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November 8, 1996

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VIA FACSIMILE AND FEDERAL EXPRESS

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For the State of California
110 West "A" Street, Suite 1100
San Diego, California 92101

Re: Mancuso v. California State Coastal Conservancy, et al.
L.A. Sup. Ct. No. BS 040 197

Dear Mr. Kaufman:

Under this cover, and pursuant to the Court's order and our agreement, I am transmitting the Memorandum of Points and Authorities which we filed today in connection with the above-referenced action.

In the course of our preparation of the Memorandum and our review of the record which Respondents prepared, we learned that Exhibit 3 of the record refers to negotiations and an agreement with the Mountains Recreation and Conservancy Authority ("MRCA") pursuant to which MRCA will operate and service the easement for a period of 20 years.

IRELL & MANELLA LLP

A REGISTERED LIMITED LIABILITY LAW PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

Peter H. Kaufman, Esq.
November 8, 1996
Page 2

Although Respondents have included the staff report regarding the MRCA agreement, they have failed to include all relevant evidence regarding the same. Relevant evidence would include, but not be limited to, draft documents such as the "maintenance program" referred to in Exhibit 3; notice records for the Conservancy's September 20, 1995 meeting; and all records of the MRCA's proceedings in connection with agreement.

We are requesting that the record be augmented to include all relevant evidence pertaining to the MRCA agreement, and that we be provided with copies of the same. Please contact us as soon as possible so that we can determine how to proceed.

sincerely,



Allan J. Abshez

AJA:msl

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6
 7
 8 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
 9 FOR THE COUNTY OF LOS ANGELES

11 FRANK MANCUSO, SR., an individual,)
 12 Petitioner,)
 13 v.)
 14 CALIFORNIA STATE COASTAL)
 CONSERVANCY, an agency of the State of)
 15 California, CALIFORNIA STATE)
 COASTAL CONSERVANCY BOARD, the)
 16 governing body of the California State)
 Coastal Conservancy, CALIFORNIA)
 17 DEPARTMENT OF GENERAL SERVICES,)
 an agency of the State of California, and)
 18 DOES 1 through 100,)
 19 Respondents.)

CASE NO.: BS 040197

MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 PETITION FOR WRIT OF MANDATE

[Code Civ. Proc. § 1085]

Date: December 5, 1996
 Time: 9:30 a.m.
 Dept.: 85

Discovery Cut-off: None

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1 direct effects upon Petitioner's residence, the Conservancy has failed, and continues to refuse,
2 to provide Petitioner and other affected members of the public with notice and opportunity to
3 be heard regarding the Conservancy's steps and transactions in connection with the Easement.
4 For example, in September 1995 the Conservancy entered into a 20-year property management
5 agreement with the Mountains Recreation and Conservation Authority (the "MRCA") to
6 operate the Easement (the "MRCA Agreement"). Even though the agreement will effectively
7 make the MRCA Petitioner's neighbor, and even though the agreement entailed key details
8 regarding the day-to-day operation of the Easement that will directly impact Petitioner's
9 residence (for example, the proposed maintenance program and arrangements for ranger
10 services), the Conservancy neither provided Petitioner with notice and opportunity to be heard
11 regarding the transaction, nor took any steps to comply with CEQA.¹

12 The present action arose after May 16, 1996 when the Commission authorized a
13 feasibility study to determine, in accordance with Public Resources Code Section 31404 and
14 Section 21102 of CEQA, whether the costs of developing and maintaining the Easement
15 outweigh the benefits of opening the Easement to public use (the "May 16 action"). By virtue
16 of Section 21106 of CEQA, which requires that all state agencies budget funds necessary to
17 protect the environment in relation to problems caused by their activities, the Conservancy
18 Board is obligated to consider not just the cost of physically developing the accessway, but
19 also the cost of operating the resulting beach access in a safe, sanitary, and environmentally
20 responsible manner. That is, the Conservancy cannot simply throw the accessway and Beach
21

22 ¹ Petitioner became aware of the MRCA agreement after the dispute regarding the
23 Conservancy's May 16 action arose. Petitioner's review of the agreement revealed violations
24 of the Conservancy's obligations under the Public Resources Code, CEQA, and principles of
25 due process which are asserted herein. Consequently, although Petitioner did not assert failure
26 to receive notice or opportunity to be heard regarding the MRCA agreement in the Petition,
27 this Court can (and should) order that Petitioner's pleadings be amended to conform to proof.
28 See Code Civ. Proc. §§ 473, 576 (Court has discretion to amend pleadings to conform to
proof); 5 Witkin Cal. Procedure, Pleadings § 1139 at pp. 553-54 (3d ed. 1985) (California
courts are extremely liberal in allowing amendments to conform to proof, especially where
presentation of the issue on the merits will be preserved and amendments will not prejudice
the other side).

1 to Escondido Beach. The Easement is 10 feet in width and commences at Pacific Coast
2 Highway. The Easement is currently unimproved, not open to the public, and impassable due
3 to severe natural landforms, dense natural vegetation, and private improvements. Upon
4 entering the property which comprises Petitioner's residence, the Easement overlays a portion
5 of Petitioner's private driveway, passes through Petitioner's front and side yard improvements
6 adjacent to his house, through portions of Petitioner's rear yard, and then drops 130 feet down
7 to Escondido Beach, about one-quarter of a mile from Pacific Coast Highway.

8 Although no public easement existed on Petitioner's property historically, the Easement
9 was extracted from the property's prior owner by the California Coastal Commission (the
10 "Commission") in 1978 as a condition for granting such owner permission to build the
11 residence which Petitioner later purchased, as well as a residence next door. Such exaction
12 was imposed prior to the United States Supreme Court's 1987 holding in Nollan v. California
13 Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987), which brought an end to the
14 Commission's practice of taking property through the imposition of development permit
15 conditions without an essential nexus and without the payment of just compensation.

16 In September 1995, the Conservancy undertook proceedings to develop the Easement
17 so that it can be used to open Escondido beach to general recreation. Developing the
18 Easement to public use will require, among other things, the demolition of existing
19 improvements which comprise portions of Petitioner's residence, dramatic alteration of
20 existing landforms, and the construction of substantial improvements to make the Easement
21 usable. Opening Escondido Beach to general recreation will increase the intensity of its use
22 and result in significant environmental impacts to the beach, to the surrounding community,
23 and to Petitioner's property.

24 On September 20, 1995, the Conservancy Board authorized a 20-year property
25 management agreement with the MRCA to operate the Easement. See Exhibit 3 at pp. 19-20
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1 of the "record" prepared by the Conservancy, (hereinafter, the "Record"). Id.³ The
2 agreement entails key details regarding the day-to-day operation of the Easement that will
3 directly impact Petitioner's residence (for example, the proposed maintenance program and
4 arrangements for ranger services). Even though the agreement will effectively make the
5 MRCA Petitioner's neighbor, Petitioner was not afforded with notice and opportunity to be
6 heard regarding the transaction. In May 1996, the Conservancy agendized a proposed
7 action to authorize a pre-project design and feasibility study regarding the development of the
8 Easement for the Conservancy Board's May 16, 1996, meeting in Carlsbad, California. The
9 purpose of the study is to enable the Conservancy Board to determine whether the costs of
10 developing the Easement outweigh the benefits of public use so as to enable the Conservancy
11 Board to discharge its responsibility under Pub. Res. Code § 31404. Despite the fact that
12 Petitioner owns property on which the Easement runs and hence would be directly impacted by
13 its development, the Conservancy failed to provide Petitioner with notice of the May 16
14 hearing so that he might be heard regarding the appropriate scope of the study.

15 On May 14, 1996, Petitioner became apprised of the Conservancy's impending May 16
16 hearing and the proposed action item regarding the Easement study. Petitioner's counsel
17 thereupon wrote and called the Conservancy to request that the Conservancy continue the
18 matter until after Petitioner and other members of the public were provided with due notice
19 and opportunity to be heard. See Exhibit 15 at pp. 58-59 to Record. This very reasonable
20 request was rejected by the Conservancy staff without ever being presented to the Conservancy
21 Board. See Exhibit 16 at pp. 60-61 to Record (letter from Michael Fisher of Conservancy to
22 Allan Abshez dated May 22, 1996); see also Exhibit 4 at pp. 21-23 to Record (transcript of
23 portion of Conservancy's May 16 hearing, which reflects that no mention was made of
24

25 ³ At the Conservancy's insistence, this Court instructed the parties to stipulate to a
26 "record" and the Conservancy "volunteered" to prepare one. However, the parties have been
27 unable to so stipulate, given the Conservancy's inclusion of irrelevant and selective
28 documentation as well as its omission of relevant documents in the "record" it prepared.
Notwithstanding this failure to stipulate, Petitioner will lodge the "record" prepared by the
Conservancy.

1 Petitioner's request to continue hearing). At the May 16 hearing, the Board acted and
 2 authorized a contract which limited the feasibility study to design and construction issues only.
 3 Id. See also Exhibit 13 at pp. 49-50, 14, 16, 22, 57 to Record.

4 By virtue of the Conservancy's failure to provide Petitioner with notice and opportunity
 5 to heard, Petitioner was unable to present his views regarding the issues that should have been
 6 included in the feasibility study. Specifically, Petitioner wished to present the following
 7 issues:

8 (a) the Conservancy's ability to mitigate, and the cost of mitigating, traffic
 9 hazards resulting from the opening of the Easement entrance, which is situated along a high
 10 speed blind-curve of Pacific Coast Highway;

11 (b) the Conservancy's ability to provide, and the cost of providing, sufficient
 12 off-street parking to serve the Easement;

13 (c) the Conservancy's ability to provide, and the cost of providing, life-
 14 safety facilities, such as lifeguards, emergency communication, and rescue and evacuation
 15 services to the remote location of the Easement;

16 (d) the Conservancy's ability to provide, and the cost of providing, sanitary
 17 facilities, such as toilets and changing rooms to the remote location of the Easement;

18 (e) the Conservancy's ability to provide, and the cost of providing, police
 19 services to the remote location of the Easement;

20 (f) the Conservancy's ability to mitigate, and the costs of mitigating,
 21 environmental impacts resulting from the intensification of the use of the beach.

22 (g) the Conservancy's ability to mitigate, and the costs of mitigating,
 23 environmental impacts resulting from the disruption of coastal bluffs, sensitive plant and
 24 animal species, the protected Monarch Butterfly habitat, and other issues required to be
 25 addressed and mitigated to comply with CEQA and the Coastal Act;

26 (h) the costs of maintaining the Easement subsequent to development; and
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1 (i) the ability to develop the Easement, and the cost of developing the
2 Easement in a manner which will not infringe upon the privacy of Petitioner's Residence and
3 adjoining residential property.

4 Under Section 21106 of CEQA the Conservancy Board is required to budget the funds
5 necessary to mitigate each of these potential impacts. Therefore, unless the feasibility study
6 considers such issues, the Conservancy Board will not be provided with an analysis of all of
7 the costs associated with developing and maintaining the Easement and hence cannot fully
8 comply with its responsibilities under Section 31404 of the Public Resources Code, to evaluate
9 whether the cost of developing and maintaining the Easement outweigh "the benefits of public
10 use."⁴

11 Upon becoming informed that the May 16 hearing had not been continued as requested,
12 Petitioner requested that the Conservancy stop all work regarding the feasibility study until
13 after a duly noticed public hearing had taken place. See, e.g., Exhibit 17 at pp. 62-63 to
14 Record. Although the Conservancy staff represented that it would present Petitioner's request
15 to the Board, Conservancy staff summarily and improperly denied Petitioner's request without
16 even presenting it to the Board. See Exhibit 19 at pp. 68-70 to Record. Upon becoming
17 aware that Conservancy staff had withheld his request from the Board, Petitioner objected and
18 demanded that the Board be presented with Petitioner's request for notice and opportunity to
19 be heard. Id. Despite Petitioner's demand, staff again failed and refused to present such
20 request to the Board. See Exhibit 21 at p. 71 to Record. Petitioners were therefore left with
21 no alternative but to file the instant action.

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27 ⁴ The Conservancy admits that the purpose of the feasibility study is to satisfy its
28 obligators under Section 31404. See Exhibit 3 at p. 15 to Record.

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III.

ARGUMENT

A. THE CONSERVANCY AND THE DEPARTMENT HAVE FAILED TO DEVELOP AND IMPLEMENT SECTION 31107.1 NOTICE PROCEDURES

In the enabling legislation which created the Conservancy, the Legislature enacted safeguards to ensure that the Conservancy provided broad opportunity for public input into its activities. Specifically, Section 31107.1 of the Public Resources Code requires that:

"The Department of General Services and the conservancy shall jointly develop and implement appropriate procedures to ensure that land acquisition, leasing, options to purchase, land disposal, and other property transactions undertaken in accordance with the provisions of this division are carried out efficiently and equitably and with proper notice to the public."

Pub. Res. Code § 31107.1 (West 1996). The Conservancy and the Department have not complied with the ministerial duty imposed by Section 31107.1, and instead operate on an entirely ad hoc basis, providing only such notice and opportunities for public input as suit the Conservancy's own purposes. Because the legislature has mandated broad public input into the Conservancy's activities, and because such activities significantly impact the interests of coastal area property owners and the public, correction of this situation is long overdue. Indeed, pursuant to Section 31107.1, the Conservancy should have -- but did not -- provide Petitioner notice and opportunity to be heard regarding either the 20-year MRCA property management agreement or the feasibility study authorized by the May 16 action.

1. The "Memorandum of Understanding" Does Not Satisfy Section 31107.1

Respondents contend that the Conservancy and the Department complied with Section 31107.1 by adopting a document entitled "Memorandum of Understanding Concerning Real Property Transactions," (Exhibit 11 to Record; hereinafter the "MOU"). A careful reading of the MOU reveals that it satisfies only a small part of the requirements of Section 31107.1. Specifically, the MOU provides: (a) Procedures for the acquisition and disposition of property;

1 and (b) procedures for public notice in connection with property disposals. See Exhibit 11 at
2 pp. 44-46 of Record.

3 More significant are the MOU's omissions. In derogation of the Section 31107.1, the
4 MOU does not provide:

- 5 (1) Procedures for notification of affected property owners or the general public
6 regarding any type of transaction (other than property dispositions);⁵
- 7 (2) procedures for leasing;
- 8 (3) procedures for options; or
- 9 (4) procedures for other types of property transactions.⁶

10 Because the MOU clearly fails to meet the explicit requirements of Section 31107.1, the writ
11 requested by Petitioner's first cause of action should be granted.

12 Moreover, as discussed at length herein, the Conservancy's transactions -- for example,
13 opening a beach to general recreational use -- do significantly impact the environment and
14 individual property interests. Therefore, to ensure that the Conservancy's transactions are
15 carried out "efficiently and equitably and with proper notice to the public," at a minimum this
16 Court should direct in its writ that the Conservancy provide direct mail notice to the owners
17

18 ⁵ The only provision made for any type of notice in the MOU, is for notice in connection
19 of request for offers ("RFO's") for property which the Conservancy desires to sell and for the
20 Conservancy's consideration of such offers. Even these procedures are inadequate in view
21 Section 31107.1's requirement for "equitable" notice because they fail to specify which
22 members of the public shall receive notice (for example, affected property owners within a
23 reasonable radius of the subject property) and what period of notice is required.

24 ⁶ In addition to requiring procedures and public notice for acquisitions, disposals, leases,
25 and options, Section 31107.1 explicitly includes "other property transactions undertaken in
26 accordance with Division 21 . . ." "Transact" is defined in pertinent part as "to do, carry on,
27 or conduct . . . to conduct business." The American Heritage College Dictionary 3rd Edition
28 (Houghton Mifflin 1993). "Transaction" is defined as "the act of transacting or the fact of
being transacted . . . something transacted, esp. a business agreement or exchange." Id. As
discussed below, a 20-year property management agreement (such as the Conservancy's
agreement with MRCA), a license for a vendor to enter onto real property and conduct
surveys and tests (such as the Charles Rauw feasibility study), and a decision by the
Conservancy to physically improve the Easement and open it for public use all qualify as
property transactions.

1 (and where applicable, renters) of property that may be impacted by the proposed transaction
 2 at least 10 days prior to the Conservancy's consideration of the transaction after a public
 3 hearing.⁷

4 2. The Conservancy Failed to Provide Petitioner with Section 31107.1 Notice
 5 For Either the MRCA Agreement or the Feasibility Study.

6 In Section 31107.1, the legislature explicitly required that equitable notice and
 7 opportunity to be heard be provided for "other property transactions" in addition to
 8 acquisitions, disposals, leases and options. In connection with the Easement, the Conservancy
 9 has failed to carry out this ministerial obligation with respect to at least two transactions: The
 10 20-year MRCA property management agreement, and the contract to retain engineer Charles
 11 Rauw ("Rauw") to conduct a feasibility study of developing the Easement.

12 In September 1995, the Conservancy Board authorized a 20-year property management
 13 agreement with the MRCA to operate and maintain the Easement after it has been constructed.
 14 See Exhibit 3 at pp. 19-20; Exhibit 12 at p. 48 to Record ("The [E]asement, once constructed,
 15 will be operated and maintained by the Mountains Recreation and Conservation Authority,
 16 which maintains other parks and beach accessways in the area.").⁸ Petitioner was never
 17 provided with notice or opportunity to be heard regarding the property management
 18 agreement, which can only be interpreted as a "property transaction" between the Conservancy
 19 and the MRCA within the meaning of Section 31107.1.⁹ Nor can there be any doubt that the
 20

21 ⁷ Requiring the Conservancy to provide a minimum of 10 days advance notice of
 22 Conservancy transactions to affected property owners is reasonable. Indeed, such mail notice
 is typically required for land use matters. See, e.g.; Gov't. Code 65091(a)(1).

23 ⁸ Although the Conservancy insisted in its appearance before this Court that a "record" be
 24 prepared for this action, the Conservancy has failed to include the MRCA agreement or any
 25 documentation related to the Conservancy's negotiations with the MRCA. Petitioner objects to
 the Conservancy's selective omission of this key documentary evidence.

26 ⁹The Conservancy's apparent position is that it is only required to provide notice of
 27 property acquisitions pursuant to Section 31107.1. See Exhibit 19 at p. 67 to Record (stating
 "[t]he Conservancy's action on the Chiate/Wildman [E]asement does not constitute a
 28 transaction as the Conservancy already owns the [E]asement.").

1 20-year agreement will significantly affect Petitioner's property on which the very Easement
2 that MRCA is contracting to manage is located. Although the Conservancy has failed to
3 include the MRCA agreement or any documentation related thereto in the record, in the staff
4 report regarding the September 20, 1995, meeting, Conservancy staff states that the agreement
5 includes "a maintenance program" for the Easement that will include locking the gates at
6 night, regular inspections of the stairs, ranger services available on an on-call basis, and
7 weekly trash pick up. See Exhibit 3 at p. 20 to Record. Furthermore, although the agreement
8 is for a 20-year period, the Conservancy Board only authorized funding to cover the first five
9 years of the agreement. Id. Petitioner had a right to be heard on the property management
10 agreement, which will place the MRCA on his property for 20 years, as well as the adequacy
11 of the maintenance program and the proposed funding. Because of the Conservancy's failure
12 to provide Petitioner with notice and opportunity to be heard regarding the MRCA agreement
13 in accordance with Section 31107.1, the Board's September 20, 1995, authorization of the
14 same should be set aside by this Court.

15 Similarly, the Conservancy breached its responsibility under Section 31107.1 to provide
16 Petitioner with notice and opportunity to be heard regarding the Conservancy's May 16 action
17 which authorized a contract with Charles I. Rauw Consulting Engineers ("Rauw") to conduct a
18 study to determine the design and cost of improving the Easement. See Exhibit 13 at pp. 49-
19 56 to Record. The contract includes a license for Rauw to enter onto Petitioner's property to
20 perform its obligations under the contract. This contract is a "property transaction" within the
21 legislature's intended meaning of that term in Section 31107.1 of the Public Resources Code.
22 In addition, as further discussed below, the scope of the study will significantly impact
23 Petitioner's property rights because the Conservancy Board intends to rely on it in order to
24 evaluate whether the costs of developing and maintaining the Easement outweigh the benefits
25 of opening the Easement. Accordingly, this Court should also set aside the Rauw contract for
26 failure to provide notice and opportunity to be heard in accordance with Section 31107.1.

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1 If there is any doubt whether either of these transactions fall within Section 31107.1's
2 requirement for notice and opportunity to be heard -- which there should not be -- it should be
3 resolved in favor of Petitioner and the public's right to be heard. Section 31107.1 cannot be
4 interpreted narrowly. In Section 31107.1, the legislature explicitly emphasized the importance
5 of "equity" and "proper" notice. Certainly if a governmental agency plans on entering into a
6 contract granting third party contractors and vendors a right to manage a portion of one's
7 property for 20 years, or a license to enter one's property, one should be entitled to advance
8 notice and opportunity to be heard. Indeed, "equity" mandates such advance notice. It is
9 simply inequitable and improper to shroud transactions and decisions that will significantly
10 impact Petitioner's residence in secrecy, as the Conservancy apparently desires to do.

11 Accordingly, in addition to ordering the Conservancy and Department to develop and
12 implement their long-overdue notice procedures under Section 31107.1 of the Public Resources
13 Code, the MRCA property management agreement and the decision authorizing the Rauw
14 feasibility study should be set aside pursuant to Petitioner's Second Cause of Action.

15 **B. THE CONSERVANCY FAILED TO PROVIDE PETITIONER WITH ADVANCE**
16 **NOTICE OF AND AN OPPORTUNITY TO BE HEARD REGARDING THE**
17 **MRCA AGREEMENT AND THE FEASIBILITY STUDY IN VIOLATION OF**
18 **PETITIONER'S DUE PROCESS RIGHTS**

19 In addition to its failure to provide statutory notice and opportunity to be heard
20 pursuant to Section 31107.1, the Conservancy's failures with respect to the MRCA agreement
21 and the Rauw feasibility study also violate Petitioner's constitutional right to due process. The
22 California Supreme Court has long held that due process principles require that before an
23 agency undertakes actions which may affect the rights of property owners it must first provide
24 the property owners with notice and an opportunity to be heard. See Horn v. County of
25 Ventura, 24 Cal. 3d 605, 615 (1979).

26 Horn concerned a property owner who was not provided with mailed notice of pending
27 proceedings regarding an application for a subdivision adjacent to his property. The owner

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1 learned of the proposal by chance after its approval, and filed an appeal demanding that the
2 original approval be overturned and re-opened to enable a proper hearing after due notice.
3 The owner's request was denied. Ventura County, the defendant in the action, argued that the
4 owner should have discovered the proceedings itself earlier and not relied upon the County to
5 provide notice. *Id.* at 618. The County also argued there was no due process defect because
6 the owner had become aware of the proceeding and had the opportunity to provide input
7 through the appeals and the CEQA process. Finally, Ventura argued that the owner had not
8 suffered a deprivation of property rights because the owner had "closed" on his acquisition of
9 the property after he became aware of the subdivision approval. The trial court sustained the
10 County's demurrers without leave to amend.

11 The Supreme Court reversed the trial court's judgment, holding that notwithstanding
12 the owner's intervention in the approval process by way of an appeal to the Board of
13 Supervisors, the County's approval was a violation of the owner's due process rights because
14 the owner had not been provided with notice or an opportunity to be heard regarding the
15 County's initial approval action. *Id.* at 618-19. The Court stated that it had long been
16 recognized that "land use decisions which 'substantially affect' the property rights of owners
17 . . . may constitute 'deprivations' of property within the context of procedural due process."
18 *Id.* at 615. "Due process principles," the Court held, "require reasonable notice and
19 opportunity to be heard before governmental deprivation of a significant property interest."
20 *Id.* at 612. The Horn Court also held that the owner's allegations that the subdivision plan
21 would "substantially interfere with his use of the only access from his parcel to the public
22 streets, and will increase both traffic congestion and air pollution" demonstrated a deprivation
23 of a significant property interest so as to entitle the petitioner to notice and an opportunity to
24 be heard. *Id.* at 615.

25 The Supreme Court rejected the County's arguments that the notice defect had been
26 "waived" by the owner's participation in the appeals process, or by the owner's decision to
27 close on the property after learning of the County's approval. *Id.* at 615-16, 620. The Court

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1 held that even though he was aware of the approval before he "closed" escrow, he had a right
2 to be heard as to the particular details which might cause him injury. *Id.* The Court also
3 rejected the County's argument that it was the owner's obligation to have himself placed on a
4 mailing list or to review County postings to learn of the proposed project. The Court held that
5 persons who might be significantly affected by a particular land use decision "cannot
6 reasonably be expected to place themselves on a mailing list or "haunt" county offices on the
7 off-hand chance that a pending challenge to those interests will thereby be revealed." *Id.* at
8 618.

9 As in *Horn*, under Section 31404 the Conservancy is involved in making individual
10 land use decision with respect to the Easement and Petitioner's particular property that will
11 substantially affect Petitioner's property rights. *Id.* at 613.¹⁰ Construction of the Easement
12 will deprive Petitioner of a significant property interest, because it will require, among other
13 things, the demolition of existing improvements which comprise portions of Petitioner's
14 residence, dramatic alteration of existing landforms, and the construction of substantial
15 improvements to make the Easement usable. Furthermore, as demonstrated by the opening of
16 similar access points along Pacific Coast Highway in Los Angeles County, opening the
17 Easement may attract hundreds and perhaps thousands of visitors on a daily basis to this
18 location (which is not provided with even the most basic infrastructure and services). This in
19 turn will result in life-safety hazards, unmitigatable environmental impacts and adverse effects
20 to property owned by Petitioner and neighboring residents. See Petition at ¶ 17. Because, as
21 discussed earlier, the Conservancy's authorizations of the 20-year MRCA property
22 management agreement and the feasibility study are each actions which will deprive Petitioner
23 of significant property interests, the constitutional principle of notice and opportunity to be
24 heard is invoked. As the Supreme Court held in *Horn*, "[t]he expressed opinions of the
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26 ¹⁰ In *Horn*, the Supreme Court distinguished situations where an agency's action involves
27 the adoption of broad generally applicable rules of conduct based on general public policy.
28 These types of actions, the Court held, did not invoke due process notice requirements. *Id.* at
613.

1 affected landowners might very well be persuasive to those public officials who make the
 2 decisions, and affect the outcome of the [process]. *Id.* at 615. Thus, in the instant case,
 3 Petitioners should have been provided with notice and an opportunity to be heard regarding the
 4 20-year MRCA management agreement and the scope of the feasibility study.

5 As in *Horn*, the Conservancy's excuses that the Conservancy "thought" Petitioner was
 6 aware of the proceedings regarding the Easement, or that Petitioner had opportunity to provide
 7 written comment, are irrelevant to the Conservancy's constitutional obligations.¹¹ *Id.* at 616-
 8 18, 620. At a minimum, due process demands direct mail notice to Petitioner as the affected
 9 property owner at a time "sufficiently prior to a final decision to permit a 'meaningful'
 10 predeprivation hearing to affected landowners." *Id.* at 618 (citations omitted).

11 For all of the foregoing reasons, Petitioner is therefore entitled to relief pursuant to its
 12 First Cause of Action through the issuance of a writ of mandate pursuant to Section 1085 of
 13 the California Code of Civil Procedure setting aside both the Conservancy's approvals of both
 14 the 20-year MRCA agreement and the feasibility study.

15 **C. THE MRCA AGREEMENT AND THE FEASIBILITY STUDY WERE**
 16 **APPROVED WITHOUT COMPLIANCE WITH CALIFORNIA**
 17 **ENVIRONMENTAL QUALITY ACT**

18 **1. The MRCA Agreement Was Adopted Without Compliance With CEQA**

19 As discussed earlier, on September 20, 1995, the Conservancy approved a 20-year
 20 management agreement for the operation of the Easement with the MRCA. There is no record
 21 of any CEQA compliance with respect to this action by the Conservancy. The management
 22 agreement is a discretionary project within the meaning of CEQA. *See* Cal. Code Reg., Tit.
 23 14, § 15378(a) (The definition of "project" under CEQA includes activities "supported in
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25 ¹¹ The Conservancy does not dispute the fact that it failed to provide Petitioner, as the
 26 owner of the affected property, with direct mail notice regarding either the 20-year MRCA
 27 agreement or the feasibility study. Instead, the Conservancy raises as an excuse its mistaken
 28 impression that Susan McCabe, a consultant for an adjacent owner, was Petitioner's agent and
 that she must have been keeping Petitioner informed. *See e.g.*, Exhibit 16 at pp. 60-61 to
 Record.

1 whole or in part through public agency contracts, grants, subsidies, loans, or other forms of
2 assistance from one or more public agencies."). Developing the Easement and opening
3 Escondido Beach to general recreational use will result in potentially significant environment
4 impacts requiring mitigation of various types. Moreover, as the Conservancy admits, the
5 Easement cannot be opened without a "local management entity," a role which the MRCA is
6 intended to fill. See Exhibit 3 at p. 13 to Record. Because there is no evidence whatsoever
7 that the Conservancy complied with CEQA with respect to the MRCA agreement, it should be
8 invalidated by this Court pursuant to Public Resources Code Section 21168.

9 2. The Feasibility Study Does Not Comply With Section 21102 of CEQA

10 In addition, the Conservancy's May 16, 1996 approval of the feasibility study also
11 violated CEQA. Under Section 21102 of the Public Resources Code, the preparation of a
12 feasibility study is only exempted from CEQA only where the study includes the consideration
13 of the "environmental factors related to the project." The Conservancy characterizes the study
14 authorized by the Board on May 16 as a "feasibility study" of the project to enable it to
15 determine whether the costs of developing and maintaining the Easement outweigh the benefits
16 of opening the Easement to public use. See Exhibit 3 at p. 15 to Record. Among the costs
17 which must be considered by the Conservancy Board, are those which arise under Section
18 21106, which requires the Conservancy to fund the mitigation of environmental problems
19 caused by its activities. Contrary to all of these requirements, in this case the Conservancy
20 has authorized and funded a feasibility study which relates to construction issues only and
21 which fails to consider environmental factors, in violation of Section 21102.

22 The improperly narrow scope of the feasibility study authorized by the Conservancy
23 Board at the May 16 hearing is evident from the staff report prepared for the May 16 hearing
24 (entitled "Chiate/Wildman Easement Feasibility Analysis"), which clearly indicates that the
25 study will only "analyze construction feasibility." See Exhibit 3 at p. 11 to Record.¹² The

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27 ¹² Moreover, the Conservancy itself admits that "the purpose of the feasibility analysis" is
28 to evaluate "if and how it would construct the necessary physical improvements to the
casement." Exhibit 3 at p. 16 to Record. See also Exhibit 3 at p. 15 to Record (purpose of

1 feasibility study's limited scope is further demonstrated by the transcript from the May 16
 2 hearing, which demonstrates that the purpose of the study authorized by the Conservancy is to
 3 analyze construction issues only. See Exhibit 4 at pp. 21-23 to Record (Conservancy "to hire
 4 the geology and landscape architect and designer skills necessary for us to cost out this project
 5 and decide whether or not we can afford to proceed with it."). Finally, the limited scope of
 6 the feasibility study is demonstrated by the contract with Rauw, which mentions construction-
 7 related issues only and makes no mention of considering any environmental factors.¹³ See
 8 Exhibit 13 at pp. 49-50 of Record. See also pp. 14, 16 and 57 to the Record (explaining the
 9 purpose of the feasibility study).

10 Significantly, there is no reference to any of the following environmental factors, which
 11 Petitioner sought -- but was denied -- the opportunity to raise the Conservancy Board: the
 12 ability, and the cost of mitigating, traffic hazards resulting from the opening of the Easement
 13 entrance, which is situated along a high speed blind-curve of Pacific Coast Highway; the
 14 ability, and the cost of providing, sufficient off-street parking to serve the Easement; the
 15 ability, and cost of providing, life-safety facilities, such as lifeguards, emergency
 16 communication, and rescue and evacuation services to the remote location of the Easement;
 17 the ability, and the cost of providing, sanitary facilities, such as toilets and changing rooms at
 18 the Easement; the ability, and the cost of providing, police services; the ability, and the cost
 19 of mitigating, environmental impacts resulting from the intensification of the use of Escondido
 20 Beach; and the ability, and the costs of mitigating, environmental impacts resulting from the
 21 disruption of coastal bluffs and sensitive plant and animal species (such as the protected
 22 Monarch Butterfly habitat). To enable the feasibility study to meet the requirements of Section
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26 feasibility study is to estimate "costs of access development").

27 ¹³ The environmental factors which should be assessed in any public agency's evaluation
 28 of a project are set forth in Cal. Code Reg., Tit. 14, § 15000 et seq., Appendix I to the
 CEQA Guidelines (Environmental Checklist Form).

1 21102 and 21106, all of these environmental factors should have been included in the scope of
 2 the feasibility study.¹⁴

3 Because the feasibility study fails to comply with Sections 21102, 21106, and 31404 of
 4 the Public Resources Code, and to ensure that environmental factors are considered at the
 5 earliest possible time in accordance with CEQA, Petitioner is entitled to a peremptory writ of
 6 mandate pursuant to Public Resources Code Section 21168 commanding the Conservancy to
 7 set aside the feasibility study as currently scoped and further commanding the Conservancy to
 8 include in any feasibility study regarding the Easement the consideration of all of the
 9 environmental factors identified by Petitioner.

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25 ¹⁴ The improperly limited scope of the feasibility study is further underscored by the
 26 limited expertise provided under the contract, which provides only structural engineering,
 27 geology, and landscape architecture expertise. See Exhibit 13 at p. 51 to Record. These
 28 contractors clearly lack the expertise to analyze the types of environmental issues which must
 be considered in order to comply with Section 21102 (e.g., traffic issues, parking issues, public
 safety issues, animal life issues, etc.).

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IV.

CONCLUSION

For all of the foregoing reasons, this Court should issue the peremptory writ requested by Petitioner to direct the Conservancy and the Department to prepare procedures which comply with Section 31107.1, and to direct the Conservancy to set aside the MRCA agreement and the Rauw feasibility study by reason of the Conservancy's failure to provide Petitioners with statutory and due process notice and opportunity to be heard and the Conservancy's failure to comply with CEQA. The writ should also command the Conservancy to provide Petitioner and other affected property owners with advance notice of any future actions regarding the Easement, and require the Conservancy to include within the scope of any future "feasibility study" regarding the Easement the consideration of environmental factors which Petitioner sought -- but was denied the opportunity to raise -- before the Conservancy Board.

Dated: November 8, 1996

Respectfully Submitted,

IRELL & MANELLA LLP
Allan J. Abshez
Michael S. Lowe

By: 
Allan J. Abshez
Attorneys for Petitioner Frank Mancuso, Sr.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1800 Avenue of the Stars, Suite 900, Los Angeles, California 90067.

On November 8, 1996, I served the foregoing document described as MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE on each interested party, as follows:

Peter H. Kaufman
Deputy Attorney General for the State of California
110 West "A" Street, Suite 1100
San Diego, California 92101

Facsimile Number: 619/645-2012

 X

(BY OVERNIGHT DELIVERY SERVICE) I served the foregoing document by Federal Express, an express service carrier which provides overnight delivery, as follows. I placed true copies of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed to each interested party as set forth above, with fees for overnight delivery paid or provided for.

 X

(CARRIER PICK-UP) I delivered such envelopes or packages to an authorized carrier or driver authorized by the express service carrier to receive documents.

 X

(BY FAX) I caused the foregoing document to be served by facsimile transmission at the time shown on each attached transmission report from sending facsimile machine telephone number (310) 203-7199 to each interested party at the facsimile machine telephone number shown above. Each transmission was reported as complete and without error. A transmission report was properly issued by the sending facsimile machine for each interested party served. A true copy of each such transmission report is attached hereto.

Executed on November 8, 1996, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Beverly Newman
Name


Signature