Case Nos. G053709/G053725

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 and CALIFORNIA COASTAL COMMISSION
Defendants and Appellants

APPEAL FROM THE ORANGE COUNTY SUPERIOR COURT
HON. FREDERICK HORN, JUDGE
CASE NO. 30-2015-00778153-CU-WM-CJC

APPELLANT CITY OF SAN DIEGO'S OPENING BRIEF

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I.

STATEMENT OF THE CASE

This appeal arises from a challenge to the City of San Diego's (City) approval of an amendment to its municipal code and Local Coastal Program restricting access to a City-owned beach in La Jolla during the five-month long pupping season of the harbor seals who haul out on that beach. The issue is whether the Marine Mammal Protection Act (16 U.S.C.A. §§ 1361 et seq.) preempts the City's ability to regulate and manage its own beaches and City-owned parkland.

The City Council approved the amendment to the municipal code, the amendment to the LCP and adopted a Negative Declaration on March 18, 2014, after numerous public hearings. (1 AR 000004.) Subsequently, on August 12, 2014, after further public hearings, the California Coastal Commission (Commission) unanimously approved the LCP amendment. (8 AR 001841.)

Petitioner Friends of the Children's Pool (FOCP) filed a petition for writ of mandate on October 10, 2014, in the San Diego Superior Court alleging violations of the Coastal Act. (AA 11.) FOCP filed an amended petition on December 1, 2014, adding a claim that the Marine Mammal Protection Act (MMPA) preempted the City's beach access restriction approvals. After the City and the Commission answered, FOCP requested that the case be transferred to Orange County Superior Court pursuant to the Coastal Act which allows any party to change venue to a neutral county upon request. (Pub. Res. Code § 30806, AA 173.) The Orange County Superior Court accepted the case transfer on March 18, 2015. (AA 181.)

After briefing and a hearing on the petition, the Orange County Superior Court entered a judgment granting the petition for writ of mandate on June 15, 2016. (AA 568.) The City appealed the judgment on June 27,

2016, and the Commission separately appealed the judgment on June 29, 2016. (AA 612, 618.) This Court consolidated the two appeals. (AA 652.)

II.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of the Orange County Superior Court and is authorized by Code of Civil Procedure, section 904.1, subdivision (a)(1).

III.

STATEMENT OF RELEVANT FACTS

A. The History of Children's Pool Beach.

The Children's Pool Beach is located in the coastal-oriented neighborhood of La Jolla within the City of San Diego (City). (8 AR 001847.) The .07 acre artificial pocket beach is semi-enclosed by a breakwater wall constructed in 1931 and is accessed through stairs on the beach side. (1 AR 000036, 8 AR 001849.) Since the completion of the breakwater, the public has used the Children's Pool Beach for sunbathing, swimming, fishing and diving. (8 AR 001853.) The Children's Pool Beach is surrounded by numerous other beaches also providing public access to the Pacific Ocean. (8 AR 001847.)

Although there is evidence that shows that harbor seals have used the Children's Pool Beach area since before the construction of the breakwater in 1931, the harbor seals began hauling out in greater numbers in the early 1990's. (8 AR 001853.) Haul out sites are essential to harbor seal functions of sleeping, resting, thermal regulation, skin maintenance and molting, social interactions within the herd, predator evasion, giving birth, and nursing and weaning pups. (8 AR 001859.) For harbor seals, the most critical time for protection from disturbance and harassment is during the last few months of pregnancy and while the seal pups are being nursed and weaned. (21 AR 005666.) When human interactions disturb the seals, they

flush back to the water negating the benefits of their haul out location. (1 AR 000080.) Flushing during pupping season is particularly problematic because the young pups may not be bonded enough with their mother to allow them to recognize each other again if they become separated during a flushing event. (1 AR 000083.) Indeed, there have been documented incidents where flushing caused premature births or loss of the pregnancy in pregnant seals. (1 AR 000083.) Moreover, when newborn pups are on the beach during a flushing incident, they can be trampled by stampeding adult seals. (Id.)

The seal rookery and haul out site at Children's Pool Beach is unique due to its location in an urban setting that is easily accessible to the public. (8 AR 001858.) This easy access has, unfortunately, resulted in disturbance and harassment of the hauled out seals whether through intentional conduct or ignorance. (8 AR 001858.) Those who favored a mutually beneficial joint use of the Children's Pool Beach documented hundreds of incidents in which beach goers either accidently or intentionally caused the seals to flush by getting too close to them. (10 AR 002290-14 AR 3744.)

With the increased use of the Children's Pool Beach as a haul out location, the competing public policies of protecting the seals' natural habitat and protecting the public's right to access has created conflicts. (8 AR 001853.) The City has been trying to develop and implement a shared use policy to address the competing uses for many years. (8 AR 001853.) The City's efforts to implement its shared use policy has been plagued with litigation throughout.

B. Regulation and Management of Children's Pool Beach.

In 1931, the State Legislature delegated its authority to manage and control public use of the Children's Pool Beach to the City. (The 1931 Tidelands Trust, Stats. 1931, Ch. 937.) (16 AR 004077.) The State

Legislature amended the Trust in 2010 allowing Children's Pool Beach to be used as a marine mammal park in addition to those uses set forth in the original grant. (1 AR 000008.) The National Marine Fisheries Service (NMFS), the agency charged with implementing and enforcing the Marine Mammal Protection Act (MMPA), supported the Trust amendment and interpreted the Trust amendment to provide the City with "greater latitude in implementing management actions regarding the harbor seal colony" at Children's Pool Beach. (1 AR 000083, 21 AR 005665.) The NMFS considers Children's Pool Beach to be a year-round haul out site and rookery. (1 AR 000084.)

The Commission certified the City's Local Coastal Program (LCP) in 1988 allowing the City to assume permit authority for most of its coastal zone. (8 AR 001847.) The La Jolla Community Plan/Local Coastal Program is contained within the City's certified LCP. (8 AR 001847.) The La Jolla-La Jolla Shores Land Use Plan (LUP) is one of 12 approved segments within the LCP. (8 AR 001847.) Children's Pool Beach is designated as "Parks, Open Space" in the certified LUP. (8 AR 001856.)

The Coastal Act requires the Commission to certify a LUP amendment if it meets the requirements set forth in Chapter 3 of the Coastal Act. (8 AR 001848.) Section 30214 of the Coastal Act expressly mandates that the public access policies articulated in the Coastal Act be implemented in a manner that takes into account the need to regulate the time, manner and place of the public access taking into account the facts and circumstances in each case. The Coastal Act requires decision-makers to evaluate the appropriateness of limiting public access where there are fragile natural resources in the area. (8 AR 001851.) The Coastal Act further requires that marine resources be maintained and enhanced where feasible with the goal of maintaining healthy populations of all marine species. (Pub. Res. Code § 30230; 8 AR 001852.)

Other government agencies throughout California have provided for the protection of marine mammal rookeries using their Local Coastal Programs with approval from the Commission. (1 AR 000076.) The Commission has approved restrictions to access to haul out sites in many other instances throughout California. Of the 85 rookeries that the National Oceanic and Atmospheric Administration (NOAA) (the umbrella agency for the NMFS) has mapped, all but two (including Children's Pool Beach) have access restrictions. (1 AR 000041.) For example, the City of Carpinteria amended its municipal code to close a haul out beach during pupping season. (8 AR 001857.) Similarly, the City of Solana Beach, just north of La Jolla, amended its Land Use Plan to restrict access to a haul out location. (8 AR 001862.) The same is true of Santa Barbara and Monterey County where the Commission restricted public access at haul out sites. (8 AR 001862-63.) In fact, several years ago, the Commission restricted access to Seal Rock in San Diego which is 500 feet northeast of Children's Pool Beach. (8 AR 001857.)

The Coastal Act acknowledges that the goal of public access is subordinate to protecting fragile resources. (1 AR 000041.) The Commission recognizes seal rookeries as fragile coasts resources which justifies seasonal restrictions on access. (1 AR 000040.) The Commission has supported and implemented access restrictions numerous times in the past where there were ongoing acts of MMPA-defined acts of harassment. (1 AR 000043-44.) The Commission noted that it does not regulate the taking of marine mammals but uses the statutory framework provided in the MMPA to evaluate whether a proposed development is consistent with the Coastal Act. (1 AR 000044.)

C. The City Implements Its Shared Use Policy.

After years of trying to mediate between the two vocal factions regarding the use of the Children's Pool Beach, the City in 2010 adopted a

Seasonal Shared Use Policy which contained five different components for implementation of the policy. (8 AR 1843-1868.) The Shared Use Policy 1) established a year-round rope barrier after acquiring a coastal development permit; 2) required clear signage to explain the rules to the public; 3) prohibited dogs on the beach year-round; 4) directed staff to acquire funding to retain a full-time park ranger or lifeguard; and 5) directed City staff to amend the Local Coastal Program to prohibit public access to the beach during pupping season. (8 AR 001855; 15 AR 004013.)

The City sought guidance on implementing its Shared Use Policy from the NMFS. (21 AR 005669.) The NMFS wrote to the City acknowledging that it had received numerous calls reporting violations of the MMPA at the Children's Pool Beach but "limited staffing create[d] a problem" to effective enforcement due to the significant investment of resources to investigate such complaints. (21 AR 005667-71.) Importantly, the NMFS fully supported the City's protective measures stating "NMFS supports prohibiting the public from entering the beach." (21 AR 005667.) Moreover, the NMFS noted that while the MMPA precludes State and local laws relating to the taking of marine mammals, the NMFS expressly acknowledged that "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." (21 AR 005667, emphasis added.) The NMFS also supported a year-round rope barrier and preclusion of dogs from the beach at all times. (21 AR 005666-67.) At no time has the NMFS asserted that the City could not enact land use regulations regarding the Children's Pool Beach and has, in fact, invited the City to do exactly that.

During the following subsequent years, the City implemented the first four of the adaptive beach management strategies set forth in its Shared Use Policy in the hopes of providing opportunities for everyone to

benefit from the beach including those who favored keeping the seals and those who did not. Unfortunately, the implementation of the first four protective measures did not eliminate the conflict or alleviate the intentional and/or ignorant harassment of the seals.

D. The City Implements the Fifth Component of its Shared Use Policy.

Although the City had worked very hard to implement a Shared Use Policy that would both protect the seals and allow public access, unfortunately, harassment and disturbance of the seals continued. (1 AR 000108, 8 AR 1855-61.) Indeed, a "seal cam" that had been installed to allow remote viewing of the seals captured numerous incidents of harassment and disturbance including, intentionally harmful conduct. (8 AR 001855-56.) There were numerous documented instances of continued harassment of the seals which then prompted the City to acquire a temporary emergency Coastal Development Permit from the Coastal Commission which closed the beach at night during the pupping season. (8 AR 001855-56.) That emergency permit expired in May 2013. (8 AR 001856.)

Even with the implementation of four of the components of the Shared Use Policy and the emergency prohibition on nighttime access to the beach, incidents of harassment continued to occur and, therefore, the City determined it was necessary to implement the fifth protective measure outlined in the previously adopted Shared Use Policy which was to close the entire beach during the pupping season. (1 AR 000037.) The LCP amendment that is the subject of this litigation is the fifth component of the protective measures set forth in the City's previously adopted Shared Use Policy.

After numerous public hearings, on March 18, 2014, the City adopted Ordinance 20360 amending the City of San Diego Municipal Code

section 63.0102, *Use of Public Parks and Beaches Regulated* (Ordinance), to prohibit public access to the Children's Pool beach during harbor seal pupping season from December 15 to May 15. (1 AR 000011-14.) The City Council also approved an amendment to the LCP restricting beach access during pupping season. (1 AR 000015-17.) The City expressly conditioned implementation of the Ordinance and the LCP amendment on Coastal Commission certification. (1 AR 000015-17.) During the administrative process, the City received hundreds of comments letters from both proponents of closing the beach and those who wished it to remain open. (See, generally, AR Volumes 2-4.) The City also heard again from the NMFS expressing its opinion that the ideal was a shared use policy that resulted in compliance with the MMPA (e.g. no harassment of the seals) and diminished human conflict. (1 AR 000115.) The NMFS did not, however, in any way claim that the MMPA precluded the City from taking its proposed action but merely posited that closure was not the only way to go even though it acknowledged that the City's efforts to date had not been successful. (1 AR 000103-106, 1 AR 000115.)

On April 28, 2014, the City submitted a proposed Local Coastal Program amendment to the Commission to revise the public access and marine resource protection policies contained in the LCP. (1 AR 000003.) While the City proposed closing the beach area entirely during the five-month pupping season, the adjacent breakwater remained open and accessible year-round. (1 AR 000003.)

After a further public hearings, on August 12, 2014, the Commission unanimously approved the LCP amendment. (8 AR 001841.) The City implemented the beach closure pursuant to its Ordinance beginning December 15, 2015 through May 15, 2016. (Id.)

E. FOCP Challenges the City's Land Use Decision.

FOCP filed a petition for writ of mandate in the San Diego Superior Court on October 10, 2014, alleging a single cause of action claiming that the City and the Coastal Commission were interfering with petitioner's right to access the beach during the pupping season. (AA 11.) FOCP amended its petition in December 2014 to assert a second cause of action solely against the City based on preemption but did not include the Commission as a defendant in that cause of action. (AA 41.) In essence, FOCP alleged that the MMPA pre-empted the City's ability to regulate its beach and adopt reasonable land use regulations. (Id. at ¶¶ 39-47.) Pursuant to Public Resources Code section 30806(a), FOCP opted to transfer the case to Orange County Superior Court. (AA 173.)

On January 8, 2016, FOCP filed its Memorandum in Support of Petition for Writ of Mandate (Memorandum) arguing that the MMPA preempted the City's Ordinance and Local Coastal Program amendment. (AA 226.) FOCP argued in its Memorandum that the MMPA "invalidates any state law that contradicts or interferes with an Act of Congress." (AA 235.) FOCP never argued that either the City or the Commission was required to utilize the federal Administrative Procedure Act (APA). (AA 227.)

The City and the Commission submitted briefs in opposition (AA 459, 480) and FOCP filed a reply brief (AA 503) debating the application of federal preemption. FOCP first raised the argument that the City and the Commission had to obtain Secretary of Commerce authorization to enact laws relating to the taking of the seals even while at the same time conceding that the City could enforce a beach closure for any other reason. (AA 507:14-16.)

The hearing on the writ took place on March 16, 2016. (AA 519.) The Orange County Superior Court, the Hon. Frederick Horn presiding,

issued a tentative ruling granting the petition for writ of mandate. (AA 523.) Utilizing an independent judgment standard of review, Judge Horn held that the City and/or the Coastal Commission was obligated to request that the Secretary of the National Oceanic and Atmospheric Administration (NOAA) transfer conservation and management authority of harbor seal herds to the state before it could enact any land use regulations on its own property. (AA 523-527.) Other than his conclusion that absent the Secretary's authorization to the City to manage the seal population in the state of California the MMPA preempted the City's Ordinance, Judge Horn did not otherwise provide any analysis on the preemption issues the parties debated in their briefs.

At the hearing on the petition, the attorney for the Coastal Commission expressly advised Judge Horn that he had applied the wrong standard of review in evaluating the merits of FOCP's petition. (RT 1:19-5:6.) The City and the Coastal Commission asserted that the more deferential substantial evidence standard of review applied and not the independent judgment standard of review. Judge Horn took the case under submission (RT 12:16-21.) Judge Horn issued a final Statement of Decision on May 3, 2016, granting the petition for writ of mandate without changing the standard of review he applied. (AA 532) In the Statement of Decision, Judge Horn again relied on the independent judgment standard of review that allowed him to "weigh the credibility of witnesses" and to "make [his] own findings" because he was "free to substitute [his] own findings" and could ignore the substantial evidence which supported the City and Commission's decisions. (AA 539-540.)

Judge Horn criticized appellants for not securing the NOAA Secretary's permission to "amend the Ordinance as to the 'taking' of harbor seals" and found that the "City and Commission's authority over the beach, the people allowed access to the beach and the harbor seals exists only if

the Secretary grants authority to City and the Commission to manage the property and, in this instance, protect the harbor seals." (AA 546.)

In addition, Judge Horn included findings relating to the federal Administrative Procedure Act that had never been alleged in any of the pleadings, had never been raised in any of the parties' briefs, and had not been discussed at the hearing on the writ. (AA 543-545.) Judge Horn noted that "citizens challenging actions done under the Marine Mammal Protection Act (MMPA) must sue under the Administrative Procedure Act [citations]." (AA 543.) Judge Horn found that neither the City nor the Commission "engaged in the federal administrative process under the APA mandated" by the MMPA. (AA 548.) The Statement of Decision does not discuss preemption issues at all.

The Orange County Superior Court entered judgment on the Amended Petition on June 15, 2016. (AA 568.) For reasons unknown, FOCP did not submit a proposed writ to require the City to set aside its Ordinance until December 7, 2016. (AA 765.) On that same date, FOCP also submitted an Amended Judgment to include the fees and costs the Orange County Superior Court awarded FOCP as the prevailing party under the private attorney general statute. (AA 743.) The Orange County Superior Court has not yet signed the proposed writ or the amended judgment as of the date of this Opening Brief.

The City timely appealed the Judgment on June 27, 2016. (AA 612.) The Commission timely appealed the Judgment on June 29, 2016. (AA 618.) This Court consolidated the two appeals. (AA 652.)

IV.

THE MARINE MAMMAL PROTECTION ACT DOES NOT PREEMPT THE CITY'S LAND USE ORDINANCE OR THE AMENDMENT TO THE LOCAL COASTAL PROGRAM BECAUSE THE LOCAL REGULATIONS DO NOT CONFLICT WITH THE FEDERAL ACT AND THUS PREEMPTION IS NOT IMPLICATED

A. STANDARD OF REVIEW

Preemption is almost always a legal question, the resolution of which is rarely aided by development of a more factual record. (*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n* (1983) 461 U.S. 190, 201. Questions of law are reviewed *de novo* but an agency's construction of the statutes it administers is given deference where agency expertise and other factors warrant. (*Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal. 4th 1.)

If the trial court erroneously used the independent judgment standard of review rather than the substantial evidence test, the appellate court need not remand the case back to the trial court but can instead apply the substantial evidence test to the agency's decision. (*Ogundare v. Dept. of Industrial Retention Div. of Labor Standards Enforcement* (2013) 214 Cal.App.4th 822, 829.)

The independent judgment standard of review only applies when the agency decision under challenge substantially affected a fundamental vested right. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143-144.) Courts rarely uphold the application of the independent judgment test to land use decisions. (*Goat Hill Tavern v. City of Costa Mesa* (4th Dist. Div. 3) (1992) 6 Cal.App.4th 1519, 1527.) If the decision does not substantially affect a fundamental vested right, the trial court considers only whether the findings are supported by substantial evidence in the light of the whole record.

(*Strumsky v. San Diego County Employees Retirement Assn.*, (1974) 11 Cal.3d 28, 32.)

Land use regulation in California historically has been a function of local government under the grant of police power contained in the California Constitution which provides, "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const. art. XI, § 7.) The United States Supreme Court confirms that the regulation of state lands is a traditional state function. (See *EEOC v. Wyoming* (1983) 460 U.S. 226, 239 ("The management of state parks is clearly a traditional state function.....") Importantly, the state has the right to exclude entry onto its property and the right to prohibit certain activities from being conducted thereon. (*United States v. 50 Acres of Land* (1984) 469 U.S. 24, 31.)

Here, there can be no doubt that the land use regulations at issue in this case constitutes the exercise of the City's traditional authority over its proprietary rights to state land. FOCP does not have any fundamental vested right to use the Children's Pool Beach year-round. They do not have a present, possessory interest in the beach at all. The City, on the other hand, has the right to exercise its traditional police power to enact any ordinance or regulation not in conflict with general laws including the right to manage City owned and controlled land. Indeed, FOCP conceded in its Memorandum filed in the trial court below that the City could enforce a beach closure for any reason other than further protecting the seals. (AA 507.)

The Orange County Superior Court erroneously applied the independent judgment standard of review in evaluating the merits of the petition for writ of mandate. (AA 539-540.) Judge Horn should have applied the substantial evidence standard of review and given greater deference to the City and Commission's decisions. Judge Horn's reliance

on *San Diego Unified School District v. Commission on Professional Competence* demonstrates the superior court's erroneous application of the independent judgment review. In that case, the petitioner sought a writ to compel the San Diego Unified School District to reinstate his employment as a teacher. (*San Diego Unified School District v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1140.) That case actually involved a fundamental vested right (e.g. employment) unlike here. It did not involve any land use regulations or ordinances which are traditionally state functions. Thus, that case is not at all applicable to the case at hand and does not support the use of the independent judgment standard of review.

The erroneous application of the independent judgment standard of review warrants reversal of the judgment and allows this Court to review the City and the Commission's decision using the correct substantial evidence test standard of review after making the legal determination that the MMPA does not preempt the local Ordinance and LCP amendment.

B. The MMPA Does Not Preempt the City's Seasonal Beach Closure Ordinance and LCP

The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law. (U.S. Const., art. VI, cl. 2; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516.) Numerous courts have articulated the general principle of preemption which is that state or local laws that conflict with a federal statute are without effect. (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949.) The starting place for any preemption analysis is the assumption that the historic police powers of the States are not to be superseded by the federal act unless that is the clear and manifest purpose of Congress. (*Id.*) Federal preemption can arise in the following circumstances: " 'First, Congress can define explicitly the extent

to which its enactments pre-empt state law.... Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.... Finally, state law is pre-empted to the extent that it actually conflicts with federal law,' " either because " 'it is impossible for a private party to comply with both state and federal requirements, [citation] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' [Citations.]" (*Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 923.) The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption. (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 956.) A finding that the MMPA preempts the City's municipal land use Ordinance and LCP amendment is not warranted under any of these scenarios.

1. The MMPA Does Not Expressly Preempt State and Local Land Use Regulations.

Congress enacted the Marine Mammal Protection Act in 1972. (16 U.S.C.A. §§ 1361 et seq.) Generally, the MMPA prohibits the "taking" of marine mammals. According to the provisions of the MMPA, "take" is defined as to "harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal." (See 16 U.S.C.A. § 1362(13).) The MMPA provides an extensive permitting scheme and provides for regulation by federal authorities (NOAA or Secretary of Commerce) related to the enforcement of the Act. The MMPA also expressly provides that states are prohibited from enforcing state laws related to the taking of marine mammals unless such authority has been transferred to a particular state pursuant to the provisions of the Act. (*Id.*) Specifically, 16 U.S.C.A. § 1379(a) states that: "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.A. § 1379(a).)

Congress enacted the MMPA to substitute a comprehensive federal system of marine mammal hunting laws in place of diverse, inconsistent state marine mammal hunting laws. (*People of Togiak v. United States* (D.D.C. 1979) 470 F.Supp. 423, 428 n.11, citing House Rept. No. 92-707 (Dec. 4, 1971), U.S. Code Cong. & Admin. News 1972, p. 4149.) Congress articulated its goal for the MMPA expressly stating, "efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammals from the adverse effect of man's actions." (16 U.S.C.A. § 1361(2), emphasis added.) The MMPA further states, "[t]he primary objective of the management of marine mammals should be to maintain the health and stability of the marine ecosystem." (*Id.*) Congress' express intention was to "allow development of a unified integrated system of management for the benefit of the animals and *to encourage the states to take all actions which are consistent with this objective*." (*Id.*, emphasis added.)

Express preemption arises when Congress "define[s] explicitly the extent to which its enactments pre-empt state law. (*English v. General Electric Co.* (1990) 496 U.S. 72, 78-79.) Pre-emption is a question of congressional intent and Congress must explicitly make its intention known because there can be no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it. (*Id.*)

Congress has not manifested in the MMPA in clear and definite language a desire to displace the State's ability to ban certain activities on its land. (*State v. Arnariak* (Alaska 1997) 941 P.2d 154, 158.) The legislative history of the MMPA supports this position. "It is not the intention of this Committee to foreclose effective state programs and

protective measures such as sanctuaries..." (H.R. Rep. No. 707, 92nd Cong., 1st Sess. 4161 (1971) reprinted in 1972 U.S.C.C.A.N. 4144, 4161.) The MMPA is devoid of any express language showing any intent to override the state's proprietary rights over its lands.

FOCP urges a broad preemptive intent in Congress' use of the word "relating to" in its preemption clause. But the challenged Ordinance in this case does not purport to manage the conservation or taking of the seals, it is a land use ordinance restricting access which FOCP concedes could be done for any other purpose. The court in *Arnariak* found that the "relating to" language was not definitive of Congress' intent to preempt state rights to control and manage its property.

> "However, this [the "relating to" language], at most, 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, or the discharge of firearms on, state wildlife refuges." (*State v. Arnariak* (Alaska 1997) 941 P.2d 154, 158.)

The preemption issue presented in this case is nearly identical to the preemption issue the Supreme Court of Alaska addressed in *Arnariak* wherein it held that the MMPA did not preempt state or local regulations regarding access to state or local property because Congress had not expressed any intent to preclude local governments from barring entry onto their property. (*Id.* at 156.) The Alaskan Supreme Court held that a conclusion that Congress intended the MMPA to preempt states from

enacting access regulations to its state-owned property was not warranted. (*Id.*)

Moreover, statutes should be construed in a manner which avoids a substantial risk of unconstitutionality. (*Concrete Pipe and Products, Inc. v. Construction Laborers Pension Trust* (1993) 508 U.S. 602, 627-30.) The Alaska Supreme Court in *Arnariak* found that the Fifth Amendment to the United States Constitution protects property, including state or local government owned property, from unconstitutional takings and if the MMPA were construed to mandate unfettered access to state owned property, that would render the MMPA provision unconstitutional. (*State v. Arnariak*, supra, at 157.) To hold otherwise would enlarge the scope of the MMPA by attributing an unjustified congressional intent to infringe on one of the essential attributes of land ownership: the right to exclude.

There is simply no indication that in enacting the MMPA, Congress intended to deny property owners the fundamental right to exclude or limit activities on their lands. Because federal preemption may only occur to the extent that the underlying federal statute is constitutional, it follows, then, that an unconstitutional construction cannot be the basis for federal preemption. Therefore, to construe the MMPA as requiring states to abdicate their proprietary rights for federal purposes amounts to an unconstitutional taking under the Fifth Amendment and cannot support FOCP's claim of express preemption.

The Alaskan Supreme Court also found another basis for concluding that the MMPA did not preempt the access restrictions enacted at the walrus sanctuary which is similarly applicable here. The presumption against finding federal preemption in areas traditionally regulated by the states. (*Id.* at 158.) After noting that the regulation of state lands and parks is a traditional state function, the court found that Congress has not manifested in the MMPA a clear and definite intent to prevent states from

regulating activities in state wildlife sanctuaries. (*Id.* at 158 citing *EEOC v. Wyoming* (1983) 460 U.S. 226, 239.)

Here, the challenged land-use Ordinance and LCP amendment are functions that states and local governments traditionally regulate. The Ordinance amended a provision of the municipal code found within the "Parks, Open Space" land use section. The Ordinance does not proscribe, enlarge or otherwise affect the regulations contained within the MMPA because the City is not trying to regulate or manage the seal population. The City is not trying to manage the seal herd in any way but instead is trying to manage the access that people have to the City-owned property which it is constitutionally entitled to do. The City is trying to regulate access to its property to preclude further conflict between competing public uses of the beach. As FOCP concedes, the City is not precluded from closing the beach for any other purpose. (AA 507:14-16.)

Indeed, the City noted that one of the reasons for the beach closure was for the protection of the public's safety when the seals try to nip and bite those persons coming to close to them. (8 AR 1859.) Certainly nothing in the MMPA precludes the City's ability to enact laws and regulations for the protection and public safety of its citizens. Similarly, another motivation of the beach closure was to cut down on the number of police and lifeguard calls that resulted from altercations between the pro-seal contingencies and the anti-seal contingencies. (8 AR 001843-46.) The Ordinance and LCP amendment do not "relate to" the taking of the seals in the way the MMPA has been implemented and applied. There is no case authority in which a court found that the MMPA preempted a land use regulation and, instead, as set forth in the *Arnariak* case, supra, the Alaskan Supreme Court found that the MMPA did NOT preempt land use regulations.

Importantly, the NMFS, the agency charged with enforcing and implementing the MMPA, advised and consulted with the City throughout the administrative process. (8 AR 001860.) At no time did the NMFS object to the land use regulation and, in fact, the Regional Administrator expressly told the City the MMPA did not preclude the City from enacting a beach closure ordinance even when it had the side benefit of further protecting a marine mammal. (1 AR 000081.) Even later when FOCP solicited a comment letter from an Assistant Regional Director, the NMFS did not object or otherwise claim that the MMPA preempted the City's proposed seasonal beach closure. (1 AR 000115.) Instead, the Assistant Regional Director acknowledged that NMFS guidance over the years had "not helped to diminish the human conflict that persists between various groups at Children's Pool Beach." (1 AR 000115.)

The Assistant Regional Director further advised the City that it "take steps to reduce the possibility of harassing marine mammals wherever they are encountered" even though the NMFS did not believe that a complete beach closure was warranted. (1 AR 000116.) While Rodney McInnis, the Regional Administrator, had been clear in his earlier letter to the City wherein he expressly said the City could enact beach closures without violating the MMPA, even the Assistant Regional Administrator did not say the MMPA preempted the City's regulations when he had the opportunity to do so. (1 AR 000081, 000116.)

Moreover, a conclusion that the MMPA preempts the City and the Commission's ability to enact access restrictions to state parks and land will result in significant chaos and uncertainty throughout the state because the Commission has approved numerous similar access restrictions throughout California. Of the 85 mapped rookeries (which were mapped by NOAA), only two of them prior to the enactment of the Ordinance involved in this litigation, did not have access restrictions. Other cities have regularly

restricted access to haul out sites without objection from the NMFS. (8 AR 001857, 001862-63.) If the MMPA did, in fact, preclude state and local governments from enacting access restrictions to state-owned property as FOCP argues, certainly the NMFS would have stated that clearly when it provided comments and guidance to the City. The fact that the NMFS, the agency charged with enforcing and implementing the MMPA, did not object to the City's Ordinance and LCP amendment is a clear indication that the MMPA does not preempt land use regulations.

2. Congress Did Not Intend to Occupy the Field of Land Use Regulation When it Enacted the MMPA.

The second way that preemption can occur is if Congress intended to completely occupy the field. Field preemption may occur when the federal scheme of regulation of a defined field is so pervasive that Congress must have intended to leave no room for the states to supplement it. (*City of Charleston, South Carolina v. A Fisherman's Best, Inc.* (4th Cir. 2002) 310 F.3d 155, 169.) In other words, preemption can be found when there is an implicit congressional intent to displace all state law. (*Bank of Am. v. City & County of San Francisco* (9th Cir. 2002) 309 F.3d 551, 558.) Where the field which Congress is said to have pre-empted includes areas that have been traditionally occupied by the States, congressional intent to supersede state laws must be clear and manifest. (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525.)

Land use regulations are traditionally a state function and Congress must evince a clear and unequivocal intent to occupy that field in order to preempt state laws regulating state parks and land. (*State v. Arnariak* (Alaska 1997) 941 P.2d 154, 158.) *Arnariak* addressed this specific issue finding that "Congress has not manifested in the MMPA clear and definite language a desire to displace the State's ability to ban certain activities in state wildlife sanctuaries." (*Id.*)

Moreover, as discussed above, the NMFS fully supported the City's protective measures and expressly acknowledged that "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." (21 AR 5667, 5671, emphasis added.) Indeed, there are numerous instances throughout the state of California wherein the Commission approved or certified land use regulations and Local Coastal Plans that restricted access to haul out sites. The NMFS's support of the beach access regulations and its advice that states and local governments can implement the types of regulations at issue in this case flies in the face of any conclusion that the MMPA was intended to occupy that field for preemption purposes.

The regulations at issue here have nothing to do with issuing permits for the authorized taking of marine mammals nor do the regulations relate to investigatory powers for violations of the MMPA which are the types of activities the MMPA regulates. FOCP cannot meet its burden of establishing field preemption.

3. The Beach Access Regulations Are Consistent with the MMPA.

The third way to find preemption is where a state or local law actually conflicts with the federal law. Conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. (*Hillsborough County v. Automated Medical Labs* (1985) 471 U.S. 707, 713.) Here, there is no conflict with the beach access regulations and the MMPA. As FOCP points out, the effect of the seasonal beach access restrictions is for the protection of the seals that use the Children's Pool Beach for a haul out. That is entirely consistent with the express purpose of the MMPA. FOCP does not identify any way in which the challenged regulation conflicts with the MMPA.

The challenged regulation is a land use regulation. The mere fact that the regulation has the effect of helping to protect marine mammals does not render that regulation invalid as being in conflict with the MMPA. In no way does the seasonal beach access restriction frustrate the goals and policies of the MMPA. The NMFS encouraged and supported the City's implementation of the protective measures in the City's Shared Use Policy which demonstrates that the regulation does not conflict with the MMPA or otherwise present an obstacle to the full implementation of the MMPA.

In fact, the NMFS welcomes consistent state regulation. When the NMFS proposed to amend regulations to a whale protection statute that was developed pursuant to the MMPA, it sought comments from the public. Several commenters argued that the proposed regulations would preempt state laws and opposed the new regulations on that basis. The NMFS responded, "Although the MMPA provides NMFS with authority to regulate in State waters, states can develop equally protective or more protective restrictions if they choose, and NMFS encourages such action." (Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 67 FR 1300-01.) This is consistent with the Regional Administrator's comments on the proposed Ordinance when he advised the City that "States and local governments are free to implement and enforce ordinances, such as the closure of a beach, which may have the side benefit of preventing the harassment of a marine mammal." (21 AR 005667, 005671.)

FOCP cannot overcome the presumption against preemption to establish that the MMPA preempts the City's land use regulation restricting access to the Children's Pool Beach under any of the above-discussed preemption principles. The City is not precluded from enacting land use ordinances for the protection and safety of its citizens or to reduce conflict between competing factions of people even when the side benefit of

enacting such an ordinance is to provide further protection to a marine mammal. Land use ordinances restricting access to haul out sites have been enacted throughout the state of California without the NMFS ever once stepping in to object. Indeed, NMFS encourages state and local governments to take steps to ensure compliance with the MMPA.

C. **The City Did Not Have to Participate in the Federal APA Process.**

The Orange County Superior Court erroneously concluded that the City and/or the Commission should have initiated a proceeding under the federal Administrative Procedure Act (APA). (AA 543-544.) Judge Horn confusingly states that "citizens challenging actions under the MMPA must sue under the APA." (AA 543.) Neither the City nor the Commission are challenging any action under the MMPA and are not the plaintiff or petitioner in this action so it is unclear how Judge Horn arrived at a conclusion that the City and the Commission should have initiated a proceeding under the APA when it was not challenging or contesting any action taken under the MMPA.

It further appears that Judge Horn believed that the City could initiate a proceeding under the APA to obtain Secretary authorization to allow the state to manage the seal population but that conclusion is wrong as well. The APA sets forth the procedures by which federal agencies are accountable to the public and their actions are subject to review by the courts. (5 U.S.C.A. § 704; *Franklin v. Massachusetts* (1992) 505 U.S. 788, 796.) The federal APA process is not the mechanism to obtain NOAA Secretary authorization to manage marine mammals.

The APA defines "agency" as "each authority of the Government of the United States" and then lists certain exceptions which are not applicable here. (5 U.S.C.A. § 551.) Thus, the federal APA is only applicable to federal agencies (e.g. those with authority of the Government of the United

States). The Ninth Circuit for the United States Court of Appeals held that "agencies" as defined under section 551 does not include state agencies or bodies. (*St. Michaels Convalescent Hospital v. State of California* (1981) 643 F.2d 1369, 1373.) Similarly, the United States District Court, Southern District of New York, held that New York City was not an agency of the federal government so as to fit the meaning of "agency" defined in section 551. (*Osipova v. New York City Department of Health* 2002 WL 31558031.) Accordingly, the City and the Commission are not agencies as defined under the APA and Judge Horn's conclusions in this regard are erroneous.

V.

SUBSTANTIAL EVIDENCE SUPPORTS THE CITY'S DECISION TO ENACT A SEASONAL BEACH CLOSURE

The permit issuing functions of the Commission are considered quasi-judicial in nature. (*Natural Resources Defense Council v. California Coastal Zone Conservation Commission* (1976) 57 Cal.App.3d 76, 83.) Decisions of the Commission are judicially reviewed under one of the two standards set forth in the Code of Civil Procedure section 1094.5, subsection c. (Code Civ. Proc. § 1094.5(c); *City of Coronado v. California Coastal Zone Conservation Commission* (1977) 69 Cal.App.3d 570, 573.)

As discussed earlier in this brief, unless a fundamental vested right is implicated, the proper standard of review the trial court should have used was the substantial evidence test. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143-144.) If the trial court erroneously used the independent judgment standard of review rather than the substantial evidence test, the appellate court need not remand the case back to the trial court but can instead apply the substantial evidence test to the agency's decision. (*Ogundare v. Dept. of Industrial Retention Div. of Labor Standards Enforcement* (2013) 214 Cal.App.4th 822, 829.)

Because the Orange County Superior Court used the independent judgment standard of review instead of the substantial evidence test, this Court can instead review the Commission's decision applying the substantial evidence test to the determine if the administrative record contains substantial evidence to support the decision.

In general, substantial evidence consists of evidence of ponderable legal significance, reasonable in nature, credible and of solid value that a reasonable person might accept as adequate to support a certain conclusion. (*County of San Diego v. Assessment Appeals Board No. 2* (1983) 148 Cal.App.3d 548, 555.)

Here, there is substantial evidence in the record supporting the City's decision to enact the seasonal beach closure regulations and the Commission's approval and certification of the LCP and issuance of the Coastal Development Permit. The administrative process consisted of several public hearings in which numerous people attended and voiced their positions and concerns. The City engaged in a several years-long process of implementing its Shared Use Policy and only opted to implement the seasonal beach closure after the first four components of the Shared Use Policy had failed to fully achieve the objectives of the City to harmonize the use of the beach with those that wanted the seals to remain on the beach. The City consulted with and obtained advise from the NMFS and the Commission before deciding to implement the seasonal beach closure. The City had numerous documents incidents of harassment and disturbance of the seals as well as numerous reports from the police and lifeguards about the time and resources those agencies had to expend to mediate conflicts between people. The Seal Conservancy submitted substantial information about the history of Children's Pool Beach and the seals' use of the beach as a haul out site. The anti-seal contingency submitted numerous

articles and letters in support of their position that the beach should be used for children and recreational purposes only.

The City engaged in a lengthy and difficult process to try to craft a policy that would serve all of the public's needs and implemented the least restrictive measures first (e.g. the rope guideline, education, a full-time ranger, prohibiting dogs, and closing the beach at night). Unfortunately the measures the City took did successfully prevent the continued harassment whether intentionally or inadvertently that occurred when people caused the seals to flush.

The unique urban setting of Children's Pool Beach provided easy access of the public to the seals and regrettably enabled the public to harass and disturb the seals. The Commission had successfully enacted similar access restrictions in other jurisdictions which also gave the City important insight in enacting its own regulations. Here the City opted to restrict access only during the critical pupping season. The public can still access the area because the breakwater wall remains open for walking, viewing and fishing.

The City enacted a Shared Use Policy that allowed the competing public uses to co-exist. There is substantial evidence in the record supporting the City's enactment of the seasonal beach closure and the Commission certification of the LCP amendment.

VI.

CONCLUSION

The MMPA does not preempt the City's seasonal beach closure regulations which are not in conflict with the federal law. The City and Commission's decisions are supported by substantial evidence in the record. Therefore, the City respectfully requests this Court reverse the judgment of the Orange County Superior Court and deny the petition for writ of mandate.

Dated: January 17, 2017

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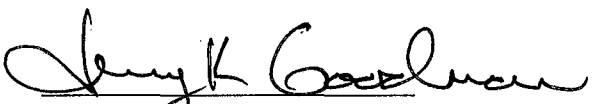
CERTIFICATE OF COMPLIANCE
[CRC 8.204(c)]

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 8175 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.

Dated: January 17, 2017

MARA W. ELLIOTT,
San Diego City Attorney



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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, et al.

Appeal No. G053709/G053725
Superior Court Case No. 30-2015-00778153-CU-WM-CJC

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California, where the mailing occurs; and, my business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

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Clerk of Orange County Superior Court
Hon. Frederick Horn
700 Civic Center Drive West
Dept. C-31
Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 17, 2017, at San Diego, California.

DeAnna Roberts

DeAnna Roberts