

## CALIFORNIA COASTAL COMMISSION

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# Item: Th 8.1 & 8.3

**Staff:** Aaron McLendon-SF  
**Staff Report:** December 2, 2010  
**Hearing Date:** December 16, 2010

## STAFF REPORT AND FINDINGS FOR CONSENT CEASE AND DESIST AND RESTORATION ORDERS

**CEASE AND DESIST ORDER:** CCC-10-CD-01 [Click here to go to the staff report addendum.](#)

**RESTORATION ORDER:** CCC-10-RO-01

**RELATED VIOLATION FILE:** V-5-06-029

**PROPERTY LOCATION:** A 6-acre portion of property treated by the Orange County Assessor's Office as three parcels with Assessor Parcel Numbers: 056-240-65, 056-240-57 and 656-191-40, located at the northern terminus of Driftwood Drive in the City of Laguna Beach, Orange County

**PROPERTY OWNER:** Driftwood Properties, LLC

**AGENT:** Athens Development AC, LLC

**VIOLATION DESCRIPTION:** Includes removal of major vegetation (including coastal sage scrub and maritime chaparral plant species) and the results thereof; placement and replacement of approximately 5,500 sandbags (and the sand/gravel/fill released from the bags); and placement of sand/gravel berms, filter fabric over the berms, and plastic discharge pipes

**SUBSTANTIVE FILE DOCUMENTS:**

1. Cease and Desist Order No. CCC-10-CD-01 and Restoration Order CCC-RO-01 file;
2. Restoration Order CCC-06-RO-03 file;
3. Cease and Desist Order No. CCC-10-CD-02 and Restoration Order CCC-RO-02 file;
4. Claim of Vested Rights 5-07-412-VRC file
5. Exhibits 1 through 14.

**CEQA STATUS:**

Exempt (CEQA Guidelines (CG) §§ 15060(c)(2)), 15060(c)(3) and Categorically Exempt (CG §§ 15061(b)(2), 15037, 15038, and 15321).

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**I. SUMMARY OF STAFF RECOMMENDATION**

Staff recommends that the Commission approve Consent Cease and Desist Order No. CCC-10-CD-01 and Restoration Order CCC-10-RO-01 (“Consent Orders”), addressing the unpermitted removal of major vegetation (including coastal sage scrub and maritime chaparral plant species) and the results thereof; and the unpermitted placement and replacement of approximately 5,500 sandbags, sand/gravel berms, filter fabric over the berms, and plastic discharge pipes, in violation of the Coastal Act. The unpermitted development activities occurred on an approximately 6-acre portion of property treated by the Orange County Assessor’s Office as comprising all of one assessor’s parcel, identified with Assessor Parcel Number (“APN”) 656-191-40, and a portion of a second parcel, designated as APN 056-240-65, which two assessor’s parcels meet at the northern terminus of Driftwood Drive in the City of Laguna Beach, Orange County (Exhibit 6). For purposes of this matter, we refer to the entirety of both assessor’s parcels, as well as a third (APN 056-240-57), all three of which are owned by Driftwood Properties, LLC (“Respondent”), collectively as the “Subject Properties”. The Subject Properties are undeveloped, with the exception of the unpermitted development, utility poles and lines, and an active, historic hiking trail (Exhibit 4 & 14). The total land acreage of the Subject Properties is approximately 75 acres. During the time staff has worked on resolving the above-described violations, the Subject Properties have been managed by Athens Development AC, LLC (“Athens”) and staff has worked closely with both Athens and Respondent to reach an amicable resolution of the subject violations.

Through the Consent Orders, Respondent has agreed to, among other things: 1) remove the unpermitted development from the Subject Properties, 2) remove all non-native plant species from the approximately 6-acre portion of the Subject Properties where the unpermitted development is located, 3) execute and record an irrevocable offer to dedicate an open space conservation and public access easement<sup>1</sup> over the entirety of the Subject Properties, 4) transfer fee title over the Subject Properties to the City of Laguna Beach, 5) record a “Preemptive Purchase Right Agreement” in favor of the California State Coastal Conservancy (“SCC”) over an additional approximately 80 acre portion of land adjacent to the Subject Properties, which is currently owned by Respondent, and 6) effectively dismiss, with prejudice, all aspects of the suit filed by Driftwood Properties LLC against the California Coastal Commission over the Commission’s denial of Vested Rights Claim No. 5-07-412-VRC.

The Subject Properties are located in the Hobo/Aliso area of Laguna Beach (Exhibit 4). The Commission has jurisdiction over permit and enforcement matters in this area because Hobo/Aliso Canyon, where the unpermitted development occurred, is an area of deferred

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<sup>1</sup> The public access aspect of the easement will be limited to a single, existing pedestrian hiking trail (See Exhibit 14 of this staff report and Figure 11, at page 41 of the Removal Plan (attached to the Consent Orders)).

certification and, therefore, is not subject to local regulation under the certified Laguna Beach Local Coastal Program.

The Commission can issue a Cease and Desist Order under Section 30810 of the Coastal Act in cases where it finds that the activity that is the subject of the order has occurred either without a required Coastal Development Permit (“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 coastal development permit, 2) is inconsistent with Chapter 3 of the Coastal Act, and 3) is causing continuing resource damage. These criteria are all met in this case, as summarized briefly here, and discussed in more detail on pages 10-15.

The unpermitted activity that has occurred on the Subject Properties clearly meets the definition of “development” set forth in Section 30106 of the Coastal Act. All non-exempt development in the Coastal Zone requires a CDP. The development was not exempt from permitting requirements and was undertaken without a CDP, in violation of Coastal Act Section 30600.<sup>2</sup>

Furthermore, the unpermitted development and the ongoing maintenance of the unpermitted development are inconsistent with the policies in Chapter 3 of the Coastal Act, including Section 30240 (requiring protection of environmentally sensitive habitat), Section 30251 (requiring protection of scenic areas and visual qualities), and Section 30253 (requiring avoidance of erosion), all of which require protection of sensitive coastal resources within the Coastal Zone and subject to regulation under the Coastal Act (as fully discussed below).

The unpermitted development has adversely impacted the resources associated with the dynamic habitats of this area of Laguna Beach. Such impacts meet the definition of damage provided in Section 13190(b) of Title 14 of the California Code of Regulations (hereinafter, “14 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 is allowed to remain, its presence will lead to further impacts (including the temporal continuation of the existing impacts) to the resources protected under Chapter 3 of the Coastal Act.

The unpermitted development remains at the Subject Properties. The continued presence of the unpermitted development and/or the maintenance of cleared areas on the Subject Properties, as described below, will exacerbate damages to resources protected by the Coastal Act. Thus, the continued presence, and/or maintenance thereof, of the unpermitted development on the Subject Properties is causing continuing resource damage, as defined in 14 CCR Section 13190. Therefore, the Commission has the authority to issue a cease and desist and restoration order in this matter.

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<sup>2</sup> Staff notes that the Commission, at its October 16, 2008 hearing, determined that Respondent’s claim of vested rights was not substantiated and that the development that is the subject of these Consent Orders required a Coastal Development Permit.

## **II. HEARING PROCEDURES**

The procedures for a hearing on a Cease and Desist Order and Restoration Order are outlined in Title 14, Division 5.5, Section 13185 of the California Code of Regulations.

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 responds to the testimony and to any new evidence introduced.

The Commission should 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 or not to issue the Consent Cease and Desist and Restoration Orders. Passage of a motion below will result in issuance of the Consent Cease and Desist and Restoration Orders.

## **III. STAFF RECOMMENDATIONS**

Staff recommends that the Commission adopt the following two motions:

### **1. Motion:**

*I move that the Commission issue Consent Cease and Desist Order No. CCC-10-CD-01 pursuant to the staff recommendation.*

### **Staff Recommendation of Approval:**

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

### **Resolution to Issue Consent Cease and Desist Order:**

The Commission hereby issues Consent Cease and Desist Order No. CCC-10-CD-01, as set forth below, and adopts the findings set forth below on grounds that development requiring a coastal

development permit from the Commission has occurred without such a permit having been issued.

**2. Motion:**

*I move that the Commission issue Consent Restoration Order No. CCC-10-RO-01 pursuant to the staff recommendation.*

**Staff Recommendation of Approval:**

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

**Resolution to Issue Consent Restoration Order:**

The Commission hereby issues Consent Restoration Order No. CCC-10-RO-01, as set forth below, and adopts the findings set forth below on the grounds that 1) development has occurred 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 CONSENT CEASE AND DESIST ORDER NO. CCC-10-CD-01 AND CONSENT RESTORATION ORDER CCC-10-RO-01<sup>3</sup>**

**A. Description of Property**

The Subject Properties include approximately 75 acres of land located at the northern terminus of Driftwood Drive in Hobo/Aliso area of Laguna Beach in Orange County (Exhibit 4). The subject unpermitted development is located on approximately six of the 75 acres (Exhibit 6). The steeply sloping hillside property contains large areas of dense, pristine southern maritime chaparral (a rare, sensitive plant community) and big leaved Crownbeard (listed as 'threatened' by the State and Federal governments). Four separate watercourses, as mapped by the City of Laguna Beach, extend across the Subject Properties (Exhibit 7). These watercourses are located in the canyons located throughout the Subject Properties. Hobo Canyon (one of the canyons running through the Subject Properties) contains a significant drainage course (a United States Geological Survey ("USGS") mapped "Blue Line Steam"), which crosses the north and northwestern portion of the Subject Properties and extends into a neighboring mobile home park. In or before 1962, a prior property owner graded "pads" on the approximately six acres of the Subject Properties where the unpermitted development at issue in this matter would later occur. Over time these pads revegetated with coastal sage scrub and southern maritime chaparral, until the unpermitted clearance of this vegetation occurred (as explained in more detail below). The

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<sup>3</sup> These findings also hereby incorporate by reference Section I of the December 2, 2010 staff report ("Staff Report and Findings for Consent Cease and Desist and Restoration Orders") in which these findings appear, which section is entitled "Summary of Staff Recommendation."

unpermitted development occurred on numerous occasions over the last 3 decades. Up until 2004, this clearance was undertaken by the prior owner, the Esslinger Family Trust. Respondent conducted clearance of major vegetation after their ownership in 2004. The sandbags first appear in aerial photographs in the late 1990's. These sandbags were placed on the Subject Properties by the prior owner. After taking ownership of the Subject Properties, Respondent continued to maintain the existing unpermitted development and placed additional sand bags and other drainage devices on the Subject Properties. Crownbeard, as well as coastal sage scrub and southern maritime chaparral plant communities, are found throughout the Subject Properties, including within and adjacent to the six acres where the unpermitted development activities occurred.

**B. Description of Coastal Act Violation**

The violations consist of the unpermitted clearance of major vegetation (coastal sage scrub and southern maritime chaparral), and the results thereof; placement and replacement of approximately 5500 sand bags (and the sand/gravel/fill released from the bags); and placement of sand/gravel berms, filter fabric over the berms, and plastic discharge pipes. All the unpermitted development that is the subject of these proceedings is located on an approximately six-acre portion of the Subject Properties (Exhibit 6).

**C. History of Coastal Act Regulation of the Subject Properties and the Current Violations**

This Commission has granted several prior permits (and amendments thereto) to Respondent's predecessor in interest, the Esslinger Family Trust, for storm drain improvements on some of their properties, including both the Subject Properties now owned by Respondent and adjacent lands on which a mobile home park is located: coastal development permits G5-95-286, 5-95-286, 5-95-286 A, 5-96-048, and 5-98-151. In addition, Respondent filed a claim of vested rights (5-07-412-VRC) asserting a vested right to the graded pads and the maintenance of those pads, which the Commission rejected in October of 2008. There have also been previous enforcement actions connected with the Subject Properties. The following briefly describes those actions, as well as the history related to the subject proceedings.

**Restoration Order CCC-06-RO-03 (Driftwood/Athens)**

On July 13, 2006, the Commission approved and issued to Respondent a Consent Restoration Order (attached hereto as Exhibit 8) to address restoration and mitigation for the unpermitted removal of 1341 sq.ft. of Big-leaved Crownbeard, an endangered plant species, from a portion of the Subject Properties. The unpermitted activity addressed by this 2006 Restoration Order occurred on October of 2005 near the southern portion of the Subject Properties adjacent to a municipal water tank. Respondent and Athens worked cooperatively with Commission staff to fully address the unpermitted activity.

Pursuant to the terms of the 2006 Restoration Order, Respondent prepared a Restoration Plan outlining the activities it proposed to undertake to restore all of the impacted crownbeard on the

property and to achieve additional mitigation for the interim losses to the overall crownbeard population. The Restoration Plan included:

- 1) Restoration of crownbeard within the area impacted by unpermitted crownbeard removal.
- 2) Removal of 31 non-native acacia shrubs and planting of 31 native chaparral shrubs.
- 3) Establishment of 670 sq.ft. of crownbeard in a separate area designated as “the Mitigation Area” to mitigate for temporal loss and loss of fitness resulting from the unpermitted removal of crownbeard.

In addition, in the 2006 Restoration Order, Respondent agreed to monitor the success of the restoration activities; report annually to Commission staff regarding compliance with the terms of the order, and prepare a final report at the end of the five year monitoring period. Restoration Order No. CCC-06-RO-03 imposes personal obligations on Respondent and Athens. Accordingly, irrespective of Respondent’s ownership of the Subject Properties, the obligations under CCC-06-RO-03 have and will remain the responsibility of Respondent and Athens.

Consent Cease and Desist Order No. CCC-10-CD-02 and Restoration Order No. CCC-10-RO-02 (Gromet)

On April 14, 2010, the Commission approved and issued to Stevan and Rona Gromet, who live adjacent to the Subject Properties, Consent Cease and Desist and Restoration Orders Nos. CCC-10-CD-02 and CCC-10-RO-02 (attached hereto as Exhibit 9) to address their removal of major vegetation, including the threatened Big-Leaf Crownbeard, from an approximately 3,500 square foot area on Respondent’s property. Respondent was not aware that Gromet was conducting the clearance of vegetation on its property. The Gromets agreed to enter into Consent Cease and Desist and Restoration Orders with the Commission, which required, among other things, full restoration of the impacted area on the Subject Properties. Following restoration, Gromet has agreed to monitor the restoration for a period of 5 years. As with the above-described restoration order, CCC-10-CD-02 and CCC-10-RO-02 are personal obligations on Gromet.

Subject Coastal Act Violations

In December 2005, Respondent notified Commission staff that it planned to replace 500 of the approximately 5,500 sandbags on the Subject Properties. In January 2006, Respondent submitted CDP application No. 5-06-014 for these replacement activities. That application was ultimately withdrawn in July 2006 after it came to light that the original placement of the sandbags occurred in the 1990s without the requisite CDP. A second CDP application, No. 5-06-382, submitted in October of 2006, included a request for after-the-fact approval of the original placement of the approximately 5,500 unpermitted sandbags and other drainage control devices installed by a previous landowner, as well as requesting prospective approval for the placement of approximately 500 new sandbags, and a 2-year maintenance provision allowing for future replacement of sandbags and drainage control devices. CDP application No. 5-06-382 was scheduled to be considered by the Commission on May 10, 2007, but it was withdrawn by Respondent upon learning of staff’s intent to recommend denial of the request based on

inconsistency with Coastal Act policies. No subsequent application was filed, and, consequently, no CDP has been obtained for sandbags on the Subject Properties.

In addition, during Commission staff's review of the CDP application discussed above, staff discovered that vegetation clearance had occurred on the Subject Properties since the late 1970's/early 1980's. In researching whether the development had been undertaken without benefit of a CDP and whether such development was inconsistent with the Coastal Act, Commission staff also reviewed historical aerial and ground-level photographs, city records, and biological surveys. The results of this research demonstrated that major vegetation was removed from the areas in and adjacent to the "graded pads" located on the Subject Properties on three disparate occasions following the grading in the early 1960's and then more regularly starting at the beginning of this Century: 1) at some time between 1979 and 1986, 2) at some time between 1993 and 1997 or 1998, 3) in 1999, and 4) periodically between 2000 and 2008. None of these actions was authorized in a CDP. After each of these instances, the areas cleared of vegetation were rapidly colonized by coastal sage scrub, southern maritime chaparral, including bigleaf crownbeard, and transitional or successional species, except for those areas occupied by the sandbags and the sand/gravel which had emanated from the bags over time, and in the locations of the plastic discharge pipes and filter fabric. Had this site been left undisturbed following the grading in the early 1960's, it most likely now would be covered with a combination of mature coastal sage scrub and maritime chaparral.<sup>4</sup> No CDPs were issued for the removal of major vegetation; placement of approximately 5,500 sandbags,<sup>5</sup> sand/gravel berms, filter fabric over the berms, and plastic discharge pipes.

In addition, the sandbags first appear in 1997/98 aerial photographs on the City of Laguna Beach's online gis maps. The sandbags are placed at regular intervals across and around the edges of the graded pads, and in rows through the watercourse located closest to the municipal water tank. There is also a sandbag berm at the base of the watercourse. Sometime between 1997/98 and 2003, drainage pipes were installed on two graded roads, thus discharging run-off from the pad areas into the stormdrain on Driftwood Drive.

All unpermitted development undertaken on the property before 2004 was performed by the Esslinger family, which also owns the Laguna Terrace Mobilehome Park (located adjacent to the Subject Properties). In 2004, the property was sold to Respondent. In November 2004, the Respondent and Athens replaced 5500 sandbags on the property that had fallen into disrepair.

On May 4, 2007, Commission staff sent a Notice of Violation letter to Respondent (Exhibit 10). Subsequently, staff discussed the possibility of resolving the violations through a consent order.

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<sup>4</sup> J. Dixon memo to R. Todaro re habitat characteristics on Athens Group property dated 04-16-07 (Exhibit 12).

<sup>5</sup> Emergency Permit No. 5-07-440-G authorized the temporary placement of up to 300 sandbags on an existing unpermitted sandbag berm at the mouth of a watercourse on the property. These approximately 300 sandbags were removed from the Subject Properties pursuant to the terms of the emergency permit.

*Claim of Vested Rights*

In November 2007, Respondent submitted to the Commission a Claim of Vested Rights application No. 5-07-412-VRC, asserting that it held a vested right to the graded pads and to maintain those pads, including by performing ongoing fuel modification on the pads based on the requirements of the City of Laguna Beach. On October 16, 2008, the Commission held a public hearing on and denied Respondent's Claim of Vested Rights application. On December 12, 2008, Respondent filed a petition for writ of mandate and complaint with the Orange County Superior Court challenging the Commission's denial of its Claim of Vested Right Claim (the "VRC litigation"). That litigation is currently inactive, as is explained below.

*Notice of Intent to Commence Cease and Desist and Restoration Order Proceedings*

On March 27, 2008, pursuant to 14 CCR Section 13181 and 13191, the Commission's Executive Director formally initiated enforcement proceedings by sending Respondent a Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings ("NOI") (Exhibit 11). The NOI sent to Respondent included a thorough explanation of why the subject violations are "development" under the Coastal Act and how such activities meet the criteria of Section 30810 and 30811 of the Coastal Act to commence proceedings for issuance of a cease and desist order and restoration order. In addition, the NOI reiterated that resolving the violation through a consent order was an option.

In accordance with Sections 13181(a) and 13191(a) of the Commission's regulations, Respondents were 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"). Respondents were required to submit the SOD form by no later than April 16, 2008.

From late 2008 until the present, Commission staff and Respondent have been working towards an amicable resolution of the issues related to the NOI. As the Consent Order process became more likely and began to include proposals for Respondent to dismiss the VRC litigation, that litigation was put on hold. Due to the length of time consumed by the negotiations, it eventually became necessary to take a different approach. In June of this year, Respondent and the Commission entered into a Stipulated Dismissal of Respondent's petition/complaint, through which Respondent dismissed its petition and complaint without prejudice and preserved the right to re-file within one year. On June 3, 2010, the Stipulated Dismissal was entered by the court.

Because Commission staff and Respondent were able to amicably resolve the violations through these Consent Orders (Attached as Exhibit 1), the Statement of Defense that Respondent submitted is inapplicable, and Respondent has waived its rights to submit defenses to contest the legal and factual basis and the terms and issuance of the Consent Orders and consent to their issuance.

Staff worked closely with Respondent and Athens over several months to reach an effective, amicable resolution to the violations. On December 2, 2010, authorized signatory for Respondent signed Consent Cease and Desist Order No. CCC-10-CD-01 and Consent Restoration Order No. CCC-10-RO-01 (*see* Exhibit 1).

**D. Basis for Issuance of Orders**

**Cease and Desist Order**

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

*If the Commission, after public hearing, determines that any person...has undertaken, or is threatening to undertake, any activity that... requires a permit from the commission without first securing the permit... the Commission may issue an order directing that person...to cease and desist.*

*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...*

**Restoration Order**

The statutory authority for issuance of Restoration Orders 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... [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 Consent Orders by providing substantial evidence that the development meets all of the required grounds listed in Section 30810 and 30811 for the Commission to issue a Cease and Desist Order and Restoration Order.

**1. Development has occurred without a Coastal Development Permit**

Unpermitted development including: removal of major vegetation and the results thereof; the placement and maintenance of approximately 5,500 sandbags, sand/gravel berms, filter fabric over the berms, and plastic discharge pipes, as well as the bags, berms, fabric, and pipes themselves, has occurred on the Subject Properties without a CDP.

Section 30600(a) of the Coastal Act states 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 coastal development permit. "Development" is defined by Section 30106 of the Coastal Act as follows:

*"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; 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...and the removal or harvesting of major vegetation other than for agricultural purposes...*

The unpermitted removal of major vegetation and placement of 5,500 sandbags and associated materials, as described above, clearly constitutes “development” within the meaning of the above-quoted definition and therefore is subject to the permit requirement of section 30600(a). In addition, the Commission, at its October 16, 2008 hearing, determined that Respondent’s claim of vested rights was not substantiated and that the development that is the subject of these Consent Orders required a Coastal Development Permit. A coastal development permit was not issued to authorize the subject unpermitted development.

## **2. The Unpermitted Development is Inconsistent with the Coastal Act**

As described below, the unpermitted development is not consistent with multiple resource protection policies of the Coastal Act, including: Section 30240 (protection of environmentally sensitive habitat); Section 30251 (protection of scenic and visual qualities); and Section 30253 (minimization of adverse impacts).

### Environmentally Sensitive Habitat Areas

The unpermitted development is inconsistent with Coastal Act Section 30240, which requires protection of environmentally sensitive habitat areas within the Coastal Zone. Environmentally sensitive habitat areas are defined in Coastal Act Section 30107.5, as follows:

*"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

Coastal sage scrub and maritime chaparral are sensitive plant communities that are very limited in distribution among the coastal and inland hills of Southern California. Coastal sage scrub in the Laguna Beach area generally consists of summer-dormant soft or suffrutescent aromatic plants that grow to approximately waist height. While its composition can vary, characteristic species generally include: California sagebrush, California buckwheat, orange bush monkey flower, and several species of sage. Southern maritime chaparral is also a low, fairly open plant community, highly dependent on maritime climate. In the Laguna area, southern maritime chaparral is generally characterized by the presence of big podded and/or warty-stemmed ceanothis, bush rue, bladder pod, and spiny or little-leaved redberry, among other species.<sup>6</sup> Both coastal sage scrub and southern maritime chaparral communities have been observed by Commission staff on the Subject Properties. These plant communities are considered by the U.S. Fish and Wildlife Service and the California Department of Fish and Game as “sensitive” or

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<sup>6</sup> Marsh, K. January 20, 1992. South Laguna Biological Resources Inventory. A report prepared for the City of Laguna Beach.

“special status.”<sup>7</sup> As discussed more fully in two memos written by Commission Ecologist John Dixon (Exhibit 12 & 13), the plant communities found on the Subject Properties serve important ecosystem functions, such as providing habitat for State and federally listed as rare and threatened bigleaf crownbeard, the federally listed as threatened California gnatcatcher, and the rufous-crowned sparrow, a California Species of Special Concern. Each of these species has been observed at the site (Exhibit 12).<sup>8</sup>

The southern maritime chaparral and coastal sage scrub communities have been severely impacted by agricultural activities, urbanization, disruption of natural fire regimes, and competition from invasive species. These rare plant communities are confined to coastal and a few inland areas of Southern California and Baja, Mexico. The US Fish and Wildlife Service reports that urbanization and agricultural conversion have caused the destruction of an estimated 82 to 93 percent of southern maritime chaparral<sup>9</sup> and an estimated 85 to 90 percent of coastal sage scrub<sup>10</sup> vegetation in California. As evidenced by these figures, southern maritime chaparral and coastal sage scrub communities are rare and easily degraded by human activities. Consequently, at the subject site, coastal sage scrub and maritime chaparral meet the definition of Environmentally Sensitive Habitat Area (ESHA) under the Coastal Act.

Coastal Act Section 30240 states the following:

*(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.*

*(b) 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 such areas, and shall be compatible with the continuance of such habitat areas.*

The unpermitted development includes the unpermitted clearing of approximately 6 acres of coastal sage scrub and maritime chaparral species, maintenance of and placement and replacement of approximately 5,500 sandbags, construction of sand/gravel berms, placement of filter fabric over the berms, and placement of plastic discharge pipes – all within and or adjacent

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<sup>7</sup> Evans, K.E. (USFWS). December 21, 2001. Letter to A. Larson (City of Laguna Beach) re: “Draft Environmental Impact Report for the Laguna Beach Driftwood Estates (Tentative Tract Number 16035), City of Laguna Beach, County of Orange, California.

<sup>8</sup> Dixon, John. (CCC). April 16, 2007. Memo to Ryan Todoro re: Habitat Characteristics on the Athens Group LLC property at Hobo Aliso Ridge (formerly known as Driftwood Estates).

<sup>9</sup> U.S. Fish and Wildlife Service. 1996. Determination of endangered or threatened status for four southern maritime chaparral plant taxa from coastal southern California and northwestern Baja California, Mexico. Federal Register 61(195): 52370-52384

<sup>10</sup> US Fish and Wildlife Service. 1993. Determination of threatened status for the California Gnatcatcher. Federal Register 58(59): 16742-16757.

to an environmentally sensitive habitat area, including coastal sage scrub and maritime chaparral plant communities.<sup>11</sup>

The unpermitted activities do not constitute a resource dependent use and caused significant disruption to a unique and fragile habitat upon which numerous rare and threatened species rely. Those activities are therefore inconsistent with Section 30240(a). Moreover, continued disturbance on the site has degraded the habitat and provided for the introduction of invasive species throughout the impacted area, which may affect adjacent coastal sage scrub and southern maritime chaparral communities in a way that is not compatible with the continuance of these habitat communities, in violation of Section 30240(b). Therefore, the unpermitted development is inconsistent with Section 30240 of the Coastal Act.

#### Scenic Public Views and Visual Qualities of Coastal Areas

The unpermitted development is inconsistent with Coastal Act Section 30251, which requires that the scenic and visual qualities of the coast be protected and any permitted development be visually compatible with the surrounding area. Section 30251 of the Coastal Act states:

*The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas....*

The resources that must be protected in this area include views to and across the few remaining unbroken tracts of coastal sage scrub and southern maritime chaparral that define Southern California's coastal hillsides and canyons. The unpermitted development neither considered nor protected the scenic character of Orange County's coastal hills. Instead, the unpermitted actions prevented the reestablishment of the very source of that aesthetic character – its native vegetation. Rather than minimizing the alteration of natural land forms, the unpermitted development – including vegetative clearing and placement of white sandbags and other foreign materials – exacerbated and accentuated the unnatural shape, color, and general appearance of the impacted area, in stark contrast to the adjacent vegetated hillsides and canyon. As a result, the unpermitted development was incompatible with the character of the adjacent, naturally contoured and vegetated hillsides, and degraded the visual quality of the area. Therefore, these actions are inconsistent with Section 30251 of the Coastal Act.

#### Minimization of Adverse Impacts

The unpermitted development is inconsistent with Section 30253(b) of the Coastal Act, which requires new development to minimize erosion and associated impacts to the site. Section 30253(b) states, in part:

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<sup>11</sup> The Commission has already found, in its approval of Consent Restoration Order No. CCC-06-RO-03, Consent Cease and Desist Order CCC-10-CD-02, and Consent Restoration Order CCC-10-RO-02, that the area where the unpermitted development occurred is ESHA.

*New development shall... (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

The types of unpermitted activities that occurred on the site, in particular the unpermitted clearing of major vegetation, require careful environmental review and the implementation of mitigation measures to ensure impacts to the surrounding environment are minimized.

Vegetation removal, especially at the base of a steep slope, disrupts the natural drainage and soil stability of the impacted area. With drainage patterns altered and top soil disrupted the potential for erosion increases significantly. When such activities are performed on or adjacent to slopes, the structural integrity and stability of the site and/or adjacent lands may be at risk.

Respondent performed and/or maintained the above mentioned activities without undergoing the type of environmental review required for a project of this scope and intensity. The types of drainage and erosion control measures that would have been required by a CDP were not implemented, and as a result contributed to soil erosion and continued destruction of the site. The sandbags have further altered the site's drainage and degrading sandbags have allowed sand/gravel material to disperse across the site, which have become a new source of sediment for stormwater runoff, rather than an erosion inhibitor. For these reasons, the unpermitted development is inconsistent with Section 30253 of the Coastal Act.

Respondent has agreed, through the signing of these Consent Orders, that the Commission has met the standards to issue and enforce these Consent Orders and does not contest the issuance of these Consent Orders.

### **3. Unpermitted Development is Causing Continuing Resource Damage**

The unpermitted development is causing continuing resource damage, as defined in 14 CCR Section 13190, which states:

*'Continuing', when used to describe 'resource damage', means such damage which continues to occur as of the date of issuance of the Restoration Order.*

*'Resource' means any resource which 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.*

*'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. (emphasis added)*

The coastal sage scrub and southern maritime chaparral communities that occur on the Subject Properties – in addition to the views they enhance and the soils they stabilize – are afforded

protection under Coastal Act Sections 30240, 30351 and 30253(b), and are therefore a “resource” as defined in 14 CCR Section 13190(a). The clearing of this habitat and the placement of materials on top of it reduced the quality and abundance of these rare plant communities, has degraded scenic views and caused erosion across the site, thereby causing “damage” to the resource, as defined in 14 CCR Section 13190(b). Without removal of the unpermitted development, which Respondent has agreed to undertake as set forth in the Consent Orders, the impacts will persist, constituting “continuing” resource damage”, as defined in 14 CCR Section 13190(c). Therefore, the Commission has the authority under Coastal Act Section 30811 to issue a Restoration Order in this matter.

#### **4. Provisions of Consent Cease and Desist Order No. CCC-10-CD-01 and Consent Restoration Order No. CCC-10-RO-01**

All of the activities set forth in these Consent Orders are consistent with and, in fact, are designed to further Chapter 3 resource protection policies. The Commission is issuing these Consent Orders to facilitate the removal activities necessary to fully resolve the violations at issue in these proceedings and to mitigate the significant impacts to sensitive resources that occurred as a result of the violations. Respondent has agreed not only to remove the unpermitted development from the Subject Properties, but has also agreed to remove non-native plant species from the entire 6-acre area. In addition, through these Consent Orders, Respondent has agreed to: 1) execute and record an irrevocable offer to dedicate an Open Space Conservation and Public Access Easement over the approximately 75 acres of the Subject Properties, 2) grant to the California State Coastal Conservancy a Preemptive Purchase Right over an additional 80 acres of Respondent’s property located adjacent to the Subject Properties, and 3) convey fee title to the Subject Properties to the City of Laguna Beach, subject to the protections of the Open Space Conservation and Public Access Easement, or, if the City is unwilling to accept title to this land subject to the terms, conditions and obligations of the OTD, to the California State Coastal Conservancy. In addition, Respondents agree to waive any and all rights created or reserved to them in the “Stipulated Dismissal Without Prejudice and Tolling Agreement; Order Thereon” filed on June 3, 2010, including the right to re-file the petition for writ of mandate and complaint referenced in that document, so that the dismissal of that case is now with prejudice and irrevocable.

#### **E. California Environmental Quality Act (CEQA)**

The Commission finds that the issuance of Consent Cease and Desist Order CCC-10-CD-01 and Consent Restoration Order CCC-10-RO-01 to compel compliance with the Coastal Act to remove unpermitted development, 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 any significant adverse effects on the environment, within the meaning of CEQA. The Order is exempt from the requirements for the preparation of an Environmental Impact Report, based on Sections 15060(c)(2), 15060(c)(3), 15061(b)(2), 15037, 15038, and 15321 of the CEQA Guidelines (also in 14 CCR).

#### **F. Consent Agreement: Settlement**

Chapter 9, Article 2 of the Coastal Act provides that violators may be civilly liable for a variety of penalties for violations of the Coastal Act, including daily penalties for knowingly and intentionally undertaking development in violation of the Coastal Act. Respondent has clearly stated its willingness to completely resolve the violations administratively and amicably, through a settlement process. To that end, Respondent has committed to comply with all terms and conditions of the Consent Orders, and not to contest the issuance or implementation of these Consent Orders. Additionally, in light of the intent of the parties to resolve these matters in a timely fashion and through settlement, Respondent has also agreed to 1) record an irrevocable offer to dedicate an Open Space Conservation and Public Access Easement over the approximately 75acre Subject Properties, 2) grant to the California State Coastal Conservancy a Preemptive Purchase Right over an additional 80 acres of Respondent's property, and 3) convey fee title to the Subject Properties to the City of Laguna Beach subject to the protections of the Open Space Conservation and Public Access Easement or, if the City is unwilling to accept title to this land subject to the terms, conditions and obligations of the OTD, to the California State Coastal Conservancy..

**G. Findings of Fact**

1. Driftwood Properties, LLC is the owner of property located at the northern terminus of Driftwood Drive in the City of Laguna Beach, in Orange County (treated by the Orange County Assessor's Office as three parcels with Assessor Parcel Numbers: 056-240-65, 056-240-57 and 656-191-40).
2. Athens Development AC, LLC (aka The Athens Group) is an agent of Driftwood Properties, LLC, has been the contact for all telephone discussions with, and the agent of service for all correspondence from, Commission staff related to the violations described in allegations #3 and #4 below.
3. Driftwood Properties, LLC has undertaken development, as defined in Coastal Act Section 30106, on some of the above-referenced property, including: removal of major vegetation (including coastal sage scrub and maritime chaparral plant species) and the results thereof; placement, replacement, and/or maintenance of approximately 5,500 sandbags (and the sand/gravel/fill released from the bags); and placement of sand/gravel berms, filter fabric over the berms, and plastic discharge pipes
4. Driftwood Properties, LLC undertook the development described in allegation #3 above without obtaining a coastal development permit, in violation of the Coastal Act.
5. The unpermitted development described in allegation #3 above impacted an Environmentally Sensitive Habitat Area and the scenic and visual qualities of the coast, and has contributed to erosion of the site, therefore, inconsistent with Coastal Act Section 30240, 30251, and 30253.
6. The unpermitted development described in allegation #3 above is causing "ongoing resource damage" within the meaning of Coastal Act Section 30811 and Title 14, California Code of Regulations, Section 13190.

7. Coastal Act Section 30810 authorizes the Commission to issue a cease and desist order, and all elements of that Section have been met herein.

8. Coastal Act Section 30811 authorizes the Commission to issue a restoration order, and all elements of that Section have been met herein.

9. The work to be performed under these Consent Orders, if done in compliance with the Orders and the plans approved therein, will be consistent with Chapter 3 of the Coastal Act.

10. On May 4, 2007, Commission staff sent a Notice of Violation letter to Respondent notifying Respondent of the violations on the Subject Properties.

11. On March 27, 2008, the Executive Director issued a "Notice of Intent to Record a Notice of Violation and to Commence Cease and Desist and Restoration Order Proceedings" to Respondent.

12. On December 2, 2010, an authorized signatory for Respondent signed Consent Cease and Desist Order No. CCC-10-CD-01 and Restoration Order No. CCC-10-RO-01, a copy of which is attached to this staff report as Exhibit 1.

13. The temporal loss and loss of fitness incurred by the ESHA will continue until the requirements of the Consent Orders are carried out.

Staff recommends that the Commission issue the Consent Cease and Desist Order and Consent Restoration Order attached hereto as Exhibit 1.

Click on the link below  
to go to the exhibits.

**Exhibit List for:  
CCC-10-CC-01 and CCC-10--RO-01**

<b>Exhibit Number</b>	<b>Description</b>
1.	Signed Consent Cease and Desist and Restoration Orders with attached Removal Plan (Exhibit A), Offer to Dedicate Open Space Conservation and Public Access Easement (Exhibit B), and Preemptive Purchase Right Agreement (Exhibit C).
2.	Blank
3.	Blank
4.	Property Location.
5.	Aerial Photograph showing the OTD Area and the PPR Area.
6.	Aerial Photograph showing ~6 acre Impacted Area.
7.	Watercourse Map, City of Laguna Beach GIS.
8.	Consent Restoration Order No. CCC-06-RO-03.
9.	Consent Cease and Desist Order No. CCC-10-CD-02 and Consent Restoration Order No. CCC-10-RO-02.
10.	May 4, 2007 Notice of Violation Letter from CCC staff to Driftwood.
11.	March 27, 2008 "NOI" Letter from Peter Douglas to Driftwood.
12.	Memo from Dr. John Dixon dated 4-16-07.
13.	Memo from Dr. John Dixon dated 7-14-08.
14.	Excerpt from Aliso and Wood Canyons Wilderness Park trail map.