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April 1, 2015
Court of Appeals
Division I
State of Washington

NO. 71947-5-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

KARY L. CALDWELL,

Plaintiff-Respondent,

v.

CITY OF HOQUIAM, a governmental entity; JENNIFER M. SMITH and JOHN DOE SMITH, individually and the marital community composed thereof; SHAWN M. SMITH and JOHN DOE SMITH, individually and the marital community composed thereof; JAMES THOMPSON and JANE DOE THOMPSON, individually and the marital community composed thereof,

Defendants-Appellants.

OPENING BRIEF OF APPELLANT CITY OF HOQUIAM

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I. INTRODUCTION

On August 11, 2009, the City of Hoquiam[1] issued a dangerous dog declaration to the owner of a dog that had twice fought with the owner's second dog. The declaration required the owner to take certain actions, such as obtaining a special license, insurance, and enclosure. If the owner failed to take those actions, an ordinance required the City to impound the dog.

The owner appealed the declaration and lost. At the September 1, 2009 hearing, the municipal court ordered the owner to take the actions listed in the August 11 declaration by September 10. The City attempted to locate the dog after September 10 to determine compliance. The City could not locate the dog because the owner moved the dog to another jurisdiction before the hearing. Several weeks later, the dog bit Plaintiff in another city.

Plaintiff claimed that Hoquiam failed to enforce its requirement that the dog be impounded for the owner's failure to comply with the court order affirming the declaration. Under the failure to enforce exception to the public duty doctrine, a city can be liable for a failure to enforce only if a city official has actual knowledge that there is a violation of an ordinance requiring mandatory enforcement. Hoquiam had no knowledge

[1] Hereafter "Hoquiam" or "City."

that the owner failed to comply with the court order because the owner and dog could not be located. In fact, the dog was no longer in Hoquiam.

The City had no duty to act absent actual knowledge of a statutory violation. The trial court erred by denying Hoquiam's motion for summary judgment and by granting summary judgment to Plaintiff.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the City of Hoquiam's summary judgment motion based on lack of duty.

2. The trial court erred by granting Plaintiff's motion for summary judgment on liability.

3. The trial court erred by denying the City of Hoquiam's motion for judgment as a matter of law pursuant to CR 50.

4. The trial court erred by giving Instruction 12 which indicated that the City owed Caldwell a duty pursuant to HMC 3.40.080.

5. The trial court erred by declining to give the City's proposed jury instruction 25, which correctly stated the circumstances under which the public duty doctrine would impose a duty on the City based upon the failure to enforce exception.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Can the City of Hoquiam be liable for failure to enforce an ordinance if the City did not have actual knowledge that the ordinance was violated? (Assignments of Error 1, 2, 3, and 4.)

B. Did Plaintiff produce evidence that the City of Hoquiam knew that the owner of the dog that bit Plaintiff was in violation of the City's dangerous dog declaration after the municipal court affirmed the declaration? (Assignments of Error 1, 2, 3, and 4.)

C. Does a City of Hoquiam animal control ordinance provide for impoundment of a dog, and criminal liability, for an owner's failure to comply with the terms of a dangerous dog declaration before the declaration is served on the owner? (Assignments of Error 1, 2, 3, and 4.)

D. Can the City of Hoquiam confiscate an owner's property, absent emergency, without prior opportunity for a hearing or other due process? (Assignments of Error 1, 2, 3, and 4.)

E. Is the constitutional prohibition on ex post facto law enforcement violated by prosecuting a dog owner for failure to have satisfied conditions in a declaration before those conditions were imposed on the owner by service of the declaration? (Assignments of Error 1, 2, 3, and 4.)

IV. STATEMENT OF THE CASE

A. Statement of Facts

1. Appeal of Hoquiam Declaration

On August 11, 2009, a dog owner received assistance from Hoquiam animal control Officer Hill to separate her two dogs. CP 206, 214. The dogs were fighting in her living room. *Id.* Officer Hill separated the dogs and then issued a "dangerous dog declaration" to the owner for one of the dogs. *Id.* Under the Hoquiam Municipal Code (HMC), the declaration required the owner to take certain actions, such as obtaining a special dog license, insurance, and an enclosure. CP 219-20; HMC 3.40.080(5).[2] If the owner failed to take these actions, the ordinance required the City to impound the dog. HMC 3.40.080(6).

The declaration became a final order if the owner did not appeal within ten days. HMC 3.40.080(4). The owner appealed the declaration. CP 207. On September 1, 2009, the Hoquiam Municipal Court heard the appeal. *Id.* The Court affirmed the declaration, directed that the dog remain with the owner, and ordered the owner to take the required actions by September 10, 2009. *Id.;* CP 222.

[2] The Hoquiam ordinance is attached as Appendix A for the Court's reference.

2. City Enforcement of Order Affirming Declaration

After expiration of the period for compliance with the court order, Officer Hill attempted to locate the owner and the dog to determine if the owner had taken the required actions. CP 207. Officer Hill could not locate the owner or the dog. CP 207-08. A person at the owner's former residence informed Officer Hill that the owner and the dog had left to find a new home and that he did not know their location. *Id.*

Unknown to the City, the dog's owner removed the dog to her daughter's residence in Olympia shortly after Officer Hill issued the August 11 declaration. CP 283, 286-87. On September 10, 2009, the daughter moved with the dog to her boyfriend's apartment in Kent. CP 223-29. The dog later bit Plaintiff's arm during Plaintiff's visit to the daughter's boyfriend at his apartment. CP 2.

B. Statement of Procedure

1. Plaintiff's Liability Claim

On July 11, 2012, Plaintiff filed an administrative claim with Hoquiam alleging liability on the following basis:

> On September 1, 2009, Temper was declared by order of court to be a dangerous dog. City of Hoquiam and its agents failed to take reasonable steps to ensure Temper's owners and/or harborers complied with the Court's order, including but not limited to, failing to properly confine Temper, failing to confiscate Temper upon learning the Court's order was not being complied with, failing to locate

> Temper, and failing to notify other jurisdictions in the State of Washington about Temper's dangerous dog declaration.[3]

(Emphasis added). On September 21, 2012, Plaintiff filed a Complaint against Hoquiam and other defendants, making the following negligence allegations against Hoquiam.

> Defendants Grays Harbor and City of Hoquiam were negligent in enforcing the conditions imposed on Defendant Shawn Marie Smith by the Municipal Court of Hoquiam and negligent by failing to enforce ordinances regarding control of dangerous or potentially dangerous animals.

CP 16. Both the administrative claim and the Complaint alleged that Hoquiam failed to enforce the September 1, 2009, Municipal Court order.

2. Summary Judgment Motions

On August 9, 2013, Hoquiam filed a motion for summary judgment on the ground that Hoquiam had no "actual knowledge" of a violation of the Court's order. CP 186-203. Actual knowledge is a requirement for the failure to enforce exception to the public duty doctrine.[4] The City's motion also argued that the City had no legal authority to enforce the court order because the owner had removed the

[3] Plaintiff's administrative claim is the first document in the appendix to the City's Motion for Discretionary Review to the Court of Appeals, so it is in this Court's file rather than in the clerk's papers.

[4] Under the failure to enforce exception to the public duty doctrine, a regulatory agency must have actual notice of a violation for which corrective action is mandatory before the agency can be liable. *Smith v. State*, 59 Wn. App. 808, 802 P.2d 133 (1990).

dog from Hoquiam jurisdiction before the court issued the order. *Id.* The trial court denied the City's summary judgment motion. CP 186-202.

Plaintiff filed a motion for summary judgment against Hoquiam on August 8, 2012. CP 37-61. Plaintiff's motion abandoned her claim that Hoquiam failed to enforce the Court order affirming the declaration. CP 56-60; 416-22. Instead, Plaintiff argued that HMC 3.40.080 required the City to impound the dog when the City served the declaration because the owner was not already in compliance with the conditions imposed by the order at the time of service. *Id.* The trial court granted Plaintiff's summary judgment on liability. CP 527-29. The court specifically found that HMC 3.40.080 required the City to impound the dog immediately on service of the declaration. VRP 40 (9/6/2013). On November 4, 2013, the court denied Hoquiam's motion for reconsideration of the court's denial of Hoquiam's summary judgment motion and the court's granting of Plaintiff's summary judgment motion. CP 510-12.

3. Petition for Discretionary Review

The City petitioned this Court for discretionary review of the trial court's summary judgment rulings, which effectively found Hoquiam liable as a matter of law based on undisputed facts. CP 151-26. The Court's ruling was:

> In short, the City has raised important arguments supporting its position that HMC 3.40.080 does not impose a mandatory duty to impound an animal immediately upon issuing a dangerous dog declaration. But Caldwell's and the trial court's interpretation is not so obviously error that interlocutory review is warranted.

CP 811. The Court concluded that "any review will be more appropriate following trial and entry of a judgment." *Id.*

4. Trial Rulings, Motions, and Verdict

From the beginning of trial, the court made clear that it would not revisit any of the earlier summary judgment rulings. VRP 30, 64-65 (1/22/14). Over the City's objections, the court ruled *in limine* that the City was prohibited from arguing that it did not have a duty to impound the dog on August 11, 2009 or that the declaration did not become final and enforceable until after appeal to the Hoquiam Municipal Court. CP 1192-94; CP 1044-50. Nevertheless, at the close of Plaintiff's case, the City moved to dismiss Plaintiff's claims, pursuant to Civil Rule 50, on the same grounds that the City argued in its summary judgment motion. VRP 3, 18-19 (4/24/14); CP 1347-55. While the court dismissed Plaintiff's outrage claim, it allowed Plaintiff's negligence claim to proceed to the jury. VRP 18-19 (4/24/14). The City similarly objected to the court's instructions indicating that it owed a duty based on Plaintiff's failure to establish any exception to the public duty doctrine. VRP 13-14 (4/24/14). On April 25,

2014, the jury returned a verdict in favor of Plaintiff, awarding damages of $435,000.00, and the court entered judgment. CP 1493-95. The City timely filed a notice of appeal on May 15, 2014. CP 1518-20.[5]

V. ARGUMENT

A. Standard of Review

The City seeks review of the trial court's erroneous ruling on cross motions for summary judgment that the City owed a duty under HMC § 3.40.080 to impound the dog "Temper" immediately upon service of the dangerous dog declaration on August 11, 2009. The court sustained the ruling at trial when it denied, in part, the City's CR 50 motion and allowed Plaintiff's negligence claim to proceed to the jury. "The standard on a motion for judgment as a matter of law mirrors that of summary judgment." *Sheikh v. Choe,* 156 Wn.2d 441, 447, 128 P.3d 574 (2006). The appellate court engages in the same inquiry as the trial court in reviewing rulings on both summary judgment and CR 50 motions. *Id.* "Whether or not the duty element exists in the negligence context is a question of law that is reviewed de novo." *Id.* at 448.

[5] The court also entered a Supplemental Judgment including Plaintiff's costs on May 15, 2014, and the City then filed an Amended Notice of Appeal objecting to the Supplemental Judgment on May 22, 2014. CP 1540-67.

B. The Regulatory Liability of the City of Hoquiam Is Governed By the Failure to Enforce Exception to the Public Duty Doctrine

The threshold requirement in a tort lawsuit against government is the existence of a duty of care which runs to the plaintiff. *LaPlante v. State,* 85 Wn.2d 154, 531 P.2d 299 (1975). Government duty for regulatory programs is limited to prevent broad liability from discouraging public welfare programs. *Taylor v. Stevens County,* 111 Wn.2d 159, 170, 759 P.2d 447 (1988). Since this Court's decision in *Georges v. Tudor,*[6] Washington courts have followed the "...general rule that negligent performance of a governmental police power duty enacted for the benefit of the general public imposes no municipal liability running to individual members of the public." This limitation on police and regulatory liability is known as the "public duty doctrine." Animal control is a government regulatory function protected by this doctrine. *Champagne v. Spokane Human Services,* 47 Wn. App. 887, 737 P.2d 1279 (1987); *King v. Hutson,* 97 Wn. App. 590, 987 P.2d 655 (1999).

There are four limited exceptions to the lack of liability for government regulatory functions. The exceptions are the legislative intent, the special relationship, the volunteer rescue, and the failure to enforce exceptions. *Smith v. State,* 59 Wn. App. 808 (1990).

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[6] 16 Wn. App. 407, 410, 556 P.2d 564 (1976)

Plaintiff's Amended Complaint makes no allegations that the legislative intent, special relationship, or volunteer rescue exceptions are satisfied in this case. *See* CP 7-18. There is also no evidence to support application of these exceptions. In regard to the legislative intent exception, Hoquiam ordinances do not have the required language showing an intent "to identify and protect a particular circumscribed class of persons" rather than the public generally. *See Smith*, 59 Wn. App. at 813; CP 247-62. In regard to the special relationship, there is no allegation of any contact by Plaintiff with Hoquiam animal control authorities, express assurances by the City, or justifiable reliance on assurances from the City. *Id.*; CP 7-18. In regard to the volunteer rescue doctrine, there is no evidence that the City of Hoquiam acted as a volunteer rather than under its government regulatory authority. CP 204-222.

The fourth circumstance under which regulatory liability might exist is the "failure to enforce" exception. Plaintiff claims that the "failure to enforce" exception creates liability for Hoquiam. CP 49; 302-311. The criteria for the failure to enforce exception are:

(1) Governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation.
(2) They fail to take corrective action.
(3) There is a statutory duty to do so.

(4) And the plaintiff is within the class that statute intended to protect.

Smith, 59 Wn. App at 814, (Emphasis added.); *Honcoop v. State,* 111 Wn.2d 182, 759 P.2d 1188 (1988). All four elements of the exception must be met; Plaintiff has the burden of establishing each element. *Atherton Condo Ass'n v. Blume,* 115 Wn.2d 506, 531, 797 P.2d 250 (1990). The failure to enforce exception is construed narrowly because a broad construction would eviscerate the policy considerations supporting the limitation of liability for government regulatory functions. *Id.*

C. Plaintiff Cannot Satisfy The Failure To Enforce Exception

1. The City Had No Actual Knowledge About the Dog Owner's Compliance With the Terms of the Court Order and City Ordinance

The City of Hoquiam dangerous dog ordinance is HMC 3.40.080. The only mandatory enforcement duty is stated in section 6.

> (6) A dangerous dog shall be immediately impounded by a police officer or an animal control officer if the owner of the dangerous dog fails to comply with any of the restrictions set forth in subsection (5)(a), (b), (c), (d), or (e) of this subsection.

HMC 3.40.080(6). In order for Hoquiam to have a duty to Plaintiff, she has the burden of showing that she has evidence that Officer Hill possessed "actual knowledge of a statutory violation." *Smith,* 59 Wn. App. at 814. Under the Hoquiam ordinance, Plaintiff would have to show

that Officer Hill had actual knowledge that the owner of the dog failed to acquire the special license, insurance, sign, enclosure, and leash that the court order and ordinance required.

Plaintiff's Amended Complaint makes two allegations that Hoquiam failed to enforce its dog ordinance. First, Plaintiff alleges that "no further action was taken by law enforcement authorities, including Animal Control" to locate the dog after Officer Hill found that the owner and the dog had abandoned their Hoquiam residence following the effective date of the Municipal Court's order imposing the statutory conditions. CP 13 (Amended Complaint ¶ 3.11). Second, Plaintiff alleges that Hoquiam "failed to take any action to ensure" that the dog owner "complied with the conditions imposed upon them by the court." *Id.*

The allegation that Hoquiam officials did not take additional actions to locate the dog does not satisfy the actual knowledge element of the failure to enforce exception. Constructive knowledge and "what the official should have known" are insufficient for the failure to enforce exception. *Atherton,* 115 Wn.2d at 532-33; *Smith*, 59 Wn. App. at 814. In *Zimbleman v. Chaussee Corp.,* 55 Wn. App. 278, 282, 777 P.2d 32 (1989), the court stated that "knowledge does not include what an official might have known if he had performed his duties more effectively or vigilantly." Failure to discover a violation is not actual knowledge of a violation. *Id.*

In regard to the second allegation, (that Hoquiam took no action to enforce the conditions imposed by the Court) Plaintiff has no evidence that Officer Hill knew that the dog's owner was in violation of the conditions in the court order. The owner appealed the restrictions placed on the dog by Officer Hill on August 11, 2009. After the hearing on September 1, 2009, the municipal court order imposing the statutory conditions became effective on September 11, 2009. On September 14 and 16, Officer Hill went to the residence where the August 11 incident occurred and did not find the owner or the dog. A person at the residence (ex-boyfriend Borselli) informed Officer Hill that the owner and the dog were not at the residence, that the owner was looking for a new residence, and that he did not know where she was or where she was looking. This was the only information known to Officer Hill after the court order became effective. CP 207-08. Officer Hill had no actual knowledge of the owner's compliance with the conditions imposed on her, or even whether the dog and its owner remained in the City of Hoquiam.

The failure to enforce exception is not satisfied here because there is no evidence that Officer Hill had knowledge of whether or not the dog's owner had violated the conditions in the court order. Moreover, the failure to enforce exception does not allow liability predicated on a claim that a city regulatory authority "should have known" of a violation. There can

be liability only if the regulatory authority had actual knowledge of a violation, and this requirement is applied strictly. *Atherton*, 115 Wn.2d at 531-32.

2. The City Had No Authority to Enforce Its Ordinance On a Dog In Another Jurisdiction

Plaintiff's claim that City of Hoquiam officials failed to enforce its ordinance has a second shortcoming. After Plaintiff filed this claim, Officer Hill contacted Mr. Borselli, the owner of the house where the dog lived in 2009. CP 207. Mr. Borselli stated that he and the dog owner had taken the dog to the owner's daughter, Jennifer, in Olympia shortly after the August 11, 2009 incident. *Id.*; CP 286. The dog no longer lived in the City of Hoquiam during or after the appeal.

In Washington, the state constitution prohibits local governments from exercising regulatory authority outside their limits.

> Any county, city, town or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

Wash. State Const., Article XI, § 11. In *Brown v. Cle Elum*, 145 Wash. 588, 261 P. 112 (1927), the Supreme Court held that a city is strictly limited to enforcing its police power within the city.

> This delegation of its police power by the state to various municipalities is strictly limited to the exercise of that power within the limits of such municipalities. Authorities are cited to the effect that the state, by legislative

> enactment, might delegate its police power to various municipalities to be exercised beyond their limits, but those authorities will be found to have not arisen where a constitutional provision obtains such as the one existing in this state.

Brown, 145 Wash. at 589-90 (emphasis in original). Therefore, in addition to Officer Hill having no actual knowledge of the owner's compliance with restrictions on her dog, Officer Hill could not enforce Hoquiam restrictions on the dog because the owner took the dog outside Hoquiam jurisdiction. Officer Hill had no authority to impound the dog under HMC 3.40.080(6) in Olympia, or in Kent, where the dog was taken on September 10, 2009.

D. The Superior Court Erred By Denying the City's Summary Judgment Motion and Granting Plaintiff's Summary Judgment Motion

Plaintiff originally claimed that Hoquiam was liable for failing to enforce the September 1, 2009, municipal court order affirming the declaration issued on August 11, 2009. CP 13. Hoquiam filed a summary judgment motion showing that Plaintiff could not meet the "actual knowledge" element of the failure to enforce exception to the public duty doctrine because the City had no knowledge of non-compliance with the court order. CP 186-202.

In response to Hoquiam's motion, Plaintiff conceded the basis for the City's motion by offering no argument that Hoquiam had actual

knowledge about the dog owner's compliance with the court order requiring the dog owner to take the five remedial actions. CP 56-60; 416-422. However, Plaintiff then argued that the Hoquiam dog ordinance created a mandatory duty for Officer Hill to impound the dog immediately when he served the initial declaration, rather than impounding the dog if there was non-compliance with the declaration after it became final following appeal. *Id.*

The court explicitly accepted Plaintiff's argument that the Hoquiam ordinance required the City to impound the dog when Officer Hill served the declaration on the owner. VRP 40 (9/6/2013). As a result, the court denied the City's summary judgment motion. *Id.* The court also granted Plaintiff's summary judgment motion. *Id.* at 41. There was no dispute that the City does not apply its ordinance to impound dogs immediately when the City serves a declaration, but only after the declaration becomes effective as a final order following either the municipal court's decision on an appeal (as here), or after an owner fails to appeal within the ten days allowed in HMC 3.40.080(4). As a result of the court's summary judgment ruling, the parties tried this case to the jury only on damages and the apportionment of fault (pursuant to chapter 4.22 RCW) between the City and the three defaulted codefendants. CP 1505.

The trial court erred in its interpretation of the City ordinance. This error allowed this case to go to trial on damages when it should have been dismissed. The Hoquiam ordinance does not, absent emergency,[7] allow confiscation of dogs prior to finality of initial City dog orders following either a decision on appeal or a failure to appeal timely. HMC 3.40.080 also cannot be interpreted to require immediate confiscation of a dog, absent emergency, without violating the dog owner's due process right to a hearing before deprivation of property, and the constitutional prohibition on *ex part facto* application of criminal laws.[8]

1. The Hoquiam Ordinance Does Not Create a Duty to Impound a Dog Immediately When the City Serves a Declaration Notifying a Dog Owner of Remedial Actions to be Taken

Plaintiff argues that HMC 3.40.080 created a mandatory duty for Officer Hill to impound the dog immediately when the City served the declaration on the dog owner. CP 416-22. The declaration required the dog owner to take remedial actions regarding the dog for the first time when the City served the owner with an order giving notice of the required actions. CP 206-07. According to Plaintiff's argument, and the trial

[7] In addition to allowing impoundment of dogs if owners fail to take the actions ordered by the City under HMC 3.40.080(4), City ordinances allow immediate impoundment under three emergency circumstances: an attack on a human; rabies infection; and running loose. HMC 3.40.150(4), 130(2) and 140.

[8] Under HMC 3.40.190(3), the failure to implement the conditions in the dangerous dog declaration is a misdemeanor. CP 261. Under the court's interpretation of HMC 3.40.080, the dog owner is guilty of a crime when the declaration is served if the owner is not already in compliance with the conditions being imposed by the declaration.

court's decision, at the instant the owner received the notice of the required actions, the City was required to impound the dog because the owner had not taken those actions before the City gave her notice that she must take those actions. This interpretation of the ordinance contradicts both the plain language of and several specific provisions in the ordinance.

HMC 3.40.080 contains no provision requiring immediate impoundment of a dog when a declaration is served. The only provision for impoundment states that the dog shall be impounded if the owner "fails to comply with any of the restrictions set forth in subsection (5)(a), (b), (c), (d), (e) of this subsection." HMC 3.40.080(6) (emphasis added). These restrictions are things that would take several days to accomplish, particularly obtaining the special license and special insurance, and obtaining or constructing a special enclosure for the dog.

The plain meaning of undefined terms in a statute may be discerned from their ordinary meaning in the dictionary; the context of the statute in which they are found; related provisions; and the statutory scheme as a whole. *Puget Sound Crab Assoc. v. State,* 174 Wn. App. 572, 583, 300 P.3d 448 (2013). A rational interpretation of HMC 3.40.080 requires that a dog owner have some *opportunity* to comply with the restrictions before the dog is impounded. The dictionary definitions of the

verbs "fail"[9] and "comply"[10] make this clear. Before an owner can be said to have "failed to comply" with a requirement, the owner must first receive notice of the requirement and have an opportunity to comply. If there is no opportunity to comply, non-compliance occurs because the dog owner had no period of time to take the remedial actions, not because the owner refused or "failed" to take those actions.

In this litigation, Plaintiff argues that the state dog law, chapter 16.08 RCW, provides the correct procedure governing confiscation of dogs after service of a notice that an owner must take remedial action regarding a dog.[11] *See* CP 51-53; 311-16. However, the notice and impoundment provisions in the state law are less stringent than those in the Hoquiam ordinance.

Under RCW 16.08.080(1), an animal authority issues a declaration containing "the reasons the authority considers the animal dangerous" and "a statement that the dog is subject to registration and controls required by

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[9] Dictionary definitions provided for the verb "to fail" include "to disappoint the expectation or trust of" and "to miss performing an expected service or function." *Merriam Webster's Collegiate Dictionary* (10th Ed. 1994).

[10] Dictionary definitions provided for the verb "to comply" include "to conform or adapt one's actions to another's wishes, to a rule, or to necessity." *Merriam Webster's Collegiate Dictionary* (10th Ed. 1994).

[11] Plaintiff actually asserts that the state dog law controls despite Hoquiam's local ordinance (HMC 3.40.080), but the state law provides that local dangerous dog notification and appeal ordinances control if those ordinances existed before June 13, 2002 (Hoquiam's did).

[chap. 16.08. RCW]".[12] An owner has fifteen days to request an informal hearing before the animal authority, and the authority then has fifteen more days to issue a final order declaring a dog to be dangerous. RCW 16.08.080(3).

The state law does not provide that a dog can be confiscated when a local government issues the initial dangerous dog declaration. *See* RCW 16.08.080(1), (2), and (3). The state law provides only that, if there is an appeal of a final order issued after the 30 day period for hearing the dog owner's objections to the declaration, the animal authority has the discretionary authority to order the dog confined (by its owner, not the animal authority) during the appeal. *See* RCW 16.08.090(1). This provision would be unnecessary if either the issuance of the initial order (the declaration) or the final order (after hearing) had required the immediate confiscation of the dog. The structure of the state dog law indicates that: (1) only a final administrative order, and not an initial order, requires compliance, and (2) that the conditions imposed by even a final dangerous dog order are not effective until the appeal period has passed.

Under HMC 3.40.080(4) the initial order (the declaration) does not become final, and thus enforceable, until the expiration of the appeal

[12] The declaration under state law imposes the same license, enclosure and control conditions as the Hoquiam ordinance. *See* RCW 16.08.080(6) (license, insurance, enclosure and sign); 16.08.090(1) (muzzle and leash off property).

period, or, in the event of an appeal, the Court's affirmation of the declaration.[13] The Hoquiam dog ordinance and the City's application of that ordinance are consistent with the provisions of the state dog law. The Hoquiam process is more streamlined and efficient than the process in chapter 16.08 RCW. Under HMC 3.40.080, the order becomes final and enforceable within ten days if there is no appeal, and, if there is an appeal, the appeal is heard and decided within 30 days. Under RCW 16.08.080, the animal authority has 30 days to issue the final order after the declaration is served. If the declaration is appealed, there is no time limit for the hearing and decision that determines whether a dog must be licensed as a dangerous dog and meet insurance and enclosure conditions.

In the decision on Hoquiam's Petition for Discretionary Review, the Commissioner commented that HMC 3.40.080(4) does not provide for a stay of impoundment, implying that impoundment is required absent a stay. CP 811. This is incorrect because HMC 3.40.080(4) does not mandate impoundment upon service of the order, but only if the dog owner "fails to comply" with the conditions being imposed by the order. As argued above, whether the owner will comply with the newly imposed conditions cannot be known at the time of service because the owner has

[13] As noted above, if at the time the declaration is served, the dog presents an immediate danger to the community, the dog can be impounded under other sections of the Hoquiam animal code.

had no opportunity to comply. Compliance can only be determined by the actions taken or not taken in a period of time appropriate to taking such actions after the order requiring the actions is served.

The Commissioner's comment on stays also does not recognize law on initial and final administrative orders. Washington does not have an administrative procedure act containing laws for adjudications by local government agencies. However, the "new" Washington State Administrative Procedure Act (APA), applying to state agencies since mid-1989, contains accepted state, federal, and constitutionally required administrative procedures developed since the advent of modern administrative law. *See* William R. Andersen, *The 1988 Washington Administrative Procedure Act – An Introduction*, 64 Wash. L. Rev. 781 (1989), 781-83.

Under the APA, only final orders are effective on entry. RCW 34.05.473.[14] Non-final or "initial" orders are effective immediately only if they are entered as emergency orders when immediate action is needed to protect the public. *See* RCW 34.05.473(3); RCW 34.05.479. There would be no need for emergency orders if initial orders had immediate effect. Consistent with these well-accepted principals of administrative law, the APA provides for stays of final orders only, and not for stays of initial

[14] RCW 34.05.473 uses the term "order" but the APA definition of order states that order means "final" order. RCW 34.05.010(11)(a).

orders. RCW 34.05.467. There is no need to stay a non-final, non-emergency order because it is not effective until "final."

Under HMC 3.40.080(4), the order served by Officer Hill on August 11, 2009, was not a final order until the ten day appeal period ran, or, in the event of appeal, the court affirmed the order. There is no need for HMC 3.40.080(4) to contain a stay procedure for a non-final order. The Commissioner did not recognize that the term "final" order used in HMC 3.40.080(4) is a term of art in administrative law and carries a meaning that establishes when an administrative order takes effect, i.e., at the time that it becomes final.

The Commissioner further commented that the City's declaration contained language saying that the initial order was "effective immediately", implying that the administrative order might override the ordinance provision stating that the order did not become final until expiration of the ten day appeal period. CP 811. This interpretation overlooks law prohibiting administrative officials from changing statutory law. Administrative agencies are creatures of statute; statements of their officials cannot alter law enacted by legislative bodies. *Murphy v. State,* 115 Wn. App. 297, 317, 62 P.3d 533 (2003). Whatever meaning is ascribed to the term "effective immediately" in the Hoquiam

administrative declaration, it cannot change the ordinance language stating that the declaration is not final until the appeal period passes. *Id.*

2. Procedures in HMC 3.40.080(4) Are Inconsistent With Automatic Impoundment of All Dogs When Owners Are Served With Declarations Notifying Them of Remedial Actions to be Taken

Specific procedures in HMC 3.40.080(4) are incompatible with interpreting the ordinance to require immediate impoundment of all dogs subject to restrictions under the ordinance. A statute must be interpreted so that all language in the statute is given effect, with no parts of the statute rendered meaningless or superfluous. *City of Seattle v. State,* 136 Wn.2d 693, 965 P.2d 619 (1998). Plaintiff's immediate impoundment interpretation of HMC 3.40.080(4) is incorrect, because it renders parts of the ordinance meaningless.

HMC 3.40.080(4) allows service of a declaration by mail or by posting at the premises where the dog resides. If the declaration is served by these methods, the animal control officer would not be present to immediately impound the dog upon service of the declaration, as Plaintiff contends is required by ordinance. Plaintiff's interpretation of HMC 3.40.080(4) requires that the dog owner always be personally served with the declaration, despite the other means of service allowed by the ordinance. The provisions for service by mail or posting cannot be given

effect if the ordinance is read to require the officer to confiscate the dog immediately upon service of the declaration on the owner.[15]

HMC 3.40.080(4) also provides different scheduling requirements for appeal hearings depending on whether or not the dog is impounded at the time that the declaration is served. HMC 3.40.080(4) states, in part:

> Hoquiam municipal court shall schedule and conduct a hearing within thirty days of receipt of the notice of appeal unless the dog has been impounded by the city, in which case the hearing shall be scheduled and conducted within ten days of receipt of the notice of appeal...

(Emphasis added). The ordinance provides for a ten-day hearing requirement if the dog is impounded and a 30-day hearing requirement if the dog is not impounded.

The hearing provision in the ordinance indicates that some declarations will be served in response to situations in which there is immediate danger, such as a human attack justifying an emergency impoundment. This provision also indicates that declaration will sometimes be served in other situations when, as here, there is no immediate danger to humans or the community justifying an immediate impoundment order. Plaintiff's interpretation of HMC 3.40.080(4) is

[15] The state law is similar to Hoquiam's ordinance regarding service. Chapter 16.08 RCW provides that the initial dangerous dog declaration is served by mail and the final order can be served in person or by mail. *See* RCW 16.08.080(1) and (3). Therefore, the state legislature also did not intend that all dogs be confiscated immediately when the orders were served, which is not possible with service by mail.

incorrect because it again renders part of the ordinance meaningless. There is no reason to have a 30-day hearing requirement for situations in which a dog is not impounded if all dogs subject to the ordinance must be immediately impounded, triggering the ten-day hearing requirement in every case.

3. Confiscating Dogs Without a Prior Hearing and Imposing *Ex Post Facto* Criminal Liability Violate the Constitution

Pet owners have a property interest in their pets. *Downey v. Pierce County,* 165 Wn. App. 152, 165, 267 P.3d 445 (2011). An opportunity for a hearing *before* deprivation of property is normally required. *Clement v. City of Glendale,* 518 F.3d 1090, 1094 (9th Cir. 2008); Andersen, at 808. Confiscating a dog prior to affording the owner an opportunity for a hearing violates the owner's right to procedural due process. *County of Pasco v. Riehl,* 635 So.2d 17 (Fla. 1994).

An exception to a right to a pre-deprivation hearing is "emergency," but this requires an immediate danger to the public and a special statement of emergency circumstances in the order. *See* RCW 34.05.479; *see also Jones v. State,* 170 Wn.2d 338, 351, 242 P.3d 825 (2010). The August 11, 2009, dog fight was not an emergency because the dog did not attack a human, did not have rabies, and was not loose in the community, any of which would have been exigent circumstances,

allowing immediate impoundment under the Hoquiam code. In this case, the incident was a fight between two dogs owned by the same person and confined in the owner's residence. While the Hoquiam ordinance allows the City to attempt to impose restrictions on a dog that fights with another dog, the circumstances of the incident here presented no immediate hazard to the public. These circumstances did not permit an emergency confiscation dispensing with the owner's normal due process right to a hearing before confiscation of her property.

Plaintiff's interpretation of the Hoquiam dog ordinance has a second constitutional infirmity. HMC 3.40.080(8) provides that the owner's failure to comply with the conditions imposed by the declaration is a misdemeanor. Plaintiff's interpretation would make the dog owner guilty of a crime for failing to be in compliance, at the time of service of the declaration, with a legal requirement to take actions that were not required before service of the order and could only be taken after service. This is an unconstitutional *ex post facto* application of criminal law. *State v. Watkins,* 76 Wn. App. 726, 732, 887 P.2d 492 (1995). A law cannot punish as a crime an act that was innocent when done. *Id.* In this case, Hoquiam could not punish the dog owner for failing to take actions to have the special dog license, insurance, and restrictions, in place before the City served the order requiring those actions.

VI. CONCLUSION

The City of Hoquiam respectfully requests the Court to reverse the summary judgment against the City and reverse the denial of summary judgment to the City. The reversal of the two summary judgment orders would require reversal of the jury verdict awarding damages to Plaintiff and would result in dismissal of this case.

RESPECTFULLY SUBMITTED this 1st day of April, 2015.

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CERTIFICATE OF SERVICE

I certify that the foregoing was served by the method indicated below to the following this 1st day of April, 2015.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of April, 2015, at Olympia, WA.

KRISTY JENNE

APPENDIX A

3.40.080 Dangerous and potentially dangerous dogs.

(1) The chief of police, the deputy chief of police, or the animal control officer shall have the authority to declare a dog to be a dangerous dog upon receiving a report and making a determination by a preponderance of the evidence that a dog:

(a) Has inflicted severe injury on a person without provocation on public or private property, unless it can be shown by a preponderance of the evidence that the injury was sustained by a person who, at the time, was committing a willful trespass or other tort upon the premises occupied by the owner of the dog, was tormenting, abusing, or assaulting the dog, in the past has been observed or reported to have tormented, abused, or assaulted the dog, or was committing or attempting to commit a crime; or

(b) Has killed a domestic animal without provocation while off the owner's property; or

(c) Has been previously found to be potentially dangerous, the owner having received notice of such and the dog again aggressively bites, attacks, or endangers the safety of persons or domestic animals.

(2) The chief of police, the deputy chief of police, or the animal control officer shall have the authority to declare a dog to be potentially dangerous upon receiving a report and making a determination by a preponderance of the evidence that a dog:

(a) Has inflicted bites on a human or a domestic animal, either on public or private property;

(b) Has chased or approached a person upon the streets, sidewalks, or public ground in a menacing fashion or apparent attitude of attack; or

(c) Has caused injury to or otherwise threatened the safety of humans or domestic animals.

(3) A declaration that a dog is potentially dangerous puts the owner on notice that the dog has exhibited behavior described in subsection (2)(a), (b), or (c) of this section, but does not impose greater restrictions upon the dog or the owner, and therefore the declaration that a dog is potentially dangerous is final and may not be appealed. A declaration that a dog is potentially dangerous shall be served upon the owner or person in control of the dog by mail, by posting upon the premises where the dog resides, or by personal service upon the owner or person in control of the dog.

(4) A declaration that a dog is dangerous shall be served upon the owner or person in control of the dog by mail, by posting upon premises where the dog resides, or by personal service upon the owner or person in control of the dog. A declaration that a dog is dangerous shall be final unless appealed by the owner or person in control of the dog within ten days of service. A notice of appeal form shall be attached to the dangerous dog declaration, and shall be completed and

filed with the Hoquiam municipal court. The Hoquiam municipal court shall schedule and conduct a hearing within thirty days of receipt of the notice of appeal unless the dog has been impounded by the city, in which case the hearing shall be scheduled and conducted within ten days of receipt of the notice of appeal. At the hearing, the court may consider written statements, reports of the animal control officer, and police reports as well as the testimony of witnesses in determining whether the dog was properly declared to be a dangerous dog. The court will affirm the dangerous dog declaration if it finds by a preponderance of the evidence that the dog has exhibited behavior described in subsection (1)(a), (b), or (c) of this section.

(5) The following restrictions shall apply to a dog that has been declared dangerous:

(a) The owner shall provide and maintain a proper enclosure for the dangerous dog, as defined in HMC 3.40.040(13); and

(b) The owner shall post his or her premises with a clearly visible warning sign that states that there is a "Dangerous Dog" on the property. In addition, the owner shall conspicuously display a sign with a warning symbol approved by the animal control officer that informs children of the presence of a dangerous dog; and

(c) The owner shall maintain a surety bond or liability insurance policy, as defined by RCW Title 48, in an amount of two hundred fifty thousand dollars payable to any person injured by the dangerous dog; and

(d) The owner of the dangerous dog shall obtain a dangerous dog license from the city under HMC 3.40.050; and

(e) The owner shall not permit the dangerous dog to be outside a proper enclosure unless the dog is muzzled and restrained by a substantial chain or leash and is under physical restraint of a responsible person. The muzzle shall be made in a manner that will not cause injury to the dog or interfere with its vision or respiration, but shall prevent it from biting any person or animal.

(6) A dangerous dog shall be immediately impounded by a police officer or an animal control officer if the owner of the dangerous dog fails to comply with any of the restrictions set forth in subsection (5)(a), (b), (c), (d), or (e) of this section.

(7) The provisions of this section shall not apply to any police canine used by a law enforcement agency.

(8) A violation of this section is a misdemeanor and subject to punishment as provided in HMC 3.40.190. (Ord. 09-04 § 1, 2009; Ord. 95-11 § 1, 1995; Ord. 91-17 § 5, 1991).