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[VIA ELECTRONIC MAIL AND U.S. POSTAL SERVICE]

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(Revised)

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California Coastal Commission
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**Your Letter to Gail Sumpter of October 3, 2006
CCC Violation File No. V-4-04-005 (MEHOA)**

Dear Pat:

Thank you for the copy of your letter to Ms. Sumpter of October 3 (received in our office on October 11). I am happy that we will be able to meet with you and representatives of the Malibu Encinal Home Owner's Association (MEHOA) in early November.

But before we go too far down this track, I must say that given the current state of our negotiations with MEHOA, the studies necessary, the CEQA compliance that may be required by the City of Malibu, and all the associated legal problems, it will be impossible for us to comply with your deadline of January next year. We are looking, realistically, at a much longer process.

I think you know the philosophy of this organization regarding public access, but the issues are complicated by the fact that not only is MEHOA a party to this process, but so is the State Coastal Conservancy, the Chairperson of which has presided over the discussions so far, and from which the funding for this project and the planning has come.

At this point, in order to retain Coastal Conservancy funding, we are not in a position to act unilaterally, and the issues that separate us from MEHOA are substantive, especially in light of what I gather from your letters the Coastal Commission expects to see.

Discussion of these problems is always a contrast between hope and experience, and I hope to be proven wrong here in the sense that the rough and tumble of this project over the past four years has left me pessimistic that agreement can be reached absent an external stimulus. Maybe your letter will provide such.

Here are the issues:

Hours of Operation

MEHOA wanted the beach open basically during business hours, but the negotiated resolution was to allow public access from 8:00 a.m. to sundown. (Everyone understood that lateral passage along the beach, so long as seaward of the Mean High Tide Line, was not involved in this agreement.¹)

MRCA agreed to his limitation based on our understanding that this proscription could be applied equally by enforcement of an amendment to the MRCA Park Ordinance. It now appears that is not the case. The ability of the MRCA to enforce its ordinance derives from its ownership and/or management of land (Public Resources Code § 5786.17) and not from the general police power. MEHOA has asserted on behalf of its members certain CC&R and easement rights that would limit a property rights based assertion of the MRCA ordinance. Given that the standard for conviction for violation of the ordinance is “beyond a reasonable doubt” it is pretty clear to us that while a member of the public could be convicted under the MRCA ordinance, a member of MEHOA bringing in their deeds and CC&Rs could create at least a reasonable doubt that the ordinance applies to them.

Acceptance of this situation would mean a privatized beach in the morning before 8:00 a.m., and in the evening after sunset, even though the underlying fee is owned by a public entity. Initial contact with the Malibu City Attorney probing whether the Malibu Municipal Code could be amended to apply differential restrictions at Lechuza was not promising and we have not pursued this avenue further.

The MRCA now enforces the Malibu Municipal Code, which applies to all persons², in preference to its own ordinance would could be read to apply only to “outsiders.”

So, the opening and closing hours of the gates, and the times during which the public may be on the beach, are still in question.

1. Assuming that Malibu municipal regulations govern public trust tidelands, then the prohibition against “loitering” on the beach between midnight and 6:00 a.m. would apply. L.A. County Code § 17.12.350. The County Beach Ordinance has been incorporated, with some changes not relevant here, into the Malibu Municipal Code. Malibu MC § 12.08.020. Presumably, however, if a member of the public kept walking along they wouldn’t be “loitering” and could still be on the beach between midnight and 6:00 a.m.

2. MEHOA has consistently said that, even though Lechuza Beach is owned by MRCA which is a public entity, it is not a “public beach.” Without necessarily agreeing to this position, it is irrelevant for most purposes because the Beach Ordinance applies “to all ocean beaches, whether publicly or privately owned,” L.A. County Code § 17.12.170.

Uses of the Beach

There is broad formal agreement on uses, although some of them are actually prohibited either by the CC&Rs or by the Beach Ordinance (residents have in practice asserted the right to drink and smoke on the portion of Lot A [East Sea Level Drive] that MEHOA owns).

The real issue is dogs. Notwithstanding the Malibu (indeed County-wide) prohibition of all dogs on the beach, MEHOA has asserted a property right on behalf of its members to walk their dogs. This was pretty heavily contested, but Coastal Conservancy Chair Bosco suggested the "Blue Tag" compromise under which MEHOA could issue dog permits to their members and MRCA could issue, on a first come first served basis, an equal number of permits to members of the general public.

Amending the MRCA ordinance to implement this program will be a real problem considering the precedent it would set for the remainder of the fifty thousand or so acres of parkland MRCA administers. Moreover, while an MRCA amendment would insulate the possessor of a blue tag from the application of its ordinance, the MRCA is without power to exempt anyone from the Malibu Municipal Code. Again, when I approached her several months back, the Malibu City Attorney didn't seem particularly interested in amending the Malibu Code to exempt MEHOA dogs from the prohibition.

So whether to allow resident's dogs on the beach is unresolved and is a pretty passionate issue for MEHOA.

Lot "I" Improvements

From MRCA's standpoint, the first improvement to Lot "I" is removal of obstructing vegetation planted by Bertinelli in the Broad Beach Road right of way. The access gate is a niche carved into the hedge and unless you know exactly where it is, you will miss it. (The first time I was there I drove by twice before seeing it.) However, Malibu's removal of such encroachments is totally beyond our control, or the control of MEHOA, for that matter. If the gate is to remain, then the "Lechuza Beach Access" sign should also be visible.

With respect to the stairway on Lot "I," there is general agreement that improvements must be made. We have also agreed that there will be no restroom facilities, and that trash cans will be positioned away from locations that will create aesthetic problems for the neighbors. Beyond that, further agreement awaits detailed drawings of the proposed improvements. Also MRCA agreed to consider re-routing of the Lot "I" easement from its present location to across the southern portion of the Bertinelli property so as to avoid impact on the

adjoining resident to the east.³

While engineering and geology studies are on-going (as I write) the potential re-engineering of the Lot "I" access can't be done in two months. Either that request gets dropped by MEHOA or the timetable is seriously delayed.

There is a further problem in that the width of the Lot "I" easement is, if not in doubt, at least in controversy. MEHOA has taken the position that the conveyance (or purported conveyance) of the additional Bertinelli easement to the Coastal Conservancy, pursuant to the Coastal Commission condition, is illegal.⁴ This is a critical issue because what can be done to improve Lot "I" is entirely dependant upon how wide the easement is. MEHOA needs to agree, on behalf of itself and its members, not to sue over the width of the easement. If there is a lawsuit it could take years to resolve.⁵

West Sea Level Drive Staircase

There is consensus that this needs to be upgraded. Engineering work is in process, but will not be completed by January.

West Sea Level Drive Access

The MRCA has deeded rights to control the pedestrian gate, but a question exists as to the survey of the deeded property. The adjacent owner has maintained that the gate is on his property. More serious is the fact that apparently there isn't deeded access between the pedestrian gate (whomever owns it) and Broad Beach Road.

3. Crossing the bluff across the Ms. Bertinelli's property would require an amendment to her CDP, and her attorney, Adam Salis, has informed MRCA counsel Laurie Collins that his client isn't interested in moving the access onto her property.

4. MRCA is also on written notice from MEHOA's counsel that the OTD's recently accepted by MRCA within the MEHOA tract are, from their standpoint, similarly illegal.

5. It is unknown at this time if the City of Malibu, like some other jurisdictions, requires the applicant to pay for the city's legal defense of a permit, and if this is the case, then MRCA has no source of revenue from which to defend the permit, however if the issue is appealed to the Coastal Commission defense of the permit will be at no cost to MRCA. Similarly, the Coastal Conservancy, owner of the Bertinelli easement, would be a necessary party to any lawsuit challenging the validity of the offer to dedicate and so the Attorney General by representing the Coastal Conservancy would also be representing MRCA's interests.

We have determined that unless the owners of the driveway from Broad Beach Road to the pedestrian gate at West Sea Level Drive deed an easement to the public, then the only legal right of access would be directly from Pacific Coast Highway. The lack of sufficient shoulder along PCH and the grade separation between PCH and West Sea Level Drive (10 to 15 feet) makes it very difficult, and perhaps impossible from a practical standpoint, to engineer a direct access from PCH.

Following a title search, we will be approaching the owners of the driveway about the voluntary grant of such an easement.

Consequences of No Deeded Access to West Sea Level Drive and City of Malibu Control of Broad Beach Road Right-of-Way

Unless we can get publically deeded access along the driveway leading down to the West Sea Level Drive pedestrian gate, then the sign currently posted there, "Permission to pass subject to permission and control of owner," is in fact correct and the owners can prohibit public use, or at least attempt to do so.⁶

Given this fact that West Sea Level Drive access can, apparently, be withdrawn at any time. In order to permanently guarantee substantially the same public benefit of access to public resources as was previously assumed to exist at West Sea Level Drive, the indubitable public rights in Lot "I" and Lot "A" must be exercised to the fullest extent permitted by law.

One immediate consequence is that while MRCA cannot provide general public parking on the easement to Lot A (East Sea Level Drive), and does not control the Broad Beach Road right-of-way and so cannot guarantee the continuation of public parking along Broad Beach Road; the MRCA does have deeded rights to four (4) handicapped parking spaces within the Lot A easement. Two of which MRCA was prepared to give up in order to get agreement with MEHOA, but that was prior to the Coastal Commission's demand for additional mitigation if the gates stay up. In light of current circumstances, it may be that, from the public's standpoint, Lechuza becomes a handicapped, or better put, a "differently-abled" beach. This is true because in this whole tangle of rights, MRCA and MEHOA can only guarantee that the occupants of four handicapped placarded vehicles can use Lechuza Beach. Practical access for everybody else depends on parking on Broad Beach

6. Determining if there has been an implied dedication of a public easement along this driveway is beyond the scope of our grant from the Coastal Conservancy. Even if there were such an implied dedication, proving such is time-consuming and very costly. MRCA is not currently funded to undertake this litigation even if colloquial evidence pointed to an implied dedication.

Road which is under the control of the City of Malibu, both in terms of what parking restrictions it applies and whether it requires the removal of encroachments on the public right-of-way.

Disabled Access

On this issue there is at least intellectual agreement, *i.e.*, that there should be accessibility for all levels of ability groups. But the practicalities of implementation just can't be resolved in the next two months. Here are the issues:

(1) *Disabled parking on Lot A (East Sea Level Drive)*. The MRCA has decided right to four handicapped parking spots. MRCA has agreed to further limit the number to two. MEHOA has said that the placement of these spaces needs to vary from time to time up and down East Sea Level Drive so as to avoid impact of the handicapped parking on any one group of homeowners. Doing so poses practical problems, but aside from this, there is question of what a disabled park patron does once he/she arrives at the designated parking space. MEHOA has insisted that for safety reasons a turn-around must be maintained at the end of East Sea Level. In theory one could maintain such a turn-around and still provide for a specially developed handicapped viewing area—that is if the easement MRCA owns (40 feet) actually was 40 feet wide. But of course, as everybody knows, MEHOA members have encroached on the easement so that now it is so narrow that “no parking-turn around only” signs have been posted. To make up for the encroachments on MRCA's right of way, MRCA may have to ask the seaward lot owners to grant an easement to MRCA for building handicapped viewing platforms and/or other handicapped modifications. Because of the other access limitations we are rethinking the wisdom of giving up one-half of the handicapped parking spaces.

(2) *Disabled access through the MEHOA gate on Lot A (East Sea Level Drive)*. Some sort of reservation system needs to be devised whereby either an employee of MEHOA or MRCA can be present to let the vehicle through, or a one-day access card mailed to the disabled person. From our initial contacts with the “differently-abled” community, many persons will want to take advantage of this opportunity because it also allows family members of the disabled person to also share in a “regular” recreational pursuit. MRCA does not have funding to publicize, staff, and otherwise implement the program, nor do we think we could organize this prior to January 1.

Alternative Disabled Access

This is an idea explored by our consultants and involves using Lot “1” for both disabled and regular access, and developing a boardwalk along the edge of the bluff for the length of the beach.

This idea has not yet been vetted with MEHOA, but before it is rejected out of hand, we should consider the advantages:

- It would allow more, and more equitable, handicapped access. Instead of a complicated procedure, handicapped parking could be reserved along Broad Beach Road without the need for a complicated reservation system or employees opening the gate for each handicapped visitor.
- A funicular system could be designed to convey disabled persons to and from the beach level. Once they arrive at the beach, there would be something for them to do other than be stationary on a platform.
- Being able to go the length of the beach simulates as much as possible the recreational experience of other beach users.
- It avoids impacts of vans driving up and down the narrow confines of East Sea Level Drive.

My first thought was that the Coastal Commission would never permit any kind of structure on the beach, no matter for what good purpose. However, our engineering consultant, Cash & Associates, has designed similar fully-accessible walkways at the Cabrillo Beach Coastal Trail in San Pedro, Mariner's Mile Waterfront Walkway in Newport Beach, and Avalon Harbor (quite similar to what we might propose), all of which have been approved under the Coastal Act.

The only disadvantage of this is that the handicapped parking spaces contemplated along Broad Beach Road are not now physically possible because of encroachments by the Bertinelli property's landscaping and other encroachments. It is our understanding that the City of Malibu owns the easement to Broad Beach Road and we have no indication (one way or another) that Malibu will require the removal of these encroachments.⁷

Restrooms

Your October 3 letter mentions that the overall management plan should include proposed structures, and restrooms were mentioned on the list. Don't count on going potty at

7. The attached letter to Hon. Ken Kearsley requests expedited action from the city to remove the encroachments so that MEHOA and MRCA can submit a public works project application consistent with the Coastal Commission request to address the parking issue.

Lechuza. While MRCA staff does believe that all public recreational facilities should have handicapped accessible restrooms, if only of the chemical type, this was such a “hot button” issue for MEHOA that we agreed to defer to them at this point in the spirit of moving on to areas where agreement was possible.

Public Parking Improvements

Your letter also mentions public parking improvements. Other than the possibility of handicapped spaces on East Sea Level Drive (provision of which is dependent on realigning the easement seaward to compensate for the encroachments), because Malibu owns the Broad Beach Road right of way, we have no way of providing for additional parking other than by requesting that Malibu take action to remove the encroachments. (See fn. 7 infra.)

Level of Assurance Required by Coastal Commission that Plan will be Implemented

In the October 3 letter you couch the “after the fact” permit application in the context of a comprehensive public access/management plan that mitigates the impact of the gates on public access. To what extent will the Commission require any probability of implementing such plan? If all we and MEHOA have to do is submit a plan, then difficult as it may be, it’s far easier than giving any assurance that the plan, as the saying goes, has a snowball’s chance in Hell of being implemented.

The reason is money. Beyond a grant for planning studies from the Coastal Conservancy, MRCA has no money to pay the costs of making a permit application, say nothing of money to actually carry out the improvements.

We do not want to be accused of writing up a fancy plan just in order for the gates to stay up, knowing full well that there is neither the money nor the will to implement it. The result of that would be gates stay, no public improvements, and therefore no mitigation for the access impacts of such gates. On the other hand, we have no power to force anybody to give us money to implement even the best intentioned plan.

So, if the Commission sees the plan as a mitigation for the access impediments caused by the gates, then a good faith submission on our part could be done only after ascertaining if there is going to be funding support for the capital expenditures required to implement the plan. I don’t think there is a way of ascertaining this before January 1, and probably not until several months thereafter. The process of making a grant application to the Coastal Conservancy and other funding sources can be a complicated and time consuming procedure.

Proposal

Much as I don't like writing it, and you won't like reading it, there is no way this beach is going to be opened up to full public access by next Summer. We can, with the full cooperation of all involved parties, make serious strides in that direction, but if there is litigation, even if the litigation is resolved in favor of beach access, then it will be Labor Day of 2010 before the beach can be fully accessible. That seems a long way away, but when you read the time-line below, I think you will see this is a reasonable date, given all that needs to be accomplished.

But our proposal should not be read as a prescription for unreasonable delay. A key factor in the proposal we are making is a series of trip-wire deadlines, the default of any of which, and the gates go down on MRCA property and the Coastal Commission assumes jurisdiction for full enforcement of all unpermitted developments, including the MEHOA gates and right of way encroachments on Broad Beach Road.

Here is how it could work:

- **November 15, 2006:** Coastal Commission agrees to postpone January 1 date for submission of complete application by six months, *i.e.* to June 1, 2007. During this time all studies, reports, and preliminary engineering plans are ongoing. Consultation with Coastal Commission staff and City of Malibu and other actions as detailed below.
- **March 1, 2007:** By this date MEHOA and MRCA agree on a comprehensive management and improvement plan. Application is made to Coastal Conservancy to fund permit application costs, working drawings, and capital improvements. *If no agreement, then MRCA takes down pedestrian gates at East Sea Level, Lot "I" and West Sea Level (if survey confirms that MRCA owns that gate). Coastal Commission or Malibu begins enforcement action against MEHOA for removal of vehicle gates.*
- **March 15, 2007:** Preliminary determination by Coastal Conservancy Executive Officer whether to recommend approval of grant. *If the Coastal Conservancy Executive Officer recommends against funding the grant, then the MRCA takes the pedestrian gates down and Coastal Commission proceeds as per above with respect to the vehicle gates. Rationale is that access improvements are mitigation for loss of public access. If those improvements aren't going to come about, then unpermitted gates should be removed.*
- **May 2007:** Coastal Conservancy votes on funds for permit application, working drawings and contingent commitment to fund capital improvements upon final approval of public works permit and culmination of judicial proceedings. *If grant is*

not approved, then gate removal procedures are instituted as per above.

- **June 2007:** If grant is approved, and upon signature of grant agreement, work begins on application for public works project to be filed with City of Malibu; CEQA process begins (many studies currently ongoing can be used in the CEQA process).
- **July 2007:** Application filed with City of Malibu.
- **July-October 2007:** Consideration of application by City of Malibu and certification of CEQA document (if Negative Declaration or Mitigated Negative Declaration) no later than August 31, 2007. If a full EIR is required, then process could take an additional nine months to a year. Additional funding from Coastal Conservancy would be required to prepare a full EIR. *If an EIR is required and no funding is forthcoming to produce such a document, the MRCA takes the gates down and Coastal Commission assumes jurisdiction of enforcement actions. Expect an appeal to the Coastal Commission from the unsuccessful party at the local level.*
- **November 2007-February 2008:** Coastal Commission consideration of appeal.
- **March 2008-May 2008:** Superior Court consideration of mandate action. *If Coastal Commission denies permit then MRCA takes down pedestrian gates and Coastal Commission assumes responsibility for enforcement.*
- **June 2008-August 2009:** Court of Appeal consideration of mandate appeal. Appeals are slow, anywhere between a year and eighteen months is standard.
- **September-October 2009:** If permit is upheld, construction contract goes to bid. *If permit is overturned, then MRCA takes down pedestrian gates and Coastal Commission assumes jurisdiction for removal of vehicle gates and encroachments.*
- **November 2009:** Contract let, contract award appeal period.
- **December 2009-August 2010:** Construction of improvements.
- **Labor Day 2010:** Dedication of improvements.

Discussion

This time-line contemplates over a year of litigation, which in itself is not unusual for coastal permits involving the high level of controversy such as is present at Lechuza Beach. While the good efforts of all parties should not be discounted, a prudent assessment of the situation must allow for the strong possibility of litigation. This project has already spurred

three lawsuits. Given the likely passage of Prop. 90 the potential for a lawsuit trying to exploit this whole new world of litigation is strong. After all, Michael Berger, one of the foremost property rights lawyers in California is counsel to MEHOA.

Assuming that the court does not issue a preliminary injunction against the project, it would be possible for MRCA to proceed to construction before final resolution of the lawsuit. However, based on the experience of MRCA and the Santa Monica Mountains Conservancy in the Ramirez Canyon case, going forward in such fashion would be imprudent until all lawsuits are finally resolved. Otherwise pressing ahead risks putting the entire public investment in the infrastructure at risk.

Again, I want to emphasize that this letter is intended to stimulate discussion. I have attempted to be realistic without being cynical about the prospects for agreement. Where I'm wrong, I hope to be instructed. But if I'm right, then we all have a lot of work to do, and we should be about it.

Sincerely,



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

cc: Interested Parties