

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

VALERIE O’SULLIVAN, )  
 )  
 Plaintiff and Respondent, )  
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 v. )  
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 CITY OF SAN DIEGO, )  
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 Defendant and Appellant. )  
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**ANSWER TO PETITION FOR REVIEW**

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of California:

Valerie O’Sullivan, Plaintiff and Respondent, respectfully submits this Answer to the Petition for Review filed by City of San Diego, Defendant and Appellant, of the decision of the Court of Appeal, Fourth Appellate District, Division I, by Alex McDonald, J., filed on September 7, 2007.

Respondent contends:

1. That the Petition should be denied forthwith since it fails to meet the mandatory provision of Rule 8.504(b)(3) in that it fails to state whether a petition for rehearing was filed and, if so, how the court below

ruled;

2. That Petitioner has failed to meet its statutory burden of showing any of the bases for review by the Supreme Court and, in particular, has failed to show that it is necessary to secure uniformity of decision or to settle an important question of law, Rule 8.500(b)(1);

3. That Petitioner is misleading and wrong on both points it raises in its Petition and that, in any event, neither point qualifies the case for review by this honorable Court:

a. Petitioner wrongly contends the court below breached the separation of powers by interpreting the trust.

b. Petitioner is misleading, and in error, in its argument that C.C.P. § 388 amounts to a form of statutory prerequisite to the recovery of fees under C.C.P. § 1021.5.

## **BACKGROUND**

The Petition starts with the sentence, “The City of San Diego is the trustee of a 1931 Tidelands Trust governing Children’s Pool Beach in La Jolla, California.”<sup>1</sup> No one, least of all Petitioner, has ever contended that the document (Stats. 1931 Chap. 937) created anything but a public trust in the Children’s Pool.

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<sup>1</sup> Interestingly, the *amicus* letter of Petitioner’s political partner Friends of the Seals starts out, “. . . the beach area in question is not held in trust by the City for the benefit of O’Sullivan and other members of the public.” Besides noting the startling contradiction in the bedrock positions of Petitioner and its political ally, Respondent will here answer Petitioner’s brief and deal with *amicus* by separate letter.

The facts of the case are set out at length in the trial court's and the Court of Appeal's decisions, the latter of which is attached to Petitioner's brief. The seawall enclosing the pool was built with private funds by Ellen Browning Scripps in 1929-1930 for the unequivocal purpose of creating a bathing pool for children and a safe place for them to enter the turbulent waters of the Pacific. Upon completion of the seawall, the legislature of the State of California donated the property to Petitioner in trust to be used as a children's pool and for the other uses specified in the grant.<sup>2</sup> The background has been visited, revisited and established convincingly by the evidence in the case. Now some nearly four years after the start of this lawsuit, after an exhaustive opinion by the trial court and a comprehensive and studied opinion by the Fourth District Court of Appeal, comprising together some 86 pages of background, issue discussion and decision, Petitioner seeks yet another go at its legally indefensible position.

Generations of public visitors have used the pool as a children's pool. In approximately 1992, harbor seals which had previously occupied Seal Rock, 150 yards or so to the north-northeast of the Children's Pool, began to migrate to the Children's Pool. As their numbers grew, they

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<sup>2</sup> Included was the use of part of the donated property as open access, or highway and parkway, as delineated in the statute, all of which was the subject of attention in the trial court but was not pursued by Petitioner in the Court of Appeal or here.

increasingly fouled the waters which are separated by the seawall from the open sea. In addition, Sea World of San Diego, under contract with the federal government, began a program of rehabilitating injured or diseased seals and then, after attaching tags to them, releasing them back into the ocean. Sea World released the animals in large numbers in the area of the Children's Pool. Evidence at trial, including photographs, showed an abundance of tagged animals on the beach. The buildup of seals at the Children's Pool was dramatic and relentless and eventually in the late 90's, because of their presence on the beach and their fecal contamination of the adjoining waters, the pool became unusable by humans. Plaintiff and Respondent Valerie O'Sullivan, after exhaustive unanswered pleas to the City to observe its bounden duty, filed this action seeking a court declaration of the terms of the trust and the City's duties thereunder. She prevailed in the trial court, and the judgment included an award of fees under C.C.P. § 1021.5. The trial court mandated the presence in the action of the State Attorney General who, after being named a party and being served, responded by declining to intervene but rather stipulated to be bound by the trial court's judgment.

After full briefing, the Court of Appeal heard argument and decided the case on September 7, 2007. Its opinion is attached to the Petition. It exhaustively discusses every issue raised by Petitioner, advertng to the

history of the Children's Pool, the terms of the trust, the application of the trust, the breach by the City of the trust and of its fiduciary duties, the remedy and the award of attorneys' fees. What the Court of Appeal, like the trial court, accomplished was to read, interpret and apply the wording of the trust document at issue. Courts have for eons been charged with the duty of interpreting the terms of public trusts; but Petitioner, seeking to confuse the issue, claims that in this instance by interpreting it in a way Petitioner doesn't like, the Court of Appeal has breached the separation between the legislative and judicial branches of local government.

After giving the issue a sideways glance in its brief on appeal, Petitioner also contends that Plaintiff's failure to notify the Attorney General under C.C.P. § 388 bars its eligibility for fees under C.C.P. § 1021.5, under the authority of *Schwartz v. City of Rosemead*, 155 Cal.App.3d 547. Incredibly, Petitioner claims that there is a conflict between this case and *Schwartz* which requires resolution by this Court as a dispute among the districts. Both positions, Respondent submits, are incorrect.

Petitioner, Appellant below, so far as Respondent is aware did not petition the Court of Appeal for rehearing of any issue in the case but here fails to state one way the other whether a petition for rehearing was sought.

## LEGAL DISCUSSION

### **I. PETITIONER’S PETITION SHOULD BE DENIED FORTHWITH FOR FAILURE TO COMPLY WITH THE MANDATORY REQUIREMENTS OF THE STATUTE.**

Rule 8.504(b)(3) of the Rules of Court states as follows:

If a petition for rehearing could have been filed in the Court of Appeal, the petition for review must state whether it was filed and, if so, how the court ruled.

There is no reason to believe that rehearing was not possible in this case.

The Petition herein fails to state whether any such rehearing was sought or, if so, how the court ruled. For failure to meet this mandatory statutory prerequisite, this Petition for Review should be denied forthwith.

### **II. THE PETITION FAILS TO MEET ANY OF THE CRITERIA FOR REVIEW BY THIS COURT.**

The statutory ground for review by the Supreme Court is the necessity “to secure uniformity of decision or to settle an important question of law.” Rule 8.500(b)(1). (None of the other statutory provisions appear to apply.) Although Petitioner’s Petition is replete with the most cavalier assertions that the issue before the Court is “important” or that review is necessary to resolve a claimed conflict between *Schwartz* and this case, those claims are incomplete, incorrect and misleading.

### **III. THE COURT OF APPEAL SIMPLY AND CORRECTLY INTERPRETED THE TRUST.**

Petitioner takes the position that the Court of Appeal violated the constitutional doctrine of the separation of powers when it restricted public-trust use to one narrow use when multiple other uses are authorized by the trust.

What this amounts to saying is that the Court of Appeal here read, interpreted and applied the trust. Petitioner does not seem to quarrel with its legal right to do so, including under the separation of powers doctrine. What Petitioner claims is that the Court of Appeal misread the trust and chose, from among an array of possible uses, one use which Petitioner does not like. Therefore, so Petitioner claims, the court intruded into the legislative domain because the City Council of the City of San Diego would have preferred another use.

The malignancy of Petitioner's argument is apparent. What Petitioner is really saying is that the court was perfectly justified in reading, interpreting and applying the terms of a public trust but, when a public entity disagrees with its interpretation and prefers a different one, then that court is invading the province of the legislature by choosing a use which the public entity does not prefer. Were the Petitioner consistent, its position would be that the court had no business at all interpreting the trust and that

interpretation of the trust is a matter for the legislative branch. This is a position which Petitioner cannot take in light of decades of decided cases in California. Petitioner is relegated to trying to have it both ways: a court can read the trust; but if it finds a mandated use which the entity doesn't favor, then, Petitioner would say, the court is illegal in reaching its conclusion because the Petitioner doesn't like it.

Respondent disagrees with the position that the Court of Appeal had no authority to interpret, or that it misinterpreted, the terms of the trust. The long history of the beach; its perennial and repeated use; its acceptance, indeed advertising, by the City as a children's pool and for other designated trust uses; its decades-long maintenance of the area as a children's pool, which includes staffing a lifeguard tower there year-round; its very name: all resoundingly underscore the correctness of the trial court's and the Court of Appeal's unanimous decision in this case. Petitioner cites no law, undoubtedly because there could be none, that the Court of Appeal cannot interpret a public trust. Either the court is charged with the authority of interpreting the trust or it is not. It is indisputable that the court in this instance has the duty to interpret the trust. Its interpretation was that use as a children's pool was mandated.

At the end of the day Petitioner's only quarrel is with the trial court's and the Court of Appeal's interpretation of the trust. Fearing apparently

that such a predictable and hornbook kind of quarrel will not gain it review in this Court, Petitioner sets out to bootstrap that quarrel into an important question of high constitutional moment: a claim that the court below is in breach of the wall of separation between the legislative and judicial branches of government. In order to get there, however, Petitioner has to invent the mischaracterization that the Court of Appeal did something it came nowhere close to doing: exercising from alternative freely available uses a political preference for one use over another as a *de novo* policy choice. This labored pretext of Petitioner should not beguile this honorable Court into granting review of a case where the court below did nothing more than courts, rightly, do every day—interpret the meaning of a legal document. This Petition, unraveled, is no more than a claim that the City disagrees with the outcome of a duty appropriately undertaken by the court below to interpret a statute according rights to the citizenry of the State.

**IV. C.C.P. § 388 HAS NOTHING WHATEVER TO DO WITH C.C.P. § 1021.5 AND THE DECISION OF THE COURT OF APPEAL IN THIS CASE IS NOT IN CONFLICT WITH SCHWARTZ.**

Petitioner here claims, after giving the thought a passing reference in its brief in the Court of Appeal, that noncompliance with § 388 of the Code of Civil Procedure disqualifies Plaintiff and Respondent from entitlement to

fees under C.C.P. § 1021.5. Respondent's answers to this position are several. First of all, the Court of Appeal dealt with the issue in its opinion and conclusively and persuasively held that the purpose of the section was well-satisfied in this instance by what occurred historically. That is, the trial court ordered the Attorney General to be made a party to the action. After service, the Attorney General stipulated to be bound by the judgment of the trial court and not to intervene or participate further in the action at all.

In addition to the thoughtful answer provided by the Court of Appeal, other arguments suggest themselves as well. First of all, C.C.P. § 388, mandating service of pleadings on the Attorney General, says nothing by its terms regarding the private-attorney-general-fee section of C.C.P. § 1021.5. § 1021.5 simply requires that before fees may be awarded there must be a showing of necessity for the action. The *Schwartz* case held that the action was a private action and that the necessity element of C.C.P. § 1021 had not been shown. In aid of that position, the court referred to the background regarding lack of service of the action on the Attorney General as further evidence that the action was private, not public, and thus did not meet the necessity requirement of C.C.P. § 1021.5. The *Schwartz* court never held that failure to comply with the strict terms of C.C.P. § 388 disqualified an applicant from fees under C.C.P. § 1021.5.

Secondly, while the matter of pollution from seals is referred to in this action, the case is not about pollution or adverse environmental effects which could affect the public generally; it is about enforcement of the terms of a public trust. All of the causes of action in the Complaint deal with this issue, not with abatement of pollution or provision regarding environmental effects. Indeed, if there were no pollution in these waters from the defecating seals<sup>3</sup>, the case would still be necessary under C.C.P. § 1021.5 because their very presence on the shore interferes with the mandated use of the beach as a children's pool under the terms of the trust. The case, in short, is not principally about pollution or environmental effects but about enforcement of the terms of the 1931 trust according the property to the City for that purpose.

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<sup>3</sup> A late *amicus* letter sets about to make the case that there is none.

Furthermore, if the City thought that failed compliance with C.C.P. § 388, requiring an invitation to the Attorney General to intervene in the action, disqualified Plaintiff O'Sullivan from fees under § 1021.5, the City itself could have served its Answer on the Attorney General.<sup>4</sup> Indeed, the section provides that the party filing the pleading concerning alleged pollution shall furnish a copy to the Attorney General within ten days after its filing. Here if the Complaint dealt with pollution and should have been served on the Attorney General, the Answer to the Complaint by definition referred to that matter and could have been but was not served by Petitioner upon the Attorney General. Thus, the City itself is in breach of the section, and its position here particularly disingenuous in claiming that the failure to comply with the section, and invite the Attorney General to intervene, disqualifies Respondent from entitlement to fees under C.C.P. § 1021.5. Under its (wrong) view, Petitioner itself could have accomplished the disqualification of the Respondent to fees by filing its own pleading with the Attorney General.

Moreover, the fact that the Attorney General may have a chance to weigh in on a public issue by way of intervention does not mean that the

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<sup>4</sup> Petitioner's unstated belief must be that the Attorney General, invited to do so, would have entered the fray and rendered Plaintiff's continued presence in the case completely or largely unnecessary, a belief exactly contrary to what occurred here.

Plaintiff would not still have satisfied the necessity element of C.C.P. § 1021.5. Here if the Attorney General had intervened, as it had an opportunity but stipulated not to do, there is no automatic necessity that the Plaintiff would thereby have been out-of-court and not bound or entitled to pursue the action on her own.

Finally, the Court of Appeal's opinion here is not certified for publication. Even if it were at odds with *Schwartz*, this Court's intervention is not indicated because there is no disuniformity of legally citeable and binding authorities to be resolved.

As the Court of Appeal discussed, the Attorney General had every opportunity here to intervene had it desired to do so and to take any legal action whatsoever to that purpose. It declined to do so and instead stipulated to be bound by the judgment. Every reason for the rule of C.C.P. § 388 has been well satisfied here and in any event its provisions have no inter-connectedness with the entitlement of a plaintiff, who satisfies its terms, to be awarded fees under C.C.P. § 1021.5.

## **V. A NOTE ON THE EXHIBITS.**

Respondent O’Sullivan continues to object to the use by the City of the letter of Curtis Fossum of March 4, 2005. That letter was not admitted into evidence, although the Court of Appeal erred on the side of caution and discussed it away in any event. This letter came, after an eve-of-trial backdooring by the City Attorney, from the author of the letter of August 15, 2000, which is attached hereto as Attachment A. Attachment B is a portion of the record referring to it (albeit by the wrong number) as the “famous Fossum letter,” a characterization persistent throughout the trial which conclusively correctly identifies it. Both are hearsay, full of unsubstantiated opinion, and otherwise objectionable, except the earlier letter (Attachment A) was admitted for notice to the City of the State’s position. The incessant misleading production by Petitioner of a later letter not in evidence contradicting the earlier operative one bespeaks the lengths to which Petitioner will resort in aid of its politically motivated effort to deny public trust benefits to the citizens for whose use the beach was specifically set aside.

## **VI. CONCLUSION.**

For all the foregoing reasons, Respondent submits that this Petition should be denied out of hand for its failure to observe the procedural prerequisites of the statute. The Court of Appeal correctly interpreted the

trust and was correct in upholding the award of fees to Plaintiff and Respondent. The Petition shows no necessity for this Court to secure uniformity of decision or to resolve an important question of law. The clamor of Petitioner to that effect rings hollow and lacks merit. Respondent submits that the Petition should be denied.

Respectfully submitted this 6th day of November, 2007.

**KENNERSON & GRANT, LLP**

By \_\_\_\_\_  
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CERTIFICATE OF WORD COUNT  
(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 3,197 words as counted by the Corel  
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DATED: November 6, 2007

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Paul Kennerson  
Appellate Counsel