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Staff: Andrew Willis – LB
Staff Report: September 28, 2018
Hearing Date: October 10, 2018

STAFF REPORT: RECOMMENDATIONS AND FINDINGS FOR CONSENT CEASE AND DESIST ORDER AND CONSENT ADMINISTRATIVE CIVIL PENALTY

Consent Cease and Desist Order: CCC-18-CD-04

**Consent Administrative Civil
Penalty:** CCC-18-AP-03

Related Violation File: V-6-03-010

Property Owner: Multiple owners including Rosalena Owners' Association and individual homeowners.

Location: 24 adjacent properties located on Navigator Circle, Carlsbad, San Diego County, also identified by Assessor's Parcel Numbers 216-420-01, 02, -03, -04, -05, -06, -07, -08, -09, -10, -11, -12, -13, -14, -88, -89, -18, -19, -20, -21, -22, -23, -24, and 216-571-29.¹

Violation Description: Failure to construct a public access trail that was required by Coastal Development Permit ("CDP") No. 6-85-482 and obstruction of construction of such public access trail, all of which was in violation of CDP No. 6-85-482 and the public access provisions of the Coastal Act.

¹ Although the public access trail at the heart of this matter is required to be constructed on the lots listed here, all of the lot owners within the Rosalena community, as successors in interest to the permittee who obtained the permit that required the trail (CDP No. 6-85-542), are responsible for failure to construct the trail pursuant to that permit. For the purposes of this staff report, "Rosalena community" refers to the area encompassed by all of the lots within Tract No. 11616, as well as an adjacent parcel identified as APN No. 216-571-29.

**Parties Subject to this Order
and Penalty:**

**Rosalena Owners' Association and all of the
individual property owners within the Rosalena
community**

Substantive File Documents:

1. Public documents in Consent Order files No. CCC-18-CD-04 and CCC-18-AP-03.
2. Appendix A, and Exhibits 1 through 7 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).

SUMMARY OF STAFF RECOMMENDATION

Commission staff brings this enforcement action to resolve longstanding violations related to the failure to construct a public access trail at a residential community in Carlsbad known as the Rosalena community, which is situated on a blufftop on the north side of Batiquitos Lagoon (**Exhibit 1**). Construction of the trail was a requirement of Coastal Development Permit 6-85-482 (“the CDP”), which the Commission approved on November 22, 1985 (**Exhibit 2**). That permit authorized the subdivision of land and the construction of the Rosalena community on that land, contingent upon the fulfillment of a variety of conditions, including that the applicant build an approximately .25 mile long public access trail along the lagoon or the blufftop above the lagoon (hereinafter “the Trail”) (**Exhibit 3**).

As discussed in greater detail below, the Commission found that the requirement to build the Trail at the site was necessary to make development of the community consistent with public access provisions of the Coastal Act. The Trail at the Rosalena community was designed to, and once constructed, will, provide a public access connection through the area to the beach and to existing trails, and thus provide additional public coastal access opportunities and increased connectivity with the coast, as required by the CDP. Since the Trail will tie into accessways that connect to nearby public beaches, parks, and trailheads, the Trail will help open up access to the lagoon for the wider public. Conversely, the ongoing failure to have constructed the Trail has resulted in an inability of the public to access this area of the coast, in violation of the CDP and public access provisions of the Coastal Act.

The original developer commenced development of the Rosalena community but did not complete the development, allegedly because of financial issues. Although a successor took over the project and prepared plans for the Trail in 1993, the Trail was never constructed as required by the permit. During this time the Commission did not have a formal enforcement program and, thus, did not have the ability to aggressively take action to ensure permit condition compliance.

An effort by various parties, including homeowners in the Rosalena community, to consider alternative locations for the Trail further delayed its construction. To help move this matter toward resolution through construction of the required trail, Commission staff sent multiple letters to the City advising the City of our position that the Trail must be built in its required location on the blufftop. Ultimately, in February 2015, Commission Enforcement staff (“Staff”) sent a Notice of Violation letter to the Rosalena Owners’ Association (“Association”)(**Exhibit 4**) regarding the long-standing failure of the developers of the residential project, and some of their successors in interest, including the Association and individual property owners, to construct the Trail. Since each of the property owners in the Rosalena community is a beneficiary of the original CDP, and thus also shares the obligations of the CDP with the other property owners, the Association, as a representative of all the owners, was identified by Staff as an appropriate party to work with to resolve this matter.

In its February 2015 letter, Staff requested that the Association submit a plan to construct the Trail along the blufftop in the Rosalena community, as required by the CDP. Since the February 2015 letter, the Association has been working diligently with Commission staff to address these long-standing violations (see, for instance, **Exhibit 5**). In March 2017, after initial submittal of a conceptual trail plan and then extensive efforts by, and collaboration between, the Association, City, and Staff to develop a proposed trail plan to ensure that the Trail is sited and designed to best provide the optimal trail alignment and configuration for public access and to be most protective of coastal resources, the Executive Director of the Commission (“Executive Director”) issued a Notification of Intent to Commence Cease and Desist Order and Administrative Civil Penalties Proceedings (“NOI”)(**Exhibit 6**). The NOI provided formal notice of the Commission’s intent to resolve these trail issues through the administrative process, including, but not limited to, potentially through a consensual resolution.

Discussions following issuance of the NOI were decidedly productive and culminated in the proposed Consent Cease and Desist No. CCC-18-CD-04 and Consent Administrative Civil Penalty CCC-AP-18-03(collectively referred to herein as “the Consent Agreement”) attached hereto as Appendix A.

Through the Consent Agreement, the Association has agreed to construct the Trail as required by the CDP. When built as required, the Trail will provide expansive views of the lagoon, the coast and ocean, and the mountains inland, and it will also potentially link the California Coastal Trail and other coastal trails to an extensive network of inland trails (**Exhibit 7**). In addition to building the Trail as originally envisioned, a key provision of the Consent Agreement is the additional requirement for the Association to secure an easement for a trail connector that, with other proposed trails, will close a critical gap between coastal and inland trails.

Additionally, as part of the negotiated penalties, the Association has agreed to pay \$540,000 to the Batiquitos Lagoon Foundation, a local non-profit organization, to fund acquisition of coastal property and/or an additional easement(s) for open space and public access purposes, school programs, and other coastal related programs. Further, as part of the negotiated penalties, the

Association has agreed to provide a suite of public access improvements, including acquisition and provision of the easement described above, which will potentially provide a key connection between coastal and regional trails; and installation of 1) new public trail signage, including signage that will direct Trail users to the site from the location of the Interstate 5 exit; 2) interpretive signage along the Trail; 3) public benches along the Trail; 4) public binoculars at a vista point along the Trail; and 5) parking spaces within the Rosalena community strictly for Trail users. If the Association is unable to provide the easement for the trail connector described above, the Association will pay an additional \$540,000 to the Violation Remediation Account of the State Coastal Conservancy. Finally, under the Consent Agreement, the Association has agreed that the Association will comply with the terms of the CDP and not take any actions to physically or indirectly impede the public's use of the Trail. The Association took action consistent with its Conditions, Covenants and Restrictions to obtain the agreement of its members to this Consent Agreement, and the effect of such action was to bind the individual owners of properties within the Rosalena community, i.e. members of the Association, to the terms and conditions of this Consent Agreement in perpetuity.

Staff therefore recommends that the Commission **approve** Consent Cease and Desist No. CCC-18-CD-04 and Consent Administrative Civil Penalty CCC-AP-18-03.

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APPENDIX

Appendix A Consent Cease and Desist Order and Consent Administrative Civil Penalty

EXHIBITS

Exhibit 1 – Vicinity Map

Exhibit 2 – CDP No. 6-85-482

Exhibit 3 – Trail Location

Exhibit 4 – Notice of Violation dated February 10, 2015

Exhibit 5 – Letter from Association dated August 11, 2015

Exhibit 6 – NOI to Commence Enforcement Proceedings dated March 29, 2017

Exhibit 7 – Location of Trail Connector

I. MOTION AND RESOLUTION

Motion 1:

*I move that the Commission **issue** Consent Cease and Desist Order No. CCC-18-CD-04 pursuant to the staff recommendation.*

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in the 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-18-CD-04, as set forth below, and adopts the findings set forth below on grounds that activities have occurred on property owned and/or managed by the Association without a coastal development permit, and in violation of CDP No. 6-85-482, and the Coastal Act; that other activities that were required by CDP No. 6-85-482 have not occurred, inconsistent with that permit; and that the requirements of the Consent Cease and Desist Order are necessary to ensure compliance with the Coastal Act.

Motion 2:

*I move that the Commission **issue** Consent Administrative Civil Penalty No. CCC-18-AP-03 pursuant to the staff recommendation.*

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in the issuance of the Consent Administrative Civil Penalty. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Consent Administrative Civil Penalty:

The Commission hereby assesses an administrative civil penalty by adopting Consent Administrative Civil Penalty No. CCC-18-AP-03, as set forth below, to be paid by conducting the various actions required and described in Section III.F.2(b), below, and adopts the findings set forth below on grounds that activities and failures to act have occurred on property owned and/or managed by the Association without a coastal development permit and in violation of CDP No.6-85-482 and the Coastal Act, and those actions and failures to act have limited or precluded public access and violate the public access provisions of the Coastal Act.

II. HEARING PROCEDURES

A. ADMINISTRATIVE CIVIL PENALTY AND CEASE AND DESIST ORDER

The requisite procedure for imposition of administrative penalties pursuant to Section 30821 of the California Public Resources Code (a section of the Coastal Act) is set forth in Section 30821(b), which specifies that penalties shall be imposed by majority vote of all Commissioners present in the context of a public hearing in compliance with the requirements of Section 30810 (cease and desist orders), 30811 (restoration orders), or 30812 (notices of violation).

The procedures for a hearing on a Cease and Desist Order pursuant to Section 30810 are outlined in the Commission's regulation at California Code of Regulations, Title 14 ("14 CCR") Section 13185. For a Cease and Desist 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 actual controversy exists. The Chair may then recognize other interested persons, after which the Commission typically invites staff to respond 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 13185 and 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commission may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner so 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 impose administrative penalties, in the form recommended below, or as amended by the Commission. Passage of Motion 2, above, per the Staff recommendation, or as amended by the Commission, will result in the imposition of administrative penalties.

The Commission shall also determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of Motion 1, above, per the Staff recommendation or as amended by the Commission, will result in the issuance of the Cease and Desist Order.

III. FINDINGS FOR CONSENT CEASE AND DESIST ORDER NO. CCC-18-CD-04 AND CONSENT ADMINISTRATIVE CIVIL PENALTY ACTION NO. CCC-18-AP-03²

A. DESCRIPTION OF THE PROPERTIES

The violation at issue consists of the failure to construct, and obstruction of the construction of, a public access trail on the blufftop within the Rosalena community, in violation of Coastal Development Permit No. 6-85-482 (“the CDP”). The Rosalena community is located on a blufftop in the City of Carlsbad, in north San Diego County, overlooking the Batiquitos Lagoon, which is one of the most extensive remaining tidal wetlands in southern California. Part of the lagoon is designated as the Batiquitos Lagoon State Marine Conservation Area, which is operated by the California Department of Fish and Wildlife as a nature reserve. This lagoon is home to several protected nesting birds.

Several residential communities share the blufftop with the Rosalena community, and there are trails going through and around these other communities. At the residential community west of the Rosalena community, there is an existing blufftop trail (**Exhibit 3**), which was also required by the Commission via separate coastal development permits (see CDP Nos. 6-95-101 and 6-95-119). This trail through the community west of the Rosalena trail is heavily used by the various residential communities in the area and by the public at large. This existing trail provides access to the beach and ties into miles of coastal trails.

The required Trail at the Rosalena community was designed to, and once constructed, will, connect to the beach via the blufftop trail at the adjacent community noted above, and thus provide both additional public coastal access opportunities, and increased connectivity with the coast, as required by the CDP. Considering the popularity of the existing blufftop trail west of the Rosalena community, the Trail within the Rosalena community is expected to be an equally prized public asset.

The Rosalena community consists of all of the lots within Tract No. 11616 (hereinafter “Properties”), and, for the purpose of this staff report, an adjacent parcel identified as APN No. 216-571-29. Specifically, the Trail is required to be located along the blufftop within the Rosalena community, extending across the 24 adjacent properties located on Navigator Circle, Carlsbad, San Diego County, also identified by Assessor’s Parcel Numbers 216-420-01, -02, -03, -04, -05, -06, -07, -08, -09, -10, -11, -12, -13, -14, -88, -89, -18, -19, -20, -21, -22, -23, -24, and 216-571-29. Although the Trail is required to be constructed on the lots listed here, all of the lot owners within the Rosalena community, as successors in interest to the permittee who obtained

² These findings also hereby incorporate by reference the information listed in the Summary section at the beginning of the September 28, 2018 staff report (“STAFF REPORT: Recommendations and Findings for Consent Cease and Desist Order and Consent Administrative Civil Penalty”) in which these findings appear, which section is entitled “Summary of Staff Recommendation.”

CDP No. 6-85-542, are responsible for the failure, to date, to construct the Trail per CDP No. 6-85-542. Deed restrictions and easements have been recorded on title to portions of the Properties pursuant to coastal development permits in order to provide for public access to the Trail that is to be built on portions of the Properties.

B. HISTORY OF COMMISSION ACTION ON PROPERTIES

On November 22, 1985, the Coastal Commission approved CDP No. 6-85-482, which authorized the subdivision that largely comprises the Rosalena community. More specifically, CDP No. 6-85-482 authorized the following development:

Subdivision of a 167.9 acre site; Master Plan for approval of a mixed use planned community development, consisting of: a graduate university, research and development offices, recreational facilities, a commercial center, hotel conference complex, 603 (maximum) residential units in single-family and multi-family structures; and constructions of Phase One of the Master Plan consisting of a portion of the university and 129 residential units.

The CDP included conditions to ensure resource protection and provided for preservation of open space areas and public access. With specific regard to the Trail, Special Condition No. 13 of the CDP states, in relevant part:

13. Public Access. Prior to transmittal of the coastal development permit, the applicant shall submit a public access plan for the project which assures compliance with the following requirements:

...

(C) A continuous public access path shall be provided along the north shore of Batiquitos Lagoon. The location of such access path shall be determined subsequent to commission review of the Batiquitos Lagoon Enhancement Plan. . . .

Should the approved Enhancement Plan include the determination that a continuous public access path along the base of the bluffs would interfere with the habitat value of the lagoon resources, the continuous path shall be provided within the bluff-top setback area along the top of the lagoon bluffs In either case, a path of adequate width (minimum 10 feet) shall be provided with sufficient improvements to provide reasonable access along the north shore of the lagoon.

To assure compliance with this condition, the applicant shall record the requirements listed in paragraphs A, B and C above, against the property in the form of a deed restriction. . . .

The original CDP permittee and developer, Sammis Properties, satisfied the “prior-to-transmittal requirements” of the CDP by recording deed restrictions, offers to dedicate open space easements, and CC&Rs, and taking other such actions that the CDP required to be completed in

order for the Executive Director to issue the CDP. The CDP was issued and, subsequently, the permittee/developer commenced development of the Rosalena community.

The developer's financial issues delayed complete buildout of the Rosalena community. When Sammis Properties declared bankruptcy in the early 1990's, a new developer, Kaiza Poinsettia, purchased the Rosalena community properties and assumed the obligations under the CDP. Eventually, as completion of the Rosalena community neared, in 1993, the City of Carlsbad approved the developer's plans to build the Trail, and the developer subsequently submitted the plans to Commission staff for approval. There were a variety of suggestions for relocating or effectively eliminating the trail, leading to many meetings and press reports, but ultimately, Commission staff did not sign off on the plans and those plans were eventually set aside until replaced by the plans to be implemented pursuant to this action, consistent with the original requirements of the CDP and resolving the longstanding noncompliance with the permit. Since the time of the objections of the homeowners, there have been many years of correspondence and discussions between the Association, the Commission, homeowners, and the City attempting to resolve this matter.

C. DESCRIPTION OF COASTAL ACT VIOLATIONS

The violations at issue in this hearing include the failure to construct the Trail, in violation of Coastal Development Permit No. 6-85-482, and obstruction of construction of the Trail, which, in addition to being an unpermitted reduction in access to the coast, constitutes non-compliance with Coastal Development Permit No. 6-85-482. Obstruction of construction of the Trail largely took the form of threats of litigation against the Coastal Commission by a predecessor Board of Directors (predecessor to the present board of the Association) if construction of the Trail had moved forward in 1993. The failure to build the Trail and the actions described above have the effect of preventing public access in violation of public access provisions of the Coastal Act.

D. ENFORCEMENT ACTIVITIES

As noted above, the matter at hand is a long-standing access violation, however, the process to bring this action to the Commission began more recently and is described here in some detail. Prior to initiation of the current action, enforcement staff spent a significant amount of time piecing together the numerous parts of this complex issue, researching its long history, and corresponding with the City to ensure the City was aware of our position that the Trail must be built in its required location. Then, in February 2015, Staff sent a formal Notice of Violation letter to the Association regarding the long-standing failure of the developers of the residential project, and some of their successors in interest, including the Association, to construct the Trail. Since each of the property owners in the Rosalena community is a beneficiary of the original CDP, and also shares the obligations of the CDP with the other property owners, the Association, as it is a representative of all the owners, was identified by Staff as an appropriate party to work with to resolve this matter.

In the February 2015 letter, Staff requested that the Association submit a plan to construct the Trail along the blufftop in the Rosalena residential community, as required by the CDP.

Since the February 2015 letter, the Association has been working diligently with Commission

staff to address these long-standing violations. In March 2017, after initial submittal of a conceptual trail plan and then extensive efforts by, and collaboration between, the Association, City, and Staff to come to agreement on a proposed trail plan that ensures that the Trail is sited and designed to best provide the optimal trail alignment and configuration for public access and to be most protective of coastal resources, the Executive Director issued an NOI to initiate the formal enforcement process to implement the trail plan, as well as resolve other aspects of the violation. The NOI provided formal notice of the Commission's intent to resolve these trail issues through the administrative process, including, but not limited to, potentially through a consensual resolution.

Discussions following issuance of the NOI were decidedly productive and culminated in the proposed administrative settlement attached hereto as Appendix A.

E. BASIS FOR ISSUING CEASE AND DESIST ORDER

1. Statutory Provision

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

(a) if the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist....

...

(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.

2. Application to Facts

a. Development has Occurred Without a Permit and Inconsistent with CDP No. 6-85-482

Unpermitted development (activities that constituted "development," as defined in the Coastal Act, and that required a permit from the commission but did not receive such a permit), as described in Section III(C), above, has occurred on the Properties, in violation of a previously issued coastal development permit and without Coastal Act authorization. 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 broadly 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 any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....

Activities have also occurred that are inconsistent with the CDP, regardless of whether they constitute development, and thus there have also been failures to act as required by the CDP. The Commission has enforcement jurisdiction over all of these violations at issue herein. The violations addressed in this action pertain directly to CDP No. 6-84-482, which was issued by the Commission prior to certification of the City of Carlsbad Local Coastal Program (“LCP”); the Commission has jurisdiction to enforce its own permits. As noted above, Special Condition No. 13 of the CDP requires the construction of the Trail. Although the CDP was exercised and the Rosalena community constructed, the Trail was not constructed, and neither the developer of the community, nor, subsequently, the Association or its members, complied with Special Condition No. 13 of the CDP. The unpermitted development described above, obstruction of construction of the Trail, also is non-compliant with CDP No. 6-84-482. The Commission therefore has jurisdiction to issue a cease and desist order to address these violations pursuant to Section 30810 of the Coastal Act.

The portion of the City of Carlsbad LCP that covers the Rosalena community was approved by the Commission in 1985; the City now issues permits for development and ensures compliance with the Coastal Act within its geographic limits. Although the Commission is enforcing a Commission CDP, and has authority to do so, in the spirit of cooperation, Commission staff has coordinated with the City of Carlsbad regarding this enforcement action and asked that the City support the Commission’s enforcement action, which it has done.

F. BASIS FOR ADMINISTRATIVE PENALTY

1. Statutory Provisions

The statutory authority for imposition of administrative penalties is provided in the Coastal Act in Public Resources Code Section 30821,³ which states, in relevant part:

(a) In addition to any other penalties imposed pursuant to this division, a person,

³ All section references in this section III.F are to the California Public Resources Code, and as such, to the Coastal Act, unless otherwise indicated.

including a landowner, who is in violation of the public access provisions of this division is subject to an administrative civil penalty that may be imposed by the commission in an amount not to exceed 75 percent of the amount of the maximum penalty authorized pursuant to subdivision (b) of Section 30820 for each violation. The administrative civil penalty may be assessed for each day the violation persists, but for no more than five years.

In addition, sections 30820 and 30822 create potential civil liability for violations of the Coastal Act more generally. Section 30820(b) also provides for daily penalties, as follows:

Any person who performs or undertakes development that is in violation of [the Coastal Act] or that is inconsistent with any coastal development permit previously issued by the commission . . . , when the person intentionally and knowingly performs or undertakes the development in violation of this division or inconsistent with any previously issued coastal development permit, may, in addition to any other penalties, be civilly liable . . . in an amount which shall not be less than one thousand dollars (\$1,000), nor more than fifteen thousand dollars (\$15,000), per day for each day in which the violation persists.

Through the proposed settlement, the Association has agreed to resolve its financial liabilities under all of these sections of the Coastal Act.

2. Application to Facts

The Properties are covered by a permit containing a condition regarding public access that has not been fulfilled, in violation of the access provisions of the CDP and the access provisions of the Coastal Act. As discussed in Section B of these findings, above, the Commission found previously in issuing the CDP for the Rosalena residential project that in order to comply with public access policies of the Coastal Act, a special condition was required to provide for construction of the Trail. The access violation at issue in this action consists of failure to construct the Trail, and obstruction of construction of the Trail, by a prior iteration of the Association, in contravention of Special Condition 13 of CDP No. 6-85-482. With specific regard to the Trail, Special Condition No. 13 of the CDP states, in relevant part:

13. Public Access. Prior to transmittal of the coastal development permit, the applicant shall submit a public access plan for the project which assures compliance with the following requirements:

...

(C) A continuous public access path shall be provided along the north shore of Batiquitos Lagoon. The location of such access path shall be determined subsequent to commission review of the Batiquitos Lagoon Enhancement Plan. . . .

Should the approved Enhancement Plan include the determination that a continuous public access path along the base of the bluffs would interfere with the habitat value of the lagoon resources, the continuous path shall be provided within the bluff-top setback

area along the top of the lagoon bluffs In either case, a path of adequate width (minimum 10 feet) shall be provided with sufficient improvements to provide reasonable access along the north shore of the lagoon.

To assure compliance with this condition, the applicant shall record the requirements listed in paragraphs A, B and C above, against the property in the form of a deed restriction. . . .

Although the City approved a plan to construct the Trail in 1993, the Board of Directors of the Association at that time effectively blocked construction of the Trail, and it was not constructed pursuant to Special Condition 13, despite the construction of the homes approved pursuant to the CDP.

The ongoing failure to have constructed the Trail has resulted in an inability of the public to access this area of the coast; the Rosalena community homeowners have long benefited from the terms of the permit without having to comply with the corresponding burdens to provide access in kind. In addition, the effect of the objection to construction of the Trail – the lack of public access here – continues. The permit non-compliance and unpermitted development at issue in this action therefore constitute ongoing violations of a special condition intended to ensure consistency with public access provisions of the Coastal Act; Section 30821 is therefore applicable.

a. Section 30821(h) Notice

Under section 30821(h) of the Coastal Act, under certain circumstances, a party who is in violation of the public access provisions of the Coastal Act can nevertheless avoid imposition of administrative penalties by correcting the violation within 30 days of receiving written notification from the Commission regarding the violation. This “cure” provision of Section 30821(h) is inapplicable to the matter at hand. There are two requirements for 30821(h)’s cure provision to apply that are not met here: 1) the violation must be remedied within 30 days of notice, and 2) the violation must not be a violation of permit conditions. Neither of these is applicable here. The Association was notified of the persistence of the violation(s) on the Properties and of the potential applicability of Section 30821 on February 10, 2015; though it is clear the Association has made an effort to work with staff over the last couple years to fully resolve this matter and have done so cooperatively and amicably, any 30-day period since that date has long since run. Further, this action is to enforce Special Condition 13 of CDP 6-85-482, which has heretofore not been complied with; a cure under 30821(h) is not available for permit violations.

Additionally, Section 30821(f) of the Coastal Act states:

(f) In enacting this section, it is the intent of the Legislature to ensure that unintentional, minor violations of this division that only cause de minimis harm will not lead to the imposition of administrative penalties if the violator has acted expeditiously to correct the violation.

Section 30821(f) is inapplicable in this case. As discussed above and more fully below, the failure to provide the Trail is significant both because it was an essential access requirement of the CDP, and because loss of access is very significant under the Coastal Act. Therefore, the violation cannot be considered to have resulted in “de minimis” harm to the public.

b. Penalty Amount

Pursuant to Section 30821(a) of the Coastal Act, the Commission may impose penalties in “an amount not to exceed 75 percent of the amount of the maximum penalty authorized pursuant to subdivision (b) of Section 30820 for each violation.” 30820 (b) authorizes civil penalties that “shall not be less than one thousand dollars (\$1,000), not more than fifteen thousand dollars (\$15,000), per day for each day in which the violation persists.”⁴ Therefore, the Commission may authorize penalties in a range up to \$11,250 per day for each violation.

Section 30821(a) sets forth the time for which the penalty may be collected by specifying that the “*administrative civil penalty may be assessed for each day the violation persists, but for no more than five years.*” In this case, by one calculation, the violation has persisted since 1993, when a developer of the Rosalena residential project was prepared to build the Trail but those efforts were halted, which is years longer than the five years for which the statute provides penalties. However, given the context of resolving this matter through settlement without need for litigation, and because of the mitigating factors listed below, the Commission chooses to exercise its prosecutorial discretion to limit the period for which a penalty is imposed to a single year. For context, one year is also roughly the time period from initiation of the recent enforcement action in this matter to reaching a conceptual agreement with the Association to resolve this matter consensually. The period is therefore 365 days. The next step is to calculate the daily penalty to be applied for that 365-day period.

Under Section 30821(c), in determining the amount of administrative penalty to impose, “the commission shall take into account the factors set forth in subdivision (c) of Section 30820.”

Section 30820(c) states:

In determining the amount of civil liability, the following factors shall be considered:

- (1) *The nature, circumstance, extent, and gravity of the violation.*
- (2) *Whether the violation is susceptible to restoration or other remedial measures.*
- (3) *The sensitivity of the resource affected by the violation.*
- (4) *The cost to the state of bringing the action.*

⁴ Multiple Coastal Act violations have occurred on the Properties. For the purposes of this administrative penalty hearing, however, Commission staff is recommending only one violation be used for the determination of this penalty amount – the failure to construct the Trail pursuant to Special Condition 13. The analysis in this section adopts that approach.

- (5) *With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require.*

Applying the factors of Section 30820(c)(1) and (3), the violation at hand should warrant the imposition of substantial civil liability; violations have persisted on the Properties for many years and the violation has meant that the public has been denied access to this area of the coast. Moreover, the resource affected by the violation—access—is a scarce and important resource across the State.

In terms of subdivision (c)(4) of Section 30820, the costs to the State have not been significant relative to other enforcement resolutions; much of the recent time and effort that has been expended has been spent coordinating with the Association on design of the Trail to best provide for public access. Staff sent notice of this violation to the Association in 2015, and the Association immediately agreed to work to resolve the matter. The intervening time has been spent defining the parameters of the compliance obligations, negotiating settlement documents, and working with the Association to design the Trail. While this has in fact required significant staff time, it has been time dedicated to ascertaining the method and manner of compliance given the fact that construction of the Trail needed to be done in a manner that is both most protective of coastal resources and best provides for public access, rather than in contesting the violation and its resolution. In calculating the penalty amount, the immediacy with which the Association agreed to comply with the Coastal Act and engage in the resolution process weighs heavily towards the diminution of the penalty.

An additional mitigating factor considered in the calculation of the penalty is the Association's degree of culpability. Although current property owners are responsible for complying with the Coastal Act and all permit conditions on their property, the degree to which they are blameworthy, i.e. culpable, is more nuanced. Individual lot owners, who comprise the Association, purchased the Properties subsequent to the initial failure of the developers to build the required Trail, and, although a previous Board of Directors of the Association played a role in the delay of the construction of the Trail, the Commission is not aware of the current property owners playing any role in the effort of the then Board of Directors in 1993 to obstruct construction of the Trail. In addition, the Association represents that each of those directors is no longer a part of the Association. In contrast, when enforcement staff contacted the Association in 2015 to provide notice of the violations at issue, the Association immediately agreed to enter into the process with Staff to begin resolution of the matter, and its representatives have worked diligently with Staff to reach the proposed resolution.

Also factored into the consideration of the penalty calculation is Section 30820(c)(2), which cuts both ways here; the violation is susceptible to restoration, and moving forward the Trail will be built pursuant to the proposed Consent Agreement. On the other hand, there are many years of public access losses that can never be recovered. We note, however, that the Association has been working with staff to plan for and design the Trail to ensure that the planning of the Trail will have already been accomplished at the time this Consent Agreement is issued, thus

accelerating construction of the Trail.

Aggregating these factors, the Commission finds that a moderate penalty is justified here. Imposing 50 percent of the maximum penalty for 365 days would result in a penalty of just over \$2 million ($\$11,250 \times .5 \times 365$). Thus, a \$2 million penalty would be justified. Imposing 25 percent of the maximum penalty would obviously result in a penalty of approximately \$1 million. Especially given the alacrity with which this Association responded to recent enforcement efforts by agreeing to reach a consensual resolution of this matter, staff recommends that the Commission exercise its prosecutorial discretion, and impose an administrative penalty in the amount of \$1,080,000.

In sum, while the violation is significant, the current Association has worked with Staff to quickly rectify the violation after Staff had contacted the Association to initiate resolution of the violation. Therefore, the Commission finds the penalty amount to be \$540,000 to be paid to the Batiquitos Lagoon Foundation, and, if the Association fails to secure the trail connector public access easement described in the summary to this staff report above, an additional \$540,000 to be paid to the Violation Remediation Account of the Coastal Conservancy, for a total of \$1,080,000. In addition, as part of the negotiated penalties, the Association has agreed to provide a suite of public access improvements, including acquisition and provision of the easement described above, which will potentially provide a key connection between coastal and regional trails; and installation of 1) new public trail signage, including signage that will direct Trail users to the site from the location of the Interstate 5 exit; 2) interpretive signage along the Trail; 3) public benches along the Trail; 4) public binoculars at a vista point along the Trail; and 5) parking spaces within the Rosalena community strictly for Trail users. These public amenities on the site will have significant value in enhancing public enjoyment and use of the coast and trails and are a component of the penalty in addition to the monetary amounts listed above.

G. THE CONSENT AGREEMENT IS CONSISTENT WITH CHAPTER 3 OF THE COASTAL ACT

This Consent Agreement, attached to this staff report as Appendix A, is consistent with the resource protection policies found in Chapter 3 of the Coastal Act. This Consent Agreement requires and authorizes the Association to, and the Association has agreed to, among other things, construct the Trail pursuant to the CDP. Further, the Consent Agreement requires the Association to, and the Association has agreed to, undertake additional public access improvements and fund additional public access programs in the area of the Rosalena community and acquisition of coastal property and/or an easement(s) for the purpose of public open space and access. Constructing the Trail, undertaking public access improvements, and funding public access programs in compliance with all requirements of this Consent Agreement will be compliant with Chapter 3 of the Coastal Act. Failure to provide the required public access would result in the continued loss of public access, inconsistent with the resource protection policies of the Coastal Act.

Therefore, the Consent Agreement is consistent with the Chapter 3 policies of the Coastal Act, and its issuance is consistent with Coastal Act Section 30810(b).

H. CALIFORNIA ENVIRONMENTAL QUALITY ACT

The Commission finds that issuance of this Consent Agreement to compel compliance with the CDP and implementation of this Consent Agreement is exempt from the requirements of the California Environmental Quality Act of 1970 (CEQA), Cal. Pub. Res. Code §§ 21000 *et seq.*, for the following reasons: first, the CEQA statute (section 21084) provides for the identification of “classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt from [CEQA].” The CEQA Guidelines (which, like the Commission’s regulations, are codified in 14 CCR) provide the list of such projects, which are known as “categorical exemptions,” in Article 19 (14 CCR §§ 15300 *et seq.*). Because this is an enforcement action designed to protect and restore public access to the coast: the exemption applies here covering enforcement actions by regulatory agencies (14 CCR § 15321).

Second, although the CEQA Guidelines provide for exceptions to the application of these categorical exemptions (14 CCR § 15300.2), the Commission finds that none of those exceptions applies here. Section 15300.2(c), in particular, states that:

A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

CEQA defines the phrase “significant effect on the environment” (in Section 21068) to mean “a substantial, or potentially substantial, adverse change in the environment.” This Consent Agreement is designed to protect the environment, and it contains provisions to ensure, and to allow the Executive Director to ensure, that it is implemented in a manner that will protect the environment. Thus, this action will not have any significant effect on the environment, within the meaning of CEQA, and the exception to the categorical exemptions listed in 14 CCR section 15300.2(c) does not apply. An independent but equally sufficient reason why that exception in section 15300.2(c) does not apply is that this case does not involve any “unusual circumstances” within the meaning of that section, in that it has no significant feature that would distinguish it from other activities in the exempt classes listed above. This case is a typical Commission enforcement action to protect and restore the environment and natural resources.

In sum, given the nature of this matter as an enforcement action to protect and restore public access, and since there is no reasonable possibility that it will result in any significant adverse change in the environment, it is categorically exempt from CEQA.

IV. SUMMARY OF FINDINGS OF FACT

1. The properties that are the subject of this Consent Agreement (the “Properties”) are described as follows: the properties located within Tract No. 11616, Carlsbad, San Diego County, all of which are entirely situated in the Coastal Zone. There is a certified LCP applicable to the Properties.
2. The Rosalena Owners’ Association and its members, i.e. the individual lot owners within the Rosalena community, separately own parcels that collectively constitute the Properties.

3. In its approval of CDP 6-85-482, the Commission found construction of the Rosalena community consistent with the Coastal Act and approved the CDP because, among other things, it contained a permit condition designed to protect public access, including the requirement that the Trail be constructed on portions of the Properties. The Trail was not constructed as required, which constitutes a violation of the public access provisions of the original permit.
4. Coastal Act Section 30810 authorizes the Commission to issue a cease and desist order when the Commission determines that any person has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the Commission without securing a permit or (2) is inconsistent with any permit previously issued by the Commission.
5. Unpermitted development and development inconsistent with the CDP has occurred on the Properties. Therefore, the jurisdictional requirements for the issuance of a cease and desist order have been met.
6. The work to be performed under this Consent Agreement, if completed in compliance with the Consent Agreement and the plan(s) required therein, will be consistent with Chapter 3 of the Coastal Act.
7. The statutory authority for imposition of administrative penalties is provided in Section 30821 of the Coastal Act. Sections 30820 and 30822 of the Coastal Act create potential civil liability for violations of the Coastal Act more generally.
8. As stated in #5, above, unpermitted development and development inconsistent with a CDP has occurred on the Properties, which are owned by the Association and members of the Association. These actions are also inconsistent with the public access provisions of the Coastal Act and therefore render the Association and members of the Association in violation of the public access provisions of the Coastal Act and subject to penalties under 30821 of the Coastal Act. Through the Consent Agreement, the Association and members of the Association have agreed to resolve their financial liabilities under the Coastal Act.