

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
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**NOTICE OF VIOLATION OF THE CALIFORNIA COASTAL ACT
REGULAR AND CERTIFIED MAIL**

June 17, 2021

Christian B. Miller
35127 Beach Road
Capistrano Beach, CA 92624

Violation File Number: V-5-21-0038

Property location: 35127 Beach Road, Capistrano Bay, Dana Point, Orange County, CA 92624 (APN 691-142-02)

Unpermitted Development¹: Unpermitted installation of shoreline protection devices, including but not limited to boulders, sandbags, and sand berm built using public resources and impacting public access.

Dear Mr. Miller:

Commission staff has confirmed that unpermitted development in the form of installation of shoreline armoring devices, including but not limited to boulders, sandbags, and a sand berm built using public resources and impacting public access, has occurred at 35127 Beach Road and adjacent tidelands. The Commission understands that Capistrano Bay homeowners are attempting to protect their properties and homes from future sea level rise. The global sea level has risen by 7 to 8 inches over the past century; the Commission scientists expect the sea level to continue to rise at an accelerated pace. The continuing sea level rise results in higher tides and waves that cause significant coastal erosion, particularly at our beaches. Under the Coastal Act, the public has an inherent right to the use and enjoyment of beaches; this includes use of the beaches for aesthetic and recreational enjoyment. Both sea level rise and shoreline armoring deprive the public of beaches that the public has a right to access. The Commission emphasizes that it is concerned about private property interests and public interests; the Commission believes there are mutually beneficial options available, as described below.

As you may know, the California Coastal Act¹ was enacted by the State Legislature in 1976 to provide long-term protection of California's 1,100-mile coastline through the implementation of a comprehensive planning and regulatory program designed to manage conservation and

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

development of coastal resources. The California Coastal Commission ("Commission") is the state agency created by, and charged with administering, the Coastal Act of 1976. In making its permit and land use planning decisions, the Commission carries out Coastal Act policies, which, amongst other goals, seek to protect and restore sensitive habitats; protect natural landforms; preserve scenic landscapes and views of the sea; safeguard against loss of life and property from coastal hazards; and provide maximum public access to the sea.

A joint letter from the Commission and the City of Dana Point ("City"), dated December 23rd, 2019, was sent to all Capistrano Bay homeowners with unpermitted shoreline protective devices on their properties, including to you. As previously stated in that letter, our staff has confirmed that unpermitted and unauthorized development has occurred at your property (35127 Beach Road) in violation of the California Coastal Act. The unpermitted development activities that are the subject of this notice of violation include the placement of boulders along the shoreline and the placement of sandbags on the seaward edge of the oceanside patio.² Under the California Coastal Act, any placement or construction of a seawall, or any other ocean protection device, in the coastal zone requires a Coastal Development Permit ("CDP"). The development activities described herein were not authorized pursuant to a CDP. Although the Capistrano Bay District applied for an Emergency Coastal Development Permit ("Emergency Permit") to authorize the temporary use of sandbags and/or water filled K-rails until May 20th, 2016, to be effective, the Emergency Permit required individual homeowners to submit an Emergency Permit Acceptance Form, as described in more detail below. The Commission staff has confirmed that no Emergency Permit Acceptance Form was submitted for this property, thus the Emergency Permit did not authorize the development at issue, nor is placement of boulders the type of development that would have been authorized temporarily by the Emergency Permit.

Additionally, the City has implemented a Local Coastal Plan in accordance with the California Coastal Act that allows CDPs to be processed at the local level. The unpermitted development described herein is both a violation of the Coastal Act, where it has occurred on state tidelands, and is a violation of the City of Dana Point Municipal Code ((DPMC) 6.14.002 and 9.69.020).

Permit History

On April 16th, 1979, the Commission approved CDP SF-79-5105 for the construction of a two-story single-family dwelling with an attached garage on this property.³ As a condition of permit approval, a deed restriction—limiting the use of the structure to a single-family dwelling and allowing public access to the beach portion of the property—was required to be recorded prior to the issuance of the permit. The public access secured by the deed restriction extends from the

² Construction of an unpermitted sand berm built using local sand and rock has also occurred on your property. Property owners are liable for Coastal Act violations that occur on their property, as is the party that undertook the development. The berm extends along the shoreline—reasonably indicating that it was constructed by the Capistrano Bay Maintenance District, for the benefit of the homeowners. During a phone call between CCC and the District, the District's attorney at the time confirmed the District's involvement with the berm. We have contacted the district to seek resolution of this violation and expect homeowners to cooperate with the resolution of this matter.

³ Please note that this property (35127 Beach Road) was previously referred to as 35129 Beach Road, but the lot number confirms that the documents discussed pertain to 35127.

mean high tide line inland 25 ft, and no closer than 5 ft from the structure. The deed restriction was recorded on May 1st, 1979. The Commission issued the permit on May 7th, 1979.

On December 22nd, 2015, the Commission approved Emergency Permit G-5-15-0043 to authorize the temporary placement, until May 20th, 2016, of certain shoreline protective devices in the form of either sandbags 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. To make the permit effective, Special Condition 1 of the Emergency Permit required submittal of an Emergency Permit Acceptance Form within 15 days of commencement of emergency work authorized by the permit for each individual property owner implementing the authorized emergency work. The completed form was required 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., sandbags 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.

Special Condition 3 of the Emergency Permit clearly stated that both the temporary status of this permit and that the existence of any remaining sandbags or water filled K-rails after May 20, 2016, would constitute a violation of the Coastal Act:

The work authorized by this permit is TEMPORARY and only authorized for a limited period. All sandbags and K-rails authorized under this emergency permit action must be completely removed by Friday, May 20th, 2016, the weekend before Memorial Day holiday...Persistence of any temporary measure...past May 20th, 2016, will constitute unpermitted development, and, therefore a violation of the Coastal Act. Commission enforcement staff will consider appropriate action to address the persistence of any temporary measures past the deadline for removal. Such action may include assessment of monetary penalties under Coastal Act Section 30821 for violations of the public access provisions of the Coastal Act.

Commission staff did not receive any of the required documentation, as listed above, for the Emergency Permit to become effective. The time period for the Emergency Permit to be effective has long since lapsed.

Although no CDP has been authorized for such development, staff has observed that a sand berm, sandbags, and boulders have been placed on your property without Coastal Act authorization. These shoreline protective devices were not approved by a CDP, nor did the

Emergency Permit contemplate authorization of the boulders. Moreover, the unpermitted development described herein has not been removed from the beach pursuant to Emergency CDP G-5-15-0043, and, in the case of the boulders at minimum, continue to encroach on public land.

Unpermitted Development

Commission staff has researched our permit files and concluded that no coastal development permit has been issued for unpermitted development described above. Pursuant to Section 30600 (a) of the Coastal Act, any person wishing to perform or undertake development in the Coastal Zone must obtain a coastal development permit, in addition to any other permit required by law. "Development" is defined by Section 30106 of the Coastal Act as:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....

From visiting the site and researching aerial photographs and other files, Commission staff has confirmed that unpermitted boulders, sandbags, and a sand berm have been placed on the property for shoreline protection. This development activity is unpermitted and inconsistent with the resource protection policies of the Coastal Act, as discussed below.

The activities at issue collectively constitute development in several ways. First the placement of boulders, sandbags, and sand berm on the property all constitute placement of solid material. Second is the construction of a structure on the property. Staff has documented evidence of boulders being used to construct a wall-like structure. Third, the beach has been graded to construct the berm. Finally, the development described above precludes public access to areas of the beach and interferes with lateral access, all of which constitute development in the form of a change of access to the coast.

As noted above, neither CDP SF-79-5105 nor the Emergency Permit authorized the development described herein.

The berm, boulders, and sandbags at issue constitute development under the Coastal Act and, therefore, require a Coastal Development Permit. Any non-exempt development activity conducted in the Coastal Zone without a valid coastal development permit, or which does not substantially conform to a previously issued permit (which is the case here, as described above), constitutes a violation of the Coastal Act.

Public Access Violation

The sand berm and boulders preclude public use of public land and land designated for public access. This development effectively privatizes the public portion of the beach for the benefit of the private home, 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.

This property has a deed restriction recorded over a portion of it that secures public right of access to the beach area from the mean high tide line inland 25 ft and no closer than 5 ft from the structure. The placement of boulders and the berm within this public beach area blocks public access to the beach. The development is inconsistent with both the terms of the deed restriction and the CDP that required the deed restriction.

The development also physically impedes lateral public access along the coast and to state tidelands. 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 unpermitted armoring devices physically impede the public's ability to laterally access this beach.

Furthermore, the presence of hard armoring on the coast, including the unpermitted armoring devices, generally 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. It is our preference that we reach a consensual resolution of the Commission's claims for monetary penalties.

Enforcement Remedies

Although we would prefer to resolve this matter consensually, 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 of the Coastal Act. 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.

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, with exceptions that are not applicable here. The penalties imposed can be up to \$11,250 per day for each day that each violation persists, for up to five years.

Resolution

In many cases, violations involving unpermitted development may be resolved administratively by removal of the unpermitted development, restoration of any damaged resources, and addressing the Commission's claims for monetary penalties. As the development that you have installed is unpermitted, and in violation of the Coastal Act, we request that the unpermitted development be removed from the site. The Commission understands that you may still want to protect your property. Therefore, we propose a phased approach that begins with the dismantling of the unpermitted devices, which will be replaced with an interim solution that is acceptable to the Commission. This interim solution will ideally be comprised of a temporary alternative such as sandbags or sand cubes that are placed immediately adjacent to residence.⁴ Both the removal of the boulders and placement of a temporary alternative will require Commission authorization, through which we can also resolve the Commission's claims for monetary penalties.

⁴ Please note that the Commission authorized the placement of sand cubes and armor rock on the beach in Capistrano Beach County Park because the Commission must protect the public's right to the amenities the park provides. This authorization is only for a period 2 years as an interim solution while a long term, master plan is finalized. Other conditions include but are not limited to a public access program and habitat and sensitive species protection measures. See CDP 5-19-0345 for more details.

Additionally, the Commission is available to work with property owners to discuss a long-term solution to protect the public beach at the Capistrano Bay community, which would have the effect of protecting homes as well.

Please note that the Commission has previously corresponded with the Capistrano Bay District ("District") through a series of letters. The Commission discussed a resolution of the violations at Capistrano Bay on a community-wide scale. A resolution on this scale would allow the community to explore options such as the installation of an offshore cobblestone reef with kelp beds, construction of a cobble stone core sand berm (planted with dune vegetation) in front of the homes, and beach nourishment in tandem with the installation of groins. Another component of a longer term solution we discussed with the District was the establishment of regional sediment management group, comprised of local stakeholders and adjacent property owners. This group would work to determine the feasibility of alternative measures, such as raising houses or sealing houses to withstand flooding, if the public beach is eventually lost. However, the District was not amenable to the Commission's suggestion to seek a comprehensive resolution that involved removing the existing devices, replacing them with an interim solution, and finally, a long-term solution. Such a comprehensive resolution remains the staff's preferred approach, and we encourage the homeowners to work collectively through the District to achieve such a resolution.

In the absence of community-wide resolution, staff suggests that the placement of homes on piles replace the interim solution noted above. Piles interfere less with the reflective wave energy—reducing the waves' erosion potential – than seawalls and revetments. In CDPA-5-DPT-01-336, heard in 2002, the Commission found that the use of piles “would protect the [home] from flooding, erosion and uprush hazards without the need for protective devices” or significantly interfering with public access.

As stated above, the Commission requests that you work with staff to authorize removal of all unpermitted development and implementation of a phased protection plan. Please contact me by no later than June 28, 2021 regarding how you intend to resolve this violation.

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 or Andrew Willis, Enforcement Supervisor, at lara.ibrahim@coastal.ca.gov or Andrew.willis@coastal.ca.gov.

Sincerely,



Lara Ibrahim
South Coast Enforcement

cc: Lisa Haage, Chief of Enforcement, CCC
Andrew Willis, Enforcement Supervisor, CCC
Karl Schwing, Deputy Director, CCC
Shannon Vaughn, Coastal Program Manager, CCC

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