

MEETING  
STATE OF CALIFORNIA  
STATE LANDS COMMISSION

STATE CAPITOL  
ROOM 126  
SACRAMENTO, CALIFORNIA

MONDAY, JULY 19, 1993

2:30 P.M.

COMMISSIONERS IN ATTENDANCE

Leo McCarthy, Lieutenant Governor, Chairman

Gray Davis, State Controller

Steve Kolodney, Commission-Alternate for Thomas Hayes,  
Director of Finance

Stan Stancell, Commission-Alternate for Thomas Hayes,  
Director of Finance

SPEAKERS

John F. Foran, Lechuza Villas West

Sherman L. Stacey, Attorney, Lechuza Villas West

David C. Weiss, Civil Engineer, Lechuza Villas West

Robert H. Philibosian, Attorney, Save Lechuza Beach  
Committee

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P R O C E E D I N G S

1  
2 CHAIRMAN McCARTHY: Good afternoon, ladies and  
3 gentlemen. This is a meeting of the State Lands Commission.

4 On my right, Commissioner Gray Davis. On my left,  
5 Commissioner Steve Kolodney.

6 We have a consent calendar. I see that Mr. Brent  
7 Thrams was here on Consent Item Number 5. We intended to  
8 take those later so we could get to the one issue that will  
9 require more time, Item 59. I don't anticipate any  
10 difficulties on Consent Item Number 5.

11 Mr. Thrams, if you wish to stay with us for  
12 however long Item 59 takes you're certainly welcome. That  
13 may, you know, take some time.

14 (Inaudible comments.)

15 CHAIRMAN McCARTHY: It's hard to say, but I think  
16 we're going to give it good time. It's an important issue.  
17 So an hour at least.

18 MALE VOICE: Mr. Chairman, pardon me for  
19 interrupting. All items other than Item 59 are in consent  
20 calendar. I understand that Mr. Thrams is here only to  
21 support the consent recommendation on Item 5.

22 CHAIRMAN McCARTHY: Yeah. He indicated that on  
23 the witness application. He's here to answer questions if  
24 necessary.

25 (Inaudible comments.)

1           CHAIRMAN McCARTHY: All right. Well, then we can  
2 act on the consent file now, everything else is --

3           MALE VOICE: Before you act, Mr. Chairman, you  
4 pull items 18, 34 and 41.

5           CHAIRMAN McCARTHY: Items 18, 34 and 41 are pulled  
6 off the consent and then --

7           MALE VOICE: Regular calendar items 57 and 58 can  
8 be added to the consent calendar.

9           CHAIRMAN McCARTHY: Any objection to adding 57 and  
10 58 to the consent calendar?

11           If there is none, that action is taken. The  
12 consent calendar's before the Commission.

13           Any objections from the public or members of the  
14 Commission on acting on the consent calendar at this time?

15           If not, the consent calendar is adopted.

16           Previous Commission minutes are approved without  
17 objection.

18           Any other matters to come up before we reach Item  
19 59?

20           All right. We're on Item 59.

21           MALE VOICE: On that item, Mr. Chairman --

22           CHAIRMAN McCARTHY: Representing the applicant,  
23 Mr. Sherman Stacey and Mr. John Foran. And we have as  
24 another witness, I take it in some opposition, Mr. Robert  
25 Philibosian.

1 Mr. Philibosian in -- yes. All right. Thank you.

2 All right. If I may suggest to the applicants,  
3 what is your preference? Would you like the State Lands  
4 Commission to present their case first or would you prefer  
5 to present your case first?

6 (Inaudible comments.)

7 CHAIRMAN McCARTHY: All right. Mr. Warren, would  
8 you proceed with our staff.

9 MR. WARREN: Mr. Chairman and members -- let me --  
10 this is not an application as such. Perhaps a little  
11 background statement on the nature of the proceeding before  
12 you is in order, and for the record.

13 From time to time the State Lands Commission is  
14 asked to advise other agencies as to its views on questions  
15 of public ownership or other interest in property. This is  
16 the case with respect to this particular calendar item.

17 Mr. Stacey represents the applicant for a coastal  
18 permit on a beach in Malibu. Recently the Coastal  
19 Commission denied such permit for development. One of the  
20 Coastal Commission's considerations in making its denial was  
21 your staff's conclusion that there is substantial evidence  
22 that the proposed development would take place on state  
23 public trust lands. We have met three times with Mr. Stacey  
24 and his client, Normal Haney (ph.), about this matter, but  
25 nothing they have submitted has contravened the facts we

1 have available or the law we understand to be applicable.

2           The legal determination here was based on the  
3 established principal that the boundary supporting the  
4 state's public trust tidelands from the uplands is an  
5 ambulatory one consisting of the mean high tide line. It  
6 changes with the season and the condition of the beach,  
7 usually moving landward in the winter and seaward in the  
8 summer.

9           To help determine the facts of the project before  
10 you, we asked our own former chief boundary determination  
11 officer, Mr. Francois Uzez (ph.), to study the boundary  
12 issue. In addition we performed an on-site survey. On the  
13 basis of the review by Mr. Uzez, our and other on-site  
14 surveys and anecdotal photographic and other evidence, we  
15 advised the Coastal Commission that substantial evidence  
16 showed encroachment of the project on state tidelands.

17           Other forums are available to determine Mr.  
18 Stacey's objections to our decision. He has challenged the  
19 Coastal Commission's permit denial in an action now pending  
20 in superior court. Mr. Stacey could file a quiet title  
21 action if he desires additional certainty on the boundary  
22 issue. Staff believes the issue to be critical in its  
23 administration of sovereign lands. Consequently, we are not  
24 prepared to reconsider the advice we have already provided  
25 the Coastal Commission on this issue. To this position

1 Mr. Stacey takes exception and has requested an opportunity  
2 to address you. So I'd like to have him present his  
3 objections to you at this time.

4 CHAIRMAN McCARTHY: Mr. Foran, Mr. Stacey. Let's  
5 make room for them so they can sit together, please.

6 Would you like to sit on the same side of the  
7 table? We can move a chair over there.

8 MALE VOICE: Mr. Chairman, you might make note  
9 that we've been joined by Mr. Stancell.

10 (Asides.)

11 MR. FORAN: Mr. Chairman, members of the  
12 Commission --

13 CHAIRMAN McCARTHY: Welcome to the Commission.

14 MR. FORAN: It's the first time I've been in  
15 Sacramento.

16 CHAIRMAN McCARTHY: Yes. I thought it might be.

17 MR. FORAN: My name is John Foran and I'm  
18 representing the Lechuza Villas West in this matter, and we  
19 are going to make a presentation which will, I think, be  
20 somewhat different from my friend Charlie Warren's.

21 But basically, Mr. Chairman and members, we  
22 believe that this would represent a major policy change with  
23 respect to the title of tidelands in the State of California  
24 and its impact would go way beyond the property that's  
25 before you. It would have a statewide ramification, which



1 we will I believe establish as soon as we get to our  
2 particular point.

3 But let me just, by way of making the points that  
4 we believe will come out in this hearing, and that is that  
5 if you were to adopt the two proposals that the tideland  
6 goes to anywhere that the high water mark ever comes or the  
7 other issue, which is being the navigational one, but what  
8 you would have on a statewide basis, not just with respect  
9 to this property, but you would have a devaluation of the  
10 property, all beach property, coastal property, all up and  
11 down the State of California.

12 You would have a revenue loss in the -- literally  
13 in the hundreds of millions of dollars insofar as local  
14 property that is presently beach property would be devalued  
15 significantly thereby reducing property taxes. You can have  
16 your land revalued by virtue of Proposition 13.

17 In addition to this, with respect to any capital  
18 gains type of taxes or revenues to the state or even the  
19 federal government, but let's deal with the state, you would  
20 have a significant loss of revenue. We have estimated in  
21 the brief that has been presented by Mr. Stacey that the  
22 combined total of these revenue losses could be in the  
23 neighborhood of \$200 million, and we can verify this or at  
24 least indicate how we arrived at that particular number.

25 The third point that I think should be considered

1 in the significance of the decision you would make if you  
2 were to adopt the staff recommendation as to how the  
3 property should be -- the property line should be  
4 determined, would be that you could very seriously be  
5 involved in a taking of property and subject to significant  
6 lawsuits, there would be a liability on the part of the  
7 state insofar as that would be the basis of the decision.

8 So on these basis we are suggesting that it is not  
9 an appropriate redefinition, at least we consider it a  
10 redefinition, and I'd like to have Mr. Stacey now begin with  
11 the specific points on the legal and then we can come back  
12 to the consequences at a later time if you wish to do so.

13 CHAIRMAN MCCARTHY: Thank you, Mr. Foran.

14 Mr. Stacey.

15 MR. STACEY: Thank you, Mr. Foran.

16 Mr. Chairman, members of the Commission, my name  
17 is Sherman Stacey. I'm an attorney. I practice in Santa  
18 Monica, California. I have a considerable amount of  
19 experience in dealing with real property in the Malibu area  
20 where this property is located.

21 We have advanced the position and I have submitted  
22 to each of you a spiral bound notebook which was for a  
23 hearing originally scheduled for July 14th as well as two  
24 letters, one dated June 10th and one dated July 9th of this  
25 year. And basically what I wish to address and what I think

1 that we will be able to present to you is that the position  
2 that Mr. Warren has taken is indeed a departure from  
3 existing policies of the State Lands Commission, it is a  
4 departure which has major policy implications, and as he  
5 himself describes is critical to the administration of state  
6 lands. And those are the kind of issues that I think are  
7 most appropriately before you.

8 Mr. Warren has taken a position on two issues that  
9 claim that there are state interests in my client's property  
10 where he proposes to build some homes. He communicated this  
11 initially in a letter dated November 4, 1992 to Peter  
12 Douglas, the Executive Director of the California Coastal  
13 Commission. And the two interests that he asserts are, one,  
14 that some portion of the property where my client proposes  
15 to build are state tidelands, and, two, that beyond the  
16 bounds of the state tidelands there are navigational  
17 servitude that extend over those waters as the waters rush  
18 up over the beach above the ordinary high water mark which  
19 the construction of homes would interfere with.

20 I'm going to first trace what has been the manner  
21 in which the State Lands Commission has dealt with these  
22 issues because in advising the Coastal Commission this is  
23 certainly not the first occasion that the advice has been  
24 sought. So when I researched the matter in examining files  
25 with the Coastal Commission I found 82 letters lying between

1 February of 1978 and August of 1991 in which the State Lands  
2 Commission has communicated to the Coastal Commission  
3 whether or not a particular structure will or will not  
4 interfere with state tidelands.

5 And the manner in which the state has undertaken  
6 to do this is to look at their existing recorded survey  
7 maps, examine and compare them to the proposed construction  
8 drawings which are sent to them, and if no recorded survey  
9 shows an encroachment into state lands to communicate a  
10 letter to that effect to the Coastal Commission.

11 In none of these letters is there a single  
12 communication that beyond state tidelands there may exist  
13 some navigational servitude. In none of these letters is  
14 there any reference to any type of data or information other  
15 than the surveys, field surveys, which you have on file in  
16 your offices here in Sacramento. That has been the standard  
17 policy manner in which it is dealt with.

18 This case marks a departure, a departure in two  
19 ways. One, it marks a departure in that you utilize  
20 photographic interpretive evidence provided by Mr. Uzez who  
21 examined a series of photographs, approximately 31, and I'd  
22 like to pass the packet around to you. These are  
23 photographs taken from high elevation, many of which are at  
24 a scale of 1 inch equals 2,000 feet in which with my thumb I  
25 can cover the entire 1,000 feet of beach that my client

1 owns, and from observing these photographs and performing  
2 some calculations which he describes, Mr. Uzez purports to  
3 be able to identify where the line of mean high tide of the  
4 Pacific Ocean happens to be. Not by field survey, but by  
5 the examination of photographs.

6 And I'd just like it if members of the Commission  
7 could flip through and look at the dimension on those  
8 photographs, because we have one extra witness we'll present  
9 today, Mr. Davis Weiss, a civil engineer. We have very  
10 grave doubts that Mr. Uzez can reach the conclusions that he  
11 purports to reach.

12 The second information that Mr. Warren relied upon  
13 did not arise before his November 4, 1992 letter, it came  
14 subsequently, and that was field survey data which the  
15 Commission undertook to obtain during the storms of this  
16 year at a time when the beach was in an extraordinarily  
17 eroded or depleted state, at a time when indeed the sand had  
18 been removed from the beach rapidly due to storms, a  
19 condition commonly known as evulsion. And data we'll  
20 present to you today that as of today the beach has restored  
21 to where the line of mean high tide is the approximate  
22 location it was in the 1932 survey at the time this property  
23 was subdivided.

24 As to being a departure from existing policy, we  
25 think that it is a departure to rely on other than the

1 survey data you have. You have utilized photographic  
2 evidence in cases in the past where because of unnatural  
3 accretion arising from the construction of man-made  
4 facilities, you can no longer go out and survey where the  
5 line of mean high tide may have been at the last time a  
6 beach was in its original unaffected condition. Therefore  
7 photographic information may be the only source you can have  
8 to approximate where the tideland boundary might have been  
9 in order to reach tideland resolutions on cases involving  
10 artificial accretion.

11 But where you have the capacity to actually  
12 physically survey a property because it remains subject to  
13 the natural forces, there is no reason to utilize  
14 interpretive evidence based upon very, very long range  
15 photographs in which the interpreter must estimate the time  
16 of day in which the photograph took place in order to try to  
17 estimate the location at which the line of mean high tide  
18 may be.

19 And, second, that your agency now asserts that the  
20 area of state tidelands extends even when major storms erode  
21 a beach away rapidly and that beach restores rapidly after  
22 the erosion, that that is a change in beach condition  
23 commonly known as evulsion, which the law is clear does not  
24 change the location of the ordinary high water mark.

25 If I might take a moment to orient you, there were

1 some photographs in the package that you have. However, I  
2 think perhaps utilizing the photographs to illustrate the  
3 location would be of some assistance. What we have here is  
4 an area subdivided in 1932 for single family residential  
5 development. There are a number of homes constructed in the  
6 area up on Easterman Beach and my client owns (inaudible)  
7 shaded area (inaudible) over to the edge (inaudible)  
8 distance of approximately 1,000 feet.

9 In this area the state now claims that the line of  
10 mean high tide, not always, but from time to time it may  
11 intrude beyond this what is called string line boundary.  
12 String line is an administrative term used by the Coastal  
13 Commission as their way of establishing a maximum  
14 (inaudible) you can build out from a beach. And so my  
15 client had proposed to build homes close to that string  
16 line, and in their effort to provide permits the Coastal  
17 Commission (inaudible) evidence that was supplied to Mr.  
18 Foran.

19 Mr. Uzez I don't think was hired by the State  
20 Lands Commission to examine the issue, but rather the  
21 Attorney General's Office employed him in connection with  
22 events of prior litigation, that was the developer's  
23 (inaudible).

24 But utilizing either the photograph determination  
25 or the survey of the severely eroded condition would be a

1 major change from policy even if you accepted the idea that  
2 state policy allows the tide line to move seasonally, which  
3 I think is not consistent with the law of the State of  
4 California.

5           Rather, the ordinary high water mark, the boundary  
6 between uplands and tidelands defined in Section 830 of the  
7 Civil Code, is a much more stable boundary than one that may  
8 fluctuate as much as 50 or 60 feet every year. It is  
9 indeed, and ought to be, the average among the boundaries in  
10 that area. That is, you look at where it might be normally  
11 in the winter, you look at where it may be normally in the  
12 summer, and you have an average between those two that  
13 establishes the ordinary high water mark.

14           I think that is supported by what is the present  
15 case that is the only case on the issue in California,  
16 People versus William Kent Estate Company decided by the  
17 Court of Appeals in 1966, which provided that when a beach  
18 is wider in summer than in winter and if these changes are  
19 regular, they can hardly be gradual and imperceptible and  
20 cannot meet the definition of natural accretion and  
21 (indiscernible) and directs the trial court to figure out an  
22 average between them.

23           I think that all of the evidence here, even if you  
24 accept the photographic interpretations, are that this beach  
25 does exactly that; it's bigger in the summer, it gets



1 smaller in the winter. And there are numerous survey tide  
2 lines identified in this beach area. In fact, we went out  
3 and surveyed yesterday the tide line. This is the tide line  
4 that in February of this year, five months ago, your staff  
5 surveyed and found encroachments beyond the string line.  
6 Yesterday this orange line depicts where that tide line is  
7 now located.

8 Over the months since the major storms of the  
9 earlier part of this year, the sand has rebuilt upon the  
10 beach and the boundary (inaudible) boundary moves has not  
11 only eroded rapidly but has built up rapidly again. I don't  
12 think that's a way for the people of the State of California  
13 to be able to define the boundary between their land and the  
14 tideland. I think they are entitled and the law gives them  
15 a more stable boundary, one that changes by small and  
16 imperceptible degrees.

17 Now, Mr. Warren in a letter to me of March 25th of  
18 this year criticized my reliance on the Kent Estate Company  
19 case, and I recognize that the court decided a decision last  
20 year in a case called Antoine versus Coastal Commission  
21 where they accepted the argument that Mr. Warren advances to  
22 you today. However, the California Supreme Court ordered  
23 that decision to be unpublished and removed it as a case  
24 that could be cited as a controlling case before the State  
25 of California. So the Kent Estate Company case is indeed

1 the only case we have controlling.

2 And the staff can attempt to distinguish it or  
3 shrug it off and act as though it doesn't exist, but there  
4 is no other case.

5 But he criticizes it on the grounds that he finds  
6 it inconsistent with prior California Supreme Court cases  
7 from the teens and the twenties. The principal one of which  
8 is Strand Improvement Company versus Long Beach. Strand  
9 Improvement Company again concluded that to change the  
10 boundary between the tideland and the upland, that the  
11 changes must be little by little, by small and imperceptible  
12 degrees.

13 And I would submit to you that when in the winter  
14 of this year this beach eroded 50 to 60 feet in a few days,  
15 that those were not changes by little by little or by small  
16 and imperceptible degrees, and therefore a survey conducted  
17 after all of that evulsion had taken place cannot define the  
18 boundary in the public's lands and the tidelands.

19 Beyond this I think you need to understand this  
20 concept of navigational servitude. The theory Mr. Warren  
21 advances is that when waves crash upon the shore, and if  
22 you've ever observed the beach, which I'm sure you have, the  
23 water rushes up along the sand and then recedes. That while  
24 the water is rushing up the sand and then recedes it is  
25 navigable because you can launch catamarans and kayaks

1 through that water. And for those few seconds, because it  
2 is navigable, the property that is beneath that rushing and  
3 receding wave has a navigational servitude that the people  
4 of the State of California can prevent my client from  
5 building a house and interfering with.

6 And he relies for this upon two cases which I can  
7 find little basis to rely upon. The first of these is Bone  
8 versus Albertson from 1951 in which a farmer's tract of land  
9 became flooded in 1938 and it was still flooded in 1947, and  
10 the court found that having been flooded that long and  
11 having been navigable over those flood waters that indeed a  
12 navigational servitude existed.

13 And he says we should apply that when the water is  
14 flooded twice a day at high tides for periods that usually  
15 range five to six seconds in their cycles and frequency  
16 because the frequency of waves is generally once every 13  
17 seconds; they crash upon the beach, they recede, and when  
18 the waters recede it's not navigable anymore because your  
19 boat plops down upon the sand. But he asks the State of  
20 California as a policy position to determine that a  
21 navigational servitude applies in those areas.

22 The second case is the case of Baker versus Mack.  
23 And in Baker versus Mack there was a navigable stream which  
24 the landowner argued couldn't be found navigable unless it  
25 could be used for commerce. But the findings of fact in

1 that case were very clear, that the width of the stream was  
2 107 to 292 feet wide and its depth varies from 2.7 feet to  
3 17 feet in depth. That seems reasonably navigable to me.  
4 That does not justify applying navigability simply because a  
5 catamaran or kayak may launch into the surf on water that  
6 will range between two and eight inches in depth and which  
7 will only exist at that depth for a few seconds before it  
8 recedes back down the sand and joins the sea and then is  
9 replaced by the next wave.

10 So I think clearly that being that in these 82  
11 letters previously issued, some of which identify  
12 development which is at the line of mean high tide -- now,  
13 if I build a house that comes right out to the line of mean  
14 high tide what happens when a wave breaks and rushes up on  
15 the beach? It's going to go into his navigational  
16 servitude. Yet in not one of those 82 letters was there  
17 ever a mention over 13 years of the existence of such a  
18 navigational servitude. There I think these have become  
19 departures from the policies that this Commission has  
20 applied in the past.

21 I have a further difficulty which is the subject  
22 of my July 9th letter because I find that the Commission's  
23 staff is now not even applying those same policies on people  
24 who come after my client, on people who are on the same  
25 beach as my client.

1           On this beach there's another problem on which  
2 your office has recently sent a letter. On May 21st of 1993  
3 they sent a letter concerning a house which is on this  
4 parcel marked H (inaudible) the same beach. However, they  
5 declined to assert that state tidelands might be involved  
6 here. They declined to assert that because Mr. Uzez went  
7 out and interpreted his photographs (inaudible) surveys were  
8 done, and they only showed in one photograph that there  
9 might be some encroachment on that property by state title.

10           Now, I'm not sure that that's in fact going to be  
11 the case every year because this beach, as Mr. Weiss will  
12 indicate to you, tends to erode fairly uniformly. But  
13 what's surprising about the May 21, 1993 letter is that the  
14 navigational servitude disappeared. It's not even  
15 mentioned. Indeed, when I look at Mr. Uzez' study that he  
16 submitted, which forms the basis for the opinion, if I look  
17 at the study he prepared for my client, Lechuza Villas West,  
18 the title of it on the front page in big print reads "Report  
19 on Locations of Mean High Tide Lines and Landward Limits of  
20 Wave Uprush."

21           Well, that landward limits of wave uprush, that's  
22 the navigational servitude concept. But when it comes to  
23 preparing the report on the Bachman (ph.) property, a report  
24 that the State Coastal Commission has no real interest in  
25 denying a permit on, when it comes to that report, Mr. Uzez'

1 report is entitled "Report on Locations of High Tide Lines."  
2 What happened to landward wave uprush?

3 And in Mr. Trout's letter with regard to the  
4 Bachman property where he does not assert a navigational  
5 servitude, he is silent. Suddenly this policy which is used  
6 to deny my client his ability to make use of his property  
7 because it will interfere with important constitutionally  
8 guaranteed public rights doesn't exist for a house 600 feet  
9 away on the same beach subject to the same surf, subject to  
10 that same advancing (inaudible). I don't understand that.  
11 The policies that were applied before to hundreds of people  
12 who built houses on the beach are not going to apply to my  
13 client, and then after, they continue not to be applied.

14 This is a matter of I think some grave import in  
15 that if you've ever visited the Malibu area and many other  
16 areas of the state, there are numerous structures built out  
17 along the shoreline on what are generally called wet  
18 beaches. These are beach locations where the water rushes  
19 regularly up underneath the houses. And one thing I would  
20 note in these 82 letters that I found in the Coastal  
21 Commission files and signed on behalf of this Commission, a  
22 great number of them are for sea walls or revetments.

23 Now, what's the purpose of a sea wall or  
24 revetment? Its sole purpose it to block the water that  
25 advances up the beach. Block water that would be navigable

1 and subject to the navigational servitude. Yet this agency  
2 regularly and routinely approves sea walls if it finds,  
3 looking at its survey maps, that the line of mean high tide  
4 is not affected.

5 In the notebook that I distributed to you there  
6 are a number of photographs in Exhibit D showing numerous  
7 beach locations where houses are built on caissons over the  
8 beach designed for the water to go beneath those houses. If  
9 this is the policy of the State of California, the vast  
10 majority, if not all of those houses, are either on state  
11 tidelands or are subject to the navigational servitude.  
12 Those people's tidelands all become affected by what I  
13 consider a severe departure in policy by this Commission in  
14 asserting claims on property it has not asserted claims upon  
15 in the past.

16 What we are looking for is the opportunity for  
17 this decision not to be made by your Executive Director  
18 because it is of such -- but for the decision in fact to be  
19 made by you. You are the ones who under statute govern the  
20 tidelands of the State of California. And I don't think  
21 that Mr. Warren can expand those tidelands simply by  
22 asserting that the definition by which we determine the  
23 boundary is different than case law and tradition holds it  
24 to be.

25 One other chart that I will show you (inaudible)

1 why you should ask that an ordinary high water mark not be  
2 (inaudible) this drawing is one (inaudible) in which he  
3 identified between these two widest dark lines on the survey  
4 of (inaudible) location where 90 percent of all of the mean  
5 high tide lines that were surveyed fall in that zone. They  
6 are (inaudible).

7           And when you're asked to determine what the State  
8 of California will assert the ordinary high water mark to  
9 be, I ask you to look and say as an average person what  
10 seems ordinary? Does it seem ordinary that after severe  
11 storms we go out and survey and say, "That's the ordinary  
12 high water mark"? Is the condition of the beach at that  
13 time ordinary or is it extraordinary? And ought we not  
14 follow the law of California and fall somewhere between a  
15 seaward (inaudible) average, statistical average that my  
16 client does not interfere with in any manner whatsoever in  
17 the construction of his house.

18           He seeks to do no more than what thousands of  
19 other citizens in California have done, be able to make  
20 reasonable use of his own property in a location where it is  
21 appropriate to do so.

22           I'd like to (inaudible) Mr. Weiss, a civil  
23 engineer, has 30 years of experience in dealing with this  
24 area.

25           You can take my chair. And --



1           CHAIRMAN MCCARTHY: It's all right. He can sit  
2 over here if he likes.

3           Would you like to come around this side, Mr.  
4 Weiss? And if you'd just switch that microphone around you  
5 can use that. Thank you.

6           MR. WEISS: Yes. Thank you, gentlemen. My name  
7 is David Weiss. I am a licensed civil and structural  
8 engineer in the State of California. I have 30 years of  
9 experience in studying and observing the natural wave and  
10 shoreline processes in the area of Malibu. In that 30 years  
11 I have performed and my office has been responsible for  
12 performing almost 300 wave uprush studies, 20 of which have  
13 been done along Lechuza Beach. As a result of this  
14 experience I feel I can make the following statements.

15           First of all, Lechuza Beach is a pocket beach  
16 situated between two rock outcroppings on its east and west  
17 edges. Second of all, waves attack this beach on a fairly  
18 perpendicular direction from the ocean. As a result, the  
19 beach scours during a storm on a pretty uniform basis.  
20 There are times when the waves would approach the beach from  
21 a slight angle where one end of the beach may accrete or  
22 scour a little more than the other and then vice versa in  
23 other storms, but by and large over a period of time any  
24 accretion or scouring of this beach is pretty uniform and  
25 pretty even.

1           As a result, there is no reason to allow homes to  
2 be built on one end of the beach and state they are beyond  
3 the mean high tide -- or they are landward of a mean high  
4 tide line and not to be built on another end -- the other  
5 end of the beach.

6           Over the years there has been very little  
7 permanent change in the location of the mean high tide line.  
8 Other than on very rare occasions when the beach scours  
9 dramatically as a result of a very erosive storm, the mean  
10 high tide line pretty well meanders around the location of  
11 the 1932 tract line.

12           From my experience, the location of the mean high  
13 tide line has always been established by three-dimensional  
14 field surveys, that means getting a man out there with a  
15 survey -- with a transit and a measuring tape and a range  
16 pole. In a report prepared for the state by Mr. Uzez, he  
17 used a method of trying to establish the location of the  
18 mean high tide lines of observing some historical data. He  
19 used a series of historical photographs. In my mind this  
20 process has done nothing more than to establish what we've  
21 always said, that the mean high tide line on these beaches  
22 oscillate.

23           But he cannot -- I do not feel he can use this  
24 process to establish a property line because there are too  
25 many variables and too many unknowns.

1           First of all, the scale of the photographs used  
2 vary from 1 in 200 to 1 in 2,000. When somebody is trying  
3 to predict or make a statement, "Well, the mean high tide  
4 line meandered over a certain string line by a distance of 5  
5 or 15 feet," he's trying to identify a swath on a photograph  
6 somewhere between 200ths and 2000ths of a inch wide.

7           Second of all, in order to establish the elevation  
8 of the water surface one must know the time of day, consult  
9 an almanac and know what the height of the water of the tide  
10 was at that given hour. The photographs used for the most  
11 part had no times on them, as a result Mr. Uzez had to use a  
12 sun dial theory. In other words, he had to take a look at  
13 some shadows on the photograph and say, "Well, it must be  
14 three o'clock," and therefore he established the time of day  
15 in his mind and he said -- and he established the height of  
16 the water. This is very, very inaccurate.

17           Third, Mr. Uzez made an assumption that the  
18 waterline intersects the beach -- or the still waterline  
19 intersects the beach at a distance of approximately halfway  
20 up the, quotation mark, "wet line." Mr. Uzez established  
21 the wet line on his photographs by using the line of the  
22 debris on the beach and the line or the location of the  
23 water or the waves.

24           First of all, the debris line of the beach could  
25 be days old and has nothing to do particularly with where

1 the waterline is on that particular day or a given day.  
2 Second of all, Mr. Uzez cannot establish where the actual  
3 washback line of the wave is. All he sees in the photograph  
4 is the water is somewhere on the photograph and he doesn't  
5 know if it is washing up the beach or washing back toward  
6 the ocean. As a result of this, I say that Mr. Uzez cannot  
7 necessarily define -- or can't define the location of the  
8 mean high tide line.

9           Finally, at the Lechuza Villas project, the mean  
10 high tide line will rarely encroach beyond the project  
11 string line. Observation shows that the occurrences that  
12 this has happened would be -- has been maybe one or two  
13 percent of the time, and of the times this has occurred it  
14 has been as a result of a phenomenal occurrence such as a  
15 storm or as Mr. Stacey has used the word evulsion. This is  
16 a very swift movement of the sand and a very swift movement  
17 of the tidal line and is not slow and imperceptible, and  
18 boundary lines are usually established by slow and  
19 imperceptible movements.

20           Thank you very much.

21           CHAIRMAN MCCARTHY: May I ask a question?

22           Did I understand you correctly to say that over  
23 the years the mean high tide line can be pretty consistently  
24 fixed according to the surveys that exist?

25           MR. WEISS: According to our information, the mean

1 high tide line on this beach has pretty consistently been  
2 around the location of the 1932 tract line.

3 CHAIRMAN McCARTHY: Would you give me the dates of  
4 the surveys that you used to come to that conclusion?

5 MR. WEISS: We are using surveys that were taken  
6 in July of 1932, August of 1951, we have a survey from 1957,  
7 1960 --

8 CHAIRMAN McCARTHY: What months are those?

9 MR. WEISS: We don't have the months on here.

10 CHAIRMAN McCARTHY: 19 -- what are those --

11 MR. WEISS: 51.

12 CHAIRMAN McCARTHY: Yeah.

13 MR. WEISS: I'm sorry --

14 CHAIRMAN McCARTHY: August '51.

15 MR. WEISS: August '51, 1957 --

16 CHAIRMAN McCARTHY: Right.

17 MR. WEISS: -- 1966, 1970, 1972, April of 1990,  
18 September of 1992, and then of course the survey that was  
19 taken just yesterday.

20 CHAIRMAN McCARTHY: Are there any winter surveys  
21 in the group that you relied upon?

22 MR. WEISS: The 1950 -- there may be some in the  
23 1957 through '72 surveys. The April 1990 survey would be  
24 considered a winter survey.

25 CHAIRMAN McCARTHY: Why would that be defined as a

1 winter survey?

2 MR. WEISS: We usually consider the winter months  
3 of the storm seasons between November and April.

4 CHAIRMAN McCARTHY: Any questions?

5 Thanks.

6 MR. WEISS: Thank you, gentlemen.

7 CHAIRMAN McCARTHY: Mr. Stacey, let me ask a  
8 question. You've appeared before the State Coastal  
9 Commission on this matter.

10 MR. STACEY: Yes.

11 CHAIRMAN McCARTHY: All right. More than once?

12 MR. STACEY: Yes.

13 CHAIRMAN McCARTHY: And their decision?

14 MR. STACEY: Their decision was to deny based upon  
15 the findings that the construction of the structures would  
16 interfere with state tidelands and a navigational servitude.  
17 They made some additional findings of environmental issues.

18 CHAIRMAN McCARTHY: Mr. Warren's letter affected  
19 the last decision, the last two decisions? I don't know the  
20 dates of the Coastal Commission hearings. Incidentally, how  
21 many times have you been before the Coastal Commission on  
22 this issue?

23 MR. STACEY: Four.

24 CHAIRMAN McCARTHY: All right. Mr. Warren's  
25 letter came at what point in that sequence?

1           MR. STACEY: It came at the end of the sequence in  
2 response, in my view, to the decision of the United States  
3 Supreme Court in Lucas versus South Carolina Coastal Council  
4 where the Supreme Court stated that to prevent use of  
5 property you must find that either the use would constitute  
6 a public nuisance or that the owner does not have sufficient  
7 title to proceed with the use. And I believe it goes to the  
8 latter of those two issues.

9           CHAIRMAN McCARTHY: So I understand your  
10 perspective on this, are you indicating that the State  
11 Coastal Commission would not have reached this decision on  
12 other grounds and the last decision but for Mr. Warren's  
13 letter?

14           MR. STACEY: I do not believe there would have  
15 been any justifiable grounds for the Commission to have made  
16 a decision. But indeed they did make other findings about  
17 the impact of the construction of residences, and I've  
18 represented probably 200 people in the past 20 years before  
19 the Coastal Commission, and I could find no impact these  
20 residences would cause that is not caused by every  
21 shorefront residence that is built in the Malibu area. The  
22 only difference being that this is a relatively open unbuilt  
23 beach area where other areas by the time the Coastal  
24 Commission came along already had a number of houses.

25           CHAIRMAN McCARTHY: So for three occasions the

1 California Coastal Commission rejected your application on  
2 behalf of your client on other grounds and on the final  
3 occasion there were independent -- other independent grounds  
4 plus Mr. Warren's letter that you believe played a role in  
5 their decision?

6 MR. STACEY: I believe absent the assertion of a  
7 tidal interest by the state, that the Commission would not  
8 have denied the permit.

9 CHAIRMAN McCARTHY: In their fourth denial?

10 MR. STACEY: Yes.

11 CHAIRMAN McCARTHY: I welcome Commissioner  
12 Stancell. The Department of Finance is sort of running in  
13 -- each one's going to cover three innings of this.

14 (Tape change.)

15 CHAIRMAN McCARTHY: -- assessment done for the  
16 Lands Commission. But you're aware of the survey that they  
17 took in February, Mr. --

18 (Inaudible comments.)

19 CHAIRMAN McCARTHY: All right.

20 MR. STACEY: Yes.

21 CHAIRMAN McCARTHY: Which found what, Mr. Hight?

22 EXECUTIVE OFFICER HIGHT: The placement of the  
23 mean high tide line on that date (inaudible).

24 CHAIRMAN McCARTHY: Now, a survey's a more  
25 traditional way of determining -- right.



1           Do you quarrel with that particular survey, the  
2 legitimacy of that survey?

3           MR. STACEY: No. We don't quarrel with the  
4 survey, we quarrel with utilizing a survey at a time of  
5 severe storm activity to establish a property boundary.  
6 Certainly it establishes where the mean high tide intersects  
7 the shoreline on the beach. But I don't believe that the  
8 law will support the proposition that that means that when  
9 that beach eroded those lands changed from being private  
10 lands to public lands.

11           CHAIRMAN MCCARTHY: But isn't the legal definition  
12 of the state's property, you know, the mean high tide line,  
13 at any point during the calendar year?

14           MR. STACEY: I believe the definition in the Civil  
15 Code is the ordinary high water mark. Now, I don't think  
16 that means the mean high tide line wherever it might exist  
17 through the year. That was the argument the state made in  
18 the Candice State case and it was rejected, affirmatively  
19 rejected by the court that the erosion on a beach that  
20 arises in a regular annual fashion, that may be as much as  
21 80 feet a year, and if you observe the distance of that line  
22 that's pretty much on the order we're talking about here,  
23 that that kind of erosion and accretion is not such that it  
24 is little by little and by imperceptible degrees and  
25 therefore changes the boundary.

1           CHAIRMAN MCCARTHY: This is the yardstick in the  
2 1966 case?

3           MR. STACEY: Yes. '66, '56? '66. '66. Yeah.

4           CHAIRMAN MCCARTHY: So you take the position that  
5 since the Court of Appeals case was unpublished that the  
6 courts have not changed their definition of what the mean  
7 high tide line is?

8           MR. STACEY: For whatever reasons, the California  
9 Supreme Court decided that that opinion should not become  
10 the law of the State of California. I can't crystal-ball  
11 the reasons, I can only say Antoine is not the law.

12           CHAIRMAN MCCARTHY: Do we have any -- do our legal  
13 counsel have any views on that?

14           DEPUTY ATTORNEY GENERAL STEVENS: Yes.  
15 (Inaudible) basically we believe that the lines that  
16 (inaudible) ambulatory (inaudible). This had been discussed  
17 (inaudible). The Antoine case (inaudible) pointed out that  
18 this determination of this ambulatory (inaudible) actually  
19 has some advantages for the private owner as well.  
20 (Inaudible).

21           And there's one other point (inaudible) surveys  
22 (inaudible) all occurred (inaudible). This is the  
23 ambulatory line (inaudible) must be considered (inaudible)  
24 change in the Lechuza Beach is characterized as being  
25 (inaudible) of 100 year storm (inaudible) nature and the

1 wave action (inaudible). The public resources code  
2 (inaudible) where a beach is changed by artificial means  
3 (inaudible) fixed. And I think this (inaudible).

4 CHAIRMAN MCCARTHY: Mr. Stancell -- Commissioner  
5 Stancell.

6 COMMISSIONER STANCELL: Mr. Stevens, it was  
7 asserted by Mr. Stacey that there's a major departure from  
8 what you just said in terms of how the boundaries were  
9 determined in this case. Is he correct in that assertion?

10 DEPUTY ATTORNEY GENERAL STEVENS: I'd like  
11 (inaudible) the boundary's always the big (inaudible). I  
12 have seen correspondence dated at least back to the early  
13 eighties which describes this land (inaudible).

14 COMMISSIONER STANCELL: Are we applying something  
15 differently now?

16 MR. STACEY: No.

17 DEPUTY ATTORNEY GENERAL STEVENS: No.

18 COMMISSIONER STANCELL: Then I'm not sure I  
19 understand where the departure is taking place from a  
20 current policy.

21 MR. STACEY: We find no departure from existing  
22 past policy.

23 DEPUTY ATTORNEY GENERAL STEVENS: I think perhaps  
24 Mr. Stacey may be suggesting (inaudible). I'd like to  
25 mention that Mr. Stacey mentioned there was 82 some letters

1 that he has of State Lands Commission communicating to the  
2 Coastal Commission regarding developments along the beach.  
3 We have over a dozen letters relating to this stretch of  
4 beach between 1978 and 1990 or -- excuse me, yes, 1990, in  
5 which the Commission specifically did make those same kind  
6 of statements.

7 But what he failed to read to you was that each  
8 one of those letters also points out that it's based upon  
9 the available evidence that the Commission and this office  
10 has not made a final determination of the boundary, that we  
11 reserve the right to assert an interest at a later date, and  
12 if in fact a structure's been built to require a lease and  
13 that -- and so forth. So in each one of those letters to  
14 Mr. Stacey's client or his predecessors or the real estate  
15 agents who were contacting our office about this property,  
16 they were informed that that was certainly a possibility.

17 There is also correspondence with the Coastal  
18 Commission where they asked us and we told them we didn't  
19 have sufficient evidence -- reliable sufficient evidence at  
20 that time and it was only after that evidence came in that  
21 we did object. We still lack that evidence on the Bachman  
22 residence and so the staff was -- did not feel that it was  
23 appropriate to object to a piece of property where there was  
24 insubstantial evidence.

25 CHAIRMAN McCARTHY: Mr. Warren.

1 MR. WARREN: Mr. Chairman, Commissioners, for your  
2 information, I've gone over most of the 82 some letters that  
3 Mr. Stacey referred to in his opening, and substantially  
4 they are the same, and I'd like just to read you -- it's a  
5 standard reply.

6 It says, "Based on" -- this is to applicants and  
7 agencies and so forth,

8 "Based on the information you  
9 provided and an analysis of our in-house  
10 records and maps, the proposed residence  
11 appears to be located landward of those  
12 surveyed mean high tide lines known to  
13 us at this time. Therefore we will not  
14 require a lease or permit.

15 "You should be aware, however, that  
16 this office has not made a final  
17 determination of the state's boundary at  
18 this location. Therefore we reserve the  
19 right to require a lease or permit at  
20 some time in the future should it be  
21 determined that state land is involved.

22 "This letter is not intended nor  
23 should it be construed as a waiver of  
24 any right, title or interest of the  
25 State of California in any lands under

1           its jurisdiction."

2           That is typical of the 82 letters provided and  
3 accurately reflects the position of this agency. When we  
4 receive inquiries such as the one posed to us by the Coastal  
5 Commission we look at the available information on the  
6 particular site. Depending on its relevance and its  
7 substance we then make a determination of mean high tide  
8 line, and that's exactly what we did in this instance.

9           Back in 1981, for example, we received an inquiry  
10 concerning this very site. This inquiry was from -- oh, I  
11 think it was a real estate agent, and raising questions  
12 about this Lechuza Villa -- this stretch of what was then  
13 referred to I think it is Ensenel Beach.

14           MALE VOICE: Um-hmm. Tract 10630.

15           MR. WARREN: Tract 10630. In that letter in 1981  
16 we advised the person interested in the site,

17                   "That Section 6357 of the Public  
18 Resources Code provides authority to  
19 this body to establish the ordinary high  
20 water mark of defined wetlands under its  
21 jurisdiction. The courts have held that  
22 under natural conditions the location of  
23 the ordinary high water mark is an  
24 ambulatory line changing from day to day  
25 depending upon the available sand supply

1 and other factors. Therefore a  
2 determination of the ordinary high water  
3 mark in such circumstances is valid only  
4 for the instance it's made and is seldom  
5 performed by this office.

6 "The usual application of Section  
7 6357 is an area where the shoreline  
8 configuration has been substantially  
9 altered by works of man. In such cases  
10 the ordinary high water mark is located  
11 in the position it last occupied under  
12 natural conditions. Notwithstanding the  
13 foregoing discussion, it does sometimes  
14 become necessary to locate the  
15 instantaneous ordinary high water mark  
16 in natural areas. The procedure used by  
17 this office is to locate a" --

18 Well, and so forth. The line that -- and the  
19 manner that we did in February of this year. It says, "This  
20 office," and this -- this is a fact which continues -- this  
21 was a fact then and it continues to be a fact today, "This  
22 office does not have a full-time surveying party and lacks  
23 the resources necessary to conduct a field survey of the  
24 subject property." Those were the circumstances concerning  
25 the information available to us.

1           Now, when we -- on this particular parcel when we  
2 received the photographs, when we conducted the -- had the  
3 expert opinion of Mr. Uzez in the litigation involving the  
4 Coastal Commission and this parcel, his expert opinion as to  
5 the location of the line, we then conducted an on-the-site  
6 survey, we were given, as I say, anecdotal photographs  
7 showing the existence of the -- of what appeared to be  
8 sovereign waters over the proposed site. We then came to  
9 the conclusion that there was substantial evidence  
10 indicating that a significant part of the time that the  
11 project would be on sovereign lands.

12           This is not a case, as Mr. Stacey argued, of  
13 permitting a person to do -- a private owner to do with what  
14 he wants with his own lands. What they're trying to do is  
15 to -- he's seeking is to allow a private developer to use  
16 state lands for his development.

17           Now, this is the way we -- this agency has and is  
18 operating. It is not a change of policy. Mr. Stacey's  
19 quarrel with this agency, with the Attorney General, with  
20 the Coastal Commission and other state agencies, is over the  
21 law. His remedy is not, I respectfully suggest, to this  
22 Commission, but to the courts, a forum not unfamiliar to him  
23 on this and other matters.

24           MR. FORAN: Well, Mr. Chairman --

25           CHAIRMAN McCARTHY: Mr. Foran.



1           MR. FORAN: -- it seems to me that that sort of  
2 begs the question, you assert that there is a title -- state  
3 title involved and then you proceed from that on this  
4 particular type of property. I don't know how many pieces  
5 of property are on beaches and coasts up and down the state,  
6 but if this were to prevail and everyone were to -- the  
7 title companies I think would go crazy for one thing because  
8 every -- there would be a cloud on every title in the state  
9 if you adopt this rule, which apparently has never been  
10 asserted -- I don't know. Has it ever been asserted  
11 officially by this body other than through the statement  
12 that Mr. Warren has made?

13           This is the point, and this is the point that I  
14 was saying it brings into the question the valuation of all  
15 of the properties that I was referring to at all. It is a  
16 -- it's certainly a new direction for the State Lands  
17 Commission to move based upon this particular statement that  
18 you haven't even applied to other property, and it will, of  
19 course, I assume, then apply to ever other piece of beach  
20 property in the State of California. I think there's about  
21 25 percent of the coastal beach property that has not yet  
22 been developed and would make it worthless.

23           MALE VOICE: What is new? What are you saying is  
24 a new policy departure?

25           MR. STACEY: If I might -- it's been a defense of

1 the claim that the mean high tide line is ambulatory. I  
2 heard nothing about the navigational servitude asserted  
3 against my client and nowhere else.

4 CHAIRMAN McCARTHY: May I suggest, to stay on  
5 track, if we could just keep on the first point.

6 MR. STACEY: All right. The departure --

7 CHAIRMAN McCARTHY: We can get to that later.

8 MALE VOICE: What is the departure?

9 MR. STACEY: I believe the departure has been to  
10 claim that wherever the mean high tide line might exist  
11 despite the forces that might have produced it. And  
12 evulsion is not an observation of some atmospheric activity.  
13 Evulsion is the rapid depletion of a bank. And whether  
14 there happened to be an atmospheric activity that justifies  
15 that appalachian hundred year storm that caused it or not, I  
16 think there is little question that there was a rapid  
17 depletion of the sand off this beach as a result of whatever  
18 the ocean was doing in February of this year.

19 There is a difference of fact, and I believe that  
20 this is the first occasion where your agency has gone out to  
21 assert a wintermost severe line. In the study submitted to  
22 you with regard to Mr. Bachman's house by Mr. Gad, he  
23 describes, and this is another study which is relied on, he  
24 describes the erosive nature of the beach.

25 The findings of the study indicate that the

1 present condition of the beach exhibits the most extreme  
2 erosion that is found in the historical survey archives.  
3 "This eroded beach condition was caused by wave action  
4 during the recent winter season during which storm  
5 occurrence was both frequent and intense." That was not our  
6 expert's conclusion, that was Mr. Philibosian's expert's  
7 conclusion. That I think is a difference in that the state  
8 is reaching beyond normal beach activity to claim state  
9 lands in areas that are exposed to the tides only by  
10 extraordinary occurrences.

11 And whether we label them with some meteorological  
12 label like 100 year storm, it doesn't alter the facts that  
13 the sand disappeared very fast and it came back again a few  
14 months later.

15 MR. WARREN: Mr. Stacey misstates our position.  
16 Again, we are not claiming the line of demarkation between  
17 sovereign land and privately-owned land to be the landward  
18 most under severe storm erosive evulsive condition. That's  
19 not what we're claiming. He insists that we are. We're  
20 claiming that the sovereign -- the line is an ambulatory  
21 line moving on a seasonal basis from summer to winter. We  
22 don't talk about severe 100-year storms or severe erosive  
23 conditions or evulsions. We're not talking about that at  
24 all. We're just talking about ordinary seasonal variations  
25 of -- well, of the point of contact with the land and the

1 mean high tide line.

2 CHAIRMAN McCARTHY: And the staff disputes Mr.  
3 Stacey's contention that in February the line where we found  
4 it to be was the result of extreme evulsive activity.

5 MR. WARREN: Yes, we dispute that. In his  
6 communications to you and to us he's contended that 1990 --  
7 that the mean high tide line measurement we took at that  
8 point in time was the result of severe storms. We dispute  
9 that.

10 MR. STACEY: 100-year storm. Yeah.

11 MR. WARREN: And we checked with weather experts  
12 and have been assured that no such unusual conditions  
13 existed with respect to tidal action on the coast in the  
14 winter of 1992-1993.

15 CHAIRMAN McCARTHY: And weren't there also  
16 photographs submitted to the Commission from property owners  
17 at a prior point before the storms?

18 MR. WARREN: Yes.

19 CHAIRMAN McCARTHY: And those photographs  
20 indicated what?

21 MALE VOICE: There's quite a few that have been  
22 given to us over the years. The most recent ones last  
23 October indicated that -- and along with letters from people  
24 who had used the property in the vicinity testified to the  
25 fact that there were a number of recreational vessels that

1 were on the beach, that the navigable waters -- not a storm,  
2 there was no storm during the October 25th and 26th  
3 photographs that we have that we can show you.

4           It was simply a higher tide, and I think that's an  
5 important thing to talk about because Mr. Stacey continually  
6 asserts this wave rushup -- uprush and believes that that is  
7 what the staff of the Commission is asserting are navigable  
8 waters, when, in fact, the mean high tide line, as he points  
9 out in some of his correspondence, 50 percent of the time  
10 the high tide exceeds the mean high tide.

11           So 50 percent of the high tides, not wave uprush  
12 but the elevation of the ocean, exceeds high tide, and those  
13 waters are clearly navigable. They're not wave uprush,  
14 they're not this water crashing up on the beach. So the  
15 photographs of October when there were no storms show you  
16 what a higher tide does to the beach with no storm activity.

17           There's a few other things. Mr. Weiss in his  
18 statements to you about the number of mean high tide line  
19 surveys that he relied upon, he was only able to give you  
20 two dates, July of 1932 -- excuse me, he gave you several  
21 dates, July of '32, August of '51, April of '90, September  
22 '92 and July '93. What he fails to do is tell you that --  
23 what four of the months were.

24           He also fails to mention that when the staff of  
25 the Commission requested copies of these surveys or sources

1 for these surveys, other than the July '32 subdivision map,  
2 we were not presented with any of that evidence. We don't  
3 know where he came up with the evidence. We certainly don't  
4 have any copies of it. We believe what in fact he's talking  
5 about is surveys on other pieces of property that they tried  
6 to use to try and argue applied somehow to this beach.

7 CHAIRMAN MCCARTHY: Do you have those surveys, Mr.  
8 Stacey?

9 MR. STACEY: I don't know if Mr. Weiss has brought  
10 those surveys with him. But there are indication -- five of  
11 the surveys are immediate field surveys, four of the surveys  
12 are extrapolations from surveys from either side.

13 MALE VOICE: Now, if he's counting the July 1993  
14 survey that they conducted yesterday --

15 MR. STACEY: Yes.

16 MALE VOICE: -- it is possible that there's three  
17 for the last 60 some years. Your Commission was forced to  
18 rely on 60-year-old surveys in this location until the  
19 evidence was presented to us last fall based on the Uzez  
20 study. We've asked for copies of the '51 and those other  
21 surveys and have not been given those. Even Mr. Weiss  
22 himself states that the winter period is generally  
23 considered between November and April.

24 The evidence that we've been presented by Mr.  
25 Stacey over the last few months has no evidence of any

1 surveys during that period of time, a six-month period of  
2 any year in the last 100 years. So that's our concern is  
3 that we needed evidence to show what a typical beach looked  
4 like throughout the year and we believe we have that  
5 evidence now.

6 CHAIRMAN MCCARTHY: May I -- Mr. Philibosian has  
7 been waiting patiently to testify.

8 Mr. Foran, Mr. Stacey, we'll give you ample time  
9 to respond to anything that's being said here and to make  
10 any points that you'd like.

11 Mr. Philibosian, would you like to join us up  
12 here? You can sit on this side if you want so everybody can  
13 stay in place.

14 MR. PHILIBOSIAN: Thank you. Chairman McCarthy,  
15 Commissioner Davis, Commissioner Stancell, I'm Robert  
16 Philibosian, I'm an attorney and I represent the Save  
17 Lechuza Beach Committee. I appreciate very much the  
18 Commission's permitting us to speak at this particular  
19 meeting. I'm not calling it a hearing, I'm not calling it  
20 an appeal, that's apparently what Mr. Stacey seems to want  
21 to have here and I think we should get that clear.

22 For the record I will object to this proceeding.  
23 It has no basis in law. There is no recommendation before  
24 the Commission from staff, although Mr. Stacey has used the  
25 words to the effect that if this Commission adopts the staff

1 recommendations then certain consequences will follow, there  
2 is no recommendation. There is nothing for this Commission  
3 to adopt at this particular time.

4 CHAIRMAN McCARTHY: Can I interrupt you right  
5 there?

6 MR. PHILIBOSIAN: Yes, sir.

7 CHAIRMAN McCARTHY: Do we challenge that or do we  
8 accept that as -- what are we doing here?

9 MALE VOICE: We are, at the request of Mr. Stacey,  
10 listening to his version of the proceedings. The Commission  
11 has the authority to direct staff in any direction it so  
12 chooses.

13 CHAIRMAN McCARTHY: What's the issue before us  
14 besides indulging Mr. Stacey, which we're happy to do  
15 because I'm only on 62 other boards. I've got nothing else  
16 to do. But --

17 MALE VOICE: He's simply --

18 CHAIRMAN McCARTHY: I don't mean to be facetious.  
19 But is there an issue before us we're supposed to decide  
20 something?

21 MALE VOICE: No.

22 MALE VOICE: No.

23 MALE VOICE: I think the relevance is that Mr.  
24 Warren sent a letter to the California Coastal Commission  
25 and Mr. Stacey and Mr. Foran are here asserting that that



1 letter had some impact on the fourth denial of the  
2 California Coastal Commission.

3 CHAIRMAN McCARTHY: But isn't that something the  
4 Coastal Commission can speak to? I mean how do we know  
5 what --

6 MALE VOICE: Well, I think that they feel that  
7 your Executive Officer is wrong and they're trying to get  
8 this Commission to correct Executive Officer in what is  
9 alleged to be new policy.

10 MALE VOICE: Well, there's an assertion of title  
11 that the Coastal Commission is relying upon to deny the  
12 application before the Coastal Commission. And you're the  
13 determiners of the title as far as state lands are  
14 concerned.

15 COMMISSIONER STANCELL: But weren't there three  
16 other occasions, at least three, where the Coastal  
17 Commission denied the --

18 MALE VOICE: But I don't think they denied it on  
19 the question of title. I wasn't there, I could be wrong,  
20 but somebody else can --

21 COMMISSIONER STANCELL: That's what I'm trying to  
22 ascertain. What was the basis for the other denials?

23 MR. STACEY: At the time of the original three  
24 decisions we had a letter from the State Lands Commission  
25 virtually identical to these other 82 that there were, in

1 their records, no state lands involved in this construction  
2 and -- with the caveat that this was not a final  
3 determination, similar to what Mr. Warren had read to you.

4 And the Commission in each of those occasions on  
5 other grounds denied but chose to reconsider those denials  
6 and to accept by stipulation with Mr. Kaufman a remand of  
7 the nine cases I had presently at that time in litigation,  
8 all to be consolidated together for a final decision, which  
9 became the fourth decision in which I believe the evidence  
10 provided by your Executive Director or his position was the  
11 most material aspect in the Commission's decision.

12 CHAIRMAN MCCARTHY: We should let Mr. Philibosian  
13 proceed with his testimony.

14 MR. PHILIBOSIAN: Thank you, Chairman McCarthy.

15 Having --

16 CHAIRMAN MCCARTHY: I must say I'm not -- I have a  
17 lot of respect for my staff, but I'm not satisfied what  
18 we're doing here either. So besides --

19 MR. PHILIBOSIAN: I'm only here because Mr. Stacey  
20 is here and has brought Senator Foran with him and some  
21 other high-powered lobbyists. I'm only here to speak on  
22 behalf of the people who have consistently opposed this  
23 project through many iterations before the Coastal  
24 Commission and try to set the record straight as to what's  
25 going on here and what the actual history is. To that

1 extent I will once again, and then I'll drop it, reiterate  
2 my objection to the proceeding because there's nothing  
3 before this Commission.

4           Simply I think the mechanism is that Mr. Stacey is  
5 appearing here in the public testimony portion of your  
6 hearing when which you allow any member of the public to  
7 come forward and talk about any issue that may have some  
8 potential relevance to the State Lands Commission. What  
9 he's seeking to do is to have this Commission reverse the  
10 staff determination. I don't think there's a mechanism for  
11 doing that. Having said that I'd like to address the issues  
12 that are before you.

13           I brought some photographs of the beach if I may  
14 distribute these.

15           (Pause.)

16           MR. PHILIBOSIAN: Just so we can bring this issue  
17 to life a little bit, Commissioners, this is Lechuza Beach,  
18 primarily the westerly end. These photographs were taken  
19 during nonstorm conditions. These are normal kinds -- in  
20 fact, they're low surf conditions. The red stakes that you  
21 see in the foreground of some of these photographs are the  
22 stakes placed there by Mr. Haney's people which mark his  
23 purported string line. You can see quite clearly that the  
24 surf is right in the midst of those stakes.

25           As also to the navigational easement issues, if I

1 may jump to that issue, although it's a bit out of the  
2 sequential order, you can see that there are water craft  
3 right there on the beach. And I think the reason, from my  
4 familiarity with that beach situation, that the staff of the  
5 State Lands Commission address the navigable easement issues  
6 with regard to Lechuza Villas property and did not address  
7 them with regard to Bachman property is that there are no  
8 water craft that use the beach in front of the Bachman  
9 property or any of the properties at the easterly end of the  
10 beach. The water craft are at the westerly end of the beach  
11 and have been using that beach for many, many years.

12 CHAIRMAN MCCARTHY: Mr. Philibosian, what was the  
13 date which the photos with the sticks of the property owner  
14 up here in --

15 MR. PHILIBOSIAN: I don't have that precise date,  
16 Commissioner -- Chairman McCarthy. They were during the  
17 winter months and taken at different times. Winter of 1991-  
18 1992. I don't have the precise dates of those photographs.  
19 But I don't think the precise dates are as relevant as just  
20 giving you a picture of the situation. And also so that you  
21 know what we're talking about in terms of proposed  
22 development, and if you look at the photograph that's at the  
23 lower right-hand portion of the sheet you will see a coastal  
24 bluff there with some cypress trees atop the bluff.

25 The westerly edge of Sea Level Drive terminates at

1 the top of that bluff, and what the applicant to the Coastal  
2 Commission, Mr. Haney, who's here today, was proposing to do  
3 is to bring a road down from that bluff to the level sand on  
4 the beach and then extend it eastward to hook up with the  
5 existing eastern end -- I'm sorry, hook up with the existing  
6 westerly end of Sea Level Drive. Sea Level Drive terminates  
7 at the bluff that you see at the westerly end and terminates  
8 at an easterly end which is not in these photographs. So he  
9 is proposing to build a road to access the 16 residences  
10 which he proposes to build.

11 That road would require a rock revetment. It is  
12 that rock revetment and road, Commissioners, which form the  
13 primary reason for the three denials by the Coastal  
14 Commission of the applicant's request for permits. During  
15 those three denials before the state boundary issue was ever  
16 raised, the Coastal Commission based its conclusions on  
17 numerous reasons, the most prominent of which was the fact  
18 that the rock revetment was not being placed there to  
19 protect existing structures and was not for an in-fill  
20 development, therefore violative of the Coastal Act.

21 There were other reasons which are detailed in my  
22 letter to this Commission that were given by the Coastal  
23 Commission.

24 Now, how did this issue arise? The issue of the  
25 state boundary only arose when the applicant requested a

1 reconsideration following the third denial, and these  
2 denials took place over a two-year period. The applicant  
3 had submitted this project in various configurations, and  
4 when his last denial was received he then requested  
5 reconsideration. The Coastal Commission at the suggestion  
6 of their staff granted reconsideration and one of the  
7 reasons articulated for the granting of reconsideration was  
8 the then existence of the Lucas case, which has been  
9 referred to here by Mr. Stacey.

10 At that time the staff then entered into a  
11 reexamination of their earlier recommendations to the  
12 Commission and the Attorney General's Office as counsel to  
13 the Commission apparently made a determination, and Mr.  
14 Kaufman is here and can speak to that issue if the  
15 Commission wishes to ask. The Attorney General's Office  
16 then retained the services of Mr. Uzez, who is a former  
17 chief surveyor for the State Lands Commission, he was  
18 retained and he conducted the study which has been referred  
19 to here. It was only after that request for reconsideration  
20 by Mr. Haney and Mr. Stacey that this issue arose at all.

21 During the course of the reconsideration hearing  
22 the Coastal Commission again reviewed all of the previous  
23 recommendations from staff which asserted numerous reasons  
24 other than the high tide line issue for denying the project.  
25 The California Coastal Commission ultimately denied the

1 project on reconsideration and they gave as their reasons  
2 all the reasons which staff had presented to them.

3 In fact, the Chairman of the Coastal Commission,  
4 Mr. Thomas Gwen, stated at the conclusion of the hearing,  
5 and I've enclosed his transcript for you, that regardless,  
6 and I'll paraphrase his statements, regardless of the mean  
7 high tide line issues, he said that the necessity for a  
8 shoreline protective device would be required and that under  
9 the Coastal Act such a shoreline device would not be  
10 appropriate for the various reasons.

11 So far from Mr. Stacey's assertion that the mean  
12 high tide line issue was the basis for the conclusion by the  
13 California Coastal Commission to deny this project, this  
14 project was denied on three occasions without any evidence  
15 on mean high tide line whatsoever and was finally denied on  
16 reconsideration on many issues which included as only one of  
17 those the mean high tide line issue.

18 The applicant has now filed an action in the  
19 Superior Court for writ of mandate and complaint against the  
20 California Coastal Commission. I understand that that  
21 action is proceeding forward, and that's really the  
22 appropriate place to test all of these particular issues.

23 What we have here before this Commission really,  
24 as I said, is a request for the Commissioners to change what  
25 the staff has determined on a technical basis. This is not

1 a policy issue before this Commission, this is a technical  
2 determination and I don't think it's appropriate for the  
3 Commission to be, in effect, second-guessing its staff on  
4 technical issues.

5           There have been extensive technical reports which  
6 have been prepared and have been viewed and examined by the  
7 staff. One of those was the Uzez report. The other was the  
8 Gad report, which to correct Mr. Stacey is not my report.  
9 That's Mr. Bachman's report. Mr. Bachman, as I understand  
10 it, obtained that report because he was told by State Lands  
11 Commission staff that he needed to establish clearly that  
12 the survey pertaining to the Lechuza Villas property would  
13 not impact him. He obtained the report.

14           The report indicated that Mr. Bachman's property  
15 would not infringe on state lands, but as part of the  
16 comparison which had started with a Coastal Commission  
17 assertion of a potential change circumstances, that survey  
18 also reviewed the Lechuza Villas West property and  
19 interestingly enough came to the same conclusion that Mr.  
20 Uzez came to.

21           Now, Mr. Uzez' methods were to examine  
22 photographs, State Lands Commission staff did an on-site  
23 survey, Mr. Gad did on-site surveys but also examined  
24 several surveys that had been conducted over the course of  
25 many years by various county and state and federal agencies.



1 Mr. Gad's conclusion based on that historical research was  
2 that Mr. Uzez' conclusions were correct. So far from just  
3 the photographic evidence that's before you, you also have  
4 before you the Gad report, which had been submitted to your  
5 staff as part of the Bachman situation.

6 Further, I think it's important for this  
7 Commission to note the statement from Mr. Uzez commenting on  
8 Mr. Weiss' assertions about the inaccuracies of Mr. Uzez'  
9 report, and I'll quote from a letter dated March 3, 1993  
10 from Mr. Uzez to the staff of the State Lands Commission.  
11 I'll just quote one sentence. It says, "Mr. Weiss first  
12 misstates the scales of the aerial photographs used in my  
13 report and then compounds the error by incorrectly reporting  
14 the capabilities of measuring on photographs."

15 And I don't think, again, we should be in this  
16 battle of technicalities before this Commission. However,  
17 since Mr. Weiss has made these assertions about Mr. Uzez I  
18 think it's only appropriate to point out Mr. Uzez' response  
19 to them.

20 As to the history of this situation, I think it's  
21 also important for this Commission to understand that Mr.  
22 Haney and his successor, Lechuza Villas West, of which he is  
23 a partner, acquired this property in January of 1991. In  
24 fact, they acquired the property on the same day,  
25 January 10th, that the Coastal Commission issued its first

1 denial of the application.

2 This is not a historical property owner seeking to  
3 develop his property. This is a fairly recent acquisition  
4 from the historical property owner which was the Adamson  
5 family. The Adamson family owns a lot of property in that  
6 area. They owned this particular beach.

7 There had been, prior to this acquisition by Mr.  
8 Haney and his partners, an action filed by people who live  
9 in that tract over prescriptive easements and rights to use  
10 the beach. The Adamson family -- or the Adamson company, I  
11 should say, was a defendant in that action. They sold the  
12 property to Mr. Haney who in turn sold it to the partnership  
13 and they sold it by means of a quitclaim deed, exempting any  
14 potential liability for such issues as this.

15 Now the sale price of the property was  
16 approximately \$2 million. My clients, the Save Lechuza  
17 Beach Committee, offered to Mr. Haney at the time and  
18 offered to him on several subsequent occasions the sum of  
19 \$2.1 million. Initially of course a 5 percent profit on his  
20 investment. He declined those offers on several occasions.  
21 So this was a situation where far from trying to deprive  
22 someone of his property, this particular group of people in  
23 the area sought to purchase the property on the condition  
24 that they would deed restrict that property in perpetuity  
25 and have it available as beach for the public.

1           In fact, the public has used the beach,  
2           Commissioners, historically as long as that beach has been  
3           there. That finding was made by the Coastal Commission in  
4           the course of their hearings and the Coastal Commission said  
5           that there was ample evidence of prescriptive rights on that  
6           particular beach. The matter still is in controversy  
7           between the Malibu Homeowners Association, whom I do not  
8           represent, and the Lechuza Villas West partnership.

9           The fact of the matter is that that beach has been  
10          in continuous use by the public for recreational purposes  
11          and navigation purposes for many, many years, predating the  
12          acquisition by Mr. Haney and Lechuza Villas West property.  
13          So when Mr. Stacey points out to the Commission in his  
14          communications to you that he's attempted to settle this  
15          matter by offering to the staff of the State Lands  
16          Commission a scheme by which he would allow the public to  
17          use certain footage of property between his string line and  
18          the -- what he supposed the mean high tide line to be, that  
19          offer really is specious, Commissioners, because the public  
20          uses the beach anyway.

21          And if this action ever were to go to conclusion  
22          based on what I've seen so far and based on what the  
23          California Coastal Commission has said, it's pretty apparent  
24          that the public prescriptive rights would prevail over  
25          whatever interest Mr. Haney bought in that property.

1           I think it's important for this Commission to know  
2 that Mr. Haney entered into that agreement based on a  
3 quitclaim deed. It was a speculative venture on his part.  
4 I don't in any way disparage speculation by developers.  
5 I've represented many developers who engage in speculation.  
6 At the same time I think it is wrong to any way cast the  
7 situation as a property owner trying to simply develop his  
8 property. This is not a case where someone has owned  
9 property for many, many years and now is in a position to  
10 develop it with a single dwelling to be used for their  
11 residential purposes.

12           Mr. Haney entered into this purchase knowing full  
13 well of the disabilities involved with this particular piece  
14 of property, and in fact in evidence presented to the  
15 Coastal Commission by its staff, their Executive Director,  
16 Mr. Douglas, went into some detail in pointing out the  
17 extensive conversations that he had with Mr. Haney showing  
18 him and pointing out to him all the difficulties that he  
19 would have based on violations of the Coastal Act that would  
20 be produced by the development.

21           Commissioners, I believe that I have summarized  
22 the historical situation and hopefully have put in  
23 perspective what the -- what Mr. Haney is requesting of this  
24 particular -- requesting of this Commission at this  
25 particular time. I believe that all of his rights have been

1 fully protected by the procedures before the California  
2 Coastal Commission. He has filed a Superior Court action  
3 against the California Coastal Commission. That action will  
4 take into account all of these issues and he will have a  
5 full opportunity to litigate those issues.

6 As your own staff has pointed out, that if he  
7 wishes he can file a quiet title action and in some way have  
8 a judicial determination of the action which your staff has  
9 taken in this particular situation. It is I think a  
10 mischaracterization of the situation for Mr. Stacey, as he  
11 said to you in his concluding remarks, that Mr. Haney seeks  
12 only to make use of his property as many others. He is not  
13 seeking to make use of his property as many others, he is  
14 seeking to put in a 16 residence development on a pocket  
15 beach which has a questionable title both as to the state  
16 sovereign lands and as to the right to use because of public  
17 prescriptive easements.

18 These were issues and these were conditions that  
19 he was fully aware of when he purchased the property (tape  
20 ran out) --

21 (Tape change.)

22 MR. PHILIBOSIAN: -- most of this property in  
23 January 10 of 1991, those should have been dispelled by the  
24 previous conversations which he had with staff of the  
25 Coastal Commission.

1 I'd be happy to answer any questions that you  
2 Commissioners may have.

3 COMMISSIONER DAVIS: Just a couple questions. Do  
4 you accept or quarrel with Mr. Stacey's notion that we are  
5 breaking new ground here, that we are -- this is a new legal  
6 principle that we're adopting?

7 MR. PHILIBOSIAN: Commissioner Davis, I do not  
8 have the length of contact and experience, nor do I have the  
9 expertise in State Lands Commission matters which your own  
10 staff has, and your own staff has expressed to you that this  
11 is not breaking with any policy or tradition of this  
12 Commission. I happen to agree with that statement, but I  
13 would be presumptuous to say something to you on my own  
14 knowledge, which is better founded in the knowledge of your  
15 own staff.

16 COMMISSIONER DAVIS: And just to reiterate what  
17 you said before, you view this as a technical determination,  
18 one which is subject to expert determination as opposed to  
19 policy making (indiscernible) Board.

20 MR. PHILIBOSIAN: Yes, I do, Commissioner Davis.  
21 And I believe that further evidence of that is really  
22 supplied by Mr. Stacey and Mr. Weiss themselves when they  
23 bring to you all of the technical arguments that they have  
24 sought to lay at your doorstep this particular afternoon.  
25 These arguments are better made to staff, and if they don't

1 like the staff determination there is a procedure for them  
2 in the Superior Court.

3 COMMISSIONER DAVIS: I don't have any other  
4 questions.

5 CHAIRMAN MCCARTHY: Thank you, Mr. Philibosian.

6 MR. PHILIBOSIAN: Thank you.

7 MR. FORAN: Mr. Chairman, could I just make a  
8 point?

9 CHAIRMAN MCCARTHY: Certainly. Mr. Foran.

10 MR. FORAN: I have no -- you know, I am sure that  
11 Mr. Philibosian has all of the history and all of the events  
12 and things like that, but that's not what the issue is  
13 before this body, I don't think. The issue before this body  
14 is that the staff made a determination as to where the state  
15 owns title to beach property. And if you take no action or  
16 do nothing then that staff will be confirmed by the State  
17 Lands Commission and it will, in fact, impact properties up  
18 and down the state, as I indicated in my opening remarks.  
19 So it is -- if it's a reversal of a staff determination, it  
20 is a determination.

21 CHAIRMAN MCCARTHY: Let me ask you then. How can  
22 you say that, Mr. Foran? We're only talking about a survey  
23 on a limited part of the beach. How can that affect  
24 properties up and down the State of California?

25 MR. FORAN: Because if you say that the mean high

1 tide line is wherever the high tide -- the water approaches  
2 even for a short period of time in the winter, you're making  
3 a determination as far as state property in Mendocino  
4 County. You're finding a state title as a particular line,  
5 which we say is not existing California law and is certainly  
6 not in conformity with the Lucas decision which only  
7 allows -- that's why you're here, right, basically because  
8 the State Coastal Commission is denying it on the grounds of  
9 state title.

10           You are the determiners of state title. And if  
11 you confirm the staff decision you're doing that. You can  
12 deny -- I mean you can say, "Don't do what the staff says,"  
13 you go back to the Coastal Commission, they go back and they  
14 get denied again, they go to court. Fine. Good. All fair.  
15 That's okay. But at least you as the State Lands Commission  
16 haven't made what we submit is a new determination based  
17 upon the mean high tide line or on navigational servitude,  
18 if that's included in the decision as well. That is a new  
19 theory. Unless you have a written decision somewhere along  
20 the line that you have used these definitions for properties  
21 -- determining state title to property, beach property, in  
22 previous decisions. And I don't know if that exists.

23           CHAIRMAN MCCARTHY: A response to that, Jan?

24           DEPUTY ATTORNEY GENERAL STEVENS: Well, basically  
25 we believe that (inaudible) is the issue here. (Inaudible)



1 to determine where the high tide line occurs (inaudible) and  
2 if the land consists of loose sand easily removed  
3 (inaudible) variable decision in relation to (inaudible).

4 With respect to the impact on titles statewide we  
5 have been this before (inaudible) clearly (inaudible) body  
6 of water (inaudible) unsettled throughout the state hitherto  
7 (inaudible) springboard (inaudible) low water (inaudible).  
8 Second time was in (inaudible) versus State of Mississippi  
9 (inaudible) State of Mississippi and the State of California  
10 we have a stating of sovereign rights to all waters, all  
11 land subject to (inaudible) irrespective of that (inaudible)  
12 title of waters (inaudible) ambiguous (inaudible) this was  
13 not settled (inaudible) as well as in the state's  
14 (inaudible).

15 I think we should also respect (inaudible) be the  
16 first to have been handed this trouble and this language,  
17 and I don't think it represents (inaudible). (Inaudible)  
18 case involved an effort to enjoin the landowners (inaudible)  
19 in this context (inaudible) went to the appellate court of  
20 which felt that an effort could be made to determine  
21 (inaudible). I think expressly stated no effort was made by  
22 the parties to determine whether the (inaudible) throughout  
23 here was (inaudible) distance. It was the same distance.  
24 This might be a basis for (inaudible) proposed by Mr.  
25 Stacey.

1           This effort should be made (inaudible) before  
2 (inaudible) we recognize the almost mathematical (inaudible)  
3 but perhaps greater certainty should be possible  
4 (inaudible). If not (inaudible) injunction. On re-trial  
5 the evidence showed that there were identical (inaudible)  
6 any difference. So it was impossible to do what (inaudible)  
7 suggested had to be done. For that reason (inaudible).

8           MR. STACEY: Mr. Chairman, I'm not going to  
9 reiterate Greatly and Kent. Kent was clear that ownership  
10 boundaries do not change except little by little and by  
11 imperceptible degrees and that a change of 80 feet in a year  
12 was by definition not little by little, and those are the  
13 facts we have here. The staff's advise to you in conclusion  
14 is that if tomorrow the boundary moves ten feet then state  
15 tidelands would move ten feet.

16           And if it moves toward the ocean -- the  
17 extraordinary effect of this is that when the beach is the  
18 nicest for the public to use it it has the least rights to  
19 make use of it because the boundary's extended out in the  
20 summer toward the ocean and in the winter when they're most  
21 critical about not building a structure that would interfere  
22 with it, when it's cloudy and raining and stormy, that's  
23 when the public has the use of it.

24           I'd like to only respond to two items that Mr.  
25 Philibosian said. First, I think it makes little difference

1 whether my client's a historical property owner. He didn't  
2 own the property, and the Adamson companies were here who'd  
3 owned it since 1890. Is somehow their rights different from  
4 what my client's rights are to be able to make use of his  
5 property? Does the tide line change because he's owned it  
6 two years and they owned it 100? I think not.

7           So that fact, other than it may be a nice anecdote  
8 to suggest that you have someone who is -- should have known  
9 maybe that this was going to be a tough piece of property to  
10 deal with doesn't change how the state must deal with the  
11 property owner.

12           And, second, I still get some focus on this  
13 navigational servitude. Mr. Philibosian said, "Well, there  
14 aren't any boats down near Mr. Bachman's house." But the  
15 state law cited by Mr. Warren isn't is it navigated, but is  
16 it capable of navigation. And for every photograph they  
17 have of the water rushing across my client's property the  
18 staff had photographs -- Mr. Bachman has an existing house,  
19 sits right there next to where he's going to build his  
20 current house, photographs of whether water rushes up all  
21 the way underneath his house. Equally as capable of being  
22 navigated.

23           But Mr. Trout's letter to the Coastal Commission  
24 doesn't even mention this concept of navigational servitude,  
25 and it applies when the high tides go above those mean high

1 tides, as Mr. Fasom indicated, even if the mean high tide  
2 line didn't encroach, the higher tides come underneath Mr.  
3 Bachman's house by the analysis that they have evidence of.

4 My belief, and I will, you know, I will remain  
5 steadfast in this belief, is that this is part of an overall  
6 effort to assert title in an area where title is  
7 unjustified. You don't go to court and claim title. We're  
8 supposed to? We had a deed that says we own property to  
9 this 1932 high tide line. Quitclaim or not, we have a deed  
10 from the people who owned it since 1890.

11 MALE VOICE: Do you have title insurance?

12 MR. STACEY: We're supposed to sue the state with  
13 regard to that when the state asserts they have title on our  
14 property? Why doesn't the state sue us if they're making  
15 the claim and take the burden of proof?

16 Be that as it may, I think that the state is  
17 indeed stepping long beyond -- when you ask, "What are you  
18 here for?" it is indeed what Mr. Philibosian said. At the  
19 conclusion of this hearing I wanted you to make a motion  
20 directing Mr. Warren to rescind his letter and write a  
21 different letter that would say the state asserts no claim  
22 to this property.

23 I don't know that you will or will not do that,  
24 but that was my object in writing my objections to Mr.  
25 Warren. I think I've been fairly forthright with him in the

1 positions that I have taken as to what I believe my client's  
2 position is and I don't think we've hidden anything. That  
3 is the purpose for bringing this matter before you here  
4 today.

5 We had proposed a compromise, indeed. We proposed  
6 a compromise that said, look, (inaudible) 90 percent of the  
7 time the tide's out here where 50 to 60 feet of beach isn't  
8 (inaudible) and where we live in (inaudible) the state would  
9 assure us of the security of our tide line, (inaudible)  
10 string line, we went (inaudible) property beyond that  
11 because by this ambulatory line the public uses the right to  
12 make use of the beach at the time when the right to use the  
13 beach is of most importance and value to the public in the  
14 summer months. That was the compromise.

15 In my request to you I suggested that Mr. Warren  
16 was wrong to have rejected that compromise. I don't know if  
17 you're prepared to accepted it or at what point it might be  
18 an acceptable compromise, but we'll lay that one on the  
19 table. It'll probably be there for some time. But I think  
20 certainly you should consider is the public served by the  
21 assertion of Mr. Warren's policies and the rejection of that  
22 as a compromise.

23 I think Mr. Foran has perhaps some closing comment  
24 with regard to what we would like to see occur as a result  
25 of this proceeding.

1           MR. FORAN: Well, basically what the  
2 recommendation that we would make before this -- again, we  
3 assert that there is a major title -- state title issue  
4 involved here which your action will -- if you take no  
5 action then you confirm the staff and confirm what we  
6 believe to be a change in state policy. So we would request  
7 that you accept the State Lands policy that the average  
8 location of the mean high tide, which as of record is the  
9 ordinary high water mark, Civil Code Section 830, based upon  
10 field surveys of beaches which have not been affected by  
11 major storm activities.

12           And, secondly, we would request that you not  
13 pursue this policy of so-called navigational servitude that  
14 has been alluded to before.

15           And, finally, if you wish to avoid the legal  
16 consequences of those two decisions, you could adopt or  
17 recommend or instruct on the compromise solution, which as  
18 it was pointed out by Mr. Stacey would benefit the people  
19 who walk along the beaches or use the dry part during the  
20 bulk of the year when it's usable, not in the winter storms,  
21 and that would provide I think the public with more access  
22 to the beaches than would denying the compromise that was  
23 suggested.

24           CHAIRMAN MCCARTHY: Thank you.

25           Any final comments by the staff?

1           MR. WARREN: Mr. Chairman, just one brief comment  
2 perhaps on a minor point but it's one in which Mr. Stacey  
3 continues to refer. First, let this be clear, that it's  
4 staff's position on this particular parcel that the mean  
5 high tide line itself is the determining factor. We are not  
6 necessarily relying on navigational easement, although that  
7 is an argument we believe should be made in this instance  
8 for a number of reasons, but it is not the determinative  
9 issue.

10           Mr. Stacey said that we did not -- that Mr. Trout  
11 in his letter to the Coastal Commission dated May 21  
12 concerning the Bachman property did not mention the  
13 navigational servitude claim. That is not correct. On page  
14 two of his letter on the third paragraph Mr. Trout wrote,  
15 "Similarly, based on information of which we are now aware,  
16 we are not able to say whether public recreational rights  
17 would be adversely affected by the proposed Bachman  
18 residence. The precise -- in an extent -- the public  
19 recreational rights in ocean waters has not been determined  
20 by the court." That is our position.

21           Public recreational rights is a term which assumes  
22 navigational right. So navigational rights are what was  
23 included in the use by Mr. Trout of that phrase. So to say  
24 that we did not discuss this in the letter concerning Mr.  
25 Bachman's property to the Coastal Commission is a

1 mischaracterization of the truth.

2           Insofar as what Mr. Foran suggests you do, I just  
3 urge this Commission to -- if you're inclined to give any  
4 credence whatsoever to that proposal, bear in mind that it  
5 would have severe, indeed wrenching effects on the extent of  
6 sovereign lands in the State of California involving title  
7 and navigable water. I'm not at all sure that in this  
8 proceeding such a momentous historical decision should be  
9 made.

10           Thank you.

11           CHAIRMAN McCARTHY: No further comments?

12           MR. WARREN: No further comments.

13           CHAIRMAN McCARTHY: We've heard a great deal from  
14 all sides this afternoon. I'd like to suggest to my two  
15 fellow Commissioners that we reflect on all the material  
16 we've heard, the testimony we've heard. If any one of you,  
17 Mr. Stacey, Mr. Foran and Mr. Philibosian, and our staff  
18 want to counter any comments made today, if you don't think  
19 you've had an opportunity to do so, I'll give you the  
20 opportunity. I think that -- we'll pole the Commission and  
21 give a response within seven days as to what action if any  
22 we will take upon this.

23           I'm assuming there's no limit on our ability to do  
24 that given the informal nature of this hearing.

25           MALE VOICE: (Inaudible.)



1           COMMISSIONER DAVIS: Isn't the Commission meeting  
2 again this month?

3           MALE VOICE: The notice (inaudible) has already  
4 gone out (inaudible).

5           COMMISSIONER DAVIS: Well, but can't we just  
6 continue this as an item on the 29th?

7           MALE VOICE: No. It has to be re-noticed.

8           CHAIRMAN MCCARTHY: So this was a Commission  
9 hearing we were not required to hold, therefore --

10          COMMISSIONER DAVIS: There's no staff  
11 recommendation in front of us.

12          CHAIRMAN MCCARTHY: Would public notice  
13 requirements pertain to a meeting that we were not required  
14 to hold?

15          MALE VOICE: (Inaudible.)

16          MALE VOICE: Well, it is to the extent that you're  
17 now -- if you are contemplating taking action on the  
18 meeting, yes. That part is --

19          CHAIRMAN MCCARTHY: I'm not suggesting what the  
20 Commission is going to do. It will make a statement in  
21 response to everything we've heard. It may be for no  
22 action, it may be for partial action. So I'm not attempting  
23 to imply in any sense any course of action. We've just  
24 heard an awful lot in the last couple of hours and I think  
25 the Commissioners want to try to digest this and make some

1 reasonable and fair decision on this.

2 MALE VOICE: Chairman, the notice that was sent  
3 out was to allow Mr. Stacey to address the Commission  
4 concerning certain property interests in Lechuza Beach. If  
5 the Commission would like to agendaize an item relating to a  
6 position it wishes to take, it could direct the staff to do  
7 that with the ten days notice requirement.

8 CHAIRMAN McCARTHY: That's fine. Is that  
9 acceptable?

10 MALE VOICE: I'm not quite sure what we're  
11 agreeing to do here.

12 MALE VOICE: Board can -- because this matter  
13 relates to the law as much as it certainly relates to the  
14 facts based on the assertions of Mr. Stacey, it can decide  
15 in Executive Session what position it wishes to take as to  
16 the law, assuming we're sued on this or the Commission  
17 wishes to take action.

18 CHAIRMAN McCARTHY: So you're saying we can deal  
19 with it at the next closed session of this Commission?

20 MALE VOICE: Well, as to -- there is no -- pardon?

21 MALE VOICE: (Inaudible.)

22 MALE VOICE: Published notice. The Commission has  
23 sent out a notice already, I believe, to its next meeting.

24 CHAIRMAN McCARTHY: It's ten days from now to our  
25 next meeting, right?

1 MALE VOICE: Right. Has it been sent out, mailed  
2 out?

3 MALE VOICE: Yes.

4 MALE VOICE: It's already been mailed.

5 CHAIRMAN McCARTHY: Yeah, but can't we mail  
6 another one before the close of business today meeting the  
7 ten-day requirement?

8 MALE VOICE: Close of business is midnight.

9 CHAIRMAN McCARTHY: Close of business is whenever  
10 we close for business. All the parties are here. Who's not  
11 here?

12 MALE VOICE: The question is whether it's  
13 technically feasible to get out a public notice and have --  
14 and whether the staff exists to create such a notice and  
15 mail it to all the proper parties in the time.

16 CHAIRMAN McCARTHY: Mr. Foran, will you stipulate  
17 that you won't object to the notice provision?

18 MR. FORAN: We would waive notice.

19 MALE VOICE: (Inaudible.)

20 MALE VOICE: Public notice.

21 MALE VOICE: (Inaudible.)

22 MALE VOICE: If it hadn't been already mailed I  
23 think that would be the case.

24 CHAIRMAN McCARTHY: You could just add it --

25 MALE VOICE: Yeah. We could send it -- if we have

1 the ability to get out enough copies of it physically to  
2 produce such a thing and make the copies and stamp them and  
3 get them to the mail box. I'm just relying on the staff  
4 that has to do that and they're indicating there may be  
5 problems.

6 COMMISSIONER STANCELL: But in order for Mr.  
7 Stacey's client to proceed they need to go back to the  
8 Coastal Commission or have that --

9 MALE VOICE: They're in litigation with the  
10 Coastal Commission.

11 COMMISSIONER STANCELL: Litigation. So whatever  
12 we say here would not give them any kind of authority to  
13 proceed until that issue is resolved. So what's the urgency  
14 of having this besides your seven-day notice, what your  
15 thought is? I mean is there some real urgency that we have  
16 to, you know, address this in such a short time?

17 COMMISSIONER DAVIS: But then we have to meet in  
18 public, don't we, to make a decision?

19 MALE VOICE: Yeah. Absolutely.

20 COMMISSIONER DAVIS: So when are we meeting after  
21 July 29th?

22 MALE VOICE: Chairman McCarthy, if I may?

23 CHAIRMAN MCCARTHY: And we're not talking about  
24 taking anymore testimony, we're talking about simply coming  
25 to whatever form of conclusion we want and announcing it.

1           COMMISSIONER DAVIS: And if we can't do that on  
2 July 29th what's the next opportunity?

3           MALE VOICE: There is no scheduled meeting, but  
4 whenever you would so choose.

5           MALE VOICE: We can hold a meeting whenever after  
6 that you want to set. You can set another meeting date at  
7 this time and we can schedule another meeting.

8           CHAIRMAN McCARTHY: But I want to make it clear --

9           MALE VOICE: Chairman McCarthy --

10          CHAIRMAN McCARTHY: -- we're not suggesting that  
11 we go over this ground again. I think we've heard ample  
12 testimony and I think now it's up to us just to try to  
13 digest this and reflect on this and then we'll decide what  
14 form of response we want to give.

15          MR. PHILIBOSIAN: Mr. McCarthy, if I may?

16          CHAIRMAN McCARTHY: Mr. Philibosian.

17          MALE VOICE: Pardon me?

18          MR. PHILIBOSIAN: To respond to Commissioner  
19 Stancell's statement, the Coastal Commission has lost  
20 jurisdiction in this matter. They have held a  
21 reconsideration hearing, there is no provision under the law  
22 for them to do anything further with this particular matter  
23 no matter what decision the State Lands Commission comes to,  
24 if in fact the State Lands Commission does come to a  
25 decision.

1           Your decision may be to take no action and that's  
2 what I would urge, that this Commission take no action  
3 whatsoever. Anything that you do or don't do will have no  
4 bearing on the current action by the California Coastal  
5 Commission. There is no way that the matter can be once  
6 again reconsidered or reheard by them. That's it. They've  
7 lost jurisdiction.

8           MR. STACEY: It can be reheard whenever we make a  
9 reapplication to do it. The court can remand it to the  
10 Commission (indiscernible).

11           CHAIRMAN McCARTHY: (Indiscernible), Mr.  
12 Philibosian, were we to, and I don't know that we're going  
13 to, but were we to say that we disagree with the staff  
14 decision and we're not claiming title, why wouldn't that be  
15 a material change of position that would allow the Coastal  
16 Commission to reconsider this matter?

17           MR. PHILIBOSIAN: Because the reconsideration  
18 hearing has been held and it's finished, it's over with.  
19 There's no further -- you can't have a reconsideration of a  
20 reconsideration.

21           MALE VOICE: (Inaudible.)

22           MR. PHILIBOSIAN: Anything that's changed now is  
23 before the Superior Court.

24           MALE VOICE: Procedurally --  
25 (Cross conversation.)

1 MR. PHILIBOSIAN: But that's probably beside the  
2 point anyway.

3 CHAIRMAN McCARTHY: We don't have to dwell on  
4 this.

5 MR. PHILIBOSIAN: I have no objection to the  
6 Commission setting down a date whenever the Commission  
7 decides it's appropriate to announce whatever it's decision  
8 is, to take no action or to take some action. I would urge  
9 no action.

10 CHAIRMAN McCARTHY: Mr. Warren, do we have a way  
11 in which we could make our decision and announce it on the  
12 29th?

13 MR. WARREN: I know of none.

14 CHAIRMAN McCARTHY: How many people do you have to  
15 send notices out to on this matter?

16 MR. WARREN: (Inaudible.)

17 CHAIRMAN McCARTHY: Do you have anything planned  
18 for tonight?

19 MALE VOICE: (Inaudible.)

20 CHAIRMAN McCARTHY: Mr. Warren, can -- this  
21 hearing this afternoon that we were not obliged to grant is  
22 a public hearing with our recorder. I take it Mr. Stacey  
23 and Mr. Foran are up here to try to persuade us to amend or  
24 reverse the staff position on this. Now, beyond that, is  
25 this hearing usable in the pending lawsuit, the pending

1 litigation in any form on this issue?

2 MALE VOICE: I don't think the hearing is usable.  
3 The result, should you take some different action would --  
4 it is your action that is important as opposed to the  
5 arguments and the facts that are laid out here.

6 CHAIRMAN McCARTHY: Nothing in this record could  
7 be used -- nothing said in this record could be used in the  
8 lawsuit?

9 MALE VOICE: Nothing today. Nothing that was said  
10 today would be usable. That hearing, as Mr. Philibosian  
11 indicated, is closed now.

12 CHAIRMAN McCARTHY: I'm not talking about the  
13 hearing before the Coastal Commission, I'm talking about the  
14 lawsuit in the Superior Court.

15 MALE VOICE: Right. That as well. Because the  
16 lawsuit in the Superior Court is based on the administrative  
17 record before the Commission, which is also closed. All  
18 that evidence is done. Only the matters that appear -- that  
19 were before the Commission at that time are usable.

20 (Asides.)

21 CHAIRMAN McCARTHY: I want to thank everyone who  
22 appeared at this hearing this afternoon and gave ardent and  
23 effective advocacy. It is the opinion of the majority of  
24 this Commission that the Executive Officer has not changed  
25 the previous policy of the Commission, so the Commission



1 takes no action to amend or to reverse the action taken by  
2 Mr. Warren based on the history of previous Commission  
3 actions and staff actions on behalf of the Commission.

4 That concludes the meeting. Thank you.

5 (Thereupon, at 4:20 p.m., the meeting was  
6 concluded.)

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## CERTIFICATION OF TRANSCRIPT

TITLE: State Lands Commission Meeting

NO. OF TAPES: 2

MEETING DATE: July 19, 1993

I certify that the above-described electronic recording was accurately transcribed by me and constitutes a true, complete and accurate transcription of the aforementioned proceedings.

SIGNED: \_\_\_\_\_

*Kim Willman*

DATED: \_\_\_\_\_

*3/29/95*