State of California

Department of Justice
300 South Spring Street, Suite 5212
Los Angeles, CA 90013

Memorandum

To : Joseph T. Edmiston, Executive Director
Santa Monica Mountains Conservancy
3700 Solstice Canyon Road
Malibu, CA 90265

Date : August 10, 1993

Telephone: CALNET (8) 647-2706
(213) 897-2706
FACSIMILE (213) 897-2801

From : Terry T. Fujimoto
Deputy Attorney General
Public Rights-Land Law
Office of the Attorney General - Los Angeles

Subject: Advice Letter Re Access Rights over Winding Way

You have requested a response to the following question:

What access rights over Winding Way does the Conservancy possess by virtue of its ownership of the Flood and Parcel A properties?[1]

CONCLUSION:

Under both the Flood and Parcel A deeds the Conservancy has express easement rights over Winding Way. The extent of those rights is limited by the "reasonableness" of use by the Conservancy and its invitees.

DISCUSSION:

a. Description of Conservancy Property and Express Easements

The MRCA owns two parcels in the Escondido Canyon area of Malibu. The "Flood" property, approximately 12.69 acres in size, was acquired in September 1992. The parcel is located in lower Escondido Canyon behind a single family residence at 6100 Via Escondido. The second lot, referred to as Parcel "A", was originally part of a single 140 acre parcel owned by a partnership of Fairfax Savings Bank. In February, 1990, the MRCA acquired a 26 acre portion of the site (i.e., Parcel A). On its

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1. The memorandum, dated May 30, 1993, requesting an informal opinion on this matter raised several additional questions, which, because of time constraints, we were unable to answer. Should you desire a response to those issues as well, we will, at your request, issue a supplementary letter. In addition, this letter does not address whether the State has any prescriptive rights over Winding Way.

easter boundary, Parcel A is continguous to the Flood property. Access to the MRCA properties from Pacific Coastal Highway (PCH) is made primarily via Winding Way, a 25 foot wide, two lane, asphalt paved, private road.[2]

The Conservancy\MRCA acquired the two parcels in order to preserve the property as open space and open a hiking and equestrian trail on-site for use by the public at large.

Both the Flood and Parcel A deeds grant the MRCA express easements over Winding Way in general terms and with no conditions of limitation. Specifically, the Flood deed provides in relevant part: " **An easement appurtenant to Parcel 1, for road purposes to be used in common with others over those private streets shown on record of survey ....**". Similarly, the Parcel A deed grants the State: "**A non-exclusive easement over that portion of Winding Way Road, as now occupied and traveled, for ingress and egress extending from Parcel 1 above to Pacific Coast Highway**".

At issue is the manner and extent of use[3] permitted under the express easements over Winding Way.

b. <u>General Principles Governing the Interpretation and Construction of Express Easements</u>

The determination of the manner and extent of use of a right of way created by express grant necessarily involves a construction of the grant. Several basic principles govern: 1) The grant must be construed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect to the intention of the parties; 2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant; 3) The past behavior of the parties in connection with the use of the right of way may be regarded as a practical construciton of the use of the way; 4) In case of doubt, constuction should be in favor of the grantee. (Annot., Extent and Reasonableness of Use

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2. In addition, the Conservancy owns an access easement for equestrian and hiking along Winding Way and Debutts Terrace. The easement terminates at the cul-de-sac adjacent to the remaining Fairfax Savings property. The Conservancy obtained the easement as a condition to a coastal development permit issued by the Coastal Commission to the Los Angeles County Water District.

3. "Manner" is here taken to involve the mode of use, i.e., pedestrian, equestrian, bicycle or various vehicles. "Extent" of use involves both the purpose for which the use is made and the amount or degree of use.

of Private Way in Exercise of Easement Granted in General Terms (1965) 3 ALR3d 1256, 1259-1260.)

Where a grant of a right of way is general and without terms of limitation (as the easements are here), courts have generally construed the grant to mean a general right of way which is capable of "all reasonable use". (3 ALR3d at 1260.) This "reasonableness of use" is the operational test in judging the propriety of the purpose, extent and manner of use. In determining the validity of a particular purpose or manner of use, reference is typically made to the service of the dominant tenement (i.e., grantee) and burden on the servient tenement. The reasonable service that the dominant tenement may derive is not limited to the uses made of the dominant estate at the time of its creation but to "any reasonable use to which the dominant parcel may be devoted". (Wall v. Rudolph (1961) 198 Cal.App.2d 684, 693.) This reasonable "contemplation" presumptively includes "normal future development with the scope of the basic purpose". (Id. at 692.) Restatement, Property, § 484 (1941), similarly provides:

> "In ascertaining, in the case of an easement appurtenant created by conveyance, whether additional or different uses of the servient tenement required by changes in the character of the use of the dominant tenement are permitted, the interpreter is warranted in assuming that the parties to the conveyance contemplated a normal development of the use of the dominant tenement".

However, the dominant owner may not engage in abnormal activities which unduly or materially increase the burden upon the servient tenement. (Wall, supra, 198 Cal.App.2d at 692.) Similarly, the dominant owner has no right to exclude the grantor or other persons having an equal right from use of the right of way. (3 ALR3d at 1271.)

The question of reasonable use or unreasonable deviation is one of fact. (Pasadena v. California-Michigan, etc. Co. (1941) 17 Cal.2d 576, 579.)

c. Manner of Use Permitted Under the Express Terms of the Flood and Parcel A Easements

A general easement or right of way, without limitations as to its terms, has generally been regarded as permitting all reasonable manner of use, including but not limited to pedestrian, vehicular and bicycle travel. The rationale is that such uses were necessary to the reasonable and proper use and enjoyment of the dominant estate. (Anot. (1965) 3 ALR3d at 1284.)

The term "road" or "road purposes", unless qualified, has been regarded as meaning a thoroughfare for the use of all reasonable manner of travel, including pedestrian and vehicular. (Loumar Development Co. v. Redel (1963, Mo.) 369 SW2d 252.) Similarly, the phrase "ingress and egress" has been interpreted as too general a term to warrant the construction that the manner of use was to be restricted to any particular mode of travel. (Arnold v. Fee (1896) 42 NY 214.)

Here, the right of way in both grants is stated in general terms. Specifically, the Flood deed grants an easement over Winding Way for "**road purposes**". The Parcel A deed grants the State a non-exclusive easement over Winding Way for "**ingress and egress**".

It is our conclusion, based upon our review of the terms of the easement and the relevant law that all reasonable manner of travel, including vehicular, pedestrian, and bicycle use, would be permitted over Winding Way by the Conservancy and its invitees under the express terms of the Flood and Parcel A easements.

d. The Effect of an Increase and Change in Use of the Dominant Estate on the Right of Way and Servient Estates

The Conservancy has indicated that it intends to preserve the Flood and Parcel A properties as open space and open a hiking and equestrian trail for use by the general public. Concerns have been raised that use of the two parcels as open space in an area which is predominantly residential would increase vehicular traffic, the likelihood of vandalism and trespass, and expose the homeowners to potential liability for injuries which may occur on the road, and thus, materially increasing the burden on the servient estates and other easement holders.

In fact, neither an increase or change in use of the dominant tenement alone constitutes an undue burden on the easement or servient estate. As stated in 25 Am.Jur.2d, Easements and Licenses, §74, p. 480:

> "[Use of the easement] is not restricted to use merely for such purposes of the dominant estate as are reasonably required at the time of the grant or reservation, but the right may be exercised by the dominant owner for any purposes to which that estate may be subsequently devoted. Thus, there may be an increase in the volume and kind of use of such an easement during the course of its enjoyment".

In that same treatise at § 77, p. 484 it is said:

> "Furthermore, no unlawful additional burden is imposed on the lands of a servient estate by an increased number of persons using an unlimited

right of way to which the land is subject."

In Inter Community Memorial Hospital Bldg. Fund, Inc. v. Brown (1957) 168 NYS 2d 535, the court held that a change in use of the dominant tenement from farmland to a private hospital did not unduly burden the easement or servient estate:

> " Where the language of the instrument specifies no limitation of use thereof " it will not necessarily be confined to the purposes for which the land was used at the time the way was created, but may be used for any purpose to which the land accomodated by the way may naturally and reasonably be devoted". [Citation omitted.]
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> "In the instant case, the only language in the instrument creating the right of way which seems to define the use to be made of it is the language providing that it is "to be used as a private way". Such language undoubtedly prevents the plaintiff from using it for a public thoroughfare, but does not restrict the nature or frequency of its use by it or by its employees, invitees and licensees". (168 NYS 2d at 538.)

In Laux v. Freed (1960) 53 Cal.2d 512, partners who owned rangeland that been used for farming, and hunting by themselves and their invitees, dissolved the partnership and partitioned the land, one retaining a right of way over the other to reach his land. The court held that the dominant owner could lease his property to another who sold hunting "memberships" to individuals who used the right of way to get to the dominant parcel. Rejecting plaintiff's contentions that use of the right of way for purposes other than farming was an unauthorized change in the burden of the easement, the court observed that if plaintiff had intended defendant himself and hunters invited or licensed by defendant were to be barred from use of the existing right of way it was "incumbent on the plaintiff to have caused the deed .. to so state". (Id. at __.) Inasmuch as the deed granted defendants an "unlimited right of way", there was no basis for the relief sought. Similarly, in Cushman Virginia Corp. v. Barnes (1963, Va.) 129 SE2d 633, the court held that a change in use from agricultural to residential subdivision did not impose an additional burden on the servient owner. The court concluded that since the deed creating the right of way contained no terms of limitation upon its use, the dominant owner, in the reasonable use of his land, was entitled to make use of the easement even if the result may be that the degree of burden is increased. (Id. at 640.)

In Logan v. Brodrick (1981, Wash.) 631 P.2d 429, the Washington Court of Appeals found that the expansion of an existing resort

did not overburden the right of way despite evidence that there was an increased volume of traffic. Observing that "changes in surrounding conditions and modernization of recreational vehicles are to be reasonably contemplated", the court of appeal agreed with the trial court that the increase in traffic was not unreasonable "given the population increase, and particularly given the propensity that people have toward outdoor recreation that have occurred here in the last fifteen years". (Id. at 432; also see Karches v. Adolph Invt. Corp. (1968 Mo.) 429 SW2d 788 [held, change in use from single estate to residential subdivision did not unreasonbly burden servient estate particularly where right of way was unambiguous].)

However, while an easement granted in general and unrestricted terms is available for any reasonable use to which the dominant estate may be devoted, the owner of an easement cannot "materially increase the burden of it upon the servient estate or impose thereon a new and additional burden". (Wall v. Rudolph (1961) 198 Cal.App.2d 684, 686.) For example, in Wall, both the dominant and servient estates had been used for citrus growing and ranching. Subsequently, the dominant parcel was converted into a commerical venture involving sumps or dumping grounds for oil well and oil field waste. The court held that the development of an oil field was an unreasonable use of a private right of way. The court observed: "Not only do the trucks interfere with cultivation of plaintiff Wall's property but they also, as they pass each other on these narrow roads, pack down the soil; consideration dust is raised which settles on the citrus trees and damages them". (Id. at 697.)

Similarly, an easement may be extinguished by the performance of any act, on either the dominant or servient estate, by the owner of the easement, that is incompatible with the nature or exercise of the easement.[4] (Civ. Code § 811 (3).) Specifically, the act must be one that necessitates a permanent interference with the easement or an act of a nature that thereafter exercise of the easement cannot be made without severe burden on the servient tenement (28 Cal. Jur. 3d (Rev.) Easements and Licenses, §50, p.187; Crimmins v. Gould (1957) 149 Cal.App.2d 383, 391-392.)

e. The Purpose and Extent of Use Permitted Under the Terms of the Flood and Parcal A Easements

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4. The general rule is that misuse or excessive use is not sufficient for abandonment or forfeiture, but an injunction is the proper remedy (Crimmins v. Gould (1957) 149 Cal.App.2d 383.) Extinguishment of the easement is only appropriate where it is impossible to sever the increased burden so as to preserve to the owner of the dominant tenement that to which he is entitled. (Id. at 392.)

In evaluating the rights of the MRCA\Conservancy under the "reasonableness of use" standard we focus on several considerations. First, is the right of way restricted or qualified in any way? Second, is use of the property as open space within the normal future development of the site? Would the increase in vehicular and pedestrian traffic materially increase the burden on the servient tenements?

As previously noted, the easements in both grants are stated in general terms. Accordingly, the Conservancy is entitled to use the two parcels for any purpose to which the land "may naturally and reasonably be devoted". (Inter Community, supra, 168 NYS 2d at 538.)

Similarly, preservation of the property as open space would appear to be a reasonable use and consistent with the surrounding circumstances and situation of the property. The properties are currently zoned RR40 (Rural Residential) which limits development to one dwelling per 40 acres. Use of the site as open space is consistent with that zoning. The Malibu Land Use Plan has designated the site as an Environmentally Sensitive Habitat Area (ESHA). In addition, there is substantial evidence that residents as well as members of the general public have used Winding Way for years to gain access to the existing trail which leads to Escondido Falls. Finally, we note that the Conservancy as well as other groups including the Mountains Restoration Trust, have for some time been acquiring property in the Santa Monica Mountains for similar purposes (i.e., recreation and preservation). All these factors indicate that use of the site as a staging ground for hikers would not be an "abnormal" development which would constitute a misuse of the easement.

The more difficult question is whether the likely increase in traffic and use of the right of way and dominant estate for park and open space purposes will impose an undue burden on the easement and servient tenements. We reiterate that an increase in the volume and kind of use does not in and of itself render the change in use improper. (25 Am. Jur. 2d, Easements and Licenses, §§ 74, 77, p. 480, 484; Inter Community, supra.) However, a use may be so burdensome as to warrant injunctive relief. (See Wall, supra.) In this instance, the question is premature. We do not know with any specificity the nature and extent of the likely increase in use. Therefore, we cannot say whether the likely increase in use, if any, will be reasonable or unreasonable. This does not mean that the residents' complaints are not legitimate or should be ignored. To the extent the Conservancy can mitigate the perceived problems that exist on the site the less likely a claim that the increased use is unreasonable can be maintained. For example, there are several measures that the Conservancy can take which would minimize or alleviate the problems posed by using the site for park purposes: 1) Provide parking for users; 2) Provide alternate access routes into the site; 3) Place limits

on the hours of operation and vehicular use; 4) Contribute to maintenance of the road; 5) Signage delineating clearly the types of uses permitted on the property; 6) Provide law enforcement services, and; 7) Adequate management and maintenance of the open space areas.

In summary, it is our conclusion that all reasonable manner of travel by the Conservancy's invitees over Winding Way to state land, including but not limited to vehicular, pedestrian and bicycle, is permissible under the express terms of the easements. Similarly, we conclude that change in use of the properties to open space is within the normal development of the land and neither unduly burdens the easement or servient estates. Finally, we render no opinion as to whether the increase and volume of use which is likely to occur as a result of the change in use is a misuse of the easement. At present, there is insufficient evidence to make that determination.

DANIEL E. LUNGREN
Attorney General

TERRY T. FUJIMOTO
Deputy Attorney General