71947-5

FILED
June 9, 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,

Defendant-Appellant.

REPLY BRIEF OF APPELLANT CITY OF HOQUIAM

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I. REPLY TO PLAINTIFF'S STATEMENT OF THE CASE

A. Plaintiff Presents Extensive Facts Immaterial To The Issue In The Appeal

Plaintiff[1] makes a long and elaborate presentation of the facts leading to Hoquiam's issuance of a dangerous dog declaration (an administrative order) to the owner of the dog "Temper." *See* Respondent's Brief (Resp. Br.) pp. 2-14. These facts are both undisputed and unnecessary to the issue on appeal. Hoquiam is seeking review only of whether language in a City ordinance creates a duty to Plaintiff under the failure to enforce exception to the public duty doctrine. *See* Appellant's Brief (App. Br.) pp. 2-3. The issue is whether the ordinance mandates impoundment of dogs before initial orders declaring dogs dangerous become final, and before owners have an opportunity to comply with or appeal the restrictive conditions imposed by the orders. *Id.*

If the Hoquiam ordinance does not create a mandatory duty to impound at the time the City serves the initial dog control order, then the trial court improperly denied the City's summary judgment motion and improperly granted Plaintiff's summary judgment motion. The surfeit of immaterial facts provided by Plaintiff obscures the straightforward legal issue before this Court for decision.

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[1] For clarity, Appellant City of Hoquiam refers to itself as "City" or "Hoquiam" and refers to Plaintiff Caldwell as "Plaintiff."

B. Plaintiff's Description Of The Officer's Knowledge Of The Dog Owner's Compliance With The City Order Is Inaccurate

In addition to a "mandatory duty" to enforce an ordinance, the failure to enforce exception requires a municipal official to have "actual knowledge" a person violated an ordinance subject to the mandatory enforcement duty. *Atherton Condo. Ass'n v. Blume,* 115 Wn.2d 506, 530, 799 P.2d 250 (1990). Plaintiff's description of Hoquiam's knowledge of the dog owner's purported violation of the City order is misleading.

Plaintiff states the Hoquiam officer knew that the dog owner had not complied with the conditions in the administrative order served on August 11, 2009. *See* Resp. Br., pp. 10-11. However, the testimony referenced is only that, at the time of the deposition, the officer knew that the owner had not complied, and, at the time he served the order, he knew that she was not already in compliance with the conditions that she would need to implement after receiving the order. *See* CP 122, 126, 130-31. Plaintiff cites no evidence the officer knew in 2009 whether the owner complied with the order after he served it. The evidence is that the officer sought to locate the owner and dog to determine compliance after September 10, 2009 (the effective date of the court order affirming the City order), but found that the owner and dog had left Hoquiam. *See* CP 207-08, 282-87.

II. REPLY TO PLAINTIFF'S ARGUMENT

A. Plaintiff Did Not Respond To Hoquiam's Arguments

1. The Alleged Liability In This Case Is Governed By The Public Duty Doctrine

Appellant's Brief argued that the City's animal control program is a regulatory function of government, with its potential liability determined by the public duty doctrine and, in this case, the "failure to enforce" exception to that doctrine. *See* App. Br., pp. 10-12; *Smith v. State,* 59 Wn. App. 808, 802 P.2d 133 (1990). In her response to the City, Plaintiff initially states that "the City's duty to her was predicated both on common law principle and on the City's violation of its own ordinance and state law." Resp. Br., p. 17. Plaintiff then presents no argument that any common law principles apply to regulatory liability.

Plaintiff asserts liability only on the basis of a series of cases applying the failure to enforce exception to determine if statutes create a duty to enforce various animal laws.[2] *See* App. Br., pp. 18-27; *e.g., King v. Hutson,* 97 Wn. App. 590, 987 P.2d 655 (1999). Plaintiff states:

> Washington law provides for civil liability for defendants whose dogs bite others or municipalities that fail to enforce their ordinances relating to dangerous dogs. This liability may be predicated on statute and/or ordinance.

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[2] Plaintiff does claim that the City can have a duty based on the foreseeability of harm, but this Court rejected that theory in *Halleran v. Nu West, Inc.,* 123 Wn. App 701, 98 P.3d 52 (2004) *rev. den.* 154 Wn.2d 1005 (2005). Lack of foreseeability limits the scope of a duty but foreseeability does not create a duty. *Id.* at 717.

Resp. Br., p. 18. Thus, Plaintiff ultimately agrees that the public duty doctrine determines whether Hoquiam has a duty to enforce the City's animal control law for her benefit.

Plaintiff also asserts that the City claims immunity. *See* Resp. Br., p. 27. The City does not claim immunity. The City claims that the public duty doctrine, and its exceptions, determine whether government regulatory duties run to an individual, rather than to the general public. *See Halleran,* 123 Wn.2d at 710.

2. The Hoquiam Officer Had No Actual Knowledge That The Dog Owner Violated The Court Order Imposing Conditions On Her Dog

Plaintiff's Complaint claimed the City is liable because the Hoquiam officer failed to enforce the municipal court order imposing conditions on the dog effective September 10, 2009. Appellant's Brief pointed out that the Hoquiam officer had no actual knowledge of the dog owner's compliance with the court order because the owner and the dog could not be located. *See* App. Br., pp. 12-15. A witness informed the officer that the owner and the dog had left Hoquiam. *Id.* The City has no liability for failing to enforce the court order because there is no evidence the City had actual knowledge the dog owner violated the order. *Atherton,* 115 Wn.2d at 531-32. Moreover, the dog left the City and was no longer

subject to Hoquiam jurisdiction.[3] *Brown v. Cle Elum,* 145 Wash. 588, 589-90, 261 P. 112 (1927).

Plaintiff makes no argument supporting the basis for Hoquiam liability alleged in her Complaint. Therefore, she abandoned her claim that the City failed to enforce the municipal court order.

In this appeal, Plaintiff makes the claim that:

> In sum, the City had a duty to enforce both RCW 16.08.100 and HMC 3.40.080/.150 on August 11, 2009 by immediately impounding Temper because his owners were in violation of the dangerous dog restrictions in statute and in City ordinance.

Resp. Br., pp. 26-27 (emphasis added). The question presented by this new theory is whether Hoquiam Municipal Code (HMC) 3.40.080(6)[4] created a mandatory duty to impound the dog on the day the Hoquiam officer served the owner with the initial order imposing conditions on the dog, with impoundment of the dog required if the owner "fails to comply" with those conditions.[5] If HMC 3.40.080 did not require immediate

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[3] Plaintiff incorrectly states the City raised this argument in reference to her new theory discussed below, rather than to the claim pled in her Complaint, which was the subject of Hoquiam's summary judgment motion. *See* Resp. Br., p. 24 n. 31.

[4] HMC 3.40.080 is attached to this brief as Appendix A for convenient reference.

[5] Plaintiff cites HMC 3.40.150 and RCW 16.08.100 as law imposing impoundment duties on Hoquiam, but these laws do not apply here. HMC 3.40.150 is the ordinance setting procedures for impoundment rather than requirements for impoundment, except for creating a permissive authority (not mandatory duty) to impound a dog that has bitten a human. RCW 16.08.100 is part of the state dog law and does not apply to Hoquiam because the state law provides that dog ordinances in local jurisdictions apply in place of state law. *See* RCW 16.08.080(1).

impoundment, then Plaintiff cannot satisfy the mandatory duty element to the failure to enforce exception to the public duty doctrine.

3. Plaintiff's Interpretation Of HMC 3.40.080 Violates Its Plain Meaning, Conflicts With Its Specific Provisions And Ignores Established Principles Of Administrative Law

a. The Plain Meaning Of HMC 3.40.080 Is That Compliance With A City Order Must Be Determined By The Owner's Actions After, Rather Than Before, The City Serves The Order

Plaintiff posits City liability on the contention HMC 3.40.080(6) requires "immediate impoundment of a dangerous dog not meeting the legal restrictions" in a dangerous dog order. Resp. Br., p. 24. Appellant's Brief pointed out that HMC 3.40.080 contains no requirement to impound the dog when the City serves a dangerous dog order, but only a requirement that the dog be impounded if the owner "fails to comply" with the restrictions imposed on the dog owner by service of the order. HMC 3.40.080(6); *see* App. Br., pp. 19-20. Under the plain meaning of the terms "fail" and "comply," and the context of their use in the ordinance, the meaning of HMC 3.40.080(6) is that any mandatory impoundment can occur only after the order is served and the dog owner has not taken the several actions required to comply with the order. *Id.*

Plaintiff does not respond to the substance of the argument that her interpretation of HMC 3.40.080 conflicts with the plain meaning of the

ordinance. Resp. Br., pp. 24-25. Plaintiff simply asserts that the ordinance "language could not be plainer" in requiring immediate impoundment of all dogs. *Id.* at 24. She does not explain how that is possible when the ordinance does not state such and uses terms whose accepted meaning in the context of the ordinance indicates that impoundment is authorized only if the owner defaults on his or her obligation to take actions following service of the order.[6] *Id.*

Plaintiff previously attempted to avoid her inability to show a statutory impoundment duty by arguing that the "effective immediately" language in the administrative order means that Temper was in immediate non-compliance and could be immediately confiscated. *See* CP 307-08. Only a mandatory statute creates a regulatory duty under the failure to enforce exception. *See Smith v. State,* 59 Wn. App. at 814. An administrative document is not a statute. This Court has previously held government agencies are creatures of statute and public employees cannot create duties inconsistent with statutes. *Murphy v. State,* 115 Wn. App. 297, 317, 62 P.3d 533 (2003) (administrative policy could not create

[6] Of course, dogs can be impounded immediately pursuant to other ordinances under circumstances where the dog presents an immediate danger to humans. *See* HMC 3.40.130(2) (suspected rabies); 3.40.150(4) (bites a human); 3.40.140 (off premises and not under control). None of these circumstances were present at the time the City issued the dangerous dog order on August 11, 2009.

confidentiality for pharmacy records when statute made records available to law enforcement).

b. The Specific Terms Of HMC 3.40.080 Conflict With Plaintiff's Interpretation Of The Ordinance

Appellant's Brief highlighted specific provisions in HMC 3.40.080 inconsistent with Plaintiff's interpretation of the ordinance. These provisions cannot be given effect under Plaintiff's interpretation, contrary to law that ordinances must be interpreted to give all sections effect. *See* App. Br., pp. 25-27; *City of Seattle v. State,* 136 Wn.2d 693, 697-98, 965 P.2d 619 (1998). Specifically, HMC 3.40.080 allows service of dangerous dog declarations by mail or posting, which cannot be done if the officer must confiscate all dogs immediately when the order is served. HMC 3.40.080 also provides for appeal hearings within 30 days if a dog is not impounded, but ten days if impounded, unequivocally indicating that the ordinance does not require automatic impoundment of all dogs when the initial order is served. Plaintiff makes no response whatsoever to this argument. *See* Resp. Br., pp. 17-27.

c. Only Final Or Emergency Administrative Orders, And Not Initial Orders, Are Effective Immediately

HMC 3.40.080 provides that the initial order served on a dog owner does not become "final" for ten days.[7] Appellant's Brief highlighted established administrative law principles indicating that "final order" is a term of art in administrative law, meaning an order that is effective on entry, as distinguishable from an initial order which does not require compliance until "final." App. Br., pp. 22-24. Only final orders and emergency orders require stays to prevent the order from having immediate effect. *Id.* Since the order served on the dog owner was not a final order, it could not require the dog owner to comply instantly with the conditions in the order. Non-compliance with the order could not be grounds for impounding the dog until the order became final.[8]

Again, Plaintiff does not respond to the substance of the City's argument. Plaintiff argues only that the state Administrative Procedures Act (APA), Ch. 34.05 RCW, which describes initial, final, and emergency orders, does not apply to local governments. *See* Resp. Br., pp. 25-26. Hoquiam did not claim that the APA applied to local governments in

[7] The ordinance provides that the initial order is "final unless appealed by the owner" within ten days. The City cannot know if it is an enforceable final order until the appeal period passes.

[8] Here, the dog owner appealed Hoquiam's August 11 order so it became final only on the September 10 date established by the court after the unsuccessful appeal.

Washington, but only that the APA summarizes well-established administrative law principles and is the best source for determining the meaning of terms of art in administrative law. Plaintiff makes no argument that the meaning and effect of initial, emergency, and final orders in Washington administrative law is inaccurately stated in the APA. Plaintiff also made no response to the City's argument that the initial order did not allow City action against a dog owner until the order became final by expiration of its appeal period, or, if appealed, by order of the court deciding the appeal.

4. The State Dog Statute Is No Different From The Hoquiam Dog Ordinance In Requiring Impoundment Of Dogs Only After An Owner Fails To Comply With A Final Order

Plaintiff repeatedly argues that the state dog law, Ch. 16.08 RCW, applies to municipalities and requires cities to impound immediately dogs when cities serve the initial dangerous dog order. Resp. Br., pp. 18-19, 22-24, 26-27, 39. Appellant's Brief showed that Ch. 16.08 RCW neither applies to cities with their own dangerous dog ordinances nor requires impoundment of dogs when the initial dangerous dog order is served. *See* App. Br., pp. 20-22.

Before 2002, local dog ordinances more strict than state law were not pre-empted by state law[9] and, since 2002, RCW 16.08.080(1) expressly provides that local dangerous dog ordinances enacted before 2002 apply in place of state law. In regard to impoundment of dogs after service of the initial order, state law does not provide for impoundment before the initial order is final (RCW 16.08.080(1)-(4)) and even after the order is final, during an appeal, state law provides only discretionary authority to confine a dog. RCW 16.08.080(4).

While Plaintiff asserts the state dog law controls in Hoquiam, she provides no argument showing the state statutes cited above and in Appellant's Brief contain any language supporting her assertion. The only state statute cited by Plaintiff is RCW 16.08.100(1), which states that the animal control authority shall immediately confiscate dogs whose owners have not complied with the conditions imposed by a final dog order, the same provision as in HMC 3.40.080(6). *See* Resp. Br., p. 23. Nothing in RCW 16.08.100 authorizes automatic, mandatory impoundment of a dog when the initial dangerous dog order is served.[10]

The dog Temper also did not meet the state definition of "dangerous dog" which is:

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[9] *Rabon v. Seattle,* 135 Wn.2d 278, 289-94, 957 P.2d 621 (1998).

[10] As under Hoquiam ordinances, if a dog attacks a human, it can be impounded immediately under provisions separate from dangerous dog provisions. *See* RCW 16.08.100(3).

> (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.

RCW 16.08.070 (emphasis added). When the City served the dangerous dog order, Temper had never bitten or injured a human or killed a domestic animal. The state statute would not have allowed Hoquiam to issue a dangerous dog order to the owner because the state statute is less stringent than the Hoquiam ordinance.

B. Plaintiff Relies On Cases That Do Not Resolve The Issue About The Proper Interpretation Of Hoquiam's Ordinance

Plaintiff relies heavily on two cases to support her argument that Hoquiam had a mandatory duty to impound the dog for the owner's failure to comply with the order before the City served it.[11] *See* App. Br., pp. 20-22; *King v. Hutson,* 97 Wn. App. 590; *Gorman v. Pierce County,* 176 Wn. App. 63, 307 P.3d 795 (2013). These cases do not discuss the issue presented in this case.

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[11] Plaintiff also relies on *Livingston v. Everett,* 50 Wn. App. 655, 751 P.2d 1199 (1988). However, this Court decided *Livingston* before it decided *McKasson v. State,* 55 Wn. App. 18, 776 P.2d 971 (1989), which clarified that the failure to enforce exception requires a mandatory statutory duty to enforce (the issue here) rather than simply a failure to implement any provision of a regulatory scheme. *Livingston* did not require the mandatory statutory duty element now required for the failure to enforce exception.

Both *King* and *Gorman* correctly used the failure to enforce exception to consider whether local animal regulatory authorities had a mandatory duty to take some sort of remedial action in regard to a dog. The legal doctrine is the same as this case, but the decision on the mandatory duty element turns on the specific terms of the local ordinance, *i.e.*, whether each ordinance created a mandatory enforcement duty satisfying the necessary element of the failure to enforce exception. The issue in this case is whether the Hoquiam ordinance creates a mandatory duty to impound immediately when the City serves the initial dangerous dog order. This was not the issue in *King* or *Gorman,* which involved other aspects of statutes or ordinances in other municipalities. *Gorman* interpreted the Pierce County code and *King* interpreted Chapter 16.08 RCW. These laws do not apply in the case at bar.

Although *Gorman* decided a local ordinance issue different from the issue in this case, *Gorman* notes that the Pierce County ordinance in that case required "impounding any dog whose owner allowed it to violate the restrictions placed upon it." *Gorman,* 176 Wn. App. at 81 (emphasis added). This is precisely the way that Hoquiam applies its ordinance, *i.e.,* the dog is impounded if the owner fails to take the licensing, insurance,

and restrictive actions that must be taken after the city imposes those conditions in its administrative order.[12]

C. Hoquiam Does Not Claim That Its Ordinance Is Unconstitutional But Only That Plaintiff's Interpretation Of The Ordinance Would Render It Unconstitutional

Plaintiff argues that Hoquiam claims its dangerous dog ordinance is unconstitutional. *See* Resp. Br., pp. 32-39. Hoquiam claims the opposite, *i.e.,* that Plaintiff's interpretation of HMC 3.04.080 violates due process requirements and *ex post facto* law prohibitions, not that the ordinance as drafted is unconstitutional. *See* App. Br., pp. 27-28.

Plaintiff's Complaint asserted that Hoquiam was liable because it failed to enforce the municipal court's September 1, 2009 order, which gave the dog owner until September 10, 2009 to comply. CP 16. Hoquiam moved for summary judgment on the ground that the City had not been able to locate the dog or its owner to determine compliance after the order, so had no "actual knowledge" of violations, a requirement of the failure to enforce exception. CP 197-200. In response to the City's motion, Plaintiff abandoned her claim that the City failed to enforce the

[12] In prior briefing, Plaintiff acknowledged the correct interpretation of this kind of impoundment ordinance by stating the requirement for the county action in *Gorman* as: "Once the dog was declared 'potentially dangerous' [Pierce] [C]ounty was required to seize the dog if it violated any of the imposed restrictions, or if it engaged in aggressive acts involving other animals or humans." Answer to Motion for Discretionary Review, p. 14 (emphasis added) (this document is in the Court of Appeals file and not the Clerk's Papers).

court order and made a new claim that the Hoquiam ordinance mandated immediate impoundment upon service of an initial order that did not become final until a ten day appeal period expired. CP 302.

When Plaintiff raised her new "immediate impoundment" claim, the City raised the unconstitutionality of Plaintiff's interpretation of the ordinance because her interpretation would require the City to confiscate the dog owner's property before the owner had an opportunity for hearing, and would make the owner subject to criminal penalty for failure to comply with dangerous dog conditions before they were imposed.[13] CP 427. The City raised constitutional issues only to show Plaintiff interpreted HMC 3.40.080 incorrectly because statutes and ordinances must be interpreted in a way that comports with overriding constitutional principles.[14] *See Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n,* 141 Wn.2d 245, 4 P.3d 808 (2000).

Plaintiff argues that, under *Mathews v. Eldridge,* 424 U.S. 319, 96 St. Ct. 893, 47 L.Ed.2d 18 (1976), the City must provide only a post-deprivation hearing before the dog owner could be deprived of her

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[13] Plaintiff had multiple opportunities in the trial court to address the City's argument regarding the constitutionality of her interpretation. Plaintiff filed an unauthorized "sur-reply" on this issue. CP 434-44. She also had opportunities to address the issue when the City raised it on reconsideration and in its CR 50 motion.

[14] Since the City made no claim that its own ordinance was unconstitutional, there was no obligation to notify the Attorney General as Plaintiff alleges. *See* Resp. Br., p. 34. The constitutional issue was not a new issue raised by the City for the first time in its reply, but was a defense to a new claim that was not in Plaintiff's Complaint and was made by Plaintiff for the first time in response to the City's summary judgment motion.

property. *See* Resp. Br., pp. 33-35. *Mathews* held the extent of a due process hearing is tailored to the importance of the interest of the government and citizen, and to the risk of improper deprivation of property. *Id.* at 355. *Mathews* did not hold that no hearing at all is required before the government deprives a citizen of property. *Id.*

Some kind of due process hearing is required, even if not a full evidentiary hearing, before important property is confiscated by the government, unless there is a true emergency or notice is impractical. *Clement v. Glendale,* 518 F.3d 1090, 1093 (9th Cir. 2008); *Connecticut v. Doehr,* 501 U.S. 1, 111 St. Ct. 2015, 105 L.Ed.2d 1 (1991); *Jones v. State,* 170 Wn.2d 338, 351-52, 242 P.3d 825 (2010). Pet owners have a property interest in their pets. *Downey v. Pierce County,* 165 Wn. App. 152, 267 P.3d 445 (2011). Confiscating an allegedly dangerous dog prior to affording the owner an opportunity for a hearing violates the owner's right to procedural due process, despite availability of a post-deprivation hearing. *County of Pasco v. Riehl,* 635 So.2d 17, 18-19 (Fla. 1994); *See also Siebert v. Severino,* 256 F.3d 648 (7th Cir. 2001) (due process required some kind of hearing before seizure of horses). Even the imposition of substantial burdens on a dog owner's hearing right violates due process. *Downey,* 165 Wn. App. 152, 267 P.3d 445 (2011) *rev. den.*

174 Wn.2d 1016 (2012) (charging high fees to obtain hearing on dangerous dog order held unconstitutional).

Plaintiff attempts to come within the emergency exception by arguing the need for "immediate impoundment to protect humans when Shawn Smith [the dog owner] refused to exert control over the animal or to protect people from its vicious propensities." Resp. Br., p. 35. Plaintiff cites no evidence the dog attacked a human on the day the owner called the City or at any other time. *Id.* The dogs did not attack or threaten the officers or owner on the day of the incident. CP 206-08, 214-15. Plaintiff cites no evidence showing the owner allowed the dogs to run loose out of control or that there had ever been any citizen complaint about her dogs. *See* Resp. Br., p. 35.

The City had knowledge only of the owner's two dogs fighting each other while confined on her property. CP 206-08, 214-15. Thus, Plaintiff presents no facts justifying emergency impoundment under either HMC 3.40.140 (impoundment of unsupervised stray dog) or HMC 3.40.150 (impoundment of dog that attacks a human).

Plaintiff relies on *Johnson v. Dept. of Fish & Wildlife,* 175 Wn. App. 765, 305 P.3d 1130 (2013), a case in which the plaintiff missed the deadline for renewing his Dungeness crab coastal fishery license causing the State to deny his late application. The court noted, "it would be

impossible for the Department to provide individuals in Johnson's situation a pre-deprivation hearing.... Until [the] deadline passed, the Department had no reason to deny Johnson's application." *Id. Johnson* is not analogous to the case at bar, where a pre-deprivation hearing was possible.

Finally, Plaintiff relies on *Ritter v. Bd. of Commissioners of Adams County Public Hosp. Dist. No. 1,* 96 Wn.2d 503, 637 P.2d 940 (1981). The *Ritter* Court held that a public hospital did not need to provide a pre-deprivation hearing to a doctor whose hospital privileges had been suspended. *Id.* at 511-12. Unlike here, the court in *Ritter* specifically found the physician "did not have a property interest in staff privileges" at the hospital. *Ritter*, 96 Wn.2d at 509-10 (emphasis added). The physician's interest in *Ritter* was limited to reputational injury, which could be remedied with a post-deprivation medical staff hearing. *Id.* at 511-12. Where a person's interest is limited to reputational injury, a post-deprivation hearing generally satisfies due process. *See, e.g., Mustafa v. Clark County School Dist.,* 157 F.3d 1169 (9th Cir. 1998).

Cases about reputational injury are inapposite to the constitutional interest at stake here. Courts recognize that animal owners have due process property interests in their animals. Property interests require a pre-deprivation hearing absent emergency or impracticability. *Downey,*

165 Wn. App. at 165; *Clement,* 518 F.3d at 1094 ("the default rule is advance notice and the state must present a strong justification for departing from the norm").

D. The City's Appeal Is Not Frivolous

Plaintiff contends this appeal is frivolous because the City did not : 1) include facts related to the City's earlier contact with the dog's owner; 2) ignored *Livingston v. Everett,* 50 Wn. App 655 and *Gorman v. Pierce County,* 176 Wn. App. 63; and 3) claimed the Hoquiam dog ordinance is unconstitutional. Resp. Br., p. 41. The earlier incident with the dog is irrelevant because the City appealed only the duty issue arising from the City order issued for the second incident. *See* p. 1, *supra. Livingston* has no application because the Court of Appeals decided that case before this Court adopted the "mandatory duty" element of the "failure to enforce" exception at issue in this appeal. *See* n. 8, *supra. Gorman* has no application because it interpreted a Pierce County ordinance, not the Hoquiam ordinance at issue here. *See* pp. 12-13, *supra.* The City argues that Plaintiff's interpretation of HMC 3.40.080 would render the ordinance unconstitutional, not that the ordinance is unconstitutional as it exists. *See* pp. 13-14, *supra.*

Plaintiff further claims the City improperly delayed this appeal by failing to perfect the record. Resp. Br., p. 41. This Court's own file will

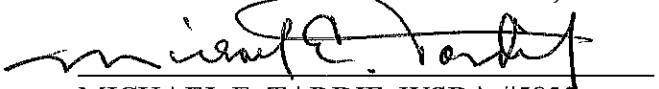
show: that the delay was caused by an official court reporter who claimed an injury prevented her completion of the report of proceedings; that the City initially tried to work with the official reporter and this Court to obtain the transcript; and, finally, that the City then worked with this Court and the superior court to obtain a replacement official reporter and the transcript. Plaintiff claims that the report of proceedings was unnecessary for the appeal. The Court's files will show that the City offered to forgo the report of proceedings if Plaintiff stipulated that she would not raise failure to preserve error, and that Plaintiff rejected that solution, but now does not claim failure to preserve error in this appeal.

III. CONCLUSION

The City of Hoquiam respectfully requests the Court of Appeals reverse the superior court order denying summary judgment to the City and the order granting summary judgment to Plaintiff, and dismiss Plaintiff's claims against the City.

RESPECTFULLY SUBMITTED this 9th day of June, 2015.

FREIMUND JACKSON & TARDIF, PLLC



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CERTIFICATE OF SERVICE

I certify that the foregoing was served by the method indicated below to the following this 9th day of June, 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 9th day of June, 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).