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Comptroller of City of New York v. Mayor of New York (decided July 29, 2004)

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COMPTROLLER OF CITY OF NEW YORK V. MAYOR OF NEW YORK (decided July 29, 2004)

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Snapple is "Made from the best stuff on Earth."[1] But is Snapple "the best stuff" for New York City? Under the New York City Charter (the "Charter"), it is up to the City's chief executive alone to determine whether a contract with Snapple is proper. However, in *Comptroller of City of New York v. Mayor of New York*[2] the New York State Supreme Court undermined the City's ability to make such agreements by placing additional limits on the executive branch's broad discretion in contracting for the City's intellectual property.[3] Without invalidating the agreement at issue, the court held that all future agreements for the use of the City's intellectual property must be submitted to the Franchise and Concession Review Committee (the "FCRC") for approval.[4] This case comment contends that the court improperly extended the FCRC's jurisdiction contrary to the design and intent of the Charter. The holding could have far-reaching negative effects on the executive branch's ability to contract for the disposition of the City's intellectual property.

The dispute in *Comptroller* arose from a series of agreements between the City and the Snapple Beverage Corporation ("Snapple").[5] The first agreement occurred in December 2003 when the Department of Education (the "DOE") granted Snapple an exclusive concession to sell fruit juice and bottled water in all city public schools.[6] The second agreement, entered into on February 19,

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1. "Snapple" and "Made from the best stuff on Earth" are registered trademarks of the Snapple Beverage Corporation.
2. 783 N.Y.S.2d 237 (Sup. Ct. N.Y. County 2004).
3. *See id.* at 244.
4. *Id.*
5. *Id.* at 238.
6. *Id.* at 240.

2004, granted Snapple an exclusive concession to sell beverages in vending machines within all real property owned and controlled by the City (the Department of Citywide Administrative Services "DCAS concession") and included a marketing provision between Snapple and the New York City Marketing Development Corporation (the "MDC"), by which Snapple would compensate the City for the concession through marketing and promotional activity (the "marketing agreement").[7] The New York City Mayor created the MDC in July 2003 in an attempt to capitalize on the City's valuable brand name,[8] thereby generating revenue, jobs, and increasing tourism.[9] To do this, the MDC would oversee the City's marketing assets and create licensing and corporate sponsorship programs with private businesses.[10] The agreement with Snapple to market and promote the City was the first marketing initiative undertaken by the MDC.[11] Pursuant to the agreement, Snapple would spend an average of $12,000,000 per year to market and promote the City throughout the world.[12] In return, the City would market Snapple through media events, sponsorship, advertising, and other promotions.[13]

Charter section 374(a) requires that city agencies comply with FCRC procedures before granting a concession.[14] On December 8, 2003, the City submitted the DCAS concession to the FCRC at a public hearing.[15] The City did not submit the marketing agreement.[16] The FCRC voted four to two in favor of approving the DCAS concession.[17] Subsequently, the New York City Comptroller (the "Comptroller") sued the Mayor, MDC, and DCAS (the "defen-

7. *Id.*

8. Young & Rubicam ranked the name "New York City" 13th out of 2400 brands. *Comptroller*, 783 N.Y.S.2d at 239.

9. *Id.*

10. *Id.*

11. Sabrina Tavernise, *Competitors See Conflict in Deal With Snapple*, N.Y. TIMES, Dec. 6, 2003, at B4.

12. *Comptroller*, 783 N.Y.S.2d at 240.

13. *Id.*

14. N.Y. CITY CHARTER § 374(a) (2003).

15. *Comptroller*, 783 N.Y.S.2d at 240.

16. *Id.*

17. *Id.*

dants")[18] for their failure to submit the marketing agreement to the FCRC.[19] In his complaint, the Comptroller argued that the agreement must be declared invalid because defendants did not follow proper contracting procedures. Specifically, the Comptroller claimed that the Mayor failed to certify the DCAS and marketing agreements before they were filed, as required under sections 327(a) and (b) of the Charter,[20] and claimed that the defendants should have submitted the marketing agreement to the FCRC.[21] Additionally, the Comptroller asked the court to declare that the definition of "concession" in Charter section 362(a) includes the City's intellectual property,[22] and therefore the FCRC must also approve the marketing agreement.[23] In response, the defendants ar-

18. The Comptroller also included Snapple as a party because the court's decision would affect Snapple's contractual rights. Because Snapple's contractual rights do not directly relate to the issue of FCRC review, this Case Comment does not discuss Snapple's involvement as a defendant.

19. *Comptroller*, 783 N.Y.S.2d at 241. The Comptroller also claimed that the agreements should be invalidated and not implemented because (1) the Mayor failed to properly certify the agreements and (2) there was a possibility of corruption in the awarding of the agreement to Snapple. Only the Comptroller's claim that concessions for the use of the City's intellectual property must be submitted to the FCRC is considered in this Case Comment. *Id.* at 238-39.

20. Since the DCAS concession and marketing agreement were awarded outside of the competitive bidding process, the defendants were required to follow Charter § 327 procedures. Under Charter § 327:

> a. In the case of any contract which is let by other than competitive sealed bidding, the mayor shall certify, prior to the filing of the contract with the comptroller for registration in accordance with section three hundred twenty-eight of this chapter, that the procedural requisites for the solicitation and award of the contract have been met . . .
>
> b. The corporation counsel shall certify prior to the filing of a contract with the comptroller for registration in accordance with section three hundred twenty-eight of this chapter, that each agency proposing to award a contract has legal authority to award each such contract.

Here, the Mayor and Corporation Counsel failed to certify the DCAS concession and marketing agreement before filing them with the Comptroller's office. Thus, the Comptroller argued that they should be invalidated on this basis.

21. *Comptroller*, 783 N.Y.S.2d at 240.

22. Under N.Y. CITY CHARTER § 374(a), all concessions granted by City agencies must be approved by the FCRC. A concession is defined in N.Y. CITY CHARTER § 362(a) as:

> a grant made by an agency for the private use of city-owned property for which the city receives compensation other than in the form of a fee to cover administrative costs, except that concessions shall not include franchises, revocable consents and leases.

23. *See Comptroller*, 783 N.Y.S.2d at 238-39.

gued that the Comptroller's objections to the agreement were moot because the Mayor certified the agreement after it was filed. Defendants sought a declaration that "concession," in Charter section 362(a), only includes real property, and therefore, the City did not have to submit marketing initiative agreements to the FCRC.[24]

While the court rejected the Comptroller's procedural objections to the marketing agreement, the court also rejected the defense that those objections were moot.[25] The court noted that in his original response to the agreement, the Comptroller did not object to the agreement on the ground that the certifications were improper.[26] Thus, the court held that the Comptroller could not raise objections to the agreement that he failed to make at the outset, and the Charter did not allow the Comptroller to object to certification of only one portion of a filed contract.[27] Therefore, the Comptroller waived all of his objections to the current agreement, and the agreement could not be declared invalid on this basis.[28] The court rejected the defendants' assertion that the Comptroller's objections to the agreement were moot because the defendants subsequently certified the agreement after it was filed.[29] According to the court, mootness was not a valid defense because the certifications were too late.[30] Nevertheless, the court did not invalidate the marketing agreement because the Comptroller had waived his objections.[31]

The court, however, found that a justiciable controversy existed as to whether FCRC review is required for future agreements involving the use of the City's intellectual property because the defendants made it clear that the City will implement intellectual property agreements in the future.[32] The court examined the use of the word "property" in Charter section 362(a) in order to determine whether the City's future marketing agreements should be

24. *Id.* at 242-43.
25. *Id.* at 243.
26. *Id.* at 241.
27. *Id.* at 241-42.
28. *See id.*
29. *Comptroller*, 783 N.Y.S.2d at 243.
30. *Id.*
31. *Id.* at 241.
32. *Id.* at 243.

considered "concessions" subject to FCRC review.[33] The court pointed out that unlike other provisions in the Charter, which use the word "property" and limit it to "real property" or "personal property," Charter section 362(a) does not modify "property" with any such adjective.[34] The court reasoned that because the plain meaning method of statutory construction dictates "when broad, general language is used in a municipal ordinance, 'it must be assumed that there was a purpose in such use'"; therefore, the word property should not be read as being limited to real property, but should be read expansively as including intellectual property.[35] Additionally, the court reasoned that if the drafters of the Charter had meant to limit FCRC review to concessions that only involve real property they would have done so.[36] Thus, the court held that future concessions for the use of the City's intellectual property must be reviewed by the FCRC.[37] The court found that the effect of its decision would be that the FCRC must conduct a broader review of concession contracts, and the FCRC would have more say in the review and approval of these contracts. Such steps, the court reasoned, would benefit the public.[38]

Under *Comptroller*, all concession agreements dealing with any city property, tangible or intangible, are subject to the FCRC review process.[39] Nonetheless, granting the FCRC power to review agreements that license the City's intangible property is an improper construction of the Charter. As the defendants argued in *Comptroller*, the lack of an adjective such as "real" or "personal" modifying the word "property" in Charter section 362(a) does not mean that all property, whether tangible or intangible, is covered by this provision.[40] To the contrary, such a distinction is improper because the Charter often alternates the use of the word "property" with the

33. *Id.* at 243-44.

34. *Id.*

35. *Comptroller*, 783 N.Y.S.2d at 244 (quoting City of Buffalo v. Rochester Tr. Co., 303 N.Y. 453, 460 (1952)).

36. *Id.* at 244.

37. *See id.*

38. *Id.*

39. *See id.*

40. Brief for Respondents at 14, Comptroller of City of New York v. Mayor of New York, 783 N.Y.S.2d 237 (Sup. Ct. N.Y. County 2004) (No. 04-106253).

phrase "real property."[41] In addition, one Charter provision concerning the power of the FCRC over concessions defines a "major concession" in terms that relate only to real property.[42] Charter section 374 provides:

> The city planning commission shall adopt rules that either list major concessions or establish a procedure for determining whether a concession is a major concession. A 'major concession' shall mean a concession that has significant land use impacts and implications, as determined by the commission, or for which the preparation of an environmental impact statement is required by law.[43]

Moreover, two of the FCRC's own rules, New York City Rules and Regulations sections 1 to 11 and 1 to 12, include a list of information relating to real property that an agency must publish when it requests competitive sealed bids or competitive sealed proposals:

> (i) Location, including a brief description of the surrounding area. If located in a terminal, a map of the entire floor; (ii) Size, including a blueprint of the exterior; (iii) Photograph of the exterior; (iv) Prior usage and/or other possible usage of the premises; (v) Description of fixtures, equipment, etc. on the premises; (vi) Description of any legal restrictions on the use of the location; (vii) Term of the concession; (viii) Invitation to inspect the premises[.][44]

The remaining information that must be listed by an agency for potential concessions relates not to intangible property, but rather to procedural requirements such as instructions for submission of Vendex questionnaires, public notice of bids or proposals, a description of the minimum qualification requirements for a proposal, and a description of the evaluation procedures.[45] Additionally, an agency must include the location of a concession in its public notice of a concession award.[46] Thus, the FCRC rules antici-

41. For example, Charter §§ 382, 383, and 384 use the word "property" in the heading, but only discuss or refer to real property. *See id.*

42. N.Y. CITY CHARTER § 374(b) (2003).

43. *Id.*

44. New York City Rules and Regulations, Tit. 12, §§ 1-11 and 1-12 (2004).

45. *See id.*

46. *See id.* § 1-08(b)(2).

pate that concessions relate only to the use of the City's real property.

Furthermore, the drafters of the Charter intended the FCRC's jurisdiction to be limited to concessions allowing private persons to use the City's real property. In 1989, after the New York City Charter Revision Commission (the "Charter Commission") decided to abolish the Board of Estimate,[47] the City approved many changes to the Charter by referendum. Included in those changes were Charter provisions establishing the FCRC – which was an attempt to undo the inconsistency of the award process for concessions, franchises, and revocable consents.[48] The result of the 1989 Charter revision was a complete redistribution of the Board of Estimate's powers between the Mayor and the City Council.[49] While the City Council gained significant control over land use policy decisions, the Charter Commission conferred power over land use — in the form of franchises, concessions, and revocable consents — to the FCRC.[50] This restructuring of the concession approval process was designed to limit the borough presidents' power[51] and increase

47. Before 1978, the power to grant concession agreements was entirely the jurisdiction of the Board of Estimate's Bureau of Franchises. Yet, individual agencies routinely oversaw the granting of concessions on their own. In order to better regulate the award of concessions, which was done inconsistently throughout the City as a whole and within each individual agency, in 1978 Mayor Ed Koch established a Concessions Review Committee (the "CRC") that would be responsible for approving most concessions. The CRC implemented regulations for concessions, limiting most concessions to a term of two years, and requiring that expenses for capital improvements of City property undertaken by concessionaires be the responsibility of the concessionaires (but become City property when the concession ends). *See* Frederick A.O. Schwartz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter,* 42 N.Y.L. SCH. L. REV. 775, 875-76 (1998).

48. *Id.*

49. *See id.*

50. *Id.* at 873, 876.

51. N.Y. CITY CHARTER § 373(a) provides that the FCRC is comprised of a number of City officials:

> [T]he mayor, who shall serve as chair; the director of the office of management and budget; the corporation counsel; the comptroller; and one additional appointee of the mayor. Whenever the committee reviews a proposed franchise or concession or the procedures for granting a particular concession, the borough president of the borough in which such franchise or concession is located or his or her designee shall also serve as a member of the committee. If such a franchise, concession or procedure relates to more than one borough, the borough presidents of such bor-

mayoral power.[52]

In creating the FCRC, the members of the Charter Commission understood the FCRC's role to consist of approval of concessions on real property.[53] In fact, even though the Charter Commission members were aware that their definition of a concession was ambiguous,[54] they nevertheless considered concessions to consist of the City's "inalienable rights to its streets, highways, avenues, parks, wharves, and other public property."[55] The members cited actual concessions on real property to illustrate the nature of the FCRC's jurisdiction: a proposal for a racetrack in a park, a proposal for a hot dog stand in a park, and maintenance of sidewalk cafes.[56] Furthermore, the members viewed the underlying concern of the FCRC as how to justly allocate private concessions throughout the City's public land:

> In most other places in the United States, there is enough private land available to do all sorts of things. We have very tough quality of life issues in New York City because we need to get the most out of public land for rich people as well as poor people, in order to have just a half-decent quality of life . . . . [O]utdoor cafes have also caused community complaints. Parks advocates have protested private food vendors. And, recently, the mayor has

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> oughs shall designate one of such borough presidents or another individual to serve as a member of the committee for the purpose of considering such matter.

Thus, although the five borough presidents are accounted for in the FCRC structure, their influence is limited. *See* N.Y. CITY CHARTER § 373(a) (2003).

52. *See* Laura Sulem, Note, *The Franchise and Concession Review Committee: The Mayor's Vehicle to Control City Franchises*, 42 N.Y.L. SCH. L. REV. 1255, 1255 (1998).

53. *See* Schwartz, Jr. & Lane, *supra* note 47; *see also* Brief for Respondents, *supra* note 40, at 10-12 (discussing the Charter Commission's understanding that concessions involved the grant of an interest in real property).

54. As Charter Commission chairman Frederick A.O. Schwartz, Jr. stated at a public meeting, "[N]either the King nor the deity, in fact, has laid down immutable rules on what is a franchise, and what is a concession, and what is a revocable consent." *See* Schwartz, Jr. & Lane, *supra* note 47, at 873.

55. *Id. See also* Brief for Respondents, *supra* note 40, at 10-12.

56. *See* Schwartz, Jr. & Lane, *supra* note 47, at 873 . The CRC, as predecessor to the FCRC, maintained jurisdiction only over real property, and the Charter Commission indicated that the FCRC would assume the same responsibilities as the CRC. *See id.* at 873-80.

> unsuccessfully attempted to block both artists and food vendors from using the streets.[57]

Thus, the 1989 Charter created the FCRC solely as a means to insure that City agencies are accountable to an outside entity for the concessions on City land that they plan to award to private entities.[58]

Beyond the Charter provisions dealing with the FCRC, no other Charter provision sets out a process for the disposition of the intellectual property of the City.[59] One court has adopted the rule of law that in the absence of an explicit declaration in the Charter over the disposition of property, the Mayor may dispose of the property in a manner that best serves the public interest.[60] In the case of *Creole Enterprises v. Giuliani*,[61] relied on by the defendants in support of their argument that intellectual property agreements may take place outside of the FCRC review process,[62] the court upheld the sale of the City's WNYC radio license outside of the competitive bidding process.[63] The court rejected the argument that radio stations are real property of the City and must be sold through the competitive bidding process.[64] Rather, the court found that because radio licenses are actually the personal property of the City, and the Charter contains no provision relating to the sale of such property, the Mayor "as the chief executive officer of the City . . . has the power to sell city property."[65] Here, where the Charter is silent as to the disposition of the City's intangible property, it is clear that an expansion of FCRC jurisdiction to include review of intellectual property would improperly encroach on executive discretion over such property.[66]

Furthermore, the expansion of FCRC review to include intellectual property agreements is improper in light of the Charter's

57. *See id.* at 874.
58. *See supra* text accompanying notes 53–56.
59. *See generally* N.Y. CITY CHARTER (2003).
60. Creole Enterprises v. Giuliani, 636 N.Y.S.2d 547 (Sup. Ct. N.Y. County 1995), *aff'd*, 653 N.Y.S.2d 576 (1st Dep't 1997).
61. 636 N.Y.S.2d 547.
62. *See* Brief for Respondents, *supra* note 40, at 14.
63. *Creole*, 636 N.Y.S.2d at 551-54.
64. *Id.* at 552.
65. *Id.*
66. *See* Brief for Respondents, *supra* note 40, at 15.

concentration of contract authority in the executive.[67] In 1989, the Charter Commission attempted to reduce involvement of other elected officials in the contracting process based on the idea that mayoral accountability would increase if collective responsibility for contracts were eliminated.[68] Even though the Comptroller has the power to voice his concern that a contract award was corrupt by refusing to register the contract, the Mayor, under the Charter, may nevertheless require him to register the contract.[69] What the Charter does is "allow the comptroller to act on integrity [or corruption] information without holding up a city contract or diluting mayoral accountability."[70] Indeed, final mayoral accountability lies mainly with the political process.[71] Here, the Comptroller voiced his concern over the Snapple contract and the Mayor was accountable for his decision.[72] To require that all marketing agreements be reviewed and approved by the FCRC based upon the "public benefit" of greater input by elected officials[73] would effectively mandate procedural restraints over marketing decisions that actually belong to the executive branch. It is up to the voters, not the FCRC, to hold the executive accountable for any future marketing agreements.

As *Comptroller* illustrates, the Charter establishes two important principles of executive accountability and independent review of City concession agreements. Yet, the design and intent of the Charter indicate that such review does not extend to agreements relating to the City's intellectual property. To require such review would improperly undermine executive discretion to enter into marketing agreements. The governmental structure of the City indicates that accountability for marketing decisions lies only in the political process.

67. *See generally* Genevieve Bishop, Note, *The Local Baker/Local Bureaucrat Dilemma: Privatization and Power in New York City*, 42 N.Y.L. SCH. L. REV. 1163, 1178 (1998) (discussing procedural restraints on executive authority to enter into contracts).

68. Ross Sandler, *The Comptroller, the HRA Contracts and the Charter*, 6 CITYLAW 25, 28 (2000).

69. *See* N.Y. CITY CHARTER § 328.

70. *See* Sandler, *supra* note 68, at 28.

71. *See id.* at 38; *see also* Bishop, *supra* note 67, at 1179.

72. *Comptroller*, 783 N.Y.S.2d at 240-42.

73. *Id.* at 244.