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MARCH 26, 2010

REPORT TO THE NATURAL RESOURCES
AND CULTURE COMMITTEE

ANALYSIS OF OPTIONS FOR MANAGEMENT OF THE LA JOLLA CHILDREN'S POOL
AND RELATED ISSUES

INTRODUCTION

This Report is in response to questions to our Office generated by members of the Natural Resources and Culture Committee [NR&C Committee]. The members of the NR&C Committee have posed various questions to this Office regarding potential changes to the current management of the La Jolla Children's Pool [Children's Pool]; a joint use beach with the placement of a guide rope during harbor seal pupping season. The various requests for analysis have been reorganized and in some cases combined to allow for a more organized presentation.

The Options presented for changing the current status are:

Option 1: Prohibit the Public from Crossing the Rope during Pupping Season

Option 2: Prohibit the Public from Entering the Beach during Pupping Season

Option 3: Close the Beach at Night

Option 4: Prohibit Dogs on Children's Pool Beach at All Times

Option 5: Close the Pool Year Around

Councilmembers requested information regarding the process to accomplish these Options, the effect any of these Options would have on the jurisdiction of state and federal agencies, as well as any potential liabilities the City may face should any of the Options be pursued. Questions were posed regarding the ability to impose fines and the duty to post rules.

Clarification of various terms used in the discussions regarding the Children's Pool was requested, as well as analysis of the City's ability to operate a concession at the Children's Pool to sell merchandise. Finally, we were asked to opine on how the City could cede the trust lands back to the State of California for the administration and management of the 1931 trust.

DISCUSSION QUESTIONS

1. Does the City have any legal ability to implement Options 1- 5? What ordinances or permits would be needed to implement the Options?
2. In order to pass the required ordinances or seek the required permits, what findings have to be made by the City Council?
3. Would any of the Options require an approval process from any additional governmental entities? Specifically, would the City have to seek a new permit from the Coastal Commission?
4. Some have argued that, to limit public access to the beach in any way, the City Council might have to make a determination to change the use of the Children's Pool from "shared use" to "marine mammal use." Would such a determination trigger an entire set of additional regulations from National Marine Fisheries Service or other governmental entity? Additionally, would implementing any of the Options result in bringing the Children's Pool under any additional regulations or legal requirements of the federal or state government?
5. What rules would be posted?
6. What City fines could or should be levied in case of violations?
7. Are there any other legal risks or challenges faced by the City with respect to pursuing these Options?
8. What approximate timeline would be needed to implement these Options?
9. What are the boundaries of the Children's Pool beach?
10. What is the definition of a "marine mammal park" as it appears in Senate Bill 428, which became law on January 1, 2010?
11. Would declaring seal watching the preferred use at the Children's Pool require a change to the State Tidelands Trust [Trust]? What does the term "preferred use" mean?
12. Could the City operate a concession at the Children's Pool to sell merchandise?
13. Could the City take action to cede the Children's Pool to the State of California for the administration and management of the 1931 Trust?

SHORT ANSWERS

1. Yes. Various future discretionary approvals, as described in more detail below, would be necessary.
2. An ordinance enacted pursuant to the City's police powers would have to be rationally related to a legitimate government purpose, and the findings required by the Coastal Act and San Diego Municipal Code [SDMC] must be made, as described in more detail below.
3. All of the Options changing the current status would be subject to California Coastal Commission [CCC] approval.
4. A change in the Trust use would neither confer new jurisdiction on a separate, sovereign entity, nor would it remove existing jurisdiction.
5. None of the Options creates a duty to post rules.
6. As described in more detail below, the fines levied by the City for violations of the SDMC are pursuant to existing SDMC sections.
7. A question regarding potential liabilities cannot be answered in absolutes.
8. This question is not within the purview of the Office of the City Attorney.
9. The tideland boundaries are established by the Trust; however, the City may create a definition for the area it wishes to regulate. Any City regulations may not conflict with the Trust purposes.
10. "Marine mammal park" is not a defined term in California Senate Bill 428 (2009-2010 Reg. Sess.); however, the intent of the bill was to allow the City of San Diego to decide whether the seals could continue to use the Trust lands.
11. The terms of the Trust, as amended, allow the use of the Trust lands for a "marine mammal park for the enjoyment and educational benefit of children." Seal watching would be encompassed within that use. "Preferred use" is not a term used in the Trust and has no special meaning.
12. The City may operate a concession on Trust lands, if the use does not conflict with the trust. The City may operate a concession on non-Trust lands near the Children's Pool, assuming certain use and permitting requirements are met.
13. Yes. The City could cede the Trust lands to the State via a quit claim deed. Alternatively, the state could repeal the grant of tidelands to the City.

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BACKGROUND¹

In 1931, the State of California granted the Children's Pool area tidelands to the City of San Diego upon certain trust conditions; "[t]hat said lands shall 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;" as well as "[t]he 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." Cal. Stats. 1931, ch. 937.

On September 14, 2004, the City Council voted to direct staff to implement a joint use policy at the Children's Pool. *See* San Diego Resolution R-299646 (September 14, 2004).

In April 2006 and December 2006, the City Council passed resolutions directing that a rope barrier be placed at the Children's Pool during pupping season.² *See* San Diego Resolution R-301368 (April 18, 2006); and R-302160 (December 5, 2006). A rope barrier was installed, as authorized by an emergency Coastal Development Permit [CDP]. In each subsequent year, a rope barrier has also been installed for at least a portion of pupping season, as authorized by an emergency CDP.

On September 22, 2009, staff brought forward a Site Development Permit [SDP], CDP, and Environmental Impact Report [EIR] for the removal of approximately 3000 cubic yards of sand from the Children's Pool, which would have allowed the pool water to circulate, thereby reaching decontamination levels that would allow human use of the beach. The City Council voted not to certify the EIR. *See* San Diego Resolution R-305275 (September 22, 2009).

On December 2, 2009, the City Hearing Officer approved a CDP for an annual placement of the rope barrier during pupping season, December 15 to May 15. This permit was appealed to the Planning Commission and the CCC; the appeal was denied by both bodies.

Effective January 1, 2010, the Trust was amended to list an additional use of the tidelands: a "marine mammal park for the enjoyment and educational benefit of children." California Senate Bill 428 (2009-2010 Reg. Sess.).

¹ The following background summarizes the actions by the state of California and the City of San Diego. It does not summarize the various legal challenges that have occurred regarding the use of the Children's Pool.

² In 2006, pupping season was considered to be from January 1- May 1; in 2007, it was extended to December 15- May 15 to provide more protection for the pregnant and nursing seals.

ANALYSIS

I. DOES THE CITY HAVE ANY LEGAL ABILITY TO IMPLEMENT OPTIONS 1- 5? WHAT ORDINANCES OR PERMITS WOULD BE NEEDED TO IMPLEMENT THE OPTIONS?

The City may implement Options 1, 2, 3, 4, or 5, or in some cases, may decide to implement more than one Option. For example, Option 1 (closure of the beach during pupping season) and Option 4 (prohibiting dogs on the beach) are not mutually exclusive. There are several discretionary approvals necessary, however, to implement any of these Options.

An ordinance amending the SDMC could be passed by the City Council which codifies Options 1, 2, 3, 4, or 5. Environmental review of the proposed ordinance would be necessary. SDMC § 128.0202(a). In addition, to comply with the Coastal Act, the ordinance would need to be processed as either a CDP or a Local Coastal Program [LCP] amendment. Even if the ordinance was processed as a CDP, however, the La Jolla Community Plan would also need to be amended, requiring a LCP amendment. The CDP would be subject to an appeal to the CCC. A LCP amendment would require the approval of the CCC.

Some examples of beach closures or other restrictions on public access that have been deemed by the CCC to require a CDP are as follows: City of Coronado ordinance creating a curfew at a coastal beach from 11:00 p.m. – 5:00 a.m. daily due to crime in the area; City of Laguna Beach ordinance closing all city beaches and parks to public use between 1:00 a.m. – 5:00 a.m.; and the City of Half Moon Bay permit only nighttime parking.

II. IN ORDER TO PASS THE REQUIRED ORDINANCES OR SEEK THE REQUIRED PERMITS, WHAT FINDINGS HAVE TO BE MADE BY THE CITY COUNCIL?

The City may make and enforce "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. XI, § 7; *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993). A police power regulation will be upheld as reasonable if the requirements of the law are reasonably related to a legitimate governmental purpose. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129 (1976). Therefore, enactment of an ordinance prohibiting access to the Children's Pool need only be reasonably related to a legitimate governmental purpose.

However, because the ordinance would be effective in the Coastal Zone, the City must also comply with the Coastal Act. This would require processing the ordinance as either a CDP or an LCP amendment.³

A. Processing the Ordinance as a CDP

The Coastal Act defines "development" very broadly:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; *change in the density or intensity of use of land*, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; *change in the intensity of use of water, or of access thereto*; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

³ Although there has not been a proposal made to date to install a gate or fencing, any city public works project, such as the installation of a gate at the stairs or side road, on *environmentally sensitive lands*, defined in the SDMC as "land containing *steep hillsides, sensitive biological resources, coastal [sic] beaches, sensitive coastal [sic] bluffs*, or *Special Flood Hazard Areas*, requires the processing of an SDP in addition to a CDP or LCP amendment. SDMC §§ 113.0103; 126.0502(a)(1). The findings required for a SDP are: (1) The proposed *development* will not adversely affect the applicable *land use plan*; (2) The proposed *development* will not be detrimental to the public health, safety, and welfare; and (3) The proposed *development* will comply with the applicable regulations of the Land Development Code. SDMC § 126.0504(a). In addition, the following supplemental findings would need to be made: (1) The site is physically suitable for the design and siting of the proposed *development* and the *development* will result in minimum disturbance to *environmentally sensitive lands*; (2) The proposed *development* will minimize the alteration of natural land forms and will not result in undue risk from geologic and erosional forces, *flood hazards*, or fire hazards; (3) The proposed *development* will be sited and designed to prevent adverse impacts on any adjacent *environmentally sensitive lands*; (4) The proposed *development* will be consistent with the City of San Diego's Multiple Species Conservation Program (MSCP) Subarea Plan; (5) The proposed *development* will not contribute to the erosion of public beaches or adversely impact local shoreline sand supply; and (6) The nature and extent of mitigation required as a condition of the permit is reasonably related to, and calculated to alleviate, negative impacts created by the proposed *development*. SDMC § 126.0504(b).

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

Cal. Pub. Res. Code § 30106 (emphasis added).

The Coastal Act includes changes in the density or intensity of use of land and changes in the intensity of use of water of access thereto in the definition of "development." Therefore, changes in use of the Children's Pool may require the issuance of a CDP.⁴ The SDMC sets forth the CDP findings as follows:

1. The proposed *coastal development* will not encroach upon any existing physical accessway that is legally used by the public or any proposed public accessway identified in a *Local Coastal Program land use plan*; and the proposed *coastal development* will enhance and protect public views to and along the ocean and other scenic coastal areas as specified in the *Local Coastal Program land use plan*;
2. The proposed *coastal development* will not adversely affect *environmentally sensitive lands*; and
3. The proposed *coastal development* is in conformity with the certified *Local Coastal Program land use plan* and complies with all regulations of the certified Implementation Program.
4. For every Coastal Development Permit issued for any *coastal development* between the nearest public road and the sea or the shoreline of any body of water located within the Coastal Overlay Zone the *coastal development* is in conformity with the public access and public recreation policies of Chapter 3 of the California Coastal Act.

SDMC §126.0708(a)(1)-(4).

⁴ Although a Coastal Development Permit would usually be a Process 3 decision, with any appeal of the permit heard by the Planning Commission and any appeal of the environmental decision heard by the Council, the SDMC requires that approvals be consolidated and processed at the highest decision-making level. SDMC § 112.0103. Therefore, the ordinance, CDP/SDP or LCP amendment, and environmental document would be decided by the City Council.

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B. Processing the Ordinance as a Local Coastal Program Amendment

As an alternative to a CDP, the City may wish to process any ordinance as a Local Coastal Program amendment. The definition of a Local Coastal Program is also very broad: a Local Coastal Program [LCP] means "a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resource areas, other implementing actions, which, when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level." Cal. Pub. Res. Code § 30108.6. A land use plan "means the relevant portions of a local government's general plan, or local coastal element which are sufficiently detailed to indicate the kinds, location, and intensity of land uses, the applicable resource protection and development policies and, where necessary, a listing of implementing actions." Cal. Pub. Res. Code § 30108.5.

Implementing actions "means the ordinances, regulations, or programs which implement either the provisions of the certified local coastal program or the policies of this division and which are submitted pursuant to Section 30502." Cal. Pub. Res. Code § 30108.4. The passage of an ordinance restricting access to the coastal resources would come within the definition of an "implementing action"; therefore, the ordinance could be submitted as an LCP amendment instead of a CDP.

A LCP amendment would be necessary in any event because the La Jolla Community Plan [Community Plan] is the certified LCP for the area of the Children's Pool and the Community Plan identifies the Children's Pool as a point of public access. *See La Jolla Community Plan and Local Coastal Program Land Use Plan*; pgs. 30-31, 33, 39, 41, 51 and 170. Any change to the Community Plan would require a community plan amendment. SDMC § 122.0106(a).

The community plan amendment must be submitted to the CCC as a LCP amendment. Cal. Pub. Res. Code § 30514(a); SDMC § 122.0106(c). A LCP amendment will be evaluated for compliance with the requirements and policies of Chapter 3 of the Coastal Act; public access, recreation, marine environment, and land resources (sensitive habitat, agriculture, soils, timberland, archeology and paleontology). Cal. Pub. Res. Code § 30512(c).

III. WOULD ANY OF THE OPTIONS REQUIRE AN APPROVAL PROCESS FROM ANY ADDITIONAL GOVERNMENTAL ENTITIES? SPECIFICALLY, WOULD THE CITY HAVE TO SEEK A NEW PERMIT FROM THE COASTAL COMMISSION?

A CDP or an amendment of the current CDP would be subject to an appeal to the CCC. Cal. Pub. Res. Code § 30604. A LCP amendment would be subject to the CCC's approval. Cal. Pub. Res. Code § 30514(a). In addition, the State Lands Commission shall review and may comment on any proposed local coastal program that could affect state lands (including tidelands), prior to its certification by the CCC.

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IV. SOME HAVE ARGUED THAT, TO LIMIT PUBLIC ACCESS TO THE BEACH IN ANY WAY, THE CITY COUNCIL MIGHT HAVE TO MAKE A DETERMINATION TO CHANGE THE USE OF THE CHILDREN'S POOL FROM "SHARED USE" TO "MARINE MAMMAL USE." WOULD SUCH A DETERMINATION TRIGGER AN ENTIRE SET OF ADDITIONAL REGULATIONS FROM NATIONAL MARINE FISHERIES SERVICE OR OTHER GOVERNMENTAL ENTITY? ADDITIONALLY, WOULD IMPLEMENTING ANY OF THE OPTIONS RESULT IN BRINGING THE CHILDREN'S POOL UNDER ANY ADDITIONAL REGULATIONS OR LEGAL REQUIREMENTS OF THE FEDERAL OR STATE GOVERNMENT?

On September 14, 2004, City Council approved a policy of seasonal joint use. Any later actions by the City Council that are inconsistent with this policy would either implicitly repeal that resolution, or explicitly repeal that resolution.

The term "marine mammal use" is not defined in state or federal jurisprudence. Further, a decision by the City Council regarding the management of the Children's Pool does not remove jurisdiction from any governmental entity that already has jurisdiction in some manner, nor does it confer additional jurisdiction on any other governmental entity. For example, federal law is the supreme law of the land. 72 Am. Jur. 2d *States, Territories, and Dependencies* § 22 (2001). The National Marine Fisheries Service and the National Oceanic Atmospheric Administration derive their authority from the Commerce Clause of the United States Constitution. Therefore, the City is without authority to effect any change in the jurisdiction of these bodies. <http://www.nmfs.noaa.gov/aboutus.htm>. No additional rules or regulations would apply to the Children's Pool as a result of a designation for marine mammal use.

V. WHAT RULES WOULD BE POSTED?

There is not generally any legal requirement to post rules. Due process requires that statutes forbidding or requiring any act must be set forth in such terms that people of common intelligence do not need to guess at its meaning, or differ as to its application. 58 Cal. Jur. 3d *Statutes* § 21 (2004). Such a standard not only provides law-abiding citizens with the guidelines they need to follow, it also prevents enforcement on a subjective, ad-hoc basis. 14 Cal. Jur. 3d *Constitutional Law* § 326 (2004). This standard is true for civil as well as criminal statutes, although greater tolerance exists for statutes imposing only a civil penalty. 58 Cal. Jur. 3d *Statutes* § 21 (2004).⁵

There are signs posted at the Children's Pool warning that harassment of marine mammals is against the law, although no such signage is required by law. Photographs of the

⁵ The City of San Diego has some ordinances prohibiting conduct in violation of posted signs. SDMC section 63.20.13 prohibits acts contrary to the rules established for the use of the beach, but the rules must be conspicuously posted. In addition, section 63.0104 prohibits acts contrary to rules established for the golf course, but the rules must be posted in the clubhouse. These SDMC provisions relate to rules promulgated by the Park and Recreation Director, however, and do not pertain to ordinances passed by the City Council.

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signs are included in attachment 1. Signage of this nature was directed by City Council as part of the decision in 2004 to pursue joint use.

VI. WHAT CITY FINES COULD OR SHOULD BE LEVIED IN CASE OF VIOLATIONS?

This Office does not have a recommendation regarding what fines should be levied. A violation of the SDMC is a misdemeanor, unless otherwise stated. SDMC § 12.0201. Misdemeanors are punishable by a fine of up to \$1000 or by imprisonment for not more than six months in jail, or by both fine and imprisonment.⁶ *Id.* The prosecution may reduce the violation to an infraction, in which case the fine may not exceed \$250 for the first conviction and \$500 for the second conviction or any subsequent conviction within a period of one year.⁷ *Id.* The penalty for violation of an ordinance must be reasonable. *In re Cheney*, 90 Cal. 617 (1891). A municipality may "pass ordinances covering similar offenses and provide for greater punishment than a statute if the offense is not *precisely* the same offense covered by the statute." *Ex parte Borah*, 92 Cal. App. 2d 826, 829 (1949). Keeping these principals in mind, the City may create a separate fine for a violation of an ordinance restricting access to the Children's Pool.

VII. ARE THERE ANY OTHER LEGAL RISKS OR CHALLENGES FACED BY THE CITY WITH RESPECT TO PURSUING THESE OPTIONS?

It is impossible to determine with certainty what legal challenges may be raised with respect to any particular course of action the City may take.

VIII. WHAT APPROXIMATE TIMELINE WOULD BE NEEDED TO IMPLEMENT THE OPTIONS?

This question cannot be answered by the Office of the City Attorney. The time needed to process SDMC amendments, discretionary permits, and community plan amendments by City and Coastal Commission staff depends on variables such as the completeness of the application and the workload of the staff.

IX. WHAT ARE THE BOUNDARIES OF THE CHILDREN'S POOL BEACH?

The legal description in the tidelands trust reads as follows:

Beginning at the intersection of the ordinary high water mark of the Pacific Ocean with a line bearing S. 87° 40' W. from the monument marking the intersection of Coast Boulevard South with Jenner Street as said monument, said Coast Boulevard South, and said Jenner Street are designated and shown on that certain map entitled "Seaside subdivision number 1712" and filed June 23,

⁶ This is consistent with the penalties for a misdemeanor violation of state law. Cal. Penal Code § 19.

⁷ There is a maximum fine of \$250 for an infraction violation of state law. Cal. Penal Code § 19.8.

1920, in the office of the county recorder of San Diego County, State of California; thence N. 350', thence E. 300', thence S. 185' more or less to the ordinary high water mark of the Pacific Ocean, thence in a general southwesterly direction along the ordinary high water mark of the Pacific Ocean to the point of beginning, all in the Pacific Ocean, State of California

Cal. Stats. 2009, ch.19 (SB 428).

An aerial photograph with the survey of this legal description is provided as Attachment 2. The City is not bound to this legal description, however, in creating an ordinance regulating use of the beach. As discussed in Section V above, an ordinance must contain sufficient detail such that people of common intelligence need not guess at its meaning. The City is, however, prohibited from allowing uses within the trustlands that violate the Trust. *City of Long Beach v. Morse*, 31 Cal. 2d 254 (1947).

"Beach" itself is defined at least twice already in the SDMC: section 56.54 defines beach as "the sand or land area bordering the water of an ocean or bay," and section 113.0103 defines coastal beach as "the land between the edge of the sea and the first line of terrestrial vegetation or *development* or the toe of an adjacent *sensitive coastal bluff* or seawall, whichever is most seaward." Without some concept of the legislative purpose for which this definition is to be used, a dictionary definition must suffice. To determine the usual, ordinary meaning of words, the courts commonly look to dictionaries. *Arocho v. California Fair Plan Insurance Company*, 134 Cal. App. 4th 461 (2006). Webster's Dictionary provides one definition of "beach" as "an expanse of sand or pebbles along a shore." Webster's Encyclopedic Unabridged Dictionary 180 (1996). Any definition drafted for the Children's Pool beach must take into account the objective of the ordinance for which it is created and provide sufficient clarity to allow for both compliance and enforcement.

X. WHAT IS THE DEFINITION OF A "MARINE MAMMAL PARK" AS IT APPEARS IN SENATE BILL 428, WHICH BECAME LAW ON JANUARY 1, 2010?

The term "marine mammal park" is not defined in California Senate Bill 428. The goal of statutory construction is to give effect to the purpose of the law, as well as the evil to be averted. 58 Cal. Jur. 3d, *Statutes*, §§ 110; 112 (2009). When statutory language is ambiguous, extrinsic aids such as the historical background and objective may be used. *Id.* 58 Cal. Jur. 3d *Statutes* § 118 (2009). The background of the passage of the Senate Bill was the "untenable position" the City was in at the time; a state court order to dredge the beach so that it could be returned to use as a children's pool and a federal court order enjoining the City from removing the seals. The "evil to be averted" was the City being in a position of conflicting court orders. An interpretation that would allow the City to leave the seals at the pool would avoid a new potential claim that the City was violating the Marine Mammal Protection Act. Based on a review of the reports to the various state legislative committees considering the bill, the intent was to allow the City, and not

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the courts, to determine whether the seals would stay at Children's Pool Beach. The bill analysis for the Senate Committee on Natural Resources and Water, dated April 14, 2009, states "[t]his bill would allow San Diego, as trustee, to determine which activities would be allowed at the Children's Pool." The analysis also states that the bill does not "require the removal of the seals; it does not require the restoration, dredging, or continuance of the Children's Pool, pool restoration, or any other any activity by the San Diego City Council." The Bill simply allows the City to determine its future course of action regarding the use of the Children's Pool.

XI. WOULD DECLARING SEAL WATCHING THE PREFERRED USE AT THE CHILDREN'S POOL REQUIRE A CHANGE TO THE STATE TRUST? WHAT DOES THE TERM "PREFERRED USE" MEAN?

There is no requirement to state a preference among the stated permissible uses of the trust lands. In fact, the uses of the trust lands may be changed, so long as the uses are consistent with the trust. "Ordinarily, a public trustee's decision that trust land shall be used for a specific purpose, such as the dedication of such land as a street, stands only until the trustee decides to reallocate the land to some other public purpose or to dispose of it if that is congenial to the interests protected by the trust." *Zack's, Inc. v. City of Sausalito*, 165 Cal. App. 4th 1163, 1182 (2008). As discussed above, allowing the trust land to be used for watching seals seems encompassed within the amendment to the trust language: a "marine mammal park for the enjoyment and educational benefit of children." The term "preferred use" has no defined meaning. As discussed above, to determine the usual, ordinary meaning of words, courts will look to a dictionary. "Preferred" means "[p]ossessing or accorded a priority or a privilege." Black's Law Dictionary 1298 (9th ed. 2009).

XII. COULD THE CITY OPERATE A CONCESSION AT THE CHILDREN'S POOL TO SELL MERCHANDISE?

The operation of a concession in the trust land is not explicitly authorized by the Trust. However, a use may be implied by the trust, as long as the use is in furtherance of a state trust use. *Zack's, Inc. v. City of Sausalito*, 165 Cal. App. 4th 1163 (2008). Given the boundaries of the Trust, it is more likely that any concession would occur near, but not specifically on, the Trust lands.

Should the City wish to consider the operation of a concession near Children's Pool, but not actually within the Trust land, other restrictions would have to be evaluated. For example, on February 22, 2000, the Ellen Browning Scripps Park was dedicated as parkland pursuant to San Diego Charter section 55. *See* San Diego Ordinance O-18773 (Feb. 22, 2000). Therefore, any use of the park would have to be consistent with the restrictions of San Diego Charter section 55, and be only for park purposes. San Diego Charter § 55. Generally speaking, the courts have tended to uphold recreational and cultural uses that furthered the public's enjoyment of the park. 59 Am. Jur. 2d *Parks, Squares and Playgrounds* § 19 (2002). As discussed above, any development, as defined by the Coastal Act, would be subject to the processes described above for a CDP. In addition, a City public works project on environmentally sensitive lands

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would also require a SDP, and the project as whole would require environmental review. SDMC §§ 126.0504(a)(1); 128.0202.

XIII. COULD THE CITY TAKE ACTION TO CEDE THE CHILDREN'S POOL TO THE STATE OF CALIFORNIA FOR THE ADMINISTRATION AND MANAGEMENT OF THE 1931 STATE TIDELANDS TRUST?

The City could return the property to the State through a quitclaim deed. 3 Op. Cal. Att'y Gen. 343 (1944); *People of the State of California ex rel v. City of Long Beach*, 200 Cal. App. 2d 609 (1962). The State Lands Commission is vested with the jurisdiction and authority over tidelands. *Id.*; Cal. Pub. Res. Code § 6301. Authority to accept quitclaim deeds on behalf of the State is vested in the State Lands Commission, unless otherwise indicated. Cal. Pub. Res. Code § 6220. Alternatively, the State legislature could repeal the Trust. *Mallon v. City of Long Beach*, 44 Cal. 2d 199 (1955); *County of Orange v. V.A. Heim*, 30 Cal. App. 3d 694 (1973).

CONCLUSION

Several Options are available to the City, should the City Council decide to legislatively change the current use of the Children's Pool. Any change to the current use would be subject to further discretionary approvals and environmental review.

A change in the current use would not require the posting of any signs, nor would it confer or remove jurisdiction from any state or federal agency. Assuming compliance with San Diego Charter section 55, permitting, and environmental laws, the City could operate a concession near the Children's Pool trust lands to sell merchandise.

The term "marine mammal park" is not defined; however, the intent of the recent amendment to the Trust language was to allow the City of San Diego to decide the use of the Trust lands. The City may take actions to return the Trust to the State.

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By Shannon Thomas



THE CITY OF SAN DIEGO

PLEASE WATCH FROM A DISTANCE
AND AVOID DISTURBING THE SEALS.

HARASSMENT OF MARINE MAMMALS
IS AGAINST THE LAW.

WARNING! CONTACT WITH THIS
WATER MAY CAUSE SERIOUS ILLNESS.
BACTERIA LEVELS EXCEED HEALTH
STANDARDS.

AVISO! EL CONTACTO CON ESTA AGUA
PUEDE CAUSAR ENFERMEDADES.
LA CANTIDAD DE BACTERIAS EXCE-
DE LOS NIVELES DE SALUD.

THE BEACH IS OPEN FOR PUBLIC USE.
SWIMMING IS ALLOWED, BUT NOT
RECOMMENDED.

FOR MORE DETAILED INFORMATION CONTACT
COUNTY HEALTH DEPARTMENT AT (619) 451-1774
PARA MAS INFORMACION CONTACTA AL
DEPARTAMENTO DE SALUD PUBLICA AL (619) 451-1774

08.18.2008 10:15



WARNING!

MARINE MAMMALS
ARE PROTECTED
BY FEDERAL LAWS



PLEASE! Do NOT Disturb Marine Mammals.

**Observe Them From a Safe Distance and Keep Pets on a Leash.
Marine Mammals are Wild Animals and Can be Dangerous!**

It is Against the Law to Feed, Harass, Hunt, Capture, or Kill Marine Mammals. This Includes Any Act of Pursuit, Torment or Annoyance that has the Potential to Injure or Disturb a Marine Mammal. Violators are Subject to Civil and Criminal Penalties under The Marine Mammal Protection Act.



Report Violations to the NMFS Enforcement Hotline:

1-800-853-1964

08.18.2008 09:50

THE CITY OF SAN DIEGO



PUBLIC ACCESS ON THE BEACH IS ALLOWED
AT ALL TIMES.

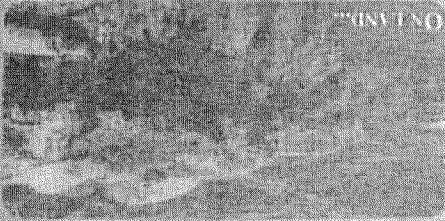
PLEASE BE RESPECTFUL OF THE SEALS ON THE BEACH.
HARASSMENT OF MARINE MAMMALS IS AGAINST THE
LAW. FOLLOW THE MARINE MAMMAL PROTECTION
GUIDELINES AS POSTED.

PLEASE NOTE: ANY SIGNS IN THIS AREA THAT DO
NOT HAVE AN OFFICIAL CITY OF SAN DIEGO SEAL
ARE NOT APPROVED NOR SANCTIONED BY THE CITY OF SAN DIEGO.

08.18.2008

11:10

HARBOR SEAL



ON LAND...

Seals move up and down like caterpillars. They rest or haul out on rocks and beaches. The seals in this area live here all year round.



WHAT DO THEY EAT?

Adult harbor seals eat mostly fishes and squids, while pups often catch bottom-dwelling crustaceans. They don't chew the food, they swallow it whole.



THIS IS A BABY SEAL.

It could be. Baby seals, called pups, are born from February through April. They weigh about 9 kg (20 lb.) and begin swimming only hours after birth.



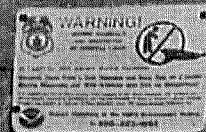
IN THE WATER...

Seals move their back flippers from side to side for swimming. They can stay below water for nearly 30 minutes. How long can you hold your breath?

YOU CAN BE A GOOD FRIEND TO THE SEALS.

Stay quiet. And make sure seals are safe. Stay quiet. And make sure seals are safe. Stay quiet. And make sure seals are safe.

PLEASE BE RESPECTFUL OF THE SEALS ON THE BEACH. HARASSMENT OF MARINE MAMMALS IS AGAINST THE LAW. FOLLOW THE MARINE MAMMAL PROTECTION GUIDELINES AS POSTED.



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08.18.2008 11:23

