

CALIFORNIA COASTAL COMMISSION

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Th-15

Staff Report: November 4, 2004
Hearing Date: November 18, 2004
Staff: CLD-SF

STAFF REPORT FOR COMMISSION CEASE AND DESIST ORDER

CEASE AND DESIST ORDER: CCC-04-CD-13

RELATED VIOLATION FILE: V-4-02-052

PROPERTY DESCRIPTION: 19020 Pacific Coast Highway, Malibu, Los Angeles County, (APN 4449-003-026). This property fronts onto Las Tunas Beach.

PROPERTY OWNER: Mark B. Gilmartin

VIOLATION DESCRIPTION: Maintaining unpermitted development including but not limited to a solid wooden storage enclosure and gate. These structures are also inconsistent with the approved plans for Coastal Development Permit No. P-3-11-77-376 and Condition 2(b) of that permit, which required a deed restriction for public access.

SUBSTANTIVE DOCUMENTS: Coastal Development Permit No. P-3-11-77-376 (Hundley) (EXHIBIT A); Deed Restriction (Los Angeles County Recorded Document No. 77-435422) (EXHIBIT B), Administrative Record for Cease and Desist Order No. CCC-04-CD-10.

CEQA STATUS: Exempt (CEQA Guidelines (CG) Sections 15060(c)(3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines).

easement on Harner's property more identifiable and more visually open, and therefore more enticing and user friendly. The Harner and Gilmartin accessway is the only vertical public accessway along the 1.5 mile stretch of coastline between Las Tunas County Beach and Topanga County Beach.

Second the unpermitted development is inconsistent with policies of the Coastal Act and Malibu LCP that protect the scenic and visual qualities of the coast. For example, Section 30251 of the Coastal Act protects views to and along the coast. The storage enclosure and gate block a portion of the already narrow view of the ocean between Gilmartin's house and Harner's house. Thus, the storage enclosure and gate are inconsistent with Section 30251.

Although Gilmartin states that he did not construct the wooden storage enclosure and gate, he has continued to maintain these structures on the Subject Property despite notification from Staff that they constitute unpermitted development, are inconsistent with the Permit and must be removed. Gilmartin's continued maintenance of the unpermitted development constitutes undertaking both an activity that requires a CDP without obtaining one and an activity that is inconsistent with the Permit. Accordingly, Gilmartin's maintenance of the unpermitted development and refusal to remove the development constitutes a violation of the Coastal Act, and a violation of the Permit.

On April 28, 1977, the Hundleys recorded in the Los Angeles County Recorder's Office as Document No. 77-435422 a Deed Restriction on the Subject Property in compliance with the requirements of the Permit, which authorized construction of a single-family residence on a beachfront lot. The Deed Restriction "give[s] the public the privilege and right to pass and repass over a strip of Dedicator's said real property 3 feet in width measured from the east property line and extending from the edge of the public right-of-way, Pacific Coast, to the mean high tide line of the Pacific Coast Highway".

This Cease and Desist Order would require Gilmartin to cease and desist from maintaining the storage enclosure and the gate. The Order would require Gilmartin to remove the unpermitted development from the accessway within 30 days of notification by Staff that construction of public access improvements to the Harner easement proposed by Access for All will commence. Staff has indicated to Gilmartin that it will accept an application for an amendment to the Permit to authorize placement of a visually permeable fence in order to address the 6-foot drop-off between the street level and the top of the return wall in the accessway.

Desist Order No. CCC-04-CD-13. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to issue Cease and Desist Order:

The Commission hereby issues Cease and Desist Order No. CCC-04-CD-13 set forth below and adopts the proposed findings set forth below on the grounds that Gilmartin conducted development without a CDP and in so doing has violated the Coastal Act.

IV. Proposed Findings

A. Coastal Act Authority

This Cease and Desist Order is being issued pursuant to Section 30810 of the Coastal Act, which provides in relevant parts:

- (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 or governmental agency 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.*

The Coastal Act violations that resulted in this recommendation to issue a Cease and Desist Order consist of maintaining development without a CDP and maintaining development that is inconsistent with Coastal Act policies and the terms and conditions of a previously approved CDP. The purpose of this Cease and Desist Order is to remedy said violations by requiring and authorizing the removal of the unpermitted development.

B. Violations of the Coastal Act – Unpermitted Development

Coastal Act Section 30600(a) requires that any person wishing to undertake development in the coastal zone shall obtain a CDP from the Commission or the local government implementing a certified LCP. "Development" is defined in Section 30106 of the Coastal Act as "on land, in or under water, the placement or erection of any solid material or structure;" and "construction, reconstruction,

and recreational opportunities shall be provided..." Chapter 2, Section C, Subsection 2.2 of the Malibu LCP provides that "New development shall minimize impacts to public access to and along the shoreline and inland trails." In addition, the Specific Vertical Accessway Standards in Subsection 2.86 states that for Las Tunas Beach one vertical accessway every 1,000 feet of shoreline is appropriate. This public accessway is the only vertical public accessway along the 1.5 mile stretch of coastline between Las Tunas County Beach and Topanga County Beach. The storage enclosure and gate block the entrance and a portion of the area required to be available for vertical public access from Pacific Coast Highway to the ocean. Although there is a 6-foot drop-off from the street level to the top of the return wall in the accessway, this can be addressed with the improvements to the immediately adjacent access easement held by Access for All, as discussed below.

The Deed Restricted access area on the Subject Property is contiguous with a 3-foot wide vertical public access easement on Harner's property. The easement was accepted by Access For All on June 10, 2004. After a public hearing in October 2004, the Commission issued Cease and Desist Order No. CCC-04-CD-10 that requires removal of unpermitted development located in the Harner easement. Access for All plans to make improvements to the easement on Harner's property that will ensure the accessway is safe for public use, including installation of stairs from the top of the return wall to the beach. There are already stairs in the easement area on Harner's property that lead from the street down to the top of the return wall. With stairs at both ends of the easement on Harner's property, a portion of the accessway on the Subject Property will be useable. Further, and more importantly, removal of the storage enclosure and gate will make the entrance to the easement on Harner's property more identifiable and more visually open, and therefore more enticing and user friendly.

The Commission finds that a fence at the northern entrance to the accessway on the Subject Property may be necessary for public safety purposes. To be consistent with the public access and visual protection policies of the Coastal Act and the Malibu LCP, however, the fence should be visually permeable to allow for views to the ocean, as discussed below and to make the accessway more identifiable and therefore more user friendly. Therefore, the Commission would accept an application for an amendment to the Permit to allow for a visually permeable fence at the northern entrance to the accessway. The Commission also finds that the removal of the storage enclosure and gate should be coordinated with the planned improvements to the easement on Harner's property by Access for All. Therefore, this Cease and Desist Order requires Gilmartin to remove the storage enclosure and gate within 30 days of receipt of notice from staff that Access for All is set to commence its improvements to the Harner easement.

he failed to remove the unpermitted development by the deadline, the Commission has the authority to issue a cease and desist order and seek civil fines and penalties.

On June 16, 2003, Gilmartin sent a letter to Staff responding to the Notice of Violation (EXHIBIT F). In the letter he denied responsibility for performing development on the Subject Property and asserted that Staff's request that he remove the development was unreasonable because it would create a public safety hazard. He stated there is a 6-foot drop-off from the north side of the storage enclosure and gate to the top of the return wall in the accessway at the northern end of the accessway. He also said there is another 6-foot drop-off on the adjacent Harner property from the top of Harner's timber bulkhead to the sandy beach at the southern end of the Harner easement. Gilmartin expressed a concern that the requirement to remove the storage enclosure and the gate would create a risk of personal injury to the public while trying to gain access to the beach. Gilmartin also maintained that adequate parking does not exist along Pacific Coast Highway for users of the public accessway and that the public access improvements proposed for the Harner easement would require removal of development that is protecting the structural integrity of the homes and septic systems. He also noted that there is no room on the beach for trash receptacles or lifeguard facilities and increased use of the beach would jeopardize the health of the beach.

In a letter dated June 17, 2004, Staff responded to the issues Gilmartin raised in his June 16 letter (EXHIBIT G). Staff informed Gilmartin that Access for All, a California non-profit dedicated to improving public access to California's beaches recorded a Certificate of Acceptance of the offer-to-dedicate a 3-foot wide vertical wide public access easement on Harner's property. Staff said that it is working with Access for All to develop a Management Plan for the Harner easement that will include improvements to ensure public safety before the public accessway is opened. Staff reiterated that the maintenance of the storage enclosure and the gate on the Subject Property constitutes unpermitted development and a violation of the Permit, which are violations of the Coastal Act. Staff visited the Subject Property and confirmed that there is an approximately 6-foot drop-off behind the storage enclosure to the ground level. Accordingly, Staff suggested that Gilmartin remove the storage enclosure and gate and the install with an attractive visually permeable fence. Staff indicated that Gilmartin could construct the fence, or that Access for All would install the fence at no cost to Gilmartin. Staff noted that in addition to preventing a public safety hazard, this type of fence would not block public views of the beach and ocean. In combination with the adjacent public access easement on the Harner property, this would result in a larger view corridor between Pacific Coast Highway and the ocean, and would improve public accessibility to the Harner easement.

development in the accessway until Access for All is prepared to make the improvements to the Harner easement. Staff included a copy of Access for All's current insurance policy and a booklet published by the Commission and the Coastal Conservancy entitled "Limitations on Liability for Nonprofit Land Managers." Staff also responded to other issues raised by Gilmartin in his previous correspondence and in a telephone conversation with Staff on July 9, 2004, regarding potential public safety hazards and the impact of the public access improvements, the Management Plan, installation of a trash receptacle, alternative locations for the public accessway, and financial responsibilities. Staff reminded Gilmartin that he was required to submit a completed Statement of Defense form by August 9, 2004.

On August 25, 2004, Staff sent a draft Consent Cease and Desist Order to Gilmartin for his review and comments. The draft Consent Order proposed ordering and authorizing Gilmartin to remove the unpermitted development at a time specified by Staff and allow Access for All to install an attractive visually permeable fence to prevent a public safety hazard that might result from the gap created by the removal of the storage enclosure.

On September 7, 2004, Gilmartin sent a letter to Staff rejecting the terms of the Draft Consent Cease and Desist Order (EXHIBIT L). Gilmartin stated that Staff failed to consider whether a vertical public accessway on Harner's property would be appropriate under the Public Resources Code and the Commission's Access Guidelines. He also asserted that the offer-to-dedicate the Harner easement did not authorize Access for All to undertake construction of public access improvements. Gilmartin also asserted that the Commission does not have the authority to compel him to allow Access for All to construct a visually permeable fence to replace the storage enclosure. Gilmartin further stated that the existing wooden gate is unlocked and is not inconsistent with the requirements of the Deed Restriction. He stated that he is unwilling to allow Access for All to use the public accessway on his property to design and install a fence on his property or to construct public access improvements to the Harner easement. Moreover, he asserted that neither Access for All nor anyone else has the right to do anything more than pass and repass over the Deed Restricted portion of his property.

In a letter to Peter Douglas dated October 7, 2004, Gilmartin provided comments on Cease and Desist Order No. CCC-04-CD-10, which the Commission issued to Harner on October 13, 2004 (EXHIBIT M). He requested that the Commission decline to issue the Cease and Desist Order against Harner. In addition to issues he raised in his previous correspondence, Gilmartin asserted that the Management Plan is deficient because it provides no details regarding the public access improvements to the Harner easement and only limited details regarding how the public accessway would be managed. Gilmartin claimed that the Cease

- (2) The unpermitted development is inconsistent with the terms and conditions, and the approved plans, for CDP No. P-3-11-77-376.
- (3) On April 28, 1977 the Commission issued CDP No. P-3-11-77-376. Special Condition 2(b) of the CDP required Hundley to record a public access Deed Restriction on a 3-foot wide strip of land running along the eastern boundary between Pacific Coast Highway and the mean high tide line of the Pacific Ocean. The public access Deed Restriction was recorded on April 28, 1977.
- (4) The maintenance of unpermitted development on the Subject Property is a violation of the Coastal Act. The maintenance of unpermitted development in Deed Restricted strip of property is a violation of the terms of CDP No. P-3-11-77-376, and a violation the Coastal Act.
- (5) Despite numerous requests by Commission staff that he agree to remove the unpermitted development on the Subject Property and replace it with a visually permeable fence, Gilmartin has declined to do so. Gilmartin continues to maintain the unpermitted development on his property.

G. Violators' Defenses and Commission's Response

(1) Failure to Submit Statement of Defense

The State legislature explicitly granted the Coastal Commission the right to "adopt or amend...rules and regulations to carry out the purposes and provisions of [the Coastal Act], and to govern procedures of the commission." (Pub. Res. Code Section 30333.) Relying on such powers, the Coastal Commission promulgated Section 13181 entitled "Commencement of Cease and Desist Order Proceeding before the Commission," which became operative on September 3, 1992. (See CCR Title 14, Section 13181, and historical comments thereto.) Subdivision (a) of Section 13181 provides in relevant part:

"If the executive director believes that the results of an enforcement investigation so warrant, he or she shall commence a cease and desist order proceeding before the commission by providing any person whom he or she believes to be engaging in development activity as described in Section 30810(a) of the Public Resources Code with notice of his or her intent to do so...The notice of intent shall be accompanied by a "statement of defense form" that conforms to the format attached to these regulations as Appendix A. The person(s) to whom such notice is given shall complete and return the statement of defense form to the Commission by the date specified therein, which date shall be no earlier than 20 days from transmittal of the notice of intent." (CCR Title 14, Section 13181, subd. (a); emphasis added.)

(2) Gilmartin's Comments and Objections

Although Gilmartin did not submit a completed Statement of Defense form by August 9, 2004 as instructed in the Notice of Intent to Commence a Cease and Desist Order Proceeding dated July 20, 2004 that was sent to him, he has provided comments and raised objections in correspondence to Staff regarding the enforcement action. (See Section D, "Background and Administrative Resolution Attempts") For the most part, Gilmartin's comments and objections pertain to the permit condition that required the deed restriction for public access on the Subject Property and as such are not relevant to the issuance of this Cease and Desist Order. The time for objecting to the permit condition ran in 1977 and such objections are now barred by the statute of limitations. The law regarding this is well established and has been recently affirmed. The permit condition requiring the Hudleys to record a public access Deed Restriction became final and binding in 1977 when the Hudleys failed to challenge it and accepted the permit benefits. Gilmartin also raises several objections to opening the Harner public access easement. For the reasons set forth above, objections to the Commission's decision in 1983 to require an easement for public access to the beach on Harner's property are barred by the statute of limitations. In addition, this Cease and Desist Order only addresses unpermitted development on the Subject Property; accordingly, issues related to development and opening the Harner easement are not relevant to this Order. Staff has summarized Gilmartin's comments and concerns and Staff's responses to those comments below.

Comments Relating to Development on the Subject Property:

- (a) Gilmartin asserted that the unpermitted development existed at the time that he purchased the property in August 2000 and that he has not performed any "development" on the property, as that term is defined in Section 30106 of the Coastal Act.

Commission Response:

Gilmartin is the current owner of the Subject Property where the unpermitted development is located. He has continued to insist on his right to maintain the unpermitted development despite Staff's requests to remove it. Gilmartin's continued maintenance of the unpermitted development constitutes undertaking both an activity that requires a CDP without obtaining one and an activity that is inconsistent with the CDP issued for development on the Subject Property. Gilmartin's maintenance of the unpermitted development and refusal to remove the development constitutes a violation of the Coastal Act and a violation of the Permit. Accordingly, the Commission has the authority to order Gilmartin to remove the unpermitted development.

cost to him, although he is not compelled to choose this option. Staff provided Gilmartin with the addresses of other properties in Malibu where he could view the style of attractive wrought iron fence that Access for All has proposed (See photographs of examples of fences, EXHIBIT O). Under no circumstances may Gilmartin retain the unpermitted development on the grounds that it is necessary to protect safety while refusing to apply for a CDP for a fence that would be consistent with Coastal Act policies. The Cease and Desist Order does not require Gilmartin to grant any special access to his property for construction of improvements in the Harner easement. The Deed Restriction already grants the public the right to pass and repass in a 3-foot wide area along the eastern boundary of Gilmartin's property.

Comments Related to the Harner Easement:

Each of the comments addressed below presents an objection to opening of the Harner easement to the public. This Cease and Desist Order only addresses unpermitted development on the Subject Property; accordingly, these comments are not relevant to the decision in this matter. In addition, objections to the permit condition requiring the Harner easement are barred by the statute of limitations. A brief response to each of these comments is provided below to explain why these are not valid objections to the Harner easement. Furthermore, the Commission rejected these objections in the findings for issuance of Cease and Desist Order CCC-04-CD-10, which are incorporated herein.

- (d) Gilmartin stated that the western half of Las Tunas beach on which the residences are located is for most of the day a wet beach and that this location is not suited for public access. He also stated that due to the lack of sandy beach at this location, the public would inevitably trespass onto his property.

Commission Response:

The California Constitution established that the land below the mean high-tide line belongs to the people of California and as such the people have a right to use and enjoy the public beach. In addition, Access for All has recorded a Certificate of Acceptance of a lateral public access easement along the beach seaward of Harner's house and there is an existing lateral public access Deed Restriction along the beach seaward of the Subject Property. At low tide, this beach is a broad sandy beach that provides ample beach in the public domain. By opening this public accessway, it is not the purpose of Staff or Access for All to encourage the public to trespass on Gilmartin's property. Staff believes it is unlikely that the members of the public will come to this section of Las Tunas beach to sit below Gilmartin's deck or under his house

wide public access easement would endanger the stability of the houses and the septic systems located under the houses from erosion by waves.

Commission response:

The Harner Cease and Desist Order only requires removal of the unpermitted portion of the Harner's timber bulkhead located in the 3-foot wide easement. The Order was carefully crafted to allow for portions of the unpermitted development to remain if it can be incorporated into the design for the improvements. The Order requires Harner to "remove the unpermitted development from the easement (with the exception of any portion of the development identified in a plan approved by the Executive director as development that may remain)." In addition, the Staff Report for the Order also notes (at page 7) "any design for public access improvements in the easement approved by the Executive Director would take into consideration protection of the Subject Property." Lastly, the fact that a property owner places illegal development in an easement cannot be used as an excuse to not comply with a condition of a permit. This also applies to this proposed Cease and Desist Order to address the unpermitted development blocking the public accessway on the Subject Property.

- (h) Gilmartin maintains there is insufficient space within the Harner easement at the northern entrance to the public accessway to install a trash receptacle without blocking the easement.

Commission Response:

Locating and placing a trash receptacle, if appropriate, is part of the second phase of the Management Plan implementation. A survey of the Harner easement will determine its location and whether there is sufficient space to install a trash receptacle. An appropriate design and location for a trash receptacle have not been determined. An appropriate design and location for any trash receptacle will not block the entrance to the easement or create a hazard to motor vehicles. Access for All will not install a trash receptacle on private land where it has no right to do so.

- (i) Orally, Gilmartin has suggested to Staff that a narrow strip of land owned by the California Department of Transportation (hereinafter "Caltrans") upcoast from the Subject Property would be a more appropriate location for a vertical public accessway to the beach because it is adjacent to a bus stop.

V. Exhibits

- A. Coastal Development Permit No. P-3-11-77-376 (Hundley), April 11, 1977.
- B. Deed Restriction, Los Angeles County Recorded Document No. 77-435422.
- C. Map showing location of 19020 Pacific Coast Highway, Malibu, Los Angeles County.
- D. Photographs showing the unpermitted development blocking the public accessway on the Subject Property taken by Staff on March 11, 2004 and April 14, 2004, and plans approved under CDP No. P-3-11-77-376.
- E. Notice of Violation of the Coastal Act sent to Mark Gilmartin dated May 12, 2003.
- F. Letter from Mark Gilmartin to Aaron N. McLendon dated June 16, 2003.
- G. Letter from Chris Darnell to Mark Gilmartin dated June 17, 2004.
- H. Letter from Chris Darnell to Mark Gilmartin dated July 15, 2004
- I. Notice of Intent to Commence Cease and Desist Order Proceeding dated July 20, 2004.
- J. Letter from Mark Gilmartin to Chris Darnell dated July 21, 2004.
- K. Letter from Chris Darnell to Mark Gilmartin dated August 17, 2004.
- L. Letter from Mark Gilmartin to Chris Darnell dated September 7, 2004.
- M. Letter from Mark Gilmartin to Peter Douglas dated October 7, 2004.
- N. Letter from Chris Darnell to Mark Gilmartin dated October 12, 2004.
- O. Photographs of examples in Malibu of attractive wrought iron style fences.

CALIFORNIA COASTAL COMMISSION
SOUTH COAST REGIONAL COMMISSION

666 E. OCEAN BOULEVARD, SUITE 3107

P. O. BOX 1450

LONG BEACH, CALIFORNIA 90801

213/590-5071 714/846-0648



Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

COASTAL DEVELOPMENT PERMIT

EXHIBIT A 1 of 3

Application Number: P-3-11-77-376

Name of Applicant: Mr. and Mrs. Norris Hundley, Jr.

745 Alma Real Drive, Pacific Palisades, CA 90272

Permit Type: Emergency
 Standard
 Administrative

Development Location: 19020 Pacific Coast Highway

Las Tunas Beach, Malibu, CA

Development Description: Construct a two-story single-family dwelling,
with attached two-car garage, 37 feet above average finished grade
and 26 feet above centerline of frontage road, with conditions.

I. The South Coast Commission finds that:

A. The proposed development, or as conditioned, is:

1. In conformity with the provisions of Chapter 3 of the California Coastal Act of 1976 and will not prejudice the ability of local government to prepare a local coastal program in conformity with said chapter.
2. If located between the nearest public road and the shoreline of any body of water in the coastal zone is in conformity with public access and public recreation policies of Chapter 3, California Coastal Act of 1976.
3. That there are/are no feasible alternatives, or feasible mitigation measures, as provided in the California Environmental Quality Act, available which would substantially lessen any significant adverse impact that the development as finally proposed may have on the environment.

Conditions for P-376

Prior to issuance of permit, applicant shall submit:

1. revised plans indicating that no part of the proposed structure shall be built out to a point seaward of an imaginary string line drawn between the corners of the adjoining structures; a similar string line shall be used to limit the build out of any decks;
2. a deed restriction for recording:
 - a. granting lateral public access up to 25 ft. inland from the mean high tide line, however, in no case will said dedication be nearer than 5 ft. to the proposed development;
 - b. granting vertical access to give the public the privilege and right to pass and repass over a strip of Dedicator's said real property 3 feet in width measured from along the east property line, Pacific Coast Highway, and extending from the edge of the public right-of-way to the mean high tide line of the Pacific Ocean.

* * * * *

77- 435422

RECORDING REQUESTED BY AND MAIL TO
NAME CCC/SCR
STREET PO Box 1450
CITY Long Beach, CA 90801

RECORDED IN OFFICIAL RECORDS
OF LOS ANGELES COUNTY, CA.
MIN.
1 PAST 12 P.M. APR 28 1977

CALIFORNIA COASTAL COMMISSION
SOUTH COAST REGION

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DEED RESTRICTION

This instrument, made this 6 day of April
1977, by Norma C. Hundley and Carol M. Hundley, of the City
or Cities of Los Angeles, State of California, hereinafter
collectively referred to as "the Permittee;"

WHEREAS, pursuant to the California Coastal Act of 1976,
Sections 3000 through 30900 of the California Public Resources Code,
the Permittee has made Application No. P-376 to the California Coastal
Commission, South Coast Region, for the issuance of a permit for the
construction of a single family residence

(Describe Proposed Project)

on certain real property owned ~~14625881~~ (Other - state Permittee's
interest in subject property)

by the Permittee and more particularly described below; and

WHEREAS, said Commission has determined to grant said
application and issue a permit for the construction of a single
family residence

(Describe Approved Project)

on said real property, subject to the following conditions, imposed
for the benefit of the Public, and without agreement to which by
Permittee, said Commission could not grant the permit: The Permittee

- FILL) grants vertical access to give the public the privilege and
IN) right to pass and repass over a strip of Dedicator's said real
CONDITIONS) property 3 feet in width measured from the east property
) line and extending from the edge of the public right-of-way,
) Pacific Cst. Highway to the mean high tide line of the Pacific Ocean.

South Coast Regional Commission
APR 13 1977
KILLIAN

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)
EXHIBIT B 1 of 3

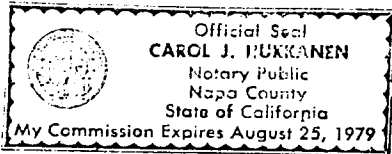
STATE OF CALIFORNIA
COUNTY OF NAPA

} ss.

Norris C. Hundley, Jr.
Carol M. Hundley
Permittee Carol M. Hundley

On April 6, 1977, before me, the undersigned Notary Public, personally appeared NORRIS C. HUNDLEY JR. and CAROL M. HUNDLEY, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same.

Witness my hand and official seal the day and year in this certificate first above written.



Carol J. Pukkanen
Notary Public, in and for the
County of NAPA,
State of California.

TO BE FILLED IN BY COMMISSIONER _____

This is to certify that the deed restriction set forth above, dated April 6, 1977, and signed by Norris C. Hundley Jr. and Carol M. Hundley Permittee, is hereby accepted by order of the California Coastal Commission, South Coast Region, on April 18, 1977 and said Commission consents to recordation thereof by its Executive Director, its duly authorized officer.

Date April 25, 1977

By Louis R. Nowell
Chairman, California Coastal
Commission, South Coast Region

STATE OF CALIFORNIA }
COUNTY OF Los Angeles } ss.

On this 25th day of April, 1977, before me, the undersigned Notary Public, personally appeared Louis R. Nowell, known to me to be the Chairman of the California Coastal Commission, South Coast Region, and known to me to be the person who executed the foregoing instrument on behalf of said Commission, and acknowledged to me that such Commission executed the same.

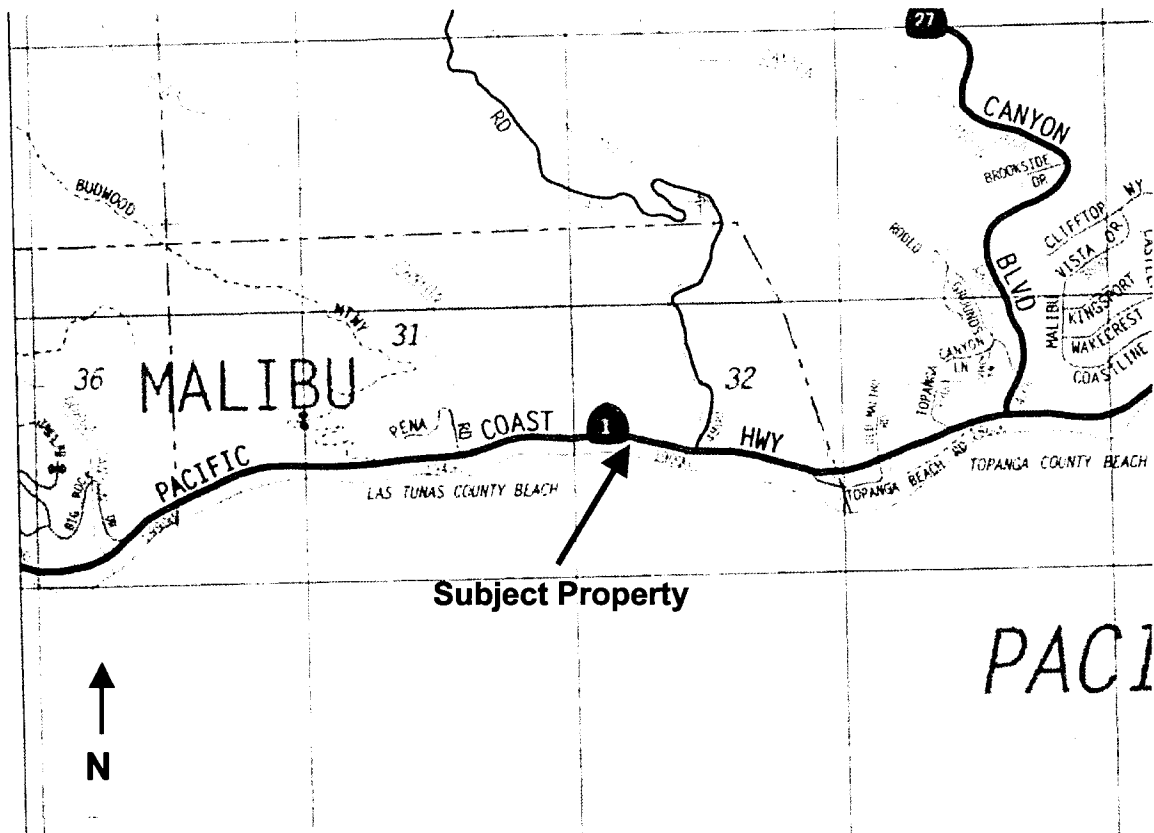
Witness my hand and official seal the day and year in the certificate first above written.



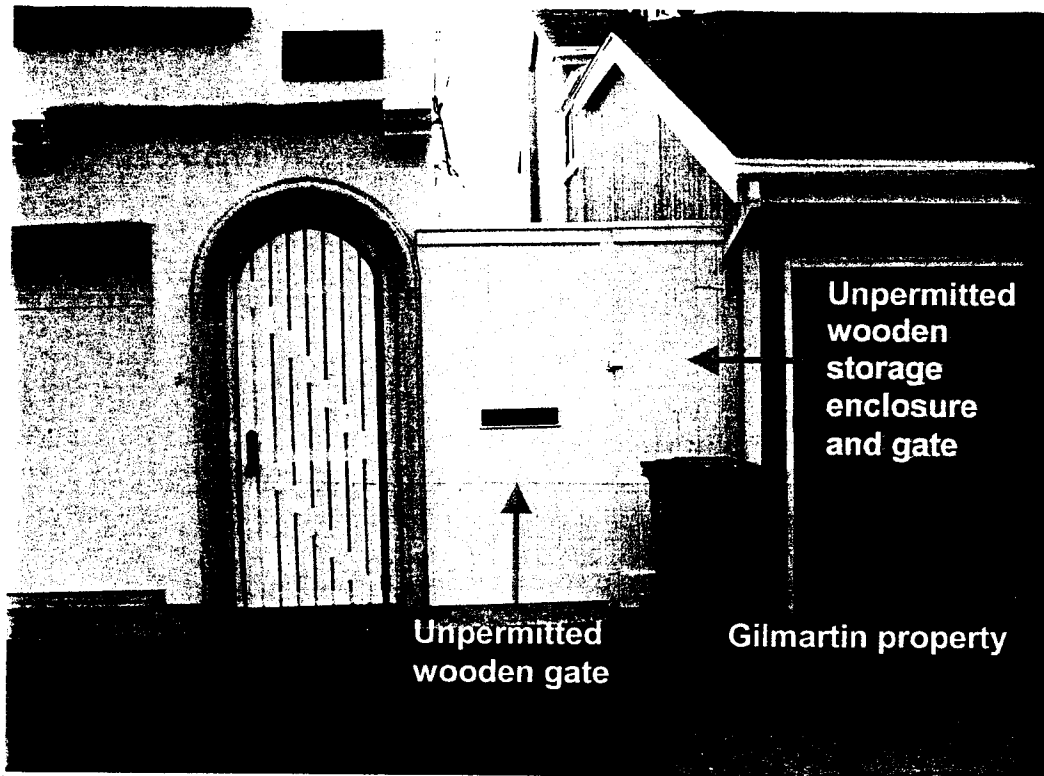
Marilyn L. Mayer
Notary Public in and for the
County of Los Angeles,
State of California.

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

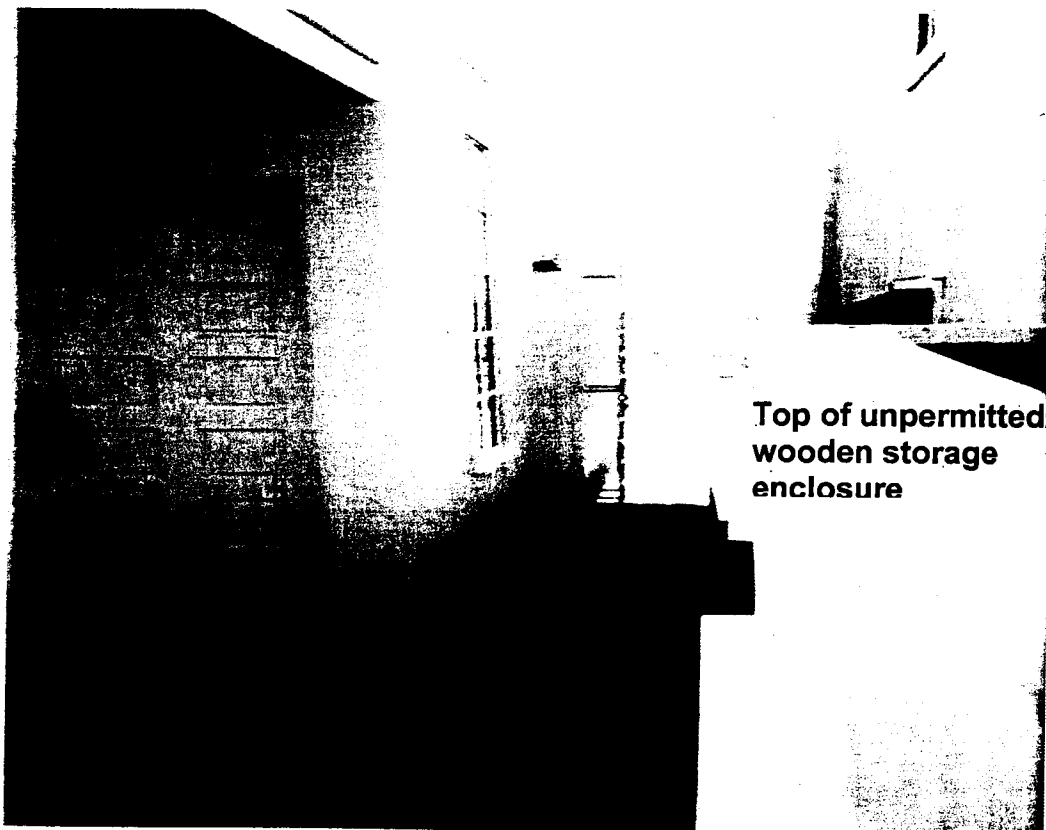
EXHIBIT B 3 of 3



Map showing approximate location of the Gimartin property at 19020 Pacific Coast Highway Malibu, Los Angeles County.



Entrance to the public accessway between Gilmartin and Harner houses viewed from Pacific Coast Highway.



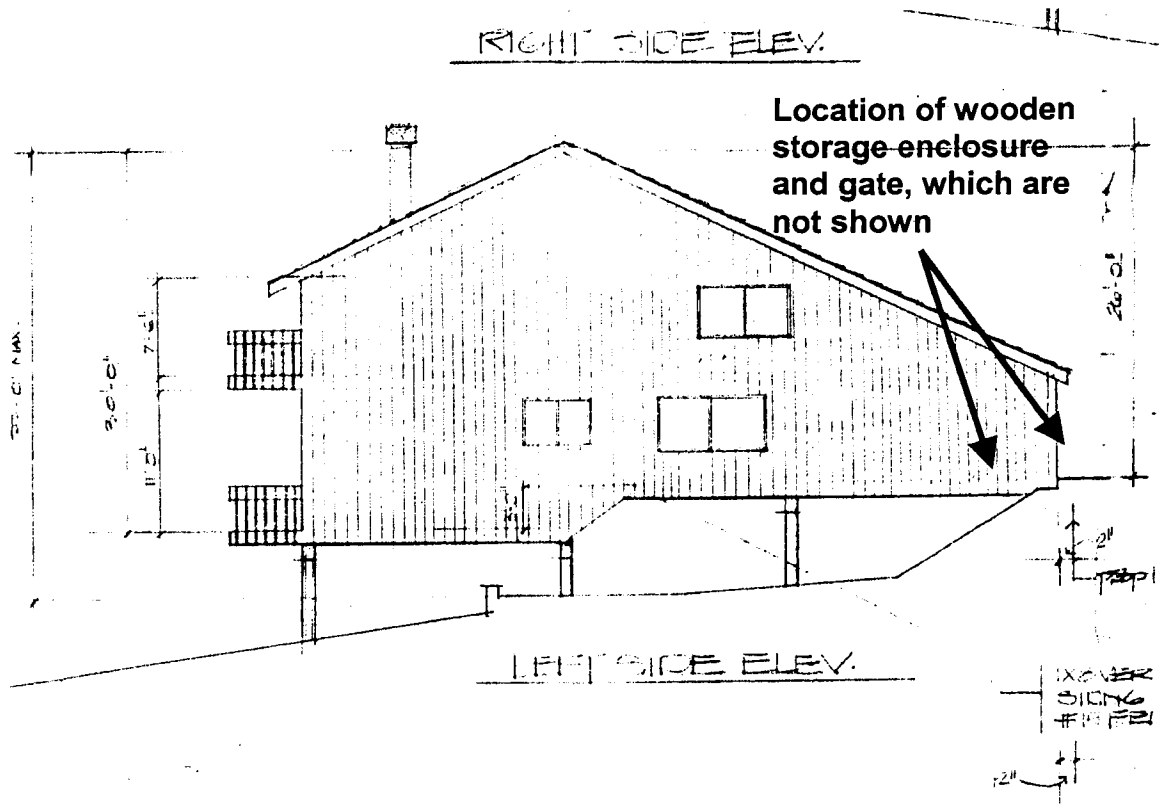
Public accessway between the Gilmartin and Harner houses taken from Pacific Coast Highway looking south.



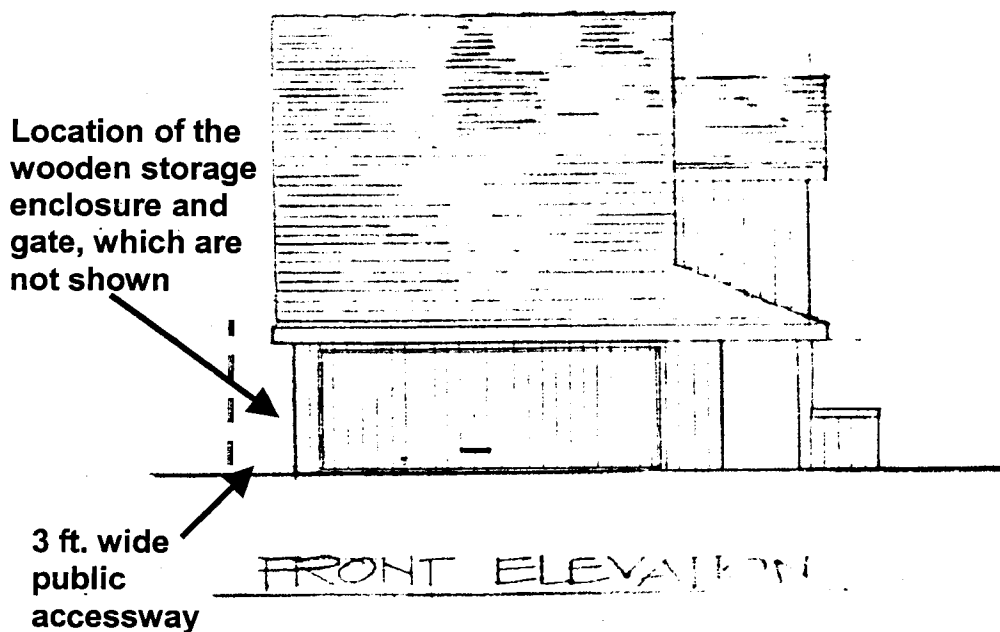
View of the public beach seaward of the Gilmartin and Harner houses looking west (upcoast).



View of Pacific Coast Highway from Gilmartin's property looking east showing wide shoulder for public parking.



Wooden storage enclosure and gate are not shown in the approved plans showing east side of the Gilmartin house.



Wooden storage enclosure and gate are not shown in the plans showing the north side (front) of the house.

CALIFORNIA COASTAL COMMISSION

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

**NOTICE OF VIOLATION OF THE CALIFORNIA COASTAL ACT
REGULAR AND CERTIFIED MAIL (7001-2510-0009-2099-7743)**

May 12, 2003

Mark Gilmartin
233 Wilshire Blvd., Suite 350
Santa Monica, CA 90401

Subject: 19020 Pacific Coast Highway, Malibu, Los Angeles County

Violation No.: V-4-02-052

Violation Description: Construction and maintenance of a wooden fence enclosure, gate, and concrete caissons located within a portion of the property for which a deed restriction has been recorded for a 3 ft. wide public vertical accessway along the eastern property line from Pacific Coast Highway to the mean high tide line in non-compliance with the approved plans and terms and conditions of Coastal Development Permit P-77-376.

Dear Mr. Gilmartin:

Commission staff has confirmed that unpermitted development has occurred on the property noted above. This development, consisting of construction and maintenance of a fence enclosure and gate, and concrete caissons, fully block a deed restricted area for vertical public access (Los Angeles County Instrument No. 77 435422, recorded on April 28, 1977) that was recorded by prior property owners in satisfaction of the requirements of Special Condition 2b of Coastal Development Permit (CDP) No. P-77-376. The Commission granted CDP No. P-77-376 for the construction of the house on the subject property. The area subject to the recorded deed restriction is a 3-foot wide portion of your property along the eastern property line from Pacific Coast Highway to the mean high tide line of the Pacific Ocean. Commission staff has researched our permit files and concluded that no coastal development permits have been issued for any of the above development and that the above development undertaken on your property does not fully comply with the final approved plans and terms and conditions of Coastal Development Permit No. P-77-376.

Pursuant to Section 30600 (a) of the Coastal Act, any person wishing to perform or undertake development in the Coastal Zone must obtain a coastal development permit, in addition to any other permit required by law. "Development" is defined by Section 30106 of the Coastal Act as:

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

are unpermitted and clearly inconsistent with Special Condition No. 2b of this CDP. Please be advised that non-compliance with the terms and conditions of an approved permit constitutes a violation of the Coastal Act.

In many cases, a violation involving unpermitted development and 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 if the development is inconsistent with the Coastal Act and any applicable permits and/or to remove the unpermitted development and restore the site. However, construction and maintenance of a fence enclosure and gate and concrete caissons that block a 3-foot wide area that is subject to a deed restriction for vertical public access is not consistent with the Chapter 3 policies of the Coastal Act or conditions of CDP P-77-376. In addition, Section 13166 of the California Code of Regulations states that the Executive Director must reject an application for an amendment to a previously approved coastal development permit if such amendment would lessen or avoid the intended effect of any condition of that permit. In this case, the construction of the above referenced unpermitted development within the portion of the property where the offer of public access across the site has been required would lessen or avoid the intent of Special Condition Two (2) of CDP P-77-376. Therefore, in order to resolve this violation, all encroachments in the 3-foot wide area that is subject to a deed restriction for vertical public access including, but not limited to, fences, gates, and concrete caissons would need to be removed.

In order to resolve this matter in a timely manner and avoid the possibility of further enforcement proceedings and/or a monetary penalty or fine, we are requesting that you remove the unpermitted development by no later than June 11, 2003. Please contact Aaron McLendon of the Commission's Statewide Enforcement Unit by May 23, 2003, as to what action you intend to take.

We hope that you will choose to cooperate in resolving this violation by removing the unpermitted development by June 11, 2003. If you do not, we will consider pursuing additional enforcement action against you. 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. 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.

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

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E-MAIL: mbgilmartin@earthlink.net

FILE NO.

2201.01

June 16, 2003

Aaron N. McLendon
Statewide Enforcement Officer
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

*Property: 19020 Pacific Coast Highway
Malibu, Los Angeles County*
NOV No. V-4-02-052

Dear Mr. McLendon:

This letter serves to respond to the issues raised in your letter dated May 12, 2003.

The subject property is located within the Las Tunas Beach community located along Pacific Coast Highway ("PCH") in the eastern portion of Malibu. I purchased the property in approximately August 2000. All current improvements existed at the time of my acquisition of the property, and I have not performed any "development", as defined by Public Resources Code § 30106, during my ownership of the property.

REQUEST FOR REMOVAL OF GATE AND CAISSONS

You requested that I remove the fencing and gate by June 11, 2003. Your request is unreasonable as explained below.

Removal of the gate would be inconsistent with public health and safety. There is a 6-foot elevation difference between the driveway on the north side of the gate and sand and rocks on the south side of the gate. Removal of the gate would create a risk of personal injury to any person who might inadvertently step into the opening or fall while trying to gain access to the beach below. There is a seawall approximately 30 feet south of the gate creating a 6-foot elevation difference between the top of the seawall and the sand

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

EXHIBIT F 1 of 3

Aaron N. McLendon
June 16, 2003
Page 3

The western half of Las Tunas Beach on which residences are located is for most of the day a wet beach. Accordingly, this beach is not suited for typical public use.

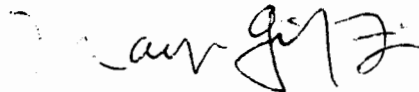
Creation of a public walkway on my neighbor's property would require removal of his 6-foot seawall that exists on the southern portion of his property extending across the east and west boundaries thereof. Removal of the vertical seawalls would jeopardize the integrity of existing septic systems.

There is no space on the public portion of Las Tunas Beach for lifeguard facilities, restrooms or trash receptacles due to the tide conditions that persist during most of the day. The absence of such facilities would endanger the natural habitat.

CONCLUSION

No legitimate public interest would be served by removal of fencing and caissons from my property. For the reasons stated herein, I respectfully request that you rescind the notice of violation.

Very truly yours,



Mark B. Gilmartin

MBG:kk

cc: David Harner

CALIFORNIA COASTAL COMMISSION

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



June 17, 2004

Mark B. Gilmartin
233 Wilshire Boulevard, Suite 350
Santa Monica, CA 90401

Re: Coastal Act Violation File No. V-4-02-052, 19020 Pacific Coast Highway,
Malibu, Los Angeles County

Dear Mr. Gilmartin:

Thank you for your letter dated June 6, 2003 responding to our Notice of Violation to you dated May 12, 2003. I apologize for the delay in responding to your letter.

As the NOV indicated, Staff has confirmed that development occurred without a coastal development permit (CDP) in a portion of your property that is subject to a recorded public access deed restriction (LA County Instrument No. 77 435422). The unpermitted development consists of a storage enclosure adjacent to your garage that blocks coastal views and serves as a barrier to public access. The public access deed restriction was recorded by a prior owner pursuant to Special Condition 2 of CDP No. P-77-376 and runs with the land, binding successor owners such as yourself.

Special Condition 2 of CDP No. P-77-376 provides for recording a deed restriction:

- b. granting vertical access to give the public the privilege and right to pass and repass over a strip of Dedicator's said property 3 feet in width measured from along the east property line, Pacific Coast Highway, and extending from the dege (sic) of the public right-of-way to the mean high tide line of the Pacific Ocean.*

As you may know, an offer-to-dedicate (OTD) an easement for a 3 foot wide vertical public accessway from PCH to the mean high tide line was recorded along the western boundary of 19016 Pacific Coast Highway, which is owned by David Harner. The easement on Mr. Harner's property is adjacent to the deed restriction on your property and together they create a 6-foot wide area over which the public has the right to pass. The Commission is committed to opening the vertical public accessway on Mr. Harner's property.

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

EXHIBIT G 1 of 2

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
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July 15, 2004

Mark B. Gilmartin
233 Wilshire Boulevard, Suite 350
Santa Monica, CA 90401

Re: Coastal Act Violation File No. V-4-02-052, 19020 Pacific Coast Highway,
Malibu, Los Angeles County

Dear Mr. Gilmartin:

Thank you for speaking with me on the telephone on July 9, 2004 regarding the Coastal Act violation on your property. The violation is the maintenance of an unpermitted wooden storage enclosure that is blocking the vertical public access deed restricted area on your property. As I indicated, we would prefer to resolve this matter amicably.

In order to resolve the violation, the Commission is required to issue either a consent or a unilateral cease and desist order to authorize removal of the enclosure. Regardless of which type of order the Commission issues, I am required to serve you with Notice of Intent to Commence a Cease and Desist Order Proceeding pursuant to Section 13181 of the Public Resources Code. Thus, I have sent you the Notice under a separate cover. In the Notice, I discussed the consent cease and desist order option in more detail.

As we discussed, I have enclosed a copy of the Approved Management Plan for the Vertical Public Access Easement and information about the non-profit corporation that accepted the offer-to-dedicate a vertical public access easement on your neighbor David Harner's property.

Lastly, I was unable to schedule the meeting with Staff and Mr. Harner at the site, however, Staff and a representative from Access for All is willing to meet at the site with you and Mr. Harner to discuss the vertical public accessway and any improvements that may need to be made in order to open it.

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

EXHIBIT H 1 of 2

CALIFORNIA COASTAL COMMISSION

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



VIA REGULAR AND CERTIFIED MAIL

**NOTICE OF INTENT TO COMMENCE CEASE AND DESIST ORDER
PROCEEDING**

July 20, 2004

Mark B. Gilmartin
233 Wilshire Boulevard, Suite 350
Santa Monica, CA 90401

Subject: Coastal Act Violation File No. V-4-02-052

Property Location: 19020 Pacific Coast Highway, Malibu, Los Angeles County (APN 4449-003-026). This property fronts onto Topanga Beach.

Description of Violations: Unpermitted development in and across a recorded public accessway including but not limited to a wooden enclosure used to store trash bins and a solid wood gate and or fence. These structures are inconsistent with the approved plans for Coastal Development Permit No. P-3-11-77-376 and Condition 2(b) of that permit, which required the grant of a vertical public accessway.

Dear Mr. Gilmartin:

I am writing to you as the owner of the property at 19020 Pacific Coast Highway, Malibu, CA ("your property") to notify you that I am preparing to recommend that the Commission issue a cease and desist order ("CDO") pursuant to Section 30810 of the Coastal Act to you for maintaining development on your property without a coastal development permit (CDP), and your failure to comply with the requirements of CDP No. P-3-11-77-376, issued by the Commission on April 28, 1977 (copy attached).¹ Condition 2(b) of the permit required the permittees (Norris and Carol Huntley) to record an a deed restriction granting vertical access to give the public the privilege and right to pass and repass over a 3-foot wide strip along the eastern boundary of the property extending from Pacific Coast

¹On April 28, 1977, the Commission issued CDP No. P-3-11-77-376 to Norris and Carol Hundley to authorize construction of a 2-story, single-family dwelling with attached 2-car garage on a vacant oceanfront lot in Malibu.

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

Condition 2 of the permit provides:

2. *a deed restriction for recording:*
 - b. *granting vertical access to give the public the privilege and right to pass and repass over a strip of Dedicator's said real property 3 feet in width measured along the east property line, Pacific Coast Highway, and extending from the dege [sic] of the public right-of-way to the mean high tide line of the Pacific Ocean.*

Even though the language of Condition 2(b) does not enable the Commission to require you to improve the public accessway to facilitate its use by the public, the deed restricted are must remain unobstructed. The storage enclosure and gate and/or fence are inconsistent with Section 30251 of the Coastal Act, which provides that "Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas..." These structures block the view of the beach and the ocean from Pacific Coast Highway between your house and Harner's house. They also make it more difficult to identify the public accessway on the adjacent property.

Cease and Desist Order

Pursuant to Section 30810 of the Coastal Act, the Commission, after a public hearing, has the authority to issue a CDO to any person who performed development inconsistent with a permit or the Chapter 3 policies of the Coastal Act. In addition to requiring you to refrain from conducting any further development on your property without a CDP, the CDO would require you to remove the unpermitted development that is located within or across the vertical public accessway. The CDO would provide you with the authority to remove the unpermitted development and avoid the necessity for you to obtain another CDP for the work.

In addition, the Commission may issue either a unilateral or a consent CDO ("consent order"). Under both types of order, removal of the unpermitted development is required and you would be required to stipulate to the basic facts. A consent order is similar to a settlement agreement in that it would provide you with an opportunity to have input into the process and timing of removal of the unpermitted development and, if appropriate, would allow you to negotiate a penalty amount with Commission staff. We could discuss the possibility of authorization for a visually permeable fence to replace the storage enclosure (I am informed there is an example of this type of fence at 21704 Pacific Coast Highway). If you are interested in negotiating a consent order, please contact my staff when you receive this letter to discuss options to resolve this case.

Mark B. Gilmartin
July 20, 2004
Page 5

Enclosure

cc: Lisa Haage, Chief of Enforcement
Steve Hudson, Southern California Enforcement Supervisor
Linda Locklin, Public Access Coordinator
Steve Hoye, Access for All

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FILE NO.

2201.01

July 21, 2004

Via Facsimile

Chris Darnell

Headquarters Enforcement Specialist
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

*Property: 19020 Pacific Coast Highway
Malibu, Los Angeles County*
File No. V-4-02-052

Dear Mr. Darnell:

This letter serves to follow up our telephone conferences and respond to the issues raised in your recent letters regarding my residence located at 19020 Pacific Coast Highway.

LETTER DATED JUNE 17, 2004

Your letter discusses a Deed Restriction recorded more than 27 years ago. The stated purpose of the deed restriction was to give the public the right to pass over a 3-foot strip from the exterior of the residential structure to the east property boundary. The Deed restriction was apparently entered into at a time when Las Tunas Beach was a dry sand beach. The Deed Restriction does not state anything about providing the public a view corridor.

You contend that unpermitted development exists on my residential property, consisting of a "storage enclosure...that blocks coastal views and serves as a barrier to public access." Based on the fact that the surface of the pavement on the north side of the gate is currently at least six feet higher than the rocks beneath the storage enclosure on the south side of the gate, you indicate removal of the gate and storage enclosure will not be required at this time in order to avoid creation of a hazard to public health and safety. Thus, it is my understanding you are not asking that I take any action at this time.

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

EXHIBIT J 1 of 3

Chris Darnell
July 21, 2004
Page 3

improvements will be erected on my property. There is currently existing on the Harner property a wooden bulkhead that protects the structural integrity of the Harner residence as well as my home. During high surf, the ocean frequently surges over the bulkhead. Without the bulkhead, the structural integrity of the Harner residence and the septic systems beneath the Harner residence and my residence could be compromised. Additionally, the soil supporting PCH could be eroded.

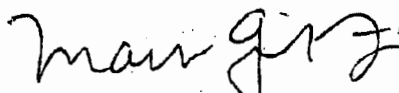
The Management Plan fails to consider the feasibility of constructing a public access on the Harner property. At the time these easements were granted, the Las Tunas groins restrained the tides. Since the groins were removed, the beach in the area of the easements is usually wet and rocks are often present. In fact, it would currently be very unsafe to travel over the easement to the sand due to a large deposit of rocks. Passage over the easement during the current condition or during any high tide would be extremely dangerous.

The Management Plan indicates that a trash receptacle will be placed at the gate of the proposed access on the Harner property. Inasmuch as the width of the easement on the Harner property is only three feet, how will it be possible to locate a trash receptacle without blocking the gate or creating a hazard to motor vehicles?

NOTICE OF INTENT TO ISSUE CEASE AND DESIST ORDER

I am informed a Notice of Intent to Issue a Cease and Desist Order has been issued to David Harner, and a hearing will be held at the Commission's regularly scheduled meeting in San Pedro on August 11-13, 2004. I would like to be heard on this matter. Please inform me whether a hearing will go forward at the meeting in August.

Very truly yours,



Mark B. Gilmartin

MBG:kk

cc: David Harner

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

EXHIBIT J 3 of 3

CALIFORNIA COASTAL COMMISSION

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



August 17, 2004

Mark B. Gilmartin
233 Wilshire Boulevard, Suite 350
Santa Monica, CA 90401

Re: Violation File No. V-4-02-052 (Gilmartin), 19020 Pacific Coast Highway,
Malibu, Los Angeles County

Dear Mr. Gilmartin:

I am writing to respond to your letter dated July 21, 2004 and to provide you with the information you requested. I apologize for the delay in responding. Initially, I note that when you sent your letter, you had not yet received the Notice of Intent to Commence Cease and Desist Order Proceeding dated July 20, 2004 that I sent you. After you received the Notice of Intent, we discussed some of these issues on the phone, and this letter will also provide a written response.

In your letter, you assert that the deed restriction on your property does not require you to maintain a view corridor where the unpermitted storage enclosure and wood gate or fence is located. However, the deed restriction required a 3 foot wide area for public access to the beach on your property, and the presence of the accessway would also mean that there would not be a solid structure blocking the view of the ocean at this location. As we have previously noted, pursuant to Title 14 California Code of Regulations Section 13166(a), the Executive Director could not accept an application for a coastal development permit ("CDP") to authorize after-the-fact the storage enclosure since it would "lessen or avoid the intended effect" of Condition 2(b) of CDP No. P-3-11-77-376. The development also adversely affects public views of the ocean. This would be inconsistent with Section 30251 of the Coastal Act, which requires protection of views to and along the ocean. The enclosure blocks the public view of the ocean from Pacific Coast Highway between your house and David Harner's house.

We are not asking you to take action to remove the storage enclosure or the wooden gate at this time. As I explained, once an engineer has developed and is ready to implement a plan for improving the accessway between your house and the Harner house, the storage enclosure must be removed and replaced by a visually permeable fence or gate of some kind.

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

EXHIBIT K 1 of 4

Trash Receptacle

Locating and placing a public trash receptacle, if appropriate, is part of the second phase of this project. The size, design and location of any trash receptacle have not been determined. An appropriate design and location for any trash receptacle that will not block the entrance to the accessway or create a hazard to motor vehicles will be selected.

Caltans Property

You suggest that instead of an accessway on the adjacent Harner property, it would be preferable if the California Department of Transportation ("Caltrans") provided public access to the sea at a nearby location owned by Caltrans. Caltrans has indicated to Commission staff that it is not willing to do so. Furthermore, the Commission is without authority to require Caltrans to agree to this.

Costs of Compliance

As the Management Plan indicates, AFA will assume the cost of surveying the properties and making improvements to the easement on Mr. Harner's property to facilitate opening the public accessway. You will be responsible for the assuming the cost of removing the unpermitted storage enclosure and wooden gate or fence on your property. AFA will replace the wooden gate fence with a visually permeable barrier. Of course, you may also contact AFA to discuss whether you are able to agree on the type, materials and location for a visually permeable barrier on your property.

Visual Corridor Deed Restriction

During our telephone conversation last week, you proposed amending CDP No. P-3-11-77-376 to change the deed restriction on your property from a public access deed restriction to an open space deed restriction in exchange for giving AFA permission to use your property during construction of the improvements to the public accessway on Mr. Harner's property. Members of the public, including AFA, do not need your permission to walk in the deed restricted accessway. Moreover, Commission staff could not agree to eliminate any right of public access because it is not possible to predict what conditions might be present on the property in the future. We also do not know what type of improvements will be constructed to allow public use of the easement on the adjacent Harner property. It is possible that the after those improvements are constructed, use of the easement will be facilitated or enhanced by public use of a portion of the deed restricted access area on your property. Furthermore, for the reason previously discussed, the Executive Director could not accept an application to

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FILE NO.

2201.01

September 7, 2004

Via Facsimile/U.S. Mail

Chris Darnell
Headquarters Enforcement Specialist
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

*Property: 19020 Pacific Coast Highway
Malibu, Los Angeles County*
File No. V-4-02-052

Dear Mr. Darnell:

I am in receipt of and have reviewed your proposed Consent Cease and Desist Order No. CCC-04-CD-09 ("CCDO"). The CCDO is unacceptable in its present form.

Coastal Development Permit No. P-3-11-77-376 (CDP) was issued to Mr. & Mrs. Norris Hundley, Jr. in April 1977. The CDP required that Mr. & Mrs. Hundley record a deed restriction granting vertical access to give the public the privilege and right to pass and repass over a strip of real property 3 feet in width on the eastern side of the above referenced property ("Subject Property"). It appears a deed restriction was signed by Mr. & Mrs. Hundley and recorded on April 28, 1977 ("Deed Restriction").

A storage enclosure with an unlocked wooden gate was apparently constructed on the Subject Property by Mr. & Mrs. Hundley. The subject storage enclosure and gate serve the purpose of preventing a public safety hazard due to the more than 6-foot vertical drop from the pavement on the north side of the gate to the rocks and sand below the pavement on the south side of the gate.

Section 1.0 of the CCDO provides that upon notification from Commission staff, I shall remove the existing wooden gate and storage enclosure and allow Access for All ("AFA") to install a visually permeable fence in place of the gate. The CCDO further provides that the removal of the gate and storage enclosure should coincide with the construction of improvements

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

EXHIBIT L 1 of 3

Chris Darnell
September 7, 2004
Page 3

Section 15.0 of the CCDO provides that the State of California shall not be liable for injuries or damages to persons or property resulting from my acts or omissions. As you have acknowledged, removal of the gate will create a hazard to public safety. In the event the Commission issues an order compelling removal of the existing gate and storage enclosure from the Subject Property, the State should be liable for any resulting personal injury or property damage.

In conclusion, the CCDO is unacceptable because the obligations contained therein exceed the scope of and are inconsistent with the provisions of the Deed Restriction. Commission staff is attempting to misuse government power. Commission staff is seeking to take private property without compensation. Commission staff is attempting to expose me to potential liability for personal injury and property damage that would result from compliance with the CCDO. The public would be better served by improvements to existing public accesses to the east and west of my property that do not pose a risk to public safety and the environment or threaten the rights of private property owners.

Very truly yours,



Mark B. Gilmartin

MBG:kk

cc: David Harner
Steve Hoye, Access for All

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FILE NO.

2201.01

October 7, 2004

Peter M. Douglas
Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Date: *October 13, 2004*
Property: *19016 Pacific Coast Highway*
 Malibu, Los Angeles County
Owner: *David Harner*
File No. *V-4-02-051*
Order No. *CCC-04-CD-10*

Dear Mr. Douglas:

I am the owner of the residential property located at 19020 Pacific Coast Highway ("PCH"), located adjacent to and west of the above referenced property ("Harner Residence"). I am writing on behalf of myself as a party who will be adversely impacted by the issuance of proposed Cease and Desist Order No. CCC-04-CD-10 ("CDO").

OFFER TO DEDICATE

It appears that Dorothy J. Friedman, the former owner of the Harner Residence, executed an Irrevocable Offer to Dedicate ("OTD") on January 3, 1984 in order to obtain a permit for proposed development. The OTD (attached to the Staff Report as Exhibit "B") provides, in pertinent part, that "the owner(s) hereby offer(s) to dedicate to the People of the State of California an easement in perpetuity for the purposes of (10) Public access to the shore line located on the subject property (11) Along the western property line to the mean high tide line an easement three feet in width and as specifically set forth by attached Exhibit C (12) hereby incorporated herein." The OTD was to be irrevocable for a period of 21 years from the date of recording. The OTD was recorded on February 16, 1984. While the OTD provides for an easement for public access through the 3-foot strip, there is no express authorization for construction thereon. Accordingly, the easement provides only for public access and not for construction of physical improvements.

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

EXHIBIT M 1 of 4

with staff. Copies of the two letters are enclosed and should be part of the administrative record.

The Staff Report attempts to discount the verbal arguments conveyed by Mr. Harner to staff by characterizing them as "objections to permit condition requiring recordation of the public access OTD." The points made by Mr. Harner go to the deficiencies in the administrative process by which the OTD was accepted and is proposed to be implemented.

CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA")

The Staff Report states that the requested administrative action is exempt from CEQA. Notwithstanding whether this process is or is not technically exempt from CEQA, it is apparent that the intent of CEQA is being ignored.

The Staff Report fails to discuss the potential adverse impacts of the proposed CDO. The Staff Report issued in 1983 (Exhibit "A" of Staff Report) notes on page 5 that "the development is located on a sand promontory in an area subject to hazards from wave run up, scour and erosion." There is a six- to seven-foot elevation difference from the paved area on the north side of the easement to the filled area above the bulkhead. There is a total elevation drop to the beach of approximately 15 feet. The CDO would require removal of a portion of a bulkhead which constrains fill and restrains the ocean. Such removal would expose the septic system located within two or three feet of the vertical bulkhead wall on the Harner Residence. It would also allow for high tides to erode support for PCH. It would be irresponsible to issue a CDO without further consideration of the consequences of compliance with the CDO on the environment. Removal of this 10-foot bulkhead wall would create a very dangerous condition.

The Staff Report fails to discuss the adverse affects of allowing Access for All to accept the OTD. Moreover, the Management Plan is inconsistent with the Commission's own Access Guidelines. There is inadequate parking for a public access at this location. It is my understanding the property that lies on the north side of the residential properties along PCH, including, but not limited to, the Harner Residence and my residence, extends to the shoulder of PCH. Thus, in order to park legally on the south side of PCH, the public would have to park dangerously close to PCH. Alternatively, the public would have to park on the north side of PCH and walk across the fast-moving traffic on PCH. This is a very dangerous stretch of road. Within the past 60 days, a pedestrian was struck by a motorist and killed across from the Harner Residence. Additionally, both Mr. Harner and I have 2-car garages. Existence of a public access between our properties would invite motorists to park vehicles blocking our garages and access to PCH.

Commission staff has failed to consider topographic constraints of the site. Las Tunas Beach is a wet beach that is frequently inaccessible because of high tides and rock

CALIFORNIA COASTAL COMMISSION

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VIA FACSIMILE AND REGULAR MAIL

October 12, 2004

Mark B. Gilmartin
233 Wilshire Boulevard, Suite 350
Santa Monica, CA 90401

Re: Violation File No. V-4-02-051, Cease and Desist Order No. CCC-04-CD-10, 19016 Pacific Coast Highway, Malibu, Los Angeles County

Dear Mr. Gilmartin:

Thank you for your letter to Peter Douglas dated October 7, 2004 providing comments on the Item W 6, public hearing on Commission issuance of Cease and Desist Order No. CCC-04-CD-10 to David Harner.

I am writing to respond to the issues that you raised in your letter. I have provided the responses below in the order in which you raised them in your letter. Your letters to Staff dated June 16, 2004, July 21, 2004 and October 7, 2004 and Staff's responses to those letters have been included in the Addendum for the hearing, and will be part of the record for this matter.

- (1) The easement on David Harner's property provides only for public access and not for construction of physical improvements.

Commission Response:

Easements convey a property interest in the property on which the easement is recorded to the easement holder. In this case, the recorded irrevocable offer-to-dedicate (OTD) a 3-foot wide public access easement was recorded by Dottie Friedman in February 1984 and accepted by Access for All in June 2004. As the holder of the easement, Access for All has the right to manage the easement to provide safe public access to the shoreline. In order to facilitate safe public access, Access for All is empowered to make improvements to the easement.

- (2) Access for All accepted the OTD more than 20 years after it was recorded on February 16, 1984.

Commission Response:

The OTD was valid for 21 years after recordation. Access for All accepted the OTD on June 10, 2004, within the legally required time period.

Cease and Desist Order
CCC-04-CD-13 (Gilmartin)

As to any issues regarding implementation, as noted above, the detailed plans for improvements to the easement have not yet been developed, and, in order to ensure an orderly process, the order specifically does not require removal of the unpermitted development blocking the easement until the plan has been reviewed and approved by the Executive Director. Also as noted in the Staff Report, Access for All and Staff are willing to work with Mr. Harner to address any legitimate issues.

To the extent that you and Mr. Harner raise objections to the permit condition that required recordation of the public access OTD, the time for objecting to the condition ran in 1983 and such objections cannot now be heard. The law regarding this is well established and has been recently affirmed. The permit condition became final and binding in 1983 when Ms. Friedman failed to challenge them and accepted the permit benefits. Abundant case authority establishes that Mr. Harner is bound by the conditions of the 1983 permit and that they may not relitigate those permit conditions now. As noted in the Staff Report at pages 7-8, issues regarding whether the permit condition is appropriate and justified must have been raised at the time of the original permit. It is well settled that such objections cannot be raised now.

- (6) Staff is ignoring the spirit of the California Environmental Quality Act (CEQA) and the removal of the unpermitted development in the easement and the construction of public access improvements would be dangerous, etc.

Commission Responses:

- (a) Inadequate and unsafe parking.

Again, these are issues that go to whether the permit condition was appropriate, and the time for raising objections to the permit condition have long since run. There are many locations along Pacific Coast Highway where the public parks along PCH to access to beach and this can be accomplished here as well.

- (b) Removal of the western portion of the bulkhead would damage the environment.

The work to be performed under the Cease and Desist Order will be consistent with the Chapter 3 policies of the Coastal Act and will be designed to protect coastal resources.

- (c) Removal of the bulkhead would create a hazard.



Example of a visually permeable wrought iron style fence of the type Access for All has proposed installing to replace the storage enclosure.



Another example of a visually permeable wrought iron style fence of the type Access for All has proposed installing to replace the storage enclosure.

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**COMMISSION CEASE AND DESIST ORDER NO. CCC-04-CD-13**

Pursuant to authority under Section 30810 of the Public Resources Code, the California Coastal Commission hereby orders Mark B. Gilmartin (hereinafter "Gilmartin"), owner of property identified in Section 4.0 of this Cease and Desist Order (hereinafter "Subject Property") to cease and desist from maintaining development without a coastal development permit (CDP) in violation of the Coastal Act, and in violation of the terms and conditions of CDP No. P-3-11-77-376, as specified herein, which is also a violation of the Coastal Act. This Order requires and authorizes Gilmartin to remove the unpermitted development within 30 days of notification by Coastal Commission Staff that Access for All will undertake construction of improvements to the public access easement on David Harner's property (hereinafter "Harner's Property").¹ This Order also requires Gilmartin to refrain from conducting unpermitted development on the Subject Property in the future.

1.0 PUBLIC ACCESS DEED RESTRICTION

On April 28, 1977, Norris and Carol Hundley, previous owners of the Subject Property recorded a Deed Restriction in the Los Angeles County Recorder's Office as Document No. 77-435422 as required by Special Condition 2(b) of CDP No. P-3-11-77-376, which authorized the construction of a single-family residence on a beachfront lot in Malibu. The Deed Restriction gave the public the privilege and right to pass and repass over a 3-foot wide strip of land along the eastern boundary of the Subject Property extending from the southern edge of Pacific Coast Highway to the mean high tide line of the Pacific Ocean.

2.0 DESCRIPTION OF COASTAL ACT VIOLATION

Placement and maintenance without a CDP of a solid wooden storage enclosure attached to the eastern wall of the house at the northern extent of the wall and a

¹David Harner's property is located at 19016 Pacific Coast Highway (APN 4449-003-027). On February 16, 1984, the previous property owner (Dottie Friedman) recorded an irrevocable offer to dedicate a 3-foot wide vertical public access easement extending between Pacific Coast Highway and the mean high tide line. The offer was accepted by Access for All on June 10, 2004 and therefore the property now has an easement upon it. On October 13, 2004, the Commission issued Cease and Desist Order No. CCC-04-CD-10 to Harner. The Order required and authorized Harner to cease and desist from maintaining unpermitted development in the easement and upon notification from Staff, remove the unpermitted development from the easement with the exception of any portion of the development identified in a plan approved by the Executive Director as development that may remain.

8.0 EFFECTIVE DATE

This Cease and Desist Order shall become effective as of the date of issuance by the Commission and shall remain in effect permanently unless and until rescinded by the Commission.

9.0 COMPLIANCE OBLIGATION

Strict compliance with the terms and conditions of this Cease and Desist Order is required. If Gilmartin fails to comply with the requirements of this Order, it will constitute a violation of the Order and may result in the imposition of civil penalties of up to six thousand (\$6,000) per day for each day in which the compliance failure persists pursuant to Section 30821.6(a) of the Coastal Act.

10.0 SITE ACCESS

Gilmartin shall provide Staff access to the Subject Property at all reasonable times for the purpose of inspecting the site and verifying compliance with the requirements of the Cease and Desist Order and CDP No. P-3-11-77-376. Except as authorized herein, nothing in this order is intended to limit the right of the public to use the portion of the Subject Property subject to the Deed Restriction that grants the public the right to pass and repass.

11.0 APPEALS AND STAY RESOLUTION

Pursuant to Title 14, Article 5, Section 30803(b) of the Public Resources Code, Gilmartin against whom this Cease and Desist Order is issued may file a petition with the Superior Court for a stay of this Order.

12.0 GOVERNMENT LIABILITY

The State of California shall not be liable for injuries or damages to persons or property resulting from acts or omissions by Gilmartin 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 the Gilmartin or his agents in carrying out activities pursuant to this Order.

13.0 SUCCESSORS AND ASSIGNS

This Cease and Desist Order shall run with the land, binding all successors in interest, future owners of the Subject Property, heirs and assigns of Gilmartin. Notice shall be provided to all successors, heirs and assigns of any remaining obligations under this Order.