

At a Term/Part ___ of the Supreme Court of the State of New York, held in and for the County of Westchester at the Courthouse located at 111 Martin Luther King Jr. Blvd., White Plains, New York 10601, on the 17 day of April, 2007.

PRESENT: **W. DENIS DONOVAN**
JUSTICE OF THE SUPREME COURT
J.S.C.

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DENNIS C. DURING, MICHAEL S.
FRISCLA and MARCI MALONE,

Plaintiffs,

Index No. 6561/07

-against,

ORDER TO SHOW CAUSE

NO ORAL ARGUMENT

THE CITY OF NEW ROCHELLE,
NEW YORK,

Defendant,

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Upon reading and filing the annexed Affirmation of Patricia B. Wild, dated April 7, 2007, with the Exhibits annexed thereto, the Affidavit of plaintiff Dennis C. During, sworn to the 7th day of April, 2007; the Affidavit of plaintiffs Michael S. Friscia and Marci Malone, sworn to the 7th day of April, 2007; the Affidavit of Matthew S. Wild, sworn to the 3d day of April, 2007; Plaintiffs' Memorandum of Law in Support of Their Motion for a Preliminary Injunction; and the Summons and Complaint, to be served simultaneously herewith; and sufficient cause appearing therefor,

LET the defendant City of New Rochelle, New York ("New Rochelle") show cause before this Court, in Room 1412 at the Courthouse located at 111 Martin Luther King, Jr. Blvd., White Plains, New York 10601, on the 4 day of May, 2007 at

9:30 a.m./~~p.m.~~ in the fore/after noon of that day or as soon thereafter as counsel may be heard, why an order should not be made and entered, pursuant to CPLR §6301, preliminarily enjoining the defendant New Rochelle and its agents, employees, representatives and assigns from enforcing a certain ordinance, to wit: "Ordinance Amending the Code of the City of New Rochelle, Sections 89-1, Running at Large Prohibited, of Chapter 89, Animals; 224-9, Animals, of Chapter 224, Parks; and 133-1, Enumeration of Fees, of Chapter 133, Fees (Ward Acres Park)" (the "Ordinance"), and further permanently enjoining the New Rochelle Police Department from stopping and questioning persons in Ward Acres Park without a reasonable suspicion that such persons are engaged in illegal conduct, upon the grounds that the defendant currently is enforcing the Ordinance in violation of plaintiffs' statutory and constitutional rights and has and is currently causing plaintiffs to suffer irreparable harm and such harm will continue unless the defendant is immediately restrained and the restraint continues during the pendency of this action, and awarding plaintiffs such other and further relief as the Court may deem just and proper, and

SUFFICIENT CAUSE APPEARING THEREFOR, it is

ORDERED, that personal service of this Order to Show Cause together with a copy of the papers upon which it is based, ^{with the exception of} and the Summons and Complaint, upon defendant City of New Rochelle by delivering a true copy of same to the Office of the Clerk of the City of New Rochelle, 515 North Avenue, New Rochelle, New York, 10801, on or before the 19 day of April, 2007, at 5:00 p.m., shall be deemed sufficient service, and it is further

Exhibit A

Exhibit B

Exhibit C

Exhibit D

Exhibit E

Exhibit F

ORDERED, that the defendant New Rochelle shall serve its answering papers, if any, by hand upon counsel for plaintiffs, Patricia B. Wild, 35 North Chatsworth Avenue, #4S, Larchmont, New York 10538, at least five (5) days prior to the return date of this motion.



J.S.C.

W. DENIS DONOVAN
JUSTICE OF THE SUPREME COURT

Dated: *April 17, 2007*

PROOF OF SERVICE MUST BE SUBMITTED
TO ROOM 1806 ON OR BEFORE THE RETURN DATE
1412

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

Judge Assigned:

DENNIS C. DURING, MICHAEL S. FRISCIA and
MARCI MALONE,

Index No.

Plaintiffs,

COMPLAINT

-against-

THE CITY OF NEW ROCHELLE, NEW YORK,

Defendant.

-----X

Plaintiffs Dennis C. During, Michael S. Friscia and Marci Malone, by their attorney,
Patricia B. Wild, as and for their Complaint against the Defendant herein, respectfully allege:

Introduction

1. This action is brought for a declaratory judgment and for a permanent injunction barring enforcement of a novel new dog license ordinance- the first of its kind in New York State- effective April 1, 2007, that has been enforced by a phalanx of armed police officers deployed in a 62-acre public park called Ward Acres Park (“Ward Acres”) in the City of New Rochelle.
2. Although people have been permitted to walk¹ their dogs in Ward Acres for 45 years without any fee or registration requirement and have done so without incident, this new ordinance requires them to undergo a burdensome application process and pay annual dog license fees of \$50 per dog for for dogs owned by residents and \$250 per dog for dogs owned by non-residents. Since people may bring 4 dogs into the park, residents may be charged a total of \$200 and non-residents a total of \$1,000 annually.
3. Violation of the ordinance is a crime punishable by a fine of not more than \$250 or a term of imprisonment of not more than 15 days, or both. On the first two

days the ordinance was effective, New Rochelle deployed approximately 20% of its on-duty police force in the park, where police officers stopped and questioned anyone who appeared there accompanied by a dog.

4. The ordinance violates plaintiffs' rights under various statutes and the Constitution of the State of New York and its enforcement scheme also violates plaintiffs' rights.
5. Plaintiffs are dog owners who for years have walked their dogs in Ward Acres. As defendant knows, the primary users of Ward Acres are individuals such as plaintiffs who walk their dogs in the park.
6. Ward Acres is a wilderness area. It consists of wooded areas, fields, mud paths and small bodies of water. There are no facilities or amenities at Ward Acres--no benches, no picnic tables, no bathrooms, no running water and no parking lot.
7. Although Ward Acres is dedicated for public recreational use and dog owners and walkers are the primary users of the park, upon information and belief, defendant is seeking to reduce the public's use of Ward Acres to such extent that it becomes abandoned and defendant can use it for as yet undisclosed purposes.
8. In furtherance of its conspiracy, defendant planned to engage in and has engaged, in police harassment of the primary users of Ward Acres. Defendant has used its police force in Ward Acres with the purpose and effect of making it sufficiently unpleasant that law-abiding people with dogs will be deterred from visiting Ward Acres. In furtherance of its conspiracy, defendant has also imposed exorbitant fees and highly burdensome licensing requirements on those same primary users of the park. Defendant is doing so without any findings or substantial evidence that the presence of dogs in Ward Acres has caused damage and without any census or surveys of the persons who use or would use Ward

Acres for recreation in the absence of dogs at the park. Rather, defendant's fees and burdensome application process were promulgated with the purpose and the result of making the dog licensing procedure sufficiently expensive and difficult that people with dogs would choose not to obtain the license and instead abandon Ward Acres.

9. When defendant acquired Ward Acres, 75 percent of the purchase price consisted of funds provided by the New York State Park and Recreation Land Acquisition Bond Act. The Environmental Conservation Law prohibited defendant from excluding non-residents from the park without the approval of the Commissioner. In an end-run around the statute, defendant is excluding non-residents by charging them the unconscionable license fee of \$250 annually per dog.
10. Enforcement of the ordinance is all the more egregious because defendant has accepted \$500,000 in Westchester County funds to refurbish that portion of the Colonial Greenway that is situated in Ward Acres. The Colonial Greenway is to be a continuous hiking path which traverses five shore communities including a large series of trails in Ward Acres. In the communities other than defendant, hikers are permitted to take their dogs with them on the Greenway trail. However, once they enter the Ward Acres portion, such hikers will have to produce a Ward Acres dog license that they will have had to purchase and, absent such license, the hikers and their dogs will be evicted from the so-called "continuous" Colonial Greenway and they will be subject to a fine, imprisonment, or both.
11. Plaintiffs have no adequate remedy at law and have suffered, are suffering and will continue to suffer irreparable harm unless enforcement of the ordinance is

preliminarily and permanently enjoined.

12. If an injunction is granted, defendant will not suffer any harm because it plans to use the dog license funds merely to pay for the police presence at Ward Acres to enforce the illegal ordinance. On the other hand, in the absence of an injunction, plaintiffs will continue to suffer irreparable harm and injury.
13. The balance of equities lies with plaintiffs.

THE ILLEGAL ORDINANCE

14. Defendant recently enacted an “Ordinance Amending the Code of the City of New Rochelle, Sections 89-1, Running at Large Prohibited, of Chapter 89, Animals; 224-9, Animals, of Chapter 224, Parks; and 133-1, Enumeration of Fees, of Chapter 133, Fees (Ward Acres Park)”, hereinafter referred to as the “Ordinance.” A copy of the Ordinance is annexed hereto as Exhibit A.
15. The Ordinance requires dog owners who wish to walk their dogs in Ward Acres (or allow others to do so) to obtain a special license from the Department of Parks and Recreation. It imposes annual fees on dogs owned by residents of New Rochelle of \$50 per dog and on dogs owned by non-residents of \$250 per dog. People may bring up to 4 dogs to the park. The Ordinance requires each person who walks a dog in Ward Acres to carry this license on his or her person along with a separate certificate of rabies vaccination.
16. This additional requirement duplicates requirements under the Agriculture & Markets Law that requires people to have a dog license affixed to their dogs. To obtain a New York State dog license, the owner must provide proof of rabies inoculation. It is apparent that the additional requirement to carry proof of rabies inoculation on one’s person is intended to further burden people who walk dogs in Ward Acres as it serves no legitimate purpose.

17. In implementing the Ordinance, the Parks Commissioner requires that each member of a family that wishes to walk a dog in Ward Acres appear at City Hall to have his or her photograph taken. Numerous licensing requirements, including those in the Agriculture & Markets Law governing dog licenses, do not impose in-person registration requirements that require personal appearances or photographs of the applicants.

THE PARTIES

18. Plaintiff Dennis C. During is a resident of the City of Mount Vernon, New York. He owns a standard poodle that he took for exercise at Ward Acres at least 300 times during the past year. The Ordinance requires this plaintiff to pay \$250 annually for a Ward Acres dog license, except that such license purchased now would be at a prorated cost of \$200. If During chose to own 4 dogs and take them to Ward Acres, his license would cost \$1,000. In addition, the Ordinance subjects During to the burdensome application requirements and to being stopped and questioned by police.
19. Plaintiffs Michael S. Friscia and Marci Malone are husband and wife who reside together in the City of New Rochelle, New York. Together these plaintiffs own 3 standard poodles that have been walked and exercised at Ward Acres most days of the week since in or about January, 2002. The Ordinance imposes annual fees of \$50 per dog for them to continue to do so and would impose an additional \$50 fee if they choose to own another dog and take it to the park. In addition, the Ordinance subjects Friscia and Malone to the burdensome application requirements and to being stopped and questioned by police. Friscia and Malone were in fact stopped by a police officer while visiting Ward Acres with their dogs and required to produce a Ward Acres dog license.

20. Defendant City of New Rochelle is a municipal corporation located in the County of Westchester, and is organized and existing pursuant to the Constitution and laws of the State of New York.

VENUE

21. Plaintiffs bring claims solely under the statutes and Constitution of the State of New York. Venue is proper in the County of Westchester because all of the parties reside in that County.

FIRST CAUSE OF ACTION:

VIOLATION OF THE AGRICULTURE & MARKETS LAW

22. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 21 with the same force and effect as though fully set forth herein.
23. New York State Dog Licenses are issued pursuant to Article 7 of the Agriculture & Markets Law, which preempts the Ordinance.
24. If a city wishes to levy dog license fees in excess of the New York State fee, such additional fee may not exceed the sum of \$10.00. Moreover, a city may not broaden or expand the requirements for licensing dogs set forth in Article 7.
25. The Ward Acres dog licenses required by the Ordinance are dog licenses covered by the statute. They contain the title "Dog License." The Ordinance requires submission of a rabies vaccination certificate and levies a fee per dog, not per owner. An owner may entrust his or her Ward Acres dog license to another person who will walk the licensee's dog in Ward Acres. The license travels with the dog, not the person.
26. The Ordinance's excessive fees and in-person registration requirements violate the Agriculture & Markets Law.

SECOND CAUSE OF ACTION:

VIOLATION OF §144 OF THE GENERAL MUNICIPAL LAW

- 27. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 26 with the same force and effect as though fully set forth herein.
- 28. By reason of the foregoing, the defendant has violated §144 of the General Municipal Law entitled “Parks, playgrounds and libraries to be free.”

THIRD CAUSE OF ACTION:

VIOLATION OF ART. I, §12 OF THE NEW YORK CONSTITUTION

- 29. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 28 with the same force and effect and though fully set forth herein.
- 30. Article I, §12 of the Constitution of the State of New York provides that the people shall be safe from unreasonable searches and seizures.
- 31. Defendant is causing its police officers to stop people, including plaintiffs Friscia and Malone, who are walking dogs in Ward Acres to question them about their possession, or lack thereof, of the special dog license. These police officers have no reason to believe that the persons whom they stop in Ward Acres have violated the law.
- 32. In view of the foregoing, defendant is violating Article I, §12 of the New York State Constitution.

FOURTH CAUSE OF ACTION:

VIOLATION OF ART. I, § 6 OF THE NEW YORK CONSTITUTION

- 33. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 32 with the same force and effect as though fully set forth herein.
- 34. Article I, §6 of the New York State Constitution provides that persons shall not be deprived of liberty or property without due process of law.
- 35. The Ordinance and, without limitation, its application procedure, fee structure

and enforcement mechanism are not reasonable, do not further any legitimate governmental purpose, and are not reasonably related to any legitimate governmental purpose.

36. By reason of the foregoing, the Ordinance violates the due process clause of the New York State Constitution.

FIFTH CAUSE OF ACTION (PLAINTIFF DURING ONLY)

VIOLATION OF §80 OF THE GENERAL MUNICIPAL LAW

37. Plaintiff During repeats and realleges each and every allegation contained in paragraphs 1 through 36 with the same force and effect as though fully set forth herein
38. Plaintiff During has conducted and wishes to continue to conduct lawful business in Ward Acres.
39. By reason of the foregoing, the Ordinance violates §80 of the General Municipal Law entitled “Discrimination against non-residents.”

SIXTH CAUSE OF ACTION (BY PLAINTIFF DURING ONLY):

VIOLATION OF THE ENVIRONMENTAL CONSERVATION LAW

40. Plaintiff During repeats and realleges each and every allegation contained in paragraphs 1 through 39 with the same force and effect as though fully set forth herein.
41. Ward Acres was acquired in 1962 with funds from the New York State Park and Recreation Land Acquisition Bond Act.
42. The Deed to Ward Acres subjects the property to limitations imposed by then Article 16-c of the Environmental Conservation Law.
43. Among other things, that statute prohibited exclusion of non-residents from Ward Acres without the prior approval of the State Commissioner of Environmental

Conservation.

44. Before enacting the Ordinance or since, defendant neither sought nor obtained said approval.
45. By reason of the foregoing, defendant has violated a condition set forth in its Deed to Ward Acres and the environmental statute.

SEVENTH CAUSE OF ACTION (BY PLAINTIFF DURING ONLY):

VIOLATION OF ART. I, §11 OF THE NEW YORK CONSTITUTION

46. Plaintiff During repeats and realleges each and every allegation contained in paragraphs 1 through 45 with the same force and effect as though fully set forth herein.
47. Article I, §11 of the New York State Constitution guarantees people equal protection of the laws.
48. The Ordinance's imposition of fees on non-residents of \$250 per dog annually, in contrast to the fee of \$50 per dog on residents, is not reasonable, does not further any legitimate governmental purpose, and is not reasonably related to any legitimate governmental purpose.
49. By reason of the foregoing, the Ordinance violates Article I, §11 of the New York State Constitution.

EIGHTH CAUSE OF ACTION (BY PLAINTIFF DURING ONLY):

VIOLATION OF A PUBLIC TRUST

50. Plaintiff During repeats and realleges each and every allegation contained in paragraphs 1 through 49 with the same force and effect as though fully set forth herein.
51. Defendant purchased Ward Acres with conditions imposed by statute that

dedicated that property to environmental preservation and public recreation purposes.

52. For the past 45 years, defendant has opened Ward Acres to all visitors, both residents of New Rochelle and non-residents.
53. The Ordinance's fee structure for Ward Acres dog licenses discriminates against non-residents and has the effect of excluding plaintiff During, and others, from Ward Acres.
54. Defendant has violated the public trust which prohibits limiting access to Ward Acres to residents of New Rochelle.

WHEREFORE, Plaintiffs respectfully pray for judgment:

1. Declaring the Ordinance invalid;
2. Declaring the application process invalid;
3. Preliminarily and permanently enjoining enforcement of the Ordinance;
4. Preliminarily and permanently enjoining the New Rochelle Police Department from stopping and questioning persons in Ward Acres without a reasonable suspicion that such persons are engaged in illegal conduct;
5. Awarding plaintiffs the costs and expenses of this action and
6. Granting plaintiffs such other and further relief as the Court may deem just and proper.

Dated: April 13, 2007

Patricia B. Wild
Attorney for Plaintiffs
35 North Chatsworth Avenue, #4S
Larchmont, N.Y. 10538

(914) 834-3969

ATTORNEY CERTIFICATION

PATRICIA B. WILD, an attorney duly admitted to practice in the State of New York, hereby certifies that after an investigation of the facts reasonable in the circumstances, I believe that the annexed Complaint is not frivolous as that term is defined in 22 NYCRR Part 130.1-1.

Dated:

Patricia B. Wild