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***NO FEE***
***Pursuant to Government Code Section 6103***

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

| | |
|---|---|
| **CITIZENS FOR THE RESPONSIBLE USE OF CARBON AND LA COSTA BEACHES, an unincorporated association,**<br><br>Plaintiff and Petitioner,<br><br>**v.**<br><br>**SANTA MONICA MOUNTAINS CONSERVANCY, a governmental entity; MOUNTAINS RECREATION AND CONSERVATION AUTHORITY, a local government public entity; AND DOES 1-25, inclusive,**<br><br>Respondents and Defendants. | Case No. 21STCP02371<br><br>**NOTICE OF RULING ON MOTION FOR PRELIMINARY INJUNCTION**<br><br>Hearing:<br>Date: November 30, 2021<br>Time: 9:30 a.m.<br>Dept: 82<br><br>Judge: The Honorable Mary H. Strobel<br>Trial Date: Not Set<br><br>Action Filed: July 21, 2021 |

NOTICE IS HEREBY GIVEN that, on November 30, 2021, the Court in the above-entitled matter held a hearing on petitioner and plaintiff Citizens for the Responsible Use of Carbon and La Costa Beaches' motion for a preliminary injunction. Petitioner appeared by and through its attorneys of record, Alan R. Block and Michael N. Friedman. Respondent and defendant Santa Monica Mountains Conservancy appeared by and through its attorney of record, Deputy Attorney General Mitchell E. Rishe. Respondent and defendant Mountains Recreation and Conservation Authority appeared by and through its attorney of record, Angelica Ochoa.

Following oral argument, the Court DENIED the motion and adopted its tentative ruling as the final ruling on the motion. A true and correct copy of the Court's tentative ruling, adopted as its final ruling, is attached hereto as Exhibit A.

Dated: November 30, 2021

Respectfully submitted,

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Attorney General of California
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# EXHIBIT A

**DEPARTMENT 82 LAW AND MOTION RULINGS**

Hon. Mary H. Strobel

The clerk for Department 82 may be reached at (213) 893-0530.

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**Case Number:** 21STCP02371 **Hearing Date:** November 30, 2021 **Dept:** 82

Citizens for the Responsible Use of Carbon and La Costa Beaches,

v.

Santa Monica Mountains Conservancy, et al.

Judge Mary Strobel

Hearing: November 30, 2021

21STCP02371

Tentative Decision on Motion for Preliminary Injunction

Petitioner Citizens for the Responsible Use of Carbon and La Costa Beaches ("Petitioner") moves for a preliminary injunction commanding Respondents Santa Monica Mountains Conservancy ("SMMC") and Mountains Recreation and Conservation Authority ("MRCA") (collectively "Respondents") to apply for and diligently perform all acts necessary to obtain an emergency permit from the City of Malibu to restore a previously-erected 6-foot high fence along the northerly property line of their vacant lots, commonly known as Assessor's Parcel Nos. 4451-003-900 and 4451-004-900, located between 21746 and 21660 Pacific Coast Highway (on the ocean-side of Pacific Coast Highway between Carbon and La Costa Beaches), and to promptly erect and maintain said fence until they do all of the following:

(a) Submit an application for a coastal development permit ("CDP") to the City of Malibu ("City") and/or any other or additional entitlements required by the City for the installation or construction of temporary or other improvements required by the City, consistent with its certified Local Coastal Program, to open the beach access for daytime use by the public;

(b) Install or construct all improvements authorized by its approved CDP to the satisfaction of the City; and

(c) Comply with all conditions of its approved CDP, including all conditions requiring monitoring, policing and maintenance in the vicinity of the beach access. (See Proposed Order Granting Motion for Preliminary Injunction.)

**SMMC's Evidentiary Objections**

Overruled: 1-3, 5, 6, 8-10, 15, 18, 19, 22, 26, 29-41, 43-48, 51 - 54

Sustained: 4, 7, 11-14, 16-17, 20, 21, 23-25, 27, 28, 42, 49, 50

**Petitioner's Evidentiary Objections**

Overruled: 1-15, 17-20

Sustained: 16, 21

**Background**

SMMC is a state agency that owns and manages property for public recreation. (Pub. Res. Code §§ 33201, 33203.) The MRCA is a public entity established pursuant to the Joint Exercise of Powers Act (Government Code Section 6500 et seq.). (Sandoval Decl., ¶ 3.) Its purpose is the preservation and management of local open space and parkland, watershed lands, trails, coastal accessways, and wildlife habitat throughout Southern California. (Ibid.) These agencies have executed a reciprocal management agreement covering the properties owned by each agency. (Sandoval Decl. ¶ 9.) Under the management agreement, the MRCA

manages SMMC's properties, including the properties at issue here. (Ibid.)

21704 and 21714 Pacific Coast Highway

SMMC owns the two adjacent beachfront parcels of land that are the subject of this litigation. In 2005, the property at 21704 Pacific Coast Highway (the 21704 Parcel) was donated to the State Coastal Conservancy (SCC, a separate state agency) by three beachfront homeowners as a condition of development of their properties by the Coastal Commission. (Sandoval Decl. ¶ 11; Exh. A.) The Coastal Commission approved the dedication of the parcel "for public views and public access." (Id. at ¶ 11, Exh. A at 2.) The Commission's approval stated, in relevant part:

> The entire parcel, as measured from the Pacific Coast Highway right-of-way line seaward to the ambulatory mean high tide line, shall be available for public recreation and both vertical and lateral public access to the beach and ocean on and across the entire site. Any future development or improvements on the parcel will require a new coastal development permit and shall be limited to those improvements necessary to provide adequate public recreation and access. New development such as gates, stairs, fences, signs, and locks may be approved, subject to the issuance of a coastal development permit, if the Commission finds that such improvements are appropriate to regulate public access on the site. (Id. Exh. A at 6.)

In connection with their permit approval, and prior to the transfer of the property to the SCC, the beachfront homeowners erected a wrought-iron fence with a gate, which still remains on the property. (Id. ¶¶ 11, 26, Exh. H.)

In or about 2003 the SCC acquired the adjacent property at 21714 Pacific Coast Highway (the 21714 Parcel). (Sandoval Decl., ¶ 12, Exh. B.) The property was specifically acquired to provide "scenic visual and passive public access." (Id. at ¶ 12, Exh. B at 1.)

SMMC acquired both properties from the SCC in 2018. (Id. at ¶ 13.) At the time of the SMMC's acquisition, public access to the beach through the 21714 Parcel was blocked by a chain link fence, which remained intact until the events occurring in May 2021, as described below. (Id. at ¶ 12; see also Block Decl. Exh. 6 [before and after photos of fence].)

MRCA Removes Illegally Installed Fence

On May 5, 2021, MRCA staff observed construction activity taking place on the 21714 and 21704 parcels. (Sandoval Decl. ¶ 14.) MRCA staff observed that the original chain link fence that spanned the 21714 parcel had been completely removed from the site, and that contractors were installing a new chain link fence with barbed wire arms spanning both the 21714 and 21704 parcels. MRCA staff investigated the matter and determined that neighboring homeowners had contracted to have SMMC's fence removed and replaced with a new chain link, barbed wire fence. (Ibid.) MRCA staff determined that the construction activity had taken place without permission from SMMC, the owner of the property. Further the contractors did not provide a permit from the City of Malibu.

On May 7, 2021, MRCA staff returned to the site to stop the illegal activity taking place on SMMC's property. (Sandoval Decl. ¶ 16.) MRCA staff determined that neighbors of the property had paid for the illegal fence removal and replacement. (Id. at ¶ 17; Ramsey Decl., Exh. A.) On or about May 7, 2021, the MRCA removed the illegally constructed fence from the 21714 Parcel and there is presently no fence blocking beach access from that parcel. (Sandoval Decl. ¶ 18; O'Connor Decl. ¶ 3; Block Decl. ¶ 12 and Exh. 6 [MRCA "fact sheet" that includes before and after photos].) As the homeowners did not remove the wrought-iron fence and gate spanning the 21704 PCH parcel, that gate still remains on the property. (Id. at ¶ 26, Exh. H.)

Petitioner's Allegations of Adverse Impacts from Public Beach Access

As noted, there is presently no fence blocking beach access from the 21714 Parcel. (Sandoval Decl. ¶ 18; O'Connor Decl. ¶ 3; Block Decl. ¶ 12 and Exh. 6 [MRCA "fact sheet" that includes before and after photos].) (Sandoval Decl. ¶ 18; O'Connor Decl. ¶ 3; Block Decl. ¶ 12 and Exh. 6 [MRCA "fact sheet" that includes before and after photos].)

Petitioner asserts that, by not replacing the removed fence, Respondents have allowed the "unrestricted" beach access to the parcels without any public accommodations, including (1) a stairway down to the beach over large boulders which line the northern side of the state-owned lots and serve as a sea wall protecting PCH from wave rush up; (2) any trash cans for beachgoers to discard trash; (3) public restroom facilities despite the nearest public restrooms being at Malibu Pier, 1.7 miles away; and (4) signage warning beachgoers of hazards due to rising tides, informing beachgoers of the demarcation of public and private property, and informing beachgoers of the rules for use of the public beach. (Mot. 2; see Block Decl. ¶ 14; Williams Decl. ¶ 7; Linkon-Fryzer Decl. ¶ 7; Rogers Decl. ¶¶ 3-4; O'Connor Decl. ¶ 9; Rosenthal Decl. ¶¶ 3-5; Smith Decl. ¶ 5.)

Petitioner further asserts that “unrestricted” beach access has caused various adverse impacts, as further discussed *infra*. (Mot. 3-4; see Williams Decl. ¶¶ 8-14; Linkon-Fryzer Decl. ¶¶ 8-11; Rogers Decl. ¶¶ 3-10; O’Connor Decl. ¶¶ 5-7; Rosenthal Decl. ¶¶ 3-5; Smith Decl. ¶¶ 5-7.)

Coastal Commission’s July 28, 2021, Letter

The Coastal Commission acknowledged the MRCA’s removal of the illegal fence and consequent public beach access in a July 28, 2021, letter to SMMC. (Sandoval Decl., Exh. F.) The Commission noted that “the subject CDP Amendments [related to the 21704 Parcel] do not apply to the adjacent beach parcel owned by the SMMC at 21714 PCH (APN 4451-004-900).” (Ibid.) The letter further stated:

> In order to achieve provision of public access at 21704 Pacific Coast Highway, Commission staff is requesting that the existing gate at the site be opened either (1) through the use of a time lock mechanism that would allow the public vertical access to the beach, at a minimum, during daylight hours or (2) simply by ensuring that the existing gate is open and available for public use on a daily basis.
>
> According to information provided to Commission staff, on or about May 5, 2021 , neighboring property owners installed an unpermitted chain link fence with barbed wire on the State-owned beach parcel at 20714 PCH, which is adjacent to the Carbon-La Costa parcel. This unpermitted fence on the State-owned parcel was removed shortly thereafter by Mountains Recreation and Conservation Authority staff on behalf of SMMC. As a result, members of the public are currently able to access the Carbon-La Costa parcel at 21704 Pacific Coast Highway by entering from the adjacent parcel at 21714 Pacific Coast Highway. However, pursuant to Special Condition Three of the aforementioned CDP Amendments, "the entire [subject Carbon-La Costa offsite mitigation] parcel, as measured from the Pacific Coast Highway right of way, shall be available for public recreation and both vertical and lateral public access to the beach and ocean on and across the entire site." Thus, while there is currently access by way of an adjacent parcel, the subject parcel must also be open for public access in accordance with Special Condition Three of the subject CDP Amendments. (Ibid.)

Writ Proceedings

On July 21, 2021, Petitioner filed its petition for writ of mandate and complaint for injunctive relief. The first cause of action is for writ of ordinary mandate pursuant to CCP section 1085. The second cause of action is for nuisance.

In the petition, Petitioner alleges that "MRCA removed all or a portion of the replacement fence and opened the entire subject property to the public without obtaining a CDP [Coastal Development Permit] and while the subject property was undergoing environmental review." (Pet. ¶ 23.) The petition alleges that "[t]he MRCA has a ministerial duty to: (a) undertake only lawful development with all required permits; (b) adequately maintain and safeguard property within its charge; (c) monitor and patrol its property to prevent its unauthorized or illegal use; (d) prevent a use of property charged to it that would cause adverse environmental impacts or nuisance to adjacent private property owners; and (e) comply with all laws, including environmental protection law, affecting the land entrusted to it." (Id. ¶ 24.) The petition further alleges that "[t]he SMMC has a ministerial duty to: (1) apply for and obtain all necessary permits before allowing its agents to perform development on property it owns; (2) supervise and monitor its agents acting on its behalf in connection with the maintenance and use of property it owns; (3) undertake appropriate environmental review before changing the use of property it owns; and (4) terminate or modify any use of property it owns in a manner which does not comply with all applicable law." (Id. ¶ 25.) The petition seeks a writ of mandate compelling Respondents "to restrict public access to the subject property until it has been approved for such use." (Id. Prayer ¶ 1.)

On November 2, 2021, the court stayed the second cause of action for nuisance until the court rules on the first cause of action for writ of mandate. (See LASC Local Rules 2.8(d) and 2.9.)

On September 27, 2021, Petitioner filed its motion for preliminary injunction. The court has received SMMC's opposition, MRCA's joinder in the opposition, and Petitioner's reply.

**Summary of Applicable Law**

The purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits. (*Major v. Miraverde Homeowners Ass'n.* (1992) 7 Cal. App. 4th 618, 623.) In deciding whether or not to grant a preliminary injunction, the court looks to two factors, including "(1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 553-54.) The factors are interrelated, with a greater showing on one permitting a lesser showing on the other. (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley*

(2003) 105 Cal.App.4th 1414, 1420.) However, the party seeking an injunction must demonstrate at least a reasonable probability of success on the merits. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73-74.) The party seeking the injunction bears the burden of demonstrating both a likelihood of success on the merits and the occurrence of irreparable harm. (*Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1571.) Irreparable harm may exist if the plaintiff can show an inadequate remedy at law. (CCP § 526(a).)

**Analysis**

Petitioner's Likelihood of Success – Petition for Writ of Mandate

The petition for writ of mandate is brought pursuant to CCP section 1085.

There are two essential requirements to the issuance of an ordinary writ of mandate under Code of Civil Procedure section 1085: (1) a clear, present and ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right on the part of the petitioner to the performance of that duty. (C*alifornia Ass'n for Health Services at Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 704.) "An action in ordinary mandamus is proper where … the claim is that an agency has failed to act as required by law." (Id. at 705.)

"Normally, mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner. However, it will lie to correct abuses of discretion. In determining whether a public agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld. A court must ask whether the public agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to follow the procedure and give the notices the law requires." (*County of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 654.)

Petitioner "bears the burden of proof in a mandate proceeding brought under Code of Civil Procedure section 1085." (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1154.)

Petitioner Seeks a Mandatory Injunction

The parties dispute the scope of injunctive relief requested by Petitioner. Respondents characterize the motion and petition as asserting that Respondents have a ministerial duty to erect a fence on its property. (Oppo. 11-13.) Petitioner construes the motion and petition differently, stating: "In fact, this case has always been about the SMMC and MRCA complying with the permit requirements of the California Coastal Act for the removal of the replacement fence and, if it wants to open the state-owned lots as a public beach and access, that it provide public accommodations to beachgoers, as may be imposed by the City of Malibu, so that they do not create offsite adverse impacts for nearby property owners." (Reply 5-6.) Petitioner also contends that Respondents have effectively made a decision to open the state-owned lots for public use, and that, in doing so, Respondents "failed to comply with both the Coastal Act's permit requirements and CEQA's environmental review requirements." (Reply 3-4.) Petitioner further states: "While CITIZENS requests that the Court order the MRCA to apply for an emergency permit to reinstall the fence it removed, it is not requesting the Court to order the MRCA to actually rebuild the fence." (Reply 6.)

Despite this characterization in reply, Petitioner specifically requested in the notice an injunction commanding Respondents "to restore a previously-erected 6-foot high fence." (Mot. 2:1-2.) However, other statements in the motion and proposed order indicated that Petitioner also seeks an injunction compelling Respondents to apply for a city permit to rebuild the fence. (See Mot. 13:6-8; see Proposed Order quoted above.)

In either case, Petitioner seeks a mandatory injunction. "The granting of a mandatory injunction pending trial is not permitted except in extreme cases where the right thereto is clearly established." (*Teachers Ins. & Annuity Ass'n v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493.) Moreover, "[t]here is a general rule against enjoining public officers or agencies from performing their duties." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.)

Petitioner's Coastal Act Claim

Petitioner briefly asserts that "removal of the replacement fence and the opening of the beach access to the public constitute 'development' for which a CDP is required." (Mot. 6:3-14 and fn. 6; see also Pet. ¶¶ 23-25.) Relatedly, Petitioner argues that, because improvements to the SMMC's property are included in the Malibu Coastal Access Public Works Plan (PWP), the SMMC "cannot proceed to open the state-owned lots for public access" until the Coastal Commission approves the PWP. (Mot. 7:21-9:2.)

These arguments are not fully developed in the petition, the opening brief, or the reply.

For that reason alone, the court is not persuaded, on this briefing, that Petitioner has a reasonable probability of success. (*Nelson v. Avondale HOA* (2009) 172 Cal.App.4th 857, 862-863 [argument waived if not raised or adequately briefed]; *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282 [same]; *Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 934 [Cal. Rules of Court, Rule 3.1113 "rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the moving party's theories"].)

On the merits, Petitioner does not persuasively show that Respondents had a ministerial duty under the Coastal Act to refrain from removing the illegally constructed fence, or that Respondents presently have a ministerial duty to apply for a City of Malibu permit to erect a new fence pending an application for a CDP.

In support of its Coastal Act claim, Petitioner relies on Public Resources Code sections 30106, 30605, and 30803. Section 30106 defines "Development" under the Coastal Act to include: "[O]n land, in or under water, the placement or erection of any solid material or structure; … grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; …. As used in this section, 'structure' includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line."

Section 30605 defines public works plans under the Coastal Act. As paraphrased by Petitioner, public works plans are a creature of statute which allow public agencies to bypass the permitting authority of local government for public works projects in the coastal zone and confers that authority exclusively on the California Coastal Commission. One of the purposes of a public works plan is to obviate the need for "project by project review" of public works and this is done in order to "promote greater efficiency for the planning of any public works." (See Mot. 7.)

Section 30803(a) specifies the court's authority in a Coastal Act action: "Any person may maintain an action for declaratory and equitable relief to restrain any violation of this division, of a cease and desist order issued pursuant to Section 30809 or 30810, or of a restoration order issued pursuant to Section 30811. On a prima facie showing of a violation of this division, preliminary equitable relief shall be issued to restrain any further violation of this division. No bond shall be required for an action under this section."

As noted by Respondents (Oppo. 13), other relevant provisions include sections 30601 and 30600(d). Section 30601 states, in relevant part, that a CDP shall be obtained from the Coastal Commission for "(1) Developments between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance…. (3) Any development which constitutes a major public works project or a major energy facility." Section 30600(d) states that a CDP is not required for "Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities; provided, however, that if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter."

Here, Respondents contend that removal of the illegally constructed fence constituted "repair or maintenance activities" exempt from the CDP requirement pursuant to section 30610(d). (Oppo. 13.) Petitioner responds only briefly in reply, stating that there is no "legal authority before the Court that permits the replacement of a dilapidated fence on the beach or its demolition to be characterized as maintenance." (Reply 5.) Petitioner's reply argument misconstrues Respondents' actions and is therefore unpersuasive. Respondents did not replace or demolish a "dilapidated fence." It is undisputed that neighbors illegally removed the fence on the 21714 Parcel and erected the new fence. (See Pet. ¶ 19; Mot. 3:1-4; Mot. 11:6-9.) Respondents engaged in permissible "self-help" by removing an illegal, unauthorized structure from SMMC's property. (See *City of Berkeley v. Gordon* (1968) 264 Cal.App.2d 461, 468 ["[i]n California, one remedy available to plaintiff to remove an encroachment is self-help followed by an action against the owner of the encroachment for the reasonable costs of its removal"].) In such circumstances, Respondents have a colorable argument that their removal of the illegal fence was exempt from the CDP requirement as a repair or maintenance activity pursuant to section 30610(d).

In its motion and reply, Petitioner also fails to address the July 28, 2021, letter from the Coastal Commission, which acknowledged the MRCA's removal of the illegal fence and consequent public beach access. Notably, the Commission did not object to the MRCA's removal of the illegal fence, and in fact advised SMMC that the adjacent parcel currently protected by a wrought iron gate "must also be open for public access." (Sandoval Decl. Exh. F.) While perhaps not dispositive, these statements from Commission, which has jurisdiction over the approval of public works plans, weigh against Petitioner's contention that Respondents violated the Coastal Act by removing the illegal fence or have some present, ministerial duty to apply for a City permit to install a new fence.

Petitioner states, repeatedly, that "[o]n or about June 17, 2021, the MRCA announced on its website that it had opened the state-owned lots as a public beach access." (Mot. 2; Reply 4.)

In reply, Petitioner asserts that "a decision was made to advertise the opening of the state-owned lots for public use on the MRCA's website." (Reply 3.) However, it appears those assertions are based entirely on statements taken from a news article and lack sufficient foundation. (See Block Decl. ¶ 13, Exh. 7.)

The reply states that MRCA "posted on its website that new coastal access is now available at Carbon-La Costa Beach. [See, https://mrca.ca.gov/coastal-access/]." (Reply 2.) This evidence was improperly submitted in reply. (See *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) On that site, the "MRCA Stewardship Operations at Carbon-La Costa Beach is listed under "new coastal access" with links to various informational documents including the Coastal Commission's 7/28/21 letter to SMMC, a "Carbon-La Costa Unpermitted Fence Removal Fact Sheet," and presentations to the Coastal Commission. The website information appears to correspond with documents and evidence offered in this proceeding. Other than this listing, the court does not see an "announcement" that MRCA opened the state-owned lots as a public beach access.

The court also notes evidence in the record, including statements from Commission and in the declaration of Petitioner's counsel, that the CDP for the 20174 Parcel already requires public beach access through that adjacent parcel. (See Sandoval Decl. Exh. F; Block Decl. ¶ 7.) Thus, it appears that, in effect, beach access was already available at the location in question. Nonetheless, MRCA's removal of the illegal fence on the 21714 Parcel did, as a consequence, open access to the beach through that parcel. At trial, Petitioner may further develop its claim that this action violated the Coastal Act.

On this record and briefing, Petitioner has not made a strong showing of probability of success on a writ claim brought under the Coastal Act. To support the issuance of a mandatory injunction, Petitioner must show this is an extreme case where the right to the requested in junction is clearly established. Petitioner has not met that burden.

Petitioner's CEQA Claim

Petitioner also seems to contend that Respondents' removal of the illegal fence violated CEQA. (See Mot. 8; Pet. ¶¶ 23-25.) Petitioner cites *Citizens for a Responsible Caltrans Decision v. Department of Transportation* (2020) 46 Cal.App.5th 1103, for the proposition that "[e]xcept as CEQA otherwise provides, CEQA's provisions apply to all discretionary projects proposed to be carried out or approved by public agencies." (Mot. 8.) According to Petitioner, MRCA is engaged in ongoing environmental review for its PWP. (Mot. 8; Block Decl. ¶¶ 10-11, Exh. 4.) Petitioner points out that Respondents did not complete environmental review under CEQA related to the

removal of the illegally erected fence.

These arguments are not fully developed in the petition, the opening brief, or the reply. For that reason alone, the court is not persuaded, on this briefing, that Petitioner has a reasonable probability of success. (*Nelson v. Avondale HOA* (2009) 172 Cal.App.4th 857, 862-863.) While not raised by Respondents, Petitioner also does not allege its compliance with procedural requirements necessary to maintain a CEQA cause of action (See Public Resources Code section 21167 et seq.)

Respondents have a colorable argument that removal of the illegal fence was not a "discretionary project." (See Oppo. 14; *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 270 [defining a discretionary project as one which "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations."].) Petitioner does not respond in reply.

On this record and briefing, Petitioner has not shown a reasonable probability of success on a writ claim brought under CEQA.

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Respondents' Unclean Hands Defense

Respondents contend that Petitioner has unclean hands because "this Court may reasonably presume that the petitioner is comprised of, or financed by, the same neighbors that illegally removed and replaced the Conservancy's fence." (Oppo. 20.) Respondents contend that Petitioner's unclean hands bar any equitable remedy. (Oppo. 18-20.) This argument applies both to the balance of harms, discussed *infra*, as well as to Petitioner's probability of success on a petition for writ of mandate, which is a claim based in equity. (See *Sutro Heights Land Co. v. Merced Irr. Dist.* (1931) 211 Cal. 670, 704-705.)

A party seeking equitable relief must have "clean hands" and inequitable conduct by the party seeking relief is a complete defense. (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 446; *Salas v. Sierra Chem. Co.* (2014) 59 Cal.4th 407, 432.) A plaintiff's "hands are rendered unclean … by any form of conduct that, in the eyes of honest and fair-minded persons, may properly be condemned and pronounced wrongful." (*Bennett v. Lew* (1984) 151 Cal.App.3d 1177, 1186.) The plaintiff must "come into court with clean hands, and keep them

clean," or the plaintiff "will be denied relief, regardless of the merits of his claim." (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) For the doctrine to apply, "there must be a direct relationship between the misconduct and the claimed injuries." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 846, citation omitted.) In other words, "it must pertain to the very subject matter involved and affect the equitable relations between the litigants." (Ibid., citation omitted.) Thus, "[t]he issue is not that the plaintiff's hands are dirty, but rather that the manner of dirtying renders inequitable the assertion of such rights against the defendant." (Ibid.)

Petitioner acknowledges that this action was precipitated by beachfront neighbors illegally removing the fence that separated the SMMC's property from the Pacific Coast Highway and replacing it with an unpermitted fence, all without the permission of, or even notice to, the property owner. (Motion, 2:8-13; see also Petition, ¶ 19.) Petitioner claims not to know the identities of the neighbors that undertook this illegal activity. (Rishe Decl., Exh. A [Response to Special Interrogatory No. 2: "Responding party has no personal knowledge of the person or persons responsible for removing the old fence and replacing it with a new fence."].)

Respondents cite some evidence that two neighbors, Julie O'Connor (personal assistant to Adler) and Douglas Rogers, have submitted declarations in support of the motion and may have participated in the illegal fence removal. (Oppo. 18-19; see Ramsey Decl. Exh. 1 and Sandoval Decl. Exh. E.) In discovery in this action, Petitioner has declined to disclose the names of all of its members. (See Rishe Decl. Exh. A.) If Respondents are able to prove at trial that Petitioner is comprised of, or financed by, the neighbors that illegally removed a fence on SMMC's property and then illegally erected a new fence, Respondents may also be able to prove that there is a direct relationship between misconduct of the Petitioner and the claimed injuries.

At present time, Respondents admittedly cannot prove that Petitioner is comprised of or funded by persons that were involved in the illegal removal of the fence. However, given that discovery is not complete and Petitioner declined to disclose its full membership in special interrogatory responses, the court concludes that Respondents may have at least some probability of proving a defense of unclean hands. The court would reach the same result on this motion even if it is assumed Respondents cannot prove this defense.

Based on the foregoing, Petitioner does not show a very strong probability of prevailing on its writ petition. Even if Petitioner has some probability of success, Petitioner has not shown a "clearly established" right to a mandatory injunction.

<u>Petitioner's Likelihood of Success – Second Cause of Action for Nuisance</u>

On November 2, 2021, the court stayed the second cause of action for nuisance until the court rules on the first cause of action for writ of mandate. (See LASC Local Rules 2.8(d) and 2.9.) Nonetheless, and contrary to Respondents' argument, the court may consider Petitioner's probability of success on the nuisance claim in determining whether to grant a mandatory injunction.

It is unclear whether Petitioner alleges public or private nuisance, or both. (Pet. ¶ 29.) The elements for private nuisance are: (1) Plaintiffs owned or occupied the property; (2) Defendant created a condition that was harmful to health or that was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (3) Defendant interfered with Plaintiffs' use or enjoyment of her land; (4) Plaintiffs did not consent to Defendants' conduct; (5) an ordinary person would be reasonably annoyed or disturbed by Defendant's conduct; (6) Plaintiffs were harmed; (7) Defendant's conduct was a substantial factor in causing Plaintiffs' harm; and (8) the seriousness of the harm outweighs the public benefit of the conduct. (CACI 2021; see *San Diego Gas & Electric Co. v. Sup. Ct.* (1996) 13 Cal.4th 893, 938.)

Under Civil Code section 3479, "anything that 'is' injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property is defined as a nuisance." (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1213.)

Petitioner does not address the nuisance claim in any detail in the opening brief or reply. Nor does Petitioner respond to Respondents' contentions that they are not responsible, under a nuisance theory, for the actions of third parties. (See Oppo. 14-15, citing *Avedon v. State* (2010) 186 Cal.App.4th 1336.) For those reasons alone, the court is not persuaded that Petitioner has a reasonable probability of success. (*Nelson v. Avondale HOA* (2009) 172 Cal.App.4th 857, 862-863; *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].)

Respondents make colorable arguments that Petitioner is unlikely to prevail on the nuisance claim. (Oppo. 14-15.) As in *Avedon, supra*, Petitioner alleges the wrongful conduct of third parties who gained access to public property by an alleged uncontrolled access point. Arguably, the intervening acts of third parties was the proximate cause of the alleged nuisance, not the lack of a fence. (See *Avedon, supra*, 186 Cal.App.4th at 1341, 1345; see also *Martinez v. Pacific Bell* (1991) 225 Cal.App.3d 1557, 1565 [where plaintiff alleged that defendant installed the pay phones that attracted drug dealers who shot plaintiff, court sustained defendant's demurrer to nuisance cause of action, since the "independent intervening acts of others" were the proximate cause of plaintiff's injury].)

The *Avedon* court also held that the State was immune from nuisance liability under Civil Code section 3482, which provides that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." The Department of Parks and Recreation's "operation of the park, including its decision to allow access to the cave and to the road near the cave, fall squarely within its statutory authority." (*Avedon, supra* at 1345.) Similarly, SMMC owns and manages property for public recreation under express statutory authority and, arguably, cannot be liable thereunder for nuisance. (Pub. Resources Code § 33201(a).)

While unclear from the reply, Petitioner may have grounds to distinguish *Avedon* and related case law, including because Respondents allegedly have failed to provide sufficient public accommodations at the public beach at issue. However, such arguments have not been sufficiently developed in Petitioner's papers.

Based on the foregoing, Petitioner does not show a reasonable probability of prevailing on its nuisance claim. Petitioner has not shown a "clearly established" right to a mandatory injunction.

Balance of Harms

For the second factor, the court must consider "the interim harm that the plaintiff would be likely to sustain if the injunction were denied as compared to the harm the defendant would be likely to suffer if the preliminary injunction were issued." (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749.) "Irreparable harm" generally means that the defendant's act constitutes an actual or threatened injury to the personal or property rights of the plaintiff that cannot be compensated by a damages award. (See *Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410.)

"Where, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties…. This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must make a significant showing of irreparable injury." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.)

Petitioner asserts that "unrestricted" beach access has caused various adverse impacts, including (1) Excessive demand for parking on PCH in the vicinity of the state-owned lots, as well as long-term and overnight parking of recreational vehicles and campers which are used to camp out on and adjacent to the beach; (2) Increased trash and litter on PCH, on the state-owned lots and on the beach and private property in the vicinity of the state-owned lots; (3) Increased threats to public safety due to the state-owned lots being submerged during high tide; (4) Trespass onto private property, including private beach areas, stairs, decks and beneath decks and residences along the beach in the vicinity of the state-owned lots; and (5) Increased criminal activity on and in the vicinity of the state-owned lots including but not limited to the consumption of alcohol and marijuana on public beaches and beneath the adjacent private residences, theft and vandalism, playing of loud amplified music on public beaches and on and beneath adjacent private residences, public urination and defecation, and overnight camping on public beaches and on adjacent private property. (Mot. 3-4; see Williams Decl. ¶¶ 8-14; Linkon-Fryzer Decl. ¶¶ 8-11; Rogers Decl. ¶¶ 3-10; O'Connor Decl. ¶¶ 5-7; Rosenthal Decl. ¶¶ 3-5; Smith Decl. ¶¶ 5-7.)

Respondents submit some evidence of measures taken to address Petitioner's concerns. Since June 2021, MRCA staff patrol, inspect and maintain the subject properties on a daily basis. (Latham Decl., ¶ 5.) They collect litter, remove any graffiti, and photograph the condition of the property. (Id. at ¶¶ 5-7.) MRCA also provides on-call ranger services, 24 hours a day, 7 days a week. (Id. at ¶ 10.) Douglas Rogers, with his declaration in support of the motion, submitted video evidence of MRCA employee who was maintaining the public beach and cleaning up trash. (See Rogers Decl. Exh. 5.)

The court has considered the evidence of harm submitted by Petitioner, as well as Respondents' evidence. Petitioner is not merely requesting that the court preserve the status quo pending trial. It is requesting that the court compel government agencies to perform a mandatory act—apply for a permit and construct a fence. (See Motion, 2:1-2, 13:6-7.) Petitioner has not shown that the alleged harm justifies the extreme remedy of a mandatory preliminary. Significantly, Petitioner and its members have remedies should third parties trespass or engage in other unlawful conduct at the beach, including by contacting law enforcement. The court also notes that the adjacent 20174 Parcel is open for beach access. (See Sandoval Decl. Exh. F; Block Decl. ¶ 7.) In that context, the mandatory injunction that Petitioner seeks would not necessarily address the conduct of third parties of which Petitioner complains.

Finally, Respondents' unclean hands defense, while not fully developed prior to completion of discovery, raises some question about whether equitable relief should be granted to Petitioner, even if some harm was shown.

The court has considered Petitioner's probability of success and the balance of harms. Petitioner has not shown a clearly established right to a mandatory injunction, or the "significant

showing of irreparable injury" necessary for an injunction against public agencies in the performance of their duties. The court denies the motion.

Undertaking

Because the court denies the preliminary injunction, the court need not analyze the undertaking requirement.

**Conclusion**

The motion is DENIED.

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**DECLARATION OF SERVICE BY E-MAIL and U.S. Mail**

Case Name: **Citizens v. SMMC**

Case No.: **21STCP02371**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On December 1, 2021, I served the attached **NOTICE OF RULING ON MOTION FOR PRELIMINARY INJUNCTION AND EXHIBIT A** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 1, 2021, at Los Angeles, California.

Dan Daniele
Declarant

Signature

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