

CALIFORNIA COASTAL COMMISSION

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Items TH11 &12

Staff: Andrew Willis-LB
Staff Report: March 26, 2009
Hearing Date: April 9, 2009

STAFF RECOMMENDATIONS AND FINDINGS FOR CEASE AND DESIST AND RESTORATION ORDERS

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 staff report addendum.](#)

CEASE AND DESIST ORDER: CCC-09-CD-03

RESTORATION ORDER: CCC-09-RO-02

RELATED VIOLATION FILE: V-5-08-011

PROPERTY LOCATION: 21622 Pacific Coast Highway, Huntington Beach, Orange County Assessor's Parcel No. 114-150-86

PROPERTY OWNER: Mills PCH, LLC¹

VIOLATION DESCRIPTION: Unpermitted development, including 1) removal of major vegetation, including native wetland vegetation; 2) placement of fill in a wetland; 3) grading a wetland; 4) construction of a trench drain in a wetland; and 5) change in the intensity of use of water resulting from altering the hydrology of wetlands through soil compaction, grading, placement of fill and construction of a trench drain.

PERSONS SUBJECT TO THESE ORDERS: 1. Mills PCH, LLC²

SUBSTANTIVE FILE DOCUMENTS:

1. Huntington Beach certified Local Coastal Program
2. Public documents in Cease and Desist and Restoration Order files No. CCC-09-CD-03 and CCC-09-RO-02

¹ Mills PCH, LLC has informed staff that Mills PCH, LLC is now known as Beachfront Village, LLC. All references to Mills PCH, LLC or Respondent are to Beachfront Village, LLC (formerly known as Mills PCH, LLC).

² See fn1.

3. Exhibits #1 through #12 and Appendix 1 of this staff report

CEQA STATUS:

Exempt (CEQA Guidelines (CG) §§ 15060(c)(2) and (3)) and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308 and 15321).

I. SUMMARY OF STAFF RECOMMENDATION AND FINDINGS

This case involves the filling, grading and draining of wetlands that support saltmarsh vegetation native to southern California on two portions of an approximately 10.78 acre property located at 21622 Pacific Coast Highway, Huntington Beach (hereinafter, “subject property”) (Exhibit #1), as well as other unpermitted development, including removal of major vegetation, such as native saltmarsh vegetation; construction of a trench drain; and change in the intensity of use of water resulting from altering the hydrology of wetlands through soil compaction, grading, placement of fill, and the construction of the trench drain. The unpermitted development at issue affected a 1.12 acre fenced portion of the subject property and a 0.92 acre unfenced portion of the subject property (Exhibit #2). The latter portion of the subject property is located at the Northeast corner of the Newland Street and Pacific Coast Highway intersection. Areas of wetlands and the habitat provided by native saltmarsh vegetation located on the subject property constitute the predominant resources that were affected by the unpermitted development that is the subject of these proceedings. In addition, the state endangered Belding’s Savannah Sparrow has been documented within the unfenced and fenced portions of the subject property.

Wetland and Habitat Resources

Wetlands are extremely rare and important ecosystems. Of California’s remaining wetlands, southern California wetlands have been the most severely depleted. Despite their rarity, they remain extremely important from an ecological standpoint and southern California’s coastal wetlands still support numerous plant species found only in wetlands and resident and migrant wildlife species, including birds migrating along the Pacific Flyway. Wetlands often provide critical habitat, nesting sites, and foraging areas for threatened or endangered wildlife and bird species.

The affected wetland areas pond frequently during winter and support vegetation native to southern California saltmarshes, including saltgrass (*Distichlis spicata*) and pickleweed (*Salicornia virginica*). Commission staff ecologist Dr. Jonna Engel has visited the site and has verified that this site contains wetland as that term is defined in Section 30121 of the Coastal Act and Section 2.16.04 of the City of Huntington Beach certified Local Coastal Program (“LCP”) (see March 26, 2009 memorandum from Jonna D. Engel, PH.D, Commission staff ecologist (Exhibit #12).

The impacted wetland is a component of the larger Huntington Beach wetlands complex, which is a rare remnant of an extensive and disappearing historic wetland area that existed at the mouth of the Santa Ana River (Exhibit #3) and is designated an environmentally sensitive habitat area

(“ESHA”) in the City LCP. The Huntington Beach wetlands support a diversity of native plants characteristic of saltmarshes, which in turn provide habitat for animal species. Numerous wetland dependent and wetland associated bird species, such as Marsh Wren, Song Sparrow, Killdeer, and Western Meadowlark nest within the complex. The Huntington Beach Wetlands provide a critical food source and breeding habitat for the endangered Belding’s Savannah Sparrow. The area also presently serves as a waterfowl wintering area, providing resting and foraging areas during migration.

The impacted wetlands are ecologically connected to the Huntington Beach wetlands complex through shared saltmarsh plant species and wildlife usage and contiguous ponding. The native saltmarsh vegetation in the impacted wetlands, in and of itself, provides habitat for wildlife, including wetland dependent species. In addition, the saltmarsh vegetation on the impacted site expands the propagule and seed sources for vegetation in adjacent wetlands, thus helping to preserve genetic diversity and the flora of the wetland complex. Bird species that nest or forage within the Huntington Beach wetlands, including Killdeer, Western Meadowlark, and the endangered Belding’s Savannah Sparrow utilize the habitat, primarily composed of the saltmarsh vegetation and ponded areas, of the impacted wetlands.

The subject property is a portion of a larger parcel identified by Orange County Assessor’s Parcel No.114-150-86, which is owned by Mills PCH, LLC (“Respondent”). The subject property is zoned for coastal conservation and its designated land use is commercial visitor. A portion of the property is developed with a mobilehome park. Mills Land & Water Company owns the mobilehome park and is the primary manager of Respondent. In communications with staff, the Respondent has asserted that the unpermitted development at issue was undertaken to reduce ponding within the fenced portion of the subject property.

Unpermitted Development

The unpermitted activity that is the subject of these proceedings includes impacts to a wetland on the subject property, specifically including 1) removal of major vegetation; 2) placement of fill, including but not limited to sediment discharge from an unpermitted trench drain; 3) grading; 4) construction of a trench drain; and 5) change in the intensity of use of water resulting from altering the hydrology of wetlands through soil compaction, grading, placement of fill and construction of a trench drain (Exhibit #4). The removal of major vegetation, placement of fill, grading and change in the intensity of use of water described above all occurred within or adjacent to wetlands. Respondent acknowledges that a trench drain was excavated on the subject property; grading occurred to construct the trench; soil excavated from the trench was dispersed on the property, including into a wetland in the unfenced portion of the property; grading on the property resulted in the removal of saltgrass and pickleweed; and stormwater was discharged into a wetland from the trench drain.

Jurisdiction

Huntington Beach has a certified LCP. Once the Commission has certified an LCP, the local government obtains jurisdiction for issuing Coastal Development Permits (“CDPs”) under the Coastal Act, and it has inherent (police power) authority to take enforcement actions for

violations of its LCP. Pursuant to Section 30810 of the Coastal Act, Commission staff coordinated with the City of Huntington Beach, and requested that Huntington Beach take action to enforce the policies of the LCP, or to indicate their preference that the Coastal Commission take action to address the Coastal Act violation. City staff recommended that the Coastal Commission take action to address the Coastal Act violations at issue.

Commission's Authority

The Commission can issue a Cease and Desist Order under Section 30810 to enforce the requirements of a certified LCP in cases where it finds that the activity that is the subject of the order has occurred either without a required CDP or in violation of a previously granted CDP. The Commission can issue a Restoration Order under section 30811 of the Coastal Act if it finds that development 1) has occurred without a CDP, 2) is inconsistent with the Coastal Act, and 3) is causing continuing resource damage. These criteria are all met in this case, as summarized briefly, below.

As described in more detail in Section IV of this staff report, the unpermitted activity that has occurred on the subject property clearly meets the definition of "development" set forth in Coastal Act Section 30106 and LCP Section 245.04. Coastal Act Section 30600 and LCP Section 245.06 state that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the Coastal Zone must obtain a CDP. Since the City has a certified LCP, the performance of this development requires a CDP from the City. No such permit was issued by the City nor has a permit application been submitted.³ No permit was issued for the activity at issue, either by the Commission or by the City pursuant to its authority under the LCP, implementing the Coastal Act.

As discussed below, not only does the unpermitted activity clearly meet the definition of development as that term is defined in the Coastal Act and in the City LCP, and therefore requires but lacks a CDP, but the unpermitted development is also clearly inconsistent with the Chapter 3 policies of the Coastal Act and the policies of the City LCP. The unpermitted development and the ongoing maintenance of the unpermitted development are inconsistent with policies in Chapter 3 of the Coastal Act, including Section 30231 (biological productivity of coastal waters), Section 30233 (limiting fill of wetlands), and Section 30240 (environmentally sensitive habitat areas or ESHA), and numerous policies within the City's LCP, as fully discussed below.⁴

The unpermitted development has adversely impacted the resources associated with wetland habitat. Such impacts meet the definition of damage provided in Section 13190(b) of Title 14 of

³ The location of the unpermitted development and the property on which the activity occurred is located within the Commission's "Appeals Area," as that term is defined by LCP Section 245.04(B), since the subject property and the location of the unpermitted development are located within 100 feet of a wetland. This area is also within the Commission's appeals jurisdiction as defined in the Coastal Act, for the same reason. See Coastal Act Section 30603(a)(2). Therefore, if the Respondents had applied for and obtained any permit for this activity, which it did not, any action taken by the City, under its LCP, approving proposed development at this location, including the subject unpermitted development, would be appealable to the Commission.

⁴ A description of the Chapter 3 policies of the Coastal Act and the City LCP policies that apply to the Subject Property is provided in Section IV of this staff report.

the California Code of Regulations (“CCR”), which defines “damage” as, “any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development.” If the unpermitted development, including, but not limited to, wetland fill, a trench drain, and altered wetland hydrology, is allowed to remain unmitigated, its effects will lead to further adverse impacts (including the temporal continuation of the existing impacts) to water quality and biological productivity of wetlands and adjacent sensitive habitat.

The unpermitted development remains at the subject property. The continued presence of the unpermitted development, as described below, will exacerbate and/or prolong the adverse impacts to wetland habitat, the water quality and biological productivity of this area, and the adjacent sensitive habitat. Thus, the continued presence of the unpermitted development on the subject property is causing continuing resource damage, as defined in 14 CCR Section 13190.

Staff recommends that the Commission approve Cease and Desist Order CCC-09-CD-03 and Restoration Order CCC-09-RO-02 (“Orders”) to require and authorize Respondent to 1) remove all unpermitted development from the subject property, 2) restore and undertake mitigation activities on the subject property using restorative grading and planting of vegetation native to southern California saltmarshes, and 3) cease and desist from conducting any further unpermitted development on the subject property.

II. HEARING PROCEDURES

The procedures for a hearing on a Cease and Desist Order and Restoration Order are outlined in 14 CCR Section 13185 and 14 CCR Section 13195.

For a Cease and Desist Order and Restoration Order hearing, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which time Staff typically responds to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in 14 CCR Section 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order and Restoration Order, either in the form recommended by the Executive Director, or as amended by

the Commission. Passage of the motion below, per the Staff recommendation or as amended by the Commission, will result in issuance of the Cease and Desist Order and Restoration Order.

III. STAFF RECOMMENDATIONS

Staff recommends that the Commission adopt the following two motions:

1. Motion

I move that the Commission issue Cease and Desist Order No. CCC-09-CD-03 pursuant to the staff recommendation.

Staff Recommendation of Approval

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Cease and Desist Order

The Commission hereby issues Cease and Desist Order No. CCC-09-CD-03, as set forth below, and adopts the findings set forth below on grounds that development, conducted by the Respondent and/or its manager or other associated entities has occurred on property owned by Respondent without a coastal development permit, in violation of the City of Huntington Beach Local Coastal Program.

2. Motion

I move that the Commission issue Restoration Order No. CCC-09-RO-02 pursuant to the staff recommendation.

Staff Recommendation of Approval

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Restoration Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Restoration Order

The Commission hereby issues Restoration Order No. CCC-09-RO-02, as set forth below, and adopts the findings set forth below on the grounds that 1) development has occurred on the subject property without a coastal development permit, 2) the development is inconsistent with the Coastal Act, and 3) the development is causing continuing resource damage.

IV. FINDINGS FOR CEASE AND DESIST ORDER NO. CCC-09-CD-03 AND RESTORATION ORDER CCC-09-RO-02⁵

A. Description of Unpermitted Development

The unpermitted development that is the subject matter of these Orders, consists of 1) removal of major vegetation; 2) placement of fill, including but not limited to sediment discharge from an unpermitted trench drain; 3) grading; 4) construction of a trench drain; and 5) change in the intensity of use of water resulting from altering the hydrology of wetlands through soil compaction, grading, placement of fill and construction of a trench drain. The removal of major vegetation, placement of fill, grading and change in the intensity of use of water described above all occurred within or adjacent to wetlands.

B. History of Violations

Site History

The unpermitted development activities at issue occurred in February 2008. The wetlands impacted by the unpermitted development in February 2008 have been disturbed in the past. In May 2005, several mounds of asphalt were placed on wetland vegetation. In response, the City of Huntington Beach ordered the mobilehome park management to remove the asphalt and informed management that a permit must be obtained for any further such activities.⁶ In August 2006, City staff noticed that wetland vegetation had been removed from the same area of the subject unpermitted development. The City informed the mobilehome park management in writing that vegetation could not be removed from the site – also the site of the unpermitted development at issue – without a CDP. In April 2007, several mounds of asphalt were again placed on top of wetland vegetation. The mounds were later removed.

In addition, in 1981, a Coastal Act violation (V-5-81-032) involving grading and removal of wetland vegetation from a parcel adjacent to the mobilehome park was resolved through a settlement agreement between the mobilehome park owner, Mills Land & Water Company, and the Office of the Attorney-General, which required Mills Land & Water Company to remove debris and trash from the parcel, notify the Attorney-General of the debris removal, and apply for a coastal development permit for any vegetation removal in the future. The parcel subject to the 1981 enforcement action is on the opposite side of the mobilehome park from the subject property. Mills Land & Water Company, which is the primary manager of Respondent, presently owns the mobilehome park, as they did at the time of the 1981 Coastal Act violation. Mills Land & Water Company would therefore have reason to both know of the protection the Coastal Act provides for wetlands and of the general need for coastal development permits and the role of the Coastal Commission in implementing the Coastal Act and its requirements. Mills Land & Water Company, as primary manager of the Respondent, would presumably have informed Respondent of these facts. In communications with staff Respondent has asserted that the unpermitted

⁵ These findings also hereby incorporate by reference Section I of the March 26, 2009 staff report (“Staff Recommendations and Findings”) in which these findings appear, which section is entitled “Summary of Staff Recommendations and Findings.”

⁶ As discussed above in Section I of the March 26, 2009 staff report, the Property is located within the City of Huntington Beach certified Local Coastal Program jurisdiction. The City recommended the Commission assume primary enforcement authority with regard to the current violation pursuant to Section 30810.

development at issue was undertaken to reduce ponding within the fenced portion of the subject property

Unpermitted Development at Issue

The current incident of unpermitted development commenced on February 23, 2008 and was reported to Commission staff by a member of the public on February 24. Photographs taken on February 23 and 24 documenting the activity accompanied the report. Staff visited the site on February 26 and confirmed that development, including grading and fill of wetlands, removal of wetland vegetation, and construction of a trench drain in a wetland, had occurred. At the site, staff observed graded wetland areas, ponding water in several locations, placement of a trench drain and pipe, and areas where wetland vegetation, including pickleweed had been removed and destroyed. Two pieces of heavy equipment - a mechanized soil compactor and a backhoe - were parked on the site. Commission staff researched City and Commission CDP history and confirmed that no application for a CDP had been submitted, and no CDP had been obtained from the City or the Commission, for any such activities.

Commission staff consulted with the City, during a telephone conversation on February 26, 2008, regarding what action would be appropriate and the appropriate entity to address the unpermitted development under the policies of the City's certified Local Coastal Program ("LCP"), as is provided for in Sections 30809 and 30810. City staff recommended that the Commission assume primary enforcement authority with regard to this violation.

Commission staff confirmed, in a letter dated March 4, 2008 (Exhibit #5), that City staff had requested the Commission take action to enforce the policies of the City LCP, including but not limited to issuance of an order to enforce the requirements of the LCP pursuant to Section 30810 and/or 30811. As noted above, on February 26, 2008, the City recommended that Commission staff proceed with cease and desist and restoration order proceedings, and therefore, Commission staff initiated these proceedings to resolve the unpermitted development and obtain restoration of the subject property.

Attempts at Resolution

The Commission staff has made extensive attempts to resolve this matter amicably, and to work with Respondent to achieve restoration of this area. Commission staff sent a Notice of Violation letter to Respondent on March 21, 2008 (Exhibit #6), that explained the subject unpermitted activity is "development" under the City LCP, that development without a CDP is a violation of the LCP, and requested that the Respondent contact Commission staff to discuss Respondent's willingness to resolve the violations.

In an April 14, 2008 response to Commission staff's March 21 Notice of Violation letter (Exhibit #7), Respondent indicated its preference to resolve the matter through a consensual agreement. Subsequently, staff discussed with Respondent during a telephone conversation on June 13, 2008, the possibility of addressing these violations through a consent order.

Commission staff ecologist Dr. Jonna Engel and Commission enforcement staff met with a representative of Respondent and its biological consultant on the site on July 7, 2008. During

that site visit, wetland indicator plant species, including saltgrass and pickleweed, were documented by Commission staff in the area disturbed by unpermitted development. Dr. Engel's site visit notes are summarized on page 1 of her March 25, 2009 memorandum. (Exhibit #12)

Respondent submitted a letter including a wetland delineation memo to staff on September 16, 2008 that stated that they had found no wetlands in the disturbed area and requested the enforcement action be delayed to study the site throughout winter. Commission staff responded by letter dated October 27, 2008 that existing photographic documentation adequately addressed the site hydrologic characteristics and the information Mills PCH proposed to gather wasn't necessary to staff's ability to make a wetland determination, and moreover, in order to address the impacts to coastal resources resulting from the subject unpermitted development in a timely manner, it was necessary to move forward expeditiously. Staff reiterated its preference to work cooperatively with Mills PCH to reach a consensual resolution of the violations.

In an effort to assist the discussions and to share the grounds for the CCC staff analysis of the character of the site, on November 25, 2008, Commission staff shared photographic documentation of the site's hydrologic characteristics with Respondent.

In a January 13, 2009 letter, Commission staff proposed draft consent orders to Respondent in order to settle the matter of this violation regarding fill of wetlands in February 2008, including settlement of penalties for these violations as well, in order to be able to avoid litigation over the subject Coastal Act violations on the Property and to most quickly move to site restoration.

On January 27, 2009, staff received Mills PCH, LLC's response to the proposed draft consent orders, indicating its preference to continue to work towards a consent order. Staff continued discussions of this possibility during a telephone conversation with Mills PCH, LLC on January 29.

Notice of Intent to Commence Cease and Desist and Restoration Order Proceedings and to Record a Notice of Violation of the Coastal Act

Because of the ongoing resource damage at the subject property and the fact that the subject violations remain in place and unaddressed despite the discussions noted above, Commission staff initiated these proceedings to resolve the unpermitted development and to provide a framework to restore the subject property as quickly as possible. To that end, on February 3, 2009, the Executive Director issued a Notice of Intent to Record a Notice of Violation of the Coastal Act and to Commence Cease and Desist and Restoration Order Proceedings (Exhibit #8), to resolve the violations, through formal enforcement actions either as a consent or standard order proceeding.

In accordance with Sections 13181(a) and 13191(a) of the Commission's regulations, Respondent was provided the opportunity to respond to the Commission staff's allegations as set forth in the NOI by completing a Statement of Defense form (hereinafter "SOD"). Respondent was required to submit the SOD by no later than February 23, 2009, under the applicable regulations. At the request of Respondent, staff extended the deadline twice, to February 27 and March 2. Although not characterized as an SOD by Respondent, on March 2, Respondent

submitted a letter containing their responses to issues raised in the NOI (Attached with Exhibit #10). (This letter is summarized and responded to in Section IV.F herein). Respondent also indicated their preference to continue discussions with CCC staff and so requested additional extensions of time to submit a more formal SOD. Late on the evening of March 19, Respondent informed CCC staff that they would not be settling this matter. Therefore, CCC staff gave them until Monday, March 23 to submit a supplemental SOD if they chose to do so. Respondent's supplemental SOD, received on March 23, is attached as Exhibit #10.

Also contained in the February 3, 2009 NOI, was a Notification of Intent to Record a Notice of Violation of the Coastal Act (hereinafter, "NOI for NOVA").

The Commission's authority to record a Notice of Violation is set forth in Section 30812(a) of the Coastal Act, which states the following:

"Whenever the executive director of the commission has determined, based on substantial evidence, that real property has been developed in violation of this division, the executive director may cause a notification of intention to record a notice of violation to be mailed by regular and certified mail to the owner of the real property at issue, describing the real property, identifying the nature of the violation, naming the owners thereof, and stating that if the owner objects to the filing of a notice of violation, an opportunity will be given to the owner to present evidence on the issue of whether a violation has occurred."

NOVAs are merely intended to provide notice to avoid inadvertent creation of innocent purchasers, and do not constitute a lien or other encumbrance of the property. The Executive Director issued the NOI for NOVA because unpermitted development had occurred at the subject property, in violation of the Coastal Act. The NOI for NOVA stated, "If you object to the recordation of a Notice of Violation in this matter and wish to present evidence on the issue of whether a violation has occurred, you must respond in writing... within twenty days of the postmarked mailing of this notification. If you fail to object within that twenty-day period, we are authorized to record the Notice of Violation in the Orange County recorder's office pursuant to Section 30812 of the Coastal Act." The deadline for Respondent to object to the recordation of a Notice of Violation was February 23, 2009. Respondent did not object to the recordation, and moreover, agreed to its recordation, and therefore, on February 24, 2009, a Notice of Violation was sent to the Orange County Recorder's office to be recorded on the subject property. On February 27, 2009, the Orange County Recorder's office recorded the Notice on the subject property as Instrument No. 2009-000092466 (Exhibit #9).

The NOI did not signal the end of negotiations to resolve the matter consensually. In an effort to continue to work cooperatively with Respondent, Commission staff discussed the terms of potential consent orders with Respondent on January 29 and sent Respondent updated proposed language on February 6, 2009. By letter dated February 17, 2009, Respondent objected to the updated proposed language in the draft consent orders. Staff revised the proposed language again and sent the revised draft consent orders on March 5, 2009. On March 10, staff and the Respondent discussed the proposed language of the orders.

On March 13, 2009, Respondent informed staff that it objected to some of the provisions in the proposed order. CCC staff tried several times to propose compromise language and spoke numerous times with Respondent in an attempt to resolve this matter, but was ultimately unsuccessful in doing so. Therefore, in order to obtain restoration of the site, the Commission staff was required to continue with these Cease and Desist and Restoration Order proceedings.

C. Basis for Issuance of Orders

Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in Coastal Act Section 30810, which states, in relevant part:

(a) If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program . . . or any requirements of [the Coastal Act] which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:

(1) The local government . . . requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.

(b) The cease and desist order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material...

The unpermitted development detailed above in Section IV.A has occurred on the subject property without a CDP. The unpermitted development that is the subject of these Orders meets the definition of “development” contained in Section 245.04 of the Huntington Beach LCP, as explained below.

Section 245.06 of the City’s LCP states that, in addition to obtaining any other permit required by law, and with limited exceptions not applicable here, any person wishing to perform or undertake any development in the Coastal Zone must obtain a CDP. “Development” is defined by Section 245.04 of the LCP as follows:

The placement or erection of any solid material or structure on land, in or under water; discharge or disposal of any materials; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land...change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure...and the removal or harvesting of major vegetation other than for agricultural purposes...

In this case, the activities described in Section IV.A constitute “development” within the meaning of the above-quoted definition and therefore are subject to the permit requirement of LCP Section 245.06. Respondent acknowledges that a trench drain was excavated on the subject property; grading occurred to construct the trench; soil excavated from the trench was dispersed on the property, including into a wetland in the unfenced portion of the property; grading on the property resulted in the removal of saltgrass and pickleweed; and stormwater was discharged into a wetland from the trench drain. A CDP was not issued by the City or the Commission to authorize the subject development, the unpermitted development is not exempt under the permit requirements, and the City requested that the Commission take action and issue a Cease and Desist Order.⁷ Therefore, the requirements for issuance of a Cease and Desist Order under Coastal Act Section 30810 have been met.

Restoration Order

The statutory authority for issuance of this Restoration Order is provided in Section 30811 of the Coastal Act, which states, in relevant part:

In addition to any other authority to order restoration, the commission... may, after a public hearing, order restoration of a site if it finds that [a] the development has occurred without a coastal development permit from the commission, local government, or port governing body, [b] the development is inconsistent with this division, and [c] the development is causing continuing resource damage.

The following paragraphs set forth the basis for the issuance of the Restoration Order by providing substantial evidence that the development meets all of the required grounds listed in Section 30811 for the Commission to issue a Restoration Order.

a. Development has occurred with a Coastal Development Permit

As previously presented in Section IV.C of this report, the activities at issue in this matter constitute “development” as defined in the City LCP and Coastal Act and are therefore subject to LCP permitting requirements. Staff has verified that the cited development on the subject property was conducted without a CDP.

b. The Unpermitted Development at Issue is Inconsistent with the Coastal Act and the City LCP

As described below, the unpermitted development is not consistent with Section 30231 (protection of biological productivity of coastal waters and quality of coastal waters), Section 30233 (limiting fill of wetlands) and Section 30240 (ESHA protection) of the Coastal Act, in addition to policies within the Huntington Beach LCP.

i. Wetlands

⁷ As previously noted, on February 26, 2008, the City of Huntington Beach requested that the Commission take enforcement action on the City’s behalf. Section 30810(a)(1) provides that a local government can request the Commission to assume primary responsibility for issuing a cease and desist order.

Because of the historical losses and current rarity of these habitats, and because of their extreme sensitivity to disturbance, wetlands are provided protection under the Coastal Act and the City LCP.

Section 30121 of the Coastal Act states:

“Wetland” means lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens.

The Commission has further specified how wetlands are to be identified through regulations and guidance documents. Section 13577(b)(1) of the Commission’s regulations states, in pertinent part:

Wetlands shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes For purposes of this section, the upland limit of a wetland shall be defined as:

- (A) the boundary between land with predominantly hydrophytic cover and land with predominantly mesophytic or xerophytic cover;*
- (B) the boundary between soil that is predominantly hydric and soil that is predominantly nonhydric; or*
- (C) in the case of wetlands without vegetation or soils, . . .*

The City LCP defines a wetland in similar terms, essentially combining the above statutory and regulatory definitions, resulting in a definition of wetlands as:

Land which may be covered periodically or permanently with shallow water and includes saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens. Wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification², wetlands must have one or more of the following attributes:

- 1. At least periodically, the land supports predominantly hydrophytes; or*
- 2. The substrate is predominantly undrained hydric soil; or*
- 3. The substrate is non-soil and is saturated with water or covered by shallow water at some point during the growing season of each year.*

² *“ Classification of Wetlands and Deep-Water habitats of the United States” by Lewis M. Cowardin, et al, United States Department of Interior, Fish and Wildlife Service, December 1979*

Section 30233(a) of the Coastal Act states:

The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

- 1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*
- 2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*
- 3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
- 4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
- 5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
- 6) Restoration purposes.*
- 7) Nature study, aquaculture, or similar resource dependent activities.*

Section 30108.2 of the Coastal Act defines "Fill" as:

"Fill" means earth or any other substance or material, including pilings placed for the purposes of erecting structures thereon, placed in a submerged area.

In addition, the City LCP specifically addresses development activity in wetlands and provides for protection policies to ensure that wetlands are not impacted by development. Policy C 6.1.20 of the City LCP limits filling of wetlands to the specific activities outlined in Section 30233 of the Coastal Act.

Policy 7.1.4 states:

Require that new development contiguous to wetland or environmentally sensitive habitat areas include buffer zones. Buffer zones shall be a minimum of one hundred feet setback from the landward edge of the wetland...

The Commission's staff ecologist, Dr. Jonna Engel, evaluated the subject property and confirmed that the area impacted by the unpermitted development contained wetlands, as that term is defined by Section 30121 of the Coastal Act and the City LCP.⁸ The Coastal

⁸ The LCP clearly provides for identification of wetlands in this manner, regardless of the fact that the area being assessed was not specifically and independently called out as a wetland in the LCP. This approach is undisputed, as evidenced not only by Respondent's participation in this evaluation process, but also by the fact that Respondent

Commission's regulations regarding wetlands and the LCP definition of wetlands, both quoted above, establish a "one parameter definition," meaning that they only require evidence of a single parameter to designate an area as a wetland conditions. *See, also, Kirkorowicz v. California Coastal Comm'n* (2000) 83 Cal.App.4th 980, 990. Dr. Engel found that not just one parameter, but two parameters, wetland hydrology and a preponderance of wetland vegetation, are present on the site. (see March 26, 2009 memorandum from Jonna D. Engel, PH.D, Commission staff ecologist (Exhibit #12)).

The unpermitted development includes placement of fill within and adjacent to wetlands and removal of wetland vegetation, including saltgrass and pickleweed. Section 30233 of the Coastal Act and Policy 6.1.20 of the LCP do allow for fill of wetlands under narrow criteria, and when properly authorized in a CDP. Notably, there was no CDP applied for or obtained for the development activities at issue in this enforcement action. Moreover, even if they had applied for a CDP from the County or CCC, the unpermitted development that resulted in wetland fill does not fall under any of the allowable criteria for wetlands fill under the Coastal Act and LCP.

As stated above, fill was placed within and adjacent to wetlands on the subject property, and wetland vegetation was removed. Not only does the City LCP restrict almost all development within wetlands, but, pursuant to Section 7.1.4 of the City LCP, development is also limited within a 100-foot buffer zone surrounding wetlands. Clearly, the placement of fill directly into the wetland, and the removal of wetlands vegetation are not types of development allowed within wetlands or within the 100-foot buffer surrounding wetlands.

In addition, the grading and fill of the wetlands and the removal of vegetation within and around the wetlands was conducted without benefit of a CDP, in violation of the Coastal Act and the City LCP. As demonstrated in this section and throughout this staff report, the unpermitted development is inconsistent with the resource protection policies of the Coastal Act and City LCP. Thus, the requirements to issue a Cease and Desist and the first two criteria that must be satisfied for issuance of a Restoration Order have been met.

ii. Biological Productivity of Wetlands and Development Adjacent to Environmentally Sensitive Habitat Areas

Section 30231 of the Coastal Act states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow,

recognizes the wetlands within the unfenced portion of the subject property (an area not specifically called out as containing wetlands in the LCP) as wetlands.

encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Policy 6.1.4 of the City LCP states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain organisms and for the protection of human health shall be maintained and, where feasible, restored.

Coastal Act Section 30240(b) states:

Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

Policy 7.1.3 of the City LCP duplicates the language of Coastal Act Section 30240(b).

Biological Productivity of Wetlands and ESHA

Any fill or alteration of wetland hydrology reduces a wetland's ability to function, and consequently, its biological productivity. Water is the main requirement for a functional wetland. If water is drained or removed, or isn't present in the wetland for as long, then wetland function will be degraded. Therefore, wetland function would be degraded by actions that disrupt water supply through direct fill of a wetland or draining. Degradation of function means that the same plants will not grow and the wetland will not provide the same water filtration, percolation, and stormwater runoff storage function. The unpermitted development at issue disrupted water supply through direct fill, both from grading and placement of soil excavated to construct the trench drain on the site, as well from sediment-laden discharge from the trench drain, and draining of a wetland. Respondent acknowledges that the biological productivity of the wetlands on the unfenced portion of the subject property was affected by stormwater discharge from the trench drain. Consequently, the unpermitted development degraded the function of wetlands on the subject property.

In addition, as noted above, the habitat that a functioning wetland provides is a significant coastal resource due in part to the high biological productivity of wetland habitat and the rarity of this habitat and the sensitive species it supports. One of the chief components of wetland habitat is wetland vegetation. Thus, removal of wetland plant species reduces the habitat value of a wetland. Wetland vegetation native to southern California saltmarshes, such as pickleweed and saltgrass, were among the vegetation removed here, without a permit and subsequently in violation of the Coastal Act. Also, as noted in the paragraph above, degradation of function through alteration of wetland hydrology means that the same plants may not grow and habitat value and wildlife use of the wetland could be reduced.

Also, bird species that are a component of the Huntington Beach wetland ecosystem, such as Killdeer, and bird species that nest in the adjacent Huntington Beach wetlands, including the

state endangered Belding's Savannah Sparrow⁹ and the Western Meadowlark, have been documented in the impacted wetlands. The use of the impacted wetlands by these species underscores the fact that wetlands on the subject property are part of the larger Huntington Beach wetlands complex, which is a designated ESHA in the City LCP. The wetlands and habitat on the subject property are also ecologically connected to the wetland complex through shared saltmarsh plant species and contiguous ponding.

The wetlands on the property and the wetland complex have been historically degraded and fragmented as a result of development in the area. Impacts to the wetlands and native saltmarsh vegetation on the subject property can fragment the wetland complex, causing more extensive damage to the whole complex and the flora and fauna it supports. For instance, as noted above, bird species that nest in the Huntington Beach wetlands have been documented utilizing the area disturbed by the unpermitted development. In disturbing the site, foraging areas for birds nesting in the adjacent wetlands, a designated ESHA, have been eliminated, thus impacting adjacent ESHA and the biological productivity of adjacent wetlands, which is inconsistent with Coastal Act Sections 30240(b) and 30231.

Quality of Coastal Waters

Sediment discharged into the wetlands on the unfenced portion of the property from the trench drain and fill placed in the wetlands, both on the unfenced and fenced portions of the property, inevitably diminished the water quality of the wetlands by increasing turbidity. Respondent acknowledges that stormwater was discharged from the trench drain into the wetlands on the unfenced portion of the property. Increased sedimentation and turbidity diminish the water quality of wetlands, and as noted above, the function and biological productivity of the wetland, by reducing water clarity, increasing water temperature, and smothering wetland vegetation.

No measures were taken to control runoff in order prevent these water quality impacts. On the contrary, the unpermitted development facilitated runoff into the wetland on the unfenced portion of the property and directly introduced sediment into wetlands on the unfenced and fenced portions of the property.

In summary, the unpermitted development has significantly impeded the functioning and biological productivity of wetlands on and off the subject property, in part due to removal of native vegetation that provides habitat to wildlife, which in turn will affect adjacent wetlands and ESHA. Further, the interim loss of habitat value and wetland hydrology will have a significant impact that will continue to be experienced until the impacts of the unpermitted development are remedied. Due to its deleterious effect on wetland habitat and function on and off the subject property, the unpermitted development does not maintain, much less restore, the biological productivity and water quality of wetlands necessary to maintain the optimum populations of marine organisms and is not compatible with the continuance of the Huntington Beach wetlands ESHA. Therefore, the unpermitted development is inconsistent with Sections 30231 and

⁹ The Belding's Savannah Sparrow was observed on March 10, 2009 and March 17, 2009 within the unfenced portion of the impacted area and on March 17, 2009 within the fenced portion of the impacted area. Personal communication from Robb Hamilton of Hamilton Biological, Inc., and co-author of *The Birds of Orange County, California: Status and Distribution*. Sea & Sage Press, Sea & Sage Audubon Society, Irvine.

302340(b) of the Coastal Act and Policies 6.1.4 and 7.1.3 of the City LCP, again satisfying the second criterion for issuance of a Restoration Order. As noted above, Respondent acknowledges that the biological productivity of the wetlands on the unfenced portion of the subject property was affected by sediment discharge from the trench drain. Thus, Respondent is in agreement that the second criterion for issuance of Restoration Order has been met. Mitigation is necessary in this case, due to the fact even with proper restoration of the wetlands and habitat on site, the interim loss of ecosystem value and water quality functioning will have a significant impact that will be experienced into the future.

c. Unpermitted Development is Causing Continuing Resource Damage

The unpermitted development is causing “continuing resource damage”, as those terms are defined by Section 13190 of the Commission’s regulations.

i. Definition of Continuing Resource Damage

Section 13190(a) of the Commission’s regulations defines the term “resource” as it is used in Section 30811 of the Coastal Act as follows:

”Resource’ means any resource that is afforded protection under the policies of Chapter 3 of the Coastal Act, including but not limited to public access, marine and other aquatic resources, environmentally sensitive wildlife habitat, and the visual quality of coastal areas.”

The term “damage” in the context of Restoration Order proceedings is provided in Section 13190(b) as follows:

“Damage’ means any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development.”

In this case, the resources are the habitat provided by the impacted native saltmarsh vegetation, and the water quality functions and environmentally sensitive wildlife and plant habitat provided by the wetlands, and the damage is the degradation of that wetland habitat, including ESHA, which is caused by the unpermitted development on the subject property, as described in the prior section.

The term “continuing” is defined by Section 13190(c) of the Commission’s regulations as follows:

“Continuing’, when used to describe ‘resource damage’, means such damage, which continues to occur as of the date of issuance of the Restoration Order.”

As of this time, all of the unpermitted development that is the subject of these proceedings and the results thereof remain at the subject property. As described above, the unpermitted development results in impacts to coastal resources, including habitat provided by native

saltmarsh vegetation, wetlands and wetlands habitat, biological productivity of the wetlands, and ESHA. The fill of wetlands and removal of wetland vegetation continues to impact the coastal resources, including wetland and protected resources within and adjacent to the wetland area by continuing to prevent the wetland from existing or functioning and disrupting the biological productivity of these areas.

As described above, the unpermitted development is causing adverse impacts to resources protected by the Coastal Act and the City LCP that continue to occur as of the date of this proceeding and damage to resources is “continuing” for purposes of Section 30811 of the Coastal Act. The damage caused by the unpermitted development, which is described in the above paragraphs, satisfies the regulatory definition of “continuing resource damage.” The third and final criterion for issuance of a Restoration Order is therefore satisfied.

D. Orders are Consistent with Chapter 3 of the Coastal Act

The Cease and Desist Order and Restoration Orders attached to this staff report are consistent with the resource protection policies found in Chapter 3 of the Coastal Act. The Orders require Respondent to remove all unpermitted development from the subject property, restore the subject property using restorative grading and planting of vegetation native to southern California saltmarshes, mitigate for temporal losses, and cease and desist from conducting any further unpermitted development on the subject property. The Orders require Respondent to plant native plant species to be compatible with the surrounding wetlands habitat and to ensure that non-native, invasive plant species do not colonize the newly restored site and spread from there to supplant the surrounding native habitat. Failure to revegetate the site would lead to potential invasion of non-native plant species, thus decreasing the biological productivity of this wetland habitat, inconsistent with the resource protection policies of the Coastal Act and the City LCP.

Therefore, the Cease and Desist Order and Restoration Order are consistent with the Chapter 3 policies of the Coastal Act and the City LCP.

E. California Environmental Quality Act (CEQA)

The Commission finds that issuance of these Orders to compel the restoration of the subject property is exempt from any applicable requirements of the California Environmental Quality Act of 1970 (CEQA), Cal. Pub. Res. Code §§ 21000 *et seq.*, and will not have significant adverse effects on the environment, within the meaning of CEQA. The Orders are exempt from the requirement for the preparation of an Environmental Impact Report, based on Sections 15060(c)(2) and (3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines, also in 14 CCR.

F. Statement of Defense

In accordance with Sections 13181(a) and 13191(a) of the Commission’s regulations, Respondent was provided the opportunity to respond to the Commission staff’s allegations as set forth in the NOI dated February 3, 2009, by completing a Statement of Defense form (hereinafter “SOD”). Respondent was required to submit the SOD by no later than February 23, 2009, under

the applicable regulations. At the request of Respondent, in conjunction with settlement negotiations, staff extended the deadline twice, to February 27 and March 2. Although not initially characterized as an SOD by Respondent, on March 2, Respondent submitted a letter that included, by reference, issues raised in prior letters (dated November 12, 2008, January 27, 2009, and February 17, 2009) and memoranda from Respondent's biological consultant (dated September 11, 2008, November 12, 2008, and February 28, 2009) and contained their responses to issues raised in the NOI. Respondent subsequently indicated that its March 2 letter constituted part of its SOD.

Respondent also indicated its preference to continue discussions with CCC staff and so requested additional extensions of time in the hopes of avoiding having to submit a more formal SOD. Late on the evening of March 19, Respondent informed CCC staff that they would not be settling this matter. As a courtesy, CCC staff gave Respondent an opportunity to submit a supplemental SOD by March 23 if it chose to do so. Respondent supplemented its March 2 letter on March 23, and the Commission is responding herein.

The following paragraphs present statements made by Respondent and the Commission's responses to those statements.

1. Respondent Defense:

“We disagree with the characterization of the Cabrillo Site as a wetland. Photos from that time show that the majority of the site consisted of bare, compacted soil to support its use as a parking lot and vehicle storage facility with patches of vegetation, consisting of both sensitive plants such as saltgrass (*Distichlis spicata*), small patches of pickleweed (*Salicornia virginica*), and non-native ruderal species, such as five-hook bassia (*Bassia hyssopifolia*) small-flowered ice plant (*Mesembryanthemum nodiflorum*), and Italian ryegrass.

As we discussed during your site visit, although sensitive vegetation, specifically saltgrass and pickleweed, are present on site, these plants on this site are not hydrophytes growing in hydric soils.” March 2, 2009 letter, p.3.

CCC Response:

Commission staff ecologist Jonna D. Engel's March 26, 2009 memorandum (Exhibit #12) delineates wetlands on the site that were impacted by the unpermitted development. Dr. Engel was able to observe the site, review all available information including that submitted by Respondent, apply the applicable standards for evaluating wetlands under the Coastal Act and the City LCP, and concluded that one large area and a few smaller areas on the fenced portion of the subject property do exhibit wetland hydrology and support wetland vegetation therefore meeting the definition of California Coastal Commission and LCP wetlands.

In addition, although Respondent disputes the delineation of wetlands within the fenced portion of the subject property, representatives of Respondent have admitted to staff that there are wetlands on the unfenced portion of the property and these were impacted by stormwater from

the trench drain and sidecast from excavation of the trench drain. Thus, Respondent acknowledges that the unpermitted development resulted in fill of an area which has been determined to be wetland and consequently, that one of the necessary findings for issuance of a restoration order – that the development is inconsistent with the Coastal Act – has been satisfied.

Moreover, wetland fill for a purpose that is not one of the enumerated allowable purposes is just one basis for issuance of a restoration order. As described in the Section IV of this staff report, the unpermitted development was inconsistent with several Chapter 3 policies of the Coastal Act and resource protection policies in the City LCP.

In addition, it should be noted that wetland fill for a purpose not listed as allowable, or any finding of an inconsistency with a Chapter 3 policy, is not a necessary element for the issuance of a cease and desist order. The only elements necessary for issuance of a CDO are that development was undertaken without a CDP or which is inconsistent with a CDP. As discussed above, these elements have been met here.

As noted in Respondent's statement above, the site contained sensitive plants such as saltgrass and pickleweed. Respondent admits that the unpermitted activity resulted in the removal of these plants, which constitute major vegetation as that term is used in the definition of development in the Section 30106 in the Coastal Act. Respondent also admits that a trench was excavated on site, grading occurred to construct the trench, soil excavated from the site was dispersed on the site, and grading occurred in the area of saltgrass and pickleweed, resulting in their removal. All of these are development activities, as defined in Section 30106 of the Coastal Act, and all would therefore require a CDP unless otherwise exempt. However, no City or Commission-issued CDP authorized any of this development, and no exemption is applicable, and, thus the prerequisites for issuance of a cease and desist order have been met.

2. Respondent Defense:

“The 1.1.2 acre area is referred to in this Statement of Defense as the “Cabrillo RV Storage Lot” and has been used to park and store recreational vehicles since the 1960’s pursuant to a permit issued by the City of Huntington Beach. A copy of the City permit...is attached as Exhibit 1A. The Cabrillo RV Storage Lot was filled in the 1950’s-1960’s and has been used and regularly maintained (as required by the terms of the permit) as a parking lot since 1966.” March 23, 2009 Statement of Defense of Beachfront Village, LLC, p.1.

CCC Response:

Respondent's defense appears to rest on the implicit claims that Respondent has a vested right to use of the subject property as a vehicle storage lot and that the subject unpermitted development was exempt maintenance of the lot. As explained below, this defense fails in that there is no established vested right to the use of the subject property for vehicle storage, or even an application before the Commission to consider the issue, the unpermitted development at issue does not constitute maintenance, and even if all of Respondent's assertions were correct, the

activity would not qualify as the sort of maintenance that would be exempt from the permitting requirements of the City's LCP.

There is a specific and formal process for establishing a vested right to an activity under the Coastal Act, as set forth in Section 30608 and its implementing regulations. No such application has been filed, and no such vested right has been established, nor does Respondent assert that it has done such. "A developer who claims exemption from the permit requirement of the [Coastal] act on grounds that he has a vested right to continue his development is required to seek confirmation of his vested right claim ... and may not first assert the claim in defense." Halaco Engineering Co. v. South Central Coast Regional Commission (1986) 42 Cal.3d 52, 63; see also LT-WR (2007) 152 Cal.App.4th 770, 785; Davis v. CCZCC (1976) 57 Cal.App.3d 700.

However, even if the Commission were to apply the standards for reviewing claims of vested rights, Respondent does not appear to have satisfied those standards. If this were a proceeding for the Commission to determine if Respondent has a "vested right" for the alleged parking and storage of recreational vehicles on the fenced portion of the subject property, the Commission would evaluate the evidence provided by Respondent and apply the established legal criteria for evaluating such claims based on the terms of the Coastal Act, its implementing regulations, as well as case law interpreting the Coastal Act's vested right provision and common law vested rights claims. The applicable criteria include the following:

1. The claimed development must have received all applicable governmental approvals needed to complete the development prior to the effective date of the Coastal Act. Typically this would be a building permit, grading permit, Final Map, Health Department approval for a well or septic system, etc. or evidence that no permit was required for the claimed development. (*Billings v. California Coastal Commission* (1988) 103 Cal.App.3d 729, 735).
2. If work was not completed prior to the Coastal Act, the claimant must have performed substantial work and/or incurred substantial liabilities in good faith reliance on the governmental authorization received prior to that date. (*Tosh v. California Coastal Commission* (1979) 99 Cal.App. 3d 388, 393; *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785).
3. The burden of proof is on the claimant to substantiate the claim of vested right. (Title 14, California Code of Regulation, Section 13200). If there are any doubts regarding the meaning or extent of the vested rights exemption, they should be resolved against the person seeking the exemption. (*Urban Renewal Agency v. California Coastal Zone Conservation Commission* (1975) 15 Cal.3d 577, 588).
4. A narrow, as opposed to expansive, view of vested rights should be adopted to avoid seriously impairing the government's right to control land use policy. (*Charles A. Pratt Construction Co. v. California Coastal Commission* (1982) 128 Cal.App.3d 830, 844). In evaluating a claimed vested right to maintain a nonconforming use (i.e., a use that fails to conform to current zoning), courts "follow a strict policy against extension or expansion of those uses." (*Hansen Bros. Enterprises v. Board of Supervisors* (1996) 12 Cal.4th 533, 568). "It is the general purpose to eventually end all nonconforming uses and to permit no improvements or rebuilding which

would *extend the normal life* of nonconforming structures.” (*Sabek, Inc. v. County of Sonoma*, (1987) 190 Cal.App.3d 163, 168).

5. Section 30608 of the Coastal Act does not allow a substantial change to a vested development without obtaining prior approval pursuant to the requirements of the Coastal Act.

These detailed standards and criteria demonstrate that numerous issues are involved in a vested rights determination. The Commission rejects the Respondent’s attempt to raise a claim of vested rights as a defense in this enforcement action, when Respondent has failed to follow the procedures for seeking such a determination by the Commission. As indicated above, several California courts have found that it is not appropriate to raise a claim of vested rights in a different proceeding, without following the Commission regulations for such claims.

However, as indicated above, although no vested rights claim has been filed, Respondent has provided evidence that the claimed development did not receive all necessary local approvals. Respondent provided staff with a Use Variance from the City allowing a motor vehicle storage yard on the subject property from July 19, 1966, to July 19, 1967. The variance expired and Respondent has provided no evidence that another variance was obtained. Thus, far from establishing that the claimed development received all necessary local approvals, the variance proves that local approval was required for the claimed development and none was obtained past July 19, 1967.

In addition, it appears that the use of the site for this purpose has been episodic and would likely fail to qualify for a vested right for that reason as well. Of the hundreds of historic photos taken over dozens of dates and taken with more frequency in the past several years, only one of which, taken in 1976, shows possible vehicle storage in the area of the impacted wetlands. In the remaining hundreds of photos, there is no vehicle storage in the impacted wetlands.

Therefore, in addition to not being legally established as a vested right which might otherwise have been relevant as a possible defense, the activity also appears to not qualify on the facts as a vested right.

Even if a vested right for ongoing use of the site as a parking lot were found to exist, which Respondent has not applied for and the facts do not support, then the question arises whether the subject unpermitted development is a maintenance activity and whether it would qualify for the Coastal Act exemption for repair and maintenance to existing development in Section 30610(d) and the LCP exemption for maintenance to existing development in Section 245.08. Since, the unpermitted development was undertaken in an area of the property that has not been used for vehicle storage – as described above, only one photo of the hundreds of historical photos taken of the site show possible vehicle storage in the area of the impacted wetlands – the unpermitted development would not maintain any areas used for vehicle storage. Moreover, even if, for argument’s sake, we were to assume the activity was considered maintenance, it would still not be exempt from the permit requirements. That is because, under the Commission’s and City’s regulations, exempt repair and maintenance is distinguished from activities that require a coastal development permit because they involve a risk of substantial adverse environmental impact. 14 CCR Section 13252(a)(3) states:

“Any repair or maintenance to facilities or structures or work located in an environmentally sensitive habitat area, any sand area, within 50 feet of the edge of a coastal bluff or environmentally sensitive habitat area, or within 20 feet of coastal waters or streams that include:

- (A) The placement or removal, whether temporary or permanent, of rip-rap, rocks, sand or other beach materials or any other forms of solid materials;
- (B) The presence, whether temporary or permanent, of mechanized equipment or construction materials.

Likewise, pursuant to LCP Section 245.08, maintenance activities involving placement of solid material or the presence of mechanized equipment or construction materials within 20 feet of a wetland requires a CDP.

Wetland areas on the subject property are clearly within 20 feet of the unpermitted development at issue. In fact, wetland areas within the fenced portion of the property were graded and filled. Sediment was discharged, resulting in wetland fill, into a wetland on the unfenced portion of the property. Respondent agrees that there is a wetland on the unfenced portion of the property and the unpermitted trench drain discharged sediment into this wetland. Therefore these activities, even if all of Respondent’s assertions were correct and the activities were considered maintenance, could not be exempt and would require a CDP. No such CDP was applied for nor obtained here.

3. Respondent Defense:

“The Extension Letter also described the unpermitted development as including “soil compaction” that changed the intensity of use of water, i.e. altered the site’s wetland hydrology. As a result of the use of the Cabrillo Site for vehicle storage for over 40 years, the soils on the site are highly compacted. The compaction was not a result of the work that occurred in February, 2008, nor did that work result in the alteration of wetland hydrology.” March 2, 2009 letter, p.4.

CCC Response:

As is explained above in No. 2, there is no established vested right or coastal development permit authorizing use of this site as vehicle storage area. More relevant to the compaction of soil in the area of the impacted wetlands, and thus the alteration of wetland hydrology, are the hundreds of historic photos taken over dozens of dates and taken with more frequency in the past several years, only one of which, taken in 1976, shows possible vehicle storage in the area of the impacted wetlands. In the remaining hundreds of photos, there is no vehicle storage in the impacted wetlands. In contrast, photos documenting the unpermitted development in February 2008 show the use and storage of heavy machinery on the site and within the impacted wetlands, including a mechanized soil compactor, two backhoes, a flatbed truck and a dumptruck, a storage container loaded with debris and soil, equipment trailers, and a bobcat. Relative to the soil compaction resulting from operation and storage of this heavy machinery, vehicle storage within

the impacted wetlands, which is documented solely by one photograph taken 33 years ago, would result in little soil compaction in the impacted wetland areas.

Regardless of the relative effect of the activities, the use of a mechanized soil compactor on the site, as documented during the February 2008 unpermitted development, would necessarily result in soil compaction.

4. Respondent Defense:

“The removal of small areas of pickleweed and saltgrass would not have resulted in the measurable loss of ecological functions.” November 12, 2008 memorandum, p.8.

CCC Response:

The analysis of the unpermitted development’s inconsistency with the Coastal Act is discussed in Section IV of this report. Even if degraded, all coastal wetlands are valuable because of the dramatic loss of wetlands and the unique habitats wetland provide. Clearly then, in degrading the function of the wetlands on the subject property and removing of native saltmarsh vegetation, the unpermitted development resulted in habitat loss. Moreover, even if this statement were true, which it is not, this defense creates and relies on a term (“measurable loss of ecological functions”) which is not the legally applicable standard for issuance of orders under Sections 30810 and 30811 of the Coastal Act. The correct standard and elements to be proven are discussed above in Section C, and are demonstrated to have been met as discussed herein.

5. Respondent Defense:

“It is also important to note that the pickleweed that was present on the site exhibited no potential for either breeding or foraging habitat for the state-listed Belding’s savannah sparrow. Any suggestion that the site exhibited potential to support this species is unfounded and not supported by the literature that addresses the ecological requirements of this species.” November 12, 2008 memorandum, p.8.

CCC Response:

Belding’s Savannah Sparrow was observed on March 10, 2009, and March 17, 2009, within the unfenced portion of the impacted area and on March 17, 2009, within the fenced portion of the impacted area. Personal communication from Robb Hamilton of Hamilton Biological, Inc., and co-author of *The Birds of Orange County, California: Status and Distribution*. Sea & Sage Press, Sea & Sage Audubon Society, Irvine. Although its presence is not necessary to establish the value of the wetlands impacted by the unpermitted development, the presence of this species on the subject property is evidence that the wetlands on the subject property are habitat for a rare and endangered species. The Belding’s Savannah Sparrow has lost much of its habitat due to the loss and degradation of saltmarshes in southern California. The saltmarshes that remain, including those on the subject property are critical, and increasingly so due to further loss, to the survival of this species.

The removal of the saltmarsh vegetation and wetland fill that resulted from the unpermitted development at issue degraded the sparrow's habitat on the property, thus lowering the biological productivity of the wetlands on the property. Furthermore, the loss of wetlands and habitat on this site affects the biological productivity of the ecologically connected Huntington Beach wetland complex.

Therefore, as explained in Section IV of this staff report, the unpermitted development is inconsistent with Section 30231 of Coastal Act, which protects the biological productivity of wetlands, and the second criterion for issuance of a Restoration Order is satisfied.

6. Respondent Defense:

“As a mobilehome park facility, the Cabrillo Mobilehome Park and its associated Cabrillo Storage Lot fall under the jurisdiction of the Department of Housing and Community Development (“HCD”) acting as lead agency. Proper maintenance of the facility is required by HCD regulations including surfacing the site to mitigate against “excessive dust.”” March 23, 2009 Statement of Defense of Beachfront Village, LLC, p.5.

CCC Response:

HCD has adopted regulations establishing a permit system and development standards for mobilehome parks. (Cal. Code Regs., Title 25 Section 1000 et seq.) These regulations contemplate that other permit requirements may also apply to mobilehome parks and refer to the necessity for park operators to obtain approvals from other state agencies with regulatory jurisdiction. (See, *id.*, Sections 1020.6, 1032 and 1044). As explained extensively in this staff report, the subject development, as well as any similar project in the coastal zone, requires a coastal development permit from the City or Commission. After certification of its LCP, the City assumed responsibility for issuing CDPs, thus implementing state law, although the Commission retains appellate authority in specified areas of the coastal zone, including the subject property. Neither the Coastal Act nor the Coastal Commission's regulations contain an exclusion or an exemption from the permit requirements of the Act for development in a wetland on the basis that it occurs within an existing mobile home park.

Although HCD's regulations may govern some aspects of the facility's operations, they do not preempt applicable Coastal Act provisions. There is nothing in the Special Occupancy Parks Act (SOPA), Cal. Health and Safety Code (“H&SC”) §§ 18860-74; the Mobilehome Parks Act, *id.* at §§ 18200-700; the Mobilehome-Manufactured Housing Act, *id.* at §§ 18000-135; or HCD's regulations to suggest that Coastal Act review and protection of wetlands would be wholly abandoned in this context. In fact, SOPA itself recognizes the applicability of LCPs within regulated facilities. *Cf. id.* at § 18865.2.

Thus, even if one were to accept that HCD has general jurisdiction over dust mitigation, for example, it is also unquestionably true that the Coastal Commission (or in this case, the City, as the entity with delegated authority to issue Coastal Act permits) has general jurisdiction over “development,” as defined in the Coastal Act and LCP, and an obligation to protect wetlands, an issue not within HCD's jurisdiction. In this context, general rules of statutory construction

would require that HCD's jurisdiction and the City's or Commission's be harmonized such that both given effect whenever possible. One way to do that would be to have HCD specify its objective for dust mitigation, and have the City review various proposed alternatives to find one that is, at a minimum, as consistent as possible with the Coastal Act and the applicable LCP, and arguably only approve ones that are found to be fully consistent.

In any event, matters which may involve impacts to wetlands, including actions to mitigate against "excessive dust" are properly subject to review through the coastal permit process, which could allow for such dust mitigation if consistent with the resource protection policies of the Coastal Act. Thus, the failure to obtain a permit remains a violation of the Coastal Act and the LCP.

Furthermore, it is clear from the HCD letter to Respondent dated February 18, 2008, attached with Exhibit #10, that Respondent was under no actual obligation to undertake the subject unpermitted development to mitigate for excessive dust. HCD had not ordered Respondent to undertake the unpermitted development to mitigate for excessive dust and had received no complaints to require Respondent to take such action.

7. Respondent Defense:

"As we have previously discussed, because APN 114-150-86 encompasses a much larger property, a portion of which also includes land developed and used as a mobile home park, those areas should be excluded from the NOV and only the two parcels described above on which activity occurred constitute the "Subject Property" covered by the NOV." March 23, 2009 letter, p2.

CCC Response:

In response to this issue raised by Respondent, the property subject to these Orders is described as the 0.92 unfenced portion of the subject property and the 1.12 fenced portion of the subject property.

8. Respondent Defense:

"Beachfront would accept the proposed consent order but for the finding that the excavation of the trench occurred in a "natural wetland",..." March 23, 2009 Statement of Defense of Beachfront Village, LLC, p.5. "The 1.12 acre area is not a "natural wetland."..."March 23, 2009 Statement of Defense of Beachfront Village, LLC, p.1.

CCC Response:

The wetland protection policies of the Coastal Act and City LCP apply to wetlands of natural or anthropogenic origin. The Commission's findings supporting a determination that the unpermitted development resulted in fill of a wetland that is inconsistent with the wetland protection policies of the Coastal Act are contained in Section IV.C of this staff report.

9. Respondent Defense:

“The placement of fill was limited to the removal of soil from the trench and deposition of that material immediately adjacent to the trench.” March 23, 2009 Statement of Defense of Beachfront Village, LLC, p.1.

CCC Response:

Placement of fill anywhere on the site, regardless of its origin, constitutes development under the definition of development in Coastal Act Section 30106. The placement of fill was not authorized by a CDP from the City or Commission. Unpermitted development that is not otherwise exempt constitutes a violation of the City LCP and Coastal Act. In addition, Respondent acknowledges that grading was undertaken in more locations on the site than just immediately adjacent to the trench. This grading resulted in earth movement and placement of fill in wetlands. Furthermore, Respondent acknowledges that soil excavated from the trench on the unfenced portion of the property was placed in wetlands.

G. Summary of Findings

1. Mills PCH, LLC¹⁰ is the owner of property located at 21622 Pacific Coast Highway, Huntington Beach. The property is identified by the Orange County Assessor’s Office as APN 114-150-86 (“subject property”). The property is located within the Coastal Zone.
2. Respondent undertook unpermitted development, as defined by Coastal Act Section 30106 and Huntington Beach LCP Section 245.04, at the subject property, consisting of 1) unpermitted removal of major vegetation; 2) unpermitted placement of fill; 3) unpermitted grading; 4) unpermitted construction of a trench drain; and 5) unpermitted change in the intensity of use of water resulting from altering the hydrology of wetlands through soil compaction, grading, placement of fill and construction of a trench drain.
3. Respondent conducted the above-described development without a Coastal Development Permit or any other Coastal Act authorization, in violation of Coastal Act Section 30600(a) and LCP Section 245.06.
4. No exemption from the permit requirements of the Coastal Act or the City LCP applies to the unpermitted development on the subject property.
5. On February 3, 2009, the Executive Director informed Respondent that pursuant to Title 14, California Code of Regulations, Sections 13181(a) and 13191(a), the Commission intended to initiate cease and desist and restoration order proceedings against them, and outlined steps in the cease and desist and restoration order process.

¹⁰ Mills PCH, LLC has informed staff that Mills PCH, LLC is now known as Beachfront Village, LLC. All references to Mills PCH, LLC or Respondent are to Beachfront Village, LLC (formerly known as Mills PCH, LLC).

6. On February 3, 2009, the Executive Director sent Respondent a Notification of Intent to Record a Notice of Violation of the Coastal Act pursuant to Section 30812 of the Coastal Act.
7. Respondent did not object to the recordation of a Notice of Violation of the Coastal Act and therefore, the Executive Director recorded the Notice on the subject property as Instrument No. 2009-000092466 in the Orange County Recorder's Office.
8. The unpermitted development filled and graded wetlands, as that term is defined by Section 30121 of the Coastal Act and the City LCP.
9. The unpermitted development described in item No. 2 is inconsistent with the policies set forth in Sections 30231, 30233, and 30240(b) of the Coastal Act and City LCP Policies 6.1.4, 6.1.20, 7.1.3, and 7.1.4.
10. The unpermitted development described in item No. 2 is causing "continuing resource damage" within the meaning of Section 30811 of the Coastal Act and Section 13190, Title 14, California Code of Regulations.

Click on the links below to go to the exhibits and the appendix.

Exhibit List

Exhibit

Number

Description

1. Site Map and Location
 2. Photographs of the site prior to the unpermitted development at issue
 3. 1940 Aerial photograph of subject property
 4. February 23 and 24, 2008 photographs of the site after grading and construction of the trench drain
 5. Letter from CCC staff to the City of Huntington Beach staff, March 4, 2008
 6. Notice of Violation letter to Respondent, March 21, 2008
 7. Letter from Respondent to CCC staff, April 14, 2008
 8. Notification of Intent to Commence Cease and Desist Order and Restoration Order Proceedings and to Record a Notice of Violation of the Coastal Act, February 3, 2009
 9. Recorded Notice of Violation of the Coastal Act, Instrument No. 2009-000092466, Orange County Recorder's Office, February 27, 2009
 10. Letter from Respondent to CCC staff, March 23, 2009 including attachments (note: a link to full copies of all exhibits to the attachments and appendices to this exhibit is available on the April agenda at www.coastal.ca.gov).
 11. Cease and Desist and Restoration Orders No. CCC-09-CD-03 and No. CCC-09-RO-02
 12. March 26, 2009 memorandum from Jonna D. Engel, Ph.D, Commission staff ecologist and exhibits thereto
- Appendix 1. Exhibits and appendices to February 28 memorandum attached with Exhibit #10