SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

AARON LEIDER, Plaintiff, v. JOHN LEWIS, et al., Defendants.	)))))))))))	Case BC 375 234 REVISED RULINGS ON DEMURRER AND MOTION FOR PRELIMINARY INJUNCTION

The demurrer is overruled because each count of the first amended complaint states a cause of action. The motion for preliminary injunction is denied because plaintiff Leider has not demonstrated a likelihood of success on the merits.

At oral argument and after the parties reviewed this court's tentative written decision, they joined in asking the court to certify this case for review. The case is certified. This court sets a case management conference on February 7, 2011 at 8:30 a.m. The parties are to file a joint status report on or before January 17, 2011. This report should include a recommendation about whether the court should continue the February 7 hearing, and, if so, to what date.

I

The demurrer is overruled.

There has been an issue about just what remedy Leider seeks in this case. One view has been the case is about ONLY the size and flooring of the Zoo's elephant exhibit. On this view, the case would NOT be about whether the Zoo uses electricity or bull hooks on elephants. The broader view is that the case indeed does encompass electrical shocking and bull hooks. This broader view is correct. Pages 27 through 29 of Leider's brief of November 23, 2010 make it clear he is not stipulating to a narrow or excerpted reading of his first amended complaint. Rather, Leider is insisting on a conventionally full reading of his pleading, as is his right. Leider's first amended complaint does cover electrical shocks and bull hooks. [See First Amended Complaint paragraphs 9, 17, 20, 23, and 31.]

Leider thus states valid causes of action when he alleges the Zoo physically abuses its elephants with electric shocks in violation of Penal Code section 596.5. This law specifically forbids disciplinary "use of electricity" on elephants. Leider sues as a taxpayer under Code of Civil Procedure section 526a. "[A] section 526a action will not lie where the challenged governmental conduct is legal. . . . [But a taxpayer does have] standing under section 526a to challenge an 'illegal expenditure' when it is alleged that paid employees of a public entity are spending their time engaging in illegal conduct." (*Culp v. City of Los Angeles* (2009) 2009 Cal. App. Unpub. Lexis 7621 pages *15-*16 [citation and quotation marks omitted].) Acts violating Penal Code section 596.5 are illegal conduct.

The City demurs on the basis of section 3369 of the Civil Code. Section 3369 provides "[n]either specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or as otherwise provided by law." The City urges this section means equity will not enjoin a crime.

A respectful and deferential reading of the *Culp* decision suggests the Court of Appeal did not leave this issue open on remand. To accept the City's argument would render superfluous the entire appellate discussion of Penal Code section 596.5. If that is the proper reading of the *Culp* decision, the City will have to obtain that reading from the Court of Appeal. Trial judges must apply appellate law respectfully, faithfully, and wholly.

The City has preserved this section 3369 issue for review.

II

Leider's motion for a preliminary injunction is denied. A motion for a preliminary injunction requires a showing of likelihood of success on the merits. It is harder to earn a preliminary injunction than to defeat a demurrer. For a demurrer, a court simply assumes the unsubstantiated factual assertions in plaintiff's complaint are all true. By contrast, injunctive relief requires evidence about the truth. On this score, Leider falls short.

A

Regarding issue of the Zoo's alleged use of electricity and bull hooks, Leider accuses the Zoo of committing these abuses in the 1980s. In his pending motion for a preliminary injunction, however, Leider offers no evidence, and makes no claim, that the Zoo is abusing elephants in these ways today, or that it has done so anytime in the past 20 years. Leider does not suggest or prove such abuse is likely in the future. Lacking evidence, this category of accusation cannot support Leider's motion for a preliminary injunction. This defect in Leider's case is factual in character.

B

On the issue of keeping elephants on 3.5 acres or less (see First Amended Complaint 16:10-11), Leider has no likelihood of success in proving the Zoo is breaking the law. No statute requires that elephant exhibits be larger than 3.5 acres. This defect in Leider's case is legal in character.

1

Leider says Penal Code section 596.5 broadly regulates zoo design. Leider proposes an unprecedented, vague, and illogical interpretation of this statute to achieve his goal of supervising zoo design. This statute does not support Leider's proposal.

a

Penal Code section 596.5 makes it a crime for an elephant manager or owner "*to engage in abusive behavior towards the elephant, which behavior shall include the discipline of the elephant by any of the following methods: (a) Deprivation of food, water, or rest. (b) Use of electricity. (c) Physical punishment resulting in damage, scarring, or breakage of skin. (d) Insertion of any instrument into any bodily orifice. (e) Use of martingales. (f) Use of block and tackle*."

The two key words at issue in Penal Code section 596.5 are "abusive behavior." The Court of Appeal ruled that "'abusive behavior' may include the physical characteristics of the enclosure in which elephants are kept." (*Culp v. City of Los Angeles* (2009) 2009 Cal. App. Unpub. LEXIS 7621, page *25.) As a matter of logic as well as binding precedent, this point is unquestionably correct. The physical characteristics of an enclosure indeed can be used as a weapon of abuse. Keepers might use close confinement abusively, just as they might use a whip abusively. Confinement unquestionably can be punitive. After all, confinement is the main way society punishes human criminals. Everyone recognizes the implications of forcing humans and other animals into confining spaces. Even a dog knows the difference between being fenced in a back yard and being locked in a cabinet.

Zoos, animal parks, and animal reserves, however, are *always* confining. There are always fences or walls.

How confining is too confining, according to Penal Code section 596.5? That now is the decisive question. To this court's knowledge, no published decision has interpreted this statute in this respect. The first published opinion to do so will break new ground in California law.

Three fundamentals of statutory interpretation guide this interpretative work.

i

First, statutory interpretation is a pure question of law. It is never a question of fact. When construing the California Penal Code, a court never takes evidence. Interpretation of a criminal statute proceeds according to the standard of a reasonable lay person rather than a technical expert like a zoologist or elephant expert. Leider agrees with this first principle of statutory interpretation, as he must. (See Leider brief of November 16, 2010 page 10:19 ["Statutory construction is a pure question of law"].)

ii

Second, the words of the statute are the best guide to the statute's meaning. (See Leider brief of November 16, 2010 page 16:4-12 [citing authorities].) We proceed by focusing intently on every work in the statute, seeking to wring out every drop of meaning. Penal Code section 596.5 makes it a crime for an elephant manager or owner "*to engage in abusive behavior towards the elephant, which behavior shall include the discipline of the elephant by any of the following methods: (a) Deprivation of food, water, or rest. (b) Use of electricity. (c) Physical punishment resulting in damage, scarring, or breakage of skin. (d) Insertion of any instrument into any bodily orifice. (e) Use of martingales. (f) Use of block and tackle*."

Dictionaries tell us that a martingale is a particular type of harness, and that a block and tackle is a rope and pulley system for hoisting or dragging heavy weights.

We discover the meaning of Penal Code section 596.5 by studying each of its words. The statute forbids acts of cruelty. It does so generally, and then it does so specifically. It does so generally: it states "abusive conduct" is illegal. It does so specifically: it gives a nonexclusive list of six particular acts of cruelty.

The nonexclusive list of particulars illustrates the general kind of elephant cruelty the legislature had in mind. (*See McBoyle v. United States* (1931) 283 U.S. 25, 26 [analyzing the "theme" of a statutory list of words] [Holmes, J.]; *People v. Arias* (2008) 45 Cal. 4th 169, 180 ["when a particular class of things modifies general words, those general words are construed as applying only to things of the same nature or class as those enumerated"].)

For instance, it would be abusive to force an elephant into a punishment closet so small the elephant cannot turn around or lie down. All reasonable lay people would agree such punitive confinement would be abusive cruelty. That type of confinement is analogous to the six specific examples in section 596.5.

Another analogous abuse would be Leider's hypothetical "use of weapons or tools designed to inflict pain." (Leider brief of November 16, 2010 page 15:14.)

Another analogous abuse would be burning an elephant with a cigarette for any reason – an example the parties discuss in their briefs.

By contrast, however, there is no listed specific that would be logically analogous to designing a zoo display with only 3.5 acres per elephant.

There is a pattern in the statute. The statute's examples of cruelty typically would occur secretively and relatively quickly. One who would insert instruments into elephant orifices, for instance, would rarely seek an audience. In addition, the listed acts by their nature also would tend to happen relatively quickly. They would stem from a sadistic whim, or would be borne of an evil urge to punish or dominate. Motive also might boil up in a testy martinet because an elephant responds only slowly to his commands – a situation involving more pique than

discipline. The slowest process in this list is “deprivation of food, water, or rest.” That abuse can be significant in only 24 hours, however, as any serious dieter or new parent can attest.

Designing a zoo is completely different. Zoo designers aim to create a public display they hope will attract and sustain an approving audience. The display is the opposite of secret. And a decision about how much acreage for the elephant exhibit would never be made relatively quickly. Zoo design is an involved, slow, collaborative, and bureaucratic process. It would typically take months or years, not minutes or hours.

Designing a zoo thus is different in kind from “insertion of any instrument into [an elephant’s] bodily orifice,” shocking an elephant with electricity, or the like.

The statutory words reveal a meaningful pattern. Leider’s proposal does not fit. These statutory words are not logically read to require elephant exhibits to exceed 3.5 acres – or any other acreage minimum. The statute’s words give no basis for determining an acreage minimum. Any acreage requirement would be arbitrary. It would not be a faithful interpretation of the legislative intent behind these particular words. Had the legislature intended to codify an acreage limitation, it would have said so. It did not.

iii

Third, courts interpret criminal statutes to give fair notice of forbidden conduct. (*E.g., McBoyle v. United States* (1931) 283 U.S. 25, 27 [“Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.”] [Holmes, J.]; *People v. Moreland* (1978) 81 Cal.App.3d 11, 16-17 [“Penal statutes will not be made to reach beyond their plain intent; they include only those offenses coming clearly within the import of their language.”]; *People v. Gutierrez* (1982) 132 Cal.App.3d 281, 287 ["[Because] of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the {instinctive distaste} against {people} languishing in prison unless the lawmaker has clearly said they should.”] [emphasis, quotation marks, and citations omitted].)

Another way to phrase this third point is to note “the rule of lenity for ambiguous penal statutes: It is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit; [because,] just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute." (*Bradwell v. Superior Court* (2007) 156 Cal. App. 4th 265, 270 [quotation marks and citations omitted]; *see also People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313 [“Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability. [B]ecause of the seriousness of

criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. . . . [C]riminal penalties, because they are particularly serious and opprobrious, merit heightened due process protections for those in jeopardy of being subject to them, including the strict construction of criminal statutes."] [quotation marks and citations omitted]; *People v. Avery* (2002) 27 Cal. 4th 49, 58 ["although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent"]; *In re Carleisha P*. (2006) 144 Cal. App. 4th 912, 923; *Wooten v. Superior Court* (2001) 93 Cal. App. 4th 422, 428-430; *People v. Clark* (1996) 45 Cal.App.4th 1147, 1155.)

Leider objects. Reasoning that this case is a civil rather than a criminal action, Leider claims this third principle does not apply here. This claim is incorrect. Leider cannot rely on the Penal Code as a basis for his claim and then deny the law that governs the Penal Code. Every criminal statute has specified elements that govern its scope of liability. The elements of the offense remain the same, whether the criminal statute is used in a civil or a criminal context. An example from the civil field of tort law shows the constancy of the criminal law. It is prima facie negligence for a driver to cause an accident while violating the Vehicle Code. Suppose Jane Jones was driving 40 miles per hour in a 25 mile per hour zone. That conduct means a police officer can cite Jones, and the government can prosecute Jones successfully. Jones then would be subject to Vehicle Code penalties. In a civil context, as a prima facie matter, Jones also will be liable to Sam Smith if Jones hits Smith's car while breaking the 25 mile per hour speed limit. The remedies are different – now Jones must pay civil damages to Smith – and the burdens of proof are different. But the speed limit does not change in the civil context. The law remains the same 25 mile an hour limit, whatever the context.

The constancy of the criminal law is vital. As the *Culp* decision emphasized, cases like this one are justiciable because this constancy is an anchor. (See *Culp v. City of Los Angeles* (2009) 2009 Cal. App. Unpub. LEXIS 7621, pages *30-*31 ["Here, appellants' illegal expenditure claims are justiciable. Appellants seek to restrict conduct they claim violates Penal Code section 596.5, thus there is **A LEGAL STANDARD** by which the alleged governmental conduct may be tested. Penal Code section 596.5 renders this issue subject to judicial determination because it provides **A FRAMEWORK** that takes the issue beyond one of mere governmental discretion."] [emphasis added].) This "legal standard," this "framework," would vanish if the elements that govern the criminal context were up for grabs in the civil context.

Leider offers no authority for the notion a criminal offense with one set of elements in one context has a different set in another content. This court is aware of no such authority.

As a result, when this or another court interprets the elements of this criminal statute, that interpretation logically will govern all uses of section 596.5, in both the criminal and the civil context.

The interpretation of this criminal statute in this case thus must give fair notice of the forbidden conduct.

The interpretation Leider proposes for this criminal statute would not give fair notice of the conduct Leider seeks to forbid. He proposes the statute outlaws "unnecessary suffering" that includes an acreage minimum to be determined only at trial, after the testimony of conflicting experts on elephant care. These experts would be designated only close to trial. Their opinions would not be limited by any existing or published government or industry standards.

Under Leider's proposed interpretation, then, the decisive criminal standards would be completely unpredictable. It would be simply impossible to learn from reading the statute – or any legal authority or ***ANY SOURCE OF ANY KIND*** – how many acres the criminal law requires for elephants.

Indeed, in this case Leider's goal is to not to apply existing zoo industry standards, but to reform and thereby to revise them. The Court of Appeal stated "[t]he Zoo is licensed by the United States Department of Agriculture (USDA) and accredited by the American Zoo and Aquarium Association (AZA)." (*Culp v. City of Los Angeles* (2009) 2009 Cal. App. Unpub. LEXIS 7621, page *1.) Leider rejects these standards as lax and inadequate. As revealed in his opposition to the summary judgment motion, Leider's experts share his critical perspective. They all seek transformative change in the name of reform.

Elephants are foreign to lay Californians. Elephants are exotic. Proper elephant care is a topic even more arcane. Lay people have little intuition on this score, beyond the most elementary points set out in the specifics of Penal Code section 596.5. The proper acreage minimum for elephants is unknown to lay opinion and consensus.

After more than three years of litigation, Leider himself has been vague, even silent, on specifics of his proposed reforms. Leider obviously believes the Zoo's elephant exhibit is too small. But how big would be big enough? Paragraph 34 of the First Amended Complaint suggests that "over 100 acres" might be enough, if the land suits elephants. Leider has not been more definite than that. So according to Leider, this criminal statute requires more than 3.5 acres per elephant and 100+ acres would do, if the land is good.

If the land is good and the treatment exemplary, what exactly would be the acre minimum? In other words, what is the law, according to Leider?

As Holmes said about the criminal law, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." Where is that certain line in section 596.5? At what point would defendant zookeeper Lewis become a criminal? Fifty acres? Five?

Leider acknowledges the importance of the statute's "plain meaning." (Brief of November 16, 2010 pages 16-18.) The practical effect of his proposed interpretation, however, would keep the statute's true content concealed and unpredictable. Under the Leider approach, no zoo designer could know how to comply with section 596.5 simply by reading it.

Leider emphasizes the unpredictability of his proposal by saying it "fits nicely within the ambit of the famous quotation of Justice Potter Stewart referring to the definition of hard-core pornography, concluding that "**I know it when I see it**.' (*Jacobellis v. State of Ohio* (1964) 378 U.S. 184, 197.)" (Leider Brief of November 16, 2010 page 17:1-3 [emphasis in Leider's original].)

Justice Stewart's "I know it when I see it" quotation is infamous. It was the notorious triumph of unpredictable subjectivity over the objective rule of law. Justice Stewart himself recognized the error of his 1964 statement – which no other Justice would join – when he later JOINED Justice Brennan's 1973 critique of the gaffe. (*See Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, 73 and 84 (Stewart, J., joining Brennan, J., dissenting).)

When people tell you they "know it when they see it," they are saying they have no better way to describe it. Lacking an objective description, their reaction will be objectively unpredictable. That is the problem here. Leider advocates an interpretation of the Penal Code that is objectively unpredictable. In the criminal law, this problem is fatal. Leider is right to say his proposed interpretation "fits nicely within the ambit of the famous quotation." That concisely explains why Leider's proposal is incorrect.

The task of setting inevitably arbitrary quantitative standards is the proper work of a regulatory commission or a state agency, not a criminal court. And indeed, the legislature has vested the state Department of Fish and Game with jurisdiction over elephant care. In section 2116.5 of the state Fish and Game Code, the legislature declared "that some populations of wild animals are being depleted; that many animals die in captivity or transit; [and] that some keepers of wild animals lack sufficient knowledge or facilities for the proper care of wild animals . . . . It is the intention of the Legislature that the . . . possession of wild animals shall be regulated to protect the health and welfare of wild animals . . . ."

Section 2125 of this law specifies penalties for violating these state standards. Section 2150.3 establishes a "Committee on Care and Treatment of Wild Animals" to "advise the director [of the agency] on the humane care and treatment of wild animals." Section 2150.4 provides for "Inspection of Wild Animal Facilities." Section 2192 provides for "Caging Standards."

The Department of Fish and Game also has published regulations on this topic. (See Exhibit A to Leider's November 23, 2010 brief, [copy of California Department of Fish and Game pamphlet that excerpts sections of California Fish and Game Code and Title 14, California Code of Regulations .) Section 671(2)(M) of these regulations says the regulations cover "all species" of "Elephants." Section 671.1(b)(8) covers "Shelter." Section 671.2 covers "Humane Care and

Treatment Standards." Section 671.3 covers "Minimum Facility and Caging Standards for Wild Animals Housed at Permanent Facilities." There are numerical requirements for "minimum pen, cage, or enclosure size requirements" for elephants. Other regulations govern proper flooring for elephant enclosures. Regulations cover "chaining requirements" for elephants. Section 671.4 sets "Transportation Standards for Exhibition of Live Restricted Animals," including elephants.

The Zoo apparently complies with all these state regulations. These regulations do not satisfy Leider, who calls them "limited," "out-dated," and "remarkably low standards." (Leider brief of November 23, 2010 pages 5:20 and 11:1.) Rather than petition the state agency and convince its advisory committee and its regulatory staff on the merits, however, Leider has bypassed all that. Leider instead pursues his reform agenda using the Penal Code.

It is not the office of the criminal law to overthrow one view of proper public policy for another. The criminal law draws its awesome power from social consensus about moral culpability. This law aims to shame. That is its distinctive purpose. To be a criminal in America, one must have made a morally blameworthy choice. Our nation was not founded on the idea that a good faith public policy debate can make the loser a criminal facing jail time.

b

In sum, section 596.5 governs elephants' enclosures only when the space is so small that all reasonable lay people would agree the confinement is abusive, as with forcing an elephant into a punishment closet where it cannot turn around or lie down. Leider has not suggested or proved the Zoo engages in such abuse. This statute cannot support a preliminary injunction.

c

Leider's complaints about the Zoo extend beyond its limited acreage. He also says the elephants' walking surface is too hard. Leider's demands here, however, are also fatally vague and unpredictable. By what standard or scale would one measure the hardness of compacted dirt or decomposed granite? Assuming there is a standard unit of measurement, what is the proper level of hardness Leider would recommend? When does hard become criminally hard? If dirt is to be rototilled, how often, and at what depth? Leider offers no specifics. How is the language of section 596.5 to give fair notice of the undefined proposals Leider would make mandatory? For the reasons canvassed above, Leider's additional claims also cannot be within a proper interpretation of Penal Code section 596.5.

2

Leider cites a number of other statutes, but none of them requires some minimum acreage for a zoo elephant exhibit, or some maximum hardness for the dirt. Leider proposes all these statutes should be interpreted his way, but his proposals suffer the problems already set forth. None of these other statutes can support Leider's request for a preliminary injunction. Leider cites *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, but the actual holdings there are entirely unfavorable to his position.

C

Leider's case is founded on section 526a of the California Code of Civil Procedure. This section provides for "[a]n action to obtain a judgment, restraining and preventing any illegal ***expenditure*** of, ***waste*** of, or ***injury*** to . . . property of a . . . city . . . ."

This language creates three prongs within section 526a: "expenditure," "waste," and "injury to . . . property." This ruling on Leider's motion for a preliminary injunction so far has grappled only with the issue of illegal expenditures. The remaining 526a prongs are "waste" and "injury to . . . property." The motion for preliminary injunction is denied on these other prongs as well.

At page *15, the *Culp* decision suggested a section 526a action "will not lie where the challenged governmental conduct is legal." (*Culp v. City of Los Angeles* (2009) 2009 Cal. App. Unpub. LEXIS 7621, page *15 [*quoting Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 361] [quotation marks omitted].) A few pages later, the Court of Appeal expanded on this notion in the following language:

"[C]ourts are cautious not to allow suits under section 526a that serve no purpose other than to challenge the lawful exercise of governmental discretion. In the context of a claim of alleged governmental waste, the California Supreme Court in Sundance explained that waste as used in section 526a '"means something more than an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion. To hold otherwise would invite constant harassment of city and county officers by disgruntled citizens and could seriously hamper our representative form of government at the local level. Thus, the courts should not take judicial cognizance of disputes which are primarily political in nature, nor should they attempt to enjoin every expenditure which does not meet with a taxpayer's approval. On the other hand, a court must not close its eyes to wasteful, improvident and completely unnecessary public spending, merely because it is done in the exercise of a lawful power.' [Citation.]" (Sundance, supra, 42 Cal.3d at pp. 1138-1139, quoting City of Ceres v. City of Modesto (1969) 274 Cal.App.2d 545, 555.)

Similarly, in Coshow v. City of Escondido (2005) 132 Cal.App.4th 687, 714, the court explained that "[a] cause of action under [section 526a] ***WILL NOT LIE WHERE THE CHALLENGED GOVERNMENTAL CONDUCT IS LEGAL****. [Citation.] Conduct in accordance with regulatory standards 'is a perfectly legal activity.' [Citation.] Further, a taxpayer is not entitled to injunctive relief under [section 526a] where the real issue is a disagreement with the manner in which government has chosen to address a problem because a successful claim requires more than 'an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion.' [Citation.]"* (*Culp v. City of Los Angeles* (2009) 2009 Cal. App. Unpub. LEXIS 7621, pages *17-19 [emphasis added].)

As we see, the Court of Appeal twice stated that a section 526a action "will not lie where the challenged governmental conduct is legal." This emphasis hardly seems inadvertent. This court concludes that Leider's section 526a action will not lie where the challenged governmental conduct violates no statute.

To put the matter differently, the appellate ruling appears to doom Leider's section 526a case about waste and property because Leider cannot identify a statute that outlaws the Zoo's treatment of elephants.

Stated in yet other terms, under Code of Civil Procedure section 526a and on the facts of this case, there would appear to be no legal reason to treat the issue of "property" differently from the question of "waste." The proper legal analyses of these two prongs of Code of Civil Procedure section 526a would collapse into one on the facts of this case.

III

The demurrer is overruled. The motion for preliminary injunction is denied because Leider has not demonstrated a likelihood of proving the Zoo is breaking the law.

Upon the parties' mutual request at oral argument, the case is certified.

There will be a case management conference on February 7, 2011 at 8:30 a.m. The parties are to file a joint status report on or before January 17, 2011. This report should include a recommendation about whether the court should continue the February 7 hearing, and, if so, to what date.