NATIONAL
ANIMAL LAW
COMPETITIONS

# 2011
## Appellate Moot Court Competition
# Memorandum Opinion

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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| QUINTON RICHARDSON, | § | |
| | § | |
| Plaintiff, | § | Civil Action No. 10cv00416 |
| | § | |
| v. | § | |
| | § | |
| CITY OF WINTHROP, | § | |
| MASSACHUSETTS, | § | |
| | § | |
| Defendant. | § | |

**MEMORANDUM OPINION**

Plaintiff Quinton Richardson ("Richardson") brought this action challenging an ordinance enacted by the City of Winthrop, Massachusetts ("City"), which deems all dogs of the "pit bull variety of terrier" to be "vicious" and bans them from the City. Pursuant to this ordinance, Winthrop Municipal Code section 6.04.090 (Ordinance"), the City seized and subsequently killed one of Richardson's two dogs solely because the City determined her to be of the "pit bull variety of terrier."

Richardson claims that the Ordinance violates his rights under the Fourteenth Amendment of the U.S. Constitution because it is impermissibly vague, both facially and as applied to him, and also because it deprives him of his right to substantive due process. He seeks both injunctive relief preventing enforcement of the Ordinance and damages under 42 U.S.C. § 1983. The City now moves for summary judgment.

Finding no violation of Richardson's constitutional rights, the Court enters summary judgment in favor of the City.

## I. Winthrop Municipal Code section 6.04.090

The Ordinance at issue provides, in relevant part:

**6.04.090 Nuisance dogs--Vicious dogs--Potentially vicious dogs.**

. . .

B. Vicious Dogs.

1. For purposes of this Section, "vicious dogs" are defined as

(a) dogs who unprovoked have attacked or bitten a human being or animal or have a known propensity, tendency or disposition to attack unprovoked, to cause injury or to endanger the safety of human beings or animals;

(b) dogs who are trained or kept for dogfighting; or

(c) any of the breeds commonly referred to as belonging to the "pit bull" variety of terrier, which consists of the following breeds or breed types and mixtures: American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier.

2. No person shall own, keep or have the custody, care or control of any of the breeds identified in subsection B.1(c) of this Section or mixtures thereof within the Winthrop city limits.

3. No dog shall be declared vicious if injury or damage is sustained by a person who was willfully trespassing or committing or attempting to commit a crime or tort upon the premises occupied by the owner or keeper of the dog. Also exempted are dogs who were teased, tormented, abused or assaulted by the injured person or animal prior to attacking or biting. No dog shall be declared vicious if the dog was protecting or defending a human being in its immediate vicinity from attack or assault. [1]

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[1] The ordinance includes procedural requirements that are not an issue but state:

(1) Dogs who have violated any of the conditions of subsections A through C of this Section can be declared to be a nuisance, vicious or potentially vicious by the City Council upon written complaint of a citizen or by the animal control officer, police department or other public safety agent. A hearing by the City Manager or the City Manager's designee will determine whether the dog in question is a nuisance, vicious or potentially vicious dog. Investigation of the matter may be made by the animal control officer, and the animal's owner will be notified of the hearing by certified mail. The hearing must be open to the public and must be held within two weeks of the service of notice upon the owner or keeper of the dogs.

(2) Prior to the hearing, if the dog is believed to be a potential threat of serious harm to people or to other animals, the City Manager may require the dog to be impounded during the hearing and appeal process. The owner or keeper is liable for any boarding and impounding fees incurred.

(3) The owner will be notified of the findings of the City Manager, in writing. If the dog is declared a nuisance, vicious or potentially vicious dog, the City Manager may impose any and all penalties and fines allowed under MGL c. 140. Furthermore, if the dog is declared vicious, the

. . .

## II. Background

The following facts are taken from the parties' briefs and supporting evidence and are viewed in the light most favorable to Richardson, the non-movant.

In 2005, Richardson, a lifelong resident of the City, obtained two puppies he named Zoe and Starla from a rescue organization that had found the dogs as young strays in a City park. The dogs were believed to be littermates because they were the same age (estimated at four months) when picked up in the park, very similar in appearance, and found together under a park bench. The dogs' heritage was unknown, however, and they both were classified by the rescue organization and later by Richardson's veterinarian as "mixed breed."

Richardson testified that he procured the dogs for his companionship because he found them to be "cute" and enjoyed the playful antics and affection they displayed toward him and each other. The dogs were considered to be friendly and well-socialized, including in the company of Richardson's young nieces and nephews, and there was no evidence that the dogs had ever bitten a person or other dog, attacked any other animal or otherwise threatened the community peace. In the photo below provided by Richardson, Starla is in the foreground, Zoe behind her.

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City Manager may require that the dog be removed from the City or that the owner or keeper comply with the provisions of this Section as stated below. Any owner or keeper may appeal an adverse determination by the City Manager to a trial court of appropriate jurisdiction.

In 1988, the City enacted the Ordinance, banning "all pit bull variety of terrier" from the Winthrop city limits. On August 1, 2009, a meter reader observed Zoe inside Richardson's home through a window. The meter reader notified animal control officers, who seized Zoe the next day. During this time, Starla was at a veterinary hospital recovering from surgery. Starla made a full recovery and returned to live with Richardson after her release from the hospital.

As provided by the Ordinance, a hearing was held. The animal control officer testified that based on her appearance, Zoe was a pit bull. Richardson presented an affidavit from his veterinarian stating that Zoe was a "mixed breed." No DNA testing was performed. The City Manager determined that Zoe was a "Pit Bull Terrier type dog" and therefore was "vicious" under the Ordinance. The City Manager required that Zoe be removed from the City within ten days. Richardson was unable to find a home for Zoe outside of the City within the allotted time. He appealed to the state trial court, which affirmed the City Manager's finding without opinion. Thereafter, on December 1, 2009, Zoe was killed by lethal injection.

Starla continues to live with Richardson in the City today. However, Richardson fears that the City also may seize and kill Starla for alleged violation of the Ordinance. Since Zoe was seized, Richardson has not allowed Starla to leave his home except to relieve herself in the

backyard, which has a privacy fence, and he now keeps his curtains drawn over his windows at all times to hide her. Richardson averred that he essentially leaves Starla only for work and will not go on vacation, which would require boarding her, or leave the house for any extended period of time out of fear that she will be seized. A preliminary injunction preventing the City from seizing Starla was issued pending the outcome of this case.

Richardson filed the instant complaint alleging that the Winthrop pit bull ban violates the Fourteenth Amendment to the U.S. Constitution because (1) it is unconstitutionally vague, on its face and as applied, and (2) it deprives him of substantive due process. Richard is not challenging procedural due process or the Takings Clause of the Fifth Amendment; therefore, this Court will not address those issues.

## III. Analysis

### A. Jurisdiction; Standing

This Court's jurisdiction arises under 28 U.S.C. § 1343. There is no dispute that Richardson has standing to file suit for both retrospective and prospective relief.

### B. Standard for Summary Judgment

Summary judgment may be granted where the evidence shows there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing the absence of a genuine issue of material fact. In reviewing a summary judgment motion, the court must view the evidence in the light most favorable to the nonmoving party. All doubts must be resolved in favor of the nonmoving party.

### C. Plaintiff's Claims

Richardson claims that, under the Fourteenth Amendment to the U.S. Constitution, the Ordinance is unconstitutionally vague and violates his right to substantive due process. The Court will consider each of these claims in turn.

#### 1. *Vagueness and Overbreadth*

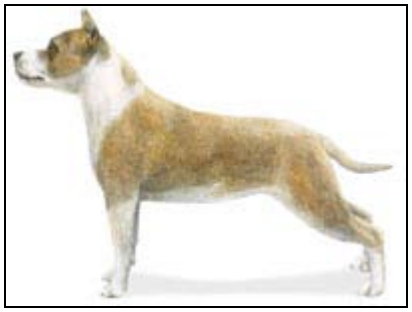
Richardson first challenges the Ordinance on the ground that it is unconstitutionally vague both on its face and as applied to him, and overly broad.

It is well established that a law is unconstitutionally vague if its language is not definite enough to give notice of what is prohibited, or if the law could be enforced in an arbitrary manner. The Constitution tolerates a greater degree of vagueness in enactments with civil rather than criminal penalties because the consequences are less severe. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) ("*Hoffman Estates*"). 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 (1974). A court will sustain the challenge "if the enactment is impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 495.

The Ordinance, which is civil in nature, designates as "vicious" dogs "of the following breeds or breed types and mixtures: American Staffordshire Terrier, American Pit Bull and Pit Bull Terrier." Muni. Code § 6.04.090.B.1(c). It also forbids the keeping of any of these breeds "or mixtures thereof" within City limits. Muni. Code § 6.04.090.C. First, Richardson argues that the law is overly broad and void on its face because it inadequately describes which dogs it bans. Unless a dog is a registered purebred of one of the three breeds listed or a mixture thereof,

he contends, the owner has no guidance as to what will be considered one of the forbidden "breed types and mixtures." He asserts that because there is no reliable means of identifying the heritage of unregistered or mixed-breed dogs, the Ordinance does not provide individuals with adequate notice as to whether the law pertains to them, and also is highly susceptible to arbitrary and discriminatory enforcement. In support of his arguments, Richardson cites *American Dog Owners Ass'n, Inc. v. City of Lynn*, 533 N.E.2d 642 (Mass. 1989), and *American Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416 (Iowa 1991).

Richardson further notes that the American Kennel Club ("AKC") recognizes the American Staffordshire Terrier, a picture of which (from www.akc.org) is included below, but recognizes neither an "American Pit Bull Terrier" or "Pit Bull Terrier."



Meanwhile, the United Kennel Club ("UKC") recognizes the American Pit Bull Terrier ("APBT"), a picture of which (from www.ukcdogs.com) is below, but not the American Staffordshire Terrier or "Pit Bull Terrier."

The Official UKC Breed Standard notes the "powerful physique" of the APBT and states that "most APBTs exhibit some level of dog aggression." However, the UKC standard also states:

> This breed is eager to please and brimming over with enthusiasm. APBTs make excellent family companions and have always been noted for their love of children. . . . The APBT is not the best choice for a guard dog since they are extremely friendly, even with strangers. Aggressive behavior toward humans is uncharacteristic of the breed and highly undesirable.

Notably, neither the AKC nor UKC – the two largest dog breed registries in the United States – recognize a "Pit Bull Terrier," the type of dog Zoe was determined to be.

Second, Richardson contends that the Ordinance is unconstitutionally vague as applied to him. His dogs Zoe and Starla were of unknown heritage and neither the rescue group from which he obtained them nor his veterinarian ever suggested to him that the dogs belonged to one of the three listed breeds, breed types or mixtures. Richardson submitted evidence that, because his dogs were always well-behaved and exhibited none of the problematic behavioral tendencies attributed to "pit bull" types of terriers, he had no reason to consider whether they might be considered to be the type of dogs banned from the City.

The City denies Richardson's vagueness allegations, contending that it is well known – to dog owners, law enforcement and, indeed, the general public – what types of dogs constitute the "'pit bull' variety of terrier." In particular, the City points to pervasive use of the term in the news media and popular culture, as well as by welfare and advocacy groups such as the Humane Society of the United States and Best Friends Animal Society.

On review of all the facts in the light most favorable to Richardson, the Court finds that the Ordinance is not "impermissibly vague in all of its applications," as required by *Hoffman Estates*, 455 U.S. at 495, because the owners of dogs registered either as purebred American Stafford Terriers or American Pit Bull Terriers necessarily must know that the Ordinance applies to them and bans their dogs from the City. *Cf. American Dog Owners Ass'n, Inc. v. Dade County, Fla.*, 728 F. Supp. 1533 (S.D. Fla. 1989).

Whether the Ordinance survives Richardson's challenge that it is impermissibly vague as applied to him presents a closer question. In particular, serious issues are raised by Richardson's claims that when he obtained the dogs he had no reason to believe they fell within the Ordinance, and that he has no reliable means of ascertaining their genetic makeup. They do not, however, create genuine issues of material fact. Even at a glance, the evidence Richardson presented shows that Zoe and Starla are muscular dogs with large heads and short coats. These characteristics were ample to support the City Manager's finding that Zoe was of the "'pit bull' variety of terrier" and to put Richardson on notice that both of his dogs were subject to the ban. Richardson presented some evidence that these traits tend to dominate when dogs are allowed to breed freely, and certainly are not confined to dogs of the "'pit bull' variety of terrier." The Court, however, finds that this evidence is insufficient to create a genuine issue of material fact,

and holds that the Ordinance is not impermissibly vague as applied to Richardson nor in violation of the overbreadth doctrine.

**2. *Substantive Due Process***

Richardson's second claim is that the Ordinance violates the Due Process Clause of the Fourteenth Amendment by impermissibly treating so-called "pit bulls" and their owners in a different fashion than other dogs and owners because there is a lack of evidence other than outdated, inaccurate stereotypes 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." *City of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974)). In addition to guaranteeing fair procedures, the Due Process Clause "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 (internal 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 (1997). But if an enactment burdens some lesser right, the infringement merely has to bear a rational relation to a legitimate government interest. *Id.* at 728; *Reno v. Flores,* 507 U.S. 292, 305 (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.").

While Richardson has a protected interest in the property of his dogs, this interest must be balanced against the local government's power to provide for public safety. Where justified, a

deprivation of private property is a legitimate exercise of police power if the statute in question bears a rational relationship to a legitimate legislative goal or purpose. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

The Court finds that because the Ordinance does not implicate a fundamental right, it merely must meet the less stringent standard and bear a rational relationship to a legitimate government interest in order to survive Richardson's substantive due process challenge. *Glucksberg*, 521 U.S. at 728.

It is uncontested that the City has a legitimate interest in animal control – the protection of public health, safety and welfare – and that dogs may be taken and destroyed under the state's police power without offending the constitutional rights of their owners. *See, e.g., Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698, 704 (1897). Richardson asserts, however, that the means by which the City has chosen to pursue that interest bears no rational relation to the interests it seeks to protect. In particular, Richardson contends there is a lack of evidence that dogs of the "'pit bull' variety of terrier" pose a threat to public safety or constitute a public nuisance and, thus, there is no rational basis for the City to enact a breed-specific prohibition. Richardson further contends that although pit bull bans twenty years ago may have been justified by the then-existing body of knowledge, the state of science in 2010 is such that the bans no longer bear any rational relation to the government's interest.

Richardson argues that breed-specific legislation ("BSL") like the Ordinance is opposed by many, including the National Animal Control Association ("Dangerous and/or vicious animals should be labeled as such as a result of their actions or behavior and not because of their

breed.")[2]; the American Veterinary Medical Association ("The AVMA supports dangerous animal legislation by state, county, or municipal governments provided that legislation does not refer to specific breeds or classes of animals.")[3]; and the Humane Society of the United States ("[O]nce research is conducted most community leaders correctly realize that BSL won't solve the problems they face with dangerous dogs.").[4]

Richardson further argues that BSL, and specifically subsection B.2 of the Ordinance here, fails to meet the threshold rationality requirement because it is fatally both under-inclusive and over-inclusive: under-inclusive because it does not apply to dogs of non-targeted breeds who exhibit behaviors that threaten public safety, and over-inclusive because it impacts a great many dogs who, like Zoe and Starla, pose no danger at all due to their temperament, the responsible behavior of their owners, or both. He asserts that this poor fit between means and ends also renders BSL inherently ineffective.

Pointing to the cases where courts across the country have rejected substantive due process challenges to pit bull bans, the City responds that the Ordinance meets the "rational relationship" test. The City argues that the mere presence of pit bulls poses a significant threat to the health, safety and welfare of City residents and visitors, asserting that "pit bulls" as a breed are dangerous because they generally display the following traits:

> (i) powerful instincts for dominance which naturally result in a proclivity for fighting;
>
> (ii) a strong prey drive, which inspires a natural chase instinct that often results in their aggressive pursuit of cats, rabbits, other dogs, and human children;

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[2] *See* http://www.nacanet.org/guidelines.html.
[3] *See* http://www.avma.org/issues/policy/dangerous_animal_legislation.asp.
[4] *See* http://www.humanesociety.org/animals/dogs/facts/statement_dangerous_dogs_breed_specific_legislation.html.

(iii) a stubbornness that results in sustained, unyielding aggressiveness once an attack begins;

(iv) powerful jaws capable of crushing bones and hanging on to victims even while the animal withstands infliction of injury or pain; and

(v) a combination of stamina, strength, agility, and "gameness" (the will to successfully complete a task).

Given the high degree of deference owed to the City in applying the "rational relationship" test, the Court finds that these reasons are sufficient to survive Richardson's challenge and uphold the Ordinance. Furthermore, Massachusetts' highest state court has noted the pit bull as a breed is "commonly known to be aggressive." *Commonwealth v. Santiago*, 896 N.E.2d 622, 626-27 (Mass. 2008) (addressing whether an exception to the "knock and announce" rule for the execution of a search warrant was justified where one factor was the presence of a pit bull on the premises).[5] *See also Vanater v. Village of South Point*, 717 F. Supp. 1236, 1243 (S.D. Ohio 1989) ("The evidence indicates that Pit Bulls possess the inherent characteristics of exceptional aggression, athleticism, strength, viciousness and unpredictability which are unique to the breed; they possess an extraordinary fighting temperament and have been shown to be the most tenacious dog of any breed; they have a history of unpredictably and instantaneously attacking in a berserk and frenzied rage and have the ability to inflict significant damage upon their victims.").

The Court finds that the City's decision to classify pit bulls as dangerous animals has a rational basis in fact, and that adopting controlling measures such as banning them from within City limits in order to reduce the likelihood of human injury bears a rational relationship to the governmental objective of preserving public health, safety and welfare.

[5] *Contra People v. Riddle*, 630 N.E.2d 141 (Ill. App. Ct. 1994).

## IV. Conclusion

The Court holds that, as a matter of law, Winthrop Municipal Code section 6.04.090 is not void for vagueness, either facially or as applied to the plaintiff, and it does not violate the plaintiff's substantive due process rights. The Court therefore grants summary judgment in favor of the defendant City.

IT IS SO ORDERED this 28th day of August, 2010.

Hon. H.H. Summers
United States District Judge