

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 05/03/2016

TIME: 08:04:00 AM

DEPT: C31

JUDICIAL OFFICER PRESIDING: Frederick P. Horn

CLERK: Edwin Hong

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: 30-2015-00778153-CU-WM-CJC CASE INIT.DATE: 03/20/2015

CASE TITLE: **Friends of the Children's Pool vs City of San Diego**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT ID/DOCUMENT ID: 72367381

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 03/16/2016 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows: A Statement of Decision prepared by the court has been signed and filed this date, a copy of which is attached hereto and incorporated herein by reference.

Court orders clerk to give notice.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MAY 03 2016

ALAN CARLSON, Clerk of the Court


BY E. HONG

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE**

FRIENDS OF THE CHILDREN'S
POOL, a nonprofit public benefit
corporation,

Petitioner,

v.

CITY OF SAN DIEGO,
CALIFORNIA COASTAL
COMMISSION,

Respondents.

CASE NO.: 30-2015-00778153

STATEMENT OF DECISION

HON. FREDERICK P. HORN
Dept. C31

The Court grants the petition by Petitioner, Friends of the Children's Pool ("Friends") for:

(1) issuance of a peremptory writ of mandate ordering the City of San Diego ("City") and the California Coastal Commission ("Commission") to set aside the Local Coastal Program ("LCP") amendment, ordinance, and coastal development permit closing all access to the La Jolla Children's Pool Beach between December 15 and May 15 adopted and/or issued in 2014;

1 (2) enjoining the City and the Commission from enforcing the City's LCP amendment and
2 ordinance adopted in 2014, and the Commission's coastal development permit for the
3 proposed seasonal beach closure issued in 2014;

4
5 (3) declaring that the City's LCP amendment and beach closure ordinance adopted in 2014,
6 and the Commission's coastal development permit issued in 2014 and authorizing the same,
7 are void, unenforceable, and are preempted by the public's right to beach access acquired
8 under the Coastal Act, the California Constitution, and the terms of the legislation granting
9 Children's Pool Beach to the City;

10
11 (4) declaring that the City's LCP amendment and beach closure ordinance adopted in 2014
12 relate to the taking of marine mammals, and are therefore void, unenforceable and preempted
13 by 16 U.S.C.A. section 1379(a) of the Marine Mammal Protection Act ("MMPA"); and

14
15 (5) granting Friends its costs incurred in this litigation and reasonable attorney's fees, to be
16 determined at a future hearing.

17
18 "No State may enforce, or attempt to enforce, any State law or regulation relating to the
19 taking of any species . . . of marine mammal within the State unless the Secretary has
20 transferred authority for the conservation and management of that species . . . to the State
21 under subsection (b)(1) of this section." 16 U.S.C.A. section 1379(a)

22
23 There is no showing that, prior to the California Legislature's 2009 enactment of the
24 amendment to the 1931 land trust consisting of the Children's Pool Beach, "to include in that
25 list of uses and purposes a marine mammal park for the enjoyment and educational benefit of
26 children", the Legislature, City of San Diego and/or the California Coastal Commission
27 formally engaged the Secretary identified in 16 U.S.C.A. section 1379(a) and secured
28

1 permission from said Secretary to amend the land trust to add “a marine mammal park for the
2 enjoyment and educational benefit of children” to the 1931 land trust for the Children’s Pool
3 Beach.

4
5 There is further no showing that, prior to the amendment to City Ordinance No. 63.0102 to
6 add subparagraph (e)(2), City initiated proceedings involving the Secretary, to secure the
7 Secretary’s permission to amend the ordinance as to the “taking” of harbor seals, nor that the
8 California Coastal Commission initiated proceedings including the Secretary to obtain the
9 Secretary’s permission to issue a permit to City allowing the seasonal closure amendment to
10 the existing ordinance.

11
12 Notwithstanding the foregoing, (1) on March 12, 2014, City of San Diego passed an
13 amendment to City Ordinance No. 63.0102 at subparagraph (e)(2) to enforce a seasonal
14 closure of the Children’s Pool Beach to the public from December 15 to May 15 each year for
15 the protection of the harbor seals during the pupping season; and (2) on or after August 14,
16 2014, California Coastal Commission issued a permit allowing the seasonal closure.

17 18 **History**

19
20 1930: Ellen Browning Smith received approval from the State to construct a 330-foot,
21 crescent-shaped concrete breakwater off the coast of La Jolla for use as a children’s pool.

22
23 1930-31: The Children’s Pool Beach, a man-made beach and breakwater, was built.

24
25 9-23-1931: The governor approved Senate Bill No. 422, “An Act Granting Certain Tide and
26 Submerged Lands of the State of California to the City of San Diego”, which “officially”
27 authorized the project. The legislation granted the Children’s Pool shoreline to the City of
28

1 San Diego in trust, devoted “exclusively to public park, bathing pool for children, parkway,
2 highway, playground, and recreational purposes, and to such other uses as may be incident to,
3 or convenient for the full enjoyment of, such purposes.”

4
5 1931: The State Legislature delegated its authority to manage and control public use of the
6 Children’s Pool Beach in San Diego to the City pursuant to the 1931 Tidelands Trust, Stats.
7 1931, Ch 937.

8
9 1972: The Marine Mammal Protection Act was passed.

10
11 Early 1990’s: a colony of harbor seals started to share the beach with the public. The people
12 were divided on whether the seals should be removed.

13
14 2004: City Council adopted a “joint use” policy for the beach, allowing the seals to remain
15 while members of the public continued to use the beach.

16
17 2005: The San Diego Superior Court in *O’Sullivan vs. City of San Diego*, found that the
18 Legislature, in creating the 1931 land trust, evidenced a legislative intent that the Children’s
19 Pool was to be “used exclusively for a public park and children’s pool”. The decision further
20 stated: “Recognizing that a bathing pool for children existed on the land when the Trust was
21 created and that the land was situated adjacent to a public park, and would be an extension of
22 same, the legislative intent was clear. The entrusted land shall be used exclusively for a
23 public park which includes a children’s pool, and that the purpose of that use shall be
24 recreational.” The Superior Court also stated that the terms of the trust do not authorize the
25 Children’s Pool to be used as a habitat, marine sanctuary, zoo or seal watching facility. The
26 court ordered City to dredge sand from the ocean and clean the waters to allow people to use
27 the beach.

28

1 2006: City Council, noting that the harbor seals began to regularly “haul out” (leave the water
2 to rest; they also ate and gave birth to pups) on the Children’s Pool Beach in greater numbers.
3 It further noted that there was increasing interference by people with the seals, which caused
4 the seals to “flush” out into the ocean. This process resulted in mother seals leaving behind
5 their pups, who were too young to swim alone in the ocean, and could be trampled by the
6 flushing seals and/or be separated from their mothers, with death likely resulting.

7
8 2006: To address the above issue, City Council installed a year-round rope barrier to the
9 beach and ocean to protect the seals, after obtaining first a three-year permit from the Coastal
10 Commission to do so.

11
12 2009: The State Legislature amended the land grant “to include in that list of uses and
13 purposes a marine mammal park for the enjoyment and educational benefit of children.”

14
15 The rope barrier ultimately was ineffective for the purpose for which it was installed; people
16 continued to harass and interfere with the seals and their pups.

17
18 6-8-10: City Council passed a resolution calling on the City Attorney to draft an ordinance
19 that would prohibit the public from accessing the beach from Dec. 15 to May 15 every year,
20 i.e. the seal pupping season—along with a corresponding amendment to City’s Local Coastal
21 Program and designation of the Children’s Pool Beach as an Environmentally Sensitive
22 Habitat Area (“ESHA”). The seasonal beach closure was intended to prevent people from
23 injuring or disrupting seal mothers and their pups during pupping season.

24
25 2012: At the Coastal Commission’s recommendation, City Council abandoned any attempt to
26 have the Children’s Pool Beach designated an ESHA. City Council requested and obtained
27 approval from the Coastal Commission for the proposed seasonal closure of the pool as to
28

1 people, with the people maintaining access to the beach for the remainder of the year—with
2 the proposal—that the area be considered sensitive resources and/or marine mammals
3 pursuant to Public Resources Code Section 30230 of the Coastal Act.

4
5 8-27-13: The City of San Diego, Developmental Services issued a Negative Declaration
6 concerning the proposed seasonal closure, concluding that “the proposed project will not have
7 a significant environmental effect and the preparation of an Environmental Impact Report
8 will not be required.”

9
10 10-29-13: A Joint Public Hearing by City Council and the Coastal Commission was
11 conducted for the proposed seasonal closure of the Children’s Pool Beach, with notice thereof
12 having been previously given. Each speaker was allotted three minutes, with no more than a
13 total 15 minutes per side. People opposing the proposed closure, generally consisted of
14 divers, disabled people and “Friends of the Children’s Pool”, with some concern for fishing
15 also advanced. People in favor of the closure generally stated they sided with protecting the
16 seals. The administrative record is replete with written and e-mail communications by each
17 side, with much duplication of the materials offered on this issue. Some of the people also
18 contacted employees of City Council and/or the Coastal Commission multiple times to
19 advance their views—before and after the Public Hearing.

20
21 12-12-13 and 1-16-14: Public Hearings by the Planning Commission were held.

22
23 4-24-14: City Council held another Public Hearing.

24
25 2-24-14: City Council voted to adopt the proposed LCP amendment and ordinance
26 implementing a seasonal beach closure at the Children’s Pool.

1 3-12-14: City Council passed a resolution adopting “an amendment to the General Plan and
2 the La Jolla Community Plan to close to public access the La Jolla Children’s Pool beach, . . .
3 from Dec. 15 to May 15 annually.” (“LCP Amendment”) December 15 to May 15 is
4 considered the pupping season. The Council also noted that there was no substantial evidence
5 that the amendment would have a significant effect on the environment.

6
7 4-3-14: City Council granted final approval of the amendment to the existing ordinance, with
8 the following language added to San Diego Municipal Code (“SDMC”) section
9 63.0102(e)(2): “It is unlawful for any person to be upon or to cause any person to be upon the
10 beach of the La Jolla Children’s Pool, starting from the lower stairs to the beach beginning at
11 the second landing, from December 15 to May 15.”

12
13 Prior to the 8-14-14 Coastal Commission meeting, the Commission’s staff prepared reports,
14 addendums, and attached exhibits for the LCP amendment and the coastal development
15 permit. Ex 4

16
17 6-12-14: A public hearing was hosted by the California Coastal Commission, with public
18 comment.

19
20 8-14-14: A joint public hearing by the California Coastal Commission and the City of San
21 Diego City was held concerning the proposed seasonal closure. The Commission announced
22 it would consider approving City’s LCP Amendment and application for a coastal
23 development permit authorizing the seasonal beach closure at its meeting—and shortly
24 thereafter issued the permit. Public comment was also given at this hearing.

25
26
27
28

1 *Standard of Review*

2 A trial court reviewing the decision of an administrative agency under Code Civ. Proc.
3 section 1094.5 exercises its independent judgment in reviewing the evidence and finds an
4 abuse of discretion if it determines that the findings are not supported by the weight of the
5 evidence. *San Diego Unified School District vs. Commission on Professional Competence*
6 (2013) 214 Cal.App.4th 1120, 1140 Under the independent review standards, the trial court
7 may weigh the credibility of witnesses. *Ibid.*

8
9 Although the Court is required to exercise its independent judgment on the evidence, it is to
10 give a strong presumption of correctness to the administrative commission's findings. *San*
11 *Diego Unified School District vs. Commission on Professional Competence, supra*, 214
12 Cal.App.4th 1120, 1140 In a proceeding on a writ of administrative mandate, the party
13 challenging the administrative decision bears the burden of convincing the court that the
14 administrative findings are contrary to the weight of the evidence. *Ibid.* However,
15 "[i]ndependent judgment review "does not mean that the preliminary work performed by the
16 administrative board in sifting the evidence and in making its findings is wasted effort[I]n
17 weighing the evidence the courts can and should be assisted by the findings of the board."
18 [Citations.]" *Id.* at p. 1141.

19
20 Thus, the findings of a board where formal hearings are held come before the courts with a
21 strong presumption in their favor based on the rebuttable presumption that an official duty has
22 been regularly performed. *San Diego Unified School District vs. Commission on*
23 *Professional Competence, supra*, 214 Cal.App.4th 1120, 1141 "Such a procedure "gives the
24 reviewing court the power and duty of exercising an independent judgment as to both facts
25 and law, but contemplates that ... the burden shall rest upon the petitioner to support his
26 challenge affirmatively, competently, and convincingly. In other words, rarely, if ever, will a
27
28

1 board determination be disturbed unless the petitioner is able to show a jurisdictional excess,
2 a serious error of law, or an abuse of discretion on the facts.” [Citation.]” *Ibid.*

3
4 However, the strong presumption of correctness is not the same as a substantial evidence
5 review and does not relieve the trial court of its obligation to make its own findings. *San*
6 *Diego Unified School District vs. Commission on Professional Competence, supra*, 214
7 Cal.App.4th 1120, 1141 The presumption provides the trial court with a starting point for
8 review—but it is only a presumption, and may be overcome. *Ibid.* Because the trial court
9 ultimately must exercise its own independent judgment, this Court is free to substitute its own
10 findings after first giving due respect to the agency’s findings. *Ibid.*

11 12 **City of San Diego**

13 Friends challenges City Council’s final approval of the proposed seasonal closure of
14 the Children’s Pool Beach from December 15 to May 15 annually during the harbor seal
15 pupping season.

16 17 **California Coastal Commission**

18 Friends challenges the Coastal Commission’s issuance of a coastal development
19 permit for seasonal closure of the Children’s Pool Beach from December 15 to May 15
20 annually during the harbor seal pupping season.

21 22 **Discussion**

23 Friends of the Children’s Pool dispute:

24
25 (1) The viability of the City of San Diego’s amendment to the San Diego Municipal Code,
26 which adds subparagraph (e)(2) to Section 63.0102:

1 “It is unlawful for any person to be upon or to cause any person to be upon the beach of the
2 La Jolla Children’s Pool, starting from the lower stairs to the beach beginning at the second
3 landing, from December 15 to May 15”; and

4
5 (2) Coastal Commission’s issuance of a coastal development permit to City allowing seasonal
6 closure of the Children’s Pool Beach during the pupping season.

7
8 Marine Mammal Protection Act, 16 U.S.C.A. section 1379, provides:

9
10 (a) “State enforcement of State laws or regulations prohibited without transfer of
11 management authority by Secretary.”

12
13 “No State may enforce, or attempt to enforce, any State law or regulation relating to the
14 taking of any species (which term for purposes of this section includes any population stock)
15 of marine mammal within the State unless the Secretary has transferred authority for the
16 conservation and management of that species (hereinafter referred to in this section as
17 ‘management authority’) to the State under subsection (b)(1) of this section.”

18
19 The California State Legislature created a land trust for the Children’s Pool Beach to be
20 devoted “exclusively to public park, bathing pool for children, parkway, highway,
21 playground, and recreational purposes, and to such other uses as may be incident to, or
22 convenient for the full enjoyment of, such purposes,” to the City of San Diego. The State
23 Legislature reserved (1) the absolute right to fish in the Pacific Ocean over the tidelands or
24 submerged lands for the people of the State of California, and (2) all deposits of minerals in
25 the land to the State or all persons authorized by the State. This land trust became law upon
26 the governor’s signing of Senate Bill No. 422 on September 23, 1931.

1 In 1972, Congress passed a body of law entitled the Marine Mammal Protection Act, which
2 was designed to protect endangered marine mammals. 16 U.S.C.A. sections 1361, *et seq.*

3
4 In 2009, the State Legislature amended the Children's Pool Beach land grant "to include in
5 that list of uses and purposes a marine mammal park for the enjoyment and educational
6 benefit of children".

7
8 In recent years, City was faced with competing factions in managing the Children's Pool
9 Beach: the people that wish to use the beach and/or preserve it in a pristine state for people to
10 use, which extends to children, disabled persons, divers, fishers and tourists; and other people
11 that want to preserve the harbor seals' +20-year established pattern of using the Children's
12 Pool Beach as a rookery, haul-out, place to rest and a feeding place in their traverse along the
13 California coast.

14
15 Commission was charged with, *inter alia*, ensuring that the maintenance of the beach, its
16 accessibility by people, and protection of marine animals conformed with relevant laws.

17
18 The harbor seals are "marine mammals" such that, a person or entity must request that the
19 Secretary transfer authority for the conservation and management of the harbor seals along
20 the California coast prior to amending a State ordinance extend to the "taking" of harbor
21 seals. (To "take" includes "harass, capture or kill" a marine mammal. 16 U.S.C.A. section
22 1362(13))

23
24 Under the MMPA, the Secretary empowered to transfer authority relating to the taking of
25 seals is "the Secretary of the department in which the National Oceanic and Atmospheric
26 Administration is operating". 16 U.S.C.A. section 1362(12)(A)(i)

1 The National Marine Fisheries Service (“NMFS”) is identified as the agency involved in
2 administration of the MMPA. *National Resources Defense Council, Inc. vs. Evans*, (N.D.Cal.
3 August 26, 2003) 279 F.Supp.2d 1129, 1142

4
5 “Citizens challenging actions done under Marine Mammal Protection Act (MMPA) must sue
6 under Administrative Procedure Act (APA) . . . 5 U.S.C.A. sections 551 et seq.; Marine
7 Mammal Protection Act of 1972, § 2 et seq., 16 U.S.C.A. sections 1361 et seq.” *National*
8 *Resources Defense Council, supra*, at p. 1142

9
10 ““The APA permits a citizen suit against an agency when an individual has suffered ‘a legal
11 wrong because of an agency action’ or has been ‘adversely affected or aggrieved by agency
12 action within the meaning of a relevant statute.’ 5 U.S.C. section 702. When a claim is
13 brought pursuant to the APA, there must be ‘final agency action for which there is no other
14 adequate remedy in court.’ 5 U.S.C. section 704” *La Jolla Friends of the Seals vs. National*
15 *Oceanic and Atmospheric Admin. Nat. Marine Fisheries Service*, (S.D. Cal. April 28, 2009)
16 630 F.Supp.2nd 1222, 1226

17
18 “Agency action made reviewable by statute and final agency action for which there is no
19 other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or
20 intermediary agency action or ruling not directly reviewable is subject to review on the
21 review of the final agency action. Except as otherwise expressly required by statute, agency
22 action otherwise final is final for the purposes of this section whether or not there has been
23 presented or determined an application for a declaratory order, for any form of
24 reconsideration, or, unless the agency otherwise requires by rule and provides that the action
25 meanwhile is inoperative, for an appeal to superior agency authority.” 5 U.S.C.A. section 704

1 However, “. . . [a]n agency’s decision not to take enforcement action should be presumed
2 immune from judicial review under section 701(a)(2). For good reason, such a decision has
3 traditionally been ‘committed to agency discretion,’ and we believe that the Congress
4 enacting the APA did not intend to alter that tradition. . . . In so stating, we emphasize that the
5 decision is only presumptively unreviewable: the presumption may be rebutted where the
6 substantive statute has provided guidelines for the agency to follow in exercising its
7 enforcement powers.” *Heckler vs. Chaney*, (1985) 470 U.S. 821, 832

8
9 “[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal
10 process, is a decision generally committed to an agency’s absolute discretion.’ Accordingly
11 an agency’s decision not to undertake enforcement actions is ‘presumptively unreviewable’.”
12 *Salmon Spawning & Recovery Alliance vs. United States Customs and Border Protection*,
13 (Fed.Cir. 2008) 550 F.3d 1121, 1128

14
15 When review of an agency decision “is sought not pursuant to specific authorization in the
16 substantive statute, but only under the general review provisions of the APA, the ‘agency
17 action’ in question must be ‘final agency action’. ‘[A]gency action’ is defined in section
18 551(13) to include ‘the whole or a part of an agency rule, order, license, sanction, relief, or
19 the equivalent or denial thereof, or failure to act.’” *La Jolla Friends*, *supra*, at p. 1229

20
21 There is no private right of action under the Marine Mammal Protection Act (MMPA).
22 *Natural Resources Defense Council, Inc.*, *supra*, at page 1142

23
24 Citizens challenging actions done under the MMPA must sue under the Administrative
25 Procedure Act (“APA”), [*which provides for a federal administrative proceeding culminating*
26 *in an adjudication and order*], with review thereof under the APA “arbitrary and capricious”
27 standard. *Natural Resources Defense Council, Inc.*, *supra*, at page 1142.

1 “[T]he requirement of a final agency action is considered jurisdictional. If the agency action
2 is not final, the court . . . cannot reach the merits of the dispute. . . . The APA defines agency
3 action to include ‘the whole or a part of an agency rule, order, license, sanction, relief, or the
4 equivalent or denial thereof, or failure to act.’ *Indep. Petroleum Ass’n of Am. vs. Babbitt*,
5 (D.C.Cir. 2001) 235 F.3d 588, 594

6
7 Under the APA:

8
9 (1) “Agency” does not include “the courts of the United States” 5 U.S.C.A. section
10 551(1)(B), (emphasis added)

11 (2) “Order” means “the whole or a part of a final disposition, whether affirmative, negative,
12 injunctive, or declaratory in form, of an agency in a matter other than rule making”, 5
13 U.S.C.A. section 551(6);

14 (3) “Adjudication” is the “agency process for the formulation of an order”, 5 U.S.C.A. section
15 551(7);

16 (4) “Relief” includes (A) “grant of . . . authority, exemption . . . or remedy”; “recognition of
17 an . . . exemption, or exception”, 5 U.S.C.A. section 551(11)(A), (B);

18 (5) “Agency proceeding” means an agency process as defined by paragraphs (5) (“rule
19 making”), (7) (“adjudication”) and (9) (“licensing”) of this section; 5 U.S.C.A. section (12);
20 and

21 (6) “Agency action” includes the whole or a party of an agency rule, order, . . . relief, or the
22 equivalent or denial thereof.” 5 U.S.C.A. section 551(13)

23
24 The court itself clearly is not an “Agency” as stated in 5 U.S.C.A. section 551(1)(B),
25 however, City of San Diego and the California Coastal Commission appear to constitute
26 agencies. A third agency, in which rests the penultimate authority, NMFS on behalf of the
27 United States, was not formally drawn into the dispute.

28

1 Neither City, nor Commission, formally sought Secretary's express authority to amend a City
2 Ordinance to require seasonal closure of the Children's Pool Beach from December 15 to
3 May 15 during the harbor seal pupping season each year, nor to issue a permit allowing such
4 conduct by City. Neither the administrative record, nor that authority cited, establish that the
5 Secretary had previously granted full authority to City and/or Commission to manage the
6 subject property. Pursuant to the above authority, City and Commission's authority over the
7 beach, the people allowed access to the beach and the harbor seals exists only if the Secretary
8 grants authority to City and Commission to manage the property and, in this instance, protect
9 the harbor seals.

10
11 NMFS corresponded with City on January 2, 2014, commencing with "[t]his letter provides
12 comments from the West Coast Region of the National Marine Fisheries Service (NMFS) on
13 the City of San Diego's (City) proposal to prohibit the public from entering the sandy area of
14 Children's Pool Beach in La Jolla during harbor pupping season from December 15th through
15 May 15th." (Emphasis added.) NMFS did not agree that complete closure of the beach was
16 required during the pupping season, did not state that the Secretary authorized the proposal,
17 nor even that a determination had been made by the Secretary, or an authorized individual, on
18 this issue. 5 AR 001238-001239

19
20 At most, the administrative record establishes that the U.S. Department of Commerce,
21 National Oceanic and Atmospheric Administration, National Marine Fisheries Service, West
22 Coast Region, was aware that City intended to amend an ordinance to prohibit the public
23 from entering the Children's Pool Beach during the seal pupping season.

24
25 There is no evidence confirming that the appropriate federal agency in 1931 transferred
26 management authority of the marine mammals, the tidelands and adjacent beach to City
27 and/or Commission in 1931; to the contrary, the statute conveyed the property to the State.

28

1 Years later when City amended its ordinance to prohibit people from accessing the Children's
2 Pool Beach during the pupping season, and the California Coastal Commission issued its
3 permit, there is no record that either agency affirmatively and formally sought to involve the
4 Secretary and secure management authority over the harbor seals, the beach or the tidelands.
5 Federal law currently permits transfer of such authority to a State, not a City within the State
6 or a state's Coastal Commission. 16 U.S.C.A. section 1379

7
8 As to the two agencies directly involved in this proceeding, "[t]he Court's role is to: consider
9 whether the [agency's] decision was based on a consideration of the relevant factors and
10 whether there has been a clear error of judgment. Although this inquiry into the facts is to be
11 searching and careful, the ultimate standard of review is a narrow one. The court is not
12 empowered to substitute its judgment for that of the agency. The final inquiry is whether the
13 Secretary's action followed the necessary procedural requirements." *Natural Resources*
14 *Defense Council, Inc., supra*, at pp. 1139-1140

15
16 There is no showing that respondents or the Secretary "followed the necessary procedural
17 requirements" with respect to the Secretary prior to City's amendment of the ordinance or
18 Commission's issuance of a permit to City authorizing the seasonal closure of the beach to
19 people.

20
21 "There is no private right of action under the MMPA. Citizens challenging actions done
22 under the MMPA must sue under the APA. Therefore, actions challenged under the MMPA
23 are reviewed under the APA 'arbitrary and capricious' standard." *Natural Resources Defense*
24 *Council, Inc., supra*, at p. 1142. (*Internal citations omitted.*)

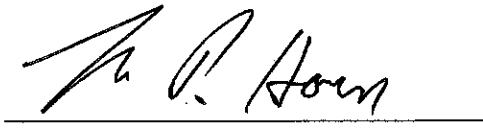
25
26 Respondent California Coastal Commission cites to the Coastal Zone Management Act
27 ("CZMA") as additional authority supporting its position. CZMA is charged with preserving,
28

1 protecting, developing and, where possible, restoring and enhancing the resources of the
2 Nation's coastal zone for current and succeeding generations, which extends to "the
3 protection of . . . wildlife and their habitat." 16 U.S.C. section 1452(1)

4
5 "The CZMA does not create a private right of action. Accordingly, plaintiffs must pursue
6 their claim via the APA. . ." *SLPR, LLC vs. San Diego Unified Port District*, (S.D. Cal. June
7 30, 2008) 2008 WL 2676771

8
9 The administrative record does not establish that either City or Commission engaged in the
10 federal administrative process under the APA mandated by both the MMPA and the CZMA.
11 Providing "comments" on a proposed amendment to City's ordinance in a January 2, 2014
12 letter falls well below the APA standard of an administrative proceeding culminating in an
13 adjudication and order. 5 U.S.C.A. section 551(1), (6), (7) and (11)-(13)

14
15
16 Dated: May 3, 2016



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18 Frederick P. Horn
19 Superior Court Judge
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