

CALIFORNIA COASTAL COMMISSION

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**W13&14**

Staff: Andrew Willis-LB
Staff Report: December 22, 2011
Hearing Date: January 11, 2012

**STAFF RECOMMENDATIONS AND FINDINGS
 FOR CONSENT CEASE AND DESIST AND RESTORATION ORDERS**

CONSENT CEASE AND DESIST ORDER:	CCC-12-CD-01	Click here to go to the exhibits and final signed orders which contain the revised mitigation fund amount.
CONSENT RESTORATION ORDER:	CCC-12-RO-01	
RELATED VIOLATION FILE:	V-5-11-001	
PROPERTY LOCATION:	Vacant property on the east side of the intersection of Brightwater Drive and Bolsa Chica Street; Orange County APN 110-016-18.	
PROPERTY OWNER:	Douglas Goodell, Stuart Goodell, and Patricia Price, as trustees of Trusts A, B, and C of the Donald E. Goodell and Shirley L. Goodell Family Trust	
VIOLATION DESCRIPTION:	Excavation of 16 50-cm wide by, on average, 101 cmbs (centimeters below surface) deep pits ¹ and deposition of soil excavated from said pits. Said pits were excavated without Native America monitors in areas suspected at the time of excavation to contain cultural and archaeological resources and resulted in excavation of intact cultural midden.	
PERSONS SUBJECT TO THESE ORDERS:	Douglas Goodell, Stuart Goodell, and Patricia Price, and their successors as trustees of Trusts A, B, and C of the Donald E. Goodell and Shirley L. Goodell Family Trust	
SUBSTANTIVE FILE DOCUMENTS:	<ol style="list-style-type: none"> 1. Public documents in Cease and Desist and Restoration Order files No. CCC-12-CD-01 and CCC-12-RO-01 2. 5-10-035-X 3. 5-10-258 4. Huntington Beach certified Local Coastal 	

¹ The third dimension of the pits, length, varies from roughly 60 to 120 centimeters.

Program

5. Exhibits #1 through 8 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

The Proposed Consent Orders

The unpermitted development at issue in this matter includes excavation of 16 pits and deposition of excavated soil on vacant property located east of the intersection of Brightwater Drive and Bolsa Chica Street in unincorporated Orange County that is identified by the Orange County Assessor's Office as APN 110-016-18 ("subject property") (Exhibit #2). The subject property is located on the southeastern portion of the Bolsa Chica Mesa and contains a known archaeological site, CA-ORA-144. Some archaeologists consider CA-ORA-144 to be the northeastern portion of another archaeological site located on the Bolsa Chica Mesa, the highly significant cultural and archaeological site CA-ORA-83. In fact, the subject property owner's own archaeologist agrees that CA-ORA-144 is a part of CA-ORA-83, which is a 9,000 year old archaeological site that was successfully nominated to the National Register of Historic Places in 2009 due to its historical and archaeological significance.

Commission staff has worked closely with the individuals who hold title to the subject property as trustees of the Donald E. Goodell and Shirley L. Goodell Family Trust (collectively, "Respondents") to reach an agreement on Consent Cease and Desist Order No. CCC-12-CD-01 and Consent Restoration Order No. CCC-12-RO-01 ("Consent Orders") to resolve the alleged Coastal Act violations. Respondents, through these Consent Orders, collectively have agreed to resolve all Coastal Act violation matters addressed herein, including resolving monetary claims under Coastal Act Sections 30820 and 30822.

Staff recommends that the Commission approve Consent Orders, attached to this staff report as Exhibit #1, addressing unpermitted excavation and deposition of soil undertaken in violation of the Coastal Act. Pursuant to the terms of the Consent Orders, Respondents have agreed to, among other things: 1) cease and desist from conducting any further unpermitted development on the subject property; 2) install erosion control measures; 3) arrange for Native American monitors to oversee all work conducted pursuant to these Consent Orders; 4) screen excavated soil for cultural materials; 5) document and rebury all cultural materials encountered during work conducted pursuant to the Consent Orders; 6) return the topography of excavated areas to its preexisting condition; and 7) fund a mitigation project in the amount of \$130,000 to promote conservation of archaeological resources in coastal Orange County.

Background

The subject property lies on the southeastern portion of the Bolsa Chica Mesa (Exhibit #3) and is separated from the main portion of the significant archaeological site, CA-ORA-83, only by

Bolsa Chica Street in places and a pedestrian trail in others. Initial surveys have confirmed the presence of archaeological resources on the subject property.

On April 16, 2010, the Executive Director issued exemption 5-10-035-X (Exhibit #4) to allow Respondents to carry out a surface survey and a geophysical program intended to provide data to be used to generate archaeological maps of the subject property, including site boundaries, location of surface artifacts, and other relevant GPS data to establish the parameters of a comprehensive Archaeological Research Plan (“ARP”) to follow the surface survey under authorization of a separate coastal development permit (5-10-258²). Respondents did not request authorization to perform, nor did the exemption exempt from coastal development requirements, any subsurface work. The project description on the face of the exemption clearly states that “Other than placement of stakes to mark grids, no ground disturbing, or sub-surface excavation/earth movement will occur.”

However, in addition to carrying out the exempt surface study, in May and June 2010, Respondents also excavated 16 50-cm wide by, on average, 101-cmbs (centimeters below surface) deep pits (Exhibit #6) on the subject property. The pits were excavated in areas suspected, at the time of excavation, to be areas of intact cultural midden.³ Based upon the results of the excavations provided by Respondents, it is evident that intact cultural midden material was in fact excavated from six of the pits and deposited on site. Although the apparent purpose of the excavations was to help determine boundaries of intact cultural midden to establish the parameters of the comprehensive ARP, the Commission was not given notice of this work, and moreover, this excavation work was not authorized, either as part of the exemption or otherwise, and the excavations resulted in disturbance of protected archaeological resources and were undertaken without the presence of Native American monitors with ancestral ties to the area and without any erosion control measures in place. Further, the excavated soil, which included intact cultural midden, was not screened for cultural materials during excavation. The Commission has required - and the State Native American Heritage Commission (“NAHC”) consistently supports this requirement - the presence of Native American monitors when subsurface investigation is undertaken in areas that are known or suspected to contain archaeological resources to ensure appropriate treatment of the site and cultural materials and to provide necessary cultural context for archaeological investigations.

The Commission is scheduled to hear Respondents’ request for approval of the comprehensive ARP (Coastal Development Permit No. 5-10-258) at the January Commission meeting, following the hearing on these Consent Orders. Commission staff is proposing approval of the ARP conditioned on, among other things, provision of Native American monitors to oversee all

² Respondents have prepared an ARP for this site and have submitted a CDP application (5-10-258) seeking authorization to implement that plan. CDP 5-10-258 is scheduled as hearing item W19b on January 11, 2012 (see Exhibit #5 for the staff report, as incorporated by reference herein).

³ A cultural midden is a prehistoric mound of discarded material used in cooking and food processing and contains marine shell, animal bone, fired rocks, and discarded artifacts and is characterized by organic material in the soil such as grease, blood, and body fluids that help define the boundaries of historic Native American sites. Cultural midden is “intact” if it is in place and has not been dug up and re-deposited or severely disturbed as the result of historic or modern activities.

work. Approval of the ARP as proposed would not authorize subsurface investigation within known areas of intact cultural midden. (See staff report attached as Exhibit #5)

Respondents have withdrawn their request for after-the-fact authorization of the unpermitted excavations; these Consent Orders are intended to address the unpermitted excavations and deposition of soil and the results thereof and ensure protection and appropriate treatment of the significant archaeological and cultural resources on the subject property, including the integrity of this significant cultural site.

Commission's Jurisdiction

The subject property lies within the Bolsa Chica segment of the Orange County Local Coastal Program ("LCP"). There is no certified Land Use Plan ("LUP") or Implementation Plan ("IP") for the Bolsa Chica segment of the Orange County LCP. The standard of review for proposed development in this area is therefore Chapter 3 of the Coastal Act, and the Coastal Commission has initial jurisdiction over both permit and enforcement matters on the subject property.

However, the subject property is pending annexation to the City of Huntington Beach. The City of Huntington Beach has a certified LCP, but it will not be applicable to the subject property until the area is annexed into the City and the City amends its LCP to include the site. Therefore, to the extent that the certified Huntington Beach LCP, as amended, applies to the subject property, it may be used for guidance. In particular, the Commission recently approved amendments, including site specific policies, to the certified City of Huntington Beach LCP for the proposed Parkside Estates site, which is immediately adjacent to the subject property to the east.

Requirements for Issuance of Cease and Desist and Restoration Orders

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 CDP, 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 below.

As described in more detail in Section IV of this staff report, the unpermitted activity that has occurred on the subject property meets the definition of "development" set forth in Coastal Act Section 30106. Coastal Act Section 30600 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 CDP. No such permit was issued by the Commission nor has a permit application been submitted for the subject unpermitted activities.

As discussed below, not only do the unpermitted activities meet the definition of development, and therefore require but lack a CDP, but the unpermitted development and the ongoing maintenance of the unpermitted development is also inconsistent with the Chapter 3 policies of

the Coastal Act, including Sections 30244 (Archaeological or paleontological resources), 30230 (Marine Resources), 30231 (biological productivity and water quality), and 30253 (minimization of adverse impacts) and policies within the City's LUP, as fully discussed below.^{4 5}

The unpermitted development has adversely impacted coastal resources. Such impacts meet the definition of "damage" provided in Section 13190(b) of Title 14 of the California Code of Regulations ("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 and any physical results of the unpermitted development, including the excavations and excavated soil, are allowed to remain unrestored and unmitigated, their effect will lead to further adverse impacts (including the temporal continuation of the existing impacts) to archaeological resources and coastal waters. 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 Recommendation

Staff recommends that the Commission approve Consent Cease and Desist Order CCC-12-CD-01 and Consent Restoration Order CCC-12-RO-01 to address the unpermitted development, and the results thereof, as described below.

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 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 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

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

⁵ Respondents' post-excavation survey of Southern tarplant, a protected plant species found on the subject property, indicates that, when compared to pre-excavation surveys, excavation of the pits did not result in direct impacts to tarplant and tarplant populations did not decline after the excavations occurred.

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 Consent Cease and Desist Order and Restoration Orders. Passage of the motions below will result in issuance of the Consent Cease and Desist Order and Consent Restoration Order.

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-12-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-12-CD-01, as set forth below, and adopts the findings set forth below on grounds that development has occurred without a coastal development permit, in violation of the Coastal Act.

2. Motion

I move that the Commission issue Consent Restoration Order No. CCC-12-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-12-RO-01, 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-12-CD-01 AND RESTORATION ORDER NO. CCC-12-RO-01⁶

A. Description of Coastal Act Violations

The violations of the Coastal Act that formed the basis for these Consent Orders include development, as that term is defined in the Coastal Act (PRC Section 30106), on the subject property that required a CDP, pursuant to the Coastal Act, but for which no such permit was obtained, including excavation of 16 50-cm wide by, on average, 101-cmbs (centimeters below surface) deep pits⁷ and deposition of soil, and any other physical materials excavated from said pits, on the subject property and/or physical changes to the subject property resulting from the excavations and deposition of excavated materials. Said pits were excavated without Native American monitors in areas suspected at the time of excavation to contain cultural and archaeological resources and resulted in the excavation of intact cultural midden and deposition of cultural midden material on site.

B. History of Site and Coastal Act Violations

As noted above, the subject property is located on southeastern Bolsa Chica Mesa and contains a mapped archaeological site, CA-ORA-144, “The Water Tower Site”. Some archaeologists, including the subject property owner’s archaeologist, believe CA-ORA-144 to be a part of the highly significant CA-ORA-83, which is a 9,000 year old archaeological site known as the “Cogged Stone Site,” due to the great number of cogged stone artifacts (Exhibit #7) recovered there. ORA-83 has been successfully nominated to the National Register of Historic Places by the State Historical Resources Commission under Criteria A and D⁸ for listing as a National Historic Site. The site was successfully nominated under Criterion A as a type site for production, manufacture and distribution of the cogged stone artifact and a historic site that represents an Early Holocene ceremonial complex important to the local Native American communities, and under Criterion D since the site has produced hundreds of cogged stones, human remains, numerous semi-subterranean pit houses, and other artifacts and since the site is considered highly significant with regard to research potential, particularly if this information is combined with other archaeological and ethnographic evidence.

As a result of years of archaeological research, much of which was performed pursuant to coastal development permits, and some of which predated the Coastal Act, approximately 160 human burials; several animal burials; and over 100 significant archaeological features such as house pits, rock pits, hearths and tens of thousands of beads, charmstones, cogged stones and other artifacts have been found on CA-ORA-83.

⁶ These findings also hereby incorporate by reference Section I of the December 22, 2011 staff report (“Staff Recommendations and Findings for Consent Cease and Desist and Restoration Orders”) in which these findings appear, which section is entitled “Summary of Staff Recommendations and Findings.”

⁷ The third dimension of the pits, length, varies from roughly 60 to 120 centimeters.

⁸ Sites are nominated under Criterion A if they are sites “That are associated with events that have made a significant contribution to the broad patterns of our history,” and under Criterion D if they are sites “That have yielded, or may be likely to yield, information important in prehistory or history.”

Prior to the development of a site, such as the subject property, which is suspected to contain significant archaeological resources, due in part to its contiguity with CA-ORA-83, the Commission requires that applicants for development prepare an Archaeological Research Plan to identify portions of the site that contain archaeological resources (such as Native American human remains, archaeological features, or cultural midden), and to define the boundaries of these areas using techniques that avoid impacts to these resources, if they are present. Respondents have had an ARP prepared for this site and have submitted a CDP application (5-10-258) seeking authorization to implement that plan.⁹ The purpose of the ARP specific to the subject property is to identify and leave in place significant archaeological resources found on the site; any subsequent development of the subject property will be designed to avoid further impacts to these resources.

Archaeological study of a site proposed for development in the Coastal Zone commonly occurs in two primary phases: first, a non-invasive surface survey; and second, a comprehensive survey including subsurface investigations, i.e. an ARP. As noted above, on April 16, 2010, the Executive Director issued exemption 5-10-035-X to allow Respondents to carry out a surface survey and a geophysical program intended to provide data to be used to generate archaeological maps of the subject property, including site boundaries, location of surface artifacts, and other relevant GPS data to establish parameters for the comprehensive ARP to follow the surface survey, which was envisioned would be authorized by a separate CDP, and for which Respondents have now applied. Respondents did not request authorization to perform, nor did the exemption exempt from coastal development permit requirements, any subsurface work. The project description, submitted by Respondents and included on the face of the exemption clearly states that “Other than placement of stakes to mark grids, no ground disturbing, or sub-surface excavation/earth movement will occur.”

However, in addition to carrying out the exempt surface study, Respondents also excavated 16 50-cm wide by, on average, 101-cmbs (centimeters below surface) deep profiles on the subject property. The pits were excavated in areas suspected¹⁰ at the time of excavation to be areas of intact cultural midden. Intact cultural midden was in fact excavated from six of the pits and deposited on site. Although the purpose of the excavations was apparently to help determine boundaries of intact cultural midden to establish the parameters of the comprehensive ARP, this excavation work was not a part of the exemption or otherwise approved, and the excavations were undertaken without the presence of Native American monitors with ancestral ties to the area to ensure appropriate treatment of the site and cultural materials and to provide necessary cultural context for archaeological investigations, without any erosion control measures in place, and the excavated soil, which included intact cultural midden, was not screened for cultural materials.

⁹ CDP 5-10-258 is scheduled as hearing item W19b on January 12, 2012 (see Exhibit #5 for the staff report, as incorporated by reference herein).

¹⁰ The Herring excavations conducted in the 1960's identified the area of the excavations as a potential archaeological site. Moreover, review of surface evidence, such as shell material, as well as the results of the ground penetrating radar survey, would have suggested the presence of cultural midden.

After receiving reports of the excavations described above in December 2010, and subsequent to requesting and receiving more information related to the activity, staff sent Respondents a Notice of Violation letter on January 6, 2011 informing them that (1) excavation of the pits constituted development under the Coastal Act, (2) pursuant to Coastal Act Section 30600, any person wishing to perform or undertake any development in the Coastal Zone is required to obtain a CDP authorizing such development, and (3) no CDPs have been issued for the development. The letter also informed Respondents that one option they may consider to resolve this matter is to amend the pending application for a comprehensive ARP (CDP 5-10-258) to include a request for after-the-fact (“ATF”) authorization of the unpermitted excavations. Through the permit process, the letter explained, staff would analyze whether the subject excavations are consistent with resource protection policies of the Coastal Act, including but not limited to Coastal Act Section 30244 (Archaeological or paleontological resources).

Respondents subsequently amended their application for a comprehensive ARP (5-10-258) to include a request for ATF authorization of the unpermitted excavations. After reviewing the application for ATF authorization, staff found that it could not recommend approval of the excavations, stating in the initial staff report for the November hearing, which has since been revised to remove the request for ATF authorization of the excavations, that “The Commission cannot approve this work ATF as it was not done in a manner most protective of the archaeological/cultural resources since Native American monitors were not present and therefore not allowed to verify the findings or make comments on the methods (including whether the material should be screened for human bone or animal fragments).”

Respondents’ response to staff’s recommendation of denial included providing staff with citations to the Commission’s Statewide Archaeological Guidelines, which Respondents maintain were adhered to in carrying out the excavations and which Respondents claim exempt the excavations. On the contrary, the archaeological guidelines confirm that a CDP is required for an archaeological investigation that involves removing or extracting any material. Staff pointed this out to Respondents and explained that the guidelines do not alter staff’s position that a CDP was necessary for the excavations; in fact, the guidelines bolster staff’s position, and that staff planned to recommend denial of the excavations at the November 2011 Commission hearing. Respondents subsequently requested a postponement of the hearing.

On November 8, 2011, Commission staff met with Respondents to discuss a consensual resolution of the unpermitted excavations, potentially through a settlement agreement in the form of consent orders that would provide a permanent and complete resolution of this matter. At the meeting, Respondents expressed their willingness to resolve this matter consensually through the consent order process.

Staff and Respondents have worked extensively and collaboratively towards an amicable resolution of the unpermitted excavations. On December 18, 2011, Respondents signed Consent Cease and Desist Order No. CCC-12-CD-01 and Consent Restoration Order No. CCC-12-RO-01. In order to amicably resolve the violations through these Consent Orders, Respondents agree not to contest the legal and factual bases for, the terms of, or the issuance of these Consent Orders, and have elected to settle this matter rather than submit a Statement of Defense form and

contest issuance of these Consent Orders. Specifically, Respondents agree not to contest the issuance or enforceability of these Consent Orders at a public hearing or any other proceeding.

The Commission is scheduled to hear Respondents' request for approval of a comprehensive ARP at the January meeting following the hearing on these Consent Orders, however, Respondents withdrew their request for ATF authorization of the unpermitted excavations; these Consent Orders are intended to address the unpermitted excavations and deposition of soil and the results thereof for which Respondents previously sought ATF authorization and ensure protection and appropriate treatment of the significant archaeological and cultural resources on the subject property.

C. 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 Sections 30810 and 30811 for the Commission to issue a Cease and Desist Order and a Restoration Order.

Staff notes that the standard of review in this matter is the Coastal Act. However, the subject property is pending annexation to the City of Huntington Beach. The City of Huntington Beach has a certified LCP but it will not be applicable to the subject property until the area is annexed into the City and the City amends its LCP to include the site. Therefore, to the extent that the

certified Huntington Beach LCP, as amended, applies to the subject property, it may be used for the purposes of guidance and relevant portions of the LCP are discussed herein as appropriate.

1. Development has occurred without a Coastal Development Permit

Unpermitted development consisting of excavation of 16 50-cm wide by, on average, 101-cmbs (centimeters below surface) deep pits and deposition of soil excavated from said pits, as well as placement of any other physical materials excavated from said pits on the subject property and/or physical changes to the subject property resulting from the excavations, has occurred on the subject property 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 in relevant part 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 excavation of 16 pits and deposition of soil excavated from said pits, 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). A CDP was not issued to authorize the subject development.

On April 16, 2010, the Executive Director issued exemption 5-10-035-X to allow Respondents to carry out a non-invasive surface survey and geophysical program intended to provide data for subsequent comprehensive archaeological study. Respondents did not request authorization for, nor did the exemption exempt, any subsurface work. The project description on the face of the exemption clearly states that "Other than placement of stakes to mark grids, no ground disturbing, or sub-surface excavation/earth movement will occur." The requirement for a CDP is also clear upon reading the Commission's Statewide Archaeological Guidelines; the archaeological guidelines confirm that a CDP is required for an archaeological investigation that involves removing or extracting any material.

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: Sections 30244 (Archaeological or paleontological resources), 30230 (Marine Resources), 30231 (biological productivity and water quality), and 30253 (minimization of adverse impacts) and policies within the City's LUP, as fully discussed below.

Archaeological Resources

The unpermitted development is inconsistent with Coastal Act Section 30244, which requires protection of archaeological and paleontological resources within the Coastal Zone. Section 30244 states:

Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.

The unpermitted development is inconsistent with the archaeological resources protection policy of the Coastal Act because intact cultural midden, a protected archaeological resource in part because it helps define the boundaries of the historic Native American site on the subject property, was excavated from the pits, and certain reasonable mitigation measures necessary to ensure protection and appropriate treatment of archaeological resources, and the integrity of this significant cultural site¹¹, were not implemented during excavation of the pits. In particular, the pits were excavated without the presence of Native American monitors with ancestral ties to the area and the excavated soil was not screened for cultural materials. Thus the pits were not excavated in a manner that is consistent with the archaeological resources protection policies of the Coastal Act and the excavation resulted in disturbance of protected archaeological resources.

The Coastal Commission, as well as the local government, has consistently required as a reasonable mitigation measure the presence of Native American monitors when subsurface investigation is undertaken in areas, such as the subject property, that are known or suspected to contain archaeological resources. The Native American community in general, as well as tribal groups with ancestral ties to the site, and the Native American Heritage Commission, are concerned that Native American resources, especially human remains, if they are exposed, be treated with appropriate dignity and respect.

The NAHC explains in guidelines for field archaeological work (Exhibit #8) the value of monitoring as a mitigation measure to ensure appropriate treatment of archaeological sites and cultural materials during archaeological research. The NAHC guidelines for such work state, in part:

When projects are proposed in areas where Native American cultural features are likely to be affected, one way to avoid damaging them is to have a Native American monitor/consultant present during ground disturbing work. In sensitive areas, it may also be appropriate to have a monitor/consultant on site during construction work.

A knowledgeable, well-trained Native American monitor/consultant can identify an area that has been used as a village site, gathering area, burial site, etc. and estimate how extensive the site might be. A monitor/consultant can prevent damage to a site by being able to communicate well with others involved in the project, which might involve:

¹¹ As noted above, the expansive archaeological site on the Bolsa Chica Mesa, of which the site on the subject property is believed to be a part, has been successfully nominated to the National Register of Historic Places by the State Historical Preservation Officer through the State Historical Resources Commission, as a National Historic Site.

1. *Requesting excavation work to stop so that new discoveries can be evaluated;*
2. *Sharing information so that others will understand the cultural importance of the features involved;*
3. *Ensuring excavation or disturbance of the site is halted and the appropriate State laws are followed when human remains are discovered;*
4. *Helping to ensure that Native American remains and any associated grave items are treated with culturally appropriate dignity, as is intended by State law.*

By acting as a liaison between Native Americans, archaeologists, developers, contractors and public agencies, a Native American monitor/consultant can ensure that cultural features are treated appropriately from the Native American point of view... [Native American Heritage Commission Guidelines for Native American Monitors/Consultants]

The absence of monitors during excavations, in addition to failing to ensure protection of archaeological resources, also undermines the effectiveness of future mitigation measures to protect cultural resources on the site. The goal of archaeological research in this context is to determine the significance and extent of archaeological resources on site and prepare a mitigation plan appropriate to the site. The perspective of Native American monitors during field work is an important component of productive archaeological research in this regard. If present during excavations, Native American monitors can guide the process by stopping work to evaluate the significance of any cultural materials encountered during excavation, providing input and adaptive strategies as the work is carried out, and requesting that excavated soils be screened for cultural material.

Respondents' archaeologist states that the soils were not screened because they were fill material that originally came from other portions of the site during previous on-site historic development and were not midden soils. However, the unpermitted development did in fact result in the excavation of intact cultural midden material. It is evident in photographs and graphics submitted by Respondents that intact cultural midden was cut away and removed from the pits during their excavation. Furthermore, fill material may contain isolated cultural materials, i.e. artifacts discovered within disturbed soil, - particularly given the historic development on portions of this site and resulting potential for fill material to mix with adjacent midden soils - and Native American monitors may request that fill material be screened for the presence of cultural materials. For instance, on the adjacent Parkside Estates site, Native American representatives requested that bones encountered there during grading be examined to determine their origin. Because the pits at issue were excavated without the presence of Native American monitors, the affected tribal groups were not afforded the opportunity to participate in this critical phase of the research process, thus undercutting the effectiveness of mitigation measures that are developed based upon the results of the research.

The unpermitted development impacted protected archaeological resources, was undertaken in the absence of certain reasonable mitigation measures necessary to ensure protection and appropriate treatment of archaeological resources, including those, such as here, that have been identified by the State Historical Preservation Officer through the State Historical Resources

Commission, and hampers development of appropriate mitigation measures; therefore, the unpermitted development is inconsistent with Section 30244 of the Coastal Act.

Marine Resources and Biological Productivity/Minimization of Adverse Impacts

The unpermitted development is inconsistent with Coastal Act Sections 30230 and 30231, which require protection of marine resources and biological productivity of coastal waters, including from the effects of erosion and run-off, as well as Section 30253, which requires that new development minimize erosion. Sections 30230, 30231, and 30253 state:

Section 30230

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231

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

Section 30253

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 unpermitted excavations resulted in disturbance of soil and deposition of unsecured soil on a slope descending to the Bolsa Chica wetlands complex, a coastal wetland that provides habitat for threatened and endangered species. The unpermitted excavations and excavated soil were left in place for over a year, including during the rainy season, without erosion control measures that are necessary to prevent erosion and impacts to coastal waters, such as the adjacent Bolsa Chica wetlands. In fact, at the time the excavations were reported to staff in December 2010, it appears that the excavated soil had already been eroded away by rainfall and wind.

The unpermitted development has thus exposed the site and surrounding water bodies to the effects of unregulated erosion and sediment laden runoff. Unmanaged runoff across disturbed dirt areas can increase the level of sediment entering water bodies, consequently also increasing the turbidity of receiving waters, which reduces the penetration of sunlight needed by aquatic vegetation that provides food and cover for aquatic species and disrupts the reproductive cycles of aquatic species, leading to adverse changes in reproduction and feeding behavior. These impacts reduce the biological productivity and the quality of coastal waters and reduce optimum populations of marine organisms and their predators. Similarly, sediment-laden stormwater runoff can increase sedimentation in coastal waters. Sedimentation of coastal waters impacts fish populations, and their predators, in part by burying aquatic vegetation that provides food and cover for aquatic species. For these reasons, the unpermitted development is inconsistent with Coastal Act Sections 30230, 30231 and 30253(b) of the Coastal Act.

c. 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 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.

‘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 archaeological resources on the subject property, as well as the coastal waters in the vicinity of the subject property, are afforded protection under Coastal Act Sections 30230, 30231, 30244, and 30253(b), and are therefore “resources” as defined in Section 13190(a) of the Commission’s regulations. The unpermitted development on the subject property impacted protected archaeological resources, has been undertaken without reasonable mitigation measures necessary to ensure protection and appropriate treatment of archaeological resources, and exposed the site and surrounding coastal waters to the effects of unregulated runoff, thereby causing “damage” to a resource, as defined in Section 13190(b) of the Commission’s regulations. Without restoration of the excavated areas, and monitoring of such restoration by Native American monitors, the foregoing impacts are continuing and will continue to occur. The persistence of these impacts constitutes “continuing” resource damage, as defined in Section 13190(c) of the Commission’s regulations.

For the reasons stated above, the unpermitted actions are causing continuing resource damage. As a result, the third and final criterion for the Commission’s issuance of the proposed Restoration Order pursuant to Coastal Act Section 30811 is therefore satisfied

d. Unpermitted Development is Inconsistent with the Certified Land Use Plan

The standard of review is Chapter 3 of the Coastal Act and the Coastal Commission has jurisdiction over permit and enforcement matters on the subject property. However, staff notes that the unpermitted development at issue in this matter is also inconsistent with policies of the Huntington Beach LCP. Although the Huntington Beach LCP does not currently apply to the subject property since the site has yet to be annexed into the City and the City would need to amend its certified LCP to include policies and development standards for the subject property, the Commission considers the development standards designed to protect archaeological resources contained in the Huntington Beach LCP as guidance. The LCP policies with which the unpermitted development at issue is inconsistent include, but may not be limited to the policies cited below.

Objective C 5.1

Identify and protect, to the maximum extent feasible, significant archaeological, paleontological and historic resources in the Coastal Zone.

Policy C 5.1.2

Where new development would adversely impact archeological or paleontological resources within the Coastal Zone, reasonable mitigation measures to minimize impacts shall be required.

Section 230.82E [Parkside Estates IP]

Archaeological/Cultural Resources Within the coastal zone, applications for grading or any other development that has the potential to impact significant archaeological/cultural resources shall be preceded by a coastal development permit application for implementation of an Archaeological Research Design (ARD). This is required when the project site contains a mapped archaeological site, when the potential for the presence of archaeological/cultural resources is revealed through the CEQA process, and/or when archaeological/cultural resources are otherwise known or reasonably suspected to be present. A coastal development permit is required to implement an ARD when such implementation involves development (e.g. trenching, test pits, etc.). No development, including grading, may proceed at the site until the ARD, as reflected in an approved coastal development permit, is fully implemented. Subsequent development at the site shall be subject to approval of a coastal development permit and shall be guided by the results of the approved ARD.

As described above, the unpermitted development impacted protected archaeological resources, was undertaken in the absence of certain reasonable mitigation measures necessary to ensure protection and appropriate treatment of archaeological resources, and precludes effective implementation of mitigation measures. Therefore, the unpermitted development is inconsistent with resource protection policies of the Coastal Act, as well as policies of the Huntington Beach

LCP that require 1) issuance of a CDP before development that may impact significant archaeological resources occurs, and 2) reasonable mitigation measures to protect those resources.

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

The unpermitted development at issue significantly impacted coastal resources, including archaeological resources, on the subject property. The unpermitted development is therefore inconsistent with the resource protection policies of the Coastal Act and City LCP, and the resource damage caused by the unpermitted development will continue unless the unpermitted activities cease and the subject property is properly restored. Issuance of the Consent Orders is essential to resolving the violations and to ensure compliance with the Coastal Act.

The Consent Cease and Desist Order and Consent Restoration Order attached to this staff report are consistent with and, in fact, are designed to further the resource protection policies found in Chapter 3 of the Coastal Act. The Consent Orders require Respondents to 1) install erosion control measures; 2) screen excavated soil for cultural materials; 3) return the excavated area to its preexisting topography; 4) arrange for Native American monitors to oversee all work conducted pursuant to these Consent Orders; 5) document and rebury all cultural materials encountered during work conducted pursuant to the Consent Orders; 6) cease and desist from conducting any further unpermitted development on the subject property; and 7) fund a mitigation project to promote conservation of archaeological resources in coastal Orange County.

If the unpermitted development and any physical results of the unpermitted development, including the excavations and excavated soil, are allowed to remain unmitigated, their presence and the effects thereof will lead to further adverse impacts (including the temporal continuation of the existing impacts) to cultural resources and coastal waters. Therefore, the Consent Cease and Desist Order and Consent Restoration Order are consistent with the Chapter 3 policies of the Coastal Act.

E. California Environmental Quality Act (CEQA)

The Commission finds that issuance of these Consent 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 Consent 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. 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. Respondents have clearly stated their willingness to completely resolve the violations, including any penalties,

administratively and amicably, through a settlement process. To that end, Respondents have committed to comply with all terms and conditions of the Consent Orders, and not to contest the issuance and 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, Respondents have also agreed to fund a mitigation project to promote conservation of archaeological resources in coastal Orange County to resolve the violations fully without litigation.

G. Findings of Fact

1. Douglas Goodell, Stuart Goodell, and Patricia Price, as trustees of Trusts A, B, and C of the Donald E. Goodell and Shirley L. Goodell Family Trust, are the owners of vacant property located on the east side of the intersection of Brightwater Drive and Bolsa Chica Street in Orange County. The property is identified by the Orange County Assessor's Office as APN 110-016-18.
2. Trustees of the Donald E. Goodell and Shirley L. Goodell Family Trust ("Respondents") have undertaken development, as defined in Coastal Act Section 30106 on the above-referenced property including excavation of 16 50-cm wide by, on average, 101-cmbs (centimeters below surface) deep pits and deposition of soil excavated from said pits, as well as placement of any other physical materials excavated from said pits on the subject property and/or physical changes to the subject property resulting from the excavations.
3. Respondents undertook the development described in finding #2 above without obtaining a coastal development permit, in violation of the Coastal Act.
4. The unpermitted development described in finding #2 above impacted archaeological resources, marine resources, and the biological productivity of coastal waters, and has contributed to erosion of the site, and is therefore inconsistent with the Coastal Act, including Sections 30244, 30230, 30231, and 30253.
5. The unpermitted development described in finding #2 above is "causing continuing resource damage" within the meaning of Coastal Act Section 30811 and Title 14, California Code of Regulations, Section 13190.
6. Coastal Act Section 30810 authorizes the Commission to issue a cease and desist order under specified conditions, and all elements of that section have been met herein.
7. Coastal Act Section 30811 authorizes the Commission to issue a restoration order under specified conditions, and all elements of that section have been met herein.
8. The work to be performed under these Consent Orders, if done in compliance with the Consent Orders and the plans approved therein, will be consistent with Chapter 3 of the Coastal Act.
9. On January 6, 2011, Commission staff sent a Notice of Violation letter to Respondents notifying Respondents of the violations on the subject property.

10. On December 18, 2011, an authorized signatory for Respondents signed Consent Cease and Desist Order No. CCC-12-CD-01 and Consent Restoration Order No. CCC-12-RO-01, a copy of which is attached to this staff report as Exhibit #1. Respondents agreed not to contest commencement of proceedings to issue these Consent Orders without receiving written notice of commencement of cease and desist order and restoration order proceedings pursuant to Sections 13181 and 13191, respectively, of the Commission's administrative regulations.
11. Impacts to coastal resources resulting from the unpermitted development described in finding #2 will continue until the requirements of the Consent Orders are carried out.

Staff recommends that the Commission issue Consent Cease and Desist Order No. CCC-12-CD-01 and Consent Restoration Order No. CCC-12-RO-01 attached hereto as Exhibit #1.

Click on the link below
to go to the exhibits.

Exhibit List

**Exhibit
Number**

Description

1. Signed Consent Cease and Desist and Restoration Orders
2. Site map and location
3. Aerial and ground photographs showing Bolsa Chica Mesa
4. CDP 5-10-035-X
5. Staff report for CDP 5-10-258 without exhibits
6. Photographs showing examples of the subject excavations
7. Photographs showing cogged stone artifact examples
8. Native American Heritage Commission Guidelines for Native American Monitors/Consultants