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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**

11 VALERIE O’SULLIVAN,
12 Plaintiff,

13 v.

14 CITY OF SAN DIEGO, a municipal entity;
15 STATE OF CALIFORNIA; and FOES 1
through 500, inclusive,
16 Defendants.

) Case No: GIC 826918

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN RESPONSE TO**
) **REPORT RE: FINAL STATEMENT OF**
) **DECISION**

) **DATE: October 27, 2005**
) **TIME: 2:00 p.m.**
) **DEPT: 60**
) **JUDGE: William C. Pate**
) **COMPLAINT**
) **FILED: March 12, 2004**
) **TRIAL: July 26, 2005**

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20 **INTRODUCTION**

21 Plaintiff Valerie O’Sullivan (“plaintiff”), in her representative capacity as a private
22 attorney general, submits the following in response to “Report Re: Final Statement of Decision”
23 submitted by the City of San Diego (“City”).

24 The judgment provides that “The City is directed to file a report with this court, no later
25 than sixty (60) days following entry of this order, setting forth what steps it has undertaken and
26 intends to undertake to comply with this order.” The City’s report, in purported compliance with
27 this direction, is really a masquerade for a motion, seeking an amendment to the judgment by
28 delay of its enforcement against the City. As such, it is unsupported by admissible evidence, is

1 formally incorrect and is unmeritorious and should be denied.

2 Seen as a summary of its efforts to comply, the report is an empty recitation of no more
3 than ritualistic meetings, culminating in nothing. The report glaringly lacks a discussion of the
4 most pressing compliance issues and is internally inconsistent. The report should be rejected and
5 the City required to report back within two weeks on specific and definite requirements at the
6 core of its mandated compliance with the judgment.

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I. THE REPORT AS MOTION

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The City's Report is a Motion in Disguise.

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The court in its judgment required the City to submit to a report within 60 days of
11 August 26, 2005, and set this hearing for October 27, 2005. The papers filed by the City, styling
12 themselves the required interim report, really amount to a motion in disguise.

13

Rather than stating its plan to implement this court's judgment, the City recites alleged
14 efforts to comply with the judgment, ending, in its conclusion (page 7),¹ with the "request[s] that
15 the Court modify its Judgment and Final Statement of Decision and require City compliance by
16 January 2007." This is no more and no less than a motion to amend the judgment.

17

The judgment in this case is final. It was signed by the court on August 26, 2005; it was
18 filed October 4, 2005; notice of its entry was served on October 12, 2005 (see Exhibit A to
19 accompanying Notice of Lodgment [NOL]). The City has filed a Notice of Appeal of the
20 judgment (Exhibit B to NOL). Appeals lie only from judgments that are final. (CCP § 904.1;
21 see also *Laraway v. Pasadena*, (2002) 98 Cal. App. 4th 579.)

22

The City has not filed a motion for judgment notwithstanding the verdict (CCP § 629), a new
23 trial (CCP § 659), or any other relief that would entitle it, in effect, to vacation, reconsideration,
24 alteration or amendment of the judgment (e.g., CCP § 663). The City has signaled its
25 recognition of the judgment's finality by its appeal of it. There is no provision in the law for this
26 unilateral and unsupported attempt to modify the final judgment. Hence, the City's request for a

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¹ References are to City's Report.

1 continuance to allow altered compliance with the judgment should be summarily denied.

2 Nor is the request properly viewed as a motion for a stay. No writ of supersedeas has
3 been filed, the proper remedy to invoke a stay of an injunction (CCP § 923), and the City is
4 behaving as if it must go forward. In Mr. Aguirre's words, "We are free to disagree but not to
5 disobey." (October 22, 2005 San Diego *Union Tribune*.)

6
7 **The Report, as a Motion, Fails to Comply With the Law.**

8 Even if a request for amendment of the judgment were theoretically permissible without
9 more, the City has completely failed to comply with the statutory requirements for a noticed
10 motion, including a memorandum of points and authorities and supporting evidence properly
11 authenticated. Its papers are replete with unsupported documentary and testimonial evidence.
12 For example, the statement on page 6 of the report, "Mr. Durham also informed the City that the
13 Corps was not subject to this court's judgment; therefore, compliance with the judgment was not
14 a concern of the Corps," is unauthenticated hearsay and unfounded opinion. There are
15 references throughout the report to requirements of law that are nowhere supported by citations
16 or discussion: "If there is a significant issue, then an Environmental Impact Study will be
17 required," (page 5). There are no minutes attached of the seven meetings alleged to have been
18 held by City personnel on the indicated dates. For these and a multitude of other reasons,
19 plaintiff Valerie O'Sullivan will be denied due process of law if the court were to entertain the
20 request to amend the judgment as the City has proposed, or at all.

21
22 **The Relief Sought Should be Denied.**

23 Even if the judgment could be amended and the proper procedural mechanisms for a
24 motion had been observed, which they were not, the City's attempt to amend the judgment is
25 unmeritorious.

26 The report starts out by informing the court that the city had in effect anticipated the
27 court's judgment and had begun compliance with it as early as September 14, 2004. (The court
28 will recall that it was on this date the City passed the dredging proposal that came to naught and

1 had not been implemented as of the start of trial on July 26, 2005.) The City's papers state
2 (page 2) that even at that time it was anticipated that the project would likely start no sooner than
3 September of 2006. This is because there is to be no construction between January and May or
4 June, and then again none between Memorial Day and Labor Day. Memorial Day is typically at
5 the end of May. Hence, the City proposes that nothing be done from January through September
6 of any given year. The City proposes that this is to be the case for January 2006 through
7 September 2006 as well. That is in wholesale violation, if not defiance, of this court's judgment
8 which, by the comments of the court and the terms of the statement of decision, required the
9 City's attention to this matter immediately. ²

10 The City's papers then state (page 3) that on May 26, 2005, two months before trial in
11 this matter commenced, "the City's Park and Rec department submitted a project package to the
12 City's Development Services Department for analysis." (If that occurred, the plaintiff herein
13 was not provided a copy of that documentation pursuant to permissible pretrial requests in this
14 case; and such a package was never part of the evidence supplied to this court.)

15 The City next claims to have been working on the permit process starting in September,
16 2004, up to August, 2005 (page 4). In that time the City apparently obtained no permits. The
17 City does not tell us what it actually had done during that period, but only that "the process
18 includes, but is not limited to," the following:

- 19 ● finalizing grading plans.

20 Where are they?

- 21 ● finalizing a biology report.

22 What is a biology report? Where is it?

- 23 ● finalizing alternative reports.

24 Alternatives to what? What are they? Where are they?

- 25 ● finalizing geological reconnaissance report.

26 For what? What is it? Where is it? Why is it needed?

27
28 ² Indeed the "pupping-season" delay (January through May or June) is not in order at all
because (see *infra*) NOAA urges the City to deter the seals by early November, five days from now.

- 1 ● finalizing traffic plans.

2 Is this a man with a sign?

- 3 ● finalizing a best management practice plan.

4 What, why, where?

- 5 ● finalizing a schedule.

6 Where? Is this anything other than what appears on pp. 2-3 of the report?

- 7 ● finalizing the methods and means of the construction operation
8 and addressing the seals.

9 What does this mean? What is it? Where is it?

10 Nothing was produced during this period so far as the papers show.

11 Then the papers jump (page 4) to what has occurred since the court's judgment of
12 August 26, 2005. Several meetings were held at which time various issues were discussed. No
13 minutes have been produced.

14 The principal impediment to implementation of the judgment, according to the City's
15 report, would appear to be delays caused by positions of the California Coastal Commission and
16 by the Army Corps of Engineers. Interestingly, when the dredging proposal was first birthed in
17 March 1999 at a City Council meeting, permits from these very same agencies were also
18 required. The City Council Minutes of the meeting of March 29, 1999, however, report that the
19 City Manager had begun the permit application process and the dredging work would be
20 "completed by the start of the summer season," a period of just 2-3 months. (Exhibit C to NOL.)
21 The dredging work itself, the City estimated in the April 29, 1998 Manager's Report, would take
22 some 15 days. (Exhibit D to NOL.)

23 Furthermore, and very importantly, the dredging proposal and cleaning up the waters by
24 getting rid of the seals are independent efforts. They can and should be pursued independently.
25 On October 17, 2005 (Exhibit E to NOL), Rodney R. McInnis, Regional Administrator of
26 NOAA, wrote the City indicating, in substance, that the City could avail itself of the 109(h)
27 exceptions to the Marine Mammal Protection Act, and if it were to do so, it should get rid of the
28 seals by November 2005, in order that they might find an acceptable alternative location before

1 pupping season started after the first of the year. Here it is October 27th, and there is no sign of
2 any effort by the City to achieve relocation of the seals which the federal government itself is
3 plumping for.

4 5 CONCLUSION I

6 Thus, on all counts, the City's feet should be held to the fire. This court, in blisteringly
7 unadorned language upon delivering its judgment, scolded the City that it had studied the
8 problem for years and had done nothing to correct it. Now the City comes to the court hat-in-
9 hand, impermissibly seeking an amendment to a judgment that is final, by papers that are out-of-
10 order, and on grounds that simply do not stand the light of even a casual examination. If the City
11 truly is unable to comply with the court's judgment, then it may have a defense later when it is
12 attempted to be held in contempt of this court. But on these papers, there is no valid and
13 admissible evidence that it cannot comply if it puts its shoulder to the wheel. These papers are
14 full of the kinds of excuses, misstatements, misreadings of the law, and pleas for mercy from a
15 City which the court has found was willfully and knowingly in breach of its fiduciary duty to its
16 citizens. The court should give the City no quarter, here or otherwise, from its mandate to
17 comply with the judgment.

18 19 II. THE REPORT AS STATUS SUMMARY

20 The report also purports to summarize, in the words of the judgment, "what steps it [City]
21 has undertaken and intends to undertake to comply with this order." What the report tells us on
22 that score is that the City has held seven meetings and, ultimately coming up empty-handed,
23 wants the court to delay enforcement of the judgment for another year-and-a-half.

24 The report, as a summary of the City's efforts to get rid of the seals and dredge the beach,
25 is glaringly insufficient:

26 1. The report does not say whether the City means to get rid of the seals and, if so,
27 how it plans to do so. Is the City going to have a Park and Rec employee on the beach shooping
28 the seals away? Is it going to use a dog to do so, as Jim Antrim and Sarah Allen, the leading

1 harbor-seal experts on the west coast, have recommended? In short, how does the City plan to
2 get rid of the seals? The need for an answer is immediately pressing since NOAA has
3 recommended they be gotten rid of within four days, i.e., by November 2005, in order to
4 acclimate the seals to a new habitat before the pupping season. (See Exhibit E to NOL.)

5 2. What is the funding source for the project? This was a big question in connection
6 with the September 2004 dredging proposal, and at one point resort was to be had to
7 contributions from the community to accomplish the work. Does the City have a funding source
8 for the project and, if so, what is it and how much money does it amount to; and, if not, where is
9 it going to get the money to comply with the court's order?

10 3. Has the City told Hubbs Sea World not to release rehabilitated seals in the kelp
11 beds off the Children's Pool?

12 4. The City completely fails to address what is perhaps, after all, the most pressing
13 issue of all: the efforts by the seal activists to continue their takeover of the beach, barring all
14 human use of it. While the court in its judgment declined to order the City to enforce its laws
15 and ordinances more strenuously, since the judgment seal activists have continued to gin up their
16 efforts to bar human use of the beach. Exhibit F to the NOL is a compilation of pictures taken on
17 October 22, 2005, by Mr. Don Perry, a witness at trial, showing the presence of signs on the
18 beach, the absence of people there, and the fact that what was once a line in the sand has now
19 become a ditch across the beach, effectively barring people from use of it. This matter is
20 becoming increasingly more serious. This is not a First Amendment exercise by people who
21 simply are voicing their views, it is a matter of deadly serious animal activists who are intent on
22 taking over possession of the beach for the use of the seals which the court has ruled must leave
23 the beach. The City's spokespeople, like its City Attorney, have made great efforts to appease
24 this activist interest, saying, for example, that the City will not shoo the seals from the beach,
25 that the dredging will not interfere with them, and the like. The City's report completely
26 overlooks, or rather omits pointedly to discuss, this impediment to its compliance with the
27 court's judgment and order.

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1 5. The City's report further omits to discuss any contact it has had with the County
2 Health Department personnel who test the water. The whole object of this judgment is to clean
3 up the water at the Children's Pool so it is safely useable by humans. Yet the City has apparently
4 not contacted County Health Department personnel who test the waters to resume testing.
5 Plaintiff has a right to know when it is expected, with the seals' departure, that the waters will
6 return to a point of health and safety for beach users, when the signs warning people not to use
7 the beach will be removed, and the like. None of these matters are discussed in the City's report.

8 6. The City has kept the plaintiff completely in the dark as to its efforts. The plaintiff
9 has not been included in any meetings or asked to participate by way of input or commentary in any
10 of the steps that the City purports to have taken. The plaintiff should be permitted to do so and
11 should be kept in the loop of the City's efforts to comply with the judgment. This is not the case of a
12 private trustee of private funds whose ways may remain shielded from its beneficiaries so long as the
13 outcome is honest and correct. The City is a public entity; the plaintiff is one of its citizens. That
14 public entity holds the plaintiff's property in trust. The plaintiff should be able to ascertain fully by
15 way of on-hand observation and participation what is going on to protect her and her fellow citizens'
16 publicly trusted property. Thus, the City should be required to keep plaintiff and her counsel
17 apprised of all efforts in the direction of complying with the court's judgment and order and the
18 plaintiff and her counsel should be able to offer suggestions to the City and participate in the
19 processes leading to its compliance with the judgment.

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CONCLUSION II

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The City's report can be seen only as more excuses and malingering in order to avoid
23 compliance with its legal obligation under the 1931 Trust and with this court's judgment. While of
24 course all judiciousness is essential to the treatment of this problem, like any other, it would be
25 hardly untoward if the court's patience were showing a bit thin with the City's marginal and
26 barely camouflaged gestures, not serious efforts at all, to comply with the judgment.

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Plaintiff would suggest that the City be required to return to court within two weeks and
28 report upon the following points, for example:

28

- 1 1. Has the City gotten rid of the seals? If not, when will it do so and by what means?
2 2. Has the City found funds to do the dredging project? Has the contract been let?
3 Where will the funds derive from? Are they segregated in the event of the City's bankruptcy in
4 order to accomplish this project?
5 3. What has the City done to deter Hubbs Sea World from releasing seals at the kelp
6 beds?
7 4. What has the City done, and what does it intend to do, to restore the beach to
8 beach users and take it back from seal activists who have barred all human use of it by their
9 ditches and lines in the sand, and their physical presence with signs telling people to stay away?
10 5. What is the status of the County Health Department's resumption of testing?
11 When will the signs come down?

12 Seen as a summary of the City's efforts to comply with the court's judgment, this report is
13 shamefully deficient. It should be rejected. The City should be required to return to court within
14 two weeks to answer the inquiries, and perhaps others of the court, recited above. In the
15 plaintiff's view of life, the City, despite the withering judgment delivered against it, despite its
16 having been found in willful and knowing breach of its fiduciary duties, continues to play fast
17 and loose with the court, apparently thinking it is not subject to the court's power to remedy this
18 wrong. In this, as in other currently notorious public issues, the City still has not learned it must
19 obey the law.

20 Respectfully submitted,

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KENNERSON & GRANT, LLP

Dated: October 25, 2005

By: _____
Paul Kennerson
Attorney for Plaintiff VALERIE O'SULLIVAN

**Minutes of the Council of the City of San Diego
for the Regular Meeting of Monday, March 29, 1999**

Exhibit
"C"

ITEM-211: In the matter of "Sufficient Assurances" concerning

FILE LOCATION: MEET (64)

COUNCIL ACTION: (Tape location: D306-G148.)

MOTION BY STALLINGS TO ACCEPT STAFF'S REPORT. Second by Kehoe.
Passed by the following vote: Mathis-yea, Wear-yea, Kehoe-yea, Stevens-yea,
Warden-yea, Stallings-not present, McCarty-yea, Vargas-yea, Mayor Golding-yea.

ITEM-S400: Two actions related to La Jolla Children's Pool Beach Management and Water
Quality Improvement Project and Certifying Mitigated Negative Declaration
LDR-98-0671.

(Continued by Common Consent from the meeting of March 22, 1999, Item 151,
due to lack of five affirmative votes.)

(See City Manager Reports CMR-98-99 and CMR-98-29. La Jolla and La Jolla
Shores Community Areas. District-1.)

TODAY'S ACTION ARE: REFERRED TO NATURAL RESOURCES AND
CULTURE COMMITTEE AND DIRECTIONS TO CITY
MANAGER

Adoption of the following resolutions:

Subitem-A: (R-99-958 Cor. Copy)

Authorizing the City Manager to proceed with the project to restore the beach
width in La Jolla Children's Pool to that present in 1941 by removing
approximately 3,000 cubic yards of sand for disposal at either Marine Street or
north La Jolla Shores beach;

Authorizing the City Auditor and Comptroller to expend an amount not to exceed
\$40,000 from General Fund 100, Department 442, Park and Recreation Coastal
Division.

Court's Ex. 114
Case # GIC826918
Rec'd 8-1-05
Dept 62 Clk _____

Subitem-B: (R-99-962 Cor. Copy)

Certifying that the information contained in Mitigated Negative Declaration LDR-98-0671, La Jolla Children's Pool Dredging (Project), has been completed in compliance with the California Environmental Quality Act of 1970, as amended, and State guidelines, and that said declaration reflects the independent judgement of the City, and that said report has been reviewed and considered by the Council.

NATURAL RESOURCES AND CULTURE COMMITTEE'S RECOMMENDATION:

On 5/6/98, NR&C voted 4-1 to approve directing the City Manager to apply for a Coastal Development Permit to remove sand and open the sluiceways at the Children's Pool beach, and to deposit the sand at La Jolla Shores beach. (Councilmembers Mathis, Wear, Kehoe, Warden voted yea. Councilmember Stallings voted nay.)

CITY MANAGER SUPPORTING INFORMATION:

On May 6, 1998, the Natural Resources and Culture Committee considered City Manager's Report No. 98-88 and voted 4:1 to recommend the City Council approve directing the City Manager to apply for a Coastal development permit to remove sand and open the sluiceways at Children's Pool beach, and to deposit the sand at La Jolla Shores beach. Subsequently, environmental analyses have been conducted and a final Mitigated Negative Declaration prepared. The objective of this action is to restore the shared use of Children's Pool by people and harbor seals. Approximately three thousand cubic yards of sand will be removed from Children's Pool beach and deposited either on Marine Street beach or on north La Jolla Shores. This will restore the Children's Pool beach width to its design configuration consisting of a large "pool" of water. The water entry point for public use will be set back from a rip current located at the end of the breakwater making the use of Children's Pool by swimmers safer. The reduced beach width will also increase competition for space between humans and harbor seals which may decrease the number of seals hauling out on Children's Pool beach which could result in sufficiently reducing fecal coliform counts to the point that the prohibition on human contact with the pool waters can be lifted. Consistent with Committee direction, permit applications are in process with the California Coastal Commission, Army Corps of Engineers, and the National Marine Fisheries Service. Work is targeted to be completed by the start of the summer season.

Aud. Cert. 9900942.

FILE LOCATION:

MEET



THE CITY OF SAN DIEGO
MANAGER'S REPORT

Seal
EUF 1

Exhibit
"D"

DATE ISSUED: April 29, 1998

ATTENTION: Natural Resources and Culture Committee,
Agenda of May 6, 1998

SUBJECT: CHILDREN'S POOL: SEALS, POLLUTION AND REMOVAL OF
SAND TO REDUCE BEACH WIDTH

REFERENCE: Manager's Report No. 98-29 Issued February 11, 1998
Manager's Report No. 97-176 Issued September 29, 1997

SUMMARY

Issues -

1. Shall the Committee accept this status report on Children's Pool seals and pollution, including the City Manager's plan to replace barricades on the beach between people and seals?
2. Shall the City Manager be directed to apply for a Coastal Development Permit to remove up to 3,000 cubic yards of sand from Children's Pool beach in La Jolla in order to reduce beach width on a trial basis to evaluate impacts on water safety, pollution, and seals?

Manager's Recommendations -

1. Accept this status report and endorse the City Manager's plan to replace barricades on the beach between people and seals.
2. Recommend to the City Council that the City Manager be directed to apply for a Coastal Development Permit, and subsequently proceed to remove sand from Children's Pool beach on a trial basis.

Court's Ex. 112
Case # **GIC826918**
Rec'd 8-1-03
Dept u Clk _____

Other Recommendations - None at this time. Note: This report was prepared with the civil engineering input of Testing Engineers-San Diego, Inc., the oceanographic and coastal engineering input of Coastal Environments, and the public safety input of City Lifeguard Services.

Fiscal Impact -

1. Replacing the barricades on the beach would have no fiscal impact.
2. Removal and transport of the sand to the disposal site approved in the permit will be performed by City forces with City equipment within the Coastal Parks Division Fiscal Year 1999 beach maintenance operating budget, resulting in a reduced level of kelp removal and beach grooming during the operation. Depending on the tide conditions, weather conditions, what month permits allows us to do the work, availability of City equipment, and any other unforeseen interferences, it is anticipated that fifteen (15) working days would be the minimum number of days it would take to remove and transport the sand. The labor costs to remove and transport the sand is estimated to be anywhere from \$20,000 to \$40,000. Contractual services to measure the subsequent rate of sand accretion will not exceed \$4,800 with funds available in the Coastal Parks Division Fiscal Year 1999 operating budget.

BACKGROUND

Children's Pool in La Jolla has been closed to water contact since September 4, 1997 due to high fecal coliform counts from harbor seals. On February 18, 1998 this Committee accepted the Manager's recommendations to: 1) continue the practice which was begun on January 28, 1998 of not placing barricades on the beach between people and seals on a trial basis, in an effort to restore shared use of the beach and water by people and seals; and 2) hire a consultant to evaluate the scope of work, cost and probable impacts of opening the four plugged sluiceways in the Children's Pool breakwater in order to restore water flow through the breakwater to reduce the size of the beach and increase the size of the "pool," thereby improving water safety for human users of Children's Pool and potentially reducing the number of seals hauling out on the beach. The Committee additionally directed a comprehensive review of the seal and pollution signs at Children's Pool, and that any necessary signage improvements be made based on that review.

DISCUSSION

Pollution

The chart of fecal coliform counts presented at the February meeting has been updated to include the counts to-date, see attached. On just two dates, February 2 & 23, 1998, counts were below the level at which human contact is prohibited.