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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 et al., Defendants and Appellants.	G053709, G053725 (Super. Ct. No. 30-2015-00778153) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick Paul Horn, Judge. Request for judicial notice granted. Judgment reversed.

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JW Howard/Attorneys and John W. Howard for The Seal Conservancy as Amicus Curiae on behalf of Defendants and Appellants.

Law Offices of Bernard F. King III and Bernard F. King III for Plaintiff and Respondent.

* * *

This appeal concerns regulation of access to a seal rookery located at Children's Pool Beach in San Diego County. Children's Pool Beach is public trust land granted by the State of California to defendant City of San Diego (City). During several months of the year seals reside on the beach to breed, give birth, and nurse and wean seal pups.

Since the late 1990's to early 2000's disputes have arisen between people who want the seals removed and people who want to protect Children's Pool Beach for the seals. This has led to numerous calls to police to control violence. In addition, often visitors to Children's Pool Beach, either negligently or intentionally, disturbed the seals. Such disturbances can result in a variety of negative consequences, including abandonment of pups, premature births or abortions, and stampeding adults that kill pups. Further, when disturbed seals nipped at humans.

Where is the evidence?

Where is the evidence?

City introduced a variety of measures to attempt to mitigate against these problems. Ultimately, with the approval of defendant California Coastal Commission (Commission; collectively with City, defendants), City enacted an ordinance (Ordinance) closing access to Children's Pool Beach for five-and-a-half months a year during pupping season. Subsequently Commission issued a permit allowing that action.

Plaintiff Friends of the Children's Pool (plaintiff) filed an action for a writ of mandate to overturn the Ordinance claiming it violated the California Constitution and Coastal Act (Pub. Resources Code, § 30000 et seq.; Coastal Act; all further statutory

references are to this code unless otherwise stated) and the Marine Mammal Protection Act (16 U.S.C. § 1361 et seq.; MMPA). The trial court set aside the Ordinance, fi was preempted by the provisions of the MMPA and violated the Coastal Act.

Did it not find any constitutional issure?

Defendants appeal, arguing the Ordinance is not expressly preempted by the MMPA nor is it preempted by field preemption or conflict preemption. It is a land use regulation authorized by the state police power. They further contend the Ordinance was allowed by and does not violate the Coastal Act. We agree with defendants and reverse the judgment, concluding there is substantial evidence to support defendants' actions.

We grant Commission's unopposed request for judicial notice of a report from the United States House of Representatives, which is part of the legislative history of the MMPA and relevant to the issues on appeal.

What does this mean?

FACTS AND PROCEDURAL HISTORY

Children's Pool is located in a cove in La Jolla bordering on the .07 acre Children's Pool Beach.[1] There are several other nearby beaches, accessible to the public, surrounding Children's Pool Beach. In 1931 a curved breakwater was constructed around the cove to protect it from waves. Since that time Children's Pool Beach has been used for swimming, diving, sunbathing, and fishing.

In 1931 the State of California granted the Children's Pool Beach to City in trust to be "devoted exclusively to public park, bathing pool for children, parkway, highway, playground and recreational purposes, and to such other uses as may be incident to, or convenient for the full enjoyment of such purposes." (Stats. 1931, ch. 937, §1; Trust.)

Although there were probably harbor seals at Children's Pool Beach even before the breakwater was constructed, beginning in the early 1990's seals regularly

[1] Reference to Children's Pool Beach will include Children's Pool where applicable.

began to "haul out" onto the Children's Pool Beach, establishing a rookery. A rookery is where seals breed. Hauling out describes seals leaving the water for a variety of essential activities, including sleep, rest, giving birth, and nursing and weaning pups. Haul out sites are essential for seals to engage in these activities. Seals need the most protection from harassment during the final months of pregnancy until weaning. Pups are generally born in early to mid-January and weaning, which lasts four to seven weeks, is comp by the end of May. When pups are present mother seals are more aggressive. Duri pupping season there are more seals on Children's Pool Beach and they remain the longer periods of time than other times during the year.

From mid-January to 7 weeks later would be early March.

There is no evidence, and if it were true, the problem would solve itself.

After early March (see above) the population of seals is due to molting season.

n interaction with humans disturbs seals they "flush" into the water, benefits of hauling out. Flushing is particularly harmful during pupping season. If mothers and pups do not bond for a sufficient period they may not recognize each other if separated, causing the mother to abandon the pup leading to its likely death. In addition flushing can cause a female to abort a fetus or give birth prematurely. When pups are on the beach, stampeding adult seals can kill them.

No evidence that has happened

Fake news from NOAA, yes it can be proven.

The haul out area and rookery at Children's Pool Beach is unique because it d in an urban area and accessible by the public. This has resulted in unwanted between humans and seals with seals subject to disturbance and humans "at risk from defensive seal bites and nips when people attempt to interact too closely with the seals." There have been almost 150 "flush events" caused by human presence at Children's Pool Beach.

Repeat of false allegations. Where are the records of lifeguards treating injuries?

According to the ranger who did nothing about it.

This situation created a dispute between people who wanted the seals removed to give the public unfettered access to Children's Pool Beach and those who wanted to protect Children's Pool Beach for the seals.

In 2005 a private citizen obtained a judgment ordering City to use "all reasonable means to restore the Pool to its 1941 condition by removing the sand build-up" and clean the Children's Pool Beach so the water was safe for humans. Effective

Wrong. O Sullivan obtained a judgment to uphold the Trust and the State Lands Act. That judgement included requiring the City to carry out the only plan it had ever proposed to solve the problems.

The amendment did not obviate the other stipulations, it only allowed shared use. The judgement was not completely vacated. Taylor stated the other terms in the Pate decision were still valid. It did not make any of the terms conditional or seasonal.

2010 the Legislature amended the Trust (Trust Amendment) to add an additional use of the Children's Pool Beach for a "marine mammal park for the enjoyment and educational benefit of children." The judgment was then vacated.

The National Marine Fisheries Service (NMFS)[2] approved of

Oh? Whosay? So NMFS has the authority to approve or disapprove?

Amendment because it gave City "greater latitude in implementing manage

regarding the harbor seal colony" at Children's Pool Bea

's

Pool Beach to be a seal rookery and year-round haul-out

Good, then any attempt to keep people from using it was a violation and required rescinding the rope permit.

In an attempt to manage the ongoing disput

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barrier just up from the mean high tide line during pupping season, December to May. One end was open to allow access to Children's Pool Beach. Signs were also erected

directing the public to remain at a safe distance away from the hauled out seals.

Safe distance has neve been defined. "Directing means demanding".

In 2007 the NOAA's Office of Law Enforcement (OLE) sent a lette

City stating it "continue[d] to receive" reports of seal harassment and was concerned harassment would be ongoing. Although it noted the rope barrier gave some level of better protection for the seals and informed people to respect them, it had not deterred the "determined' individual(s) from approaching the seals." Therefore it "strongly recommend[ed]" City close the Children's Pool Beach from "December 15 through May 30." "[C]losing the beach would make a safer environment for the nursing seals." OLE stated it "look[ed] forward to a continued opportunity to work with [City] in assisting [it] achieving [its] goals as well as protecting the animals and citizens of our commu

So NMFS was not finished determining what should be done and how. McInnis could not have been encouraging San Diego to act illegally outside the MMPA, but had to be encouraging San Diego to petition for permission to act, either after California assumed management authority (noted by Yates) or requesting a special permit. (by which State officials are granted permission to kill greedy sea lions today)

For the first time ever, the City then accepted NOAA stewardship of that urban rookery and requirement NOAA give permission for San Diego to take actions.

Be

sponded 184 tim

incidents at Child

eace calls and fo

reports of battery

0 City adopted a

Seasonal Shared

) establishing a y

[2] The NM

mmerce and its subagency, the National Oceanic and Atmospheric Administration (NOAA), is the agency responsible for implementing and enforcing the MMPA.

round rope barrier; 2) erecting clear signs to explain the rules; 3) prohibiting dogs; 4) hiring a full-time lifeguard or ranger; and 5) prohibiting public access to the Children's Pool Beach during pupping season, December 15 through May 15 (Closure).

The NMFS supported a year-round rope barrier but acki "not guarantee that a person will not violate the MMPA." It also supported the prohibition on public access during pupping season, noting this was the most crucial time to protect seals. The NMFS stated that even traffic noise, people laughing and shouting disturbed the seals. The pre to the hauled out seals or at the edge of t numbers of seals [to] flush[]." The NMFS also had report abortions at Children's Pool Beach.

The NMFS opined that although it had enfor MMPA and despite the MMPA's preemption provision, "States and local governments are free to implement and enforce ordinances, such as the closure of a beach, which may have a side benefit of preventing the harassment of a marine mammal."

ears City implemented only the first four elements of s during pupping season. However, this did not resolve ment of seals. A "Seal Cam" showed several incidents re intentional. Video footage revealed people crossing the rope barrier and harassing the seals. There were more than 250 flushing incidents in a 12-month period in 2013-2014, many during pupping season.

There was continuing conflict between people seeking access to the Children's Pool Beach and people defending the seals, including numerous demonstrations. Often people encouraged others to ignore the rope barriers. Lifeguards and park rangers were routinely required to intervene, thereby to protect

#2 was NOT done.

So NOAA retained the final say.

That has been debunked ever since, And could only be solved by forbidding access to a distance NOAA required in the lifeguard tower IHA - with prohibition of sounds seals can hear. Why did NOAA not request the sea wall be closed to the public? Why not S. Casa? The City proceeded on the assumption NOAA had ceded all control and enforcement to San Diego.

No, it accepted hearsay accounts

Mc Innis was not authorized to make that statement absent a permit, nor was Masters. Preventing MMPA forbidden harassment was to be a side benefit, not the justification, though San Diego did not take the hint.

Lifeguards established they were not required to intervene. The Ranger was not authorized to enforce The one ticket he issued was withdrawn by the City Attorney. The obvious fixes were never budgeted.

The record does not show NMFS taking any action about these allegations. Or even these 250 being reported to NOAA to deal with or why NMFS did not act on them. The City wanted NMFS to act on spurious claims but in the end decided NOAA did not have exclusive jurisdiction and so it could do the job for NMFS.

So, it was a seal protection measure preferred over others for budgetary reasons.

City then determined it was necessary to implement the Closure included in the Policy adopted in 2010. This would protect seals during pupping season, and reduce enforcement activity by park rangers and lifeguards as well as police calls. With the Closure the breakwater would still be open to [illegible] allowing for fishing, walking, viewing seals, numerous nearby beaches, some within walking distance, available for swimming and sunbathing during the Closure.

Beaches within walking distance are some of the most dangerous in town. They are always targeted by the famous 3Rs program.

The NMFS commented on the proposed Closure, observing its pr[illegible] in giving guidance on MMPA compliance had "not helped to diminish the hum[illegible] that persists between various groups at Children's Pool Beach." It noted the "id[illegible] solution" was shared use. The NMFS did not believe a complete closure of Ch[illegible] Pool Beach was necessary and encouraged more education and outreach. It also pointed out the preemption provision in the MMPA. But the NMFS did not prohibit ~~Closure~~.

That ideal solution was stated by Yates in his letter reminding the Ctiy of 109(a). This suit was about the City ignoring him.

After numerous public hearings and an extensive p[illegible] generating hundreds of letters on both sides of the issue, in 2014 Ordinance. It amended City's Municipal Code section 63.0102 banning public access to Children's Pool Beach during pupping 15 to May 15. Concurrently City amended the Local Coastal Program (LCP; LCP Amendment) to prohibit public access to the Children's Pool Beach during pupping season, December 15 through May 15. Implementation of the Ordinance and the LCP Amendment were expressly conditioned on certification by Commission.

No, the notice prohibited doing anything concerning marine mammal takes without a NOAA permit or exception, such as seeking Management Authority

City then submitted to Commission for approval the LCP Amendment and an application for a coastal development permit (Permit) to close Children's Pool Beach from December 15 to May 15 each year. After Commission held public hearings it unanimously approved the LCP Amendment and the Permit. The Permit was issued for a five-year period subject to application for another permit and required a monitoring plan

to evaluate the efficacy of the Closure and signage. Implementation of the Ordinance closing Children's Pool Beach began December 15, 2015.

Plaintiff filed a petition for a writ of administrative mandamus, alleging the Ordinance violated the California Constitution and the Coastal Act and was preempted by the MMPA. It sought to have the Ordinance set aside and to enjoin defendants from enforcing it.

The appeal court dumped an independent judgement standard?

Using an independent judgment standard, the court granted plaintiff's petition and issued a writ of mandate ordering City and state to set aside the Ordinance and enjoining its enforcement. In the statement of decision the court found the actions of City and state were preempted by the MMPA and violated the Coastal Act. It also found City had not obtained permission of the Secretary of Commerce (Secretary) for authority to enact the Ordinance nor had Commission obtained permission to issue the Permit allowing City to enact the Ordinance.

Further, the court found City and Commission were required to follow the Administrative Procedures Act (15 U.S.C. § 551 et seq.; APA). It held the authority of City and Commission "over the beach, the people allowed access to the beach and the harbor seals exists only if the Secretary grants authority to [them] to manage the property and, in this instance, protect the harbor seals." The court found such authority had not been given to City or Commission.

DISCUSSION

1. Standard of Review

Under Code of Civil Procedure section 1094.5, subdivision (b), trial court review of an administrative decision must consider whether the agency acted within its jurisdiction, whether the hearing was fair, and whether there was prejudicial abuse of discretion. Abuse of discretion is shown if the agency did not proceed in the legally

required manner, the findings do not support the decision, or the evidence does not support the findings.[3] (*Ibid.*)

On appeal, we use the same standard of review, determining whether the agency proceeded according to law, whether the findings are supported by substantial evidence, and whether the findings support the decision. (*Hoitt v. Dept. of Rehabilitation* (2012) 207 Cal.App.4th 513, 521.) We do not review the decision of the trial court. (*Jefferson Street Ventures, LLC v. City of Indio* (2015) 236 Cal.App.4th 1175, 1197.) Although we engage in "'"some weighing to fairly estimate the worth of the evidence,"'" we do not conduct an independent review or substitute our findings or inferences in place of those of the agency. (*Sustainability, Parks, Recycling & Wildlife Legal Defense Fund v. San Francisco Bay Conservation & Development Com.* (2014) 226 Cal.App.4th 905, 916.) We may reverse only if a reasonable person could not have come to the same conclusion as did the agency. (*Ibid.*)

Judge Horn was not a reasonable person?

We presume the findings and actions of the agency are supported by substantial evidence. (*Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966, 998.) Plaintiff has the burden to show lack of substantial evidence. (*Ibid.*) Substantial evidence includes expert opinions, staff reports, testimony at public hearings, photographs, and the like. (*Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, 261; *City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 491.)

That was the problem? We were supposed to prove a negative?

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[3] The trial court incorrectly used an independent judgment standard in reviewing City's enactment of the Ordinance and Commission's issuance of the Permit. This standard applies only when fundamental vested rights are affected, not the case here. (*HPT IHG-2 Properties Trust v. City of Anaheim* (2015) 243 Cal.App.4th 188, 198.) Despite the trial court's use of an incorrect standard, we may review the administrative findings using the correct substantial evidence test without remanding the case back to the trial court. (*Ogundare v. Department of Industrial Relations* (2013) 214 Cal.App.4th 822, 829.)

What about my fundamental vested rights?

We interpret statutes de novo. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032, 1040-1041.) In connection with our interpretation we give deference to an agency's construction of its governing statutes and regulations. (*Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 434-435.)

legal or not?

On undisputed facts we review the question of preemption de novo as well. (*Cellphone Termination Fee Cases* (2011) 193 Cal.App.4th 298, 311.) Any factual determinations underlying a preemption question are reviewed under the substantial evidence standard. (*Ibid.*) There were no factual determinations made in connection with the preemption question.

By them or by Judge Horn?

2. The MMPA

The MMPA embodies a comprehensive federal plan to protect marine mammals and maintain them at the "optimum sustainable population." (16 U.S.C. § 1361(2), (6).) The MMPA directs that "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. § 1361(2).) "[T]he primary objective of their management should be to maintain the health and stability of the marine ecosystem." (16 U.S.C. § 1361(6).)

If the MMPA bans it then NOAA sees to it, not to be usurped.

The MMPA bans the "taking" of marine mammals, includ
(16 U.S.C. §§ 1362(6); 1372(a); *People of Togiak v. United States* (D.D.C. 1979) 470 F.Supp. 423, 428 & fn. 11.) "Take" is defined as "harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal." (16 U.S.C. § 1362(13).) Harassment is as "any act of pursuit, torment, or annoyance which- [¶] (i) has the potential to injure a marine mammal . . . ; or [¶] (ii) has the potential to disturb a marine mammal . . . by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." (16 U.S.C. § 1362(18)(A).)

Under the MMPA, "No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species . . . of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species . . . to the State . . . ." (16 U.S.C. § 1379(a).)

3. No MMPA Preemption

The court held the MMPA preempted the Closure because it "related to" the taking of seals under Title 16 United States Code section 1379(a). We disagree.

a. Federal Preemption Principles

The Supremacy Clause of the United States Constitution states federal law is the "supreme Law of the Land" (U.S. Const., art. VI, cl. 2) and gives Congress the authority to preempt state law (*Arizona v. United States* (2012) 567 U.S 387, 399). But there is "a strong presumption against preemption." (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1088.) "'In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," [citation] we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [Citations.]' [Citations.] We apply this presumption to the *existence* as well as the *scope* of preemption. [Citation.]"

States did not have an MMPA.

What is unclear about 109(a)?

"State action may be foreclosed by express language in a congressional enactment, [citation], by implication from the depth and breadth of a congressional scheme that occupies the legislative field, [citation], or by implication because of a conflict with a congressional enactment, [citation]." (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U

And NOAA did not believe it needed to say more.

"'"[C]ourts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it."'" (*Viva! Internat. Voice For Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936.) "'[W]hen the text of a pre-emption clause is susceptible of more than

one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption."'" (*CTS Corp v. Waldburger* (2014) __ U.S. __, __ [134 S.Ct. 2175, 2188].)

b. Public Trust Principles

When California was admitted to the Union, it acquired its tidelands held "in trust for public purposes"[4] as part of its sovereignty. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482; § 6009, subd. (a).) "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 . . . ." (*Marks v. Whitney, supra,* 6 Cal.3d at p. 260.) The Legislature has the power to grant tidelands to local governments, subject to the public trust. (§§ 6009, subds. (a) & (d), 6305; *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1187, fn. 14.)

c. No Express Preemption

Relying on the language of Title 16 United States Code section 1379(a), plaintiff claims the MMPA expressly preempts the Closure.[5] That section states: "No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species . . . of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species . . . to the State . . . ." (16 U.S.C. § 1379(a).) Plaintiff argues the MMPA gives the federal government "exclusive jurisdiction over the conservation and management of marine mammals." (*Florida Marine Contractors v. Williams* (M.D.Fla. 2005) 378 F.Supp.2d 1353, 1357.)

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[4] Public purposes include bathing, swimming, and preservation of wildlife and its habitats. (*Marks v. Whitney* (1971) 6 Cal.3d 251, 259, 260.)

[5] Plaintiff argues the trial court's finding the Closure "relates to" harassment of seals is supported by substantial evidence. As discussed above this is not the correct standard of review. We do not review the trial court's decision (*Jefferson Street Ventures, LLC v. City of Indio, supra,* 236 Cal.App.4th at p. 1197) but rather the decisions of City and Commission (*Hoitt v. Dept. of Rehabilitation, supra,* 207 Cal.App.4th at p. 521).

(public)

Per their authority as to their sovereignty on land and anything on it..

Pointing to the definition of "take" (16 U.S.C. § 1362(13)), which applies to an intentional or negligent act of harassment, plaintiff contends the harassment of seals on Children's Pool Beach leading to flushing is a taking under the MMPA. From this it concludes the language of Title 16 United States Code section 1379(a) plainly shows Congress's intent to preempt any laws relating to the harassment of seals. Plaintiff argues that because the Ordinance "has a connection with or reference to the harassment of harbor seals," it is preempted. We are not persuaded.

It is about nothing else but managing the seal population.

1) "Relating To"

We understand the United States Supreme Court has recognized "'relate to' in a preemption clause 'express[es] a broad pre-emptive purpose.'" (*Coventry Health Care of Missouri, Inc. v. Nevils* (2017) __ U.S. __, __ [137 S.Ct. 1190, 1197].) "Congress characteristically employs the phrase to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates. (*Id*. at p. __ [137 S.Ct. at p. 1197].)

"At the same time, [the Court has held], the breadth of the words 'related to' does not mean the sky is the limit. [It has] refused to read the preemption clause of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) [(ERISA)], which supersedes state laws 'relate[d] to any employee benefit plan,' with an 'uncritical literalism,' else 'for all practical purposes pre-emption would never run its course.'" (*Dan's City Used Cars, Inc. v. Pelkey* (2013) 569 U.S. 251, 260; accord *Gobeille v. Liberty Mut. Ins. Co.* (2016) __ U.S. __, __ [136 S.Ct. 936, 943] (*Gobeille*).)[6]

"[A]pplying the "relate to" provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." (*Labor Standards Enforcement v. Dillingham Const., N.A., Inc.* (1997) 519 U.S. 316, 335 (*Dillingham*) (conc. opn. of Scalia, J.) [discussing ERISA

[6] There is a dearth of authority interpreting "relating to" in the MMPA. Hence we turn to analogous case law.

preemption].) This is a result "no sensible person could have intended." (*Gobeille*, *supra*, __ U.S. at p. __ [136 S.Ct. at p. 943], quoting *Dillingham, supra*, 519 U.S. at p. 336 (conc. opn. of Scalia, J.).)

According to Justice Scalia, "it would greatly assist our function of clarifying the law if we simply acknowledged that our first take on this [ERISA] statute was wrong; that the 'relate to' clause of the pre-emption provision is meant, not to set forth a test for pre-emption, but rather to identify the field in which ordinary field pre-emption applies." (*Dillingham, supra*, 519 U.S. at p. 336 (conc. opn. of Scalia, J., italics omitted.)

In *Gobeille*, *supra*, __ U.S. __ [136 S.Ct. 936], the court considered the breadth of "relate to," noting there were only two categories of state laws preempted by ERISA: 1) "'[w]here a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation'"; and 2) whether the "state law . . . has an impermissible 'connection with' ERISA plans, meaning a state law that 'governs . . . a central matter of plan administration' or 'interferes with nationally uniform plan administration.'" (*Id*. at p. __ [136 S.Ct. at p. 943].) This ensured the preemption provision of the statute was honored "while avoiding the clause's susceptibility to limitless application." (*Id*. at p. __ [136 S.Ct. at p. 943].)

Thus, a state law that has only an "indirect, remote, or tenuous effect" on the federal statute is not expressly preempted. (*Dump Truck Transportation v. Mendonca* (9th [illegible] (*Mendonca*) [state prevailing wage law not preempted by federal statute barring state from enacting law related to "price, route, or service of any motor carrier"].)

Where in the closure and its creation did the City say they had concern only for public safety? That was added later.

In deciding whether express preemption applies we consider the MMPA's "text, context, and purpose." (*Coventry Health Care of Missouri, Inc. v. Nevils* (2017) __ U.S. __, __ [137 S.Ct. 1190, 1197].) Nothing in the MMPA, and specifically in Title 16 United States Code section 1379(a), manifests an express congressional intent to preempt

the state's ability to exercise its police powers to regulate access to its own property. (*Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1088.) The Ordinance does not govern a central matter of the statute or interfere with nationally uniform management of seals. (*Gobeille*, *supra*, __ U.S. at p. __ [136 S.Ct. at p. 943].) It is not directed to conservation or taking of seals. Rather, it is a land use regulation, which falls within a traditional state police power.

In issuing the Permit, Commission was exercising the state's police power reserved to it by the Tenth Amendment to the United States Constitution. (*Nollan v. Coastal Com.* (1987) 483 U.S. 825, 836 [Commission's regulation of coastal development exercise of police power]; *Equal Employment Opportunity Commission v. Wyoming* (1983) 460 U.S. 226, 239 [management of state park "traditional state function"].) When City adopted the Ordinance it was also exercising its police power. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 [land use regulation exercise of police power].)

State v. Arnariak (Alaska 1997) 941 P.2d 154 (*Arnariak*), while not binding on us, is instructive. In that case after the Arnariaks were charged with entering a state game sanctuary without a permit, they challenged the regulation on which the charges were based, arguing it was preempted by the MMPA and specifically Title 16 United States Code section 1379(a). The Alaska Supreme Court found no preemption, stating that to do so would require the conclusion that Congress "intended to preclude the State from barring entry onto state property." (*Arnariak* at p. 156.) Instead, reiterating the principle that regulating state lands is an exercise of state police power (*id*. at p. 158), it concluded the "State has the right to exclude entry onto its property and the right to prohibit certain activities from being conducted thereon" (*id.* at p. 156).

for the purpose of huniting endangered animals in a reserve.

Arnariak acknowledged "'relating to'" language in other fed had sometimes been construed "to suggest a broad scale preemption." (*Arnariak, supra,* 941 P.2d at p. 158.) But the *Arnariak* court concluded "at most[it] is merely one guide

to the meaning or intended scope of an enactment; it does not necessarily control where there is evidence that another meaning was intended, or where other rules of construction are also applicable. Here the legislative history, the purpose of MMPA, and the rule that statutes should be construed to avoid an unconstitutional result persuasively indicate that MMPA's preemption is not so broad as to prevent the State from limiting access to . . . state wildlife refuges." (*Arnariak,* at p. 158.)

In so holding, the *Arnariak* court relied on the MMPA's legislative history, pointing to the report of the House Committee on Merchant Marine and Fisheries (House Report), which stated, "'It is not the intention of this Committee to foreclose effective state programs and protective measures such as sanctuaries.'" (*Arn*d at p. 157, citing H.R. Rep. No. 92-707, at p. 28 (1971) reprinted in 1972 U.S. Code Cong. & Admin. News, at pp. 4144, 4161, italics omitted.) The court also noted another portion of the report which stated, "'There is no intention or desire within the Committee to remove any incentive from the states . . . to protect animals residing within their jurisdictions.'" (*Arnariak* 2-707, at p. 18 (1971) reprinted in 1972 U.S. Code Cong. & Admin. News, at pp. 4144, 4151.)

Nor did it, By not ruling.

This is only a report of some kind, not case law.

In our case, plaintiff challenges reliance on the House Report, asserting it refers to a provision in the House bill that was not in the final version of the statute. Plaintiff argues we should look instead to the conference report (Conference Report) discussing the final version, which stated, "The House bill preempted State law, but allowed cooperative agreements with the States in harmony with the purposes of the Act. The Senate amendment allowed the Secretary to review State laws and to accept those that are consistent with the policy and purpose of the Act. The conference substitute clarifies the Senate version to assure that the Secretary's determination will control as to whether or not the State laws are in compliance. Once granted authority to implement its laws relating to marine mammals, the State concerned may issue permits, handle enforcement, and engage in research." (Conf. Rep. No 92-1488 (1971) reprinted in 1972

U.S. Code Cong. & Admin. News, at pp. 4187, 4188; <https://www.govinfo.gov/content/pkg/GPO-CRECB-1972-pt25/pdf/GPO-CRECB-1972-pt25-5-2.pdf.> [as of May 30, 2018].)

Although it is true the adopted version of Title 16 United States Code section 1379 differed from the one discussed in the House Report, the House Report remains relevant to show the intent of the MMPA is to protect marine mammals. Additionally, the Conference Report shows the MMPA was not intended to preempt land use regulations. In delineating what authority could be transferred to states, the MMPA did not include regulating access to state lands but dealt only with issuing permits, enforcing the MMPA, and scientific research. (Conf. Rep. No 92-1488 (1971) reprinted in 1972 U.S. Code Cong. & Admin. News, at pp. 4187, 4188; <https://www.govinfo.gov/content/pkg/GPO-CRECB-1972-pt25/pdf/GPO-CRECB-1972-pt25-5-2.pdf.> [as of May 30, 2018]; *Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1401 [review of committee reports to show legislative intent].)

Of course. The question is who does what

109(a) IS in the MMPA

The Ordinance does not purport to control any of those activities. As City and Commission explain, they are not attempting to manage the seals but to manage the public safety and the access of people to the state-owned property.

Oh, c'mon.

Plaintiff cites *UFO Chuting v. Young* (D. Hawaii 2004) 327 F.Supp.2d 1220 (*UFO Chuting 1*) to support its argument "relating to" should be broadly interpreted. There Hawaii adopted a law banning parasailing for seven months a year in a national marine sanctuary. The plaintiff challenged the statute arguing it was preempted by the MMPA. Relying on Title 16 United States Code section 1379(a), the court found express preemption based on its interpretation of "relating to." (*UFO Chuting 1,* at pp. 1223, 1224.)

The court focused on the "primary intent" of the state statute, to prevent harassment of whales. (*UFO Chuting 1, supra*, 327 F.Supp.2d at p. 1223.) "That the

State considered other justifications as well when it adopted the restriction does not mean that the restriction does not relate to the safety of whales." (*Ibid.*)

Yeah!

2) Primary Intent

Plaintiff argues that because the purpose of the Closure was to protect seals during pupping season, it is expressly preempted. Plaintiff directs us to City's LCP Amendment, which states "seasonal access restrictions" were "to protect breeding pinnipeds." Plaintiff also cites to City's focus on preventing flushes, based on its conclusion prior regulations had not prevented improper interactions between people and seals.

Plaintiff additionally points to the condition in the Permit requiring City to devise a monitoring plan to address whether the Closure was effective at minimizing harassment of seals. Plaintiff further cites to Commission findings that the purpose of the Closure was to protect the rookery during pupping season.

Plaintiff maintains evidence shows the Ordinance was enacted primarily to protect seals from harassment. It complains defendants are arguing for the first time on appeal the Closure does not relate to harassment but claim it might diminish conflict between those who support seals and those who opposed, and that it will reduce seals biting people. Plaintiff asserts these were "alternative justifications," which it claims were barely mentioned by City or Commission in enacting the Ordinance and Permit. Relying on *UFO Chuting 1,* it argues that in any event they did not negate preemption. This argument does not persuade.

Because.....?

Initially, the record reflects both defendants discussed the meaning of "relating to" in the trial court. Moreover, this is a legal argument we may consider for the first time on appeal. (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 377.)

The nub. State's rights. Anti-federalism.

Further, *UFO Chuting 1,* a federal district court decision, does not bind us,[7] and in any event it is distinguishable. The regulation in that case was in conflict with the MMPA, thereby "expressly preempted." (*UFO Chuting 1, supra*, 327 F.Supp.2d at p. 1224.) The MMPA allows boats to come within 100 yards of humpback whales while the Hawaii statute banned parasailing at any distance. There is no such conflict here. In one of its letters to City the NMFS stated the MMPA "does not mandate set distances" to keep people away from marine mammals. Moreover, nothing in the MMPA allows people to harass harbor seals. In addition, the Hawaii statute restricted activity within waters managed by the federal government as opposed to on state prop here. (*Id*. at p. 1221; see 15 C.F.R. § 911.180.) Thus, the case has little if any persuasive authority.[8]

and animals managed by the federal government

Additionally, other than *Arnariak*, which held there was no preemption, and *UFO Chuting 1*, which is distinguishable, the parties have not cited us to any other cases that hold Title 16 United States Code section 1379(a) preempts a state land use regulation.

Except the plain language in 109(a)

Plaintiff cites some older ERISA cases for the general proposition that even consistent state laws can be preempted. (E.g., *Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 386-387; *Mackey v. Lanier Collection Agency & Service, Inc.* (1988) 486 U.S. 825, 829.) But these principles are contrary to the newer cases cited

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[7] "'[T]he decisions of the lower federal courts on federal questions are merely persuasive. . . . Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law.'" (*Fair v. BNSF Railway Co.* (2015) 238 Cal.App.4th 269, 287.)

The nub. A state decides independently where federal law is valid?

[8] After *UFO Chuting 1* was decided the MMPA w exemption from its preemption provision. This was upheld in *UFO Chuting of Hawaii, Inc. v. Young* (D.Hawaii 2005) 380 F.Supp.2d 1166, 1167-1168, which affirmed vacating the summary judgement in *UFO Chuting 1*.

above limiting the breadth of "relating to." In addition, in general ERISA cases are distinguishable because they do not implicate the state's sovereign police power.

3) No NMFS Opposition

Further, in this case, the NMFS, which enforces the MMPA, never ob to the Ordinance or Permit although it had many opportunities to do so, consulting with City throughout the several years leading up to the enactment of the Ordinance. In 2007 the NMFS "strongly recommend[ed]" City close Children's Pool Beach from December 15 through May 30. And the NMFS supported the Trust Amendment authorizing a marine mammal part at Children's Pool Beach because it gave City "greater latitude in implementing management actions regarding the harbor seal colony."

Oh? Yates never notified the Ctiy?

That is unfortunately true, that NOAA had feed ot clay

Also, in 2010, in responding to City's request for comments on the proposed five-part Policy, as to the proposed Closure the NMFS focused on the dangers of flushing during pupping season. Its one comment was a suggestion City consider exempting "certain categories of people," such as SeaWorld employees, from the Closure.

In the same document, NMFS supported hiring a park ranger or lifeguard for "enforcement and education" of the public as to the dangers of disturbing the seals. It further stated, "States and local governments are free to implement and enforce ordinances, such as the closure of a beach, which may have a side benefit of preventing the harassment of a marine mammal."

It was indeed, a hint how to evade the law, by indirectly protecting marine mammals as if by accident.

In 2014, commenting on the not believe "complete closure of Children's Pool Beach is necessary to protect the harbor seals from violations of the MMPA." But it acknowledged its "efforts to provide guidance on complying with the MMPA ha[d] not helped to diminish the human conflict that persists." It advised City should "take steps to reduce the possibility of harassing marine mammals wherever they are encountered in the wild." The NMFS recommended

City review Title 16 United States Code section 1379(a), but it never stated the Ordinance would be preempted.

The purpose then was to mention 109(a) as a joke, to be evaded?

In a second letter in 2014, the NMFS reiterated that its "most preferable outcome" was "shared use." In that letter it also again recommended City review Title 16 United States Code section 1379(a), explaining the section generally banned laws relating to the taking of marine mammals unless management and conservation authority has been transferred to a state. The letter noted such authority had not been transferred to City. But again, when the opportunity was present, the NMFS did not state the Ordinance was preempted or ban the Closure.

Although the NMFS interpretation of the MMPA is not binding on us it is "'entitled to [our] consideration and respect'" (*De La Torre v. California Horse Racing Board* (2017) 7 Cal.App.5th 1058, 1065) and we "give[] weight to [its] construction" (*Western States Petroleum Assn. v. Bd. of Equalization* (2013) 57 Cal.4th 401, 415; see *Wyeth v. Levine* (2009) 555 U.S. 555, 576 [agencies have "unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"].) When directly asked for comments about the Closure the NMFS did not attempt to prevent City from enacting it. Further, the NMFS's instruction that steps be taken to reduce harassment of seals negates plaintiff's argument that any acts by defendants, even if consistent with the MMPA, are preempted. We consider this very persuasive in our analysis.

NOAA lost this case by its reluctance. Our appeal needs NOAA support or NOAA loses authority.

Moreover, even though the NMFS has known about th Children's Pool Beach for years, not once has it directly acted to solve them but instead relied on City, indeed directed City, to address the issue.

Wanna see my federal citation?

Further, regardless of the fact one basis for the Ordinance and Permit was to reduce harassment of seals, defendants were also concerned with public safety, seeking to eliminate the many years of conflicts between the pro- and anti-seal constituencies,

resulting in near constant police involvement. It would be hair splitting at its finest to hold the exact same Ordinance and Permit would comply with the MMPA had the City and Commission merely failed to mention protecting the s goal was reduction of interaction between seals and people during p the Ordinance and Permit are preempted. We will not reach such an absurd conclusion.

A different absurd conclusion is merited.

Plaintiff has acknowledged defendants are not prohibited from closing Children's Pool Beach for reasons unrelated to harassment of seals. And not MMPA expressly preempts municipalities or states from protecting their citizens even if indirectly related to protecting seals. In using the term "relating to" Congress did not intend to preempt land use regulations just because marine mammals are present. Closure does not relate to issuing of permits to allow taking of harbor seals. The mere connection or reference to seals does not overcome the presumption against preemption.

What?

Be careful what you ask for, Max.

In addition, as noted by City, cities have enacted and Commission approved a number of access restrictions to rookeries throughout the state. Before this action, 83 out of 85 rookeries mapped by NOAA in California had access restrictions. There is no evidence in the record NMFS objected to any of these or claimed they were preempted by the MMPA. In fact, there is no evidence of federal involvement in the regulation of access to state property where marine mammals are present.

So they had a presumption. True

Hmmm. Anybody want to see my citation?

The Court DEMANDS NOAA take direct action or forfeit the ability? Use it or lose it?

4) Transfer of Management

Plaintiff also argues that to enact the Ordinance and adopt the Permit, needed to have management authority of Children's Pool Beach transferred deral government.[9] We disagree.

[9] Management authority for harbor seals has not been transferred to California by the Secretary. Plaintiff claims defendants argued in the trial court that management authority had been transferred but fails to cite to any such argument in the record. Defendants dispute this claim. City asserts its position is and always has been that no transfer of authority was needed to enact the Ordinance. Commission argued at trial that NMFS had "approved and supported" the Closure.

The transfer of management is premised on a state "develop[ing] and . . . implement[ing] a program for the conservation and management of the species" (16 U.S.C. § 1379(b)(1)) and requires, for example, that taking be humane and only when the "species is at the optimum sustainable population" (16 U.S.C. § 1379(b)(1)(B) & (C)(i)(I)). That is not the purpose or thrust of the Ordinance or the Permit. And nothing in the MMPA that suggests a local government must implement a conse and management program just so it can regulate access to its property. We will not interpret Title 16 United States Code section 1379(a) to reach such an unreasonable result. (*Downen's Inc. v. City of Hawaiian Gardens Redevelopment Agency* (2001) 86 Cal.App.4th 856, 860; *United States v. Wilson* (1992) 503 U.S 329, 334.)

Because it is outside the purposes of the MMPA.

Nobody said that.

d. No Field or Conflict Preemption

Plaintiff contends the Ordinance and Permit are preempted by field and conflict preemption. Field preemption applies "'when the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively.'" (*Kurns v. Railroad Friction Products Corp.* (2012) 565 U.S. 625, 630; *Cellphone Termination Fee Csaes, supra,* 193 Cal.App.4th at pp. 309-310.) In addition state law is preempted "'to the extent of any conflict with a federal statute.'" (*Ibid.*)

Plaintiff claims the MMPA occupies the field of managing "the taking, importation, and conservation of marine mammals." It cites to the various powers of the Secretary such as issuing permits, investigating violations and enforcing the statute, and engaging in negotiations for international agreements. (16 U.S.C. §§ 1372, 1373, 1374, 1375, 1376, 1378.) Plaintiff argues those sections in addition to Title 16 United States Code section 1379(a) and (b)(1) show Congress's intent to bar any regulation within this field. We disagree.

"'[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (*Arizona v. InterTribal Council of Arizona, Inc*. (2013)

Our point exactly

570 U.S. 1, 13.) "'Congress does not exercise lightly' the 'extraordinary power' to 'legislate in areas traditionally regulated by the States.'" (*Ibid.*) As discussed above, land use regulation is a traditional state police power. (*Equal Employment Opportunity Commission v. Wyoming, supra,* 460 U.S. at p. 239; *Big Creek Lumber Co. v. County of Santa Cruz, supra,* 38 Cal.4th at p. 1151; *Arnariak, supra*, 941 P.2d at p. 158.)

Here, the Ordinance and Permit solely regulate access to Children's Pool Beach. They have nothing to do with any of the enumerated powers of the Secretary. There is nothing in the MMPA showing a clear intent for Congress to usurp the state's traditional power to regulate land use.

Plus, the relationship between the Ordinance, the Permit, and the taking of seals is attenuated and incidental. Granted the problems at Children's Pool Beach are due to the seals' presence and the Closure will indirectly reduce take. But the Ordinance and the Permit say nothing about human interaction with seals and do not set out penalties for improper taking.[10] Therefore, the Ordinance and the Permit do not fall within the field of laws that regulate the taking of marine mammals.

Oh. The beach is closed but I can go there if I don't take any seals?

Nor do the Ordinance and Permit conflict with MMPA. To the extent they relate at all, they are completely consistent with and further the MMPA's purpose and intent to protect seals. We are not persuaded by plaintiff's argument the Closure conflicts because it frustrates the uniformity of the MMPA.

Read the statute. 109(a) is in English

In sum, plaintiff has not met its burden to overcome the presumption against preemption. Plaintiff's rigid approach and literal interpretation of the MMPA and

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[10] Compare the Ordinance and Permit with cases where the court found preemption based on Title 16 United States Code section 1379(a) due to direct regulation of marine mammals. (*People of Togiak v. United States, supra*, 470 F.Supp. at p. 427 [state law banning walrus hunting preempted by MMPA provisions allowing Native Alaskans to do so]; *Fouke v. Mandel* (D.Md. 1974) 386 F.Supp. 1341, 1360 [state law prohibiting importing of seal fur preempted]; *UFO Chuting, supra*, 327 F.Supp.2d at pp. 122, 1229-1230.)

The purpose is to have states enforce the MMPA?

specifically Title 16 United States Code section 1379(a) are inconsistent with its "text, context, and purpose." (*Coventry Health Care of Missouri, Inc. v. Nevils, supra,* __ U.S. at p. __ [137 S.Ct. at p. 1197].) We will not read Title 16 United States Code section 1379(a) with an "'uncritical literalism.'" (*Dan's City Used Cars, Inc. v. Pelkey, supra,* 569 U.S. at p. 260.)

Not only that, plaintiff is attempting to use the MMPA to frustrate its stated purposes. Overturning the Permit and Ordinance would have the effect of subjecting the seals to take. Concluding the Permit and Ordinance are effective is consistent with the MMPA and will "preserve the proper and legitimate balance between federal and state authority." (*Mendonca, supra*, 152 F.3d at p. 1189.)

Please define that balance. Right now NOAA has no jurisdiction.

4. Substantial Evidence

The record contains substantial evidence to support the Closure, enactment of the Ordinance, and issuance of the Permit. City closed Children's Pool Beach only after years of dispute, conflict, and implementation of lesser measures in an attempt to resolve the issue. City's evidence included studies and information about the history of the seals and development and use of the haul out site. It also had information about numerous acts of harassment and disturbing of seals as well as conflicts between people supporting the seals and those supporting complete access to Children's Pool Beach. City consulted with the NMFS and Commission and conducted many public hearings to hear the concerns and opinions of the public, also reviewing letters in support and in opposition to the Closure.

It was not until the other components of the Policy failed that City was forced to implement the Closure. And the Closure is not complete but is limited to the pupping season only. Further, the breakwater wall is open year-round allowing for viewing of the Children's Pool Beach and seals, fishing, and walking. The City is to be commended for its measured response to the problems at Children's Pool Beach.

Atta boy for Goldsmith

This evidence was available to and relied upon by Commission as well. It also noted the availability of nearby beaches without seals that remain open year round. It, too, imposed only a limited restriction on public access, leaving the breakwater area open year-round. It balanced the conflicting concerns of protecting marine mammals and the public safety.

Plaintiff has not met its burden to overcome the presumption City's and Commission's acts were supported by substantial evidence.

5. No MMPA Preemption of Amendment

As an alternative argument, plaintiff contends that if the Trust Amendment allowing the establishment of the marine mammal park authorized City to enact the Closure, the Trust Amendment is preempted by the MMPA because it relates to the taking of seals. Plaintiff claims there was an implied finding of preemption based on the finding in the statement of decision that there was no evidence City or Commission had obtained permission from the Secretary to add a marine mammal park to the Trust. Without the provision for a marine mammal park in the Trust, plaintiff argues, the Closure would violate the Trust and section 30211, which bars development that interferes with the public's right of access. Again, we are not persuaded.

First, as noted above we do not review the trial court's decision. Second, we have thoroughly explained why the Closure is not a taking under the MMPA. Likewise, the mere provision for a marine mammal park does not relate to the taking of marine mammals. In fact, the NMFS supported the Trust Amendment. Contrary to plaintiff's argument the Trust Amendment did not deal with taking or harassment of seals or bear on their management or conservation. Instead, it added a marine mammal park as a use authorized by the Trust. This is consistent with a public trust.

I can't believe they said this.

"The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another.

So it is free to do anything ? The state constitution is theirs to discard?

[Citation.] There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life." (*Marks v. Whitney, supra*, 6 Cal.3d at pp. 259-260.)

Further, any challenge to the Amendment is barred by the three-year statute of limitations that ran years ago. (Code Civ. Proc., §§ 308, subd. (a), 338; *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561, 1577 ["when an ordinance conflicts with statutory or constitutional provisions already in effect when the ordinance is passed, then the claim begins to accrue when the ordinance is passed"].)

6. No This is an admission the amendment was unconstitutional

The Coastal Act is a "'comprehensive scheme to govern land use planning for the entire coastal zone of California.'" (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 793.) It was enacted to "protect the ecological balance of the coastal zone and prevent its deterioration and destruction." (§ 30001, subd. (c).) Seals introduced to a man-made beach by federal tampering is not of a natural balance.

A local government with land in the coastal zone must prepare an LCP implementing the Coastal Act's policies. (§ 30500, subd. (a).) The Commission must certify the LCP, plus any amendments. (§§ 30512, 30513, 30514.) After an LCP is certified, the local government has authority to issue permits. (§ 30519, subd. (a).) However, Commission retains authority to issue permits for "tidelands, submerged lands, or on public trust lands." (*Id.*, subd. (b).) This is the Commission's claim tp be a separate judicial entitity, not subject of outside review.

Before a local government can engage in coastal development on tidelands or public trust lands, it must obtain a permit from Commission. (§ 30601, subd. (2).) Development includes "the placement or erection of any solid material or structure; . . . change in the density or intensity of use of land . . .; [and] change in the intensity of use of water, or of access thereto." (§ 30106.)

Plaintiff contends the Coastal Act preempts the Closure because it interferes with the public's right of access that was acquired both by use and by legislative authorization. Plaintiff relies on the Trust, as amended, in support of its claim of legislative authorization. It provides: "(a) That said lands shall be devoted exclusively to public park, marine mammal park for the enjoyment and education benefit of children, bathing pool for children, parkway, highway, playground and recreational purposes, and to such other uses as may be incident to, or convenient for[,] the full enjoyment of those purposes. [¶] (b) The absolute right to fish in the waters of the Pacific Ocean over said tidelands or submerged lands, with the right of convenient access to said waters over said lands for said purpose is hereby reserved to the people of the State of California." (Stats. 1931, ch. 937, § 1, as amended by Stats. 2009, ch. 19.)

Section 30211 states, "Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation." Citing *Grupe v. California Coastal Com.* (1985) 166 Cal.App.3d 148, plaintiff claims section 30211's use of "shall" makes public access to the Children's Pool Beach mandatory, and argues the Closure violates the statute. Plaintiff further asserts section 30211 "is not a policy recommendation that must be balanced or considered," or a "vague 'policy' objective'" to be ignored in favor of other policies. We disagree.

Again they make the CCC a separate legal system.

Section 30211 is part of chapter 3 of the Coastal Act. Contrary to plaintiff's claim, it is one of many policies that "shall constitute the standards by which the adequacy of local coastal programs . . . and the permissibility of proposed developments subject to the provisions of this division are determined." (§ 30200, subd. (a).)

The policies within the Coastal Act are not always consistent. (§ 30007.5 ["The Legislature further finds and recognizes that conflicts may occur between one or

more policies of the division"].) Section 30007.5 provides "such conflicts [are to] be resolved in a manner which on balance is the most protective of significant coastal resources." Further, "[w]hen a provision of the Coastal Act is at issue, we are enjoined to construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations." (*McAllister v. California Coastal Com*. (2008) 169 Cal.App.4th 912, 928; § 30009.)

Additionally, section 30211 is limited by section 30214, which states the "public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case."

If you accord the Coastal Act the ability to override all other legislation, making it the supreme law of that land. This is a high price to pay to repel federal control.

On this point *Carstens v. Calif* 277 (*Carstens*) is instructive. There, in connection with a permit issued to the operators of the San Onofre Power Plant, Commission restricted access to the beach near the plant. The plaintiff argued this limitation was in violation of the public trust doctrine and section 30212.[11]

The *Carstens* court disagreed, holding "Commission [had] properly exercised its duty . . . to consider the various uses of tidelands under the public trust doctrine." ~~*Carsten*~~ The doctrine "does not prevent the state from preferring one trust use over another." (*Id.* at p. 289.) In so ruling the court noted the Coastal Act specifically refers to the publ "emphasizes the need to consider public safety." (*Id.* at p Coastal Act recognized there may be conflicting policies and explained the Legislature had provided that such conflicts should be resolved to afford the most protection to "'significant coastal resources.'" (*Ibid.*)

Except to review iwth the State Lands Commission

Then the trust becomes a suggestion list, as would all other trusts.

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[11] Section 30212, subdivision (a)(1) requires that in new developments, p access shall be provided to the shore and coast unless "it is inconsistent with pul safety . . . or the protection of fragile coastal resources."

CP is not a new development. Creating an animal reserve is.

Plaintiff argues *Carstens* is distinguishable because Children's Pool Beach is not federal land and restricted access is not for purposes of protecting nuclear safety. Neither of these distinctions makes a difference in the principles *Carstens* enunciated. Nor does it matter that in *Carstens* there was no legislation granting the public access or specifying uses. The Coastal Act provides for access but not absolute access to the exclusion of every other consideration. Further the Trust provides for multiple uses and does not regulate the time and manner of access to the Children's Pool Beach.

This is what Kennerson fought and won - that a trust is a list of stipulations and had to be altered to remove the public access terms.

Plaintiff also relies on an apparent finding in *Carstens* that there wou only an "indirect[] impair[ment]" of access in contrast to the prohibition of access (*Carstens, supra,* 182 Cal.App.3d at p. 294, fn. 15.) But there is no complete proh here. The Closure is in effect for only a portion of the year and the breakwater is accessible throughout the year.

Additionally, we are not persuaded that section 30214 does not apply to interpret section 30211. Plaintiff argues section 30211 is mandatory because it uses the word shall. But as Commission points out, every public access section in Article 2 and all policy sections in Article 3 of the Coastal Act contain the word shall. (E.g., 0 ["maximum access . . . shall be provided"]' 30211 ["Development shall not interfere"], 30212 ["public access . . . shall be provided' facilities . . . shall be distributed"], 30213, 30222, 3023 63.)

The 10 commandments used "shalt", not "maybe ought to".

So "shall" is not a binding legal term any more. What will that mean everywhere else?

And at least one section, section 30230, di section 30211 in this case. It provides, "Marine resources shall be maintained, enhanced, and, where feasible, restored. Special protection shall be given to areas and species of biological or economic significance. Uses of the marine environment shall be carr 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." (§ 30230.)

Saturating the coast with seals does not do that.

Seals are not being restored. In NOAA harbor seals Stock Assessment Report for California Harbor Seals 2003 p9 it was noted the population had not grown since 1990. "and may indicate that the population has reached its environmental carrying capacity. Population growth has also slowed or stopped for the harbor seal stock on the outer coasts of Oregon and Washington (see separate Stock Assessment Report)., Seals came to La Jolla in 1993,

In concluding section 30214 limits 30211 we employ the ordinary rules of statutory construction. "We must harmonize statutes dealing with the same subject if possible [citation] and avoid interpreting a statute in a way which renders another statute nugatory. [Citation.] '"[T]he 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction sho prevail if it is contrary to the legislative intent apparent in the statute. The inter over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." [Citation.]' [Citations.]" (*Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1816.)

Nor did that happen. They just threw out the legislative intent.

We also disagree with plaintiff's claim that, assuming section 30214 applies, the Closure does not just regulate time, place, and manner but rather eliminates access during the several applicable months. Eliminating access for part of the year does regulate time and manner.

What?

Finally, as discussed above, substantial evidence supports Commission's grant of the Permit. In reviewing a request for a permit and amendment to an LCP, Commission must determine whether they conform with the Coastal Act. (§§ 30512, 30512.2, 30513.) Courts presume an agency properly performed it duties (Evid. Code, § 664) and that its decision is supported by substantial evidence (*Young v. City of Coronado* (2017) 10 Cal.App.5th 408, 419). Plaintiff has the burden to show there is insufficient evidence. (*Ibid.*) It has not done so.

Proving a negative

Aha!

The Commission granted the Permit, acting to protect the seals by limiting human contact. As shown by the numerous access restrictions it has approved,[12] this was not unusual. And it conformed to the Coastal Act by balancing the goals of protecting both resources and public access.[13]

And only the Coastal Act, which the judges have made the supreme law of the land, not an augmentation.

7. APA Process

The trial court ruled defendants should have instituted a proceeding under the APA, stating, in part, "Citizens challenging actions done under [the MMPA] must sue under [the APA]." This action does not involve a challenge to an MMPA action. Nor did plaintiff ever argue the APA applied to the matter.

The court apparently decided City could have obtained authorization from the Secretary to manage the seals by virtue of an APA proceeding. This is incorrect as well. First, as discussed above, the Ordinance did not "manage" the seals. Further, the APA does not provide a process by which City could have obtained authorization to do so. The APA allows judicial review of "final agency action for which there is no other adequate remedy in a court." (5 U.S.C. § 704.) It sets out "procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." (*Franklin v. Massachusetts* (1992) 505 U.S. 788, 796.)

The feds be damned.

Which there no longer is, by this action

Further, contrary to the court's finding, neither City nor Commission is an agency under the APA. (5 U.S.C. § 551(1) [with certain inapplicable exceptions, "'agency' means each authority of the Government of the United States"]. Thus, the APA did not provide a basis for invalidating the Ordinance or the Permit.

Because the CCC is above all other lawmaking bodies.

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[12] Commission has taken similar action to limit access to protect marine resources in other locations throughout the state, including Solana Beach, Malibu, and Monterey County.

[13] Commission has never been shy about requiring public access to California's beaches where it believed it was proper. (See e.g., *Surfside Colony, Ltd. v. California Coastal Com.* (1991) 226 Cal.App.3d 1260, 1262; *Whaler's Village Club v. California Coastal Com*. (1985) 173 Cal.App.3d 240, 256 (and cases cited therein).

DISPOSITION

The judgment is reversed. The request for judicial notice is granted. Defendants are entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.