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Staff: R. Modellmog-SF
Staff Report: July 27, 2018
Hearing Date: August 9, 2018

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

Proposed Cease and Desist Order No.: CCC-18-CD-02

Proposed Administrative Penalty No.: CCC-18-AP-02

Related Violation File: V-5-17-0019

Persons and Entities Subject to these Proceedings: 11 Lagunita, LLC; Jeffrey and Tracy Katz

Location: 11 Lagunita Drive, Laguna Beach, Orange County (APN 656-171-76).

Violation Description: 1) Unpermitted alteration of an existing house, including removal, demolition, reconstruction, and redevelopment of the house or substantial elements thereof; 2) failure to remove a seawall, the authorization of which has expired pursuant to Special Condition No. 2 of Coastal Development Permit (“CDP”) A-5-LGB-14-0027; 3) use of the seawall to protect the unpermitted new development, in violation of Special Condition No. 6 of the same CDP; and 4) failure to apply for a permit amendment, prior to expiration of the authorization for the seawall, to address the seawall’s inconsistency with the Coastal Act and the City of Laguna Beach Local Coastal Program,

as required by Special Condition No. 2 of the same CDP.

Substantive File Documents:

1. Public documents in Cease and Desist Order No. CCC-18-CD-02, Administrative Penalty No. CCC-18-AP-02, and CDP A-5-LGB-14-0027 files, respectively.
2. Exhibits 1 through 42 and Appendix A of this staff report.

SUMMARY OF STAFF RECOMMENDATIONS

These proceedings concern investors who have enjoyed the benefits of a Coastal Development Permit authorizing a seawall to protect a house built in the 1950's, but chose not to comply with the burdens of the Permit, giving rise to both permit violations and unpermitted development. This Commission approved the seawall permit (the "Permit") in 2015 on appeal. However, because the pre-Coastal Act house did not conform with the applicable Local Coastal Program ("LCP") bluff top setback requirements, and was located hazardously close to the sea, and since seawalls cause major negative impacts to beaches and public access, the Commission imposed conditions on the Permit limiting the authorization of the seawall in two significant respects: It could not be used to protect future development, and its authorization would expire if the house were significantly remodeled. These requirements were crafted to ensure that any new construction would have to be relocated to a safer part of the lot, thus phasing out the non-conformity.

However, after the permit was approved, neighboring property owners ("the Katzes") bought the property, obtained local approvals to completely reconstruct the house, and completed the reconstruction, still relying on the seawall, and without any Coastal Development Permit or Coastal Commission involvement. The house was thus completely re-built in the same hazardous location as the old one. The new development that resulted was a near-100% remodel, by any meaningful standard, and according to figures provided by the Katzes, it added \$11 million to the house's value, a 78% increase.

Today, the seawall is eleven feet high and eighty feet long, and is already causing public access impacts at Victoria Beach, as described below. Little dry sand is left during certain times of the year, and in the two years since the reconstruction began, the seawall has already trapped a quantity of sand approximately equal to 18 large dump trucks behind it, unable to erode and nourish the beach (see discussion at Section E). Since the house was so extensively remodeled, it triggered the condition limiting the life of the seawall. Therefore, the Katzes must remove that seawall. The new, unpermitted development also relies on the seawall, in violation of the other condition. Thus, the Katzes must apply for a CDP to either retain portions of Unpermitted Development, defined below, associated with the now existing home on the Property that can exist safely without the unpermitted seawall and/or to modify the house on the Property such that it does not need a seawall for protection, using planned relocation and/or other alternative methods that do not involve seawalls, revetments, or other similar hard structures (specifically excluding those other measures that also have the potential to contribute to erosion and/or impact the beach).

Background

The original house at 11 Lagunita Drive was built in 1952 on a bluff overlooking Victoria Beach. The portion of sandy beach¹ in front of the house is owned by the Lagunita Homeowners Association and has been made public through a public access easement required by the Commission² and recorded in 1987, part of which abuts the Property. Victoria Beach is very popular, with people coming to enjoy the sand, play beach volleyball at the public courts set up in the summer, see the tidepools, and view the castle-shaped “Pirate Tower” built in 1926 at the north end of the cove. Notably, the sport of skimboarding in its modern form was invented at Victoria Beach, and the beach lends its name to the major skimboard manufacturer, Victoria Skimboards.³

In 2005, a previous owner built a seawall and received an emergency CDP, which included requirements to obtain a follow-up CDP to either remove the seawall or get long term Coastal Act authorization, but no follow-up CDP was submitted, and the seawall was not removed, and thus became unpermitted. The house then entered foreclosure, which delayed enforcement efforts to address the seawall.

Permit History

An open violation case for that unpermitted seawall still existed when, in 2013, MSSK Ventures bought the parcel at 11 Lagunita Drive (“the Property”). MSSK Ventures retained James Conrad as architect/agent, and he has remained the architect/agent on the Property ever since, including today for the Katzes. In 2014, the City of Laguna Beach (“the City”) granted a local CDP to MSSK Ventures, providing the long-overdue follow-up authorization for the seawall as well as authorizing a major remodel of the house and reinforcement of the seawall. Commissioners Effie Turnbull-Sanders and Mary Shallenberger subsequently filed an appeal of the local approval, citing concerns that the City did not adequately analyze the negative impacts of the seawall and did not address the house’s non-conformity with bluff top setbacks, as required by the LCP. The appeal noted that “these (setback) policies [of the LCP] are in place to ensure that development is not perpetuated in hazardous locations like the subject site.”⁴

Following the appeal filing, in 2014, Mr. Conrad, then representing the previous owner, MSSK Ventures LLC, met with Commission staff to discuss the appealed project, both a fortification of the unpermitted seawall and a reconstruction of the house, which was very similar to the unpermitted development that is the subject of these proposed Orders. Commission staff agreed with the concerns raised in the appeal and concluded that the house could not be re-built in the same hazardous, non-conforming location. When Commission staff informed Mr. Conrad why they could not recommend approval of the project, Mr. Conrad acquiesced. He sent an email message to Commission staff, dated November 21, 2014, stating: “it is very clear after our meeting last week that [Commission] staff will not support the proposed remodel of the home.”⁵ In the same email, Mr. Conrad modified the pending application to remove the proposed

¹ Above the mean high tide line; the area below the mean high tide line was already public property under state law.

² See Section III.B.

³ Skimboarding involves running on the beach and riding waves into the sand, which is difficult or impossible where seawalls have resulted in loss of sand on the beach, such as the south end of Victoria Beach.

⁴ See Commission Notification of Appeal of Laguna Beach CDP 14-308, dated May 9, 2014 pg. 5-6 (Exhibit 12).

⁵ See email from Jim Conrad dated Nov 21, 2014 (Exhibit 6).

development associated with the existing home and stating they would just do “some cosmetic remodeling” instead. The result was that the pending appeal sought authorization for the fortification of the seawall and its permanent retention to protect the pre-Coastal Act house.⁶ In a subsequent phone call, Mr. Conrad further clarified the idea of cosmetic remodeling, stating that he would only replace “paint and carpet.”⁷

On June 11, 2015, the Commission opened a hearing on whether the City’s approval of a CDP for a remodel and seawall raised a substantial issue with conformity to the City’s LCP, and the Commission found that there was a “substantial issue.” On October 7, 2015, the Commission, on *de novo* review, approved the Permit, which authorized the reinforcement of the seawall in order to protect the existing pre-Coastal house on the property, subject to Special Conditions in order to find the seawall consistent with the Coastal Act and LCP. Special Condition No. 2 of the Permit states that the Coastal Act authorization for the seawall would expire when the house is “redeveloped in a manner that constitutes new development,” and Special Condition No. 6 states that future development “shall not rely on the permitted seawall,” and that “any future new development on the site shall be sited and designed to be safe without reliance on shoreline protective devices.”

Less than a month after the Permit was approved by the Commission with the conditions noted above, but before the Permit was “issued,” the Property was sold to the Katzes,⁸ who own and reside in the property next door. The Katzes also retained Mr. Conrad and directed him to pursue a large-scale remodeling project very similar to the one that he had withdrawn a year earlier, on behalf of the prior owners, in the face of Commission staff opposition. The Katzes directed Mr. Conrad to avoid the Coastal Commission and seek only local permits for the work.⁹ Sure enough, on December 28, 2015, the same day that Commission staff issued the Permit, the Katzes, unbeknownst to Commission staff, received the first of many local approvals from the City, including both interior and exterior “demolition” and “major remodel” permits, none of which were authorized by the Permit or any other CDP.

By July of 2016, the house was almost completely demolished, with only some framing and foundation left. The Katzes then proceeded to effectively replace the remaining framing by: installing new roof framing (including steel beams); adding new exterior wall framing “sistered” to existing framing; adding new (larger) joists sistered to existing joists and/or adding new joists; installing glue lams and steel beams and adding new window/door framing. In addition, the Katzes’ other unpermitted development includes the replacement of all walls, roofs, decks, doors, windows, plumbing, and electrical elements, etc. This list may not include all unpermitted development that has occurred on the Property, because drapes were hung that largely obscured the construction work taking place behind them.

It was not until the end of December of 2016, after the demolition was done, and reconstruction had begun, that the City’s Design Review Board issued a “determination” (as a note at the bottom of a Notice of Public Hearing) that the ongoing development was exempt from Coastal

⁶ The revised proposal also included some minor foundation work and backfilling of an excavated area.

⁷ See Letter to James Conrad (Exhibit 6).

⁸ Title is actually held by a limited liability company (11 Lagunita, LLC), but the Katzes control it.

⁹ See CCC Letter to James Conrad, dated April 28, 2017 (Exhibit 6).

Act permitting requirements, and not appealable to the Commission. Moreover, neither the City nor the Katzes sent that notice to the Commission, and, as is discussed more fully below, the exemption determination turned out to be inaccurate, not supported by the evidence, and somewhat irregular.¹⁰

After a neighbor alleged that a major remodel was occurring, the City opened an investigation in January of 2017. Laguna Beach Building Official Dennis Bogle stated in an email that the project is a “100 percent remodel and addition” and that fire sprinklers were therefore required. He also stated that “every area inside and outside of the house has been rebuilt.” Although another city official, Zoning Administrator Nancy Csira, replied to Dennis Bogle that she had visited the site the day before and that she felt this remodel still did not meet the city’s “current major remodel definition,” she simultaneously acknowledged that the City’s definition was “not approved by” the Coastal Commission.¹¹

Initial Enforcement Actions

Commission enforcement staff began investigating this Coastal Act violation case after becoming aware of the unpermitted demolition and new development activities, and the City’s exemption determination in January of 2017. In April of 2017 Commission staff issued an enforcement letter requesting that construction cease, the seawall be removed as required by the Permit, and requesting a site visit by Commission staff to investigate the violations further. Commission staff subsequently talked, via phone, with the Katzes’ architect/agent, Mr. Conrad, who admitted that much more than “paint and carpet” had occurred, but insisted that there was no Coastal Act violation related to the remodel of the house on the Property.¹² Mr. Conrad stated that the original house was the shabbiest and oldest on the street, and that the Katzes intended to remodel the house and sell it, but that they did not want to get a CDP or deal with the Coastal Commission at all.¹³¹⁴

Thereafter, between June and November of 2017, Commission enforcement staff exchanged multiple letters and phone calls with the Katzes’ attorney, Steven Kaufmann, and even met with Mr. Kaufmann to discuss the April 17, 2017 Notice of Violation letter. Throughout all of the Commission’s communications, Commission Enforcement staff expressed a willingness to work with the Katzes to resolve the matter amicably, but the Katzes refused to stop construction, refused to consider any alternative protection methods other than the seawall, and insisted that only exempt “repair and maintenance” had occurred. Finally, on November 3, 2017, Commission staff notified the Katzes that the matter was being elevated for formal action to address the violations on the Property.¹⁵

¹⁰ See Section III.C.3 below and Memorandum from Rob Modellmog, Statewide Enforcement Analyst, dated July 16, 2018 (Exhibit 30).

¹¹ Moreover, the circumstances surrounding Ms. Csira’s involvement in the investigation is discussed in greater detail in Section III.C.3.

¹² See Letter to James Conrad, dated April 28, 2017, Exhibit 6.

¹³ Id.

¹⁴ The owner of the property is responsible for violations on their property and cannot blame their contractor.

¹⁵ See Letter from Commission Staff to 11 Lagunita, LLC, dated November 3, 2017 (Exhibit 23).

Lawsuit

In January of 2018, the Katzes sued the Commission, arguing that the Commission had unduly delayed resolution of this matter, and alleging that the existence of the Notice of Violation letter and the open enforcement case constituted a “taking.” The complaint alleged that the house was now worth \$25 million (a more than 75% increase from the \$14 million purchase price). After attending to the extra workload created by the Katzes’ litigation, including time-consuming discovery demands, on April 16, 2018, the Executive Director of the Commission sent the Katzes a formal Notice of Intent to Commence Cease and Desist Order and Administrative Penalties Proceedings. In June of 2018, the court stayed the litigation to allow for this administrative hearing.¹⁶

Primary Contested issues

The Katzes continue to argue that this entire project constitutes exempt repair and maintenance. However, this project looks nothing like repair or maintenance. Where virtually everything that makes up a house is replaced, and what is left is reengineered and fortified, and where the value of the house increases by \$11 million just over the course of the reconstruction, that is not mere “repair and maintenance” by any common definition or understanding, and therefore is not eligible for the repair and maintenance exemption under the LCP and Coastal Act. Moreover, even true repair and maintenance projects are not legally eligible for that exemption when they are located in certain, defined sensitive areas, as is the case here, as the house is within 50 feet of a coastal bluff.

The Katzes also contend that, pursuant to Permit Special Condition No. 2, the authorization for the seawall was not to expire until the house underwent a “major remodel,” which they allege should be narrowly defined as applying only to cases involving the demolition of 50% of the perimeter framing (apparently defined not to include siding or sheer wall). However, Special Condition No. 2 neither uses the term “major remodel” nor refers to any 50% threshold. Moreover, this redevelopment did replace more than 50% of the house and constitutes a major remodel by any common understanding of that term. Here, virtually all of the house was altered, demolished, reconstructed, and replaced. Only a partial skeleton of some old framing was left, and even that was effectively replaced by a new framing system and new wood and steel beams. Moreover, the Katzes’ assertion that one should look only at perimeter framing and only at demolition has no basis in the Permit, and has no basis in the LCP, which, in addition to demolition, also measures replacement, reconstruction, and removal. The Katzes also argue that the Permit condition prohibiting any new development that would rely on the existing seawall is concerned only with the narrow measurement of “major remodel” described above, but there is nothing in the Permit to support that position.

Conclusion

Victoria Beach is currently a popular public beach in Southern California. But at the south end, a glimpse of the potential future can be seen; there, a large seawall was installed in 1963 to protect a pre-Coastal Act apartment complex, and this seawall has effectively eliminated the beach for much of the year. Little dry sand exists there, and often, the waves crash directly into the seawall, allowing for absolutely no public access. The seawall on the Property is eleven feet high

¹⁶ This litigation and related issues are discussed further herein, but we note that a party is generally required to “exhaust administrative remedies” prior to seeking judicial review of an Agency’s actions.

and eighty feet long. Currently, the public access impacts at 11 Lagunita are seasonal, depending on swells and storms. But, so long as a seawall remains, waves will continue to hit the seawall rather than the bluff, and the beach will be deprived of sand resulting in a loss of beach, and blockage of natural sand supply from bluff erosion.¹⁷ Moreover, seawalls protect a small amount of private property at the direct expense of the public, including at the expense of iconic sandy beaches used for low-cost recreational purposes by all Californians from all economic backgrounds, including those who come from disadvantaged communities.¹⁸ The burdens of seawalls are disproportionately borne by low-income and minority communities, who cannot afford to rent many oceanfront houses (for example, the Katzes say their house after this remodel will rent for \$70,000 per month).¹⁹ In contrast, coastal property owners may benefit from increased privacy when the beach in front of the house has diminished public access and public use with fewer visitors. Finally, as sea levels rise, these impacts will only grow.

These issues were already considered and addressed by the Commission. Thus, in the Permit, the Commission stated that:

Notably, there are several coastal resource benefits that would result from the removal of [the seawall] after the authorization period including, but not limited to, restoration of the bluff's natural visual integrity, removing the seawall's physical impediments to access, allowing the bluff material [sand] trapped behind a seawall to return to the littoral cell [the beach] and potentially restoring marine habitat within the intertidal zone (if the seawall is sited or will be sited in the intertidal zone with rising sea levels).

There are many potential alternatives available to the seawall²⁰, which the Katzes should have considered before building a new house without the proper Coastal Act review, and which the Katzes continue to refuse to consider now. Thus, staff recommends that the Commission enforce its Permit by requiring that the seawall be removed, and that the Katzes apply for a CDP to address the unpermitted development related to the house using a method that does not impact the beach, and which is consistent with the Coastal Act and LCP.

Proposed Cease and Desist Order and Administrative Penalty

To address these violations, staff recommends that the Commission approve Cease and Desist Order No. CCC-18-CD-02 (“the Order”) and approve Administrative Penalty No. CCC-18-AP-02 (“Administrative Penalty”). The proposed Order and Administrative Penalty are included as Appendix A to this Staff Report and require, among other things, that the Katzes: 1) either remove unpermitted development at the site related to the house or apply for a coastal development permit (CDP) to authorize a modified version of the unpermitted development that would not rely, for protection, on a seawall, revetment, or any similar hard structure, and, if necessary, would instead protect any development that is to remain using an alternative method that does not impact the beach, 2) comply with the existing CDP for the site (A-5-LGB-14-0027), including by removing the seawall; 3) cease and desist from undertaking additional

¹⁷ See findings for CDP A-5-LGB-14-0027 (Exhibit 32).

¹⁸ See Section E for a longer discussion.

¹⁹ See Complaint by 11 Lagunita, LLC and Jeffrey Katz, dated January 18, 2018 (Exhibit 35).

²⁰ See Memorandum of Dr. Lesley Ewing, dated July 25, 2018 (Exhibit 40).

unpermitted development, and 4) pay penalties for violations of the public access provisions of the Coastal Act at that site.

Applying the factors set forth in the statute for determining the size of a penalty to the facts at hand, the Commission could easily impose a penalty in the millions of dollars here. However, in this case, staff is recommending adopting a conservative approach and invoking the prosecutorial discretion of the Commission, and imposing a penalty far below the maximum. Taking a conservative approach in measuring the penalty period and in weighing the relevant statutory factors and the facts of this matter, Commission staff believes a penalty in the range of \$400,000 and \$900,000 is justified. Given that the litigation has occurred and that the Katzes have threatened more litigation, and that the Commission will be able to seek larger penalties under the broader penalty provisions of the act (such as Public Resources Code section 30820) in any litigation, staff is recommending the Commission assess a penalty of \$500,000. In addition, Commission staff also recommends imposing this penalty upon sale or transfer of the property, or one and a half years after the effective date of the Cease and Desist Order and Administrative Penalty, whichever comes first, in order to facilitate a speedy resolution to this violation, given that the Katzes have indicated they would like to sell the Property.

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Appendix A – Cease and Desist Order No. CCC-18-CD-02 and Administrative Penalty No.
CCC-18-AP-02

EXHIBITS

- Exhibit 1 Vicinity Map
- Exhibit 2 Parcels Overview
- Exhibit 3 Aerial Photograph of Previously Existing House on Property
- Exhibit 4 Construction Photographs - Overview
- Exhibit 5 Photographs of Lack of Dry Sand in Front of Seawall

- Exhibit 6 CCC Letter to James Conrad, dated April 28, 2017
- Exhibit 7 Memorandum from Pat Veesart, Enforcement Supervisor, dated July 23, 2018
- Exhibit 8 Photos from City of Laguna Beach Inspection
- Exhibit 9 E-mail Correspondence from City of Laguna Beach dated January 10-13, 2017
- Exhibit 10 Photographs of First Remodel of Residence in 1970s
- Exhibit 11 Letter from Vickie Collins to Laguna Beach Design Review Board dated January 23, 2017
- Exhibit 12 Commission Notification of Appeal of Laguna Beach CDP 14-308, dated May 9, 2014
- Exhibit 13 E-mail from James Conrad to Commission Staff, dated November 21, 2014
- Exhibit 14 City of Laguna Beach Zoning Division Plan Check, dated December 28, 2015 by Nancy Csira, Zoning Administrator
- Exhibit 15 City of Laguna Beach Building Permits dated Jan. –Sept. 2016
- Exhibit 16 City of Laguna Beach Zoning Division Plan Check, dated December 22, 2016 by Monique Alaniz-Flejter, Associate Planner
- Exhibit 17 City of Laguna Beach Notice of Public Hearing for January 2017 Design Review Board Meeting and Exemption
- Exhibit 18 Letter from Gregory Pfof, Laguna Beach Community Development Director, to Stanley Feldsott, dated January 26, 2017
- Exhibit 19 Notice of Violation of the Coastal Act, dated April 17, 2017
- Exhibit 20 Letter from 11 Lagunita, LLC to Commission Staff, dated May 12, 2017
- Exhibit 21 Letter from Commission staff to 11 Lagunita, LLC, dated Oct. 20, 2017
- Exhibit 22 Letter from 11 Lagunita, LLC to Commission Staff, dated Oct. 30, 2017
- Exhibit 23 Letter from Commission Staff to 11 Lagunita, LLC, dated November 3, 2017
- Exhibit 24 Letter from Commission Staff to Scott Drapkin, City of Laguna Beach, dated November 20, 2017
- Exhibit 25 Notice of Intent to Commence Cease and Desist Order and Administrative Civil Penalties Proceedings, dated April 16, 2018
- Exhibit 26 Letter from 11 Lagunita, LLC to Commission Staff, dated June 18, 2018
- Exhibit 27 Letter from Commission Staff to 11 Lagunita, LLC, dated May 1, 2018
- Exhibit 28 Email from James Conrad to Zoning Administrator Nancy Balmer-Csira, dated December 18, 2017
- Exhibit 29 Declaration of Gregory Pfof, Laguna Beach Community Development Director, dated June 8, 2018
- Exhibit 30 Memorandum from Rob Moddelmog, Statewide Enforcement Analyst, dated July 16, 2018
- Exhibit 31 Additional Construction Photographs
- Exhibit 32 Staff Report: Appeal De Novo for A-5-LGB-14-0027, dated Sept. 24, 2015

- Exhibit 33 Staff Report: Appeal Substantial Issue and De Novo for A-5-LGB-14-0027, dated May 29, 2015
- Exhibit 34 Email from Steven Kaufmann to Commission staff, dated July 13, 2018
- Exhibit 35 Complaint by 11 Lagunita, LLC and Jeffrey Katz, filed in Superior Court of California, dated January 18, 2018
- Exhibit 36 Memorandum from Mark Johnsson, Staff Geologist, dated January 16, 2003
- Exhibit 37 Staff Report: Appeal - Substantial Issue and De Novo for A-5-VEN-16-0029, dated April 11, 2016
- Exhibit 38 Notice of Violation of the California Coastal Act regarding the Rechtzajd case in Los Angeles, CA, dated May 10, 2016
- Exhibit 39 Staff Report: Regular Calendar for CDP 5-10-031, regarding 32 North La Senda Drive, Laguna Beach, dated Nov. 4, 2010
- Exhibit 40 Memorandum from Dr. Lesley Ewing, Senior Coastal Engineer, dated July 25, 2018
- Exhibit 41 Statement of Defense from 11 Lagunita, LLC, dated May 22, 2018
- Exhibit 42 Letter from 11 Lagunita, LLC to Commission staff, dated July 26, 2018

I. MOTIONS AND RESOLUTIONS

Motion 1: Cease and Desist Order

*I move that the Commission **issue** Cease and Desist Order No. CCC-18-CD-02 pursuant to the staff recommendation.*

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

Resolution to Issue Cease and Desist Order:

The Commission hereby issues Cease and Desist Order No. CCC-18-CD-02, as set forth below, and adopts the findings set forth below, on the grounds that development has occurred on property currently owned by 11 Lagunita LLC, which is controlled by Jeffrey and Tracy Katz, without a Coastal Development Permit and in violation of CDP A-5-LGB-14-0027, in violation of the Coastal Act, and that the requirements of the Cease and Desist Order are necessary to ensure compliance with the Coastal Act and the Coastal Development Permit.

Motion 2: Administrative Penalties

*I move that the Commission find that 11 Lagunita, LLC and Jeff and Tracy Katz are in violation of the public access provisions of the Coastal Act, and that the Commission **impose** upon them an administrative civil penalty in the amount of \$500,000 pursuant to the staff recommendation and Administrative Civil Penalty Order No. CCC-18-AP-02.*

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in the assessment of an administrative penalty against 11 Lagunita LLC and Jeff and Tracy Katz in the amount of \$500,000. The motion passes only by an affirmative vote of the majority of Commissioners present.

Resolution to Impose Administrative Penalties:

The Commission hereby imposes an administrative civil penalty against 11 Lagunita LLC and Jeff and Tracy Katz in the amount of \$500,000; and adopts the findings set forth below; on grounds that development has occurred and is being maintained on their property that violates the public access provisions of the Coastal Act.

II. HEARING PROCEDURES

The procedures for a hearing in which the Commission issues a Cease and Desist Order under Section 30810 are described in Section 13185 of Title 14 of the California Code of Regulations (“14 CCR”). Additionally, Section 30821(b) states that the imposition of administrative civil penalties by the Commission is to take place at a duly noticed public hearing in compliance with

the requirements of Section 30810, 30811, or 30812. Therefore, the procedures employed for a hearing to impose administrative penalties may be the same as that for a Cease and Desist Order.

For this Cease and Desist Order and for an Administrative Penalty Action, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record. The Chair shall then have staff indicate what matters are parts of the record already, and the Chair shall 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 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 Sections 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions of 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. The Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order and impose an Administrative Penalty, either in the form recommended by staff, or as amended by the Commission. Passage of the motions above, per the staff recommendation, or as amended by the Commission, will result in issuance of the Cease and Desist Order and imposition of an Administrative Penalty.

III. FINDINGS FOR CEASE AND DESIST ORDER NO. CCC-18-CD-02 AND ISSUANCE OF ADMINISTRATIVE PENALTIES²¹

A. DESCRIPTION OF COASTAL ACT VIOLATIONS

This Cease and Desist Order is necessary to address Coastal Act violations involving development that is both unpermitted and inconsistent with a prior CDP, in addition to other CDP violations, such as failure to take actions required by permit conditions.

The unpermitted development activities that have been undertaken on the Property include, but are not limited to: removal of exterior cladding, roofing, windows, doors, decks, flooring, and walls, leaving the framing of the house completely exposed. The interior of the house was also gutted and interior (non-load bearing) walls appear to have been removed. After adding new framing as described below, all the components that make up a modern house were added back in, including, but not limited to: new exterior walls; new roofing; new decks; new interior

²¹ These findings also hereby incorporate by reference the section “Summary of Staff Recommendations” at the beginning of this staff report (“STAFF REPORT: Recommendations and Findings for Cease and Desist Order and Administrative Civil Penalty”) in which these findings appear.

framing; new exterior cladding, and new windows and doors.²² In addition, the Katzes installed new walkways and landscaping.

Every part of the house appears to have been replaced or, as in the case of the wood framing and decks, has been effectively replaced by the addition of new, reinforcing beams, framing, and other materials, including: installing new roof framing (including steel beams); adding new exterior wall framing or framing “sistered” to existing framing; adding new (larger) joists sistered to existing joists and/or adding new joists; installing glue lams and steel beams and adding new window/door framing. Moreover, this list of unpermitted development may not include all unpermitted development that has occurred on the Property, because tarps, drapes and plywood obscured other potential unpermitted development from view during construction. The extensive replacement and fortification of every part of the house means that the nonconforming structure will continue to exist for decades longer.

As noted at the beginning of this section, the violations at issue in this matter also include violations of permit conditions. In particular, the Katzes’ actions and inactions violated Special Conditions 2 and 6 of the Permit (CDP A-5-LGB-14-0027).

Special Condition 2 provided a limited, after-the-fact authorization for the seawall that was in place at the time the Permit was approved, in 2015, stating that the authorization for that wall would expire if and when, among other triggers, the residence in place at that time was ever “redeveloped in a manner that constitutes new development.” It went on to require that the permittee apply for an amendment “to remove the seawall or to modify the terms of its authorization” in conjunction with any such redevelopment. By conducting the extensive remodel described above without seeking an amendment, and retaining the seawall throughout that process and to this day, the Katzes have violated Special Condition 2 of the Permit.

Special Condition 6 provided that any “[f]uture development,” or “redevelopment” of the residence in place at the time the Permit was approved, in 2015, “shall not rely on the permitted seawall to establish geologic stability or protection from hazards. Any future new development on the site shall be sited and designed to be safe without reliance on shoreline protective devices.” Much of the new development described above does rely on the seawall for protection and is not sited far enough landward to be safe without that seawall. Thus, by adding all of that new development, the Katzes have violated Special Condition 6 of the Permit.

B. DESCRIPTION OF PROPERTY

The Property is located on an oceanfront blufftop, and the Property extends from the private Lagunita Drive/Faulkner Road all the way down to the sand at Victoria Beach in Laguna Beach, Orange County. Victoria Beach is a very popular public beach that includes tidepools and an old castle tower at the north end, as well as beach volleyball, skimboarding and other beachgoing recreation. Skimboarding in its modern form was invented at Victoria Beach, and it was the site of the first ever skimboarding contest. The beach lends its name to the major skimboard manufacturer Victoria Skimboards.

²² See Memorandum of Pat Veasart, dated July 23, 2018 (Exhibit 7).

The sandy beach²³ is owned by the Lagunita Homeowners Association and has been made public through a public access easement, part of which abuts the property. The easement was accepted by the City of Laguna Beach (“City”) in 1991. Public access to Victoria Beach is available via a public access way about 60 feet upcoast from 11 Lagunita, at the termination of Dumond Drive. The easement and public accessway north of the property were both conditions of a CDP that gave after-the-fact approval of a gate and guardhouse at the entry to the Lagunita community, CDP 5-83-878 and amendment 5-83-878-A1. The sandy beach in front of the house is 50 to 150 feet wide, and the land immediately seaward of the beach is characterized by oceanfront homes.

The owner of 11 Lagunita is 11 Lagunita LLC, of which Jeff and Tracy Katz are members and control the LLC. The Katzes do not live at 11 Lagunita, but instead live at 9 Lagunita, a neighboring property, and bought 11 Lagunita to redevelop it and sell it.²⁴ Vehicular access to the house is through a gated community, via the private Faulkner Road, which is owned by the Lagunita Community Association (APN 656-171-70). 11 Lagunita is located at the termination of Faulkner Road. The only two houses served by this road are 9 and 11 Lagunita, both owned by the Katzes. Cars often park on the road to access a private beach access way on a nearby street that is open only to HOA members and their guests. The house is bordered by the undeveloped portion of the parcel to the northwest, and by the private road to the north, both of which could potentially be used as sites for relocation of portions of the house, if necessary.

11 Lagunita is located on APN 656-171-76. About half of the parcel is undeveloped, and used to be “10 Lagunita.” A lot line adjustment between 9 and 11 Lagunita was proposed to the City in 2016 which would have transferred much of the undeveloped ‘10 Lagunita’ to 9 Lagunita. The proposal was later withdrawn, and was replaced by a private easement agreement between 9 Lagunita and 11 Lagunita, the details of which are not public.

C. HISTORY OF DEVELOPMENT, PERMITTING, ENFORCEMENT, AND LITIGATION ON THE PROPERTY

1. Original Seawall and Emergency CDP

In 2005, a previous owner, Kay Kiermeyer, applied for an emergency permit for a seawall on the property. However, Ms. Kiermeyer built the seawall before receiving the emergency permit. A violation case was thus opened in 2005, and a violation case for the seawall on the Property has been open ever since²⁵. Ms. Kiermeyer did receive received emergency CDP 5-05-080-G, which provided temporary authorization for a seawall on the Property, but she then built a seawall that was larger than permitted. Then, Ms. Kiermeyer failed to receive a follow up CDP, in violation of the terms of that Emergency CDP. Subsequently, Commission enforcement staff attempted to reach Ms. Kiermeyer multiple times but did not receive any response. The property was eventually foreclosed upon, which delayed enforcement action, and the open violation case still existed when MSSK Ventures bought the house in 2013.

²³ Above the mean high tide line. Below the MHTL, the beach is public as well by state law.

²⁴ See Letter to James Conrad (Exhibit 6).

²⁵ With the exception of a little over a year between October 2015, when follow up Permit was granted (with the conditions discussed above), and January 2017, when Commission staff learned of the City’s CDP exemption.

2. Previously Proposed Remodel, Appeal, and CDP A-5-LGB-14-0027

MSSK Ventures purchased the Property in 2013, and in 2014, Jim Conrad, as architect/agent for MSSK Ventures, applied for a CDP to: (1) remodel the house that was on the Property at that time, and (2) reinforce the then-unpermitted seawall constructed under the 2005 emergency permit. In March of 2014, the City of Laguna Beach approved, with conditions, local CDP No. 14-0308 and Design Review Permit No. 14-0305, providing the long-overdue after-the-fact authorization for the seawall and authorizing the reinforcement of the existing seawall and additions to the existing single-family residence. On May 9, 2014, Commissioners Effie Turnbull-Sanders and Mary Shallenberger appealed that local approval to the Commission.

After this time, Mr. Conrad, as agent for the then-property owner, entered into talks with Commission staff. During these talks Commission staff made it clear to Mr. Conrad that they could not support the extensive remodel of the home, as it would result in a new structure well seaward of the required coastal bluff setback and would need a seawall to protect it. Commission staff informed him that the existing seawall could only remain and be repaired if it were to protect the existing structure. Accordingly, in November of 2014, Jim Conrad agreed to scale back the proposed project substantially, indicated that MSSK Ventures had decided to drop the proposed remodel from the proposed project, and instead requested that the project only include approval of the then unpermitted seawall and reinforcement of that seawall, minor foundation work, and placement of fill in an excavated area. The seawall would be for the protection of the existing, pre-Coastal Act structure. Mr. Conrad explained via email that “it is very clear after our meeting last week that [Commission] staff will not support the proposed remodel of the home,” and stated that he would instead only apply for a seawall “to protect the existing structures.”²⁶ Conrad further explained to Commission staff via phone that he would only replace “paint and carpet.”²⁷ Thus, Mr. Conrad was well aware that Commission staff could not recommend approval of a seawall at this location to be used to protect such a remodeled structure.

On June 11, 2015, the Commission found that the appeal of the City’s approval of the seawall raised substantial issues with conformity to the City’s Local Coastal Program (“LCP”). On October 7, 2015, the Commission conducted a *de novo* review of the modified proposed project (now without a proposed home remodel) and approved the Permit with Special Conditions, authorizing construction of a seawall to protect the house built in 1952. Per Special Condition No. 2, Coastal Act authorization for the seawall would expire upon, among other things, redevelopment of the house that the seawall protected “in a manner that constitutes new development;” and per Special Condition No. 6, no “[f]uture development” or “redevelopment” was allowed to rely on the seawall for protection (unless it was exempt).

In the Permit findings, Commission staff explained why the Special Conditions limited the seawall’s authorization to only the existing, pre-Coastal Act structure:

Otherwise, if a new structure is able to rely on shoreline armoring which is no longer required to protect an existing structure, then the new structure can be sited without a

²⁶ See Email from James Conrad (Exhibit 13).

²⁷ See Letter to James Conrad (Exhibit 6).

sufficient setback, perpetuating an unending reconstruction/redevelopment loop that prevents proper siting and design of new development, as required by LUE Policies 7.3 & I-F and the public access and recreation policies of the Coastal Act.

Staff Report at 28.

Were there any doubt about the temporary nature of the seawall, Commission staff also noted that they fully expected that the seawall authorization might end upon redevelopment, and explained that removing the seawall would benefit coastal resources:

Given the reasonably foreseeable trend of redevelopment of bluff top homes in the City, it is important to ensure that the need for shoreline armoring is evaluated when an applicant proposes an alteration to his or her home to determine if the proposed alteration triggers the end of the authorization period for any shoreline protection that is approved to protect the existing structure and requires removal of that shoreline protection. Notably, there are several coastal resource benefits that would result from the removal of shoreline armoring after the authorization period including, but not limited to, restoration of the bluff's natural visual integrity, removing the seawall's physical impediments to access, allowing the bluff material trapped behind a seawall to return to the littoral cell and potentially restoring marine habitat within the intertidal zone (if the seawall is sited or will be sited in the intertidal zone with rising sea levels).

Id.

Thus, the Permit clearly explained the temporary nature of the seawall, and that the seawall must be removed if and when new development occurs.²⁸

3. Unpermitted Development at Issue in this Action

Less than a month after the Permit was approved at the October 2015 hearing, the Katzes purchased the property on November 4, 2015, and Mr. Conrad continued to serve as the architect/agent for the Property on behalf of the Katzes. The Permit was issued on December 28, 2015, and the Katzes subsequently began building the new seawall. Separately, however, and without contacting or informing the Coastal Commission, the Katzes began obtaining building permits from the City of Laguna Beach, with a Plan Check issued the day the Permit from the Commission to authorize the seawall to protect the existing pre-Coastal house was issued, and with the first City demolition permit issued one week after. Throughout the first half of 2016, the Katzes, fully aware that the Commission had only authorized the seawall as a temporary measure to protect the pre-Coastal house, sought and obtained local permits (but with no Coastal Act authorization) for an extensive demolition and reconstruction of the pre-Coastal Act house. These permits included both interior and exterior demolition permits, major remodel permits for exterior and interior remodels, and a demolition permit to demolish surrounding exterior features such as stairs and a concrete slab. Despite these local demolition and major remodel permits, no Coastal Development Permit was obtained. The exterior demolition appears to have occurred in July and August of 2016, and by November of 2016, the house had new plywood on the roof and deck, new siding, new beams, and the reconstruction was underway.

²⁸ The Katzes were on notice of the Permit, as it runs with the land.

However, at that point, there had been no Coastal Act review of any of that work, much less had any CDP or Coastal Act exemption been issued. To our knowledge, it was not until January of 2017 (or just prior thereto) that any regulatory body considered or addressed the need for a CDP to undertake this new development. That was when the City of Laguna Beach Design Review Board issued a Notice of Public Hearing on which it states that the work on the Property “is exempt from the Coastal Development Permit requirements pursuant to Municipal Code Section 25.07,” however, as the only work being proposed to the Design Review Board was some of the exterior finishing and things like air conditioners, it is unclear whether the exemption actually covered all of the work done.

After a neighbor alleged that a major remodel was occurring (in fact, the City even processed interior and exterior major remodel permits, so even the City acknowledged via its local permitting process that such development was considered a major remodel), the City opened an investigation in January of 2017. Laguna Beach Building Official Dennis Bogle stated in an email that the project is a “100 percent remodel and addition” and that fire sprinklers were therefore required. He also stated that “every area inside and outside of the house has been rebuilt.” Although another city official, Zoning Administrator Nancy Csira, replied to Dennis Bogle that she had visited the site the day before and that she felt this remodel still did not meet the city’s “current major remodel definition,” she acknowledged that the City’s definition was “not approved by” the Coastal Commission. It should be noted that nothing in the Permit indicates that the Commission was relying on this uncertified definition. Further, as described above, due to a “perception of a conflict of interest” with respect to Mr. Conrad, 11 Lagunita LLC’s architect/agent, Ms. Csira was apparently precluded from working this project as well apparently precluded from all other projects managed by the architect/agent for 11 Lagunita LLC.²⁹ In the beginning of the City’s review of this project, Ms. Csira issued all the City’s plan checks for 11 Lagunita LLC’s redevelopment, but in the fall of 2016, Ms. Csira was evidently precluded from working on the project. Accordingly, the December 2016 plan check was issued by a different City official, Monique Alaniz-Flejter.³⁰ Yet, as described in the summary, after this recusal was apparently in place, Ms. Csira still visited the site in January of 2017 and apparently still worked towards the outcome that the development was somehow exempt from CDP requirements, including issuing the finding countermanning the finding of the Building Official that the project was a 100 percent remodel. Thus, the Katzes may have improperly influenced the erroneous exemption determination, as well as the resulting closure of the investigation, which initially determined that a 100% remodel had occurred, which would have been consistent with the Commission staff determination that the project is clearly not exempt from Coastal Act review.

4. Recent Enforcement Actions

After learning of the exemption and investigating the extent of the new development, on April 17, 2017, Commission staff sent Mr. Conrad, on behalf of the Katzes, a “Notice of Violation” letter, notifying the Katzes of the unpermitted development and requesting that they, among

²⁹ See Memorandum of Rob Moddelmog (Exhibit 30).

³⁰ See City of Laguna Beach Zoning Division Plan Check by Monique Alaniz-Flejter, dated December 22, 2016 (Exhibit 16).

other things, stop the unpermitted activities at the Property, and that if they continued to proceed with the development on the house it would be at their own risk.

On April 19, 2017, Commission staff spoke with Mr. Conrad about the NOV. Mr. Conrad acknowledged that much more work had been undertaken than “paint and carpet,” despite what he had previously told Commission staff about the proposed project. He explained that, while the previous owner had installed paint and carpet, a new owner bought the house, and kept Mr. Conrad as architect/agent, but wanted to remodel the house, which Mr. Conrad described as the oldest and shabbiest on the street. Mr. Conrad stated that 11 Lagunita LLC wanted to undertake this remodel without getting a CDP or dealing with the Coastal Commission at all. Mr. Conrad refused to discuss removal of the seawall, and instead responded by saying that Commission staff would have to wait to be contacted by his lawyer. Despite the letter requesting a halt of the unpermitted activities, and despite subsequent contact by Commission staff, 11 Lagunita LLC continued the unpermitted development that was also inconsistent with their Permit, and knowingly continued at their own risk.

After the initial conversation with Mr. Conrad, Commission staff met with Steve Kaufmann, 11 Lagunita LLC’s lawyer, and exchanged several letters and many phone calls with him. In all of the communications, Mr. Kaufmann insisted that the work done was merely repair and maintenance, and refused to discuss any alternatives to the seawall. Finally, during a phone call with Mr. Kaufmann on October 30, 2017, Mr. Kaufmann stated that the Katzes had not stopped construction, and when Commission staff offered to discuss alternatives to the seawall, Mr. Kaufmann stated that any alternative to the seawall was a “non-starter.” Therefore, on November 3, 2017, Commission staff wrote to Mr. Kaufmann, explaining that since 11 Lagunita LLC refused to consider any acceptable alternatives to the seawall, Commission staff was “prepared to take a formal unilateral action” if necessary.

5. 11 Lagunita LLC’s Lawsuit

Having been unable to reach agreement, or even get the Katzes to discuss with Commission staff compliance with the Permit, including addressing seawall alternatives, at the end of 2017 and the beginning of 2018, Commission staff began preparing a Notice of Intent to commence formal administrative enforcement proceedings (NOI). On January 18, 2018, before Commission staff had completed the NOI, 11 Lagunita LLC filed a lawsuit in Orange County Superior Court against the Commission over Enforcement staff’s communications regarding this matter, seeking declaratory and injunctive relief and damages for inverse condemnation and temporary takings, and arguing that the Commission had unduly delayed the proceedings. Yet, this lawsuit was brought after the holidays, and in a month with no Commission hearing in which such an administrative proceeding could have even taken place, and in spite of the fact that the Katzes had never asked for a hearing until the lawsuit. On January 29, 2018, before the Commission had been served with the lawsuit, Mr. Kaufmann, called Statewide Enforcement Analyst, Rob Modellmog, to ask if the Commission had “decided to drop the violation.” Mr. Modellmog informed Mr. Kaufmann that Commission staff had not done so, and that it appeared that the site activities were both unpermitted and a violation of the specific Permit conditions, but that Commission staff continued to want to find a way to resolve the matter amicably. Mr. Kaufmann replied by repeating his belief that no consensual resolution was possible. Mr. Kaufmann made

no mention of the complaint that he had already filed, and on February 1, 2018, as staff was finalizing the NOI, the Commission was served with the complaint.

At that point, Commission staff temporarily suspended our preparations for an administrative hearing in order to evaluate and respond to the lawsuit. At the April Commission hearing, Chief of Enforcement Lisa Haage spoke with Mr. Kaufmann, and she offered to discuss consensual resolutions. Mr. Kaufmann again turned down the Commission's offer to discuss. Shortly thereafter, Commission staff thus issued the NOI on April 16, 2018. In June of 2018, the court stayed the litigation to allow for this administrative hearing. Then, on July 13, 2018, Senior Staff Counsel, Alex Helperin, spoke with Mr. Kaufmann and let him know that, given Mr. Kaufmann's voluminous Public Records Act request and administrative discovery requests, the latter of which is not allowable in an administrative hearing, we could postpone the hearing, but Mr. Kaufmann declined. On July 6, 2018, Commission staff visited the site at the invitation of Mr. Kaufmann, which re-affirmed Commission staff's understanding that the house had been completely reconstructed. Finally, the Commission's Deputy Chief of Enforcement, Aaron McLendon, spoke with another of the Katzes' representatives, Susan McCabe, on July 23, 2018, and let her know that Commission staff was still willing to work with the Katzes, even at this late moment, to reach a consensual resolution. However, Ms. McCabe informed Mr. McLendon the next day that the Katzes were still not willing to reach a consensual resolution that would involve addressing the seawall. Thus, Commission staff notified the City of the impending release of this staff report in an effort to coordinate Coastal Act compliance.

D. BASIS FOR ISSUANCE OF A CEASE AND DESIST ORDER

Statutory Provisions

The statutory authority for issuance of a Cease and Desist Order is provided in Section 30810 of the Coastal Act. Section 30810 (a) states, in part:

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

Additionally, Section 30810 (b) provides that, in part:

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. . . .

Factual Support for Statutory Elements

This section sets forth the basis for the issuance of the proposed Cease and Desist Order by providing substantial evidence that the events at issue satisfied all of the required grounds listed in Coastal Act Section 30810 for the Commission to issue a Cease and Desist Order. The first part of the discussion addresses how the Katzes’ actions violated the Coastal Act and the City’s LCP in that the Katzes undertook development without the required coastal development permit. The second part discusses how the activities and the situation that has resulted from those activities violated and continue to violate conditions of the Permit.

Violation of Permit Requirements

The demolition and reconstruction that occurred here clearly meet the definition of development under the Coastal Act. This development required a CDP, but no CDP was ever applied for or granted.

The Activities at Issue in this Matter Constitute Development

“Development” is broadly defined, in relevant part, by Coastal Act Section 30106, as well as by the Laguna Beach LCP Implementation Plan, codified in the Laguna Beach Municipal code, at section 25.07.006(d), as:

“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, 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 use 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....(emphasis added)

Development Requires a Permit

The Laguna Beach LCP Implementation Plan (“IP”), codified at Municipal Code § 25.07.004, states:

A coastal development permit shall be required for all proposed development within the coastal zone except for development specifically exempted under Sections 25.07.008 and 25.07.010. Development undertaken pursuant to a coastal development permit shall conform to the plans, specifications, and terms and conditions approved or imposed in granting the permit.

The activities at issue involve the placement or erection of solid materials as well as construction, reconstruction, demolition, and alteration of the size of a structure. All these activities constitute development under the Coastal Act and the IP.

The Development in this Matter is Not Exempt

a. The Development is Not Repair and Maintenance

The Coastal Act provides an exemption from its coastal development permit requirement for development that constitutes repair or maintenance activities. California Public Resources Code (“PRC”) § 30610(d). The City’s LCP contains a parallel provision. Laguna Beach Municipal Code (“LBMC”) § 25.07.008(C). Relying on these provisions, the Katzes have argued that the development at issue in this case is exempt repair and maintenance.

The activities at issue here are not exempt. Under any understanding of the words “repair and maintenance,” demolishing and replacing virtually every part of the house with new materials, including roofing, flooring, decking, walls, interior framing, exterior cladding, and all doors and windows, as well as effectively replacing the few original parts left, some of the framing, by installing new framing inside of it, along with new joists, new wood, and new steel beams, does not qualify as mere repairs or maintenance. Commission Enforcement Supervisor Pat Veasart, who has extensive construction industry experience, also reviewed the project and concluded that it did not constitute repair or maintenance work. His memorandum, the conclusions of which are hereby adopted by the Commission and incorporated herein, is attached hereto as Exhibit 7. The Katzes also alleged, in their complaint, that the house is now worth \$25 million, 78% more than the \$14 million it was purchased for less than three years ago. An \$11 million increase in the value of a house does not fit with any common conception of repair and maintenance.

Furthermore, by law, work cannot count as repair and maintenance when it involves “replacement of 50 percent or more of a single family home,” under the Coastal Commission Regulations (14 C.C.R. § 13252(b)) and the LCP.

The work performed here involved demolition, removal, replacement, and/or reconstruction of well over 50% of the original, existing structure, calculated by any reasonable metric (weight, volume, surface area, value, etc.). *See* Exhibit 7.

b. Even Repair and Maintenance Work Would Not be Exempt in this Location

Moreover, even it were possible to consider this type of total removal and replacement as repair and maintenance, which it is not, it would still not be subject to an exemption, and would have required a CDP per 14 C.C.R. § 13252(a)(3) and LBMC § 25.07.008(C)(4), because it is within 50 feet of a coastal bluff edge and within a sand area. The house is located directly on and over the coastal bluff edge, and in a sandy area. Therefore, even if this work were merely repairs and/or maintenance to an existing single family home, which it clearly is not, it would also require a CDP given its location. Although some improvements to single family residences are exempt, the Katzes have disclaimed the idea that this work could be treated as improvements.³¹ In addition, those exemptions are also subject to the same limitations with regard to location, and

³¹ See SOD page 20, footnote 4 (Exhibit 43).

given the location of this house within 50 feet of a bluff edge, it is not a category of development that is exempt and therefore requires a CDP. See 14 C.C.R. § 13250(b)(1) and LBMC § 25.07.008(A)(2).

The Development in this Matter Was Appealable

Finally, not only did the development require a CDP, but any CDP issued by the City is appealable per Laguna Beach Municipal Code § 25.07.006(A)1(a)-(b) because the development purportedly authorized was to occur between the first public road and the sea, within 300 feet of the beach, and within 300 feet of a coastal bluff. In addition, this exemption determination was challenged by a neighbor, which should have triggered the review process outlined in LBMC § 25.07.012(B). That LCP section requires that if a local government's determination "is challenged by . . . an interested person, . . . the local government shall notify the commission . . . of the dispute/question and shall request the executive director's opinion."³² Thus, when the neighbor challenged the exemption in this case, the City should have called the Commission and asked for a determination from the executive director.

Rather than seek a CDP from the City or an amendment to the Permit from the Commission, the Katzes sought from the City a CDP exemption, which was not supported by the facts or the legally applicable standards. In addition, the Katzes sought to avoid dealing with the Commission at all,³³ and because any CDP would have been appealable, they sought an exemption. Moreover, they did not notify the Commission, even though a neighbor had been challenging the work done there through the course of the construction. The CDP exemption was issued only after development had been underway for at least six months. The City did not notify the Commission before the reconstruction commenced, as is required for appealable development. In summary, although the Katzes wanted to avoid contact with the Commission and wanted an exemption, this does not make the development exempt. Development, as that term is defined in the Coastal Act and the City's LCP, was undertaken by the Katzes without a Coastal Development Permit, and therefore, the criterion for issuance of this Cease and Desist Order has been met.

Conclusion

For all of the above reasons, the work at issue was non-exempt development that required a coastal development permit. No such permit was obtained. Thus, this Commission is authorized to issue a cease and desist order. In addition, had the City approved a coastal development permit, that approval would have been appealable to the Commission.

Violation of the Special Conditions of CDP A-5-LGB-14-0027

The Commission has the authority to issue a Cease and Desist Order here under Section 30810(a)(2) because the unpermitted development on the property is in violation of a permit previously issued by the Commission.

³² Laguna Beach Municipal Code §25.07.012(B)(2).

³³ See Letter to James Conrad (Exhibit 6).

As described below, this unpermitted development violated Special Conditions No. 6 and No. 2 of CDP A-5-LGB-14-0027. Special Conditions No.6 clearly states that “future development” or “redevelopment of the existing structure” “shall not rely on the permitted seawall.” Yet, the existing structure has been redeveloped, and new development has occurred, and the seawall is therefore now protecting new development in violation of Special Condition No. 6. In addition, Special Condition No. 2 states that the authorization for the seawall expires when the structure is “redeveloped in a manner constituting new development.” New development and redevelopment have occurred, and the authorization for the seawall has therefore expired.

The Unpermitted Development Relies on the Seawall in Violation of Permit Special Condition No. 6

The Permit authorized the construction of a seawall specifically to protect an existing (non-conforming) structure on the Property, subject to certain Special Conditions so that the seawall could be found consistent with the Coastal Act and LCP.

As the Commission noted in the Permit findings,

Applications for redevelopment and additions to existing homes are reasonably foreseeable and illustrate the importance of regulating shoreline armoring in a manner that ties the authorization period to the existing structure it is designed to protect. In this way, the authorization period mirrors the language in [LCP] Action 7.3.9 because that provision allows for protective devices only if it is required to protect the existing home in danger from erosion; once the existing home is no longer there...the LUE [Land Use Element] Action does not support the continued existence of the shoreline protection...

The Special Conditions require that upon redevelopment of the existing house, the Coastal Act authorization for that seawall expires and the seawall must then be removed. In addition, Special Condition No. 6 of the Permit does not allow the seawall to protect new development.

Special Condition No.6 of the Permit states:

6. *Future Development of the Site.*

Future development, which is not otherwise exempt from coastal development permit requirements, or redevelopment of the existing structure on the bluff top portion of the applicant’s property, shall not rely on the permitted seawall to establish geologic stability or protection from hazards. Any future new development on the site shall be sited and designed to be safe without reliance on shoreline protective devices.

As explained in the prior section, development occurred on the property that is not exempt from coastal development permit requirements. The development at issue here conducted from 2016-2018 was also “future” with respect to the 2015 Permit, so, based on that condition, it could not rely on the seawall for protection from hazards, but it clearly does. In addition, demolition and redevelopment of the existing structure has occurred, as evidenced by the fact that virtually every

part of the original, pre-Coastal Act house was reconstructed with new materials, with the end result being a new, modern house.

The Failure to Apply to Remove the Seawall is in Violation of Special Condition No. 2

Special Condition No.2 of the Permit states:

2. Duration of Armoring Approval as Related to the Existing Bluff Top Residence.

- A. Authorization Expiration. This coastal development permit authorizes the seawall to remain until the time when the currently existing residence requiring protection is: A) redeveloped in a manner that constitutes new development, B) is no longer present or becomes uninhabitable; or C) no longer requires a shoreline protective device, whichever occurs first. Prior to the anticipated expiration of the permit and/or in conjunction with redevelopment of the property, the Permittee shall apply for a permit amendment to remove the seawall or to modify the terms of its authorization.**

As described in the above sections and in Exhibit 7, close to 100% of the house was demolished, removed, reconstructed, replaced, and altered, and therefore, the original house was both redeveloped, and new development occurred. Therefore, the house was redeveloped in a manner that constitutes new development, measured by any standard.

Further, the Permit findings (at 18) make clear that this condition was adopted based, in part, on Section 7.3.10 of the Land Use Element , which states that, for non-conforming oceanfront blufftop homes:

Improvements that increase the size or degree of nonconformity, including but not limited to development that is classified as a major remodel...shall constitute new development.

The oceanfront blufftop house here is non-conforming as to the oceanfront blufftop setbacks and the development “stringline.” The improvements have replaced the non-conforming original house³⁴ and now, a non-conforming new house exists and is inconsistent with the Permit. Moreover, absent some action to bring it into compliance with the Permit and Coastal Act, it will continue to exist at the site in its non-conformity state for many decades longer than it would have had it not been completely reconstructed. Therefore, it has increased the degree of non-conformity and “constitutes new development.” Thus, new development has occurred here and the house must be brought into conformity with oceanfront blufftop setbacks and the stringline.

In sum, the Special Conditions of the Permit only allow for the existing seawall to protect the existing structure (at the time the CDP was approved), and not any new development; yet, the extensive development and redevelopment that was undertaken by the Katzes meets the LCP and Coastal Act definitions of development; therefore, pursuant to Special Condition No. 2 of the Permit, authorization of the seawall has expired.

³⁴ See Memorandum of Pat Veasart (Exhibit 7.)

Conclusion

Therefore, the activities that have occurred on the Property are inconsistent with a permit previously issued by the Commission, and thus the criterion for issuance of this Cease and Desist Order has been met. The continuing presence of the seawall is a Coastal Act violation, and 11 Lagunita LLC must remove it through the requirements of the Cease and Desist Order and the authorizations provided therein.

E. BASIS FOR IMPOSITION OF ADMINISTRATIVE PENALTIES

Statutory Provisions

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

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

(b) All penalties imposed pursuant to subdivision (a) shall be imposed by majority vote of the commissioners present in a duly noticed public hearing in compliance with the requirements of Section 30810, 30811, or 30812.

Factual Support for Statutory Elements: Public Access Violations

The Coastal Commission has a statutory mission to maximize public access and recreational opportunities to and along the coast. Section 30210 states:

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

In addition, Section 30211 states:

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30213 states:

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.

Section 30221 states:

Oceanfront land that is suitable for recreational use shall be protected for recreational use and development...

Section 30222 states:

The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential...development.

Also, Policy 3-A of the LCP Open Space/Conservation Element states:

Retain the City's existing public beach accessways and take action where possible to enhance public rights to use the dry sand beaches of the City.

Negative Effects of Seawalls on Public Access

In order to maximize public access, development must be, among other things, sited and designed to ensure that public access is not adversely affected. The Commission found, in its approval of the Permit, seawalls cause a loss of public access and sand on eroding beaches. Seawalls protect houses from wave action because the waves crash against the seawall, not the house. But, when waves crash against a seawall, they pinch the beach between the waves and the seawall until eventually, no dry sand is left for public access. In addition, seawalls that sit in front of coastal bluffs stop those bluffs from naturally eroding and adding sand to the beach. Therefore, the sand inside the bluff is trapped behind the seawall and unable to supply the beach as long as that wall remains.

The Commission's adopted findings for the Permit states on page 24 that quantifiable impacts from seawalls include:

...(1) the loss of the beach area, on which the structure is located; (2) the long-term loss of beach that will result when the back-beach location is fixed on an eroding shoreline; and (3) the amount of bluff material that would have been supplied to the littoral system if the back-beach or bluff were to erode naturally to renourish beach areas nearby with eroded bluff material.

Seawalls have the effect of causing loss of sand supply from the bluffs, which reduces the amount of beach area for public access, in addition to reducing the natural buffer between the ocean and the coastal development. Further, when seawalls are used, they cause beaches to be

pinched between crashing waves and a hard seawall. When waves hit a seawall, there is often no dry sand left to traverse to the other side of the beach safely, or any beach to access at all, which also greatly impacts public access. If a structure requires a seawall, this means that, by definition, waves will hit the seawall, causing public access impacts that will grow over time due to, among other things, sea level rise.³⁵ In addition, seawalls cause scour, whereby waves hit the seawall, refract the wave energy downcoast, and increase erosion and shrink the beach downcoast. Thus, by their nature, seawalls negatively affect the beaches around them,³⁶ and this seawall is no different.

Negative Effects of this Seawall on Public Access

Here, in approving the Permit for the seawall, the Commission considered this precise issue of the negative effects of using a seawall to protect a pre-Coastal Act structure. In doing so, the Commission specifically limited the purpose and legal authorization of this seawall in this location, and only authorized the seawall for as long as the “grandfathered,” non-conforming house existed.

On page 24 of the adopted findings for the Permit, the Commission found:

“...the proposed seawall will have indirect and long-term impacts to the public beach area seaward of the property associated with fixing the back of the beach and loss of shoreline sand supply.”

For all of the reasons listed above, the seawall that was designed to protect a pre-Coastal Act home only as long as it was not redeveloped, is no longer authorized. Moreover, the requirement in the Permit that the wall be removed as soon as possible was specifically designed to protect public access.

Notwithstanding the public access lost by shrinking of the beach due to wave action, using the calculations adopted by the Commission in the Permit when it specifically limited its approval of the seawall to protect only the then existing home, it can be estimated that in the two years since the house was reconstructed, over 222 cubic yards of sand (over 18 large dump trucks full³⁷) that would have otherwise come from the bluff and supplied sand to the beach, has instead been trapped behind the seawall, unable to naturally erode and nourish the beach. It was to avoid just this outcome that the Commission imposed specific Special Conditions to avoid ongoing harm to sand supply and public access by requiring the owner of the Property to remove the seawall when the home was redeveloped, and to not conduct new development that would rely on the existing seawall for protection.

In addition, last spring, Commission staff found that little dry sand existed in front of the seawall relative to the rest of Victoria Beach. The pictures in Exhibit 5 show how there were only a few

³⁵ Sea level rise is causing increased erosion impacts and therefore increased building of seawalls; see findings for CDP A-5-LGB-14-0027 at pg. 25, (Exhibit 32), and the Commission’s Adopted Sea Level Rise Policy Guidance Document (2015).

³⁶ Id.

³⁷ See findings for CDP A-5-LGB-14-0027 at pg. 26 (Exhibit 32).

feet of dry sand left in front of the seawall. Wet sand stretched almost to the seawall itself, which showed that any one on the beach at that time would have had an extremely narrow area of beach to traverse. Therefore, during certain seasons and particularly during high tides and swells, public access appears to be especially affected by the lack of dry sand available to traverse to the other side of the beach or to even use the public easement and State tidelands in front of the seawall for recreation. Thus, the continued presence of the seawall is a violation of the public access provisions of the Coastal Act.

Finally, while not a criterion for issuance of a cease and desist order, the presence of the unpermitted development and the resulting unpermitted seawall is causing continuing resource damage as that phrase is defined in 14 CCR Section 13190, and is an ongoing violation of the Coastal Act and its public access provisions. As of this time, the retention of the unpermitted seawall causes impacts to public access, and so, by definition it impacts public access. Therefore, the presence of development placed without a CDP and in violation of the terms of the existing Permit, in addition to the now unpermitted seawall, satisfies both distinct criteria for issuance of a Cease and Desist Order pursuant to Section 30810 of the Coastal Act. Under Section 30810 (b) the Commission may order the removal of any such development as necessary to ensure compliance with the Coastal Act.

The Unpermitted Development at Issue is not Consistent with the Coastal Act's Access Provisions and Principles of Environmental Justice

That all of the public should enjoy access for recreation at coastal areas is an important concept for environmental justice precepts in California. However, public access and coastal recreation face the growing threat of seawalls, which, as described above, cause major negative impacts to beaches and public access. Seawalls literally protect a small amount of very expensive private property (e.g., the Katzes stated that their house is worth \$25 million) at the direct expense of the public, including at the expense of environmental justice communities. The burdens of seawalls are disproportionately borne by low-income and minority communities, while coastal property owners benefit from the privacy that affords a property owner where the beach in front of the house has diminished public access, and therefore, less visitors. In addition, coastal property owners can better take advantage of the tides, seasons, and lack of swells when the beach is widest and most accessible. Further, coastal property owners still get to enjoy an ocean view each day, but the views from the beach are correspondingly diminished as the beach becomes less available to access. In addition, renting these houses is often far above the means of low-income communities (e.g., the Katzes' house will rent for \$70,000 per month).³⁸ Finally, public recreation and the ability for the public to access the beach are a major cornerstone of the Coastal Act and are critical in Laguna Beach, where many coves still lack public access. Thus, the seawall here is causing unpermitted impacts that are and will disproportionately affect low income and minority communities.

The Violation is Ongoing

Along with the violations of the public access provisions of the Coastal Act stemming directly from the failure to comply with the CDP Special Conditions, the current retention of the

³⁸ See Complaint by 11 Lagunita LLC and Jeffrey Katz (Exhibit 35).

unpermitted seawall that harms the beach and public access constitutes an ongoing violation of the Coastal Act's public access provisions generally. As courts have said, the public access provisions of the Coastal Act should be broadly construed since the Coastal Act is to be "liberally construed to accomplish [the act's] purposes and objectives." (*Pacific Palisades Bowl Mobile Estates, LLC. v. City of Los Angeles* (2012) 55 Cal.4th 783, 796.) Moreover, a primary purpose of the Coastal Act is the protection and maximization of public access to the California Coast. (*Yost v. Thomas* (1984) 36 Cal.3d 561, 565-566. (See e.g., Coastal Act Section 30001.5(c).)) The public access concerns of the Coastal Act include not just direct impediments to public access, but broadly concern indirect impediments as well. The California Court of Appeal has ruled that the "public access and recreational policies of the Coastal Act should be broadly construed to encompass *all* impediments to access, whether direct or indirect, physical or nonphysical." *Surfrider Foundation v. California Coastal Comm.* (1994) 26 Cal.App.4th 151, 158.

30 Day Notice/De Minimis Violations

Under 30821(h) of the Coastal Act, under certain circumstances, imposition of administrative penalties may be avoided when a violation is corrected within 30 days of written notification from the Commission regarding the violation. Section 30821(h) is inapplicable to the matter at hand. There are three requirements for 30821(h) to apply, none of which are met here: 1) the violation must be remedied within 30 days of notice, 2) the violation must not be a violation of permit conditions, and 3) the violation must be able to be resolved without requiring additional development that would require Coastal Act authorization. None of these are applicable here. The Katzes were notified of the persistence of the violation(s) numerous times, including in writing on April 17, 2017 and again on April 16, 2018, – any 30-day period since that date has long since run.. Further, this action is to enforce the terms and conditions of A-5-LGB-14-0027, the conditions of which they have not complied; 30821(h) cure is not available for permit violations. Finally, since the violation at issue will require removal of development and obtaining Coastal Development Permits for any development to be retained under the orders, resolving this matter would necessarily involve additional development that would require Coastal Act authorization; 30821(h) does not apply to this matter.

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 remove the seawall is significant both because it was an essential requirement of the Permit, and because loss of public access and sandy beach is very significant under the Coastal Act. Therefore, the violation cannot be considered to have resulted in "de minimis" harm to the public.

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.” Therefore, the Commission may authorize penalties in a range up to \$11,250 (\$15,000 x .75) 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, the violations have persisted at least since July of 2016. However, because this is only the second instance in which the Commission has unilaterally imposed a penalty pursuant this new statutory authorization, and the first time it has done so in a case where the impact on public access, while arising from intentional acts and clearly impacting access, is more indirect than some access violations, the Commission chooses to exercise its prosecutorial discretion to limit the period for which a penalty is imposed to a single year. Although liability for penalties is not triggered by notice, for simplicity and in an attempt to be very conservative, the Commission chooses the year from April 17, 2017, when it issued its Notice of Violation letter, to April 16, 2018. The recommended 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.” 30820(c), the Coastal Act 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.*
- (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), the violation at hand warrants the imposition of substantial civil liability. First, under 30820(c)(1), the violation is significant in nature, circumstance, and gravity. The nature and circumstance of the violation at hand includes (1) the performance of development that the Katzes knew or should have known would require Coastal Act authorization, without that authorization, achieved by intentionally avoiding Commission review; (2) the retention of a seawall that the Commission had made clear was having an adverse impact on public access, in spite of the fact that the Katzes undertook development that clearly triggered the Permit conditions requiring removal of the seawall, and in violation of the Permit conditions that were specifically required in order to prevent such public access impacts; and (3)

the use of the seawall to protect new, unpermitted development. The extent of the violation is a significant impact to sand supply and public access, which is a major and significant resource protected by the Coastal Act. Moreover, the gravity of the violation is significant because of the relatively limited public access to the coast in this area, given that many of the coves in Laguna Beach are not publicly accessible. In addition, the permit conditions were well known to the Katzes and their representatives, and they were further reminded of them by Commission staff. Instead of seeking legal means to address the situation consistent with the permit and Coastal Act and LCP, or attempting to resolve the matter, they instead avoided Coastal Act review and declined to work towards resolving the violations. They also declined to take advantage of the opportunity to halt the ongoing violation when they were informed of the issues, and rather than avoid incurring additional harm to coastal resources, costs and risks, instead continued with the unpermitted work. In sum, the Commission finds that the application of this factor warrants a high penalty.

Second, under section 30820(c)(2), the loss of public access during the time when the wall caused the loss of sand is not easily susceptible to remedial measures. The Katzes have been in violation of the underlying CDP for more than two years, and substantial amounts of sand have been trapped in the bluff behind the seawall and/or scoured off the beach as a result of the wall. The seawall has therefore caused public access impacts, especially during particular seasons and swell events. While more sand could be placed on the beach in the future, it cannot replace those lost periods of public access, and it cannot make up for the periods in which the beach had less sand than it would have without the seawall. In addition, it will likely still be a significant period of time before the Katzes remove the seawall and, if necessary, modify the house and/or provide for an alternate method of protection that does not impact the beach. On the other hand, the violation itself, rather than the past impacts of that violation, can be remedied by the removal of the seawall, and sand can be placed on the beach such that, going forward, there would be no ongoing public access impacts. In sum, the Commission finds that the application of this factor warrants a moderate penalty.

Third, under section under 30820(c)(3), the resource affected by the violation is a scarce, sensitive resource overall, particularly in this coastal region. Laguna Beach does not have as many wide, sandy beaches as other parts of Orange County, and therefore, the sand is especially important. In addition, many parts of the coast in Laguna Beach have large seawalls that negatively impact public access, for example, the apartment complex at the south end of Victoria Beach. However, other than 11 Lagunita, the Permit found that this section of Victoria Beach is not characterized by vertical seawalls.³⁹ Therefore, this beach is relatively free of large seawalls, and thus, it is more sensitive to the impacts of this seawall, and is a sensitive resource. On the other hand, there are times of year when the sandy beach likely remained fairly broad, showing that the resource was not so sensitive as to be continually substantially diminished by this violation. Therefore, in light of that, Commission finds that the application of this factor warrants a moderate penalty.

Fourth, under section 30820(c)(4), the costs to the state have been significant. The State has had to expend its limited resources in order to restore public access to the sandy beach that should have already existed, had the CDP been complied with. Instead of complying in any way, the

³⁹ See the Permit at pg. 19 (Exhibit 32).

Katzes refused to stop construction, sued the Commission, and then undertook time-consuming and costly discovery. The Commission has worked on this enforcement case for more than a year and a half, all because the Katzes decided not to apply for a CDP before undertaking the unpermitted development. Had the Katzes applied for a CDP as they were clearly required to, it would have saved the Commission significant time, money, and staff resources. Thus, the Commission finds that the application of this factor warrants a moderate to high penalty.

Fifth, section 30820(c)(5) provides for a moderate penalty as well. We have no information to indicate that the Katzes have a history of violations. On the other hand, the Katzes have been particularly uncooperative. As to the issue of “economic profits, if any, resulting from, or expected to result as a consequence of, the violation,” although they have stated their desire to sell the property for a significant increase over the purchase price, if the orders are complied with and the violations are resolved, it appears that they would not reap the same economic benefits from the violations. Therefore, it appears that this factor would support a moderate penalty.

Aggregating these factors, the Commission finds that a moderate to high penalty could be 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.

Applying those general factors here, and if the actual date of the demolition to today's date were used to calculate the number of days of violation, the Commission could actually justify imposing a penalty up to a maximum of \$8.3 million in this case, given the severity of the violation, the Katzes' refusal to stop construction work or consider any other alternatives to the seawall, the substantial amount of Commission staff work attempting to resolve this violation, the significant Coastal Act resources impacted by the violation—Victoria Beach and public access to it now and in the future—and the significant public and legal policies at issue here, including the need to secure compliance with Commission CDPs and CDP conditions regarding seawalls, and the importance of public access in this area and of avoiding building seawalls in general, especially in light of sea level rise. And if one calculated the penalty to run until the violation were resolved, it would clearly be even higher.

However, because this is a case of first impression, Commission staff wants to focus on the injunctive solution that will help to restore public access at Victoria Beach; namely, removing the seawall and modifying the house and/or applying for alternate methods of protecting the house that do not impact the beach. In addition, litigation has already occurred and the Katzes have threatened more litigation, and so there is a likely chance that the Commission will be able to seek further 30820 penalties in litigation. Therefore, Commission staff recommends using prosecutorial discretion to impose a lower penalty than allowable by the factors discussed above. Therefore, staff recommends that the Commission exercise its prosecutorial discretion, and impose an administrative penalty amount in the range between \$400,000 and \$900,000, with a recommended amount of \$500,000, recognizing that further section 30820 penalties may be sought in litigation.

This amount is well below that envisioned by the factors in 30821, and certainly would provide an amount below that justifiable under the law and sustainable in public scrutiny, and given the applicable potential penalties specified under Section 30821 reflects a generous weighing of factors and exercise of discretion by the Commission.

In addition, given the nature of the investment that took place, the indications given to us from the Katzes' representatives that they intent to sell the property, and to provide a focus to address bringing the house into compliance with the Permit and then removing the seawall, Commission staff recommends that payment of the administrative penalty occur within 30 days of the sale or transfer of the property, or within 1 ½ years of the effective date of this Cease and Desist Order and Administrative Penalty, whichever comes first. Commission staff believes this will help facilitate the speedy resolution of this violation, which has already persisted for two years as well as facilitate the payment of the assessed penalties.

The Commission emphasizes that this analysis was provided in the staff report for this matter, and the Katzes were therefore on notice of the possibility of a penalty of up to \$2 million. Indeed, they were on notice that a much longer penalty period could have been chosen and a different analysis of the factors was possible. Using a two year period (July, 2016, when the work began in earnest to July, 2018, for example) and at 75 percent of the maximum penalty, the penalty could be more than \$6 million ($365 \times 2 \times \$11,250 \times .75$).

Section 30820 Penalties

The Coastal Act additionally provides for the imposition of civil liability (variously described as fines, penalties, and damages) for violations of the Coastal Act. Section 30820(a) provides for civil liability to be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission in an amount that shall not exceed \$30,000 and shall not be less than \$500 for each violation.

Section 30820(b) provides that additional civil liability may be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with an CDP previously issued by the Commission, when the person intentionally and knowingly performs or undertakes such development, in an amount not less than \$1,000 and not more than \$15,000 per day for each day in which each violation persists. Section 30821.6 provides that a violation of a cease and desist order, including an Executive Director Cease and Desist Order, or a restoration order can result in civil fines of up to \$6,000 for each day in which each violation persists. Courts have held that property owners are liable for violations on their property even if they were not directly and actively responsible for creating the situation.

Here, the unpermitted development at issue consists of several violations for the unpermitted demolition, reconstruction, and alteration of the house, as well as the failure to comply with the permit conditions. Had the house been properly permitted, it would have been required to be much farther inland, which would likely have resulted in a smaller house with less coastal resource impacts. Instead, this large unpermitted house was placed directly on a coastal bluff, causing impacts to coastal resources, including as a result of its not being cited consistent with Coastal Act policies regarding new development being cited to avoid the need for shoreline

protection, the continuing alteration of the blufftop landforms, and by its increased impact on views.

Other Chapter 9 Penalties

The Coastal Act additionally provides for the imposition of civil liability (variously described as fines, penalties, and damages) for violations of the Coastal Act. Section 30820(a) provides for civil liability to be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission in an amount that shall not exceed \$30,000 and shall not be less than \$500 for each violation.

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Property Lien

Under Section 30821(e) the Coastal Act states:

(e) If a person fails to pay a penalty imposed by the commission pursuant to this section, the commission may record a lien on the property in the amount of the penalty assessed by the commission. This lien shall have the force, effect, and priority of a judgment lien.

Therefore, in this case, if the Commission imposes an administrative penalty and the Katzes fail to pay the penalty, the Commission authorizes the Executive Director to record a lien on 11 Lagunita LLC's property in the amount of the penalty imposed by the Commission.

F. DEFENSES ALLEGED AND RESPONSE THERETO

The Commission regulations⁴⁰ require that every notice of intent to commence Cease and Desist Order proceedings (NOI) be accompanied by a statement of defense (SOD) form, providing the recipient with a formal vehicle for the presentation of any facts or arguments that may rebut the allegations in the NOI or otherwise exonerate the accused party of the allegations in the NOI (including through the presentation of any affirmative defenses) or mitigate their responsibility. The SOD form requires the party to enclose copies of all written documents, including letters, photographs, maps, drawings, etc., and written declarations under penalty of perjury that they want the Commission to consider as part of the hearing.⁴¹ The party must complete and return the SOD form by the date specified therein.

On May 22, 2018, the Katzes submitted both a completed SOD form and a letter that indicates that it is intended to constitute the SOD (Exhibit 37). That letter also says that it incorporates by reference two previous letters (dated May 12 and October 30, 2017) as part of the SOD. Below, we refer to these four documents, respectively, as (1) the SOD form; (2) the SOD letter; (3) the May, 2017 letter; and (4) the October, 2017 letter. Many of the arguments raised by the Katzes were repeated in several of these letters.

Commission staff used the SOD form, all three letters, and their attachments to categorize and summarize the various defenses raised by the Katzes. The Commission hereby adopts the following description of, and responses to, all of the defenses asserted in the SOD form and in the associated letters.

The Katzes' defenses can be divided into seven main categories of arguments, which we summarize as follows:

- Whether the work at issue required Coastal Act authorization at all, or was exempt (questions 1-4, below)
- Whether the work at issue triggered the requirements of various permit conditions (questions 5-15, below)
- The relationship of this action to other Commission actions (questions 16-17)
- Whether Commission staff's investigation and prosecution has been fair and adequate (questions 18-21, below)
- The respective authorities and jurisdictions of the Commission and the City of Laguna Beach (questions 22-24, below)
- Notice and Knowledge (questions 25-27, below)
- Affirmative defenses and the applicability of penalty provisions (questions 28-31, below)

However, several of the issues raised below are not actually defenses, in that they do not contest the elements necessary for the Commission's issuance of a Cease and Desist Order under PRC section 30810 or those necessary for the Commission's imposition of an administrative penalty under PRC section 30821. Subsequent observations that certain arguments are not relevant to the Commission's authority to issue the proposed orders are intended as references to this

⁴⁰ 14 C.C.R. § 13181.

⁴¹ 14 C.C.R., Division 5.5, Chapter 5, Subchapter 8, Appendix A (following Section 13188).

general point. Nevertheless, as a courtesy, and as background, we provide the following responses to as many of the claims as we have been able to identify, grouped based on subject-matter, and with citations to the documents in which they claims appeared. The numbered and italicized language reflects claims made by the Katzes, and the Commission’s responses follow.

The Work at Issue Required Coastal Act Authorization

1. *The work performed was exempt* (SOD letter at 1 and 20.)

The Commission reiterates its conclusion that the work was not exempt from Coastal Development Permit requirements because: (1) the work did not constitute repair and maintenance, and (2) even if it were repair and maintenance, it would not be exempt, for a number of reasons, as discussed above, including its proximity to a coastal bluff. The Commission hereby incorporates by reference the analysis in the body of the staff report in which it adopted findings and analysis to support these conclusions.

2. *Work “may be substantial and yet qualify as exempt repair and maintenance. The Commission’s own regulations utilize a 50% metric when determining whether such work amounts to 50% or more of the residence or structure such that it constitutes a ‘replacement’ requiring a CDP.”* (SOD letter at 21.)

In addition to not being exempt based on its location, the work here clearly is not repair and maintenance, by virtue of what was done. The Katzes appear to argue that the work at issue must be considered repair and maintenance work because of a Commission regulation (14 C.C.R. section 13252(b)) that establishes a limit on what can be considered repair and maintenance, and because, according to the Katzes, the work at issue here did not reach that limit, as it involved replacement of less than 50 percent of the previously existing structure. They also argue that the substantiality of the work is irrelevant to the question of whether it constitutes repair and maintenance.

The Katzes’ reliance on this section of the regulations is misplaced. Section 13252(b) states that, in cases not involving destruction by disaster, “the replacement of 50 percent or more of a single family residence . . . or any other structure is not repair and maintenance . . . but instead constitutes a replacement structure requiring a coastal development permit.” This language does not say, does not imply, and does not mean, that every form of work that does *not* involve replacement of 50 percent or more of a structure necessarily *is* repair and maintenance. It establishes a threshold which, if surpassed, necessarily and automatically renders the work ineligible for the “repair and maintenance” label; but it does not do the converse, in that it does not mean that everything that does not cross that threshold automatically *is* repair and maintenance. Simple common sense dictates that there are many things one could do to a structure that would not involve replacement of 50 percent but that would nevertheless not constitute repair or maintenance.

It may well be true that work can be “substantial” and yet still qualify as repair and maintenance, but that proposition sheds no light on whether, in any particular case, the work at issue actually is repair or maintenance. In this case, the work at issue does not look anything like repair or maintenance, based on any normal usages of those words. This is clear from the memo provided

by Enforcement Supervisor Pat Veasart (Exhibit 7), the conclusions of which this Commission adopts and incorporates by reference.

Finally, as indicated above, the Commission found that the work here did involve the replacement of more than 50 percent of the subject structure, so even by that metric, the work does not qualify as repair and maintenance.

This section of the SOD letter also cites to a set of appeals processed by the Commission last July (A-5-VEN-17-0020 to -0024, Henson) as alleged examples of cases where the Commission has treated extensive remodeling work as exempt repair and maintenance. The Katzes also cite Henson in their October, 2017 letter, where they argue that the Commission found those projects to constitute exempt repair and maintenance because the size, height, or footprint of the bungalows did not change. However, there are several critical factors that make the Henson matters distinct. First and foremost, for most of the five units remodeled in Henson, the Commission concluded that less than 10 percent of the existing structures were being removed; and for the other two, the figure was 15 percent and 46 percent. (Henson findings at 17.) Thus, the Commission found those matters to involve much less extensive work. Second, those cases involved the restoration of potentially historic bungalows built in the 1910's and 1920's, where the applicant was "retaining as much of the existing buildings as possible" (*id.*), not an attempt to completely rebuild a non-conforming structure. For example, in Henson, the Commission emphasized that "the exterior cladding on the buildings is being retained" (*id.*), unlike here, where 100 percent of the exterior cladding was removed. The differences in the amounts of other elements changed (such as roofing elements) between Henson and the instant case are also dramatic. Finally, the Henson units were in an inland area that was not subject to the same sort of hazards concerns as are at issue here.

The SOD letter also cites a permit application that the Commission approved last August (CDP No. 5-17-0068, South La Senda Trust) for the proposition that "cosmetic" portions of walls, like exterior stucco and interior drywall, may be removed as part of a project, and it can still be considered a "minor remodel." However, the analysis in that case was about whether the project work was extensive enough that it "constitutes a replacement structure" (Findings at 15), not whether it was exempt repair and maintenance. In fact, the South La Senda Trust project demonstrates the point that even in a case like that, where the Commission concluded that less than 50 percent of the structure was replaced (*id.* at 16), there is no indication that the work was ever considered to be exempt repair and maintenance. To the contrary, the applicant sought, and the Commission approved, a permit.

In sum, the work performed here was not in the nature of repair and maintenance, and as a result, it was not eligible for the repair and maintenance exemption in the Commission's regulations or the City's LCP. That is true due to the character of the work, regardless of whether it was substantial or whether it involved replacement of 50 percent of the pre-existing structure, and the standard in 14 C.C.R. section 13252(b) does not indicate otherwise. However, in this case, the work did involve the replacement of more than 50 percent of the structure, and 14 C.C.R. section 13252(b) does establish that that fact is an additional reason why the work was not eligible for a repair and maintenance exemption. Finally, the cases the Katzes cited do not reflect any contrary holding by this Commission.

3. *The exceptions to the repair and maintenance exemption do not apply here because this is a single-family house, and the “repair and maintenance provision is, by its terms, directed to repair and maintenance of ‘shoreline protective works,’ and thus must be read in that light.”* (SOD letter at 23, citing LBMC § 25.07.008(C).)

The Commission has concluded that even if the work at issue could be characterized as repair and maintenance (which it cannot), the repair and maintenance exemption would not apply, as it does not apply to work in certain locations, including where this work occurred.

In this portion of the SOD letter, the Katzes appear to be arguing that, given certain language in the Laguna Beach Municipal Code (“LBMC”), these location-based exclusions from the repair and maintenance exemption only apply to shoreline protective works. This argument is both wrong and self-defeating.

The argument is wrong because LBMC section 25.07.008(C) is obviously intended to incorporate the repair and maintenance provisions of the Coastal Act (PRC § 30610(d)) and the Commission’s regulations (14 C.C.R. § 13252) into the City’s LCP. Most of the language is identical, and the structure is merely changed to fit the provisions into the City’s Code. However, it appears that an error occurred in the incorporation of the language into the LCP.

Section 13252(a) of the Commission’s regulations lists “extraordinary methods of repair and maintenance [that] require a coastal development permit because they involve a risk of substantial adverse environmental impact.” It has three subparts to address the three categories of repair and maintenance work the Commission concluded fit into this description: (a)(1) addresses “repair or maintenance of a seawall revetment, bluff retaining wall, . . . or similar shoreline work;” (a)(2) addresses “routine maintenance dredging;” and (a)(3) is not specific to any particular type of work, but is instead based on location, addressing repair or maintenance of all “facilities or structures or work located in” one of the specified locations. LBMC section 25.07.008(C) does essentially the same thing. (C)(1) matches (a)(1), it adds a new (C)(2), (C)(3) matches (a)(2), and (C)(4) matches (a)(3).

However, somehow, language from 25.07.008(C)(1) and 13252(a)(3) about shoreline protective works also ended up at the beginning of 25.07.008(C). This is an obvious error, as it would limit the entire repair and maintenance exemption to shoreline protective devices. Where an LCP appears to deviate from the Coastal Act, the courts have made clear that the LCP must be read to be consistent with the Coastal Act. *See, e.g., McAllister v. California Coastal Commission* (2009), 169 Cal.App.4th 912, 930-32. That is even more true here, where the issue is jurisdictional. Local governments cannot assert coastal development permitting authority over something that the Coastal Act deems exempt;⁴² and conversely, they cannot create an exemption for something that the Coastal Act requires to have a permit (at least not without going through the categorical exclusion process of PRC section 30610(e)).⁴³

⁴² They may exercise other forms of regulatory authority, based on their police powers, and they may be more restrictive than the Coastal Act (PRC § 30005(a)), but they cannot require a coastal development permit if the law makes the work exempt from the Coastal Act’s permitting requirement.

⁴³ *See* PRC § 30610(e) and Subchapter 5 of Chapter 6 of the Commission’s regulations (14 C.C.R. §§ 13240 *et seq.*) for the substantive and procedural rules related to the establishment of a categorical exclusion from the Coastal Act’s permit requirements, including the need for a two-thirds vote of the appointed membership of the Commission.

In addition, this argument is self-defeating. The errant language about shoreline protective devices comes at the beginning of LBMC section 25.07.008(C), which establishes the exemption for repair and maintenance work. If that section were limited by the language about shoreline protective devices, as the Katzes suggest, that would not only limit what types of repair and maintenance qualify for the exemption to the exemption, but also what types of repair and maintenance work could qualify for the exemption in the first place. In other words, it would mean that the entire repair and maintenance exemption (not just the exceptions to the exemption) would be so limited. That would undermine the Katzes' argument by indicating that there could be no exemption for the work at issue here (since it was work on a single-family home, not a shoreline protective device), even if that work did qualify as repair and maintenance work (which it does not) and didn't fall into any of the exceptions to the exemption (which it does).

In sum, the repair and maintenance provision of the LBMC must be interpreted to follow section 13252 of the Commission's regulations. Accordingly, repair/maintenance work located in any of the areas listed in LBMC section 25.07.008(C)(4) and 14 C.C.R. § 13252(a)(3) (including within fifty feet of the edge of a coastal bluff or in any sand area) is not exempt. Moreover, even if the Katzes' argument to the contrary were to prevail, it would mean that no repair or maintenance work would be exempt except work on shoreline protective devices. In either case, the result would be that the work at issue in this matter would not be exempt.

4. *It is... questionable whether the existing residence fronts on a "coastal bluff" ...In addition, not every pimple on the California coast constitutes a coastal bluff.* (SOD letter at 23, footnote 5.)

The house at issue is clearly on a bluff, the Commission had already found that it is a bluff, and the Katzes have admitted previously that it is on a bluff, as discussed below.

The Commission has concluded that even if the work at issue could be characterized as repair and maintenance (which it cannot), the repair and maintenance exemption would not apply, as it does not apply to work within 50 feet of a coastal bluff edge. In this footnote in the SOD letter, the Katzes, for the first time, question whether the house is truly on a coastal bluff.

As an initial matter, questioning the status of the bluff is at odds with many previous statements, both in letters to the Commission and in court filings, in which the Katzes acknowledged that the house at 11 Lagunita Drive is located on a coastal bluff. For example, in a May 12, 2017 letter to the Commission, Steve Kaufmann, on behalf of the Katzes, argued that the "improvements do not include . . . any further encroachment into the bluff." (Exhibit 20 at 4; *see also id.* at 5.) The letter even analogizes to LCP provisions from another city that address bluff top redevelopment. He repeats these arguments in his letter of October 30, 2017 (Exhibit 22 at 3 & 8). The complaint filed by the Katzes in January of this year also describes the house as being nonconforming as to the required blufftop setback (Exhibit 35 at 3:1) and describes a previous proposal as involving "hardscape improvements within the applicable bluff top setback" (*id.* at 8:5). And the SOD letter itself (at 3) refers to the fact that the CDP approved by the City in March of 2014 authorized the construction of hardscape "within the applicable bluff top setback."

More importantly, though, this Commission’s findings in support of its approval of the Permit discuss the coastal bluff extensively and throughout. Those findings discuss the applicability of the LCP provisions and Coastal Act policies regarding bluffs, the impacts of the seawall on the bluff, and how the seawall will trap sand inside the bluff, which will be unable to erode naturally and replenish the beach. Special Condition No. 2 of the Permit, which is at the heart of this matter, is entitled “Duration of Armoring Approval as Related to the Existing Bluff Top Residence.” As is discussed in point 24, below, the SOD letter argues that the City’s determinations in this case should be treated as *res judicata*. For the reasons explained in that section, the Commission disagrees. However, these prior Commission findings regarding the bluff, which were never contested and long ago became legally binding, truly are administrative *res judicata*.

The footnote in the SOD letter also cites Statewide Interpretive Guidelines for the proposition that a landform must be at least 10 feet tall to be a bluff, and they argue that the bluff here is not 10 feet tall. However, PRC section 30620(3) explains that interpretive guidelines are only to be used prior to the certification of (and in the preparation and amendment of) LCPs, and they do not supercede the authority of the public agency. Laguna Beach has a certified LCP. Moreover, that LCP defines a coastal bluff as “an oceanfront landform having a slope of forty-five degrees or greater from horizontal whose top is ten or more feet above mean sea level.” (LBMC § 25.50.004 (B)(4)(a).)⁴⁴ The slope of this bluff is greater than 45 degrees and the top is well above ten feet above sea level. Therefore, the house is on a coastal bluff pursuant to the governing LCP, and the interpretive guidelines cannot supersede that.⁴⁵

The footnote in the SOD letter also discusses section 13577(h)(2) of the Commission’s regulations,⁴⁶ which defines how the boundaries of bluff edges are to be determined. The Katzes argue that the regulation requires “at a minimum a 500’ trend line” for something to qualify as a bluff, based on the following language in the regulation:

The termini of the bluff line, or edge along the seaward face of the bluff, shall be defined as a point reached by bisecting the angle formed by a line coinciding with the general trend of the bluff line along the seaward face of the bluff, and a line coinciding with the general trend of the bluff line along the inland facing portion of the bluff. Five hundred feet shall be the minimum length of bluff line or edge to be used in making these determinations.

This language does not mean that a landform must be at least 500 feet long to be a coastal bluff. It merely provides the method for defining the transition point between a seaward-facing bluff edge and a bluff edge of a canyon, when the bluff edge turns inland. Bluff edges generally do not follow straight lines, and there is usually a somewhat gradual transition between the seaward face and the inland face. This regulation provides instructions on where the transition occurs. One is to draw straight lines representing the general trend of the bluff along its seaward and inland faces, find their intersection point, and then bisect the angle created by the

⁴⁴ The Land Use Element of the LCP also defines “Oceanfront Bluff/Coastal Bluff” as “A bluff overlooking a beach or shoreline or that is subject to marine erosion. . . .”

⁴⁵ Even if the interpretive guidelines were used, it is unclear how the Katzes measured the bluff, but the seawall is 11 feet tall, and the staff report for the Permit found that the bedrock is deep below the sand in front of the house (Findings at 19). Thus, while sand may pile up higher during certain seasons, making the bluff appear less tall, the actual height of the bluff is at least 11 feet, as is evidenced by the height of the seawall.

⁴⁶ The footnote erroneously cites to this section as section 13577(a).

intersection. That is the terminus of the coastal bluff line. To determine the “general trend” of a bluff edge that has a lot of local variations, one is to ignore the small scale variations and measure the general trend along at least 500 linear feet of the bluff edge.

The section begins by stating what the phrase “Coastal bluff shall mean,” without any reference to this 500-foot standard, defining it instead as “bluffs, the toe of which is now or was historically...subject to marine erosion.” Here, the bluff is clearly subject to marine erosion, and therefore is a bluff under these regulations.

Finally, past Commission practice supports the Commission’s position here. In a 2003 memorandum written by the Commission’s previous staff geologist, Dr. Mark Johnsson, he explained that the Coastal Act’s definition of “bluff edge” is “largely qualitative.” To illustrate an example of a measurement of a bluff edge, he even cited the City of Laguna, which defines a bluff edge as “that point at which the coastal bluff attains a certain specified steepness.” (Exhibit 36 at 6.)

In sum, the Commission, consistent with its past findings and the Katzes’ past statements related to this site, that the site is on a coastal bluff, and the house is within 50 feet of the edge of that bluff. As such, even if the work at issue could be characterized as repair and maintenance (which it cannot), it would not have been exempt, as the repair and maintenance exemption does not apply to work within 50 feet of a coastal bluff edge.

The Work Performed was Extensive Enough to Trigger the Requirements of the Permit Conditions

5. *A minor remodel does not violate the conditions of the Permit, is “perfectly lawful and neither constitutes a violation of the condition nor gives rise to the drastic measure of removal of the seawall.”* (SOD letter at 1 and 13.)

As discussed both above and below, the work at issue was both a major remodel and triggered the permit requirements of two Permit conditions.

The Katzes maintain that the work at issue constituted a minor remodel and that, as such, it was legal, did not violate any Permit conditions, and did not require the removal of the seawall. As indicated above, in the body of the staff report, the Commission found that multiple violations have occurred in this case, including the undertaking of development without the required permit, which constitutes a violation of the Coastal Act *independent* of any requirement imposed by any of the Permit’s conditions. However, even focusing solely on the alleged violations of the Permit conditions, the Commission found that the requirements of Special Condition No. 2 were triggered by the Katzes’ development and that the work also resulted in a situation that violates Special Condition No. 6. The Commission incorporates by reference the analysis in the body of the staff report in which the Commission came to these conclusions.

Thus, whether some work constitutes a “minor remodel” (assuming that simply means a remodel that does not qualify as a “major remodel”)⁴⁷ is irrelevant to analyzing what the conditions

⁴⁷ The Commission notes that the Katzes have not identified, and the Commission is not aware of, any definition for the phrase “minor remodel” in the Coastal Act or the Commission’s regulations, the Permit, the Commission’s findings in support of the Permit, or the LCP. We thus presume the Katzes use the term to refer to any remodel that does not qualify as a “major remodel.”

required and the fact that they were violated. The fact is that each condition set forth the standard for its requirements to be triggered, and those standards were met, yet the Katzes did not comply with the permit condition requirements.

In addition, the Commission has found that the work at issue did qualify as a major remodel, which findings are, again, incorporated by reference here, and which, whatever “minor remodel” might mean, is presumably mutually exclusive of it being a minor remodel. The Commission incorporates by reference the analysis in the body of the staff report in which the Commission came to this conclusion. Thus, whether a “minor remodel” is a reification or a real status with legal significance – and assuming it is a real thing, whether it is violates the permit conditions, is lawful, or meets any of the other characterizations attributed to it in the SOD letter – is irrelevant. The work done here, as discussed both above and below, was both a major remodel and triggered the permit conditions requirements.

6. *Whether the Permit conditions were triggered was to be judged based on “the 50% threshold that governs in determining a ‘major remodel,’ as defined by the City of Laguna Beach (‘City’) certified LCP.” (SOD letter at 1.) The subject condition “only foreclosed a major remodel.” (SOD letter at 14.) Similarly, the Commission’s findings “explained precisely what constitutes ‘new development’ for purposes of Special Condition No. 2,” and in doing so, the record “could not be clearer: Only a ‘major remodel,’ requiring the calculation mandated by the LCP” would trigger forfeiture of the seawall approval. The “question of whether a ‘major remodel’ has occurred . . . is the most relevant and dispositive question.” (SOD letter at 4-5, 12-13, and 17.)*

Whether the requirements of Special Condition No. 2 and Special Condition No. 6 of the Permit were triggered did not turn on whether a major remodel occurred or the work at issue exceeded a 50 percent threshold.

The Katzes argue that the sole basis for determining whether the Permit conditions were triggered is whether the work constituted a “major remodel,” as determined based on whether 50 percent of the pre-existing structure was demolished. The Commission disagrees. The house was redeveloped in a manner as to constitute new development, and therefore the requirements of Special Condition No. 2, requiring removal of the seawall, apply. The standard for triggering this condition is not whether or not there was a major remodel, although here, that standard also was satisfied. Special Condition No. 6 applies even more broadly, to any development occurring after the Permit was approved, so it too applies.

As a preliminary matter, all of the Katzes’ arguments in this regard are based on discussions of Special Condition No. 2 that they selected from the Commission’s findings in support of the Permit and from the initial hearing on the appeal, but the quote above makes claims about the trigger for “the Permit conditions” (plural). The Commission found that the work at issue also violated Special Condition 6, which uses distinct language from Special Condition No. 2 (referring to “future development” as a trigger, regardless of whether it qualifies as redevelopment or new development, and never using the phrase “major remodel”). Moreover, the Katzes point to nothing in the findings or the discussion at the hearing addressing Special

Condition No. 6 at all.⁴⁸ Thus, this argument is, at best, only relevant to the question of whether the requirements of Special Condition No. 2 were triggered, and therefore, the remainder of this response (up to the last paragraph) focuses solely on Special Condition No. 2.

Special Condition 2

Special Condition No. 2 never uses the words “major remodel” either, and this term is clearly not the sole trigger for this Condition to apply, as discussed below. Instead, it explains that the authorization for the seawall expires when the house is **“redeveloped in a manner that constitutes new development.”** Nor does Special Condition No. 2 refer to any “50% threshold” or standard. And the Katzes point to nothing within Special Condition 2, the findings, or the hearing discussion indicating that LCP definitions were intended to be used to interpret the conditions of the Permit. Had the Commission intended to limit the standard of measurement of Special Condition No. 2 to the exclusive question of whether a major remodel occurred, they would have at least mentioned the term.

At the bottom of page 5 of the SOD letter, and again at 13, the Katzes quote two excerpts from the Commission’s findings (specifically from pages 17 and 18 of those findings) to argue that the findings effectively redefine the key terms in the special condition, so that “major remodel” becomes the standard. But the Special Condition does not use this term, and findings do not and cannot alter the meaning of permit conditions. In addition, the second of the two quotes that the Katzes pull from the Commission’s findings is particularly telling, in that it discusses the termination of the seawall authorization by reference to three LUP “Actions” or “Policies” (7.3.9, 7.3.10, and 7.3.12). 7.3.9 *refers to* major remodels, but merely as one item in a list that also includes “new development” and “additions.” 7.3.10 refers to improvements that increase the size or degree of non-conformity, including, *but not limited to*, major remodels. And 7.3.12 refers to “the economic life of the structure (75 years).” Each of these authorities uses a different standard. And none of these statements states, or even implies, that any of these references to other standards is intended as an exhaustive list. These were simply examples of things that would trigger the condition.

The Katzes then quote Commission staff statements from the substantial issue hearing, months before the Commission adopted the relevant conditions,⁴⁹ arguing that these statements show that the Special Conditions were meant to refer to the 50% major remodel standard. As the Katzes note, at the hearing, Commission Vice-Chair Zimmer asked: “Let’s say going forward a subsequent purchaser wants to initiate some remodeling again, would they be starting from scratch with regard to the 50 percent cumulative totals?” Deputy Director Sherilyn Sarb replied that “from this point forward, then a 50 percent, you know, threshold, would have to be determined in order to be considered new development.” It is clear that Vice-Chair Zimmer

⁴⁸ The Commission also found that the work was unpermitted generally, which is unrelated to the triggering of any permit conditions.

⁴⁹ The Katzes criticize Commission staff for citing the findings from that June, 2015 hearing, arguing that because that hearing only resolved the question of whether the appeal raised a substantial issue, the “Commission itself made no findings per se. This was Staff’s explanation as its view why the appeal filed raised a substantial issue.” SOD letter at 18 (emphasis in original). However, this was not merely staff’s explanation, as the Commission adopted the staff recommendation on the substantial issue question, thus adopting the proposed findings as well (*cf.* 14 C.C.R. 13092 & 13096(b)), and the mere fact that the *de novo* portion of the hearing did not occur at that time in no way lessens the degree to which the findings the Commission adopted at that time reflect the Commission’s position. Conversely, the Katzes seem to have no problem relying on the discussion at that hearing about condition language that truly was not adopted at that hearing.

asked a specific question in regard to when the 50% measurement would begin and whether it would be calculated cumulatively. Deputy Director Sarb answered that specific question, without foreclosing the possibility that redevelopment in a manner that constitutes new development (the key concept based on the language of the condition) could be determined in other ways. Deputy Director Sarb simply explained how one particular standard worked in response to a question about it, and any other response would not have answered the question.⁵⁰

Thus, whether the work constituted a “major remodel” was not the standard for determining whether the requirements of Special Condition No. 2 were triggered (much less for the other violations identified). And even if the status of the work as a “major remodel” were to be at issue, there would be no basis to rely on the definition in the LBMC, which was not only uncertified, but which City staff had been specifically told was unacceptable to the Commission. As such, whether the work performed “did not remotely come close to the criteria in the LCP and the City’s Municipal Code as to what constitutes a major remodel” (as the Katzes claim in the SOD letter at 14) is totally irrelevant.

Finally, the Commission finds it worth re-iterating that, even if the above analysis were not convincing, and one were to have continuing questions as to the exact nature of the standard(s) at issue, that would be a reason for the Katzes to have consulted with the Commission to seek clarification, not an invitation for them to work with the City to obtain clearance while intentionally avoiding consulting with the CCC about the permit they had issued, and to build the project without the Commission becoming aware of it.

And of course, all of the above analysis is essentially irrelevant, because even if the trigger for Special Condition No. 2 were to be whether a major remodel had occurred, as described above, the Commission found that one had occurred.

Special Condition 6

In addition, as indicated at the beginning of this section, the Katzes’ argument here implies that Special Condition No. 2 is the only relevant condition, and the SOD in general largely ignores Special Condition No. 6, except to argue that it must be read in conjunction with Special Condition No. 2. However, Special Condition No. 6 explains that “future development” or “redevelopment... shall not rely on the permitted seawall.” Special Condition No. 6 is very clear that the seawall cannot be used to protect any development other than what existed at the site at the time of the Permit (in 2015). However, extensive additional development, as defined in the Coastal Act and LCP, occurred here in 2016 and 2017, creating what is effectively an entirely new house, significant parts of which are now relying on the seawall for protection.

On pages 19 to 20 of the SOD letter, the Katzes make a conclusory statement that the same “major remodel” standard applies to Special Condition 6, as well, even while they acknowledge that it uses different language. The Katzes summarize that language as “non-exempt future development or redevelopment,” but they then quickly add the words “*i.e.*, a major remodel,” as if the two are synonymous. The Katzes attempt to re-write Special Condition No. 6; however, there is no basis for this. Nothing in Special Condition No. 6 limits “future development” or “redevelopment” to major remodels, and had the Commission intended that, it would have at

⁵⁰ Moreover, even if Deputy Director Sarb’s thinking were that the condition(s) should be narrowed such that the sole issue were whether a major remodel occurred, which doesn’t seem to be the case, and/or that she was doing so, she would not have had the power to alter the condition language through her comments, without formally requesting the Commission make revisions to that condition language.

least mentioned the words “major remodel.” The Katzes themselves cite to multiple examples of non-exempt new development that the Commission determined did not qualify as major remodels (*see, e.g.*, pages 16-17 of the SOD letter). Special Condition 6 uses different language from Special Condition 2 and thereby created a different standard.

Conclusion

Even if Special Condition 2 were the only relevant condition, which it is not, and even if it were true that the only possible trigger for Special Condition 2 were the existence of a major remodel, which it is not, and even if it were appropriate to judge that based on the LCP definition, or even the uncertified LBMC definition, which it is not, as is explained in the body of the staff report, a major remodel still would have occurred here. Thus, this point, even if true, would not raise any doubt as to the Commission’s ability to issue the subject orders. This point makes even less sense as applied to Special Condition 6, and it is wholly irrelevant to the general unpermitted development at issue.

Finally, it does not constitute a “forfeiture” for an agency that granted a temporary authorization, expressly conditioned on factors that would trigger the expiration of that temporary authorization, to recognize that those factors had arisen and to enforce the termination of the authorization.

7. *Written findings “are a fundamental legal requirement.” The findings here referring to a “major remodel” as a relevant threshold “inform the applicant and any subsequent purchaser as to what the Commission intended [in Special Condition No. 2].”* (SOD letter at 12 and 13.)

While it is true that findings are required and provide clarity on the meaning of ambiguous conditions, the first and foremost indicator of what the Commission intended in imposing a permit condition in any case is not its findings, but the language of the condition itself. As is explained above, the Permit’s Special Conditions never use the words “major remodel.” Instead, Special Condition No. 2 explains that the authorization for the seawall expires when the house is “redeveloped in a manner that constitutes new development.” Thus, even if the findings indicate that a major remodel would constitute redevelopment in a manner that constitutes new development, and thus would be a trigger for the condition, they cannot supplant the language of the condition and make that the *only* trigger.

In addition, as noted above, even if the sole trigger for Special Condition No. 2 were whether a major remodel had occurred, the Commission has found that the work here was a major remodel, so that this permit condition would still be in effect.

8. *“The ‘demolition, removal, replacement and/or reconstruction’ [language in the LUP definition of ‘major remodel’] all relate to demolition.”* (SOD letter at 19.)

In an attempt to reduce the amount of unpermitted development they use to calculate whether or not a major remodel has occurred, the Katzes appear to be arguing that the part of the LUP definition of “major remodel” that says that the phrase includes the “demolition, removal, replacement and/or reconstruction of 50% or more of the existing structure” can be reduced to only looking at the term “demolition,” as all four terms somehow “relate to demolition.” Quite the opposite is true. Rules of statutory construction require that all words be given meaning.

The reason a list of terms like this exists is to enlarge the coverage beyond that which would be covered if only one term were used. The word “reconstruction,” in particular, must be given a meaning that goes beyond removal and replacement. It must be intended to apply to situations exactly like the one at issue in this case, where certain framing elements are not removed or replaced, but they are reinforced or fortified by sistering new framing around them and the structure as a whole is reengineered and supported with a new set of framing. And again, this is beside the point given that a major remodel did occur here.

9. *The Commission did not intend to “approve a costly and substantial seawall, only to let the older existing structure protected to rot away.”* (SOD letter at 14.)

In fact, the Commission’s intent clearly *was* to phase out the non-conforming existing structure. The Commission’s findings states:

Due to the age of many of the bluff top and beachfront structures in Laguna Beach, including the subject property, applications for redevelopment . . . are reasonably foreseeable and illustrate the importance of regulating shoreline armoring in a manner that ties the authorization period to the existing structure it is designed to protect. In this way the authorization period mirrors the language in LUE Action 7.3.9 . . . [which] does not support the continued existence of the shoreline protection if no longer necessary.

Findings at 28.

The staff report clearly explained that if the authorization were not limited to the useful life of the existing structure, but could instead be used to protect new development, it would be “perpetuating an unending reconstruction/ redevelopment loop that prevents proper siting and design of new development, as required by [the Laguna Beach Local Coastal Plan policies] and the public access and recreation policies of the Coastal Act.” *Id.* Moreover, the staff report also stated that:

there are several coastal resource benefits that would result from the removal of shoreline armoring after the authorization period including, but not limited to, restoration of the bluff’s natural visual integrity, removing the seawall’s physical impediments to access, allowing the bluff material trapped behind a seawall to return to the littoral cell and potentially restoring marine habitat within the intertidal zone (if the seawall is sited or will be sited in the intertidal zone with rising sea levels).

Id.

This is also consistent with the general approach of phasing out legal nonconforming uses and structures over time. *See, e.g., City of Los Angeles v. Gage* (1954), 127 Cal. App. 2d 442, 459; *Hansen Bros. Enter., Inc. v. Bd. of Supervisors*, 12 Cal. 4th 533, 552.

10. *The Katzes “were at all times mindful of the condition” and “made certain, through meetings and repeated inspections . . . , that the work done . . . did not rise to the level of a ‘major remodel.’”* (SOD letter at 14.)

The claim that the Katzes were “mindful” of the relevant Permit conditions is not directly relevant to the Commission’s authority to issue the proposed orders, though it does show that their actions were knowing and intentional. The claim that they had meetings to ensure that the

work would not “rise to the level of a ‘major remodel’” is not relevant either, both because it does not change the reality of whether the work did rise to that level, and because, for all the reasons stated above, whether the work constituted a “major remodel” was not the dispositive factor. And finally, even if it were, the work more than constituted a major remodel.

However, the fact that the Katzes were so acutely attuned to this issue, and allegedly expending significant resources to address it, does highlight an important point. Specifically, if they were so concerned about compliance with this condition, it raises the question as to why they never once mentioned the issue to the regulatory body that created the standard they were allegedly trying to stay within (the Commission), and why they never invited any Commission staff to participate in any of these meetings. The answer may well lie in the statement of James Conrad that the Katzes wanted to avoid dealing with the Commission. (*See* Exhibit 6.) However, that is not an excuse. This argument actually highlights the extent of the Katzes’ evasion of Coastal Act concerns by conceding that they were keenly aware of the issue and yet avoided involving the Commission.

11. *The “Commission consistently has applied a bright-line 50% criteria” to determine whether work performed extends the degree of nonconformity or constitutes a major remodel. This criteria “is objective and equitable – something that can readily be applied by city and Coastal Commission planners and applicants developers.” (SOD letter at 14.)*

In fact, the 50% criteria has been applied in a nuanced and site specific manner, and the more significant question is to what the 50% applies, and the question of whether something increases the degree of non-conformity is separate from the question of whether something has been altered by 50%. For example, in the Substantial Issue findings, it was explained that fortifying the house would increase the degree of non-conformity. This is because a non-conforming house that is fortified to last longer in place is now even more non-conforming. This is a related but separate standard from the 50% threshold measurement.

Moreover, the LUP definition that incorporates the 50 percent standard refers to 50 percent or more “of the existing structure.” The Katzes’ approach to quantifying a structure would ignore virtually every aspect of the structure other than the perimeter rough framing. Even the uncertified definition in the LBMC includes cladding as relevant to the calculation, yet the Katzes’ approach would ignore the cladding. Clearly a more meaningful analysis would include the other major construction components. Under any reasonable definition, the work that occurred here exceeded 50 percent of the structure.

12. *The “demolition of the exterior elevations amounted to 9.8% of the total, while demolition of the floor and roof totaled 3.5% -- both far below the 50% threshold set forth in the LCP.” (SOD letter at 14; see also SOD letter at 1.) The work performed “did not remotely come close to the criteria in the LCP and the City’s Municipal Code as to what constitutes a major remodel,” and the “basic structural elements of the house did not materially change.” (SOD letter at 14.)*

As discussed above a below, the work done here clearly constituted a major remodel and far exceeded the percentage figures cited by the Katzes. The percentages cited are mystifyingly low, and appear to have been derived by: (1) only taking into account the perimeter walls and not the

rest of the structure, and even of that (2) only considering the framing of those walls and not the cladding and other elements, and even of that (3) only counting framing that was entirely removed and not the framing that was rendered functionless by the new framing that was sistered to the old wood in the places that it was retained. As the Katzes' attorney confirmed, their approach was that "if the framing remains, that portion of the wall, etc., is not being demolished." (Exhibit 34.) The first two limitations find no basis in the LCP, and the third is directly contrary to the LCP definition of "major remodel," which states that one is to consider not only demolition, but also reconstruction, replacement, and removal. As for limiting the analysis to the demolition of framing, even the City's uncertified code, though not relevant here, directs the calculation to be performed considering reconstruction and alteration, and includes the cladding among the items to be measured.

Moreover, based on the plans submitted with these figures on them, it appears that the numbers were generated from an assessment of the demolition of "elevations," which show the exterior of the planned structure from a given side. However, if the approach was to consider the wall as not being demolished as long as the framing remains, that means the 9.8 percent and 3.5 percent figures were generated by treating those "exterior elevations" as being nothing more than the studs hidden behind the siding. That is not what elevations are. In fact, elevations (as shown on plans) do not even show the studs.

In reality, the work performed here involved the reconstruction of the entire house and the demolition of far more than 9.8 percent of the total exterior elevations and far more than 3.5 percent of the floor and roof totaled. This is clear from the memo provided by Enforcement Supervisor Pat Veasart (Exhibit 7), the conclusions of which this Commission adopts and incorporates by reference, or even from a cursory review of the photographs.

Nor are the "criteria in the LCP and the [LBMC] as to what constitutes a major remodel" relevant, for the reasons stated above. However, even if those standards were relevant, as indicated throughout the staff report, the work performed actually far exceeded those standards.

Finally, the basic structural elements of the house *did* materially change. In fact, as indicated in the Veasart memo (Exhibit 7), the house was entirely re-engineered.

13. *In January, 2017, City officials visited and inspected the property and "found that less than 50% of the exterior wall framing or floors and roof systems had been demolished and did not [sic] constitute a 'major remodel.'"* (SOD letter at 7.)

Actually, the City Building Official found just the opposite to be the case. When asked about the project, City Building Official Dennis Bogle described it as follows:

. . . the project is a 100 percent remodel and addition which is why we required them to install fire sprinklers. Every area inside and outside the house has been rebuilt. The exterior decks have been rebuilt and exterior yards are also being developed . . .

(Exhibit 9 at 4.) It was only after he provided that assessment that City Zoning Administrator Csira (who, by that time, was precluded from working on this project by official City policy, in order to avoid the appearance of a conflict of interest) countermanded his evaluation. However, even Ms. Csira conceded that the Commission, the body that had issued the Permit, with condition language creating the relevant standard here, did not agree with the City's approach to

assessing what constitutes a “major remodel.” Her message, sent to City Building Official Dennis Bogle and Community Development Director Greg Pfost, stated:

. . . the home was not demolished more than 50% per the current major remodel definition (not approved by CCC). Furthermore, not more than 50% of the nonconforming portion of the structure was demolished or rebuilt (approved by CCC). The only additional concern is that when the CCC looks at properties on appeal, they include interior demolition. This scenario is not codified per LBMC. Jomo, Ann and I met with the CCC about defining a Coastal Major Remodel and staff argued that interior demolition should not be included. This effort stopped a couple years ago.

Thus even after the City reversed itself (based at least in part on the opinions of a person who was supposed to be recused from the project)⁵¹ and stated that the project involved less than 50% demolition, it did so acknowledging that that was using a standard that the Commission, the entity that issued the permit in question, had rejected. This conclusion by the city is therefore legally irrelevant to determining whether the standard in the Permit had been satisfied.

These facts also demonstrate that the City was aware that: (1) very significant work had occurred, making the project appear to be a 100% remodel, (2) their later determination that this project did not constitute a major remodel was based on a standard that had not been approved by the entity that imposed the permit condition establishing the standard at issue, (3) in addressing the site subject to the Commission-issued permit, the City and Katzes did not consult the Commission or seek Coastal Act authorization, and moreover, used a standard that was not approved by the Commission, and (4) the City was aware of this for multiple years. Nevertheless, they proceeded to issue a letter on January 26, 2017, indicating that the project was not a major remodel, and without acknowledging the Commission’s different approach in calculating major remodels, which would apply to the permit condition at issue in this case, given it was a Commission-issued permit.

But even if the City’s determination had been a valid assessment of a “major remodel” for Coastal Commission purposes, it would still not have been dispositive of the relevant issues here, as the existence of a “major remodel” was not the only trigger for Special Condition No. 2 or No. 6.

First, as described above, the special conditions apply whether or not a major remodel has occurred here. Moreover, even if major remodel were the only trigger for the conditions to apply, a major remodel has in fact occurred, no matter how it is measured. Even if only the replacement of exterior framing is counted, which is apparently how the Katzes reached such very low demolition and replacement numbers, the new framing added inside the old framing effectively replaced the original framing and supplanted its functions with the new framing, which therefore means that the number should be close to 100%.

14. The Commission’s position is that LUP Policy 7.3.10 “trumps the specific findings that the Commission made with respect to Special Condition 2 . . . – findings that

⁵¹ As discussed more fully above in the staff report, City policy was to have Ms. Csira not work on this project due to concerns about the appearance of a conflict of interest.

made absolutely no specific reference at all to LUP Policy 7.3.10. (SOD letter at 15, emphasis in original.)

The above quote is wrong on both counts. The Commission's position is not that the cited policy trumps the condition language or the findings, and the Commission findings do specifically reference the stated policy. On the latter point, as the SOD letter itself notes (at page 5), the Commission's findings stated that if the house that existed in 2015 were to undergo a "major remodel or is demolished, per Actions 7.3.9, 7.3.10, and 7.3.12 of the City's [LUP] and Special Condition 2 the seawall will no longer be authorized and must be removed from the site." (Findings at 18, emphasis added.) Thus, the Commission's findings do explain that the cited LUP policy was relevant to the standard established by the condition language.

However, the Commission's reference to that policy does not elevate the policy over the Commission's findings. It explains how the policy is relevant. The Commission's findings cite to that policy, and thus, they must be read together, along with the Commission's other findings. As is explained elsewhere, nothing in those findings says that a major remodel is the sole trigger for Special Condition 2. In fact, the quote immediately above demonstrates this.

More importantly, the Katzes would have *their interpretation* of the Commission's findings trump the actual condition *language*, which is clearly erroneous. The condition language is the starting point for any analysis, and neither of the conditions at issue refers to the idea of a "major remodel" at all. The key terms in the two relevant conditions are redevelopment, new development, and future development.

15. *The Commission's position would also "rewrite LUP Policy 7.3.10," as the true "threshold, or dividing line, for whether there is an increase in the degree of nonconformity is whether the development constitutes a 'major remodel.'" (SOD letter at 15, 16, and 17.)*

The Katzes assertion that the key to determining whether there has been an increase in the degree of nonconformity is whether the development constitutes a "major remodel" is unsubstantiated and wrong. It is simply another example of their exclusive focus on the question of whether the work constitutes a "major remodel," when, as noted above, this is simply not the trigger for the special conditions to apply, and further, even if it does apply, this was clearly a major remodel. Their misplaced preoccupation with the concept of a major remodel is on clear display in the above quote.

Moreover, it is demonstrably absurd to say that Policy 7.3.10's reference to increasing the degree of nonconformity is reducible to the idea of whether a major remodel has occurred, given the actual language of the policy. The very language of 7.3.10 makes that clear and states:

improvements that increase the size or degree of nonconformity, including but not limited to development that is classified as a major remodel . . . , shall constitute new development and cause the pre-existing nonconforming oceanfront...structure to be brought into conformity with the LCP.

The Commission's position does not rewrite Policy 7.3.10. It recognizes that the plain language of that provision indicates that there are other ways that nonconformity can be increased. It further recognizes that the provision is designed to implement the goal of phasing out nonconforming uses, and that necessarily means not extending their useful lives. The

Commission’s findings (at 28) made it clear that this was a critical issue. Thus, the fact that those findings did not use the specific word “fortification” (as the SOD stresses at page 17) is irrelevant.

The Relationship of this Action to Other Commission Actions

16. *The subject work is not unusual and is “no different than many minor remodels previously approved by the City, including other remodels currently underway in Laguna. Further, just in July 2017, . . . the Commission rejected appeals of local coastal exemptions issued by the City of Los Angeles for extensive repair and maintenance activities refurbishing five residential buildings in Venice.”* (SOD letter at 14, emphasis in original; see also SOD letter at 16, citing additional examples.)

The work at issue in this case is entirely distinguishable from the four cases that the Katzes cite. The first case they cite is CDP No. 5-15-0751 (Foxdale Properties), which they quote for the proposition that the 50% demolition threshold is a consistent and equitable method of dealing with non-conformities. However, the full quote from the case explains that “the 50% demolition threshold provides *one*” method of measurement (emphasis added). Commission staff in Foxdale therefore acknowledged that they were using but one of many potential methods of measurement.

The Katzes also cite this Commission’s action on CDP amendment 5-84-329-A1 (Garg and Shah), a case where there the Commission found that there was no major remodel because there was “not more than 50% alteration to major structural components such as the foundation, floor, and roof structure.” However, here, Commission staff noted that the applicant was only proposing to “re-tile” the roof, and that “no structural elements of the roof will be replaced.” This was not the case at 11 Lagunita, where the Katzes replaced all the plywood sheeting, added new framing that effectively replaced the old remaining framing and sistered much of the old framing with new beams and joists, and also replaced the roof exterior.

The Katzes also cite appeal number A-5-LGB-16-0098 (Kinstler) for a proposition that only hurts the Katzes’ case. In Kinstler, Commission staff explained that, for minor remodels, existing non-conformities “can be considered for retention.” However, this is not helpful to the Katzes because obviously, the Katzes never contacted the Commission to request the retention of their non-conforming structure. It is clear that Commission staff in Kinstler intended applicants to apply for CDPs to retain non-conformities, and that Commission staff could still consider whether to allow it. Thus, the Katzes are essentially admitting that the Commission could require the removal of non-conforming parts of the structure even if only a minor remodel occurred. Further, even the City, which erroneously issued an exemption, did not consider whether or not the Katzes could retain the non-conforming parts of the structure.

Finally, the Katzes cite recent appeal number A-5-LGB-18-0009 (Matthews) for the proposition that the work qualified as a minor remodel because it fell just under the 50% criteria. While this is true, this does not change the facts here, where virtually 100% of the house was reconstructed. In Matthews, the Commission also noted that “the existing residence will not be substantially modified in such a way that would compromise the structural integrity of the structure.” However, at 11 Lagunita, the structure was demolished to such an extent that it had to be held

together with new wooden beams, new steel beams, sistered wood beams and new joists, all of which kept the structural integrity together.

17. *The Commission's recent action on the San Clemente LUP shows that when the Commission uses the term "redeveloped" it means "major remodel."* (SOD letter at 19.)

The Katzes argument that the Commission's action on an entirely separate LCP for a different city should be used to inform the meaning of a word in a permit condition in another jurisdiction is without basis or merit.

The permit condition at issue in the instant case was drafted by Commission staff and adopted by the Commission. Nothing in that condition or the findings supporting it indicate that the City's LUP definitions should be used to interpret that condition. Moreover, even if the LCP definitions did control, it would be the City of Laguna Beach LCP's definitions, not the definitions from another city's LCP. Every LCP is different. In fact, the San Clemente LCP language that the Katzes quote specifically says "As used in this LUP, the term 'redevelopment' shall be interchangeable with the term 'major remodel.'" There is no such analogous language in the Laguna Beach LCP. If the Commission felt it necessary to specify this in the San Clemente LUP, but it didn't do so in the Laguna Beach LUP, the implication is that the same is not true in both cases.

Staff's Investigation and Prosecution was Fair and Adequate

18. *Staff performed no calculations.* (SOD letter at 1 and 8.)

First of all, it should be noted that compliance with CDP conditions is a requirement that falls on the permittee, not the Commission. If the Katzes had gone through the permit process for their extensive remodeling, as they should have, they would have had to submit plans with evaluations and calculations made, prior to any work being undertaken. The Commission would then have been able to evaluate those figures. This is precisely how the Coastal Act permit process is intended to implement the policies protecting the coast. Instead, here, the Katzes did everything they could to evade just such a process and prevent just such an analysis to be made in a thorough manner, before any work had begun. This is not a defense to the issuance of this Order and Administrative Penalty.

Staff reviewed photographs that made it perfectly clear that the entire house had been remodeled. Any calculations done by Commission staff at this point would be to determine what fraction of a percentage of the house was *not* reconstructed. Staff also analyzed the Special Conditions and whether or not the activities on the ground triggered their application. Given the nature of what was done, the legal application of the conditions was clear, and calculations as to the specific percentage of the original structure that was affected by the subject work were unnecessary.⁵²

⁵² It is also notably ironic that the Katzes would complain about the lack of detailed analysis of work done by Commission staff, since the Katzes did not give the Commission notice of the work being done, provide plans in advance for approval or discussion, nor did they provide complete or accurate information about what was done after the fact. It fell instead to various Laguna residents, Commission staff, and others to piece together what was done, relying in part on photos which clearly show the overwhelming nature of the demolition and new construction.

The LCP clearly defines a major remodel as “demolition, removal, replacement and/or reconstruction of 50% or more of the existing structure.” As is explained in the sections above, by any reasonable measure, more than 50% of the structure has been demolished, removed, replaced, or reconstructed. The only thing left was some of the original framing, which was effectively replaced and superceded by new framing placed inside it. Therefore, close to 100% of the structure was replaced and reconstructed.

Second, even assuming that the Katzes had requested a particular type of calculation, which they have not, they did not provide any statistics regarding removal, replacement, alteration, or reconstruction, other than their artificially low demolition statistics. In fact, the Katzes actively resisted making such data available. While plans provided to the Commission for the 2014 proposed remodel included demolition and other calculations, the plans provided with the SOD provide nothing of the sort.

Moreover, again, this “defense” assumes that the 50 percent standard was the relevant standard, even though the Special Conditions never mention it.

Given the different ways of measuring the 50% major remodel that are specified in the LCP, it appears that the Katzes’s calculations only include one of the elements of development, demolition; and only include demolition insofar as it affects one part of the house, the exterior framing.⁵³ However, even if the Commission were to use the measurement methods used by the Katzes, and only measure the amount of exterior framing affected by the development, it is clear that virtually all of the original framing has been effectively replaced by new framing placed inside of it. Therefore, the Commission would still reach a number that close to or 100% of the house is remodeled.

19. *Staff “performed no real investigation,” in that they did not contact the owners or their representatives to conduct a site visit, performed no site visit or inspection, and did not review City documents. (SOD letter at 2, 8, and 20.)*

Again, the legal relevance of these assertions isn’t clear and they do not constitute a defense to these actions, but moreover, this simply is not true. With respect to asking for a site visit, staff did make such a request twice⁵⁴, and the Katzes never responded to those written requests. They instead told the Commission to wait for them to hire a lawyer, who also never responded to the written request. With respect to performing a site visit, staff did that as well, to the extent possible from public lands, and it was more than adequate to confirm the extent of the work. Because virtually all of the house was demolished, it was possible to literally see right through the walls to the interior and through to the other side, as is evidenced by the photos.

In addition, staff also reviewed the documents the City has on file, and found that staff had already possessed all of the relevant documents. Finally, staff did visit the site with the Katzes’ attorney, and again, this did not change any of the conclusions from staff’s initial investigations.

⁵³ The Katzes’s measurements appear to be based on a strained and narrow interpretation of the City’s uncertified code, which is already much narrower than that used by the Commission in these Conditions. But it should be noted that even in that uncertified code, the definition includes situations where the framing systems are only “altered,” and here, close to 100% of the framing was altered.

⁵⁴ See Exhibits 6 and 19.

20. *The violation allegation is “based on photographs by a disgruntled neighbor.”* (SOD letter at 2.)

This is not relevant as a defense, in that it does not contest the elements necessary for the Commission’s issuance of a Cease and Desist Order under Section 30810 or a penalty under Section 30821, but it is also not true. Staff reviewed multiple sets of photographs, taken from several vantage points, including from staff visits to the publicly accessible beach in front of the house. In addition, staff obtained photographs taken by City staff of the interior of the house. All of the photographs clearly show new demolition, development, redevelopment, and a major remodel. The demolition and reconstruction of the house is readily apparent in all of the photos, none of which could not be mistaken for mere repair and maintenance. Moreover, as indicated above, staff also visited the site in person, on multiple occasions, viewing the project from both publicly accessible beach areas and from within during a guided tour.

21. *Commission staff was nonresponsive and exhibited “extraordinary inaction and delays”* (SOD letter at 10.)

Regarding the claim of “extraordinary inaction and delays by Staff,” as an initial matter, the Commission notes that this is not actually a defense in that it does not contest the elements necessary for the Commission’s issuance of a Cease and Desist Order under Section 30810 or a penalty under Section 30821. However, it is also a gross mischaracterization. As the Katzes’ own recitation of the facts indicates, Commission staff first learned of this matter in January 2017 and began investigating the violation after that. After Commission staff was able to review all of the materials and research the permit history and the LCP, and after talking with City staff, Commission staff issued a formal Notice of Violation letter on April 17, 2017.

As shown above, the Katzes argue that Commission staff did not fully investigate this case, but then also argue that Commission staff unduly delayed. It therefore appears that Commission staff is caught in a catch-22, where if any time is spent to investigate the case, the Katzes claim delay; but if immediate action is taken, Commission staff is accused of failing to fully investigate the matter. Moreover, the record shows that, far from delaying the matter, Commission staff put significant time and effort into attempting to investigate and resolve the matter expeditiously. After receiving further information on April 26, staff sent a follow-up letter on April 28. After receiving a response on May 12, staff hosted a meeting on June 8. Staff wrote further letters in October and November of 2017. The October letter indicated that the matter was being elevated for formal enforcement proceedings. The November letter indicated that because the Katzes refused to discuss any potential resolutions other than dropping the violation entirely and leaving all the unpermitted development in place without complying with the permit conditions, Commission staff was prepared to take formal unilateral action.

Mr. Kaufmann has stated that he sent an email asking Commission staff to meet in November of 2017, but that email was never received, as it was addressed incorrectly with a misspelling of Mr. Modellmog’s name, as is evident in SOD Exhibit 18. Moreover, it is irrelevant given that Commission staff had already met with Mr. Kaufmann, and given his refusal to discuss consensual resolutions both before and after the misspelled email. On October 30, 2017, Mr. Kaufmann explained that any alternative to the seawall is a “non-starter,” and that the Katzes would not consider it. Then, on January 29, 2017, Mr. Kaufmann reiterated his belief that no consensual resolution was possible. Several times since then, and as recently as in the last week,

Commission staff attempted to reach out to seek a consensual resolution of the violations, but the Katzes' position has thus remained unchanged regardless of the fact that no second meeting occurred.

This has been the consistent position of the Katzes's representatives despite a number of additional attempts by Commission staff to reach out and seek a resolution, even over the last few months and weeks. Therefore, whether or not Commission staff missed one communication is irrelevant given that the Katzes have never been willing to discuss consensual resolutions, were not willing to do so before, during, or after November of 2017, and are not willing to do so now.

After the November letter, the holidays ensued, and the Katzes filed suit in January of 2018, alleging that the Commission had unduly delayed bringing the case to a Commission hearing, even though the Katzes had never requested a hearing and filed suit in a month with no Commission hearing, so no hearing would have been possible. The suit was filed while staff was preparing a formal Notice of Intent, so preparation of the NOI was then temporarily put on hold to evaluate and address the litigation, in which the Katzes pursued time-consuming discovery, and the NOI was issued on April 16, 2018, just under a year after the initial Notice of Violation letter was sent.

The Relationship Between the City and the Commission and their Respective Authorities and Jurisdictions

22. *“Like other local governments with certified LCPs, the City, not the Commission, had the delegated responsibility under its LCP to make the determination that the work underway constitutes an exempt ‘minor remodel.’”* (SOD letter at 2; see also SOD letter at 6, 11, and 20.)

This assertion misstates the role of the Commission, ignores its appellate function, and, moreover, ignores the fact that the permit violated here, and subject to interpretation here, is one issued by the Commission, over which the Commission retains all its authorities to interpret and enforce. However as a courtesy, we provide a primer on the salient jurisdictional issues, but we emphasize that this case is actually governed by the Commission-issued permit.

It is true that, as a general matter, local governments with certified LCPs are responsible, pursuant to the authority delegated to them pursuant to the Coastal Act, for making an *initial* determination as to whether proposed development is exempt from the permit requirement of the Coastal Act and the LCP. The City of Laguna Beach's authority and responsibility in this respect is codified in the City's Municipal Code at section 25.07.012(A),⁵⁵ which states, in pertinent part, as follows:

At the time an application for development is submitted, the community development director or his/her designee shall determine . . . that the development project is one of the following

- (1) Within an area where the coastal commission continues to exercise original permit jurisdiction . . .;*
- (2) Appealable to the coastal commission a requires a coastal development permit;*

⁵⁵ This section of the LBMC is part of the City's certified LCP.

(3) *Nonappealable to the coastal commission a requires a coastal development permit;*

(4) *Categorically excluded or exempt and does not require a coastal development permit.*

It is not true, however, that the Commission has no role in that determination. In fact, in the location at issue here, the Commission has authority that can *supersede* that of the City. That is because, by law, exemption determinations such the one authorized by paragraph (4) of the above quote may be appealable to the Coastal Commission, based on the same factors that make permit decisions appealable. See PRC §§ 30625 (“any appealable action on a . . . claim of exemption for any development by a local government . . . may be appealed to the commission by [various parties, including commission members]”) and 30603(a) (a project’s location can render it appealable if it is: (1) between “the sea and the first public road paralleling the sea,” (2) “within 300 feet of the inland extent of any beach,” or (3) “within 300 feet of the top of the seaward face of any coastal bluff”);⁵⁶ see also LBMC § 25.07.006(A) (defining “appealable development” for purposes of the City’s implementation of the Coastal Act as the approval of any development project in those same areas); *City of Dana Point v. California Coastal Commission* (2013), 217 Cal.App.4th 170, 188 (the Coastal Act “grants the Commission administrative *appellate* jurisdiction to hear an *appeal* of a decision rendered by a local government that has *adjudicated* . . . a claim of exemption”); *Pratt v. Coastal Com’n* (2008) 162 Cal.App.4th 1068, 1075.

Thus, the statement quoted above, that “the City, not the Commission, had the delegated responsibility under its LCP to make the [exemption] determination,” is, at best, misleading. To the extent it is intended to suggest that the City’s determination is definitive, and that the Commission has no role, it is simply false. In addition, this exemption determination was challenged by a neighbor, which should have triggered the review process outlined in LBMC § 25.07.012(B). That LCP section requires that if a local government’s determination “is challenged by . . . an interested person, . . . the local government shall notify the commission . . . of the dispute/question and shall request the executive director’s opinion.”⁵⁷ Thus, the Executive Director should have had the final authority here, not the City.

In this case, to this day, the only evidence the Commission has seen of any official public notice of an exemption determination is the City Design Review Board (“DRB”) Notice of Public Hearing attached as Exhibit 17 to this staff report, and the City did not provide that document to the Commission until April 26, 2017, more than a week after Commission staff had initiated enforcement work and issued the NOV.⁵⁸

However, the absence of a specific procedure set out in the LCP does not in any way diminish the importance of the Commission role or call into question its authority. Indeed, the LCP for

⁵⁶ The project at issue meets all three criteria.

⁵⁷ Id. at §25.07.012(B)(2).

⁵⁸ The Commission was copied on a letter that the City sent to an attorney about the project at the end of January, 2017, in which the City opined that no coastal development permit was required for the work, but that letter was in response to a request from that attorney. It was not an official public notice as envisioned by LBMC section 25.07.012(A) or PRC section 30603(c) & (d). Moreover, even at that point, work at the site was far along, as the City had issued building permits for exterior remodel work as early as the previous summer (Exhibit 29), and for demolition work several months earlier than that (Exhibit 15), all without any exemption determination.

the neighboring city of Dana Point was equally silent. However, that fact gave the court no pause in ruling that the Commission had appellate jurisdiction. *City of Dana Point, supra*.

In addition, there were other determinations made here, apart from the exemption determination. The quote of the SOD letter at the beginning of this section not only claims that the City has the responsibility, “under its LCP,” for determining whether the subject work was exempt, but also whether it “constitutes a . . . ‘minor remodel’.” However, the SOD letter cites no authority for this proposition and this simply is inaccurate. The reality is that the LCP never even uses the phrase “minor remodel,” much less does it define it and assign responsibility to the City to make determinations as to whether any given work should be so labeled. Thus, it is not true that the City had any delegated authority, under its LCP other otherwise, to make a determination as to whether the work constituted a “minor remodel,” much less whether it did so for purposes of the language of a Commission permit condition

Nor is there anything in the Permit (or the staff report for the Permit) indicating that the City should have the authority to interpret the special conditions of the Permit. Enforcement is a separate function, and the Commission retains the ability to interpret its own permits, as is clearly stated in Standard Condition 3 of the Permit. As the Katzes are well aware, and even quoted in the SOD on page 10, the City of Laguna expressly acknowledged the Commission’s authority to enforce the Commission-issued Permit Special Conditions in an email dated November 28, 2017. Thus, while the City may have authority to make some initial permit determinations and to implementing its LCP, it does not have responsibility for implementing Commission permits. And while the Commission may be able to file appeals of exemption determinations, that is not required, especially not in cases where the LCP does not provide a process for it, much less is it the Commission’s exclusive remedy.

In sum, although the City clearly had a legitimate role in this matter, that role did not include interpreting the Commission’s permit, was not exclusive of the Commission’s appellate review authority, and did not preempt the Commission’ enforcement authority, particularly to interpret and enforce its own permit.

23. *The work was “completed pursuant to the City’s determination that the work constitutes an exempt ‘minor remodel’ prior to Staff’s initial April 17, 2017 enforcement letter.” (SOD letter at 1; see also SOD letter at 2.) The City Council found “that the work did not constitute a major remodel.” (SOD letter at 2.)*

As an initial matter, this claim is not relevant to the determinations before the Commission in this action. The only determinations that the Commission needs to make in order to issue a CDO here are (1) that development has occurred that was unpermitted or was inconsistent with an existing Commission permit, and (2) that the terms of the proposed order are ones the Commission determined necessary to ensure compliance with the Coastal Act. Those factors are independent of whether the work was completed pursuant to an erroneous City determination. The only determination that the Commission needs to make in order to impose a penalty is that the Katzes are in violation of the public access provisions of the Coastal Act.

That said, the quote above implies that the City made a determination that the work at issue would constitute a “minor remodel,” and that at some point after the City made that determination and before Commission staff issued the April 17, 2017 NOV, the work was completed in reliance on that determination. The evidence in the record demonstrates otherwise.

The first evidence of any City determination that the work constituted a minor remodel is in a letter from the City's Community Development Director Gregory Pfof on January 26, 2017 (Exhibit 18). At that point, the house had already been virtually demolished, and reconstruction had already begun. Thus, much of the work was already underway well before the City made that determination, so the work was not "completed pursuant to" any such determination, which didn't come until that date.

However, even assuming that the work was performed pursuant to that determination, that is irrelevant to question of whether the work was, in fact, exempt under the law, as described above.

To the extent this is intended as an estoppel argument, suggesting that the Katzes were entitled to rely on the City's determination and that the Commission is estopped from challenging it, the factors necessary to estop the Commission are not present here. The standard for estoppel against the Commission was articulated in the *Feduniak* case. It began with the following quotation:

Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be [sic] acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.

Feduniak v. California Coastal Commission (2007), 148 Cal.App.4th 1346, 1359 (citations omitted). The case goes on to clarify that "'where even one of the requisite elements for estoppel is missing, it does not apply.'" *Id.* at 1360.

Here, the Commission was not apprised of the City's determination. In fact, quite the opposite is true, as the project architect (Jim Conrad) indicated that, at his clients' request he had intentionally avoided involving the Commission. (Exhibit 6.) As the *Feduniak* case explains, the Commission is under no duty to continually inspect all properties. *Id.* at 1363. And the fact that the LCP requires the City to keep a record of exemptions does not require the Commission to repeatedly ask for that list. For all of those reasons, and because the record is otherwise devoid of evidence to the contrary, it is clear that the Commission did not intend for its silence on this issue to be relied upon. Thus, neither of the first two criteria for estoppel are satisfied here.

The third criterion for estoppel is that the party asserting the estoppel must be ignorant of the true state of facts. The Katzes argue that they had a good faith belief that the work was exempt and did not trigger the relevant permit condition, but as indicated above, that was largely as a result of their intentional exclusion of the Commission from the process, and thus, their willful ignorance. Nor is there any evidence that the Katzes relied upon the Commission's silence. Rather, the Katzes manufactured that silence by keeping the Commission in the dark. In addition, the fact that most of the work occurred prior to the City's determination shows that the Katzes did not rely on the Commission's silence.

Finally, the *Feduniak* case explained that, in order to estop the Commission, it must be the case that doing so "would not nullify a strong rule of policy adopted for the public's benefit and (2) the injustice to the [party asserting the estoppel] without estoppel outweighs, and therefore justifies, any effect upon public interest or policy that results from estopping enforcement of the

Commission's orders." *Id.* at 1372. That case, as well as others, have stressed the important public policy advanced by enforcement of the Coastal Act. *See, e.g., id.* at 1375-77.

In sum, it is not true that the work was conducted "pursuant to" any City determination. Even if that were true, it would be irrelevant. And to the extent this claim is intended as an estoppel argument, the factors necessary to support an estoppel are not present here.

24. *The Commission "would be barred in any event by the doctrine of res judicata from, in essence, collaterally attacking [the City's] determination."* (SOD letter at 2; see also SOD letter at 15.)

Clearly, the Commission taking action here is not barred by the doctrine of *res judicata*. The doctrine of *res judicata* rests upon the ground that the party to be affected has litigated, or had an opportunity to litigate, the same matter in a former action and, as a result, should not be permitted to litigate it again to the harassment and vexation of his opponent. *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association* (1989) 60 Cal. App.4th 1053, 1065. The doctrine applies when 1) the issues decided in the prior adjudication are identical with those presented in the later action, 2) there was a final judgment on the merits in the prior action, and 3) the party against whom the plea is raised was a party or in privity with a party to the prior adjudication. *Id.* Even if these threshold requirements are established, *res judicata* will not be applied if injustice would result or if the public interest requires that relitigation not be foreclosed. *Id.*

Here, the Katzes argue that the City's determination is final and bars the Commission from proceeding with this action. However, none of the three factors listed above applies here, so the doctrine of *res judicata* is inapplicable.

First, there is no identity of issues here, because the City's determination did not address consistency with the Permit or the applicability of Special Conditions 2 or 6, each of which is central to the Commission's ruling here.

As for the second factor, the City's determination was not final. As is described in more detail above, this project involved appealable development per LBMC section 25.07.006(A)1(a)-(b) because the development authorized was to occur between the first public road and the sea, within 300 feet of the beach, and within 300 feet of a coastal bluff. PRC section 30603(c) states that a local government's action on appealable development does not become final until "the close of business on the 10th working day from the date of receipt by the commission of the notice of the local government's final action."⁵⁹ Since no such notice was ever submitted to the Commission in this case, the City's action never became final. To conclude otherwise would vitiate the clear purpose of 30625 and 30603 of ensuring the Commission's role as an appellate body.

The third factor would only apply if the Commission was a party to, or in privity with a party to, the City's review of the proposed project. As indicated above, not only was the Commission not a party; the entire matter was intentionally kept off of the Commission's radar. Thus, the Commission was actively prevented from being a party, making this factor particularly inapplicable.

⁵⁹ PRC section 30603(d) goes on to require that local governments send such a notice. If that is not done, the Commission has no way of knowing what has occurred.

Finally, as indicated above, *res judicata* will not be applied if the public interest requires that relitigation not be foreclosed. Given both the public's substantive interest in protecting the sandy beach and the general public interest in the integrity of the process and maximizing public participation, it is critical to the public interest that this matter be brought before the Commission.

There is also a broader principle at stake here, related to the Commission's ability to enforce its permits. The Katzes' argument would allow a local government to undermine the Commission's ability to enforce its own permits. That simply is not how the law works, and it is worth noting that the City itself acknowledged the Commission's authority here. The SOD letter itself quotes Scott Drapkin, the City's Planning Manager, as stating "I agree since the Commission issued the CDP, the Commission has jurisdiction to enforce the terms and conditions of that CDP" (SOD letter at 10). The Coastal Act itself also clearly affirms this authority:

(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 a permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program ...

PRC § 30810 (emphasis added).

Moreover, in this case, the Commission was not alerted to the existence of the project until it was well under way, and the Commission didn't receive notice of the City's exemption determination until even later. In fact, the City didn't provide the public hearing notice containing the exemption determination to the Commission until April 26, 2017, *after* the Commission had already begun enforcement. This is entirely distinguishable from cases cited by the Katzes, such as *Patrick Media Group, Inc. v. California Coastal Commission* (1992), 9 Cal.App.4th 592, where the permit applicant sought to challenge the permit award to it, but did so by bringing an inverse condemnation action without also filling a petition for a writ of mandate. None of the cases cited by the Katzes involve a designated appellate body's alleged failure to challenge the action of the government agency it is authorized to review. Thus, it would make no sense to say that the Commission is precluded from taking enforcement action due to its having failed to participate in the City's process.

In sum, as indicated in response to point 13, where an LCP does not provide for appeals of exemption determinations, the Commission may, but is not required to, fashion a process for appealing such determinations. If work has already begun under the auspices of an unlawful exemption determination, the Commission may also choose the enforcement route. It has the ability to make an election of remedies. In a case such as this one, where the work had not only begun, but was well under way by the time the Commission became aware of it, the enforcement route makes the most sense. That choice is even clearer in this case, since neither the applicant nor the city provided the exemption determination to the Commission until after Commission staff had already commenced its enforcement work, reasonably concluding that no exemption determination had even been made, and correctly concluding that no such determination had been made until the project was well under way.

The Katzes had Notice and Knowledge of the Permit Conditions

25. *“The NOI incorrectly asserts . . . that Staff made clear it would not support ‘the proposed extensive reconstruction of the home, as it would result in a new structure . . .’ Mr. Conrad, the prior owner’s architect, never discussed with Staff an ‘extensive reconstruction of the home’ as such or one that would ‘result in a new structure,’ although Staff did indicate that it would not support the project as approved by the City.”* (SOD letter at 3.)

As an initial matter, this is not actually a defense, in that it does not contest the elements necessary for the Commission’s issuance of a Cease and Desist Order under Section 30810 or a penalty under Section 30821. However, it is also false. The Katzes deny that Commission staff ever conveyed that they would not support the sort of work that was performed here or that they would consider the resulting project a “new structure.” They also deny that Mr. Conrad ever discussed such work with Commission staff. However, after meeting with Commission staff about the version of the remodel that the City had initially approved, in 2014, Mr. Conrad sent an email message to Commission staff in which he correctly summarized the message that staff had conveyed as follows: “it is very clear after our meeting last week that [Commission] staff will not support the proposed remodel of the home.” (Exhibit 13). Mr. Conrad also correctly stated that Commission staff could support seawalls to protect the existing structures. Thus, Mr. Conrad understood the distinction clearly, and therefore told Commission staff he would only replace “paint and carpet,” which he also correctly knew would be considered exempt. Moreover, whether the reconstructed house is characterized as a “new structure” or not, the Katzes’ architect and agent clearly understood the limits of what Commission staff thought was approvable. These are the reasons Mr. Conrad cited in dropping the previously proposed remodel. Mr. Conrad also stated that after the Katzes decided to do much more than paint and carpet, they intentionally avoided contacting the Commission. (Exhibit 6.) Thus, while the Katzes may have intentionally avoided contacting the Commission, they cannot avoid the history of communications with Commission staff here.

26. *“No reasonable person reviewing the record . . . could have assumed that the Commission’s decisions . . . might . . . be summarily disregarded and repudiated by Staff such that a ‘minor remodel,’ as opposed to a ‘major remodel,’ might result in a claim that the approved seawall must be forfeited.”* (SOD letter at 6.)

Commission staff did not disregard or repudiate the Commission’s prior decision, and the Commission itself is not doing so through this action. The Katzes read into that decision elements that were not there. Moreover, even if “major remodel” were the dispositive factor here as is described above, a major remodel has occurred here.

Further, the Katzes argue that no reasonable person would believe that a minor remodel would trigger the Special Conditions. However, the terms major and minor remodel are never mentioned in the Special Conditions, so a “reasonable person” would have a hard time understanding why a “minor” remodel could not trigger the permit conditions.

Finally, a “reasonable person” would have recognized that if s/he wanted to embark on a major construction project without triggering a condition imposed by a regulator body, it would make sense to contact that regulatory body before doing so to be sure that the work would not trigger

that condition. A reasonable person would have done so in any case, but even more so where that regulatory body had include a condition (Standard Condition 3 of the Permit) reserving to itself the authority to interpret its conditions. A reasonable person would certainly not have thought it prudent to avoid any contact with that body and could not claim innocent ignorance of the rules after having done so.

27. The Katzes “worked closely with the City’s Planning Staff to ensure that the work performed would comply” and the City “determined that the work proposed is exempt from the CDP requirements under [the LCP].” (SOD letter at 6.)

The claims that the Katzes worked closely with the City and that the City made certain determination are not relevant to the Commission’s authority to issue the proposed orders. Moreover, the Katzes appear to be implying that they relied on the City’s assurance that the work was exempt. In reality, the Katzes obscure the fact that no CDP exemption was issued until the project was well underway. To support their claim, the Katzes cite the City’s notice of an upcoming Design Review Board hearing that was issued in the last week of December 2016, and which states at the bottom that the project is exempt from CDP requirements and not appealable to the Commission. However, this purported “exemption” was not issued until six months after exterior demolition began, and by December of 2016, parts of the house were already being replaced.

Responses to Affirmative Defenses; Penalty Provisions are Applicable Here

28. The Katzes’ good faith belief in the legality of their work insulates them from liability for penalties. (SOD letter at 24-25.)

Under applicable law, the Katzes are not insulated from penalties. They cite to five cases for the proposition that “a ‘good faith belief reasonably entertained’ is a defense to the imposition of civil penalties.” However, only one of those cases actually found a party to be immune from penalties on this basis (*No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50 Cal.App.3d, 8), and then only because the defendant company had conducted its operations on the basis of local ordinances pursuant to which the city had authorized the operations, and those ordinances were later adjudicated to be invalid.⁶⁰

No such change in the law has occurred here. The cases cited by the Katzes show a long line of more limited construction projects than the one at issue, and they all were going through the permitting process. Yet the Katzes went to great lengths to avoid doing so. At best, Mr.

⁶⁰ The Katzes argue that the last two cases they cite stand for the proposition that a good faith belief that one is not violating the law can make the imposition of statutory penalties a violation of the defendants’ due process rights. However, the *RJ Reynolds* case actually only held that good faith is relevant to the evaluation of the fine, not whether the imposition of a penalty creates a due process claim. *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 730 (“we here conclude that, although ignorance of the law is not a defense to a violation of section 118050, a defendant’s good faith or bad faith is relevant to the evaluation of the fine assessed against the defendant”). And the Proposition 65 case only said that due process considerations could be relevant where the defendant reasonably relied on agency interpretations of the relevant statute suggesting that they were in compliance. Neither is the case here.

Conrad's affirmative avoidance of the Commission casts serious doubt on his or his client's good faith belief that their actions were proper.

However, even if they did have some sort of belief that this work was exempt, which seems unlikely given the massive remodel undertaken and the permit conditions attached to their house, it would not have been a "reasonable" good faith belief. It is not reasonable to assume that the complete gutting of a house can be characterized as repair and maintenance, nor that even legitimate repair and maintenance in this location would be exempt, and the long line of nearby cases cited by the Katzes (all of which went through the permitting process, even though they appear to have involved less significant changes) further emphasizes the absurdity of this position.

The Katzes argue that they could not have reasonably concluded that the Commission would consider this project a violation after the City's "careful and expeditious review of the work underway." First, this quote acknowledges that the City's review was of work already "underway," which undermines The Katzes' argument that they acted in good faith from the start and demonstrates that they could not have, in commencing the work, relied on a City determination that had not yet been made. Second, the City's exemption determination was clearly in error, given the nature and location of the work, and, as discussed in the staff report, there are some issues regarding the appearance of impropriety as well.

Next, the Katzes argue that they could not have reasonably concluded that the Commission would consider this project a violation after the City "notified" the Commission "in January 2017 of the City staff's determination that the work constitutes an exempt minor remodel." First, the "notice" to which they refer appears to be a letter from the City to a lawyer representing a neighbor. Copying the Commission on such a letter does not constitute providing the Commission with formal notice of the City's exemption determination. Second, even if this letter did constitute notice, it was not sent until the project was well underway, and Commission staff issued its Notice of Violation less than three months later.

The Katzes next argue that they could not have reasonably concluded that the Commission would consider this project a violation "following . . . substantial work on the minor remodel having already been completed." But this is exactly the point. They completed substantial work before informing the Commission. Once the Commission learned of the situation, it quickly responded. The Katzes cannot argue that they were allowed to complete substantial amounts of work without informing the Commission and then reasonably expect the Commission to defer to whatever they had done.

The Katzes then argue that that they could not have reasonably concluded that Commission "Staff would seek to substitute for the City on issues committed to the City's jurisdiction." However, for all the reasons listed above in point 22, the issues here were not committed to the City's exclusive jurisdiction. The Commission has appellate review authority over the exemption determination, and Standard Condition No. 3 in the Permit clearly states that the Executive Director or the Commission has the authority to resolve questions regarding the Permit conditions. The Commission clearly has the authority to enforce permits it has issued.

The Katzes next argue that they could not have reasonably concluded that "Staff would repudiate the Commission's written findings, which explain in unmistakable terms that the 'new development' referred to in Special Condition Nos. 2 and 6 is governed by the 50% criteria." However, as is explained above, neither the Commission nor its staff did so, the findings do not

say that, and even if they did, this project exceeded that threshold. Nor did Commission staff ignore the discussion at the hearing, as alleged on page 25 of the SOD letter, as is explained above in point 6. Thus, the Katzes are subject to penalties here.

29. *Both forfeiture of a seawall and monetary penalties are barred by laches* (SOD letter at 26.)

Neither the Cease and Desist Order nor the Administrative Penalty proposed in this action is barred by laches, based on both the law and the facts of the case. The Katzes claim that the proposed action is barred by the doctrine of laches based on “inexcusable delay and prejudice.” SOD letter at 26. As evidence of delay, they cite the fact that the City copied Commission Staff on a letter, dated January 26, 2017, in which the City informed a private attorney that the work underway did not constitute a major remodel and did not need a CDP. There were myriad reasons why it was not unreasonable for Commission staff not to drop everything they were doing and conduct a full investigation in response to a cc at the bottom of this letter.

First, this was not a formal notice to the Commission about an exemption determination and was not accompanied by the sort of detailed project plan information that would have allowed Commission staff to evaluate the situation fully. It was a letter responding to a private attorney complaining about a project, and Commission staff was merely listed a “cc.” Second, the letter indicated that the City had concluded that there was no cause for concern here, as the project was an exempt minor remodel. Third, the work was clearly already well underway, so there was no indication that an immediate response was necessary to prevent work from occurring. And finally, this letter arrived at the Commission out of the blue regarding a matter that was not before the Commission. Despite all this, the implication of the Katzes claim appears to be that, upon receiving a copy of this third-party letter, the Commission should have immediately stopped everything else it was doing, conducted a permit review to provide context for whatever work was occurring, and raced out to the site to conduct an inspection. The Commission does not have the resources to respond to every letter it receives in that matter, and the courts have recognized this and affirmed that property owners cannot reasonably expect the Commission to do so. *See, e.g., Feduniak v. California Coastal Commission* (2007), 148 Cal.App.4th 1346, 1363-64.

The Katzes are also wrong in asserting that Commission staff “did nothing until April 17, 2017, when it first sent a letter.” SOD letter at 26. In fact, Commission staff did look into this matter as soon as resources permitted. Given the Commission’s resource constraints, however, the staffing situation for this matter was that it was assigned to an unpaid, part time intern. However, once that intern was assigned to the matter, he did immediately begin researching the permit history and the LCP. He also reviewed pictures and documents he received regarding the site, which provided ample evidence of the level of work performed. Nor is it true, as the Katzes assert, that Commission staff “did not . . . engage with City staff to determine the basis for its determination” either prior to issuing the NOV “or after.” Commission staff did both. After completing its initial review, Southern California Enforcement Supervisor Andrew Willis contacted Scott Drapkin at the City to discuss the matter. They continued to be in contact after the NOV was issued, and in fact, it was only through that contact that Commission staff learned that the DRB notice constituted the entirety of the City’s exemption determination.

In sum, the Katzes' factual assertions about Commission inaction are wrong. The Katzes are also wrong in concluding that Commission staff unreasonably delayed. Given Commission staff resources to address literally thousands of violations, and the circumstances in which the Commission became aware of this matter, a two-and-a-half month turn-around from receiving a third-party letter, to opening a violation case and investigating it, to issuing a 13-page NOV, is actually quite quick. Moreover, had the Katzes not intentionally avoided contacting the Commission, the Commission could have addressed these violations much sooner.

The Katzes also claim that they were prejudiced by this course of events, since they performed additional work between the end of January, 2017, and mid-April, 2017, and presumably argue this was done in reliance on the Commission's lack of immediate response. However, this argument ignores the fact that the Katzes had already done much of the work by January of 2017. The Katzes began obtaining local demolition permits from the City for this work a full year earlier, in January of 2016 (Exhibit 15), and starting in July, they began the exterior demolition (Exhibit 4). Thus, they had already been hard at work rebuilding the existing house for many months, and perhaps as long as a year, prior to the City's letter and any knowledge by the Commission. And the reason the Commission did not know about the unpermitted development and the permit violations earlier was because the Katzes and their representatives chose not to inform the Commission, and worked with the City to avoid applying for a Coastal Act Permit, despite their familiarity with the permit process and knowledge that the Commission had issued the prior permit for the seawall. They cannot seek to avoid review by an agency and simultaneously then claim harm due to the very lack of review resulting from their actions.

Finally, even if there had been both unreasonable delay and prejudice (neither of which existed here for the reasons articulated above), "laches is not available where it would nullify an important policy adopted for the benefit of the public." *Feduniak, supra*, 148 Cal.App.4th at 1381. Here, applying laches to prevent the Commission from enforcing the permit conditions it adopted for the express purpose of protecting the public beach and public access and implementing the Chapter 3 policies of the Coastal Act would clearly nullify these important policies.

The remedies imposed by the Commission in this case are not barred by laches.

30. Penalties for Violation of the Public Access Provisions of the Coastal Act, pursuant to PRC section 30821, would not apply here, as the permittees have already paid to mitigate the impacts of the seawall (SOD letter at 26-27.)

The Katzes misunderstand both the impacts of the seawall and the distinction between the mitigation fees paid as a condition of obtaining the Permit and the penalties imposed by the Commission in this action. The Katzes argue that there is no evidence that the continued presence of the seawall has resulted in the loss of public beach, but that even if it has, the Katzes have already paid the mitigation fee required by the Permit to offset the impacts of the seawall on shoreline sand supply. Thus, they argue, imposition of a fee would constitute a requirement to pay twice for the same harm. There are two problems with this argument.

First, this argument misunderstands the impacts of the seawall. Part of the impact is an opportunity cost, since, as the Commission found in issuing the Permit, 111 cubic yards of sand are trapped behind the seawall every year. Although one may not see the failure of that sand to reach the beach (since one does not see what does not happen), it is still an impact in that the

seawall has altered the *status quo* to the detriment of the public beach and public access. In addition, as indicated above, there is photographic evidence of the lack of dry sand (Exhibit 5).

Second, this argument confuses mitigation with penalties. The payment made pursuant to Special Condition No. 3 of the permit was explicitly designed to mitigate for certain impacts. However, the Permit also, independently, required the seawall to be removed under certain conditions. When those conditions were satisfied and the wall remained, that constituted a violation of the public access provisions of the Coastal Act. Pursuant to section 30821, that violation of the public access *provisions* made the Katzes liable for penalties, regardless of a specific showing or quantification of the public access *impacts*. The impacts may be relevant to the calculation of the specific penalty amount, pursuant to PRC section 30821(c) and 30820(c) (and specifically 30820(c)(1)-(3)), but it is not a prerequisite to the applicability of penalties. A primary purpose of penalties is to provide a deterrent to violations such as those at hand here. The argument by the Katzes would mean that in any case where the Commission has had to assess a mitigation fee in order to be able to find the development consistent with the Coastal Act, any such permittee would be free from all penalties and could violate the permit and Coastal Act without any consequences. This is clearly not what the legislature intended and is in direct conflict with the statutory provisions in both 30821 and 30820. Penalties are applicable here.

31. *The doctrine of Constitutional or equitable tolling bars the imposition of penalties for the period during which the Katzes lawsuit is pending* (SOD letter at 27-28.)

The Katzes cite to federal case law for the proposition that penalties may not be imposed while litigation is pending. However, the primary case that they cite (*U.S. v. Pac. Coast European Conference*, 451 F.2d 712 (9th Cir. 1971), quoted the Supreme Court's articulation of this rule as being that it is improper to impose penalties based on a "violation of commands of an unascertained quality." *Id.* at 718, quoting *Wadley S. Ry. Co. v. State of Georgia*, 235 U.S. 651, 662 (1915). The commands to which the Court was referring were orders of general applicability issued by the Federal Railroad Commission. In both cases, the defendants were challenging the validity of penalties to be imposed on them based on such generally applicable regulations (either of the Federal Railroad Commission or Federal Maritime Commission), which they contended were invalid.

No such regulations are at issue here. The Katzes have not challenged the validity of the administrative penalty provision, nor do they assert any facts that would support such a challenge. Their litigation merely challenges Commission staff's conclusions and actions relative to the facts of this specific case. Thus, the doctrine on which they rely is not applicable.

It is also worth noting that the litigation at issue has been stayed because the court agreed that this Commission's action should be allowed to proceed first. Thus, the court has already held that here, the administrative action (including any potential imposition of penalties) should go first, not the judicial review.

In addition, as indicated above, the main consequence of the litigation was to delay this Commission's action. That is because Commission staff had already indicated to the Katzes that this matter was being elevated for formal enforcement proceedings when the Katzes filed suit, causing a delay in that process (Exhibit 23). Thus, the litigation actually prolonged the resolution of this matter.

Finally, it is not true, at the Katzes argue, that there have been unreasonable delays or that the imposition of penalties would force them to choose between exercising their right to petition for redress and acceding to potentially substantial daily penalties. Like any alleged violator, they had the ability to comply with Commission staff's request to stop work when they received the NOV and still preserve their ability to challenge the Commission's action. They could have stopped at any point before the development was completed. (In fact, they could have come to the Commission before they started and thereby avoided the entire dispute.) Thus, the doctrine of Constitutional or equitable tolling does not prevent the imposition of penalties here.

G. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The Commission finds that issuance of this Cease and Desist Order and Administrative Penalty to compel the removal of unpermitted development from the property, as well as the implementation of the order, is exempt from any applicable 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 Commission finds that the actions required by the proposed Cease and Desist Order and Administrative Penalty will not have significant adverse effects on the environment, within the meaning of CEQA. Furthermore, 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.*). The proposed Order and Administrative Penalty is exempt from the requirement for the preparation of an Environmental Impact Report, based on 14 CCR Sections 15060(c)(2) and (3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines.

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.” The proposed order requires very limited changes to the physical environment and no harm to 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.

In sum, given the nature of this matter as an enforcement action, 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.

H. SUMMARY OF FINDINGS OF FACT

1. 11 Lagunita LLC, which is controlled by members Jeff and Tracy Katz, purchased 11 Lagunita Drive, Laguna Beach, Orange County (APN 656-171-76) from MSSK Ventures on November 4, 2015.
2. The Commission found, in its approval of CDP A-5-LGB-14-0027, that the seawall would negatively impact Victoria Beach, sand supply, and public access.
3. In its approval of CDP A-5-LGB-14-0027, the Commission found the project consistent with the Coastal Act and LCP and approved the CDP because it contained a number of permit Special Conditions designed to limit the duration of the seawall, including the requirement that it only be used to protect the existing pre-Coastal Act house built in 1952, and be removed upon redevelopment of that house, among other things.
4. The Commission issued Coastal Development Permit A-5-LGB-14-0027 to the owners of the aforementioned property on December 28, 2015, which authorized the use of a seawall to protect the existing pre-Coastal Act structure built in 1952, subject to Special Conditions.
5. CDP A-5-LGB-14-0027 included Special Condition No. 6, which required that “future development” or “redevelopment” “shall not rely on the permitted seawall. The Permit also included Special Condition No. 2, which stated that if the property is redeveloped in a manner that constitutes new development, the seawall authorization expires, and the seawall must therefore be removed. Special Condition No. 2 also stated that, “Prior to the anticipated expiration of the permit and/or in conjunction with redevelopment of the property, the Permittee shall apply for a permit amendment to remove the seawall or to modify the terms of its authorization.”
6. Unpermitted development and redevelopment, including demolition, reconstruction, and alteration of a structure, and including a major remodel that is not exempt, has all occurred on the property, without a CDP and inconsistent with the Permit. No permit amendment was applied for to remove the seawall. Therefore, the jurisdictional requirements for the issuance of a cease and desist order have been met.
7. The work to be performed under this Cease and Desist Order, if completed in compliance with the instructions therein, which includes removal of the seawall and applying for a CDP to protect the house in a way that does not require any hard seawall type structure and does not harm the beach, will be consistent with Chapter 3 of the Coastal Act, and

therefore, this Cease and Desist Order provides Coastal Act Authorization to conduct the removal work, among other development, required by the Cease and Desist Order.

8. 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. CDP A-5-LGB-14-0027 found that the seawall would cause negative impacts to public access, and therefore only authorized the seawall with Special Conditions to allow it to comply with the Coastal Act. The CDP Special Conditions stated that the seawall's authorization would expire if "redevelopment in a manner that constitutes new development" occurred, and that the seawall could not be used to protect "future development" or "redevelopment." The retention of the unpermitted development and the seawall violates the terms of those CDP conditions, and therefore violates the cited public access provisions of the Coastal Act. The Katzes are therefore in violation of the public access provisions of the Coastal Act.
9. As stated in #7, above, unpermitted development and development inconsistent with a CDP has occurred on the Property, which is owned by 11 Lagunita LLC. These actions are also inconsistent with the public access provisions of the Coastal Act and therefore subject 11 Lagunita LLC to penalties under 30821 of the Coastal Act.