

CALIFORNIA COASTAL COMMISSION

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Sent Via Email

December 14, 2020

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

Violation File Number: V-5-16-0064

Property location: 3500 Beach Rd., Orange County, APN [178-553-05]

Unpermitted Development¹: Unpermitted installation of shoreline protection devices; including but not limited to sand bags, cobblestone filled gabions, plastic retaining walls, rip rap, sea walls, and berms.

Dear Mr. Russell:

Commission staff would like to thank you and the board members of the Capistrano Bay District ("District") for meeting with us via videoconference on September 25, 2020 to discuss the necessary next steps to resolve the above described Coastal Act violations. Our staff is encouraged by the productive conversation we had with the District. Through this letter we would like to outline the next steps that we discussed in more detail during our conversation, in order to provide the District with a more focused direction toward a resolution. During our conversation we discussed that one option for resolving this matter is a "Consent Order". A Consent Order is similar to a settlement agreement. A Consent Order would provide the District and homeowners with an opportunity to resolve this matter consensually, and to have input into the process and timing of removal of the unpermitted development, and would allow you to negotiate a penalty amount with Commission staff. More specifically, in this case, a Consent Order would establish the terms of a resolution, including timely removal of the unpermitted development, mitigation for the impacts to shoreline sand supply and public access resulting from the unpermitted development, payment of a monetary penalty, and establishment of a framework for potential authorization of Coastal Development Permits ("CDP") for shoreline protection solutions to be implemented in phases, including interim measures to immediately replace the unpermitted development and implementation of longer term strategies for sea level rise adaptation, as described in more detail below.

¹ Please note that the description herein of the violation at issue is not necessarily a complete list of all development on the subject property 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.

Background of the Violations

As you know, on December 22nd, 2015 the Commission issued Emergency CDP G-5-15-0043 ("Permit") 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. Although the Permit was issued for 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, and thus could not have authorized the shoreline protective devices that were subsequently installed, including the sand berm discussed below. The Permit was not effective because the homeowners never submitted the Emergency Permit Acceptance Form that was required to be returned to our office within 15 days of commencement of emergency work authorized by the permit for each individual property implementing the authorized emergency work 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

None of the of additional shoreline protective devices installed subsequent to approval of the Permit; including but not limited to sand bags, cobblestone filled gabions, plastic retaining walls, rip rap, and sea walls were authorized by Emergency CDP G-5-15-0043 or any other permit.

Moreover, over time, additional shoreline protective devices have been installed without a permit on an even greater scale. According to Commission staff research, there are approximately 135 homes within the District that have unpermitted shoreline protective devices in front of them without a CDP. Furthermore, many of the properties within the District have waived their right to shoreline protection or do not have such a right under the Coastal Act, either as a result of redevelopment or applicable permit conditions.

Finally, on June 11, 2018, Commission staff sent the District a Notice of Violation ("NOV") letter for the unpermitted construction of a sand berm built using public resources and impacting public access. Furthermore, a sand berm was never contemplated for approval per Emergency CDP G-5-15-0043 and the sand berm was built using local sand and rock along the shoreline adjacent to approximately 85 homes within the District.

Given the complex permitting history of the individual properties within the District, and the number of properties with unpermitted shoreline protective devices, it is important for the District to work with Commission staff through the Consent Order and CDP process to reach an amicable, comprehensive resolution to this matter, as described in more detail below.

Components of the Consent Order

As you may remember, in the joint enforcement letter sent by the City of Dana Point (“City”) and Commission staff on December 23, 2019, we informed the District that a resolution to the violations, including removal of the unpermitted development, as well as any ancillary short term solutions to protect the homes and/or the public beach, must obtain authorization under the Coastal Act. During our conversation on September 25, 2020, we discussed the components of the Consent Order, which include: 1) removal of the unpermitted shoreline protective devices, 2) payment of monetary penalties and providing mitigation for the impacts of the unpermitted shoreline protective devices to public access and shoreline sand supply, and 3) a framework, e.g. a timeframe and deadlines, for permitting of an interim alternative to the unpermitted shoreline protective devices, which could include immediate replacement of the unpermitted shoreline protective devices, with more appropriate “soft” solutions to protect homes, assuming these soft solutions are consistent with the Coastal Act. We are happy to discuss with the District the monetary penalty amount and type of mitigation projects that would be required by the Consent Order, but the penalty amount must satisfy the Commission’s claims for monetary penalties under Section 30821 of the Coastal Act for public access violations, as described in more detail below.

Through issuance of and subsequent compliance with the Consent Order and CDP, the liability of the District and all participating homeowners for the above described unpermitted installation of shoreline protective devices will be resolved, while at the same time gaining the necessary Coastal Act authorization to install a more appropriate “soft” solution to protect the public beach. Through this process, Commission staff will work with the District on the siting and design of the interim “soft” solution, which may include a combination of appropriately placed sand bags, sand cubes, a sand berm, etc., with all necessary conditions imposed to protect public access. However, as we discussed, due to their adverse effect on public access and the exacerbation of shoreline erosion, the interim “soft” solution would not include rip rap, or sea walls, or any other type of “hard” armoring. To that end, Commission staff is ready and willing to work with the District and their coastal engineer on an interim “soft” solution to be implemented contemporaneously with the timely removal of the unpermitted shoreline protective devices at issue.

Long-term Sea Level Rise Planning Through a Coastal Development Permit

One condition of any permit authorizing the interim solution would be a requirement to develop, within a timeframe specified in the Consent Order, a long-term sea level rise adaptation plan. The first step is for the District to conduct a sea level rise vulnerability assessment one component of which is for the District to work with the local

governments or other non-profits in the area already conducting vulnerability assessments for the affected area, to identify the impacts of different sea level rise scenarios and provide the District and Commission with a baseline set of facts and maps and exhibits. Next, the data can be used to evaluate the efficacy of any options in protecting the public beach as outlined in the adaptation plan, which should include options for both capital improvements, as well as logistical measures to protect life and property. The adaptation plan should be developed in cooperation with the City of Dana Point, and may be considered for inclusion into the Dana Point certified LCP as a specific plan for the hazardous area. During our call, we discussed a number of different project types that could be analyzed in the adaptation plan including: installation of an offshore cobblestone reef with kelp beds, construction of a cobblestone core sand berm (planted with dune vegetation) seaward of the homes, and beach nourishment in tandem with the installation of groins. Any approval of these mechanisms would be premised upon their capability to protect the public trust resource (including the public beach, public access, biological resources, etc.) seaward and up and downcoast of the homes. Measures must be considered in the adaptation plan for nearterm implementation, such as raising the foundations of the homes or methods of waterproofing the foundations and first floors to withstand flooding, as well as increasing setbacks from the seaward property line to allow for migration of public tidelands, and a plan for managed retreat if it is apparent that the homes are no longer safe for occupancy, despite the other efforts. One of the components of a longer term solution that we discussed was the District's support of a regional sediment management group with local stakeholders and adjacent property owners, which our staff has already begun to explore. The Commission typically recommends a phased adaptation approach, where adaptation strategies are tailored to the amount of sea level rise, flooding, or wave attack and a timeframe for implementation when they will be most effective.

Once a longer-term solution is identified, the District will then apply to the Commission, pursuant to the timeframes established in the Consent Order, for a CDP to authorize the adaptation plan and any associated long-term project under the Coastal Act. During the CDP process our staff will continue to work with the District to fine tune the project's components in order to ensure that they are consistent with the resource protection policies of the Coastal Act. Due to the already hazardous conditions and projected sea level rise, the District is encouraged to start the adaptation planning efforts immediately. Commission planning staff is prepared to devote time to this planning process, even prior to application of the CDP, and can assist with drafting potential adaptation strategies. The consequences of failing to comply with the permitting deadlines established in the Consent Order could include removal of existing protective devices or the interim devices described herein.

Public Access Violation

The subject unpermitted development and permit non-compliance 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.

Shoreline protective devices physically impede public access to the coast and state tidelands. Additionally, the unpermitted shoreline protective devices are 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 easements². Many of the dislodged sandbags that have been installed over time without a permit are now littering the public portion of the beach, and due to the dynamic nature of the shoreline, are being buried into the sand below the mean high tide line, and thus on public trust tidelands, and negatively impact the public's ability to access these 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

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. 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. A violation of a cease and desist order or restoration order can result in civil fines of up to \$6,000 for each day in which the violation persists.

² Properties with easements, include, but are not necessarily limited to the following properties: 35061, 35007, 35097, 35105, 35107, 35111, 35127, 35135, 35155, 35191, 35197, 35251, 35255, 32585. 35391, 35395, 35465, 35655, 35671, 35685, 35687, 35691, 35705, 35731, 35735, 35737, 35771, 35777, 35791, 35837, 35841, 35857 Beach Rd.

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.

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. However, as noted above, Commission staff would prefer to avoid unilateral action to impose these remedies and to resolve the matter or restoration, payment of penalties, and providing mitigation consensually instead.

Resolution

As discussed above, one option for comprehensively resolving these numerous Coastal Act violations is through agreement to a Consent Order. Please contact me by no later than **December 31, 2020** to confirm that you agree to work with Commission staff to pursue the option of a Consent Order that incorporates the terms generally described above. The Consent Order option must include the involvement and consent of all homeowners to the extent necessary to effectuate the terms of the Consent Order, but we are happy to discuss the mechanics of this agreement.

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 Jordan.Sanchez@coastal.ca.gov.

Sincerely,



Jordan Sanchez
Enforcement Officer

cc: Lisa Haage, Chief of Enforcement, CCC
Andrew Willis, Enforcement Supervisor, CCC
Karl Schwing, Deputy Director, CCC
Shannon Vaughn, Coastal Program Manager, CCC
Eric Stevens, Planning Supervisor, CCC
Alex Yee, Planner – Sea Level Rise Team, CCC
Christine Pereira, Coastal Program Analyst, CCC
Brenda Wisneiski, Community Development Director, City of Dana Point
Jeff Rosaler, Planning Manager, City of Dana Point
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