

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
301 Ocean Blvd, Suite 300
Long Beach, CA 90802-4302
(562) 590-5071



Sent Via Email

February 19, 2021

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

Violation File Number: V-5-16-0064

Property location: 35000 Beach Rd., Dana Point

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

Dear Mr. Russell and Mr. Irani:

Commission staff would like to thank you for your letter dated December 22, 2020 which was a response to our December 14, 2020 letter to the Capistrano Bay District ("District"). The intent of this letter is to respond to your December 22 letter and to provide you with an update on the necessary next steps that Commission staff will take to resolve the above described violations of the Coastal Act by District homeowners, including, as described in more detail below, referral of this case to our Headquarters enforcement unit for formal enforcement action in order to resolve the Coastal Act violations at issue.

We had addressed the December 22 letter to the District because it was our understanding from statements of the District that the District was interested in taking comprehensive action, funded by the homeowners, and on behalf of the homeowners, in its capacity as the entity responsible for community-wide infrastructure projects, to resolve the violations, whether those violations were undertaken by the District or by the homeowners. This resolution would generally entail replacement of all unpermitted shoreline protective devices with appropriate short-term and long-term solutions, mitigation for the impacts of the unpermitted devices, and resolution of the Commission's claims for monetary penalties.

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.

We think it would best facilitate a speedy resolution of this matter if the District acts as the point of contact for the homeowners collectively in negotiations with Commission staff. If the District declines to do so, we will address the liabilities of the District and each of the homeowners separately. However, we believe that this will result in a patchwork of outcomes throughout the neighborhood, and, thus, at least as a practical matter, our preference is to reach a global resolution of this matter with the District's involvement.

Our staff was surprised by the response we received in your letter and the District's unwillingness to work toward the resolution outlined in our December 14, 2020 letter, especially given the productive conversation we had with the District on September 25, 2020. As you know, in our December 14 letter we requested that the District take certain steps in order to resolve the violations amicably through a Consent Order, which included: 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 Act². However, to the contrary, the District's December 22 letter did not agree to the terms set forth in our December 14 letter and instead proposed to retain the unpermitted development after-the-fact without payment of a monetary penalty. As our December 14 letter made clear, and is the case regardless of how the District has interpreted our communications, the District and homeowners are obligated to resolve the Commission's claims for monetary penalties for these violations.

Furthermore, the District has recently applied for an Emergency Coastal Development Permit to install an interim device to protect the homes, without removing the unpermitted devices; an action that was not discussed or agreed upon as a next step during our September 25, 2020 phone call. We do not believe that this is a viable approach to addressing this issue since the unpermitted protective devices in place in front of many homes obviates the need for emergency work. We have suggested instead that the District work quickly with staff to authorize a comprehensive replacement of the unpermitted devices with a temporary solution through the consent order process.

The Unpermitted Shoreline Protective Devices Impact Public Access

Additionally, your letter asserts that "the existing armoring has not blocked public access to the beach." However, it is clear from both photographic evidence and site visits by Commission staff that the unpermitted shoreline protective devices occupy sandy beach that would otherwise be open for public access. While it may be true that

² 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.

many of the property lines extend to the Mean High Tide Line (“MHTL”), as you may know, lateral public access along the shoreline at or below the MHTL is guaranteed by the Coastal Act and the California Constitution. As your letter notes, the beach adjacent to the homes has eroded significantly in recent decades for several reasons including sea level rise, and as a result, the MHTL has also migrated toward the homes. For those reasons, and especially on days with larger wave events and during higher tides, it is clear that the public’s ability to laterally access this beach is not only physically impeded by the unpermitted shoreline protective devices, but being exacerbated by their presence and their contribution to erosion of the public beach.

Many District Homes Do Not Have a Right to Shoreline Protection

In your letter dated December 22, you assert that “most of the homes on Beach Road were built prior to the 1976 Coastal Act, and therefore maintain an ongoing right of protection.” However, contrary to that assertion, most 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, or have public access easements recorded across them that would restrict or preclude construction of shoreline protective devices within the easement: according to staff research, of the 195 homes in the District, at least 33 properties have explicitly forfeited their right to future shoreline protection, and at least 59 properties do not have a right to future shoreline protection because they were either built or significantly remodeled after the effective date of the Coastal Act³, and 32 properties have public access easements recorded across them. Moreover, where a home might be entitled to shoreline protection, that protection must be authorized through the coastal development permit process and, in that manner, must be found to be consistent with the Coastal Act.

Public Access Violation

The unpermitted development and permit non-compliance at issue 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:

³ The numbers are for reference purposes only and do not necessarily comprehensively include all properties that do not have a right to shoreline protection.

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 easements⁴. Also, many of the sandbags and other materials that have been installed over time without a permit have dislodged and 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. Furthermore, the presence of hard armoring on the coast, which in this case consists of unpermitted shoreline protective devices, exacerbates and accelerates the erosion of the public beach. 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.

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

⁴ 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.

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.

Resolution

At noted above, Commission enforcement staff is working to elevate this case to our Headquarters enforcement unit in order to undertake formal action to implement these remedies and to resolve the matters or restoration, payment of penalties, and providing mitigation. However, while our staff begins to work on a formal enforcement action, we are still open to discussing the terms of a Consent Order as outlined in our December 14 letter, and, thus, through this letter, we wanted to clear up what appears to be some misunderstanding on the District's part in order to properly frame those discussions. If you are interested in discussing a Consent Order with the terms outlined in our December 14 letter, please contact me by March 8, 2020.

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 Wineskin, Community Development Director, City of Dana Point
Jeff Rosaler, Planning Manager, City of Dana Point
Johnathan Ciampa, Senior Planner, City of Dana Point