

CALIFORNIA COASTAL COMMISSION

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Sent Via Email

May 12, 2021

Capistrano Bay District
c/o Steve Kaufmann
35000 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. Kaufmann:

Commission staff appreciates your letter dated March 12, 2021, which was a response to our February 19, 2021 letter to the Capistrano Bay District ("District"). The intent of this letter is to respond to your March 12 letter and to reiterate our offer to resolve this matter through a "Consent Order". As we described in our previous letters to the District, 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, as described in more detail below.

We had addressed the December 22, 2020 and February 19, 2021 letters 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 – please note that we address unpermitted development undertaken by the District 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 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 properties as indicative of Commission acceptance of, or acquiescence in, any such development.

We continue to suggest that the District, regardless of whether it has any liability for installation of shoreline protective devices, act as the representative for all homeowners who have installed unpermitted armoring devices and work with us toward a Consent Order², as described in more detail below. A property by property approach to resolving the numerous instances of unpermitted development will result in a patchwork of outcomes instead of a consistent global resolution.

A global resolution would generally entail replacement³ of all unpermitted armoring 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.

As you know, in our December 14 letter we requested that the District take certain steps, on behalf of the homeowners, 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 provision of mitigation for the impacts of the unpermitted shoreline protective devices to public access and shoreline sand supply, and 3) agreement of 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 armoring devices with more appropriate "soft" solutions to protect homes, assuming these soft solutions are consistent with the Coastal Act. According to the District's December 22 letter, it did not agree to the terms set forth in our December 14 letter and instead proposed to seek after-the-fact authorization of the unpermitted armoring without payment of a monetary penalty. As our December 14 letter made clear, and is the case regardless of how the District continues to interpret our communications, the District and homeowners are obligated to resolve the Commission's claims for monetary penalties for their violations.

With regard to the District's liability for unpermitted development at Capistrano Bay, your March 12 letter stated that the District "wishes to underscore that it has not undertaken any unpermitted development and...has no liability here for any unpermitted development or responsibility for resolving any unpermitted development that may have been undertaken by individual homeowners". While the subject of our most recent correspondence has been focused on the above described unpermitted armoring devices, which may have been constructed by individual homeowners, the District undertook and is liable for the unpermitted construction of a sand berm that was built using public resources and impacted public access. As the District knows, on June 22, 2018 Commission staff sent the District a Notice of Violation letter to that effect. Furthermore, during a July 2, 2018 telephone conversation with a representative of the

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.

³ Your letter indicates your understanding that "the Board was told that the homeowners' existing armoring could stay in place until a mutually acceptable solution is presented to them." To be clear, through a consent or unilateral order, the Commission would require replacement of the unpermitted armoring with a device that is consistent with the Coastal Act. Until that replacement occurs, the existing armoring will persist in violation of the Coastal Act.

District, Commission staff confirmed that the District undertook the unpermitted construction of the berm. Additionally, the June 22, 2018 NOV letter sent to the District is also described in the joint enforcement letter sent to the District by City of Dana Point staff and Commission staff dated December 23, 2019, and in a follow-up NOV letter sent by Commission staff to the District on December 14, 2020. Therefore, the District has been put on notice of its liability for construction of the unpermitted berm in multiple letters, and it is our hope that the District will resolve this liability through the Consent Order.

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:

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

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.

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 may require 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 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

As noted above, Commission enforcement staff's preference is to resolve this matter comprehensively through a Consent Order. In the alternative, we will prepare to proceed against individual property owners with unpermitted armoring devices. While our staff initiates those actions, we are open to discussing the terms of a Consent Order as outlined in our December 14 letter. If you are interested in discussing a Consent Order with the terms outlined in our December 14 letter, please contact me by May 28, 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

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
Christine Pereira, Coastal Program Analyst, CCC
Brenda Wisneski, Community Development Director, City of Dana Point
Jeff Rosaler, Planning Manager, City of Dana Point
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