

Appeals Court affirms order to dredge Children's Pool

By La Jolla Light Staff

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The city of San Diego is in violation of its trust status over La Jolla's Children's Pool by allowing it to be used for purposes other than as a public park and children's pool, and therefore must dredge sand from the pool to return it to the state it was in 1941 when it was safe for human use.

That was the decision handed down last week by the Fourth District Court of Appeal in Valerie O'Sullivan v. the city of San Diego, upholding now-retired Superior Court Judge Michael Pate's August 2005 ruling.

In rendering its decision, the Court of Appeal rejected the city's argument that the terms of the 1931 trust grant by the state Legislature should allow the city to broadly interpret the trust document, allowing it discretion to determine recreational uses in the pool, including public sightseeing of harbor seals.

"... the trial court concluded the trust property (Children's Pool) was to be used exclusively for a public park and children's pool," stated the Court of Appeals ruling. "The use by the city of the Children's Pool as a habitat, animal sanctuary, zoo or seal watching facility that precludes its being used as a bathing pool for children would be outside the scope of the trust."

Children's Pool was closed to human contact in 1997 due to high bacterial coliform counts in the pool's water caused by buildup of seal waste.

In the wake of the appellate court's decision, deputy city attorney George F. Schaefer said, "We're going to petition to the California Supreme Court to review this decision."

La Jolla attorney Paul Kennerson, representing the plaintiff, O'Sullivan, noted the lower court's decision was affirmed, in all respects, by the Court of Appeals. "That means we won, big time," said Kennerson. "The city will now have to dredge sand to return it (pool) to the configuration it was in in 1941. The city will have to devise a plan to do that. There's not much wiggle room in that mandate."

Kennerson hailed the two judicial decisions, noting they preserve the intent of La Jolla benefactress Ellen Browning Scripps, who donated \$50,000 in 1931 for construction of the 300-foot concrete, crescent-shaped breakwater now being legally contested 76 years later.

"A lot of people in La Jolla learned to swim, or swam as children, at Children's Pool," Kennerson said. "It's a legacy in the sense that it (pool) was given to the city as a trust property to be preserved as a Children's Pool. That's the point the city never got, or pretended they didn't get."

The courts reaffirmed, said Kennerson, that it's not up to the city to decide what uses are permitted at the pool. Those, he said, are spelled out unequivocally in the terms of the trust. "This court, in affirming Judge Pate, is pointing their finger at the city and saying, 'Wake up,'" Kennerson said. "This must be used as a children's pool."

Court documents note that comparisons of photographs of Children's Pool when it was first constructed more than 70 years ago and now demonstrate the city has failed to maintain the trust property in a condition similar to when the property was conveyed. The original, sheltered pool was adjacent to a relatively small strip of sand beach. Today, the beach extends out almost to the end of the breakwater, no longer serving to protect bathers, as sand over the years has filled in most of the pool.

In 2004, the city manager issued a report detailing a plan to restore Children's Pool by dredging a substantial portion of its sand at an estimated cost of \$250,000 to \$500,000.

Council President Scott Peters representing District 1, which includes La Jolla, initiated the effort to find a way to return Children's Pool to shared use by humans and seals. Asked where the money would come from to pay for sand dredging, given the city's present financial crunch, Peters replied: "The city's budget is \$3 billion. Everyone is concerned about where \$100,000 will come from. We'll find the money to do that. It's not going to hurt any seals. It's going to provide an opportunity for water to be cleaner and for people to swim."

James Hudnall, a member of La Jolla Friends of the Seals, was disheartened by the court's decision. "These harbor seals contribute, in a positive way, to the richness of the near-shore ecosystem," Hudnall said. "It's a shame these kinds of things aren't considered before someone makes a decision that this particular beach has to be for people."

Hudnall believes the loss of the beach as a haul out for seals is not only a loss to them and the ecosystem, but also to thousands of seal watchers, divers and naturalists who benefit from the unique opportunity to observe such creatures in their natural habitat.

Children's Pool beach, contends Hudnall, is not large enough to accommodate both species. "We know that the beach, as a seal rookery, is too small for it to be shared between people and seals," Hudnall said, adding he believes public sentiment outside of La Jolla in San Diego is overwhelmingly in favor of leaving the pinnipeds there. "Most people love the seals, love the presence of the seals and value that presence," he concluded.

Asked what to expect next from the court's decision, Hudnall replied: "I expect there to be a large reaction from the public when they are made aware that the seal rookery is threatened."

Kennerson said it's his intent to "hold the city's feet to the fire" in terms of their executing the court order to return Children's Pool to a condition where it can once again be safe for human contact.

"They've (city's) dilly dallied around and broken the law," he said. "The time to act is here. There are a lot of people fed up with the city about this."

Source: <http://www.lajollalight.com/news/2007/sep/12/appeals-court-affirms-order-to-dredge-childrens/>