

CALIFORNIA COASTAL COMMISSION

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MEMORANDUM

TO: Commissioners and Interested Parties

FROM: Peter Douglas, Executive Director
Linda Locklin, Manager, Coastal Access Program

SUBJECT: Coastal Access Program: Action Plan to Implement
the Offer to Dedicate Access Easement Program.

Staff Note: Recent media reports have focused new attention on an old and continuing problem that the Commission has struggled with for years - how to convince other public agencies with the authority the Commission lacks and/or non-profit organizations to assume the liability and costs for opening and operating new public beach accessways along the California coast. These potential accessways involve "offers to dedicate" (OTD) easements for public use that the Commission required as conditions of coastal development permits. Because the Coastal Act prohibits opening for public use any accessway required as a condition of a coastal development permit unless and until a responsible third party (i.e., local government, any other public agency with the authority to hold and manage land, private non-profit associations) agrees to accept responsibility for maintaining them, most OTDs remain on the record as offers only. Due to legal constraints, offers to transfer an interest in real property, such as OTDs, are time-limited - in most cases, twenty-one (21) years. If this time period runs and an OTD has not been "accepted" by an appropriate third party, the offer expires and the potential for public use is extinguished. It is important to understand that even if an OTD has been accepted by a third party, mere acceptance does not translate into public use. Accordingly, the issues raised by the current situation of the outstanding OTDs must be divided and understood as raising two distinct questions: First, what steps must be taken to ensure that none of the outstanding OTDs that are appropriate for possible future public use expire due to the passage of the time period during which they can be accepted on behalf of the general public? Second, what actions can be taken to open new accessways for actual use by the public?

The first question is easily answered: The Commission, in cooperation with the State Coastal Conservancy and the State Lands Commission has taken steps to ensure that no OTD that is suited for public use will expire due to the time period running on the offer. The second question

is more difficult to deal with in large part due to the politics of public access (i.e., many seaside residents actively oppose opening new public accessways near their homes) and the fiscal constraints confronting public agencies that might otherwise be interested in assuming responsibility for opening and maintaining public accessways to and along the coast.

At the Commission's September meeting in Eureka, the Commission briefly discussed the status of the Offers to Dedicate (OTD's) public access easements. The Executive Director recommended that the staff prepare an action plan to deal with OTDs and that this plan be reviewed by the Commission.

I. Introduction

The California Constitution guarantees the public the right of access to State waters, which includes the ocean, most lakes, streams and rivers. Unfortunately, this Constitutional provision is not self-implementing. Public access policies incorporated into the Coastal Act seek to carry out this constitutional guarantee (see sections 30210-12 PRC) along the California coast (excluding San Francisco Bay, which has its own law to protect and promote public access). Accordingly, the Coastal Commission is charged with the responsibility of protecting, maintaining and enhancing public access opportunities to and along the coast. The Commission shares coastal public access responsibilities with many other public agencies - State agencies include the State Coastal Conservancy, the San Francisco Bay Conservation and Development Commission, the State Lands Commission, the California Department of Parks and Recreation, the Santa Monica Mountains Conservancy, the Department of Fish and Game (Wildlife Conservation Board), the Department of Navigation and Ocean Development, the Food and Agriculture Agency (i.e., Agricultural Districts), the University of California (i.e., UCSB, UCSD), and the California Department of Transportation: Federal agencies such as the Department of Interior (National Park Service, the Bureau of Land Management), the Department of Defense (i.e., the US Air Force at Vandenberg, the Navy and the Army), the National Oceanic and Atmospheric Administration (i.e., Estuarine Research Reserves and the Marine Sanctuaries); the Department of Agriculture (i.e., the Forest Service), and the U.S. Coast Guard: Regional agencies such as joint powers entities and regional park and/or open space districts: Local governmental entities such as county and city park departments. In addition, in many areas private property owners and private, non-profit organizations manage public access and use on private and/or public property.

In carrying out its mandate, the Commission has, in appropriate circumstances, applied conditions to coastal development permits that require permit applicants to record an Offer to Dedicate (OTD) to an entity acceptable to the Commission's Executive Director an easement for public access to the beach or along the shoreline. These OTDs constitute mitigation for the adverse impact of the new development on public access opportunities. Since the Commission began using OTD's as a mitigation technique in 1980, 1269 OTD's have been recorded. Most OTD's are available for 21 years and if not accepted within that time frame, the offer expires. To date, only 19% of the OTD's have been accepted. Starting in 2002 and in the absence of any action by the Commission and other public agencies, OTD's will begin to expire. To avoid this possibility, the Executive Officer of the State Coastal Conservancy, at the request of Commission staff, has agreed that the Conservancy would accept any OTD that has not been determined to be unsuitable for future public use in order to prevent its expiration. It should be noted that the mere acceptance of an OTD involves some costs for legal and land title work. It is for this reason Commission and Conservancy staff are working out an approach that would require the careful examination of every individual OTD before the process of formal acceptance by the Conservancy is initiated. OTDs, as noted before, can be accepted even though the easement area that is the subject of the offer may not be opened to public use until a subsequent, unknown point in time.

Historically, the Commission anticipated that local governments would accept and open OTD's as part of the local coastal program (LCP) implementation process. For a variety of reasons, this has not happened.

II. Background:

A. Coastal Access Program

In 1979, the Legislature amended the Coastal Act and added Sections 30530-34, calling for the creation of the Coastal Public Access Program. This legislation transferred the responsibility for preparation of a coastal public access program from the California Department of Parks and Recreation to the Commission and the Conservancy. Clearly, the Legislature intended to create a comprehensive program that would increase public access opportunities to and along the coastline. The Commission was encouraged, to the maximum extent practicable, to incorporate the access program into the LCPs. Other components of the program included an inventory of access points and OTDs, as well as a map of their location. The Commission and Conservancy were also required to submit annual Public Access Program progress reports. These program elements have been implemented through creation of the Access Inventory database, the Access Inventory maps, and the Joint Annual Access Report prepared by the Commission and Conservancy.

The Commission and the Conservancy identified a number of innovative funding techniques to help local governments implement the coastal access program and, in January 1981, published a report entitled "Innovative Management and Funding Techniques for Coastal Accessways." The report concludes that the primary impediment to the implementation of an effective access program relative to OTDs was the absence of public agencies willing to step forward to accept responsibility for opening and managing the land areas subject to easement offers. The main reasons identified why public agencies are reluctant to accept OTDs is the lack of funding to: a) construct accessways and make other necessary improvements; b) carry out annual maintenance activities; c) pay for legal services associated with liability issues; and d) pay for additional public services associated with public accessways, such as police and fire protection.

The 1981 report identified several management and funding techniques that could be utilized to resolve the problems standing in the way of making use of the OTDs for the public's benefit. An important recommendation was the creation of a statewide non-profit organization to operate and maintain coastal access facilities (a prototype was called the California Coastal Access Trust). The Conservancy was to provide start-up funding and technical expertise to the Trust. No Trust for the purpose of implementing this recommendation was ever formed. A recommendation relative to funding was to establish a new coastal access fund, administered by the Conservancy, through a voluntary add-on tax or new auto license fee. Most of these recommendations, written 15 years ago, were never implemented. Many remain applicable today. Certainly, the difficulties with the implementation of OTDs have not diminished.

Although a statewide non-profit public access Trust has not been created, the Conservancy maintains an active technical assistance program for non-profit organizations, including several that have assumed some public access responsibilities. Toward this end, the Conservancy published, in 1984, "The Nonprofit Primer, A Guide Book for Land Trusts". Relative to funding, the Commission initiated and last month received final approval to move forward with a special purpose license plate program to generate new funds for a variety of coastal protection purposes. Under that program, once expenses are paid, 50% of the proceeds from the sale of these special coastal theme plates will be available to support the Commission's Adopt-A-Beach program and the State Coastal Conservancy. It is anticipated that the public access programs of both agencies will also benefit. However, this additional revenue is not expected by any means to fill the funding gap. Notwithstanding progress on some fronts, the central challenge of the Access program is finding entities that are willing to take on the responsibility of opening and maintaining the new accessways represented by the outstanding OTDs.

B. The Problem

Of the 1269 OTD's recorded, only 19% have been accepted. Thus 1014 OTD's remain unaccepted. These OTDs must be reviewed and those determined to be suitable for public access must be accepted and then opened for public use. In addition, because these OTD's were required to mitigate the impacts of private development upon public access, if they are not accepted and opened for use, project impacts will not have been fully mitigated. Most of the OTD's were recorded in the early 1980's and will begin to expire in the next six years. Beginning in 2002, the time limitations on over 100 OTD's will become due each year for several years. Although steps have been taken to avoid the expiration of any OTD suitable for public use, it is imperative that potential management entities be identified in the next year or two in order to actually open for public use the easement areas represented by these OTDs.

C. What the Commission has done to achieve the acceptance of OTDs?

1. The Commission has now computerized the OTD inventory. Until last year, the Inventory was on the Wang System. It has now been transferred and updated onto a regular database system that is capable of sorting the data in a variety of ways. The ability to sort the data (i.e., by vertical OTD's, by expiration date) has greatly improved staff's ability to work with the data.
2. Commission staff are in the process of sending all local governments copies of the new Inventory. In addition, several non-profit groups have asked for those portions of the Inventory that cover the geographic area of most interest to them.
3. Commission staff has established priority geographic areas in which OTDs will be analyzed to determine which OTD's should be pursued first. For example, Malibu has long been recognized as an area lacking sufficient public access opportunities and has therefore been designated a high priority area. Several years ago the Commission established the Malibu Beach Access Fund to help defray costs of opening and maintaining new vertical accessways. The

intent had been to create an annuity fund that Los Angeles County would use to support its management of public access facilities in Malibu. Unfortunately, the County has resisted entreaties that it assume this responsibility.

Commission staff has now identified all vertical OTD's in Malibu and has begun to evaluate them to determine which can be opened utilizing the money in the Fund. The first five years of operation and maintenance for the recent Conservancy accepted vertical OTDs at Escondido Beach (Stern and Seacliff) will be paid for from the Fund (assuming the Commission approves the proposed transfer of Fund monies to the Conservancy for this purpose).

4. Major LCP amendments have been reviewed for conformance with Coastal Act public access requirements, including the acceptance of OTD's. For example, when Santa Cruz County submitted a major LCP revision last year, staff evaluated the access component of the LCP in light of the recorded OTD's. Because the previously certified LCP did not mention OTD's, the Commission adopted a modification requiring the County to set up a program among three County departments (Planning, Public Works, and Parks) to evaluate all OTD's and to move forward with the acceptance and opening of those suitable for public use.

5. In partnership with the Conservancy, Commission staff is working with local governments and non-profits to explain the OTD process. For example, two years ago, staff met with various non-profit groups in Mendocino County who were interested in the OTD's. An important result was that the Redwood Coast Land Conservancy requested and has now accepted three blufftop OTDs in Gualala, thus becoming the first non-profit organization to implement OTDs for the purpose of providing public access. A recent meeting with Mendocino County staff resulted in a planned workshop for the County and non-profits, supported by Commission and Conservancy staff expertise, to identify the ways in which the County can assist non-profits to accept and open OTD's for public use.

6. Staff has been working with the State Lands Commission to accept all lateral OTD's that apply to sandy beach areas. Three years ago the Lands Commission staff agreed to accept any lateral OTD that is free of improvements (i.e., seawalls, fences, etc.). Although the acceptance rate has been relatively slow (9 OTD's accepted in two years), staffs of the two agencies are working to improve the process.

7. As mentioned above, the Conservancy's Executive Officer has made a commitment to accept all OTD's that are in danger of expiring. Although acceptance by the Conservancy will avoid the potential of the public losing any OTD, it does not result in the opening of any OTD to public use since the Conservancy does not have the resources to operate accessways. Accordingly, both staffs agree that time and energy would be better spent to locate a viable management entity.

8. The Conservancy staff has completed a comprehensive survey of existing accessways and has prioritized the OTDs for San Diego, Orange, Los Angeles and San Luis Obispo counties.

9. Commission and Conservancy staffs have reached agreement on the use of non-profits for managing accessways and have developed a management plan prototype. The Conservancy has agreed to monitor the non-profits activities and will serve as the receiver agency in the event a non-profit fails to perform.
10. The Conservancy has just initiated a one year Federal grant program which will explore alternatives to fund operation and maintenance of accessways.

D. What actions are local governments taking to secure the OTD's?

The following lists the active programs that staff is aware of:

1. San Luis Obispo County staff has been directed by its Board to review each OTD and to accept all that are feasible. The easements will be opened for public use over time, as money and managing groups are identified. The majority of OTD's will be preserved for future use through a "landbanking" approach.
2. The City of Laguna Beach planning staff is evaluating each OTD and anticipates that the City will accept the majority of them.
3. Santa Barbara County planning staff recently prepared and submitted to its Board a Coastal Resource Enhancement Fund proposal for \$46,000 to fund a program to accept OTD's. This proposal, however, does not include opening any of the easement areas. County staff also submitted a Coastal Access Implementation Plan for Board approval. The CAIP contains a detailed analysis and recommended actions for each OTD.
4. Orange County staff is currently evaluating OTDs in the county.
5. City of San Diego staff is currently evaluating OTDs in the city.
6. Santa Cruz County revised its LCP last year to include a policy that the County will accept OTDs and/or assist non-profits to accept OTDs.
7. Mendocino County staff has requested Commission and Conservancy assistance in setting up a workshop to facilitate the acceptance of OTDs by non-profit organizations.

E. Actions by non-profit groups relative to OTDs

1. In Mendocino County, the Redwood Coast Land Trust requested approval to accept three OTDs for a blufftop trail in Gualala. This request was approved in 1994 and the group is now in the process of obtaining County permits and raising the necessary money to finance maintenance of the trail.

2. Also in Mendocino, the Mendocino Land Trust is actively pursuing an OTD that will provide outstanding views of Mendocino Bay. A draft trail plan has been submitted for review.
3. In Marin County, the Inverness Foundation has agreed to accept two OTDs that will provide excellent access (pedestrian and for small boats) to and along Tomales Bay. Staff anticipates that a request for formal approval will be submitted soon.
4. Statewide, two groups have expressed interest in OTDs. The Sierra Club has contacted chapter members to explore the level of interest in participating in a program that assumes responsibility for operating beach accessways. Coastwalk is working with various individuals to explore the feasibility of forming a statewide non-profit group for the same purposes.
5. As a result of media coverage of this situation, staff has received dozens of calls from individuals/groups wanting information on how to get involved in the process.

III. Proposed OTD Action Plan

There are a variety of actions the Commission can take to promote public access opportunities. Unfortunately, with respect to OTDs the Commission is not in a controlling position. The Commission's primary responsibility is to ensure that new coastal development projects that adversely impact public access resources are adequately mitigated or otherwise planned in a manner that furthers public access opportunities. In that regard, OTDs preserve future public access options. While the Commission is not in a position to force their acceptance or that they be opened to the public, it has the responsibility to make certain that OTDs do not expire. Because the Commission is not authorized to hold property interests, it cannot itself accept OTDs. Nor can the Commission operate accessways. The Commission can, however, be a facilitator and advocate with those entities that do have the ability to accept and operate accessways. The Commission can also sponsor legislation that deals with impediments to OTD implementation.

The following actions and recommendations are intended to address public access issues and to promote public access benefits for current and future generations.

1. **FORMALIZE AGREEMENTS TO ACCEPT OTDs:** The Commission should formalize the understanding with the Conservancy and State Lands Commission that these agencies will accept any and all OTDs that are in danger of expiring due to the passage of time and where the OTD has not been determined to be unsuitable for public use. If nothing else, this action will preserve OTDs in perpetuity as a form of public access bank for future implementation and use. Toward this end, an MOU between the Commission and these sister State agencies would be appropriate.

Recommendation: The Commission should direct its staff to prepare and execute an appropriate agreement to formalize the position that the Conservancy and the State Lands Commission will accept OTDs to avoid the possibility of their expiration.

2. **MEET WITH PUBLIC ENTITIES:** Commission staff will meet with appropriate local government representatives and other state agencies (i.e., Santa Monica Mountains Conservancy, State Parks) to encourage their acceptance and opening of OTDs.

3. **SUITABILITY OF OTDs:** Commission staff will take steps to review OTDs to determine their suitability for public use and to give priority attention to those deemed to be of greatest potential benefit to the public. If in the process of dealing with OTDs the staff identifies any that are deemed not suitable for public use, a process will be instituted that ensures that the Commission makes the final determination whether to allow an OTD to expire.

4. **WORKING WITH NON-PROFITS:** Staff, in cooperation with Conservancy staff, will work with appropriate non-profit organizations to facilitate OTD acceptance and opening them for public use.

5. **FUNDING:** An absence of adequate funding is a primary reason why more OTDs have not been accepted and opened for public use. Accordingly, if a funding mechanism could be found to support the operation and maintenance of new public accessways the public would realize tangible and substantial benefits.

Recommendation: The Commission should direct staff to seek legislation that would direct coastal development permit fees that the Commission collects into a special Public Access Account to be administered by the Coastal Conservancy. The Conservancy should be directed to issue grants to public and private, non-profit entities for the purpose of defraying costs to accept, improve, operate and maintain new public accessways to and along the coast.

Discussion: The Coastal Act's primary mandate calls for the protection of existing and maximization of potential public access and recreational opportunities to and along the California coast. One of the ways to implement this mandate is the OTD program. 80% of OTDs have not been accepted and time is running out. One of the main reasons local governments and/or non-profits have not accepted OTDs is lack of money.

In the past, the Conservancy has been the principal agency to finance coastal public access projects. Over the years, the Conservancy has spent almost \$40,000,000 on 225 access projects. The result has been over 35 additional miles of coastal trails, 32 stairways, 28 parking lots, plus a variety of other projects that have enhanced the public's ability to get to and enjoy the use of coastal resources. These projects were funded by several different bond acts. It is important to note that Bond Act funds are restricted and may only be used to pay for acquisition and construction of access facilities and not for operation and maintenance costs. Consequently, these on-going costs must be paid by local government and/or non-profits from other sources. As the result of the defeat of several recent Park Bond Act proposals, the Conservancy's budget

for the improvement of accessways has been severely reduced (\$0 allotted for this year), and therefore this funding is no longer available. In order to protect the public's interest in existing and new coastal access facilities, it is imperative that new sources of revenue be identified and utilized.

The Coastal Commission collects approximately \$600,000 in coastal development permit application fees a year. Currently, these funds are deposited in the State's General Fund. If these monies were designated for use by local government and non-profits to support improvement, operation and maintenance of public accessways, the coastal public access program could be energized and carried out at an adequate level to ensure substantial public benefits. Although costs will vary for each OTD, staff estimates that about 20-30 OTD projects could be funded per year.

6. LIABILITY AND ATTORNEY FEES: Another impediment to opening and maintaining new public coastal access facilities is the potential for substantial liability in the event of personal injury. While there currently exists some level of immunity, costly litigation remains a deterrent.

Recommendation: Commission staff should be directed to pursue legislation that would increase the immunity from liability of private property owners, non-profit organizations and public entities that operate and maintain accessways for free public use. The legislation should also seek payment of costs and attorney fees to prevailing party in the event a personal injury lawsuit is filed in connection with the use of an accessway open to free public use.

Discussion: Many potential managing entities, whether governmental or private, have expressed concern about liability. The costs of liability insurance and of defending against personal injury lawsuits make accepting an OTD an expensive proposition. In order to shield managing entities from liability and to encourage lawful use of private lands for public recreational purposes, the Legislature enacted the Recreational Use Statute (Civil Code Section 846) in 1963. The statute has been amended several times to expand the class of persons protected against liability and the scope of recreational activities to which the statute specifically applies.

Public entities and public employees have been granted limited immunity from certain types of liability. Government Code Section 831.5 extends "public entity" status to certain non-profits for the purpose of limiting their tort liability in specific circumstances. The Conservancy has an established procedure to extend this "public entity" status to non-profits. Many non-profits have taken advantage of this immunity protection and those that accept grants from the Conservancy are required to go through this procedure.

Despite these statutes, non-profits and local governments continue to have concerns over the potential costs associated with liability and the defense of personal injury litigation. Even if a managing entity is ultimately found not liable, the cost of defending a lawsuit can be expensive.

7. **ADOPT-A-BEACH PROGRAM:** The Adopt-A-Beach program assists in the maintenance of existing coastal parks, beaches, accessways and trails by bringing more than 40,000 volunteers to the coast for the annual Coastal Cleanup Day. In addition, more than 500 groups volunteer for cleanups throughout the year by participation in the Adopt-A-Beach program. Staff will evaluate how the program could be expanded to help reduce the costs to local governments and non-profits of operating and maintaining coastal accessways.

8. **HANDBOOK:** Staff could explore with the Conservancy the possibility of preparing and publishing a *Guide to Opening Offers to Dedicate* that details the steps and provides model documents needed for non-profits to accept and/or operate public accessways.

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