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W 11 & 12

ADDENDUM

July 8, 2009

TO: Coastal Commissioners and Interested Parties

FROM: Lisa Haage, Chief of Enforcement

SUBJECT: ADDENDUM TO ITEM **W 11 & 12** COASTAL COMMISSION CEASE AND DESIST ORDER NO. CCC-09-CD-01 AND HEARING ON WHETHER A VIOLATION HAS OCCURRED FOR THE COMMISSION MEETING OF **JULY 8, 2009**

Documents included in this addendum:

1. Letter in support of staff recommendation from Sierra Club (pgs 2-3).
2. Letter in support of staff recommendation from Fran Gibson, President of the Board of Coastwalk California (pgs. 4-7).
3. Letter in support of staff recommendation from Jenny Price (pgs 8-9).
4. July 28, 2003, Public Vertical Access Easement Management plan (10-12)
5. July 2, 2009 Letter to Chair Neely and Commissioners from Respondent's Attorneys, Diane R. Abbitt and Steven H. Kaufmann, received by Commission staff on July 3, 2009 (pgs 13-36).**
6. Settlement Agreement between Access for All and Lisette Ackerberg (pgs 37-52).**
7. Exhibit letters to the October 21, 2008 letter from Diane Abbitt to Lisa Haage (pgs 53-74) ***
8. Responses to July 2, 2009 letter and proposed additional findings (pgs 75-93).

** Because of the large volume of material given to Commission staff just days prior to the hearing, Commission staff has made the remaining exhibits available on the Commission's website. In addition, Mrs. Ackerberg's representatives have indicated that they distributed copies of all the exhibits to the commissioners already.

*** We did not include large maps which are also exhibits because we lack the ability to duplicate them. In addition, we did not include a copy of the 1985 staff report because it is already an exhibit to the staff recommendation for this Order.

SIERRA CLUB
FOUNDED 1892

Mark Massara, Director
Sierra Club Coastal Programs

Hon. Bonnie Neely, Chair
California Coastal Commission
45 Fremont Street
San Francisco, California 94122

VIA EMAIL

Monday, July 6, 2009

Re: Ackerberg Public Accessway
22466 & 22500 Pacific Coast Highway, Malibu, Ca.
Agenda Item W11 & 12

Dear Ms. Neely and Coastal Commissioners:

We have just been provided with notice of settlement of litigation between private parties which purports to further delay and/or permanently extinguish the long sought public accessway otherwise known as the Ackerberg mansion. ***Sierra Club strenuously objects to the legal maneuvers and urges the Commission to allow no further delay in opening of the Ackerberg accessway, and to issue the proposed cease and desist order.***

The public has been forced to wait over 20 years for the Ackerberg vertical accessway to be opened, while the Ackerberg's have long enjoyed an oceanfront mansion and virtual private sandy beach.

While the imposition on the public is obviously outrageous, the latest twist presented by Ackerberg and the organization Access For All (AFA) threatens an even worse result. In exchange for money, AFA intends to launch a lawsuit against the County of Los Angeles in order to try to open ***a different*** accessway. Then, presumably after another 20 years or so, the charade pretends the County accessway will be opened and the Ackerberg's will not open their accessway ***EVER!***

This is intolerable. Surely if AFA is unwilling or unable to fulfill the legal obligations associated with opening the Ackerberg accessway the Commission retains some legal authority and jurisdiction to be able to rescind AFA's operating agreement, and to award the job to an organization who will insure public access is achieved.

mark.massara@sierraclub.org *1642 Great Highway, San Francisco, CA 94122*
phone: 415-665-7008 fax: 415-665-9008

As your staff clearly describes, from a variety of perspectives the Ackerberg easement is a superior public accessway to the County owned easement area, which is through a parking lot and an condominium complex, and lacks lateral easement area on the sandy beach. Worse, neither Ackerberg nor AFA has any legal right or ability to insure the County accessway is opened.

In conclusion, Sierra Club urges the Commission not to delay this urgent matter and support your staff analysis and recommendations, and to issue the cease and desist order in this matter.

Sincerely,

Mark A. Massara

APPROVE CEASE AND DESIST ORDER FOR CARBON BEACH ACKERBERG PROPERTY ENCROACHMENTS TO LATERAL AND VERTICAL EASEMENTS (Items 11 and 12 Order # CCC-09-CD-01 Ackerberg, Malibu, Los Angeles County)

Madam Chair Neely, Commissioners, Mr. Douglas, Commission staff and others gathered today -- I am Fran Gibson, President of the Board of Coastwalk California -- a 25 year old non-profit dedicated to coastal access and the completion of the 1200 mile California Coastal Trail from Oregon to Mexico.

We support wholeheartedly the Ackerberg property Cease and Desist order before you today and seldom have I seen a more appropriate application of this legal instrument to cure encroachments to coastal access. If we had an "easy button" here today I would implore you to hit it solidly!

Malibu's crescent-shaped Carbon Beach is close to 1.5 miles long with an impenetrable Great Wall of seventy or so backsides

and garages of mostly second homes along the Pacific Coast Highway imposing visual and physical limitations to the public's access to the coast. Only two vertical access ways are open along this stretch of Malibu's coastal zone: the 1981 Zonker Harris Gate and the 2005 Geffen Gate both accepted and very well-managed by Access for All. All beaches seaward of the mean high tide line are held in public trust as state sovereign lands for the people marking public access as one of the highest purposes of our public trust doctrine first founded in Common Law.

Article X section 4 of the state Constitution guarantees all people "maximum access to the sea" and our federal 1972 Coastal Management Zone Act adopted as leading national policy to protect and gain new access to public beaches in this nation. One of the highest policy objectives of our Coastal Act's Chapter 3 is protection and guarantee of coastal access to California's stunning coastline. "Development shall not interfere with the public right of access to the sea." Public access policies are included in Malibu's 2002 LCP Chapter 2 stating the standard of one public access way every thousand feet of coastline. Exclusive Carbon Beach is not excluded from this standard.

Offers to dedicate are fair mitigation for direct individual and cumulative impacts of private development upon public coastal access. Access findings by this body are public trust assets that are irrevocable, nonfungible and constitute an essential protection for coastal conservation along California's coast. Access easements run with the land to perpetuity in chain of title. They are a burden that cannot be shifted to a subsequent property owner, another easement area open or closed, are not predicated upon support facilities (like parking and cross-walks) and are pedestrian rights-of-way to the mean high tide line assuring coastal access to the public.

Vertical easements like Ackerberg Gate are higher policy priority for coastal access than lateral easements and must be guarded carefully by legal decisions like yours today. They are the sole egress when high tides and storm conditions dictate and provide rapid safe routes to the coast for emergency personnel. Lateral easements are rendered useless even privatized if the public enjoys no vertical rights-of-way to the coast.

The vested title holder Access for All must be allowed to open the Ackerberg Gate to the public as was the 1985 finding of this Commission. Ms. Ackerberg got what she sought in permit conditions in direct benefits to her private property. 25 years

later the general public still awaits the benefits of improved coastal access. Every OTD that lapses in California each year without being accepted is like losing living species and each one lost is grave to Coastwalk California who views access rights inherent within these offers-to-dedicate the fullest guarantee and commitment to coastal access.

Thank you for consideration of our concerns and thank you for all you do to champion the coast of California for generations to come.

July 5, 2009

To the Coastal Commission:

I am writing to strongly support the Cease and Desist order on Carbon Beach that the commission will decide on at the July 8 hearing.

As a writer and Los Angeles Urban Ranger, I have tried to educate people about public beach access in Malibu for 6-7 years, and I can testify that L.A.-area beachgoers are as eager to use these stunning public lands as they are frustrated about the difficulties of doing so.

A key and obvious reason for this difficulty is the scarcity of accessways. By the state standard (every 100 feet), we should have 100-plus access points along the 20 miles of coast that are lined with private development. Yet we have only 17 working accessways--for each of these, there should ideally be five more--so that many people who live just across the PCH, even, must drive two miles or more to get to the beach.

The opening of the accessway at 22126 PCH next to the Geffen property in 2005 significantly improved the public access to Carbon Beach, which had essentially functioned before as an all-private beach, with no public entrance except the Zonker Harris gate at the upcoast end. The dedicated access by the Ackerberg property would finally make the public lands on this beach truly public, as it lies smack between the two extant accessways on a stretch of the beach that still enjoys almost no public use.

I have taken many people to Carbon Beach since the 22126-PCH accessway opened, and they aways fall in love with it. It is a beautiful strip of coast, wider than most of Malibu's developed beaches (so more accessible at high tide), with lateral dry-sand easements in front of more than half the properties. And its proximity to Malibu's commercial center makes it an ideal place to beachcomb on a visit to this area, whether from the canyons above or from outside Malibu.

I find it deeply objectionable that the state typically has to waste such extensive time and resources to open public accessways in Malibu that were dedicated 25 years ago as state law requires, as a condition of extensive private development on the coast that belongs to everyone. That this particular accessway has been accepted by Access For All since 2003 makes this case especially frustrating. That the homeowner has built an illegal generator, wall, fence, and light system inside the easement, and has built illegally and extensively inside the lateral easement as well, makes this case outrageous even by Malibu standards.

I urge the Commission to enforce the removal of these obstructions, so that Access For All can proceed to develop and open the accessway for the public.

Thank you for your attention.

Sincerely,

Jenny Price

21 Thornton Ave., #32
Venice, CA 90291
310-396-1548
jjprice@ucla.edu

Access For All
PO Box 1704
Topanga, California 90290

July 28, 2003

PUBLIC VERTICAL ACCESS EASEMENT MANAGEMENT PLAN

By this agreement, Access for All, a California nonprofit corporation incorporated and qualified as a 501(c)(3) organization undertakes to manage a vertical public access easement offered for dedication within the City of Malibu, Los Angeles County. This easement is located at 22466 - 22500 W. Pacific Coast Highway, Malibu, CA 90265, and was required pursuant to Coastal Development Permit #5-84-754, Ackerberg.

Background

To permanently protect the public's right to access State Tidelands and to mitigate the impact of private development upon public access, the California Coastal Commission required that an offer to dedicate a vertical public access easement be recorded on this site.

Purpose/ Area Description

The purpose of this easement is to provide vertical public pedestrian access to Carbon Beach. The easement is 10 feet wide and is located along the eastern boundary of the property line, extending from the northerly property line to the mean high tide line. There is only one existing public accessway to Carbon Beach, approximately 1600 feet to the west, the Zonker Harris accessway, operated by Los Angeles County. In addition, approximately 2200 feet to the east is the site of the Geffen public access easement, which Access for All owns and is preparing to open and operate.

The vertical OTD connects to a lateral public access easement also recorded on the two Ackerberg parcels. This easement is owned by the State Lands Commission and is 148 ft. in length. State Lands Commission also owns an adjacent public access easement, located directly west of the easement they own on the Ackerberg parcels. That easement is 61 linear feet in length. In addition, on the 70 ft. long parcel to the east of the Ackerberg parcels, there is a public access dedication recorded. Thus the vertical OTD directly connects to 279 linear feet of public beach.

Easement Description/ Public Improvements

The Ackerberg OTD easement appears to be level, and may be mostly paved. A high, solid wall blocks viewing the easement from PCH, and views of the OTD easement from the beach side are obscured as well. Therefore, development of the accessway will be accomplished in two phases.

Phase 1: Access for All will accept the OTD. Upon acceptance, Access for All will hire a surveyor to locate the boundaries of the easement and identify encroachments within the easement area. At a minimum it appears that the perimeter wall along PCH is within the easement, as well as two eucalyptus trees and a large generating box. Once the encroachments are identified, Access for All will submit the information to the Coastal Commission staff for review and action.

Phase 2: Once the issue of encroachments has been resolved, Access for All intends to replace 10 linear ft. of the solid perimeter wall with gates, operated by a time lock mechanism. Actual delineation of the accessway, whether it be a short side yard fence or marking on the existing pavement, will be determined after it is known what existing improvements are located within the easement area and what the appropriate method for demarcation is. Access for All will work with the property owner to design these improvements. Once Access for All designs the final improvements, they will be submitted to the Coastal Commission and Coastal Conservancy staffs for review and approval and subsequent amendment to this Management Plan, prior to placement of any improvements on the site.

Operation

Access for All intends to operate this vertical easement from sunrise to sunset daily, consistent with Los Angeles County beach opening hours, as soon as possible. The site will be monitored and trash picked up weekly. A sign will be installed both on the entrance gates at PCH as well as at the southern end (beachside) of the accessway detailing hours of opening and will include a contact number for Access for All.

Annual Report

On February 1 of each year, AFA will submit an annual report to the Commission and Conservancy staff. This report shall identify efforts to open the vertical easement area. Once opened, the report shall estimate number of users, and any concerns raised regarding the public use and efforts to address those concerns.

Amendment

This plan may be amended, as deemed appropriate, with concurrence of all three signatories.

Agreement

Should Access for All cease to exist or fail to carry out its responsibilities pursuant to the approved management plan, then all right, title, and interest in the easement shall be vested in the State of California, acting by and through the State Coastal Conservancy or its successor in interest, or in another public agency or nonprofit organization designated by the State Coastal Conservancy and approved by the Executive Director of the California Coastal Commission This right of entry is set forth in the Certificate of Acceptance/Certificate of Acknowledgment by which Access for All has agreed to accept the OTD. The foregoing is agreed to by and between Access for All, the California Coastal Commission and the State Coastal Conservancy.

7/28/03

Steve Hoye
Executive Director
Access for All

Date

12/4/03

Peter M. Douglas
Executive Director
California Coastal Commission

Date

11/18/03

Sam Schuchat
Executive Officer
State Coastal Conservancy

Date

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July 2, 2009

W 11 & 12

OVERNIGHT MAIL

The Honorable Bonnie Neely, Chairperson
And Members
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: Administrative Cease and Desist Proceeding CCC-09-CD-01 (Ackerberg)

Access for All v. Lisette Ackerberg
Los Angeles Superior Court Case No. BC405058

Dear Chair Neely and Commissioners:

Diane Abbitt of the Law Offices of Diane Abbitt and this firm represent Lisette Ackerberg, the owner of the property located at 22466 and 22500 Pacific Coast Highway, Malibu.

The enforcement proceeding before you presents a unique set of circumstances and an equally unique resolution. The vertical accessway at issue has been the subject of two proceedings – one judicial and one administrative and both authorized under the Coastal Act. On June 19, 2009, the Los Angeles Superior Court entered a final Judgment in the above case, Access for All v. Lisette Ackerberg, thereby resolving the enforcement matter, providing for orderly enforcement of the Ackerberg easement, consistent with this Commission's decision approving the original CDP in 1985, and, as discussed further below, producing a "win-win" resolution for the public.

Our narrow response to the staff report is that the current administrative proceeding is foreclosed by the Court's Judgment, under settled principles of *res judicata*. Staff's efforts, however, have helped shape the requirements set forth in the Judgment. Consequently, without waiving *res judicata*, we have attached a redlined Draft Consent Cease and Desist Order (Exh. 1) that mirrors the one provided to us by Staff but specifically incorporates the provisions of the Judgment, together with additional provisions recommended by Staff.

The Coastal Act Enforcement Lawsuit and Judgment Entered

In the Coastal Act, as originally enacted, the Legislature provided a statutory scheme for judicial enforcement of alleged violations of the Coastal Act. Section 30803 broadly provided that "Any person may maintain an action for declaratory and equitable relief to restrain any violation of this division [the Act]." Section 30805 likewise broadly provided that "Any person may maintain an action for the recovery of civil penalties provided for [in the Act].[1] Recognizing broad citizen participation in the Coastal regulatory process, the Legislature also broadly defined "persons" in Section 30111 of the Act to include "any individual [or] organization." Thus, since its inception, the Act has encouraged private citizen enforcement suits to enforce its provisions.

In the years since enactment of the Coastal Act, the Legislature also has added provisions, like the instant proceeding, a cease and desist proceeding under Section 30810, to enable the Commission to administratively pursue violations, if it chooses not to use the judicial process and the Attorney General to enforce the Act.

Thus, the statutory scheme of the Coastal Act authorized enforcement by different means, and in this case Staff elected to proceed administratively, while Access for All, the holder of the Ackerberg easement, chose to file a Coastal Act enforcement lawsuit under Sections 30803 and 30805. That lawsuit, a "Complaint for Declaratory and Injunctive Relief and Civil Fines for Violations of the California Coastal Act, Trespass and Nuisance," was filed on January 6, 2009. Faced with a lawsuit now seeking monetary penalties, Mrs. Ackerberg answered the complaint filed. Following a case management conference before the Court, the parties discussed settlement in the judicial context. On June 18, 2009, they entered into a Settlement Agreement and Stipulation for Entry of Judgment (Exh. 2), and on June 19, 2009, at the second case management conference, the Court entered a Judgment Pursuant to Stipulation (Exh. 3), which now is final.

As discussed further below, the Judgment is consistent with the Commission's decision in imposing the Ackerberg vertical access requirement in 1985 – namely, a policy that publicly owned accessways should be opened before accessways required

[1] Section 30803 has since been amended *also* to provide for judicial enforcement of a cease and desist order or a restoration order. Section 30805 has similarly been amended to restate the numbered provisions of the Coastal Act that provide for specific monetary penalties.

of private property owners, and if the County of Los Angeles dedicated public accessway, located only five properties upcoast from the Ackerberg property, is opened, a mechanism will be developed in the LCP to permit Mrs. Ackerberg to terminate or extinguish her easement. This was a "commitment" that the Commission made to Mrs. Ackerberg when it approved her permit with a vertical access condition. Nonetheless, it is important to emphasize that the Judgment leaves the last word regarding the Ackerberg easement to this Commission.

Specifically, the Judgment provides that it is "a full settlement of all causes of action stated in the complaint" and that the Court has jurisdiction over the action "brought under the enforcement provisions of the California Coastal Act." (Exh. 3, ¶s 1-2.) The principal terms of the Judgment are:

1. Within 5 days after the entry of judgment, Access for All will file an action against the County to enforce the already dedicated County public accessway.

2. If Access for All is successful in obtaining a settlement or final judgment that results in removing encroachments currently in the County's dedicated accessway, Mrs. Ackerberg will fund, or cause to be funded, the improvement and opening of the accessway.

3. Within 20 days after the County's dedicated accessway is opened and improved, Access for All and Mrs. Ackerberg will jointly apply to the Commission to amend her original CDP to terminate or extinguish the Ackerberg easement.

4. Mrs. Ackerberg will pay $125,000 in private funding to Access for All to maintain and manage the County's dedicated accessway for five years.

5. Mrs. Ackerberg will pay $125,000 to the State Coastal Conservancy, which, through inter-agency agreement, will provide funding to this Commission for public access and enforcement; but, if the Commission does not wish to accept the funds, then they are paid to Access for All to ensure funding for maintenance and management of the County's dedicated accessway for 10 years.

6. If Access for All is not successful in the lawsuit against the County, within 20 days, Access for All and Mrs. Ackerberg will jointly apply to the Commission to amend her original CDP to improve the Ackerberg easement and modify the Management Plan informally agreed to between the Commission staff, Conservancy and Access for All, to include security measures that do not interfere with public access.

On June 26, 2009, pursuant to the Judgment, Access for All filed its lawsuit, *Access for All v. County of Los Angeles, et al*, LASC Case No. BC416700, in Los Angeles Superior Court against the County of Los Angeles to enforce and open the County's dedicated public accessway. (Exh. 4.) That lawsuit is now being served.

All Parties Benefit from the Judgment and Newly Filed County Lawsuit

The Judgment and the lawsuit filed against the County produce a "win-win" result for all parties. Notably:

1. The lawsuit, if successful, will provide the legal basis for opening the other closed County accessways. There are currently three closed County accessways. This lawsuit, if successful, will be precedent-setting, and will provide the legal basis for opening the County's other accessways.

2. The public gets a vertical access easement to Carbon Beach. The public gets either the Ackerberg easement or the County's dedicated accessway, which the County required and accepted in 1973 in approving a condo conversion on Pacific Coast Highway. Thirty-six years later, a party has stepped forward and now aggressively seeks to open it. It would never happen but for this lawsuit, as evidenced by Staff's strangely defeatist attitude toward this accessway (Staff Report, pp. 25-26).

3. The public potentially gets a superior vertical access easement. As discussed further below, the Ackerberg easement is not visible from Pacific Coast Highway, has no sidewalk, and is sandwiched between two residences. The County's easement is open and visible, has a sidewalk, is directly across the street from a public parking facility and in close proximity to a crosswalk, and provides the unique opportunity for a mountain-to-sea trail connection with trail access to the Coastal Slope Trail also provided directly across the street.

4. The County easement improvements are funded. If the County accessway is successfully opened, Mrs. Ackerberg will fund the improvement of the accessway (minimal improvement is required), if the County or the condo owners do not do so.

5. The County easement maintenance and management is funded. If the County accessway is opened, Mrs. Ackerberg will fund its maintenance and management for five years, thereby relieving the need for any public agency, like the State Coastal Conservancy, to provide funding at a time when it is not available.

6. Mrs. Ackerberg gets easement termination, as contemplated by the Commission. If the County accessway is opened, Mrs. Ackerberg and Access for All, her easement holder, will jointly ask the Commission to terminate her easement. As discussed below, this is precisely what the Commission contemplated when it originally approved the Ackerberg easement.

7. The Commission gets the Ackerberg easement through an orderly process. If the County lawsuit is not successful, Mrs. Ackerberg and Access for All will expeditiously request a permit amendment to implement the Ackerberg easement, and the implementation of the accessway also will be expeditiously undertaken.

Finally, at a time when the State is facing an unprecedented budget crisis, the Access for All Judgment requires Mrs. Ackerberg to pay $125,000 to Commission through the State Coastal Conservancy to help the Commission fund its public access and enforcement programs. This would be done through inter-agency contract, a process that already exists with respect to other State agencies, such as Caltrans and the Santa Monica Mountains Conservancy. But, if the funds are not accepted, then they go to Access for All to ensure funding for maintenance and management of the County's dedicated accessway for 10 years.

The Res Judicata Effect of the Court's Judgment on this Administrative Proceeding

A fuller discussion of doctrine of *res judicata* and its application here is set forth in an attached memorandum. (Exh. 5.) Under the doctrine of *res judicata*, a prior judgment bars a subsequent action if three elements are met. These are briefly discussed below.

~ Identity of Issues

The first element is that the issues decided in the first adjudication must be identical with the issues presented in the subsequent proceeding. (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, 1065.) To determine whether the issues are identical, the courts examine whether the "rights which are sought to be vindicated and the harm for which redress is claimed" are identical. *Id.*

In *Citizens for Open Access to Sand and Tide*, the court held that a settlement agreement and accompanying judgment by the Coastal Commission, State Lands Commission and Attorney General specifically adjudicated the public easement issue presented and barred a subsequent action brought by Citizens for Open Space to Sand and Tide. As the court put it: "The prior and current actions differ only in the procedural context in which they have arisen, not the substantive issues presented." (*Id.* at 1068.)

Here, Access for All filed its Coastal Act enforcement action, alleging that "DEFENDANT's failure to clear the easement of physical impediments imposes illegal restrictions on the use of this easement by the public, violating the California Coastal Act, resulting in a trespass on PLAINTIFF's easement, and causing a public nuisance," and "On January 1, 2009, the physical impediments located in the easement, including but not limited to an electrical generator, wall, and lighting fixtures had not been removed and PLAINTIFF was unable to open the accessway to the public. (Exh. 6, ¶s 1 and 15.) The prayer to the complaint filed requests "injunctive relief mandating DEFENDANT to remove all physical impediments in the easement to ensure the public access to the Property at issue in this Complaint." (*Id.*, Prayer, ¶ 2.)

The final Judgment entered pursuant to settlement agreement provides that the Court "has jurisdiction over the parties hereto and the subject matter hereof, specifically an action brought under the enforcement provisions of the California Coastal Act, Pub. Resources Code sections 30803, 30820(a) and (b)," and that it "is a full settlement of all causes of action stated in the complaint." It further includes a judicial finding "that the settlement and this Judgment thereon are in the interests of justice and provide for the orderly resolution of the Coastal Act violation alleged in the Complaint file and for enforcement and maintenance of the Ackerberg easement,

while permitting the parties a reasonable opportunity to pursue improvement and opening of the County's dedicated accessway and thereafter termination of the Ackerberg easement." (Exh. 3, ¶s 1, 2, 6.)

The staff report for the cease and desist proceeding asserts the identical claims, thus satisfying the first element of *res judicata*:

> ". . . [D]ue to the presence of the unpermitted material and structures within the easement area, AFA cannot open the easement to the public, and, thus, the public is precluded from using the public easement to access the beach. The Coastal Act violations at issue have resulted in a loss of public access to the coast. The proposed cease and desist order would direct Mrs. Ackerberg to comply with the CDPs, to remove the unpermitted items located within the easement area, and to cease from placing any solid material or structure into the easement area in the future or otherwise interfering with public access, thereby allowing AFA to open the easement to provide the valuable public access that the Commission found was required when it authorized the construction of the current Ackerberg residence and seawall." (Staff Report, p. 4.)

There is one difference between the two proceedings. The staff report for the cease and desist proceeding also contends that there is a seawall violation both in and outside of the vertical access easement. We demonstrate below, however, that Staff is in error. There is no seawall violation.

~ ***Final Judgment on the Merits***

The second element of *res judicata* is that the first adjudication must involve a final judgment on the merits. (*Citizens for Open Access to Sand and Tide*, *supra*, 60 Cal.App.4th at 1065.) A court-approved settlement or stipulated judgment, as here, constitutes a final judgment on the merits for the purposes of *res judicata*. (*Id.*) The Judgment entered in the *Access for All* lawsuit is now final. (Exh. 3, ¶ 7 ["Plaintiff and Defendant have waived findings of fact, conclusions of law, a statement of decision, and any and all rights of appeal from this Judgment."].)

~ ***Privity of the Parties***

The final element of *res judicata* is that the party against whom the doctrine is being raised was either a party in the first action or was in privity with a party to the first action. (*Citizens for Open Access to Sand and Tide, supra*, 60 Cal.App.4th at 1065.)

In *Citizens for Open Access to Sand and Tide*, the court held that a nonprofit organization was in privity with the government agencies that previously sought to enforce a public access easement. For purposes of *res judicata*, "privity" means "a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights." (*Id.* at 1069.)

The Staff Report explains: "Access for All, a non-profit coastal access organization, recorded a Certificate of Acceptance, formally accepting the OTD for the vertical access easement in December 2003," that Access for All "now holds the legal easement," that it "assumes all responsibility for operating and maintaining the accessway." (Staff Report, pp. 4, 8, 31.) As noted, Access for All was a proper "person" authorized to bring the Coastal Act enforcement action, and Staff has had knowledge of the lawsuit since shortly after it was filed in January of this year.[2]

Thus, the element of privity is also present – hence the application of *res judicata* as a bar to the instant proceeding.

The Attached Redlined Draft Consent Cease and Desist Order Mirrors the Judgment and Provides Additional Provisions Requested by Staff

As chronicled in the staff report, Staff has engaged in an active dialogue with Mrs. Ackerberg's counsel, Diane Abbitt, for some time now, and more recently graciously agreed to meet with Ms. Abbitt and co-counsel Steven Kaufmann at the Commission office in San Francisco to discuss the enforcement matter. In the staff

[2] Steve Hoye, Executive Director of Access for All, advised Erin Murphy and Linda Locklin of the filing of the lawsuit in January and February 2009, and also the pendency of the lawsuit also was noted in conversations between Mr. Hoye and Lisa Haage and Aaron McLendon in May and early June 2009. Ms. Abbitt also noted the pendency of the lawsuit in an e-mail to Mr. McLendon on June 4, 2009. (Exh. 7.)

report, Staff has expressed its willingness to continue to work with Mrs. Ackerberg to resolve the alleged violations in a cooperative manner (Staff Report, pp. 37, 41), and Mrs. Ackerberg seeks likewise to work cooperatively with Staff. In that spirit, without waiving the *res judicata* effect of the Judgment, we have attached a redlined Draft Consent Cease and Desist Order that mirrors the Judgment, but also incorporates additional provisions requested by Staff.

Mrs. Ackerberg is legally obligated to comply with the Court's Judgment. Similarly, if the Commission adopts the redlined Draft Consent Cease and Desist Order, she would be bound by that Order as well -- a "belt and suspenders" approach to ensure enforcement.

There is No Seawall Violation

In addition to the improvements currently in the Ackerberg easement area, the staff report asserts incorrectly that the seawall also is in violation.[3] The staff report provides scant support for its assertion, and it misinterprets the support it provides.

In June 1983, the Commission approved the application of Mrs. Ackerberg's predecessors, the Truebloods, for construction of a 140-foot wood pile-supported, wood-sheeted bulkhead along the seaward side of the property. The staff report asserts that the Commission's approval included rocks up to 12" in size, but the actual rocks placed are larger. Staff has misinterpreted the schematics prepared for the seawall. The seawall was built per the plans approved.

[3] We are frankly surprised that Staff is continuing to raise an issue regarding the seawall. In December 2008, Ms. Abbitt and her staff twice requested that Staff provide a copy of the file for the approval of the Trueblood seawall, CDP No. 5-83-360. Rather than provide the file (something Staff routinely does upon request, whether it be for preparation of administrative records or production of documents in response to a Public Records Act request, and something to which an alleged violator is absolutely entitled in preparing its defense), Staff suggested that Ms. Abbitt try and get the documents from the architect who worked on the 1985 application. (Exh. 8.) Surely, it is unfair, if not a violation of due process, for Staff to assert a seawall violation but not provide the documents that may bear on it. Further, by letter dated October 21, 2008, Ms. Abbitt provided explanatory documents to Staff concerning the seawall. While Ms. Abbitt's letter is attached to the staff report (Staff Report, Exh. 24), however, the explanatory documents attached to it are not, thus compounding the problems associated with Staff's approach to this issue.

The Trueblood staff report includes a "typical section." (Staff Report, Exh. 2, p. 14.) The typical section includes "man size" rocks behind the bulkhead (an "overtopping blanket of 1'0" to 2'0" Rocks"). It also includes large cap stone rocks positioned to abut the face of the bulkhead, interspersed with rock and gravel wastemix.

The staff report points to a February 15, 1984 letter from Vincent Kevin Kelly and Associates, Inc., (Staff Report, Exh. 40) and inaccurately states that all that was permitted in front of the bulkhead was "man sized boulders, extending a minimum of 10 feet from the wall," proving, as Staff states, that rocks were placed *seaward* of the bulkhead. The staff quote, however, is wrong, and the rocks were the man-sized boulders placed behind the bulkhead: ". . . the man sized boulders were inspected extending a minimum of 10 feet 0 inches back from the wall." (Staff Report, Exh. 40, p. 2; underscored word, "back," was omitted from the staff report.) That is evident, moreover, from the typical section.

Staff further states that the "typical section" states that immediately seaward of the bulkhead, boulders were to be "replaced with rock and gravel waste mix." This is indeed true – "existing" boulders seaward of the property were to be replaced. The typical section, however, shows a modest amount of cap stone to be carefully positioned to butt up against the to-be-constructed bulkhead (unlike a rock revetment which typically would extend much further seaward), but only half-way up the bulkhead, and interspersed with the rock and gravel waste mix. It seems obvious, but there would have been no reason to simply place small rock and wastemix by itself in front of the seawall; it would have washed away with the first major storm.

Further, the plans for the bulkhead prepared by the coastal engineer provided for similar but slightly deeper rocks to anchor the seawall at the downcoast end, including the portion in front of the vertical easement. These plans – provided to Staff, but, as noted in footnote 2, not attached to the staff report – show the same rock configuration and size – "cap stone 800# to 6 ton", but in addition "B-stone 200# to 800#" for two feet below it, and then a filter blanket." (Exh. 9.)

There is no mystery why the rocks today are visible. The seawall has been on the property for over 20 years, but, as proposed and constructed, sand originally covered the rip rap. (Staff Report, Exh. 2, p. 14, and reference to "Ave Beach Level" which is a couple of feet higher than the rocks.) However, as is the case along many

parts of the Southern California coast, the west end of Carbon Beach has been eroding, and the beach is significantly shallower today than it was when the Commission approved the seawall. It is for that reason that the rocks can now be observed.

Importantly, the seawall work was inspected when completed – indeed, a short time prior to the Commission and Staff's review of the original Ackerberg CDP. As explained in the February 15, 1984 letter from Vincent Kevin Kelly and Associates, Inc.: "It is our opinion, from the above inspections, that your [Mr. Trueblood's] bulkhead seawall was satisfactorily constructed in accordance with our plans and specifications." (Staff Report, Exh. 40, p. 2.)

In short, the seawall was built as approved. There is no seawall violation.

The Commission's 1985 Decision Contemplated that the Ackerberg Easement Would be Extinguished if the County's Dedicated Accessway is Improved and Opened

This matter is unique for yet another reason. This is not a case where an applicant years later seeks merely to substitute another accessway for one previously required by the Commission. Rather, the record demonstrates that when the Commission approved the original Ackerberg permit, it specifically contemplated that the Ackerberg easement could be extinguished if the County's dedicated accessway is improved and opened.

- ***The Commission's 1985 Decision Contemplated the Possibility of a Future Amendment Request***

The staff report attaches only the original staff report prepared for the original Ackerberg permit (Staff Report, Exh. 5) as though the Commission adopted it. (Staff Report, p. 8.) The Commission clearly did not adopt that staff report. The transcript, which was not provided to the Commission, is rife with instruction to Staff to prepare revised findings. At the same time, Staff suggests that the Commission never adopted revised findings. We have attached the revised findings, which, again, have not been included with the staff report.[4]

[4] The suggestion that revised findings were never adopted is as aggravating as it is unbelievable. The Commission is legally required to adopt findings (Cal. Code Regs., § 13096; *Topanga Assn. for a*

The Commission approved the Ackerberg permit on January 24, 1985. On the day of the hearing, the Ackerberg's counsel wrote a letter to the Commission, objecting to the vertical access condition recommended.[5] He noted the proximity of the Ackerberg property to the already dedicated, but not yet opened County accessway, and requested that at the very least the condition be modified to permit abandonment of the Ackerberg accessway if the County accessway is developed, consistent with a policy proposed by Staff and then under review in connection with the Malibu/Santa Monica Mountains LUP. (Exh. 10.) An amending motion to accept the applicant's requested modification was withdrawn in favor of Staff's suggestion of revised findings. Then Assistant Executive Director Douglas explained:

> ". . . I do understand what both Commissioner McInnis and Commissioner Wright are saying. What you are saying, basically, is that priority should be to develop publicly owned accessways before these private offers of dedication are, in fact, implement, activated, and developed. [¶] And, that is a policy question that I think is appropriate for the LUP, and could be incorporated here in the finding, as a policy that you have taken, as opposed to a condition. (Exh.11, p. 34; emphasis added.)

After further discussion, Commissioner McInnis stated: "I think I heard staff say that they would be willing to put some pretty nice – I think they are pretty nice – words into the findings, at least. And, is that a commitment at this point?" (Exh. 11, p. 39.) Mr. Douglas responded:

Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 514) Assuming for the sake of argument that despite instruction from the Commission to prepare revised findings and the "commitment" Mr. Douglas made at the hearing to prepare them, revised findings were not presented to the Commission and adopted, that failing would fall squarely on the shoulders of Staff, and certainly not Mrs. Ackerberg.

[5] The staff report explains that "the Commission found that vertical public access in this location was necessary due to the continuous residential development along Carbon Beach blocking views and the lack of open accessways in the area." (Staff Report, p. 8 fn. 5.) It is worth noting that the Trueblood residence, which the Ackerbergs sought to demolish, extended across the entirety of the property. There was no pre-existing view of the beach or vertical beach access at that location. Today, a vertical accessway could not be required because of the absence of a constitutionally required "nexus," under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825. At the time, however, there were numerous constitutional challenges to the Commission's access requirements, including *Nollan*. In reliance on the Commission's commitment that the Ackerbergs would at least have a fair opportunity to extinguish the vertical access condition, the Ackerbergs did not challenge the condition.

> "Well, whether they are nice, or not, I can't vouch for that, but we will put in language consistent with the discussion that we've held here, if that is your direction. . . I should just indicate that with the general policy of saying opening up publicly owned accessways first by developing those. . . ." (*Id.*, at 39-40.)

Several commissioners voiced support for revised findings – Hisserich (*id.*, p. 35), Wright (*id.*, p. 38 – "I would concur, in placing some strong language in the findings, particular to the effect that of extinguishing these accesses."), McInnis (*id.*, p. 39), Chairman Nutter (*id.*, pp. 43, 45, 46 – "In terms of revised findings, it is clear to me that whatever this Commission does, we need some revised findings to reflect our discussion, and in the absence of objection, my colleagues, even if we have a per-staff motion, which passes, we ought to have revised findings" *and* "The main motion is per staff, with the understanding that we will have revised findings for our consideration.")

On January 28, 1985, following the hearing, the Ackerberg's counsel wrote Staff indicating his understanding concerning the revised findings that would be prepared. (Exh. 12.) On February 4, 1985, he followed up with another letter to Staff indicating his conversation with Mr. Douglas that a draft of the revised findings had been completed and forwarded to District staff. (Exh. 13.) On February 11, 1985, District Staff, in turn, forwarded a copy of the revised findings to the Ackerberg's attorney (Exh. 14). Thereafter, District clerical staff prepared the revised findings (Exh. 15), and Staff issued its revised findings, specifically incorporating the changes into the staff report. (Exh. 16.) In fact, the revised findings bear the stamp that Staff used at the time to reflect the Commission's action – in this case, "Approved with Changes See Pg. 7," which includes the revised findings.[6] (Exh. 16, pp. 7-8.) Importantly, the Ackerbergs relied on the Commission's decision and, despite their objection to the condition, they did not challenge it. Thereafter, the OTD for the Ackerberg easement was prepared, and it includes as an attachment the staff report with the revised findings, and the Commission's Chief Counsel, Roy Gorman, signed off on the form of the OTD, and it was recorded. (Exh. 17.)

[6] Staff has indicated that it could not locate this document in its file, but the document is a part of the record in the Roth lawsuit (as reflected by the bates page numbering) and, as noted, bears the stamp that Staff used at the time to reflect the Commission's action – in this case, "Approved with Change See Pg. 7," which includes the revised findings. (Exh. 16, pp. 7-8.)

In the revised findings, the Commission noted the County's dedicated accessway, and expressed its intent, consistent with Commission discussion but again omitted from the quoted language in the staff report, that "as a matter of policy, publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical access easements are opened." (Exh. 16, pp. 7-8.) The findings went on to state:

> "Once a public accessway has been improved and opened for public use, and a suitable policy and mechanism has been developed and adopted to ensure that such a vertical accessway remains open and available for public use and assuming the commission has approved a policy that outstanding offers to dedicate additional vertical access easement within 500 of an opened vertical accessway can then be extinguished, staff will initiate actions to notify affected property owners that they can take steps to extinguish such offers to dedicate. As part of the Commission's public access program, procedures will be developed to implement this directive." (*Id.*; emphasis added.)

– The LCP Permits an Application to Amend the Ackerberg CDP to Extinguish her Access Requirement

At the January 24, 1985 hearing, Mr. Douglas and the District Director, Mr. Crandall, explained two ways in which the Ackerbergs might subsequently seek to extinguish the vertical access requirement -- 1) as provided for in the LCP, and 2) by request for a permit amendment. (Exh. 11, pp. 27-30.)

Thereafter, on December 12, 1986, the Commission certified the Malibu/Santa Monica Mountains LUP with the policy "directive" under discussion at the Ackerberg hearing. P51, as drafted by Staff but not quoted in the staff report, provides:

> "Where two or more offers of dedication closer to each other than the standard of separation provides have been made pursuant to this policy, the physical improvement and opening to public use of offered accessways sufficient to meet the standard of separation shall result in the abandonment of other unnecessary offers."[7] (Exh. 18.)

[7] That staff report quotes from the Commission's findings on the 1986 LUP, but not the resulting policy, P51. In addition, the quote states, "the revised Policy 55d will prevent the abandonment of already opened accessway." (Staff Report, p. 28.) So that there is no confusion, P55d is directed only

For Carbon Beach, P56-16 ultimately set the standard of separation at "one accessway per 1,000 feet of beach frontage," not 500 feet. (*Id.*) And, here, in any event, the two accessways are "closer to each other than the standard of separation provides."

Of course, the City of Malibu incorporated in 1991, and in September 2002, this Commission subsequently prepared and certified the City's LCP. Unfortunately, the Commission's Ackerberg decision, the "commitment" that Commissioner McInnis requested and received, the "directive" that the Commission promised would be developed as part of the Commission's public access program and the policy established in P51 somehow all got lost in the process. P51 was not incorporated as such by the Commission. The Commission, however, included implementation language that reserved to itself the ability to extinguish or negate a previously imposed vertical access condition. Section 13.10.2 of the City's LIP provides:

> "The Commission retains authority over coastal development permits issued by the Commission including condition compliance. Where either new development, or a modification to existing development, is proposed on a site where development was authorized in a Commission-issued coastal development permit either prior to certification of the LCP or through a de novo action on an appeal of a city-approved coastal development permit and the permit has expired or been forfeited, the applicant shall apply to the City for the coastal development permit except for:
>
> > ". . . 2) Development that would lessen or negate the purpose of any specific condition, any mitigation required by recorded documents, any recorded offer to dedicate or grant of easement or any restriction/limitation or other mitigation incorporated through the project description by the permittee, of a Commission-issued coastal permit.
>
> "In any of these circumstances, the applicant must seek to file an application with the Coastal Commission for an amendment to the Commission-issued coastal development permit and authorization for the proposed new

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at County accessways – something the Judgment in the *Access for All* case seeks to enforce: "The County of Los Angeles shall not close, abandon, or render unusable by the public any existing accessway, either vertical or lateral." (Exh. 18.) P55d is not applicable to the Ackerberg easement.

development or modification to existing development . . . . " (Exh. 19; emphasis added.)[8]

The staff report now asks everyone to turn a blind eye to the Commission's 1985 decision and revised findings, and essentially suggests that all bets are off for Mrs. Ackerberg. But, we respectfully submit that the Commission, in approving her application, never intended to deprive her of the opportunity to extinguish her access requirement if the County's accessway is opened and improved. It is readily apparent that the Commission intended the vertical access requirement to be a "safety net" if in fact the County's dedicated easement is never improved and opened. It made a "commitment" to Mrs. Ackerberg that it would adopt a policy that publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical access easements are opened. That is why the Commission took the highly unusual step of allowing her to develop in the easement area.

Finally, on this issue, the staff report correctly states that Access for All now holds the legal interest in the vertical access area, but the Settlement Agreement and Judgment in the Access for All case make clear that if the County lawsuit is successful and the County accessway is improved and opened, Mrs. Ackerberg and Access for All will jointly apply to the Commission to extinguish her access

[8] Pursuant to the Judgment, if the County lawsuit is successful, Mrs. Ackerberg and Access for All will jointly apply to amend her coastal permit to extinguish the vertical access requirement. Under the circumstances, we certainly hope that the Commission will grant the amendment request. Among other things, we will demonstrate that the vertical access policies in the City's LCP do not apply to the Ackerberg easement since, by the constitutional standard in *Nollan*, vertical access is required only where the new development proposed creates a burden or impact on public access. (See fn. 5, ante.) That limitation is incorporated in Policy 2.66. The separation standards in Policy 2.86 – including the 1000-foot standard for Carbon Beach -- also have no application to Mrs. Ackerberg because that policy merely implements the other inapplicable Policy 2.66. Nonetheless, if the County accessway is opened, it will be within 1000 feet of the next upcoast vertical accessway, and the Ackerberg property will be approximately 500 feet to 690 feet from the County accessway. Further, the Commission contractually bound itself to considering an amendment to the 1985 permit to authorize extinguishment of the easement upon the opening of the County accessway. As the Attorney General put it, in an informal opinion (November 18, 1985) addressing Commission post-LCP permit authority over projects commenced under Commission permits: "The right to insist upon compliance with the terms and conditions of a permit under which construction has commenced is a contractual right. (See, Edmonds v. County of Los Angeles (1953) 40 Cal.2d 642, 653.)" The reverse also must be true: Mrs. Ackerberg has the right to insist upon the Commission's compliance with its decision and the revised findings and expression of intent under which the permit originally was granted.

requirement. But again, the ultimate discretion whether to grant or deny that application still resides with the Commission.

The County Accessway is Superior to the Ackerberg Easement

The staff report asserts that the Ackerberg easement is superior to the County's dedicated accessway. While for different reasons we may agree with Staff that the relative value of the easements is not relevant, Staff has dismissed the County easement out of hand when further investigation would reveal that it is in fact far superior to the Ackerberg easement is in its potential to provide meaningful public access to Carbon Beach.[9]

As noted, the Commission itself noted the superior nature of the County's dedicated accessway during the hearing in 1985 at which the Commission approved the original Ackerberg permit. The Commission made clear its "policy" that publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical accessways are opened.

Regarding specifics, the Ackerberg easement would be hidden from Pacific Coast Highway behind three substantial, mature Eucalyptus trees which are located outside the easement in the City of Malibu's right-of-way. (Exh. 16.) Staff notes the presence of the trees, but makes the interesting statement that "Commission staff will work with the City of Malibu's local agencies to ensure that any obstructions within the City's right-of-way that restricts access to the Ackerberg vertical accessway (including the eucalyptus trees, if necessary) are appropriately addressed." (Staff Report, p. 31.) The City of Malibu, at odds with the Commission for years, has just authorized the filing of a lawsuit against the Commission challenging its approval last month of the Santa Monica Mountains Conservancy LCP override amendment. Can

[9] The Staff Report reveals very disappointing negativity towards the County accessway – "the County has no intentions of opening the specific vertical easement area in the future," "the County does not intend to open *any* easement areas in the future," and even if opened, "the easement area may close in the future if the County no longer has the funds for operating and maintaining the easement area." (Staff Report, pp. 25-26.) But, this is a just a distraction. The Judgment and the lawsuit now filed against the County seize the moment, and will press to open the County's dedicated accessway, and thereafter Access for All intends to use that precedent to open the other two County accessways. Instead of simply cowering before the mighty County of Los Angeles, we would like to think that the Commission would throw its weight behind this important lawsuit, and we invite the Commission to do so.

anyone seriously believe that Commission Staff will convince the City of Malibu to remove three mature eucalyptus trees from the right-of-way so that vertical access can be provided down an alleyway between two houses to Carbon Beach?

The Ackerberg easement area would not only be hidden, but cramped and sandwiched between two homes. The Staff Report erroneously states that there is a sidewalk at this location. (Staff Report, p. 15) There is, however, no sidewalk in front of the accessway, minimal available street parking (the parking that exists is largely consumed by residents), and exposed rock rip rap (as noted, authorized by the Commission and legally placed) where the easement adjoins the beach that makes use of the easement problematic.[10]

By contrast, success in opening the County easement – something that no one has accomplished since the County required and accepted the easement in 1973 – would establish the legal precedent for opening the two other closed County access easements.

The County's dedicated access easement is completely visible, directly across the street from a public parking facility (noted on the Commission's website for this portion of Carbon Beach – Exh. 21), a signal, a crosswalk, a sidewalk, and it is already paved. Modest encroachments currently exist in the easement area: a stucco retaining wall, a planter, a wood gate, a pool equipment area, and a portion of a wood deck.

But there's more. On April 6, 2009, Ms. Abbitt sent a letter to the State Coastal Conservancy, with a copy to Mr. Douglas, but that letter, too, is not attached to or referenced in the staff report. (Exh. 22.) In the letter, Ms. Abbitt explained that the National Park Service (NPS), working with a landowner-applicant pursuing a residential development inland of Pacific Coast Highway, obtained a key piece of the Coastal Slope Trail, leading from the area above Carbon Canyon to an area close to

[10] In the Geffen permit (5-83-703-A1), the Commission required that the applicant design a "movable, lightweight, metal (stainless steel or an equivalent material) ramp with non-slip surface and stainless steel handrail on each side which shall provide a transition from the concrete slab to the sandy beach at times when the elevation of the concrete slab/walkway is higher than the sandy beach." (*Id.*, p. 8.) The Judgment entered in the *Access for All* lawsuit requires design and use of a similar structure when the existing rock revetment fronting the Ackerberg easement impedes access to the beach. (Exh. 3, ¶ 4(e)(1)(i).)

the public parking lot on the inland side of PCH directly across from the County's dedicated accessway. The Santa Monica Mountains Conservancy likewise had asked for this trail, and the City required it as a condition of approving the residential development.[11] Ms. Abbitt explained:

> ". . . I have learned that the County's dedicated accessway actually has heightened and special importance to the Coastal program. Other agencies – notably the National Park Service (NPS) and the Santa Monica Mountains Conservancy (SMMC) – believe that the County accessway is the key connector between the Coastal Slope Trail in this part of the Santa Monica Mountains and the California Coastal Trail along this part of Carbon Beach. Somewhere along the way, this was overlooked, but I know that both the Conservancy and the Commission, in particular, would not abandon this vital connector, knowing how fortuitous it is that it exists and would serve a key public access function." (*Id.*)

Thus, on top of everything else, the County's dedicated accessway provides the unique and exciting opportunity to create a "mountain-to-sea" trail. In sum, there are indeed numerous reasons why the County's accessway, if opened, would be far superior to the Ackerberg easement. Regardless, the Judgment merely affords Mrs. Ackerberg the chance to pursue, through litigation, the opening of the County accessway, and thereafter to apply to the Commission to extinguish the Ackerberg easement, as contemplated in her original permit approval. But, as earlier stated, nothing in the Judgment interferes with the Commission's discretion in determining whether to grant that request.

Even Absent the Judgment, This Proceeding is Premature

Even if there were no Judgment, the current proceeding seeks but "half a loaf." It is premature. The focus of the cease and desist proceeding is "*removal*" of the improvements in the vertical easement area. (Staff Report, p. 4.) However, at this point, no permit has been sought or granted authorizing the actual "development" of the vertical easement.

[11] The landowner-applicant is Rancho Topanga. Following the trial court's ruling upholding the City of Malibu's decision to approve the Rancho Topanga residential development, including the trail requirement, the Commission participated as an amicus in the appeal that ultimately affirmed the judgment. (*Albert v. City of Malibu*, 2d Civ. 202631.)

In approving the original CDP for the Ackerberg residence, the Commission approved development, as proposed, over the easement area. In response to the request of Mrs. Ackerberg's counsel to use the easement area "for the tennis court, or patio, or plantings, or whatever, until the easement "is picked up and used" (Exh. 11, p. 11), Staff confirmed that there is no prohibition against use of the easement area. (*Id.* at p. 24.) The staff report (at p. 14 fn. 7) suggests that this was simply a "courtesy to the Ackerbergs." In fact, coupled with the discussion about the County's dedicated accessway and the rather unprecedented permission that the Commission granted for development in the easement area in the interim, it would be more accurate (and fair) to state that the Commission had serious doubts that this accessway would ever be opened.[12] The staff report (at p. 14 fn. 7 and p. 15) also inaccurately asserts that the Commission did not approve any development in the easement area. The plans submitted for the Ackerberg development, which were approved by the Commission (as noted by Staff on the face of the plans), reflected that the development would extend to the property line and that items such as a perimeter block wall, fences, railing, and landscaping would be erected in the easement.[13] (Exh. 23.) The staff report incorrectly asserts that there is other development in the accessway. In fact, there is no "planter," or "staircase" in the easement area. Moreover, the "lightposts" were there already to provide lighting for the Trueblood's tennis court; indeed, they were there in place when the Commission approved the Trueblood's seawall.

In any event, the Commission's decision simply required an OTD, but it provided no self-executing specifics on the actual development and implementation of the easement. Specifically, the Commission did not address surfacing of the walkway, gating, lighting, fencing, landscaping or any method of dealing with the

[12] As District Director Crandall explained to the Commission: "Just to remind all, again though, that these are offers to dedicate. Unless they are picked up and developed by somebody within the prescribed period of time, the 21 years, they do not become accessways. And, of course, as I pointed out to you, there may well also be a provision in the final LCP which will set up a mechanism for extinguishing such accessways, once there are usable public means to gain shoreline access within 500 feet of any of these existing offers." (Exh. , p. 3.)

[13] In one respect, Staff is correct. The staff report (at p. 34) points out that four days after the Commission approved the Ackerberg permit, Mrs. Ackerberg's attorney sent Staff a letter in which he explained his understanding that "both Commissioners and Staff agreed that the Ackerbergs could make full use of the entire width of their property, including the continuation of use of the offered strip, until such time as it is developed into an open vertical accessway." (Staff Report, Exh. 9.)

previously approved and constructed seawall. Likewise, it did not address security improvements that would not interfere with public access, but would provide a measure of security to the property owner. In other instances, by contrast, the Commission has required a permit to address the development required to implement a vertical accessway. (*See e.g.*, 5-83-703-A1 [Geffen].)

In short, Staff is a bit ahead of itself in this proceeding. Removal of the improvements from the easement area does not produce an accessway. The accessway is a "development" unto itself, and must be addressed by a permit which has not yet occurred. Nonetheless, the requirement of an application to amend the original Ackerberg permit to implement development of the accessway is specifically covered by the Judgment.

The Administrative Enforcement Process, as Applied Here, Would Deny the Due Process, Equal Protection and the Right to Petition Government for Grievances

There is no doubt that enforcement is an important component of the Coastal Act regulatory scheme. This was fully accomplished in the judicial proceeding. Without waiving *res judicata*, it additionally can be confirmed and implemented through the redlined Draft Cease and Desist Order attached.

Nonetheless, regardless of the enforcement mechanism pursued, the hallmark of that process ought to be, like any other proceeding before the Commission, to ensure fundamental fairness. Proceedings in the judicial context differ greatly from the evolving process by which the Commission approaches administrative enforcement. In a judicial proceeding, a party sued has ample time and opportunity to defend and present its case to the court. In the administrative context, the balance unfortunately is skewed so that the alleged violator may be forced to defend a serious allegation literally with "one hand tied behind his back." For example, as applied to Mrs. Ackerberg, we respectfully submit that the instant proceeding would violate the basic requirements of due process, equal protection and the right to petition government under the state and federal constitutions. Briefly:

1. Time to respond to the Staff Report. The 48-page staff report seeks to penalize Mrs. Ackerberg, but it was not made available until midday on June 26, 2008, when it was posted on the Internet, leaving only five business days for Mrs.

Ackerberg to check the Internet and prepare a written response that might be meaningfully considered by the Commission.

2. Notice to Surrounding Property Owners and Interested Parties. Despite the nature of proceeding, it appears that notice may not have been provided to all surrounding property owners and interested parties, as due process requires (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 615-616; *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 548-549.)

3. Ex Parte Communications. Mr. Douglas has advised us that ex parte communications with Commissioners somehow are a "crime" and not permitted. Following due research on the issue, we believe that they are permitted, but that due process and fairness have always required full disclosure on the record. Staff's position creates a due process and equal protection issue, violates the constitutional right to petition government, and is inconsistent with Rule 2-100 of the California Rules of Professional Conduct, which expressly recognize an attorney's right to contact any "public officer, board, committee, or body," without the consent or presence of the Commission's lawyer, including communications during litigation. Ex parte communications are permitted in permit proceedings. An equal opportunity to present one's case must be available where an enforcement proceeding actually seeks to penalize a party.

4. The Role of the Attorney General. In the judicial context, the Attorney General, though prominent, sits at the counsel table with the rest of the attorneys. In this process, the Attorney General sits next to and advises the Chair, raising a due process question. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 92.) This would be compounded, moreover, were the Commission, as neutral adjudicator, to go into closed session to discuss the matter with, in effect, the prosecutor, Staff and the Commission's counsel. (*Id.*)

5. Time Limits for Presentation. Not only is the alleged violator walled off from Commissioners and provided minimal time to educate the decision maker, but he or she is limited to a mere 15 minutes to present his case. As you might imagine, this bears no resemblance to a proceeding in court before a judge.

6. Statement of Defense. The Statement of Defense required by Staff was prepared and submitted to Staff in October 2008. Staff may argue that Mrs. Ackerberg is limited in this proceeding to the points she previously made in the Statement of Defense. If so, constricting her in that manner would deny due process since her position has necessarily evolved with the change in events – notably the litigation.

7. Staff's Presentation of the Evidence. A fair proceeding necessarily requires that all relevant evidence presented to or available to Staff be provided to the Commission for review. There is, however, considerable evidence available to, or submitted to, Staff that has not been presented to the Commission. This includes: the transcript from the 1985 hearing; correspondence concerning the 1985 hearing; the 1985 "revised findings"; and exhibits attached to Ms. Abbitt's October 21 letter to demonstrate that there is no seawall violation. Despite Ms. Abbitt's request, Staff did not provided the Trueblood seawall file. In this type of proceeding, where a penalty is sought and preparation of a defense is essential, Staff must provide the file – not merely dispatch counsel to locate the 1985 architect to see what he may have. Finally, while Staff suggests that the County's dedicated accessway is inferior to the Ackerberg easement, it has not provided the Commission with Ms. Abbitt's letter nor the attachments to it that demonstrate the County's dedicated accessway is not only superior, but an opportunity that must be pursued, even if not by the Commission itself.

8. Scope of Staff's Recommended Cease and Desist Order. Staff's proposed Cease and Desist Order well exceeds the scope of the specific violations asserted. The light posts for the tennis court were preexisting and served the Trueblood's tennis court, and there is no "staircase" in the easement area. In addition, the proposed Order casts a wide net beyond the asserted violations at issue by defining "unpermitted development" as "includ[ing] but may not be limited to" the identified improvements and then imposing potential monetary penalties with respect to those undefined improvements.

Viewed separately or together, the foregoing at least illustrates the differences between judicial and administrative enforcement, and suggests that more process, not less, is required when proceeding to enforce a violation administratively to ensure a fundamentally fair proceeding.

Conclusion

Regardless of our respective positions, we do need to underscore that Staff has been exceedingly gracious in the dialogue with counsel on this particular matter and in meeting with Mrs. Ackerberg's representatives. We are looking for a mutually agreeable middle ground that leaves the Commission with the final word on the Ackerberg easement and which provides Staff with the additional protections it typically seeks. Without waiving *res judicata*, we respectfully submit that the redlined Draft Consent Cease and Desist Order accomplishes that by incorporating the Judgment.

We look forward to discussing these matters further with you at the hearing.

Very truly yours,

Diane R. Abbitt

Steven H. Kaufmann

cc: Mr. Peter Douglas
Ms. Lisa Haage
Mr. Aaron McLendon
Mrs. Lisette Ackerberg

Attachments

12674-0002\1147031v1.doc

RICHARDS, WATSON & GERSHON
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Attorneys for Defendants,
LISETTE ACKERBERG LIVING TRUST, dated January 14, 1998,
and LISETTE ACKERBERG, individually and as trustee of the
LISETTE ACKERBERG TRUST

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

ACCESS FOR ALL, a California non-profit corporation,

Plaintiff,

vs.

LISETTE ACKERBERG TRUST, a Trust, LISETTE ACKERBERG, individually and as Trustee of the LISETTE ACKERBERG TRUST, and DOES 1-10, Inclusive,

Defendants.

Case No. BC405058

SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF JUDGMENT

Action Filed: January 5, 2009

Assigned for all Purposes to:
The Honorable Rolf M. Treu
Department 58

This Settlement Agreement and Stipulation for Entry of Judgment ("Agreement") is entered into by and between Plaintiff Access for All and Defendants Lisette Ackerberg Living Trust, dated January 14, 1998 ("Trust"), and Lisette Ackerberg, individually and as Trustee of the Trust (collectively, "Ackerberg"). Access for All and Ackerberg are collectively referred to as the "Parties."

RECITALS:

WHEREAS, the Trust is the owner of the real property located at 22466 Pacific Coast Highway in the City of Malibu, County of Los Angeles, California ("Ackerberg Property").

WHEREAS, Access for All is a California non-profit public benefit corporation whose mission is to facilitate and improve the public's ability to access public lands and the California seashore.

WHEREAS, in furtherance of its mission, Access for All acquires real property and easements through gifts, purchases and transfers, and develops and maintains public accessways for the benefit of the People of the State of California.

WHEREAS, in 1984 Lisette Ackerberg and her husband (now deceased) Norman Ackerberg applied to the California Coastal Commission ("Coastal Commission") for a Coastal Development Permit ("CDP") to demolish an existing house, guest house and swimming pool and to construct a new single-family residence and swimming pool and to renovate an existing tennis court on the Ackerberg Property.

WHEREAS, on January 24, 1985, the Coastal Commission approved the proposed development and granted CDP No. 5-84-754, subject to, among others, a condition requiring an offer to dedicate a 10-foot wide vertical access easement ("Ackerberg OTD") along the eastern, or downcoast, side of the Ackerberg Property.

WHEREAS, in approving the proposed development and granting CDP No. 5-84-754, the Coastal Commission expressed its intent that another vertical access easement, a County of Los Angeles dedicated vertical accessway ("County's dedicated accessway"), is within 500 feet of the project; that as a matter of policy, publicly owned vertical accessways should be improved and opened to public use before additional offers to dedicate vertical accessways are opened; that once a public accessway has been improved and opened for public use, the Commission's policy would be to permit extinguishment or termination of the offer to dedicate; and that as part of its public access program in the Malibu/Santa Monica Mountains Local Coastal Program ("LCP"), procedures would be

developed to implement that directive; and on or about December 12, 1986, the Commission certified the Land Use Plan for the Malibu/Santa Monica Mountains LCP with a policy (P56-16) that there be dedication of one vertical access "per 1,000 feet of beach frontage.".

WHEREAS, on or about October 29, 1973, the County of Los Angeles required and accepted the County's dedicated accessway "on behalf of the public" as a condition of approving Tract Map No. 29628, which authorized the conversion of an apartment building at 22548 Pacific Coast Highway to condominiums.

WHEREAS, the County's dedicated accessway was intended to provide public access from Pacific Coast Highway to the mean high tide line, but now serves additionally as a potential key trail connector between the California Coastal Trail on the beach and that portion of the Coastal Slope Trail located in the area of the Santa Monica Mountains above Carbon Beach.

WHEREAS, the Ackerbergs constructed the development approved in CDP No. 5-84-754, and recorded the Ackerberg OTD on or about April 4, 1985.

WHEREAS, in 2003 Access for All applied to the Coastal Commission to accept the Ackerberg OTD and to open, operate, and manage the resulting easement ("Ackerberg easement"), which application was subsequently granted and memorialized in an instrument recorded on December 17, 2003, and contacted Norman and Lisette Ackerberg by letter, dated December 24, 2003, requesting their participation in removing obstructions and opening the Ackerberg easement.

WHEREAS, on March 29, 2006, an adjoining property owner at 22446 Pacific Coast Highway, whose property shares the boundary of the easement on the Ackerberg property, filed an action against the Coastal Commission, the State Coastal Conservancy and Access for All, alleging that the Commission failed to provide him with public notice of the Ackerberg's application for Coastal Development Permit.

WHEREAS, the State agencies and Access for All prevailed in that action in the trial court and on appeal, and the State Supreme Court denied review on July 9, 2008.

WHEREAS, on September 25, 2008, Access for All wrote Lisette Ackerberg requesting removal of certain improvements located in the Ackerberg easement by January 1, 2009, and advising that Access for All intended to open the Ackerberg easement on that date and would file a lawsuit if the improvements were not removed by that date.

WHEREAS, on January 6, 2009, Access for All commenced the instant action ("AFA Action") which alleges that because Ackerberg has not removed those improvements, she has violated the requirements of the California Coastal Act ("Coastal Act"; Pub. Resources Code, § 30000 et. seq.) and committed a trespass and nuisance. The AFA Action seeks declaratory and injunctive relief and monetary penalties, as provided in the enforcement provisions of the Coastal Act and Public Resources Code sections 30803, 30820(a) and (b).

WHEREAS, Ackerberg has answered the complaint filed in the AFA Action, and contends that her actions at all times have been lawful and proper, and specifically that she has not violated the provisions of the Coastal Act or committed a trespass or nuisance.

WHEREAS, the Parties agree that Access for All is a "person" that is authorized under the Coastal Act to file an enforcement action and seek judicial relief pursuant to the enforcement remedies set forth in the Coastal Act.

WHEREAS, the Parties have jointly agreed (a) to file separate litigation to enforce the County's dedicated accessway and require that it be improved and opened for public access; (b) if the lawsuit is successful and the County's dedicated accessway is thereafter improved and opened, to seek and obtain from the Coastal Commission an amendment of CDP No. 5-84-754 to terminate or extinguish the Ackerberg easement; and (c) if the lawsuit is not successful, to seek and obtain from the Coastal Commission an amendment of CDP No. 5-84-754 to facilitate improvements necessary to effectuate and operate the Ackerberg easement.

///

WHEREAS, the Parties continue to believe that they will prevail should this matter proceed to trial. Nevertheless, continuation of the lawsuit will result in considerable and unnecessary expense and expenditure of time and effort by the Parties. Accordingly, after a considerable amount of discussion and negotiation, both before and after the filing the Action, the Parties have decided to settle and compromise their differences in the manner prescribed by and set forth hereunder in this Agreement. Further, the Parties believe and intend that this Agreement and the various actions it contemplates best serves the public interest, provides for an orderly resolution of the Coastal Act violation alleged in the Complaint filed, and will provide a fair and equitable resolution of the dispute while carrying out the intent of the Coastal Commission in approving the Ackerberg residence and granting CDP No. 5-84-754.

AGREEMENT

NOW THEREFORE, in consideration of the mutual covenants and conditions described below, and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

1. ACTION TO ENFORCE THE COUNTY'S DEDICATED ACCESSWAY:

1.1 Within five (5) days after the entry of judgment, Access for All shall file an action in the Los Angeles Superior Court against the County of Los Angeles, the Malibu Outrigger Homeowners Association, and the owners of the land underlying the County's dedicated accessway for declaratory and injunctive relief, trespass, nuisance, and such other causes of action as may be appropriate to enforce the County's dedicated accessway ("County Action"). Access for All shall be represented in the County Action by the following counsel: Richards, Watson & Gershon ("RW&G"), Diane R. Abbitt, David J. Weinsoff and J. Timothy Nardell. Ackerberg shall have the right to substitute new counsel for RW&G and/or Diane R. Abbitt, and Access for All shall have the right to substitute new counsel for David J. Weinsoff and/or J. Timothy Nardell. Access for All

has separately executed a conflict waiver to permit such representation by RW&G and Diane R. Abbitt. RW&G, or counsel substituted for RW&G, shall serve as lead counsel in all matters relating to the County Action, except that David J. Weinsoff, or counsel substituted for David J. Weinsoff, shall serve as lead counsel for all matters related to publicity, which shall be consistent with the terms of this Agreement and the position of Access for All in the County Action. Access for All agrees to actively prosecute the County Action to and including the entry of a final judgment in the action, including any and all settlement discussions and proceedings in the trial and California appellate courts.

1.2 Ackerberg shall fund all attorneys' fees and court costs incurred by Access for All in the County Action.

1.3 In the event Access for All is the prevailing party in the County Action, it shall file a motion to recover all attorneys' fees and court costs incurred, including but not limited to attorneys' fees pursuant to Code of Civil Procedure section 1021.5, which monies shall be used to reimburse Ackerberg for funds used to pay attorneys' fees.

2. PAYMENT OF ATTORNEY'S FEES TO ACCESS FOR ALL:

Within ten (10) days of the entry of judgment in the AFA Action, Ackerberg shall pay, or cause to be paid, to Access for All the amount of ten thousand five hundred dollars ($10,500.00) to reimburse Access for All for its attorneys' fees and costs in connection with the AFA Action. The payment shall be made payable to "ACCESS FOR ALL," and shall be made by delivery of a certified check to counsel for Access for All.

3. PAYMENT OF FUNDS TO IMPROVE AND OPEN THE COUNTY'S DEDICATED ACCESSWAY:

If Access for All is successful in obtaining a settlement or final judgment in the County Action that results in removal of the encroachments within, and the opening of, the County's dedicated accessway, the Parties agree that Ackerberg shall fund, or cause to be funded, the improvement and opening of the County's dedicated accessway, provided such funding is not otherwise made available by the County of Los Angeles, the

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Malibu Outrigger Homeowners Association, or the owners of the land underlying the County's dedicated accessway.

4. EXTINGUISHMENT OF ACKERBERG EASEMENT AND PAYMENT OF FUNDS TO MAINTAIN THE COUNTY'S DEDICATED ACCESSWAY:

4.1 If Access for All is successful in obtaining a settlement or final judgment in the County Action that results in removal of the encroachments within, and the opening of, the County's dedicated accessway, the parties agree that:

(a) Within twenty (20) days from the date of settlement or final judgment, if required, Access for All will apply for a coastal development permit, to improve and open the County's dedicated accessway and, upon receipt of the coastal development permit, will improve and open the accessway with the funding provided under Paragraph 3, above.

(b) Within twenty (20) days after the County's dedicated accessway is improved and opened, Access for All and Ackerberg will jointly apply to the Coastal Commission to amend CDP No. 5-84-754 to terminate or extinguish the Ackerberg easement.

(c) At the time of the opening of the County's dedicated accessway, Ackerberg shall pay, or cause to be paid, to Access for All, the sum of one hundred and twenty-five thousand dollars ($125,000.00). This private funding will be used to provide five (5) years of support for maintenance and management of the County accessway. During the current fiscal period in which traditional sources of public funding are increasingly becoming limited, the County's dedicated accessway, if opened, will have a dedicated source of funding ensuring that the public enjoys access to Carbon Beach, consistent with the strict maintenance and management standards set by the Coastal Commission, the State Coastal Conservancy, and Access for All under an agreed-upon "management plan."

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(d) Pursuant to a written agreement to be entered into between Ackerberg and the State Coastal Conservancy, Ackerberg shall further pay, or cause to be paid, the sum of one hundred and twenty-five thousand dollars ($125,000.00) to be deposited in such account as the State Coastal Conservancy deems appropriate to be used as follows: (1) through inter-agency agreement or otherwise, to provide funding and assistance to the Coastal Commission for public access and enforcement, or (2) if the Coastal Commission does not wish to accept the funds, to provide funding to Access for All for the maintenance and management of the County accessway, ensuring that Access for All has a full ten (10) years of support for the management and maintenance of the County's dedicated accessway.

5. ENFORCEMENT OF THE ACKERBERG EASEMENT:

5.1 If Access for All is not successful in obtaining a settlement or final judgment in the County Action that results in removal of the encroachments within, and the opening of, the County's dedicated accessway, or if lead counsel determines that the County Action should be voluntarily dismissed, within twenty (20) days of the settlement, entry of final judgment, or voluntary dismissal:

(a) The Parties shall jointly apply to the Coastal Commission to amend CDP No. 5-84-754 to improve the Ackerberg easement and to modify the approved "Public Vertical Access Easement Management Plan" ("Management Plan"), dated July 28, 2003, to include security measures acceptable to Ackerberg. All improvements to the Ackerberg easement not required by the Management Plan shall be funded by Ackerberg. Said application shall include, but not be limited to, the following:

(i) A design for a movable, lightweight, metal (stainless steel or an equivalent material) ramp with non-slip surface and stainless steel handrails on each side which shall provide a transition from the concrete slab to the sandy beach at times when the existing rock revetment impedes access to the beach. The movable ramp shall be designed and constructed in a manner that it may be secured and locked into place or removed and placed into storage. The ramp shall be designed by a civil engineer in

consultation with Access for All and shall be adequate to provide for safe pedestrian access from the seaward edge of the concrete slab/walkway to the sandy beach whenever the sand level is lower that the top elevation of the rock revetment and in a manner that will accommodate any future changes in beach profile/sand level elevations over time, and shall be ADA compliant.

(ii) A site plan identifying the removal and/or relocation of all improvements within the easement area that will result in direct obstacles to public access.

(iii) Security improvements, including, but not limited to, a security wall consistent in height with the existing wall, a sunrise opening and sunset closing gate located at the entrance to the Ackerberg easement on Pacific Coast Highway which shall include a timed mechanism for automatically unlocking and locking and an alarm system, and security lighting, consistent with the requirements of the City of Malibu LCP, that permit public access on the Ackerberg easement while ensuring the privacy and security of the Ackerberg Property.

(iv) A notation that except as otherwise permitted, the applicant/landowner shall in no way obstruct or prevent the use of the Ackerberg easement.

(b) Unless the Executive Director of the Coastal Commission grants additional time for good cause, within ninety (90) days of the issuance of the Coastal Development Permit Amendment by the Commission:

(i) Ackerberg shall remove and/or relocate all physical improvements within the easement area that result in direct obstacles to public access.

(ii) Access for All shall install the concrete slab and movable ramp. Use, operation, and maintenance of the ramp will be at the sole discretion and control of Access for All.

6. <u>MUTUAL RELEASE OF CLAIMS</u>:

For and in consideration of the above terms, the parties agree as follows:

6.1. Ackerberg for herself and her employees and agents, fully and forever releases Access for All, its officers, employees, governing members, agents and attorneys from any and all liability, claims, demands, damages, punitive damages, disputes, suits, claims for relief and causes of action, whether known or unknown, foreseen or unforeseen, which directly or indirectly relate to any claims, facts or circumstances arising out of or alleged in the AFA Action.

6.2. Access for All for itself and its officers, governing members, employees and agents, fully and forever releases Ackerberg, her agents and/or attorneys from any and all liability, claims, demands, damages, punitive damages, disputes, suits, claims for relief and causes of action, whether known or unknown, foreseen or unforeseen, which directly or indirectly related to any claims, facts or circumstances arising out of or alleged in the AFA Action.

6.3 Except as otherwise provided in this Agreement, the Parties do not waive their respective rights and interests to any future enforcement of the California Coastal Act of 1976, Public Resources Code section 30000 et seq., or of the terms and conditions relating to the Ackerberg easement that occur after the execution of this Settlement Agreement and Stipulation For Entry of Judgment.

7. WAIVER OF THE BENEFITS OF CIVIL CODE SECTION 1542:

Having been fully apprised of the nature and effect of the provisions of Section 1542 of the California Civil Code, the Parties waive all rights which they may have against the other, both known and unknown with regard to the subject matter of this Agreement, which might otherwise exist by virtue of the provisions of Section 1542 which provides as follows:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

8. WAIVER OF FINDINGS OF FACT, STATEMENT OF DECISION, CONCLUSIONS OF LAW, AND RIGHTS OF APPEAL:

The Parties agree to waive findings of fact, conclusions of law, a statement of decision, and any and all rights of appeal from the judgment entered in this action.

9. ENFORCEMENT OF SETTLEMENT AGREEMENT:

The Parties stipulate, covenant and agree that the Agreement shall be enforceable by any judge of the Superior Court of the County of Los Angeles once Judgment is entered pursuant to C.C.P. sections 128(4) and 664.6.

10. DUTY TO COOPERATE:

The Parties agree to cooperate and operate in good faith in effectuating the terms and conditions of this Agreement. The Parties agree to support, both orally and in writing, the terms and conditions as set forth in this Agreement in any judicial proceeding or any administrative proceeding referred to in Paragraph 5.

11. LEGAL ADVICE:

Each Party has received independent legal advice from its attorneys with respect to the advisability of executing this Agreement and the meaning of the provisions hereof. The provisions of this Agreement shall be construed as to the fair meaning and not for or against any party based upon any attribution of such party as the sole source of the language in question, it being expressly understood and agreed that the Parties participated equally or had equal opportunity to participate in its drafting.

12. COSTS AND EXPENSES:

Except as otherwise provided in Paragraph 2, above, the Parties shall bear their own costs, expenses and attorneys' fees in connection with the AFA Action, and the negotiations and drafting of this Agreement. In any legal action or proceeding to enforce the terms of this Agreement, the prevailing party shall be entitled to recover all reasonable attorneys' fees, costs and expenses incurred therein, in addition to any other relief to which it or they may be entitled.

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13. ENTIRE AGREEMENT AND AMENDMENTS:

This Agreement constitutes the entire agreement between the Parties concerning the subject matter hereof. This Agreement supersedes any written or oral agreement(s) or representation(s) that preceded or may have preceded execution of this Agreement. The Parties have not relied upon any oral representation(s) in deciding whether to enter into this Agreement. This Agreement may be modified only by a writing signed by the Parties hereto.

14. SUCCESSORS AND ASSIGNS:

This Agreement and the settlement contained herein shall bind and inure to the benefit of the principals, agents, representatives, transferees, successors and assigns of the Parties hereto, and the judgment entered pursuant to this Agreement shall be recorded to give interested parties notice of the obligations herein placed on the owner of the Ackerberg property.

15. INTERPRETATION AND REPRESENTATION BY COUNSEL:

The terms of this Agreement are the product of arms-length negotiations between the Parties and their counsel, and no provision shall be construed against the drafter thereof. All Parties mutually warrant and represent that they have been represented by counsel of their own choosing in the negotiation and drafting of this Agreement, and that they fully understand its terms and conditions and voluntarily consent to all of the provisions herein.

16. NO LIABILITY:

It is understood and agreed that this Settlement Agreement and Stipulation for Entry of Judgment is the compromise of disputed claims, and that the terms and conditions recited hereinabove are not to be construed as an admission of liability on the part of the parties hereby released, and that said parties deny liability therefore and intend merely to avoid litigation.

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17. CHOICE OF LAW AND VENUE:

This Agreement shall be governed by and construed in accordance with the laws of the State of California. The venue for any disputes concerning this Agreement shall be in Los Angeles County, California.

18. COUNTERPARTS AND FACSIMILE SIGNATURES:

This Agreement may be executed in counterparts which, taken together, shall constitute one and the same agreement. This Agreement may also be delivered by facsimile transmission and in such event all facsimile signatures shall be deemed complete for all purposes hereof. The original executed counterparts shall be kept in the custody of Richards, Watson & Gershon. Execution may be by facsimile copy.

19. CAPTIONS AND HEADINGS:

Any captions or headings to the paragraphs or subparagraphs of this Agreement are solely for the convenience of the Parties, are not part of this Agreement, and shall not be used for the interpretation of or determination of the validity of this Agreement or any provision hereof.

20. AUTHORIZATION:

Each person signing this Agreement represents and warrants to the Parties and to each other that he or she is fully authorized to sign the Agreement on behalf of the Party for whom/which he or she is signing, and thereby to bind such Party to each and all of the terms of this Agreement.

21. WARRANTY OF NON-ASSIGNMENT:

The parties warrant that they have not assigned or transferred, nor will they in the future attempt to assign or transfer, any claim for relief or cause of action released herein.

22. TIME IS OF THE ESSENCE:

Time is expressly declared to be of the essence in this Agreement, and of every provision in which time is an element.

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23. SEVERABILITY:

Even if a court holds one or more parts of this Agreement ineffective, invalid, or void, all remaining provisions shall remain valid and in effect unless a party's consideration materially fails as a result of the invalidity.

24. EFFECTIVE DATE:

This Agreement shall be effective only if executed by all parties on or before June 18, 2009, and the Court enters Judgment pursuant to this Agreement on or before June 19, 2009.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement and Stipulation for Entry of Judgment to be executed:

PARTIES:

ACCESS FOR ALL Dated: 6/18/2009

By: Steve Hoye
Executive Director

LISETTE ACKERBERG LIVING TRUST, dated January 14, 1998

Dated: 6-18-09

By: Lisette Ackerberg
Trustee of the Lisette Ackerberg Living Trust, dated January 14, 1998

LISETTE ACKERBERG

Dated: 6-18-09

By: Lisette Ackerberg

[APPROVAL AS TO FORM CONTINUED NEXT PAGE]

APPROVED AS TO FORM:

DATED: June ___, 2009

DIANE R. ABBITT
LAW OFFICES OF DIANE ABBITT

and

RICHARDS, WATSON & GERSHON
A Professional Corporation
STEVEN H. KAUFMANN
GINETTA L. GIOVINCO

By: _____
Steven H. Kaufmann

Attorneys for Defendants
LISETTE ACKERBERG LIVING TRUST, dated January 14, 1998, and LISETTE ACKERBERG

DATED: June 14, 2009

DAVID J. WEINSOFF
LAW OFFICES OF DAVID WEINSOFF
and

NARDELL CHITSAZ & ALDEN LLP
J. TIMOTHY NARDELL

By: David Weinsoff
David J. Weinsoff

Attorneys for Plaintiff
ACCESS FOR ALL

RICHARDS | WATSON | GERSHON
ATTORNEYS AT LAW – A PROFESSIONAL CORPORATION

RICHARDS | WATSON | GERSHON
ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION

PROOF OF SERVICE

I, Yvonne Alamillo, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Richards, Watson & Gershon, 355 South Grand, 40th Floor, Los Angeles, California. On June 18, 2009, I served the within documents:

SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF JUDGMENT

[ ] by causing facsimile transmission of the document(s) listed above from (213) 626-8484 to the person(s) and facsimile number(s) set forth below on this date before 5:00 P.M. This transmission was reported as complete and without error. A copy of the transmission report(s), which was properly issued by the transmitting facsimile machine, is attached. Service by facsimile has been made pursuant to a prior written agreement between the parties.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below. I am readily familiar with the firm's practice for collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in this affidavit.

[ ] by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a agent for delivery, or deposited in a box or other facility regularly maintained by , in an envelope or package designated by the express service carrier, with delivery fees paid or provided for, addressed to the person(s) at the address(es) set forth below.

David J. Weinsoff, Esq. Law Office of David J. Weinsoff 138 Ridgeway Avenue Fairfax, California 94930 Tel: (415) 460-9760 Fax: (415) 460-9762 E-Mail: Weinsoff@ix.netcom.com	J. Timothy Nardell, Esq. Nardell Chitsaz & Alden LLP 790 Mission Avenue San Rafael, California 94901 Tel: (415) 485-2200 Fax: (415) 457-1420 E-Mail: tim@ncalcgal.com

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 18, 2009.

YVONNE ALAMILLO

DENNIS, JUAREZ, REESER, SHAFER & YOUNG
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ATTORNEYS AT LAW
SUITE 1800
2049 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067

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LUCINDA DENNIS*
L. MORRIS DENNIS*
GEORGE A. JUAREZ
EDWIN B. REESER, III
ALAN H. SHAFER
THOMSEN YOUNG
WILLIAM E. CREIM
PHYLLIS J. BERSON
ELSA M. JONES
DAVID L. MORGAN
GENTRY YOUNG
*A PROFESSIONAL CORPORATION

January 28, 1985

RECEIVED
JAN 30 1985
CALIFORNIA
COASTAL COMMISSION
SOUTH COAST DISTRICT

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

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

Dear Mr. Gleason:

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

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

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

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

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

Mr. Gary Gleason
Re: Lisette & Norman Ackerberg

January 28, 1985
Page Two

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

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

Very truly yours,

DENNIS, JUAREZ, REESER, SHAFER & YOUNG

Edwin E. Reeser, III

EER:lg

cc: Norman & Lisette Ackerberg
Richard Sol

PAGE 5/16 * RCVD AT 3/22/2007 3:51:48 PM [Central Standard Time] * SVR:... * DNIS:4777 * CSID:310 456 3950 * DURATION (mm-ss):04-10

David C. Weiss
Structural Engineer & Associates, Inc.

August 6, 1985

Mr. Norman J. Ackerberg
c/o Mr. Richard Sol, Architect
23904 De Ville Way
Malibu, CA 90265

RECEIVED
AUG 7 1985
RICHARD SOL, AIA

SUBJECT: Ackerberg Residence
22466 Pacific Coast Highway
Malibu, California 90265
(Our Job #22085)

Dear Mr. Ackerberg,

As requested by Mr. Richard Sol, Supervising Architect for the Subject Project, I observed the elevation of the sand on the seaward side of the bulkhead at the project site. In addition, the wave uprush report by John Hale, C.E., dated April 9, 1983, and the subject site survey by Mario Quiros, dated December 1983 were also reviewed. This was done in an effort to predict a maximum sand elevation on the ocean side of the bulkhead.

Based on information gained from the noted sources, I estimate that the maximum sand elevation at this site will be approximately 1'-6" below the top of the existing bulkhead. This estimate is based on observation of the sand elevations on July 3, and July 26, 1985, as well as the sand elevations recorded in Mario Quiros' survey of December 1983. During July of 1985, the sand was approximately 1'-6" below the top of the bulkhead. During the summer, the sand profile is normally at it's maximum elevation. There were no indications on the bulkhead (such as fading or bleaching), that the sand had been higher. The survey of December 1983 indicates that the sand was as low as elevation +9.0 M.S.L. The top of the bulkhead piles are at elevation +13.6 M.S.L. A normal maximum backshore beach elevation of +12.0 M.S.L. is reasonable for this area.

The above is an opinion only, based on observations. No tests can be taken, nor calculations performed, therefore, no exact prediction can be made.

Respectfully,

David C. Weiss, President
S.E. 1867

EXHIBIT D

22440 CLARENDON STREET • SUITE 203 • WOODLAND HILLS • CALIFORNIA 91367 • (818) 704-0631

Vincent Kevin Kelly and Associates Inc.
civil and structural engineering
2216 wilshire boulevard
santa monica, ca 90403
213 / 828-3431

Vincent Kevin Kelly
president
Michael A. Gardner, P.E.
associate
Stephen F. Taylor, C. Eng
Edward D. Kellman
John Lambert
Doree Thompson
Betty Jo Sproul

March 26, 1984

John Kelly
c/o Malibu Building Department
23535 Civic Center Way
Malibu, California 90265

Re: Bulkhead Seawall @
Trueblood Residence
22486 Pacific Coast Hwy.

MAR 27 1984
MALIBU B & S

Dear John,

Further to your recent enquiry regarding the filter rock required behind Mr. Truebloods bulkhead. I should like to confirm that the installation of this material was observed by myself. I witnessed the contractor using plywood sheeting as a temporary barrier between the sand and filter rock. The rock was being installed to the underside of the bottom whaler and was in excess of the 1'-0" minimun width specified on our plans.

We trust you will append this to and approve our report.

Sincerely,

Stephen F. Taylor, C. Eng.
SFT/sas

cc: Ralph Trueblood

Coastal Engineering, Inc.
JOHN S. HALE, Coastal Engineer
15138 Chetney Drive • Baldwin Park, California 91706 (213) 338-1465

RECEIVED
OCT 24 1984
RICHARD SOL, AIA
FR. RETSER

January 25, 1984

Mr. Jim Coulson
883 N. Topanga Blvd.
Topanga, CA 90290

RE: Inspection Of The Rock Wall Return On Mr. Trueblood's Property on Pacific Coast Highway, Malibu, CA

Dear Mr. Coulson;

We have made four trips out there and have inspected the rock return and find that the rock section extends the appropriate distances east and west. The section is deep enough, high enough, and has the proper gradation.

The placement is in accord with the design. This rock structure should provide adequate protection.

Very truly yours,

John S. Hale
Consulting Coastal Engineer
RCE 16530

JSH/sw

Vincent Kevin Kelly and Associates Inc.
civil and structural engineering
2216 wilshire boulevard
santa monica, ca 90403
213 / 828-3431

Vincent Kevin Ke
presi
Michael A. Gardner, E
assoc
Stephen E Taylor, C. E
Edward D. Kellin
John Lamb
Doree Thomps
Betty Jo Spi

February 15, 1984

Mr. Ralph W. Trueblood
#14 Oakmont Drive
Los Angeles, Calif. 90049

Re: Bulkhead Inspection
22470 Pacific Coast Hwy.
Malibu, Calif. 90265

Dear Mr. Trueblood:

Per our contract of December 1, 1983 this office conducted periodic surveys of the construction of your bulkhead at the above referenced address. The following is a summary of those inspections:

12/5/83 The 14 inch diameter piles were driven at an average of 4 feet on center.

12/21/83 The 14 foot, 2 inch long, 3 X 12 sheathing to be driven on your property was just commencing. Jim Coulson, the Contractor, had completed driving the sheathing on the Sherman property, which is an extension of your bulkhead. It should be noted that, in our opinion, the job was done exceptionally well.

1/4/84 The filter cloth was placed correctly to the underside of the top whaler. The filter rock was, at that point, just arriving. It was clean and of good quality. However placement of said material had not yet commenced. The bulkhead return ended at the existing tennis court, which was short of the length stated in the wave action report dated April 9, 1983. However, John Hale, the Coastal Engineer of record, will personally direct boulder placement as an alternative to the shortened return.

1/22/84 The bulkhead has been completed. A general final inspection of all bolts, washers, whalers, sheathing and dimensional aspects were made. It was noticed that by sighting along the top edge of the sheathing that the wall bowed in and out horizontally. The slight variation noticed has no structural affect, and is exceptable to this office.

1/26/84 At the request of the Contractor, the man sized boulders were inspected extending a minimum of 10 feet 0 inches back from the wall. These rested on 1 foot 0 inch minimum filter material and all were as per plans. Excellent workmanship was observed.

Also noted was the completed return wall which extends only to the tennis court (approximately 19 feet 0 inches). It is our understanding that the corner boulder protection has been installed under the supervision of John Hale's office.

Elevations were established at the property by Mario C. Ouiros, Land Surveyor, 22249 Pacific Coast Hwy, P.O. Box 106, Malibu, Ca.

Piling was observed by Kovac-Byer-Robertson and their findings are contained in their report no. M742-F, dated January 11, 1984.

It is our opinion, from the above inspections, that your bulkhead seawall was satisfactorily constructed in accordance with our plans and specifications.

Sincerely,

Paul A. Spieler
Project Engineer

PAS/dmt

CONTRACTOR'S WAIVER AND AFFIDAVIT
(INDIVIDUAL)

STATE OF CALIFORNIA
COUNTY OF Los Angeles } ss.

Coulson Construction and Development, a sole proprietorship

first being duly sworn, deposes and says:

That he, as general contractor, on August 10, 1983

entered into a written contract with Ralph Trueblood

as owner ____, for the construction of a Sea Bulkhead

on that certain real property in the city of unincorporated area

county of Los Angeles, state of California, described as:

As per legal description attached hereto and made a part hereof:

That said buildings and work of improvement were fully completed on January 24, 1984, and a notice of such completion was recorded in the office of the county recorder of the county in which said land is located, on n/a;

That all bills for labor and/or material furnished in connection with the construction of said buildings and work of improvement have been fully paid;

That the undersigned hereby waives any and all lien rights which he may have or may have had on account of or arising out of the construction of said buildings and work of improvement;

That said affiant further certifies and declares that he will testify or depose before any competent tribunal, officer, or person, in any case now pending or hereafter instituted, to the truth of the foregoing statements and each of them.

COULSON CONSTRUCTION AND DEVELOPMENT

By: James Coulson

SUBSCRIBED and SWORN to before me on February 17, 1984

Elizabeth A Praino
Notary Public in and for said County and State.

OFFICIAL SEAL
ELIZABETH A PRAINO
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 29, 1987

EXHIBIT "A"

PARCEL 1:

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

BEGINNING AT A POINT IN THE SOUTHERLY LINE OF THE 80 FOOT STRIP OF LAND DESCRIBED IN DEED TO THE STATE OF CALIFORNIA RECORDED IN BOOK 15228 PAGE 342, OFFICIAL RECORDS, OF SAID COUNTY, SAID POINT OF BEGINNING BEING WESTERLY ALONG SAID SOUTHERLY LINE FOLLOWING THE ARC OF A CIRCULAR CURVE CONCAVE SOUTHERLY HAVING A RADIUS OF 5608.01 FEET, A DISTANCE OF 638.47 FEET FROM A POINT BEING DISTANT SOUTH 6° 11' 30" WEST 40 FEET, FROM HIGHWAY ENGINEER'S CENTERLINE STATION 989 + 65.17 AT THE WESTERLY EXTREMITY OF THAT CERTAIN COURSE DESCRIBED IN SAID DEED AS SOUTH 83° 48' 30" EAST 2153.25 FEET, THENCE EASTERLY ALONG SAID SOUTHERLY LINE 86.54 FEET, THENCE LEAVING SAID SOUTHERLY LINE SOUTH 0° 33' 09" WEST 42.93 FEET; THENCE NORTH 88° 48' 37" WEST 10.70 FEET; THENCE SOUTH 1° 11' 23" WEST TO THE ORDINARY HIGH TIDE LINE OF THE PACIFIC OCEAN; THENCE WESTERLY ALONG SAID TIDE LINE TO THE INTERSECTION WITH A LINE BEARING SOUTH 0° 13' 30" WEST FROM THE POINT OF BEGINNING; THENCE NORTH 0° 13' 30" EAST TO THE POINT OF BEGINNING.

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

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

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

(LEGAL CONTINUED)

PARCEL 2:

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

BEGINNING AT A POINT IN THE SOUTHERLY LINE OF THE 80 FOOT STRIP OF LAND DESCRIBED IN DEED TO THE STATE OF CALIFORNIA RECORDED IN BOOK 15228, PAGE 342 OF OFFICIAL RECORDS OF SAID COUNTY, SAID POINT OF BEGINNING BEING WESTERLY ALONG SAID SOUTHERLY LINE FOLLOWING THE ARC OF A CIRCULAR CURVE CONCAVE SOUTHERLY HAVING A RADIUS OF 5608.01 FEET, A DISTANCE OF 490.17 FEET FROM A POINT BEING DISTANT SOUTH 6° 11' 30" WEST 40 FEET FROM ENGINEER'S CENTERLINE STATION 989 PLUS 65.17 FEET AT THE WESTERLY EXTREMITY OF THAT CERTAIN COURSE DESCRIBED IN SAID DEED AS SOUTH 83° 48' 30" EAST 2153.25 FEET, THENCE WESTERLY ALONG SAID CURVE 61.76 FEET, THENCE LEAVING SAID SOUTHERLY LINE AND CURVE SOUTH 0° 33' 09" WEST 42.93 FEET, THENCE NORTH 88° 48' 37" WEST 10.70 FEET, THENCE SOUTH 1° 11' 23" WEST TO THE ORDINARY HIGH TIDE LINE OF THE PACIFIC OCEAN, THENCE EASTERLY ALONG SAID TIDE LINE TO AN INTERSECTION WITH A LINE BEARING SOUTH 1° 11' 23" WEST FROM THE POINT OF BEGINNING, THENCE NORTH 1° 11' 23" EAST TO THE POINT OF BEGINNING;

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

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

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

David C. Weiss
Structural Engineer & Associates, Inc.

August 6, 1985

Mr. Norman J. Ackerberg
c/o Mr. Richard Sol, Architect
23904 De Ville Way
Malibu, CA 90265

RECEIVED
AUG 7 1985
RICHARD SOL, AIA

SUBJECT: Ackerberg Residence
22466 Pacific Coast Highway
Malibu, California 90265
(Our Job #22085)

Dear Mr. Ackerberg,

As requested by Mr. Richard Sol, Supervising Architect for the Subject Project, I observed the elevation of the sand on the seaward side of the bulkhead at the project site. In addition, the wave uprush report by John Hale, C.E., dated April 9, 1983, and the subject site survey by Mario Quiros, dated December 1983 were also reviewed. This was done in an effort to predict a maximum sand elevation on the ocean side of the bulkhead.

Based on information gained from the noted sources, I estimate that the maximum sand elevation at this site will be approximately 1'-6" below the top of the existing bulkhead. This estimate is based on observation of the sand elevations on July 3, and July 26, 1985, as well as the sand elevations recorded in Mario Quiros' survey of December 1983. During July of 1985, the sand was approximately 1'-6" below the top of the bulkhead. During the summer, the sand profile is normally at it's maximum elevation. There were no indications on the bulkhead (such as fading or bleaching), that the sand had been higher. The survey of December 1983 indicates that the sand was as low as elevation +9.0 M.S.L. The top of the bulkhead piles are at elevation +13.6 M.S.L. A normal maximum backshore beach elevation of +12.0 M.S.L. is reasonable for this area.

The above is an opinion only, based on observations. No tests can be taken, nor calculations performed, therefore, no exact prediction can be made.

Respectfully,

David C. Weiss, President
S.E. 1867

22440 CLARENDON STREET • SUITE 203 • WOODLAND HILLS • CALIFORNIA 91367 • (818) 704-0631

Vincent Kevin Kelly and Associates Inc.
civil and structural engineering
2216 wilshire boulevard
santa monica, ca 90403
213 / 828-3431

Vincent Kevin Kelly
president
Michael A. Gardner, P.E.
associate
Stephen F. Taylor, C. Eng
Edward D. Kellman
John Lambert
Doree Thompson
Betty Jo Sproul

March 26, 1984

John Kelly
c/o Malibu Building Department
23535 Civic Center Way
Malibu, California 90265

RECEIVED
MAR 27 1984
MALIBU B & S

Re: Bulkhead Seawall @
Trueblood Residence
22466 Pacific Coast Hwy.

MAR 27 1984
MALIBU B & S

Dear John,

Further to your recent enquiry regarding the filter rock required behind Mr. Trueblood's bulkhead. I should like to confirm that the installation of this material was observed by myself. I witnessed the contractor using plywood sheeting as a temporary barrier between the sand and filter rock. The rock was being installed to the underside of the bottom whaler and was in excess of the 1'-0" minimun width specified on our plans.

We trust you will append this to and approve our report.

Sincerely,

Stephen F. Taylor, C. Eng.
SFT/sas

cc: Ralph Trueblood

RECEIVED
JUN 19 1985
RICHARD SOL, AIA

Coastal Engineering, Inc.

JOHN S. HALE, Coastal Engineer

15138 Chatney Drive • Baldwin Park, California 91706 (213) 338-1466

January 25, 1984

Mr. Jim Coulson
883 N. Topanga Blvd.
Topanga, CA 90290

RE: Inspection Of The Rock Wall Return On Mr. Trueblood's Property on Pacific Coast Highway, Malibu, CA

Dear Mr. Coulson:

We have made four trips out there and have inspected the rock return and find that the rock section extends the appropriate distances east and west. The section is deep enough, high enough, and has the proper gradation.

The placement is in accord with the design. This rock structure should provide adequate protection.

Very truly yours,

John S. Hale
Consulting Coastal Engineer
RCE 16539

JSH/sw

Vincent Kevin Kelly and Associates Inc.
civil and structural engineering
2216 wilshire boulevard
santa monica, ca 90403
213 / 828-3431

Vincent Kevin Kelly
president
Michael A. Gardner, P.E.
associate
Stephen F. Taylor, C. Eng.
Edward D. Kellman
John Lambert
Ocee Thompson
Betty Jo Sproul

February 15, 1984

Mr. Ralph W. Trueblood
#14 Oakmont Drive
Los Angeles, Calif. 90049

Re: Bulkhead Inspection
22496 Pacific Coast Hwy.
Malibu, Calif. 90265

Dear Mr. Trueblood:

Per our contract of December 1, 1983 this office conducted periodic surveys of the construction of your bulkhead at the above referenced address. The following is a summary of those inspections:

12/5/83 The 14 inch diameter piles were driven at an average of 4 feet on center.

12/21/83 The 14 foot, 2 inch long, 3 X 12 sheathing to be driven on your property was just commencing. Jim Coulson, the Contractor, had completed driving the sheathing on the Sherman property, which is an extension of your bulkhead. It should be noted that, in our opinion, the job was done exceptionally well.

1/4/84 The filter cloth was placed correctly to the underside of the top whaler. The filter rock was, at that point, just arriving. It was clean and of good quality. However placement of said material had not yet commenced. The bulkhead return ended at the existing tennis court, which was short of the length stated in the wave action report dated April 9, 1983. However, John Hale, the Coastal Engineer of record, will personally direct boulder placement as an alternative to the shortened return.

1/22/84 The bulkhead has been completed. A general final inspection of all bolts, washers, whalers, sheathing and dimensional aspects were made. It was noticed that by sighting along the top edge of the sheathing that the wall bowed in and out horizontally. The slight variation noticed has no structural affect, and is exceptable to this office.

1/26/84 At the request of the Contractor, the man sized boulders were inspected extending a minimum of 10 feet 0 inches back from the wall. These rested on 1 foot 0 inch minimum filter material and all were as per plans. Excellent workmanship was observed.

Also noted was the completed return wall which extends only to the tennis court (approximately 19 feet 0 inches). It is our understanding that the corner boulder protection has been installed under the supervision of John Hale's office.

Elevations were established at the property by Mario C. Quiros, Land Surveyor, 22249 Pacific Coast Hwy, P.O.Box 186, Malibu,Ca.

Piling was observed by Kovac-Byer-Robertson and their findings are contained in their report no.M742-F, dated January 11, 1984.

It is our opinion, from the above inspections, that your bulkhead seawall was satisfactorily constructed in accordance with our plans and specifications.

Sincerely,

Paul A. Spieler

Paul A. Spieler
Project Engineer

PAS/dmt

CARBON BEACH ~CHARTOFF.

JOHN S. HALE
COASTAL ENGINEERING, INC.
5138 Chatney Drive • Baldwin Park, California 91706 (213) 338-1465

STEVE'S OFFICE COPY. (R 4-11-83)

CHARTOFF

COASTAL ENGINEERING REPORT FOR THE PROPOSED WOOD WALL ALONG THE PROPERTIES AT 22470, 22506, AND 22520 PACIFIC COAST HIGHWAY MALIBU, CA

DARROW ~ OPTED OUT OF VENTURE

Seawall

~~PROPOSED 22470~~

by

John S. Hale

April 9, 1983

RECEIVED
JUN 19 1985
RICHARD SOL, AIA

RECEIVED
MAY 26 1983
S DIV

1. This report is for the proposed wood seawall development along the ocean shoreline of the aforementioned lots. Parameters are included for the height, depth, and length of the return walls for the bulkhead wall.

2. This seawall shall have a height of +14 feet mean sea level datum and the bottom of the sheeting will be at an elevation of zero feet mean sea level datum. The elevation of the bottom of the return walls shall be as shown on the enclosed drawings.

3. The return walls shall be constructed as shown in the enclosed drawings.

4. The bulkhead wall shall be backfilled with filter blanket material from the bottom of the sheeting to the height of soil backfill. See the following description of the rock filter material and the specifications for all rock, including the rock shown on the enclosed drawings. Rock can be used at the ends of the wood seawall in cases where the return walls cannot be constructed. This solution is not to be used except as the only solution!

   The filter blanket rock specifications are as follows:

   Stone shall be sound, durable, hard, resistant to abrasion and free from laminations, weak cleavage planes and the undesirable effects of weathering. It shall be of such character that it will not disintegrate from the action of air, water, or the conditions to be met in handling and placing. All materials shall be clean and free from deleterious impurities, including alkali, earth, clay refuse, and adherent coatings. The specific gravity shall be no less than 2.46. All rock shall not have a loss more than 40 percent as a result of the Los Angeles machine "shot rattler test."

5. The seawall shall be backfilled to the approximate elevation of the surrounding back yards or the elevation necessary for protection of the sewage systems.

6. All elevations placed on the plans shall be referenced to mean sea level datum and a note to this effect will be placed on the plans.

7. A note shall be placed on the plans that inspection of the height of the sheeting, the depth of the sheeting, and required backfill must be made by the coastal engineer, and that a letter accepting the seawall construction be submitted to the County Building and Safety Office by the coastal engineer.

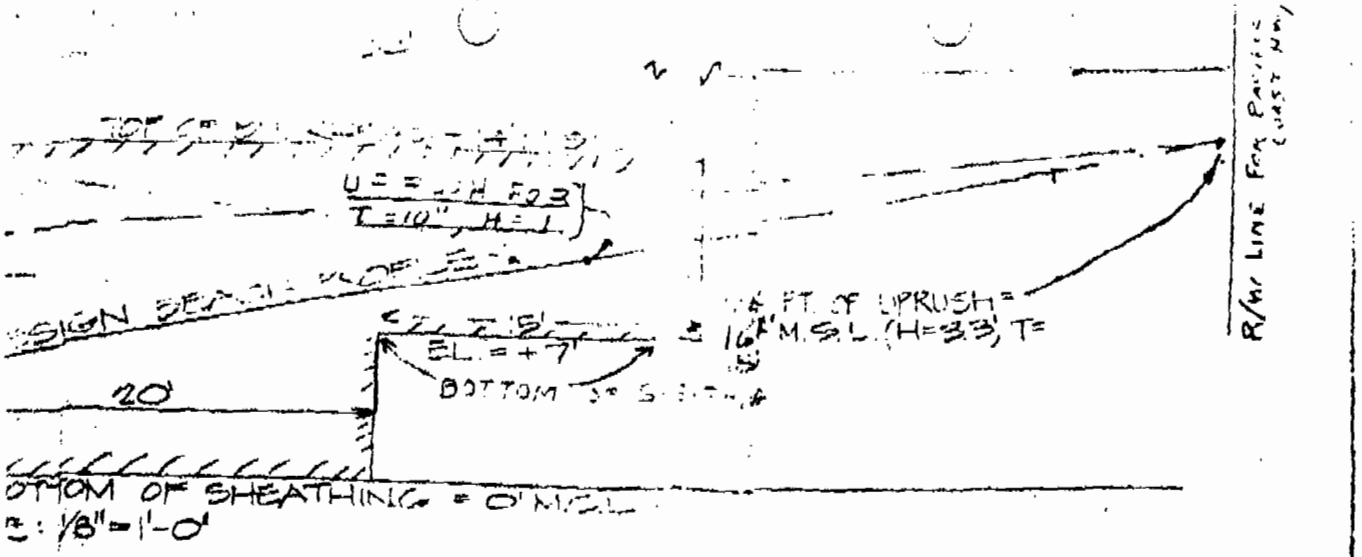
8. All piles calculations shall be based on the design beach profile elevation. If piles or caissons cannot be placed the necessary depth below the design beach profile, then another design method will have to be used, but the structural engineer will use the design profile as the basis of design.

9. The rock gradation of the filter blanket shall be as follows:

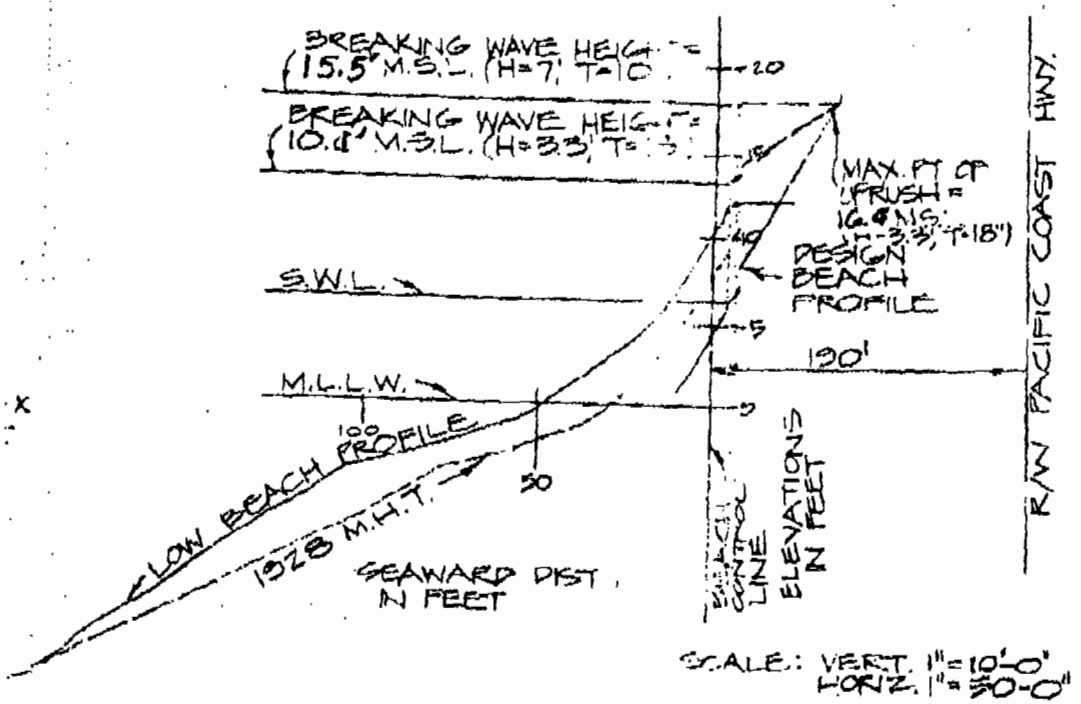
STONE SIZE DIAMETER	PERCENT PASSING BY WEIGHT
4"	100%
2½"	40% to 60%
1½"	25% to 50%
3/4"	00% to 10%

John S. Hale
Consulting Coastal Engineer
RCE 16539

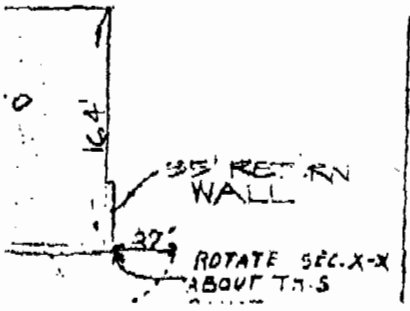
JSH/de
Encl.



TERLY RETURN WALL

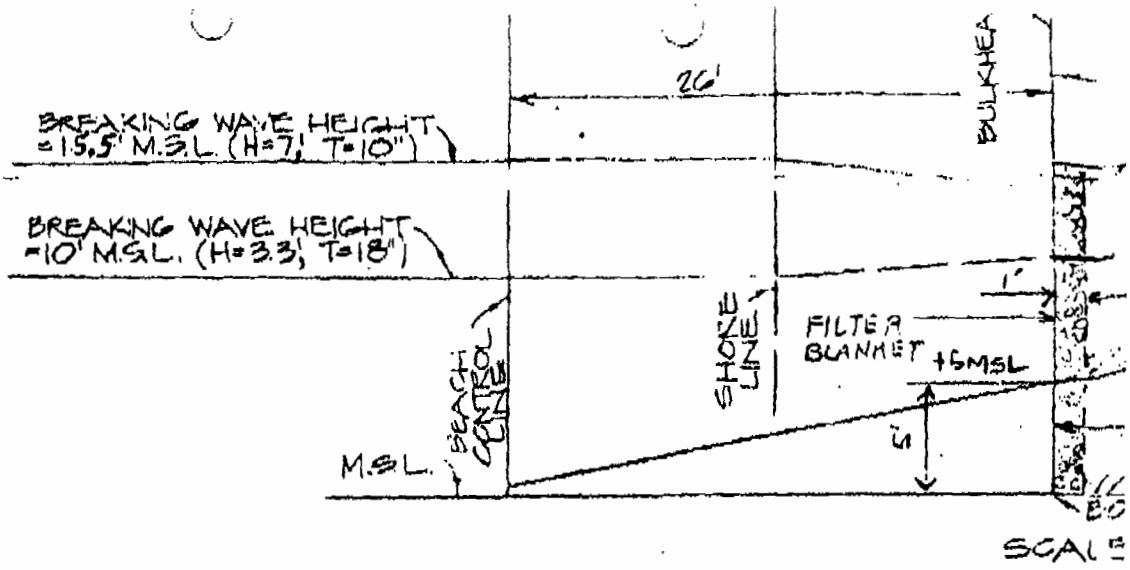


STA. 068+16

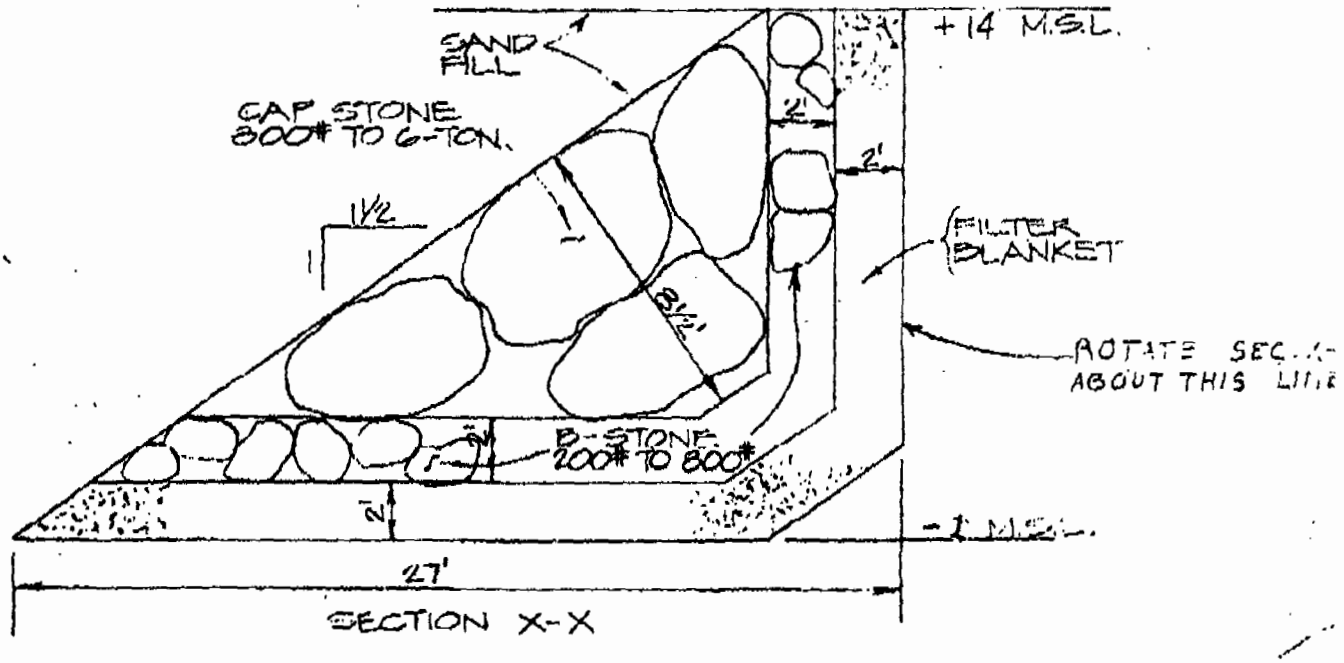


BULKHEAD WALL FOR HOMES @ 22520, 22506 & 22470 PACIFIC COAST HWY.

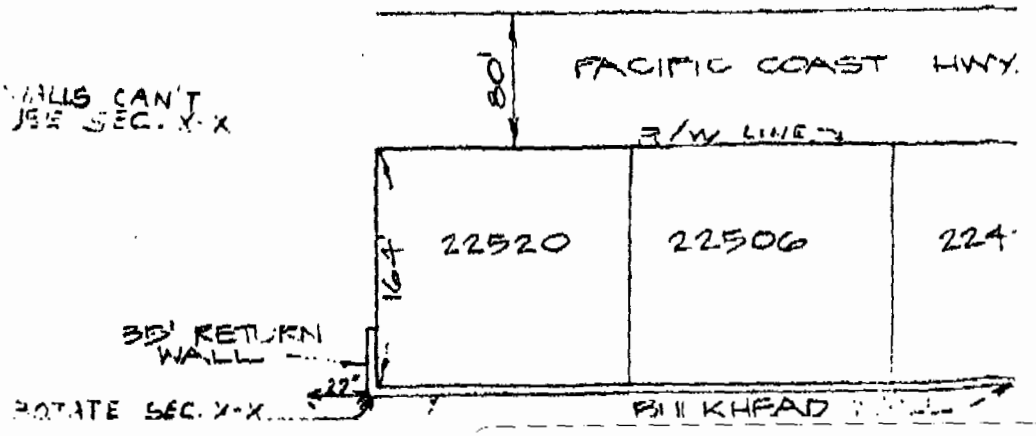
COASTAL ENGINEERING, INC.
JOHN S. HALE
15135 CHETNEY DR.
BALDWIN PARK, CA 91706
TEL: (626) 338-1465



EASTERLY AND WE



NOTE: IF RETURN WALLS CAN'T BE BUILT USE SEC. X-X



Address - 22506 P.C.H.

$H_o = 7'$ $T = 10^{\circ}$ $H_o' = 1.67 \times 7 = 11.7$

Wave Uprush

$H_o'/gt^2 = .0036$

Comp. Slope (using 4' scour line below lowest prot

AVE SLOPE = 17 to 1

(Fig. 7-13) $K = 1$

(Fig. 7-11) $\frac{R}{H_o'} = .39$ $R = .39 \times 11.7 = 4.6'$

$= +6.0'$ (TIDE

UPRUSH $= 10.6$ MLLW

Breaking Wave Height

$H_o'/gt^2 = .0036$ & an under water slope of $\frac{3.1}{50} = .06$

(Fig. 7-3) $H_b/H_o' = 1.35$ $H_b = 11.7 \times 1.35 = 15.8'$

$H_c = 15.8 \times .78 + 6 = 18.3'$ M.L.L.W. $= 15.5'$ M.S.L.

Breaking Wave Depth

$H_b/gt^2 = 15.8/32.2 \times 100 = .0049$ (Fig. 7-2) $\frac{d_b}{H_b} = .95$

$d_b = 15.8 \times .95 = 15'$ S.W.L = 9' M.L.L.W.

ASSUMPTION OK

Address - 22506 P.C.H.

$H = 3.3'$ $T = 18''$ $H_o' = 3.3'$

Wave Uprush

$H_o'/gt^2 = 3.3/32.2 \times 18^2 = .0003$

$= 1$ $d_s = 3.3'$ below S.W.L. $2.7'$ Above M.L.L.W.

Composite Slope

$104 \div 17.8 = 5.8$ To 1

(Fig. 7-13) $K = 1.06$

(Fig. 7-11) $R/H_o = 3.8$ $R = 3.8 \times 1.06 \times 3.3 + 6 = 19.2$ MLLW or 16.4 MSL.

Breaking Wave Height

Est. $d_b = 6$ Slope $= \frac{25}{3.7} = 6.8{:}1$ to 1 $m = .15$

(Fig. 7-3) $\frac{H_b}{H_o'} = 2.7$ $H_b = 2.7 \times 3.3 = 8.9'$

$H_c = .78\, H_b + 6 = .78 \times 8.9 + 6 = 12.9'$ M.L.L.W. $= 10.1$ M.S.L.

Breaking Wave Depth

$H_b/gt^2 = 8.9/32.2 \times 18^2 = .00085$ (Fig. 7-2) $\frac{d_b}{H_b} = .74$

$d_b = 8.9 \times .73 = 6.5'$

ASSUMPTION OK

SINCE ACTIVE SOIL PRESSURE WILL OFFSET OCEAN WAVE LOADS NO WAVE LOADS WILL BE CALCULATED

RESPONSES TO DOCUMENT 4 AND 5 AND PROPOSED ADDITIONAL FINDINGS

On June 3, 2009, Commission staff met with Access for All ("AFA") to discuss, among other things, enforcement of violations involving public access easements held by AFA, including the public access easement on the Ackerberg property. On June 5, 2009, Commission staff, including the Executive Director of the Commission, met with Diane Abbitt and Steve Kaufmann, attorneys for Lisette Ackerberg. The June 5 meeting was at the request of both Ms. Abbitt and Mr. Kaufmann and was intended to allow them the opportunity to propose an amicable resolution to the subject violation case. For several years prior to this meeting, Commission staff explicitly informed Mrs. Ackerberg and her representatives that staff could not agree to extinguishing the Ackerberg public access easement in exchange for the opening of another public access easement and that any resolution of the violation had to include the removal of unpermitted development from the public access easement areas on the Ackerberg property.

During the above referenced meetings (or at any other time), neither AFA nor Mrs. Ackerberg and her representatives, informed Commission staff of a possible settlement agreement between AFA and Mrs. Ackerberg. Unbeknownst to Commission staff, AFA and Mrs. Ackerberg were evidently in the process of agreeing to a settlement agreement to, in part, pursue opening another existing public accessway in the hope of extinguishing the existing public accessway that was required as a condition of a Commission issued CDP and that is provided for by an easement currently held by AFA. On June 19, 2009, without ever discussing it with Commission staff, AFA and Mrs. Ackerberg entered into a settlement. Even after the settlement was entered by the court, neither AFA nor Mrs. Ackerberg and her representatives informed Commission staff of the settlement. Furthermore, during this time, Commission staff left messages with AFA and Mrs. Ackerbergs's representatives attempting to further discuss a resolution of the violation consistent with the permit and Coastal Act; and, even then, no calls were returned to Commission staff informing them of the settlement agreement. Commission staff was evidently intentionally left in the dark during the settlement process and had no way of providing input, including critical factual information that likely would have swayed the outcome or, at a minimum, provided the Commission an opportunity to defend the public access policies of the Coastal Act. In addition, the Court did not get the opportunity to hear the Commission's concerns or issues.

On Friday afternoon, July 3, 2009, just prior to the July 4th holiday weekend and only 5 days prior to the Commission hearing, Steve Kaufmann and Diane Abbitt sent Commission staff and Commissioners a 24 page letter with hundreds of pages of Exhibits, notifying staff for the first time of the settlement agreement and raising defenses to the issuance of a cease and desist order. The following are summaries of these defenses and responses by Commission staff. Many of the defenses raised are addressed in the staff report for this item and are already a part of the public record. Commission Staff also hereby amends its recommendation to recommend that the Commission include, in addition to the above summary and the letters attached hereto, the following responses within its findings:

As indicated above, Respondent has submitted a lengthy (and late-submitted) set of documents to the Commission. This document was received on the Friday afternoon prior to the hearing, on a holiday weekend. While staff did not have sufficient time to do a full analysis and response to all of the issues raised in their submittal, many were repeated from prior correspondence and already responded to in the numerous discussions we have had with Respondent previously. Many of these are already addressed in the staff report and exhibits thereto. In addition, many of the issues they raise are not legal defenses to issuance of the order, and do not represent any claim, much less evidence, that the elements necessary for the issuance of the Cease and Desist Order, under Coastal Act section 30810, have not been satisfied.

However, staff has prepared a response to some of the issues raised by Respondent. First of all, staff notes that some general observations and responses to their submittal are necessary in order to put Respondent's allegations in context of this enforcement proceeding. Second, staff responds to Respondent's specific allegations.

1985 CDP – Basis for Respondent's Claims.

The basis for Respondent's argument lies within the assumption that somehow, in the context of Commission deliberation during the 1985 CDP hearing, the Ackerbergs were allowed to extinguish their public access *easement* at some unspecified future date. This assumption fails on all grounds. In summary, at the January 24, 1985 hearing, the Commission explicitly considered an amending motion that would provide for extinguishment of an offer to dedicate an easement upon the opening of adjacent access points within 500 ft. After an extensive discussion among Commissioners, staff, and Ackerbergs' representative, the amendment motion died for lack of a second. The Commissioners ultimately voted unanimously to grant the permit as recommended by staff. The recorded OTD includes language that is characterized as an addition to the findings that reflects the Commission's discussion of a possible procedure regarding the abandonment of pending offers to dedicate accessways across private property if nearby, adequate, publicly owned accessways are opened first. The "Finding" in effect summarized the Commission's position that, in general (but not in this particular hearing for an individual CDP), publicly owned accessways should be prioritized to be opened before privately owned access easements. However, Commissioners also determined that the offer to dedicate and open an easement on the Ackerberg's property for public use was a <u>necessary condition</u> to finding the proposed project consistent with the Coastal Act.

Ackerberg asserts that this permit hearing (and these additional findings) somehow authorized the eventual extinguishment of an accepted easement across her property that was required as a condition of a Commission-approved CDP. The following is a brief summary of why this assertion fails:

Even with the additional findings, the Commission discussed three pre-conditions requisite to the Commission considering a request by the Respondent to extinguish the offer to dedicate a public access easement.[1] The first pre-condition was that the Commission approve a policy that

[1] The Commission, at the 1985 CDP hearing, discussed only the possibility of extinguishing an Offer to Dedicate ("OTD") a pubic access easement. At no time did Commissioners ever address extinguishing accepted OTDs – or legally valid easements across property. In this particular case, the OTD has been legally accepted.

outstanding offers to dedicate additional vertical access easements within 500 feet of an opened vertical accessway can be extinguished. The second pre-condition was that a public accessway be improved and opened for public use. Lastly, the informal findings required the development of a "suitable" policy and mechanism to ensure that such a vertical accessway remain open and available for public use (envisioned in the context of a certified Local Coastal Program). These conditions have not been met in this case as the Commission did not develop a policy to insure that other already open and publicly used accessways would remain open for public use. Although the old County LUP had a policy allowing for the extinguishment of offers to dedicate easements, that policy has since been superseded by the 2002 Commission-certified City of Malibu LCP which is the legally applicable LCP for this area. Respondent, like any other citizen, had the opportunity to participate in the public hearings before the State to raise this issue at the time the Malibu land use plans were under consideration. The LCP adopted in 2002 did not include this policy. In fact, the LCP adopted for this area specifically identified this access way as one to be opened. Lastly, to date and for the foreseeable future there are no improved and open accessways available within 500 ft of the Respondent's property. The County-owned public access easement that Respondent believes, once open, will satisfy this condition, is 690 feet away from the Ackerberg easement. Therefore none of the prerequisites listed in the **extra findings** for the permit have been met and thus the easement is not qualified for extinguishment consideration, even assuming that the **additional findings** are binding and allow for such extinguishment.

Settlement does not resolve Coastal Act violation.

Respondent's settlement with AFA does not resolve the Coastal Act violations which are the subject of these proceedings. Respondent and AFA have agreed to pursue litigation to seek the opening of the LA County-owned vertical accessway, instead of immediately opening the vertical access easement on Respondent's property. The Settlement Agreement includes no deadline for opening of a vertical accessway at all, nor any guarantee that any vertical access route will ever be opened; in contrast to the issuance of the Cease and Desist Order, which would require the vertical access easement on Respondent's property to be opened as soon as possible. The Settlement Agreement is focused not on resolving this violation at all, but rather on seeking to open an accessway elsewhere some time in the future, and leaving this violation unaddressed and the permit condition not complied with until some uncertain future time. In contrast, the Cease and Desist Order will require the vertical public access to be opened immediately, by requiring that the Respondent open the public access way to the beach, without any speculative reliance on the outcome of another lawsuit.

Moreover, under the Settlement Agreement, the Coastal Act violations will persist for an unspecified period of time, as the Settlement Agreement includes no deadline for completion of the first step, the completion of the contemplated lawsuit to open the LA County-owned vertical accessway to public use. The Settlement Agreement includes a deadline to file the lawsuit, however filing a suit in no way ensures that it will be successfully prosecuted or resolved. In any event, it is clear that litigation would not resolve this immediately. Further, AFA has no clear legal authority or right to force LA County to open the vertical public accessway it owns, and thus there is no guarantee that the first step will result in any improvement in public access. The Settlement Agreement thus provides that vertical public access will remain impeded for an

unspecified period of time. This would allow the Coastal Act violations to persist indefinitely, which the Cease and Desist Order would resolve immediately, as it addresses all Coastal Act violations.

Additionally, the Coastal Act violations will remain unresolved by the Settlement Agreement.. First, if the lawsuit to open the LA County-owned vertical accessway is successful (and presuming no one else sued to prevent that accessway from being opened), then while public access in that location might be improved, unpermitted development in violation of the Coastal Act would still persist on Respondent's property and would be unresolved. If the LA County accessway is eventually opened, the Settlement Agreement allows Mrs. Ackerberg to apply for a permit amendment to extinguish the easement across her property, but even if the Commission approved such an amendment, that would not remedy the extended period of time during which no access at all was provided to this stretch of beach despite the permit requirements.

Second, if the LA County-owned vertical accessway is not opened, and the Respondent and AFA apply for and receive a CDP Amendment to open the vertical access easement on Respondent's property, the other unpermitted development at this site would remain unaddressed, as discussed below. Thus, under all possible future conditions created by the Settlement Agreement, there would still be unresolved Coastal Act violations whereas the issuance of the Cease and Desist Order would resolve all of the Coastal Act violations immediately.

The Cease and Desist Order addresses all of the Coastal Act violations.

Respondent's settlement with AFA does not resolve all of the Coastal Act violations which are the subject of the Cease and Desist Order. The unpermitted development which exists at the site and which is covered by the proposed order includes the placement of rock riprap, a concrete wall, a generator and associated concrete slab, fence, railing, planter, light posts, and landscaping. The violation also includes complete obstruction of the vertical public access easement and partial obstruction of the lateral public access easement. Of all these Coastal Act violations, all of which are addressed by the order, only the obstruction of the vertical access easement is addressed by the Settlement Agreement. The other Coastal Act violations, including the obstruction of the lateral access easements, and associated unpermitted development, are not addressed by the settlement agreement and would otherwise remain unresolved. Further, the Cease and Desist Order provides for enforceability of the resolution of the Coastal Act violations, through Section 9.0 and the structure of an order itself, which requires compliance and includes potential civil penalties if Respondent fails to comply with the order.

The Commission was not a party to the Settlement Agreement between Respondent and Access for All.

As discussed below in the Commission's response to Respondent's statement alleging that the Commission is bound from issuing a Cease and Desist Order by *res judicata*, the Commission was not a party to the Settlement Agreement between Respondent and AFA. As such, the Settlement does not bind the Commission in any way, nor does it fully resolve the Coastal Act violations at issue. In addition to not being a party to the Settlement between AFA and

Respondent, the Commission was not informed of the existence of the Settlement until Friday, July 3, 2009, two weeks after the Settlement Agreement was entered into.

In addition to the Commission's response to the *res judicata* statements above, the Commission notes that the interests of the public were not adequately represented by either party in the Settlement Agreement. The paramount right of the public to access the sea is guaranteed in the California Constitution, and is protected in the Coastal Act, and the actions of AFA and Respondent have not promoted the public right of access to the sea, as they have agreed to the termination of a legally valid vertical public access easement, in favor of pursuing speculative litigation to open another vertical accessway, failing to work towards the opening of the vertical public access easement held by AFA on the Respondent's property. The interests of the public require that public access be promoted wherever possible, and here the issuance of the Cease and Desist Order will result in the certain opening of a vertical public accessway while the Settlement Agreement would only result in further litigation and the possible opening of a different vertical public accessway. The Commission staff and Coastal Act would support opening other accessways in addition, to assist in achieving the goals of maximum public access to the coast, but doing so at the cost of closing this accessway would not further those goals. AFA has not acted with the public's interests in mind, did not and cannot legally represent the Commission in the judicial proceeding, and in fact is not proposing a resolution of the violation at hand and its actions do not bind the Commission.

In addition, Respondent asserts that the settlement reached between AFA and Respondent should vitiate the Commission's action here. This is not accurate. It should be noted that the resolution of a lawsuit between AFA and Respondent filed under PRC Section 30803(a) does not preclude other enforcement actions under PRC Section 30800, which specifically provides that citizen-suits "shall be in addition to any other remedies available at law," which includes enforcement actions under PRC Sections 30810, 30811, and 30812; and thus the Commission would be able to act to resolve the remaining unpermitted violations.

AFA cannot abandon the vertical access easement on Respondent's property, and if it does, then the easement automatically vests in the State of California acting through the State Coastal Conservancy.

AFA is prohibited from abandoning the easement by the terms of the Acceptance of the Offer to Dedicate applicable to this very case [Exhibit #4 to the Staff Report], which include that ". . . any offeree to accept the easement may not abandon it but must instead offer the easement to other public agencies or private associations acceptable to the Executive Director of the Commission . . . ." Further, the Acceptance of the Offer to Dedicate [Exhibit #4 to the Staff Report] provides in Section VII that:

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

The referenced AFA Management Plan [exhibit XX to the Staff Report] provides that:

> *"Should Access for All cease to exist or fail to carry out its responsibilities pursuant to the approved management plan, then all right, title, and interest in the easement shall be vested in the State of California, acting by and through the State Coastal Conservancy, or its successor in interest, or in another public agency or nonprofit organization designated by the State Coastal Conservancy and approved by the Executive Director of the California Coastal Commission. This right of entry is set forth in the Certificate of Acceptance/Certificate of Acknowledgement by which Access for All has agreed to accept the OTD. The foregoing is agreed to by and between Access for All, the California Coastal Commission, and the State Coastal Conservancy."*

The AFA Management Plan and the Acceptance of the Offer to Dedicate by AFA together state that AFA cannot abandon the vertical public access easement, and provide that if it does, as proposed in the Settlement Agreement, then the easement will vest in the State of California, acting by and through the State Coastal Conservancy. Thus, under the terms of the easement AFA agreed to abide by, the ultimate effect of the settlement agreement, or any other failure to carry out the responsibilities of the easement by AFA, will be to return the Ackerberg easement to public ownership via the State Coastal Conservancy, or another similar organization approved by the Executive Director to be an easement holder compliant with the permit and easement. The ultimate result would be the same as is before the Commission in the Cease and Desist Order, except that the public would have been denied public access for an additional period of time.

The AFA Management Plan also provides that "Access for All intends to operate this vertical easement from sunrise to sunset daily, consistent with Los Angeles County beach opening hours, as soon as possible." AFA actions have not been in accord with the management plan it agreed to, as it has instead agreed to terminate the access easement in favor of speculative litigation to open a different access easement. AFA's actions show that it has failed to meet the intent of the Management Plan to open the easement for access as soon as possible, which will be accomplished if the CDO is issued. Note that the Management Plan includes an Amendment provision, allowing amendments if all three signatories agree, however no amendment has been agreed to by the Executive Director of the Coastal Commission, who is one of the signatories. Therefore the actions taken thus far by AFA are clearly not in compliance with the permit condition, OTD, easement or Management Plan they explicitly agreed to. The Commission notes that it is pursuing possible options under the Management Plan, as AFA has demonstrated that it is failing to carry out its responsibilities under the Management Plan.

Overall, the Settlement Agreement contemplates, as one of the possible scenarios, that AFA will apply to terminate the vertical public access easement it holds on the Respondent's property. This would impede public access to the beach, and is inconsistent with the permit, Coastal Act, easement and Management Plan and the legal obligations by undertaken and agreed to by both Respondent and AFA to provide public access at this site.

1) Respondent

Respondent suggests that the judgment in *Access for All v. Ackerberg*, Los Angeles Super. Ct. No. BC405058 ("Judgment"), is a "'win-win' resolution for the public. Pages 1-5 (of Abbitt and Kaufman's July 2, 2009 letter to Chair Neely).

CCC:

Commission Staff ("Staff") issued a Notice of Intent to bring this CDO to the Commission more than two years ago (April, 2007), and Staff has been trying to bring this matter to the Commission ever since, but Staff has been delayed by, among other things, requests for delay by Respondent's prior counsel (granted as a courtesy by Staff), the litigation filed by the neighbor (in which this Commission prevailed at every level of the more than two-years worth of litigation), changes in Respondent's counsel and request for additional time, Respondent's counsel's medical leave and request for additional time, and, finally, requests for postponements to allow Respondent to meet with and negotiate with Staff. Ultimately, AFA filed its lawsuit and apparently colluded with the Ackerbergs to rush to the courthouse to settle their lawsuit in a manner that they could argue would preempt this enforcement action. It is notable that the Commission was not given notice of this purported settlement, either before it was reached, or even after it was reached. More than two weeks elapsed from the time of the settlement being entered into on June 19 and the letter we received on July 3 informing us of its existence. This was despite the fact that the parties were well aware of the pending enforcement action and the fact the matter was being heard at the upcoming CCC hearing in an attempt to resolve the violation, consistent with the permit requirements and the Coastal Act.

The Settlement Agreement doesn't resolve the violation. It just sets up a system through which the violation may be "forgiven" and not deemed a violation at some point in the future, if AFA is successful in getting the County Accessway opened and assuming this Commission is willing to allow abandonment of the subject easement. In addition, even if this Commission were to support the approach proposed in the settlement, it may well take years to get the County accessway opened, if at all, and in the meantime, the public has been waiting for years to use the Ackerberg accessway.

In fact, nothing in their settlement provides a legal assurance that the other accessway would be opened. As discussed more fully in the Staff Report, that accessway is under the control of the County and even Respondent has acknowledged that the County has indicated it does not plan to open that accessway. CCC has been working with the County and will continue to do so but there are no assurances that this access will be opened up. In fact, the County accessway is not the subject of a Commission-issued permit or we would also be addressing that matter in an enforcement case. Even if the County were to open that accessway, it would be complementary to this one and would not supplant the need for access here. Also, since the Commission does not have a permit condition to enforce there, even if opened up, the Commission cannot ensure that it would in fact stay open nor ensure that it provided equivalent public access.

In addition, as more fully discussed in the Staff Report, the County accessway upon which Respondent relies is in fact not superior to the one at issue in this action. In fact, they are

equidistant from a cross walk and both adjacent to PCH which provides convenient access for the public. And although this access way is not currently visible, that is because of the violation at issue here—they have fully blocked the access way with a large and high solid wall. Under the order, access and visibility would be restored, and the accessway would have the standard highly visible coastal access signage. Moreover, this access way is in an excellent geographic location between other available accessways and would contribute significantly to public access opportunities. In addition, this accessway is immediately adjacent to complementary lateral accessways and the County easement does not have adjacent lateral accessways. Finally, the County location is more subject to inundation and would require more complicated improvements to make it workable.

Furthermore, when the Commission made its decision in approving the 1985 CDP for the Ackerbergs' home, pool , and tennis court, the County easement had been recorded (in 1973). The Commission was aware of the existence of the County easement and found that the Ackerberg easement was a better location (citing the similar reasons above). Putting aside all of the above policy considerations, the fact remains that the Commission did require that this specific area on the Ackerberg property be opened to public use. In addition, this is not even a legal defense, as this "defense" does not present any claim, much less evidence, that the elements necessary for the issuance of the Cease and Desist Order, under Coastal Act section 30810, have not been satisfied.

2) Respondent

Respondent alleges that the Judgment resolved the enforcement matter. Pages 1, 3, 6 and Exhibit 5, Page 4 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The Commission was not a party (nor is in privity with AFA) to the case between AFA and Ackerberg; and thus it is not bound by the resolution of that suit, as *res judicata* operates only on parties to the suit and those in privity with parties to the suit (see response to #3, below). The Commission is not in privity with AFA given that AFA sued to enforce its own easement while the Commission serves the public at large. The settlement of the AFA/Ackerberg litigation itself demonstrates the distinct, if not conflicting, interests of AFA and this Commission. Although AFA purportedly has a public-interest mandate, its actions here are not in fact in the public interest nor consistent with the very terms of the public access permit condition nor easement (as more fully discussed herein); thus the Commission has a different set of goals and is not in privity with it.

In addition, California Public Resources Code ("PRC") section 30800 provides that the authorization for citizen suits filed under PRC section 30803 is in addition to any other remedies available at law, thereby including the provisions of 30810 and 30811.

3) Respondent

Respondent argues that the Commission's current administrative proceeding is foreclosed by the Judgment under *res judicata*. (July 2, 2009 Letter to Chair Neely and Commissioners from Respondent's Attorneys, Diane R. Abbitt and Steven H. Kaufmann and in the attached Memorandum, as Exhibit 5).

CCC:

Respondent's allegation that the Commission is barred from enforcing the Coastal Act due to res judicata on the basis of the Settlement Agreement fails for three reasons. First, the Commission is not in privity with AFA and is thus not bound by the first Judgment. Second, the issues in the Settlement Agreement and the issues which the Commission seeks to resolve with the Cease and Desist Order are not identical. Third, Respondent fails to mention the fourth element of res judicata under California law, which prevents the application of res judicata when the public interest requires that the second action be allowed to proceed.

The Commission was not in privity with AFA.
The case relied upon by Respondents to support its claim of privity of parties, *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Assoc.* (1998) 60 Cal. App. 4th 1053, is importantly the reverse of the situation at issue. In *Citizens*, the court held that a public interest group is bound by the terms of a settlement agreement between a coastline property owners' association and federal and state government agencies. The court emphasized the fact that the state agencies were vested by the public with authority to litigate the issue of public access. *Id.* at 1070. Also, the court noted that the public interest group had no direct interest in the dispute that went unrepresented by the agencies in the prior litigation. *Id.* at 1073. Conversely, in the matter at issue, Respondent claims that a state agency should be bound by a settlement between a violator and a public interest group. Yet, this public interest group, Access for All, was not vested by the public with any special authority to litigate public access issues and, more importantly, the Commission here raises legitimate claims (i.e., regarding Respondent's seawall violation, lateral access, and the issue of interim public access) that went unaddressed in the prior litigation.

Moreover, the public interest was clearly not adequately represented by Access for All. The *Citizens* court notes that the nonparty must be adequately represented by the party in the first action, meaning its interests and motives are so similar that the latter was essentially a representative of the former. *Id.* at 1070-71. "If the interests of the parties in question are likely to have been divergent, one does not infer adequate representation and there is no privity." *Id.* at 1071. Here, the interests of the Commission and Access for All are manifestly divergent: Access for All is interested in receiving fees, costs and support for its organization, while the Commission is a public agency that has no motivation to accept fees and penalties in exchange for closing public accessways. Unlike Access for All, the Commission is concerned with remedying Coastal Act violations (hence, leading the Commission to contemplate issuing a cease and desist order); Access for All, on the other hand, has settled according to terms that leave outstanding Coastal Act violations on the Property in exchange for money and other terms rather than ensuring compliance with the permit which is the subject of this proceeding. Access for All is not adequately or justly representing the public interest. Moreover, Access for All's

ownership and management of the easement are subject to the terms of the Offer to Dedicate, the Certificate of Acceptance of the OTD, and of the Management Plan for the easement. Access for All's actions to delay opening of the easement and agree to ultimately abandon the easement exceed its authority under the terms of the OTD, the Certificate of Acceptance, and the Management Plan.

Furthermore, according to the court in *Citizens*, "[t]he circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication. . ." *Id.* (quoting *Victa v. Merle Norman Cosmetics, Inc.*, (1993) 19 Cal. App. 4th 454, 464). The Commission could not reasonably have expected to be bound by the settlement in *Access for All v. Ackerberg*. Although the Commission was aware that AFA had filed a lawsuit against Mrs. Ackerberg and was in contact with Access for All about a number of issues, Staff was never warned of Access for All's intention to settle or an impending settlement. In fact, Staff understood that AFA filed the lawsuit in order to advance the very issue sought at this proceedings: that the Ackerberg permit be complied with and the Ackerberg accessway be opened up. The Commission would never have accepted such a settlement given the strength of the Plaintiff's arguments and had repeatedly informed both counsel for Respondent and AFA of the importance and significance of this accessway. Additionally, given its mandate to ensure maximum public access and to enforce the Coastal Act, the Commission could not reasonably be expected to be bound by an agreement that results in decreased public access and allowance of continuing Coastal Act violations, and is inconsistent with both the Coastal Act policies and the permit issued by the Commission itself.

The issues are not identical.
The application of res judicata requires that the issues resolved in the judgment be the same as the issues raised in the subsequent proceeding. The issues are not identical in this case because the settlement only mentions the vertical access easement on Respondent's property, and because the Settlement failed to actually resolve the Coastal Act violation.

The settlement did not resolve the impediments to the lateral access easement, nor the associated unpermitted development, nor the seawall violation.

Respondent's allegation that the settlement resolves the Coastal Act violations is incorrect for two reasons, first that the Legislature intended that multiple means be used to enforce the Coastal Act, and second because the settlement fails to completely resolve the Coastal Act violation, as detailed below. Respondent asserts that the Legislature's intention that there be multiple means to enforce the Coastal Act means that the use of any one method forecloses the use of the others; however this is incorrect, as the Commission often seeks to resolve an issue administratively first, and then resorts to more formal enforcement action if necessary. More importantly, the settlement does not enforce the Coastal Act. The settlement merely sets up a process through which a Coastal Act violation can be allowed to continue indefinitely, subject only to the possibility of future hypothetical actions by various entities that are not party to the settlement. The Commission can enforce the Coastal Act through its usual remedies, including the issuance of a Cease and Desist Order under PRC Section 30810, and is not barred by res judicata. Therefore since the issues raised in this proceeding by the Commission are substantially different from those issues allegedly resolved in the settlement, res judicata does not operate here.

Protection of the public interest prevents the application of res judicata.
Respondents failed to address or even mention the fourth prong of the res judicata analysis: "Even if these [first three] threshold requirements are established, res judicata will not be applied 'if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.]'" *Citizens*, 60 Cal. App. 4th at 1065 (quoting *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal. 3d 891, 902). The *Citizens* court expressly points out that res judicata was appropriately applied in that case—

> based upon the particular and rather unique circumstances presented to us, that the claims asserted by appellant in the present case were commendably advanced during negotiation and ratification of the settlement agreement . . . Only because we find that the right of public access . . . was considered, litigated and thoroughly protected do we accord binding effect to the settlement agreement in this proceeding despite appellant's lack of direct participation in the prior actions.

Citizens, 60 Cal. App. 4th at 1074. In this matter, it is certainly not in the public interest to foreclose the possibility of the Commission continuing an enforcement action against Respondent. There was no uniquely "commendable" negotiation in the present case. Quite the contrary, Access for All abandoned its duty to the public in settling a strong, promising case in exchange for a settlement which provided them fees and other financial payments. The Commission was deliberately kept in the dark about the settlement agreement, which is now being invoked to prevent the Commission from enforcing the requirements of a Commission-issued permit intended to protect public rights of access to the shoreline. The result is grave loss of public access, which is not only an injustice but also in clear opposition to the public interest. The settlement in *Citizens* is thus not analogous to the settlement of *Access for all v. Ackerberg*.

Moreover, the application of res judicata in *Citizens* was predicated on the nature of the settlement agreement, which "was the product of a reasonable compromise, and does not carry with it even the hint of any abdication of the role of public agent by the parties to the prior litigation." *Id.* at 1072. The facts here are the exact opposite, as AFA has entered into a settlement that would abdicate its role as manager of the Ackerberg easement, in favor of terminating the easement entirely. The application of res judicata here is thus not in the public interest, as public injustice would result as the public would be denied from accessing the beach for an indefinite period of time as a result of the Settlement Agreement.

Res judicata is, of course, important to judicial economy and to protecting defendants from malicious litigation. Here, however, the issue of public access and resolving Coastal Act violations was not resolved justly. Violations remain on Respondent's property and, in the interim until the County accessway is opened (if it is ever opened, which is unlikely and, in any event, not for many years), the public has neither accessway to this stretch of the coast, because the settlement did not open Respondent's easement in the interim. Therefore, unlike the judgment in *Citizens*, this Judgment did not "thoroughly protect" the right of public access. Indeed, the public interest requires that relitigation not be foreclosed, so that the Commission can enforce the public's right to access the coast through the maximum number of accessways – including both the County-owned accessway and the easement on Respondent's property.

4) Respondent

Respondent argues that there was no pre-existing view of the beach or vertical access, and that today, a vertical accessway could not be required because of the absence of a "nexus" under *Nollan*. Page 12, note 5 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The permit and its conditions were issued in 1984 and legally the Respondent had 60 days from permit issuance to challenge the permit. Not only did they not do that, but they accepted and signed the permit and agreed to its terms. The time to challenge the permit ran over 20 years ago and this argument is not legally relevant to this proceeding. Moreover, the Commission, in issuing the original permit fully examined the access issue in light of the new proposed development and concluded that public access was required to make the development overall consistent with the Coastal Act. During the more than twenty years since this permit was issued, the Respondent enjoyed the use of the development which would, but for this accessway, have been inconsistent with the Coastal Act and would not have been permitted.

5) Respondent

Respondent argues that the Judgment is consistent with the Commission's 1985 decision imposing vertical access requirement, as well as the "commitment" the Commission made at that time to Ackerberg—namely, that the Commission would adopt a policy that publicly-owned easements should be opened before those obtained from private property owners. Pages 2-3 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The Judgment is facially contrary to Special Condition 1 of the permit authorizing Respondent to proceed with the requested development. As this permitting condition required the irrevocable offer to dedicate an easement on the *subject* property, and the settlement purports to transfer this requirement to a pre-existing, unopened easement on land not associated with the subject property, it is not an adequate substitute to satisfy the requirements of the permit.

Moreover, the county owned easement referenced in the Judgment was in existence in the same form at the time of the Commission meeting in 1985. At this meeting the Commission considered the necessity of a private easement when a public easement was unopened downcoast. The Commissioners considered this as a factor of whether to adopt staff recommendation requiring an easement and determined that the presence of another potential easement was not dispositive to the inquiry, as this section of Malibu has particularly limited public access to the beach. Additionally, during the hearing Commissioner Hisserich indicated that while he agreed that the general public policy should be to open public prior to privately held easements, he ultimately concurred with the decision to require an easement on the subject property. Commissioner Hisserich affirmed that the vertical easement on the Respondent's property is distinguishable from the easement at 22132 PCH in that the easement on

Respondent's property connects to 279 linear feet of public beach in addition to the section of beach located below the mean high tide line. Thus, there is more room for the public to recreate once they arrive at the beach via the vertical Ackerberg easement. The Judgment includes no compensation for the loss of this connectivity.

6) Respondent

Respondent claims that Commission Staff prepared and issued revised findings, specifically incorporating the changes into the staff report. Respondent further asserts that, although Staff states it cannot locate this document, the document is part of the *Roth* lawsuit record (as evidenced by Bates stamping). Page 13, note 6 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The issue of whether there were revised findings for this matter is a red herring. The Commission, in its discussion clearly felt that even if there were to be some later permit amendment permitted, that this would only be appropriate if three specific preconditions were met, as is discussed elsewhere herein. The Respondent was aware of the analysis predicated on the three preconditions and specifically agreed to them. These conditions have never been met so even if the revised finding had been formally adopted by the Commission or was incorporated by adopted findings, it would not have applied here or given any legal justification for extinguishing this easement. See below for a full discussion of the issue of revised findings here.

7) Respondent

Respondent argues that the amending motion to accept applicant's requested modification to the vertical access condition was withdrawn in favor of Staff's suggestion of revised findings. Respondent alleges that revised findings were specifically adopted requiring the opening of public easements prior to private easements. Page 12 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

At the January 24, 1985 Commission meeting, several commissioners discussed adding language to the findings addressing a possible procedure to allow for extinguishing pending offers-to-dedicate accessways across private property if other nearby, adequate, publicly owned accessways are opened first. Then-Assistant Executive Director Peter Douglas stated that he would have such a statement added to the findings. Most of the commissioners' comments regarding changes to the findings were not explicit about whether the findings would be brought back to the Commission for a formal vote at a subsequent meeting, though the Chair did state at the conclusion of Commission deliberations that he expected the findings would be brought back to the Commission. The meeting minutes also indicate that revised findings would be brought back to the Commission. It does not appear that revised findings were ever brought back to the Commission for formal action, though the recorded OTD does include an insert that is

characterized as an addition to the findings and that is consistent with the Commission's deliberations. Of course, Mrs. Ackerberg could have objected at the time if she felt that Commission staff was handling the findings inappropriately. The Commission does not have any evidence that she did.

In any event, the Commission's regulations do not require the Commission to vote on revised findings unless the Commission action was substantially different than the staff recommendation. See 14 CCR section 13096(b). In this instance, the Commission's action was consistent with the staff recommendation.

At the January 24, 1985 Commission meeting where the underlying coastal permit was conditionally approved, the Commission explicitly considered an amending motion that would provide for the extinguishment of this offer to dedicate an easement upon the opening of adjacent access points within 500 ft. While this proposed amendment was extensively discussed by the Commissioners, ultimately, the seconder of the amending motion withdrew his second and the amending motion died for lack of a second. Commissioner Wright seconded this motion "to get it before the Commission, but I won't be able to support it" (25), he later withdrew the second after generating discussion on the topic.

Additionally, Commissioner Wright, who seconded the motion to amend, rather than echoing the proposed amendment, expounded the need for a system for extinguishing easements that were not picked up in cases where there is a plan to develop access (28). He contemplated a much higher threshold for the extinguishment of an easement, specifically, that there is an access plan in place that does not require the easement in question, and that the easement has not been picked up. He subsequently summarized, stating, "I could continue to support the amendment, if the extinguishment occurred after the development of the pending Los Angeles County LUP for the Santa Monica Mountains], and determined that this was not needed....and then if this accessway was needed, in terms of completing the [pending Los Angeles County LUP for the Santa Monica Mountains], then I would like to leave that option open." (30-31). Commissioner Wright further specified that what he supported was in fact a "prioritization" of opening public before private easements. Thus, the possibility of automatically extinguishing an easement upon the opening of another in the same vicinity was not even contemplated by one of the only two proponents of the amendment.

Then-Assistant Executive Director Douglas indicated his preference that this type of decision be made as a general policy decision, not on an individual basis, responding to the discussion regarding amending the permit by stating, "[w]hat you are saying, basically, is that the priority should be to develop publicly owned accessways before these private offers of dedications are, in fact, implemented, activated, and developed. And, that is a policy question that I think is appropriate for the LUP, and could be incorporated here in the finding, as a policy that you have taken, as opposed to a condition." (34). Ultimately, the Commissioners voted unanimously to grant the permit as recommended and to add an additional finding effectively summarizing the Commission's position that, in general, publicly owned accessways should be prioritized to be opened before privately owned access easements. Chairman Nutter agreed that, "…the place ultimately to make our policies stand, I think, is in the context of [pending Los Angeles County LUP for the Santa Monica Mountains] LCP." (44).

On the question of whether to include additional findings, Assistant Executive Director Douglas agreed that he would, "put this discussion in the findings", stating further that it was in fact the general policy of the access program to develop public access points first. Thus the Commissioners determined that an individual permit application was am inappropriate venue to address large access policy questions. Therefore, while this was indeed expressed as the general policy of the Commission, the Commissioners nonetheless also determined that the offer to dedicate and open an easement on the Ackerberg's property for public use was a necessary condition to finding the proposed project consistent with the Coastal Act.

8) Respondent

Respondent argues that the Commission clearly did not adopt the staff report prepared for the original Ackerberg permit (Staff Report, Exhibit 5), and that the transcript of hearing "is rife with instruction to Staff to prepare revised findings." Respondent further argues that the Commission's suggestion that revised findings were never adopted is unbelievable, and claims that the Commission is legally required to adopt findings. Pages 11-12, note 4 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

As discussed above, after rather extensive discussion, the proponent of the amendment, Commissioner Mc Innis settled on asking the staff to, "say they would be willing to put some pretty nice—I think they are pretty nice—words into the findings, at least." Assistant Executive Director Peter Douglas agreed that to put in language, "consistent with the discussion that we've held here…I think the general policy there is one that we have held before, and this way it would become a know, conscious decision of the Commission."

Additionally, Respondents are correct in asserting that the Commission is legally required to adopt findings. Here, however, the Commission acted pursuant to the staff recommendation. In the absence of explicit direction by the Commission, the staff report became the Commission's findings. In any event, the permit and conditions are legally enforceable and even if Respondent's point were accurate, as discussed herein, and the additional language is included, it sets forth the three preconditions which have not been met.

9) Respondent

Respondent alleges that the Commission's revised findings allow for the extinguishment of the easement. Additionally, Respondent asserts that she did not challenge the condition on reliance on CCC's commitment that they would at least have a fair opportunity to extinguish the vertical access condition. Page 12, note 5 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

Under the terms of the additional findings language included in the OTD, the easement has not been extinguished. The proposed additional findings specified three conditions requisite to the Commission considering a request by the Respondent to extinguish the easement. The findings that Mr. Reeser requested be added to the original Commission findings delineated these conditions, stating, "[t]his position assumes that the publicly owned accessway is within 500 feet of the subject property, that it is equally suitable for public use based on management and safety concerns, and that improvements to accomplish public use are feasible. Once a public accessway has been improved and opened for public use, and a suitable policy and mechanism has been developed and adopted to ensure that such a vertical accessway remains open and available for public use and assuming the Commission has approved a policy that outstanding offers to dedicate additional vertical access easements within 500 feet of an opened vertical accessway can then be extinguished, staff will initiate actions to notify affected property owners that they can take steps to extinguish such offers to dedicate." (Letter from Ed Reeser to Gary Gleason, February 12, 1985).

The first condition was that the Commission approve a policy that outstanding offers to dedicate additional vertical access easements within 500 feet of an opened vertical accessway can be extinguished. The second condition was that a public accessway be improved and opened for public use. Lastly, the informal findings required the development of a "suitable" policy and mechanism to ensure that such a vertical accessway remains open and available for public use. These conditions have not been met as the Commission did not ultimately approve a policy allowing for the extinguishment of outstanding offers to dedicate easements, nor did the Commission develop a policy or mechanism which could insure that other already open and publicly used accessways would remain open for public use. Lastly, to date and for the foreseeable future there are no improved and open accessways available within 500 ft of the Respondent's property. Therefore none of the prerequisites listed in the extra findings for the permit have been met and thus the easement is not qualified for extinguishment consideration.

Finally, Respondent's failure to challenge the conditions of the permit allegedly based on reliance on the possibility of eventual extinguishment of the easement is not a persuasive rationale for violating the terms of the permit now. If the downcoast public access is as viable and beneficial to the public as Respondent claims, Respondent may apply for a permit amendment under Section 13166 of the Coastal Act Regulations. Though Respondent has yet to take advantage of the amending process, Respondent is free to apply for such an amendment at any point.

10) Respondent

Respondent claims that in December 2008, Ms. Abbitt twice requested that staff provide a copy of file for approval of the Trueblood seawall, CDP No. 5-83-360. Page 9, footnote 3 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

While it is true that Respondent requested documents at the end of a telephone conversation, staff indicated to Ms. Abbitt that she would be required to coordinate with and pay for a copying service to reproduce the large scale plans (since Commission staff offices do not have the ability to reproduce such large documents). Ms. Abbitt failed to follow up on this, did not coordinate with a copying service and did not pay for the plans to be reproduced.

11) Respondent

Respondent alleges that the rock riprap in front of the bulkhead and within the lateral access easement is not a violation of the 1983 CDP or unpermitted under the Coastal Act. Pages 9-10 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

While this was discussed in the staff report for this matter (at pgs. 32, 38-41), it is clear that the Commission findings for the permit include specific measurements of the bulkhead, including the diameter of the rocks to be used, attached as Exhibit 3. The riprap at issue in this matter was not approved under the 1983 permit or any other permit, exceeds the approved specifications in the 1983 permit, and lies within the lateral access easement that the Commission required to bring the bulkhead into compliance with the Coastal Act. Thus, its placement constitutes unpermitted development and/or development inconsistent with an existing permit, either of which constitutes a violation of the Coastal Act and authorizes the Commission to issue this Cease and Desist Order. Furthermore, the Commission required the lateral easement to mitigate for the shoreline impacts that could result from the bulkhead and specifically required the offer to dedicate the easement to prohibit interference with public use. The riprap extends into the easement, thus taking up public beach and extending the scouring effects from wave uprush of the bulkhead into the seaward extent of the easement area. Mrs. Ackerberg has provided no evidence that the rocks were preexisting. The Commission approved the 1983 permit for the bulkhead according to the schematic attached to the findings as Exhibit 3. The schematic states that immediately seaward of the bulkhead, boulders were to be "replaced with rock and gravel waste mix," the diameter of which was not to exceed 1 foot in diameter.

12) Respondent

Respondent claims that during 1985 hearing, the Commission noted the superiority of county accessway (as evidenced by its policy adoption). Page 17 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

First, the Commission did not adopt policy in its approval of the Ackerberg CDP. In fact, they chose to specifically avoid such a policy decision by stating that such broader public access

issues should be addressed in a future LCP. There was a general sense during the Commission's deliberations that public accessways should be opened first, but only in order to minimize the burden on private parties, not because public accessways are somehow inherently superior.

13) Respondent

Respondent claims that even absent the Judgment, the current CDO proceeding is premature because it seeks "removal" of development in the easement area and no permit has been sought/authorized for the development of the vertical easement. Page 19 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely).

CCC:

Once a public access easement exists, it is not premature to demand that it not be obstructed. Given that the obstruction must be removed prior to construction of improvements, it makes sense to proceed with the order first.

14) Respondent

Respondent asserts that the Commission approved development in the easement area until the easement is "picked up and used" and that plans submitted for the Ackerberg development reflected that the development would extend to the property line and items such as a perimeter block wall, fences, railing, and landscaping would be erected in the easement. Page 20 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The Commission did not approve any development in the easement area. If easement holders had to wait until they were actually using it before Ackerberg would have to remove her encroachments, it would never open.

In addition, none of the items listed in Ackerberg's assertion were depicted on the Commission approved, final plans. Even Mrs. Ackerberg, through her legal counsel at the time and subsequent to, the 1985 Commission hearing acknowledged that any legal improvements made in the easement areas were to be temporary, and removed once the easement areas accepted (as more fully discussed on pages 34-35 of the staff report for this matter).

15) Respondent

Respondent raises a due process question with regards to the fact that the Attorney General sits right next to, and advises the Chair of the Commission, and may discuss the matter at issue with the Commissioners in closed session, citing *Nightlife Partners, Ltd. V. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 92. Page 22 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

The Attorney General ("AG") referred to here by Respondent is not an advocate on either side of this matter. The AG sits with the Commission as its neutral advisor. In this case, the AG has not advised staff regarding its recommendation and is not advocating on behalf of the staff recommendation. "In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal. 4th 731, 741. Respondent has failed to demonstrate actual bias from the mere fact that the AG serves as the Commission's legal advisor, failing to meet the standard of *Morongo Band*.

16) Respondent

Respondent argues that "considerable evidence available to, or submitted to, Staff has not been presented to the Commission. This includes: the transcript from the 1985 hearing; correspondence concerning the 1985 hearing; the 1985 'revised findings'; and exhibits attached to Ms. Abbitt's October 21 letter to demonstrate that there is no seawall violation." Page 23 (of Abbitt and Kaufman's July 2, 2009 to Chair Neely)

CCC:

In fact, Commission staff did not have the transcript until receipt of the July 2 Abbitt and Kaufmann letter, 5 days before the hearing, as Ms. Abbitt and Mr. Kaufmann concede elsewhere in their letter. Id. at 11. Commission staff did not even know that a transcript existed until receiving the Abbitt and Kaufmann letter. It was prepared in conjunction with litigation in which Mr. Kaufmann was involved, but he failed to provide a copy to the Commission until 5 days prior to the hearing. In any event, the quotes of the 1985 hearing, which Commission staff prepared by listening to the hearing tapes, are confirmed by the hearing transcript provided by the Respondent.