

**CALENDAR ITEM
64**

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J. Rader

S. Lehman

CONSIDER A PROPOSED BOUNDARY LINE AGREEMENT THAT WOULD SET THE PERMANENT BOUNDARY BETWEEN SOVEREIGN TIDE AND SUBMERGED LAND AND PRIVATE UPLAND AT THE PROPOSED DESIGN TOE OF A REVETMENT; CONSIDER THE ALTERNATIVE OF A LEASE FOR THE REVETMENT, IN FRONT OF THE SEACLIFF BEACH COLONY, VENTURA COUNTY

Applicant

Seacliff Beach Colony Homeowners Association
5346 Rincon Beach Park Drive
Ventura, CA 93001

Summary

The issue before the Commission involves an existing rock revetment constructed on the Seacliff beach in the 1970s and a current project for its proposed repair. There is a fundamental disagreement of both the applicable facts and law as to whether the site of the revetment is on public lands under the Commission's jurisdiction or private property owned by the Seacliff Beach Colony Homeowners Association ("HOA" or "Applicant"). The HOA has requested that its proposal for a boundary line agreement ("BLA") between the HOA and the California State Lands Commission ("CSLC" or "Commission") be brought before the Commission for consideration. The HOA's proposal is set forth in the letter of September 22, 2010, and is attached as Exhibit B.¹ The proposal, if implemented, would permanently fix the boundary between sovereign tide and submerged lands of the Pacific Ocean and private uplands at the proposed design toe of a project to repair an existing revetment that is located between the

¹ The Applicant incorrectly cites Public Resources Code section 6307(c)(7) as the authority for a boundary line agreement. That citation refers to one of several findings the Commission must or could make when approving a land exchange. Although the Applicant did not raise the possibility of a land exchange in its recent letter, the land at the center of this dispute is ineligible for such an exchange. California Constitution Article X, Section 3 and California Public Resources Code section 6307. The correct section for a boundary line agreement is California Public Resources Code section 6357. The Commission staff proposed a boundary line agreement with the HOA as an option to resolve the boundary dispute, but the proposal, which differed significantly from what the HOA is currently proposing, was rejected by them due to disagreement on the facts and law affecting the location of the proposed boundary.

CALENDAR ITEM NO. 64 (CONT'D)

ocean and the homes of the HOA.² Based on staff's investigation, including the factual evidence showing that the location of the mean high tide line (boundary between upland private lands and state owned tide and submerged lands) just prior to construction of the existing revetment underlies a substantial portion of the existing revetment and proposed revetment repair, Commission, staff recommends that the Commission reject HOA's proposal.

The Applicant's original application, submitted in 2008, was for a lease. A staff report recommending a lease with the HOA for this repair project, which involves the placement of an additional 5,000 tons of rock along 2,040 feet of beach, was placed on the agenda and subsequently pulled from three prior Commission meetings at the request of the HOA.³

Background

The Seacliff Beach Colony residential development ("Colony") was constructed in two phases. The first phase of the development occurred in the 1950s when the upland property owners, represented by Walter Hoffman and other family members (hereafter "Hoffman"), entered into a series of lot leases with individuals that allowed construction of vacation houses on the uplands.⁴ The second phase was constructed in the 1980s following the creation of ten additional lots at the down-coast end of the Hoffman property.

In January 1970, the California Department of Public Works, Division of Highways (now the California Department of Transportation, hereafter "Caltrans") obtained a lease from the Commission (Lease PRC 4402) to construct a 8,800-foot section of Highway 101 on to-be-filled tide and submerged lands up-coast of the Colony, including construction of a six-lane freeway with a "cloverleaf" off-ramp adjacent to the Seacliff Beach Colony. Subsequently, the Commission, Caltrans and the private property owners (including Hoffman) entered into a boundary line agreement (BLA 117) which resolved and fixed the boundary upcoast and included the first six lots of the Colony, allowing the freeway development to proceed.

Survey and Title History and Boundary Analysis

The upland property at this location involves land that was in the federal public domain. In 1870, the United States Coast Survey created a topographic map of the area, Register Number 1189, which depicted the shoreline at that time. The uplands at the subject location were conveyed into private ownership by the

² The Commission, at its December 17, 2009 Meeting (Minute Item 39), directed staff to include a provision in future boundary and title settlement agreements that the Public Trust Easement will continue to move with submergence or when subject to the ebb and flow of the tide.

³ Commission meetings of: October 16, 2008, Item 32; December 3, 2008, Item 28; August 20, 2010, Item 54.

⁴ In 1973, 33 of the 40 lots leased to individuals had mailing addresses other than at the Seacliff Beach Colony.

CALENDAR ITEM NO. 64 (CONT'D)

United States to Robert A. Callis by Homestead Entry Patent, Serial No. 81, dated June 13, 1878. This patent is the base title for the Colony's property.

There were three lots, totaling 156.47 acres, included in that patent. The township surveys for this location (Section 17, Township 3 North, Range 24 West, San Bernardino Meridian) began on February 20, 1871, with the final survey being approved November 9, 1871. That survey, conducted by W. H. Norway in 1871, meandered the high water mark of the Pacific Ocean as reflected on the Official United States Government Plat (Exhibit C).

The first deed for the HOA's property that the CSLC staff has located after the 1878 patent was in 1927. By grant deed dated September 30, 1927, A.L. Hobson deeded a portion of his upland parcel to Grace Smith. The waterward boundary as described in the deed was the "mean high tide line" ("MHTL"). When plotted, the MHTL as described in the deed approximates the southerly extension of the ordinary high water mark per the survey and map ("The Kingsbury Map") approved by the former Surveyor General and then Chief of the Division of State Lands, W. S. Kingsbury in 1930,⁵ discussed below, and the rear lot lines as deeded to the individual homeowners in June 2005. This line varies, but is an average of approximately 12 feet landward of a 1970 MHTL based upon a topographic survey prepared by Caltrans just before the construction of the subject revetment in 1972. Additional background regarding the MHTL is discussed below.

The Kingsbury Map, approved by the Division of State Lands in August 1930, was produced in connection with the issuance of oil and gas permits and leases that were applied for pursuant to the 1921 Tidelands Leasing Act (Chapter 303, Statutes of 1921). The State Surveyor General, W. S. Kingsbury, then a statewide elected official and predecessor to the State Lands Commission,⁶ upon advice from California Attorney General U. S. Webb, refused to issue the leases and permits for tideland oil and gas drilling in this area. The California Supreme Court in the case, *Boone v. Kingsbury* (1928) 206 Cal.148, directed that the permits and leases be issued. Within a month the Legislature and Governor repealed Chapter 303. However, oil and gas leases were granted prior to the repeal of the statute and some are still active leases.

Another survey in this area was performed by a local surveying company, Lewis and Lewis Civil Engineers and Land Surveyors in 1927, likely for oil and gas leasing. This survey extends southerly over the northernmost 22 lots of Seacliff.

⁵ The terms "map" and "survey" are frequently used interchangeably. Technically, a "survey" refers to an actual survey conducted by a surveyor for the purpose of locating points on or near the surface of the earth and is generally documented by field notes or maps.

⁶ Between 1850 and 1929, the Surveyor General was an elected State Constitutional Officer. The Commission is the successor agency of that office and the Division of State Lands. (Chapter 104, Statutes of 1850, Chapter 516, Statutes of 1929; Chapter 948, Statutes of 1941).

CALENDAR ITEM NO. 64 (CONT'D)

This line, referred to as the Ramelli line, based upon field book notes, lies 15 to 50 feet landward of the location of the 1970 MHTL.⁷

In 1933, the U.S Coast and Geodetic Survey prepared a topographic map Register Number 4854 along the coast from Rincon Point to Seacliff. This survey showed a beach of sand and cobblestone with a mean high water line similar to the 1970 MHTL, but fluctuating both landward and waterward at different locations.

Also in 1933, the State of California Department of Public Works Division of Highways prepared a right-of-way map. That map shows the MHTL at the location of the 1927 deed and is located approximately 12 feet landward of the 1970 MHTL.

In April 1953, this area was surveyed by Commission staff. The purpose of the survey was to establish a baseline location to determine whether oil drilling in the Rincon Oil Field was causing subsidence. The Commission approved the survey and directed its recordation.⁸ This survey located the ordinary high water mark at the time of the survey at an average of 45 feet waterward of the 1970 MHTL.

Also in 1953, there was the unrecorded lease map filed with the Ventura County Surveyor's Office as Map No. C-15-1, dated November 26, 1953. The map shows the waterward boundary of the individual lots at substantially the same location as located by Commission staff in April 1953. Like the 1953 CSLC survey, the this lease map shows that the waterward boundary is an average of 45 feet waterward of the 1970 MHTL. This lease map is referenced on the 1972 Record of Survey, discussed below.

A 1970 Caltrans topographic map represents the last known map of the area prior to the construction of the freeway in 1970 and the 1972 revetment construction in front of the Seacliff properties. This topographic map was compiled from aerial photographs taken on June 25, 1970.⁹ The elevation contours on the 1970 map were then used to interpolate a mean high tide line.

Based on the quality of the map and the timing of the aerial survey, Commission staff concludes that the 1970 Caltrans map is the **best evidence** of the true location of the legal boundary between State-owned sovereign lands and uplands. The basis for this conclusion is that this evidence reflects the boundary

⁷ Commission staff has located both maps and field books of the Ramelli survey. The Ramelli survey surveyed all the way to what is now Lot 22 within the Seacliff Colony.

⁸ Commission meeting of December 17, 1954, Item 32.

⁹ This was a topographic survey and map prepared by Caltrans under aerial survey contract # 7001-194 compiled December 30, 1970 with aerial photos taken on June 25, 1970. Typically summer conditions reflect a wider sandy beach with a seaward location of the MHTL. Other aerial photography reviewed by Commission staff from 1969 indicates a similar landward shoreline.

CALENDAR ITEM NO. 64 (CONT'D)

at the time of the placement of the revetment on the shore, thereby fixing the MHTL's last natural location.

Caltrans also performed field surveys to support its report "Beach Monitoring Report Punta Gorda to Pitas Point." ("1975 Caltrans Report")¹⁰ Commission staff has recently acquired from Caltrans, through a Public Records Act request, the surveyed cross-sections from May 1972. Caltrans also graphed the changes in the location of the ordinary high tide line from 1953 to April of 1975 indicating a shoreline subject to erosion and includes those graphs in the aforementioned report. These cross sections show that the revetment was placed waterward of both the 1970 MHTL and the 1972 MHTL as surveyed by Caltrans in field book TVE101F pages 1242-1254.

Documents filed by Caltrans in a lawsuit brought in 1972 by the then owners of the upland, discussed more below, and from the Commission's own January 1970 minutes, indicate the property owners had expressed concerns regarding the potential risk of erosion once the freeway construction occurred. From Caltrans documents, the evidence indicates that this stretch of beach was comprised of small cobbles and a thin layer of sand and was already subject to naturally occurring erosion. Based on the commitment by Caltrans to study the situation and respond to the concerns regarding erosion, it is reasonable to infer that the purpose of the 1970 Caltrans survey was to address those concerns and document conditions just prior to any construction activities taking place.

The most recent Caltrans Right-of-Way map CSLC staff has acquired is one that was last revised in January 1974.¹¹ The purpose of the January 1974 map was to show respective property ownership interests in and around State Route 101. The Right-of-Way map purports to delineate a boundary between private uplands and sovereign lands at the mean high tide line and references the 1927 deed. The final revision in 1974 to the map was conducted after the first portion of the revetment was completed, but prior to the construction of the second project in 1976. This map locates the mean high tide line at the same location as the 1927 deed, which is approximately 12 feet landward of the 1970 MHTL.

In 2005, Seacliff Land, LLC granted two parcels to the Seacliff Beach Colony Homeowners Association. The revetment is located within the land description of the deed granting these two parcels. This is the most recent deed that Commission staff is aware of and it is the document upon which the HOA bases its claims to the land beneath the revetment. In addition to excepting out specific oil interests, **the deeds to both parcels expressly exclude any land, including**

¹⁰ Materials Section, District 7, of California Department of Transportation, September 1975, "Beach Monitoring Report Punta Gorda to Pitas Point.(Exhibit R)

¹¹ The map is titled "State of California Transportation Agency Department of Public Works Division of Highways; 07-VEN-101-38.5; R/W Map; Sta. 385+00 to Sta. 416+00; file no. F2242-3 and F2242-4; Date 4-5-67 with last revision date 1-21-74.

artificial accretions, below the last natural ordinary high tide.¹² This reflects, and is consistent with, the law on water boundaries in California and supports the Commission staff's position regarding the boundary at this location and recommendations regarding the HOA's proposed boundary and the staff's proposed lease.

The most recent map that Commission staff is aware of is by Moffat & Nichol, prepared at the direction of the HOA, as part of the application for a permit from the California Coastal Commission (CCC) for the revetment repair. The 2008 site plan titled "Seacliff Colony Homeowners Association Shore Protection Repair Plan" shows a mean high tide line surveyed in August 2006. This 2006 MHTL is approximately 25 feet waterward of the 1970 MHTL, except at the southern portion where the 2006 MHTL moves landward of the 1970 MHTL. While this survey is informative of recent conditions, the fact that it occurs nearly forty years after the point in time when the 1972 revetment construction took place makes it legally irrelevant for locating the boundary between State sovereign lands and private uplands at this location. California courts have clearly established that a shoreline boundary in a state of nature continues to move with the mean high tide line, (*Lechuzza Villas West v. California Coastal Commission, et al.* (1997) 60 Cal. App. 4th 218). The corollary of that is that the natural boundary can no longer move if an artificial act, such as a revetment, prevents its migration landward (*City of Los Angeles v. Anderson* (1929) 206 Cal. 662, 667) thereby fixing the boundary at its last natural location.

Revetment and Erosion History

It is unclear when the original shoreline protection was constructed in front of the homes. Some seawalls were present in the general area by the 1930s as evidenced by references to them in the 1930 Kingsbury Map and were likely constructed to protect oil operations and early roads to the north. Only a few homes had been constructed at Seacliff at the time of the 1953 survey and it is not apparent if there were seawalls or revetments protecting those houses at the time. By the 1960's, however, the majority of the houses at the northern portion of the development had been constructed and shoreline protective structures had already been placed on the beach as evidenced in both the photos provided by the HOA's attorney and the photos used to create the 1970 Caltrans survey. A 1969 report by UC Berkeley Professor Joe Johnson¹³ describes the shore protections as made of cobble and being of poor quality and the responsibility of the individual homeowner. The Caltrans Report, covering this area discusses the existence of un-engineered and ineffective shore protection devices having existed prior to the revetment being placed in the 1970s.

¹² The deed, attached as Exhibit I, states: "Excepting any portion of the above described property along the shore below the line of Natural Ordinary High Tide, and also excepting any artificial accretions to said land waterward of said line of Natural Ordinary High Tide."

¹³ This letter was produced by Caltrans as part of the 1972 litigation and is attached as Exhibit J

CALENDAR ITEM NO. 64 (CONT'D)

At the time of the Commission's initial approval of BLA 117 and the right-of-way permit to Caltrans to fill the approximately 8,800 feet of the ocean for the freeway in January 1970, according to the official minutes from the meeting, Mr. Walter Hoffman, a landowner, expressed concerns that the freeway construction might cause erosion to the down-coast shore fronting the structures being leased to various individuals. From those same minutes, Caltrans' experts asserted that such changes were unlikely, but that Caltrans would undertake a study of the matter and would take responsibility if the freeway caused erosion.¹⁴ The Commission has no official transcripts of its meetings from this era, but a partial copy of a transcription dated in 1975, which has been provided by the HOA's representatives that purports to be from the January 1970 Commission meeting, is consistent with the official minutes from the meeting.

The Commission reauthorized BLA 117 at its June 1973 meeting. According to Calendar Item 25,¹⁵ the reasoning for reauthorizing the original approval was to amend BLA 117 as it related to oil, gas and mineral leases partially in response to litigation in *People v. Hoffman, et al.*¹⁶ (Ventura County Superior Court, Action No. 52546), a condemnation action filed by Caltrans. The location of the agreed upon boundary was not changed. The HOA's predecessor in interest Walter Hoffman and the other upland owners signed BLA 117 in November and December 1972; it was signed by the Governor on August 9, 1973 and was recorded August 29, 1973. There is no indication or evidence in the Commission's files that the Commission was informed that an inverse condemnation lawsuit had been filed by the upland owners or that the revetment in front of the Seacliff Colony had been constructed.

Commission staff is unable to locate any record that either the Commission or its staff received notice of the 1972 revetment project. Consequently, the CSLC never reviewed the project to determine whether the revetment was to be built on private property or State owned tide and submerged lands under the Commission's exclusive jurisdiction.¹⁷ This project was not included in either the lease application to the Commission or Lease PRC 4402 from the Commission to Caltrans for the Highway 101 construction project, approved in 1970.

Commission staff have reviewed a 1972 Record of Survey ("Record of Survey"), prepared by Robert E. Martin, for the then-property owners Walter Hoffman, *et al.* This Record of Survey was filed with the Ventura County Recorder's Office in March of that year. The Record of Survey did not purport to survey the current

¹⁴ Commission Meeting of January 7, 1970, Items 57, 58, and 59 available at http://archives.slc.ca.gov/Meeting_Summaries/1970_Documents/01-07-70/Index.pdf.

¹⁵ Calendar Item 25 was approved as Minute Item 26.

¹⁶ This appears to have been a condemnation action by Caltrans, but the Commission was not a party to this litigation and there are no records of it in the Commission's files.

¹⁷ Public Resources Code Section 6301.

CALENDAR ITEM NO. 64 (CONT'D)

location of the mean high tide line. The purpose of this Record of Survey, as stated on the survey itself, was simply to establish the property lines of unrecorded leases at the Sea Cliff Beach Colony and establish lease parcels 5-44. Parcels 1-4 had been acquired by Caltrans for construction of the cloverleaf by this time; parcel 45 was sub-divided in 1983 into ten lots and is discussed further below. Although the Record of Survey references the CSLC 1953 survey, the Record of Survey moved the waterward location of the leased lot lines significantly landward from where it was located in the 1953 unrecorded map of the leases, to a location approximately 12 feet landward of the 1970 MHTL. The waterward boundary of the individual lots is located at substantially the same location as the up-coast BLA 117, which extends into lot 6 as shown on the 1972 Record of Survey, and at a location similar to the MHTL described in the 1927 deed for this area. In addition, the 1972 Record of Survey depicted a separate seaward parcel, Parcel B, which ostensibly shows the 1953 CSLC survey as its waterward boundary, with the entire parcel noted as "Proposed Dedication to State of Calif."¹⁸

The current revetment appears to have been built in two phases in the 1970s. The first notice the Commission had of a riprap project for the subject area was a US Army Corps of Engineers Public Notice PN CE LA 76-134 indicating that Caltrans was proposing to place rock along lot 45 owned by Hoffman and at the adjacent Hobson County Park on the down-coast end of Seacliff. The 1976 plans reviewed by Commission staff indicated that the proposed project was to be located landward of the mean high tide line, was to "stop shoreline erosion and prevent further beach and ocean pollution from the existing oil impregnated Hoffman Property material" (see Exhibit M) As such, Commission staff concluded no further action was required.

According to the HOA's representatives, the shoreline had already started to recede by 1970 based upon winter storm events in 1969 and further receded after the construction of the highway improvements, which began in the summer of 1970. Based on court files recently obtained, an inverse condemnation action was filed November 9, 1972, three months after the revetment had been constructed. The plaintiffs were: Fred W. Smith, as Executor for the estate of Grace Hobson Smith; Janice P. Smith, as Executrix of the estate of Rodney Hobson Smith, Barbara Barnard Smith, Helen Margaret Smith, Walter W. Hoffman, and Katherine Hoffman Haley. The plaintiffs were the same parties as those that signed BLA 117 shortly after the litigation was filed. The only defendant was the State of California, Department of Public Highways. There is no indication that the State Lands Commission was a party to the litigation, or was otherwise aware of the litigation. The case was dismissed in February 1977.

The litigation files reflect that the property owners claimed \$2.52 million in damages for both lost land and diminution in value of the remaining property,

¹⁸ The Record of Survey is attached as Exhibit L.

CALENDAR ITEM NO. 64 (CONT'D)

plus costs and fees related to the litigation. Caltrans disputed the property owners' allegations. According to the HOA's representative, to mitigate impacts of the freeway construction Caltrans agreed to construct a revetment in front of the existing structures in July and August of 1972. Evidence, including that prepared for Caltrans, which the Commission staff has reviewed, strongly indicates that the highway construction was not responsible for erosion at this location.¹⁹

Based on a review of the litigation documents, Commission staff has found no evidence to support the property owners' allegations or to refute the evidence produced by Caltrans that showed the construction was not the cause of the erosion. In addition to the lack of evidence presented by the property owners, staff finds it significant that the property owners defined their waterward boundary in the lawsuit filed in 1972 as "3 ½ miles of the **mean high tide line** of the Pacific Ocean" (emphasis added),²⁰ rather than to any fixed position.

According to the HOA's representatives, upon completion of the 1976 revetment, Caltrans entered into a general release agreement²¹ with the property owners of the lot (Hoffman, *et al.*) and Ventura County, in which the "State" was released from all liability for damage to the respective properties and from any requirements to maintain the revetment in the future, including a provision that the upland property owners would be entirely responsible for the future maintenance of the revetment. This agreement apparently applies only to Lot # 45 shown on the 1972 Record of Survey and the County Park. The Commission and its staff were unaware of and not a party to the litigation, the negotiations or the settlement.²²

¹⁹ See the 1975 Caltrans Report and the follow-up journal article, "Shore Process at a Man-Made Headland" by Cramer and Pauly, published in the July 1979 issue of the *Journal of the American Shore & Beach Preservation Association*. The journal article concludes that the highway project did not cause any of the erosion, but that erosion is a natural occurrence at this location. The purpose of the study, which appears to have been conducted by an outside expert retained by Caltrans, University of California Professor Joe Johnson, was to evaluate whether erosion was caused by the construction project. The Report concludes, "The [mean high tide line] had been progressively advancing landward for many years prior to freeway construction. The revetment now provides a barrier to further landward advancement of the [mean high tide line]...."

The presence of seawalls in the vicinity dating to the 1930s supports that conclusion.

²⁰ The Complaint for Inverse Condemnation, filed November 9, 1972, is attached as Exhibit N.

²¹ The general release agreement is attached as Exhibit O. Neither the HOA nor Caltrans have provided the Commission's staff with any further information about the litigation or the settlement.

²² By law, the Commission is a necessary party to any litigation involving the boundaries of tidelands and the Attorney General's Office must represent the State in the litigation. Neither the Attorney General's Office nor the Commission was involved in any litigation. Public Resources Code section 6308, "Whenever an action or proceeding is commenced by or against a county, city, or other political subdivision or agency of the State involving the title to or the boundaries of tidelands or submerged lands ..., the State of California shall be joined as a necessary party defendant in such action or proceeding. Service of summons shall be made upon the chairman of the State Lands Commission and upon the Attorney General, and the Attorney General shall represent the State in all such actions or proceedings."

CALENDAR ITEM NO. 64 (CONT'D)

The next notice the Commission staff had of any activity involving the subject area was from a surveyor in 1983 when he was proposing to record Tract Map 3793, which involved parcelizing the undeveloped lot #45 into 10 new lots at the down-coast end of Seacliff. Staff made it clear to Hoffman's surveyor that *"the boundary is not known at the present time, and the proposed tract map is landward of the 1953 O.H.W.M a permit will not be required from the State Lands Commission at this time. However, we so reserve the right to require a permit at some future time if it is shown that State land is, in fact, involved."*²³

On two subsequent occasions in 1996 and 2006, CSLC staff responded to notices from Moffat and Nichol on behalf of Seacliff Beach Colony regarding repair projects. Those responses indicated lack of *"sufficient information to determine whether your client's project will intrude upon sovereign lands..."* *"Accordingly, the SLC presently asserts no claims..."* *"This conclusion is without prejudice to any future assertion of state ownership or public rights, should circumstances change, or should additional information come to our attention."*²⁴

As part of the process of obtaining the necessary Coastal Development Permit ("CDP") from the CCC for the current repair project, the HOA was required to provide the CCC with documentation from the Commission indicating its jurisdictional review and either its approval or non-objection to the project. The CCC staff's preliminary investigation concluded that the project appeared to be located on sovereign lands under the CSLC's jurisdiction. According to the CCC staff report,²⁵ in 1983 the CCC approved the ten-lot subdivision of the single lot 45, which was also where the 1976 revetment project was constructed. The CCC's approval included a special condition that required the property owner record a deed restriction to provide two lateral public accessways seaward of all 50 residential lots in the development. The Applicant is responsible for maintaining both of these accessways. In 1996 and in 1998, the Applicant completed minor repairs to the revetment through Coastal Development Permits issued by Ventura County, not the CCC.

It is staff's understanding that prior to the HOA's purchase of the lots in 2005, for an undisclosed amount, all homeowners leased the lots underlying their individual houses. Staff research indicates that the purchase of the lots was a result of a settlement over a dispute of lease fees with the Seacliff Land Company, the landowner and successor to Hoffman, *et al.* The amount is confidential, but as of 2005 the reported value was in excess of \$70 million.

²³ Attached as Exhibit P.

²⁴ Attached as Exhibit Q.

²⁵ See CCC Coastal Development Permit No. 4-07-154 for more information. Available on the Coastal Commission's website at <http://documents.coastal.ca.gov/reports/2008/6/W17d-6-2008.pdf>.

CALENDAR ITEM NO. 64 (CONT'D)

CSLC staff's investigation of the current matter initially relied on the fact that the 2006 Moffat and Nichol survey submitted by the HOA identified that portions of the existing and proposed revetment were waterward of the mean high tide line; and that during the winter the line would be expected to move even more landward. The HOA's representative objected to that conclusion by Commission staff. In response to the assertions of the HOA's representative, additional investigation conducted by Commission staff uncovered better evidence indicating that substantially more of the existing and proposed revetment is located on sovereign land under the Commission's jurisdiction. The HOA disagrees with Commission's staff, and to date, although numerous meetings with HOA representatives have taken place, Commission staff and the HOA have been unable to mutually agree on reach a resolution that would allow the HOA's revetment project to move forward.

Current Revetment Project

The HOA's project proposes to retrieve dislodged rocks from the beach and to deposit the rocks back on the revetment. The HOA also proposes to add approximately 5,000 tons of new rock to restore the revetment to a design height of +11 feet above mean sea level (MSL) along 1,600 linear feet of the western section and to +14 feet in height above MSL along the 440 linear foot eastern section. The rock would be placed seaward of the pre-existing 1972 and 1976 toe of the revetments. The project also includes removal of 19 existing unpermitted private beach access stairways located between the existing public trail and the beach. Additionally, improvements are to be made to three existing beach access stairways for public use. Based on surveys, including one provided by the Applicant's consultant, portions of the current as well as proposed revetment and beach access stairways are located on sovereign lands.

The majority of the revetment is located on two parcels, APN 060-0-440-025 and a parcel designated as "not a part of this subdivision" on Tract Map 3793 on 060-0-430-N/A. The parceled lot is assessed by Ventura County to the HOA, but with no value and no taxes assessed; the Ventura County Assessor's unparceled area is listed as belonging to the State of California and not assessed. The landward limit of the revetment is approximately the same as the MHTL described in the grant deed to Grace Smith from A. L. Hobson dated September 30, 1927 and, in the case of the two northern most parcels, is the same as the boundary fixed by BLA 117. The assessor's map shows that the waterward boundary of APN 060-0-440-25 as the 1953 surveyed ordinary high water mark. However, 42 feet of the revetment are located waterward of BLA 117 and portions in the middle that are located waterward of the 1953 survey.

Settlement Attempts

Staff of the Commission and representatives of the HOA vigorously dispute the location of the legal boundary separating State-owned tidelands and adjacent private property. Both Caltrans, which first constructed the revetment in the 1970s, and the HOA have asserted through their respective representatives that they believe the ownership of the land on which the revetment was built was private property. No evidence has been provided to support that either party's assertion. However, the 1974 Caltrans Right-of-Way map, discussed above, directly contradicts those assertions, as do the 1970 Caltrans survey and cross sections done prior to the placement of the revetment.

In June and August 2010, in an effort to resolve disagreement over the terms of the proposed lease, staff from the Commission, Caltrans and Attorney General's Office met with the representatives for the HOA. At the conclusion of both of those meetings, the parties at the meetings agreed to a resolution. At the August meeting the resolution was a lease from the Commission as set forth in Exhibit T. At HOA board meetings subsequent to the meetings, the negotiated agreements were reportedly rejected.

Because of the dispute as to the location of the boundary, the involvement of another state agency and the public access to be provided by the HOA, staff was prepared to recommend, at the three prior Commission meetings at which this project was placed on the agenda, that the Commission authorize a long-term lease where neither party conceded the location of the boundary and the rental rate be discounted to approximately \$13,000 per year. Based on the HOA rejecting the agreements, the items were pulled from all three agendas.

Current Proposal for a Boundary Line Agreement

At the August 20, 2010 Commission meeting an HOA representative expressed the HOA's position on the boundary and requested that this item reflecting their proposed boundary be brought before the Commission at the next meeting. On September 22, 2010, the HOA submitted a written request that the Commission calendar its proposed boundary line agreement. The HOA requests that the boundary be fixed at the "design toe of the revetment".

The HOA letter (Exhibit B) incorrectly cites a section of the Public Resources Code (6307 (c) 7) as the authority for the Commission to enter into a boundary line agreement.²⁶ Public Resources Code section 6307 authorizes the Commission to enter into a land exchange provided certain findings can be made.²⁷ It appears that to provide support for the findings that the Commission

²⁶ Public Resources Code section 6357, the correct citation for a boundary line agreement, authorizes the Commission to "establish the ordinary high-water mark or the ordinary low-water

CALENDAR ITEM NO. 64 (CONT'D)

would need to make for a land exchange, the HOA asserts that because the design toe is landward of portions of most of the 1953 survey, the State will gain more than it would lose and that the land below the revetment is cut off from tidelands and is relatively useless for public trust purposes.

Commission staff cannot recommend approval of a land exchange based on the HOA's proposal. In particular, Commission staff does not believe that the sovereign lands within the subject area have been "cut off from water access," a required finding of PRC Section 6307. The evidence of the current conditions, as reflected by the HOA's own survey performed, indicate that portions of the current and proposed revetment will be waterward of the 2006 MHTL and therefore on tidelands, rather than "cut off from tidelands." Further, Article X, Section 3 of the California Constitution bars the exchange of sovereign public trust lands, whether filled or unfilled, that are "fronting on the water" of any waterway "used for purposes of navigation". Therefore, by necessity there must be some area of land reserved between the water and the property to be exchanged. Further, staff disagrees with the conclusions drawn by the HOA as to the value of the land for either public trust purposes or its economic value and the characterization of its being "cutoff from tidelands". The HOA has not presented any evidence to support its conclusion as to the economic or public trust value of the lands.

Commission staff agrees that construction of the revetment has fixed the location of the boundary between sovereign lands and uplands, at the location it was prior to filling or artificially caused accretions. However, the Commission staff strongly disagrees with the HOA about the location of that boundary as it involves its property, and therefore cannot agree to its proposed boundary line agreement. The HOA's insistence on the 1953 CSLC survey or the design toe of the proposed revetment repair as the location of the boundary line is contrary to both law and facts. The HOA asserts that the reason the 1953 CSLC survey is appropriate is because the Commission had it recorded, it is shown on the 1972 Record of Survey and the County Assessor's map, and that there was a large storm in 1969 that makes the mean high tide line located in the 1970 Caltrans survey abnormal and therefore, inappropriate to use for a boundary line.

California law refutes the arguments that either the recording of a survey or the reference of a survey in other deeds or recorded maps fixes the boundary. In addition, the HOA's assertion that the mean high tide line located by the 1970

mark of any of the ... tide, or submerged lands of this State, by agreement, arbitration or action to quiet title...." The Commission entering into a boundary line agreement is based upon a good faith factual determination of the last natural location of the mean high tide line prior to fill or artificial accretions.

²⁷ Public Resources Code section 6307 requires several mandatory findings by the Commission, which do not fit the facts of the subject property. Subsection (c) 7 is one of seven alternative reasons to do an exchange, but is not among the mandatory findings in subsection (a).

CALENDAR ITEM NO. 64 (CONT'D)

Caltrans survey is inappropriate is not supported by facts. The location of the mean high tide line in that survey is seaward of its locations in the 1920s. In addition, the presence of seawalls and revetments²⁸ that predate the construction of the freeway by Caltrans are strongly indicative of the character of this beach being subject to erosion. All the surveys of the mean high tide line are further landward than where it was located in the 1953 survey. In addition, Caltrans' own Right-of-Way map from 1974 locates the mean high tide line at the waterward edge of the lot lines, which is roughly the same location as the lines from the 1920s and the 1970 Caltrans survey.

The Commission staff's position relies on a comprehensive analysis of all facts and law, which results in the conclusion that the best evidence of the location of the last natural mean high tide line prior to fill or artificial accretion, is the 1970 Caltrans Map. The construction of the revetment prevents the MHTL from migrating further inland and creates a de-facto location for the boundary since the mean high tide line can no longer be in its natural location.²⁹ The United States Court of Appeals 9th Circuit was recently faced with a similar fact pattern of an upland owner in the State of Washington placing a revetment below the mean high tide line and refusing to enter into a lease.³⁰ The court in that case posited that not only should the upland owner not have the benefit of the unpermitted revetment, but that the boundary should be determined where the mean high tide line would exist, but for the revetment. The Commission's staff has not asserted this position with the HOA, but has asserted that the location of mean high tide line prior to the placement of the revetment is the best evidence of the boundary between sovereign lands and private uplands prior to artificial influences.

Neither the HOA's current vesting documents, nor the 1927 deed, purport to have a fixed waterward boundary. Since 1931 the only legal mechanism to obtain a fixed waterward boundary in California is by agreement, arbitration or quiet title litigation with the State, acting by and through State Lands. In addition, Mr. Hoffman, the HOA's predecessor, while negotiating the terms and location of BLA 117, had the 1972 Record of Survey completed and recorded. This Record of Survey showed a proposed dedication of all land waterward of the individual lots. He then entered into BLA 117, reflecting the location of the agreed boundary at several of those individual lots. This is strongly suggestive that Mr. Hoffman understood the relevance of the mean high tide line and understood that it was a moving boundary that had eroded since its 1953 surveyed location. This knowledge is also evidenced by the fact that the 1972 Record of Survey moved the waterward lot lines landward to coincide with the 1970 Caltrans map location

²⁸ The revetments are discussed in 1975 Caltrans Report and its follow-up journal article discussed in footnote 19. Copies of both are attached as Exhibit R.

²⁹ The 1975 Caltrans Report and study also explain that the effect of the revetment would be to prevent any further landward movement of the mean high tide line.

³⁰ *United States v. Milner* (2009) 583 F.3d 1174.

CALENDAR ITEM NO. 64 (CONT'D)

from their prior location on the 1953 unrecorded lease map. Finally, as discussed above, the 2005 deed to the HOA only conveyed whatever ownership existed landward of the location of the last natural "ordinary high tide line", rather than a fixed line, and the best evidence of that location is the 1970 Caltrans map and is supported by the 1972 Caltrans field surveys.

Staff Recommendation

Based on the above referenced facts and law, staff recommends denial of the HOA's proposed boundary line agreement.

Commission staff has sought to negotiate an acceptable and legal resolution of the current situation with the HOA. Staff has had numerous meetings and exchanged information with HOA representatives. In order for the HOA to move forward with processing a permit from the California Coastal Commission, without further time delay, staff recommends that the Commission authorize a lease to the HOA, with the terms negotiated at the August 2010 meeting with staff, in the form attached as Exhibit T. The annual rent of this lease includes a significantly discounted dollar amount reflecting the unique circumstances of this project. Those circumstances include the provision of public access, involvement of Caltrans in the construction of the revetment in the 1970s, and the title and boundary dispute as also described in Exhibit S, attached and by this reference made a part hereof.

EXHIBITS:

- A. Location and Site Map
- B. Seacliff HOA's Proposal Letter
- C. 1871 Survey W.H. Norway, Official United States Government Township Plat, T 3 N, R 24 W, SBM
- D. 1927 Deeds from A.L. Hobson to Grace Smith, recorded in Bk. 154, Pg. 249 and Bk. 167, Pg 249, Official Records Ventura County
- E. 1953 CSLC Ordinary High Water Mark Survey
- F. 1970 Caltrans Topographic Map
- G. Graph from the 1975 Caltrans Report Showing Erosion/Accretion
- H. 1974 Caltrans Right-of-Way Map
- I. 2005 Deed from Seacliff Land, LLC to Seacliff Beach Colony HOA recorded as Doc. No. 20050602-0133949, Official Records Ventura County
- J. Dr. Joe Johnson's 1969 letter report to Caltrans
- K. BLA 117, recorded in Bk. 4159 Pg. 961, Official Records Ventura County
- L. 1972 Record of Survey by Robert E. Martin for Hoffman
- M. 1976 U.S Army Corps Notice, PN CE LA 76-134
- N. Complaint Filed November 1972 - *Fred W. Smith, as Executor for the estate of Grace Hobson Smith; Janice P. Smith, as Executrix of the estate of Rodney Hobson Smith, Barbara Barnard Smith,*

CALENDAR ITEM NO. 64 (CONT'D)

*Helen Margaret Smith, Walter W. Hoffman, and Katherine Hoffman
Haley v. State of California*

- O. Undated General Release Agreement between "State" (Caltrans) and "Plaintiff's" in Exhibit N and Ventura County
- P. 1983 CSLC Letter to Martin, Hoffman's Surveyor
- Q. 1996 and 2006 Letters to Moffat and Nichol, Engineering
- R. 1975 Caltrans Report and 1979 article by Cramer and Pauly from the *Journal of the American Shore & Beach Preservation Association*
- S. Staff Report for August 10, 2010, Cal. Item 54.
- T. Proposed Lease

IT IS RECOMMENDED THAT THE COMMISSION:

A. PROPOSED BOUNDARY LINE AGREEMENT

CEQA FINDINGS:

Find that the activity is exempt from the requirements of CEQA pursuant to Title 14, California Code of Regulations, section 15061 as a statutorily exempt project pursuant to Public Resources Code section 21080 (b) (5) and Title 14, California Code of Regulations, section 15270 (a), projects which a public agency rejects or disapproves.

AUTHORIZATION:

Reject the proposal for a boundary line agreement agreeing to a agreed common boundary location at the design toe of a proposed revetment repair project as set forth in the proposal attached as Exhibit B.

B. PROPOSED LEASE

CEQA FINDINGS:

Find that an environmental analysis document, California Coastal Commission (CCC) permit # 4-07-154, was adopted for this project by the CCC under its certified program [Title 14, California Code of Regulations, section 15251 (c)], and that the California State Lands Commission has reviewed and considered the information therein and concurs in the CCC's determination.

AUTHORIZATION:

Authorize issuance of a General Lease - Protective Structure Use to the Seacliff Beach Colony Homeowners Association beginning October 29, 2010, for a term of 35 years, for the use, repair and maintenance of an existing 2,040 foot long rock revetment and repair and maintenance of three beach access stairways for public use, said lease to be in the form of Exhibit T, attached and by this

CALENDAR ITEM NO. **64** (CONT'D)

reference made a part hereof; annual rental in the amount of \$13,842, with the State reserving the right to adjust the rent every five years based on the Consumer Price Index during the lease term, as provided in the lease; liability insurance with coverage of no less than \$1,000,000.

The Seacliff Beach Colony Homeowners Association has 60 days, beginning October 29, 2010, to execute the General Lease – Protective Structure Use, or such authorization terminates and is no longer valid and effective.