

January 6, 2010

Board of Directors
Mountains Recreation & Conservation Authority
Ramirez Canyon Park
1510 Ramirez Canyon Road
Malibu, CA 90265

Re: January 6, 2010 Agenda Items XII - XV Governing Board Meeting; Agenda Item IV of Special Meeting of the Governing Board; Lechuza Beach

Honorable Board Members:

Greenberg Traurig LLP is counsel to the Malibu Encinal Homeowners Association (“MEHOA”), which is the homeowner association for the private common-interest subdivision known as “Malibu Encinal” that includes Lechuza Beach (the “Community”) and which owns real property within the Community. We are writing on behalf of MEHOA to respectfully request that no action be taken on the above-referenced agenda items and that they be taken off-calendar for the following reasons.

I. The Malibu Recreation & Conservation Authority (“MRCA”) Has Not Given Proper Notice To Property Owners Affected By Its Proposed Action In Violation Of Due Process Requirements

The actions contemplated by the above-referenced agenda items will substantially affect the property rights of MEHOA and its individual members, yet the MRCA has not afforded MEHOA and its members reasonable notice and opportunity to be heard by MRCA in accordance with the requirements set forth by the California Supreme Court in *Horn v. County of Ventura*, 24 Cal.3d 605, 612 (1979).

In *Horn*, the California Supreme Court held that regulatory actions that may substantially affect the property rights of individual property owners require notice by mail to the owners of record of property within a designated radius, and that the notice must, of course, occur sufficiently prior to a final decision to permit a meaningful predeprivation hearing to the affected landowners. *Id.* at 618; *See also Kennedy v. City of Hayward*, 105 Cal.App.3d 953 (1st Dist. 1980).

As discussed below, the promulgation of a beach management plan for the MRCA’s Lechuza Beach interests is a project which is reserved to the California Coastal Conservancy and which is outside of the MRCA’s jurisdiction. While the MRCA lacks jurisdiction to

promulgate such a plan, it has made no effort to provide proper notice of its proposed actions to MEHOA or the individual property owners within the Community, all of whom will be directly and substantially impacted by the proposed actions. Instead, it appears that MRCA merely added agenda items in an *ad hoc* manner, and contacted select people by email or phone on New Year's Eve informing them of a January 6, 2010 hearing date only seven days later. Compounding this deficiency is the fact that the MRCA has not made complete files available for review and the web link to the limited files referenced in the agenda (www.drop.io/1-6-10attachments/media) does not function. Moreover, the limited time period spanning the MRCA's informal notification, and the New Year's holiday, and the January 6th hearing date made meaningful file review virtually impossible.

Because due process requires -- at a minimum -- direct mail notice to MEHOA and the individual property owners in the Community sufficiently prior to the hearing to permit them a meaningful hearing, the MRCA Board should not open any hearing and should take all of the above-referenced agenda items off-calendar until proper notice is given.

II. The MRCA Has No Authority To Promulgate A Management Plan For Lechuza Beach Or To Make Any Improvements Or Alterations To Property In The Community

The proposed actions include the adoption of a management plan for Lechuza Beach, including proposed alterations and improvements to the property in the Community (including property owned by MEHOA and/or its individual members), and the imposition of regulations over property in the Community (including property owned by MEHOA and/or its individual members -- and property *not* owned by the MRCA). In fact, MRCA's agents have already acted without obtaining prior permission to make alterations to existing improvements (such as existing security gates whose maintenance is required by the CC&R's governing the Community). All of these actions and proposed actions are in violation of the MRCA's authority as limited by the Restrictive Covenants on the Grant Deeds for MRCA's Lechuza Beach interests.

Specifically, in its action allocating funds for the acquisition of the Lechuza Beach interest to which the MRCA now holds title, the Coastal Conservancy expressly provided that the MRCA was *only* to be a management agency. The September 28, 2000 Coastal Conservancy Staff Report regarding the proposed acquisition grant and restrictive covenants expressly states that:

“The [Coastal] Conservancy will work with the State Lands Commission, the Coastal Commission, local governments, the Malibu-Encinal Homeowners, and other interested parties to develop agreements for the management of the beach. Initially, and until a management plan is developed no additional improvements would be installed. 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... **The [Coastal] conservancy** would continue to be responsible for the development of this management planning.”

See September 28, 2000 Staff Report to California Coastal Conservancy attached as **Exhibit A** hereto at page XI-2. (emphasis added).

The requirement for the Lechuza Management Plan (which is to be prepared by the Coastal Conservancy -- not the MRCA) is expressly included in the Restrictive Covenants over the Lechuza Beach interests as Restrictive Covenant 4.a. See May 7, 2002 Grant Deed attached as **Exhibit B** hereto. Unless and until a management plan by the California Coastal Conservancy is promulgated, the MRCA has no authority to do anything other than manage the Lechuza Beach interests consistent with the express and continuing restrictions imposed by the California Coastal Conservancy. Specifically, the MRCA has no authority to:

- 1) Promulgate its own plan;
- 2) Make alterations to its property or any property in the Community;
- 2) Apply to government agencies for permits to modify its property or any property in the Community;
- 3) Manage or regulate its property in any other way than to allow public beach use to “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....” See Exhibit A at page XI-2.

We note that MRCA’s agents have already acted in violation of the Restrictive Covenant by removing one of the security gates as discussed above.

The actions and proposed actions of MRCA and its agent purport to be under color of law. However, because the MRCA lacks lawful authority to engage in anything other than the management of existing access as described in the continuing Coastal Conservancy grant restrictions, and because the actions and proposed actions of the MRCA and its agents substantially affect the property rights of MEHOA and its members, the actions and proposed actions of MRCA and its agents give rise to a right to damages and penalties under 42 U.S.C. Section 1983.

Accordingly, the MRCA should not take any of the actions proposed in the above-referenced agenda items, and should await the Coastal Conservancy’s development of a management plan as contemplated by the Conservancy’s continuing grant restrictions.

III. The Proposed Actions Improperly Seek To Regulate The Private Property Of MEHOA And The Individual Owners In The Community

In addition to the fact that the actions and proposed actions violate the Restrictive Covenants under the Coastal Conservancy grant, the proposed actions seek to regulate the private property of MEHOA and the individual property owners in the Community. The MRCA is a joint powers agency, which has only the powers of its constituent members.

California Government Code § 6502; 75 Ops. Cal. Atty. Gen. 6, 7 (1992); *City of Oakland v. Williams*, 15 Cal.2d 542, 549 (1940) (a statute authorizing the joint exercise of powers separately possessed by municipalities grants no new powers but merely sets up a new procedure for the exercise of existing powers). *Burbank-Glendale-Pasadena Airport Authority v. Hensler*, 83 Cal.App.4th 556, 563 (2d Dist. 2000) (local governmental entities may enter into a joint powers agreement and create a separate joint powers agency to exercise on their behalf powers they hold in common).

The MRCA is a local partnership between the Santa Monica Mountains Conservancy, the Conejo Recreation and Park District and the Rancho Simi Recreation and Park District. None of these agencies have the authority to regulate private property not owned by such agencies. *See, e.g.* Public Resources Code § 33008(c) (the Santa Monica Mountains Conservancy is not authorized to regulate private property).

Notwithstanding the lack of authority to regulate private property, the proposed actions seek to impose police powers regulations on property owned by MEHOA and the individual private property owners in the community. Such proposed action is plainly *ultra vires* and its adoption would give rise to a right to damages and penalties under 42 U.S.C. Section 1983.

Accordingly, the MRCA should refrain from taking any action which regulates private property, and should not adopt any of the above-referenced agenda items.

IV. The Proposed Actions Improperly Seek To Regulate The Property Outside Of The MRCA'S Geographic Jurisdiction

In addition to the fact that the actions and proposed actions violate the Restrictive Covenants under the Coastal Conservancy grant and improperly seek to regulate private property, the proposed actions seek to regulate property outside of the geographic jurisdiction of the MRCA.

As discussed in Section III, above, as a joint powers agency, the MRCA may exercise only the power and jurisdiction of its constituent members. The Conejo Recreation and Park District and the Rancho Simi Recreation and Park District have no jurisdiction over property in the vicinity of the Community. Pursuant to the express provisions of California Public Resources Code § 33105, the geographic jurisdiction of the Santa Monica Mountains Conservancy is limited to certain land area in the greater Los Angeles metropolitan region *landward* of the Pacific Coast Highway (State Highway Route 1). None of the members of the MRCA have geographic jurisdiction to regulate or police public lands outside of their jurisdiction.

Because the proposed actions seek to regulate and police public lands outside of the geographic jurisdiction of its member agencies, the proposed plan would be *ultra vires* and its adoption would give rise to a right to damages and penalties under 42 U.S.C. Section 1983.

Accordingly, the MRCA should refrain from adopting any regulations or taking any police actions outside of its geographic jurisdiction, and should not adopt any of the above-referenced agenda items.

V. Compliance With CEQA Must Occur Before A Management Plan Is Adopted

The proposed management plan contemplates improvements and alterations to the physical environment and changes to existing public access to Lechuza Beach beyond the continuing restrictions imposed by the California Conservancy.

In its September 28, 2000 Staff Report regarding the grant for the acquisition of MRCA's Lechuza Beach interests, the Coastal Conservancy stated that environmental analysis would take place before a management plan was approved or there was any change in the operation of 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 existing trails, involving negligible or no expansion of use beyond that previously existing, and will not result in any physical effect on the environment.”

See September 28, 2000 Staff Report to California Coastal Conservancy attached as Exhibit A hereto at page XI-14. (emphasis added).

By taking unauthorized action to remove security gates to the Community that control nighttime access, the MRCA's agents have already acted in violation of CEQA and the Coastal Conservancy's restriction of no change in use or improvements until *after* the Coastal Conservancy has promulgated a management plan and conducted environmental review in accordance with CEQA. Moreover, the MRCA's staff report proposes to further defer CEQA analysis to some undetermined future date, which is a violation of CEQA itself. The proposed management plan contemplates improvements and changes to the operation of the beach that are one *project* under CEQA, and prior environmental review in accordance with CEQA must be performed by the lead agency for the management plan (the California Coastal Conservancy) before any management plan is adopted.

Because CEQA compliance for the proposed actions has not been completed, the MRCA should take no action on the above-referenced agenda items and should take them off-calendar until CEQA compliance has been completed. Such environmental review should include, but not be limited to review of the impact of the expanded public use on the beach, including the ecological, aesthetic, geotechnical and impacts of construction of ramps, bluff platforms and stairways on areas known to be subject to flooding and soil instability, as well as land use and compatibility, public safety, security and sanitation impacts.

VI. Conclusion

As discussed in Section I, the MRCA has not provided MEHOA or the individual property owners in the Community sufficient notice to permit them a meaningful opportunity to respond to the proposed actions or be heard. Accordingly, the forgoing deficiencies do not represent all of the comments and objections of MEHOA and its individual members to the proposed actions, and MEHOA and its individual members reserve the right to submit additional comments, objections and evidence, and reserve all rights and remedies. MEHOA also requests that all of the documents and information provided in **Exhibit C** be incorporated into the administrative record for the above-referenced agenda items.

In conclusion, for all of the foregoing reasons, we respectfully request that no action be taken on the above-referenced agenda items and that they be taken off-calendar.

Sincerely,

Allan J. Abshez

cc: Steve Hudson, California Coastal Commission (“CCC”)
Peter Douglas, Executive Director, CCC
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