

Meeting #673

CAPISTRANO BAY DISTRICT
AGENDA REPORT
May 25, 2021

Old Business/Shoreline Protection

ITEM 9a

Shoreline Protection Update

Letter from the Coastal Commission:

The District received another reply from the Coastal Commission on 5-12-21. With this letter the District and the Coastal Commission have exchanged five communications since their first letter to the District back in December (*a copy of the letter is attached on the following pages*).

The Board will be addressing the content of this latest letter and will have Attorney Steve Kaufmann of Nossaman LLP present to discuss how to best reply back to the Coastal Commission.

Email from Homeowner Jack Tarr:

Also attached on the following pages is a recent email communication to the Board from homeowner Jack Tarr.

ITEM 9b

LAFCO/Latent Powers Update

The District's application has been submitted and by Board meeting time they will have received the initial check for fees. This will begin the process which could take up to six months. LAFCO will be in touch with the District in the next ten days to discuss next steps.

CALIFORNIA COASTAL COMMISSION

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



Sent Via Email

May 12, 2021

ITEM 9a

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
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
Johnathan Ciampa, Senior Planner, City of Dana Point

RECEIVED

MAY 19 2021

Don Russell

From: Jack Tarr <jacktarr@jacktarrdc.com>
Sent: Wednesday, May 19, 2021 1:28 PM
To: Patrick McNulty
Cc: Don Russell; Karen Morris; Brad Jenkins; Will Wiersig; Saeed Irani; Mike Haack
Subject: LAFCO; Beach Road
Attachments: Letter to City of Dana Point re Capistrano Bay District Latent Power Request.pdf

ITEM NO. 9a

Follow Up Flag: Follow up
Flag Status: Flagged

Jack Tarr

Pat:

I was unable to attend the meeting yesterday because of a conflict. You and Mr. Wiersig asked good questions. Unfortunately, there was no one there that provided you or Mr. Wiersig an objective correct answer.

Besides the fact that we believe, for a variety of reasons, that the request to LAFCO is not on a sound legal foundation, the request, if granted, is the first step under Mr. Irani's leadership (presumably with the Board's consent) in supporting his representation to the Coastal Commission during their private meeting that he would use his best efforts to gain Community Support for a holistic solution versus a decentralized solution for shoreline protection (We obviously support a Decentralized Solution for a variety of reasons). In other words, Mr. Irani appears to at the very least represented he would attempt to deliver the support of the majority of the Beach Road Community (on a platter(my words)) for a holistic shoreline protection solution, including (to name only a few) the draconian conditions the CCC would attach to support their mission of Managed Retreat, Environmental Justice and Equity, Climate Change Resilience and Sea Level Rise conditions. These would include as but not limited to the "One and Done" and "Rolling Easements" and "Sand Renourishment in Perpetuity" (or annual "in lieu" sand mitigation fees) deed restrictions based on sea level elevation and other criteria that would impact the private property owners rights and ultimate property values. Now, of course, Mr. Irani requested something in return from the CCC in exchange for his efforts and the potential Community's relinquishment of all their property rights and that is to seriously consider what I will characterize as the "Del Mar" solution. By Mr. Irani's own recorded public statement he believes this is the best solution...a permanent seawall to mirror the Del Mar Beach seawall. I have no information that would lead me to conclude the Board has previously vetted this idea with the Community. Given the prior position of the CCC, I would respectfully submit that the idea of a permanent seawall is beyond delusional, but...but... for sake of conversation, let's say I am wrong...then the question becomes what is the cost, not only the initial money costs but the "loss of value" of reduced and/or terminated property rights and ongoing perpetual cost and liability obligations. Will the cost to the Community property owners be an acceptable "pound of flesh" or will the cost render the Community as a "double amputee"???

So if granted the requested latent power, this is the beginning of at least one legal framework/pathway to financially spend taxpayers funds for the design exploration of and potential construction of a seawall on private property and if necessary condemnation of private property either through a GHAD OR...OR...OR... other Community assessment vehicle(s). Again the "ruse" or rationalization for exploration of design of shoreline protection systems on private property for this action is to protect the District's only asset....Beach Road. And, as Mr. Russell stated, "we are not there yet"....YET....YET... in creating an assessment vehicle. True enough, but the actions taken by the Board are the "gateway" action to allow the beginning of the process and will survive the normal tenure of the existing Board Members. The Coastal Commission has a behavioral pattern of 'teasing' you into a conversation that appears to give you hope to meet your expectations and as you go further down the 'rabbit hole' they will change the rules and expectations to their and only their advantage. They add new meaning to the phrase "mission creep".

Mr. Wiersig...Mr. Russell wrongly answered the question if there was anyone in the community favoring a GHAD. The registered entity with a fictitious name of Save Capistrano Bay initially funded by Beach Road resident Murad Siam has stated several times their desire to support and pursue a GHAD formation encouraging the District to support such an entity. Based on the public information available this group intends to promote its desire to form a GHAD, and, of course, they have every right to do so. These letters were in your previous meeting packets. I trust Mr. Russel can provide these letters to you to refresh what appears to be an inadvertent lack of recollection of your thorough reading and understanding of each meetings packet materials. I would request that Mr. Russell also correct this error in public for the public record when the Draft Minutes are approved/corrected of this meeting as the Brown Act would require.

Mr. Wiersig...Mr. Russell also mischaracterized our opposition to application to LAFCO as being primarily driven by our concern about a GHAD. That interpretation is incorrect. Irrespective of a potential GHAD or some other vehicle that accomplishes the same result, the strategy (or lack thereof) by the District limits the District's long-term choices. From my perspective, the District's strategy is mainly based on defense with little or no offensive component. I am being generous to analogize the effort to a Grand Slam home run in the 9th inning with two outs and two strikes. I attach our written opposition to LAFCO for your review, a copy of which was previously submitted to the District by the City of Dana Point and myself.

Of course, you should not only rely on only my statements and conclusions but look for other "live" Benchmarks. As one Benchmark, you need to look no further than how the CCC treated the County of Orange Parks and Recreation in their application for a mere "extension" for the Park at the entry of our Community. The CCC UNANIMOUSLY stated that they preferred to invoke the Managed Retreat solution and NOT rebuild the storm damaged park but to reconstitute the area in a "soft beach" solution with no parking or recreational facilities. The members of the CCC admonished the OC Parks and Rec in a very hostile threatening tone. Mr. Russell should be able to provide you the "LINK" to the publicly recorded ZOOM meeting that both Mr. Russell and I watched. I urge you to watch it. So this is the CCC's Government "cousin"...how do you think they will treat you?

Again, there are several previous "picture shows" or Benchmarks for you to reference as a source of guidance, too many to list here but simply ask your own legal counsel who represents Billionaire property owners at Broad Beach who are in opposition of the "Faustian Bargain" their Community made with the CCC. They have spent over \$21.5 million dollars over the last ten years and not one "grain of sand" has been yet moved or replenished. The Broad Beach Community is actually exploring under the theory of reducing the annual estimate of \$7.5 million dollar costs barging in "sand" from Canada to fulfill their obligations to the CCC.

Again, the GHAD is not the primary issue, it is merely an authority/financing mechanism. The issue is thinking you as a Board or any "individual" of the Board can negotiate effectively without a more level playing field with the Coastal Commission when you have no component in your plan to attempt to level the playing field. FOOLS GOLD...my friends.

There are many more layers of this onion and I have arguably gone on too much in this email. Please call me at (949) 795-1401 if you have any questions, comments or desire to discuss this topic in a free form manner.

Respectfully,

Jack Tarr