To be argued by
HENRY MARK HOLZER

— BINDER —

Court of Appeals

STATE OF NEW YORK

HELEN E. JONES individually, as President of Society for Animal Rights, Inc., as Chairman of Citizens for Animals, and as Guardian for all animals now confined in the Queens, Prospect Park and Central Park Zoos; KEITH DAVID, individually, and as Chairman of the Committee to Close the Queens, Prospect Park and Central Park Zoos; SOCIETY FOR ANIMAL RIGHTS, INC. individually, and on behalf of its members; CITIZENS FOR ANIMALS individually, and on behalf of its members; COMMITTEE TO CLOSE THE QUEENS, PROSPECT PARK AND CENTRAL PARK ZOOS, individually and on behalf of its members; COMMITTEE TO PROTECT NEW YORK CITY ANIMALS, INC. individually, and on behalf of its members, DOROTHY DI SOMMA; VIRGINIA WOODS; IRENE SALUCCI; MARY R. CLAIR; ELVIRA VITACCO,

Plaintiffs-Appellants,

-against-

ABRAHAM D. BEAME individually, and as Mayor of the City of New York; THE CITY OF NEW YORK; EDWIN L. WEISL, JR. individually, as Administrator of the Parks,

(Continued on Reverse)

BRIEF FOR PLAINTIFFS-APPELLANTS

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Recreation and Cultural Affairs Administration of the City of New York; and as Commissioner of Parks of the City of New York; JOHN T. CARROLL individually, and as Administrator of the Municipal Service Administration of the City of New York; ROBERT I. COHEN individually, and as Commissioner of Purchase of the City of New York; PERCY E. SUTTON individually, and as Borough President of the Borough of Manhattan; SEBASTIAN LEONE individually, and as Borough President of the Borough of Brooklyn; DONALD R. MANES individually, and as Borough President of Queens; JOHN FITZGERALD individually and as Supervisor of Menagerie of the Queens Zoo; WALTER NEWMAN individually, and as Supervisor of Menagerie of the Prospect Park Zoo; and ROBERT BEACH individually, and as Supervisor of Menagerie of the Central Park Zoo,

Defendants-Respondents,

-and-

NEW YORK MEDICAL COLLEGE FLOWER AND FIFTH AVENUE HOSPITALS, ET AL.,

Defendants.

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COURT OF APPEALS : STATE OF NEW YORK

HELEN E. JONES, ET AL,

Plaintiffs-Appellants,

-against-

ABRAHAM D. BEAME, ET AL,

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

What this case is really all about was best expressed by Justice Abraham Gellinoff at Special Term (in a conclusion left undisturbed by the Appellate Division):

> If all these allegations are true -- and for the purpose of this motion [to dismiss the amended complaint] the truth must be assumed -- then plaintiffs' complaint constitutes far more than an attempt to formulate and enforce a "Zoo Code". These allegations, if true, establish blatant cruelty to animals [in the Queens, Prospect Park, and Central Park Zoos] in violation of the provisions of the Agriculture and Markets Law. (166*).[1]

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* Numbered references, unless otherwise indicated, are to pages of the Record on Appeal.

1. No claim was or is made that cruelty does or does not exist at the Bronx Zoo, which is not a zoo of the City of New York. The Bronx Zoo is operated by the New York Zoological Society, a New York corporation created by Chapter 435 of the Laws of 1895. The zoos involved in this case are the three zoos operated by the City of New York at Queens, Prospect Park, (Brooklyn) and Central Park (Manhattan), all of which will be referred to collectively in this brief as "the zoos" or "the City's zoos".

Plaintiffs, individuals and organizations more fully described below, sue for declaratory judgments and injunctions invoking various provisions of State and City law, in order to put an end to the cruelty and other violations of law being perpetrated by the City of New York in its operation of the zoos.

Justice Gellinoff upheld the basic causes of action of the amended complaint (causes of action 1, 2, 3, 9 and 11) against the City's multi-ground motion to dismiss.

On the City's appeal,[2] the Appellate Division reversed, dismissing those five causes of action on the single ground that plaintiffs lacked "standing to sue", with reliance being placed exclusively on Abrams v. N.Y.C. Tr. Auth., 39 N.Y. 2d 990. In reversing Special Term, the Appellate Division apparently disagreed with Justice Gellinoff that:

> This case presents issues of importance and significance to our society. And justice requires that judicial inquiry and resolution of the grave questions not be thwarted. (166)

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2. The City's appeal was reinstated in the Appellate Division, on the City's motion, after having been dismissed for failure to prosecute.

PROCEDURAL STATEMENT

Plaintiffs (who are more fully described below) are individuals and organizations professionally and otherwise concerned with the welfare of animals. Plaintiffs have named as defendants everyone thought to be necessary in an action such as this.

Plaintiffs' amended complaint (16-32) originally set forth eleven causes of action. Six of them (4, 5, 6, 7, 8, and 10) failed to survive Special Term, and they were abandoned by plaintiffs when the City appealed to the Appellate Division. The five that survived Special Term and which the City took to the Appellate Division, (1, 2, 3, 9 and 11) alleged, in essence, as follows:

1. That conditions in the City's zoos (thoroughly described in painful detail in the amended complaint) constitute cruelty to animals in violation of sections 353, 356 and 370 of the State's Agriculture and Markets Law.

2. That those conditions also constitute waste of municipal assets.

3. That those conditions also violate section 532-9.0 of the City's Administrative Code.

9. That the circumstances of the City's sale of certain animals violate sections 353, 356 and 370 of the State Agriculture and Markets Law.

11. That based on the amended complaint's allegations plaintiffs are entitled to have a summary inquiry commenced pursuant to section 1109 of the City Charter.

Although it was clear what causes of action had survived Special Term, and equally as clear that in upholding them Justice Gellinoff had made other substantive rulings as well -- that civil causes of action could exist under the penal sections of the Agriculture and Markets Law, and that the elements for State and City "waste" actions as well as for a summary inquiry had been appropriately alleged -- it was not so clear as to exactly what the City was contending, or what rulings it was seeking to reverse, in the Appellate Division.

The City's brief's Table of Contents in the Appellate Division summarized its position this way:

> POINT I
>
> Notwithstanding the recent liberalized view of standing in this State, the operation of the City's zoos into which the plaintiffs seek to inject themselves is so inappropriate for judicial supervision and claims of illegality are so tenuous that plaintiffs should be held without standing to maintain this action.
>
> POINT II
>
> Plaintiffs do not state a cause of action under Section 1109 of the New York City Charter.

The City's "Questions Presented" were expressed thusly:

> The question this [sic] presented is whether plaintiffs have standing, either becuase [sic] of their special interest or as taxpayers, to maintain an action of this sort where what is involved is the "management and operation of public enterprises", Abrams v. New York City Transit Authority, 39 N Y 2d 990, 992 (1976), and, more concretely, in this case, an attempt by plaintiffs "to substitute [their own and the Court's] oversight for the discretionary management of public business by public officials" (id.).
>
> A corollary to the question of plaintiff's standing is the question of whether the City is subject to Article 26 of the Agriculture and Markets Law, and, if so, whether by implication Article 26 provides for a civil remedy.

We have mentioned Justice Gellinoff's various rulings and the City's posture in the Appellate Division because of what that court actually decided and how the emphasis of that decision affects the task of plaintiffs-appellants here. Although Justice Gellinoff's decision had given the City more to think about than just plaintiffs' standing, and although, apparently realizing this, the City did concern itself on appeal with more than standing, the Appellate Division concerned itself only with standing. "The pivotal issue", said the Appellate Division, "is whether or not plaintiffs have standing to bring this suit."(174). Only that issue was discussed -- and only because the court believed that under Abrams plaintiffs had no standing, every one of the five surviving causes of action were dismissed.

Accordingly, after considerable analysis of just what was thus presented for plaintiffs on this appeal, we have concluded that the decision, opinion and order of the Appellate Division give rise to this Court's review only of "the pivotal issue" -- whether plaintiffs, or any of them, have standing to bring all or any of causes of action 1, 2, 3, 9, and 11 of the amended complaint. We do not now address any other issue arising out of Special Term's decision, out of the City's posture in the Appellate Division, or out of anything else implied in the case. We assume that if this Court reverses -- which would seem necessary if even one plaintiff has standing as to even one cause of action -- a remand to the Appellate Division will be necessary in order to obtain determinations on those issues not made by that court when the case was there, e.g., whether, if one of the plaintiffs does possess a sufficient "standing" interest to sue, the Agriculture and Markets Law's penal sections give rise to a civil cause of action.

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3. Although we do not believe that anything but plaintiffs' standing is now before this Court, against the possibility that the other issues below may be considered here, we have annexed as Appendix "A" to this brief that portion of our brief below dealing with those issues.

QUESTIONS PRESENTED

Whether, in light of this Court's recent "standing" decisions, and the principles consistently enunciated therein, plaintiffs, or at least one of them -- national animal rights organizations and their members, committees to close the City's zoos and taxpayers -- are proper parties to request that a summary inquiry be commenced pursuant to section 1109 of the City Charter (cause of action 11) and/or have standing to seek a judgment:

- That the City's zoos are violating the State's cruelty laws (causes of action 1 and 9), and/or

- That the City is guilty of a waste of municipal assets (cause of action 2), and/or

- That the City is violating section 532-9.0 of the Administrative Code (cause of action 3).

STATEMENT OF FACTS

In accordance with plaintiffs' view that there is but one issue now before this Court -- standing to sue -- it would appear that the salient "facts" are limited to an identification of those persons and organizations who have brought this action,[4] and a statement of the laws which they invoke and the relief which they seek.

The Plaintiffs

HELEN E. JONES is a City resident and taxpayer. She is President of the Society for Animal Rights, Inc. and Citizens for Animals (both described more fully below), to which she devotes her full-time professional career. Miss Jones "is deeply committed to the principle of humane treatment of animals and, thus, to their being protected from all forms of cruelty, suffering and exploitation, and she has devoted her professional life to that principle. The inhumane treatment of animals offends her moral, aesthetic, conservational, recreational, environmental, economic and social values."

Miss Jones sues not only individually and as President of SAR and Chairman of Citizens but "[s]ince the animals now confined in the [City's] zoos are real parties in interest in this proceeding, but cannot speak for themselves, HELEN E. JONES sues here as their guardian...."

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4. These facts are taken from paragraphs 1-11 of the amended complaint, set forth at 16-32 of the Record on Appeal. No specific references to the quotations will be given.

KEITH DAVID is a City resident and taxpayer and Chairman of the Committee to close the Queens, Prospect Park and Central Park Zoos. Mr. David's commitment to the welfare of animals and those of his values which are adversely affected by the acts complained of in the amended complaint, are pleaded in the same language as are Miss Jones' commitment and values.

SOCIETY FOR ANIMAL RIGHTS, INC., is "a national not-for-profit corporation organized under the laws of the District of Columbia and authorized to do business in the State of New York." The Society "is devoted to the humane treatment of animals and thus to their being protected from all forms of cruelty, suffering and exploitation.[5] Of SAR's approximately 30,000 members and contributors nationally, a substantial number reside in the City of New York and in Queens, Brooklyn and Manhattan." The commitment of SAR's members and contributors to the welfare of animals and those of the members' and contributors' values which are adversely affected by the acts complained of in the amended complaint, are pleaded in the same language as are Miss Jones', Mr. David's and SAR's commitments and values. SAR sues on its own behalf and on behalf of its members.

CITIZENS FOR ANIMALS, "a national [lobbying] organization organized under the laws of the State of New York, is devoted to the enactment of laws to safeguard and advance the humane treatment of animals and thus to protect them from all forms of cruelty, suffering and exploitation.[6]

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5. A copy of the "purposes" section of SAR's Certificate of Incorporation is annexed hereto as Appendix "B".

6. A copy of the "purposes" section of Citizen's Trust Indenture is annexed hereto as Appendix "C".

Among Citizens' approximately 8,000 members and contributors nationally, there are some who reside in the City of New York and in Queens, Brooklyn and Manhattan." The commitment and values of Citizens' members and contributors regarding animals are pleaded in the same language as are the other plaintiffs'. Citizens sues on its own behalf and on behalf of its members.

COMMITTEE TO CLOSE THE QUEENS, PROSPECT PARK, AND CENTRAL PARK ZOOS "is an unincorporated association of persons and organizations whose purpose is to assure that all animals now confined in the Queens, Prospect Park and Central Park Zoos are treated humanely and protected from all forms of cruelty, suffering and exploitation. Some of the Committee's members reside in the City of New York and in Queens, Brooklyn and Manhattan." The commitment and values of the Committee's members and contributors regarding animals are pleaded in the same language as are the other plaintiffs'. The Committee sues on its own behalf and on behalf of its members.

COMMITTEE TO PROTECT NEW YORK CITY ANIMALS (the "N.Y.C. Committee"), "a not-for-profit corporation organized under the laws of the State of New York, is dedicated to putting forth public information in the City of New York to encourage the humane treatment of animals and humane attitudes toward animals. Most of the N.Y.C. Committee's 2,000 members and contributors reside in the City of New York and in Queens, Brooklyn and Manhattan." The commitment and values of the N.Y.C. Committee's members and contributors regarding animals are pleaded in the same language as are the other plaintiffs'. The N.Y.C. Committee sues on its own behalf and on behalf of its members.

DOROTHY DI SOMMA, VIRGINIA WOODS, IRENE SALUCCI, MARY R. CLAIR and ELVIRA VITACCO are residents and taxpayers of the City.

The amended complaint is pleaded in a manner which asserts each of the surviving causes of action (1, 2, 3, 9 and 11) on behalf of each plaintiff named above. Thus, every plaintiff named above -- Jones, individually as a City resident and taxpayer, as President of SAR, Chairman of Citizens, and guardian for the City's zoo animals; David, individually as a City resident and taxpayer; SAR, Citizens, the Committee and the N.Y.C. Committee, on their own behalf and on behalf of their thousands of members; DiSomma, Woods, Salucci, Clair and Vitacco individually as City residents and taxpayers -- asserts five causes of action seeking relief for the City's zoo animals, victims of "blatant cruelty". (166)

The Laws Invoked and the Relief Sought

Causes of action 1 and 9, seeking a declaratory judgment and an injunction, allege the City's violation of sections 353, 356 and 370 of the State's Agriculture and Markets Law. Those sections provide as follows:

§ 353. Overdriving, torturing and injuring animals; failure to provide proper sustenance

A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or by both.

Nothing herein contained shall be construed to prohibit or interfere with any properly conducted scientific tests, experiments or investigations, involving the use of living animals, performed or conducted in laboratories or institutions, which are approved for these purposes by the state commissioner of health. The state commissioner of health shall prescribe the rules under which such approval shall be granted, including therein standards regarding the care and treatment of any such animals. Such rules shall be published and copies thereof conspicuously posted in each such laboratory or institution. The state commissioner of health or his duly authorized representative shall have the power to inspect such laboratories or institutions to insure compliance with such rules and standards. Each such approval may be revoked at any time for failure to comply with such rules and in any case the approval shall be limited to a period not exceeding one year.

§ 356. Failure to provide proper food and drink to impounded animal

A person who, having impounded or confined any animal, refuses or neglects to supply to such animal during its confinement a sufficient supply of good and wholesome air, food, shelter and water, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or by both. In case any animal shall be at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than twelve successive hours, it shall be lawful for any person, from time to time, and as often as it shall be necessary, to enter into and upon any pound in which any such animal shall be so confined, and to supply it with necessary food and water, so long as it shall remain so confined; such person shall not be liable to any action for such entry, and the reasonable cost of such food and water may be collected by him of the owner of such animal, and the said animal shall not be exempt from levy and sale upon execution issued upon a judgment therefor.

§ 370. Protection of the public from attack by wild animals and reptiles

Any person owning, possessing or harboring a wild animal or reptile capable of inflicting bodily harm upon a human being, who shall fail to exercise due care in safeguarding the public from attack by such wild animal or reptile, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or by both. "Wild animal" within the meaning of this section, shall not include a dog or cat or other domestic animal.

Previous attacks upon a human being by such wild animal or reptile, or knowledge of the vicious propensities of such wild animal or reptile, on the part of the possessor or harborer thereof, shall not be required to be proven by the people upon a prosecution hereunder; and neither the fact that such wild animal or reptile has not previously attacked a human being, nor lack of knowledge of the vicious propensities of such wild animal or reptile on the part of the owner, possessor or harborer thereof shall constitute a defense to a prosecution hereunder.

Cause of action 2, seeking a declaratory judgment, alleges that the City is committing waste of its assets. General Municipal Law §51 provides that:

GENERAL MUNICIPAL LAW § 51

§ 51. Prosecution of officers for illegal acts

All officers, agents, commissioners and other persons acting, or who have acted, for and on behalf of any county, town, village or municipal corporation in this state, and each and every one of them, may be prosecuted, and an action may be maintained against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation by any person or corporation whose assessment, or by any number of persons or corporations, jointly, the sum of whose assessments shall amount to one thousand dollars, and who shall be liable to pay taxes on such assessment in the county, town, village or municipal corporation to prevent the waste or injury of whose property the action is brought, or who have been assessed or paid taxes therein upon any assessment of the above-named amount within one year previous to the commencement of any such action, or who has been so assessed but has not paid nor shall be liable to pay any or the full amount of taxes on such assessment because of a veteran's exemption therefrom pursuant to section four hundred fifty-eight of the real property tax law, or who has been so assessed but has not paid nor shall be liable to pay any or the full amount of taxes on such assessment because of an exemption therefrom granted to persons sixty-five years of age or over or their spouses pursuant to the real property tax law. Such person or corporation upon the commencement of such action, shall furnish a bond to the defendant therein, to be approved by a justice of the supreme court or the county judge of the county in which the action is brought, in such penalty as the justice or judge approving the same shall direct, but not less than two hundred and fifty dollars, and to be executed by any two of the plaintiffs, if there be more than one party plaintiff, providing said two parties plaintiff shall severally justify in the sum of five thousand dollars. Said bond shall be approved by said justice or judge and be conditioned to pay all costs that may be awarded the defendant in such action if the court shall finally determine the same in favor of the defendant. The court shall require, when the plaintiffs shall not justify as above mentioned, and in any case may require two more sufficient sureties to execute the bond above provided for. Such bond shall be filed in the office of the county clerk of the county in which the action is brought, and a copy shall be served with the summons in such action. If an injunction is obtained as herein provided for, the same bond may also provide for the payment of the damages arising therefrom to the party entitled to the money, the auditing, allowing or paying of which was enjoined, if the court shall finally determine that the plaintiff is not entitled to such injunction. In case the waste or injury complained of consists in any board, officer or agent in any county, town, village or municipal corporation, by collusion or otherwise, contracting, auditing, allowing or paying, or conniving at the contracting, audit, allowance or payment of any fraudulent, illegal, unjust or inequitable claims, demands or expenses, or any item or part thereof against or by such county, town, village or municipal corporation, or by permitting a judgment to be recovered against such county, town, village or municipal corporation, or against himself in his official capacity, either by default or without the interposition and proper presentation of any existing legal or equitable defenses, or by any such officer or agent, retaining or failing to pay over to the proper authorities any funds or property of any county, town, village or municipal corporation, after he shall have ceased to be such officer or agent, the court may, in its discretion, prohibit the payment or collection of any such claims, demands, expenses or judgments, in whole or in part, and shall enforce the restitution and recovery thereof, if heretofore or hereafter paid, collected or retained by the person or party heretofore or hereafter receiving or retaining the same, and also may, in its discretion, adjudge and declare the colluding or defaulting official personally responsible therefor, and out of his property, and that of his bondsmen, if any, provide for the collection or repayment thereof, so as to indemnify and save harmless the said county, town, village or municipal corporation from a part or the whole thereof; and in case of a judgment the court may in its discretion, vacate, set aside and open said judgment, with leave and direction for the defendant therein to interpose and enforce any existing legal or equitable defense therein, under the direction of such person as the court may, in its judgment or order, designate and appoint. All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state or any body corporate or other unit of local government in this state which possesses the power to levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments or for which taxes or benefit assessments upon real estate may be required pursuant to law to be levied, including the Albany port district commission, are hereby declared to be public records, and shall be open during all regular business hours, subject to reasonable regulations to be adopted by the applicable local legislative body, to the inspection of any taxpayer or registered voter, who may copy, photograph or make photocopies thereof on the premises where such records are regularly kept. This section shall not be so construed as to take away any right of action from any county, town, village or municipal corporation, or from any public officer, but any right of action now existing, or which may hereafter exist in favor of any county, town, village or municipal corporation, or in favor of any officer thereof, may be enforced by action or otherwise by the persons hereinbefore authorized to prosecute and maintain actions; and whenever by the provisions of this section an action may be prosecuted or maintained against any officer or other person, his bondsmen, if any, may be joined in such action or proceeding and their liabilities as such enforced by the proper judgment or direction of the court; but any recovery under the provisions of this article shall be for the benefit of and shall be paid to the officer entitled by law to hold and disburse the public moneys of such county, town, village or municipal corporation, and shall, to the amount thereof, be credited the defendant in determining his liability in the action by the county, town, village or municipal corporation or public officer. The provisions of this article shall apply as well to those cases in which the body, board, officer, agent, commissioner or other person above named has not, as to those in which it or he has jurisdiction over the subject-matter of its action.

Cause of action 3, seeking a declaratory judgment, alleges the City's violation of Section 539-9.0 of its Administrative Code, which provides that:

> § 532-9.0 **Gifts of real and personal property.**—a. Gifts of real and personal property, except such surplus animals and duplicate specimens as the commissioner may deem it judicious to dispose of by sale or otherwise, shall be forever properly protected, preserved and arranged for public use and enjoyment. However, upon the determination of the commissioner to discontinue the maintenance of the zoological collection in Central Park, it shall be lawful for him, with the approval of the mayor and the board of estimate, to transfer such collection to the New York Zoological Society.
>
> b. The commissioner, with his annual report, shall make a statement of the condition of all the gifts, devises and bequests of the previous year, and of the names of the persons making the same.

Cause of action 11, seeking an order, alleges that, based on the amended complaint's allegations, plaintiffs are entitled to have a summary inquiry commenced pursuant to section 1109 of the City Charter, which provides:

> § 1109. **Summary inquiry.**—A summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city may be conducted under an order to be made by any justice of the supreme court in the first or second judicial district on application of the mayor, the comptroller, the president of the council, any five council members, the commissioner of investigation or any five citizens who are taxpayers, supported by affidavit to the effect that one or more officers, employees or other persons therein named have knowledge or information concerning such alleged violation or neglect of duty. Such inquiry shall be conducted before and shall be controlled by the justice making the order or any other justice of the supreme court in the same district. Such justice may require any officer or employee or any other person to attend and be examined in relation to the subject of the inquiry. Any answer given by a witness in such inquiry shall not be used against him in any criminal proceeding, except that for all false answers on material points he shall be subject to prosecution for perjury. The examination shall be reduced to writing and shall be filed in the office of the clerk of such county within the first or second judicial district as the justice may direct, and shall be a public record.

* * *

The foregoing facts -- who the plaintiffs are, the provisions of law which they seek to enforce, and the relief they seek -- appropriately frame the question to be decided by this Court: Do any of these plaintiffs have the legal right to use these provisions of law in order to complain about the City's "blatant cruelty" to the animals in the zoos?

ARGUMENT

IN LIGHT OF THE COURT'S RECENT "STANDING" DECISIONS AND THE PRINCIPLES CONSISTENTLY ENUNCIATED THEREIN, PLAINTIFFS, OR AT LEAST ONE OF THEM -- NATIONAL ANIMALS RIGHTS ORGANIZATIONS AND THEIR MEMBERS, COMMITTEES TO CLOSE THE CITY'S ZOOS AND THEIR MEMBERS, AND CITY RESIDENTS AND TAXPAYERS -- ARE PROPER PARTIES TO REQUEST THAT A SUMMARY INQUIRY BE COMMENCED PURSUANT TO SECTION 1109 OF THE CITY CHARTER (CAUSE OF ACTION 1), AND/OR HAVE STANDING TO SEEK A JUDGMENT:

- **THAT THE CITY'S ZOOS ARE VIOLATING THE STATE'S CRUELTY LAWS (CAUSES OF ACTION 1 AND 9), AND/OR**

- **THAT THE CITY IS GUILTY OF A WASTE OF MUNICIPAL ASSETS (CAUSE OF ACTION 2), AND/OR**

- **THAT THE CITY IS VIOLATING SECTION 532-9.0 OF THE ADMINISTRATIVE CODE (CAUSE OF ACTION 3).**

Introduction

In the final analysis, plaintiffs' argument on this appeal comes down to a single point: that they, or at least one of them, have standing to seek the relief which is requested in the amended complaint.

Unfortunately, in two crucial respects the Appellate Division did not deal with the issue of plaintiffs' standing precisely enough. That the court below had an over-simplified view of the standing issue is manifest from its notion that "[t]he pivotal issue is whether or not plaintiffs have standing to bring this suit."(174) [Emphasis added]

First, although there are countless plaintiffs in this case -- four organizations, two of them national, with thousands of members; various individual City residents and taxpayers; indirectly, the zoo animals themselves; etc. -- no effort was made by the court to differentiate among them on the basis of the different standing interests which they represent. Surely, on the standing spectrum, plaintiffs here do not all occupy the same position.[7]

Second, the court refers too casually to "this suit", as if plaintiffs had but one cause of action. As we have made clear above, in its present posture, this suit involves five causes of action. Although all are bottomed on the City's "blatant cruelty" to its zoo animals, the route which plaintiffs' claims take to obtain relief is not identical. The "suit" of which the Appellate Division spoke is, in reality, at least three suits.

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7. We recognize (and even concede), for example, that for standing purposes the interest of SAR, a national humane organization chartered by the Federal government to protect animals, is quite different from an interest asserted by Helen E. Jones on behalf of the zoo animals themselves.

Causes of action 1 and 9 seek to invoke (to different ends) three anti-cruelty sections of the State's Agriculture and Markets Law. Causes of action 2 and 3 seek to invoke the General Municipal Law's and Administrative Code's anti-waste provisions, and cause of action 11 seeks to invoke the City Charter to obtain a summary inquiry into the City's "violation or neglect of duty" concerning its zoo animals. As with its imprecise reference to "plaintiffs", the Appellate Division's reference to "this suit" paints with too broad a brush.

If the decision below means (as we presume it does) that not one of the plaintiffs here possesses standing to assert in the courts of New York even one of these five causes of action, that decision -- ignoring the different plaintiff interests and the different causes of action, resting as it does on wholly insufficient analysis, and offering only Abrams to support it -- is plainly wrong and cannot be allowed to stand. In order to demonstrate why the order of the Appellate Division should be reversed, it will be necessary here to analyze this case in more detail than did that court. We will do the following:

First, we will demonstrate that there appear to be real issues of cruelty, waste, neglect and other violations of the legal rights of the City's zoo animals, in plain violation of the State and City law.

Second, unlike the Appellate Division, which apparently thought it unnecessary to utter even a single word about what interest each of the plaintiffs have in the matter, we will discuss the interest of each and demonstrate that all of them have a substantial interest in animal welfare, greater by far than members of the general public.

Third, we will demonstrate that the bridge between violation of the animals' legal rights and plaintiffs' interest in animal welfare, allowing those rights to be enforced by these plaintiffs, is to be found in this court's recent standing decisions and the principles consistently enunciated therein.

Cruelty, Waste, Neglect....

Justice Gellinoff's opinion at Special Term sets forth many of the cruel and thus illegal conditions which plaintiffs allege are suffered by the animals in the City's zoos.(166) These conditions, described in shocking detail by plaintiffs in paragraphs 30-35 of the amended complaint (23-24), are fully and unimpeachably supported by numerous affidavits and other material submitted by plaintiffs in opposition to the City's motion to dismiss at Special Term. This material includes affidavits by the plaintiff Jones (119-140); by Ray Fitzgerald, a menagerie keeper employed by the City itself (141-147); by Dr. Tony Carding, Chief Consultant of the World Federation for the Protection of Animals (97-115). Also put before the court, and part of the Record on Appeal here, are exceedingly critical inspection reports prepared for the Marine Mammal Protection Division of the United States Department of Commerce and for the National Marine Fisheries Service, in connection with the Central Park Zoo's efforts to obtain additional sea lions.(158-161)

A few of the appalling entries in those federal reports follow:

- 16 animals at the Central Park Zoo died within a nine-month period in 1974 alone. (123-125)
- At least 15 animals died at the Prospect Park Zoo between October 1973 and January 1975. (125, 146-147)

- No less than 8 sea lions have reportedly died at the Flushing Meadow Zoo.(126)

That these animals and countless others have died in the City's zoos is not at all surprising to anyone familiar with the facts. Veterinary care ranges from non-existent, to too little, usually too late; the general conditions of confinement are palpably primitive and the habitat conditions run from mediocre to conditions which are actually antithetical for the zoo's animal inhabitants; security is ignored.

Although the City has consistently and unalterably refused fully to make its zoo records available, even under assault by the Freedom of Information Act, it is nonetheless possible to be more specific about what goes on in the City's zoos.

The physical conditions in which many of the City's zoo animals are kept can only be characterized as barbaric and clearly contribute greatly to the animals' suffering. Animals are kept in cages or pens which are too small, and which make not even a pretense of supplying the living conditions which the animals need. Water-needing polar bears are kept with nowhere to swim, often in heat they cannot tolerate; climbing and jumping animals are kept where there is no place to climb or to jump; hoofed animals are kept on paved surfaces; wholly incompatible animals are required to share cages, resulting in fighting among them and frequent injuries. (127-129, 145-146)

Nor do the animals receive the protection which they need from some "sub-humans" who visit the zoo. For instance, in one of the milder stories to be printed, the papers reported that a monkey in the Prospect Park Zoo was burned with a cigarette by several boys while a guard stood by watching.(117) As everyone knows, much worse has happened.

Small and defenseless animals are kept in cages where they may be attacked, as were the gentle fallow deer, brutally murdered in Central Park a few years ago.(131) Animals are repeatedly stolen. Despite recent assurances by the City that security for the animals would be increased, shortly afterward the papers reported a theft of birds from the Central Park Zoo.(132)

In addition, dangerous animals are kept in cages into which people may easily reach. Although it was necessary to shoot and kill a polar bear during the rescue of one such irresponsible person, the zoos have not been substantially changed, and other animals face the same threat.(131-132)

The Jones affidavit and other materials submitted by plaintiffs at Special Term contain numerous additional specific instances of unimaginable cruel and thus illegal treatment of the animals. Regrettably, the catalogue of horrors could easily be extended to still greater lengths, clearly establishing massive violation of the various State and City laws forbidding cruelty to animals. The documentation which caused Justice Gellinoff to characterize the situation as one of "blatant cruelty" is in the Record on Appeal, appearing in the Carding affidavit and exhibits annexed thereto (97-115), in the Jones and

Fitzgerald affidavits (119-147), and in the federal reports. (158-161) They must be read in order to understand fully how the City's zoos in these supposedly enlightened times can be hell holes for the unfortunate creatures confined there.

To make matters worse, if that be possible, the City is fully aware of the cruel and inhumane conditions at its own zoos. Indeed, defendant Weisl (then in charge of the City's zoos), has honestly characterized the Central Park and Prospect Park Zoos as "a disgrace" and is reported to have called the Prospect Park Zoo a "hell hole".(133) The New York Times reported Mr. Weisl to have described the Central Park Zoo as "filthy and too small" and

> ...very inadequately staffed. The animals' water was covered with scum and the monkey cages smelled... We've been exhibiting animals in small cages and that's completely contrary to our duty to the animals. Zoos are supposed to be educational. There is nothing educational about aging lions in a small empty cage, or two elephants so bored that they are going out of their mind. (133)

Mr. Weisl proved to be grimly prophetic. Nearly three years later, the press widely reported the destruction of one of the Central Park Zoo's elephants. She was killed after she had attacked a keeper. An autopsy disclosed that the unfortunate creature had been suffering from numerous chronic and severe diseases. (New York Times, December 16, 1976, p.51, col.4).

In sum, whether or not plaintiffs ultimately prove on a trial of this case that the City's zoos violate the cruelty laws, constitute a painful and primitive waste and neglect of public assets, and/or otherwise violate the legal rights of the

City's zoo animals, it is quite clear, as Special Term found, that plaintiffs have thus far made a powerful showing that the cruelty and other violations of the animals' legal rights in the City's zoos is pervasive and shocking, so much so as to seem to be blatantly in violation of various applicable laws.

Those laws are quoted above, but they warrant some discussion here in light of how the City's zoo animals are treated.

In addition to prescribing specific illegal acts, section 353 of the State's Agriculture and Markets Law condemns anything which "in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty."

Section 353's anti-cruelty provisions are reinforced by section 356, which condemns refusal or neglect to provide confined animals "a sufficient supply of good and wholesome air, food, shelter and water."

Section 370 imposes a strict duty of care on one who owns, possesses, or harbors a wild animal to safeguard the public from such animal.

General Municipal Law, section 51 expressly provides for an action "to prevent any illegal official act...or to prevent waste or injury to...any property" of, among other political subdivisions of the State, the City of New York.

Section 532-9.0 of the City's Administrative Code requires that City property "be forever properly protected, preserved and arranged...."

Section 1109 of the City Charter provides that "[a] summary inquiry into any alleged violation or neglect of duty in relation to the property...or affairs of the city may be conducted...."

If -- as plaintiffs have alleged, and as the courts below had to have taken as true for purposes of the City's motion to dismiss the amended complaint, and as Justice Gellinoff found -- on a trial of this action, plaintiffs can prove that the City's zoo animals receive little or no veterinary care, that conditions of their confinement are palpably primitive, that habitat conditions are at best mediocre and at worst antithetical, that security is ignored, etc., then it will be obvious that there is cruelty in violation of section 353, and/or insufficient "good and wholesome air, food shelter and water" in violation of section 356, and/or waste and injury in violation of the General Municipal law and Administrative Code, and/or surely grounds under the City Charter for a summary inquiry into "violation or neglect of duty".

We offered above to "demonstrate that there appear to be real issues of cruelty, waste, neglect and other violations of the legal rights of the City's zoo animals, in plain violation of State and City law." We think that we have.

Plaintiffs...and their Interest

The amended complaint ostensibly sets forth eleven named plaintiffs. There are, in fact, many more. Of individual plaintiffs, suing as residents and taxpayers, there are seven: Jones, David, DiSomma, Woods, Salucci, Clair and Vitacco. As to Jones and David explicitly and the others by implication, the amended complaint pleads that they are "deeply committed to the principle of humane treatment of animals and thus to their being protected from all forms of cruelty, suffering and exploitation....the inhumane treatment of animals offends [their] moral, aesthetic, conservational, recreational, environmental, economic and social values." Far from these allegations having been the work of a pleader wishing to utter magic words which would automatically create standing, it was further alleged as proof of Jones' devotion to the principle of humane treatment for animals that "she has devoted her professional life" to it, as indeed she has. (In the same vein, David is Chairman of the Committee to Close the Zoos, to be discussed below).

Jones also sues as President of Society for Animal Rights, Inc. and as Chairman of Citizens for Animals (both organizations to be discussed below). It should be underscored that for purposes of causes of action 2, 3 and 11, there are seven plaintiffs who have sued as City residents and taxpayers.

In addition, it is alleged that "[s]ince the animals now confined in the City's zoos are real parties in interest but cannot speak for themselves, HELEN E. JONES sues here as their guardian..." The discussion below suggests that this idea is not as farfetched as it might first appear. (See Jones v. Butz,

374 F. Supp. 1284 (S.D.N.Y. 1974; cf. Byrn v. N.Y.C. Health and Hospital Corp., 38 A.D. 2d 316 (2d Dep't.) rev'd on other grounds, 21 N.Y. 2d 194, cert. denied, 409 U.S. 821).

There are four organization plaintiffs, preeminent among them SOCIETY FOR ANIMAL RIGHTS, INC. SAR[8] was organized in 1959 under the laws of the District of Columbia. Some of its stated purposes are: "To promote protection for animals from all forms of cruelty and suffering inflicted upon them for the demands of science, profit, sport or from neglect or indifference to their welfare or from any other cause. To seek to prevent nationwide causes of cruelty to and suffering in animals. To publish... [materials] dealing with the individual aspects of animal welfare. To conduct mass humane education....to foster mercy, compassion and respect for animals...."

Today, SAR is a national humane organization authorized to operate in and operating in many states of the Union, among them New York, Pennsylvania, California and Connecticut. It has approximately 30,000 members and contributors nationally and is no stranger to public interest litigation on behalf of animal rights. For example, SAR was the only organization in the country, humane or otherwise, to commence an action in the United States District Court for the District of Columbia in an effort to halt the efforts of the federal government and various southern States to kill countless millions of blackbirds. SAR's lawsuit was national news on every television network and in the major newspapers and news magazines of the country. SAR carried to the

8. The organization's name was changed in 1972 from National Catholic Society for Animal Welfare.

Supreme Court of the United States a constitutional challenge to certain exemptions found in the Federal Humane Slaughter Act. Here in New York, SAR has attempted to obtain a judicial declaration defining the ASPCA's responsibilities in regard to stray dogs and cats. In neighboring New Jersey, SAR has challenged all the way to the State Supreme Court state laws allowing municipalities to contract-out poundkeeping activities to private profit-making companies. Counsel for SAR have frequently been requested to furnish, and have furnished, amicus curiae briefs in animal rights cases throughout America, the most recent being in a Maryland case involving the measure of damages for a veterinarian's negligent destruction of a pet. In short, SAR has been and continues to be the cutting edge of animal rights litigation in this country.

It is important to note that SAR sues here not only on its own behalf, but also on behalf of its many members throughout America, members who share the organization's commitment to and values concerning animal welfare. (See Sierra Club v. Morton, 405 U.S. 727).

CITIZENS FOR ANIMALS is a national lobby for animal rights. Its approximately 8,000 members and contributors, whose commitment to and values concerning animal welfare are the same as the members and contributors of SAR, are found in virtually every state in the Union. Citizens, among other of its activities, has recently been in the forefront of the fight to repeal New York's Metcalf-Hatch Act, which requires certain pounds and shelters to turn over animals in their care for purposes of experimentation.

Several years ago, Citizens attempted to put an Initiative Petition on the ballot at a general election calling for the creation of a New York City Department of Animal Affairs. When the drive for signatures failed, having started too close to the election, Citizens' Petition became a bill and was introduced into the New York City Council. The credentials of Citizens for Animals in the fight for animal rights are impecable, and it is an action organization of the first rank -- so much so, in fact, that it is not recognized by the Internal Revenue Service as an organization to which contributions are tax deductible. Like SAR, Citizens sues not only on its own behalf, but on behalf of its many members across this country who share the organization's commitment to and values concerning animal welfare. (See Sierra Club v. Morton, supra).

The remaining two organization plaintiffs are, frankly, entities devoted principally to one specific purpose: bettering the lot of the City's zoo animals. The allegations as to each parallel the allegations made as to SAR and Citizens. The Committees are special interest action groups which, with SAR and Citizens, have consistently been at the point of the assault on the cruelty so rampant in the City's zoos. As with SAR and Citizens, both Committees sue not only on their own behalf, but also on behalf of their members.

It is because SAR, Citizens and the two Committees sue for themselves and for their members that we said above that there are many more than the eleven named plaintiffs here.

However, regardless of how one calculates the actual number of plaintiffs, we believe that one thing is clear: this case has been brought by individuals and organizations who possess a substantial, full-time professional interest in the welfare of animals. Indeed, in that regard one need look no further than Appendix "B", SAR's charter from the District of Columbia, accepted by New York when SAR qualified to operate here. Inter alia, SAR is devoted: "To promote protection for animals from all forms of cruelty and suffering inflicted upon them for the demands of science, profit, sport or from neglect or indifference to their welfare or from any other cause. To seek to prevent nationwide causes of cruelty to and suffering in animals. To publish...[materials] dealing with the individual aspects of animal welfare. To conduct mass humane education....to foster mercy, compassion and respect for animals...."

We promised above that we would "demonstrate that [plaintiffs] have a substantial interest in animal welfare, greater by far than members of the general public". We think that we have.

The Bridge: Plaintiffs' Standing to Sue

The foregoing two sections of this brief have established: (1) that there appear to be real issues of cruelty, waste, neglect and other violations of the legal rights of the City's zoo animals, in plain violation of State and City law, and (2) that plaintiffs have a substantial interest in animal welfare, greater by far than members of the general public.

Therefore, only one question remains: Given violation of the animals' legal rights and given plaintiffs' special concern for those rights, on what basis can those rights be enforced by these plaintiffs? The answer is because plaintiffs have standing to sue.

They have it pursuant to the holdings of, and the principles expressed in, every one of this Court's recent standing cases -- including Abrams, et al. v. N.Y.C. Tr. Auth., et al., supra, the only case the Appellate Division relied on to deny standing to all of the plaintiffs here. These cases will be considered seriatim.

In Columbia Gas of New York, Inc. v. New York State Electric & Gas Corporation, 28 N.Y. 2d 117, 123, because "the 'interest sought to be protected by the complainant [was] arguably within the zone of interests to be protected or regulated by the statute'. (Data Processing Serv. v. Camp, 397 U.S. 150, 153, supra.)", an individual firm's "claim of economic injury, caused by the business practices of a competitor in violation of the Public Service Law ... [was] sufficient to confer standing" [citing the U.S. Supreme Court's Data Processing case and

three New York cases] in order to allow that individual firm to seek a declaratory judgment. In our case, especially as to the Agriculture and Markets Law and Administrative Code causes of action (1, 3 and 9), it cannot be said that the interests of the seven individual plaintiffs are any less genuine or worthy of protection than the business competitor in Columbia Gas.

National Organization for Women et al. v. State Division of Human Rights et al., 34 N.Y. 2d 416 presented a situation essentially not unlike the one here. There, the National Organization for Women (hereafter"NOW") -- a corporate entity not itself in any manner discriminated against or otherwise "personally" affected by the practice of Gannett Publishing Company, Inc. of running gender designated "Help Wanted" columns -- sought to enforce a section of the State Executive Law against those allegedly discriminatory ads. The respondents argued that NOW was in no way affected, and thus had no standing. This court unanimously (per Wachtler, J.) disagreed, and in words that could have been written about the instant case held that the organization plaintiff did indeed have standing.

> NOW is a bonafide and nationally recognized organization dedicated to eliminating discriminatory practices against women. It is clearly not what the United States Supreme Court referred to as a mere "concerned bystander" (United States v. SCRAP, 412 U.S. 669, 687). Nor is it relevant that a named plaintiff was not directly refused employment based on sex as a result of the separate listings.... When legislation proscribes conduct against a class, the complaining party need not allege and specify injured parties (Pittsburgh Press Co. v. Human Relations Comm. .... The complainant, as here, may be a bona fide recognized organization representing that class with a specific interest in the litigation in question.

> [Citations omitted. In a footnote, No.3, the Court added:] There is even more reason to grant standing where, as here, rather than involving only one specific place or instance (see Sierra Club....), the alleged wrongdoing has a wide impact (see....SCRAP ....). (34 N.Y. 2d at 419-420).

We submit that NOW easily disposes of the contention that the organization plaintiffs here lack standing, especially as to the Agriculture and Markets Law and Administrative Code causes of action (1, 3 and 9). Even putting aside Citizens and the two Committees, SAR (which must be considered the "lead" organization plaintiff) "is a bona fide and nationally recognized organization dedicated to eliminating" cruelty to and neglect of animals. As its vigorous litigative activities throughout the United Staates demonstrate, it is not "a mere 'concerned bystander'". Moreover, the legislation which SAR and the other organization plaintiffs seek to enforce here proscribe cruelty, neglect, etc. to animals as a class. Thus, under NOW, it is entirely appropriate to allow suit by an organization which, like SAR and the others, is "a bona fide recognized organization representing that class with a specific interest in the litigation in question". And just as the Court observed in NOW, "[t]here is even more reason to grant standing where, as here, rather than involving only one place or instance ... the alleged wrongdoing has a wide impact...."

Mtr. of Douglaston Civic Association, Inc. et al. v. Galvin et al., 36 N.Y. 2d 1, involved the attempt by "a civic or property owners' association" (36 N.Y. 2d 4) to contest an agency's grant of a variance to build an apartment house.

The City Administrative Code granted standing to an "aggrieved" party, so the question for this court was whether petitioners were aggrieved. Recognizing "the broadening rules of standing in related fields [citing NOW and two lower court New York cases]" (36 N.Y. 2d 6), and that only by broader standing in the zoning field would there be a maximization of appropriate enforcement of zoning laws, Judge Jasen wrote for a unanimous court that:

> ...we believe that an appropriate representative association should have standing to assert rights of the individual members of the association where such persons may be affected by a rezoning, varience or an exception determination of a zoning board. (36 N.Y. 2d at 7).

The court then expressed concern that such an organization be the appropriate representative, and set forth various criteria by which that could be measured: capacity to assume an adversary position, size and composition, impact of the decision on the members, ability of interested and affected persons to join. In words reminiscent of Flast v. Cohen, 392 U.S. 83 -- which, of course, rested on the idea of "personal stake in the outcome" required by Baker v. Carr, 369 U.S. 186 -- Judge Jasen explained that these criteria would "insure that the necessary adverseness is present for litigation of the issues...." (36 N.Y. 2d at 8). On the record of that case, the association petitioner had standing.

Applying the criteria enunciated by the Court to the organization plaintiffs here, it is apparent that those criteria are amply satisfied.

First, the Court seemed to believe that broader standing could result in a maximization of appropriate law enforcement, an idea with special significance for this case because of the Agriculture and Markets Law causes of action. The three sections of the Agriculture and Markets Law relied upon by plaintiffs make cruelty to and neglect of animals illegal. Obviously, if plaintiffs do not have standing to enforce those statutes, no one will. As Justice Gellinoff wisely observed at Special Term, a denial of standing to plaintiffs:

> ...would restrict judicial scrutiny to an instance in which the [SPCA], either itself or through a police officer — a city employee — might arrest the Mayor of the City of New York, or one of his aides, and lodge criminal charges potentially resulting in a prison term.
>
> It "must be considered unlikely" that such drastic action will be taken. Thus, unless the court holds that a civil proceeding may be brought by those, like plaintiffs, with a special interest, any challenge to the lawfulness of the city's maintenance of the zoos would be "effectually remote". (166)

If enforcement of the Agriculture and Markets Law against the City, or any other subdivision of government, depends on police action against public officials, obviously that enforcement will never take place.

Second, that SAR and the other organization plaintiffs possess the capacity to assume an adversary position, is demonstrated not only by their efforts here, but by their national litigation activities, which were described above.

Third, the size and composition of organization plaintiff SAR alone -- approximately 30,000 members/contributors

nationally -- is far in excess of the organization plaintiff found to have standing in Douglaston.

Fourth, given the commitment to animal welfare of the organization plaintiffs' members, and their values in that regard, all as pleaded in the amended complaint, it should be obvious that the impact upon them of continued cruelty and illegal treatment of the animals confined in the City's zoos will be great indeed.

Finally, not only are there no impediments to interested and affected persons joining the organization plaintiffs, but substantial recruiting efforts are continuing to take place in order to attract to this cause as many individuals and organizations as possible.

In sum, Douglaston firmly supports the standing of the organization plaintiffs here, and its underlying philosophy supports the standing of the individual plaintiffs as well.

After Douglaston came a major breakthrough in New York's law of standing. In Boryszewski v. Brydges, 37 N.Y. 2d 361, 362, this court finally held "that a taxpayer has standing to challenge enactments of our State Legislature as contrary to the mandates of our State Constitution." Citing Douglaston and NOW, Judge Jones, writing for a 5-1 majority, recognized that "[i]n other settings in which questions of standing have been posed it has been our disposition to expand rather than to contract the doctrine...." (37 N.Y. 2d at 363). The court's principal reason, one which succinctly and eloquently expresses the enlightened, modern view of standing, was its recognition that:

> ...as in the present case, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action. In the present instance it must be considered unlikely that the officials of State government who should otherwise be the only ones having standing to seek review would vigorously attack legislation under which each is or may be a personal beneficiary. Moreover, it may even properly be thought that the responsibility of the Attorney-General and of other State officials is to uphold and effectively to support action taken by the legislative and executive branches of government. As Judge Fuld wrote generally in St. Clair (supra, p.79) "The suggestion *** that the Attorney-General and other state officials may be relied upon to attack the constitutional validity of state legislation is both unreal in fact and dubious in theory". His estimate of the situation has been verified in the years since St. Clair.
>
> Where the prospect of challenge to the constitutionality of State legislation is otherwise effectually remote, it would be particularly repellant today, when every encouragement to the individual citizen-taxpayer is to take an active, aggresive interest in his State as well as his local and national government, to continue to exclude him from access to the judicial process — since Marbury v. Madison... the classical means for effective scrutiny of legislative and executive action. The role of the judiciary is integral to the doctrine of separation of powers. It is unacceptable now by any process of continued quarantine to exclude the very persons most likely to invoke its powers. (37 N.Y. 2d at 364).[9]

In large measure it was Boryszewski of which Justice Gellinoff spoke when he observed at Special Term that the failure to grant standing here -- not only to the seven residents-citizens-taxpayers, but to the organization plaintiffs as well -- would create that "impenetrable barrier" to judicial scrutiny.

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9. It is most interesting to note that soon after Boryszewski this court, in a Memorandum opinion, implied that general harm to the public may be all that is necessary to confer standing:

> Under the constantly broadening view in this State of standing to sue in order to redress illegality of official action, it may no longer be necessary to establish that plaintiffs suffer special harm as distinguished from that suffered by the public at large (see Boryszewski...but cf. the more representative type of standing to sue in...Douglaston and [NOW]....Abrams, supra, (39 N.Y. 2d at 991-992)).

Neither the police, nor the Attorney-General, nor any other public official can realistically be expected to press for enforcement of State and City laws (causes of action 1, 3 and 9) against the City of New York. Indeed, that is probably why at least in part, statutory causes of action have been given to taxpayers, causes of action such as the one sought to be asserted here (cause of action 2) under section 51 of the General Municipal Law -- as to which there can be no doubt that the seven individual plaintiffs have standing. As to both waste causes of action (2 and 3), we have alleged that maintenance of the City's zoos as currently run is cruel, illegal and thus a waste of the public funds spent on them, as are all sums spent on the animals who are dying weekly. Justice Gellinoff recognized that our "claim of the 'use of public property for entirely illegal purposes' [Kaskel v. Impelliteri, 306 N.Y. 73, 79 (1953)] states proper causes of action for waste of public funds."(166)

We also claim, however, that the individual plaintiffs possess standing under the Agriculture and Markets Law and Administrative Code causes of action (1, 3 and 9) by reason of Boryszewski's recognition that today, when individuals are encouraged to participate actively in government, it is no longer acceptable

> ...to continue to exclude [them] from access to the juddicial process - since Marbury v. Madison the classical means for effective scrutiny of legislative and executive action. The role of the judiciary is integral to the doctrine of separation of powers. It is unacceptable now by any process of continued quarantine to exclude the very persons most likely to invoke its powers. (37 N.Y. 2d at 364, emphasis added).

Accordingly, Boryszewski compels the result that the seven individual taxpayers have standing not only as to cause of action 2 (General Municipal Law section 51), but also as to the Agriculture and Markets Law and Administrative Code causes of action (1, 3 and 9) as well.

As to plaintiffs' "standing" on the City Charter section 1109 cause of action (11) (which section ought to be liberally construed, see Mtr. of City of New York (Seligman), 179 Misc. 505), there can be no question. Reversal is so patently required on this cause of action that one really wonders if the Appellate Division simply lost sight of it in that court's haste to turn plaintiffs out of court across the board. It is truly quite odd that the Appellate Division could have so completely ignored cause of action 11, especially in view of how cogently Justice Gellinoff upheld it at Special Term.

> The City's argument, in seeking to dismiss this cause of action, is that "the inquiry provided by section 1109 of the New York City Charter is solely for the purpose of creating a public record. . .by bringing acts of corruption and clear violation of law by officials before the public, . . .Here there is no violation of law whatsoever nor do plaintiffs have standing to sue" [Memorandum, p. 11].
>
> To the contrary, plaintiffs have alleged serious violations of law by the public officials charged with operating the City's zoos, and their standing to "sue" is irrelevant to their standing to petition for a summary inquiry. Undisputedly, plaintiffs constitute five citizens who are taxpayers, and who have submitted their own affidavits, and those of others, supporting their "knowledge or information" concerning the alleged violations of law. They therefore state an adequate claim for a summary inquiry.

Within months, Boryszewski was followed by Mtr. of Dairylea Cooperative, Inc. v. Wakley, 38 N.Y. 2d 6, an Article 78

proceeding brought by an individual firm to review a determination of the Commissioner of Agriculture and Markets. Although an administrative review case, like Douglaston, supra, Dairylea sets forth an important policy statement about standing in the State of New York. For the Court, Judge Wachtler wrote that:

> The increasing pervasiveness of administrative influence on daily life on both the State and Federal level necessitates a concomitant broadening of the category of persons entitled to a judicial determination as to the validity of proposed action. In recent years the right to challenge administrative action has been enlarged by our court. [citations omitted]
>
> In doing so, however we have carefully examined the relevant statutes and precedents ascertaining the presence or absence of a legislative intention to preclude review. Only where there is a clear legislative intent negating review ... or lack of injury in fact ... will standing be denied. (38 N.Y. 2d at 10-11).

There is, of course, no provision of law anywhere denying standing to any of the plaintiffs here. On the contrary, General Municipal Law §51 and City Charter §1109 expressly grant standing, and the Administrative Code section invoked here impliedly recognizes that someone possesses standing to sue. It would appear that Dairylea stands for the proposition that all plaintiffs here possess standing as to all causes of action.

Dairylea is an interesting case in another respect as well. Although, in an extremely well-reasoned and persuasive opinion for himself and Judge Jasen, the Chief Judge dissented on the facts of Dairylea, rejecting the majority's use of the "zone of interest" test, at the same time he did recognize the necessity "to distinguish the different meanings and applications of the concept of "standing", and that the problem of

standing to sue arose not only in administrative review cases but also in "cases involving the standing of taxpayers, concerned citizenry [NOW?] and organizations embracing community interests in preventing unconstitutional or illegal action by governmental agencies affecting the public fisc or recognized property interests [Douglaston?]." (38 N.Y. 2d at 16). That being so, and there being different contexts in which standing issues can arise, some plaintiff(s) must have standing to sue as to at least some cause(s) of action(s) pleaded in the amended complaint here.

The year after Dairylea, this court again addressed a standing issue and had occasion to restate what it had said there. Mtr. of Fritz, et al. v. Huntington Hospital, 39 N.Y. 2d 339, grew out of an Article 78 proceeding wherein petitioners sought to compel respondent hospital to appoint them to its medical staff. In an opinion finding standing to sue, written for a unanimous court by Judge Gabrielli (the lone Boryszewski dissenter), this Court once again reiterated how New York's law of standing had recently undergone modernization:

> "We have recently recognized the expanding scope of standing to sue in other contexts [citing Dairylea, Boryszewski, Douglaston, NOW, and Columbia Gas, all supra] and we are guided here by our statement of principle in [Dairylea] that "[o]nly where there is a clear legislative intent negating review *** or lack of injury in fact *** will standing be denied. (39 N.Y. 2d at 345-346).

As we said above, there is no statutory preclusion of review applicable to this case; nor is there any lack of injury to the various plaintiffs, or at least to some of them.

The last standing case to be discussed is the only one upon which the Appellate Division relied[10] in reversing Special Term. Ironically, not only does that case provide no support at all for the Appellate Division's action, but it actually supports fully the standing of each of the plaintiffs here. The case is Abrams, et al. v. New York City Transit Authority, et al., 39 N.Y. 2d 990.

Abrams, a 5-1 memorandum opinion by this Court (only slightly more than a page long), is not difficult to understand. After recognizing that the idea of standing has come so far in New York that "[u]nder the constantly broadening view in this State of standing to sue in order to redress illegality of official action, it may no longer be necessary to establish that plaintiffs suffer special harm as distinguished from that suffered by the public at large [citing Boryszewski, Douglaston and NOW]" (39 N.Y. 2d at 991-992), the Court in at least three separate references juxtaposes two antithetical ideas:

> . . . it is one thing to have standing to correct clear illegality of official action and quite another to have standing in order to interpose litigating plaintiffs and the courts into the management and operation of public enterprises. (39 N.Y. 2d at 992, emphasis added).
>
> * * *
>
> . . . no specific illegal acts or omissions [had ever been alleged] for which judicial correction may be sought [because no noise code standards had yet been adopted].[11] (39 N.Y. 2d at 992, emphasis added).

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10. The case was deemed to be "controlling". The Appellate Division may have taken its lead from the City, which relied on only the same one case to support its entire argument that plaintiffs lacked standing.
11. Therefore, among the other problems petitioners had in Abrams, one large one was that there was apparently nothing yet in existence which could have affected them. Inter alia, this seems to be a ripeness problem, and thus not one of standing.

* * *

> Neglect, inefficiency and erroneous but reasonably made exercise of judgment fall short of illegality, correctible by the judicial branch of government. (39 N.Y. 2d at 993, emphasis added.

The two ideas juxtaposed in these quotations are these: On the one hand, standing to sue does exist to challenge illegal acts by public officials; on the other, it does not exist if litigants want merely to meddle in the conduct of public affairs.

The obvious reasons for this dichotomy are clearly stated in the Abrams opinion. As to the former, the courts are charged by the separation of powers doctrine with redressing illegality. As to the latter, the same constitutional separation of powers manifestly lodges in other branches of government the running of public affairs, or at least initially. We believe that this is what the Court meant when it said in Abrams that when litigants sought to interpose themselves and the courts "into the management and operation of public enterprises":

> Here questions of judgment, discretion, allocation and resources and priorities inappropriate for resolution in the judicial arena are lodged in a network of executive officials, administrative agencies and local legislative bodies. To allow such actions would in effect attempt displacement, or at least overview by the courts and the plaintiffs in litigations, of the lawful actions of appointive and elective officials charged with the management of the public enterprises.
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> * * *
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> Standing, however, has not and should not be extended to substitute judicial oversight for the discretionary management of public business by public officials. It is not sufficient that plaintiffs assert, and perhaps could prove, that they could do better than the appointive or elective officials charged with the responsibility

> of running the subways. The point is that neither the plaintiffs nor the courts have been lawfully charged with that responsibility. (39 N.Y. 2d at 992, emphasis added).

Nothing could be plainer that in Abrams the petitioners were not attempting to enlist the courts in performing their mandated separation of powers duty of redressing illegal acts, but were instead trying to obtain the courts' assistance in running one aspect of the subways' operation in a wholly subjective manner apparently known only to petitioners. That is why, in light of all of its recent standing decisions, this court, in Abrams had to reach the conclusion it reached.

In our case nothing could be plainer that, consistent with all of the standing cases discussed above and consistent with Abrams, plaintiffs here are attempting to enlist the courts in performing their mandated separation of powers duty of redressing illegal acts. Plaintiffs have alleged (and when it looked only at documentary evidence Special Term preliminarily found) "blatant cruelty" to the City's zoo animals, cruelty which, if true, violates a clutch of State and City laws, cruelty which must be redressed, and cruelty which it is the job of the courts of this state to redress. Plaintiffs are not trying to run the zoos. On the contrary, they are trying to get the City to run them -- in accordance with the State Agriculture and Markets Law, the State General Municipal Law, and the City's own Administrative Code. The plaintiffs are not trying to promulgate a "zoo code", as the City charged below. There already is a zoo code, which plaintiffs want enforced, and enforced by the

arm of government constitutionally charged in our separation of powers system with ultimate responsibility for enforcing it: the courts!

As we said above, it is ironic that the most recent case in this court that says plaintiffs here do indeed have standing is Abrams. But there is still a greater irony. Not only did Justice Starke -- on an application in the Supreme Court for interim relief not relevant here -- recognize the special interest plaintiffs have in bringing this action,[12] but, as Justice Gellinoff said at Special Term, even

> The city does not dispute that plaintiffs are individuals and organizations with especial concern for the interest in the welfare of the animals housed in the city zoos. Indeed, many of these same plaintiffs have previously been held qualified to challenge federal animal slaughter statutes (see, Jones v. Butz, 374 F. Supp. 1284 (S.D.N.Y. 1974). Accordingly, plaintiffs are deemed part of the class for whose benefit the statutes were enacted. (165, emphasis added).

Indeed, based on the lengthy discussion above concerning the conditions in the City's zoos, and the plaintiffs' interests in animal welfare, and New York's standing law, even if the City apparently changed its mind when it reached the Appellate Division, one must agree with Justice Gellinoff's ultimate conclusion:

> Plaintiffs have adequately demonstrated their special interest in the subject matter of this action. Accordingly ... they have standing. (166)

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12. "The Court is not unmindful of the sincerity and dedication to humane treatment of animals clearly demonstrated by the plaintiffs. The Court recognizes the legitimate concern of these plaintiffs to help protect against any cruel, vicious and inhumane treatment of the animals in the municipal zoos." (Memorandum of June 25, 1975, p. 4).

CONCLUSION

Ordinarily, our conclusion to this brief would consist of a brief summary of our arguments. However, because we believe that our arguments are clear enough, and because we believe further that this court knows very well what is really at stake in this case, we depart from that tradition in order to end on a different note:

> This case presents issues of importance and significance to our society. And justice requires that judicial inquiry and resolution of the grave questions not be thwarted. (Abraham J. Gellinoff, Justice of the Supreme Court of the State of New York).(166)

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