UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Filed Electronically]

CIVIL ACTION NO. 3:07-CV-230

THE LOUISVILLE KENNEL CLUB, INC., ET AL.	)
Plaintiffs,	)
v.	)
LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT	)
Defendant.	)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs The Louisville Kennel Club, Inc., The League of Kentucky Sportsmen, Inc., Kentucky Houndsmen's Association, Inc., Greater Louisville Training Club, Ruth Snow d/b/a Roses for Felines Cat Club, Ruth Snow d/b/a Dimes and Dollars Cat Club, Norman Auspitz d/b/a Kentucky Colonels Cat Club, Waggin' Tail Kennels, Inc., Royalton Kennels, LLC, Paul Lee, H. Patrick King, Jr., DVM, and Kurt Oliver, DVM, by counsel, for their memorandum in support of their motion for summary judgment, state as follows.

INTRODUCTION

This is a constitutional challenge to Louisville's animal control ordinance.[1] The Metro Council passed the nearly 100-page ordinance in the early morning hours of December 20, 2006, after a nine hour meeting. The ordinance is the embodiment of the legislative process that preceded it – a complicated mess. It is filled with irrational legislative choices and vague language that effectively grants unfettered discretion to Metro Animal Services ("MAS") in choosing how and when to enforce its provisions. For instance, the ordinance is so vaguely worded that it allows ***any*** dog -- regardless of its personality, behavior, or history -- to be declared "dangerous" according to the sole and absolute discretion of the Director of Metro Animal Services.

The parties have taken discovery and this case is ripe for summary judgment. The discovery process -- consisting of the deposition of Dr. Gilles Meloche, Director of Metro Animal Services, and a review of the legislative record – further confirmed that the ordinance suffers from pervasive defects. Dr. Meloche's deposition reveals that even he, the chief enforcer of the ordinance, does not understand how to interpret or enforce many of its vague provisions.

Moreover, in the course of this lawsuit, the Plaintiffs have uncovered some very serious problems regarding animal control in Louisville generally. For one, Dr. Meloche is legally unqualified to serve as Director of Metro Animal Services. This raises a substantial question about the validity of any of Dr. Meloche's actions since he took office in 2005. In addition to his lack of qualifications, Dr. Meloche has taken some extreme positions regarding his authority to enforce the ordinance. For example, Dr. Meloche believes he may inspect the home of a person with an

[1] At the time of enactment, the law was styled Ordinance No. 233, Series 2006, "An Ordinance Amending and Reenacting Chapter 91 of the Louisville/Jefferson County Metro Government Code of Ordinances [LMCO] Pertaining to Animal Control and Welfare [Floor Substitute as Amended]." It has since been re-enacted and in its latest iteration is styled Ordinance No. 290, Series 2007, "An Ordinance Amending Chapter 91 of the Louisville/Jefferson County Metro Government Code of Ordinances ('Code') Pertaining to Unaltered Dogs, the Waiver of Metro Animal Service Fees Due to Financial Hardship, and the Quarantine of Animals (Amended By Substitution)."

unaltered dog for the purpose of determining whether the home is, in his view, suitable for keeping an unaltered dog. Dr. Meloche has also expressed doubt about the ability of so-called "poor people" to own dogs.

As the following demonstrates, this is not a simple "dog" ordinance. Rather, it is an ordinance by which the City of Louisville is attempting to unnecessarily and illegally intrude into the lives and homes of many of its citizens and the ownership of pets by its citizens. The political process which resulted in the ordinance was faulty, and the ordinance it produced is faulty to an extreme.

For the following reasons, the Court should grant the Plaintiffs' motion for summary judgment and void the ordinance in its entirety.

FACTUAL BACKGROUND

Louisville has had animal control laws in place for years. The predecessor to the current ordinance addressed the common public concerns regarding animal control. (See prior ordinance, attached hereto as Exhibit 1.) Among other things, the prior ordinance required that owners prevent animals from trespassing (91.004), confine female dogs in heat (91.003), keep animals in proper enclosed spaces (91.001), and leash animals when off the owner's property (91.002). The ordinance called for the impoundment of stray animals. (91.035).

The prior ordinance also imposed special measures for identifying and confining "potentially dangerous" and "dangerous" dogs. The ordinance contained a single, clear definition of "dangerous dog": "Any dog, which when approached, in an aggressive manner commits a severe attack on any person." (*Id*. at 91.001). Animal control officers were authorized to impound a dog that committed an attack. (*Id*. at 91.110). The Jefferson District Court then made a determination as to whether the dog was "potentially dangerous" or "dangerous." (*Id.*) If determined to be "potentially dangerous"

or "dangerous," the dog was required to be kept by the owner in a specific type of enclosure and only removed for veterinary treatment or inspection by animal control. (*Id.*) The owner was not allowed to transfer ownership of the dog. (*Id.*)

I. The Metro Council Considers Re-Writing Louisville's Animal Control Ordinance.

Because of two dog attacks in late 2005, certain members of the Metro Council ("the Council") suggested that Louisville's comprehensive scheme for regulating animal control was not good enough. At the Metro Council meeting on November 22, 2005, a proposed new animal control ordinance -- identified as a "Pit Bull" law -- was introduced and referred to the Government Administration, Rules, Ethics and Audit Committee ("the Committee") for further review. (Minutes of November 22, 2005, Council Meeting, attached hereto as Exhibit 2, at 1, 13.) The City has never explained ***why*** the prior ordinance was not good enough or ***why*** it needed to be changed. The City has never suggested that the prior ordinance, if properly enforced, would not have addressed whatever perceived animal control problems exist in Louisville.

At the January 30, 2006, meeting of the Committee, the Council members who had proposed the amended ordinance stated that they were working with Dr. Gilles Meloche, the newly-appointed Director of Metro Animal Services, to "fine tune" the ordinance. (See Committee Meeting Minutes, attached hereto as Exhibit 3.) Although initially the ordinance had been styled a "Pit Bull" law, by early 2006 it had become clear that certain Council members and Dr. Meloche were planning an overhaul of Louisville's animal control laws. (See the laundry list of topics set forth in the January 30, 2006 meeting minutes.)

II. Dr. Meloche Takes the Lead in Re-Writing the Law.

At the committee meeting of February 13, 2006, Dr. Meloche presented a new version of the proposed ordinance that he had prepared with input from certain Council members. (See Committee

Meeting Minutes, Exh. 3; Meloche Draft, Exh. 4.) Because Dr. Meloche's ordinance constituted a complete re-write of Louisville's animal control laws, the County Attorney's Office was asked to analyze the legality of Dr. Meloche's draft. The County Attorney's Office concluded that the draft -- which formed the backbone of what the Council eventually approved in December 2006 -- suffered from significant legal deficiencies, some of which stemmed from poor draftsmanship.

> [Y]ou requested this office to furnish the Committee a legal analysis of the draft which Animal Service Director Dr. Gilles Meloche had presented to the Committee on that date [hereinafter referred to as the "draft".]
>
> . . .
>
> The draft involves a near total overhaul of Chapter 91.
>
> . . .
>
> As many of the specific comments state, **the enforcement provisions of the draft, taken as a whole, are not a good fit with existing Kentucky statutes and, in some aspects, are inconsistent with settled principles of Federal and Constitutional law and procedure**. Part of that problem seems to be that **the duties and responsibilities of enforcement, and enforcement officers, are scattered throughout the draft and uncoordinated.** In our opinion, the best way to deal with this problem is for the Director and the Council to discuss and agree on desired enforcement policy and goals, and then direct the drafters to write it up in a coordinated, consistent, and legal manner.
>
> We strongly emphasize the statement of the organization, Responsible Dog Owners of Louisville (RDOL), on the first page of its Comments on the draft, which says, "The law must be written so that a person with no experience with animals does not have trouble understanding it." As is noted in our comment number 3, above, and elsewhere in this document, **the ordinance suffers significantly from grammatical anomalies, internal inconsistencies and contradictions, and imprecise terminology, all of which are aggravated by the detailed complexity of the ordinance, and which, in our opinion, will lead to enforcement frustration and difficulties.** We have recommended that the complexity problem be addressed by removing much of the details from the ordinance and placing it in administrative regulations.

(County Attorney Opinion, attached hereto as Exhibit 5) (emphasis added).

Many of the provisions of Dr. Meloche's draft contain gross Fourth Amendment violations that reflect a lack of understanding of the law of search and seizure at its most basic level and as it is commonly understood by American citizens. Dr. Meloche would have authorized "any Animal Control Officer to canvass any dwelling unit, business, organization and institution within Metro Louisville for the purpose of ascertaining compliance with any section of this chapter and/or any state law pertaining to animals." (Exh. 4, 91.012 (A).) Dr. Meloche would have authorized "any Animal Control Officer to go upon private property and into yard to inspect the condition of any animal or investigate any violation of this chapter and/or any state law pertaining to animals." (*Id.* at 91.012 (B).) Without any regard to the Fourth Amendment's warrant requirement or its narrow exceptions, Dr. Meloche provided, "Animal Control Officers are authorized to go on or about private property to seize any animal." (*Id.* at 91.036(B).) The County Attorney's Office noted that these provisions are clearly illegal under the Fourth Amendment. (Exh. 5, at 4; *see also* County Attorney Opinion on canvassing provisions, attached hereto as Exhibit 6.)

At the Committee meeting of February 27, 2006, Councilman James Peden updated the Committee on the drafting process. Although the County Attorney's Office had roundly condemned Dr. Meloche's draft a few days earlier, Mr. Peden stated that "Dr. Meloche's document was well done and he is working closely with county attorney." (See Committee Meeting Minutes, Exh. 3.)

It was also suggested during this Committee meeting that "details and definitions be left to administrative regulation rather than ordinance" -- in other words, that the Council should give Dr. Meloche wide discretion to interpret and enforce the ordinance as he liked.[2] (*Id.*) The Committee

[2] Dr. Meloche has failed to enact administrative regulations regarding interpretation and enforcement of the ordinance. (Depo. Meloche, 8/3/07, at 46, 85, 91, 92, 97, 109, 117; Depo. Meloche, 9/17/07, at 32, 35, 36, 41, 53,

expressed a concern to "make the document readable and understandable for all citizens." (*Id.*) Mr. Peden announced the formation of a Work Group consisting of certain Council members and representatives of certain interested groups to discuss policy issues surrounding the proposed new ordinance. (*Id.*)

III. During the Legislative Process, Dr. Meloche Threatens to Retaliate Against Citizens Who Question His Legal Qualifications to Hold the Office of Director of Metro Animal Services.

In the summer of 2006, as the Work Group discussed the proposed ordinance, certain citizens began voicing public concerns about Dr. Meloche's qualifications for the office of Director of Metro Animal Services. They investigated problems that had arisen during Dr. Meloche's previous tenures. (See news article attached hereto as Exhibit 7.) The citizens also pointed out that Dr. Meloche did not meet one of the qualifications for being Director of Metro Animal Services, namely, that he be eligible as a "peace officer" under Kentucky law. The job posting for the position of Director clearly requires that the applicant meet this qualification. (See job posting and application, attached hereto as Exhibit 8.) However, Dr. Meloche omitted details regarding his peace officer qualifications when filling out his job application. (*Id.*)

The peace officer requirement exists because Kentucky law, which authorizes municipal governments to hire animal control officers, requires those officers to meet the requirements of "peace officer" in order to enforce Kentucky's animal control laws. KRS 436.605.[3] In order to be a peace officer, one must be a U.S. Citizen and must not have committed any crime of moral turpitude, among other things. KRS 61.300. One must also take the oath prescribed in the Kentucky Constitution. Ky. Const. §228. Dr. Meloche is not qualified to be a peace officer because he is not a

---

58, 67, 70, 72, 76, 78, 93, 97, 101, 105, 147.) He fills the ordinance's massive interpretive gaps with nothing more than "common sense," that is, guesswork. (*Id.* at 125-126.)

[3] The City, through the County Attorney's Office, has acknowledged that animal control officers must meet the qualifications of a "peace officer" for the purpose of enforcing Kentucky's animal control laws. (*See* Exh. 5, at n. 2.)

U.S. Citizen. (See Deposition of G. Meloche, 8/3/07, attached hereto as Exhibit 9, at 6.) Additionally, he pleaded guilty to drug crimes in Canada. (*See* judgment attached hereto as Exhibit 10.) The fact that Dr. Meloche fails to meet the qualifications of a peace officer has serious ramifications for Louisville. It raises the significant possibility that all of his official acts are void.[4]

Apparently, in the midst of all this, Dr. Meloche tried to rectify the situation by taking the oath of a peace officer before District (now Circuit) Judge Audra Eckerle in July, 2006. (See Peace Officer Certificate, attached as Exhibit 11.) However, because Dr. Meloche is legally prohibited from serving as a peace officer because of his citizenship and his crime of moral turpitude, his decision to take the oath only made the situation much worse. Dr. Meloche has now sworn before a Jefferson District Judge that he possesses qualifications which he knows he lacks. (See Oath of Dr. Meloche, attached as Exhibit 12.)

In August 2006, Dr. Meloche attempted to silence public discussion about his qualifications to hold public office. He hired attorney Larry Zielke and threatened to sue citizens who were questioning his background and qualifications. (See Zielke letter, attached hereto as Exhibit 13.) Mr. Zielke warned, "To all those individuals that seek to defame Dr. Meloche, this letter is a demand for you to cease and desist from continuing such defamatory comments and a warning that any further dissemination of defamatory comments will be dealt with in accordance with the law." This threatening effort was immediately curtailed after the citizens responded that they had an absolute right to question the qualifications of a public officer such as Dr. Meloche and would strongly resist any attempts to silence them.

---

[4] An individual such as Dr. Meloche who occupies public office "without color of title or right" is deemed a "usurper" under Kentucky law. *Broyles v. Commonwealth*, 219 S.W.2d 52, 54 (Ky. App. 1949). Generally, the actions of a usurper "are absolutely void, and may be impeached at any time in any proceeding . . . ." *Am. Jur. Public Officers and Employees*, § 24 (1997). In particular, when the state constitution requires the taking of an oath in order to hold public office, and the purported public officer has not taken such oath, his or her official actions are invalid. *Id*. at § 33; *see French v. State of Texas*, 572 S.W.2d 934 (Tx. 1978); *Holloway v. State of Florida*, 342 So.2d 966 (Fla. 1977).

IV. The Committee Takes up the Ordinance Again.

On August 21, 2006, the Committee considered the proposed ordinance for the first time in several months. The ordinance had not been formally addressed by Committee while it was being considered by the Work Group. Councilwoman Cheri Bryant Hamilton gave a presentation in which she attempted to gain support for the ordinance. Dr. Meloche and Assistant County Attorney Bill Warner answered questions about the ordinance. (See Committee Meeting Minutes, Exh. 3.)

At several Committee meetings throughout September, October and November, concerned members of certain interested groups identified problems with the ordinance. (*Id.*) For instance, the Responsible Dog Owners Association felt that "the focus of Public Safety has been lost," expressed "concern[] about vague wording in the ordinance regarding types of dogs," feared that the ordinance may amount to an effective "[o]utlawing of animal ownership," and highlighted "due process" concerns. (*Id.*) At the conclusion of the November 27, 2006 meeting, and despite (or, perhaps, because of) months of drafting, Councilman Heiner noted that the ordinance needed "reorganization" and was "difficult to follow." (*Id.*)

On December 11, 2006, the Committee held its final meeting to discuss the ordinance. After numerous amendments, the Committee approved a version of the ordinance by a 4-3 vote and placed it on the agenda for a full Council vote at the next Metro Council meeting of December 19, 2006. The Committee version of the ordinance was provided to members of the Council for their review prior to the December 19 vote. (See Committee version of ordinance, attached hereto as Exhibit 14.)

V. The Ordinance Is Drastically Altered in Secret in the Final Days before the Full Council Vote.

Between the final Committee meeting of December 11, 2006 and the full Metro Council meeting of December 19, 2006, significant revisions to the proposed ordinance were made. The

revisions were never considered or discussed at any formal meeting of any Committee. No Committee heard any public comment or testimony on the last-minute revisions. Whoever made the revisions did not advise the Council that the revisions were being made.

One hour before the full Council meeting, a heavily altered version of the ordinance was distributed to the Council. (See Minutes of December 19, 2006, Council Meeting, attached hereto as Exhibit 15, at 16.) Councilwoman Adams noted that she had not even received a copy of the newly revised 100-page ordinance. (*Id*. at 13, 16.) Councilwoman Hamilton characterized the new version of the ordinance as her "floor substitute." (*Id*. at 20.) The meeting began with Councilwoman Hamilton's efforts to substitute her new version of the ordinance for the prior Committee version on which the Council members had believed they would be voting that evening. (*Id*. at 21.)

The most significant difference in the floor substitute was that it systematically discriminated against owners of unaltered dogs. Whoever drafted the floor substitute had eliminated the term "pit bull dog" from the ordinance and replaced it with "unaltered dog." There is no known record of the rationale or reasoning behind applying all "pit bull" provisions to "unaltered dogs" throughout the ordinance. Neither the Council nor any of its committees ever discussed the wisdom or desirability of this sweeping change. No one articulated any reason for the change. In her opening address at the full Council meeting of December 19, 2006, where she derisively characterized opponents of the ordinance as "voices of hysteria," Councilwoman Hamilton noted that "pit bulls" had been replaced with "unaltered" -- but she provided no justification for the change. (*Id*. at 24.)

The last-minute change from "pit bulls" to "unaltered dogs" resulted in several onerous new burdens on owners of unaltered dogs. For instance, the floor substitute required all unaltered dogs to be microchipped; required the inspection by Dr. Meloche of all enclosures for unaltered dogs; required that notification be given to MAS before changing the location of an unaltered dog for more

than three days; required immediate notice to MAS any time the person in possession of an unaltered dog changed; required that unaltered dogs be kept on four-foot leashes; prohibited the use of electronic fences for unaltered dogs; required that any unaltered dog be neutered if found running loose; banned unaltered dogs from "off-leash" areas designated by the Metro Department of Parks; required impoundment of any unaltered dog if its owner failed to comply with any of these requirements; and provided limitless discretion to Dr. Meloche to release or not release unaltered dogs on "terms and conditions imposed by the Director that are in the interest of public safety and welfare." (*See* December 19, 2006, Ordinance, attached hereto as Exhibit 16, at Section 91.035(E).)

A debate ensued over whether to substitute Councilwoman Hamilton's version for the Committee version. Several Council members contended that the Council should reconvene at a later date to consider the floor substitute after everyone (and the public) had the opportunity to read it. (*See, e.g.,* Exh. 15, at 35.) Councilman Downard summarized the concerns of several Council members.

> This is a – "overwhelmed" is kind of a good point of view. We have a 106-page ordinance that's gone to 94. The public has spent 6 months watching the council move forward with deliberation on 106 pages. There are 12 pages missing now. I don't know where they are. I – I have a copy of this new one that I received an hour ago, and it is 94 pages.
>
> . . .
>
> [The revisions have] been done without a lot of us having a clue that it's going on, and the public at large has no idea whatsoever, what's in here. They don't have a copy of it, even. And I really feel compelled to say for their benefit, what have we done?

(*Id*. at 28-29.)

The Council held several votes on the preliminary issues of whether to accept Ms. Hamilton's floor substitute and whether to reconvene at a later date. The impression that emerges

from these early votes is that Council Democrats had already decided to vote as a bloc in favor of the floor substitute that night regardless of whether the public and the Council had any time to consider it.[5] Before having held any substantive debate on the ordinance, the Democrats voted as a bloc to consider Councilwoman Hamilton's floor substitute, to table the earlier version that everyone had believed they would be considering that evening, and to vote on the passage of the floor substitute that evening. (*Id*. at 23, 31, 36, 37.)

The Democrat voting bloc continued throughout the nine-hour debate. The Council held several roll call votes on whether to amend certain provisions of the ordinance. Consistently, the Democrats controlled the deliberations by voting as a bloc. (*Id*. at 19-152.) This prompted Councilwoman Call to comment, "[W]e've now degenerated to a point where every matter raised no matter how minor or objectionable is being decided on party line vote. Nearly every vote has been decided along party lines the last couple of hours and I would like to renew my motion or make a new motion to table this matter." The motion to table failed, again along party lines. (*Id*. at 94-95.)

Mayor Jerry Abramson signed the ordinance into law on January 4, 2007. He called the law "a work in progress." (See Courier-Journal article attached hereto as Exhibit 17.) Citizens raised concerns about the ordinance's many vague, open-ended provisions. Dr. Meloche assured the public that he would use his "common sense" in enforcing the ordinance. (*Id*.)

VI. Concerned Citizens File This Lawsuit.

This lawsuit was filed on March 27, 2007. Discovery has consisted of a review of the legislative record, the deposition of Dr. Meloche, and Plaintiffs' identification of two expert

[5] With respect to this issue, the Louisville Kennel Club and the League of Kentucky Sportsmen filed an Open Meetings lawsuit that is currently pending in Jefferson Circuit Court. Two hours before the full Council meeting, the Democratic Caucus (a majority of the Council) held a Caucus meeting to discuss the ordinance. Although this meeting constituted a "special meeting" under the Open Meetings Act, Council Democrats did not provide the requisite notice of the meeting. Thus, the public did not have the opportunity to observe whatever voting bloc the Democrats reached during that meeting, an opportunity guaranteed the public by the Open Meetings law. KRS 61.805 *et seq*.

witnesses. Plaintiffs' experts have opined that there is no rationale for believing that unaltered dogs pose a greater likelihood of aggression than altered dogs. Matthew P. Duffy, a professional dog trainer and owner of Duffy's Dog Training Center, LLC, has worked with over 12,000 dogs in his career, many of which exhibited aggression problems. In his experience, he does not recall a single instance where altering the dog neutralized the aggression. (*See* Report of M. Duffy, attached hereto as Exhibit 18.) Dr. M. Christine Zink, a veterinarian and professor at Johns Hopkins University, opined that older studies suggesting a link between unaltered dogs and aggression have fundamental flaws, and that newer, properly-conducted studies "clearly contradict the belief that spayed and neutered dogs are less aggressive." (See Report of C. Zink, attached hereto as Exhibit 19.)

Dr. Meloche was deposed on August 3, 2007, and September 17, 2007. Dr. Meloche provided his interpretation of the ordinance in his capacity as the ordinance's chief enforcement officer. (Depo. Meloche, 8/3/07, at 81-82.) He also testified regarding how he implements and enforces the ordinance. Dr. Meloche was asked about many of the ordinance's new vague provisions. His testimony indicates that, without clear standards in the ordinance and without administrative regulations to guide him, he simply relies on his "common sense" in choosing when and how to enforce the ordinance. (*Id*. at 110).[6]

Dr. Meloche's testimony also raised some additional troubling points about his fitness for public office. Primarily, Dr. Meloche testified at length about the ability of so-called "poor people" to own dogs. Although he attempted to avoid sounding overtly prejudiced against "poor people," the tone of his testimony indicates that he does not approve of "poor people" owning pets, and that he is somewhat contemptuous of "poor people" generally.[7]

[6] Rather than quoting all of the pertinent portions of Dr. Meloche's deposition at this point, then quoting them again in the "Argument" section of this memorandum, the Plaintiffs have reserved quoting most of the pertinent portions of the deposition for the "Argument."

[7]

Q. . . . Do you think the higher fees discourage people from obtaining permits for unaltered dogs, especially poorer people?

A. Honestly, what we see for poor people, I don't think it's an issue. I don't think it's a fact that -- that the fact -- because we know that even if the dog is altered, we don't see a different. They just don't license, period. That's my perception.

Q. So you don't think that the fact that they have to pay a fee -- a higher fee discourages people?

A. No, not poor people. First, we know one thing, they barely go to veterinary clinics. Should the fee of the veterinary clinic be lower to accommodate them, maybe, maybe not. But it's everything, the kind of food that they're going to buy, if they buy some. Most of the cruelty that I've seen -- that we see are from, of course, poor neighborhood, and it's dynamic. It's just a small thing for us. We don't think that is the major issue. For us, if you are not able to go to a veterinary clinic, you're not able to afford food, you're not able to afford license, and you have five, six dog. Sometimes you'd be better to just have one to spade and neuter and license and be able to go. That is mentality that we see.

. . .

A. . . . And most of them don't have fences. They should not have -- own a third pet because that is major problem, they let him out and --

Q. When you say most of them, who are you talking about?

A. Poor people.

Q. Poor people?

A. Because it's expensive to have a fence.

Q. What I'm talking about, if I come to you and I'm poor, whatever that means, and you've got hundreds of dollars in boarding fees and you've got redemption fee and you've got the microchip fee and you've got the -- at that point I say, "I'd like to get my dog." You say, We'll, you owe us $900" -- whatever it is, $500. I say, "I can't pay that. I don't have it." What happens?

A. 900, that's impossible because after five days the dog belongs to us. Suppose it's 250 or 300.

Q. Whatever, $300.

A. Unfortunately, you cannot claim your dog. I will allow for you to spade and neuter and try to get the fee where it should be if the dog was spade and neutered. Of course, the license will be less. You don't have to be permitted, you don't have a couple of other things that will decrease. But at one point, honestly, if you're not able to license, if you're not able to do that, how are you going to feed your dog. And that's the reality.

Q. Well, that isn't about licensing. That is about paying the $300 that you've charged me for boarding.

. . .

Q. Now, you've mentioned several times during your deposition today concern about the ability -- the financial ability of poor people to take care of animals.

A. Uh-huh.

Q. That is a concern of yours?

A. Yes.

Q. Is it your judgment that poorer people should not have unaltered dogs?

A. No.

Q. Is it your judgment -- you have testified that you think that poor people cannot construct a fence?

A. Uh-huh.

Q. If they can't construct a fence, they can't have an unaltered dog, can they?

A. No, they cannot. You know, you asked me a judgment of -- I think it's kind of severe here to say they should not.

Q. Right.

A. I cannot say that. Honestly, It's --

Q. What can you say?

A. I think that is prejudice there. They may not but should no -- you know, it's -- you have to be careful there.

. . .

Q. Okay. Do you think it's prejudicial to impose financial requirements on people?

. . .

A. I will not answer.

Q. You're not going to answer that?

A. No.

(Depo. Meloche, 8/3/07, at 66-80.)

VII. In Response to this Lawsuit, the Metro Council Revises Numerous Provisions of the Ordinance that the Plaintiffs Have Challenged on Constitutional Grounds.

To date, this lawsuit has been the catalyst for significant amendments to the ordinance. In April 2007, the Council omitted the excessively harsh requirement that any unaltered dog that was impounded must be neutered before release. (See Amendment, attached hereto as Exhibit 20.) After the discovery process in this case, the Council began seriously considering the possibility of eliminating many of the irrational provisions pertaining to owners of unaltered dogs. These were the provisions resulting from the last-minute, non-public revisions to the ordinance in the days before the full Council vote, in which certain drafters replaced "pit bull" with "unaltered," thereby applying all the so-called “pit bull” provisions to unaltered dogs with equal force and for no legislative purpose.

On December 20, 2007, the Council voted to eliminate many of these problematic provisions. On December 21, 2007, the Mayor approved the amendments. (See current Ordinance, attached as Exhibit 21.) The chief sponsor of the ordinance, Cheri Bryant Hamilton, stated she was glad to see the removal of unequal treatment for unaltered and altered dogs, thus acknowledging that there is no rational reason to treat owners of altered and unaltered dogs differently. (See excerpts from minutes of December 20, 2007 meeting, attached hereto as Exhibit 22.) These amendments rectified most, but not quite all, of the problematic provisions pertaining to unaltered dogs. Oddly, despite Ms. Hamilton's comment and despite the general elimination of unequal treatment for owners of unaltered dogs, the Council decided to keep one of the most irrational provisions in the ordinance, section 91.022, which requires the Director to inspect enclosures for every unaltered dog in Louisville. That task is both impossible and pointless. Moreover, Dr. Meloche interprets this provision as authorizing him to inspect people's homes.

The recent deletion of many of the irrational unaltered dog provisions was necessary and commendable. However, it did nothing to address the multitude of unconstitutionally vague provisions, and other illegal provisions, in the ordinance.

ARGUMENT

The Court should void several provisions of the ordinance pursuant to 42 U.S.C. §1983 as illegal under the United States Constitution. These same provisions also violate the Kentucky Constitution.[8] The Court should also void provisions that are in conflict with Kentucky statutes.

I. SECTION 1983 VIOLATIONS.

42 U.S.C. §1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

In any action under Section 1983, the plaintiff must prove that (1) he or she has been deprived of a right secured by the United States constitution or laws, and (2) the defendant who allegedly caused that deprivation acted under color of state law. *Ross v. Duggan*, 402 F.3d 575, 581 (6th Cir. 2004). An action under Section 1983 is the appropriate vehicle for invalidating a municipal ordinance that

---

[8] Kentucky courts interpret Sections 2 and 3 of the Kentucky Constitution as providing essentially the same protections against vagueness, deprivations of due process and denials of equal protection as under federal law. *Com. Nat'l Resources v. Kentec*, 177 S.W.3d 718, 724 (Ky. 2005); *Com. v. Louisville Atlantis Community/Adapt, Inc*., 971 S.W.2d 810, 816 (Ky. App. 1997). Therefore, Plaintiffs do not include in this brief any substantive analysis under the Kentucky Constitution.

It is worth noting, however, that Section 2 of the Kentucky Constitution contains language with special significance here. Section 2 provides, "***Absolute and arbitrary power*** over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." (Emphasis added.) This guarantee against "absolute and arbitrary power" is particularly relevant in this case, for, as this memorandum demonstrates, absolute and arbitrary power is exactly what Dr. Meloche sought to obtain in drafting the new ordinance and is exactly what the Metro Council gave him by enacting numerous vague, meaningless provisions that confer unfettered discretion on his enforcement authority. Court action is needed to restore the people of Louisville to a state free of "absolute and arbitrary power."

violates the federal Constitution. *See, e.g, Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377 (6th Cir. 2001).

A. Section 91.001 – Definitions of "Potentially Dangerous Dog" and "Dangerous Dog," as well as Exemptions from Those Definitions at Section 91.150, Are Unconstitutionally Vague.

i. Section 91.001 – Definitions of "Potentially Dangerous Dog" and "Dangerous Dog"

The ordinance attempts to create a mechanism for identifying and controlling so-called "dangerous" and "potentially dangerous" dogs. This goal is, in theory, legitimate. (See Prior Ordinance, Exh. 1, Section 91.110.) As drafted, however, the provisions regarding dangerous and potentially dangerous dogs are so vague that they provide unfettered discretion to animal control officers enforcing the ordinance.

Section 91.001 of the Ordinance defines "dangerous dog," in pertinent part, as follows.

> …
>
> (2) Any dog which maims or kills domestic pets or livestock when not under restraint;
>
> …
>
> (4) Any dog which is declared by the Director to be a dangerous dog under the procedures set forth in this chapter; or

These definitions trigger a host of special requirements for the enclosure, restraint, transport, and sale, among other things, of so-called "dangerous" dogs. (*See, e.g.,* Section 91.112.) Failure to comply with these requirements is punishable as a Class A misdemeanor with up to twelve months in jail. (Section 91.999.) Both of these definitions are unconstitutionally vague.

The void-for-vagueness doctrine is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments. An ordinance is void-for-vagueness if "(1) it fails to define the offense with sufficient definiteness that ordinary people can understand the prohibited conduct, or (2) it fails

to establish standards to permit enforcement of the law in a non-arbitrary, non-discriminatory manner." *United States v. Caseer*, 399 F.3d 828, 835 (6th Cir. 2005) (citing *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 556-57 (6th Cir. 1999)).

The second prong – arbitrary enforcement -- is "the more important aspect of the vagueness doctrine." *Id*. The chief danger of an unconstitutionally vague law is that it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). The Constitution will not countenance laws that "permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983) (internal quotations omitted); *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608-09 (6th Cir. 2005) (courts will invalidate laws amounting to "an unrestricted delegation of power which leaves the definition of its terms to [law enforcement].")

Moreover, in a vagueness analysis, a law will be subjected to closer scrutiny when it threatens criminal sanctions. *Caseer*, 399 F.3d at 835 (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S 489, 498-99 (1982)). Although a law need not rise to the level of "impossible clarity," the language of the law must survive "a relative strict standard of scrutiny where criminal sanctions apply." *Belle Maer Harbor v. Charter Township of Harrison*, 170 F.3d 553, 559 (6th Cir. 1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 361 (1983)). A law imposing criminal sanctions will not withstand constitutional scrutiny unless it "incorporates a high level of definiteness." *United States v. Blaszak*, 349 F.3d 881, 887 (6th Cir. 2003) (citing *Belle Maer*, 170 F.3d at 557).

In evaluating a vagueness challenge, the court's interpretation of the ordinance should focus on the words of the ordinance itself, any interpretations the court below has given to analogous laws, and the interpretation of the ordinance provided by those charged with enforcing it. *Grayned*, 408 U.S. at 110. Administrative interpretation and implementation of a law are "highly relevant to [the court's] analysis." *Ward v. Rock Against Racism*, 491 U.S. 781, 795-796 (1989) (citations omitted).

Subsection 2 of the definition of "Dangerous Dog" is unconstitutionally vague because of its use of the term "domestic pets," defined elsewhere in 91.001 as "domestic dog, cat, rabbit, mouse, rat, reptile, guinea pig, chinchilla, hamster, gerbil, ferret." This definition "fails to establish standards to permit enforcement of the law in a non-arbitrary, non-discriminatory manner." *Caseer*, 399 F.3d at 835. Any dog will "maim or kill" any number of these animals -- rabbit, mouse, rat, etc.-- if presented with the opportunity. Thus, "any dog which maims or kills" effectively includes ***every dog in Louisville***. A definition that includes every dog in Louisville, and fails to provide any further standards for enforcement, effectively grants unfettered discretion to animal control officers to pick and choose "dangerous" dogs arbitrarily. This definition sweeps everyone into a net for the animal control officer to sort through. *See Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.")

Subsection 4 of the definition of "Dangerous Dog" is the quintessential vague law. It constitutes an express grant of unfettered discretion to law enforcement. Under this definition, a dangerous dog is any dog "declared by the Director to be a dangerous dog under the procedures set forth in this chapter." However, the "procedures set forth" for declaring dogs to be dangerous –at

Sections 91.150 and 91.151 -- ***do not further define*** "dangerous dog." Thus, dangerous dog means what ever Dr. Meloche wants it to mean. This is plainly illegal.

A federal district court in Iowa has recently invalidated identical language. *Folkers v. City of Waterloo*, 2007 U.S. Dist. LEXIS 76101, 30-31 (D. Iowa 2007). In *Folkers*, the plaintiff challenged the following definition of "dangerous dog" as unconstitutionally vague: "Any dog declared to be dangerous by the city council or an animal control officer." The definition is so obviously vague that the Magistrate Judge spent minimal analysis in recommending that the district court declare it unconstitutional. The Magistrate Judge simply stated, "this circular definition does not provide any guidance for the public." *Id.* It allows the city to find a dog "dangerous . . . by simply declaring her to be 'dangerous'." The district court adopted the Magistrate's recommendation and voided the definition. *See also Belle Maer Harbor v. Charter Township of* Harrison, 170 F.3d 553 (6th Cir. 1999) (Sixth Circuit held that provision of ordinance, "or as determined by the inspecting officer to be a reasonable radius," was unconstitutionally vague because it provided the inspector with limitless discretion, stating "[d]iscretion of this magnitude furnishes [] inspectors with a convenient tool for harsh and discriminatory enforcement against particular groups deemed to merit their displeasure.")

Thus, the Court should void Subsections 2 and 4 of the definition of "Dangerous Dog." For the same reasons discussed above, the Court should also void Subsections 2 and 3 of the definition of "Potentially Dangerous Dog." Those Subsections contain the same reference to "domestic pets" and the same grant of unfettered discretion to Dr. Meloche.

ii. Exemptions from "Dangerous" and "Potentially Dangerous" at Section 91.150.

The Court should also void certain exemptions from the definitions of "Dangerous" and "Potentially Dangerous" dog as unconstitutionally vague. Section 91.150 sets forth the exemptions,

some of which border on the absurd. Under Section 91.150(B)(1), a dog is not dangerous or potentially dangerous if it bites "anyone assaulting its owner," but ***not including a police officer***. Section 91.150(B)(4) exempts a dog if it bites someone committing a criminal trespass, but does not exempt a dog that bites someone committing simple trespass, an exemption that requires the dog to accurately perceive whether the trespasser has criminal intent.

These exemptions are unconstitutionally vague under both prongs of the vagueness analysis. Both exceptions set forth such incomprehensible standards that citizens cannot know how to conform to the law and enforcement officers cannot know how to enforce the law. *Caseer*, 399 F.3d at 835. Dr. Meloche's interpretation of these exemptions is conclusive proof of their unconstitutional vagueness. When asked whether a dog can know whether a person assaulting its owner is a police officer, Dr. Meloche waffled before conceding, "I don't think so, but I don't know." (Depo. Meloche, 8/3/07, at 113-114.) When asked how a dog is supposed to tell the difference between someone committing simple trespass and someone with a heightened criminal intent, he testified as follows:

> That's another question very difficult to answer because, first, I'm not a dog, but most of the time a dog -- what we -- my perception of this definition in terms of trespass, you're walking on the sidewalk and for any reason you pass a little bit on the ground that belongs -- you know, that many sidewalk in Louisville pass through your own property, so that that's my definition of a sample of trespass.

(*Id*. at 115.) Next, Dr. Meloche was asked whether a dog must discern whether someone who steps two feet onto private property intends to commit burglary or does not intend any criminal conduct. Dr. Meloche's answer that "it depends" and "it's a very gray zone" confirms the vagueness of this provision. (*Id*. at 117.)

These exemptions are incomprehensible to citizens and enforcement officers. As such, they are unconstitutionally vague.

B. Section 91.022 – The Inspection Requirement for Enclosures for Unaltered Dogs Is Unconstitutionally Vague, Violates the Fourth Amendment, Violates the Equal Protection Clause, and Constitutes a Deprivation of Substantive Due Process.

Section 91.022 of the Ordinance provides, in pertinent part, as follows.

> (A) Unaltered dogs shall at all times be kept and maintained;
>
> (1) In a proper enclosure as defined in this chapter, and as approved by the Director in writing; or
>
> (2) Under restraint as defined in this chapter.

By its plain terms, Subsection (A)(1) requires that all unaltered dogs be kept in an enclosure approved by the Director, Dr. Meloche, in writing. Enclosure is defined in Section 91.001 as "a fence or structure of sufficient height and construction to prevent the animal from leaving the owner's property. . . ." Another appropriate form of enclosure is a buried wire electronic fence. *Id.* Failure to keep an unaltered dog in a proper enclosure is punishable as a Class A misdemeanor with up to twelve months in jail. (Section 91.999.)

Oddly, the Metro Council did not delete Section 91.022 when the Council recently amended the ordinance in December 2007. Section 91.022 is the only remaining provision of the ordinance that imposes special requirements on owners of unaltered dogs. What compounds the oddity of Section 91.022 is that the Council also recently eliminated any difference in the definition of "enclosure" for unaltered and altered dogs. Previously, these definitions differed in that owners of unaltered dogs were prohibited from enclosing an unaltered dog with an electronic fence. Having eliminated that restriction, the same definition of enclosure applies to both altered and unaltered dogs. Nonetheless, by keeping Section 91.022, the Council apparently deems it important that the Director verify the existence of proper enclosures for unaltered dogs, but not for altered dogs.

Dr. Meloche has testified that he interprets Section 91.022, in conjunction with the definition of "enclosure," to allow him to inspect people's homes, and that he makes a "case by case" determination of whether someone's home qualifies as a proper enclosure for an unaltered dog.

> Q: And it's your testimony that if you have an unaltered dog you have to have an enclosed dwelling?
>
> A: I would say most of the time.
>
> Q: Why is that?
>
> A: Because it depends on the situation of the dog, what kind of unaltered dog, what kind of breed, what kind of size, what kind of situation we have. It's a question we ask when we're going there, and that depends.
>
> Q: If I came to you – somebody came to you and said, "I have an unaltered dog and I'm going to either keep it in the house at all times or take it out under proper restraints. That's the only way I'm going to do it," can I do that under the ordinance?
>
> A: It depends. You will have to prove several thing, where you live, do you have a backyard, a front yard, do you have a place to go, where you go. It's very difficult for me. You have to be very specific to –
>
> Q: Okay. Why is it important where I live?
>
> A: Depends on the size of the dog also, not only where you live, depends on several factor.
>
> Q: But why is it important where I live?
>
> A: Suppose if you live in an apartment, suppose that you live here, that's your apartment here ...
>
> …
>
> Q: . . . So, for example – that was a good example – if I live in an apartment, I can still have an unaltered dog?
>
> A: Depends on the size of the dog, depend how you going to tell us, where the dog will go, and how you're going to maintain the dog. We have examples and people say, "I go outside and I let my dog run out of leash."

Q: If I tell you –

A: Your question, sir, with all respect, that's why I'm telling you it depends on different situation. For the same apartment I can say yes and I can say no . . .

. . . .

Q: You previously testified it depends where you live; right?

A: Correct.

Q: Why is that important?

A: Okay. I should not have said where. Depends on what type of apartment is what I meant.

. . .

A: What type of location, what type of apartment you have, what type –

Q: What do you mean by what type of apartment?

A: If it's an apartment or a house or a complex where you live, are you on the first floor, second floor, third floor. We'll take everything into consideration.

Q: If I – what I'm trying to understand is how you exercise your authority under this statute – under this ordinance.

A: I think it's what I'm trying to tell you. I think we're just – don't communicate well here. It's that I have to approve that. To approve I need several evidence of where the dog will stay. This is the most important part. What is the chance that the dog can escape without leash, what is the owner responsibility . . . .

…

Q: And there are no regulations that you've promulgated under this section?

A: No. It depends on each case. It's a case by case.

(Depo. Meloche, 8/3/07, at 163-168.)

Section 91.022 is unconstitutional for several reasons.

i. Section 91.022 Is Unconstitutionally Vague.

This provision is unconstitutionally vague. Because the Director cannot possibly enforce the provision against everyone to whom it applies, he must enforce it selectively. The provision contains no standards to guide the Director in choosing when and how to enforce it. As with so much of the ordinance, the provision "fails to establish standards to permit enforcement of the law in a non-arbitrary, non-discriminatory manner." *Caseer*, 399 F.3d at 835.

Moreover, the language of the provision is unconstitutionally vague for another and more fundamental reason – there is no standard set forth for what a "proper" enclosure is. This allows unfettered discretion, which is exactly how Dr. Meloche enforces the provision. His testimony indicates that he follows no guiding principles in determining what constitutes a "proper" enclosure. (Depo. Meloche, 8/3/07, at 163-168.) As he says repeatedly, whether an enclosure is proper "depends" on a multitude of factors that appear to shift with the breeze and, even more dangerously, that are known only by Dr. Meloche. (*Id.*)

ii. Section 91.022 violates the Fourth Amendment.

To the extent Dr. Meloche interprets Section 91.022 to authorize warrantless inspections of people's homes, it also violates the Fourth Amendment. The Supreme Court has long dispelled the notion that administrative inspections by governmental authorities are not subject to the warrant requirement. *Camara v. Municipal Court*, 387 U.S. 523 (1967). The Supreme Court has carved out only one exception to the warrant requirement for administrative inspections – namely, for certain closely regulated industries with a long tradition of close governmental supervision. *New York v. Burger*, 482 U.S. 691 (1987). There can be no suggestion that this city has a long history of inspecting the homes of owners of unaltered dogs. *Compare Michigan Wolfdog Ass'n, Inc. v. St. Clair County*, 122 F.Supp.2d 794 (E.D. Mich. 2000) (upholding Michigan law permitting

warrantless inspection of facilities harboring wolf-dogs because Michigan had a long history of regulating similar animals and because the law did not permit inspection of private homes). Thus, the City is required to obtain warrants prior to conducting the inspections Dr. Meloche believes he may conduct under this provision.

To the extent Dr. Meloche interprets this provision as authorizing warrantless searches, it is invalid. A city ordinance that authorizes blanket warrantless searches or seizures is unconstitutional. *See Spencer v. City of Bay City*, 292 F.Supp.2d 932 (E.D. Mich. 2003) (court invalidated as unconstitutional a city ordinance that authorized mandatory alcohol breath tests because such tests constitute a search within the meaning of the Fourth Amendment and the ordinance contained no requirement that police obtain a warrant prior to testing.)

iii. Section 91.022 violates the Equal Protection Clause and constitutes a deprivation of Substantive Due Process.

Section 91.022 also violates the Equal Protection Clause of the Fourteenth Amendment and constitutes a deprivation of substantive due process under the Fourteenth Amendment. In an Equal Protection challenge that does not involve discrimination against a protected class, the court must apply rational basis review. The court must ask whether "there is a rational relationship between the disparity of treatment and some legitimate government purpose." *Doe, XIV v. Michigan Dept. of State Police*, 490 F.3d 491, 505 (6th Cir. 2007)(citation omitted). Likewise, in a case not involving fundamental rights, a law constitutes a deprivation of substantive due process when it is not rationally related to any legitimate government purpose. *Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998).[9] Thus, the analysis here is functionally the same.

[9] Unlike a procedural due process claim, *see Hahn v. Star Bank* 190 F.3d 708, 716 (6th Cir. 1999), a substantive due process claim does not require the plaintiff to define the particular liberty or property right being deprived. The law is examined solely in terms of its rationality.

However, it is noteworthy that Kentucky recognizes both physical and intellectual property rights in animal ownership. KRS 437.415.

Rational basis review "is not toothless," *id*. (quoting *Mathews v. Lucas*, 427 U.S. 95, 510 (1976), and it "is not a rubber stamp of all legislative action." *Hadix, et al. v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000). Legislative action "that can only be viewed as arbitrary and irrational ***will*** violate the Equal Protection Clause." *Id*. (emphasis in original). If "the varying treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes then [the court] can only conclude that the [legislature's] actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

Section 91.022(A)(1) fails rational basis review. First, the provision does not further any legitimate government interest. The provision was initially drafted to apply to "pit bulls." (See Exh. 14, Committee version.) As with several other provisions, however, the "pit bull" language was replaced by "unaltered dog" in the final days before passage and without any public oversight or input. This legislative choice was irrational on its face, and the City has never attempted to justify it. A legislature cannot rationally spend a year designing a system of legislation addressing one issue and, at the last minute, drop the issue and apply the system of legislation to a new issue. Moreover, the chief sponsor of the ordinance, Councilwoman Cheri Bryant Hamilton, has recently acknowledged that owners of unaltered dogs should not be treated differently from owners of altered dogs. (See Exhibit 22.)

Further, even if Section 91.022 was based on some legitimate governmental interest, the provision could not rationally further any such interest. The provision is absolutely impossible to enforce. Dr. Meloche cannot possibly inspect every enclosure for every unaltered dog in Louisville. A conservative estimate would place the dog population in Louisville/Jefferson County in the multiple hundreds of thousands. A substantial portion of these dogs would, of course, be unaltered.[10]

[10] The American Veterinary Medical Association indicates that approximately thirty-six percent of households own dogs. (See http://www.avma.org/reference/marketstats/ownership.asp.)

Thus, in order to carry out the mandate of Section 91.022(A)(1), Dr. Meloche would have to spend every hour of every day for years doing nothing but inspecting enclosures for unaltered dogs. Legislation that is impossible to enforce cannot be rationally related to any governmental interest.

C. Sections 91.073, 91.094, and 91.101 – Other Warrantless Searches and Seizures Also Violate the Fourth Amendment.

In addition to the blanket, warrantless inspection of enclosures authorized by Section 91.022, the ordinance contains certain other provisions that violate the Fourth Amendment. Section 91.073(D) authorizes an animal control officer who observes a dog on a chain or tether to enter private property and seize the dog if it has been tethered or chained for more than one hour. Section 91.094(A) authorizes MAS to take into "custody" any animal that has been subjected to cruelty, neglect or torment. Section 91.101(A) provides: "Any animal found involved in a violation of any portion of this section may be confiscated by any Animal Control Officer or any peace officer and held in a humane manner."[11]

Section 91.073(D) violates the Fourth Amendment by authorizing law enforcement officers to enter private property and seize animals without first obtaining a warrant. Entry upon private property to confiscate an animal constitutes both a search and seizure within the meaning of the Fourth Amendment. *See State of North Carolina v. Nance*, 562 S.E.2d 557, 561-565 (N.C. App. 2002) (in case involving warrantless seizure of emaciated horses from private property, the Court conducted a thorough analysis of pertinent Fourth Amendment principles in holding that law enforcement should have, but failed, to obtain a warrant prior to entering the property and seizing the horses.) As such, the government must obtain a warrant in order to confiscate the animal. *Id.*

[11] This particular provision does not even make sense because of its reference to animals "found involved in a violation." Animals do not violate the ordinance. People do. Here as everywhere, it is important to remember that this ordinance poses its irrational and incomprehensible burdens on *people*.

At the state level, Kentucky has long acknowledged the application of the warrant requirement to animal control. Kentucky has long required that any animal control officer who wants to enter private property to investigate violations of state animal control laws must apply to a District Judge for a search warrant.

> When any peace officer, animal control officer, or any officer or agent of any society or association for the prevention of cruelty to animals duly incorporated under the laws of this Commonwealth who is employed by, appointed by, or has contracted with a city, county, urban-county, charter county, or consolidated local government to provide animal sheltering or animal control services makes an oath before any judge of a District Court that he has reasons to believe or does believe that an act of cruelty, mistreatment, or torture of animals is being committed in a building, barn, or other enclosure, the judge shall issue a search warrant directed to the peace officer, animal control officer, or officer or agent of the society or association for the prevention of cruelty to animals to search the premises.

KRS 436.605(2). Considering the existence of a Kentucky statute directly on point and well within compliance with the Fourth Amendment, the City's failure to comply with the warrant requirement in the area of animal control is an even more glaring omission.

An ordinance, such as this, that authorizes blanket warrantless searches or seizures is unconstitutional. *See Spencer v. City of Bay City*, 292 F.Supp.2d 932 (E.D. Mich. 2003). Because Section 91.073(D) authorizes warrantless entry upon private property (a search) and warrantless confiscation of an animal (a seizure of property) it violates the Fourth Amendment.

For the same reasons, Section 91.094(A) is unconstitutional. This provision authorizes taking into "custody" any animal subjected to cruelty, torment or neglect, regardless of whether MAS must enter onto private property to do so and without the requirement of obtaining a warrant prior to entering the property and seizing the animal. Like Section 91.073(D), this provision authorizes the seizure of animals from private property without a warrant. This blanket authorization of warrantless searches violates the Fourth Amendment. *Id.*

For the exact same reason, Section 91.101(A) is also unconstitutional. This provision authorizes the confiscation of any animal "found" in violation,[12] regardless of whether the animal is "found" on private property and without the requirement of obtaining a warrant prior to entering the property and confiscating the animal. Like Sections 91.073(D) and 91.094(A), this provision authorizes the seizure of animals from private property without a warrant. This blanket authorization of warrantless searches violates the Fourth Amendment. *Id*.

D. Section 91.101 – Forfeiture of Animals Without Procedural Due Process.

In addition to authorizing warrantless searches and seizures, Section 91.101 authorizes the permanent forfeiture of animals without due process of law. Section 91.101 provides that, after confiscation of an animal for a "violation of any portion of this section," and "upon a hearing before a district court judge, and that judge finding probable cause for the charge, the court shall order ***immediate forfeiture*** of the animal to the Metro Government unless the owner, within 24 hours of such finding, posts a cash bond with the court equal to the cost of care of the animal(s), including all estimated boarding and veterinary fees in the amount of $450 ($15 per day)" plus unspecified other fees and fines. (Emphasis added.) Thus, a person who cannot pay or chooses not to pay the bond loses his or her animal permanently. There is no further proceeding which could result in the owner regaining his or her dog. Incredibly, under the plain terms of this provision, even one who ***pays*** the bond does not regain his or her dog. Since the purpose of the bond is to cover the cost of boarding and caring for the dog, presumably MAS keeps the dog pending further resolution of the proceeding. Upon a "finding of innocence" (whatever that means), the cash bond is returned to the owner, but the animal, apparently, is not returned.

[12] The provision does not specify the "violations" to which it applies. For this reason alone, it is also unconstitutionally vague. Citizens and law enforcement officers cannot know when it applies.

A violation of procedural due process of the Fourteenth Amendment occurs whenever the government deprives a citizen of a liberty or property interest and the procedures afforded to protect that interest are insufficient under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Silvernail v. County of Kent*, 385 F.3d 601 (6th Cir. 2004). Under *Mathews,* the process due in a given case requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures currently used, and the probable value, if any, of additional or substitute safeguards; and (3) the government's interest, including the administrative and fiscal burdens that additional safeguards would entail.

Here, there is no dispute that individuals have a property interest in the animals they own. There is also no dispute that the ordinance provides some process prior to deprivation of the animal. The legal question is whether the ordinance provides ***enough*** process to comply with the Fourteenth Amendment. It does not. Section 91.101 contains an unprecedented and, frankly, bizarre process for the deprivation of an animal whose owner has allegedly violated the ordinance. The oddity of Section 91.101 is that it requires the "forfeiture" of property -- the animal -- upon only a finding of probable cause and without regard to any final determination of guilt. Any such final determination would be meaningless because it could not result in the owner regaining the animal.

This procedure violates procedural due process based chiefly on the second *Mathews* factor. The risk of an erroneous deprivation of property under Section 91.101 is very significant because the deprivation occurs ***without any final determination as to guilt***. Obviously, the risk of an erroneous deprivation will be high any time the deprivation occurs prior to any actual finding and based on nothing more than a judge's preliminary conclusion that probable cause exists for the case to proceed.

To the Plaintiffs' knowledge, this provision has no precedent in the law. Plaintiffs know of no law that effects a final deprivation of life, liberty or property upon only a finding of probable cause, thus rendering all further proceedings – including the final determination – meaningless. Frankly, it is likely that this provision, like some other provisions of the ordinance, resulted from poor drafting. Poor drafting is no excuse for imposing unconstitutional laws on the people of Louisville. The Court should void Section 91.101 as unconstitutional.

E. Section 91.001 -- Definition of "Nuisance" Is Unconstitutionally Vague.

Section 91.001 of the Ordinance defines "nuisance," in pertinent part, as follows.

> Any act of an animal or its owner that irritates, perturbs or damages rights and privileges common to the public or enjoyment of private property or indirectly injures or threatens the safety of a member of the general public.

The ordinance prohibit the commission of a nuisance. (Section 91.004). Commission of a "Nuisance" is punishable as a Class B misdemeanor with up to ninety days in jail. (Section 91.999).

The definition of "Nuisance" is unconstitutionally vague. The definition offends both prongs of the vagueness analysis. First, "it fails to define the offense with sufficient definiteness that ordinary people can understand the prohibited conduct." *Caseer*, 399 F.3d at 835. There is no way to know whether one's conduct or the conduct of one's animal will "irritate" or "perturb" someone else. Under this definition, "Nuisance" is in the eye of the beholder. Anyone who is irritated or perturbed by the actions of any person or any person's animal has become, under the ordinance, the victim of a "Nuisance." It is important to note that the nuisance provision applies not just to conduct of animals but to the conduct of animal ***owners*** as well. Moreover, under the wording of the ordinance, the conduct of the owner does not even have to relate to the conduct of the animal. This results in an impossibly vague and overbroad law which makes anyone who happens to own an

animal and who happens to irritate or perturb another human being for any reason subject to criminal liability. The mind reels at the potential consequences of this vague law.

Second, the definition "fails to establish standards to permit enforcement of the law in a non-arbitrary, non-discriminatory manner." *Id.* In this regard, Dr. Meloche has testified that he will enforce the "Nuisance" provision in an arbitrary, selective manner.

> Q. -- what does irritate mean?
>
> A. Irritation, that mean that person is irritating by something.
>
> Q. Okay. what does perturb mean?
>
> A. That someone is perturbing by something.
>
> Q. What does perturb mean to you?
>
> A. That your perturbed, that's the range you don't like it. It's annoying.
>
> …
>
> Q. Okay. Are there times when people are irritated that you do not find --
>
> A. Yes.
>
> Q. -- unreasonable cause?
>
> A. Uh-huh.
>
> Q. Are there times when people are perturbed that you don't find reasonable cause?
>
> A. Correct.

(Depo. Meloche, 8/3/07, at 120.) In other words, sometimes a nuisance is a nuisance, and sometimes it is not.

The Supreme Court has long disapproved of similarly vague language. In *Coates v. Cincinnati*, 402 U.S. 611, 611-612 (1971), a Cincinnati ordinance made it a criminal offense for

"three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." The Court invalidated the ordinance on vagueness grounds because of this meaningless standard.

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning.
>
> It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.

Id. at 614.

The definition of "Nuisance" at issue here raises the identical concerns identified by the Court in *Coates*. "[M]en of common intelligence must necessarily guess" at the meaning of "irritates" or "perturbs." *Id*. Therefore, the definition of "Nuisance" is unconstitutionally vague.[13]

F. Section 91.001 -- Definition of "Attack" Is Unconstitutionally Vague.

Section 91.001 defines an attack as something causing "a scratch, abrasion, or bruising, or on a domestic pet or livestock that causes death or injury." A so-called "attack" triggers significant requirements for a dog owner. Under Section 91.150, a dog that commits an attack may be seized and declared dangerous or potentially dangerous, thus triggering the onerous requirements that accompany those labels. Owners who fail to comply with the requirements for owning a dangerous

[13] Moreover, as discussed in Section II, *infra*, the "Nuisance" provision illegally conflicts with Kentucky statutes.

or potentially dangerous dog may then be subject to a Class A misdemeanor with up to twelve months in jail. (Section 91.999).

The definition of "attack" is unconstitutional. First, it is unconstitutionally vague because it sweeps into its limitless reach all dogs that would cause "injury" to a "domestic pet," defined elsewhere in Section 91.001 as "domestic dog, cat, rabbit, mouse, rat, reptile, guinea pig, chinchilla, hamster, gerbil, ferret." As discussed in Section "I.A.," *supra*, the use of the term "domestic pet" results in a definition that effectively includes every dog in Louisville. Any dog would subject any of the enumerated "domestic pets" to "injury" if provided with the opportunity to do so. The definition fails to provide any further standards to guide animal control officers in selecting which dogs in Louisville to accuse of a so-called "attack." Instead, it requires animal control officers to make that determination on an "ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-109.

The definition is also unconstitutionally vague because it applies to any dog that would subject a person to a "scratch, abrasion, or bruising." Again, this definition effectively includes all dogs in Louisville. Under this definition, a person could be "attacked" regardless of the situation or manner in which the "scratch, abrasion or bruising" was received. A scratch, abrasion, or bruising could result from any number of harmless situations involving a dog to which the ordinance cannot possibly be intended to apply. With no measurable standards, animal control officers are left to guess when a scratch constitutes an "attack," and when it does not.

In sum, the definition of "attack" wholly fails to incorporate the "high level of definiteness" required of laws that impose criminal punishment. *United States v. Blaszak*, 349 F.3d 881, 887 (6th Cir. 2003) (citing *Belle Maer*, 170 F.3d at 557). Therefore, it is unconstitutionally vague.

G. Section 91.001 -- Definition of Restraint Is Unconstitutionally Vague.

The ordinance requires that "all animals shall be kept under restraint at all times." (Section 91.002.) Failure to comply with this provision is punishable as a Class B misdemeanor with up to ninety days in jail. (Section 91.999.) The ordinance contains a lengthy definition of what constitutes "restraint." Of relevance here, restraint "for dogs and puppies" means, among other things, "under the control of a responsible person physically able to control the dog" when off the owner's property.

Plaintiffs had challenged this definition as illegally infringing on the rights owners of service dogs, which would constitute a violation of the Americans with Disabilities Act. (Complaint, ¶ 39.) The City has conceded this point and acknowledged that it has no power to discriminate against owners of assistance dogs or in any way impose regulations that create a conflict with such federal laws. (Depo. Meloche, 8/3/07, at 126-130.) Thus, the Plaintiffs have prevailed on this point.

Additionally, this particular provision is unconstitutionally vague. The concept "physically able to control the dog" provides no meaningful guidance for citizens trying to comply with the ordinance or animal control officers trying to enforce the ordinance. It is pure guesswork to ascertain under what circumstances a dog of a given size and disposition would be under "control" of a given human. Dr. Meloche implicitly acknowledged this in his deposition. His interpretation of this phrase reveals that his enforcement of the restraint requirement relies on pure guesswork that he euphemistically refers to as "common sense." (Depo. Meloche, at 125-126.) He has prescribed no regulations guiding animal control officers on how to enforce this provision. (*Id.*) The provision simply invites enforcement "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-109. As such, it is unconstitutionally vague.

H. Section 91.070 – Impoundment Provision Is Unconstitutionally Vague.

Section 91.070 provides, in pertinent part, as follows:

> (C) Any dog which has been declared to be a dangerous dog, or a potentially dangerous dog by the Director and whose owner has not complied with all of the requirements of this chapter for owning or maintaining such a dog, shall be impounded.
>
> (D) Any animal deliberately used to facilitate an act that is illegal under federal, state, or metro law shall be impounded.
>
> (E) Any animal impounded under subsections (C) and/or (D) shall not be released, except upon terms and conditions imposed by the Director that are in the interest of public safety and welfare.

These subsections deal largely with the impoundment and release of so-called dangerous or potentially dangerous dogs whose owners have failed to comply with the ordinance's requirements for ownership of such a dog. Of course, as explained in Section "I.A.," *supra*, no dog owner in Louisville can safely assume that his or her dog will not be labeled "dangerous" or "potentially dangerous" under the ordinance, since the definitions of these terms are so vague that they permit the Director to label any dog "dangerous" or "potentially dangerous" at his whim. If the owner of such a dog fails to comply with any of the onerous requirements accompanying ownership of a dangerous or potentially dangerous dog (*see* 91.152), then the dog must be impounded pursuant to Section 91.070(C). Section 91.070(E) provides that the dog shall not be released except under whatever conditions the director decides to impose.

Section 91 .070(E) is unconstitutionally vague. It grants unfettered discretion to the Director to release or not release so-called "dangerous" or "potentially dangerous" dogs on conditions "in the interest of public safety and welfare." The ordinance contains no further delineation as to what constitutes "the interest of public safety and welfare." Dr. Meloche has not issued any regulations regarding the interpretation or enforcement of this provision. (Depo. Meloche, 9/17/07 at 70.)

This provision grants to the Director absolute discretion to impose conditions which, on any given day, he believes further the public safety and welfare. He may find it in the public interest to impose a new type of fee or require so-called dangerous dogs to wear a scarlet "D." In enacting a provision such as this, the Metro Council has essentially ceded its legislative power to Dr. Meloche. The provision amounts to "an unrestricted delegation of power which leaves the definition of its terms to [the Director]." *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608-09 (6th Cir. 2005). As such, it is unconstitutionally vague.

I. Section 91.027(D) -- Prohibiting the Sale of Animals Constitutes a Deprivation of Substantive Due Process.

Section 91 .027(D) of the ordinance provides as follows:

> (D) ***It shall be unlawful for any person to sell, offer to sell, or to advertise the sale of an animal***, or for any person to purchase a dog which has been classified by the Director as a dangerous dog or a potentially dangerous dog without the written permission of the Director.

(Emphasis added). Any violation of this provision is punishable as a class B misdemeanor with up to ninety days in jail. (Section 91 .999).

This provision constitutes a deprivation of substantive due process in violation of the Fourteenth Amendment. The law is not rationally related to any legitimate government purpose. *Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998). Section 91.027(D) lacks even the faintest indicia of rational legislative thought. It is truly nonsensical. By its plain terms, the provision renders it unlawful for any person to sell an animal. Thus, as written, the provision completely eradicates the free trade of animals in Louisville. This is not only irrational on its face, but also because it directly conflicts with the other provisions of 91.027 regulating the sale of animals (all of which obviously imply that the sale of animals is, in fact, legal in Louisville.)

This provision may have simply resulted from poor draftsmanship. Poor draftsmanship, however, is not a defense to an unconstitutional law. As such, Section 91.027(D) is unconstitutional.

J. Section 91.091 -- Tethering Standards Are Unconstitutionally Vague.

Section 91 .091 provides, in pertinent part, as follows:

> (A) Minimum standards for restraint of animals shall be as follows:
>
> (1) It is prohibited to exclusively restrain a dog or puppy by a fixed-point chain or tether:
>
> (a) between the hours of 8:00 a.m. and 6:00 p.m.;
>
> (b) for a period of time exceeding one hour in any eight-hour period.
>
> (2) Any dog may be restrained by a chain or tether provided that it is at least ten feet in length and attached to a pulley or trolley mounted on a cable which is also at least ten feet in length and mounted no more than seven feet above ground level.

Any violation of this provision is punishable as a Class A misdemeanor with up to 12 months in jail. (Section 91.999).

Section 91.091 is unconstitutionally vague. It offends both prongs of the vagueness analysis. Primarily, the danger of 91.091(A) lies in its utter failure to enable the public to understand or predict how to comply with the law. On one hand, subsection (A)(1) appears to prohibit restraining a dog or puppy by a "fixed point chain or tether" except within certain narrow time constraints. On the other hand, subsection (A)(2) appears to permit restraining a dog by using the chain or tether system described therein, presumably without any time constraints.

The interplay of these two sections is utterly unclear. It is impossible to discern whether subsection (A)(2) is subject to the time constraints imposed by subsection (A)(1). It is also impossible to discern whether there is any difference between the so-called “fixed point tether”

referred to in subsection (A)(1) and the "tether" referred to in subsection (A)(2). Moreover, for someone trying to comply with subsection (A)(1), it is unclear how the two independent time constraints set forth therein relate to each other. Subsections (A)(1)(a) and (A)(1)(b) are not stated in the conjunctive or the disjunctive. They are simply two independent time constraints with an unclear relationship.

Neither citizens nor animal control officers can understand how Section 91.091 is designed to be enforced. As such, the provision is unconstitutionally vague. *Caseer*, 399 F.3d at 835.

K. Section 91.024(B) -- Revocation of License Provision Is Unconstitutionally Vague.

Section 91.024(B) provides, in pertinent part, as follows:

> (1) The Director may revoke or deny any license issued hereunder.
>
> (2) Grounds for such revocation or denial include, but are not limited to, conviction pursuant to any violation of this chapter or conviction pursuant to any related state or federal law.

This provision is unconstitutionally vague because it contains an express grant of unfettered discretion to Dr. Meloche to revoke one's animal license on whatever grounds he chooses. By its plain terms, Section 91.024(B) provides that the Director's grounds for revocation are "not limited." There could hardly be a clearer example of a legislature granting unlimited discretion to law enforcement. The law is unconstitutionally vague because it "allows [the Director] to pursue [his] personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983).

Section 91.024(B) provides one example of a basis for revocation -- the conviction of the owner pursuant to any violation of the ordinance or "related" law. This example is itself unconstitutionally vague. Dr. Meloche has testified that he does not know how or when a law should be deemed "related" to the ordinance. (Depo. Meloche, 9/17/07, at 27-29.)

L. Sections 91.001 (Definition of "Cruelty"), 91.090, 91.120, 91.121, 91.122 Contain Terms that Are Unconstitutionally Vague.

Numerous provisions of the ordinance attempt to hold animal owners and kennel operators to certain standards of care for the general well-being of animals. While admirable in theory, in practice these provisions fall short of minimal standards for constitutionality. The provisions contain vague, meaningless terminology that encourages arbitrary and discriminatory enforcement by MAS and Dr. Meloche.

Section 91.001 defines "Cruelty" as, among other things, "failing to provide adequate food and water," "failing to detect the need for or withholding veterinary care," "creating or allowing unhealthful living conditions," "striking" an animal, "infliction of suffering" through the use of "objects," and failing to provide "health related grooming." Section 91.090, entitled "Provision of Necessities," requires that every owner provide his or her animal with, among other things, "good wholesome food and water, proper shelter and protection from the weather, veterinary care when needed to prevent suffering, and humane care and treatment." Kennels must abide by similar requirements, including maintaining temperatures at a "comfortable level," providing "wholesome, palatable" food, and "veterinary care . . . to maintain good health." (Sections 91.120, 91.121, 91.122.) Animal owners who commit cruelty or fail to provide necessities may be convicted of a Class A misdemeanor and sentenced to jail for twelve months. (Section 91.999.)

All of these provisions are unconstitutionally vague. With regard to these provisions, it is particularly important to remember that a law imposing criminal sanctions will not withstand constitutional scrutiny unless it "incorporates a high level of definiteness." *United States v. Blaszak*, 349 F.3d 881, 887 (6th Cir. 2003) (citing *Belle Maer*, 170 F.3d at 557). The foregoing provisions incorporate ***no level of definiteness***, much less a high level. Absent enforceable standards, the

provisions confer unfettered discretion on animal control officers to make arbitrary choices about which citizens have provided "humane" care and which have not.

It is truly frightening to think that whether or not a pet owner will be subjected to a criminal prosecution depends on whether Dr. Meloche believes the pet owner provided "wholesome" food. Dr. Meloche has not prescribed any rules or regulations on how to apply these provisions. (Depo. Meloche at 97.) As he says, "it's a judgment call." (*Id.* at 91.) This last comment highlights the precise danger of a vague law. A vague law illegally vests the enforcement officer with the power to legislate on a case-by-case basis. As the Supreme Court has recognized time and again, this is dangerous and unconstitutional.

II. The Court Should Void Provisions of the Ordinance that Conflict with Kentucky Law.

The ordinance also conflicts with Kentucky statutes in certain respects. Certain provisions of the ordinance have the effect of regulating the practice of veterinary medicine, a field which has long been subject to a comprehensive scheme of regulation set forth in KRS Chapter 321. Certain other provisions regarding "cruelty" and "nuisance" also conflict with Kentucky law. These provisions are illegal and should be voided.

A. The Ordinance illegally attempts to regulate veterinary medicine.

KRS 81.082 authorizes a city to "exercise any power and perform any function within its boundaries . . . that is in furtherance of a public purpose of the city and not in conflict with a positional provision or statute." The statute further defines when a city law is deemed “in conflict” with state law: "A power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a ***comprehensive scheme of legislation on the same general subject*** embodied in the Kentucky Revised Statutes . . . ." *Id.* (emphasis added).

Applying this statute, the Kentucky Supreme Court has invalidated another Louisville ordinance imposing certain regulations which, although not expressly prohibited by state law, constituted an impermissible attempt to regulate in an area where the state had imposed a comprehensive scheme of legislation – alcohol beverage control. The Court struck down an attempt by the Jefferson County board of alcoholic beverage control to impose certain civil fines on certain individuals when the comprehensive scheme of legislation for alcohol beverage control at KRS Chapters 241 through 244 provided for no such fines. *Ky. Licensed Beverage Ass'n v. Louisville-Jefferson Cty. Metro Govt*., 127 S.W.3d 647 (Ky. 2004); *see also Pierce v. Com*., 777 S.W.2d 926 (Ky. 1989). The Court reached its holding despite the fact that the General Assembly had provided ***some*** express authority on local governments to regulate in the area of alcohol beverage control at KRS 67.083(3).

Here, Kentucky law contains a comprehensive scheme for the regulation of veterinary medicine at KRS Chapter 321. That chapter was specifically enacted to regulate "the practice of veterinary medicine," "a privilege which is granted by legislative authority in the interest of pubic health, safety, and welfare." KRS 321.175. The General Assembly asserted its authority over the practice of veterinary medicine when it mandated that, "[n]o person shall practice veterinary medicine . . . unless the person at the time holds a certificate of license to practice veterinary medicine issues and validly existing ***under the laws of this Commonwealth***." KRS 321.190 (emphasis added). The General Assembly further established an administrative agency, the Kentucky Board of Veterinary Examiners, for the purpose of administering and enforcing the provisions of KRS Chapter 321. KRS 321.235.

It is very noteworthy that, unlike with respect to alcohol beverage control and many other areas, the General Assembly has not provided ***any*** express authority to local governments to regulate

in the area of veterinary medicine. KRS 67.083(3). In fact, the list of enumerated areas of local regulatory authority is notably devoid of any authority to regulate professionals generally. It would certainly raise an uproar if local governments attempted to impose new regulations on attorneys or physicians. There is no reason to treat veterinarians differently.

Thus, pursuant to KRS Chapter 321, the practice of veterinary medicine is subject to a "comprehensive scheme of legislation" within the meaning of KRS 82.082. As such, any attempts to regulate the practice of veterinary medicine at the local level are illegal.

i. Section 91.025(B) illegally imposes vaccination reporting requirements on veterinarians.

Section 91.025(B) of the Ordinance has been slightly altered to allow Dr. Meloche to know the identities of people whose dogs are vaccinated for rabies. Previously, that section simply required that rabies certificates be sent to the Board of Health. Now, however, they are sent to the Board's "designee," Dr. Meloche. (Depo. Meloche at 36.) The purpose of this has nothing to do with public health, but with tax-collecting.[14] Dr. Meloche uses the vaccination information to check whether the owner of the vaccinated animal has also paid the requisite license fees. (*Id*. at 37-38.)

The City has absolutely no authority to impose this new reporting requirement on veterinarians. Veterinarians are regulated by the comprehensive scheme of legislation in KRS Chapter 321. In the face of this comprehensive scheme, any regulation imposed upon veterinarians is illegal. Therefore, Section 91.025(B) should be voided.

ii. Section 91.075 illegally imposes bite reporting requirements on veterinarians.

Section 91.075 is a new provision that illegally imposes bite reporting requirements on veterinarians and also attempts to re-write and expand KRS 258.065 without any authority to do so.

[14] Animals vaccinated for rabies pose no health concern because ***they have been vaccinated***. If the City was really interested in either animal or human health rather than increasing tax dollars then they should want to know the names of all the animals and their owners that have not been vaccinated for rabies and may serve as a health risk.

KRS 258.065 mandates reporting by physicians of animal bites. Section 91.075 extends this to veterinarians and others. Because KRS Chapter 321 is a comprehensive scheme of legislation pertaining to the regulation of veterinary medicine, Section 91.075 is illegal to the extent it imposes new regulation on veterinarians.

Section 91.075 is also illegal because it conflicts with KRS 258.065. The General Assembly has spoken in the area of animal bite reporting. The City has no authority change state law in this area. The City is attempting to unilaterally rewrite KRS 258.065. This effort constitutes an illegal conflict with state law prohibited by KRS 81.082.

iii. Section 91.020(F) illegally imposes notification requirements on veterinarians.

Section 91.020(F) requires veterinarians to notify clients of the ordinance's licensing and permit requirements. For the same reasons discussed above, this Section is illegal. The City cannot impose regulations on the practice of veterinary medicine when the General Assembly has enacted a comprehensive scheme of regulation at KRS Chapter 321.

B. The Ordinance illegally attempts to regulate cruelty to animals.

The General Assembly has prescribed a comprehensive scheme of legislation defining, addressing, and criminalizing cruelty to animals. *See* KRS 525.125, 525.130, 525.135. The existence of this comprehensive scheme of legislation forbids the attempted regulation of "cruelty" at the local level. The City's attempt to regulate animal cruelty at Sections 91.001 and 91.094 conflicts with Kentucky statutory law and is illegal.

C. The Ordinance illegally attempts to regulate nuisances.

The General Assembly has explicitly acknowledged that local governments may regulate nuisances by municipal ordinance. KRS 82.710. However, the definition of Nuisance contained in Section 91.001 conflicts with the Kentucky statute. KRS 82.710 requires that a local nuisance

ordinance must, among other things, "(1) Establish the acts, actions, behavior, or conditions which constitute violations; (2) Establish reasonable standards and procedures for the enforcement of the nuisance code . . . ." The ordinance wholly fails to meet these requirements. As discussed in Section I.D., *supra*, the nuisance provisions are so vague they allow animal control officers to deem ***any*** act a nuisance. In this regard the ordinance fails to either set forth the specific acts constituting a nuisance or establish any reasonable standards for abating nuisances.

III. The Ordinance Should Be Voided in Its Entirety.

Upon concluding that a portion of a law is invalid, a court must then decide whether to sever the invalid portion of the law or whether to void the law in its entirety. "Severability of a local ordinance is a question of state law . . . ." *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456 (6th Cir. 2007) (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988)). Kentucky has enacted a severability statute that has been interpreted as applying to both statutes and local ordinances. KRS 446.090. The statute provides, in pertinent part, as follows.

> . . . if any part of the statute be held unconstitutional the remaining parts shall remain in force, unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the [legislature] would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the [legislature].

KRS 446.090.

In these circumstances, the Court should void the ordinance at issue in its entirety. The Plaintiffs have established that a great portion of the ordinance is unconstitutional. Many of the unconstitutional provisions affect the ordinance in a systemic way. Removal of provisions relating to dangerous dogs, impoundment, nuisances, restraint, cruelty, confiscation of animals, and searches of premises, among others, leaves the ordinance in fragments that cannot be enforced in any

meaningful or consistent manner. The remaining fragments of the ordinance are "incomplete and incapable of being executed in accordance with the intent of the [legislature]." *Id*. As such, the Court should void the ordinance in its entirety.

CONCLUSION

The people of Louisville are currently subject to a vague and irrational animal ordinance that represents a complete legislative failure. To make matters worse, it is clear that Dr. Meloche, who is not even qualified to hold office, thinks he should have unfettered discretion to enforce this faulty law. All of this is unconstitutional.

For all of the foregoing reasons, and for any other reasons the Court deems just and proper, the Court should void the ordinance styled Ordinance No. 290, Series 2007, "An Ordinance Amending Chapter 91 of the Louisville/Jefferson County Metro Government Code of Ordinances ('Code') Pertaining to Unaltered Dogs, the Waiver of Metro Animal Service Fees Due to Financial Hardship, and the Quarantine of Animals (Amended By Substitution)," in its entirety.

Respectfully submitted,

s/ Jon L. Fleischaker
Jon L. Fleischaker
Michael C. Merrick
DINSMORE & SHOHL LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
(502) 540-2300 (Telephone)
(502) 585-2207 (Facsimile)

and

s/ B. Ballard Rogers (w/ permission)
B. Ballard Rogers
MIDDLETON REUTLINGER
Brown & Williamson Tower

401 S. Fourth Ave, Ste. 2500
Louisville, Kentucky 40202

and

s/ John T. Fowler, III (w/ permission)
John T. Fowler, III
Fowler Law Firm
121 S. Seventh St., Suite 3
Louisville, Kentucky 40202
Telephone: (502) 582-1347
Facsimile: (502) 582-1349

COUNSEL FOR THE PLAINTIFFS