

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904- 5200
FAX (415) 904- 5400



W11&12

Staff: Andrew Willis-LB
Staff Report: April 18, 2019
Hearing Date: May 8, 2019

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

Consent Cease and Desist Order No.:	CCC-19-CD-01
Consent Administrative Civil Penalty:	CCC-19-AP-02
Related Violation File:	V-5-13-020
Location of Properties:	Shore Hotel, 1515-1525 Ocean Avenue and 1530 Second Street, Santa Monica, Los Angeles County, also identified by Assessor's Parcel Numbers 4291-028-027 and 4291-028-004.
Owners of the Properties:	Sunshine Enterprises LP
Violation Description:	Demolition of two lower cost motels and construction and operation of a luxury boutique hotel (Shore Hotel) without benefit of the required coastal development permit, in violation of the Coastal Act, including the public access provisions thereof.
Entities Subject to this Order:	Sunshine Enterprises, LP; Ocean Avenue Management LLC; and Sand & Sea, Inc.
Substantive File Documents:	<ol style="list-style-type: none">1. Public documents in the Cease and Desist Order file No. CCC-19-CD-01 and Administrative Civil Penalty file No. CCC-19-AP-02.2. Exhibits 1 through 9 of this staff report.

CEQA Status: Exempt (CEQA Guidelines (CG) §§ 15060(c)(2) and (3)) and Categorically Exempt (CG §§ 15061(b)(2), 15321).

SUMMARY OF STAFF RECOMMENDATION

The Consent Cease and Desist Order and Consent Administrative Civil Penalty described herein (“hereinafter referred to collectively as the “Consent Agreement”) are a result of the efforts of the parties to this Consent Agreement to work diligently to find an amicable solution to address and resolve Coastal Act violations related to the Shore Hotel in Santa Monica. Staff appreciates the efforts of Sunshine Enterprises¹ to reach this agreement and recommends that the Commission approve the proposed Consent Agreement (**Appendix A**) described in more detail herein.

Permit History and Affordable Accommodations

Commission staff brings this enforcement action to resolve violations related to the unpermitted demolition of two lower cost motels and the unpermitted construction of a self-described “luxury boutique hotel” (Shore Hotel) in their place on properties located at 1515-1525 Ocean Avenue and 1530 Second Street, Santa Monica (“Properties”)(**Exhibit 1 – Location Map**). The developer in this matter, Sunshine Enterprises, did obtain Commission approval (Coastal Development Permit (“CDP”) No. 5-09-040) (**Exhibit 3**) for replacement of the original, lower-cost motels with a low to moderately priced hotel, in other words, affordable accommodation. However, the developer never got that permit issued, so it expired, and the subsequent work was unpermitted. Moreover, even if that permit had issued, it approved the work on the basis that it would preserve affordable overnight accommodations on the site. The hotel constructed on site is in fact a luxury hotel. (**Exhibit 2 – Photo of hotel**) As one measure of its exclusivity, the actual rates for rooms at the Shore Hotel currently range from roughly \$300 to \$800 per night.

The issue of affordable accommodation is of particular significance to the Commission as the Commission has the responsibility, pursuant to the public access policies of the Coastal Act, and particularly Section 30213, to protect lower cost visitor-serving facilities along the coast and to ensure that new development projects provide for a range of affordable visitor serving facilities along the coast. The Commission has found that facilities providing lower cost overnight accommodations are critical to providing coastal access. Moreover, the Commission has found that overnight accommodations are a necessary part of providing public access and recreational opportunities for the many visitors that live further from the coast, including those from inland

¹ Sunshine Enterprises, LP and Ocean Avenue Management LLC are owned by the same family, and counsel for Sunshine Enterprises, LP has acknowledged that the entities have the same owners. The court in the related litigation also noted that the beneficial owners of Ocean Management LLC are the same as the owners of Sunshine Enterprises, LP. Likewise, Sand & Sea, Inc. is owned by the same family. Accordingly, these entities, since they are effectively one and the same, are referred to herein, collectively and individually, as Sunshine Enterprises.

areas, such as the Los Angeles Basin and San Gabriel and San Fernando Valleys, where a coastal trip requires a lengthy car ride. For many low and moderate income visitors, lower cost overnight accommodations are essential to being able to access the California coast at all. In its approval of construction of a moderately priced hotel on the Properties, the Commission relied on Sunshine Enterprises' representation that the hotel proposed for the Properties would be moderately priced, finding that "[s]ince the City provides a large number of hotels in the high end range, the proposed low to moderate priced hotel will provide rooms in a range that is in short supply within the coastal zone... Therefore, the Commission finds that the hotel, as proposed, in this highly urbanized and popular coastal destination would encourage and enhance public opportunities for coastal recreation consistent with Section 30213 and 30222 of the Coastal Act."

Enforcement Background and Permitting Litigation

In 2013, the City of Santa Monica (City) imposed a fee on the developer of approximately \$1.2 million for failing to provide affordable accommodation per a City permit. The City also referred the developer to the Commission. When Commission staff learned that the demolition and replacement project had gone forward despite the permit's expiration, and that the developer had constructed a luxury boutique hotel rather than the hotel it had proposed, Commission staff sent Sunshine Enterprises a Notice of Violation letter in January 2014 (**Exhibit 4**). In an attempt to address the unpermitted development and to avoid additional potential penalties going forward, Staff directed Sunshine Enterprises to seek after-the-fact authorization of the development from the Commission, which would include provision of all legally required mitigation for loss of affordable accommodation. Subsequent to the 2014 Notice of Violation letter, in January 2015, Sunshine Enterprises applied to the Commission for a second coastal development permit, CDP No. 5-15-0030, to obtain after-the-fact approval of the demolition and the creation of the luxury boutique hotel that it had constructed on the Properties. However, in their application, Sunshine Enterprises did not propose any mitigation for the loss of affordable accommodations, beyond the fee it had already paid to the City. On September 9, 2015, the Commission denied the application due, in part, to the Commission finding that the project as proposed would be inconsistent with Section 30213, as it did not protect or provide for lower cost visitor accommodation and did not provide sufficient mitigation for loss of affordable accommodations resulting from the demolition of the two pre-existing motels (**Exhibit 5**).²

Sunshine Enterprises then challenged the Commission's denial of the project, by suing the Commission. The Los Angeles County Superior Court found in favor of the Commission, noting that the Commission had properly denied the project due to the project's failure to protect or to provide lower cost visitor accommodations or to provide an adequate mitigation fee, in other

² The Commission found that the mitigation fee of \$4,140,485 recommended by Staff was insufficient to mitigate the project's impacts to affordable accommodations and thus to make the project consistent with the Coastal Act. In conjunction with CDP No. 5-18-0872, described in more detail below, and which the Commission is scheduled to hear subsequent to this Consent Agreement, Staff is proposing that Sunshine Enterprises provide for, and Sunshine Enterprises has agreed to do so, new or expanded lower cost visitor serving facilities through the payment of a \$9,500,000 mitigation fee that will be used to construct affordable accommodations in the vicinity of the hotel. This information is provided as background; nothing in this Consent Agreement limits the discretion of the Commission in acting on CDP No. 5-18-0872.

words, due to its inconsistency with Section 30213 (**Exhibit 6**). The court assessed the propriety of such fees and found that mitigation fees can be a critical component of a project to ensure its consistency with the Coastal Act when the project does not preserve or provide for lower cost accommodation, stating that “[t]here is a strong nexus between the Commission’s interest in preserving and encouraging lower cost accommodations, as set forth in Section 30213, and the requirement that removal of lower cost accommodations through development be mitigated payment of an in-lieu fee.” The court thus upheld the denial, stating that the Commission had “properly determined that Petitioner’s application did not satisfy section 30213” and that the Commission’s “... conclusion about the proper scope of the mitigation fee is bolstered by the present circumstance where Petitioner conducted a bait and switch, obtaining a permit for a moderately priced Travelodge and then constructing a boutique luxury hotel.”³

Sunshine Enterprises appealed the superior court’s decision, and in March 2019, the Court of Appeal affirmed the trial court’s decision upholding the Commission’s decision to deny CDP No. 5-15-0030 as inconsistent with the Coastal Act (**Exhibit 7**). In doing so, the Court of Appeal noted that, as the trial court had found, “[h]ere it is undisputed that the demolished motels were low-cost and that demolishing them removed low-cost accommodations from the coastal zone.” Although Sunshine Enterprises appealed the superior court’s decision, staff and Sunshine Enterprises worked together, concurrently with the appellate litigation, to reach an amicable resolution of this matter. In July 2017, the Executive Director of the Commission (“Executive Director”) issued a formal Notification of Intent to Commence Cease and Desist Order and Administrative Civil Penalty Action Proceedings (“NOI”)(**Exhibit 8**). The NOI provided formal notice of the Commission’s intent to resolve these issues through the administrative process, including, but not limited to, potentially through a consensual resolution.

Consensual Resolution

Discussions following issuance of the NOI were, ultimately, decidedly productive and culminated in the proposed Consent Agreement, attached hereto as **Appendix A**. Pursuant to the terms of the Consent Agreement, Sunshine Enterprises has agreed to stop all unpermitted development, in part by obtaining and complying with a coastal development permit for the Shore Hotel or ceasing operations if it fails to secure such a permit. In order to facilitate implementation of this requirement of the Consent Agreement, in August of last year, Sunshine Enterprises submitted CDP application No. 5-18-0872, which requests after-the-fact authorization of the existing Shore Hotel. Through the Consent Agreement, Sunshine Enterprises has agreed to abide by CDP No. 5-18-0872, if it is approved as recommended by Commission staff, which includes conditions necessary to make the project consistent with the Coastal Act, including a condition for a mitigation fee that is in keeping with the direction of past Commission actions and decisions of the court to fully offset the loss of the lower cost accommodation resulting from this violation. CDP No. 5-18-0872 is scheduled to come before the Commission after the hearing on this Consent Agreement. Nothing in this Consent Agreement limits the discretion of the Commission in acting on CDP No. 5-18-0872. Neither is this Consent Agreement intended to provide any

³ As described in more detail below, the Los Angeles County District Attorney’s office has also initiated enforcement of California Business and Professions code Section 17200 against Sunshine Enterprises with respect to the activities that constitute the Coastal Act violations at issue.

assurance of the Commission's approval of any future or pending application(s) by Sunshine Enterprises for coastal development permits or coastal development permit amendments, or any other type of permit. If Sunshine Enterprises does not obtain a coastal development permit for the Shore Hotel within 180 days of issuance of the Consent Agreement, they will cease operating the Shore Hotel per the terms of the Consent Agreement, though they do retain the right to challenge any denial of this new application.

In addition to agreeing to refrain from any unpermitted development in the future per the terms of the Consent Agreement and, as described above, to obtain the necessary coastal development permit for the Shore Hotel, and fully comply with its terms and conditions, through the Consent Agreement, Sunshine Enterprises has agreed to resolve its liability for the past Coastal Act violation matters addressed herein, including resolving civil liability under Coastal Act Sections 30820, 30821 and 30822, by paying a \$15,581,000 penalty to the Violation Remediation Account of the California State Coastal Conservancy Fund.

As noted above, Staff recommends that the Commission **issue** the Consent Agreement to address Sunshine Enterprises liability for the Coastal Act violations at issue.

TABLE OF CONTENTS

I.	MOTION AND RESOLUTION	7
II.	HEARING PROCEDURES	7
III.	FINDINGS FOR CONSENT AGREEMENT	8
	A. DESCRIPTION OF THE PROPERTIES.....	8
	B. DESCRIPTION OF VIOLATIONS.....	9
	C. PLANNING, ENFORCEMENT AND LITIGATION HISTORY.....	9
	D. BASIS FOR ISSUANCE OF CEASE AND DESIST ORDER.....	16
	E. BASIS FOR ISSUANCE OF ADMINISTRATIVE PENALTY.....	17
	F. CONSENT AGREEMENT IS CONSISTENT WITH THE COASTAL ACT.....	22
	G. CALIFORNIA ENVIRONMENTAL QUALITY ACT.....	22
	H. SUMMARY OF FINDINGS OF FACT.....	23

APPENDIX

Proposed Consent Agreement

EXHIBITS

Exhibit 1	Location Map
Exhibit 2	Photos of Shore Hotel
Exhibit 3	Staff Report for CDP No. 5-09-040 (expired)
Exhibit 4	Notice of Violation letter dated January 2014
Exhibit 5	Adopted Findings for denial of CDP No. 5-15-0030
Exhibit 6	Superior Court Judgment and Tentative Ruling
Exhibit 7	Court of Appeal Decision
Exhibit 8	Notice of Intent dated July 2017
Exhibit 9	Letter from Sunshine Enterprises dated August 2014

I. MOTION AND RESOLUTION

Motion 1: Consent Cease and Desist Order

*I move that the Commission **issue** Consent Cease and Desist Order No. CCC-19-CD-01, pursuant to the staff recommendation.*

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

Resolution to Issue Consent Agreement and Settlement Cease and Desist Order:

The Commission hereby issues Consent Cease and Desist Order No. CCC-19-CD-01, as set forth below, and adopts the findings set forth below on grounds that development has occurred on the Properties without the requisite coastal development permit, in violation of the Coastal Act.

Motion 2: Consent Administrative Civil Penalty

*I move that the Commission **issue** Consent Administrative Civil Penalty No. CCC-19-AP-02 pursuant to the staff recommendation.*

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

Resolution to Issue Consent Administrative Civil Penalty:

The Commission hereby assesses an administrative civil penalty by adopting Consent Administrative Civil Penalty No. CCC-19-AP-02, as set forth below, to be paid as described in Section III.F, and adopts the findings set forth below on grounds that Sunshine Enterprises has undertaken development on the Properties without a coastal development permit, and that the development has limited public access to the coast and violates the public access provisions of the Coastal Act.

II. HEARING PROCEDURES

A. ADMINISTRATIVE CIVIL PENALTY AND CEASE AND DESIST ORDER

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

The procedures for a hearing on a Cease and Desist Order pursuant to Section 30810 are outlined in the Commission’s regulation at California Code of Regulations, Title 14 (“14 CCR”) Section 13185. For a Cease and Desist Order and Administrative Penalty hearing, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding, including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where actual controversy exists. The Chair may then recognize other interested persons, after which the Commission typically invites staff to respond to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in 14 CCR Section 13185 and 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commission may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner so chooses, any questions proposed by any speaker in the manner noted above.

Finally, the Commission shall determine, by a majority vote of those present and voting, whether to impose administrative penalties. The Commission shall also determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order. Passage of the motions above will result in issuance of the Consent Cease and Desist Order and Consent Administrative Civil Penalty.

III. FINDINGS FOR CONSENT AGREEMENT⁴

A. DESCRIPTION OF THE PROPERTIES AND AREA

The properties on which the unpermitted demolition of two lower cost motels and construction of a luxury boutique hotel occurred (the Properties) are located in downtown Santa Monica at 1515-1525 Ocean Boulevard and 1515-1525 Ocean Avenue and 1530 Second Street, Santa Monica. The Properties are also identified by Los Angeles County Assessor’s Parcel Numbers 4291-028-027 and 4291-028-004. The Properties are located less than a quarter of a mile from the beach.

In approving the replacement of the previous motels on the Properties with a new, moderately priced hotel, in 2009, the Commission found that “[b]ased on the survey of hotels within Santa Monica coastal zone, it is evident that there is a shortage of low and moderate priced over-night accommodations within the City’s coastal zone.” Prior to the unpermitted demolition in 2010, the properties were developed with the 57-room Pacific Sands Motel and 30-room Santa Monica

⁴ These findings also hereby incorporate by reference the preface of this staff report (“STAFF REPORT: Recommendations and Findings for Consent Cease and Desist Order and Consent Administrative Civil Penalty) in which these findings appear, which section is entitled “Summary of Staff Recommendation.”

Beach Travelodge, which were considered lower cost accommodations. In 2009, the Travelodge had an average nightly room rate of approximately \$159, and the Pacific Sands had an average nightly room rate of approximately \$143. After these facilities were demolished without a valid coastal development permit, in 2011, the 164-room Shore Hotel was constructed on the properties and opened, also without a valid coastal development permit.

B. DESCRIPTION OF THE VIOLATIONS

This Consent Agreement addresses Sunshine Enterprises' unpermitted demolition of two lower cost motels at the Properties and construction and operation of a luxury boutique hotel on the Properties (Shore Hotel).

C. PLANNING, ENFORCEMENT HISTORY AND LITIGATION HISTORY FOR THE PROPERTIES

This section outlines the, at times contentious, but ultimately collaborative, progression of the parties from contrary positions to a mutually agreeable resolution. The permitting, enforcement, and litigation history related to this matter is complicated and is described in more detail below, but to summarize briefly, in 2009, the Commission approved CDP No. 5-09-040, which authorized the demolition of the two lower cost motels on the Properties and the construction of a new hotel on the Properties, which, per the representations of Sunshine Enterprises, would be a moderately priced hotel. The representation that the hotel would be moderately priced was central to the Commission's approval of the project, as this allowed the Commission to review the project as an in-kind replacement of existing affordable visitor-serving accommodations and obviated the need for the project to mitigate for loss of affordable accommodation under the Coastal Act policies.

The CDP was not issued, because of the failure of Sunshine Enterprises to provide required documents in the two years after it was approved, and thus, it expired in 2011. This occurred despite the fact that, to help ensure that Sunshine Enterprises was aware of the CDP's prior-to-issuance conditions and potential for expiration, on June 18, 2009, Commission staff mailed to Ocean Avenue Management, c/o Michael Farzam, a document entitled "Notice of Intent to Issue Permit (Upon satisfaction of special conditions)". The "Permit NOI" explained the procedure for issuance of the CDP and also noted that the CDP would expire two years from the date of approval unless it was issued and signed and development commenced by that time. Specifically, the Permit NOI noted the following:

A Coastal Development Permit for the development described below has been approved but is not yet effective. Development on the site cannot commence until the CDP is effective. In order for the CDP to be effective, Commission staff must issue the CDP to the applicant, and the applicant must sign and return the CDP. **Commission staff cannot issue the CDP until the applicant has fulfilled each of the "prior to issuance" Special Conditions.** A list of all of the Special Conditions for this permit is attached.

The Commission's approval of the CDP is valid for two years from the date of approval. To prevent expiration of the CDP, you must fulfill the "prior to issuance" Special Conditions, obtain and sign the CDP, and commence development within two years of

the approval date specified below. You may apply for an extension of the permit pursuant to the Commissions regulations at Cal. Code Regs. Title 14, section 13169. [emphasis in original]

On behalf of Sunshine Enterprises, Michael Farzam signed the Permit NOI on June 29, 2009, thus acknowledging that he “fully understands its contents, including all conditions imposed.” However, despite Sunshine Enterprises’ acknowledged understanding of the conditions, the materials required to be submitted prior-to-issuance of the permit – noted above – were not submitted and the CDP expired by its terms on June 9, 2011. Despite this lack of a permit, Sunshine Enterprises proceeded with demolition of two motels on the Properties and construction and operation of a new hotel without a CDP. Moreover, the hotel that Sunshine Enterprises constructed and now operates is a luxury boutique hotel, instead of the Commission-approved moderately priced hotel.

In response to letters from Commission staff that notified Sunshine Enterprises that the Shore Hotel had been built without the necessary CDP, Sunshine Enterprises first applied to amend CDP No. 5-09-40 (see **Exhibit 9**), which was ineffective as that permit had expired, and then in 2015, Sunshine Enterprises applied for after-the-fact approval of the, by then, existent Shore Hotel, through CDP No. 5-15-0030. The Commission denied this CDP, as the project resulted in the loss of lower cost visitor-serving accommodation, did not provide for lower cost visitor accommodation, and did not adequately mitigate for the loss of lower cost visitor accommodation, and was therefore inconsistent with various provisions of the Coastal Act. Sunshine Enterprises challenged the Commission’s denial of CDP No. 5-15-0030 by filing litigation against the Commission, and the Los Angeles County Superior Court found in favor of the Commission and upheld the denial. Sunshine Enterprises appealed the superior court’s decision, and, as described below, the Court of Appeal has upheld the superior court’s decision.

1. Coastal Development Permit No. 5-09-040

In 2009, the Commission approved the following development through CDP No. 5-09-40, as described in the project description included in Sunshine Enterprise’s application and as presented to the Commission at the hearing on the coastal development permit:

Demolish two separate motels, Pacific Sands Motel (57 rooms) and Santa Monica Beach Travelodge (30 rooms) and construct a single 89,900 square foot, 164 room, forty-five foot high, low to moderate priced Travelodge hotel, swimming pool, 4,670 square feet of retail space, and a total of 294 parking spaces in a 4 level subterranean parking garage.

In reviewing such development proposals for consistency with resource protection policies of the Coastal Act, the Commission is charged with protecting lower cost visitor serving facilities, such as overnight accommodations that facilitate access to nearby coastal areas. For instance, Coastal Act Section 30213 states, in part, that:

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

The fact that Sunshine Enterprises proposed an affordable, moderately priced hotel was central to the Commission’s review of the project. In finding the proposal consistent with Coastal Act policies related to affordable overnight accommodation, the Commission stated:

To encourage coastal public access and recreation there should be a range of accommodations to meet all economic sectors. Since the City provides a large number of hotels in the high end range, the proposed low to moderate priced hotel will provide rooms in a range that is in short supply within the coastal zone. In addition, the number of available of low to moderate priced rooms is being increased from the existing 87 rooms to 164 rooms. Therefore, the Commission finds that the hotel, as proposed, in this highly urbanized and popular coastal destination would encourage and enhance public opportunities for coastal recreation consistent with Section 30213 and 30222 of the Coastal Act.

2. Unpermitted Development/Coastal Act Violations

CDP 5-09-040, described above, was approved by the Commission on June 11, 2009, subject to both standard and special conditions. These conditions included Special Conditions Nos. 2, 4, and 5, which required that Sunshine Enterprises submit, respectively, a “dewatering of groundwater” agreement, an archaeological monitoring plan, and evidence of geotechnical review, in order for the CDP to be issued and to become effective (“prior-to-issuance conditions”). Standard Condition No. 2 stated that the CDP would expire if development did not commence within two years of the Commission’s approval.

The materials required to be submitted prior-to-issuance of the permit – noted above – were not submitted, and the CDP expired by its terms on June 9, 2011. Despite this, and despite the lack of a permit, it turns out that unbeknownst to Commission staff construction of a hotel had nevertheless begun more than a year earlier. Although construction began before expiration of the CDP, the prior-to-issuance conditions were never satisfied, and thus, the permit was never issued and did not become effective. As a result, demolition of the lower cost motels and construction of the Shore Hotel was undertaken without authorization, in violation of the Coastal Act, and did not prevent the eventual expiration of the 2009 permit approval.

As is explained above, since the CDP was never issued, and in fact expired, and therefore could not legally be issued, the CDP could not have authorized the demolition and construction that has occurred on the properties. More significantly, however, for purposes of the substantive policies in Chapter 3, even if the CDP had been issued prior to its expiration, the hotel that has been constructed on the properties is clearly not consistent with the project that the Commission approved. The Commission approved the construction of a moderately priced Travelodge, as is fitting, since affordability to a broad range of visitors was the central characteristic of the project considered by the Commission. As reflected in the project description and the Commission’s findings, the affordability of the proposed project was a critical component of the project description and the Commission’s approval.

To provide evidence that the hotel would be affordable, in a March 9, 2009 letter submitted with the application, Sunshine Enterprises projected that the average daily room rate for the new hotel would be approximately \$160. Based upon that projection, the City of Santa Monica and the Commission both considered the proposed hotel to be a lower cost accommodation for Santa Monica. In its 2009 approval of the hotel on the properties, the Commission acknowledged that “there is no certainty that the room rates will continue to be moderate or affordable by the average tourist.” Although the Commission acknowledged the potential eventual variability of the hotel’s rates, the Commission was clear in its findings that any change to the hotel rates that would affect its affordability, would require authorization from the Commission, saying that “[t]o ensure that any future changes come back to the Commission to ensure that the project will continue to enhance public access a future improvement conditions (Special Condition No. 1) is required.” Special Condition No. 1 required Commission authorization for any change from the project description, unless exempt.

In fact, the increase in the rates of the hotel, from proposed to current, have been drastic, reinforcing the change from the proposed moderately priced hotel into a high priced luxury hotel. Rather than adhering to those estimates provided to the CCC noted above, the actual rates for rooms at the Shore Hotel currently range from roughly \$300 to \$800 per night, plus a mandatory \$25 resort fee.⁵ In its denial of Sunshine Enterprises’ request for after-the-fact approval of the Shore Hotel (5-15-0030), the Commission found that “[t]he proposed new boutique hotel has 164 new high cost rooms.” And moreover, the court, in upholding the denial, found that “[t]he Shore Hotel is a boutique luxury hotel, not a moderately priced hotel,” and noted Sunshine Enterprises’ “failure to construct new affordable hotel rooms” in constructing the Shore Hotel. The court described Sunshine Enterprises’ actions as a “...circumstance where Petitioner conducted a bait and switch, obtaining a permit for a moderately priced Travelodge and then constructing a boutique luxury hotel.”

The Commission and the courts have thus both found that the hotel as constructed is not a moderately priced hotel and, therefore, is not consistent with the description of the project approved by the Commission. For that reason, the project as constructed could not have been authorized by the CDP, even if the CDP had been issued.

3. CDP No. 5-15-0030

On January 6, 2015, Sunshine Enterprises submitted an application to the Commission for after-the-fact authorization of the Shore Hotel as constructed. Commission staff recommended approval of the project with the condition that Sunshine Enterprises pay a \$4,140,485 mitigation fee to provide for funding of lower cost visitor accommodations to replace the moderately priced accommodations that were removed from the Properties and not provided for in the Shore Hotel.

The Commission denied CDP 5-15-0030 on September 9, 2015, after a full public hearing. The Commission approved revised findings supporting the denial on January 21, 2016, which stated, in part, that the project neither protected on-site lower cost accommodations nor provided for sufficient mitigation and, thus, is inconsistent with Section 30213. The Commission found that

⁵ Rates as of February 2019 and vary by package and room type per the Shore Hotel website: www.shorehotel.com.

the propose mitigation fee (\$4,140,485 to build off-site cabins) was insufficient to mitigate the project's impacts for a few reasons, including because "providing 12 off-site cabins would not adequately mitigate the loss of the 72, pre-existing, lower-cost hotel rooms, much less the failure to provide lower cost rates for any of the 92 new rooms." The Commission noted that "although the Commission has sometimes mitigated the loss of lower cost existing hotel rooms with construction of new hostel beds, RV parks, or campgrounds, this approach may not always adequately offset a project's impacts. A private hotel or motel room (250 sq. ft. average) represents a much larger space than a single bed (120 sq. ft. average) in a shared space, such as hostels or cabins." Turning to the costs of replacing lost lower cost hotel rooms with new lower cost hotel rooms, the Commission found that the replacement costs would far exceed the proposed mitigation fee (See page 26 of the Commission's adopted findings for CDP No. 5-15-0030)(See **Exhibit 5**).

4. Litigation

In the litigation relevant to the matter at hand, Sunshine Enterprises sued to challenge the Commission's denial of CDP 5-15-0030. The trial court rejected the suggestion that the Commission had denied the application due to the applicants' refusal to pay a particular mitigation fee, noting (at page 13) that the Commission's revised findings made clear that the Commission had simply denied the project due to the project's inconsistency with the Coastal Act, and especially with Section 30213. The court nevertheless assessed the propriety of such fees and found that such fees can be a critical component of a project to ensuring its consistency with the Coastal Act when the project does not preserve or provide for lower cost accommodation, stating that "There is a strong nexus between the Commission's interest in preserving and encouraging lower cost accommodations, as set forth in Section 30213, and the requirement that removal of lower cost accommodations through development be mitigated payment of an in-lieu fee." The court upheld the denial, noting that the Commission had properly denied the project due to the project's failure to protect or provide lower cost visitor accommodation or provide an adequate mitigation fee, in other words, due to its inconsistency with Section 30213. Sunshine Enterprises appealed the superior court's decision, and in March 2019, the Court of Appeal affirmed the trial court's decision upholding the Commission's denial of CDP application No. 5-15-0030 as inconsistent with the Coastal Act (Exhibit 7). In doing so, the Court of Appeal noted that, as the trial court had found, "[h]ere it is undisputed that the demolished motels were low-cost and that demolishing them removed low-cost accommodations from the coastal zone."

5. CDP No. 5-18-0872

Subsequent to the superior court's decision upholding the Commission's denial of CDP 5-15-0030, the parties entered negotiations to resolve the Coastal Act violations at issue through an enforcement order. A component of the proposed enforcement orders, as described above, is a requirement that Sunshine Enterprises obtain a coastal development permit for the Shore Hotel or cease operations. In order to facilitate implementation of this requirement of the consent agreement, Sunshine Enterprises submitted CDP application No. 5-18-0872, which requests authorization of the Shore Hotel "after the fact". Through the consent agreement, Sunshine Enterprises has agreed to abide by the terms of CDP No. 5-18-0872, if approved as

recommended by Commission staff, which contains conditions consistent with the Commission's prior findings, and to ensure consistency with the Coastal Act policies at issue.

A key difference between the coastal development permit application denied by the Commission in 2015 (CDP No. 5-15-0030) and the current coastal development application being recommended for approval (CDP No. 5-18-0872)⁶ is that the 2015 application proposed no new mitigation for the loss of affordable overnight accommodations, whereas now, Sunshine Enterprises is agreeing to provide affordable accommodation through payment of funds to construct affordable accommodation to mitigate for the negative impacts of the Shore Hotel on lower-cost visitor serving facilities, which has resulted from the demolition of the two low cost motels on the site and failure to provide affordable accommodation in the Shore Hotel. Sunshine Enterprises has agreed to provide affordable accommodation by paying a \$9,500,000 mitigation fee to the California Department of Parks and Recreation, the California Coastal Conservancy, the Mountains Recreation and Conservation Authority (MRCA), Hostelling International USA, or a similar entity approved by the Executive Director. The purpose of the permit mitigation fee is to establish lower cost overnight visitor accommodations, such as lower cost motel rooms, hostel beds, tent campsites, cabins or campground units, at appropriate locations within the coastal area of Santa Monica or the greater Los Angeles County coastal area, or a similar project to promote access to the coast. Per the terms of the proposed coastal development permit, the funds may be used to fund construction of a variety of low cost accommodations, but the fee has been calculated, as described below, based upon the cost of building motel rooms. Thus, if the opportunity presents itself, the fee may be used to fund in-kind replacement of the motel rooms lost when the motels on the site of the Shore Hotel were demolished.

Staff arrived at the \$9,500,000 figure by using the formula that the Commission identified for determining the appropriate mitigation fee for the Shore Hotel in the revised findings staff report for Coastal Development Permit No. 5-15-0030. Specifically, the Commission found the following:

The cost of replacing lower cost hotel rooms with new lower cost hotel/motel rooms is significantly higher than replacing them with hostel beds. In this case, the consultant estimates a construction cost of \$100,000 per motel room, with each motel room requiring 250 square feet of land area.

Thus, for CDP No. 5-18-0872, Staff calculated the mitigation fee at \$9.5 million by multiplying \$100,000 (which is the per motel room construction cost) by 95, (which is the number of rooms that must be mitigated for). 95 rooms must be mitigated for in this situation because 72 low cost rooms were lost when the motels on the site were demolished and, in addition, the Commission requires that 25% of a new hotel's rooms that are over and above any low cost rooms demolished in the process, be low cost or be mitigated for. In this situation, given the number of rooms at the Shore Hotel, that equals 23 additional rooms to be mitigated for. These mitigation funds will be directed toward a project that will provide for low cost accommodations in the Los Angeles County coastal area. It should be noted that the prior, lower proposed mitigation fee had been rejected by the Commission. The Commission found that the Shore Hotel project, as proposed

⁶ For more detail on the permitting history and recommendations of permit staff, please see the staff report for CDP No. 5-18-0872, which is agendaized as item W16a.

through CDP application No. 5-15-0030, and as conditioned by Staff, was not consistent with the Coastal Act, as the mitigation fee of \$4,140,485 associated with that permit application would not sufficiently mitigate the impacts of the Shore Hotel project on the availability of affordable accommodations. The \$4,140,085 figure was calculated by multiplying the number of motel rooms to be mitigated for (95) by the cost of a constructing a hostel bed (\$42,120), with some administrative costs included. However, the Commission found in approving the revised findings for Coastal Development Permit No. 5-15-0030 that replacing motel rooms with hostel beds does not adequately mitigate the loss of affordable accommodations in this situation. Specifically, the Commission found the following:

As stated earlier, although the Commission has sometimes mitigated the loss of lower cost existing hotel rooms with construction of new hostel beds, RV parks, or campgrounds, this approach may not always adequately offset a project's impacts. A private hotel or motel room (250 sq. ft. average) represents a much larger space than a single bed (120 sq. ft. average) in a shared space, such as hostels or cabins.

In this case, the value of the existing 72 lower cost ocean-front hotel rooms compared to 75 beds in shared cabin rooms was not found to be adequate mitigation...

6. Business and Professions Code Section 17200

The Los Angeles County District Attorney's office has also initiated enforcement of California Business and Professions code Section 17200 against Sunshine Enterprises with respect to the activities that constitute the Coastal Act violations at issue. Generally, Section 17200 provides for prosecution of parties that undertake unfair business practices, which are described in Section 17200 as follows: "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." As Sunshine Enterprises is operating the Shore Hotel in violation of the Coastal Act, the corollary is that Sunshine Enterprises is also engaging in unfair competition. The District Attorney's office is monitoring the status of resolution of the Coastal Act violations at issue to determine their course of action to address the unfair business practices related to operation of the Shore Hotel. Commission enforcement staff have been coordinating with the District Attorney's office to avoid any inconsistencies.

This Consent Agreement is a result of a collaborative effort of Sunshine Enterprises and Commission staff to reach a consensual resolution that maximizes options for the provision of public access and availability of lower cost accommodations, which the Consent Agreement does, including by requiring Sunshine Enterprises to pay \$15,581,000 to the Violation Remediation Account, including for the purpose of, among other things, funding new lower cost accommodations and public access projects. Although Sunshine Enterprises initially submitted a Statement of Defense ("SOD") in response to the NOI, through the Consent Agreement, Sunshine Enterprises has agreed to withdraw the SOD. As a condition of settlement, the Consent Agreement also provides a commitment that Sunshine Enterprises shall obtain all legally necessary authorizations, including a coastal development permit consistent with the findings of

the Commission and the requirements of the Coastal Act.⁷ For this reason, amongst others, staff recommends that the Commission issue the Consent Agreement.

D. BASIS FOR ISSUANCE OF CEASE AND DESIST ORDER

1. Statutory Provisions

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

(a) if the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit

...

(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. Factual Support for Statutory Elements

a. Development has occurred without a Coastal Development Permit that was Required

Development, as described in Section III.C.2, above, has occurred on the Properties without a CDP. Section 30600(a) of the Coastal Act states that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the Coastal Zone must obtain a coastal development permit. Development is broadly defined by the Coastal Act Section 30106, as follows:

“Development” means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations.... (underlining added)

⁷ In order to assure this, Commission enforcement staff and permit staff have coordinated the timing and consistency of the parallel enforcement actions.

The demolition of two existing motels and construction and operation of the Shore Hotel, involve demolition and construction activities, including grading, and the loss of access to the coast through loss of affordable accommodation, all of which constitute “development” under the Coastal Act, and, therefore, require a CDP, and no coastal development permit has been issued to authorize those activities. The Commission therefore has jurisdiction to issue a cease and desist order to address these violations pursuant to Section 30810 of the Coastal Act.

E. BASIS FOR ISSUANCE OF ADMINISTRATIVE PENALTY

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.

Through this proposed settlement, Respondents have agreed to resolve their financial liabilities under Section 30821 of the Coastal Act, as well as potential liability under Section 30820 and the Coastal Act.

2. Application to Facts

In this case, as described below, there are significant violations of the public access provisions of the Coastal Act, including Section 30213, which states, in relevant part, that:

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

The Commission has long considered lower cost accommodations to be facilities that are critical to providing coastal access; without lower cost accommodations, a large segment of the population will effectively be excluded from overnight stays at the coast. In its denial of a CDP for the Shore Hotel (CDP No. 5-15-0030), the Commission found that

Section 30213 states that lower cost visitor-serving facilities shall be protected, encouraged, and where feasible, provided. This includes lower cost overnight accommodations that aid in maximizing access to and enjoyment of the Coastal Zone.
[underlining added for emphasis]

The unpermitted demolition of two low to moderately priced motels on the site clearly does not protect lower cost visitor facilities and in fact has resulted in the loss of lower cost facilities, in contravention of Coastal Act Section 30213. Furthermore, unpermitted construction of a luxury

boutique hotel in the place of the two lower priced motels, without providing for adequate mitigation to offset the loss of the demolished motels, fails to provide for lower cost accommodation, as required, where feasible, by Coastal Act Section 30213. In its denial of CDP No. 5-15-0030, the Commission found that “the unpermitted 164 room high cost hotel adversely affects coastal access because it is not in conformity with policies of the Coastal Act that encourage new lower cost visitor serving facilities and protect existing lower cost overnight accommodations.”

The unpermitted demolition of lower cost motels and the failure of Sunshine Enterprises to provide for lower cost accommodation in the Shore Hotel, or provide for adequate mitigation for the loss of the motels and for failure to provide new lower cost accommodation, are inconsistent with public access policies, including, amongst other policies, Section 30213. Therefore, the criterion of Section 30821 has been satisfied.

a. Section 30821(h) Notice

Under section 30821(h) of the Coastal Act, under certain circumstances, a party who is in violation of the public access provisions of the Coastal Act can nevertheless avoid imposition of administrative penalties in certain specified cases by correcting the violation within 30 days of receiving written notification from the Commission regarding the violation. This potential “cure” provision of Section 30821(h) is inapplicable to the matter at hand as 30821 (h) requires that the violation must be remedied within 30 days of notice for 30821(h)’s cure provision to apply. Staff notified Sunshine Enterprises of the violations at issue in letters dated January 15, 2014 and February 5, 2016. As of this date, the Coastal Act violations at issue have not been remedied; in fact, the unpermitted luxury boutique hotel continues to operate on site in place of the demolished lower cost motels, without, among other things, adequate mitigation to offset the loss of affordable accommodations, and the availability of lower cost accommodation is negatively affected as a result.

b. Section 30821(f):

Section 30821(f) of the Coastal Act states:

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

Section 30821(f) is inapplicable in this case. Clearly, Sunshine Enterprises intended to demolish the two previously existing motels and construct the Shore Hotel. Access violations in general, and this one in particular, would not be considered minor violations and would not be characterized as causing only *de minimis* harm. In addition, the Commission has found that these development activities, in its denial of CDP No. 5-15-0030, are not consistent with policies of the Coastal Act unless properly mitigated for, thus confirming the significance of the harm to coastal resources resulting from the violations. Finally, the violations persist at the site, and thus the violator has not acted expeditiously to correct the violations.

c. Penalty Amount

Pursuant to Section 30821(a) of the Coastal Act, the Commission may impose penalties in “an

amount not to exceed 75 percent of the amount of the maximum penalty authorized pursuant to subdivision (b) of Section 30820 for each violation.” 30820 (b) authorizes civil penalties that “shall not be less than one thousand dollars (\$1,000), not more than fifteen thousand dollars (\$15,000), per day for each day in which the violation persists.”⁸ Therefore, the Commission may authorize penalties in a range up to \$11,250 per day for each violation.

Section 30821(a) sets forth the time for which the penalty may be collected by specifying that the “*administrative civil penalty may be assessed for each day the violation persists, but for no more than five years.*” Given the context of resolving this matter through settlement, and because of the mitigating factors listed below, and although the penalties have continued to run during the pendency of the litigation, Commission staff recommends that the Commission choose to exercise its prosecutorial discretion to limit the period for which a penalty is imposed to the period between the July 1st, 2014⁹ effective date of Section 30821 to the date at which Sunshine Enterprises agreed to pay the appropriate monetary penalty. The period is therefore 1,385 days. The maximum penalty under Section 30821 for one violation for 1385 days is \$15,581,250 (1437 days x \$11,250/day), which we’ve rounded to \$15,581,000 for ease of discussion.

For background, we also provide an analysis of the factors referenced in Section 30821(c) as they would apply to an access violation here. Section 30821(c), in determining the amount of administrative penalty to impose, incorporates by reference the preexisting penalty factors for all violations and states “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*

⁸ Multiple Coastal Act violations have occurred on the Properties. For the purposes of this administrative penalty hearing, however, Commission staff is recommending, due to Sunshine Enterprises’ willingness to resolve this matter through a consent order, only one violation be used for the calculation of this penalty amount. The analysis in this section adopts that approach.

⁹ This date is more than four years after the hotel project had been initiated in violation of the Coastal Act, and thus, four years after potential fines under Section 30820 (as opposed to Section 30821) had begun to accrue, however, the monetary penalty has been calculated as described herein in the context of a consent order.

result as a consequence of, the violation, and such other matters as justice may require.

Section 30820(c)(1)(the nature, circumstance, extent, and gravity of the violation) and (3)(the sensitivity of the resource affected by the violation)

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

The violations at issue include demolition of affordable motel rooms that provided accommodations for coastal visitors and failure to provide low cost accommodation in conjunction with the Shore Hotel. The Los Angeles Superior Court described the activities at issue as follows: “The Project involves the demolition of two lower cost hotels and the construction of a single luxury boutique hotel... By building a luxury hotel, Petitioner removed any opportunity to support a moderately priced hotel. This was an issue of particular concern in 2009 when the Commission approved CDP [coastal development permit] 5-09-040.”

The Commission has found that facilities providing lower cost overnight accommodations are critical to providing coastal access. In fact, in its approval of construction of a moderately priced hotel on the site, the Commission relied on Sunshine Enterprises’ representation that the hotel proposed for the site would be moderately priced, finding that “[s]ince the City provides a large number of hotels in the high end range, the proposed low to moderate priced hotel will provide rooms in a range that is in short supply within the coastal zone... Therefore, the Commission finds that the hotel, as proposed, in this highly urbanized and popular coastal destination would encourage and enhance public opportunities for coastal recreation consistent with Section 30213 and 30222 of the Coastal Act.”

Section 30213 also promotes environmental justice, which is defined as “the fair treatment of people of all races, cultures, and income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies” in Government Code Section 65040.12(e). Lower cost facilities ensure members of the public with lower incomes, including those that live further from the coast, have options that enable them to access and recreate at the coast. The Coastal Act’s requirement to maximize access and promote lower cost visitor and recreational facilities is critical in providing opportunities for individuals and families from underserved communities to visit the coast when they might not be able to do so otherwise due to costs, including the lack of affordable lodging.

The unpermitted demolition of two low to moderately priced motels on the site clearly does not protect lower cost visitor facilities and in fact has resulted in the loss of lower cost facilities, in contravention of Coastal Act Section 30213. Furthermore, unpermitted construction of a luxury boutique hotel in the place of the two lower priced motels, without providing for adequate mitigation to offset the loss of the demolished motels, fails to provide for lower cost accommodation, as required, where feasible, by Coastal Act Section 30213.

In its denial of coastal development permit No. 5-15-0030, the Commission confirmed that failure to provide low cost accommodation in the Shore Hotel, which has occurred on the site without a permit, is inconsistent with public access policies of the Coastal Act, stating, for instance, that “[b]ecause the proposal would neither protect on-site lower-cost accommodations nor sufficiently mitigate for the impacts through in-lieu fees, it is inconsistent with Section 30213 of the Coastal Act.” The court upheld the denial, stating that the Commission had “properly determined that Petitioner’s application did not satisfy section 30213”.

Throughout its decision, the court confirmed the appropriateness of requiring a mitigation fee for the project in order to ensure the consistency of the project with public access policies of the Coastal Act, stating, “[t]here is a strong nexus between the Commission’s interest in preserving and encouraging lower cost accommodations, as set forth in Section 30213, and the requirement that removal of lower cost accommodations through development be mitigated by payment of an in-lieu fee”, and “[t]he finding [the Commission’s finding in support of a mitigation fee] was not an attempt to effectively set room rates as Petitioner contends. Rather, it is a mitigation for Petitioner’s failure to provide lower cost rooms. This mitigation most certainly “encourages” Petitioner (and other property developers) to provide lower cost visitor facilities in the Coastal Zone pursuant to section 30213... In this case, the mitigation is a payment to offset the Project’s destruction of lower cost rooms and failure to construct new ones. It is not an attempt to fix room rates at a particular level.” Given the clear connection drawn by the court between the public access policies of the Coastal Act and requiring a mitigation fee to offset the impacts of the project on public access, it stands to reason that tearing down affordable accommodation, failure to provide affordable accommodation in the Shore Hotel, and failure to provide adequate mitigation for the project, all of which has occurred as a result of the project proceeding without and inconsistently with Commission approval, is inconsistent with the public access policies of the Coastal Act.

Section 30820(c)(2))(Whether the violation is susceptible to restoration or other remedial measures)

With regards to 30820(c)(2), the violation can be remedied and lower cost accommodations provided through the payment of an appropriate mitigation fee, and through this Consent Agreement Sunshine Enterprises has committed to obtaining a coastal development permit to do so. However, there is no restoration possible for the years that the low cost motels have been demolished, and low cost accommodations therefore lost, without mitigation, and therefore, a significant penalty is warranted.

Section 30820(c)(4) and (5) (the cost to the state of bringing the action) and (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)

With regards to 30820(c)(4), the costs to the state have been significant; for instance, as described above, Sunshine Enterprises has sued the Commission to challenge its denial of CDP No. 5-15-0030. With regards to 30820(c)(5), for instance, Sunshine Enterprises has garnered significant economic profits from the violation through the operation of the Shore Hotel.

The salient mitigating factor here is Sunshine Enterprises effort to largely work cooperatively,

in recent months, to resolve this matter and their agreement to resolve the violations through a Consent Agreement.

Aggregating the factors described above, the Commission finds that a substantial penalty is justified here. Therefore, staff recommends that the Commission impose the maximum administrative penalty, treating this as one violation (see above for explanation), for the time period described above, in the amount of \$15,581,000.

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

The Consent Agreement attached to this staff report as **Appendix A** is consistent with the resource protection policies found in Chapter 3 of the Coastal Act. The Consent Agreement requires Sunshine Enterprises to obtain a coastal development permit for the Shore Hotel within 180 days of issuance of the Consent Agreement or to cease operations. In order to facilitate implementation of this requirement of the consent agreement, Sunshine Enterprises submitted CDP application No. 5-18-0872, which requests authorization of the Shore Hotel. If Sunshine Enterprises does not obtain a coastal development permit for the Shore Hotel within 180 days of issuance of the Consent Agreement, they will cease operating the Shore Hotel per the terms of the Consent Agreement, though they do retain the right to challenge any denial of this new application.

In addition, through the Consent Agreement, Sunshine Enterprises has agreed to resolve its liability for all past Coastal Act violation matters addressed herein, including resolving civil liability under Coastal Act Sections 30820, 30821 and 30822, by paying a \$15,581,000 penalty.

G. CONSENT AGREEMENT IS CONSISTENT WITH CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The Commission finds that issuance of this Consent Agreement to compel compliance with the Coastal Act is exempt from the requirements of the California Environmental Quality Act of 1970 (CEQA), Cal. Pub. Res. Code §§ 21000 et seq., for the following reasons. First, the CEQA statute (section 21084) provides for the identification of “classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt from [CEQA].” The CEQA Guidelines (which, like the Commission’s regulations, are codified in 14 CCR) provide the list of such projects, which are known as “categorical exemptions,” in Article 19 (14 CCR §§ 15300 et seq.). Because this is an enforcement action, the exemption 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 Consent Agreement does not require any change to the physical state of the site. Thus, this action will not have any significant effect on the environment, within the meaning of CEQA, and the exception to the categorical exemptions listed in 14 CCR section 15300.2(c) does not apply. An independent but equally sufficient reason why that exception in section 15300.2(c) does not apply is that this case does not involve any “unusual circumstances” within the meaning of that section, in that it has no significant feature that would distinguish it from other activities in the exempt classes listed above. This case is a typical Commission enforcement action to protect and restore the environment and natural resources.

In sum, given the nature of this matter as an enforcement action to protect and restore 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 from CEQA.

H. SUMMARY OF FINDINGS OF FACT

1. The properties that are the subject of this Consent Agreement (the “Properties”) are located at 1515-1525 Ocean Avenue and 1530 Second Street, Santa Monica, Los Angeles County, also identified by Assessor’s Parcel Numbers 4291-028-027 and 4291-028-004. The Properties are located within the Coastal Zone.
2. Sunshine Enterprises, LP owns the Properties. Sunshine Enterprises, LP, Ocean Avenue Management LLC, and Sand & Sea, Inc are parties to this Consent Cease and Desist Order and Consent Administrative Civil Penalty Consent Agreement (herein referred to as a Consent Agreement). Sunshine Enterprises, LP, Ocean Avenue Management LLC, and Sand & Sea, Inc are owned by the same family, and counsel for Sunshine Enterprises, LP has acknowledged that the entities have the same owners. The court in the related litigation also noted that the beneficial owners of Ocean Management LLC are the same as the owners of Sunshine Enterprises, LP. Likewise, Sand & Sea, Inc. is owned by the same family. Accordingly, these entities, since they are effectively one and the same, are referred to herein, collectively and individually, as Sunshine Enterprises.
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 any permit previously issued by the Commission.
4. Sunshine Enterprises has undertaken unpermitted development activities, which are the subject of and encompassed by this Consent Agreement, including demolition of two lower cost motels at the Properties and construction and operation of a luxury boutique hotel on the Properties (Shore Hotel). The criterion for issuance of a Cease and Desist Order has been met pursuant to Section 30810 of the Coastal Act.
5. On September 9, 2015, the Commission denied CDP No. 5-15-0030, which would have authorized the Shore Hotel project after-the-fact, due, in part, to its inconsistency with Section 30213, as it did not protect or provide for lower cost visitor accommodation and did

not provide sufficient mitigation for loss of affordable accommodations from the demolition of the two pre-existing motels.

6. The Los Angeles County Superior Court upheld the Commission's denial of CDP No. 5-15-0030, noting that the Commission had properly denied the project due to the project's failure to protect or provide lower cost visitor accommodation or provide an adequate mitigation fee, in other words, due to its inconsistency with Section 30213.
7. The Court of Appeal confirmed the trial court's decision to uphold the Commission's decision to deny CDP No. 5-15-0030 as inconsistent with the Coastal Act.
8. The actions to be performed under this Consent Agreement, if completed in compliance with the Consent Agreement, and the plans approved therein, will be consistent with Chapter 3 of the Coastal Act.
9. The statutory authority for imposition of administrative penalties is provided in Section 30821 of the Coastal Act. The criteria for imposition of administrative civil penalties pursuant to Section 30821 of the Coastal Act have been met in this case. Sections 30820 and 30822 of the Coastal Act create potential civil liability for violations of the Coastal Act more generally.
10. As stated in #4, above, unpermitted development has occurred on the Properties. These actions are also inconsistent with the public access provisions of the Coastal Act and therefore render Sunshine Enterprises in violation of the public access provisions of the Coastal Act and subject to penalties under 30821 of the Coastal Act; the unpermitted demolition of two low to moderately priced motels on the site does not protect lower cost visitor facilities and has resulted in the loss of lower cost facilities, in contravention of Coastal Act Section 30213. Furthermore, unpermitted construction of a luxury boutique hotel in the place of the two lower priced motels, without providing for adequate mitigation to offset the loss of the demolished motels, fails to provide for lower cost accommodation, as required, where feasible, by Coastal Act Section 30213. Through the Consent Agreement, Sunshine Enterprises has agreed to resolve its financial liabilities under the Coastal Act.
11. Section 30213 also promotes environmental justice, which is defined as "the fair treatment of people of all races, cultures, and income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies" in Government Code Section 65040.12(e). Lower cost facilities ensure members of the public with lower incomes, including those that live further from the coast, have options that enable them to access and recreate at the coast. The Coastal Act's requirement to maximize access and promote lower cost visitor and recreational facilities is critical in providing opportunities for individuals and families from underserved communities to visit the coast when they might not be able to do so otherwise due to costs, including the lack of affordable lodging.
12. As called for in 30821(c), the Commission has considered and taken into account the factors in 30820(c) in determining the amount of administrative civil penalty to impose. The penalty agreed to in this settlement is an appropriate amount when considering those factors.