



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: May3, 2010

REPORT NO: 10-069

Report to the City Council from the Natural Resources and Culture Committee Chair

The purpose of the Requested Action before the City Council is to establish a new Seasonal Shared Use Policy for the Children's Pool.

The new Seasonal Shared Use Policy includes:

- Maintaining a rope barrier year around;
- Allowing seal only use on the beach during pupping season and shared use during non-pupping season;
- Prohibiting dogs from the beach year around;
- Seeking private/grant funding for a full-time Park Ranger or Lifeguard and
- Establishing clear signage explaining the rules to the public.

REQUESTED ACTION:

1. Adopt a resolution determining that an emergency exists warranting the year around placement of the rope at Children's Pool; directing the Mayor or his designee from the appropriate city department to apply for an emergency Coastal Development Permit within 10 days of the effective date of this resolution to maintain the rope barrier at Children's Pool year around to protect the public health and safety and to mitigate the loss of or damage to life, health, and essential public services based on the findings contained herein and any other information or actions required to process and obtain an emergency Coastal Development Permit.
2. Direct the Mayor or his designee (as a required condition of the Emergency Coastal Development Permit) to seek an amendment to Coastal Development Permit Number 701673 and Site Development Permit Number 701765 to keep the rope barrier up year round at Children's Pool and to timely submit the permit applications.
3. Direct the City Attorney's office to draft an ordinance amending Municipal Code

§63.0102 to prohibit any person to be on the beach during pupping season (December 15 to May 15) and to prohibit a dog to be on the beach at any time for docketing at City Council no later than June 30, 2010.

4. Direct the Mayor or his designee to determine if the proposed year around rope barrier placement at Children's Pool and Municipal Code Amendments §63.0102 are consistent with the Local Coastal Program and California Coastal Act; and only if required, direct the Mayor or his designee to amend the Local Coastal Program accordingly.

5. Direct the Mayor or his designee to seek private funding and/or grants for a Park Ranger or Lifeguard full-time position with expert qualifications whose primary duty is to patrol the Children's Pool and to create a Volunteer Docent Program and prepare a written report to present to the Natural Resources and Culture Committee within 45 days.

6. Direct the Mayor or his designee to propose appropriate signage based on the Council actions and prepare a written report to present to the Natural Resources and Culture Committee within 45 days.

SUMMARY OF EVENTS AND PRIOR COUNCIL AND COMMITTEE ACTIONS*:

In 1931, the State of California granted Children's Pool area tidelands to the City of San Diego upon certain trust conditions: "[t]hat said lands shall be developed exclusively to public park, bathing pool for children, parkway, highway, playground and recreational purposes, and to such other uses as may be incident to, or convenient for the full enjoyment of, such purposes;" as well as "[t]he absolute right to fish in the waters of the Pacific ocean over said tidelands or submerged lands, with the right of convenient access to said waters over said lands for said purpose is hereby reserved to the people of the State of California." Cal. Stats. 1931, ch. 937.

In 2004, a lawsuit is filed against the City by a swimmer claiming that the city violated the terms of a 1931 trust between the State of California and the City of San Diego. Case No. D047382

On September 14, 2004, the City Council voted 5 to 3 (Council District 4 vacant) to: "APPROVE THE CITY MANAGER'S ALTERNATIVE RECOMMENDATION 1 IN CITY MANAGER REPORT 04-135 THAT WOULD MODIFY THE STAFF RECOMMENDATION TO DESIGN AND PERMIT THE SAND REMOVAL PROJECT AND OPEN THE POOL FOR YEAR-ROUND USE. DIRECT THAT THE OPENING OF THE SLUICeways IN THE CHILDREN'S POOL BE EVALUATED AS AN ALTERNATIVE METHOD TO OBTAIN SAND REMOVAL AND TIDAL FLUSHING AS PART OF THIS EFFORT. DIRECT THAT THE ROPE BARRIERS AND SIGN POSTS BE IMMEDIATELY REMOVED TO RESTORE PUBLIC ACCESS TO THE AREA AND THAT NEW SIGNS BE PLACED ON THE LIFEGUARD TOWER INDICATING THAT PUBLIC ACCESS IS PERMITTED BUT THAT SEAL HARASSMENT IS A VIOLATION OF THE MARINE MAMMAL

PROTECTION ACT. THESE SIGNS SHOULD ALSO INDICATE THE BACTERIA LEVELS GARNERED FROM TESTING IN THE AREA, WHICH SIGNS ARE CONSISTENT WITH THE RECOMMENDATIONS OF THE PARK AND RECREATION DEPARTMENT. DIRECT THAT CIP FUND NO. 29-872 BE CREATED FOR THE LA JOLLA CHILDREN'S POOL TO PROVIDE FOR FUTURE FUNDING." San Diego Resolution R-299646.

In August 2005, Superior Court Judge William C. Pate ruled in the lawsuit and ordered the excavation of the pool and a "return to its pre-seal condition in six months."

In September 2005, the City Council voted to appeal Judge Pate's ruling.

On March 21, 2006, the United States Department of Commerce, National Oceanic and Atmospheric Administration Office of Law Enforcement for the National Marine Fisheries Service issued a letter to Mayor Jerry Sanders. In that letter, the Special Agent in Charge expressed concern about the continued reports of seal harassment by the public and recommended the temporary closing of the Children's Pool during pupping season. It is also stated in the letter that the Office for Law Enforcement has received over 60 HOTLINE calls reporting alleged marine mammal harassment at the Children's Pool since January 1, 2006.

On April 5, 2006, the Natural Resources and Culture Committee voted unanimously to move forward for consideration at a City Council meeting, the Committee's recommendation to reinstate the rope barrier that was once in place at the Children's Pool from January 1 through May 1, and that the rope should be in place through the remainder of this year's pupping season and every year from this point forward.

On April 18, 2006, the City Council voted 7 to 1 in support of declaring that the rope barrier at the Children's Pool beach will be reinstated for the remainder of this year's pupping season and will be placed at the beach from January 1 through May 1 every year from this point forward.

On December 5, 2006, the City Council voted 6 to 1 to authorize the Mayor, or his designee, to immediately place a rope barrier at the Children's Pool during pupping season and supported changing the dates for the rope placement from January 1, 2007 to December 15, 2006, and May 1, 2007 to May 15, 2007. A rope barrier was installed, authorized by an emergency Coastal Development Permit [CDP]. In each subsequent year, the rope barrier was installed for at least a portion of pupping season, as authorized by an emergency CDP.

On April 30, 2007, the San Diego Police Department, Northern Division posted a statement about the Children's Pool stating their goals of minimizing the potential for confrontational behavior by maintaining peace and order during human-human and human-animal contact on and around the beach.

On November 30, 2007, the United States Department of Commerce, National Oceanic and Atmospheric Administration Office of Law Enforcement for the National Marine Fisheries Service issued a letter to the City Attorney. In that letter, the Special Agent in Charge again

expressed concern about the number of HOTLINE calls regarding the Children's Pool and the ongoing harassment of the seals. It was again recommended that the City close the beach to the public during pupping season.

On April 17, 2008, The Voice of San Diego, in an article written by Will Carless titled "Don't Do Your Threats by E-Mail" reports :

"La Jolla resident and Children's Pool activist Kent Douglas Trego just pleaded guilty in federal court to threatening a federal witness, a crime that is punishable by up to 10 years imprisonment and a \$250,000 fine.

For years, debate has been raging over whether a colony of seals that has made its home at the Children's Pool Beach should be allowed to stay, unfettered by people using the beach, or whether the beach should be open to humans.

Trego was accused of sending a threatening e-mail to an animal rights activist who reported two scuba divers who disrupted seals at the beach last September. According to the federal prosecutor, Trego admitted to following the two scuba divers onto the Children's Pool beach. The divers entered the water and caused some of the seals to flush into the water. A volunteer at the Animal Protection and Rescue League who videotaped the incident reported the scuba divers to federal law enforcement agents of the National Oceanic and Atmospheric Administration.

A release from the U.S. Attorney's Office states that after the scuba divers were ticketed for misdemeanor offences, Trego used a computer at the La Jolla Riford Library to send a threatening e-mail to the activist. Here's the text of the e-mail, with the witness's name removed by the federal government, from the press release:

*Two divers who used the Children's Pool in September have been cited by federal wildlife marshalls for disturbing the seals. [Witness] was apparently the one who turned them in. The problem is now that revenge will be taken out on [witness]. Many of the local divers have close friends in the California motorcycle clubs. As is this case, motorcycle club members have been contacted about [witness] and [he/she] will be dealt with very harshly, if [he/she] is not killed. They know that if [he/she] is not in San Diego, [he/she] may be found in San Francisco. Either San Diego or Oakland hit hogs will be involved in [his/her] punishment. [He/She] has brought this on [himself/herself].
He will be sentenced in July."*

On September 11, 2008, the Court ordered the City to submit a plan showing compliance with its earlier order to return the Children's Pool to its 1941 configuration. The schedule submitted to the Court in response included the Council making a decision on the Environmental Impact Report by September 30, 2009.

In December 2008, Federal Judge William Hayes ordered San Diego officials to install a rope barrier at Children's Pool to help protect the colony of seals during pupping season at

least until the parties return to court in February 2009.

On December 17, 2008 a Coastal Development Permit and Site Development Permit to erect the rope barrier at Children's Pool from December 2008 to May 2009 was approved and subsequently appealed to the Planning Commission where the appeal was denied. That decision was appealed to the California Coastal Commission, but the rope barrier had been removed by the time the Coastal Commission could hear the appeal, so it was determined to be moot.

On January 27, 2009, the City Council voted 6-1 in Closed Session to advance the proposal to amend the 1931 Tidelands Trust to include seals to open session before expiration of the Legislature's deadline for submission of proposed legislation.

On February 17, 2009, the City Council voted 7 to 1 at a regular City Council meeting to seek Supporting Legislation to Amend State Law to Permit Marine Mammals to Inhabit the Children's Pool Beach in La Jolla, California and Directing the City's Intergovernmental Relations Department to Seek Such Legal Legislation. The City Attorney recommended that the City Council support the resolution R-304668. According to the City Attorney:

"The Legislature has the authority to amend or revoke a public trust. The proposed Resolution would support legislation to amend the 1931 Tidelands Trust to permit the City, as trustee, to allow marine mammals to continue to inhabit the Children's Pool and to preserve the marine mammals' habitat. This proposed amendment to the Trust is consistent with the Trust's original intent that the Children's Pool be a source of recreation for children. It is also consistent with a recent appellate court decision that held protection of undomesticated wildlife is a trustee's obligation under the public trust doctrine. The Resolution mandates that the City's Intergovernmental Relations Department seek such legislation."

On February 26, 2009, State Sen. Christine Kehoe introduced legislation that would amend state law to allow seals at Children's Pool.

In May 2009, San Diego County Superior Court Judge Yuri Hoffman said the law requires the removal and dispersal of the seals from the area and scheduled a status conference.

On June 8, 2009, the City Attorney issued a memorandum to the Mayor and City Council regarding the Misconceptions about the Children's Pool/Seals Debate. It stated in part that: "*Ellen Browning Scripps never owned this beach, did not grant a trust to anyone and there was no agreement with her. The beach is owned by the State of California and it is the State that transferred the beach to the City in trust. Ms. Scripps asked and received permission of the State to build the wall. She was thanked, as she and her family should be today, for this and other gifts they have given to our community. But, she did not ask for an agreement and there was none. The only property rights involved with this beach belong to the State of California. Public entities that own land have property rights. As opined by the Attorney General, if the State wants to change the terms of this trust, it can do so as the property owner. With limited exceptions, federal law prohibits removal of the seals. Whether those*

exceptions apply is subject to litigation. If they do apply, federal law dictates the method of removal- and it is quite involved. Hence, the \$700,000 cost. The federal government has instructed us in writing that allowing dogs to harass the seals is a federal crime and they will enforce the law. Removal of the seals does not end the matter. The state court order would also require that the beach sand be dredged, contaminants removed and the beach be reconfigured to its 1941 geography. The estimate on this is an additional \$1 million for the dredging plus the environmental impact report and a lot of years seeking approval from the Coastal Commission and other agencies and defending environmental lawsuits. In February, I recommended that the City Council sponsor legislation to change the terms of the trust to give the City discretion on use of the beach. In our opinion, that renders the state lawsuit moot and the issue can be decided by the City Council and Mayor, the way public policy issues are supposed to be decided. Senator Christine Kehoe has stepped up to the plate and introduced this legislation."

In July 2009, the Governor signed into law legislation (Senate Bill 428) drafted by Sen. Christine Kehoe that adds to the the tidelands Trust the additional use of: a "*marine mammal park for the enjoyment and educational benefit of children.*"

In July 2009, Superior Court Judge Yuri Hofmann (three days after he gave the city 72 hours to begin relocating the seals) delayed his order to remove the animals, ruling that a new law shifting control of the beach back to the city of San Diego warrants a full hearing.

On September 22, 2009, staff proposed a Site Development Permit (SDP), CDP, and Environmental Impact Report (EIR) for the removal of approximately 3,000 cubic yards of sand from the Children's Pool, to allow water to circulate, thereby reaching decontamination levels for human use of the beach. The City Council voted 7 to 1 not to certify the EIR.

In November 2009, Judge Timothy B. Taylor of Superior Court, overruled a previous order by a predecessor in the case to disperse the seals, and ruled that given the new law, the seals shall remain at Children's Pool.

On December 2, 2009, the City Hearing Officer approved a Coastal Development Permit for annual placement of the rope barrier during pupping season, December 15 to May 15.

On December 7, 2009, the Coastal Development Permit was appealed to the Planning Commission by Mr. Leek; the appeal was denied on January 21, 2010.

On December 16, 2009, the Park and Recreation Department placed the rope at the Children's Pool as a temporary safety measure pending the appeal.

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

On March 10, 2010, the California Coastal Commission heard the appeal of the Coastal Development Permit; the appeal was denied. Currently, the City has a Coastal Development

Permit and Site Development Permit to install a rope barrier, annually, during seal pupping season (December 15 through May 15) at Children's Pool.

On March 17, 2010, the Natural Resources and Culture Committee considered several management options for the Children's Pool as presented by various community organizations. Two motions made at this hearing failed to obtain a majority vote of the Committee members.

In April 2010, the San Diego Police Department provided information regarding Calls for Service at Children's Pool. The report to the Committee lists the number of Disturbance Calls, including Battery Calls for Service at Children's Pool. It showed that from February 1, 2009 through January 31, 2010, there were 184 Designated Runs, 37 calls for disturbing the Peace and 4 calls for battery incidents. Out of service time for that same time period was approximately 185 hours as compared to 2005 (70 hours); 2006 (95 hours); 2007 (40 hours); 2008 (79 hours). This is a significant increase in calls for service at Children's Pool from 2005 to 2009.

On April 5, 2010, the Natural Resources and Culture Committee held a special hearing to consider various management options or combination of management options regarding the Children's pool. At the hearing the Committee voted unanimously to take the following actions:

Seek an emergency amendment to the existing Coastal Development Permit to keep the guideline rope up year round.

Direction to seek a Local Coastal Program amendment to prohibit the public from entering the beach during pupping season, 24 hours a day from December 15th through May 15th.

Prohibit dogs on the Children's Pool beach year round, 24 hours a day;

Seek private funding for a Park Ranger or Lifeguard full-time position with expert qualifications whose primary duty is to patrol the Children's Pool. Authorize the Park and Recreation Department or Lifeguard Services to create a Volunteer Docent Program led by this Park Ranger or Lifeguard.

Request the Mayor's office to return to this Committee in May of this year with information regarding a ranger or lifeguard and docent program and cost analysis, timeline for the permits, signage issues, merchandise tables, and any other issues the Committee members might have.

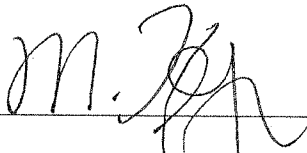
** The Summary is not inclusive, however, it does provide a timeline of many key events and City Council hearings and actions.*

ENVIRONMENTAL IMPACTS:

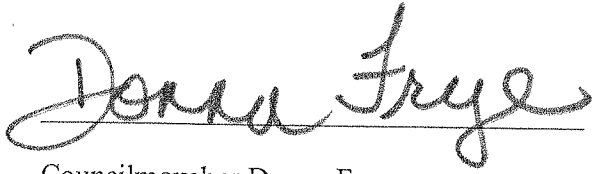
The activity of the City Council today is not subject to CEQA pursuant to State CEQA Guidelines Section 15060 (c)(3). This is not a statement or determination on any permits that may be applied for, and any permits are subject to review pursuant to the City's Municipal Code.

FISCAL CONSIDERATIONS:

Development Services Department staff estimate the cost to process the Emergency Coastal Development Permit to be in the range of \$1,000-\$3,000; the cost to process the Site Development Permit and a Coastal Development Permit amendments to be in the range of \$30,000-\$40,000 and the cost to amend the Local Coastal Program, if required, to be in the range of \$30,000-\$40,000. If the Site Development Permit, Coastal Development Permit and Local Coastal Program amendment, if required, are processed concurrently the cost for all three is estimated to be \$50,000.



Mary Ann Kempezenski
Natural Resources & Culture Consultant



Councilmember Donna Frye
Chair of the Natural Resources & Culture
Committee