SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

IN THE MATTER OF THE APPLICATION OF the JUNIPER PARK CIVIC ASSOCIATION, **Petitioner,** **- against -** **THE CITY OF NEW YORK, ADRIAN BENEPE, COMMISSIONER, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, and the NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION** **Respondent(s).**	**Index No.: ________________** **ARTCILE 78 PROCEEDING** (Mandamus to Compel)

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE

PRELIMINARY STATEMENT

Petitioner moves this Court to compel the Respondents (The City of New York and its agencies, i.e. the NYC Department of Parks and Recreation et al.) to perform a ministerial act of complying with section 161.05 of the NYC Public Health Code and section 1-04 of the Department of Parks and Recreation's own rules and regulations.

The aforementioned sections, in sum and substance, require that dogs remain leashed at all times in public spaces. The above sections are commonly referred to as the "dog leash law." In this case, the public spaces are NYC parks, and, in particular, Juniper Valley Park located in Middle Village, Queens County.

Respondents are entrusted with enforcement of these laws and regulations.[1]

The case in controversy herein arose when the Respondents arbitrarily refused to enforce the aforementioned law and regulations and have actively engaged in a course of conduct that encourages and promotes the violation of the Public Health Code by promoting the fact that Respondents will not enforce the aforementioned Public Health Code between the hours of 9 p.m. and 9 a.m.

The Petitioner's position is that the Respondents have no authority to encourage the violation of the law and that there are no time limitations on enforcing the law. The law is the law at all times. The Respondents have a ministerial duty to comply with and to enforce the law and not to encourage or promote the violation of the law.

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[1] Upon information and belief, Respondent NYC Department of Parks and Recreation ("Parks Department") requested that the Department of Health amend the Health Code to permit the Parks Department to enforce section 161.05 of the Health Code. The code was amended to give Parks enforcement authority over the leash law ***(Please see Exhibit One- Notice of Adoption of Amendments to sections 161.03, 161.04, and 161.05 of the New York City Health Code).***

STATEMENT OF FACTS

The Petitioner seeks to compel the Respondent to adhere to the following law and/or NYC regulations and codes:

In pertinent part, section 161.05 of the NYC Health Code mandates 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."

In pertinent part, NYC Department of Parks and Recreations rules and regulations, in particular § 1-04, mandates that "no person owning or possessing any animal shall cause or allow such animal to be unleashed or out of control in any park." at all New York City Parks including Juniper Valley Park.

The Parties are as follows *(See Affidavit of Robert Holden, President of Petitioner Organization)*:

Petitioner is a duly incorporated New York State Domestic Not-For-Profit Corporation with offices and regularly scheduled meetings and activities within Queens County ***(Please see Order to Show Cause Exhibit Three- NYS Department of State, Entity Information).*** Since its incorporation in 1942, Petitioner has served as a civic organization dedicated to preserving the quality of life in and around Middle Village, Elmhurst and Maspeth, Queens County. In particular, the Petitioner has been instrumental in the beautification and preservation of Juniper Valley Park; an approximately 55-acre New York City Park located within Middle Village, Queens

County. Petitioner publishes and distributes the "Juniper Berry," a full color community magazine in which Petitioner updates and informs the community on a variety of community issues including issues related to parks. Petitioner has sponsored and hosted community events such as forums on parks, zoning, and overdevelopment. Petitioner has honored community activists and community leaders. The most recent such honorary award was presented to NYC Mayor Michael Bloomberg.

Recently, Petitioner successfully advocated to have the City of New York purchase an industrial complex known as the "Elmhurst Gas Tanks" in Elmhurst, Queens County, and to convert the property into a New York City park. The property was purchased by the City of New York and the site is presently scheduled to be converted into a park.

Petitioner's members are residents and merchants who live and work in the neighborhoods surrounding Juniper Valley Park. Petitioner's members are threatened and continue to be at risk over the lack of enforcement of the aforementioned dog leash laws at Juniper Valley Park and other NYC Parks.

Respondent, the City of New York, is a municipal government.

Respondent, Adrian Benepe, is the Commissioner of the New York City Department of Parks and Recreation (hereinafter "Commissioner"). This action is brought against him in his official capacity.

Respondent, NYC Department of Parks and Recreation, is an agency of the City of New York entrusted with the administration of New York City Parks and the enforcement of the NYC Health Code § 161.05 and its own rules and regulations.

As the Court will note from the annexed letters from Petitioner to the Respondents, Petitioner has made numerous requests for enforcement ***(Please see Exhibit Four- Letters to Defendants dated February 17, 2006 & March 23, 2006 & Notice of Claim).*** Nevertheless, Respondents continue to encourage the violation of the law by refusing to enforce the law.

Petitioner now must seek the Court's assistance to protect the health, safety and well-being of its members.

APPLICATION OF LAW

POINT ONE

PETITIONER HAS STANDING TO COMMENCE THIS ACTION

Courts may accord standing under Article 78 to organizations acting in a representative capacity on behalf of their members. The Court of Appeals has held that an organization has standing when: 1) at least one or more of its members would have had standing as individual petitioners; 2) the claims asserted; to wit, preservation of New York City Parks and protection of the general welfare of the community, are sufficiently germane to the organization's purpose; and 3) neither the claim asserted nor the available relief would require the participation of individual members. See **Aeneas McDonald Police Benevolent Association v. City of Geneva**, 92 NY2d 326 (1998); **Society of Plastics v. County of Suffolk**, 77 NY2d 761 (1991); **NOW v. State Division of Human Rights**, 34 NY2d 416 (1975).

In this case, Petitioner has standing to commence said action. First, one or more of its members would have had standing as individual petitioners. Petitioner's members

are community residents that reside near and use Juniper Valley Park and other parks throughout the Queens County.

Second, as a civic organization, the claims asserted; to wit, preservation of New York City Parks and protection of the general welfare of the community, are sufficiently germane to the organization's purpose. As its name may suggest, the Petitioner has been at the forefront of parks issues. As stated in the Affidavit of Robert Holden, President of the Juniper Park Civic Association, the organization publishes and distributes the "Juniper Berry," a full color community magazine in which Petitioner updates and informs the community on a variety of community issues including issues related to parks. Petitioner sponsors and hosts community events such as forums on parks, zoning, and overdevelopment and most recently spear-headed the community effort to have the City of New York purchase an industrial complex known as the "Elmhurst Gas Tanks" in Elmhurst, Queens County, and to convert the property into a New York City park. The property was purchased by the City of New York and the site is presently scheduled to be converted into a park. See Holden Affidavit.

Finally, neither the claim asserted nor the available relief would require the participation of individual members. The issue is simple—Are the Respondents encouraging and promoting the violation the Public Health Code by refusing to enforce the law and preventing other agencies from enforcing the same. Respondents are in the best position to respond to the Petitioner's claims. No witnesses are necessary.

Therefore, for the aforementioned reasons, Petitioner has standing to commence the present action.

POINT TWO

MANDAMUS TO COMPEL IS AN AVAILABLE REMEDY

It is well-established that the remedy of mandamus will lie only to compel the performance of a ministerial act, and only when there exists a clear legal right to the relief sought. **Matter of Bullion v. Safir**, 249 AD2d 386 (2nd Dept., 1998) citing Matter of Legal Aid Society v. Scheinmand, 53 NY2d 12 (1981). Therefore, the issue presented is whether the compulsion sought in the present application is of a ministerial act.

As the Court will note from the following analysis, the relief sought (i.e. compulsion of the government to simply cease and desist from encouraging and promoting the violation of the law and to comply with said law by enforcing it) is a ministerial act, even if discretion is involved in its implementation.

Although mandamus to compel is an extraordinary remedy under the law, there are numerous examples of when mandamus is warranted even when the actions of the government require some discretion in the implementation of the law. For example, mandamus to compel is available to require state officials to carry out legal obligations with regard to providing services to persons with mental disabilities, even though the preparation of service plans and the creation of particular programs will necessarily involve many discretionary decisions. See *New York Civil Practice*, Weinstein, Korn, Miller 2nd Edition Volume 14 citing **Klosterman v. Cuomo**, 61 NY2d 525 (1984) (*what has been somewhat lost from view is this function of mandamus to compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so. Moreover, if a statutory directive is mandatory, not precatory, it*

is within the courts' competence to ascertain whether an administrative agency has satisfied the duty that has been imposed on it by the legislature and, if it has not, to direct that the agency proceed forthwith to do so). In addition, mandamus to compel is available to require the Attorney General to decide to accept or reject a cooperative housing offering plan within the Martin Act's statutorily mandated 30-day time period, even though the particular ultimate decision to accept or reject the offering plan falls with the discretion of the Attorney General. See *New York Civil Practice*, Weinstein, Korn, Miller 2nd Edition Volume 14 citing **Gonkjur Associates v. Abrams**, 82 AD2d 683 (1st Dept., 1981). Similarly, mandamus to compel has been held to be available to require a licensing agency to decide a license application, but not the ultimate decision on the application. See *New York Civil Practice*, Weinstein, Korn, Miller 2nd Edition Volume 14 citing **Utica Cheese v. Barber**, 49 NY2d 1028 (1980). Likewise, mandamus to compel is available to require public officials or agencies to render decisions on financial assistance applications or in contractual processes, but not dictate the outcome or those applications or processes. See *New York Civil Practice*, Weinstein, Korn, Miller 2nd Edition Volume 14 citing **Williamsville Care Bridge Operator, Inc. v. Novello**, 6 AD2d 861, 775 NYS2d 382 (3rd Dept., 2004). Additionally, mandamus to compel is available to require public officials or agencies to provide services required under the law, such as installing public toilets at bath houses, but cannot compel the agency to design it in a particular manner. See **Matter of Kusky v. Town of Islip**, 191 A.D.2d 633 (2nd Dept., 1993). Also, mandamus to compel is available to require the Commissioner of Correctional Services to calculate a prisoner's jail time credit. See *New York Civil Practice*, Weinstein, Korn, Miller 2nd Edition Volume 14 citing **Bottom v.**

Goord, 96 NY2d 870 (2001). Moreover, mandamus to compel can require a judge or other judicial officer to render a decision in a pending case, but not to require the judge to render a particular decision or outcome. See *New York Civil Practice*, Weinstein, Korn, Miller 2nd Edition Volume 14 citing **Klosterman v. Cuomo**, 61 NY2d 525 (1984).

Where a law imposes an obligation on a government agency the duties to perform those duties are ministerial actions. In each of the above examples, it is clear that just because the application of the law requires the agency to use its discretion does not insulate that agency from judicial scrutiny. In each of the above cases the Courts compelled the government agencies to perform their duties, but were careful not to trample on the discretion of the agencies. For example, in **Klosterman,** Appellant's claims were grounded in the provisions of NY Mental Hygiene Law [sections 29.15(f)-(h)] which prescribed certain acts that had to be undertaken when a patient in a state psychiatric institution was to be discharged or conditionally released into the community. The Court in **Klosterman** held that to the extent that plaintiffs can establish that defendants are not satisfying nondiscretionary obligations to perform certain functions, they are entitled to orders directing defendants to discharge those duties. **Klosterman, id.** In **Bottom**, Appellants demand the calculation of a prisoner's time in jail. The Court in granting the Appellant's appeal held in **Bottom** that the calculation of jail time credit, pursuant to NY Corrections Law section 600-a and NY Penal Law section 70.30(3), involves a continuing, nondiscretionary, ministerial obligation and where a person seeks to compel the performance of a purely ministerial act, such relief may be sought through a petition in the nature of mandamus to compel. **Bottom id.** In **Kusky**, Appellants moved for review under Article 78 to compel the installation of public toilets at a beach

under 10 NYCRR § 6-2.2. The court in granting Appellant's appeal held that the beach was a bathing beach as defined in 10 NYCRR § 6-2.2 and it did not fall within the exempted category of beaches set forth in § 6-2.3(a). The court ruled that the beach was of a type that the court had previous found to fall within the purview of the toilet requirements. See **Kusky id.** In **Williamsville**, Appellants it made a formal application to respondent Department of Health for acceptance into its retention standards waiver program under 18 NYCRR § 487.3 and never received a determination. The Court held that the Article 78 proceeding was appropriate to compel the governments' action. See **Williamsville id.** In **Utica Cheese**, in the article 78 proceeding petitioner sought to compel the Commissioner of the Department of Agriculture and Markets to act on its milk dealer license application, which was pending for 16 months. Under subdivision 1 of the State Administrative Procedure Act section 301, the commissioner is required to reach his decision "within reasonable time". The Court held that although the statute did not define this period with specificity, it would have to deem it elapsed, but modified the lower courts decision and ordered a hearing on the issue. See **Utica Cheese id**. In all these cases, the existence of the law compelled government action. That action was ministerial in nature.

Similarly, in this case, Petitioner simply seeks to compel the Respondents to perform their ministerial duty-- to cease and desist the encouragement of the violation of the law and to enforce the Public Health Code, in particular section 161.05 mandating that dogs remain leased within City parks. What has been lost on the Respondents is that they are duty-bound to perform their obligations under the law, regardless of whether they may exercise their discretion in doing so. The law, in this case Public Health Code §

161.05, as amended, imposes an obligation on the Respondent to enforce the law. There is no discretion where the law mandates that a dog must remain leashed in public places. There is no discretion in the matter.

Like the above cited cases, the ministerial act is the duty to implement the law as enacted or adopted. In **Bottom** the government was compelled to comply with the Corrections and Penal Laws requiring the calculation of a prisoner's time in jail. How and in what manner it is calculated may involve some discretion, but the performance of the duty is required. In **Gonkjur Associates** the Attorney General was required to issue a determination on a submitted offering plan. The Attorney General was given that statutorily authority and must thereby render a decision. Whether or not to approve the offering plan is a matter of discretion. Likewise, in **Utica Cheese** the government agency was responsible for reviewing the application and therefore subject to mandamus review, however, whether to grant the application was a matter of discretion.

Therefore since the Respondent, NYC Department of Parks and Recreation, is entrusted with the enforcement of the Public Health Code section 161.05 and arbitrarily refuses to enforce the law, but instead encourages and promotes the violation of the law, it is subject to mandamus review. Respondents must enforce the law and not encourage its violation.

As an illustrative point, it would be inconceivable for the New York City Police Department to announce and promote that it was not enforcing the Penal Law (say on assaults, homicides, and robberies) between the hours of 9 p.m. and 9 a.m. It is inconceivable because the law entrusts them with that operation. We expect that if a government agency is entrusted with that responsibility and the law mandates it that the

government agency will comply. When the government does not, the courts are warranted to intervene.

Similarly here, the Respondents must enforce the Public Health Code, in particular section 161.05, at all times. The law is not discretionary. Here, the Respondents specifically sought the right to enforce the Public Health Code from the Department of Health. They were granted that right and now are entrusted with that responsibility ***(Please see Order to Show Cause Exhibit 1-Notice of Adoption of Amendments)***. The Public Health Code therefore mandates its enforcement.

Also, by refusing to enforce the law and encouraging its violation, the Respondent NYC Department of Parks has prevented other government agencies from enforcing the law in City parks. The result being that the public is in danger.

There are numerous alternatives for the Respondent. First, the Respondents could change the law. Clearly, Respondents could amend the Public Health Code to limit its scope. Respondents (NYC Department of Parks and Recreation) could give away its enforcement power over Public Health Law 161.05 in NYC parks to the Department of Health and it could amend its own rules and regulation. But, instead, Respondents choose not to implement any changes. Therefore, they should be compelled to perform their duties.

It is ironic that the NY Department of Parks and Recreation sought the amendment of the health code to give the Parks Department the right to enforce section 161.05 ***(Please see Order to Show Cause Exhibit 1-Notice of Adoption of Amendments)***. Truly, the Respondents out foxed the Department of Health and now the fox is guarding the hen house.

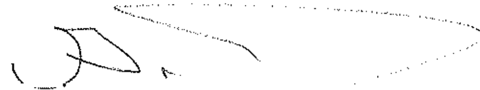
It is ironic because instead of enforcing the law the Respondents refuse to enforce the law. Instead, Respondent actively promotes the violation of the law. Respondents, NYC Department of Parks and Recreation, make it known that the Parks Department will not enforce the Public Health Code—particularly between the hours of 9 p.m. and 9 a.m. This is an active invitation to people to violate a Health Code that has been implemented for the public's safety. Respondent, NYC Department of Parks and Recreation, recognizes and admits in its own website that, "unleashed dogs pose potential danger to people and other dogs. Many park users, horses, park wildlife and leashed dogs have been attacked and bitten by unleashed dogs. Many park visitors are frightened by dogs and may find unleashed dogs to be intimidating or annoying. Unleashed dogs are more likely to leave behind waste that is not picked up by their owners; canine waste is a known source of several pernicious zoonotic diseases. Unleashed dogs destroy lawns and flower beds; areas used for informal "dog runs" have been severely damaged by the combination of wear and uric acid, a known killer of plant life" ***(Please see Exhibit Two-Website of NYC Department of Parks and Recreation).***

Left with an agency that refuses to obey the law, Petitioner requests court intervention.

IN CONCLUSION

The complying with the law is a ministerial act. There is nothing discretionary in the fact that a dog must be leashed at all times. Furthermore, Respondents do not have the authority to encourage the violation of the law. Since the relief sought is ministerial in nature, mandamus is an appropriate remedy under the circumstances.

Respectfully submitted,

By: 

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