SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - November 12, 2009

EVENT DATE: 11/13/2009 EVENT TIME: 01:30:00 PM DEPT.: C-72

JUDICIAL OFFICER: Timothy Taylor

CASE NO.: GIC826918

CASE TITLE: O'SULLIVAN VS CITY OF SAN DIEGO

CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Motion Hearing (Civil)
CAUSAL DOCUMENT/DATE FILED: Motion - Other, 10/01/2009

A. Judicial Notice

The court grants the City's unopposed Request for Judicial Notice of Ex. A-L pursuant to Evid. Code sections 451 and 452, in support of its motion to dissolve injunction and the Seal Dispersal Order, consisting of: California State Senate Bill 428; Trial Ex. 631, the Minutes of March 29, 1999 of the San Diego City Council; Excerpt from the trial testimony of Valerie O'Sullivan and Ann Cleveland; Final Judgment; Seal Dispersal Order of 7/21/09; Court of Appeal's unpublished opinion; San Diego City Council Resolution Number R-304668; the Official Bill History for State Senate Bill 428; Analysis of State Senate Bill 428 by the California Assembly Committee on Natural Resources; Analysis of State Senate Bill 428 by the California Senate Committee on Natural Resources; Excerpt of the transcript of the hearing on 3/7/05; and the San Diego City Council Meeting Results of 9/22/09.

The Court also grants the City's supplemental request for judicial notice of Ex. M-O), consisting of excerpts of the Marine Mammal Protection Act of 1972, 16 U.S.C. section 1361 et seq; H.R. Rep. Non 92-907 (1972) as reprinted in 1972 U.S.C.C.A.N. 4144; and an excerpt of an amicus curiae brief of the USA in **Animal Protection and Rescue League, et al., v. State of California, et al**, Ninth Circuit Case No. 08-55319. The court also grants Plaintiff's implied request for judicial notice underlying her Notice of Lodgment.

B. Consolidation

Plaintiff Animal Rescue and Protection League's Motion to Consolidate 37-2009-00093309-CU-MC-CTL, **Animal Rescue and Protection League v. City of San Diego; Jerry Sanders; and State of California; and Does 1-10**, into GIC 826918, **Valerie O'Sullivan v. City of San Diego; State of** California; and Does 1-500, with GIC826918 to serve as the lead case, is denied pursuant to CCP 1048. While the cases may share common questions of fact and law concerning the rights and obligations of the City regarding protection of a seal rookery via a marine mammal park (now that SB 428 has been signed into law and will become effective on 1/1/10), the court exercises its discretion to deny consolidation because the cases are in a very different procedural posture and the court is not convinced consolidation offers any real efficiencies not already present by virtue of the fact the cases

are related before the same judge.

C. Intervention

California State Lands Commission's Motion to Intervene into this action is granted pursuant to CCP 387. Intervention under CCP 387 requires a timely motion and a showing by movant that it: (a) has a direct interest in the lawsuit; (b) intervention will not enlarge the issues; and (c) the reasons for participating are not outweighed by the rights of the original parties to conduct their lawsuit.

CSLC's motion is timely as it was made shortly after the Governor signed SB 428 which takes effect on 1/1/10.

The Commission has a direct interest in defending the amended statutory grant of public trust tidelands. It is the trustor entity with a fiduciary obligation regarding the tidelands. Further, it shall "administer all laws and statutes committed to it." Public Resources Code section 36103. Additionally, the CSLC exercises residual jurisdiction of public trust tidelands such as the Children's Pool beach. Thus, it has a direct interest in defending the validity of the amended statutory grant (i.e. SB 428).

Intervention will not enlarge the issues raised by the original parties. The Commission will only respond to O'Sullivan's allegation the amended statutory grant is invalid and unconstitutional. It will not raise new allegations itself.

CSLC's reasons for participating outweigh the rights of the original parties to conduct their lawsuit. First, there was no waiver by the Commission's earlier stipulation (actually a one-sided withdrawal) wherein the Commission agreed to be dismissed from the lawsuit. Intervention is evaluated at the time of the motion, not at the inception of the case. See **Goes v. Perry** (1941) 18 Cal.2d 373, 377-78, and **Bolamperti v. Larco Manufacturing** (1985) 164 Ca.3d 249. Second, the Commission's interest in participating in this lawsuit is based on its fiduciary obligation toward the interpretation and application of statutory grants of public trust tidelands. It previously agreed to be dismissed from the lawsuit at a time prior to the passage of SB 428, which adds another permissible use to the statutory grant of public trust tidelands to the City of San Diego. The change in law supports the Commission's intervention.

D. Termination of Injunction.

In a variety of circumstances, one branch or another in the tripartite system of checks and balances enshrined in our Constitution must consider whether it is appropriate to defer to another branch. This willingness to defer in an appropriate setting is essential to the continuing vitality of our democracy. Consider, for example, the constitutional crisis which would have followed had President Dwight D. Eisenhower decided to reject the Supreme Court's ruling in **Brown v. Board of Education** on grounds that it was, in his opinion, an unwarranted expansion of equal protection, and refused to send federal troops to Little Rock. President Richard M. Nixon might have refused on executive privilege grounds to follow the Supreme Court's order that he turn over the tapes to the Watergate special prosecutor. More recently, President George W. Bush might have asserted commander in chief powers and refused to obey the Court's ruling in **Boumediene v. Bush** upholding access to the writ of habeas corpus for Guantanamo Bay detainees. Closer to home, the California Supreme Court, having decided the **In Re Marriage Cases**, 43 Cal. 4th 757 (2008), might have ignored the will of the electorate as expressed in Proposition 8 in deciding **Strauss v. Horton**, 46 Cal. 4th 364 (2009).

In making the foregoing observations, the court is neither seeking to elevate the issues of this case to the level of the historic events offered by way of example, nor denigrating the importance of this case to the parties involved in it. Rather, the court seeks to frame the issues presented by this motion: Should the court ignore an Act of the California Legislature, signed into law by the Governor? Given the court's sworn duty to uphold the law, merely to pose the question is to provide the answer: emphatically "no." Should the court consider that same Act to be a material change in the facts, warranting termination of a mandatory injunction imposed before the Act passed the Legislature and was signed by the Governor? In the circumstances of this long-running case, the court finds that the answer is "yes." In answering the questions this way, the court is not suggesting the earlier orders of Judge Pate and Judge Hofmann were incorrect. Those decisions and orders were correct under the law as it existed at the time those orders were made. Now, however, as the result of the operation of the political process, the law has changed. The Act (SB 428, signed into law by the Governor on 7/20/09), will go into effect on January 1, 2010. The court is not persuaded the Act is in any way constitutionally infirm. It is the court's view that nothing would be gained by insisting on compliance with the earlier orders for the next 48 days. The City's evidence persuades the court that substantial public resources would unnecessarily be expended if orders which have been superseded by actions of the two other branches of the government of California were to continue in force.

The City of San Diego's Motion to Dissolve the 10/4/05 injunction order and the 7/21/09 post-judgment dispersal order is granted pursuant to pursuant to CCP 533 and the Legislature's passage of Senate Bill 428. The Court is not powerless to vacate the injunction. Case law appears to indicate a court has inherent authority to modify or vacate any permanent injunction, be it mandatory or prohibitive. See **West Coast Constr. Company v. Oceano Sanitary District**, 17 Cal.App.3d 693, 699 (1971), quoting **Brunzell Constr. Co. V. Harrah's Club**, 253 Cal.App.2d 764, 772 (1967).

Even if a court could only modify a prohibitory injunction, J. Hofmann's order forbade the City from allowing the seal colony to remain at the Children's Pool. This order has prohibitory terms.

Additionally, CCP 533 does not limit itself to dissolving only permanent prohibitory injunctions. Further, CC 3422 states an injunction may be granted to prevent breach of an obligation where the obligation rises from a trust.

Finally, the 4th DCA, Div. 1 stated at page 46, ftn 29 of its 7/7/07 opinion that the trial court retained jurisdiction and either side can return to trial court to present issues not anticipated.

The amended trust terms do not break a contract. No contract existed as there was no consideration.

Further, the amended trust terms do not violate separation of powers. The CSLC's purported stipulation to be dismissed from the case with prejudice cannot bind the Legislature from later enacting legislation (SB 428) which changes the potential use of public trust tidelands. The Commission is a part of the Executive Branch. No branch may exercise the exclusive powers of another branch. Thus, the Commission cannot bind the Legislature.

An agreement in the course of litigation can be subject to changes in the law. Even if the Commission's action is considered to be similar to a stipulated judgment or a consent decree, the Legislature is within its powers to amend the underlying legislation and annul such a stipulation. See **Mendley v. County of** Los Angeles (1994) 23 Cal.App.4th 1193.

The Commission could not contract away the Legislature's ability to do its job. See **United States Trust Co. of N.Y. v. New Jersey** (1977) 431 U.S. 1, 23, ftn. 20. The change in the law by the Legislature supports dissolution of the injunction and seal dispersal order.

The Legislature cannot legally agree to abstain from amending enactments. " It is the general rule that one legislative body cannot limit or restrict its own power or that of subsequent Legislatures and that the act of one Legislature does not bind its successors. **In re Collie,** (1952) 38 Cal.2d 396, 398; **San Francisco v. Cooper,** (1975) 13 Cal.3d 898, 929.

Finally, the Marine Mammal Protection Act of 1972, 16 U.S.C. section 1361 et seq, (MMPA), does not preempt the amended trust terms. The MMPA does not preempt the state legislature's grant of public trust tidelands to the City for possible use as marine mammal park. There is no federal preemption because the amended statutory trust grant (SB 428) is not inconsistent with the MMPA. It does not declare Children's pool Beach to be a marine preserve. It simply lists the permissible uses for the beach, just as the statute had before the Legislature amended it. See **State v. Arnariak** (Alaska 1997) 941 P.2d 154, 157-158 (State's designation of an island as a walrus sanctuary was not pre-empted by the MMPA).