SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

IN THE MATTER OF THE APPLICATION OF THE JUNIPER PARK CIVIC ASSOCIATION, INC. Petitioner, - against -	:	Index No. 7888/06
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.	:	Hon. Peter J. Kelly

MEMORANDUM OF LAW IN SUPPORT OF NYCDOG'S
CROSS-MOTION TO INTERVENE AND IN OPPOSITION TO THE PETITION

CURTIS, MALLET-PREVOST, COLT & MOSLE, LLP
COUNSELLORS AT LAW
101 PARK AVENUE
NEW YORK, N.Y. 10178
212-696-6000

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Preliminary Statement

The New York Council of Dog Owner Groups ("NYCDOG") respectfully submits this memorandum in support of its motion to intervene in this Article 78 proceeding. NYCDOG also joins in Respondents' request that this Court deny the relief sought by Petitioner and dismiss the Petition,[1] for the reasons set forth herein.[2]

Petitioner is a small Queens community civic association attempting to impose its will on residents across the entirety of New York City (the "City"), by forcing termination of the City's rule that dogs may be let off of their leashes in certain areas of City parks in the late evening hours after 9:00 p.m. and in the early morning hours before 9:00 a.m. (the "off-leash hours," or the "off-leash rule"). In so doing, Petitioner impermissibly seeks to legislate through the courts to further its own interests at the expense of the Rules of the City of New York (the "Rules"), in contravention of their statutory purpose, and to the severe detriment of the constituency of NYCDOG's member groups, residents from across all boroughs of this City.

NYCDOG has an undeniable interest in this proceeding. The over 20,000 dog-owners whom NYCDOG represents City-wide will be directly affected by the outcome of this proceeding. Should this Court bow to the hyperbolic cries of Petitioner – one lone, unrepresentative voice – more than 20,000 dog owners will suffer. These residents will no longer be permitted to provide their dogs with that brief, albeit necessary, early morning or late

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[1] Verified Petition, dated May 19, 2006 (hereinafter, "Petition").

[2] A party seeking to intervene in an Article 78 proceeding may file a motion to intervene and simultaneously make a pre-answer motion to dismiss pursuant to CPLR §§ 3211 and 7804(f). Matter of Rent Stabilization Ass'n of New York City v. New York State Div. of Hous. & Cmty. Renewal, 252 A.D.2d 111, 114, 681 N.Y.S.2d 679 (N.Y. App. Div. 3rd Dep't 1998). However, NYCDOG also files a proposed pleading pursuant to CPLR § 1014 in light of the direction of Zehnder v. State of New York, 266 A.D.2d 224, 224-25, 697 N.Y.S.2d 347, 348 (N.Y. App. Div. 2nd Dep't 1999). NYCDOG's Proposed Verified Answer is attached as Exhibit A to the Affidavit of Andrew D. Otis, sworn to on August 21, 2006.

night interlude of exercise before returning them, tethered by the leash, to urban streets of concrete and the confines of apartment life. Loss of the off-leash rule will leave these owners with under-exercised, unhealthy and anxious animals, with the real risk that many of these once happy pets will also become unsocialized and aggressive.

The injury to NYCDOG and the constituency of its membership is thus demonstratively real and concrete, should Petitioner prevail in eliminating the City's off-leash rule. In contrast, Petitioner – notwithstanding its free use of words such as "threats," "fear," and "attacks" – does not allege even a single credible instance of actual injury as a result of the off-leash hours permitted by the City. The jurisprudential threshold requirement of standing is designed to protect precisely against such challenges made by pressure groups who like Petitioner here, seek to defeat governmental action in order to further only their own interests while lacking a cognizable legal interest – *i.e.*, injury *in fact.*

Petitioner is without standing to compel the governmental action it seeks. Even if Petitioner had alleged actual injury – and it does not – Petitioner fails the additional test required to satisfy organizational standing.

Standing aside, the Petition is without basis in law. Petitioner seeks mandamus to compel the City to "enforce" what it refers to as "the dog leash law." (Petition ¶ 2.) However, enforcement of the law is a purely discretionary governmental act for which mandamus to compel is unavailable as a remedy. Petitioner misses this critical point.

Petitioner also disingenuously ignores the fact that the plain text of the Rules at issue expressly grant City officials the discretion to permit people to let dogs off of their leashes in City parks. There is no more inappropriate case for mandamus than this one. The Petition should be dismissed.

Facts

This Petition was brought on by Order to Show Cause by the Juniper Park Civic Association ("JPCA," or "Petitioner"). Petitioner seeks mandamus to compel the City, the City's Department of Parks and Recreation (the "Parks Department") and the Parks Department's Commissioner (collectively, "Respondents") to "enforce" certain sections of the City's Rules, namely section 161.05 of Title 24 (New York City Health Code) (hereinafter, "§ 161.05"), and section 1-04(i) of Title 56 (Department of Parks and Recreation) (hereinafter, "§ 1-04(i)").

The Rules provide as follows:

> (a) 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.
>
> (b) Notices of violation for failure to comply with this section ***may*** be issued by any authorized employee, officer or agent of the Department [of Health and Mental Hygiene], or of the Departments of Sanitation and Parks and Recreation, or successor agencies.

Official Compilation of the Rules of the City of New York, Vol. 9, Title 24, New York City Health Code, §161.05 (2003 & 2006 Cumulative Supplement) (emphasis added).

> (i) *Failure to control animals.* Except as specified in § 1-05(s)(3),[3] 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***. Any such animal found at large may be seized and impounded. Properly licensed dogs and cats, restrained by a leash not exceeding six feet in length, may be brought into the park, except in no event shall dogs or other animals be allowed to enter any playground, zoo, bathing facilities, or other area prohibited by the Commissioner. Nothing in this subdivision

[3] Section 1-05(s)(3) provides:

Dog runs: Certain fenced park areas may be designated by the Commissioner as dog runs, and persons owning or possessing dogs are permitted to allow such animals to remain unleashed in these areas. Users of dog runs shall obey posted rules. All exclusive areas will be specifically posted as such and signs will be posted informing the public of this designation.

> (i) shall be construed to prohibit persons with disabilities from bringing seeing eye dogs, hearing ear dogs or other dogs trained to assist such persons into these areas. Nothing herein shall prohibit horses entering or being within a park as provided in §1-05(q).

Official Compilation of the Rules of the City of New York, Vol. 12, Title 56, Department of Parks and Recreation, § 1-04(i) (2003) (emphasis added).

Petitioner collectively refers to these sections of the foregoing Rules as "the dog leash law," contends that Respondents "refuse to enforce" it, and ask this Court to compel Respondents to do so. (Petition ¶¶ 1, 3.) Petitioner takes particular offense with Respondents "between the hours of 9 P.M. and 9 A.M.," a period of time when Petitioners claim that Respondents choose not to "enforce" the Rules (Id. ¶ 17).

As demonstrated *infra*, Petitioner's contentions are without basis in fact or law. Respondents' allowance of off-leash time for dogs in designated park areas during the early morning hours before 9:00 a.m. and in the late evening hours after 9:00 p.m. is an action fully within their discretion – both as a matter of law and pursuant to the express terms of the Rules themselves. There is no basis to compel Respondents to "enforce" the leashing of dogs at all times of day in all areas of the City parks when Respondents not only have the discretion to enforce, but the discretion to in fact permit dogs to be off-leash.

Basis For NYCDOG's Motion To Intervene

NYCDOG is a non-profit corporation dedicated to the establishment, preservation, and promotion of humane off-leash recreation opportunities for dogs in New York City, responsible dog ownership and respectful park stewardship. (Marino Aff. ¶ 2.[4])

[4] References in the form "Marino Aff. __" are to the Affidavit of Robert A. Marino, sworn to on August 18, 2006, submitted in support of NYCDOG's Cross-Motion to Intervene.

NYCDOG serves as an umbrella organization for the majority of the City's community-based dog owner groups. (Id. ¶ 3.) NYCDOG consists of approximately 30 dog owner groups made up over 20,000 individuals who live in all boroughs of New York City and all of whom own dogs. (Id.; see Marino Aff., Ex. A.)

The individuals who constitute NYCDOG's member groups all share and embrace NYCDOG's commitment to off-leash recreation. (Id. ¶ 5.) The continuation and preservation of off-leash recreation opportunities for dogs in this City is the fundamental organizational purpose of NYCDOG and its member groups. (Id.; see Press Release, "NYCDOG, A Citywide Coalition Of Dog Owner Groups, Is Formed To Advance Safe Off-Leash Recreation For Dogs," dated May 24, 1999, Marino Aff., Ex. B.)

New York City's urban environment and unique demographics preclude options for off-leash areas that are available in other communities. (Id. ¶ 6.) New York City dog owners, including the constituents of NYCDOG's member groups, have come to rely upon the rules of the Parks Department to meet their needs for off-leash recreation. (Id.)

For more than two decades, New York City dog owners' need for and overriding interest in off-leash recreation have been protected by the Parks Department through its permission of off-leash time in designated areas of City parks in the late evening hours after 9:00 p.m. and in the early morning hours before 9:00 a.m.[5] (Id. ¶ 7.)

Respondents explain the reasons for the off-leash rule as follows:

> The Parks & Recreation rules and policies with respect to dogs in City parks has evolved to meet the needs of the public as well as to ensure public safety. As the numbers of dogs and dog owners have increased in the City, the need and demand for

[5] Most City parks have specific closing times at which point no individual – with or without a dog – is permitted to enter the park. Thus, the "after 9:00 p.m./before 9:00 a.m." rule is not a period of off-leash time spanning twelve hours, but is considerably less. (Marino Aff. ¶ 7, n. 3.) See also Respondents' Verified Answer, dated June 21, 2006 ("Respondents' Answer"), ¶ 40.)

> areas in which dogs could be provided exercise and active recreation has increased as well, and the open space of City parks is the only area available to most City dog owners to meet the exercise needs of their pets.... As a result, accommodations have been provided to allow limited areas[6] and times in which dogs can be permitted off leash within City parks for the mutual benefit of the dogs, dog owners and the community....
>
> Beginning in the 1980s, Parks & Recreation has provided "courtesy hours" for off-leash dog activity within designated areas of City parks ... between 9:00PM to 9:00AM during the times that the park is open to the public [*i.e.*, excluding intervening hours when the park is closed to the public]. All other restrictions about where dogs are permitted in City parks and how they must behave are still in effect during the courtesy hours, and Parks Enforcement Patrol officers issue violations to dog owners for any such violations of Parks Rules regardless of the time of day.

Respondents' Answer ¶¶ 39-40 (internal citations and footnotes omitted).

The off-leash hours permitted by the City are cherished by NYCDOG and its members' constituents. (Marino Aff. ¶¶ 6, 7, 14-15.) The importance of off-leash time for dogs is well documented and widely appreciated. (Marino Aff. ¶¶ 6-15; Respondents' Answer ¶¶ 43-45). The City's off-leash rule is supported in this City by pre-eminent entities unrelated to NYCDOG who support NYCDOG in its request to intervene in this proceeding. (See Affidavit of Jane Hoffman on behalf of Mayor's Alliance for New York City's Animals, sworn to on Aug. 18, 2006; Affidavit of Meena Alagappan on behalf of the Association of the Bar of the City of New York's Committee on Legal Issues Pertaining to Animals, sworn to on Aug. 21, 2006; Affidavit of Daisy L. Okas on behalf of the American Kennel Club, sworn to on Aug. 17, 2006; Affidavit of Claire Shulman, former Queens Borough President, sworn to on Aug. 21, 2006.)

[6] The rule prohibits dogs from being off-leash in most park areas, including children's playgrounds, ball fields, tennis courts, nature preserves, "quite relaxation areas," such as Sheeps Meadow in Central Park, and water features such as ponds, lakes, streams, and decorative fountains. (Marino Aff. ¶ 7 n. 2.) See also Respondents' Memorandum of Law In Support of Verified Answer, dated June 21, 2006 ("Respondents' Mem."), at 2.

A. The Need For Off-Leash Recreation

Daily off-leash recreation is critical to canine health and social development. (Marino Aff. ¶ 8.) Time off of the leash provides dogs with the requisite opportunity and ability for exercise and play, which dogs need in order to release energy pent-up while confined to the home, as well as relief from listlessness. (Id.)

Exercise is essential not only to the health and well-being of the dog, but for the humans around them. (Id.; Respondents' Answer ¶ 44.) The socialization and exertion provided by time off-leash reduces canine aggression and thus aggression-related incidents. (Marino Aff. ¶ 9; Respondents' Answer ¶ 44.) Off-leash recreation provides dogs with opportunities for both human and canine interaction and the socialization they need in order to learn and abide by behavioral norms. (Marino Aff. ¶ 10; Respondents' Answer ¶ 44.) It is well documented that inadequate time off the leash frequently leads to behavioral disorders, and conversely, that adequate off-leash time reduces and prevents behavioral disorders, including anxiety and the quite serious problem of canine aggression. (Id.)

Off-leash recreation also provides civic benefits such as crime reduction and increased compliance with leash laws. (Marino Aff. ¶¶ 11, 13; Respondents' Answer ¶ 44.) For example, off-leash recreation areas are credited with the transformation of Prospect Park from a den of violent crime during the 1970s and 80s to its present state. (Marino Aff. ¶ 12.) In the words of the Park's administrator, it was the dog owners who returned Prospect Park "back to the people." See Clem Richardson, "Prospect Park's Biggest Booster," *New York Daily News*, Sept. 29, 2005 (Marino Aff., Ex. C).

B. NYCDOG's Interest In This Proceeding

The Parks Department's current off-leash rule during the late evening hours after 9:00 p.m. and the early morning hours before 9:00 a.m. in designated areas of the City parks is a crucial benefits to the dog owners who constitute NYCDOG's membership. (Marino Aff. ¶ 14.) The brief interlude in the very early morning hours before 9:00 a.m. or the late evening hours after 9:00 p.m., when they may freely exercise their dogs off-leash in an open space, is essential to the daily life of these residents and the health and well-being of their dogs. (Id.) These residents cherish this limited time period carved out from the realm of a dense, concrete urban environment where dogs must be tethered at all times by a leash or otherwise confined to apartment living with no outdoor outlet for pent-up energy. (Id.)

NYCDOG, as the representative of its member dog owner groups and their respective individual dog owner constituents, has a compelling and exigent interest in this litigation. (Id. ¶ 15.) The individuals who comprise NYCDOG's membership utilize the off-leash hours after 9:00 p.m. and before 9:00 a.m. in permitted designated areas in parks across the City on a daily basis. (Id.) NYCDOG's members and their individual constituents will suffer actual, tangible injury should Petitioner prevail in this proceeding. (Id.) Should Petitioner be granted the relief it seeks, the individuals represented by NYCDOG and its member groups will no longer be permitted to allow their dogs to exercise off-leash in New York City parks during the restricted hours after 9:00 p.m. and before 9:00 a.m. – and they will face legal liability if they do. (Id.) Without the benefit of the off-leash rule, their dogs will be under-exercised and quickly become anxious and unhealthy, with many running the real risk of becoming unsocialized or turning aggressive, or both. (Id.) These owners will suffer as a result. (Id.)

ARGUMENT

POINT I

THE COURT SHOULD ALLOW NYCDOG TO INTERVENE IN THIS PROCEEDING

Pursuant to CPLR § 7802(d), this Court "may allow other interested persons to intervene" in an Article 78 proceeding.[7]

This liberal standard grants the Court broader power to allow intervention in an Article 78 proceeding than it has in a civil action pursuant to CPLR §§ 1012 or 1013. Matter of Elinor Homes Co. v. St. Lawrence, 113 A.D.2d 25, 494 N.Y.S.2d 889 (N.Y. App. Div. 2nd Dep't 1985). See also Matter of Tennessee Gas Pipeline Co. v. Town of Chatham Board of Assessors, 239 A.D.2d 831, 832, 657 N.Y.S.2d 269, 270 (N.Y. App. Div. 3rd Dep't 1997) (intervention liberally granted in Article 78 proceedings). Intervention pursuant to CPLR 7802(d) is a matter of this Court's sound discretion. White v. Incorporated Vil. of Plandome Manor, 190 A.D.2d 854, 854, 593 N.Y.S.2d 881, 881 (N.Y. App. Div. 2d Dep't 1993), appeal denied, 83 N.Y.2d 752, 633 N.E.2d 489, 611 N.Y.S.2d 134 (N.Y. 1994).

A. NYCDOG Has A Compelling And Exigent Interest In This Proceeding And Should Be Allowed To Intervene

A party need only show that it has an "interest" in an Article 78 proceeding in order to be permitted to intervene. A party who will be "directly affected by the outcome" of the proceeding is deemed an "interested person" within the meaning of CPLR 7802(d). White, 190 A.D.2d at 854, 593 N.Y.S.2d at 881. Where, as here, a party's liability is at stake as a result of the outcome of the proceeding, that party is "clearly an 'interested person'" under CPLR 7802(d)

[7] See also CPLR § 401 (after commencement of an Article 78 proceeding, intervention shall be allowed by leave of court).

and should be permitted to intervene. Matter of Tennessee Gas Pipeline Co., 239 A.D.2d at 832, 657 N.Y.S.2d at 271.

Under the foregoing liberal standard, NYCDOG is undeniably an "interested person" for purposes of § 7802(d). The outcome of this proceeding will directly effect the constituency of NYCDOG's member groups. Should Petitioner prevail in this proceeding, NYCDOG's members' constituents will no longer be permitted to allow their dogs to be off of their leashes in designated areas of City parks before 9:00 a.m. and after 9:00 p.m. – and if any such owner does let his or her dog off its leash, that owner could face legal liability for the violation.

NYCDOG should be afforded the opportunity to effectively prosecute the compelling and exigent interest its members' constituents have in maintaining the City's current off-leash rule, as well as to defend it from revocation as threatened by this Petition. This Court should permit NYCDOG to intervene in this proceeding.

B. NYCDOG Has Standing To Intervene In This Proceeding

In order to establish standing:

> First, a plaintiff must show "injury in fact," meaning that plaintiff will actually be harmed by the challenged ... action. As the term implies, the injury must be more than conjectural. Second, the injury a plaintiff 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.

Matter of Graziano v. County of Albany, 3 N.Y.3d 475, 479, 787 N.Y.S.2d 689, 692 (N.Y. 2004).

Further, in order to establish associational or organizational standing, a party must demonstrate:

> (1) that one or more of its members has standing to sue; (2) that the interests advanced [in the proceeding] are sufficiently germane to [the organization's] purposes to satisfy the court that [the organization] is an appropriate representative of those interest; and (3) that the participation of individual members is not required to assert th[e] claim or to afford ... complete relief.

Matter of Aeneas McDonald Police Benevolent Ass'n v. City of Geneva, 92 N.Y.2d 326, 331, 680 N.Y.S.2d 887, 889 (N.Y. 1998).

NYCDOG meets the test for organizational standing in this case. First, one or more of its members would have standing to sue. Each and every one of NYCDOG's dog owner group members are comprised of individual dog owners who routinely utilize the off-leash hours and who would therefore suffer actual harm if the off-leash rule is terminated.

Should Petitioner prevail in this proceeding, the injury to these dog owners is real and concrete. These owners will lose what small opportunity they now have to allow their dogs to exercise off-leash in the City parks. Without the benefit of the off-leash rule, these owners' dogs will quickly become under-exercised, anxious, and unhealthy, with many running the real risk of becoming unsocialized and/or aggressive. The dogs will obviously suffer as a result. But the real injury will be suffered by their owners, for the owners will be left without the crucial means to exercise their dogs and will be responsible for managing all the ills that befall the animal as a result of that loss. The injury here is directly within the zone of interests or concerns sought to be promoted or protected by the City's off-leash rule. (See Respondents' Answer ¶¶ 39, 43-45.)

The continuation and preservation of off-leash recreation opportunities for dogs in New York City is precisely NYCDOG's fundamental organizational purpose. The interest advanced by NYCDOG in this proceeding – *i.e.*, maintaining the City's off-leash rule – is directly relevant to NYCDOG's organizational purpose. There is no more appropriate representative of this interest than NYCDOG.

Finally, the participation of individual members is not required to assert NYCDOG's claims or defenses or to afford it complete relief. NYCDOG is capable of prosecuting its members interests in this proceeding, which is easily disposed of as a matter of law, not fact.

POINT II

THE PETITION FOR MANDAMUS IS NOT SUSTAINABLE AS A MATTER OF LAW AND SHOULD BE DISMISSED

A. Mandamus to Compel Cannot Not Lie Because The Public Action At Issue Is Discretionary, Not Ministerial

Mandamus to compel cannot lie in this case because Petitioner seeks to enjoin public action that is, by the plain text of the Rules at issue, purely discretionary. It is well settled that mandamus to compel is not an available remedy in such a case.

"Mandamus is available ... only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law.... Thus, mandamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial." New York Civil Liberties Union v. State of New York, 4 N.Y.3d 175, 184, 791 N.Y.S.2d 507, 513 (N.Y. 2005) (internal citations omitted).

Petitioner attempts to foist a "duty" upon Respondents where § 161.05 does not impose one, and then characterize that "duty" as "ministerial." But the plain language of §

161.05 does not obligate Respondents to enforce a requirement that dogs remained leashed in public places; the rule expressly states only that they *may* do so:

> Section 161.05 provides:
>
> (a) A person who owns, possesses or controls a dog shall not permit it to be in any public place ... unless the dog is effectively restrained by a leash or chain not more than six feet long.
>
> (b) Notices of violation for failure to comply with this section ***may*** be issued by ... the Department [of] Parks and Recreation....

Pursuant to subpart (a) of § 161.05, a dog owner "shall" not allow his or her dog to be in a public place unless the dog is on a leash (or chain) not more than six feet long. In contrast to the foregoing mandatory language, subpart (b), the enforcement aspect of the rule, is purely discretionary – the Parks Department "*may*" issue notices of violation for a person's failure to comply with part (a), but it is not obligated or required to. Marcus v. Wright, 225 A.D.2d 447, 449, 639 N.Y.S.2d 369, 371 (N.Y. App. Div. 1st Dep't 1996) ("Throughout section 32 [of the Private Housing Finance Law], the Legislature uses the discretionary term 'may' in enumerating the powers of the commissioner or the supervising agency ... instead of the mandatory term 'shall.' ... [W]hen the legislative body wishes to impart discretion to an agency, it uses the word 'may', in contrast to the use of the verb 'shall', which evinces an intent to impose mandatory duties upon the agency.") (citing Natural Resources Defense Council v. New York City Dep't of Sanitation, 83 N.Y.2d 215, 221, 608 N.Y.S.2d 957 (N.Y. 1994) (use of the verb "shall" throughout the pertinent provisions of New York City Council's Local Law No. 19 "illustrates the mandatory nature of the duties contained therein"; when the City Council intended to impart discretion within the provisions of Local law No. 19, it made this intention clear by using the word "may")); Connolly, Fierson & Wallander, Inc. v. Williams Real Estate Co., 80 A.D.2d 109, 112, 438 N.Y.S.2d 3, 5 (N.Y. App. Div. 1st Dep't 1981) (reversing ruling

that Superintendent of Banking was obligated, pursuant to the Banking Law, to defend actions relating to foreign banks situated in New York; Commissioner's action or inaction is purely discretionary given statute's use of the permissive term "may"); Deane v. City of New York Dep't of Buildings, 177 Misc.2d 687, 694-95, 677 N.Y.S.2d 416, 421 (N.Y. Sup. Ct. New York County 1998) (construing § 1-02 of Title 63 of the Rules of the City of New York; stating "[t]he use of the word 'may' in the regulation vests the agency with discretion over all acts taken or made pursuant to that provision."); Matter of D'Elia v. Douglas B., 138 Misc.2d 370, 376, 524 N.Y.S.2d 616, 620 (N.Y. Fam. Ct. 1988) ("The terms 'shall' and 'may' have opposite meanings; the former mandatory, the latter discretionary.... [I]t is presumed that the use of the word 'shall' when used in a statute is mandatory, while the word 'may' when used in a statute is permissive only and operates to confer discretion, especially where the word 'shall' appears in close juxtaposition in other parts of the same statute.").

Respondents have no legal duty to "enforce" § 161.05(a) given the Rule's express use of the word "may." Because Respondents have the discretion, and not the obligation, to act, mandamus to compel cannot lie. See, e.g., Muzillo v. Mount Vernon Civil Serv. Comm'n, 656 N.Y.S.2d 368, 368-69, 238 A.D.2d 425, 425-26 (N.Y. App. Div. 2d Dep't 1997) (affirming denial of petition for mandamus to compel Civil Service Commission to enforce its determination that Board of Education should change petitioners' civil service titles; "[P]etitioners have failed to show that the Commission is under a legal duty to enforce compliance by the Board. Under the sections of the Civil Service Law relied upon by the petitioners, the operative term 'may' indicates the Commission has the discretion, and not the obligation, to act."); Matter of New Rochelle Water Co. v. Public Serv. Comm'n, 31 N.Y.2d 397, 404, 340 N.Y.S.2d 617, 623 (N.Y. 1972) (denying public utility's Article 78 challenge of Public

Service Commissioner's failure to allow rate reparations; use of word "may" in applicable section of Public Service Law conferred purely discretionary authority on Commissioner); Marcus, 225 A.D.2d at 448-49, 639 N.Y.S.2d at 370-71 (Supreme Court erred in finding acts at issue were mandatory duties of Housing Commissioner); Deane, 177 Misc.2d at 694-95, 677 N.Y.S.2d at 421.

Respondents' discretionary function is reiterated and made even more explicit in § 1-04(i), which provides:

> [N]o 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***....

Section 1-04(i) expressly states that the Commissioner of the Parks Department may permit a dog owner to allow his or her dog to be unleashed in a City park. There could be no greater expression of discretionary authority than this Rule. The Parks Department's permission of off-leash time before 9:00 a.m. and after 9:00 p.m. is an exercise of discretion well within that conferred upon it by § 1-04(i).

The City's Rules do not direct, obligate or require the Parks Department to enforce strict adherence to an absolutist world in which dogs are leashed in all public places at all times. To the contrary, enforcement of the leash rule is left entirely within the discretion of the Parks Department and the Commissioner, by the express terms of the Rules, is free to decide that dogs may go leashless, and under what circumstances. There simply is no "ministerial" act amenable to mandamus here. Posner v. Levitt, 325 N.Y.S.2d 519, 521, 37 A.D.2d 331, 332 (N.Y. App. Div. 3rd Dep't 1971) (ministerial act amenable to mandamus is "a specific act which the law requires a public officer to do in a specified way on conceded facts without regard to his own judgment").

Petitioner repeatedly asserts that Respondents fail, and must be made to, "enforce the law." But contrary to Petitioner's assertion, enforcement of the law is itself discretionary – independent of whether the law expressly provides for discretionary enforcement, as it does here – and "is simply not a ministerial act." Leland v. Moran, 235 F. Supp. 2d 153, 166 (N.D.N.Y. 2002) (duty to enforce the laws, and how to go about enforcing those laws, involves the exercise of judgment and discretion) (citing New York State cases), aff'd, 80 Fed. Appx. 133, 2003 U.S. App. LEXIS 22882 (2d Cir. Nov. 6, 2003). See also Heckler v. Chaney, 470 U.S. 821, 831, 105 S.Ct. 1649, 1655 (1985) (under well-settled Supreme Court precedent, "an agency's decision not to prosecute or enforce ... is a decision generally committed to an agency's absolute discretion"); Perazzo v. Lindsay, 290 N.Y.S.2d 971, 972-73, 30 A.D.2d 179, 973 (N.Y. App. Div. 1st Dep't 1968) (no basis for mandamus to compel city officials to enforce various provisions of the Penal Law and Administrative Code where there was no violation of a mandatory public duty to perform a specific official act as to which there was no discretion; under well-settled principles of New York law, absent some constitutional mandate, public officials have discretion as to whether to enforce state statutes) (citing, *inter alia*, Gaynor v. Rockefeller, 15 N.Y.2d 120, 131, 256 N.Y.S.2d 584, 592 (N.Y. 1965)), aff'd, 23 N.Y.2d 764, 296 N.Y.S.2d 957 (N.Y. 1968).

In short, Respondents have full discretion to permit the off-leash hours and are not obligated to act in the manner asserted by Petitioner. Therefore, mandamus to compel cannot lie. See, e.g., New York Civil Liberties Union, 4 N.Y.3d 175, 184, 791 N.Y.S.2d 507, 513 (N.Y. 2005) (irrespective of the regulatory mandate that Commissioner of Education develop a "corrective action plan" once a school is identified as under "registration review," the initial decision to so classify a school is wholly discretionary and therefore mandamus to compel cannot lie); Posner, 325 N.Y.S.2d at 521, 37 A.D.2d at 333 (while State Comptroller has the

authority to challenge the legality of the State budget, he is not obligated to do so, therefore mandamus to compel cannot not lie).

B. In Any Event, Petitioner Does Not Have Standing To Bring This Proceeding

Even if mandamus were an available remedy in this case – and it is not – the Petition is unsustainable for the additional reason that Petitioner lacks standing. Petitioner lacks standing to compel the governmental action it seeks because Petitioner does not allege any injury in fact. Nor does Petitioner satisfy the additional test for organizational standing.

1. Petitioner Fails To Allege Actual Injury

The "injury in fact" requirement is a critical element of standing. New York State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211-12, 778 N.Y.S.2d 123, 125 (N.Y. 2004) (plaintiff must show "injury in fact," meaning that plaintiff will actually be harmed by the challenged ... action. As the term implies, the injury must be more than conjectural.").

Tenuous allegations that plaintiff or its members "will likely be" injured, or allegations of injury that are based merely upon speculation, or allegations of "hypothesized harm" that "might befall" plaintiff or its members are insufficient to confer standing. Id., 2 N.Y.3d at 211-15, 778 N.Y.S.2d at 125-27.

Further, plaintiff must allege an injury in fact that is different in kind and degree from that suffered by the public at large; a pleading that seeks to advance interests shared by the public at large does not amount to allegations of a particularized harm sufficient to confer standing. Hassig v. New York State Dep't of Health, 5 A.D.3d 846, 847, 773 N.Y.S.2d 158, 160 (N.Y. App. Div. 3rd Dep't 2004). See also New York State Psychiatric Ass'n, Inc. v. Mills, 29 A.D.3d 1058, 1059, 814 N.Y.S.2d 382, 384 (N.Y. App. Div. 3rd Dept' 2006).

Petitioner here alleges no injury in fact. While Petitioner alleges that it has "received complaints from its members and community residents that dogs are walked or roam in the park unleashed" (Petition ¶ 22; Holden Aff. ¶ 27[8]) mere complaints do not rise to the level of actual injury.

Petitioner's thin claim that its members "are threatened and continue to be at risk" (Petition ¶¶ 9, 24; Holden Aff. ¶¶ 8, 29) due to the off-leash hours from 9:00 p.m. to 9:00 a.m. amounts to nothing more than a tenuous allegation of hypothesized harm far too inconcrete to constitute injury in fact for purposes of standing. See, e.g., New York State Ass'n of Nurse Anesthetists, 2 N.Y.3d at 214-15, 778 N.Y.S.2d at 127 ("That in the future the hypothesized harm *might* befall CRNAs does not at this time entitle plaintiff to maintain this action.") (emphasis added); Matter of Long Is. Bus. Ass'n Inc. v. Town of Babylon, 29 A.D.3d 794, 815 N.Y.S.2d 217, 218 (N.Y. App. Div. 2nd Dep't 2006) ("[T]he potential injuries alleged by the petitioner were speculative and therefore insufficient to establish standing...."); Rent Stabilization Ass'n of N.Y.C., Inc. v. Miller, 15 A.D.3d 194, 194, 789 N.Y.S.2d 126, 127-28 (N.Y. App. Div. 1st Dep't 2005) (petitioner's claim of potential increase in cases of lead poisoning in children deemed speculative harm and thus insufficient to establish injury in fact for purposes of standing), appeal denied, 4 N.Y.3d 709, 2005 N.Y. LEXIS 1037 (N.Y. 2005); Pub. Util. Law Project of New York, Inc. v. New York State Pub. Serv. Comm'n, 263 A.D.2d 879, 881, 694 N.Y.S.2d 522, 524 (3rd Dep't 1999) (petitioner's challenge of Public Service Commission's "lightened regulation" of private electric service companies dismissed for lack of standing; "The hypothetical loss of [statutory] protections ... does not give rise to standing."), appeal denied, 94 N.Y.2d 755, 701 N.Y.S.2d 711 (N.Y. 1999).

[8] Affidavit of Robert Holden, dated May 22, 2006.

Moreover, Petitioner's vague allegation of continued risk and threat to its members fails to demonstrate any harm which is different from that which may concern the public-at-large and is thus insufficient to confer standing on Petitioner. New York State Psychiatric Ass'n, 29 A.D.3d at 1059, 814 N.Y.S.2d at 384 ("[P]etitioner's argument that the public will not be properly protected by the licensure requirements set forth in the regulations posits harm that is both speculative and no different from any injury that may be suffered by the public at large."); Matter of Concerned Taxpayers of Stony Point v. Town of Stony Point, 28 A.D.3d 657, 658, 813 N.Y.S.2d 227, 229 (N.Y. App. Div. 2d Dep't 2006) (a petitioner "who does not show any special rights or interests in the matter in controversy, other than those common to all taxpayers and citizens, has no standing to sue...."); Rent Stabilization Ass'n of N.Y.C., 15 A.D.3d at 194, 789 N.Y.S.2d at 128 ("Even if not speculative, the environmental harm, alleged would be shared by the public at large, and is thus insufficient to confer ... standing..."); Pub. Util. Law Project of New York, 263 A.D.2d at 881, 694 N.Y.S.2d at 524 ("Nor do petitioners have common-law standing for they have not alleged facts demonstrating that they will suffer direct harm and injury different from that suffered by the public at large because of the PSC's action....").[9]

Likewise, Petitioner's unspecified allegation that "several of Petitioner's members have been freighted [sic] or attacked by unleashed dogs in the past" (Petition ¶ 23; Holden Aff. ¶ 28), is wholly unsubstantiated and thus an insufficient basis upon which to confer standing. Wyman v. Braman, 298 A.D.2d 787, 789, 750 N.Y.S.2d 655, 658 (N.Y. App. Div. 3rd Dep't

[9] Petitioner attempts to expand JPCA's interests beyond just the three Queens neighborhoods it initially alleged (Holden Aff. ¶ 11), now broadening them to the entirety of New York City by virtue of the fact that its members allegedly work in all areas of the City and use parks City-wide. (Reply Affidavit of Robert Holden, dated June 25, 2006 ("Holden Reply Aff."), ¶¶ 6, 8.) These new allegations only further demonstrate how Petitioner fails to allege specific harm different from that which may be felt by the public-at-large.

2002) (unsupported allegations of harm insufficient to confer standing), appeal dismissed, 99 N.Y.2d 578, 785 N.E.2d 735, 755 N.Y.S.2d 713 (N.Y. 2003); New York State Psychiatric Ass'n, 29 A.D.3d at 1059, 814 N.Y.S.2d at 384 (in the absence of any factual evidence of actual harm, allegations of injury are merely "tenuous" and "ephemeral" and insufficient to confer standing).

After Respondents raised the key point that Petitioner fails to demonstrate any actual injury,[10] Petitioner submitted a Reply Affidavit purporting to document instances of actual injury. However, Petitioner still fails to allege a single credible instance of actual injury as a result of the off-leash hours in City parks.

The allegations contained in paragraphs 9 through 12 of Holden's Reply Affidavit, by his own admission, concern an alleged incident occurring *outside* the time of the off-leash rule (*i.e.*, the hours after 9:00 pm/before 9:00 a.m.), and outside of any park. This alleged incident is of no relevance to the core issue raised by Petitioner in this proceeding – permission of dogs off-leash in parks after 9:00 p.m. and before 9:00 a.m. Likewise, while paragraph 21 alleges "unleashed dog attacks in the past," referring to a series of letters, only one of those letters purports to recount an "attack" – but one which occurred at 8:30 p.m. – outside the off-leash hours. The only letter that refers to time within the off-leash hours (8:30 a.m.) does not make any report of injury actually inflicted by a dog.

For the same reasons, paragraph 14 is of no avail to Petitioner because it makes no mention that the alleged incident occurred during the off-leash hours.

All of the foregoing allegations are, in any event, insufficient and of no evidentiary value because they are merely recounts based upon articles and letters and, as such, level upon level of hearsay.

[10] See Respondents' Mem. at 4.

The only testimonial allegation is made by Mr. Holden himself. (Holden Reply Aff. ¶ 13.) Mr. Holden is Petitioner's President and the instigator of this proceeding. Mr. Holden alleges that one evening in Juniper Valley Park at 11:00 p.m., a large dog "jumped at me hitting me in the stomach causing me injuries." This allegation is nothing more than a self-serving statement designed to create standing for Petitioner where no standing otherwise exists. Moreover, the credibility of Mr. Holden's allegation is highly diminished by contradictory statements contained in the letter he attaches as Exhibit 2 to his Reply Affidavit. This letter states not only that the alleged incident occurred at a time different than that alleged by Mr. Holden, but that Mr. Holden was, in fact, "not very hurt." With no other credible witness statements to support the allegation of actual injury caused by dogs during, and as a result of, the off-leash hours, Mr. Holden's statement in paragraph 21 is of doubtful weight and, as such, is an insufficient basis to confer standing to obtain the far-reaching relief sought by Petitioner.

Petitioner's inability to allege actual injury is critical. As a result, Petitioner has no standing to bring this proceeding.

2. Petitioner Also Fails To Meet The Test For Organizational Standing

In order to meet the test for organizational standing, Petitioner is required to establish that at least one of its members would have standing to sue individually. But, as demonstrated above, Petitioner fails to allege actual injury suffered by anyone, let alone any one of its members. For this reason, Petitioner cannot and does not satisfy the requirement for organizational standing. See Wyman, 289 A.D.2d at 789, 750 N.Y.S.2d at 658 (organization had no standing to bring Article 78 proceeding where organization failed to establish that any one of its members had sustained injury in fact).

Further, Petitioner cannot meet the test for organizational standing because Petitioner has not demonstrated that the interests asserted in this proceeding are representative of its alleged organizational purpose of "preserving quality of life in and around Middle Village, Elmhurst and Maspeth" in Queens County. (Holden Aff. ¶ 11.)[11] At best, Petitioner's claim that members of the JPCA are "threatened and continue to be at risk" during off-leash hours is personal to such persons independent of their status as members of the JPCA – none of whom have themselves alleged any actual injury in any event.

Petitioner is a civic organization associated with three neighborhoods in Queens which seeks to destroy a New York City Parks Department rule overwhelmingly enjoyed and supported by communities spanning all boroughs of New York City. The purported interest asserted by Petitioner in bringing this proceeding is vastly overbroad in its reach and is not representative of Petitioner's stated organizational purpose of serving the community interests of Middle Village, Elmhust and Maspeth, Queens. The essential principles of standing are designed to protect precisely against the danger of special interest or pressure groups such as Petitioner who seek to overturn rules established for the public good, motivated only by their own self-interests in an impermissible attempt to legislate through the courts. Soc'y of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 774-75, 788, 570 N.Y.S.2d 778, 785, 789 (N.Y. 1991).[12]

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[11] Following Respondents' Memorandum, which demonstrates why Petitioner lacks organizational standing, Petitioner attempts to expand its organizational purpose, stating now that it is "the enhancement and preservation of the quality of life *in the entire City of New York*." (Holden Reply Aff. ¶ 7.) This newly minted allegation is an obvious attempt to cure Petitioner's deficient status for purposes of standing and is simply not credible. Petitioner is a Queens-based civic association the interests of which are admittedly localized to Middle Village, Elmhurst and Maspeth, Queens. (Holden Aff. ¶ 11.) Petitioner is bound by the admissions in Holden's initial affidavit.

[12] Moreover, if there are in fact members of Petitioner who own dogs and are in favor of off leash hours in Juniper Park, then Petitioner's asserted interests are not aligned with its stated organizational purposes. Rudder v. Pataki, 93 N.Y.2d 273, 279-80, 689 N.Y.S.2d 701, 704-05 (N.Y. 1999) (organizations assertedly representing social workers holding MSW degrees held to lack organizational standing where their members consisted of both social workers who had MSWs and those that did not; "By seeking to enhance job opportunities of only some of their members – those holding MSWs – these groups implicitly seek to diminish opportunities for other of their members – those otherwise qualified members who do not hold MSWs. This imperfect alignment of interests, when considered along with the negligible injury asserted, leads to the conclusion that these organizations lack standing.").

Petitioner has no legally cognizable interest here and lacks standing to maintain this proceeding. Because Petitioner fails to meet the threshold requirement of standing to compel the governmental action it seeks, the Petition must be dismissed.

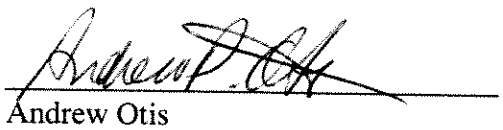
CONCLUSION

For the foregoing reasons, the Court should grant NYCDOG's motion to intervene and dismiss the Petition with prejudice.

Dated: August 21, 2006
New York, New York

Respectfully submitted,

CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP

By: 

Andrew Otis
Dora Straus
101 Park Avenue
New York, New York 10178
(212) 696-6000

Attorneys for Intervenor-Respondent New York Council of Dog Owner Groups ("NYCDOG")