

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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

Plaintiffs,

-against-

THE CITY OF NEW ROCHELLE, NEW YORK,

Defendant.  
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Index No. 6561-07

Assigned Judge:  
Hon. W. Denis Donovan

**PLAINTIFFS' REPLY MEMORANDUM OF LAW**

**PRELIMINARY STATEMENT**

Plaintiffs respectfully submit this memorandum of law in reply to Defendant's Memorandum In Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Def. Memo") and in further support of their motion for a preliminary injunction.

This action makes a targeted challenge to certain provisions of a New Rochelle ordinance (the Ordinance") that requires dog owners to obtain licenses from Defendant and pay exorbitant fees to walk their dogs in a park – Ward Acres (the "Park") – located in New Rochelle. Although they were free to walk their dogs in the Park for more than four decades, this novel, new Ordinance imposes annual fees per dog as high as \$200 for New Rochelle residents and \$1,000 for non-residents depending upon the number of dogs that they bring to the Park. Plaintiffs have also challenged the New Rochelle Police Department's enforcement practice to stop under threat of force all people walking dogs in the Park and require them to prove their compliance with the Ordinance.

In their opening brief, plaintiffs established that the Ordinance violates the New York State

Agriculture & Markets Law, two provisions of the General Municipal Law, the Environmental Conservation Law, the public trust doctrine and the due process clause of the New York Constitution. Plaintiffs also established that the police department's enforcement practices violate plaintiffs' "right to be let alone" guaranteed by the Article 1, §12 of the New York Constitution.

Rather than respond directly to plaintiffs' claims, defendant tries to obfuscate the narrow and focused issues raised by plaintiffs' challenge. Defendant attempts to justify provisions in the Ordinance that plaintiffs do not challenge, submits affidavits that discuss matters of no relevance and relies upon cases that do not even discuss the legal questions for which they are cited. Notwithstanding its effort of misdirection, this Court cannot miss the inescapable conclusion that the Ordinance violates plaintiffs' state statutory, common law and constitutional rights, and the enforcement tactics have violated and will continue to violate plaintiffs' civil rights.

### **SUMMARY OF ARGUMENT**

This brief demonstrates that the Ordinance violates numerous state statutes and common law. These laws prohibit defendant from charging more than \$10 for a local dog license (which it is already charging dog owners who obtain State dog licenses in New Rochelle (Art. 7, §110[4][a] of the Agriculture & Markets Law)), discriminating on the basis of residency (§80 of the General Municipal Law, §16-c of the Environmental Conservation Law set forth in defendant's deed to Ward Acres and the public trust doctrine) and require that the Park be free of charge (§144 of the General Municipal Law). Defendant attempts to defeat these statutory claims by inserting words in statutes that are not present or ignoring words that are present. Moreover, while defendant has devoted a significant part of its brief arguing that plaintiffs bear a heavy burden to invalidate the Ordinance, defendant fails to mention that this burden only applies to

plaintiff's single constitutional challenge to the Ordinance.<sup>1</sup> Plaintiffs' burden to show the Ordinance's invalidity under state statutory and common law claims is no different than the burden required to establish the invalidity of any type of conduct.

#### The Fees Violate Plaintiffs' Statutory Rights

Defendant concedes that if the Ordinance requires dogs to have another dog license it violates the Agriculture & Markets Law. Even though the Ordinance issues the dog license to a specific dog (identified by its New York dog license number), requires and allows any person with the dog carrying the license to enter the Park and the license itself bears the legend "DOG LICENSE," defendant argue the Ordinance issues a "permit" rather than a license merely because the Ordinance calls it a permit. Defendant cannot avoid clear statutory restrictions by the use of synonyms.

While §144 of the General Municipal Law requires that all municipal parks be "free," defendant claims that allowing dogs to walk in the Park is an amenity for which they can charge a fee. The logical extension of defendant's argument is that municipalities can charge fees to people for "amenities" such as flying kites or having picnics in their public parks. Defendant cannot create such a frivolous exception to the clear language of the statute.

#### The Discriminatory Fees Violate Non-Residents' Statutory and Common Law Rights

§80 of the General Municipal Law, the Environmental Conservation Law and the public trust doctrine prohibit defendant's discriminatory license fees based on residence. Defendant argues that §80 of the General Municipal Law prohibits discrimination only against non-resident commercial enterprises. Defendant cites no authority and ignores legal precedent to the contrary.

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<sup>1</sup>Plaintiffs' other constitutional challenge is to enforcement of the Ordinance by armed police officers.

The public trust doctrine holds that where, as here, a park has been dedicated to public use and open to residents and non-residents alike for many years, a municipality may not exclude non-residents. §16-c of the Environmental Conservation Law, as set forth in defendant's deed to Ward Acres, prohibits defendant from excluding non-residents from the Park without the prior authorization of New York State. Defendant claims that because the Ordinance allows non-residents to use the Park but only imposes fees for use of an "amenity" -- walking dogs, it does not violate these restrictions. As set forth above, walking a dog in the Park is no more an amenity than flying a kite or picnicking. Similarly, the exorbitant license fee of \$250 per dog, up to \$1,000 per family for 4 dogs, was designed to, and has had the effect of, excluding non-residents from the Park. Defendant cannot gut the public trust doctrine by manufacturing exceptions that do not exist.

#### Due Process

Based on a review of the legislative record, plaintiffs showed that the license fees bore no relation to the cost of dogs in the Park and thus constituted an unconstitutional tax. Defendants have submitted affidavits from its City Manager and Parks Commissioner purporting to justify these fees but these officials do not point to anything in the legislative record that supports their opinions. As an initial matter, the Court must disregard these affidavits as a matter of law. Defendant cannot rely upon justifications that were never expressed at a public meeting because to do so would violate binding principles used to ascertain legislative intent. It would also violate the Open Meeting Law. Plaintiffs have submitted reply affidavits from two people who have attended each of the relevant meetings who aver that the justification for the license fees was never mentioned.

Even if the Court were to consider defendant's affidavits, they are nothing more than hearsay and speculation. The affiants do not claim to have personal knowledge of conditions in the Park they claim will be remedied and do not submit any records or documentary evidence to back up their claims of expense. Moreover, the affidavits themselves do not even attempt to support their assertions that costs incurred for cleaning, maintaining and policing the Park are attributable to the presence of dogs in the Park or why the fee charged to non-residents should be five times greater than for residents. Plaintiffs have submitted 9 affidavits from people who have been present in the Park nearly every day for the past several years and thus have personal knowledge of the Park's conditions. They aver that the Park is clean and sanitary and that defendant has done little to clean the Park since passage of the Ordinance. They also aver that they have not seen a police officer in the Park since early April, 2007. Thus, defendant has not and cannot show that the fees are used for anything other than general municipal purposes.<sup>2</sup>

#### Police Enforcement Tactics Violate Plaintiffs' Rights

Defendant concedes that its police officers have stopped and demanded that people walking dogs in the Park produce their dog's license. Defendant also concedes that they have given their officers discretion to escalate the situation if people refused to comply. Nevertheless, defendant argues that it can forcibly stop people without cause because they have no expectation of privacy in a public park. Such a claim is nonsense. Similarly, defendant claims that even though police officers threatened people with force if they did not stop, they do not have to justify their stops unless they use physical force. No court has ever adopted such a radical position and the United States Supreme Court has held exactly the opposite.

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<sup>2</sup>Even if the Court were inclined to accept defendant's affidavits, it should not resolve the factual dispute presented by the conflicting affidavits without holding an evidentiary hearing.

## ARGUMENT

### PLAINTIFFS FULFILL THE REQUIREMENTS FOR THE GRANT OF A PRELIMINARY INJUNCTION

#### I. Plaintiffs Will Succeed on the Merits of their Case.

##### A. Defendant Ignores the Rules of Statutory Construction.

Well established rules of statutory construction guide a court's determination of whether the Ordinance violates the Agriculture & Markets Law and General Municipal Law. First, as the Second Department has explained:

The primary consideration of the court in the construction of statutory provisions is to ascertain and give effect to legislative intent . . . In effecting that objective, the courts are first bound to ascertain such intent from a literal reading of the words and language in the statute itself. . . . Further, where a statute is clear on its face and its words are possessed of a definite and precise meaning, resort to extrinsic matter, such as legislative history, is inappropriate. . . .

In re Allstate Insurance Company v. Libow, 482 N.Y.S.2d 860, 863, 106 A.D.2d 110 (2d Dep't 1984), *aff'd*, 65 N.Y.2d 87 (1985), citations omitted. Second, a court must try to find meaning in every word. Room Additions, Inc. v. Howard, 124 Misc.2d 19, 475 N.Y.S.2d 310 (Civ. Ct., Bronx Co., 1984) Third, every word in these statutes must be given effect as it is written. People v. Tatta, 196 N.Y.S.2d 328, 610 N.Y.S.2d 280, 282 (2d Dep't 1994).

Defendant conveniently ignores these fundamental principles. It advocates interpretations of these statutes by inserting or deleting words in the text of these statutes that contradict their clear and unambiguous language. This Court should not accept defendant's interpretations that violate basic precepts of statutory construction.

The only principle of statutory construction that defendant cites has no application to

plaintiffs' claims that the Ordinance violates state statutes or common law. Defendant argues that a court must sustain an ordinance unless it finds that it is invalid beyond a reasonable doubt. However, defendant neglects to mention that this principle only applies when the Court addresses the constitutionality of an ordinance.

**B. Defendant Fails to Justify its Violation of Article 7 of the Agriculture & Markets Law.**

Defendant bottoms its entire defense that the Ordinance is not a dog license under the Agriculture & Markets Law because (1) the Ordinance says that dog license is a "permit" and (2) its operation is limited to the Park. Defendant's transparent attempt to defeat the statutory restrictions cannot be sustained.

Defendant admits that the Ward Acres dog license itself bears the legend "Dog License," but claims that use of this language was an "oversight." The Ward Acres dog license says what it is: a "Dog License". This Court should not ignore defendant's plain and contemporaneous admission based upon defendant's belated claim of mistake. Moreover, defendant ignores the requirements of the Ordinance that make clear that the Ward Acres dog license is the same as any other dog license:

- The license travels with the dog and not the person – e.g., the Ward Acres dog license is tied to a specific dog identified by the same New York state dog license number; the owner may purchase the license and lend it to another person who is authorized to walk the owner's dog in Ward Acres;
- Dog owners must register their dogs to obtain the license;
- and
- Dog owners must provide proof of rabies inoculation to obtain the license.

Each of these requirements are precisely the same as those required by Agriculture & Markets Law to obtain a New York state dog license.

Defendant does not dispute that the Ordinance imposes fees in excess of the \$10 permitted by the statute and administrative burdens on dog owners in addition to those required to obtain a New York state dog license such as mandating that dog owners appear at City Hall personally and have their photographs taken. Accordingly, a Ward Acres dog license is what it says -- a dog license within the meaning of the Agriculture & Markets Law. The Ordinance must be invalidated.<sup>3</sup>

**B. §144 of the General Municipal Law Means What It Says.**

§144 of the General Municipal Law provides that “[a]ll parks ... shall be free and open to the public for use and enjoyment.” Defendant concedes this point but claims that a locality may charge a fee for access to a public park if it is providing an “amenity.” Def. Memo at 26. Defendant claims that allowing people to walk dogs in the Park is such an amenity. Yet, in its Answer, defendant **“[a]dmits ... that Ward Acres is a wilderness area with no facilities or amenities.”** Answer at ¶ 6 (emphasis added); Exhibit B to Affirmation of Patricia B. Wild, dated June 2, 2007 (“Wild 6/02/07 Aff.”). Defendant’s admission in its Answer is inconsistent with the position it now maintains.

The cases that defendant cites also offer no support for its position. Indeed, defendant admits that such “special facilities” have been defined as “parking lots, pools, shows and golf

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<sup>3</sup>Plaintiffs do not contest that defendant has the right to ensure the health and safety of dogs and people in the Park. However, defendant may not do so by “varying, modifying or enlarging” the requirements of the Agriculture & Markets Law. Notably, defendant contends that requiring persons walking dogs in Ward Acres to carry a rabies vaccination certificate is necessary because of Park conditions, but never points out a single incident or report of a rabid animal in the Park for over forty years.

courses.” Def. Memo at 26. Where, as here, words have been judicially defined, such judicial definition will control. *People v. Eulo*, 64 N.Y.2d 341, 482 N.Y.S.2d 436, 444 (1984) (“When the Legislature has failed to assign definition to a statutory term, the courts will generally construe that term according to “its ordinary and accepted meaning as it was understood at the time . . .” If the term at issue has been judicially defined prior to its use in a statute, however, that definition will be assigned to the term . . .”), internal citations omitted.

Moreover, as explained above, basic principles of statutory construction mandate that the statute be construed to mean what it says. “Free” means “free.” “Amenity” and “special facility” mean a pool, parking lot or similar structure. Defendant is not providing an amenity or special facility and its Ward Acres dog license fees violate §144 of the General Municipal Law.

**D. The Ordinance Violates §80 of the General Municipal Law.**

Defendant urges a reading of this statute, which bans discrimination against non-residents “carrying on or desiring to carry on any lawful business or calling,” as applying only to commercial business activities. However, defendant failed to distinguish the cases that reject such a limitation to commercial business, *see 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); *Mathys v. Town of East Hampton*, 114 A.D.2d 842, 495 N.Y.S.2d 146 (2d Dep’t 1985), and has cited none to the contrary.

**E. The Ordinance Violates the Public Trust Doctrine and the Environmental Law.**

The public trust doctrine provides that where, as here, a municipality has dedicated a park to public use, and for a period of many years has opened it to both residents and non-residents, it cannot exclude non-residents. *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). Defendant argues that notwithstanding the Gewirtz case and others, a municipality may charge a larger fee to non-residents "for use of a public facility and its amenities." Def. Memo at 28. It goes on to cite cases dealing with charging a greater fee to non-residents than to residents.

Those cases involve a public pool, public parking, and public schools. These are all facilities that must be constructed and maintained. They are in no way comparable to Ward Acres, a park without any such facilities. The logic of those cases is that the facilities have limited space and are constructed and supported by local taxes.

As defendant admits, "**Ward Acres is a wilderness area with no facilities or amenities.**" Answer, ¶6 (emphasis added). Ward Acres is not comparable to such public facilities. The Park consists of 62 acres of wilderness and is not crowded, and was acquired with New York State Park and Recreation Land Acquisition Bond Act funds (see Deed to Ward Acres, Exhibit C to 4/07/07 P. Wild Aff.). Defendant's admission that there are no facilities or amenities in the Park should end the discussion.<sup>4</sup>

With respect to the Environmental Law prohibition in its Deed to Ward Acres, which bars defendant from excluding non-residents from the Park without the approval of tNew York State. Defendant argues that it is not excluding non-residents because they can enter without a dog, thereby avoiding the annual fee of \$250 per dog. Def. Memo at 29, footnote. However, the effect of the \$250 fee is to exclude non-residents such as plaintiff Dennis C. During, from the Park. Since April 1, 2007, when the Ordinance became effective, there are far fewer people in the Park.

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<sup>4</sup>Defendant admits that Ward Acres was purchased substantially in part with state funds. Defendant is also to receive a \$500,000 grant from Westchester County to make improvements to its segment of the Colonial Greenway trail, much of which is situated in the Park. Thus, funds from non-residents were used to construct the Park and will be used to improve it. The imposition of discriminatory fees would therefore violate the rationale of the very cases defendant cites.

Affidavit of Kathryn D. Wiegand, sworn to on June 1, 2007, ¶8.

**E. Defendant's Enforcement Tactics Violate Plaintiffs' Constitutional Rights.**

Article 1, §12 of the New York State Constitution protects citizens from unreasonable searches and seizures. It is not contested that a substantial number of armed police officers were deployed in Ward Acres to enforce the Ordinance on April 1 and 2, 2007. It is not contested that the police officers stopped people and asked to see their Ward Acres dog licenses. Defendant deals with this fact by claiming that the stops by police officers were not stops. Def. Memo at 19, 20.

Matthew Wild did not want to stop. He asked a police officer what would happen if he refused to stop and show his dog's licenses. The police officer stated that he would forcibly remove Mr. Wild from the park and charge him with a violation of the Ordinance. Affidavit of Matthew S. Wild, sworn to on April 3, 2007, ¶4. Plaintiffs Friscia and Malone were also stopped by the police. Affidavit of Michael S. Friscia and Marci Malone, sworn to on April 7, 2007, ¶6.

The Affidavit of Anthony Murphy, Deputy Police Commissioner, sworn to on May 24,

2007, supports Mr. Wild's belief that he would have been physically restrained if he did not comply with the officers' instructions. As Commissioner Murphy admits, "[i]f an individual ... refuses all requests for information [would] an officer, within his reasonable judgment, escalate the encounter to a stop." ¶21.

Regardless of the officer's polite demeanor, Mr. Wild complied under threat of force.<sup>5</sup> Defendant's Memo argues for several pages (20-23) that this was not an unconstitutional "stop." The case law is otherwise. As the Court of Appeals recognized, the test for whether an encounter with a police officer gives rise to a "seizure," "is whether a reasonable person would feel free to disregard the police and go about his business." *People v. Hollman*, 79 N.Y.2d 181, 581 N.Y.S.2d at 619, 627 (citations omitted); *see also People v. Howard*, 50 N.Y.2d 383, 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"). Accordingly, the United States Supreme Court makes clear that "[t]he application of [an Ordinance] to detain [an individual] and require to identify himself violate[s] the Fourth Amendment [where] the officers lack any reasonable

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<sup>5</sup>Indeed, Mr. Wild's fear of disregarding the police's demands and threats were well founded. Just this past week, on May 29, 2007, the New Rochelle City Court dismissed a case, *People v. Hoffstead*, where the police arrested an individual who approached them and did nothing more than beg for money. That prosecution pursuant to the state law prohibiting loitering for the purpose of begging, was an unconstitutional infringement of the defendant's right to freedom of speech. See articles in *The New York Times*, Exhibit C to 6/02/07 Wild Aff. The decision criticized defendant's enforcement of the statute in face of the Second Circuit's having held the law unconstitutional. Moreover within days of when Plaintiffs made this application, a federal civil rights action was brought by a citizen who went to the New Rochelle Police Department to complain about the conduct of a police officer. Plaintiff alleges that another police officer "grabbed him around the neck and pinned him against the wall of the interview room unlawfully detaining him." *Carello v. The City of New Rochelle et al.*, 07 CIV. 2914, Complaint at para 11. On May 11, 2007, another federal civil rights action was brought against the police alleging excessive force and false arrest when the police issued a desk appearance ticket which like *Hoffstead* resulted in acquittal. *Soto v. The City of New Rochelle*, 07 CIV. 3726, Complaint. Copies of these complaints are annexed to the 6/02/07 Wild Aff. as Exhibit D.

suspicion to believe that [the individual] was engaged or had engaged in criminal conduct.” *Brown v. Texas*, 443 U.S. 47, 53 (1979); *see also People v. McIntosh*, 96 N.Y.2d 521, 525 (2001) (holding that a police demand for all passengers to produce bus tickets and identification based upon a police hunch was unconstitutional) .<sup>6</sup> Defendant does not claim that its officers had any basis to believe that Mr. Wild was engaged in criminal activity. *Brown* is dispositive.

Defendant relies on *Hollman* to impose a lower test to justify the police’s conduct. Yet, *Hollman* imposes a greater standard where an individual would feel free to disregard the police and leave. 79 N.Y.2d at 181, 581 N.Y.S.2d at 627 (“we see no reason to eliminate entirely ... oversight of police encounters that fall below the level of a Fourth Amendment seizure”). The four-step analysis of justifications for approaching citizens applies only when individuals would feel free to disregard the police -- not when the police threaten force to secure compliance.

Defendant goes so far as to argue that citizens have no expectation of privacy in a public place such as Ward Acres. (Def. Memo at 22). The cases cited to support that specious proposition- *People v. Gant*, 802 N.Y.S.2d 839 (Sup. Ct. Westchester Co. 2005) and *People v. Westerman*, 123 Misc.2d 491, 473 N.Y.S.2d 922 (Sup. Ct., New York Co. 1984)- both involved vehicles. Vehicles have always been treated as an exception under search and seizure law. There is a lesser expectation of privacy in a vehicle because drivers are subject to regulation and frequent, noncriminal encounters with police officers, and because a vehicle can move and leave the scene. *Cady v. Dombrowski*, 413 U.S. 433, 441, 442 (1973). The third case cited, *DeGregorio v. CBS, Inc.*, 123 Misc.2d 491, 473 N.Y.S.2d 922 (Sup. Ct., New York Co. 1984) is

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<sup>6</sup>Defendant attempts to distinguish *McIntosh* arguing the police have to detain or block an individual to trigger Art. 1, §12. *McIntosh* imposes no such requirement and the New Rochelle police’s threat of force is even more intimidating and likely to gain compliance over an individual’s objection.

inapposite because it involved the mere filming of a person in a public place and, indeed, did not even involve any government or police action.<sup>7</sup>

The Court should end this unconstitutional police harassment.

### **G. The Ordinance Violates Substantive Due Process.**

#### Applicable Standard of Review

There is a strong presumption as to the constitutionality of any legislative enactment . . . , but this will not preclude a court from inquiring into the validity of such presumption.” *People v. Kennedy*, 128 Misc.2d 937, 491 N.Y.S.2d 968, 970 (Sup. Ct. Kings Co., 1985), *aff’d* on other grounds, 128 A.D.2d, 549, 512 N.Y.S.2d 483 (2d Dep’t 1987).<sup>8</sup>

Both defendant and plaintiffs cite the same cases for the principle that, in order to fulfill the requirements of substantive due process, the Ordinance must have

“a reasonable relation to a proper governmental purpose so as not to constitute an arbitrary exercise of governmental powers. . . . “Legitimate governmental goals are those which in some way promote the public health, safety, morals or general welfare. . . .”

*People v. Buckley*, 142 Misc.2d 262, 536 N.Y.S.2d 948 (Dist. Ct. Nassau Co. 1989), internal citations omitted.

#### Unconstitutional Tax

Defendant does not dispute that Ward Acres dog license fees must be reasonably related to the defendant’s costs in administering the licensing scheme or the presence of dogs and that the fee differential between residents and non-residents must bear a reasonable relationship to amount

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<sup>7</sup>Defendant asks to be excused from compliance with Art. I, §12 of the New York State Constitution because only defendant’s police officers are authorized to issue summonses. Def. Memo at 20. There is no legal basis for such an excuse.

<sup>8</sup>Defendant is no stranger to enforcing unconstitutional laws. In *People v. Donato*, 179 Misc.2d 192, 684 N.Y.S. 2d 394 (City Ct. New Rochelle, 1998), the New Rochelle City Court invalidated a local ordinance that prohibited “unnecessary” animal noise. The complaint was based on a dog’s barking. The court held the ordinance unconstitutionally void for vagueness.

that these different constituents contribute to pay for those costs. *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). Defendant attempts to satisfy this requirement with post hoc justifications. They offer affidavits purporting to show that fees were intended to pay for the cost of police enforcement of the Ordinance, park clean-up of conditions caused by dogs, and a conclusory statement that defendant can charge more to non-residents because they do not pay New Rochelle property taxes. The Court should not give these affidavits any weight.

As an initial matter, defendant cannot rely upon costs, analyses or studies that were never discussed at a public meeting or reviewed by the City Council before enacting the Ordinance. It is well settled that a court “may not ... enact an intent which the legislature has not expressed at all.” *Archer v. Equitable Life Ins. Society*, 218 N.Y. 18, 22 (1916). Similarly, the Open Meetings Law (§ 96 *et seq.* of the Public Officers Law) requires that all public business be discussed at a public meeting. As the Second Department explained: “Every step of the decision-making process ... is a necessary preliminary to formal action. ... Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one’s official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute.” *Orange Co. Publications v. Council of the City of Newburgh*, 60 A.D.2d 409, 415, 401 N.Y.S.2d 84 (2d Dep’t ), *aff’d*, 45 N.Y.2d 947 (1978). The reliance on a justification not expressed at a public meeting would thus violate this statute. *See, e.g., Matter of Goetschius v. Board of Educ. Of Greenburgh Eleven Free School Dist.*, 721 N.Y.S.2d 386, 387 (2d Dep’t 2001) (holding that the Board violated the Open Meetings Law by “conducting business in a manner inaudible to the public”).

Defendant has not shown that the amount of any of the purported costs was ever discussed at any public meetings or that maintenance costs were even considered as a basis for imposing the fees or their amount. As shown in the affidavits of Steering Committee members Jan Kliger and Vicki Rothweiler, both sworn to on May 30, 2007, no such discussions took place at any Steering Committee meeting. The minutes of the City Council (Exhibit A to 6/02/07 Wild Aff.) reflect only a statement that the fees raised would be used for police enforcement of the Ordinance but does not explain how those fees were calculated. Thus, defendant has not and cannot come forward with admissible evidence to justify the amount of the license fees. The Ordinance must be invalidated. *See, e.g., ATM One L.L.C. v. Incorporated Village of Freeport, supra, 276 A.D.2d 573, 714 N.Y.S.2d at 722.*

The only concern expressed at meetings of the Steering Committee,<sup>9</sup> was that some people expressed fear of unleashed dogs and so did not visit the Park. Affidavit of Vicki Rothweiler, sworn to on May 30, 2007 (“Rothweiler Aff.”), ¶5; Affidavit of Debora Hellman, sworn to on May 30, 2007 (“Hellman Aff.”), ¶6. Responding to that alleged concern (the complainants were never identified or quantified), the Ordinance places restrictions on the hours that dogs may walk unleashed in the Park. This action does not challenge that provision of the Ordinance.

Now, after plaintiffs’ challenge, defendant offers a purpose for the Ordinance that was never discussed by the Steering Committee. Defendant alleges that the purpose of the Ordinance is to promote the health, safety and welfare of dogs and people in Ward Acres. Def. Memo at 8. The Strome and Zimmerman Affidavits are defective because they fail to state how they know

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<sup>9</sup>The Steering Committee was appointed by defendant’s Mayor to meet defendant’s consultant, Vollmer Associates, for the purpose of planning improvements to Ward Acres.

about conditions in the Park. They do not claim any personal knowledge, but only speculate that dogs make the Park unsanitary.

The Steering Committee never discussed any health or safety issues with respect to dogs in Ward Acres. Members of the Steering Committee say that the committee did not discuss the amount of a fee to be charged to dog owners, the differential between the resident and non-resident fees, the cost of cleaning up dog waste in the park or that it was necessary to clean it up or that the fees collected would be used to ensure sanitary conditions in the park or to pay police officers to patrol the park. Affidavit of Jan Kliger, sworn to on May 30, 2007, ¶¶1-5; Affidavit of Vicki Rothweiler, sworn to on May 30, 2007, ¶¶4-10. Such concerns are also absent from the Ward Acres Master Plan.

Even if the Court were to consider defendant's affidavits, they should be given no weight. As to the cost, Mr. Strome is the City Manager. He ought to be conversant with the municipal budget. Yet he presents no budget documents. He fails to relate any dollar cost to the presence of dogs in Ward Acres. Defendant's tactic is to conflate the cost of general maintenance of the park with the alleged costs of allowing dogs there. The Affidavit of William V. Zimmerman, sworn to on May 24, 2007 ("Zimmerman Aff.") waves the flag on dog waste, sanitation and the need to keep Ward Acres safe and clean. Zimmerman Aff., ¶¶2 ("health, safety and welfare"), 21 (if a "rabid dog were to bite a person in the Park"), 25 ("Plaintiffs have asserted that the dog owning community has been informally cleaning up the Park. . . .people leave . . .dog feces. . ."). He presents no budget analysis or cost attributable to the presence of dogs in the park. He, too, lumps the alleged cost of cleaning up after dogs with the cost of cleaning up the entire park, thereby proving plaintiffs' claim that the Ward Acres dog license fees are an unconstitutional tax on dog

owners.<sup>10</sup> **It is apparent that the Ward Acres annual dog license fees of \$50 per dog for residents and \$250 for nonresidents, are an illegal tax on dog owners for the general maintenance of Ward Acres.**<sup>11</sup>

Moreover, the dog owner obtains one dog license stating how many dogs he or she intends to walk in the Park. The cost is the same to produce the license, no matter how many dogs a person owns, yet he or she is charged a fee per dog. The cost to defendant to pay a police officer to inspect the dog license is the same whether a person takes 1 or 4 dogs into the Park. The police officer does not inspect the dogs. He looks at the license.

Defendant also has not shown why non-residents should pay five times more than residents for permission to walk a dog in Ward Acres. The cost to defendant to produce the license is the same regardless of where the owner lives. Compare this fee structure to that for the New Rochelle Omnicard, set forth on Exhibit G to the Zimmerman Affidavit. An adult resident is charged \$31 for entrance to **six (6)** beach parking lots. Non-resident adults must pay \$50. For that money, the Omnicard holders gain access to a real facility- a parking lot in each location. In contrast, defendant is charging non-residents **5 times** the \$50 per dog they charge to residents for admission to **only one** park. Indeed, defendant has not pointed to a single municipal fee in New Rochelle or elsewhere where the disparity is five times as much between residents and non-

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<sup>10</sup>Defendant claims that its estimate and justification of fees is entitled to deference. That may be case if the City Council made legislative findings or even considered the basis for the fees. The *post hoc* justifications by city commissioners are not entitled to any such deference.

<sup>11</sup>Nobody has ever seen defendant's employees clean up dog waste in the park. The great majority of dog walkers clean up after their dogs or after others' dogs. Plaintiffs' witnesses walk their dogs in Ward Acres almost every day. They say there is very little or no dog waste in the park, and that they have never seen any employee of defendant clean up dog waste there. Six witnesses conducted a surveillance of the park for the entire day of May 21, 2007, and did not see any such activity. See Affidavits sworn to on May 30, 2007: Kliger Aff., ¶¶8, 9; Rothweiler Aff., ¶¶10, 11; Anne Bedrick, ¶¶3, 5, 8; Deborah Cowie, ¶¶3, 5, 7; Debora Hellman, ¶¶3, 5, 7; Kathryn D. Wiegand, ¶¶5, 7; Jeffrey P. Wiegand, ¶¶3, 6, 8.

residents. Defendant cannot justify this disparity and has not even attempted to do so.

The Zimmerman Affidavit points to New Rochelle taxpayers having to pay taxes to maintain

Ward Acres, so that it is only fair that nonresident park users pay substantial fees to use the park (§27). He completely omits the fact that Ward Acres was acquired with New York State Park Recreation Land Acquisition Bond Act funds. Ward Acres Master Plan, unnumbered page in Introduction, Exhibit C to Zimmerman Aff. He is oblivious to §144 of the General Municipal Law mandating that public parks be free.

Further, Mr. Zimmerman tries to wish away a \$500,000 grant of Westchester County funds for improvement of that part of the Colonial Greenway situated in New Rochelle, most of which is located in Ward Acres. <sup>12</sup> In ¶37, he says:

First, the City has not accepted any funds from the County to date and all discussions about a grant have been related to improving the pedestrian roads and pathways surrounding Ward Acres rather than the Park itself.

That allegation is contradicted by a press release appearing on defendant's official web site in March, 2007, Exhibit H to 4/07/07 Wild Affirmation. The press release stated, in pertinent part:

Under an arrangement announced by County Executive Andy Spano, the focus of the initial improvements will be in New Rochelle, where approximately 50 percent of the trail is located.

**Proposed improvements will be made to a segment that runs through the City's Ward Acres Park,** along with safety enhancements on Pinebrook Boulevard and Quaker Ridge Road. . . . Funding for this portion of the project is expected to be in excess of \$500,000. . . .

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<sup>12</sup>The Ordinance would require persons walking with a dog on the Colonial Greenway in neighboring communities to purchase a Ward Acres dog license for \$250 or risk ejection from the Trail when they enter Ward Acres with a dog, or a fine or imprisonment.

Emphasis added. There is no indication in the legislative history that the effect of the Ordinance on the Colonial Greenway was ever considered. Of course Mr. Zimmerman does not want to admit that State and County funds were used and will be used for Ward Acres. To do so would make the \$250 per dog tax for non-residents of New Rochelle inequitable. And so it is. Ward Acres dog license fees are thus an unconstitutional tax on dog owners.

#### No Relationship Between Purpose and the Ordinance

Even if one accepts defendant's belated justification that the Ordinance is designed to promote health and safety in the Park, the content of the license does not promote health or safety in the Park. Only the dog owner is shown and identified on the license, along with the number of dogs. The dog is not identified in any way on the license; so a person can take any dog into the Park and not the dog for which a fee was paid and whose New York State license and vaccination certificate have been registered with defendant. This result is wholly irrational.

Commissioner Zimmerman expresses concern for the health and safety of visitors to Ward Acres. He would be more credible if on or about April 1, 2007 the defendant had not removed large trash bins from the interior of the park, thereby making it more difficult for persons walking dogs to dispose of dog waste. Moreover, the paths are full of trip hazards, such as overgrown tree roots, and a visit on June 1, 2007 revealed a large, broken tree branch hanging low over a main path reached from the Broadfield Road entrance. See Affidavit of Michael S. Friscia and Marci Malone, sworn to on June 1, 2007, ¶¶6, 7, 8, and photographs annexed thereto.

Where, as here, a legislative enactment is designed to raise money for the general maintenance of the Park, by taxing dog owners, its amount is wholly unreasonable compared to

other admission fees it charges, and it does not promote health and safety, it violates substantive due process.

**G. Plaintiffs Demonstrate Irreparable Harm.**

Mr. Strome states:

Ward Acres is a truly exceptional parcel of land within our City. It is essentially a 62 acre nature preserve with trails, meadows and forest. Although nestled within northern New Rochelle, it is easily accessible to all of our residents, and to residents of neighboring communities.

Strome Aff., ¶4. While trumpeting the virtues of this unique Park, defendant contends that defendants will not suffer irreparable harm if they are unable to enjoy it with their dogs as they had been doing for years.

Irreparable harm is a deprivation that cannot be redressed by monetary damages. Credit Index, L.L.C. v. RiskWise International. L.L.C., 282 A.D.2d 246, 247 (1<sup>st</sup> Dep't 2001).

Deprivation of the pleasure of walking one's dog in the Park cannot be compensated by money. The high fee charged to non-residents for the license has kept plaintiff During out of the Park. Similarly, the resident's license fee is too much for During and some residents to pay, as the Park is nearly empty these days. Although plaintiffs Friscia and Malone have paid the fee and can go into the Park with their dogs, if the Ordinance is not invalidated, they will be subject to paying the fee, and perhaps a higher fee next year.

Violation of plaintiffs' constitutional rights through police stops also constitutes irreparable harm. Where, as here, there is a likelihood that the Ordinance will be held unconstitutional or otherwise invalid, a preliminary injunction should be granted. Niagara Recycling v. Town of Niagara, 83 A.D.2d 316, 443 N.Y.S.2d 939 (4<sup>th</sup> Dep't 1981).

**J. The Balance of Equities Lies With Plaintiffs.**

This is what the Ward Acres Master Plan says about the “dog walker constituency,” which includes plaintiffs:

Local park users, mainly the dog walker constituency, have in recent years begun to remove invasive vines and improve trails. They regularly assist the City Parks and Recreation staff by collecting and bagging garbage within the park and placing it for pick up at the park perimeter.

Exhibit C to Zimmerman Aff., unnumbered page in Introduction. The page contains 2 photographs.

One is captioned “Volunteers bring trash bags to park perimeter.” The other is captioned “Volunteers have spread mulch along some paths.” See, also, Affidavit of Aileen Sedgwick, sworn to on June 2, 2007, describing her efforts as a volunteer to supply large trash bags for the bins in the Park and drag the filled bags to the edge of the Park for removal.

On the same page:

The City of New Rochelle has provided basic maintenance for Ward Acres Park, but in the park’s history has not funded any major capital projects.

Moreover, plaintiffs were not wrongfully walking their dogs in the Park. It is not disputed that the leash law was never enforced there prior to April 1, 2007. Contrary to defendant’s repeated statement that no dogs were allowed in the Park before that date, a prominent sign near the Broadfield Road entrance stated “Please do not . . . Unleash Dogs.” The sign is described and pictured in the Ward Acres Master Plan, Exhibit C to Zimmerman Aff., p. 15. It implies that leashed dogs could lawfully be taken into the Park.

The dog owners and walkers have performed needed chores in the Park for many years. The defendant has neglected the Park. If the Ward Acres dog license fees are invalidated, dog owners who have been eliminated from the Park will come back. Health and safety will not

suffer, because the dogs are regulated by the Agriculture and Markets Law pursuant to which they must wear an identification tag and be inoculated against rabies. The Ordinance adds nothing to health and safety, but instead, is a revenue-raising measure. Moreover, defendant has not shown that it will suffer any hardship if enforcement of the Ordinance is suspended. Thus, the balance of equities favors plaintiffs. See, *Reuschenberg v. Town of Huntington*, 16 A.D.3d 568, 570, 791 N.Y.S.2d 652 (2d Dep't 2005).

## **POINT II**

### **AN EVIDENTIARY HEARING MAY BE REQUIRED**

CPLR §6312(c) provides:

Issues of fact. Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff's papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion. In such event the court shall make a determination by hearing or otherwise whether each of the elements required for issuance of a preliminary injunction exists.

Defendants have not raised a question of fact. The issues at bar are questions of law.

The Ordinance and its progeny, the Ward Acres dog license, are clear on their face. The license is either a dog license or it is not. It either violates the Agriculture and Markets Law or it does not. The Park is free or, since it is not, the Ordinance violates §144 of the General Municipal Law. A stop by the police is a stop under threat of force, or it is not. There is no fact raised in defendant's affidavits that has any bearing on the legal outcome of this motion.

Moreover, defendant's affidavits are not based on personal knowledge and should therefore be disregarded.

However, in the unlikely event that the Court finds an issue of fact presented that would

prevent it from granting a preliminary injunction, plaintiffs request that an evidentiary hearing be held.

### **Conclusion**

For all the reasons set forth above, in plaintiffs' moving papers, and in the affidavits submitted herewith, it is respectfully urged that plaintiffs' motion for a preliminary injunction be granted, and that the Court grant plaintiffs such other and further relief as it may deem just and proper.

Dated: June 3, 2007

Respectfully submitted,

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