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January 29, 2010

N. Patrick Veesart
Enforcement Supervisor
California Coastal Commission
South Central Coast Area
89 South California Street, Suite 200
Ventura, CA 93001

Reference: Your notification and analysis of potential Coastal Act violations in connection with gates, signs and ROW encroachments on Broad Beach Road and Sea Level Drive in Malibu (Lechuza Beach)

Your file No. V-4-04-005

Dear Mr. Veesart:

I write on behalf of the City and in response to your letter dated January 15, 2010, addressed to City Code Enforcement Officer Lisa Tent.

Your letter to the City was misidentified as a Notice of Violation. A notice of violation, of course, is a notice that is sent to a violator demanding that he or she correct the violation. Your letter was instead an analysis of your understanding of the facts and conclusion that the placement of two gates and signs and unspecified encroachments into the public ROW on Broad Beach Road violate the Coastal Act and the Malibu's certified LCP and a request, pursuant to Public Resources Code section 30809, that the City take enforcement action with respect to the alleged violation.

As a prosecutor, I am mindful that a fair and neutral assessment of all available evidence and facts must precede the decision of whether to prosecute a violation of law. The recitation of facts set forth in your January 15 letter appears skewed toward a conclusion and does not, in my view, fairly assess the circumstances surrounding the gates and signs.[1] For example, evidence suggests that the original gates were erected before the adoption of the Coastal Act. If so, this eliminates the issue of whether those gates should have had a coastal development permit. Presumably, the same reasoning that would have made the replacement of the wrought iron gates exempt in 1993 would have led to the conclusion that the replacement of the wooden gates with iron ones was exempt in 1977. Surely, the analysis does not hinge on the material out of which the gates are made; rather, the question is whether the original gates required a CDP. If not and replacement of existing structures is exempt from CDP requirement, then the law would not support the City's prosecution.

I agree with you that the lynchpin of this analysis is whether a Coastal Development Permit was required for the erection of the original gates. It is possible that the Coastal Commission staff did not pursue the issue after the staff first raised it 33 years ago because the staff then determined that its 1977 notice did not take into account the fact that the project merely replaced existing structures and was thus exempt from the CDP requirement, which would be consistent with the staff's analysis 16 years later. More information is required to determine whether the original gates, which have been replaced twice, required a permit; however, it would appear not.

I am also concerned that the Coastal Commission staff's actions have given rise to an estoppel defense by MEHOA. I would need more information to evaluate that issue but your letter describes a number of communications that may have led MEHOA to believe that the matter was resolved in 1977 and again in 1993.

As you know, the LCP was adopted and certified by the Commission in 2002. The subject gates pre-existed the adoption of the LCP. One would assume that the Coastal Commission adopted and certified an LCP that was entirely consistent with and advanced

[1] Signs are mentioned in your letter's reference line and in passing on Page 2; however, you offer no specific information about the alleged violation relating to the signs in particular.

the goals of the Coastal Act. The LCP did not require that property owners obtain CDPs for then existing structures. The LCP regulated new development.

In any event, with the information provided in your January 15 letter, I believe that I would be hard pressed to convince a jury that an operable gate that opens and closes, provides pedestrian access, and which is marked with a sign inviting the public's entrance during daylight hours interferes with public access. Many public accessways have operable gates. A locked gate or other barrier would be unacceptable.

With respect to the encroachments into the public right of way, your letter did not provide sufficient information to enable the City to evaluate the alleged violations. The City will investigate encroachments into the public ROW. Please provide more specific addresses and any information that you have collected with respect to the encroachments, including when and by whom they were installed. Also, please provide a copy of the 2007 MRCA survey to which you refer in your letter and indicate exactly which of the identified alleged encroachments you believe are still at issue.

Finally, please note that a general accusation that violations are present on Broad Beach is inadequate for the City to respond or to meet your preliminary obligation to request enforcement under section 30809. More importantly, please note that while you continue to assert that the Commission will "assume jurisdiction" you have not provided the City the facts that are required to confer jurisdiction to the Commission or the Executive Director under the Coastal Act. Specifically, the Coastal Act only authorizes Commission or Director enforcement with respect to an "alleged violation which could cause significant damage to coastal resources." To my knowledge, but for the MRCA's failure to repair the storm damaged accessway, Lechuza Beach has been and continues to be open to the public and, while there may be issues with respect to encroachments or permits for 35+ year old structures, no credible threat of "significant damage" to a coastal resource exists.

Accordingly, the City looks forward to working with the Commission in staff toward resolving this lingering issue. I note that the MRCA has failed to provide a complete application for a management plan. As you appear to have developed a productive working relationship with the MRCA's staff, I urge you to use your good

offices to encourage the MRCA to complete its management plan and submit it to the City.

Feel free to contact me or Lisa Tent (310-456-2489 x358) should you wish to discuss this matter further. I have copied this letter to the people to whom you sent your January 15, 2010 letter and to the attorney for MEHOA who requested a copy of any response that the City sent.

Very truly yours,

Christi Hogin
City Attorney
City of Malibu

cc: Lisa Tent, Code Enforcement Officer
John Ainsworth, Deputy Director, CCC
Lisa Haage, Chief of Enforcement, CCC
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