SUPREME COURT OF THE STATEOF NEW YORK
COUNTY OF WESTCHESTER

----------X Judge Assigned:

DENNIS C. DURING, MICHAEL S. FRISCIA and MARCI MALONE, Index No.

Plaintiffs,

-against-

THE CITY OF NEW ROCHELLE, NEW YORK,

Defendant.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

Plaintiffs respectfully submit this memorandum of law in support of their motion pursuant to CPLR §6301 for a preliminary injunction.

Simultaneously with this motion, plaintiffs filed a complaint seeking a declaratory judgment and an injunction barring enforcement of defendant's new ordinance mandating expensive dog licenses for dogs entering Ward Acres Park ("Ward Acres"). Although the public has walked dogs in Ward Acres for forty-five (45) years without incident, defendant enacted a novel ordinance – effective on April 1, 2007 – that imposes annual dog license fees of up to $1,000 for dogs walked in Ward Acres and penalties of up to fifteen (15) days' imprisonment and $250 fine. Moreover, defendant has created needless hurdles to comply with the ordinance by imposing cumbersome in-person registration requirements. Finally, defendant has deployed

nearly twenty (20) percent of its on-duty police force to harass people walking dogs in Ward Acres even though they have done nothing suspicious or violated any law. The ordinance, its application process and enforcement trample numerous of plaintiffs' statutory and constitutional rights under New York law.

Point I demonstrates that the ordinance is facially invalid because it violates four state statutes, namely, Article 7 of the Agriculture & Markets Law, §§80 and 144 of the General Municipal Law, the version of §16-c of the Conservation Law that is referred to in the Deed to Ward Acres as well as the public trust doctrine. The ordinance violates the Agricultural & Markets Law's provision that prohibits a municipality from charging more than $10 for a dog license or imposing different dog licensing requirements. The ordinance charges fees of up to $250 per dog and requires an applicant to appear in-person and have his photograph taken – a process that is far more burdensome that the state process. The ordinance violates §144 of the General Municipal Law's prohibition against charging a fee to use a public park. Moreover, the ordinance's discrimination against non-residents violates §80 of the General Municipal Law, the Environmental Conservational Law, and the public trust doctrine.

Point II shows that the ordinance violates plaintiffs' rights under the New York State Constitution, namely, their rights to due process and to be free from unreasonable searches and seizures. The ordinance violates due process because it furthers no legitimate purpose and imposes excessive fees. Defendant has not and cannot offer any legislative findings to show that its imposition of outrageous annual dog license fees furthers the public good or that those fees bear a reasonable relation to the cost of administering its Ward Acres dog license requirements. Point II further demonstrates that by stopping all people accompanied by dogs in Ward Acres without any basis to believe that they are violating the law, the New Rochelle Police

Department is violating their rights to be free from unreasonable search and seizure.

Point III demonstrates that plaintiffs meet the standards for the grant of a preliminary injunction.

STATEMENT OF FACTS

Ward Acres

Ward Acres is a 62-acre wilderness area lying within defendant's borders. The property, which was once a farm, has some outbuildings that are not open to the public. The public has access to mud trails, small bodies of water, and fields. Much of the vegetation is being choked out by invasive vines. Exhibit D, pp. 10, 13 (photos).[1] There are no amenities in Ward Acres– no benches, picnic tables, water fountains, bathrooms or parking lot.

Defendant acquired Ward Acres in 1962. Seventy-five percent of the purchase price was provided by the New York State Park and Recreation Land Acquisition Bond Act. Exhibit C, Deed. As a result, defendant holds Ward Acres in trust for environmental conservation, preservation and public recreation purposes. Exhibit D, p.11, quoting §16-c of the Environmental Law.

The primary users of Ward Acres have been dog owners and dog walkers. Exhibit D, p. 13. The leash law was not enforced in Ward Acres until April 1, 2007. From 1962 until then, dogs were permitted to run and play off-leash in the park with defendant's full knowledge and consent. The dog-owning community has labored as volunteers to keep Ward Acres clean and safe including clearing out vines that are killing the trees and other vegetation, cleaning up beer cans, litter and debris, and spreading wood chips to make the trails less treacherous. Exhibit D,

1 References to "Exhibit" are to Exhibits annexed to the Affirmation of Patricia B. Wild dated April 13, 2007.

p. 13; Affidavit of Dennis C. During, sworn to April 7, 2007, ¶3. Defendant has done virtually nothing to maintain Ward Acres, relying instead on these efforts.

Ward Acres Master Plan

Defendant commissioned Vollmer Associates to prepare a report on current and possible future uses of Ward Acres. Its 66- page report, entitled **Ward Acres Master Plan** (Exhibit D), is dated July 18, 2006. The report made numerous recommendations for future use and maintenance of the park. So far, the only recommendation that defendant has adopted is to charge a fee for a Ward Acres dog license. The purpose was to address the "suspicion that the park is being used by a growing contingent of non-residents." Exhibit D, p. 58.

The Colonial Greenway

The Colonial Greenway is a 15-mile trail, with gaps and interruptions, that traverses five shore municipalities. The major portion of the trail is situated in New Rochelle, particularly in Ward Acres. Defendant recently received a grant of $500,000 in Westchester County funds to improve its part of what is hoped will become a continuous loop system. Exhibits H and I.

The Ordinance

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." Exhibit B.

The Ordinance requires dog owners who wish to walk their dogs in Ward Acres to obtain a special license from the Department of Parks and Recreation. The license bears the title "Dog License(s)." The Ordinance imposes annual fees on residents of New Rochelle of $50 per dog owned by New Rochelle residents and $250 per dog owned by non-residents. People may bring

up to four dogs to the park. Accordingly, dog owners who are residents of New Rochelle may be required to pay an annual license fee of up to $200 and non-residents an annual license fee of up to $1,000. 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. Notably, the license travels with the dog. Thus, a person who walks another person's dog must carry the license for that dog rather than any license he may have for his own dog.

In implementing the Ordinance, the defendant's Commissioner of Parks and Recreation requires that each member of a family that wishes to walk its dog in Ward Acres appear at City Hall to have his or her photograph taken. Additionally, in order to obtain the license, dog owners must produce a current New York State dog license along with a certificate of rabies inoculation.

Exhibit F. The latter certificate is redundant because an owner must produce a rabies vaccination certificate to obtain a New York State dog license in the first place.

Violation of the Ordinance subjects the violator to a fine of not more than $250 or a term of imprisonment of not more than 15 days, or both. **New Rochelle Municipal Code**, §224-20(B).

Accordingly, hikers who traverse the "continuous" Colonial Greenway Trail accompanied by a dog will, in the absence of carrying a Ward Acres dog license, be subject to a fine or imprisonment, or both. They could also be forced to exit the trail in Ward Acres.

Enforcement of the Ordinance

The Ordinance became effective on April 1, 2007. See Exhibit B. On the first two days the Ordinance was in effect, defendant deployed approximately 20 percent of its on-duty police force in Ward Acres. Affidavit of Matthew S. Wild, sworn to on April 3, 2007 "Wild Aff't", ¶6.

The officers stopped each person who walked into the park accompanied by a dog and required production of the Ward Acres dog license. If an individual refused to produce the license, or did not wish to stop and speak to the officer, an officer explained that the officer would remove that person from the park and give him or her a summons. Wild Aff't, ¶¶2-6. See also Exhibit J (**Journal News** article).

This Action

Plaintiffs are dog owners who for years have walked their dogs in Ward Acres. 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 Petitioner to pay $250 annually for a Ward Acres dog license for him to continue to do so. During has not purchased a Ward Acres dog license and has not entered Ward Acres since March 31, 2007 even though he has wanted to do so. Affidavit of Dennis C. During, sworn to April 7, 2007. 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 three standard poodles that have been walked and exercised at Ward Acres most days of the week since January, 2002. Friscis and Malone have endured the application process and paid $120 (prorated fee) for dog licenses for their poodles. In addition, a police officer has stopped Malone and Friscia in Ward Acres while they were walking their dogs even though they had done nothing suspicious or wrong and demanded production of the Ward Acres dog licenses. Affidavit of Michael S. Friscia and Marci Malone, sworn to April 7, 2007.

Distressed by the Ordinance, its application and enforcement, plaintiffs commenced this action.

ARGUMENT

POINT I

PLAINTIFFS WILL LIKELY PREVAIL ON THE MERITS BECAUSE THE ORDINANCE VIOLATES AT LEASTFOUR STATE LAWS

A. The Ordinance Violates Article 7 of the Agriculture & Markets Law.

New York State Dog Licenses are issued pursuant to Article 7 of the Agriculture & Markets Law. State law has preempted the field of dog regulation. *See, e.g., Opinion of Attorney General*, 1983 N.Y. Op. Gen 31, 1983 WL 167433 (Dec. 27, 1983 (concluding that a local ordinance may not "var[y] the provisions of Article 7 of the Argiculture and Markets Law … [because] State law has preempted the field of dog control").

§§109 and 110 of Article 7 set forth the procedure for obtaining a dog license by application to a County or local clerk's office, provide that the application be accompanied by a rabies vaccination certificate, and prescribe the fees for a dog license.

§110(4)(a) provides that a city may charge an additional license fee **provided that such fee does not exceed the sum of $10.00.**

Additionally:

> Any municipality may enact a local law or ordinance upon the keeping or running at large of dogs and the seizure thereof, provided **no municipality shall vary, modify, enlarge or restrict the provisions of this article relating to identification, licensing, rabies vaccination** and euthanization.

Art. 7, §124(1), Agriculture & Markets Law (emphasis added).

Defendant's Ordinance violates the foregoing statutes. Let there be no mistake– even though defendant purports to denominate its dog license a "permit," it is a dog license. **The permit itself bears the legend "Dog License."** See Exhibit G. The Ward Acres dog license may be given by the dog owner to another person who may walk the owner's dog at Ward Acres. The license travels with the dog, not the owner. The fee charged is per dog, not per person.

It is clear that the annual license fees of $50 per dog for New Rochelle residents and $250 per dog for nonresidents, violate §110(4)(a) of Article 7 because such fees far exceed $10.00 per dog. *See, e.g., Opinion of Attorney General*, 1964 N.Y. Op. Atty. Gen. No. 63, 1964 WL 108842 (Jan. 21, 1964) (explaining that "[o]bviously, any proposed town ordinance which attempts to increase the licensing fee for … dogs would be in conflict with ... the Agriculture and Markets Law" and invalid). Defendant's burdensome application requirements violate §124(1) of Article 7 because they impermissibly "vary, modify, enlarge or restrict the provisions of this article relating to identification, licensing. . ." In order to obtain a Ward Acres dog license, each member of a family who intends to walk a family dog in Ward Acres must appear at City Hall to have his or her photograph taken. The applicant must not only produce a New York State dog license; he or she must also produce a rabies vaccination certificate, even though such certificate is required for a State dog license in the first place. See Exhibit F. Once the Ward Acres dog license is obtained, it must be carried on the dog walker's person at all times while in Ward Acres, along with a rabies vaccination certificate.

Article 7 imposes no such burdensome requirements. No personal photograph is required in order to obtain a State dog license. No personal appearance is necessary either. One may apply by mail.

Ordinances are routinely declared invalid where their licensing requirements or regulation of dogs were different than or exceeded those established by the Agriculture and Markets Law. For example, at a time when Article 7 did not require presentation of a rabies inoculation certificate with an application for a dog license, a court declared a "local law … a nullity and void [because] all that the Town Clerk can require is set forth in section 109 of the Agriculture and Markets Law." *Wickham v. Newkirk*, 60 Misc.2d 868, 869, 303 N.Y.S.2d 919,

920 (Sup. Ct., Albany Co. 1969). Similarly, the Attorney General concluded that a proposed ordinance that would ban the keeping of an unspayed female dog over the age of 6 months, would violate §126 of the Agriculture and Markets Law because it would be more restrictive than the statute. *Opinion of Attorney General*, 1965 N.Y. Op. Atty. Gen. at 176-177 (Nov. 22, 1965).

The Ordinance is invalid, if only on the single ground that it violates Article 7 of the Agriculture & Markets Law.

B. The Ordinance Violates §144 of the General Municipal Law.

§144 of the General Municipal Law provides:

> All parks, playgrounds and libraries existing under this article shall be free and open to the public for use and enjoyment, subject only to such reasonable rules and regulations as the trustees from time to time shall adopt and promulgate.

The authority given to establish a public park does not carry with it the authority to charge admission. *Opinion of Comptroller*, N.Y. Op. Comptroller, 1946, Vol. 2, File No. 1475.

The statute does not make exceptions-- it does not say that public parks are free unless the park user is accompanied by a dog. Accordingly, the Ordinance is invalid because it imposes a fee to use the park in violation of §144 of the General Municipal Law.

C. The Ordinance's Discrimination Against Non-Residents Violates §80 of the General Municipal Law and the Public Trust Doctrine.

§80 of the General Municipal Law provides:

> Discrimination against non-residents. Any restriction or regulation imposed by the governing board of a municipal corporation within this state, upon the inhabitants of any other municipal corporation within this state, carrying on or desiring to carry on any lawful business or calling within the limits thereof, which shall not be necessary for the proper regulation of such trade, business or calling or shall not apply to citizens of all parts of the state alike . . . shall be void.

It cannot be doubted that the $250 fee charged to non-resident dog owners for walking a

dog in Ward Acres, was intended to discriminate against non-residents. The **Ward Acres Master Plan** stated:

> A primary recommended park usage requirement would be a New Rochelle resident pass for access to Ward Acres with one or more dog(s). Since canine facilities are not common in the region, and **there is already some suspicion that the park is being used by a growing contingent of non-residents, it is strongly recommended that the City adopt and implement a fee-based park-use with dog pass policy.**

Exhibit D, p. 58, emphasis added.

Such discriminatory access fee to a public park violates §80 of the General Municipal Law. §80 applies to any lawful activity without regard to whether it is commercial. For example, one court relied on this anti-discrimination statute, to invalidate a Suffolk County law requiring a fund-raising organization to be 90% comprised of residents of the county. *People v. State of New York D.A. Investigators, P.B.A.*, 104 Misc.2d 225, 227, 428 N.Y.S.2d 144 (Dist. Ct., Suffolk Co. 1980).[2]

Accordingly, the Second Department has held that an ordinance violates §80 where "the defendants have failed to adequately explain why, in issuing different permits for residents and nonresidents, it is necessary to charge the nonresidents a substantially higher fee than residents." *Mathys v. Town of East Hampton, supra,* 114 A.D.2d 842, 842, 495 N.Y.S.2d 146, 146. Here, defendant cannot prove that it is necessary, in order to regulate dogs in Ward Acres, to charge a fee of $250 to non-residents while charging only $50 to residents. A resident's dog is still a dog.

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2 Indeed, the Court noted that a contrary decision would require it to invalidate the Suffolk County law under the equal protection clauses of the United States and New York State Constitutions. *Id.; accord Mathys v. Town of East Hampton*, 114 A.D.2d 842, 842, 495 N.Y.S.2d 146, 146 (2d Dep't 1985) (invalidating an ordinance under §80 and therefore avoiding the "issue of whether the ordinance violates the equal protection clauses"). Here, plaintiff has also sued under the equal protection clause of the New York Constitution, but the Court need not address that claim as the ordinance also violates §80.

Similarly, the Ordinance also violates the "public trust" doctrine, which restricts a municipality's freedom to limit access to a public park. The Ordinance effectively bars non-residents from bringing their dogs to the park as they have always been free to do for the last forty-five (45) years.

Courts have struck down ordinances that have discriminated against non-residents' use of public parks. For example, when the City of Long Beach, New York attempted to restrict the use of its Ocean Beach Park to residents of Long Beach and their guests, a court held that the restriction was invalid because the park had been irrevocably dedicated to public use and was held as a public trust:

> When the city dedicated this property to use as a public park and thereafter devoted it to the use of the public at large for 30 years, it put itself in the position of holding that property in trust for the benefit of the public at large. Public parks occupy a special position insofar as the public at large is concerned . . .

Gewirtz v. City of Long Beach, 69 Misc.2d 763, 773, 774, 330 N.Y.S.2d 495, 508 (Sup. Ct. Nassau Co. 1972), *aff'd*, 45 A.D.2d 841, 358 N.Y.S.2d 34 (2d Dep't 1974); *accord Ackerman v. Steisel,* 104 A.D.2d 940, 480 N.Y.S.2d 556 (2d Dep't 1984). Any restriction would require authorization by the State legislature. 69 Misc.2d at 775; 330 N.Y.S.2d at 509-510.

Ward Acres had been used by the public without restriction since the park was acquired in 1962. Defendant holds Ward Acres in trust for the general public not only by virtue of its history of open park access, but also by the terms of its Deed which subjects the property to Article 16-c of the then Environmental Law (discussed in the next section of this memorandum, below). Accordingly, the $250 dog license fee limits the access of non-residents to the park and, therefore, violates §80 of the General Municipal Law and the public trust doctrine.

D. The Ordinance's Discrimination Against Non-Residents Violates §16-c of the Environmental Conservation Law.

The Deed to Ward Acres (Exhibit C) made the property subject to then Article 16-c of the Conservation Law, which provided, in pertinent part:

> Lands acquired for state or municipal parks shall consist of predominantly open or natural lands, including lands under water or forested lands, in or near urban or suburban areas, or suitable to serve the recreation needs of the expanding populations of growing metropolitan areas, or desirable to preserve the scenery or natural resources thereof.
>
> * * * * *
>
> A municipality which acquires land with funds made available by this act may establish reasonable rules and regulations to insure proper administration and development of such lands, **provided that no rule or regulation restricting the use of such lands to the residents of the municipality shall be valid without the express approval of the commissioner.**

Exhibit D, p. 11, emphasis added.[3]

The Ward Acres Master Plan expresses a "suspicion that the park is being used by a growing contingent of non-residents," and goes on to recommend that the City adopt a "fee-based park use with dog pass policy." Exhibit D, page 58. It is plain that defendant wanted to push non-residents out of Ward Acres, in violation of the above-quoted Environmental Law.

The Ordinance follows through on this recommendation and, in an apparent attempt to make a Ward Acres dog license too expensive for non-residents to purchase, the Ordinance requires non-residents to pay the unconscionable annual fee of $250 per dog for the dog license. This fee has already had the effect of excluding non-residents, including plaintiff

3Current §15.07 of the Parks, Recreation & Historic Preservation Law provides: "A municipality which acquires lands with funds made available pursuant to this article may establish reasonable rules and regulations to insure proper administration and development of such lands, provided that no rule or regulation restricting the use of such lands to the residents of the municipality shall be effective without the express approval of the commissioner."

During, from Ward Acres. Affidavit of Dennis C. During, sworn to April 7, 2007, ¶5.

Defendant has never sought the commissioner's approval of its fee structure for non-residents. Defendant takes the position that it was not required to obtain the commissioner's approval for the Ordinance, because defendant is not excluding non-residents from Ward Acres. See Letter from New Rochelle City Clerk, Exhibit E.

On the contrary, defendant is deliberately circumventing the law by charging a ridiculously high fee for the dog license. The Ordinance thus violates a condition set forth in the Deed to Ward Acres and in the Environmental Law.

POINT II

PLAINTIFFS WILL LIKELY PREVAIL ON THE MERITS BECAUSE THE ORDINANCE AND ITS ENFORCEMENT VIOLATE PLAINTIFFS' CONSTITUTIONAL RIGHTS

A. The Ordinance Violates the Due Process Clause of the New York Constitution.

Article I, §6 of the New York State Constitution provides, among other things, that "No person shall be deprived of life, liberty or property without due process of law."

The Ordinance is invalid unless it fulfills "substantive principles of due process":

> Substantive principles of due process require that the legislative enactment have a reasonable relation to a proper governmental purpose so as not to constitute an arbitrary exercise of governmental powers. *First Broadcasting Corp. v. City of Syracuse*, 78 A.D.2d 490, 435 N.Y.S.2d 194 (1981). "Legitimate governmental goals are those which in some way promote the public health, safety, morals or general welfare. . ." *Marcus Assoc. v. Town of Huntington*, 45 N.Y.2d 501, 506-507, 410 N.Y.S.2d 546, 382 N.E.2d 1323 (1978).

People v. Buckley, 142 Misc.2d 262, 536 N.Y.S.2d 948 (Dist. Ct., Nassau Co. 1989) (invalidating a town ordinance that required that beach chairs used at the town beach be rented from a particular concessionaire). The principles of substantive due process require (1) the ordinance to bear a reasonable relationship to a legitimate legislative objective, *see, e.g.,*

People v. Lee, 58 N.Y.2d 491, 495-496, 462 N.Y.S.2d 417, 419-420 (1983) and (2) any fees imposed to bear a reasonable relationship to cost in administering the program, *see, e.g., ATM One L.L.C. v. Incorporated Village of Freeport*, 276 A.D.2d 573, 714 N.Y.S.2d 721, 722 (2d Dep't 2000).

For example, in *People v. Lee*, *supra,* the Court of Appeals invalidated, as violating due process, a village ordinance prohibiting the opening of an alcoholic beverage container in a public place:

> Absent any legislative findings that there exists a reasonable relation between mere possession of an opened or unsealed container of an alcoholic beverage and the public good, we conclude that the Monticello ordinance cannot withstand constitutional scrutiny.

58 N.Y.2d at 496, 462 N.Y.S.2d at 420.

The Ordinance at bar lacks any support in legislative findings. In all 66 pages of the **Ward Acres Master Plan**, there is no suggestion that the presence of dogs in Ward Acres has harmed the park in the more than four decades since the park was acquired. Defendant did not make a legislative finding based on the **Ward Acres Master Plan** or any other survey, study or document that it would be desirable to get rid of the dogs or that the dogs were a health or safety hazard. The Ward Acres dog license is a second license that serves no proper governmental purpose not already covered by the Agriculture and Markets Law.

Moreover, the effect of the Ordinance on the Colonial Greenway, a large part of which lies in Ward Acres, evidently was not considered when the Ordinance was enacted. Although dogs are permitted in other towns on the Colonial Greenway, persons hiking on the Colonial Greenway with a dog, when they traverse the portion in Ward Acres, will be subject to ejection, fine and imprisonment if they do not possess a Ward Acres dog license. Such a result

is inconsistent with the County's $500,000 grant to defendant with the hope of making the Colonial Greenway a continuous hiking path through numerous localities. *See* Exhibits H and I. The Ordinance is wholly irrational and does not further any legitimate governmental interest.

Similarly, the Second Department has explained that license fees must bear a reasonable relationship to the cost of administering the program:

> It is well established that where a license or permit fee is imposed under the power to regulate, the amount charged cannot be greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement. To the extent that fees charged are exacted for revenue purposes or to offset the cost of general governmental functions they are invalid as a tax.

ATM One L.L.C. v. Incorporated Village of Freeport, *supra,* 276 A.D.2d at 574, 714 N.Y.S.2d at 722 (citation omitted).

Here, defendant has not in its legislative record or elsewhere demonstrated that the fee charged per dog-- $250 for non-residents and $50 for residents-- and the cost of defendant's Ward Acres dog license program bear any reasonable relationship to each other. First, there is no possibility that it costs defendant even $50 for a dog to walk in Ward Acres. Indeed, defendant charges less than $50 for an annual permit to use its parking facilities at all of its other parks combined. Second, it costs no more to regulate a non-resident dog than a dog belonging to a resident. Third, the Ward Acres dog license is issued to one adult, no matter how many dogs he or she intends to walk in Ward Acres, and the family receives only one license. So, the imposition of a license fee per dog bears no relationship, rational or otherwise, to the cost of running the license program. Finally, the defendant has not made any study or findings setting forth the cost of administering such a program. Where, as here, a municipality cannot justify the cost of a permit or license, the Second Department has held

that the fee will violate due process because it is an unauthorized tax. *See, e.g., ATM One L.L.C. v. Incorporated Village of Freeport*, *supra.*

Accordingly, the Ordinance violates the due process clause of the New York State Constitution.

B. Enforcement of the Ordinance Violates Plaintiffs' Right To Be Free From Unreasonable Searches and Seizures.

Defendant enforced the Ordinance by sending a group of police officers to Ward Acres, who stopped persons walking there with dogs and demanded production of a Ward Acres dog license. Matthew Wild said that he wanted to go on his way and asked a police officer if the officer was "stopping" him. The officer answered in the affirmative. See Wild Affidavit; Friscia & Malone Affidavit, ¶6. The officers were armed and determined.

Article I, §12 of the New York State Constitution provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause. . .

The seminal case is *People v. De Bour*, 40 N.Y.2d 210, 386 N.Y.S.2d 375 (1976). Its holding is described in *People v. McIntosh*, 96 N.Y.2d 521, 525, 703 N.Y.S.2d 265 (2001):

> When police acting in their criminal law enforcement capacity initiate an encounter with private citizens, the propriety of the encounter must be assessed under the four-tiered analytical framework articulated in De Beur and reaffirmed in Hollman:
>
> "If a police officer seeks simply to request information from an individual, that request must be supported by an objective, credible reason, not necessarily indicative of criminality. The common-law right of inquiry, a wholly separate level of contact, is "activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion.' Where a police officer has reasonable suspicion that a particular person was involved in a felony or misdemeanor, the officer is authorized to forcibly stop and detain that person. Finally, where the officer has probable cause to believe that a person has committed a crime, an arrest is authorized." (People v. Hollman, 79 N.Y.2d at

> 184-185 [internal citation omitted], quoting People v. De Beur, 40 N.Y.2d at 223). It is well settled that when an officer asks an individual to provide identification or destination information during a police-initiated encounter, the request for information implicates the initial tier of the De Bour analysis.

Ibid.

People v. Grullon, 2005 NY Slip Op 51707(U) at 5, (Crim. Ct., N.Y. Co. Oct. 24, 2005) (attached hereto) explained:

> It is well-settled under this hierarchy of authority to detain that, "[w]hen the police lack a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor, which is necessary to justify a forcible stop, they cannot stop an individual who exercises his or her right to be let alone and to refuse to respond to police inquiry" (*People v. Adams*, 194 A.D.2d 102, 106 [3d Dept 1993] [internal quotation omitted]; *see also People v. Howard*, 50 N.Y.2d 583, 386 [1980] ["**An individual to whom a police officer addresses a question has a constitutional right not to respond. He may remain silent or walk or run away. His refusal to answer is not a crime.** Though the police officer may endeavor to complete the interrogation, he may not pursue, absent probable cause to believe that the individual has committed, is committing, or is about to commit a crime, seize or search the individual or his possessions, even though he ran away."], *People v. Cantor*, 36 N.Y.2d 106, 112 [1975] [Before a person may be stopped in a public place a police officer must have reasonable suspicion that such person is committing, has committed, or is about to commit a crime."]). Emphasis added.

Accordingly, in *People v McIntosh*, *supra,* the Court of Appeals invalidated a search where a police investigator asked every passenger on a bus to produce identification and a bus ticket. That search was not more intrusive than the police inquiries at bar, where police officers stopped persons walking dogs in Ward Acres and demanded production of a dog license.

New York affords more protection under Article I, §12 than the United States Supreme Court provides under the 4th Amendment to the United States Constitution. *See, e.g., People v. Scott*, 79 N.Y.2d 474, 583 N.Y.S.2d 920 (1992). Accordingly, the Court of

Appeals has held that a canine sniff violated a person's expectation of privacy under Article I, §12. 79 N.Y.2d at 480, 583 N.Y.S.2d at 923. The police stops of persons walking dogs in Ward Acres and their demands to produce a license, are more intrusive than a mere canine sniff.

Indeed, defendant's practice of deploying police officers in Ward Acres to stop and question persons walking dogs, would not pass constitutional muster even under the Fourth Amendment. In *Brown v. Texas*, 443 U.S. 47 (1979). the Supreme Court struck down a conviction based on a Texas statute that made it a crime to refuse to produce personal identification upon request. A police officer had stopped Brown because "the situation 'looked suspicious' . . ." 443 U.S. at 49. The Court held:

> The reasonableness of seizures that are less intrusive than a traditional arrest … depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with, individual liberty.

443 U.S. at 50, 51, citations omitted.

There was no grave public concern that would justify the seizures in Ward Acres. Defendant never identified or made a finding of any public concern that it intended to address by charging dog license fees for dogs walked in Ward Acres. The seizures did not promote any public interest other than to make sure that the person walking a dog proved, by producing the license, that he or she had paid a fee and there are many other ways to ensure compliance than to stop people walking dogs. The health and identification of the dogs being walked in Ward Acres are covered by the Agriculture and Markets Act dog license program; thus, the seizures and demands for a Ward Acres dog license in no way advance the public

interest. In light of the complete absence of a public concern or a public interest, the seizures at Ward Acres fail the balancing test enunciated in *Brown v. Texas, supra*, even if that more forgiving standard were to apply. Under the New York Constitution, the New Rochelle Police Department's stops are plainly illegal.

Article I, §12 of the New York State Constitution prohibits the police stops in Ward Acres, and such stops and questioning should be enjoined.

POINT III

PLAINTIFFS MEET THE CRITERIA FOR THE GRANT OF A PRELIMINARY INJUNCTION

The criteria for granting a preliminary injunction are:

> (1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor.

Ruiz v. Meloney, 26 A.D.3d 485, 486, 810 N.Y.S.2d 216 (2d Dep't 2006) (citations omitted).

Plaintiffs have demonstrated a likelihood of success on the merits in the preceding Points of this brief. The Ordinance violates numerous statutes and constitutional guarantees, and it must be invalidated.

Plaintiffs have demonstrated that they have already suffered, and are continuing to suffer, irreparable harm. Where a property owner alleged that a town's zoning of his property would deprive him of his long-standing business use, the zoning ordinance was preliminarily enjoined. *See, e.g., Florio v. Incorporated Village of Lynbrook*, 138 A.D. 2d 672, 526 N.Y.S.2d 486 (2d Dep't 1988). At bar, plaintiffs will lose, and plaintiff During has lost, a long-standing practice of exercising their dogs at Ward Acres unless they pay an exorbitant fee and submit to defendant's burdensome application process.

Where, as at bar, there is a substantial likelihood that the Ordinance will be found unconstitutional or otherwise invalid, a preliminary injunction should be granted. *See, e.g., Niagara Recycling, Inc. v. Town of Niagara*, 83 A.D.2d 316, 443 N.Y.S.2d 939 (4th Dep't 1981). Denial of statutory and constitutional rights constitute irreparable harm. Indeed, the Ordinance violates plaintiffs' rights under four state laws and due process and its enforcement efforts violate plaintiffs' rights to be free from unreasonable search and seizure. Under such circumstances, a preliminary injunction should issue. *See, e.g., Matthes v. Collyer*, 32 Misc.2d 224, 223 N.Y.S.2d 280 (Sup. Ct., West. Co. 1961) (temporary restraining order granted where an ordinance was void and unconstitutional on its face); *Niagara Recycling, Inc. v. Town of Niagara*, 83 A.D.2d 316, 334, 443 N.Y.S.2d 939, 951 (4th Dep't 1981) (preliminary injunction granted where it was likely that local law governing permits for waste disposal would be held unconstitutional); *Roadway Transit v. City of Buffalo*, 279 A.D.2d 705, 108 N.Y.S.2d 425 (4th Dep't 1951) (temporary injunction granted when constitutionality of a noise ordinance was challenged); *Brous v. Town of Hempstead*, 62 N.Y.S.2d 701 (Sup. Ct., Nassau Co. 1946) (temporary restraining order issued when the constitutionality of a zoning ordinance was at issue).

As in the many cases cited above, the balance of equities favors the plaintiffs. Defendant is violating their constitutional rights. Plaintiffs were permitted for years to walk their dogs in Ward Acres without obtaining a special license or paying a fee. State laws exist that protect the health and safety of dogs and persons exposed to dogs. Those laws already require a rabies vaccination and a license. The only inconvenience to defendant would be to return Ward Acres to its prior status as a haven for people and dogs, without charge or police harassment.

Defendant has not identified any urgent need to restrict dogs in Ward Acres now, while never having regulated dogs in the park in the 45 years since the property was acquired. Where, as here, the defendant cannot show that the Ordinance must be enforced on an emergency or urgent basis, a preliminary injunction should be granted. *See, e.g., Eighth Ave. Coach Corporation v. City of New York*, 245 A.D. 829, 5 N.Y.S.2d 539 (1st Dep't 1938) (preliminary injunction issued barring city's designating certain streets as one-way streets).

CONCLUSION

For all the reasons set forth above, and in the accompanying affidavits of Dennis C. During, Michael S. Friscia, Marci Malone, and Matthew S. Wild, it is respectfully requested that the Court grant plaintiffs a preliminary injunction enjoining enforcement of the Ordinance and enjoining defendant's police department from stopping and questioning persons in Ward Acres in the absence of a reasonable suspicion that such person is engaging in illegal conduct.

Dated: April 15, 2007

Respectfully submitted,

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Patricia B. Wild
Attorney for Plaintiffs
35 North Chatsworth Avenue, #4S
Larchmont, New York 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 Memorandum of Law is not frivolous as that term is defined in 22 NYCRR Part 130.1-1.

Dated:

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Patricia B. Wild