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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CIVIL DIVISION

STEPHEN SCHREINER, MARY SCHREINER, Plaintiffs,	)	
V.	)	Case No.: CV-2013-903036.00
CITY OF CLAY, Defendant.	)	

ORDER

This matter was called for trial on the issues on September 2, 2014. The Court, after receiving the sworn testimony of witnesses and the introduction into evidence of certain documents during the course of an ore tenus proceeding at which the Court had the opportunity to hear and view all of the evidence and to make credibility determinations regarding the witnesses who came before it makes the following findings of fact and law upon which the judgment entered herein is based.

Pleading History

Plaintiffs commenced this action on July 30, 2013, seeking a preliminary injunction and declaratory relief with regard to the adoption by Defendant City of Clay of Ordinance No. 2013-15. Therein Plaintiffs allege that they adopted a dog of the pit bull breed from the Birmingham Jefferson County Animal Control on April 27, 2013. Plaintiffs further allege that subsequently, on June 3, 2013, Defendant City of Clay adopted Ordinance No. 2013-15 styled: "AN ORDINANCE PROHIBITING OR REGULATING THE OWNING OR KEEPING OF DANGEROUS ANIMALS INCLUDING PIT BULL DOGS AND PROVIDING FOR REGISTRATION FOR CERTAIN DANGEROUS ANIMALS, AND PROVIDING PENALTIES FOR VIOLATIONS THEREOF."

Plaintiff alleges the following basis for declaring the said Ordinance unconstitutional in the following Counts:

- Count I – That the Ordinance is facially vague and in violation of the Fourteenth Amendment to the United States Constitution and corresponding provisions of the Alabama Constitution;
- Count II – That the Ordinance is in violation of the due process provisions of the Fourteenth Amendment to the United States Constitution;
- Count III – That the Ordinance deprives Plaintiffs of their property or liberty interest prior to any fair and impartial judicial determination owned by them is subject to the prohibitions and restrictions contained in the said Ordinance in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution;
- Count IV – That the said Ordinance constitutes an ex post facto criminal statute, making unlawful and providing criminal sanctions to existing and otherwise lawful conduct;
- Count V – That the said Ordinance, to the extent that it attempts to regulate conduct within the sanctity and solicitude of Plaintiff's private residence is allegedly violates the right of privacy of Plaintiffs in violation of the Fourteenth Amendment to the United States Constitution;
- Count VI – That the said Ordinance is unconstitutional in that it establishes the guilt and punishment of one charged with a violation of its provisions without a charge, trial or right to counsel in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution; and,
- Count VII – That the said Ordinance and its provisions violate substantive due process of law in that the alleged blanket prohibition of the breed specific dog has no rational relation to the articulated government purpose of exercising its police powers to further public safety.

On July 31, 2013, Defendant City of Clay was served with summons and complaint.

On August 2, 2013, the Attorney General of the State of Alabama was issued summons and complaint by certified mail.

On August 22, 2013, the Attorney General for the State of Alabama accepted service of the summons and complaint, as is required by *Ala. Code §6-6-227 (1975)*[1] and waived the right to be heard in this matter.

On August 30, 2013, Defendant City of Clay filed its answer denying the allegations of Plaintiff's complaint.

On May 28, 2014, the Court set this matter for trial on September 2, 2014.

Evidence before the Court

The Court first received the sworn testimony of Plaintiff Mary Schreiner. She testified that she is a 25 year resident of Jefferson County, a resident of the City of Clay, and is the owner of two dogs, namely Emma a Pit Bull, and Sophie a Doberman. Ms. Schreiner testified that she adopted Emma from the Birmingham Jefferson County Animal Control and that her ownership of the said dog is regulated and subject to the said ordinance adopted by the City of Clay, Ordinance No. 2013-15.

The said ordinance, she testified, requires her to register the said Pit Bull dog with the City of Clay and that it is her understanding of the operation of the said ordinance that if she fails to register her dog and comply with the restrictions of ownership specified in the said ordinance, she can be made subject to criminal fines and penalties without benefit of a judicial process.

The Court received into evidence various photographs of the said Pit Bull communing with members of Plaintiff's family and with Plaintiff's other dog, Sophie, the Doberman.[2]

Ms. Schreiner testified that she brought this cause of action because she had adopted the said Pit Bull, but that under the said Ordinance, adopted after her acquisition of the said animal, the restrictions contained therein constituted an undue burden on her ownership rights and placed her, as a dog owner, in the position of either

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[1] **Ala. Code § 6-6-227. Persons to be made parties; rights of persons not parties.**

All persons shall be made parties who have, or claim, any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance, or franchise, such municipality shall be made a party and shall be entitled to be heard; and if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.

[2] Plaintiffs' Exhibit #2

enjoying her dog or violating the overly restrictive city ordinance. Ms. Schreiner testified that her Pit Bull, Emma, is not dangerous, but is playful and plays with her grandchildren. She testified that the said Pit Bull has been spayed, so that she cannot bear offspring, but that if she could, then the said Ordinance would require that the pups born to her said Pit Bull would be separated from their mother and destroyed.

Ms. Schreiner testified that she does not object to the City of Clay regulating dogs within its jurisdiction with leash laws, but that the subject ordinance imposes certain financial burdens on her, as the owner of a Pit Bull in terms of certain fencing requirements and insurance requirements to which owners of other dogs are not so subject.

Ms. Schreiner testified that the petition which was circulated and submitted to the Defendant City of Clay to repeal Ordinance 2013-15 was circulated on the internet and was signed by persons from many different places other than the City of Clay, Alabama.

The Court then received the sworn testimony of Mr. Jeff Hardwick of Vestavia Hills, Alabama. He testified that he is the owner of Pawms Pet Resort which is a firm that boards pets, serving essentially the same function as a day care for working people with small children as opposed to pet animals.

Mr. Hardwick testified that he has 30 – 40 clients who board pit bull bred animals at his facility. Of the approximate 150 dogs that he boards daily, approximately 5 such dogs are Pit Bull bred.

Mr. Hardwick testified that he takes precautions with all dogs as he is responsible to the owners for the safety of their pets while in his custody. He testified that he could identify the breed of a dog by its appearance. With a mixed breed dog, Mr. Hardwick testified that by appearance he could determine the breeds that were mixed, but that he could not determine with any accuracy the predominant breed of a mixed breed dog.

Mr. Hardwick testified that the behavior of a dog is the product of the manner in which the dog was raised rather than genetically predetermined for a particular breed. He testified that he does not encounter many overly aggressive dogs that are owned as pets.

Mr. Hardwick testified that he boards Plaintiffs' pit bull, Emma, and that she is a nice domesticated dog.

Mr. Hardwick was asked if he could define the term "break stick"[3], and Mr. Hardwick testified that he was not familiar with the term. He testified that genetics play little to no part in whether a dog will be a vicious dog or not.

The Court then received the sworn testimony of Ms. Marli Prather. Ms. Prather testified that she has a background in biology and is a certified dog trainer, currently employed at the Pawms Pet Resort as a receptionist and dog trainer. Ms. Prather testified that she trains dogs to obey verbal commands of their owners and that she has trained over 400 dogs of various breeds. She testified that she has trained pit bull terriers. Ms. Prather testified that smaller dogs usually do not bite, but that they bark when feel threatened and display, what she characterized as "little man syndrome".

Ms. Prather testified that it has been her experience in training dogs that the animals accept training as they need rules and discipline. She testified that dogs do not wish to be "alpha" animals, but rather they like to mind their owners and so they are receptive to discipline.

Ms. Prather testified that she has trained approximately 10 pit bull terriers. She testified that the manner in which a dog is raised is determinative of the dog's conduct, that is, the dog is product of its environment, rather than of genetic predisposition. Ms. Prather also testified that she can determine the breed of a dog by its physical appearance. She testified that if a dog has never been provoked into aggression, then it is difficult to predict how the animal will respond to provocation.

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[3] "**What Is a Break Stick?**
A break stick is a device inserted into the mouth of a pit bull (behind the molars) to facilitate the release of its grip on another dog.
Remember: pit bulls do not have a special mechanism or enzyme that allows them to "lock" their jaw, nor do they possess a higher than average "bite pressure." They simply have the determination of a terrier.
Not all pit bulls are aggressive toward other dogs. But because the breed has a somewhat higher tendency for dog aggression, break sticks are useful tools to have in a multi-dog household. Please read the following guidelines before attempting to break up a fight using a break stick.
Why Should Responsible Pit Bull Owners Have a Break Stick?Because canines are pack animals, fights are possible in any multi-dog household, no matter what breed of dog you own. A responsible owner should take measures to prevent such fights, but he or she should also be prepared for the worst. The goal of any owner should be to break up a fight quickly and efficiently. The majority of breeds will snap erratically at their opponent, biting and releasing repeatedly. As terriers, pit bulls will usually bite and hold. **Contrary to popular myth, this is not some kind of special pit bull behavior; it is merely terrier behavior.** As its name suggests, a break stick is designed to break this determined terrier hold. This is the safest, easiest, and most effective way to stop a fight. (emphasis original)" **Pit Bull Rescue Central** http://www.pbrc.net/breaksticks.html

Ms. Prather testified that she knows Plaintiffs' pit bull, Emma, and that it is a playful animal and a good dog.

Ms. Prather testified that she will not accept an aggressive dog for training. She testified that she is a trainer not a behaviorist and for that reason will not attempt to change the behavior of an aggressive animal.

The Court then received the sworn testimony of Mr. Ronnie Dixon. He testified that he is the City Manager for the City of Clay, Alabama and has held that position since November 2012. Before becoming the City Manager, Mr. Dixon testified that he had been primarily engaged in private business for the thirty years preceding his service in city government.

Mr. Dixon testified that he authored the June 3, 2013 ordinance, Ordinance No. 2013-15, the constitutionality of which is the subject of the present litigation. He testified that prior to the adoption of the subject ordinance, the City of Clay did not have any vicious dog ordinance, and that since the adoption of Ordinance No. 2013-15, Defendant City of Clay adopted a leash law in 2014.

Mr. Dixon testified that he was prompted to initiate action on a vicious dog ordinance in response to an item appearing in local media regarding dangerous breeds of dogs.

Mr. Dixon testified that the said ordinance banned ownership of certain dogs identified in Section 1 of the said Ordinance and regulated ownership of the said dogs for those residents who owned a dog covered by the ordinance prior to its adoption.

Section 2(1)(b-c) defined prohibited breeds of dogs.

Section 2(2)(a-j) defines restrictions imposed on owners of the prohibited breeds of dogs, who owned the animals regulated by the said ordinance on or before the date of adoption of the said ordinance. He testified to those provisions as follows:

Subsection (a) requires that a covered dog, in order to go outside must be on a leash not more than 4 feet long and the dog must be muzzled.

Subsection (b) requires that a covered dog must be confined indoors or in a securely enclosed and locked pen with a top and with side fencing that extends at least 2 feet below the surface of the ground.

Subsection (c) provides that with regard to indoor confinement of a covered dog, that the dog may not be kept on a porch or patio and that it may not be kept indoors where the windows are open or where the doors are open and only "obstacle" preventing the covered dog from exiting the indoor confined areas is a window screen or a screen door.

Subsection (d) requires the owner of a covered dog to post his or her property with a prominently placed sign that reads "Beware of Dog".

Subsection (e) requires the owner of a covered dog, at the time of registering his or her covered dog to provide the City Manager with proof of homeowners insurance in the minimum amount of $50,000 per incident for any person who is the victim of attack by its covered dog. The owner of the covered dog may not cancel his or her homeowner's insurance policy with the required provision for dog attack without first giving the City Manager a ten (10) day notice.

Subsection (f) requires the owner of a covered dog to provide two color photographs of the said dog at the time that the said dog is registered with Defendant City.

Subsection (g) provides for reporting requirements for owners of covered dogs to report to the City Manager within ten (10) days of the event, the removal or death of a covered dog; the birth of a pup from a covered dog; and the new address of a covered dog should the owner change addresses.

Subsection (h) provides that the owner of a covered dog may not sell or otherwise transfer ownership of the covered dog except to a non-resident of Defendant City of Clay.

Subsection (i) provides that the offspring of a covered dog must be removed from the Defendant City within six (6) weeks of birth.

Subsection (j) provides as follows:

> "**Irrebuttable presumption**. There shall be an irrebuttable presumption that any dog registered with the city or any of those breeds prohibited by subsection (1) of this section is in fact a dog subject to the requirements of this section."

Mr. Dixon testified that if an owner of a covered dog did not comply with the requirements of the said ordinance, then a Code Enforcement Officer[4] would post a notice on the home advising the owner that he or she is out of compliance and that the owner would have seven (7) days to report to City Hall. The owner should report to the City Manager where, Mr. Dixon testified, "they have a discussion", apparently with regard to the need to comply, though Mr. Dixon did not further specify the nature or object of the referenced discussion.

Mr. Dixon testified that if the owner of a covered dog failed to comply with the said ordinance after the seven day notice posted by the Code Enforcement Officer, then a second notice would be posted by a contract Deputy of the Jefferson County Sheriff's Department advising the owner that failure to comply can result in fines of $200-$500. Mr. Dixon testified that if the owner of a covered dog continued to refuse to comply after posting by the contract Deputy, then the violation would be reported to the appropriate magistrate to commence a prosecution of the violation.

Mr. Dixon testified that the violation would then be tried in the District Court of Jefferson County, Alabama as would any other criminal violation of a city ordinance.

Mr. Dixon testified that he drafted Ordinance No. 2013-15 and in so doing he referenced a similar ordinance from the Cities of Gardendale, Irondale, and Centerpoint, as well as the League of Municipal Governments. He testified that the Irondale ordinance and the League of Municipal Governments model ordinance are not breed specific; that Gardendale has a hybrid ordinance, and that Centerpoint has a breed specific ordinance.

Mr. Dixon testified that he did not know whether there were pit bull attacks in the City of Clay prior to the adoption of the said ordinance or whether there had been any pit bull attacks in the City of Clay prior to the adoption of the said ordinance. Mr. Dixon testified that the adoption of the ordinance was not prompted by a rash of pit bull attacks in the City of Clay, but by the news article that he referenced in his testimony and the fact that the City of Clay did not have an ordinance regulating the ownership of vicious or dangerous dogs.

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[4] Mr. Dixon testified that "Code Enforcement Officers" were Don Isbell and himself"

Mr. Dixon admitted that the text of Ordinance No. 2013-15 did not provide for Code Enforcement Officers or for the 7 day notice to which he testified or the notices to be provided by the contract Sheriff's Deputy, but that such procedural matters are covered in the Acts of Alabama governing all municipalities and the enforcement of municipal ordinances[5].

Mr. Dixon also testified that the Code Enforcement Officers to which he referenced in his testimony are not trained in identifying the breed of any dog or, whether a dog of mixed breed, in which part of its genetic makeup is from a covered dog, is predominantly of the covered breed or not.

Mr. Dixon testified that if a covered dog is registered, as required by Section 3 of Ordinance Nol. 2013-15, but is not properly confined and the owner fails to comply with the notices as he detailed, then a sworn statement or affidavit is presented to the magistrate for issuance of a warrant of arrest based on probable cause and a formal criminal case is prosecuted.

Mr. Dixon testified that the source for the derivation of the various breeds that are considered pit bulls came from a publication of the Insurance Institute website.

In explaining the penalty provisions of the said ordinance Section 4(1) provides, among other things that "failure to comply will result in the revocation of the *license* of such animals resulting in the immediate removal of the animal from the city." Mr. Dixon explained that the term "license" as used in Section 4(1) means the same as "registration" as that term is used in Section 3.[6]

Section 4(2) of the said ordinance provides that upon conviction of a violation of the restrictions specified in the said ordinance, an owner of a covered dog shall be fined not less than $200 and not more than $500 in addition to suffering incarceration for a period not greater than thirty (30) days as well as other consequential penalties specified in the Section.

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[5] Mr. Dixon did not provide a reference or citation to an Act of Alabama that provided for a 7 day notice.

[6] "**Section 3. Registration of Pit Bulls**
Owners . . . of dogs prohibited by this Ordinance shall have sixty (60) days from the adoption of this Ordinance to register the animal at City Hall. The registration shall last the life of the dog and will expire upon death, sale, or removal of the pit bull from the premises. Failure to register will result in a violation of this Ordinance and be subject to the penalties set forth in Section 4."

Mr. Dixon testified that prior to the enactment of the said ordinance, state law[7] would apply to regulate dogs that ran loose without the supervision of its owner.

The Court then received the sworn testimony of Ms. Kimberly Vaughn. Ms. Vaughn is a resident of Springville, St. Clair County, Alabama and offered anecdotal testimony of a pit bull attack in which her son was injured as the victim of the attack in September of 2011. Various photographs of Ms. Vaughn's son's injuries were introduced into evidence.

The Court then received the sworn testimony of Mr. Jeremy Harvard. Mr. Harvard testified that he is a resident of Riverside, St. Clair County, Alabama and offered anecdotal testimony regarding his son John Harvard, who suffered fatal injuries in an unprovoked attack by a pit bull near his home. The attack occurred on April 6, 2014.

The Court also received the sworn testimony of Mr. Tony Stanfield of Pell City, St. Clair County, Alabama. Mr. Stanfield testified that on November 2, 2013, he was the victim of an unprovoked attack by a pit bull dog that required 47 stitches and 18 staples to repair in the calves of both of his legs.

Finally, the Court received the sworn testimony of Mr. Tom Henderson. Mr. Henderson testified that he is currently serving in his third term as the Mayor of Centerpoint, Alabama. Mr. Henderson testified that he is the first and thus far the only mayor that the City of Centerpoint has ever had.

Mayor Henderson testified that Centerpoint adopted in March of 2008, essentially the same vicious dog ordinance as Defendant City of Clay's Ordinance No. 2013-15. Mayor Henderson testified that he did not draft the Centerpoint Ordinance

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[7] *E.g.* **Ala. Code § 3-1-5. Permitting dogs to run at large; applicability of provisions of section in counties and certain cities or towns.**
(a) Every person owning or having in charge any dog or dogs shall at all times confine such dog or dogs to the limits of his own premises or the premises on which such dog or dogs is or are regularly kept. Nothing in this section shall prevent the owner of any dog or dogs or other person or persons having such dog or dogs in his or their charge from allowing such dog or dogs to accompany such owner or other person or persons elsewhere than on the premises on which such dog or dogs is or are regularly kept. Any person violating this section shall be guilty of a misdemeanor and shall be fined not less than $2.00 nor more than $50.00.
(b) This section shall not apply to the running at large of any dog or dogs within the corporate limits of any city or town in this state that requires a license tag to be kept on dogs nor shall this section apply in any county in this state until the same has been adopted by the county commission of such county.

and so it is not familiar with its etiology. However, he did testify that upon Centerpoint becoming an incorporated municipality, there existed a public safety issue within the city limits of Centerpoint, regarding breeders of pit bulls for the purpose of engaging them in pit bull fights, which violated the state statute against such activity.[8]

In response to this public safety issue, Mayor Henderson testified that the City of Centerpoint adopted its vicious dog ordinance.

Findings of Law

The Ordinance before the Court defines a "dangerous animal" in three categories, namely: A "vicious dog", a "dangerous dog"; and a "pit bull". The three categories are further defined as follows:

A vicious dog is any dog with a propensity to attack human beings or other domestic animals without provocation; any dog which, without provocation attacks or has attacked a human being or domestic animal; or any dog harbored or trained for the purpose of engaging in dog fighting and found to be vicious by any court.

A dangerous dog is defined as one which by its aggressive nature or training is capable of inflicting serious physical harm or death to humans, or any dog which when unprovoked chases or approaches a person in a menacing fashion or apparent attitude of attack on public or private property.

A pit bull is defined as a pit bull terrier, which is further defined as an American pit bull terrier, a Staffordshire bull terrier, or a American Staffordshire terrier, or a mixed breed of dog which contains as an element of its breeding one of the above listed terrier breeds.

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[8] **Ala. Code § 3-1-29. Activities relating to fighting of dogs prohibited; violations; confiscation; procedures for disposition of animals; bond for the care of seized dog; forfeiture.**

"(a) It shall be a Class C felony for any person to do any of the following:

(1) To own, possess, keep, or train any dog with the intent that such dog shall be engaged in an exhibition of fighting with another dog.

(2) For amusement or gain, to cause any dog to fight with another dog, or cause any dogs to injure each other.

(3) To permit any act in violation of subdivisions (1) and (2) of this subsection.

(b) It shall be a Class C felony for any person to be knowingly present, as a spectator, at any place, building, or tenement where preparations are being made for an exhibition of the fighting of dogs, with the intent to be present at such preparations, or to be knowingly present at such exhibition or to knowingly aid or abet another in such exhibition.

. . ."

The said ordinance prohibits the keeping or harboring of any of the defined animals within the city limits of Defendant City of Clay.

The said ordinance further provides that, with regard to residents of Defendant City which own one of the above defined covered dogs as of the enactment of the said ordinance, the animal must be registered with the Defendant City and the various requirements of Section 2(2)(a-i) must be observed by the said owner.

Section 2(2)(j) contains the irrebuttable presumption provision that if a dog is registered with the Defendant City, then the act of registration by the owner creates an irrebuttable presumption that the dog so registered is a covered dog under the Ordinance, and Defendant City need to establish proof of this fact in a subsequent criminal prosecution in the event of a violation of the ordinance.

The said ordinance provides that if an owner of a covered dog, as of the date of the adoption of the said ordinance, fails to register the said animal with Defendant City within 60 days of adoption of the ordinance, then the owner is subject to prosecution.

The said ordinance also provides that if an owner of a covered dog at the time of the adoption of the said ordinance has registered his or her animal fails, but to comply with the provisions of Section 2(2)(a-i), then the person is also subject to prosecution which can result in fines of from $200-$500, in addition to confinement for a period not to exceed thirty (30) days.

Plaintiff's constitutional challenge to Defendant City of Clay Alabama's Ordinance No. 2013-15 is premised on allegations that provisions of the said ordinance violate procedural due process (Counts I & II) and substantive due process (Counts III, VI & VII) guarantees of the Fifth and Fourteenth Amendments to the United States Constitution; violations of privacy rights guaranteed by the Fourteenth Amendment (Count V); and violations of the provisions of the Art. I §9 cl. 3 with regard to *ex post facto* criminal laws (Count IV). The Court shall address these issues.

Since Plaintiff's complaint alleges violation of federal constitutional rights, the Court shall cite to opinions of the federal courts as persuasive authority with regard to determination of the issues presented.

In ***Colorado Dog Fanciers, Inc. v. City and County of Denver,*** *820 P.2d 644 (Colo. 1991)* the Court was presented with similar constitutional challenges to a

breed specific dog ordinance adopted by the City of Denver Colorado. Section 8-55 of the Denver Ordinance made it "unlawful for any person to 'own, possess, keep, exercise control over, maintain, harbor, transport, or sell within the City any pit bull.'" The said ordinance further provided that an owner of a previously *licensed* pit bull may keep the animal "only if the owner (1) annually renews a 'pit bull license' . . ., (2) proves that the dog has been spayed or neutered and has been vaccinated against rabies, (3) keeps the dog confined or securely leashed and muzzled, and (4) maintains $100,000 in liability insurance."

The Denver Ordinance defined a "pit bull" as an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying a majority of physical traits of any one or more of the above breeds, or any dog exhibiting those distinguishing characteristics which substantially conform to the standards established by the American Kennel Club (AKC) or United Kennel Club (UKC) for any of the above breeds. The AKC and UKC standards were maintained on file by the City of Denver for reference by owners.

The Denver Ordinance imposed criminal as well as civil sanctions, providing that should the owner be found not to be incompliance with the said ordinance, then the owner would be granted a hearing and bear "the risk of nonpersuasion". If the owner did not carry the required burden of proof before the hearing officer and the dog was found to be a pit bull, then the dog would be destroyed unless the owner agreed to permanently remove the dog from the City of Denver.

The trial court found that because the ordinance placed the burden on the dog owner to establish that the dog was not covered under the ordinance that the said provision was not constitutional. In addressing procedural and substantive due process challenge to the said Denver Ordinance, the Court wrote the following:

> "Legislation designed to protect the public's health and safety is entitled to a presumption of constitutionality. ***People v. Unruh,*** *713 P.2d 370, 373 (Colo.), cert. denied, 476 U.S. 1171, 106 S.Ct. 2894, 90 L.Ed.2d 981 (1986);* ***People v. Riley,*** *708 P.2d 1359, 1362 (Colo.1985).* A party challenging a public safety law must prove the unconstitutionality of a legislative ordinance beyond a reasonable doubt. ***Riley,*** *708 P.2d at 1362;* ***High Gear & Toke Shop v. Beacom,*** *689 P.2d at 630.*
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> . . .

> The trial court determined that the city ordinance improperly placed the "risk of nonpersuasion" on the owner of an impounded dog to prove that the dog is not a pit bull. . . We agree with the trial court's construction with regard to criminal violations under the ordinance, but we do not agree that the city must assume the burden of proof beyond a reasonable doubt at the civil or regulatory stage of the proceedings.
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> Section 8–55(f) provides that a dog owner demanding a hearing "shall bear the risk of nonpersuasion." While the city may have intended this provision to place the burden of proof on the owner of an impounded dog at an administrative hearing at which the dog's breed is in dispute, the plain meaning of the provision is merely that regardless of the placement of the burden, the owner bears the "risk" that the hearing officer will be unconvinced. See, e.g., CRE 301 (although a presumption imposes the burden of going forward to rebut the presumption upon the party against whom it is directed, the risk of nonpersuasion remains upon the party upon whom it was originally cast). Even if we were to equate the risk allocation with a formal placement of the burden of proof on the dog owner, the term "risk of nonpersuasion" lacks a standard of proof. Because the ordinance fails to apprise dog owners of the quantum of evidence necessary to prevail at a section 8–55(f) hearing, it may encourage arbitrary enforcement and is thus constitutionally infirm. See ***Kolender v. Lawson,*** *461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)* (invalidating a criminal statute that required loiterers to provide "credible and reliable" identification). As the United States Supreme Court said in ***Lawson,*** '"Although due process does not require 'impossible standards' of clarity, this is not a case where further precision in the statutory language is either impossible or impractical."' *461 U.S. at 361, 103 S.Ct. at 1860.* Because the statutory language of the ordinance fails to meet constitutional scrutiny, we uphold the trial court's severance of the offending provision. (note 1 omitted)" 820 P.2d at 647-48

In the Ordinance that is before this Court, rather than the owner bearing "the risk of nonpersuasion", which the Colorado Court found to be constitutionally infirm, there is an irrebuttable presumption, in the Defendant City of Clay Ordinance, that provides if an owner has registered his or her dog, then the dog is conclusively presumed to be covered under the Ordinance without any further proof offered by the City of Clay and the Defendant is not allowed to present evidence otherwise.

In ***Nelson v. Solem,*** *490 F.Supp. 481 (D.C.S.D. 1980),* the Court wrote the following with regard to such presumptions in statutes where criminal penalties can be incurred:

> "The use of presumptions in criminal law is limited by considerations of due process. A presumption may not shift the burden of proof to the accused by presuming an element upon proof of the other elements of the offense.

Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975);* ***Hankerson v. North Carolina****, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977).* Furthermore, to meet due process standards, the presumption must be no more than a "permissive inference." ***Ulster County Court v. Allen****, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979);* ***United States v. United States Gypsum Co.****, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978).*

An inference is defined as a conclusion which the jury is permitted but not compelled to draw from the facts, whereas a presumption is defined as an inference which the law directs a jury to draw if it finds a given set of facts. ***United States v. Burnes****, 597 F.2d 939 (9th Cir. 1979).* A permissive inference allows without requiring the jury to infer an elemental fact. It 'leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.' ***Ulster County Court v. Allen****, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).*" 490 F.Supp. at 483

Procedural due process requires that the prosecuting authority, in this case, the City of Clay, must be required to prove each element of the offense charged beyond a reasonable doubt and that burden should never be shifted to the accused. The Court in ***Sandstrom v. Montana****, 442 U.S. 510, 99 S.Ct. 2450 (U.S.Mont. 1979)* addressed conclusive presumptions and the constitutional standard of procedural due process which otherwise applies in that regard, as follows:

"We consider . . . the validity of a conclusive presumption. This Court has considered such a presumption on at least two prior occasions. In ***Morissette v. United States****, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)*, the defendant was charged with willful and knowing theft of Government property. Although his attorney argued that for his client to be found guilty, 'the taking must have been with felonious intent', the trial judge ruled that '[t]hat is presumed by his own act.' ***Id.****, at 249, 72 S.Ct. at 243.* After first concluding that intent was in fact an element of the crime charged, and after declaring that '[w]here intent of the accused is an ingredient of the crime charged, its existence is . . . a jury issue," ***Morissette*** held:

"' *It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.* It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts. . . . [But] [w]e think presumptive intent has no place in this case. *A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense.* A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the

> jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, *this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.*" ***Id.****, at 274–275, 72 S.Ct. at 255–256.* (Emphasis original; footnote omitted).
>
> . . .
>
> As in ***Morissette*** . . . a conclusive presumption in this case would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury. . . . The State was thus not forced to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged,' *397 U.S., at 364, 90 S.Ct. at 1073,* and defendant was deprived of his constitutional rights as explicated in ***[In re] Winship,*** *[397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)]*
>
> A presumption which, although not conclusive, had the effect of shifting the burden of persuasion to the defendant, would have suffered from similar infirmities. If Sandstrom's jury interpreted the presumption in that manner, it could have concluded that upon proof by the State of the slaying, and of additional facts not themselves establishing the element of intent, the burden was shifted to the defendant to prove that he lacked the requisite mental state. Such a presumption was found constitutionally deficient in ***Mullaney v. Wilbur,*** *421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)*. . . . As we recounted just two Terms ago in ***Patterson v. New York,*** *[432 U.S. 197, 97 S.Ct. 2319 (U.S.N.Y. 1977)],* '[t]his Court . . . unanimously agreed with the Court of Appeals that Wilbur's due process rights had been invaded by the presumption casting upon him the burden of proving by a preponderance of the evidence that he had acted in the heat of passion upon sudden provocation." *432 U.S., at 214, 97 S.Ct. at 2329*. And ***Patterson*** reaffirmed that 'a State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant' by means of such a presumption. ***Id.****, at 215, 97 S.Ct. at 2330*." 99 S.Ct. at 2458-59

The Court thus finds that the "irrebuttable presumption" provision contained in Section 2(2)(j) renders the Ordinance constitutionally infirm as violative of the procedural due process provisions of the Fourteenth Amendment to the U.S. Constitution as alleged in Count VI of Plaintiffs' complaint. Though Defendant City of Clay's Ordinance No. 2013-15 contains a severance provision, Section 5, whereby the

Court may severe out the offending section and render the balance of the ordinance constitutional, the Court elects not to do so for the reasons set out hereinbelow.[9]

Regarding issues of substantive due process, and returning to ***Colorado Dog Fanciers***, supra, the plaintiff dog owners further challenged the breed specific dog regulation as violating substantive due process by the creation of a legislative presumption that a pit bull owner knowingly and voluntarily possessed a pit bull. The dog owners also alleged that the Denver Ordinance allowed for a finding that a dog was a covered dog under the said ordinance based upon non-scientific evidence which is alleged as a violation of substantive due process.

The Court rejected the argument writing:

> "The city is not required to meet its burden of proof with the mathematical certainty of scientific evidence. ***Id.; Robinson v. United States,*** *324 U.S. 282, 65 S.Ct. 666, 89 L.Ed. 944 (1945).* Therefore, even though section 8–55 permits a finding of pit bull status to be based on an expert opinion or on nonscientific evidence, such a procedure does not violate the dog owners' due process rights." 820 P.2d at 650

The Court notes that in so finding, the Court in Colorado Dog Fanciers makes clear that the City had the burden to prove that the owners dog was a covered dog, unlike the ordinance before the Court whereby a registered dog is conclusively presumed to be a covered dog, thus relieving the City of that element of its burden of proof.

Plaintiffs in ***Colorado Dog Fanciers***, supra, also argued that since the said ordinance treats all pit bulls and substantially similar dogs as inherently dangerous, that the Denver Ordinance was unconstitutionally over broad. The Court rejected the contention writing the following:

> "This contention is without merit. Outside the limited area of fundamental constitutional rights such as, for example, first amendment rights of speech or association, a statute may not be attacked as overbroad. ***Schall v. Martin,*** *467 U.S. 253, 268 n. 18, 104 S.Ct. 2403, 2412 n. 18, 81 L.Ed.2d 207 (1984);* ***Dandridge v. Williams,*** *397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).* In addition, we do not agree with the dog owners' contention that the ordinance is underinclusive and, thus, violates due process by failing to

[9] It is noted that the Centerpoint Ordinance No. 2008-004 upon which the subject ordinance is modeled also bears an irrebuttable presumption clause, as well as a severance provision which may be used to cure a similar infirmity with the said Centerpoint Ordinance.

> include other dangerous breeds. Upon choosing to regulate a hazard, a legislature is not required to simultaneously regulate every similar hazard. ***Williamson v. Lee Optical***, *348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955);* ***People v. Elliott***, *186 Colo. 65, 69, 525 P.2d 457, 459 (1974);* see also ***State v. Peters***, *534 So.2d 760, 764 (Fla.Dist.Ct.App.1988), review denied, 542 So.2d 1334 (Fla.1989);* ***McQueen v. Kittitas County***, *115 Wash. 672, 198 P. 394 (1921).* Thus, the ordinance does not deny the dog owners substantive due process of law and is not unconstitutional on that ground. 820 P.2d at 650.

To the extent that Plaintiffs have made allegations that the said Ordinance is over broad in Count VII of the Complaint, the evidence and above cited authority does not support the allegation.

Plaintiffs in the case before this Court have argued that the City of Clay Ordinance is unconstitutionally vague on its face in violation of due process guarantees that criminal statutes should properly provide notice and give fair warning to citizens of conduct which is prohibited by the statute. The Court in ***Colorado Dog Fanciers***, supra, wrote the following:

> "We also do not agree with the dog owners' argument that the term "pit bull" is imprecise and, thus, unconstitutionally vague because the average dog owner is not afforded fair warning of the act prohibited by the ordinance. 'The fourteenth amendment due process guarantee against vagueness requires that laws provide fair warning to persons of ordinary intelligence of the conduct prohibited, and standards to protect against arbitrary and discriminatory enforcement.' ***American Dog Owners Ass'n v. Dade County***, *728 F.Supp. 1533, 1539 (S.D.Fla.1999)*; see also ***United States v. Harriss***, *347 U.S. 612, 617, 74 S.Ct. 808, 811–12, 98 L.Ed. 989 (1954);* ***Florida Businessmen v. City of Hollywood***, *673 F.2d 1213, 1218 (11th Cir.1982)*
>
> Although the United States Constitution requires adequate notice of unlawful acts, it does not require the language of a legislative enactment to be mathematically precise. ***Miller v. California***, *413 U.S. 15, 28, 93 S.Ct. 2607, 2617, 37 L.Ed.2d 419 (1973);* ***Grayned v. City of Rockford***, *408 U.S. 104, 110, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222 (1972).* Greater degrees of vagueness are tolerated when an ordinance provides for civil rather than criminal penalties. ***Hoffman Estates v. Flipside, Hoffman Estates, Inc.***, *455 U.S. 489, 498–99, 102 S.Ct. 1186, 1193–94, 71 L.Ed.2d 362 (1982).* Legislation is entitled to a presumption of constitutionality and is not 'automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within [its] language.' ***Parker v. Levy***, *417 U.S. 733, 757, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439*

(1974) (quoting ***United States v. National Dairy Corp.****, 372 U.S. 29, 32–33, 83 S.Ct. 594, 597–98, 9 L.Ed.2d 561 (1963)*).

Although many of the pit bull ordinances that have withstood vagueness challenges were construed in civil actions, ***Vanater v. Village of South Point****, 717 F.Supp. 1236 (S.D.Ohio 1989)*, reviewed a criminal ordinance with penalties similar to those in section 8–55. In ***Vanater***, the court emphasized the plaintiff's heavy burden in sustaining a vagueness challenge:

'Facial vagueness occurs when a statute or an ordinance is so utterly void of a standard of conduct that it simply has no core and cannot be validly applied to any conduct. See ***United States v. Powell****, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975)*. To sustain such a challenge, the plaintiff must prove that 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.' ***Coates v. City of Cincinnati****, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971)*. There is no constitutional requirement that legislation be written with scientific precision to be enforceable. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' ***Dandridge****, 397 U.S. at 485, 90 S.Ct. at 1161[,]* citing ***Metropolis Theatre Co. v. City of Chicago****, 228 U.S. 61, 69–70, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913)*.' ***Vanater*** *at 1243*.

The ***Vanater*** court found that whether a dog was covered by the ordinance was a matter of evidence rather than constitutional law and concluded that the ordinance was not unconstitutionally vague despite its lack of 'mathematical certainty.' ***Id.*** *at 1244*.

Because the ownership of a dog does not implicate fundamental rights such as speech or association, the ordinance should be upheld unless the dog owners are able to establish that the ordinance is unconstitutional on its face and incapable of *any* valid application. ***Flipside***, 455 U.S. at 494–95, 102 S.Ct. at 1191–92; ***High Gear & Toke Shop v. Beacom****, 689 P.2d at 631*; ***Englewood v. Hammes****, 671 P.2d 947, 951 (Colo.1983)*. The ordinance is not invalid for failure to list the "majority of physical traits" that are to be used to determine whether a dog is a pit bull. Admittedly, the ordinance does not list the specific physical traits of the American Pit Bull, American Staffordshire, or the Staffordshire Bull terriers. These characteristics, however, may readily be ascertained by referring to the official standards of the American Kennel Club (AKC) and the United Kennel Club (UKC). Presumably, the city council felt that if it were to limit the definition of a pit bull to specific AKC or UKC standard breeds, the ordinance would be underinclusive since it would exclude substantially similar but unpedigreed dogs. By including dogs "displaying the majority of the physical traits" of the listed breeds, the city council sought to include unpedigreed dogs presenting the same danger to society. *Moreover, the ordinance's hearing procedure, as construed with the burden properly placed on the city to prove pit bull status, provides a sufficient safeguard to avoid arbitrary application of the*

> *law.* Based upon the evidence presented, the trial court found that doubtful cases are resolved in favor of finding that the animal in question is not a pit bull.
>
> Since the standards for determining whether a dog is a pit bull are readily accessible to dog owners, and because most dog owners are capable of determining the breed or phenotype of their dog, the trial court properly determined that the ordinance provides adequate notice to dog owners and is not unconstitutionally vague." 820 P.2d at 651-52

The case before the Court is somewhat distinguishable from ***Colorado Dog Fanciers*** on this point since the Denver Ordinance provided for a hearing procedure where the City would be required to prove that the alleged pit bull was in fact a pit bull and the said Denver Ordinance referenced accepted veterinary documents which defined the breed of dog covered by the ordinance. In the case before this Court, there is no requirement for the City of Clay to establish by evidence that an alleged pit bull is in fact a pit bull if the owner has registered the dog with the City. Also, the ordinance does not reference accepted veterinary publications by which breeds are identified and determined.

However, this factual distinction is not the only consideration in determining whether the facially vague challenge is well taken. Also to be considered on the issue that the said Ordinance No. 2013-15 is facially void or vague, the Court in ***Dias v. City and County of Denver,*** *567 F.3d 1169 (C.A.10 (Colo.) 2009)* wrote that the burden on Plaintiff to prove a statute unconstitutional on grounds of being facially vague as depends upon the ordinance is being enforced against the Plaintiff or not as of the commencement of litigation. The Court wrote:

> "'As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.' ***Kolender v. Lawson,*** *461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).* This doctrine serves not only to put the public on notice of what conduct is prohibited, but also to guard against arbitrary enforcement. ***Id.*** *at 358, 103 S.Ct. 1855* (explaining that the more important aspect of the vagueness doctrine is 'the requirement that a legislature establish minimal guidelines to govern law enforcement'). Although '[t]he same facets of a statute usually raise concerns of both fair notice and adequate enforcement standards ... [t]he Supreme Court ... continues to treat each as an element to

be analyzed separately.' ***United States v. LaHue**, 261 F.3d 993, 1005 (10th Cir.2001)* (quotation omitted).

'"Facial challenges are strong medicine."' ***Ward v. Utah ("Ward II")**, 398 F.3d 1239, 1246 (10th Cir.2005)*. As the Supreme Court has explained, '[a]lthough passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks.' ***Sabri v. United States**, 541 U.S. 600, 608–09, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004)*. For this reason, we have held that facial challenges are appropriate in two circumstances: (1) when a statute threatens to chill constitutionally protected conduct (particularly conduct protected by the First Amendment); or (2) *when a plaintiff seeks pre-enforcement review of a statute because it is incapable of valid application.* (emphasis added) ***United States v. Gaudreau**, 860 F.2d 357, 360–61 (10th Cir.1988)*: see ***Hoffman Estates**, 455 U.S. at 494–95 & n. 5, 102 S.Ct. 1186*. In the latter case, plaintiffs face a heavy burden: They must 'demonstrate that the law is impermissibly vague in all of its applications.' ***Hoffman Estates**, 455 U.S. at 497, 102 S.Ct. 1186*; see ***Ward II**, 398 F.3d at 1251* ("Because Mr. Ward's vagueness challenge comes in the procedural posture of a declaratory judgment with no pending criminal charges, we may find [the challenged statute] unconstitutionally vague only if it is impermissibly vague in all of its applications."). Here, the plaintiffs' vagueness claim falls into this second category of facial challenges.

Insofar as the plaintiffs claim the AKC and UKC standards contain some elements that are vague and subjective, that may be true. But as we further explain below, a statute with some arguably vague elements is not automatically vague on its face in violation of the Fourteenth Amendment. Plaintiffs direct us to the AKC and UKC breed standards as incorporated by reference in the Ordinance. . . .

Even so, plaintiffs' counsel conceded at oral argument that these standards can clearly fit a pure breed American Pit Bull Terrier, American Staffordshire Terrier, or Staffordshire Bull Terrier, registered as such with the AKC or UKC. Such a registered pure breed would unquestionably qualify as a prohibited dog under the Ordinance. See ***Sun**, 2007 WL 878573, at *9* ("[I]t is difficult to imagine, at least with respect to purebred specimens, how the breed could be identified more precisely in the Ordinance."). Moreover, and for the same reason, the Ordinance is sufficiently definite such that it does not encourage arbitrary enforcement with respect to registered pure breeds. The Ordinance, therefore, is admittedly not "vague in all of its applications," and the plaintiffs' facial vagueness challenge was properly dismissed for failure to state a claim. See ***Hoffman Estates**, 455 U.S. at 500–03, 102 S.Ct. 1186; cf.* ***Hotel & Motel Ass'n of Oakland v. City of Oakland**, 344 F.3d 959, 973 (9th Cir.2003)* (affirming 12(b)(6) dismissal of facial vagueness challenge because plaintiffs had not alleged that the challenged ordinance was vague in all its applications)." 567 F.3d at 1179-80

As applied to the case before this court, Plaintiffs are in a posture in the case of seeking a pre-enforcement review of the said ordinance to determine its constitutionality. In fact, the enforcement of the said ordinance has been voluntarily stayed by Defendant pending the outcome of this case. Of the two types of facial challenges set forth in the cited authority, therefore, the case before the Court comes under the second category.

Though there is evidence before the Court that the said Ordinance proscribes ownership of "vicious dogs" and "dangerous dogs" which are not otherwise defined in the said Ordinance, and though it proscribes the ownership of mix breed pit bulls which by appearance and characteristics indicate that the animal is "predominantly" of the proscribed breeds, the said ordinance, like the City of Denver Ordinance, does proscribe the ownership of pure breed pit bulls of the type specified. Since a facial challenge in the posture in which this case comes to the Court requires Plaintiffs to prove beyond a reasonable doubt that the said ordinance is "impermissibly vague in *all* of its applications", as was the case in ***Diaz,*** *supra*, Plaintiffs' have not carried this burden of proof with regard to their allegations of facial vagueness as alleged in Count I of their complaint.

Plaintiff's make a claim under Count VII that there is no rational relation between the Defendant City of Clay's Ordinance No. 2013-15 and the condition which Defendant City of Clay seeks to remedy. This is an equal protection argument addressed in ***Dias v. City and County of Denver,*** *567 F.3d 1169 (10th Cir (Colo.) 2009)*. The Court wrote the following:

> "Plaintiffs' final contention is that the Ordinance deprives them of substantive due process. First, they allege that the human/companion animal bond is a fundamental liberty interest, and because the Ordinance is not narrowly tailored to serve a compelling government interest, it imposes an unconstitutional burden on this fundamental right. Second, even if a fundamental liberty interest is not implicated, the plaintiffs contend the Ordinance irrationally treats pit bulls and their owners in a different fashion than other dogs and owners because there is a lack of evidence that the prohibited animals pose a threat to public safety or constitute a public nuisance.
>
> "'[T]he touchstone of due process is protection of the individual against arbitrary action of government.'" ***County of Sacramento v. Lewis,*** *523 U.S. 833, 845, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)* (quoting ***Wolff v.***

McDonnell, *418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)).* In addition to guaranteeing fair procedures, the Due Process Clause of the Fourteenth Amendment 'cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them.' ***Lewis,*** *523 U.S. at 840, 118 S.Ct. 1708* (quotation omitted).

This substantive component guards against arbitrary legislation by requiring a relationship between a statute and the government interest it seeks to advance. If a legislative enactment burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest. ***Washington v. Glucksberg,*** *521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).* But if an enactment burdens some lesser right, the infringement is merely required to bear a *rational relation to a legitimate government interest.* ***Id.*** *at 728, 117 S.Ct. 2258;* ***Reno v. Flores,*** *507 U.S. 292, 305, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)* ("The impairment of a lesser interest ... demands no more than a 'reasonable fit' between governmental purpose ... and the means chosen to advance that purpose."); ***Seegmiller v. LaVerkin City,*** *528 F.3d 762, 771–72 (10th Cir.2008)* ("Absent a fundamental right, the state may regulate an interest pursuant to a validly enacted state law or regulation rationally related to a legitimate state interest." (citing ***Reno,*** *507 U.S. at 305, 113 S.Ct. 1439*)). . . .

At the outset, plaintiffs claim that the human/companion animal bond is a fundamental liberty interest triggering strict scrutiny. In order to show that the human/companion animal bond is a fundamental right, we undertake a two-part inquiry. First, we 'carefully describe the asserted fundamental liberty interest.' ***Seegmiller,*** *528 F.3d at 769* (quoting ***Glucksberg,*** *521 U.S. at 721, 117 S.Ct. 2258*) (alterations omitted). Second, we ask whether that interest is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.' ***Glucksberg,*** *521 U.S. at 720–21, 117 S.Ct. 2302* (quotations omitted); ***Seegmiller,*** *528 F.3d at 769* (quotations omitted).

The district court properly refrained from applying strict scrutiny to the Ordinance. Plaintiffs' complaint is devoid of any factual allegations which would lend support to a conclusion that the human/companion animal bond is a fundamental liberty interest. Quite to the contrary, the nature and history of the relationship between the plaintiffs and their dogs is not raised in the complaint. Because of such failure, we do not further pursue a strict scrutiny analysis.

Even if the Ordinance does not implicate a fundamental right, it must nonetheless bear a rational relationship to a legitimate government interest. ***Glucksberg,*** *521 U.S. at 728, 117 S.Ct. 2302;* ***Seegmiller,*** *528 F.3d at 771*. . . .

It is uncontested that Denver has a legitimate interest in animal control—the protection of health and safety of the public. See ***Nicchia v. New York,*** *254 U.S. 228, 230–31, 41 S.Ct. 103, 65 L.Ed. 235 (1920);* ***Sentell v. New***

***Orleans & Carrollton R.R. Co.**, 166 U.S. 698, 704–05, 17 S.Ct. 693, 41 L.Ed. 1169 (1897);* ***Clark v. City of Draper**, 168 F.3d 1185, 1188 (10th Cir.1999);* ***Am. Canine Found. v. City of Aurora**, No. 06–cv–01510–WYD–BNB, 2008 WL 2229943, at *7 (D.Colo. May 28, 2008);* ***Vanater v. Village of South Point**, 717 F.Supp. 1236, 1242–43 (S.D.Ohio 1989);* ***Starkey v. Township of Chester**, 628 F.Supp. 196, 197 (E.D.Pa.1986); Colo.* ***Dog Fanciers**, 820 P.2d at 653;* ***City of Toledo v. Tellings**, 114 Ohio St.3d 278, 871 N.E.2d 1152, 1157 (2007).* Even so, the plaintiffs have alleged that the means by which Denver has chosen to pursue that interest are irrational. In particular, the plaintiffs contend that there is a lack of evidence that pit bulls as a breed pose a threat to public safety or constitute a public nuisance, and thus, that it is irrational for Denver to enact a breed-specific prohibition.

Pointing to the cases where courts across the country have rejected substantive due process challenges to pit bull bans, see, e.g., ***Vanater**, 717 F.Supp. at 1242–43; Colo. Dog Fanciers, 820 P.2d at 650;* ***Garcia v. Village of Tijeras**, 108 N.M. 116, 767 P.2d 355, 358–61 (1988);* ***Singer v. City of Cincinnati**, 57 Ohio App.3d 1, 566 N.E.2d 190, 191–92 (1990),* Denver argues that the Ordinance is rational as a matter of law. This argument misconceives the nature of the plaintiffs' challenge. Specifically, the plaintiffs contend that although pit bull bans sustained twenty years ago may have been justified by the then-existing body of knowledge, the state of science in 2009 is such that the bans are no longer rational.[FN12] This claim finds some support in the AKC and UKC standards themselves, to which the plaintiffs direct us. The official UKC breed standard for the American Pit Bull Terrier, for instance, states that '[American Pit Bull Terriers] make excellent family companions and have always been noted for their love of children.' Official UKC Breed Standard, American Pit Bull Terrier, Appellant Br. Ex. 4. American Pit Bull Terriers are an 'extremely friendly' breed 'even with strangers. Aggressive behavior toward humans is uncharacteristic of the breed....' ***Id.*** Similarly, the AKC breed standard for Staffordshire Bull Terriers states that, 'with its affection for its friends, and children in particular, its off-duty quietness and trustworthy stability, [the Staffordshire Bull Terrier is] a foremost all-purpose dog.' AKC Staffordshire Bull Terrier Breed Standard, Appellant Br. Ex. 2. Without drawing factual inferences against the plaintiffs, the district court could not conclude at this early stage in the case that the Ordinance was rational as a matter of law.

FN12. Moreover, in the majority of cases where courts have sustained a pit bull ban as reasonable, they have done so based on a developed evidentiary record. See, e.g., ***Vanater**, 717 F.Supp. at 1238–41;* ***Colo. Dog Fanciers**, 820 P.2d at 652 n. 6;* ***Garcia**, 767 P.2d at 357; Tellings, 871 N.E.2d at 1154; Singer, 566 N.E.2d at 191; cf.* ***City of Aurora**, 2008 WL 2229943, at *9* (denying city's motion for summary judgment when, "[u]nlike the above referenced cases, no evidence or facts ha[d] been presented as to why the Aurora City Council believed

> that the ordinance was necessary to protect the safety of its residents"). No such record was developed in this case because the district court dismissed pursuant to Rule 12(b)(6). 1082-84

Though the Court in ***Dias***, *supra*, did not address the issue of whether dog ownership is a fundamental liberty interest to which a strict scrutiny standard would apply, or is a lesser right to which the rational relationship test applies, the Court in ***Weigel v. Maryland***, *950 F.Supp.2d 811 (D.Md. 2013)* did discuss federal authorities and the nature of the right to own a pet as a fundamental right or not. The Court wrote the following:

> "The Fourteenth Amendment's Due Process Clause 'guarantees more than fair process.' (note 55 omitted) It also covers a substantive sphere, 'barring certain government actions regardless of the fairness of the procedures used to implement them.' ***Daniels v. Williams***, *474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)*. 'This substantive component guards against arbitrary legislation by requiring a relationship between a statute and the government interest it seeks to advance." ***Dias v. City & Cnty. of Denver***, *567 F.3d 1169, 1181 (10th Cir.2009)*. If a law burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest. ***Washington v. Glucksberg***, *521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)*. If a law burdens a lesser right, the infringement need only be rationally related to legitimate government interests. ***Id.*** *at 728, 117 S.Ct. 2258*. (note 56 omitted).
>
> The Plaintiffs assert, without citation to any authority, that the right to own and keep dogs is fundamental. . . .
>
> *The right to own and keep dogs is not fundamental.* ***Nicchia v. New York***, *254 U.S. 228, 230, 41 S.Ct. 103, 65 L.Ed. 235 (1920)* (property in dogs is "of an imperfect or qualified nature and [dogs] may be subjected to peculiar and drastic police regulations by the state without depriving their owners of any federal right").(note 58 omitted)
>
> Therefore, to the extent that any standard of review applies to substantive due process challenges to judicial decisions, it would be the rational basis standard. ***Glucksberg***, *521 U.S. at 728, 117 S.Ct. 2258*. . . ." F.Supp.2d at 835

For purposes of analyzing the Defendant City of Clay's Ordinance No. 2013-15 to determine whether it complies with the substantive due process requirements of the Fourteenth Amendment, the Court, therefore, uses the rational relation test, that is, the Court must consider the said ordinance, which infringes on the ownership rights of

covered dogs to determine if there is a rational relationship between the legitimate government interest to be furthered and the proscriptions of the said ordinance.

In ***American Canine Foundation v. City of Aurora, Colo.****, 2008 WL 2229943 (D.Colo. 2008)* the Court performed the analysis on a breed specific dangerous dog ordinance adopted by the City of Aurora Colorado. The Court wrote the following:

> "Plaintiffs argue that the ordinance is not rationally related to a legitimate government purpose. I find that this argument impacts the substantive due process and equal protection claim as well as a takings claim encompassed in the Fifth Claim (addressed below in Section III.B.3.e).
>
> The Supreme Court holds that in order to withstand scrutiny under the Fifth and Fourteenth amendments to the United States Constitution, a statute or ordinance must bear a rational relationship to a legitimate legislative goal or purpose. ***Exxon Corp. v. Governor of Maryland****, 437 U.S. 117, 124 (1978);* ***Kelley v. Johnson****, 425 U.S. 238, 247 (1976)*. In this case, it is undisputed that the City of Aurora stated a legitimate purpose in enacting the ordinance at issue—the protection of health and safety of the public. However, I find that there is no evidence in the record to show that the ordinance at issue is rationally related to that purpose.
>
> While Defendant relies on ***Colorado Dog Fanciers, [Inc. v. City and County of Denver****, 820 P.2d 644 (Colo. 1991)]* and other cases that have denied substantive due process and equal protection challenges, they did so based on evidence presented by the municipality that the ordinance was rationally related to the stated purpose. For example, in Colorado Dog Fanciers the court stated:
>
> 'The trial court found that pit bull attacks, unlike attacks by other dogs, occur more often, are more severe, and are more likely to result in fatalities. The trial court also found that pit bulls tend to be stronger than other dogs, often give no warning signals before attacking, and are less willing than other dogs to retreat from an attack, even when they are in considerable pain. ***Id****. at 652.*
>
> The court thus found that ample evidence exists to establish a rational relationship between the city's classification of certain dogs as pit bulls and the legitimate governmental purpose of protecting the health and safety of the city's residents and dogs. ***Id***.
>
> Similarly, in ***[Garcia v.] Village of Tijeras****,[108 N.M. 116, 767 P.2d 355 (N.M.App.,1988)]*, the court found as to the plaintiff's substantive due process claim that the village had a legitimate purpose in enacting the ordinance—the protection of the health and safety of village residents—which was undisputed. ***Id****., 767 P.2d at 358*. While the plaintiffs contended that the ordinance was not rationally related to that purpose, the court disagreed. It found that the evidence supported the trial court's findings that pit bulls presented a special danger to the health and safety of village residents based on evidence of, among other things, several serious attacks involving pit bulls, evidence that the pit bull breed possesses inherent characteristics of aggression, strength, viciousness and unpredictability not found in other

breeds of dog, in a fight or attack they are very aggressive and tenacious, unlike other breeds pit bulls will "bite and hold", thereby inflicting significantly more damage upon their victim, and pit bulls are especially dangerous due to their unpredictability. Based on that evidence, the court found that the ordinance banning possession of pit bulls was reasonably related to protecting the health and safety of the residents of the village and did not violate substantive due process.

As to equal protection, the dog owners in ***Colorado Dog Fanciers*** argued that the ordinance violated the Equal Protection Clause by creating an irrational distinction between one who owns a dog with the physical characteristics of a pit bull and one who owns a dog lacking those characteristics. ***Id.****, 820 P.2d at 652*. The court stated, "[l]egislation not implicating a fundamental right or involving a suspect class will be upheld against an equal protection challenge if it is *rationally related* to a legitimate governmental purpose." ***Id.*** Based on the evidence found by the trial court which established the ordinance was rationally related to a legitimate government purpose of protecting the health and safety of the city's residents and dogs (discussed above), the Colorado Supreme Court found that the trial court correctly concluded that the ordinance did not violate the dog owners' right to equal protection. ***Id.***

Similarly, in ***Garcia***, substantial evidence was submitted that pit bulls presented a special threat to the safety of the residents of the village over and above that presented by other breeds of dog. ***Id.****, 767 P.2d at 361*. Accordingly, the court found that there was not an equal protection violation as the ordinance was rationally related to a legitimate state interest." ***Id.*** . . .

Unlike the above referenced cases, no evidence or facts have been presented as to why the Aurora City Council believed that the ordinance was necessary to protect the safety of its residents. Without such evidence, the principle of stare decisis is simply not applicable.

I further note that Plaintiffs have cited cases where courts have found that there was not sufficient evidence that pitbull dogs or puppies are inherently dangerous. See ***Carter v. Metro North Assocs.****, 680 N.Y.S.2d 239, 251–52 (1998)* (finding that court erred in circumventing the requirement for evidence concerning the particular animal by purporting to take judicial notice of the vicious nature of pit bull breeds as there are alternative opinions that preclude judicial notice—"[w]hile many sources, including the authorities relied upon by the IAS Court, assert the viciousness of pit bulls in general, numerous other experts suggest that, at most, pit bulls possess the potential to be trained to behave viciously.... Furthermore, scientific evidence more definitive than articles discussing the dogs' breeding history is necessary before it is established that pit bulls, merely by virtue of their genetic inheritance, are inherently vicious ...."); see also ***Zuniga v. San Mateo Dept. of Health Serv.****, 218 Cal.App.3d 1521, 1532–33 (1990)*.

Based on the foregoing, I find that summary judgment is improper on the basis of *stare decisis* as to the substantive due process and equal protection claims (the Third Claim for Relief). Defendant presented no evidence to

> support its argument that the ordinance was rationally related to a legitimate governmental purpose." 2008 WL 2229943 at *8,*9

In the case before this Court, though evidence was presented of pit bull attacks that occurred in Springville, Riverside and Pell City Alabama, there was no evidence presented of a pit bull attack that occurred wherein the victim was a resident of Defendant City of Clay, Alabama. Defendant City Manager testified that he was prompted to propose and draft Ordinance No. 2013-15 by an article that appeared on the AL.Com Website with regard to dangerous dogs. He testified that the Defendant City of Clay ordinance was modeled after the City of Centerpoint Pit Bull Ordinance. However, the evidence before the Court was that the City of Centerpoint adopted its ordinance in the wake of a finding of widespread activity of raising pit bulls in within the city limits for use in unlawful dog fighting activity. Thus the Centerpoint ordinance was *rationally related* to a legitimate governmental purpose, namely to eradicate unlawful pit bull fights within the city limits. None of the evidence presented by Defendant City of Clay indicated that such a condition existed within the incorporated city limits of Clay or that any reported cases of assaults of city residents by pit bulls. Without such evidence, the said ordinance does not pass the rational relation test.

The Court's finding in this regard is not a determination that the residents of Defendant City of Clay are somehow immune from suffering injury, serious injury or fatalities as the result of an attack by a vicious, dangerous or breed of pit bull dog, only that Plaintiff's evidence was that no such attack has been reported in the City of Clay, Alabama and the Defendant's evidence indicates also that there were no reported cases of such attacks prior to the adoption of the said ordinance.

Furthermore, evidence was offered in the case before this Court, as was the case in ***American Canine Foundation v. City of Aurora, Colo.***, *supra*, that the evidence is mixed and not certain as to whether pit bulls inherently or genetically predisposed to display vicious or aggressive traits, or whether such behavior is learned due to environment and training.

The Court's findings on this day do not foreclose Defendant City of Clay from adopting a proper Ordinance that can pass constitutional muster under the guidelines set forth herein. Indeed, the people of the State of Alabama have adopted an

Amendment to the Ala. Constitution of 1901 regulating the ownership of vicious and dangerous dogs in the unincorporated areas of Madison County Alabama which meets all of the constitutional requirements set forth herein, and which is non-breed specific.[10]

WHEREFORE, the foregoing evidence and authority having been considered by the Court, the Court hereby finds and orders the following:

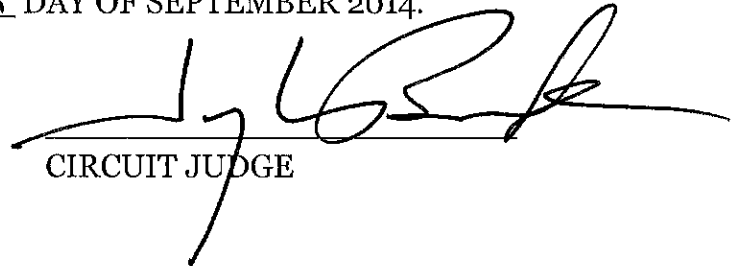
1. Defendant City of Clay, under its general police powers to protect the health and safety of its citizens has the right to enact certain ordinances regulating the ownership of certain dogs which may imperil the health and safety of its citizens. However, there is a rational relationship between the ordinance so enacted and government purpose to be furthered of protecting the health and safety of the city's residents and domestic animals from dangerous or vicious dog attacks.
2. Defendant City of Clay's Ordinance No. 2013-15, which restricts the rights of certain dog owners, violates Plaintiffs Fourteenth Amendment right to substantive due process of law, in that it is found not to be rationally related to the stated government interest since there was no evidence presented of harm to the residents of the City of Clay from the dogs which the said ordinance regulates or bans.
3. Defendant City of Clay's Ordinance No. 2013-15 is further found to be constitutional infirm as violative of procedural due process with regard to the provision set forth in Section 2(2)(j) therein which establishes a conclusive presumption that Plaintiff's dog is a banned or restricted dog by the mere fact of registering the dog with the Defendant City by its owner. Such an element of proof should, under procedural due process guarantees of the Fourteenth Amendment, be subject to proof beyond a reasonable doubt by Defendant City of Clay in the event of a criminal prosecution, contemplated under Section 4 of the said ordinance is commenced against Plaintiffs.
4. The Court therefore, under the provisions of the Alabama Declaratory Judgment Act, specifically *Ala. Code § 6-6-223 (1975)*[11], hereby declares

[10] **AL CONST Amend. No. 862, Madison County § 0.60**

Defendant City of Clay Ordinance No. 2013-15 unconstitutional as being in violation of substantive and procedural due process rights of the Plaintiffs guaranteed to them by the Fourteenth Amendment to the United States Constitution.

5. The Court also hereby grants Plaintiff's petition to enjoin enforcement of the said resolution on the basis set forth hereinabove.
6. Costs of these proceedings are hereby taxed to Defendant City of Clay.

DONE AND ORDERED ON THIS THE 12 DAY OF SEPTEMBER 2014.



CIRCUIT JUDGE

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[11] **Ala. Code § 6-6-223. Construction or validity of instruments, statutes, ordinances, contracts, or franchises.**
Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.