No. 71947-5-I

SC#93265.4

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

KARY L. CALDWELL,

Petitioner,

vs.

CITY OF HOQUIAM, a governmental entity,

Respondent,

and

GRAYS HARBOR COUNTY, 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.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kary L. Caldwell asks this Court to review the published Court of Appeals decision described in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its unpublished decision on April 18, 2016. A copy of that decision is in the Appendix at pages A-1 through A-17. The Court ordered publication of that opinion in an order entered on May 26, 2016, found in the Appendix at A-18.

C. ISSUES PRESENTED FOR REVIEW

1. Where a municipal animal control officer and police officers knew that a pit bull was dangerous, given its vicious, bloody attacks on another dog, and that the dog's owner had taken no steps to comply with the municipality's dangerous dog ordinance to protect the public from the dog, did the Court of Appeals err in implying a "reasonable time period" for the pit bull owner to comply with the dangerous dog ordinance when the ordinance mandated immediate impoundment of the dog and municipal authorities should have impounded it, thereby permitting the owner to evade enforcement of the municipality's dangerous dog ordinance, allowing the animal to subsequently attack and inflict horrendous injuries on a human?

2. Does a municipality owe a person bitten by a dangerous pit bull a common law duty of care where the City was fully aware of the dog's dangerousness and it was foreseeable that the dog would harm others, but the City took no steps to prevent exposing others to the dog's foreseeable propensity to harm others?

D. STATEMENT OF THE CASE

The Court of Appeals opinion provides a highly sanitized version

of the facts here, omitting critical facts about a dangerous dog so vicious that it could only be subdued with a catchpole and a taser and its bite so powerful that it broke Caldwell's arm in ten places. These facts are indeed critical to the City's duty to Caldwell.

While residing in Hoquiam, Shawn Marie Smith owned two pit bulls,[1] Temper and Yayo. In a first incident on February 26, 2009, Smith called Grays Harbor County 911 because the two pit bulls were engaged in a savage fight and Smith believed that Temper was going to kill Yayo, CP 66, 115-16, and the City dispatched Police Officer Steve Wells and Animal Control Officer Bob Hill to 2323 Aberdeen, a residence in the City. CP 83. Temper bloodied Yayo badly, CP 66, and would have killed Yayo but for the intervention of Wells and Hill. CP 83-84. ACO Hill determined that Temper was a potentially dangerous dog within the meaning of HMC 3.40.040(12)(c) because it attacked Yayo. CP 66, 69. *See* Appendix. Hill separated the dogs with a catch pole. CP 116.[2] Hill recommended to Smith that she agree to have Temper immediately

[1] "The pit bull dog has extremely strong shoulders, weighs between 40 and 80 pounds, and has muscles two inches thick on its lower jaws. When the dog bites, it locks on its victim with its back jaws, ripping and tearing its way through flesh and bone. It attacks without a bark or any warning, has a high threshold of pain, and usually will not quit the fight voluntarily. The injuries the dog can inflict upon a person or on another animal are most severe." 33 Am. Jur. Trials 195 at § 3.

[2] A catch pole is a long aluminum pole with a wire that goes down the middle, and it has a loop on one end, and on the other end the user pulls on it and it cinches it down to capture an animal.

declared a dangerous dog. CP 84. He prepared a potentially dangerous dog declaration. CP 31.

Hill failed to serve Smith with a potentially dangerous dog declaration while at the scene. CP 116; RP (4/21/14):67-68. However, when Hill returned the next day he was informed by a woman at the door that Smith had vacated the premises and had taken Temper with her. *Id.* Smith fled intentionally to avoid formal service of the declaration. RP (4/22/14):4-5. Hill knew dog owners did this to avoid the impact of the law. *Id.* at 49-51.[3]

Hill took no further steps with respect to Temper for months thereafter; he did not seek identifying information on Smith or photos of the animals, nor did he seek to locate Smith, her daughter Jennifer Smith, or Temper. CP 117; RP (4/22/14):11-13.

Five months later, Grays Harbor County emergency dispatch received yet another frantic 911 call on August 11, 2009 from Shawn Smith because her pit bulls were fighting and Temper was again killing Yayo. CP 67, 97, 118. City Police Officers Dennis Luce and Jeremy Mitchell, and ACO Hill responded to the scene at 909 Wood, another City residence. CP 67, 68, 89, 97, 117-18. Smith was frantic. CP 68. Mitchell

[3] Hill was told to contact a person named William DeGarmo about Smith. *Id.* DeGarmo told Hill Temper was "dangerous," as he related in his report. CP 66, 116-17; RP (4/21/14):72-75.

and Hill opened the front door, but did not enter the house and saw Temper with his jaws around Yayo's neck. CP 98. There was blood around Temper's mouth and Yayo's neck. CP 90, 98, 118.

Hill then tried, unsuccessfully, to separate Temper from Yayo by using a catch pole, but Temper's bite on Yayo's neck was too strong to get the rope of the pole between Temper's muzzle and Yayo's neck. CP 98, 118. Mitchell believed Temper would kill Yayo. CP 99.[4] Officer Mitchell was compelled to use his taser weapon to stop Temper. CP 89-90, 99.[5] Only after Temper was tased was ACO Hill then able to use his catch pole to control the animal and move him to the home's only bedroom, away from Yayo. CP 90, 100, 118-19. Hill decided not to impound either animal because the Grays Harbor animal shelter was allegedly full, RP (4/22/14):59-61, and Hill did not believe he had an obligation to impound Temper because it had not bitten a human. CP 120.[6]

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[4] Office Luce testified that Temper was sufficiently large and muscular that the dog could have taken him down if the officer did not have a weapon at his disposal; Luce is nearly six feet tall. CP 100.

[5] Use of a taser to subdue an animal is rare. RP (4/22/14):19.

[6] This assessment was incorrect under HMC 3.40.080(1)(c) where Temper had previously been the subject of a potentially dangerous dog designation and HMC 3.40.080(6) required Temper's immediate impoundment, as will be noted *infra*.

ACO Hill told Smith that because Temper was previously declared potentially dangerous, Temper would now be declared a dangerous dog, CP 67, 120, 214,[7] but Hill then left the premises. CP 121. When Hill returned, he served both the potentially dangerous dog and dangerous dog declarations upon Shawn Smith on August 11, 2009. CP 70-71, 121, 123-24; RP (4/22/14):22-23. *See* Appendix.

Hill knew Smith was not compliant with the dangerous dog restrictions outlined in the dangerous dog declaration as mandated by HMC 3.40.080(5),[8] but Hill did not tell Smith that she had to comply with

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[7] The City *admitted* Temper is a dangerous dog as defined under its ordinance. CP 32.

[8] The Court of Appeals incorrectly determined that Temper did not meet the definition of a dangerous dog at that point. Op. at 8. That court seemingly reads the ordinance to provide that immediate impoundment is not required if the dog owner complied with just one of the restrictions. The proper reading is that impoundment is mandatory if the owner fails to comply with *any* of the restrictions. Not only did the court *concede* that Smith did not meet the signage requirement, op. at 9-10, the record discloses that Smith met *none* of them and ACO Hill knew that. Hill knew that Smith was required to comply immediately with HCM 3.40.080(5)'s five restrictions from the ordinance. RP (4/22/14):40-46; CP 119, 121. Hill knew that Smith lived in a small single story 600 square foot home with just one bedroom. *Id.* The home did not have a fenced or enclosed back yard. *Id.* The home had a very small front yard, mostly gravel, with no enclosure. *Id.* He observed there were no "Dangerous Dog" signs posted anywhere on the property. *Id.* He also did not see a sign with a special symbol of a dangerous dog for Temper's owner to use to warn children of the presence of a dangerous dog on the property. *Id.* Further, Hill did not ask Smith if she had liability insurance so he had no evidence that she had complied with this restriction; Hill knew that the owner of a dangerous dog must show proof of insurance coverage. CP 119. Hill also had the capability to verify whether Temper had been issued a dangerous dog license from the City; he knew Temper had not been issued such a license on the date he declared the animal dangerous. CP 124. When asked whether Shawn Smith was ever in compliance with the City's dangerous dog restrictions, Hill responded, "No." CP 122, 130-31. The Court of Appeals' conclusion was simply wrong.

the dangerous dog restrictions, RP (4/22/14):24, and instead left the premises without impounding Temper. CP 119-20. Hill *admitted* below that a dangerous dog whose owners are in violation of the dangerous dog restrictions in the City's ordinance must be picked up immediately. CP 112.

Rather than comply with the City's ordinance, Smith appealed the dangerous dog designation to the City's municipal court and that appeal was heard on September 1, 2009; the court upheld the dangerous dog designation for Temper. CP 121-22, 222.

The City took no significant steps after August 11, 2009 to do anything more about Temper. CP 122, 125. As was their custom, the Smiths left the City to avoid compliance with the City's dangerous dog ordinance, CP 127, and on September 26, 2009, Temper predictably caused more harm. Kary Caldwell went to the apartment of a friend in Kent, Washington, with whom Jennifer Smith lived, as did Temper. CP 74-75.[9] Temper's presence in the apartment was contrary to the lease

[9] According to King County's investigator, Sheriff Sergeant Dave Morris, Jennifer Smith told Jim Thompson "to keep the dog away from people." CP 228. Thompson told Morris: "The dog is bad! It needs to be killed." *Id.* Thompson related that Smith knew Temper had bitten before and had been declared dangerous in Hoquiam. CP 229.

agreement and the landlord had ordered Thompson to vacate the premises as a result. CP 227, 1449.[10]

Without provocation, CP 229, Temper lunged and jumped onto Caldwell's back, biting her arm with a "vice grip." *Id.* She fought back. *Id.* Caldwell blacked out. *Id.* When Caldwell awoke, she was in shock, and was bleeding. CP 148, 149. Temper released her arm only when struck with an iron skillet. *Id.* Caldwell's arm was broken in ten places. CP 79, 148, 149. Her medical treatment was extensive. CP 149-52, 552-55.[11]

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED[12]

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[10] Thompson later pleaded guilty to attempted possession of a dangerous dog. CP 1083-90.

[11] Subsequent to the attack, Temper was taken to the Kent Shelter and placed under quarantine. CP 74. King County deemed Temper an "unredeemable animal," CP 77, and it was destroyed. CP 1247-48, 1270, 1302. Temper's destruction was not an issue for the jury. CP 1330.

[12] The City *conceded* the issue of breach of duty below. CP 872-73. *See also,* CP 1158, 1195. It further conceded the factual predicate for causation when it proposed that the jury be instructed as follows:

> Defendant Hoquiam admits that, on August 11, 2009, Hoquiam Animal Control Officer Hill served a dangerous dog declaration on the owner of a dog that later bit plaintiff. Defendant Hoquiam further admits that the dog's owner had not complied with the conditions in the declaration at the time that Officer Hill served the declaration and admits that Officer Hill did not impound this dog when he served the declaration...

CP 1019. The City did not appeal causation or jury's $435,000 award to Caldwell. The only issue here is duty.

Each year in the United States, dog bites account for thousands of injuries to humans. In 2014, the Center for Disease Control reported that there were roughly 4.5 million dog bite incidents in America resulting in 353,954 injuries to humans. http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html. More than half of the victims are children. *Civil Liability for Injuries caused by Dogs After Tracey v. Solesky: New Path to the Future or Back to the Past?* 40 Seton Hall Legis. J. 29, 31 (2015). Pit bulls are a particularly dangerous breed of dog, accounting for the bulk of human dog attack deaths in America. *Id.*[13]

The public policy of Washington is to protect people from dangerous dogs; their owners are strictly liable for their actions.[14] The

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[13] *See, e.g., People v. Flores*, 156 Cal. Rptr. 3d 648 (Cal. App.), *review denied* (2013) (pit bull previously designated a potentially dangerous dog by county, viciously attacked 90-year-old man after previous unprovoked attacks on other animals; defendant's conviction for keeping a "mischievous animal" upheld); *Ramirez v. M. L. Management Co.*, 920 So.2d 6 (Fla. App. 2006) (landlord had duty to tenant's child bitten at park adjacent to premise by another tenant's pit bull).

Some courts have presumed pit bulls as a breed to be dangerous. *Tracey v. Solesky*, 50 A.3d 1075 (Md. 2012) (landlord held liable for pit bull's attack on tenant's child; harboring a pit bull was an inherently dangerous activity that subjected landlord to liability even in the absence of knowledge that the specific dog was dangerous; the court noted seven maulings of Maryland citizens by pit bulls over the previous 13 years and declared a special rule as to that species "because of its aggressive and vicious nature and its capability to inflict serious and sometimes fatal injuries..."

Courts generally hold that the breed of an animal will place an owner or keeper on notice of its dangerous propensities. *Humphries v. Rice,* 600 So.2d 975, 978 (Ala. 1992) (owner or keeper of animal charged with knowledge of propensities of breed of animal that he or she owns – pit bull). *See also, Thompson v. Wold*, 47 Wn.2d 782, 289 P.2d 712 (1955) (applying Montana law).

[14] In 1941, the Legislature enacted RCW 16.08.040(1) making dog owners

1987 Legislature also enacted RCW 16.08 relating to dangerous dogs. Laws of 1987, ch. 94.[15] Consistent with the authority in RCW 16.08, the City enacted its own dangerous dog ordinance. HMC 3.40.

This public policy, found in state and local laws and the common law, implements the deterrent effect of tort law, a key feature of tort law recognized by Justice Chambers in his opinion in *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419-20, 150 P.3d 545 (2007). But that deterrent policy is incomplete unless this Court requires municipalities, to

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strictly liable for dog bites inflicted by their dogs. Such strict liability for dog owners has been recognized in numerous appellate decisions. *See Frobig v. Gordon*, 124 Wn.2d 732, 735 n.1, 881 P.2d 226 (1994) (owner, keeper, or harborer of dangerous or vicious animal is liable to persons harmed by that animal; statute makes owner strictly liable without regard to owner's knowledge of dog's viciousness); *Arnold v. Laird*, 94 Wn.2d 867, 870, 621 P.2d 138 (1980) (dog owner is strictly liable for harm inflicted by vicious or dangerous dog, regardless of owner negligence or negligence of injured person); *Johnston v. Otis*, 76 Wn.2d 398, 400, 457 P.2d 194 (1969) (one who owns or keeps vicious or dangerous dog had strict liability duty to kill or confine dog under common law); *Hansen v. Sipe*, 34 Wn. App. 888, 890, 664 P.2d 1295 (1983) (RCW 16.08.040 sets strict liability standard); *Rogers v. City of Kennewick*, 304 Fed. Appx. 599, 602 (9th Cir. 2008) (recognizing Washington strict liability standard in RCW 16.08.040).

[15] These statutory provisions do not occupy the field of regulation for dangerous dogs, however. RCW 16.08 did not override local ordinances or common law duties owed by dog owners or municipalities to dog bite victims. Municipalities are free to enact more restrictive local ordinances regulating such animals, as our Supreme Court concluded in *Rabon v. City of Seattle*, 135 Wn.2d 278, 957 P.2d 621 (1998). There, Seattle enacted an ordinance that banned the possession of vicious dogs in the city even though state law seemingly permitted ownership of dangerous dogs, some which might fall within Seattle's definition of a "vicious" dog. Absent an *express* indication from the Legislature that it intends to overrule the common law, new legislation is presumed to be consistent with prior judicial decisions. *State v. Calderon*, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984) ("We will not assume that the Legislature would effect a significant change in legislative policy by mere implication."). Nothing in the 1987 legislation or RCW 16.08 generally purports to abrogate common law remedies.

scrupulously fulfill their legal obligations to humans who may be harmed by dogs known to be vicious.

Review of the published opinion of the Court of Appeals is needed because this Court has not addressed the duty owed by a municipality to individuals harmed by a municipality's failure to enforce its dangerous dog ordinance at least since *Rabon*, although various decisions of the Court of Appeals have done so. The Court of Appeals decision here is at odds with other decisions of the Court of Appeals finding a duty owed by a municipality to a dog bite victim. RAP 13.4(b)(2). Moreover, the Court of Appeals decision here misreads the City's ordinance, and improperly implies a reasonable time for dog owner compliance, contrary to this Court's statutory interpretation principles, creating a significant loophole for owners to evade enforcement and diminishing public protection; the Court also misreads the effect of any municipal court appeal on a valid administrative order, RAP 13.4(b)(4). The Court of Appeals essentially disregarded a municipality's common law duties as to vicious dogs and this Court should also carefully articulate those common law duties. RAP 13.4(b)(4).

(1) The Court of Appeals Created a Loophole in Dangerous Dog Ordinances Requiring Review – RAP 13.4(b)(2), (4)

The Court of Appeals misapplied the public duty doctrine in

concluding the City owed no duty to Caldwell.[16]

Washington courts have readily determined that a municipality's dangerous dog ordinance can establish the necessary predicate to that municipality's liability to dog bite victims for its negligence where it fails to properly handle a dangerous animal.[17]

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[16] The Court of Appeals applied the public duty doctrine, analyzing the failure to enforce aspect of that focusing tool on duty. Op. at 5-7. The Court of Appeals seemingly adopted the City's essential argument in its brief at 10-12 that the doctrine is akin to sovereign immunity and then exceptions to that immunity are analyzed. Rather, "governmental entities in Washington are liable for their 'tortious conduct' to the 'same extent' as a private person or corporation." *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753, 310 P.3d 1275 (2013). This Court has *repeatedly* affirmed that the doctrine is merely a tool to properly apply traditional tort duty principles. The doctrine "began its useful life as a tool to assist courts in determining the intent of legislative bodies when interpreting statutes and codes." *Cummins v. Lewis County*, 156 Wn.2d 844, 863, 133 P.3d 458 (2006) (Chambers, J. concurring); it is a focusing tool only. *Munich v. Skagit Emergency Communication Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012).

The City owed Caldwell a duty because it failed to enforce its dangerous dog ordinance. Where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation and fail to take corrective action despite a statutory duty to do so, duty is clear. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987); *Campbell v. City of Bellevue,* 85 Wn.2d 1, 13, 530 P.2d 234 (1975). *See also, Coffel v. Clallam County*, 58 Wn. App. 517, 523, 794 P.2d 513 (1990). Here, there is no question that the City was fully aware of Temper's vicious propensities from the events of February 26 and August 11, 2009.

[17] *E.g., Livingston v. City of Everett*, 50 Wn. App. 655, 658, 751 P.2d 1199, *review denied,* 110 Wn.2d 1028 (1988); *King v. Hutson*, 97 Wn. App. 590, 594-95, 987 P.2d 655 (1999) (plaintiffs claimed the County should have confiscated the dog in question prior to the attack, relying on RCW 16.08.100(1), which states that the animal control authority of a county "shall...immediately confiscate" "any dangerous dog" if the dog is found in violation of the dangerous dog requirements); *Gorman v. Pierce County*, 176 Wn. App. 63, 307 P.3d 795 (2013), *review denied*, 179 Wn.2d 1010 (2014) (the county ordinance commanded that its animal control personnel *shall* classify potentially dangerous dogs; despite receiving numerous complaints about a pit bull, the county failed to declare the dog to be potentially dangerous, and the court affirmed the judgment on the jury's verdict for the plaintiff whose house was invaded by the dogs, attacking her).

First, it is clear, as the City has *conceded*, as it must, that its officers had the authority to declare Temper a potentially dangerous dog on February 26, 2009, given his vicious conduct at that time. HMC 3.40.040(12); HMC 3.40.080(2). The fact that Temper was a potentially dangerous dog and *repeated* his vicious behavior made him a dangerous dog. HMC 3.40.080(1). This decision on Temper's dangerousness was affirmed by the municipal court.

A distinct issue is the implication of such a decision. HMC 3.40.080(5). Contrary to *Livingston, King,* and *Gorman,* the Court of Appeals here failed to firmly apply the City's ordinance in finding that the City had no obligation to immediately impound Temper on August 11, 2009. Op. at 8-10. To continue the possession of such a dangerous animal, the Smiths were obligated to *immediately* take steps to protect people from its potential harmfulness. HMC 3.40.080(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."). *See also,* RCW 16.08.100(1) (requiring immediate impoundment of non-compliant dangerous dog). To do no less would fail to protect humans.

The Court of Appeals erred in implying a reasonable period for compliance. Op. at 10. This Court in *Saucedo v. John Hancock*, 185 Wn.2d 171, 180, 369 P.3d 150 (2016), stated that a court in the guise of interpreting a statute is not free to add provisions that the legislative body did not enact.

The ordinance's plain language controls. The Court of Appeals loses sight of a vital point about the ordinance's statutory scheme that the City wants to ignore — the City was on notice that Temper was a potentially dangerous dog. By its terms, HMC 3.40.080(3) states that the potentially dangerous dog designation puts the dog owner on notice that his/her dog is dangerous. Hill so advised Smith here. Thus, the City was on notice that Temper was dangerous and Smith already had a "grace period" from February 26, 2009 until August 11, 2009 to take steps to address Temper's viciousness.[18] Such a "de facto" grace period dispenses with the need to allow a dog owner added time to comply and makes the reason for *immediate* impoundment as required by HMC 3.40.080(6) all the more understandable.

HMC 3.40.080(6) requires *immediate* impoundment of a dangerous dog not meeting the legal restrictions attendant upon such a

[18] As noted *supra*, only ACO Hill's ineptitude in failing to serve the potentially dangerous dog declaration on Smith on February 26 allowed Smith to abscond with Temper.

designation. The language could not be plainer.[19] The City's argument would permit a dangerous animal to roam unrestricted, free to do further harm to humans, just as Temper did here. Shawn Smith never complied, nor had the capability or intent of complying, with the City ordinance on dangerous dogs. There was *no admissible evidence* that Smith would have met the specific protective requirements that would have allowed her to keep Temper and the City's ACO Hill knew that. Instead, Smith simply absconded with her dogs whenever their dangerousness was identified.

The Court of Appeals also misread the effect of Smith's municipal court appeal, op. at 10-13, asserting, in effect, that not only did the municipal court's order confer a "grace period" on Smith to comply, HMC 3.40.080(4) conferred what amounted to an automatic stay of the dangerous dog order during the appeal. Not only is such an analysis

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[19] The language of HMC 3.40.150 on impoundment further reinforces this interpretation. Similarly, its legislative history does so as well. On April 27, 2009, the Hoquiam City Council unanimously voted to adopt the dangerous dog declaration form which was served upon Shawn Marie Smith. CP 450-51. On April 13, 2009, prior to the vote, City Attorney Steve Johnson provided a written report to the Council on proposed amendments to the dangerous dog ordinance. CP 455-56. In his report, Johnson noted that the designation of a dog as dangerous was final unless the owner appealed to the municipal court. CP 460. A dangerous dog could be impounded if the owner did not comply with the conditions for keeping such a dog. *Id.* Attached to City Attorney Johnson's report was the dangerous dog declaration form which stated: "Effective immediately you are required to comply with the restrictions set forth in HMC 3.40.080(5)." CP 46. Presumably, the Council did not enact an unconstitutional ordinance. Indeed, such ordinance is presumptively constitutional and a party like the City bears the burden of proving otherwise beyond a reasonable doubt. *Didlake v. Wash. State*, 186 Wn. App. 417, 345 P.3d 43, *review denied,* 184 Wn.2d 1009 (2015).

contrary to the plain language of the ordinance, it violates general administrative law principles, requiring review. RAP 13.4(b)(4).

Contrary to the Court of Appeals' belief, op. at 13, the order was final. Washington's Administrative Procedures Act, RCW 34.05, makes an order immediately *effective*. RCW 34.05.473 ("Unless a later date is stated in an order or a stay is granted, *an order is effective when entered...*"). (emphasis added).

Smith's appeal did not stay the requirement of *immediate* impoundment of non-compliant dangerous dogs under the City's ordinance either. *Nothing* in HMC 3.40.080(4) provides for an automatic stay of the dangerous dog designation on appeal. Quite to the contrary, HMC 3.40.080(4) indicates the designation is *final*, unless appealed. HMC 3.40.080(6) directs immediate impoundment if the dog is dangerous and the owner is not meeting the requirements of HMC 3.40.080(5). HMC 3.40.150(5) allows the City to enter private premises to impound the dog. HMC 3.40.150(3) mandates that a dangerous dog failing to comply with the restrictions in HMC 3.40.080(5) is not to be released until the municipal court holds its hearing.[20]

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[20] A procedure for prehearing impoundment of a dangerous dog, subject to subsequent full procedural hearings, is constitutional. A prehearing deprivation of a property interest does not violate procedural due process. *Johnson v. Wash. Dep't of Fish & Wildlife*, 175 Wn. App. 765, 305 P.3d 1130, *review denied*, 179 Wn.2d 1009 (2013); *Ritter v. Board of Comm'rs of Adams County Pub. Hosp. Dist. No. 1*, 96 Wn.2d 503, 637

The City's dangerous dog ordinance provides for distinct decisions. One is whether the dog actually meets the criteria of HMC 3.40.080(1) to establish it is dangerous. That decision is appealable to municipal court, HMC 3.40.080(4); the hearing on that issue is expedited where the dog has been impounded. *Id.* A distinct question relates to the impoundment of a dangerous dog. The dog must be *immediately* impounded under HMC 3.40.080(6) unless the dog owner takes steps mandated by HMC 3.40.080(5) to protect people from the dog. HMC 3.40.150(5) even allows City police or its animal control officer to enter private premises to impound a dangerous dog. The dog owner is entitled to a hearing on the release of a dangerous dog. HMC 3.40.150(3). HMC 3.40.150(3) further provides that when a dangerous dog is impounded, even if the dog's owners are in compliance with the ordinance, the hearing judge may still order the animal's destruction, if the dog is vicious and constitutes a threat to humans in the City. Temper should have been *immediately* impounded on August 11,

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P.2d 940 (1981). *See also, Wall v. City of Brookfield*, 406 F.3d 458 (7th Cir. 2005) (post-impound hearing on dangerous dog satisfied due process); *O'Keefe v. Gist*, 908 F. Supp. 2d 946 (C.D. Ill. 2012) (post-deprivation hearing or common law action to return dog satisfies due process); *Wilson v. Sarasota County*, 2011 WL 5117566 (M.D. Fla. 2011) (statutory post-deprivation hearing satisfies due process).

The governmental interest in protecting people from vicious animals like Temper weighs powerfully in favor of a procedure that imposes safety and control measures on such a dog owner *immediately* to protect humans, subject to a later hearing on the animal's dangerousness within the meaning of state law or municipal code. In fact, here it is clear that Smith had a right to appeal Temper's dangerousness designation to court, HMC 3.40.080(4), a right she claimed, and she would have had a right to seek Temper's release under HMC 3.40.150(3) had the City impounded him.

2009. That would have prevented the harm that ultimately occurred to Kary Caldwell from that vicious pit bull.

In sum, the City had a duty to under HMC 3.40.080/.150 on August 11, 2009 to *immediately* impound Temper because his owners were in violation of the City's dangerous dog ordinance. The trial court did not err in granting summary judgment to Caldwell on the duty issue, particularly in light of *Livingston*, *King,* and *Gorman*. The Court of Appeals decision implying "grace periods" in the City's ordinance where there are none and implying a stay during any municipal court appeal undercut the HMC 3.40.080(6)'s express terms, diminishing public safety. Review is merited. RAP 13.4(b)(2), (4).

(2) The Court of Appeals Failed to Address the City's Common Law Duty to Foreseeable Victims of a Dangerous Dog Like Caldwell Requiring Review – RAP 13.4(b)(4)

The Court of Appeals asserted that the City owed Caldwell no common law duty apart from the City's ordinance.[21] Op. at 15. The court was flatly wrong, and this Court should grant review to address that issue. RAP 13.4(b)(4).

[21] The public policy doctrine does not apply here as a statute or ordinance is not involved. *Munich,* 175 Wn.2d at 886-87 (Chambers, J. concurring, joined by four other justices). Moreover, Caldwell clearly raised and preserved the issue of the City's common law duty to her when she argued below that the City's duty to her was predicated both on common law principles and on the City's violation of its own ordinance and state law in addressing Temper's viciousness. CP 50-53.

Washington courts have recognized the application of common law negligence principles in dog attack cases. *E.g., Sligar v. Odell,* 156 Wn. App. 720, 731-33, 233 P.3d 914 (2010), *review denied,* 170 Wn.2d 1019 (2011). Here, the duty owed by the City to Kary Caldwell falls readily within the ambit of the *Restatement (Second) of Torts* § 321 (1965):

> (1) If the actor does not act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.
>
> (2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

Under this section, a duty is owed where a party's affirmative act exposes a plaintiff to a recognizable high degree of risk of harm. *Parrilla v. King County*, 138 Wn. App. 427, 433, 157 P.3d 879 (2007). The duty turns on the foreseeability of the risk created. *Higgins v. Intex Recreation Corp.*, 123 Wn. App. 821, 837, 99 P.3d 421 (2004). There can be little question that a pit bull so vicious that it attacked other pit bulls and could only be subdued by City law enforcement officers with catchpoles and tasers created a foreseeable risk of harm to animals and humans.

In the present case, the City owed Caldwell a common law duty of care. The City knew Temper was a vicious animal; he was a potentially dangerous dog that should have been declared so on February 26, 2009 but

for Hill's nonchalant failure to serve Smith, allowing her to abscond with Temper. It failed to do *anything* about Temper between February 26 and August 11, 2009. After August 11, 2009 the City had *full knowledge* that Temper was so vicious he could only be subdued with a catchpole or taser. The City again did little to address Temper's viciousness after August 11, 2009. The City also had knowledge that Shawn Marie Smith and Jennifer Smith exhibited a history and ongoing pattern of noncompliance with animal control ordinances and statutes. It was entirely foreseeable under these circumstances that Temper, left free to do harm, would attack Caldwell.

In sum, it created an unreasonable risk of physical harm to others it had a duty to address. The City knew Temper was a ticking time bomb in the hands of irresponsible owners; it had a duty to confiscate Temper to prevent his entirely foreseeable risk of harming animals or humans.

This Court should grant review to address the City's common law duties to dog bite victims. RAP 13.4(b)(4).

F. CONCLUSION

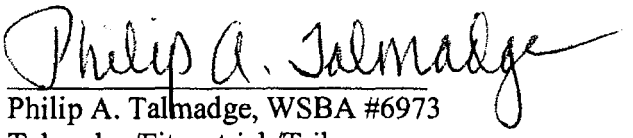
The trial court did not err in determining that the City owed a duty to Kary Caldwell for the vicious pit bull attack on her. Under its own dangerous dog ordinance and the common law, the City owed Caldwell a duty of care to Caldwell to impound Temper, an animal the City

designated a potentially dangerous dog and later a dangerous dog because of vicious acts, known to the City, in which Temper was involved. Had the City impounded Temper, he never would have attacked Caldwell. Under the common law, as described in the *Restatement (Second) of Torts* § 281, the City was on notice of Temper's viciousness but by its inaction, and it foreseeably exposed Kary Caldwell to Temper's attack.

This Court should grant review of the Court of Appeals' published opinion, reverse that court, and reaffirm the judgment on the jury's verdict. Costs on appeal should be awarded to Caldwell.

DATED this 30th day of June, 2016.

Respectfully submitted,



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APPENDIX

HMC 3.40.040(12):

> (12) "Potentially dangerous dog" means a dog that without provocation:
>
> > (a) Inflicts bites on a human or a domestic animal, either on public or private property;
> >
> > (b) Chases or approaches a person upon the streets, sidewalks, or public ground in a menacing fashion or apparent attitude of attack; or
> >
> > (c) Causes injury or otherwise threatens the safety of humans or domestic animals.

HMC 3.40.080:

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).

HMC 3.40.150:

(1) Upon seizing and impounding an animal, if the identity of the owner is known or can be readily determined by the animal control officer, the animal control officer shall make reasonable attempts to notify the owner by note, telephone, or mail that the animal has been impounded and, if subject to redemption, may be redeemed as provided.

(2) Unless specific provisions of this chapter require impounding for a longer period of time, an impounded animal may be redeemed by the

owner or an authorized representative of the owner from the animal control officer upon proof that the following conditions have been met:

(a) On the first impoundment of an animal, an impounding fee of twenty dollars shall be paid, and a boarding fee of six dollars for each calendar day or portion of a day that the animal has been confined. On subsequent impoundment of the same animal within a one-year period, the impounding fee is forty dollars;

(b) If the animal has no valid license tag and a license is required by the provisions of this chapter, the owner shall obtain a license tag or duplicate for the current year.

(3) Notwithstanding subsection (2) of this section, no animal impounded under this chapter as a dangerous dog may be released or redeemed until the municipal court holds a hearing to determine whether the animal should be released. Notice of the hearing shall be given to the owner by one of the methods specific in subsection (1) of this section at least twenty-four hours before the hearing. If the judge determines that the animal has or exhibits vicious or dangerous propensities and would, if released, constitute a threat to the welfare of the residents of the city, the judge may direct the governmental agency having jurisdiction over the animal to destroy or otherwise satisfactorily dispose of the animal.

(4) Any dog which has bitten a person may be immediately impounded by the city pursuant to HMC 3.40.130. The provisions of this section shall not apply to any police canine used by a law enforcement agency.

(5) Whenever a dog has previously been declared dangerous or has bitten a person and is subject to impoundment pursuant to HMC 3.40.080(6) or 3.40.130, the animal control officer or a police officer has the authority to enter private or public property to impound the dog. If the owner or person in control of the dog will not cooperate with the city in effecting the impoundment or allow access into the premises where the dog resides, the city may seek a court order authorizing the city to enter the premises to impound the dog. The court shall issue a court order based upon a showing of probable cause that the owner of the dog has violated HMC 3.40.080(6), or has bitten a person. Ord. 09-04 § 2, 2009; Ord. 06-20 § 2, 2006; Ord. 91-17 § 12, 1991.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KARY L. CALDWELL, Respondent, v. CITY OF HOQUIAM, a governmental entity, Appellant, and GRAYS HARBOR COUNTY, 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; and JAMES THOMPSON and JANE DOE THOMPSON, individually and the marital community composed thereof, Defendants.	No. 71947-5-I DIVISION ONE UNPUBLISHED FILED: April 18, 2016

Cox, J. — Kary Caldwell suffered substantial injuries when she was attacked by a dog in Kent, Washington. The City of Hoquiam had previously declared that animal a "dangerous dog" under its municipal code. This personal injury action followed the attack.

The trial court granted Caldwell partial summary judgment, concluding that the City owed her a duty, under its municipal code and state law, to immediately impound the dog when the City declared it a "dangerous dog." We disagree. Accordingly, we reverse the partial summary judgment order and the judgment on the jury verdict in Caldwell's favor that followed.

As a threshold matter, we note that this appeal is not about the negligence of the dog's owner. Likewise, this is not about the negligence of others in whose care the dog was placed at the time of the attack. And the severity of Caldwell's injuries is unquestioned. These matters were resolved below, and no one takes issue with them in this appeal.

The focus of this appeal is whether the City owed a duty to Caldwell, either under its municipal code or state law, to immediately impound the dog when the City's animal control officer served the owner with a "dangerous dog" declaration. Accordingly, we focus on that question.

The material facts are largely undisputed. Shawn Smith owned two dogs, named Temper[1] and Yayo. In February 2009, Smith called 911 to report that her two dogs were fighting. Robert Hill, the City of Hoquiam's animal control officer, responded and separated the dogs. Officer Hill also informed Smith that he declared Temper a "potentially dangerous" dog under the municipal code because it had injured Yayo, another animal. The following day, Officer Hill

[1] In the record, this dog's name is also sometime spelled as "Tempur." For consistency, we refer to the dog as "Temper" throughout this opinion.

returned to the residence to serve the written potentially dangerous dog declaration. But he was unable to locate Smith to serve her at that time.

On August 11, 2009, Officer Hill once again responded to a report that Smith's dogs were fighting. He again separated the dogs. He also informed Smith that because Temper had been previously declared a "potentially dangerous" dog, he now declared that Temper was a "dangerous dog." He served Smith with a "dangerous dog" declaration on that day. It stated, among other things, that the declaration would become final unless it was appealed within 10 days. He did not immediately impound Temper.

Smith timely appealed the declaration to the municipal court. The court concluded that Temper was a "dangerous dog" under the municipal code. The court's order, entered on September 1, 2009, required Smith to comply with the municipal code dangerous dog regulations by September 10.

On September 14, Officer Hill returned to Smith's residence to determine whether she was complying with the dangerous dog regulations, as the court order directed. But no one was present at the residence.

When he returned to the property two days later, he learned that Smith no longer lived there and was looking for a new residence. Although, Officer Hill asked the residence's owner to tell Smith to contact him, this record does not show any further contact by Smith or the dog with the City.

Some two weeks later, Kary Caldwell visited her friend at an apartment in Kent, Washington. Temper was in the apartment. The dog attacked Caldwell, severely injuring her arm. Caldwell required extensive medical attention.

Caldwell commenced this action against the City, those who owned or took care of Temper, and others. She obtained default judgments against Smith, her daughter, and the resident of the apartment where she was attacked.

Caldwell moved for summary judgment, arguing that the City owed her a duty, under both its municipal code and state law, to immediately impound the dog on declaring it a "dangerous dog." She also claimed that the City breached that duty to her. The City argued it had no duty.

The court granted partial summary judgment in favor of Caldwell solely on the question of duty. The court decided that the duty arose "on or after August 11, 2009 [the date of service of the dangerous dog declaration]." The questions of breach, damages, and proximate cause were reserved for later determination.

At trial, a jury returned a substantial verdict in Caldwell's favor against the City. The trial judge entered judgment on that verdict.

The City appeals.

DUTY

The City argues that it did not owe Caldwell a duty under either its municipal code or state law. The City is correct.

As in any personal injury case, a plaintiff must generally establish four elements: duty, breach, damages, and causation.[2] This appeal focuses on the first of these elements.

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[2] See Lowman v. Wilbur, 178 Wn.2d 165, 169, 309 P.3d 387 (2013).

Whether a duty exists is a question of law.[3] We review de novo questions of law.[4]

Washington has legislatively abolished sovereign immunity.[5] Under RCW 4.96.010(1), local governments are liable for their tortious conduct "to the same extent as if they were a private person or corporation."

If the defendant is a governmental entity and "a statute, ordinance, or regulation" creates the alleged duty, the public duty doctrine applies.[6] Under this doctrine, a duty owed to the general public does not create liability. Instead, the governmental entity must owe a duty specifically to the plaintiff to be liable.[7] This doctrine "is simply a tool [courts] use to ensure that governments are not saddled with greater liability than private actors as they conduct the people's business."[8]

At issue in this appeal is the failure to enforce exception to the public duty doctrine.[9] Under this exception, a government entity owes a duty to the plaintiff when "'[1] governmental agents responsible for enforcing statutory requirements

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[3] Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 528, 799 P.2d 250 (1990).

[4] Lyons v. U.S. Bank Nat. Ass'n, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014).

[5] RCW 4.92.090; RCW 4.96.010.

[6] Munich v. Skagit Emergency Commc'n Ctr., 175 Wn.2d 871, 886, 288 P.3d 328 (2012) (Chambers, J. concurring).

[7] Id. at 878.

[8] Id. at 886.

[9] Opening Brief of Appellant City of Hoquiam at 11-12; Brief of Respondent Caldwell at 30-31.

[2] possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and [3] the plaintiff is within the class the statute intended to protect.'"[10] The plaintiff must establish each element of this exception.[11] Courts construe this exception narrowly.[12]

The narrow question in this case is whether either the City's municipal code or the state statute mandated Temper's immediate impoundment when the City's animal control officer served the dog's owner with the "dangerous dog" declaration on August 11, 2009.

Construction of a statute is a question of law that this court reviews de novo.[13] We construe municipal ordinances and state statutes under the same standards.[14] Our fundamental objective is to ascertain and carry out the legislative body's intent.[15] If the meaning of a statute's text is plain, we effectuate that meaning.[16] We avoid reaching absurd results when interpreting statutes.[17]

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[10] Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs., 115 Wn.2d at 531 (alterations in original) (quoting Honcoop v. State, 111 Wn.2d 182, 190, 759 P.2d 1188 (1988)).

[11] Id.

[12] Id.

[13] Citizens All. for Prop. Rights Legal Fund v. San Juan County, 184 Wn.2d 428, 435, 359 P.3d 753 (2015).

[14] World Wide Video, Inc. v. City of Tukwila, 117 Wn.2d 382, 392, 816 P.2d 18 (1991).

[15] Citizens All. for Prop. Rights Legal Fund, 184 Wn.2d at 435.

[16] Id.

[17] Tingey v. Haisch, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007).

We now consider each of these statutes.

City Code

The City argues that it did not have an immediate duty to impound Temper at the time it served the dangerous dog declaration. We agree.

HMC 3.40.080 regulates "[d]angerous and potentially dangerous dogs." Subsection (6) of this provision states:

> 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.***[18]

HMC 3.40.080(5), to which subsection (6) refers, states:

> 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.[19]

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[18] (Emphasis added.)

[19] (Emphasis added.)

These provisions specify the circumstances under which the municipal code requires the immediate impoundment of a dangerous dog. The word "shall" in these provisions is mandatory.[20]

Subsection (6)'s plain words condition the immediate impoundment of a dangerous dog on its owner's failure to comply with ***any*** of the provisions of the five paragraphs under subsection (5) of the code.

Notably, subsection (6) does not direct immediate impoundment of a dog merely upon service of its owner with a dangerous dog declaration. Rather, the words of this subsection plainly require that a duty to immediately impound a dog arises when two things occur. First, the City must serve the owner of the dog with a dangerous dog declaration. Second, the owner must fail to comply with "any" of the provisions of subsection (5). In the absence of either of these requirements, no duty arises.

Applying this interpretation to the facts of this case, it is difficult to see how a duty to immediately impound Temper arose on August 11, 2009. Officer Hill testified at deposition that he served Smith with the dangerous dog declaration on that date. During his deposition, he also testified whether Smith met certain provisions of subsection (5) on the day he served her in response to counsel's questions:

> [Counsel:] Did—on August 11, 2009, did Shawn Marie Smith have any signs posted warning the community about Temp[e]r?
>
> [Officer Hill:] No.
>
> [Counsel:] Were there any Dangerous Dog signs anywhere in her

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[20] State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

residence at [her address]?

[Officer Hill:] No.

. . . .

[Counsel:] Did—on August 11, 2009, did Shawn Marie have any liability insurance coverage?

[Officer Hill:] I wouldn't know that.

[Counsel:] Did you ask her?

[Officer Hill:] Why would I ask her?

[Counsel:] Did you ask her if she had any liability insurance coverage at the time?

[Officer Hill:] No.

[Counsel:] Did you ask her if she had renter's insurance?

[Officer Hill:] No.

[Counsel:] Did you ask her if she had homeowner's insurance?

[Officer Hill:] No.

[Counsel:] Did you ask her if she was employed?

[Officer Hill:] No.

[Counsel:] Do you know if she was employed?

[Officer Hill:] I do not.[21]

Fairly read, the undisputed evidence shows that when Hill served Smith with the dangerous dog declaration there was no signage on her property of the type subsection (5) requires. Moreover, this record shows that it is unclear

[21] Clerk's Papers at 121.

whether she met subsection (5)'s other requirements. Officer Hill simply had no personal knowledge about these requirements other than signage.

The parties dispute whether the absence of the signage described in subsection (5) constitutes Smith's failure to comply with that subsection, triggering the City's duty to immediately impound Temper. The City argues that an owner, served with the required declaration, must have a reasonable time after service to comply with the regulations. Caldwell responds that "Smith never complied nor had the capability or intent of complying." We agree with the City on this point.

To read the code to require instantaneous or near-instantaneous compliance with the regulations set forth in subsection (5) after service of the dangerous dog declaration makes no sense. The five paragraphs under this subsection specify different requirements that likely would take different time periods to meet. For example, obtaining the required insurance might take longer than obtaining the required signage to post on the property. Even obtaining the required signage might take different periods of time, particularly where the City must approve certain signs, as HMC 3.40.080(5)(b) requires. Thus, Caldwell's argument that the City code required immediate impoundment of this dog on August 11, 2009 is unpersuasive.

Caldwell does not appear to rely on any other time to contend that the City owed her a duty to immediately impound this dog.

This record establishes that the municipal court's September 1, 2009 order following Smith's appeal specified that she had until September 10 to

comply with subsection (5)'s requirements. Caldwell does not argue that the City failed to impound the dog during this period, although there is no evidence that the City did so at this time.

In any event, Officer Hill's deposition testimony establishes that both Smith and the dog where gone when he went to check on compliance with the municipal court's order after the grace period expired. Thus, it is difficult to see how Hill could have either had actual knowledge of a statutory violation or impounded Temper during this period.

Another fundamental dispute between the parties regarding duty centers on the effect, if any, of the period of time to appeal a dangerous dog declaration. The City maintains that certain provisions of HMC 3.40.080(4) would be rendered meaningless if service of this declaration triggered a duty to immediately impound the dog.[22] Caldwell responds by arguing a dog must be immediately impounded on service of the declaration unless its owner complies with subsection (5).[23] We again agree with the City.

HMC 3.40.080(4) provides that "[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." Thus, a fair reading of this provision is that the declaration cannot be final during the ten days following service. To read this provision otherwise requires that we conclude that the declaration becomes "final" for the

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[22] Opening Brief of Appellant City of Hoquiam at 25-27.

[23] Brief of Respondent Caldwell at 26.

ten day period following service and prior to a possible appeal. This we decline to do.

If the owner timely appeals, the municipal court holds a hearing to determine the dog's dangerousness.[24] The time in which the court must schedule the hearing depends on whether the City impounded the dog. If the dog has been impounded, the hearing must occur within ten days of receipt of the notice of appeal.[25] If the dog has not been impounded, the hearing must occur within 30 days.[26] A dog impounded as a dangerous dog cannot be redeemed prior to a municipal court hearing.[27]

If service of a dangerous dog declaration required immediate impoundment of a dog, the provision for scheduling a hearing within thirty days of receipt of the notice of appeal if the dog is not impounded would be meaningless. That is because this provision only applies when a dog is not impounded.

As we explained earlier in this opinion, service of the declaration does not trigger a duty to immediately impound a dog. Rather, an owner's failure to comply with the regulations of subsection (5) within a reasonable time after service of the dangerous dog declaration requires immediate impoundment.

Harmonizing these provisions, as we must, we conclude that a dangerous dog declaration that may be timely appealed is not final. Thus, there is no duty to

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[24] HMC 3.40.080(4).

[25] Id.

[26] Id.

[27] HMC 3.40.150(3).

enforce such a declaration upon service by immediately impounding a dog under HMC 3.40.080(6)'s provisions.

Here, the dangerous dog declaration was the subject of a timely appeal by Smith. The City did not owe Caldwell a duty based on its failure to enforce HMC 3.40.080 on August 11, 2009 because the declaration was not then final.

Caldwell argues HMC 3.40.080 does not provide a stay pending appeal. But this argument begs the question—a stay is necessary only if the dangerous dog declaration is final when served.

Here, the relevant question is whether a dangerous dog declaration is final immediately when served. For the reasons explained earlier, it is not. Thus, lack of a "stay" is immaterial—the declaration does not need to be stayed because it is not yet final.

State Law

The City argues that it did not owe Caldwell a duty under state law. We agree.

RCW 16.08.100 requires animal control officers to confiscate "dangerous dogs" if their owners fail to comply with certain conditions.

> For the purposes of this statute, a dog is dangerous if it:
>
> (a) inflicts severe injury on a human being without provocation on public or private property,
>
> (b) kills a domestic animal without provocation while the dog is off the owner's property, or
>
> (c) has been previously found to be potentially dangerous because of injury inflicted on a human, the owner having received notice of

> such[,] and the dog again aggressively bites, attacks, or endangers the safety of humans.[28]

Temper was not a "dangerous" dog under any of the above definitions of the state law. Through September 2009, the time period when the dog was arguably within the City's jurisdiction, none of the above definitions applied.

Animal control had twice received reports that Temper had attacked another dog. But Temper had not either attacked a human or killed another animal. Thus, it did not fall under sections (a) or (b).

Temper also did not fall under section (c). While Temper had been previously declared potentially dangerous, this was not "because of injury inflicted on ***a human.***"[29] Thus, Temper was not a dangerous dog under state law.

For these reasons, there is no duty under state law that the City owed to Caldwell.

Common Law

Caldwell also argues that the City owed her a duty under the common law. But she fails to articulate a duty owed to her independent of the City's statutory duty to enforce the dangerous dog restrictions.

The court granted Caldwell summary judgment solely on the basis of the city code and state law. It did not determine that the City owed her a duty under the common law.

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[28] RCW 16.08.070(2).

[29] RCW 16.08.070(2)(c) (emphasis added).

In her motion for summary judgment, Caldwell argued that "[w]hen the City declared Temp[e]r to be a Dangerous Dog and Temp[e]r's owners were in violation of the Dangerous Dog restrictions, the City had a common law duty to take reasonable measures to prevent an attack from taking place." Similarly, on appeal she argues that "[a]bsent the City's proper enforcement of state law and its own ordinance" it was foreseeable that Smith would fail to restrain Temper. She further argues that "parties must avoid exposing others to harm from the foreseeable conduct of third parties."

But Caldwell merges two separate concepts—foreseeability and duty. Foreseeability determines a duty's scope.[30] But foreseeability by itself does not create a duty.[31] Thus, even assuming it was foreseeable that Temper would cause harm, this foreseeability does not create a common law duty on the City.

Caldwell's arguments on duty depend on the existence of the dangerous dog restrictions. Thus, any duty is created by "a statute, ordinance, or regulation."[32] There is no separate common law duty.

Both parties make additional arguments on appeal. Because of our disposition, it is not necessary for us to address those other arguments, with one exception.

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[30] Halleran v. Nu W., Inc., 123 Wn. App. 701, 717, 98 P.3d 52 (2004).

[31] Id.

[32] Munich, 175 Wn.2d at 886.

Caldwell states in her briefing that this court could conclude that the legislative intent exception to the public duty doctrine could also apply to the question of duty.[33] On the briefing that is before us, we do not reach that question. All that we decide is whether the City owed Caldwell a duty under the failure to enforce exception of the public duty doctrine.

Accordingly, we conclude, on the basis of that question only, that reversal of the partial summary judgment order in favor of Caldwell and the judgment of the jury verdict that followed are appropriate. Moreover, denial of the motion for summary judgment of the City on that question only was incorrect.

ATTORNEY FEES

Caldwell seeks attorney fees on appeal. Specifically, she argues that the City's appeal is frivolous. We hold that its appeal is not frivolous.

Parties in Washington may recover attorney fees if a statute, contract, or recognized ground of equity authorizes the award.[34] Under RAP 18.9(a), "[a]n appellate court may order a party to pay compensatory damages or terms for filing a frivolous appeal."[35] "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is

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[33] Brief of Respondent Caldwell at 31 n.41.

[34] LK Operating, LLC v. Collection Grp., LLC, 181 Wn.2d 117, 123, 330 P.3d 190 (2014).

[35] Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 906, 151 P.3d 219 (2007).

no possibility of reversal."[36] This court resolves doubts whether an appeal is frivolous in favor of the appellant.[37]

For the reasons we have already discussed in this opinion, the issues were debatable and had merit. There is no basis for an award.

We reverse the partial summary judgment in Caldwell's favor and the judgment on the jury verdict that followed. We deny Caldwell's request for attorney fees and remand for such further proceedings as are appropriate.

Cox, J

WE CONCUR:

Schindler, J.

Becker, J.

[36] Id.

[37] Id.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KARY L. CALDWELL, Respondent, v. CITY OF HOQUIAM, a governmental entity, Appellant, and GRAYS HARBOR COUNTY, 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; and JAMES THOMPSON and JANE DOE THOMPSON, individually and the marital community composed thereof, Defendants.	No. 71947-5-I ORDER GRANTING MOTIONS TO PUBLISH OPINION

The City of Hoquiam, Appellant, and Kary L. Caldwell, Respondent, and Paul L. Schneiderman and Roger E. Hawkes, both persons not a party to this appeal, have moved for publication of the opinion filed in this case on April 18, 2016. The panel hearing the case has considered the motions and appellant's answer and has determined that the motions should be granted. The court hereby

ORDERS that the motions to publish the opinion are granted.

Dated this 26th day of May 2016.

FOR THE PANEL:

Cox, J.

Judge

CITY OF HOQUIAM 09-HU0174 ANIMAL CONTROL

POTENTIALLY DANGEROUS DOG DECLARATION

A potentially dangerous dog as defined per Hoquiam City Ordinance 91.17 Section 1 Subsection (11) states: "A dog that, without provocation:

a. inflicts bites on a human or domestic animal, either on public or private property, or

b. chases or approaches a person upon the streets, sidewalks, or public ground in a menacing fashion or apparent attitude of attack, or

c. causes injury or otherwise threatens the safety of humans or domestic animals."

DOG DESCRIPTION

Breed PIT BULL Color WHITE Age _____ Sex M Name TEMPUR

The above described dog believed to be yours is hereby declared to be a POTENTIALLY DANGEROUS DOG for the following reason(s):

SEVERLY BIT ANOTHER DOG WHILE ON ITS OWN PROPERTY.

BOTH DOGS BELONG TO OWNER

Any further incidents involving your dog biting or attacking persons or animals will result in your dog being declared a DANGEROUS DOG, requiring full compliance with the terms and conditions of the DANGEROUS DOG ORDINANCE (copy provided).

It is unlawful for an owner of a dangerous dog to permit the dog to be outside a proper enclosure unless the dog is muzzled and restrained by a substantial chain or leash and 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.

PROPER ENCLOSURE--A dangerous dog while on the owner's property shall be securely confined indoors or in a secure enclosed and locked pen or structure, suitable to prevent the entry of young children or their being able to place any portion of their anatomy so as to expose it to risk of attack by the dog and designed to prevent the animal from escaping. Such pen or structure shall have secure sides and a secure top, and shall also provide protection from the elements for the dog.

Copy received this _____ day of 8-11-09, 2009.

Signed by K. D. Smith (dog owner).

CITY OF HOQUIAM ANIMAL CONTROL OFFICER _____

215-10th Street, Hoquiam, WA 98550 (206)532-0892

LICENSE # 09-00046

EXHIBIT C

LE

HOQUIAM POLICE DEPARTMENT
215 TENTH STREET
HOQUIAM, WASHINGTON 98550
(360) 532-0892

DANGEROUS DOG DECLARATION

HPD Incident Number: 09-HD8247

To: SHAWN SMITH

Address: 909 WOOD

Date: 8-11-09

Breed of Dog (if known): PIT BULL (WHITE)

Name of Dog (if known): TEMPUR

On 08-11-09, the Hoquiam Police Department received a complaint concerning the above-named dog. You have been identified as the owner or person in control of the dog. Based upon our investigation of the complaint, it has been determined that your dog should be classified as a "dangerous dog," as defined in Hoquiam Municipal Code (HMC) Section 3.40.040(7). Therefore, **you are hereby notified that your dog is declared to be a dangerous dog.** HMC Section 3.40.040(7) defines a "dangerous dog" as follows:

"Dangerous Dog" means a dog that:

(a) Has inflicted severe injury on a human being without provocation on public or private property;
(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 humans or domestic animals.

Effective immediately, you are required to comply with the restrictions set forth in HMC 3.40.080(5), if you intend to keep the dog within the limits of the City of Hoquiam. Those restrictions are as follows:

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

EXHIBIT D

(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 and Fifty Thousand Dollars ($250,000) payable to any person injured by the dangerous dog; and

(d) The owner of 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.

Failure to comply with the above restrictions is a misdemeanor pursuant to HMC 3.40.080(7), and will result in the immediate impound and possible euthanizing of the dog.

This declaration that your dog is dangerous shall be final unless appealed by you within ten (10) days of the date that it was mailed, posted on your premises, or personally served upon you, whichever is sooner. Your appeal must be in writing, and served upon the Clerk of the Hoquiam Municipal Court, 609 Eighth Street, Hoquiam, Washington. The attached Notice of Appeal form may be used. At the hearing, you may present any written or oral evidence as to why you believe your dog should not be classified as a "dangerous dog."

In addition to the above, if your dog has bitten a person, it will be impounded immediately and quarantined for a period of ten (10) days pursuant to HMC Section 3.40.130.

HOQUIAM POLICE DEPARTMENT

By [signature]

Title ANIMAL CONTROL

NOT IMPOUNDED

EXHIBIT D

DECLARATION OF SERVICE

On said day below I electronically filed a true and accurate copy of the Petition for Review in Court of Appeals Case No. 71947-5-I with e-service to the following parties:

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Gregory E. Jackson
Michael E. Tardif
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: June 13, 2016 at Seattle, Washington.

Stephanie Nix-Leighton

Stephanie Nix-Leighton, Legal Assistant
Talmadge/Fitzpatrick/Tribe