MOUNTAINS RECREATION & CONSERVATION AUTHORITY
Ramirez Canyon Park
5810 Ramirez Canyon Road
Malibu, California 90265
Phone (310) 589-3230 Fax (310) 589-3237

VIA ELECTRONIC MAIL AND FACSIMILE

February 3, 2010

Ms. Christi Hogan
Malibu City Attorney
Jenkins & Hogin, LLP
1230 Rosecrans Avenue, Suite 110
Manhattan Beach, California 90266

**City of Malibu Response to Coastal Commission Notice of Violation**
**January 10, 2010, Lechuza Beach, File No. V-4-04-005**

Dear Christi:

I'm addressing you by the familiar because there was a time when this was our common greeting, notwithstanding our policy positions, so I want to reaffirm both my personal cordiality and respect for your professionalism representing the City of Malibu.

The Mountains Recreation and Conservation Authority is not formally implicated in the question of estoppel as against enforcement, so the Coastal Commission's response of this date will stand on its own.

One observation, however, and that is that nowhere did the Malibu-Encinal Homeowners Association (MEHOA) or even the City of Malibu, for that matter, ever say, "Hey, the Coastal Commission is letting us slide, so let's go ahead and do what we want." Everything that I have seen from the record shows that there has been a delicate process—may I say a stylized "dance"—between the Coastal Commission, MEHOA, and the City of Malibu trying to resolve a contentious problem of Coastal Act enforcement short of all-out war.

So now, after a long period of (what now appears to be) futile attempts at less than formal proceedings, the Coastal Commission's forbearance shouldn't count against either their or your efforts to enforce the Coastal Act. Furthermore, I appreciate your practical problem in convincing a Malibu jury about providing public access, but matters of enjoining violation of the California Coastal Act are tried to the Court, not to a jury.

With respect to the encroachments on Broad Beach Road, the City of Malibu has had a survey of such encroachments, completed by Mark D. Sandstom, Licensed Land Surveyor,

(No. LS 6847), in your possession since July 16, 2007. This survey was filed with the Coastal Development Permit application for Lechuza Beach improvements. A copy of this survey, in Adobe PDF format, is attached. (Use your browser's zoom function to expand the document to at least 75% and the image becomes clearly readable.)

The City of Malibu having had within their hands a certified survey clearly showing encroachments on the public right-of-way since July 2007, and failing to act thereon, surely justifies the California Coastal Commission taking enforcement action. Each and every sheet of this survey shows encroachments on the Broad Beach Road right-of-way. Everything from mailboxes, to flagstone walls, to wood walls, to stone walls, to earth fill, virtually every type of encroachment on the public right-of-way exists along Broad Beach Road to the effect that the public may not park on the public right-of-way. Without parking there is no effective means of access to the public beach at Lechuza.

It is especially significant that Broad Beach Road is the "old" Pacific Coast Highway. Securing this right of way was an historic victory on the part of the public as against May Rindge's Winchester rifle enforced exclusivity of the old Rancho Malibu. The United States Supreme Court in *Rindge Co. v. County of Los Angeles,* (1923) 262 U.S. 700, held that Los Angeles County could use eminent domain for purposes of constructing a scenic highway through Malibu. That condemned right-of-way is now Broad Beach Road.

As the Supreme Court said:

> [T]hese roads, especially the main road, through its connection with the public road coming along the shore from Santa Monica, will afford a highway for persons desiring to travel along the shore to the county line, with a view of the ocean on the one side, and of the mountain range on the other, constituting, as stated by the trial judge, a scenic highway of great beauty. Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. Thus, the condemnation of lands for public parks is now universally recognized as a taking for public use. A road need not be for a purpose of business to create a public exigency; air, exercise and recreation are important to the general health and welfare; pleasure travel may be accommodated as well as business travel; and highways may be condemned to places of pleasing natural scenery. (262 U.S. 700 at 707-708.)

Malibu cannot vitiate this historic ruling by letting these private Broad Beach Road encroachments lapse into the right-of-way such that there isn't sufficient parking for the public seeking to use Lechuza Beach. Surely, Christi, it can't be City of Malibu policy that private encroachments have created an "untouchable zone" by virtue of what has not been

previously enforced by the City. Even I would not suggest that Malibu is in cahoots with MEHOA to sanction encroachments which are a clear violation of the original public purpose of the *eminent domain* proceeding in the Rindge case.

But there is the problem of public perception. Absent City of Malibu enforcement, there never will be a more clear rationale for the California Coastal Commission to intervene than to secure the historic rights of the public to the original right-of-way to Pacific Coast Highway, as determined by the U.S. Supreme Court way back in 1923.

With respect to the Bunnie Lane (Lot "I") access way, it is undisputed that the recent storms scoured the sandy beach away (the old Rindge railroad rails were exposed during the storm). The stairs were not affected, but the end of the stairs and the beach level are far apart. The Authority staff and engineering consultants have now determined how to correct this situation. The only question remains: does the extension of the stairway down to the presently scoured sand level constitute an exempted "repair and maintenance" activity, or will the City of Malibu require a Coastal Development Permit therefor? That issue is up to your Planning Department. From an initial scour of seven or eight feet, the sand level below the Lot "I" stairs as of today is four feet. Natural sand deposit may restore the previous beach level at some point, but we want to get the stairs down to the sand now.

If the City of Malibu requires a full Coastal Development Permit for reconstruction of the stairway down to the beach, then it will be many months, even years (given the appeal process), before the public can again gain access to Lechuza Beach through the only publically owned access way.

<u>So, we request an authoritative determination from your office whether the City of Malibu will permit the Mountains Recreation and Conservation Authority to reconstruct the pedestrian stairway at Bunnie Lane (Lot "I") down to the sand level as "repair and maintenance" and not subject to a Coastal Development Permit.</u>

Finally, you say that the Authority has not completed its application for Lechuza improvements by including a management plan. Following a public hearing before the Authority governing board on February 5, 2010, on February 8, 2010 the Authority has supplemented the Lechuza CDP filing by the adopted "Initial Management Plan" for Lechuza. (See attached.) You will note that this "Initial Management Plan" consists of the applicable provisions of the Malibu Municipal Code together with a nondiscrimination provision. We believe that all parties can agree that the provisions of the Malibu Municipal Code should govern this beach, adopted as it was by the elected representatives of the people of Malibu.

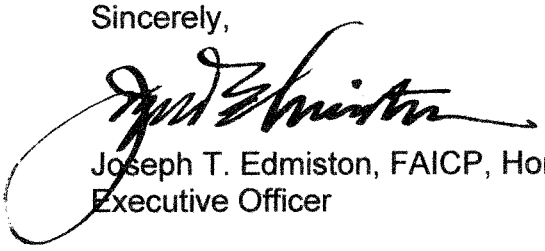
The Malibu Planning Department has sent us a third "incomplete" letter dated today. New things keep proping-up. Prominent among which is a requirement for MEHOA to join the

application. The invocation of Malibu Local Coastal Program § 13.62(c) is flat out inapplicable. That section says, "Where the applicant for a Coastal Development Permit is not the owner of a fee interest in the property on which a proposed development is to be located, . . . ." The undisputed fact is that the Authority is the fee owner of the Bunnie Lane (Lot "I") access way, and therefore it is improper to require MEHOA's approval of this submission as per the plain language of the LCP. As you and the Planning Department know full well, if MEHOA's approval is required for this application, then there will never be any improvement to Lechuza Beach.

At some point constantly putting up stumbling blocks to bringing this application to public hearing—first filed in 2007—must end. Surely the City of Malibu understands that restriction of public access is unlikely to be approved by the California Coastal Commission, so it appears that the strategy being pursued by the City is to "incomplete" the application for as long as possible, then at least during that time of "incompletion" (now going on almost three years) the Lechuza residents, including one of your bosses—a Malibu City Council member—do not have to deal with full public access.[1]

I continue to be available to discuss this at my office number printed above. If I'm not in the office, staff will refer you to my cell phone and home number if necessary.

Sincerely,



Joseph T. Edmiston, FAICP, Hon. ASLA
Executive Officer

Attachment: Broad Beach Road Survey Pages 1-6

Copy list: See list next page.

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[1] We have no evidence that this Council Member has exercised undue influence, indeed this person is noted for his probity, but the purpose of the conflict-of-interest law is to avoid any possible appearance of conflict; moreover, members of the City staff and at-will appointees (such as the City Attorney) are surely aware of the situation with respect to this Council Member.

Copies to:

MRCA Governing Board
N. Patrick Veesart, CCC Enforcement Supervisor
Stephanie Danner, Senior Planner, City of Malibu
Lisa Trent, Malibu Code Enforcement Officer
Peter Douglas, Executive Director, CCC
John Ainsworth, Deputy Director, CCC
Steve Hudson, District Manager, CCC
Barbara Carey, Supervisor, CCC
Tom Sinclair, District Enforcement Officer, CCC
Aaron McLendon, Statewide Enforcement Officer, CCC
Linda Locklin, Public Access Manager, CCC
Rorie A. Skei, Chief Deputy Executive Officer, MRCA
Laurie C. Collins, Chief Staff Counsel, MRCA
Paul Edelman, Chief of Planning & Natural Resources, MRCA
Judi Tamasi, Senior Planner, MRCA
Sam Schuchat, Executive Officer, SCC
Mary Small, South Coast Manager, SCC
Elena Eger, Senior Staff Counsel, SCC
Lisa Pallack, President, MEHOA
Richard Davis, Esq., Greenberg Traurig, LLP
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Steven H. Kaufmann, Esq., Richards Watson & Gershon