

IAS PART 28

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THE AMERICAN KENNEL CLUB, INC.,  
AMERICAN DOG OWNERS ASSOCIATION, INC.,  
UNITED KENNEL CLUB, INC., CHARLES  
ARRIGO, RUSSELL GOLDSTEIN, HARRY  
KLEIN-SMITH, ROBERT LOW, JOSEPHINE  
MILLER, ISABEL CAMPOS, SHERRY SIEGEL,  
JANET TAGUE and KENTON D. FLAIG,

INDEX NO.

13584/89

Plaintiffs,

- against -

CITY OF NEW YORK, BOARD OF HEALTH  
OF THE DEPARTMENT OF HEALTH OF THE  
CITY OF NEW YORK, DEPARTMENT OF  
HEALTH OF THE CITY OF NEW YORK,  
STEPHEN C. JOSEPH, In His Official  
Capacity as COMMISSIONER OF HEALTH  
and CHAIRMAN OF THE BOARD OF HEALTH  
OF THE CITY OF NEW YORK,

Defendants.

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LELAND DEGRASSE, J.:

This is an action for a declaratory judgment in which the plaintiffs move for an order, pursuant to CPLR 6301, enjoining the defendants from implementing or enforcing Section 161.08 of the New York City Health Code ("Section 161.08"). The defendants cross-move for an order, pursuant to CPLR 3211(a)(7), dismissing the plaintiffs' complaint for failure to state a cause of action.

The plaintiffs are: The American Kennel Club, Inc. ("AKC"), a non-profit corporation chartered by the Legislature of the State of New York for the protection and advancement of pure-bred dogs; American Dog Owners Association, Inc. ("ADOA"), a Michigan

based not-for-profit corporation involved in the advancement of the rights of dog owners; United Kennel Club, Inc. ("UKC"), a Michigan based corporation which acts as a registry and holds shows for numerous breeds of dogs; Charles Arrigo, Russel Goldstein, Robert Low, Josephine Miller, Isabel Campos, Sherry Siegel and Janet Tague, who are individual dog owners in New York City whose dogs allegedly may exhibit certain of the physical characteristics of a pit bull dog ("pit bull") as defined in Section 161.08; Harry Klein-Smith, a breeder of championship dogs whose dogs are registered as both American Staffordshire Terriers and American Pit Bull Terriers; and Dr. Kenton Flaig, a veterinarian who boards dogs and operates an animal hospital in Staten Island. The plaintiffs claim that they, or their members, would be adversely and unfairly affected by Section 161.08 .

The defendants are: The City of New York; Department of Health of the City of New York ("Department of Health"); Board of Health of the Department of Health ("Board of Health"); and Stephen C. Joseph, as Commissioner of Health and as Chairman of the Board of Health.

Section 161.08, which amends Section 161 of the Health Code, is a breed specific regulation which requires the registration of all pit bulls within the City of New York (the "City") before October 1, 1989 and forbids the introduction of pit bulls into the City after that date. In order to register a pit bull under Section 161.08, a person must, inter alia: be at least 18 years of age; prove that he/she has obtained liability insurance in the

amount of \$100,000; prove that the dog has been spayed or neutered; and then must bring the dog to a facility designated by the Department of Health where it will be tattooed with a registration number. The regulation also provides that the dog must be either confined or leashed and muzzled at all times. Any pit bulls brought into the City or registered after October 1, 1989, as well as any litters born after that date, must be removed from the City or turned over to the Department of Health, presumably to be destroyed. Section 161.08 also provides exceptions to these provisions which include places of public exhibition, contest or show or to persons who have brought pit bulls into the city temporarily for these purposes.

Prior to the adoption of Section 161.08, the Board of Health noticed a period for public comment and conducted public meetings. On or about March 14, 1989, the Department of Health held a public hearing to hear comments and testimony on the proposed amendment. Plaintiffs annex a copy of the transcript of the said hearing and it is clear that a majority of the speakers and letter writers, many of whom are experts in the care, behavior and breeding of dogs, were in favor of a non-breed specific ordinance and were against the breed specific provisions of Section 161.08. The Board of Health thereafter held a meeting on March 27, 1989 in which they adopted Section 161.08. The resolution was published in the City Record on March 31, 1989 and was to become effective on April 30, 1989.

On or about April 28, 1989, the plaintiffs filed a 30 day notice of claim with the New York City Comptroller and the Comptroller neglected and/or refused to make an adjustment on the claim for a period of time in excess of 30 days prior to plaintiffs' commencement of this action (see New York City Administrative Code §7-201). Plaintiffs thereafter commenced this action by service of a summons and complaint, simultaneously with this motion for a preliminary injunction, on or about June 22, 1989. The complaint interposes 7 causes of action<sup>1</sup> which assert that Section 161.08 is violative of Federal Due Process and void for vagueness; is violative of State Due Process and void for vagueness; was an improper exercise of legislative powers by the Board of Health; is violative of state Equal Protection/Substantive Due Process; is violative of state Procedural Due Process; and is violative of Federal Procedural Due Process. Plaintiffs seek a declaration that Section 161.08 was enacted by the Board of Health in violation of the City Charter, the United States Constitution and the New York State Constitution and is therefore null and void. The plaintiffs also seek an order permanently enjoining the defendants from enforcing or implementing Section 161.08.

<sup>1</sup> The plaintiffs, in their papers, state that the only four issues before this court are: whether the Board of Health improperly exercised its authority, whether Section 161.08 is void for vagueness; whether Section 161.08 violates procedural due process; and whether Section 161.08 violates substantive due process.

In *Boreali*, suit was brought challenging the Public Health Council's<sup>2</sup> ("PHC") promulgation of a comprehensive anti-smoking code. The Court of Appeals found that the PHC had overstepped its administrative authority in enacting the code and transgressed into the domain of the legislature, thereby exceeding its statutory powers. The Court of Appeals stated that: "we do conclude that the agency stretched that statute [the legislative grant of authority] beyond its constitutionally valid reach when it uses the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be." (*Boreali v. Axelrod*, *supra*, at 9).

The defendants contend that *Boreali* does not apply to the present case because the Board of Health has been vested with the authority to act legislatively in any health related manner and therefore has much broader powers than the PHC. The defendants, however, provide no specifics as to which Board of Health powers are broader or why and this court rejects the defendants' argument. The Court of Appeals has held that:

"However facially broad, a legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers doctrine permits . . . Even under the broadest and most open ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives . . ." (emphasis added) (*Boreali v. Axelrod*, *supra*, at 9).

<sup>2</sup> The PHC is the approximate state equivalent to the City Board of Health.

The Court of Appeals also held that:

"While the separation of powers doctrine gives the Legislative considerable leeway in delegating its regulatory powers, enactments conferring authority on administrative agencies in broad or general terms must be interpreted in light of the limitations that the constitution imposes (NY Const. art III, §1)."

(Boreali v. Axelrod, supra at 9).

In addition, a review of the legislative grants of authority to the PHC and the Board of Health does not support the defendants' contention that a much broader spectrum of powers was granted to the Board of Health nor does it convince this court that the Board of Health is not governed by the holding of Boreali (cf. New York City Charter §558 with Public Health Law §225). As a result, this court concludes that Boreali is controlling on the facts of the present case.

In striking down the code promulgated by the PHC in Boreali, the court of Appeals enumerated four circumstances, which when viewed together, lead to the conclusion that the agency has improperly assumed the discretion to choose ends, which is the Legislature's role in our system of government.

The Court in Boreali first held that PHC "construed a regulatory scheme laden with exceptions based solely upon economic and social concerns" (Boreali v. Axelrod, supra, at 11-12). The court based this finding on the exemptions the PHC carved out for bars, convention centers, small restaurants and the like which were based more on financial hardship than

considerations of public health. The court concluded that striking a proper balance between health concerns, cost and privacy interests was a uniquely legislative function.

Likewise in the present case, section 161.08 exempts from its strict regulations, inter alia; places of public exhibition, contest or show as well as persons who have brought a pit bull into the City temporarily for such purposes. Laboratories, educational and scientific institutions are also exempt. The plaintiffs maintain and the defendants do not dispute, that the Westminster Dog Show which is a prestigious event held annually at Madison Square Garden and which attracts 15,000-20,000 people daily as well as a national evidencia, brings the dogs into close contact with large numbers of people.

The defendants claim that any dog in the City temporarily for such purposes "will not theoretically" be in contact with the public. This argument is without merit and quite remarkable in light of the fact that the dogs will be in an enclosed arena being viewed and approached by thousands of people. It is clear that this exemption cannot be justified on purely public health grounds but is also based on social and economic concerns as well as private interests.

The court also notes that Section 161.08 requires a pit bull owner to obtain \$100,000 in liability insurance before the dog can be registered. This is clearly a social and economic concern in addition to the fact that the imposition of an insurance requirement has been held to be a legislative function

(Matter of While You Wait Photo Corp. v. Department of Consumer Affairs of City of New York, 87 AD2d 46, appeal dismissed 57 NY2d 957). This court therefore concludes that the provisions of Section 161.08 reflect social and economic concerns and private interests as well as considerations of public health.

Secondly, the Court of Appeals in Boreali held that:

"The PHC wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance. Viewed in that light, the agency's actions were a far cry from the 'interstitial' rule making that typifies administrative regulatory activity (see, Matter of Nicholas v. Kahn, supra, 47 N.Y.2d at 31, 416 N.Y.S.2d 565, 389 N.E. 2d 1086; Packer Cull. Inst. v. University of State of N.Y., supra, 298 N.Y. at 190, 81 N.E.2d 80; see also, Tribe, op. cit., at 285)."

(Boreali v. Axelrod, supra, at 13).

The defendants maintain that Section 161.08 is interstitial and that its enactment is typical of administrative regulatory activity. The defendants refer the court to New York City Health Code §§161.07(d), 161.09(m) and (n) for the proposition that the Board of Health regulates wild and vicious animals as well as guard dogs and dogs to be restrained and therefore the enactment of Section 161.08 is simply interstitial in nature.

After a review of the New York City Health Code Sections cited by the defendants, this court can only conclude that the Board of Health, like the PHC in Boreali, wrote Section 161.08 on a clean slate. The sections to which the defendants refer are non-breed specific vicious dog laws which provide for the control of vicious dogs and the issuance of permits to keep them. On the

other hand, Section 161.08 provides for a number of firsts: it is a breed-specific regulation; it requires a dog owner to obtain substantial liability insurance with minimum coverage greater than that required for a car; it requires the tattooing of dogs; and it eventually bans an entire breed of dog from the city. It is clear that the Board of Health, in adopting these provisions, has acted without legislative guidance.

The third indication that an agency has exceeded the scope of its authority is that the agency "acted in an area in which the Legislature had repeatedly tried - and failed - to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" (Boreali v. Axelrod, supra, at 13).

The plaintiffs annex an affidavit from New York City Council Member Carolyn B. Maloney in which the Councilwoman states that she first introduced a breed-specific (pit bull) vicious dog bill, Int. No. 888, to the City Council on July 13, 1987. Councilwoman Maloney claims that in the months following the introduction of the bill after hearing from the public and conducting her own investigations, she concluded that a breed-specific bill was too narrow and that a non-breed specific vicious dog ordinance was necessary to address the problem of vicious dogs.

Councilwoman Maloney thereafter drafted a bill to improve the licensing and regulation of guard dogs, Int. No. 912. On September 10, 1987, Councilman Jerry L. Crispino introduced

another breed-specific bill, Int. No. 893, allegedly at the request of Mayor Koch. In October 1987, a public hearing was held in which Councilwoman Maloney claims that testimony from various groups and the public overwhelmingly favored a non-breed specific ordinance.

On or about November 24, 1987, Councilwoman Maloney, along with other council members, drafted another non-breed specific ordinance, Int. No. 943. The Councilwoman then claims that on October 25, 1988 another public hearing was held during which testimony again was overwhelmingly in favor of a non-breed specific bill. The Councilwoman contends that her latest non-breed specific bill was never brought to the council floor for a vote due to the Board of Health's adoption of section 161.08.

In this court's view, it does appear that the Legislature has repeatedly tried, and failed, to reach an agreement in the face of public debate. The defendants cite Festa v. Leshen, 145 AD2d 49, for the proposition that:

"[T]he Court of Appeals, in Bereali, could not have intended to invalidate a regulation merely because the Legislature had, at some point, considered the same subject matter. The court had in mind the type of extensive and repeated consideration which the Legislature had afforded to the issue of smoking in areas open to the public."

(Festa v. Leshen, supra, at 63).

Festa, however, is distinguishable because the court goes on to hold that:

"Moreover, the PHC had only acted after substantial legislative debate on the issue. Here, by the time the Legislature first

considered the matter, in February 1986, DHCR had already submitted the proposed regulations to HFD for comment."

This is clearly not the situation in the present case where the City Council has been debating the vicious dog issue and has been considering breed specific and non-breed specific vicious dog bills since July 1987.

Lastly, the Court of Appeals in *Boreali* came to the conclusion that "no special expertise or technical competence in the field of health was involved in the development of the antismoking regulations challenged here." (*Boreali v. Axelrod*, supra, at 14).

The defendants argue that because the Board of Health has previously promulgated animal regulations, it has the technical competence needed to enact Section 161.08. This court disagrees. The fact that the Board of Health has previously enacted non-breed specific vicious dog regulations does not give it the technical competence, or knowledge, to legislate against one particular breed of dog.

The submissions of the parties bear this out. The plaintiffs annex 11 affidavits to their papers: Councilwoman Maloney, who contends that public and private support are "overwhelmingly" in favor of a non-breed specific ordinance; Dr. Robert Johnson, a licensed veterinarian, Professor Emeritus and Director Emeritus of the Animal Behavior Clinic of the University of Minnesota; Dr. Joe Templeton, a Professor of Veterinary Pathology; Kenneth A. Morden, President of the AKC and a breeder

and judge of pure-bred dogs for over 25 years; Gordon Carvill, the President of the ADOA and an approved AKC show judge; Fred T. Miller, President of the UKC; Sherry Siegel, Robert Low, Russel Goldstein and Josephine Miller, who are individual dog owners whose dogs may fall under the provisions of Section 161.08; and Harry Klein-Smith, a breeder of championship American Staffordshire Terriers and American Pit Bull Terriers. All of the above affiants support the plaintiffs' position that a non-breed specific vicious dog ordinance is necessary and question the propriety of a breed-specific ordinance.

The defendants on the other hand only submit an affidavit from an attorney without personal knowledge of pit bulls or vicious dogs. There are no affidavits annexed from any of the Board of Health members who allegedly have technical competence on this issue, nor are any affidavits submitted from the veterinarians or kennel attendants who have allegedly experienced the "savagery" of the pit bulls, as explained in Section 161.08's Statement of Basis and Purpose. The sole documentary proof submitted by the defendants are the dog-bite statistics<sup>3</sup> pursuant to which the enactment of this legislation is partially based. Upon challenge by the plaintiffs, the defendants conceded that the statistics may involve a certain degree of exaggeration or distortion, but defendants' attorney assures the court that they are still alarming. There is no further elaboration on the

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<sup>3</sup> The defendants contend that pit bulls represent 2% of the dog population in New York City, but are responsible for 14% of the bites.

degree of distortion or on the possible margin of error and it is unclear why the statistics, after an unknown adjustment, should still be considered alarming. As a result of the foregoing, and based upon the recent decision of the Court of Appeals in Boreali, this court concludes that the plaintiffs have sufficiently established a likelihood of success on the merits for the purpose of obtaining a preliminary injunction.

The plaintiffs have also sufficiently demonstrated that irreparable harm would result in the absence of an injunction. If Section 161.08 is allowed to take effect, on October 1, 1989 all affected dog owners would have to obtain \$100,000 liability insurance, if it is available, at what would probably be a prohibitive cost for a great deal of households. In addition, plaintiffs and other dog owners, especially those who breed and show dogs, would have to mar their dogs with tattoos, impairing their value and show worth. The dog owners would also be required to spay and neuter their dogs, a devastating financial blow to breeders, all pursuant to an ordinance that may not pass constitutional muster. For non-compliance with Section 161.08, dog owners would face both civil and criminal penalties as well as confiscation and destruction of their dogs.

¶ "The allegations of financial hardship and the need to avoid forcing an individual to speculate on the scope of a criminal statute . . . establish the need for temporary injunctive relief."

(Dougal v. County of Suffolk, 86 AD2d 897). As a result, this court concludes that plaintiffs would suffer irreparable injury absent injunctive relief.

The balance of the equities also favor the plaintiffs. The granting of the relief requested merely maintains the status quo (see Medical Malpractice Ins. Assn. v. Cuomo, 139 AD2d 177) whereas the denial of such would cause irreparable harm to the plaintiffs as well as all affected dog owners. In addition, as the defendants themselves pointed out, vicious dog laws are already in place as part of the New York City Health Code and can be enforced. As a result of all the foregoing, the plaintiffs' motion for a preliminary injunction is granted.

The defendants cross-move for an order, pursuant to CPLR 3211(a)(7), dismissing plaintiffs' complaint for failure to state a cause of action. On a motion to dismiss a complaint pursuant to CPLR 3211, the allegations in the complaint must be deemed to be true and the plaintiffs are entitled to all favorable inferences which may be drawn from the complaint. The complaint will be held to be legally sufficient if it states a cognizable cause of action (Underpinning & Foundation Constructors v. Chase Manhattan Bank, N.A., 46 NY2d 459; Rovello v. Orofino Realty Co., 40 NY2d 403; O'Henry's Film Works v. Nabisco, Inc., 112 AD2d 825).

The court will first address the legal sufficiency of plaintiffs' first and second causes of action which assert that Section 161.08 violates both Federal and State Due Process and is void for vagueness.

Section 161.08 (a)(1) defines a pit bull as: "a dog which is an American Pit Bull Terrier according to the phenotypic standards promulgated, as of March 27, 1989, by the United Kennel Club, Inc. of Michigan, or which substantially conforms to such standards . . . The genetic characteristics which are inherent in an American Pit Bull Terrier may be determined by an appropriate scientific test approved for such use and acceptable to the department." The plaintiffs contend that the UKC breed standard for the American Pit Bull Terrier fails to adequately define a pit bull or give fair notice of what conduct is prohibited, thereby subjecting citizens to arbitrary law enforcement.

The due process clause of the Fourteenth Amendment requires that any state or municipality, in making an enactment, must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." (Grayned v. City of Rockford, 408 US 104, 108; United States v. Harris, 347 US 612). In addition, an enactment should not encourage arbitrary and discriminatory enforcement (Kolender v. Lawson, 461 US 352).

The plaintiffs maintain that the UKC breed standard is to be used to judge registered, pure-bred American Pit Bull Terriers and cannot be reliably interpreted by either trained law

enforcement personnel or the average citizen. Plaintiffs also claim that under these standards, some pit bulls may be deemed not to conform whereas members of other breeds, such as the mastiff, may be deemed to conform to the standards, thereby endangering other breeds of dogs and failing to properly warn the citizenry of what is prohibited. The plaintiffs further contend that no reliable scientific tests exist which can ascertain the exact breed of a dog, despite what the statute claims.

The plaintiffs, as already discussed, annex numerous affidavits from experts in the fields of animal behavior and veterinary science, as well as dog breeders and judges,<sup>4</sup> to support their contentions that Section 161.08's definition of a pit bull is vague and that breed-specific legislation is inherently unreasonable. The defendants, on the other hand, submit an affidavit from an attorney without personal knowledge to support their position that Section 161.08 is not vague and that test to determine breeds of dog do exist. At this juncture of the proceedings, with the evidence before it, this court can only conclude that the plaintiffs' first and second causes of action must be sustained as the evidence submitted by the plaintiffs is overwhelming and certainly sufficient to support their causes of action.

The plaintiffs' third cause of action, which asserts that Section 161.08 was an improper exercise of legislative powers by the Board of Health has previously been discussed in this

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<sup>4</sup> The ASPCA, in a brief submitted amicus curiae, also supports the plaintiffs' positions.

decision and as has already been made clear, states a valid cause of action. Plaintiffs' fourth and fifth causes of action assert that section 161.08 is in violation of both Federal and State Equal Protection, Substantive Due Process. The plaintiffs allege that Section 161.08 is arbitrary and capricious and is not rationally related to the accomplishment of a legitimate state purpose or interest. The plaintiffs further claim that Section 161.08 is based upon artificial, rather than real and pertinent differences.

"Where a statute is challenged on nonprocedural grounds as violative of due process, the test is whether there is 'some fair, just and reasonable connection' between the statute and 'the promotion of the health, comfort, safety and welfare of society'. (E.g., *Montgomery v. Daniels*, 38 NY2d 41, 54; *Nettleton Co. v. Diamond*, 27 NY2d 182, 193, app dand sub nom. *Reptile Prods. Assn. v. Diamond*, 401 US 969; *People v. Sunis*, 9 NY2d 1, 4))."

(*Patterson v. Carey*, 41 NY2d 714, 720-721).

The Supreme Court of the United States has held that:

"the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

(*Williamson v. Lee Optical Co.*, 348 US 483, 487-488; see also *Kelly v. Johnson*, 425 US 238).

The plaintiffs have submitted a great deal of evidence and testimony which indicates that the Board of Health's enactment of section 161.08 was irrational. In addition to expert testimony, the plaintiffs submit studies which contradict the defendants'

statistics of the frequency of pit bull attacks in relation to the entire dog population (see, Traumatic Deaths from Dog Attacks in the United States, 69 Pediatrics, at 193-194 [February 1982]). As previously discussed, the defendants themselves indicate there may be some distortion in their statistics. This is in addition to testimony given during the aforementioned hearings on Section 161.08 and other breed-specific and non-breed specific ordinances which was strongly in favor of a non-breed specific bill and against Section 161.08 and other ordinances of its kind.

"Under an analysis of the ordinances in view of the fourteenth amendment equal protection clause, the pit bull dog laws appear to be unconstitutional because the classification of one breed as inherently more dangerous than others is arbitrary and underinclusive. While a deadly assault is tragic, it is unduly oppressive to classify pit bull dogs as uniquely dangerous. Many breeds are capable of and responsible for fatal attacks on people. A 1982 report found that sixteen different breeds were responsible for seventy-three fatal attacks on people. Pit bull dogs were responsible for six fatalities, the same number as Great Danes. Statistics on dog bites also demonstrate that pit bull dogs are not uniquely dangerous." (citations omitted)

(Harner, The New Breed of Municipal Dog Control Laws: Are They Constitutional?, 53 U. Cin. L. Rev. 1067, 1076-1077 [1984]).

The ASPCA, echoing the same position, contends that "while injuries caused by pit bull terrier mix dogs are a prime subject for the media, other breeds of dogs are responsible for many more of the dog bites which take place each year." The ASPCA goes on

to claim that if pit bulls are banned from the City, the people who misuse the dogs will simply obtain other breeds which can also be trained to be vicious.

The defendants submit no evidence which would demonstrate the rationality or reasonableness of section 161.08. The defendants simply quote from Section 161.08's Statement of Basis and Purpose, yet make no attempt to support the statements. As a result, this court concludes that at this stage of the proceedings, in light of the evidence submitted by the plaintiffs and in the absence of the submission of any contradictory evidence by the defendants, that the plaintiffs' fourth and fifth causes of action do not fail to state a cause of action.

Lastly, the plaintiffs' sixth and seventh causes of action assert that Section 161.08 is violative of both State and Federal Procedural Due Process. The plaintiffs contend that dogs are personal property and that Section 161.08's failure to provide for pre-seizure hearings and its failure to provide assurance of prompt post-seizure hearings are both violative of procedural due process. The defendants maintain that section 161.08 provides for a post-seizure hearing. (Section 161.08(g)(4)) and that courts have found that where appropriate, a property interest may be terminated pending a hearing without violating the dictates of due process.

Dogs are considered personal property and are therefore protected by the Due Process clause of the Fourteenth Amendment to the United States Constitution (Augustine v. Doe, 740 F2d 322).

The New York State Constitution also directs that no person shall be deprived of life, liberty or property without due process of law (NY Const., Art I, §6).

"In determining whether state action has violated an individual's right to procedural due process, a court must address two questions. First, it must decide whether the state action has deprived the individual of a protected interest - life, liberty, or property. Finding such a deprivation, the court must then determine whether the state procedures available for challenging the deprivation satisfy the requirements of due process. See Hudson, \_\_\_ US at \_\_\_, 104 S. Ct. at 3203-04; Logan v. Zimmerman Brush Co., 1982, 455 U.S. 422, 428, 102 S. Ct. 1140, 1153, 71 L. Ed2d 265; Parratt v. Taylor, 451 U.S. at 535-537, [subsequently overruled by Daniels v. Williams, 474 US 327]; 101 S. Ct. at 1912-13; Ingraham v. Wright, 1977, 430 U.S. 651, 672, 97 S. Ct. 1401, 1413, 51 L. Ed2d 711."

(Augustin v. Doe, supra at 327).

"If the state cannot protect the individual by imposing predeprivation procedures, or if quick action is essential, the best the state can do is to allow injured individuals to recover damages after the injury has occurred . . . If, however, the state is able to provide the affected individual with a hearing before the deprivation occurs, due process usually requires that the state do so."

(Augustine v. Doe, supra, at 327-328; see also Parratt v. Taylor, 451 US 527, overruled on other grounds, 474 US 327; Logan v. Zimmerman Brush Co., 455 US 422; Fuentes v. Shevin, 407 US 67).

It is clear then that the nature of the hearing will depend on the circumstances and competing interests involved. (Goss v. Lopez, 419 US 565; Signet Construction Corp. v. Borg, 775 F2d 486).

section 161.08(g)(1) provides for the seizure of dogs "[w]hen the Department has reasonable cause to believe that a dog is a pit bull which has not been registered in accordance with the provisions of this section or is unconfined, unleashed or unmuzzled in violation of the provisions of this section . . . ." There are no provisions for a pre-seizure hearing.

Section 161.08(g)(4) provides that post-seizure hearings shall be conducted in accordance with article seven of the Health Code. Section 7.09(a) of the Health Code provides that "[h]earings shall be open to the public, presided over by a hearing examiner and shall proceed with all reasonable expedition and order . . . ."

What disturbs this court is that Section 161.08(g)(1) provides for the seizure of all dogs which the Department of Health believes may be pit bulls without a hearing. This could very well lead to the wrongful confiscation of non-vicious dogs which are not pit bulls and therefore the wrongful deprivation of personal property without justifiable reason. In addition, the confiscation of large numbers of dogs as soon as Section 161.08 becomes effective could delay the post-seizure hearings for extremely long periods of time.<sup>5</sup>

This court does recognize that the courts have allowed post-seizure hearings where exigent circumstances exist. This court also recognizes the defendants' intent to protect the health and safety of the public. However, this court does not

<sup>5</sup> The ASPCA claims that even now, hearings held by the Department of Health on vicious dogs are delayed several months.

believe that such an objective can be obtained by the impounding of dogs which may not be vicious, without a pre-seizure hearing, because the Department of Health believes they may be pit bulls. There has been no demonstration by the defendants that non-vicious, potential pit bulls are a health hazard which would therefore create a situation where a pre-seizure hearing should be waived. In addition, the Health Code provides for the detention of vicious dogs pending a hearing (Health Code Sections 161.05 and 161.07). As a result, this court concludes that the plaintiffs' sixth and seventh causes of action do not fail to state a cause of action.

Accordingly, the plaintiffs' motion for a preliminary injunction is granted and the defendants are enjoined from implementing or enforcing Section 161.08 pending the final disposition of this action. The defendants' cross motion to dismiss plaintiffs' complaint is denied in all respects. The defendants are directed to serve their answer within twenty days after service of this order with notice of entry. The TRO previously granted is continued pending signing of the order herein.

Settle order.

DATED: September 19, 1989.

**LELAND DeGRASSE**  
J. S. C.

believe that such an objective can be obtained by the impounding of dogs which may not be vicious, without a pre-seizure hearing, because the Department of Health believes they may be pit bulls. There has been no demonstration by the defendants that non-vicious, potential pit bulls are a health hazard which would therefore create a situation where a pre-seizure hearing should be waived. In addition, the Health Code provides for the detention of vicious dogs pending a hearing (Health Code Sections 161.05 and 161.07). As a result, this court concludes that the plaintiffs' sixth and seventh causes of action do not fail to state a cause of action.

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