

CAPISTRANO BAY DISTRICT
AGENDA REPORT
APRIL MEETING
September 30, 2025

Shoreline Committee

ITEM 7a

Miller CDP Application Status

The third round of PC corrections was submitted but the City found a few additional items that require attention by the Coastal Engineer, Dave Skelly, so we are now into the fourth set of items to correct. The engineer has indicated that he can get this done during the week of September 29th through October 3rd.

The Committee has a Planning Commission hearing date in early November and all the consultants have been reminded that we cannot miss this hearing date by dragging our feet on this last set of corrections.

As was reported last month, the consultants are moving forward with the staff report for the City that goes along with the CDP application package for Planning Commission approval.

ITEM 7b

Susan McCabe Evaluation of Miller Project

The Shoreline Committee engaged with Susan McCabe, a consultant familiar with doing business with the Coastal Commission. Ms. McCabe, as an independent third party, was tasked with providing an evaluation on the strategy the Committee is employing with Miller. Her report is included on the following four pages.

MEMORANDUM

ITEM NO. 7b

To: Capistrano Bay District
From: McCabe & Company
Subject: Strategy Memo Regarding Shoreline Protection of Beach Road Homes
Date: September 28, 2025

Introduction

Our firm was asked by Capistrano Bay District (District) to review background materials and correspondence between the Coastal Commission (Commission) and the District related to unpermitted shoreline protective devices along Beach Road and provide strategic counsel and advice to assist it in evaluating the potential for success of its efforts to resolve the enforcement matters in a comprehensive manner.

We have reviewed background materials and communications between the District and the Commission as provided by the District and have the following observations.

District's Approach Over the Years

While the Coastal Commission has for a number of years informed individual homeowners and the District of the existence of unpermitted shoreline protective devices along Beach Road and has requested the District lead a community-wide effort to comprehensively resolve the issues, the District has consistently pointed out that it doesn't have the legal authority to lead such an effort but has remained open to engaging with Commission staff to seek a comprehensive solution to the shoreline erosion problem.

Recent Coastal Commission Correspondence

Commission staff recently renewed its efforts to seek a comprehensive resolution to the unpermitted shoreline protective devices starting in December 2024 and has engaged in a back-and-forth with the District's legal counsel, Stan Lamport. His correspondence with Commission staff has been measured, respectful and strategic.

In a letter to individual Beach Road property owners dated December 10, 2024, Commission staff requested that homeowners agree to "engage in a community-wide discussion (emphasis added) of this matter". In a letter dated February 26, 2025, Stan responded that a Shoreline Committee of property owners had been formed to "facilitate a community-wide discussion and follow-up" per Commission staff's previous letter. In subsequent correspondence, Commission

staff has requested the Shoreline Committee prepare a community-wide adaptation plan and were “disappointed” that the Shoreline Committee has declined to prepare an adaptation plan. It is clear that Commission enforcement staff is frustrated that the District will not (and cannot legally) assume a coordinating role regarding the enforcement proceedings and understands that the Commission’s options to assert jurisdiction are limited and would require substantial staff resources to undertake that effort.

City Role

In the Commission staff’s most recent correspondence with the Shoreline Committee, they posited that they could assume jurisdiction if the City of Dana Point fails to act or doesn’t act in a “timely manner”. While it is unclear what constitutes “timely manner”, the District and City planning staff maintain a cooperative relationship and have coordinated their efforts to demonstrate City support of a regional beach nourishment program through the implementation of the South Orange County Resiliency Strategic Plan. The City has also engaged in regular communications with Commission staff and are currently processing a CDP for shoreline protection at the Miller residence located at 35127 Beach Road and which the District has pursued as a post-1976 permit application regarding the definition of “existing” in the Coastal Act and within the City’s LCP.

Chris Miller Post-1976 CDP Application

I was asked to review the choice of the Miller residence as a post-1976 applicant and the strength of using a denial of the CDP by the Commission based on the structure’s construction post-1976 to pursue a legal takings challenge. The Miller residence seawall application presents a set of facts that I believe positions it well to litigate the constitutional takings issue if denied by the Commission. Several facts make Miller a strong candidate for a takings challenge.

First, the Commission must make a finding that the structure is in “imminent danger”. If the structure is not in imminent danger, the Commission can deny the permit. Not only is the photographic evidence of the residence compelling in demonstrating imminent danger, but the Commission made that specific finding when it approved an emergency CDP for sand cubes at the residence in September of 2021.

Second, the Commission could use a rationale that protection of the post-1976 Miller residence could be approved if it was connected to a pre-1977 structure which would be entitled to protection. That fact doesn’t apply at the Miller residence so could not be used to justify approval of a protective device to avoid a finding on the definition of “existing”.

Third, the Commission has been requiring structures being redeveloped (more than a 50% remodel) be built on caisson and grade beam foundations. Although the Miller property is not proposing redevelopment, if the Commission suggested that approach as a viable option to

approve a protective device for post-1976 structure, the structural engineers have concluded that replacing the non-structural wood piles with a caisson and grade beam system would cause the structure to fail and that a protective device is necessary to protect the residence.

The facts surrounding this CDP application will put the Commission in a position of having to either approve the protective device for the Miller residence which it has already determined is in imminent danger or deny it solely because it's a post-1976 structure. It sets Miller up for a takings challenge through the California courts and if denied, a petition to the U.S. Supreme Court.

I have followed the Commission's policy evolution on sea level rise, coastal protective devices, and managed retreat throughout my career. I believe Stan, with input from Steve Kaufmann, has identified a CDP application that has a good chance of prevailing in the courts.

Additional Efforts by the District

In addition to ongoing communications with Commission staff, the District is pursuing a variety of actions to advance a comprehensive approach to resolving the issues surrounding beach erosion along Beach Road as listed below and which we believe are helpful to the District's efforts to assist homeowners along Beach Road in protecting their residences:

- Performing twice yearly MHTL surveys for 20+ years.
- Considering commissioning a study to demonstrate that protective measures taken by individual property owners aren't causing beach erosion as asserted by Commission staff.
- Continuing efforts to advance a CDP application for a protective device at the Chris Miller residence and providing an LCP policy consistency review for City consideration and inclusion in the City CDP staff recommendation.
- Continuing efforts to demonstrate that beach erosion is likely caused by channelization of San Juan Creek, not by individual shoreline protective devices as asserted by Commission staff.
- Supporting efforts of OC Parks to implement the South Orange County Resiliency Strategic Plan as a regional solution to beach erosion in South Orange County.
- Collaborating with the District's Sacramento legislative representatives (Sen. Tony Strickland and Asm. Laurie Davies) to identify opportunities for statewide or regional solutions to beach erosion along California's coast.

Conclusion and Recommendations

We have reviewed background materials and recent correspondence and communications between the District and Commission staff and are impressed by the comprehensive,

thoughtful and strategic approach the District has taken up to this point. Creating and implementing a strategy to respond to Commission enforcement staff, particularly on a complicated enforcement matter involving dozens of homeowners, resembles a multi-dimensional chess game. Every action the Commission staff takes must be anticipated and responded to in a way that maximizes the chances for a favorable long-term outcome for Beach Road homeowners and minimizes the chances of adverse outcomes. There is no better legal team than Stan Lamport and Steve Kaufmann to anticipate and respond to Commission staff actions on this matter. Their decades of experience with the Commission both on policy, permitting and litigation matters gives them a unique ability to clearly convey the pros and cons of each potential outcome so their clients can make informed decisions on the best course of action.

Stan's responses to enforcement staff correspondence have been clear, concise, matter-of-fact, and importantly—non-confrontational. Commission staff is clearly frustrated that they can't force or coerce the District into becoming point for all the alleged violators along Beach Road. The Commission is short on resources and a comprehensive enforcement action by the Commission involving countless property owners each with different circumstances would be daunting, to say the least, and necessitate a significant use of limited staff resources. While it's hard to predict the next moves by Commission staff, the measured responses by the District and the newly formed Shoreline Committee to communications from Commission are effective and will undoubtedly give Commission staff pause as they determine their next steps.

In summary, we believe the District's efforts and strategy up to this point have been largely effective and have diffused overly aggressive responses from Commission staff. We believe the District is well positioned to respond to future Commission staff actions regarding long- and short-term solutions to beach erosion along Beach Road. We are available to discuss this memo and our recommendations as well as future actions contemplated by the District and the Shoreline Committee in furtherance of the goals of the Beach Road homeowners.