

Meeting #635

CAPISTRANO BAY DISTRICT  
AGENDA REPORT  
*September 26th, 2017*

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*Old Business*

## ITEM 9c

### City Council – Flood Zone Changes

Further discussion on this item was requested by Board President Mastro. This item was discussed at some length at the July Board meeting with the Directors choosing to take no action for the time being.

Attached is the letter from the attorney representing the affected homeowner with a good summary of the action taken by the Dana Point City Council.

In speaking with the attorney for the homeowner, he filed suit in Orange County Superior Court, has served the City and is awaiting further direction from the Court on a court date.

Jeffrey S. Eddington  
A Law Corporation

ITEM NO. 9c

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Via Email

July 6, 2017

Dr. Ambrose Masto (ambrosemasto@cox.net)  
Capistrano Bay District

Re: Re-Zoning of Beach Road

Dear Dr. Masto:

I represent Albert Bertha, the owner of 35715 Beach Road. I am writing to bring to the attention of the Capistrano Bay District community a recent action taken by the Dana Point City Council which we believe affects the vast majority of the community.

Mr. Bertha recently appealed City staff's determination that his property is located in the FP-3 Floodplain Overlay District (the "FP-3 Zone"), and therefore, subject to significant building restrictions. This determination was made despite the fact that every single City zoning map, FEMA map, and the City's own internal records, show that Mr. Bertha's property is clearly outside of the FP-3 Zone. In fact, these documents show that the vast majority of Beach Road properties are clearly outside of the FP-3 Zone.

Mr. Bertha's appeal was heard by the City Council on May 16, 2017. The City Council sided with staff and affirmed staff's determination. Mr. Bertha is filing a petition for writ of mandate in the Orange County Superior Court to overturn that decision.

In affirming staff's determination, the City Council adopted a resolution. The resolution has two parts. The first part denies Mr. Bertha's appeal. The second part, however, affects the vast majority of owners along Beach Road because it has the effect of re-zoning their properties into the FP-3 Zone without complying with the requirements of the California Government Code or providing basic constitutional due process protections.

The resolution passed by the City Council on May 16, 2017 reads as follows:

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA, UPHOLDING THE DETERMINATION OF THE DIRECTOR OF COMMUNITY DEVELOPMENT THAT THE PROPERTY AT 35715 BEACH ROAD IS LOCATED IN THE FP-3 FLOODPLAIN OVERLY DISTRICT; AND REAFFIRMING THE COUNCIL'S ADOPTION OF THE COASTAL FLOODPLAIN DEVELOPMENT STUDY, DEFINED IN SECTION 9.75.030.C OF THE MUNICIPAL CODE, FOR PURPOSES OF IDENTIFYING AREAS OF SPECIAL FLOOD HAZARDS, AS RECOMMENDED BY THE FLOODPLAIN ADMINISTRATOR.

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The portion highlighted in yellow affects all of Beach Road. In this portion of the resolution, the City claims to be simply “reaffirming” a prior adoption of a 1985 document called the Coastal Floodplain Development Study (the “Study”), which Study purportedly defines the extent of the FP-3 Zone as going all the way up to the railway grade.

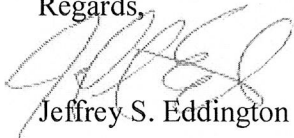
The problem with the City’s action is that the evidence is beyond clear that the City never adopted the Study or its definition of the FP-3 Zone, but rather, adopted a FEMA Map based definition instead. This is confirmed by the City’s own zoning maps and the City’s own municipal code, all of which base the FP-3 Zone on the FEMA Map, and not the Study.

Therefore, the City, in passing this resolution, was not “reaffirming” a past act, but rather, adopting a new and conflicting definition of the FP-3 Zone. This amounts to an amendment of the Dana Point Municipal Code and a re-zoning of all the properties along Beach Road into the FP-3 Zone.

California Government Code Section 36933 contains strict notice and waiting period requirements for changes to the municipal code, none of which were complied with by the City in this case. Furthermore, state and federal constitutional due process protections require that notice and a meaningful opportunity to be heard, prior to adverse action being taken, be afforded affected property owners. This was not done.

This letter is provided merely to inform you of our perspective on the matter, and not as legal advice to you or the district, or as a solicitation for representation. If you or anyone in the community believes that further action is warranted, I recommend contacting a land use attorney. Please be advised that certain time limits apply for filing a legal challenge to the City’s action, which you will want an attorney to review right away if you are considering taking action.

Regards,



Jeffrey S. Eddington