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March 27, 2012

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Honorable Ignazio J. Ruvolo  
Presiding Justice, Division 4  
First District Court of Appeal  
350 McAllister Street  
San Francisco, CA 94102

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Re: *Town of Fairfax v. John Berg, et. al*  
Case No.: A131225

Jeanine Michaels  
ADMINISTRATIVE ASSISTANT

Dear Presiding Justice Ruvolo:

Our office represents the County of Marin ("County."). The above referenced case is now fully briefed, and the County does not wish to delay its resolution by this Court. However, this case involves a seven (7) acre parcel of real property purchased by the appellant Town of Fairfax ("Town") for "open space purposes" with money provided by the County, (see the Respondent's Brief ("RB") at page 6), the Town of Fairfax and scores of individual donors. (See RT 60-61, consisting of the trial testimony of then Mayor Lewis Tremaine, regarding fund-raising efforts, spotted owl habitat and adoption of Resolution 2358. See also Trial Exhibit 1.)

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The Marin County Open Space District received an easement (which permits public access) following the Town's purchase, via Town Resolution, and the County of Marin accepted the Open Space Easement. Thus, while the County of Marin did not participate in this litigation, it remains critically concerned about its outcome.

No one really disputes that the easements in question were not intended to provide full unfettered access across respondent's property by the "public." However, neither could anyone deny that the Town acquired the same rights to use the easement that any other owner of this property would possess upon purchase. The trial court also determined that "(t)he Town's easement was a private, appurtenant easement across the (respondent's) property." (See tentative decision at page 2).

However, the court's decision then goes on to state not only that the Town may not "...allow or promote public use..., of the easements, but

also that the Town "...may not invite members of the public onto the easements...." (Ibid.; emphasis added). This, of course, would appear to go well beyond what the law allows.

While the Town of Fairfax does not seek to create a public right of way with unlimited public access, as the owner of a seven (7) acre open space parcel for the benefit of its citizens as well as the public generally, it must be allowed to use the easement for reasonable access by invitees who happen to be members of the public.

The County recognizes that this may create some practical issues for the parties or the trial court in determining the reasonable use of the easements. However, that of course is not grounds for denying the Town reasonable use of this easement which provides the only access to the property. The court has the authority to craft terms which would protect the rights and interests of all parties. These might include such limitations as: daylight hours only, no dogs allowed unless on a leash, kids under twelve on bikes, and no motor vehicle access except for maintenance of the property. These reasonable limitations, along with a lack of available public parking in the immediate area, would restrict usage to a small number of members of the public.

For these reasons, the County of Marin believes this matter must be remanded to the trial court to work out the scope of that reasonable use.

Thank you very much for any consideration the assigned panel is able to give to the County's concerns.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Zaltsman". The signature is fluid and cursive, with a large initial "D" and "Z".

David L. Zaltsman  
Deputy County Counsel

Cc: Counsel for Appellant and Respondent