

CALIFORNIA COASTAL COMMISSION

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Th 7.3 & 7.4

ADDENDUM

September 10, 2012

TO: Coastal Commissioners and Interested Parties

FROM: Lisa Haage, Chief of Enforcement
Enforcement Staff

SUBJECT: **ADDENDUM TO ITEMS Th 7.3 & 7.4 (Shea Homes): COASTAL COMMISSION CONSENT CEASE AND DESIST ORDER NO. CCC-12-CD-10 AND CONSENT RESTORATION ORDER NO. CCC-12-RO-10 – FOR THE COMMISSION MEETING OF SEPTEMBER 13, 2012**

Documents included in this addendum:

1. September 6, 2012 letter from Flossie Horgan, Executive Director, Bolsa Chica Land Trust (“BCLT”).
2. September 7, 2012 letter from John Vander Velde, Vice President, Shea Homes Limited Partnership (“Shea Homes”).

1. Staff has reviewed BCLT’s letter and provides the following comments in response, which comments it hereby incorporates into its August 30, 2012 staff report and thereby into its proposed Commission findings (the Commission’s response to Shea Homes’ letter follows, below):

The Commission appreciates BCLT’s support for enforcement action to resolve this matter and its commitment to ensuring compliance with the Coastal Act. The Commission notes, though, that BCLT conflates the Commission’s typical practice of requiring compensation for temporal impacts to habitat in the context of an enforcement action (sometimes referred to as “mitigation”) with the Commission’s practice of requiring mitigation - at different ratios dependent upon a case-by-case analysis of the affected resource - for permanent impacts to wetlands associated with approved projects, pursuant to Coastal Act section 30233. BCLT correctly notes that, in permitting actions involving wetlands that are permanently filled, the Commission has often used a ratio of 4:1 (requiring 4 acres of wetland restoration for every one filled); however, this enforcement action requiring restoration of wetlands arises in a different context.

Contrary to BCLT's statement that the Consent Orders have "determined" that wetlands have been "lost," the Consent Orders in fact ensure complete restoration of the 4 acre EPA wetland impacted during Shea Homes' ownership of the subject properties and the 0.4 acre portion of the CP Wetland that was impacted by unpermitted development in the early 1980's prior to Shea Homes' purchase of the property. Therefore, there will be no permanent loss of these wetlands. In addition, pursuant to the terms of these Consent Orders, Shea Homes will restore and/or fund restoration of an additional 8 acres of wetlands, including through the payment of \$292,500 to a wetland restoration project. That monetary figure should, based upon general restoration costs for wetland restoration projects in the area, provide for approximately 4.5 acres of additional wetland restoration. The total amount of restoration provided under these Orders is, therefore, 12.4 acres, and includes a settlement of the penalty claim under the Coastal Act as well as injunctive relief.

The Commission did not establish a mitigation ratio to address unpermitted development, as the BCLT suggests, through its previous actions on the City of Huntington Beach Land Use Plan related to these properties. In fact, the Commission expressly stated in approving the LUP that it was not making a determination whether or not unpermitted development had occurred at the time, much less what an appropriate enforcement remedy would be for such an unpermitted action. The LUP is silent, as would be expected in a planning document, with regard to obtaining full relief under the Coastal Act for violations on site.

Staff reached this proposed resolution of the Commission's claims for relief for violations of the Coastal Act after considering the unique factors related to this case, including the historical use of the site.

Staff urges the Commission to issue the proposed Consent Orders in order to effectuate a settlement of the violations at issue that ensures restoration of critical wetland resources on-site within the Bolsa Chica Wetlands complex and coastal Orange County.

2. Staff has reviewed Shea Homes' letter and provides the following comments in response, which comments it hereby incorporates into its August 30, 2012 staff report and thereby into its proposed Commission findings:

Staff thanks Shea Homes for their efforts in reaching a proposed resolution of this matter of unpermitted development and for their support for issuance of these Consent Orders expressed in the attached September 7 letter.

Shea Homes' letter notes that after the June 2012 hearing, Shea Homes provided staff with information asserting that the Commission could not "re-impose a 4:1 mitigation ratio for the "loss" of the EPA wetland." Staff believes this assertion is a reference to the Commission's decision not to establish through the LUP process a 4:1 mitigation ratio to compensate for wetland impacts that had occurred on the site but were not project related impacts. To the extent that Shea Homes is asserting that the Commission declined to

establish a mitigation ratio through the LUP to address unpermitted development, this is correct.

As noted above, the Commission's decision not to include a 4:1 ratio mitigation ratio for impacts related to unpermitted development in a planning document--the LUP-- does not affect the appropriate level of compensation for temporal impacts to habitat that the Commission may achieve through enforcement action. Staff weighed the unique factors related to these properties to determine the appropriate level of compensation for temporal impacts to wetland habitat resulting from the unpermitted development at issue.

As is detailed in the staff report, staff reached an agreement with Shea Homes that requires Shea Homes, through these proposed Consent Orders, to restore all wetland areas impacted by unpermitted development, as well as resolve the issue of monetary penalties and compensation for temporal impacts to habitat. In total, the Consent Orders require restoration and payments of a value of approximately 12.4 acres of wetland restoration in resolution of the violation.

The Commission also notes that although Shea Homes' letter again raises protestations to the presence of the EPA wetland, this issue is moot since the Commission has delineated the EPA wetland, which Shea Homes notes in their letter that they accept, and moreover, through these Consent Orders, Shea Homes has agreed to fully restore the EPA wetland and compensate for temporal effects to the EPA wetland resulting from the unpermitted development at issue.

Staff thanks Shea Homes for their commitment to resolving this matter and looks forward to working with Shea Homes to ensure implementation of the significant amount of wetland restoration required by these Consent Orders.

Change to staff report for CCC-12-CD-10 and CCC-12-RO-10:

Add the following footnote at the end of the final paragraph on page 7:

The unpermitted development addressed by these Consent Orders and referenced throughout this staff report is described in more detail in Section 7 of the Consent Orders, attached as Appendix A, to consist of grading in the areas of the EPA Wetland and CP Wetland, including in adjoining areas.



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Ballona Wetlands Land
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Friends of Harbors,
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Huntington Beach
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Huntington Beach Tomorrow
Orange Coast League of
Women Voters
Orange County
Coastkeeper
Peninsula Open Space Trust
Sea and Sage Audubon
Sierra Club
Angeles Chapter
Surfrider Foundation

September 6, 2012

California Coastal Commission
Mary K. Shallenberger, Chair
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

RE: SEPTEMBER 13, 2012, TH7.3 & 7.4 **CCC-12-CD-10 & CCC-12-RO-10 (Shea Homes)**

Dear Chair Shallenberger and members of the Commission:

These comments are being submitted on behalf of the Bolsa Chica Land Trust, a grassroots, 501c3 nonprofit organization of nearly 5,000 members. Our objective is to provide recommendations to the California Coastal Commission (CCC) which will ensure protection of the coastal zone resource values of the Bolsa Chica ecosystem in Huntington Beach, California.

The Land Trust thanks the Commission for issuing a Cease and Desist Order and Restoration Order for the unpermitted grading that has occurred at the Shea property during Shea's ownership. While we are gratified to see this issue finally addressed, and strongly support Consent Cease and Desist Order No. CCC-12-CD-10, regrettably the Land Trust cannot support Consent Restoration Order No. CC-12-RO-10 as detailed in the staff report TH7.3 & 7.4, due to inadequate mitigation.

The 8/30/12 staff report scarcely mentions mitigation, and only does so in the most general of terms:

"Mitigation is necessary in this case, due to the fact that even with proper restoration of the wetlands and habitat on site, the interim loss of ecosystem value will have a significant impact that will be experienced into the future." (pg. 16)

Mitigation is what is required when impacts are made to coastal resources. Mitigation rectifies and compensates for the impacts. The Commission has regularly utilized a specific mitigation ratio of 4:1 when determining how much mitigation to apply to rectify and compensate for the loss of wetlands.

This ratio has been used throughout the state for various projects, and has been referenced multiple times in Commission staff reports specifically concerning the Shea property.

As part of the City of Huntington Beach LUP Amendment process in 2007, the staff report outlined the issue of wetland loss and mitigation:

"The Commission typically requires mitigation for wetland impacts, generally at a ratio of 4:1. If wetland areas...on site were lost due to unpermitted activity, not only would the wetland areas need to be protected and restored, but mitigation for the interim loss of habitat values would be required. The amount of wetland impact and the need for mitigation would most appropriately be determined at the time a coastal development permit for the site is considered." (W16a, Nov.1, 2007, pg. 36)

The 4:1 ratio was also included as part of the City of Huntington Beach LUP Amendment Adopted Findings of May 2008:

***"Unpermitted development-Long-time farming activities** resulted in the loss of the 4-acre EPA wetland area. Section 30233 of the Coastal Act requires that loss of wetlands due to fill must be mitigated. The Commission typically requires mitigation at a ratio of 4:1 (area of mitigation to wetland area lost)." (LUPA Adopted Findings, May 2008, pgs. 35-36)*

Now that the Cease and Desist Order has affirmed the loss of wetlands, and has affirmed that "mitigation is necessary" for the interim loss of habitat value, exactly what amount of mitigation is proposed by the Consent Restoration Order and can it be considered adequate compensation?

The Consent Restoration Order states that:

1. Respondent will pay a penalty of \$292,500 (calculated from acres of wetlands lost)
2. Respondent will restore onsite the 4.4 acres of wetlands lost (4.0 EPA + .4 CP)
3. Respondent will provide for restoration (onsite or offsite) of 3.5 additional acres of wetlands or in lieu fees

The total number of acres to be restored is 7.9. That means that the mitigation ratio is not even close to the 4:1 regularly cited in Commission staff reports, nor close to 3:1 either. **The total mitigation is less than 2:1 for the fill of wetlands that occurred as a violation of the Coastal Act.** The low ratio of wetlands mitigation for this offense is baffling.

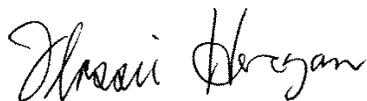
It does not make sense for the Commission to continually quote a specific ratio for wetlands mitigation and then not apply it when wetlands mitigation is required. The loss of wetlands in this case was due to unpermitted activity, a violation of the Coastal Act, and the habitat has been devalued for at least five years (at least since

2007, when Coastal staff did its major analysis--the Land Trust asserts it has been for a longer period). Enforcement Officer Andrew Willis has explained that 4:1 mitigation is typically required for the loss of wetlands that occur in conjunction with a CDP application (personal conversation with Julie Bixby 9/4/12). However, permitted or not, the habitat loss still occurred and still negatively impacted the ecosystem. The penalty for violation destruction should not be significantly less than for planned approved destruction. Using a lesser mitigation standard for violations compared to permitted development only serves to incentivize future violations of this type.

The staff report gives no reasoning for how the figure of 3.5 additional acres was derived as adequate mitigation and no rationale for why the total amount of wetlands to be restored is at a mitigation ratio less than 2:1 to the acres affected.

Therefore, because the Restoration order is inconsistent with the Commission's statewide practice for wetlands mitigation without any explanation or justification for doing so, and appears to let a Coastal Act violation enjoy a lesser restoration penalty than those who follow the rules, the Land Trust opposes the Consent Restoration Order No. CCC-12-RO-10 as submitted by staff.

Sincerely,

A handwritten signature in cursive script, appearing to read "Flossie Horgan".

Flossie Horgan, Executive Director
Bolsa Chica Land Trust

September 7, 2012

Mary K. Shallenberger, Chair
And Members of the California Coastal Commission
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

Re: Consent Cease and Desist Order No. CCC-12-CD-10
Consent Restoration Order No. CCC-12-RO-10
(Shea Homes Limited Partnership – Parkside Estates)

Agenda Item: Thursday, September 13, 2012, Items 7.3 and 7.4

Dear Madam Chair and Members of the Commission:

We appreciate the opportunity to comment on the above Consent Orders, which Staff has recommended to resolve the issue of alleged unpermitted development on Shea Homes' Parkside Estates property in Huntington Beach. The Consent Orders were the product of a very difficult negotiation, but at this point Shea supports the Staff's recommendation and appreciates your Staff's efforts. The Orders are fully responsive to concerns raised by the Commission at the conclusion of its June 2012 hearing on Shea's application for permit and will provide substantial wetland benefits in addition to those required by the City's Certified LCP and provided by Shea's pending application for CDP.

We are in receipt of the September 6, 2012 letter sent to you by the Bolsa Chica Land Trust (BCLT). It is readily apparent that BCLT does not understand the Consent Orders. Equally important, the BCLT letter misrepresents the Commission's May 2008 Adopted Findings on the certified Land Use Plan Amendment for Parkside and the Commission's 2007 LUPA discussion and resulting decision governing development of the property. For these reasons, we believe it may be helpful to highlight what prompted these Consent Orders and to provide you with an accurate explanation of what the Commission determined in its 2008 revised findings, as well as Shea's position concerning unpermitted development, notwithstanding its willingness to agree to the Consent Orders.

First, following a court-ordered remand, the Commission conducted a hearing on our permit application at the June 2012 meeting. The Commission continued the matter to allow Staff to consider whether an enforcement action is viable and to pursue discussions with us to resolve any perceived unpermitted development in advance of final action on the CDP. The Commission at that point may not have appreciated the great extent to which these issues had already been identified, addressed and resolved

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Attachment 2
Addendum Th 7.3 & 7.4

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*Shea Homes Limited Partnership &
Shea Homes Marketing Company*
Independent member of the Shea family of companies

by the Commission in 2007, when it approved the LUPA, and in 2008, when it adopted revised findings to support its decision.

After the June meeting, we met with your Staff and provided a “white paper” to explain the following:

1. The Commission’s decision in 2007 expressly rejected a 4:1 mitigation ratio for the “loss” of the EPA wetland in favor of 1:1 restoration of the EPA area.
2. The evidence before the Commission amply supported its determination to require 1:1 (or 4 acre) restoration of the EPA area and the Commission further included a policy in the certified LUP (now certified LCP) to guide resolution of unpermitted development and the pending CDP application complies with that policy.
3. Based on considerable case law, the Commission lacks the authority to now re-impose a 4:1 mitigation ratio for the “loss” of the EPA wetland.

The proposed Consent Orders acknowledge our disagreement with Staff that Shea has performed any unpermitted development on the Parkside Estates property. At the same time, in the spirit of cooperation and to achieve a reasonable compromise, we have agreed to the resolution that your Staff has set forth in the Consent Orders.

In objecting to the Consent Orders, the BCLT letter asserts that “the 4:1 [mitigation] ratio was also included as part of the City of Huntington Beach LUP Amendment Adopted Findings of May 2008.” That is a highly misleading statement. In fact, Staff proposed 4:1 mitigation in the initial version of the Revised Findings, but ***the Commission then expressly rejected it in favor of 1:1 restoration of the EPA.*** This was reflected in the redlined version of the 2008 adopted findings that your Staff included in the June 2012 staff report on the CDP application.

The BCLT letter suggests that the habitat at issue has been “devalued” for at least five years. This, too, is very misleading. It is beyond dispute that the EPA area has been farmed since the mid-1930s. No evidence ever was presented of an EPA wetland as such, or of an area that meets any of the three parameters required to establish a wetland (no hydric soils, no predominance of hydrophytes, no saturated soils for more than 14 days in a majority of years), or of any functional wetland values in that area. It is for these reasons that the Commission, in its adopted revised findings, determined that 1:1 restoration of the EPA area (not 4:1) was what is required to be consistent with the wetland policy in the Coastal Act.

The BCLT letter also argues that the Commission typically imposes 4:1 mitigation for the loss of wetlands. While 4:1 mitigation may often be used as a mitigation ratio for the “loss” of wetlands, the Commission’s 2008 revised findings rejecting 4:1 mitigation demonstrate that it is not universally applied but varies according to the situation. See, e.g., Appeal no. A-1-DNC-12-016 (Del Norte County), where the Commission at the recent July 2012 meeting concluded (at p. 16) that a 3:1 wetland mitigation ratio was adequate, noting “the Commission has not universally applied the 4:1 ratio to all

Chair Shallenberger and Commissioners

September 7, 2012

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habitat, the mitigation location, the degree of temporal loss, the likelihood of success and other factors.”

Shea Homes wishes to emphasize that at this point it does not contest the Commission’s designation of the 4-acre EPA as a wetland. That Commission decision was made in 2007 and was reflected in the Commission’s 2008 findings. Along with the Commission’s determination to require only 1:1 restoration of that area (actually, creation in the first instance) and to reject 4:1 mitigation, those decisions are dispositive, final and binding. In fact, Shea Homes’ acceptance of the 4-acre EPA designation was linked to the 1:1 restoration requirement.

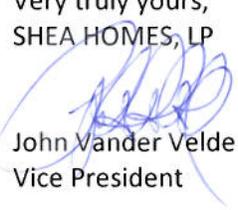
The proposed Consent Orders will provide substantial wetland benefits in addition to the requirements for wetland restoration set forth in the City’s certified LCP to govern our development of the Parkside property. The Consent Orders provide:

1. Shea Homes will implement the already staff-approved Habitat Management Plan and, using the Natural Treatment System proposed by the pending CDP application as the water source, it will restore all of the wetlands onsite to which it has committed plus additional acreage in the CP area (a total of 7.5 acres), and it will additionally pay an in-lieu fee of \$292,500 for creation, restoration or enhancement of wetlands offsite in the Huntington Beach coastal zone. The fee equates to another 4.5 acres of wetlands (4.5 acres x \$65,000/acre). Thus, BCLT’s suggestion that the total “mitigation” is less than 2:1 is factually wrong.
2. If Shea Homes cannot implement the Habitat Management Plan (*e.g.*, because there is insufficient water to achieve restoration), a revised plan is required, and Shea is to restore the EPA (4 acres) and CP (0.4 acre) onsite and restore another 3.5 acres offsite or pay a fee of \$227,500 (3.5 acres x \$65,000/acre). This fee would be in addition to the \$292,500 (4.5 acres x \$65,000).

Since the June 2012 hearing, we have worked very closely with your Staff to come to an agreement that addresses the Commission’s concerns at the June 2012 hearing. We truly appreciate Staff’s efforts. It is our hope that the Commission will now adopt the Consent Orders so that we can return to the timely completion of the court-ordered remand on our application for permit, proceed to hearing on a positive Staff Recommendation, and obtain your approval of the Parkside Estates project, augmented by the additional coastal resource benefits that would be provided as a result of the proposed Consent Orders.

Thank you.

Very truly yours,
SHEA HOMES, LP



John Vander Velde
Vice President

A copy of this letter has also been provided to Commission Staff
Attachment 2

Addendum Th 7.3 & 7.4

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Chair Shallenberger and Commissioners

September 7, 2012

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Vice President

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