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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LISETTE ACKERBERG, Individually and  
as Trustee, etc.,

Plaintiff and Appellant,

v.

CALIFORNIA COASTAL  
COMMISSION,

Defendant and Respondent;

STATE COASTAL CONSERVANCY,

Real Party in Interest and  
Respondent.

B235351

(Los Angeles County  
Super. Ct. No. BS122006)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Law Office of David C. Codell, David C. Codell; Law Office of Diane R. Abbitt, Diane R. Abbitt; Richards, Watson & Gershon and Steven H. Kaufman for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, John A. Saurenman, Senior Assistant Attorney General, and Jamee Jordan Patterson, Supervising Deputy Attorney General, for Defendant and Respondent and for Real Party in Interest and Respondent.

An owner of beachfront real property in Malibu, California, dedicated two public accessway easements on the property, one vertical and one lateral, as mitigation for development permits under the California Coastal Act of 1976 (Coastal Act). (Pub. Resources Code, §§ 30000–30900; all undesignated section references are to that code.) Later, at a public hearing, the California Coastal Commission (Commission) issued an administrative cease and desist order to remove development from the easements so they could be opened and provide public access to the beach. Before the Commission, the landowner argued that (1) the offer to dedicate the vertical easement was subject to an unfulfilled condition precedent — a nearby publicly owned easement would be opened first — and (2) the order was precluded by res judicata based on the judgment in a prior lawsuit between the landowner and a nonprofit organization concerning the opening of the vertical easement on the landowner’s property. The Commission rejected those arguments and issued the cease and desist order in an effort to open the landowner’s easements.

The landowner then filed this action, seeking a petition for a writ of administrative mandate overturning the Commission’s cease and desist order. The trial court denied the petition. The landowner appealed.

On appeal, the landowner points to the original permit findings to support the argument that a prerequisite to opening the vertical easement renders the cease and desist order invalid, claiming the Commission promised it would attempt to open a nearby county-owned accessway easement before opening the accessway easement on the landowner’s property. We disagree because there is no unsatisfied prerequisite; the landowner’s argument confuses permit findings, which serve to facilitate review on appeal by elucidating the Commission’s deliberative process, with terms and conditions, which impose requirements on the coastal development permit agreement between the landowner and the Commission to ensure that development complies with the Coastal Act. The landowner also asserts that the Commission and the trial court should have applied the 1986 local coastal program standards in reaching their respective decisions. We disagree because the Commission and the trial court applied the proper standards,

which were those in place at the time of enforcement given that the permit was to be interpreted under the Coastal Act. The landowner contends that the cease and desist order is not supported by substantial evidence. We disagree. Finally, the landowner argues the judgment in the prior suit between the nonprofit organization and the landowner precludes the cease and desist order. We disagree because public policy would be undermined by applying res judicata in this case.

## I

### BACKGROUND

#### A. The Coastal Act

The California Legislature implemented the goals of the federal Coastal Zone Management Act (16 U.S.C. §§ 1451–1466) by enacting the Coastal Act in 1976, which codifies the policy of maintaining public access to the ocean as set forth in article X, section 4 of the California Constitution. Consistent with the principle that regulatory and enforcement powers be separated, the Legislature divided authority under the Coastal Act between two state agencies, the Commission, established under the Coastal Act, and the State Coastal Conservancy (Conservancy), established under division 21 of the Public Resources Code (§§ 31000–31410) (Conservancy Act). (See §§ 30300 [creating the Commission], 31100 [establishing the Conservancy].)

The Commission administers the Coastal Act by approving local coastal programs or acting as the reviewing body for coastal development permits in areas where no local coastal program has been approved. (§ 30600, subd. (c).) The Commission may condition its approval of coastal development permits on mitigation measures, including offers to dedicate public coastal accessway easements (offers to dedicate), designed to offset the impacts of development on public access to the coast. (§ 30212; see also § 30534.) Offers to dedicate are necessary because by law the Commission cannot hold title to property; thus, permit applicants cannot transfer public accessway easements to the Commission. (§§ 30330–30344.) The Coastal Act “provides for two kinds of access [easements]: ‘vertical’ access, that is, access from the nearest public roadway to the sea; and ‘lateral’ access, that is, access along the coast. [Citations.]” (*Grupe v. California*

*Coastal Com.* (1985) 166 Cal.App.3d 148, 161; see also § 30212, subd. (a).) Vertical easements enable public access from the public road to the ocean, while lateral easements run parallel to the ocean and enable public beach access inland of the mean high-tide line. The public cannot use a mitigation accessway easement unless a public or nonprofit entity, approved by the Conservancy, accepts the offer to dedicate by way of a recorded certificate of acceptance and acknowledgement, under which that “public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.” (§ 30212, subd. (a).) Most offers to dedicate are irrevocable for a period of 21 years from the date of the offer.

Originally, the Legislature granted the Conservancy authority to acquire land and directed it to secure public accessways, but did not mandate that the Conservancy accept all offers to dedicate. (See § 31105, added by Stats. 1976, ch. 1441, § 1 [“conservancy is authorized to acquire . . . real property”].) Subsequently, some offers to dedicate expired when they were not accepted through recorded certificates of acceptance within the period specified as the irrevocable period of the offers. In 2002, the Legislature amended the Conservancy Act to require the Conservancy to accept *every* offer to dedicate that would otherwise expire within 90 days. (§ 31402.2, added by Stats. 2002, ch. 518, § 4.) The Legislature added language clarifying its intent: “In order to prevent the potential loss of public accessways to and along the state’s coastline, it is in the best interest of the state to accept all offers to dedicate real property that . . . have the potential to provide access to . . . any beach, shoreline, or view area, or that provide a connection to other easements or public properties providing this access.” (§ 31402.1, subd. (b)(1).)

Although the Conservancy must accept all easements to prevent expiration of the offers to dedicate, it has some discretion in opening and managing easements. (See §§ 30214 [legislative intent for implementing public access policies], 31402.2 [requiring Conservancy to accept all accessway offers prior to expiration], 31404 [Conservancy is not required to “open any area for public use when, in its estimation, the benefits of public use would be outweighed by the costs of development and maintenance”].) The Legislature granted the Conservancy discretion to act in the public interest so long as it

maintains public accessways. (*Ibid.*) Section 31402.3 of the Conservancy Act governs the transfer of public access easements to nonprofit organizations. It provides the Conservancy may “enter into agreements with . . . nonprofit organizations for the development, management, or public use of the accessway . . . [and] . . . shall retain the right to reclaim the easements . . . in the event that . . . the nonprofit organization . . . violates the terms of the agreement.” (§ 31402.3, subd. (b).) Any nonprofit organization seeking to accept an offer to dedicate must first submit a management plan to the Conservancy outlining the nonprofit’s planned management and operation of the easement. (§ 31402.3, subd. (c)(2), amended by Stats. 2003, ch. 337, § 3.) The management plan must grant the Conservancy the right to reclaim or assign the interest to another public agency or nonprofit organization “if the [C]onservancy and the [C]ommission determine that the nonprofit organization is not managing or operating the interest consistent with the management plan . . . .” (§ 31402.3, subd. (c)(3).)

## **B. The Accessway Easements**

In 1983, Ralph Trueblood, the prior owner of what is now the Ackerberg property,<sup>1</sup> applied for a coastal development permit to construct a bulkhead on the property. The permit was approved subject to an offer to dedicate, irrevocable for 21 years, a lateral public accessway easement extending from the exterior toe of the bulkhead to the mean high-tide line. In February 1984, Ackerberg purchased the property subject to the offer to dedicate a lateral easement.

In 1984, Ackerberg applied to the Commission for a coastal development permit to demolish a beachfront Malibu home and replace it with a home quadruple the size of the existing home. In 1985, the Commission approved the permit subject to an offer to dedicate a vertical public accessway easement through the property that would be irrevocable for 21 years. At the permit hearing, Ackerberg proposed a condition be

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<sup>1</sup> Norman and Lisette Ackerberg purchased the property in February 1984. Subsequently, title has been held by Norman Ackerberg, Lisette Ackerberg, and the Lisette Ackerberg Trust. To assist the reader, the name “Ackerberg” is used to represent the titleholder at all times after February 1984.

added to the permit that would “first require development of [a nearby county easement] before the development of the Ackerberg [easement] accessway and in the event [the county easement] is developed that the requirement for access on [Ackerberg’s property] may be abandoned.” Ackerberg asserted the county easement should be opened before her easement because the county easement would provide adequate public access to the beach. The Commission did not approve the proposed amendment, although Commission staff and the commissioners discussed *a preference* for opening publicly owned easements prior to privately owned easements as a matter of policy, and the Commission amended the permit findings to reflect that discussion.

The amended permit findings included a reference to the commissioners’ discussion of the proposed Malibu Local Coastal Plan, which had not yet been adopted. The commissioners speculated that, if the plan were adopted, it could include provisions to require that publicly owned easements be opened prior to privately owned easements. The revised findings provided that “[t]he Commission believes as a matter of policy, publically owned vertical accessways should be improved and opened to the public before additional offers to dedicate vertical easements are opened,” but the “appropriate vehicle for establishing the policy relative to the precise spacing of vertical accessways and whether previously secured offers to dedicate vertical accessways can be extinguished if another vertical accessway is improved and opened within 500 feet of the subject property [is] the [land use plan].” The findings included additional qualifying language providing that “[t]his position assumes that the publically owned accessway is within 500 feet of the subject property, that it is equally suitable for public use based on management and safety concerns, and that improvements to accomplish public use are feasible. Once a public accessway has been improved and opened for public use, and a suitable policy and mechanism has been developed and adopted to ensure that such vertical accessway remains open and available for public use and assuming the Commission has approved a policy that outstanding offers to dedicate additional vertical access easements within 500 feet of an opened vertical accessway can then be extinguished, staff will initiate actions to notify affected property owners that they can

take steps to extinguish such offers to dedicate. As part of the Commission’s public access program, procedures will be developed to implement this directive.” The findings further stated that the easement termination *might* be accomplished *in the future if* a local coastal program were adopted for the Malibu area, but noted that this was *contingent on* the county staff recommendations being approved by both the Los Angeles County Board of Supervisors and the Commission. The Ackerberg permit was issued at the Commission meeting in January of 1985; the Malibu Local Coastal Program Land Use Plan was certified on December 11, 1986. The Malibu Local Coastal Program Land Use Plan contained a provision that future offers to dedicate would not be required if the county determined that adequate access existed nearby and provided for the abandoning of existing offers to dedicate on the condition that adequate alternative access was already opened to the public. (See Malibu Local Coastal Program Land Use Plan (Dec. 11, 1986) § 4.1.2, Vertical Access, P51 <[http://planning.lacounty.gov/view/malibu\\_local\\_coastal\\_plan](http://planning.lacounty.gov/view/malibu_local_coastal_plan)> [as of Aug. 22, 2012].)

In 2003, Access for All, a nonprofit organization, contracted to manage the Ackerberg vertical easement in exchange for funding from the Conservancy. Access for All recorded a certificate of acceptance and acknowledgement on December 17, 2003, within the 21-year period provided for in the recorded offer to dedicate the easement. The recorded acceptance included the following language: “It is the intention of the California Coastal Commission . . . and Access for All to ensure that the purposes, terms and conditions of the Offer to Dedicate be carried out within a framework established by and among the Commission, Access for All and the State Coastal Conservancy . . . *in order to implement the Commission’s Coastal Access Program* pursuant to the California Coastal Act of 1976 . . . . [¶] . . . [¶] [A]cceptance of the offer is subject to a covenant that runs with the land, providing that *any offeree to accept the easement may not abandon it* but must instead offer the easement to other public agencies or private associations acceptable to the Executive Director of the Commission . . . . [¶] . . . [¶] [T]he easement will be transferred to another qualified entity or to the Conservancy in the event that Access for All ceases to exist or is otherwise unable to carry out its

responsibilities as Grantee, *as set forth in a management plan approved by the Executive Director of the Commission . . . [¶] [and] on the condition that should Access for All cease to exist or fail to carry out its responsibilities as Grantee to manage the easement for the purpose of allowing public pedestrian access to the shoreline, then all of Access for All's right, title and interest in the easement shall vest in the State of California . . . .* The responsibilities of Access for All to manage the easement shall be those set forth in the Management Plan dated July 28, 2003, and maintained in the offices of the Commission and the Conservancy . . . .” (Italics added.)

### **1. The Management Plan**

Access for All, the Commission, and the Conservancy signed the public vertical access easement management plan (management plan) for the purpose of providing “public pedestrian access to Carbon Beach.” The parties thereby agreed that the easement would be developed in two phases. During the first phase, Access for All would hire a surveyor to locate the boundaries of the easement and identify encroachments . . . .” Access for All would then “submit the information to the Coastal Commission staff for review and action.” The management plan specified that the wall along Pacific Coast Highway, two eucalyptus trees, and a large generator box appeared to be encroaching on the easement. During the second development phase, Access for All was to work with Ackerberg to determine the best means of delineating the public accessway, either with “a short side yard fence or marking on the existing pavement.” But “prior to placement of any improvements on the site,” Access for All was to submit design plans to both the Commission and the Conservancy “for review and approval and subsequent amendment to this management plan.” The management plan could be amended only with written approval of the Commission, the Conservancy, and Access for All. The management plan included details about the hours the access gates would be unlocked, the frequency of trash pickup, and the number and content of signs to be placed at the easement. Additionally, Access for All agreed to submit a report to the Commission and the Conservancy every year on February 1, in which it would outline “efforts to open the vertical easement area,” the “estimate[d] number of users,” and “any

concerns raised regarding the public use [of the easement] and efforts to address those concerns.”

## **2. Enforcement Proceedings**

After Access for All accepted the easement, Ackerberg’s attorneys persistently sought an alternative to opening the easement. Ackerberg took the position with Commission enforcement staff that her offer to dedicate was contingent on the Commission’s alleged promise that it would attempt to open the county easement before opening her easement and that her easement could be terminated because the county easement would provide adequate alternative access. On December 13, 2005, the Commission notified Ackerberg’s attorney that all encroachments in the vertical easement had to be removed, including the portion of the riprap in the lateral easement. The development encroaching in the easement was described as “rock riprap, a 9-ft high wall, a concrete slab and generator, and a fence, railing, planter, light posts, and landscaping in the area of the property covered by the public access easements . . . which were established pursuant to Commission-issued Coastal Development Permit Nos. 5-83-360 and 5-84-754.”

In 2007, after repeatedly communicating that the vertical easement on Ackerberg’s property had to be opened, the Commission commenced administrative enforcement proceedings under section 30810 of the Coastal Act by sending notice to Ackerberg. But the Court of Appeal stayed enforcement proceedings pending the outcome of litigation commenced by Ackerberg’s neighbor in 2006 involving the Ackerberg easement. The Commission prevailed in that litigation. Later, the Court of Appeal affirmed the judgment in favor of the Commission. (*Roth v. California Coastal Com.* (Apr. 23, 2008, B195748, B200099) [nonpub. opn.].) The Commission renewed its enforcement efforts by scheduling an administrative hearing for December 2008. The hearing was postponed at Ackerberg’s request.

### 3. The Access for All Lawsuit and Settlement Agreement

On January 6, 2009, notwithstanding the detailed terms of the management plan stating that Access for All was to seek approval from the Commission and the Conservancy at regular intervals during the development process, Access for All commenced a suit against Ackerberg to open the easement. (*Access for All v. Lisette Ackerberg Trust* (Super. Ct. L.A. County, 2009, No. BC405058) (*Access for All lawsuit*)). In response, Commission staff did not order Access for All to withdraw the suit under the terms of the management plan agreement. Instead, Commission staff met with Commission counsel, then informed Access for All that the Commission could not “provide legal advice on the matter, [but] there are a few ways in which filing suit prior to a hearing may [a]ffect the outcome of our administrative proceedings. First, filing suit may cause the court to place a stay on any administrative proceedings . . . . In addition it may be beneficial to have an administrative record for the courts to review instead of them reviewing the facts of the case de novo.” Commission staff communicated with Ackerberg’s attorney throughout this period. Ackerberg’s attorney emailed a meeting request to Commission executives on April 13, 2009, because Access for All had informed Ackerberg that it could not proceed further with “any course of action other than what it ha[d] already taken with regard to the Ackerberg accessway” without approval from the Commission and the Conservancy. The executive director of the Commission, Peter Douglas, agreed to meet with Ackerberg’s attorney, but sent her an email, explaining, “[W]e have made our position very clear on many previous occasions . . . . There is a major public asset and value at stake here . . . . I do not see any basis for giving away or abandoning such a precious public resource . . . .” On May 21, 2009, Douglas emailed a third party regarding the Ackerberg easement, stating, “To my knowledge Access for All wants to open this access way and does not think eliminating it is something they support. Even if they did, we will not.”

The Commission rescheduled the administrative enforcement hearing for June 10, 2009. On May 29, 2009, Commission staff postponed the hearing and scheduled a meeting for June 5, 2009, with Ackerberg’s attorney because Commission staff were

“attempting to resolve this matter amicably.” On June 3, 2009, Ackerberg’s attorney sent Commission staff an email stating that counsel representing Access for All would join them at the June 5 meeting because, “[a]s you are aware Access for All brought an enforcement action against Mrs. Ackerberg in LA Superior Court this last January.” (See *Access for All lawsuit, supra*, BC405058.) Commission staff responded that counsel for Access for All should not attend the meeting.

On June 19, 2009, the superior court in the *Access for All lawsuit, supra*, No. BC405058, approved a settlement agreement between Access for All and Ackerberg (Ackerberg Trust Settlement). The Ackerberg Trust Settlement provided that Ackerberg would pay \$10,500 of Access for All’s attorney fees in the *Access for All lawsuit*; Access for All would commence a lawsuit against Los Angeles County to open the county easement; Ackerberg would fully fund the lawsuit against Los Angeles County; and Ackerberg’s attorney would serve as lead counsel in the suit against Los Angeles County. The Ackerberg Trust Settlement also provided that, if the lawsuit were successful, Ackerberg would pay to improve and open the county accessway; Access for All and Ackerberg would jointly seek Commission approval to terminate the Ackerberg easement; and Ackerberg would pay \$250,000 for maintenance, management, and enforcement of the county easement if her easement were terminated. The \$250,000 payment would be split between the Conservancy and Access for All unless the Conservancy did not “wish to accept the funds,” in which case the full amount would be paid to Access for All as maintenance costs for 10 years for the county easement. If the lawsuit were not successful, Ackerberg and Access for All would jointly apply to the Commission to amend the management plan to include security measures at Ackerberg’s expense and then open the Ackerberg easement within 90 days.

On July 6, 2009, Douglas exchanged emails with Steve Hoye, the executive director of Access for All. Douglas expressed surprise at learning that Access for All had entered into a settlement agreement with Ackerberg and noted that neither Access for All nor Ackerberg had mentioned the possible settlement in recent meetings with Commission staff. In his second email, Douglas informed Hoye that he saw “the

\$125,000 offer to the Commission as a bribe to acquiesce in giving up a public right that we will reject AS WE HAVE EVERY TIME SUCH AN OFFER HAS BEEN MADE IN THE PAST under similar circumstances . . . .”

#### **4. The Cease and Desist Order**

On July 8, 2009, the Commission held its rescheduled administrative hearing and issued a cease and desist order that directed Ackerberg to “[r]emove all unpermitted development located within the lateral and vertical public access easements on the property according to the provisions of this Order.” At the hearing, Ackerberg argued that the Commission’s actions were barred under the doctrine of res judicata by the Ackerberg Trust Settlement in the *Access for All lawsuit, supra*, No. BC405058. In determining to issue the cease and desist order, the Commission referred to the Malibu Local Coastal Program, which was adopted in 2002 under the Coastal Act. (See § 30600.5.) The 2002 Malibu Local Coastal Program explicitly forbade abandoning any public access easements.

Ackerberg initiated the present action against the Commission, filing a petition for a writ of administrative mandate (see Code Civ. Proc., § 1094.5) and arguing that the cease and desist order was not supported by substantial evidence; the Commission erred by citing the public access provisions from the current local coastal program, namely, the 2002 Malibu Local Coastal Program, in its decision; and the cease and desist order was barred under the doctrine of res judicata. The trial court denied Ackerberg’s petition for a writ of administrative mandate, determining that Access for All did not act in the public interest by settling the lawsuit and that the Commission and the Conservancy were not in privity with Access for All, thereby precluding the application of res judicata. The trial court determined that the Commission’s order was supported by substantial evidence and was not premature because authorization to “use” the easement area did not include authorization to erect structures on the easement without first obtaining permits. In reaching its decision, the trial court referenced standards from the 2002 Malibu Local Coastal Program as applicable to the cease and desist order.

Ackerberg appealed from the trial court's denial of her petition for a writ of administrative mandate.

## II

### DISCUSSION

On appeal, Ackerberg points to the original permit findings to support the argument that a prerequisite to opening the vertical easement renders the cease and desist order invalid, claiming the Commission promised it would attempt to open a nearby county-owned accessway easement before opening the accessway easement on the Ackerberg property. We disagree because there is no unsatisfied prerequisite; Ackerberg's argument confuses permit findings, which serve to facilitate review on appeal by elucidating the Commission's deliberative process, with terms and conditions, which impose requirements on the coastal development permit agreement between Ackerberg and the Commission to ensure that development complies with the Coastal Act. Ackerberg also asserts that the Commission and the trial court should have applied the 1986 local coastal program standards in reaching their respective decisions. We disagree because the Commission and the trial court applied the proper standards, which were those in place at the time of enforcement. Ackerberg contends that the cease and desist order is not supported by substantial evidence. We disagree. Finally, Ackerberg argues that the judgment in the *Access for All lawsuit* and the Ackerberg Trust Settlement preclude the cease and desist order under the doctrine of res judicata. We disagree because applying res judicata in this case would contravene public policy. Accordingly, we affirm the trial court's denial of Ackerberg's petition for a writ of administrative mandate.

#### A. Standard of Review

Under Public Resources Code section 30801, an "aggrieved person" secures judicial review of a Commission action by filing a petition for a writ of mandate pursuant to Code of Civil Procedure section 1094.5. "The inquiry in such a case shall extend to the questions of whether the [Commission] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of

discretion. Abuse of discretion is established if the [Commission] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.’ (*Id.*, § 1094.5, subd. (b).)” (*La Costa Beach Homeowners’ Assn. v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 814.) In reviewing the agency’s decision, a court ““““must consider all relevant evidence, . . . a task which involves some weighing to fairly estimate the worth of the evidence. [Citation.]” [Citations.] That limited weighing is not an independent review where the court substitutes its own findings or inferences for the agency’s. [Citation.] ‘It is for the agency to weigh the preponderance of conflicting evidence [citation]. Courts may reverse an agency’s decision only if, *based on the evidence before the agency*, a reasonable person could not reach the conclusion reached by the agency.’ [Citation.]” [Citation.]” (*Ibid.*)

“““““[I]n an administrative mandamus action where no limited trial de novo is authorized by law, the trial and appellate courts occupy in essence identical positions with regard to the administrative record, exercising the appellate function of determining whether the record is free from legal error. [Citations.]” [Citation.] Thus, the conclusions of the superior court, and its disposition of the issues in this case, are not conclusive on appeal. [Citation.]’ [Citation.]” [Citation.]’ [Citation.]” (*La Costa Beach Homeowners’ Assn. v. California Coastal Com., supra*, 101 Cal.App.4th at pp. 814–815.)

## **B. Terms and Conditions of the Vertical Easement**

Ackerberg contends that the Commission erred in issuing the cease and desist order because it ignored the Commission’s 1985 promise that it would attempt to open the nearby county-owned easement prior to opening Ackerberg’s easement. We disagree because Ackerberg’s argument is based on the faulty assumption that permit findings are tantamount to permit terms and conditions. Simply put, the Commission did not promise to open the county-owned easement prior to opening Ackerberg’s easement.

““A contract may validly include the provisions of a document not physically a part of the basic contract. . . . “It is, of course, the law that the parties may incorporate by reference into their contract the terms of some other document. [Citations.] But each

case must turn on its facts. [Citation.]””” (Troyk v. Farmers Group, Inc. (2009) 171 Cal.App.4th 1305, 1331.) The contractual agreement between Ackerberg and the Commission, coastal development permit No. 5-84-754, was attached to the recorded offer to dedicate the vertical easement. The coastal development permit and the offer to dedicate both incorporated terms that required those agreements to be construed in compliance with the Coastal Act, including its public access provisions and management plan requirements. (See §§ 31400 [declaring legislative policy of guaranteeing public access to coastal resources and noting the Conservancy’s principal role in accessway implementation], 31402.3, subd. (c)(2) [requiring management plans].) Accordingly, we look to the permit, the offer to dedicate, the transcript of the public hearing, and the management plan in evaluating the agreement between Ackerberg and the Commission.

Ackerberg cites principles of contract interpretation to support the argument that findings included in the 1985 permit are binding terms of the contract between Ackerberg and the Commission that should be construed against the Commission. Ackerberg states that as reasonably construed, and relied on, the findings guarantee that the vertical easement would be terminated either when the county easement was opened or when the offer to dedicate expired. This argument fails for three reasons: It ignores the purpose of findings under the Coastal Act, thereby confusing findings with terms and conditions; it does not account for the policies underlying the Coastal Act, including limitations on the Commission’s approval authority; and it requires a narrow reading of the findings rather than reading the permit and the findings as a whole.

“The purpose of requiring written findings [under the Coastal Act] is to record the grounds on which the decision of the Commission rests and thus render its legality reasonably and conveniently reviewable on appeal. [Citations.] Without appropriate written findings, the trial court cannot properly perform its function in a proceeding for administrative mandate and determine whether the agency’s decision is supported by its findings and its findings are supported by the evidence. [Citation.]” (McAllister v. California Coastal Com. (2008) 169 Cal.App.4th 912, 941.) The Commission uses written findings to elucidate its reasoning for the purpose of enabling judicial review

under Code of Civil Procedure section 1094.5 and Public Resources Code section 30801. (See also Cal. Code Regs., tit. 14, § 13057 [requiring staff reports to the Commission contain “specific findings, including a statement of facts, analysis, and legal conclusions as to whether the proposed development conforms to the requirements of the Coastal Act”].) Courts review the Commission’s findings to determine whether the Commission’s decision complies with the Coastal Act. (See Pub. Resources Code, § 30604, subds. (a)–(c); Cal. Code Regs., tit. 14, § 13096, subd. (a).) In contrast to findings, terms and conditions impose requirements on the permit “in order to ensure that such development or action will be in accordance with the provisions of [the Coastal Act].” (Pub. Resources Code, § 30607.) While findings, terms, and conditions all relate to compliance with the Coastal Act, they differ in that findings explain the reasoning underlying the Commission’s decision that a given permit complies with the Coastal Act at the time the decision is rendered, while terms and conditions operate to constrain or limit a specific development project at the time of formation and into the future.

On January 24, 1985, at a public hearing, the Commission approved Ackerberg’s coastal development permit, but the Commission decided not to approve a special condition, proposed by Ackerberg, that would limit the required offer to dedicate by requiring that the Commission attempt to open the nearby county-owned easement, and if opened, the Ackerberg easement would terminate if termination were possible under a not-yet-approved local coastal plan. Rather, the Commission approved the permit with revised findings reflecting the discussion during the hearing. Both the face of the permit and the findings attached to the offer to dedicate specifically included language that the permit would not be approved without the offer to dedicate. During the hearing, Commission staff advised the commissioners that a preference for opening publicly owned easements “is a policy question that . . . is appropriate for the [land use plan], and could be incorporated . . . in the finding, as a policy that [the Commission has] taken, as opposed to a condition. And then . . . the message [gets] across to the county . . . . [¶] [T]hat would be a better way to get [the Commission’s] point across.” Just prior to the Commission’s vote on the coastal development permit, Commission Chair Nutter

discussed the proposed amended findings. Commissioner McMurray responded and asked Chair Nutter whether the findings, like Ackerberg's proposed amendment, would dictate that "if the public access point was improved, then no other access points within 500 feet are required," adding, "I think we should vote on that." Chair Nutter clarified his proposed amended findings prior to moving for a vote by responding, "No, what I am suggesting is, that what we have before us, at this point in time, is a permit application. We don't have the county before us. We have no ability —obviously, at this point — to open any accessway. [¶] What we have got is a permit application, with some policy considerations that we have been struggling with for a good long while, and I think it is appropriate to reflect that in the findings. [¶] . . . The main motion is per staff, with the understanding that we will have revised findings for our consideration." Without further discussion, the Commission then voted to approve the permit application with the revised findings.

We conclude that the findings did not create an additional condition of the permit and thus did not require the Commission to open the county easement before opening the Ackerberg easement. Rather, the findings reflected the Commission's reasoning process at the time it approved Ackerberg's coastal development permit. The Commission demonstrated its compliance with the Coastal Act in its findings by requiring Ackerberg to dedicate the easement in exchange for the permit and clarified its reasoning process in responding to Ackerberg's proposed amendment by including language that the termination *might* be accomplished *but only* if the recommendations drafted by the Los Angeles County staff working on completing the Malibu Local Coastal Plan were approved (by both Los Angeles County and the Commission) and enacted through a future local coastal plan. While the 1986 land use plan contained a provision that future offers to dedicate would not be required if the county determined that adequate access existed nearby, it did not contain a provision requiring that existing offers to dedicate be abandoned. To the contrary, it provided that existing offers to dedicate should be accepted and opened before new offers to dedicate were required in the same area. (See

Malibu Local Coastal Program Land Use Plan, *supra*, <[http://planning.lacounty.gov/view/malibu\\_local\\_coastal\\_plan](http://planning.lacounty.gov/view/malibu_local_coastal_plan)> [as of Aug. 22, 2012].)

The findings merely discuss a possible *future* policy and did not constitute a condition when the instrument was read as a whole. While findings referenced by Ackerberg include language that “[t]he Commission believes as a matter of policy, publically owned vertical accessways should be improved and opened to the public before additional offers to dedicate vertical easements are opened,” the findings go on to qualify this statement, noting that the Commission does not implement policy changes through individual permit applications which apply to a single property because broad policy decisions are implemented through local land use plans which apply to the entire community.

Ackerberg references the commissioners’ discussion to support her argument that the permit findings operated as conditions on her offer to dedicate the easement. This interpretation fails to account for the entire record. The statements of the commissioners, when read together with the recorded offer to dedicate, illuminate the meaning behind the policy decision espoused by the Commission. The commissioners acknowledged that they could not force Los Angeles County to open its nearby easement, but wanted to call attention to the need to open the easement. The commissioners and Commission staff discussed, in language almost identical to the language in the revised findings, that the Commission would not enact broad policy changes in an individual coastal development permit, but that broad policy changes were the purview of a local coastal program. Thus, the Commission’s findings do not operate as conditions on Ackerberg’s permit because the Commission did not adopt any broad policy change at that time.

Assuming the Commission’s findings could be construed to mean that the Commission guaranteed the future termination of Ackerberg’s easement, such a guarantee would violate the Coastal Act. The Legislature sought to encourage local government regulation by enabling municipalities to implement Coastal Act regulations through their own local coastal programs. “The Legislature left wide discretion to local governments to formulate land use plans for the coastal zone and it also left wide

discretion to local governments to determine how to implement certified [local coastal programs].” (*Yost v. Thomas* (1984) 36 Cal.3d 561, 574.) A land use plan is one component of a local coastal program. A local coastal program is tailored to the unique needs of the local community and must “meet the requirements of, and implement the provisions and policies of, [the Coastal Act] at the local level.” (§ 30108.6.)

The proposed land use plan that would have covered the Ackerberg property in 1986 was written and adopted by Los Angeles County, the local municipality responsible for adopting a local coastal program at that time. The Commission could only have guaranteed that the future land use plan would contain policies enabling termination of the vertical easement if the Commission used its review authority to reject any local coastal program that did not enact the easement termination policy — an action which would violate the Coastal Act. “[T]he Commission in approving or disapproving [a local coastal program] does not create or originate any land use rules and regulations. It can approve or disapprove but it *cannot itself draft any part of the coastal plan.*” (*Yost, supra*, 36 Cal.3d at p. 572, italics added.) “Section 30500, subdivision (c) provides, in relevant part: ‘The precise content of each local coastal program shall be determined by the local government, consistent with Section 30501, in full consultation with the Commission and with full public participation.’ Pursuant to section 30512, the Commission’s review of a land use plan is limited to a determination as to whether the land use plan conforms to the . . . Coastal Act [and], in making its review, section 30512.2, subdivision (a) provides that ‘the commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan.’” (*Douda v. California Coastal Com.* (2008) 159 Cal.App.4th 1181, 1198.) Accordingly, Ackerberg could not have reasonably relied on the findings as a promise to open the county-owned easement before opening the vertical easement on her property.

### **C. Application of Local Coastal Program**

Ackerberg argues that the Commission and the trial court erred because they applied the 2002 policies to interpret both Ackerberg’s offer to dedicate and Ackerberg’s

coastal development permit. Ackerberg asserts that the 2002 policies do not expressly authorize their retroactive application, and, therefore, they should not apply to the 1985 permit. Ackerberg implies that the 2002 policies should also not apply to the 1983 bulkhead permit. For reasons we shall explain, we disagree.

The California Coastal Act of 1976 encourages local agencies to enact their own local coastal programs and to then issue local coastal development permits. (§§ 30004, 30500.) Land use plans are one component of a local coastal program. (§ 30108.6; see also § 30108.5.) On December 11, 1986, the Commission certified Los Angeles County's land use plan for the unincorporated Malibu area (portions of Malibu that were under the county's jurisdiction because they had not been incorporated by the City of Malibu) as a part of the county's proposed local coastal program. The remainder of the proposed program was never adopted. Instead, in 2002, after the Ackerberg property had been incorporated into the City of Malibu, the city adopted a new local coastal program that applied to the Ackerberg property. The 2002 Malibu Local Coastal Program policies include standards for vertical easement spacing and the policy of opening as many public accessways as possible. (See Malibu Local Coastal Program Land Use Plan, *supra*, <[http://planning.lacounty.gov/view/malibu\\_local\\_coastal\\_plan](http://planning.lacounty.gov/view/malibu_local_coastal_plan)> [as of Aug. 22, 2012].)

“‘[W]hen an instrument provides that it shall be enforced according either to the law generally or to the terms of a particular . . . statute, the provision must be interpreted as meaning the law or the statute in the form in which it exists at the time of such enforcement.’ [Citations.]” (*City of Torrance v. Workers’ Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 379.) The Coastal Act governs enforcement of Ackerberg’s recorded offer to dedicate and the accompanying coastal development permit because both documents include language that they are subject to the Coastal Act. Further, both documents directly reference and quote the Coastal Act extensively. The permit included a standard condition, labeled “interpretation,” which specified that “[a]ny questions of intent or interpretation of any condition will be resolved by the Executive Director of the Commission.”

In issuing the cease and desist order, the Commission was enforcing the 2002 Malibu Local Coastal Program, the law in effect at the time it issued the order. Under the Coastal Act, all new development in the coastal zone must be authorized under a coastal development permit. (§ 30600, subd. (a).) When it issued the cease and desist order, the Commission found that there were no coastal development permits issued for the development in the Ackerberg easements, but the easements were nevertheless developed with “rock riprap, a 9-ft high wall, a concrete slab and generator, and a fence, railing, planter, light posts, and landscaping.” The Commission found that the development was not included in the 1983 permit, nor was it included in the 1985 permit. Finding that the development had been added without the necessary coastal development permit(s), the Commission applied the 2002 Local Coastal Program standards to its evaluation of the unpermitted structures in the easement accessways. When development occurs in violation of the Coastal Act, the law applicable to enforcement of the act is the law then in force. Neither the law in effect at the time the unpermitted development commences nor the law in effect at the time an offer to dedicate an easement is recorded applies, even when the easement offer is for the same property as the development. In sum, when the Commission issued the cease and desist order, it was acting as required under the Coastal Act to accomplish the opening of an easement accessway to the public.

Ackerberg relies on *Strauss v. Horton* (2009) 46 Cal.4th 364 (*Strauss*) for the proposition that retroactive application of a statute requires either a clear statement of retroactive intent or very clear extrinsic evidence of such intent. (See *id.* at p. 470.) Ackerberg’s reliance on *Strauss* and similar cases is misplaced. *Strauss* addressed the retroactive application of Proposition 8, a voter-approved measure that prohibited same-sex marriage in California effective November 5, 2008. (*Strauss*, at p. 385.) Interveners in *Strauss* argued that California should not recognize same-sex marriages that occurred prior to the enactment of Proposition 8, reasoning that refusal to recognize same-sex marriages, as opposed to revoking past marriage licenses, would not involve retroactive application of Proposition 8. (*Strauss*, at pp. 471–472.) The court held that “[w]ere Proposition 8 to be applied to invalidate or to deny recognition to marriages performed

prior to November 5, 2008, rendering such marriages ineffective in the future, such action would take away or impair vested rights acquired under the prior state of the law and would constitute a retroactive application of the measure.” (*Strauss*, at p. 472.) The court explained, “[A] . . . retrospective law “is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute.” [Citations.] . . . “[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, *in respect to transactions or considerations already past*, must be deemed retrospective.””” (*Id.* at pp. 471–472, italics added.)

Ackerberg’s analogy to *Strauss* relies on two faulty assumptions. First, *Strauss* dealt with executed marital “contracts”; the married, same-sex couples had accepted the state’s offer of the right to marry, entered into a contractual relationship, and reasonably relied on the state’s promise to honor their marriages. (See *Strauss, supra*, 46 Cal.4th at pp. 472–474.) In contrast, Ackerberg’s offer to dedicate a public easement was analogous to an option contract that the Commission had explicitly accepted by recording an acceptance certificate. Ackerberg’s offer to dedicate the easement was irrevocable for 21 years and was recorded in exchange for the coastal development permit for her home. “An irrevocable option is a *contract*, made for consideration, to keep an offer open for a prescribed period’ [citation].” (*Erich v. Granoff* (1980) 109 Cal.App.3d 920, 927–928; *City of Orange v. San Diego County Employees Retirement Assn.* (2002) 103 Cal.App.4th 45, 51–52.) The Commission reasonably relied on Ackerberg’s offer when it allowed Ackerberg to build a large beachfront home, thereby impacting public coastal access. Second, the argument assumes Ackerberg had a vested right to have the offer of an easement terminated. That assumption is incorrect. Ackerberg’s vested rights were included in the plain language of the 1983 and 1985 offers to dedicate; those rights were limited to the right to quadruple the size of the existing home and add other improvements to the property consistent with the approved plans in 1985 and to maintain the 1983 bulkhead. Two offers to dedicate public access easements across the property were offered in exchange for those rights, and the offers specified that they were to

remain irrevocable for 21 years. Ackerberg's rights to maintain the development on her property, as depicted in the plans submitted for the 1983 and 1985 coastal development permits, were not impaired by the issuance of the cease and desist order. The cease and desist order requires Ackerberg to remove development that was added without the requisite permits in the public accessways and to bring the property into compliance with its depiction in the plans submitted for the 1983 and 1985 permits. It follows that Ackerberg's vested rights — to build a larger home and to maintain the bulkhead — were not affected by the cease and desist order.

Additionally, Ackerberg's argument fails on its own terms. Even assuming the cease and desist order should be evaluated under standards in place at either the time Ackerberg's permit was originally approved in January of 1985 or the offer to dedicate was recorded on April 4, 1985, Ackerberg advocates applying the Los Angeles County land use policies adopted in December 1986. Ackerberg attempts to justify the application of those standards, which were enacted nearly two years after the 1985 permit was approved and the offer to dedicate was recorded, by arguing that she believed the standards adopted in December 1986 governed the permit agreement and thus justifiably decided to “avoid challenging the Commission's actions in requiring the opening of the easement — a challenge that almost certainly would have [succeeded as] . . . an unconstitutional taking without compensation . . . .” But “[t]here cannot be written into the contract of the parties by implication the provision that it shall be subject to the terms of statutes to become effective at a future date.” (*Loeb v. Christie Hotel Corp.* (1936) 16 Cal.App.2d 299, 300–301.) This argument mirrors Ackerberg's contention that the permit findings operate as conditions and therefore runs into the same problems as her assertion that the 1985 permit was intended to require opening the county easement before opening the Ackerberg easement. Both arguments fail to account for the Commission's limited authority under the Coastal Act (see § 30512.2, subd. (a)) and the need to interpret the permit and the offer to dedicate reasonably according to the plain language of the documents (see *Fireman's Fund Ins. Co. v. Superior Court* (1997) 65 Cal.App.4th 1205, 1212–1213). Section 30512.2, subdivision (a) provides: “The

commission's review of a land use plan shall be limited to its administrative determination that the land use plan submitted by the local government does, or does not, conform with the requirements of Chapter 3 (commencing with Section 30200). In making this review, the commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan.”

Ackerberg contends that she relied on the commissioners' statements at the 1985 meeting, which were reflected in the permit findings, to guarantee a future right to terminate the easement. We disagree because Ackerberg's reliance on a finding that would contradict the purpose of mitigation measures under the Coastal Act would be unreasonable. (See *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1369 [finding property owners could not have reasonably believed that the Commission intended to abandon an easement by failing to enforce it for 18 years].) During the January 24, 1985 public hearing, the Commission discussed the forthcoming local coastal program and the need for hearings and findings related to the local coastal program before it could return to the Commission for approval. (See §§ 30503, 30510.) While the revised findings for the Ackerberg coastal development permit referred to a *recommendation* made by the Los Angeles County land use planning staff, allowing a mere recommendation to govern the interpretation of the coastal development permit here is not reasonable. Staff recommendations serve to provide background information to the public at public hearings and local elected officials who must decide the contents of the proposed local coastal program prior to submitting the proposed program to the Commission for its approval or denial. The Los Angeles County Board of Supervisors, the local approving authority, did not approve the Malibu land use policies until October 7, 1986. (See Malibu Local Coastal Program Land Use Plan, *supra*, <[http://planning.lacounty.gov/view/malibu\\_local\\_coastal\\_plan](http://planning.lacounty.gov/view/malibu_local_coastal_plan)> [as of Aug. 22, 2012].)

The correct vehicle for implementing the access policies that Ackerberg sought would have been through public participation in the local coastal program adoption process. Finally, as noted in the permit, “the Commission found that but for the

imposition of the . . . condition [requiring an irrevocable offer to dedicate a vertical public accessway easement], the proposed development could not be found consistent with the public access policies of Section[s] 30210 through 30212 of the California Coastal Act of 1976 and that therefore in the absence of such a condition, a permit could not have been granted.”

**D. Substantial Evidence Supported the Cease and Desist Order**

Arkerberg’s final argument in her opening brief is captioned, “Questions Involving the Purportedly Unpermitted Development Are Mere Pretexts for the Commission’s Core Goal of Opening the Easement.” In that section Ackerberg states that “the removal of this purportedly unpermitted development is not truly at issue here” because “there is no reason to remove allegedly unpermitted development at all unless the easement itself is opened.” But Ackerberg’s contention that the easement cannot be opened is based on her arguments that we have already rejected.

Nevertheless, Ackerberg further argues that the Commission’s finding that the development was unpermitted is not supported by the record. She devotes nine lines of her opening brief to this argument, citing plans, photographs, and a staff report which she claims proves her point. We have examined those items in light of the entire record and the statutory requirements under the Coastal Act and the Conservancy Act, and we conclude that Ackerberg has failed to demonstrate that the Commission’s findings were not supported by substantial evidence.

“‘Substantial evidence’ is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citations.]” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.) “The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record. [Citation.]” (*Id.* at p. 652.) Development in the coastal zone always requires a coastal development permit subject to the requirements of the Coastal Act. (See §§ 30600, 30820; Cal. Code Regs., tit. 14, § 13052.)

Ackerberg forfeited the defense that the development predated the Coastal Act by not seeking a vested rights ruling under section 30608 of the Coastal Act. (See Cal. Code Regs., tit. 14, § 13200.)

Ackerberg further contends that the Commission permitted the development in the vertical easement at the 1985 hearing, when Commission staff told Ackerberg she could “use” the easement unless or until the easement was accepted and opened to the public. In reaching its determination to issue the cease and desist order, the Commission reviewed evidence from its enforcement staff and Ackerberg and heard from both sides. Evidence submitted to the Commission and in the administrative record included plans, photographs, and staff reports. The 1985 coastal development permit application describes the project as “[d]emolition of existing single family dwelling . . . and concrete block wall along street property line.” The plans associated with the 1985 permit depict the proposed and existing structures on the property but do not depict the block wall at the street line nor the generator Ackerberg placed on the easement. The Commission could reasonably find, based on the 1985 permit description and plans, that the wall and other development in the easement were unpermitted. Similarly, the 1983 bulkhead permit plans include a depiction of a “typical section” of the bulkhead in which an arrow connects the depiction of riprap at the toe of the bulkhead and the words “replace exist[ing] boulders with rock and gravel wastemix, 3/4" to 12".” The Commission required an offer to dedicate a lateral easement as a condition of issuing the bulkhead permit; that lateral easement area included the area on which Ackerberg placed the riprap according to the survey completed by Access for All. Further, the Commission reviewed the plans, photographs, staff report, and survey record and reasonably determined that the boulders Ackerberg placed on the public accessway easement were not authorized by a coastal development permit. Finally, Ackerberg presented no evidence establishing development in the easements met the permit requirements under the Coastal Act. Thus, the record shows the cease and desist order was supported by substantial evidence.

## E. Res Judicata

The trial court determined that the Ackerberg Trust Settlement was not in the public interest based on policy considerations. We agree. “[R]es judicata will not be applied “if injustice would result or if the public interest requires that relitigation not be foreclosed.” [Citation.]” (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 577.) The doctrine of res judicata is applicable when (1) the parties have an opportunity to litigate through notice or constructive notice and choose not to litigate or (2) the parties’ interests were adequately represented in the prior action. (*Id.* at pp. 575–577.) “A predictable doctrine of res judicata benefits both the parties and the courts because it ‘seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.*’ [Citation.]” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.) But holding the cease and desist order was barred by res judicata because of the Ackerberg Trust Settlement would be contrary to the Coastal Act and its underlying policies, as enacted by the Legislature, because of (1) the act’s public access policies; (2) the act’s limitations on citizen enforcement motivated by pecuniary interest, including penalties; and (3) the act’s management plan requirement.

Accordingly, we hold that the terms of the Ackerberg Trust Settlement are unenforceable because they are contrary to public policy. Pertinent to our analysis are the separate contractual agreements, including Ackerberg’s 1985 permit and the easement accessway management plan, both of which espoused the common purpose of ensuring that any development complied with the Coastal Act. “““A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”” [Citations.] ‘Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case.’ [Citation.]” (*Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 183.)

## 1. Public Access Requirements Under the Coastal Act

In order to be approved, all development in the coastal zone must be reviewed and found to be in compliance with the Coastal Act, including its public access provisions. “The Coastal Act of 1976 was the result of popular recognition that uncontrolled development of the California coastline could not continue. The act sets forth a statement of policies (§§ 30200–30264) which are binding on local and state agencies in planning further development in the coastal zone. . . . [I]mportant sections of the act provide for a coastal access program . . . . There is no doubt that the Coastal Act is an attempt to deal with coastal land use on a statewide basis.” (*Yost v. Thomas, supra*, 36 Cal.3d at p. 571.) The offer to dedicate the vertical easement that Ackerberg recorded acknowledged these policy concerns, stating, “public access to the shoreline and along the coast is to be maximized . . . .” “Prior to certification of the local coastal program, a coastal development permit shall be issued if . . . [the Commission] finds that the proposed development . . . will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with Chapter 3,” including “the public access . . . policies of Chapter 3.” (§ 30604, subs. (a), (c).) The offer to dedicate the easement acknowledged this requirement, reciting, “the Commission found that *but for* the imposition of the . . . condition [offering the easement], the proposed development *could not be found consistent with the public access policies . . . of the California Coastal Act of 1976* and that therefore in the absence of such a condition, a permit could not have been granted.” (Italics added.) The 1985 permit could not have been issued without the Commission conditioning the permit on Ackerberg’s offer to dedicate the vertical easement because, without the condition, Malibu’s ability to prepare a local coastal program would have been prejudiced given the Coastal Act’s public access policies.

Ackerberg urges that the 1985 permit is to be interpreted to allow for termination of the accessway easement, but this contention is not supported by the permit. The interpretation subverts the intent expressed in the Coastal Act that no permit be approved that would prejudice Malibu’s ability to prepare a local coastal program in compliance with the act’s public access provisions. And such a strained reading of the contract

between Ackerberg and the Commission would be contrary to standard rules of contract interpretation. (See *Fireman's Fund Ins. Co. v. Superior Court*, *supra*, 65 Cal.App.4th at pp. 1212–1213 [discussing plain meaning rule and reasonable interpretation in contract law].) Even if such an interpretation were reasonable, it would be unenforceable. “The general rule is that ‘a contract made in violation of a regulatory statute is void. [Citation.] Normally, courts will not “lend their aid to the enforcement of an illegal agreement or one against public policy . . . .” [Citations.]” (*Hinerfeld-Ward, Inc. v. Lipian* (2010) 188 Cal.App.4th 86, 92.) The plain language of both the coastal development permit and the recorded offer to dedicate support our determination that the Commission did not guarantee termination of Ackerberg’s offer to dedicate. The Commission and Ackerberg recognized in the permit that the offer to dedicate was required under the Coastal Act.

## **2. Penalties Under the Coastal Act**

Although “any person” may enforce the Commission’s duties under the Coastal Act (see §§ 30111, 30803, 30805), all penalties under the act must be paid to the state. (*Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 678 (*Sanders*).) The *Sanders* case dealt with a private citizen’s suit to enforce a provision of the Coastal Act’s predecessor (former §§ 27000–27650). (Compare former § 27426 [“Any person may maintain an action for the recovery of civil penalties”] with current § 30805 [“Any person may maintain an action for the recovery of civil penalties provided for in Section 30820 or 30821.6”].) In *Sanders*, the court held that “absent a specific provision in the Coastal Act designating any person other than the state to be a recipient of a part or all of the civil penalties recovered under the act, the statute is *not* a *qui tam* statute and all the penalty must be paid to the state.” (*Sanders*, at p. 678.) The court reasoned that the Coastal Act was meant to protect public interests and that, accordingly, any penalties for harm would have to be paid to the state to benefit the public rather than those seeking personal pecuniary gain. (*Ibid.*) The court noted that “[b]y definition, *qui tam* rights have never existed without statutory authorization.” (*Id.* at p. 671.) The *Sanders* court explained, “*Qui tam* actions were eventually abolished in England completely, because they had been persistently abused. Some of the disadvantages arising from its permissive use

were: . . . [I]t gave what many considered to be excessive powers to prospective plaintiffs, and, when not carefully controlled, it was subject to abuse, becoming vexatious or resulting in suits settled for an amount prejudicial to the government’s interest.” (*Id.* at p. 675, fns. omitted.)

The Ackerberg Trust Settlement specifically provided that if Access for All successfully sued to open the county easement, Ackerberg would pay Access for All, a private organization, \$125,000 in “private funding,” in addition to attorney fees associated with the suit. The purpose of the settlement agreement was to “provide for an orderly resolution of the Coastal Act violation alleged . . . and for enforcement and maintenance of the Ackerberg easement . . . .” Although Access for All sued Ackerberg pursuant to the citizen enforcement provisions of the Coastal Act for penalties, any award under the settlement agreement meant to address violations of the Coastal Act could not be paid to Access for All. By providing for payment to a private organization, the Ackerberg Trust Settlement violated the Coastal Act. Thus, the private financial gain Ackerberg conferred on Access for All in the Ackerberg Trust Settlement renders the settlement agreement invalid under the citizen enforcement provisions of the Coastal Act.

### **3. Management Plan Required by the Coastal Act**

The Coastal Act requires management plans for public access easements and provides that “[t]he Conservancy shall retain the right to reclaim the easements or other interests in the event that the . . . nonprofit organization . . . violates the terms of the agreement.” (§ 31402.3, subd. (b).) “The Legislature . . . declares that in carrying out the provisions of this [act] . . . conflicts be resolved in a manner which on balance is the most protective of significant coastal resources.” (§ 30007.5.) The Coastal Act, by replacing the California Coastal Zone Conservation Act (§ 27000 et seq.), “requires the Commission [on such permit applications] to undertake a delicate balancing of the effect of each proposed development upon the environment of the coast . . . .’ This ‘delicate balancing’ concept implicitly confers a substantial discretion in the Commission in its factual determinations.” (*Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Com.* (1976) 57 Cal.App.3d 76, 88.) While Ackerberg argues that the

Ackerberg Trust Settlement is more protective of coastal resources than the cease and desist order requiring her to open the easement on her property, this argument fails because the authority to make such decisions has been placed in the Commission and the Conservancy, not in a landowner or a nonprofit organization. (See *id.* at pp. 87–88.) Upholding Ackerberg’s position on the issue of res judicata would be contrary to the provisions of the Coastal Act because it would contravene the priority assigned to the protection of significant coastal resources, including public coastal access, as determined by the Commission. Because we decide that public policy considerations are determinative here, we do not decide other issues under res judicata.

**F. Taking Without Just Compensation**

A theme underlying several of Ackerberg’s arguments is that opening the Ackerberg easements would be tantamount to an unconstitutional taking for lack of compensation. Ackerberg concludes that the Ackerberg Trust Settlement was in the public interest by arguing that the public access easements on her property constitute a taking of private property without just compensation. In support of this argument Ackerberg cites section 30010 of the Coastal Act, requiring just compensation when private property is taken for a public use, and the United States Supreme Court decision in *Nollan v. California Coastal Comm’n* (1987) 483 U.S. 825 [107 S.Ct. 3141]. Because Ackerberg never previously raised any argument that the original permit condition constituted an unlawful “taking,” this claim is time barred. (See § 30801 [permit decisions of the Commission are final if not challenged by writ petition within 60 days]; *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 54.

**III**  
**DISPOSITION**

The judgment is affirmed.  
NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.