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October 7, 2019

Staff: Heather Johnston – SF
Staff Report: October 7, 2019
Hearing Date: October 17, 2019

STAFF REPORT: Recommendations and Findings for Consent Cease and Desist Orders and Consent Administrative Civil Penalties

Cease and Desist Order Nos.:	CCC-19-CD-05 and CCC-19-CD-06
Administrative Civil Penalty No.:	CCC-19-ACP-04
Related Violation File:	V-4-13-217
Property Owners:	Individual owners of the Malibu Outrigger Condominiums and The Sterling Family Trust
Entity Subject to CDO/AP:	Malibu Outrigger Homeowners Association
Entity Subject to Separate CDO:	The Sterling Family Trust
Location:	Two adjacent properties located at 22548 and 22600 Pacific Coast Highway, City of Malibu, Los Angeles County.
Violation Description:	Violations include development that is 1) unpermitted, and 2) inconsistent with Coastal Development Permit ("CDP") No. A-6-1-73-1100, and that is also 3) in violation of the resource protection and public access provisions of the Coastal Act, including: a portion of a parking lot, concrete walls and concrete walkway, and rock riprap on the beach, on and potentially seaward of both 22600 and 22548 Pacific Coast Highway, which prevent use of the vertical access easement delineated in Los Angeles County Tract Map No. 29628. Additional unpermitted development includes the installation of a leach field on 22600 Pacific Coast Highway.

Substantive File Documents:	1. Public documents in Consent Cease and Desist Order file Nos. CCC-19-CD-05 and CCC-19-CD-06, Consent Administrative Civil Penalty file No. CCC-19-ACP-04, Coastal Development Permit No. A-6-1-73-1100. 2. Appendices A and B, and Exhibits 1 through 30 of this staff report.
CEQA Status:	Exempt (CEQA Guidelines (CG) §§ 15060(c)(2) and (3)) and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308, and 15321)

SUMMARY OF STAFF RECOMMENDATIONS

A. DESCRIPTION OF PROPERTIES

As one of the first beaches that the public encounters when driving into Malibu from Los Angeles, Carbon Beach is an incredibly popular destination for the beach-going public. The Commission and staff have worked for years to increase access to this beach, and with the opening of the "Geffen" and "Ackerberg" Accessways (Carbon Beach East and West, respectively) and the pending construction of new access stairs adjacent to the Malibu Pier, the Commission has slowly been winning a decades long battle to open and enhance public access along Carbon Beach. However, contemporaneous with these steps towards increased access, sea levels have been rising, increasingly fragmenting what was once one long stretch of beach. As waves on the rising tides now frequently crash into beach-front development, including riprap and seawalls, less and less beach is available for the public, and accessways that once could have allowed the public to walk a mile down the beach now, at high tides, only provide access to small pockets of beaches. These beaches are perennially accessible to those fortunate enough to live on a beachfront lot; however, in Malibu particularly, this proposition is cost prohibitive for most. It is thus of critical importance that public access to all beaches, and Carbon Beach in particular, be vigorously pursued, protected, and enforced so as to ensure that those of lesser means are still able to visit and recreate along California's coastline.

This enforcement action will ensure that another beach access point will be opened along Carbon Beach, which will increase the amount of beach readily accessible to the public and reduce pedestrian and vehicular gridlock at other accessways. Additionally, the access point at issue is located almost immediately across the street from P.C. Greens, a grocery that – pursuant to a coastal development permit – has dedicated space for weekend and holiday public beach parking within its parking structure. With a cross walk less than 500 feet from the access point, this area is primed for ease of use by the beach going public once the access point is opened.

The enforcement matter at hand involves multiple violations on two adjacent properties on the ocean-side of Pacific Coast Highway ("PCH") in Carbon Beach in Malibu, Los Angeles County

(Exhibit 1). The first property is a lot approximately an acre in size located at 22548 Pacific Coast Highway ("the Outrigger Property"), which is occupied by a forty-two-unit condominium complex called the Malibu Outrigger Condominiums (hereinafter "MOC"). Each unit of the MOC is owned separately and any portion of the property that is not part of a residential unit is part of a common area that is owned by all of the unit owners as tenants in common. The MOC is governed by a Homeowners Association (hereinafter "Outrigger") Board of Directors, which has the authority to bind all members of the association to the proposed resolution of this matter.

The second property to which this enforcement matter relates is an ocean-front lot owned by the Sterling Family Trust (hereinafter "Sterling") that is located at 22600 Pacific Coast Highway[1] ("the Sterling Property"), immediately upcoast of the Outrigger Property (Exhibit 2). The Sterling Property is similarly sized to the Outrigger Property, however unlike its downcoast neighbor, the Sterling Property has been largely undeveloped for at least the last fifty years (Exhibit 3). Up until the 1980s the Sterling Property was used by the Malibu Yacht Club and was occupied by dozens of parked boats and a few small, semi-permanent out buildings. In the 30 years since the Malibu Yacht Club's lease of the Sterling Property ended, the property has remained vacant with the exception of the unpermitted development discussed below. The Sterling Property is included in this action as a result of unpermitted development being placed upon it by Outrigger.

B. SUMMARY OF VIOLATION AND PROPOSED RESOLUTION

The Outrigger building was originally constructed in 1962 as an apartment building, and for several years in the late 1960s it was used alternately as a motel and apartment building before eventually being converted into a condominium complex in 1973. This action of converting to condominiums required authorization under what was then the new Coastal Zone Conservation Act of 1972 ("Prop. 20"), and a permit was issued by the South Coast Region California Coastal Zone Conservation Commission (hereinafter the "Commission")[2] in 1973 for the conversion (Exhibit 4). The Commission permit required, among other things, that the permittee comply with the Los Angeles County ("County") tract map issued for the subdivision of the property that was undertaken as part of the condominium conversion. The County tract map required, along the Outrigger Property's upcoast property line, a ten-foot wide easement to provide for public access from PCH to the beach (Exhibit 5); the Commission's permit incorporated this easement requirement by reference (hereinafter the "Easement").

Although the recorded a tract map reflected the Easement, almost immediately after the condominium conversion was completed, Outrigger undertook efforts to prevent the Easement from actually opening – the initial effort took the form of writing letters to the County and threatening litigation if the County continued to pursue opening of the Easement. Soon thereafter, in the mid-1970s, Outrigger extended its tenant parking lot, and surrounding concrete

[1] Also identified as Los Angeles County Assessor's parcel number 4452-003-011.

[2] The California Coastal Zone Conservation Commission was created pursuant to Proposition 20 in 1972 and would become the California Coastal Commission through the adoption of the 1976 California Coastal Act. For the purposes of this document "Commission" refers to both the California Coastal Commission and its predecessor, the California Coastal Zone Conservation Commission, as well as the various regional versions of those commissions.

walls, onto the upcoast Sterling Property, and also installed a leach field on the Sterling Property – all also without Coastal Act authorization. By extending the concrete walls and parking lot, Outrigger not only physically precluded use of the Easement but additionally manufactured a situation where the Easement would have to run through the middle of a parking lot – thus creating potential safety issues if the Easement were ever to be opened (Exhibit 6).

Approximately a decade later, in 1986, Outrigger installed – again without a coastal development permit – several tons of riprap on the beach on the Outrigger and Sterling Properties, and, at times, potentially on State tidelands (Exhibit 7). Several years later, in 2003, a gate was installed in one of the unpermitted concrete walls on the seaward side of the unpermitted parking lot, and an unpermitted concrete walkway was placed on the beach seaward of the gate, thus creating a private beach access for Outrigger occupants immediately upcoast from where the Easement is located, where it was supposed to be providing access for the public (Exhibit 8). As detailed below in Sections III.C and D, Commission staff carefully tracked compliance progress regarding this easement for several years after the 1973 permit was issued; however, once the properties became mired in third party litigation relating to Outrigger's development on the Sterling Property, staff had to focus on other matters while awaiting resolution. Similarly, in the late 2000s, soon after staff discovered that Outrigger had yet to comply with the Coastal Act and attendant permit, the Easement again became the subject of litigation pertaining to another unrelated Coastal Act violation down coast of the Outrigger Property. Once it became clear that the litigation would not affect the status of the Easement, enforcement staff renewed its efforts to resolve this matter in 2013.

The proposed resolution of this matter involves issuance of two separate consent cease and desist orders – one to Outrigger and one to Sterling – and the imposition of a consent administrative civil penalty against Outrigger. The Consent Cease and Desist Order and Administrative Civil Penalty directed to Outrigger (collectively hereinafter "Orders" or "Consent Orders") address Coastal Act violations on both the Outrigger and Sterling Properties by requiring 1) removal of the unpermitted riprap and private beach access walkway, 2) removal of the unpermitted leach field, 3) application for an after-the-fact permit for the unpermitted parking lot extension and perimeter walls, and 4) payment of a $500,000 administrative civil penalty.

Furthermore, as part of the resolution of civil liabilities in addition to the $500,000 mentioned above, Outrigger will greatly enhance public access in the area by providing a suite of public access amenities and easements. Firstly, Outrigger will provide lateral public access across the entire stretch of beach fronting its property. Additionally, connecting to this lateral access will be a relocated and improved vertical access easement from Pacific Coast Highway to the beach immediately upcoast of the expanded parking lot (Exhibit 9). This new vertical easement – across a completely undeveloped portion of land – will, at twenty-feet-wide, be double the width of the extant Easement. Outrigger has, in consultation with the Easement holder, additionally agreed to pay for the construction of an Americans with Disability Act ("ADA") compliant vertical accessway, which will include amenities such as benches and a shade structure to allow members of the public of all abilities to enjoy this heretofore difficult to access portion of the coast.

Meanwhile, the related proposed Consent Cease and Desist Order directed to Sterling (hereinafter the "Sterling Order") requires that Sterling 1) allow access to the Sterling Property for Outrigger to undertake work pursuant to the Orders and for appropriate entities to inspect said work, and 2) participate, as necessary, as applicant or co-applicant in applying for permits proscribed by the Orders.

The process of arriving at this proposed resolution, with multiple involved parties, overlapping jurisdictions, and physical constraints, has taken time and effort to reach this consensual result, and Commission staff appreciates the work of all parties in addressing these various issues and helping map out an outcome that will be of such great benefit to the public. Because this public accessway is being relocated upcoast approximately fifty feet, it will be located on a relatively flat area, one that can accommodate both a much wider easement, and one that is ADA accessible. The proposed settlement will therefore increase the number and nature of people able to visit this stretch of the coast; the improvements to be made pursuant to the Outrigger and Sterling Orders are valued at $1.5 million. Staff is grateful for the collaboration of Outrigger and Sterling in crafting a resolution that will simultaneously resolve Coastal Act violations and also provide an invaluable enhancement of public access to the beach.

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I. Motions and Resolutions

Motion 1: Consent Cease and Desist Order (Malibu Outrigger Homeowners Association)

> *I move that the Commission **issue** Consent Cease and Desist Order No. CCC-19-CD-05 to the Malibu Outrigger Homeowners Association and individual owners of the Malibu Outrigger Condominiums pursuant to the staff recommendation.*

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

Resolution to Issue Consent Cease and Desist Order:

> *The Commission hereby issues Consent Cease and Desist Order No. CCC-19-CD-05, as set forth below, and adopts the findings set forth below, on the grounds that development has occurred on property owned by the individual owners of the Malibu Outrigger Condominiums and managed by the Malibu Outrigger Homeowners Association, as well as on adjacent property, without the requisite coastal development permit, and in violation of CDP No. A-6-1-73-1100, in violation of the Coastal Act, and that the requirements of the Order are necessary to ensure compliance with the Coastal Act.*

Motion 2: Consent Cease and Desist Order (Sterling Family Trust)

> *I move that the Commission **issue** Consent Cease and Desist Order No. CCC-19-CD-06 to the Sterling Family Trust pursuant to the staff recommendation.*

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

Resolution to Issue Consent Cease and Desist Order:

> *The Commission hereby issues Consent Cease and Desist Order No. CCC-19-CD-06 as set forth below, and adopts the findings set forth below on the grounds that development has occurred on property owned by the Sterling Family Trust, without the requisite coastal development permit, in violation of the Coastal Act, and that the requirements of the Order are necessary to ensure compliance with the Coastal Act.*

Motion 3: Consent Administrative Civil Penalty Action (Malibu Outrigger Homeowners Association)

> *I move that the Commission find that the Malibu Outrigger Homeowners Association and individual owners of the Malibu Outrigger Condominiums are in violation of the public access provisions of the Coastal Act, and that the Commission **impose** upon it and them an administrative civil penalty in the amount of $500,000, in addition to other public access enhancements enumerated in the administrative civil penalty, pursuant to the staff recommendation.*

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in the assessment of an administrative civil penalty against Malibu Outrigger Homeowners Association and individual owners of the Malibu Outrigger Condominiums in the amount $500,000. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Consent Administrative Civil Penalty Order:

> *The Commission hereby issues Consent Administrative Penalty Order No. CCC-19-AP-04, as set forth below, imposing an administrative civil penalty of $500,000; and adopts the findings set forth below; on the grounds that activities have occurred on property owned by individual owners of the Malibu Outrigger Condominiums and managed by Malibu Outrigger Homeowners Association without a coastal development permit and/or in violation of CDP No. A-6-1-73-1100 and the Coastal Act, and these activities have limited or precluded public access and violated the public access policies 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 shall 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 those used for a Cease and Desist Order hearing.

For a Cease and Desist Order and an Administrative Civil 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 announce the rules of the proceeding, including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any

Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s), or their representative(s), may present their position(s) with particular attention to those areas where actual controversy exists. The Chair may then recognize other interested persons, after which 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 Section 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(s) 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(s) and imposition of an Administrative Penalty.

III. Findings for Consent Cease and Desist Order Nos. CCC-19-CD-05 and CCC-19-CD-06, and Consent Administrative Civil Penalty No. CCC-19-ACP-04[3]

A. DESCRIPTION OF PROPERTIES

The Malibu Outrigger Condominiums ("MOC") are situated on the ocean-side of PCH along Carbon Beach in the City of Malibu in Los Angeles County. The 1.3 acres of beach-front property upon which Outrigger is located lies approximately equidistant between the next nearest public beach accessways on either side; the Zonker Harris and Ackerberg (or Carbon Beach West) accessways are approximately 800-feet upcoast and downcoast from the Outrigger Property, respectively (Exhibit 10). The Outrigger Property is developed with a forty-two-unit condominium complex replete with a swimming pool, gymnasium, and game room. Pursuant to the MOC Declaration of Covenants, Conditions, and Restrictions ("CCRs"), any portion of the Outrigger Property that is not part of a residential unit is a "Common Area", and is owned by all owners as tenants in common. The owner of each condominium unit owns an undivided one-forty-second interest in the common areas; by operation of the MOC CCRs and the agreement of Outrigger, through the execution of the proposed Consent Orders by the Outrigger Board of directors of the Outrigger, all forty-two individual condominium owners are subject to the Consent Orders.

[3] These findings also hereby incorporate by reference the Summary at the beginning of the October 7, 2019 staff report ("STAFF REPORT: Recommendations and Findings for Consent Cease and Desist Orders and Consent Administrative Civil Penalties") in which these findings appear, which section is entitled "Summary of Staff Recommendations."

Immediately upcoast from the Outrigger Property is property owned by the Sterling Family Trust that remains largely undeveloped. Originally used in the 1960s and early 1970s as the site of the Malibu Yacht Club (Exhibit 11), the 1.1-acre ocean-front Sterling Property was purchased by the Sterlings in 1975. As described in greater detail in Section III.E, below, the only extant development currently on the Sterling Property, except for a perimeter fence, is that which was placed or installed without permit by Outrigger.

B. HISTORY OF DEVELOPMENT ON PROPERTIES

The MOC was originally constructed as a four-story, forty-four-unit apartment building in 1962. In July of 1970, a Transient Occupancy permit was granted by Los Angeles County to allow the owner to operate the building as a motel, at which point interior modifications were made, converting some 2-bedroom apartments into 1-bedroom apartments and single motel units; thereby resulting in a fifty-six-unit building. In 1972, Malibu Terrace Ltd., the then owner of what is now the Outrigger Property, began to formally subdivide the property so as to convert the building into a condominium complex.

The process of subdividing the Outrigger Property required that a new tract map be approved by Los Angeles County and that a conditional use permit and a variance also be issued by Los Angeles County. The conditional use permit was required for the basic conversion to condominiums, and the variance was required because the condominium complex – once converted – would have less than the required number of parking spaces for such a facility.

Tentative Tract Map No. 29628 ("Tract Map") was filed for the Outrigger Property on February 29, 1972, and was granted multiple time extensions while other aspects of the project were being finalized with the County. At a hearing on September 14, 1972, the County granted zoning approval for the subdivision by approving Conditional Use Permit No. 151 and Variance No. 92 (Exhibit 12). These permits were granted with a number of conditions for the layout and development of the Outrigger Property, including detailing the minimum number and allowable size of parking spaces, and requiring that a six-foot-high wall be constructed on the westerly property line.

Shortly thereafter, on November 21, 1972, the Los Angeles County Regional Planning Commission approved the subdivision of the Outrigger Property – contingent upon a variety of conditions, including that the applicant "[p]rovide provisions for public access to the beach to the satisfaction of the County Department of Beaches,"[4] (Exhibit 13). Malibu Terrace LTD duly made the offer of dedication of public access, and on October 23, 1973, the County accepted the dedication, writing on the Tract Map, "[t]hat all easements shown on said map and offered for dedication by and the same are hereby accepted on behalf of the public." The finalized version of the Tract Map was recorded with the County on October 29, 1973 (Exhibit 14). The Tract Map includes both graphic and narrative reference to the ten-foot-wide Easement along the westerly

[4] Regional Planning Commission "Letter of Conditions" dated January 3, 1973: Condition 11.

property line of the Outrigger Property, with the latter indicating that the Easement is for "pedestrian ingress and egress purposes."

C. HISTORY OF COMMISSION ACTION ON PROPERTIES

CDP Application Number 3-2-73-165

Having navigated county permitting requirements, Malibu Terrace Ltd. requested, by letter dated January 31, 1973, to the then-nascent South Coast Regional Commission, to waive the coastal development permit requirement for the conversion of the motel/apartments to condominiums. After this request was denied by staff, on March 1, 1973, Malibu Terrace Ltd. applied to the Commission for a Coastal Development Permit for the conversion of an existing 56-unit motel/apartment facility to 42 condominium units (Exhibit 15). Referencing the County-imposed access Easement requirement, the application also asserted that "[t]he project will increase access to the beach by the granting of a 10-foot easement through the property for public access to the beach which does not now exist."[5]

A public hearing was held on April 23, 1973 - closing without a vote and with Commissioners requesting that a written statement be supplied describing the project and responding to questions posed by the Commissioners. The answers supplied to the Commission stated that the only construction required to effectuate the conversion was the "upgrading" of parking facilities by the addition of twenty-five uncovered parking spaces adjacent to the existing building. Malibu Terrace Ltd. also indicated that they would "provide for the possible construction at some future date of an additional leach field to be utilized by the existing septic tank system, although to date no public agency has required such construction."[6] Malibu Terrace Ltd. further clarified that the "Regional Water Quality Control Board has not and is not now requiring the actual construction of an additional leach field but only requires that Applicant provide for such construction in the event such need should arise in the future, to which Applicant has agreed" (*emphasis added).* [7]

At a public hearing held on April 30, 1973, the Commission voted to deny the permit including because Malibu Terrace Ltd. had not provided requisite evidence of compliance with local code requirements. This denial was predicated on failure to obtain California Regional Water Quality Control Board and Los Angeles County Health Department approvals. It was subsequently determined that the applicant was in fact compliant with these outstanding issues; the County entities so informed the Commission.

On May 10, 1973, Malibu Terrace Ltd. filed a request for reconsideration of the Commission's denial of the permit based upon the aforementioned "new" information. This request was later withdrawn after the new application, below, was approved by the Commission.

[5] CDP 3-2-73-165 application page 4 § 17.
[6] Preliminary Statement P-3-2-73-165 § II, April 25, 1973.
[7] Preliminary Statement P-3-2-73-165 § VII, April 25, 1973.

CDP Application Number A-6-1-73-1100

On June 1, 1973, Malibu Terrace Ltd., submitted a new CDP application for the condominium conversion, incorporating by reference all exhibits from the prior CDP application. The project was described in this application as, "conversion of an existing structure which was built as an apartment building to condominiums, which requires only the construction of additional uncovered parking." The applicant again stated in its submittal, "[t]he project will increase access to the beach by the granting of a 10 foot [sic] easement through the property for public access to the beach which does not now exist."

On June 14, 1973, the Commission approved CDP A-6-1-73-1100 (hereinafter the "CDP") to Malibu Terrace Ltd. for the conversion of a 56-unit apartment to a 42-unit condominium. Condition I.C of the CDP provided that the permit was subject to "Los Angeles County tract map requirements," making the provision of the vertical public access Easement required in the Tract Map an affirmative obligation of the property owner in the CDP (Exhibit 4). After the condominium conversion was complete, Malibu Terrace Ltd. sold off the individual condominiums, thereby divesting themselves from the property.

CDP Application Number 5-90-791

In 1990, Outrigger submitted a CDP application to the Commission to construct a fifty-three-foot-long vertical concrete seawall to protect a portion of the condominium complex; specifically, to protect the lone cantilevered room that extended over the existing bulkhead that forms the seaward edge of the MOC. In the staff report for this 1990 CDP application, Commission staff stated, "[a]n unpermitted non-engineered rock seawall was placed in front of the cantilevered room some time [sic] in the early 1980s in violation of the Coastal Act." Staff was recommending approval of the permit application, which was to be conditioned by, among other things, the requirement to record an easement for lateral public access in front of the condominium complex. This permit was also to be conditioned to require Outrigger to remove the unpermitted riprap from the beach. Outrigger withdrew this application on September 5, 1991, immediately prior to the hearing on the matter – the unpermitted riprap remains on the beach to this day, and portions of the rubble have since migrated to the Sterling Property and potentially to State tidelands seaward of both properties.

D. LEASES AND SUBSEQUENT LITIGATION

On June 22, 1973, the General Partner of Malibu Terrace Ltd. executed a lease - subsequently recorded on August 21, 1973, for a portion of what is now the Sterling Property. This lease was "for the purposes of providing additional space for a private sewage disposal system for which there is inadequate space on the original building site." The terms of the lease additionally require that the Outrigger Property and the portion of the Sterling Property where the development would take place would be held as one, with Malibu Terrace Ltd. stating that they "do hereby promise, covenant and agree to and with the County of Los Angeles that the herewith described property which includes both the original building site and the annexed portion will be

maintained as a unit until such time as a sewer sewage [sic] disposal service can be otherwise accomplished…." (Exhibit 16).

An additional lease was executed October 12, 1973, by the General Partner of Malibu Terrace, Ltd., and was recorded October 16, 1973. In this document, Malibu Terrace Ltd. leased to Malibu Outrigger Board of Governors premises for surface parking area for motor vehicles for $1.00 per annum until 2003 (Exhibit 17). These two leases cover the unpermitted parking area and leach field – shown in Exhibit 6 - that are on the Sterling Property, and thus delimit a substantial portion of the Coastal Act violations at issue in this case. In aggregate, the result of these leases was that there was one parcel with the actual MOC on it, while a portion of the neighboring separately owned parcel contained the MOC's leased parking lot extension and leach field areas, as can be seen on Exhibit 18. No coastal development permit was issued for any actual development within this leased area.

On September 18, 1975 Sterling acquired title to the Sterling Property, subsequently filing litigation on September 29, 1982 against Outrigger to terminate their use of the Sterling Property. This dispute over property interest regarding the area upon which the unpermitted leach field and parking lot are located lasted for years, and eventually resulted in Outrigger obtaining a prescriptive easement entitling it to the use of those areas. However, despite the outcome of that litigation, it is important to note that obtaining, ex post facto, the right to use the Sterling Property for the leach field and parking lot did not and does not convey any Coastal Act authorization for use and development of those areas. Regardless of the ultimate property right to use those areas, no Coastal Act authorization was obtained for the construction of the parking lot extension and leach field on the Sterling Property.

E. DESCRIPTION OF COASTAL ACT VIOLATION

As discussed above, the Commission granted the CDP for the conversion of an apartment building to a condominium complex. Condition I.C. of the CDP specifically required that the development adhere to "Los Angeles County tract map requirements." Los Angeles County Tract Map No. 29628 depicts a ten-foot wide public access easement on behalf of "the County of Los Angeles for pedestrian ingress and egress purposes" for public beach access, and therefore the Commission CDP incorporated this requirement for a ten-foot wide public access easement. Despite this specific access requirement, over the four decades since the issuance of the CDP and the execution of the condominium conversion, no portion of this Easement has ever been opened to the public – being blocked by the unpermitted development listed herein.

At some point after the issuance of the CDP, between 1973 and 1979, a parking lot was constructed, without Coastal Act authorization, on the upcoast side of the condominium complex on the Easement and the Sterling Property. Concrete walls were constructed along the periphery of the unpermitted parking lot across on the Sterling Property, also without the benefit of a CDP. The unpermitted concrete walls and unpermitted parking lot both occupy portions of the Easement and therefore preclude use thereof. Additionally, at some point after 1973, a large

septic system was installed on the Sterling Property for use by the condominium complex, again without the benefit of a CDP (Exhibits 6 and 19).

In the late 1980s, rock riprap was placed on the Sterling and Outrigger properties and potentially on State tidelands fronting both properties, without a CDP and within the Easement, thus constituting development that is both unpermitted and impeding potential use of the Easement in violation of the CDP (Exhibit 7). As described above, in 1990, Outrigger applied to the Commission for a CDP that, if approved pursuant to the staff recommendation, would have required, as a condition of that approval, Outrigger to address the unpermitted riprap. This permit application, which would have required, via permit conditions, the removal of the riprap and dedication of a lateral access easement across the seaward side of the property, was ultimately withdrawn by Outrigger just prior to hearing. The riprap remains in place on the beach to this day and is addressed in the proposed Orders.

Finally, at some point prior to 2002, Outrigger added to the concrete walls around the unpermitted parking lot, and constructed a gate in the southern wall and concrete walkway from the parking lot to the beach – all without the benefit of a CDP. While simultaneously precluding the public's use of the Easement, this new gate and walkway afford private beach access to condominium residents and their guests (Exhibit 8).

F. ENFORCEMENT ACTIVITIES

Efforts to open the Easement began long before the Commission even had an enforcement program; on August 7, 1975 Mel Carpenter, the Executive Director of the South Coast Regional Commission at the time, wrote a letter to the Deputy Attorney General indicating that his staff had begun verifying compliance with permits that had been issued by the South Coast Regional Commission and that two cases of non-compliance had been noted. One of these cases was for the unpermitted development at the Outrigger Property where, "as late as August 5, 1975, this area is still fenced off with a 'No Trespassing' sign." Mr. Carpenter, who was the Executive Director when the permit was issued, stated that "[s]ince the access has not been provided, I consider them in violation of the permit which was granted with the understanding of the access-way being provided" (Exhibit 19). Unfortunately, there is no record that further formal steps were taken.

In June of 2009, an entity called Access for All ("AFA") filed suit against Los Angeles County and the Malibu Outrigger Homeowners Association (and forty-two named condominium owners) attempting to compel Outrigger and the County to remove encroachments from and to open the Easement. Litigation continued for years. Litigation concluded in 2014 when the court dismissed the case. Neither the litigation nor the subsequent dismissal had any impact upon either the validity of the Easement or the nature of the Coastal Act violations on the Properties.

Shortly before the AFA litigation finally concluded, on July 1, 2013, Commission enforcement staff sent a notice of violation letter to both Outrigger and Sterling, in which staff informed both parties of the presence of unpermitted development on their properties, including within the

Easement, and sought to begin a process whereby Outrigger and Sterling would address the non-compliance with the Coastal Act and CDP (Exhibit 20). In response to this letter, on August 28, 2013, Commission staff met on the properties with representatives from Outrigger as well as City of Malibu staff to discuss the enforcement case and view the extant state of the properties. In the coming months staff spoke with and exchanged documents with Outrigger to ensure both staff and Outrigger had a fulsome, factual understanding of the matter. During meetings on February 24 and April 8, 2014, staff again detailed the items of unpermitted development on both properties and indicated that all physical items of unpermitted development located in the Easement, among other areas, needed be removed to bring the properties into compliance with the Coastal Act. While constructive, these meetings ultimately failed to yield any significant progress, and the process of trying to resolve these violations stalled.

In an effort to re-start dialogue and provide information regarding the potential application to this enforcement matter of the then-recently adopted statute giving the Commission the authority to impose penalties administratively for violation cases involving public access (see Section 30821 of the Coastal Act), staff sent Outrigger and Sterling an additional notice of violation letter on February 10, 2015 (Exhibit 21). On May 18, 2015, staff met with representatives of Outrigger – the entity that undertook[8] the unpermitted development on both the Outrigger and Sterling Properties – to discuss potential mechanisms to resolve the Coastal Act violations in light of existing development constraints (including local zoning codes and extant development). Outrigger sent a letter on August 17, 2015, responding to issues that had been raised at this meeting and raising the notion of potentially relocating the Easement (Exhibit 22).

After additional phone calls on June 8th and July 8th in which Outrigger representatives indicated that they wanted to pursue moving the easement to a different location on the Outrigger Property , staff sent a letter on September 2, 2015, indicating that pursuit of moving the easement would only be acceptable insofar as it did not further delay the opening of the Easement and also directed Outrigger to develop a plan to have the easement opened by September 16, 2016 (Exhibit 23). When progress towards the opening of the Easement had again failed to materialize, staff wrote another letter to Outrigger on September 15, 2016, requesting again that the Easement be opened and indicating that any agreement to relocate the easement could be addressed after the Easement was made available to the public (Exhibit 24).

By letter dated October 19, 2016, Outrigger responded to Commission staff's continued requests that unpermitted development be addressed and encroachments into the easement area be removed, among other things (Exhibit 25). While continuing to advocate for relocation of the easement, this letter also enumerated a number of asserted defenses to the enforcement action – to which staff responded in writing on February 28, 2017 (Exhibit 26). In this letter, staff addressed the alleged defenses raised and again indicated that the Easement should be opened

[8] Although the Coastal Act subjects the party who undertook the development to various forms of potential administrative enforcement (*see* Coastal Act sections 30809-12 and 30821, among others), the owners of property are also liable for unpermitted development on the property, even if they did not actively engage in the development. *See Leslie Salt Co. v. San Francisco Bay Conservation and Development Comm'n* (1984), 153 Cal.App.3d 605.

immediately and that attempts to relocate the easement should not continue to prolong the time that the public was precluded from accessing the beach.

Finally, on May 1, 2017, a Notice of Intent to Commence Cease and Desist Order Proceedings, and Administrative Civil Penalty Proceedings ("NOI") was issued to both Outrigger and Sterling (Exhibit 27). In the two years since the issuance of the NOI, staff has worked collaboratively with Outrigger to try to craft a creative resolution to this longstanding violation that also addresses the concerns of Sterling and the infrastructure requirements for Outrigger, as well as obtaining compliance with the Coastal Act and ensuring that safe and convenient public access to the beach is provided.

The proposed resolution of this matter takes the form of three actions by the Commission: the consensual imposition of an administrative civil penalty on Outrigger to address public access violations, issuance of a consent cease and desist order to Outrigger, and issuance of a consent cease and desist order to Sterling. Because Sterling did not actually undertake any unpermitted development on its property, the Sterling Order simply requires that Sterling participate and cooperate with Outrigger as necessary to address unpermitted development on the Sterling Property, and that they not take any actions that prevent compliance with the Consent Orders.

Meanwhile, the proposed Consent Orders (both the Consent Administrative Civil Penalty and Consent Cease and Desist Order) directed to Outrigger: address all enumerated items of unpermitted development on the Sterling and Outrigger Properties, require the creation of a suite of public access improvements that will greatly enhance public access in the area (including provide the long-delayed vertical public accessway to the beach) in lieu of a much larger penalty, and require payment of an administrative civil penalty of $500,000. Firstly, the Consent Orders address the unpermitted development by requiring that the unpermitted riprap and private beach access walkway be removed, providing for the relocation of the unpermitted leach field, and directing that Outrigger submit an application for after-the-fact Coastal Act authorization of the unpermitted parking lot.

Additionally, to resolve the unpermitted development relating to the public access easement, Outrigger will create a complement of public access enhancements, the first of which will be to relocate the vertical access easement to a more favorable portion of the Outrigger Property. Because the current easement runs through a parking lot (the portion of the parking lot that is not unpermitted) along Outrigger's upcoast property line, in order to relocate the vertical access easement to a location more suitable for public use, Outrigger and Sterling have agreed to and will apply for a permit to shift their shared property line approximately 50 feet upcoast. As depicted in Exhibit 9, this will result in a slight diminution in size of the Sterling Property and a concomitant gain by the Outrigger Property. A new public access easement from PCH to the beach will be dedicated to the Mountains Recreation and Conservation Authority ("MRCA") in the area added to the Outrigger Property by the lot line adjustment – this easement will be twenty feet wide, twice the width required by the original CDP. This new easement, which is located in a favorably flat and undeveloped area, will be on the adjusted upcoast end of the Outrigger

Property, ensuring that the Easement remains on the same property that is the subject of the original permit requirement.

Furthermore, pursuant to the proposed Consent Orders, Outrigger will fund construction of the new ADA accessible public access path to render the easement completely useable by the public. The amenities to be included in this new accessway include benches, and a shade structure, allowing members of the public of all capabilities to enjoy this stretch of the coast. Not only will Outrigger create and improve this new vertical access easement, an undertaking which is valued at over 1 million dollars, but they have also agreed through the Consent Orders to provide for and codify lateral public access across the entire approximately 200 feet of beach fronting the MOC (Exhibit 9). The combination of a wide vertical access way with a complementary lateral access along this stretch of beach will immeasurably enhance public access on a heretofore difficult to reach beach.

Finally, pursuant to the proposed Consent Orders, in addition to paying for the above amenities in lieu of a much higher penalty, Outrigger will pay $500,000 to address the remaining civil liabilities associated with the unpermitted development and access violations; $350,000 will go to the Commission's Violation Remediation Account, and $150,000 will go to MRCA for operation and maintenance of the new public access areas. This settlement, which all told has a monetary worth of $1.5 million, is the result of a complex and challenging process in which both Sterling and Outrigger demonstrated a complete commitment to resolving these Coastal Act violations and a dedication to ensuring that public access in the area is enhanced to the benefit of all.

G. BASIS FOR ISSUING CEASE AND DESIST ORDERS

1. **STATUTORY PROVISION**

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

> *(a) if the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist….*
>
> …
>
> *(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.*

2. APPLICATION TO FACTS

a. Development has Occurred Without a Permit **and** Inconsistent with CDP A-6-1-73-1100 (the CDP)

Unpermitted development, as described in Section II.E, above, has occurred on the Outrigger and Sterling properties in violation of a previously issued CDP and without Coastal Act authorization. We will discuss the lack of affirmative authorization for the development first.

Section 30600(a) of the Coastal Act states that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the Coastal Zone must obtain a coastal development permit. "Development" is defined broadly by Section 30106 of the Coastal Act and Section 12.2.1 of the City of Malibu Local Coastal Program ("LCP") as follows, in relevant part:

> *"Development" means, on land, in or under water, the placement or erection of any solid material or structure; . . . ; grading, removing, dredging, mining, or extraction of any materials; . . . ; change in the intensity of use of water, or of access thereto;. . . .*

The construction of the parking lot in the Easement and on the Sterling Property, walls, leach field, and private walkway, as well as the placement of riprap all involve the placement or erection of solid material and thus squarely fit within the above definition of "development." Since all of that development occurred prior to the certification of the Malibu LCP in 2002, all of that required a permit from the Commission. None of it received any such authorization. Thus, all of that work constituted unpermitted development, or, in the parlance of section 30810, the undertaking of an activity that required a permit from the commission without securing the permit, thus triggering the independent criterion in section 30810(a) and sufficing to authorize the Commission's issuance of the subject Cease and Desist Orders.

Further, those above items of unpermitted development also have the effect of preventing access to the ocean via the Easement, which was required by the CDP specifically to provide for such access. Thus, the unpermitted development is also inconsistent with a permit previously issued by the Commission, triggering the other independent criterion in section 30810(a), which authorizes the Commission's issuance of the subject Cease and Desist Order. In other words, the Commission has jurisdiction to enforce its own permits.

In sum, the Commission has enforcement jurisdiction over the violations at issue herein, and it has such jurisdiction for two separate reasons (30810(a)(1) and (a)(2)) with respect to those violations that are located within the Easement and have the effect of preventing or discouraging use of the Easement.

The Commission also retains enforcement authority within a locality with a certified LCP. This is potentially relevant here because the City of Malibu Land Use Plan and Local Implementation

Plan (which together form the LCP) were adopted by the Commission on September 13, 2002; the City now issues CDPs for development and ensures compliance with the Coastal Act within its geographic limit. Commission staff coordinated with the City of Malibu regarding enforcement on the Outrigger and Sterling properties, and on January 28, 2015, received a letter from City of Malibu Senior Code Enforcement Officer Douglas Cleavenger requesting that the Commission take over primary enforcement action regarding the violations that exist on the two properties for those violations that may be outside the scope of the CDP (Exhibit 28) or that occurred prior to the certification of the LCP. The Commission's enforcement authority within a locality with a certified LCP is set forth, in part, in the following portion of Section 30810(a):

The [cease and desist] order may be issued…under any of the following circumstances:

> *1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.*

The Commission thus has authority to enforce violations pertaining to the CDP, as well as the remainder of the violations on both properties, including the rip rap that was placed on the beach. Commission staff has been in communication with City of Malibu enforcement and planning staff to keep the City apprised of the potential parameters and ramifications of this enforcement action.

In the matter at hand, Outrigger engaged in construction of a parking area and concrete walls and a concrete walkway, as well as the placement of riprap onto the beach - all of which are unpermitted (by either the Commission or the City of Malibu) for Coastal Act purposes and encroach into the Easement. The construction and placement of riprap on the beach within the Easement prevents use of the easement and the beach by the public in contravention of the CDP and the Coastal Act. These activities and failures to comply with conditions of a previously issued permit clearly meet the definition of development under Section 30106, and no exemptions to the Coastal Act's permit requirement apply. The unpermitted development required a CDP and no CDP was issued. In addition, the unpermitted development located within the public access easement is directly inconsistent with CDP A-6-1-73-1100. Therefore, both of the independent criterion required for issuance of a Cease and Desist Order are met here.

It is only necessary to find that development has been undertaken without a required permit or in violation of a previously issued permit in order for the Commission to issue a Cease and Desist Order. However, the following Sections b and c are included for background purposes and to provide information relevant to Section G, below.

b. <u>The Unpermitted Development at Issue is not Consistent with the Coastal Act's Access Provisions and Principles of Environmental Justice</u>

The following discussion does not address any element of Section 30810 of the Coastal Act, and the findings in this section are therefore not essential to the Commission's ability to issue a cease

and desist order. This explication is, however, important for understanding the totality of impacts associated with the violations and for analyzing factors discussed in Section G, below.

Coastal Act Section 30210 states:

> *In carrying out the requirements 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.*

Additionally, Section 30013 of the Public Resources Code provides:

> *The Legislature further finds and declares that in order to advance the principles of environmental justice and equality, subdivision (a) of Section 11135 of the Government Code and subdivision (e) of Section 65040.12 of the Government Code apply to the commission and all public agencies implementing the provisions of this division….*

The unpermitted development all variously encroach upon the public access easement required by the CDP. This development physically precludes use of the easement and limits the amount of beach available for pass and repass, making it difficult if not impossible for the owner of the Easement to construct an access way here. Additionally, the unpermitted placement of rock rip rap on the beach, even outside of a vertical access easement, is an access violation as it occupies physical space on the beach, increases erosion up and down the beach, and shrinks useable beach area.

Public recreation and the ability for the public to access the beach are major cornerstones of the Coastal Act and are critical provisions to enforce in this difficult-to-access section of coastline in Malibu. According to the City of Malibu Land Use Plan, "Access to many beaches throughout the City… is restricted due to blockage by development including gated communities or private compounds, unopened accessways, and lack of parking."[9] Currently, across the entire approximately 1.5 mile stretch of coastline that makes up the very popular destination of Carbon Beach, there are only three available points of public ingress and egress. This relative dearth of access points concentrates the beach-going public at these three loci, compounding the existing paucity of parking along the already impacted PCH. This paradigm increases the likelihood that if an individual wants to visit the beach, they will be required to either pay a substantial amount for parking or walk a great distance – which means decreased accessibility for lower income and disabled visitors.

In addition to limiting the use of beaches due to scarcity of parking around the few accessways that are in fact open, the infrequency of open accessways along the beach means that those

[9] Malibu Local Coastal Program; Land Use Plan. Chapter 1 – Introduction (June 2016).

walking the beach must be well equipped with knowledge about tides and swell conditions and know the distances from the few access points so they are not caught as waves and high tides rise from hour to hour. Particularly in areas like Carbon Beach, where development forms a continuous wall immediately fronting the ocean, and with rising sea levels, the tide can be quite near homes or seawalls fronting the homes – walking up or down coast from an accessway can mean getting trapped and unable to return, particularly where properties have substantial seawalls or riprap. Thus, greater numbers of access points across even one part of the beach increases the span of that beach that is safely accessible.

The Malibu LCP also recognizes the importance of the fair implementation and enforcement of environmental laws in order to "promote the fair treatment of people of all races, cultures, and incomes."[10] Although no single public accessway to the beach will solve all environmental justice problems related to coastal access, every new accessway that makes it easier for the public to access the coast, especially by making available those accessways already acquired by the State or County for public recreation, will cumulatively improve public access and reduce environmental justice concerns.

Finally, it is an important precept of environmental justice in California that all of the public should enjoy access for recreation at coastal areas. Public access and coastal recreation continue to be threatened by private development, illegal encroachments, and other restrictions on beach or coastal access. While coastal property owners benefit from private development fronting the beach and ocean, those that do not have these means and/or live far from the coast receive the burdens associated therewith. Securing open public access for all citizens provides low-cost, outdoor recreation that can improve the overall quality of life of all the public.

The unpermitted development at issue in this matter is therefore inconsistent with Section 30810 of the Coastal Act and the public access policies of the Coastal Act and City of Malibu LCP.

c. <u>The Unpermitted Development is Inconsistent with other Chapter 3 Policies of the Coastal Act</u>

The unpermitted development addressed through the proposed Consent Orders and Sterling Order did not have the benefit of scrutiny by the Commission for consistency with resource protection policies of the Coastal Act prior to construction. In fact, as discussed above in Section III.G.2.b, immediately above, much of the unpermitted development is inconsistent with important public access tenants enumerated in Chapter 3 of the Coastal Act.

Additionally, Section 30253 of the Coastal Act requires that:

> *New development shall:*
> *(1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*

[10] Malibu LCP, Chapter 1.D

> *(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

While, Section 30235 of the Coastal Act provides that:

> *"Revetments…shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline and sand supplies….."*

Furthermore, Section 30251 of the Coastal Act states that:

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

Collectively, these provisions of the Coastal Act are intended to ensure that coastal protection devices are used only in circumscribed instances, and to make sure that when they are used that they are designed in such a way as to render them minimally impactful to the marine environment, viewshed, and beach. The riprap at issue in this enforcement matter was placed without the benefit of a permit – no review was undertaken to assess its impacts on public access, recreation, views, erosion, or landforms. Similarly, there was no analysis to ensure that, given the likely impacts on some of those resources, the shoreline protection was in fact needed and that this was the least deleterious and most appropriate mechanism of protecting any appropriately permitted existing development.

Besides reducing the visual and scenic quality of the coastline, construction of seawalls, stacked boulder walls, revetments and other similar structures also reduces the actual area of beach available for public pass and repass through direct occupation of sandy beach. In addition, another effect of these structures on the beach is the loss of beach sand caused by erosive forces and trapping of beach sediment behind the hardened structures.

Not only do seawalls, stacked boulder walls, revetments and other similar structures physically block the public from using the portion of the beach that these structures occupy, but they also frequently result in increased erosion rates – narrowing beaches and pinching lateral access into narrower and narrower strips of sand until eventually no beach is left. These walls, revetments, and other structures concentrate the force vectors of waves; whereas wave energy naturally dissipates through eddies across both the horizontal and vertical planes, the presence of a solid, immovable structure concentrates breaking wave forces downward, resulting in scour of sand from the base of the structure. Additionally, beaches are naturally dynamic; when wave action is low the beach is often wide and flat, however when subjected to more powerful wave action the

beach becomes steeper with sand moving from the beach to an offshore sand bar that builds up and helps dissipate wave energy. However, because the hardened structures (revetments, seawalls, etc.) are physically on or in front of the sand needed to nourish the offshore bar, the offshore sand bar shrinks and becomes less effective and wave rush up goes farther with greater energy. Sand is thus scoured from the base of the revetment.

Furthermore, the presence of these hardened structures additionally increases the likelihood of neighboring properties requiring seawalls, revetments, or other similar structures as well. Increased scour at the upcoast and downcoast margins from concentrating force vectors denudes beach along the periphery of the structure. Likewise, placement of shoreline armoring interrupts longshore transport and can result in diminution of downcoast sand supply. By precluding sand from eroding in the area protected by revetments, sediment is impounded in place, which results in a concomitant reduction in sediment that can be carried down coast.

An additional impact of beach armoring is that it results in the loss of beach and intertidal ecosystems. Section 30230 of the Coastal Act requires that:

"Marine resources shall be maintained, enhanced, and where feasible, restored…."

By physically occupying the beach and intertidal zones, armoring diminishes productivity associated with intertidal zones. Studies have found that on armored vs unarmored beaches biomass, abundance, and size of upper intertidal macro invertebrates are significantly lower. Presence of armoring was also shown to correlate with diminution in total abundance as well as species richness in shorebirds[11]. Additionally, not only does placement of seawalls and riprap on the beach physically diminish the breadth of beach available for organisms to forage, breed, and nest, but it also acts as a barrier that prevents those ecosystems from migrating landward with rising sea levels – a circumstance that will result in the elimination of those inter and supra tidal ecosystems as the water levels rise to meet the seawalls and revetments.

Because the rock riprap was installed without permits, it was never subjected to Commission review under the Coastal Act. At a minimum, the unpermitted riprap impacts public access (for the reasons discussed above), natural beach sediment processes (for the reasons discussed above), and intertidal ecological productivity by preventing intertidal ecosystems from migrating inland as sea levels rise, all inconsistent with the Chapter 3 policies of the Coastal Act. The proposed Consent Orders require removal of the riprap, which will address these impacts. Apart from the physical impacts to the beach, as discussed above in Section III.G.2.b, unpermitted development on the Sterling and Outrigger Properties impacts public access to the beach inconsistent with Chapter 3 of the Coastal Act. The proposed Consent Orders require that Outrigger address these issues by providing enhanced public access by 1) relocating the easement to a more favorably undeveloped and flat portion of the Outrigger property, 2) doubling the width of the lateral public access easement, and 3) constructing a host of public access amenities, including benches and a shade structure, in the easement to render it useable by

[11] Dugan, J.E. Hubbard, D.M. Rodil, I.F. Revell, D.L. and Schroeter, S. 2008, Ecological effects of coastal armoring on sandy beaches. Marine Ecology, v 29 supl. I. p 160-170.

the public. This new accessway will reach the same beach in front of the Sterling and Outrigger properties, but will be shifted upcoast so as to be situated in a more level and useable location. Pursuant to the proposed Consent Orders, Outrigger will execute a lot line adjustment so the easement will remain on the upcoast end of their property – ensuring that the Easement remains on the same property that is the subject of the original permit requirement.

H. BASIS FOR IMPOSITION OF ADMINISTRATIVE PENALTIES

1. 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.*

2. APPLICATION TO FACTS

This case, as discussed above, includes violations of the public access provisions of the Coastal Act. These provisions include, but are not necessarily limited to, Section 30210, which states in relevant part that "maximum access…and recreational opportunities shall be provided for all the people." As detailed above, there is generally a dearth of public access to Carbon Beach, and in the City of Malibu in general – the beach in front of the Outrigger and Sterling Properties is unreachable from existing accessways when the tide is high or if the swell is large. Because the unpermitted development continues to block the vertical public access easement and prevents development of a public accessway on the Easement, the unpermitted development is blocking public access and therefore is inconsistent with the provision of maximum public access to the beach in contravention of Section 30210 of the Coastal Act.

Additionally, in approving the CDP in 1973, the Commission found that special conditions were required to make the proposed project consistent with the Coastal Act; including its findings in support of the provision requiring that a public access easement be recorded along the westerly edge of the property. The unpermitted development at issue here currently encroaches onto and blocks the area of the vertical access easement and hinders the development of the Easement for public access, inconsistent with Condition I.C. of the CDP, which was explicitly imposed in order to ensure that the development would comply with the Public access provisions of the Coastal Act. Development in violation of that condition is therefore necessarily a violation of the public access provisions of the act.

a. Exceptions to Section 30821 Liability do Not Apply

Under Section 30821(h) of the Coastal Act, under certain circumstances, a property owner can "cure" a violation and thereby avoid imposition of administrative penalties by correcting a violation within 30 days of written notification from the Commission regarding the violation. Section 30821(h)'s cure opportunity does not apply to the matter at hand. For 30821(h) to apply, there are three requirements, all of which must be satisfied: 1) the violation must be remedied consistent with the Coastal Act within 30 days of receiving notice, 2) the violation must not be a violation of a permit condition, and 3) the party must be able to remedy the violation without performing additional development that would require Coastal Act authorization. None of these conditions is satisfied in the matter at hand.

The public access portions of the violations at issue in this enforcement action includes blocking a public access easement, extending a parking lot onto an adjacent property, and installation of rip rap on a beach. The unpermitted development on the Sterling and Outrigger Properties is a violation of CDP A-6-1-73-1100, with the narrow exception of the portion of the unpermitted development that is 1) located outside of the Easement and 2) does not affect the Easement, including portions of the riprap, leech field, and the private beach walkway. Notice of the unpermitted development was provided on July 1, 2013, when Commission staff sent a notice of violation letter to Outrigger, specifically identifying each element of unpermitted development. To date, all unpermitted development remains in place; any cure period applicable to this item of unpermitted development has long since lapsed. Further, removal of the riprap would itself constitute development that would require a permit.

The remainder of the violations, including the construction of a parking lot, concrete walls, a concrete path, are all violations of the CDP. These violations were variously enumerated in notices and letters from Commission staff dating from the July 1, 2013 notice of violation to the May 1, 2017 NOI. Further, this development persists in contravention of the CDP, and cure is not available for permit violations. Even assuming arguendo that these violations are not considered permit violations, any 30-day period to cure these long-standing violations has long since run.

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

> *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 to this case. As discussed above and more fully below, the construction of the encroachments into the Easement and onto the Sterling Property, as well as the placement of riprap on the beach are significant because they inhibit any potential use of the Easement and the beach occupied by the riprap, and access to this area of the coast is a scarce and important resource. The violations cannot therefore be considered to be "minor violations"

or to have resulted in "de minimis" harm to the public. Nor were they unintentional. And as is explained in Section III.F, above, although the parties have been cooperative over the past two years, the violator did not act expeditiously to correct the violation over many years, and even decades, and the violations were retained in place despite numerous notices and attempts by Commission staff to resolve the situation.

b. Penalty Amount

Pursuant to Section 30821(a) of the Coastal Act, the Commission may impose penalties in *"an amount not to exceed 75 percent of the amount of the maximum penalty authorized pursuant to subdivision (b) of Section 30820 for each violation."* Section 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 impose penalties of up to $11,250 ($15,000 x .75) per day for each violation. There are multiple Coastal Act violations at issue here, some of which qualify as violations of the public access provisions of the Coastal Act. For the purposes of calculating the penalty for this consensual administrative penalty hearing, however, in light of Respondent's willingness to enter into this Consent Order, and because the new Board of Directors have, after the issuance of the NOI, worked diligently and expeditiously with staff to reach an amicable resolution, in this specific case and under these particular fact patterns, the Commission is treating Outrigger's maintenance of various items of unpermitted development that are either directly or indirectly precluding use of the Easement as a single violation.

Section 30821(a) establishes the time period 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 unpermitted parking lot was constructed across the Easement in the mid-1970's and the rocks were placed on the beach in 1986 without a CDP. The violations have thus persisted since the 1970s and mid-1980s, decades longer than the five years for which the statute provides penalties. While Section 30821 of the Coastal Act provides for the daily assessment of penalties for each day a violation persists, given the facts at hand and nature of the resolution in this case Commission staff recommends a lower penalty assessment. The proposed settlement with not only open up a much needed accessway, it will result in a wider accessway than originally required in the permit, which is of great value and which would be expensive if it had to be purchased. In addition, the accessway will be built at the expense of the settlors, include additional improvements such as signage, benches, and shade structures, and the settlors will take the responsibility of obtaining the permits and performing the construction activities, which will save the public both time and expenses. Finally, in light of the manner in which the new composition of Outrigger's Board of Directors has taken ownership of the violations and has worked diligently and creatively with staff to craft a resolution that will be a net benefit to the public, Staff recommends a lower penalty amount. As previously stated, if this matter was not settled amicably, the Commission could seek penalties dating back to 2014, however, to avoid costly litigation and to recognize the efforts Outrigger has undertaken to endeavor to rectify this violation, staff recommends assessment of a $1.5 million dollar penalty; $500,000 of which will be paid directly to the VRA and MRCA, while the

remaining $1,000,000 will be paid towards developing and implementing a suite of public access enhancements. This proposed resolution will satisfy the goals of resolving access violations quickly and creatively, while ensuring that State resources can be used elsewhere rather than being required for contentious and protracted litigation.

As discussed immediately below, Commission staff thoroughly analyzed the factors enumerated by the Coastal Act in crafting the proposed Consent Administrative Civil Penalty calculation for the Commission's approval, and, if adopted as recommended, the Commission concurs with staff's analysis. Under 30821(c), in determining the amount of administrative penalty to impose, "the commission shall take into account the factors set forth in subdivision (c) of Section 30820."

Section 30820(c) states:

> *In determining the amount of civil liability, the following factors shall be considered:*
>
> *(1) The nature, circumstance, extent, and gravity of the violation.*
>
> *(2) Whether the violation is susceptible to restoration or other remedial measures.*
>
> *(3) The sensitivity of the resource affected by the violation.*
>
> *(4) The cost to the state of bringing the action.*
>
> *(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.*

Section 30820(c)(1) requires consideration of the nature, circumstances, extent, and gravity of the violation. While the violation[12] at issue in this case impacts a significant coastal resource, the scope and nature of the unpermitted development itself is relatively limited. On the other hand, the property has been in violation of the CDP for over forty years, and such violation has meant that the public has been completely unable to access the beach in this particular area. The analysis of this factor supports imposition of a higher level penalty.

Application of the factor listed in Section 30820(c)(2), whether the violation is susceptible to restoration, to the penalty calculus involves an analysis of the extent to which the losses and resource can be restored, and therefore, an evaluation of the temporal losses. In fact, the condition that remains within the physical footprint of the violation is not irremediable; the physical items of unpermitted development can be removed from the Easement, the access can be built, the parking lot can be removed or reconfigured, and the boulders can be removed from

[12] Again, for the purposes of this settlement, the many violations involved in this matter are being treated as a singular unit.

the beach. These actions, however, do nothing to undo the decades of lost access and lost days at the beach for the public that directly resulted from Respondent's actions; access across this public easement has been blocked for 40 years – a circumstance that has rendered the portion of beach fronting the Sterling and Outrigger properties difficult if not impossible to reach during higher tides. Further, the riprap has been on the beach since 1986 – that is decades of physically blocking use, causing up and down coast beach erosion, and changing beach profiles – none of which can be restored. Analysis of this factor therefore supports imposition of a penalty in the high-range.

Section 30820(c)(3) requires consideration of the nature of the resource affected by the violation in the assessment of a penalty amount. The resource affected by the violation in this case, public access to the beach, is a scarce and important resource across the State, and in this coastal region specifically. Public access is extremely limited in Los Angeles County in general, and in the Malibu area in particular. A 2012 Commission staff report[13] on Commission recorded vertical accessways found that at the end of 2011 there had been thirty-four accessways recorded in Los Angeles County as a result of Commission required actions such as requirements in CDPs, yet only sixteen had been opened and constructed for public use. In the city of Malibu, the Commission permit actions have resulted in the recordation of twenty-nine vertical public access easements, but only eleven are open at this time, and eighteen remain closed.

At the same time, almost all of the twenty-one miles of Malibu's coastline has been developed for private residences, both limiting visual coastal access and preventing any coastal public access unless through recorded easements, or in some rare cases, public ownership. Access in Malibu is therefore finite, infrequent, and limited; it is an extraordinarily sensitive resource in this particular region of the State. Moreover, population in southern California has continued to increase, creating additional pressures on the already heavily used coastal access points. Analysis of this factor therefore supports imposition of a higher penalty.

Consideration of Section 30820(c)(4), expense to the state of bringing this action, tends to point to a more significant penalty here; this case has been consuming time, albeit discontinuously, of both State and local government personnel at various levels since the mid-1970s. As an illustration of the many years of effort involved, in a letter dated April 17, 1975, the Regional Commission's Executive Director attempted to first resolve this matter expeditiously. Following this, on August 7, 1975 Mel Carpenter, the then Executive Director of the South Coast Regional Commission, wrote to a deputy attorney general to provide notice that the ten-foot easement recorded through the Outrigger property was still fenced, and had a "No Trespassing" sign in front. This letter requested that enforcement action be taken to "have this access way opened up in accordance with the permit (Exhibit 19)." More recently, in the five years since enforcement action began anew in earnest in 2013, staff has been continuously dedicating very significant time and effort to trying to resolve this matter and open the underlying easement to the public. This reflects a significant expenditure of time and resources by Commission staff and suggests a higher penalty amount.

[13] http://documents.coastal.ca.gov/reports/2012/1/Th5-1-2012.pdf

Finally, Section 30830(c)(5) requires evaluation of the entity or individual that undertook and/or maintained the unpermitted development; whether the violator has a previous history of violations, whether they financially benefited from the violation, the degree of culpability, and whether they undertook any voluntary remedial measures. Respondents began fighting the opening of the Easement two years after it was imposed; on April 9, 1975, Los Angeles County Beaches and Harbors notified Outrigger of the County's intent to proceed with construction to open the pedestrian accessway on the property in the coming months (Exhibit 29). Instead of taking "voluntary measures" to resolve the violation, what transpired at that time was a flurry of correspondence between attorneys for Outrigger and the County. In these many letters, despite having agreed to the conditions of the subdivision, specifically including creation of the Easement, less than two years earlier, rather than working to comply with the permit's clear requirements, attorneys for the owners instead raised myriad reasons why the Easement should be relocated or not presently be constructed. Outrigger's attorney variously argued that the easement would "prevent us from erecting a security system for the underground parking garage", and that opening "the easement where presently located would deprive us of a number of parking spaces that were provided by the subdivider in converting the building to a condominium." (Exhibit 30). Under the terms of the original permit, the County was going to construct improvements within the Easement and had been working toward this in the 1970s. Unfortunately, the actions by the owners thwarted this and ended up delaying construction for decades. In response to several letters from Outrigger objecting to the opening of the Easement in its agreed-upon location, the County was initially, potentially amenable to this solution of moving the easement but expressed concern that their funding constraints might mean that the construction contract would have to be awarded within a short amount of time. In fact, construction was foiled when the County received a letter from attorneys for Outrigger on May 27, 1975, demanding that the County not proceed with the construction of an accessway pending resolution of an unrelated dispute in which Outrigger had received a claim by a third-party averring to have a security interest in the Sterling Property. This property dispute ended up lasting over a decade, and by the time it was finally resolved, the County's focus and funding had moved on to other areas. These facts would suggest a higher penalty.

However, we also note that staff is unaware of any other violations associated with Outrigger. Further, obviating the potential need for costly and time-consuming litigation to resolve this matter, Outrigger has now agreed to undertake extensive remedial measures to voluntarily resolve the Coastal Act violations at issue herein, to address associated civil liabilities, and to cease and desist from any future unpermitted development on the property. Consideration of these facts in the penalty calculus suggests a mid-range penalty.

Analysis of each of the Section 30820(c) factors indicates the significance of this violation, and helps illustrate why Commission staff has continued to work to resolve this matter. However, the appropriate penalty amount for a settlement must be determined in the context of both the settlement, the history and facts under each of the aforementioned factors, and the value to the public and state of the proposed settlement. As noted throughout this document, this proposed settlement would afford the public with enhanced public access, including by providing an

accessway double the width of that which was originally required, and by creating additional access enhancements such as benches and shade structures. Moreover, having Outrigger both perform and pay for the accessway will result in an accelerated process and save the state and public money not just in avoided litigation costs, but also in the permitting and construction process itself. All of this was taken into account in evaluating an appropriate penalty amount. Further, while the Coastal Act violations on the Outrigger and Sterling Properties are significant, longstanding, and have required a good deal of staff time to resolve, these factors are balanced by the changed nature of the membership of the condominium complex since the time the unpermitted development was installed, as well as the fact that the current occupants have worked assiduously with staff to find a mutually acceptable solution to this matter, and do not have a history of violations.

Therefore, staff has recommended a monetary penalty amount totaling $500,000, to be directed towards the Mountains Recreation and Conservation Authority and the Violation Remediation Account of the State Coastal Conservancy. In lieu of a much larger monetary penalty, Outrigger has also agreed to undertake additional public access improvements on the Outrigger Property including: to dedicate a lateral public accessway across the entirety of beach fronting the Property, to widen and relocate the easement and construct public access improvements there at their own expense, including benches, shade structures, signage, and which collectively has a monetary value of approximately $1,000,000. Therefore, the total, combine amount of the penalty is approximately $1.5 million.

I. PROPOSED CONSENT ORDERS AND STERLING ORDER ARE CONSISTENT WITH CH. 3

The proposed Consent Orders and Sterling Order, attached to this staff report as Appendices A and B, respectively, are consistent with the resource protection policies found in Chapter 3 of the Coastal Act and the correlative policies enumerated in the City of Malibu LCP. The proposed Consent Orders require Outrigger to remove the unpermitted riprap and private beach access from the property. The proposed Consent Orders would allow Outrigger to apply for after-the-fact permission to retain the parking lot and appurtenant walls, and for permission to relocate the unpermitted septic system. Further, the proposed Consent Orders would allow and require Outrigger to relocate the public access easement no more than fifty feet upcoast, double the width of the easement to a total of twenty feet, and construct the actual public access improvements necessary to create a useable accessway to the very same stretch of beach, including benches, signage, shade structures, and an ADA accessible pathway. Additionally, the proposed Consent Orders would require Outrigger to provide a codified lateral public access along the length of the beach fronting the Outrigger Property. Finally, the proposed Consent Orders require Outrigger to seek a lot line adjustment that will allow the relocated easement to remain on the Outrigger parcel but be situated in a location that is better suited for public access. While enhancing public access, the relocated easement would allow access to the same beach, encumber the same property, and abut the same neighboring property. The proposed Sterling Orders direct Sterling to participate and cooperate in the execution of work required pursuant to the Consent Orders, including by providing physical access to the Sterling Property, and by being a co-applicant on permit applications where necessary. Therefore, the Consent Orders and

Sterling Order are consistent with the Chapter 3 policies of the Coastal Act, and their issuance is consistent with Coastal Act Section 30810(b).

J. CALIFORNIA ENVIRONMENTAL QUALITY ACT

The Commission finds that imposition and implementation of these Cease and Desist Orders, to compel the removal of unpermitted development and to effectuate public access across an easement contemplated by CDP A-6-1-73-1100, among other things, are exempt from the requirements of the California Environmental Quality Act of 1970 (CEQA), Cal. Pub. Res. Code §§ 21000 *et seq*., for the following reasons. First, the CEQA statue (section 21084) provides for the identification of "classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt from [CEQA]." The CEQA Guidelines (which, like the Commission's regulations, are codified in 14 CCR) provide a list of such projects, which are subject to what is known as "categorical exemptions," in Article 19 (14 CCR §§15300 *et seq.*). Because this is an enforcement action designed to protect, restore, and enhance natural resources and the environment, and because the Commission's process, as demonstrated above, involves ensuring that the environment is protected throughout the process, three of those exemptions apply here: (1) the one covering actions to assure the restoration or enhancement of natural resources where the regulatory process involves procedures for protection of the environment (14 CCR § 15307); (2) the one covering actions to assure the restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment (14 CCR §15308); and (3) the one covering enforcement actions by regulatory agencies (14 CCR § 15321).

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

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

CEQA defines the phrase "significant effect on the environment" (in Section 21068) to mean "a substantial, or potentially substantial, adverse change in the environment." This Cease and Desist Order is designed to protect and enhance the environment, and contains provisions to ensure, and to allow the Executive Director to ensure, that it is implemented in a manner that will protect the environment. Thus, this action will not have any significant effect on the environment, within the meaning of CEQA, and the exception to the categorical exemptions listed in 14 CCR section15300.2(c) does not apply. An independent but equally sufficient reason why that exception in Section 15300.2(c) does not apply is that this case does not involve any "unusual circumstances" within the meaning of that section, in that it has no significant feature that would distinguish it from other activities in the exempt classes listed above. This case is a typical Commission enforcement action to protect and restore coastal resources, including public access to the coast.

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

IV. SUMMARY OF FINDINGS OF FACT

1. Outrigger Homeowners Association ("Outrigger") manages the property at 22548 Pacific Coast Highway on behalf of its members, who own the common areas as tenants in common. The Sterling Family Trust owns property at 22660 Pacific Coast Highway. Both properties are located within the City of Malibu and in the Coastal Zone.
2. In its approval of CDP A-6-1-73-1100, the Commission approved the conversion of the structure at 22548 Pacific Coast Highway to condominiums, finding the project consistent with the Coastal Act, contingent upon Outrigger complying with Los Angeles County Tract Map No. 29628, which required a ten-foot wide vertical public access easement along the Outrigger Property's westerly property line from PCH to the MHTL.
3. Coastal Act Section 30810 authorizes the Commission to issue a cease and desist order when the Commission determines that any person has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the Commission without securing a permit, or (2) is inconsistent with a permit previously issued by the Commission.
4. Unpermitted development and development inconsistent with CDP A-6-1-73-1100 has been undertaken by Outrigger on both the Outrigger and Sterling properties. This unpermitted development includes: an unpermitted parking lot, concrete walls, gate, concrete walkway, and rock riprap on the beach, which are unpermitted and block the vertical public access easement delineated in Los Angeles County Tract Map No. 29628, and therefore required by the permit previously issued by the Commission. Additional unpermitted development includes the installation of a septic system and placement of rocks on the sandy beach on and seaward of the Sterling Property. Therefore, the Commission has jurisdiction to issue a cease and desist order.
5. The work to be performed under these Consent Orders, if completed in compliance with the Consent Orders and the plans required therein, will be consistent with Chapter 3 of the Coastal Act.
6. 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 contain general civil liability provisions for Coastal Act violations.
7. As stated in Section 4, above, unpermitted development and development inconsistent with CDP A-6-1-73-1100 has been undertaken by Outrigger on property owned by Outrigger and Sterling. These actions are also inconsistent with the public access provisions of the Coastal Act and therefore subject Outrigger to penalties under Section 30821 of the Coastal Act. Through the Consent Orders, Outrigger has agreed to resolve all financial liabilities under the Coastal Act.