IN THE CITY OF DES MOINES

ABIGAIL JACQUES, Appellant, v. CITY OF DES MOINES, Respondent.	)	Docket No. 15DSM002 DMPD 2015-4073, 2015-4075 **DECISION**

A hearing was held at City Hall on June 30, 2015. Attorney Jaysen McCleary represented Appellant Abigail Jacques. Jacques did not appear. Dr. Neil Hovick and Darcy Emehiser testified on behalf of Jacques. Assistant City Attorney Katharine Massier represented Respondent City of Des Moines. Des Moines Police Department Sergeant James Butler and Dr. Amanda Steffen testified on behalf of the City. Attorney Erik Fisk appeared on behalf of Dr. Steffen. Exhibits A through D, and 1 through 2, 4, 6 through 10, 12, and 14 through 22 were admitted into the record. Des Moines, Iowa, Ordinance chapters 3 and 18 (2015) were also received into the record. The record was left open through 4:30 p.m. on July 21, 2015 for the receipt of post-hearing briefs only.[1]

FINDINGS OF FACT

In December 2014, Chelsea Jacques was the owner of Simba, a dog living in Des Moines. The Des Moines Police Department ("DMPD") received a complaint that Simba had bitten a person. The DMPD investigated the incident. That incident is not the subject of this appeal.

Sergeant Butler, the Chief Human Officer for the City, testified Simba was impounded and taken to the Animal Rescue League ("ARL") shelter in Des Moines. The ARL has a contract with the City for the provision of veterinary and shelter care services for animals in the City. Dr. Steffen, a 2011 graduate of the Iowa State University College of Veterinary Medicine, provides veterinary services for the City pursuant to the City's contract with the ARL. Dr. Steffen began performing services for the City on December 23, 2014.

In February 2015, Dr. Steffen examined Simba. Dr. Steffen testified she determined Simba was predominantly an American Staffordshire terrier. Dr. Steffen's written

[1] The parties' simultaneous post-hearing briefs were to be filed by 4:30 p.m. on July 21, 2015. On July 21, 2015, Jacques filed a Motion to Add Party Defendant Simba Trust, a Motion for Additional Time to Respond to City's Brief, and a Memorandum in Support of Judgment of Acquittal. The record was left open for the filing of post-hearing briefs only. Jacques' Motions are denied.

determination states Simba is "[p]redominantly pit bull terrier." (Exhibit A at 5). Dr. Steffen did not perform DNA testing on Simba to determine Simba's genetic makeup. The City commenced an action against Chelsea Jacques under the then existing City Ordinance governing dangerous animals. Chelsea Jacques contested the action. That matter is not the subject of this appeal. McCleary wanted to place Simba in a trust. Eventually the dog was transferred to Abigail Jacques ("Jacques"), Simba's current owner. Jacques lives on Cottage Grove in Des Moines.

Sergeant Butler testified he examined the police file involving Simba. According to Sergeant Butler, Simba's veterinary records listed Simba's breed as characteristic of an American Staffordshire terrier. The City did not produce Simba's veterinary records during the hearing. Some of the City's Exhibits refer to Simba as a male and some refer to Simba as a female. The picture of Simba produced at hearing is of a male dog.

Sergeant Butler testified the City amended the Ordinance governing animals on March 15, 2015, and adopted the provisions governing "high risk" dogs. Sergeant Butler reported the City had previously used the term "vicious dog" and decided to change the term because the term "vicious" was not a fair term.

Sergeant Butler testified the City always presumed Simba was a "high risk" dog because of Simba's breed.

Sergeant Butler's unit generates statistics on dog bites in Des Moines each year. Sergeant Butler testified in his experience with the DMPD, "high risk" dogs are responsible for the majority of the dog bites in Des Moines 11 out of 12 months of the year.

When Jacques appeared at City Hall in June 2015 to pay the transfer of ownership fee for Simba, Sergeant Butler served her with a "high risk dog" letter. The letter provides in part,

> Simba was impounded and is at the animal shelter. Simba was evaluated and determined to be over six months old and a high risk dog breed, defined by city ordinance 18-41 as a Staffordshire Terrier, an American Pit Bull Terrier, an American Staffordshire Terrier or any dog which has the appearance and characteristics of being predominantly of the breeds of Staffordshire Terrier, American Pit Bull Terrier or an American Staffordshire Terrier.
>
> **Because of that determination Simba is hereby declared a "High Risk Dog."**
>
> You my reclaim Simba by properly licensing it as a high risk dog with the City Clerk's Office and properly confining/leashing it as a high risk dog. If Simba is found unlicensed as a high risk dog in the City of Des Moines again you will **NOT** be able to reclaim her and she may be destroyed in a humane manner, in accordance with city ordinance 18-58. Also, if Simba

> is found not properly confined/leashed more than twice you will **NOT** be able to reclaim her and she may be destroyed in a humane manner, in accordance with city ordinance 18-57. ***Please be informed, if your high risk animal kills any domesticated animal while off its' own property, or violates any provision of 18-196, your animal may be deemed dangerous and destroyed in a humane manner.***

(Exhibit A at 4). The letter informed Jacques she had three business days to appeal the determination. Jacques appealed the determination.

Dr. Steffen prepared a Checklist on February 13, 2015, which provided she had examined Simba. The Checklist contains type-written text stating, "I have examined this dog and found it to have the predominant characteristics of the American Staffordshire Terrier breed." (Exhibit A at 5). Dr. Steffen recorded her findings on the Checklist as follows:

Head:	__X__ Medium Length	Shoulders:	__X__ Strong
	__X__ Deep Trough		__X__ Muscular
	__X__ Broad Skull	Neck:	__X__ Heavy
	__X__ Pronounced Cheek Muscles		__X__ Tapers from Back of Skull to Shoulders
Muzzle:	__X__ Medium Length	Tail:	__X__ Low Set
	__X__ Jaws Well Defined		__X__ Tapers to a Fine Point
	_____ Black Nose		__X__ Not Curled Over Back
Back:	_____ Fairly Short	Coat:	__X__ Short
	_____ Slight Sloping from Withers to Rump		__X__ Close
			_____ Glossy
Body:	_____ Well Sprung Ribs		
	__X__ Forelegs set Rather Far Apart	Eyes:	_____ Dark and Round
	__X__ Chest Deep and Round		__X__ Low Down in Skull
Legs:	__X__ Straight Front Legs		__X__ Set Far Apart
	_____ Hindquarters Well Muscled		
	__X__ Moderate Size Feet	Size:	_____ Inches at Shoulders
			_____ Lbs.

Color _Tan_____

Comments:
Neutered male
Over 6 months of age
Predominantly pit bull terrier

(Exhibit A at 5). Dr. Steffen uses the Checklist for determining whether a dog is and Staffordshire Terrier, American Pit Bull Terrier, an American Staffordshire Terrier, or predominantly one of the three breeds. The Checklist contains two findings, that Simba is predominantly of the Staffordshire Terrier breed, and Simba is "[p]redominantly pit bull terrier." (Exhibit A at 5).

The parties stipulated that the characteristics or traits listed on the Checklist are included in the American Kennel Club's (AKC's) Breed Standard for the American Staffordshire terrier.

Dr. Steffen testified that in her experience and training as a veterinarian, the characteristics or traits listed on the Checklist are important when determining a given dog's breed. Dr. Steffen opined Simba predominantly shows American Staffordshire characteristics.

Dr. Steffen reported she uses the Checklist and makes a visual determination of whether a given dog meets the listed traits, taking into account differences in the ears and tail. Dr. Steffen uses the Checklist for determining whether a given dogs is predominantly a Staffordshire terrier, an American pit bull terrier, or an American Staffordshire terrier. Dr. Steffen noted "predominantly" means a mixture, but overall, the dog is one of the listed breeds. Dr. Steffen opined that even if all of the boxes were checked on the Checklist, a person could not tell the breed of a given dog because the dog could be many breeds or two breeds, but the characteristics or traits of the Staffordshire terrier, the American pit bull terrier, or the American Staffordshire terrier would exist.

Dr. Steffen noted that she cannot visually tell the difference between an American Staffordshire terrier and an American pit bull terrier. Dr. Steffen reported the two breeds have similar characteristics, but the American pit bull terrier is generally taller, and the American Staffordshire terrier generally is more stout.

Dr. Hovick has been a veterinarian since 1977. Dr. Hovick opined that in his experience as a veterinarian, the Staffordshire terrier, the American pit bull terrier, and the American Staffordshire terrier are not more dangerous than other breeds.

Dr. Hovick testified he and other veterinarians could not consistently and reliably visually identify the three breeds as "high risk" using the Checklist.

Emehiser is nationally certified as a dog trainer who specializes in reactive/aggressive dogs. Emehiser reported she has worked with over 4,000 dogs during her career. Emehiser testified in her professional experience the Staffordshire terrier, the American pit bull terrier, and the American Staffordshire terrier are not any more inherently dangerous than other dog breeds. Emehiser testified she cannot visually tell the difference between an American Staffordshire terrier and an American pit bull terrier.

Emehiser testified all dogs may bite. Emehiser has been bitten seven or eight times, but never by a pit bull or bull dog. Emehiser reported that in her experience cocker spaniels and German shepherds are the most likely to bite. And in her experience biting is due to the dog's temperament, not the dog's breed. Emehiser does not believe the Staffordshire terrier, the American pit bull terrier, and the American Staffordshire terrier are any more inherently dangerous than other dog breeds.

CONCLUSIONS OF LAW

Cites may adopt ordinances in accordance with the requirements of Iowa Code chapter 380. The proposed ordinance or amendment must be considered and voted on for passage at two council meetings before the meeting at which it is to be finally passed, unless suspended by a recorded voted of not less than three-fourths of all members of the city council.[2] The clerk is required to publish a summary of all ordinances or the complete text of ordinances and amendments in the manner provided in Iowa Code section 362.3.[3] "The narrative description shall be written in a clear and coherent manner and shall, to the extent possible, avoid the use of technical or legal terms not generally familiar to the public. When necessary to use technical or legal terms not generally familiar to the public, the narrative description shall include definitions of those terms."[4]

The City has adopted an ordinance governing animals living in the City, including dogs.[5] The owner of a dog over the age of six months living in the City is required to apply for an annual license for the dog on or before January 1 of each year.[6] Owners of "high risk" dogs must comply with additional requirements, including proof of insurance and confinement requirements.[7]

The City determined Simba is a "high risk dog" based on "appearance and characteristics of being predominantly of the breeds of Staffordshire Terrier, American Pit Bull Terrier or an American Staffordshire Terrier," relying on Des Moines, Iowa, Ordinance section 18-41 (Exhibit A at 4).

The Ordinance provides, "[a]n appealable decision which has been memorialized in writing and signed by a city officer shall be prima facie evidence of the correctness of the facts specified therein. . . . no appealable decision shall be reversed or amended except upon proof by a preponderance of the evidence that such decision is contrary to the law or this code, or is unsupported by the facts."[8] Jacques timely appealed the decision.

The Ordinance defines a "high risk dog" as:

> (1) Any dog which has bitten or attacked a human being or domestic animal one or more times, without provocation;
> (2) Any dog with a history, tendency or disposition to attack, to cause injury, or to otherwise endanger the safety of human beings or domestic animals;
> (3) Any dog that snaps, bites, or manifests a disposition to snap or bite;

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[2] Iowa Code § 380.3 (2015).
[3] *Id.* § 380.7(3).
[4] *Id.*
[5] Des Moines, Iowa, Ordinance ch. 18 (2015).
[6] *Id.* § 18-43.
[7] *Id.* §§ 18-44, 18-56-59.
[8] *Id.* § 3-22.

(4) Any dog that has been trained for dog fighting, animal fighting or animal baiting or is owned or kept for such purposes;
(5) Any dog trained to attack human beings, upon command or spontaneously in response to human activities, except dogs owned by and under the control of the police department, a law enforcement agency of the state or of the United States or a branch of the armed forces of the United States;
(6) Staffordshire terrier breed of dog;
(7) The American pit bull terrier breed of dog; or
(8) The American Staffordshire terrier breed of dog; or
(9) Any dog which has the appearance and characteristics of being predominantly of the breeds of Staffordshire terrier, American pit bull terrier, American Staffordshire terrier.[9]

The Ordinance provides that when "determining whether a dog is high risk by breed" the opinion of the City veterinarian, or a veterinarian who is an agent or employee of a contractor controls.[10]

The City relies on Subsection 9 of the Ordinance to support its contention Simba is a "high risk dog," based on Dr. Steffen's determination Simba has the appearance and characteristics of being "[p]redominately [a] pit bull terrier." (Exhibit A at 5). The Ordinance language allows for a subjective determination. When making the subjective determination, the City uses a Checklist adopted sometime before the City adopted the current version of the Ordinance.

During the hearing Jacques asserted the Ordinance does not comply with due process. Due process requires notice and an opportunity to be heard.[11] "A city ordinance is unconstitutionally vague under the due process clause 'when its language does not convey a sufficiently definite warning of the proscribed conduct.'"[12] A statute or ordinance is unconstitutionally vague when a person must guess as to the meaning of a statute or ordinance and its applicability.[13] Due process is satisfied "[i]f the statute [or ordinance's] meaning is fairly ascertainable by reliance on generally accepted and common meaning of words used, or by reference to the dictionary, related or similar statutes, the common law or previous judicial constructions . . . "[14]

The Checklist and the criteria used by the City in this case are not contained or referenced in the Ordinance. Webster's Dictionary defines "predominantly" as "for the most part; mainly."[15] Webster's Dictionary defines "pit bull" as "a dog of any of several breeds or a real or apparent hybrid with one or more of these breeds that was developed

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[9] *Id.* § 18-41.
[10] *Id.* § 18-44(d).
[11] *In re Estate of Adams*, 599 N.W.2d 707 (Iowa 1999).
[12] *Lewis v. Jaeger*, 818 N.W.2d 165, 183 (Iowa 2012).
[13] *Id.*
[14] *Id.* (quoting *Blinder, Robinson & Co. v. Goettsch*, 403 N.W.2d 772, 773 (Iowa 1987)).
[15] *Merriam-Webster's Collegiate Dictionary* (10th Ed. 1998).

and is now often trained for fighting and is noted for strength and stamina."[16] Webster's Dictionary does not discuss the physical characteristics of a "pit bull." The characteristics or traits of the Staffordshire terrier, American pit bull terrier, American Staffordshire terrier are not commonly known or defined. "When persons must necessarily guess at the meaning of a statute [or ordinance] and its applicability, the statute [or ordinance] is unconstitutionally vague."[17] The City did not provide notice to Jacques of the criteria used for determining whether Simba is "predominantly" an American Staffordshire terrier, American pit bull terrier, or a Staffordshire terrier.[18] The City's reliance on the unpublished and unreferenced criteria is improper.[19] The City's determination should be reversed.

ORDER

The City's determination that Simba is a high risk dog is REVERSED. The City shall take any steps necessary to implement this decision.

Dated this 24th day of July, 2015.



Heather L. Palmer
Administrative Law Judge
515-281-7183

cc: Katharine Massier – Assistant City Attorney (first class mail)
Jaysen McCleary – Attorney (first class mail)
Diane Rauh – City Clerk (first class mail)

NOTICE

Any person aggrieved by this final determination may seek judicial review of this decision by commencing a certiorari action with the Polk County District Court within 30 days of the entry of this decision.[20]

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[16] *Id.*
[17] *Knepper v. Monticello State Bank*, 450 N.W.2d 833, 838 (Iowa 1990).
[18] *Lewis*, 818 N.W.2d at 183.
[19] *Cf. Anderson v. Iowa Department of Human Services*, 368 N.W.2d 104, 108 (Iowa 1985) (concluding the Department's reliance on an employee manual was improper because the manual provisions had not been adopted as a rule through the rulemaking process); *see also Fears v. Iowa Dep't of Human Servs.*, 382 N.W.2d 473, 476 (Iowa Ct. App. 1985) (finding it improper for the Department to rely on a provider's manual as a basis for denying Medicaid benefits).
[20] Des Moines, Iowa, Ordinance §§ 3-24(c), 3-25.