STATE OF CALIFORNIA - NATURAL RESOURCES AGENCY

ARNOLD SCHWARZENEGGER, *Governor*

CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST AREA
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3 February 2010

Christi Hogin
City Attorney
City of Malibu
2385 Stuart Ranch Road
Malibu, CA 90265

CCC Violation File Number:	V-4-04-005 (Lechuza Beach)
Property location:	Lechuza Beach; at the terminus of Lot A (APN 4470-021-009) at Broad Beach Road and separately at 31885 Sea Level Drive (APN 4470-026-003); City of Malibu; County of Los Angeles
Unpermitted Development:	Placement of gates and signs at two locations (described above) blocking and/or restricting public access to a public beach; placement of private encroachments in the public ROW on Broad Beach Road in the vicinity of Lechuza Beach

Dear Ms. Hogin:

Thank you for your letter dated January 29, 2010 in response to the Commission's "Notice of Violation" letter, dated January 15, 2010. We appreciate your letter and the opportunity to clarify some of the issues you raise:

1. **Notice of Violation** - The Commission's January 15, 2010 letter was indeed intended to be titled a "Notice of Violation". The purpose of the letter is to notify the City of violations of the Coastal Act and the City's LCP in the vicinity of Lechuza Beach, in an attempt to resolve the violations. In addition, we note that the City was previously notified of the above-mentioned violations in letters dated August 21, 2006 and October 3, 2006 and the City was copied on other correspondence regarding this issue, as detailed in my January 15, 2010 letter.

2. **Gate Violation History** – In your letter you speculate that perhaps the reason why the Commission did not pursue the unpermitted gates during the 25 years between 1977 and 2004 is that the Commission was swayed by the Malibu Encinal Homeowners Association's ("MEHOA") arguments that the existing steel gates are exempt from coastal development permit ("CDP") requirements

because they (allegedly) replaced wooden gates that pre-dated the Coastal Act. Actually, a review of the history here indicates that this is not the case. You will note that in our letter to the City dated October 3, 2006, we enclosed copies of letters between the MEHOA and the Commission, sent in 1977, in which MEHOA made precisely this argument and in which the Commission's response was, repeatedly, that replacement of the old gates with a new and different type of gates is not repair and maintenance but rather new development and, therefore, requires a CDP. That was the Commission's position in 1977; that was the Commission's position in 2004 (when this violation case was re-opened); and that is still the Commission's position today. The likely reason why the Commission did not pursue this violation, after the initial exchange of letters in 1977, is lack of staff. Indeed, the Commission did not initially have a real enforcement program with dedicated enforcement staff. After the Mountains Recreation and Conservation Authority ("MRCA") acquired Lechuza Beach in 2001/2002, the gates again came into focus as they then were impeding public access to a publicly owned beach.

3. **1993 Exemption Letter** - I believe that we covered the issue of the 1993 exemption letter thoroughly on Page 5 of our January 15, 2010 letter. I won't repeat that discussion and analysis here, but I would note that the MEHOA has not received authorization from the City for the work they undertook in 1993 (that was the subject of the exemption letter) or for the two "replacements" you mention in your letter. I believe that some, if not all, of this work required authorization from the City in addition to CDP authorization.

4. **Estoppel** – In your letter you express concern about an estoppel defense being made by the MEHOA. We do not believe that the facts here would support such a defense should they themselves assert it. Moreover, as you can imagine, this is an issue often raised with us and so we have had the opportunity to familiarize ourselves with the case law in this area and specifically as it applies, or fails to apply, to our actions. I won't provide a full analysis here since this is presumably an issue which would be more relevant to our discussions with MEHOA, and because you did not elucidate which facts you feel might support such a defense. But, I would note briefly that, as you no doubt are aware, that there are many elements, and that courts have explicitly factored in public policy concerns and, in addition, have been extremely conservative about applying such defenses against a governmental or regulatory agency for obvious public policy reasons. Just briefly, we would note that City and County of San Francisco v. Pacello (1978) 85 Cal.App.3d 637, 646, says that **laches, and estoppel, "will not ordinarily be invoked to defeat a policy adopted for the public protection"**; South Central Coast Regional Commission v. Pratt Construction Co. (1982) 128 Cal. App. 3d 830, 848, specifically notes that the Coastal Act reflects "an important public policy to protect the coastal environment." Moreover, the recent Court of Appeals decision in *Feduniak v. California Coastal Commission* (2007) 148 Cal.App.4th 1346, specifically addressed at some length and rejected this category of defense. It specifically held that there is a four part test for such a

defense to lie, that all four tests need to be satisfied, and that one of those factors which must exist for this defense to apply is that the governmental entity intended them to act based on its inaction or gave them a reason to believe it so intended, which was clearly not the case here, as discussed above. Moreover, an estoppel defense will not lie unless the asserting party was ignorant of the true facts, which again here is not the case.

5. **Gates pre-date the City's LCP** – In your letter you mention that the gates were pre-existing when the City's LCP was adopted and certified and that the LCP does not require property owners to obtain CDPs for then-existing structures. Notwithstanding that, as I am sure you know, adoption of a LCP does not somehow automatically authorize all development within its jurisdiction, since that would be a clear public policy concern. And so here too, the City's LCP did not somehow erase or negate violations of the Coastal Act that were extant at the time the LCP was adopted.

6. **Convincing a Jury** – You suggest that the information provided by the Commission in our January 15, 2010 letter is not sufficient "...to convince a jury that an operable gate that opens and closes, provides pedestrian access, and which is marked with a sign inviting the public's entrance during daylight hours interferes with public access." While I can appreciate your concern about potential litigation, whether the gates interfere with public access is irrelevant to the threshold question of whether their placement constitutes unpermitted development in violation of the Coastal Act and/or LCP. Moreover, the issue at hand and the purpose of the discussions between the City and the Commission at this point is to determine whether the City plans to take action as requested in our letter, which notified you of violations of the Coastal Act and the City's LCP and asked that the City take appropriate steps to resolve the violations, as provided for in the Coastal Act. In addition, there are many other issues of concern regarding the gates, including the following: that the hours of operation of the pedestrian gates were never authorized through the CDP process; that the gates currently block vehicular handicapped access which is allowed under the terms of the easement held by the MRCA; that there is signage on (and near) the gates which discourages public access and; that the gates themselves create the appearance that the publicly-owned beach and easement is not available to the public. The common impression of a gate is that it prevents access. While the presence of appropriate signage that informs the public of the location and hours of operation of the gates can help overcome the public access barriers created by private gates, they of course cannot fully address all concerns nor do they address the issue of the perception the gate will convey when observed by the public.

7. **Encroachments** - In your letter you stated that you did not feel our letter provided the City with sufficient information to evaluate the encroachment violations. You requested that we provide specific addresses and information about the encroachments including when and by whom they were installed. As a

preliminary matter, we note that the subject violations are in the City of Malibu's jurisdiction (and in fact on City property) and preliminarily, it would be a matter for the City to investigate and resolve violations of the City's LCP. However, if the City cannot do so, or chooses not to do so, we simply need to know that in order to proceed on our own. Having said that, we would be glad to provide any assistance we can regarding this important matter. In fact, I would note that in our October 3, 2006 letter, we enclosed annotated photographs of encroachments on Broad Beach Road from East Sea Level Drive west to Pacific Coast Highway. If we can provide you with another copy of these annotated photographs, please let me know. I hope there was sufficient information in our January 15, 2010 letter and the two previous letters, including the annotated photographs, for the City to, at a minimum, initiate an investigation, but to the best of our knowledge, this has not been done. We previously offered to assist the City in resolving these violations, but this assistance was declined. Therefore, we are now suggesting that if the City declines to enforce, the Commission will assume responsibility for the investigation and work towards resolution of the matter. Finally, you also asked for a copy of the MRCA survey of Broad Beach Road. Unfortunately, we do not have a way to copy the survey (the sheets are quite large) and suggest that you contact the MRCA directly to request a copy.

8. **General Accusation** – In your letter you suggest that we have only provided the City with a "general accusation" that is inadequate to meet our "...preliminary obligation to request enforcement under section 30809." Just to be clear, we note that our letter cited Sections 30809(a) *and* 30810(a) as the authority under which we can issue orders to enforce the Coastal Act and the City's LCP. Sections 30309 and 30810 state (in relevant part):

> **<u>Section 30809</u> Ex parte cease & desist orders; notice; terms and conditions; time of effectiveness; duration**
>
> (a) If the executive director determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) may require a permit from the commission without securing a permit or (2) may be inconsistent with any permit previously issued by the commission, the executive director may issue an order directing that person or governmental agency to cease and desist. The order may be also issued to enforce any requirements of a certified local coastal program or port master plan, or any requirements of this division which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:
>
> (1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.
>
> (2) The commission requests and the local government or port governing body declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources.
>
> (3) The local government or port governing body is a party to the violation.

<u>Section 30810</u> Cease & desist orders issued after public hearing; terms and conditions; notice of hearing; finality and effectiveness of order

(a) If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program or port master plan, or any requirements of this division which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:

(1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.

(2) The commission requests and the local government or port governing body declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources.

(3) The local government or port governing body is a party to the violation.

As noted previously, the subject gates, signs and encroachments cause significant damage to a coastal resource by restricting general public access and by blocking access for disabled persons to a publicly owned beach. Public access is a coastal resource and is specifically protected both under the Coastal Act and under the Malibu LCP. Furthermore, the pedestrian gates are in the control of the MEHOA, are locked at hours selected by the MEHOA, and *could* be locked at any time – causing even more significant damage to public access at this location. In addition, we note that encroachments that are the subject of this letter (and previous letters), are unpermitted development that has occurred on City property, thereby unfortunately also making the City a party to the violation. Finally, we note that this is the fourth letter we have sent to the City specifically addressing these violations and hope that we can move forward to resolve them at long last. In the background section of our January 15, 2010 letter, there is a chronology of these letters and other letters, upon which the City was copied, regarding these matters. We have provided the City with specific information regarding the gates and the encroachments that go well beyond a "general accusation", but have, both in this letter and prior letters, provided you with details about the violations and are happy to continue these discussions with an end to resolving the situation. We are again, formally, requesting the City to enforce, in a timely manner, its LCP in regard to the gates, signs and encroachments by **February 12, 2010**.

9. **Encourage MRCA** – You end your letter by suggesting that the Commission encourage the MRCA to complete a management plan and submit it to the City for approval. In fact, we have been trying to encourage *all* parties involved in Lechuza Beach, for going on five years now, to complete a management plan

and seek approval through the CDP process. We have suggested that *all* parties involved could seek authorization for the gates through that same process. We remain willing to encourage all parties to resolve these violations and will do all we can, but I don't know how we can be more encouraging. It appears that all attempts to resolve these matters amicably have not yet resolved the situation. In the meantime, the public, who paid for this beach, continues to be discouraged (and in the case of the disabled, blocked) from using it, and violations of the Coastal Act and the City's LCP remain unresolved. The law provides for a stronger course of action when encouragement fails. We believe that we are now at that point and we strongly encourage the City to step up to the plate to protect the public interest. We look forward to working with you to do just this.

Thank you for your attention to this matter. If you have any questions regarding this letter or the pending enforcement case, please feel free to contact me. If you think a meeting with the City or any of the parties involved would be helpful, we are of course willing to be involved. However, we believe that it is action that is called for now and hope you do, and believe you should, agree.

Sincerely,

N. Patrick Veesart
Enforcement Supervisor

cc: **John Ainsworth, Deputy Director, CCC**
Lisa Haage, Chief of Enforcement, CCC
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