IN THE COUNTY COURT
IN AND FOR CLAY COUNTY, FLORIDA

Janie Oliver,

Plaintiff,

v.

Clay County,

Defendant.
_____/

COUNTY CIVIL DIVISION
CASE NO. 2010-CC-187 C

MEMORANDUM OF LAW
IN SUPPORT OF FIRST AMENDED
COMPLAINT FOR DECLARATORY JUDGMENT

I. Plaintiff's Amended Complaint meets all the requirements for Declaratory Relief

The instant declaratory relief action was filed as a result of an order of the Clay County Fire Chief declaring Plaintiff's dogs dangerous and ordering them destroyed. The dogs were seized, impounded, and classified dangerous on the authority of F. S. 767 and the Clay County Animal Control Ordinance.

There is a bona fide, actual need for this court to declare the rights of Plaintiff pursuant to her due process rights and the forfeiture of her property in the form of her two dogs, Pip and Lily, as it relates to the state and county laws. Such declaration by the Court will be based on a present ascertainable set of facts which

present an actual controversy. The right of Plaintiff in keeping her property (in this case two sentient beings), is dependent on this Court's application of the facts to the concepts of due process and forfeiture. Plaintiff has an actual adverse interest to the Defendant. Simply put, Plaintiff wants her dogs back, and the Defendant wants them dead. All persons who have adverse legal interests in the matter are before the court. Plaintiff has served the State Attorney with a copy of this Complaint. The decision of this Court will not be "advice." It will determine whether Pip and Lily live or die.

There is ample authority for the proposition that a declaratory relief action is the proper vehicle to challenge the constitutionality of a Dangerous Dog Ordinance. *Schoendorf v. City of Spokane*, Case No. 2007-02-039923, attached as "**Exhibit A"** and *Colorado Dog Fanciers v. City and County of Denver*, 820 P.2d 644 (S.Ct. 1991).

II. Plaintiff was denied due process in the initial impoundment and seizure of Pip and Lily

There is no question that Plaintiff has a protected property interest in the ownership of Pip and Lily, and the seizure and impoundment of these dogs triggers due process, *Pasco v. Reihl*, 635 So.2d 17 (S.Ct. 1994).

> "In the instant case, the Riehl's private property was subject to, among other things, physical confinement, tattooing or electric implantation, and muzzling. In the aggregate, these restrictions are a deprivation of property and before such restrictions are imposed, a property owner must be afforded

> an opportunity to be heard. Accordingly, we find that the Riehls suffered a deprivation of property without benefit of a hearing, and such violation was a violation of their procedural due process rights." *Id*. at 19.

See also, Mansour v. King, 131 Wash. App. 255 (Wash. App.2006) and *Philips v. San Luis Obispo County Dept. of Animal Regulation*, 183 Ca. App. 3d 372 (Cal. App. 1986).

The deprivation here is unquestionably more severe than *Pasco,* as this case involves destruction; a total, complete and final deprivation of Oliver's property rights.

A. Oliver was not provided a post seizure hearing that comported with due process

1. There is no provision in the Clay County Ordinance for a swift post seizure hearing and the Ordinance is therefore unconstitutional

The Clay County Ordinance Section 4-34 entitled "Determination to destroy dog" does not provide for *any* swift post seizure hearing. Essentially, the department head makes a unilateral determination of whether the dog shall be destroyed, Section 4-34(b). Thereafter, the only remedy provided by the Ordinance is to petition to the county court to "appeal" the determination, Section 4-34(c). Thus, under the Ordinance, the dog can be held for months without the owner having any opportunity to heard on the issue of whether the dog was properly seized in the first instance.

a. The Clay County Ordinance violates Chapter 767.12 and was therefore enacted *ultra vires*

Section 767.13(2) Fla. Stat. is the portion of the state dog law that provides the procedure mandated for the destruction of dogs such as Pip and Lily. The Ordinance does not meet the requirements for a post seizure hearing within 21 days of an owner's request. The State scheme requires that an owner be given a hearing after the initial determination to destroy the dog. To comply with minimum due process mandates, the government must put forward their proof justifying the seizure, impoundment and claim for destruction of the dog. Under state law, it is only after this hearing that the matter proceeds to an "appeal" in County Court. The State procedure is mandatory. "Each applicable local governing authority ***must*** establish hearing procedures that conform to this paragraph" (Emphasis added).

The Clay County Ordinance therefore fails to follow the mandatory scheme required by state statute and is therefore unconstitutional since it was enacted *ultra vires*.

b. The Clay County Ordinance violates procedural due process

Even without violation of the clear mandate of F.S. 767.12, the Ordinance would violate Plaintiff's due process rights. It is facially unconstitutional because it does not provide an immediate post seizure hearing. *Pasco v. Riehl, supra*, is both instructive and dispositive. There, the County of Pasco used the same procedure

that was used here to declare a dog dangerous. That is, the governmental authority made a unilateral decision to declare the dog dangerous, and thereafter, the only recourse for the dog owner was an appeal to the county court. The Supreme Court held that such a procedure was unconstitutional, on the basis that it failed to afford the owner an opportunity to heard prior to appeal. Thus, under the Supreme Court's decision in *Pasco, supra*, the Clay County Ordinance is facially unconstitutional for failure to provide a swift post seizure hearing.

2. The County's provision of a hearing before The Fire Chief does not cure the unconstitutionality of the Clay County Ordinance

The county did provide a hearing before Clay County Fire Chief Lawrence Mock shortly after Pip and Lily's seizure. Because this hearing was not required under the county Ordinance but afforded gratuitously, this hearing will be referred to hereinafter as the "Courtesy Hearing." The County erroneously asserts that provision of the Courtesy Hearing to Oliver cures the constitutionally defective Clay County Ordinance. It does not.

There is no requirement that such a hearing ever be afforded before a pet owner is forced to seek redress in County Court. Whether a Courtesy Hearing is provided rests in the sole discretion of the County. Providing a courtesy hearing that is not legally mandated does not create due process. *See Philliips v. San Luis Obsido County of Dept. of Animal Regulation*, 183 Cal.App 372 (Cal.App. 1986). In *Phillips*, *supra*, a city ordinance providing for seizure and destruction of a dog

was found unconstitutional even though a post seizure "courtesy" hearing was held, where the ordinance made no provision for such hearing either before or after seizure.

a. The Courtesy Hearing improperly put the burden of nonpersuasion (going forward with the evidence) on Oliver and thus the County had no right to continued impoundment of Pip and Lily and further failed to provide Oliver with due process

The procedures followed during the Courtesy Hearing were an egregious departure from procedural due process. Most importantly, it put the burden of nonpersuasion on Oliver. The burden of nonpersuasion simply means the burden of going forward with the evidence. The County adduced no admissible evidence at the Courtesy Hearing that justified the original seizure, the continued impoundment, or the destruction of the dogs. The County did not call one witness or introduce a single exhibit.

The transcript makes it clear that the posture of the hearing was such that the County put the burden of going forward with the evidence on Plaintiff. In other words, Plaintiff was required at the hearing to prove her dogs were not dangerous and should not be destroyed. Under the County's scheme, if a pet owner fails to provided exculpatory evidence, the County can, unless the pet owner appeals to County Court, destroy the dog seven days later, without ever having had to prove reasonable cause before a neutral fact finder.

Such a procedure flies in the face of due process, which requires that the burden of going forward with the evidence be on the County. The County seized private property and intends to effectuate what is essentially a forfeiture. If the county fails to produce any evidence to support the seizure, they have not carried the burden of going forward with the evidence and the property must be returned to the rightful owner.

The concept of the burden of going forward with the evidence and its relationship to due process was discussed in *Colorado Dog Fanciers v. City and County of Denver*, 820 P2d 66 (S.Ct. 1991). The case involved the burden of going forward with the evidence in cases where the municipality had declared a dog a pit bull under its breed specific ordinance. The Colorado Supreme, en banc, stated:

> 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 was not a pit bull. As a result, the court severed that provision and construed the ordinance to place the burden on the city…We agree with the trial court's construction. *Id*. at 648.

Since there is not a statutory requirement for such a hearing in the Clay County Ordinance, there can be no legal procedure outlined as to who bears the burden of going forward with the evidence. Dog owners are not advised of who bears this risk, and there are no procedural guidelines whatsoever because the entire Courtesy Hearing procedure was made up by the County. The Courtesy

Hearing provided to Plaintiff violated Plaintiff's procedural due process rights by improperly putting the burden of going forward with the evidence on her. Thus, the entire Courtesy Hearing was *ultra vires*.

b. Pip and Lily were held for over two months before the County produced *any* evidence supporting their seizure and impoundment which is not the swift post seizure hearing required by State Statute or due process

1. State Statute

It is clear from Sections 767.12 and 767.13 Fla. Stat, that when a municipality seizes a dog for purposes of destruction a swift immediate post seizure hearing is mandated no later than twenty-one calendar days after a dog owner requests one. This timeframe is imposed to prevent the very situation that occurred here. A citizen is being deprived of her property without the government being required to promptly prove the seizure was legally justified. This deprivation of property is particularly heavy handed in instances where the seized properties are sentient beings and such beings considered by many pet owners to be members of the family. Further, these family members are being held in solitary confinement, without exercise, behind a chain link fence on a concrete slab.

The Clay County Ordinance tracks the state law regarding timeframes for dangerous dog investigations. But the Ordinance does not require a prompt post seizure hearing under the "Destruction of Dog" section. Thus, we are left with an

absurd result. An owner gets more due process if his or her dog is declared dangerous than when it is going to be killed.

The result is that the "Destruction of dog" section of the Ordinance does not limit the amount of time the County has to have a hearing. This clearly conflicts with the State Law that requires a hearing within twenty one days of the request in both cases. The "Destruction of dog" section of the Ordinance violates the mandate of State statute, is unconstitutional and *ultra vires*.

2. Due process

One of the hallmarks of due process, is the right to notice and a meaningful opportunity to be heard. A meaningful opportunity to be heard means "at a meaningful time and in a meaningful way." *Mathews v. Eldridge*, 424 U.S. at 333 (S.Ct. 2002).

As noted by the court in *Brinkley v. County of Flagler*, 769 So2d 468 (5th DCA 2000), (a case involving Flagler County's seizure and forfeiture of neglected animals) the court emphasized the importance of whether the litigant "received a full hearing during which the validity of the County's seizure was judicially determined." *Id*. at 472. Here the Plaintiff did not receive any due process review of the County's seizure of her dogs until sixty days after the fact. The only reason for the sixty day period (it could have been much longer) was the effort of counsel and the open schedule of the judge.

c. Neither the Courtesy nor County Court hearing articulated or utilized any ascertainable standard of proof thereby violating Plaintiff's procedural due process rights

The standard of proof utilized for the finding that Pip and Lily should be destroyed has *never* been articulated. With respect to the Courtesy Hearing, the standard of proof is not evident in the Fire Chief's initial finding, the subsequent proceeding in which he upheld his own death sentence or the County court order. Of course, since there is nothing in the Ordinance even requiring such a hearing, the Ordinance can provide no guidance.

The same is true for the County Court hearing. There is nothing in the state Statute, Ordinance, or Judge Collin's order that gives any indication of what standard of proof was required or utilized. Due process requires that the standard of proof be clearly ascertainable. In *Mansour v. King*, 131 Wash. App. 255 (Wash. App.2006) the court said:

> An adequate standard of proof is a mandatory safeguard….Neither the King County Code nor the Board rules require a particular standard of proof. Nor does the record indicate what standard the Board applied here….(The Board) simply issued findings of fact and then stated it "upheld" Animal Control's Removal Order…The lack of a clearly ascertainable adequate standard of proof violated Mansour's procedural due process rights.

The above quotation can be applied to the record here. The same result is inevitable. Oliver's procedural due process rights have been violated.

d. Since the penalty for Pip and Lily under the Ordinance is death, the County claim was a forfeiture to which a clear and convincing standard burden of proof applied

The instant case involves seizure, impoundment and the County's decision to destroy two dogs. Such a proceeding constitutes a forfeiture, as it is a complete, total and final deprivation of Plaintiff's property rights. In *Brinkley v. County of Flagler*, 769 So2d 468 (5th DCA 2000) a proceeding under F.S. 828.073 to take Brinkley's animals, the court found that such a proceeding amounted to a forfeiture requiring a clear and convincing standard of proof. As stated previously, it is not evident anywhere what standard was applied by Judge Collins. Thus, pursuant to *Mansour, supra*, both the Courtesy Hearing and County Court hearing violated Plaintiff's procedural due process rights.

g. Plaintiff was not provided the evidence used by the county in the Courtesy Hearing and was thereby denied the right to due process

A review of the Courtesy Hearing indicates that evidence was considered by Mock that was never provided to Oliver or her counsel. The failure to provide documentary evidence that allegedly provided the basis for the determination to destroy Pip and Lily violates due process. Further, counsel should have been allowed to cross examine witnesses and defend against the County's case. The County made this impossible by not providing counsel with all the records Mock considered in making his own initial determination. In *Schoendorf v. City of Spokane*, Case No. 2007-02-03992 (Wash.2007), a copy of which is attached as

"**Exhibit A**," the court reversed a dangerous dog determination in part because, "(a)ppellant was not given prior to the hearing certain documents used in the hearing examiner's decision." The court determined that such a procedure resulted in a denial of procedural due process. The same infirmity infects the case at hand.

1. Chief Mock was not a neutral fact finder

Another obvious requirement of procedural due process is the necessity of a neutral fact finder. A litigant may be denied due process of law due to judicial bias. *Matter of Johnson*, 99 Wn.2d 466, 475 (1983) (noting that a biased decision maker is "constitutionally unacceptable" as "our system of law has always endeavored to prevent even the probability of unfairness"). Under the "appearance of fairness" doctrine, quasi-judicial proceedings are valid "only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. *Id*. at 478. "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." *State v. Post*, 118 Wn.2d 596, 618 (1992). Impartial means absence of bias, either actual or apparent. *State v. Moreno*, 147 Wn.2d 500, 507 (2002).

It violates basic notions of fair play and due process to have Mock make the initial determination and then be asked to change his mind while sitting as the hearing officer. When one looks across the state, these roles are generally mutually exclusive. The animal control department makes an initial determination, and a

hearing officer or code enforcement board hears the appeal. It is noteworthy that the Clay County Ordinance does allow the department head to delegate such a hearing to the Code Enforcement Board in section 4-20(d).

j. Chief Mock improperly curtailed Plaintiff's cross examination of witness and Plaintiff was thereby denied due process

The ability to cross examine witnesses is another hallmark of procedural due process, *Mansour v. King, supra*. It is evident from the record that Mock improperly curtailed cross examination by Plaintiff's counsel. He refused to allow "deposition type questions" without giving any clue as to what that meant. The record taken as whole at the Courtesy Hearing illustrates that Plaintiff counsel's right to cross examination was truncated to the extent that it was unconstitutional.

III. The subsequent County Court hearing did not cure the County's denial of due process at the initial hearing

It seems clear that the County and the County attorney viewed the Courtesy Hearing as a throw away proceeding of no consequence. The County made no effort to put forth any evidence, and took the position that the burden of going forward with the evidence was on Plaintiff. Apparently the County felt that a County Court appeal would cure any due process issues in the Courtesy Hearing. This is contrary to law.

A. The law is not settled that a de novo hearing is required

First, under the State statute and the Clay County Ordinance, there is no guarantee that Plaintiff is entitled to a de novo hearing. The state statute simply says that the owner may "file a written request for a hearing in the county court to appeal the classification." F.S. 767.12(d). The state statute is silent about what kind of appeal is afforded, but the majority view in the State is that it a simple record review is the appropriate procedure. *See* McCune Order attached hereto as "**Exhibit B**." Note that it took an order of this court after argument of counsel to give the Plaintiff a de novo review.

If an appellate court rules that the county court cannot have a de novo hearing, and that an "appeal" means a record review only, the problem with the County procedures will be revealed. Having not gone forward at the initial hearing with any evidence, and having only a record appellate review, there will be no evidence to sustain the classification. The County procedure violates due process, and the clear intent of the State statute.

B. Due process requires the County prove its entitlement to seizure, impoundment and the classification at an initial post seizure hearing

The whole purpose of the initial post seizure hearing is to require the government to justify their seizure, impoundment and the initial classification. Based on the State statute this must happen within twenty-one days. This is so that

the government cannot hold property without an immediate review of whether the seizure was justified.

Having a hearing sixty days later does not cure the failure of to have an immediate contested evidentiary post seizure hearing because it allows the government to keep the dogs without any meaningful due process review for forty more days than allowed by the State statute. As noted in *Schoendorf v. City of Spokane*, *supra*:

> The Supreme Court has stated "If the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at time when the deprivation can still be prevented…No later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. In this case, the monetary bar to appeal and the drastic action of destroying property (killing the animal) if there isn't a timely restraining order filed, raise serious concerns about whether there is enough due process involved.

To make matters worse, since the dog is impounded at animal control, boarding fees are accruing daily. F.S. 767.13(1) and 767.13(2) requires payment of these boarding fees pending the initial proceeding and appeal. The Clay County Ordinance 4-19(b) states that an owner "shall pay all fees….as a condition precedent to release of an impounded animal." Thus, even if Pip and Lily were to prevail on appeal, they would still be liable to pay all the boarding fees that had accrued. Plaintiff might be faced with boarding fees in excess of her ability to pay, which would result in destruction or forfeiture of the dogs, despite the fact that she prevailed on appeal.

C. Boarding fees act as a forfeiture without due process

The accrual of boarding fees can act as a forfeiture without due process, particularly in this case where the County failed to provide an immediate post seizure hearing. In *Louisville v. Kennel Club v. Louisville County Metro Government*, 2009 WL 3210690 (W.D. Ky 2009) the court held that a requirement that a dog owner whose dog had been seized for alleged animal cruelty post a $450 bond unconstitutional because of the risk that the dog owner would permanently lose his dog if he could not post his bond.

> (I)f such a person was unable to put up $450 immediately upon the probable cause finding, his pet is forfeit and he has no apparent course of recovery, even if he is ultimately found innocent of the underlying charge.

See also Schoendorf v. City of Spokane, *supra*, where the court stated: "The city needs to examine the process of appealing a dangerous dog determination and ensure that they are not permanently depriving someone of their property interests before there is a chance to appeal because of financial reasons."

Here, Oliver was required to wait two months, during which boarding fees accrued and then pay a county court filing fee of more than $300.00.

1. The County's retraction of boarding fees accrued does not affect the unconstitutionality of the Ordinance

The County's new attempt to moot the boarding fee issue by "interpreting" the statute to only require boarding fees up to the time of the initial hearing does nothing to cure the unconstitutionality of the Ordinance. Again, "interpreting" a

statute that is clear on its face does not change the wording of the statute. It only serves to show that the County realizes the operation of the statute is unfair. But such an interpretation allows total discretion to the County as to when and how to apply it. Since the statute is unconstitutional on its face, interpretation cannot save it.

D. Plaintiff should not have to pay a filing fee to get a post seizure due process hearing that should have been provided at the Courtesy Hearing

Finally, Oliver should have been given a post seizure due process hearing without having to pay a filing fee. The County, in treating the Courtesy Hearing as a throw away do over, required Oliver to pay an appeal fee in order to have the contested evidentiary due process hearing that she was supposed to have in front of Mock. Again, in *Louisville v. Kennel Club v. Louisville County Metro Government*, 2009 WL 3210690 (W.D. Ky 2009) the court held that a requirement that a dog owner whose dog had been seized for alleged animal cruelty post a $450 bond unconstitutional because of the risk that the dog owner would permanently lose his dog if he could not post his bond.

Such hearings "must meet the minimal requirements of due process. *Id*. at 660, fn. 4. *See also In Re Estate of Dionne*, 128 N.H. 682 (1986), where the court held a statute unconstitutional because it required parties to pay fees to a probate court judge for a special contested hearing session.

The appeal to the county court is the only way to contest a "Destruction of dog" determination. Requiring a fee for a due process hearing on "appeal" to determine the validity of the County's seizure of Oliver's property is an unconstitutional burden.

IV. The Clay County Ordinance substantially affects Plaintiff's right to property, and therefore the euthanasia of Pip and Lily violates substantive due process by not narrowing tailoring the outcome to the least restrictive alternative

The government may not deprive a citizen of its property without due process. This guarantee is made in both the State and Federal Constitutions. In *Rutledge v. County of Hillsborough*, 2005 WL 2416979 (Hills. Cnty 2005) the court, citing to *Massey v. Charlotte County*, 842 So.2d 142 (2nd DCA 2003) stated:

> (P)roperty rights are among the basic substantive rights expressly protected by the Florida Constitution….As such, the means by which the state can protect its interest must be *narrowly tailored to achieve its objective through the least restrictive alternative* when such basic rights are at stake. *Id*. at 5 (Emphasis added).

The liberty interest in property was further illuminated in *In Re Estate of Magee v. Magee*, 988 So2d 1 (2nd DCA 2007). There, the court, citing to *Shriners Hospital v. Zrillic*, 563 So2d 64 (Fla. 1990) said:

> (A)rticle I, section 2, protects all incidents of property ownership from infringement by the state unless regulations are "reasonably necessary" to secure public welfare….the *state must employ the "least restrictive alternative" to achieve its legitimate objectives* where such rights are at stake; *In re Forfeiture of 1969 Piper Navajo*, 592 So.2d 233, 236 (Fla. 1992) (invalidating statute because it was not narrowly tailored to the state's objectives; (S)o long as the public welfare is protected, every person in

> Florida enjoys the right to possess property free from unreasonable government influence."

It is clear from the citation above, that the protected property interest extends to personal property under forfeiture. *In re Forfeiture of 1969 Piper Navajo*, 592 So.2d 233, 236 (Fla. 1992). This case involves exactly such a situation.

The right to the life of one's pet must be considered a liberty interest guaranteed by the State constitution, strictly limiting governmental intrusion. *Rae v. Flynn*, 690 So2d 1341 (3rd DCA 1997) illustrates this principle. There, a neighbor complained that a neighborhood dog was a nuisance. The court upheld the injunction stating:

> (B)ecause the trial court correctly exercised judicial restraint in crafting a remedy to accomplish the reduction of neighborhood hostilities *by the least restrictive means*, we affirm the order below. *Id*. at 1343 (Emphasis added).

Here, the Plaintiff will introduce evidence showing that there are less restrictive alternatives that will serve the public safety. Since the County has not, and cannot show that there are not less restrictive alternatives to protect the public health, safety and welfare of the citizens of Clay County, the destruction of Oliver's unique and irreplaceable property is unconstitutional.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent by mail to: Frances Moss, Esq., P.O. Box 1366, Green Cove Springs, FL 32043-1366 and

Marcy I. LaHart, Esquire, at 4804 SW 45th Street, Gainesville, FL 32608 this 22nd day of July, 2010.

Fred M. Kray/238546
Attorney for Plaintiff Oliver
1914 SW 36th Place
Gainesville, FL 32608
(352) 337-2721