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February 12, 2007

 Michael Berger, Chair
 Mountains Recreation and Conservation Authority
 570 West Avenue Twenty-six, Suite 100
 Los Angeles, CA 90065

 Re: Enforceability of CC&Rs at Lechuza Beach, Approval of Lechuza
 Beach Management Plan, and Defeasance Requirements

Dear Chairman Berger:

Your Staff has asked us to address certain issues relating to Lechuza Beach. Specifically, we are asked to address the enforceability of the "Declaration As to Establishment of Conditions, Restrictions, Covenants, Liens and Charges Affecting That Certain Real property known as Malibu-Encinal" ("CC&Rs") to MRCA's real property interests in the Beach lots (Lots 140, 142-156, U, I and the washed out portion of Lot A). Additionally, we are asked to conclude which entity or entities are required to approve MRCA's Lechuza Beach Management Plan ("Management Plan"), and to analyze the requirements for, and any defenses to, any effort by the State Coastal Conservancy (the "Conservancy") to defease MRCA of title to the Lechuza Beach property.

* * *

It is our understanding that MRCA, the Conservancy, Malibu-Encinal Home Owners Association ("MEHOA"), and the City of Malibu are in the process of developing the Management Plan for Lechuza Beach. Among the issues still outstanding are whether to limit the hours the public may access the beach, and in what manner to permit dogs on the beach. The question is whether the MEHOA residents retain certain rights under the CC&Rs in that regard, or whether any restrictions on use apply equally to both MEHOA residents and the public. Additionally, the question exists as to which entity or entities have the authority to approve the Management Plan.

Despite MRCA's efforts to develop public access to the Lechuza Beach property, the Conservancy's Chair has questioned whether MRCA has violated the terms of the grant agreement, and, if so, whether that would serve to defease MRCA automatically of its title to those lots purchased with Conservancy grant funds.

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Accordingly, a discussion of the limitations of a defeasance effort, and MRCA's defenses thereto, is included in this letter.

Background

Marblehead Land Company ("Marblehead") subdivided Tract No. 10632 in 1932, recorded CC&Rs for the tract on September 6, 1932, and created MEHOA to "provide for the upkeep, maintenance and purchase of all streets, walks, easements, reservations, community beach and/or community park areas" within the tract. All lot owners in the tract are members of MEHOA. Each original deed from Marblehead to a purchaser of a fee interest granted an easement over the street (Lot A) and pathways (Lots B, U, V, E, I, M, Q, T and C) in the tract. The deed also granted certain recreational easements described in Attachment "A" hereto.

Each conveyance of a fee interest was made and accepted subject to an express condition stating that the grantees:

"agree with the Grantor that the restrictions, covenants and conditions herein set forth or mentioned are known to the Grantees to be and are a part of a general plan for the improvement and development of all the lots situate in said Tract, and are for the benefit of said lots, and all thereof, and for each owner of any lot or lots in said Tract, and shall inure to and pass with said property and each and every parcel of land therein, and shall apply to and bind the respective successors in interest of the parties hereto, and are, and each thereof is, imposed upon said realty as a servitude in favor of said property and each and every parcel of land therein as dominant tenement or tenements."

Marblehead excepted and reserved from each deed:

"... the right to construct, use and maintain, and all such littoral rights as may be necessary to construct, use and maintain forever, a pier or mole or breakwater harbor, or anchorage, boat landings, boat anchorage or casino, plunge, automobile parking lot, theatre, concessions, or other recreational structure or structures and the usual appurtenances thereto at such place or places as may be selected by Grantor, its successors or assigns at said tract in the vicinity of and southerly of Encinal Canyon, it being understood and agreed that Grantor shall reserve for itself, its successors and assigns and such persons as Grantor may designate, nominate or license an easement to pass over any and all private streets, walks, paths and steps in said tract for the

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purpose of gaining access to said aforesaid structure or structures, it being agreed that grantor, its successors and assigns shall have the right to maintain said structure or structures for business concessions, amusements or recreational purposes and to make reasonable charges for the use of said properties."

The CC&Rs, by their terms, apply to "[a]ll real property contained within the exterior boundary lines of Tract No. 10632." (CC&Rs, Intro.) The CC&Rs provide that the restrictions therein are to be written in and/or incorporated by reference in and as part of every deed to a lot in the tract. (*Id.*) Pertinent provisions of the CC&Rs are appended hereto.

The CC&Rs further provide that any restriction contained therein may be changed or modified on any of the Lechuza lots by recording "an instrument setting forth such modifications or amendments jointly executed by the Marblehead Land Company (or its successors in interest as owners of the reversionary rights herein) and the owners of record of two-thirds of the area within three hundred (300) feet in any direction of the portion of said tract affected by said amendment or modification." (CC&Rs, ¶2(b).) This provision has significance because, as we understand it, MRCA is now the owner of at least two-thirds of the area within 300 feet of each of Lots 140, 142-156, 76, U, I and the washed out portion of A and therefore may change or modify any restriction in the CC&Rs affecting those lots.

There has been considerable litigation with respect to MEHOA's efforts to control access to and use of the beachfront lots. In 1990, MEHOA filed a quiet title action against the Adamson Companies ("*MEHOA I*") in an effort to block Lechuza Villas West's then-proposed development of the beachfront lots. Lechuza sought "to establish title in and to a prescriptive easement over substantially all of the level portions of the Tract; sunbathing, picnicking and recreational purposes and all purposes incidental thereto including but not limited to landing, launching and tethering boats; the maintenance of stairways and stairway access from the top of the bluffs which run along the northerly portion of said lots down to the level beach front area of the lots; the maintenance of locked gates to control access to said lots; and the installation of drinking fountains and outdoor showers."

While *MEHOA I* was pending, Lechuza filed a mandamus action against the Coastal Commission for denial of its permit application to develop the beachfront lots. This action was coordinated with *MEHOA I*. MEHOA filed a cross-complaint in Lechuza's action seeking a declaration of its rights to interpret and to enforce the CC&Rs against the Lechuza lots. Ultimately, MEHOA dismissed its cross-complaint

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without prejudice. (*Lechuza Villas West v. California Coastal Com.* (1997) 60 Cal.App.4th 222, 246.)

In 1997, the trial court entered judgment against MEHOA, finding that MEHOA "shall have no prescriptive easement over any portion of the property legally described [the beachfront lots, lots 141-156] for any purpose, including pedestrian travel and ingress and egress to other portions of [the tract], sunbathing, picnicking and recreational purposes and all purposes incidental thereto including but not limited to landing, launching and tethering boats, maintenance of stairways and stairway access from the top of the bluffs which run along the northerly portion of the property legally described above, maintenance of the gates to control access to the property legally described above, and the installation of drinking fountains and outdoor showers on the property legally described above." MEHOA did not appeal.

In 1999, Lechuza abandoned its development plans and opened negotiations with the Coastal Conservancy to sell certain of its properties to MRCA, the result of which would ensure the beachfront lots would be permanently used as public beaches. In October 2000, MEHOA filed a second action against Lechuza and other defendants, *MEHOA v. Lechuza Villas West* ("*MEHOA I*") for declaratory relief and to quiet title. Thereafter, MEHOA amended its complaint to seek a judicial determination of MEHOA's and Lechuza's respective rights and duties in relation to the CC&Rs and the easement rights held by MEHOA's members over Lots 76, 140-156 and Lots A, B, I, T and U. MEHOA contended that under the CC&Rs, Lechuza had no right to open its lots to the general public or to install, modify, or remove any of the improvements to the lettered lots without the express approval of MEHOA's architectural committee. In March 2001, the trial court sustained Lechuza's demurrer to this second lawsuit without leave to amend, ruling that *res judicata* barred *MEHOA II*. MEHOA appealed, but the Court of Appeal affirmed. The Court explained, in an unpublished opinion: ". . . MEHOA alleges the same fundamental harm in both actions [*MEHOA I* and *MEHOA II*]: Lechuza's interference with MEHOA's asserted right to control access to and use of the beachfront lots. The ultimate goal of both *MEHOA I* and *MEHOA II* was to protect that right. That goal, not the legal theory advanced or the nature of the suit as one in contract, tort or equity, determines the primary right involved and the proper application of the *res judicata* doctrine." (*MEHOA II*, 2d Civ. B150612, slip op. p. 12.)

In 2000, the Coastal Conservancy authorized disbursement to MRCA of up to \$10,000,000 for the acquisition of a portion of the Lechuza Beach property (MRCA separately and independently acquired title from Curci-Turner Company to additional Lechuza Beach lots). In connection therewith, MRCA and the Conservancy entered

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into California State Coastal Conservancy Grant Agreement No. 00-170 (the "Grant Agreement"), which contains Essential Deed Provisions regulating, among other items, MRCA's use, management, and operation of the property. The Grant Agreement provides that MRCA "shall use, manage, operate and maintain the real property for public access to the beach and public recreation consistent with the provisions of Exhibit A." The Grant Agreement further states that, should MRCA violate any of the Essential Deed Provisions, "all of the grantee's right, title and interest in the real property shall automatically vest in the State of California for the benefit of the Conservancy or its successor...."

In May 2002, Lechuza Villas West conveyed the Beach lots to MRCA by a Grant Deed (the "Deed"). The Deed contained restrictive covenants, including language identical to that in the Grant Agreement stating that should MRCA violate any essential provisions, title in the property automatically shall vest in the State of California for the benefit of the Conservancy or its successor. The Deed also contains a provision entitled "Notice of Violation," which states, "Notice of violation of an essential provision shall be provided by the Conservancy to the fee title owner of the Property promptly upon the Conservancy's actual knowledge of the violation, which notice shall specify the violation and provide the fee title owner with a 30-day period to make best efforts to abate the violation prior to [automatic vesting in the State]."

I. What effect does the decision in *MEHOA II* have on the current negotiations?

As noted above, in *MEHOA I*, MEHOA sought a judicial determination of its claimed right to control access to and use of the beachfront properties (including denying beach access to the public), basing its claim upon alleged prescriptive easement rights. Similarly, in *MEHOA II*, MEHOA asserted a right, "on behalf of its members, to make specific use of and control over the beachfront lots, the community beach, the private road and the pedestrian walkways to the beach" (Slip. Op., p. 5), this time basing its claim on alleged express easement rights and the CC&Rs. Absent a declaration of MEHOA's right to control access to, and the use of, the beachfront lots, MRCA's purchase would ensure that the lots permanently would be used as public beaches – an outcome to which MEHOA objected. The Court of Appeal, however, held that *MEHOA II* was barred by the doctrine of res judicata since it concerned the same "primary right" that MEHOA asserted unsuccessfully in *MEHOA I*: "MEHOA's asserted right to control access to and use of the beachfront lots." (Slip. Op., p. 7.)

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The question of whether MRCA permanently can use the beach lots as public beaches is therefore now settled, and we understand that MEHOA no longer contests that proposition. The question now is whether MEHOA's members have separate rights under the CC&Rs such that MEHOA's members may use the beach differently from the public generally, including walking dogs on beach, accessing the beach after posted hours, and drinking alcohol on beach. Our view is that MEHOA is once again barred by *res judicata*, as permissible use of the beach is the same primary right asserted in both *MEHOA I* and *MEHOA II*.

In *MEHOA II*, the Court of Appeal explained the basic principal that under the *res judicata* doctrine, a valid, final judgment [such as in *MEHOA I*] precludes the parties or their privies from relitigating the same "cause of action" in a subsequent suit. (*Mycogen Corp. v. Monsanto* (2002) 28 Cal.4th 888, 896.) "Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. *Res judicata* precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." (*Mycogen Corp.*, *supra*, 28 Cal.4th at 896-897; internal quotes omitted.)

In *MEHOA II*, the Court further explained that for *res judicata* to apply, the second suit must seek to vindicate the same "primary right" at issue in the prior action:

"California law defines a 'cause of action' for purposes of the *res judicata* doctrine by analyzing the primary right at stake: [A] cause of action is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. A pleading that states the violation of one primary right in two causes of action contravenes the rules against 'splitting' a cause of action.

"[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery . . . If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged . . . The reason for this is manifest. A party cannot by negligence or design withhold issues

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and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable." (Slip Op., p. 8; citations and internal quotes omitted.)

Thus, in *MEHOA II* the Court considered whether the causes of action in *MEHOA I* and those matters as to which *MEHOA* then had an opportunity to litigate embraced the claims sought to be asserted in *MEHOA II*. As explained above, the court concluded that *MEHOA II*, like *MEHOA I*, concerned attempted vindication of the same primary right: *MEHOA*'s claimed right to control access to and use of the beachfront properties. (Slip Op., pp. 9-12.)

The question here, then, is whether *MEHOA*'s assertion that the CC&Rs give it separate rights regarding access to and use of the beachfront properties is the same primary right asserted in *MEHOA I* and whether that issue, which was not raised in *MEHOA I*, could nevertheless have been raised in that case. We believe that a court likely would conclude that the issue here once again raises the same primary right that *MEHOA* had the opportunity to litigate in *MEHOA I* – namely, the scope of its right to control access to and use of the beachfront properties – and thus the current claim likewise would be barred.

In effect, *MEHOA*'s contention that the CC&Rs afford its members separate rights pertaining to the use of the beachfront lots is simply another way of trying to control the use of those lots. In both *MEHOA I* and *MEHOA II*, *MEHOA* objected to the public's access to and use of the lots, claiming that it (*MEHOA*) had the right to block such access. As the Court of Appeal noted, in both cases "the threatened harm is interference with *MEHOA*'s and its members' private enjoyment of the beach should Lechuza's plans go forward." (Slip Op., p.5.) Now conceding that it cannot block the public's right to access and use the beachfront lots, *MEHOA* is still trying to stave off any interference with what it believes is its members' rights to private enjoyment of the beach, this time by contending that any rules that govern the public's use of the beachfront lots should not apply to *MEHOA*'s members and that instead its members' use is instead solely governed by the CC&Rs and existing easement rights. This is simply an end-run around the judgment in *MEHOA I*, and is another effort to obtain a judicial imprimatur on a determination of how *MEHOA*'s members may use the beachfront lots. We believe that the ultimate "right" which *MEHOA* seeks to protect is the same as in *MEHOA I* and *MEHOA II*, and would be barred since the "goal, not the legal theory advanced or the nature of the suit as one in contract, tort or equity, determines the primary right involved and the proper application of the res judicata doctrine." (Slip. Op., p. 7.)

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Thus, our conclusion is that *MEHOA I* and *MEHOA II* control MEHOA's current attempt to define the scope of its right to use the beachfront lots, and would bar such an attempt.

II. Would the City of Malibu Municipal Code supersede contrary provisions in the CC&Rs, or in the Grant Agreement between the Conservancy and MRCA?

The discussions regarding a Management Plan have included the possibility of amendments to the Malibu Municipal Code. We are also informed that the Malibu Municipal Code incorporates the provisions of the Los Angeles County Beach Ordinance (Malibu MC § 12.08.020A). Section 17.12.170 of the Beach Ordinance provides, with exceptions not applicable here, that its regulatory provisions (Part 3 of the Ordinance) shall "apply to all ocean beaches, whether publicly or privately owned." (Emphasis added.)

Apparently, several items in contention regarding the Management Plan are already addressed in the City's Municipal Code:

- Dog and cat prohibition (Sec. 17.12.290)
- Alcoholic beverage restriction (Sec. 17.12.320)
- Boating restrictions within 300 yards of shore, sailboards, surfboards, surfmats, paddle boards and similar objects (Sec. 17.12.470, 127.12.480)
- Smoking restrictions on a "public beach" (Sec. 12.08.035)
- Fires (Sec. 17.12.370)
- Fireworks prohibition (Sec. 17.12.400)

The question raised is whether a municipal ordinance "trumps" private CC&Rs. Public and private land use restrictions provide a dual system of use controls, and usually they are held to operate independently with the more restrictive limitation on use controlling. Generally, therefore, the interpretation (and enforcement) of privately created restrictions is not affected by the zoning laws, even if they are inconsistent. (*Seaton v. Clifford* (1972) 24 Cal.App.3d 46, 62-52; *Barrett v. Lipscomb* (1987) 194 Cal.App.3d 1524, 1530-1531.) However, as one treatise has explained:

"Private use restrictions will not be enforced where the private covenant violates public policy, or changed circumstances support a finding that the private use restriction has been superseded by applicable zoning, that evenhanded enforcement is lacking and/or the new use will not damage the

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covenantee's property." (Miller & Starr, California Real Estate (3rd Ed. 2001), § 24:7, p. 33.)

Public police power regulations validly can abrogate preexisting private covenants where justified by broad societal interest. (See, e.g., *Barrett v. Dawson* (1998) 61 Cal.App.4th 1048, 1055 [residential neighbors unsuccessfully sued to close a daycare home based on CC&Rs prohibiting use of a lot for a commercial activity; court held that local daycare for working parents "is probably about as broad a public purpose as any that might be imagined."]; *Hall v. Butte Home Health, Inc.* (1997) 60 Cal.App.4th 308, 320 [residential neighbors unsuccessfully sued to enjoin a residential care facility for the elderly disabled based on CC&Rs; court held there is a compelling governmental interest in ensuring that disabled persons have access to suitable and affordable housing.])

As noted, it is our understanding that with respect to the beachfront lots, MEHOA has suggested that the rights of its members are not controlled by limitations applicable to the public generally, but rather are controlled separately by the CC&Rs. This, then, sets up the possibility of separate rules applicable to the public generally and to MEHOA's members. Based upon the limited facts thus far presented to us, we are currently unable to determine whether the City's Municipal Ordinance legally supersedes the CC&Rs. The inquiry would involve an assessment of whether the City's police power regulations further a sufficiently broad societal interest such that they abrogate any conflicting CC&Rs. That assessment also may include questions involving changed circumstances, the potential lack of evenhanded enforcement, and/or the potential inability to effectively enforce the Ordinance as against the members of the public who use the beachfront lots.

III. Does MRCA have the power to amend the CC&Rs to address matters at issue in the negotiations?

A further issue presented is whether the CC&Rs may be amended to address in some manner specific issues raised in connection with the Management Plan. When the document creating CC&Rs authorizes amendment or modification by less than all of the owners of the land affected, the restrictions can be amended by the number of landowners specified if the terms and provisions of the original restrictions are satisfied. (*Taormina Theosophical Community, Inc. v. Silver* (1983) 140 Cal.App.3d 964, 970; *Sharp v. Quinn* (1931) 214 Cal.194, 197.) The CC&Rs at issue contain such a provision.

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Paragraph 2 of the CC&Rs states:

"Any restriction herein contained may from time to time be changed or modified in the following manner: ((a) As to any of said tract then owned by Marblehead Land Company, by the recordation of a written instrument setting forth such changes or modifications jointly executed by Marblehead (or its successors in interest as owner of the reversionary rights herein) and the owners of record of one-third of the area of said tract within two hundred (200) feet in any direction of the part of said tract affected by said amendment or modification.

"As to any of said property then owned by any grantee from Marblehead Land Company, or any successor in interest of such grantee, by the recordation of an instrument setting forth such modifications or amendments jointly executed by said Marblehead Land Company (or its successors in interest as owner of the reversionary rights herein), and the owners of record of two-thirds of the area within three hundred (300) feet in any direction of the portion of said tract affected by said amendment or modification."

The CC&Rs additionally provide that the restrictions therein are to be written in and/or incorporated by reference in and as part of every deed to a lot in the tract. (CC&Rs, Intro.) We have been provided with a form of grant deed that we understand is identical to all of the grant deeds that conveyed title to purchasers of lots in the tract.

Thus, the CC&Rs permit MRCA to change or to modify any restriction in the CC&Rs affecting Lots 140, 142-156, 76, U, I and the washed out portion of A because, as we understand it, MRCA is the owner of two-thirds of the area within 300 feet of each of the lots. (CC&Rs, ¶ 2(b).) Such changes or modifications might address specific restrictions concerning these lots, or compliance with the City of Malibu Municipal Code or specific provisions thereof, the MRCA Park Rules Ordinance (Ord. 1-2005), or other applicable law.

IV. Which Entity or Entities Have Authority to Approve the Management Plan?

The Grant Agreement includes a section entitled, "USE, MANAGEMENT, OPERATION, AND MAINTENANCE," which states that "...the grantee and the Conservancy shall work together to design a plan and budget for operation and maintenance of the property. The Conservancy shall not be liable for any cost of such

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management, operation or maintenance, except as provided in a future management plan that is approved by the Conservancy." (Emphasis added.)

Thus, while MRCA clearly has a role in the development and contents of the Management Plan, the Conservancy has approval authority over the Management Plan.

V. If MRCA Were to Breach the Grant Agreement, Could the Conservancy Automatically Defeas MRCA of the Property?

It is our understanding that the Conservancy's Chair has suggested that MRCA's proposal for implementation of public access at Lechuza may breach the Grant Agreement, and thus the Conservancy would have the authority to defeas MRCA of title to those beachfront lots purchased with grant funds.¹ In evaluating a possible defeasance effort by the Conservancy, the threshold question is whether MRCA's actions even constitute a breach of the Grant Agreement terms.

The Grant Agreement provides that MRCA "shall use, manage, operate and maintain the real property for public access to the beach and public recreation consistent with the provisions of Exhibit A." (Grant Agreement, p. 7, emphasis added.) Based on the limited facts with which we have been provided, it does not appear that MRCA has taken any action inconsistent with its obligations under the Grant Agreement. MRCA's efforts have been directed towards *increasing* public access to the beach and developing a Management Plan that will allow for responsible use of the beach by the public. Additionally, the provision of public access in the manner contemplated by MRCA is consistent with the constitutional right to access to the sea (*see* Calif. Const., Art. XV, §§ 2, 3; *Lane v. City of Redondo Beach* (1975) 49 Cal.App.3d 251), the policies of the Coastal Act respecting public access (Pub. Res. Code sections 30210-30214), and the statutory provisions governing the Conservancy itself (Pub. Res. Code sections 31400, *et seq.*). Accordingly, we are not aware of any support for the contention that MRCA's proposal for public access breaches the Grant Agreement.

The Coastal Conservancy's Chair has further suggested that language in the Grant Agreement provides that, in the event of a breach, title to the property may vest

¹ We again note that only a portion of MRCA's Lechuza property was purchased with funds provided by the Conservancy; Curci-Turner Company donated lots 142-148 to MRCA in 2000 and 2001. Thus, this issue would pertain only to those lots purchased with Conservancy funds.

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automatically in the State of California (for the benefit of the Conservancy), without any further action required. We believe that this position is incorrect and is not supported by California statutes or legal precedent.

The Grant Agreement provides that "if any of the essential deed provisions stated above [including those relating to the use, management, operation, and maintenance of the property] are violated, all of the grantee's right, title and interest in the real property shall automatically vest in the State of California for the benefit of the Conservancy or its successor..." (Grant Agreement, p. 6.) The Deed contains identical language in a restrictive covenant, binding on MRCA as the grantee (Exh. B to Deed, section 4(d)), but also includes a provision declaring as follows:

"Notice of violation of an essential provision shall be provided by the Conservancy to the fee title owner of the Property promptly upon the Conservancy's actual knowledge of the violation, which notice shall specify the violation and provide the fee title owner with a 30-day period to make best efforts to abate the violation prior to the exercise of the State's rights pursuant to 4(d) above, or vesting of title in the State of California." (Exh. B to Deed, section 5.)

We assume that the Conservancy's argument would be that upon its unilateral determination that MRCA has breached the Grant Agreement and has failed to timely cure that breach, title in the property automatically would transfer to the State. However, and despite the fact that the Deed and the Grant Agreement both state that upon an uncured breach by MRCA of any of the essential provisions the property "shall automatically vest in the State of California for the benefit of the Conservancy or its successor," California law does not allow this type of automatic reversion. Pursuant to Civil Code section 885.020, enacted in 1982, possibilities of a reverter "are abolished" and instead are deemed to be merely "power[s] of termination."² As

² We note that a court may not even conclude that the Conservancy possesses a valid power of termination. Due to a lingering distaste in the courts for conveyances of restricted estates (such as those evidencing the possibility of forfeiture), courts "are bound by the rule of strict interpretation of conditions subsequent to choose the interpretation that gives the power of termination the narrowest scope." (*Sanders v. East Bay Municipal Utility Dist.* (1993) 16 Cal.App.4th 125, 132; see also Civil Code section 1442 ["A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created"].) Thus, if the relevant language is susceptible of an interpretation other than one creating a condition subsequent, the court likely will find that a condition subsequent was not established. Here, the relevant language states that "if any of the essential provisions stated above are violated," title to the property shall vest in the State. Arguably, this language does not identify with (Footnote continued on next page)

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such, upon a breach of a stated condition, title to the land will *not* transfer automatically, but instead the holder of the power of termination must take certain affirmative steps to enforce its rights. Specifically, Civil Code section 885.050 states that a "power of termination shall be exercised only by notice or by civil action and, if the power of termination is of record, the exercise shall be of record. The notice shall be given, and any civil action shall be commenced, within five years after breach of the restriction to which the fee simple estate is subject...."

In our view, it is clear that even if the Conservancy possesses a valid power of termination, simply providing notice of a breach (as in the Deed), without more, is not sufficient to exercise that power or to effectuate a transfer of title where the existence of a breach is disputed. To permit this would render the clauses "or civil action" and "any civil action shall be commenced" superfluous, as one would never incur costly litigation to determine property ownership if merely serving a simple notice would allow for the same result. Indeed, unless there are clear standards by which to judge the legal adequacy of the notice, such notice would be illusory. Instead, Civil Code section 885.050 must be read to provide for exercise of the power of termination by notice or civil action, while anticipating the filing of a civil action (*e.g.*, for declaratory relief or to quiet title) to enforce that power. As noted by the Law Review Commission comment to this section, such a requirement is similar to procedures in other areas, such as unlawful detainer/eviction matters (*see, e.g.*, Civil Code sections 791 and 793; *Jordan v. Talbot* (1961) 55 Cal.2d 597), as well as to requirements in similar grants (*e.g.*, Pub. Res. Code, § 5002.6(b)(2), a statute pertaining to a grant of beach lands by the State to Los Angeles County, which declares that the State will not terminate the County's interest in the land until "a court of competent jurisdiction [determines that a material breach has] been made intentionally...."). Finally, as the clear purpose of the statute abolishing automatic reversions was to make it more difficult to create a valid reversionary interest, it is logical that something more than mere unilateral notice would be required to enforce a power of termination, otherwise, there would have been no reason for the Legislature to change the law in the first place. Accordingly, we believe that the language in the Deed and Grant Agreement, providing that title to the property

sufficient specificity what constitutes a violation of the essential provisions; for example, is a violation of limited duration sufficient to divest MRCA of the land? Are all violations equal in severity? Because the language purportedly establishing the conditions is somewhat vague, a court may be inclined to find that the Deed is merely a statement of intent regarding use of the land.

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automatically vests in the State upon a unilateral determination by the Conservancy that MRCA has breached the Grant Agreement, is invalid.

Finally, we note that although our interpretation of applicable law suggests that the onus would be on the Conservancy to initiate legal action to enforce any power of termination rights, nothing would foreclose MRCA from pursuing its legal options as well. Thus, were MRCA to receive formal notice of an alleged breach of Grant Agreement terms, it would have the right preemptively to seek declaratory or injunctive relief to determine whether a breach has occurred or to enjoin transfer to the Conservancy of title to the lots.

* * *

We hope that this analysis provides the Board with a framework for addressing some of the issues under discussion relating to beach management at Lechuza. Should you have any questions regarding the foregoing analysis, please do not hesitate to contact us.

Very truly yours,


Steven H. Kaufmann

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cc: Joseph T. Edmiston, Executive Officer
Rorie Skei, Assistant Executive Officer
Laurie C. Collins, Chief Staff Counsel

ATTACHMENT "A"**Recreational Easements**

"An easement and/or right of way to the grantor and to its successors, assigns and all owners of lots in said tract and in such additional tracts as may be subdivided by grantor, its successors and assigns, in Lots 15, 16 and 17 of the Rancho Topanga Sequit as shown on Recorder's filed as Map No. 534, on file in the office of the Recorder of Los Angeles County. Said easement shall be used for pedestrian travel, bathing and recreational purposes and not for the purpose of camping, erecting tents, or buildings, landing or launching boats, or maintaining concessions or lighting fires. On Lots 124-139, inclusive, said easement shall include the southerly fifty feet (50') of each and all of said lots, being a strip of land fifty feet (50') in width, lying within said lots and bounded on the south by the southerly line of said lots, on the east by the easterly line of Lot 124, and on the west by the westerly line of Lot 139, as said lines are delineated on the recorded map and/or maps hereinabove referred to, and also all land that may now or hereafter be located between said lots and the ordinary high water mark of the Pacific Ocean."

"On Lots 141 to 159, inclusive, said easement shall include the southerly twenty-five feet (25') of each and all aforesaid lots, being a strip of land twenty-five (25') in width, lying within said Lots 141 to 159, inclusive, and bounded on the south by the southerly line of said lots, on the east by the westerly line of Lot 141, and on the west by the westerly line of Lot 159, as said lines are delineated on the recorded map and/or maps hereinabove referred to, and also all the land that may now or hereafter be located between said lots and the ordinary high water mark of the Pacific Ocean, except where said northerly line of said easement shall be at an elevation greater than five feet (5') above said ordinary high water mark line, in which event said five foot elevation line above said ordinary high water mark shall become the northerly line of said easement, provided, however, in no event shall said easement be less than ten feet (10') inland from said ordinary high water mark. Said easement shall include the whole of Lot 140 in said Tract."

Declaration as to Establishment of Conditions, Restrictions, Covenants, Reservations, Liens and Charges Affecting that Certain Real Property Known as Malibu Encinal
(Recorded September 23, 1932)

Pertinent provisions

Section 2. Declaration of Restrictions may be modified by the owner of the reversionary rights and the owners of record of two-thirds of the area within 300 feet in any direction of the portion of the tract to be amended.

Section 3. HOA may provide for the upkeep, maintenance and purchase of all streets, walks, easements, reservations, community beach and/or community park

Section 7. Lots are restricted to one single family residence only.

Section 8. No buoy and barge, pier, wharf, groin or other structures extending across the herein mentioned easements above the line of the ordinary high water mark of the Pacific Ocean may be built and/or maintained as shown on the recorded map and/or maps hereinabove referred to.

Section 10. No signs may be placed or erected except by permission of the Architectural Committee as to form, content and appearance.

Section 13. No hedge nor fence may be maintained of a height greater than 4 feet above natural grade. No wall or patio wall shall be erected to a height greater than seven feet above natural grade.

Section 17. No outhouses.

Section 24. Fires shall not be allowed on beach southerly of northerly line of the easement on the beach and in no event unless in fire pits.

Section 26. No swine, fowl, reptiles and wild animals except household pets shall be kept on any part of the property. No horses, unleashed dogs, asses and horned animals shall be permitted to run at large thereon.

Section 28. Restates the recreation easement over lots 124-159.

Section 29. Breach of any of the conditions shall cause the realty to revert to Grantor or successors.

Section 30. The right and power to interpret and enforce the restrictions are conferred upon the HOA and the Architectural Committee as the articles and by-laws of said Association shall provide.