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CITY OF DANA POINT

*EXEMPT FROM FILING FEES PURSUANT
TO GOVERNMENT CODE SECTION 6103*

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

11 CENTER FOR NATURAL LANDS
MANAGEMENT, a non-profit organization,

12 Plaintiff and Cross-Defendant,

13 vs.

14 CITY OF DANA POINT, and DOES 1-50,

15 Defendant and Cross-
16 Complainant.

Case No. 30-2021-01219668-CU-OR-CJC

*Assigned For All Purposes To:
Hon. Michael J. Strickroth; Dept. C15*

**CROSS-COMPLAINT FOR CIVIL FINES
AND INJUNCTIVE RELIEF FOR
VIOLATION OF THE COASTAL ACT**

Date Action Filed: September 7, 2021

Trial Date: None

18
19 Cross-complainant CITY OF DANA POINT (“City” or “Cross-Complainant”) alleges as
20 follows:

21 1. City is a California municipal corporation, located in the County of Orange,
22 California.

23 2. Cross-defendant CENTER FOR NATURAL LANDS MANAGEMENT (“CNLM”
24 or “Cross-Defendant”) is a non-profit organization which owns and manages the Dana Point
25 Preserve (the “Preserve”).¹ Included on the Preserve is a nature trail which runs along a bluff,
26 along with several coastal overlook areas (the “Nature Trail and Overlook Areas”). The Nature
27

28 ¹ The Preserve is referred to as the “Headlands Conservation Park” in the relevant planning documents discussed herein.

Trail is horseshoe shaped, and public access is controlled by fencing on each side of the Trail and gates at each end which can be locked closed at night.

3. The Preserve is within the City's Coastal Overlay Zone, and subject to the Coastal Act, which among other things, seeks to "[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners." (Pub. Res. Code § 30001.5.)

4. The concept of maximizing coastal public access is echoed in the City's Municipal Code, and imposed upon individuals who develop and/or own property within the City's Coastal Zone via various development entitlements, such as a Coastal Development Permit. (*See*, Dana Point Municipal Code ("DPMC") § 9.27.010(a)(1) ["The purpose of this section is to achieve the basic state goals of maximizing public access to the coast and public recreational opportunities, as set forth in the California Coastal Act..."].)

5. As described in detail below, multiple development entitlements were issued in relation to the development of the Headlands, and included in the conditions attached to said entitlements, was the obligation to create the Preserve, and to do so in a manner which not only created the Conservation Park, but also ensured daily public access to the Preserve, and in particular the Nature Trail and Overlook Areas.

6. As part of the strategy to implement the above noted entitlement conditions, the Preserve was first dedicated to the CNLM, and then, on November 3, 2005, the City and CNLM entered into a Conservation Easement relating to the Preserve (the "Conservation Easement"). A true and correct copy of the Conservation Easement is attached hereto as **Exhibit A** and incorporated herein by reference.

7. The Conservation Easement grants to the City several rights, including but not limited to the right to enforce the public's right of access to the Nature Trail and Overlook Areas for daily scenic enjoyment, passive recreation, and education during daylight hours. (Ex. A [Conservation Easement], § 5.2, subd. (d) [listing public access and use as a permitted use]; § 4.2 [granting City the ability to enforce the provisions of the Conservation Easement].)

8. Consistent with its Coastal Act and Conservation Easement obligations, beginning in April 2010, and for the next ten (10) years, CNLM opened the Nature Trail and Overlook Areas to the public from 7:00 a.m. until sunset, seven (7) days a week.

9. The City is informed and believes that on or about March 13, 2020, in response to the COVID-19 pandemic, CNLM locked the gates at each end of the Nature Trail, and thereby closed all public access to the Preserve, including but not limited to the Nature Trail and Overlook Areas.

10. In light of the unprecedented COVID-19 pandemic, and the public health concerns and uncertainties associated with it, the City did not initially take issue with the CNLM's actions in closing the Preserve to the public. Indeed, the City closed trails it owns and controls in Headlands area during the early days of the pandemic out of concern for public health and safety. However, as events evolved, by May 19, 2020, County and State regulations related to the pandemic were such that the City was able to safely reopen its trails, and it requested that CNLM reopen the Nature Trail and Overlook Areas to the public. Despite repeated requests from the City, CNLM has *to date* refused to re-open the Preserve, including but not limited to the Nature Trail and Overlook Areas, to daily public access during daylight hours, notwithstanding the fact that State and County regulations related to COVID-19 that might otherwise justify the closure of these public assets were lifted on or about May 19, 2020.

11. CNLM's actions in refusing to provide the public access during daylight hours constitutes a violation of the Coastal Act, the City's Municipal Code, the Conservation Easement, and the various conditions related to the development entitlements issued in relationship to this property, commencing on or about May 19, 2020 to the present date.

12. Accordingly, as set forth below, the City is entitled to recover civil fines and attorney fees, and is further entitled to injunctive and declaratory relief for Cross-Defendant's violations of the Coastal Act and the Conservation Easement.

The Coastal Act

13. The Coastal Act was adopted in 1976 in order to enhance public access to the shoreline, protect coastal natural resources, and balance development and conservation in the

1 Coastal Zone.

2 14. One of the many things the Coastal Act accomplished was the establishment of the
3 California Coastal Commission, which was created to implement the Coastal Act’s provisions and
4 oversee development in the Coastal Zone, including but not limited to the Act’s core mission to
5 “[m]aximize public access to and along the coast and maximize public recreational opportunities
6 in the coastal zone consistent with sound resources conservation principles and constitutionally
7 protected rights of private property owners.” (Pub. Res. Code § 30001.5; *see also*, Cal. Const.,
8 Art. X, § 4 [guaranteeing public access to California’s coast]; Pub. Res. Code § 30210 [requiring
9 “maximum access, which shall be conspicuously posted” to carry out the constitutional
10 requirement of Art. X, § 4].)

11 15. Significantly, the Act requires “any person,” including an individual, corporation or
12 state or local agency, to obtain a coastal development permit before undertaking “development” in
13 the Coastal Zone. (Pub. Res. Code § 30600; DPMC § 9.27.010.)

14 16. The term “development” is defined broadly as “on land, in or under water, the
15 placement or erection of any solid material or structure; discharge or disposal of any dredged
16 material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining,
17 or extraction of any materials; change in the density or intensity of use of land, including, but not
18 limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of
19 the Government Code), and any other division of land, including lot splits, except where the land
20 division is brought about in connection with the purchase of such land by a public agency for
21 public recreational use; change in the intensity of use of water, or of access thereto; construction,
22 reconstruction, demolition, or alteration of the size of any structure, including any facility of any
23 private, public, or municipal utility; and the removal or harvesting of major vegetation other than
24 for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a
25 timber harvesting plan submitted pursuant to the provisions of the Z’Berg-Nejedly Forest Practice
26 Act of 1973 (commencing with Section 4511).” (Pub. Res. Code § 30106; DPMC § 9.75.040
27 [same].)

28 17. The Coastal Commission and the Courts have has interpreted the term

1 “development” to include the establishment of or any changes to the hours of operation of coastal
2 trails because doing so would necessarily “change in the intensity of use of water, or of access
3 thereto.” (Pub. Res. Code § 30106; DPMC § 9.75.040 [same]; *See, e.g., City of Dana Point v.*
4 *California Coastal Commission* (2013) 217 Cal. App. 4th 170.) As such, any action to establish or
5 change the hours of operation of the Nature Trail and Overlook Areas in this case constitutes
6 development and would require a coastal development permit. (Pub. Res. Code § 30600; DPMC
7 § 9.27.010.) Indeed, the California Coastal Commission has expressly advised CNLM that it may
8 not set hours for the Nature Trail and Overlook Areas without first obtaining a Coastal
9 Development Permit, yet CNLM continues to refuse to do so. (*See, Ex. B*)

10 **Relevant Background Regarding Development Entitlements**

11 18. On or about September 22, 2004, the City and the California Coastal Commission
12 adopted the Headlands Development and Conservation Plan (“HDCP”), which amongst other
13 things calls for the creation of the Preserve as well as the Nature Trail and Overlook Areas. The
14 HDCP implements to the Coastal Act.

15 19. Section 4-113 of the HDCP provides:

16 The overall goal of the program is to provide for the short and long-term
17 preservation of natural resources within the parks and open space areas while
18 addressing appropriate public recreational use and enjoyment of the Headlands area
19 on an ongoing basis.

20 20. Section 4-49 of the HDCP provides:

21 The bluff-top trail in the Headlands Conservation Park shall be accessible to the
22 public year-round, except for any specific period determined by the resources
23 agencies to protect on site resources. ***The recipient public agency or non-profit
24 entity with determine hours of daily operation.*** (emphasis added).

25 21. On or about January 19, 2005, the City’s Planning Commission approved Coastal
26 Development Permit No. 04-23 for the development of the Preserve (the “CDP”). The CDP
27 requires Cross-Defendant to comply with Dana Point Municipal Code (“DPMC”) Section
28 9.27.030 to ensure compliance with the Coastal Act.

22 22. Section 9.27.030(a)(1) provides, in relevant part:

23 The purpose of this section is to achieve the basic state goals of maximizing public
24 access to the coast and public recreational opportunities, as set forth in the
25 California Coastal Act; to implement the public access and recreation policies of
26 Chapter 3 of the Coastal Act; and to implement the certified land use plan of the

1 Local Coastal Program which is required by Section 30500(a) of the Coastal Act to
2 include a specific public access component. In achieving these purposes, the
3 provisions of this subsection shall be given the most liberal construction possible so
that public access to the navigable waters shall always be provided and protected
consistent with the goals, objectives and policies of the California Coastal Act. . . .

4 23. Section 9.27.030(a)(4)(C)(1) of the DPMC provides, in relevant part:

5 Bluff Top Access (Minimum Requirements).

6 A condition to require public access along a bluff top as a condition of approval of
7 a coastal development permit (or other authorization to proceed with development)
8 pursuant to Section 9.27.030(a)(3)(A) shall provide the public with the permanent
right of scenic and visual access from the bluff top to the public tidelands; provided
that in some cases, controls on the time, place and manner of uses may be
justified

9 24. Section 9.27.030(a)(4)(D) of the DPMC provides, in relevant part:

10 Trail Access (Minimum Requirements).

11 A condition to require public access as a condition of approval of a coastal
12 development permit (or other authorization to proceed with development) required
pursuant to Section 9.27.030(a)(3)(A) shall provide the public with the permanent
right of access and active recreational use. . . .

13 25. Section 9.27.030(a)(4)(H) of the DPMC provides, in relevant part:

14 Management Plan (Minimum Requirements).

15 A management plan may be required in conjunction with a dedication of public
16 access in any case where there is substantial evidence of potential conflicts between
17 public access use and other uses on or immediately adjacent to the site. Examples
include access in areas of sensitive habitats, . . . The plan shall be prepared by the
accepting agency and approved by the City of Dana Point prior to the opening of
the access to public use. . . .

18 26. On or about April 18, 2005, the City adopted the Habitat Management and
19 Monitoring Plan for the Preserve ("HMMP") pursuant to DPMC Section 9.27.030(a)(4)(H). The
20 HMMP was written by Cross-Defendant in conjunction with a City-hired consulting firm. The
21 CDP requires Cross-Defendant to comply with DPMC Section 9.27.030, including the HMMP
22 adopted thereunder.

23 27. Section D of the HMMP provides in relevant part, that:

24 D. Current Issues and Constraints to Management

25 ...Control of public access to the Headlands Conservation Park will be the
26 responsibility of CNLM in *consultation with the City of Dana Point. Hours of
operation for the Headlands Conservation Park and other areas of Biological
Open Space will be 7:00 am to sunset.* (emphasis added)

27 ///

28 ///

1 28. Section I of the HMMP provides in relevant part, that:

2 I. Public Access Control

3 *Hours of operation shall be set by the City of Dana Point in consultation with the*
4 *Habitat Manager*, however, the Biological Open Space shall not be open to the
5 public after dark and *the anticipated hours of operation would be 7:00 am to*
6 *sunset.* (emphasis added)

7 29. Together the HDCP, CDP, and HMMP are referred to herein as the “Development
8 Entitlements.”

9 30. Together, the Development Entitlements require CNLM to provide daily public
10 access during daylight hours (approximately 7:00 a.m. to sunset), consistent with the Coastal Act’s
11 objective of maximizing public access to the coast. Any change to these hours of operation would
12 constitute “development,” and at a minimum, require the issuance of a coastal development
13 permit.

14 31. Most recently, on November 4, 2021 the California Coastal Commission weighed
15 in and has asserted that the CDP does not actually set the hours for the Nature Trail and Overlook
16 Areas, and that before any hours may be set restricting public access to those public amenities,
17 CNLM must apply to the City for, and receive a Coastal Development Permit specifically for that
18 purpose. Attached hereto as **Exhibit B** is a true and correct copy of the Coastal Commission’s
19 November 4, 2021 letter, which is incorporated herein.

20 **Relevant Facts Regarding the Conservation Easement**

21 32. On November 3, 2005, the City and CNLM entered into the Conservation
22 Easement, whereby CNLM granted to the City an easement to ensure that the “biological values
23 and resources in the [Preserve] continue to exist in perpetuity, and to prevent any use of the
24 [Preserve] that will materially impair or interfere with such values and resources.” (Ex. A
25 [Conservation Easement], § 2.)

26 33. The Conservation Easement grants to the City several rights, including but not
27 limited to the public’s right of access to the Nature Trail and Overlook Areas for daily scenic
28 enjoyment, passive recreation, and education during daylight hours. (Ex. A [Conservation
29 Easement], § 5.2, subd. (d) [listing passive public access and use as a permitted use].) “Permitted

1 passive recreational uses include, but are not limited to, walking, hiking, jogging, and bird
2 watching” along the Nature Trail and Overlook Areas. (*Id.*)

3 34. Significantly, the Conservation Easement also grants the City the “right to enforce
4 by proceedings at law or in equity the covenants” set forth in the Easement, including but not
5 limited to, the public’s right of daily access to the Nature Trail and Overlook Areas. (Ex. A
6 [Conservation Easement], § 4.2.)

7 **CNLM’s Breach of the Coastal Act, Development Entitlements, and Conservation Easement**

8 35. Consistent with the obligations set forth in the Coastal Act, the Development
9 Entitlements, and the Conservation Easement, beginning in April 2010, when the Preserve opened,
10 and for the next ten (10) years, CNLM opened the Nature Trail and Overlook Areas to the public
11 from 7:00 a.m. until sunset, seven (7) days a week.

12 36. However, on or about March 13, 2020, CNLM closed and locked the gates to the
13 Nature Trail and Overlook Areas, and thereby eliminated all public access to the Preserve.
14 California’s Statewide Stay-at-Home order was issued six (6) days later on March 19, 2020.

15 37. On May 18, 2020, the State of California began revising its Stay-at-Home Order,
16 and allowing counties to reopen, and on or about that time the County of Orange received
17 approval to enter Stage 2 of the State’s Reopening Plan allowing for indoor dining and shopping
18 to resume. On May 19, 2020 the City of Dana Point revised its then existing emergency order,
19 issued in consideration of the State’s actions, and formalized the action previously taken by the
20 City’s Director of Emergency Operations declaring that all City trails (which included the Nature
21 Trail) were to be opened on May 6, 2020. Thus, by at least May 19, 2020, if not sooner, outdoor
22 public recreational facilities (such as the Nature Trail and Outlook Areas) were permitted to re-
23 open, subject to COVID-19 precautions; and all City owned facilities (*i.e.*, the public right to
24 access to the Nature Trail created by the Conservation Easement) were ordered reopened.

25 38. Despite the foregoing, CNLM refused to open the gates to the Nature Trail and
26 Overlook Areas, and as such, it continued to prevent the daily public coastal access contemplated
27 in the Coastal Act, the Development Entitlements and the Conservation Easement.
28

1 39. Beginning in May, 2020, the City began requesting CNLM to re-open the Nature
2 Trails and Overlook Areas to the public. CNLM, however, continued to refuse to do so. For
3 instance, on or about May 26, 2020 CNLM wrote a letter to City in response to a request to reopen
4 the facilities, in which it continued to assert that the Preserve must remained closed because of
5 CNLM's inability to comply with the County health officer's COVID orders. The City responded
6 on or about June 19, 2020, again requesting the Nature Trail be returned to normal operating hours
7 and advised CNLM of the City's successful management of its other, opened trails at the
8 Headlands, pointing out COVID had not been a challenge related to such trails.

9 40. After months of ongoing discussion between City and CNLM on the topic, on or
10 about October 15, 2020, after the Nature Trail and Overlook Areas had been completely closed to
11 the public for four months, CNLM finally began to allow limited public access to the Nature Trail
12 and Outlook Areas. Specifically, it began allowing public access two days a week, for three hours
13 a day (Tuesday and Thursday 9:00 a.m. to noon). The City advised CNLM in writing on or about
14 October 28, 2020 that this was not acceptable and did not meet the requirements of the Coastal
15 Act, Development Entitlements and the Conservation Easement; and further, demanded that the
16 Nature Trail and Overlook Areas be opened to the public seven days a week, from 7:00 a.m. to
17 sunset, as had been the case for the prior 10 years. CNLM provided a written response in which it
18 refused to do so, and instead advised it would continue to only allow the limited access noted
19 above.

20 41. Despite ongoing efforts by the City to cause CNLM to comply with its various
21 obligations to open the Nature Trail and Outlook Areas the public, it steadfastly refused to do so.
22 No change in status occurred until after the State's COVID Tier system ended all together. Then,
23 on or about June 15, 2021, CNLM increased the hours of public access to the Nature Trail and
24 Outlook Areas to three days a week (Tuesday, Thursday, and Saturday) from 8:00 a.m. to 4:00
25 p.m.

26 42. In an effort to compel compliance with its legal obligations, commencing on or
27 about June 18, 2021, the City began to issue administrative citations to CNLM (also called Notices
28 of Violation) in the hope it would encourage CNLM to cease its wrongful conduct and open the

1 Nature Trail and Overlook Areas on a daily basis for public use as required by the Coastal Act, the
2 Conservation Easement and Development Entitlements. CNLM was not persuaded by the Notices
3 of Violation and continued to unlawfully prevent the public from accessing the Nature Trail and
4 Overlook Areas.

5 43. CNLM has steadfastly insisted that it has the exclusive authority to continue to set
6 hours during which the public may access the Nature Trail and Outlook Areas. CNLM has
7 asserted during the City's efforts to compel it to open the Nature Trail and Outlook Areas that the
8 Conservation Easement does not give the public a right of access to such amenities during daylight
9 hours. It continuously relies on language of the Conservation Easement that indisputably provides
10 the public does not have unfettered access to the Conservation Park as justification for this
11 position. Yet, it ignores clarifying language that makes clear the Nature Trail and Overlook Areas
12 "***shall***" be open to the public and public access to the Conservation Park "***shall***" be limited to the
13 Nature Trail and Overlook Areas. Indeed, the very sentence upon which CNLM basis its tortured
14 position contains clarifying language to the effect the conservation easement does not grant
15 unfettered public access to the Conservation Park but expressly does provide a right for the public
16 to access to the Nature Trail and Outlook Areas. As provided in the Conservation Easement:

17 Public Use and Access. Certain portions of the Conservation Park, which portions
18 are more particularly described in the Restoration/Revegetation Plans, **shall be**
19 **open to the public for scenic enjoyment, education and passive recreation.**
20 Except as provided in Section 6 with respect to Marguerita Road, such public
21 **access shall be controlled and shall be limited to the nature trail and overlook**
22 **areas** to be constructed on the Conservation Park as depicted on Exhibit "A" (the
23 "Nature Trail and Overlook Areas") attached hereto. Permitted passive recreational
24 uses include, but are not limited to, walking, hiking, jogging and bird watching.
25 Notwithstanding the foregoing, ***this Conservation Easement does not convey to***
26 ***the public a general right of access to the Conservation Park but allows access***
27 ***for passive recreation along the Nature Trail and Overlook Areas.***

28 44. CNLM has stubbornly refused to comply with the Coastal Act, Development
Entitlements and Conservation Easement requirements even after receiving a written notice from
the California Commission on or about November 4, 2021 advising it that a Coastal Development
Permit is required for it to set ***any hours*** restricting public access to the Nature Trail and Overlook
Areas, and that absent obtaining such a Coastal Development Permit CNLM is in violation of the
Coastal Act. (Ex. B.)

45. As of the date of the filing of this Cross Complaint, the Nature Trail and Overlook Areas continue to only open three days a week (Tuesday, Thursday, and Saturday) from 9:00 a.m. to 4:00 p.m., in violation of the Coastal Act, the Development Entitlements, and the Conservation Easement.

46. Moreover, in further violation of the Coastal Act and the Development Entitlements, CNLM has not sought a coastal development permit to either set the original hours (*i.e.*, 7:00 a.m. to sunset) or to change such hours of operation of the Nature Trail and Overlook Areas to the current 9:00 a.m. to 4:00 p.m.

FIRST CAUSE OF ACTON

(Civil Penalty for Violation of the Coastal Act)

47. Cross-Complainant realleges and incorporates the allegations of paragraphs 1 through 46 as though fully set forth herein.

48. Sections 30805 and 30111 of the Coastal Act entitle the City to maintain a cause of action recover civil penalties for a violation of the Coastal Act, as more fully set forth in Section 30820(a) which provides:

Any person who violates any provision of this division may be civilly liable in accordance with this subdivision as follows:

(1) Civil liability may be imposed by the superior court in accordance with this article on any person who performs or undertakes development that is in violation of this division or that is inconsistent with any coastal development permit. . . in an amount that shall not exceed thirty thousand dollars (\$30,000) and shall not be less than five hundred dollars (\$500).

(2) Civil liability may be imposed for any violation of this division other than that specified in paragraph (1) in an amount that shall not exceed thirty thousand dollars (\$30,000).

49. Sections 30805 and 30111 of the Coastal Act similarly entitle the City to maintain a cause of action recover an additional penalty when a violation of the Coastal Act is conducted or continued “intentionally and knowingly” as fully set forth in Section 30820(b) which provides:

Any person who performs or undertakes development that is in violation of this division or that is inconsistent with any coastal development permit . . . when the person intentionally and knowingly performs or undertakes the development in violation of this division or inconsistent with any previously issued coastal development permit, may, in addition to any other penalties, be civilly liable in accordance with this subdivision. Civil liability may be imposed by the superior court in accordance with this article for a violation as specified in this subdivision in an amount which shall not be less than one thousand dollars (\$1,000), nor more

1 than fifteen thousand dollars (\$15,000), *per day for each day in which the*
2 *violation persists*. (emphasis added)

3 50. Cross-Defendant's action to set hours for the Nature Trail and Overlook Areas are
4 alone "development" under the Coastal Act for which a required Coastal Development Permit has
5 not been obtained; and further its closure of such facilities and subsequent reduction in hours of
6 operation from the original 7:00 a.m. to Sunset additionally constitutes "development" under the
7 Coastal Act and the HDCP for which a COASTAL DEVELOPMENT PERMIT is required, yet
8 was not obtained. (*See*, Pub. Res. Code, § 30106; *and* DPMC § 9.75.040.)

9 51. Cross-Defendant's failure to provide access to the Nature Trail and Overlook Areas
10 on a daily basis violates HDCP Section 4-113 because it fails to ensure "public recreational use
11 and enjoyment of the Headlands area on an ongoing basis." This violation of the HDCP violates
12 the CDP, and constitutes development for which a Coastal Development Permit is required but
13 was not obtained.

14 52. Cross-Defendant's failure to provide access to the Nature Trail and Overlook Areas
15 on a daily basis violates HDCP Section 4-49 because it fails to establish "hours of daily
16 operations" for the Nature Trail and Overlook Areas. This violation of the HDCP violates the
17 CDP, and constitutes development for which a Coastal Development Permit is required but was
18 not obtained.

19 53. Cross-Defendant's failure to provide access to the Nature Trail and Overlook Areas
20 on a daily basis violates DPMC Section 9.75.030 because it fails to ensure a "permanent right of
21 scenic and visual access from the bluff top to the public tidelands." This violation of the DPMC
22 violates the CDP, and constitutes development for which a Coastal Development Permit is
23 required but was not obtained.

24 54. Cross-Defendant's failure to provide access to the Nature Trail and Overlook Areas
25 on a daily basis violates DPMC Section 9.75.030 because it fails to "provide the public with the
26 permanent right of access and active recreational use." This violation of the DPMC violates the
27 CDP, and constitutes development for which a Coastal Development Permit is required but was
28 not obtained.

1 55. Cross-Defendant's failure to provide access to the Nature Trail and Overlook Areas
2 on a daily basis from 7AM to sunset violates HMMP Section D because it fails to establish
3 "[h]ours of operation . . . [from] 7:00 am to sunset." This breach of the HMMP violates DPMC
4 Section 9.75.030(a)(4)(H), and thereby violates the CDP, and constitutes development for which a
5 Coastal Development Permit is required but was not obtained.

6 56. Cross-Defendant's failure to provide access to the Nature Trail and Overlook Areas
7 on a daily basis from 7AM to sunset violates HMMP Section I because it fails to establish "[h]ours
8 of operation . . . [from] 7:00 am to sunset." This breach of the HMMP violates DPMC Section
9 9.75.030(a)(4)(H), and thereby violates the CDP, and constitutes development for which a Coastal
10 Development Permit is required but was not obtained.

11 57. Each of the violations alleged in the paragraphs above is an independent violation
12 of the CDP, and constitutes development for which a Coastal Development Permit is required but
13 was not obtained, and is each a sufficient basis for Cross-Complainant to seek civil penalties
14 pursuant to Section 30820(a) and (b) of the Coastal Act.

15 58. Cross-Defendant knew it was violating the Coastal Act as alleged herein at least as
16 early as May 19, 2020, yet continued to do so knowingly and intentionally, and despite numerous
17 communications from the City as well as a notice from the Coastal Commission.

18 59. As of the date of the filing of this Cross-Complaint, Cross-Defendants have
19 continued the above-mentioned violations for a total of at least 612 days, and hence the City is
20 entitled to a civil penalty of \$30,000.00 pursuant to Coastal Act Section 30820(a), and daily
21 penalties of \$15,000 for the period of 612 days totaling \$9,180,000.00 (and continuing at the rate
22 of \$15,000 each day until the violation ceases) pursuant to Coastal Act Section 30820(b).

23 60. Cross-Defendant should be held liable for the maximum penalty amounts
24 considering: (a) the fact the public has been denied access to an invaluable coastal resource for
25 nearly two years; (b) the fact this loss by the public cannot be replaced or otherwise remedied; (c)
26 the sensitivity of the coastal resource in question which is more fully described in the HDCP and
27 HMMP, and has been the subject of over 40 years of public efforts to preserve; and (d) the
28 stubborn and knowing actions of CNLM whereby, despite progressively increasing efforts by the

1 City to gain compliance, it has refused to open the Nature Trail and Overlook Areas to the public
2 as required (even considering it could have done so while it sought a judicial declaration of its
3 rights had it actually believed its legal position had merit).

4 **SECOND CAUSE OF ACTION**

5 **(Enforcement of Conservation Easement under Civil Code § 815 *et seq.*)**

6 61. Cross-Complainant realleges and incorporates the allegations of paragraphs 1
7 through 60 as though fully set forth herein.

8 62. The City and CNLM entered into the Conservation Easement on November 3,
9 2005, whereby City is the holder of the conservation easement set forth in such instrument. The
10 Conservation Easement grants to the City several rights, including but not limited to the right to
11 enforce the public's right of access to the Nature Trail and Overlook Areas for daily scenic
12 enjoyment, passive recreation, and education during daylight hours. (Conservation Easement,
13 § 5.2, subd. (d) [listing public access and use as a permitted use]; § 4.2 [granting City the ability to
14 enforce the provisions of the Conservation Easement].

15 63. CNLM breached its obligation to provide daily public access, and thereby breached
16 the Conservation Easement, by failing to allow public access to the Nature Trail and Observation
17 Areas a daily basis, during daylight hours and specifically from 7:00 am to sunset since on or
18 about May 19, 2020, as set forth above.

19 64. CNLM's breach of the Conservation Easement's terms constitutes an actual injury
20 or impairment of the City's easement rights, held on behalf of the public.

21 65. City, as the grantee and holder of the easement rights conveyed by the
22 Conservation Easement, has the ability to enforce the provisions of the Conservation Easement by
23 a proceeding in law or equity both pursuant to the terms of the Conservation Easement itself and
24 pursuant to Civil Code § 815.7; and, further, pursuant to both, the Court has the ability to prohibit,
25 restrain, or enforce any actual or threatened injury to or impairment of easement right by way of
26 injunctive relief and/or monetary damages.

27 66. The City is entitled to damages, pursuant to Civil Code § 815.7, for CNLM's
28 breach of the Conservation Easement in an amount to be proved at trial, taking into account the

1 public's loss of the scenic and aesthetic value of the Nature Trail and Overlook Areas which are
2 part of the real property subject to the easement.

3 67. The City is additionally entitled to its costs of litigation, including but not limited to
4 its attorney's fees, for enforcing the rights granted to it (and the public) as holder of the
5 conservation easement pursuant to Civil Code 815.7.

6 **THIRD CAUSE OF ACTION**

7 **(Declaratory Relief under Code Civil Procedure § 1060)**

8 68. The City hereby incorporates the allegations contained in paragraphs 1 through 67
9 above.

10 69. California Code of Civil Procedure section 1060 allows for the Court to issue a
11 declaration of the rights and duties of the parties, including but not limited to the validity or
12 construction of an instrument or contract.

13 70. There is an actual controversy between the City and CNLM as to its ability to limit
14 the public access to the Nature Trail and Overlook Areas, and in particular whether doing so
15 violates the Coastal Act, the Development Entitlements and/or the Conservation Easement.

16 71. The City asserts that CNLM's actions in limiting the public access hours without a
17 coastal development permit violates the Coastal Act, the Development Entitlements and/or the
18 Conservation Easement; whereas CNLM asserts the contrary to be the case.

19 72. The City is therefore entitled to a declaration of the parties rights with respect to the
20 matters set forth above.

21 **FOURTH CAUSE OF ACTION**

22 **(Injunction)**

23 73. Cross-Complainant realleges and incorporates the allegations of paragraphs 1
24 through 72 as though fully set forth herein.

25 74. Cross-Defendant's wrongful conduct violates the Coastal Act, the Conservation
26 Easement and the DPMC.

27 75. Cross-Defendant's wrongful conduct, unless restrained by order of this Court, will
28 continue to the great and irreparable harm of Cross-Complainant and to members of the public

1 through further denial of public access to the Nature Trail and Overlook Areas. Cross-
2 Complainant has no adequate remedy at law to prevent such irreparable harm.

3 76. The purpose of a preliminary injunction is to preserve the status quo pending
4 determination on the merits. (*See SB Liberty, LLC v. Isla Verde Assn., Inc.* (2013) 217
5 Cal.App.4th 272, 280, *as modified on denial of reh'g* (June 11, 2013).) “A trial court must weigh
6 two interrelated factors when deciding whether to grant a plaintiff’s motion for a preliminary
7 injunction: (1) the likelihood that the plaintiff will prevail on the merits at trial, and (2) the relative
8 interim harm to the parties from the issuance or nonissuance of the injunction, that is, the interim
9 harm the plaintiff is likely to sustain if the injunction is denied as compared to the harm the
10 defendant is likely to suffer if the preliminary injunction is issued.” (*Ibid.*)

11 77. Similarly, to qualify for a permanent injunction, a party must prevail on the cause
12 of action for a tort or other wrongful act, and must show that equitable relief is appropriate, such
13 as where there is no adequate remedy at law. (*Salazar v. Matejcek* (2016) 245 Cal.App.4th 634,
14 647.)

15 78. Cross-Complainant is entitled to preliminary and permanent injunctive relief
16 requiring Cross-Defendant to reopen the Nature Trail and Overlook Areas in compliance with the
17 CDP and related regulations. Injunctive relief will serve to prevent further injury to Cross-
18 Complainant and the public caused by Cross-Defendant’s wrongful acts. Cross-Complainant is
19 entitled to such further equitable remedies, such as an award of restitution and attorneys’ fees, as
20 may be appropriate.

21 **WHEREFORE**, Cross-Complainant prays as follows:

- 22 1. For civil penalties of \$30,000 pursuant to Coastal Act Section 30820(a);
- 23 2. For civil penalties of \$15,000 per day, commencing May 15, 2020 pursuant to
24 Coastal Act Section 30820(a) (currently \$9,180,000.00), continuing until such time as CNLM
25 ceases its unlawful conduct;
- 26 3. For damages pursuant to Civil Code 815.7;
- 27 4. For injunctive relief;
- 28

1 5. For a declaration of the parties rights and obligations in connection with the matters
2 set forth herein;

3 6. For costs of suit incurred herein including attorney's fees recoverable and permitted
4 by law, including under Civil Code Section 815.7 and Code of Civil Procedure Section 1021.5;
5 and

6 7. For such other legal and equitable relief as the court may deem just and proper.

7 Dated:

RUTAN & TUCKER, LLP
A. PATRICK MUÑOZ
JENNIFER J. FARRELL

9
10 By: _____

A. Patrick Muñoz
Attorneys for Defendant and Cross-
Complainant CITY OF DANA POINT

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