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Mr. Douglas Bosco, Chairman
California Coastal Conservancy
1330 Broadway, 13th Floor
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Dear Mr. Bosco:

On January 25th our clients, the Malibu Encinal Homeowners Association ("MEHOA"), received a copy of a letter from Mr. Schuchat to the Executive Director of the Malibu Recreation & Conservation Authority ("MRCA") regarding the Conservancy's 2001 Grant Agreement to the MRCA. We were surprised by the discussion in the letter, as we believe you will be in light of the time you have personally dedicated to Lechuza Beach matters. While we do not believe that it is necessary to respond to Mr. Schuchat's letter in detail, we believe it is important to set the record straight as to the Coastal Conservancy's responsibilities and commitments in this matter, as well as the recent actions of the MRCA, which have violated the restrictive covenants under the 2001 Grant Agreement and which threaten to embroil the Coastal Conservancy in imminent litigation.

We hope that you will bring these matters up for discussion at the upcoming Coastal Conservancy Board meeting on February 4, 2010, and act to take appropriate action to avoid unnecessary litigation and get this matter back on track. Specifically, we are requesting that the Coastal Conservancy (a) declare that the MRCA's title to the Lechuza Beach interests is reverted to the Coastal Conservancy in accordance with the restrictive covenants under the 2001 Grant Agreement; or in the alternative, (b) reassume its planning responsibilities under the 2001 Grant Agreement, and direct the MRCA to rescind all of its previous actions, restore conditions at Lechuza Beach to the *status quo ante*, and refrain from any further actions not approved in advance by the Coastal Conservancy Board.

I. Introduction

When the Coastal Conservancy funded the acquisition of the Lechuza Beach interests in 2001, it caused restrictive covenants in favor of the Coastal Conservancy to be included in the Grant Deed to the MRCA in order to retain the ability to discharge its responsibilities and commitments pursuant to that action. These covenants established a clear division of

responsibilities between the Conservancy and the MRCA. The Coastal Conservancy specifically retained for itself the responsibility for promulgating a beach management plan (the "Management Plan") to address the coordination of public access with the rights of private property holders at Lechuza Beach. Although the MRCA was allowed to hold title to the acquired interests as the Conservancy's management agent, the Conservancy plainly provided that the MRCA was to function *only* as an interim management agent. The Coastal Conservancy also provided that no change in the *status quo* with respect to public access was to occur prior to the Conservancy's approval of a Management Plan. And finally, the Conservancy provided that a violation of any essential restrictive covenant automatically would result in the MRCA's title *automatically* vesting in the Conservancy.

As discussed in Section II below, the MRCA has exceeded its authority, and committed numerous violations of the restrictions of the Grant Agreement by, among other things: (a) usurping the Conservancy's retained responsibility to prepare and adopt the Management Plan for the Lechuza Beach interests; (b) changing the *status quo* with respect to access and improvements at Lechuza Beach without the Conservancy having adopted a Management Plan and having complied with CEQA; (c) acting in advance of the City of Malibu approving a Coastal Development Permit; (d) having created a public and private nuisance and safety risk by removing security gates that were to be retained under the Grant Agreement; and (e) acting to curtail and modify private property rights held by members of the Lechuza Beach community.

In addition, the MRCA's Executive Director has recently made various public claims that the Court of Appeal's decision in *Malibu-Encinal Homeowners Association v. Lechuza Villas West*, 2002 WL 31519371 (Cal.App. 2nd Dist. 2002; "MEHOA II") eliminates the master CC&Rs and private easements affecting Lechuza Beach and justifies the MRCA's improper actions. However, as discussed in Section III below, the Court of Appeal's decision in MEHOA II has no bearing upon, and does not justify, the MRCA's improper actions.

II. Discussion

A. The Grant Agreement and the Responsibilities Retained by the Coastal Conservancy

At page 7 of the June 26, 2001 Grant Agreement between the Coastal Conservancy and the MRCA, the Conservancy expressly provided that the 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." *See* **Exhibit 1**. Exhibit A is the October 26, 2000 Coastal Conservancy staff report for the Grant Agreement. It expressly provides that the Coastal Conservancy is to be the lead agency in developing a Management Plan for the beach interests, stating that:

> "**The [Coastal] Conservancy** will work with the MRCA, the State Lands Commission, the Coastal Commission, local governments, the Malibu-Encinal Homeowners Association, and other interested parties to develop agreements for the management of the beach."

See Exhibit 1 at page XVII-2 (emphasis added).

The MRCA is described only as an interim management agency -- not a planning agency -- for the beach interests. *See* Exhibit 1 at pages XVII-2 and 4. Indeed, at page XVII-2, the Conservancy names other potential management agents who might manage the beach interests over the longer term as an alternative to the MRCA, including "Los Angeles County, which also manages other beaches nearby, the City of Malibu, and a number of local nonprofit organizations." The Coastal Conservancy emphasized it would retain express planning control, stating "**[t]he [Coastal] conservancy** would continue to be responsible for the development of this management planning." *See* Exhibit 1 at page XVII-2 (emphasis added)

The Conservancy recognized that public beach access was already being provided, and that until it adopted the Management Plan, the existing improvements and uses would remain *unchanged*:

> "Initially, and until a management plan is developed, no additional improvements would be installed. Pending completion of a management plan, public beach use would continue in the same manner as has been permitted and signed since 1991; during daylight hours, by pedestrian access from Broad Beach Road down either of the three improved routes of access, and with no support facilities such as restrooms or water service… In the longer term, an evaluation will be made of what physical improvements would be desirable to support or increase public access to Lechuza Beach…"

See Exhibit 1 at page XVII-2 (emphasis added).

The public access to be maintained pending the Conservancy's completion of the Management Plan is explained at page XVII-7:

> "The public has had access to the beach since 1991 when permission was granted by the current landowners and by the local homeowners' association. The public is currently permitted to enter through either of three metal gates, located along Broad Beach Road at East Sea Level Drive, West Sea Level Drive and across from the Bunny Lane intersection, each of which bears a sign indicating that public access is permitted. No public vehicular access is permitted, and the conditions of use include a limit to daylight hours and restrictions on fires, dogs, and boat launching."

status quo

The Conservancy also found that its approval of the Grant Agreement was exempt from CEQA because the required environmental review would take place before there would be any change in the *status quo*, stating:

> "The project is limited to the acquisition of property as public parkland for the purpose of preserving natural open space and permitting access to the beach. No management plan has been prepared for the public park, and no development of additional facilities will take place until a management plan and environmental analysis has been approved. Until that occurs, public use will continue in the same manner as has been permitted by the

private landowners since 1991. As a consequence, the proposed project will consist solely of the continued operation of trails, involving negligible or no expansion of use beyond that previously existing, and will not result in any physical effect on the environment."

See Exhibit 1 at p. XVII-15.

B. The MRCA has Violated the Restrictions of the Grant Agreement

The Grant Agreement provides that "if any of the essential deed provisions stated above are violated, all of [MRCA'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 . . . ." See Exhibit 1 at p. 6.

The MRCA has exceeded its authority and violated the restrictions of the Grant Agreement by, among other things: (a) usurping the Conservancy's retained responsibility to prepare and adopt the Management Plan; (b) changing the *status quo* with respect to access and improvements without the Conservancy having adopted the Management Plan and having complied with CEQA; (c) acting in advance of the City of Malibu approving a Coastal Development Permit; (d) having created a public and private nuisance and safety risk by removing security gates that were to be retained under the Grant Agreement; and (e) acting to curtail and modify private property rights held by members of the Lechuza Beach community.

On January 6, 2010, the MRCA Board adopted its own 'plan' for the Lechuza Beach interests. The MRCA had not obtained the Coastal Conservancy Board's prior approval of the 'plan', and it did not reflect any effort to coordinate the interests and rights of the private property owners at Lechuza Beach. Moreover, the MRCA has filed for a Coastal Development Permit from the City of Malibu, which seeks major modifications to the beach, including the removal of security gates for the existing residential community, the installation of temporary and permanent restrooms, and the construction of a new road on the beach -- all without the Coastal Conservancy's prior approval. *See* **Exhibit 2.**

On January 5, 2010, the MRCA's Executive Director acted on his own initiative to tear down the Bunny Lane security gate in violation of the Conservancy's guarantee that the status quo would be maintained until the Conservancy Board approved the Management Plan. In a letter explaining his action, the MRCA's Executive Director stated that it was his intent to intimidate the residents of the Lechuza Beach community into accepting the 'plan' he wished to force upon them. *See* **Exhibit 3.** The MRCA's aggressive and unauthorized actions threaten to embroil the Coastal Conservancy in unnecessary litigation.

In 2007, without having obtained the approval of the Conservancy and prior to the Conservancy's approval of the Management Plan, the MRCA filed an application for Coastal Development Permit to develop the beach. Under the 2001 Grant Agreement, this planning responsibility was reserved to the Conservancy. Moreover, by virtue of the MRCA's action to tear down the Bunny Lane access, which was to remain in place until the Conservancy's

adoption of the Management Plan, the MRCA has acted without the benefit of a Coastal Development Permit to implement its beach plan, violating the Coastal Act and the CEQA.[1]

The MRCA's improper actions have created a public and private nuisance and safety risk by removing the security gate to the Bunny Lane pathway. *See* **Exhibit 4**. The terms of the 2001 Grant Agreement required that this gate be maintained and that access through the Bunny Lane pathway be limited to pedestrians during daylight hours only. The pathway is not marked or lighted, follows a steep set of stairs along the bluff face, with no useable handrails or protective railings to guard against a fall from the bluff. The beach itself is frequently entirely underwater, resulting in risk of drowning. There are no warnings of the hazardous condition posted. The gate protected adjacent private property from trespass at night. Subsequent to its improper removal of the gate, the MRCA admitted the hazardous condition created by stringing yellow and red barrier tape across the path as shown in the photographs attached in Exhibit 4. However, the tape is not an adequate replacement for the security gate. All of these actions create monetary liability for the Conservancy because the MRCA is acting as the Conservancy's management agent under the Grant Agreement.

The MRCA has acted to curtail and modify private property rights held by members of the Lechuza Beach community. *See* **Exhibit 5**. In 2002, the MRCA attempted to unilaterally amend the original CC&R's over the entire Lechuza Beach tract (adopted when the community was first developed in 1932) to take away private rights of all of the residents of the Lechuza Beach community. This attempt was invalid because the MRCA's enabling legislation for the MRCA prohibits it from regulating private property.[2] More recently, at its meetings of January 6, 2010, the MRCA announced its intention to again amend the original CC&R's to remove restrictions on outhouses and to extinguish the private easement rights enjoyed by the residents on beach lots. These actions have caused monetary damages to the Malibu Encinal Homeowners Association and its members, who have had to retain legal counsel, and create monetary liability for the Conservancy because the MRCA is acting as the Conservancy's management agent under the Grant Agreement. They are also contrary to the Conservancy Board's stated commitment as part of the 2001 Grant Agreement to coordinate -- not extinguish -- private property rights at Lechuza Beach.

III. The Decision of the Court of Appeal in MEHOA II does not Justify the MRCA's Improper Actions

The MRCA's Executive Director has recently made various public claims that the Court of Appeal's decision in *Malibu-Encinal Homeowners Association v. Lechuza Villas West*, 2002 WL 31519371 (Cal.App. 2nd Dist. 2002; "MEHOA II") eliminates the master CC&Rs and

[1] As discussed in Section II.A, the 2001 Grant Agreement guaranteed that the status quo would be maintained until a Beach Management Plan was adopted *after* CEQA compliance.

[2] Public Resources Code Section 33008(c) specifically prohibits the Santa Monica Mountains Conservancy from regulating private property. Neither the Conejo Park District nor the Simi Valley Park District (the two other public agencies that are part of the MRCA joint powers agency) have any authority to regulate private property. Even if the MRCA had authority to regulate private property, which it does not, it did not follow the required procedures for amending the CC&R's.

private easements affecting Lechuza Beach and justify the MRCA's improper actions. These claims are incorrect.

In MEHOA II, the Court of Appeal affirmed the decision of the trial court below to grant a demurrer without leave to amend against an action filed by MEHOA based on the legal principle of *res judicata.* In MEHOA II, MEHOA had filed a complaint against Lechuza Village West, an entity that was previously seeking to develop various lots at Lechuza Beach for declaratory relief and to quiet title. MEHOA argued that by virtue of the CC&R's and easements over the various lots owned by it, Lechuza Village West had no right to open its lots to the general public or to install, modify or remove any existing improvements.

On appeal, the Court of Appeal upheld the granting of the demurrer finding that the MEHOA II action sought to vindicate the same primary right which MEHOA had the opportunity to litigate in a previous multi-party lawsuit over Lechuza Village West's plans to develop its lots (in which MEHOA had been joined as a party); specifically, that the original CC&R's and private easements held by the Lechuza Beach residents prohibited opening the beach, private road and pedestrian walkways to public access.

MEHOA's present objections to the MRCA's improper actions (as outlined above) has nothing to do with the Court of Appeal's application of *res judicata* principles in MEHOA II. As noted in the Conservancy's October 26, 2000 staff report, MEHOA has permitted public access to Lechuza Beach since 1991, and is not contending that the CC&R's and the private easements of the residents preclude public access to the beach. Rather, as discussed above, MEHOA contends that the MRCA has engaged in numerous violations of the restrictive covenants of the 2001 Grant Agreement. In addition, MEHOA's position is that its residents enjoy certain private easement and other rights under the CC&R's which cannot be extinguished by agency action or public use of the lots acquired with the funds granted by the Conservancy. MEHOA also contends that the outhouse structures, which are now being proposed by the MRCA, are expressly prohibited by the still enforceable CC&R's. Finally, MEHOA's position is that the MRCA has taken title to certain easements granted subsequent to the decision in MEHOA II, which contain express restrictions with respect to time and manner of access, as well as what improvements may be constructed; all of which the MRCA has violated or is threatening to violate by its recent conduct. *See* **Exhibit 6**. None of these legitimate objections to the MRCA's improper actions are affected by the Court of Appeal's decision in MEHOA II.

IV. Conclusion

Beyond violating the restrictions of the Grant Agreement, the MRCA's improper actions have breached the Conservancy's responsibilities and commitments, and threaten to embroil the Conservancy in imminent litigation. For all of these reasons, we respectfully request that the Coastal Conservancy (a) declare that the MRCA's title to the Lechuza Beach interests is reverted to the Coastal Conservancy in accordance with the restrictive covenants under the 2001 Grant Agreement; or in the alternative, (b) reassume its planning responsibilities under the 2001 Grant Agreement, and direct the MRCA to rescind all of its previous actions, restore conditions at

Lechuza Beach to the *status quo ante*, and refrain from any further actions not approved in advance by the Coastal Conservancy Board.

We look forward to answering any questions you may have at the February 4, 2010 Conservancy Board meeting.

Very truly yours,

Allan J. Abshez