



MOUNTAINS RECREATION & CONSERVATION AUTHORITY
5810 Ramirez Canyon Road
Malibu, California 90265
(310) 589-3230 FAX (310) 589-3237

VIA FACSIMILE
(310-457-9428)

ELECTRONIC MAIL
lisap0305@verizon.net

January 5, 2010

Ms. Lisa Pallack, President
Malibu-Encinal Homeowners Association
31824 Seafield Drive
Malibu, California 90265

Your Letters of November 2, 2009

Dear Ms. Pallack:

After thirty years as a public land manager I don't often deal with a wholly unique situation. But your threat to defease a \$9,000,000 public beach acquisition is unprecedented—certainly it has been a prod to my mental acuity—say nothing of stirring a certain ancestral twitch to reach for the claymore.¹

I'm still trying to get my mind around a homeowner's association that has benefitted from a public acquisition, thereby ensuring no development adjacent to their homes, turning around and asserting that the public's use of such property would actually revert it to back to the private ownership of those selfsame homeowners.

This invigorating assertion is fully worthy of the pay of whichever lawyer concocted it.

Immediately after receipt of your letters I ordered a top-to-bottom review of all the Lechuza issues. I didn't think that the Malibu-Encinal Homeowners Association (MEHOA) would send such a letter unless there was something in our previous analysis that we missed. So in the two months since delivery of your letters the Authority has reviewed the entire file, the litigation and court decisions, and the long history of our attempts to work with MEHOA going back seven years. At some expense we have consulted with outside counsel, as well as with the Authority's counsel. After all that expense and effort we have concluded, with apologies to Gertrude Stein, that there is no "there there" to any of your assertions.

¹ Not for nothing is the motto of Scotland *Nemo me impune lacessit*.

Ms. Lisa Pallack
January 5, 2010

Page 2

I called you on December 30, 2009 to find out what was behind this dramatic escalation. You declined to speak to me but directed me instead to your attorney Rick Davis. He is a capable exponent of MEHOA's position, and I appreciate his making himself available for an extended conversation during the "end-of-the-year" rush.

We had a cordial conversation as these things go, but there seems to be a profound gap between MEHOA's understanding of the legal situation and that which we have been advised. I got the distinct impression that you are serious that if we don't "correct" what you see as the so-called "defaults" you really may sue to "terminate MRCA's rights" as per your letter.

This isn't the trajectory I anticipated. My last letter, September 1st instant, addressed to your predecessor president of MEHOA, was directed to what we thought was the last outstanding issue, namely parking for persons with disabilities. In that letter we sought to have you give us more than a hand-drawn sketch for an alternative. Furthermore, we went to great length to discuss the actual ADA requirements and how they could be implemented.

Imagine my surprise when the next correspondence from MEHOA doesn't deal with our disabled persons compliance concerns. Instead, in two letters, you as the new President of MEHOA, assert that if we don't do what you want, the Malibu-Encinal Homeowners Association "reserves the right" to take away the Authority's over \$9,000,000 land acquisition and convert it into MEHOA ownership. This because you allege that the Authority hasn't complied—according to you—with MEHOA's CC&R's and the grant of easements.

Now we have moved from how to deal with disabled persons access to MEHOA trying to take away the public property altogether?

Just as President Kennedy defused the Cuban Missile Crisis by declining to respond to Krushchev's most provocative message, I chose to engage your attorney only with the immediate issue of disabled persons access, not with the most provocative issue of taking away Lechuza Beach from the public.

My conversation with attorney Davis was disappointing in this regard. He flatly said that the Americans with Disabilities Act doesn't apply. I reminded him of our consultant's conclusion that it did, and he said they were wrong and that MEHOA would help us by providing legal analysis of why the Authority didn't need to comply, thereby providing us with "cover."

Much as we would like to compromise with you in order to seal a deal, as a public agency, the Authority isn't interested in trying to find "cover" to weasel-out of providing real and substantive disabled persons access.

In this respect we believe you fundamentally misunderstand California law and the mandate that public agencies at all levels of government are under. Even if—and we totally disagree—attorney Davis is right that the American's With Disabilities Act (ADA) doesn't by its own terms apply, California law has made ADA fully applicable. The California Disabled Persons Act incorporates ADA (Civil Code § 54(c).)

Moreover, there is no legerdemain that even the highest paid² lawyer can conjure that will overcome the explicit words of Government Code § 4450(a):

It is the purpose of this chapter [Chapter 7 of Division 5 of Title 1 of the Government Code] to ensure that all buildings, structures, sidewalks, curbs, and related facilities, constructed in this state by the use of state, county, or municipal funds, or the funds of any political subdivision of the state shall be accessible to and usable by persons with disabilities.

Maybe you think we are being “stiff necked” about it, but actually we are just trying to fully comply with the law. Not just a few parking spaces, but an ADA compliant access way to overlook the Authority owned beach and to the actual beach conveyance device (probably some combination of temporary ramp, wheelchair elevator, and/or beach wheelchairs).

Furthermore, trying to avoid full ADA compliance, you are pitching to the wrong batter. My recently deceased step-son (who lived with us for 24 of his 34 years) was handicapped, yet because of ADA he was able to enjoy many amenities of life otherwise foreclosed to him. So when Mr. Davis suggests that “in the spirit of compromise” the Authority should graciously accept your lawyer's arguments, that isn't a rhetorical strategy that will work with me, and I doubt that it will get you any votes on the Mountains Recreation and Conservation Authority governing board.

Turning to MEHOA's threat to re-privatize the beach:

At this point, given the impasse, maybe I should say “go for it” and we see each other in court. However, our posture is solution not suit. Please read this letter in that vein.

No surprise to you that we aren't perfect. I want to acknowledge that the one instance of burying a large tire in the sand was wrong. As soon as management became aware of it

² Talking with your lawyer was a tad frustrating when I advanced arguments from the Authority's counsel but was rebuffed as to substance by his saying that “all of our attorneys” at Greenberg Traurig agreed with him. It has yet to be shown that unanimity at this law firm is dispositive.

(from you—and thank you) the action was reversed—that same day—and the responsible maintenance person was appropriately admonished. And as for the dead seal you speak of, our actions were fully consistent with policy of the National Marine Fisheries Service.³

Before engaging in a point-by-point response, I want to share with you the overarching view of every one of our lawyers and the view of the agencies involved in this issue: MEHOA sued to prevent the acquisition and lost in court; almost eight years after the purchase you can't go back and say that the public has only those rights that MEHOA will recognize.

In *MEHOA v. Lechuza Villas West* (2002) Case No. B150612 [commonly referred to as *MEHOA II*], the 2nd District Court of Appeal said (slip opinion p. 4): "MRCA's purchase would ensure the beachfront lots would be permanently used as public beaches." The court went on to say that the assertions of right to control the beach and uses were barred by the decision in the prior lawsuit that you also lost [*MEHOA I*]. The Court of Appeal summarized your case as follows:

MEHOA's complaint in *MEHOA II* alleges, in part, the CC&R's and express easements applicable to Lechuza's properties prohibit opening the beach, private road and pedestrian walkways to public access MEHOA also alleges the CC&R's prohibit installation or removal of any improvements to the private road and pedestrian walkways (for example, gates, sidewalks or curbs) without MEHOA approval. MEHOA thus asserts a right, on behalf of its members, to make specific use of and control over the beachfront lots, the community beach, the private road and the pedestrian walkways to the beach. (Slip opinion p. 9.)

The court specifically found that these allegations were barred by the doctrine of *res judicata* and threw your case out of court. That decision is the law. MEHOA sued to stop the acquisition of the beach and lost. The ocean air at Lechuza must have an amnesia provoking quality, otherwise why would MEHOA think it can take back the property because of a purported violation of the very CC&R's the court barred you from enforcing.

First of all, the Malibu-Encinal Homeowners Association does not own the rights to which it purports. Lechuza Villas West by conveyance of Norman Haynie as General Partner and President, granted all reversionary rights to the Mountains Recreation and Conservation Authority by documents recorded in the Official Records of Los Angeles County, Nos. 02-1224374 and 02-2753558. You may wish to refer to your title documents. Check out that "notwithstanding clause" that references the grant of first right of purchase to Mountains Recreation and Conservation Authority. For valuable consideration the Mountains

³ Telephonic communication with Joe Cordero, wildlife biologist, NMFS, Long Beach, California.

Recreation and Conservation Authority purchased the reversionary rights expressly to deal with a potential situation like the one presented now. MEHOA has no reversion rights against the Mountains Recreation and Conservation Authority.

In addition to being barred from enforcing the CC&R's against the Authority's real property interests, MEHOA is also barred from stopping the successor-in-interest [the Authority] from exercising those property rights, viz., to the rights reserved by Marblehead Land Company, which include recreational easements, all littoral rights, all reversionary rights, the right to construct recreational structures at such places as may be selected by Marblehead, its successors and assigns, and access easements over any and all private streets, walks and paths to the recreational structures. The Adamson Land Company, successor to Marblehead, conveyed these property rights to Lechuza Villas West by deed recorded January 10, 1991. The Authority is successor to those rights by deeds recorded in 2002.

The Court of Appeal noted that precisely those rights conveyed to Lechuza Villas West were part of the complaint in *MEHOA II*, which complaint the court found was barred by *res judicata*:

MEHOA also seeks a judicial determination of the rights allegedly conveyed to Lechuza [Villas West] by the properties' former owner, the Adamson Companies, as evidenced in the quitclaim deed recorded on January 10, 1991. In particular, MEHOA contends the CC&R's are binding on Lechuza's lots and prohibit the right to construct structures and engage in activities purportedly conveyed to Lechuza through the 1991 quitclaim deed. (*MEHOA II*, slip opinion, p. 5.)

Secondly, the Authority can at will amend the CC&R's. See ¶ 2(b) of the CC&R's. They permit the Authority to change or modify any restriction affecting Lots 140, 142-156, 76, U, I and the washed out portion of A because the Authority is owner of two-thirds of the area within 300 feet of each of the lots. We have agendized doing just this for a special meeting of the Mountains Recreation and Conservation Authority governing board on January 6, 2010. Copy of notice of this meeting and the proposed resolution has been provided to you separately.

With respect to your purported "Notice of Default" on the Grant of Easements, the Authority categorically rejects each and every one of them. Furthermore such false and inaccurate statements, made with knowing falsehood or reckless disregard of the truth of the matter, constitutes a tortuous slander of title. Specifically in order of your assertions:

- (a) The Authority has maintained all gates to which it is obligated.
- (b) The gate at the end of West Sea Level Drive was nonfunctional and a public

safety hazard when the Authority took title to the property; it was removed upon recommendation of the Chief Ranger of the Authority. Its replacement would require a Coastal Development Permit but because it poses an obstruction to public access, the gate has not been included in the CDP pending with the city of Malibu.

(c) Locking both sides of the gates constitutes a public safety hazard in that members of the public may be “locked in.” Best management practices in such circumstances provide for exit opportunities for members of the public without having to travel almost a quarter of a mile in either direction to the Bunnie Lane exit. Nothing in the CC&R’s, even if they applied to the Authority’s property, requires members of the public to be “locked-in.”

(d) Failure to remove “non-resident” members of the public after sundown is not an obligation of the Authority. We respectfully refer you to the court decisions that deprive MEHOA of any right to enforce your purported CC&R’s against the Authority and any persons who may be using the property thereof. Furthermore, nothing that we see in the CC&R’s, even if they did apply, would require the Authority to eject members of the public.

(e) Failure to limit access to non-residents during daylight hours using bicycles and motorcycles is a peculiar assertion. We are aware of no instance, and none has been reported to us, of motorcycle use. Under the Beach Ordinance motor vehicles are prohibited unless specially permitted. We will enforce this provision. As for bicycles, what’s wrong with bikes; kind of a pinched view of the world where one can’t ride a bicycle down to the viewing area, don’t you think? Legally speaking, nothing in the Municipal Code nor the CC&R’s, even if they were applicable, prohibits bicycles and we see no public policy reason against them. We are aware of only two instances of bicycle use. One, to whom William Keifer objects, is a person that he describes as “homeless” who has accessed the Authority’s easement via bicycle, but other than use of a bicycle, nothing about that person’s conduct is violative of any proscription, notwithstanding Mr. Keifer’s pejorative description of him. The other case is of what our ranger has described as “a retired couple” who ride their bikes to the vista point and observe the Pacific Ocean from such vantage point. There is no violation of any proscription in such conduct.

(f) Notices and signs have been placed consistent with the Authority’s grant of easements and with the rights obtained when the Lechuza lots were acquired.

(g) Finally, MEHOA would seek to “terminate MRCA’s rights” for the offense of submitting a Coastal Development Permit to the city of Malibu allegedly outside the Authority’s rights. We strenuously maintain that each and every portion of the CPD application is within the Authority’s rights. Moreover, in the context of the California Coastal Act of 1976 and the Malibu Local Coastal Program, it is the CDP that will define such rights as the Coastal Act trumps private agreements contrary thereto.

Turning now to your purported “Notice of Default” with respect to the CC&R’s, we must reassert the fact that MEHOA does not have the right to enforce them against the Authority. See *Malibu-Encinal HOA v. Lechuza Villas West* (2002) *supra*.

Much of what you assert in this claim is redundant of what you said respecting the grant of easements.

Your claim that signs have been installed without Architectural Committee approval is mooted by the court decision. Moreover, what MEHOA is concerned with isn’t the “look” of the signs, but the content thereof. Architectural Committees don’t get to make public access policy under the guise of whether the signs look pretty.

To the extent that homeowner access has been restricted after sundown it has been done on a non-discriminatory basis for regulatory reasons. With respect to Lot “I” (Bunnie Lane) access is no longer physically restricted for MEHOA members or others as the gate has been removed. We must observe that no member of MEHOA has been cited for presence on the beach after sundown, and indeed, considering that the Authority is only enforcing the Beach Ordinance, no such member will be so cited for presence on or before midnight, and will not be cited after midnight if such persons aren’t “loitering.”

Your “failure to remove the non-resident public” complaint assumes that the Authority has an obligation to remove members of the public from property that they, presumably as taxpayers of the State of California, have paid for through the issuance of General Obligation Bonds. As long as members of the public comply with the Malibu Municipal Code their presence on the beach is legal and the Authority has no right, much less the inclination, to “remove them.”

Finally, what you say about the CDP for Lechuza Beach improvements is totally off base and ignores our repeated efforts to get your assent. Such approval has been unreasonably withheld. MEHOA’s assertion in Susan K. Hori’s letter of August 19, 2007 that approval has been withheld based on noncompliance with an Interim Beach Management Plan is misplaced. Such plan was never approved by the Authority, nor by the State Coastal Conservancy governing board,⁴ nor—most importantly—by the city of Malibu or the California Coastal Commission through the coastal development permit process. The Coastal Commission has stated that such a plan needs CDP approval and we intend, with the approval of the Authority’s governing board, to make a minimum plan a part of the pending application to the city of Malibu. We also observe that the Coastal Commission staff said that the purported “Interim Plan” restricted public access too much. Proceeding with a

⁴ We appreciate Doug Bosco’s personal time and effort toward an interim solution which apparently had MEHOA’s endorsement, but for reasons stated above this interim effort was neither approved by the landowner nor by the necessary CDP process.

Ms. Lisa Pallack
January 5, 2010

Page 8

proposal that would get a staff recommendation of denial would have been a waste of taxpayer's money.

In sum, you may be assured that MEHOA's purported right to invoke a "termination of MRCA's property interests" will be met with vigorous opposition. But that shouldn't be the end of our dialogue, so before you release the forces of litigation, please call me—principal to principal—so we can discuss this without the courtroom hanging over our head.

Contact me at 310-589-3230 x 110 or *via* e-mail at joseph.edmiston@mrca.ca.gov.

Sincerely,



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

cc: MRCA Governing Board
Rorie A. Skei, Chief Deputy Executive Officer, MRCA
Laurie C. Collins, Chief Staff Counsel, MRCA
Paul Edelman, Chief, Natural Resources & Planning, MRCA
Judi Tamasi, Resource Planner, MRCA
Sam Schucat, Executive Officer, SCC
Mary Small, South Coast Manager, SCC
Elena Egger, Staff Counsel, SCC
John Ainsworth, Deputy Director, CCC
Steve Hudson, District Manger, CCC
N. Patrick Veesart, Enforcement Supervisor, CCC
Stefanie Edmondson, Acting Planning Manager, Malibu
Stephanie Danner, Senior Planner, Malibu
Steven H. Kaufmann, Esq.
Rick Davis, Esq.
Michael M. Berger, Esq.
Susan K. Hori, Esq.
Real Support Property Management (on behalf of MEHOA members)
Norman Haynie, General Partner, Lechuza Villas West, LP
William Keifer