JENKINS & HOGIN, LLP
A LAW PARTNERSHIP

MICHAEL JENKINS
CHRISTI HOGIN
MARK D. HENSLEY
KARL H. BERGER
GREGG KOVACEVICH
JOHN C. COTTI
ELIZABETH M. CALCIANO
LAUREN LANGER
TREVOR RUSIN
DAVID KING
NATALIE C. KARPELES

MANHATTAN TOWERS
1230 ROSECRANS AVENUE, SUITE 110
MANHATTAN BEACH, CALIFORNIA 90266
(310) 643-8448 • FAX(310) 643-8441
WWW.LOCALGOVLAW.COM

WRITER'S EMAIL ADDRESS:
CHOGIN@LOCALGOVLAW.COM

August 27, 2013

Chief Justice Tani Cantil-Sakauye
and the Associate Justices of the California Supreme Court
350 MacAllister Street
San Francisco, CA 94102

Reference: ***City of Dana Point vs. California Coastal Commission (Headlands Reserve LLC, RPI),* Supreme Court Case No. S212432**

***Surfrider Foundation v. City of Dana Point (Headlands Reserve LLC, RPI),* 2013 WL 2934682, 4th District, Div. 1 (June 17, 2013) (D060260; D060369)**

To the Chief Justice and the Honorable Associate Justices:

The League of California Cities respectfully submits this amicus curiae letter pursuant to the California Rules of Court, Rule 8.500(g) in support of the petition for review filed by the City of Dana Point in the case referenced above. The League urges this Honorable Court to grant the petition in order to resolve any doubt that the presumption in favor of the validity of an ordinance follows the ordinance into the courtroom whether the City is there as petitioner or respondent. The League further urges this Court to grant review in order to address the interpretation of the Coastal Act presented by the parties such that the constitutional and statutory authority to declare and abate nuisances is equally preserved for all California cities, whether coastal or inland. These are important questions of law with practical implications for cities, which must allocate finite resources to protect the public health, safety and welfare.

The League of California Cities' Interest in This Case

The League of California Cities is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The League and its member cities have a substantial interest in the outcome of this important case. Cities exercise the police power to enact and enforce ordinances that regulate conditions that may become a nuisance or health hazard. *See* Cal Const art XI, §7; *Schroeder v Municipal Court* (1977) 73 CA3d 841, 848 (zoning regulations); *Sullivan v. City of Los Angeles* (1953) 116 CA2d 807, 810 (building regulations); *Citizens for a Better Eureka v. California Coastal Com. (2011) 196 Cal.App.4th 1577, 1585* (Coastal Act: *"[W]here a local government properly declares a nuisance and requires abatement measures that are narrowly targeted at abating the declared nuisance, those measures do not require a CDP*); *See also* Municipal Law Handbook 2013 Ed. (CEB), section 12.1.

Abating public nuisances is a core function of local government and the lion's share of municipal resources is dedicated to public safety. Whether manifested in crack-houses, graffiti, inadequate sanitation, fire hazards, excessive noise or disturbing the peace, city government must determine when and how to abate nuisances to protect public safety and welfare. Often, cities must make hard choices due to limited funds and enforcement options. These value choices reflect the most basic function of democratic government and the Legislature wisely exempted such decisions from the reach of the Coastal Act. Instead, like all such legislative actions, cities' nuisance determinations are answerable to the Constitution and applicable laws through judicial review and answerable through elections to the People for the priorities their choices demonstrate. The League of California Cities comes before this Honorable Court in defense of this democratic system.

Cities Implement the Coastal Act

The City of Dana Point correctly notes that Public Resources Code section 30005(b) has not created much controversy in the 35 years since the Coastal Act was enacted. Dana Point Petition for Review at 4, n.2. The reason for that belies the undertones of the Court of Appeals' remand order [217 Cal.App.4th at 176] and the Coastal Commission's argument before this Court [CCC Answer to Petition at 10]. Local Coastal Programs (LCPs) are forged in cooperation with the Coastal Commission, reflect local values, and are enforced by willing local governments that enacted the policies themselves.

The California Coastal Act of 1976 (Public Resources Code (PRC) § 30000 *et seq.*) lays out the statutory scheme that consists of three parts:

> (1) the broad statewide policies of Chapter 3 established by the Legislature (PRC §§30200-30265.5);
>
> (2) the implementation of these policies through local governments within the coastal zone by local coastal programs (LCPs)[1] certified by the Commission to advance the Act's objectives of protecting sensitive coastal resources and maximizing public access (Pub. Res. Code (PRC) § 30001.5, 30512, 30513; *Landgate, Inc. v. California Coastal Commission* (1998) 17 Cal.4th 1006, 1011); and
>
> (3) the coastal development permit requirement which regulates development in the coastal zone, assigning the authority first to the Commission and transferring most permitting authority to the local government upon certification of an LCP (PRC §§30600, 30519).

City of Malibu v. California Coastal Comm'n (2012) 206 Cal.App.4th 549 (finding the Coastal Commission exceeded its jurisdiction when it purported to amend a certified LCP unilaterally and without the consent of the local government). The Legislature left "wide discretion to a local government not only to determine the contents of its land use plans,

[1]The Coastal Act defines an LCP as "a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, implementing actions which, when taken together, meet the requirements of, and implement the provisions and policies of [the Coastal Act] at the local level." PRC §30108.6.

but to choose how to implement these plans." *Yost v. Thomas* (1984) 36 Cal.3d 561, 573. "Local governments are responsible for creating their LCPs. [Citations omitted.] The Coastal Commission was established to review these LCPs and certify that the LCPs meet the requirements of the Act."[2] *Conway v. City of Imperial Beach* (1997) 52 Cal.App.4th 78, 86 (emphasis added); *Schneider v. California Coastal Comm'n* (2006) 140 Cal.App.4th 1339, 1344-1345.

Amendments to a certified LCP must be initiated and approved by the local government. PRC § 30514. This involves an extensive public hearing process at the local level. *See* 14 Cal. Code Regs. §13552(a), 13515. The Commission's role is limited to certifying a proposed amendment's consistency with the policies set forth in Chapter 3 of the Act. PRC §30514(d); 14 Cal Code Regs. §§13554, 13555. If the Commission finds the proposed amendment consistent with those policies, it will be certified. If the Commission finds that modifications are necessary in order for the amendment to conform to Chapter 3 policies, it may suggest those modifications to the local government. The local government may either accept the Commission's suggested modifications (in which case, the amendment will be certified as modified) or propose an alternative (in which case, the local government will begin the process anew).

The Coastal Act allocates authority between state and local government to assure the implementation of the State policies. The primary method of implementing the Coastal Act policies is through coastal development permits. The Coastal Act defines a limited area where the Coastal Commission has original permit jurisdiction and limited circumstances under which the Commission may have appellate jurisdiction. Once a certified LCP is in place, the Coastal Act largely shifts implementation of the Coastal Act to local government through permitting authority.

---

[2] In a telling imprecision, the Coastal Commission characterizes its 2004 action as "approval" of an LCP amendment. Coastal Commission's Answer to the Petition for Review at 4. In fact, the Commission "certifies" that the LCP conforms with the policies of Chapter 3 of the Coastal Act and the statute expressly limits the meaning of certification so as to preserve the "authority of the local government to adopt and establish, by ordinance, the precise content of its land use plan." PRC §30512.2. Certification is a statutorily limited function, different from the broader policy choice that the local government makes when it approves an LCP amendment.

The LCP is the *local* government's policies. The implication that local government would be hostile to its own LCP such that it would seek in "bad faith" to avoid its requirements fails to account for the fact that local governments write those very rules and possess the authority to amend them, consistent with the Coastal Act.

When faced with the abatement of a nuisance, local governments must sometimes confront competing policies: maximum public access to the beach is a policy goal on one hand and public safety on the other, requiring management of the emergence of un-policed areas of nighttime congregation where illegal and unsafe activities are reported. The reason that so few cases have arisen addressing the nuisance exemption under the Coastal Act is that cities are not in conflict with their LCPs. There is no general motivation to use the nuisance abatement authority as a pretext to avoid compliance with the Coastal Act. Coastal cities enforce the Coastal Act through their LCPs and cities possess the authority to amend their LCPs. Nuisance abatement authority is invoked under specific circumstances and its exercise subject to judicial review. The Legislature expressly exempted nuisance abatement from the Coastal Act, placing more weight on the policy to abate public nuisances than on the implementation of Coastal Act Chapter 3 policies, as is the prerogative of the Legislature.[3]

If allowed to stand, the Court of Appeal's decision will create a different standard of review for the 61 California coastal cities exercising their authority to abate nuisances than from the 406 inland cities in California, which is precisely what the Legislature decided against when it exempted nuisance abatement from the Coastal Act.

A Challenge to a City's Ordinance May Be Raised Directly or as a Defense

The declaration and abatement of a nuisance is constrained by constitutional and statutory requirements. Any public nuisance may be enjoined. Civil Code §3491; *see also* Civil Code §§3490–3496. Any city attorney in any city in which a nuisance exists or any district attorney may bring an action in the name of the People of the State of California to abate a public nuisance. Code Civ. Pro. §731. When a public nuisance has been statutorily defined, it is considered a "nuisance per se" and the function of the court is to determine whether such a statutory violation in fact exists, without an independent

[3]Sound policy and practical considerations underpin the Legislature's choice in this regard. Police services are expensive and a city's determination on the deployment of public safety resources invariably comes at the expense of other desirable expenditures.

assessment of the danger caused by the violation. *City of Costa Mesa v. Soffer* (1992) 11 CA4th 378, 385 (vehicle abatement); *McClatchy v. Laguna Lands, Ltd.* (1917) 32 CA 718, 725. Cities may declare by ordinance what constitutes a public nuisance. Govt Code §38771. *See* Municipal Law Handbook 2013 (CEB) §12.3, *et seq.* These determinations by cities are subject to judicial review. *See* Code Civ. Pro. §1085.

In its answer to the petitions for review, the Coastal Commission argues that the presumption of validity of an ordinance applies only when the City is a respondent/ defendant. CCC Answer to Petition at 8-9. Under the Coastal Commission's construction, if the City is plaintiff/petitioner, the presumption evaporates and the City must bear an extra burden to prove "its cause against the Commission," to wit that the City's ordinance is valid and therefore the Commission exceeded its jurisdiction when it purported to judge the validity of the local government's nuisance determination. *See* CCC Answer to Petition to Review at 8.

The Commission insists that there is "nothing unusual about placing the burden of proof on a petitioner and plaintiff." CCC Answer to Petition at 2. The Commission thereby asserts that the evidentiary presumption in favor of the validity of an ordinance applies only when the city is a defendant. The Commission characterizes this heightened burden of proof as a "narrow construction" of the exemption. CCC Answer to Petitions at 10. However, the Commission readily concedes that the presumption would apply if the city were defendant; it is illogical for an exemption to be construed one way if the city is plaintiff and another if the city is defendant. In this regard the Court of Appeal improperly creates dual standards of review for abatement ordinances without any rational distinction. Moreover, the presumption is rooted in the separation of powers doctrine, affording deference to the legislative body for its legislative determinations.

The Commission's construction invites mischief: the Commission may avoid the burden of proving in court an ordinance it challenges by instead appointing itself the reviewing authority, declaring the city ordinance invalid and then forcing the city to choose between challenging in court the Commission's *ultra vires* action or paying the Commission substantial fines for Coastal Act violations. If the city chooses the former, it bears the burden of proof that the law otherwise places on those who challenge the validity of a city ordinance. Instead of seeking judicial review to resolve the dispute over the Commission's statutory authority, the Commission draws the fire – it purports to determine the scope of its own jurisdiction and thereby avoids the burden of directly

challenging the validity of the ordinance. In this way the Commission usurps both the local government's function of determining nuisances and the court's role in statutory interpretation.

The separation of powers doctrine is the most structurally significant component of the Constitution. It ensures the cohesive strength of our government by limiting the authority of any one of the three branches of government to arrogate to itself the core functions of another branch. See *Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal.4th 287, 297. At the same time, the doctrine contemplates that the three branches of government are, to some extent, interdependent. Accordingly, the doctrine does not operate to prohibit one branch from acting in a manner properly within its sphere that has an incidental effect duplicating a function or procedure delegated to another branch. Rather, the purpose of the doctrine is to prevent one branch of government from exercising the complete power vested in another. *Id.* at 298. Nevertheless, even though the lines separating the three branches of government are allowed to shift somewhat in the interest of functionality and efficiency, they are not infinitely malleable. On the contrary, the law is settled that there is a point certain that cannot be crossed without flying in the face of the fundamental constitutional principle of separation of powers. See, e.g., *In re McLain* (1923) 190 Cal. 376, 379; *People's Federal Sav. & Loan Ass'n v. State Franchise Tax Bd.* (1952) 110 Cal.App.2d 696, 700.

In the case at bar, Dana Point's constitutional and statutory roles are to implement the Coastal Act and abate public nuisances to protect the public safety and welfare. The Commission's roles are to certify LCP amendments proposed by local governments and to entertain appeals of matters within its statutory authority. The court's role is to interpret the statute and protect the distinct authorities of the different branches of government. The Commission's attempt to usurp the city's and the court's roles was rewarded by the Court of Appeal's unusual decision to shift to the City the burden to prove the validity of its own ordinance, notwithstanding the statutory presumption of validity, solely on the basis that the Commission sought to act in excess of its jurisdiction and forced the city to seek judicial review.

The Coastal Commission Does Not Have the Statutory Authority to Substitute Its Judgment for the City's in Determining Whether a Nuisance Exists or Assume the Court's Role to Review Whether the Ordinance is Rationally Related to a Legitimate Government Purpose

Public Resources Code section 30005(b) is not authority for cities to abate nuisances. As discussed above, nuisance abatement authority emanates from the Constitution and the police power. That provision of the Coastal Act reflects the Legislature's choice to leave the municipal nuisance abatement authority unaffected by the obligations of the Coastal Act to implement the State policies. Nevertheless, the Coastal Commission sought to create a *de facto* limitation on the municipal abatement authority by assigning to itself the authority to review the validity of local government actions and to judge whether the abatement measures are sufficiently constrained, in the opinion of the Commission, using a more stringent standard than employed by courts undertaking the same inquiry. In this way, at the urging of the Coastal Commission, the Court of Appeal's decision has done what the Legislature expressly decided not to do in the Coastal Act: it placed a limitation "on the power of any city or county or city and county to declare, prohibit, and abate nuisances." *See* Pub. Res. Code § 30005(b) ("No provision of this division is a limitation on any of the following: … (b) On the power of any city or county or city and county to declare, prohibit, and abate nuisances. …")

The Court of Appeal remands the case back to the trial court to determine "whether the City's enactment of the ordinance was a pretext for avoiding the requirements of its local coastal program" and that the city was acting in "good faith." *City of Dana Point v. California Coastal Commission* (2013) 217 Cal.App.4th 170, 205. Whether a city invokes the nuisance authority for unassailable motives or nefarious ones is legally irrelevant. Either way, the Coastal Act does not limit the authority to abate a nuisance; thus, the only issue is whether the authority was exercised in the manner provided by law and without abuse of discretion. Under the principle of separation of powers, courts review the effect of legislation, not its motive. If the ordinance is rationally related to a legitimate government purpose – *vis.* declares and abates a public nuisance -- it will withstand scrutiny, without reference to the motives of the legislators. The question of an ordinance's validity may be addressed directly by challenge to the legislative action or raised in defense in the posture presented in the instant case where the city challenges the Coastal Commission's assertion of jurisdiction. Either way, the same standard of review is applied to legislative actions.

Conclusions

Under the Coastal Act, implementation of State policies rests primarily with local governments and is achieved through their adoption of LCPs, which are certified by the Coastal Commission. The Legislature exempted the declaration and abatement of nuisances from the reach of the Coastal Act. Consequently, coastal cities possess the same authority (and responsibility) to promote public safety through abatement of nuisances as inland cities. When courts review the validity of legislation, they do so mindful of the separate roles assigned to the different branches of government, which is achieved by employing a standard of review that scrutinizes legislation under the rational basis test and no more. The Court of Appeal's decision added an additional inquiry into the legislative enactments of coastal cities related to abatement of nuisances; but there is no basis for this different standard. A nuisance is a nuisance, be it on the coast or inland. And a government's legislative action is legislative whether the court reviews it in a case where the local government is plaintiff or defendant.

For the forgoing reasons and those set forth in the City of Dana Point's petition for review, the League of California Cities respectfully urges this Honorable Court to grant review in this case.

Respectfully submitted,

Christi Hogin
For Amicus Curare
League of California Cities

cc: service list

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1230 Rosecrans Avenue, Suite 110, Manhattan Beach, CA 90266.

On **August 27, 2013**, I served the foregoing documents described as:

AMICUS BRIEF IN SUPPORT OF PETITION FOR REVIEW;

on the interested party or parties in this action by placing the copy(ies) of the original(s) thereof enclosed in sealed envelopes with fully prepaid postage thereon and addressed as follows:

PLEASE SEE SERVICE LIST ATTACHED

VIA EMAIL. I caused such document as described above in PDF format, to be transmitted via **E-Mail** to the offices of the addressee(s).

VIA FACSIMILE. I caused such document to be transmitted via facsimile to the offices of the addressee(s).

VIA OVERNIGHT MAIL COURIER. I caused such envelope to be transmitted via **Overnite Express Mail Courier** to the offices of the addressee(s).

X **VIA U.S. MAIL**. I enclosed the above described documents in a sealed envelope or package addressed to the person (s) listed above or on the attached service list and caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

*I am readily familiar with the **Jenkins & Hogin, LLP's** practice of collection and processing correspondence for outgoing mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon prepaid at Manhattan Beach, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.*

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

Executed this 27th day of August 2013, at Manhattan Beach, California.

Wendy Hoffman

WENDY HOFFMAN

SERVICE LIST

Anthony Patrick Munoz
Rutan & Tucker, LLP
611 Anton Boulevard, Fourteenth Floor
Costa Mesa, CA

Attorney for Plaintiff and Respondent
City of Dana Point

Jamee Jordan Patterson
Office of the Attorney General
110 W. A Street, Suite 1100
San Diego, CA

Attorneys for Defendant and Appellant
California Coastal Commission

George Michael Soneff
Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA

Michael M. Berger
Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA

Attorney for Real Party in Interest and Respondent
Headlands Reserve LLC

Jennifer N. Kalnins-Temple

David Beckwith
McDermott Will & Emery LLP
4 Park Plaza, Suite 1700
Irvine, CA

Angela Tiffany Howe
Attorney at Law
1053 Oro Street
Laguna Beach, CA

Attorneys for Plaintiff and Respondent
Surfrider Foundation

Court of Appeal
Fourth Appellate District, Div. One
750 B. Street, Suite 300
San Diego, CA 92101-8189

Courtesy Copy

San Diego Superior Court
Central Division
330 W. Broadway
San Diego, CA 92101-3409
Honorable Joan M. Lewis, Dept. C-65

Courtesy Copy

Office of the Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-3600

Original + 8 copies
Via Overnight Mail