Case Nos. G053709/G053725

# IN THE COURT OF APPEAL
# OF THE STATE OF CALIFORNIA
## FOURTH APPELLATE DISTRICT
## DIVISION THREE

**FRIENDS OF THE CHILDREN'S POOL**
*Plaintiff and Respondent*

**v.**

**CITY OF SAN DIEGO and THE CALIFORNIA COASTAL COMMISSION**
*Respondents and Appellants*

APPEAL FROM THE ORANGE COUNTY SUPERIOR COURT
HON. FREDERICK HORN, JUDGE
CASE NO. 30-2015-00778153-CU-WM-CJC

# APPELLANT CITY OF SAN DIEGO'S REPLY BRIEF

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**CITY OF SAN DIEGO**

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## I.

## INTRODUCTION

Petitioner Friends of the Children's Pool (FOCP) attempts to reframe the issues in this case to avoid the fatal implications the clear decisional law that demonstrates the Marine Mammal Protection Act (MMPA) does not preempt the challenged land use decision at issue in this litigation. Appellant City of San Diego (City) and appellant California Coastal Commission's (Commission) decisions approving a seasonal beach closure were an appropriate exercise of their historical police powers to regulate state-owned property. FOCP's preemption interpretation produces a rather absurd result for a federal law clearly designed to optimize the number of marine mammals and to provide for their protection. The challenged land use ordinance does not trigger MMPA preemption and is entirely consistent with the federal statute. The City respectfully requests this Court determine that the seasonal beach closure ordinance does not relate to the MMPA for preemption purposes and find that the City's and Commission's decisions were supported by substantial evidence.[1]

## II.

## THIS COURT REVIEWS THE CHALLENGED LAND USE DECISIONS APPLYING THE SUBSTANTIAL EVIDENCE STANDARD OF REVIEW

Citing cases that dealt with challenges to findings of fact following evidentiary trials, FOCP argues that this Court must give deference to the Orange County Superior Court's decision. FOCP ignores the proper

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[1] The City joins in the analysis set forth in the Commission's Opening and Reply briefs. The City has attempted to avoid duplication of legal arguments contained in the Commission's briefs and any omission of an issue from the City's brief is not intended to be a waiver of that issue but is merely an effort to streamline the similar and consistent analysis contained in the Commission's briefs.

standard of review that is applicable in administrative mandamus actions. Here, there are two relevant standards to address; (1) the legal question of preemption and (2) whether substantial supports the approvals for the seasonal beach closure.

First, this Court reviews questions of law under a *de novo* standard of review. (*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n* (1983) 461 U.S. 190, 201.) "Because the interpretation of statutes and administrative regulations and the ascertainment of legislative or regulatory agency intent are purely questions of law, 'we determine the preemptive effect of either statutes or regulations independently [citation], *without deferring to the trial court's conclusion* or limiting ourselves to the evidence of intent considered by the trial court [citation].' " (*Gibson v. World Savings & Loan Assn.*, (2002) 103 Cal.App.4th 1291, 1297, emphasis added.) Thus, the analysis of whether the MMPA preempts the City's land use regulation is a purely legal question and does not require any special regard for the views of the Orange County Superior Court although deference to the agency's interpretation of a statute it implements should be given. (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 7-8.)

FOCP relies on cases that do not involve administrative decision challenges for its supposition that this Court should presume the Orange County Superior Court judgment is correct. (FOCP Answering Brief, p. 20 citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) But *Denham* involved a challenge to a trial court's exercise of discretion and did not involve an administrative mandamus case and is, therefore, inapplicable in the present situation. FOCP's proposed standard of review ignores the clear decisional law, cited above and in the City's Opening Brief, which requires this Court to conduct of a *de novo* review of the legal question of

preemption without regard for the superior court's analysis. FOCP implies that the superior court made findings of disputed facts so as to invoke the substantial evidence standard of review of the superior court's decision but FOCP does not identify what purported disputed facts the superior court allegedly resolved. (FOCP Answering Brief, pp. 22-23.) There were no disputed factual issues in the writ hearing below. The primary issue was the legal determination of whether the MMPA preempted the local land use ordinance and whether the City abused its discretion in approving the seasonal beach closure. Accordingly, this Court is not required to give any deference to the superior court's decision and may review the legal question of preemption *de novo*.

Second, the standard of review to be applied by an appellate court with respect to a trial court's decision in an administrative mandamus action depends on the proper standard of review that should have occurred in the superior court. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94-95.) "The scope of review at each of the three levels of review is the same and consists in the application of the substantial evidence rule to the original record of the Department." (*Id.* at 95.)

Only where a trial court *properly* exercised independent judgment on a question of fact determined by the agency does the appellate court examine the trial court record to determine whether substantial evidence supports the *trial court's* decision. (*Id.*) But, if the independent judgment test did not apply in the trial court, on appeal from that decision, the appellate court examines the administrative record to determine if substantial evidence supports *the agency's* decision. (*Id.*) If the trial court erroneously used the independent judgment standard of review rather than the substantial evidence test, as here, the appellate court need not remand

the case back to the trial court but can instead conduct the necessary review and apply the proper substantial evidence test to the agency's decision. (*Ogundare v. Dept. of Industrial Retention Div. of Labor Standards Enforcement* (2013) 214 Cal.App.4th 822, 829.)

The California Supreme Court has set forth standards by which to judge which cases merit independent judgment review in the superior court. (*Bixby v. Pierno* (1971) 4 Cal. 3d 130, 143-44.) In *Bixby*, the court held that independent judgment review is only implicated when a fundamental vested right is impinged otherwise the substantial evidence standard of review applies. (*Id.*) Similarly, in administrative mandamus actions, the proper standard of review is the substantial evidence standard of review unless the court is authorized by law to exercise the independent judgment standard of review. (Code Civ. Proc. § 1094.5(c).) The independent judgment standard only applies where fundamental vested rights are involved. (*Paoli v. California Coastal Commission* (1986) 178 Cal.App.3d 544, 550.) Courts have rarely upheld the application of the independent judgment test to land use decisions. (*Cadiz Land Co., Inc., v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 111.) In *Cadiz,* the Fourth District Court of Appeal, Div. 2, declined to apply the independent judgment standard in a land use case and held that plaintiff did not have a present possessory interest in the project site and, therefore, no fundamental vested right was implicated. (*Id.*)

In this case, the Orange County Superior Court erroneously applied the independent judgment standard of review instead of the utilizing the proper substantial evidence standard of review. The issues presented in this litigation do not implicate a vested fundamental right and, therefore, the superior court should not have exercised its independent judgment. This Court can review the administrative record and apply the correct standard

of review to determine if substantial evidence supports the City and Commission's decisions. This Court is not required to presume the superior court judgment was correct nor it is required to give any deference to the superior court's decision. Indeed, it must start with the presumption that *the agency's* decisions are correct. Under the substantial evidence test, the agency's findings are presumed to be supported by the administrative record and the party challenging them has the burden to show they are not. (*SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 459, 469.)

Here, as discussed extensively in the City's Opening Brief, substantial evidence supports the City and the Commission's decisions to seasonally close the Children's Pool Beach and the Orange County Superior Court erred in applying the independent judgment standard of review to their decisions. FOCP does not even address the fact that the superior court used the wrong standard of review but merely argues that this Court should give deference to the trial court irrespective of its use of the wrong standard of review. That reversible error allows this Court to now conduct the appropriate review of the City's and Commission's decisions applying the proper standard of review without regard for the superior court's erroneous analysis.

## III.

## PETITIONER HAS NOT MET ITS BURDEN TO ESTABLISH THAT THE MMPA PREEMPTS LAND USE REGULATIONS

### A. This Court Must Start With the Presumption that the MMPA Does Not Preempt the Seasonal Beach Closure.

Any determination regarding preemption must begin with the presumption that MMPA does not preempt the City's land use decisions.

(*Godfrey v. Oakland Port Services Corp* (2014) 230 Cal.App.4th 1267, 1273.) Absent a clear and manifest intent to preempt a state law, federal preemption is disfavored. (*People v. Boultinghouse* (2005) 134 Cal.App.4th 619, 625.) The text of the federal law is the best indicator of Congress's intent. (*Id.*)

Because land use regulations are historically matters of state police power, the Court should take a narrow view of any asserted federal preemption in these areas. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 822–823.) Indeed, the "power of the state to control, regulate and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute [citation]". (*Marks v. Whitney* (1971) 6 Cal. 3d 251, 260.)

The challenged land use decision at issue in this case was an exercise of the City's historical police powers and, therefore, preemption should not be broadly construed. Indeed, the express language of the MMPA encourages state and local actions that are consistent with the MMPA. "In particular, *efforts should be made* to protect essential habitats, *including the rookeries*, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions." (16 U.S.C.A. § 1361(2).) Here, the land use decision was an effort to protect an essential habitat rookery and was entirely consistent with the directive in the MMPA for states and local agencies to make efforts to achieve that objective.

### B. The City's Land Use Regulations Do Not Directly Relate to the MMPA for Preemption Purposes.

FOCP argues that the superior court made a finding of fact that the seasonal beach closure ordinance "relates to" the prohibition against unpermitted takings in the MMPA. (FOCP's Answering (sic) Brief, p. 27,

§ 2.) FOCP urges this Court to apply the substantial evidence standard of review to this "factual finding." Yet, the analysis of whether the seasonal beach closure ordinance "relates to" the MMPA for preemption purposes is not a factual finding, it is a legal conclusion. As discussed earlier, this Court reviews legal issues under the *de novo* standard of review. The superior court did not make a finding of fact that the ordinance language "related to" the MMPA and FOCP's arguments invoking the substantial evidence standard to apply to the superior court's ruling should be disregarded. Whether a regulation "relates to" a federal statute for preemption purposes is a legal issue and not a factual issue because it involves interpretation of a statute, not a factual finding.

Alternatively, FOCP argues that the Commission did not raise the issue of the legal interpretation of the "relates to" phrase in the trial court below and has, therefore waived that issue on appeal. (FOCP's Answering (sic) Brief, p. 32-33.) FOCP is wrong. The Commission expressly discussed the scope of the "relating to" language in its brief in opposition to the petition for writ of mandate. (Commission Opposition Brief, p. 11:24-12:6, AA 496.) FOCP also ignores the fact that the City also raised this issue in the trial court below (City's Opposition Brief, p. 8:10-9:10, AA 470). This Court can review the statute's text to ascertain the intent of the statute and interpret the legal meaning of the "relate to" language contained therein as this issue has not been waived as FOCP implies.

A regulation with an indirect and tenuous effect on a preempted subject does not "relate to" it for preemption purposes. (*CPF Agency Corp. v. Sevel's 24 Hour Towing Service* (2005) 132 Cal.App.4th 1034, 1055.) As the Ninth Circuit Court noted, "applying the 'relate to' provision according to its terms was ... doomed to failure, since ... everything is related to everything else." (*Californians for Safe & Competitive Dump*

*Truck Transp. V. Mendonca* (9th Cir. 1998) 152 F. 3d 1184, 1189 [finding that an indirect relation to regulation is not sufficient to overcome the presumption against federal preemption].)

To construe the "related to" language as broadly as FOCP urges would essentially do away with the presumption against preemption because the phrase "relate to" is indeterminate. Although FOCP cites to several cases in which the phrase is broadly applied, none of those cases were applicable to the MMPA specifically. The *only* case in which that phrase has been interpreted in the specific context of the MMPA is the *Arnariak* case. (See, *State v. Arnariak* (Alaska 1997) 941 P.2d 154, 158.) The *Arnariak* court expressly held that the MMPA's preemption clause utilizing the "relate to" language is not so broad as to prevent Alaska from limiting access to state property. (*Id.*) FOCP does not distinguish this case which is very similar to the issues before the Court presently and, instead, argues that this Court should ignore the majority opinion in that case and adopt the "thorough and well-reasoned" rationale of the dissenting opinion. (FOCP's Answering (sic) Brief, p. 33.) FOCP does not provide any analysis as to why this Court should disregard the majority opinion (which is still valid legal precedent) other than its own self-serving description of the dissenting opinion. FOCP also relies upon a case that is no longer legal precedent (*UFO Chuting v Young* (Dist. Hawaii 2004) 327 F. Supp.2d 1220). FOCP's arguments are not persuasive and are contrary to valid legal precedent established in *Arnariak.*

*Arnariak* involved a state's enactment of access restrictions to its state-owned property which was challenged on the basis that the MMPA preempted the state's ability to restrict access. Despite the clear similarities in issues, FOCP wants to rely only upon the dissenting opinion in that case as well as the *UFO Chuting* case that is no longer citable as precedent.

(See, FOCP's Answering Brief, p. 29.) Moreover, the *UFO Chuting* case involved a regulation that actually conflicted with the MMPA so it is not persuasive in situations in which no conflict exists. *UFO Chuting* did not reject an attempt to narrow the phrase "relate to" but instead found that a state regulation that attempted to proscribe the distance from which one could approach a humpback whale within a federally regulated sanctuary was related to the same type of distance barrier provision that was found in the MMPA and based thereon, concluded that the regulation was expressly preempted. At no time did the *UFO Chuting* court overrule the *Arnariak* decision as FOCP suggests.

The analysis of the "relate to" language in the MMPA is a legal issue. *Arnariak,* the only citable case that interprets the "relate to" language in the MMPA establishes that the "relate to" language is not to be construed broadly for purposes of preemption. Any interpretation of the scope of the "relate to" language should be tempered with the presumption against preemption of the state's historical state powers. A connection to or reference to harassment of harbor seals is not what is required to overcome the presumption against preemption. The City's seasonal beach closure ordinance does not relate in any way to issuance of permits allowing the taking of the harbor seals and is not inconsistent in any way with the MMPA. Therefore, the MMPA does not preempt the City's land use ordinance.

### C. The MMPA Does Not Preempt the Seasonal Beach Closure

As discussed more extensively in the City's Opening Brief, federal preemption can arise in the following three circumstances: " 'First, Congress can define explicitly the extent to which its enactments pre-empt state law.... Second, in the absence of explicit statutory language, state law

is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.... Finally, state law is pre-empted to the extent that it actually conflicts with federal law,' " either because " 'it is impossible for a private party to comply with both state and federal requirements, [citation] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' [Citations.]" (*Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923.) The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 956.) A finding that the MMPA preempts the seasonal beach closure ordinance is not warranted under the circumstances herein presented.

### 1. Congress Did Not Expressly Preempt Local Land Use Regulations.

First, express preemption arises when Congress defines explicitly the extent to which its enactments pre-empt state law. (*Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923.) The MMPA established a permitting process administered by the National Marine Fisheries Service (NMFS) through which the fishing industries' incidental takings could be allowed but carefully controlled. (*People of Togiak v. United States* (D.D.C. 1979) 470 F.Supp. 423, 428 n.11.) The MMPA reserved exclusive jurisdiction over the conservation and management of marine mammals to the federal government. (*Id.*) Here, the seasonal beach closure does not purport to manage *the herd* of harbor seals. The seasonal beach closure manages *the people* who come into contact with the harbor seals resulting in violations of the MMPA which FOCP acknowledges happens regularly.

A federal agency's determination of the scope of preemption under which it operates is entitled to special consideration. (*Wyeth v. Levine* (2009) 555 U.S. 555, 565.) In 2007, the City sought guidance from the NMFS regarding its proposed ordinance. (21 AR 5671.) The NMFS Regional Director recommended that the City close Children's Pool during pupping season. In 2010, the NMFS Regional Director again recommended closure. (21 AR 5666-67.) In fact, the NMFS also supported the Trust Amendment because it interpreted the Trust Amendment to provide the City with "greater latitude in implementing management actions regarding the harbor seal colony at Children's Pool Beach." (1 AR 00083, 21 AR 005666.) Furthermore the Commission has approved similar access restrictions at other haul out sites throughout California to prevent ongoing acts of MMPA-defined harassment without objection from the NMFS. (1 AR 000043-44.) The fact that most, if not all, local municipalities have enacted access restrictions throughout the state without intervention from the NMFS is illustrative that the NMFS does not consider such regulations to be contrary or preempted by the MMPA. Only in situations in which a state desires to issue hunting permits, handle enforcement of MMPA-defined acts of harassment or issue permits for scientific research of marine mammals are states required to obtain transfer of management authority. (See, Conf. Rept. on H.R. 10420, 92nd Cong., 2nd Sess., 118 Cong. Rec. 33227 (daily ed. Oct. 2,1972) <https://www.gpo.gov/fdsys/pkg/GPO-CRECB-1972-pt25/pdf/GPO-CRECB-1972-pt25-5-2.pdf#page=51> (as of July , 2017).)[2] The Conference Report shows that the MMPA only

[2] FOCP argues this Conference Committee Report is more appropriate gauge of Congress's intent. City does not disagree that this report further demonstrates that Congress was trying to replace a hodge-podge state permitting scheme with a federal permitting process. Indeed, the point of City's argument is that a land use regulation does not relate to a federal permitting scheme.

preempts those state laws which address issuance of permits for a taking of a marine mammal. "Once granted authority to implement its laws relating to marine mammals, the State concerned may issue permits, handle enforcement, and engage in research." (*Id.*) The findings required before the Secretary can transfer conservation and management authority to a state further shows that transfer of authority is directed to hunting and fishing permit regulations, not land use regulations. For example, the Secretary must find that "all taking of the species be humane" and that the taking of the species only occur when the "species is at the optimum sustainable population" and limits the number of animals that may be taken so as not to allow the species to drop below the optimum sustainable population. (16 U.S.C.A. § 1379.) It defies logic to argue that a City or State must develop a conservation and management program within those guidelines to transfer management authority over the harbor seals merely to implement access regulations to City-owned property that FOCP acknowledges it could otherwise implement. It is clear that the Congressional intent was to supplant permitting regulations and not land use regulations.

### 2. The Seasonal Beach Closure is Consistent with the MMPA.

Second, conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. (*Hillsborough County v. Automated Medical Labs* (1985) 471 U.S. 707, 713.) FOCP does not explain how the land use ordinance would create a situation where compliance with both the seasonal beach closure ordinance and the MMPA would be impossible. A claim of positive conflict might gain more traction if the City were attempting to remove the harbor seals as FOCP urges the City to do but the land use ordinance contains no such conflicting requirements. In short, nothing in the seasonal beach closure

purports to make it impossible to comply simultaneously with both federal and state law.

### 3. Congress Did Not Intend to Occupy the Field of Land Use Regulation.

Finally, field preemption, i.e., 'Congress' intent to pre-empt all state law in a particular area,' applies 'where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.' [Citations.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935–936.) The MMPA does not express any intent to regulate land use. As FOCP admits, the MMPA,

> "restricts the taking and importation of marine mammals, and authorizes the Secretary to regulate these activities. (16 U.S.C. §§ 1372, 1373.) The MMPA authorizes the Secretary to issue permits for taking marine mammals, investigate violations of the act, issue fines and penalties, and designate state employees to help enforce the act. (16 U.S.C. §§ 1374, 1375, 1376 & 1377.) Congress even gave the Secretary authority to initiate negotiations for international agreements regarding the conservation and importation of marine mammals. (16 U.S.C. § 1378.)" (See, Answering (sic) Brief, p. 42.)

None of these expressly delegated tasks is the subject of the challenged land use ordinance. The City does not seek to issue take permits or authorize importation of the harbor seals, it does not seek to investigate violations of the MMPA, issue fines or penalties or seek to provide for enforcement of the MMPA. The "field" in which the MMPA has reserved for federal management is the field of hunting and fishing permits. Congress enacted the MMPA to substitute a comprehensive federal system of marine mammal hunting laws in place of diverse, inconsistent state marine mammal hunting laws. (*People of Togiak v. United States* (D.D.C. 1979) 470 F.Supp. 423, 428 n.11, citing House Rept. No. 92-707 (Dec. 4,

1971), U.S. Code Cong. & Admin. News 1972, p. 4149.) There is no clear and manifest intent that Congress intended to usurp local and state land use regulations. There is no basis for a conclusion that field preemption applies in the instant circumstances.

### D. The City Never Argued that the NMFS Transferred Management Authority.

Oddly, FOCP asserts in its respondent's brief that the City and the Commission had previously argued in the court below that NMFS had transferred management authority to the City and Commission. (Answering (sic) Brief, p. 18.) This argument is disingenuous at best and purposefully misleading at worse. The citation to the Reporter's Transcript that FOCP selectively chose to support this incorrect argument clearly indicates that the Commission argued at the short hearing appellants were afforded in the trial court that neither the City nor the Commission needed to obtain transfer authority.

> THE COURT: SO ARE YOU SAYING THAT THE STATE COULD HAVE DONE THIS ON ITS OWN WITHOUT THE CONSULTING OR GETTING A – HAVING IT REVIEWED BY T HE AGENCYTHAT IMPLEMENTS THE MARINE MAMMALS PROTECTION ACT THAT WAS IMPLEMENTED IN 1972?
>
> MS. ARNDT: THAT'S CORRECT. (RT p. 5:21-25.)

At no time has the City ever argued that the federal agency had transferred management authority because it has been and continues to be the City's position that no such transfer of management authority is needed to implement land use regulations. As discussed earlier in this brief, the transfer authority expressly applies to issuance of takings permits. It does not apply to land use regulations.

### E. The City and Commission Were Not Required to Bring an Action Under the Administrative Procedure Act.

It does not appear that FOCP disagrees with the City's argument that the trial court erred in concluding that the City and the Commission were required to participate in a federal Administrative Procedures Act (APA) process since it did not address this in its respondent's brief. (AA 561.) It is undisputed that neither the City nor the Commission brought any action under the MMPA so as to invoke the need for a federal administrative process. The superior court's finding that appellants were required to initiate a proceeding under the APA is without legal or factual support. Similarly, the superior court erred in concluding that a federal APA proceeding was needed to initiate a transfer of management authority. First, as discussed above, no transfer authority is needed to implement land use regulations. Second, even if such transfer authority were required, a federal APA proceeding is not the vehicle to obtain that transfer. Only when a private party seeks to bring an action under the MMPA (e.g. for denial of a take permit) is an APA proceeding warranted. (5 U.S.C.A. § 551 et seq.; *National Resources Defense Council v. Evans* (N.D. Cal. 2003) 279 F. Supp. 2d 1129, 1142.) The City and the Commission were respondents in the superior court action. They were not required to initiate an APA proceeding because they did not seek to adjudicate a final federal agency decision. It is unclear why the superior court reached this conclusion since none of the parties raised this issue in their briefs nor did they argue this position at the short hearing on the petition. In any event, FOCP does not dispute the erroneous finding in its respondent's brief.

## IV.

## FOCP HAS NOT MET ITS BURDEN TO ESTABLISH THE COASTAL ACT PREEMPTS LAND USE REGULATIONS

FOCP alternatively argues that the City's seasonal beach closure ordinance conflicts with the Coastal Act (Pub. Res. Code §§ 30000 et seq.) and is, therefore, preempted by that state law. (FOCP Answering (sic) Brief, pp. 43-51.) FOCP is wrong on this issue too and its narrow application of only one part of the Coastal Act, while ignoring more relevant provisions, is fatal to its argument.

### A. The Coastal Act Expressly Provides for the Protection of Fragile Resources.

The Coastal Act provides "a comprehensive scheme to govern land use planning for the entire coastal zone of California." (*Yost v. Thomas* (1984) 36 Cal.3d 561, 565.) The Coastal Act has numerous policies supporting, encouraging, and requiring the protection of public access to the shoreline and recreational facilities. The Coastal Act creates a shared responsibility between local governments and the Commission for the planning of coastal developments. (*Schnieder v. California Coastal Commission* (2006) 140 Cal.App. 4th 1339, 1344.)

There are circumstances, however, where the Coastal Act requires the Commission to balance the need to protect marine resources with the public's right to access. In section 30007.5 of the Coastal Act it states, "The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources." (Pub. Res. Code § 30007.5; 1 AR 000040.) Similarly, section 30230 of the Coastal Act mandates that "[m]arine resources shall be

maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes." (Pub. Res. Code § 30230.) Additionally, section 30214 allows the Commission to restrict access by imposing certain time, place and manner restrictions if to do so would protect fragile coastal resources. (Pub. Res. Code § 30214.) When a provision of the Coastal Act is at issue, courts are enjoined to construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations. (Pub. Res. Code § 30009.)

The Coastal Commission staff recognizes the Children's Pool seal rookery as a "fragile coastal resource." (1 AR 000040.) Moreover, the Commission interprets its own statutes to allow for a balancing of public access and coastal resources. "Where fragile coastal resources exist on the site...and if full public access would have an adverse impact on such resources...limitations on public use should be imposed to allow for public access consistent with the protection of the values of the site. Restrictions on the seasons during which public access would be allowed...may be imposed to mitigate impacts on the access on the fragile resources." (Statewide Interpretive Guidelines for Public Access, Coastal Commission, February 1980.) (1 AR 000040.) Thus, the Coastal Act and its Interpretative Guidelines makes it clear that public access is subordinate to the goal of protecting fragile coastal resources.

Here, the Commission and the City implemented a LCP amendment that imposed reasonable time, place and manner restrictions on access to

protect a fragile resource. Nothing in the Coastal Act requires that the Commission allow unfettered access at all times and, in fact, expressly allows and mandates protection of fragile resources by implementing restrictions where necessary. FOCP cannot meet its burden to establish that the Coastal Act in any way preempts the land use planning process that it expressly mandates.

### B. Substantial Evidence Supports the Commission's Approval.

When the Commission reviews a local coastal program for certification, its task is to determine whether it conforms to the minimum policies established in the Coastal Act. (Pub. Res. Code §§ 30512, 30512.2, 30513.) In the absence of evidence to the contrary, courts should presume that an agency carries out its official obligations. (Evid.Code, § 664; *City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 976.) The trial court presumes that the agency's decision is supported by substantial evidence, and the petitioner bears the burden of demonstrating the contrary. (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 336.)

Here, the trial court erroneously used its independent judgment to review the Commission's approval and, as discussed above, that error warrants reversal and allows this Court do now apply the proper standard of review to determine if substantial evidence supports the Commission's approval of the seasonal beach closure. To the extent that the preemption analysis entails interpretation of the Coastal Act provisions, this Court may review those determinations *de novo*.

Contrary to FOCP's arguments, the seasonal beach closure is entirely consistent with the Coastal Act and furthers its objectives and goals

of shared responsibility between local governments and the Commission to protect fragile coastal resources including the Children's Pool seal rookery.

The Commission has approved other similar local regulations and coastal plans that required limiting public access in order to protect marine resources. (8 AR 001862.) For example, the Commission approved Local Coastal Programs for the City of Solana Beach and the City of Malibu which included provisions which managed access-ways to and along the shoreline to protect marine mammal hauling grounds, seabird nesting and roosting sites, sensitive rocky points and intertidal areas, and coastal dunes. (*Id.*) Similarly, the Implementation Plan for the County of Santa Barbara mandates that marine mammal rookeries shall not be altered or disturbed by recreational, industrial or any other uses during pupping seasons. (*Id.*) In each of these cases, and many others as well, the Commission approved limitations on public access in areas that required special protection due to the presence of sensitive species and marine resources.

The Coastal Commission's approval of the LCP amendment for the seasonal beach closure was not unusual or contrary to the Coastal Act. The Coastal Act policies regarding marine resources ensure protection of the valuable habitat that Children's Pool Beach provides harbor seals consistent with section 30230 and 30214 and well within the Commission's authority and obligation to balance the goals of public access with resource protection.

The long history of harassment of the seals (whether intentionally or ignorantly) supports the need for a seasonal beach closure. The Children's Pool Beach is a unique site due to its urban environment. Many people come just to see the seals. The public will still have access to the beach for seven months of the year and the adjacent breakwater will be accessible

year-round. The public will still be able to enjoy all the scenic amenities of the area, viewing the shoreline and ocean. Therefore, substantial evidence supports the Commission's decision that the City's seasonal beach access regulation was consistent with the Coastal Act policies regarding public access and resource protection.

### C. FOCP's Challenge to the 2009 Trust Amendment is Time-Barred.

As a last resort argument, FOCP argues that the MMPA preempts the state legislature's 2009 Trust Amendment. (FOCP's Answering (sic) Brief, p. 51.) For the same reasons discussed in the preemption analysis above (and in the Opening Briefs), the Trust Amendment does not "relate to" the MMPA for preemption purposes. The Trust Amendment does not address or impact the take of any marine mammal and does not attempt to regulate the conservation or management of harbor seals. The Trust Amendment simply delineates the uses to which the City could put the Children's Pool Beach to for the benefit of the public. Those uses are not mutually exclusive and the legislature leaves it up to the City's discretion to determine which uses prevail.

Moreover, any collateral challenge to the 2009 Trust Amendment are barred by a three-year statute of limitation even if the issue belatedly raised is one of preemption. (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 772-73 [challenge to an ordinance based on state law preemption subject to three year statute of limitation].) Thus, if FOCP believed that the MMPA preempted the 2009 Trust Amendment, that challenge should have been brought within three years of the Trust Amendment's passage. Any challenge brought now on the basis of preemption is time barred.

## IV.

## CONCLUSION

For all the reasons set forth in the City's and the Commission's Opening and Reply briefs, the City respectfully requests that the judgment be reversed and that this Court find that the MMPA does not preempt the seasonal beach closure and that the City and Commission's decisions to enact a seasonal beach closure at Children's Pool are supported by substantial evidence.

Dated: August 4, 2017

Mara W. Elliott, City Attorney

Jenny K. Goodman
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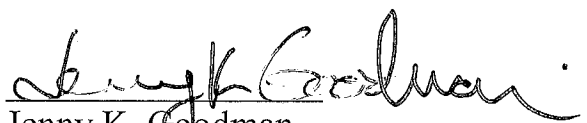
**CERTIFICATE OF COMPLIANCE**

**[CRC 8.204(c)]**

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5,875 words, including footnotes, and is printed in a 13-point typeface. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: August 4, 2017

Mara W. Elliott, City Attorney



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**COURT OF APPEAL, STATE OF CALIFORNIA**
**FOURTH APPELLATE DISTRICT, DIVISION THREE**
**PROOF OF SERVICE**

*Friends of the Children's Pool v. City of San Diego, et al.*

Appeal No. G053709/G053725
Superior Court Case No. 30-2015-00778153-CU-WM-CJC

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California, where the mailing occurs; and, my business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

On August 4, 2017, I served the foregoing **Appellant City of San Diego's Reply Brief**

[By E-file/E-service] By submitting an electronic version of the document(s) to True Filing, through the user interface at www.truefiling.com. The act of electronic filing is evidence that the party agrees to accept service at the electronic service address the party has furnished to the court under Rule 2.256(a)(4) as follows:

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[BY U.S. MAIL] I further declare I served the individual(s) named by placing a true and correct copy of the documents in a sealed envelope and placed it for collection and mailing with the United States Postal Service this same day, at my address shown above, following ordinary business practices. [CCP § 1013(a)]

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

Clerk of Orange County Superior Court
Hon. Frederick Horn
700 Civic Center Drive West
Dept. C-31
Santa Ana, CA 92701

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct. Executed on August 4, 2017, in San Diego, California.

Merlita S. Rich
Legal Secretary