

No. 10cv00416

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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QUINTON RICHARDSON

*Plaintiff/Appellant,*

v.

CITY OF WINTHROP, MASSACHUSETTS

*Defendant/Appellee.*

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*Appeal from the United States District Court  
for the District of Massachusetts*

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BRIEF FOR APPELLANT

Team # 18  
Attorneys for Appellant

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- American Pit Bull Terrier Breed Standard, United Kennel Club,  
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- Breed Bans, National Canine Research Council,  
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- Breed Specific Legislation Update, Netherlands to Repeal Breed Ban,  
<http://www.endangerreddogs.com/EDDRNetherlandsBSL.htm> (last visited Jan. 24, 2011). ... 12
- Dog Asbo Legislation Approved by MSPs*, BBC News, Apr. 22, 2010,  
[http://news.bbc.co.uk/2/hi/uk\\_news/scotland/8636913.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/8636913.stm) (last visited Jan. 24, 2011). ..... 12
- Elizabeth Paek, Recent Developments, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. Haw. L. Rev. 481 (2003).  
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- Kansas, National Canine Research Council, <http://nationalcanineresearchcouncil.com/in-your-state/kansas> (last visited Jan. 24, 2011). ..... 12
- Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745 (2007). ..... 19
- Summary of Animal Cruelty Laws, American Humane Association,  
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- William C. Root, Note, *'Man's Best Friend': Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for their Wrongful Death or Injury*, 47 Vill. L. Rev. 423 (2002). ..... 18, 19

## STATEMENT OF THE ISSUES

- I. Did the district court err when it ruled that Winthrop Municipal Code § 6.04.090, designating all “‘pit bull’ variety of terrier” as *per se* vicious and thus banning them, is not unconstitutionally vague on its face or as applied to Richardson under the Fourteenth Amendment to the U.S. Constitution and does not violate the overbreadth doctrine?
- II. Did the district court err when it ruled that Winthrop Municipal Code § 6.04.090, designating all “‘pit bull’ variety of terrier” as *per se* vicious and thus banning them, does not violate substantive due process under the Fourteenth Amendment to the U.S. Constitution?

## STATEMENT OF THE CASE

### **I. STATEMENT OF FACTS**

Quinton Richardson (“Richardson”) is a lifelong resident of Winthrop, Massachusetts (the “City”). *Richardson v. City of Winthrop*, No. 10cv00416, slip op. at 4 (D. Mass. Aug. 28, 2010). In 2005, Richardson adopted two puppies that a rescue organization had found as young strays in a City park. *Id.* While the heritage of the puppies was unknown, both the rescue organization and Richardson’s veterinarian classified the puppies as “mixed breed.” *Id.* Richardson named the two puppies Starla and Zoe.<sup>1</sup> *Id.*

Starla and Zoe were cute, affectionate, well-socialized, and playful dogs, and they got along with each other, as well as with Richardson. *Id.* Even in the company of Richardson's young nieces and nephews, Starla and Zoe were always friendly. *Id.* In fact, Starla and Zoe had never bitten another dog or a person, had never attacked another animal, and had never disturbed the peace of the community. *Id.*

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<sup>1</sup> A photo of Starla and Zoe is reproduced in the attached Appendix A. Starla is in the foreground, and Zoe is behind her.

On August 1, 2009, a meter reader observed Zoe inside Richardson's home through a window. *Id.* at 5. In 1988, the City had enacted Winthrop Municipal Code § 6.04.090 (the “Ordinance”), a provision that banned “all pit bull variety of terrier” from the Winthrop city limits.<sup>2</sup> *Id.* After seeing Zoe, the meter reader informed animal control officers, who seized Zoe from Richardson's home the very next day. *Id.* A hearing was held,<sup>3</sup> during which the animal control officer testified that Zoe was a pit bull. *Id.* The officer’s assessment was based solely upon Zoe’s appearance; no DNA testing was performed to determine Zoe’s genetic make-up. *Id.* Although Richardson submitted an affidavit from his veterinarian stating that Zoe was in fact a “mixed breed” and not a “pit bull type of terrier,” the City Manager nevertheless determined that Zoe was a “pit bull terrier type dog” and therefore “vicious” under the Ordinance. *Id.* As a result, the City Manager gave Richardson only ten days to remove Zoe from the City. *Id.* Unable to find Zoe a home during the short time provided, Richardson appealed to the state trial court, which affirmed the City Manager’s finding without opinion. *Id.* On December 1, 2009, the City killed Zoe by lethal injection. *Id.*

Fortunately, at the time of Zoe’s seizure, Starla was recovering from surgery at a veterinary hospital and was able to escape Zoe’s fate. *Id.* Starla has since returned to live with Richardson in the City, but Richardson is petrified that Starla will also meet Zoe’s fate. *Id.* As a result, Richardson has confined Starla to the house, only allowing her outside to relieve herself in the backyard, which is enclosed by a privacy fence. *Id.* at 5-6. Richardson does not leave the house either, except to go to work. *Id.* at 6. Richardson has also not been on a vacation since Zoe’s death, fearing that Starla will also be seized if accidentally discovered. *Id.* The district

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<sup>2</sup> Relevant portions of the Winthrop Municipal Code are reproduced in the attached Appendix B.

<sup>3</sup> The Ordinance includes procedural requirements of a hearing by the City Manager or the City Manager's designee to determine whether the dog in question is a nuisance or is a vicious or potentially vicious dog. *Richardson*, No. 10cv00416, slip op. at 3 n.1.

court issued a preliminary injunction preventing the City from seizing Starla, pending the outcome of this case. *Id.*

## II. PROCEEDINGS BELOW

This action arose from the seizure and ultimate destruction of Richardson's dog Zoe by the City in 2009. *Richardson*, No. 10cv00416, slip op. at 5. Following Zoe's death on December 1, 2009, Richardson brought an action against the City, alleging that the Ordinance violated his rights under the Fourteenth Amendment to the U.S. Constitution. *Id.* at 6. Specifically, Richardson alleged that the Ordinance was impermissibly vague, both facially and as applied to him, and that the Ordinance deprived him of his right to substantive due process. *Id.* at 2. The City then moved for summary judgment. *Id.* at 2.

On August 28, 2010, the United States District Court for the District of Massachusetts granted summary judgment for the City.<sup>4</sup> *Id.* at 15. The district court held that the Ordinance was not overbroad. *Id.* at 10. Moreover, the district court reasoned that the Ordinance was not vague on its face because the Ordinance is not "impermissibly vague in all its applications," as owners of registered, purebred dogs prohibited under the Ordinance must know the Ordinance applies to them. *Id.* at 10. According to the district court, the Ordinance was also not impermissibly vague as applied to Richardson because Zoe and Starla's physical features should have put Richardson on notice that the Ordinance applied to both of his dogs. *Id.* at 10. Furthermore, the district court held that the Ordinance did not violate Richardson's right to substantive due process because Richardson's property interest in his dogs was subject to the exercise of the police power, the Ordinance did not implicate a fundamental right, and the Ordinance was rationally related to its legitimate goal of protecting public health, safety, and

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<sup>4</sup> The order and opinion of the trial court is reported as a slip opinion as *Richardson v. City of Winthrop*, No. 10cv00416 (D. Mass. Aug. 28, 2010).

welfare because pit bulls are “commonly known to be aggressive.”. *Id.* at 12 (internal quotations and citations omitted). Following the district court’s decision, Richardson filed a motion to appeal the judgment of the district court. (Briefing Order 1.) The appeal being accepted on the issues of whether the Ordinance is impermissibly vague, both facially and as applied to Richardson, whether the Ordinance is overbroad, and whether the Ordinance violates Richardson’s right to substantive due process, the matter is now before this Court. (Briefing Order 1-2.)

### SUMMARY OF ARGUMENT

The United States Court of Appeals for the First Circuit should reverse the district court’s grant of summary judgment for the City and remand the case to the district court with instructions to consider the remaining triable issues of fact. In seizing and ultimately killing Zoe, one of Richardson’s two mixed breed dogs, the City violated Richardson’s rights under the Fourteenth Amendment to the U.S. Constitution. Devastated by the loss of his loving companion and in constant fear that the same fate would befall Zoe’s littermate Starla, Richardson brought an action against the City challenging the constitutionality of the Ordinance, which gave the City the authority to seize and destroy Zoe. Richardson seeks both injunctive relief preventing enforcement of the Ordinance and damages under 42 U.S.C. § 1983.

The district court erred in granting summary judgment in favor of the City because there are genuine issues of material fact in determining whether the Ordinance is vague or overbroad in its application. First, the Ordinance is vague as applied to Richardson because it does not adequately describe the dogs that fall within the scope of the Ordinance, resulting in arbitrary enforcement. There are a number of courts that have found that discrepancies between experts regarding the methods of determining the breed of a dog are a sufficient basis for the denial of

summary judgment. There are also unresolved policy questions as to whether non-aggressive dogs should fall within the scope of the Ordinance, especially in light of recent trends whereby legislation encouraging responsible pet ownership is being favored over breed specific legislation. Similarly, the Ordinance is vague on its face because it requires arbitrary enforcement that is unsupported by an evidentiary determination of a dog's breed. In analyzing this issue, courts have found that the disagreement between experts leads to arbitrary enforcement of ordinances that do not clearly describe the type of dogs that fall within the ordinances' scope. Finally, the Ordinance is overbroad because it lacks a scienter requirement and infringes a citizen's private interests. While dogs, being property, can be subject to the police power of the state, courts have found that an owner's private interests deserve protection because of the value that the dog may have to its owner.

Furthermore, the district court erred in granting summary judgment for the City on Richardson's substantive due process claim. Although the Supreme Court's holding in *Sentell v. New Orleans & Carrollton R.R. Co.* grants dog owners no more than a qualified property interest in their pets, using a case that is over 122 years old to define the nature of the relationship between the modern dog owner and his companion is improper. Contrary to the holding of *Sentell*, modern courts and legislatures have recognized the change in the relationship between Americans and their pets, and this change is now reflected in a number of legal disciplines, including torts, family law, and trusts and estates. In order for the law to accurately reflect the prevailing views, social norms, and ideals of modern society, it is essential that the Court recognize the strong emotional bond between Americans and their companion animals afford broad protection a person's interest therein.

The U.S. Court of Appeals for the First Circuit should reverse the district court's order granting summary judgment for the City because the district court failed to properly balance the public and private interests when assessing whether the City's exercise of police power was legitimate. Specifically, in balancing the interests of the public with the private burden, the district court failed to consider the nature of the property involved and the necessity of its sacrifice as required by *Sentell v. New Orleans & Carrollton R.R. Co.* Consequently, the district court's determination that the City's exercise of the police power was legitimate was based on an incomplete balancing test and cannot stand. Summary judgment on that basis was therefore inappropriate.

The U.S. Court of Appeals for the First Circuit should reverse the district court's grant of summary judgment in favor of the City because triable issues of fact remain as to whether pit bulls are actually dangerous and present a threat to public safety or are a public nuisance. The constitutionality of the Ordinance depends on whether it is rationally related to the City's goal of protecting public health, safety, and welfare. Whether the relationship is rational then turns on the nature of the danger posed by pit bulls. Although the courts are deferential to legislative fact-finding, where, as in the instant case, the constitutionality of a statute depends on the existence of certain facts or circumstances and those facts or circumstances are alleged to have changed, the court can and should inquire into the facts on which rationality is based. Consequently, because there are genuine issues of material fact that require consideration by a fact-finder, summary judgment in this instance was not appropriate.

Finally, even finding that there was no remaining genuine issue of material fact, the district court's grant of summary judgment for the City was improper. Summary judgment requires a court to accept the facts of the non-movant as true and draw justifiable inferences in

his favor. Here, Richardson presented facts indicating that pit bulls pose no danger to the community; in fact, Zoe and Starla themselves were models of good behavior. Accepting Richardson's factual assertions as true directly negates the rationality of the relationship between the Ordinance and the City's interest. Well-behaved, sociable dogs are not a threat to public safety, nor are they a public nuisance. Because, construing the facts in Richardson's favor, the relationship between the Ordinance and the City's stated interest is wholly arbitrary, the City was not entitled to judgment as a matter of law. Accordingly, this Court should reverse the district court's grant of summary judgment in favor of the City and remand the case to the district court for consideration of the remaining issues of triable fact.

## ARGUMENT

### **I. STANDARD OF REVIEW**

Summary judgment is a question of law, not fact, and therefore, the Court should review *de novo* the district court's decision to grant summary judgment for the City. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466 n.10 (1992). Consequently, this Court should give little deference to the district court's understanding and review the issues anew to determine whether the grant of summary judgment for the City was appropriate. *Id.*

Under Rule 56(c), summary judgment is only appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of showing that no genuine issue of material fact exists. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 323 (1986). If the moving party cannot show the absence of any genuine issue of material fact, the court must deny the motion, regardless of the response of the non-moving party. *See, e.g., Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995).

In ruling on a motion for summary judgment, the court must accept the evidence of the non-movant as true and draw all justifiable inferences in his favor. *See Anderson*, 477 U.S. at 255. The judge must not weigh the evidence or determine the truth of the matter. *See id.* at 249. Determining credibility, weighing evidence, and drawing legitimate inferences from the facts are exclusively the functions of the jury. *See id.* at 255. Instead, in ruling on a motion for summary judgment, the judge’s sole function is to determine whether there is a genuine issue for trial. *See id.* at 249. Consequently, the court must be cautious in granting summary judgment, particularly in cases where there is reason to believe that the better course of action would be to proceed to trial. *See id.* at 255 (internal citation omitted).

**II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY ON RICHARDSON’S VAGUENESS AND OVERBREATH CLAIMS BECAUSE THERE ARE REMAINING GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE ORDINANCE AT ISSUE IS VAGUE OR OVERBROAD IN ITS APPLICATION AND THE CITY HAS NOT SHOWN THAT THERE IS AN ABSENCE OF EVIDENCE TO SUPPORT RICHARDSON’S POSITION.**

Under the summary judgment standard, there is a genuine issue of material fact as to whether the Ordinance is vague or overbroad, and the City has not shown that there is an absence of evidence to support Richardson’s position that the Ordinance is, in fact, vague and overbroad. Accordingly, this court should overturn the district court’s grant of summary judgment in favor of the City.

A. This Court Should Reverse the District Court’s Grant of Summary Judgment in Favor of the City Because the Ordinance is Unconstitutionally Vague and Therefore Infringes Richardson’s Rights Under the Fourteenth Amendment to the U.S. Constitution.

The Ordinance is unconstitutionally vague because it does not specify adequate standards to prevent arbitrary enforcement. For a law to be vague, the law must be missing at least one of two procedural elements: “adequate notice to citizens and adequate standards to prevent arbitrary

enforcement.” *See American Dog Owners Ass’n v. City of Yakima*, 113 Wash.2d 213, 215, 777 P.2d 1046, 1047-48 (Wash. 1989) (quoting *Seattle v. Huff*, 111 Wash.2d 923, 767 P.2d 572 (Wash. 1989)). A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant danger of arbitrary and discriminatory application. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (holding that a “breach of the peace” ordinance was not unconstitutionally vague because it was specifically written for the school context, where the prohibited disturbances were easily measured by their impact on the normal activities of the school). When the vagueness of a law is challenged, the plaintiff bears the burden of showing that the law in question 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 (1971).

1. *The Ordinance is vague as applied to Richardson because it does not adequately describe the dogs that fall within the scope of the Ordinance, resulting in arbitrary enforcement.*

The Ordinance is vague as applied to Richardson because the Ordinance does not adequately describe the dogs that fall within the scope of the Ordinance, especially as it relates to Zoe. In *Hearn v. City of Overland Park*, 244 Kan. 638, 244 P.2d 758 (Kan. 1989), the court acknowledged the difficulty in attempting to identify a dog by breed with absolute certainty, and that whether or not a particular dog falls within the scope of an ordinance is a question of fact which requires evidentiary analysis. *See Hearn*, 244 Kan. at 642-44, 244 P.2d at 762-64 (finding that vagueness challenges that do not implicate First Amendment rights must be “examined in light of the facts of the case at hand”) (quoting *U.S. v. Mazurie*, 419 U.S. 544, 550 (1975)); *see also Vanater v. Village of South Point*, 717 F. Supp. 1236, 1246 (S.D. Ohio 1989) (finding that

while identification of a pit bull may be difficult in some situations, there may be other methods that might sufficiently determine whether a dog is a pit bull within the meaning of an ordinance).

Evidence regarding the propensity of pit bulls, or lack thereof, has been discussed by several courts. For example, in *Carter v. Metro North Associates*, 680 N.Y.S.2d 239, 240-41, 255 A.2d 251, 251-52 (N.Y. App. Div. 1998), the court pointed out that there are alternative opinions on the vicious propensities of pit bulls. The court in *Carter* emphasized that scientific evidence is required to establish that pit bulls, merely by virtue of their genetic inheritance, are inherently vicious or unsuited for domestic living. *See id.* (finding that no statistical evidence was offered to demonstrate that a high percentage of pit bulls engaged in vicious conduct). Similarly, in *American Dog Owners Ass'n, Inc. v. City of Lynn*, 404 Mass. 73, 79, 533 N.E.2d 642, 646 (Mass. 1989), the judge found that there was no scientific means to determine a dog's breed, the officers did not have any training in breed identification, and other experts who testified could not provide specific objective criteria for identifying dog breeds. The court in *Lynn* also pointed out that some dogs might appear to be "pit bulls" yet belong to a breed "commonly understood" not to be "pit bulls," and vice versa. *Id.* In yet another case, experts for both plaintiffs and defendants testified that they were wrong in identifying pit bulls to varying degrees. *See American Dog Owners Ass'n v. Dade County*, 728 F. Supp. 1533, 1536 (S.D. Fla. 1989); *see also Dias v. City and County of Denver*, No. 07-cv-00722-WDM-MJW, 2010 WL 3873004, at \*4 (D. Colo. Sept. 29, 2010) (finding that experts disagree on whether a determination of a dog's threat to harm can be made on a breed-specific basis, and the significance of the results of research on the subject). The *Dias* court held that this very ambiguity makes summary judgment inappropriate. *Dias*, 2010 WL 3873004, at \*7.

Here, in assessing the evidence before it, the district court relied on the American Kennel Club's ("AKC") breed standard for the American Staffordshire Terrier and the United Kennel Club ("UKC") breed standard for the American Pit Bull Terrier. *Richardson*, No. 10cv00416, slip op. at 8. However, the district court admitted that neither the AKC nor the UKC recognized a "pit bull terrier," which was the definition pursuant to which Zoe was impounded and later killed. *Id.* at 9. Here, during the hearing to determine whether or not Zoe fell within the scope of the Ordinance, the animal control officer testified that Zoe was a pit bull based solely on her appearance. *Id.* at 5. No DNA testing was performed to determine Zoe's genetic make-up. *Id.* Moreover, Richardson submitted an affidavit from his veterinarian stating that Zoe was in fact a "mixed breed," which was in direct contradiction to the animal control officer's testimony that Zoe was a "pit bull type of terrier." *Id.* Applying the court's analysis in *Dias*, which specifically found that ambiguity in expert testimony regarding the violent propensities of a dog renders summary judgment inappropriate, the district court should have refrained from granting summary judgment in favor of the City, because of the discrepancy in classifying Zoe's breed. *Dias*, 2010 WL 3873004, at \*7.

Finally, even if, *arguendo*, Zoe was classified as a "pit bull type of terrier," in *Toledo v. Tellings*, 114 Ohio St. 3d 278, 283, 871 N.E.2d 1152, 1159 (Ohio 2007) (O'Connor, J., dissenting), Judge O'Connor emphasized his disapproval of an ordinance that classified pit bulls as vicious animals solely on the basis of their breed. In Judge O'Connor's estimation, the danger posed by pit bulls is the result of both those dog owners, like drug dealers, who "deliberately increase the dog's aggression and lethality through abuse or other specific methods of training" and those owners who "simply fail to properly train and supervise the animal, thereby creating dangerous behavior by the dog." *Id.* Thus, because of the strong link between owner behavior

and dog behavior, rational dangerous dog legislation should focus on the owner of the dog, rather than the specific breed. *Id.*; *see also McNeely v. U.S.*, 874 A.2d 371, 384 (D.C. 2005) (finding an ordinance constitutional because it criminalizes ownership of pit bulls that cause serious injury or death to a human being or a domestic animal and because the dog owner knew of the pit bull's propensity for viciousness based on prior incidents). As a matter of policy, a number of cities, such as Toledo, Ohio and Topeka, Kansas, have overturned breed specific legislation in favor of legislation aimed at responsible pet ownership. *See, e.g.*, Breed Bans, National Canine Research Council, <http://nationalcanineresearchcouncil.com/canines-issues/breed-bans> (last visited Jan. 24, 2011); Kansas, National Canine Research Council, <http://nationalcanineresearchcouncil.com/in-your-state/kansas> (last visited Jan. 24, 2011).. Moreover, various countries, including the United Kingdom and the Netherlands have repealed breed specific legislation in favor of responsible pet ownership. *See, e.g.*, Breed Specific Legislation Update, Netherlands to Repeal Breed Ban, <http://www.endangereddogs.com/EDDRNetherlandsBSL.htm> (last visited Jan. 24, 2011); *Dog Asbo Legislation Approved by MSPs*, BBC News, Apr. 22, 2010, [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/8636913.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/8636913.stm) (last visited Jan. 24, 2011).

Zoe's plight brings this matter to the forefront. Zoe was a cute, affectionate, well-socialized and playful dog, and she got along with Starla, as well as with Richardson. *Richardson*, No. 10cv00416, slip op. at 4. In fact, Zoe was often in the company of Richardson's young nieces and nephews. *Id.* Zoe had never bitten another dog or a person, had never attacked another animal, and had never disturbed the peace of the community. *Id.* Therefore, under the policy considerations that more and more cities are turning to, Zoe should not have been penalized. Compared to *McNeely*, where an ordinance was found to be constitutional because it

criminalized ownership of pit bulls known to be vicious based on prior incidents, there is nothing in the record to show that Zoe had vicious propensities. *See McNeely v. U.S.*, 874 A.2d at 384.

Thus, there are unresolved, genuine issues of material fact pertaining to the inclusion of non-aggressive dogs, such as Zoe, within the scope of the Ordinance. Consequently, a grant of summary judgment in favor of the City was inappropriate.

2. *The Ordinance is facially vague because it requires arbitrary enforcement unsupported by an evidentiary determination of a dog's breed.*

In *American Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416, 418 (Iowa 1991), the Supreme Court of Iowa held that the language of an local ordinance<sup>5</sup> that resembled the Ordinance at issue here allowed for subjective determinations. In *Des Moines*, the court clarified that the language of an ordinance that gives “improperly broad discretion to enforcement personnel, who are free to make the ‘ad hoc and subjective’ determinations” are exactly the kind of vague ordinances that were condemned in *Grayned. Id.*

The court in *Grayned* found that vague laws impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant danger of arbitrary and discriminatory application. *See Grayned*, 408 U.S. at 109, 112-13 (finding that a “breach of the peace” ordinance was not vague because it was specifically written for the school context, where (1) the prohibited disturbances are easily measured by their impact on the normal activities of the school; (2) a causality can be demonstrated between the disruption and the noise or diversion; and (3) the acts are willfully done). However, unlike in *Grayned*, the impact of the Ordinance on the Winthrop community cannot be easily measured, the City has not provided any evidence supporting the alleged causality between Zoe and any

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<sup>5</sup> Relevant portions of the ordinance at issue in *Des Moines* defined vicious dogs as “[d]ogs of mixed breed or of other breeds . . . which breed or mixed breed is known as pit bulls, pit bull dogs or pit bull terriers,” and “any other breed commonly known as pit bulls, pit bull dogs or pit bull terriers, or a combination of any of these breeds.” *Des Moines*, 469 N.W.2d at 418.

alleged disruption to the community, and Richardson did not willfully choose to procure a pit bull. *Richardson*, No. 10cv00416, slip op. at 9-10. In fact, the record shows that Zoe was a cute, affectionate, well-socialized and playful dog, that she got along with Starla and Richardson, and that she was often in the company of children. *Id.* at 4-5. The record also confirms that Zoe did not have any history of aggressive behavior. *Id.*

Moreover, unlike in *Dog Federation of Wisconsin, Inc. v. City of South Milwaukee*, 178 Wis. 2d 353, 504 N.W.2d 375 (Wis. Ct. App. 1993), in the present case Richardson adopted both Starla and Zoe without consideration of the physical or mental characteristics of the dogs. *See Dog Federation of Wisconsin*, 178 Wis. 2d at 364, 504 N.W.2d at 380 (finding that an ordinance puts a person on notice of the type of dogs that are prohibited, because a person acquires a dog for certain physical and mental characteristics). In fact, Richardson acquired both Zoe and Starla for companionship, as is evidenced by their playful and affectionate nature, both towards each other, towards Richardson, and towards Richardson's young nephews and nieces. *Richardson*, No. 10cv00416, slip op. at 4.

In considering the constitutionality of breed specific legislation, a number of courts have considered the issue of notice to a dog owner. In *State v. Anderson*, 57 Ohio St. 3d 168, 172-73, 566 N.E.2d 1224, 1228 (Ohio 1991), the court found that an ordinance restricting ownership of pit bulls was constitutional because the owner could seek guidance from a veterinarian as to the breed of a dog. *See also Vanater*, 717 F. Supp. at 1244 (holding that a fact-finder, with the assistance of a qualified veterinarian, can determine whether or not a dog falls within the scope of an ordinance); *Greenwood v. City of North Salt Lake*, 817 P.2d 816, 820 (Utah 1991) (holding that an ordinance was not unconstitutional because it allowed dog owners to get an evaluation of their dogs to determine whether or not the dog fell within the scope of the ordinance). However,

unlike *Anderson*, *Vanater*, or *Greenwood*, the Ordinance does not allow for a dog owner to obtain an evaluation of his dog's breed by the City prior to the City impounding the dog. More importantly, here the City did not accept a veterinarian's evaluation of a dog's breed, which is in direct contradiction to the facts of *Anderson*. *Richardson*, No. 10cv00416, slip op. at 5. This, in itself, creates a genuine issue of material fact as to whether the Ordinance provides sufficient notice to a dog owner.

In view of the above, there are genuine issues of material fact as to the scope of the Ordinance and whether or not the Ordinance provides both adequate notice to citizens and adequate standards to prevent arbitrary enforcement. Accordingly, this Court should reverse the district court's grant of summary judgment in favor of the City.

B. The District Court Erred in Granting Summary Judgment for the City Because the Ordinance is Unconstitutionally Overbroad, Because the Scope of the Ordinance Lacks a Scierer Requirement, and Because the Ordinance Infringes the Private Interests of Citizens.

Overbreadth is only a problem when it "reaches a substantial amount of constitutionally protected conduct." *Yakima*, 113 Wash. 2d at 216, 777 P.2d at 1048 (quoting *Houston v. Hill*, 482 U.S. 451, 458 (1987)). A statute is facially invalid for being overbroad if it prohibits a substantial amount of protected speech, and the doctrine seeks to strike a balance between competing social costs. *See U.S. v. Williams*, 553 U.S. 285, 292 (2008); *see also Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003). However, the *Williams* court also explained that one of the features that rendered the ordinance at issue constitutional was the inclusion of a scierer requirement. *See Williams*, 553 U.S. at 294. While the City might argue that the Ordinance is not overbroad because it is unrelated to constitutionally protected speech or conduct, the Ordinance does not meet the *Williams* standard of constitutionality because there is no scierer requirement, rendering the Ordinance overbroad. *See also State v. Wear*, 15 Ohio App. 3d 77,

80, 472 N.E.2d 778, 782 (Ohio Ct. App. 1984) (finding that a phrase in the ordinance pertaining to presence was so imprecise that an individual of ordinary intelligence would be unable to determine what conduct is being prohibited).

While is true that in *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 701, 704 (1897), the Supreme Court of the United States held that even if dogs are considered property “in the fullest sense of the word,” they are still subject to the bona fide exercise of the state’s police power, the Supreme Court also recognized that ordinances are usually based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd. *See Sentell*, 166 U.S. at 701, 704 (finding that a state may interfere with private property, even to the extent of destroying said property, similar to any legislative power which is aimed towards the welfare and comfort of its citizens). In fact, the *Sentell* court stated that private interests require that the valuable ones shall be protected. *Id.* at 702. In the present case, Zoe was valued by Richardson, as is evident from Zoe’s cute, affectionate, well-socialized and playful demeanor, and the substantial disruption to Richardson’s life after Zoe was killed by the City. *Richardson*, No. 10cv00416, slip op. at 4-6. Thus, even if, *arguendo*, the Ordinance is deemed to meet the scienter requirement under *Williams*, the Ordinance is overbroad because it infringes the private interests of citizens that requires protection.

In view of the above, there are unresolved genuine issues of material fact as to the scope of the Ordinance, and thus, this court should overturn the district court’s grant of summary judgment in favor of the City.

**III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE CITY ON RICHARDSON’S SUBSTANTIVE DUE PROCESS CLAIM BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER PIT BULLS ARE DANGEROUS AND, CONSTRUING ALL FACTS IN RICHARDSON’S FAVOR, THE CITY WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.**

The Due Process Clause of the Fourteenth Amendment prohibits a state from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. In addition to guaranteeing fair procedures, the Due Process Clause also “covers a substantive sphere,” which bars “certain government actions regardless of the fairness of the procedures used to implement them.” *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). More specifically, substantive due process protects the individual against three types of government actions: (1) government interference with those rights that are specifically enumerated in the Bill of Rights (e.g., the right to free speech, the right to bear arms); (2) government interference with certain unenumerated fundamental rights (e.g., the right to privacy) where there is no compelling justification for the interference; and (3) arbitrary uses of government power, even when the use does not implicate a fundamental right. *See U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). Among the rights receiving the Fourteenth Amendment’s protections is the right to property, which is included in the text of the Due Process Clause itself. *See* U.S. amend. XIV, § 1.

A. Richardson and Other Dog Owners Have an Unqualified Protectable Property Interest in their Pets Which Should Be Afforded Broad Protection by the Courts.

In cases similar to the case at hand, courts have historically relied on the holding of *Sentell v. New Orleans & Carrollton R.R. Co.*, a case decided over 122 years ago, to diminish owners’ property rights in their pets and thus uphold the constitutionality of regulations enacted pursuant to the state’s police power. *See, e.g., Vanater*, 717 F. Supp. at 1243 (citing *Sentell*, 166

U.S. at 704) (“[D]og ownership is not considered one of the cherished rights which the [c]ourt must carefully protect.”); *Nicchia v. New York*, 254 U.S. 228, 230-31 (1920) (citing *Sentell*, 166 U.S. at 698) (“Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the state without depriving their owners of any federal right.”). Viewed broadly, *Sentell* stands for the proposition that while a person has an unqualified property interest in his vegetables, clothing, or books, he likely has no more than a qualified property interest in his pet. *See Sentell*, 166 U.S. at 701-02, 704.

Inasmuch as *Sentell* equates a person’s property interest in his living, breathing, four-legged companion with his interest in his inanimate possessions, *id.*, *Sentell* does not accurately reflect the changing role of companion animals in contemporary society. Pet owners increasingly view their pets as family members, rather than personal property. *See* William C. Root, Note, ‘*Man’s Best Friend*’: *Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for their Wrongful Death or Injury*, 47 Vill. L. Rev. 423, 423 (2002). A number of courts and legislatures have made the same observation, awarding damages beyond market value when a pet is killed or injured, granting custody over pets in divorce cases, and recognizing trusts organized for the benefit of a pet. *See generally* Elizabeth Paek, Recent Developments, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. Haw. L. Rev. 481, 507-517 (2003) (discussing the trend among courts and legislatures for recognizing animals as family members). In addition to protecting the interests of the owner, the laws have also begun to protect the interests of the animals themselves. *Id.* All fifty states have criminal animal cruelty laws in place, and animal cruelty carries a felony sentence in all but four of these states. *See* Summary of Animal Cruelty Laws, American

Humane Association, <http://www.americanhumane.org/advocacy/animal-protection/animal-cruelty-summary.html> (last visited Jan. 24, 2011).

At the time the Supreme Court wrote the *Sentell* opinion, dogs had no intrinsic value, were without protection in the criminal laws, and were often viewed as no more than a public nuisance. *See Sentell*, 166 U.S. at 701, 705 (“[D]ogs . . . preserve some of their heredity wolfish instincts, which occasionally break forth in the destruction of . . . helpless animals. Others, too small to attack these animals, are simply vicious, noisy, and pestilent.”). In the over 120 years since that case was decided, American society has developed a strong and undeniable emotional bond with its companion animals. *See generally* Root, *supra*, at 423. Accordingly, in determining the extent of an owner’s property interest in his companion animal and the degree of protection that interest deserves, this Court should consider the immeasurable value a companion animal has to its owner.

B. The District Court Erred in Holding That the City’s Exercise of the Police Power was Legitimate Because it Failed to Consider the Nature of the Property and the Necessity of Its Sacrifice When Balancing the Public Interest the Ordinance Serves with the Private Burden it Creates.

In 1827, United States Chief Justice John Marshall used the term “police power” to refer to the sovereignty states retained after surrendering some of their authority to the federal government. *See Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745, 782-84 (2007). Marshall’s early definition itself suggests what has subsequently been held by modern courts: although the police power is broad, it is not unlimited. *See Lawton v. Steele*, 152 U.S. 133, 137 (1894). Although the police power grants local governments the power to regulate “everything essential to the public safety, health, and morals,” regulation under the police power is, by definition, subject to the limits of the Constitution. *See id.* at 137. Specifically, the Fourteenth

Amendment's guarantee of due process requires that all exercises of the police power be, at a minimum, reasonable under the circumstances. *See, e.g., Vanater*, 717 F. Supp. at 1243. An unreasonable exercise of the police power is thus a violation of substantive due process. *See id.*

All property is subject to the exercise of the police power. *See, e.g., Sentell*, 166 U.S. at 695-96 ("That a State, in a bona fide exercise of its police power, may interfere with private property . . . is as well settled as any legislative power can be . . ."). Nevertheless, for an exercise of the police power to be superior to private property rights and thus constitutional, the exercise of the police power must confer a public benefit commensurate with the private burden it creates. *See, e.g., Lawton*, 152 U.S. at 137. Accordingly, a state may only exercise the police power to limit an owner's control of private property when (1) the interests of the general public require the interference; and (2) the means chosen to accomplish the purpose are both reasonably necessary and not unduly oppressive to individuals. *See, e.g., id.* at 137.

In assessing the extent of the private burden created by an exercise of the police power, a court is "bound to consider the nature of the property, the necessity of its sacrifice, and the extent to which it has heretofore been regarded as within the police power." *Sentell*, 166 U.S. at 705. Thus, in *Lawton*, the Supreme Court considered a statute providing for the destruction of fishing nets, the use of which was likely to result in the depletion of fish stocks within the state's waters. *See Lawton*, 152 U.S. at 137. In holding that the statute was constitutional, the Court noted that the property in question was of "trifling value," yet the manner in which the property was being used was "detrimental to the interests of the public." *Id.* at 139, 141. Similarly, in *Clark v. City of Draper*, 168 F.3d 1185, 1186 (10th Cir. 1999), the Tenth Circuit contemplated the constitutionality of the sudden seizure and destruction of two foxes belonging to the plaintiff. The Tenth Circuit held that because the plaintiff's property interest in wild animals was qualified

and because the foxes were suspected of infecting a human with rabies, the public's interest in the capture and destruction of infected animals outweighed the plaintiff's property rights. *See Clark*, 168 F.3d at 1187-89.

Here, although the district court balanced Richardson's protectable property interest against the City's power to provide for public safety, it failed to consider the unique nature of the property at issue and the necessity for its sacrifice when weighing the interests of the state and the individual. *Richardson*, No. 10cv00416, slip op. at 11-12. Applying these considerations to the aforementioned balancing test evinces the error below. As discussed in Part III.A above, companion animal guardians view their pets more as family members than as property. *See supra* Part III.A. As a result, companion animals have immeasurable value to their owners. *See supra* Part III.A. While the district court noted Richardson's property interest in his dogs, it failed to mention, let alone consider, the special nature of this interest. *Richardson*, No. 10cv00416, slip op. at 11-12. Likewise, the district court failed to consider whether the sacrifice of the property of pit bull owners (and the sacrificed lives of the pit bulls living in the City) was necessary for the public interest. *Id.* Although the district court's opinion repeatedly mentions Starla and Zoe's mild-mannered temperament, the court never addresses whether the destruction of friendly, sociable pit bulls like Starla and Zoe is necessary for the public interest. *Id.* at 4, 9, 12. The aforementioned shortcomings require a reversal of the district court's grant of summary judgment for the City.

C. The District Court Erred in Holding That There Remained No Genuine Issue of Material Fact Because the Rationality of the Ordinance Depends on a Factual Determination of Whether Pit Bulls Are a Threat to Public Safety or a Public Nuisance.

Oftentimes in a cause of action for a violation of constitutional rights, the constitutionality of a statute depends primarily on the existence or nonexistence of certain facts.

*See, e.g., Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548-49 (1924) (reversing dismissal and remanding for additional fact-finding where the continued constitutionality of a provision fixing rents in the District of Columbia following World War I depended upon the condition of the D.C. housing market at the time). Where there is a genuine dispute over the facts necessary to show rationality, summary judgment is not appropriate. *See, e.g., Dias*, 2010 WL 3873004, at \*7 (denying summary judgment for city where the constitutionality of a statute banning pit bulls depended on a factual finding that pit bulls presented a breed-specific risk); *see also Anderson*, 477 U.S. at 248 (holding that a dispute over a fact that might affect the outcome of the action precludes summary judgment).

Generally, the determination of questions of fact is a job for the legislature and not the courts, and consequently, the courts give deference to legislative fact-finding. *See, e.g., Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209-10 (1934). Nevertheless, the courts do not give legislative fact-finding dispositive weight, and therefore the presumption of constitutionality can be rebutted. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 165 (2007). More specifically, courts have consistently inquired into the legislative fact-finding underlying a particular statute where the facts or circumstances on which the constitutionality of the statute was based either have changed or have ceased to exist. *See e.g., Chastleton Corp.*, 264 U.S. at 548-49 (reversing decree of dismissal and remanding for additional fact-finding to determine whether the post-WWI D.C. housing market had changed such that the legislation was now unconstitutional); *Gonzales*, 550 U.S. at 165-66 (holding that “uncritical deference” to legislative fact-finding is inappropriate where important factual recitations in the statute had been superseded).

*Gonzales* involved a constitutional attack on substantive due process grounds of the Partial-Birth Abortion Ban Act. *Gonzales*, 550 U.S. at 132. The Act’s recitation of facts included several findings that had been superseded. *See id.* at 165-66. For example, the recitations stated that the medical community’s consensus was that the procedure prohibited by the Act was never medically necessary. *See id.* at 165-66. Without considering the accuracy of the statements when Congress initially drafted the Act, the Supreme Court noted that more recent evidence presented in the district courts tended to negate that conclusion. *See id.* at 166. Consequently, the Supreme Court viewed the legislative fact-finding with a critical eye when considering the Act’s constitutionality. *Id.* at 165-66.

Here, Richardson’s argument is precisely that of those challenging the constitutionality of the statutes at issue in *Chastleton* and *Gonzales*. Richardson does not pass judgment on the accuracy of the City’s underlying factual findings at the time the City enacted the Ordinance. *Richardson*, No. 10cv00416, slip op. at 12. Instead, Richardson asserts that in the more than twenty-two years since the passage of the Ordinance, the facts and circumstances that bear on the Ordinance’s constitutionality have changed. *Id.* In fact, modern evidence supports the conclusion that pit bulls are not exceptionally aggressive, vicious or unpredictable; on the contrary, these dogs are “excellent family companions,” “extremely friendly, even with strangers,” and even “noted for their love of children.” *Compare Vanater*, 717 F. Supp. at 1243 with American Pit Bull Terrier Breed Standard, United Kennel Club, <http://www.ukcdogs.com/WebSite.nsf/Breeds/AmericanPitBullTerrierRevisedNovember12008> (last visited Jan. 24, 2011). Consequently, “the state of science in [2011] is such that the bans no longer bear any rational relation to the [City’s] interest” in protecting the public health, safety, and welfare of its residents. *Richardson*, No. 10cv00416, slip op. at 12. Because the rationality

of the Ordinance is predicated on the conclusion that pit bulls are both a threat to public safety and a public nuisance and because recent evidence suggests that the facts underlying these conclusions are no longer accurate, a clear and compelling issue of triable fact existed. The district court's grant of summary judgment for the City was thus inappropriate.

D. Even If No Genuine Issue of Material Fact Exists, the City is not Entitled to Judgment as a Matter of Law Because, Construing the Facts in Richardson's Favor, the Ordinance is Not Rationally Related to Its Stated Purpose.

At an absolute minimum, the Fourteenth Amendment requires that the Ordinance bear a rational relationship to a legitimate government interest. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). Although this standard is quite deferential to legislative action, it is not insurmountable. *See, e.g., id.* Particularly where courts consider a summary judgment motion, the presumption of rationality is easier to overcome, as summary judgment requires a court to accept the facts of the non-movant as true and draw justifiable inferences in his favor. *See Anderson*, 477 U.S. at 255; *Dias*, 2010 WL 3873004, at \*7. As discussed in Part II.C above, a finding of rationality may be entirely predicated on the existence or non-existence of a particular set of facts. *See supra* Part III.A. Thus, where the facts of the non-movant are accepted as true and those facts negate rationality, summary judgment is not appropriate. *See Dias*, 2010 WL 3873004, at \*7.

Here, Richardson presented facts tending to indicate that pit bulls pose no danger to the community and that the "facts" the City presented about the nature of pit bulls were no more than outdated stereotypes. *Richardson*, No. 10cv00416, slip op. at 11-12. Richardson's own dogs Zoe and Starla were models of good behavior. *Id.* at 4. Accepting Richardson's factual assertions as true directly negates the rationality of the relationship between the Ordinance and the City's interest in protecting public health, safety, and welfare. If pit bulls are, as Richardson

asserts, victims of negative stereotyping, and there is no connection between a dog's breed and his viciousness or aggressiveness, then the relationship between the Ordinance and the City's interest is wholly arbitrary. *Id.* at 11-12. Adopting controlling measures like removing them from the City will not reduce the likelihood of human injury, and therefore such controlling measures are unrelated to the preservation of public health safety and welfare. *Cf. id.* at 14. Thus, construing the facts in Richardson's favor, the Ordinance does not bear a rational relationship to a legitimate government interest. The City was therefore not entitled to judgment as a matter of law, and this Court should reverse the district court's order granting summary judgment accordingly.

#### CONCLUSION

For the reasons stated above, Richardson respectfully requests that this Court reverse the district court's order granting summary judgment for the City and remand the case to the district court for consideration of the remaining triable issues of fact.

Respectfully submitted,

Dated: January 24, 2011

Team # 18  
Attorneys for Appellant

APPENDIX A

Photo of Starla and Zoe



(Front: Starla; Rear: Zoe)

APPENDIX B

Relevant Provisions of the Ordinance

**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.<sup>1</sup>

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<sup>1</sup> 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 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.