RICHARDS | WATSON | GERSHON
ATTORNEYS AT LAW – A PROFESSIONAL CORPORATION

355 South Grand Avenue, 40th Floor, Los Angeles, California 90071-3101
Telephone 213.626.8484 Facsimile 213.626.0078

richard richards (1916–1988)
glenn r. watson (retired)
harry l. gershon (1922—2007)

steven l. dorsey
william l. strausz
mitchell e. abbott
gregory w. stepanicich
rochelle browne
quinn m. barrow
carol w. lynch
gregory m. kunert
thomas m. jimbo
robert c. ceccon
steven h. kaufmann
kevin g. ennis
robin d. harris
michael estrada
laurence s. wiener
steven r. orr
b. tilden kim
saskia t. asamura
kayser o. sume
peter m. thorson
james l. markman
craig a. steele
t. peter pierce
terence r. boga
lisa bond
janet e. coleson
roxanne m. diaz
jim g. grayson
roy a. clarke
william p. curley iii
michael f. yoshiba
regina n. danner
paula gutierrez baeza
bruce w. galloway
diana k. chuang
patrick k. bobko
norman a. dupont
david m. snow
lolly a. enriquez
kirsten r. bowman
billy d. dunsmore
amy greyson
deborah r. hakman
d. craig fox
susan e. rusnak
g. inder khalsa
ginetta l. giovinco
trisha ortiz
candice k. lee
david g. alderson
melissa m. crosthwaite
maricela e. marroquín
gena m. stinnett
jennifer petrusis
steven l. flower
christopher j. diaz
debbie y. cho
geoffrey ward
erin l. powers
toussaint s. bailey
whitney g. mcdonald
serita r. young
veronica s. gunderson
shiri klima
diana h. varat
katrina c. gonzales

of counsel
mark l. lamken
sayre weaver
jim r. karpiak

san francisco office
telephone 415.421.8484

orange county office
telephone 714.990.0901

January 15, 2010

VIA ELECTRONIC MAIL

Ms. Stephanie Danner
Senior Planner, Planning Division
City of Malibu
25815 Stuart Ranch Road
Malibu, CA 90265

Mr. Steve Hudson
District Manager, South Central District
California Coastal Commission
89 South California Steet, Suite 200
Ventura, CA 93001-2801

Mr. N. Patrick Veesart
Enforcement Superior
California Coastal Commission
89 South California Street, Suite 200
Ventura, CA 93001-2801

Re: Unpermitted Gate, Lot I, (Bunnie Lane) Tract 10630, Lechuza Beach, Response to Susan Hori Letter of January 8, 2010

Dear Ms. Danner, Mr. Hudson, and Mr. Veesart:

This firm serves as special counsel to the Mountains Recreation and Conservation Authority (Authority). By letter dated January 11, 2010, MRCA Executive Officer Joseph T. Edmiston responded to the January 8, 2010 letter to you from attorney Susan Hori concerning removal of the unpermitted gate on Lot "I" of Tract No. 10630, the "Bunnie Lane" access to Lechuza Beach. Because of our familiarity with the Lechuza Beach issues, Mr. Edmiston has asked that we also separately respond to two specific contentions in Ms. Hori's letter.

<u>The Letter Incorrectly Describes the Status of Lot "I"</u>

On Page 3 of her letter, Ms. Hori incorrectly asserts that removal of the unpermitted gate on Lot "I" conflicts with MRCA's Grant of Easement. She states "As the Coastal Commission, City and MRCA are all well aware, MRCA's Grant of Easement is for 'public pedestrian ingress and egress during daylight hours' only." This, unfortunately, confuses the property interests held by MRCA. Lot "I" is <u>not</u> subject to the Grant of Easement or to a "daylight hour" limitation.

MRCA is the fee owner of Lot "I" and the gate that was removed. By Grant Deed dated May 6, 2002, Lechuza Villas West, LLC, and Lechuza Villas West, L.P., conveyed fee title to Lot "I" to MRCA, along with Lots 140, Lots 142-156 inclusive, Lot U, Lot 76, that portion of Lot A located easterly of the southerly extension of the easterly property line of Lot "I" and westerly of the northerly extension of the most westerly property line of Lot 155. Contrary to Ms. Hori's letter, there is no restriction of any kind on public pedestrian ingress or egress over Lot "I".

The Grant of Easements to which Ms. Hori refers does not apply to Lot "I". It pertains only to the paved portions of Lot A (West and East Sea Level) which Lechuza Villas West, L.P., conveyed to MEHOA by quitclaim recorded September 4, 2002. MEHOA took subject to all easements, servitudes, appurtenances, rights and interests conveyed to the MRCA. Those interests, which MRCA acquired from Lechuza Villas West, L.P., by Grant of Easements, dated May 1, 2002, included the following:

1. An easement to construct and/or control and maintain the existing pedestrian access gates on Lot A and install a new gate at the northerly boundary line of West Sea Level.

2. The right to open the gates during daylight hours provided the gates are locked at night.

3. A non-exclusive easement for pedestrian ingress and egress during daylight hours to any and all properties owned by MRCA in the Tract.

4. A non-exclusive easement for ingress and egress for emergency, maintenance and service access.

5. A non-exclusive easement for vehicles driven or occupied by persons with disabilities. The specific location of the spaces shall be approved by Grantor and approval cannot be unreasonably withheld.

6. A non-exclusive easement for four parking spaces for disabled person.

Thus, the non-exclusive easement "for pedestrian ingress and egress during daylight hours" referred to in Ms. Hori's letter applies only to the paved portion of Lot A (West and East Sea Level Drive), not Lot "I".

Removal of the Unpermitted Gate Did Not Require a Coastal Development Permit

Ms. Hori's letter also incorrectly argues that removal of the unpermitted gate on Lot "I" violates the Coastal Act. If the gate on Lot "I" had been lawful to begin with, its removal might well constitute "development" under Section 30106 of the Coastal Act which, unless exempt or subject to a waiver, requires a coastal development permit (CDP). But it was not. The flaw in Ms. Hori's argument is that this gate was unpermitted and unauthorized from the start.

In two letters, Mr. Edmiston recounted the Commission staff's frustration with the persistence of the unpermitted gates at Lechuza and the Authority's desire to avoid the initiation of an enforcement action. (See letter from Mr. Edmiston to Mr. Hudson, dated 1/5/10; letter to Ms. Danner and Messrs. Hudson and Veesart, dated 1/11/10.) The issue of whether a permit would be required was explored with the Commission's staff, and the unpermitted gate on Lot "I" was removed only after confirmation that a CDP is not required. We understand that the Commission staff determined that removal of the unpermitted gate would not adversely impact coastal resources and would enhance public access.

Under the Coastal Act, unpermitted development can be removed in one of four ways that would not necessarily require a CDP: (1) voluntarily by the property owner; (2) by injunction, as ordered by a court (Pub. Res. Code § 30803); (3) by cease and desist order, as issued by the Coastal Commission (Pub. Res. Code § 30810); or (4) by restoration order, as ordered by the Commission or a local government implementing a certified LCP (§ 30811).

There are good reasons why voluntary removal of unpermitted development is permitted without a CDP. First, the enforcement provisions of the Coastal Act provide for daily fines and penalties, among other remedies. (*See* Pub. Res. Code § 30820(b) [civil liability may be imposed by the superior court in any amount which shall be not less than $1000 nor more than $15,000 per day for each day in which the

violation persists].) Voluntary removal permits an alleged violator to limit or eliminate the possibility of monetary penalties that would continue to accrue if a permit were required.

Second, the CDP process often takes considerable time to complete. This would be especially significant if an alleged violator were required to pursue a CDP first from local government and then from the Commission, in the case of an appeal. This scenario would permit unpermitted development to remain in place for perhaps a very long time – the likely consequence of Ms. Hori's argument. In fact, to require a CDP to remedy a violation could encourage violations and reward violators because it would allow unpermitted structures or other development to remain in place, perhaps with serious continued impacts to coastal resources, for long periods of time.

An exception is where the removal or remediation of the violation itself may adversely impact coastal resources. For example, the restoration of a wetland that has been graded or filled or an ESHA that has been disturbed might require further development activities and consequently, if not otherwise addressed by a restoration order, a CDP could be required to ensure conformity with Coastal Act policies or, if applicable, the provisions of a certified LCP.

Here, as the Commission's staff determined, removal of the unpermitted gate would not have adversely impacted coastal resources. Consequently, no CDP was required for MRCA to remove the gate from its fee-owned property.

Certainly, if you have any further questions relating to the gate removal, please do not hesitate to contact either Mr. Edmiston or me.

Very truly yours,

Steven H. Kaufmann

ccs: MRCA Governing Board Members
Mr. Joseph T. Edmiston
Laurie C. Collins, Chief Counsel, MRCA
Peter Douglas, Executive Director, CCC
Samuel Schuchat, Executive Officer, SCC
Elena Eger, Senior Staff Counsel, SCC
Mary Small, South Coast Manager, SCC
James Thorsen, City Manager, Malibu
Christi Hogin, City Attorney Malibu
Joyce Parker-Bozylinski, Planning Manager, Malibu
Susan Hori, Esq.
Richard Davis, Esq.

10265-0012\1199885v1.doc