved development.

In considering the impacts of shoreline protective works on shoreline processes and shoreline sand supply, additional Coastal Act policy concerns are applicable and must be addressed. Sections 30235 and 30253(1) and (2) of the Coastal Act state, in part:

> Section 30235.
>
> Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosions and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.
>
> Section 30253.
>
> New development shall:
>
> (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.
>
> (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.

Previous attempts in the Malibu area to protect homes from storm wave damage and erosion have included the construction of wooden or concrete seawalls and the placement of rip-rap. Such structures tend to cause the loss of sand from beach areas in front of and adjacent to them (according to "Planning for an Eroding Coast", a report to the Coastal Commission by Frank Broadhead, Shore Protection Manual, Army Corps of Engineers, 1977, and Saving the American Beaches: A Position Paper by Concerned Coastal Geologists, Pilkey, et al, 1981). The impenetrable surfaces of the structures or boulders reflect the energy generated by the breaking waves, resulting in the scouring away of the sandy areas in front of and up and down coast from the structures. And, by artificially building up and steepening the slope in the vicinity of such structures, two additional effects occur: (1) wave energy is not gradually reduced, as would occur on a more gently, sloping beach, but is increased, thus exacerbating the scouring effect on adjacent sandy beach areas; and (2) the structures tend to cause a landward retreat of the mean high tide line, potentially affecting the boundary between public and private lands along beaches adjacent to the project as well as on the project site itself.

The U.S. Army Corps of Engineers' Shoreline Processes Manual, Vol. 11, states:

5.22 Limitations. These structures (seawalls, revetments, bulkheads, etc.) afford protection only to the land immediately behind them, and none to adjacent areas up or downcoast. When built on receding shoreline, the recession will continue and may be accelerated on adjacent shores. Any tendency toward loss of beach material in front of such structures may well be intensified. Where it is desired to maintain a beach in the immediate vicinity of such structures, companion works may be necessary. (Page 5-3)

5.26. Erosion updrift from such a structure will continue unabated after the wall is built, and downdrift erosion will probably be intensified. (Page 5-4)

In addition, the State Interpretive Guidelines reference "projects whose burden on public access may not be successfully mitigated with only a 25 foot accessway", with particular emphasis placed on the impact of shoreline protective devices:

"Shoreline protective devices, particularly vertical seawalls, have serious adverse effects on coastal resources. Such seawalls increase scour from their base and, thus, decrease the area of usable beaches. Also, because shoreline protective devices are intended to halt the landward progress of erosion, they tend to define the shoreline in areas subject to erosion. As such, they tend to limit public passage on beaches especially at high tides and storm conditions. Further, construction of shoreline protective devices eliminates dune material as a source of beach sand, and further limits the ability of the shoreline to migrate as it would in a natural state. Given these additional direct burdens on the availability of sandy beach and the resultant impacts on public access to the state-owned tidelands, it is only with additional provisions for public access that this burden can be sufficiently mitigated and thus that construction of such devices can be found consistent with Section 30212 of the Coastal Act."

It has been the Commission's experience, based on the review of previous similar shoreline protective devices and of scientific and engineering data pertinent to the subject, that such devices have an adverse impact on shoreline sand supply and a direct adverse impact on public access along the shoreline. Such development, therefore, is inconsistent with the requirement of Section 30235 of the Coastal Act which allows such structure only ". . .when designed to eliminate or mitigate adverse impacts on shoreline sand supply. . ." since the primary purpose of revetment is to protect landward structures and property. As mentioned earlier, however, the Commission has approved such projects with a condition to ensure that any potential or expected loss of sandy beach for use by the public shall be mitigated through a requirement that applicants offer to dedicate a lateral access easement for public use along the shoreline from the mean high tide line to the toe of any such shoreline protective device.

In conclusion, the Commission finds that the proposed project does place burdens on public access and coastal resources, and that an access dedication from the mean high tideline to the toe of the proposed bulkhead represents an appropriate balancing of the public and private

burdens and benefits. The Commission finds that the proposed development as conditioned is consistent with Sections 30210, 30211, 30212, 30214 and 30604(c) of the Coastal Act of 1976.

C. Wave Hazard. Section 30253(1) and (2) of the Coastal Act states:

> Section 30253.
>
> New development shall:
>
> (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.
>
> (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.

Oceanfronting parcels in Malibu, such as the subject property, are susceptible to flooding and wave damage from storm waves and storm surge conditions. Past occurrences have resulted in public costs (through low-interest loans) in the millions of dollars in the Malibu area alone. Section 30001.5 of the Coastal Act states, in part, that the econom needs of the people of the State are a basic consideration:

> Section 30001.5.
>
> The Legislature further finds and declares that the basic goals of the state for the coastal zone are to:
>
> (a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and manmade resources.
>
> (b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.

The experience of the Commission in evaluating the consistency of proposed developments with the policies of the Coastal Act regarding development in areas subject to problems associated with geologic instability, flood, wave, or erosion hazard, has been that development has continued to occur despite periodic episodes of heavy storm damage, landslides, or other such occurrences. Recent episodes on December 1, 1982 and January 27, 1983, re-affirm the fact that damage from high tides, storm surge, and storm waves is a likely occurrence during the expected duration of the residences. In addition, the area in which the proposed development will occur, is an area described as critical for present development. According to the Accessment and Atlas of Shoreline Erosion along the California Coast, prepared by the Department of Navigation and Ocean Development (now known as the Department of Boating and Waterways), the Big Rock Beach portions of the Malibu coast is subject to damage during high wave conditions. As a means of allowing continued development in areas subject to those hazards while avoiding placing the economic

burden on the people of the State for costs arising from the damage to private development, the Commission has regularly required that the applicants agree to wave any claims of liability on the part of the Commission or any other public agency for allowing the development to proceed. As conditioned, the Commission finds that the proposed development will be consistent with Section 30001.5 of the Coastal Act.

D. Local Coastal Program. Section 30604(a) of the Coastal Act states, in part:

> Section 30604.
>
> (a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200).

The County of Los Angeles Board of Supervisors adopted the Land Use Plan portion of the Malibu/Santa Monica Mountains area Local Coastal Program on December 28, 1982, for submittal to the Coastal Commission for certification. At a public hearing on March 24, 1982, the Commission voted not to certify the Land Use Plan as submitted; further hearings have not been scheduled at this time. Since the proposed development is otherwise consistent with the policies of Chapter 3 of the Coastal Act, as mentioned earlier, the Commission finds that approval of this project as conditioned will not prejudice the ability of the County of Los Angeles to prepare a Local Coastal Program that is consistent with the policies of Chapter 3 of the Coastal Act.

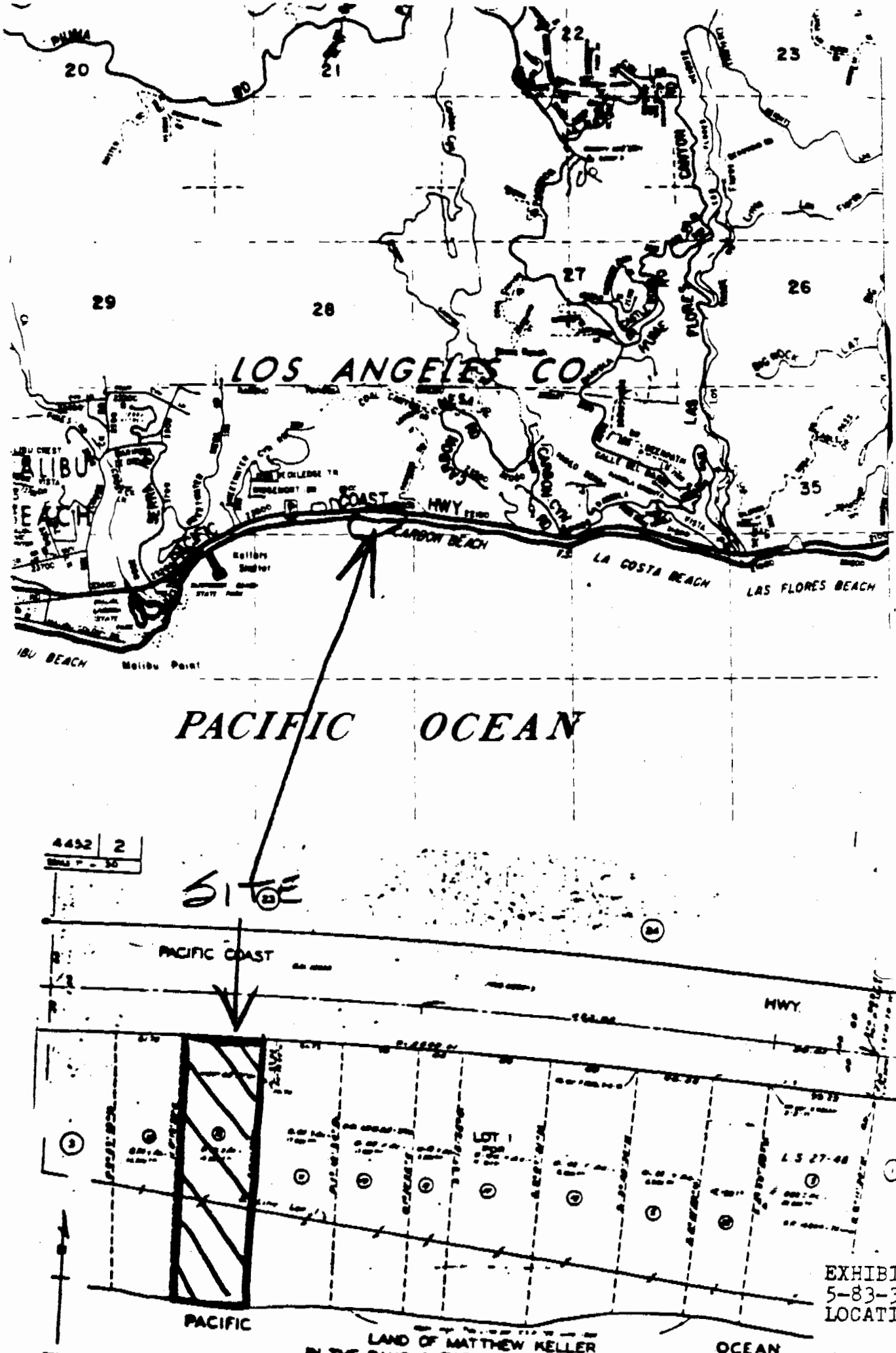
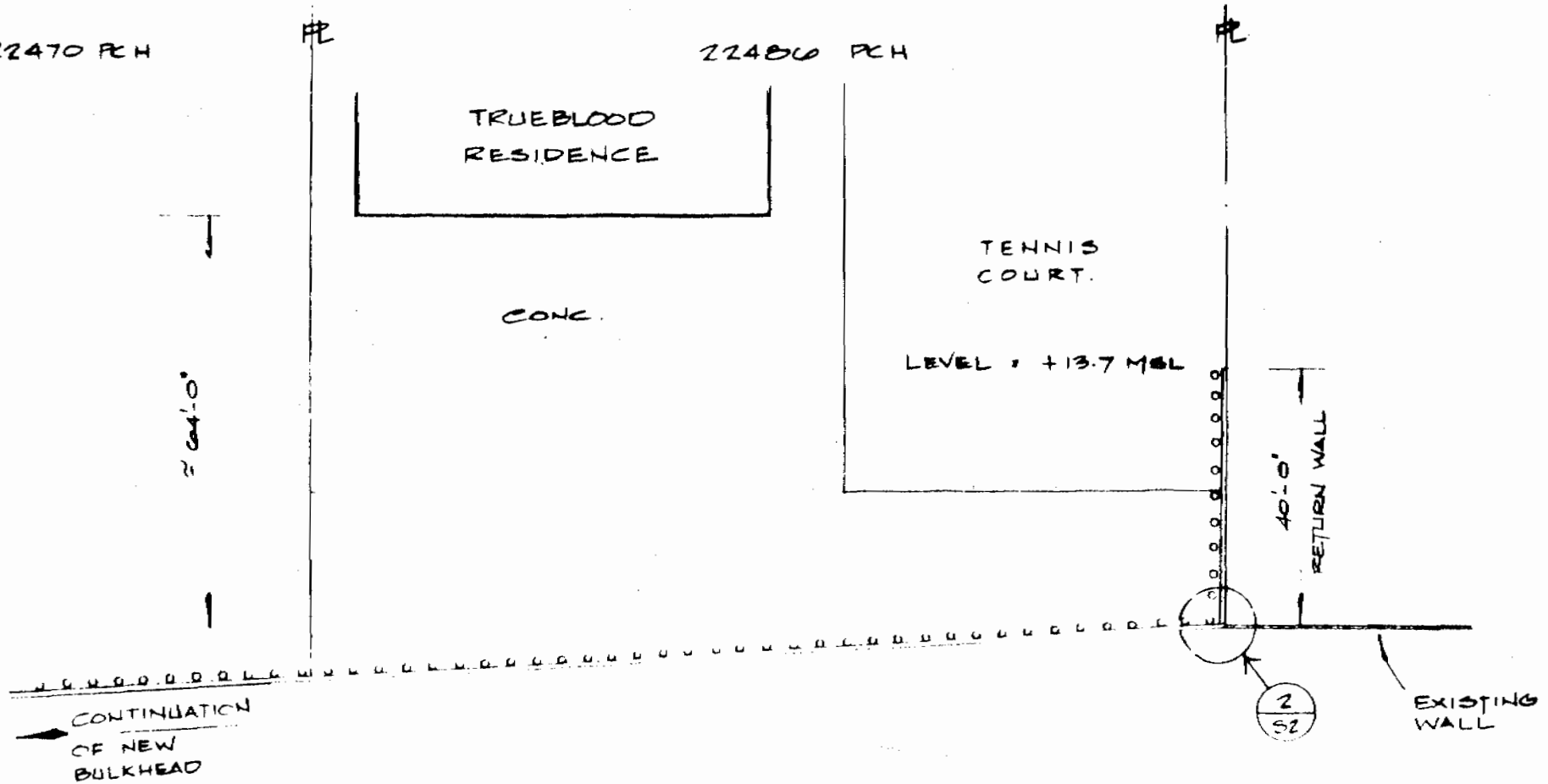


EXHIBIT 1
5-83-360
LOCATION

Exhibit 2
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

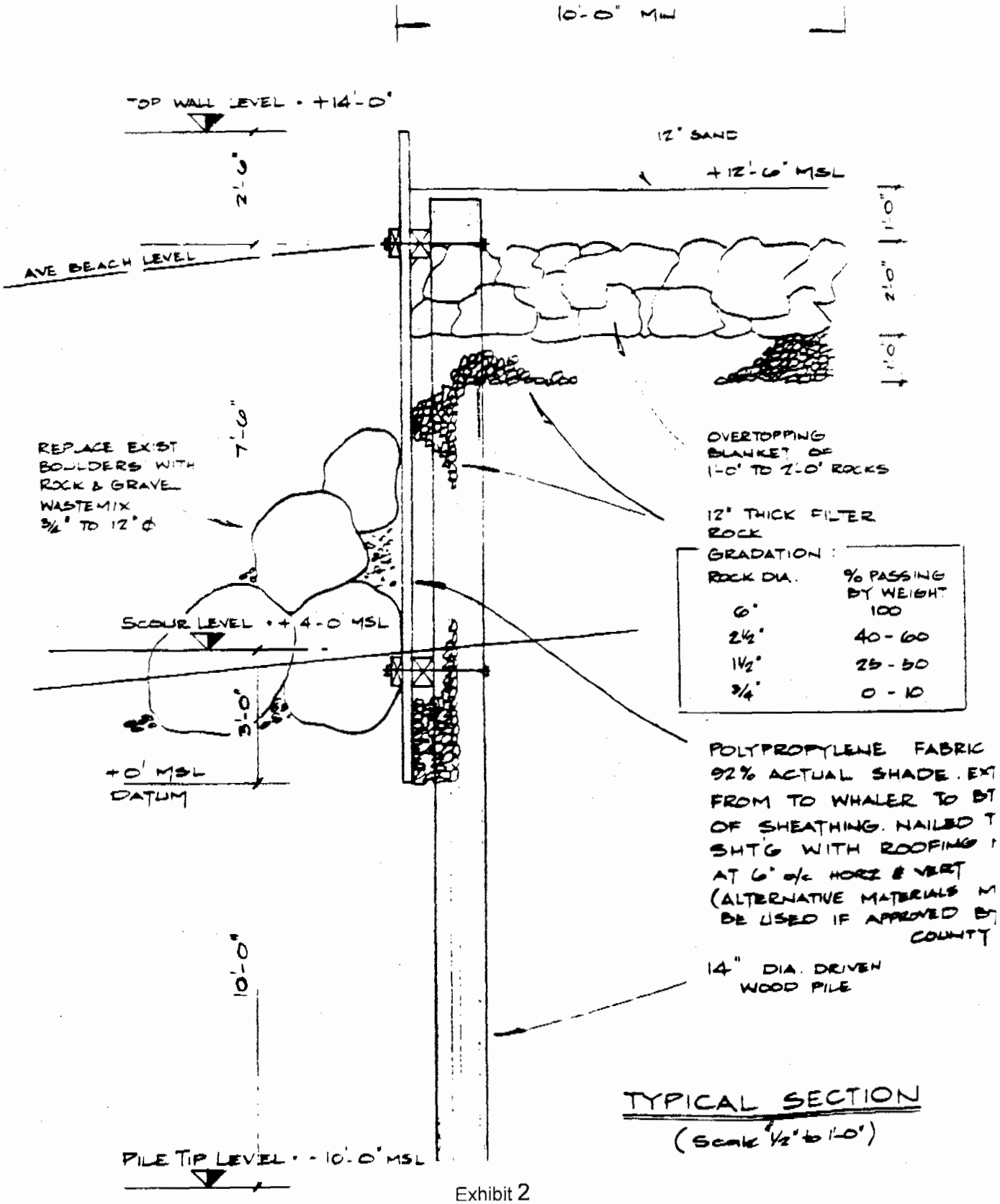
Page 12 of 17



LAYOUT OF BULKHEAD WALL

(Scale 1/16" to 1'-0")

EXHIBIT 2
5-83-360
BULKHEAD



TYPICAL SECTION
(Scale ½" to 1'-0")

EXHIBIT 3
5-83-360
BULKHEAD

8/25/83

State of California, George Deukmejian, Governor

California Coastal Commission
South Coast District
245 West Broadway, Suite 380
P.O. Box 1450
Long Beach, California 90801-1450
(213) 590-5071

COASTAL DEVELOPMENT PERMIT NO. 5-83-360

FILE COPY

On June 9, 1983, The California Coastal Commission granted to

Ralph Trueblood, 14 Oakmount Drive, Los Angeles, CA 90049

this permit for the development described below, subject to the attached Standard and Special conditions.

Construction of a 140 foot wood pile-supported, wood-sheeted bulkhead in the Carbon Beach area of Malibu.

SITE: 22486 Pacific Coast Highway, Malibu

Issued on behalf of the California Coastal Commission by

MICHAEL L. FISCHER
Executive Director
and

P.F. Xander

IMPORTANT: THE PERMIT IS NOT VALID UNLESS AND UNTIL A COPY OF THE PERMIT WITH THE SIGNED ACKNOWLEDGEMENT HAS BEEN RETURNED TO THE COMMISSION OFFICE.

ACKNOWLEDGEMENT

The undersigned permittee acknowledges receipt of this permit and agrees to abide by all terms and conditions thereof.

Date Signature of Permittee

5/81

STANDARD CONDITIONS:

1. Notice of Receipt and Acknowledgement. The permit is not valid and construction shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.

2. Expiration. If construction has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Construction shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

3. Compliance. All construction must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.

4. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.

5. Inspections. The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.

6. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affadavit accepting all terms and conditions of the permit.

7. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

SPECIAL CONDITIONS:

1. Lateral Access. Prior to transmittal of permit, the Executive Director shall certify in writing that the following condition has been satisfied. The applicant shall execute and record a document, in a form and content approved in writing by the Executive Director of the Commission, irrevocably offering to dedicate to a public agency or a private association approved by the Executive Director, an easement for public access and passive recreational use along the shoreline. The document shall also 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 easement shall include all areas from the mean high tide line landward to the toe of the bulkhead. Such easement shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed.

The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of 21 years, such period running from the date of recording.

2. Applicant's Assumption of Risk. Prior to transmittal of the permit, the applicant shall submit to the Executive Director a deed restriction for recording free of prior liens except for tax liens, that bind the applicant and any successors in interest. The form and content of the deed restriction shall be subject to the review and approval of the Executive Director. The deed restriction shall provide (a) that the applicant understands that the site may be subject to extraordinary hazard from erosion, flooding or wave damage, and the applicant assumes the liability from those hazards; (b) the applicant unconditionally waives any claim of liability on the part of the Commission or any other public agency for any damage from such hazards; and (c) the applicant understands construction in the face of these possible known hazards may make them ineligible for public disaster funds or loans

(continued)

for repair, replacement, or rehabilitation of the property in the event of erosion, flooding or wave damage.

83 950711

Recording Requested by and
When Recorded, Mail to:
California Coastal Commission
631 Howard Street, 4th Floor
San Francisco, California 94105
Attention: Legal Department

83-137

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IRREVOCABLE OFFER TO DEDICATE PUBLIC ACCESS EASEMENT

AND

DECLARATION OF RESTRICTIONS

THIS IRREVOCABLE OFFER TO DEDICATE PUBLIC ACCESS EASEMENT AND DECLARATION OF RESTRICTIONS (hereinafter "offer") is made this 11 day of July, 19 83, by RALPH W. TRUEBLOOD, JR., (hereinafter referred to as "Grantor").

I. WHEREAS, Grantor is the legal owner of a fee interest of certain real properties located in the County of Los Angeles, State of California, and described in the attached Exhibit A (hereinafter referred to as the "Property"); and

II. WHEREAS, all of the Property is located within the coastal zone as defined in Section 30103 of the California Public Resources Code (which code is hereinafter referred to as the "Public Resources Code"); and

III. WHEREAS, the California Coastal Act of 1976, (hereinafter referred to as the "Act") creates the California Coastal Commission (hereinafter referred to as the "Commission") and requires that any development approved by the Commission must be consistent with the policies of the Act set forth in Chapter 3 of Division 20 of the Public Resources Code; and

IV. WHEREAS, Pursuant to the Act, Grantor applied to the Commission for a permit to undertake development as defined in the Act within the Coastal zone of Los Angeles County (hereinafter the "Permit"); and

V. WHEREAS, a coastal development permit (Permit No. 5-83-360) was granted on June 9, 19 83, by the Commission in

accordance with the provision of the Staff Recommendation and Findings, Exhibit B, attached hereto and hereby incorporated by reference, subject to the following condition:

1. Lateral Access. Prior to transmittal of permit, the Executive Director shall certify in writing that the following condition has been satisfied. The applicant shall execute and record a document, in a form and content approved in writing by the Executive Director of the Commission, irrevocably offering to dedicate to a public agency or a private association approved by the Executive Director, an easement for public access and passive recreational use along the shoreline. The document shall also 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 easement shall include all areas from the mean high tide line to the toe of the bulkhead. Such easement shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed.

The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of 21 years, such period running from the date of recording.

VI. WHEREAS, the subject property is a parcel located between the first public road and the shoreline; and

VII. WHEREAS, under the policies of Sections 30210 through 30212 of the California Coastal Act of 1976, public access to the shoreline and along the coast is to be maximized, and in all new development projects located between the first public road and the shoreline shall be provided; and

VIII. WHEREAS, the Commission found that but for the imposition of the above condition, the proposed development could not be found consistent with the public access policies of Section 30210 through 30212 of the California Coastal Act of 1976 and that therefore in the absence of such a condition, a permit could not have been granted;

IX. WHEREAS, it is intended that this Offer is irrevocable and shall constitute enforceable restrictions within the meaning of Article XIII, Section 8 of the California Constitution and that said Offer, when accepted, shall thereby qualify as an enforceable restriction under the provision of the California Revenue and Taxation Code, Section 402.1;

NOW THEREFORE, in consideration of the granting of Permit No. 5-83-360 to the owner(s) by the Commission, the owner(s) hereby offer(s) to dedicate to the People of California or the Commission's designee an easement in perpetuity for the purposes of Public access and passive recreational use along shoreline

located on the subject property and shall include all areas from the mean high tide line to the toe of the bulkhead

and as specifically set forth by attached Exhibit C hereby incorporated by reference.

1. BENEFIT AND BURDEN. This Offer shall run with and burden the Property and all obligations, terms, conditions, and restrictions hereby imposed shall be deemed to be covenants and restrictions running with the land and shall be effective limitations on the use of the Property from the date of recordation of this document and shall bind the Grantor and all successors and assigns. This Offer shall benefit the State of California.

2. DECLARATION OF RESTRICTIONS. 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.

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3. ADDITIONAL TERMS, CONDITIONS, AND LIMITATIONS. Prior to the opening of the accessway, the Grantee, in consultation with the Grantor, may record additional reasonable terms, conditions, and limitations on the use of the subject property in order to assure that this Offer for public access is effectuated.

4. CONSTRUCTION OF VALIDITY. If any provision of these restrictions is held to be invalid or for any reason becomes unenforceable, no other provision shall be thereby affected or impaired.

5. SUCCESSORS AND ASSIGNS. The terms, covenants, conditions, exceptions, obligations, and reservations contained in this Offer shall be binding upon and inure to the benefit of the successors and assigns of both the Grantor and the Grantee, whether voluntary or involuntary.

6. TERM. This irrevocable offer of dedication shall be binding for a period of 21 years. Upon recordation of an acceptance of this Offer by the Grantee, this Offer and terms, conditions, and restrictions shall have the effect of a grant of access easement in gross and perpetuity that shall run with the land and be binding on the parties, heirs, assigns, and successors. The People of the State of California shall accept this offer through the local government in whose jurisdiction the subject property lies, or through a public agency or a private association acceptable to the Executive Director of the Commission or its successor in interest.

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Acceptance of the Offer is subject to a covenant which runs with the land, providing that any offeree to accept the easement may not abandon it but must instead offer the easement to other public agencies or private associations acceptable to the Executive Director of the Commission for the duration of the term of the original Offer to Dedicate.

Executed on this 11 day of July 1983, at Los Angeles, California.

Dated: July 11, 1983

Signed Ralph W Trueblood Jr
Owner

RALPH W. TRUEBLOOD, JR.
Type or Print

Signed _____

_____
Type or Print

NOTE TO NOTARY PUBLIC: If you are notarizing the signatures of persons signing on behalf of a corporation, partnership, trust, etc., please use the correct notary jurat (acknowledgment) as explained in your Notary Public Law Book.

State of California,)
)SS
County of Los Angeles)

On this 22 day of July, in the year '83, before me Laura E. Sedota, a Notary Public, personally appeared Ralph W. Trueblood, Jr.

/X/ personally known to me

/ / proved to me on the basis of satisfactory evidence

to be the person(s) whose name is subscribed to this instrument, and acknowledged that he/she/they executed it.

Laura E Sedota

NOTARY PUBLIC IN AND FOR SAID COUNTY AND STATE

OFFICIAL SEAL
LAURA E SEDOTA
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires JUL 11, 1986

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RT PAPER
OF CALIFORNIA
113 (REV. 8-72)

Exhibit 3
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

This is to certify that the Offer to Dedicate set forth above is hereby acknowledged by the undersigned officer on behalf of the California Coastal Commission pursuant to authority conferred by the California Coastal Commission when it granted Coastal Development Permit No. 5-83-360 on June 9, 1983 and the California Coastal Commission consents to recordation thereof by its duly authorized officer.

Dated: August 9 1983

Cynthia K Long

CYNTHIA K LONG, STAFF COUNSEL

California Coastal Commission

STATE OF California)

)

COUNTY OF San Francisco)

On 9 August 1983, before me Gary Lawrence Holloway, a Notary Public, personally appeared Cynthia K. Long, personally known to me to be the person who executed this instrument as the Staff Counsel (TITLE) and authorized representative of the California Coastal Commission and acknowledged to me that the California Coastal Commission executed it.

GARY LAWRENCE HOLLOWAY
NOTARY PUBLIC-CALIFORNIA
CITY & COUNTY OF
SAN FRANCISCO
My Commission Expires October 25, 1985

Gary Lawrence Holloway

Notary Public in and for said County and State

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EXHIBIT A

PARCEL 1:

A PARCEL OF LAND IN LOS ANGELES COUNTY, STATE OF CALIFORNIA, BEING A PORTION OF THE RANCHO TOPANGA MALIBU SEQUIT, AS CONFIRMED TO MATTHEW KELLER BY PATENT RECORDED IN BOOK 1 PAGE 407 ET SEQ., OF PATENTS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE SOUTHERLY LINE OF THE 80 FOOT STRIP OF LAND DESCRIBED IN DEED TO THE STATE OF CALIFORNIA RECORDED IN BOOK 15228 PAGE 342, OFFICIAL RECORDS, OF SAID COUNTY, SAID POINT OF BEGINNING BEING WESTERLY ALONG SAID SOUTHERLY LINE FOLLOWING THE ARC OF A CIRCULAR CURVE CONCAVE SOUTHERLY HAVING A RADIUS OF 5608.01 FEET, A DISTANCE OF 638.47 FEET FROM A POINT BEING DISTANT SOUTH 6° 11' 30" WEST 40 FEET FROM HIGHWAY ENGINEER'S CENTERLINE STATION 989 + 65.17 AT THE WESTERLY EXTREMITY OF THAT CERTAIN COURSE DESCRIBED IN SAID DEED AS SOUTH 83° 48' 30" EAST 2153.25 FEET, THENCE EASTERLY ALONG SAID SOUTHERLY LINE 86.54 FEET, THENCE LEAVING SAID SOUTHERLY LINE SOUTH 0° 33' 09" 42.93 FEET; THENCE NORTH 88° 48' 38" WEST 10.70 FEET; THENCE SOUTH 1° 11' 23" WEST TO THE ORDINARY HIGH TIDE LINE OF THE PACIFIC OCEAN; THENCE WESTERLY ALONG SAID TIDE LINE TO THE INTERSECTION WITH A LINE BEARING SOUTH 0° 13' 30" WEST FROM THE POINT OF BEGINNING; THENCE NORTH 0° 13' 30" EAST TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM, AS CONTAINED IN VARIOUS DEEDS FROM MARBLEHEAD LAND COMPANY, RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

(A) ALL MINERALS, OIL, PETROLEUM, ASPHALTUM, GAS, COAL AND OTHER HYDROCARBON SUBSTANCES AND RIPARIAN RIGHT, CONTAINED IN, ON, WITHIN AND UNDER SAID LAND BUT WITHOUT RIGHT OF ENTRY.

(B) ALL LITTORAL RIGHTS WITH THE FULL AND EXCLUSIVE RIGHT TO PRESERVE AND PROTECT SAID LITTORAL RIGHT.

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EXHIBIT A

PARCEL 2

That portion of the Rancho Topanga Malibu Sequit, in the County of Los Angeles, State of California, as confirmed to Matthew Keller by patent recorded in Book 1, Page 407 et seq., of Patents in the office of the County Recorder of said County, particularly described as follows:

Beginning at a point in the southerly line of the 80 foot strip of land described in Deed to the State of California recorded in Book 15228, Page 342 of Official Records of said County, said point of beginning being westerly along said southerly line following the arc of a circular curve concave southerly having a radius of 5608.01 feet, a distance of 490.17 feet from a point being distant South 6° 11' 30" West 40 feet from Engineer's centerline station 989 plus 65.17 feet at the westerly extremity of that certain course described in said Deed as South 83° 48' 30" East 2153.25 feet, thence westerly along said curve 61.76 feet, thence leaving said southerly line and curve South 0° 33' 09" West 42.93 feet, thence North 88° 48' 37" West 10.70 feet, thence South 1° 11' 23" West to the ordinary high tide line of the Pacific Ocean, thence easterly along said tide line to an intersection with a line bearing South 1° 11' 23" West from the point of beginning, thence North 1° 11' 23" East to the point of beginning;

EXCEPTING THEREFROM, as contained in various deeds from Marblehead Land Company, recorded in the office of the County Recorder of said County

(A) All minerals, oil, petroleum, asphaltum, gas, coal and other hydrocarbon substances and riparian right, contained in, on, within and under said land but without right of entry;

(B) All littoral rights with the full and exclusive right to preserve and protect said littoral rights;

It is herein noted that the total estate and all rights, including riparian and littoral rights, presently vested in the owners of this property shall hereby pass in their entirety to the Grantee herein.

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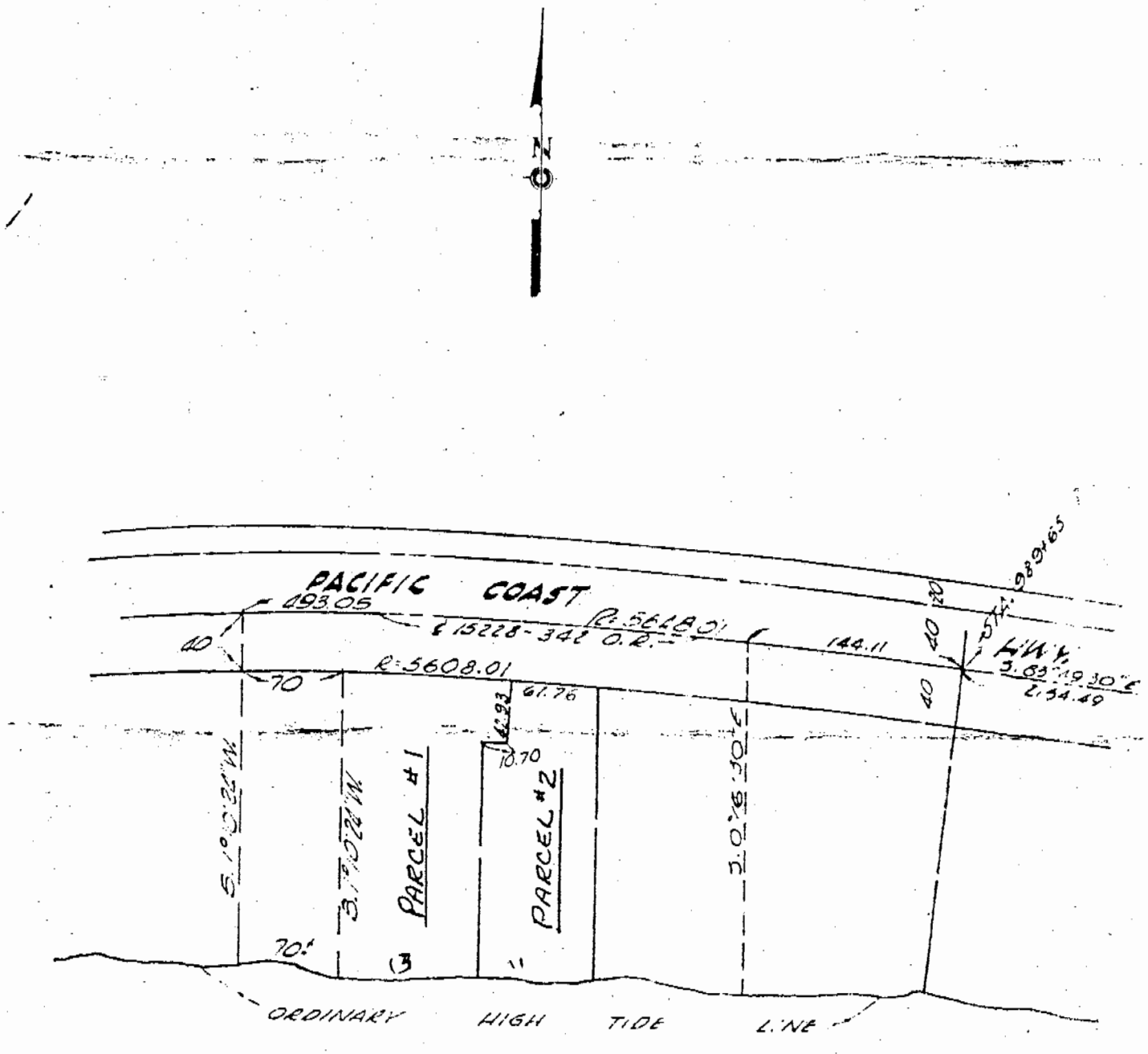
EXHIBIT A
PARCELS # 1 & 2

PORTION OF THE RANCHO TOPANGA MALIBU SEQUIT



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State of California, George Deukmejian, Governor

California Coastal Commission
SOUTH COAST DISTRICT
245 West Broadway, Suite 380
P.O. Box 1450
Long Beach, California 90801-1450
(213) 590-5071

FILED: 5-16-83
49th DAY: 7-3-83
180th DAY: 10-31-83
STAFF: D. Lowell/GG/bp
STAFF REPORT: 5-31-83
HEARING DATE: June 9-10, 1983

REGULAR CALENDAR

STAFF REPORT AND RECOMMENDATION

Application No. 5-83-360 (Trueblood)

Applicant: Ralph Trueblood
22486 Pacific Coast Highway
Malibu, CA 90265

Agent: Kevin Kelly & Assoc.

Description: Construction of a 140 foot wood pile-supported, wood-sheeted bulkhead in the Carbon Beach area of Malibu.

Site: 22486 Pacific Coast Highway, Malibu, Los Angeles County.

SUMMARY

Staff recommends the Commission approve the project with conditions addressing public access and wave hazard liability.

STAFF RECOMMENDATION

The staff recommends the Commission adopt the following resolution:

I. Approval with Conditions

The Commission hereby grants, subject to the conditions below, a permit for the proposed development on the grounds that the development, as conditioned will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3 of the Coastal Act, is located between the sea and the first public road nearest the shoreline and is in conformance with the public access and public recreation policies of Chapter 3 of the Coastal Act, and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.

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II. Special Conditions

This permit is subject to the following special conditions:

1. Lateral Access. Prior to transmittal of permit, the Executive Director shall certify in writing that the following condition has been satisfied. The applicant shall execute and record a document, in a form and content approved in writing by the Executive Director of the Commission, irrevocably offering to dedicate to a public agency or a private association approved by the Executive Director, an easement for public access and passive recreational use along the shoreline. The document shall also 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 easement shall include all areas from the mean high tide line landward to the toe of the bulkhead. Such easement shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed.

The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of 21 years, such period running from the date of recording.

2. Applicant's Assumption of Risk. Prior to transmittal of the permit, the applicant shall submit to the Executive Director a deed restriction for recording free of prior liens except for tax liens, that bind the applicant and any successors in interest. The form and content of the deed restriction shall be subject to the review and approval of the Executive Director. The deed restriction shall provide (a) that the applicant understands that the site may be subject to extraordinary hazard from erosion, flooding or wave damage, and the applicant assumes the liability from those hazards; (b) the applicant unconditionally waives any claim of liability on the part of the Commission or any other public agency for any damage from such hazards; and (c) the applicant understands construction in the face of these possible known hazards may make them ineligible for public disaster funds or loans for repair, replacement, or rehabilitation of the property in the event of erosion, flooding, or wave damage.

III. Findings and Declarations

The Commission finds and declares as follows:

A. Project Description. The applicant proposes to construct an approximately 140 foot long wood pile-supported, wood-sheeted bulkhead with a 40 foot long return on the east portion of the parcel (see Exhibit 3 for height specifications). The western end of the bulkhead will tie-in with a previously approved (but not constructed) bulkhead (5-81-521, Sherman).

B. Shoreline Access/Protective Structures. Article X Section 4 of the California Constitution provides:

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No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purpose ... and the Legislature shall enact such law as will give the most liberal construction to this provision so that access to the navigable waters of this state shall always be attainable for the people thereof." (emphasis added)

The Coastal Act Sections which carry out the Constitutional direction on public access are 30210, 30211 and 30212, as follows:

Section 30210.

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211.

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30212.

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

(b) For purposes of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

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The legislature has also provided guidance as to the time, place and manner of public access.

Section 30214(a) provides:

> Section 30214.
>
> (a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:
>
> (1) Topographic and geologic site characteristics.
>
> (2) The capacity of the site to sustain use and at what level of intensity.
>
> (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.
>
> (4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

Additionally, the legislature expressed its intent that the Commission consider the equities and balance the rights of the individual property owner with the public's constitutional right of access to the coast (Section 30214(b)).

> (b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution.

Finally, Section 30604(c) of the Coastal Act requires that:

> (c) Every coastal development permit issued for any development between the nearest public road and the sea or the shoreline of any body of water located within the coastal zone shall include a specific finding that such development is in conformity with the public access and public recreation policies of Chapter 3 (commencing with Section 30200).

The proposed development is for the construction of a "new" bulkhead built on the sandy beach in order to protect existing development on the applicant's parcel. When the Commission determines that a shoreline project constitutes "new development", access is required. In the recent "Sea Ranch Association vs. California Coastal Commission, C-74-1320"

decision, the court ruled that it is within the Commission's power to require dedications of access as a condition of a development permit. The opinion also states, in part, that . . ."It is clear the Commission would be in violation of the policies and its duties as spelled out under the Act if it had not formulated or imposed the challenged conditions. . . ."

In 1979, the Commission began work on the Interpretive Guidelines for public access in order to provide a comprehensive review of the policies developed in permits in the previous 2½ years. These Guidelines were and are intended to provide the public, including permit applicants, with a general description of how the Coastal Act has been applied in previous cases and indicate the general approach the Commission would use in future actions. They are not regulations, do not supercede the statute and need not be followed in any particular case.

The major question presented in this case is how much access is appropriate given the circumstances. The question of the appropriate width and description of lateral accessways was one of the more important issues addressed in the Guidelines. Permit decisions by the State Commission and six Regional Commission decisions had been somewhat inconsistent prior to 1980 when the Guidelines were adopted.

The Coastal Act's basic policy is that maximum access must be provided in new development projects, in a time, place and manner responsive to the facts and circumstances outlined in Section 30214. The Commission, through a long line of permit decisions and in the Guidelines, has developed a policy approach which implements these requirements. Although each permit is reviewed on its own merits, many cases contain similar factual circumstances. The Commission has attempted to provide a uniform and consistent policy approach which protects both private and public interests by ensuring that landowners in similar factual circumstances are treated similarly and ensuring that dedicated accessways can be properly and efficiently managed for the enjoyment of the public and the protection of neighboring private uses.

The Guidelines discuss the general case of development located on the beach when they conclude that: "A 25 foot accessway along the dry, sandy beach for passive recreational use by the public has been found to offset the burden new development projects generally impose on public access". The 25 foot accessway is described as a minimum area for public use. An examination of the permit history in Malibu clearly demonstrates that the most common development is located on an existing parcel or on immediately adjacent to the beach.

However, the Guidelines also state:

> Describing an Accessway From a Fixed Inland Point. The most efficient way to describe an accessway is as a distance from a fixed line landward of and parallel to the mean high tide line and extending seaward to the seaward property line (mean high tide line). When this description is used, the area of dry sand beach may vary from wide areas of sandy beach available for public uses during the low tide conditions, to very narrow stretches of sandy beach resulting in little area for public use during high tide or storms. To account for the potential changes in the waterline, the area included in the accessway should be sufficient to assure that the public will have the ability to use some dry sandy beach at all times of the year. Because the landward boundary of this accessway is fixed, the landowners/residents of the beachfront parcels, are afforded a greater degree of certainty of where public rights exist than that additional beach area may be required to protect the public's right of access to and along

the shoreline. The public also benefits from this approach, since the public and the accepting agency can more readily determine where public rights exist. However, the public trade off for this certainty is that during storms and high tides, the accessways designated may be entirely submerged.

To determine the point at which such an accessway should begin the Commission should consider the variations in the high water line during the year, the topography of the site, the location of other lateral accessways on neighboring lands and the privacy needs of the property owner. Any such fixed point should, however, give the greatest amount of assurance that the public would retain the right of access and use along the shoreline during the majority of the year.

Thus, the discussion in the Guidelines regarding the 25 foot accessway as being generally sufficient unless extraordinary burdens on access are shown, does not announce a rule or standard for application to all circumstances. Rather it describes the Commission's experience in the most frequently encountered circumstances when development is located on or near the beach. In balancing the private and public interest in these cases, the Commission concluded the 25 foot easement for public access is consistent with the Coastal Act.

The guidelines make clear, however, that a lateral access requirement should be meaningful in light of all the circumstances of the site. Most important is the physical characteristics of the beach. Certainty in locating the inland extent of the accessway is primary in importance in reducing potential for conflict between beach users and property owners. Because the location of a 25 foot ambulatory access changes hourly, the guidelines prefer to establish the inland extent by means of a fixed inland point. . ."the most efficient way to describe an accessway is as a distance from a fixed line landward of and parallel to the mean high tide line. . . ."

Only where it is difficult to locate a fixed inland point do the guidelines suggest an ambulatory accessway. Using a fixed inland point creates greater certainty for both public and the landowner. In addition, because a 25 foot ambulatory easement is far more difficult to locate, those members of the public visiting the beach can be more easily intimidated by landowners who wish to exclude the public from use of the state tidelands. A fixed point can be easily mapped or described on signs educating the public to the actual public-private boundary.

In prior actions the Commission has used the fixed inland point to describe accessways: 1) nearly uniformly where a bluff fronts on the beach (See: Goldberg & Fisher A-264-80, Rehberger A-217-79, Auguste A-29-79, Voger A-164-79 and Gershwin A-160-78 and A-259-79); 2) nearly always where a seawall is placed on the beach (See Mussel Shoals A-158-81 to 162-81 and Robertson A-345-79) except where a retaining wall to contain septic systems rather than protect the residence is located under the house or very narrow beaches (See Couson 191-79 and Larronde 199-79) where a 25 foot ambulatory easement was required; and 3) occasionally where terrestrial vegetation clearly demands a significant cahnge in beach features (See Bernfeld 294-79 and Seadrift permits).

Where a beach is bounded on the inland side by bluff, seawall or significant vegetation, the width of the beach is generally defined at some time, often regularly, by this upland barrier. In the case of bulkheads/seawalls designed to protect inland structures from wave damage

once waves reach the seawall, the reflected energy causes the sand in front of the seawall to be scoured out, thus leaving the seawall to define the upland/ocean boundary for a larger period of time. Vertical seawalls reflect more wave energy and cause greater sand scour, in general, than sloping seawalls or irregular rock walls, bluff faces or vegetation boundaries. All of the boundaries reflect more energy than a steep sandy or cobble beach. Thus, the definition of an inland extent of the beach by a natural or manmade feature is an indication that public access in front of the feature is probably severly limited or non-existant for at least the time of highest water.

If the accessway is defined as or by this inland boundary feature, the landowner is more secure from wave attack behind the barrier, while public access is diminished. Because of these relative benefits and burdens, the Commission finds that the accessway should be defined as an area seaward of the boundary feature so as to ensure greater and off-setting public access if the width of the beach fluctuates from season to season. In this way, the Commission can carry out the Constitutional and statutory mandates that access "always be attainable" and "maximum access. . .be provided for all the people." Private developments which create impediments to public access along the shoreline by eliminating sandy beach areas impose a burden on the ability of the public to enjoy and use of a public resource -- one to which access is guaranteed through Sections 30210 and 30211 of the Coastal Act and Article X Section 4 of the California Constitution.

Given the requirement of Section 30604(c) of the Coastal Act projects located between the first public road and the sea be in conformity with the access policies of the Coastal Act, a shoreline protective work which runs the risk of exacerbating shoreline erosion and loss of shoreline sand supply must mitigate or eliminate such adverse impacts. While it is difficult for such works to wholly eliminate adverse impacts, it has been the experience of the Commission, through many permit actions on similar projects, to mitigate those impacts through the provision of increased public access to and along the shoreline (Appeal No. 2-79, Isla Vista; Apeal No. 165-79, Blue Lagoon Community Association, Inc.; Permit No. 5-81-568, Schafer, et al, to name a few) as a more feasible means of meeting the requirements of the Coastal Act.

In addition to the aforementioned previous permit actions by the Commission on applications or appeals on similarly related projects, the Commission approved a permit with conditions for the reconstruction of a seawall for the Blue Lagoon Community Association, Inc. in South Laguna, Orange County (Appeal No. 165-79). The Commission found that due to the construction of the seawall, public access along the shoreline was adversely affected. Due to the physical impairment to access during periods of low sand supply on the beach, in part created by the seawall, lateral access was required as a condition of approval as well as the provision of enhanced lateral access during periods of low sand supply through the construction of stairways for "emergency public access" to and along the community road for use by the public for the sole purpose of access to the beach when tidal or wave action prevented safe passage along the beach seaward of the approved development.

In considering the impacts of shoreline protective works on shoreline processes and shoreline sand supply, additional Coastal Act policy concerns are applicable and must be addressed. Sections 30235 and 30253(1) and (2) of the Coastal Act state, in part:

> Section 30235.
>
> Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosions and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.
>
> Section 30253.
>
> New development shall:
>
> (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.
>
> (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.

Previous attempts in the Malibu area to protect homes from storm wave damage and erosion have included the construction of wooden or concrete seawalls and the placement of rip-rap. Such structures tend to cause the loss of sand from beach areas in front of and adjacent to them (according to "Planning for an Eroding Coast", a report to the Coastal Commission by Frank Broadhead, Shore Protection Manual, Army Corps of Engineers, 1977, and Saving the American Beaches: A Position Paper by Concerned Coastal Geologists, Pilkey, et al, 1981). The impenetrable surfaces of the structures or boulders reflect the energy generated by the breaking waves, resulting in the scouring away of the sandy areas in front of and up and down coast from the structures. And, by artificially building up and steepening the slope in the vicinity of such structures, two additional effects occur: (1) wave energy is not gradually reduced, as would occur on a more gently, sloping beach, but is increased, thus exacerbating the scouring effect on adjacent sandy beach areas; and (2) the structures tend to cause a landward retreat of the mean high tide line, potentially affecting the boundary between public and private lands along beaches adjacent to the project as well as on the project site itself.

The U.S. Army Corps of Engineers' Shoreline Processes Manual, Vol. 11, states:

5.27 Limitations. These structures (seawalls, revetments, bulkheads, etc.) afford protection only to the land immediately behind them, and none to adjacent areas up or downcoast. When built on receding shoreline, the recession will continue and may be accelerated on adjacent shores. Any tendency toward loss of beach material in front of such structures may well be intensified. Where it is desired to maintain a beach in the immediate vicinity of such structures, compensation works may be necessary. (Page 5-3)

5.28. Erosion updrift from such a structure will continue unabated after the wall is built, and downdrift erosion will probably be intensified. (Page 5-4)

In addition, the State Interpretive Guidelines reference "projects whose burden on public access may not be successfully mitigated with only a 25 foot accessway", with particular emphasis placed on the impact of shoreline protective devices:

> "Shoreline protective devices, particularly vertical seawalls, have serious adverse effects on coastal resources. Such seawalls increase scour from their base and, thus, decrease the area of usable beaches. Also, because shoreline protective devices are intended to halt the landward progress of erosion, they tend to define the shoreline in areas subject to erosion. As such, they tend to limit public passage on beaches especially at high tides and storm conditions. Further, construction of shoreline protective devices eliminates dune material as a source of beach sand, and further limits the ability of the shoreline to migrate as it would in a natural state. Given these additional direct burdens on the availability of sandy beach and the resultant impacts on public access to the state-owned tidelands, it is only with additional provisions for public access that this burden can be sufficiently mitigated and thus that construction of such devices can be found consistent with Section 30212 of the Coastal Act."

It has been the Commission's experience, based on the review of previous similar shoreline protective devices and of scientific and engineering data pertinent to the subject, that such devices have an adverse impact on shoreline sand supply and a direct adverse impact on public access along the shoreline. Such development, therefore, is inconsistent with the requirement of Section 30235 of the Coastal Act which allows such structure only ". . .when designed to eliminate or mitigate adverse impacts on shoreline sand supply. . ." since the primary purpose of revetment is to protect landward structures and property. As mentioned earlier, however, the Commission has approved such projects with a condition to ensure that any potential or expected loss of sandy beach for use by the public shall be mitigated through a requirement that applicants offer to dedicate a lateral access easement for public use along the shoreline from the mean high tide line to the toe of any such shoreline protective device.

In conclusion, the Commission finds that the proposed project does place burdens on public access and coastal resources, and that an access dedication from the mean high tideline to the toe of the proposed bulkhead represents an appropriate balancing of the public and private

burdens and benefits. The Commission finds that the proposed development as conditioned is consistent with Sections 30210, 30211, 30212, 30214 and 30604(c) of the Coastal Act of 1976.

C. Wave Hazard. Section 30253(1) and (2) of the Coastal Act states:

> Section 30253.
>
> New development shall:
>
> (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.
>
> (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.

Oceanfronting parcels in Malibu, such as the subject property, are susceptible to flooding and wave damage from storm waves and storm surge conditions. Past occurrences have resulted in public costs (through low-interest loans) in the millions of dollars in the Malibu area alone. Section 30001.5 of the Coastal Act states, in part, that the economic needs of the people of the State are a basic consideration:

> Section 30001.5.
>
> The Legislature further finds and declares that the basic goals of the state for the coastal zone are to:
>
> (a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and manmade resources.
>
> (b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.

The experience of the Commission in evaluating the consistency of proposed developments with the policies of the Coastal Act regarding development in areas subject to problems associated with geologic instability, flood, wave, or erosion hazard, has been that development has continued to occur despite periodic episodes of heavy storm damage, landslides, or other such occurrences. Recent episodes on December 1, 1982 and January 27, 1983, re-affirm the fact that damage from high tides, storm surge, and storm waves is a likely occurrence during the expected duration of the residences. In addition, the area in which the proposed development will occur, is an area described as critical for present development. According to the Accessment and Atlas of Shoreline Erosion along the California Coast, prepared by the Department of Navigation and Ocean Development (now known as the Department of Boating and Waterways), the Big Rock Beach portions of the Malibu coast is subject to damage during high wave conditions. As a means of allowing continued development in areas subject to those hazards while avoiding placing the economic

burden on the people of the State for costs arising from the damage to private development, the Commission has regularly required that the applicants agree to wave any claims of liability on the part of the Commission or any other public agency for allowing the development to proceed. As conditioned, the Commission finds that the proposed development will be consistent with Section 30001.5 of the Coastal Act.

D. Local Coastal Program. Section 30604(a) of the Coastal Act states, in part:

> Section 30604.
>
> (a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200).

The County of Los Angeles Board of Supervisors adopted the Land Use Plan portion of the Malibu/Santa Monica Mountains area Local Coastal Program on December 28, 1982, for submittal to the Coastal Commission for certification. At a public hearing on March 24, 1982, the Commission voted not to certify the Land Use Plan as submitted; further hearings have not been scheduled at this time. Since the proposed development is otherwise consistent with the policies of Chapter 3 of the Coastal Act, as mentioned earlier, the Commission finds that approval of this project as conditioned will not prejudice the ability of the County of Los Angeles to prepare a Local Coastal Program that is consistent with the policies of Chapter 3 of the Coastal Act.

83 950711 √

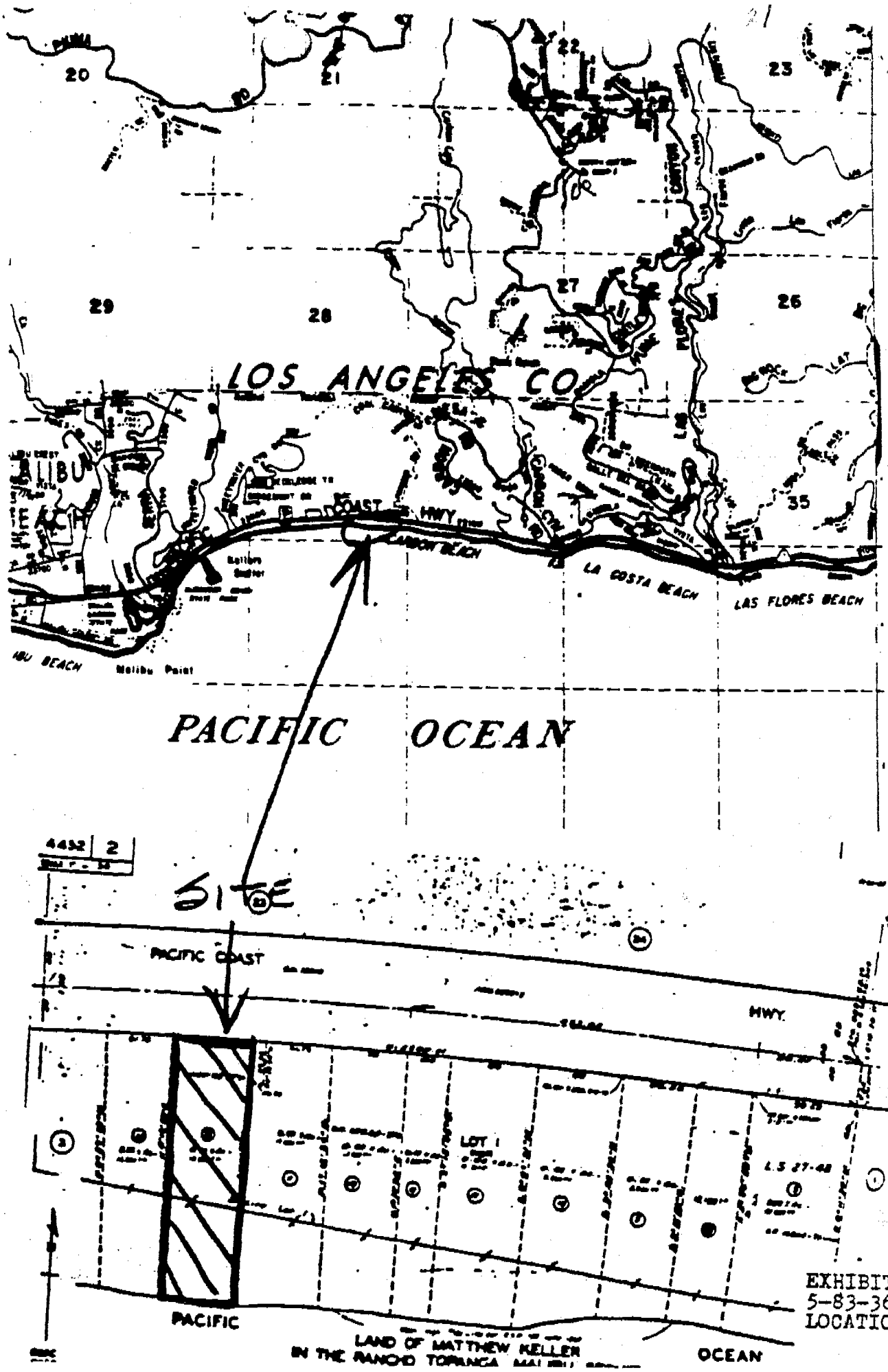
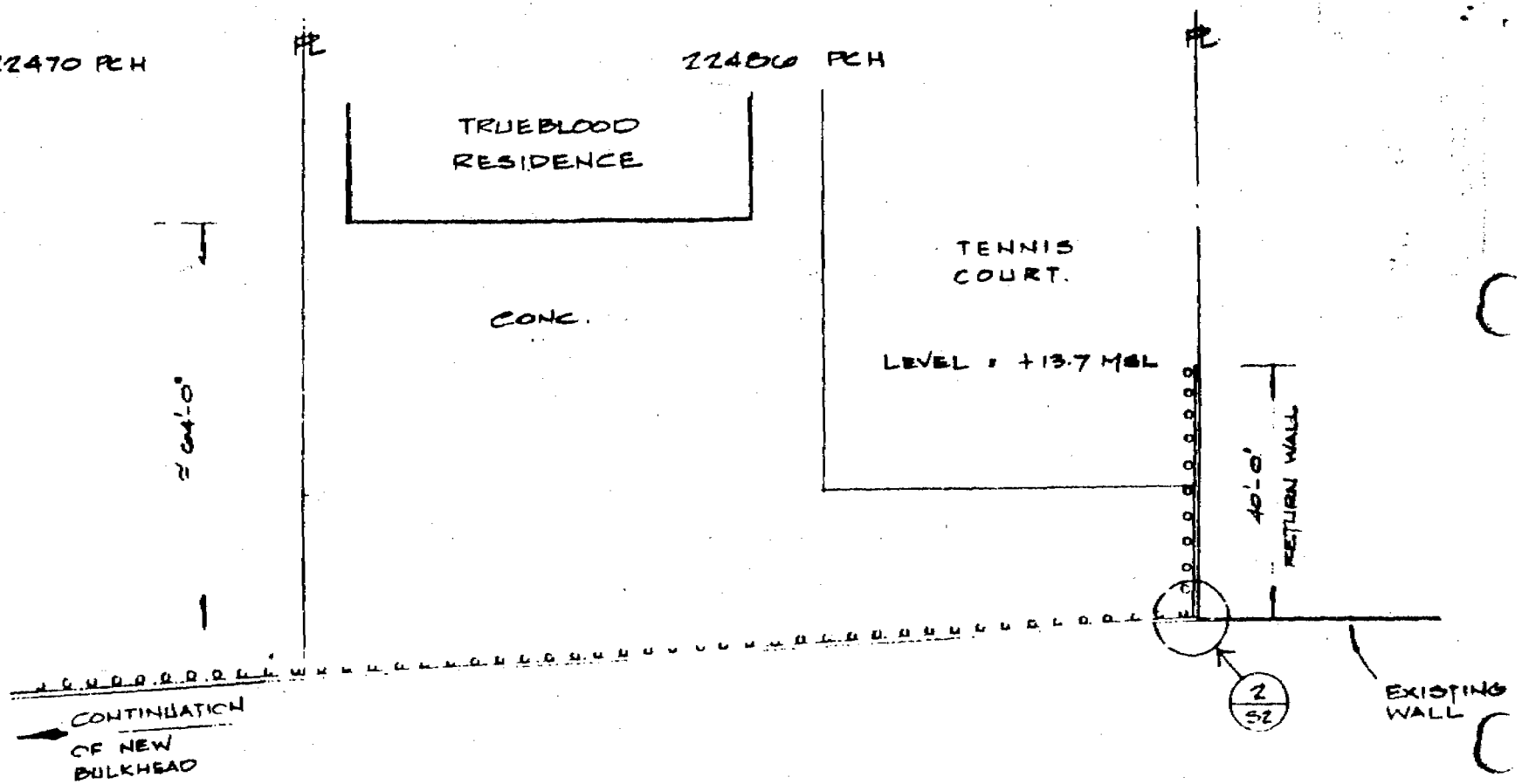


EXHIBIT 1
5-83-360
LOCATION

83 950711

Exhibit 3
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Exhibit 3
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)



LAYOUT OF BULKHEAD WALL

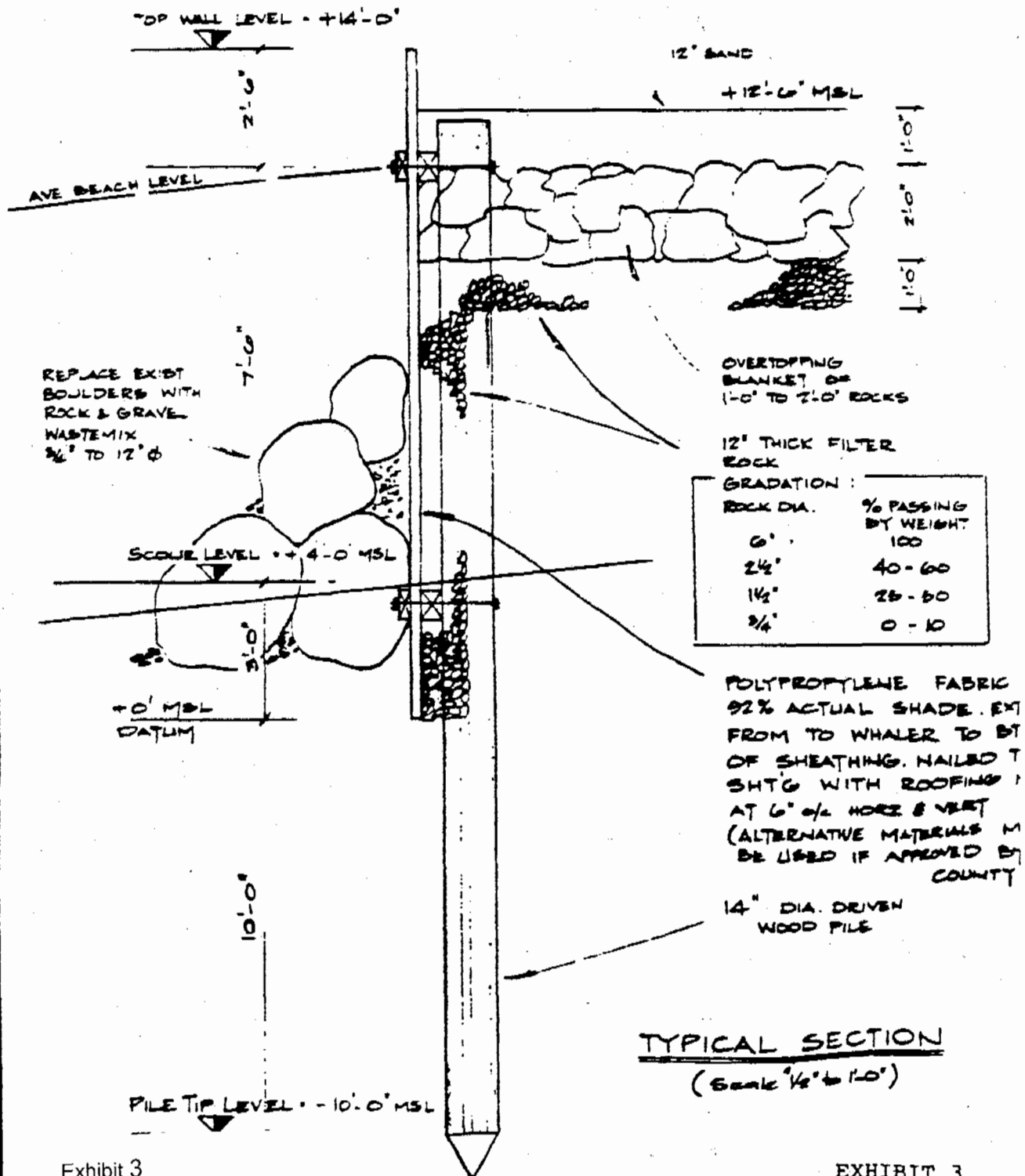
(Scale 1/16" to 1'-0")

83 950711

EXHIBIT 2
5-83-360
BULKHEAD

23

RECORDED IN OFFICIAL RECORDS
OF LOS ANGELES COUNTY, CA
AUG 17. 1983 AT 8 A.M.
Recorder's Office



TYPICAL SECTION
(Scale 1/2" to 1'-0")

83 950711

EXHIBIT 3
5-83-360
BULKHEAD

LEAD SHEET

02-0671882

RECORDED/FILED IN OFFICIAL RECORDS
RECORDER'S OFFICE
LOS ANGELES COUNTY
CALIFORNIA
4:01 PM MAR 20 2002

SPACE ABOVE THIS LINE FOR RECORDERS USE

TITLE(S)

FEE

D.T.T.

FREE D

3

CODE
20

CODE
19

CODE
9___

Assessor's Identification Number (AIN)
To Be Completed By Examiner OR Title Company In Black Ink

Number of Parcels Shown

THIS FORM IS NOT TO BE DUPLICATED

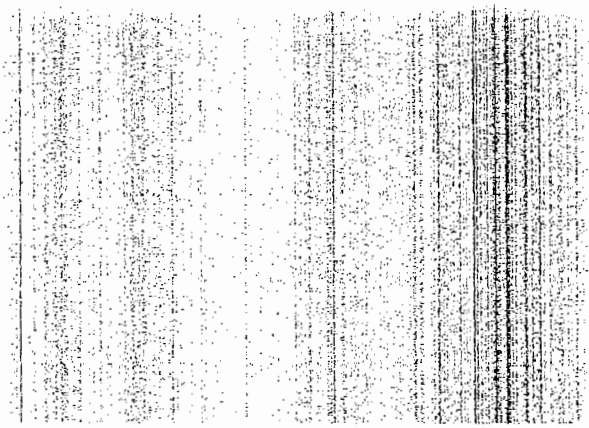


Exhibit 4
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

02-0671882

RECORDED AT THE REQUEST OF
AND WHEN RECORDED MAIL TO:
STATE OF CALIFORNIA
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105
Attention: Legal Division

STATE OF CALIFORNIA
OFFICIAL BUSINESS
Document entitled to free recordation
pursuant to Government Code Section 27383

SPACE ABOVE THIS LINE FOR RECORDER'S USE

NO TAX DUE -0-
SLC No. AD 360
CCC Permit No. 5-83-360

A.P.N. 4452-002-013 and 4452-002-011
22466 and 22500 Pacific Coast Hwy

CERTIFICATE OF ACCEPTANCE

Government Code 27281

This is to certify that the State of California, acting by and through the California State Lands Commission, a Public Agency of the State of California, hereby accepts any and all right, title and interest in real property conveyed by the Offer to Dedicate Public Access Easement, dated July 11, 1983, recorded August 17, 1983, as Instrument No. 83-950711, Official Records of Los Angeles County, from **Ralph W. Trueblood, Jr.** to the **State of California**.

The interest in real property conveyed by the offer is accepted in trust for the people of the State. Acceptance is made of that interest which can be legally conveyed and is not intended to define boundaries or accept interests or rights in lands which are already the property of the State or people of California.

This Acceptance and consent to recording of the Acceptance is executed by and on behalf of the State of California by the California State Lands Commission, acting pursuant to law, as approved and authorized by its Calendar/Minute Item No. C 79 of its public meeting on December 16, 1998, by its duly authorized undersigned officer.

California State Lands Commission

Dated: FEB 19, 2002

By: Paul D. Thayer
Paul D. Thayer
Executive Officer

ACKNOWLEDGMENT BY CALIFORNIA COASTAL COMMISSION

This is to certify that the California State Lands Commission is a public agency acceptable to the Executive Director of the California Coastal Commission to be Grantee under the Offer to Dedicate referenced above.

Dated: 3,602

By: John Bowers
John Bowers, Staff Counsel

Exhibit 4
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

02 0671882

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of SACRAMENTO } ss.

On Feb 19 2002 (Date), before me, KIMBERLY L. KORHONEN, NOTARY PUBLIC (Name and Title of Officer (e.g., "Jane Doe, Notary Public"))
personally appeared PAUL D. THAYER (Name(s) of Signer(s))

☒ personally known to me
☐ proved to me on the basis of satisfactory evidence

to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she~~/~~they~~ executed the same in his/~~her~~/~~their~~ authorized capacity(~~ies~~), and that by his/~~her~~/~~their~~ signature(~~s~~) on the instrument the person(~~s~~), or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

WITNESS my hand and official seal.

KIMBERLY L. KORHONEN
Commission # 1283249
Notary Public - California
Sacramento County
My Comm. Expires Nov 5, 2004

Place Notary Seal Above

Signature of Notary Public

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document
Title or Type of Document: CERTIFICATE OF ACCEPTANCE SLC AO: 360 CCC 5-83-360 APN. 4452-002-013, 4452-002-011
Document Date: Dec 16, 1998 Number of Pages: 1
Signer(s) Other Than Named Above: JOHN BOWERS

Capacity(ies) Claimed by Signer
Signer's Name: PAUL D. THAYER
☐ Individual
☐ Corporate Officer — Title(s):
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☒ Other: EXECUTIVE OFFICER
Signer Is Representing: CA STATE LANDS COMMISSION

RIGHT THUMBPRINT OF SIGNER
Top of thumb here

02 0671882

STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

On MARCH 6, 2002, before me, JEFF G. STABEN-MIHALEK, a Notary Public, personally appeared JOHN BOWERS, personally known to me (or proved to me on the basis of satisfactory evidence) to be the persons(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

JEFF G. STABEN-MIHALEK
COMM. # 1244407
NOTARY PUBLIC-CALIFORNIA
City & County of San Francisco
COMM. EXP. DEC. 3, 2003

Signature

State of California, George Deukmejian, Governor

California Coastal Commission
SOUTH COAST DISTRICT
245 West Broadway, Suite 380
P.O. Box 1450
Long Beach, California 90801-1450
(213) 590-5071

FILED: 11/ 7/84
49th DAY: 12/26/84
180th DAY: 5/ 6/85
STAFF: Gleason:do
STAFF REPORT: 1/14/85
HEARING DATE: 1/24/85

REGULAR CALENDAR

STAFF REPORT AND RECOMMENDATION

Application No.: 5-84-754

Applicants: Lisette & Norman Ackerberg Agent: Edwin Reeser
22466 Pacific Coast Highway
Malibu, CA

Description: Demolition of an existing single family dwelling, guest house, swimming pool, and construction of a new two-story single family dwelling and swimming pool. The project also includes the renovation of an existing tennis court.

Site: 22466 Pacific Coast Highway, Malibu, Los Angeles County

SUMMARY

The staff is recommending approval of the project subject to a vertical access condition and a stringline condition to bring the project into conformance with the policies of Chapter 3 of the Coastal Act.

Substantive File Documents:

1. Malibu/Santa Monica Interpretive Guidelines
2. 5-83-871 (Diamond)
3. 5-83-242 (Singleton)
4. 5-84-592 (Gordon)
5. 5-83-360 (Trueblood)
6. 5-84-629 (Ritchie)
7. 5-83-136 (Geffen)
8. Seventh Edition, Coastal Access Inventory

STAFF RECOMMENDATION

The staff recommends the Commission adopt the following resolution:

I. Approval

The Commission hereby grants, subject to the conditions below, a permit for the proposed development on the grounds that the development, as conditioned, will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3 of the Coastal Act, is located between the sea and the first public road nearest the shoreline and is in conformance with the public access and public recreation policies of Chapter 3 of the Coastal Act, and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.

II. Standard Conditions: See Attachment X.

III. Special Conditions

This permit is subject to the following special conditions:

1. Vertical Access Condition. Prior to transmittal of the permit, the Executive Director shall certify in writing that the following conditions have been satisfied. The applicant shall execute and record a document, in a form and content approved by the Executive Director of the Commission, irrevocably offering to dedicate to an agency approved by the Executive Director, an easement for public pedestrian access to the shoreline. Such easement shall be 10 feet wide located along the eastern boundary of the property line and extend from the northerly property line to the mean high tide line. Such easement shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed.

The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of 21 years, such periods running from the date of recording.

2. Revised Plans. Prior to transmittal of permit, the applicant shall be required to submit revised plans which conform the structural and deck stringline criteria contained in the adopted Interpretive Guidelines for the Malibu/Santa Monica Mountains.

IV. Findings and Declarations

The Commission hereby finds and declares as follows:

A. Project Description. The proposed project consists of the demolition of an existing single family dwelling, guest house and swimming pool and the construction of a new two-story single family dwelling with three-car garage, swimming pool and septic system. The newly proposed project involves construction of a new swimming pool on the seaward side of the residence. The previous swimming pool was located landward of the previously existing residence. In addition as part of the project, the applicant proposes to renovate an existing tennis court. Also, the proposed project will result in the relocation of the tennis court on the project site approximately 14 feet seaward.

B. Background. On June 9, 1983, the California Coastal Commission approved the construction of a 140-foot in length wood pile-supported, wood sheeted bulkhead. In its action to approve the project the Commission imposed a lateral access condition requiring an offer of dedication of an easement for public access from the mean high tide line to toe of the bulkhead. In addition the Commission required the applicants to assume the risks associated with development of the site which might result from flood or wave damage.

C. Public Access. The Coastal Act contains strong policy provisions in Sections 30210 and 30212, requiring public access to and along the shore. However, the requirements for the provision of access for the public to California's shoreline is not limited to the Coastal Act. The California Constitution in Article X, Section 4 provides:

> **No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purposes . . .and the Legislature shall enact such law as will give the most liberal construction to this provision so that access to the navigable waters of this state shall always be attainable for the people thereof. (Emphasis added).**

The Coastal Act contains more specific policies regarding the provision of public access to the State's shoreline. Coastal Act Section 30210 as set forth below, stipulates that in meeting the requirements of Section 4, Article X of the Constitution maximum public access, conspicuously posted shall be provided subject to certain conditions.

1. Lateral Access. The Coastal Act in Section 30210 requires the provision of public access along the shoreline in new development projects. An application for a seawall at this location in 1983 (5-83-360, Trueblood) was conditioned to provide public lateral access across the project site from the toe of the seawall to the mean high tide line. Therefore, the Commission finds that lateral access for the public has been provided for through prior permit action of the Commission and that the currently proposed project is consistent with Sections 30210 and 30212 of the Coastal Act as it relates to the provision of lateral access.

2. Vertical Access. New development projects are required to provide public access in compliance with the public access provisions of Chapter 3 of the Coastal Act.

Section 30210.

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30212 of the Coastal Act contains several very explicit policy provisions regarding the location and type of public access to be provided.

Section 30212.

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby, or

(3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

(b) For purposes of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

(4) The reconstruction or repair of any seawall; provided, however, that the reconstructed or repaired seawall is not a seaward of the location of the former structure.

(5) Any repair or maintenance activity for which the commission has determined, pursuant to Section 30610, that a coastal development permit will be required unless the regional commission or the commission determines that such the activity will have an adverse impact on lateral public access along the beach.

As used in this subdivision "bulk" means total interior cubic volume as measured from the exterior surface of the structure.

In addition to the above provisions of the Coastal Act, Section 30214(a) addresses with a greater degree of specificity the time, place and manner of public access. Section 30214(a) states:

> Section 30214.
>
> (a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:
>
> (1) Topographic and geologic site characteristics.
>
> (2) The capacity of the site to sustain use and at what level of intensity.
>
> (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.
>
> (4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

Additionally, the legislature has expressed its intent that the Commission balance the rights of the individual property owner with the public's constitutional right of access to the coast. Section 30214(b) states:

> (b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution.

All projects requiring a Coastal Development permit must be reviewed for compliance with the public access provisions of Chapter 3 of the Coastal Act. New development on sites located between the sea and the first public road may be required to provide vertical access under the policy provisions of Section 30212 of the Coastal Act. In determining where vertical access should be required, the Commission must consider the need to gain access to the shoreline in a given area, taking into account the physical constraints of the site, including, but not limited to, safety hazards, existence of fragile coastal resources, the location of support facilities, such as parking areas and the privacy needs of residents of the project site.

As outlined in the Seventh Edition, September 1983, Coastal Access Inventory within the area identified as the Malibu Coastline (a distance of about 27 miles from Topanga State Beach on the east to Leo Cabrillo State Beach on the west) only 16 vertical accessways have been recorded as a result of Coastal permit requirements. Of these, only 4 vertical accessways have been opened to the public. Accessways obtained through the Coastal permit process cannot be developed and/or actually used by

the public until a public or private agency agrees to accept responsibility for maintenance and liability. The following is a list of vertical accessways that have been obtained via the Coastal permit process in Malibu.

Coastal Permit No.	Street Address/Malibu	Width of Access	Open
73-290	State Park/Point Dume	6'	Yes
73-511	26168 Pacific Coast Highway	6'	Yes
73-1526	22706 " " "	10'	Yes
74-2840	22626 " " "	2'	No
75-6376	22032 " " "	5'	No
76-8877	21554 " "	6'	No
76-8957	25120 " " "	35'	Yes
77-376	19020 " " "	3'	No
77-574	26834 Malibu Cove Colony	5'	No
77-1466	31736 Broad Beach Road	5 -10'	No
77-2130	27398 Pacific Coast Highway	10'	No
78-3473	27700 " " "	10'	No
78-3591	20802 " " "	5'	No
79-4918	21202 " " "	10'	No
80-2707	27900 " " "	10'	No
5-83-136	22126-22132 Pacific Coast Highway	9'	No

In addition to the vertical accessways listed above, there are several vertical accessways in Malibu which are owned by the County of Los Angeles. One County accessway (at 22550 P. C. H.) is located within 500 feet of the project site; however, the accessway is closed and the County has no plans to open this accessway.

The project site is located in the Carbon Beach area of Malibu; one of the least publicly accessible beaches in the Malibu area. The existence of a solid row of residential structures along this stretch of Pacific Coast Highway effectively creates a private beach enclave. The residential development along Carbon Beach even precludes views of the ocean and shoreline from Pacific Coast Highway.

On the inland side of Pacific Coast Highway in the vicinity of the project are multi-unit apartment buildings, small offices and commmercial structures. Although this particular area of Malibu has not experienced great demand for recycling of existing structures or development of the few vacant parcels, it appears inevitable that as the pattern of growth in Malibu continues, a demand for recycling and more intensive development will occur. In turn this will create a greater demand for beach usage.

In order to determine whether the currently proposed project complies with the access provisions of the Coastal Act and more specifically with Section 30212 of the Coastal Act, the Commission must determine whether adequate access exists nearby.

The Commission has already found that the project meets the definition of new development, thus if adequate access does not exist nearby, access for the public from the nearest public roadway (P. C. H.) to the shoreline is required.

In its review of prior similar permit applications where the issue of vertical access has been raised, the Commission has used a 500-foot criteria as a guideline to determine whether adequate access exists nearby. More specifically, the Commission has previously made a determination in similar cases if open vertical access for the public exists within 500 feet of the project site, adequate access exists nearby. With respect to the currently proposed project, the Commission notes that the nearest open public vertical accessways are located 1,300 feet west of the project and 3,099 feet east of the project site. Since open vertical access for the public does not exist nearby, the Commission finds it is necessary to condition the project to provide for vertical access for the public, from Pacific Coast Highway across the project site to the shore. Only if so conditioned would the project be consistent with Section 30212 of the Coastal Act.

The Commission further finds that since the project site consists of two contiguous lots with a total frontage of 140 feet both the applicant and the Commission are afforded great flexibility in siting the vertical accessway. The Statewide Guidelines adopted by the Commission indicate that a vertical accessway when provided should be a minimum of 10 feet in width and should usually be sited along the borders of the project site. The Commission concludes the large size of the project site (40,041 square feet) affords great opportunity in the actual design of the vertical accessway across the project site benefiting both the applicant and the public. In addition, the Commission notes that there is on-street parking available on both sides on Pacific Coast Highway in the vicinity of the project. Therefore, the Commission concludes that adequate support facilities (for parking) exist within the vicinity of the project. Finally the Commission finds that if conditioned, as indicated above with a vertical accessway, the project would be in conformance with the access policies of Chapter 3 of the Coastal Act.

D. Scenic and Visual Resources/Seaward Encroachment. The Coastal Act in Section 30251 states:

> **Section 30251.**
>
> **The scenic and visual qualities of coastal areas shall be [illegible]ed and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.**

The proposed project consists of the demolition of an existing single family dwelling and swimming pool and the construction of a new

two-story, 32-foot above average finished grade, single family residence with swimming pool. The project also involves renovation of an existing tennis court and the relocation of the tennis court approximately 14 feet seaward of its present location.

New development along the shoreline is of particular concern to the Commission. Section 30251 of the Coastal Act requires that permitted development be sited and designed to protect views to and along the ocean and scenic coastal areas. As one means of limiting the encroachment of residential development onto sand beach areas, the Commission has adopted a stringline guideline. With respect to this criteria, the Guidelines state:

> **"In a developed area where new construction is generally infilling and is otherwise consistent with Coastal Act policies, no part of a proposed new structure, including decks and bulkheads, should be built further onto a beach front than a line drawn between the nearest adjacent corners of the adjacent structures. Enclosed living space in the new unit should not extend farther seaward than a second line drawn between the most seaward portions of the nearest corner of the enclosed living space of the adjacent structure."**

One of the purposes of this Guideline is to limit seaward encroachment on sandy beach areas. In the case of the currently proposed project, the applicant proposes to demolish an existing single family home and construct a significantly larger single family home. The proposed construction will occur landward of an existing seawall/bulkhead previously approved by the Commission . As proposed the new residence will conform with the Commission's stringline condition for structural development. However, other portions of the development including a solar trellis for the residence exceed the stringline. Also, the project calls for the seaward encroachment of a tennis court by 14 feet which could have a visual impact since if relocated the tennis court would be at the bulkhead line. Therefore, the Commission finds it necessary to condition the project to require revised plans which clearly indicate the project complies with both structural and deck stringlines. Only if so conditioned would the project be consistent with Section 30251 of the Coastal Act which addresses scenic and visual resources.

E. Hazards. Section 30253 (1) of the Coastal Act specifies that new development minimize risks to life and property in areas of high geologic flood and fire hazard. That an emergency permit was requested by the prior owner of the project site for construction of a 140-foot in length wood seawall attests to the potential flood hazard on the site. In approving the regular permit for construction of a seawall on the site, the Commission required the seawall to meet storm design criteria and for the project applicant to assume the risks associated with development of the site. Therefore, the Commission finds that the

seawall will serve to mitigate the flood hazard which previously existed on the site and that as previously conditioned, the project is consistent with Section 30253 (1) of the Coastal Act.

F. Local Coastal Program. Section 30604(a) of the Coastal Act states in Part:

> Section 30604.
>
> (a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200).

The County of Los Angeles adopted the Land Use Plan portion of the Malibu/Santa Monica Mountains area Local Coastal Program on December 28, 1982, for submittal to the Commission for certification. On March 24, 1983 the Commission voted to find that the Land Use Plan raised a "Substantial Issue" in terms of conformity with the Coastal Act and voted to deny the Land Use Plan as submitted.

At the time of this writing the Commission is scheduled to consider suggested modifications to the Malibu Land Use Plan at the Commission hearing in early January.

Among the suggested modifications which the Commission is scheduled to consider are access policies proposed as modifications to the County's Land Use Plan. With respect to beach access in general and vertical access specifically, the suggested modifications state:

4.1.2 COASTAL ACCESS

1. GENERAL POLICIES

P49 In accordance with Section 30214(a) of the Coastal Act, the time, place, and manner of public beach access requirements for new development will depend on individual facts and circumstances, including topographic and site characteristics, the capacity of the site to sustain use at the intensity proposed, the proximity to adjacent residential uses, the privacy of adjacent owners, the feasibility to provide for litter collection, and safety of local residents and beach users.

P50 In accordance with Section 30214(b) of the Coastal Act, the requirement of access shall be reasonable and equitable, balancing the rights of the individual property owner and the public.

Vertical Access

P51 For all land divisions, non-residential new development, and residential new development on lots with 75 or more feet of frontage or with an existing drainage or utility easement connecting a public street with the shoreline or on groups of two or more undeveloped lots with 50 feet or more of frontage per lot, an irrevocable offer of dedication of an easement to allow public vertical access to the mean high tide line shall be required, unless public access is already available at an existing developed accessway within 500 feet of the project site measured along the shoreline. Such offer of dedication shall be valid for a period of 21 years, and shall be recorded free of prior liens. The access easement shall measure at least 10 feet wide. Where two or more offers of dedication within 500 feet of each other have been made pursuant to this policy, the physical improvement and opening to public use of one offered accessway shall result in the abandonment of other offers located within 500 feet of the improved accessway.

* Exceptions to the above requirement for offers of dedication may be made regarding beaches identified in the Land Use Plan's Area-Specific Marine Resource Policies (P111 through P113) as requiring limitations on access in order to protect sensitive marine resources.

* P51b On the basis of a Beach Management Plan prepared by the County and approved by the Coastal Commission which takes into account beach recreation opportunities, the width of the beach, the presence of immediately adjacent residences or sensitive natural resources, local parking conditions, beach support facilities, the feasibility of emergency vehicle access to the beach, and related factors, accessways at greater intervals than would be required by P51 may be required, up to a maximum standard of separation for new vertical accessways of one accessway per 2000 feet of shoreline. Such a Beach Management Plan, which may be submitted to the Commission for its review at the same time as the implementing ordinances, shall assure that lateral access offers made in connection with coastal permits previously approved (as well as in connection with future permits and vertical access offers sufficient to meet the standard of separation included in the Plan) are accepted for maintenance and liability purposes by the County or other responsible entity acceptable to the Executive Director of the Coastal Commission. Reasonable restrictions on use of the beach to protect sensitive marine resources, minimize risks to public safety due to geologic and wave hazards and reduce potential conflicts with the privacy of nearby residences while promoting reasonable public access may be adopted by the accepting agency as part of the Beach Management Plan.

If the Commission were to approve the currently proposed project without a vertical access condition in advance of the development of a Beach

Management Plan as indicated in proposed suggested modification P51G above, the ability of the County to prepare a Local Coastal Program in conformance with the policies of Chapter 3 of the Coastal Act would be prejudiced.

In addition to the proposed suggested modifications to the County of Los Angeles Land Use Plan access policies listed above, the suggested modifications also call for development of a beach access program to be implemented in conjunction with the proposed policies on public access. With respect to the beach access program the suggested modifications state:

2. BEACH ACCESS PROGRAM

Objectives

(a) ~~The principal~~ One means of maximizing public access is to ~~create and~~ improve major accessways at locations where ~~adequate parking and other~~ necessary public improvements, including parking or public transit facilities where appropriate, can be provided to ensure adequate safety for users, traffic safety, security and privacy for adjacent residents, and clear public identification.

(b) Priorities for improved vertical public access in the Malibu Coastal Zone shall be in accordance with the ranking as depicted in Figure 5. Other criteria for determining priority for this new beach access are:

(1) First priority shall go to expanding safe off-highway parking at existing beaches with lifeguards.

(2) New accessway priorities shall feature:

Improvement of access to sandy beaches where there is no current public access.

* Improvement of access to sandy beaches where the distance between existing accessways exceeds one-half mile.

Improvement of accessways using offers of dedication which were already made pursuant to the conditions of coastal permits issued by the Coastal Commission or the County where to do so would allow the County to avoid requiring future offers of dedication as provided by P51.

Capacity to allow emergency vehicle passage from highway to beach and return, except where steepness or the existence of stairs would not allow vehicle use.

Revenue recovery system so that the costs of new accessways and adjacent beach operations are ~~wholly~~ covered to the extent possible.

New accessways should be obtained in conjunction with off-highway property where it is feasible to develop parking or public transit facilities and safe pedestrian systems.

(3) Beach access opportunities requiring vertical pedestrian pathways shall not be opened until the improvements are in place and a public agency is willing to accept management and liability for such accessways.

(c) The frequency of public access locations shall vary according to localized beach settings and conditions as set forth for Policy ~~55~~ P51 below. Vertical access standards and related dedication requirements may range from none in areas of major public beach holdings to one accessway per 1,000 feet of shoreline where accessways would be short and directly link roadways with adequate parking or transit access and the beach.

The Beach Access Program proposed above is directly related to the access policies of the suggested modifications. Thus, if the Commission were to approve the project, as proposed without a vertical access condition, the ability of the County to prepare a LCP in conformance with Chapter 3 of the Coastal Act would be prejudiced.

Attachment X

To: Permit Applicants

From: California Coastal Commission, South Coast District

Subject: Standard Conditions

The following standard conditions are imposed on all permits issued by the California Coastal Commission.

STANDARD CONDITIONS

1. Notice of Receipt and Acknowledgement. The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.

2. Expiration. If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

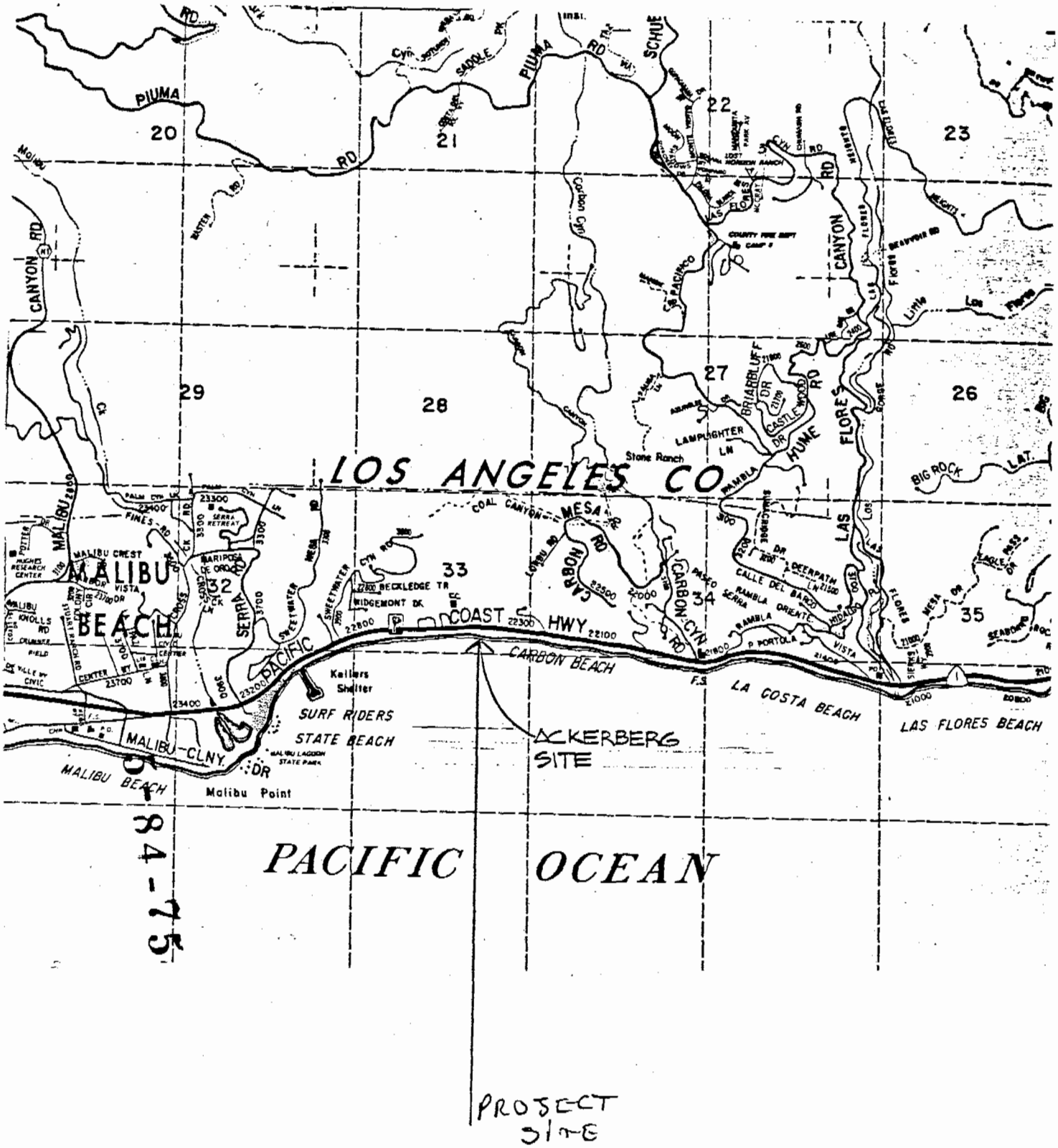
3. Compliance. All development must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.

4. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.

5. Inspections. The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.

6. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.

7. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.



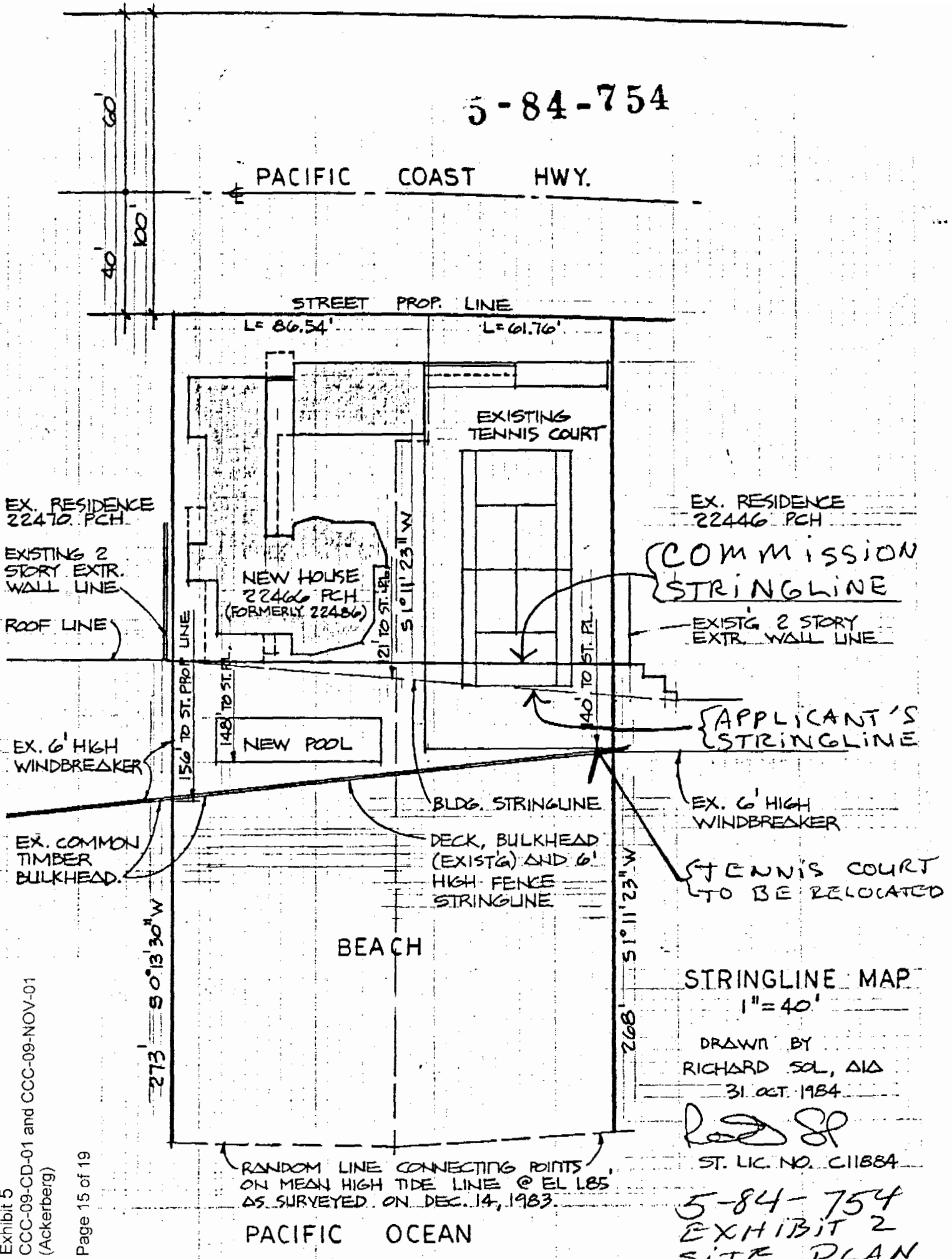
5-84-754

Exhibit 5
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Page 14 of 19

5-84-754
EXHIBIT 1
LOCATION MAP

5-84-754



STRINGLINE MAP
1"=40'

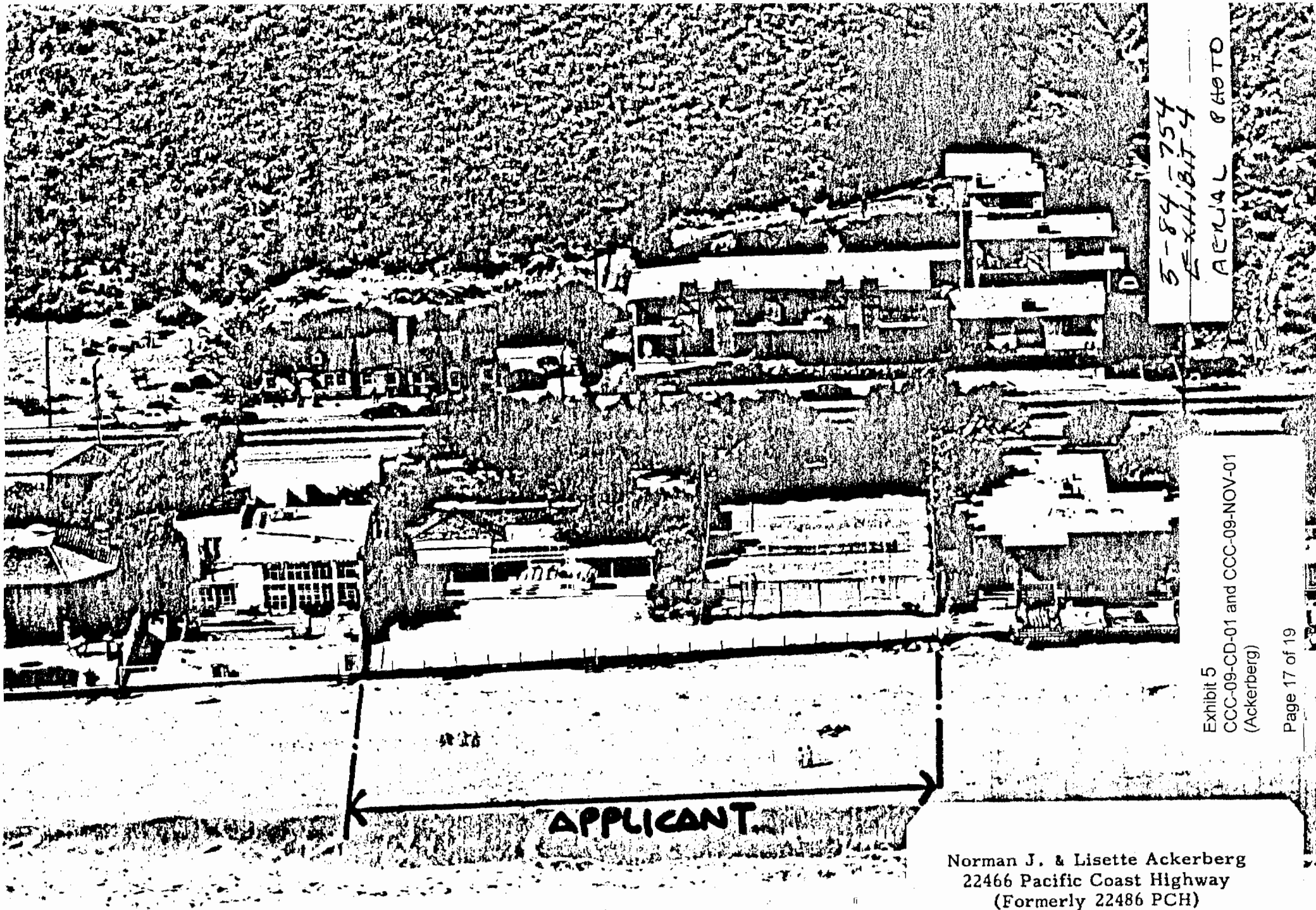
DRAWN BY
RICHARD SOL, AIA
31 OCT. 1984

ST. LIC. NO. C11884

5-84-754
EXHIBIT 2
SITE PLAN

Norman J. & Lisette Ackerberg
22466 Pacific Coast Highway
(Formerly 22486 PCH)
Malibu, CA 90265

5-84-754
EXHIBIT 3
AERIAL PHOTO



5-84-754
EXHIBIT 4
AERIAL PHOTO

Norman J. & Lisette Ackerberg
22466 Pacific Coast Highway
(Formerly 22486 PCH)
Malibu, CA 90265

State of California, George Deukmejian, Governor

California Coastal Commission
SOUTH COAST DISTRICT
245 West Broadway, Suite 360
P.O. Box 1450
Long Beach, California 90801-1450
(213) 590-5071

4-9-85 GG/wr

COASTAL DEVELOPMENT PERMIT

No. 5-84-754

On January 24,1985, the California Coastal Commission granted to

Lisette & Norman Ackerberg

this permit for the development described below, subject to the attached Standard and Special conditions.

Demolition of an existing single family dwelling, guest house, swimming pool, and construction of a new two-story single family dwelling and swimming pool. The project also includes the renovation of an existing tennis court.

Site; 22466 Pacific Coast Highway, Malibu, Los Angeles County.

Issued on behalf of the California Coastal Commission by

Michael L. Fischer
Executive Director
and

Staff Analyst

IMPORTANT: THIS PERMIT IS NOT VALID UNLESS AND UNTIL A COPY OF THE PERMIT WITH THE SIGNED ACKNOWLEDGEMENT HAS BEEN RETURNED TO THE COMMISSION OFFICE.

ACKNOWLEDGEMENT

The undersigned permittee acknowledges receipt of this permit and agrees to abide by all terms and conditions thereof.

April 15, 1985
Date

Norman Ackerberg
Lisette Ackerberg
Signature of Permittee

Coast 11: 7/81

STANDARD CONDITIONS:

1. Notice of Receipt and Acknowledgement. The permit is not valid and construction shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.

2. Expiration. If construction has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Construction shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

3. Compliance. All construction must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.

4. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.

5. Inspections. The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.

6. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affadavit accepting all terms and conditions of the permit.

7. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

SPECIAL CONDITIONS: This permit is subject to the following special conditions:

1. Vertical Access Condition. Prior to transmittal of the permit, the Executive Director shall certify in writing that the following conditions have been satisfied. The applicant shall execute and record a document, in a form and content approved by the Executive Director of the Commission, irrevocably offering to dedicate to an agency approved by the Executive Director, an easement for public pedestrian access to the shoreline. Such of the property line and extend from the northerly property line to the mean high tide line. Such easement shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed.

The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of 21 years, such periods running from the date of recording.

2. Revised Plans. Prior to transmittal of permit, the applicant shall be required to submit revised plans which conform the structural and deck stringline criteria contained in the adopted Interpretive Guidelines for the Malibu/Santa Monica Mountains.

Return Original To and
Recording Requested By:
State of California
California Coastal Commission
631 Howard Street, 4th Floor
San Francisco, California 94105

85 369283

RECORDED IN OFFICIAL RECORDS
OF LOS ANGELES COUNTY, CA
APR 4 1985 AT 8 A.M.
Recorder's Office
FREE 1

IRREVOCABLE OFFER TO DEDICATE

I. WHEREAS, (1) Norman J. Ackerberg and Lisette Ackerberg, husband and wife as Joint Tenants is/are the record owner(s), hereinafter referred to as "owner(s)", of the real property located at (2) 22486 Pacific Coast Highway, Malibu, California, legally described as particularly set forth in attached (3) Exhibit A hereby incorporated by reference and hereinafter referred to as the "subject property"; and

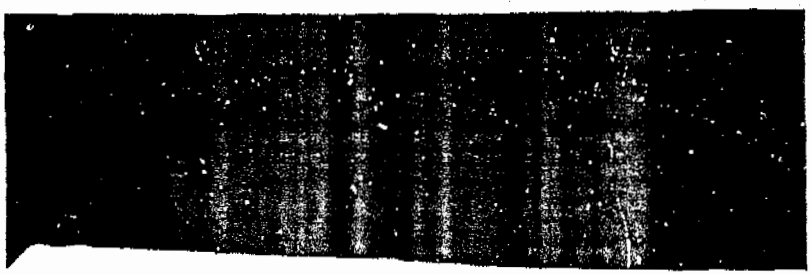
II. WHEREAS, the California Coastal Act of 1976 (hereinafter referred to as the "Act") creates the California Coastal Commission (hereinafter referred to as the "Commission") and requires that any coastal development permit approved by the Commission or local government as defined in Public Resources Code Section 30109 must be consistent with the policies of the Act set forth in Chapter 3 of Division 20 of the Public Resources Code; and

III. WHEREAS, the People of the State of California have a legal interest in the lands seaward of the mean high tide line; and

IV. WHEREAS, pursuant to the California Coastal Act of 1976, the owner(s) applied to the Commission for a coastal development permit for (4) Demolition of an existing single family dwelling, guest house, swimming pool, and construction of a new two-story single family dwelling and swimming pool, and renovation of existing tennis court on the subject property; and

V. WHEREAS, a coastal development permit no. (5) 5-84-764 was

Exhibit 6
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)



granted on (6) January 24, 1985 by the Commission in accordance with the provisions of the Staff Recommendation and Findings (7) (Exhibit B) attached hereto and hereby incorporated by reference, subject to the following conditions: (8)

1. Vertical Access Condition. Prior to transmittal of the permit, the Executive Director shall certify in writing that the following conditions have been satisfied. The applicant shall execute and record a document, in a form and content approved by the Executive Director of the Commission, irrevocably offering to dedicate to an agency approved by the Executive Director, an easement for public pedestrian access to the shoreline. Such easement shall be 10 feet wide located along the eastern boundary of the property line and extend from the northerly property line to the mean high tide line. Such easement shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed.

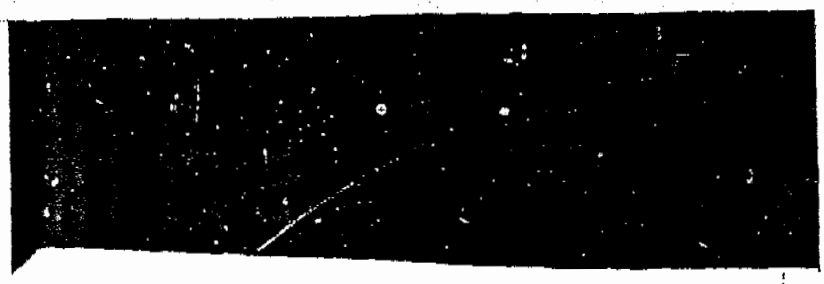
The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of 21 years, such periods running from the date of recording.

2. Revised Plans. Prior to transmittal of permit, the applicant shall be required to submit revised plans which conform the structural and deck stringline criteria contained in the adopted Interpretive Guidelines for the Malibu/Santa Monica Mountains.

VI. WHEREAS, the subject property is a parcel located between the first public road and the shoreline; and

VII. WHEREAS, under the policies of Sections 30210 through 30212 of the California Coastal Act of 1976, public access to the shoreline and along the coast is to be maximized, and in all new development projects located between the first public road and the shoreline shall be provided; and

VIII. WHEREAS, the Commission found that but for the imposition of the above condition, the proposed development could not be found consistent with the public access policies of Section 30210 through 30212 of the



California Coastal Act of 1976 and that therefore in the absence of such a condition, a permit could not have been granted;

NOW THEREFORE, in consideration of the granting of permit no. (9) 5-84-754 to the owner(s) by the Commission, the owner(s) hereby offer(s) to dedicate to the People of California an easement in perpetuity for the purposes of (10) public pedestrian access to the shoreline

located on the subject property (11) along the eastern boundary of the property line at a width of ten feet, and extending from the northerly property line to the mean high tide line and as specifically set forth by attached Exhibit C (12) hereby incorporated by reference.

This offer of dedication shall be irrevocable for a period of twenty-one (21) years, measured forward from the date of recordation, and shall be binding upon the owner(s), their heirs, assigns, or successors in interest to the subject property described above. The People of the State of California shall accept this offer through the local government in whose jurisdiction the subject property lies, or through a public agency or a private association acceptable to the Executive Director of the Commission or its successor in interest.

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Acceptance of the offer is subject to a covenant which runs with the land, providing that any offeree to accept the easement may not abandon it but must instead offer the easement to other public agencies or private associations acceptable to the Executive Director of the Commission for the duration of the term of the original offer to dedicate. The grant of easement once made shall run with the land and shall be binding on the owners, their heirs, and assigns.

Executed on this 5th day of March, 1985, at Palm Beach, Florida.

Dated: March 5, 1985

Signed Norman J Ackerberg

Norman J. Ackerberg

Type or Print Name of Above

Signed Lisette Ackerberg

Lisette Ackerberg

Type or Print Name of Above

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-4-

Exhibit 6
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Acceptance of the Offer is subject to a covenant which runs with the land, providing that any offeree to accept the easement may not abandon it but must instead offer the easement to other public agencies or private associations acceptable to the Executive Director of the Commission for the duration of the term of the original Offer to Dedicate.

Executed on this _____ day of _____, at _____

_____, California.

Dated: _____ Signed _____

Owner

_____

Type or Print

Signed _____

_____

Type or Print

NOTE TO NOTARY PUBLIC: If you are notarizing the signatures of persons signing on behalf of a corporation, partnership, trust, etc., please use the correct notary jurat (acknowledgment) as explained in your Notary Public Law Book.

State of California,)

)ss

County of Los Angeles)

On this 1st day of April, in the year 1985, before me L. Morris Dennis, a Notary Public, personally appeared Norman Ackerberg and Lisette Ackerberg

X personally known to me

/ / proved to me on the basis of satisfactory evidence

to be the person(s) whose name is subscribed to this instrument, and acknowledged that he/she/they executed it.

L Morris Dennis

NOTARY PUBLIC IN AND FOR SAID COUNTY AND STATE

85 369283

OFFICIAL SEAL
L MORRIS DENNIS
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires JUL 24, 1985

COURT PAPER
STATE OF CALIFORNIA
STD 113 (REV 8-72)

This is to certify that the Offer to Dedicate set forth above is hereby acknowledged by the undersigned officer on behalf of the California Coastal Commission pursuant to authority conferred by the California Coastal Commission when it granted Coastal Development Permit No. 5-84-754 on January 24, 1985 and the California Coastal Commission consents to recordation thereof by its duly authorized officer.

Dated: March 27, 1985

T R Norman

Chief Counsel

California Coastal Commission

STATE OF California)

)SS

COUNTY OF San Francisco)

On March 27, 1985, before me Deborah S. Bernabi, a Notary Public, personally appeared T.R. Norman, personally known to me to be (or proved to me on the basis of satisfactory evidence) to be the person who executed this instrument as the Chief Counsel TITLE and authorized representative of the California Coastal Commission and acknowledged to me that the California Coastal Commission executed it.

OFFICIAL SEAL
DEBORAH S. BERNABI
NOTARY PUBLIC - CALIFORNIA
SAN FRANCISCO COUNTY
My Comm. Expires MAY 20, 1988

Deborah S Bernabi

Notary Public in and for said County and State

-6- 85 369283

Exhibit 6
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

EXHIBIT B

A. Project Description. The proposed project consists of the demolition of an existing single family dwelling, guest house and swimming pool and the construction of a new two-story single family dwelling with three-car garage, swimming pool and septic system. The newly proposed project involves construction of a new swimming pool on the seaward side of the residence. The previous swimming pool was located landward of the previously existing residence. In addition as part of the project, the applicant proposes to renovate an existing tennis court. Also, the proposed project will result in the relocation of the tennis court on the project site approximately 14 feet seaward.

B. Background. On June 9, 1983, the California Coastal Commission approved the construction of a 140-foot in length wood pile-supported, wood sheeted bulkhead. In its action to approve the project the Commission imposed a lateral access condition requiring an offer of dedication of an easement for public access from the mean high tide line to toe of the bulkhead. In addition the Commission required the applicants to assume the risks associated with development of the site which might result from flood or wave damage.

C. Public Access. The Coastal Act contains strong policy provisions in Sections 30210 and 30212, requiring public access to and along the shore. However, the requirements for the provision of access for the public to California's shoreline is not limited to the Coastal Act. The California Constitution in Article X, Section 4 provides:

> No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purposes . . .and the Legislature shall enact such law as will give the most liberal construction to this provision so that access to the navigable waters of this state shall always be attainable for the people thereof. (Emphasis added).

The Coastal Act contains more specific policies regarding the provision of public access to the State's shoreline. Coastal Act Section 30210 as set forth below, stipulates that in meeting the requirements of Section 4, Article X of the Constitution maximum public access, conspicuously posted shall be provided subject to certain conditions.

1. Lateral Access. The Coastal Act in Section 30210 requires the provision of public access along the shoreline in new development projects. An application for a seawall at this location in 1983 (5-83-360, Trueblood) was conditioned to provide public lateral access across the project site from the toe of the seawall to the mean high tide line. Therefore, the Commission finds that lateral access for the public has been provided for through prior permit action of the Commission and that the currently proposed project is consistent with Sections 30210 and 30212 of the Coastal Act as it relates to the provision of lateral access.

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2. Vertical Access. New development projects are required to provide public access in compliance with the public access provisions of Chapter 3 of the Coastal Act.

Section 30210.

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30212 of the Coastal Act contains several very explicit policy provisions regarding the location and type of public access to be provided.

Section 30212.

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby, or

(3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

(b) For purposes of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

(4) The reconstruction or repair of any seawall; provided, however, that the reconstructed or repaired seawall is not a seaward of the location of the former structure.

(5) Any repair or maintenance activity for which the commission has determined, pursuant to Section 30610, that a coastal development permit will be required unless the regional commission or the commission determines that such the activity will have an adverse impact on lateral public access along the beach.

As used in this subdivision "bulk" means total interior cubic volume as measured from the exterior surface of the structure.

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In addition to the above provisions of the Coastal Act, Section 30214(a) addresses with a greater degree of specificity the time, place and manner of public access. Section 30214(a) states:

> Section 30214.
>
> (a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:
>
> (1) Topographic and geologic site characteristics.
>
> (2) The capacity of the site to sustain use and at what level of intensity.
>
> (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.
>
> (4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

Additionally, the legislature has expressed its intent that the Commission balance the rights of the individual property owner with the public's constitutional right of access to the coast. Section 30214(b) states:

> (b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution.

All projects requiring a Coastal Development permit must be reviewed for compliance with the public access provisions of Chapter 3 of the Coastal Act. New development on sites located between the sea and the first public road may be required to provide vertical access under the policy provisions of Section 30212 of the Coastal Act. In determining where vertical access should be required, the Commission must consider the need to gain access to the shoreline in a given area, taking into account the physical constraints of the site, including, but not limited to, safety hazards, existence of fragile coastal resources, the location of support facilities, such as parking areas and the privacy needs of residents of the project site.

As outlined in the Seventh Edition, September 1983, Coastal Access Inventory within the area identified as the Malibu Coastline (a distance of about 27 miles from Topanga State Beach on the east to Leo Cabrillo State Beach on the west) only 16 vertical accessways have been recorded as a result of Coastal permit requirements. Of these, only 4 vertical accessways have been opened to the public. Accessways obtained through the Coastal permit process cannot be developed and/or actually used by

the public until a public or private agency agrees to accept responsibility for maintenance and liability. The following is a list of vertical accessways that have been obtained via the Coastal permit process in Malibu.

Coastal Permit No.	Street Address/Malibu	Width of Access	Open
73-290	State Park/Point Dume	6'	Yes
73-511	26168 Pacific Coast Highway	6'	Yes
73-1526	22706 " " "	10'	Yes
74-2840	22626 " " "	2'	No
75-6376	22032 " " "	5'	No
76-8877	21554 " "	6'	No
76-8957	25120 " " "	35'	Yes
77-376	19020 " " "	3'	No
77-574	26834 Malibu Cove Colony	5'	No
77-1466	31736 Broad Beach Road	5 -10'	No
77-2130	27398 Pacific Coast Highway	10'	No
78-3473	27700 " " "	10'	No
78-3591	20802 " " "	5'	No
79-4918	21202 " " "	10'	No
80-2707	27900 " " "	10'	No
5-83-136	22126-22132 Pacific Coast Highway	9'	No

In addition to the vertical accessways listed above, there are several vertical accessways in Malibu which are owned by the County of Los Angeles. One County accessway (at 22550 P. C. H.) is located within 500 feet of the project site; however, the accessway is closed and the County has no plans to open this accessway.

The project site is located in the Carbon Beach area of Malibu; one of the least publicly accessible beaches in the Malibu area. The existence of a solid row of residential structures along this stretch of Pacific Coast Highway effectively creates a private beach enclave. The residential development along Carbon Beach even precludes views of the ocean and shoreline from Pacific Coast Highway.

On the inland side of Pacific Coast Highway in the vicinity of the project are multi-unit apartment buildings, small offices and commmercial structures. Although this particular area of Malibu has not experienced great demand for recycling of existing structures or development of the few vacant parcels, it appears inevitable that as the pattern of growth in Malibu continues, a demand for recycling and more intensive development will occur. In turn this will create a greater demand for beach usage.

In order to determine whether the currently proposed project complies with the access provisions of the Coastal Act and more specifically with Section 30212 of the Coastal Act, the Commission must determine whether adequate access exists nearby.

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The Commission has already found that the project meets the definition of new development, thus if adequate access does not exist nearby, access for the public from the nearest public roadway (P. C. H.) to the shoreline is required.

In its review of prior similar permit applications where the issue of vertical access has been raised, the Commission has used a 500-foot criteria as a guideline to determine whether adequate access exists nearby. More specifically, the Commission has previously made a determination in similar cases if open vertical access for the public exists within 500 feet of the project site, adequate access exists nearby. With respect to the currently proposed project, the Commission notes that the nearest open public vertical accessways are located 1,300 feet west of the project and 3,099 feet east of the project site. Since open vertical access for the public does not exist nearby, the Commission finds it is necessary to condition the project to provide for vertical access for the public, from Pacific Coast Highway across the project site to the shore. Only if so conditioned would the project be consistent with Section 30212 of the Coastal Act.

The Commission further finds that since the project site consists of two contiguous lots with a total frontage of 140 feet both the applicant and the Commission are afforded great flexibility in siting the vertical accessway. The Statewide Guidelines adopted by the Commission indicate that a vertical accessway when provided should be a minimum of 10 feet in width and should usually be sited along the borders of the project site. The Commission concludes the large size of the project site (40,041 square feet) affords great opportunity in the actual design of the vertical accessway across the project site benefitting both the applicant and the public. In addition, the Commission notes that there is on-street parking available on both sides on Pacific Coast Highway in the vicinity of the project. Therefore, the Commission concludes that adequate support facilities (for parking) exist within the vicinity of the project. Finally the Commission finds that if conditioned, as indicated above with a vertical accessway, the project would be in conformance with the access policies of Chapter 3 of the Coastal Act.

D. Scenic and Visual Resources/Seaward Encroachment. The Coastal Act in Section 30251 states:

> Section 30251.
>
> The scenic and visual qualities of coastal areas shall be [illegible]ed and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

The proposed project consists of the demolition of an existing single family dwelling and swimming pool and the construction of a new

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two-story, 32-foot above average finished grade, single family residence with swimming pool. The project also involves renovation of an existing tennis court and the relocation of the tennis court approximately 14 feet seaward of its present location.

New development along the shoreline is of particular concern to the Commission. Section 30251 of the Coastal Act requires that permitted development be sited and designed to protect views to and along the ocean and scenic coastal areas. As one means of limiting the encroachment of residential development onto sand beach areas, the Commission has adopted a stringline guideline. With respect to this criteria, the Guidelines state:

> "In a developed area where new construction is generally infilling and is otherwise consistent with Coastal Act policies, no part of a proposed new structure, including decks and bulkheads, should be built further onto a beach front than a line drawn between the nearest adjacent corners of the adjacent structures. Enclosed living space in the new unit should not extend farther seaward than a second line drawn between the most seaward portions of the nearest corner of the enclosed living space of the adjacent structure."

One of the purposes of this Guideline is to limit seaward encroachment on sandy beach areas. In the case of the currently proposed project, the applicant proposes to demolish an existing single family home and construct a significantly larger single family home. The proposed construction will occur landward of an existing seawall/bulkhead previously approved by the Commission. As proposed the new residence will conform with the Commission's stringline condition for structural development. However, other portions of the development including a solar trellis for the residence exceed the stringline. Also, the project calls for the seaward encroachment of a tennis court by 14 feet which could have a visual impact since if relocated the tennis court would be at the bulkhead line. Therefore, the Commission finds it necessary to condition the project to require revised plans which clearly indicate the project complies with both structural and deck stringlines. Only if so conditioned would the project be consistent with Section 30251 of the Coastal Act which addresses scenic and visual resources.

E. Hazards. Section 30253 (1) of the Coastal Act specifies that new development minimize risks to life and property in areas of high geologic flood and fire hazard. That an emergency permit was requested by the prior owner of the project site for construction of a 140-foot in length wood seawall attests to the potential flood hazard on the site. In approving the regular permit for construction of a seawall on the site, the Commission required the seawall to meet storm design criteria and for the project applicant to assume the risks associated with development of the site. Therefore, the Commission finds that the

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seawall will serve to mitigate the flood hazard which previously existed on the site and that as previously conditioned, the project is consistent with Section 30253 (1) of the Coastal Act.

F. Local Coastal Program. Section 30604(a) of the Coastal Act states in Part:

> Section 30604.
>
> (a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200).

The County of Los Angeles adopted the Land Use Plan portion of the Malibu/Santa Monica Mountains area Local Coastal Program on December 28, 1982, for submittal to the Commission for certification. On March 24, 1983 the Commission voted to find that the Land Use Plan raised a "Substantial Issue" in terms of conformity with the Coastal Act and voted to deny the Land Use Plan as submitted.

At the time of this writing the Commission is scheduled to consider suggested modifications to the Malibu Land Use Plan at the Commission hearing in early January.

Among the suggested modifications which the Commission is scheduled to consider are access policies proposed as modifications to the County's Land Use Plan. With respect to beach access in general and vertical access specifically, the suggested modifications state:

4.1.2 COASTAL ACCESS

1. GENERAL POLICIES

P49 In accordance with Section 30214(a) of the Coastal Act, the time, place, and manner of public beach access requirements for new development will depend on individual facts and circumstances, including topographic and site characteristics, the capacity of the site to sustain use at the intensity proposed, the proximity to adjacent residential uses, the privacy of adjacent owners, the feasibility to provide for litter collection, and safety of local residents and beach users.

P50 In accordance with Section 30214(b) of the Coastal Act, the requirement of access shall be reasonable and equitable, balancing the rights of the individual property owner and the public.

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Vertical Access

P51 For all land divisions, non-residential new development, and residential new development on lots with 75 or more feet of frontage or with an existing drainage or utility easement connecting a public street with the shoreline or on groups of two or more undeveloped lots with 50 feet or more of frontage per lot, an irrevocable offer of dedication of an easement to allow public vertical access to the mean high tide line shall be required, unless public access is already available at an existing developed accessway within 500 feet of the project site measured along the shoreline. Such offer of dedication shall be valid for a period of 21 years, and shall be recorded free of prior liens. The access easement shall measure at least 10 feet wide. Where two or more offers of dedication within 500 feet of each other have been made pursuant to this policy, the physical improvement and opening to public use of one offered accessway shall result in the abandonment of other offers located within 500 feet of the improved accessway.

Exceptions to the above requirement for offers of dedication may be made regarding beaches identified in the Land Use Plan's Area-Specific Marine Resource Policies (P111 through P113) as requiring limitations on access in order to protect sensitive marine resources.

* P51b On the basis of a Beach Management Plan prepared by the County and approved by the Coastal Commission which takes into account beach recreation opportunities, the width of the beach, the presence of immediately adjacent residences or sensitive natural resources, local parking conditions, beach support facilities, the feasibility of emergency vehicle access to the beach, and related factors, accessways at greater intervals than would be required by P51 may be required, up to a maximum standard of separation for new vertical accessways of one accessway per 2000 feet of shoreline. Such a Beach Management Plan, which may be submitted to the Commission for its review at the same time as the implementing ordinances, shall assure that lateral access offers made in connection with coastal permits previously approved (as well as in connection with future permits and vertical access offers sufficient to meet the standard of separation included in the Plan) are accepted for maintenance and liability purposes by the County or other responsible entity acceptable to the Executive Director of the Coastal Commission. Reasonable restrictions on use of the beach to protect sensitive marine resources, minimize risks to public safety due to geologic and wave hazards and reduce potential conflicts with the privacy of nearby residences while promoting reasonable public access may be adopted by the accepting agency as part of the Beach Management Plan.

If the Commission were to approve the currently proposed project without a vertical access condition in advance of the development of a Beach

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Management Plan as indicated in proposed suggested modification P51G above, the ability of the County to prepare a Local Coastal Program in conformance with the policies of Chapter 3 of the Coastal Act would be prejudiced.

In addition to the proposed suggested modifications to the County of Los Angeles Land Use Plan access policies listed above, the suggested modifications also call for development of a beach access program to be implemented in conjunction with the proposed policies on public access. With respect to the beach access program the suggested modifications state:

2. BEACH ACCESS PROGRAM

Objectives

(a) ~~The principal~~ One means of maximizing public access is to ~~create and~~ improve major accessways at locations where ~~adequate parking and other~~ necessary public improvements, including parking or public transit facilities where appropriate, can be provided to ensure adequate safety for users, traffic safety, security and privacy for adjacent residents, and clear public identification.

(b) Priorities for improved vertical public access in the Malibu Coastal Zone shall be in accordance with the ranking as depicted in Figure 5. Other criteria for determining priority for this new beach access are:

(1) First priority shall go to expanding safe off-highway parking at existing beaches with lifeguards.

(2) New accessway priorities shall feature:

Improvement of access to sandy beaches where there is no current public access.

Improvement of access to sandy beaches where the distance between existing accessways exceeds one-half mile.

Improvement of accessways using offers of dedication which were already made pursuant to the conditions of coastal permits issued by the Coastal Commission or the County where to do so would allow the County to avoid requiring future offers of dedication as provided by P51.

Capacity to allow emergency vehicle passage from highway to beach and return, except where steepness or the existence of stairs would not allow vehicle use.

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Revenue recovery system so that the costs of new accessways and adjacent beach operations are wholly covered to the extent possible.

New accessways should be obtained in conjunction with off-highway property where it is feasible to develop parking or public transit facilities and safe pedestrian systems.

(3) Beach access opportunities requiring vertical pedestrian pathways shall not be opened until the improvements are in place and a public agency is willing to accept management and liability for such accessways.

(c) The frequency of public access locations shall vary according to localized beach settings and conditions as set forth for Policy ~~55~~ P51 below. Vertical access standards and related dedication requirements may range from none in areas of major public beach holdings to one accessway per 1,000 feet of shoreline where accessways would be short and directly link roadways with adequate parking or transit access and the beach.

The Beach Access Program proposed above is directly related to the access policies of the suggested modifications. Thus, if the Commission were to approve the project, as proposed without a vertical access condition, the ability of the County to prepare a LCP in conformance with Chapter 3 of the Coastal Act would be prejudiced.

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Add this paragraph to the findings on Ackerberg:

On page 7, after last paragraph just before Section D, insert:

The Commission further finds that notwithstanding the fact the County of Los Angeles owns a vertical accessway within 500 feet of the project, that accessway has not been opened to the public and therefore the Commission cannot make a finding that "adequate access exists nearby." In addition, although the Commission has, in some cases, found that if an accessway is open to the public within 500 feet, new offers of vertical access dedication will not be required, such an approach is not appropriate here. The appropriate vehicle for establishing the policy relative to the precise spacing of vertical accessways and whether previously secured offers to dedicate vertical accessways can be extinguished if another vertical accessway is improved and opened within 500 feet of the subject property in the LUP. The Malibu LUP staff recommmendation suggests a policy on this point. The Commission believes that as a matter of policy, publically owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical access easements are opened. This position assumes that the publically 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

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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.

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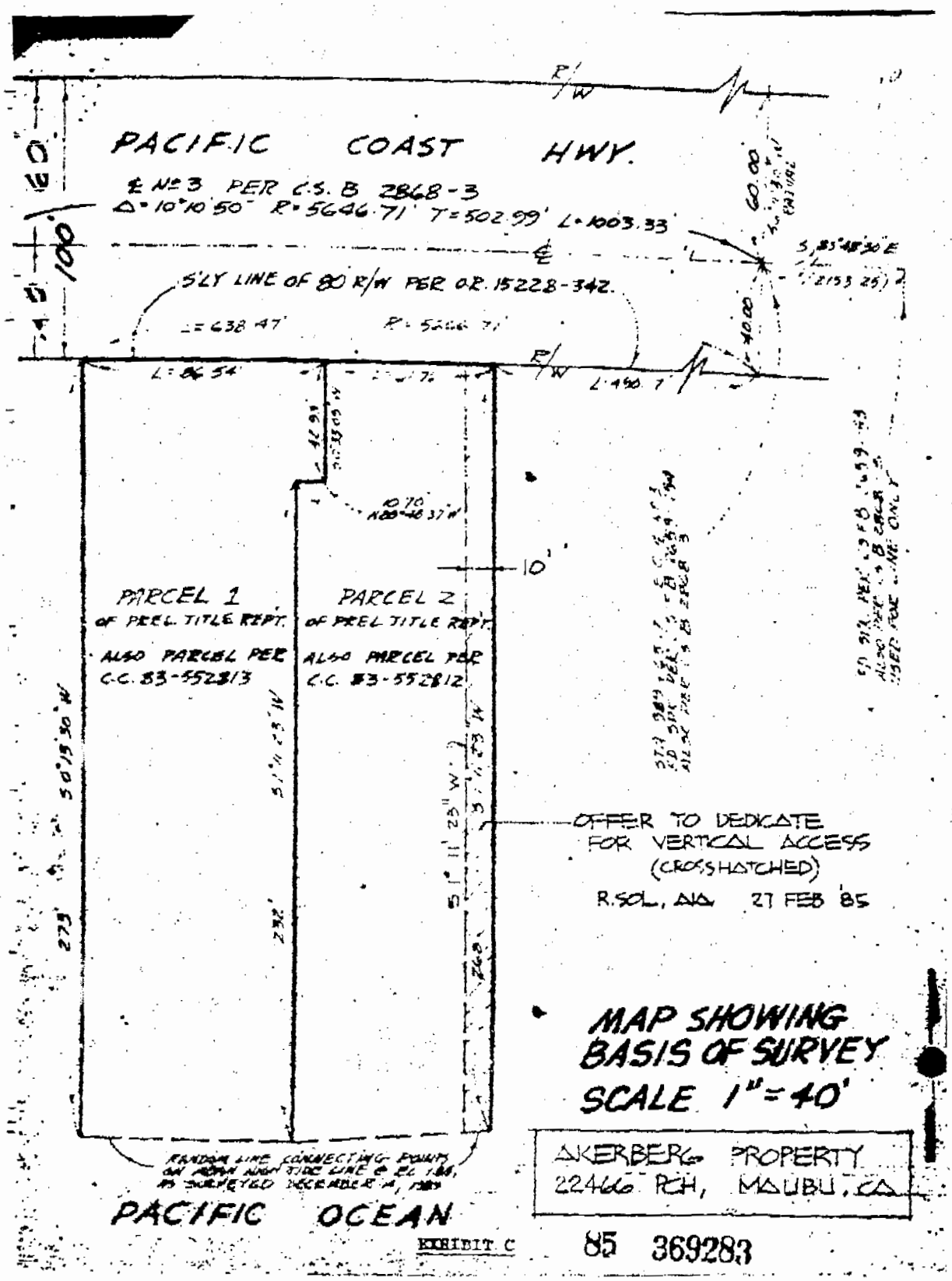
PACIFIC COAST HWY.
℄ No 3 PER C.S.B 2868-3
Δ=10°10'50" R=5646.71' T=502.99' L=1003.33'
S'LY LINE OF 80 R/W PER O.R. 15228-342.
PARCEL 1
OF PEEL TITLE REPT.
ALSO PARCEL PER
C.C. 83-552813
PARCEL 2
OF PEEL TITLE REPT.
ALSO PARCEL PER
C.C. 83-552812
OFFER TO DEDICATE
FOR VERTICAL ACCESS
(CROSSHATCHED)
R.SOL, AIA 27 FEB 85
MAP SHOWING
BASIS OF SURVEY
SCALE 1"=40'
AKERBERG PROPERTY
22466 PCH, MALIBU, CA
PACIFIC OCEAN
EXHIBIT C
85 369283

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D.T.T

CODE 20

CODE 19

CODE 9

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Number of Parcels Shown

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03 3801416

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CDP 5-84-754
(Vertical)

CERTIFICATE OF ACCEPTANCE

AND

ACKNOWLEDGEMENT BY CALIFORNIA COASTAL COMMISSION

OF ACCEPTANCE OF IRREVOCABLE OFFER TO DEDICATE

THIS CERTIFICATE OF ACCEPTANCE AND ACKNOWLEDGEMENT acknowledges and certifies the acceptance by Access For All, a private nonprofit corporation, of an Irrevocable Offer to Dedicate dated March 5, 1985, executed by Norman J. Ackerberg and Lisette Ackerberg and recorded on April 4, 1985 as Instrument Number 85 369283 of the Official Records of Los Angeles County (hereinafter the "Offer to Dedicate"), and sets forth conditions of that acceptance with respect to the management and future disposition of the dedicated easement. It is the intention of the California Coastal Commission (hereinafter the "Commission") and Access For All to ensure that the purposes, terms and conditions of the Offer to Dedicate be carried out within a framework established by and among the Commission, Access For All and the State Coastal Conservancy (hereinafter the "Conservancy") in order to implement the Commission's Coastal Access Program pursuant to the

California Coastal Act of 1976, Public Resources Code Sections 30000 et seq. (hereinafter the "Coastal Act").

I. **WHEREAS**, the Commission is an agency of the State of California established pursuant to Public Resources Code Section 30300 and is charged with primary responsibility for implementing and enforcing the Coastal Act; and

II. **WHEREAS**, the Conservancy is an agency of the State of California existing under Division 21 of the California Public Resources Code, which serves as a repository for interests in land whose reservation is required to meet the policies and objectives of the Coastal Act or a certified local coastal plan or program; and

III. **WHEREAS**, Access For All is a private nonprofit corporation existing under Section 501(c)(3) of the United States Internal Revenue Code and having among its principal charitable purposes the preservation of land for public access, recreation, scenic and open space purposes; and

IV. **WHEREAS**, as a condition to its approval of Coastal Development Permit Number 5-84-754, the Commission required recordation of the Offer to Dedicate pursuant to Sections 30210-30212 of the Coastal Act; and

V. **WHEREAS**, terms and conditions of the Offer to Dedicate provide, among other things, that (A) the People of the State of California shall accept this offer through the local government in whose jurisdiction the subject property lies, or through a public agency or a private association acceptable to the Executive Director of the Commission or its successor in interest; (B) acceptance of the offer is subject to a covenant which runs with the land, providing that any offeree to accept the easement may not abandon it but must instead offer the easement to other public agencies or private associations acceptable to the Executive Director of the Commission; and (C) the grant of easement once made shall run with the land and shall be binding on the owners, their heirs, and assigns; and

VI. **WHEREAS**, Access For All desires to accept the Offer to Dedicate and accordingly has requested that the Executive Director of the Commission approve it as an acceptable management agency; and

VII. **WHEREAS**, Access For All is acceptable to the Executive Director of the Commission to be Grantee under the Offer to Dedicate provided that the easement will be transferred to another qualified entity or to the Conservancy in the event that Access For All ceases to exist or is otherwise unable to carry out its responsibilities as Grantee, as set forth in a management plan approved by the Executive Director of the Commission;

NOW, THEREFORE, this is to certify that Access For All is a private nonprofit corporation acceptable to the Executive Director of the Commission to be Grantee under the Offer to Dedicate, on the condition that should Access For All cease to exist or fail to carry out its responsibilities as Grantee to manage the easement for the purpose of allowing public pedestrian access to the shoreline, then all of Access For All's right, title and interest in the easement shall vest in the State of California, acting by and through the Conservancy or its successor, upon acceptance thereof; provided, however, that the State, acting through the Executive Officer of the Conservancy or its successor agency, may designate another public agency or private association acceptable to the Executive Director of the Commission, in which case vesting shall be in that agency or organization rather than the State. The responsibilities of Access For All to manage the easement shall be those set forth in the Management Plan dated July 28, 2003, and maintained in the offices of the Commission and the Conservancy (and as the Management Plan may be amended from time to time with the written concurrence of the Executive Director of the Commission, the Executive Officer of the Conservancy, and Access For All). Notwithstanding the foregoing, the right, title and interest of Access For All in the easement may not vest in the Conservancy or another entity except upon (1) a finding by the Conservancy, made at a noticed public hearing, that Access For All has ceased to exist or failed to carry out its responsibilities as set forth in the

Management Plan; and (2) recordation by the State or another designated agency or entity of a Certificate of Acceptance, substantially in the form set forth in California Government Code §27281. Nothing herein shall prevent Access For All from transferring the easement to a qualified entity pursuant to the Offer to Dedicate, thereby relieving itself of the obligation to manage the easement in accordance with the Management Plan.

This document further certifies that Access For All, a private nonprofit corporation, hereby accepts the Offer to Dedicate pursuant to authority conferred by Resolution No. 2002-3 of the Board of Directors of Access For All adopted on July 12, 2002, and Access For All consents to recordation thereof by its duly authorized officer. In accepting the Offer to Dedicate, Access For All covenants and agrees to the conditions set forth in the Offer to Dedicate and in this Certificate.

IN WITNESS WHEREOF, the Commission and Access For All have executed this CERTIFICATE OF ACCEPTANCE and ACKNOWLEDGEMENT OF ACCEPTANCE OF IRREVOCABLE OFFER TO DEDICATE as of the dates set forth below.

Dated: Dec. 15, 2003

CALIFORNIA COASTAL COMMISSION

By: John Bowers
John Bowers, Staff Counsel

Dated: December 16, 2003

ACCESS FOR ALL

By: Steve Hoye
Steve Hoye, Executive Director

STATE OF CALIFORNIA

03 3801416

COUNTY OF SAN FRANCISCO

On 12.15.03, before me, Jeff G. Staben, a Notary Public, personally appeared John Bowers, personally known to me (or proved to me on the basis of satisfactory evidence) to be the persons(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature

JEFF G. STABEN
Comm. # 1449647
NOTARY PUBLIC - CALIFORNIA
City and County of San Francisco
My Comm. Expires Dec. 3, 2007

STATE OF CALIFORNIA

COUNTY OF Los Angeles

On DECEMBER 16, 2003, before me, Leigh C. Bloom, a Notary Public, personally appeared STEVE HAYE, personally known to me (or proved to me on the basis of satisfactory evidence) to be the persons(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature

LEIGH C. BLOOM
COMM. # 1309341
NOTARY PUBLIC-CALIFORNIA
LOS ANGELES COUNTY
COMM. EXP. JUNE 16, 2005

Access for All

PO Box 1704
Topanga, CA 90290

December 19, 2003

Norman and Lisette Ackerberg
22466 Pacific Coast Highway
Malibu, CA 90265

Dear Mr. and Mrs. Ackerberg,

It is with pleasure that I'd like to inform you that Access for All has accepted your generous Offer-to-Dedicate for the vertical easement adjacent to your Malibu residence.

Access for All is a local nonprofit organization formed for the specific purpose of bringing about coastal access, and it has been approved by the California Coastal Commission to do this. Access for All's mission states that "this will be done by assumption of land and easements, through gifts, acquisitions, and transfers, within Southern California, doing all necessary construction to open these into public accessways, and performing all maintenance required, to guarantee the people permanent access to their public lands."

Access for All would like to move forward to survey and open up this new easement as soon as is mutually convenient, and would like to meet with your representatives to assure that this process is carried out with the utmost sensitivity to both your interests and those of the people of California.

Please find attached a Management Plan for the access site, which has been approved by the California Coastal Commission and the State Coastal Conservancy.

Please contact us at the above address so that we may arrange a meeting.

Sincerely,

Steve Hoye
Executive Director

Exhibit 8
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

STATE OF CALIFORNIA – THE RESOURCES AGENCY
CALIFORNIA COASTAL COMMISSION
STATEWIDE COASTAL ACCESS PROGRAM
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
(831) 427-4875

March 28, 2005

Lisette Ackerberg
22466 Pacific Coast Highway
Malibu, California 90265

Re: Vertical Public Access Easement at 22466 Pacific Coast Highway, Malibu

Dear Mrs. Ackerberg:

I am following up on the letter sent to you in December 2003 from the nonprofit organization Access for All. In that letter, Access for All (AFA) informed you that they had accepted the vertical Offer to Dedicate Public Access Easement recorded by you and your husband in 1985. (Certificate of Acceptance recorded on December 17, 2003 as Document No. 03-3801416). The easement is a ten foot wide strip of property along the entire eastern border of your property. The Executive Director of AFA, Steve Hoye, requested a meeting so that AFA could conduct a survey of the easement, in preparation for opening the easement to the general public. Since that time, Mr. Hoye has been in discussion with your representative, Terry Tamminen, and informed him that AFA requests your permission to enter the property to conduct a survey of the easement. Of course, we know that Mr. Tamminen is extremely busy, and we do not know if he has discussed this with you yet. Nevertheless, AFA has not received your permission for conducting the survey.

I am writing to remind you that the Coastal Commission imposed a permit condition requiring the recording of this public access easement in order to mitigate the impacts of constructing your new home (Coastal Development Permit 5-84-754). Both the Coastal Commission and the Coastal Conservancy have approved AFA to open and operate this accessway; the Conservancy has provided AFA with a grant to perform a survey and install a pedestrian gate and public access signage. Therefore AFA is ready to take on the responsibilities to open and operate this easement. In order for this to occur, you must remove any structures that have been placed or built in the easement. A cursory look at your property shows that both a front yard and a backyard perimeter wall block the easement. These must be removed. The edge of the tennis court, lights and a generator might also be in the easement area. 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
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

We have reached the time to open this public accessway. I am requesting that you, or your representative, contact us within the next 30 days to inform us when AFA and their surveyor can enter your property and conduct the survey. Once the survey has been completed, if any additional encroachments in the easement are identified (i.e., tennis court, lights and/or generator), they must be removed expeditiously.

Failure to promptly remove the front and backyard wall in the easement and any other encroachments that are identified constitutes a violation of the Coastal Act of 1976. Under Public Resources Code section 30812 (copy enclosed), if efforts to resolve the matter are not successful, the Coastal Commission has the authority to record a notice of violation against the property that has the unpermitted development on it, to ensure that any potential buyer is aware of the situation.

I hope that we resolve this issue in the near term. Please contact me if you want to discuss this matter in more depth.

Sincerely,

Linda Locklin
Coastal Access Program Manager

Cc: Steve Hoye, Access For All
Steve Hudson, CCC-Ventura
Pat Veesart, CCC-Ventura
Sandy Goldberg, CCC Legal Counsel
Terry Tamminen

Exhibit 9
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

April 7, 2005

Lisette Ackerberg
22466 Pacific Coast Highway
Malibu, California 90265

Dear Mrs. Ackerberg:

I write to follow up a March 28 letter from my colleague, Linda Locklin. That letter mistakenly referred to Terry Tamminen as your representative. I apologize for the misimpression on this point. I realize Terry is a longtime family friend and that his involvement merely represents a good faith effort to help find an amicable solution to the issue relating to the opening of the public access easement on your property. Indeed, I welcome his assistance. I am also aware of your recent sad loss, and regret the unfortunate timing of our letter.

As I understand the situation, our staff was concerned that certain improvements on your property that encroach into a public easement area would possibly not be removed prior to your possible disposition of the property. Obviously, what you do with your property is entirely within your discretion. The concern we have is that the issue relating to opening the public access easement be resolved prior to a potential transfer of the property. In deference to your personal situation, I think it appropriate to afford you a reasonable period of additional time to address our request that encroachments into the public access easement area be removed. I do, however, suggest that you or your representative contact Linda Locklin as soon as possible to discuss the timing of actions that need to be taken to resolve this matter.

Please don't hesitate to contact me if you have any questions.

Sincerely,

Peter Douglas

cc. Terry Tamminen
Linda Locklin
Steve Hudson
Pat Veesart
Sandy Goldberg
Steve Hoye, Access for All

Exhibit 10
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Page 1 of 1

CALIFORNIA COASTAL COMMISSION
STATEWIDE COASTAL ACCESS PROGRAM
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
(831) 427-4875

December 13, 2005

Edwin B. Resser, III
Sonnenschein, Nath & Rosenthal
601 South Figueroa Street
Suite 1500
Los Angeles, California 90017

Re: Vertical Public Access Easement and Survey at 22466 Pacific Coast Highway

Dear Mr. Reeser:

As you know, the firm of Quiros Surveying conducted a survey of the Vertical Public Access Easement located on the Ackerberg parcel on September 6, 2005. We understand that the Easement holder, Access for All, has sent a copy of this survey, dated October 12, 2005, to you. The survey shows that the 10 foot wide Vertical Public Access Easement ("Easement") contains the following encroachments:

1. A concrete slab, generator, and a portion of a ficus hedge, near the northern end of the Easement, adjacent to PCH;
2. A 9 ft. high block wall across the 10 foot wide Easement, near the northern end of the Easement, parallel to PCH;
3. Four light posts (noted as "LP" on the survey) within the Easement;
4. A post and raised railing (noted as "curtain post" on the survey) near the southern end of the Easement;
5. A portion of a Myoporum hedge near the southern end of the Easement;
6. A chain link fence over a wood planter near the southern end of the Easement;
7. Rip-rap rocks near the southern end of the Easement.

All of these encroachments prevent or impede Access for All from opening this Easement for public use. These encroachments must be removed in order to allow use of the recorded Public Access Easement. After the block wall across the Easement near PCH is removed, Access For All intends to install a fence with a gate that will allow public access over the Easement during daylight hours.

We also note that 8 feet of pavement is present within the Easement along nearly the entire length of the Easement. The Commission's records indicate that this area was paved prior to approval of CDP No. 5-84-754. Therefore, removal of the pavement is not required; however, the pavement within the Easement cannot be used as part of the private tennis court.

With respect to the rip-rap rocks near the southern end of the Easement, CDP No. 5-83-360 (Trueblood) authorized a new bulkhead with placement of a rock and gravel mix up to 12 inches in diameter extending approximately 5 feet seaward of the bulkhead. The survey indicates that there are currently large, exposed rocks seaward of the bulkhead on the property. These rocks are larger than 12 inches diameter, and therefore are not authorized by CDP No. 5-83-360. A copy of CDP No. 5-83-360 which includes the plan for the approved bulkhead and rocks is enclosed. We have also included a copy of the Lateral Offer to Dedicate Public Access Easement recorded pursuant to that permit, as well as the Certificate of Acceptance recorded by the State Lands Commission. All rocks located in the Vertical Easement that exceed those that were approved by the Trueblood CDP must be removed. We also note that these rocks extend the entire length of the property and are not in conformance with the Trueblood CDP. However, at this time we are only requesting removal of the rocks located in the 10 ft. wide Vertical Easement. We are reserving our rights to address these other rocks at some point in the future.

We request that you submit a plan by January 20, 2006, that describes, in detail, the steps your client has taken and intends to take in order to remove the encroachments. We request that all removal of encroachments from the Easement be completed within 120 days of submitting the plan to Commission staff.

Please do not hesitate to contact me if you want to discuss these issues in more detail.

Sincerely,

Linda Locklin
Coastal Access Program Manager

Cc: Steve Hoye, Access for All
Pat Veesart, CCC-Ventura

Sonnenschein
SONNENSCHEIN NATH & ROSENTHAL LLP

Edwin B. Reeser, III
213-892-5072
ereeser@sonnenschein.com

601 S. Figueroa Street
Suite 1500
Los Angeles, CA 90017-5704
213.623.9300
213.623.9924 fax
www.sonnenschein.com

Chicago
Kansas City
Los Angeles
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Washington, D.C.
West Palm Beach

January 19, 2006

VIA FACSIMILE & U.S. MAIL

Linda Locklin
Coastal Access Program Manager
California Coastal Commission
725 Front St., Suite 300
Santa Cruz, CA 95060

Re: Vertical Access Easement at 22466 Pacific Coast Highway, Malibu

Dear Ms. Locklin:

We are responding to your letter dated December 13, 2005 concerning the easement at the above-referenced property and your identification of encroachments within the easement that you maintain must be removed.

Mrs. Ackerberg has a number of reasonable questions and concerns about any potential opening of an accessway for public use and the effect such an opening would have on her private property. As you know, California Public Resources Code Section 30210 states that public access is to be "consistent with public safety needs and the need to protect . . . rights of private property owners." Additionally, Section 30212 states that public access is to be provided "except where it is inconsistent with public safety." Furthermore, Section 30214(a) states that public access policies "shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to" the topographic and geologic site considerations, "[t]he capacity of the site to sustain use and at what level of intensity," and "[t]he need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter." Finally, Section 30214(b) states that public access policies are to be "carried out in a reasonable manner that considers the equities" and that "balances the rights of the individual property owner with the public's constitutional right of access."

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Before removal of any items identified in your letter can proceed, we must receive from Access for All proof of adequate liability insurance coverage for the easement, as well as an agreement by AFA to indemnify the property owner. Furthermore, it is proper to discuss what amount of liability insurance coverage is appropriate for the easement. However, to determine the proper amount of coverage, one would first need to know how the easement is going to be improved and what the easement is going to look like. For example, does AFA intend to install stairs from the top of the seawall to the sand? The physical makeup of the easement will affect the determination of what amount of coverage is appropriate. Moreover, in determining the proper amount of liability coverage, it would be prudent to take into consideration the amounts of coverage provided for other vertical access easements in Malibu, as well as the number of claims made by persons injured using these other accessways. We believe that given these factors, it would be proper to have a third-party consultant determine what would be the appropriate amount of liability coverage for this easement. We are prepared to proceed in that fashion if you can timely provide the insurance information on other public accessways.

Additionally, we request that AFA submit to us a detailed management and operation plan for the easement (we are informed that AFA prepared a plan for the Geffen easement, so this is probably already either performed or contemplated). We would expect that such a plan would address issues relating to the easement such as hours of operation, types and amounts of liability and other insurance, upkeep, trash collection, graffiti removal, parking concerns, and public safety concerns such as sanitation, security for neighboring homes, and closure of the easement during periods of rough or extreme high tide. We would also expect the plan to address whether AFA intends to station beach monitors at the easement similar to the Geffen easement, and details about the gate and fence that AFA plans to install. For instance, it would seem appropriate for AFA to install a gate at the beach end of the easement as well as at the PCH end. Finally, we would also expect the plan to address whether AFA intends to install stairs or a ramp from the top of the seawall down to the sand, and if so, the kind of stairs/ramp AFA intends to install. Unlike the Geffen property, the easement over the Ackerberg property involves a drop. In this regard, we would inquire whether the provision of a ramp, or other improvements, are required to comply with the Americans With Disabilities Act.

Moreover, since it costs substantial amounts of money to open, maintain, and operate public access easements, it is reasonable for AFA to provide adequate assurance of its financial viability and ability to manage and operate the easement going forward. Although Public Resources Code Section 30212(a) provides for the ability of a private association to accept responsibility for the maintenance and operation of an accessway, implicit in this provision is a requirement that the association prove it is capable, financially and otherwise, to manage and operate the easement. See City of Malibu Local Coastal Program, Land Use Plan, Sections 2.70

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& 2.71 (referring to "appropriate" and "qualified" private associations). Therefore, we would request that AFA provide a copy of its most recent financial statements, and evidence of its sources of funds to long term support its obligations for this and other easements. Additionally, how is AFA qualified to manage and operate the Ackerberg easement? We are informed that AFA consists of three members and has no employees and no office. Also, has AFA prepared a budget estimating the costs to open the easement and the yearly costs of maintenance and operation? In this regard, how does AFA intend to pay for the opening of the easement and its management and operation going forward?

We understand that AFA has accepted OTDs for 5 other vertical access easements and 16 other lateral access easements. Does AFA plan to accept other OTDs and if so, how many? Given the number of easements AFA currently holds and intends to hold, it would be reasonable to inquire whether this would affect AFA's ability to effectively finance, manage, and operate the Ackerberg easement in perpetuity. Mrs. Ackerberg is understandably concerned that private associations such as AFA may not have the necessary resources, financial and otherwise, to manage and operate the accessway in perpetuity which would ultimately result in neglect to the easement and her private property, as well as impact on neighboring property.

We would also like to address certain of the "encroachments" that you identified in your letter and which you maintain must be removed. The generator to which you referred was installed to provide back-up power for the elevator in the house. For the last twenty-odd years of his life, Norman Ackerberg was unable to walk due to his multiple sclerosis, so the elevator was his only means of moving upstairs and downstairs. Now, Mrs. Ackerberg depends on the elevator as well due to her Parkinson's disease. The generator is needed to keep the elevator running through the frequent power outages in the area. 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. 22446 PCH is her primary residence, not a seasonal home. Without the generator, Mrs. Ackerberg fears she will be forced out of her present home.

As to the four light posts within the easement, there is a question of whether certain of these posts existed prior to the approval of CDP No. 5-84-754. A December 1983 survey of the property (then owned by Mr. Trueblood) performed by Mario Quiros shows the existence of some light posts at the eastern edge of the property line. Of course, those light posts which existed prior to the approval of the Ackerberg CDP would not be required to be removed. In any event, it is not apparent how any of these four light posts would "prevent or impede Access for All from opening the Easement for public use," since they run along the eastern edge of the easement and would not obstruct public passage through the ten-foot-wide easement.

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Additionally, the rip-rap rocks in front of the seawall are necessary to protect the Ackerberg property and adjacent properties from the often severe tidal conditions. Removal of the rip-rap rocks near the southern end of the property would compromise the seawall. Since the Ackerberg seawall is tied together with the seawalls of adjoining properties, removal of rip-rap rocks in front of the Ackerberg seawall could have a detrimental collateral effect on these adjoining properties. Moreover, Mrs. Ackerberg believes that some of these rocks were actually pre-existing underneath the sand, and have only been exposed in recent years due to the lower sand level at the beach.

Currently, the drop from the top of the seawall to the sand is approximately four feet, but it varies depending on the conditions, and the drop has been as much as twenty feet during periods of extreme tidal conditions (for example, during the El Niño storms of early 1995). Mrs. Ackerberg advises that the sand level is generally much lower than it used to be, and that a larger portion of the beach is "wet" compared to twenty years ago. The variation in drop will obviously be a problem if AFA intends to install stairs or a ramp from the top of the seawall to the sand. Moreover, based on the Ackerbergs' prior experience, if AFA intends to install wood "tear down" stairs, it is likely they will be washed away after only a few years. Given the amount of beach/shoreline erosion and the movement of the mean high tide line over the years, it would seem prudent to hire a consultant or engineer to determine the potential variation in distance from the top of the seawall to the sand and also to perform an analysis of the "wave uprush" at the Ackerberg property ("wave uprush" refers to the rush of water up onto the shoreline or a structure following the break of a wave) to determine if opening the easement is safe and feasible.

Finally, we believe that the time frame set forth in your letter for submission of a removal plan and actual removal of identified "encroachments" is unreasonable and unworkable. As you know, at the time David Geffen agreed to open the easement on his property, that easement was already improved, paved, and gated, with a gentle slope leading from the end of the easement to the sand. Thus, it was just a matter of turning over the keys to the gate and the easement was ready for public use. That is not the case with the Ackerberg easement. You have identified a number of significant "encroachments" that you maintain must be removed. Section 2.70 of the Land Use Plan portion of the Local Coastal Program sets a goal of opening an accessway within five years of its acceptance. Here, we are only two years removed from AFA's acceptance of the Ackerberg easement, and you have only just recently identified encroachments in the easement that you maintain must be removed. Moreover, as set forth above, there are a number of significant issues and questions that Mrs. Ackerberg has raised, which need to be satisfactorily addressed and answered before discussion of opening the easement for public use can move forward.

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We look forward to your response to these issues and questions, and would welcome a meeting with you and Access for All to discuss these, and other issues and questions, further. We are ready to get started.

Very truly yours,

Edwin B. Reeser, III

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CALIFORNIA COASTAL COMMISSION
STATEWIDE COASTAL ACCESS PROGRAM
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
(831) 427-4875

February 16, 2006

Edwin B. Reeser, III
Sonnenschein, Nath & Rosenthal
601 South Figueroa Street
Suite 1500
Los Angeles, California 90017

Re: Vertical Public Access Easement at 22466 Pacific Coast Highway

Dear Mr. Reeser:

Thank you for your letter dated January 19, 2006. In that letter, you raise a number of questions and request a number of documents. Let me begin by discussing some of the issues you raised and listing the documents that I believe address those issues:

1. Liability Insurance
Access for All maintains a Liability Policy for the 23 Public Access Easements they hold, including for the Ackerberg property. The amount of coverage is determined by Access for All and the carrier. A copy of that policy is attached. In addition I have enclosed a copy of "Limitations on Liability for Nonprofit Managers" published jointly by the Coastal Commission and Coastal Conservancy in 1997; this brochure discusses liability issues associated with public access easements.

2. Management Plan
For every Offer to Dedicate Public Access Easement accepted by a nonprofit organization, the Coastal Commission requires the submittal of a Management Plan. The Commission and the Coastal Conservancy must approve this plan. Details as to improvements (e.g. gates and signs) as well as monitoring and maintenance responsibilities are required elements of the Plan. Attached is the approved Management Plan, dated July 23, 2003, for the Ackerberg Easement. As you can see, the implementation is phased; Phase 1 required the survey to identify the encroachments and Phase 2 (now) includes encroachment removal and identification of the public access improvements. Once the improvements are identified, then the Management Plan will be amended to reflect those improvements.

3. Funding
Access for All has received two grants from the State Coastal Conservancy. The first grant was approved on December 2, 2004 and authorized $35,000 for a variety of site design tasks to

develop four coastal accessways in Malibu, including the Easement on the Ackerberg property. A second grant was approved on October 27, 2005 for $70,000 for site design tasks for four coastal accessways in Malibu. Copies of the Staff Recommendations for both grants are attached.

4. Qualifications
Access for All applied to the Executive Director of the Coastal Commission on July 25, 2000 to be considered as a nonprofit organization acceptable to accept and operate Offers to Dedicate Public Access Easements. After reviewing the submittal from Access for All and reviewing their qualifications, the Executive Director approved them to an acceptable agency on September 15, 2000. The submittal from Access for All and the Executive Director approval letter is attached.

5. Public Access Easements
Access for All has accepted 23 Offers to Dedicate; 21 are located in Malibu (16 are lateral along the shoreline and 5 are verticals). To date, only one vertical Easement (on David Geffen's parcel) has been opened. They have also accepted one lateral Easement in Santa Monica and one in San Diego. The location of these Public Access Easements are shown in the attached spreadsheet. We expect that Access for All will continue to accept Offers to Dedicate and to manage these easements into the future.

6. Long Term Responsibility for the Easement
The Certificate of Acceptance includes provisions for future disposition of the Easement should Access for All cease to exist or fail to carry out its responsibilities as Grantee. On page 3 of the Certificate it states that if Access for All does not manage the easement in accordance with July 23, 2003 Management Plan, then all of Access for All's right, title and interest in the Easement shall vest in the State of California, acting by and through the Conservancy. A copy of the Certificate of Acceptance is attached.

I hope this discussion and the documents I have provided give you sufficient information about the steps that the State has taken to allow Access for All to accept the Easement, as well as how Access for All will open and operate the Accessway.

As for the series of questions you raised about the specifics of constructing new public access gates, signs, hours of operation, stairs/ramp, etc, I suggest that we set a meeting to discuss these details. Along with myself, Steve Hoye of Access for All and Joan Cardellino of the State Coastal Conservancy could attend. At this point, the State and Access for All are ready and prepared to move ahead with opening this Public Access Easement.

Ackerberg Encroachments
As we have previously discussed, a necessary step in the process is your client's agreement to timely removal of the identified encroachments. At a minimum, it will be necessary to remove 10 ft. of perimeter wall and relocate the generator to a location outside the Easement area. As for the light posts and potential ramp or stairs over the unauthorized rip rap, we can discuss these issues during an on-site visit or at the meeting I suggested above.

In conclusion, we are encouraged by your readiness to move forward and your willingness to continue efforts to resolve this informally, without resorting to a formal enforcement proceeding. We are confident that we can resolve these issues amicably and in a way that is consistent with the permit and Coastal Act. We hope to do so very soon, and of course, prior to any sale of the property. Since we would both like to resolve these issues quickly, we are ready to meet with you in the next 30 days. Please call me to discuss meeting times and location or if you have any questions about this letter.

Sincerely,

Linda Locklin
Coastal Access Program Manager

Cc: Steve Hoye, Access for All
Joan Cardellino, State Coastal Conservancy
Sandy Goldberg, CCC-Staff Attorney
Lisa Haage, CCC-Enforcement, San Francisco
Pat Veesart, CCC-Enforcement, Ventura

Sonnenschein
SONNENSCHEIN NATH & ROSENTHAL LLP

Edwin B. Reeser, III
213-892-5072
ereeser@sonnenschein.com

601 S. Figueroa Street
Suite 1500
Los Angeles, CA 90017-5704
213.623.9300
213.623.9924 fax
www.sonnenschein.com

Chicago
Kansas City
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Washington, D.C.
West Palm Beach

March 23, 2006

VIA FACSIMILE & U.S. MAIL

Linda Locklin
Coastal Access Program Manager
California Coastal Commission
725 Front St., Suite 300
Santa Cruz, CA 95060

Re: 22466 Pacific Coast Highway, Malibu

Dear Ms. Locklin:

We have reviewed your letter dated February 16, 2006 (received February 22, 2006) and accompanying documents regarding vertical access for the above-referenced property. Your letter and documents raise a number a couple of new questions and issues which, along with those raised in our previous January 19, 2006 letter to you, can serve as a framework for our meeting with you and representatives from Access for All and the California Coastal Conservancy.

1. Insurance and Indemnification

The Chubb liability policy maintained by AFA contains no specific reference as to which easements held by AFA are covered under the policy. Presuming that AFA intends for this liability policy to cover all easements held by AFA, we would request that Chubb be notified upon AFA's opening of the Ackerberg easement for public use. It would also seem appropriate that AFA and the Coastal Commission agree that should the liability policy lapse for any reason, the easement will be immediately closed.

You state that the $2,000,000 "general aggregate" and $1,000,000 "each occurrence" limits on the policy were "determined by AFA and the carrier." However, the yearly premium for such liability coverage was not set forth in the policy information you provided. Given that a

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typical homeowner might have an individual liability policy for these coverage amounts, we would inquire whether these policy limits provide sufficient coverage for the Ackerberg easement given the hazardous conditions inherent to the easement, such as the seawall, the significant (and variance in) drop from the top of the seawall to the sand, and the periodic extreme tidal and shoreline conditions, as well as the fact that the easement begins at the edge of a busy highway and will be for open for public use. In light of these unique conditions, we again raise the question whether a third-party consultant would be in the best position to determine appropriate coverage limits for the Ackerberg easement. In addition to the unique conditions inherent in the Ackerberg easement, we would think such a consultant would want take into consideration the number and nature of claims arising from public use of similar beach accessways.

Your letter also did not address whether AFA would agree to indemnify the property owner as a condition for opening the Ackerberg easement for public use. What is AFA's position on indemnification of the property owner?

2. Encroachments and Improvements

We appreciate AFA's statement in its 2003 Management Plan for the Ackerberg easement that it "will work with the property owner to design" necessary improvements. We look forward to discussing with you and AFA the "encroachments" identified in your December 13, 2005 letter, issues relating to gates, signs, and hours of operation, and whether AFA intends to install and maintain a ramp or stairs from the top of the seawall down to the sand, as would seem necessary for pedestrian traffic, and whether such an improvement must be ADA compliant. The Coastal Conservancy, in its Staff Recommendations recommending grant awards to AFA, has itself recognized the potential need to install stairs at other vertical access easements in Malibu, such as the easement at 19106 Pacific Coast Highway. We also look forward to discussing issues relating to the seawall, rip-rap rocks, and the impact of the unique beach and tidal conditions on the feasibility and safety of opening the easement for public use, all of which you do not address in your letter. On a related subject, AFA's July 2000 application to the Coastal Commission for authorization to accept Offers to Dedicate refers to "site-specific feasibility studies" that were to be undertaken for each easement AFA planned to open and operate. Has AFA prepared such a "feasibility study" for the Ackerberg easement?

3. Operation and Maintenance

Although we understand that AFA is to amend its Management Plan once removal of encroachments and improvements to the easement take place, we do not view the current Plan as sufficiently detailed concerning AFA's intended operation and maintenance of the Ackerberg

easement. For instance, the Plan fails to address any issues relating to graffiti removal, parking, sanitation and toilets, security for neighboring homes, lifeguards, and closure of the easement during periods of rough or extreme high tide.

Additionally, the Plan does not indicate whether AFA plans to install gates both at the beach end and the PCH end of the easement, as exist at the Geffen easement. Moreover, although the Plan states that the easement is to be "monitored," AFA does not provide any further details as to its "monitoring" plans. For instance, does AFA plan to station monitors at the easement, as it did during peak season at the Geffen easement?

AFA's Management Plan also states that a "time-lock mechanism" will operate the gate that is to be constructed on the PCH side of the Ackerberg easement. We have observed AFA's representations over the last few years that it plans to install a similar "time-lock mechanism" for the gates at the Geffen easement, but note that no such mechanism has been installed there yet. Given AFA's apparent efforts to develop such a mechanism with a local college professor, since admittedly such a mechanism has never been used in an outdoor, marine environment, what are AFA's current plans for installation of such a mechanism on gates to the Ackerberg easement? Additionally, what provisions will AFA make in the event such an installed mechanism malfunctions or is damaged?

Finally, AFA's Management Plan states that on February 1 of each year, it is to submit an annual report to the Coastal Commission and Coastal Conservancy staff detailing its activities with regards to vertical access easements. Please provide us with copies of all such annual reports AFA has submitted concerning the Ackerberg easement, including its 2006 report.

4. Long-Term Funding

Although it appears from the documents you provided that the Coastal Conservancy awarded two separate grants to AFA in December 2004 and October 2005 in the amounts of $35,000 and $70,000, we are concerned by the fact that nothing in the information you provided reflects AFA's sources of long-term funding for operation and maintenance of all the easements it holds or intends to hold, including the Ackerberg easement. As the Conservancy's Staff Recommendations for the 2004 and 2005 grants pointed out, the costs inherent in maintaining and operating beach accessways are so significant that Los Angeles County has refused to accept responsibility for any new easements over the last several years, citing insufficient funding. Indeed, according to the Conservancy's October 2005 Staff Recommendation, "a significant portion" of the December 2004 grant of $35,000 was used up by AFA over a period of few months just to open the Geffen easement for public use.

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The Conservancy Staff Recommendations demonstrate that AFA is almost entirely dependent on Conservancy grant money at the present time for funding. The Conservancy Staff Recommendations reflect that AFA has raised, or plans to raise, only $6,000 in in-kind contributions to fund its planned activities, compared to the $105,000 in total grant money awarded by the Conservancy to AFA. However, in AFA's July 2000 application letter to the Coastal Commission requesting authorization to accept OTDs and operate public accessways, AFA stated that it only planned to apply for grant assistance from the Conservancy through 2005, that it "hop[ed] to eventually become self-sustaining" financially through "personal solicitation fundraising," and that its "fundraising program has already begun with solicitation of private foundations through grant proposals for start-up funding" and it intended to "initiate a personal solicitation fundraising program which will include: Direct Mail; Major Gift Club; Planned Giving/Estate Gift Solicitation; [and] Capital Campaign for Endowment."

As we are now in 2006 – six years after AFA's formation and the Coastal Commission's approval of AFA to accept OTDs and manage public accessways -- it is reasonable to inquire as to the sources of funding for AFA's activities in the long term. How much money has AFA raised from private sources for its past and future activities, and how much does AFA plan to allocate from these privately raised funds to operate and manage the Ackerberg easement? Does AFA intend to continue to seek funding from the Coastal Conservancy to support its activities, even though AFA represented in its application to the Coastal Commission that it would only seek such funding through 2005? Does the Coastal Conservancy plan to continue to fund AFA for the foreseeable future or in perpetuity? Moreover, has AFA prepared itemizations of how it has spent Conservancy grant money thus far? If so, we would like copies of those records as well. We would also renew our request for copies of AFA's recent financial statements and AFA's budget estimating the costs to open the Ackerberg easement and the yearly costs of its maintenance and operation.

5. Staffing/Personnel

In AFA's July 2000 application letter to the Coastal Commission, Mr. Hoye states that AFA intended to "expand its Board." Has AFA has expanded its Board from the original three directors in place at the time of its incorporation? We also note from AFA's application letter that its original intent was to "initially contract out the opening, closing and maintenance of access sites" to Los Angeles County, but that "gradually . . . [the] plan is to hand this job over to local volunteers." We would like to know whether the County has agreed to initially perform these duties at the Geffen easement and whether the County has agreed to perform a similar function for the Ackerberg easement. Furthermore, given AFA's stated plan to recruit volunteers "to assist with maintenance and monitoring of its access sites" and our awareness that AFA has

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attempted to solicit volunteers to assist with its accessways, we would also inquire as to how many active volunteers AFA has recruited and how many of these volunteers will assist with the long-term maintenance and monitoring of the Ackerberg accessway.

In light of these funding and staffing issues, and given that (1) AFA has only recently opened the first of five vertical access easements in Malibu where it has accepted Offers to Dedicate, (2) it intends on opening these remaining four accessways, and (3) it intends to accept new Offers to Dedicate and to manage these easements in the future, Mrs. Ackerberg's concern about AFA's ability to adequately finance, maintain, and operate the easement through her property in perpetuity is entirely reasonable. Your February 17, 2006 letter does not adequately address her concerns in this regard.

6. AFA's Forfeiture of Interest in Ackerberg Easement

AFA's Certificate of Acceptance of the Ackerberg OTD provides that "should [AFA] cease to exist or fail to carry out its responsibilities as Grantee to manage the easement . . . , then all of [AFA's] right, title and interest in the easement shall vest in the State of California, acting by and through the Conservancy or its successor, upon acceptance thereof," provided, however that the State can designate another public agency or private association acceptable to the Commission, in which case vesting shall be in that agency or organization rather than the State. The questions that are posed by this provision are twofold. First, how would the funding, operation, and maintenance of the Ackerberg easement be affected if the State accepts AFA's interest in the easement? Second, what happens to the Ackerberg easement if the State does not accept AFA's interest in the easement, and no other public agency or qualified private association steps forward to take over funding, operation, and management of the easement?

Additionally, under the Certificate of Acceptance, AFA's right, title and interest in the Ackerberg easement cannot be taken away except upon (1) a finding by the Conservancy, made at a noticed public hearing, that AFA has ceased to exist or failed to carry out its responsibilities, and (2) recordation by the State or another designated agency or entity of a Certificate of Acceptance. Under this scenario, it appears likely that if AFA were to abandon its obligation to operate and manage the easement (via ceasing to exist or otherwise), there would be a significant period of time before its rights to the easement are actually taken away, leaving the easement without active management and in danger of serious neglect during this intervening period. The Certificate of Acceptance fails to take into account such a situation.

We are ready to meet with you, Mr. Hoye, and Ms. Cardellino to discuss these issues and those we have raised in our previous letter to you. Although we do not feel that Mrs. Ackerberg's presence is necessary at this meeting, it will be difficult for us to communicate with

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her during the month of May as she will be out of town for that entire month, so you might want to take that into consideration for the timing of our meeting.

We look forward to meeting with you.

Very truly yours,

Edwin B. Reeser, III

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Sonnenschein
SONNENSCHEIN NATH & ROSENTHAL LLP

601 S. Figueroa Street
Suite 1500
Los Angeles, CA 90017-5704
213.623.9300
213.623.9924 fax
www.sonnenschein.com

Chicago
Kansas City
Los Angeles
New York
San Francisco
Short Hills, N.J.
St. Louis
Washington, D.C.
West Palm Beach

Edwin B. Reeser, III
213-892-5072
ereeser@sonnenschein.com

April 3, 2006

VIA FACSIMILE & U.S. MAIL

Linda Locklin
Coastal Access Program Manager
California Coastal Commission
725 Front St., Suite 300
Santa Cruz, CA 95060

Re: 22466 Pacific Coast Highway, Malibu

Dear Ms. Locklin:

On Friday, March 31, 2006, we received a summons and complaint filed on March 29 by Jack Roth, Lisette Ackerberg's neighbor, naming the Coastal Commission, the Coastal Conservancy and Access for All as defendants (and Mrs. Ackerberg and the Lisette Ackerberg Trust as real parties in interest) in a lawsuit relating to opening of vertical access through Mrs. Ackerberg's property. Given that this lawsuit will certainly complicate our discussions concerning vertical access and that Mr. Roth seeks a preliminary injunction as part of his requested relief, we would inquire whether it would be prudent to meet at this time with you and representatives of the Coastal Conservancy and Access for All as originally planned, or whether such a meeting should be continued to a later date.

Further complicating scheduling such a meeting is that Mrs. Ackerberg has advised that she will be celebrating Passover at her home with family from April 12 through April 20, during which time she will have houseguests, and I will be out of the country from May 8 through May 15. I further understand that you will be on vacation beginning the week of April 24. We can explore with Mrs. Ackerberg whether she is amenable to opening up her property while she is out of town during the month of May so that the parties can jointly discuss issues relating to the physical layout of her property and the proposed accessway. Please advise after consultation with your counsel when would be an appropriate date for such a meeting. Furthermore, now that

Exhibit 15
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

litigation has commenced, please advise whether we should continue to speak with you directly concerning this matter or solely through your counsel.

Very truly yours,

Edwin B. Reeser, III

30264687

CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800

NOTICE OF VIOLATION OF THE CALIFORNIA COASTAL ACT
REGULAR AND CERTIFIED MAIL

5 March 2007

Lisette Ackerberg
22466 Pacific Coast Highway
Malibu, CA 90265

Edwin B. Reeser, III
Sonnenschein, Nath, and Rosenthal
601 South Figueroa Street, Suite 1500
Los Angeles, CA 90017

Violation File Number:	V-4-07-006
Property location:	22466 Pacific Coast Highway; City of Malibu; County of Los Angeles; APN 4452-002-013
Unpermitted Development:	Rock rip-rap, 9-foot high block wall, concrete slab and generator, fence, railing, planter, and landscaping located within vertical and lateral public access easements.

Dear Ms. Ackerberg and Mr. Reeser:

Our staff has confirmed that there is development that has been undertaken on the above-referenced property without a Coastal Development Permit (CDP), and moreover, which is inconsistent with the terms and conditions of Coastal Development Permit No. 5-84-754 which was approved by the Coastal Commission on January 24, 1985. That permit required you to record a vertical public access Offer to Dedicate in order to mitigate the impacts of construction of your (then) new home located at 22266 Pacific Coast Highway in the City of Malibu. The Irrevocable Offer to Dedicate was recorded by you and your husband in 1985, and was formally accepted by Access for All in 2003. As you know, Access for All is now prepared to develop the public access easement and open it for public use.

As you are aware, there has been a great deal of correspondence regarding this issue between the Commission, Mr. Reeser, and Access for All over the last two years. We believe that there has been a thorough discussion of the issues in that correspondence and that there is no need to revisit those discussions in this letter. The basic issue is that Access for All (the easement holder) is now prepared to open the public access easement for public use, as provided for in the permit, and therefore, you[1] must now remove the unpermitted development located within said easement that would impair public access in order for Access for all to proceed.

[1] The property owner: Mrs. Ackerberg

The unauthorized development on your property includes:

1. The placement of rock rip-rap in both the lateral and vertical access easements. On June 9, 1983, the Commission approved CDP No. 5-83-360 which authorized the construction of a 140-foot long wooden bulkhead. The approved plans allowed rock and gravel wastemix, ¾" to 12" in diameter seaward of the bulkhead, and an overtopping blanket of rocks 1' to 2' in diameter landward of the bulkhead. The rock rip-rap in place today does not conform to the approved plans of CDP No. 5-83-360. Please see our letter to you dated December 13, 2005.
2. The placement of a concrete slab and generator, adjacent to PCH, at the northern end of the easement. The City of Malibu apparently issued an electrical permit for the generator in 1998, however, there is a note attached which indicates that the project is "beyond rec'd setbacks" and the permit is stamped "expired." Regardless, no CDP was issued for the slab and generator, and it is located within the area specifically identified as the location of the vertical accessway.
3. The placement of a 9-foot high block wall across (blocking) the easement at the northern end of the easement along PCH. Neither the City of Malibu nor the Commission issued a CDP for the block wall.
4. The placement of fences, railings, landscaping and planters in the easement. Neither the City of Malibu nor the Commission has issued CDPs for fences, planters, railings, etc. which block the easement or which could potentially impede public pedestrian access to the shoreline.

Standard Condition Three (3) of CDP No. 5-84-754 states:

> ***All development must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval*** **(emphasis added).**

The above-mentioned development was not approved in any CDP and moreover, is not consistent with the development approved by the Commission pursuant to CDP Nos. 5-84-754 and 5-83-360. In fact, it is directly inconsistent with Special Condition one (1) of CDP No. 5-84-754 which states:

> ***Vertical Access Condition. Prior to transmittal of the permit, the Executive Director shall certify in writing that the following conditions have been satisfied. The applicant shall execute and record a document, in a form and content approved by the Executive Director of the Commission, irrevocably offering to dedicate to an agency approved by the Executive Director, an easement for public pedestrian access to the shoreline. Such easement shall be 10 feet wide located along the eastern boundary of the property line and extend from the northerly property line to the mean high tide line. Such easement shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed.***
>
> ***The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of 21 years, such periods running from the date of recording.***

Please be advised that non-compliance with the plans, terms, and conditions of an approved permit constitutes a violation of the Coastal Act.

Additionally, the Irrevocable Offer to Dedicate recorded on April 4, 1985 as Document No. 85-369283 states (in relevant part):

> ***NOW THEREFORE, in consideration of the granting of permit no. 5-84-754 to the owner(s) by the Commission, the owner(s) hereby offer(s) to dedicate to the People of California an easement in perpetuity for the purpose of public pedestrian access to the shoreline.***

In most cases, a violation involving non-compliance with an approved coastal permit may be resolved administratively by applying for and obtaining an amendment to the previously issued coastal permit to either authorize the unpermitted changes to the approved project and/or to remove the unpermitted development and restore the site. However, the Coastal Act specifically requires the Executive Director to reject amendments which would "lessen or avoid the intended effect of an approved permit" (section 13166 of the Coastal Act implementing regulations). Thus, an application to amend CDP No. 5-84-754 to authorize the subject development is not an option here.

In this case, the unpermitted development is located within vertical and lateral public access easements, blocks or impedes public access, and is directly inconsistent with the intended effect of the original permit condition of providing public pedestrian access to the shoreline. Therefore, in order to resolve this matter in a timely manner and avoid the possibility of a monetary penalty or fine, we are requesting that you submit, by **April 6, 2007,** an as-built site plan and a detailed plan and project description for removal of the unauthorized development. Upon receipt of said plan, staff will review it and make a determination as to whether a CDP or an amendment to CDP No. 5-85-754 will be required to authorize the work. Please contact me by no later than **March 23, 2007** regarding how you intend to resolve this violation.

We hope that you will choose to cooperate in resolving this violation by submitting a detailed plan as requested above. If you do not, we will be forced to consider pursuing additional enforcement actions to resolve the matter. The Coastal Act contains many enforcement remedies for Coastal Act violations. Section 30803 of the Act authorizes the Commission to maintain a legal action for declaratory and equitable relief to restrain any violation of the Act. Coastal Act section 30809 states that if the Executive Director determines that any person has undertaken, or is threatening to undertake, any activity that may require a permit from the Coastal Commission without first securing a permit, the Executive Director may issue an order directing that person to cease and desist. Coastal Act section 30810 states that the Coastal Commission may also issue a cease and desist order. A cease and desist order may be subject to terms and conditions that are necessary to ensure compliance with the Coastal Act. Moreover, section 30811 authorizes the Commission to order restoration of a site where development occurred without a permit from the Commission, is inconsistent with the Coastal Act, and is causing continuing resource damage.

In addition, section 30820(a) provides for civil liability to be imposed on any person who performs or undertakes development without a coastal development permit or in a manner that is inconsistent with any coastal development permit previously issued by the Commission in an amount that shall not exceed $30,000 and shall not be less than $500 per violation. Section 30820(b) provides that additional civil liability may be imposed on any person who performs or undertakes development without a coastal development permit or that is inconsistent with any coastal development permit previously issued by the Commission when the person intentionally and knowingly performs or undertakes such development, in an amount not less than $1,000 and not more than $15,000 per day for each day in which each violation persists. Section 30821.6 provides that a violation of either type of cease and desist order or of a restoration

order can result in the imposition of civil fines of up to $6,000 for each day in which each violation persists. Section 30822 allows the Commission to maintain a legal action for exemplary damages, the size of which is left to the discretion of the court. In exercising its discretion, the court shall consider the amount of liability necessary to deter further violations.

Finally, the Executive Director is authorized, after providing notice and the opportunity for a hearing as provided for in Section 30812 of the Coastal Act, to record a Notice of Violation against your property.

We would strongly prefer to resolve this matter amicably and look forward to hearing from you. Thank you for your attention to this matter. If you have any questions regarding this letter or the pending enforcement case, please feel free to contact me.

Sincerely,

N. Patrick Veesart
Enforcement Supervisor

cc: **Lisa Haage, Chief of Enforcement**
Gary Timm, District Manager
Linda Locklin, Public Access Manager
Alex Helperin, Staff Counsel
Barbara Carey, Supervisor, Planning and Regulation
Steve Hudson, Supervisor, Planning and Regulation
Tom Sinclair, District Enforcement Officer

Enc: **CCC letter to Edwin B Reeser dated December 13, 2005**
Trueblood - Offer to Dedicate pursuant to CDP No. 4-83-360
Ackerberg - Offer to Dedicate pursuant to CDP No. 4-85 754
Access For All - Certificate of Acceptance – Ackerberg OTD
State Lands Commission – Certificate of Acceptance – Trueblood OTD

Sonnenschein
SONNENSCHEIN NATH & ROSENTHAL LLP

Edwin B. Reeser, III
213-892-5072
ereeser@sonnenschein.com

601 South Figueroa Street
Suite 1500
Los Angeles, CA 90017-5704
213 623.9300
213 623.9924 fax
www.sonnenschein.com

March 22, 2007

VIA FACSIMILE & U.S. MAIL

N. Patrick Veesart
Enforcement Supervisor
California Coastal Commission
South Central Coast Area
89 South California St., Suite 200
Ventura, CA 93001

Re: 22466 Pacific Coast Highway, Malibu, California

Dear Mr. Veesart:

We have received your March 5, 2007 "Notice of Violation of the California Coastal Act" addressed to Lisette Ackerberg and me.

As you are no doubt aware, on March 29, 2006, Jack Roth filed a lawsuit against the California Coastal Commission, California Coastal Conservancy, and Access for All (in which he also named Lisette Ackerberg and the Lisette Ackerberg Trust as Real Parties in Interest), seeking to revoke and invalidate the ten-foot-wide vertical access easement that runs along the eastern boundary of Mrs. Ackerberg's property line and to enjoin the defendants from opening the easement for public use. Mr Roth appealed Judge Yaffe's November 2, 2006 dismissal of his lawsuit to the Second District Court of Appeal, Appeal No. B195748, and the parties are currently waiting for the Court of Appeal to set a briefing schedule.

Until Mr. Roth's lawsuit 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. Although you state that Access for All "is now prepared to develop the public access easement and open it for public use" and that the alleged "unpermitted development" on Mrs. Ackerberg's property "would impair public access" to the easement, should Mr. Roth

Sonnenschein
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prevail in his lawsuit, the Coastal Commission, Coastal Conservancy, and AFA would have no right to open the easement for public use.

Forcing Mrs. Ackerberg to remove all items within the easement (or imposing penalties against Mrs. Ackerberg for her failure to do so) before final resolution of Mr. Roth's lawsuit would cause irreparable harm to Mrs. Ackerberg. Mrs. Ackerberg would lose the benefits of a successful legal challenge by Mr. Roth should she be forced to remove such items as the generator, block wall, fences, and landscaping located within the easement (or forced to incur penalties for her failure to remove such items) before Mr. Roth's lawsuit is adjudicated to a final judgment. On the other hand, the Coastal Commission, Coastal Conservancy, and AFA will not be unduly prejudiced or suffer any irreparable harm by waiting for final resolution of Mr. Roth's lawsuit before taking further action concerning the easement. Indeed, nearly nineteen years elapsed before the Coastal Commission, Coastal Conservancy, and AFA decided to act on the offer to dedicate.

Moreover, should Mr. Roth prevail in his lawsuit, Mrs. Ackerberg would have available to her the option to apply for and obtain an amendment to the previously issued coastal permit to authorize any unpermitted development. Your statement that such an administrative procedure is available "[i]n most cases," but is "not an option here" because such amendment would "lessen or avoid the intended effect of the approved permit," is premature given that Mr. Roth's lawsuit has not been adjudicated to final judgment. Should Mr. Roth prevail in his lawsuit, such an administrative remedy would not "lessen or avoid the intended effect of the approved permit," because the easement would have been declared invalid and its opening for public use would be permanently enjoined.

Finally, it should be noted that 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." Both Coastal Commission commissioners and staff agreed to this use at the January 24, 1985 hearing on the Ackerbergs' coastal permit, which agreement is memorialized in my January 28, 1985 letter to Gary Gleason of the Coastal Commission (a copy of which was attached to Ms. Locklin's March 28, 2005 letter). Both Ms. Locklin's letter and Mr. Reeser's letter are attached for your reference. Moreover, the plans for the Ackerberg development that were submitted to the Coastal Commission in 1984/85 in conjunction with the Ackerbergs' coastal development permit application contemplated the erection of items such as the block wall, fences, railings, and landscaping (copies of relevent segments of those plans are attached). Accordingly, we object to the Coastal Commission's assertion that any and all items on Mrs. Ackerberg's property within the ten-foot-wide easement are *per se* unauthorized and unpermitted.

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We would welcome further discussion with you concerning the appropriateness of Coastal Commission action on the vertical access easement, including demanding that Mrs. Ackerberg remove all items that lie within the easement, while Mr Roth's appeal is pending.

Very truly yours,

Edwin B. Reeser, III

cc: Lisette Ackerberg
Peter Sheridan

Enclosures

3029056]

STATE OF CALIFORNIA – THE RESOURCES AGENCY Arnold Schwarzenegger, Governor

CALIFORNIA COASTAL COMMISSION
STATEWIDE COASTAL ACCESS PROGRAM
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
(831) 427-4875

March 28, 2005

Lisette Ackerberg
22466 Pacific Coast Highway
Malibu, California 90265

Re: Vertical Public Access Easement at 22466 Pacific Coast Highway, Malibu

Dear Mrs. Ackerberg:

I am following up on the letter sent to you in December 2003 from the nonprofit organization Access for All. In that letter, Access for All (AFA) informed you that they had accepted the vertical Offer to Dedicate Public Access Easement recorded by you and your husband in 1985. (Certificate of Acceptance recorded on December 17, 2003 as Document No. 03-3801416). The easement is a ten foot wide strip of property along the entire eastern border of your property. The Executive Director of AFA, Steve Hoye, requested a meeting so that AFA could conduct a survey of the easement, in preparation for opening the easement to the general public. Since that time, Mr. Hoye has been in discussion with your representative, Terry Tamminen, and informed him that AFA requests your permission to enter the property to conduct a survey of the easement. Of course, we know that Mr. Tamminen is extremely busy, and we do not know if he has discussed this with you yet. Nevertheless, AFA has not received your permission for conducting the survey.

I am writing to remind you that the Coastal Commission imposed a permit condition requiring the recording of this public access easement in order to mitigate the impacts of constructing your new home (Coastal Development Permit 5-84-754). Both the Coastal Commission and the Coastal Conservancy have approved AFA to open and operate this accessway; the Conservancy has provided AFA with a grant to perform a survey and install a pedestrian gate and public access signage. Therefore AFA is ready to take on the responsibilities to open and operate this easement. In order for this to occur, you must remove any structures that have been placed or built in the easement. A cursory look at your property shows that both a front yard and a backyard perimeter wall block the easement. These must be removed. The edge of the tennis court, lights and a generator might also be in the easement area. 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 17
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Page 4 of 14

We have reached the time to open this public accessway. I am requesting that you, or your representative, contact us within the next 30 days to inform us when AFA and their surveyor can enter your property and conduct the survey. Once the survey has been completed, if any additional encroachments in the easement are identified (i.e., tennis court, lights and/or generator), they must be removed expeditiously.

Failure to promptly remove the front and backyard wall in the easement and any other encroachments that are identified constitutes a violation of the Coastal Act of 1976. Under Public Resources Code section 30812 (copy enclosed), if efforts to resolve the matter are not successful, the Coastal Commission has the authority to record a notice of violation against the property that has the unpermitted development on it, to ensure that any potential buyer is aware of the situation.

I hope that we resolve this issue in the near term. Please contact me if you want to discuss this matter in more depth.

Sincerely,

Linda Locklin
Coastal Access Program Manager

Cc: Steve Hoye, Access For All
Steve Hudson, CCC-Ventura
Pat Veesart, CCC-Ventura
Sandy Goldberg, CCC Legal Counsel
Terry Tamminen

Exhibit 17
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Page 5 of 14

DENNIS, JUAREZ, REESER, SHAFER & YOUNG
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ATTORNEYS AT LAW
SUITE 1900
2049 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067

LUCINDA DENNIS*
L. MORRIS DENNIS*
GEORGE A. JUAREZ
EDWIN G. REESER, III
ALAN M. SHAFER
THOMSEN YOUNG
WILLIAM S. CREIM
PHYLLIS J. BERSCH
ELSA R. JONES
DAVID L. MORGAN
GENTRY YOUNG
*A PROFESSIONAL CORPORATION

TELEPHONE
(213) 557-1900
TELEX
698280
TELECOPIER
(213) 552-0621

January 28, 1985

RECEIVED
JAN 30 1985
CALIFORNIA
COASTAL COMMISSION
SOUTH COAST DISTRICT

Mr. Gary Gleason
California Coastal Commission
South Coast District
245 West Broadway, Suite 380
Long Beach, California 90801-1450

Re: Lisette & Norman Ackerberg
Site: 22466 Pacific Coast Highway
Application: 5-84-754

Dear Mr. Gleason:

Pursuant to the unanimous decision of the Commission at the January 24, 1985 hearings at the Laguna City Council Chamber, the application for the above project has been approved. However, it is my understanding from the proceedings of that hearing that Staff is instructed to revise its findings in several particulars as requested by Commissioners McInnis, Nutter and Wright, among others, in consideration of issues addressed in my letter to you dated January 24, 1985.

Specifically, language should be put in the staff report as to the desirability of opening accessways already owned by the public before the opening of private accessways; particularly where the burden on the private property owner is substantial.

Second, there was considerable discussion by Commissioners at the hearing about the extinguishment of offers to dedicate where adequate nearby access is developed; or where after adoption of a Malibu Land Use Plan it may be determined that further access is not required.

Third, 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.

There is no question in my mind that the issues raised at the hearing are critical not only to the Ackerbergs, but to the Commission and its efforts to adopt a Land Use Plan for Malibu. As the merits of these issues were not decided, but rather

Mr. Gary Gleason
Re: Lisette & Norman Ackerberg

January 28, 1985
Page Two

deferred for consideration under the process of adoption of a Land Use Plan for Malibu, it is absolutely necessary for the property rights of the Ackerbergs to be protected pending the determination of vertical access policies by the Commission. I believe that the Commissioners so agree, and that is the purpose of the additional findings.

Finally, I would like to obtain a copy of the transcript of that portion of the hearing which concerned the Ackerberg application.

Very truly yours,

DENNIS, JUAREZ, REESER, SHAFER & YOUNG

Edwin B. Reeser, III

EBR:lg

cc: Norman & Lisette Ackerberg
Richard Sol

Exhibit 17
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Page 7 of 14

PUBLIC RESOURCES CODE
DIVISION 20
CALIFORNIA COASTAL ACT
(2005)

Exhibit 17
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Section 30809 Ex parte cease & desist orders; notice; terms and conditions; time of effectiveness; duration

(a) If the executive director determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) may require a permit from the commission without securing a permit or (2) may be inconsistent with any permit previously issued by the commission, the executive director may issue an order directing that person or governmental agency to cease and desist. The order may be also issued to enforce any requirements of a certified local coastal program or port master plan, or any requirements of this division which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:

(1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.

(2) The commission requests and the local government or port governing body declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources.

(3) The local government or port governing body is a party to the violation.

(b) The cease and desist order shall be issued only if the person or agency has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity. The notice shall include the following:

(1) A description of the activity which meets the criteria of subdivision (a).

(2) A statement that the described activity constitutes development which is in violation of this division because it is not authorized by a valid coastal development permit.

(3) A statement that the described activity be immediately stopped or the alleged violator may receive a cease and desist order, the violation of which may subject the violator to additional fines.

(4) The name, address, and phone number of the commission or local government office which is to be contacted for further information.

(c) The cease and desist order may be subject to such terms and conditions as the executive director may determine are necessary to avoid irreparable injury to any area within the jurisdiction of the commission pending action by the commission under Section 30810.

(d) The cease and desist order shall be effective upon its issuance, and copies shall be served forthwith by certified mail upon the person or governmental agency subject to the order.

(e) A cease and desist order issued pursuant to this section shall become null and void 90 days after issuance.

(Added by Ch. 761, Stats. 1991.)

Section 30810 Cease & desist orders issued after public hearing; terms and conditions; notice of hearing; finality and effectiveness of order

(a) If the commission, after public hearing, determines that any person or governmental agency 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 or governmental agency to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program or port master plan, or any requirements of this division which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:

(1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.

(2) The commission requests and the local government or port governing body declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources.

(3) The local government or port governing body is a party to the violation.

(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.

(c) Notice of the public hearing on a proposed cease and desist order shall be given to all affected persons and agencies and the order shall be final and effective upon the issuance of the order. Copies shall be served immediately by certified mail upon the person or governmental agency subject to the order and upon other affected persons and agencies who appeared at the hearing or requested a copy. The notice shall include a description of the civil remedy to a cease and desist order, authorized by Section 30803.

(Amended by Ch 1199, Stats. 1993.)

Section 30811 Restoration order; violations

In addition to any other authority to order restoration, the commission, a local government that is implementing a certified local coastal program, or a port governing body that is implementing a certified port master plan may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission, local government, or port governing body, the development is inconsistent with this division, and the development is causing continuing resource damage.

(Added by Ch. 955, Stats. 1992.)
(Section renumbered by Ch. 1199, Stats. 1993.)

Section 30812. Notice of violation

(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.

(e) (1) The notice of violation shall be contained in a separate document prominently entitled "Notice of Violation of the Coastal Act." The notice of violation shall contain all of the following information:

(A) The names of the owners of record.

(B) A legal description of the real property affected by the notice.

(C) A statement specifically identifying the nature of the alleged violation.

(D) A commission file number relating to the notice.

(2) The notice of violation, when properly recorded and indexed, shall be considered notice of the violation to all successors in interest in that property. This notice is for informational purposes only and is not a defect, lien, or encumbrance on the property.

(f) Within 30 days after the final resolution of a violation that is the subject of a recorded notice of violation, the executive director shall mail a clearance letter to the owner of the real property and shall record a notice of recision in the office of each county recorder in which the notice of violation was filed, indicating that the notice of violation is no longer valid. The notice of recision shall have the same effect of a withdrawal or expungement under Section 405.61 of the Code of Civil Procedure.

(g) 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.

(h) This section only applies in circumstances where the commission is the legally responsible coastal development permitting authority or where a local government or port governing body requests the commission to assist in the resolution of an unresolved violation if the local government is the legally responsible coastal development permitting authority.

(i) The commission 24 months from the date of recordation, shall review each notice of violation that has been recorded to determine why the violation has not been resolved and whether the notice of violation should be expunged.

(j) The commission, at any time and for cause, on its own initiative or at the request of the property owner, may cause a notice of recision to be recorded invalidating the notice of violation recorded pursuant to this section. The notice of recision shall have the same effect of a withdrawal or expungement under Section 405.61 of the Code of Civil Procedure.

Exhibit 17
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Page 11 of 14

No. Revisions Date By

BLUEPRINTS W/ 3 L.A. COUNTY APPROVALS

- D COASTAL COMM (2)
- D NORMAN ACKERBERG
- D RICHARD MEIER
- D ERWIN BECKER
- D RICHARD SOL

ARCHITECTS
Richard Meier & Partners Architects
136 East 57 Street
New York, New York 10022
212 593 1170

CONSULTING ARCHITECT
Richard Sol, Architect
23504 De Ville Way
Malibu, California 90265
213 456 6000

STRUCTURAL ENGINEERS
Ove Arup & Partners California
405 14th Street
Oakland, California 94612
510 835 3075

EXISTING ZERO SETBACK

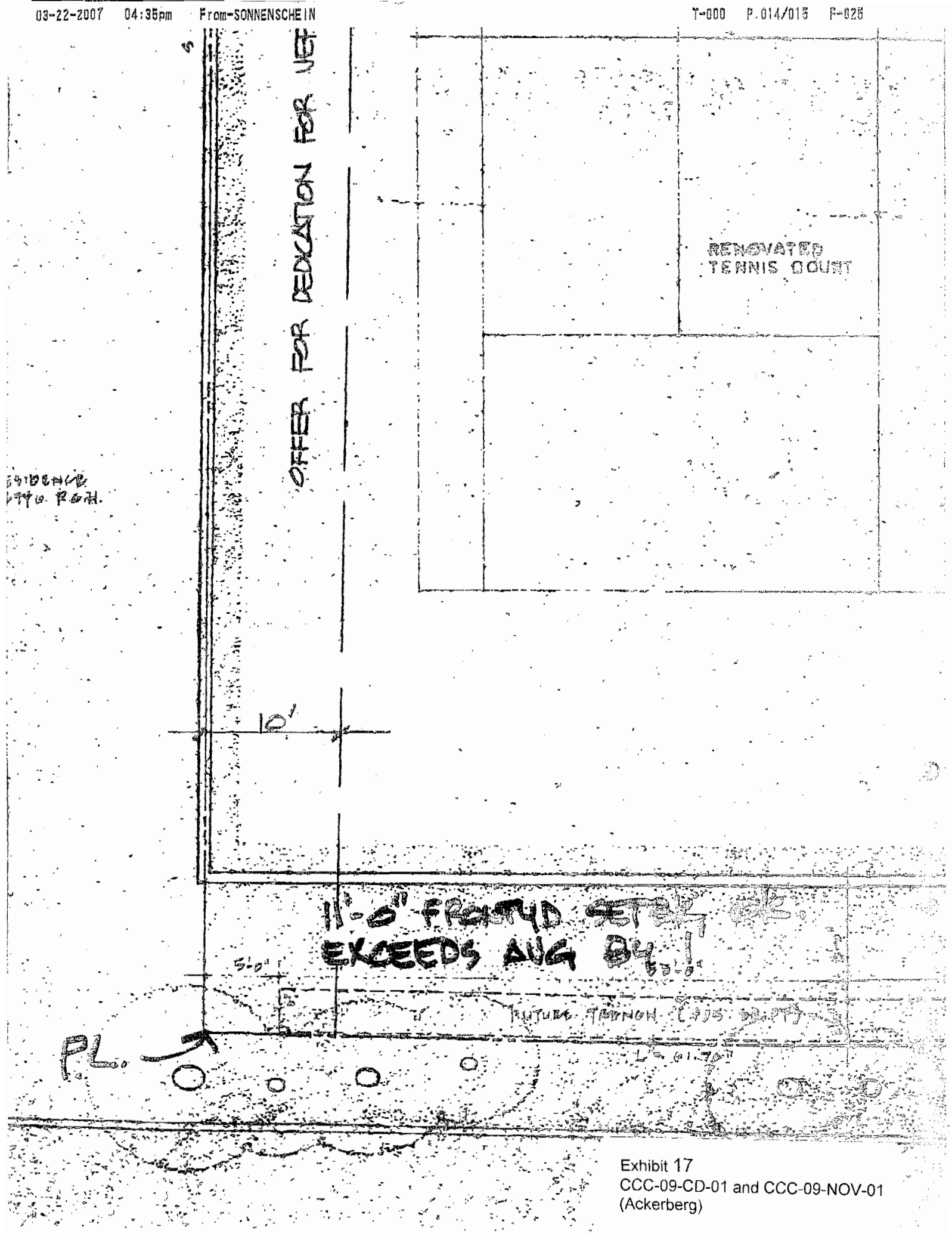
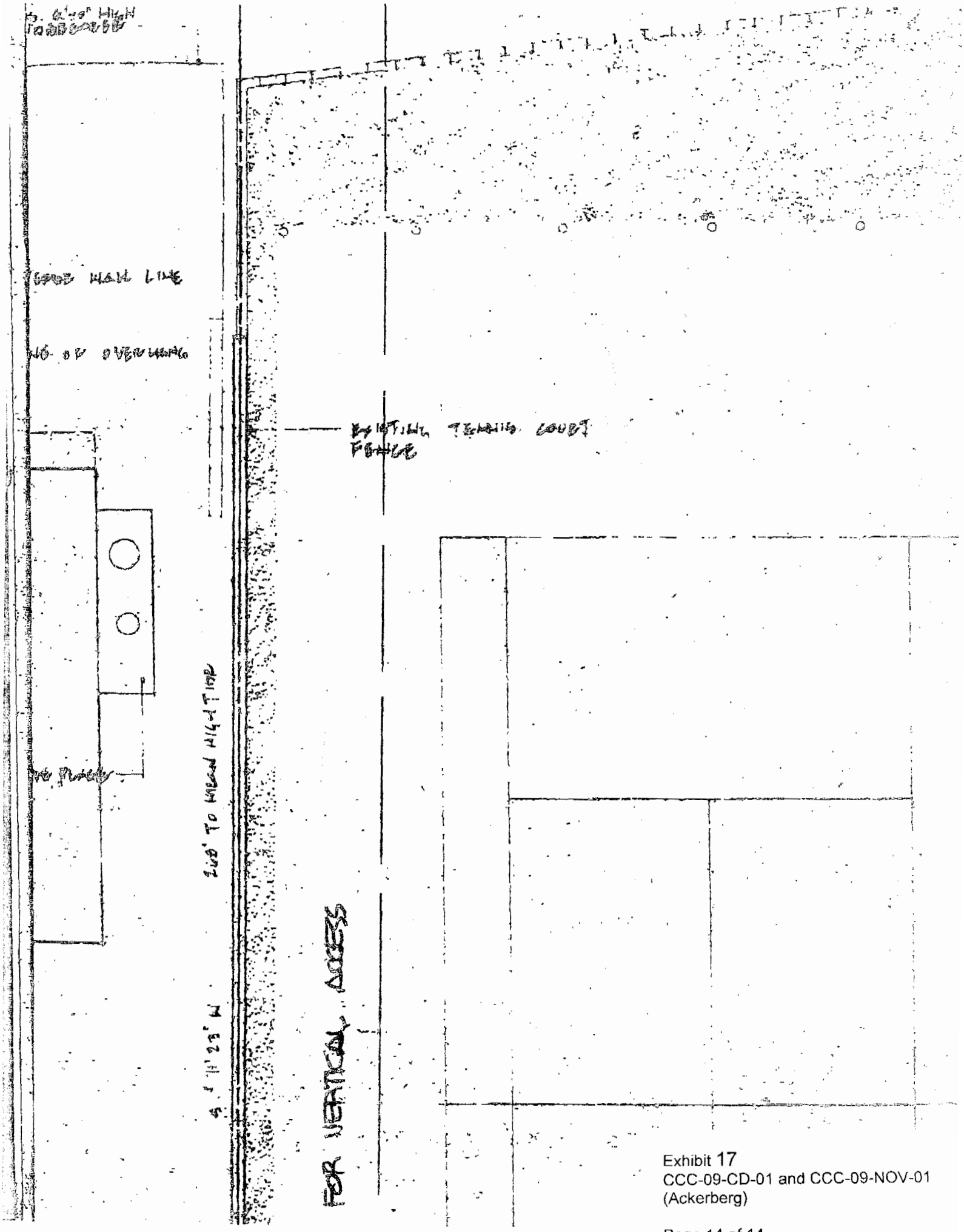


Exhibit 17
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)


EXISTING TENNIS COURT FENCE
FOR VERTICAL ACCESS

STATE OF CALIFORNIA – THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, GOVERNOR

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE (415) 904- 5200
FAX (415) 904- 5400
TDD (415) 597-5885

VIA CERTIFIED AND REGULAR MAIL
(Article No. 7006 0100 0003 4574 1486)

April 27, 2007

Ms. Lisette Ackerberg
22466 Pacific Coast Highway
Malibu, CA 90265

Subject:	**Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings**
Violation No.:	V-4-07-006
Location:	22500 and 22466 Pacific Coast Highway, Malibu, Los Angeles County (APN 4452-002-013, 4452-002-011)
Violation Description:	1) Unpermitted development including, but not limited to, rock rip-rap, 9-ft high wall, concrete slab and generator, fence, railing, planter, and landscaping located within, and restricting access to, vertical and lateral access easements; and 2) development that is inconsistent with the terms and conditions of an existing Coastal Development Permit

Dear Ms. Ackerberg:

The purpose of this letter is to notify you of my intent, as the Executive Director of the California Coastal Commission ("Commission"), to record a Notice of Violation of the Coastal Act against your property at 22500 and 22466 Pacific Coast Highway in Malibu, Los Angeles County Assessor's Parcel No. APN 4452-002-013 and 4452-002-011 ("property"), and to commence proceedings for issuance of a Cease and Desist Order ("Order") to address development on that property that is unpermitted and inconsistent with the terms and conditions of an existing Coastal Development Permit ("CDP"). The development activities at issue include, but are not limited to: the placement of rock rip-rap in lateral and vertical access easements; the placement of a concrete slab and generator at the northern end of the vertical easement; the placement of a 9-foot high concrete wall that completely blocks the northern end of the vertical easement; and the placement of fences, railings, landscaping and planters in the vertical easement. These activities constitute development as defined in the Coastal Act, are not exempt from Coastal Act permitting

requirements, and therefore required a CDP. No CDP was obtained for this development.[1] In addition to being unpermitted, the development prevents the use of public access easements that were established to satisfy the requirements imposed by the conditions of previously-issued CDPs, and that development is therefore inconsistent with the terms and conditions of those permits.

Background

In June of 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.[2] The Commission found that the proposed development would impact coastal access and the permit included a provision, as a condition for approval of the permit, for recordation of an offer to dedicate (OTD) a lateral access easement from the toe of the bulkhead to the mean high tide line. The owner recorded the OTD in July of 1983. State Lands Commission accepted the easement in March of 2002. Although you purchased this parcel subsequent to the recordation, the permit and recorded OTD clearly state that the offer runs with the land and were included in the chain of title for this property. Therefore, you are required to comply with the permit and the easement and not impede access to or through the easement.

In November of 1984, you 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 Commission unanimously approved CDP No. 5-84-754 with conditions. The Commission included a vertical public access condition, including recordation of an OTD for a 10-foot wide easement along the eastern property boundary. 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." You did not challenge that permit within the time prescribed in the Coastal Act (Cal. Pub. Res. Code § 30801). In fact, you recorded the OTD as required and you signed and returned the permit (it was issued on April 15, 1985).

Access for All, a non-profit coastal access organization, recorded a Certificate of Acceptance, formally accepting your OTD in December of 2003 and sent you a letter soon thereafter to inform you 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. In March of 2005, after Access for All had not yet received permission to conduct the survey, Commission staff sent you a letter requesting that you remove all structures blocking the easement and contact Commission staff within 30

[1] You contend that the Commission, during the hearing on CDP No. 5-84-754, informally granted you "full use of your entire property... until such time as it is developed into an open vertical accessway." Even if this were the case, the development blocking the accessway was not actually approved under that permit, but was only allowed to remain until the accessway could be opened. This development must be removed now, as Access for All is ready to open and operate the easement. Moreover, additional development, including the generator, fence, and planter, do not appear to have been present when the permit was heard, so even any potential allowance by the Commission for existing development to remain temporarily would not apply to these items. Thus, all of the development at issue is unpermitted and must be removed.

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

days to schedule the survey. Access for All did eventually conduct the survey in September of 2005 and found that the vertical easement was blocked by the above-mentioned development, including the slab and generator, 9-ft high wall, planters, fence, landscaping, and rock rip-rap.

Subsequent attempts by Commission staff to resolve the violations in an amicable manner have been unsuccessful. On March 5, 2007, Commission staff sent you a Notice of Violation, alerting you to the possibility of formal enforcement action and monetary penalties if the violations are not resolved. The letter provided you 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 on March 22, 2007, you sent Commission staff a letter in response to the Notice of Violation, you did not agree, and to date have not agreed, to resolve the violations on your property. Consequently, you have not submitted removal plans for the unpermitted development.

Access for All is prepared to open and manage the easement for public access to the beach, so that the area can function as required by the Commission and as set forth in the recorded Certificate of Acceptance. Access for All 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 within the easement and completely obstructs access. As a result, the accessway remains closed and the public access that the Commission found to be necessary for approval of the permit that allowed your new residence and pool to be built has not been provided. 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.

Since the attempts to resolve these violations were unsuccessful, as Executive Director, I have decided that it is necessary to commence Cease and Desist Order proceedings, pursuant to Coastal Act Section 30810, in order to bring your property into compliance with the Coastal Act and with the existing CDP. The purpose of these enforcement proceedings is to issue a Cease and Desist Order, directing you to 1) remove the unpermitted development from the property and 2) comply with the Special Conditions of the existing CDPs. In addition, I intend to record a Notice of Violation to protect potential purchasers of the property from unwittingly assuming responsibility for the existing violations. The Cease and Desist Order and Notice of Violation are discussed in greater detail below.

Notice of Violation

The Commission's authority to record a Notice of Violation is set forth in Section 30812 of the Coastal Act, which states 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.*

I am issuing this notice of intent to record a Notice of Violation because the unpermitted development described above has occurred in violation of the Coastal Act at the subject property. This determination is based on an analysis of photographs taken by staff on December 12, 2005, February 5, 2007, and March 8, 2007 and aerial photographs, and a review of the existing permits for the property and relevant recorded documents.

In our letter dated March 5, 2007, in accordance with Coastal Act Section 30812(g), we notified you of the potential for the recordation of a Notice of Violation against your property. If you object to the recordation of a Notice of Violation in this matter and wish to present evidence to the Coastal Commission at a public hearing on the issue of whether a violation has occurred, **you must specifically object, in writing, within 20 days of the postmarked mailing of this notification.** The objection should be sent to Christine Chestnut at the Commission's headquarters office (the address is provided in the letterhead), no later than May 17, 2007. Please include the evidence you wish to present to the Coastal Commission in your written response and identify any issues you would like us to consider.

If, you fail to object within 20 days of mailing of this notification, I shall record the Notice of Violation in the Los Angeles County recorder's office as provided for under Section 30812(b) of the Coastal Act. The Notice of Violation will become part of the chain of title of the subject property, and will be subject to review by potential buyers.

Cease and Desist Order

The Commission's authority to issue Cease and Desist Orders is set forth in Coastal Act Section 30810(a), which states the following:

> *If the commission, after public hearing, determines that any person or governmental agency 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 or governmental agency to cease and desist.*

An order is warranted in this case because the development at issue is both unpermitted and inconsistent with a previously-issued permit.

Unpermitted Development

"Development" is defined in Coastal Act Section 30106 as follows:

> *"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, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreation use; 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 harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations... (emphasis added)*

Construction and/or placement of the rip-rap, wall, slab, generator, fence, railing, planter, and landscaping on the property, which is located in the Coastal Zone, constitutes development under Section 30106.

Coastal Act Section 30600(a) states that development activity in the coastal zone requires a coastal development permit (CDP) before that development can occur. As stated above, the activities at issue constitute development, and this development is therefore subject to the permit requirement of Section 30600(a). No CDP permit application was submitted for the cited development and, accordingly, no CDP was issued. Additionally, no exemptions to Coastal Act permitting requirements apply. Therefore, the cited development items are unpermitted and constitute Coastal Act violations.

Inconsistent with CDP

In addition to being unpermitted, the cited development is inconsistent with the existing permits. The unpermitted development is located within established public access easements, preventing access to and across the easements in violation of the conditions of the previously-issued CDPs for the property. This non-compliance with the conditions of approved CDPs constitutes a violation of the Coastal Act and such non-compliance is specifically mentioned in the Coastal Act section authorizing cease and desist orders. *See* Cal. Pub. Res. Code § 30810(a) ("any activity that . . . is inconsistent with any permit previously issued by the commission").

Special Condition One (1) of CDP No. 5-83-360 required the recordation of an offer to dedicate (OTD) a lateral public access easement extending from the mean high tide line to the toe of the bulkhead, which extends across your property. The OTD, which prohibits any interference with the public's use of the easement, was recorded, and the easement has been accepted. The unpermitted rip-rap at issue is located seaward of the toe of the bulkhead, within the lateral access easement, and it interferes with the public's access to and across the easement. The unpermitted rip-rap is inconsistent with the condition of the permit and the recorded OTD.

In addition, Standard Condition Three (3) of CDP No. 5-84-754 states the following:

> *All development must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation*

from the approved plans must be reviewed and approved by the staff and may require Commission approval (emphasis added).

The cited development was not part of the plan approved by the Commission under the permit, nor was it reviewed and approved by the Commission as part of a subsequent permit. Thus, the development is also inconsistent with this condition of CDP No. 5-84-754.

Furthermore, Special Condition one (1) of CDP No. 5-84-754 required that you record an OTD for a vertical accessway along your property's eastern boundary. You recorded the OTD as required. The OTD offers "an easement in perpetuity for the purpose of public pedestrian access to the shoreline," and prohibits interference with public use of the easement. The unpermitted development at issue lies within the vertical access easement, blocking the public's use of it.

The Commission imposed Standard Condition 3 and Special Condition 1, among others, out of a concern for the provision of public access in the area and to mitigate for the impacts from the proposed development and to bring the project into compliance with the Coastal Act. The unpermitted development at issue obstructs the access that the Commission required in violation of the permit, the OTD, and the Coastal Act.

Under Section 30810(b) of the Coastal Act, any Cease and Desist Order issued by the Commission may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with the Coastal Act, including immediate removal of any development or material. Pursuant to Section 30810(a) and 30810(b), I am issuing this notice of intent to commence Cease and Desist Order proceedings to: 1) compel removal of all unpermitted development from the property; 2) order compliance with the requirements of existing permits and; 3) prevent future unpermitted development activities from being undertaken on the property.

In accordance with Sections 13181(a) of the Commission's regulations, you have the opportunity to respond to the Commission staff's allegations as set forth in this notice of intent to commence Cease and Desist proceedings by completing the enclosed Statement of Defense form. **The Statement of Defense form must be returned to the Commission's San Francisco office, directed to the attention of Christine Chestnut, no later than May 17, 2007.**

Please be aware that Section 30820(a) provides for civil liability to be imposed on any person who performs or undertakes development without a coastal development permit and/or that is inconsistent with any coastal development permit previously issued by the Commission in an amount that shall not exceed $30,000 and shall not be less than $500. Section 30820(b) provides that additional civil liability may be imposed on any person who performs or undertakes development in violation of the Coastal Act or inconsistent with a coastal development permit previously issued by the Commission when the person intentionally and knowingly performs or undertakes such development, in an amount not less than $1,000 and not more than $15,000 per day for each day in which the violation persists. Finally, Section 30821.6 provides that any intentional or negligent violation of a cease and desist order can result in civil fines of up to $6,000 for each day in which the violation persists.

Commission staff has tentatively scheduled the hearing for the proposed Cease and Desist Order (and for the proposed Notice of Violation, should you additionally request, **in writing,** a hearing on this issue) for the June 2007 Commission meeting in Santa Rosa.

As always, we are more than willing to discuss a timely and amicable resolution of this matter. One option that you may consider is agreeing to a "consent order". A consent order is similar to a settlement agreement. A consent order would provide you with an opportunity to work cooperatively with staff to resolve this matter, to have input into the process and timing of removal of the unpermitted development, and to negotiate a penalty amount with Commission staff. If you would like to discuss resolution of this matter via a Consent Order, please contact us immediately. If you have any questions regarding this letter or the enforcement case, please call Christine Chestnut at (415) 904-5200 or send correspondence to her attention at the address provided on the letterhead.

Sincerely,

PETER M. DOUGLAS
Executive Director

Encl.: Statement of Defense form
cc (without Encl): Lisa Haage, Chief of Enforcement
Alex Helperin, Staff Counsel
Patrick Veesart, Southern California Enforcement Supervisor
Edwin B. Reeser, III, Attorney for Ms. Ackerberg
Christine Chestnut, Headquarters Enforcement Analyst

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885

VIA FACSIMILE AND REGULAR MAIL

May 30, 2007

Edwin B. Reeser, III
Sonnenshein Nath & Rosenthal LLP
601 South Figueroa Street, suite 1500
Los Angeles, CA 90017-5704

Re: Coastal Act Violation No. V-4-07-006

Dear Mr. Reeser,

I received your May 17, 2007 letter requesting termination of the above referenced matter or, alternatively, a one-month extension of the deadline for submittal of a statement of defense in the above referenced matter. While we cannot "terminate" the enforcement action in light of the outstanding violation, as a courtesy to your client and in response to your request, we have granted a twenty-five day extension of the deadline for submittal of a statement of defense. The extended and final deadline is **June 11, 2007**. Please submit all materials that you wish the Commission to consider by the deadline.

In your letter, you objected to the enforcement proceedings set forth in the Executive Director's April 27, 2007 Notice of Intent. Therefore, a hearing on the proposed Cease and Desist Order and recordation of a Notice of Violation shall be held during an upcoming Commission meeting. Given that we have extended the statement of defense deadline into June, we have postponed the hearing on this matter and tentatively scheduled it to occur during the Commission's July meeting.

We are pleased to hear your assertion that Mrs. Ackerberg has cooperated with Commission staff in the past and your assurances that she intends to continue working cooperatively with staff. We look forward to discussing this matter with you and your client further and are hopeful we can affect an amicable resolution of the matter. It should be noted that the pending litigation

initiated by Mr. Roth is not an impediment to a collaborative effort between Mrs. Ackerberg and Commission staff to resolve this matter. We would prefer to reach an amicable resolution in this matter and look forward to working with Mrs. Ackerberg to secure her compliance with the conditions of the existing permit and the terms of the accepted offer to dedicate that she recorded in 1985. One option that you may consider is a "consent order", which is similar to a settlement agreement. A consent order would provide you with an opportunity to resolve this matter consensually, and to have more input in the process. If you are interested in negotiating a consent order or in proposing an alternative amicable resolution of this violation, please contact me at (415) 904-5220 or send correspondence to my attention at the address listed on the letterhead. I look forward to hearing from you at your earliest convenience.

Sincerely,

Christine Chestnut
Headquarters Enforcement Analyst

cc: Lisa Haage, Chief of Enforcement
Alex Helperin, Staff Counsel
Linda Locklin, Access Program Manager
Pat Veesart, Southern California Enforcement Supervisor

Sonnenschein
SONNENSCHEIN NATH & ROSENTHAL LLP

Edwin B. Reeser, III
213-892-5072
ereeser@sonnenschein.com

601 South Figueroa Street
Suite 1500
Los Angeles, CA 90017-5704
213.623.9300
213.623.9924 fax
www.sonnenschein.com

May 17, 2007

VIA FACSIMILE & U.S. MAIL

Christine Chestnut
Legal Division
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Re: Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings
Violation No. V-4-07-006
Location: 22500 and 22466 Pacific Coast Highway, Malibu, California
APN 4452-002-013, 4452-002-011 (the "Property")

Dear Ms. Chestnut:

We have received the Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings, dated April 27, 2007, from Peter M. Douglas, Executive Director of the California Coastal Commission (the "Douglas Notice Letter"), directed to Lisette Ackerberg concerning the above-referenced Property. Please consider this letter as a response and objection to these proposed proceedings.

Frankly, we are surprised that the Coastal Commission has decided to initiate these proceedings against Mrs. Ackerberg in light of her previous cooperation with the Coastal Commission and Access for All ("AFA") concerning the vertical access easement on the Property (the "Easement"), as well as the pending appeal by Jack Roth of the dismissal of his lawsuit in Los Angeles County Superior Court, Second District Court of Appeal No. B195748 (the "Appeal"), which lawsuit seeks to revoke and invalidate the Easement and to enjoin the Coastal Commission, State Coastal Conservancy, and AFA from opening the Easement for public use (the "Lawsuit"). 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.

As you are no doubt aware, there have been extensive communications between Mrs. Ackerberg and the Coastal Commission/AFA concerning the Easement and issues relating

thereto since 2005. At the request of AFA, Mrs. Ackerberg permitted a survey of the Easement to be conducted on her Property. After this survey was conducted in September 2005 and a survey map prepared, I received a letter from Linda Locklin of the Coastal Commission dated December 13, 2005, which stated that the survey identified a number of "encroachments" within the easement and demanded that those "encroachments" be removed, asserting that they "prevent or impede" the opening of the Easement for public use. These identified "encroachments" included a generator, concrete slab, portions of a nine-foot-high block perimeter wall, railings, fencing, landscaping, and rip-rap rocks along the seawall near the southern end of the Easement (collectively, the "Alleged Encroachments").

Thereafter, back-and-forth communications ensued between Mrs. Ackerberg and the Coastal Commission regarding a number of reasonable issues, questions, and concerns raised by Mrs. Ackerberg about removal of the Alleged Encroachments and opening of the Easement for public use, and we suggested a meeting with the Coastal Commission to discuss these subjects. In her February 16, 2006 letter to me, Ms. Locklin agreed to a meeting with me and representatives from AFA and the Coastal Conservancy to discuss open issues concerning the Easement. We agreed to participate in such a meeting and communicated with Ms. Locklin, both verbally and in writing, in February and March 2006 to coordinate a date for this meeting.

It was during this period, on March 29, 2006, that Jack Roth filed his Lawsuit, in which he named Mrs. Ackerberg and the Lisette Ackerberg Trust as Real Parties in Interest. Shortly thereafter, on April 3, 2006, I wrote to Ms. Locklin inquiring whether, in light of the Lawsuit, it would be prudent to go forward with the planned meeting or whether it should be continued to a later date, given that the Lawsuit would complicate any discussions concerning the Easement and Mr. Roth sought injunctive relief in his Lawsuit. Ms. Locklin responded in writing on April 10, 2006, stating that "[a]s for the series of other questions and issues you raise, including whether or not we should set a meeting date, we are preparing a response and will get back to you soon." However, we never heard back from Ms. Locklin or anyone else from the Coastal Commission concerning this meeting and, therefore, reasonably assumed that the Coastal Commission chose to postpone any further direct discussions with us about the Easement pending adjudication of Mr. Roth's Lawsuit. In fact, we did not receive a direct communication from the Coastal Commission again until nearly a year later, when we received a "Notice of Violation of the California Coastal Act," dated March 5, 2007, from N. Patrick Veesart of the Coastal Commission (the "Veesart Notice Letter").

Contrary to the representations in the Douglas Notice Letter, our March 22, 2007 written response to the Veesart Notice Letter did not contain an outright refusal to remove any Alleged Encroachments, and our failure to submit an "as-built site plan" and "detailed plan and project description" for removal of the Alleged Encroachments, as requested in the Veesart Notice

Letter, should not be taken as such. Rather, our letter was an attempt to amicably address the Coastal Commission's concern about the need to immediately initiate any enforcement proceedings relating to the Alleged Encroachments or the Easement, and raise the issue of the appropriateness of demanding immediate removal of the Alleged Encroachments while legal action initiated by Mr. Roth relating to the Easement is still pending.

Repeatedly throughout the Veesart Notice Letter and the Douglas Notice Letter, the Coastal Commission attempts to justify the need for immediate removal of the Alleged Encroachments by implying that, but for the Alleged Encroachments, the Easement would promptly be opened by AFA for public use. However, as the Coastal Commission is aware, Mr. Roth's Appeal is pending, and the parties are waiting for the Court of Appeal to set a briefing schedule. We believe that Mr. Roth's Appeal has merit and that the Court of Appeal will reinstate Mr. Roth's Lawsuit. In any event, we reiterate our position that until Mr. Roth's Lawsuit 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 Encroachments on the Property. Should Mr. Roth prevail in his Appeal and, ultimately, in his Lawsuit, the Coastal Commission, Coastal Conservancy, and Access for All will have no right to open the Easement for public use. By forcing Mrs. Ackerberg to remove the Alleged Encroachments -- under threat of penalties and fines -- before final adjudication of the Appeal and Lawsuit, the Coastal Commission is subjecting her to irreparable harm and loss of the benefits she would receive should Mr. Roth prevail.

If the Coastal Commission proceeds with its Notice of Violation and Cease and Desist Order proceedings against Mrs. Ackerberg during the pendency of the Appeal, she would be required, under threat of encumbrance, penalties, and fines, to demolish and/or remove the following Alleged Encroachments on her Property: (1) a ten-foot-wide portion of a nine-foot-high block perimeter wall facing Pacific Coast Highway; (2) a generator and the concrete slab on which it sits; (3) rip-rap rocks located along the seawall of the Property; and (4) chain link fence, railings, and landscaping located within the Easement.

As we have previously advised, the generator was installed to provide back-up power for the elevator in the two-story residence on the Property. For the last twenty-odd years of his life, Norman Ackerberg was unable to walk due to his multiple sclerosis, so the elevator was his only means of moving upstairs and downstairs. Now, Mrs. Ackerberg depends on the elevator as well due to her Parkinson's disease. The generator is needed to keep the elevator running through the frequent power outages in the area. 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. The Property is her primary residence, not a seasonal home. Without the generator, Mrs. Ackerberg fears she will be forced out of her present home.

Additionally, as we have also previously advised, the rip-rap rocks along the seawall are necessary to protect the Property and adjacent properties from the often severe tidal conditions and wave uprush effects (such as those caused by the El Niño phenomenon) (see attached photograph). Removal of the rip-rap rocks along the entire length of the seawall, or even just the portion within the Easement, would compromise the seawall. Since the Ackerberg seawall is tied together with the seawalls of adjoining properties, removal of rip-rap rocks in front of the Ackerberg seawall could have a detrimental collateral effect on these adjoining properties. Moreover, Mrs. Ackerberg believes that some of these rocks were actually pre-existing underneath the sand, and have only been exposed in recent years due to the lower sand level at the beach. In light of these issues, we believe it would be appropriate for a consultant or engineer to perform an analysis of the rip-rap rocks, including the impact of their removal, and present those findings before any decision is made to remove some or all of the rocks.

If Mrs. Ackerberg is forced to immediately remove/demolish the Alleged Encroachments while this Appeal is pending, and Mr. Roth is ultimately successful in the Appeal and underlying Lawsuit, resulting in revocation of the Easement and enjoinment of its opening for public use, Mrs. Ackerberg will be left with a gaping ten-foot-wide hole in her block perimeter wall facing well-traveled Pacific Coast Highway; an elevator in her residence that is inoperable, affecting her ability to move about her residence; and greater exposure to property damage from the effects of the Pacific Ocean. Restoring the Property to its original condition would require significant expenditure from Mrs. Ackerberg -- a prospect she should not be forced to face in light of the pending Appeal.

The Coastal Commission has asserted that an independent basis exists for the Notice of Violation and Cease and Desist Order proceedings, apart from any issues relating to opening the Easement for public use, because it considers all of the Alleged Encroachments to be "unpermitted development" not approved in any Coastal Development Permit[1] and that,

[1] The Coastal Commission's assertion in the Veesart Notice Letter and Douglas Notice Letter that all of the Alleged Encroachments were "not approved in any CDP [Coastal Development Permit]," is false. Ms. Locklin, in her March 28, 2005 letter to Mrs. Ackerberg, acknowledged 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." Both Coastal Commission commissioners and staff agreed to this use at the January 24, 1985 hearing on the Ackerbergs' CDP application, which agreement is memorialized in my January 28, 1985 letter to the Coastal Commission (and a copy of which was attached to Ms. Locklin's March 28, 2005 letter to Mrs. Ackerberg). Moreover, the plans for the Ackerberg development that were submitted to the Coastal Commission in 1984/85 in conjunction with the Ackerbergs' CDP application, which plans were approved by the Coastal Commission (indeed, the submitted plans taken from the Coastal Commission's own files contain an "Approved" stamp signed by Gary Gleason of the Coastal Commission -- see attached), reflected that items such as a perimeter block wall, fences, railings, and landscaping would be erected in the path of the Easement. Accordingly, any assertion by the Coastal

therefore, these items must be removed regardless of how the Appeal and Lawsuit unfold or whether the Easement is ever allowed to be opened for public use. However, as the Coastal Commission itself acknowledged in the Veesart Notice Letter, administrative procedures exist for Mrs. Ackerberg to apply for and obtain amendments to previously issued coastal development permits to authorize any alleged unpermitted development. See Cal. Code Regs. tit. 14, §§ 13164-13168. The Coastal Commission's statement in the Veesart Notice Letter that such an administrative procedure is available "[i]n most cases," but "is not an option here" because such amendment would "lessen or avoid the intended effect of [the] approved permit" -- that is, conflict with the Easement -- is premature given that the Roth Appeal is pending and his Lawsuit has not been adjudicated to final judgment. Should Mr. Roth prevail in his Appeal and underlying Lawsuit, such an administrative remedy will not "lessen or avoid the intended effect of [the] approved permit," because the Easement will have been declared invalid and its opening for public use will be permanently enjoined. In that case, there is no reason why Mrs. Ackerberg could not attempt to apply for and obtain any necessary amendments to previously issued coastal permits to authorize any alleged unpermitted development. Indeed, Mrs. Ackerberg plans to avail herself of these administrative procedures -- as is her right -- should Mr. Roth succeed in his Appeal and Lawsuit.

On the other hand, the Coastal Commission, Coastal Conservancy, and AFA will not be unduly prejudiced or suffer any irreparable harm by waiting for final adjudication of Roth's Lawsuit before commencing any enforcement proceedings or taking any other action concerning the Alleged Encroachments and the Easement that they deem necessary. Indeed, nearly nineteen years elapsed after recordation of the offer to dedicate vertical access easement on the Property in 1985 before the Coastal Commission/AFA decided to accept the OTD and move forward to open the Easement for public use. Given the significant amount of time that has passed, surely it would not prejudice the Coastal Commission or anyone else to wait the comparatively short time period until the Roth Appeal and Lawsuit have been resolved before taking further action concerning the Easement.

Additionally, as the Coastal Commission is aware, there is an existing vertical access 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 than one-half mile to the east of the Ackerberg Property. Both of these vertical access easements provide public access to the same beach in Malibu -- Carbon Beach -- that the Easement would provide if opened for public use. Therefore, immediate

---

Commission that all of the Alleged Encroachments on the Property are *per se* unauthorized and unpermitted is unfounded.

enforcement actions concerning the Easement and Property are not necessary to provide public access to beaches in Malibu which otherwise lack public access.

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 of his Lawsuit -- to ensure compliance with any and all legal obligations concerning the Easement. That will also be the appropriate time to resume direct communications with the Coastal Commission/AFA concerning removal of the Alleged Encroachments and the issues, questions, and concerns we had previously raised regarding the Easement.

We therefore respectfully request that the Coastal Commission terminate any action related to its Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings and not reinstitute such proceedings until Roth's Lawsuit has reached final judgment, and only then if such proceedings are still deemed necessary. If the Coastal Commission insists on proceeding with such enforcement actions despite the pending Roth Appeal, we object to such actions and request the opportunity to be heard before the Coastal Commission at a public hearing. In this event, pursuant to Cal. Code Regs. tit. 14, § 13181(b), we would respectfully request that the time for submittal of any Statement of Defense form be extended for a period of thirty (30) days, so that we can gather the required information and analysis concerning removal of the rip-rap rocks and the other Alleged Encroachments.

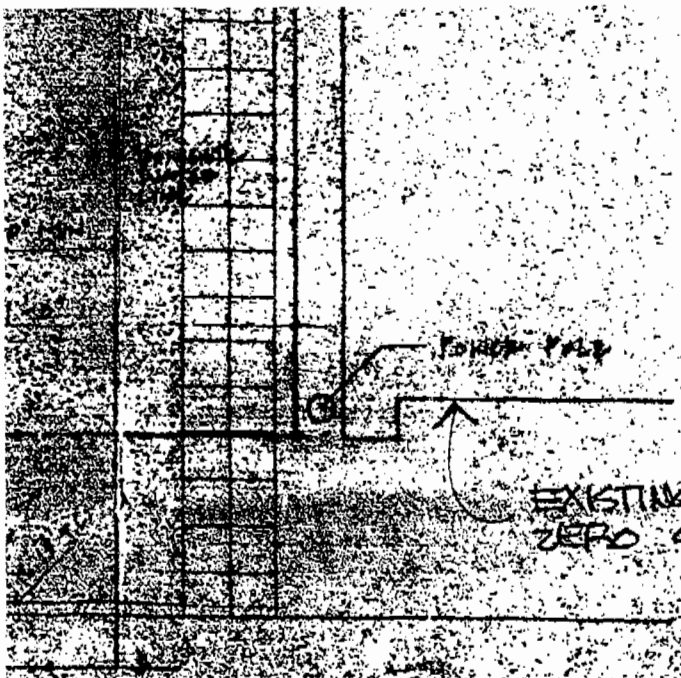
Very truly yours,

Edwin B. Reeser, III

cc: Lisette Ackerberg

Enclosures

30294380



DEPT. OF REGIONAL PLANNING

APPROVAL IN CONCEPT

SIGNED

DATE 2-21-85

PLAN CHECK NO.

Per sec. 21400 et seq of the Public Resources Code and Sec 13210(a), Title 14 of the Administrative Code, State of California,

THIS IS NOT A PERMIT,

and

is subject to any conditions listed below.

DEPARTMENT OF REGIONAL PLANNING

The proposed development. Except as noted herein is approved as shown in concept and complies with sections ZONING COMPLIANCE of County Code, Title 22.

This approval is contingent upon the facilities noted and the requirements of said code, Title No. 22 in effect at this time. It is applicable only as specifically indicated hereby and does not relieve the applicant of any changes in pertinent ordinance requirements. Such approval shall not be construed to permit the violation of any provision of county ordinance or state law.

2-21-85

RECEIVED
FEB 27

APPROVAL

Permit No.

VPP33668

ARCHITECTS
Richard Meier & Partners Arch
136 East 57 Street
New York, New York 10022
212 593 1470

CONSULTING ARCHITECT
Richard Sol, Architect
23904 De Ville Way
Malibu, California 90265
213 456 6909

STRUCTURAL ENGINEERS
Severud-Perrone-Szegezdy-Sti
485 Fifth Avenue
New York, New York 10017
212 986 2700

MECHANICAL & ELECTRICAL EN
John L. Alliset, P.E.
3 Morgan Avenue
Norwalk, Connecticut 06851
203 866 5538

ACKERE
RESIDE

MALIBU CA

SITE PLAN
SOUTH ELEVA

Job No.	Date	Scale	Dr
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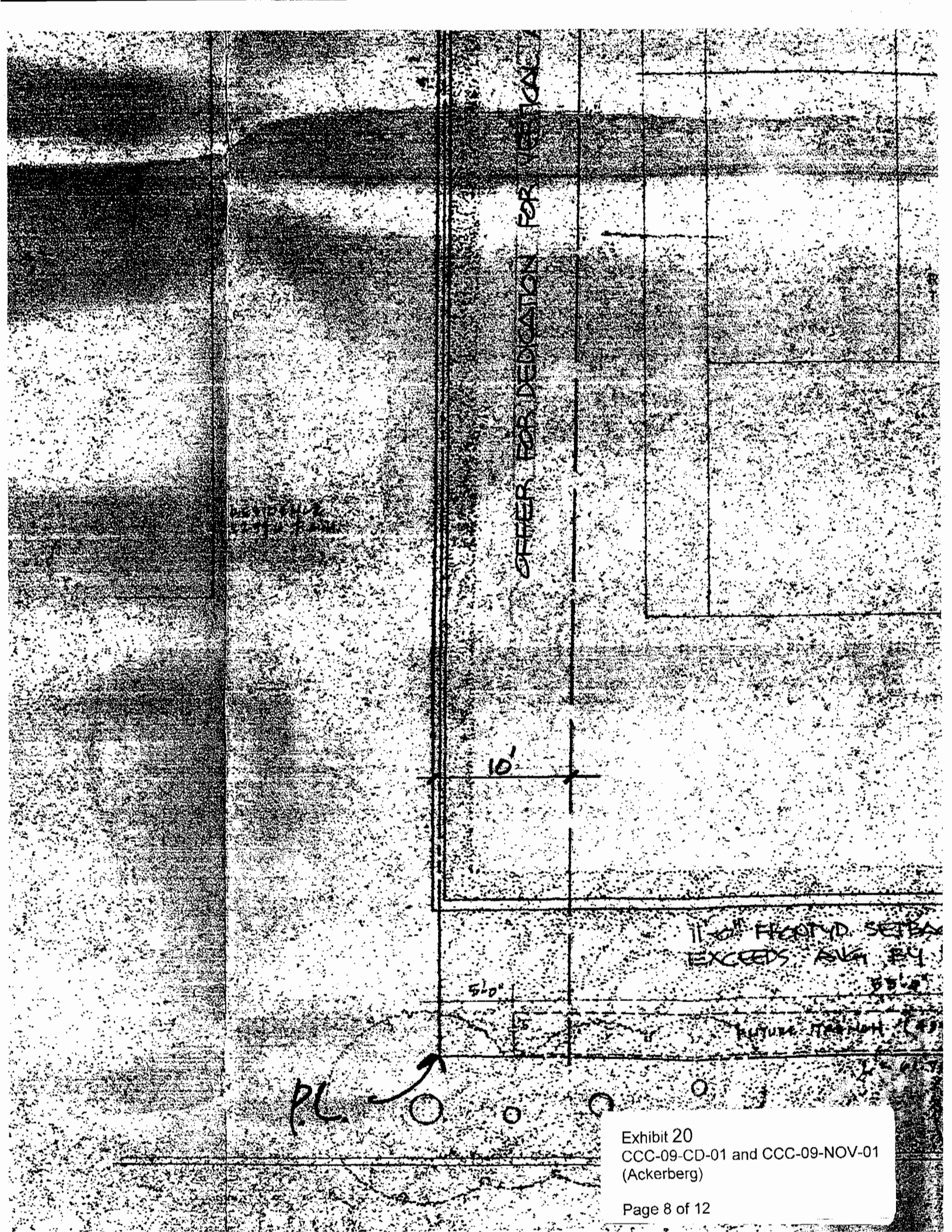
Drawn	Checked	Approved	


OFFER FOR DEDICATION FOR
10'
P.L.

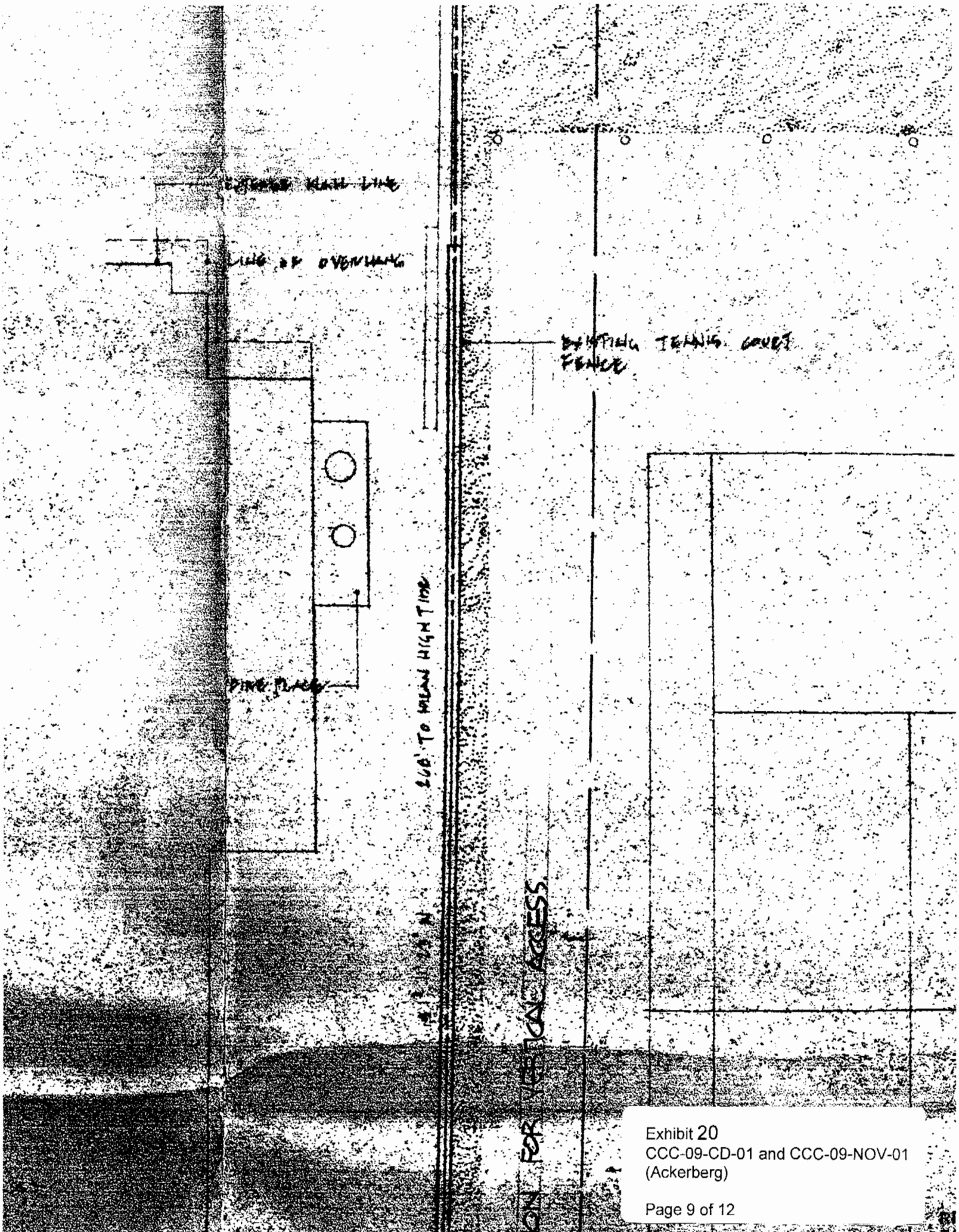


Exhibit 20
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Page 9 of 12

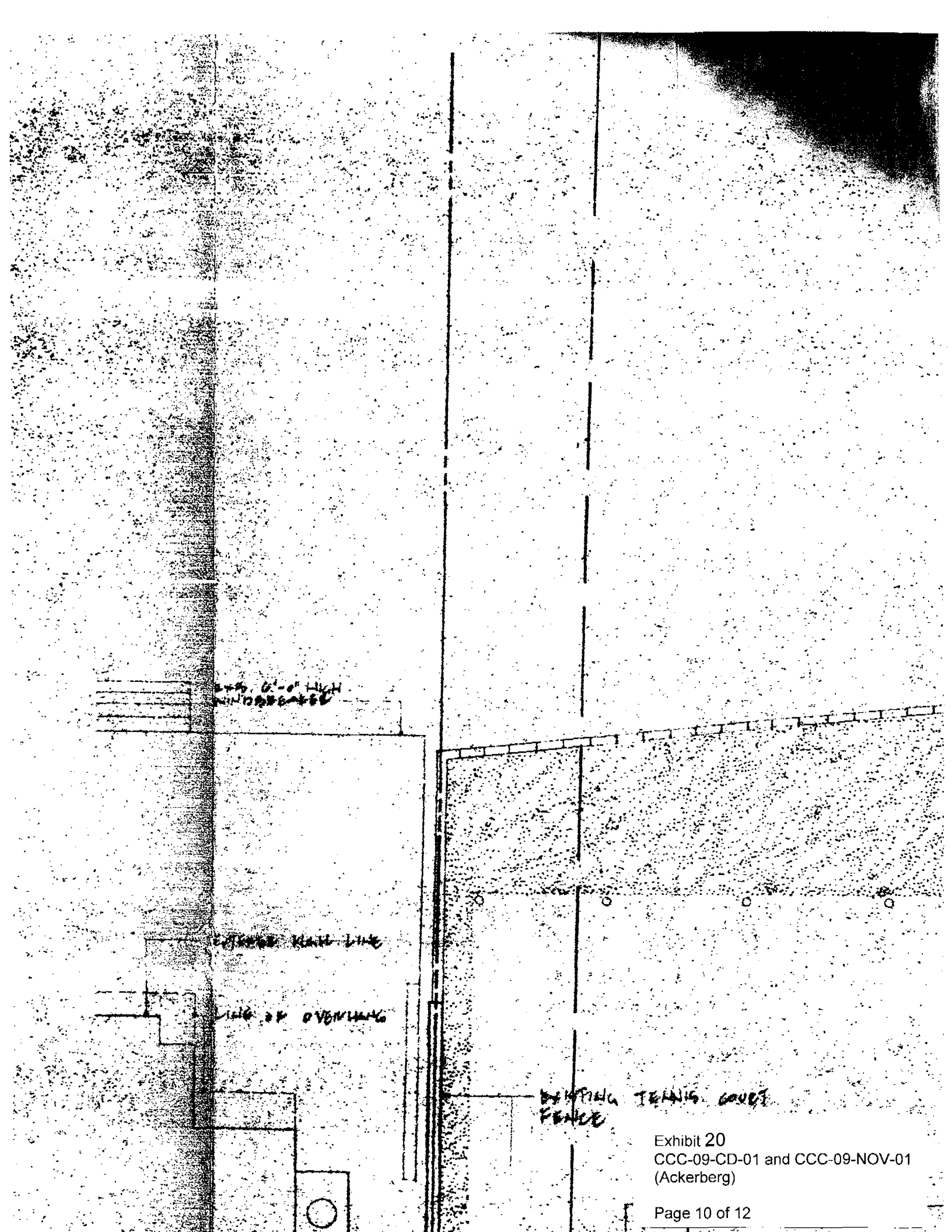


Exhibit 20
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Page 10 of 12

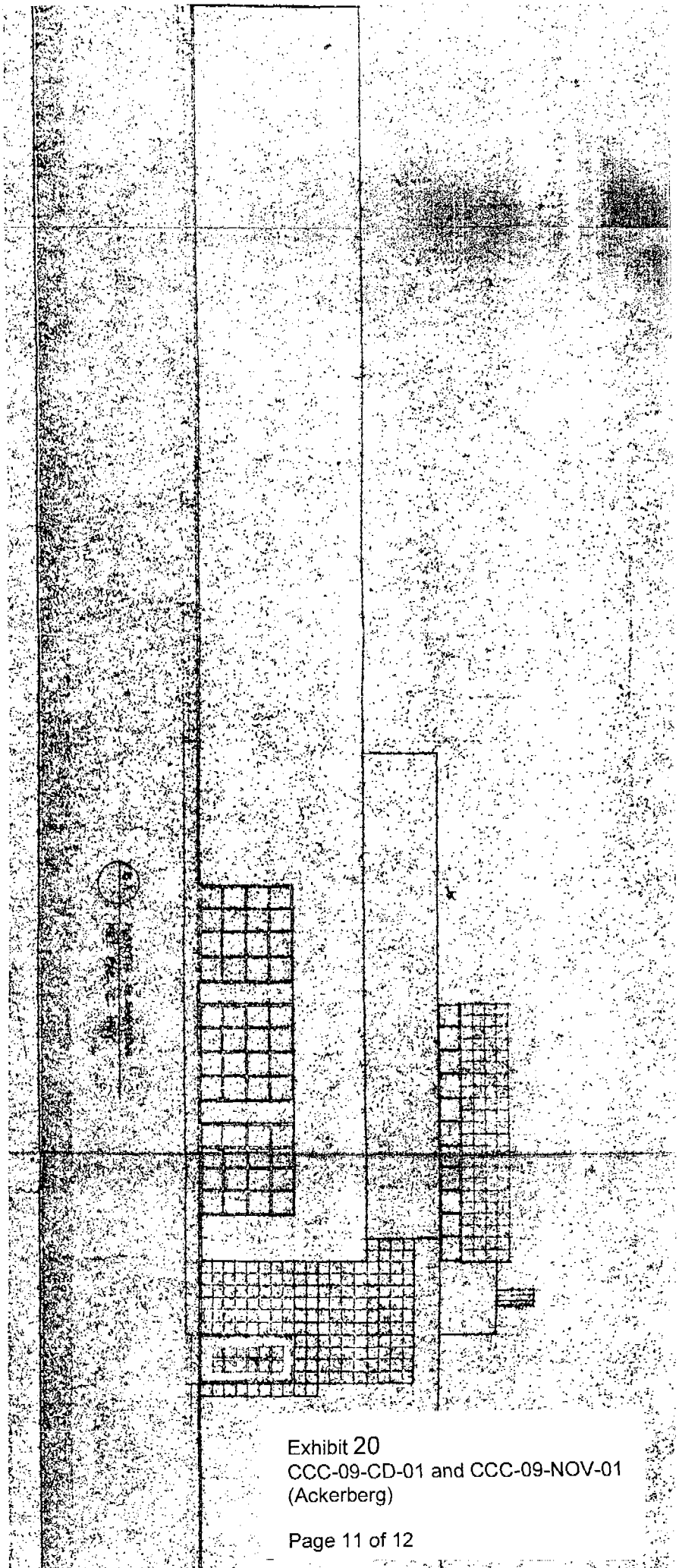


Exhibit 20
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Sonnenschein
SONNENSCHEIN NATH & ROSENTHAL LLP

David S. Alverson
213-892-2916
dalverson@sonnenschein.com

601 South Figueroa Street
Suite 1500
Los Angeles, CA 90017-5704
213.623.9300
213.623.9924 fax
www.sonnenschein.com

June 11, 2007

VIA FACSIMILE & U.S. MAIL

Christine Chestnut
Legal Division
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Exhibit 21
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Re: Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings dated April 27, 2007
(the "Enforcement Proceedings")
Violation No. V-4-07-006
Location: 22500 and 22466 Pacific Coast Highway, Malibu, California
APN 4452-002-013, 4452-002-011 (the "Property")

Dear Ms. Chestnut:

We have received your letter to Edwin B. Reeser, III, of our firm dated May 30, 2007, in which you advised that, despite Jack Roth's pending appeal of the dismissal of his lawsuit in Los Angeles County Superior Court, Second District Court of Appeal No. B195748 (the "Appeal"), the Coastal Commission is moving forward with the Enforcement Proceedings against Lisette Ackerberg and her Property, which Property is immediately adjacent to Mr. Roth's property, and that a Coastal Commission hearing on the Enforcement Proceedings has been tentatively scheduled for July 2007. Please consider this letter, the previous letters sent by Mr. Reeser to the Coastal Commission dated March 22, 2007 and May 17, 2007, and any further response that may be submitted, as Mrs. Ackerberg's response to the Enforcement Proceedings.

We note that in your brief letter, other than to indicate that the Coastal Commission intends to proceed with the Enforcement Proceedings, you fail to address any of the issues raised in Mr. Reeser's detailed May 17, 2007 letter. Most importantly, you fail to address our contention that the Enforcement Proceedings are improper in light of Mr. Roth's pending Appeal. As you know, Mr. Roth's lawsuit seeks to revoke and invalidate the Easement and to

enjoin the Coastal Commission, State Coastal Conservancy and Access For All ("AFA") from acting to implement, enforce and open the Easement. Your statement that "the pending litigation initiated by Mr. Roth is not an impediment to a collaborative effort between Mrs. Ackerberg and Commission staff to resolve this matter," wholly ignores the fact that, should Mr. Roth prevail in his Appeal and, ultimately, in his lawsuit, the Coastal Commission, Coastal Conservancy and AFA will have no right to open the Easement on her Property for public use.

The Coastal Commission has not provided a single reason why immediate removal of the alleged encroachments from the Ackerberg Property -- which would require Mrs. Ackerberg to substantially alter the physical appearance of her Property and to remove/demolish a number of items and structures within the Easement, including a ten-foot-wide portion of a nine-foot high perimeter block wall facing Pacific Coast Highway -- is necessary or required while Mr. Roth's Appeal is pending and before his lawsuit has been fully adjudicated. Because the legality of opening the Easement for public use has yet to be fully adjudicated in Mr. Roth's lawsuit, the Easement cannot open for public use at this time. Nevertheless, the Coastal Commission apparently expects Mrs. Ackerberg to immediately remove a significant portion of her perimeter block wall facing Pacific Coast Highway, which wall was reflected in the plans approved by the Coastal Commission in 1985. This would leave the interior of the Property exposed and unprotected from trespassers for the entirety of the time Mr. Roth's Appeal and lawsuit are pending (which, as you know, will be several months at the very least). The Coastal Commission's failure to consider the effects of such circumstance is unfair and unfortunate.

Most significantly, the Enforcement Proceedings constitute an impermissible effort by the Coastal Commission to make an "end run" around the pending Appeal and to divest the Second District Court of Appeal of its constitutionally derived appellate jurisdiction. See People ex rel. San Francisco Bay Conservation and Dev. Comm'n v. Town of Emeryville, 69 Cal.2d 533, 536-39 (1968) (hereinafter, "Emeryville"). Emeryville is instructive and highlights the Coastal Commission's improper efforts to ignore the pending Appeal and to divest the Second District Court of Appeal of its appellate jurisdiction to determine the viability of Mr. Roth's lawsuit and the issues and claims raised therein.

In Emeryville, California's Attorney General brought an action on behalf of the San Francisco Bay Conservation and Development Commission ("BCDC") against the Town of Emeryville to enjoin it from conducting fill operations for failure to obtain a necessary permit from the BCDC. Emeryville, 69 Cal.2d at 536. The trial court first granted the injunction, then dissolved it on the ground that the Town was exempt from securing such a permit. Id. In upholding its order enjoining all fill operations by the Town pending final determination of BCDC's appeal, the California Supreme Court found that resumption of fill activities would have imperiled the value of BCDC's right of appeal and threatened maintenance of the Court's

appellate jurisdiction. Id. The Supreme Court held that "had Emeryville been permitted to resume its fill activities, it would have been able, as a practical matter, to render this appeal moot." Id. at 537

What the Coastal Commission seeks to do here via its Enforcement Proceedings is exactly what the California Supreme Court held in Emeryville to be an impermissible interference with appellate jurisdiction. Here, as in Emeryville, the trial court has rejected Mr. Roth's claims for injunctive relief and Mr. Roth has appealed that trial court ruling -- which ruling is subject to *de novo* review by the Court of Appeal. See Honig v. San Francisco Planning Dep't, 127 Cal.App.4th 520, 524 (2005) (*de novo* review standard for dismissal from sustained demurrer without leave to amend). Moreover, as in Emeryville, while Mr. Roth's Appeal is pending, the Coastal Commission seeks to engage in the very acts sought to be enjoined by his lawsuit -- namely, the implementation, enforcement and opening of the Easement through its use of the Enforcement Proceedings to force Mrs. Ackerberg to immediately remove the alleged encroachments from the Easement. Indeed, the Coastal Commission admits in its April 27, 2007 Notice letter to Mrs. Ackerberg that the Enforcement Proceedings against her are designed to ensure that AFA can "open and manage the easement for public access to the beach" and "the area can function as required by the Commission and as set forth in the recorded Certificate of Acceptance." Thus, as in Emeryville, the Coastal Commission's Enforcement Proceedings impermissibly interfere with maintenance of the Second District Court of Appeal's appellate jurisdiction and imperil the value of Mr. Roth's and Mrs. Ackerberg's rights on appeal.

Your consideration of this letter is greatly appreciated.

Very truly yours,

David S. Alverson

cc: Lisette Ackerberg
Martin J. Foley, Esq.

30295942

STATE OF CALIFORNIA – THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, GOVERNOR

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE (415) 904- 5200
FAX (415) 904- 5400
TDD (415) 597-5885

Via Certified (# 7006 2760 005 5883 3961)
and Regular Mail

October 2, 2008

Ms. Diane Abbitt
511 5th Street, Suite G
San Fernando, CA 91340

Subject:	Public Access Easement at 22466 and 22500 Pacific Coast Highway, Malibu. Property Owner Lisette Ackerberg/Lisette Ackerberg Trust.
Violation No.:	V-4-07-006
Location:	22500 and 22466 Pacific Coast Highway, Malibu, Los Angeles County (APN 4452-002-013, 4452-002-011)
Violation Description:	1) Unpermitted development including, but not limited to, rock rip-rap, 9-ft high wall, concrete slab and generator, fence, railing, planter, and landscaping located within, and restricting access to, vertical and lateral access easements; and 2) development that is inconsistent with the terms and conditions of existing Coastal Development Permits No. 5-83-360 and 5-84-754, requiring vertical and lateral public access easements.

Dear Ms. Abbitt:

This letter is in regards to your client's, Mrs. Lisette Ackerberg, property and the above referenced Coastal Act violation.[1] The purpose of this letter is to notify you of the California Coastal Commission ("Commission") staff's intention to move forward with the proceedings that were stalled in June of last year due to a now-dissolved judicial stay: (1) for issuance of a Cease and Desist Order and (2) to determine whether a Notice of Violation ("NOVA") will be recorded against your client's property. The nature of and reasons for these proposed proceedings were addressed in previous correspondence from the Commission staff. The original Notice of Intent ("NOI") was sent to Mrs. Ackerberg on April 27, 2007,[2] after more than two years of prior correspondence failed to resolve this matter informally. These proceedings did not occur in 2007 because of litigation filed by your client's neighbor, Jack Roth, seeking to resolve and invalidate

[1] The Coastal Act is codified in Cal. Pub. Res. Code sections 30000-30900.

[2] For your convenience, a copy of the April 27, 2007 NOI is attached to this letter.

the subject easement ("Public Access Easement") and to enjoin the Commission, the State Coastal Conservancy, and Access for All ("AFA") from opening the easement for public use. Mrs. Ackerberg's previous lawyer, Mr. Edwin Reeser, requested that the Commission postpone the proceedings until the issuance of a final judgment for Jack Roth's lawsuit against the Commission, 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 the Court of Appeals granted a stay of Commission proceedings until it ruled on the appeal.

As you know, 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. Therefore, the dismissal of Mr. Roth's lawsuit has been upheld by the courts, and the stay has been dissolved. Thus, we intend to re-commence the proceedings which were postponed in June of 2007. We understand that AFA also intends to proceed with opening the Public Access Easement which it accepted in 2003, and is therefore now held by that organization. Since 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. The work that was conditionally permitted by the Commission under Coastal Development Permit ("CDP") Nos. 5-83-360 and 5-84-754 was completed long ago, and since that time, the benefits of the permits have accrued to the property. However, the public access, which the Commission found in the original permit hearing to be required in order to approve the CDPs in a manner that was consistent with the Coastal Act and authorize the development that Mrs. Ackerberg now enjoys and which was a specific condition of the CDPs referenced above, has not been provided.

The April 27, 2007 NOI presented the opportunity to raise defenses in a Statement of Defense form ("SOD"). The NOI and the SOD form specified a twenty-day period for submittal of an SOD, consistent with Section 13181 (a) of the Commissions regulations. The final date for submittal of the SOD was May 17, 2007; however, Commission staff granted Mrs. Ackerberg a 25-day extension of the deadline to submit the SOD extending the final SOD submittal deadline to June 11, 2007, and simultaneously moving the tentative hearing to July. Mrs. Ackerberg sent letters to Commission staff on May 17, 2007 and June 11, 2007, both containing objections to the recordation of a NOVA and the issuance of a Cease and Desist Order.[3] NOVA proceedings were stalled due to the court issued stay. The stay has been resolved with the California Supreme Court's denial of Mr. Roth's petition for review and application for stay on July 9, 2008. Therefore, the proceedings regarding the recordation of a NOVA and the issuance of a Cease and Desist Order are ripe for action. At the time of the prior exchanges, Mrs. Ackerberg was represented by Mr. Reeser. The twenty-day time for identifying issues and raising objections relevant to the Commission proceedings provided for in the Coastal Act regulations has long run, but in light of the change in Mrs. Ackerberg's representation, Commission staff is offering, as a courtesy, an additional ten-day period to raise any issues that were not raised by Mr. Reeser on behalf of Mrs. Ackerberg in the previous objection letters. This is a courtesy offer

[3] Mrs. Ackerberg's June 11, 2007, May 17, 2007 and March 22, 2007 letters incorporating objections are attached. Staff construes that the letters form her statement of defense, even though the statement of defense form that was sent with the NOI was not completed and submitted. An additional statement of defense form is attached.

and the Commission is under no obligation to provide an additional opportunity to raise additional defenses to the original NOI.

Unpermitted Development/Obstruction of Public Access

The unpermitted development here at issue includes, but is not necessarily limited to, the placement of rock rip-rap, a 9-ft high concrete wall, large generator and associated concrete slab, fence, railing, planter, and landscaping, all of which continues to exist on the property. The unpermitted items lie directly within the vertical easement area and/or the lateral easement area AFA has been attempting to open since 2005. Offers to Dedicate ("OTD") both easements were found by the Commission to be necessary to find the project consistent with the Coastal Act, and were required by specific permit conditions adopted by the Commission when it issued the two CDPs in the early 1980's for construction of a wooden bulk head, a new residence and pool, the renovation of an existing tennis court, and the demolition of an existing single-family residence. The unpermitted items completely obstruct public access within the vertical easement and partially obstruct access along the lateral easement. Therefore, the items are both inconsistent with the public access policies of Chapter 3 of the Coastal Act and with the existing permits and the easements established as conditions of the existing permits. Staff has attempted to obtain a voluntary resolution of the violations, but to date, Mrs. Ackerberg has not agreed to resolve the violations on the property and has not submitted removal plans for the unpermitted development.

The Coastal Act violations at issue have resulted in a loss of public access to the coast. The proposed cease and desist order proceeding would direct Mrs. Ackerberg to comply with the permit conditions and easement by removing the unpermitted items located within the easement area, and to cease from placing any development in the easement area in the future or otherwise interfering with public access in the area covered by the legal easement. Removal of the unpermitted development and prohibiting the placement of development within the area in the future allows AFA to open the easement to provide the valuable public access that the Commission required when it authorized the construction of the current Ackerberg residence.

Removal of unpermitted development includes removal of the rip rap at issue, which lies within the lateral access easement area. As we have pointed out in earlier correspondence, the unpermitted rip rap is inconsistent with the applicable permits for the property as it exceeds that which was approved under the 1983 CDP or any other CDP, exceeds the approved specifications in the 1983 permit, and in addition, it lies within the lateral access easement that the Commission required to bring the bulkhead into compliance with the Coastal Act. In addition removal of unpermitted development requires the removal of the rock rip rap, 9-ft high wall, concrete slab and generator, fence, railing, planter, and landscaping located within the vertical easement which completely restricts access to the vertical access easement. The unpermitted development within both the vertical access easement and the lateral access easement constitute development that is inconsistent with an existing CDP and is unpermitted development within the meaning of the Coastal Act and allows the Commission to issue a Cease and Desist Order.[4] The unpermitted development within the vertical easement area has been in violation of an existing CDP since March of 2005, when AFA accepted the easement and indicated it was ready to open it, and

[4] See attached April 27, 2007 NOI letter p. 4-5 defining "unpermitted development" and "inconsistent with CDP" under Section 30106 of the Coastal Act and Cal. Pub. Res. Code § 30810 (a).

since that time, Mrs. Ackerberg has not agreed to comply with removal of the unpermitted development within the vertical easement area.

Additional Statements of Defense

Please submit any additional defenses you wish to assert, in addition to the previous defenses asserted by Mrs. Ackerberg's former counsel, to the Commission's San Francisco office by **October 12, 2008.** A Statement of Defense form is attached to this letter. Comments may be directed to Erin Murphy of the Enforcement Unit, at the address listed on the letter head above. Despite the previously unsuccessful attempts to resolve the violations amicably, Commission staff remains willing to work with Mrs. Ackerberg to resolve the violations in a cooperative manner. Please feel free to contact Commission staff with any questions or concerns you may have regarding the resolution of this violation matter by calling (415) 904-5220. We look forward to working with you to resolve these enforcement actions.

Sincerely,

A. McLend

Aaron McLendon
Statewide Enforcement Analysts

Encl: April 27, 2007 NOI to Mrs. Ackerberg from Peter M. Douglas
Mrs. Ackerberg's June 11, 2007 letter to the Commission
Mrs. Ackerberg's May 17, 2007 letter to the Commission
Mrs. Ackerberg's March 22, 2007 letter to the Commission
Statement of Defense form

Cc (with Encl): Mrs. Lisette Ackerberg

Cc (without Encl): Lisa Haage, Chief of Enforcement
Alex Helperin, Staff Counsel

LAW OFFICES OF DIANE ABBITT

511 5th Street
Suite G
San Fernando, California 91340

TELEPHONE (818) 637-2117
FAX (818) 256-2379

October 16, 2006

VIA FACSIMILE & US MAIL

Erin Murphy
Enforcement Unit
CALIFORNIA COASTAL COMMISSION
45 Fremont, Suite 2000
San Francisco, California 94105-2219

Re: Second Statement of Defense Submittal Extension
Lisette Ackerberg/Lisette Ackerberg Trust Public Access Easement

Dear Ms. Murphy,

Thank you for your correspondence received by our offices at 5:40 PM yesterday afternoon. Ms. Ackerberg asked me to express her appreciation of the courtesy you are extending to our offices by giving us till October 22, 2008, to respond to the October 2, 2008, correspondence sent to our offices by Aaron McLendon.

Please know that we take this matter very seriously, and are reviewing the history of this matter very carefully so that we can appropriately advise our client of her options.

Sincerely,

Diane R. Abbitt

DRA/dir

cc: Lisette Ackerberg
Lisa Haage, Chief of Enforcement
Aaron McLendon, CCC Headquarters Enforcement Analyst

Exhibit 23
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE (415) 904- 5200
FAX (415) 904- 5400
TDD (415) 597-5885

Via Fax and Regular Mail

October 15, 2008

Ms. Diane Abbitt
511 5th Street, Suite G
San Fernando, CA 91340

Subject: Second Statement of Defense Submittal Extension, Lisette Ackerberg/Lisette Ackerberg Trust Public Access Easement.

Violation No.: V-4-07-006

Location: 22500 and 22466 Pacific Coast Highway, Malibu, Los Angeles County (APN 4452-002-013, 4452-002-011)

Dear Ms. Abbitt:

This letter is in response to your request to extend the deadline for submittal of an additional Statement of Defense in regards to the above referenced Coastal Act violation for your client, Mrs. Ackerberg, and to express our continuing interest in resolving this violation. Commission staff member Aaron McLendon received your request to extend the original deadline via email on Tuesday, October 14, 2008. The original deadline for submitting defenses in addition to those submitted by Mrs. Ackerberg's former counsel was October 12, 2008. You requested a 30 day extension period from the date of your request, October 14, 2008, (not from the date of the original letter). We attempted to reach you to discuss this issue further on the afternoon of October 14, 2008, but were unable to reach you and as of this date, have not received a return call from you. We therefore are writing this letter to avoid more time passing before we had the opportunity to communicate with you.

Unfortunately, Commission staff cannot grant such a lengthy extension period at this time. We point out that the application regulations provide for "20 days from transmittal" of the notice of intent for a response to be submitted. (CCR, Title 14, Division 5.5 Section 13181 (a)). Moreover, as we previously discussed, the Commission already provided your client such a period of response to the notice of intent at the time the original letter was sent. The actual time limit period she had to respond to the notice of intent letter has long since passed and the regulations do not provide for a new opportunity to respond. However, as a courtesy, in light of the fact that we became aware that she had retained new counsel, we voluntarily offered you and your client a new opportunity to respond to the issues raised in the notice of intent. However, given the long passage of time since this case began, and the need to move toward resolution and to address this matter in an upcoming hearing, we need to move forward.

Despite the foregoing, as an additional accommodation to your request, the Commission staff is willing to grant a 20 day period of time for the new response (from the date on which Commission staff mailed a letter to your office extending the courtesy opportunity to assert additional defenses on behalf of your client, Mrs. Ackerberg, which would mean that she now has the full amount of time provided to your office as if she had not had an opportunity to respond previously). That letter was mailed to your office on October 2, 2008. Please submit any defenses you wish to assert to the Commission's San Francisco office by **October 22, 2008**. Comments may be directed to Erin Murphy of the Enforcement Unit, at the address listed on the letter head above.

This letter is sent in addition to the voice mail you received from Commission staff Lisa Haage and Erin Murphy at your office on Tuesday, October 14, 2008. As stated in that voice mail, Commission staff remains willing to work with Mrs. Ackerberg to resolve the violations in a cooperative manner. Moreover, as we mentioned in our voicemail of yesterday, if it appears that it is likely we were going to be able to reach an expeditious settlement of this matter, it may be that you do not need to respond with a Statement of Defense at all. In many cases, parties prefer to work towards a consensual resolution of the violation which obviates the need for a contested hearing altogether. If you and your client would like to discuss the option of reaching an agreement which would comply with the permit conditions and would resolve the violation and open the accessway Commission staff is available to discuss those options with both of you. As we noted, such an agreement would allow you and your client increased input in the manner and timing of the resolution of the violation, and we would strive to make the process as collaborative as possible. We would, however, have to work very quickly to address this issue, given the upcoming hearing schedule. **If you would like to discuss this option, please contact our office no later than October 21, 2008.** For your information, Commission staff is tentatively looking at bringing this matter before the Commission at the November 12-14 hearing which will be held in Long Beach, California.

You also indicated that you are working with counsel for Access for All, who hold the easement established by the Commission permit conditions. We are pleased to hear that, and encourage this as a constructive step in resolving the situation and opening the accessway. We look forward to working with you to resolve the violation and in moving forward with this matter. Please feel free to contact Erin Murphy of the Commission Enforcement Unit with any questions or concerns you may have regarding the resolution of this violation matter by calling (415) 904-5220. We look forward to working with you to resolve these enforcement actions.

Sincerely,

Erin Murphy

Erin Murphy
Enforcement Unit

cc. Lisa Haage, Chief of Enforcement
Aaron McLendon, CCC Headquarters Enforcement Analyst

LAW OFFICES OF DIANE ABBITT

511 Fifth Street, Suite G
San Fernando, California 91340

TELEPHONE (818) 637-2117
FAX (818) 256-2379

COPY

October 21, 2008

Via Fax and UPS OVERNIGHT

Ms. Lisa Haage
Chief of Enforcement
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Re: Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings
V-4-07-006
Location: 22500 and 22466 Pacific Coast Highway, Malibu, California
APN 4452-002-013, 4452-002-011

Dear Ms. Haage:

This letter is written on behalf of our client, Lisette Ackerberg, in response to Staff's recent October 2, 2008, and October 15, 2008, letters regarding the above-referenced Coastal Act violation and the short extension that we were provided to submit an additional Statement of Defense. We appreciate Staff's courtesies and offer to work with Mrs. Ackerberg; we believe that our objective is the same as the Commission's, to end up with a meaningful vertical accessway to this area of Carbon Beach and, toward that end, we are taking aggressive, pro-active action. We now find that to accomplish this mutual objective, we need more time, as well as your assistance.[1]

To date, the letters exchanged have addressed the fact that Access for All (AFA) has accepted the vertical access easement located on the downcoast side of Mrs. Ackerberg's property, that AFA indicates that it is ready to open and operate the easement, and that Staff has requested that certain improvements located within easement strip be removed. Yet, a fundamental problem remains – namely, this particular vertical

[1] For the sake of simplicity, we would ask Staff to construe Mrs. Ackerberg's prior objection letters, as well as this letter, as her statement of defense, to the extent you believe that is required at this point.

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.

We all agree that in approving the Ackerberg residence in 1984, the Commission imposed a vertical access requirement. But, the Commission's decision also anticipated the current situation and included revised findings to address it. In a letter to Staff dated January 28, 1985, the Ackerberg's then attorney, Edwin Reeser, recounted his understanding of the Commission's instructions regarding the revised findings:

- "[L]anguage should be put in the staff report as to the desirability of opening accessways already owned by the public before the opening of private accessways; particularly where the burden on the private property owner is substantial."

- "[T]here was considerable discussion by Commissioners at the hearing about the extinguishment of offers to dedicate where adequate nearby access is developed; or where after adoption of a Malibu Land Use Plan it may be determined that further access is not required."

- "[B]oth 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." (See the accompanying letter, dated January 28, 1985, from Edwin B. Reeser, III, to Gary Gleason attached to this letter as Exhibit A and made a part of it.)

With this in mind, the Commission then added a finding to its decision to provide the Ackerbergs with the future opportunity for extinguishing the condition. After discussing the reason for imposing the vertical accessway, the Commission stated:

> "The Commission further finds that notwithstanding the fact the County of Los Angeles owns a vertical accessway within 500 feet of the project, that accessway has not been opened to the public and therefore the Commission cannot make a finding that 'adequate access exists nearby.' In addition, although the Commission has, in some cases, found that vertical access dedication will not be required, such an approach is not appropriate here. The appropriate vehicle for establishing the policy relative to the precise spacing of vertical accessways and whether previously secured offers to dedicate vertical accessways can be extinguished if another vertical accessway is improved and opened within 500 feet of the subject property in [sic] the LUP. The Malibu LUP recommendation suggests a policy on this point. ***The Commission believes that as a matter of policy, public owned vertical accessways should be improved and opened to***

> ***public use before additional offers to dedicate vertical access easements are opened*** (Emphasis Added). This position assumes that 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 accomplishment 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 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."[2] (Commission Decision, Application No. 5-84-754, pp. 7-8 attached to this letter as Exhibit B and made a part of it.)

With this very specific language, the Commission explained to the Ackerbergs its policy that "publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical access easements are opened," and that "[o]nce a public accessway has been improved and opened for public use," a suitable policy and mechanism would be developed and adopted that would enable the OTD to be extinguished. This makes sense because, as a practical matter, not every accessway mechanically spaced at 500 feet results in meaningful or viable public access, something ordinarily that would be provided by a publicly owned accessway.

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, i.e., trash cans, lifeguards, or bathrooms, on or near the beach. As you undoubtedly know, the easement area is cramped, sandwiched between two homes, and is not visible from Pacific Coast Highway.

In addition and equally important, there are problems that exist at both ends of the easement area. Erin Murphy was kind enough to forward me the July 28, 2003, "Public Vertical Access Easement Management Plan" for the easement. On page 2, the Management Plan states that two eucalyptus trees are located within the easement. That, however, is not accurate. 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. (Please see the accompanying survey of the Ackerberg property attached to this letter as Exhibit C and made a part of it.) Mrs. Ackerberg has no control over the location of the trees. They are owned by the City and are not encroachments in the easement. The trees are

[2] The accompanying copy of the revised Staff Report includes a margin note by Mr. Reeser, "added change in findings," reflecting the addition of this paragraph to the findings.

significant, however, because they are mature and fully obscure the easement area. (Please see photo on Exhibit C which clearly reflect the height and location of the trees.)

A problem also exists at the seaward end of the easement. Staff's letters assert that "the placement of rock rip-rap" constitutes unpermitted development. However, this is inaccurate as well. On June 9, 1983, the Commission approved the construction of an approximately 140-foot long wood pile supported, wood sheeted bulkhead. Importantly, the approved seawall, which spanned the length of the property, included rock rip-rap. (Please see the accompanying correspondence and seawall engineering report attached to this letter as Exhibit D and made a part of it.) The seawall/rip-rap has been on the property for over 20 years, but sand covered the rip-rap. By our observation, the west end of Carbon Beach where the Ackerberg property is located has been eroding. The beach is significantly shallower today than it was when the Commission imposed the vertical access easement requirement. Thus, the rip-rap that Staff notes is, of course, visible, but it was lawfully installed under the 1983 permit approved by the Commission. The significance of this is two-fold: First, there is no violation with respect to the existing seawall. Second, the exposed rock where the easement adjoins the beach makes use of the easement, again, problematic.

Based upon the foregoing, it is clear that there are some fundamental problems associated with opening this particular vertical accessway, problems which the Commission itself appears to have been aware of as reflected in the above quoted language of the revised findings.

As originally stated, we recognize the Commission's and Staff's desire to provide a meaningful vertical accessway in the Carbon Beach area. To that end, we have been diligently pursuing a related course of action, consistent with the findings and guidance that the Commission provided in granting the permit for the Ackerberg residence. . As noted in the revised findings, "[O]ne County accessway (at 22550 P. C. H.) is located within 500 feet of the project site." This vertical accessway was created in or about 1973, when the County of Los Angeles approved Tract Map No. 29628 ("Tract Map"), which authorized the conversion of an existing apartment building at 22600 Pacific Coast Highway to condominiums. The Tract Map reflects a surveyed 10-foot wide vertical access easement on the upcoast side of the condominium building that extends to the mean high tide line, identified as "[a]n easement to the County of Los Angeles for pedestrian ingress and egress purposes." The then property owner, Malibu Terrace, Ltd., provided the following dedication on the approved map: "We also dedicate to the County of Los Angeles the easement for ingress and egress purposes so designated on said map and all uses incident thereto, including the right to make connections therewith from any adjoining properties." And, on October 23, 1973, the County of Los Angeles accepted the easement on behalf of the public: "That all easements shown on said map and offered

for dedication be and the same are hereby accepted on behalf of the public." [3] (Please see the accompanying Tract Map attached to this letter as Exhibit E and made a part of it.)

Thus, there still exists a dedicated public vertical accessway only five properties to the west (upcoast) of the Ackerberg residence. (See Commission's Website, "Carbon Beach – Parcels with Public Access Easements – Malibu, Los Angeles County" – #s2 and 3 of 6.) This public accessway is located immediately upcoast of the condominium building in the existing parking lot that serves the building. In contrast to the easement adjacent to the Ackerberg residence, the County accessway is visible and far closer to public parking, a signal, and a crosswalk, and it is already paved. The accessway is 420 feet from the nearest pedestrian crosswalk downcoast and 850 feet from the nearest pedestrian crosswalk upcoast. There are, however, modest encroachments currently within the easement area: a stucco retaining wall, a planter, a wood gate, a pool equipment area, and portion of a wood deck that need to be removed. We have prepared a "Topography Survey" which more graphically shows both the west end of the condominium property and the unimproved property immediately upcoast. The survey identifies the location of the dedicated public accessway, and it also notes another possible location for it outside of condominium parking lot. (Please see Exhibit F attached to this letter and made a part of it.)

Further to our efforts, we met recently with Supervisor Zev Yaroslavsky's office to discuss the opening of this public accessway and the funding of its long-term maintenance. That dialogue is continuing.

We understand that this matter has been pending since 2003, and that everyone is impatient to be done with it and to move forward and open the accessway, but I ask you the same questions we have been asking ourselves – Is this the right accessway? Is it truly viable? For the money to be spent, will we get the desired return on our dollars? I'm new to this matter and, in reviewing all of the materials generated by previous counsel and Staff to date, the materials enclosed with this correspondence, my visits to the Ackerberg property and the County accessway, and the guidance offered in the revised findings as set forth in Exhibit B, I would have to answer, NO, not if the County accessway can be opened.

We are committed to proceeding expeditiously, but we need more time and we need to work together. We are aware that the upcoming November Commission meeting is in Long Beach, and we think that would be a great time to meet with you and, if your time permits, to visit both sites.

[3] The property immediately upcoast of the condominium building and parking lot is undeveloped. The Tract Map approval required a sizable area for a temporary private easement for a leachfield to serve the condominium which is to be maintained until such time as a sewer is installed in this area of Malibu. (See the accompanying "Covenant and Agreement.") Since it is not likely that there will ever be a sewer system approved and constructed in Malibu, the leachfield is likely to remain for the life of the building, and the leachfield easement greatly limits the developable area available on this unimproved parcel.

I look forward to discussing this further with you at your earliest convenience.

Sincerely,

Diane R. Abbitt

Cc: Mr. Aaron McLendon, CCC Headquarters Enforcement Analyst
Ms. Erin Murphy, CCC Enforcement Unit (w/o enclosures)
Mrs.Lisette Ackerberg (w/o enclosures)
Mr. Terry Taminen (w/o enclosures)

Enclosures

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885

Via Regular Mail
and Fax

November 14, 2008

Law Offices of Diane Abbitt
511 Fifth Street, Suite G
San Fernando, CA 91340

Subject:	**Draft Consent Cease and Desist Order No. CCC-08-CD-10**
Violation No.:	V-4-07-006
Location:	22500 and 22466 Pacific Coast Highway, Malibu, Los Angeles County (APNs 4452-002-013, 4452-002-011)
Violation Description:	1) Unpermitted development including, but not limited to, rock rip-rap, 9-ft high wall, concrete slab and generator, fence, railing, planter, light posts, staircase, and landscaping, all of which is located within, and restricting access to, vertical and lateral access easements; and 2) development that is inconsistent with the terms and conditions of existing Coastal Development Permits Nos. 5-83-360 and 5-84-754, requiring vertical and lateral public access easements.

Dear Ms. Abbitt:

This letter is in regards to Mrs. Lisette Ackerberg's (your client) property and the above referenced Coastal Act violation case.[1] In light of California Coastal Commission ("Commission") staff's desire to resolve the above-cited violations that exist on your client's property, along with your October 21, 2008 letter sent to Commission staff expressing the desire to resolve this matter amicably, I am attaching a draft of a proposed Consent Cease and Desist Order for your review. As you are aware from the Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings, sent by Commission staff to Ms. Lisette Ackerberg, and dated April 27, 2007, as well as the letter I sent to you dated October 2, 2008, Commission staff has been making preparations to bring to the Commission at its December meeting, (1) a proposed Cease and Desist Order and (2) findings in support of a recordation of a Notice of Violation ("NOVA") against your client's property. As

[1] The Coastal Act is codified in Cal. Pub. Res. Code sections 30000-30900.

noted in the Notice of Intent ("NOI") letters sent to your client, we always prefer to resolve matters consensually if possible. As a reflection of our desire to resolve this matter amicably, we are providing you with the opportunity to reach an agreement with the Commission via a Consent Cease and Desist Order, to settle the violations that exist at the subject property. The situation is similar to executing a settlement and you will note the similarity of the proposed Consent Order to a settlement agreement.

A Consent Order would provide your client with an opportunity to resolve this matter consensually, to have greater input into the process and timing of removal of the unpermitted development, and to resolve the issue of penalties under the Coastal Act. The Consent Order process will provide your client with the necessary framework to proceed with the removal of unpermitted development at the subject property as well as comply with the terms and conditions of Coastal Development Permit Nos. 5-83-360 and 5-84-754, requiring vertical and lateral public access easements. The proposed order includes a provision that you agree not to contest to the issuance or enforceability of the order.

Provided that you, on behalf of your client, reach agreement with Commission staff on the proposed Consent Order, we will ask Mrs. Ackerberg to sign the Consent Order prior to the December 11-12, 2008 Commission hearing since the terms of the Order relate to the conduct of the Commission hearing. In order to avoid a unilateral hearing, we ask that Mrs. Ackerberg sign the Consent Order **by Tuesday, December 2, 2008**. In the event that we are unable to reach an agreement regarding the proposed Order, Commission staff will proceed with the Cease and Desist Order proceedings already scheduled, as well as determining whether a NOVA will be recorded against your client's property at the December 11-12, 2008 Commission hearing.

Please review the proposed Consent Order and provide me with comments by **Wednesday, November 19, 2008**. If we fail to reach agreement by that date, the Commission staff will proceed as scheduled with a unilateral Cease and Desist Order proceeding as well as a hearing on recordation of a NOVA.

If you have any questions regarding this letter, the proposed Consent Order, or any other issues relating to this violation matter, please contact me at 415-597-5886 or send correspondence addressed to my attention at the address listed on the letterhead above. Again, we hope we can resolve this matter amicably and look forward to hearing from you.

Sincerely,

Erin Murphy

Erin Murphy
Enforcement Program

cc: Lisa Haage, Chief of Enforcement
Alex Helperin, Staff Counsel

Aaron McLendon, Statewide Enforcement Analyst
Pat Veesat, Southern California Enforcement Program Supervisor
Lisette Ackerberg

November 14, 2008

DRAFT CONSENT CEASE AND DESIST ORDER CCC-08-CD-10

1.0 CONSENT CEASE AND DESIST ORDER CCC-08-CD-10

Pursuant to its authority under California Public Resources Code ("PRC") § 30810, the California Coastal Commission ("Commission") hereby authorizes and orders Mrs. Lisette Ackerberg, both in her individual capacity and in her capacity as trustee for the Lisette Ackerberg Trust, all her successors, assigns, employees, agents, and contractors, and any persons acting in concert with any of the foregoing (hereinafter, "Respondent") to take all actions required by Consent Cease and Desist Order No. CCC-08-CD-10 ("Consent Order"). Through the execution of this Consent Order, the Respondent agrees to comply with the terms of this paragraph and with following terms and conditions embodied in this Consent Cease and Desist Order:

1.1 Cease and desist from engaging in any further development on the subject property, as defined in Section 5.1 of this Consent Order, unless authorized pursuant to the Coastal Act (Cal. Pub. Res. Code §§ 30000 *et. seq.*).

1.2 Cease and desist from maintaining any unpermitted development on the property, as that phrase is defined in Section 6 of this Consent Order.

1.3 Take all steps necessary to ensure compliance with the Coastal Act by removing (consistent with the requirements in Section 2.0 of this order) all unpermitted development, as defined in Section 6 of this order, consisting of, but not limited to, rock rip-rap, a 9-ft. high wall, a concrete slab and generator, a fence, a railing, a planter, light posts, a stairwell, and landscaping, all of which is located within, and restricting access to, vertical and lateral access easements, by complying with the requirements of Section 2 as set forth below.

1.4 Respondent shall allow Access for All, and all their employees, agents and contractors, access to the vertical easement area for purposes of surveying the area as well as designing, constructing, opening, and maintaining the vertical easement area dedicated for public use once the unpermitted development is removed.

2.0 ADDITIONAL TERMS AND CONDITIONS

2.1 Removal Plan

Within 60 days of issuance of this Consent Order, Respondent shall submit for the review and approval of the Executive Director of the Commission ("Executive Director") a Removal Plan ("Plan"). The Plan shall outline the removal of all unpermitted development on the subject property along with any restoration work that may be required as a result of removal activities. The Executive Director's approval of the plan will not constitute concurrence that no unpermitted development exists on the property other than that which is listed in the Plan. Unpermitted development to be removed includes, but is not necessarily limited to, all unpermitted development within the vertical and lateral easement areas including rock rip-rap, a 9-ft. high wall, a concrete slab and generator, a fence, a railing, a planter, light posts, a stairwell, and landscaping, all of which is located within, and restricting access to, vertical and lateral access easements. If the Respondent proposes to relocate the concrete slab and generator to another area on the property, the property owner shall apply for applicable coastal development permits. The plan shall include and discuss the following elements:

a. A current, scaled site plan prepared by a qualified surveyor depicting all existing development on the subject property.

b. Photographs of the site and of all unpermitted and approved development contained thereon.

c. A description of all equipment that will be used for removal of the unpermitted development. If the Plan calls for heavy equipment on the sandy beach, the Plan shall also include appropriate operation of mechanized equipment necessary to complete removal work, including, but not limited to the following:

    i. Hours of operation of mechanized equipment shall be limited to weekdays between sunrise and sunset, excluding the holidays;

    ii. Equipment shall be stored in an appropriate location inland from the beach when not in use;

    iii. A contingency plan shall be established addressing: 1) potential spills of fuel or other hazardous releases that may result from the use of mechanized equipment; 2) clean-up and disposal of the hazardous materials; and 3) water quality concerns;

    iv. Measures to protect impacts to water quality from removal activities shall be provided.

    v. At no time shall any equipment or other construction activities occur within the intertidal (wet sand) areas of the sandy beach. If tides and surf are such that any equipment or construction material make contact with coastal waters, all such activities shall stop and any equipment or construction material shall be immediately removed from the sandy beach area.

d. A detailed and comprehensive description of the removal activities.

e. Identification of any restoration work that will be needed as a result of removal activities, to ensure public access consistent with the permit condition and protection of coastal resources consistent with Chapter 3 of the Coastal Act.

f. A description including name and location of an appropriate, licensed disposal site (or, if usable materials are being reused or stored for future use, the location of reuse or an appropriate storage facility) where the unpermitted development will be taken. Should the disposal or storage site be located in the Coastal Zone, a coastal development permit shall be required for such disposal.

g. A proposed series of dates and times for performing the removal work.

h. A provision that all work to be performed under this Consent Order shall be done in compliance with all applicable laws.

i. All plans, reports, photographs and any other materials required by this Consent Order shall be sent to:

California Coastal Commission
Headquarters Enforcement Program
Attn: Aaron McLendon
45 Fremont Street, Suite 2000
San Francisco, California 94105
Facsimile (415) 904-5235

With a copy sent to:

California Coastal Commission
South Central Coast District
Attn: Tom Sinclair
89 S. California Street, Suite 200
Ventura, CA 93001
Facsimile (805) 641-1732

California Coastal Commission
Central Coast District
Attn: Linda Locklin
725 Front Street, Suite 300
Santa Cruz, CA 95060
Facsimile (831) 427-4877

2.2 Execution of Removal Plan

Respondent shall implement all the terms and requirements of the Removal Plan in accordance with the approved deadlines of the Plan.

2.3 Evidence of Compliance

Within 30 days of the completion of the removal activities described in paragraph 2.1, Respondent shall submit to the Executive Director a report documenting the removal of

unpermitted development from the subject property. This report shall include a summary of dates when work was performed and photographs that show the removal of the unpermitted development from the subject property, as well as photographs of the subject property after removal of all unpermitted development.

3.0 REVISIONS OF DELIVERABLES

If the Executive Director determines that any modifications or additions to a proposed Removal Plan are necessary, he shall notify Respondent. Respondent shall complete requested modifications and resubmit the Removal Plan for approval within 10 days of the postmarked date of the notification. The Executive Director may extend time for submittals upon a written request and a showing of good cause, pursuant to Section 12.0 of this Consent Order.

4.0 PERSONS SUBJECT TO THE ORDER

Mrs. Lisette Ackerberg, both in her individual capacity and in her capacity as trustee for the Lisette Ackerberg Trust, all her successors, assigns, employees, agents, and contractors and any persons acting in concert with any of the foregoing are jointly and severally subject to all the requirements of this Consent Order.

5.0 IDENTIFICATION OF THE PROPERTY

The property that is the subject of this Consent Order is described as follows:

22466 and 22500 Pacific Coast Highway, Malibu, Los Angeles County, APNs 4452-002-013 and 4452-002-011.

6.0 DESCRIPTION OF ALLEGED COASTAL ACT VIOLATION

6.1 Unpermitted development and development that is inconsistent with the terms and conditions of existing CDP Nos. 5-83-360 and 5-84-754, including, but not limited to, rock rip-rap exceeding that which was approved by the Commission under Coastal Development Permit No. 5-83-360, a 9-ft. high wall, a concrete slab and generator, a fence, a railing, a planter, light posts, a stairwell, and landscaping, all of which is located within, and restricting access to, vertical and lateral access easements.

6.2 As used in this Consent Order, the phrase 'unpermitted development' refers to any development, as that term is defined in PRC Section 30106, that lacks a necessary Coastal Development Permit including any materials and structures existing on the subject property as a result of such development.

7.0 COMMISSION JURISDICTION

The Commission has jurisdiction over resolution of this alleged Coastal Act violation pursuant to PRC Section 30810. Respondent agree not to contest the Commission's jurisdiction to issue or enforce this Consent Order.

8.0 SETTLEMENT OF MATTER PRIOR TO HEARING

In light of the intent of the parties to resolve these matters in settlement, Respondent agreed not to contest the legal and factual bases for, and the terms and issuance of, this Consent Order, including the allegations of Coastal Act violations contained in the Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist Order Proceedings ("NOI") dated April 27, 2007. Specifically, Respondent has agreed not to contest the issuance or enforcement of the Consent Order at a public hearing or any other proceeding.

9.0 EFFECTIVE DATE AND TERMS OF THE ORDER

The effective date of this Consent Order is the effective date the Consent Order is issued by the Commission. This order shall remain in effect permanently unless and until rescinded by the Commission.

10.0 FINDINGS

This Consent Order is issued on the basis of the findings adopted by the Commission, as set forth in the document entitled "Staff Report and Findings for Consent Cease and Desist Order No. CCC-08-CD-10." The activities authorized and required in this Consent Order are consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act. The Commission has authorized the activities required in this Consent Order as being consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act.

11.0 SETTLEMENT/COMPLIANCE OBLIGATION

11.1 In light of the intent of the parties to resolve these matters in settlement, Respondent shall pay a monetary settlement in the amount of $_____. The settlement monies shall be deposited in the Violation Remediation Account of the California Coastal Conservancy Fund (see PRC Section 30823). Respondent shall submit the settlement payment amount by _____ to the attention of Aaron McLendon of the Commission, payable to the California Coastal Commission/Coastal Conservancy Violation Remediation Account.

11.2 Respondent agrees to not engage in any further development, as that term is defined in PRC section 30106, located on or seaward of the subject property unless authorized pursuant to the Coastal Act, PRC §§ 30000-30900, and/or the City of Malibu certified Local Coastal Program or recognized, in writing, by the Commission to be exempt.

11.03 Strict compliance with this Consent Order by all parties subject thereto is required. Failure to comply with any term or condition of this Consent Order, including any deadline contained in this Consent Order, unless the Executive Director of the Commission ("Executive Director") grants an extension under Section 12, will constitute a violation of this Consent Order and shall result in Respondent being liable for stipulated penalties in the amount of $1,000 per day per violation. Respondent shall pay stipulated penalties within 15 days of receipt of written demand by the Commission for such penalties regardless of whether Respondent has subsequently complied. In addition, if Respondent violates this Consent Order, nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available, including the imposition of civil penalties and other remedies pursuant to Public Resources Code Sections 30821.6, 30822 and 30820 as a result of the lack of compliance with the Consent Orders and for the underlying Coastal Act violations as described herein.

11.4 Settlement monies and any other materials required by this Consent Order shall be sent to:

California Coastal Commission
Headquarters Enforcement Program
Attn: Aaron McLendon
45 Fremont Street, Suite 2000
San Francisco, California 94105
(415) 904-5220
Facsimile (415) 904-5235

12.0 DEADLINES

Prior to the expiration of any given deadlines established by this Consent Order, Respondent may request from the Executive Director an extension of the unexpired deadline. Such a request shall be made in writing 10 days in advance of the deadline and directed to the Executive Director in the San Francisco office of the Commission. The Executive Director may grant an extension of deadlines upon a showing of good cause.

13.0 SITE ACCESS

Respondent shall provide access to the subject property at all reasonable times to Commission staff and any entity having jurisdiction over the work being performed under this Consent Order. Nothing in this Consent 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 staff may enter and move freely about the portions of the subject property on which the violations are located, and on adjacent areas of the property to view the areas where removal of development is being performed pursuant to the requirements of the Consent Order for purposes including but not limited to inspecting

records, operating logs, and contracts relating to the site and overseeing, inspecting and reviewing the progress of respondents in carrying out the terms of this Consent Order.

14.0 GOVERNMENT LIABILITIES

Neither the State of California, the Commission, nor its employees shall be liable for injuries or damages to persons or property resulting from acts or omissions by Respondent in carrying out activities pursuant to this Consent Order, nor shall the State of California, the Commission or its employees be held as a party to any contract entered into by Respondent or their agents in carrying out activities pursuant to this Consent Order.

15.0 SETTLEMENT OF CLAIMS

15.1 Persons against whom the Commission issues a Cease and Desist and/or Restoration Order have the right pursuant to PRC Section 30803(b) to seek a stay of the order. However, in light of the desire to settle this matter and avoid litigation, pursuant to the agreement of the parties as set forth in this Consent Order, Respondent hereby waives whatever right they may have to seek a stay or to challenge the issuance and enforceability of this Consent Order in a court of law or equity.

15.2 The Commission and Respondent agree that this Consent Order settles the Commission's monetary claims for relief for those violations of the Coastal Act alleged in the NOI dated April 27, 2007 occurring prior to the date of this Consent Order (specifically including claims for civil penalties, fines, or damages under the Coastal Act, including under PRC Sections 30805, 30820, and 30822), with the exception that, if Respondent fails to comply with any term or condition of this Consent Order, the Commission may seek monetary or other claims for both the underlying violations of the Coastal Act and for the violation of this Consent Order. In addition, this Consent Order does not prevent the Commission from taking enforcement action due to Coastal Act violations at the subject property other than those that are the subject of the NOI.

16.0 SUCCESSORS AND ASSIGNS

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

17.0 MODIFICATIONS AND AMENDMENTS

Except as provided in Section 12.0, and for minor, immaterial matters upon mutual written agreement of the Executive Director and Respondent, this Consent Order may be

amended or modified only in accordance with the standards and procedures set forth in Section 13188(b) of the Commission's administrative regulations.

18.0 GOVERNMENTAL JURISDICTION

This Consent Order shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California.

19.0 LIMITATION OF AUTHORITY

19.1 Except as expressly provided herein, nothing in this Consent Order shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Consent Order.

19.2 Correspondingly, Respondent has entered into this Consent Order and waived their right to contest the factual and legal bases for issuance of this Consent Order, and the enforcement thereof according to its terms. Respondent has agreed not to contest the Commission's jurisdiction to issue and enforce this Consent Order.

20.0 INTEGRATION

This Consent Order constitutes the entire agreement between the parties and may not be amended, supplemented, or modified except as provided in this Consent Order.

21.0 STIPULATION

Respondent and their representatives attest that they have reviewed the terms of this Consent Order and understand that their consent is final and stipulate to its issuance by the Commission.

22.0 RECORDATION OF A NOTICE OF VIOLATION

Respondent does not object to recordation by the Executive Director of a notice of violation, pursuant to PRC Section 30812(b). Accordingly, a notice of violation will be recorded after issuance of this Consent Order. No later than thirty (30) days after the Commission determines that Respondent has fully complied with this Consent Order, the Executive Director shall record a notice of rescission of the notice of violation, pursuant to Section 30812(f). The notice of rescission shall have the same effect of a withdrawal or expungement under Section 405.1 of the Code of Civil Procedure.

IT IS SO STIPULATED AND AGREED:
On behalf of Respondent:

Lisette Ackerberg _____ Date _____

Executed in San Francisco on behalf of the California Coastal Commission:

Peter Douglas, Executive Director _____ Date _____

LAW OFFICES OF DIANE ABBITT

511 Fifth Street, Suite G
San Fernando, California 91340

TELEPHONE (818) 637-2117
FAX (818) 256-2379

November 19, 2008

Via Fax and US MAIL

Ms. Erin Murphy
Enforcement Program
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Re: Draft Consent Cease and Desist Order No. CCC-08-CD-10
Violation No.: V-4-07-006
Location: 22500 and 22466 Pacific Coast Highway, Malibu, California
APN 4452-002-013, 4452-002-011

Dear Ms. Murphy:

This letter is written on behalf of our client, Lisette Ackerberg, in response to Staff's recent correspondence, faxed over to our offices at 4:57 p.m. on Friday, November 14, 2008, regarding the above-referenced Coastal Act violation, and requesting a response by Wednesday, November 19, 2008.

In conversations with, and as expressed in my correspondence to Staff of October 21, 2008 (a copy of which is enclosed with this letter), there has never been any question that our approach has been to co-operate with Staff and Access for All to end up with the most meaningful vertical accessway to this area of Carbon Beach. Toward this end we have thoroughly investigated the facts leading up to the dedication of the Ackerberg accessway and, to the best of our ability, the reasons for the language in the 1984 Ackerberg staff report referring to the County accessway, as well as the "whys" of why that County accessway has not yet been opened. We have had a licensed surveyor survey both the Ackerberg and the County accessway properties and have objectively examined which property provides the best visitor serving opportunity and, as the Commission did in the adopted Ackerberg staff report, have concluded that the County accessway is by far the superior location.

We shared the findings of our investigation and the surveys we had commissioned in our October 21, 2008, correspondence to your offices and invited Staff to meet with us, if time permitted, during its November Commission meeting and to view both the Ackerberg property and the County vertical accessway. We were surprised by the lack of a response to both our correspondence and our invitation, but believed that the issues we raised were of sufficient relevance that Staff was taking the time to carefully examine the points raised and to conduct its own investigation after which we could expect a thoughtful, meaningful response as versus the correspondence I received late last Friday.

While waiting for your response, we have continued to take steps in pursuit of a solution to this issue. (Please see the attached e mail of this same date from Steve Afriat of the Afriat Consulting Group Inc., who has been retained to assist in discussions with the County regarding the opening of the County accessway.) These efforts are continuing.

Your correspondence makes clear your intent to take this matter to the Commission during the December 11-12 Commission hearing. I am scheduled for surgery the morning of December 10, 2008, and will be out on disability until mid January, 2009. I would ask that you postpone taking this matter to the Commission until such time as I can attend the hearing. The postponement would also provide the additional time need by the Afriat Consulting Group to determine the viability of opening the County accessway.

Thank you in advance for your courtesy.

Sincerely,

Diane R. Abbitt

Cc: Mr.Peter Douglas, Executive Director, California Coastal Commission
Mr. Aaron McLendon, CCC Headquarters Enforcement Analyst
Ms. Lisa Haage, Chief of Enforcement, California Coastal Commission
Mrs.Lisette Ackerberg (w/o enclosures)
Mr. Terry Taminen (w/o enclosures)

Enclosures

ATE OF CALIFORNIA – THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, GOVERNO

ALIFORNIA COASTAL COMMISSION
FREMONT, SUITE 2000
N FRANCISCO, CA 94105- 2219
OICE (415) 904- 5200
AX (415) 904- 5400
DD (415) 597-5885

Via Fax
and Regular Mail

November 24, 2008

Law Offices of Diane Abbitt
511 Fifth Street, Suite G
San Fernando, CA, 91340

Subject: **Response to our November 19, 2008 telephone conversation and your November 19, 2008 letter**

Dear Ms. Abbitt:

This letter is written in response to your letter sent to Commission staff, dated November 19, 2008 on behalf of your client, Mrs. Ackerberg. Commission staff thanks you for your response to our letter dated November 14, 2008, which enclosed a Draft Consent Order for your consideration. Although your letter did not respond to this settlement proposal, we are still interested in reaching a Consent Order agreement to remove the unpermitted development from the vertical and lateral easement areas recorded on Mrs. Ackerberg's property, in an effort to avoid formal Commission proceedings at an upcoming Commission hearing. In light of some of the comments made in our conversation on November 19, 2008, and your subsequent letter of the same date, I believe an overview of Commission staff's attempts to resolve this matter, as well as some of the history regarding this violation will help us in furtherance of our desire to resolve this violation amicably.

In summary, Access for All ("AFA") recorded a Certificate of Acceptance, formally accepting the Offer to Dedicate ("OTD") for the vertical access easement in December of 2003 and sent a letter soon thereafter to inform Mr. and 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. In March of 2005, AFA had not yet received permission to conduct the survey, and Commission staff sent a letter requesting that Mrs. Ackerberg remove all structures blocking the easement and contact Commission staff within 30 days to schedule the survey. When Mrs. Ackerberg informed Commission staff 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. AFA did eventually conduct a survey in September of 2005 and found that the vertical easement was blocked by unpermitted development. Linda Locklin, the Commission's Coastal Access Program Manager, sent Mrs. Ackerberg's previous attorney, Mr. Reeser, a letter on December 13, 2005, listing the encroachments found by the surveyor, and requested submittal of a removal plan.

In response, Mr. Reeser, on behalf of Mrs. Ackerberg, sent a letter to staff outlining her concerns regarding removal of the development, and "defenses" to staff's request for removal of the unpermitted development. Additional correspondence between Ms. Locklin and Mr. Reeser pertaining to Mrs. Ackerberg's concerns and defenses occurred, including letters dated January 19, 2006, February 16, 2006, March 23, 2006, and April 3, 2006. On March 5, 2007, Enforcement Supervisor Pat Veesart sent Mrs. Ackerberg a Notice of Violation ("NOV"), explaining that the presence of the items in the easement areas constituted violations of the Coastal Act and, seeking informal resolution of the matter, requested a removal plan, and alerted her to the possibility of formal enforcement action and monetary penalties if the permit conditions were not complied with and the items were not removed. Although Mr. Reeser sent a response to the NOV on March 22, 2007, the letter simply repeated arguments for why Mrs. Ackerberg believed she should not have to remove the items. It did not state that Mrs. Ackerberg was ready to discuss resolution, nor did the requested removal plan accompany the letter. Therefore, 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"). Mrs. Ackerberg has been aware of Commission staff's desire to resolve the matter, and, if necessary, the need to move forward with formal hearing procedures for more than a year and a half now. Additionally, Mrs. Ackerberg has been aware of AFA's and the Commission staff's efforts to obtain compliance with the permit since 2005.

As you know, the NOI procedures were postponed until the resolution of the then pending appeal regarding the litigation brought by Mr. Roth. In the Spring of this year, the Court of Appeals upheld the trial court's decision in favor of the Commission, and the stay placed upon the Commission's enforcement proceedings was dissolved. In August of 2008, Lisa Haage, the Commission's Chief of Enforcement, discussed the possibilities of settling this violation matter with you during a long conversation on August 11th. During the August 11, 2008 conversation, you raised the suggestion that Mrs. Ackerberg's easement not be opened and some other accessway should be pursued instead. 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 condition. Upon your request, Ms. Haage did agree that she would discuss this issue internally after you mailed additional information regarding the 22458 PCH vertical accessway as well as information regarding your then proposal to assist with opening the 22548 PCH accessway instead of agreeing to open the accessway at your client's property. Ms. Haage did not receive such a proposal from you regarding opening the 22548 PCH vertical accessway. To date, the only information provided by you or your client regarding the 22548 PCH was a survey of the easement area and a Tract Map recording the offer and acceptance of the vertical accessway, which was attached to the letter you mailed in response to the opportunity to submit additional SODs, dated October 21, 2008.

After discussing this matter internally, Ms. Haage and other Commission staff called you to make it clear that we were very willing to work with you and your client, but that we needed to have a settlement that included compliance with the permit conditions and could not agree to exchanging one existing public access easement for extinguishing the existing easement on Mrs. Ackerberg's property. Doing so would not constitute compliance with the permit, nor provide a similar public access benefit. Since we were unable to reach you, we left a voicemail message

on September 10, 2008 to this effect. Unfortunately, we did not hear back from you regarding this message and for some reason, these communications are not referenced or reflected in your letters.

Less than one month later, in an October 2, 2008 letter, Commission staff again notified you and your client of our desire to resolve this matter, to obtain compliance with the permits, and our intentions to move forward once again with the enforcement proceedings. In that letter, Commission staff agreed to allow your client to submit supplemental information in a new Statement of Defense ('SOD"), in addition to the defenses previously asserted by Mrs. Ackerberg's former counsel, even though there is no legal provision for such an additional opportunity, and even though the deadlines provided for by the applicable regulations and given to you in the notice had long since passed. We again urged you and your client to consider resolution of the violation and a settlement of this matter. On October 14, 2008, you requested an extension of the deadline for submitting an additional SOD, and although staff told you we were not able to grant the full additional 30-day extension you requested given the fact the violation issue was tentatively scheduled for the November hearing and staff would have to meet the mailing deadline for the hearing, Commission staff did grant a partial extension as a courtesy. Your October 21, 2008 letter included a new summary of defenses and objections to removing the unpermitted development located in the vertical and lateral easements dedicated on your client's property.

On October 21, 2008, prior to receiving your letter dated that same day, I called your office as well as your cell phone in an attempt to discuss settlement possibilities. I was unable to reach you, and so I left a message on your voice mail reiterating Commission staff's desire to reach an agreement to resolve the violations and open the recorded accessway on your client's property. I requested that you call me back if you wanted to discuss reaching settlement options. Unfortunately, I did not receive a return phone call, nor have you indicated since this time that you would like to discuss reaching a settlement regarding a consent order. Instead, in your October 21, 2008 letter, you continued to indicate you were not interested in reaching a settlement regarding the removal of unpermitted development in Mrs. Ackerberg's easement and only interested in discussing the option of assisting with opening a County owned accessway nearby. We have provided Mrs. Ackerberg with our responses to your allegations and defenses in previous letters and telephone conversations; however, we are briefly responding again to these claims below to make our position clear and in the hope that this will lead to a more productive discussion as we continue our efforts to resolve the violations on your client's property. In order to review the legal matters regarding the defenses you asserted, Commission staff scheduled the hearing for the December Commission meeting, and we placed the matter on the agenda on November 19, 2008.

Subsequently, in our continued efforts to resolve this matter amicably through a settlement agreement, Commission staff faxed and mailed you a Draft Consent Order in which we proposed negotiating an agreement to remove the unpermitted development from the easement areas on Mrs. Ackerberg's property, and proposed settlement language for your consideration. On November 19, 2008, during a conversation that took place between you and Commission staff members Counsel Alex Helperin and myself, we discussed the Draft Consent

Order. During that conversation, we were disappointed that you indicated that you were not interested in discussing the possibility of removing the unpermitted development from the easement areas, which is necessary for opening the easement area, or in complying with the terms of the permit conditions. Therefore, in order to resolve this matter, the Commission is still moving forward with enforcement proceedings and addressing this issue at a Commission hearing.

In addition, it should be noted that the statements made in your November 19, 2008 letter do not accurately or fully portray our efforts to resolve these violations. In your November 19, 2008 letter you allege that staff had not responded to "findings of [Ackerberg's] investigation and the surveys we had commissioned", and that you were "surprised by the lack of any response at all to both our correspondence and our invitation..." As you are aware, Commission staff made it clear to you in voicemail messages on September 10, 2008 and October 21, 2008, that we cannot agree to exchanging one existing public access easement for extinguishing the existing public access easement on Mrs. Ackerberg's property. These communications were not referenced in your letter, nor did we receive a return call in which we could more fully communicate the situation. The information you submitted in your October 21, 2008 letter was a repeat of previous statements you have made involving opening an existing public access easement held by the County in exchange for not removing unpermitted development on Mrs. Ackerberg's property and did not respond to our offer to resolve the on-site violations.

During our November 19, 2008 conversation, for the first time you mentioned that you are scheduled to have surgery on December 10, 2008 (the first day of the December hearing and the day the cease and desist order was scheduled for this matter) and are unable to attend the hearing and will be out on disability until January 12, 2009. We are disappointed that at no time over the last 3 months, during our various phone and written communications, and during which time we had made it clear the hearing would be in either November or one of the upcoming Commission meetings, you did not inform us of your scheduled surgery. Despite this, in another attempt to resolve this matter, Commission staff is willing, once again, to postpone the cease and desist order hearing so long as you can assure us that you and Mrs. Ackerberg agree to continue, in good faith, to try to resolve this matter through the consent order process, with the goal of reaching agreement on an approach that would include the removal of unpermitted development on Mrs. Ackerberg's property and the opening of the recorded access easement on the property that is held by AFA. We would again note that this violation has been pending for years now, and the immediate pendency of a hearing has been clear since the time we sent the formal Notice of Intent, on March 5, 2007. Your client has been on notice for over a year and a half, and you have been aware of the pending enforcement hearing for some months, and yet we were never informed of any potential scheduling issues you might have.

In your letter responding to our recently proposed Draft Consent Order, you continue to object to your client complying with the requirements of the Coastal Development Permits ("CDPs") referenced above, which required dedication of both a vertical and lateral public access easement on the subject property. Instead, you discuss opening an existing vertical access easement held by Los Angeles County and located on private property at 22548 Pacific Coast Highway ("PCH"), Malibu, California. While the discussion of the 22548 PCH vertical

accessway was raised in previous communication between Commission staff, Mrs. Ackerberg's former counsel, Mr. Reeser, and yourself, it might be helpful to address some of the issues you raise in your letters dated October 21 and November 19, 2008. Some of the issues associated with the 22548 PCH vertical accessway were also discussed in our November 19, 2008 conversation as well as in the previous conversation between you and Ms. Haage on August 11, 2008. We would like to briefly address some of these issues below in yet another attempt to resolve this violation matter amicably.

As you know, the Commission does not own or otherwise control the dedicated vertical accessway at 22548 PCH, and does not have authority to open the accessway. The public access easement at 22548 PCH has been held by Los Angeles County for 34 years now, and the County has never opened the accessway nor has the county presented any plans for opening the accessway. In fact, County planning staff has informed Commission staff several times in the past that it has no plans for opening any more public accessways, including the accessway located at 22548 PCH. More importantly, even assuming the County were to agree to open the public access easement at 22548, this matter is irrelevant to the matter at hand, which is the placement of unpermitted development and development inconsistent with a previously issued CDP on an accepted vertical and lateral public access easement on your client's property. Even if the County, at some time in the future, proposes to open the vertical accessway at 22548 PCH, and commits to keeping it open, there is nothing in the applicable permits or in the 2002 Malibu Local Coastal Program ("LCP") prohibiting AFA from opening and operating the vertical accessway that exists on your client's property while the County operates the 22548 vertical accessway.

In fact, Policy No. 2.85 in Section 4 of the LCP, states:

> *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.*

The vertical accessway dedicated by Mr. and Mrs. Ackerberg was accepted by AFA, a private nonprofit corporation, and is held on behalf of the public. Under the legally applicable 2002 Malibu LCP, the distance between the Ackerberg's vertical accessway and the nearest vertical accessway does not prohibit, but rather encourages, opening or improving both the Ackerberg easement area and the easement area located at 22548 PCH. In addition, the 2002 Malibu LCP includes a specific plan for opening and operating vertical accessways along Carbon Beach, in Policy No. 2.86 of Section 5. That policy requires "improving and opening 2 existing vertical access Offers to Dedicate ("OTDs") and 4 existing vertical access deed restrictions" in addition to maintaining and operating the existing vertical accessway known as "Zonker Harris." In the Access Maps within the 2002 Malibu LCP, there are only two OTDs shown to exist on Carbon Beach in addition to the Zonker Harris accessway: one is located at your client, Mrs. Ackerberg's, property and the other is located down coast at David Geffen's property. Since the 2002 Malibu LCP, the Geffen easement has been opened and is operating, and the publicly owned vertical accessway that exists at your client's property remains closed and blocked by the unpermitted development referenced above. Therefore, not only does the Malibu LCP require the opening of all public easements regardless of distance to the nearest available vertical

accessway, but the LCP, the land use document for the entire City of Malibu, explicitly calls for the opening of the vertical access easement on your client's property.

In your letters dated October 21, 2008 and November 19, 2008, you refer to the revised findings that were added to the January 14, 1985 Ackerberg staff report approving CDP No. 5-84-754 with conditions requiring the dedication of a vertical easement for the public's use. It should be noted that the revised findings added to the 1985 staff report were founded on the satisfaction of three criteria, none of which have been met. Moreover, the 1985 revised findings were premised on an OTD which was not accepted. In any event, the conditions which were part of the permit issued by the Commission to your client are legally applicable.

Commission staff is open to continuing working on reaching a Consent Order agreement *to open the accessway that exists at your client's property*. Please notify me in writing regarding whether or not you are interested in reaching a Consent Order agreement for opening the easement area on behalf of your client by **Wednesday, November 26th**. In fact, if we can resolve these issues amicably through a Consent Order between now and December 10, 2008, the date of the Commission hearing, you will not necessarily have to attend the hearing since we would have worked through all of our issues prior to the Order going to the Commission. Again, we are eager to work with you and your client to resolve this issue and look forward to hearing from you. Please call me at (415) 597-5886 with any issues you would like to discuss regarding resolving this violation matter, or send a letter to my attention at the address listed on the letter head above.

Sincerely,

Erin Murphy

Erin Murphy
Enforcement Program

cc: Lisa Haage, Chief of Enforcement
Alex Helperin, Staff Counsel
Aaron McLendon, Statewide Enforcement Analyst
Pat Veesat, Southern California Enforcement Supervisor
Lisette Ackerberg
Terry Tamminen

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885

Via Regular Mail
and Fax

November 25, 2008

Law Offices of Diane Abbitt
Attn: Diane Abbitt
511 Fifth Street, Suite G
San Fernando, CA 91340

Subject: **Commission hearing postponement**

Dear Ms. Abbitt:

This letter is written in regards to the recent request you made to postpone the Commission hearing to resolve your client, Mrs. Ackerberg's, violation matter (violation no. V-4-07-006), which is tentatively scheduled for the Wednesday, December 10, 2008 Commission meeting in San Francisco. In your letter to Commission staff dated November 19, 2008, you requested Commission staff postpone the hearing date for this violation matter due to your surgery scheduled for December 10, 2008. In addition, you informed Commission staff that you will be in recovery from surgery and unable to represent your client until mid January, 2009. If necessary, Commission staff is willing to postpone the hearing to resolve your client's violation matter until the January or February Commission meeting. However, as is explained below, we continue to hope that is not necessary.

As indicated in the letter I sent to you, dated November 24, 2008, and received by you via fax yesterday, Commission staff requests a written statement by **Wednesday, November 26, 2008**, regarding whether you wish to continue working amicably with Commission staff to reach an agreement for a Consent Order to open the accessway that exists on your client's property. In the event that we do reach a Consent Order agreement prior to the December 10, 2008 Commission meeting, Commission staff can keep this on the calendar and present the terms of the agreement at the meeting, and it would not be necessary for your or your client to attend the hearing since we will have worked through all of our issues prior to the Order going to the Commission. In the event that we are unable to reach a Consent Order agreement prior to the December 10, 2008 hearing, or between then and the scheduled hearing, Commission staff will plan on scheduling the hearing on staff's proposed order to resolve this violation matter no later than the February, 2009 Commission meeting. Please call me at (415) 597-5886 with any issues you would like to discuss regarding resolving this violation matter, or send a letter to my attention at the address listed on the letter head above.

Sincerely,

Erin Murphy

Erin Murphy
Enforcement Program

Exhibit 28
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

cc: Lisette Ackerberg
Terry Tamminen
Lisa Haage, Chief of Enforcement
Alex Helperin, Staff Counsel
Aaron McLendon, Statewide Enforcement Analyst
Pat Veesat, Southern California Enforcement Supervisor

LAW OFFICES OF DIANE ABBITT

511 Fifth Street, Suite G
San Fernando, California 91340

TELEPHONE (818) 637-2117
FAX (818) 256-2379

November 26, 2008

Via Fax and US MAIL

Ms. Erin Murphy
Enforcement Program
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Re: Draft Consent Cease and Desist Order No. CCC-08-CD-10
Violation No.: V-4-07-006
Location: 22500 and 22466 Pacific Coast Highway, Malibu, California
APN 4452-002-013, 4452-002-011

Dear Ms. Murphy:

As you have requested, I write in brief response to your correspondence sent to our offices on November 24, 2008, and to your further letter to me of November 25, 2008.

At the outset, I want to again express my appreciation for Staff's courtesy in agreeing to postpone this matter to the February, 2009, Commission meeting to accommodate my surgery and initial rehabilitation. You indicate that Staff nonetheless may make a "report" on the item at the December 10, 2009, Commission meeting. Inasmuch as I will be unable to attend the hearing, and in that due process obviously attaches to the type of proceeding agendized, it is my hope, and request, that Staff not make any report to the Commission that is substantive in nature or that addresses any material aspect of the violation matter. Certainly, if this matter is not resolved and we need to go to hearing in February, there will be ample time for Staff to make its case to the Commission and for us to respond in a way that fairly presents this matter for the Commission's consideration.

Regarding your November 24, 2008 letter, I have read it carefully and believe it to clearly set forth Staff's position. In this regard, we do appreciate Staff's patience and

willingness to try and amicably resolve the matter, and as my October 21, 2008, letter explains, we are proactively working toward that end. We have not reached the point, however, where we can agree to the Consent Order agreement you have previously provided.

Your discussion has raised issues I will be discussing with my client and to which we will respond as we continue to work with Staff in good faith to resolve this matter.

In the interim, I would offer a response to three points made in your November 24, 2008, letter. First, the letter refers to the Los Angeles County easement at 22548 Pacific Coast Highway, and correctly states that the County has never opened the accessway. As your letter indicates, on several occasions Staff has discussed the opening of that accessway with County planning staff, but to date has not been successful making it clear that the County easement has obviously and rightfully been of importance to the Commission. As discussed in my October 21, 2008, letter, we have and continue to have meaningful discussions with the Supervisor's office towards opening this existing public accessway and funding its long-term maintenance. It is truly in everyone's best interest to permit these discussions to continue and to, hopefully, succeed.

Second, your letter again notes Staff's view that exchanging the County accessway for the existing easement on Ms. Ackerberg's property would not constitute compliance with the CDP issued by the Commission, nor provide a similar public access benefit. We hope staff will give this additional thought. The substitution of the County accessway for the easement on Ms. Ackerberg's property was specifically addressed in the 1985 revised findings, and, with the co-operation and consent of Access for All, could be achieved by an amendment to that permit. Further, the County accessway is superior to the easement on Ms. Ackerberg's property. In contrast to the easement on Ms. Ackerberg's property, the County easement is paved, visible, and proximate and accessible to public parking on both sides of Pacific Coast Highway. Further, as my October 21, 2008, letter explained, there are fundamental problems at both ends of the Ackerberg easement that raise serious questions about whether this vertical accessway, even if opened, could provide meaningful public access to Carbon Beach.

Finally, our initial review of the Malibu LCP does not disclose anything that would foreclose the resolution we are pursuing or that would permit the Commission to simply dismiss the revised findings it added to the 1985 permit approval which specifically stated that "as a matter of policy, publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical access easements are opened." The Ackerbergs accepted the permit on the basis of the commitment in those revised findings to provide a mechanism to allow for the extinguishing of the imposed vertical access easement once the existing County accessway had been improved and opened for public use.

We will continue to work with Staff and provide you with a timely update on the status of our efforts in dealing with the County. Again, thank you for postponing the December 10, 2008, hearing to the February 2009, Commission meeting.

Sincerely,

Diane R. Abbitt

Cc: Mr.Peter Douglas, Executive Director, California Coastal Commission
Mr. Aaron McLendon, CCC Headquarters Enforcement Analyst
Ms. Lisa Haage, Chief of Enforcement, California Coastal Commission
Mrs.Lisette Ackerberg
Mr. Terry Taminen

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE (415) 904- 5200
FAX (415) 904- 5400
TDD (415) 597-5885

Via Regular Mail
and Fax

December 2, 2008

Diane Abbitt
Law Offices of Diane Abbitt
511 Fifth Street, Suite G
San Fernando, California, 91340

Subject: **Response to your letter dated November 26, 2006**

Violation No.: V-4-07-006

Dear Ms. Abbitt

This letter is written in response to your letter to Commission staff dated November 26, 2006. Commission staff is happy to hear that you are willing to continue working amicably to resolve this violation prior to the January 2009 and February 2009 Commission meetings. In order to further discuss resolution of this violation and reaching a Consent Order agreement, Commission staff would like to arrange a call to discuss some of the issues you have raised in your November 26, 2008 letter as well as those raised in your previous communications with Commission staff. While this letter did not raise any new issues, Commission staff has thought long and hard about the arguments you have raised during our communications regarding the resolution of this violation matter, and we would like to schedule a time when we can discuss in detail our response to your arguments and the possibility of settling this matter. We realize the need to move as quickly as possible before the commencement of your medical leave on December 10, 2008; therefore we would like to schedule a meeting with you for some time this week to discuss the legal issues involved in this matter as well as settlement options. Please call our office to discuss the possibility of arranging a meeting by calling me directly at (415) 597-5886.

While Commission staff has addressed the issues raised in your November 26, 2006 letter in previous conversations that took place between you and Commission staff on August 11th and November 19, 2008, as well as in our letter dated November 24, 2008, we will briefly respond to those arguments again in this letter. To begin, Commission staff would like to reiterate some of the similarities between the vertical easement area located at 22548 Pacific Coast Highway (PCH) and the vertical easement area located on your client, Mrs. Ackerberg's, property. Both easements exist on privately owned property and are held for the benefit of the public; in that sense the two easement areas are indistinguishable. As for the distinction you attempt to draw in your communications with Commission staff that the 22548 PCH easement is publicly owned and the vertical easement located at Mrs. Ackerberg's property is not, it is, at best, a distinction

without a difference, as both easements are for general public access and are held by entities on behalf of the public, and are both easements located on private property. Additionally, we would like to point that contrary to your statements in your letter dated November 26, 2008, the easement area located on Mrs. Ackerberg's property is paved, and proximate and accessible to public parking on both sides of PCH, as the easement location complements the public parking pattern along PCH.

In addition, as indicated in the letter I sent to you dated November 24, 2008, the Commission does not own or otherwise control the vertical easement located at 22458 PCH, and, moreover, does not have the authority to open the easement area, or, if it is opened, to ensure that it remains so. As indicated in the conversation that took place between you and Ms. Haage, the Commission's Chief of Enforcement, on August 11, 2008, as well as in a voicemail left for you by Ms. Haage on September 10, 2008, and in the November 24, 2008 letter, even if we did receive a guarantee that the County easement would be opened, Commission staff can not agree to forever relinquish the possibility of opening a public accessway that was secured as a condition of a permit in exchange for the opening of another accessway more than 600 feet away. We can not agree on policy grounds, because there is no basis, even in the revised findings[1], for doing so under the present conditions. Nor can we do so legally, as the easement on your client's property is owned by a third party. Furthermore, staff's review of the 2002 Malibu Local Coastal Program ("LCP") does reveal that the LCP forecloses the resolution you are pursuing to trade opening and improving one vertical accessway for the extinguishment of another. As quoted in our letter dated November 24, 2008, Policy No. 2.85 in Section 4 of the Malibu LCP requires opening public access easements such as both the vertical easement located at 22548 PCH and the vertical easement located at Mrs. Ackerberg's property, regardless of the distance of the nearest open and available vertical accessway. A policy allowing for the extinguishment of one vertical accessway if another nearby vertical accessway opens up nearby does not exist in the Malibu LCP.

Furthermore, Policy No. 2.86 of Section 5 of the 2002 Malibu LCP specifically requires improving and opening the vertical accessway located at Mrs. Ackerberg's property in addition to the four existing vertical access deed restrictions along Carbon Beach, one of which is the vertical easement area located at 22548 PCH. The 2002 Malibu LCP calls for and encourages opening the vertical accessway located at 22548 PCH and the vertical accessway located at Mrs. Ackerberg's property; it does not require opening one or the other. The 2002 Malibu LCP favors opening as many dedicated and accepted accessways as possible, a policy that is in line with the Commission's belief that the more accessways that are opened and operating, the better, since such a policy complements Sections 30210, 30211 and 30212 of the Coastal Act, and Section 4

[1] Your statement, at the bottom of page 2 of your letter, that the Ackerberg's accepted their permit "on the basis of the commitment in those revised findings to provide a mechanism to allow for the extinguishment of the imposed vertical accessway easement once the existing county accessway had been improved and opened" is also untrue. The findings you reference contained no commitment by the Commission to provide such a mechanism. They contained only conditional statements about what would happen if certain criteria were satisfied – which they have not been. Nor did the discussion in those findings apply to where an offer to dedicate had been accepted, so that a third party had a defensible property interest.

of Article X of the California Constitution, which require the provision of maximum access for all of the public. To state that Commission staff "to date has not been successful making it clear [to County staff] that the County easement [located at 22548 PCH] has obviously and rightfully been of importance to the Commission" is misleading, irrelevant, and does not accurately reflect the Commission staff's commitment to open as many dedicated and accepted accessway as possible. As indicated in our November 24, 2008 letter, even if the County were to agree to open the public accessway located at 22548 PCH, the opening of the accessway is irrelevant to the matter at hand, which is the placement of unpermitted development and development inconsistent with a previously issued Coastal Development Permit ("CDP") on an accepted vertical and lateral public access easement on your client's property and failure to allow opening this easement.

Lastly, Commission staff would like to again note that the opening of the easement located 22548 is irrelevant to the resolution of this violation matter. The issue of concern in this matter is the removal of unpermitted development located within the vertical easement area at Mrs. Ackerberg's property as well as the removal of rip-rap exceeding that which was permitted in CDP No. 5-83-360 which the Commission approved in 1983 and which authorized the construction of the bulkhead located in front of Mrs. Ackerberg's property, and the access itself. The Commission also approved CDP No. 5-84-754, however, that permit did not approve the development that exists within the vertical accessway and therefore the development within both the vertical and lateral easement areas is inconsistent with CDP Nos. 5-84-754 and 5-83-360. The "fundamental problems [that exist] at both ends of the Ackerberg easement" which you discuss in your letter dated November 26, 2008, as well as in previous communications with Commission staff, is unpermitted development that was not approved by the Commission in any of the CDPs for the property and in fact are part of the violation at the site. Therefore, Commission staff is, in resolving this matter, seeking to reach a resolution regarding the removal of the unpermitted development.

Commission staff is willing to work amicably with you on behalf of Mrs. Ackerberg to try and resolve this violation and open this easement with as little disruption to her as is possible. We would be glad to discuss the issues with you and it is possible that a settlement could include negotiating the retention of some of the unpermitted development, so long as it does not restrict the available access within the vertical and lateral easement areas located at Mrs. Ackerberg's property. Commission staff would like to discuss with you the retention of some of the unpermitted development along with other issues relevant to the resolution of this violation matter. Please call me at the number listed above to schedule a convenient time for you to further discuss with Commission staff the legal issues involved in this matter as well as the resolution of this violation.

As previously indicated, Commission staff would like to have such a discussion with you some time this week, prior to your leave of absence beginning December 10, 2008. Additionally, to address your concern regarding the December 2008 Commission meeting, any comments and updates regarding this matter that may be raised at the upcoming Commission meeting will not include a substantive discussion of this violation matter. As always,

Commission staff is eager to work with you and your client to resolve this issue and we look forward to hearing from you.

Sincerely,

Erin Murphy

Erin Murphy
Enforcement Program

cc: Lisette Ackerberg
Terry Tamminen
Lisa Haage, Chief of Enforcement
Alex Helperin, Staff Counsel
Aaron McLendon, Statewide Enforcement Analyst
Pat Veesat, Southern California Enforcement Supervisor

Norman J. & Lisette Ackerberg
22466 Pacific Coast Highway
(Formerly 22486 PCH)
Malibu, CA 90265

Exhibit 31
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

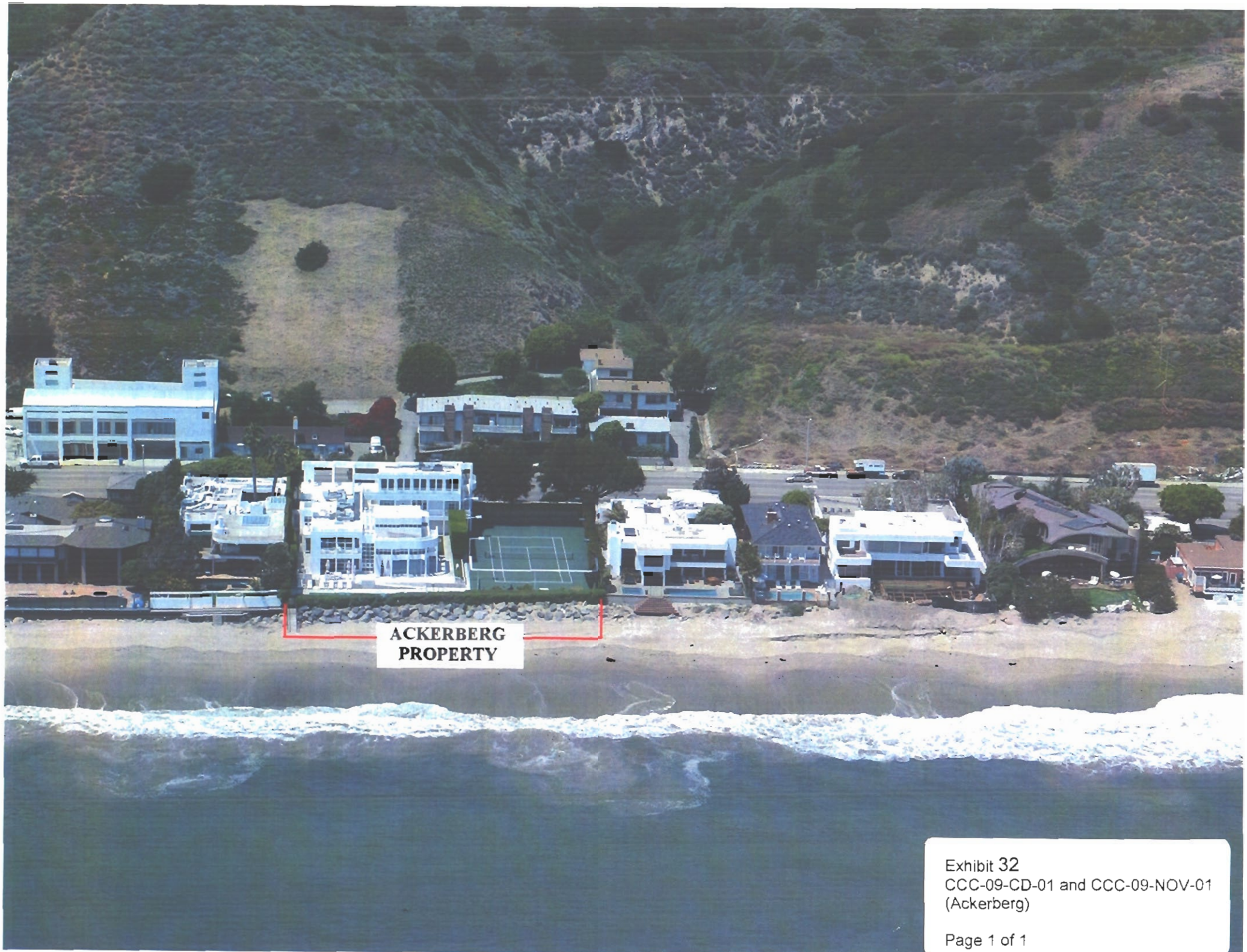


Exhibit 32
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

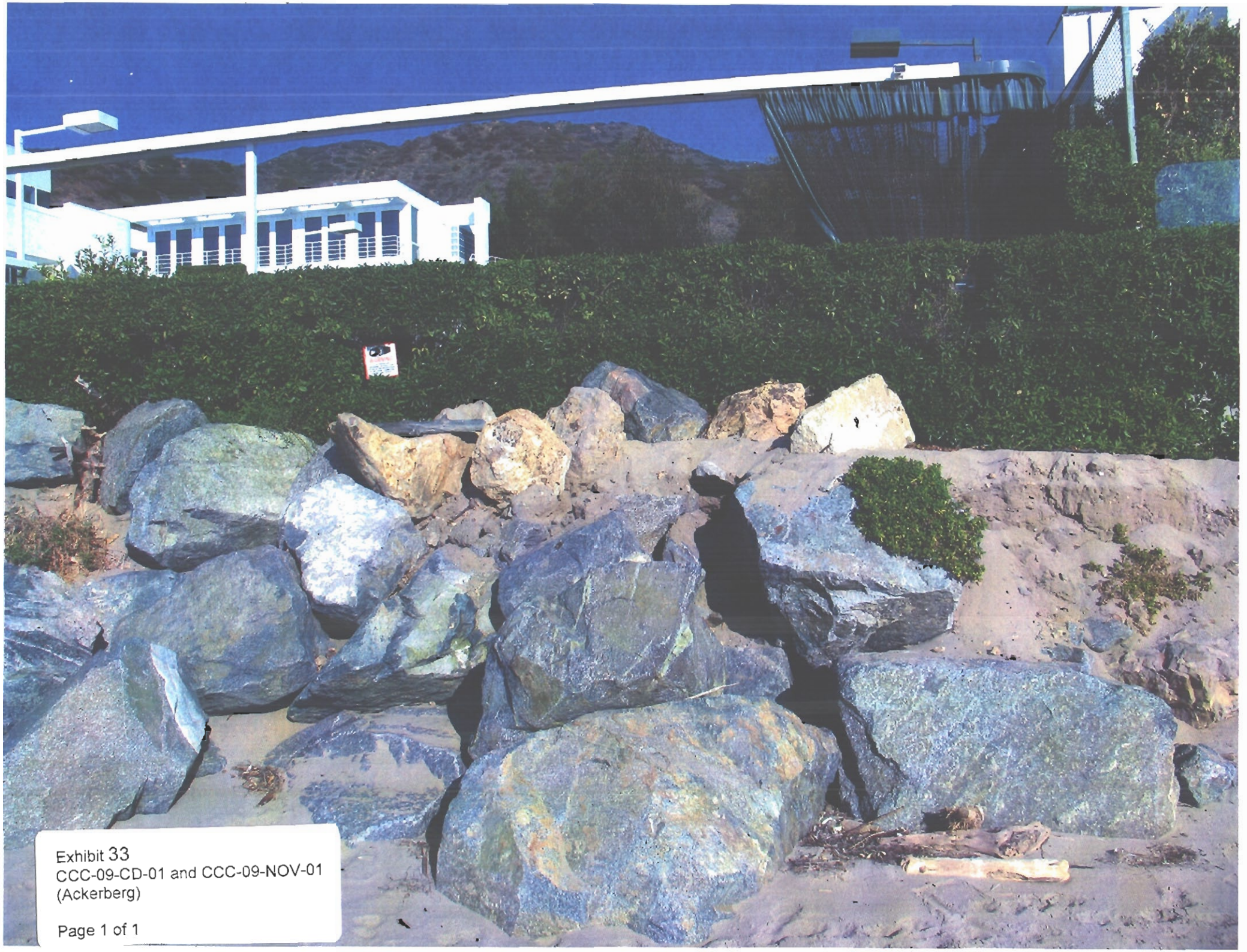


Exhibit 33
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

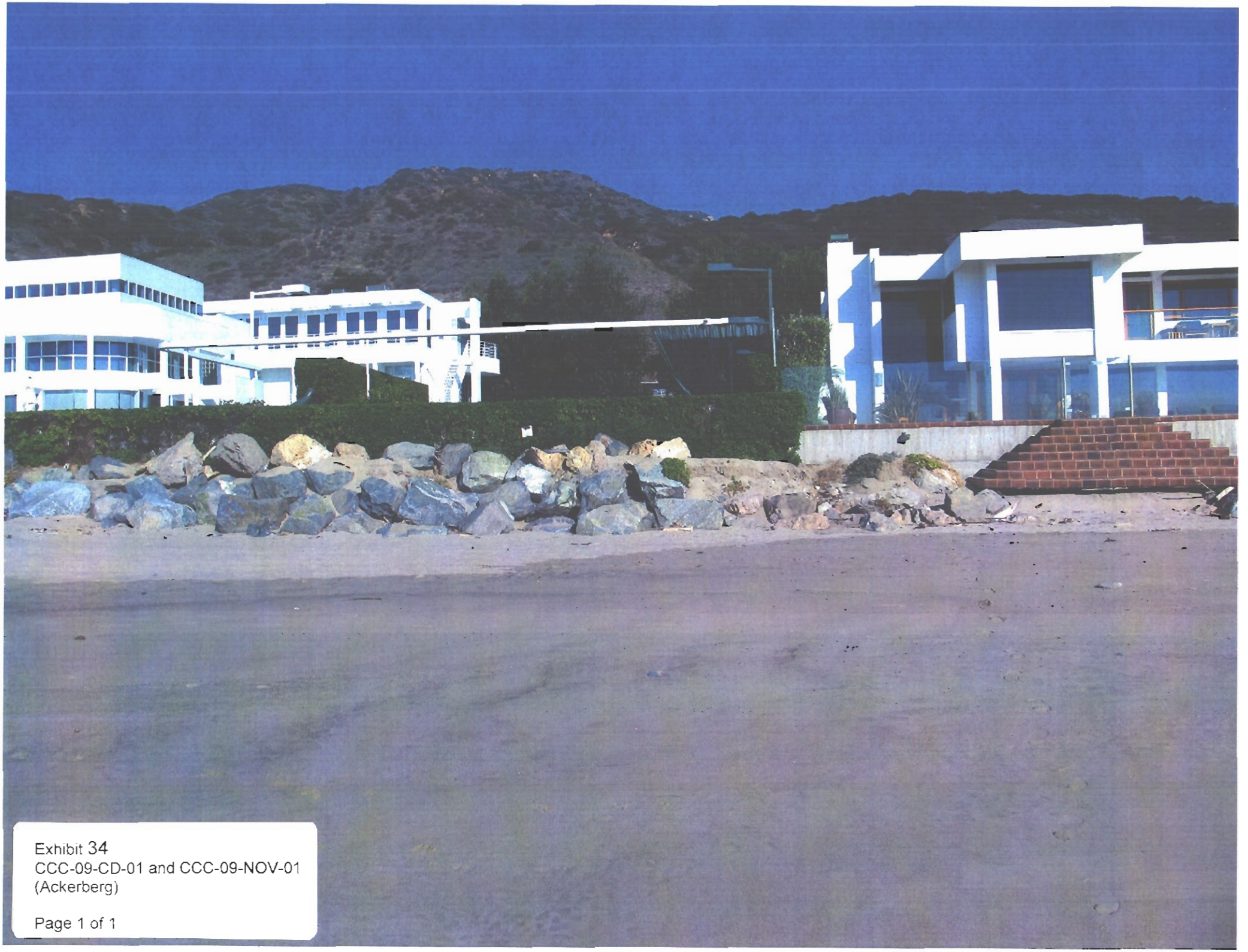


Exhibit 34
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

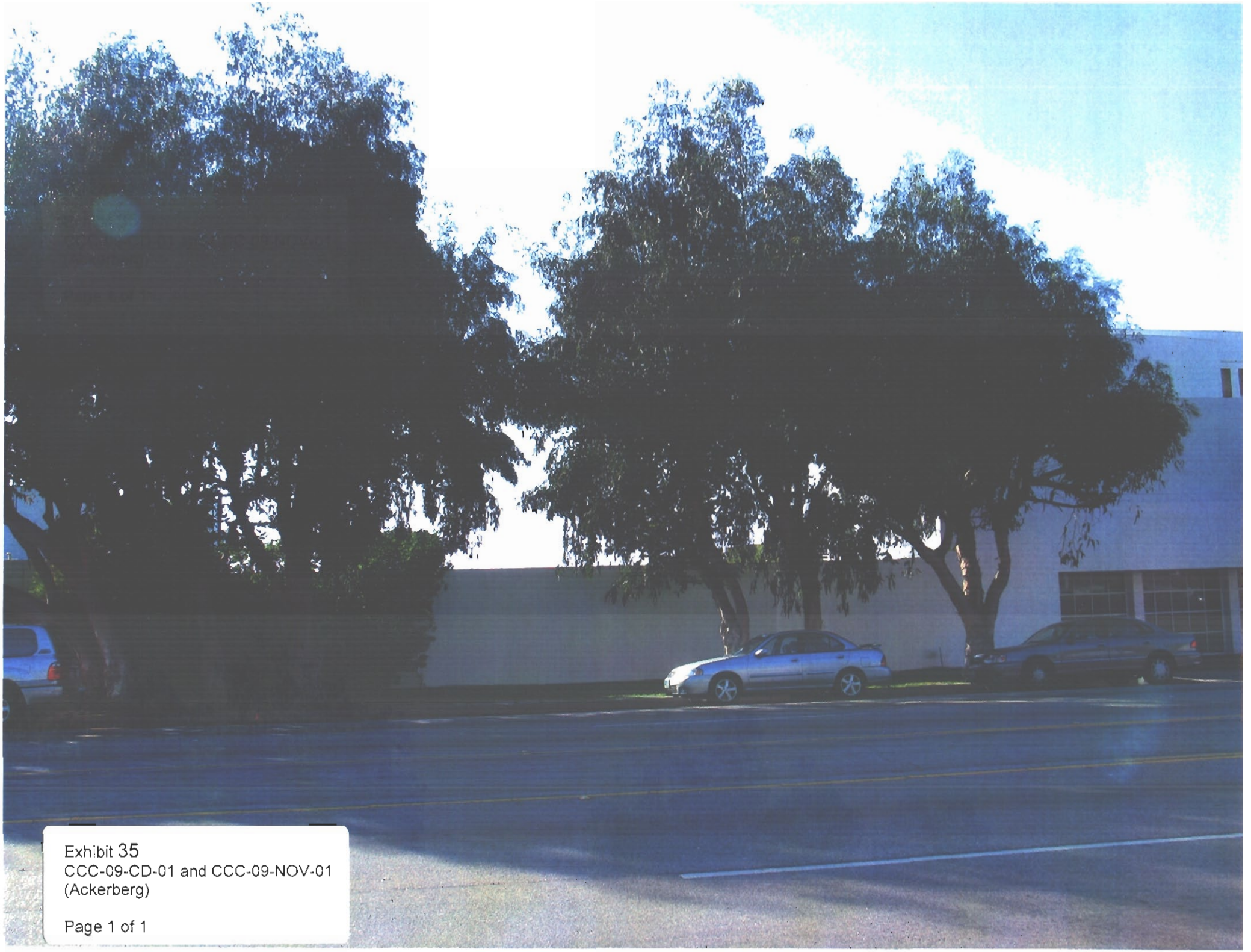


Exhibit 35
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Exhibit 36
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Exhibit 37
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

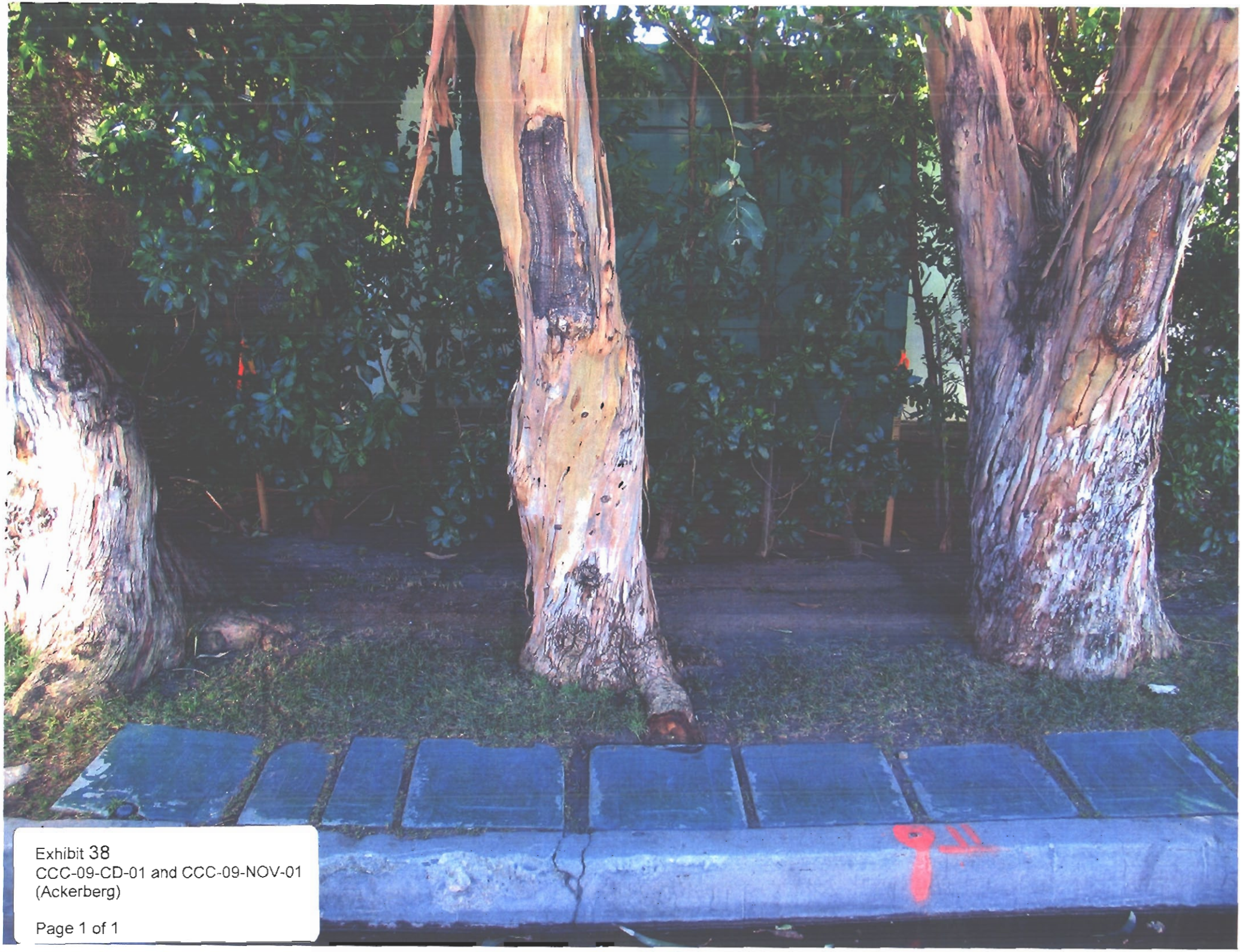


Exhibit 38
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

22548 PCH P-732-165-7 Malibu Terrace

BOOK 835 PAGE 49

SHEET 1 OF 2 SHEETS

TRACT NO. 29628

IN THE UNINCORPORATED TERRITORY OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

FOR CONDOMINIUM PURPOSES

BEING A PORTION OF THE RANCHO TOPANGA MALIBU SEQUIT, AS CONFIRMED TO MATTHEW KELLER BY PATENT RECORDED IN BOOK I, PAGE 407 ET. SEQ., OF PATENTS EXCEPT ANY PORTION OF SAID LAND WHICH IS TIDE OR SUBMERGED LAND OR HAS BEEN CREATED BY ARTIFICIAL MEANS OR HAS ACCRETED TO SUCH PORTION SO CREATED.

FILED
AT REQUEST OF OWNER
OCT 29, 1973
2? MIN. PAST 4 PM
IN BOOK 835
AT PAGE 49
OF MAP RECORDS
LOS ANGELES COUNTY, CALIF.
COUNTY RECORDER
BY _____ Deputy

OWNER'S CERTIFICATE:

WE HEREBY CERTIFY THAT WE ARE THE OWNERS OF OR ARE INTERESTED IN THE LANDS INCLUDED WITHIN THE SUBDIVISION SHOWN ON THIS MAP WITHIN THE COLORED BORDER LINES, AND WE CONSENT TO THE PREPARATION AND Filing OF SAID MAP AND SUBDIVISION.

WE HEREBY DEDICATE FOR PUBLIC USE FOR STREET PURPOSES THE CERTAIN STRIP OF LAND DESIGNATED AS FUTURE STREET ON THIS MAP RESERVING TO OURSELVES ALL ORDINARY USES OF SAID LAND EXCEPT THE ERECTION OR CONSTRUCTION OF ANY STRUCTURE NOT ORDINARILY PLACED IN PUBLIC STREETS UNTIL SUCH TIME AS SAID STREET IS OPENED FOR PUBLIC USE.

WE ALSO DEDICATE TO THE COUNTY OF LOS ANGELES THE EASEMENT FOR INGRESS AND EGRESS PURPOSES SO DESIGNATED ON SAID MAP AND ALL RIGHTS INCIDENT THERETO, INCLUDING THE RIGHT TO MAKE CONNECTIONS THEREWITH FROM ANY ADJOINING PROPERTIES.

MALIBU TERRACE, LTD.,

A LIMITED PARTNERSHIP

ROBERT T. MORRIS
Robert T. Morris
GENERAL PARTNER

DONALD F. WICKHAM
Donald F. Wickham
GENERAL PARTNER

TITLE INSURANCE AND TRUST COMPANY,
A CORPORATION
(TRUSTEE)

UNDER DEED OF TRUST RECORDED IN BOOK T-5478 PAGE 448 OFFICIAL RECORDS

We further certify that except as shown on a copy of this map on file in the office of the County Road Commissioner, we know of no easement or structure existing within the easements hereon offered for dedication to the public, other than public service water lines, sewers, or storm drains, that we will grant as right or whereon within boundaries of said map conveyed to the public, except where such right or interest is expressly made subject to the dedication hereon.

Seal Elements

ENGINEER'S CERTIFICATE:

I HEREBY CERTIFY THAT I AM A REGISTERED CIVIL ENGINEER OF THE STATE OF CALIFORNIA; THAT THIS MAP, CONSISTING OF 2 SHEETS, CORRECTLY REPRESENTS A TRUE AND COMPLETE SURVEY MADE UNDER MY SUPERVISION NOVEMBER 6, 1972; THAT THE MONUMENTS OF THE CHARACTER AND LOCATIONS SHOWN HEREON WILL BE IN PLACE WITHIN TWENTY-FOUR MONTHS FROM THE FILING DATE OF THIS MAP; THAT SAID MONUMENTS ARE SUFFICIENT TO ENABLE THE SURVEY TO BE READILY RETRACED AND THAT TIE NOTES TO ALL CENTERLINE MONUMENTS SHOWN AS "TO BE SET" WILL BE ON FILE IN THE OFFICE OF THE COUNTY ENGINEER WITHIN TWENTY-FOUR MONTHS FROM THE FILING DATE SHOWN HEREON.

Ronald W. Spindler 8-20-73
RONALD W. SPINDLER R.C.E. [illegible]
SPINDLER ENGINEERING CORPORATION

REGISTERED PROFESSIONAL ENGINEER RONALD W. SPINDLER NO. 13184 CIVIL STATE OF CALIFORNIA

NOTE: ALL 1" IRON PIPES WILL BE SET FLUSH.

BASIS OF BEARINGS:

THE BEARING SOUTH 86°25'16" WEST ON THE CENTERLINE OF PACIFIC COAST HIGHWAY SHOWN ON C.S.B. 2868, SHEET 3 AND SHOWN ON THIS MAP AS NORTH 86°01'00" EAST WAS USED AS THE BASIS OF BEARINGS OF THIS MAP.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS

ON THIS 16 DAY OF August 1973 BEFORE ME Sharon Pattison A NOTARY PUBLIC IN AND FOR SAID STATE, PERSONALLY APPEARED ROBERT T. MORRIS AND DONALD F. WICKHAM, KNOWN TO ME TO BE THE PARTNERS OF THE PARTNERSHIP THAT EXECUTED THE WITHIN INSTRUMENT AND ACKNOWLEDGED TO ME THAT SUCH PARTNERSHIP EXECUTED THE SAME.

Sharon Pattison

OFFICIAL SEAL

Map (1 Sheet)

UNION BANK,

A CALIFORNIA CORPORATION

(TRUSTEE)

UNDER DEED OF TRUST RECORDED IN BOOK T-8316
PAGE 478 OFFICIAL RECORDS

Edward D. Ptacek — E. A. Harris

Edward D. Ptacek
ASSISTANT VICE PRESIDENT

E. A. Harris
VICE PRESIDENT

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS

ON THIS _____ DAY OF _____ 19__ BEFORE ME
_____ A NOTARY PUBLIC IN AND FOR
SAID STATE, PERSONALLY APPEARED _____
KNOWN TO ME TO BE THE _____ PRESIDENT AND _____
KNOWN TO ME TO BE THE _____
SECRETARY OF TITLE INSURANCE AND TRUST COMPANY, THE CORPORATION
THAT EXECUTED THE WITHIN INSTRUMENT AND KNOWN TO ME TO BE THE
PERSONS WHO EXECUTED THE WITHIN INSTRUMENT ON BEHALF OF THE
CORPORATION HEREIN NAMED AND ACKNOWLEDGED TO ME THAT SUCH
CORPORATION EXECUTED THE SAME AS TRUSTEE.

Sharon Jackson
Notary Public

NOTARY PUBLIC-CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires Nov. 23, 1976

THE SIGNATURE OF THE ADAMSON COMPANIES, A PARTNERSHIP, OWNER OF AN EASEMENTS AS DISCLOSED BY DEEDS RECORDED IN BOOK D 518, PAGE 191 AND RECORDED IN BOOK 16057, PAGE 111 OF OFFICIAL RECORDS OF LOS ANGELES COUNTY, HAS BEEN OMITTED UNDER THE PROVISIONS OF SECTION 11587, SUBSECTION (A) OF THE SUBDIVISION MAP ACT, THEIR INTEREST IS SUCH THAT IT CANNOT RIPEN INTO A FEE TITLE AND SAID SIGNATURE IS NOT REQUIRED BY THE GOVERNING BODY.

THE SIGNATURE OF SOUTHERN CALIFORNIA EDISON COMPANY OWNER OF AN EASEMENT, AS DISCLOSED BY DEED RECORDED IN BOOK D 1727, PAGE 347 AND IN BOOK D 1776, PAGE 45, ALL OF OFFICIAL RECORDS OF LOS ANGELES COUNTY, HAS BEEN OMITTED UNDER THE PROVISIONS OF SECTION 11587, SUBSECTION (A) OF THE SUBDIVISION MAP ACT, THEIR INTEREST IS SUCH THAT IT CANNOT RIPEN INTO A FEE TITLE AND SAID SIGNATURE IS NOT REQUIRED BY THE GOVERNING BODY.

THE SIGNATURE OF STATE OF CALIFORNIA OWNER OF AN EASEMENT, AS DISCLOSED BY DEED RECORDED IN BOOK 17004, PAGE 240 AND RECORDED IN BOOK 19228 PAGE 142 OF OFFICIAL RECORDS OF LOS ANGELES COUNTY, HAS BEEN OMITTED UNDER THE PROVISIONS OF SECTION 11587, SUBSECTION (A) OF THE SUBDIVISION MAP ACT, THEIR INTEREST IS SUCH THAT IT CANNOT RIPEN INTO A FEE TITLE AND SAID SIGNATURE IS NOT REQUIRED BY THE GOVERNING BODY.

THE SIGNATURE OF GENERAL TELEPHONE COMPANY OF CALIFORNIA, A CORPORATION, SUCCESSOR TO ASSOCIATED TELEPHONE COMPANY, LTD., A CORPORATION OWNER OF AN EASEMENT, AS DISCLOSED BY DEED RECORDED IN BOOK 18726, PAGE 186 OF OFFICIAL RECORDS OF LOS ANGELES COUNTY, HAS BEEN OMITTED UNDER THE PROVISIONS OF SECTION 11587, SUBSECTION (A) OF THE SUBDIVISION MAP ACT, THEIR INTEREST IS SUCH THAT IT CANNOT RIPEN INTO A FEE TITLE AND SAID SIGNATURE IS NOT REQUIRED BY THE GOVERNING BODY.

THE PRESENT OWNERS OF THE MINERALS, OIL, PETROLEUM, GAS AND OTHER HYDROCARBON SUBSTANCES RESERVED IN THE DEED RECORDED DECEMBER 14, 1943 IN BOOK 20518, PAGE 137 OF OFFICIAL RECORDS, HAVE BEEN OMITTED AS NECESSARY PARTIES TO SIGN THE MAP UNDER THE PROVISIONS OF SECTION 11587 C-(1) OF THE SUBDIVISION MAP ACT, INASMUCH AS SUCH OWNERSHIP DOES NOT INCLUDE A RIGHT OF ENTRY ON THE SURFACE OF THE LAND.

THIS TRACT IS A CONDOMINIUM PROJECT WHEREBY THE OWNERS OF THE UNITS OF AIR SPACE WILL HOLD AN UNDIVIDED INTEREST IN THE COMMON AREAS WHICH WILL IN TURN PROVIDE THE NECESSARY ACCESS AND UTILITY EASEMENTS FOR THE UNITS.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS

ON THIS 17TH DAY OF AUGUST 1973 BEFORE ME
MARY C. CALDARIO A NOTARY PUBLIC IN AND FOR
SAID STATE, PERSONALLY APPEARED EDWARD A. HARRIS
KNOWN TO ME TO BE THE VICE PRESIDENT AND
EDWARD D. PTACEK KNOWN TO ME TO BE THE ASST. VICE PRESIDENT
SECRETARY OF UNION BANK, THE CORPORATION THAT EXECUTED THE WITHIN INSTRUMENT AND KNOWN TO ME TO BE THE PERSONS WHO EXECUTED THE WITHIN INSTRUMENT ON BEHALF OF THE CORPORATION HEREIN NAMED AND ACKNOWLEDGED TO ME THAT SUCH CORPORATION EXECUTED THE SAME AS TRUSTEE.

Mary R. Caldario
Notary Public

OFFICIAL SEAL
MARY R CALDARIO
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires August 1, 1976

IN RE TRACT NO. 29628) IT IS ORDERED THAT THE MAP OF TRACT NO. 29628 IS HEREBY APPROVED, AND THAT THE BOND IN THE AMOUNT OF $ 33,200.00 FILED WITH THE BOARD TO INSURE PAYMENT OF TAXES AND SPECIAL ASSESSMENT COLLECTED AS TAXES BE APPROVED.

THAT ALL ~~STREETS, HIGHWAYS AND OTHER PUBLIC WAYS AND~~ EASEMENTS SHOWN ON SAID MAP AND OFFERED FOR DEDICATION BE AND THE SAME ARE HEREBY ACCEPTED ON BEHALF OF THE PUBLIC.

THAT THE Future Street SHOWN ON SAID MAP AND HEREIN OFFERED FOR DEDICATION BE AND THE SAME IS HEREBY REJECTED.

I HEREBY CERTIFY THAT THE FOREGOING ORDER WAS ADOPTED BY THE BOARD OF SUPERVISORS AT A MEETING HELD
[illegible] 23 1973

JAMES S. MIZE, EXECUTIVE OFFICER - CLERK OF THE BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

BY _____ DEPUTY

I HEREBY CERTIFY THAT I HAVE EXAMINED THIS MAP; THAT IT CONFORMS SUBSTANTIALLY TO THE TENTATIVE MAP AND ALL APPROVED ALTERATIONS THEREOF; THAT ALL PROVISIONS OF APPLICABLE STATE LAW AND LOCAL SUBDIVISION ORDINANCES HAVE BEEN COMPLIED WITH; AND THAT I AM SATISFIED THAT THIS MAP IS TECHNICALLY CORRECT.

DATED: October 29 1973

HARVEY T. BRANDT
COUNTY ENGINEER

BY _____
DEPUTY

Exhibit 39
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)
Page 2 of 4

22548 PCH 835/50

BOOK 835 PAGE 50

SCALE: 1"=50'

TRACT NO. 29628

IN THE UNINCORPORATED TERRITORY OF THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

SHEET 2 OF 2 SHEETS

FILED WITH LOS ANGELES COUNTY RECORDER
OCT 29 1973

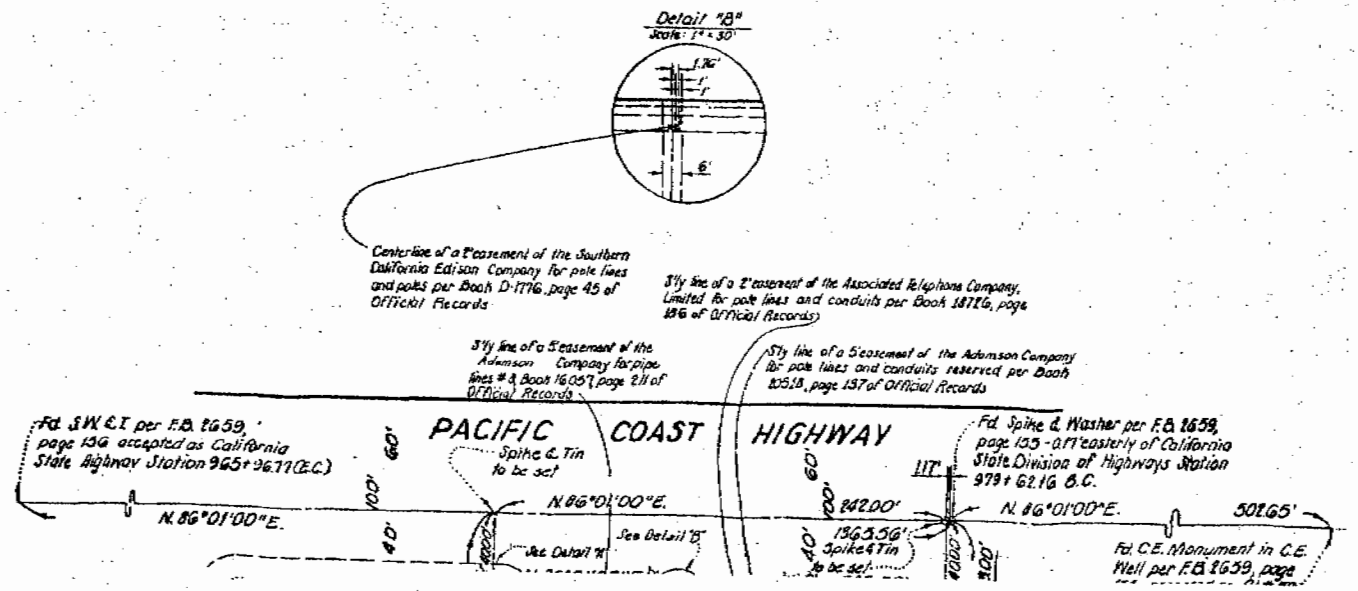


Exhibit 39
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

Vincent Kevin Kelly and Associates Inc.
civil and structural engineering
2216 wilshire boulevard
santa monica, ca 90403
213 / 828-3431

Vincent Kevin Ke
presi
Michael A. Gardner, F
assoc
Stephen F Taylor, C. E
Edward D. Kellm
John Lamb
Doree Thomps
Betty Jo Spr

February 15, 1984

Mr. Ralph W. Trueblood
#14 Oakmont Drive
Los Angeles, Calif. 90049

Re: Bulkhead Inspection
22470 Pacific Coast Hwy.
Malibu, Calif. 90265

Dear Mr. Trueblood:

Per our contract of December 1, 1983 this office conducted periodic surveys of the construction of your bulkhead at the above referenced address. The following is a summary of those inspections:

12/5/83 The 14 inch diameter piles were driven at an average of 4 feet on center.

12/21/83 The 14 foot, 2 inch long, 3 X 12 sheathing to be driven on your property was just commencing. Jim Coulson, the Contractor, had completed driving the sheathing on the Sherman property, which is an extension of your bulkhead. It should be noted that, in our opinion, the job was done exceptionally well.

1/4/84 The filter cloth was placed correctly to the underside of the top whaler. The filter rock was, at that point, just arriving. It was clean and of good quality. However placement of said material had not yet commenced. The bulkhead return ended at the existing tennis court, which was short of the length stated in the wave action report dated April 9, 1983. However, John Hale, the Coastal Engineer of record, will personally direct boulder placement as an alternative to the shortened return.

Exhibit 40
CCC-09-CD-01 and CCC-09-NOV-01
(Ackerberg)

1/22/84 The bulkhead has been completed. A general final inspection of all bolts, washers, whalers, sheathing and dimensional aspects were made. It was noticed that by sighting along the top edge of the sheathing that the wall bowed in and out horizontally. The slight variation noticed has no structural affect, and is exceptable to this office.

1/26/84 At the request of the Contractor, the man sized boulders were inspected extending a minimum of 10 feet 0 inches back from the wall. These rested on 1 foot 0 inch minimum filter material and all were as per plans. Excellent workmanship was observed.

Also noted was the completed return wall which extends only to the tennis court (approximately 19 feet 0 inches). It is our understanding that the corner boulder protection has been installed under the supervision of John Hale's office.

Elevations were established at the property by Mario C. Quiros, Land Surveyor, 22249 Pacific Coast Hwy, P.O.Box 186, Malibu, Ca.

Piling was observed by Kovac-Byer-Robertson and their findings are contained in their report no.M742-F, dated January 11, 1984.

It is our opinion, from the above inspections, that your bulkhead seawall was satisfactorily constructed in accordance with our plans and specifications.

Sincerely,

Paul A. Spieler

Paul A. Spieler
Project Engineer

PAS/dmt

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE (415) 904- 5200
FAX (415) 904- 5400
TDD (415) 597-5885

W 11 & 12

ADDENDUM

July 8, 2009

TO: Coastal Commissioners and Interested Parties

FROM: Lisa Haage, Chief of Enforcement

SUBJECT: ADDENDUM TO ITEM **W 11 & 12** COASTAL COMMISSION CEASE AND DESIST ORDER NO. CCC-09-CD-01 AND HEARING ON WHETHER A VIOLATION HAS OCCURRED FOR THE COMMISSION MEETING OF **JULY 8, 2009**

Documents included in this addendum:

1. Letter in support of staff recommendation from Sierra Club (pgs 2-3).
2. Letter in support of staff recommendation from Fran Gibson, President of the Board of Coastwalk California (pgs. 4-7).
3. Letter in support of staff recommendation from Jenny Price (pgs 8-9).
4. July 28, 2003, Public Vertical Access Easement Management plan (10-12)
5. July 2, 2009 Letter to Chair Neely and Commissioners from Respondent's Attorneys, Diane R. Abbitt and Steven H. Kaufmann, received by Commission staff on July 3, 2009 (pgs 13-36).**
6. Settlement Agreement between Access for All and Lisette Ackerberg (pgs 37-52).**
7. Exhibit letters to the October 21, 2008 letter from Diane Abbitt to Lisa Haage (pgs 53-74) ***
8. Responses to July 2, 2009 letter and proposed additional findings (pgs 75-93).

** Because of the large volume of material given to Commission staff just days prior to the hearing, Commission staff has made the remaining exhibits available on the Commission's website. In addition, Mrs. Ackerberg's representatives have indicated that they distributed copies of all the exhibits to the commissioners already.

*** We did not include large maps which are also exhibits because we lack the ability to duplicate them. In addition, we did not include a copy of the 1985 staff report because it is already an exhibit to the staff recommendation for this Order.

SIERRA CLUB
FOUNDED 1892

Mark Massara, Director
Sierra Club Coastal Programs

Hon. Bonnie Neely, Chair
California Coastal Commission
45 Fremont Street
San Francisco, California 94122

VIA EMAIL

Monday, July 6, 2009

Re: Ackerberg Public Accessway
22466 & 22500 Pacific Coast Highway, Malibu, Ca.
Agenda Item W11 & 12

Dear Ms. Neely and Coastal Commissioners:

We have just been provided with notice of settlement of litigation between private parties which purports to further delay and/or permanently extinguish the long sought public accessway otherwise known as the Ackerberg mansion. ***Sierra Club strenuously objects to the legal maneuvers and urges the Commission to allow no further delay in opening of the Ackerberg accessway, and to issue the proposed cease and desist order.***

The public has been forced to wait over 20 years for the Ackerberg vertical accessway to be opened, while the Ackerberg's have long enjoyed an oceanfront mansion and virtual private sandy beach.

While the imposition on the public is obviously outrageous, the latest twist presented by Ackerberg and the organization Access For All (AFA) threatens an even worse result. In exchange for money, AFA intends to launch a lawsuit against the County of Los Angeles in order to try to open ***a different*** accessway. Then, presumably after another 20 years or so, the charade pretends the County accessway will be opened and the Ackerberg's will not open their accessway ***EVER!***

This is intolerable. Surely if AFA is unwilling or unable to fulfill the legal obligations associated with opening the Ackerberg accessway the Commission retains some legal authority and jurisdiction to be able to rescind AFA's operating agreement, and to award the job to an organization who will insure public access is achieved.

mark.massara@sierraclub.org *1642 Great Highway, San Francisco, CA 94122*
phone: 415-665-7008 fax: 415-665-9008

As your staff clearly describes, from a variety of perspectives the Ackerberg easement is a superior public accessway to the County owned easement area, which is through a parking lot and an condominium complex, and lacks lateral easement area on the sandy beach. Worse, neither Ackerberg nor AFA has any legal right or ability to insure the County accessway is opened.

In conclusion, Sierra Club urges the Commission not to delay this urgent matter and support your staff analysis and recommendations, and to issue the cease and desist order in this matter.

Sincerely,

Mark A. Massara

APPROVE CEASE AND DESIST ORDER FOR CARBON BEACH ACKERBERG PROPERTY ENCROACHMENTS TO LATERAL AND VERTICAL EASEMENTS (Items 11 and 12 Order # CCC-09-CD-01 Ackerberg, Malibu, Los Angeles County)

Madam Chair Neely, Commissioners, Mr. Douglas, Commission staff and others gathered today -- I am Fran Gibson, President of the Board of Coastwalk California -- a 25 year old non-profit dedicated to coastal access and the completion of the 1200 mile California Coastal Trail from Oregon to Mexico.

We support wholeheartedly the Ackerberg property Cease and Desist order before you today and seldom have I seen a more appropriate application of this legal instrument to cure encroachments to coastal access. If we had an "easy button" here today I would implore you to hit it solidly!

Malibu's crescent-shaped Carbon Beach is close to 1.5 miles long with an impenetrable Great Wall of seventy or so backsides

and garages of mostly second homes along the Pacific Coast Highway imposing visual and physical limitations to the public's access to the coast. Only two vertical access ways are open along this stretch of Malibu's coastal zone: the 1981 Zonker Harris Gate and the 2005 Geffen Gate both accepted and very well-managed by Access for All. All beaches seaward of the mean high tide line are held in public trust as state sovereign lands for the people marking public access as one of the highest purposes of our public trust doctrine first founded in Common Law.

Article X section 4 of the state Constitution guarantees all people "maximum access to the sea" and our federal 1972 Coastal Management Zone Act adopted as leading national policy to protect and gain new access to public beaches in this nation. One of the highest policy objectives of our Coastal Act's Chapter 3 is protection and guarantee of coastal access to California's stunning coastline. "Development shall not interfere with the public right of access to the sea." Public access policies are included in Malibu's 2002 LCP Chapter 2 stating the standard of one public access way every thousand feet of coastline. Exclusive Carbon Beach is not excluded from this standard.

Offers to dedicate are fair mitigation for direct individual and cumulative impacts of private development upon public coastal access. Access findings by this body are public trust assets that are irrevocable, nonfungible and constitute an essential protection for coastal conservation along California's coast. Access easements run with the land to perpetuity in chain of title. They are a burden that cannot be shifted to a subsequent property owner, another easement area open or closed, are not predicated upon support facilities (like parking and cross-walks) and are pedestrian rights-of-way to the mean high tide line assuring coastal access to the public.

Vertical easements like Ackerberg Gate are higher policy priority for coastal access than lateral easements and must be guarded carefully by legal decisions like yours today. They are the sole egress when high tides and storm conditions dictate and provide rapid safe routes to the coast for emergency personnel. Lateral easements are rendered useless even privatized if the public enjoys no vertical rights-of-way to the coast.

The vested title holder Access for All must be allowed to open the Ackerberg Gate to the public as was the 1985 finding of this Commission. Ms. Ackerberg got what she sought in permit conditions in direct benefits to her private property. 25 years

later the general public still awaits the benefits of improved coastal access. Every OTD that lapses in California each year without being accepted is like losing living species and each one lost is grave to Coastwalk California who views access rights inherent within these offers-to-dedicate the fullest guarantee and commitment to coastal access.

Thank you for consideration of our concerns and thank you for all you do to champion the coast of California for generations to come.

July 5, 2009

To the Coastal Commission:

I am writing to strongly support the Cease and Desist order on Carbon Beach that the commission will decide on at the July 8 hearing.

As a writer and Los Angeles Urban Ranger, I have tried to educate people about public beach access in Malibu for 6-7 years, and I can testify that L.A.-area beachgoers are as eager to use these stunning public lands as they are frustrated about the difficulties of doing so.

A key and obvious reason for this difficulty is the scarcity of accessways. By the state standard (every 100 feet), we should have 100-plus access points along the 20 miles of coast that are lined with private development. Yet we have only 17 working accessways--for each of these, there should ideally be five more--so that many people who live just across the PCH, even, must drive two miles or more to get to the beach.

The opening of the accessway at 22126 PCH next to the Geffen property in 2005 significantly improved the public access to Carbon Beach, which had essentially functioned before as an all-private beach, with no public entrance except the Zonker Harris gate at the upcoast end. The dedicated access by the Ackerberg property would finally make the public lands on this beach truly public, as it lies smack between the two extant accessways on a stretch of the beach that still enjoys almost no public use.

I have taken many people to Carbon Beach since the 22126-PCH accessway opened, and they aways fall in love with it. It is a beautiful strip of coast, wider than most of Malibu's developed beaches (so more accessible at high tide), with lateral dry-sand easements in front of more than half the properties. And its proximity to Malibu's commercial center makes it an ideal place to beachcomb on a visit to this area, whether from the canyons above or from outside Malibu.

I find it deeply objectionable that the state typically has to waste such extensive time and resources to open public accessways in Malibu that were dedicated 25 years ago as state law requires, as a condition of extensive private development on the coast that belongs to everyone. That this particular accessway has been accepted by Access For All since 2003 makes this case especially frustrating. That the homeowner has built an illegal generator, wall, fence, and light system inside the easement, and has built illegally and extensively inside the lateral easement as well, makes this case outrageous even by Malibu standards.

I urge the Commission to enforce the removal of these obstructions, so that Access For All can proceed to develop and open the accessway for the public.

Thank you for your attention.

Sincerely,

Jenny Price

21 Thornton Ave., #32
Venice, CA 90291
310-396-1548
jjprice@ucla.edu

Access For All
PO Box 1704
Topanga, California 90290

July 28, 2003

PUBLIC VERTICAL ACCESS EASEMENT MANAGEMENT PLAN

By this agreement, Access for All, a California nonprofit corporation incorporated and qualified as a 501(c)(3) organization undertakes to manage a vertical public access easement offered for dedication within the City of Malibu, Los Angeles County. This easement is located at 22466 - 22500 W. Pacific Coast Highway, Malibu, CA 90265, and was required pursuant to Coastal Development Permit #5-84-754, Ackerberg.

Background

To permanently protect the public's right to access State Tidelands and to mitigate the impact of private development upon public access, the California Coastal Commission required that an offer to dedicate a vertical public access easement be recorded on this site.

Purpose/ Area Description

The purpose of this easement is to provide vertical public pedestrian access to Carbon Beach. The easement is 10 feet wide and is located along the eastern boundary of the property line, extending from the northerly property line to the mean high tide line. There is only one existing public accessway to Carbon Beach, approximately 1600 feet to the west, the Zonker Harris accessway, operated by Los Angeles County. In addition, approximately 2200 feet to the east is the site of the Geffen public access easement, which Access for All owns and is preparing to open and operate.

The vertical OTD connects to a lateral public access easement also recorded on the two Ackerberg parcels. This easement is owned by the State Lands Commission and is 148 ft. in length. State Lands Commission also owns an adjacent public access easement, located directly west of the easement they own on the Ackerberg parcels. That easement is 61 linear feet in length. In addition, on the 70 ft. long parcel to the east of the Ackerberg parcels, there is a public access dedication recorded. Thus the vertical OTD directly connects to 279 linear feet of public beach.

Easement Description/ Public Improvements

The Ackerberg OTD easement appears to be level, and may be mostly paved. A high, solid wall blocks viewing the easement from PCH, and views of the OTD easement from the beach side are obscured as well. Therefore, development of the accessway will be accomplished in two phases.

Phase 1: Access for All will accept the OTD. Upon acceptance, Access for All will hire a surveyor to locate the boundaries of the easement and identify encroachments within the easement area. At a minimum it appears that the perimeter wall along PCH is within the easement, as well as two eucalyptus trees and a large generating box. Once the encroachments are identified, Access for All will submit the information to the Coastal Commission staff for review and action.

Phase 2: Once the issue of encroachments has been resolved, Access for All intends to replace 10 linear ft. of the solid perimeter wall with gates, operated by a time lock mechanism. Actual delineation of the accessway, whether it be a short side yard fence or marking on the existing pavement, will be determined after it is known what existing improvements are located within the easement area and what the appropriate method for demarcation is. Access for All will work with the property owner to design these improvements. Once Access for All designs the final improvements, they will be submitted to the Coastal Commission and Coastal Conservancy staffs for review and approval and subsequent amendment to this Management Plan, prior to placement of any improvements on the site.

Operation

Access for All intends to operate this vertical easement from sunrise to sunset daily, consistent with Los Angeles County beach opening hours, as soon as possible. The site will be monitored and trash picked up weekly. A sign will be installed both on the entrance gates at PCH as well as at the southern end (beachside) of the accessway detailing hours of opening and will include a contact number for Access for All.

Annual Report

On February 1 of each year, AFA will submit an annual report to the Commission and Conservancy staff. This report shall identify efforts to open the vertical easement area. Once opened, the report shall estimate number of users, and any concerns raised regarding the public use and efforts to address those concerns.

Amendment

This plan may be amended, as deemed appropriate, with concurrence of all three signatories.

Agreement

Should Access for All cease to exist or fail to carry out its responsibilities pursuant to the approved management plan, then all right, title, and interest in the easement shall be vested in the State of California, acting by and through the State Coastal Conservancy or its successor in interest, or in another public agency or nonprofit organization designated by the State Coastal Conservancy and approved by the Executive Director of the California Coastal Commission This right of entry is set forth in the Certificate of Acceptance/Certificate of Acknowledgment by which Access for All has agreed to accept the OTD. The foregoing is agreed to by and between Access for All, the California Coastal Commission and the State Coastal Conservancy.

7/28/03

Steve Hoye
Executive Director
Access for All

Date

12/4/03

Peter M. Douglas
Executive Director
California Coastal Commission

Date

11/18/03

Sam Schuchat
Executive Officer
State Coastal Conservancy

Date

RICHARDS | WATSON | GERSHON
ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION
355 South Grand Avenue, 40th Floor, Los Angeles, California 90071-3101
Telephone 213.626.8484 Facsimile 213.626.0078
Telephone 213.626.8484 Facsimile 213.626.0078

July 2, 2009

W 11 & 12

OVERNIGHT MAIL

The Honorable Bonnie Neely, Chairperson
And Members
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: Administrative Cease and Desist Proceeding CCC-09-CD-01 (Ackerberg)

Access for All v. Lisette Ackerberg
Los Angeles Superior Court Case No. BC405058

Dear Chair Neely and Commissioners:

Diane Abbitt of the Law Offices of Diane Abbitt and this firm represent Lisette Ackerberg, the owner of the property located at 22466 and 22500 Pacific Coast Highway, Malibu.

The enforcement proceeding before you presents a unique set of circumstances and an equally unique resolution. The vertical accessway at issue has been the subject of two proceedings – one judicial and one administrative and both authorized under the Coastal Act. On June 19, 2009, the Los Angeles Superior Court entered a final Judgment in the above case, Access for All v. Lisette Ackerberg, thereby resolving the enforcement matter, providing for orderly enforcement of the Ackerberg easement, consistent with this Commission's decision approving the original CDP in 1985, and, as discussed further below, producing a "win-win" resolution for the public.

Our narrow response to the staff report is that the current administrative proceeding is foreclosed by the Court's Judgment, under settled principles of *res judicata*. Staff's efforts, however, have helped shape the requirements set forth in the Judgment. Consequently, without waiving *res judicata*, we have attached a redlined Draft Consent Cease and Desist Order (Exh. 1) that mirrors the one provided to us by Staff but specifically incorporates the provisions of the Judgment, together with additional provisions recommended by Staff.

The Coastal Act Enforcement Lawsuit and Judgment Entered

In the Coastal Act, as originally enacted, the Legislature provided a statutory scheme for judicial enforcement of alleged violations of the Coastal Act. Section 30803 broadly provided that "Any person may maintain an action for declaratory and equitable relief to restrain any violation of this division [the Act]." Section 30805 likewise broadly provided that "Any person may maintain an action for the recovery of civil penalties provided for [in the Act].[1] Recognizing broad citizen participation in the Coastal regulatory process, the Legislature also broadly defined "persons" in Section 30111 of the Act to include "any individual [or] organization." Thus, since its inception, the Act has encouraged private citizen enforcement suits to enforce its provisions.

In the years since enactment of the Coastal Act, the Legislature also has added provisions, like the instant proceeding, a cease and desist proceeding under Section 30810, to enable the Commission to administratively pursue violations, if it chooses not to use the judicial process and the Attorney General to enforce the Act.

Thus, the statutory scheme of the Coastal Act authorized enforcement by different means, and in this case Staff elected to proceed administratively, while Access for All, the holder of the Ackerberg easement, chose to file a Coastal Act enforcement lawsuit under Sections 30803 and 30805. That lawsuit, a "Complaint for Declaratory and Injunctive Relief and Civil Fines for Violations of the California Coastal Act, Trespass and Nuisance," was filed on January 6, 2009. Faced with a lawsuit now seeking monetary penalties, Mrs. Ackerberg answered the complaint filed. Following a case management conference before the Court, the parties discussed settlement in the judicial context. On June 18, 2009, they entered into a Settlement Agreement and Stipulation for Entry of Judgment (Exh. 2), and on June 19, 2009, at the second case management conference, the Court entered a Judgment Pursuant to Stipulation (Exh. 3), which now is final.

As discussed further below, the Judgment is consistent with the Commission's decision in imposing the Ackerberg vertical access requirement in 1985 – namely, a policy that publicly owned accessways should be opened before accessways required

[1] Section 30803 has since been amended *also* to provide for judicial enforcement of a cease and desist order or a restoration order. Section 30805 has similarly been amended to restate the numbered provisions of the Coastal Act that provide for specific monetary penalties.

of private property owners, and if the County of Los Angeles dedicated public accessway, located only five properties upcoast from the Ackerberg property, is opened, a mechanism will be developed in the LCP to permit Mrs. Ackerberg to terminate or extinguish her easement. This was a "commitment" that the Commission made to Mrs. Ackerberg when it approved her permit with a vertical access condition. Nonetheless, it is important to emphasize that the Judgment leaves the last word regarding the Ackerberg easement to this Commission.

Specifically, the Judgment provides that it is "a full settlement of all causes of action stated in the complaint" and that the Court has jurisdiction over the action "brought under the enforcement provisions of the California Coastal Act." (Exh. 3, ¶s 1-2.) The principal terms of the Judgment are:

1. Within 5 days after the entry of judgment, Access for All will file an action against the County to enforce the already dedicated County public accessway.

2. If Access for All is successful in obtaining a settlement or final judgment that results in removing encroachments currently in the County's dedicated accessway, Mrs. Ackerberg will fund, or cause to be funded, the improvement and opening of the accessway.

3. Within 20 days after the County's dedicated accessway is opened and improved, Access for All and Mrs. Ackerberg will jointly apply to the Commission to amend her original CDP to terminate or extinguish the Ackerberg easement.

4. Mrs. Ackerberg will pay $125,000 in private funding to Access for All to maintain and manage the County's dedicated accessway for five years.

5. Mrs. Ackerberg will pay $125,000 to the State Coastal Conservancy, which, through inter-agency agreement, will provide funding to this Commission for public access and enforcement; but, if the Commission does not wish to accept the funds, then they are paid to Access for All to ensure funding for maintenance and management of the County's dedicated accessway for 10 years.

6. If Access for All is not successful in the lawsuit against the County, within 20 days, Access for All and Mrs. Ackerberg will jointly apply to the Commission to amend her original CDP to improve the Ackerberg easement and modify the Management Plan informally agreed to between the Commission staff, Conservancy and Access for All, to include security measures that do not interfere with public access.

On June 26, 2009, pursuant to the Judgment, Access for All filed its lawsuit, *Access for All v. County of Los Angeles, et al*, LASC Case No. BC416700, in Los Angeles Superior Court against the County of Los Angeles to enforce and open the County's dedicated public accessway. (Exh. 4.) That lawsuit is now being served.

All Parties Benefit from the Judgment and Newly Filed County Lawsuit

The Judgment and the lawsuit filed against the County produce a "win-win" result for all parties. Notably:

1. The lawsuit, if successful, will provide the legal basis for opening the other closed County accessways. There are currently three closed County accessways. This lawsuit, if successful, will be precedent-setting, and will provide the legal basis for opening the County's other accessways.

2. The public gets a vertical access easement to Carbon Beach. The public gets either the Ackerberg easement or the County's dedicated accessway, which the County required and accepted in 1973 in approving a condo conversion on Pacific Coast Highway. Thirty-six years later, a party has stepped forward and now aggressively seeks to open it. It would never happen but for this lawsuit, as evidenced by Staff's strangely defeatist attitude toward this accessway (Staff Report, pp. 25-26).

3. The public potentially gets a superior vertical access easement. As discussed further below, the Ackerberg easement is not visible from Pacific Coast Highway, has no sidewalk, and is sandwiched between two residences. The County's easement is open and visible, has a sidewalk, is directly across the street from a public parking facility and in close proximity to a crosswalk, and provides the unique opportunity for a mountain-to-sea trail connection with trail access to the Coastal Slope Trail also provided directly across the street.

4. The County easement improvements are funded. If the County accessway is successfully opened, Mrs. Ackerberg will fund the improvement of the accessway (minimal improvement is required), if the County or the condo owners do not do so.

5. The County easement maintenance and management is funded. If the County accessway is opened, Mrs. Ackerberg will fund its maintenance and management for five years, thereby relieving the need for any public agency, like the State Coastal Conservancy, to provide funding at a time when it is not available.

6. Mrs. Ackerberg gets easement termination, as contemplated by the Commission. If the County accessway is opened, Mrs. Ackerberg and Access for All, her easement holder, will jointly ask the Commission to terminate her easement. As discussed below, this is precisely what the Commission contemplated when it originally approved the Ackerberg easement.

7. The Commission gets the Ackerberg easement through an orderly process. If the County lawsuit is not successful, Mrs. Ackerberg and Access for All will expeditiously request a permit amendment to implement the Ackerberg easement, and the implementation of the accessway also will be expeditiously undertaken.

Finally, at a time when the State is facing an unprecedented budget crisis, the Access for All Judgment requires Mrs. Ackerberg to pay $125,000 to Commission through the State Coastal Conservancy to help the Commission fund its public access and enforcement programs. This would be done through inter-agency contract, a process that already exists with respect to other State agencies, such as Caltrans and the Santa Monica Mountains Conservancy. But, if the funds are not accepted, then they go to Access for All to ensure funding for maintenance and management of the County's dedicated accessway for 10 years.

The Res Judicata Effect of the Court's Judgment on this Administrative Proceeding

A fuller discussion of doctrine of *res judicata* and its application here is set forth in an attached memorandum. (Exh. 5.) Under the doctrine of *res judicata*, a prior judgment bars a subsequent action if three elements are met. These are briefly discussed below.

~ Identity of Issues

The first element is that the issues decided in the first adjudication must be identical with the issues presented in the subsequent proceeding. (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, 1065.) To determine whether the issues are identical, the courts examine whether the "rights which are sought to be vindicated and the harm for which redress is claimed" are identical. *Id.*

In *Citizens for Open Access to Sand and Tide*, the court held that a settlement agreement and accompanying judgment by the Coastal Commission, State Lands Commission and Attorney General specifically adjudicated the public easement issue presented and barred a subsequent action brought by Citizens for Open Space to Sand and Tide. As the court put it: "The prior and current actions differ only in the procedural context in which they have arisen, not the substantive issues presented." (*Id.* at 1068.)

Here, Access for All filed its Coastal Act enforcement action, alleging that "DEFENDANT's failure to clear the easement of physical impediments imposes illegal restrictions on the use of this easement by the public, violating the California Coastal Act, resulting in a trespass on PLAINTIFF's easement, and causing a public nuisance," and "On January 1, 2009, the physical impediments located in the easement, including but not limited to an electrical generator, wall, and lighting fixtures had not been removed and PLAINTIFF was unable to open the accessway to the public. (Exh. 6, ¶s 1 and 15.) The prayer to the complaint filed requests "injunctive relief mandating DEFENDANT to remove all physical impediments in the easement to ensure the public access to the Property at issue in this Complaint." (*Id.*, Prayer, ¶ 2.)

The final Judgment entered pursuant to settlement agreement provides that the Court "has jurisdiction over the parties hereto and the subject matter hereof, specifically an action brought under the enforcement provisions of the California Coastal Act, Pub. Resources Code sections 30803, 30820(a) and (b)," and that it "is a full settlement of all causes of action stated in the complaint." It further includes a judicial finding "that the settlement and this Judgment thereon are in the interests of justice and provide for the orderly resolution of the Coastal Act violation alleged in the Complaint file and for enforcement and maintenance of the Ackerberg easement,

while permitting the parties a reasonable opportunity to pursue improvement and opening of the County's dedicated accessway and thereafter termination of the Ackerberg easement." (Exh. 3, ¶s 1, 2, 6.)

The staff report for the cease and desist proceeding asserts the identical claims, thus satisfying the first element of *res judicata*:

> ". . . [D]ue 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." (Staff Report, p. 4.)

There is one difference between the two proceedings. The staff report for the cease and desist proceeding also contends that there is a seawall violation both in and outside of the vertical access easement. We demonstrate below, however, that Staff is in error. There is no seawall violation.

~ ***Final Judgment on the Merits***

The second element of *res judicata* is that the first adjudication must involve a final judgment on the merits. (*Citizens for Open Access to Sand and Tide*, *supra*, 60 Cal.App.4th at 1065.) A court-approved settlement or stipulated judgment, as here, constitutes a final judgment on the merits for the purposes of *res judicata*. (*Id.*) The Judgment entered in the *Access for All* lawsuit is now final. (Exh. 3, ¶ 7 ["Plaintiff and Defendant have waived findings of fact, conclusions of law, a statement of decision, and any and all rights of appeal from this Judgment."].)

~ ***Privity of the Parties***

The final element of *res judicata* is that the party against whom the doctrine is being raised was either a party in the first action or was in privity with a party to the first action. (*Citizens for Open Access to Sand and Tide, supra*, 60 Cal.App.4th at 1065.)

In *Citizens for Open Access to Sand and Tide*, the court held that a nonprofit organization was in privity with the government agencies that previously sought to enforce a public access easement. For purposes of *res judicata*, "privity" means "a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights." (*Id.* at 1069.)

The Staff Report explains: "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 2003," that Access for All "now holds the legal easement," that it "assumes all responsibility for operating and maintaining the accessway." (Staff Report, pp. 4, 8, 31.) As noted, Access for All was a proper "person" authorized to bring the Coastal Act enforcement action, and Staff has had knowledge of the lawsuit since shortly after it was filed in January of this year.[2]

Thus, the element of privity is also present – hence the application of *res judicata* as a bar to the instant proceeding.

The Attached Redlined Draft Consent Cease and Desist Order Mirrors the Judgment and Provides Additional Provisions Requested by Staff

As chronicled in the staff report, Staff has engaged in an active dialogue with Mrs. Ackerberg's counsel, Diane Abbitt, for some time now, and more recently graciously agreed to meet with Ms. Abbitt and co-counsel Steven Kaufmann at the Commission office in San Francisco to discuss the enforcement matter. In the staff

[2] Steve Hoye, Executive Director of Access for All, advised Erin Murphy and Linda Locklin of the filing of the lawsuit in January and February 2009, and also the pendency of the lawsuit also was noted in conversations between Mr. Hoye and Lisa Haage and Aaron McLendon in May and early June 2009. Ms. Abbitt also noted the pendency of the lawsuit in an e-mail to Mr. McLendon on June 4, 2009. (Exh. 7.)

report, Staff has expressed its willingness to continue to work with Mrs. Ackerberg to resolve the alleged violations in a cooperative manner (Staff Report, pp. 37, 41), and Mrs. Ackerberg seeks likewise to work cooperatively with Staff. In that spirit, without waiving the *res judicata* effect of the Judgment, we have attached a redlined Draft Consent Cease and Desist Order that mirrors the Judgment, but also incorporates additional provisions requested by Staff.

Mrs. Ackerberg is legally obligated to comply with the Court's Judgment. Similarly, if the Commission adopts the redlined Draft Consent Cease and Desist Order, she would be bound by that Order as well -- a "belt and suspenders" approach to ensure enforcement.

There is No Seawall Violation

In addition to the improvements currently in the Ackerberg easement area, the staff report asserts incorrectly that the seawall also is in violation.[3] The staff report provides scant support for its assertion, and it misinterprets the support it provides.

In June 1983, the Commission approved the application of Mrs. Ackerberg's predecessors, the Truebloods, for construction of a 140-foot wood pile-supported, wood-sheeted bulkhead along the seaward side of the property. The staff report asserts that the Commission's approval included rocks up to 12" in size, but the actual rocks placed are larger. Staff has misinterpreted the schematics prepared for the seawall. The seawall was built per the plans approved.

[3] We are frankly surprised that Staff is continuing to raise an issue regarding the seawall. In December 2008, Ms. Abbitt and her staff twice requested that Staff provide a copy of the file for the approval of the Trueblood seawall, CDP No. 5-83-360. Rather than provide the file (something Staff routinely does upon request, whether it be for preparation of administrative records or production of documents in response to a Public Records Act request, and something to which an alleged violator is absolutely entitled in preparing its defense), Staff suggested that Ms. Abbitt try and get the documents from the architect who worked on the 1985 application. (Exh. 8.) Surely, it is unfair, if not a violation of due process, for Staff to assert a seawall violation but not provide the documents that may bear on it. Further, by letter dated October 21, 2008, Ms. Abbitt provided explanatory documents to Staff concerning the seawall. While Ms. Abbitt's letter is attached to the staff report (Staff Report, Exh. 24), however, the explanatory documents attached to it are not, thus compounding the problems associated with Staff's approach to this issue.

The Trueblood staff report includes a "typical section." (Staff Report, Exh. 2, p. 14.) The typical section includes "man size" rocks behind the bulkhead (an "overtopping blanket of 1'0" to 2'0" Rocks"). It also includes large cap stone rocks positioned to abut the face of the bulkhead, interspersed with rock and gravel wastemix.

The staff report points to a February 15, 1984 letter from Vincent Kevin Kelly and Associates, Inc., (Staff Report, Exh. 40) and inaccurately states that all that was permitted in front of the bulkhead was "man sized boulders, extending a minimum of 10 feet from the wall," proving, as Staff states, that rocks were placed *seaward* of the bulkhead. The staff quote, however, is wrong, and the rocks were the man-sized boulders placed behind the bulkhead: ". . . the man sized boulders were inspected extending a minimum of 10 feet 0 inches back from the wall." (Staff Report, Exh. 40, p. 2; underscored word, "back," was omitted from the staff report.) That is evident, moreover, from the typical section.

Staff further states that the "typical section" states that immediately seaward of the bulkhead, boulders were to be "replaced with rock and gravel waste mix." This is indeed true – "existing" boulders seaward of the property were to be replaced. The typical section, however, shows a modest amount of cap stone to be carefully positioned to butt up against the to-be-constructed bulkhead (unlike a rock revetment which typically would extend much further seaward), but only half-way up the bulkhead, and interspersed with the rock and gravel waste mix. It seems obvious, but there would have been no reason to simply place small rock and wastemix by itself in front of the seawall; it would have washed away with the first major storm.

Further, the plans for the bulkhead prepared by the coastal engineer provided for similar but slightly deeper rocks to anchor the seawall at the downcoast end, including the portion in front of the vertical easement. These plans – provided to Staff, but, as noted in footnote 2, not attached to the staff report – show the same rock configuration and size – "cap stone 800# to 6 ton", but in addition "B-stone 200# to 800#" for two feet below it, and then a filter blanket." (Exh. 9.)

There is no mystery why the rocks today are visible. The seawall has been on the property for over 20 years, but, as proposed and constructed, sand originally covered the rip rap. (Staff Report, Exh. 2, p. 14, and reference to "Ave Beach Level" which is a couple of feet higher than the rocks.) However, as is the case along many

parts of the Southern California coast, the west end of Carbon Beach has been eroding, and the beach is significantly shallower today than it was when the Commission approved the seawall. It is for that reason that the rocks can now be observed.

Importantly, the seawall work was inspected when completed – indeed, a short time prior to the Commission and Staff's review of the original Ackerberg CDP. As explained in the February 15, 1984 letter from Vincent Kevin Kelly and Associates, Inc.: "It is our opinion, from the above inspections, that your [Mr. Trueblood's] bulkhead seawall was satisfactorily constructed in accordance with our plans and specifications." (Staff Report, Exh. 40, p. 2.)

In short, the seawall was built as approved. There is no seawall violation.

The Commission's 1985 Decision Contemplated that the Ackerberg Easement Would be Extinguished if the County's Dedicated Accessway is Improved and Opened

This matter is unique for yet another reason. This is not a case where an applicant years later seeks merely to substitute another accessway for one previously required by the Commission. Rather, the record demonstrates that when the Commission approved the original Ackerberg permit, it specifically contemplated that the Ackerberg easement could be extinguished if the County's dedicated accessway is improved and opened.

- ***The Commission's 1985 Decision Contemplated the Possibility of a Future Amendment Request***

The staff report attaches only the original staff report prepared for the original Ackerberg permit (Staff Report, Exh. 5) as though the Commission adopted it. (Staff Report, p. 8.) The Commission clearly did not adopt that staff report. The transcript, which was not provided to the Commission, is rife with instruction to Staff to prepare revised findings. At the same time, Staff suggests that the Commission never adopted revised findings. We have attached the revised findings, which, again, have not been included with the staff report.[4]

[4] The suggestion that revised findings were never adopted is as aggravating as it is unbelievable. The Commission is legally required to adopt findings (Cal. Code Regs., § 13096; *Topanga Assn. for a*

The Commission approved the Ackerberg permit on January 24, 1985. On the day of the hearing, the Ackerberg's counsel wrote a letter to the Commission, objecting to the vertical access condition recommended.[5] He noted the proximity of the Ackerberg property to the already dedicated, but not yet opened County accessway, and requested that at the very least the condition be modified to permit abandonment of the Ackerberg accessway if the County accessway is developed, consistent with a policy proposed by Staff and then under review in connection with the Malibu/Santa Monica Mountains LUP. (Exh. 10.) An amending motion to accept the applicant's requested modification was withdrawn in favor of Staff's suggestion of revised findings. Then Assistant Executive Director Douglas explained:

> ". . . I do understand what both Commissioner McInnis and Commissioner Wright are saying. What you are saying, basically, is that priority should be to develop publicly owned accessways before these private offers of dedication are, in fact, implement, activated, and developed. [¶] And, that is a policy question that I think is appropriate for the LUP, and could be incorporated here in the finding, as a policy that you have taken, as opposed to a condition. (Exh.11, p. 34; emphasis added.)

After further discussion, Commissioner McInnis stated: "I think I heard staff say that they would be willing to put some pretty nice – I think they are pretty nice – words into the findings, at least. And, is that a commitment at this point?" (Exh. 11, p. 39.) Mr. Douglas responded:

Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 514) Assuming for the sake of argument that despite instruction from the Commission to prepare revised findings and the "commitment" Mr. Douglas made at the hearing to prepare them, revised findings were not presented to the Commission and adopted, that failing would fall squarely on the shoulders of Staff, and certainly not Mrs. Ackerberg.

[5] The staff report explains that "the Commission found that vertical public access in this location was necessary due to the continuous residential development along Carbon Beach blocking views and the lack of open accessways in the area." (Staff Report, p. 8 fn. 5.) It is worth noting that the Trueblood residence, which the Ackerbergs sought to demolish, extended across the entirety of the property. There was no pre-existing view of the beach or vertical beach access at that location. Today, a vertical accessway could not be required because of the absence of a constitutionally required "nexus," under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825. At the time, however, there were numerous constitutional challenges to the Commission's access requirements, including *Nollan*. In reliance on the Commission's commitment that the Ackerbergs would at least have a fair opportunity to extinguish the vertical access condition, the Ackerbergs did not challenge the condition.

> "Well, whether they are nice, or not, I can't vouch for that, but we will put in language consistent with the discussion that we've held here, if that is your direction. . . I should just indicate that with the general policy of saying opening up publicly owned accessways first by developing those. . . ." (*Id.*, at 39-40.)

Several commissioners voiced support for revised findings – Hisserich (*id.*, p. 35), Wright (*id.*, p. 38 – "I would concur, in placing some strong language in the findings, particular to the effect that of extinguishing these accesses."), McInnis (*id.*, p. 39), Chairman Nutter (*id.*, pp. 43, 45, 46 – "In terms of revised findings, it is clear to me that whatever this Commission does, we need some revised findings to reflect our discussion, and in the absence of objection, my colleagues, even if we have a per-staff motion, which passes, we ought to have revised findings" *and* "The main motion is per staff, with the understanding that we will have revised findings for our consideration.")

On January 28, 1985, following the hearing, the Ackerberg's counsel wrote Staff indicating his understanding concerning the revised findings that would be prepared. (Exh. 12.) On February 4, 1985, he followed up with another letter to Staff indicating his conversation with Mr. Douglas that a draft of the revised findings had been completed and forwarded to District staff. (Exh. 13.) On February 11, 1985, District Staff, in turn, forwarded a copy of the revised findings to the Ackerberg's attorney (Exh. 14). Thereafter, District clerical staff prepared the revised findings (Exh. 15), and Staff issued its revised findings, specifically incorporating the changes into the staff report. (Exh. 16.) In fact, the revised findings bear the stamp that Staff used at the time to reflect the Commission's action – in this case, "Approved with Changes See Pg. 7," which includes the revised findings.[6] (Exh. 16, pp. 7-8.) Importantly, the Ackerbergs relied on the Commission's decision and, despite their objection to the condition, they did not challenge it. Thereafter, the OTD for the Ackerberg easement was prepared, and it includes as an attachment the staff report with the revised findings, and the Commission's Chief Counsel, Roy Gorman, signed off on the form of the OTD, and it was recorded. (Exh. 17.)

[6] Staff has indicated that it could not locate this document in its file, but the document is a part of the record in the Roth lawsuit (as reflected by the bates page numbering) and, as noted, bears the stamp that Staff used at the time to reflect the Commission's action – in this case, "Approved with Change See Pg. 7," which includes the revised findings. (Exh. 16, pp. 7-8.)

In the revised findings, the Commission noted the County's dedicated accessway, and expressed its intent, consistent with Commission discussion but again omitted from the quoted language in the staff report, that "as a matter of policy, publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical access easements are opened." (Exh. 16, pp. 7-8.) The findings went on to state:

> "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 easement within 500 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." (*Id.*; emphasis added.)

– The LCP Permits an Application to Amend the Ackerberg CDP to Extinguish her Access Requirement

At the January 24, 1985 hearing, Mr. Douglas and the District Director, Mr. Crandall, explained two ways in which the Ackerbergs might subsequently seek to extinguish the vertical access requirement -- 1) as provided for in the LCP, and 2) by request for a permit amendment. (Exh. 11, pp. 27-30.)

Thereafter, on December 12, 1986, the Commission certified the Malibu/Santa Monica Mountains LUP with the policy "directive" under discussion at the Ackerberg hearing. P51, as drafted by Staff but not quoted in the staff report, provides:

> "Where two or more offers of dedication closer to each other than the standard of separation provides have been made pursuant to this policy, the physical improvement and opening to public use of offered accessways sufficient to meet the standard of separation shall result in the abandonment of other unnecessary offers."[7] (Exh. 18.)

[7] That staff report quotes from the Commission's findings on the 1986 LUP, but not the resulting policy, P51. In addition, the quote states, "the revised Policy 55d will prevent the abandonment of already opened accessway." (Staff Report, p. 28.) So that there is no confusion, P55d is directed only

For Carbon Beach, P56-16 ultimately set the standard of separation at "one accessway per 1,000 feet of beach frontage," not 500 feet. (*Id.*) And, here, in any event, the two accessways are "closer to each other than the standard of separation provides."

Of course, the City of Malibu incorporated in 1991, and in September 2002, this Commission subsequently prepared and certified the City's LCP. Unfortunately, the Commission's Ackerberg decision, the "commitment" that Commissioner McInnis requested and received, the "directive" that the Commission promised would be developed as part of the Commission's public access program and the policy established in P51 somehow all got lost in the process. P51 was not incorporated as such by the Commission. The Commission, however, included implementation language that reserved to itself the ability to extinguish or negate a previously imposed vertical access condition. Section 13.10.2 of the City's LIP provides:

> "The Commission retains authority over coastal development permits issued by the Commission including condition compliance. Where either new development, or a modification to existing development, is proposed on a site where development was authorized in a Commission-issued coastal development permit either prior to certification of the LCP or through a de novo action on an appeal of a city-approved coastal development permit and the permit has expired or been forfeited, the applicant shall apply to the City for the coastal development permit except for:
>
> > ". . . 2) Development that would lessen or negate the purpose of any specific condition, any mitigation required by recorded documents, any recorded offer to dedicate or grant of easement or any restriction/limitation or other mitigation incorporated through the project description by the permittee, of a Commission-issued coastal permit.
>
> "In any of these circumstances, the applicant must seek to file an application with the Coastal Commission for an amendment to the Commission-issued coastal development permit and authorization for the proposed new

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at County accessways – something the Judgment in the *Access for All* case seeks to enforce: "The County of Los Angeles shall not close, abandon, or render unusable by the public any existing accessway, either vertical or lateral." (Exh. 18.) P55d is not applicable to the Ackerberg easement.

development or modification to existing development . . . . " (Exh. 19; emphasis added.)[8]

The staff report now asks everyone to turn a blind eye to the Commission's 1985 decision and revised findings, and essentially suggests that all bets are off for Mrs. Ackerberg. But, we respectfully submit that the Commission, in approving her application, never intended to deprive her of the opportunity to extinguish her access requirement if the County's accessway is opened and improved. It is readily apparent that the Commission intended the vertical access requirement to be a "safety net" if in fact the County's dedicated easement is never improved and opened. It made a "commitment" to Mrs. Ackerberg that it would adopt a policy that publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical access easements are opened. That is why the Commission took the highly unusual step of allowing her to develop in the easement area.

Finally, on this issue, the staff report correctly states that Access for All now holds the legal interest in the vertical access area, but the Settlement Agreement and Judgment in the Access for All case make clear that if the County lawsuit is successful and the County accessway is improved and opened, Mrs. Ackerberg and Access for All will jointly apply to the Commission to extinguish her access

[8] Pursuant to the Judgment, if the County lawsuit is successful, Mrs. Ackerberg and Access for All will jointly apply to amend her coastal permit to extinguish the vertical access requirement. Under the circumstances, we certainly hope that the Commission will grant the amendment request. Among other things, we will demonstrate that the vertical access policies in the City's LCP do not apply to the Ackerberg easement since, by the constitutional standard in *Nollan*, vertical access is required only where the new development proposed creates a burden or impact on public access. (See fn. 5, ante.) That limitation is incorporated in Policy 2.66. The separation standards in Policy 2.86 – including the 1000-foot standard for Carbon Beach -- also have no application to Mrs. Ackerberg because that policy merely implements the other inapplicable Policy 2.66. Nonetheless, if the County accessway is opened, it will be within 1000 feet of the next upcoast vertical accessway, and the Ackerberg property will be approximately 500 feet to 690 feet from the County accessway. Further, the Commission contractually bound itself to considering an amendment to the 1985 permit to authorize extinguishment of the easement upon the opening of the County accessway. As the Attorney General put it, in an informal opinion (November 18, 1985) addressing Commission post-LCP permit authority over projects commenced under Commission permits: "The right to insist upon compliance with the terms and conditions of a permit under which construction has commenced is a contractual right. (See, Edmonds v. County of Los Angeles (1953) 40 Cal.2d 642, 653.)" The reverse also must be true: Mrs. Ackerberg has the right to insist upon the Commission's compliance with its decision and the revised findings and expression of intent under which the permit originally was granted.

requirement. But again, the ultimate discretion whether to grant or deny that application still resides with the Commission.

The County Accessway is Superior to the Ackerberg Easement

The staff report asserts that the Ackerberg easement is superior to the County's dedicated accessway. While for different reasons we may agree with Staff that the relative value of the easements is not relevant, Staff has dismissed the County easement out of hand when further investigation would reveal that it is in fact far superior to the Ackerberg easement is in its potential to provide meaningful public access to Carbon Beach.[9]

As noted, the Commission itself noted the superior nature of the County's dedicated accessway during the hearing in 1985 at which the Commission approved the original Ackerberg permit. The Commission made clear its "policy" that publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical accessways are opened.

Regarding specifics, the Ackerberg easement would be hidden from Pacific Coast Highway behind three substantial, mature Eucalyptus trees which are located outside the easement in the City of Malibu's right-of-way. (Exh. 16.) Staff notes the presence of the trees, but makes the interesting statement that "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 restricts access to the Ackerberg vertical accessway (including the eucalyptus trees, if necessary) are appropriately addressed." (Staff Report, p. 31.) The City of Malibu, at odds with the Commission for years, has just authorized the filing of a lawsuit against the Commission challenging its approval last month of the Santa Monica Mountains Conservancy LCP override amendment. Can

[9] The Staff Report reveals very disappointing negativity towards the County accessway – "the County has no intentions of opening the specific vertical easement area in the future," "the County does not intend to open *any* easement areas in the future," and even if opened, "the easement area may close in the future if the County no longer has the funds for operating and maintaining the easement area." (Staff Report, pp. 25-26.) But, this is a just a distraction. The Judgment and the lawsuit now filed against the County seize the moment, and will press to open the County's dedicated accessway, and thereafter Access for All intends to use that precedent to open the other two County accessways. Instead of simply cowering before the mighty County of Los Angeles, we would like to think that the Commission would throw its weight behind this important lawsuit, and we invite the Commission to do so.

anyone seriously believe that Commission Staff will convince the City of Malibu to remove three mature eucalyptus trees from the right-of-way so that vertical access can be provided down an alleyway between two houses to Carbon Beach?

The Ackerberg easement area would not only be hidden, but cramped and sandwiched between two homes. The Staff Report erroneously states that there is a sidewalk at this location. (Staff Report, p. 15) There is, however, no sidewalk in front of the accessway, minimal available street parking (the parking that exists is largely consumed by residents), and exposed rock rip rap (as noted, authorized by the Commission and legally placed) where the easement adjoins the beach that makes use of the easement problematic.[10]

By contrast, success in opening the County easement – something that no one has accomplished since the County required and accepted the easement in 1973 – would establish the legal precedent for opening the two other closed County access easements.

The County's dedicated access easement is completely visible, directly across the street from a public parking facility (noted on the Commission's website for this portion of Carbon Beach – Exh. 21), a signal, a crosswalk, a sidewalk, and it is already paved. Modest encroachments currently exist in the easement area: a stucco retaining wall, a planter, a wood gate, a pool equipment area, and a portion of a wood deck.

But there's more. On April 6, 2009, Ms. Abbitt sent a letter to the State Coastal Conservancy, with a copy to Mr. Douglas, but that letter, too, is not attached to or referenced in the staff report. (Exh. 22.) In the letter, Ms. Abbitt explained that the National Park Service (NPS), working with a landowner-applicant pursuing a residential development inland of Pacific Coast Highway, obtained a key piece of the Coastal Slope Trail, leading from the area above Carbon Canyon to an area close to

[10] In the Geffen permit (5-83-703-A1), the Commission required that the applicant design a "movable, lightweight, metal (stainless steel or an equivalent material) ramp with non-slip surface and stainless steel handrail on each side which shall provide a transition from the concrete slab to the sandy beach at times when the elevation of the concrete slab/walkway is higher than the sandy beach." (*Id.*, p. 8.) The Judgment entered in the *Access for All* lawsuit requires design and use of a similar structure when the existing rock revetment fronting the Ackerberg easement impedes access to the beach. (Exh. 3, ¶ 4(e)(1)(i).)

the public parking lot on the inland side of PCH directly across from the County's dedicated accessway. The Santa Monica Mountains Conservancy likewise had asked for this trail, and the City required it as a condition of approving the residential development.[11] Ms. Abbitt explained:

> ". . . I have learned that the County's dedicated accessway actually has heightened and special importance to the Coastal program. Other agencies – notably the National Park Service (NPS) and the Santa Monica Mountains Conservancy (SMMC) – believe that the County accessway is the key connector between the Coastal Slope Trail in this part of the Santa Monica Mountains and the California Coastal Trail along this part of Carbon Beach. Somewhere along the way, this was overlooked, but I know that both the Conservancy and the Commission, in particular, would not abandon this vital connector, knowing how fortuitous it is that it exists and would serve a key public access function." (*Id.*)

Thus, on top of everything else, the County's dedicated accessway provides the unique and exciting opportunity to create a "mountain-to-sea" trail. In sum, there are indeed numerous reasons why the County's accessway, if opened, would be far superior to the Ackerberg easement. Regardless, the Judgment merely affords Mrs. Ackerberg the chance to pursue, through litigation, the opening of the County accessway, and thereafter to apply to the Commission to extinguish the Ackerberg easement, as contemplated in her original permit approval. But, as earlier stated, nothing in the Judgment interferes with the Commission's discretion in determining whether to grant that request.

Even Absent the Judgment, This Proceeding is Premature

Even if there were no Judgment, the current proceeding seeks but "half a loaf." It is premature. The focus of the cease and desist proceeding is "*removal*" of the improvements in the vertical easement area. (Staff Report, p. 4.) However, at this point, no permit has been sought or granted authorizing the actual "development" of the vertical easement.

[11] The landowner-applicant is Rancho Topanga. Following the trial court's ruling upholding the City of Malibu's decision to approve the Rancho Topanga residential development, including the trail requirement, the Commission participated as an amicus in the appeal that ultimately affirmed the judgment. (*Albert v. City of Malibu*, 2d Civ. 202631.)

In approving the original CDP for the Ackerberg residence, the Commission approved development, as proposed, over the easement area. In response to the request of Mrs. Ackerberg's counsel to use the easement area "for the tennis court, or patio, or plantings, or whatever, until the easement "is picked up and used" (Exh. 11, p. 11), Staff confirmed that there is no prohibition against use of the easement area. (*Id.* at p. 24.) The staff report (at p. 14 fn. 7) suggests that this was simply a "courtesy to the Ackerbergs." In fact, coupled with the discussion about the County's dedicated accessway and the rather unprecedented permission that the Commission granted for development in the easement area in the interim, it would be more accurate (and fair) to state that the Commission had serious doubts that this accessway would ever be opened.[12] The staff report (at p. 14 fn. 7 and p. 15) also inaccurately asserts that the Commission did not approve any development in the easement area. The plans submitted for the Ackerberg development, which were approved by the Commission (as noted by Staff on the face of the plans), reflected that the development would extend to the property line and that items such as a perimeter block wall, fences, railing, and landscaping would be erected in the easement.[13] (Exh. 23.) The staff report incorrectly asserts that there is other development in the accessway. In fact, there is no "planter," or "staircase" in the easement area. Moreover, the "lightposts" were there already to provide lighting for the Trueblood's tennis court; indeed, they were there in place when the Commission approved the Trueblood's seawall.

In any event, the Commission's decision simply required an OTD, but it provided no self-executing specifics on the actual development and implementation of the easement. Specifically, the Commission did not address surfacing of the walkway, gating, lighting, fencing, landscaping or any method of dealing with the

[12] As District Director Crandall explained to the Commission: "Just to remind all, again though, that these are offers to dedicate. Unless they are picked up and developed by somebody within the prescribed period of time, the 21 years, they do not become accessways. And, of course, as I pointed out to you, there may well also be a provision in the final LCP which will set up a mechanism for extinguishing such accessways, once there are usable public means to gain shoreline access within 500 feet of any of these existing offers." (Exh. , p. 3.)

[13] In one respect, Staff is correct. The staff report (at p. 34) points out that four days after the Commission approved the Ackerberg permit, Mrs. Ackerberg's attorney sent Staff a letter in which he explained his understanding 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." (Staff Report, Exh. 9.)

previously approved and constructed seawall. Likewise, it did not address security improvements that would not interfere with public access, but would provide a measure of security to the property owner. In other instances, by contrast, the Commission has required a permit to address the development required to implement a vertical accessway. (*See e.g.*, 5-83-703-A1 [Geffen].)

In short, Staff is a bit ahead of itself in this proceeding. Removal of the improvements from the easement area does not produce an accessway. The accessway is a "development" unto itself, and must be addressed by a permit which has not yet occurred. Nonetheless, the requirement of an application to amend the original Ackerberg permit to implement development of the accessway is specifically covered by the Judgment.

The Administrative Enforcement Process, as Applied Here, Would Deny the Due Process, Equal Protection and the Right to Petition Government for Grievances

There is no doubt that enforcement is an important component of the Coastal Act regulatory scheme. This was fully accomplished in the judicial proceeding. Without waiving *res judicata*, it additionally can be confirmed and implemented through the redlined Draft Cease and Desist Order attached.

Nonetheless, regardless of the enforcement mechanism pursued, the hallmark of that process ought to be, like any other proceeding before the Commission, to ensure fundamental fairness. Proceedings in the judicial context differ greatly from the evolving process by which the Commission approaches administrative enforcement. In a judicial proceeding, a party sued has ample time and opportunity to defend and present its case to the court. In the administrative context, the balance unfortunately is skewed so that the alleged violator may be forced to defend a serious allegation literally with "one hand tied behind his back." For example, as applied to Mrs. Ackerberg, we respectfully submit that the instant proceeding would violate the basic requirements of due process, equal protection and the right to petition government under the state and federal constitutions. Briefly:

1. Time to respond to the Staff Report. The 48-page staff report seeks to penalize Mrs. Ackerberg, but it was not made available until midday on June 26, 2008, when it was posted on the Internet, leaving only five business days for Mrs.

Ackerberg to check the Internet and prepare a written response that might be meaningfully considered by the Commission.

2. Notice to Surrounding Property Owners and Interested Parties. Despite the nature of proceeding, it appears that notice may not have been provided to all surrounding property owners and interested parties, as due process requires (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 615-616; *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 548-549.)

3. Ex Parte Communications. Mr. Douglas has advised us that ex parte communications with Commissioners somehow are a "crime" and not permitted. Following due research on the issue, we believe that they are permitted, but that due process and fairness have always required full disclosure on the record. Staff's position creates a due process and equal protection issue, violates the constitutional right to petition government, and is inconsistent with Rule 2-100 of the California Rules of Professional Conduct, which expressly recognize an attorney's right to contact any "public officer, board, committee, or body," without the consent or presence of the Commission's lawyer, including communications during litigation. Ex parte communications are permitted in permit proceedings. An equal opportunity to present one's case must be available where an enforcement proceeding actually seeks to penalize a party.

4. The Role of the Attorney General. In the judicial context, the Attorney General, though prominent, sits at the counsel table with the rest of the attorneys. In this process, the Attorney General sits next to and advises the Chair, raising a due process question. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 92.) This would be compounded, moreover, were the Commission, as neutral adjudicator, to go into closed session to discuss the matter with, in effect, the prosecutor, Staff and the Commission's counsel. (*Id.*)

5. Time Limits for Presentation. Not only is the alleged violator walled off from Commissioners and provided minimal time to educate the decision maker, but he or she is limited to a mere 15 minutes to present his case. As you might imagine, this bears no resemblance to a proceeding in court before a judge.

6. Statement of Defense. The Statement of Defense required by Staff was prepared and submitted to Staff in October 2008. Staff may argue that Mrs. Ackerberg is limited in this proceeding to the points she previously made in the Statement of Defense. If so, constricting her in that manner would deny due process since her position has necessarily evolved with the change in events – notably the litigation.

7. Staff's Presentation of the Evidence. A fair proceeding necessarily requires that all relevant evidence presented to or available to Staff be provided to the Commission for review. There is, however, considerable evidence available to, or submitted to, Staff that has not been presented to the Commission. This includes: the transcript from the 1985 hearing; correspondence concerning the 1985 hearing; the 1985 "revised findings"; and exhibits attached to Ms. Abbitt's October 21 letter to demonstrate that there is no seawall violation. Despite Ms. Abbitt's request, Staff did not provided the Trueblood seawall file. In this type of proceeding, where a penalty is sought and preparation of a defense is essential, Staff must provide the file – not merely dispatch counsel to locate the 1985 architect to see what he may have. Finally, while Staff suggests that the County's dedicated accessway is inferior to the Ackerberg easement, it has not provided the Commission with Ms. Abbitt's letter nor the attachments to it that demonstrate the County's dedicated accessway is not only superior, but an opportunity that must be pursued, even if not by the Commission itself.

8. Scope of Staff's Recommended Cease and Desist Order. Staff's proposed Cease and Desist Order well exceeds the scope of the specific violations asserted. The light posts for the tennis court were preexisting and served the Trueblood's tennis court, and there is no "staircase" in the easement area. In addition, the proposed Order casts a wide net beyond the asserted violations at issue by defining "unpermitted development" as "includ[ing] but may not be limited to" the identified improvements and then imposing potential monetary penalties with respect to those undefined improvements.

Viewed separately or together, the foregoing at least illustrates the differences between judicial and administrative enforcement, and suggests that more process, not less, is required when proceeding to enforce a violation administratively to ensure a fundamentally fair proceeding.

Conclusion

Regardless of our respective positions, we do need to underscore that Staff has been exceedingly gracious in the dialogue with counsel on this particular matter and in meeting with Mrs. Ackerberg's representatives. We are looking for a mutually agreeable middle ground that leaves the Commission with the final word on the Ackerberg easement and which provides Staff with the additional protections it typically seeks. Without waiving *res judicata*, we respectfully submit that the redlined Draft Consent Cease and Desist Order accomplishes that by incorporating the Judgment.

We look forward to discussing these matters further with you at the hearing.

Very truly yours,

Diane R. Abbitt

Steven H. Kaufmann

cc: Mr. Peter Douglas
Ms. Lisa Haage
Mr. Aaron McLendon
Mrs. Lisette Ackerberg

Attachments

12674-0002\1147031v1.doc

RICHARDS, WATSON & GERSHON
A Professional Corporation
STEVEN H. KAUFMANN (SBN 61686)
GINETTA L. GIOVINCO (SBN 227140)
355 South Grand Avenue, 40th Floor
Los Angeles, CA 90071-3101
Telephone: (213) 626-8484
Facsimile: (213) 626-0078

DIANE R. ABBITT
LAW OFFICES OF DIANE ABBITT (SBN 86782)
511 Fifth Street, Suite G
San Fernando, California 91340
Telephone: (818) 637-2117
Facsimile: (818) 256-2379

Attorneys for Defendants,
LISETTE ACKERBERG LIVING TRUST, dated January 14, 1998,
and LISETTE ACKERBERG, individually and as trustee of the
LISETTE ACKERBERG TRUST

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ACCESS FOR ALL, a California non-profit corporation,

Plaintiff,

vs.

LISETTE ACKERBERG TRUST, a Trust, LISETTE ACKERBERG, individually and as Trustee of the LISETTE ACKERBERG TRUST, and DOES 1-10, Inclusive,

Defendants.

Case No. BC405058

SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF JUDGMENT

Action Filed: January 5, 2009

Assigned for all Purposes to:
The Honorable Rolf M. Treu
Department 58

This Settlement Agreement and Stipulation for Entry of Judgment ("Agreement") is entered into by and between Plaintiff Access for All and Defendants Lisette Ackerberg Living Trust, dated January 14, 1998 ("Trust"), and Lisette Ackerberg, individually and as Trustee of the Trust (collectively, "Ackerberg"). Access for All and Ackerberg are collectively referred to as the "Parties."

RECITALS:

WHEREAS, the Trust is the owner of the real property located at 22466 Pacific Coast Highway in the City of Malibu, County of Los Angeles, California ("Ackerberg Property").

WHEREAS, Access for All is a California non-profit public benefit corporation whose mission is to facilitate and improve the public's ability to access public lands and the California seashore.

WHEREAS, in furtherance of its mission, Access for All acquires real property and easements through gifts, purchases and transfers, and develops and maintains public accessways for the benefit of the People of the State of California.

WHEREAS, in 1984 Lisette Ackerberg and her husband (now deceased) Norman Ackerberg applied to the California Coastal Commission ("Coastal Commission") for a Coastal Development Permit ("CDP") to demolish an existing house, guest house and swimming pool and to construct a new single-family residence and swimming pool and to renovate an existing tennis court on the Ackerberg Property.

WHEREAS, on January 24, 1985, the Coastal Commission approved the proposed development and granted CDP No. 5-84-754, subject to, among others, a condition requiring an offer to dedicate a 10-foot wide vertical access easement ("Ackerberg OTD") along the eastern, or downcoast, side of the Ackerberg Property.

WHEREAS, in approving the proposed development and granting CDP No. 5-84-754, the Coastal Commission expressed its intent that another vertical access easement, a County of Los Angeles dedicated vertical accessway ("County's dedicated accessway"), is within 500 feet of the project; that as a matter of policy, publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical accessways are opened; that once a public accessway has been improved and opened for public use, the Commission's policy would be to permit extinguishment or termination of the offer to dedicate; and that as part of its public access program in the Malibu/Santa Monica Mountains Local Coastal Program ("LCP"), procedures would be

developed to implement that directive; and on or about December 12, 1986, the Commission certified the Land Use Plan for the Malibu/Santa Monica Mountains LCP with a policy (P56-16) that there be dedication of one vertical access "per 1,000 feet of beach frontage.".

WHEREAS, on or about October 29, 1973, the County of Los Angeles required and accepted the County's dedicated accessway "on behalf of the public" as a condition of approving Tract Map No. 29628, which authorized the conversion of an apartment building at 22548 Pacific Coast Highway to condominiums.

WHEREAS, the County's dedicated accessway was intended to provide public access from Pacific Coast Highway to the mean high tide line, but now serves additionally as a potential key trail connector between the California Coastal Trail on the beach and that portion of the Coastal Slope Trail located in the area of the Santa Monica Mountains above Carbon Beach.

WHEREAS, the Ackerbergs constructed the development approved in CDP No. 5-84-754, and recorded the Ackerberg OTD on or about April 4, 1985.

WHEREAS, in 2003 Access for All applied to the Coastal Commission to accept the Ackerberg OTD and to open, operate, and manage the resulting easement ("Ackerberg easement"), which application was subsequently granted and memorialized in an instrument recorded on December 17, 2003, and contacted Norman and Lisette Ackerberg by letter, dated December 24, 2003, requesting their participation in removing obstructions and opening the Ackerberg easement.

WHEREAS, on March 29, 2006, an adjoining property owner at 22446 Pacific Coast Highway, whose property shares the boundary of the easement on the Ackerberg property, filed an action against the Coastal Commission, the State Coastal Conservancy and Access for All, alleging that the Commission failed to provide him with public notice of the Ackerberg's application for Coastal Development Permit.

WHEREAS, the State agencies and Access for All prevailed in that action in the trial court and on appeal, and the State Supreme Court denied review on July 9, 2008.

WHEREAS, on September 25, 2008, Access for All wrote Lisette Ackerberg requesting removal of certain improvements located in the Ackerberg easement by January 1, 2009, and advising that Access for All intended to open the Ackerberg easement on that date and would file a lawsuit if the improvements were not removed by that date.

WHEREAS, on January 6, 2009, Access for All commenced the instant action ("AFA Action") which alleges that because Ackerberg has not removed those improvements, she has violated the requirements of the California Coastal Act ("Coastal Act"; Pub. Resources Code, § 30000 et. seq.) and committed a trespass and nuisance. The AFA Action seeks declaratory and injunctive relief and monetary penalties, as provided in the enforcement provisions of the Coastal Act and Public Resources Code sections 30803, 30820(a) and (b).

WHEREAS, Ackerberg has answered the complaint filed in the AFA Action, and contends that her actions at all times have been lawful and proper, and specifically that she has not violated the provisions of the Coastal Act or committed a trespass or nuisance.

WHEREAS, the Parties agree that Access for All is a "person" that is authorized under the Coastal Act to file an enforcement action and seek judicial relief pursuant to the enforcement remedies set forth in the Coastal Act.

WHEREAS, the Parties have jointly agreed (a) to file separate litigation to enforce the County's dedicated accessway and require that it be improved and opened for public access; (b) if the lawsuit is successful and the County's dedicated accessway is thereafter improved and opened, to seek and obtain from the Coastal Commission an amendment of CDP No. 5-84-754 to terminate or extinguish the Ackerberg easement; and (c) if the lawsuit is not successful, to seek and obtain from the Coastal Commission an amendment of CDP No. 5-84-754 to facilitate improvements necessary to effectuate and operate the Ackerberg easement.

///

WHEREAS, the Parties continue to believe that they will prevail should this matter proceed to trial. Nevertheless, continuation of the lawsuit will result in considerable and unnecessary expense and expenditure of time and effort by the Parties. Accordingly, after a considerable amount of discussion and negotiation, both before and after the filing the Action, the Parties have decided to settle and compromise their differences in the manner prescribed by and set forth hereunder in this Agreement. Further, the Parties believe and intend that this Agreement and the various actions it contemplates best serves the public interest, provides for an orderly resolution of the Coastal Act violation alleged in the Complaint filed, and will provide a fair and equitable resolution of the dispute while carrying out the intent of the Coastal Commission in approving the Ackerberg residence and granting CDP No. 5-84-754.

AGREEMENT

NOW THEREFORE, in consideration of the mutual covenants and conditions described below, and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

1. ACTION TO ENFORCE THE COUNTY'S DEDICATED ACCESSWAY:

1.1 Within five (5) days after the entry of judgment, Access for All shall file an action in the Los Angeles Superior Court against the County of Los Angeles, the Malibu Outrigger Homeowners Association, and the owners of the land underlying the County's dedicated accessway for declaratory and injunctive relief, trespass, nuisance, and such other causes of action as may be appropriate to enforce the County's dedicated accessway ("County Action"). Access for All shall be represented in the County Action by the following counsel: Richards, Watson & Gershon ("RW&G"), Diane R. Abbitt, David J. Weinsoff and J. Timothy Nardell. Ackerberg shall have the right to substitute new counsel for RW&G and/or Diane R. Abbitt, and Access for All shall have the right to substitute new counsel for David J. Weinsoff and/or J. Timothy Nardell. Access for All

has separately executed a conflict waiver to permit such representation by RW&G and Diane R. Abbitt. RW&G, or counsel substituted for RW&G, shall serve as lead counsel in all matters relating to the County Action, except that David J. Weinsoff, or counsel substituted for David J. Weinsoff, shall serve as lead counsel for all matters related to publicity, which shall be consistent with the terms of this Agreement and the position of Access for All in the County Action. Access for All agrees to actively prosecute the County Action to and including the entry of a final judgment in the action, including any and all settlement discussions and proceedings in the trial and California appellate courts.

1.2 Ackerberg shall fund all attorneys' fees and court costs incurred by Access for All in the County Action.

1.3 In the event Access for All is the prevailing party in the County Action, it shall file a motion to recover all attorneys' fees and court costs incurred, including but not limited to attorneys' fees pursuant to Code of Civil Procedure section 1021.5, which monies shall be used to reimburse Ackerberg for funds used to pay attorneys' fees.

2. PAYMENT OF ATTORNEY'S FEES TO ACCESS FOR ALL:

Within ten (10) days of the entry of judgment in the AFA Action, Ackerberg shall pay, or cause to be paid, to Access for All the amount of ten thousand five hundred dollars ($10,500.00) to reimburse Access for All for its attorneys' fees and costs in connection with the AFA Action. The payment shall be made payable to "ACCESS FOR ALL," and shall be made by delivery of a certified check to counsel for Access for All.

3. PAYMENT OF FUNDS TO IMPROVE AND OPEN THE COUNTY'S DEDICATED ACCESSWAY:

If Access for All is successful in obtaining a settlement or final judgment in the County Action that results in removal of the encroachments within, and the opening of, the County's dedicated accessway, the Parties agree that Ackerberg shall fund, or cause to be funded, the improvement and opening of the County's dedicated accessway, provided such funding is not otherwise made available by the County of Los Angeles, the

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Malibu Outrigger Homeowners Association, or the owners of the land underlying the County's dedicated accessway.

4. EXTINGUISHMENT OF ACKERBERG EASEMENT AND PAYMENT OF FUNDS TO MAINTAIN THE COUNTY'S DEDICATED ACCESSWAY:

4.1 If Access for All is successful in obtaining a settlement or final judgment in the County Action that results in removal of the encroachments within, and the opening of, the County's dedicated accessway, the parties agree that:

(a) Within twenty (20) days from the date of settlement or final judgment, if required, Access for All will apply for a coastal development permit, to improve and open the County's dedicated accessway and, upon receipt of the coastal development permit, will improve and open the accessway with the funding provided under Paragraph 3, above.

(b) Within twenty (20) days after the County's dedicated accessway is improved and opened, Access for All and Ackerberg will jointly apply to the Coastal Commission to amend CDP No. 5-84-754 to terminate or extinguish the Ackerberg easement.

(c) At the time of the opening of the County's dedicated accessway, Ackerberg shall pay, or cause to be paid, to Access for All, the sum of one hundred and twenty-five thousand dollars ($125,000.00). This private funding will be used to provide five (5) years of support for maintenance and management of the County accessway. During the current fiscal period in which traditional sources of public funding are increasingly becoming limited, the County's dedicated accessway, if opened, will have a dedicated source of funding ensuring that the public enjoys access to Carbon Beach, consistent with the strict maintenance and management standards set by the Coastal Commission, the State Coastal Conservancy, and Access for All under an agreed-upon "management plan."

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(d) Pursuant to a written agreement to be entered into between Ackerberg and the State Coastal Conservancy, Ackerberg shall further pay, or cause to be paid, the sum of one hundred and twenty-five thousand dollars ($125,000.00) to be deposited in such account as the State Coastal Conservancy deems appropriate to be used as follows: (1) through inter-agency agreement or otherwise, to provide funding and assistance to the Coastal Commission for public access and enforcement, or (2) if the Coastal Commission does not wish to accept the funds, to provide funding to Access for All for the maintenance and management of the County accessway, ensuring that Access for All has a full ten (10) years of support for the management and maintenance of the County's dedicated accessway.

5. ENFORCEMENT OF THE ACKERBERG EASEMENT:

5.1 If Access for All is not successful in obtaining a settlement or final judgment in the County Action that results in removal of the encroachments within, and the opening of, the County's dedicated accessway, or if lead counsel determines that the County Action should be voluntarily dismissed, within twenty (20) days of the settlement, entry of final judgment, or voluntary dismissal:

(a) The Parties shall jointly apply to the Coastal Commission to amend CDP No. 5-84-754 to improve the Ackerberg easement and to modify the approved "Public Vertical Access Easement Management Plan" ("Management Plan"), dated July 28, 2003, to include security measures acceptable to Ackerberg. All improvements to the Ackerberg easement not required by the Management Plan shall be funded by Ackerberg. Said application shall include, but not be limited to, the following:

(i) A design for a movable, lightweight, metal (stainless steel or an equivalent material) ramp with non-slip surface and stainless steel handrails on each side which shall provide a transition from the concrete slab to the sandy beach at times when the existing rock revetment impedes access to the beach. The movable ramp shall be designed and constructed in a manner that it may be secured and locked into place or removed and placed into storage. The ramp shall be designed by a civil engineer in

consultation with Access for All and shall be adequate to provide for safe pedestrian access from the seaward edge of the concrete slab/walkway to the sandy beach whenever the sand level is lower that the top elevation of the rock revetment and in a manner that will accommodate any future changes in beach profile/sand level elevations over time, and shall be ADA compliant.

(ii) A site plan identifying the removal and/or relocation of all improvements within the easement area that will result in direct obstacles to public access.

(iii) Security improvements, including, but not limited to, a security wall consistent in height with the existing wall, a sunrise opening and sunset closing gate located at the entrance to the Ackerberg easement on Pacific Coast Highway which shall include a timed mechanism for automatically unlocking and locking and an alarm system, and security lighting, consistent with the requirements of the City of Malibu LCP, that permit public access on the Ackerberg easement while ensuring the privacy and security of the Ackerberg Property.

(iv) A notation that except as otherwise permitted, the applicant/landowner shall in no way obstruct or prevent the use of the Ackerberg easement.

(b) Unless the Executive Director of the Coastal Commission grants additional time for good cause, within ninety (90) days of the issuance of the Coastal Development Permit Amendment by the Commission:

(i) Ackerberg shall remove and/or relocate all physical improvements within the easement area that result in direct obstacles to public access.

(ii) Access for All shall install the concrete slab and movable ramp. Use, operation, and maintenance of the ramp will be at the sole discretion and control of Access for All.

6. <u>MUTUAL RELEASE OF CLAIMS</u>:

For and in consideration of the above terms, the parties agree as follows:

6.1. Ackerberg for herself and her employees and agents, fully and forever releases Access for All, its officers, employees, governing members, agents and attorneys from any and all liability, claims, demands, damages, punitive damages, disputes, suits, claims for relief and causes of action, whether known or unknown, foreseen or unforeseen, which directly or indirectly relate to any claims, facts or circumstances arising out of or alleged in the AFA Action.

6.2. Access for All for itself and its officers, governing members, employees and agents, fully and forever releases Ackerberg, her agents and/or attorneys from any and all liability, claims, demands, damages, punitive damages, disputes, suits, claims for relief and causes of action, whether known or unknown, foreseen or unforeseen, which directly or indirectly related to any claims, facts or circumstances arising out of or alleged in the AFA Action.

6.3 Except as otherwise provided in this Agreement, the Parties do not waive their respective rights and interests to any future enforcement of the California Coastal Act of 1976, Public Resources Code section 30000 et seq., or of the terms and conditions relating to the Ackerberg easement that occur after the execution of this Settlement Agreement and Stipulation For Entry of Judgment.

7. WAIVER OF THE BENEFITS OF CIVIL CODE SECTION 1542:

Having been fully apprised of the nature and effect of the provisions of Section 1542 of the California Civil Code, the Parties waive all rights which they may have against the other, both known and unknown with regard to the subject matter of this Agreement, which might otherwise exist by virtue of the provisions of Section 1542 which provides as follows:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

8. WAIVER OF FINDINGS OF FACT, STATEMENT OF DECISION, CONCLUSIONS OF LAW, AND RIGHTS OF APPEAL:

The Parties agree to waive findings of fact, conclusions of law, a statement of decision, and any and all rights of appeal from the judgment entered in this action.

9. ENFORCEMENT OF SETTLEMENT AGREEMENT:

The Parties stipulate, covenant and agree that the Agreement shall be enforceable by any judge of the Superior Court of the County of Los Angeles once Judgment is entered pursuant to C.C.P. sections 128(4) and 664.6.

10. DUTY TO COOPERATE:

The Parties agree to cooperate and operate in good faith in effectuating the terms and conditions of this Agreement. The Parties agree to support, both orally and in writing, the terms and conditions as set forth in this Agreement in any judicial proceeding or any administrative proceeding referred to in Paragraph 5.

11. LEGAL ADVICE:

Each Party has received independent legal advice from its attorneys with respect to the advisability of executing this Agreement and the meaning of the provisions hereof. The provisions of this Agreement shall be construed as to the fair meaning and not for or against any party based upon any attribution of such party as the sole source of the language in question, it being expressly understood and agreed that the Parties participated equally or had equal opportunity to participate in its drafting.

12. COSTS AND EXPENSES:

Except as otherwise provided in Paragraph 2, above, the Parties shall bear their own costs, expenses and attorneys' fees in connection with the AFA Action, and the negotiations and drafting of this Agreement. In any legal action or proceeding to enforce the terms of this Agreement, the prevailing party shall be entitled to recover all reasonable attorneys' fees, costs and expenses incurred therein, in addition to any other relief to which it or they may be entitled.

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13. ENTIRE AGREEMENT AND AMENDMENTS:

This Agreement constitutes the entire agreement between the Parties concerning the subject matter hereof. This Agreement supersedes any written or oral agreement(s) or representation(s) that preceded or may have preceded execution of this Agreement. The Parties have not relied upon any oral representation(s) in deciding whether to enter into this Agreement. This Agreement may be modified only by a writing signed by the Parties hereto.

14. SUCCESSORS AND ASSIGNS:

This Agreement and the settlement contained herein shall bind and inure to the benefit of the principals, agents, representatives, transferees, successors and assigns of the Parties hereto, and the judgment entered pursuant to this Agreement shall be recorded to give interested parties notice of the obligations herein placed on the owner of the Ackerberg property.

15. INTERPRETATION AND REPRESENTATION BY COUNSEL:

The terms of this Agreement are the product of arms-length negotiations between the Parties and their counsel, and no provision shall be construed against the drafter thereof. All Parties mutually warrant and represent that they have been represented by counsel of their own choosing in the negotiation and drafting of this Agreement, and that they fully understand its terms and conditions and voluntarily consent to all of the provisions herein.

16. NO LIABILITY:

It is understood and agreed that this Settlement Agreement and Stipulation for Entry of Judgment is the compromise of disputed claims, and that the terms and conditions recited hereinabove are not to be construed as an admission of liability on the part of the parties hereby released, and that said parties deny liability therefore and intend merely to avoid litigation.

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17. CHOICE OF LAW AND VENUE:

This Agreement shall be governed by and construed in accordance with the laws of the State of California. The venue for any disputes concerning this Agreement shall be in Los Angeles County, California.

18. COUNTERPARTS AND FACSIMILE SIGNATURES:

This Agreement may be executed in counterparts which, taken together, shall constitute one and the same agreement. This Agreement may also be delivered by facsimile transmission and in such event all facsimile signatures shall be deemed complete for all purposes hereof. The original executed counterparts shall be kept in the custody of Richards, Watson & Gershon. Execution may be by facsimile copy.

19. CAPTIONS AND HEADINGS:

Any captions or headings to the paragraphs or subparagraphs of this Agreement are solely for the convenience of the Parties, are not part of this Agreement, and shall not be used for the interpretation of or determination of the validity of this Agreement or any provision hereof.

20. AUTHORIZATION:

Each person signing this Agreement represents and warrants to the Parties and to each other that he or she is fully authorized to sign the Agreement on behalf of the Party for whom/which he or she is signing, and thereby to bind such Party to each and all of the terms of this Agreement.

21. WARRANTY OF NON-ASSIGNMENT:

The parties warrant that they have not assigned or transferred, nor will they in the future attempt to assign or transfer, any claim for relief or cause of action released herein.

22. TIME IS OF THE ESSENCE:

Time is expressly declared to be of the essence in this Agreement, and of every provision in which time is an element.

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23. SEVERABILITY:

Even if a court holds one or more parts of this Agreement ineffective, invalid, or void, all remaining provisions shall remain valid and in effect unless a party's consideration materially fails as a result of the invalidity.

24. EFFECTIVE DATE:

This Agreement shall be effective only if executed by all parties on or before June 18, 2009, and the Court enters Judgment pursuant to this Agreement on or before June 19, 2009.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement and Stipulation for Entry of Judgment to be executed:

PARTIES:

ACCESS FOR ALL Dated: 6/18/2009

By: Steve Hoye
Executive Director

LISETTE ACKERBERG LIVING TRUST, dated January 14, 1998

Dated: 6-18-09

By: Lisette Ackerberg
Trustee of the Lisette Ackerberg Living Trust, dated January 14, 1998

LISETTE ACKERBERG

Dated: 6-18-09

By: Lisette Ackerberg

[APPROVAL AS TO FORM CONTINUED NEXT PAGE]

APPROVED AS TO FORM:

DATED: June ___, 2009

DIANE R. ABBITT
LAW OFFICES OF DIANE ABBITT

and

RICHARDS, WATSON & GERSHON
A Professional Corporation
STEVEN H. KAUFMANN
GINETTA L. GIOVINCO

By: _____
Steven H. Kaufmann

Attorneys for Defendants
LISETTE ACKERBERG LIVING TRUST, dated January 14, 1998, and LISETTE ACKERBERG

DATED: June 14, 2009

DAVID J. WEINSOFF
LAW OFFICES OF DAVID WEINSOFF
and

NARDELL CHITSAZ & ALDEN LLP
J. TIMOTHY NARDELL

By: David Weinsoff
David J. Weinsoff

Attorneys for Plaintiff
ACCESS FOR ALL

RICHARDS | WATSON | GERSHON
ATTORNEYS AT LAW – A PROFESSIONAL CORPORATION

RICHARDS | WATSON | GERSHON
ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION

PROOF OF SERVICE

I, Yvonne Alamillo, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Richards, Watson & Gershon, 355 South Grand, 40th Floor, Los Angeles, California. On June 18, 2009, I served the within documents:

SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF JUDGMENT

[ ] by causing facsimile transmission of the document(s) listed above from (213) 626-8484 to the person(s) and facsimile number(s) set forth below on this date before 5:00 P.M. This transmission was reported as complete and without error. A copy of the transmission report(s), which was properly issued by the transmitting facsimile machine, is attached. Service by facsimile has been made pursuant to a prior written agreement between the parties.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below. I am readily familiar with the firm's practice for collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in this affidavit.

[ ] by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a agent for delivery, or deposited in a box or other facility regularly maintained by , in an envelope or package designated by the express service carrier, with delivery fees paid or provided for, addressed to the person(s) at the address(es) set forth below.

David J. Weinsoff, Esq. Law Office of David J. Weinsoff 138 Ridgeway Avenue Fairfax, California 94930 Tel: (415) 460-9760 Fax: (415) 460-9762 E-Mail: Weinsoff@ix.netcom.com	J. Timothy Nardell, Esq. Nardell Chitsaz & Alden LLP 790 Mission Avenue San Rafael, California 94901 Tel: (415) 485-2200 Fax: (415) 457-1420 E-Mail: tim@ncalcgal.com

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 18, 2009.

YVONNE ALAMILLO

DENNIS, JUAREZ, REESER, SHAFER & YOUNG
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ATTORNEYS AT LAW
SUITE 1800
2049 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067

TELEPHONE (213) 557-1944
TELEX 686606
TELECOPIER (213) 552-9626

LUCINDA DENNIS*
L. MORRIS DENNIS*
GEORGE A. JUAREZ
EDWIN B. REESER, III
ALAN H. SHAFER
THOMSEN YOUNG
WILLIAM E. CREIM
PHYLLIS J. BERSON
ELSA M. JONES
DAVID L. MORGAN
GENTRY YOUNG
*A PROFESSIONAL CORPORATION

January 28, 1985

RECEIVED
JAN 30 1985
CALIFORNIA
COASTAL COMMISSION
SOUTH COAST DISTRICT

Mr. Gary Gleason
California Coastal Commission
South Coast District
245 West Broadway, Suite 380
Long Beach, California 90801-1450

Re: Lisette & Norman Ackerberg
Site: 22466 Pacific Coast Highway
Application: 5-84-754

Dear Mr. Gleason:

Pursuant to the unanimous decision of the Commission at the January 24, 1985 hearings at the Laguna City Council Chamber, the application for the above project has been approved. However, it is my understanding from the proceedings of that hearing that Staff is instructed to revise its findings in several particulars as requested by Commissioners McInnis, Rutter and Wright, among others, in consideration of issues addressed in my letter to you dated January 24, 1985.

Specifically, language should be put in the staff report as to the desirability of opening accessways already owned by the public before the opening of private accessways; particularly where the burden on the private property owner is substantial.

Second, there was considerable discussion by Commissioners at the hearing about the extinguishment of offers to dedicate where adequate nearby access is developed; or where after adoption of a Malibu Land Use Plan it may be determined that further access is not required.

Third, 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.

There is no question in my mind that the issues raised at the hearing are critical not only to the Ackerbergs, but to the Commission and its efforts to adopt a Land Use Plan for Malibu. As the merits of these issues were not decided, but rather

Mr. Gary Gleason
Re: Lisette & Norman Ackerberg

January 28, 1985
Page Two

deferred for consideration under the process of adoption of a Land Use Plan for Malibu, it is absolutely necessary for the property rights of the Ackerbergs to be protected pending the determination of vertical access policies by the Commission. I believe that the Commissioners so agree, and that is the purpose of the additional findings.

Finally, I would like to obtain a copy of the transcript of that portion of the hearing which concerned the Ackerberg application.

Very truly yours,

DENNIS, JUAREZ, REESER, SHAFER & YOUNG

Edwin E. Reeser, III

EER:lg

cc: Norman & Lisette Ackerberg
Richard Sol

David C. Weiss
Structural Engineer & Associates, Inc.

August 6, 1985

Mr. Norman J. Ackerberg
c/o Mr. Richard Sol, Architect
23904 De Ville Way
Malibu, CA 90265

RECEIVED
AUG 7 1985
RICHARD SOL, AIA

SUBJECT: Ackerberg Residence
22466 Pacific Coast Highway
Malibu, California 90265
(Our Job #22085)

Dear Mr. Ackerberg,

As requested by Mr. Richard Sol, Supervising Architect for the Subject Project, I observed the elevation of the sand on the seaward side of the bulkhead at the project site. In addition, the wave uprush report by John Hale, C.E., dated April 9, 1983, and the subject site survey by Mario Quiros, dated December 1983 were also reviewed. This was done in an effort to predict a maximum sand elevation on the ocean side of the bulkhead.

Based on information gained from the noted sources, I estimate that the maximum sand elevation at this site will be approximately 1'-6" below the top of the existing bulkhead. This estimate is based on observation of the sand elevations on July 3, and July 26, 1985, as well as the sand elevations recorded in Mario Quiros' survey of December 1983. During July of 1985, the sand was approximately 1'-6" below the top of the bulkhead. During the summer, the sand profile is normally at it's maximum elevation. There were no indications on the bulkhead (such as fading or bleaching), that the sand had been higher. The survey of December 1983 indicates that the sand was as low as elevation +9.0 M.S.L. The top of the bulkhead piles are at elevation +13.6 M.S.L. A normal maximum backshore beach elevation of +12.0 M.S.L. is reasonable for this area.

The above is an opinion only, based on observations. No tests can be taken, nor calculations performed, therefore, no exact prediction can be made.

Respectfully,

David C. Weiss, President
S.E. 1867

EXHIBIT D

22440 CLARENDON STREET • SUITE 203 • WOODLAND HILLS • CALIFORNIA 91367 • (818) 704-0631

Vincent Kevin Kelly and Associates Inc.
civil and structural engineering
2216 wilshire boulevard
santa monica, ca 90403
213 / 828-3431

Vincent Kevin Kelly
president
Michael A. Gardner, P.E.
associate
Stephen F. Taylor, C. Eng
Edward D. Kellman
John Lambert
Doree Thompson
Betty Jo Sproul

March 26, 1984

John Kelly
c/o Malibu Building Department
23535 Civic Center Way
Malibu, California 90265

Re: Bulkhead Seawall @
Trueblood Residence
22486 Pacific Coast Hwy.

MAR 27 1984
MALIBU B & S

Dear John,

Further to your recent enquiry regarding the filter rock required behind Mr. Truebloods bulkhead. I should like to confirm that the installation of this material was observed by myself. I witnessed the contractor using plywood sheeting as a temporary barrier between the sand and filter rock. The rock was being installed to the underside of the bottom whaler and was in excess of the 1'-0" minimun width specified on our plans.

We trust you will append this to and approve our report.

Sincerely,

Stephen F. Taylor, C. Eng.
SFT/sas

cc: Ralph Trueblood

Coastal Engineering, Inc.
JOHN S. HALE, Coastal Engineer
15138 Chetney Drive • Baldwin Park, California 91706 (213) 338-1465

RECEIVED
OCT 24 1984
RICHARD SOL, AIA
FR. RETSER

January 25, 1984

Mr. Jim Coulson
883 N. Topanga Blvd.
Topanga, CA 90290

RE: Inspection Of The Rock Wall Return On Mr. Trueblood's Property on Pacific Coast Highway, Malibu, CA

Dear Mr. Coulson;

We have made four trips out there and have inspected the rock return and find that the rock section extends the appropriate distances east and west. The section is deep enough, high enough, and has the proper gradation.

The placement is in accord with the design. This rock structure should provide adequate protection.

Very truly yours,

John S. Hale
Consulting Coastal Engineer
RCE 16530

JSH/sw

Vincent Kevin Kelly and Associates Inc.
civil and structural engineering
2216 wilshire boulevard
santa monica, ca 90403
213 / 828-3431

Vincent Kevin Ke
presi
Michael A. Gardner, E
assoc
Stephen E Taylor, C. E
Edward D. Kellin
John Lamb
Doree Thomps
Betty Jo Spi

February 15, 1984

Mr. Ralph W. Trueblood
#14 Oakmont Drive
Los Angeles, Calif. 90049

Re: Bulkhead Inspection
22470 Pacific Coast Hwy.
Malibu, Calif. 90265

Dear Mr. Trueblood:

Per our contract of December 1, 1983 this office conducted periodic surveys of the construction of your bulkhead at the above referenced address. The following is a summary of those inspections:

12/5/83 The 14 inch diameter piles were driven at an average of 4 feet on center.

12/21/83 The 14 foot, 2 inch long, 3 X 12 sheathing to be driven on your property was just commencing. Jim Coulson, the Contractor, had completed driving the sheathing on the Sherman property, which is an extension of your bulkhead. It should be noted that, in our opinion, the job was done exceptionally well.

1/4/84 The filter cloth was placed correctly to the underside of the top whaler. The filter rock was, at that point, just arriving. It was clean and of good quality. However placement of said material had not yet commenced. The bulkhead return ended at the existing tennis court, which was short of the length stated in the wave action report dated April 9, 1983. However, John Hale, the Coastal Engineer of record, will personally direct boulder placement as an alternative to the shortened return.

1/22/84 The bulkhead has been completed. A general final inspection of all bolts, washers, whalers, sheathing and dimensional aspects were made. It was noticed that by sighting along the top edge of the sheathing that the wall bowed in and out horizontally. The slight variation noticed has no structural affect, and is exceptable to this office.

1/26/84 At the request of the Contractor, the man sized boulders were inspected extending a minimum of 10 feet 0 inches back from the wall. These rested on 1 foot 0 inch minimum filter material and all were as per plans. Excellent workmanship was observed.

Also noted was the completed return wall which extends only to the tennis court (approximately 19 feet 0 inches). It is our understanding that the corner boulder protection has been installed under the supervision of John Hale's office.

Elevations were established at the property by Mario C. Ouiros, Land Surveyor, 22249 Pacific Coast Hwy, P.O. Box 106, Malibu, Ca.

Piling was observed by Kovac-Byer-Robertson and their findings are contained in their report no. M742-F, dated January 11, 1984.

It is our opinion, from the above inspections, that your bulkhead seawall was satisfactorily constructed in accordance with our plans and specifications.

Sincerely,

Paul A. Spieler
Project Engineer

PAS/dmt

CONTRACTOR'S WAIVER AND AFFIDAVIT
(INDIVIDUAL)

STATE OF CALIFORNIA
COUNTY OF Los Angeles } ss.

Coulson Construction and Development, a sole proprietorship

first being duly sworn, deposes and says:

That he, as general contractor, on August 10, 1983

entered into a written contract with Ralph Trueblood

as owner ____, for the construction of a Sea Bulkhead

on that certain real property in the city of unincorporated area

county of Los Angeles, state of California, described as:

As per legal description attached hereto and made a part hereof:

That said buildings and work of improvement were fully completed on January 24, 1984, and a notice of such completion was recorded in the office of the county recorder of the county in which said land is located, on n/a;

That all bills for labor and/or material furnished in connection with the construction of said buildings and work of improvement have been fully paid;

That the undersigned hereby waives any and all lien rights which he may have or may have had on account of or arising out of the construction of said buildings and work of improvement;

That said affiant further certifies and declares that he will testify or depose before any competent tribunal, officer, or person, in any case now pending or hereafter instituted, to the truth of the foregoing statements and each of them.

COULSON CONSTRUCTION AND DEVELOPMENT

By: James Coulson

SUBSCRIBED and SWORN to before me on February 17, 1984

Elizabeth A Praino
Notary Public in and for said County and State.

OFFICIAL SEAL
ELIZABETH A PRAINO
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 29, 1987

EXHIBIT "A"

PARCEL 1:

A PARCEL OF LAND IN LOS ANGELES COUNTY, STATE OF CALIFORNIA, BEING A PORTION OF THE RANCHO TOPANGA MALIBU SEQUIT, AS CONFIRMED TO MATTHEW KELLER BY PATENT RECORDED IN BOOK 1 PAGE 407 ET SEQ., OF PATENTS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE SOUTHERLY LINE OF THE 80 FOOT STRIP OF LAND DESCRIBED IN DEED TO THE STATE OF CALIFORNIA RECORDED IN BOOK 15228 PAGE 342, OFFICIAL RECORDS, OF SAID COUNTY, SAID POINT OF BEGINNING BEING WESTERLY ALONG SAID SOUTHERLY LINE FOLLOWING THE ARC OF A CIRCULAR CURVE CONCAVE SOUTHERLY HAVING A RADIUS OF 5608.01 FEET, A DISTANCE OF 638.47 FEET FROM A POINT BEING DISTANT SOUTH 6° 11' 30" WEST 40 FEET, FROM HIGHWAY ENGINEER'S CENTERLINE STATION 989 + 65.17 AT THE WESTERLY EXTREMITY OF THAT CERTAIN COURSE DESCRIBED IN SAID DEED AS SOUTH 83° 48' 30" EAST 2153.25 FEET, THENCE EASTERLY ALONG SAID SOUTHERLY LINE 86.54 FEET, THENCE LEAVING SAID SOUTHERLY LINE SOUTH 0° 33' 09" WEST 42.93 FEET; THENCE NORTH 88° 48' 37" WEST 10.70 FEET; THENCE SOUTH 1° 11' 23" WEST TO THE ORDINARY HIGH TIDE LINE OF THE PACIFIC OCEAN; THENCE WESTERLY ALONG SAID TIDE LINE TO THE INTERSECTION WITH A LINE BEARING SOUTH 0° 13' 30" WEST FROM THE POINT OF BEGINNING; THENCE NORTH 0° 13' 30" EAST TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM, AS CONTAINED IN VARIOUS DEEDS FROM MARBLEHEAD LAND COMPANY, RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

(A) ALL MINERALS, OIL, PETROLEUM, ASPHALTUM, GAS, COAL AND OTHER HYDROCARBON SUBSTANCES AND RIPARIAN RIGHT, CONTAINED IN, ON, WITHIN AND UNDER SAID LAND BUT WITHOUT RIGHT OF ENTRY.

(B) ALL LITTORAL RIGHTS WITH THE FULL AND EXCLUSIVE RIGHT TO PRESERVE AND PROTECT SAID LITTORAL RIGHT.

(LEGAL CONTINUED)

PARCEL 2:

THAT PORTION OF THE RANCHO TOPANGA MALIBU SEQUIT, IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AS CONFIRMED TO MATTHEW KELLER BY PATENT RECORDED IN BOOK 1, PAGE 407 ET SEQ., OF PATENTS IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE SOUTHERLY LINE OF THE 80 FOOT STRIP OF LAND DESCRIBED IN DEED TO THE STATE OF CALIFORNIA RECORDED IN BOOK 15228, PAGE 342 OF OFFICIAL RECORDS OF SAID COUNTY, SAID POINT OF BEGINNING BEING WESTERLY ALONG SAID SOUTHERLY LINE FOLLOWING THE ARC OF A CIRCULAR CURVE CONCAVE SOUTHERLY HAVING A RADIUS OF 5608.01 FEET, A DISTANCE OF 490.17 FEET FROM A POINT BEING DISTANT SOUTH 6° 11' 30" WEST 40 FEET FROM ENGINEER'S CENTERLINE STATION 989 PLUS 65.17 FEET AT THE WESTERLY EXTREMITY OF THAT CERTAIN COURSE DESCRIBED IN SAID DEED AS SOUTH 83° 48' 30" EAST 2153.25 FEET, THENCE WESTERLY ALONG SAID CURVE 61.76 FEET, THENCE LEAVING SAID SOUTHERLY LINE AND CURVE SOUTH 0° 33' 09" WEST 42.93 FEET, THENCE NORTH 88° 48' 37" WEST 10.70 FEET, THENCE SOUTH 1° 11' 23" WEST TO THE ORDINARY HIGH TIDE LINE OF THE PACIFIC OCEAN, THENCE EASTERLY ALONG SAID TIDE LINE TO AN INTERSECTION WITH A LINE BEARING SOUTH 1° 11' 23" WEST FROM THE POINT OF BEGINNING, THENCE NORTH 1° 11' 23" EAST TO THE POINT OF BEGINNING;

EXCEPTING THEREFROM, AS CONTAINED IN VARIOUS DEEDS FROM MARBLEHEAD LAND COMPANY, RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY

(A) ALL MINERALS, OIL, PETROLEUM, ASPHALTUM, GAS, COAL AND OTHER HYDROCRABON SUBSTANCES AND RIPARIAN RIGHT, CONTAINED IN, ON, WITHIN AND UNDER SAID LAND BUT WITHOUT RIGHT OF ENTRY;

(B) ALL LITTORAL RIGHTS WITH THE FULL AND EXCLUSIVE RIGHT TO PRESERVE AND PROTECT SAID LITTORAL RIGHTS;

David C. Weiss
Structural Engineer & Associates, Inc.

August 6, 1985

Mr. Norman J. Ackerberg
c/o Mr. Richard Sol, Architect
23904 De Ville Way
Malibu, CA 90265

RECEIVED
AUG 7 1985
RICHARD SOL, AIA

SUBJECT: Ackerberg Residence
22466 Pacific Coast Highway
Malibu, California 90265
(Our Job #22085)

Dear Mr. Ackerberg,

As requested by Mr. Richard Sol, Supervising Architect for the Subject Project, I observed the elevation of the sand on the seaward side of the bulkhead at the project site. In addition, the wave uprush report by John Hale, C.E., dated April 9, 1983, and the subject site survey by Mario Quiros, dated December 1983 were also reviewed. This was done in an effort to predict a maximum sand elevation on the ocean side of the bulkhead.

Based on information gained from the noted sources, I estimate that the maximum sand elevation at this site will be approximately 1'-6" below the top of the existing bulkhead. This estimate is based on observation of the sand elevations on July 3, and July 26, 1985, as well as the sand elevations recorded in Mario Quiros' survey of December 1983. During July of 1985, the sand was approximately 1'-6" below the top of the bulkhead. During the summer, the sand profile is normally at it's maximum elevation. There were no indications on the bulkhead (such as fading or bleaching), that the sand had been higher. The survey of December 1983 indicates that the sand was as low as elevation +9.0 M.S.L. The top of the bulkhead piles are at elevation +13.6 M.S.L. A normal maximum backshore beach elevation of +12.0 M.S.L. is reasonable for this area.

The above is an opinion only, based on observations. No tests can be taken, nor calculations performed, therefore, no exact prediction can be made.

Respectfully,

David C. Weiss, President
S.E. 1867

22440 CLARENDON STREET • SUITE 203 • WOODLAND HILLS • CALIFORNIA 91367 • (818) 704-0631

Vincent Kevin Kelly and Associates Inc.
civil and structural engineering
2216 wilshire boulevard
santa monica, ca 90403
213 / 828-3431

Vincent Kevin Kelly
president
Michael A. Gardner, P.E.
associate
Stephen F. Taylor, C. Eng
Edward D. Kellman
John Lambert
Doree Thompson
Betty Jo Sproul

March 26, 1984

John Kelly
c/o Malibu Building Department
23535 Civic Center Way
Malibu, California 90265

RECEIVED
MAR 27 1984
MALIBU B & S

Re: Bulkhead Seawall @
Trueblood Residence
22466 Pacific Coast Hwy.

MAR 27 1984
MALIBU B & S

Dear John,

Further to your recent enquiry regarding the filter rock required behind Mr. Trueblood's bulkhead. I should like to confirm that the installation of this material was observed by myself. I witnessed the contractor using plywood sheeting as a temporary barrier between the sand and filter rock. The rock was being installed to the underside of the bottom whaler and was in excess of the 1'-0" minimun width specified on our plans.

We trust you will append this to and approve our report.

Sincerely,

Stephen F. Taylor, C. Eng.
SFT/sas

cc: Ralph Trueblood

RECEIVED
JUN 19 1985
RICHARD SOL, AIA

Coastal Engineering, Inc.

JOHN S. HALE, Coastal Engineer

15138 Chatney Drive • Baldwin Park, California 91706 (213) 338-1466

January 25, 1984

Mr. Jim Coulson
883 N. Topanga Blvd.
Topanga, CA 90290

RE: Inspection Of The Rock Wall Return On Mr. Trueblood's Property on Pacific Coast Highway, Malibu, CA

Dear Mr. Coulson:

We have made four trips out there and have inspected the rock return and find that the rock section extends the appropriate distances east and west. The section is deep enough, high enough, and has the proper gradation.

The placement is in accord with the design. This rock structure should provide adequate protection.

Very truly yours,

John S. Hale
Consulting Coastal Engineer
RCE 16539

JSH/sw

Vincent Kevin Kelly and Associates Inc.
civil and structural engineering
2216 wilshire boulevard
santa monica, ca 90403
213 / 828-3431

Vincent Kevin Kelly
president
Michael A. Gardner, P.E.
associate
Stephen F. Taylor, C. Eng.
Edward D. Kellman
John Lambert
Ocee Thompson
Betty Jo Sproul

February 15, 1984

Mr. Ralph W. Trueblood
#14 Oakmont Drive
Los Angeles, Calif. 90049

Re: Bulkhead Inspection
22496 Pacific Coast Hwy.
Malibu, Calif. 90265

Dear Mr. Trueblood:

Per our contract of December 1, 1983 this office conducted periodic surveys of the construction of your bulkhead at the above referenced address. The following is a summary of those inspections:

12/5/83 The 14 inch diameter piles were driven at an average of 4 feet on center.

12/21/83 The 14 foot, 2 inch long, 3 X 12 sheathing to be driven on your property was just commencing. Jim Coulson, the Contractor, had completed driving the sheathing on the Sherman property, which is an extension of your bulkhead. It should be noted that, in our opinion, the job was done exceptionally well.

1/4/84 The filter cloth was placed correctly to the underside of the top whaler. The filter rock was, at that point, just arriving. It was clean and of good quality. However placement of said material had not yet commenced. The bulkhead return ended at the existing tennis court, which was short of the length stated in the wave action report dated April 9, 1983. However, John Hale, the Coastal Engineer of record, will personally direct boulder placement as an alternative to the shortened return.

1/22/84 The bulkhead has been completed. A general final inspection of all bolts, washers, whalers, sheathing and dimensional aspects were made. It was noticed that by sighting along the top edge of the sheathing that the wall bowed in and out horizontally. The slight variation noticed has no structural affect, and is exceptable to this office.

1/26/84 At the request of the Contractor, the man sized boulders were inspected extending a minimum of 10 feet 0 inches back from the wall. These rested on 1 foot 0 inch minimum filter material and all were as per plans. Excellent workmanship was observed.

Also noted was the completed return wall which extends only to the tennis court (approximately 19 feet 0 inches). It is our understanding that the corner boulder protection has been installed under the supervision of John Hale's office.

Elevations were established at the property by Mario C. Quiros, Land Surveyor, 22249 Pacific Coast Hwy, P.O.Box 186, Malibu,Ca.

Piling was observed by Kovac-Byer-Robertson and their findings are contained in their report no.M742-F, dated January 11, 1984.

It is our opinion, from the above inspections, that your bulkhead seawall was satisfactorily constructed in accordance with our plans and specifications.

Sincerely,

Paul A. Spieler

Paul A. Spieler
Project Engineer

PAS/dmt

CARBON BEACH ~CHARTOFF.

JOHN S. HALE
COASTAL ENGINEERING, INC.
5138 Chatney Drive • Baldwin Park, California 91706 (213) 338-1465

STEVE'S OFFICE COPY. (R 4-11-83)

CHARTOFF

COASTAL ENGINEERING REPORT FOR THE PROPOSED WOOD WALL ALONG THE PROPERTIES AT 22470, 22506, AND 22520 PACIFIC COAST HIGHWAY MALIBU, CA

DARROW ~ OPTED OUT OF VENTURE

Seawall

~~PROPOSED 22470~~

by

John S. Hale

April 9, 1983

RECEIVED
JUN 19 1985
RICHARD SOL, AIA

RECEIVED
MAY 26 1983
S DIV

1. This report is for the proposed wood seawall development along the ocean shoreline of the aforementioned lots. Parameters are included for the height, depth, and length of the return walls for the bulkhead wall.

2. This seawall shall have a height of +14 feet mean sea level datum and the bottom of the sheeting will be at an elevation of zero feet mean sea level datum. The elevation of the bottom of the return walls shall be as shown on the enclosed drawings.

3. The return walls shall be constructed as shown in the enclosed drawings.

4. The bulkhead wall shall be backfilled with filter blanket material from the bottom of the sheeting to the height of soil backfill. See the following description of the rock filter material and the specifications for all rock, including the rock shown on the enclosed drawings. Rock can be used at the ends of the wood seawall in cases where the return walls cannot be constructed. This solution is not to be used except as the only solution!

   The filter blanket rock specifications are as follows:

   Stone shall be sound, durable, hard, resistant to abrasion and free from laminations, weak cleavage planes and the undesirable effects of weathering. It shall be of such character that it will not disintegrate from the action of air, water, or the conditions to be met in handling and placing. All materials shall be clean and free from deleterious impurities, including alkali, earth, clay refuse, and adherent coatings. The specific gravity shall be no less than 2.46. All rock shall not have a loss more than 40 percent as a result of the Los Angeles machine "shot rattler test."

5. The seawall shall be backfilled to the approximate elevation of the surrounding back yards or the elevation necessary for protection of the sewage systems.

6. All elevations placed on the plans shall be referenced to mean sea level datum and a note to this effect will be placed on the plans.

7. A note shall be placed on the plans that inspection of the height of the sheeting, the depth of the sheeting, and required backfill must be made by the coastal engineer, and that a letter accepting the seawall construction be submitted to the County Building and Safety Office by the coastal engineer.

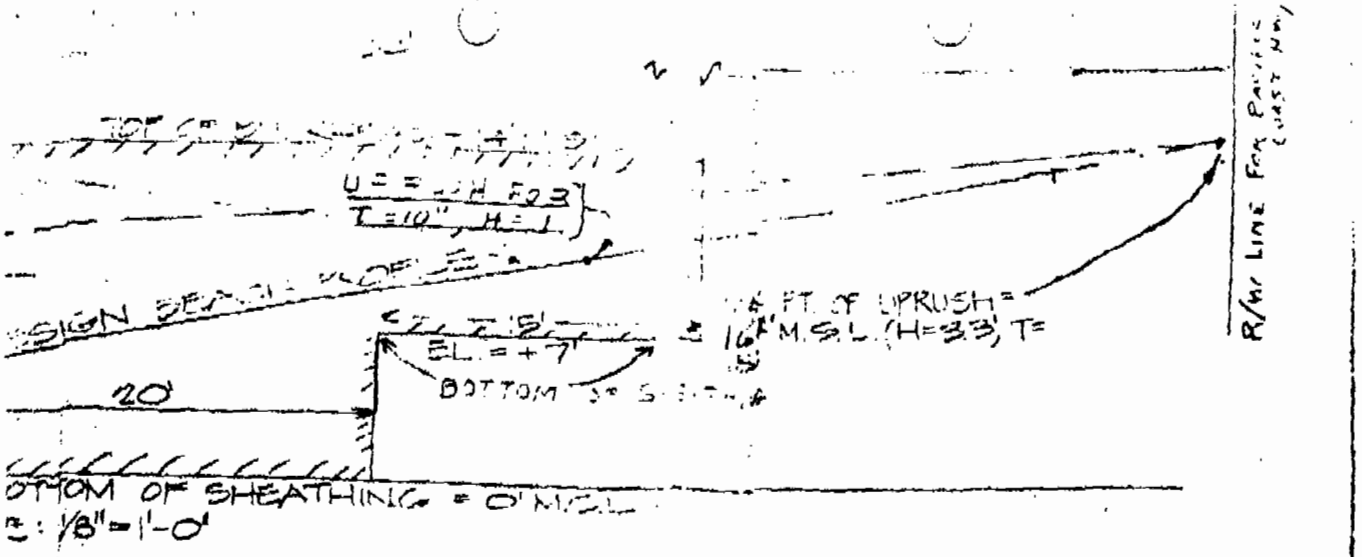
8. All piles calculations shall be based on the design beach profile elevation. If piles or caissons cannot be placed the necessary depth below the design beach profile, then another design method will have to be used, but the structural engineer will use the design profile as the basis of design.

9. The rock gradation of the filter blanket shall be as follows:

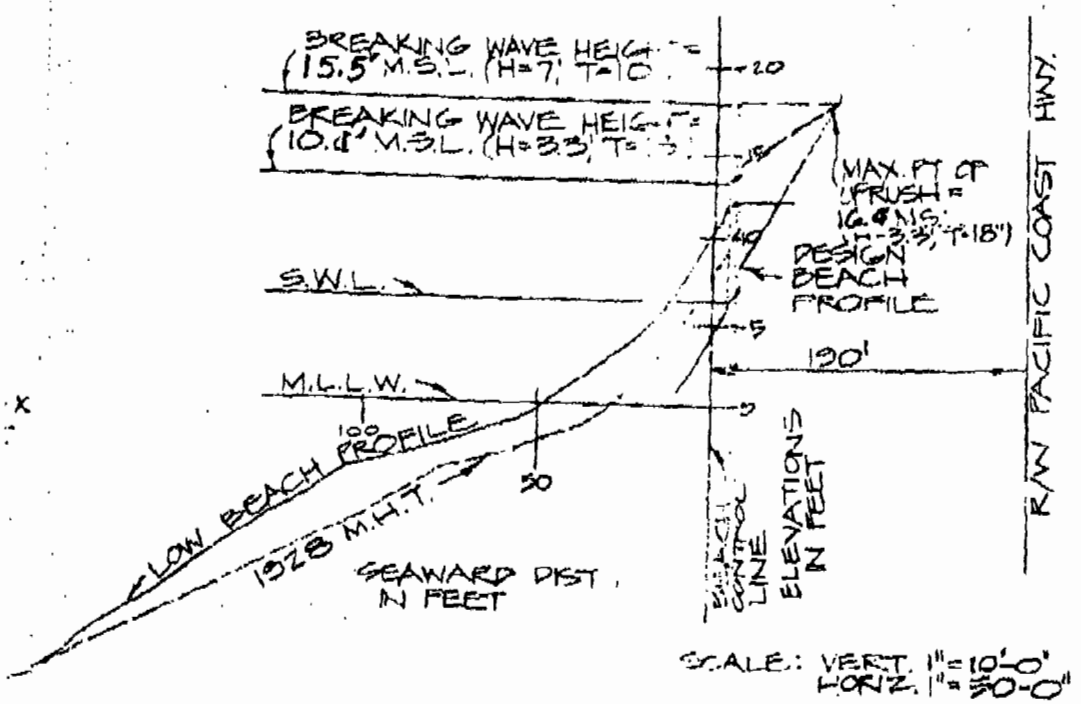
STONE SIZE DIAMETER	PERCENT PASSING BY WEIGHT
4"	100%
2½"	40% to 60%
1½"	25% to 50%
3/4"	00% to 10%

John S. Hale
Consulting Coastal Engineer
RCE 16539

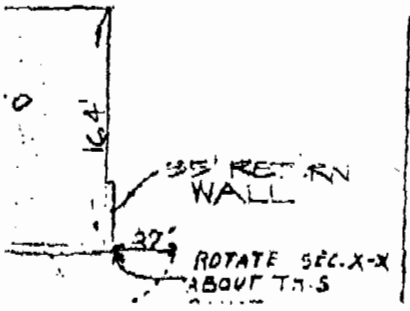
JSH/de
Encl.



TERLY RETURN WALL

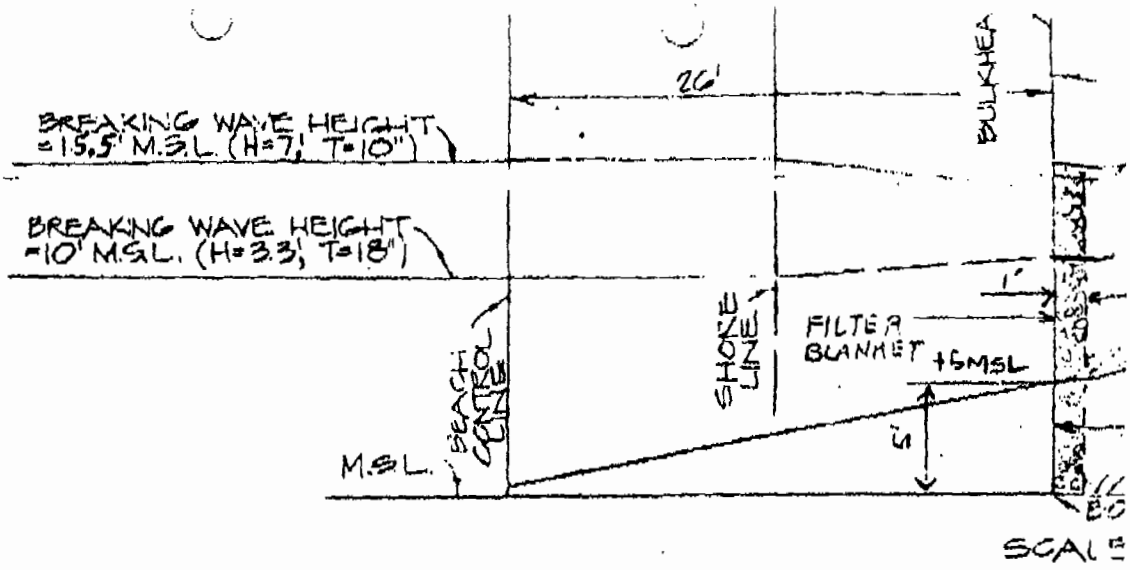


STA. 068+16

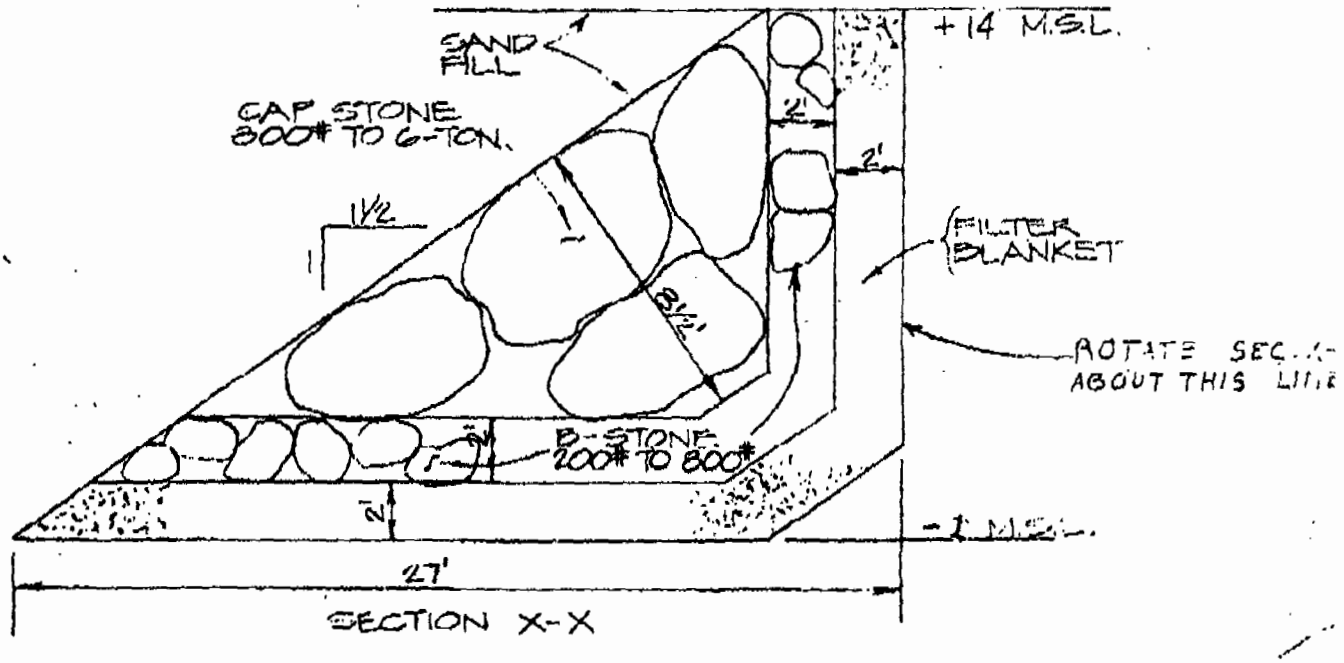


BULKHEAD WALL FOR HOMES @ 22520, 22506 & 22470 PACIFIC COAST HWY.

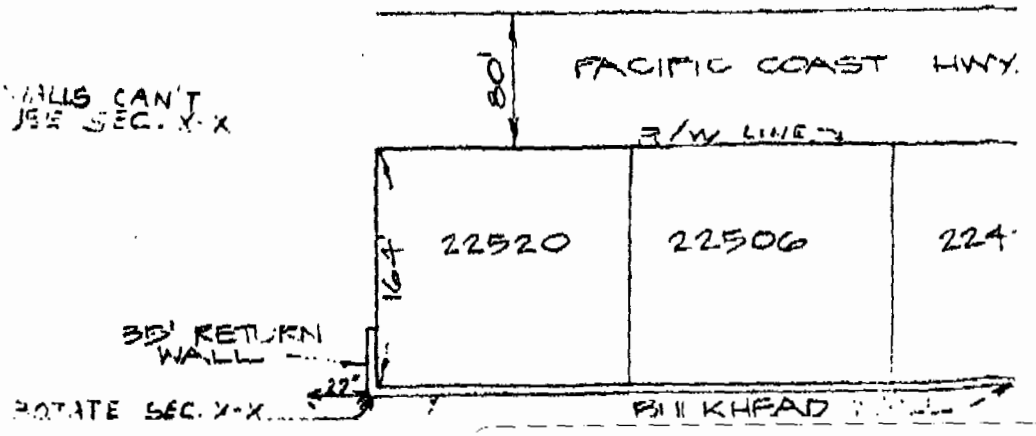
COASTAL ENGINEERING, INC.
JOHN S. HALE
15135 CHETNEY DR.
BALDWIN PARK, CA 91706
TEL: (626) 338-1465



EASTERLY AND WE



NOTE: IF RETURN WALLS CAN'T BE BUILT USE SEC. X-X



Address - 22506 P.C.H.

$H_o = 7'$ $T = 10^{\circ}$ $H_o' = 1.67 \times 7 = 11.7$

Wave Uprush

$H_o'/gt^2 = .0036$

Comp. Slope (using 4' scour line below lowest prot

AVE SLOPE = 17 to 1

(Fig. 7-13) $K = 1$

(Fig. 7-11) $\frac{R}{H_o'} = .39$ $R = .39 \times 11.7 = 4.6'$

$= +6.0'$ (TIDE

UPRUSH $= 10.6$ MLLW

Breaking Wave Height

$H_o'/gt^2 = .0036$ & an under water slope of $\frac{3.1}{50} = .06$

(Fig. 7-3) $H_b/H_o' = 1.35$ $H_b = 11.7 \times 1.35 = 15.8'$

$H_c = 15.8 \times .78 + 6 = 18.3'$ M.L.L.W. $= 15.5'$ M.S.L.

Breaking Wave Depth

$H_b/gt^2 = 15.8/32.2 \times 100 = .0049$ (Fig. 7-2) $\frac{d_b}{H_b} = .95$

$d_b = 15.8 \times .95 = 15'$ S.W.L = 9' M.L.L.W.

ASSUMPTION OK

Address - 22506 P.C.H.

$H = 3.3'$ $T = 18''$ $H_o' = 3.3'$

Wave Uprush

$H_o'/gt^2 = 3.3/32.2 \times 18^2 = .0003$

$= 1$ $d_s = 3.3'$ below S.W.L. $2.7'$ Above M.L.L.W.

Composite Slope

$104 \div 17.8 = 5.8$ To 1

(Fig. 7-13) $K = 1.06$

(Fig. 7-11) $R/H_o = 3.8$ $R = 3.8 \times 1.06 \times 3.3 + 6 = 19.2$ MLLW or 16.4 MSL.

Breaking Wave Height

Est. $d_b = 6$ Slope $= \frac{25}{3.7} = 6.8{:}1$ to 1 $m = .15$

(Fig. 7-3) $\frac{H_b}{H_o'} = 2.7$ $H_b = 2.7 \times 3.3 = 8.9'$

$H_c = .78\, H_b + 6 = .78 \times 8.9 + 6 = 12.9'$ M.L.L.W. $= 10.1$ M.S.L.

Breaking Wave Depth

$H_b/gt^2 = 8.9/32.2 \times 18^2 = .00085$ (Fig. 7-2) $\frac{d_b}{H_b} = .74$

$d_b = 8.9 \times .73 = 6.5'$

ASSUMPTION OK

SINCE ACTIVE SOIL PRESSURE WILL OFFSET OCEAN WAVE LOADS NO WAVE LOADS WILL BE CALCULATED

RESPONSES TO DOCUMENT 4 AND 5 AND PROPOSED ADDITIONAL FINDINGS

On June 3, 2009, Commission staff met with Access for All ("AFA") to discuss, among other things, enforcement of violations involving public access easements held by AFA, including the public access easement on the Ackerberg property. On June 5, 2009, Commission staff, including the Executive Director of the Commission, met with Diane Abbitt and Steve Kaufmann, attorneys for Lisette Ackerberg. The June 5 meeting was at the request of both Ms. Abbitt and Mr. Kaufmann and was intended to allow them the opportunity to propose an amicable resolution to the subject violation case. For several years prior to this meeting, Commission staff explicitly informed Mrs. Ackerberg and her representatives that staff could not agree to extinguishing the Ackerberg public access easement in exchange for the opening of another public access easement and that any resolution of the violation had to include the removal of unpermitted development from the public access easement areas on the Ackerberg property.

During the above referenced meetings (or at any other time), neither AFA nor Mrs. Ackerberg and her representatives, informed Commission staff of a possible settlement agreement between AFA and Mrs. Ackerberg. Unbeknownst to Commission staff, AFA and Mrs. Ackerberg were evidently in the process of agreeing to a settlement agreement to, in part, pursue opening another existing public accessway in the hope of extinguishing the existing public accessway that was required as a condition of a Commission issued CDP and that is provided for by an easement currently held by AFA. On June 19, 2009, without ever discussing it with Commission staff, AFA and Mrs. Ackerberg entered into a settlement. Even after the settlement was entered by the court, neither AFA nor Mrs. Ackerberg and her representatives informed Commission staff of the settlement. Furthermore, during this time, Commission staff left messages with AFA and Mrs. Ackerbergs's representatives attempting to further discuss a resolution of the violation consistent with the permit and Coastal Act; and, even then, no calls were returned to Commission staff informing them of the settlement agreement. Commission staff was evidently intentionally left in the dark during the settlement process and had no way of providing input, including critical factual information that likely would have swayed the outcome or, at a minimum, provided the Commission an opportunity to defend the public access policies of the Coastal Act. In addition, the Court did not get the opportunity to hear the Commission's concerns or issues.

On Friday afternoon, July 3, 2009, just prior to the July 4th holiday weekend and only 5 days prior to the Commission hearing, Steve Kaufmann and Diane Abbitt sent Commission staff and Commissioners a 24 page letter with hundreds of pages of Exhibits, notifying staff for the first time of the settlement agreement and raising defenses to the issuance of a cease and desist order. The following are summaries of these defenses and responses by Commission staff. Many of the defenses raised are addressed in the staff report for this item and are already a part of the public record. Commission Staff also hereby amends its recommendation to recommend that the Commission include, in addition to the above summary and the letters attached hereto, the following responses within its findings:

As indicated above, Respondent has submitted a lengthy (and late-submitted) set of documents to the Commission. This document was received on the Friday afternoon prior to the hearing, on a holiday weekend. While staff did not have sufficient time to do a full analysis and response to all of the issues raised in their submittal, many were repeated from prior correspondence and already responded to in the numerous discussions we have had with Respondent previously. Many of these are already addressed in the staff report and exhibits thereto. In addition, many of the issues they raise are not legal defenses to issuance of the order, and do not represent 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.

However, staff has prepared a response to some of the issues raised by Respondent. First of all, staff notes that some general observations and responses to their submittal are necessary in order to put Respondent's allegations in context of this enforcement proceeding. Second, staff responds to Respondent's specific allegations.

1985 CDP – Basis for Respondent's Claims.

The basis for Respondent's argument lies within the assumption that somehow, in the context of Commission deliberation during the 1985 CDP hearing, the Ackerbergs were allowed to extinguish their public access *easement* at some unspecified future date. This assumption fails on all grounds. In summary, at the January 24, 1985 hearing, the Commission explicitly considered an amending motion that would provide for extinguishment of an offer to dedicate an easement upon the opening of adjacent access points within 500 ft. After an extensive discussion among Commissioners, staff, and Ackerbergs' representative, the amendment motion died for lack of a second. The Commissioners ultimately voted unanimously to grant the permit as recommended by staff. The recorded OTD includes language that is characterized as an addition to the findings that reflects the Commission's discussion of a possible procedure regarding the abandonment of pending offers to dedicate accessways across private property if nearby, adequate, publicly owned accessways are opened first. The "Finding" in effect summarized the Commission's position that, in general (but not in this particular hearing for an individual CDP), publicly owned accessways should be prioritized to be opened before privately owned access easements. However, Commissioners also determined that the offer to dedicate and open an easement on the Ackerberg's property for public use was a <u>necessary condition</u> to finding the proposed project consistent with the Coastal Act.

Ackerberg asserts that this permit hearing (and these additional findings) somehow authorized the eventual extinguishment of an accepted easement across her property that was required as a condition of a Commission-approved CDP. The following is a brief summary of why this assertion fails:

Even with the additional findings, the Commission discussed three pre-conditions requisite to the Commission considering a request by the Respondent to extinguish the offer to dedicate a public access easement.[1] The first pre-condition was that the Commission approve a policy that

[1] The Commission, at the 1985 CDP hearing, discussed only the possibility of extinguishing an Offer to Dedicate ("OTD") a pubic access easement. At no time did Commissioners ever address extinguishing accepted OTDs – or legally valid easements across property. In this particular case, the OTD has been legally accepted.

outstanding offers to dedicate additional vertical access easements within 500 feet of an opened vertical accessway can be extinguished. The second pre-condition was that a public accessway be improved and opened for public use. Lastly, the informal findings required the development of a "suitable" policy and mechanism to ensure that such a vertical accessway remain open and available for public use (envisioned in the context of a certified Local Coastal Program). These conditions have not been met in this case as the Commission did not develop a policy to insure that other already open and publicly used accessways would remain open for public use. Although the old County LUP had a policy allowing for the extinguishment of offers to dedicate easements, that policy has since been superseded by the 2002 Commission-certified City of Malibu LCP which is the legally applicable LCP for this area. Respondent, like any other citizen, had the opportunity to participate in the public hearings before the State to raise this issue at the time the Malibu land use plans were under consideration. The LCP adopted in 2002 did not include this policy. In fact, the LCP adopted for this area specifically identified this access way as one to be opened. Lastly, to date and for the foreseeable future there are no improved and open accessways available within 500 ft of the Respondent's property. The County-owned public access easement that Respondent believes, once open, will satisfy this condition, is 690 feet away from the Ackerberg easement. Therefore none of the prerequisites listed in the **extra findings** for the permit have been met and thus the easement is not qualified for extinguishment consideration, even assuming that the **additional findings** are binding and allow for such extinguishment.

Settlement does not resolve Coastal Act violation.

Respondent's settlement with AFA does not resolve the Coastal Act violations which are the subject of these proceedings. Respondent and AFA have agreed to pursue litigation to seek the opening of the LA County-owned vertical accessway, instead of immediately opening the vertical access easement on Respondent's property. The Settlement Agreement includes no deadline for opening of a vertical accessway at all, nor any guarantee that any vertical access route will ever be opened; in contrast to the issuance of the Cease and Desist Order, which would require the vertical access easement on Respondent's property to be opened as soon as possible. The Settlement Agreement is focused not on resolving this violation at all, but rather on seeking to open an accessway elsewhere some time in the future, and leaving this violation unaddressed and the permit condition not complied with until some uncertain future time. In contrast, the Cease and Desist Order will require the vertical public access to be opened immediately, by requiring that the Respondent open the public access way to the beach, without any speculative reliance on the outcome of another lawsuit.

Moreover, under the Settlement Agreement, the Coastal Act violations will persist for an unspecified period of time, as the Settlement Agreement includes no deadline for completion of the first step, the completion of the contemplated lawsuit to open the LA County-owned vertical accessway to public use. The Settlement Agreement includes a deadline to file the lawsuit, however filing a suit in no way ensures that it will be successfully prosecuted or resolved. In any event, it is clear that litigation would not resolve this immediately. Further, AFA has no clear legal authority or right to force LA County to open the vertical public accessway it owns, and thus there is no guarantee that the first step will result in any improvement in public access. The Settlement Agreement thus provides that vertical public access will remain impeded for an

unspecified period of time. This would allow the Coastal Act violations to persist indefinitely, which the Cease and Desist Order would resolve immediately, as it addresses all Coastal Act violations.

Additionally, the Coastal Act violations will remain unresolved by the Settlement Agreement.. First, if the lawsuit to open the LA County-owned vertical accessway is successful (and presuming no one else sued to prevent that accessway from being opened), then while public access in that location might be improved, unpermitted development in violation of the Coastal Act would still persist on Respondent's property and would be unresolved. If the LA County accessway is eventually opened, the Settlement Agreement allows Mrs. Ackerberg to apply for a permit amendment to extinguish the easement across her property, but even if the Commission approved such an amendment, that would not remedy the extended period of time during which no access at all was provided to this stretch of beach despite the permit requirements.

Second, if the LA County-owned vertical accessway is not opened, and the Respondent and AFA apply for and receive a CDP Amendment to open the vertical access easement on Respondent's property, the other unpermitted development at this site would remain unaddressed, as discussed below. Thus, under all possible future conditions created by the Settlement Agreement, there would still be unresolved Coastal Act violations whereas the issuance of the Cease and Desist Order would resolve all of the Coastal Act violations immediately.

The Cease and Desist Order addresses all of the Coastal Act violations.

Respondent's settlement with AFA does not resolve all of the Coastal Act violations which are the subject of the Cease and Desist Order. The unpermitted development which exists at the site and which is covered by the proposed order includes the placement of rock riprap, a concrete wall, a generator and associated concrete slab, fence, railing, planter, light posts, and landscaping. The violation also includes complete obstruction of the vertical public access easement and partial obstruction of the lateral public access easement. Of all these Coastal Act violations, all of which are addressed by the order, only the obstruction of the vertical access easement is addressed by the Settlement Agreement. The other Coastal Act violations, including the obstruction of the lateral access easements, and associated unpermitted development, are not addressed by the settlement agreement and would otherwise remain unresolved. Further, the Cease and Desist Order provides for enforceability of the resolution of the Coastal Act violations, through Section 9.0 and the structure of an order itself, which requires compliance and includes potential civil penalties if Respondent fails to comply with the order.

The Commission was not a party to the Settlement Agreement between Respondent and Access for All.

As discussed below in the Commission's response to Respondent's statement alleging that the Commission is bound from issuing a Cease and Desist Order by *res judicata*, the Commission was not a party to the Settlement Agreement between Respondent and AFA. As such, the Settlement does not bind the Commission in any way, nor does it fully resolve the Coastal Act violations at issue. In addition to not being a party to the Settlement between AFA and

Respondent, the Commission was not informed of the existence of the Settlement until Friday, July 3, 2009, two weeks after the Settlement Agreement was entered into.

In addition to the Commission's response to the *res judicata* statements above, the Commission notes that the interests of the public were not adequately represented by either party in the Settlement Agreement. The paramount right of the public to access the sea is guaranteed in the California Constitution, and is protected in the Coastal Act, and the actions of AFA and Respondent have not promoted the public right of access to the sea, as they have agreed to the termination of a legally valid vertical public access easement, in favor of pursuing speculative litigation to open another vertical accessway, failing to work towards the opening of the vertical public access easement held by AFA on the Respondent's property. The interests of the public require that public access be promoted wherever possible, and here the issuance of the Cease and Desist Order will result in the certain opening of a vertical public accessway while the Settlement Agreement would only result in further litigation and the possible opening of a different vertical public accessway. The Commission staff and Coastal Act would support opening other accessways in addition, to assist in achieving the goals of maximum public access to the coast, but doing so at the cost of closing this accessway would not further those goals. AFA has not acted with the public's interests in mind, did not and cannot legally represent the Commission in the judicial proceeding, and in fact is not proposing a resolution of the violation at hand and its actions do not bind the Commission.

In addition, Respondent asserts that the settlement reached between AFA and Respondent should vitiate the Commission's action here. This is not accurate. It should be noted that the resolution of a lawsuit between AFA and Respondent filed under PRC Section 30803(a) does not preclude other enforcement actions under PRC Section 30800, which specifically provides that citizen-suits "shall be in addition to any other remedies available at law," which includes enforcement actions under PRC Sections 30810, 30811, and 30812; and thus the Commission would be able to act to resolve the remaining unpermitted violations.

AFA cannot abandon the vertical access easement on Respondent's property, and if it does, then the easement automatically vests in the State of California acting through the State Coastal Conservancy.

AFA is prohibited from abandoning the easement by the terms of the Acceptance of the Offer to Dedicate applicable to this very case [Exhibit #4 to the Staff Report], which include that ". . . any offeree to accept the easement may not abandon it but must instead offer the easement to other public agencies or private associations acceptable to the Executive Director of the Commission . . . ." Further, the Acceptance of the Offer to Dedicate [Exhibit #4 to the Staff Report] provides in Section VII that:

> *". . . the easement will be transferred to another qualified entity or the Conservancy in the event that Access For All ceases to exist or is otherwise unable to carry out its responsibilities as Grantee, as set forth in a management plan approved by the Executive Director of the Commission."*

The referenced AFA Management Plan [exhibit XX to the Staff Report] provides that:

> *"Should Access for All cease to exist or fail to carry out its responsibilities pursuant to the approved management plan, then all right, title, and interest in the easement shall be vested in the State of California, acting by and through the State Coastal Conservancy, or its successor in interest, or in another public agency or nonprofit organization designated by the State Coastal Conservancy and approved by the Executive Director of the California Coastal Commission. This right of entry is set forth in the Certificate of Acceptance/Certificate of Acknowledgement by which Access for All has agreed to accept the OTD. The foregoing is agreed to by and between Access for All, the California Coastal Commission, and the State Coastal Conservancy."*

The AFA Management Plan and the Acceptance of the Offer to Dedicate by AFA together state that AFA cannot abandon the vertical public access easement, and provide that if it does, as proposed in the Settlement Agreement, then the easement will vest in the State of California, acting by and through the State Coastal Conservancy. Thus, under the terms of the easement AFA agreed to abide by, the ultimate effect of the settlement agreement, or any other failure to carry out the responsibilities of the easement by AFA, will be to return the Ackerberg easement to public ownership via the State Coastal Conservancy, or another similar organization approved by the Executive Director to be an easement holder compliant with the permit and easement. The ultimate result would be the same as is before the Commission in the Cease and Desist Order, except that the public would have been denied public access for an additional period of time.

The AFA Management Plan also provides that "Access for All intends to operate this vertical easement from sunrise to sunset daily, consistent with Los Angeles County beach opening hours, as soon as possible." AFA actions have not been in accord with the management plan it agreed to, as it has instead agreed to terminate the access easement in favor of speculative litigation to open a different access easement. AFA's actions show that it has failed to meet the intent of the Management Plan to open the easement for access as soon as possible, which will be accomplished if the CDO is issued. Note that the Management Plan includes an Amendment provision, allowing amendments if all three signatories agree, however no amendment has been agreed to by the Executive Director of the Coastal Commission, who is one of the signatories. Therefore the actions taken thus far by AFA are clearly not in compliance with the permit condition, OTD, easement or Management Plan they explicitly agreed to. The Commission notes that it is pursuing possible options under the Management Plan, as AFA has demonstrated that it is failing to carry out its responsibilities under the Management Plan.

Overall, the Settlement Agreement contemplates, as one of the possible scenarios, that AFA will apply to terminate the vertical public access easement it holds on the Respondent's property. This would impede public access to the beach, and is inconsistent with the permit, Coastal Act, easement and Management Plan and the legal obligations by undertaken and agreed to by both Respondent and AFA to provide public access at this site.

1) Respondent

Respondent suggests that the judgment in *Access for All v. Ackerberg*, Los Angeles Super. Ct. No. BC405058 ("Judgment"), is a "'win-win' resolution for the public. Pages 1-5 (of Abbitt and Kaufman's July 2, 2009 letter to Chair Neely).

CCC:

Commission Staff ("Staff") issued a Notice of Intent to bring this CDO to the Commission more than two years ago (April, 2007), and Staff has been trying to bring this matter to the Commission ever since, but Staff has been delayed by, among other things, requests for delay by Respondent's prior counsel (granted as a courtesy by Staff), the litigation filed by the neighbor (in which this Commission prevailed at every level of the more than two-years worth of litigation), changes in Respondent's counsel and request for additional time, Respondent's counsel's medical leave and request for additional time, and, finally, requests for postponements to allow Respondent to meet with and negotiate with Staff. Ultimately, AFA filed its lawsuit and apparently colluded with the Ackerbergs to rush to the courthouse to settle their lawsuit in a manner that they could argue would preempt this enforcement action. It is notable that the Commission was not given notice of this purported settlement, either before it was reached, or even after it was reached. More than two weeks elapsed from the time of the settlement being entered into on June 19 and the letter we received on July 3 informing us of its existence. This was despite the fact that the parties were well aware of the pending enforcement action and the fact the matter was being heard at the upcoming CCC hearing in an attempt to resolve the violation, consistent with the permit requirements and the Coastal Act.

The Settlement Agreement doesn't resolve the violation. It just sets up a system through which the violation may be "forgiven" and not deemed a violation at some point in the future, if AFA is successful in getting the County Accessway opened and assuming this Commission is willing to allow abandonment of the subject easement. In addition, even if this Commission were to support the approach proposed in the settlement, it may well take years to get the County accessway opened, if at all, and in the meantime, the public has been waiting for years to use the Ackerberg accessway.

In fact, nothing in their settlement provides a legal assurance that the other accessway would be opened. As discussed more fully in the Staff Report, that accessway is under the control of the County and even Respondent has acknowledged that the County has indicated it does not plan to open that accessway. CCC has been working with the County and will continue to do so but there are no assurances that this access will be opened up. In fact, the County accessway is not the subject of a Commission-issued permit or we would also be addressing that matter in an enforcement case. Even if the County were to open that accessway, it would be complementary to this one and would not supplant the need for access here. Also, since the Commission does not have a permit condition to enforce there, even if opened up, the Commission cannot ensure that it would in fact stay open nor ensure that it provided equivalent public access.

In addition, as more fully discussed in the Staff Report, the County accessway upon which Respondent relies is in fact not superior to the one at issue in this action. In fact, they are

equidistant from a cross walk and both adjacent to PCH which provides convenient access for the public. And although this access way is not currently visible, that is because of the violation at issue here—they have fully blocked the access way with a large and high solid wall. Under the order, access and visibility would be restored, and the accessway would have the standard highly visible coastal access signage. Moreover, this access way is in an excellent geographic location between other available accessways and would contribute significantly to public access opportunities. In addition, this accessway is immediately adjacent to complementary lateral accessways and the County easement does not have adjacent lateral accessways. Finally, the County location is more subject to inundation and would require more complicated improvements to make it workable.

Furthermore, when the Commission made its decision in approving the 1985 CDP for the Ackerbergs' home, pool , and tennis court, the County easement had been recorded (in 1973). The Commission was aware of the existence of the County easement and found that the Ackerberg easement was a better location (citing the similar reasons above). 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. In addition, 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) Respondent

Respondent alleges that the Judgment resolved the enforcement matter. Pages 1, 3, 6 and Exhibit 5, Page 4 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The Commission was not a party (nor is in privity with AFA) to the case between AFA and Ackerberg; and thus it is not bound by the resolution of that suit, as *res judicata* operates only on parties to the suit and those in privity with parties to the suit (see response to #3, below). The Commission is not in privity with AFA given that AFA sued to enforce its own easement while the Commission serves the public at large. The settlement of the AFA/Ackerberg litigation itself demonstrates the distinct, if not conflicting, interests of AFA and this Commission. Although AFA purportedly has a public-interest mandate, its actions here are not in fact in the public interest nor consistent with the very terms of the public access permit condition nor easement (as more fully discussed herein); thus the Commission has a different set of goals and is not in privity with it.

In addition, California Public Resources Code ("PRC") section 30800 provides that the authorization for citizen suits filed under PRC section 30803 is in addition to any other remedies available at law, thereby including the provisions of 30810 and 30811.

3) Respondent

Respondent argues that the Commission's current administrative proceeding is foreclosed by the Judgment under *res judicata*. (July 2, 2009 Letter to Chair Neely and Commissioners from Respondent's Attorneys, Diane R. Abbitt and Steven H. Kaufmann and in the attached Memorandum, as Exhibit 5).

CCC:

Respondent's allegation that the Commission is barred from enforcing the Coastal Act due to res judicata on the basis of the Settlement Agreement fails for three reasons. First, the Commission is not in privity with AFA and is thus not bound by the first Judgment. Second, the issues in the Settlement Agreement and the issues which the Commission seeks to resolve with the Cease and Desist Order are not identical. Third, Respondent fails to mention the fourth element of res judicata under California law, which prevents the application of res judicata when the public interest requires that the second action be allowed to proceed.

The Commission was not in privity with AFA.
The case relied upon by Respondents to support its claim of privity of parties, *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Assoc.* (1998) 60 Cal. App. 4th 1053, is importantly the reverse of the situation at issue. In *Citizens*, the court held that a public interest group is bound by the terms of a settlement agreement between a coastline property owners' association and federal and state government agencies. The court emphasized the fact that the state agencies were vested by the public with authority to litigate the issue of public access. *Id.* at 1070. Also, the court noted that the public interest group had no direct interest in the dispute that went unrepresented by the agencies in the prior litigation. *Id.* at 1073. Conversely, in the matter at issue, Respondent claims that a state agency should be bound by a settlement between a violator and a public interest group. Yet, this public interest group, Access for All, was not vested by the public with any special authority to litigate public access issues and, more importantly, the Commission here raises legitimate claims (i.e., regarding Respondent's seawall violation, lateral access, and the issue of interim public access) that went unaddressed in the prior litigation.

Moreover, the public interest was clearly not adequately represented by Access for All. The *Citizens* court notes that the nonparty must be adequately represented by the party in the first action, meaning its interests and motives are so similar that the latter was essentially a representative of the former. *Id.* at 1070-71. "If the interests of the parties in question are likely to have been divergent, one does not infer adequate representation and there is no privity." *Id.* at 1071. Here, the interests of the Commission and Access for All are manifestly divergent: Access for All is interested in receiving fees, costs and support for its organization, while the Commission is a public agency that has no motivation to accept fees and penalties in exchange for closing public accessways. Unlike Access for All, the Commission is concerned with remedying Coastal Act violations (hence, leading the Commission to contemplate issuing a cease and desist order); Access for All, on the other hand, has settled according to terms that leave outstanding Coastal Act violations on the Property in exchange for money and other terms rather than ensuring compliance with the permit which is the subject of this proceeding. Access for All is not adequately or justly representing the public interest. Moreover, Access for All's

ownership and management of the easement are subject to the terms of the Offer to Dedicate, the Certificate of Acceptance of the OTD, and of the Management Plan for the easement. Access for All's actions to delay opening of the easement and agree to ultimately abandon the easement exceed its authority under the terms of the OTD, the Certificate of Acceptance, and the Management Plan.

Furthermore, according to the court in *Citizens*, "[t]he circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication. . ." *Id.* (quoting *Victa v. Merle Norman Cosmetics, Inc.*, (1993) 19 Cal. App. 4th 454, 464). The Commission could not reasonably have expected to be bound by the settlement in *Access for All v. Ackerberg*. Although the Commission was aware that AFA had filed a lawsuit against Mrs. Ackerberg and was in contact with Access for All about a number of issues, Staff was never warned of Access for All's intention to settle or an impending settlement. In fact, Staff understood that AFA filed the lawsuit in order to advance the very issue sought at this proceedings: that the Ackerberg permit be complied with and the Ackerberg accessway be opened up. The Commission would never have accepted such a settlement given the strength of the Plaintiff's arguments and had repeatedly informed both counsel for Respondent and AFA of the importance and significance of this accessway. Additionally, given its mandate to ensure maximum public access and to enforce the Coastal Act, the Commission could not reasonably be expected to be bound by an agreement that results in decreased public access and allowance of continuing Coastal Act violations, and is inconsistent with both the Coastal Act policies and the permit issued by the Commission itself.

The issues are not identical.
The application of res judicata requires that the issues resolved in the judgment be the same as the issues raised in the subsequent proceeding. The issues are not identical in this case because the settlement only mentions the vertical access easement on Respondent's property, and because the Settlement failed to actually resolve the Coastal Act violation.

The settlement did not resolve the impediments to the lateral access easement, nor the associated unpermitted development, nor the seawall violation.

Respondent's allegation that the settlement resolves the Coastal Act violations is incorrect for two reasons, first that the Legislature intended that multiple means be used to enforce the Coastal Act, and second because the settlement fails to completely resolve the Coastal Act violation, as detailed below. Respondent asserts that the Legislature's intention that there be multiple means to enforce the Coastal Act means that the use of any one method forecloses the use of the others; however this is incorrect, as the Commission often seeks to resolve an issue administratively first, and then resorts to more formal enforcement action if necessary. More importantly, the settlement does not enforce the Coastal Act. The settlement merely sets up a process through which a Coastal Act violation can be allowed to continue indefinitely, subject only to the possibility of future hypothetical actions by various entities that are not party to the settlement. The Commission can enforce the Coastal Act through its usual remedies, including the issuance of a Cease and Desist Order under PRC Section 30810, and is not barred by res judicata. Therefore since the issues raised in this proceeding by the Commission are substantially different from those issues allegedly resolved in the settlement, res judicata does not operate here.

Protection of the public interest prevents the application of res judicata.
Respondents failed to address or even mention the fourth prong of the res judicata analysis: "Even if these [first three] threshold requirements are established, res judicata will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.]'" *Citizens*, 60 Cal. App. 4th at 1065 (quoting *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal. 3d 891, 902). The *Citizens* court expressly points out that res judicata was appropriately applied in that case—

> based upon the particular and rather unique circumstances presented to us, that the claims asserted by appellant in the present case were commendably advanced during negotiation and ratification of the settlement agreement . . . Only because we find that the right of public access . . . was considered, litigated and thoroughly protected do we accord binding effect to the settlement agreement in this proceeding despite appellant's lack of direct participation in the prior actions.

Citizens, 60 Cal. App. 4th at 1074. In this matter, it is certainly not in the public interest to foreclose the possibility of the Commission continuing an enforcement action against Respondent. There was no uniquely "commendable" negotiation in the present case. Quite the contrary, Access for All abandoned its duty to the public in settling a strong, promising case in exchange for a settlement which provided them fees and other financial payments. The Commission was deliberately kept in the dark about the settlement agreement, which is now being invoked to prevent the Commission from enforcing the requirements of a Commission-issued permit intended to protect public rights of access to the shoreline. The result is grave loss of public access, which is not only an injustice but also in clear opposition to the public interest. The settlement in *Citizens* is thus not analogous to the settlement of *Access for all v. Ackerberg*.

Moreover, the application of res judicata in *Citizens* was predicated on the nature of the settlement agreement, which "was the product of a reasonable compromise, and does not carry with it even the hint of any abdication of the role of public agent by the parties to the prior litigation." *Id.* at 1072. The facts here are the exact opposite, as AFA has entered into a settlement that would abdicate its role as manager of the Ackerberg easement, in favor of terminating the easement entirely. The application of res judicata here is thus not in the public interest, as public injustice would result as the public would be denied from accessing the beach for an indefinite period of time as a result of the Settlement Agreement.

Res judicata is, of course, important to judicial economy and to protecting defendants from malicious litigation. Here, however, the issue of public access and resolving Coastal Act violations was not resolved justly. Violations remain on Respondent's property and, in the interim until the County accessway is opened (if it is ever opened, which is unlikely and, in any event, not for many years), the public has neither accessway to this stretch of the coast, because the settlement did not open Respondent's easement in the interim. Therefore, unlike the judgment in *Citizens*, this Judgment did not "thoroughly protect" the right of public access. Indeed, the public interest requires that relitigation not be foreclosed, so that the Commission can enforce the public's right to access the coast through the maximum number of accessways – including both the County-owned accessway and the easement on Respondent's property.

4) Respondent

Respondent argues that there was no pre-existing view of the beach or vertical access, and that today, a vertical accessway could not be required because of the absence of a "nexus" under *Nollan*. Page 12, note 5 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The permit and its conditions were issued in 1984 and legally the Respondent had 60 days from permit issuance to challenge the permit. Not only did they not do that, but they accepted and signed the permit and agreed to its terms. The time to challenge the permit ran over 20 years ago and this argument is not legally relevant to this proceeding. Moreover, the Commission, in issuing the original permit fully examined the access issue in light of the new proposed development and concluded that public access was required to make the development overall consistent with the Coastal Act. During the more than twenty years since this permit was issued, the Respondent enjoyed the use of the development which would, but for this accessway, have been inconsistent with the Coastal Act and would not have been permitted.

5) Respondent

Respondent argues that the Judgment is consistent with the Commission's 1985 decision imposing vertical access requirement, as well as the "commitment" the Commission made at that time to Ackerberg—namely, that the Commission would adopt a policy that publicly-owned easements should be opened before those obtained from private property owners. Pages 2-3 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The Judgment is facially contrary to Special Condition 1 of the permit authorizing Respondent to proceed with the requested development. As this permitting condition required the irrevocable offer to dedicate an easement on the *subject* property, and the settlement purports to transfer this requirement to a pre-existing, unopened easement on land not associated with the subject property, it is not an adequate substitute to satisfy the requirements of the permit.

Moreover, the county owned easement referenced in the Judgment was in existence in the same form at the time of the Commission meeting in 1985. At this meeting the Commission considered the necessity of a private easement when a public easement was unopened downcoast. The Commissioners considered this as a factor of whether to adopt staff recommendation requiring an easement and determined that the presence of another potential easement was not dispositive to the inquiry, as this section of Malibu has particularly limited public access to the beach. Additionally, during the hearing Commissioner Hisserich indicated that while he agreed that the general public policy should be to open public prior to privately held easements, he ultimately concurred with the decision to require an easement on the subject property. Commissioner Hisserich affirmed that the vertical easement on the Respondent's property is distinguishable from the easement at 22132 PCH in that the easement on

Respondent's property connects to 279 linear feet of public beach in addition to the section of beach located below the mean high tide line. Thus, there is more room for the public to recreate once they arrive at the beach via the vertical Ackerberg easement. The Judgment includes no compensation for the loss of this connectivity.

6) Respondent

Respondent claims that Commission Staff prepared and issued revised findings, specifically incorporating the changes into the staff report. Respondent further asserts that, although Staff states it cannot locate this document, the document is part of the *Roth* lawsuit record (as evidenced by Bates stamping). Page 13, note 6 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The issue of whether there were revised findings for this matter is a red herring. The Commission, in its discussion clearly felt that even if there were to be some later permit amendment permitted, that this would only be appropriate if three specific preconditions were met, as is discussed elsewhere herein. The Respondent was aware of the analysis predicated on the three preconditions and specifically agreed to them. These conditions have never been met so even if the revised finding had been formally adopted by the Commission or was incorporated by adopted findings, it would not have applied here or given any legal justification for extinguishing this easement. See below for a full discussion of the issue of revised findings here.

7) Respondent

Respondent argues that the amending motion to accept applicant's requested modification to the vertical access condition was withdrawn in favor of Staff's suggestion of revised findings. Respondent alleges that revised findings were specifically adopted requiring the opening of public easements prior to private easements. Page 12 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

At the January 24, 1985 Commission meeting, several commissioners discussed adding language to the findings addressing a possible procedure to allow for extinguishing pending offers-to-dedicate accessways across private property if other nearby, adequate, publicly owned accessways are opened first. Then-Assistant Executive Director Peter Douglas stated that he would have such a statement added to the findings. Most of the commissioners' comments regarding changes to the findings were not explicit about whether the findings would be brought back to the Commission for a formal vote at a subsequent meeting, though the Chair did state at the conclusion of Commission deliberations that he expected the findings would be brought back to the Commission. The meeting minutes also indicate that revised findings would be brought back to the Commission. It does not appear that revised findings were ever brought back to the Commission for formal action, though the recorded OTD does include an insert that is

characterized as an addition to the findings and that is consistent with the Commission's deliberations. Of course, Mrs. Ackerberg could have objected at the time if she felt that Commission staff was handling the findings inappropriately. The Commission does not have any evidence that she did.

In any event, the Commission's regulations do not require the Commission to vote on revised findings unless the Commission action was substantially different than the staff recommendation. See 14 CCR section 13096(b). In this instance, the Commission's action was consistent with the staff recommendation.

At the January 24, 1985 Commission meeting where the underlying coastal permit was conditionally approved, the Commission explicitly considered an amending motion that would provide for the extinguishment of this offer to dedicate an easement upon the opening of adjacent access points within 500 ft. While this proposed amendment was extensively discussed by the Commissioners, ultimately, the seconder of the amending motion withdrew his second and the amending motion died for lack of a second. Commissioner Wright seconded this motion "to get it before the Commission, but I won't be able to support it" (25), he later withdrew the second after generating discussion on the topic.

Additionally, Commissioner Wright, who seconded the motion to amend, rather than echoing the proposed amendment, expounded the need for a system for extinguishing easements that were not picked up in cases where there is a plan to develop access (28). He contemplated a much higher threshold for the extinguishment of an easement, specifically, that there is an access plan in place that does not require the easement in question, and that the easement has not been picked up. He subsequently summarized, stating, "I could continue to support the amendment, if the extinguishment occurred after the development of the pending Los Angeles County LUP for the Santa Monica Mountains], and determined that this was not needed....and then if this accessway was needed, in terms of completing the [pending Los Angeles County LUP for the Santa Monica Mountains], then I would like to leave that option open." (30-31). Commissioner Wright further specified that what he supported was in fact a "prioritization" of opening public before private easements. Thus, the possibility of automatically extinguishing an easement upon the opening of another in the same vicinity was not even contemplated by one of the only two proponents of the amendment.

Then-Assistant Executive Director Douglas indicated his preference that this type of decision be made as a general policy decision, not on an individual basis, responding to the discussion regarding amending the permit by stating, "[w]hat you are saying, basically, is that the priority should be to develop publicly owned accessways before these private offers of dedications are, in fact, implemented, activated, and developed. And, that is a policy question that I think is appropriate for the LUP, and could be incorporated here in the finding, as a policy that you have taken, as opposed to a condition." (34). Ultimately, the Commissioners voted unanimously to grant the permit as recommended and to add an additional finding effectively summarizing the Commission's position that, in general, publicly owned accessways should be prioritized to be opened before privately owned access easements. Chairman Nutter agreed that, "…the place ultimately to make our policies stand, I think, is in the context of [pending Los Angeles County LUP for the Santa Monica Mountains] LCP." (44).

On the question of whether to include additional findings, Assistant Executive Director Douglas agreed that he would, "put this discussion in the findings", stating further that it was in fact the general policy of the access program to develop public access points first. Thus the Commissioners determined that an individual permit application was am inappropriate venue to address large access policy questions. Therefore, while this was indeed expressed as the general policy of the Commission, the Commissioners nonetheless also determined that the offer to dedicate and open an easement on the Ackerberg's property for public use was a necessary condition to finding the proposed project consistent with the Coastal Act.

8) Respondent

Respondent argues that the Commission clearly did not adopt the staff report prepared for the original Ackerberg permit (Staff Report, Exhibit 5), and that the transcript of hearing "is rife with instruction to Staff to prepare revised findings." Respondent further argues that the Commission's suggestion that revised findings were never adopted is unbelievable, and claims that the Commission is legally required to adopt findings. Pages 11-12, note 4 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

As discussed above, after rather extensive discussion, the proponent of the amendment, Commissioner Mc Innis settled on asking the staff to, "say they would be willing to put some pretty nice—I think they are pretty nice—words into the findings, at least." Assistant Executive Director Peter Douglas agreed that to put in language, "consistent with the discussion that we've held here…I think the general policy there is one that we have held before, and this way it would become a know, conscious decision of the Commission."

Additionally, Respondents are correct in asserting that the Commission is legally required to adopt findings. Here, however, the Commission acted pursuant to the staff recommendation. In the absence of explicit direction by the Commission, the staff report became the Commission's findings. In any event, the permit and conditions are legally enforceable and even if Respondent's point were accurate, as discussed herein, and the additional language is included, it sets forth the three preconditions which have not been met.

9) Respondent

Respondent alleges that the Commission's revised findings allow for the extinguishment of the easement. Additionally, Respondent asserts that she did not challenge the condition on reliance on CCC's commitment that they would at least have a fair opportunity to extinguish the vertical access condition. Page 12, note 5 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

Under the terms of the additional findings language included in the OTD, the easement has not been extinguished. The proposed additional findings specified three conditions requisite to the Commission considering a request by the Respondent to extinguish the easement. The findings that Mr. Reeser requested be added to the original Commission findings delineated these conditions, stating, "[t]his 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." (Letter from Ed Reeser to Gary Gleason, February 12, 1985).

The first condition was that the Commission approve a policy that outstanding offers to dedicate additional vertical access easements within 500 feet of an opened vertical accessway can be extinguished. The second condition was that a public accessway be improved and opened for public use. Lastly, the informal findings required the development of a "suitable" policy and mechanism to ensure that such a vertical accessway remains open and available for public use. These conditions have not been met as the Commission did not ultimately approve a policy allowing for the extinguishment of outstanding offers to dedicate easements, nor did the Commission develop a policy or mechanism which could insure that other already open and publicly used accessways would remain open for public use. Lastly, to date and for the foreseeable future there are no improved and open accessways available within 500 ft of the Respondent's property. Therefore none of the prerequisites listed in the extra findings for the permit have been met and thus the easement is not qualified for extinguishment consideration.

Finally, Respondent's failure to challenge the conditions of the permit allegedly based on reliance on the possibility of eventual extinguishment of the easement is not a persuasive rationale for violating the terms of the permit now. If the downcoast public access is as viable and beneficial to the public as Respondent claims, Respondent may apply for a permit amendment under Section 13166 of the Coastal Act Regulations. Though Respondent has yet to take advantage of the amending process, Respondent is free to apply for such an amendment at any point.

10) Respondent

Respondent claims that in December 2008, Ms. Abbitt twice requested that staff provide a copy of file for approval of the Trueblood seawall, CDP No. 5-83-360. Page 9, footnote 3 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

While it is true that Respondent requested documents at the end of a telephone conversation, staff indicated to Ms. Abbitt that she would be required to coordinate with and pay for a copying service to reproduce the large scale plans (since Commission staff offices do not have the ability to reproduce such large documents). Ms. Abbitt failed to follow up on this, did not coordinate with a copying service and did not pay for the plans to be reproduced.

11) Respondent

Respondent alleges that the rock riprap in front of the bulkhead and within the lateral access easement is not a violation of the 1983 CDP or unpermitted under the Coastal Act. Pages 9-10 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

While this was discussed in the staff report for this matter (at pgs. 32, 38-41), it is clear that 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. 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.

12) Respondent

Respondent claims that during 1985 hearing, the Commission noted the superiority of county accessway (as evidenced by its policy adoption). Page 17 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

First, the Commission did not adopt policy in its approval of the Ackerberg CDP. In fact, they chose to specifically avoid such a policy decision by stating that such broader public access

issues should be addressed in a future LCP. There was a general sense during the Commission's deliberations that public accessways should be opened first, but only in order to minimize the burden on private parties, not because public accessways are somehow inherently superior.

13) Respondent

Respondent claims that even absent the Judgment, the current CDO proceeding is premature because it seeks "removal" of development in the easement area and no permit has been sought/authorized for the development of the vertical easement. Page 19 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely).

CCC:

Once a public access easement exists, it is not premature to demand that it not be obstructed. Given that the obstruction must be removed prior to construction of improvements, it makes sense to proceed with the order first.

14) Respondent

Respondent asserts that the Commission approved development in the easement area until the easement is "picked up and used" and that plans submitted for the Ackerberg development reflected that the development would extend to the property line and items such as a perimeter block wall, fences, railing, and landscaping would be erected in the easement. Page 20 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The Commission did not approve any development in the easement area. If easement holders had to wait until they were actually using it before Ackerberg would have to remove her encroachments, it would never open.

In addition, none of the items listed in Ackerberg's assertion were depicted on the Commission approved, final plans. Even Mrs. Ackerberg, through her legal counsel at the time and subsequent to, the 1985 Commission hearing acknowledged that any legal improvements made in the easement areas were to be temporary, and removed once the easement areas accepted (as more fully discussed on pages 34-35 of the staff report for this matter).

15) Respondent

Respondent raises a due process question with regards to the fact that the Attorney General sits right next to, and advises the Chair of the Commission, and may discuss the matter at issue with the Commissioners in closed session, citing *Nightlife Partners, Ltd. V. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 92. Page 22 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The Attorney General ("AG") referred to here by Respondent is not an advocate on either side of this matter. The AG sits with the Commission as its neutral advisor. In this case, the AG has not advised staff regarding its recommendation and is not advocating on behalf of the staff recommendation. "In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal. 4th 731, 741. Respondent has failed to demonstrate actual bias from the mere fact that the AG serves as the Commission's legal advisor, failing to meet the standard of *Morongo Band*.

16) Respondent

Respondent argues that "considerable evidence available to, or submitted to, Staff has not been presented to the Commission. This includes: the transcript from the 1985 hearing; correspondence concerning the 1985 hearing; the 1985 'revised findings'; and exhibits attached to Ms. Abbitt's October 21 letter to demonstrate that there is no seawall violation." Page 23 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

In fact, Commission staff did not have the transcript until receipt of the July 2 Abbitt and Kaufmann letter, 5 days before the hearing, as Ms. Abbitt and Mr. Kaufmann concede elsewhere in their letter. Id. at 11. Commission staff did not even know that a transcript existed until receiving the Abbitt and Kaufmann letter. It was prepared in conjunction with litigation in which Mr. Kaufmann was involved, but he failed to provide a copy to the Commission until 5 days prior to the hearing. In any event, the quotes of the 1985 hearing, which Commission staff prepared by listening to the hearing tapes, are confirmed by the hearing transcript provided by the Respondent.

EXHIBIT 3

Cease & Desist Order
No. CCC-09-CD-01, July 8, 2009

CCC-09-CD-01-A
(Ackerberg)

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 San Luis Obispo on July 8, 2009, on behalf of the California Coastal Commission.

By: Peter Douglas
Peter Douglas, Executive Director

EXHIBIT 4

State Coastal Conservancy Staff Report "Ackerberg Public Access Easement held by AFA: Involuntary Transfer," 9/22/11 (Divesting easement from AFA)

CCC-09-CD-01-A
(Ackerberg)

COASTAL CONSERVANCY

Staff Recommendation
September 22, 2011

ACKERBERG PUBLIC ACCESS EASEMENT HELD BY AFA: INVOLUNTARY TRANSFER

Project Manager: Joan Cardellino
Staff Counsel: Jack Judkins

RECOMMENDED ACTION: Determination that Access for All has failed in its obligation to properly manage an easement over the Ackerberg property for public access to the shoreline and authorization for the Conservancy to accept the easement or designate another entity to accept the easement.

LOCATION: 22486 Pacific Coast Highway Malibu, CA

PROGRAM CATEGORY: Public Access

EXHIBITS

Exhibit 1: Ackerberg Easement Location

Exhibit 2: Outrigger Accessway Location

Exhibit 3: Map of Area: Public Lateral Accessways

Exhibit 4: Settlement Agreement

Exhibit 5: Judgment in *Access for All v. Lisette Ackerberg Trust, et al*.

Exhibit 6: Certificate of Acceptance

Exhibit 7: Ackerberg Offer to Dedicate (OTD)

Exhibit 8: Management Plan for Easement

Exhibit 9: October 27, 2005 Conservancy Staff Recommendation

Exhibit 10: Declaration of Sam Schuchat

Exhibit 11: Declaration of Peter Douglas

Exhibit 12: Declaration of Aaron McLendon

Exhibit 13: AFA Executive Director's Letter to Conservancy's Executive Officer

Exhibit 14: AFA Attorney's written defense of AFA's actions

Exhibit 15: AFA and SCC agreement continuing 2-10 public hearing

Exhibit 16: Minute Order, *Ackerberg v. Commission*

Exhibit 17: Trial Court Decision, *Ackerberg v. Commission*

RESOLUTION AND FINDINGS:

Staff recommends that the State Coastal Conservancy adopt the following resolution pursuant to Sections 31400 et seq. of the Public Resources Code and pursuant to the Certificate of Acceptance ("Acceptance") recorded on December 17, 2003, as Instrument No. 03-3801416 in the official records of Los Angeles County, California:

"The State Coastal Conservancy hereby directs its Executive Officer to take all necessary steps to vest in the State of California (acting by and through the Conservancy), or alternatively or subsequently, in another qualified entity designated by the Executive Officer and acceptable to the Executive Director of the California Coastal Commission, the public access easement (the „Easement') created by recordation of a Certificate of Acceptance (the „Acceptance') recorded on December 17, 2003, as Instrument No. 03-3801416 in the official records of Los Angeles County" and held by Access for All („AFA')."

Staff further recommends that the Conservancy adopt the following findings:

"Based on the accompanying staff report and attached exhibits and on such other evidence that has been presented at the public hearing, the State Coastal Conservancy hereby finds that:

1. AFA has failed to carry out its responsibilities to manage the vertical public access easement (the Easement) created by the Acceptance in a manner consistent with the Acceptance and with the agreed-upon management plan for the Easement.
2. Specifically, AFA entered into a settlement (attached to the accompanying staff recommendation as Exhibit 4) of *Access for All v. Lisette Ackerberg Trust, et al.*, Los Angeles Superior Court No. BC405058, with the owner ("Ackerberg") of the property on which the Easement is located and permitted entry of a judgment (attached to the accompanying staff recommendation as Exhibit 5) based on that settlement which impair and adversely affect the public interest in the Easement by:
    a. Allowing significant delay in any development and opening of the Easement, without any assurance that encroachments to the Easement will ever be removed and without any other tangible benefit to the public access to be provided by the Easement.
    b. Failing to allow the Conservancy (and the California Coastal Commission, the "Commission") involvement in the design of the accessway or in decisions potentially affecting the viability of the Easement.
    c. Creating the factual circumstances that may lead to a joint application to the Commission for the extinguishment of the Easement and that will allow Ackerberg to argue that the Easement should be extinguished.
    d. Creating the potential for the judgment in the Ackerberg litigation to bar any Commission enforcement action or any other attempt to remove encroachments on the Easement or to develop and open the Easement.
    e. Creating the potential inability of any party to force Ackerberg to remove encroachments, to implement the Easement improvements, and to open the Easement if separate litigation, *Access for All v. County of Los Angeles, et al.*, Los Angeles Superior Court No. BC41670, required by the Ackerberg settlement and judgment and regarding another access easement, is successful.

3. The proposed authorization is consistent with the purposes and objectives of Chapter 9 of Division 21 of the Public Resources Code, regarding the provision of public access to and along the coast.

DISCUSSION:

Conservancy staff recommends that the Conservancy act to divest Access for All (AFA), a nonprofit organization, of its interest in an easement (Easement, shown on Exhibit 1) created by acceptance of an offer to dedicate required under the Coastal Act. In its simplest form, the basis for this recommendation is that AFA agreed to a written settlement (Settlement, Exhibit 4) and stipulated trial court judgment (Judgment, Exhibit 5) that relinquished or impaired certain rights in an important public access easement in Malibu, contrary to the terms under which AFA accepted the Easement and contrary to its Management Agreement with the Conservancy and the California Coastal Commission (Commission). The Judgment was entered on June 19, 2009 in the case of *Access for All v. Lisette Ackerberg Trust, et al.*, Los Angeles Superior Court No. BC405058 (AFA-Ackerberg litigation). The Easement provides that the Conservancy may take title to the Easement or designate another qualified entity to take title, if AFA ceases to exist or if it fails to carry out its management obligations.

History of this Proceeding

In December 2009, in light of the events described below, Conservancy staff determined that it should request that the Conservancy hold a public hearing to determine whether to divest AFA of its interest in the Easement. Accordingly, Conservancy staff prepared a staff recommendation and placed the matter on the Agenda for hearing by the Conservancy at its public meeting of February 4, 2010. Notice of the hearing was provided to AFA a month before the hearing date. On receipt of the notice, AFA's representative contacted Conservancy staff and an agreed settlement was eventually reached and approved by the Conservancy (Exhibit 12). Under that agreement, AFA agreed to voluntarily assign its interest in the Easement if the AFA-Ackerberg litigation and other litigation related to the Easement was settled by and among the Conservancy, the Commission, AFA and the owner of the property on which the Easement is located (Ackerberg). In return, the Conservancy agreed to postpone the public hearing unless and until the Conservancy determined that settlement of the litigation was unlikely or that AFA was not negotiating in good faith.

Since February 2010, there has been very little movement towards settlement of the litigation related to the Easement. To the contrary, Ackerberg and AFA have jointly and vigorously defended against the efforts of the Commission and Conservancy, through the pending litigation, to enforce and preserve the Easement and to remove encroachments on the Ackerberg property that stand in the way of development of the Easement. In June 2010, after verbal discussions with Ackerberg's representatives, the Commission submitted a formal settlement proposal to Ackerberg, designed to provide a basis for resolution of all of the litigation. There was no response to that proposal from Ackerberg in the ensuing 12 months. In light of this, the Conservancy, through its Executive Officer, determined in May 2011 that settlement was unlikely and began preparation to place this matter back on the Agenda of the Conservancy, as allowed for by paragraph 2.3 of the Conservancy's agreement with AFA (Exhibit 12).

On June 8, 2011, Ackerberg's attorney submitted a new settlement proposal, with no reference to the previous Commission proposal. This settlement proposal has been provided to the Conservancy board members along with a confidential and privileged analysis of it by the Conservancy's counsel. The terms and timing of the proposal are such that the Executive Officer continues to believe settlement of the Easement litigation is unlikely. Thus, the public hearing to determine whether to divest AFA of its interest that was postponed from February 2010 was initially placed on the agenda for the Conservancy's July 21, 2011 regular meeting. It was continued to the September Conservancy meeting, at the request of AFA, so that AFA would have time to secure substitute counsel to replace its previous attorney who had withdrawn from representation of AFA shortly before the July meeting.

Background

AFA obtained the Easement and associated rights through the recording of a "Certificate of Acceptance" (Acceptance, Exhibit 6) on December 17, 2003. By recording the Acceptance, AFA accepted an Offer to Dedicate (OTD, Exhibit 7) that the Coastal Commission had imposed in 1985 in issuing a coastal development permit to Ackerberg. Ackerberg holds fee title to the property that is burdened by the Easement.

The Commission and the Conservancy each play a role in the acceptance by a nonprofit organization of an offer to dedicate a public accessway, when that offer has been required as a condition of a Coastal Act development permit. Typically, the Commission approves the qualifications of any such nonprofit organization and the Conservancy, on behalf of the State and the public, retains a future interest in the easement, in the event that that nonprofit organization ceases to exist or fails to manage and operate the easement for public access. In order to establish more precise terms and conditions under which the nonprofit organization manages and operates the easement, the Commission, Conservancy and the nonprofit organization enter into a management plan, to which all parties agree.

The acceptance by AFA of the Easement followed this process. Accordingly, by the terms of the Acceptance, the Conservancy and Commission broadly required AFA to manage the Easement "for the purpose of allowing public pedestrian access to the shoreline." More precisely, the Acceptance requires AFA to carry out this obligation through compliance with a "Public Vertical Access Easement Management Plan" which the parties signed on July 28, 2003 (Management Plan, Exhibit 8). The Management Plan requires several steps by AFA in managing the Easement after acceptance: 1) to survey, identify and report to the Commission any encroachments within the easement; 2) once the encroachments are resolved, to work with Ackerberg to develop a design for the accessway improvements and, subject to Conservancy and Commission approval of the design, to subsequently implement those improvements; and 3) to open, manage and operate the improved easement for public access from sunrise to sunset. The Management Plan expressly prohibits any revision of these requirements without consent of all three parties – AFA, the Commission and the Conservancy. Under the Acceptance, if AFA ceases to exist or if it fails to carry out its management obligations, title to the easement automatically vests in the Conservancy or, in another entity designated by the Executive Officer of the Conservancy. The vesting of title in the Conservancy or designated entity can only occur after the Conservancy has held a public meeting and made the finding that a condition triggering vesting has occurred (Exhibit 7, numbered pages 3-4). The Management Plan contains a similar, agreed provision (Exhibit 8, page 3, under the heading "Agreement").

Description of Easement and Easement Setting

The Easement is a "vertical" easement ten feet in width, which extends across the entire eastern boundary of the Ackerberg property and allows for public access from Pacific Coast Highway ("PCH") to Carbon Beach in Malibu. The Easement directly connects to 280 linear feet of public beach. (See Exhibit 1, depiction of the Easement and Exhibit 3, depiction of the area and the beach lateral public accessways in and around the Easement). At the shoreline, the Easement adjoins a lateral public access easement extending the length of Carbon Beach along the Ackerberg property. This lateral beach easement is held by the State Lands Commission and is 148.3 feet in length. The State Lands Commission also holds an adjacent public access beach easement, located directly west of the easement that it owns on the Ackerberg property. The beach easement is 61.7 linear feet in length. In addition, on the 70-foot-long parcel immediately to the east of the Ackerberg property, there is a recorded deed restriction dedicating lateral public access along Carbon Beach.

To date, the Easement has not been opened to the public, nor are any public access improvements in place. At present, certain encroachments constructed by the property owner, Ackerberg, prevent the opening and development of the Easement, including: a wall along PCH that blocks access to the easement, and assorted other improvements (generator and associated concrete slab, fence, railing, planter, light posts, and landscaping) within the Easement.

A second, dedicated public accessway (the "Outrigger Accessway") provides potential vertical access from PCH to Carbon Beach (See Exhibit 2, depiction of Outrigger Accessway). However, this accessway is also undeveloped. The Outrigger Accessway is approximately 675 feet to the east of the Easement on the Ackerberg property (Exhibit 2). The Outrigger Accessway is located on private property developed with condominiums and owned by the Malibu Outrigger Homeowners' Association and/or owners of condominiums at that development. The Outriggers Accessway is currently held by the County of Los Angeles. It does not adjoin any public beach or public lateral easement above the mean high tide line.

AFA's Management of the Easement

At its October 27, 2005 meeting, the Conservancy authorized the disbursement of up to $70,000 to AFA (See October 27, 2005 staff recommendation, Exhibit 9), to assist AFA in undertaking its initial obligation under the Management Plan for the Easement: to survey, identify and report to the Commission any encroachments within the Easement. Under the grant, AFA surveyed the Easement and found several encroachments, including a wall along PCH that blocks access to the Easement, and assorted other improvements (generator and associated concrete slab, fence, railing, planter, light posts, and landscaping) within the Easement**.** AFA reported these findings to the Commission, which, in April 2007, initiated an administrative enforcement action against Ackerberg to remove the encroachments on the Easement as well as encroachments affecting the lateral beach easement. Unbeknownst to the Conservancy staff, in January 2009, AFA also independently initiated its lawsuit against Ackerberg (the AFA-Ackerberg litigation), ostensibly seeking to remedy these very same encroachments, under a provision of the Coastal Act (Public Resources Code Section 30820) which allows for private enforcement of violations of the Coastal Act.

For various reasons, including Ackerberg's own repeated requests for continuances, the Commission's hearing on its administrative enforcement action did not occur until July 8, 2009.

Prior to the hearing, on July 3, 2009, Ackerberg's attorneys submitted a package of materials to the Commission, including a lengthy letter, presenting Ackerberg arguments in opposition to the proposed enforcement by the Commission. Included in that package was a "Judgment Pursuant to Stipulation" (the "Judgment," Exhibit 5) – a judgment based on a settlement agreement (the "Settlement," Exhibit 4) – that had been entered in the AFA–Ackerberg litigation and purported to resolve that litigation.

On July 6, 2009, Commission staff provided to Conservancy staff a copy of the Judgment and the other materials Ackerberg had submitted to the Commission. This was the first that any Conservancy staff person was aware that AFA had initiated its litigation against Ackerberg and that the litigation had been concluded without any direct consultation with the Conservancy staff. See Exhibit 10, Declaration of Sam Schuchat.[1] Despite the Conservancy's direct interest in the Easement and despite the Conservancy's ongoing relationship with AFA through grants that the Conservancy had continued to provide for management of other easements, AFA had never consulted with the Conservancy about the terms of the Settlement that became the basis for the stipulated Judgment.

Although AFA did not give Conservancy staff an opportunity to consider the proposed settlement by AFA, Conservancy staff did have an opportunity in the past to consider and reject a proposal similar to the one that now has taken form in the Settlement and Judgment. In January of 2009, the Executive Officer of the Conservancy was approached through an intermediary to arrange a meeting between Ackerberg's attorney and Conservancy staff. At that meeting Ackerberg's attorney raised the possibility of having Ackerberg pay for the development, opening and maintenance and operation of the Outrigger Accessway (held by Los Angeles County) in exchange for the extinguishment of the Easement. The Executive Officer rejected that proposal, noting the long-standing policy of the Commission and Conservancy, embedded in legislation, to enhance and improve access to the coast, rather than to trade one possible accessway for another. See Exhibit 10.

Conservancy staff does not know whether Ackerberg's attorney ever conveyed the Executive Officer's rejection and the reasons for it to AFA. However, it is clear that AFA got that exact message in a very direct and unambiguous way two weeks before AFA entered into the Settlement and Judgment. On June 4, 2009, Commission staff and its Executive Director, Peter Douglas, met with AFA's Executive Director, Steve Hoye, and AFA's attorney. In that meeting, Mr. Douglas and Commission staff made it clear that they would never agree to exchanging the Easement for another public access easement or allow Ackerberg to pay her way out of opening the Easement. Mr. Hoye assured Commission staff that there was no deal to settle the matter on those or other terms. (See Declarations of Peter Douglas and Aaron McLendon, attached as Exhibits 10 and 11).[2] Despite this assurance, a mere two weeks later AFA and Ackerberg entered into just such a deal – the Settlement, which was entered as the Judgment on June 19, 2009.

[1] This declaration was submitted in connection with the Commission and Conservancy motion to intervene and to vacate the Judgment in the case between AFA and Ackerberg, in which the Judgment was entered. That motion was heard on June 22, 2010 but the judge stayed any decision on the motion until the case of *Ackerberg v. Commission and Conservancy* is resolved.

[2] These declarations were also submitted in connection with the Commission and Conservancy motion to intervene and to vacate the Judgment in the case between AFA and Ackerberg – see footnote 1.

The Terms of the Settlement and Judgment

The Settlement and Judgment in the AFA-Ackerberg litigation contain a number of provisions that have the potential to adversely affect, impair or terminate the Easement and thus frustrate the purpose of the OTD and the terms of AFA's Acceptance – to develop and provide public access across the Ackerberg property to the shoreline. The Settlement and Judgment also confer benefits on AFA and its attorneys, while failing to further the public interest in prompt development and opening of the Easement. The terms of the Settlement and Judgment are as follows:

1. The Settlement and Judgment each expressly provide that their terms fully resolve the litigation and all issues relating to the claims made in the underlying litigation, including allegations that Ackerberg has unlawfully placed encroachments on and prevented the development and opening of the Easement.
2. The Judgment provides for the payment of over $10,000 to AFA's attorneys for fees incurred in the AFA-Ackerberg litigation.
3. Rather than requiring Ackerberg to promptly remove any encroachments and permit the development and opening of the *Easement*, the Settlement and Judgment require that AFA immediately initiate litigation against the County of Los Angeles and a private property owner seeking to remove encroachments on and force the opening of another remote accessway - the *Outrigger Accessway* - which is located some distance from the Ackerberg property and which, like the Easement, crosses privately-owned property. (Consistent with the terms of the Judgment, the Outrigger Accessway lawsuit was filed seven days after the Judgment in the AFA-Ackerberg litigation was signed on June 19, 2009.)
4. Under the terms of the Judgment, Ackerberg and her attorneys will participate with AFA and its attorneys in the Outrigger Accessway litigation, Ackerberg's attorneys will control the litigation (extending to decisions as to when or whether to conclude it), and Ackerberg will pay all costs of the litigation, including the fees of AFA's attorneys. Ackerberg will fund the Outrigger litigation through final judgment or settlement and through any subsequent appeal.
5. The Judgment requires that if the Outrigger Accessway litigation is successful in removing barriers to the opening of the Outrigger Accessway, AFA must next apply for a coastal development permit to develop and improve the Outrigger Accessway. If the permit is issued, AFA must undertake the development and improvement of the Outrigger Accessway. In this event, Ackerberg has also agreed to pay for AFA's costs in developing and improving the Outrigger Accessway.
6. Finally, under the Judgment, once the Outrigger Accessway has been successfully opened and developed, AFA will jointly apply with Ackerberg to the Commission to terminate or extinguish the Easement (presumably on the theory that the existence of an opened Outrigger Accessway forecloses any need for the Easement – see discussion below).
7. After the opening of the Outrigger Accessway, if it occurs, AFA will receive $125,000 from Ackerberg for maintenance and management of the Outrigger Accessway. In addition, at some unspecified time, pursuant to a contemplated future "written agreement to be entered into between AFA and the Conservancy," Ackerberg would also pay an additional $125,000 to the Conservancy for funding the Commission's "public access and enforcement program." If the Commission elects not to accept this funding, then Ackerberg is required to pay the $125,000 to AFA for additional management and maintenance of the Outrigger Accessway.

8. Under the Settlement and Judgment, only if the AFA Outrigger action against the County is unsuccessful (i.e., the Outrigger Accessway was not developed and opened as a result of the litigation) would AFA and Ackerberg then seek to design, improve and open the Easement, subject to the design restrictions and requirements specified in the Judgment (which arguably benefit Ackerberg rather than the public). Ackerberg would pay only for any improvements that Ackerberg desired (such as "security measures acceptable to Ackerberg"), but not otherwise called for under the Management Plan.
9. Finally, the provisions of the Settlement and Judgment purport to run with the land and to bind successors in interest to AFA and Ackerberg. One can assume that such provisions were included to enable Ackerberg and AFA to assert that any subsequent owner of the Ackerberg property and any successor to AFA are bound by the terms of the Settlement and the Judgment.

Analysis

The Effects of the Settlement and Judgment. Conservancy staff has concluded that the Settlement and Judgment, in several distinct ways, directly impair the Easement and defeat the public interest in expeditiously developing and opening the Easement.

First, if enforceable, at a minimum the Judgment precludes any improvement or development of the Easement by AFA or any successor to AFA until a final conclusion is reached in the Outrigger Accessway litigation. That could be very far into the future. Under the stipulated Judgment, Ackerberg's attorneys control such litigation even though AFA attorneys are jointly prosecuting it (and being paid to do so by Ackerberg) and Ackerberg is funding the litigation, theoretically through any level of available appeal. Quite plainly, Ackerberg has no interest in developing and opening the Easement on her property, and, given this control of the Outrigger Accessway litigation, the litigation could extend indefinitely. Indeed, the Outrigger case, now on file for two years and with little accomplished and no trial date or other timeline set, has been put on an indefinite hold by court order until the AFA-Ackerberg litigation is resolved. There is no end in sight at the trial court level, not to mention subsequent appeals.

Second, AFA is required, should such litigation be successful and the Outrigger Accessway is developed and opened, to jointly seek the termination and extinguishment of the Easement. This puts AFA in the entirely inconsistent position of seeking the extinguishment of the very Easement it has committed to developing and opening for the benefit of the public. Moreover, even if the Commission rejects such an application, nothing in the Settlement and Judgment requires Ackerberg to then remove encroachments on and allow the development and opening of the Easement. Under the Settlement and the Judgment, this would only occur if the Outrigger Accessway litigation is *unsuccessful*.

Third, the existence of the Judgment provides an argument that it can be used as a shield against any other attempt to seek the removal of encroachments and opening of the Easement. This is not mere speculation – Ackerberg's attorneys have made and continue to make exactly that claim in connection with the Commission's administrative enforcement action and in the subsequent litigation by which Ackerberg has challenged the Commission's administrative order to remove encroachments and open the Easement (the "Ackerberg v. Commission litigation"). They claim that the Commission's administrative enforcement action was barred by the Judgment in the AFA-Ackerberg case, under the legal theory of *res judicata*. Although the Commission rejected this claim in its administrative proceeding and decided to issue a cease and desist order requiring removal of the encroachments, Ackerberg continues to make that assertion in litigation

challenging the Commission's enforcement action. Moreover, there is little doubt that Ackerberg will continue to do so even more forcefully in any enforcement litigation by a successor to AFA.

Finally, under the terms of the Judgment, even under the most optimistic perspective, even if the Easement is ever designed, the design is dictated by the Judgment and has never been reviewed by Commission or Conservancy staff, as the Acceptance and Management Plan require. This raises a central issue: although the Conservancy retains a future contingent interest in the Easement and is recognized in the Acceptance and Management Plan as a direct participant in AFA's management of the easement, AFA not only failed to seek the Conservancy's input on the Judgment but failed to notify the Conservancy that it had initiated litigation against Ackerberg.

These conclusions are not just those of Conservancy staff. On July 5, 2011, the trial court judge in the Ackerberg v. Commission litigation issued his decision (Exhibits 16 and 17), upholding the Commission's order that Ackerberg remove encroachments and open the Easement for public use. In that decision, the judge made the following statements concerning the Settlement and Judgment and its relationship to the duties of AFA under its acceptance of the Easement and the Management Plan (Exhibit 17, pages 15-16):

> True, the Commission and the Conservancy entered into a Management Plan with AFA. But for some reason, AFA did not perform its duties under the Plan.
>
> "AFA's failure to give the Commission notice of the proposed settlement by itself precludes a finding of privity. It simply did not adequately represent the interests of the Commission and the Conservancy".
>
> "AFA's settlement of the Ackerberg lawsuit is based on a potential exchange of the Ackerberg easement for the Malibu Terrace easement [Outrigger Accessway]. As such, it is directly contrary to the Malibu LCP. It also disregards AFA's contractual duty under the Management Plan to develop, open, and operate the Ackerberg easement. Nothing in the Plan permits AFA to rely on the opening of the County's Malibu Terrace easement [Outrigger Accessway] to avoid its duty. . . . [footnote] The tradeoff for this disregard of policy and contractual duty is that AFA received the financial benefit of $10,500 in attorney's fees, a role for its attorneys in the lawsuit against the County and payment of AFA's attorney's fees, and probable receipt of $125,000 for management of one of the two easements.
>
> AFA's failures discussed *supra* demonstrate that, while it was acting in the public interest in filing the Ackerberg lawsuit, it did not act in the public interest in settling the lawsuit. No matter how Ackerberg argues that the Malibu Terrace easement [Outrigger Accessway] is better than hers, the fact is that the public is entitled to both. The judgment is pointed towards eliminating the Ackerberg easement in favor of the Malibu Terrace easement, which is directly contrary to the Malibu LCP. The judgment's finding that the settlement is "in the interests of justice" (AR 640) does not purport to set forth what the public interest is, nor could it without involvement of the Commission and the Conservancy.

In late August 2011, Ackerberg appealed the decision in the Ackerberg v. Commission litigation California Court of Appeal, where it is pending. Thus, the trial court's decision is not a final judicial determination.

AFA's claims. AFA's Executive Director, Steve Hoye, sent a letter dated July 15, 2009 (Exhibit 13) to the Executive Officer of the Conservancy attempting to explain AFA's claim that the settlement provides benefits in the form of funding for the possible opening of the Outrigger Accessway, and that it does not directly or necessarily lead to the extinguishment of the Easement. While this claim may be true in part, it ignores all of the other negative impacts of the Settlement, as detailed above. Moreover, there is no funding required by the Settlement and Judgment that directly benefits the Easement or that furthers its development and eventual opening, which, after all, was the primary responsibility with which AFA was charged under the Acceptance and Management Plan. To the contrary, *at best*, the Settlement and Judgment directly and incontrovertibly delay the development of the Easement and create the considerable and already realized risk that Ackerberg and her attorneys will use the Judgment as ammunition in their battle (to which Ackerberg is, by all past action, fully committed, financially and otherwise) to defeat the long-term viability of the Easement. *At worst,* the Judgment could result in the extinguishment of the very Easement that AFA is charged with protecting, enhancing and opening. Indeed, Steve Hoye admits as much in his letter of July 15, 2009, when he says: "Under our settlement agreement we have initiated a process that will provide *either or both of* these easements will be opened and operated for the public use and enjoyment." Put another way, Mr. Hoye acknowledges that only *one* of the easements may be opened and operated. The next sentence in his letter also indicates what may be the true motivation behind his settlement with Ackerberg – the "private funds guaranteed by the settlement," which will flow to AFA. That, perhaps, justifies to AFA the potential risk of losing one accessway – the very accessway AFA is obligated to develop and open.

On July 24, 2009, AFA's attorney also provided a written defense of AFA's action (Exhibit 14), in response to a letter sent to AFA on behalf of the Conservancy and Commission by the California Attorney General's Office. This letter takes a slightly different tack. First, AFA's attorney asserts that under the Settlement and Judgment AFA does not and is not required to *advocate* the extinguishment of the Easement, if the Outrigger Accessway litigation is successful. The Settlement and Judgment simply requires AFA to jointly *apply* for such extinguishment. This is certainly a possible interpretation of the provisions of the terms of the Settlement agreement underlying the Judgment. At best, the relevant provisions are somewhat ambiguous, and it is unclear whether Ackerberg's attorneys would agree with AFA's interpretation. AFA also argues that it has fully carried out the Management Plan and that the Settlement and Judgment serve to advance implementation and development of the Easement, through ensuring Ackerberg's agreement with the design of the accessway. Along the same lines, AFA also asserts that it is ready and willing to proceed with the development and opening of the Easement at any time. However, what AFA ignores is the fact that the Judgment does not allow that. It only requires Ackerberg to implement the agreed design and remove encroachments *if the Outrigger Accessway litigation is unsuccessful.* If the litigation is successful, Ackerberg has no explicit obligation to remove encroachments, implement the design or allow the opening. Indeed, it is likely that in the absence of such express requirements, Ackerberg will argue that it is not bound to do so and that the issue cannot be reopened by AFA or any successor since the Judgment was intended to resolve all such issues.

One can anticipate that AFA will also argue that it has not violated the terms of the Acceptance and the Management Plan for other reasons. First, AFA may assert that the Settlement and resulting Judgment was in some way compelled by the fact that the OTD requires that the Outrigger Accessway be opened and developed before and in lieu of the Easement. Ackerberg's

attorneys made this same argument in the Commission enforcement proceeding. This argument is based on a "revised finding," added to the Commission staff recommendation as part of the Commission's approval of the 1985 development permit. (The language of the "revised finding" is included in the Commission staff recommendation for the Ackerberg coastal development permit, which, in turn, is part of the OTD, Exhibit 5. The "revised finding" starts at the third from last page of Exhibit 5). That revised finding, while noting that a Commission *policy* favoring the opening of a public accessway within 500 feet of another potential accessway *may* be adopted under a future local coastal plan (LCP), makes clear that it was not intended to condition or restrict the Easement OTD nor require its future extinguishment. Moreover, the subsequently adopted Local Coastal Program did not contain any such policy. Nor, in fact, is the Outrigger Accessway within 500 feet of the Easement. Finally, the Outrigger Accessway, like the Easement, also encumbers private property and, thus, it is hard to fathom why one private party (Ackerberg) should be able to avoid the obligation to provide otherwise required public access across her property, while another (the private owners of the Outrigger Accessway) is required to provide public access simply because the holder of the accessway across the Ackerberg property is a nonprofit entity rather than a public one.

AFA may also assert that the Judgment does not adversely affect Easement rights other than the potential for a short delay in the development of the Easement, pending resolution of the Outrigger Accessway litigation. As noted above, the Outrigger Accessway litigation is not considered complete until any potential appeal is exhausted and, thus, this "short period" could extend to multiple years of delay.

AFA may also argue that the "solution" provided by the Settlement and Judgment was a good one for coastal access generally, potentially trading one public accessway for another with funding provided for the maintenance and operation of the latter for many years. Whether or not this was a good *policy* decision[3] misses the point. AFA's responsibilities are to the long-term viability of the Easement. While AFA (or any other entity or person) is free to advocate, litigate or otherwise strive to open *additional* public access along the coast, (which efforts Conservancy staff would applaud), under the Management Plan and Acceptance AFA had only one charge: to develop and open the Easement. In agreeing to a Settlement Agreement that retarded, rather than advanced, this purpose, AFA has ignored its explicit obligations.

Conclusion

In short, as discussed in detail above, AFA failed in its obligations under the Acceptance and the Management Plan by entering into the Settlement and Judgment, which impair and adversely affect the public interest in the Easement by: 1) significantly delaying any opening and development of the easement, 2) failing to allow Conservancy (and Commission) involvement in the design; 3) creating circumstances that will require AFA and Ackerberg to jointly apply to the Commission for the extinguishment of the Easement and that will allow Ackerberg to argue that the Easement should be extinguished (whether in the application before the Commission or in other litigation); 4) raising the potential that the Judgment will bar any Commission enforcement action (as Ackerberg has argued repeatedly) or any other efforts to remove the encroachments and develop the Easement; and 5) creating the potential inability of any party to force Ackerberg

[3] It goes without saying that the Conservancy and Commission staff emphatically do not agree that it is good policy to trade one public access easement for another, to allow the owner of property across which a public access easement crosses to buy or bully her way out of providing public access, or to otherwise reduce the potential for public access to and along the coast.

to remove encroachments, implement the improvements and open the easement if the Outrigger Accessway litigation is successful.

CONSISTENCY WITH CONSERVANCY'S ENABLING LEGISLATION:

Pursuant to Chapter 9 of Division 21 (Public Resources Code Sections 31400 *et seq.*), the Legislature has conferred on the Conservancy a "principal role in the implementation of a system of public accessways to and along the coast."

In order for the Conservancy to carry out that function, Division 21 has generally provided to the Conservancy broad authority to provide grants and other assistance as necessary to aid local nonprofit and public entities in establishing coastal access (Sections 31400.1 and 31400.2) and to acquire property interests to assure an adequate system of public accessways along the entire coastline (Sections 31402 and 31404). In particular, under Section 31402.3(c), the Conservancy has been charged with oversight with respect to any offer to dedicate public access that has been required by the Coastal Act and that has been accepted by a nonprofit organization. This oversight requires that: 1) the Conservancy review and approve the nonprofit entity's management plan for the accepted accessway; and 2) the Conservancy take a legal interest in the accepted easement in the form of a "right of entry" to reclaim the accessway from the nonprofit entity, if it is determined that the nonprofit entity is not managing or operating the accessway consistent with the management plan (Section 31402.3(c)).

In the current situation, AFA has entered into a Settlement and has allowed the entry of a Judgment inconsistent with the approved Management Plan for the Easement. The Settlement and Judgment have directly threatened the ability of the Conservancy to carry out the intended purposes of the offer to dedicate (i.e., to implement the anticipated coastal access across the Ackerberg property). Under these circumstances, the Conservancy is clearly entitled, and possibly compelled, to exercise its right to divest AFA of the Easement and to vest the Easement either in the Conservancy or in another qualified and willing entity. The proposed resolution allows the Executive Officer to vest the Easement in another entity either initially, or, if that is not possible, then in the future, following an intermediate accession to the interest by the state, under the jurisdiction of the Conservancy.

COMPLIANCE WITH CEQA:

The mere change in ownership of an easement, with no intended change in use or other effect on the environment is exempt from review under CEQA under the CEQA Guidelines, 14 Cal. Code Reg., Section 15061, since there is no possibility that the change in ownership may have a significant effect on the environment.

Further, the proposed change of ownership is also categorically exempt under Section 15325, since it involves a transfer to preserve open space or lands for public park-like purposes.

Finally, at the time the Offer to Dedicate was required as a condition of the Ackerberg coastal development permit, the California Coastal Commission examined the Easement and its use as a public accessway for environmental impacts under a review considered "functionally equivalent" to the review required by CEQA. No additional review is required.

Staff will file a Notice of Exemption if the Conservancy adopts the resolution proposed by this staff recommendation.

EXHIBIT 5

Certificate of Acceptance of Vertical Public Access Easement by the Mountains Recreation and Conservation Authority, recorded 9/27/12

CCC-09-CD-01-A
(Ackerberg)

Recording Requested by and
When Recorded Return to:

California State Coastal Conservancy
1330 Broadway, 13th Floor
Oakland, Ca 94612
Attention: Legal Counsel [JJ]

Recording Fees Exempt per Gov Code§ 6103

APN: 4452-002-011

CERTIFICATE OF ACCEPTANCE OF EASEMENT

(Ackerberg Public Access Easement)

This Certificate of Acceptance of Easement is made this Sept. 12th day of 2012 by the Mountains Recreation and Conservation Authority ("MRCA"), a local public entity established under the California Joint Powers Act.

Pertinent Facts

A. The Mountains Recreation and Conservation Authority ("MRCA") is a local government public entity established pursuant to the California Joint Powers Act. The members of the MRCA are the Santa Monica Mountains Conservancy, a California state agency, and the Conejo Recreation and Park District and the Rancho Simi Recreation and Park District, both local park agencies established under California law. MRCA is dedicated to the preservation and management of local open space and parkland, watershed lands, trails, and wildlife habitat and manages and provides ranger services for public lands and parks that it owns and that are owned by other public agencies.

B. The State Coastal Conservancy (the "Conservancy") is an agency of the State of California existing under Division 21 of the California Public Resources Code, which serves as a repository for interests in land whose reservation is required to meet the policies and objectives of the California Coastal Act (Division 20 of the California Public Resources Code) (the "Coastal Act") or a certified local coastal plan or program and whose statutory mandate includes the obligation to accept offers to dedicate public accessways required under the Coastal Act.

B. The California Coastal Commission (the "Commission") is an agency of the State of California established pursuant to California Public Resources Code Section 30300 and is charged with primary responsibility for implementing and enforcing the Coastal Act.

C. In 1985, Norman J. and Lisette Ackerberg, the then-owners of certain coastal property legally described as set forth in Exhibit A hereto (the "Property") in Malibu, California, executed and recorded an offer to dedicate a public access easement (the "OTD") across the Property as a condition to Coastal Development Permit No. 5-84-754, issued by the Commission. The

OTD was recorded on April 4, 1985 as Document No. 85 369283 of the Official Records of Los Angeles County and is attached hereto as Exhibit B.

D. Access for All ("AFA"), a nonprofit corporation, created and existing under the laws of the State of California, accepted the OTD by executing and recording its Certificate of Acceptance as Document No. 03- 3801416 on December 17, 2003, in the Official Records of Los Angeles County.

E. Under the terms of its Certificate of Acceptance, AFA held the public access easement (the "Easement") created by its acceptance subject to the condition that should AFA fail to carry out its responsibilities to manage the Easement for the purpose of allowing public pedestrian access to the shoreline, then all of AFA's right, title and interest in the Easement would vest in the Conservancy (or another delegated entity) upon: (1) a finding by the Conservancy, made at a noticed public hearing, that AFA failed to carry out its responsibilities and (2) the recording of a Certificate of Acceptance by the Conservancy or a designated qualified entity.

F. On September 22, 2011, following a noticed public hearing, the Conservancy determined that AFA had failed to carry out its responsibilities under the Certificate of Acceptance to manage the Easement and, accordingly, the Conservancy adopted a resolution which authorized the Conservancy's Executive Officer to take all necessary steps (including the execution and recording of a Certificate of Acceptance) to vest all right, title and interest in the Easement in the Conservancy, or alternatively or subsequently, in another qualified entity designated by the Executive Officer of the Conservancy and acceptable to the Executive Director of the Commission.

G. Following the September 22, 2011 public hearing, the Executive Officer of the Conservancy designated MRCA, whose purposes and powers include the holding, management and operation of lands for public recreational purposes, to accept the Easement. MRCA desires to take title to and to manage and operate the Easement.

H. The Conservancy, MRCA and the Commission have agreed in writing to an unrecorded management plan for the Easement, dated July 25, 2012 (the "Management Plan"). Copies of the Management Plan, which may by amended upon the written agreement of all three parties, are maintained in the offices of the Conservancy and the Commission.

I. The Conservancy and the Commission, independently, have found that the acceptance of the Easement by MRCA will serve to maintain public access to the coast, consistent with the objectives of California Public Resources Code Sections 30210 et seq., 30212.5, 30230, and 31400 et seq.

NOW, THEREFORE, MRCA, in light of the Pertinent Facts recited above, hereby accepts all right, title and interest in the Easement held by AFA, which was created by the OTD recorded on April 4, 1985, as Document No. 85 369283 in the Official Records of Los Angeles County and AFA's acceptance of the OTD by recording its Certificate of Acceptance on December 17, 2003, as Document No. 03 3801416 in the Official Records of Los Angeles County, subject to the following terms and conditions:

1. MRCA covenants and agrees to use, maintain and operate the Easement solely for public access to the coast, consistent with the terms, conditions and restrictions of the OTD.

2. MRCA covenants and agrees to use, maintain and operate the Easement consistent with the Management Plan, as it may be amended from time-to time by written agreement of MRCA, the Conservancy and the Commission.

3. If MRCA ceases to exist, or fails to carry out its responsibilities under this Acceptance to use, maintain and operate the Easement as specified in paragraphs 1 and 2, above, then all of MRCA's right, title and interest in the Easement shall vest in the State of California, acting by and through the Conservancy, or its successor, upon acceptance by the Conservancy; provided, however, that the State, acting through the Executive Officer of the Conservancy or its successor agency, may designate another public agency or private association acceptable to the Executive Director of the Commission (the "Designee"), in which case vesting shall be in the Designee rather than the State. Notwithstanding the foregoing, the right, title and interest of MRCA in the Easement may not vest in the Conservancy or Designee except upon (1) a finding by the Conservancy, made at a noticed public hearing, that MRCA has ceased to exist, is no longer qualified as a holder of the Easements (or one of them) or failed to carry out its responsibilities; and (2) recordation by the State or the Designee of a Certificate of Acceptance, substantially in the form set forth in California Government Code Section 27281. Nothing herein shall prevent MRCA from transferring the Easement, to a qualified entity pursuant to the terms of the Easement and subject to the terms of the OTD, the terms of the Management Plan, the approval of the Commission and the Conservancy, and the terms and conditions of this Acceptance, thereby relieving itself of the obligation to manage, operate, and maintain the Easement under the terms of this Acceptance.

The signature of MRCA's authorized representative below certifies that MRCA accepts the Easement pursuant to authority conferred by the Board of Directors of MRCA on August 7, 2012, and MRCA consents to the recordation thereof by its duly authorized officer. In accepting the Easement, MRCA covenants and agrees to the terms and conditions set forth above.

MOUNTAINS RECREATION AND CONSERVATION AUTHORITY

By: _____ Dated: September 12, 2012
RORIE SKEI

Its: Chief Deputy Executive Officer

ACKNOWLEDGMENT

STATE OF CALIFORNIA }ss
COUNTY OF VENTURA }ss

On SEPT. 12, 2012, before me, MALA H PATEL, NOTARY PUBLIC
personally appeared RORIE ANN SKEI,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he~~/she/~~they~~ executed the same in ~~his~~/her/~~their~~ capacity(~~ies~~), and that by ~~his~~/her/~~their~~ signature(s) on the instrument, the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

MGC1 MALA H. PATEL COMM. # 1910995 NOTARY PUBLIC - CALIFORNIA VENTURA COUNTY COMM. EXPIRES NOV. 26, 2014 MGC1

Signature Mala H Patel

(Notarial Seal)

ACKNOWLEDGMENT BY THE STATE COASTAL CONSERVANCY
OF MRCA ACCEPTANCE OF EASEMENT

This is to certify that the State Coastal Conservancy, through its Executive Officer, has designated the Mountains Recreation and Conservation Authority as the public entity to hold all right, title and interest in the Easement created by the OTD recorded on April 4, 1985, as Document No. 85 369283 in the Official Records of Los Angeles County and the Certificate of Acceptance recorded on December 17, 2003, as Document No. 03 3801416 in the Official Records of Los Angeles County, pursuant to the determination made and authority conferred by the State Coastal Conservancy on September 22, 2011.

STATE COASTAL CONSERVANCY

By: _____ Dated: 8/28/12
Samuel Schuchat
Its: Executive Officer

ACKNOWLEDGMENT

STATE OF California }ss
COUNTY OF Alameda }ss

On August 28, 2012, before me, Amada L. Rios, personally appeared Samuel Schuchat, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature Amada L. Rios

AMADA L. RIOS
Commission # 1900556
Notary Public - California
Alameda County
My Comm. Expires Aug 20, 2014

ACKNOWLEDGMENT BY THE CALIFORNIA COASTAL COMMISSION
OF ACCEPTANCE OF EASEMENT

This is to certify that the Mountains Recreation and Conservation Authority is a public agency acceptable to the Executive Director of the California Coastal Commission to hold all right, title and interest in the Easement created by the OTD recorded on April 4, 1985, as Document No. 85 369283 in the Official Records of Los Angeles County and the Certificate of Acceptance recorded on December 17, 2003, as Document No. 03 3801416 in the Official Records of Los Angeles County.

CALIFORNIA COASTAL COMMISSION

By: _____ Dated: August 14, 2012
Karla Galvez
Its: Staff Counsel

State of California
County of San Francisco

On August 14, 2012 before me, Jeff G. Staben-Mihalek, a Notary Public, personally appeared Karla Galvez, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

JEFF G. STABEN-MIHALEK
Commission # 1966753
Notary Public - California
San Francisco County
My Comm. Expires Jan 15, 2016

WITNESS my hand and official seal.

Signature _____ (Seal)

EXHIBIT "A"

Legal Description of the Property

Real property located in the city of Malibu, county of Los Angeles, state of California, more particularly described as follows:

Parcel One (APN 4452-002-013)

A PARCEL OF LAND IN LOS ANGELES COUNTY, STATE OF CALIFORNIA, BEING A PORTION OF THE RANCHO TOPANGA MALIBU SEQUIT, AS CONFIRMED TO MATTHEW KELLER BY PATENT RECORDED IN BOOK 1 PAGE 407 ET SEQ., OF PATENTS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE SOUTHERLY LINE OF THE 80 FOOT STRIP OF LAND DESCRIBED IN DEED TO THE STATE OF CALIFORNIA RECORDED IN BOOK 15228 PAGE 342, OFFICIAL RECORDS, OF SAID COUNTY, SAID POINT OF BEGINNING BEING WESTERLY ALONG SAID SOUTHERLY LINE FOLLOWING THE ARC OF A CIRCULAR CURVE CONCAVE SOUTHERLY HAVING A RADIUS OF 5608.01 FEET, A DISTANCE OF 638.47 FEET FROM A POINT BEING DISTANT SOUTH 6°11'30" WEST 40 FEET FROM HIGHWAY ENGINEER'S CENTERLINE STATION 989 + 65.17 AT THE WESTERLY EXTREMITY OF THAT CERTAIN COURSE DESCRIBED IN SAID DEED AS SOUTH 83°48'30" EAST 2153.25 FEET, THENCE EASTERLY ALONG SAID SOUTHERLY LINE 86.54 FEET, THENCE LEAVING SAID SOUTHERLY LINE SOUTH 0°33'09" WEST 42.93 FEET; THENCE NORTH 88°48'37" WEST 10.70 FEET, THENCE SOUTH 1°11'23" WEST TO THE ORDINARY HIGH TIDE LINE OF THE PACIFIC OCEAN; THENCE WESTERLY ALONG SAID TIDE LINE TO THE INTERSECTION WITH A LINE BEARING SOUTH 0°13'30" WEST FROM THE POINT OF BEGINNING; THENCE NORTH 0°13'30" EAST TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM, AS CONTAINED IN VARIOUS DEEDS FROM MARBLEHEAD LAND COMPANY, RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY:

(A) ALL MINERALS, OIL, PETROLEUM, ASPHALTUM, GAS, COAL AND OTHER HYDROCARBON SUBSTANCES AND RIPARIAN RIGHT, CONTAINED IN, ON, WITHIN AND UNDER SAID LAND BUT WITHOUT RIGHT OF ENTRY.

(B) ALL LITTORAL RIGHTS WITH THE FULL AND EXCLUSIVE RIGHT TO PRESERVE AND PROTECT SAID LITTORAL RIGHTS.

EXHIBIT "A" (continued)

Parcel Two (APN 4452-002-011)

THAT PORTION OF THE RANCHO TOPANGA MALIBU SEQUIT, IN THE COUNTY OF LOS ANGELS, STATE OF CALIFORNIA, AS CONFIRMED TO MATTHEW KELLER BY PATENT RECORDED IN BOOK 1, PAGE 407 ET SEQ., OF PATENTS IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE SOUTHERLY LINE OF THE 80 FOOT STRIP OF LAND DESCRIBED IN DEED TO THE STATE OF CALIFORNIA RECORDED IN BOOK 15228, PAGE 342 OF OFFICIAL RECORDS OF SAID COUNTY, SAID POINT OF BEGINNING BEING WESTERLY ALONG SAID SOUTHERLY LINE FOLLOWING THE ARC OF A CIRCULAR CURVE CONCAVE SOUTHERLY HAVING A RADIUS OF 5608.01 FEET, A DISTANCE OF 490.17 FEET FROM A POINT BEING DISTANT SOUTH 6° 11' 30" WEST 40 FEET FROM ENGINEER'S CENTERLINE STATION 989 PLUS 65.17 FEET AT THE WESTERLY EXTREMITY OF THAT CERTAIN COURSE DESCRIBED IN SAID DEED AS SOUTH 83° 48' 30" EAST 2153.25 FEET, THENCE WESTERLY ALONG SAID CURVE 61.76 FEET, THENCE LEAVING SAID SOUTHERLY LINE AND CURVE SOUTH 00° 33' 09" WEST 42.93 FEET, THENCE NORTH 88° 48' 37" WEST 10.70 FEET, THENCE SOUTH 1 o 11' 23" WEST TO THE ORDINARY HIGH TIDE LINE OF THE PACIFIC OCEAN, THENCE EASTERLY ALONG SAID TIDE LINE TO AN INTERSECTION WITH A LINE BEARING SOUTH 1° 11' 23" WEST FROM THE POINT OF BEGINNING, THENCE NORTH 1° 11' 23" EAST TO THE POINT OF BEGINNING;

EXCEPTING THEREFROM, AS CONTAINED IN VARIOUS DEEDS FROM MARBLEHEAD LAND COMPANY, RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY;

(A) ALL MINERALS, OIL, PETROLEUM, ASPHALTUM, GAS, COAL AND OTHER HYDROCARBON SUBSTANCES AND RIPARIAN RIGHT, CONTAINED IN, ON, WITHIN AND UNDER SAID LAND BUT WITHOUT RIGHT OF ENTRY;

(B) ALL LITTORAL RIGHTS WITH THE FULL AND EXCLUSIVE RIGHT TO PRESERVE AND PROTECT SAID LITTORAL RIGHTS.

EXHIBIT B

Return Original To and
Recording Requested By:
State of California
California Coastal Commission
631 Howard Street, 4th Floor
San Francisco, California 94105

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RECORDED IN OFFICIAL RECORDS
OF LOS ANGELES COUNTY, CA
APR 4 1985 AT 8 A.M.
Recorder's Office
FREE 1

IRREVOCABLE OFFER TO DEDICATE

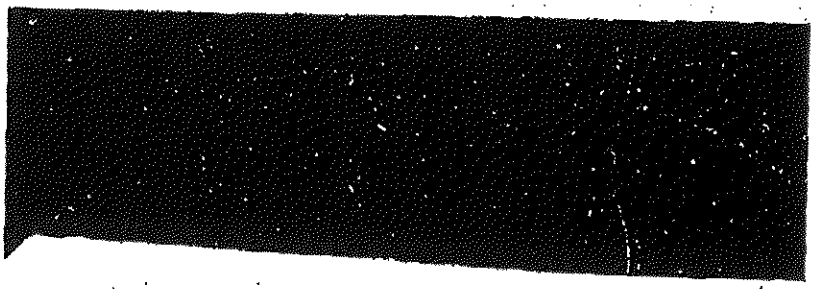
I. WHEREAS, (1) Norman J. Ackerberg and Lisette Ackerberg, husband and wife as Joint Tenants is/are the record owner(s), hereinafter referred to as "owner(s)", of the real property located at (2) 22486 Pacific Coast Highway, Malibu, California, legally described as particularly set forth in attached (3) Exhibit A hereby incorporated by reference and hereinafter referred to as the "subject property"; and

II. WHEREAS, the California Coastal Act of 1976 (hereinafter referred to as the "Act") creates the California Coastal Commission (hereinafter referred to as the "Commission") and requires that any coastal development permit approved by the Commission or local government as defined in Public Resources Code Section 30109 must be consistent with the policies of the Act set forth in Chapter 3 of Division 20 of the Public Resources Code; and

III. WHEREAS, the People of the State of California have a legal interest in the lands seaward of the mean high tide line; and

IV. WHEREAS, pursuant to the California Coastal Act of 1976, the owner(s) applied to the Commission for a coastal development permit for (4) Demolition of an existing single family dwelling guest house, swimming pool, and construction of a new two-story single family dwelling and swimming pool, and renovation of existing tennis court on the subject property; and

V. WHEREAS, a coastal development permit no. (5) 5-84-756 was



granted on (6) January 24, 1985 by the Commission in accordance with the provisions of the Staff Recommendation and Findings (7) (Exhibit 5) attached hereto and hereby incorporated by reference, subject to the following conditions: (8)

1. Vertical Access Condition. Prior to transmittal of the permit, the Executive Director shall certify in writing that the following conditions have been satisfied. The applicant shall execute and record a document, in a form and content approved by the Executive Director of the Commission, irrevocably offering to dedicate to an agency approved by the Executive Director, an easement for public pedestrian access to the shoreline. Such easement shall be 10 feet wide located along the eastern boundary of the property line and extend from the northerly property line to the mean high tide line. Such easement shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed.

The offer shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of 21 years, such periods running from the date of recording.

2. Revised Plans. Prior to transmittal of permit, the applicant shall be required to submit revised plans which conform the structural and deck stringline criteria contained in the adopted Interpretive Guidelines for the Malibu/Santa Monica Mountains.

VI. WHEREAS, the subject property is a parcel located between the first public road and the shoreline; and

VII. WHEREAS, under the policies of Sections 30210 through 30212 of the California Coastal Act of 1976, public access to the shoreline and along the coast is to be maximized, and in all new development projects located between the first public road and the shoreline shall be provided; and

VIII. WHEREAS, the Commission found that but for the imposition of the above condition, the proposed development could not be found consistent with the public access policies of Section 30210 through 30212 of the

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California Coastal Act of 1976 and that therefore in the absence of such a condition, a permit could not have been granted;

NOW THEREFORE, in consideration of the granting of permit no. (9) P-84-754 to the owner(s) by the Commission, the owner(s) hereby offer(s) to dedicate to the People of California an easement in perpetuity for the purposes of (10) public pedestrian access to the shoreline

located on the subject property (11) along the eastern boundary of the property line at a width of ten feet, and extending from the northerly property line to the mean high tide line and as specifically set forth by attached Exhibit C (12) hereby incorporated by reference.

This offer of dedication shall be irrevocable for a period of twenty-one (21) years, measured forward from the date of recordation, and shall be binding upon the owner(s), their heirs, assigns, or successors in interest to the subject property described above. The People of the State of California shall accept this offer through the local government in whose jurisdiction the subject property lies, or through a public agency or a private association acceptable to the Executive Director of the Commission or its successor in interest.

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Acceptance of the offer is subject to a covenant which runs with the land, providing that any offeree to accept the easement may not abandon it but must instead offer the easement to other public agencies or private associations acceptable to the Executive Director of the Commission for the duration of the term of the original offer to dedicate. The grant of easement once made shall run with the land and shall be binding on the owners, their heirs, and assigns.

Executed on this 5th day of March, 1985, at Palm Beach, Florida.

Dated: March 5, 1985

Signed Norman J Ackerberg

Norman J. Ackerberg

Type or Print Name of Above

Signed Lisette Ackerberg

Lisette Ackerberg

Type or Print Name of Above

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Acceptance of the Offer is subject to a covenant which runs with the land, providing that any offeree to accept the easement may not abandon it but must instead offer the easement to other public agencies or private associations acceptable to the Executive Director of the Commission for the duration of the term of the original Offer to Dedicate.

Executed on this _____ day of _____, at _____, California.

Dated: _____ Signed _____
Owner

_____
Type or Print

Signed _____

_____
Type or Print

NOTE TO NOTARY PUBLIC: If you are notarizing the signatures of persons signing on behalf of a corporation, partnership, trust, etc., please use the correct notary jurat (acknowledgment) as explained in your Notary Public Law Book.

State of California,)
)SS
County of Los Angeles)

On this 1st day of April, in the year 1985, before me L. Morris Dennis, a Notary Public, personally appeared Norman Ackerberg and Lisette Ackerberg

X personally known to me

/ / proved to me on the basis of satisfactory evidence to be the person(s) whose name is subscribed to this instrument, and acknowledged that he/she/they executed it.

OFFICIAL SEAL
L MORRIS DENNIS
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires JUL 24, 1985

L. Morris Dennis
NOTARY PUBLIC IN AND FOR SAID COUNTY AND STATE

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COURT PAPER
STATE OF CALIFORNIA
STD 113 (REV 8-72)

This is to certify that the Offer to Dedicate set forth above is hereby acknowledged by the undersigned officer on behalf of the California Coastal Commission pursuant to authority conferred by the California Coastal Commission when it granted Coastal Development Permit No. 5-84-754 on January 24, 1985 and the California Coastal Commission consents to recordation thereof by its duly authorized officer.

Dated: March 27, 1985

T R [illegible]
Chief Counsel
California Coastal Commission

STATE OF California)
) ss
COUNTY OF San Francisco)

On March 27, 1985, before me Deborah S. Benrubi, a Notary Public, personally appeared T.R. Borman, personally known to me to be (or proved to me on the basis of satisfactory evidence) to be the person who executed this instrument as the Chief Counsel
TITLE
and authorized representative of the California Coastal Commission and acknowledged to me that the California Coastal Commission executed it.

OFFICIAL SEAL
NOTARY PUBLIC - CALIFORNIA
My comm. expires MAY 20, 1988

Deborah S Benrubi
Notary Public in and for said County and State

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EXHIBIT B

A. Project Description. The proposed project consists of the demolition of an existing single family dwelling, guest house and swimming pool and the construction of a new two-story single family dwelling with three-car garage, swimming pool and septic system. The newly proposed project involves construction of a new swimming pool on the seaward side of the residence. The previous swimming pool was located landward of the previously existing residence. In addition as part of the project, the applicant proposes to renovate an existing tennis court. Also, the proposed project will result in the relocation of the tennis court on the project site approximately 14 feet seaward.

B. Background. On June 9, 1983, the California Coastal Commission approved the construction of a 140-foot in length wood pile-supported, wood sheeted bulkhead. In its action to approve the project the Commission imposed a lateral access condition requiring an offer of dedication of an easement for public access from the mean high tide line to toe of the bulkhead. In addition the Commission required the applicants to assume the risks associated with development of the site which might result from flood or wave damage.

C. Public Access. The Coastal Act contains strong policy provisions in Sections 30210, and 30212, requiring public access to and along the shore. However, the requirements for the provision of access for the public to California's shoreline is not limited to the Coastal Act. The California Constitution in Article X, Section 4 provides:

> No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purposes . . .and the Legislature shall enact such law as will give the most liberal construction to this provision so that access to the navigable waters of this state shall always be attainable for the people thereof. (Emphasis added).

The Coastal Act contains more specific policies regarding the provision of public access to the State's shoreline. Coastal Act Section 30210 as set forth below, stipulates that in meeting the requirements of Section 4, Article X of the Constitution maximum public access, conspicuously posted shall be provided subject to certain conditions.

1. Lateral Access. The Coastal Act in Section 30210 requires the provision of public access along the shoreline in new development projects. An application for a seawall at this location in 1983 (5-83-360, Trueblood) was conditioned to provide public lateral access across the project site from the toe of the seawall to the mean high tide line. Therefore, the Commission finds that lateral access for the public has been provided for through prior permit action of the Commission and that the currently proposed project is consistent with Sections 30210 and 30212 of the Coastal Act as it relates to the provision of lateral access.

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2. Vertical Access. New development projects are required to provide public access in compliance with the public access provisions of Chapter 3 of the Coastal Act.

Section 30210.

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30212 of the Coastal Act contains several very explicit policy provisions regarding the location and type of public access to be provided.

Section 30212.

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby, or

(3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

(b) For purposes of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

(4) The reconstruction or repair of any seawall; provided, however, that the reconstructed or repaired seawall is not a seaward of the location of the former structure.

(5) Any repair or maintenance activity for which the commission has determined, pursuant to Section 30610, that a coastal development permit will be required unless the regional commission or the commission determines that such the activity will have an adverse impact on lateral public access along the beach.

As used in this subdivision "bulk" means total interior cubic volume as measured from the exterior surface of the structure.

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In addition to the above provisions of the Coastal Act, Section 30214(a) addresses with a greater degree of specificity the time, place and manner of public access. Section 30214(a) states:

> Section 30214.
>
> (a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:
>
> (1) Topographic and geologic site characteristics.
>
> (2) The capacity of the site to sustain use and at what level of intensity.
>
> (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.
>
> (4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

Additionally, the legislature has expressed its intent that the Commission balance the rights of the individual property owner with the public's constitutional right of access to the coast. Section 30214(b) states:

> (b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution.

All projects requiring a Coastal Development permit must be reviewed for compliance with the public access provisions of Chapter 3 of the Coastal Act. New development on sites located between the sea and the first public road may be required to provide vertical access under the policy provisions of Section 30212 of the Coastal Act. In determining where vertical access should be required, the Commission must consider the need to gain access to the shoreline in a given area, taking into account the physical constraints of the site, including, but not limited to, safety hazards, existence of fragile coastal resources, the location of support facilities, such as parking areas and the privacy needs of residents of the project site.

As outlined in the Seventh Edition, September 1983, Coastal Access Inventory within the area identified as the Malibu Coastline (a distance of about 27 miles from Topanga State Beach on the east to Leo Cabrillo State Beach on the west) only 16 vertical accessways have been recorded as a result of Coastal permit requirements. Of these, only 4 vertical accessways have been opened to the public. Accessways obtained through the Coastal permit process cannot be developed and/or actually used by

the public until a public or private agency agrees to accept responsibility for maintenance and liability. The following is a list of vertical accessways that have been obtained via the Coastal permit process in Malibu.

Coastal Permit No.	Street Address/Malibu	Width of Access	Open
73-290	State Park/Point Dume	6'	Yes
73-511	26168 Pacific Coast Highway	6'	Yes
73-1526	22706 " " "	10'	Yes
74-2840	22626 " " "	2'	No
75-6376	22032 " " "	5'	No
76-8877	21554 " " "	6'	No
76-8957	25120 " " "	35'	Yes
77-376	19020 " " "	3'	No
77-574	26834 Malibu Cove Colony	5'	No
77-1466	31736 Broad Beach Road	5 -10'	No
77-2120	27398 Pacific Coast Highway	10'	No
78-3473	27700 " " "	10'	No
78-3591	20802 " " "	5'	No
79-4918	21202 " " "	10'	No
80-2707	27900 " " "	10'	No
5-83-136	22126-22132 Pacific Coast Highway	9'	No

In addition to the vertical accessways listed above, there are several vertical accessways in Malibu which are owned by the County of Los Angeles. One County accessway (at 22550 P. C. H.) is located within 500 feet of the project site; however, the accessway is closed and the County has no plans to open this accessway.

The project site is located in the Carbon Beach area of Malibu; one of the least publicly accessible beaches in the Malibu area. The existence of a solid row of residential structures along this stretch of Pacific Coast Highway effectively creates a private beach enclave. The residential development along Carbon Beach even precludes views of the ocean and shoreline from Pacific Coast Highway.

On the inland side of Pacific Coast Highway in the vicinity of the project are multi-unit apartment buildings, small offices and commercial structures. Although this particular area of Malibu has not experienced great demand for recycling of existing structures or development of the few vacant parcels, it appears inevitable that as the pattern of growth in Malibu continues, a demand for recycling and more intensive development will occur. In turn this will create a greater demand for beach usage.

In order to determine whether the currently proposed project complies with the access provisions of the Coastal Act and more specifically with Section 30212 of the Coastal Act, the Commission must determine whether adequate access exists nearby.

The Commission has already found that the project meets the definition of new development, thus if adequate access does not exist nearby, access for the public from the nearest public roadway (P. C. H.) to the shoreline is required.

In its review of prior similar permit applications where the issue of vertical access has been raised, the Commission has used a 500-foot criteria as a guideline to determine whether adequate access exists nearby. More specifically, the Commission has previously made a determination in similar cases if open vertical access for the public exists within 500 feet of the project site, adequate access exists nearby. With respect to the currently proposed project, the Commission notes that the nearest open public vertical accessways are located 1,300 feet west of the project and 3,099 feet east of the project site. Since open vertical access for the public does not exist nearby, the Commission finds it is necessary to condition the project to provide for vertical access for the public, from Pacific Coast Highway across the project site to the shore. Only if so conditioned would the project be consistent with Section 30212 of the Coastal Act.

The Commission further finds that since the project site consists of two contiguous lots with a total frontage of 140 feet both the applicant and the Commission are afforded great flexibility in siting the vertical accessway. The Statewide Guidelines adopted by the Commission indicate that a vertical accessway when provided should be a minimum of 10 feet in width and should usually be sited along the borders of the project site. The Commission concludes the large size of the project site (40,041 square feet) affords great opportunity in the actual design of the vertical accessway across the project site benefiting both the applicant and the public. In addition, the Commission notes that there is on-street parking available on both sides on Pacific Coast Highway in the vicinity of the project. Therefore, the Commission concludes that adequate support facilities (for parking) exist within the vicinity of the project. Finally the Commission finds that if conditioned, as indicated above with a vertical accessway, the project would be in conformance with the access policies of Chapter 3 of the Coastal Act.

D. Scenic and Visual Resources/Seaward Encroachment. The Coastal Act in Section 30251 states:

> Section 30251.
>
> The scenic and visual qualities of coastal areas shall be [illegible]ed and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

The proposed project consists of the demolition of an existing single family dwelling and swimming pool and the construction of a new

two-story, 32-foot above average finished grade, single family residence with swimming pool. The project also involves renovation of an existing tennis court and the relocation of the tennis court approximately 14 feet seaward of its present location.

New development along the shoreline is of particular concern to the Commission. Section 30251 of the Coastal Act requires that permitted development be sited and designed to protect views to and along the ocean and scenic coastal areas. As one means of limiting the encroachment of residential development onto sand beach areas, the Commission has adopted a stringline guideline. With respect to this criteria, the Guidelines state:

> "In a developed area where new construction is generally infilling and is otherwise consistent with Coastal Act policies, no part of a proposed new structure, including decks and bulkheads, should be built further onto a beach front than a line drawn between the nearest adjacent corners of the adjacent structures. Enclosed living space in the new unit should not extend farther seaward than a second line drawn between the most seaward portions of the nearest corner of the enclosed living space of the adjacent structure."

One of the purposes of this Guideline is to limit seaward encroachment on sandy beach areas. In the case of the currently proposed project, the applicant proposes to demolish an existing single family home and construct a significantly larger single family home. The proposed construction will occur landward of an existing seawall/bulkhead previously approved by the Commission . As proposed the new residence will conform with the Commission's stringline condition for structural development. However, other portions of the development including a solar trellis for the residence exceed the stringline. Also, the project calls for the seaward encroachment of a tennis court by 14 feet which could have a 'visual impact since if relocated the tennis court would be at the bulkhead line. Therefore, the Commission finds it necessary to condition the project to require revised plans which clearly indicate the project complies with both structural and deck stringlines. Only if so conditioned would the project be consistent with Section 30251 of the Coastal Act which addresses scenic and visual resources.

E. Hazards. Section 30253 (1) of the Coastal Act specifies that new development minimize risks to life and property in areas of high geologic flood and fire hazard. That an emergency permit was requested by the prior owner of the project site for construction of a 140-foot in length wood seawall attests to the potential flood hazard on the site. In approving the regular permit for construction of a seawall on the site, the Commission required the seawall to meet storm design criteria and for the project applicant to assume the risks associated with development of the site. Therefore, the Commission finds that the

seawall will serve to mitigate the flood hazard which previously existed on the site and that as previously conditioned, the project is consistent with Section 30253 (1) of the Coastal Act.

F. Local Coastal Program. Section 30604(a) of the Coastal Act states in Part:

> Section 30604.
>
> (a) Prior to certification of the local coastal program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200).

The County of Los Angeles adopted the Land Use Plan portion of the Malibu/Santa Monica Mountains area Local Coastal Program on December 28, 1982, for submittal to the Commission for certification. On March 24, 1983 the Commission voted to find that the Land Use Plan raised a "Substantial Issue" in terms of conformity with the Coastal Act and voted to deny the Land Use Plan as submitted.

At the time of this writing the Commission is scheduled to consider suggested modifications to the Malibu Land Use Plan at the Commission hearing in early January.

Among the suggested modifications which the Commission is scheduled to consider are access policies proposed as modifications to the County's Land Use Plan. With respect to beach access in general and vertical access specifically, the suggested modifications state:

4.1.2 COASTAL ACCESS

I. GENERAL POLICIES

P49 In accordance with Section 30214(a) of the Coastal Act, the time, place, and manner of public beach access requirements for new development will depend on individual facts and circumstances, including topographic and site characteristics, the capacity of the site to sustain use at the intensity proposed, the proximity to adjacent residential uses, the privacy of adjacent owners, the feasibility to provide for litter collection, and safety of local residents and beach users.

P50 In accordance with Section 30214(b) of the Coastal Act, the requirement of access shall be reasonable and equitable, balancing the rights of the individual property owner and the public.

Vertical Access

P51 For all land divisions, non-residential new development, and residential new development on lots with 75 or more feet of frontage or with an existing drainage or utility easement connecting a public street with the shoreline or on groups of two or more undeveloped lots with 50 feet or more of frontage per lot, an irrevocable offer of dedication of an easement to allow public vertical access to the mean high tide line shall be required, unless public access is already available at an existing developed accessway within 500 feet of the project site measured along the shoreline. Such offer of dedication shall be valid for a period of 21 years, and shall be recorded free of prior liens. The access easement shall measure at least 10 feet wide. Where two or more offers of dedication within 500 feet of each other have been made pursuant to this policy, the physical improvement and opening to public use of one offered accessway shall result in the abandonment of other offers located within 500 feet of the improved accessway.

Exceptions to the above requirement for offers of dedication may be made regarding beaches identified in the Land Use Plan's Area-Specific Marine Resource Policies (P111 through P113) as requiring limitations on access in order to protect sensitive marine resources.

P51b On the basis of a Beach Management Plan prepared by the County and approved by the Coastal Commission which takes into account beach recreation opportunities, the width of the beach, the presence of immediately adjacent residences or sensitive natural resources, local parking conditions, beach support facilities, the feasibility of emergency vehicle access to the beach, and related factors, accessways at greater intervals than would be required by P51 may be required, up to a maximum standard of separation for new vertical accessways of one accessway per 2000 feet of shoreline. Such a Beach Management Plan, which may be submitted to the Commission for its review at the same time as the implementing ordinances, shall assure that lateral access offers made in connection with coastal permits previously approved (as well as in connection with future permits and vertical access offers sufficient to meet the standard of separation included in the Plan) are accepted for maintenance and liability purposes by the County or other responsible entity acceptable to the Executive Director of the Coastal Commission. Reasonable restrictions on use of the beach to protect sensitive marine resources, minimize risks to public safety due to geologic and wave hazards and reduce potential conflicts with the privacy of nearby residences while promoting reasonable public access may be adopted by the accepting agency as part of the Beach Management Plan.

If the Commission were to approve the currently proposed project without a vertical access condition in advance of the development of a Beach

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Revenue recovery system so that the costs of new accessways and adjacent beach operations are wholly covered to the extent possible.

New accessways should be obtained in conjunction with off-highway property where it is feasible to develop parking or public transit facilities and safe pedestrian systems.

(3) Beach access opportunities requiring vertical pedestrian pathways shall not be opened until the improvements are in place and a public agency is willing to accept management and liability for such accessways.

(c) The frequency of public access locations shall vary according to localized beach settings and conditions as set forth for Policy 55 P51 below. Vertical access standards and related dedication requirements may range from none in arees of major public beech holdings to one accessway per 1,000 feet of shoreline where accessways would be short and directly link roadways with adequate parking or transit access and the beach.

The Beach Access Program proposed above is directly related to the access policies of the suggested modifications. Thus, if the Commission were to approve the project, as proposed without a vertical access condition, the ability of the County to prepare a LCP in conformance with Chapter 3 of the Coastal Act would be prejudiced.

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Management Plan as indicated in proposed suggested modification P51G above, the ability of the County to prepare a Local Coastal Program in conformance with the policies of Chapter 3 of the Coastal Act would be prejudiced.

In addition to the proposed suggested modifications to the County of Los Angeles Land Use Plan access policies listed above, the suggested modifications also call for development of a beach access program to be implemented in conjunction with the proposed policies on public access. With respect to the beach access program the suggested modifications state:

2. BEACH ACCESS PROGRAM

Objectives

(a) ~~The principal~~ One means of maximizing public access is to create and improve major accessways at locations where adequate parking and other necessary public improvements, including parking or public transit facilities where appropriate, can be provided to ensure adequate safety for users, traffic safety, security and privacy for adjacent residents, and clear public identification.

(b) Priorities for improved vertical public access in the Malibu Coastal Zone shall be in accordance with the ranking as depicted in Figure 5. Other criteria for determining priority for this new beach access are:

(1) First priority shall go to expanding safe off-highway parking at existing beaches with lifeguards.

(2) New accessway priorities shall feature:

Improvement of access to sandy beaches where there is no current public access.

Improvement of access to sandy beaches where the distance between existing accessways exceeds one-half mile.

Improvement of accessways using offers of dedication which were already made pursuant to the conditions of coastal permits issued by the Coastal Commission or the County where to do so would allow the County to avoid requiring future offers of dedication as provided by P51.

Capacity to allow emergency vehicle passage from highway to beach and return, except where steepness or the existence of stairs would not allow vehicle use.

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Add this paragraph to the findings on Ackerberg:

On page 7, after last paragraph just before Section D, insert:

The Commission further finds that notwithstanding the fact the County of Los Angeles owns a vertical accessway within 500 feet of the project, that accessway has not been opened to the public and therefore the Commission cannot make a finding that "adequate access exists nearby." In addition, although the Commission has, in some cases, found that if an accessway is open to the public within 500 feet, new offers of vertical access dedication will not be required, such an approach is not appropriate here. The appropriate vehicle for establishing the policy relative to the precise spacing of vertical accessways and whether previously secured offers to dedicate vertical accessways can be extinguished if another vertical accessway is improved and opened within 500 feet of the subject property in the LUP. The Malibu LUP staff recommendation suggests a policy on this point. The Commission believes that as a matter of policy, publically owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical access easements are opened. This position assumes that the publically 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

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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.

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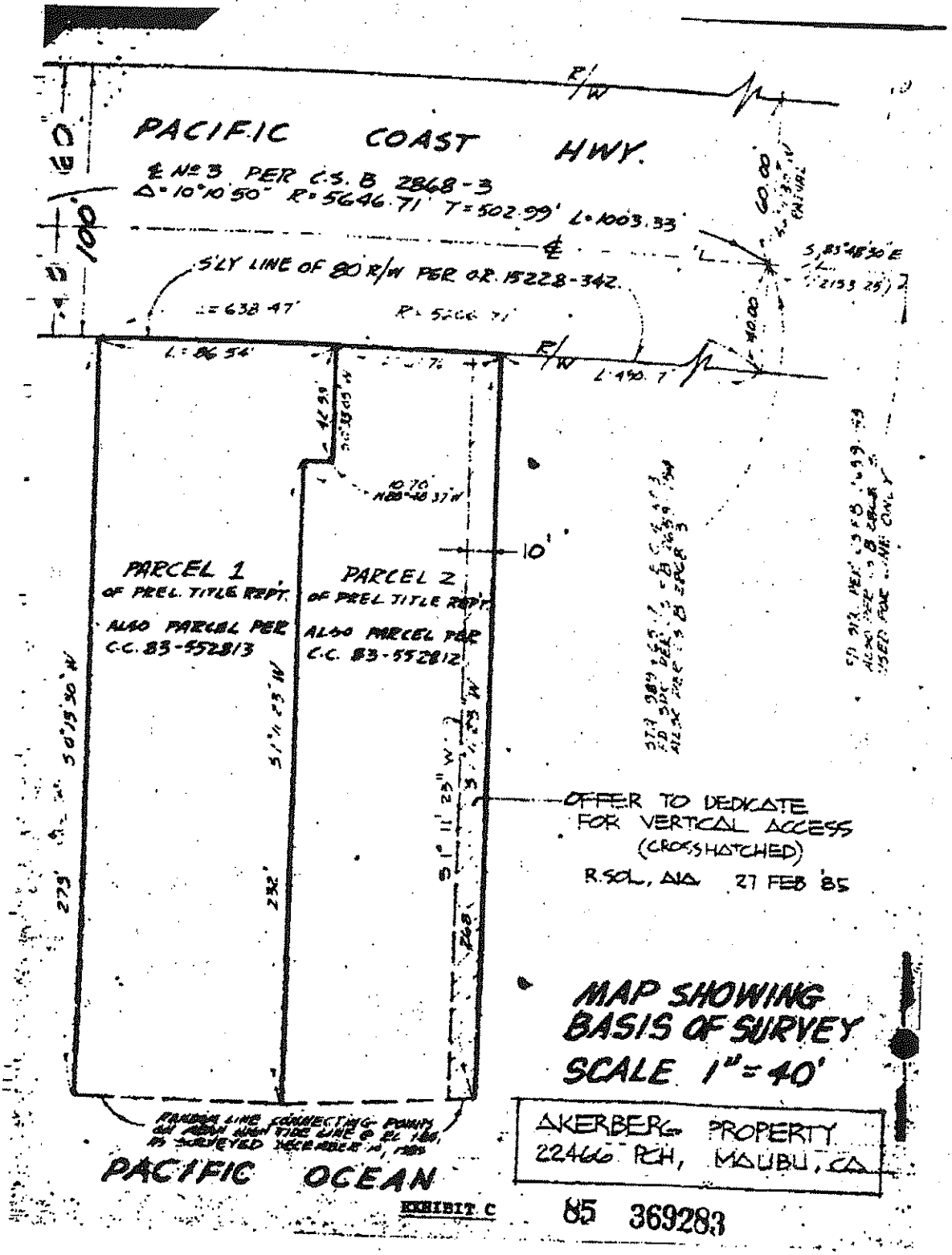
PACIFIC COAST HWY.
℄ No 3 PER C.S. B 2868-3
Δ=10°10'50" R=5646.71' T=502.99' L=1003.33'
5'LY LINE OF 80 R/W PER O.R. 15228-342.
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OF PREL. TITLE REPT.
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MAP SHOWING
BASIS OF SURVEY
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22466 PCH, MALIBU, CA
PACIFIC OCEAN
EXHIBIT C
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EXHIBIT 6

Superior Court Decision Denying Petition for Writ of Mandate and Complaint Ackerberg v. California Coastal Commission, Case No. BS 122006 (July 5, 2011)

CCC-09-CD-01-A (Ackerberg)

Ackerberg v. California Coastal Commission
BS 122006

Tentative Decision on Petition for Writ of Mandate: denied

Petitioners Lisette Ackerberg, individually and as Trustee of the Lisette Ackerberg Trust, and the Lisette Ackerberg Trust (collectively, "Ackerberg") apply for a writ of administrative mandamus overturning the July 8, 2009 decision by Respondent California Coastal Commission ("the Commission") approving a cease and desist order and a notice of violation under the provisions of the California Coastal Act of 1976 ("Coastal Act") (Pub. Resources Code §30000 *et seq.*) The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

Petitioner Ackerberg commenced this proceeding on August 4, 2009. Ackerberg seeks a writ of administrative mandamus directing the California Coastal Commission ("Commission") to vacate and set aside its July 8, 2009 decision approving a cease and desist order and a notice of violation under the provisions of the Coastal Act.

The Petition alleges in pertinent part as follows. Two proceedings under the Coastal Act — one judicial and one administrative — were commenced against Ackerberg to compel her to remove alleged improvements from a vertical public access easement required in 1985 as a condition of improving her Malibu beachfront residence.

On June 19, 2009, the Los Angeles Superior Court entered a judgment in an action (Access for All v. Ackerberg, LASC Case No. BC 405058) (the "judgment") brought by the easement holder, Access for All ("AFA"). The judgment resolved the enforcement matter and providing for the orderly enforcement of the easement.

Thereafter, on July 8, 2009, the Commission approved its own separate administrative cease and desist order.

Ackerberg contends that the Commission's cease and desist order was barred by the stipulated judgment in AFA's litigation under the doctrine of *res judicata*. Petitioner further contends that in conducting its hearing, the Commission committed numerous procedural errors that, viewed separately or together, denied Ackerberg a fair hearing and violated her rights to due process and equal protection. Ackerberg additionally contends that the Commission's decision is not support by legally adequate findings and the findings that it adopted on critical issues are neither supported by the weight of the evidence nor by substantial evidence in the light of the whole record.

B. Standard of Review

CCP section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, ("Topanga") (1974) 11 Cal.3d 506, 514-15. The pertinent issues under section 1094.5 are (1) whether the respondent has proceed without jurisdiction, (2) whether there was a fair trial, and (3) whether there was a prejudicial abuse of discretion. CCP §1094.5(b). An abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the

findings, or the findings are not supported by the evidence. CCP §1094.5(c).

Section 1094.5 does not in its face specify which cases are subject to independent review of evidentiary findings. Fukuda v. City of Angels, (1999) 20 Cal.4th 805, 811. Instead, that issue was left to the courts. In cases other than those requiring the court to exercise its independent judgment, the substantial evidence test applies. CCP §1094.5(c). "Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board, (2002) 104 Cal.App.4th 575, 585) or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n.28. The trial court considers all evidence in the administrative record, including evidence that detracts from evidence supporting the agency's decision. California Youth Authority, *supra*, 104 Cal.App.4th at 585.

An agency is presumed to have regularly performed its official duties (Ev. Code §664), and the petitioner seeking administrative mandamus therefore has the burden of proof. Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal.App.2d 129, 137; Afford v. Pierno, (1972) 27 Cal.App.3d 682, 691 ("[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion).

The agency's decision at the hearing must be based on the evidence. Board of Medical Quality Assurance v. Superior Court, (1977) 73 Cal.App.3d 860, 862. The hearing officer is only required to issue findings that give enough explanation so that parties may determine whether, and upon what basis, to review the decision. Topanga, *supra*, 11 Cal.3d at 514-15. Implicit in section 1094.5 is a requirement that the agency set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. Id.

C. Statement of Facts[1]

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[1]Ackerberg asks the court to judicially notice (1) the judgment, (2) declarations submitted by Ackerberg in opposition to a motion for leave to intervene and vacate the judgment, and (3) Land Use Plan ("LUP") Policy P56-16 from the 1986 certified County of Los Angeles Malibu/Santo Monica Mountains Local Coastal Program ("County LCP"). As the Commission argues, the judgment is already part of the administrative record and no judicial notice is required. The declarations could be judicially notice for their existence, but not their truth. *See* Weil & Brown, Civil Procedure Before Trial, §7:15, 7-7, 7-8 (1998). The declarations discuss conversations and meetings and purport to authenticate documents. As such, they are being offered for the truth. The request for judicial notice is denied as to the judgment and declarations. The request is granted for LUP Policy P56-16. Ev. Code §452(b).

Ackerberg separately offers "somewhat duplicative" declarations purporting to authenticate three emails. Petitioner has made no motion to augment the record, and these declarations cannot been considered. However, the Commission apparently included the emails in the record with a caveat that it was not able to authenticate them. If a document is included in the record, it will be received into evidence, whatever qualification the Commission puts on it.

Finally, Ackerberg offers a video excerpt of the Commission's July 8, 2009 hearing. While it seems likely that this video would meet the test of CCP section 1094.5(e), again

1. The 1983 Construction of the Bulkhead

Petitioner Ackerberg owns a beachfront home on Carbon Beach at 22466-22500 Pacific Coast Highway in the City of Malibu (the "property"). In 1983, the Commission granted a coastal development permit ("CDP") for the property's then owner, Ralph Trueblood, to construct a 140 foot long vertical bulkhead between the property and the beach. AR 2-15. The bulkhead would tie-in on its western edge with a previously approved, but not yet constructed, bulkhead of another property owner. AR 3. There would be a 40 foot long return on the east portion of the property. Ibid. The permit required the removal of existing boulders on the seaward side of the bulkhead and replacement with small gravel and waste mix. AR 15. A typical section of the 14 foot bulkhead would extend approximately 2 feet, 6 inches above beach level. Behind the bulkhead, thick filter rock would be installed topped with a blanket of one to two foot rocks, and then a foot of sand. Ibid.

Trueblood constructed the bulkhead and a civil engineer inspected it on December 1, 1983, confirming that it was constructed as planned. He observed man-sized boulders extending a minimum of 10 feet back (landward) from the wall resting on a one foot minimum filter blanket. AR 603-04.

The permit also required Trueblood to record an offer to dedicate a lateral public access and recreational use easement along the shoreline, including all areas from the toe of the bulkhead to the mean high tide line. AR 3. Trueblood recorded the offer which the California State Lands Commission ("State Lands") later accepted (in 2002). AR 438.

2. The Ackerbergs' Purchase of the Property

Trueblood transferred the property to Ackerberg and her husband (now deceased) Norman Ackerberg in February 1984. *See* AR 30. At the time, the property was occupied by a damaged residence, a guest house, a swimming pool, and a lighted tennis court. AR 290-91. The bulkhead built by Trueblood was also on the property. Ibid. None of the development on the property blocked views of the coast or impeded public access to the beach. AR 290-91.

3. The Ackerbergs' CDP Application

In November 1984, the Ackerbergs applied to the Commission for a CDP to demolish the existing structures on the property, construct a new two story residence, garage, pool, and septic system, and renovate the existing tennis court. AR 17. The application proposed to retain the eastern fence along the property line and the existing tennis court light posts, construct a perimeter block wall, relocate the tennis court closer to the eastern property boundary, and install landscaping behind the previously approved seawall. Photos of the site in 1984 show the bulkhead with no boulders on the seaward side, consistent with the 1983 civil engineer's report. AR 289, 291.

Commission staff prepared a report for the permit application recommending approval with a condition requiring recordation of an offer to dedicate a public access easement from Pacific Coast Highway to the shoreline (the "Ackerberg easement"). The Ackerberg easement

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Ackerberg failed to make a motion to augment the record. As a result, the video will not be considered.

would be ten feet wide on the eastern edge of the property and extend from the northern property line to the mean high tide line. AR 39.

The Ackerbergs' attorney submitted a letter objecting to the public easement condition in part because the potential for public access to the beach existed nearby through an easement owned by the County of Los Angeles across private property located at 22550 Pacific Coast Highway ("Malibu Terrace easement"). He contended that the condition be modified to permit abandonment of the Ackerberg easement if the County's accessway was opened, consistent with P51 of the then proposed modifications to the LUP portion of the County LCP. AR 311-12. He also urged that the Ackerbergs be allowed to "use" the area on the property required for easement dedication until "an offer to dedicate is actually accepted." AR 312.

3. The Commission's Conditional Approval of the CDP and the Ackerbergs' Acceptance

The Commission held a public hearing on the Ackerberg CDP application on January 24, 1985. AR 314.1. The Ackerbergs' attorney objected to the Ackerberg easement condition for the reasons stated in his letter. AR 314.9-314.14. The Commission entertained but did not adopt an amending motion to modify the access condition so that development of the Malibu Terrace easement would occur before development of the Ackerberg easement, as the Ackerberg's attorney had requested. AR 314.26. The basis of the motion was that "it is dead wrong" to require the Ackerbergs to provide a public easement while the County "sits there, less than 500 feet away, with a dedicated accessway which they (*sic.*) refuse to open." AR 314.23. The Commission discussed whether a policy should be included in the LUP to the effect that public easements should be developed before private easements (AR 314.37-314.39), and whether "some strong language" should be placed in the findings. AR 314.41. Ultimately, the Commission approved the permit as recommended by staff but with revisions to the findings. AR 314.49-314.50.

Pursuant to this direction, Commission staff revised the findings to add the following:

> The Commission further finds that notwithstanding the fact that the County of Los Angeles owns a vertical accessway within 500 feet of the project, that accessway has not been opened to the public and therefore the Commission cannot make a finding that "adequate access exists nearby." In addition, although the Commission has, in some cases, found that if an accessway is open to the public within 500 feet, new offers of vertical access dedication will not be required, such an approach is not appropriate here. The appropriate vehicle for establishing the policy relative to the precise spacing of vertical accessways and whether previously secured offers to dedicate vertical accessways can be extinguished if another vertical accessway is improved and opened within 500 feet of the subject property is in the LUP. The Malibu LUP recommendation suggests a policy on this point. The Commission believes that as a matter of policy, publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical access are opened. 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. AR 323-24.[2]

The Ackerbergs accepted the CDP and agreed to be bound by its terms and conditions including the condition for the Ackerberg easement. AR 343-44. On March 5, 1985, the Ackerbergs executed an irrevocable offer to dedicate the Ackerberg easement and the County Recorder recorded the offer on April 4, 1985. AR 460-79. The Ackerbergs irrevocably offered to dedicate an easement for public pedestrian access to the shoreline along the eastern boundary of the property line. AR 462. The Commission's revised findings were included in the recorded document. AR 476-77.

4. Subsequent Coastal Policy

On December 12, 1986, the Commission certified the LUP portion of the County LCP. LUP Policy P56-16 established an even more generous separation standard for vertical access at Carbon Beach of "one accessway per 1,000 feet of beach frontage," not 500 feet as discussed at the January 24, 1985 hearing. Pet. RJN, Ex. 3. LUP Policy P51 stated: "Where two or more offers of dedication closer to each other than the standard of separation provides have been made pursuant to this policy, the physical improvement and opening to public use of offered accessways sufficient to meet the standard of separation shall result in the abandonment of other unnecessary offers." AR 820.

Malibu incorporated in 1991, and in September 2002, the Commission prepared and certified the City's Local Coastal Program ("Malibu LCP"). The County LCP no longer applied, and County LUP Policy P51 was not included in the City's LCP.[3] The Malibu LCP did include

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[2]Ackerberg describes the Commission's actions as a "commitment" to adopt a policy that publicly owned vertical accessways should be improved and opened to public use before additonal offers to dedicate vertical access easements are opened. Op. Br. at 4. The Commission made no such commitment to Ackerberg. Rather, one Commissioner asked whether staff was committing to putting "some pretty nice language" in the revised findings. AR 314.42. This language concerning development of public easements before private easements was included in the revised findings. But the Commission never committed to adopting a policy to that effect.

[3]This omission may have been because the United States Supreme Court held in Nollan v. California Coastal Commission, (1987) 483 U.S. 825, that public access easements to the beach may not be required as a condition of a CDP in the absence of a constitutionally required nexus

language that reserved to the Commission the authority to extinguish a previously imposed offer to dedicate or grant of an easement. AR 823-24.

5. The Management Plan

On or about December 11, 2003, the Executive Directors of the Commission and Real Party State Coastal Conservancy ("Conservancy"), and AFA, a non-profit organization with whom the Commission and Conservancy work to develop and manage accessways, entered into a "Public Vertical Access Management Plan" ("Management Plan") for Ackerberg's easement. AR 852-54. The Management Plan provided that AFA would accept the Ackerberg's offer to dedicate, survey the easement's boundaries, work with the Ackerbergs to design improvements for the accessway, and operate the Ackerberg easement. It also provided for development of the easement in two phases. In Phase 1, AFA would hire a surveyor to locate the boundaries and identify encroachments within the easement area, informing Commission staff when it does. In Phase 2, after encroachment issues had been resolved, AFA would replace a portion of the perimeter wall with gates and any other necessary improvements, working with the Ackerbergs to design improvements and presenting them to Commission and Conservancy staffs. AR 853. The Plan provided that if AFA failed to carry out its responsibilities pursuant to the Plan, then all right, title, and interest in the Ackerberg easement would vest in the State of California, through the Conservancy. AR 854.

6. AFA's Failure to Enforce and the Stay on Enforcement

On December 18, 2003, AFA notified the Ackerbergs that it had accepted the offer to dedicate and would like to move forward to survey and upon up the easement as soon as mutually convenient. AR 485.

The conservancy authorized a number of grants for AFA relating, in part, to the Ackerberg easement, including funds to conduct a survey and funds to open and improve the accessway. AR 1187, 1189-90, 1195, 1200. Despite these authorizations, AFA spent funds only on the survey and conducted no other work on the Ackerberg easement.

The survey was conducted almost two years after AFA accepted the offer to dedicate. AFA's surveyor found numerous encroachments including a concrete slab, generator and portion of a hedge near the northern end, a nine foot high block wall across the Ackerberg easement parallel to Pacific Coast Highway, four light posts, a post and raised railing near the southern edge of the easement, a portion of another hedge near the southern end, a chain link fence over a wood planter near the southern end, and rip-rap rocks near the southern end of the easement. *See* AR 489. The rip-rap rocks were on the seaward side of the bulkhead. AR 490.

On December 13, 2005, the Commission notified Ackerberg's attorney that all of these encroachments must be removed, and requested that removal occur within 120 days. AR 489. With respect to the rip-rap rocks, the Commission only requested removal of these rocks located within the Ackerberg easement, although it reserved the right to address the remainder of the rocks in the future. AR 490.

Over the next several months, Commission staff and Ackerberg's counsel exchanged

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between the proposed development and the easement.

letters on issues relating to AFA, how the easement would be improved and managed, and the existing improvements. AR 489-504.

On March 29, 2006, Jack Roth ("Roth"), owner of the home adjacent to the Ackerberg easement on its downcoast side, filed an action against the Commission challenging the easement requirement on the basis that he received no notice of the Commission's January 24, 1985 hearing. The Court of Appeal initially stayed any Commission proceedings against Ackerberg. AR 1053. It then ruled in favor of the Commission. *See* AR 1055. The Supreme Court denied review on July 9, 2008. Ibid.

7. **The Negotiations Over Enforcement**

After the appellate stay was dissolved, in a letter dated October 2, 2008, the Commission notified Ackerberg's counsel that it intended to enforce the Ackerberg easement through a cease and desist proceeding. AR 549-52. On November 14, 2008, Commission staff sent another letter to Ackerberg's counsel, including a draft settlement proposal, and requested a response by November 19, 2008. The letter also notified her that staff had scheduled hearing on a cease and desist order for the December 2008 Commission meeting. AR 562.

In a November 19, 2008, letter, Ackerberg's counsel requested a postponement in order to have more time to respond and advised the Commission that she had begun exploring the opening of the Malibu Terrace easement as an alternative to opening the Ackerberg easement. AR 559-60.

After some additional correspondence, Commission enforcement staff phoned Ackerberg's counsel and advised her that, while staff was willing to work with her, staff needed a settlement that included compliance with the CDP condition of an easement. It would not accept a settlement that exchanged the Ackerberg easement for the Malibu Terrace easement owned by the County which has never been opened in 34 years. AR 580. Staff informed counsel that extinguishing the Ackerberg easement would not comply with the CDP or provide a similar public access benefit. AR 577.

On December 2, 2008, Commission staff sent another letter to Ackerberg's counsel, explaining why the Malibu Terrace easement was not an acceptable substitute. AR 587-590.) After recapping verbal discussions between staff and Ms. Abbitt, staff explained that there was no basis to substitute the Malibu Terrace easement for Ackerberg's, even taking into account the revised findings for the Ackerberg permit. None of the things contemplated by the revised findings had occurred. Indeed, the certified Malibu LCP expressly precludes trading one access for another. AR 588. The Malibu LCP favors opening as many dedicated and accepted public accessways as possible. This specifically requires improving and opening the Ackerberg easement along with four other existing vertical accessways along Carbon Beach. AR 588. The letter observed that the development encroaching on the Ackerberg easement was unpermitted development which required removal whether or not the accessway was ever opened. AR 589. The development along the easement was never approved by the CDP and must be removed. Ibid. At Ackerberg's request, staff again postponed the cease and desist order hearing. Ibid.

Staff wrote to Ackerberg's counsel on December 9, 2008, with information about a review of the permits, explaining that the rock revetment on the site was never approved under

any permit and explaining what had been approved. What was approved was the removal of the large boulders that were in place at the time the 1983 permit was approved for the construction of the bulkhead and the replacement of a smaller rock/gravel mix with rocks a minimum of 3/4 inches in diameter and up to a maximum of 12 inches in diameter to reinforce a portion of the bulkhead. The rock rip-rap that is currently in place on the property is not a part of the bulkhead which from what we can tell from our surveys and photos lies behind the row of shrubs that lie along the seaward edge of the property. The 1983 permit approved the use of small rocks in the construction of the bulkhead, not the large boulders that begin in front of the bulkhead and extend well into the lateral easement area. AR 1151.

8. AFA's Lawsuit Against Ackerberg

On November 24, 2008, Commission staff wrote to AFA in response to its questions. AR 1144. Staff discouraged a lawsuit against Ackerberg at that time, explaining that, after discussions with the Commission's Chief of Enforcement and staff counsel, staff concluded that "filing suit prior to a Commission hearing may not be the best idea. While we are unable to provide legal advice on the matter, there are a few ways in which filing suit prior to a hearing may effect the outcome of our administrative proceedings. First, filing suit may cause the court to place a stay on any administrative proceedings until the resolution of the legal matter. In addition, it may be beneficial to have an administrative record for the courts to review instead of them reviewing the facts of the case de novo." AR 1144.

On January 6, 2009, AFA sued Ackerberg under the Coastal Act in Access for All v. Lisette Ackerberg Trust, et al., LASC Case No. BC 405058. AR 698-711. The complaint alleged that "DEFENDANT' S failure to clear the easement of physical impediments imposes illegal restrictions on the use of this casement by the public, violating the California Coastal Act, resulting in a trespass on PLAINTIFF's easement, and causing a public nuisance" (AR 699), and "On January 1, 2009, the physical impediments located in the easement, including but not limited to an electrical generator, wall, and lighting fixtures had not been removed and PLAINTIFF was unable to open the accessway to the public." AR 701. The prayer requested "injunctive relief mandating DEFENDANT to remove all physical impediments in the easement to ensure the public access to the Property at issue in this Complaint." AR 705. The complaint additionally sought declaratory relief and monetary penalties, as provided in the enforcement provisions of the Coastal Act (Pub. Res. Code, § 30803, 30820(a) and (b)). Ibid.

9. The Commission's Continued Compliance Efforts

Commission staff continued its efforts to secure Ackerberg's compliance through the administrative process. The Commission's Executive Director told Ackerberg's counsel in an email dated April 13, 2009 that there was a major public asset and value at stake here — another public accessway to the beach not readily accessible to members of the public and he did not see any basis for giving away or abandoning such a precious public resource. "The time has come to open this new access-way for public use." AR 1162.

In a follow up email on May 20, 2009, the Executive Director reiterated that staff had made clear that a trade off involving the Ackerberg easement was not acceptable. AR 1164.

Staff scheduled a hearing on the cease and desist order for the Commission's June 2009

meeting. In response to yet another request from Ackerberg's counsel, offering to open the Ackerberg easement if she was unsuccessful in an immediate pursuit of enforcement and opening of the Malibu Terrace easement, staff continued the cease and desist hearing in order to discuss settlement. Staff scheduled a settlement meeting on June 5, 2009. AR 1176.

In a June 3,2009 email, Ackerberg's counsel noted that she Ackerberg had been sued by AFA and requested that AFA's counsel be allowed to attend the meeting. AR 712. She was rebuffed by the Commission. AR 1478-79. At the meeting, Ackerberg's counsel proposed the concept of seeking to open the Malibu Terrace easement as a solution. She was told immediately that the proposal was not acceptable. AR 1479.

On June 3, 2009, the Commission met with AFA to discuss enforcement of violations involving public access easements held by AFA, including the Ackerberg easement. Neither AFA in this meeting, nor Ackerberg's attorney in the June 5 meeting, informed the Commission staff of a possible settlement agreement between AFA and Ackerberg. AR 1204, 1470-71.

10. The Settlement of AFA's Lawsuit Against Ackerberg

AFA and Ackerberg entered into a "Settlement Agreement and Stipulation for Entry of Judgment" to resolve the AFA Lawsuit and alleged Coastal Act violations on June 18, 2009. AR 643-658. On June 19, 2009, the court entered the judgment pursuant to stipulation. AR 635-42. The judgment provided that it was a full settlement of all causes of action stated in the lawsuit, and that: (1) AFA would file an action, funded by Ackerberg, against the County to enforce the County's Malibu Terrace easement; (2) If AFA were successful in obtaining a settlement or final judgment requiring removal of the encroachments currently in the Malibu Terrace access easement, Ackerberg would fund, or cause to be funded, the improvement and opening of that accessway; (3) within 20 days after the easement is improved and opened, Ackerberg and AFA would jointly apply to the Commission to terminate Ackerberg's easement, the decision on which would be left to the Commission; (4) Ackerberg would pay $125,000 in to AFA to maintain and manage the Malibu Terrace easement for five years, and would pay another $125,000 to the Commission for public access and enforcement, but if not accepted by the Commission, then to AFA to fund maintenance and management of the Malibu Terrace easement for ten years; (5) If AFA was not successful in the lawsuit against the County, within 20 days, AFA and Ackerberg would jointly apply to the Commission to amend Ackerberg's 1985 approval to improve Ackerberg's easement for public access and to modify the Management Plan to include security measures that do not interfere with public access. Id.

Pursuant to the judgment, Ackerberg paid AFA's attorneys fees in the action, and on June 26, 2009, AFA filed a new action, AFA v. County of Los Angeles, LASC Case No. BC 416700 to enforce and open the County's access easement. AR 667-90.

On July 6, 2009, the Commission sent an email to AFA stating: "Please tell me it ain't so. I was informed last week that AFA...settled [the] lawsuit by agreeing not to open the access easement until the one held by the county is opened, and that AFA gets a sizeable payment from Ackerberg. If true, I am greatly disappointed and appalled. If true (*sic.*) this is outrageous." AR 1204. The email added that the proposed settlement was never mentioned in the meeting in early June, and the Commission had no notice that it was in the works and no opportunity to weigh in before the court. Ibid.

11. The Cease and Desist Proceeding

On July 8, 2009, the Commission held a cease and desist proceeding against Ackerberg. The Commission had its own staff counsel. AR 1504, 1513.

In connection with the hearing, on June 26, 2009, Commission staff issued a 48-page Staff Report, together with 211 pages of exhibits.[4] The staff report alleged: "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 structures 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." AR 350. The staff report attached the initial staff report for Ackerberg's 1985 CDP, but not the revised findings actually adopted by the Commission. *See* AR 441.

Three days later, on July 2, 2009, Ackerberg overnighted her response to the staff report to Commission staff and Commissioners at addresses listed on the their website. AR 605-841. Ackerberg argued that her settlement with AFA precluded the Commission from requiring her to comply with her CDP because the judgment was *res judicata* on the issues before the Commission. AR 606-12, there is no seawall violation because the "man-sized boulders" were placed behind the bulkhead (AR 613-14), the Commission's 1985 decision contemplated that the Ackerberg easement would be extinguished if the County's Malibu Terrace easement was opened (AR 615-20), the Malibu Terrace easement is superior anyway (AR 621-23), the enforcement proceeding was premature because the accessway must be the subject of a CDP before its development may occur (AR 623-25), and the hearing violated due process because *inter alia* Ackerberg had insufficient time to respond to the 48-page staff report, the staff report did not include all pertinent evidence, and the time for argument was inadequate. AR 625-27.

On the evening before the Commission's hearing, Commission staff distributed to the Commissioners an Addendum to the Staff Report containing an 18-page reply to Ackerberg's response. AR 917-35. The Addendum stated that the existence of revised findings was a red herring because the preconditions to extinguishing Ackerberg's easement had not been met. (AR 929. The Addendum apparently attached the settlement agreement in the AFA lawsuit against Ackerberg (*see* AR 879-94), but did not include a number of exhibits that Petitioner requested the Commission to consider in her counsel's July 2 submission.[5]

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[4]The staff report failed to include the revised findings and the 1985 transcript from the Ackerberg CDP hearing. *See* AR 441-47 (findings from initial staff report, not revised findings). It also omitted exhibits from an October 21, 2008 letter from Ackerberg's counsel. All of these documents are part of the administrative record.

[5]These include a redline cease and desist order, the judgment, the AFA complaint against the County, a legal memorandum on *res judicata*, a legal memorandum on the Malibu Terrace easement, exhibits on the seawall violation issue, relevant excerpts of the County LUP and Malibu LUP, photographs of the Ackerberg and Malibu Terrance easements, a letter from Ackerberg's counsel to the Conservancy, and excerpts from Ackerberg's approved plans pursuant to the CDP. Op. Br. at 21. All of these documents are in the record.

The Commission also received correspondence from the Sierra Club, Coastwalk and Santa Monica Baykeeper in support of the issuance of a cease and desist order. AR 1209-10, 1217-20, 1223-24. The Sierra Club and Santa Monica Baykeeper strenuously objected to Ackerberg's legal maneuvers and urged the Commission to allow no further delay in opening of the accessway and to issue the cease and desist order. AR 1209, 1223.

At the July 8 hearing, the Attorney General's Office represented the Commission as required by statute for litigation and administrative proceedings. Pub. Res. Code §30334. Prior to the hearing, Ackerberg objected to the deputy attorney general (the "deputy") sitting next to and advising the chair of the Commission in the cease and desist proceeding. AR 626. In response, the Addendum to the Staff Report noted that the deputy is merely a "neutral advisor" in enforcement proceedings, and is not an advocate on either side of this matter. The Addendum further indicated that the deputy had not advised staff regarding its recommendations and did not advocate on behalf of the staff recommendation. AR 935.

During the hearing, the deputy responded to questions posed by various Commissioners. AR 1512-13. When asked about the next step in enforcement if the Commission votes for the cease and desist, the deputy stated that Ackerman would have 30 days to file a court challenge. AR 1512. A Commissioner then asked about the fact that Ackerberg already had a court judgment. The deputy responded, "That is one of their arguments. We don't think it is a legitimate argument." Ibid. The Commissioner then asked whether the State would be taking our (the Commission's) position against Ackerberg in a new court seeing as how another court has approved the settlement. The deputy responded that he did not think there was a hearing in the AFA lawsuit and no court has made a real determination on it. There were a number of options that the deputy would explore, including seeking to intervene and set aside the judgment. AR 1513. When questioned whether these matters would be pursued, the deputy said: "We will, certainly." Ibid.

Ackerberg's attorneys participated in the hearing and provided a PowerPoint presentation. AR 1405-45, 1477-92. The Conservancy spoke in favor of the staff recommendation. AR 1492-94. The Sierra Club and Coastwalk also spoke in favor of the staff recommendation. The Sierra Club urged the Commission to reject Ackerberg's plan to abandon the Ackerberg easement for a non-existent accessway at a different locale. AR 1494-95. Coastwalk testified that vertical access easements are higher priority for coastal access and must be guarded carefully by legal decisions; they are the sole pedestrian egress when high tides and storm conditions dictate and provide rapid safe routes to the coast for emergency personnel. AR 1496-98. Coastwalk observed that lateral easements are rendered useless, even privatized if there are no public vertical rights of way for the public to the coast. AR 1497.

The Commission approved its staff's recommended Notice of Violation CCC-09-NOV-01 and Cease and Desist Order No. CCC-09-CD-01. AR 1515-16. On July 16, 2011, the Commission sent Ackerberg the cease and desist order. AR 1524-29.

D. Governing Law

The Coastal Act requires that anyone who wishes to undertake development in the coastal zone must obtain a CDP. Pub. Res. Code §30600. Anyone who develops without a permit or in violation of the terms and conditions of a permit violates the Coastal Act. Pub. Res. Code

§30820; Cal. Code Regs., tit. 14, §13172. Anyone who violates the Coastal Act may be civilly liable for fines and penalties, exemplary damages, and subject to declaratory and injunctive relief. Pub. Res. Code §§ 30803, 30805, 30820 and 30822.

Any person, including the Commission, may bring an action for violation of permit requirements but any monies recovered go to the Conservancy's Violation Remediation Account, not to the plaintiff. Pub. Res. Code §§ 30803, 30805, and 30823.

In addition to suing for civil liability, the Commission is authorized to pursue violations administratively by issuing cease and desist and restoration orders. Pub. Res. Code §§ 30810, 30811. The Commission's issuance of a cease and desist order may be challenged in a petition for writ of administrative mandate. Pub. Res. Code §30801.

E. Analysis

1. ***Res Judicata***

Ackerberg's principal contention is that the judgment in the AFA lawsuit bars the Commission's proceedings against her pursuant to the doctrine of *res judicata*.

"*Res judicata* describes the preclusive effect of a final judgment on the merits." Mycogen Corp. v. Monsanto Co., ("Mycogen") (2002) 28 Cal.4th 888, 896. "*Res judicata*, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." Ibid. "Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.'" Ibid. (internal citations omitted). "Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." Id. at 896-97. "[A]ll claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date." Ibid. "*Res judicata* precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." Ibid. (internal citation omitted).

Res judicata applies when "(1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior proceeding. Federation of Hillside & Canyon Assns. v. City of Los Angeles, (2004) 126 Cal.App.4th 1180, 1202. Even if these elements are met, *res judicata* will not be applied if injustice would result or if the public interest requires that relitigation not be foreclosed. Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association, ("Citizens") (1998) 60 Cal.App.4th 1053, 1065.

a. The First Element -- Whether the Decision in the AFA Lawsuit Is Final Has Been Waived

In California, an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed. CCP §1049. Thus, a judgment in California is not final for all purposes until all possibility of direct attack thereon by way of (1) appeal, (2) motion for a new trial, or (3) *motion to vacate the judgment has been exhausted.* 20th Century Ins. Co. v. Superior Court, (2001) 90 Cal.App.4th 1247, 1278

(citing Southern Public Utilities District v. Silva, (1956) 47 Cal. 2d 163, 165) (emphasis added.)

There is no final judgment in the AFA lawsuit against Ackerberg. A review of the AFA lawsuit's court docket shows that on September 14, 2009, the Commission and Conservancy filed motions for leave to intervene and to vacate the stipulated judgment in the AFA lawsuit against Ackerberg. Those motions remain pending, and pursuant to stipulation are scheduled to be heard on September 13, 2011. The pending motions constitute a direct attack on the judgment. Since the judgment remains subject to direct attack, it is not final for purposes of *res judicata*.

However, the Commission purports to concede that the judgment is final for purposes of *res judicata*. Opp. at 13. The Commission also has not asked the court to judicially notice the pending motions in the AFA lawsuit. Without evidence or argument to support this issue, it has been waived.

b. The Second Element -- The Cease and Desist Proceeding Is on the Same Cause of Action as the AFA Lawsuit

The *res judicata* doctrine is based upon the primary right theory. Id. at 904. "The primary right theory is a theory of code pleading that has long been followed in California. It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." Crowley v. Katleman, (1994) 8 Cal.4th 666, 681-82. "The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action." Ibid. "As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered." Ibid. "It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.'" Ibid. (emphasis in original.) "The primary right must also be distinguished from the *remedy* sought: 'The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.'" (emphasis in original) Ibid.

"The primary right theory . . . is invoked . . . when a plaintiff attempts to divide a primary right and enforce it in two suits. The theory prevents this result by either of two means: (1) if the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement [citations]; or (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of *res judicata*." Ibid.

The AFA lawsuit against Ackerberg alleged that she failed to clear the easement of physical impediments, which imposed illegal restrictions on the use of this easement by the public, violating the California Coastal Act, resulting in a trespass on AFA's easement, and causing a public nuisance. On January 1, 2009, these physical impediments included an electrical generator, wall, and lighting fixtures which had not been removed. The prayer requested "injunctive relief mandating that Ackerberg remove all physical impediments in the easement to ensure the public access to the easement.

The Commission's cease and desist enforcement action sought an order directing Ackerberg to comply with the CDP by removing the unpermitted items located within the easement area, and to cease from placing any solid material or structures into the easement area in the future or otherwise interfering with public access, thereby allowing AFA to open the easement to provide the Ackerberg easement.

Plainly, both matters concerned the primary right of a public easement without obstruction, a primary wrong of unpermitted items obstruction the easement, and a remedy of their removal. As such, they are identical. *See* Citizens, *supra*, 60 Cal.App.4th at 1067.

The Commission argues that its cease and desist proceeding sought to compel Ackerberg to remove all unpermitted development within the Ackerberg easement, which Ackerberg did not dispute was unpermitted other than the seawall. Yet, the stipulated judgment merely states that Ackerberg and AFA would seek to extinguish the Ackerberg easement if they succeed in opening the Malibu Terrace easement. It says nothing about removal of unpermitted development. Therefore, the issues are not identical. Opp. at 13.

Ackerberg correctly rebuts this argument in reply by pointing out that it is the complaint which frames the primary right and primary wrong, not the judgment. The relief obtained is not to be confounded with the cause of action, one not being determinative of the other. Consumer Advocacy Group, Inc. v. ExxonMobil Corp., ("Consumer Advocacy") (2008) 168 Cal.App.4th 675, 686.

The cease and desist proceeding and the AFA lawsuit concerned the same cause of action under the primary rights theory.

c. **The Third Element – The Parties Are Not in Privity**

In the context of a *res judicata* determination, privity " refers to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is sufficiently close so as to justify application of the doctrine of collateral estoppel." Consumer Advocacy, *supra*, 168 Cal.App.4th at 689 (internal citations and punctuation omitted). "The determination of privity depends upon the fairness of binding appellant with the result obtained in earlier proceedings in which it did not participate." Ibid (internal punctuation and citations omitted). Privity is a due process requirement, and whether parties are in privity requires close examination of the particular circumstances of each case. Id. at 689-90.

In some circumstances a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. Id. at 691 (citation omitted.) Among the critical issues such a determination are (a) whether notice of the nature of the action and (b) whether notice of an impending settlement, were provided to the subsequent party. Id. at 691, 693. A party may not abandon its role as representative while preserving privity. Planning and Conservation League v. Castaic Lake Water Agency, (2010) 180 Cal.App.4th 210, 233. Where the interests of the parties are divergent, courts will not infer adequate representation and there is no privity. Citizens, *supra*, 60 Cal.App.4th at 1071.

Ackerberg argues that the Commission was in privity with the AFA. She relies on the fact that AFA was handpicked by the Commission and the Conservancy to hold and manage the

Ackerberg easement, entering into the Management Plan with it, AFA filed a citizen enforcement action against Ackerberg under the Coastal Act, and the Commission knew that AFA had filed the action. Based on these facts, Acerberg concludes that the Commission was in privity with AFA.

In another case, these general facts might support a conclusion of privity. But the privity examination must be a close one, and close examination here shows that the Commission is not in privity with AFA.

True, the Commission and the Conservancy entered into a Management Plan with AFA. But for some reason, AFA did not perform its duties under the Plan. AFA accepted the Ackerbergs offer to dedicate the easement in December 2003. Although the Conservancy authorized a number of grants for AFA relating, in part, to the Ackerberg easement, AFA conducted only the survey for the easement. It conducted no other work on the Ackerberg easement despite being paid to do so.

This circumstance alone is insufficient to show divergence between the Commission and AFA. But it is indicative of what was to come.

In January 2009, AFA sued Ackerberg despite a November 24, 2008 email from Commission staff discouraging AFA from doing so. At this point, AFA's interests began to diverge from that of the Commission and Conservancy.

The Commission had worked through late 2008, and continued to work into 2009, trying to enforce the Ackerberg easement through a cease and desist proceeding. Ackerberg's counsel repeatedly requested postponements. When she advised the Commission that she wanted to try and open the Malibu Terrace easement as an alternative to opening the Ackerberg easement, she was repeatedly informed that the Commission would not accept a settlement that exchanged the Ackerberg easement for the Malibu Terrace easement. In an email dated April 13, 2009, the Commission informed Ackerberg that the easement was a major public asset and "[t]he time has come to open this new access-way for public use."

In response to yet another request from Ackerberg's counsel, staff continued a June 2009 cease and desist hearing in order to discuss settlement. That meeting was unproductive, but it is revealing because neither Ackerberg's counsel on June 5, nor AFA in a June 3 meeting, informed the Commission of a possible settlement of AFA's lawsuit against Ackerberg. Nonetheless, AFA and Ackerberg settled the lawsuit on June 18, 2009.

One of the critical factors to be determined to establish privity based on adequate representation is whether the parties in the first suit provided notice to the parties to be bound of the nature and existence of the lawsuit, and of any a potential settlement. Consumer, *supra*, 168 Cal.App.4th at 691. There is sufficient evidence to conclude that the Commission was aware of the nature of AFA's lawsuit, but it is clear that AFA settled the lawsuit with Ackerberg without notifying the Commission of its terms. Those terms involved the very proposal which the Commission repeatedly rejected when Ackerman's counsel made it: a tradeoff of the Ackerman easement for the Malibu Terrace easement. Had it known of the proposed settlement, there is no doubt that the Commission would have sought to intervene and object to the settlement. The July 6, 2009 email from the Commission to AFA expressing outrage over the settlement proves this.

AFA's failure to give the Commission notice of the proposed settlement by itself

precludes a finding of privity. It simply did not adequately represent the interests of the Commission and the Conservancy.

Additionally, the judgment was not made in the interests of the Commission and the Conservancy. The current Malibu LCP expressly precludes trading one access for another, favoring the opening of as many dedicated and accepted public accessways as possible. This specifically requires improving and opening the Ackerberg easement along with the Malibu Terrace easement. AFA's settlement of the Ackerberg lawsuit is based on a potential exchange of the Ackerberg easement for the Malibu Terrace easement. As such, it is directly contrary to the Malibu LCP. It also disregards AFA's contractual duty under the Management Plan to develop, open, and operate the Ackerberg easement.[6] Nothing in the Plan permits AFA to rely on the opening of the County's Malibu Terrace easement to avoid its duty.[7]

In short, AFA was not in privity with the Commission or Conservancy when it prosecuted the Ackerberg lawsuit and entered into the stipulated judgment. Their interests clearly diverged, and the court cannot infer that AFA adequately represented the Commission and the Conservancy. *Compare* Citizens, *supra*, 60 Cal.App.4th at 1074 (state agency's negotiation and protection of right of public access in settlement resulted in a finding of privity with subsequent public interest group for purposes of *res judicata* on second lawsuit).

d. Public Interest

Ackerberg argues that both the Commission and AFA purport to act as enforcers of the public interest, on behalf of the People of California, citing Consumer, *supra*, 168 Cal.App.4th at 690. Mot. at 15; Reply at 1. Since AFA filed its complaint against Ackerberg under the citizen enforcement provisions of the Coastal Act, it had the same interests as the Commission. Reply at 2.

Not so. AFA's failures discussed *supra* demonstrate that, while it was acting in the public interest in filing the Ackerberg lawsuit, it did not act in the public interest in settling the lawsuit. No matter how Ackerberg argues that the Malibu Terrace easement is better than hers, the fact is that the public is entitled to both. The judgment is pointed towards eliminating the Ackerberg easement in favor of the Malibu Terrace easement, which is directly contrary to the Malibu LCP. The judgment's finding that the settlement is "in the interests of justice" (AR 640) does not purport to set forth what the public interest is, nor could it without involvement of the Commission and the Conservancy.

The stipulated judgment was not in the public interest.

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[6]The Conservancy argues that it has a property interest in the Ackerberg easement and the Management Plan authorizes it to take the easement from AFA if it fails to manage it for public access to the beach. Opp. at 15. This is true, but the Conservancy has not yet exercised this right.

[7]The tradeoff for this disregard of policy and contractual duty is that AFA received the financial benefit of $10,500 in attorney's fees, a role for its attorneys in the lawsuit against the County and payment of AFA's attorney's fees, and probable receipt of $125,000 for management of one of the two easements.

2. Timing of the Enforcement Action

Ackerberg contends that the Commission's proceedings against her were premature in that the easement is not yet ready to be developed. She argues that the Commission's 1985 decision permitted her to use the easement area until it was developed into a public accessway. The Coastal Act requires a CDP for this development, and the Commission, not its staff, has authority to grant a permit. Mot. at 16-17.

This is a *non sequitur*. The cease and desist order requires removal of all unpermitted development within the vertical and lateral public access easements on the property, including rock riprap, a nine foot high wall, concrete slab and generator, fence, railing, planter, light posts, staircase, and landscaping. AR 1526. The 1985 decision permitted Ackerberg to use the easement area; it did not permit her to construct improvements on it. The Ackerbergs attorney asked that they be allowed to use the easement strip for patio or planting or whatever, certainly no improved structure...until the property is picked up." *See* AR 380.[8] The items that have been constructed in the easement are unpermitted. Pursuant to the CDP, Ackerberg is perfectly free to use the area until the easement is opened, but she is not free to construct unpermitted improvements.

The cease and desist order was not premature.

3. Fairness/Due Process

Ackerberg alleges that the Commission denied her due process and a fair administrative hearing.

First, Ackerberg argues that the deputy acted impermissibly in the role of both purportedly neutral advisor to the Commission and prosecutor, thus denying her a fair hearing pursuant to Nightlife Partners, Ltd. v. City of Beverly Hills, (2003) 108 Cal.App.4th 81.

The court has examined the record. There is no evidence that the deputy attorney general acted as any sort of "prosecutor." To the contrary, the deputy simply responded to questions posed by various Commissioners, which is precisely the role of a neutral advisor. No advocacy took place.

Ackerberg points out that the deputy sat next to the Commission's Chair, rather than at counsel table. Mot. at 19. She does not explain why this seating arrangement undermines neutrality or shows bias. Indeed, one would expect the Commission's neutral legal advisor to sit near the Commission and away from advocates.

Petitioner further argues that the deputy's responses to questions included the following statements: "That is one of [Ackerberg's] arguments. We don't think it is a legitimate argument." The deputy also stated that he did not think there was a hearing in the AFA lawsuit and no court had made a real determination on it. When questioned whether the Commission would explore intervention and setting aside the judgment in the AFA lawsuit, the deputy responded: "We will, certainly."

None of these statements were outside the deputy's role as the Commission's legal advisor. The colloquy began when the deputy was asked by a Commissioner what the next step

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[8]Ackerberg's reply contends that page 380 contains a reference by her attorney to a tennis court, but the court could find no such reference on that page. *See* Reply at 4.

in enforcement would be if the cease and desist order issued. The deputy responded, explaining Ackerman's right to file a court challenge. The deputy then what position the Commission would take concerning the AFA lawsuit judgment -- that it was not legitimate -- and why. He also promised to explore options with respect to the AFA lawsuit, including intervention and a motion to vacate the judgment. Thus, all of the responses were to questions concerning the Commission's legal rights in the event that it issued the cease and desist order. This is exactly what a legal advisor does, and did not turn the deputy into a prosecutor in the cease and desist proceeding. Indeed, it could not since the questions all assumed that the cease and desist order would be issued.

Next, Ackerberg argues that the Commission's staff failed to present all of the evidence, including that favorable to her position, in the staff report and addendum. Ackerberg cites no pertinent authority for this position. She merely cites a criminal case holding that a prosecutor must disclose (not present, only disclose) exculpatory evidence (Brady v. Maryland, 373 U.S. 83) and a civil case holding that due process requires that a person seeking renewal of a licensee be given a full opportunity to present a defense. (Bank of America v. City of Long Beach, (1975) 50 Cal.App.3d 882, 886.

Assuming that the Commission's staff has a duty to present all pertinent evidence to the Commission, Ackerberg was represented by counsel at the hearing. Her counsel sent all of the exhibits to the Commission which she claims the staff left out of its report, a point which staff noted in the staff addendum. AR 843. The Commission had all the pertinent evidence, and Ackerberg could have sought a continuance if it was clear that the Commissioners did not have time to read and evaluate it. She did not do so.

Finally, Petitioner contends that she did not have sufficient time to argue her case as she was limited to 20 minutes. Ackerberg complains about the fact that prior to the hearing, Commission staff took the position (through its staff report) that the 1985 revised findings were never adopted, but changed course at the hearing.

This did not amount to a denial of due process. Rather, that is just how adversarial proceedings go sometimes. Parties make concessions, issues change, and sometimes the decision-maker wants the parties to focus on an issue that may not have seemed important. There was nothing legally "unfair" about it. Ackerberg had the same amount of time as Commission staff. The transcript does not show that her attorneys were cut off for exceeding her time limit, and she did not ask for additional time. *See* AR 1490, 1492. Ackerberg argues that staff had additional time for rebuttal, but that is the nature of a prosecution of any kind; the moving party gets the last work. In fact, the rebuttal takes only five pages of transcript. AR 1502-06.

The Commission's hearing on the cease and desist order comported with due process.

4. Sufficiency of the Evidence

Finally, Ackerberg argues that there is not substantial evidence in the record to support the Commission's decision.

The Commission correctly observes that Ackerberg cannot challenge the Commission's issuance of the cease and desist order on grounds that some of the development predated her 1984 permit. A vested rights application is required in order to raise vested rights as a defense.

LT-WR, LLC v. California Coastal Commission, (2007) 151 Cal.App.4th 770, 784-785. Ackerberg never sought a vested rights determination, which is necessary to establish that her development predated the Coastal Act and therefore did not require a permit.

In reply, Ackerberg denies that she is raising a vested rights issue. Reply at 8. Instead, her argument apparently is that certain improvements pre-date the CDP, and the Commission promised her that she could use the easement strip as it was. Mot. at 4, 8.

Neither the 1983 Trueblood CDP nor the 1985 Ackerberg CDP authorized the development which Ackerberg now claims. Neither permit authorized the currently existing tennis court lights, perimeter wall, fence and railing, or landscaping. AR 3 (Trueblood project description), 33, 35 (plans for Ackerberg development showing tennis court with no lights, no fencing, no nine foot perimeter wall). Ackerberg argues that the aerial photos show that Trueblood had a tennis court, lights, a wall, and riprap (large boulders). Reply at 8. That some of these type of items exist in a pre-1985 photo does not mean they are the same items. In fact, it is obvious that the tennis court was renovated, new lights were put in, and the nine foot wall was added. All of this development was added by the Ackerbergs, is unpermitted, and must be removed in the easement area.

The other issue Ackerberg raises concerns the large rip-rap boulders located seaward of the approved bulkhead. *See* AR 1427. In 1983 the Commission authorized Trueblood to construct a 140 foot bulkhead on the property. AR 2-15. The approved development included the removal of existing boulders on the seaward side of the bulkhead and replacement with small gravel and waste mix. AR 15. The permit provided that the bulkhead would extend approximately 2 feet 6 inches above beach level. Behind the bulkhead thick filter rock would be installed topped with large boulders. AR 15. A civil engineer inspected the bulkhead for Trueblood on December 1, 1983, and confirmed it was constructed as planned, including "man size"[9] boulders extending a minimum of 10 feet back (landward) from the wall resting on a 1 foot minimum filter blanket. AR 603-04. A geologic report dated December 21, 1983, for the Ackerberg's proposed development depicted the existing bulkhead in relation to the site. AR 282. Ackerberg's architect sent a letter to the State Lands Commission on October 31, 1984, providing a stringline map dated that same date and two aerial photographs of the site. AR 287-292. The stringline map shows the existing bulkhead in relation to the tennis court and the aerial photographs show the constructed bulkhead with some boulders seaward of the bulkhead, but not the line of boulders that currently exists (*compare* AR 291 *and* 1427) and no vegetation landward of it. AR 291.

Ackerberg contends that the "typical section" (AR 15) depicts large rocks that abut and buttress the seaward face of the bulkhead, interspersed with rock and gravel waste mix. This is true. The typical section does indeed depict some large rocks, along with the notation that said rocks/boulders are to be replaced with rock & gravel wastemix, 3/4" to 12". AR 15. There are supposed to be no large rocks or boulders seaward of the wall. The engineer's "replace existing boulders" notation has an arrow pointing to the large rocks. Simply stated, there should be no large rocks in front of the seawall.

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[9]The court notes that, at least to a layperson, the term "man size" is a misnomer for rocks that are one to two feet in diameter.

Petitioner argues that the rock and gravel mix in front of the bulkhead would be washed away in a storm, and it makes no sense to use them without large rocks on the seaward side, citing to an email from a Commission staff intern. Mot. at 23. She also points to the plans for Trueblood's bulkhead, contending that they show rocks below sand level on the seaward side. She then argues that the west end of Carbon Beach has been eroding, and the rocks placed below the sand on the seaward side can now be observed. Ibid.

This argument is frivolous. Not is there no evidence of beach erosion, the photos shows that the boulders on the seaward side of the bulkhead are decorative, and have not been exposed by erosion of sand from the beach. AR 1441. Indeed, if the beach had eroded, the bulkhead would be higher. The bulkhead is not any higher in the photos than it was in 1984. *Compare* AR 1441 *and* 291.

In any event, substantial evidence supports the Commission's decision that the improvements subject to the cease and desist order were added by the Ackerbergs and must be removed.

E. Conclusion

There is no merit to any of Ackerberg's contentions. Petitioner has avoided her obligations with respect to the easement for 26 years. As the Commission stated: "The time has come to open this new access-way for public use." The cease and desist order is not barred by *res judicata*, and was not premature. Ackerberg was afforded due process and a fair hearing. Finally, the Commission's decision is supported by substantial evidence in the record.

Respondents' counsel is ordered to prepare a proposed judgment, serve it on the Ackerberg's counsel for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for July 29, 2011.

EXHIBIT 7

Superior Court Judgment Denying Petition for Writ of Mandate and Complaint Ackerberg v. California Coastal Commission, Case No. BS 122006 (July 28, 2011)

CCC-09-CD-01-A (Ackerberg)

KAMALA D. HARRIS
Attorney General of California
JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General
State Bar No. 100967
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2023
Fax: (619) 645-2012
E-mail: Jamee.Patterson@doj.ca.gov
Attorneys for defendant/respondent California Coastal Commission and real party in interest State Coastal Conservancy

FAX FILING

NO FEE PURSUANT TO Government Code Section 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DISTRICT

LISETTE ACKERBERG, an individual and trustee of the Lisette Ackerberg Trust; and LISETTE ACKERBERG TRUST, a Trust,

Plaintiffs and Petitioners,

v.

CALIFORNIA COASTAL COMMISSION, a state agency, and DOES 1 through 5, inclusive,

Defendants and Respondents,

ACCESS FOR ALL, a California non-profit organization; STATE COASTAL CONSERVANCY, a state agency, and DOES 6 through 10, inclusive,

Real Parties in Interest.

Case No. BS122006

~~[PROPOSED]~~ JUDGMENT DENYING PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Date: n/a
Time: n/a
Dept: 85
Judge: The Honorable James C. Chalfant
Trial Date: July 5, 2011
Action Filed: August 4, 2009

This matter came on for trial of the petition for writ of mandate and complaint for declaratory and injunctive relief on July 5, 2011. Diane Abbitt and Steven H. Kaufmann

represented petitioners/plaintiffs Lisette Ackerberg and Lisette Ackerberg Trust (Ackerberg). Supervising Deputy Attorney General Jamee Jordan Patterson represented respondent/defendant California Coastal Commission (Commission) and real party in interest State Coastal Conservancy (Conservancy). David Weinsoff represented real party in interest Access for All. The Court admitted into evidence the Commission's administrative record. The Court denied Ackerberg's request to take judicial notice of declarations submitted by Ackerberg in *Access for All v. Ackerberg* LA Superior Court Case No. BC 405058 and a video excerpt of the Commission's July 8, 2009 hearing; the Court also denied Ackerberg's request for judicial notice of a judgment in *Access for All v. Ackerberg* LA Superior Court Case No. BC 405058 because the judgment was already part of the Commission's administrative record. The Court granted Ackerberg's request for judicial notice of Land Use Plan Policy P-56-16 from the 1986 certified County of Los Angeles Malibu/Santa Monica Mountains Local Coastal Program. The Court read and considered the moving papers, opposition and reply, heard oral argument and, at the conclusion of the hearing, adopted its Tentative Decision on Petition for Writ of Mandate as the decision of the Court.

THEREFORE, THE COURT ADJUDGES AND DECREES AS FOLLOWS:

1. The petition for writ of mandate is denied.
2. All other relief is denied.
3. Ackerberg shall take nothing by this action.
4. The Commission and Conservancy shall recover their costs of suit in the amount of

Dated: 7/28/11

J. Chalfant

HONORABLE JAMES C. CHALFANT
Judge of the Superior Court

Judgment prepared by:
Jamee Jordan Patterson
Supervising Deputy Attorney General

SD2009312381; 80523090.doc

EXHIBIT 8

August 27, 2012 Court of Appeal Decision in Ackerberg v. California Coastal Commission

CCC-09-CD-01-A
(Ackerberg)

Filed 8/27/12 Ackerberg v. Cal. Coastal Com. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LISETTE ACKERBERG, Individually and as Trustee, etc., Plaintiff and Appellant, v. CALIFORNIA COASTAL COMMISSION, Defendant and Respondent; STATE COASTAL CONSERVANCY, Real Party in Interest and Respondent.	B235351 (Los Angeles County Super. Ct. No. BS122006)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Law Office of David C. Codell, David C. Codell; Law Office of Diane R. Abbitt, Diane R. Abbitt; Richards, Watson & Gershon and Steven H. Kaufman for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, John A. Saurenman, Senior Assistant Attorney General, and Jamee Jordan Patterson, Supervising Deputy Attorney General, for Defendant and Respondent and for Real Party in Interest and Respondent.

An owner of beachfront real property in Malibu, California, dedicated two public accessway easements on the property, one vertical and one lateral, as mitigation for development permits under the California Coastal Act of 1976 (Coastal Act). (Pub. Resources Code, §§ 30000–30900; all undesignated section references are to that code.) Later, at a public hearing, the California Coastal Commission (Commission) issued an administrative cease and desist order to remove development from the easements so they could be opened and provide public access to the beach. Before the Commission, the landowner argued that (1) the offer to dedicate the vertical easement was subject to an unfulfilled condition precedent — a nearby publicly owned easement would be opened first — and (2) the order was precluded by res judicata based on the judgment in a prior lawsuit between the landowner and a nonprofit organization concerning the opening of the vertical easement on the landowner's property. The Commission rejected those arguments and issued the cease and desist order in an effort to open the landowner's easements.

The landowner then filed this action, seeking a petition for a writ of administrative mandate overturning the Commission's cease and desist order. The trial court denied the petition. The landowner appealed.

On appeal, the landowner points to the original permit findings to support the argument that a prerequisite to opening the vertical easement renders the cease and desist order invalid, claiming the Commission promised it would attempt to open a nearby county-owned accessway easement before opening the accessway easement on the landowner's property. We disagree because there is no unsatisfied prerequisite; the landowner's argument confuses permit findings, which serve to facilitate review on appeal by elucidating the Commission's deliberative process, with terms and conditions, which impose requirements on the coastal development permit agreement between the landowner and the Commission to ensure that development complies with the Coastal Act. The landowner also asserts that the Commission and the trial court should have applied the 1986 local coastal program standards in reaching their respective decisions. We disagree because the Commission and the trial court applied the proper standards,

which were those in place at the time of enforcement given that the permit was to be interpreted under the Coastal Act. The landowner contends that the cease and desist order is not supported by substantial evidence. We disagree. Finally, the landowner argues the judgment in the prior suit between the nonprofit organization and the landowner precludes the cease and desist order. We disagree because public policy would be undermined by applying res judicata in this case.

I

BACKGROUND

A. The Coastal Act

The California Legislature implemented the goals of the federal Coastal Zone Management Act (16 U.S.C. §§ 1451–1466) by enacting the Coastal Act in 1976, which codifies the policy of maintaining public access to the ocean as set forth in article X, section 4 of the California Constitution. Consistent with the principle that regulatory and enforcement powers be separated, the Legislature divided authority under the Coastal Act between two state agencies, the Commission, established under the Coastal Act, and the State Coastal Conservancy (Conservancy), established under division 21 of the Public Resources Code (§§ 31000–31410) (Conservancy Act). (See §§ 30300 [creating the Commission], 31100 [establishing the Conservancy].)

The Commission administers the Coastal Act by approving local coastal programs or acting as the reviewing body for coastal development permits in areas where no local coastal program has been approved. (§ 30600, subd. (c).) The Commission may condition its approval of coastal development permits on mitigation measures, including offers to dedicate public coastal accessway easements (offers to dedicate), designed to offset the impacts of development on public access to the coast. (§ 30212; see also § 30534.) Offers to dedicate are necessary because by law the Commission cannot hold title to property; thus, permit applicants cannot transfer public accessway easements to the Commission. (§§ 30330–30344.) The Coastal Act "provides for two kinds of access [easements]: 'vertical' access, that is, access from the nearest public roadway to the sea; and 'lateral' access, that is, access along the coast. [Citations.]" (*Grupe v. California*

Coastal Com. (1985) 166 Cal.App.3d 148, 161; see also § 30212, subd. (a).) Vertical easements enable public access from the public road to the ocean, while lateral easements run parallel to the ocean and enable public beach access inland of the mean high-tide line. The public cannot use a mitigation accessway easement unless a public or nonprofit entity, approved by the Conservancy, accepts the offer to dedicate by way of a recorded certificate of acceptance and acknowledgement, under which that ~~"p~~public agency or private association agrees to accept responsibility for maintenance and liability of the accessway." (§ 30212, subd. (a).) Most offers to dedicate are irrevocable for a period of 21 years from the date of the offer.

Originally, the Legislature granted the Conservancy authority to acquire land and directed it to secure public accessways, but did not mandate that the Conservancy accept all offers to dedicate. (See § 31105, added by Stats. 1976, ch. 1441, § 1 [~~"c~~onservancy is authorized to acquire . . . real property"].) Subsequently, some offers to dedicate expired when they were not accepted through recorded certificates of acceptance within the period specified as the irrevocable period of the offers. In 2002, the Legislature amended the Conservancy Act to require the Conservancy to accept *every* offer to dedicate that would otherwise expire within 90 days. (§ 31402.2, added by Stats. 2002, ch. 518, § 4.) The Legislature added language clarifying its intent: ~~"I~~n order to prevent the potential loss of public accessways to and along the state's coastline, it is in the best interest of the state to accept all offers to dedicate real property that . . . have the potential to provide access to . . . any beach, shoreline, or view area, or that provide a connection to other easements or public properties providing this access." (§ 31402.1, subd. (b)(1).)

Although the Conservancy must accept all easements to prevent expiration of the offers to dedicate, it has some discretion in opening and managing easements. (See §§ 30214 [legislative intent for implementing public access policies], 31402.2 [requiring Conservancy to accept all accessway offers prior to expiration], 31404 [Conservancy is not required to ~~"o~~pen any area for public use when, in its estimation, the benefits of public use would be outweighed by the costs of development and maintenance"].) The Legislature granted the Conservancy discretion to act in the public interest so long as it

maintains public accessways. (*Ibid.*) Section 31402.3 of the Conservancy Act governs the transfer of public access easements to nonprofit organizations. It provides the Conservancy may "enter into agreements with . . . nonprofit organizations for the development, management, or public use of the accessway . . . [and] . . . shall retain the right to reclaim the easements . . . in the event that . . . the nonprofit organization . . . violates the terms of the agreement." (§ 31402.3, subd. (b).) Any nonprofit organization seeking to accept an offer to dedicate must first submit a management plan to the Conservancy outlining the nonprofit's planned management and operation of the easement. (§ 31402.3, subd. (c)(2), amended by Stats. 2003, ch. 337, § 3.) The management plan must grant the Conservancy the right to reclaim or assign the interest to another public agency or nonprofit organization "if the [C]onservancy and the [C]ommission determine that the nonprofit organization is not managing or operating the interest consistent with the management plan . . . ." (§ 31402.3, subd. (c)(3).)

B. The Accessway Easements

In 1983, Ralph Trueblood, the prior owner of what is now the Ackerberg property,[1] applied for a coastal development permit to construct a bulkhead on the property. The permit was approved subject to an offer to dedicate, irrevocable for 21 years, a lateral public accessway easement extending from the exterior toe of the bulkhead to the mean high-tide line. In February 1984, Ackerberg purchased the property subject to the offer to dedicate a lateral easement.

In 1984, Ackerberg applied to the Commission for a coastal development permit to demolish a beachfront Malibu home and replace it with a home quadruple the size of the existing home. In 1985, the Commission approved the permit subject to an offer to dedicate a vertical public accessway easement through the property that would be irrevocable for 21 years. At the permit hearing, Ackerberg proposed a condition be

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[1] Norman and Lisette Ackerberg purchased the property in February 1984. Subsequently, title has been held by Norman Ackerberg, Lisette Ackerberg, and the Lisette Ackerberg Trust. To assist the reader, the name "Ackerberg" is used to represent the titleholder at all times after February 1984.

added to the permit that would ―first require development of [a nearby county easement] before the development of the Ackerberg [easement] accessway and in the event [the county easement] is developed that the requirement for access on [Ackerberg's property] may be abandoned." Ackerberg asserted the county easement should be opened before her easement because the county easement would provide adequate public access to the beach. The Commission did not approve the proposed amendment, although Commission staff and the commissioners discussed *a preference* for opening publicly owned easements prior to privately owned easements as a matter of policy, and the Commission amended the permit findings to reflect that discussion.

The amended permit findings included a reference to the commissioners' discussion of the proposed Malibu Local Coastal Plan, which had not yet been adopted. The commissioners speculated that, if the plan were adopted, it could include provisions to require that publicly owned easements be opened prior to privately owned easements. The revised findings provided that ―[t]he Commission believes as a matter of policy, publically owned vertical accessways should be improved and opened to the public before additional offers to dedicate vertical easements are opened," but the ―appropriate vehicle for establishing the policy relative to the precise spacing of vertical accessways and whether previously secured offers to dedicate vertical accessways can be extinguished if another vertical accessway is improved and opened within 500 feet of the subject property [is] the [land use plan]." The findings included additional qualifying language providing that ―[t]his position assumes that the publically 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 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." The findings further stated that the easement termination *might* be accomplished *in the future if* a local coastal program were adopted for the Malibu area, but noted that this was *contingent on* the county staff recommendations being approved by both the Los Angeles County Board of Supervisors and the Commission. The Ackerberg permit was issued at the Commission meeting in January of 1985; the Malibu Local Coastal Program Land Use Plan was certified on December 11, 1986. The Malibu Local Coastal Program Land Use Plan contained a provision that future offers to dedicate would not be required if the county determined that adequate access existed nearby and provided for the abandoning of existing offers to dedicate on the condition that adequate alternative access was already opened to the public. (See Malibu Local Coastal Program Land Use Plan (Dec. 11, 1986) § 4.1.2, Vertical Access, P51 <http://planning.lacounty.gov/view/malibu_local_ coastal_plan> [as of Aug. 22, 2012].)

In 2003, Access for All, a nonprofit organization, contracted to manage the Ackerberg vertical easement in exchange for funding from the Conservancy. Access for All recorded a certificate of acceptance and acknowledgement on December 17, 2003, within the 21-year period provided for in the recorded offer to dedicate the easement. The recorded acceptance included the following language: "It is the intention of the California Coastal Commission . . . and Access for All to ensure that the purposes, terms and conditions of the Offer to Dedicate be carried out within a framework established by and among the Commission, Access for All and the State Coastal Conservancy . . . *in order to implement the Commission's Coastal Access Program* pursuant to the California Coastal Act of 1976 . . . . [¶] . . . [¶] [A]cceptance of the offer is subject to a covenant that runs with the land, providing that *any offeree to accept the easement may not abandon it* but must instead offer the easement to other public agencies or private associations acceptable to the Executive Director of the Commission . . . . [¶] . . . [¶] [T]he easement will be transferred to another qualified entity or to the Conservancy in the event that Access for All ceases to exist or is otherwise unable to carry out its

responsibilities as Grantee, *as set forth in a management plan approved by the Executive Director of the Commission* . . . [¶] [and] on the condition that *should Access for All* cease to exist or *fail to carry out its responsibilities* as Grantee to manage the easement for the *purpose of allowing public pedestrian access to the shoreline,* then *all* of Access for All's *right, title and interest in the easement shall vest in the State of California* . . . . The responsibilities of Access for All to manage the easement shall be those set forth in the Management Plan dated July 28, 2003, and maintained in the offices of the Commission and the Conservancy . . . ." (Italics added.)

1. The Management Plan

Access for All, the Commission, and the Conservancy signed the public vertical access easement management plan (management plan) for the purpose of providing ~~"p~~public pedestrian access to Carbon Beach." The parties thereby agreed that the easement would be developed in two phases. During the first phase, Access for All would hire a surveyor to locate the boundaries of the easement and identify encroachments . . . ." Access for All would then ~~"s~~ubmit the information to the Coastal Commission staff for review and action." The management plan specified that the wall along Pacific Coast Highway, two eucalyptus trees, and a large generator box appeared to be encroaching on the easement. During the second development phase, Access for All was to work with Ackerberg to determine the best means of delineating the public accessway, either with ~~"a~~ short side yard fence or marking on the existing pavement." But ~~"p~~rior to placement of any improvements on the site," Access for All was to submit design plans to both the Commission and the Conservancy ~~"f~~or review and approval and subsequent amendment to this management plan." The management plan could be amended only with written approval of the Commission, the Conservancy, and Access for All. The management plan included details about the hours the access gates would be unlocked, the frequency of trash pickup, and the number and content of signs to be placed at the easement. Additionally, Access for All agreed to submit a report to the Commission and the Conservancy every year on February 1, in which it would outline ~~"e~~fforts to open the vertical easement area," the ~~"e~~stimate[d] number of users," and ~~"a~~ny

concerns raised regarding the public use [of the easement] and efforts to address those concerns."

2. Enforcement Proceedings

After Access for All accepted the easement, Ackerberg's attorneys persistently sought an alternative to opening the easement. Ackerberg took the position with Commission enforcement staff that her offer to dedicate was contingent on the Commission's alleged promise that it would attempt to open the county easement before opening her easement and that her easement could be terminated because the county easement would provide adequate alternative access. On December 13, 2005, the Commission notified Ackerberg's attorney that all encroachments in the vertical easement had to be removed, including the portion of the riprap in the lateral easement. The development encroaching in the easement was described as ~~r~~ock 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 . . . which were established pursuant to Commission-issued Coastal Development Permit Nos. 5-83-360 and 5-84-754."

In 2007, after repeatedly communicating that the vertical easement on Ackerberg's property had to be opened, the Commission commenced administrative enforcement proceedings under section 30810 of the Coastal Act by sending notice to Ackerberg. But the Court of Appeal stayed enforcement proceedings pending the outcome of litigation commenced by Ackerberg's neighbor in 2006 involving the Ackerberg easement. The Commission prevailed in that litigation. Later, the Court of Appeal affirmed the judgment in favor of the Commission. (*Roth v. California Coastal Com.* (Apr. 23, 2008, B195748, B200099) [nonpub. opn.].) The Commission renewed its enforcement efforts by scheduling an administrative hearing for December 2008. The hearing was postponed at Ackerberg's request.

3. The Access for All Lawsuit and Settlement Agreement

On January 6, 2009, notwithstanding the detailed terms of the management plan stating that Access for All was to seek approval from the Commission and the Conservancy at regular intervals during the development process, Access for All commenced a suit against Ackerberg to open the easement. (*Access for All v. Lisette Ackerberg Trust* (Super. Ct. L.A. County, 2009, No. BC405058) (*Access for All lawsuit*).) In response, Commission staff did not order Access for All to withdraw the suit under the terms of the management plan agreement. Instead, Commission staff met with Commission counsel, then informed Access for All that the Commission could not "provide legal advice on the matter, [but] there are a few ways in which filing suit prior to a hearing may [a]ffect the outcome of our administrative proceedings. First, filing suit may cause the court to place a stay on any administrative proceedings . . . . In addition it may be beneficial to have an administrative record for the courts to review instead of them reviewing the facts of the case de novo." Commission staff communicated with Ackerberg's attorney throughout this period. Ackerberg's attorney emailed a meeting request to Commission executives on April 13, 2009, because Access for All had informed Ackerberg that it could not proceed further with "any course of action other than what it ha[d] already taken with regard to the Ackerberg accessway" without approval from the Commission and the Conservancy. The executive director of the Commission, Peter Douglas, agreed to meet with Ackerberg's attorney, but sent her an email, explaining, "[W]e have made our position very clear on many previous occasions . . . . There is a major public asset and value at stake here . . . . I do not see any basis for giving away or abandoning such a precious public resource . . . ." On May 21, 2009, Douglas emailed a third party regarding the Ackerberg easement, stating, "To my knowledge Access for All wants to open this access way and does not think eliminating it is something they support. Even if they did, we will not."

The Commission rescheduled the administrative enforcement hearing for June 10, 2009. On May 29, 2009, Commission staff postponed the hearing and scheduled a meeting for June 5, 2009, with Ackerberg's attorney because Commission staff were

attempting to resolve this matter amicably." On June 3, 2009, Ackerberg's attorney sent Commission staff an email stating that counsel representing Access for All would join them at the June 5 meeting because, "[a]s you are aware Access for All brought an enforcement action against Mrs. Ackerberg in LA Superior Court this last January." (See *Access for All lawsuit*, *supra*, BC405058.) Commission staff responded that counsel for Access for All should not attend the meeting.

On June 19, 2009, the superior court in the *Access for All lawsuit*, *supra*, No. BC405058, approved a settlement agreement between Access for All and Ackerberg (Ackerberg Trust Settlement). The Ackerberg Trust Settlement provided that Ackerberg would pay $10,500 of Access for All's attorney fees in the *Access for All lawsuit*; Access for All would commence a lawsuit against Los Angeles County to open the county easement; Ackerberg would fully fund the lawsuit against Los Angeles County; and Ackerberg's attorney would serve as lead counsel in the suit against Los Angeles County. The Ackerberg Trust Settlement also provided that, if the lawsuit were successful, Ackerberg would pay to improve and open the county accessway; Access for All and Ackerberg would jointly seek Commission approval to terminate the Ackerberg easement; and Ackerberg would pay $250,000 for maintenance, management, and enforcement of the county easement if her easement were terminated. The $250,000 payment would be split between the Conservancy and Access for All unless the Conservancy did not "wish to accept the funds," in which case the full amount would be paid to Access for All as maintenance costs for 10 years for the county easement. If the lawsuit were not successful, Ackerberg and Access for All would jointly apply to the Commission to amend the management plan to include security measures at Ackerberg's expense and then open the Ackerberg easement within 90 days.

On July 6, 2009, Douglas exchanged emails with Steve Hoye, the executive director of Access for All. Douglas expressed surprise at learning that Access for All had entered into a settlement agreement with Ackerberg and noted that neither Access for All nor Ackerberg had mentioned the possible settlement in recent meetings with Commission staff. In his second email, Douglas informed Hoye that he saw "the

$125,000 offer to the Commission as a bribe to acquiesce in giving up a public right that we will reject AS WE HAVE EVERY TIME SUCH AN OFFER HAS BEEN MADE IN THE PAST under similar circumstances . . . ."

4. The Cease and Desist Order

On July 8, 2009, the Commission held its rescheduled administrative hearing and issued a cease and desist order that directed Ackerberg to "[r]emove all unpermitted development located within the lateral and vertical public access easements on the property according to the provisions of this Order." At the hearing, Ackerberg argued that the Commission's actions were barred under the doctrine of res judicata by the Ackerberg Trust Settlement in the *Access for All lawsuit*, *supra*, No. BC405058. In determining to issue the cease and desist order, the Commission referred to the Malibu Local Coastal Program, which was adopted in 2002 under the Coastal Act. (See § 30600.5.) The 2002 Malibu Local Coastal Program explicitly forbade abandoning any public access easements.

Ackerberg initiated the present action against the Commission, filing a petition for a writ of administrative mandate (see Code Civ. Proc., § 1094.5) and arguing that the cease and desist order was not supported by substantial evidence; the Commission erred by citing the public access provisions from the current local coastal program, namely, the 2002 Malibu Local Coastal Program, in its decision; and the cease and desist order was barred under the doctrine of res judicata. The trial court denied Ackerberg's petition for a writ of administrative mandate, determining that Access for All did not act in the public interest by settling the lawsuit and that the Commission and the Conservancy were not in privity with Access for All, thereby precluding the application of res judicata. The trial court determined that the Commission's order was supported by substantial evidence and was not premature because authorization to "use" the easement area did not include authorization to erect structures on the easement without first obtaining permits. In reaching its decision, the trial court referenced standards from the 2002 Malibu Local Coastal Program as applicable to the cease and desist order.

Ackerberg appealed from the trial court's denial of her petition for a writ of administrative mandate.

II

DISCUSSION

On appeal, Ackerberg points to the original permit findings to support the argument that a prerequisite to opening the vertical easement renders the cease and desist order invalid, claiming the Commission promised it would attempt to open a nearby county-owned accessway easement before opening the accessway easement on the Ackerberg property. We disagree because there is no unsatisfied prerequisite; Ackerberg's argument confuses permit findings, which serve to facilitate review on appeal by elucidating the Commission's deliberative process, with terms and conditions, which impose requirements on the coastal development permit agreement between Ackerberg and the Commission to ensure that development complies with the Coastal Act. Ackerberg also asserts that the Commission and the trial court should have applied the 1986 local coastal program standards in reaching their respective decisions. We disagree because the Commission and the trial court applied the proper standards, which were those in place at the time of enforcement. Ackerberg contends that the cease and desist order is not supported by substantial evidence. We disagree. Finally, Ackerberg argues that the judgment in the *Access for All lawsuit* and the Ackerberg Trust Settlement preclude the cease and desist order under the doctrine of res judicata. We disagree because applying res judicata in this case would contravene public policy. Accordingly, we affirm the trial court's denial of Ackerberg's petition for a writ of administrative mandate.

A. Standard of Review

Under Public Resources Code section 30801, an "aggrieved person" secures judicial review of a Commission action by filing a petition for a writ of mandate pursuant to Code of Civil Procedure section 1094.5. "The inquiry in such a case shall extend to the questions of whether the [Commission] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of

discretion. Abuse of discretion is established if the [Commission] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.' (*Id.*, § 1094.5, subd. (b).)" (*La Costa Beach Homeowners' Assn. v. California Coastal Com*. (2002) 101 Cal.App.4th 804, 814.) In reviewing the agency's decision, a court "'must consider all relevant evidence, . . . a task which involves some weighing to fairly estimate the worth of the evidence. [Citation.]" [Citations.] That limited weighing is not an independent review where the court substitutes its own findings or inferences for the agency's. [Citation.] "'It is for the agency to weigh the preponderance of conflicting evidence [citation]. Courts may reverse an agency's decision only if, *based on the evidence before the agency*, a reasonable person could not reach the conclusion reached by the agency.' [Citation.]" [Citation.]'" (*Ibid*.)

"'"[I]n an administrative mandamus action where no limited trial de novo is authorized by law, the trial and appellate courts occupy in essence identical positions with regard to the administrative record, exercising the appellate function of determining whether the record is free from legal error. [Citations.]" [Citation.] Thus, the conclusions of the superior court, and its disposition of the issues in this case, are not conclusive on appeal. [Citation.]' [Citation.]" [Citation.]' [Citation.]" (*La Costa Beach Homeowners' Assn. v. California Coastal Com*., *supra*, 101 Cal.App.4th at pp. 814–815.)

B. Terms and Conditions of the Vertical Easement

Ackerberg contends that the Commission erred in issuing the cease and desist order because it ignored the Commission's 1985 promise that it would attempt to open the nearby county-owned easement prior to opening Ackerberg's easement. We disagree because Ackerberg's argument is based on the faulty assumption that permit findings are tantamount to permit terms and conditions. Simply put, the Commission did not promise to open the county-owned easement prior to opening Ackerberg's easement.

"'A contract may validly include the provisions of a document not physically a part of the basic contract. . . . 'It is, of course, the law that the parties may incorporate by reference into their contract the terms of some other document. [Citations.] But each

case must turn on its facts. [Citation.]"'" (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1331.) The contractual agreement between Ackerberg and the Commission, coastal development permit No. 5-84-754, was attached to the recorded offer to dedicate the vertical easement. The coastal development permit and the offer to dedicate both incorporated terms that required those agreements to be construed in compliance with the Coastal Act, including its public access provisions and management plan requirements. (See §§ 31400 [declaring legislative policy of guaranteeing public access to coastal resources and noting the Conservancy's principal role in accessway implementation], 31402.3, subd. (c)(2) [requiring management plans].) Accordingly, we look to the permit, the offer to dedicate, the transcript of the public hearing, and the management plan in evaluating the agreement between Ackerberg and the Commission.

Ackerberg cites principles of contract interpretation to support the argument that findings included in the 1985 permit are binding terms of the contract between Ackerberg and the Commission that should be construed against the Commission. Ackerberg states that as reasonably construed, and relied on, the findings guarantee that the vertical easement would be terminated either when the county easement was opened or when the offer to dedicate expired. This argument fails for three reasons: It ignores the purpose of findings under the Coastal Act, thereby confusing findings with terms and conditions; it does not account for the policies underlying the Coastal Act, including limitations on the Commission's approval authority; and it requires a narrow reading of the findings rather than reading the permit and the findings as a whole.

"The purpose of requiring written findings [under the Coastal Act] is to record the grounds on which the decision of the Commission rests and thus render its legality reasonably and conveniently reviewable on appeal. [Citations.] Without appropriate written findings, the trial court cannot properly perform its function in a proceeding for administrative mandate and determine whether the agency's decision is supported by its findings and its findings are supported by the evidence. [Citation.]" (*McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 941.) The Commission uses written findings to elucidate its reasoning for the purpose of enabling judicial review

under Code of Civil Procedure section 1094.5 and Public Resources Code section 30801. (See also Cal. Code Regs., tit. 14, § 13057 [requiring staff reports to the Commission contain ~~s~~pecific findings, including a statement of facts, analysis, and legal conclusions as to whether the proposed development conforms to the requirements of the Coastal Act"].) Courts review the Commission's findings to determine whether the Commission's decision complies with the Coastal Act. (See Pub. Resources Code, § 30604, subds. (a)–(c); Cal. Code Regs., tit. 14, § 13096, subd. (a).) In contrast to findings, terms and conditions impose requirements on the permit ~~in~~ order to ensure that such development or action will be in accordance with the provisions of [the Coastal Act]." (Pub. Resources Code, § 30607.) While findings, terms, and conditions all relate to compliance with the Coastal Act, they differ in that findings explain the reasoning underlying the Commission's decision that a given permit complies with the Coastal Act at the time the decision is rendered, while terms and conditions operate to constrain or limit a specific development project at the time of formation and into the future.

On January 24, 1985, at a public hearing, the Commission approved Ackerberg's coastal development permit, but the Commission decided not to approve a special condition, proposed by Ackerberg, that would limit the required offer to dedicate by requiring that the Commission attempt to open the nearby county-owned easement, and if opened, the Ackerberg easement would terminate if termination were possible under a not-yet-approved local coastal plan. Rather, the Commission approved the permit with revised findings reflecting the discussion during the hearing. Both the face of the permit and the findings attached to the offer to dedicate specifically included language that the permit would not be approved without the offer to dedicate. During the hearing, Commission staff advised the commissioners that a preference for opening publicly owned easements ~~is~~ a policy question that . . . is appropriate for the [land use plan], and could be incorporated . . . in the finding, as a policy that [the Commission has] taken, as opposed to a condition. And then . . . the message [gets] across to the county . . . . [¶] [T]hat would be a better way to get [the Commission's] point across." Just prior to the Commission's vote on the coastal development permit, Commission Chair Nutter

discussed the proposed amended findings. Commissioner McMurray responded and asked Chair Nutter whether the findings, like Ackerberg's proposed amendment, would dictate that "if the public access point was improved, then no other access points within 500 feet are required," adding, "I think we should vote on that." Chair Nutter clarified his proposed amended findings prior to moving for a vote by responding, "No, what I am suggesting is, that what we have before us, at this point in time, is a permit application. We don't have the county before us. We have no ability —obviously, at this point — to open any accessway. [¶] What we have got is a permit application, with some policy considerations that we have been struggling with for a good long while, and I think it is appropriate to reflect that in the findings. [¶] . . . The main motion is per staff, with the understanding that we will have revised findings for our consideration." Without further discussion, the Commission then voted to approve the permit application with the revised findings.

We conclude that the findings did not create an additional condition of the permit and thus did not require the Commission to open the county easement before opening the Ackerberg easement. Rather, the findings reflected the Commission's reasoning process at the time it approved Ackerberg's coastal development permit. The Commission demonstrated its compliance with the Coastal Act in its findings by requiring Ackerberg to dedicate the easement in exchange for the permit and clarified its reasoning process in responding to Ackerberg's proposed amendment by including language that the termination *might* be accomplished *but only* if the recommendations drafted by the Los Angeles County staff working on completing the Malibu Local Coastal Plan were approved (by both Los Angeles County and the Commission) and enacted through a future local coastal plan. While the 1986 land use plan contained a provision that future offers to dedicate would not be required if the county determined that adequate access existed nearby, it did not contain a provision requiring that existing offers to dedicate be abandoned. To the contrary, it provided that existing offers to dedicate should be accepted and opened before new offers to dedicate were required in the same area. (See

Malibu Local Coastal Program Land Use Plan, *supra*, <http://planning.lacounty.gov/view/malibu_local_coastal_plan> [as of Aug. 22, 2012].)

The findings merely discuss a possible *future* policy and did not constitute a condition when the instrument was read as a whole. While findings referenced by Ackerberg include language that "[t]he Commission believes as a matter of policy, publically owned vertical accessways should be improved and opened to the public before additional offers to dedicate vertical easements are opened," the findings go on to qualify this statement, noting that the Commission does not implement policy changes through individual permit applications which apply to a single property because broad policy decisions are implemented through local land use plans which apply to the entire community.

Ackerberg references the commissioners' discussion to support her argument that the permit findings operated as conditions on her offer to dedicate the easement. This interpretation fails to account for the entire record. The statements of the commissioners, when read together with the recorded offer to dedicate, illuminate the meaning behind the policy decision espoused by the Commission. The commissioners acknowledged that they could not force Los Angeles County to open its nearby easement, but wanted to call attention to the need to open the easement. The commissioners and Commission staff discussed, in language almost identical to the language in the revised findings, that the Commission would not enact broad policy changes in an individual coastal development permit, but that broad policy changes were the purview of a local coastal program. Thus, the Commission's findings do not operate as conditions on Ackerberg's permit because the Commission did not adopt any broad policy change at that time.

Assuming the Commission's findings could be construed to mean that the Commission guaranteed the future termination of Ackerberg's easement, such a guarantee would violate the Coastal Act. The Legislature sought to encourage local government regulation by enabling municipalities to implement Coastal Act regulations through their own local coastal programs. "The Legislature left wide discretion to local governments to formulate land use plans for the coastal zone and it also left wide

discretion to local governments to determine how to implement certified [local coastal programs]." (*Yost v. Thomas* (1984) 36 Cal.3d 561, 574.) A land use plan is one component of a local coastal program. A local coastal program is tailored to the unique needs of the local community and must "meet the requirements of, and implement the provisions and policies of, [the Coastal Act] at the local level." (§ 30108.6.)

The proposed land use plan that would have covered the Ackerberg property in 1986 was written and adopted by Los Angeles County, the local municipality responsible for adopting a local coastal program at that time. The Commission could only have guaranteed that the future land use plan would contain policies enabling termination of the vertical easement if the Commission used its review authority to reject any local coastal program that did not enact the easement termination policy — an action which would violate the Coastal Act. "'[T]he Commission in approving or disapproving [a local coastal program] does not create or originate any land use rules and regulations. It can approve or disapprove but it *cannot itself draft any part of the coastal plan*.'" (*Yost*, *supra*, 36 Cal.3d at p. 572, italics added.) Section 30500, subdivision (c) provides, in relevant part: 'The precise content of each local coastal program shall be determined by the local government, consistent with Section 30501, in full consultation with the Commission and with full public participation.' Pursuant to section 30512, the Commission's review of a land use plan is limited to a determination as to whether the land use plan conforms to the . . . Coastal Act [and], in making its review, section 30512.2, subdivision (a) provides that 'the commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan.'" (*Douda v. California Coastal Com.* (2008) 159 Cal.App.4th 1181, 1198.) Accordingly, Ackerberg could not have reasonably relied on the findings as a promise to open the county-owned easement before opening the vertical easement on her property.

C. Application of Local Coastal Program

Ackerberg argues that the Commission and the trial court erred because they applied the 2002 policies to interpret both Ackerberg's offer to dedicate and Ackerberg's

coastal development permit. Ackerberg asserts that the 2002 policies do not expressly authorize their retroactive application, and, therefore, they should not apply to the 1985 permit. Ackerberg implies that the 2002 policies should also not apply to the 1983 bulkhead permit. For reasons we shall explain, we disagree.

The California Coastal Act of 1976 encourages local agencies to enact their own local coastal programs and to then issue local coastal development permits. (§§ 30004, 30500.) Land use plans are one component of a local coastal program. (§ 30108.6; see also § 30108.5.) On December 11, 1986, the Commission certified Los Angeles County's land use plan for the unincorporated Malibu area (portions of Malibu that were under the county's jurisdiction because they had not been incorporated by the City of Malibu) as a part of the county's proposed local coastal program. The remainder of the proposed program was never adopted. Instead, in 2002, after the Ackerberg property had been incorporated into the City of Malibu, the city adopted a new local coastal program that applied to the Ackerberg property. The 2002 Malibu Local Coastal Program policies include standards for vertical easement spacing and the policy of opening as many public accessways as possible. (See Malibu Local Coastal Program Land Use Plan, *supra*, <http://planning.lacounty.gov/view/malibu_local_coastal_plan> [as of Aug. 22, 2012].)

"'[W]hen an instrument provides that it shall be enforced according either to the law generally or to the terms of a particular . . . statute, the provision must be interpreted as meaning the law or the statute in the form in which it exists at the time of such enforcement.' [Citations.]" (*City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 379.) The Coastal Act governs enforcement of Ackerberg's recorded offer to dedicate and the accompanying coastal development permit because both documents include language that they are subject to the Coastal Act. Further, both documents directly reference and quote the Coastal Act extensively. The permit included a standard condition, labeled "interpretation," which specified that "[a]ny questions of intent or interpretation of any condition will be resolved by the Executive Director of the Commission."

In issuing the cease and desist order, the Commission was enforcing the 2002 Malibu Local Coastal Program, the law in effect at the time it issued the order. Under the Coastal Act, all new development in the coastal zone must be authorized under a coastal development permit. (§ 30600, subd. (a).) When it issued the cease and desist order, the Commission found that there were no coastal development permits issued for the development in the Ackerberg easements, but the easements were nevertheless developed with ~~r~~ock riprap, a 9-ft high wall, a concrete slab and generator, and a fence, railing, planter, light posts, and landscaping." The Commission found that the development was not included in the 1983 permit, nor was it included in the 1985 permit. Finding that the development had been added without the necessary coastal development permit(s), the Commission applied the 2002 Local Coastal Program standards to its evaluation of the unpermitted structures in the easement accessways. When development occurs in violation of the Coastal Act, the law applicable to enforcement of the act is the law then in force. Neither the law in effect at the time the unpermitted development commences nor the law in effect at the time an offer to dedicate an easement is recorded applies, even when the easement offer is for the same property as the development. In sum, when the Commission issued the cease and desist order, it was acting as required under the Coastal Act to accomplish the opening of an easement accessway to the public.

Ackerberg relies on *Strauss v. Horton* (2009) 46 Cal.4th 364 (*Strauss*) for the proposition that retroactive application of a statute requires either a clear statement of retroactive intent or very clear extrinsic evidence of such intent. (See *id*. at p. 470.) Ackerberg's reliance on *Strauss* and similar cases is misplaced. *Strauss* addressed the retroactive application of Proposition 8, a voter-approved measure that prohibited same-sex marriage in California effective November 5, 2008. (*Strauss*, at p. 385.) Interveners in *Strauss* argued that California should not recognize same-sex marriages that occurred prior to the enactment of Proposition 8, reasoning that refusal to recognize same-sex marriages, as opposed to revoking past marriage licenses, would not involve retroactive application of Proposition 8. (*Strauss*, at pp. 471–472.) The court held that "[w]ere Proposition 8 to be applied to invalidate or to deny recognition to marriages performed

prior to November 5, 2008, rendering such marriages ineffective in the future, such action would take away or impair vested rights acquired under the prior state of the law and would constitute a retroactive application of the measure." (*Strauss*, at p. 472.) The court explained, "'[A] . . . retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.'" [Citations.] . . . '[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, *in respect to transactions or considerations already past*, must be deemed retrospective.'"'" (*Id.* at pp. 471–472, italics added.)

Ackerberg's analogy to *Strauss* relies on two faulty assumptions. First, *Strauss* dealt with executed marital "contracts"; the married, same-sex couples had accepted the state's offer of the right to marry, entered into a contractual relationship, and reasonably relied on the state's promise to honor their marriages. (See *Strauss*, *supra*, 46 Cal.4th at pp. 472–474.) In contrast, Ackerberg's offer to dedicate a public easement was analogous to an option contract that the Commission had explicitly accepted by recording an acceptance certificate. Ackerberg's offer to dedicate the easement was irrevocable for 21 years and was recorded in exchange for the coastal development permit for her home. "An irrevocable option is a *contract*, made for consideration, to keep an offer open for a prescribed period' [citation]." (*Erich v. Granoff* (1980) 109 Cal.App.3d 920, 927–928; *City of Orange v. San Diego County Employees Retirement Assn.* (2002) 103 Cal.App.4th 45, 51–52.) The Commission reasonably relied on Ackerberg's offer when it allowed Ackerberg to build a large beachfront home, thereby impacting public coastal access. Second, the argument assumes Ackerberg had a vested right to have the offer of an easement terminated. That assumption is incorrect. Ackerberg's vested rights were included in the plain language of the 1983 and 1985 offers to dedicate; those rights were limited to the right to quadruple the size of the existing home and add other improvements to the property consistent with the approved plans in 1985 and to maintain the 1983 bulkhead. Two offers to dedicate public access easements across the property were offered in exchange for those rights, and the offers specified that they were to

remain irrevocable for 21 years. Ackerberg's rights to maintain the development on her property, as depicted in the plans submitted for the 1983 and 1985 coastal development permits, were not impaired by the issuance of the cease and desist order. The cease and desist order requires Ackerberg to remove development that was added without the requisite permits in the public accessways and to bring the property into compliance with its depiction in the plans submitted for the 1983 and 1985 permits. It follows that Ackerberg's vested rights — to build a larger home and to maintain the bulkhead — were not affected by the cease and desist order.

Additionally, Ackerberg's argument fails on its own terms. Even assuming the cease and desist order should be evaluated under standards in place at either the time Ackerberg's permit was originally approved in January of 1985 or the offer to dedicate was recorded on April 4, 1985, Ackerberg advocates applying the Los Angeles County land use policies adopted in December 1986. Ackerberg attempts to justify the application of those standards, which were enacted nearly two years after the 1985 permit was approved and the offer to dedicate was recorded, by arguing that she believed the standards adopted in December 1986 governed the permit agreement and thus justifiably decided to ~~a~~void challenging the Commission's actions in requiring the opening of the easement — a challenge that almost certainly would have [succeeded as] . . . an unconstitutional taking without compensation . . . ." But ~~[t~~]here cannot be written into the contract of the parties by implication the provision that it shall be subject to the terms of statutes to become effective at a future date." (*Loeb v. Christie Hotel Corp.* (1936) 16 Cal.App.2d 299, 300–301.) This argument mirrors Ackerberg's contention that the permit findings operate as conditions and therefore runs into the same problems as her assertion that the 1985 permit was intended to require opening the county easement before opening the Ackerberg easement. Both arguments fail to account for the Commission's limited authority under the Coastal Act (see § 30512.2, subd. (a)) and the need to interpret the permit and the offer to dedicate reasonably according to the plain language of the documents (see *Fireman's Fund Ins. Co. v. Superior Court* (1997) 65 Cal.App.4th 1205, 1212–1213). Section 30512.2, subdivision (a) provides: ~~"~~The

commission's review of a land use plan shall be limited to its administrative determination that the land use plan submitted by the local government does, or does not, conform with the requirements of Chapter 3 (commencing with Section 30200). In making this review, the commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan."

Ackerberg contends that she relied on the commissioners' statements at the 1985 meeting, which were reflected in the permit findings, to guarantee a future right to terminate the easement. We disagree because Ackerberg's reliance on a finding that would contradict the purpose of mitigation measures under the Coastal Act would be unreasonable. (See *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1369 [finding property owners could not have reasonably believed that the Commission intended to abandon an easement by failing to enforce it for 18 years].) During the January 24, 1985 public hearing, the Commission discussed the forthcoming local coastal program and the need for hearings and findings related to the local coastal program before it could return to the Commission for approval. (See §§ 30503, 30510.) While the revised findings for the Ackerberg coastal development permit referred to a *recommendation* made by the Los Angeles County land use planning staff, allowing a mere recommendation to govern the interpretation of the coastal development permit here is not reasonable. Staff recommendations serve to provide background information to the public at public hearings and local elected officials who must decide the contents of the proposed local coastal program prior to submitting the proposed program to the Commission for its approval or denial. The Los Angeles County Board of Supervisors, the local approving authority, did not approve the Malibu land use policies until October 7, 1986. (See Malibu Local Coastal Program Land Use Plan, *supra*, <http://planning.lacounty.gov/view/malibu_local_coastal_plan> [as of Aug. 22, 2012].)

The correct vehicle for implementing the access policies that Ackerberg sought would have been through public participation in the local coastal program adoption process. Finally, as noted in the permit, ~~t~~he Commission found that but for the

imposition of the . . . condition [requiring an irrevocable offer to dedicate a vertical public accessway easement], the proposed development could not be found consistent with the public access policies of Section[s] 30210 through 30212 of the California Coastal Act of 1976 and that therefore in the absence of such a condition, a permit could not have been granted."

D. Substantial Evidence Supported the Cease and Desist Order

Arkerberg's final argument in her opening brief is captioned, "Questions Involving the Purportedly Unpermitted Development Are Mere Pretexts for the Commission's Core Goal of Opening the Easement." In that section Ackerberg states that "the removal of this purportedly unpermitted development is not truly at issue here" because "there is no reason to remove allegedly unpermitted development at all unless the easement itself is opened." But Ackerberg's contention that the easement cannot be opened is based on her arguments that we have already rejected.

Nevertheless, Ackerberg further argues that the Commission's finding that the development was unpermitted is not supported by the record. She devotes nine lines of her opening brief to this argument, citing plans, photographs, and a staff report which she claims proves her point. We have examined those items in light of the entire record and the statutory requirements under the Coastal Act and the Conservancy Act, and we conclude that Ackerberg has failed to demonstrate that the Commission's findings were not supported by substantial evidence.

"'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citations.]" (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record. [Citation.]" (*Id.* at p. 652.) Development in the coastal zone always requires a coastal development permit subject to the requirements of the Coastal Act. (See §§ 30600, 30820; Cal. Code Regs., tit. 14, § 13052.)

Ackerberg forfeited the defense that the development predated the Coastal Act by not seeking a vested rights ruling under section 30608 of the Coastal Act. (See Cal. Code Regs., tit. 14, § 13200.)

Ackerberg further contends that the Commission permitted the development in the vertical easement at the 1985 hearing, when Commission staff told Ackerberg she could "use" the easement unless or until the easement was accepted and opened to the public. In reaching its determination to issue the cease and desist order, the Commission reviewed evidence from its enforcement staff and Ackerberg and heard from both sides. Evidence submitted to the Commission and in the administrative record included plans, photographs, and staff reports. The 1985 coastal development permit application describes the project as "[d]emolition of existing single family dwelling . . . and concrete block wall along street property line." The plans associated with the 1985 permit depict the proposed and existing structures on the property but do not depict the block wall at the street line nor the generator Ackerberg placed on the easement. The Commission could reasonably find, based on the 1985 permit description and plans, that the wall and other development in the easement were unpermitted. Similarly, the 1983 bulkhead permit plans include a depiction of a "typical section" of the bulkhead in which an arrow connects the depiction of riprap at the toe of the bulkead and the words "replace exist[ing] boulders with rock and gravel wastemix, 3/4" to 12"." The Commission required an offer to dedicate a lateral easement as a condition of issuing the bulkhead permit; that lateral easement area included the area on which Ackerberg placed the riprap according to the survey completed by Access for All. Further, the Commission reviewed the plans, photographs, staff report, and survey record and reasonably determined that the boulders Ackerberg placed on the public accessway easement were not authorized by a coastal development permit. Finally, Ackerberg presented no evidence establishing development in the easements met the permit requirements under the Coastal Act. Thus, the record shows the cease and desist order was supported by substantial evidence.

E. Res Judicata

The trial court determined that the Ackerberg Trust Settlement was not in the public interest based on policy considerations. We agree. "'[R]es judicata will not be applied if injustice would result or if the public interest requires that relitigation not be foreclosed.'" [Citation.]" (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 577.) The doctrine of res judicata is applicable when (1) the parties have an opportunity to litigate through notice or constructive notice and choose not to litigate or (2) the parties' interests were adequately represented in the prior action. (*Id.* at pp. 575–577.) "A predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*.' [Citation.]" (*Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 897.) But holding the cease and desist order was barred by res judicata because of the Ackerberg Trust Settlement would be contrary to the Coastal Act and its underlying policies, as enacted by the Legislature, because of (1) the act's public access policies; (2) the act's limitations on citizen enforcement motivated by pecuniary interest, including penalties; and (3) the act's management plan requirement.

Accordingly, we hold that the terms of the Ackerberg Trust Settlement are unenforceable because they are contrary to public policy. Pertinent to our analysis are the separate contractual agreements, including Ackerberg's 1985 permit and the easement accessway management plan, both of which espoused the common purpose of ensuring that any development complied with the Coastal Act. "'A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.'" [Citations.] 'Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case.' [Citation.]" (*Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 183.)

1. Public Access Requirements Under the Coastal Act

In order to be approved, all development in the coastal zone must be reviewed and found to be in compliance with the Coastal Act, including its public access provisions. ~~"~~The Coastal Act of 1976 was the result of popular recognition that uncontrolled development of the California coastline could not continue. The act sets forth a statement of policies (§§ 30200–30264) which are binding on local and state agencies in planning further development in the coastal zone. . . . [I]mportant sections of the act provide for a coastal access program . . . . There is no doubt that the Coastal Act is an attempt to deal with coastal land use on a statewide basis." (*Yost v. Thomas*, *supra*, 36 Cal.3d at p. 571.) The offer to dedicate the vertical easement that Ackerberg recorded acknowledged these policy concerns, stating, "~~p~~ublic access to the shoreline and along the coast is to be maximized . . . ." "~~P~~rior to certification of the local coastal program, a coastal development permit shall be issued if . . . [the Commission] finds that the proposed development . . . will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with Chapter 3," including "~~th~~e public access . . . policies of Chapter 3." (§ 30604, subds. (a), (c).) The offer to dedicate the easement acknowledged this requirement, reciting, "~~th~~e Commission found that *but for* the imposition of the . . . condition [offering the easement], the proposed development *could not be found consistent with the public access policies . . . of the California Coastal Act* of 1976 and that therefore in the absence of such a condition, a permit could not have been granted." (Italics added.) The 1985 permit could not have been issued without the Commission conditioning the permit on Ackerberg's offer to dedicate the vertical easement because, without the condition, Malibu's ability to prepare a local coastal program would have been prejudiced given the Coastal Act's public access policies.

Ackerberg urges that the 1985 permit is to be interpreted to allow for termination of the accessway easement, but this contention is not supported by the permit. The interpretation subverts the intent expressed in the Coastal Act that no permit be approved that would prejudice Malibu's ability to prepare a local coastal program in compliance with the act's public access provisions. And such a strained reading of the contract

between Ackerberg and the Commission would be contrary to standard rules of contract interpretation. (See *Fireman's Fund Ins. Co. v. Superior Court*, *supra*, 65 Cal.App.4th at pp. 1212–1213 [discussing plain meaning rule and reasonable interpretation in contract law].) Even if such an interpretation were reasonable, it would be unenforceable. "The general rule is that 'a contract made in violation of a regulatory statute is void. [Citation.] Normally, courts will not 'lend their aid to the enforcement of an illegal agreement or one against public policy . . . .'" [Citations.]'" (*Hinerfeld-Ward, Inc. v. Lipian* (2010) 188 Cal.App.4th 86, 92.) The plain language of both the coastal development permit and the recorded offer to dedicate support our determination that the Commission did not guarantee termination of Ackerberg's offer to dedicate. The Commission and Ackerberg recognized in the permit that the offer to dedicate was required under the Coastal Act.

2. Penalties Under the Coastal Act

Although "any person" may enforce the Commission's duties under the Coastal Act (see §§ 30111, 30803, 30805), all penalties under the act must be paid to the state. (*Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 678 (*Sanders*).) The *Sanders* case dealt with a private citizen's suit to enforce a provision of the Coastal Act's predecessor (former §§ 27000–27650). (Compare former § 27426 ["Any person may maintain an action for the recovery of civil penalties"] with current § 30805 ["Any person may maintain an action for the recovery of civil penalties provided for in Section 30820 or 30821.6"].) In *Sanders*, the court held that "absent a specific provision in the Coastal Act designating any person other than the state to be a recipient of a part or all of the civil penalties recovered under the act, the statute is *not* a *qui tam* statute and all the penalty must be paid to the state." (*Sanders*, at p. 678.) The court reasoned that the Coastal Act was meant to protect public interests and that, accordingly, any penalties for harm would have to be paid to the state to benefit the public rather than those seeking personal pecuniary gain. (*Ibid.*) The court noted that "[b]y definition, *qui tam* rights have never existed without statutory authorization." (*Id.* at p. 671.) The *Sanders* court explained, "*Qui tam* actions were eventually abolished in England completely, because they had been persistently abused. Some of the disadvantages arising from its permissive use

were: . . . [I]t gave what many considered to be excessive powers to prospective plaintiffs, and, when not carefully controlled, it was subject to abuse, becoming vexatious or resulting in suits settled for an amount prejudicial to the government's interest." (*Id.* at p. 675, fns. omitted.)

The Ackerberg Trust Settlement specifically provided that if Access for All successfully sued to open the county easement, Ackerberg would pay Access for All, a private organization, $125,000 in "private funding," in addition to attorney fees associated with the suit. The purpose of the settlement agreement was to "provide for an orderly resolution of the Coastal Act violation alleged . . . and for enforcement and maintenance of the Ackerberg easement . . . ." Although Access for All sued Ackerberg pursuant to the citizen enforcement provisions of the Coastal Act for penalties, any award under the settlement agreement meant to address violations of the Coastal Act could not be paid to Access for All. By providing for payment to a private organization, the Ackerberg Trust Settlement violated the Coastal Act. Thus, the private financial gain Ackerberg conferred on Access for All in the Ackerberg Trust Settlement renders the settlement agreement invalid under the citizen enforcement provisions of the Coastal Act.

3. Management Plan Required by the Coastal Act

The Coastal Act requires management plans for public access easements and provides that "[t]he Conservancy shall retain the right to reclaim the easements or other interests in the event that the . . . nonprofit organization . . . violates the terms of the agreement." (§ 31402.3, subd. (b).) "The Legislature . . . declares that in carrying out the provisions of this [act] . . . conflicts be resolved in a manner which on balance is the most protective of significant coastal resources." (§ 30007.5.) The Coastal Act, by replacing the California Coastal Zone Conservation Act (§ 27000 et seq.), "requires the Commission [on such permit applications] to undertake a delicate balancing of the effect of each proposed development upon the environment of the coast . . . .' This 'delicate balancing' concept implicitly confers a substantial discretion in the Commission in its factual determinations." (*Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Com.* (1976) 57 Cal.App.3d 76, 88.) While Ackerberg argues that the

Ackerberg Trust Settlement is more protective of coastal resources than the cease and desist order requiring her to open the easement on her property, this argument fails because the authority to make such decisions has been placed in the Commission and the Conservancy, not in a landowner or a nonprofit organization. (See *id.* at pp. 87–88.) Upholding Ackerberg's position on the issue of res judicata would be contrary to the provisions of the Coastal Act because it would contravene the priority assigned to the protection of significant coastal resources, including public coastal access, as determined by the Commission. Because we decide that public policy considerations are determinative here, we do not decide other issues under res judicata.

F. Taking Without Just Compensation

A theme underlying several of Ackerberg's arguments is that opening the Ackerberg easements would be tantamount to an unconstitutional taking for lack of compensation. Ackerberg concludes that the Ackerberg Trust Settlement was in the public interest by arguing that the public access easements on her property constitute a taking of private property without just compensation. In support of this argument Ackerberg cites section 30010 of the Coastal Act, requiring just compensation when private property is taken for a public use, and the United States Supreme Court decision in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 [107 S.Ct. 3141]. Because Ackerberg never previously raised any argument that the original permit condition constituted an unlawful ~~"ta~~king," this claim is time barred. (See § 30801 [permit decisions of the Commission are final if not challenged by writ petition within 60 days]; *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 54.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.

EXHIBIT 9

Superior Court Decision Granting Motion to Vacate Stipulated Judgment
Access for All v. Ackerberg,
Case No. BC405058 (Nov. 28, 2012)

CCC-09-CD-01-A
(Ackerberg)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 11/28/12			DEPT. 58
HONORABLE ROLF M. TREU	JUDGE	K. MASON	DEPUTY CLERK
HONORABLE #6	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
A AYALA, CA	Deputy Sheriff	D HINO-SPAAN, 7953	Reporter

8:30 am	BC405058	Plaintiff Counsel	JAMEE PATTERSON (x) DAVID WEINSOFF (x): Court Call
	ACCESS FOR ALL VS LISETTE ACKERBERG TRUST ET AL	Defendant Counsel	DAVID CODELL (x) WILLIAM ROSS (x) DIANE ABBITT (x)

NATURE OF PROCEEDINGS:

MOTION OF INTERVENORS, CALIFORNIA COASTAL COMMISSION AND STATE COASTAL CONSERVANCY, TO INTERVENE, VACATE STIPULATED JUDGMENT AND STAY CASE;

JOINDER OF MALIBU OUTRIGGER HOMEOWNERS ASSOCIATION AND DESIGNATED INDIVIDUAL HOMEOWNERS FOR LEAVE TO INTERVENE, CAVATE STIPULATED JUDGMENT, AND STAY CASE AND REQUEST FOR JUDICIAL NOTICE BY COASTAL COMMISSION AND STATE CONSERVANCY;

Case called.

Order appointing court-approved reporter signed and filed.

The above Motion to Intervene- on grounds stipulated to by parties this day in open court- is continued to: JANUARY 23, 2013 at 8:30AM in this department.

The above Motion to Vacate is heard and GRANTED on grounds set forth in the Tentative Ruling, which is adopted as the Court's Order, filed and incorporated herein by reference. (Request for stay is moot.)

Notice waived.

MINUTES ENTERED
11/28/12
COUNTY CLERK

Case Number: BC405058 **Hearing Date:** November 28, 2012 **Dept:** 58

JUDGE ROLF M. TREU
DEPARTMENT 58

_____
Hearing Date: Wednesday, November 28, 2012
Calendar No: 6
Case Name: Access for All v. Lisette Ackerberg Trust, et al.
Case No.: BC405058
Motion: Motion to Intervene, Vacate Stipulated Judgment, and Stay Case
Moving Party: Non-parties, California Coastal Commission and State Coastal Conservancy (joined by Non-parties, Malibu Outrigger Homeowners Association and Designated Individual Homeowners)
Opposing Party: Plaintiff, Access for All and Defendants, Lisette Ackerberg Trust, et al.
Notice: OK

Tentative Ruling: Motion to vacate stipulated judgment is granted; request for stay is denied as moot. Joinder is denied as moot. Motion to intervene is continued.

_____

Background and Procedural History –
Plaintiff, Access for All filed this action against Defendants, Lisette Ackerberg Trust and Lisette Ackerberg (collectively "Ackerberg") for declaratory relief, injunctive relief, civil fines, trespass, and nuisance. Plaintiff alleged that Defendants were required to clear a public easement to provide access to Carbon Beach, but failed to do so. Specifically, Plaintiff alleges that Defendants were required, in order to obtain a building permit on their property, to grant a ten-foot easement for public access to the beach. Plaintiff filed this action on 1/06/09.

On 6/19/09, the parties filed a notice of settlement and stipulation for entry of judgment. The same day, the Court signed the stipulated judgment. In pertinent part, the stipulated judgment required Access for All to file an action, funded by Ackerberg, for the purpose of having the County open a dedicated accessway to the Beach so that the Ackerberg accessway would no longer be necessary.

On 8/04/09, a Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief was filed (BS122006). The action is styled Ackerberg, et al. v. California Coastal Commission, with Access for All and State Coastal Conservancy listed as the Real Parties in Interest. The action alleges that the Commission has refused to recognize the Superior Court's stipulated judgment, and has made administrative orders that are inconsistent with the Judgment. Plaintiffs allege that the administrative orders are incorrect and are barred by res judicata due to the stipulated judgment.

On 9/14/09, non-parties California Coastal Commission and State Coastal Conservancy filed a motion to intervene, to vacate judgment, and to stay action. Pursuant to the parties' stipulation, the Court has continued the hearing on this motion to allow the writ proceeding to conclude. On 8/9/11, a notice was filed indicating that the Honorable James C. Chalfant denied the petition for writ of mandate and issued a judgment in favor of the Commission and Conservancy. On 12/17/11, non-parties Malibu Outrigger Homeowners Association and "Designated Individual Homeowners" filed a joinder to the Commission and Conservancy's motion.

Pursuant to the parties' stipulation, the Court has continued the hearing on this motion

pending the appeal of the writ proceeding. On 9/10/12, the Commission and Conservancy filed a supplemental brief indicating that on 8/27/12 the Court of Appeal issued its decision (B235351) affirming the judgment in the writ proceeding: the Court of Appeal held that the terms of the settlement are unenforceable (Decision [Supp. Brief filed 9/10/12, Attachment] p. 27) and invalid (id. at p. 30).

On 9/18/12, the Court continued the hearing on this matter in light of a petition for rehearing filed on 9/12/12. The petition for hearing was denied on 9/14/12. A petition for review to the Supreme Court was filed on 10/10/12 (S205886); the petition for review was denied on 11/20/12.

Motion to Intervene, Vacate Stipulated Judgment, and to Stay –
Although remittitur has not yet issued, it appears that the appeal in the writ proceedings is now completed. Therefore, the Court is inclined to proceed with the motion and joinder thereto. Consistent with the Court of Appeal's opinion in B235351, the motion to vacate stipulated judgment is granted. The request for a stay is denied as moot.

As to the motion to intervene, Defendants correctly note that the Commission and Conservancy failed to file a proposed complaint in intervention. See, e.g., In re Sutter Health Uninsured Pricing Cases (2009) 171 Cal.App.4th 495, 513. Additionally, in light of the joinder's failure to file a proposed complaint in intervention, Defendants correctly argue that the joinder does not seek intervention but only the vacation of the stipulated judgment.

The joinder parties have failed to file any new papers relating to the motion to intervene including a proposed complaint in intervention. Therefore, reviewing the nature of the joinder, the joinder is denied as moot consistent with the Court's ruling on the motion to vacate stipulated judgment.

On 11/13/12, the Commission and Conservancy lodged their proposed complaint in intervention. The Court is inclined to continue the hearing on the Commission and Conservancy's motion to intervene to permit Defendants an opportunity to respond to the proposed complaint in intervention. See Defs.' Reply filed 9/17/12 p. 3:3-8. Otherwise, the Court is inclined to grant the Commission and Conservancy's motion to intervene under the the mandatory (CCP § 387(b)) and discretionary provisions (see CCP § 387(a); Kuperstein v. Superior Court (1988) 204 Cal.App.3d 598, 600).

EXHIBIT 10

Superior Court Decision
Granting Motion to Intervene
Access for All v. Ackerberg,
Case No. BC405058 (January 23, 2013)

CCC-09-CD-01-A
(Ackerberg)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 01/23/13			DEPT. 58
HONORABLE ROLF M. TREU	JUDGE	K. MASON	DEPUTY CLERK
HONORABLE #11	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
R.E. LEE CA	Deputy Sheriff	A GONZALEZ, 11612 Pro Tempore	Reporter

8:30 am	BC405058	Plaintiff Counsel	DAVID WEINSOFF (x): Court Call
	ACCESS FOR ALL	Defendant Counsel	DAVID CODELL (x) DIANE ABBITT (x)
	VS		JAMEE PATTERSON (x): Intervenor
	LISETTE ACKERBERG TRUST ET AL		

NATURE OF PROCEEDINGS:

MOTION OF CALIFORNIA COASTAL COMMISSION AND STATE COASTAL CONSERVANCY TO INTERVENE;

JOINDER OF MALIBU OUTRIGGER HOMEOWNERS, AND REQUEST FOR JUDICIAL NOTICE BY COASTAL COMMISSION AND STATE CONSERVANCY;

nlf

Matters called for hearing.

The Tentative Ruling is deemed submitted to by all and the Court makes the ruling below- as fully set forth in said tentative, which is adopted as the Courts Order, filed and incorporated herein by reference. All sides have received said tentative and waived further notice as moot.

The motion to intervene is GRANTED.

Court and counsel confer regarding case status.

Case Management Conference set: MARCH 29, 2013 at 8:30AM in this department.

Notice waived.

Case Number: BC405058 **Hearing Date:** January 23, 2013 **Dept:** 58

JUDGE ROLF M. TREU
DEPARTMENT 58

_____
Hearing Date: Wednesday, January 23, 2013
Calendar No: 11
Case Name: Access for All v. Lisette Ackerberg Trust, et al.
Case No.: BC405058
Motion: Motion to Intervene
Moving Party: Proposed Intervenors, California Coastal Commission and State Coastal Conservancy
Opposing Party: Defendants, Lisette Ackerberg Trust and lLisette Ackerberg
Notice: OK

Tentative Ruling: Motion to intervene is granted.

_____

Background and Procedural History –
Plaintiff, Access for All filed this action against Defendants, Lisette Ackerberg Trust and Lisette Ackerberg (collectively "Ackerberg") for declaratory relief, injunctive relief, civil fines, trespass, and nuisance. Plaintiff alleged that Defendants were required to clear a public easement to provide access to Carbon Beach, but failed to do so. Specifically, Plaintiff alleges that Defendants were required, in order to obtain a building permit on their property, to grant a ten-foot easement for public access to the beach. Plaintiff filed this action on 1/06/09.

On 6/19/09, the parties filed a notice of settlement and stipulation for entry of judgment. The same day, the Court signed the stipulated judgment. In pertinent part, the stipulated judgment required Access for All to file an action, funded by Ackerberg, for the purpose of having the County open a dedicated accessway to the Beach so that the Ackerberg accessway would no longer be necessary.

On 8/04/09, a Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief was filed (BS122006). The action is styled Ackerberg, et al. v. California Coastal Commission, with Access for All and State Coastal Conservancy listed as the Real Parties in Interest. The action alleges that the Commission has refused to recognize the Superior Court's stipulated judgment, and has made administrative orders that are inconsistent with the Judgment. Plaintiffs allege that the administrative orders are incorrect and are barred by res judicata due to the stipulated judgment.

On 9/14/09, non-parties California Coastal Commission and State Coastal Conservancy filed a motion to intervene, to vacate judgment, and to stay action. Pursuant to the parties' stipulation, the Court has continued the hearing on this motion to allow the writ proceeding to conclude. On 8/9/11, a notice was filed indicating that the Honorable James C. Chalfant denied the petition for writ of mandate and issued a judgment in favor of the Commission and Conservancy. On 12/17/11, non-parties Malibu Outrigger Homeowners Association and "Designated Individual Homeowners" filed a joinder to the Commission and Conservancy's motion.

Pursuant to the parties' stipulation, the Court has continued the hearing on this motion pending the appeal of the writ proceeding. On 9/10/12, the Commission and Conservancy filed a supplemental brief indicating that on 8/27/12 the Court of Appeal issued its decision

(B235351) affirming the judgment in the writ proceeding: the Court of Appeal held that the terms of the settlement are unenforceable (Decision [Supp. Brief filed 9/10/12, Attachment] p. 27) and invalid (id. at p. 30).

On 9/18/12, the Court continued the hearing on this matter in light of a petition for rehearing filed on 9/12/12, which was denied 9/14/12. A petition for review to the Supreme Court was filed on 10/10/12 (S205886) and denied 11/20/12.

On 11/28/12, the Court granted the motion to vacate stipulated judgment, denied the request for stay and the joinder as moot, and continued the motion to intervene to permit Defendants an opportunity to respond to the proposed complaint in intervention that was lodged on 11/13/12.

Motion to Intervene –
Defendants' response objects to the proposed complaint in intervention because it may delay settlement, it was not lodged with the original motion filed on 9/14/09, and it expands this matter beyond the original dispute between Plaintiff and Defendants.

As the Court's 11/28/12 ruling noted, the Commission and Conservancy failed to file a proposed complaint in intervention with their motion to intervene that was filed on 9/14/09: this would support denial of the motion (see, e.g., In re Sutter Health Uninsured Pricing Cases (2009) 171 Cal.App.4th 495, 513). However, Defendants fail to cite to any authority that requires the Court to deny the motion, especially in light of the history of this action. Notably, while the motion to intervene was filed on 9/14/09, Defendants did not object to this procedural deficiency in their opposition that was filed on 10/15/09; the hearing on the motion has been continued numerous times since then pursuant to the parties' stipulation pending the appeal of the writ proceeding; and Defendants' objection to this procedural deficiency was raised for the first time on 9/17/12.

Under these circumstances, the Court does not find that the procedural deficiency prejudiced Defendants. Defendants' argument that the proposed complaint in intervention expands this matter is not appropriate, in view of the purpose of intervention. Defendants' concern regarding settlement is illogical in that it appears that any settlement would necessarily include the Commission and Conservancy, irrespective of intervention.

The motion to intervene is granted.

EXHIBIT 11

Agreement: Interim Public Access Management Plan for the Ackerberg Easement; MRCA, Coastal Commission, State Coastal Conservancy; July 25, 2012

CCC-09-CD-01-A
(Ackerberg)

Agreement: Interim Public Access Management Plan
Ackerberg Easement, Malibu, CA

This *Agreement: Interim Public Access Management Plan* ("Plan"), dated July 25, 2012, is entered into by and between the Mountains Recreation and Conservation Authority ("MRCA"), the State Coastal Conservancy ("Conservancy") and the California Coastal Commission ("Commission"), and concerns the acceptance and management by MRCA of a vertical access easement (the "Easement"). The Plan shall become effective on the recordation by MRCA of a Certificate of Acceptance ("Acceptance"), in the form approved by all parties.

Background

The Easement was originally created by the recording of an acceptance, by a nonprofit organization, Access for All ("AFA"), of an Offer to Dedicate ("OTD") required as a development permit condition by the Commission. Following a public hearing in 2011, pursuant to the terms of AFA's acceptance of the Easement, the Conservancy authorized the divestment of all right, title and interest held by AFA in the Easement and the transfer of those rights to MRCA. In connection with MRCA's acceptance of the Easement, the Conservancy has retained a future contingent interest in the Easement.

To date, the Easement has not been developed or opened to the public, nor are any public access improvements in place. At present, certain encroachments constructed by the property owner ("Ackerberg") prevent the opening and development of the Easement. Various lawsuits ("Easement Litigation") related to the Easement, the encroachments and the failure of Ackerberg to allow development and opening of the Easement are currently pending, including: *Lisette Ackerberg et al. v. California Coastal Commission et al.*, Court of Appeal, Second Appellate District, No. B235351 (appeal fully briefed, awaiting appellate court decision); and *Access for All v. Lisette Ackerberg Trust, et al.*, Los Angeles Superior Court No. BC405058 (on hold pending resolution of the Ackerberg v. Commission lawsuit.)

Description of the Easement

The Easement is ten feet in width, extends across the entire eastern boundary of the Ackerberg property at 22466-500 Pacific Coast Highway, Malibu and allows for public access from Pacific Coast Highway ("PCH") to the mean high tide line of Carbon Beach.

The Easement directly connects to 280 linear feet of public beach easement. At the shoreline, the Easement adjoins a lateral public access easement extending the length of the Ackerberg property. This lateral beach easement is held by the State Lands Commission and is 148.30 feet in length. The State Lands Commission also holds an adjacent 61.76 foot long public access beach easement, located directly west of the easement on the Ackerberg property. In addition, on the 70-foot-long parcel immediately to the east of the Ackerberg property, there is a recorded deed restriction dedicating lateral public access along Carbon Beach.

Interim Public Access Management Plan
Ackerberg Easement

Purpose of the Plan

The purpose of the Interim Management Plan is to address the immediate obligations of MRCA in accepting the Easement and those obligations that MRCA will agree to take on after the Easement Litigation is resolved and all legal impediments to development and opening the of the Easement have been removed.

Obligations on Acceptance of the Easement

MRCA agrees to hold the Easement for the purpose of public access to and along Carbon Beach and to take no action that will impair or adversely affect this overriding purpose of the Easement. In particular, MRCA will hold the Easement subject to the terms and provisions of the Acceptance, the OTD and this Plan.

MRCA shall not abandon the Easement, although it may transfer the Easement to another public entity or nonprofit organization which is qualified to hold the Easement, subject to the prior written approval of the Conservancy and the Commission, which may be conditioned on execution of an approved management plan with the transferee. Any attempted transfer without the prior approval of the Commission and Conservancy is void and without effect.

MRCA shall obtain the advance written approval of the Conservancy, through its Executive Officer, and the Commission, through its Executive Director, before MRCA undertakes, authorizes or permits any action or enters into any agreement or voluntarily participates in any litigation that may materially affect, alter, impair or delay the future use of the Easement for public access or the use of the Easement by the public or that may be inconsistent with the material terms of this Plan, the OTD and the Acceptance. The Conservancy and the Commission shall not unreasonably delay or withhold approval.

In the event that MRCA is required, by law or by judicial decision, to participate or join in litigation specifically related to the Easement by reason of its acceptance of the Easement or as holder of the Easement, the parties, in good faith and to the extent permitted by law, shall negotiate and enter into a joint litigation agreement, the purposes of which are to protect the shared interests of the parties in the Easement and, to the extent feasible, to reduce, limit or avoid any costs to MRCA of participation or joinder in the litigation.

Obligations on Removal of Impediments to Development of the Easement

MRCA shall have no obligation to develop or improve the Easement for public access until the Easement Litigation is resolved by judicial decision or by agreement so that there remain no substantial legal impediments to development, improvement or opening of the Easement. At such time, the parties shall negotiate in good faith an amendment to this Plan that will address the respective obligations of the parties to undertake the following, as necessary, subject to availability of funding:

1. Preparation of a plan and design for improvement of the Easement for public access
2. Application for all permits necessary for implementation of the improvement, including any required environmental documentation under CEQA
3. Implementation of the improvement.

The Plan amendment shall also detail the obligation of MRCA to open, maintain and manage the Easement for public access, upon completion of the improvement of the Easement for public access. The amendment shall address: rules for the public use of Easement, signage, access and parking, maintenance, enforcement, and such other topics as the parties deem relevant.

Retained Future Interest

Should MRCA cease to exist or fail to carry out its responsibilities pursuant to this Plan as determined by the Executive Director of the California Coastal Commission or the Executive Officer of the State Coastal Conservancy, then all right, title, and interest in the Easement shall be vested in the State of California, acting by and through the State Coastal Conservancy or its successor in interest, or in another public agency or nonprofit organization designated by the State Coastal Conservancy that has agreed to accept the Easement. This future contingent interest shall be set forth in the Acceptance.

Agreement

The foregoing is agreed to by and between MRCA, the Commission, and the Conservancy.

MOUNTAINS AND RECREATION CONSERVANCY AUTHORITY

Rorie Skei — September 12, 2012

By: RORIE SKEI
Its: Chief Deputy Executive Officer — Date

CALIFORNIA COASTAL COMMISSION

August 14, 2012

By: Karla Galvez
Its: Staff Counsel — Date

STATE COASTAL CONSERVANCY

8/28/12

By: Sam Schuchat
Its: Executive Officer — Date