

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071

**NOTICE OF VIOLATION OF THE CALIFORNIA COASTAL ACT
REGULAR AND CERTIFIED MAIL**

June 11, 2018

RECEIVED**JUN 14 2018**

Capistrano Bay District
c/o Donal Russell
3500 Beach Road
Capistrano Beach, CA 92624

Violation File Number: V-5-16-0064

Property location: Capistrano Bay, Dana Point, Orange County

Unpermitted Development¹: Unpermitted sand berm built using public resources and impacting public access

Dear Mr. Russell:

As you probably know, the California Coastal Act¹ was enacted by the State Legislature in 1976 to provide long-term protection of California's 1,100-mile coastline through implementation of a comprehensive planning and regulatory program designed to manage conservation and development of coastal resources. The California Coastal Commission ("Commission") is the state agency created by, and charged with administering, the Coastal Act of 1976. In making its permit and land use planning decisions, the Commission carries out Coastal Act policies, which, amongst other goals, seek to protect and restore sensitive habitats; protect natural landforms; protect scenic landscapes and views of the sea; protect against loss of life and property from coastal hazards; and provide maximum public access to the sea.

Our staff has confirmed that development that is both unpermitted and not authorized by a permit issued to the Capistrano Bay District ("District"), Emergency Coastal Development Permit ("CDP") G-5-15-0043 (hereinafter "the Permit"), described below, has occurred at properties within the Capistrano Bay District community. The unpermitted development that is the subject of this letter is an unpermitted sand berm that was built using local sand and rock along the shoreline adjacent to approximately 85 homes within the District. A sand berm was never contemplated for approval per the Permit. Furthermore, although the Permit was issued and authorized the temporary placement until May 20, 2016 of sand bags and/or water filled K-rails in front of up to 196 residences, the Permit was never effective, as described in more detail below, and thus could not have authorized the sand berm at issue. To that end, we are sending this letter to the District as it routinely handles management projects for the community and thus

¹ Please note that the description herein of the violation at issue is not necessarily a complete list of all development on the properties that is in violation of the Coastal Act and/or that may be of concern to the Commission. Accordingly, you should not treat the Commission's silence regarding (or failure to address) other development on the subject property as indicative of Commission acceptance of, or acquiescence in, any such development.

would appear to be responsible for constructing the berm, but if the District has information to the contrary, it should feel free to share said information with us.

Permit History

On December 22nd, 2015 the Commission issued Emergency CDP G-5-15-0043 to the District for the temporary placement, until May 20, 2016, of certain shoreline protective devices in the form of either sand bags and/or water filled K-rails in front of up to 196 single family residences on an as-needed basis in the Capistrano Bay community in response to anticipated El Nino related storms during the 2015 winter/2016 spring. To make the permit effective, Special Condition 1 of the Emergency CDP required submittal of an Emergency Permit Acceptance Form within 15 days of commencement of emergency work authorized by the permit for each individual property implementing the authorized emergency work. The completed form was required to include:

- a. Specific Site Address;
- b. Description of all existing permitted development at subject site;
- c. Description of proposed TEMPORARY shoreline protective device to be implemented at the subject site (i.e., sand bags and/or K-rails);
- d. SIGNATURES FROM THE INDIVIDUAL PROPERTY OWNER and CAPISTRANO BAY DISTRICT, REPRESENTATIVE DONAL RUSSELL;
- e. Photographic evidence of the existing site conditions to document the extent of beach erosion, and photographs of the site after installation of temporary shoreline protective device. Cross-section plan view of the beach area seaward of existing site improvements documenting existing site conditions, if possible.

Special Condition 3 of the CDP notified you and the Capistrano Bay homeowners of the temporary status of this permit and that the existence of any remaining sand bags or water filled K-rails after May 20, 2016 would constitute a violation of the Coastal Act:

*The work authorized by this permit is TEMPORARY and only authorized for a limited period. All sandbags and K-rails authorized under this emergency permit action must be completely removed by **Friday, May 20, 2016**, the weekend before Memorial Day holiday...Persistence of any temporary measure...past May 20, 2016 will constitute unpermitted development, and, therefore a violation of the Coastal Act. Commission enforcement staff will consider appropriate action to address the persistence of any temporary measures past the deadline for removal. Such action may include assessment of monetary penalties under Coastal Act Section 30821 for violations of the public access provisions of the Coastal Act.*

Commission staff did not receive any of the required documentation, as listed above, for the CDP to become effective, and the time period for the CDP to be effective has long since lapsed.

Although no CDP has been authorized for such development, staff has observed a sand berm, sand bags, cobblestone and gabion, boulders, and plastic retaining walls installed by a number of

Capistrano Bay homeowners without Coastal Act authorization². These shoreline protective devices were not approved by the CDP, as it never became effective, and moreover, have not been removed from the beach pursuant to Emergency CDP G-5-15-0043, and in certain locations are encroaching on public land and public easements and were built using public resources including local sand and rock. This has occurred on and adjacent to property managed by you which is described as one hundred and ninety six (196) single family residences seaward of Beach Rd, Capistrano Beach, City of Dana Point. These parcels are located within the Coastal Zone.

Unpermitted Development

Commission staff has researched our permit files and concluded that no coastal development permit has been issued for the sand berm, nor the other development, described above. Pursuant to Section 30600 (a) of the Coastal Act, any person wishing to perform or undertake development in the Coastal Zone must obtain a coastal development permit, in addition to any other permit required by law. "Development" is defined by Section 30106 of the Coastal Act as:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the 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 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; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....

Commission staff has confirmed from visiting the site and researching aerial photographs and other files that an unpermitted sand berm has been constructed in front of approximately 85 homes along the shoreline throughout the entire length of the Capistrano Bay, all of which is unpermitted and inconsistent with the resource protections policies of the Coastal Act, as discussed below. The following activities undertaken on the beach at the Capistrano Bay community constitute development: 1) placement of solid material i.e. sand, 2) construction of a structure i.e. the berm, 3) grading of the beach to construct the berm and 4) change in access to the coast, as the berm precludes access to areas of the beach and impedes lateral access, including on public access easements, as well removes sand from the natural sand supply process that would otherwise replenish public beaches.

As noted above, Emergency Coastal Development Permit No. G-5-15-0043 required the submittal of an Emergency Permit Acceptance Form for each individual property implementing authorized emergency work. However, our office has not received any of the required

² Commission staff is addressing the sand berm in this letter, but will address specific unpermitted shoreline protective devices other than the unpermitted sand berm in separate correspondence to each responsible individual property owner.

Emergency Permit Acceptance forms or accompanying documents from any of the individual property owners or Capistrano Bay District, and thus, no development is validly authorized pursuant to Emergency CDP G-15-0043. Additionally, the only work authorized was the temporary use of sand bags and water filled K rails. However, as previously mentioned in this letter, Commission staff has observed an unpermitted sand berm built along the shoreline seaward of the above mentioned approximately 85 properties. No coastal development permit has been issued for the berm, and, moreover, the berm is inconsistent with a number of provisions of the Permit, as described below.

Special Condition 5 of Emergency Permit Number G-5-15-0043 prohibits the use of local beach sand and/or rock for construction of shoreline protective devices. The condition further states that all unauthorized devices utilizing local sand and rock must be dismantled and failure to comply with the condition will result in invalidation of the Permit. This condition also put the District on notice of Commission enforcement staff's intention to consider appropriate action to address the presence of any unpermitted shoreline protective devices, including pursuit of assessment, by the Commission pursuant to the terms of Coastal Act Section 30821, of monetary penalties under Coastal Act Section 30821 for violations of the public access provisions of the Coastal Act.

Special Condition 6 of the Permit prohibits the use of machinery or construction materials not essential for project improvements in the intertidal zone. During a site visit, Commission staff observed what appeared to be the tracks of heavy machinery along the unpermitted sand berm and in the intertidal area. As the berm was not a project improvement approved by the Permit, use of machinery in the intertidal zone to construct the berm was not essential to the Approved project improvements, and thus a violation of the Permit.

The work authorized through the Permit was for a limited time period. Pursuant to Special Condition 3, all sand bags and K-rails authorized under this emergency permit were required to be completely removed by May 20, 2016 and the start of the peak beach season. Even if the Permit had authorized the sand berm, which it did not, and had become effective, which did not occur, the Permit required the removal of approved shoreline protective devices more than two years ago, by May 20, 2016. However, the unpermitted sand berm persist at the site.

The berm at issue constitutes development under the Coastal Act and, therefore, requires a Coastal Development Permit. Any non-exempt development activity conducted in the Coastal Zone without a valid coastal development permit, or which does not substantially conform to a previously issued permit, which is the case here, as described above, constitutes a violation of the Coastal Act.

Public Access Violation

The sand berm precludes public use of public land and land designated for public access and effectively privatizes the public portion of the beach for the benefits of private homes, thereby limiting the public's use and enjoyment of a protected public resource and is inconsistent with the public access policies of the Coastal Act, including the following policies:

Section 30210 states:

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211 states:

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

The local sand used to build the unpermitted sand berm is a public resource and has been displaced from its natural location in the intertidal zone and littoral cell, thus removing sand that would replenish public beaches and, therefore, impacting the availability of public beach to the public. Additionally, the sand berm is built on or along a number of properties with public access easements recorded over them, thus blocking public access to these easements, and inconsistent with the terms of the public access easements³. To that end, the berm also physically impedes public access to the coast and state tidelands. Section 30821 authorizes the Commission to impose civil penalties on anyone who violates the Coastal Act's public access provisions, with exceptions not applicable here. The penalties imposed can be up to \$11,250 per day for each day that each violation persists.

Enforcement Remedies

Although we would prefer to resolve this matter consensually, please be aware that Coastal Act Section 30809 states that if the Executive Director of the Commission determines that any person has undertaken, or is threatening to undertake, any activity that requires a permit from the Coastal Commission without first securing a permit, the Executive Director may issue an order directing that person to cease and desist. The Commission may also issue a cease and desist order pursuant to Section 30810 of the Coastal Act. A cease and desist order may be subject to terms and conditions that are necessary to avoid irreparable injury to the area or to ensure compliance with the Coastal Act. Section 30811 also provides the Coastal Commission the authority to issue a restoration order to address violations at a site.

Additionally, Sections 30803 and 30805 authorize the Commission to initiate litigation to seek injunctive relief and an award of civil fines in response to any violation of the Coastal Act. Section 30820(a)(1) provides that any person who undertakes development in violation of the Coastal Act may be subject to a penalty amount that shall not exceed \$30,000 and shall not be less than \$500 per violation. Section 30820(b) states that, in addition to any other penalties, any person who "knowingly and intentionally" performs or undertakes any development in violation of the Coastal Act can be subject to a civil penalty of not less than \$1,000 nor more than \$15,000 per violation for each day in which the violation persists.

³ The properties with public access easements are as follows: 35061, 35007, 35097, 35105, 35107, 35111, 35127, 35135, 35155, 35191, 35197, 35251, 35255, 35285, 35391, 35395, 35465, 35655, 35671, 35685, 35687, 35691, 35705, 35731, 35735, 35737, 35771, 35777, 35791, 35837, 35841, 35857 Beach Rd.

In addition, as noted above, Section 30821 authorizes the Commission to impose civil penalties on anyone who violates the Coastal Act's public access provisions, with exceptions that are not applicable here. The penalties imposed can be up to \$11,250 per day for each day that each violation persists, for up to five years.

Resolution

In many cases, violations involving unpermitted development may be resolved administratively by removal of the unpermitted development and restoration of any damaged resources. As the development you have installed is unpermitted and in violation of the Coastal Act, we request that the unpermitted sand berm be dismantled and the locally derived beach sand and rock returned to its previous location on the shoreline immediately. Please contact me by no later than June 22, 2018 regarding how you intend to resolve this violation.

Thank you for your attention to this matter. We look forward to working with you to resolve this matter. If you have any questions regarding this letter or the pending enforcement case, please feel free to contact me at 562-590-5071.

Sincerely,



Jordan Sanchez
Enforcement Officer

cc: Lisa Haage, Chief of Enforcement, CCC
Andrew Willis, Enforcement Supervisor, CCC
Karl Schwing, Deputy Director, CCC
Liliana Roman, Coastal Program Analyst, CCC