

CALIFORNIA COASTAL COMMISSION

SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800

**NOTICE OF VIOLATION OF THE CALIFORNIA COASTAL ACT**

19 April 2010

Lisa Tent
Senior Code Enforcement Officer
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 Tent:

Pursuant to your request during our telephone conversation on February 22, 2010, I am enclosing correspondence from our files regarding the above mentioned violation case and a disk with photographs and other information regarding the above mentioned encroachments in the Broad Beach Road (BBR) right-of-way (ROW). Please be advised that this may not be all the correspondence we have regarding this matter, but this is what I could easily find and copy and what seemed most relevant. The purpose for sending you these materials is to better inform the City regarding the violations discussed in our January 15, 2010 letter and to assist the City in the resolution of said violations.

Please find enclosed a disk with the following:

1. An aerial photograph overview, with lot-lines, of BBR from East Sea Level Drive to Pacific Coast Highway;
2. A list of property owners, with APNs, for the area described above;

3. Photographs made by Commission staff of individual properties on BBR in the area described above.

The photographs are sorted by address and by their location on either the seaward or landward side of BBR. There is an area west of Bunnie Lane where BBR is full width with curb and gutter on the landward side where there are no encroachments that we are aware of and, therefore, no photographs.

In addition, please find enclosed the following correspondence:

From the Coastal Commission (CCC)

1. February 3, 2010 letter to Christi Hogin (Malibu);
2. January 15, 2010 letter to Lisa Tent (Malibu);
3. April 23, 2007 letter to Joseph Edmiston (MRCA) and Shari Plummer (MEHOA);
4. November 13, 2006 letter to Joseph Edmiston (MRCA);
5. August 21, 2006 letter to Gail Sumpter (Malibu);
6. May 12, 2006 letter to Gail Sumpter (Malibu).

From CCC and MEHOA - 1977 letters

Nine letters exchanged between the CCC and the MEHOA in 1977 regarding the gates.

From the MRCA

1. February 7, 2010 letter to Christi Hogin (Malibu);
2. January 11, 2010 letter to Stephanie Danner (Malibu), Steve Hudson (CCC) and Patrick Veasart (CCC);
3. January 8, 2010 letter to Stephanie Danner (Malibu);
4. January 5, 2010 letter to Lisa Pallack (MEHOA);
5. January 5, 2010 letter to Steve Hudson (CCC);
6. September 1, 2009 letter to Anthony Giordano (MEHOA);
7. December 1, 2008 letter to Anthony Giordano (MEHOA);
8. December 1, 2008 letter to Stephanie Danner (Malibu);
9. June 20, 2007 letter to Patrick Veasart (CCC);
10. October 25, 2006 letter to Patrick Veasart (CCC);
11. October 24, 2006 letter to Ken Kearsley and City Council (Malibu).

From the City of Malibu

1. January 29, 2010 letter to Patrick Veasart (CCC);
2. April 17, 2007 letter to MEHOA and Sharyl Beebe (Prism Planning);
3. December 12, 2006 letter to MEHOA;
4. September 18, 2006 letter to Patrick Veasart (CCC).

From the MEHOA

1. January 22, 2010 letter to Lisa Tent (Malibu) and Patrick Veearst (CCC);
2. January 8, 2010 letter to Stephanie Danner (Malibu) and Steve Hudson (CCC);
3. January 6, 2010 letter to Joseph Edmiston (MRCA) and the MRCA Board;
4. January 6, 2010 letter to the MRCA Board;
5. October 21 letter to Paul Edelman (MRCA) and Stephanie Danner (Malibu);
6. June 15, 2007 letter to Patrick Veearst (CCC).

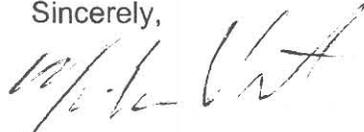
Finally, we again refer you to the survey contracted for by the MRCA in 2007 that shows BBR, property lines, and the subject encroachments. We understand that the City has a copy of said survey, but if you cannot locate your copy, we suggest contacting the MRCA to request another.

As of the date of this letter, we understand that the MRCA is working to complete and file a CDP application with the City for a management plan and public access improvements at Lechuza Beach. However, the gates and signs continue to impede public access (including vehicular access for disabled persons) at Lechuza Beach and the private encroachments on BBR continue to severely reduce the availability of public parking for beachgoers. It is our sincere hope that the City will begin to address and resolve these issues as detailed in our January 15, 2010 letter. If I or my staff can be of any assistance to that end, please do not hesitate to call upon us.

Please be advised that unless appropriate action is taken by the City by **June 1, 2010**, the Commission will assume that the City declines to act to resolve the violations after receiving a request to act from the Commission and the Commission will assume primary responsibility for issuing an order(s) pursuant to Section 30810(a) of the Coastal Act in this matter. I look forward to hearing from you soon regarding how the City intends to proceed.

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.

Sincerely,



N. Patrick Veearst
Enforcement Supervisor

cc (without attachments):

John Ainsworth, Deputy Director, CCC
Lisa Haage, Chief of Enforcement, CCC
Alex Helperin, Staff Counsel, CCC
Steve Hudson, South Central District Manager, CCC
Barbara Carey, Supervisor, Planning and Regulation, CCC
Tom Sinclair, South Central District Enforcement Officer, CCC
Aaron McLendon, Statewide Enforcement Officer, CCC
Linda Locklin, Public Access Manager, CCC
Joseph Edmiston, MRCA
Mary Small, State Coastal Conservancy

EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE



300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013
Public: (213) 897-2000
Telephone: (213) 897-2706
Facsimile: (213) 897-2801
E-Mail: Terry.Fujimoto@doj.ca.gov

April 5, 2010

Allan J. Abshez
Greenberg Traurig, LLP
2450 Colorado Avenue, Suite 400 East
Santa Monica, CA 90404

RE: MEHOA v. MRCA et al.
Los Angeles County Superior Court, Case No. BS124911

Dear Mr. Abshez:

This letter is in response to your correspondence of March 28, 2010. As you might expect, the Coastal Conservancy disagrees with your assertion that it has approval authority over the Management Plan. Your comments do not reflect accurately the terms of the Grant Agreement, as originally approved or subsequently amended. There is no provision that requires the Conservancy's approval of a beach management plan. The original Grant Agreement, dated June 26, 2001, contains a paragraph entitled "USE, MANAGEMENT, OPERATION AND MAINTENANCE." This paragraph states, in relevant part, 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 management, operation or maintenance, except as provided in a future management plan that is approved by the Conservancy." (Grant Agreement (6/26/01), p. 7; emphasis added.) Thus, as originally adopted, the grant provides for Conservancy approval of a future management plan, only if the Conservancy assumes financial responsibility for the cost of management, operation or maintenance of the property. Otherwise, as the grant provides, the MRCA, not the Conservancy, "shall use, manage, operate and maintain the real property for public access to the beach and public recreation . . ." (*Ibid.*)

Further, on April 11, 2002, the Conservancy amended the "USE, MANAGEMENT, OPERATION AND MAINTENANCE" provision. The above-quoted language was deleted to clarify that the Conservancy would not be liable subsequently for any management, operation or maintenance costs at Lechuza. It was replaced with the following language: "The grantee [MRCA] further assumes all management, operation and maintenance costs associated with the real property, including the costs of ordinary repairs and replacements of a recurring nature, and costs of enforcement of regulations. The Conservancy shall not be liable for any cost of such management, operation or maintenance." (See 11/11/02 Grant Agreement 00-170 Amendment, p. 7.) Thus, the assertion that the Conservancy has approval authority over the Management Plan

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ignores that the very language that MEHOA relies upon so heavily was removed from the 2002 amendment to the Grant Agreement and is no longer operative.

The Grant Agreement, as originally approved and amended, also states "The grantee 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 (6/21/01 and 4/11/02), p. 7; emphasis added.) Exhibit A refers to the Conservancy staff report. That report in relevant part states that "the Conservancy will work with the State Lands Commission, the Coastal Commission, local governments, the Malibu-Encinal Homeowners Association, and other interested parties to develop agreements for management of the beach." Again, this language does not require Conservancy approval of a beach management plan. Rather, it simply reiterates the Conservancy's oversight responsibilities to ensure that the management plan is consistent with the conditions of the Grant Agreement and use restrictions in favor of the Conservancy contained in the deed transferring ownership. Ultimately, the responsibility for preparing and approving the management plan under the Grant Agreement lies with the MRCA, not the Conservancy. (*Ibid.*)

Further, there is nothing in the February 12, 2007 confidential advice letter from MRCA's outside counsel to the contrary. Under the original Grant Agreement, the Conservancy's authority over the management plan was contingent upon the agency assuming responsibility for management, operation and maintenance costs. Since the Conservancy declined to assume those costs, the MRCA retained complete approval authority over the management plan. In any event, the 2002 Amendment to the Grant Agreement removed language that gave the Conservancy only conditional approval authority over the Management Plan.

As to the February 12, 2002 confidential advice letter, the MRCA is troubled as to how MEHOA obtained the document and why you did not notify MRCA staff counsel or outside counsel pursuant to *Rico v. Mitsubishi Motors* (2007) 42 Cal. 4th 807. It is well established that:

[W]hen a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided through inadvertence, the lawyer receiving these materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged.

(See *State Compensation Insurance Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656.)

Although I do not know how you obtained the document, I assume the MRCA produced it inadvertently in response to MEHOA's Public Records Act request. MRCA's staff counsel has since confirmed that she was unaware that the document had been turned over and that there was no intent to produce the letter to MEHOA. "Waiver" does not include accidental, inadvertent disclosure of privileged information. (*O'Mary v. Mitsubishi Electronics America,*

Inc. (1997) 59 Cal.App.4th 563, 577.) Further, this document was clearly labelled "CONFIDENTIAL-ATTORNEY/CLIENT COMMUNICATIONS." Under *Rico*, you had an obligation to "refrain from examining the materials any more than [was] essential to ascertain if the materials are privileged," and "immediately notify [MRCA's counsel] that [you] possesse[d] material that appears to be privileged." (*State Compensation Insurance Fund v. WPS, Inc.*, *supra*, 70 Cal.App.4th at p. 656.) Although you ultimately disclosed knowledge and possession of the document, it was in the context of demonstrating that the Conservancy has approval authority over the management plan, not for purposes of complying with your obligations under *Rico*. (See 3/28/10 Letter A. Abshez to T. Fujimoto, p. 1.) MRCA did not waive its privilege as to the February 12, 2002 letter and, therefore, requests that you return all copies of the document in your or MEHOA's possession and that you and MEHOA delete any electronic copies.

As I stated in my original letter, the MRCA and Conservancy are not opposed in principal to a standstill agreement. However, they fail to see the benefit of a stay of proceedings when settlement discussions have not been successful in the past and MEHOA offers no new proposals or ideas. The differences between the parties are so fundamental that a standstill agreement is not feasible even without pre-conditions. Although you are optimistic that the parties can resolve "the issues relating to the plan," your letter offers no substantive plan for bridging the gap on matters such as compliance with the ADA and application of the Malibu Beach Ordinance. In the absence of a tangible proposal, settlement discussions are doomed to fail. In our recent conversation you indicated that MEHOA would be submitting to the Conservancy a "new" proposed management plan. We've reviewed the two documents and they offer no new proposals and, to the contrary, appear to simply repeat the same arguments raised previously and rejected by the both the Conservancy and MRCA, namely that the Conservancy has the responsibility to facilitate a resolution. Your reliance on the Conservancy is misplaced. (See MEHOA's Proposal to the Conservancy, 4/1/10.) The Conservancy would obviously prefer to see the parties settle but not at the expense of non-compliance with the ADA and a management plan that creates one set of rules for MEHOA members and another for the general public. In summary, the MRCA and Conservancy do not believe that a standstill will allow the parties to "meaningfully" explore settlement unless MEHOA is willing to identify a substantive plan for addressing the ongoing dispute. The MRCA and Conservancy are encouraged to learn that MEHOA is granting "access to vehicles with handicap plates" and would appreciate MEHOA providing the gate code to the MRCA so that others may enjoy Lechuza Beach as well.

Regarding your response to our request to allow the MRCA and Conservancy to file their responses to the non-writ and writ claims at the same time, the MRCA and Conservancy are unwilling to enter into a stipulation that would permit discovery prior to the filing of the responsive pleadings or before the writ actions are concluded. The matter has been assigned to Judge Yaffe in the Writs and Receivers department. It has been our experience that Judge Yaffe will adjudicate the writ actions and then transfer the matter back to Department One for reassignment to a trial court for resolution of the non-writ claims. General discovery is simply not appropriate in the context of a writ proceeding. (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.app.4th 93, 101.) First, the Writs and Receiver Department is not "assigned" the task to decide every discovery dispute between the parties, particularly when the disputes will relate to actions that the court is not adjudicating. (See Los Angeles County

Superior Court Rules of Court, Rule, 2.5, subd. (j).) Second, neither party is prejudiced by staying discovery pending a decision on the writ actions. To the contrary, resolution of the writ actions may well resolve the non-writ claims or at the very least, streamline the litigation by reducing the issues that need to be addressed in the latter proceeding.¹ Accordingly, we ask you to reconsider your rejection of our proposed stipulation severing and staying the non-writ causes of action. If we are unable to reach an accommodation, the MRCA and Conservancy are prepared to file their responsive pleadings as well as a motion to sever and stay the non-writ proceedings, on or before their due date of April 9, 2010.

In response to footnote one of your letter, please be advised that the Conservancy is considering the filing of a demurrer to the Petition. Virtually every cause of action against the Conservancy is based on the theory that the MRCA is the "agent of the Conservancy under the Conservancy Grant Agreement." (Petition, ¶ 48; also see ¶¶ 31, 102). However, the Grant Agreement specifically provides that "in the performance of [the Grant Agreement] [the MRCA] shall act in an independent capacity and not as officers or employees or **agents** of the State of California." (Emphasis added.) To the extent the claims against the Conservancy are based on its failure to prepare and approve a management plan, it is the MRCA, not the Conservancy, that is obligated to prepare and approve a management plan. (Grant Agreement (6/21/01 and 4/11/02), p. 7.) Thus, MEHOA's claims against the Conservancy are unsupported. We have no objection to your request to stipulate to allow "clarifying amendments" as long as both the MRCA and Conservancy have thirty days to file a responsive pleading to the clarifying amendments. If we are served with an amended Petition and Complaint on or before April 8, 2010, we will not file the demurrer, or if received after the demurrer is filed, we will withdraw it while reserving all rights to object to the amended pleading.

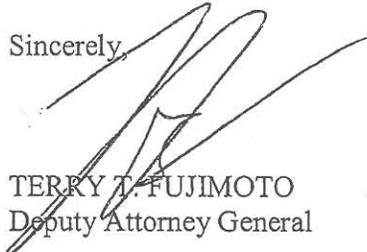
As to the scope of the administrative record, the only "proceeding relating to this action" involving the Conservancy is the October 2000 action approving the MRCA's grant for acquisition of the Lechuza Beach property. Any challenge to that Conservancy action obviously is time barred. However, as an accommodation, the Conservancy will prepare an administrative record, limited to documents relevant to that action. The MRCA will be preparing a separate administrative record that should include the other documents you refer to in your letter. However, to the extent we inadvertently omit relevant material, we invite you to submit any additional documents for inclusion in the record, subject, of course, to our review of the documents for its relevance.

¹ For example, the tenth cause of action for declaratory relief alleges a controversy "as to whether the MRCA's removal of the Bunnie Lane Gate . . . violate and conflict with the conditions of the MRCA Access Easement." (Petition, ¶ 12.) This claim is virtually identical to the ninth cause of action for quiet title that alleges that the MRCA's removal of the Bunnie Lane gate was "in violation of the MRCA Access Easement." (Petition, ¶ 124.)

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Regarding your comments on the MEHOA e-mail the MRCA obtained from a third party, I will consult with my clients and respond in due course. Finally, please confirm whether you will be attending the CEQA settlement meeting scheduled for April 7, 2010 at our office. I will need the names of those attending in advance so that our receptionist's office can prepare visitor passes. New security measures at our office require that visitors display a personal visitor's pass or badge at all times. The MRCA and Conservancy will be represented by staff counsel. I look forward to seeing you this coming Wednesday.

Sincerely,



TERRY T. FUJIMOTO
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

cc: L. Collins, MRCA; E. Eger, SCC; J. Goldman

