

**IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

Court of Appeal Case Number - D047382
Superior Court Case Number - GIC 826918

HONORABLE WILLIAM C. PATE, Judge Presiding

VALERIE O'SULLIVAN,
Plaintiff-Respondent,

v.

CITY OF SAN DIEGO, a municipal entity, and
FOES 1 through 500, inclusive,
Defendant(s)-Appellant(s).

**BRIEF *AMICI CURIAE* OF
SAN DIEGO ANIMAL ADVOCATES,
INSTITUTE FOR ANIMAL RIGHTS LAW, AND
INTERNATIONAL SOCIETY FOR ANIMAL RIGHTS,
ON BEHALF OF DEFENDANT-APPELLANT**

Appeal from the Superior Court of the State of California,
County of San Diego, Central Division, Department 60,
Case No. GIC 826918, Hon. William C. Pate, Judge.

James P. Dunne (SBN - 117654)
DUNNE & DUNNE, LLP
600 "B" Street, Suite 2020
San Diego, CA 92101
Telephone (619) 232-9260
Facsimile (619) 239-0050

Attorneys for Amici Curiae

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Statute involved:

“That said lands shall be devoted exclusively to [1] public park, [2] bathing pool for children, [3] parkway, [4] highway, [5] playground and [6] recreational purposes and [7] to such other uses as may be incident to, or convenient for the full enjoyment of, such purposes.” (Chapter 937, Laws of 1931; “An act granting certain tide and submerged lands of the State of California to the city of San Diego, San Diego County, in said state, upon certain trusts and conditions”; Section 1 (a).¹9

Question presented:

Given the unambiguous language of the statute, and given the City’s constitutionally-granted municipal affairs power, did the Superior Court err by interpreting the statute to require the City to use Casa Beach “exclusively for a public park and children’s pool”? (FSD 20)²9

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¹ Brackets and numbers added throughout brief to facilitate reference.

² “FSD” references are to the Superior Court’s “Final Statement of Decision,” filed in the Office of the Clerk of the Superior Court on August 26, 2005. At present, there is no Record on Appeal because when this motion and brief were submitted, defendant-appellant City had not yet obtained one. (Indeed, rumors abound that the City may not perfect its appeal.) The Final Statement of Decision is annexed hereto as Appendix “A.”

Argument:

Given the unambiguous language of the statute, and
given the City's constitutionally-granted municipal
affairs power, the Superior Court erred by interpreting
the statute to require the City to use Casa Beach
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THE AMICI CURIAE, AND THEIR INTEREST

Although the core legal issue in this case involves interpretation of a California statute and its relationship to the City of San Diego's municipal affairs powers, the ultimate resolution of that issue will have a substantial, even potentially fatal, impact on scores of marine mammals who inhabit the federally recognized seal rookery at Casa beach in La Jolla, California.

Each of the *amici curiae* is a recognized animal rights organization.

SAN DIEGO ANIMAL ADVOCATES is an all-volunteer 501(c)(3) not-for-profit California membership corporation devoted to animal protection. Through education, public information, and community outreach, SDAA works to end animal abuse, neglect, and exploitation in all of its manifestations.

INSTITUTE FOR ANIMAL RIGHTS LAW is a 501(c)(3) New York trust registered with the Attorney General of the State of California. IARL is devoted to protecting and advancing animal rights, among them those of marine mammals. IARL has filed *amicus curiae* briefs and drafted legislation on behalf of animal rights causes for over a decade. Supporters of IARL reside in the City of San Diego, and are familiar with the controversy surrounding the federal recognized seal rookery at Casa Beach.

INTERNATIONAL SOCIETY FOR ANIMAL RIGHTS is a 501 (c)(3) District of Columbia not-for-profit corporation registered with the Attorney General of the State of California. ISAR is devoted to protecting and advancing animal rights, among them those of marine mammals. ISAR has filed *amicus curiae* briefs and drafted legislation on behalf of animal rights causes for over three decades. Supporters of ISAR reside in the City of San Diego, and are familiar with the controversy surrounding the federal recognized seal rookery at Casa Beach.

The three *amici curiae*, who support the City of San Diego in this appeal, believe that they may be of assistance to the court in deciding the important statutory interpretation issue that this case presents.

While the *amici curiae* are in accord with the City of San Diego's publicly professed view, expressed by the City Attorney, that the Superior Court's judgment should be reversed, there appears to be a lack of clarity about what consequences should follow from a reversal of that judgment—for either the City of San Diego, or for the federally recognized seal rookery at the La Jolla beach. Indeed, from the City's posture in the Superior Court, it appears that the former did not grasp that the core of this case did not involve the public trust doctrine *per se*, but rather, as the *amici curiae* argue in their brief, a question of statutory interpretation and the City's constitutionally-based municipal affairs power.

As evidence of the *amici curiae*'s interest in the Casa Beach controversy, they offer the fact that in the fall of 2004 their three organizations sued the City of San Diego in the Superior Court, Central Division, for a declaratory judgment and other relief based on claims relating to the marine mammal problem at Casa Beach.³

NATURE OF THE ACTION RELIEF SOUGHT IN THE TRIAL COURT

This action was brought “as a private attorney general by . . . a resident of the village of La Jolla . . .”⁴ Her claim was based on Chapter 937 of the

³ Their complaint, alleging causes of action for waste and violation of municipal ordinances, was dismissed on demurrer. An amended complaint, filed by one of the *amici*, pleading only a CEQA violation by the City, was similarly dismissed on demurrer.

⁴ As the caption indicates, in addition to suing the City of San Diego, plaintiff sued “Foes 1 through 500, inclusive.” Apparently, the only “Foe” to be actually involved in the case was the “State of California, acting by and through the State Lands Commission,” which, according to the trial court's

Laws of 1931 entitled "An act granting certain tide and submerged lands of the state of California to the city of San Diego, San Diego County, in said state, upon certain trusts and conditions." Section 1 (a) of Chapter 937 states, in full:

That said lands shall be devoted exclusively to [1] public park, [2] bathing pool for children, [3] parkway, [4] highway, [5] playground and [6] recreational purposes and [7] to such other uses as may be incident to, or convenient for the full enjoyment of, such purposes.

Below, plaintiff-respondent contended that the City of San Diego had violated the public trust by allowing marine mammals to use the beach to the detriment of humans. Accordingly, *inter alia* she sought:

- a. To compel the City of San Diego . . . (1) to deter marine mammals from causing . . . damage to public and private property . . . (2) to stop them from endangering personal safety and the public health and welfare; and (3) to abate the "nuisance" there, all or any by way of a mandatory injunction.
- b. A declaration . . . that the City of San Diego has breached the terms of the trust . . . and its fiduciary duties under the grant by the State of California.

After a trial, the Superior Court, sitting without a jury, found for plaintiff-respondent.

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judgment, "did not appear, having stipulated to be bound by any judgment entered by this Court." (Judgment dated October 4, 2005, annexed hereto as Exhibit "B.")

JUDGMENT APPEALED FROM

The trial court's Final Statement of Decision consists of three parts.

"Factual Findings" sets forth much of the history of the La Jolla beach, beginning with Ellen Browning Scripps' construction of a breakwater and the State of California's enactment of legislation in relation to the beach, and ending with the San Diego City Council's meeting of September 14, 2004, concerning the seals' use of the beach.

The trial court's "Conclusions" recites the nature of the action, and plaintiff's requests for relief.

The next section of the "Final Statement of Decision" is entitled "Legislative Intent of the Trust" (i.e., Chapter 937 of the Laws of 1931), and states that:

The trust is to be used exclusively for a public park and children's pool. The presence or absence of marine mammals, or other animals for that matter, does not change the use of the beach and tidelands specified by the Trust grant. The use by the City of the Children's Pool as a habitat, sanctuary, zoo *or seal watching facility*⁵] that precludes its being used as a bathing pool for children would be outside the scope of the Trust.

The following two sections—"The City's Breach of the Trust" and "Breach of Fiduciary Duty"—explain that the City of San Diego has been derelict in not interpreting Chapter 937 of the Laws of 1931 to require Casa Beach to be used *exclusively* by humans, especially children.

The "Final Statement of Decision's" final section, "Remedies," orders the City of San Diego, "as trustee of the Children's Pool" . . . to employ all reasonable means to restore the Pool to its 1941 condition by removing the

⁵ Emphasis added. The significance of this phrase will be explained below.

sand build-up and further to reduce the level of water contamination in the Pool to levels certified by the County of San Diego as being safe for humans. Likewise, the City is ordered to maintain the beach sand so that it does not pose a health hazard to humans.”

The judgment, filed in the office of the Clerk of the Superior Court on October 4, 2004, reflects the above “Remedies” section.

Thus, central to the Superior Court’s decision was its interpretation of Chapter 937 of the Laws of 1931.

STATUTE INVOLVED

“That said lands shall be devoted exclusively to [1] public park, [2] bathing pool for children, [3] parkway, [4] highway, [5] playground and [6] recreational purposes and [7] to such other uses as may be incident to, or convenient for the full enjoyment of, such purposes.” (Chapter 937, Laws of 1931; “An act granting certain tide and submerged lands of the State of California to the city of San Diego, San Diego County, in said state, upon certain trusts and conditions”; Section 1 (a).

QUESTION PRESENTED

Given the unambiguous language of the statute, and given the City’s constitutionally-based municipal affairs power, did the Superior Court err by interpreting the statute to require the City to use the La Jolla beach “exclusively for a public park and children’s pool”?

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STATEMENT OF FACTS

*"The Trust is specific. It requires the Trust lands to be used for a children's pool."*⁶

The Superior Court's Final Statement of Decision contains a lengthy recitation of facts pertaining to the history of Casa Beach. However, only a few of those facts were relevant to the statutory interpretation issue before that court—the single issue presented by this appeal. They are as follows.

Sometime in 1922, Ellen Browning Scripps ("Scrips") and her lawyer asked a hydraulic engineer named Savage to look into the "practicality and feasibility of the accomplishment of a 'bathing pool for children' in the Ocean at La Jolla, California."⁷

Some eight years later, in May 1930, Scripps "invited [Savage's] cooperation in the accomplishment of the projected splendid gratuity 'bathing pool for children' at La Jolla."⁸

On June 21, 1930, Ellen Browning Scripps ("Scripps") asked the City's permission to build a breakwater at Casa Beach, whose purpose was to create a "Bathing Zone," not a bathing pool for children.⁹

On June 26, 1930, Savage, on behalf of Scripps, asked for permission to construct the breakwater in order to create a "bathing pool"—not a bathing pool for children.¹⁰

On June 30, 1930, Scripps received permission to construct "a concrete breakwater"—not a bathing pool, let alone a bathing pool for children.¹¹ This

⁶ FSD 20.

⁷ FSD 2. Inside quotation marks added. This fact and those that following regarding the history of the concrete breakwater and Casa Beach appear in FSD.

⁸ *Id.* Inside quotation marks added.

⁹ FSD 1.

¹⁰ FSD 2. In a later history of the project, Savage would write that the "purpose of the project was to create a safe bathing pool for children." As indicated above, that is not what his June 26, 1930, request stated.

permission was embodied in City Council Resolution No. 54177, which provided only “[t]hat permission be and it is hereby granted to Ellen Browning Scripps, by J. C. Harper, Attorney in Fact, to construct *a concrete breakwater* in the Pacific Ocean at La Jolla, California, as petitioned for under Document No. 258569.”¹²

The June 26, 1930, San Diego City Council Resolution No. 54177 appears to be the only action ever taken by the City of San Diego in connection with construction of the concrete breakwater at Casa Beach.¹³

On September 15, 1930, Scripps awarded a construction contract,¹⁴ and the project was “essentially completed on February 10, 1931.”¹⁵

As of that date, Casa Beach with its Scripps-gifted “concrete breakwater,” was owned not by the City of San Diego, but by the State of California.

On June 15, 1931, the Governor of California signed into law Chapter 937, Section 1 (a) of which—in a considerable broadening of the narrower intent that Scripps and Savage had sometimes expressed—provided: “That said lands shall be devoted exclusively to [1] public park, [2] bathing pool for children, [3] parkway, [4] highway, [5] playground and [6] recreational purposes and [7] to such other uses as may be incident to, or convenient for the full enjoyment of, such purposes.”

The Superior Court interpreted this statute to require that the City of San Diego use Casa Beach “exclusively for a public park [use 1] and children’s pool [use 2].” The Superior Court thus interpreted out of the statute the City of San Diego’s ability to use its Casa Beach for any other trust purposes specified by the State of California in Chapter 937 of the Laws of 1931.

¹¹ *Id.*

¹² Emphasis added.

¹³ FSD 3-4.

¹⁴ FSD 4.

¹⁵ FSD 5.

ARGUMENT

**GIVEN THE UNAMBIGUOUS LANGUAGE OF THE STATUTE,
AND GIVEN THE CITY'S CONSTITUTIONALLY-GRANTED
MUNICIPAL AFFAIRS POWER, THE SUPERIOR COURT ERRED
BY INTERPRETING THE STATUTE TO REQUIRE THE CITY
TO USE THE LA JOLLA BEACH "EXCLUSIVELY FOR A
PUBLIC PARK AND CHILDREN'S POOL."**

The meaning of Chapter
937 of the Laws of 1931

*"Public trusts, altogether sacred and inviolate as private ones, are enforced according to the 'terms' of the grant."*¹⁶

This quotation—with which the amici curiae are in complete agreement—appears in the second sentence on page 8 of plaintiff-respondent's trial brief. The "terms" to which she refers are the *uses* to which Casa Beach are to be "devoted exclusively," pursuant to Section 1 (a) of Chapter 937 of the Laws of 1931.

How, then shall a court ascertain what those uses are? The law of the State of California could not be clearer?

[The courts']. . . role in interpreting a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining the Legislature's intent, a court looks first to the *words of the statute*. The court gives the language *its usual, ordinary meaning*. If there is no ambiguity in the language, we presume the Legislature meant what it said and *the plain meaning of the statute governs*. The words, however, must be read in context, considering the nature and purpose of the

¹⁶ Inside quotation marks added.

statutory enactment. In this regard, sentences are not to be viewed in isolation but in light of the statutory scheme. (*In re Conservatorship of Pamela J.*, 35 Cal Rptr 3d 228, 133 Cal App 4th 807 (4th Dist, 2005), citing *Lewis v. Superior Court*, 82 Cal Rptr 2d 85, 19 Cal.4th 1232 (1999)).¹⁷

There was nothing ambiguous about the words used by the Legislature of the State of California when it enacted Chapter 937 of the Laws of 1931, and there is nothing ambiguous about that language today. The “usual, ordinary meaning” of each word and phrase is clear:

- “Devoted” means “set apart for a special use or service.”¹⁸
- “Exclusively” means “excluding or tending to exclude all others.
- “Public” means “of, belonging to, or concerning the people as a whole.” [Use 1].
- “Park” means “an area of public land; specif., *a*) an area in or near a city, usually laid out with walks, drives, playgrounds, etc., for public recreation *b*) an open square in a city, with benches, trees, etc. *c*) same as AMUSEMENT PARK *d*) a large area known for its natural scenery and preserved for public recreation by a State or national government.” [Use 1].
- “Bathing pool” is derived from “bathe,” meaning “to go into or be in a body of water so as to swim,” and from “pool,” meaning “1. a small pond, as in a garden 2. a small collection of liquid, as a puddle 3. same as

¹⁷ Inside quotation marks and citations deleted. Emphasis added.

¹⁸ This definition and those that follow are from *Webster's New World Dictionary of the American Language* (Second College Edition).

SWIMMING POOL”—the latter defined as “a pool of water used for swimming; esp., an artificially created pool, or tank, either indoors or outdoors and usually with water-filtering equipment.” [Use 2].

- “Children” is the plural of “child,” which can mean any of the following: “1. an infant, baby 2. an unborn offspring 3. a boy or girl in the period before puberty 4. a son or daughter 5. a descendant.” [Use 2].
- “Parkway” means “1. a broad roadway bordered or divided with plantings of trees, bushes, and grass 2. the landscaped center strip or border.” [Use 3].
- “Highway” means 1. “any road freely open to anyone; public road 2. main road; thoroughfare 3. a main route by land or water.” [Use 4].
- “Playground” means 1. a place, often part of a schoolyard, for outdoor games and recreation 2. a popular resort area.” [Use 5].
- “Recreational” is the adjective of “recreation,” which means “1. refreshment in body or mind, as after work, by some form of play, amusement or relaxation 2. any form of play, amusement, or relaxation used for this purpose, as games, sports, hobbies, etc.” [Use 6].
- “Incident” means “1. likely to happen as a result or concomitant; incidental”—the latter defined as “1. a) happening as the result of or in connection with something more important.” [Use 7].

- “Convenient” means “1. adding to one’s comfort; easy to do, use, or get to; causing little trouble or work; handy 2. appropriate; suitable.” [Use 7].

When in 1931 the Governor of California and the State Legislature appointed the City of San Diego trustee of Casa Beach, the “nature and purpose of the statutory enactment” and the “statutory scheme”¹⁹ could not have been more apparent. “Set apart” to the exclusion of all others, were seven uses: a certain type of land for the use of all people [use 1]; a body of water for the use of boys and girls [use 2]; a landscaped roadway of some sort [use 3]; a public thoroughfare [use 4]; an area for physical activities [use 5]; a place for renewal of mind and body [use 6]; and, akin to the “Necessary and Proper Clause” of the federal Constitution’s Article I, any and all “other uses” that would facilitate uses 1- 6.

These “trusts and conditions” of the State’s grant to the City of San Diego²⁰ are extremely broad and they vested in the City wide discretion concerning what uses the municipality would elect to implement.

From 1931 to the present, the City of San Diego has exercised its discretion in the following manner:

- Statutory use 1, a “public park,” where countless people congregate on the beach and the Scripps concrete breakwater to view the water, beach, swimmers, boaters, and marine mammals.

¹⁹ See, *In re Conservatorship of Pamela J.*, 35 Cal Rptr 3d 228, 133 Cal App 4th 807 (4th Dist. 2005), above.

²⁰ Chapter 937 of the Laws of 1931 is “An act granting certain tide and submerged lands of the State of California to the city of San Diego, San Diego County, in said state, *upon certain trusts and conditions.*” (Emphasis added).

- Statutory use 2, a “bathing pool,” where not just children bathe, but also adults, their canine pets, and marine mammals.
- Statutory use 5, a “playground,” where adults and children frolic, picnic, play games, and enjoy the beach and the views afforded by the concrete breakwater.
- Statutory use 6, a place of “recreation,” where all of uses 1, 2 and 5 are enjoyed by the resident and tourist public.
- And to the extent other uses have been allowed and encouraged by the City of San Diego, such as diving, snorkeling, and scuba diving,²¹ they have been in accordance with statutory use 7: “such other uses as may be incident to, or convenient for the full enjoyment of, such purposes.”²²

These many uses of Casa Beach by the City of San Diego, for three-quarters of a century, would not have been possible (and will not be possible if the Superior Court’s interpretation of the statute stands) had the Governor of California and the State Legislature acquiesced in what Savage and Scripps

²¹ The other uses that the City of San Diego has allowed can be judicially noticed. *See*, Evidence Code, Section 452 (a).

²² Indeed, the Superior Court’s FSD itself expressly recognized that Casa Beach could be used for a “habitat, sanctuary, zoo or seal watching facility” under certain conditions. *See* footnote 5 and accompanying text above.

wanted, and what since 1931 some have erroneously believed to be the sole use of Casa Pool: “a bathing pool for children.”

To the contrary, when the Governor of California and the State Legislature approved Chapter 937 of the Laws of 1931 the language they used *expressly rejected the Savage/Scripps desire that Casa Pool be “devoted exclusively” to a “bathing pool for children.”*

The City of San Diego’s
Municipal Affairs power

“[T]he city . . . may make and enforce all ordinances and regulations in respect to municipal affairs”²³

As a charter city recognized in the California Constitution (Cal. Const., art. XI, §§ 2, 3), Oakland [here, the City of San Diego] is empowered to govern its own “municipal affairs.” In this regard, article XI, section 5, subdivision (a), reads in relevant part: “It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.” This constitutional “home rule” doctrine reserves to charter cities the right to adopt and enforce ordinances, provided the subject of

²³ Cal. Const. art. XI, Section 5 (a).

the regulation is a “municipal affair” rather than being a subject of “statewide concern.” (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 399, 14 Cal.Rptr.2d 470, 841 P.2d 990; accord, *Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 45, 112 Cal.Rptr.2d 677.) (*Cobb v. O’Connell*, 36 Cal Rptr 3d 170, 173 (2000))

Pursuant to the authority granted the City of San Diego by the Constitution of the State of California, Article I, Section 2, of the City Charter provides that:

The City of San Diego, in addition to any of the powers now held or that may hereafter be granted to it under the Constitution or Laws of this State, *shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this Charter*

As the *amici curiae* have noted above, pursuant to the authority of its Charter, the City of San Diego has allowed, indeed encouraged, Casa Beach to be used “exclusively” (meaning: not for purposes other than those specified by Chapter 937; “limited to one thing and excluding everything else”²⁴) for:

- Statutory use 1, a “public park,” where countless people congregate on the beach and the Scripps concrete

²⁴ *Encarta Dictionary*.

breakwater to view the water, beach, swimmers, boaters, and marine mammals.

- Statutory use 2, a “bathing pool,” where not just children bathe, but also adults, their canine pets, and marine mammals.
- Statutory use 5, a “playground,” where adults and children frolic, picnic, play games, and enjoy the beach and the views afforded by the concrete breakwater.
- Statutory use 6, a place of “recreation,” where all of uses 1, 2 and 5 are enjoyed by the resident and tourist public.
- And to the extent other uses have been allowed and encouraged by the City of San Diego, such as diving, snorkeling, and scuba diving,²⁵ they have been in accordance with statutory use 7: “such other uses as may be incident to, or convenient for the full enjoyment of, such purposes.”²⁶

Further pursuant to the authority of its City Charter, and in aid of its duty to manage Casa Beach in accordance with Chapter 937, the City of San Diego enacted two ordinances directly related to Casa Beach. One is

²⁵ The other uses that the City of San Diego has allowed can be judicially noticed. *See*, Evidence Code, Section 452 (a).

²⁶ Indeed, the Superior Court’s FSD itself expressly recognized that Casa Beach could be used for a “habitat, sanctuary, zoo or seal watching facility” under certain conditions. *See* footnote 5 and accompanying text above.

Municipal Code Section 63.0102 (b) (10), which provides that “[i]t is unlawful for any person within any public . . . beach areas within the City of San Diego to do any of the acts enumerated in Section 63.0102(b),” which subsection provides that “[i]t is unlawful to . . . disturb, or maltreat any bird or animal, either wild or domesticated” The other ordinance is Municipal Code Section 63.20.1, which provides that “[i]t is the duty of the Park and Recreation Director, as the City Manager’s designee, to enforce the provisions of these sections; and all employees of the Park and Recreation Department charged with the duty of maintaining peace, order and safety in beach areas are empowered to assist the police officers of The City of San Diego in the enforcement of the provisions of these sections including the power to make arrests for violation hereof.”

Viewed together, the California Constitution, the San Diego City Charter, the two Municipal Ordinances, and the City’s custom and usage regarding Casa Beach, convincingly establish that the City has constitutionally and legally assumed and exercised a municipal affairs power over Casa Beach.²⁷ In assuming and exercising that power, the City has merely acted pursuant to the discretion that has been delegated to it—a discretion “not

²⁷ Neither Municipal Ordinance is subject to any restrictions and limitations provided in the San Diego City Charter, nor is preempted by any state law.

subject to control by the court, except to prevent an abuse by the trustee of his discretion.”²⁸

Plaintiff did not argue below, nor did the Superior Court find *sua sponte*, that the City of San Diego abused its discretion as trustee of Casa Beach when it assumed and exercised a municipal affairs power over Casa Beach in the manner just described.

The Superior Court’s erroneous interpretation of Chapter 937—that “[t]he Trust is specific. It requires the Trust lands to be used for a children’s pool,” and that Casa Beach is to be used “exclusively for a public park and children’s pool”—manifestly violates the City of San Diego’s constitutionally-granted municipal affairs power.

CONCLUSION

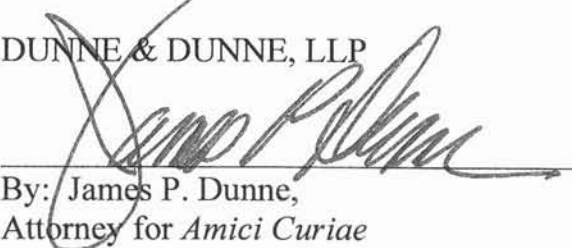
Chapter 937 of the Laws of 1931—rejecting the Savage/Scripps desire that Casa Beach be used solely as a bathing pool for children—vested the trustee City of San Diego with broad powers far exceeding what the concrete breakwater’s donor wanted, powers that the City, *qua* trustee, has exercised for three-quarters of a century pursuant to the California Constitution and the City Charter.

²⁸ *Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 29 (1964); *see also*, *Nickerson v. San Bernardino County*, 179 Cal. 518, 522-524 (1918).

Accordingly, the Superior Court's interpretation of Chapter 937 of the Laws of 1931 that the City of San Diego must use Casa Beach "exclusively for a public park and children's pool," thus barring the uses vested in the trustee City by the statute, is error as a matter of law, and the judgment below should be reversed.

Respectfully submitted this 25th day of May, 2006.

DUNNE & DUNNE, LLP

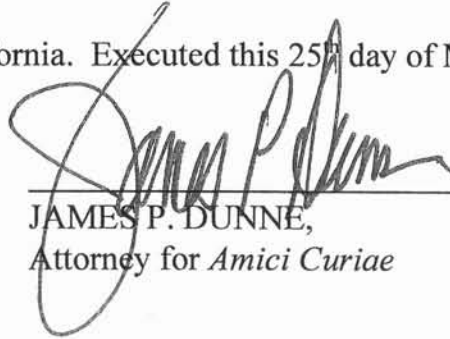


By: James P. Dunne,
Attorney for *Amici Curiae*

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JAMES P. DUNNE,
Attorney for *Amici Curiae*

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): James P. Dunne, CFLS James P. Dunne, CFLS SBN: 117654 Dunne & Dunne, LLP 600 "B" Street, Suite 2020 San Diego, CA 92101 TELEPHONE NO.: (619) 232-9260 FAX NO. (Optional): (619) 239-0050 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): AMICI CURIAE	FOR COURT USE ONLY
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 - On (date): 05/26/06 I mailed from (city and state): San Diego, CA
 the following documents (specify): Brief Amici Curiae of San Diego Animal Advocates,
 Institute for Animal Rights Law, and International Society for Animal Rights,
 on Behalf of Defendant-Appellant
- ☐ The documents are listed in the Attachment to Proof of Service by First-Class Mail—Civil (Documents Served) (form POS-030(D)).
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: May 26, 2006

Lindsey Evans

(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)


 (SIGNATURE OF PERSON COMPLETING THIS FORM)

SERVICE LIST

Attorney for Valerie O'Sullivan:

Paul Kennerson, Esq.
KENNERSON & GRANT, LLP
101 West Broadway, Suite 1150
San Diego, CA 92101

Attorney for City of San Diego:

MICHAEL J. AGUIRRE, City Attorney
Office of the City Attorney
Civil Division
1200 Third Avenue, Suite 1100
San Diego, CA 92101-4100

Superior Court:

Clerk of the Superior Court
220 West Broadway
San Diego, CA 92101

California Supreme Court: (five copies)

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

INTERNATIONAL SOCIETY FOR ANIMAL RIGHTS
Institute for Animal Rights Law

965 Griffin Pond Road
Clarks Summit, PA
(570) 586-2200 (Tel)
(570) 586-9580 (Fax)

October 23, 2007

The Honorable Ronald M. George, Chief Justice
The Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102-4783

Re: Valerie O'Sullivan v. City of San Diego
No. S157299

Dear Chief Justice George and Associate Justices:

Introduction and Question Presented

As International Society for Animal Rights (ISAR) and Institute for Animal Rights Law (IARL) (a legal-action program of ISAR) understood petitioner City of San Diego's argument below, the root question in this case has been *whether a Superior Court can deprive a California city of a constitutionally-granted municipal power by construing a state statute in a manner that contradicts its plain meaning.*

The Amici Curiae and their interest

Although the root legal issue in this case involves the lower courts' interpretation of a California statute and its relationship to the City of San Diego's constitutionally-granted municipal affairs powers, the ultimate resolution of that issue will have a substantial, even potentially fatal, impact on scores of marine mammals who inhabit the federally recognized and protected seal rookery at Casa beach in La Jolla, California.

Each of the *amici curiae* is a recognized animal rights organization.

SAN DIEGO ANIMAL ADVOCATES is an all-volunteer 501(c) (3) not-for-profit California membership corporation devoted to animal protection. Through

education, public information, and community outreach, SDAA works to end animal abuse, neglect, and exploitation in all of its manifestations.

INSTITUTE FOR ANIMAL RIGHTS LAW was until April 2007 a 501(c) (3) New York trust then registered with the Attorney General of the State of California. IARL was devoted to protecting and advancing animal rights, among them those of marine mammals. IARL had filed *amicus curiae* briefs and drafted legislation on behalf of animal rights causes for over a decade. Supporters of IARL resided in the City of San Diego, and were familiar with the controversy surrounding the federal recognized and protected seal rookery at Casa Beach. In April 2007 IARL was absorbed into ISAR and became a legal-action program of the latter.

INTERNATIONAL SOCIETY FOR ANIMAL RIGHTS is a 501 (c) (3) District of Columbia not-for-profit corporation registered with the Attorney General of the State of California. ISAR is devoted to protecting and advancing animal rights, among them those of marine mammals. ISAR has filed *amicus curiae* briefs and drafted legislation on behalf of animal rights causes for over three decades. Supporters of ISAR reside in the City of San Diego, and are familiar with the controversy surrounding the federal recognized seal rookery at Casa Beach.

The three organizations on whose behalf this letter is written in support of the City of San Diego's Petition for Review believe that they may be of assistance to the court in deciding the important statutory interpretation and municipal powers issues that this case presents.

As evidence of those organizations' interest in the root issue presented in this case, they offer the fact that in the fall of 2004 they sued the City of San Diego in the Superior Court, Central Division, for a declaratory judgment and other relief based on claims relating to the marine mammal problem at Casa Beach in La Jolla, California. In addition, in this case the three organizations filed a brief in support of the City of San Diego in the Court of Appeal.

The factual context of the legal issues

This action was brought "as a private attorney general by . . . a resident of the village of La Jolla . . ." Her claim was based on Chapter 937 of the Laws of 1931 entitled "An act granting certain tide and submerged lands of the state of California to the city of San Diego, San Diego County, in said state, upon certain trusts and conditions." Section 1 (a) of Chapter 937 states, in full:

That said lands shall be devoted exclusively to [1] public park, [2] bathing pool for children, [3] parkway, [4] highway, [5] playground and [6] recreational purposes and [7] to such other uses as may be incident to, or convenient for the full enjoyment of, such purposes." (Chapter 937, Laws of 1931; "An act granting certain tide and submerged lands of the State of California to the city of San Diego, San Diego County, in said state, upon certain trusts and conditions"; Section 1 (a)).

The ruling of the Superior Court

The Superior Court interpreted this statute to require that the City of San Diego use Casa Beach “*exclusively* for a public park [use 1] and children’s pool [use 2].” (Emphasis added.) Thus, the Superior Court interpreted out of the statute the City of San Diego’s constitutionally-granted municipal power to use its Casa Beach for any of the several other trust purposes specified by the State of California in Chapter 937 of the Laws of 1931.

The ruling of the Court of Appeal

In reviewing the Superior Court’s interpretation of the statute—which empowered the City of San Diego to make six express uses of Casa Beach, and any number of other uses that “may be incident to, or convenient for the full enjoyment of, such purposes”—the Court of Appeal held that instead of the statute’s plain and unambiguous language controlling, the lower court’s divining of “legislative intent” controlled the construction—with the result that the City of San Diego could use Casa Beach for only *two* of the statutorily-granted purposes: “*exclusively* for a public park [use 1] and children’s pool [use 2].” (Emphasis added.)

The City of San Diego’s Municipal Affairs power

As a charter city recognized in the California Constitution (Cal. Const. art. XI, §§ 2 , 3) , Oakland [here, the City of San Diego] is empowered to govern its own “municipal affairs.” In this regard, article XI, section 5 , subdivision (a), reads in relevant part: “It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.” This constitutional “home rule” doctrine reserves to charter cities the right to adopt and enforce ordinances, provided the subject of the regulation is a “municipal affair” rather than being a subject of “statewide concern.” (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 399, 14 Cal.Rptr.2d 470, 841 P.2d 990; accord, *Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 45, 112 Cal.Rptr.2d 677.) (*Cobb v. O’Connell*, 36 Cal Rptr 3d 170, 173 (2000))

Pursuant to the authority granted the City of San Diego by the Constitution of the State of California, Article I, Section 2, of the City Charter provides that:

The City of San Diego, in addition to any of the powers now held or that may hereafter be granted to it under the Constitution or Laws of this State, *shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this Charter* (Emphasis added.)

Pursuant to the power granted it in its Charter, the City of San Diego has allowed, indeed encouraged, Casa Beach to be used “exclusively” (meaning: not for purposes other than those specified by Chapter 937; “limited to one thing and excluding everything else”) for:

- Statutory use 1, a “public park,” where countless people congregate on the beach and the Scripps concrete breakwater to view the water, beach, swimmers, boaters, and marine mammals.
- Statutory use 2, a “bathing pool,” where not just children bathe, but also adults, their canine pets, and marine mammals.
- Statutory use 5, a “playground,” where adults and children frolic, picnic, play games, and enjoy the beach and the views afforded by the concrete breakwater.
- Statutory use 6, a place of “recreation,” where all of uses 1, 2 and 5 are enjoyed by the resident and tourist public.
- And to the extent other uses have been allowed and encouraged by the City of San Diego, such as diving, snorkeling, and scuba diving, they have been in accordance with statutory use 7: “such other uses as may be incident to, or convenient for the full enjoyment of, such purposes.”

Further pursuant to the authority of its City Charter, and in aid of its duty to manage Casa Beach in accordance with Chapter 937, the City of San Diego enacted two ordinances directly related to Casa Beach.

One is Municipal Code Section 63.0102 (b) (10), which provides that “[i]t is unlawful for any person within any public . . . beach areas within the City of San Diego to do any of the acts enumerated in Section 63.0102(b),” which subsection provides that “[i]t is unlawful to . . . disturb, or maltreat any bird or animal, either wild or domesticated”

The other ordinance is Municipal Code Section 63.20.1, which provides that “[i]t is the duty of the Park and Recreation Director, as the City Manager’s designee, to enforce the provisions of these sections; and all employees of the Park and Recreation Department charged with the duty of maintaining peace, order and safety in beach areas are empowered to assist the police officers of The City of San Diego in the enforcement of the provisions of these sections including the power to make arrests for violation hereof.”

Viewed together, the California Constitution, the San Diego City Charter, the two Municipal Ordinances, and the City’s custom and usage regarding Casa Beach, convincingly establish that the City has constitutionally and legally assumed and exercised a municipal affairs power over Casa Beach.

In assuming and exercising that power, the City has merely acted pursuant to the discretion that has been delegated to it—a discretion “not subject to control by the court, except to prevent an abuse by the trustee of his discretion.”

The Superior Court’s erroneous interpretation of Chapter 937, affirmed by the Court of Appeal—that “[t]he Trust is specific. It requires the Trust lands to be used for a children’s pool,” and that Casa Beach is to be used “*exclusively* for a public park and children’s pool”—manifestly strips from the City of San Diego’s constitutionally-granted municipal affairs powers. (Emphasis added.)

Reason for granting the petition

The basic, traditional canons of statutory construction need no reiteration here.

This case is important for the State of California because in violating those canons the Superior Court, as affirmed by the Court of Appeal, deprived the City of San Diego of a constitutionally-granted municipal power, thus giving rise to the question posited *supra*: *Whether a Superior Court can deprive a California city of a constitutionally-granted municipal power by construing a state statute in a manner that contradicts its plain meaning.*

If a *Superior Court* possesses the power to deprive a California city of a *constitutionally-granted municipal power* by construing a *state statute* in a manner that contradicts its plain meaning, the statewide implications for every municipality are deep and wide. Indeed, possession of that power dangerously threatens the delicate separation of powers balance embodied in the Constitution of the State of California.

For this reason, the City of San Diego's petition should be granted.

Respectfully submitted,

/s/ Henry Mark Holzer

HENRY MARK HOLZER
Member of the New York Bar

¹ This letter is submitted also on behalf of San Diego Animal Advocates.

² *Encarta Dictionary*.

³ The other uses that the City of San Diego has allowed can be judicially noticed. *See*, Evidence Code, Section 452 (a).

⁴ Indeed, the Superior Court itself expressly recognized that Casa Beach could be used for a "habitat, sanctuary, zoo or seal watching facility" under certain conditions.

⁵ Neither Municipal Ordinance is subject to any restrictions and limitations provided in the San Diego City Charter, nor is preempted by any state law.

⁶ *Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 29 (1964); *see also*, *Nickerson v. San Bernardino County*, 179 Cal. 518, 522-524 (1918).