COASTAL CONSERVANCY

Staff Recommendation
September 22, 2011

ACKERBERG PUBLIC ACCESS EASEMENT HELD BY AFA: INVOLUNTARY TRANSFER

Project Manager: Joan Cardellino
Staff Counsel: Jack Judkins

RECOMMENDED ACTION: Determination that Access for All has failed in its obligation to properly manage an easement over the Ackerberg property for public access to the shoreline and authorization for the Conservancy to accept the easement or designate another entity to accept the easement.

LOCATION: 22486 Pacific Coast Highway Malibu, CA

PROGRAM CATEGORY: Public Access

EXHIBITS

Exhibit 1: Ackerberg Easement Location

Exhibit 2: Outrigger Accessway Location

Exhibit 3: Map of Area: Public Lateral Accessways

Exhibit 4: Settlement Agreement

Exhibit 5: Judgment in *Access for All v. Lisette Ackerberg Trust, et al.*

Exhibit 6: Certificate of Acceptance

Exhibit 7: Ackerberg Offer to Dedicate (OTD)

Exhibit 8: Management Plan for Easement

Exhibit 9: October 27, 2005 Conservancy Staff Recommendation

Exhibit 10: Declaration of Sam Schuchat

Exhibit 11: Declaration of Peter Douglas

Exhibit 12: Declaration of Aaron McLendon

Exhibit 13: AFA Executive Director's Letter to Conservancy's Executive Officer

Exhibit 14: AFA Attorney's written defense of AFA's actions

Exhibit 15: AFA and SCC agreement continuing 2-10 public hearing

Exhibit 16: Minute Order, *Ackerberg v. Commission*

Exhibit 17: Trial Court Decision, *Ackerberg v. Commission*

RESOLUTION AND FINDINGS:

Staff recommends that the State Coastal Conservancy adopt the following resolution pursuant to Sections 31400 et seq. of the Public Resources Code and pursuant to the Certificate of Acceptance ("Acceptance") recorded on December 17, 2003, as Instrument No. 03-3801416 in the official records of Los Angeles County, California:

"The State Coastal Conservancy hereby directs its Executive Officer to take all necessary steps to vest in the State of California (acting by and through the Conservancy), or alternatively or subsequently, in another qualified entity designated by the Executive Officer and acceptable to the Executive Director of the California Coastal Commission, the public access easement (the 'Easement') created by recordation of a Certificate of Acceptance (the 'Acceptance') recorded on December 17, 2003, as Instrument No. 03-3801416 in the official records of Los Angeles County" and held by Access for All ('AFA')."

Staff further recommends that the Conservancy adopt the following findings:

"Based on the accompanying staff report and attached exhibits and on such other evidence that has been presented at the public hearing, the State Coastal Conservancy hereby finds that:

1. AFA has failed to carry out its responsibilities to manage the vertical public access easement (the Easement) created by the Acceptance in a manner consistent with the Acceptance and with the agreed-upon management plan for the Easement.
2. Specifically, AFA entered into a settlement (attached to the accompanying staff recommendation as Exhibit 4) of *Access for All v. Lisette Ackerberg Trust, et al.*, Los Angeles Superior Court No. BC405058, with the owner ("Ackerberg") of the property on which the Easement is located and permitted entry of a judgment (attached to the accompanying staff recommendation as Exhibit 5) based on that settlement which impair and adversely affect the public interest in the Easement by:
   a. Allowing significant delay in any development and opening of the Easement, without any assurance that encroachments to the Easement will ever be removed and without any other tangible benefit to the public access to be provided by the Easement.
   b. Failing to allow the Conservancy (and the California Coastal Commission, the "Commission") involvement in the design of the accessway or in decisions potentially affecting the viability of the Easement.
   c. Creating the factual circumstances that may lead to a joint application to the Commission for the extinguishment of the Easement and that will allow Ackerberg to argue that the Easement should be extinguished.
   d. Creating the potential for the judgment in the Ackerberg litigation to bar any Commission enforcement action or any other attempt to remove encroachments on the Easement or to develop and open the Easement.
   e. Creating the potential inability of any party to force Ackerberg to remove encroachments, to implement the Easement improvements, and to open the Easement if separate litigation, *Access for All v. County of Los Angeles, et al.*, Los Angeles Superior Court No. BC41670, required by the Ackerberg settlement and judgment and regarding another access easement, is successful.

3. The proposed authorization is consistent with the purposes and objectives of Chapter 9 of Division 21 of the Public Resources Code, regarding the provision of public access to and along the coast.

DISCUSSION:

Conservancy staff recommends that the Conservancy act to divest Access for All (AFA), a nonprofit organization, of its interest in an easement (Easement, shown on Exhibit 1) created by acceptance of an offer to dedicate required under the Coastal Act. In its simplest form, the basis for this recommendation is that AFA agreed to a written settlement (Settlement, Exhibit 4) and stipulated trial court judgment (Judgment, Exhibit 5) that relinquished or impaired certain rights in an important public access easement in Malibu, contrary to the terms under which AFA accepted the Easement and contrary to its Management Agreement with the Conservancy and the California Coastal Commission (Commission). The Judgment was entered on June 19, 2009 in the case of *Access for All v. Lisette Ackerberg Trust, et al.*, Los Angeles Superior Court No. BC405058 (AFA-Ackerberg litigation). The Easement provides that the Conservancy may take title to the Easement or designate another qualified entity to take title, if AFA ceases to exist or if it fails to carry out its management obligations.

History of this Proceeding

In December 2009, in light of the events described below, Conservancy staff determined that it should request that the Conservancy hold a public hearing to determine whether to divest AFA of its interest in the Easement. Accordingly, Conservancy staff prepared a staff recommendation and placed the matter on the Agenda for hearing by the Conservancy at its public meeting of February 4, 2010. Notice of the hearing was provided to AFA a month before the hearing date. On receipt of the notice, AFA's representative contacted Conservancy staff and an agreed settlement was eventually reached and approved by the Conservancy (Exhibit 12). Under that agreement, AFA agreed to voluntarily assign its interest in the Easement if the AFA-Ackerberg litigation and other litigation related to the Easement was settled by and among the Conservancy, the Commission, AFA and the owner of the property on which the Easement is located (Ackerberg). In return, the Conservancy agreed to postpone the public hearing unless and until the Conservancy determined that settlement of the litigation was unlikely or that AFA was not negotiating in good faith.

Since February 2010, there has been very little movement towards settlement of the litigation related to the Easement. To the contrary, Ackerberg and AFA have jointly and vigorously defended against the efforts of the Commission and Conservancy, through the pending litigation, to enforce and preserve the Easement and to remove encroachments on the Ackerberg property that stand in the way of development of the Easement. In June 2010, after verbal discussions with Ackerberg's representatives, the Commission submitted a formal settlement proposal to Ackerberg, designed to provide a basis for resolution of all of the litigation. There was no response to that proposal from Ackerberg in the ensuing 12 months. In light of this, the Conservancy, through its Executive Officer, determined in May 2011 that settlement was unlikely and began preparation to place this matter back on the Agenda of the Conservancy, as allowed for by paragraph 2.3 of the Conservancy's agreement with AFA (Exhibit 12).

On June 8, 2011, Ackerberg's attorney submitted a new settlement proposal, with no reference to the previous Commission proposal. This settlement proposal has been provided to the Conservancy board members along with a confidential and privileged analysis of it by the Conservancy's counsel. The terms and timing of the proposal are such that the Executive Officer continues to believe settlement of the Easement litigation is unlikely. Thus, the public hearing to determine whether to divest AFA of its interest that was postponed from February 2010 was initially placed on the agenda for the Conservancy's July 21, 2011 regular meeting. It was continued to the September Conservancy meeting, at the request of AFA, so that AFA would have time to secure substitute counsel to replace its previous attorney who had withdrawn from representation of AFA shortly before the July meeting.

Background

AFA obtained the Easement and associated rights through the recording of a "Certificate of Acceptance" (Acceptance, Exhibit 6) on December 17, 2003. By recording the Acceptance, AFA accepted an Offer to Dedicate (OTD, Exhibit 7) that the Coastal Commission had imposed in 1985 in issuing a coastal development permit to Ackerberg. Ackerberg holds fee title to the property that is burdened by the Easement.

The Commission and the Conservancy each play a role in the acceptance by a nonprofit organization of an offer to dedicate a public accessway, when that offer has been required as a condition of a Coastal Act development permit. Typically, the Commission approves the qualifications of any such nonprofit organization and the Conservancy, on behalf of the State and the public, retains a future interest in the easement, in the event that that nonprofit organization ceases to exist or fails to manage and operate the easement for public access. In order to establish more precise terms and conditions under which the nonprofit organization manages and operates the easement, the Commission, Conservancy and the nonprofit organization enter into a management plan, to which all parties agree.

The acceptance by AFA of the Easement followed this process. Accordingly, by the terms of the Acceptance, the Conservancy and Commission broadly required AFA to manage the Easement "for the purpose of allowing public pedestrian access to the shoreline." More precisely, the Acceptance requires AFA to carry out this obligation through compliance with a "Public Vertical Access Easement Management Plan" which the parties signed on July 28, 2003 (Management Plan, Exhibit 8). The Management Plan requires several steps by AFA in managing the Easement after acceptance: 1) to survey, identify and report to the Commission any encroachments within the easement; 2) once the encroachments are resolved, to work with Ackerberg to develop a design for the accessway improvements and, subject to Conservancy and Commission approval of the design, to subsequently implement those improvements; and 3) to open, manage and operate the improved easement for public access from sunrise to sunset. The Management Plan expressly prohibits any revision of these requirements without consent of all three parties – AFA, the Commission and the Conservancy. Under the Acceptance, if AFA ceases to exist or if it fails to carry out its management obligations, title to the easement automatically vests in the Conservancy or, in another entity designated by the Executive Officer of the Conservancy. The vesting of title in the Conservancy or designated entity can only occur after the Conservancy has held a public meeting and made the finding that a condition triggering vesting has occurred (Exhibit 7, numbered pages 3-4). The Management Plan contains a similar, agreed provision (Exhibit 8, page 3, under the heading "Agreement").

Description of Easement and Easement Setting

The Easement is a "vertical" easement ten feet in width, which extends across the entire eastern boundary of the Ackerberg property and allows for public access from Pacific Coast Highway ("PCH") to Carbon Beach in Malibu. The Easement directly connects to 280 linear feet of public beach. (See Exhibit 1, depiction of the Easement and Exhibit 3, depiction of the area and the beach lateral public accessways in and around the Easement). At the shoreline, the Easement adjoins a lateral public access easement extending the length of Carbon Beach along the Ackerberg property. This lateral beach easement is held by the State Lands Commission and is 148.3 feet in length. The State Lands Commission also holds an adjacent public access beach easement, located directly west of the easement that it owns on the Ackerberg property. The beach easement is 61.7 linear feet in length. In addition, on the 70-foot-long parcel immediately to the east of the Ackerberg property, there is a recorded deed restriction dedicating lateral public access along Carbon Beach.

To date, the Easement has not been opened to the public, nor are any public access improvements in place. At present, certain encroachments constructed by the property owner, Ackerberg, prevent the opening and development of the Easement, including: a wall along PCH that blocks access to the easement, and assorted other improvements (generator and associated concrete slab, fence, railing, planter, light posts, and landscaping) within the Easement.

A second, dedicated public accessway (the "Outrigger Accessway") provides potential vertical access from PCH to Carbon Beach (See Exhibit 2, depiction of Outrigger Accessway). However, this accessway is also undeveloped. The Outrigger Accessway is approximately 675 feet to the east of the Easement on the Ackerberg property (Exhibit 2). The Outrigger Accessway is located on private property developed with condominiums and owned by the Malibu Outrigger Homeowners' Association and/or owners of condominiums at that development. The Outriggers Accessway is currently held by the County of Los Angeles. It does not adjoin any public beach or public lateral easement above the mean high tide line.

AFA's Management of the Easement

At its October 27, 2005 meeting, the Conservancy authorized the disbursement of up to $70,000 to AFA (See October 27, 2005 staff recommendation, Exhibit 9), to assist AFA in undertaking its initial obligation under the Management Plan for the Easement: to survey, identify and report to the Commission any encroachments within the Easement. Under the grant, AFA surveyed the Easement and found several encroachments, including a wall along PCH that blocks access to the Easement, and assorted other improvements (generator and associated concrete slab, fence, railing, planter, light posts, and landscaping) within the Easement. AFA reported these findings to the Commission, which, in April 2007, initiated an administrative enforcement action against Ackerberg to remove the encroachments on the Easement as well as encroachments affecting the lateral beach easement. Unbeknownst to the Conservancy staff, in January 2009, AFA also independently initiated its lawsuit against Ackerberg (the AFA-Ackerberg litigation), ostensibly seeking to remedy these very same encroachments, under a provision of the Coastal Act (Public Resources Code Section 30820) which allows for private enforcement of violations of the Coastal Act.

For various reasons, including Ackerberg's own repeated requests for continuances, the Commission's hearing on its administrative enforcement action did not occur until July 8, 2009.

Prior to the hearing, on July 3, 2009, Ackerberg's attorneys submitted a package of materials to the Commission, including a lengthy letter, presenting Ackerberg arguments in opposition to the proposed enforcement by the Commission. Included in that package was a "Judgment Pursuant to Stipulation" (the "Judgment," Exhibit 5) – a judgment based on a settlement agreement (the "Settlement," Exhibit 4) – that had been entered in the AFA–Ackerberg litigation and purported to resolve that litigation.

On July 6, 2009, Commission staff provided to Conservancy staff a copy of the Judgment and the other materials Ackerberg had submitted to the Commission. This was the first that any Conservancy staff person was aware that AFA had initiated its litigation against Ackerberg and that the litigation had been concluded without any direct consultation with the Conservancy staff. See Exhibit 10, Declaration of Sam Schuchat.[1] Despite the Conservancy's direct interest in the Easement and despite the Conservancy's ongoing relationship with AFA through grants that the Conservancy had continued to provide for management of other easements, AFA had never consulted with the Conservancy about the terms of the Settlement that became the basis for the stipulated Judgment.

Although AFA did not give Conservancy staff an opportunity to consider the proposed settlement by AFA, Conservancy staff did have an opportunity in the past to consider and reject a proposal similar to the one that now has taken form in the Settlement and Judgment. In January of 2009, the Executive Officer of the Conservancy was approached through an intermediary to arrange a meeting between Ackerberg's attorney and Conservancy staff. At that meeting Ackerberg's attorney raised the possibility of having Ackerberg pay for the development, opening and maintenance and operation of the Outrigger Accessway (held by Los Angeles County) in exchange for the extinguishment of the Easement. The Executive Officer rejected that proposal, noting the long-standing policy of the Commission and Conservancy, embedded in legislation, to enhance and improve access to the coast, rather than to trade one possible accessway for another. See Exhibit 10.

Conservancy staff does not know whether Ackerberg's attorney ever conveyed the Executive Officer's rejection and the reasons for it to AFA. However, it is clear that AFA got that exact message in a very direct and unambiguous way two weeks before AFA entered into the Settlement and Judgment. On June 4, 2009, Commission staff and its Executive Director, Peter Douglas, met with AFA's Executive Director, Steve Hoye, and AFA's attorney. In that meeting, Mr. Douglas and Commission staff made it clear that they would never agree to exchanging the Easement for another public access easement or allow Ackerberg to pay her way out of opening the Easement. Mr. Hoye assured Commission staff that there was no deal to settle the matter on those or other terms. (See Declarations of Peter Douglas and Aaron McLendon, attached as Exhibits 10 and 11).[2] Despite this assurance, a mere two weeks later AFA and Ackerberg entered into just such a deal – the Settlement, which was entered as the Judgment on June 19, 2009.

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[1] This declaration was submitted in connection with the Commission and Conservancy motion to intervene and to vacate the Judgment in the case between AFA and Ackerberg, in which the Judgment was entered. That motion was heard on June 22, 2010 but the judge stayed any decision on the motion until the case of *Ackerberg v. Commission and Conservancy* is resolved.

[2] These declarations were also submitted in connection with the Commission and Conservancy motion to intervene and to vacate the Judgment in the case between AFA and Ackerberg – see footnote 1.

The Terms of the Settlement and Judgment

The Settlement and Judgment in the AFA-Ackerberg litigation contain a number of provisions that have the potential to adversely affect, impair or terminate the Easement and thus frustrate the purpose of the OTD and the terms of AFA's Acceptance – to develop and provide public access across the Ackerberg property to the shoreline. The Settlement and Judgment also confer benefits on AFA and its attorneys, while failing to further the public interest in prompt development and opening of the Easement. The terms of the Settlement and Judgment are as follows:

1. The Settlement and Judgment each expressly provide that their terms fully resolve the litigation and all issues relating to the claims made in the underlying litigation, including allegations that Ackerberg has unlawfully placed encroachments on and prevented the development and opening of the Easement.

2. The Judgment provides for the payment of over $10,000 to AFA's attorneys for fees incurred in the AFA-Ackerberg litigation.

3. Rather than requiring Ackerberg to promptly remove any encroachments and permit the development and opening of the *Easement*, the Settlement and Judgment require that AFA immediately initiate litigation against the County of Los Angeles and a private property owner seeking to remove encroachments on and force the opening of another remote accessway - the *Outrigger Accessway* - which is located some distance from the Ackerberg property and which, like the Easement, crosses privately-owned property. (Consistent with the terms of the Judgment, the Outrigger Accessway lawsuit was filed seven days after the Judgment in the AFA-Ackerberg litigation was signed on June 19, 2009.)

4. Under the terms of the Judgment, Ackerberg and her attorneys will participate with AFA and its attorneys in the Outrigger Accessway litigation, Ackerberg's attorneys will control the litigation (extending to decisions as to when or whether to conclude it), and Ackerberg will pay all costs of the litigation, including the fees of AFA's attorneys. Ackerberg will fund the Outrigger litigation through final judgment or settlement and through any subsequent appeal.

5. The Judgment requires that if the Outrigger Accessway litigation is successful in removing barriers to the opening of the Outrigger Accessway, AFA must next apply for a coastal development permit to develop and improve the Outrigger Accessway. If the permit is issued, AFA must undertake the development and improvement of the Outrigger Accessway. In this event, Ackerberg has also agreed to pay for AFA's costs in developing and improving the Outrigger Accessway.

6. Finally, under the Judgment, once the Outrigger Accessway has been successfully opened and developed, AFA will jointly apply with Ackerberg to the Commission to terminate or extinguish the Easement (presumably on the theory that the existence of an opened Outrigger Accessway forecloses any need for the Easement – see discussion below).

7. After the opening of the Outrigger Accessway, if it occurs, AFA will receive $125,000 from Ackerberg for maintenance and management of the Outrigger Accessway. In addition, at some unspecified time, pursuant to a contemplated future "written agreement to be entered into between AFA and the Conservancy," Ackerberg would also pay an additional $125,000 to the Conservancy for funding the Commission's "public access and enforcement program." If the Commission elects not to accept this funding, then Ackerberg is required to pay the $125,000 to AFA for additional management and maintenance of the Outrigger Accessway.

8. Under the Settlement and Judgment, only if the AFA Outrigger action against the County is unsuccessful (i.e., the Outrigger Accessway was not developed and opened as a result of the litigation) would AFA and Ackerberg then seek to design, improve and open the Easement, subject to the design restrictions and requirements specified in the Judgment (which arguably benefit Ackerberg rather than the public). Ackerberg would pay only for any improvements that Ackerberg desired (such as "security measures acceptable to Ackerberg"), but not otherwise called for under the Management Plan.

9. Finally, the provisions of the Settlement and Judgment purport to run with the land and to bind successors in interest to AFA and Ackerberg. One can assume that such provisions were included to enable Ackerberg and AFA to assert that any subsequent owner of the Ackerberg property and any successor to AFA are bound by the terms of the Settlement and the Judgment.

Analysis

The Effects of the Settlement and Judgment. Conservancy staff has concluded that the Settlement and Judgment, in several distinct ways, directly impair the Easement and defeat the public interest in expeditiously developing and opening the Easement.

First, if enforceable, at a minimum the Judgment precludes any improvement or development of the Easement by AFA or any successor to AFA until a final conclusion is reached in the Outrigger Accessway litigation. That could be very far into the future. Under the stipulated Judgment, Ackerberg's attorneys control such litigation even though AFA attorneys are jointly prosecuting it (and being paid to do so by Ackerberg) and Ackerberg is funding the litigation, theoretically through any level of available appeal. Quite plainly, Ackerberg has no interest in developing and opening the Easement on her property, and, given this control of the Outrigger Accessway litigation, the litigation could extend indefinitely. Indeed, the Outrigger case, now on file for two years and with little accomplished and no trial date or other timeline set, has been put on an indefinite hold by court order until the AFA-Ackerberg litigation is resolved. There is no end in sight at the trial court level, not to mention subsequent appeals.

Second, AFA is required, should such litigation be successful and the Outrigger Accessway is developed and opened, to jointly seek the termination and extinguishment of the Easement. This puts AFA in the entirely inconsistent position of seeking the extinguishment of the very Easement it has committed to developing and opening for the benefit of the public. Moreover, even if the Commission rejects such an application, nothing in the Settlement and Judgment requires Ackerberg to then remove encroachments on and allow the development and opening of the Easement. Under the Settlement and the Judgment, this would only occur if the Outrigger Accessway litigation is *unsuccessful*.

Third, the existence of the Judgment provides an argument that it can be used as a shield against any other attempt to seek the removal of encroachments and opening of the Easement. This is not mere speculation – Ackerberg's attorneys have made and continue to make exactly that claim in connection with the Commission's administrative enforcement action and in the subsequent litigation by which Ackerberg has challenged the Commission's administrative order to remove encroachments and open the Easement (the "Ackerberg v. Commission litigation"). They claim that the Commission's administrative enforcement action was barred by the Judgment in the AFA-Ackerberg case, under the legal theory of *res judicata*. Although the Commission rejected this claim in its administrative proceeding and decided to issue a cease and desist order requiring removal of the encroachments, Ackerberg continues to make that assertion in litigation

challenging the Commission's enforcement action. Moreover, there is little doubt that Ackerberg will continue to do so even more forcefully in any enforcement litigation by a successor to AFA.

Finally, under the terms of the Judgment, even under the most optimistic perspective, even if the Easement is ever designed, the design is dictated by the Judgment and has never been reviewed by Commission or Conservancy staff, as the Acceptance and Management Plan require. This raises a central issue: although the Conservancy retains a future contingent interest in the Easement and is recognized in the Acceptance and Management Plan as a direct participant in AFA's management of the easement, AFA not only failed to seek the Conservancy's input on the Judgment but failed to notify the Conservancy that it had initiated litigation against Ackerberg.

These conclusions are not just those of Conservancy staff. On July 5, 2011, the trial court judge in the Ackerberg v. Commission litigation issued his decision (Exhibits 16 and 17), upholding the Commission's order that Ackerberg remove encroachments and open the Easement for public use. In that decision, the judge made the following statements concerning the Settlement and Judgment and its relationship to the duties of AFA under its acceptance of the Easement and the Management Plan (Exhibit 17, pages 15-16):

> True, the Commission and the Conservancy entered into a Management Plan with AFA. But for some reason, AFA did not perform its duties under the Plan.
>
> "AFA's failure to give the Commission notice of the proposed settlement by itself precludes a finding of privity. It simply did not adequately represent the interests of the Commission and the Conservancy".
>
> "AFA's settlement of the Ackerberg lawsuit is based on a potential exchange of the Ackerberg easement for the Malibu Terrace easement [Outrigger Accessway]. As such, it is directly contrary to the Malibu LCP. It also disregards AFA's contractual duty under the Management Plan to develop, open, and operate the Ackerberg easement. Nothing in the Plan permits AFA to rely on the opening of the County's Malibu Terrace easement [Outrigger Accessway] to avoid its duty. . . . [footnote] The tradeoff for this disregard of policy and contractual duty is that AFA received the financial benefit of $10,500 in attorney's fees, a role for its attorneys in the lawsuit against the County and payment of AFA's attorney's fees, and probable receipt of $125,000 for management of one of the two easements.
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> AFA's failures discussed *supra* demonstrate that, while it was acting in the public interest in filing the Ackerberg lawsuit, it did not act in the public interest in settling the lawsuit. No matter how Ackerberg argues that the Malibu Terrace easement [Outrigger Accessway] is better than hers, the fact is that the public is entitled to both. The judgment is pointed towards eliminating the Ackerberg easement in favor of the Malibu Terrace easement, which is directly contrary to the Malibu LCP. The judgment's finding that the settlement is "in the interests of justice" (AR 640) does not purport to set forth what the public interest is, nor could it without involvement of the Commission and the Conservancy.

In late August 2011, Ackerberg appealed the decision in the Ackerberg v. Commission litigation California Court of Appeal, where it is pending. Thus, the trial court's decision is not a final judicial determination.

AFA's claims. AFA's Executive Director, Steve Hoye, sent a letter dated July 15, 2009 (Exhibit 13) to the Executive Officer of the Conservancy attempting to explain AFA's claim that the settlement provides benefits in the form of funding for the possible opening of the Outrigger Accessway, and that it does not directly or necessarily lead to the extinguishment of the Easement. While this claim may be true in part, it ignores all of the other negative impacts of the Settlement, as detailed above. Moreover, there is no funding required by the Settlement and Judgment that directly benefits the Easement or that furthers its development and eventual opening, which, after all, was the primary responsibility with which AFA was charged under the Acceptance and Management Plan. To the contrary, *at best*, the Settlement and Judgment directly and incontrovertibly delay the development of the Easement and create the considerable and already realized risk that Ackerberg and her attorneys will use the Judgment as ammunition in their battle (to which Ackerberg is, by all past action, fully committed, financially and otherwise) to defeat the long-term viability of the Easement. *At worst*, the Judgment could result in the extinguishment of the very Easement that AFA is charged with protecting, enhancing and opening. Indeed, Steve Hoye admits as much in his letter of July 15, 2009, when he says: "Under our settlement agreement we have initiated a process that will provide *either or both of* these easements will be opened and operated for the public use and enjoyment." Put another way, Mr. Hoye acknowledges that only *one* of the easements may be opened and operated. The next sentence in his letter also indicates what may be the true motivation behind his settlement with Ackerberg – the "private funds guaranteed by the settlement," which will flow to AFA. That, perhaps, justifies to AFA the potential risk of losing one accessway – the very accessway AFA is obligated to develop and open.

On July 24, 2009, AFA's attorney also provided a written defense of AFA's action (Exhibit 14), in response to a letter sent to AFA on behalf of the Conservancy and Commission by the California Attorney General's Office. This letter takes a slightly different tack. First, AFA's attorney asserts that under the Settlement and Judgment AFA does not and is not required to *advocate* the extinguishment of the Easement, if the Outrigger Accessway litigation is successful. The Settlement and Judgment simply requires AFA to jointly *apply* for such extinguishment. This is certainly a possible interpretation of the provisions of the terms of the Settlement agreement underlying the Judgment. At best, the relevant provisions are somewhat ambiguous, and it is unclear whether Ackerberg's attorneys would agree with AFA's interpretation. AFA also argues that it has fully carried out the Management Plan and that the Settlement and Judgment serve to advance implementation and development of the Easement, through ensuring Ackerberg's agreement with the design of the accessway. Along the same lines, AFA also asserts that it is ready and willing to proceed with the development and opening of the Easement at any time. However, what AFA ignores is the fact that the Judgment does not allow that. It only requires Ackerberg to implement the agreed design and remove encroachments *if the Outrigger Accessway litigation is unsuccessful.* If the litigation is successful, Ackerberg has no explicit obligation to remove encroachments, implement the design or allow the opening. Indeed, it is likely that in the absence of such express requirements, Ackerberg will argue that it is not bound to do so and that the issue cannot be reopened by AFA or any successor since the Judgment was intended to resolve all such issues.

One can anticipate that AFA will also argue that it has not violated the terms of the Acceptance and the Management Plan for other reasons. First, AFA may assert that the Settlement and resulting Judgment was in some way compelled by the fact that the OTD requires that the Outrigger Accessway be opened and developed before and in lieu of the Easement. Ackerberg's

attorneys made this same argument in the Commission enforcement proceeding. This argument is based on a "revised finding," added to the Commission staff recommendation as part of the Commission's approval of the 1985 development permit. (The language of the "revised finding" is included in the Commission staff recommendation for the Ackerberg coastal development permit, which, in turn, is part of the OTD, Exhibit 5. The "revised finding" starts at the third from last page of Exhibit 5). That revised finding, while noting that a Commission *policy* favoring the opening of a public accessway within 500 feet of another potential accessway *may* be adopted under a future local coastal plan (LCP), makes clear that it was not intended to condition or restrict the Easement OTD nor require its future extinguishment. Moreover, the subsequently adopted Local Coastal Program did not contain any such policy. Nor, in fact, is the Outrigger Accessway within 500 feet of the Easement. Finally, the Outrigger Accessway, like the Easement, also encumbers private property and, thus, it is hard to fathom why one private party (Ackerberg) should be able to avoid the obligation to provide otherwise required public access across her property, while another (the private owners of the Outrigger Accessway) is required to provide public access simply because the holder of the accessway across the Ackerberg property is a nonprofit entity rather than a public one.

AFA may also assert that the Judgment does not adversely affect Easement rights other than the potential for a short delay in the development of the Easement, pending resolution of the Outrigger Accessway litigation. As noted above, the Outrigger Accessway litigation is not considered complete until any potential appeal is exhausted and, thus, this "short period" could extend to multiple years of delay.

AFA may also argue that the "solution" provided by the Settlement and Judgment was a good one for coastal access generally, potentially trading one public accessway for another with funding provided for the maintenance and operation of the latter for many years. Whether or not this was a good *policy* decision[3] misses the point. AFA's responsibilities are to the long-term viability of the Easement. While AFA (or any other entity or person) is free to advocate, litigate or otherwise strive to open *additional* public access along the coast, (which efforts Conservancy staff would applaud), under the Management Plan and Acceptance AFA had only one charge: to develop and open the Easement. In agreeing to a Settlement Agreement that retarded, rather than advanced, this purpose, AFA has ignored its explicit obligations.

Conclusion

In short, as discussed in detail above, AFA failed in its obligations under the Acceptance and the Management Plan by entering into the Settlement and Judgment, which impair and adversely affect the public interest in the Easement by: 1) significantly delaying any opening and development of the easement, 2) failing to allow Conservancy (and Commission) involvement in the design; 3) creating circumstances that will require AFA and Ackerberg to jointly apply to the Commission for the extinguishment of the Easement and that will allow Ackerberg to argue that the Easement should be extinguished (whether in the application before the Commission or in other litigation); 4) raising the potential that the Judgment will bar any Commission enforcement action (as Ackerberg has argued repeatedly) or any other efforts to remove the encroachments and develop the Easement; and 5) creating the potential inability of any party to force Ackerberg

[3] It goes without saying that the Conservancy and Commission staff emphatically do not agree that it is good policy to trade one public access easement for another, to allow the owner of property across which a public access easement crosses to buy or bully her way out of providing public access, or to otherwise reduce the potential for public access to and along the coast.

to remove encroachments, implement the improvements and open the easement if the Outrigger Accessway litigation is successful.

CONSISTENCY WITH CONSERVANCY'S ENABLING LEGISLATION:

Pursuant to Chapter 9 of Division 21 (Public Resources Code Sections 31400 *et seq.*), the Legislature has conferred on the Conservancy a "principal role in the implementation of a system of public accessways to and along the coast."

In order for the Conservancy to carry out that function, Division 21 has generally provided to the Conservancy broad authority to provide grants and other assistance as necessary to aid local nonprofit and public entities in establishing coastal access (Sections 31400.1 and 31400.2) and to acquire property interests to assure an adequate system of public accessways along the entire coastline (Sections 31402 and 31404). In particular, under Section 31402.3(c), the Conservancy has been charged with oversight with respect to any offer to dedicate public access that has been required by the Coastal Act and that has been accepted by a nonprofit organization. This oversight requires that: 1) the Conservancy review and approve the nonprofit entity's management plan for the accepted accessway; and 2) the Conservancy take a legal interest in the accepted easement in the form of a "right of entry" to reclaim the accessway from the nonprofit entity, if it is determined that the nonprofit entity is not managing or operating the accessway consistent with the management plan (Section 31402.3(c)).

In the current situation, AFA has entered into a Settlement and has allowed the entry of a Judgment inconsistent with the approved Management Plan for the Easement. The Settlement and Judgment have directly threatened the ability of the Conservancy to carry out the intended purposes of the offer to dedicate (i.e., to implement the anticipated coastal access across the Ackerberg property). Under these circumstances, the Conservancy is clearly entitled, and possibly compelled, to exercise its right to divest AFA of the Easement and to vest the Easement either in the Conservancy or in another qualified and willing entity. The proposed resolution allows the Executive Officer to vest the Easement in another entity either initially, or, if that is not possible, then in the future, following an intermediate accession to the interest by the state, under the jurisdiction of the Conservancy.

COMPLIANCE WITH CEQA:

The mere change in ownership of an easement, with no intended change in use or other effect on the environment is exempt from review under CEQA under the CEQA Guidelines, 14 Cal. Code Reg., Section 15061, since there is no possibility that the change in ownership may have a significant effect on the environment.

Further, the proposed change of ownership is also categorically exempt under Section 15325, since it involves a transfer to preserve open space or lands for public park-like purposes.

Finally, at the time the Offer to Dedicate was required as a condition of the Ackerberg coastal development permit, the California Coastal Commission examined the Easement and its use as a public accessway for environmental impacts under a review considered "functionally equivalent" to the review required by CEQA. No additional review is required.

Staff will file a Notice of Exemption if the Conservancy adopts the resolution proposed by this staff recommendation.