

M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - IAS PART 16

In the Matter of the Application of
JUNIPER PARK CIVIC ASSOCIATION, INC.,

Petitioner,

- against -

THE CITY OF NEW YORK, ADRIAN BENEPE,
COMMISSIONER OF THE NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION and
THE NEW YORK CITY DEPARTMENT OF PARKS
AND RECREATION,

Respondents.

BY: KELLY, J

DATED: November 30, 2006

INDEX

NUMBER: 7888/2006

MOTION

DATE: August 29, 2006

Juniper Park Civic Association Inc. ("JPCA"), a non-for-profit corporation formed in 1942, has instituted this special proceeding, sounding in mandamus, to compel respondents to enforce section 165.05 of the New York City Health Code [24 RCNY] and section 1-04 of the Rules of the New York City Department of Parks and Recreation [54 RCNY]. Additionally the petitioner seeks the court to direct respondents to "cease and desist the active encouragement and promotion" of violation of section 165.05 of the New York City Health Code.

In the words of its current president, JPCA is a civic organization "dedicated to preserving the quality of life in and around Middle Village, Elmhurst and Maspeth, Queens County". The name of the organization is derived from a New York City park, Juniper Valley Park, located in Middle Village, Queens.

The respondents are responsible for, among other things,

maintaining, policing and administrating New York City parks, including Juniper Valley. Another entity, the New York Council of Dog Owner Groups ("NYCDOG"), a not-for-profit corporation that describes itself as an umbrella organization for various dog owner groups, has filed a cross-motion to intervene.

The specific Health Code and Park Rules cited above govern the walking of dogs in New York City and, among other things, prohibit dogs from being present in parks without being leashed. Specifically, New York City Health Code §161.05[a], which in common parlance is known as the "Leash Law" provides that "[a] person who owns, possesses or controls a dog shall not permit it to be in any public place or in any open or unfenced area abutting on a public place unless the dog is effectively restrained by a leash or chain not more than six feet long". Section 1-04[i] of the Rules of the New York City Department of Parks and Recreation provide, in pertinent part, that no person owning or possessing any animal "shall cause or allow such animal to be unleashed or out of control in any park, except as permitted by the Commissioner".

According to its petition, JPCA contends that park patrons are threatened and at risk due to what JPCA characterizes as non-enforcement and "active encouragement of violations of the Leash Law and [respondents'] own rules between the hours of 9 p.m. and 9 a.m.". JPCA also alleges that the respondents' actions have continued despite numerous complaints and demands for enforcement by JPCA, its members, community residents and other civic and political organizations.

In their verified answer, the respondents deny the petitioner's claim of comprehensive non-enforcement, but admit that the Commissioner

of Parks and Recreation ("Commissioner") has granted permission for dogs to be off-leash in specified areas in some parks for the limited hours of 9:00 p.m. to 9:00 a.m.

From the papers submitted as well as the arguments presented by counsel on the record, it is clear that the genesis of this dispute dates back almost 20 years.

At that time, the New York City Parks Department, under then Commissioner Henry Stern, instituted an "unwritten policy" establishing "courtesy hours" during which dogs would be permitted to be unleashed in certain portions of parkland in the city. This "unwritten policy" has, according to respondents, been adopted by several ensuing Commissioners of Parks and now encompasses the hours between 9 p.m. and 9 a.m.

JPCA grounds this proceeding on the assertion that the Commissioner does not have the authority to enact such a policy in the face of the explicit language of the Leash Law, especially in light of the fact that the Parks Department's own written rules essentially parrot those provisions.

Initially in opposition, the respondents raise an objection in point of law (See, CPLR §7804[f]) that the petitioner, as an organization, lacks standing to prosecute this proceeding since the petitioner failed to demonstrate that any of its members suffered an "injury in fact" (See e.g., Diederich v Rockland County Police Chiefs' Assn., ____ AD3d ____, 2006 NY Slip Op 7314). Although a close question, the court is satisfied, after careful review of the petitioners' submissions, including the petition and reply affidavit of the petitioner's president, that the petitioner has established

standing, albeit barely, to maintain this special proceeding.

The respondents' assertion that the petitioner is not an appropriate representative of the interests of all of the park patrons in this city, while superficially appealing, is unpersuasive. Notwithstanding the fact that the vast majority of JPCA members are from Queens, its members are users of New York City's parks and it is as qualified as any other self-organized group to represent the interests of New York City residents, especially since it has the support of community planning boards and the Queens Congress of Civic Organizations.

As a practical matter, even if the court were to limit the petitioner's standing, and consequently its ruling, exclusively to Juniper Valley Park, as urged in the alternative by respondents, a very pertinent and practical legal reality of such a holding is that the respondents would clearly be collaterally estopped from challenging an adverse ruling from this court in another similar special proceeding brought by a party with standing to represent another area within the City of New York since the Health Code, Park Rules and the disputed policy of the Commissioner of the Park's Department are effective throughout New York City (See generally, Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 349; Ryan v New York Tel Co., 62 NY2d 494, 500; Sclafani v Story Book Homes, Inc., 294 AD2d 559).

Likewise, although its legal basis for intervention is tenuous, the court will grant the cross-motion of NYCDOG to intervene in this matter (See, CPLR §1013; Jiggetts v Dowling, 21 AD2d 178, 185).

Turning to the underlying merits of this proceeding, respondents and the intervenors have devoted the substantial majority of their submissions to arguments concerning the benefits of off-leash exercise to dogs and their owners, the increasing proportion of citizenry owning dogs, and how society as a whole can benefit from well adjusted canines. In fact, accepted at face value, the intervenors attribute the current vitality of all New York City parks to the single fact that dogs have been allowed to roam off-leash, ignoring the improved climate of the City as a whole over the last 20 years.

Not to be outdone, the petitioner has submitted photographs, news articles, and affidavits which, taken in a vacuum, would lead to the inescapable conclusion that any individual daring to venture in or near a City park would expect to be harassed by marauding hordes of vicious dogs whose owners sit idly by viewing the carnage much like spectators in the Roman Coliseum.

While such arguments are philosophically interesting, they are also almost totally irrelevant to the legal issues that must be decided. Essentially this proceeding turns on the extent of the Commissioner's authority to permit dogs to roam off-leash in parks in light of the fact that other rules apparently prohibit such conduct.

The respondents contend the Commissioner is authorized by the City Charter to manage the parks and establish rules and regulations for the use of same and that the subject "courtesy hours" are a valid exercise of such authority.

Petitioner, on the other hand, accuses the Commissioner of acting with Nixonian arrogance by maintaining the off-leash policy in clear

contravention of a "law" which the Commissioner has decided is not binding upon him due to his office. In fact, JPCA's president, in his affidavit, has stated that the Commissioner "cannot usurp the legislature that has created laws for the protection of the general public". Such a statement exhibits a fundamental misunderstanding of the "laws" at issue. In point of fact, the Public Health Code is not a legislatively enacted law, but rather, like it expressly states, a code. This is an important distinction that is obviously misunderstood by the petitioner.

When referring to a legislatively created law, or more accurately a statute (See, Black's Law Dictionary 1448 [8th ed 2004]), the process by which this type of law is created is generally as follows: A legislative body approves, by a majority vote of the duly elected representatives, a measure that is either enacted or rejected by the head of the executive. On the other hand a code, rule or regulation is customarily created by some regulatory body or the head thereof, which has been accorded that power by a legislative body (See, Grossman v Baumgartner, 17 NY2d 345; People ex rel. Yonofsky v Blanchard, 288 NY 145). Thus, the Court of Appeals has held the "power to make rules and regulations is administrative, not legislative" (Acorn Employment Serv. v Moss, 292 NY 147, 153).

As concerns this case in particular, the Health Code is not promulgated by the New York City Council, but the Board of Health of the New York City Department of Health under a grant of authority codified in section 558[b] of the New York City Charter. In particular, the Health Code is enacted by the Board of Health in accordance with the

requirements of the City Administrative Procedure Act (See, New York City Charter §1041, et seq; New York City Health Code §9.01[d], et seq [24 RCNY]).

Similarly, a Commissioner of the Parks Department is authorized by section 533[9] of the New York City Charter to “establish and enforce” the Rules of the New York City Department of Parks and Recreation which must be adopted in accordance with the requirements of the City Administrative Procedure Act (See, New York City Charter §1041, et seq; Rules of the New York City Department of Parks and Recreation §1-02).

Both the Health Code and the Parks Department Rules are not only created by nearly identical processes, each are deemed to have the “force and effect of law” (See, New York City Charter §533[9] and §558[a]) violations of each are punished as misdemeanors (See, New York City Charter §533[9][i] and §558[e]). Neither is inherently superior to the other, and the fact that the subject of these regulations may fall predominately within the rubric of public health does not require the Health Code to be treated as superior or controlling on the issue of unleashed dogs in public parks.

The introductory notes to the New York City Health Code are instructive here and provide that “[a]lthough the Department of Health is the City agency with primary responsibility in the field of public health, it is not the only agency in New York City with duties relating to health”. The notes go on to state that “[o]ther City agencies involved with health [include] . . . the Department of Parks and Recreation with recreational facilities and the parks”. Also recognized is the fact that since many of the other agencies with duties relating

to public health "have their own codes or regulations, the avoidance of administrative and legal duplication or of inconsistency with the law and activities of other government agencies was a major consideration in the most recent revision of the New York City Health Code".

Accordingly, since the situation at bar does not involve an attempt by the Commissioner to override a legislative mandate to the contrary (See e.g., Meat Trade Institute, Inc. v McLaughlin, 37 AD2d 456; People v Balmuth, 189 Misc. 2d 243), the provisions of the Health Code at issue in this case do not supercede or, in the vernacular, trump the Parks Department Rules.

With this finding in mind, the issue before the court is not simply whether the respondents have usurped the Health Code and may be compelled to enforce its relevant edicts. Rather, the question that must be resolved is an apparent inconsistency between the Health Code, which contains a blanket prohibition against dogs being permitted off-leash in public, and the Parks Department Rules that, although containing a similar prohibition, also include two significant exceptions. Specifically, section 1-04[i] of the Parks Department Rules states that dogs are permitted off-leash inside City parks when within established "dog runs" (See, 56 RCNY §1-05[s][3]) and "as permitted by the Commissioner".

In light of the introductory notes to the Health Code which, among other things, acknowledge the Parks Department's concurrent oversight of public health issues as they relate to the City parks, and recognizing the Commissioner's jurisdiction over the management of City parks and duty to promulgate rules in relation thereto, the court concludes that

the Parks Department Rules, including its exceptions, are controlling under the circumstances.

Except for its discredited argument as to the superiority of the Health Code to Parks Department rules in this case, the petitioner has not challenged the propriety of the establishment of section 1-04[i] of the Parks Department Rules which expressly vests the Commissioner with the authority to permit off-leash activity at his discretion. As such, the claim that the Commissioner was not authorized to implement "courtesy hours" for off-leash dog activity in City parks fails by the language of the Parks Rules which expressly allow the Commissioner to permit such activity. Moreover, the authority to determine whether to permit off-leash activity within City parks is certainly within the powers expressly delegated to the Commissioner under section 533 of the New York City Charter.

The only remaining issue before the court is whether the petition can be construed as a demand to compel respondents to enforce the rule prohibiting off-leash activity during periods other than the "courtesy hours" complained of, in other words 9:00 a.m. to 9:00 p.m.

Initially, the petitioner's papers fail to demonstrate that the respondents are not enforcing the Park Rules or the Health Code during these hours. The affidavits submitted by the petitioners, along with non-evidentiary anecdotal proof in the form of letters and newspaper articles, establishes proof of various attacks upon park users by unleashed dogs. While the court could not be more sympathetic to the victims of these attacks, it simply does not constitute legally sufficient proof that the respondents are blanketedly not enforcing the

applicable rules through the issuance of summonses or custodial arrests. In fact, the petition as well as the affidavit submitted by JPCA's president simply alleges "[u]pon information and belief" that the respondents are not enforcing the Parks Department Rules.

Further, the respondents submit an affidavit from Kevin Jeffrey, Deputy Commissioner for Public Programs of the Parks Department, wherein he avers that Parks Department officers "may and do" cite owners for unleashed dogs outside the "courtesy hours", in other words between 9 a.m. and 9 p.m., and that, irrespective of the time of day, cite "owners who are unable to control their dogs".

Basic legal precedent establishes, however, that even if the petitioners proffered evidence of non-enforcement of the rule at issue in particular instances, or even in general, the court is without authority to intervene. Contrary to the petitioner's assertion, the decision whether and in what instances police power should be exercised is peculiarly and unquestionably a discretionary function (See, Mullaney v Brown, 300 AD2d 307; Haydock v Passidomo, 121 AD2d 540; Kerness v Berle, 85 AD2d 695; Perazzo v Lindsay, 30 AD2d 179). To the extent that the petitioner seeks a general order directing the respondents to enforce the Parks Department Rules from 9:00 a.m. to 9:00 p.m., such relief is unavailable since "[m]andamus [does] not lie to compel a general course of official conduct, as it is impossible for a court to oversee the performance of such duties'" (Walsh v La Guardia, 269 NY 437, 442, citing State ex rel. Hawes v Brewer, 39 Wash 65; Community Action against Lead Poisoning v Lyons, 43 AD2d 201, 202-203).

Indeed, the prohibition against judicial intervention into the

compulsion of the law enforcement function was aptly characterized by then Court of Appeals Chief Judge Breitel in Jones v Beame, 45 NY2d 402, 409 as follows: "One may initiate a criminal complaint against a malefactor for a particular act, or administratively charge a police officer for failing to do his duty to arrest and charge, but rarely, if ever, should mandamus lie to command the Commissioner of Public Safety to enforce the Sunday 'blue' laws or the ordinance forbidding the riding of bicycles on the sidewalk".

The court is keenly aware that while it can dispose of the legal issue presented, the broad emotional effect of the issues raised will remain. In the face of the angst and vitriol exhibited herein, common sense would dictate that something more than an "unwritten policy" governing the off-leash use of parkland by dogs, which is known by few and misunderstood by many, is required in this instance.

With this in mind, the statement by respondent's counsel during oral argument, as amplified in writing, that respondents will formalize the details of the current off-leash policy within the Park Rules, is, hopefully, more than mere puffery.

The alternative is simply more endless litigation over what is, inherently, an administrative and political problem.

Accordingly, the petition to compel the respondents to enforce section 165.05 of the New York City Health Code [24 RCNY] and section 1-04 of the Rules of the New York City Department of Parks and Recreation [56 RCNY] is denied in its entirety.

Short form Order signed simultaneously herewith.

Peter J. Kelly, J.S.C.