

<b>NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation &amp; Historic Preserv.</b>
2013 NY Slip Op 34043(U)
January 8, 2013
Supreme Court, Albany County
Docket Number: 3691-12
Judge: Jr., George B. Ceresia
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Exhibit K - Decision and Order of the Hon. George B. Ceresia, Jr., dated January  
8, 2013, Index No. 3691/12 [78-85]

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY

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In the Matter of the Application of the

NYC C.L.A.S.H., INC.,

Petitioner,

For a Judgment Pursuant to CPLR Article 78

Index No. 3691-12

RJI No. 01-12-ST3786

-against-

THE NEW YORK STATE OFFICE OF PARKS,  
RECREATION & HISTORIC PRESERVATION  
and ROSE HARVEY, in Her Official Capacity as  
COMMISSIONER OF THE NEW YORK STATE  
OFFICE OF PARKS, RECREATION & HISTORIC  
PRESERVATION,

Respondents.

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Special Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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## DECISION/ORDER

George B. Ceresia, Jr., Justice

Petitioner NYC C.L.A.S.H.<sup>1</sup> (hereinafter petitioner) is a not-for-profit corporation dedicated to advancing and promoting the interests of smokers, and protecting the legal rights of smokers. In November 2011, respondents New York State Office of Parks, Recreation & Historic Preservation and Rose Harvey, in her official capacity as Commissioner of the New York State Office of Parks, Recreation & Historic Preservation (hereinafter collectively referred to as respondents) issued a policy statement announcing new restrictions on outdoor smoking within facilities under their jurisdiction (see Verified Petition, Ex. F). Said restrictions pertained to playgrounds, swimming pool decks, beaches, bathhouses, pavilions and picnic shelters, outdoor seating areas near food and beverage concessions, areas where environmental programs are held, public gardens, and areas where large numbers of visitors congregate; however, other areas of outdoor parks remain available for smoking.<sup>2</sup>

Respondents further advised that signs would be posted in the restricted areas. In instances of non-compliance, respondents explained that the new restrictions would be enforced first by verbal counseling, and then by issuance of an violation ticket charging the individual with disorderly conduct (see 9 NYCRR § 375.1[f][1]). In April 2012, the State

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<sup>1</sup> NYC C.L.A.S.H. is an acronym for “New York City Citizens Lobbying Against Smoker Harassment” (see Verified Petition, ¶6).

<sup>2</sup> Notwithstanding the foregoing, respondents announced a total ban on outdoor smoking in six parks located within the confines of New York City in order to be consistent with the prohibition on smoking in all City parks.

Register published respondents' notice of its proposed rule regarding outdoor smoking and other tobacco use (see Verified Petition, Ex. E, p. 14). The notice indicated that respondents were proposing the rule as a "consensus rule" (State Administrative Procedure Act § 102[11]). Around the same time, no-smoking signage was installed in designated areas within respondents' parks and facilities (see Verified Petition, Exs. B-D).

In May 2012, petitioner notified respondents of its objection to the proposed rule (see Verified Petition, Ex. G). In response, respondents suspended enforcement of the policy and initiated formal rule making (see State Administrative Procedure Act § 202). Nevertheless, respondents left the previously posted signs in place, and took the position that they are merely advisory. Petitioner subsequently commenced the instant CPLR article 78 proceeding seeking a judgment: (1) enjoining respondents from creating, implementing or enforcing any policy, rule or regulation prohibiting or restricting outdoor smoking or tobacco use of any kind in state parks, historic sites or any other location under respondents' jurisdiction; and (2) directing respondents to remove all "No-Smoking;" "Smoking is Prohibited;" and "Tobacco Use is Prohibited" signs; or any other signage indicating that outdoor smoking or tobacco use of any kind is prohibited or restricted in state parks, historic sites or any other location under respondents' jurisdiction. Respondents moved to dismiss the petition on the grounds that petitioner lacks standing and raises a matter not ripe for judicial review.<sup>3</sup>

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<sup>3</sup> By letter, dated July 30, 2012, respondents withdrew their argument regarding petitioner's alleged failure to effectuate service upon the Attorney General.

## DISCUSSION

### **I. Standing**

“Standing is . . . a threshold requirement for a [petitioner] seeking to challenge governmental action. . . First, a [petitioner] must show ‘injury in fact,’ meaning that [petitioner] will actually be harmed by the challenged administrative action. . . Second, the injury a [petitioner] asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted” (New York State Assn. of Nurse Anesthetists v Novello, 2 NY3d 207, 2011 [2004]; see Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 773 [1991]). To establish standing in the context of a CPLR article 78 proceeding, an organization is required to show “that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members” (New York State Assn. of Nurse Anesthetists v Novello, 2 NY3d at 211; see Matter of Finger Lakes Zero Waste Coalition, Inc. v Martens, 95 AD3d 1420, 1421 [2012], lv denied 19 NY3d 811 [2012]; Matter of Hudson Prop. Owners’ Coalition, Inc. v Slocum, 92 AD3d 1198, 1199 [2012]).

First, respondents assert that petitioner has failed to establish standing because the petition does not allege who its members are. In the Court’s view, however, this deficiency was cured by the submission of an affidavit from petitioner’s chairperson, chief executive officer and founder, Audrey Silk (cf. Matter of Hudson Prop. Owners’ Coalition, Inc. v

Slocum, 92 AD3d at 1199). In her affidavit, Silk avers that petitioner’s organization is comprised of 914 members, almost all of whom are smokers. According to Silk, over 60% of petitioner’s members reside in New York State and “visit, utilize and patronize state parks and other facilities managed by [respondents]” (Silk Aff., ¶5). Accordingly, the Court finds that at least one of petitioner’s members would otherwise have standing to sue respondents individually.

Next, respondents argue that petitioner has not been aggrieved by the new smoking restrictions. Stated differently, it is respondents’ position that petitioner has not satisfied the aforementioned “injury in fact” threshold. Contrary to respondents’ contention, the Court finds that petitioner has standing to challenge respondents’ policy decisions because the no-smoking signage is misleading to smokers as there is, in fact, no law or regulation currently prohibiting such conduct. Accordingly, to the extent petitioner’s members ““visit, utilize and patronize state parks and other facilities managed by [respondents],” they have suffered a legally recognizable injury as a result of the outdoor smoking restrictions (Silk Aff., ¶5).

## **II. Ripeness for Adjudication**

Finally, respondents claim that, since the harm anticipated by petitioner may be prevented or averted by further administrative action, petitioner’s facial challenge to the no-smoking policy is not ripe for review. In determining whether an administrative action is ripe for review, the Court must first consider whether it “is final and whether the controversy may be determined as a ‘purely legal’ question” (Church of St. Paul & St. Andrew v Barwick, 67

NY2d 510, 519 [1986], cert denied 479 US 985 [1986]). “An action will be deemed final if ‘a pragmatic evaluation’ reveals that ‘the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury’” (Matter of Adirondack Council, Inc. v Adirondack Park Agency, 92 AD3d 188, 190 [2012], quoting Church of St. Paul & St. Andrew v Barwick, 67 NY2d at 519).

Applying the above principles, the Court notes that administrative action undertaken in connection with the formal rule making process must be treated as separate and distinct from respondents’ decision to install no-smoking signage within parks and facilities. Thus, inasmuch as petitioner challenges the respondents’ proposed rule, such challenge is not ripe for judicial review because further agency action will be forthcoming at the conclusion of the formal rule making process (see generally Matter of Agoglia v Benepe, 84 AD3d 1072, 1076 [2011]; Ogden Citizens for Responsible Land Use v Planning Bd. of Town of Ogden, 224 AD2d 921, 921 [1996]). In the event a formal rule is ultimately promulgated, petitioner may challenge the same by commencing a separate CPLR article 78 proceeding at that time.

On the other hand, the Court finds that petitioner’s challenge to respondents’ installation of no-smoking signage is ripe for judicial review. Stated differently, in April 2012, respondents arrived at a “definitive position” with respect to outdoor smoking restrictions when they installed the aforementioned signage in designated areas within their parks and facilities (Matter of Essex County v Zagata, 91 NY2d 447, 453 [1998]; see e.g. Town of Riverhead v County of Suffolk, 78 AD3d 1165, 1166 [2010]).

Accordingly it is

**ORDERED** that respondents' motion to dismiss is granted, in part, insofar as the instant proceeding challenges respondents' proposed rule; and it is further

**ORDERED** that respondents' motion to dismiss the petition is denied, in part, insofar as the instant proceeding challenges respondents' decision to install no-smoking signage in designated areas within their parks and facilities; and it is further

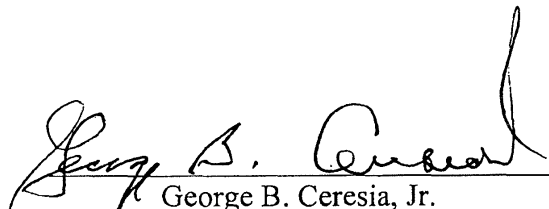
**ORDERED** that respondents are hereby directed to serve and file an answer within 20 days from the date of this Decision and Order; and it is further

**ORDERED**, that respondent re-notice the proceeding in conformity with CPLR 7804 (f); and it is further

**ORDERED**, that the proceeding, after being re-noticed, shall be referred to the undersigned for disposition.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the petitioner. The Court will retain the papers until final disposition of the proceeding. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: Albany, New York  
January 8, 2013

  
George B. Ceresia, Jr.  
Supreme Court Justice