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Case No. _____
Court of Appeal Case Nos. G053709/G053725
Orange County Superior Court
Case No. 30-2015-00778153-CU-WM-CJC

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FRIENDS OF THE CHILDREN'S POOL
Plaintiff and Respondent

v.

CITY OF SAN DIEGO and CALIFORNIA COASTAL COMMISSION
Defendants and Appellants

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Three (Nos. G053709/G053725)

PETITION FOR REVIEW

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Plaintiff and Respondent Friends of the Children's Pool ("FOCP") submits this Petition for Review and respectfully requests the Supreme Court review the opinion by the Court of Appeal, Fourth District, Division Three, in *Friends of the Children's Pool v. City of San Diego, et al.*, June 7, 2018, as modified on June 28, 2018, 2014, G053709 & G053725 (hereafter the "Opinion"), a copy of which is attached as Exhibit A.

I
ISSUES PRESENTED FOR REVIEW

FOCP presents the following issues for consideration:

(1) Does the express preemption statute in the Marine Mammal Protection Act, ("MMPA") preempt a city law closing a public beach for the purpose of protecting harbor seals from harassment during their pupping season?

(2) Does Public Resources Code section 30211 prohibit a city from approving development which precludes public access to a beach for five months of the year when the Legislature granted those access rights to the public?

II
INTRODUCTION

This case is about the application of federal and state law to the City of San Diego's ("City's") efforts to create a seasonal sanctuary for a population of harbor seals at Children's Pool beach in La Jolla. Children's Pool beach is a man-made beach and breakwater, donated to the City by

Ellen Browning Scripps in 1931. Over time, it has attracted a colony of more than 600 harbor seals, who use the beach to "haul out" and rest. During pupping season, i.e. December 15 to May 15, mother seals use the beach to raise their newborn pups. In order to protect the seals from harassment, the City approved an ordinance and local coastal program amendment ("LCP amendment") prohibiting public access to the beach during pupping season. A copy of the LCP amendment is attached hereto as Exhibit B. The Coastal Commission (the "Commission") then approved the LCP amendment and issued a coastal development permit for the closure.[1] A copy of the coastal development permit is attached hereto as Exhibit C.

FOCP sued to invalidate the beach closure and the trial court granted FOCP's petition for writ of mandate, on the grounds that (1) the beach closure "related to" the harassment of seals and was therefore preempted by the MMPA; and (2) the beach closure violated public access guarantees under the Coastal Act.

On June 7, 2018, the Court of Appeal filed its Opinion reversing the trial court. On the subject of federal preemption, the Court of Appeal applied the "presumption against preemption" to the express preemption statute and ruled that even though the beach closure related to the harassment of seals,

[1] The ordinance, the LCP amendment, and the coastal development permit are referred to collectively herein as the "beach closure" or the "seasonal beach closure."

Congress did not intend to preempt beach closures designed to protect seals from harassment. On the Coastal Act issue, the Court of Appeal ruled that even though the Legislature granted the beach for public use, the Coastal Act nevertheless authorized the City and the Commission to prohibit public access to the beach for five months every year.

FOCP petitioned for rehearing and the Opinion was modified with no change in judgment. A copy of the Opinion is attached hereto as Exhibit A.

III
GROUNDS FOR REVIEW

FOCP respectfully requests review to secure uniformity of decisions and resolve two important issues of law: First, whether California courts should employ a presumption against preemption when applying the plain language of an express preemption statute, as the Court of Appeal did here when it relied on the presumption to find no preemption. As this Court observed "[i]n recent years, the continuing vitality of the nearly 70-year-old presumption against preemption has come into question." (*Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 314.) In *Quesada*, this Court found the presumption remained valid for implied preemption but questioned whether the presumption continued to apply to express preemption statutes. (*Id.* at pp. 314-315.) Whatever question there may have been, the Supreme Court has since held that where an express preemption statute is at issue, "we do not invoke any presumption against pre-emption

but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." (*Puerto Rico v. Franklin Cal. Tax-Free Trust* (2016) 136 S.Ct. 1938, 1946 (internal quotation marks omitted); *Coventry Health Care of Missouri, Inc. v. Nevils* (2017) 137 S.Ct. 1190, 1197-1199 [no presumption against preemption when express preemption statute applies].) The Court of Appeal's Opinion relied on the presumption to find no preemption in this case. The Opinion's reliance on the presumption conflicts with Supreme Court precedent and presents an important issue of law the Court should address. (Cal. Rules of Court, Rule 8.500(b)(1).)

The second issue is whether Public Resources Code section 30211, which prohibits development that interferes with coastal access rights granted by the Legislature, is a statutory directive or, as the Court of Appeal found, merely represents a policy goal which may be balanced against other polices under Public Resources Code sections 30007.5 and 30214. This is likewise an important issue of law the Court should consider. (Cal. Rules of Court, Rule 8.500(b)(1).)

IV
THE FEDERAL PREEMPTION DECISION SHOULD BE REVIEWED

1. Congress Unambiguously Preempted All State Laws That "Relate To" the Harassment of Harbor Seals Absent a Transfer of Management Authority

Enacted in 1972, the Marine Mammal Protection Act (codified at 16 U.S.C. §§ 1361, et seq.) (the "MMPA") puts the federal government in charge of regulating the "taking" of marine mammals, including harbor seals and other pinnipeds.[2] (16 U.S.C. § 1362(6).) As part of its comprehensive regulatory scheme, the MMPA grants "exclusive jurisdiction over the conservation and management of marine mammals to the federal government." (*Florida Marine Contractors v. Williams* (M.D.Fla. 2005) 378 F.Supp.2d 1353, 1357-58, citing 16 U.S.C. § 1379(a).) Specifically, Section 1379(a)[3] of the MMPA states:

> No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any … marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as "management authority") to the State under subsection (b)(1) of this section. (emphasis added)

(16 U.S.C. § 1379(a).)

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[2] As defined under the MMPA, "[t]he term "marine mammal" means any mammal which is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea)." (16 U.S.C. § 1362(6).)

[3] Unless otherwise stated, all statutory references in Section IV of this brief refer to Title 16 of the United States Code, e.g. Section 1379 refers to 16 U.S.C. § 1379.

"Take" is defined broadly to mean "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." (16 U.S.C. § 1362(13).) The definition of "take" includes any negligent or intentional act which results in disturbing or molesting a marine mammal. (50 C.F.R. § 216.3; *Natural Resources Defense Council, Inc. v. Evans* (2003) 279 F.Supp.2d 1129, 1141.) "Harassment" includes "any act of pursuit, torment, or annoyance which (1) has the potential to injure a marine mammal…; or (2) has the potential to disturb a marine mammal … by causing disruption of behavioral patterns, including, but not limited to, … nursing, breeding, feeding, or sheltering. (16 U.S.C. § 1362(18)(A).)

The incidental harassment of seals by people on the beach, e.g. by causing them to flush during pupping season, is a "taking" under the MMPA. There is no dispute that causing seals to flush during the pupping season, approaching them too closely, or otherwise harassing on the beach them is a "taking" under the MMPA. The plain wording of Section 1379(a) unambiguously discloses Congress' intent to preempt the enforcement of any laws which "relate to" the harassment of seals, unless the Secretary has transferred management authority to the state pursuant to Section 1379(b)(1).

2. There Is No Dispute the Seasonal Beach Closure "Relates To" the Harassment of Harbor Seals

The seasonal beach closure here relates to the "taking" of marine mammals, because its purpose is to prevent the harassment of seal mothers and their pups during pupping season. On its face, the seasonal beach closure applies only during seal pupping season, i.e. December 15 through May 15. The LCP amendments specifically provides that "seasonal access restrictions and a buffer are designated for the Children's Pool Beach *in order to protect breeding pinnipeds*" and that "*[i]n order to protect breeding Harbor Seals*, no public access is permitted below the top of the lower staircase leading down to the sand during seal pupping season." EX. B, 1 AR 95, 98. (emphasis added) The Commission's coastal development permit expressly requires the City to submit a monitoring plan that addresses "the method of determining *the effectiveness of the seasonal beach closure at minimizing harassment of hauled out seals*." EX. C, 22 AR 6179-6180. (emphasis added) The City's monitoring plan must include "[p]rovisions for taking measurements of the number of harassment instances, including what activities would qualify as harassment consistent with relevant regulatory definitions of harassment (e.g. seals flushing into water) under the MMPA." EX. C, 22 AR 6180. "Upon implementation of the seasonal beach closure," the coastal

development permit requires the City (or its representative) to "record the number of seals hauled out at Children's Pool Beach, … the number of harassment instances, the number of citations and warnings issued, the outcomes of issued citations and warnings if available, … and the date at least 16 days per month." EX. C, 22 AR 6180. The connection with and reference to seal harassment is *expressly stated* in the text of the seasonal beach closure.

3. The Court of Appeal Incorrectly Applied the "Presumption Against Preemption" to Uphold the Beach Closure

a. The Presumption Does Not Apply to Express Preemption

"In recent years, the continuing vitality of the nearly 70-year-old presumption against preemption has come into question." (*Quesada, supra,* 62 Cal.4th at p. 314.) After *Quesada*, the Supreme Court addressed the validity of the presumption for express preemption cases in *Puerto Rico v. Franklin Cal. Tax-Free Trust, supra,* 136 S.Ct. 1938. In that case, the government of Puerto Rico passed legislation allowing it to restructure its municipal bond debt. Creditors challenged the law and argued it was a "State" expressly preempted by the Bankruptcy Code. Puerto Rico argued the presumption against preemption required a narrow interpretation of the preemption statute because territories and states traditionally retained "plenary control over their municipalities, particularly in fiscal matters." (*Id.*

at p. 1952 [J. Sotomayor, dis.].) In a 6 to 2 decision, the Supreme Court rejected this argument:

> The plain text of the Bankruptcy Code begins and ends our analysis. Resolving whether Puerto Rico is a "State" for purposes of the pre-emption provision begins with the language of the statute itself, and that is also where the inquiry should end, for "the statute's language is plain. And because the statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

(*Puerto Rico v. Franklin Cal. Tax-Free Trust, supra,* 136 S.Ct. 1938, 1946.) (internal citations and quotations omitted)

The abrogation of the presumption has since been recognized in several subsequent Court of Appeal and Supreme Court decisions (See e.g. *Watson v. Air Methods Corp.,* (8th Cir. 2017) 870 F. 3d 812, 817 ["In determining the meaning of an express pre-emption provision, we apply no presumption against pre-emption"]; *Atay v. County of Maui* (9th Cir. 2016) 842 F. 3d 688, 699 [no presumption for express preemption statutes, but presumption against preemption continues to apply for implied preemption]; *Coventry Health Care of Missouri, Inc. v. Nevils* (2017) 137 S.Ct. 1190, 1197-1199 [no presumption against preemption when express preemption statute applies].)

b. Erroneous Reliance on the Presumption Led the Court of Appeal to Effectively Rewrite the Preemption Statute

Despite the Supreme Court's instruction that no presumption against preemption applies to express preemption statutes, the appellate court rested

its Opinion squarely on the presumption that Congress did not intend to supersede the traditional state power of land-use regulation.

> In using the term "relating to" Congress did not intend to preempt land use regulations just because marine mammals are present. The 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.
>
> * * *
>
> There is nothing in the MMPA showing a clear intent for Congress to usurp the state's traditional power to regulate land use. ¶ … 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. ¶ In sum, plaintiff has not met its burden to overcome the presumption against preemption.

(Op. pp. 22, 24.)

As discussed above, the presumption is now inapplicable to express preemption statutes. But even if the presumption still applied, Congress specifically intended to preempt land use regulations to the extent states intended to create sanctuaries without first obtaining management authority under the MMPA. (16 §§ U.S.C. 1379(a) & (b)(1).) As reflected in the legislative history cited in the Opinion, initial drafts of the MMPA intended to allow states to create and maintain marine mammal sanctuaries. But as clarified in the final conference report, state laws creating sanctuaries must first be approved by the Secretary before authority to enforce them may be transferred to the states:

> 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.

(Op. at p. 16, quoting Conf. Rep. No 92-1488 (1971) reprinted in 1972 U.S. Code Cong. & Admin. News, at pp. 4187, 4188.) (emphasis added)

Congress wrote the MMPA to broadly preempt any state laws relating to the taking of marine mammals absent approval from the Secretary. It did this not to prohibit states from protecting marine mammals but to ensure that all state laws remained consistent with the MMPA and that Federal authorities retained responsibility for the conservation of marine mammals.

The Court of Appeal decided that it knows how to regulate marine mammals better than Congress. Instead of applying the law as written by Congress, the Court of Appeal relied on the presumption against preemption to limit the preemptive reach of Section 1379(a) – and the corresponding incentive to obtain Federal approval. This is not a decision for the Court of Appeal. This is a decision for Congress. Absent authorization from the Secretary, Congress plainly and unmistakably decided to apply MMPA preemption broadly to "any" state laws "relating to" marine mammal harassment. By invoking the now defunct presumption against preemption,

the Court of Appeal usurped the authority of Congress to write the law and its decision should be reversed.

c. Erroneous Reliance on the Presumption Led the Court of Appeal to Disregard the Stated Purpose of the Beach Closure

Reliance on the presumption also tainted the Opinion's analysis in other ways. For instance, to reconcile the beach closure with the MMPA, the Opinion disregards the stated purpose of the beach closure, i.e. protecting seals from harassment during pupping season, and instead evaluates the law under an imagined set of facts where that purpose was never expressed:

> 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 seals, but because one goal was reduction of interaction between seals and people during pupping season, then the Ordinance and Permit are preempted. We will not reach such an absurd conclusion.

(Op. pp. 21-22.)

We simply cannot ignore the stated purpose of the beach closure was to protect seals from harassment. This is evident in both the time period for the closure (i.e. seal pupping season) and, most importantly, the text of the law itself. Not only was the purpose expressly stated – it had to be to comply with California law. In order to justify restricting public access to the beach under the Coastal Act, the City had to identify "areas and species of special

biological or economic significance" that required "special protection." (Pub. Res. Code, § 30230.) This is exactly what the City did. The seals at Children's Pool were the significant marine resource and the beach closure was their special protection. Without this purpose, the beach closure would run afoul of the Coastal Act. EX. B, 1 AR 99 ["in order for the LCP to be consistent with the Coastal Act, compliance with Section 30230 is required. The seasonal prohibition of public access onto the lower staircase leading down to the sand from the sidewalk and onto the Children's Pool beach during the seal pupping season is based on such a prohibition being the most protective of significant marine resources."].) This is not splitting hairs. To remove mention of this purpose from the beach closure would be to rewrite and, indeed, invalidate the law entirely.

The Supreme Court has never instructed courts to ignore the purpose of state laws when passing on the question of preemption. To the contrary, its preemption decisions "emphasize the importance of considering the *target at which the state law aims* in determining whether that law is pre-empted." (*Oneok, Inc. v. Learjet, Inc.* (2015) 135 S.Ct. 1591, 1599-1600 [facially neutral state laws preempted when intended to regulate exclusively federal matters].) (emphasis added). It is true an innocuous purpose will not save a state law with a strong connection to preempted subject matter. (*Gobeille v. Liberty Mut. Ins. Co.* (2016) 136 S.Ct. 936, 943 (Gobeille) ["The Vermont regime cannot be saved by invoking the State's traditional

power to regulate in the area of public health."].) But the Supreme Court has "virtually taken it for granted that state laws which are specifically designed to affect employee benefit plans are pre-empted under [ERISA]." (*Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 140, quoting *Mackey v. Lanier Collection Agency & Service, Inc.* (1988) 486 U.S. 825, 829.) And while the Supreme Court has limited the scope of "relate to" preemption clauses in the context of facially neutral state law, it has not overturned its precedents holding state law preempted when it is specifically designed to regulate federal matters. In this case the beach closure ordinance was designed to regulate the harassment of harbor seals, and it thus it "relates to" the "taking" of marine mammals. Under the same standards the Supreme Court applies to the "relates to" clause of ERISA's preemption statute, the beach closure falls squarely within the scope of MMPA preemption.

V
THE COASTAL ACT DECISION SHOULD BE REVIEWED

The Court of Appeal also found the public access protections set forth in Public Resources Code section 30211 do not preempt the City's beach closure. This also presents an important question of law which should be reviewed and reversed.

A city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations that do not conflict with general law. (Cal. Const., art. XI, § 7.) "If local legislation conflicts with

state law, it is preempted by the state law and is void. A conflict exists when the local legislation contradicts state law." (*Reidy v. City and County of San Francisco* (2004) 123 Cal.App.4th 580, 587.) (internal citations omitted)

The Coastal Act generally promotes a policy of public access to the coast, but it provides special protection to public access specifically granted by the Legislature:

> 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.

(Pub. Res. Code, § 30211.) The City and the Commission are thus prohibited from undertaking or authorizing development which interferes with public access acquired through use or legislative authorization. Here, the seasonal beach closure is development[4] and it will be preempted by Section 30211 if the public acquired access to the beach through use or legislative authorization.

1. The Public Acquired the Right to Access Children's Pool Beach by Use and Legislative Authorization

The state holds tidelands in trust for the public for navigation, fishing, commerce and other public purposes specified by the Legislature. (*Lane v. City of Redondo Beach* (1975) 49 Cal.App.3d 251, 256.) The state

[4] "Development' means, on land, in or under water, the placement or erection of any solid material or structure; … change in the density or intensity of use of land, … change in the intensity of use of water, or of access thereto…" (Pub. Res. Code, § 30106.)

may grant tidelands to a municipality, subject to a public trust on the terms and conditions established by the Legislature. (*Atwood v. Hammond* (1935) 4 Cal.2d 31, 37-38.) "It is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished, and to take the necessary steps to free them from such burden." (*Marks v. Whitney* (1971) 6 Cal.3d 251, 260-261.)

In 1931, the Legislature granted Children's Pool Beach and its tidelands to the City of San Diego. The Legislature required the beach be devoted for public recreation, e.g. as a park, a bathing pool for children, a playground, etc. The Legislature amended the terms of the Trust once in 2009 to add a "marine mammal park" as an authorized use. In its present form, the trust provides as follows:

> (a) That said lands shall be devoted exclusively to public park, marine mammal park for the enjoyment and educational 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 such 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. 1.)

Subdivision (a) plainly authorizes public access to the beach as a park, marine mammal park, bathing pool, playground, and other uses which

support "the full enjoyment of such purposes." Subdivision (b) goes even further and reserves to the public an "absolute right to fish" at Children's Pool "with the right of convenient access [to the ocean] over [Children's Pool Beach]." The Legislature decided how the Children's Pool would be used to benefit the public trust when it granted title to the City. The public thus acquired its access rights from the plain language of this Legislative authorization. Moreover, since the public has been using the beach year-round since 1931, it has also acquired access rights by virtue of its continued usage.

2. The Legislature Never Restricted or Eliminated The Public's Right to Access Children's Pool Beach

The 2009 amendment reflects the Legislatures only modification of the Trust. The City requested this amendment to avoid the court-ordered disbursement of the seals and to allow the seals to continue sharing the beach with the public. The Legislature added another use, a marine mammal park, to those already enumerated in the Trust, and thus formally authorized the City's then existing policy. While the 2009 amendment codifies joint use, the amendment did not restrict existing public access to the beach, nor did it allow the City to prohibit access for any of the other uses specified in the Trust. Even after the Trust was amended, the public continued to access the beach alongside the seals in accordance with the joint use policy. The seasonal beach closure defies the Legislature's longstanding support of

public access to the Children's Pool and marks an unprecedented step in the history of the Children's Pool.

When the Legislature provides the public with specific coastal access rights, Public Resources Code section 30211 prohibits any development which interferes with that access. This is not a policy recommendation that may be balanced or compromised – it is a directive the City and the Commission must obey. (See *Marks v. Whitney, supra,* 6 Cal.3d 251, 260-261 [Legislature alone holds power to determine whether public trust uses should be modified or extinguished.]) For 85 years, the Legislature has clearly provided the public with specific access rights to the Children's Pool. Yet the City has undertaken, and the Commission has approved, a seasonal beach closure which not only interferes, but completely eliminates the public's beach access for 42 percent of the year. If the City wants to extinguish the longstanding public use of a man-made beach and modify the terms of the Trust, it must do what it did in 2009 and make its case to the Legislature. Until the Legislature decides otherwise, the seasonal beach closure directly conflicts with the Trust and Public Resources Code section 30211, and is therefore preempted.

The Court of Appeal's Opinion treats the Legislature's tidelands grant as it would any of the general policy objectives set forth in the Coastal Act. While these types of policies are generally potentially subject to countervailing interests as described in Sections 30007.5 and 30214, Section

30211 is different for two reasons. First, it is prohibitive. Instead of mandating that general policies be pursued, Section 30211 states that development "shall not" interfere with public access specifically acquired from the Legislature. Second, the statute specifically protects access rights granted by the Legislature. If the Legislature takes action to grant access rights, and then passes a statute that prohibits development which interferes with those access rights, courts should abide by the Legislature's directive. The Court of Appeal's Opinion undermines the Legislature's intent, as expressed in Section 30211, to protect these public access rights from development. This is an important issue of law that should also be reviewed and the decision of the Court of Appeal on this point should be reversed.

VI
CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Review to settle these important issues of law.

July 18, 2018 LAW OFFICES OF BERNARD F. KING III

By_____

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CERTIFICATE OF COMPLIANCE

[CRC 8.204(c)]

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5,402 words, including footnotes, and is printed in a 13-point typeface. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

July 18, 2018 LAW OFFICES OF BERNARD F. KING III

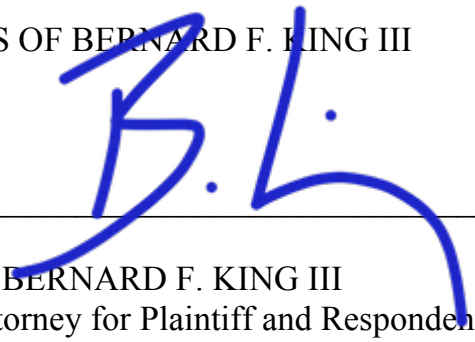
By 

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EXHIBIT A

Filed 6/28/18 Friends of the Children's Pool v. City of San Diego CA4/3

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) ORDER MODIFYING OPINION; DENYING PETITION FOR REHEARING AND REQUESTS FOR PUBLICATION; NO CHANGE IN JUDGMENT

It is ordered that the opinion filed on June 7, 2018, be modified as follows:

1. On page 1, the second full sentence below the caption is deleted and replaced with the following:

Requests for judicial notice granted.

2. On page 3, at the end of the second full paragraph add the following:

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

3. On page 33, the second full sentence is deleted and replaced with the following:

The requests for judicial notice are granted.

The petition for hearing and the requests for publication are DENIED. This modification does not change the judgment.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.

Filed 6/7/18 Friends of the Children's Pool v. City of San Diego CA4/3 (unmodified opinion)

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.

Mara W. Elliott, City Attorney, David J. Karlin and George F. Schaefer, Assistant City Attorneys and Jenny K. Goodman, Deputy City Attorney, for Defendant and Appellant City of San Diego.

Kathleen A. Kenealy, Acting Attorney General, Xavier Becerra, Attorney General, John A. Saurenman, Assistant Attorney General, Andrew M. Vogel, Jennifer W.

Rosenfeld and Baine P. Kerr, Deputy Attorneys General, for Defendant and Appellant California Coastal Commission.

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.

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, finding it was preempted by the provisions of the MMPA and violated the Coastal Act.

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.

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 completed by the end of May. When pups are present mother seals are more aggressive. During pupping season there are more seals on Children's Pool Beach and they remain there for longer periods of time than other times during the year

When interaction with humans disturbs seals they "flush" into the water, thereby losing the 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.

The haul out area and rookery at Children's Pool Beach is unique because it is located in an urban area and accessible by the public. This has resulted in unwanted contact 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.

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

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 the Trust Amendment because it gave City "greater latitude in implementing management actions regarding the harbor seal colony" at Children's Pool Beach. NMFS considers Children's Pool Beach to be a seal rookery and year-round haul-out site.

In an attempt to manage the ongoing dispute, in 2006 City installed a rope 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.

In 2007 the NOAA's Office of Law Enforcement (OLE) sent a letter to 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 community."

Between February 2009 and January 2010 police responded 184 times to incidents at Children's Pool Beach, including 37 disturbing the peace calls and four reports of battery. In order to address public safety issues, in 2010 City adopted a Seasonal Shared Use Policy (Policy) containing five elements: 1) establishing a year-

[2] The NMFS, under the auspices of the Department of Commerce 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 acknowledged it did "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, slamming car doors, and people laughing and shouting disturbed the seals. The presence of people at Children's Pool Beach close to the hauled out seals or at the edge of the water usually caused "large numbers of seals [to] flush[]." The NMFS also had reports of premature seal births and abortions at Children's Pool Beach.

The NMFS opined that although it had enforcement authority under the 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."

Over the next few years City implemented only the first four elements of the Policy and did not close access during pupping season. However, this did not resolve the human conflicts or the harassment of seals. A "Seal Cam" showed several incidents of harassment, some of which were 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 diverting them from duties to protect and save swimmers.

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 the public year-round without restrictions, allowing for fishing, walking, viewing seals, and scientific observation. There are numerous nearby beaches, some within walking distance, available for swimming and sunbathing during the Closure.

The NMFS commented on the proposed Closure, observing its prior efforts in giving guidance on MMPA compliance had "not helped to diminish the human conflict that persists between various groups at Children's Pool Beach." It noted the "ideal solution" was shared use. The NMFS did not believe a complete closure of Children's 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.

After numerous public hearings and an extensive public comment period generating hundreds of letters on both sides of the issue, in 2014 City adopted the Ordinance. It amended City's Municipal Code section 63.0102 to effect the Closure, banning public access to Children's Pool Beach during pupping season from December 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.

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.

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*.)

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.)

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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.)

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.)

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.

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).)

The MMPA bans the "taking" of marine mammals, including harbor seals. (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.]" (*Ibid.*)

"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.S. 525, 541.)

"'"'[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).

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.

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. (*Californians for Safe & Competitive Dump Truck Transportation v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, 1189 (*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"].)

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).

Arnariak acknowledged "'relating to'" language in other federal statutes 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." (*Arnariak, supra,* 941 P.2d 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,* at p. 161, citing H.R. Rep. No. 92-707, at p. 18 (1971) reprinted in 1972 U.S. Code Cong. & Admin. News, at pp. 4144, 4151.)

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].)

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.

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*.)

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.

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.)

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 property that is at issue here. (*Id*. at p. 1221; see 15 C.F.R. § 911.180.) Thus, the case has little if any persuasive authority.[8]

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.

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.)

[8] After *UFO Chuting 1* was decided the MMPA was amended to give Hawaii an 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 objected 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."

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."

In 2014, commenting on the proposed Ordinance, the NMFS stated it did 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.

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.

Moreover, even though the NMFS has known about the problems at 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.

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 seals, but because one goal was reduction of interaction between seals and people during pupping season, then the Ordinance and Permit are preempted. We will not reach such an absurd conclusion.

Plaintiff has acknowledged defendants are not prohibited from closing Children's Pool Beach for reasons unrelated to harassment of seals. And nothing in the 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. The 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.

In addition, as noted by City, cities have enacted and Commission has 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.

4) Transfer of Management

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

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[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 there is nothing in the MMPA that suggests a local government must implement a conservation 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.)

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)

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.

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.

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.)

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.)

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.

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.

"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.

[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 Coastal Act Preemption

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).)

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).)

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.

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."

On this point *Carstens v. California Coastal Com*. (1986) 182 Cal.App.3d 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." (*Carstens, supra,* 182 Cal.App.3d at p. 288.) 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 public trust doctrine and "emphasizes the need to consider public safety." (*Id*. at p. 290.) It stated the 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*.)

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

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.

Plaintiff also relies on an apparent finding in *Carstens* that there would be only an "indirect[] impair[ment]" of access in contrast to the prohibition of access here. (*Carstens, supra,* 182 Cal.App.3d at p. 294, fn. 15.) But there is no complete prohibition 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 almost all policy sections in Article 3 of the Coastal Act contain the word shall. (E.g., §§ 30210 ["maximum access . . . shall be provided"]' 30211 ["Development shall not interfere"], 30212 ["public access . . . shall be provided"], 30212.5 ["Public facilities . . . shall be distributed"], 30213, 30222, 30230, 30241, 30251, 30263.)

And at least one section, section 30230, directly conflicts with 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 special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes." (§ 30230.)

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 should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails 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.)

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.

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.

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]

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.)

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.

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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.

EXHIBIT B

Community Plan and Local Coastal Program Land Use Plan

November 2013 Edits
CP/LCP Amendment for Children's Pool

City of San Diego Planning Department
202 C Street, MS 4A
San Diego, CA 92101

This plan presents the coastal issues that have been identified for the community; it proposes policies and recommendations in the various elements of the community plan to address those issues. These issues are summarized below:

- **Public Access to the Beaches and Coastline**

  The Natural Resources and Open Space System Element recommends a comprehensive sign program to identify existing locations along the coast where public access to the shoreline exists; Figure 6, 9 and Appendix G identifies the existing coastline access points from La Jolla Farms to Tourmaline Surfing Park; and the Transportation System Element incorporates recommendations for improving bicycle access to Ellen B. Scripps Park and La Jolla Shores Beach and other public shoreline areas of La Jolla.

  The plan also states that the City will review new developments for the potential of prescriptive rights of access in accordance with the California Coastal Act and state law.

- **Environmentally Sensitive Habitat Areas and Marine Resources**

  The Natural Resources and Open Space System and Residential Elements recommend that development be designed to prevent significant impacts upon sensitive habitats and identified endangered or threatened plant and animal species. In addition, seasonal access restrictions and a buffer are designated for the Children's Pool Beach in order to protect breeding pinnipeds pursuant to Section 30230 of the California Coastal Act. No public access is permitted below the top of the lower staircase leading down to the sand from the sidewalk during seal pupping season.

- **Recreation and Visitor Serving Retail Areas**

  The Commercial Land Use Element recommends retention of existing hotel, retail and visitor-oriented commercial areas in proximity to the beach and coastline parks in order to maintain a high degree of pedestrian activity and access to coastal resources.

- **Preservation or Conservation of Historic Resources**

  The Heritage Resources Element recommends preserving the historical integrity of these community landmarks and archeological sites per the Secretary of Interior's Standards as well as maintaining the existing Cultural Complex within downtown La Jolla in order to retain the distinctive architectural, educational and historic heritage of the community.

- **Provision of Parks and Recreation Areas**

  The Community Facilities Element recommends the preservation of existing resource and population-based parks and the identification of additional park and recreation opportunities throughout the community.

- **Provision of Affordable Housing**

wildlife habitats. In addition, the open space designations and zoning protect the hillsides and canyons for their park, recreation, scenic and open space values. The location of the public and private dedicated and designated open space and park areas in La Jolla are shown on Figure 7 and include, but are not limited to, all lands designated as sensitive slopes, viewshed or geologic hazard on City of San Diego Map C-720 dated 12/24/85 (last revision).

Visual Resources

La Jolla is a community of significant visual resources. The ability to observe the scenic vistas of the ocean, bluff and beach areas, hillsides and canyons, from public vantage points as identified in Figure 9 has, in some cases, been adversely affected by the clutter of signs, fences, structures or overhead utility lines that visually intrude on these resources.

Mount Soledad provides magnificent vistas of the coast of San Diego and is a regional landmark and an important visual resource for the community to preserve. Its slopes form a unique visual backdrop of significant scenic value which provides a natural relief from the commercial development that characterizes La Jolla's village area. Moreover, public views to La Jolla's community landmarks such as the San Diego Museum of Contemporary Art, and to historic structures, including the La Jolla Recreation Center and the La Jolla Woman's Club, are to be preserved. Significant public views of the coast are provided from Ellen B. Scripps Park and Kellogg Park. Other identified public vantage points are shown in Figure 9.

Shoreline Areas and Coastal Bluffs

The entire coastline of La Jolla stretching from La Jolla Farms to Tourmaline Surfing Park provides dramatic scenic beauty to the City of San Diego is considered an important sensitive coastal resource and should be protected.

The maximum use and enjoyment of La Jolla's shoreline is dependent upon providing safe and adequate public access to such major and special use recreational areas as La Jolla Shores Beach, Ellen B. Scripps Park, Coast Boulevard Park, Marine Street Park, Coast Walk, Windansea Beach, Calumet Park, Tourmaline Surfing Park and the Bird Rock tidepool areas.

Public access to this resource is limited, particularly along portions of Bird Rock, La Jolla Hermosa and in La Jolla Farms, due to steep slopes, cliff erosion and sensitive rock formations and restricted parking. Beach access is also limited on a seasonal basis at Children's Pool Beach, an area of special biological significance, during the harbor seal pupping season to protect the harbor seal rookery during this most vulnerable period.

This plan identifies two types of physical access: lateral (movement along the shoreline) and vertical (access to the shoreline from a public road). Public access at designated beach and shoreline points has been improved with the addition of stairways or ramps at certain points along the coastline including Tourmaline Surfing Park, Linda Way, Bird Rock Avenue, Windansea Park, La Jolla Strand Park, Jones Beach, Coast Boulevard Park, Shell Beach, Scripps Park, Children's Pool and La Jolla Shores Beach.

SUBAREA E: COAST BOULEVARD

Shoreline Access:

a. La Jolla Cove. Small (.4-acre) pocket beach at the north end of Ellen B. Scripps Park. Concrete stairways provide access down bluff. Heavily used. The Cove and adjacent bluffs are an important visual and historical resource. Site of the La Jolla Roughwater Swim.

b. Ellen Scripps Park. Dedicated 5.6-acre bluff top park. The park is a major recreational focal point for visitors to La Jolla. A scenic walkway along the bluff edge provides outstanding coastal views. A ramp down the bluff provides access to Boomer Beach. Heavily utilized. No off-street parking.

c. Shell Beach. Small pocket beach south of Ellen B. Scripps Park. Stairway has been damaged.

d. Children's Pool. Small (.7-acre) artificial pocket beach held in place by seawall. Lifeguard facilities. Stairway access down bluff. Heavily utilized. In order to protect breeding Harbor Seals, no public access is permitted below the top of the lower staircase leading down to the sand from the sidewalk during seal pupping season. *See discussion below.

e. South Casa Beach. Small pocket beach accessible by concrete stairway. Part of Coastal Boulevard Park.

f. Coast Boulevard Park. Dedicated 4.55-acre Shoreline Park between the stairway at Ocean Street and the stairway south of La Jolla Boulevard. Several unimproved trails provide access down gentle bluffs and vegetation dunes. Moderate-to-heavy use. No off-street parking.

g. Vehicular access. Graded area near intersection of South Coast Boulevard and Coast Boulevard provide beach access for emergency vehicles.

h. Concrete stairway next to pump station. Provides pedestrian access to adjacent pocket beach and north end of Nicholson's Point Park.

* On June 8, 2010, the City of San Diego City Council, via Resolution R-305837, directed the City Attorney "to draft an ordinance amending the Municipal Code…to prohibit public access to the Children's Pool beach during harbor seal pupping season, from December 15 to May 15" and directed the Mayor or his designee "to amend the Local Coastal Program, only if required, to prohibit the public from entering the beach during harbor seal pupping season from December 15th through May 15th." In order to effect this directive, staff proposed the closure of Children's Pool beach during pupping season in accordance with California Coastal Act Section 30230:

"Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal

waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes."

Therefore, in order for the LCP to be consistent with the Coastal Act, compliance with Section 30230 is required. The seasonal prohibition of public access onto the lower staircase leading down to the sand from the sidewalk and onto the Children's Pool beach during the seal pupping season, generally from December 15th to May 15th, is based on such a prohibition being the most protective of significant marine resources.

In conjunction with the LCP amendment, the City Council also adopted an ordinance by adding a Section 63.0102(e)(2) as follows: *It is unlawful for any person to be upon or to cause any person to be upon the beach of the La Jolla Children's Pool, starting from the lower stairs to the beach beginning with the second landing, from December 15 to May 15.*

EXHIBIT C

STATE OF CALIFORNIA – THE NATURAL RESOURCES AGENCY EDMUND G. BROWN, JR., *Governor*

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Date: November 7, 2014
Permit Application No.: 6-14-0691

COASTAL DEVELOPMENT PERMIT

On **August 14, 2014**, the California Coastal Commission granted to:

City of San Diego Parks and Recreation Department

this permit subject to the attached Standard and Special Conditions, for development consisting of

Closure of Children's Pool Beach to all public access during Harbor Seal pupping season, December 15 to May 15, of each year. Installation of "Area Closed" signage on barrier chain at the top of the lower staircase leading to the beach from the second landing area and on the western emergency access gate adjacent to the seawall.

more specifically described in the application filed in the Commission offices.

The development is within the coastal zone

west of Coast Blvd., south of Jenner St., La Jolla (San Diego County)

Issued on behalf of the California Coastal Commission by

CHARLES LESTER
Executive Director

By: **BRITTNEY LAVER**
Coastal Program Analyst

ACKNOWLEDGMENT:

The undersigned permittee acknowledges receipt of this permit and agrees to abide by all terms and conditions thereof.

The undersigned permittee acknowledges that Government Code Section 818.4 which states in pertinent part that: "A Public entity is not liable for injury caused by the issuance. . . of any permit. . . " applies to the issuance of this permit.

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IMPORTANT: THIS PERMIT IS NOT VALID UNLESS AND UNTIL A COPY OF THE PERMIT WITH THE SIGNED ACKNOWLEDGMENT HAS BEEN RETURNED TO THE COMMISSION OFFICE. 14 Cal. Admin. Code Section 13158(a).

11/13/14
Date

Signature of Permittee

STANDARD CONDITIONS:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.

2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.

4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.

5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

SPECIAL CONDITIONS:

The permit is subject to the following conditions:

1. Permit Term.

   A. This coastal development permit authorizes development on a temporary basis only. The development is authorized for a period of five (5) years, commencing upon the date of Commission approval of Coastal Development Permit No. 6-14-0691, after which time the authorization for continuation and/or retention of any development approved as

part of this permit shall cease. After the authorization for the development expires, the retention of seasonal beach closure and associated signage at Children's Pool Beach will require the issuance of a new coastal development permit or an amendment to this coastal development permit.

B. If the applicant does not obtain a coastal development permit or amendment from the California Coastal Commission to continue implementation of seasonal beach closure and installation of associated signage at Children's Pool Beach prior to the date that authorization for the development expires, the City shall cease implementation of the seasonal beach closure.

C. All development must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions. Any deviation from the approved project plans must be submitted for review by the Executive Director to determine whether an amendment to this coastal development permit is legally required.

2. Monitoring Plan.

A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for the review and written approval of the Executive Director, a Monitoring Plan for the management and monitoring of the seasonal beach closure at Children's Pool Beach. The plan shall include, but not be limited to, the following criteria:

1. A physical description and exhibit delineating the precise location of the public access restrictions and associated signage at Children's Pool;

2. A discussion of the goals and objectives of the plan, which shall include the method by which the applicant will assess the level of use by seals of the haul out site at Children's Pool Beach throughout the year and the method of determining the effectiveness of the seasonal beach closure at minimizing harassment of hauled out seals with both methods employing, at a minimum, the procedures described in section 3 and 4, below, of this special condition;

3. Upon implementation of the seasonal beach closure, a qualified biologist, environmental resources specialist, park ranger, lifeguard, and/or City-trained volunteer shall record the number of seals hauled out at Children's Pool Beach, the number of people present on the beach, the number of people present in the water from the tip of the breakwater across to the point of rock directly below the green gazebo, the number of harassment instances, the number of citations and warnings issued, the outcomes of issued citations and warnings if available, the tide, the weather (including water and air temperature), and the date at least 16 days per month (to include weekends and holidays). Monitoring shall be conducted a minimum of 16 days per month and measurements shall be recorded a minimum of 3 times per day, to include 10 AM, 1 PM, and 4 PM;

4. Provisions for taking measurements of the number of harassment instances, including what activities would qualify as harassment consistent with relevant regulatory definitions of harassment (e.g. seals flushing into water) under the MMPA.

B. The City shall submit, for the review and approval of the Executive Director, on an annual basis, a written monitoring report from a qualified biologist or other qualified experts, as necessary to comply with the requirements of the monitoring report. Each monitoring report shall contain the following:

1. All records of measurements, analyses and conclusions created in conformance with the approved Monitoring Plan;

2. Recommendations for repair, maintenance, modifications, or other work to the development; and

3. Photographs taken from pre-designated sites (annotated to a copy of the site plans) indicating the condition, performance, and/or effectiveness of the seasonal beach closure and associated signage.

If a monitoring report contains recommendations for repair, maintenance, modifications, or other work, the permittee shall contact the San Diego Coastal Commission Office to determine whether such work requires an amendment or new coastal development permit.

C. The permittee shall undertake development in accordance with the approved final Monitoring Plan. No changes to the approved final Monitoring Plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

3. Sign Program. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit to the Executive Director for review and written approval, a final comprehensive sign program in substantial conformance with the plans submitted by the applicant with the subject application on April 29, 2014 and as shown in Exhibits 3 and 4. As part of the sign program, signs shall not exceed 36 inches wide by 30 inches tall and a maximum of two (2) signs may be posted on the beach, one on a barrier chain at the top of the lower staircase leading to beach from the second landing area and one on the western emergency access gate adjacent to the seawall.

The applicant shall undertake the development in accordance with the approved program. Any proposed changes to the approved program shall be reported to the Executive Director. No changes to the program shall occur without a Coastal Commission approved amendment to this coastal development permit, unless the Executive Director determines that no amendment is legally required.

4. Liability for Costs and Attorney Fees.

By acceptance of this coastal development permit, the Applicants/Permittees agree to reimburse the Coastal Commission in full for all Coastal Commission costs and attorney's fees including (1) those charged by the Office of the Attorney General, and (2) any court costs and attorney's fees that the Coastal Commission may be required by a court to pay that the Coastal Commission incurs in connection with the defense of any action brought by a party other than the Applicant/Permittee against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval or issuance of this permit. The Coastal Commission retains complete authority to conduct and direct the defense of any such action against the Coastal Commission.

5. Feasibility Study.

By acceptance of this coastal development permit, the applicant/permittee agrees that, prior to the submittal of any request for a new coastal development permit or an amendment to this coastal development permit to continue implementation of a seasonal beach closure and installation of associated signage at Children's Pool Beach, after the five (5) year authorized period of this coastal development permit expires, the applicant/permittee shall complete a feasibility study that shall address, the following three elements and shall be submitted with any new coastal development permit application or permit amendment application:

a. Feasibility of providing ADA-compliant access to the sandy beach area of Children's Pool Beach.

b. Analyze the water quality and methods for improving the water quality at Children's Pool Beach, including the feasibility of opening the sluiceways in the breakwater.

c. Analyze the sand quality and methods for improving sand quality at Children's Pool Beach, including dredging.

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

Friends of the Children's Pool v. City of San Diego and The California Coastal Commission
4th Civil No. G053709/G053725
Superior Court Case No. 30-2015-00778153-CU-WM-CJC

I, Bernard F. King III, declare that:

I am at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1455 Frazee Road, Suite 500, San Diego, California, 92108. On July 18, 2018, I served copies of these document(s) as follows: PETITION FOR REVIEW

Clerk of Orange County Superior Court
Hon. Frederick Horn
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(Via U.S. Mail)

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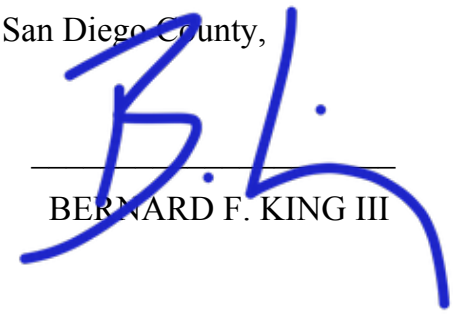
I declare under penalty of perjury under the laws of the state of California and the United States of America that the foregoing is true and correct, and was executed on July 18, 2018 in San Diego County, California.



BERNARD F. KING III