

"COURTESY HOURS" FOR OFF-LEASH DOGS IN PUBLIC PARKS

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Increasingly, dog owner groups and individual citizens are encouraging their city and county parks department to implement unfenced off-leash areas in local parks. Due to existing ordinances, regulations, and statutes (so called "Leash Laws"), and perhaps the perceived threat and fear of governmental liability, many public park agencies have maintained a blanket prohibition against off-leash dogs in public parks outside of fenced areas.

Questions of liability and safety may understandably arise when considering the feasibility of implementing a park policy which would allow dogs off-leash in parks under certain conditions as a more "dog friendly" alternative to fenced in designated dog run areas.

As illustrated by the "Juniper Park" court opinion described below, one such alternative was to perpetuate a tradition of informal "courtesy hours" for off-leash dogs in parks. This particular unwritten park policy, however, generated twenty years of complaints, controversy and ultimately litigation by community opponents of this practice demanding enforcement of existing "Leash Laws."

Whether or not to create an off-leash policy for dogs is generally left to the judgment and discretion of local officials authorized and charged with the responsibility to manage public parks. Accordingly, courts will not second-guess or question administrative decisions made by agencies and officials exercising their judgment and discretion to manage public parks in a manner consistent with the scope of their legal authority under state or local law.

Such immune administrative discretion would generally include decisions regarding where and when dogs could be off-leash in public parks, if at all. As a result, resolution of potential off-leash controversies and conflicts between dog owners and other park users is a public relations/political issue better left to the judgment and discretion of local government officials, not a legal issue for courts to decide.

Liability is also a non-issue. On the issue of potential liability, in the vast majority of instances, applicable state law would likely provide public park agencies with policy/planning immunity on the decision whether or not to restrict dogs in the parks, including the operational details of implementing an applicable Leash Law and/or off-leash policy. Moreover, the alleged failure to effectively enforce existing leash laws or an off-leash policy would generally be immune from governmental liability under general police protection/prosecutorial discretion immunity.

Further, on the issue of potential liability for injuries to park users associated with leashed or unleashed dogs in public parks, in the vast majority of situations, the role of a park agency would be limited to that of landowner. Accordingly, the mere presence of leashed and unleashed dogs in parks would not constitute an "unreasonably dangerous condition on the premises" necessary to provide a legal basis for landowner liability. On the contrary, the legal responsibility, if any,

would lie with the dog owner, not the public park agency, for any injuries associated with leashed or unleashed dogs in public parks.

#### OFF-LEASH POLITICAL CONTROVERSY

In the *Matter of Juniper Park Civic Assn. Inc. v. City of New York*, 831 N.Y.S.2d 360 (11/30/2006), a non-profit civic association, the Juniper Park Civic Association (JPCA), sought a court order to compel the City of New York (NYC) to enforce provisions of the New York City Health Code and the Rules of the New York City Department of Parks and Recreation, both of which required dogs in parks to be leashed. Formed in 1942, JPCA is "dedicated to preserving the quality of life in and around Middle Village, Elmhurst and Maspeth, Queens County". The name of the organization is derived from a New York City park, Juniper Valley Park, located in Middle Village, Queens.

NYC, through the Department of Parks and Recreation (Parks Department), was responsible for "maintaining, policing and administering" NYC parks, including Juniper Valley Park. Another non-profit umbrella organization of various dog owner groups, the New York Council of Dog Owner Groups (NYCDOG), filed a motion with the court to intervene in this case.

The NYC Health Code and Park Rules govern the walking of dogs in New York City and, among other things, prohibit dogs from being present in parks without being leashed. Specifically, New York City Health Code § 161.05a, which in common parlance is known as the "Leash Law" provides that "a person who owns, possesses or controls a dog shall not permit it to be in any public place or in any open or unfenced area abutting on a public place unless the dog is effectively restrained by a leash or chain not more than six feet long."

Similarly, Section 1-04 [i] of the Rules of the New York City Department of Parks and Recreation provide, in pertinent part, that no person owning or possessing any animal "shall cause or allow such animal to be unleashed or out of control in any park, except as permitted by the Commissioner".

JPCA claimed "park patrons are threatened and at risk" due to what JPCA characterized as non-enforcement and "active encouragement of violations of the Leash Law," including the Parks Department's "own rules between the hours of 9 p.m. and 9 a.m." which allowed dogs in parks to be off-leash. JPCA claimed the Parks Department's non-enforcement of applicable Leash Laws have "continued despite numerous complaints and demands for enforcement by JPCA, its members, community residents and other civic and political organizations."

NYC denied JPCA's claim of "comprehensive non-enforcement" of Leash Laws, but admitted "the Commissioner of Parks and Recreation (Commissioner) has granted permission for dogs to be off-leash in specified areas in some parks for the limited hours of 9:00 p.m. to 9:00 a.m."

#### UNWRITTEN POLICY

Based upon the record and arguments in this case, the court noted "the genesis of this dispute dates back almost 20 years" when the Commissioner at the time instituted an "unwritten policy"

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establishing "courtesy hours" during which dogs would be permitted to be unleashed in certain portions of parkland in the city. According to the Parks Department, this "unwritten policy" has been adopted by several ensuing Commissioners of Parks and now encompasses the hours between 9 p.m. and 9 a.m.

JPCA claimed "the Commissioner does not have the authority to enact such a policy in the face of the explicit language of the Leash Law" as well as the Parks Department's own "Leash Law" in its written rules.

In response, NYC and NYCDOG claimed off-leash exercise benefited dogs and their owners. Moreover, in light of "the increasing proportion of the citizenry owning dogs," NYCDOG contended society as a whole benefited from "well adjusted canines." Specifically, NYCDOG attributed the current vitality of all New York City parks to the single fact that dogs have been allowed to roam off-leash."

In opposition to these claims, JPCA submitted photographs, news articles, and affidavits to support the claim that "park patrons are threatened and at risk" by the Parks Department's unwritten policy which established "courtesy hours" for dogs to roam off-leash. As characterized by the court, JPCA's material "taken in a vacuum, would lead to the inescapable conclusion that any individual daring to venture in or near a City park would expect to be harassed by marauding hordes of vicious dogs whose owners sit idly by viewing the carnage much like spectators in the Roman Coliseum."

While characterizing these arguments by NYCDOG and JPCA as "philosophically interesting," the court found their positions to be "totally irrelevant to the legal issues that must be decided." As described by the court, the legal issue to be addressed was "the extent of the Commissioner's authority to permit dogs to roam off-leash in parks in light of the fact that other rules apparently prohibit such conduct."

NYC claimed "courtesy hours" were a valid exercise of the Parks Department's authority because "the Commissioner is authorized by the City Charter to manage the parks and establish rules and regulations for the use of same." JPCA, however, argued the off-leash policy was in "clear contravention of a 'law' which the Commissioner has decided is not binding upon him due to his office." According to JPCA, the Commissioner "cannot usurp the legislature that has created laws for the protection of the general public."

### ADMINISTRATIVE REGULATORY CODE

According to the court, JPCA's argument exhibited "a fundamental misunderstanding of the 'laws' at issue". As noted by the court, the Public Health Code was "not a legislatively enacted law, but rather, like it expressly states, a code." As noted by the court, there was a "fundamental distinction" between a "law, or more accurately a statute" created by a legislative body and a "code." Unlike a legislated statute, the court described a "code" as an agency's exercise of administrative powers granted by a legislative body to "make rules and regulations" to achieve the legislative intent of a given law.

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In this particular instance, the court found the Health Code was not promulgated by the New York City Council, but the Board of Health of the New York City Department of Health under a grant of rule making authority in the New York City Charter. Similarly, the court found the New York City Charter authorized the Commissioner of the Parks Department to "establish and enforce" the Rules of the New York City Department of Parks and Recreation. Subject to the requirements of the City Administrative Procedure Act, the court further found the Health Code and the Parks Department Rules were "not only created by nearly identical processes," but "each are deemed to have the force and effect of law" with "violations of each are punished as misdemeanors."

While the Leash Law "subject of these regulations may fall predominately within the rubric of public health," the court noted that fact did not necessarily require "the Health Code to be treated as superior or controlling on the issue of unleashed dogs in public parks." On the contrary, while the City Health Code acknowledged the "Department of Health is the City agency with primary responsibility in the field of public health," the Department of Health was "not the only agency in New York City with duties relating to health." In particular, the Health Code expressly noted other agencies involved with health included "the Department of Parks and Recreation with recreational facilities and the parks." Further, a major consideration in the Health Code was to avoid "administrative and legal duplication or inconsistency with the law and activities of other government agencies" with "their own codes and regulations."

In this particular instance, the court determined the Parks Commissioner was not attempting to "override a legislative mandate." As a result, the court found the Leash Law provisions in the Health Code would not supercede the Parks Department Rules.

### OFF-LEASH AUTHORITY AND DISCRETION

The issue before the court was, therefore, to resolve the apparent inconsistency between the Health Code and the Parks Department Rules. As noted by the court, the Health Code contained "a blanket prohibition against dogs being permitted off-leash in public." While the Parks Department Rules contained a "similar prohibition," the court found the Parks Department Rules would permit dogs to be off-leash inside City parks when within established "dog runs" and "as permitted by the Commissioner."

Since the Health Code acknowledged "the Parks Department's concurrent oversight of public health issues as they relate to the City parks," and "recognizing the Commissioner's jurisdiction over the management of City parks and duty to promulgate rules in relation thereto," the court concluded "the Parks Department Rules, including its exceptions, are controlling under the circumstances."

In reaching this conclusion, the court noted that JPCA had "not challenged the propriety of the establishment of section 1-04 [i] of the Parks Department Rules which expressly vests the Commissioner with the authority to permit off-leash activity at his discretion." Instead, JPCA had argued unsuccessfully the superiority of the Health Code over Parks Department Rules.

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As a result, the court found the Commissioner was indeed authorized to implement "courtesy hours" for off-leash dog activity in city parks based upon the "language of the Parks Rules which expressly allow the Commissioner to permit such activity." Further, the court found the New York City Charter had expressly delegated authority and powers to the Commissioner "to determine whether to permit off-leash activity within City parks."

### ENFORCEMENT DISCRETION

As characterized by the court, JPCA had also demanded that the Parks Department be compelled to "enforce the rule prohibiting off-leash activity during periods other than the courtesy hours," i.e., 9:00 a.m. to 9:00 p.m. To support the alleged failure to enforce Leash Laws, JPCA had submitted sworn statements, letters and newspaper articles to show "various attacks upon park users by unleashed dogs."

In the opinion of the court, JPCA's "non-evidentiary anecdotal" information did not prove the Parks Department was not enforcing the Park Rules or the Health Code from 9:00 a.m. to 9:00 p.m. While expressing sympathy for the victims of these dog attacks, the court found reports of these incidents did not "constitute legally sufficient proof" that the Parks Department was "blanketedly not enforcing the applicable rules through the issuance of summonses or custodial arrests."

In response to JPCA's anecdotal information and belief that Parks Department Rules were not being enforced, the Parks Department offered a sworn statement that Parks Department officers "may and do" cite owners for unleashed dogs outside the "courtesy hours," as well as citing "owners who are unable to control their dogs" anytime of the day.

On this particular issue of alleged non-enforcement, or non-enforcement in general, the court acknowledged it was "without power to intervene." As a general legal principle, the court noted "the decision whether and in what instances police power should be exercised is peculiarly and unquestionably a discretionary function," not subject to second-guessing by the courts. According to the court, it could not issue an order to compel a general course of official conduct, i.e., directing the Parks Department to enforce the Parks Department Rules from 9:00 a.m. to 9:00 p.m., because it would be "impossible for a court to oversee the performance of such duties."

### FORMALIZE OFF-LEASH POLICY

While the court was "keenly aware" that it could "dispose of the legal issue presented," the court acknowledged, "the broad emotional effect of the issues raised will remain." Accordingly, in light of "the angst and vitriol exhibited" in this case by JPCA and NYCDOG, the court found "common sense would dictate that something more than an 'unwritten policy' governing the off-leash use of parkland by dogs which is known by few and misunderstood by many, is required in this instance."

The court, therefore, recommended that the Parks Department follow through on its oral and written statements to the court that the Parks Department would "formalize the details of the

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current off-leash policy within the Park Rules." In so doing, the court expressed its hope that the Parks Department statements were "more than mere puffery." In the absence of a formal and clearly understood off-leash policy within the Parks Rules, the court envisioned an unacceptable alternative, "simply more endless litigation over what is, inherently, an administrative and political problem."

### CONCLUSION

As a result, the court denied JPCA's petition for the court to issue an order compelling the Parks Department to "enforce section 165.05 of the New York City Health Code and section 1-04 of the Rules of the New York City Department of Parks and Recreation" in a manner which would eliminate "courtesy hours" and require dogs to be leashed at all times in NYC public parks.

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