

Respondents County of Los Angeles ("County"), Department of Animal Care and Control ("DACC"), and Marcia Mayeda ("Mayeda") demur to the Petition of Cathy Nguyen ("Nguyen") Rebecca Arvizu ("Arvizu") and No Kill Advocacy Center ("No Kill") (collectively, Petitioners). The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

Petitioners Nguyen, Arvizu and No Kill commenced this proceeding on December 20, 2007. In addition to seeking a writ of mandate, the Petition includes "causes of action" for injunctive relief and violation of 42 USC section 1983 ("section 1983"). Petitioners allege that DACC operates its animal shelters in violation of state policy, and euthanizes animals too soon.

The first cause of action seeks a writ of mandate under CCP section 1085 directing Respondents to refrain from (1) killing any animal that is not irremediably suffering from a serious illness or severe injury, an unweaned newborn taken in without its mother, a feral cat, or an owner-relinquished dog with a history of vicious or dangerous behavior documented by DACC before expiration of the minimum statutorily-required holding period of at least four or six days, depending on shelter hours of operation, and not including the day of impoundment; (2) killing any feral cat before expiration of the minimum statutory holding period of at least three days, not including the day of impoundment; (3) holding animals in areas of DACC shelters that are not readily accessible to the public; (4) killing any animal without first employing reasonable efforts to identify the animal's owner, reunite the animal with the owner, or make the animal meaningfully available for adoption to other members of the public, including rescue organizations; and (5) refusing to release any animal scheduled to be put to death to any nonprofit rescue and/or adoption organization that requests to redeem the animal, unless the animal is irremediably suffering from a serious illness or severe injury, or is a dog that has been adjudicated after a proper hearing pursuant to Food & Ag. Code section 31601 *et seq.*, to be so vicious that the dog's release would create a significant threat to the public health, safety, or welfare.

Petitioners also seek a writ compelling Respondents to immediately begin (1) holding all animals that are not irremediably suffering from a serious illness or severe injury, or are not unweaned newborns taken in without their mother, or are not feral cats, or are not owner-relinquished dogs with a history of vicious or dangerous behavior documented by DACC for the minimum statutory period of at least four or six days, depending on shelter hours of operation and not including the day of impoundment; (2) holding all feral cats for the minimum statutory period of at least three days, not including the day of impoundment; (3) adopting, implementing, and enforcing policies and protocols for determining whether an impounded animal is truly (a) irremediably suffering from a serious illness or severe injury, (b) an unweaned newborn that cannot survive without its mother, (c) feral, or (d) vicious; (4) adopting, implementing, and enforcing a policy and protocol requiring staff to accurately classify animals upon intake (and ensuring that they will do so); (5) making animals meaningfully accessible to

the public at all times that the animals are impounded at DACC shelters; (6) releasing animals scheduled to be put to death to any nonprofit rescue and/or adoption organization that is willing to take the animals, unless the animals are irremediably suffering from a serious illness or severe injury, or are dogs that have been adjudicated after a proper hearing pursuant to Food & Ag. Code section 31601 *et seq.*, to be so vicious that their release would create a significant threat to the public health, safety, or welfare; (7) establishing policies and procedures that will ensure cooperation between shelter personnel and rescue organizations, as required by law; (8) adopting, implementing, and enforcing policies and protocols for ensuring that all animals in DACC's care are treated kindly and humanely, provided with prompt and appropriate veterinary care, and receive adequate nutrition, water, shelter, exercise (including exercise outside of their cages or kennels); (9) keeping complete and accurate records on impounded animals as required by law, including but not limited to the date of impoundment, a description of the animal (including sex, age, species and breed), health condition, veterinary care provided, and location within the shelter system; (10) performing reasonable identification and tracking measures to enable shelters, rescuers, rescue organizations, and owners to locate animals within the shelter system, including but not limited to scanning all impounded animals for microchips, contacting the owners of microchipped animals or animals wearing identification tags, contacting rescue organizations known to have an interest in adopting particular types of animals to inform them when such animals have been impounded or are about to be killed, and maintaining updated information on all impounded animals on the DACC website at all times, including photographs of the animals; (11) providing prompt assistance to members of the public, including rescue organizations, inquiring, whether by telephone or in person, about reclaiming or adopting particular animals.

B. Applicable Law

Demurrers are permitted in administrative mandate proceedings. CCP §§1108, 1109. A demurrer tests the legal sufficiency of the pleading alone and will be sustained where the pleading is defective on its face.

Where pleadings are defective, a party may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); Coyne v. Krempeles, (1950) 36 Cal.2d 257. The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer to the pleading. CCP §430.10. A demurrer is timely filed within the 30-day period after service of the complaint. CCP § 430.40; Skrbina v. Fleming Companies, (1996) 45 Cal.App.4th 1353, 1364.

A demurrer may be asserted on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading; (b) The person who filed the pleading does not have legal capacity to sue; (c) There is another action pending between the same parties on the same cause of action; (d) There is a defect or misjoinder of parties; (e) The pleading does not state facts sufficient to constitute a cause of action; (f) The pleading is uncertain ("uncertain" includes ambiguous and unintelligible); (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct; (h) No certificate was filed as required by CCP §411.35 or (i) by §411.36. CCP §430.10. Accordingly, a demurrer tests the sufficiency of a pleading, and

the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. CCP §430.30(a); Blank v. Kirwan, (1985) 39 Cal.3d 311, 318.

The sole issue on demurrer for failure to state a cause of action is whether the facts pleaded, if true, would entitle the plaintiff to relief. Garcetti v. Superior Court, (1996) 49 Cal.App.4th 1533, 1547; Limandri v. Judkins, (1997) 52 Cal.App.4th 326, 339. The question of plaintiff's ability to prove the allegations of the complaint or the possible difficulty in making such proof does not concern the reviewing court. Quelimane Co. v. Stewart Title Guaranty Co., (1998) 19 Cal.4th 26, 47. The ultimate facts alleged in the complaint must be deemed true, as well as all facts that may be implied or inferred from those expressly alleged. Marshall v. Gibson, Dunn & Crutcher, (1995) 37 Cal.App.4th 1397, 1403. Nevertheless, this rule does not apply to allegations expressing mere conclusions of law, or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken. Vance v. Villa Park Mobilehome Estates, (1995) 36 Cal.App.4th 698, 709.

C. Analysis

Respondents demur to all causes of action in the Petition.¹

Mandamus

Respondents contend that the first cause of action for traditional mandamus is fundamentally misguided in that the purportedly ministerial duties it seeks to compel are not, in fact, ministerial.

“A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act’s propriety or impropriety.” Carrancho v. California Air Resources Board, (2003) 111 Cal.App.4th 1255, 1267. When an act involves the exercise of discretionary legislative power, courts will not interfere by mandamus unless the conduct of the governmental body is “palpably unreasonable” or so “arbitrary as to indicate an abuse of discretion as a matter of law.” Tailfeather v. Board of Supervisors of Los Angeles County, (1996) 48 Cal.App.4th 1223, 144.

Petitioners allege that Respondents are required by law to hold healthy and adoptable animals for four or six days, depending on shelter hours of operation. In support of this assertion, they cite Food & Agr. sections 31108, 31752, 31753, and 31754.

Respondents argue that these duties are discretionary, not mandatory. They cite to Civil Code section 1834.4 and Food & Agr. section 17500, setting state policy that adoptable and treatable animals should not be euthanized, and argue that whether an animal is “adoptable” or treatable by veterinary medicine is a matter of discretion vested in DACC. Food & Agr. sections 31108 (stray dogs), 31752.5 (feral cats), and 31754 (adoptable animals) do not set “black and white rules,” but rather merely set forth a policy implemented by DACC. The court cannot direct DACC’s exercise in discretion for this policy

A review of the statutes shows Respondents are wrong. The statutes are mandatory. For

¹Respondents’ request that the court judicially notice provisions of the County Code is granted. Ev. Code §452(b).

example, Food & Agr. section 31108(a) establishes a required holding period for stray dogs. The only exception is set forth in Food & Agr. section 17006, which provides that those animals “irremediably suffering from a serious illness or severe injury shall not be held for owner redemption or adoption,” and that “newborn animals that need maternal care and have been impounded without their mothers may be euthanized without being held for owner redemption or adoption.”

While Respondents correctly observe that the statutes necessarily invest the DACC with discretion to determine which animals are ill or injured and therefore meet this exception, the Petition alleges that the DACC routinely euthanizes animals that do not meet these criteria, and that the DACC’s own records so reflect. When it comes to a healthy stray dog, the DACC does not have any discretion to deviate from the holding period. Respondents do not cite any authority to the contrary.

Food & Agr. section 37152 establishes a similar protocol for cats. Once again, the language of the statute is mandatory, not discretionary. Petitioners have alleged that the DACC’s records show that it has routinely euthanized healthy cats without observing the mandatory (not discretionary) holding period.

Petitioners also allege that Respondents have a mandatory, non-discretionary duty to work with nonprofit animal rescue organizations to promote adoption of animals, treat animals humanely, and keep accurate records, and they routinely violate their own policies, something they have no discretion to do. *See Gregory v. State Board of Control*, (1999) 73 Cal.App.4th 584, 595.

Petitioners have adequately alleged the existence of a mandatory duty, which is properly the subject of an action for traditional mandamus.

Respondents next contend that none of the Petitioners has “injury in fact” standing as none owned an improperly euthanized animal. *See State Water Resources Control Board Cases*, (2006) 36 Cal.App.4th 674, 829.

This contention is spurious. Petitioners are seeking to enforce a public right and to procure the enforcement of a public duty by having publicly-funded animal shelters operate in conformity with state law. Citizen standing to compel enforcement of a public right to performance of a public duty is a well-recognized exception to the requirement that a petitioner suffer an “injury in fact.” *See Green v. Obledo*, (1981) 29 Cal.3d 126, 144. Furthermore, the individual Petitioners unquestionably have an aesthetic interest in helping, observing and saving animals held at DACC’s shelters. *See Lujan v. Defenders of Wildlife*, (1992) 504 U.S. 555, 562-563. No Kill, too, has alleged an economic injury in fact with respect to frustration of its mission and diversion of its resources. *See Smith v. Pacific Properties & Development Corp.*, (9th Cir. 2004) 358 F.3d 1097, 1105.

The demurrer to the first cause of action for mandamus relief is overruled.

Injunction

The second cause of action is brought by Arvizu for injunction pursuant to CCP section 526a, which provides that a taxpayer citizen may bring an action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county of the state. Arvizu is allegedly a tax-paying resident of County, and

therefore has standing to bring an action to enjoin waste of funds.

Respondents contend that injunction is a remedy, not a cause of action, and the Petition contains no allegations relating to the waste of any public funds.

While it is true that injunction is a remedy, the claim herein is action a statutory taxpayer claim under section 526a against waste with injunction as a remedy. The Petition alleges that County funds have been used to euthanize and dispose of the remains of healthy, adoptable animals, in violation of state law. These animals could have been adopted out, resulting in the payment of an adoption fee. The DACC has wasted funds on killing animals, which action has also precluded the recovery of adoption fees. This is adequate to state a claim.

The demurrer to the second cause of action for injunction is overruled.

Section 1983

The third cause of action is by Petitioner Nguyen for retaliation in violation of her First Amendment rights pursuant to section 1983.

To state a viable claim, Nguyen must plead and prove: (1) that she engaged in constitutionally protected conduct, (2) that the County took adverse action that caused her injury; and (3) that her protected activity was a substantial or motivating factor in the decision to take adverse action. *See Mendocino Env't. Center v. Mendocino County*, (9th Cir. 1999) 192 F.3d 1283, 1300.

The Petition satisfies all three elements. Nguyen alleges that she engaged in free speech activities in connection with her protestations of alleged ongoing violations of state law at DACC shelters, both directly to Respondents and to the press. She further alleges that Respondents took adverse action against her when they suspended her privilege to pull animals out of DACC shelters. Finally, she alleges that the suspension of her privileges was in retaliation for her petitioning activities.

These allegations must be accepted as true for purposes of demurrer. Thus, Nguyen has adequately pleaded her claim.

The demurrer is overruled in its entirety.²

²Mayeda argues that the Petition contains no facts to support a claim for relief against her. As she is sued in her official capacity, no such facts need be pled.