

ANNED ON 9/16/2009
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Martin Jaffer
Justice

PART 8

Index Number : 100180/2009
STRAY FROM THE HEART, INC.,
vs.
DEPT. OF HEALTH & MENTAL HYGIENE
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 10018009
MOTION DATE 9/16/09
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion petition is granted
in accord with the annexed memorandum

FILED
SEP 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/16/09

MARILYN SHAFER

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

In the matter of the application of

STRAY FROM THE HEART, INC.
Petitioner,

INDEX NO. 100180/09

MOTION SEQ. NO. 001

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules,

-against-

**DEPARTMENT OF HEALTH AND MENTAL HYGIENE
OF THE CITY OF NEW YORK, THOMAS R. FRIEDEN,
as Commissioner of the Department of Health and
Mental Hygiene of the City of New York, and THE CITY
OF NEW YORK,**

Respondents.

The following papers, numbered 1 to 9, were read on this petition:

	<u>PAPERS NUMBERED</u>
Notice of Petition, Verified Petition – Exhibits	1,2
Amended Verified Petition – Exhibits	3
Verified Answer – Affidavits – Exhibits	4,5
Memorandum of Law	6
Verified Reply – Affirmations – Exhibits	7,8
Reply Memorandum of Law	9

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Cross-Motion: Yes No

Upon the foregoing papers, the petition is granted.

Introduction

This is an Article 78 proceeding by a volunteer organization which rescues homeless and abused animals, seeking to compel the City of New York to comply with its statutory requirement to provide full service animal shelters in all five boroughs.

Background

In 2000, the Committee on Health held a public hearing regarding the problem of unwanted, stray and abandoned dogs in New York City. Upon the finding that there is an overpopulation of unwanted dogs that poses a serious threat to public health, safety and welfare of the City's residents and animals, the Animal Shelters and Sterilization Act, Local Law 26 of 2000, was passed, adding §§ 17-801 – 7 - 808 to title 17 of the Admin. Code. Pursuant to the Act, the City was required to ensure that a full-service animal shelter be maintained in each borough, 24 hours a day, 7 days a week. The term "full-service animal shelter" is defined in the Act as "a facility ... that houses lost, stray or homeless animals and (1) accepts dogs and cats [24 hours per day, 7 days per week]; (2) has an adoption program open [24 hours per day, 7 days per week]; and (3) provides sterilization services for dogs and cats ." (§§ 17-802 c), 17-809) The Act also required that all animals be sterilized before leaving a licensed shelter for adoption or return to its owner, except in specified situations.

The Act required shelters to be completed in the boroughs of Brooklyn, Manhattan and Staten Island by January 1, 2002 and in the Bronx and Queens by July 1, 2002. Two years later the Act was amended to (1) extend the time for completion of the shelters in the Bronx and Queens to July 1, 2006; and (2) temporarily reduce the hours of operation to 12 hours a day, 5

days a week until January 1, 2005.

Although the statutory deadlines have passed, there are no shelters in the City open 24 hours a day and there are no shelters at all in the Bronx and Queens.

Petitioner is a not-for-profit volunteer organization with the stated mission of providing rescue, rehabilitation and placement of homeless dogs. Petitioner asserts the City's failure to comply with the statutory requirements has created a dangerous public health threat and overburdens citizens and private rescue organizations, such as the petitioner, which are forced to bear the costs of rescuing, sheltering, treating and sterilizing unwanted animals. Petitioner seeks restitution to recover its expenses.

Respondent opposes the petition arguing (1) the petitioner lacks standing; (2) the City has substantially complied with its statutory requirements; (3) the City's actions are discretionary and non-reviewable; and (4) petitioner's claims are barred by waiver and estoppel.

Discussion

The law is clear that in matters of "great public interest" a citizen may maintain a mandamus proceeding to compel a public officer to do his or her duty. (*Hebel v West*, 25 AD3d 172 [3d Dept 2005]) An article 78 proceeding in the nature of mandamus is an appropriate remedy to compel performance of a statutory duty that is ministerial in nature, but not one in respect to which an officer may exercise judgment or discretion, unless such judgment or discretion has been abused by arbitrary or illegal action. (*Id*) The City Council has been explicit regarding the serious public health threat which gave rise to passage of the Act:

While wandering the City's streets, homeless dogs and cats reproduce at alarming rates, exacerbating a potentially unhealthy and dangerous situation. ... increasing numbers of individuals and animals are at risk for rabies, and many homeless

animals become the victims of vehicular accidents.

We turn first to the petitioner's standing. Standing involves a threshold determination by the court as to whether it is authorized to adjudicate the merits of a dispute, rather than an actual adjudication of the merits. (*New York State Assn. of Nurse Anesthetists v Novello*, 2 N.Y.3d 207 [2004] [R.S. Smith, J., dissenting] ["Standing is a complicated subject at best, and there is always the danger that it will become a black box, from which a judicial conjurer can extract the desired result at will"])

To confer standing, there must be a determination that the challenged action would cause the petitioner direct harm. While standing principles are broadly construed in actions such as this, it remains incumbent upon the party challenging administrative action to show that it would suffer direct harm, injury that is somehow different from that of the public at large. (*Society of Plastics Indus v County of Suffolk*, 77 NY2d 761 [1991]) Under prevailing case law, an organization lacks standing unless it can demonstrate that one or more of its members would have standing to sue. (*Long Island Pine Barrens Society, Inc v Town Board of East Hampton*, 293 AD2d 616 [2d Dept 2002]) Petitioner is an organization dedicated to providing specifically the services which, in the absence of shelters, the City has failed to provide. This Court finds the petitioner has standing to assert this petition.

It is well settled that an Article 78 petition in the nature of mandamus can be brought only where the act sought to be compelled is mandatory and not discretionary. (*Brusco v Braun*, 84 NY2 674 [1994]) Courts will not interfere with municipal decisions which involve questions of judgment, discretion, allocation of resources and priorities inappropriate for resolution in the judicial arena. (*Matter of Abrams v New York City Transit*, 39 NY2d 990 [1976]) The Court has

jurisdiction to entertain a proceeding to determine whether an agency has failed to perform a duty enjoined upon it by law. (*Matter of Fehlhaber v O'Hara*, 53 AD2d 746 [3d Dept 1976])

Respondents have blatantly failed to comply with the mandatory requirements of the Act, which unambiguously requires shelters in each borough, not in 3 out of 5, open 24 hours per day, not 12 or "as needed." While it is true that the creation of a shelter involves discretionary decision-making, the process by which an imposed duty is implemented is irrelevant for mandamus purposes.

Nor is the justiciability of this dispute affected by the fact that the implementation of these mandatory provisions entails some exercise of discretion on the part of respondents. We held in *Klostermann* (*Klostermann v Cuomo*, 61 NY2d 525 [1984]) that an action seeking compliance with a statutory directive is not rendered nonjusticiable "merely because the activity contemplated ... may be complex and rife with the exercise of discretion" Compliance with almost any statutory directive will involve some measure of discretion exercised by those implementing its terms, but this will not render nonjusticiable a claim which asks the courts to compel compliance with a statute that is otherwise mandatory on its face. Mandamus may "compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so" (*id.*, at 540). The judgment below conforms to this principle. (*Natural Resources Defense Council v New York City Department of Sanitation*, 83 NY2d 215 [1994])

A petitioner in an Article 78 proceeding is entitled to recover damages which are "incidental to the primary relief sought by the petitioner" and are based on "the same set of facts." (*CPLR § 7806*) This Court finds the expenses incurred by petitioner in providing services mandated by the Act are incidental damages, recoverable under Article 78.

We have considered the other arguments raised by the parties and find them to be without merit.

Accordingly, it is hereby

ORDERED that the petition is granted; and it is further

ORDERED that respondents submit a plan for the immediate implementation of their compliance with the statutory directives of the Animal Shelters and Sterilization Act, Local Law 26 of 2000 within 60 days of the date herein;

and it is further

ORDERED that the issue of the calculation of incidental damages payable to the petitioner are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion, with respect to the issue of incidental damages only, is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

This reflects the decision and order of this Court.

Dated: 9/9/09

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MARILYN SHAFER

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION