



DENVER'S PIT BULL ORDINANCE: A REVIEW OF ITS HISTORY AND JUDICIAL RULINGS

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This article is intended to provide a review of both the history behind Denver's pit bull ordinance, found in Section 8-55 of the Denver Revised Municipal Code, and a review of the legal litigation that has successfully defended the ordinance. A copy of the text of the ordinance can be found at <http://www.municode.com>. At the very end of this article is a list of both sources used for this article, additional resources, and media stories surrounding this topic.

I. Historical Background of Pit Bull Attacks in Local Community.

Between 1984 and May of 1989, pit bulls attacked and seriously injured more than 20 people in Colorado, including three years old Fernando Salazar, who was fatally mauled by a pit bull in southwest Denver in October of 1986.¹

On May 8, 1989, 58 year-old Reverend Wilber Billingsley was attacked and bitten by a pit bull in the alley behind his home at 1075 Emerson Street, Denver. The pit bull's attack was sustained over a long period of time, and a neighbor, Mr. Norman Cable, attempted to stop the attack by hitting the pit bull with a 2 x 4 piece of wood lumber, which had no effect. Mr. Cable eventually was able to stop the attack only by shooting the pit bull with a shotgun. The victim suffered serious injuries over 70 bites, with both of his legs being broken.²

As a result of these attacks, the opinion of the local community, as evidenced by editorials by the two leading newspapers, was in support of increased regulation over pit bulls.³

II. Legislative History of Pit Bull Ordinance.

On May 22, 1989, the Denver Board of Health and Hospitals received a briefing on the issue of Pit Bulls and Dangerous Dogs. The Board forwarded their briefing report to the Denver City Council's Committee on Health, Housing, and Human Services, with additional information, recommending a ban on pit bulls.⁴

Between May and July, 1989 the Denver City Council's Committee on Health, Housing, and Human Services held four separate meetings that included a discussion on the issue of pit bulls. Sterling Drumwright, the Director of Environmental Health, stated there are 224 licensed dogs in Denver that were recorded as being a "pit bull". City Councilman Doering stated that the confinement ordinance [D.R.M.C. § 8-52] was not adequate. A draft of an ordinance was presented for discussion. Discussions included a reference to a draft ordinance to ban pit bulls that had been presented to the Council three years previously, after a fatal pit bull attack upon a 3-year old child in Denver, which was not passed. The Committee instructed the City Attorney's Office to file the proposed ordinance, prohibiting the ownership or harboring of pit bulls in the City and County of Denver.⁵

On July 24, 1989, during a regular session of the Denver City Council, Denver City Council Bill No. 434, Series 1989, proposing to enact **D.R.M.C. § 8-55 Pit bulls prohibited** was introduced.⁶

During the evening of July 31 – August 1, 1989, during a regular session of the Denver City Council, a public hearing was held on the proposed pit bull ban. A number of witnesses appeared to give testimony on the bill. On a motion by Councilmember Ortega, the Bill passed by a vote of 9 Ayes, 2 Nays, and 1 Abstaining.⁷ The Denver City Council made specific factual findings and placed them within the preamble of the ordinance, which states:

WHEREAS, the breeds of dogs known as "pit bulls" include any American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying the majority of physical traits of any one or more of the above breeds, or any dog exhibiting those distinguishing characteristics which substantially conform to the standards established by the American Kennel Club or United Kennel Club for any of the above breeds; and

WHEREAS, the breeds of dogs known as "pit bulls" have been electively bred for the purpose of dog fighting; and WHEREAS, the characteristics selectively bred into or otherwise commonly found in those dogs include:

- 1) A strong fighting instinct, together with a low level of fighting inhibitions which make pit bulls a hazard to humans as well as other animals;
- 2) A strong chase instinct which, experts believe, causes pit bulls to be a danger around running children;
- 3) A tendency to attack even those who exhibit no provocative behavior;
- 4) A diminished tendency to bark, growl, or otherwise warn their prey of an intent to attack;
- 5) A tendency to fight to the death and never quit a fight once engaged, which results in more severe injuries than those inflicted by other breeds;
- 6) The ability to withstand great pain, which makes it difficult for a person or animal to fight off a pit bull attack;
- 7) Powerful jaws capable of crushing bones and hanging on to victims even while the animal withstands infliction of injury or pain.
- 8) A tendency to tear flesh, which has resulted in grotesque injuries to human victims; and
- 9) A combination of agility, stamina, and strength, together with a genetic predisposition to aggressiveness, that makes pit bulls uniquely dangerous, even to their owners, among all breeds of dogs, especially where improperly raised or trained; and

WHEREAS, there has been an alarming increase in attacks by pit bulls against humans nationwide; and

WHEREAS, other cities have found that pit bulls are so dangerous to humans and other animals that special legislation restricting or prohibiting their ownership has been enacted; and

WHEREAS, the City and County of Denver has experienced numerous recent incidents of violent pit bull attacks; and

WHEREAS, the mere possession of pit bulls poses a significant threat to the health, welfare and safety of Denver citizens; and

WHEREAS, current: methods of control by pit: bull owners, judging by the large number of incidents involving pit bulls, have proved to be insufficient in protecting the public; and

WHEREAS, the Council believes it is necessary to prohibit, subject to certain exceptions with certain restrictions, pit bulls in order to protect human health, welfare and safety within the City and County of Denver.

On August 2, 1989, Mayor Fredrico Peña signed the Ordinance.

On October 16, 1989, City Council Bill 672 was introduced during a regular session of the City Council. The bill proposed three specific changes to D.R.M.C. § 8-55(d), two of which dealt with the liability insurance requirement for owners of pit bull that were “grandfathered”, and one change dealt with the implementation date of the ordinance.⁸

On October 23, 1989, City Council Bill 672 was passed, and redesignated Ordinance No. 631, Series of 1989, which was signed by Mayor Fredrico Peña on October 27, 1989.

III. HISTORY OF JUDICIAL REVIEW

A. Colorado Dog Fanciers v. Denver -1989-1990 Denver District Court

In the fall of 1989, several parties initiated two separate civil lawsuits in the Denver District Court against the City and County of Denver, seeking a Temporary Restraining Order against the implementation of the pit bull ordinance, and a judicial determination that the ordinance violated the plaintiff’s constitutional rights, rendering the ordinance unenforceable. The two lawsuits were consolidated for trial before District Judge Rothenberg. *The Colorado Dog Fanciers, Inc., The American Dog Owners Association, Inc., The United Kennel Club, Eugene Allen, Ken Lee, Michelle and Brian Mondragon, and Gainor Riker, v. The City and County of Denver, acting by and through its City Council, and John A. Fairman, Manager/CEO of the Department of Health and Hospitals for the City and County of Denver*, Denver District Court Case No. 89CV11714 (Consolidated with 89CV12348).(hereinafter referred to as “Colorado Dog Fanciers”)

On May 23, 1990, the Denver District Court trial commenced and was concluded after nine days, on June 1, 1990. Both sides called a number of expert witnesses. The trial transcript is 1370 pages in length. The City’s witnesses included the following:

1. Dr. Donald Clifford, Doctor of Veterinary Medicine, Director of animal facility and professor at Medical College of Ohio, Toledo.
2. Dr. Christopher Demas, Doctor of Medicine, Plastic Surgeon, Tucson, Arizona.
3. Dr. Ann Brandenburg-Schroeder, Doctor of Veterinary Medicine, former contract veterinarian for City and County of Denver.
4. Reverend Wilber Billingsley, victim of pit bull attack, May 1989, 2075 Emerson Street, Denver CO.
5. Norman Cable, witness to pit bull attack on Rev. Billingsley.

On June 28, 1990, the Denver District Court issued a written decision upholding Denver’s pit bull ordinance as a constitutional exercise of legislative authority, stating:

This Court has no authority to substitute its own judgment regarding the wisdom, desirability or ultimate effectiveness of the Ordinance.

The District Court made several specific factual findings that supported the City’s claim that there was a rational basis for differential treatment of pit bulls, stating:

27. It cannot be proven that pit bull dogs bite more than other dogs. However, there is credible evidence that pit bull dog attacks are more severe and more likely to result in fatalities.

28. At trial, the City claimed that there were fifteen major differences between pit bulls and other dogs. Some, but not all of these differences were proven:

(b) **Athletic ability.** Pit bull dogs are extremely muscular and unusually strong for their size. Reportedly, a 78-pound pit bull dog in Texas pulled 5,650 pounds for a distance of 15 feet in a weight-pulling contest.

(c) **Biting.** The City did prove that they inflict more serious wounds than other breeds. They tend to attack the deep muscles, to hold on, to shake, and to cause ripping of tissues. Pit bull attacks were compared to shark attacks.

(e) **Destructiveness.** The Court finds that some pit bull type dogs, due to their strength and athletic ability, can damage facilities and equipment. There is a disproportionate number of attacks by chained pit bull dogs which is indicative of their strength.

(f) **Fighting ability and killing instinct.** The City did prove that unregistered pit bull type dogs were responsible for a disproportionate number of severe or fatal attacks on other dogs and human beings. Credible testimony also proved that, when a pit bull dog begins to fight, it often will not retreat.

(g) **Frenzy.** The evidence proved that once pit bull type dogs do attack, they are less likely to retreat than other dogs.

(h) **Gameness.** Pit bull dogs trained for fighting are valued for "gameness," that is, their tenacious refusal to give up a fight. The Court finds that pit bull dogs trained for fighting do have the attribute of gameness.

(j) **Manageability.** American Staffordshire Terriers, Staffordshire Bull Terriers, American Pit Bull Terriers, and their mixed breeds can make excellent, gentle pets. Nevertheless, credible testimony proved that proper handling, including early socialization to humans, is very important for these dogs. Even their most ardent admirers agree that these dogs are not for everyone and they require special attention and discipline. The Lockwood study reported that 13.3 percent of pit bull type dogs attacked their owners as compared with 2.2 percent of other dogs.

(k) **Strength.** Pit bull dogs are stronger than many other dogs. The evidence showed that 42.7 percent of the pit bull type dogs attacked while restrained. . . .

(m) **Tolerance to pain.** The evidence did show that, when a pit bull dog does attack, it exhibits unusual tenaciousness and will not retreat from an attack, even when considerable pain is inflicted on the dog.

(n) **Unpredictability** . . . pit bull dogs, unlike other dogs, often give no warning signals before they attack.

The District Court did find that the burden of proof in the ordinance's civil administrative process needed changing, so the Court ordered the burden to be placed on the City, and not the dog owner.

The plaintiffs filed an appeal of the District Court's decision with the Colorado Supreme Court, and the City cross-appealed on the issue of the burden of proof in the civil administrative hearing.

B. Colorado Supreme Court Decision in *Colorado Dog Fanciers*

The plaintiffs in the Denver District Court case appealed Judge Rothenberg's decision to the Colorado Supreme Court. On November 12, 1991, the Colorado Supreme Court issued its decision⁹, affirming the constitutionality of the pit bull ordinance against attacks based upon the following issues:

1. Procedural due process

1. The District Court switched the burden of proof in the administrative hearing from the dog owner (as in the original ordinance) to the City. The Supreme Court declared that burden of proof to be preponderance of evidence. (Justice Malarkey dissented on this point, and wrote a separate opinion, concluding that Denver can place the burden of proof upon the dog owner, because of Denver's home rule authority. "Because there is no question that the regulation and/or prohibition of pit bulls in the city by the city is a matter of purely local concern, the city by proper ordinance has the power to shift the burden of proof or the risk of nonpersuasion in an 8-55(f) hearing.")
2. The District Court grafted a pre-impoundment hearing requirement onto the ordinance, and the Supreme Court reversed, finding a post-impoundment proceeding sufficient.

2. Substantive due process

1. Dog owners claimed a lack of scientific proof that an individual dog can meet a scientifically confirmable definition violates their right to due process. The Supreme Court ruled that the city is not required to meet its burden of proof with the mathematical certainty of scientific evidence. Therefore, even though section 8-55 permits a finding of pit bull status to be based on an expert opinion or on nonscientific evidence, such a procedure does not violate the dog owners' due process rights.
2. The dog owners also asserted that the city ordinance treats all pit bulls and substantially similar dogs as inherently dangerous and is, therefore, unconstitutionally overbroad. The Supreme Court rejected the claim, as outside the limited area of fundamental constitutional rights such as, for example, first amendment rights of speech or association, a statute may not be attacked as overbroad. Also, the Court found that upon choosing to regulate a hazard, a legislature is not required to simultaneously regulate every similar hazard.

3. Equal protection

The dog owners argued that the ordinance violates the Equal Protection Clause by creating an irrational distinction between one who owns a dog with the physical characteristics of a pit bull and one who owns a dog lacking those characteristics. The Supreme Court upheld the trial court's ruling, as the trial court found that pit bull attacks, unlike attacks by other dogs, are more severe, and are more likely to result in fatalities. The trial court also found that pit bulls tend to be stronger than other dogs, often give no warning signals before attacking, and are less willing than other dogs to retreat from an attack, even when they are in considerable pain. Since "ample evidence exists" to establish a rational relationship between the city's classification of certain dogs as pit bulls, and since there is a legitimate governmental purpose of protecting the health and safety of the city's residents and dogs, the trial court correctly concluded that the ordinance did not violate the dog owners' right to equal protection of the laws.

4. Vagueness

The dog owners argued that the term "pit bull" is imprecise and, thus, unconstitutionally vague because the average dog owner is not afforded fair warning of the act prohibited by the ordinance. The Supreme Court rejected the argument, as there is no constitutional requirement that legislation be written with scientific precision to be enforceable. Since the standards for determining whether a dog is a pit bull are readily accessible to dog owners, and because most dog owners are capable of determining the breed or phenotype of their dog, the trial court properly determined that the ordinance provides adequate notice to dog owners and is not unconstitutionally vague.

5. Taking of private property

The dog owners claimed that section 8-55 is an abuse of the city's police power and constitutes an unconstitutional taking of private property. The Supreme Court ruled that in Colorado, dogs are accorded "qualified property" status, and are, thus, subject to the proper exercise of police power for the protection of the public's health, safety, and welfare. The trial court found that the classification of pit bulls as dangerous animals had a rational basis in fact and that the prohibition of their possession bears a rational relationship to the legitimate governmental objective of protecting the public's health, safety, and welfare. The Supreme Court found that these findings were adequately supported by the record of the evidence before the trial court.

C. Other Jurisdictions

Prior to the 1991 Colorado Supreme Court decision, other jurisdictions have had their courts uphold similar ordinances:

1. **Overland Park, Kansas** - *Hearn v. City of Overland Park*, 244 Kan. 638, 772 P.2d 758, 766-68, cert. denied, U.S. , 110 S. Ct. 500 (1989)
2. **Village of Tijeras, New Mexico** - *Garcia v. Village of Tijeras*, 108 N.M. 116, 121-22, 767 P.2d 355, 360-61, cert. denied, 107 N.M. 785, 765 P.2d 758 (1988);
3. **City of North Miami, Florida** - *State v. Peters*, 534 So. 2d 760, 764 (Fla. Dist. Ct. App. 1988).
4. **State of Ohio** [*Ohio Rev. Code Ann. § 955.11(A)(4)(a)(iii)*] - *Ohio v. Anderson*, 57 Ohio St 3d168 (1991)

III. 2004 COLORADO LEGISLATURE & HB04-1279

On April 21, 2004, Governor Bill Owens signed House Bill 04-1279, which contained a provision prohibiting Colorado municipalities and counties from regulating dangerous dangers through specific breed legislation.

A. Denver's Voluntarily Suspension of Enforcement Actions

On April 21, 2004, Nancy Severson, the Manager of the Denver Department of Environmental Health issued the following public announcement:

Concerning Denver's response to the passage of HB04-1279:

In response to the passage of the legislation today, and the Governor's signing it into law, I have directed our Division of Animal Control to take the following temporary actions:

- Any dog currently being held in the Denver Animal Shelter for which we have an identified owner, and which is being held purely on the basis of its status as a pit bull, will be released to its owner. I understand that there are approximately 8 dogs currently in this category.
- We will continue to make best efforts to relocate pit bulls being held in the pound for which we have no known owner, i.e. strays. I understand there are approximately 14 dogs in this category.
- No dog that is being held in the Denver Animal Shelter purely due to its status as a pit bull will be euthanized due to that status.
- At the present time, we will not pick up and impound any new dogs solely due to their status as a pit bull. It is important to emphasize, however, that the Animal Control Division will continue to fully enforce all of the City's animal control laws that are generally applicable to all breeds, particularly our laws on dangerous dogs, dog bites and attacks, and running at large.

I understand that the Denver City Council is concerned that the preemptive language in HB04-1279 may intrude into the City's home rule powers, and may direct the City Attorney to take legal action to reconfirm the City's authority to regulate dangerous animals at the local level. Moreover, I believe that the entire issue of breed-specific regulation of dogs deserves a fuller discussion at the City level. If further action is taken by the elected officials of the City and the City Attorney's Office to confirm the City's authority to resume enforcement of its fifteen-year old pit bull ordinance, we may resume enforcement of the ordinance in the future.

B. Denver City Council Resolution 31-2004.

On April 26, 2004, the Denver City Council adopted Resolution Number 31, Series of 2004, directing the City Attorney to institute legal action as necessary and appropriate to preserve Denver's home rule authority in regard to animal control legislation. The resolution was sponsored by Council members Boigon, Brown, Garcia, Hancock, Lehmann, Linkhart, Montero, Robb, Rodriguez, and Wedgeworth. It stated:

Resolution No. 31, Series of 2004

Directing the City Attorney to Institute Legal Action as Necessary and Appropriate to Preserve Denver's Home Rule Authority in Regard to Animal Control Legislation

WHEREAS, Denver has adopted and enforced local ordinances and regulations concerning animal control in the interest of public health, safety and general welfare; and

WHEREAS, Denver funds its animal control efforts with locally generated revenue sources; and
 WHEREAS, one of Denver's animal control ordinances prohibits pit bulls in the City under certain circumstances; and

WHEREAS, House Bill 04-1279, which took effect on April 21, 2004, was apparently intended and may be interpreted to prohibit municipalities and counties from regulating "dangerous dogs in a manner that is specific to breed;" and

WHEREAS, such preemptive legislation is not justified under legal standards for determining matters of statewide concern, because:

A. There is no demonstrated need for uniformity of all animal regulation in Colorado's diverse urban, suburban, and rural communities.

B. Reasonable local animal control regulations do not cause an undue burden on persons living outside the municipality.

C. Historical considerations weigh heavily in favor of recognizing the local government role in establishing animal control policies, funding animal control programs, and enforcing animal control laws.

WHEREAS, Article XX, Section 6 of the Colorado Constitution confirms to the citizens of Denver and other home rule municipalities "the full right of self-government in both local and municipal matters;" and

WHEREAS, Denver's animal control ordinances are not and never have been dependent on enabling legislation from the State or subject to any limitations contained in State legislation; and

WHEREAS, Denver's animal control ordinances in general and pit bull ordinance in particular represent a lawful exercise of the City Council's legislative authority to protect life, health, and property and to preserve the security of the City and County and its inhabitants, as conferred by the people of the City and County of Denver through their home rule Charter; and

WHEREAS, the Denver Charter states that the Mayor or City Council may direct the City Attorney to institute any suit, action, or proceeding on behalf of the City and County;

NOW THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:

Section 1. The Council directs the City Attorney to take or defend legal action as necessary to preserve Denver's home rule authority to reasonably regulate animals in general and pit pulls in particular, notwithstanding the purported preemption of HB 04-1279.

Section 2. That the Clerk of the City and County of Denver shall attest and affix the seal of the City and County of Denver to this resolution and that a copy be transmitted to Cole Finegan, City Attorney, and Nancy Severson, Manager of Environmental Health.

C. City & County of Denver v. State of Colorado, 04CV3756

On May 13, 2004, the Denver City Attorney's Office, on behalf of the City & County of Denver, and Mayor John Hickenlooper, filed a civil complaint in Denver District Court, under case number 04CV3756, against the State of Colorado and Governor Bill Owens. The complaint asked for the Denver District Court for the following relief:

1. A judgment declaring that neither C.R.S. § 18-9-204.5, nor any other state statute is or ever was the source of Denver's authority to regulate dangerous dogs, and accordingly any limitation on municipal regulatory authority contained in § 18-9-204.5 shall not be deemed to be binding upon Denver.
2. A judgment declaring that the Denver Animal Code addresses matters of local and municipal concern upon which Denver has the right to enact and enforce its own ordinances without interference from or preemption by state law.
3. A judgment declaring the purported preemption of Denver's authority to regulate specific breeds of dogs as contained in HB 1279 is unconstitutional and invalid under the Home Rule Amendment, Art. XX of the Colorado Constitution; and
4. A judgment declaring that Section 8-55 of the Denver Animal Code is not preempted by HB 1279.

The Colorado Attorney General's Office filed a response on behalf of the State of Colorado and Governor Owens, denying the City's allegations, and raised three affirmative defenses:

1. Regulation of dog ownership is a matter of mixed state and local concern. Denver Municipal Ordinance 8-55 is preempted to the extent it conflicts with House Bill 04-1279.
2. Denver's breed-specific prohibition of pit bull ownership has no rational relationship to the governmental objective of protecting public health, safety, or welfare, and is not a valid exercise of Denver's police power.
3. Denver's restrictions regarding the transport of pit bulls through Denver is a matter of statewide concern. Municipal Ordinance 8-55 is preempted by HB 1279 to the extent it regulates the transportation of pit bulls through Denver on a breed-specific basis.

1. District Court Ruling on State Constitutional Home Rule Issue

On December 9, 2004, Denver District Court Judge Martin Egelhoff issued a ruling on the parties' cross-motions for summary judgment. The Court ruled as follows:

Based on the foregoing conclusions of law and the determination in *Colorado Dog Fanciers v. City and County of Denver*, 820 P.2d 644 (Colo. 1991), that Section 8-55 is otherwise constitutional, the Court hereby orders as follows:

1. C.R.S. § 18-9-204.5, insofar as this statute purports to preempt the intra-city breed-based regulations contained in D.R.M.C. § 8-55, is invalid and unconstitutional under the Home Rule Amendment. (Intra-city regulations include the regulation of ownership, possession, ability to keep, ability to exercise control over, maintenance, ability to harbor, sale and transportation from point to point within the city.)
2. C.R.S. § 18-9-204.5 remains valid and enforceable to the extent that it relates to the inter-city transportation of dogs.
3. D.R.M.C. § 8-55 remains valid and enforceable to the extent that it imposes intra-city restrictions on pit bulls. The State is and shall be permanently enjoined from enforcing against the City the preemptive language of C.R.S. § 18-9-204.5 regarding Denver's intra-city prohibition on pit bulls.
4. D.R.M.C. § 8-55 is invalid insofar as it restricts the inter-city transportation of pit bulls. The following offending language will be severed from D.R.M.C. § 8-55:

(c) Exceptions. The prohibition in subsection (a) of this section shall not apply in the following enumerated circumstances

(5) Except as provided in subdivision (4), above, the owner of a pit bull may temporarily transport through the city a pit bull only if such owner has obtained a valid transport permit from the manager. Upon request, the manager shall issue such permits only upon a showing by the owner that the pit bull is being transported either from a point outside the city to a destination outside the city, or from a point outside the city to an airport, train station or bus station within the city by producing an airline, train, or bus ticket, or other equivalent document, showing a departure time within six (6) hours of the time of transport. At all times when the pit bull is being transported within the city, it must be kept confined in a "secure enclosure" as defined in subdivision (b)(3) of this section. In all cases before issuing a transport permit, the manager must find that the transport would not constitute an unnecessary or undue danger to the public health, welfare or safety, and shall not issue the permit where the manager cannot so find. All transport permits issued shall only be valid for the time, date, and pit bull specified in the permit, and shall not be construed to permit any activity otherwise prohibited.

Both parties recognize that, in the *Colorado Dog Fanciers* case, the Supreme Court ruled Section 8-55 constitutional, finding a rational relationship between Denver's prohibition on pit bulls and the protection of the health and safety of the city's residents and dogs. 820 P.2d at 652. It is the State's position that Section 8-55 has now become unconstitutional, as new facts and/or science developed since 1991 have undermined the rationality of breed-based regulations. The parties agree that there are material disputed facts with respect to this issue. Therefore, this case will proceed to trial on the State's rational relationship affirmative defense.

2. Appeal Filed By Colo. Att. General on Home Rule Decision

Within the mandatory 30-day period after Judge Egelhoff's ruling, the Colorado Attorney General's Office did timely file a notice of appeal with the Colorado District Court and the Colorado Court Appeals regarding Judge Egelhoff's ruling on the state constitutional home rule

issues. This action properly preserved the State's ability to have the Colorado Court of Appeal review the record before the trial court and the judge's ruling.

On April 26, 2005, the Colorado Attorney General's Office filed a motion to dismiss the appeal, which the Colorado Court of Appeals granted on July 18, 2005. This voluntary dismissal could be easily interpreted to be the legal equivalent of the state's acceptance of the ruling of Judge Egelhoff, and could therefore be binding legal precedence upon which any home rule municipality in Colorado could rely.

3. 4/07/05 District Court Trial on State's Affirmative Defense

On Thursday, April 7, 2005, the trial on the State's affirmative defense commenced. Judge Egelhoff determined the parameters of the trial to be that the State Attorney General's Office carried the burden of proof to prove, beyond a reasonable doubt, that since the time of Judge Rothenberg's original ruling 1990, that there have been sufficient changes in the facts or the scientific field of ethology (the study of animal behavior) so as to prove that there is currently no rational basis to justify the pit bull ban, requiring the Court to reverse of the Colorado Dog Fanciers decision.

a.) State's Expert Witness: Dr. Daniel Q. Estep, Ph.D.

The State called one expert witness to testify, Dr. Daniel Q. Estep, Ph.D., a certified applied animal behaviorist, who is a Denver resident and frequent co-author with his wife, Dr. Suzanne Hetts, Ph.D., also a certified applied animal behaviorist, of articles on pet behavior in the Rocky Mountain News. Dr. Estep testified that since 1990, a few new studies and articles by experts in the field of ethology (the study of animal behavior) have been published that relate to the issue of dangerous dogs and pit bulls. Dr. Estep testified regarding four specific documents:

Sacks, Sinclair, Gilchrist, Golab, and Lockwood, *Breeds of dogs involved in fatal human attacks in the United States between 1979 and 1998*, JAVMA, Vol. 217, No. 6, September 15, 2000.

Lockwood, Randall, *The ethology and epidemiology of canine aggression, The domestic dog: its evolution, behaviour, and interactions with people*, edited by James Serpell, Cambridge University Press, 1995.; republished in *Animal Law and Dog Behavior*, Ed. David Favre and Peter L. Borchelt, Ph.D., 1999.

A Community Approach to Dog Bite Prevention, American Veterinarian Medical Association, Task Force on Canine Aggression and Human-Canine Interaction, JAVMA, Vol. 218, No. 1, June 1, 2001.

Report of the Vicious Animal Legislation Task Force, presented to the Prince George's County Council dated July 2003, Prince George County, Maryland (except for attachment J).

Dr. Estep testified that the Sacks/Lockwood study, reported in 2000, showed the during the last three two-year periods of the statistical study on Dog Bites Resulting in Deaths, Rottweilers overtook Pit Bulls, as being involved in more fatal attacks. He also testified that the majority of experts in the field of animal control and veterinarian medicine were opposed to breed specific legislation, concurring with the AVMA report.

b.) City's Witness: Officer John Albergotti

The City & County of Denver presented the rebuttal testimony of Denver Police Officer John Albergotti, who testified regarding an incident that occurred on February 4, 2005, when he was attacked and bitten by a pit bull while attempting to locate a homicide suspect at a residence at

3749 High Street, in Denver, Colorado. Officer Albergotti testified the pit bull came out of the open door without warning – no barking or growling – and jumped up, biting his upper left arm. As the dog was unable to get a good bite grip, Officer Albergotti was able to shake his arm free of the dog, which then used its hind legs to propel itself up the officer’s body to bite his lower left arm in a powerful bite grip. The pit bull did not release its bite grip and began shaking its head, attempting to rip the officer’s flesh with its teeth impeded in his arm. Because Officer Albergotti was carrying his service weapon, a Glock .45 caliber automatic handgun, he was able to pull his weapon from its holster and hold the muzzle against the pit bull’s neck, firing one bullet into the dog. While the shock of the bullet caused the pit bull to momentarily release its grip of Officer Albergotti’s arm and drop to the ground, the pit bull circled around to attack Officer Albergotti once more. At that time, Denver Police Officer Brill verbally advised Officer Albergotti to retreat, and Officer Brill discharged his shot gun, loaded with a solid slug, into the pit bull, finally killing the dog.

c.) City’s Expert Witness: Dr. Peter L. Borchelt, Ph.D.

The City then presented the expert testimony of Dr. Peter L. Borchelt, Ph.D., a certified applied animal behaviorist from Brooklyn, New York. Dr. Borchelt had previously testified as an expert witness on the behavior of pit bulls in litigation over the pit bull ordinance of Toledo, Ohio. Dr. Borchelt had also previously published several articles on dangerous dogs, including *Basic Behavioral Principles and Misunderstood Words*, Animal Law and Dog Behavior, which is the only published book on this legal topic, which Dr. Borchelt co-edited with Michigan State Law Professor David Favre, published in 1999. Dr. Borchelt also co-authored the only known article in the field of ethology on the attack of packs of dogs on humans: Borchelt, Peter L., Ph.D., Lockwood, Randall, Ph.D., Beck, Alan M., Sc.D., Voith, Victoria L., D.V.M., Ph.D., *Attacks by Packs of Dogs Involving Predation on Human Beings*, Animal Law and Dog Behavior, Ed. David Favre and Peter L. Borchelt, Ph.D., 1999. Dr. Borchelt testified on a number of relevant subtopics, described here:

Classic Predatory Aggressive Behaviors Selected in Pit Bull Breeding

Dr. Borchelt testified regarding the classic attack behavior of pit bulls, such as described by Officer Albergotti, described as the “bite, hold, and shake” attack behavior. Dr. Borchelt testified that for hundreds of years, humans have selectively bred dogs so as to enhance certain behaviors that would be beneficial in use in attacking bulls, bears, or other dogs for staged animal fights. These desired behaviors may be found naturally in predators, such as wolves, which would successfully hunt large mammals, such as moose or caribou, by running along beside the animal and biting them while holding on for comparatively long periods of time, despite having their victim inflict injury and pain upon them in their struggles to defend themselves, such as through the use of antler, hooves, etc. The wolves would attempt to hang on to their victims until other wolves would join in, and together they may be able to drag the larger animal down for the ultimate kill. The behavior of shaking their large heads back and forth to inflict as much damage upon their victims as possible was also desired. Other desired behavioral traits were “gameness” or great tenacity in their attacks, refusing to either disengage or retreat from the attack.

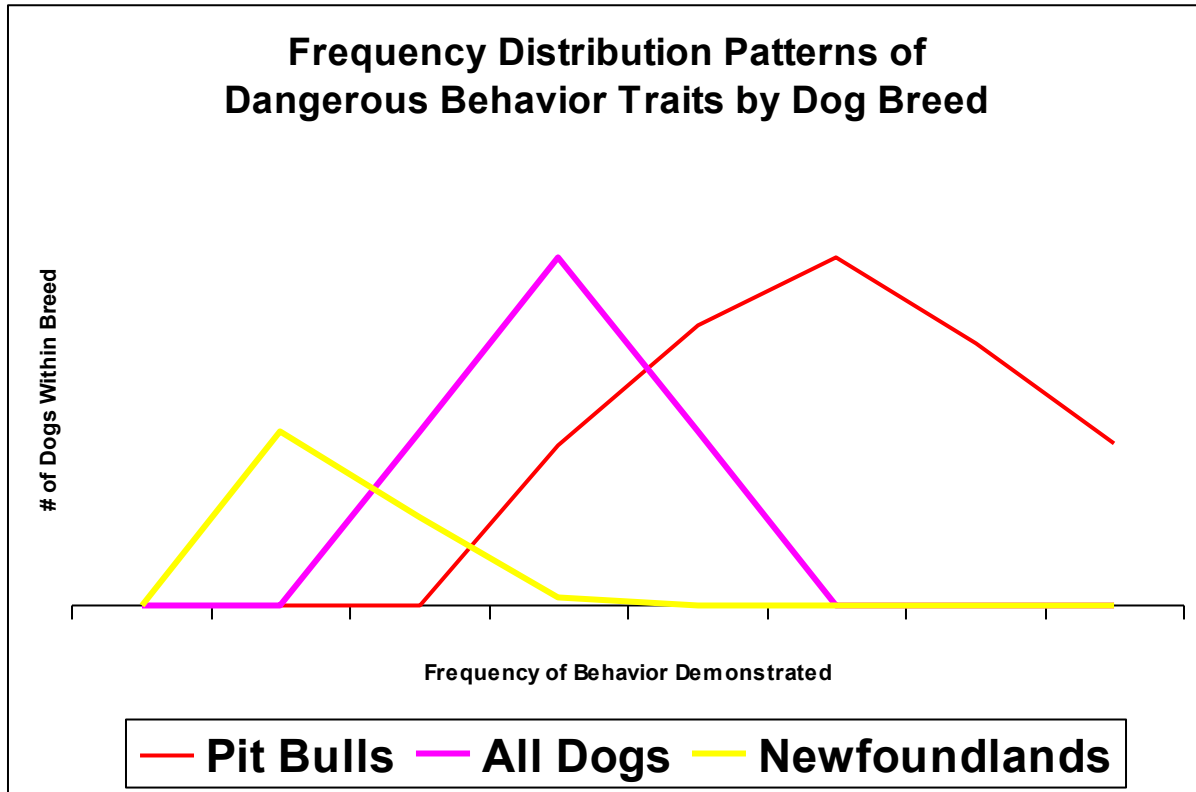
Pit Bulls Displaying Aggressive Tendencies Towards Humans Leaking to Public

Dr. Borchelt rebutted the often cited argument that pit bulls were bred to not be aggressive to humans. Dr. Borchelt testified that this issue of breeding pit bulls in order to suppress the behavioral tendencies of the breed for diverted aggression towards humans while the dog is in the fighting pit, acting aggressively towards another animal, may have occurred in the distant past, but with the increased demand for the breed by the public, breeders no longer have the incentive to cull those pit bulls rather than selling them to the unwary public, who may also breed them, diluting the suppression of this behavior. This was supported by the expert treatise article by Randall Lockwood, *The ethology and epidemiology of canine aggression*, The domestic dog: its evolution, behaviour, and interactions with people, edited by James Serpell, Cambridge University Press, 1995; republished in Animal Law and Dog Behavior, Ed. David Favre and Peter L. Borchelt, Ph.D., 1999.

Logically, this dilution of the breed caused by its increased popularity may actually be causing a selection in favor of increasing the behavior of aggression towards humans, as it would be those fighting pit bulls that would be most likely be sold by those breeders using pit bulls for dog fighting, as compared to the old procedure of culling those dogs.

Artificial Selection of Aggressive Behavior in Breeding of Pit Bulls Results in Shifted Higher Frequency Distribution Patterns

Dr. Borchelt explained that these dangerous behaviors in fighting dogs were artificially selected by humans in breeding in order to intensify the frequency of the behavior within pit bulls, causing these fighting dogs breed lines to have the frequency of these dangerous behavioral traits represented statistically in a distribution pattern similar to the traditional bell curve, but shifted towards higher levels of the dangerous behavior, as compared to the other breeds of dogs. (See demonstrative diagram below) These behavioral traits can not be artificially shifted back to lower, normal frequency distribution pattern levels. Although the actual tendencies of any individual dog of these fighting breed lines could be anywhere along the frequency distribution curve, thereby allowing for some of these pit bulls to have a lower propensity of demonstrating these behaviors. The problem is no one can determine the location of any specific individual pit bull along the frequency distribution curve for dangerous behavior traits merely by looking at it, since it shares the same phenotype or physical characteristics as other pit bulls. However, as the entire breed's selective breeding has caused the entire frequency distribution curve to be shifted higher, creating a reliable higher probability of higher frequencies of such dangerous behavior (such as the bite/hold/shake behavior despite the infliction of greater levels of injury and pain), Dr. Borchelt testified there is a rational basis to differentiate pit bulls from other breeds of dogs.



Exponential Effect of Multiple Pit Bulls Upon Levels of Dangerousness

Dr. Borchelt also testified about the effect of increasing the number of pit bulls involved in an attack upon a human in terms of the likelihood of serious injuries or death. Rather than a simple multiplying effect (i.e., the mathematical pattern of x , $x + x = 2x$, $2x + x = 3x$), Dr. Borchelt testified the effect would be closer to an exponential effect (i.e., $1 = x^1$, $2 = x^2$, $3 = x^3$).

Recent Statistical Studies Do Not Invalidate Original Court Findings

Dr. Borchelt testified that that because Judge Rothenberg's decision in 1990 did not rely upon the first Sacks statistical study on Dog Bites Resulting in Fatality, which contained data up to 1988, in making her determination, the additional 10 years of additional data had no effect upon the validity of the court's decision. He stated the apparent change in the number of Rottweilers involved in fatal attacks was too isolated in context to fully understand, and that it was better to look over the entire 20 years of data, which indicated pit bulls were involved in 66 deaths (27% of the total), while Rottweilers were involved in only 29 deaths (16% of the total), while every other breed was involved in less than 1% of the total fatal attacks.

Breed Specific Legislation as a Rational & Practical Solution

Dr. Borchelt testified that in his expert opinion, there is a rational basis for a pit bull ban ordinance. While he did not personally favor breed specific legislation as the best method to address dangerous dogs and potentially dangerous dogs, but given the limited resources local government may have, those local governments that are in fact facing a problem with pit bulls in

their community may have breed specific legislation as the most practical solution. Dr. Borchelt testified that despite the Prince George Task Force Report, the government of Prince George County had failed to implement the task force's recommendations, and still maintains a ban against pit bulls. The task force used by Prince George County, Maryland was made up of individuals from organizations with pre-determined political positions against BSL.

D. Judge Egelhoff's Ruling

At the conclusion of the evidence on Thursday, April 7, 2005, Denver District Court Judge Martin Egelhoff issued an oral ruling from the bench on the State's Affirmative Defense. The Judge found that the State failed to provide any new evidence to undermine Judge Rothenberg's original 1990 findings regarding the differences between pit bulls and other dogs. The Judge also found that the City had provided new evidence to provide additional support for Judge Rothenberg's findings. As Judge Rothenberg's decision was not based upon the claim that pit bulls have a higher propensity to bite or attack humans, the new Sacks/Lockwood study on fatal dog bite attacks was not relevant to the narrow issues presented in paragraphs 27 and 28 of that decision.

The Court agreed with the City's argument that State failed to meet its burden of proof to establish beyond a reasonable doubt that no rational basis for Denver's pit bull ban existed. The Court found that pursuant to the rule of stare decisis, the Colorado Supreme Court's ruling in the Colorado Dog Fancier's case that Denver's ordinance is constitutional is still valid, and therefore the ordinance is still constitutional.

E. Resumption of Enforcement Actions

On Friday, April 8, 2005, the City & County announced that it would resume enforcement of its pit bull ordinance starting Monday, May 9, 2005, issuing a press release that stated:

Denver's Division of Animal Control intends to resume its enforcement of the pit bull law on May 9, 2005. This 30 day time period will give pit bull owners in Denver sufficient time to remove their dogs from the City. Due to Judge Egelhoff's ruling in December of 2004, it is permissible to transport a pit bull directly through Denver, from a starting point outside of Denver to another destination outside of Denver, provided the pit bull dog remains in the vehicle.

The Denver pit bull law prohibits any person from owning, possessing, keeping, exercising control over, maintaining, harboring, or selling a pit bull in the City and County of Denver. A pit bull is defined as any dog that is an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying the majority of physical traits of any one or more of these breeds. Copies of these three official breed standards are available at the Denver Municipal Animal Shelter at 678 South Jason Street, Denver (303) 698-0076.

F. Motions to Intervene & Appeals from Trial Court.

As a side note to the procedural history of this litigation, two separate entities filed motions to intervene in this litigation, and both motions were denied by Judge Egelhoff. The first entity was the American Canine Foundation (ACF). The ACF is a non-profit pro-pit bull lobbying group based in the state of Washington that assisted Colorado State Representative Debbie Stafford (R., Elbert County) in getting 04HB1274 passed. Their motion was filed in September of 2004. The

City filed an objection to the intervention of the American Canine Foundation, on the following grounds:

- a. The Applicant, American Canine Foundation, is a non-profit organization formed under the laws of the State of Washington, and as such, did not have legal standing to intervene in this matter.
- b. The issue before the Court raised by the City's complaint is extremely narrow that being whether the home rule provisions of Article XX of the Colorado Constitution determines that the issue of dog control is a matter of pure local concern so that D.R.M.C. § 8-55 supercedes HB04-1279.
- c. The Applicant failed to establish any of the legal requirements for intervention pursuant to Colorado Rules of Civil Procedure, Rule 24.
- d. The Applicant offered to provide multiple expert witnesses to testify before this Court on a separate and distinct legal issue which is irrelevant to the single, narrow home rule issue before this Court. The Applicant is making an apparent attempt to ask this Court to revisit the Colorado Supreme Court's decision in the matter of *Colorado Dog Fanciers v. Denver*, 820 P.2d 644 (Colo. 1991). There, the Court upheld a ruling of the Denver District Court, which held that D.R.M.C. § 8-55 was constitutional, as it is rationally related to a legitimate government interest. See *Colorado Dog Fanciers v. The City and County of Denver*, Denver District Court Case No. 89CV11714 (Consolidated with 89CV12348) (Judge Sandra Rothenburg, June 29, 1990). The plaintiffs in that action for declaratory judgment were local and national dog clubs, and owners of dogs maintained in the State of Colorado, including owners of pit bulls. That trial required 10 days of expert testimony, with 34 exhibits, resulting in over 1300 pages of transcripts.

On October 13, 2004, the trial court issued an order denying A.C.F.'s motion to intervene.

On October 28, 2004, the second applicant for intervention, Ms. Marci Grebing, filed her motion with the trial court. Ms. Grebing, a Colorado resident and pit bull owner, was a member of the board of directors for A.C.F. The City filed a response on November 4, 2004, and on November 15, 2004, the trial court denied Ms. Grebing's motion.

Ms. Grebing has filed appeals of Judge Egelhoff's rulings with the Colorado Court of Appeals (Case number 04CA2453; date of final ruling 8/17/2006) and the Colorado Supreme Court (06SC641; 1/02/2007), in which the trial court's decision has been upheld by each court.

On 4/09/2007, the City was formally served legal notice by Ms. Grebing of her filing a petition for a writ of certiorari with the United States Supreme Court. The petition has not yet been docketed by the Clerk of the Court.

IV. CONCLUSION

Denver Revised Municipal Code Section 8-55 is a constitutional exercise of the Denver City Council's authority to protect the health and safety of its citizens and guests. The Denver District Court has now verified the common sense conclusion that home rule municipalities have the legal authority to make independent decisions as to how to regulate dangerous dogs within its community. Judge Egelhoff's common sense ruling is welcomed, which states, in part:

The Court concludes that the issue of which dog breeds are permitted, prohibited, or restricted within a city is a matter of purely local concern. The State has not articulated, and the Court cannot conceive, a need for statewide uniformity. In fact, there seems to be a need for local control in this area. Each community has its own attitudes and preferences with respect to dogs. In each community, depending on culture and demographics, dogs occupy a different role. It would not make sense for the owners of mountain dogs in Telluride, farm dogs in Lamar, and urban dogs in Denver to be subject to the same kinds of laws and restrictions. This point is reinforced by the state statute at issue in this case. The relevant portion of C.R.S. § 18-9-204.5 does not implement a scheme to replace municipal rules regarding dogs. Rather, it affirms municipal rulemaking authority, with the sole exception that cities cannot regulate dogs in a manner specific to breed. However, local control of breeds means flexibility in crafting locally-acceptable solutions to the problems created by dogs. As the largest and most populous metropolitan area in Colorado, Denver faces unique challenges in ensuring that *dogs* enhance the lives of citizens rather than threaten their safety.

The Denver District Court has now twice confirmed that there is objective evidence that supports a rational conclusion that pit bulls are more dangerous than other breeds of dogs because they are more likely to inflict serious injuries and cause death, and therefore there is a logical reason for the city to prohibit them within its urban jurisdiction. The Colorado Supreme Court has affirmed this ruling in 1991, and now the latest judicial review by the Denver District Court verifies there is no new evidence that undermines that ruling, but in fact, the new evidence supports and strengthens Judge Rothenberg's decision.

END NOTES

¹ *Pit bull mauls Denver man, 58: Neighbor kills dog after 70 bites, 100 stitches, 2 broken legs*, by Jim Kirskey, Denver Post, May 9, 1989.

² *Pit bull mauls Denver man, 58: Neighbor kills dog after 70 bites, 100 stitches, 2 broken legs*, by Jim Kirskey, Denver Post, May 9, 1989 ; *Pit Bull Bit 3 Others Since '86: Denver Minister mauled by terrier was fourth victim*, by Karen Bowers, Rocky Mountain News, May 10, 1989.

³ *Let's outlaw killer dogs*, editorial, Denver Post, June 12, 1998; and *Tougher rules and stronger enforcement on pit bulls*, editorial, Rocky Mountain News, May 12, 1989.

⁴ Memorandum from Elbra Wedgeworth, Council Staff to all Members of City Council, dated May 23, 1989, and attachments.

⁵ Minutes, Health, Housing, & Human Services Committee Meeting, May 20, 1989, p. 1-2; June 13, 1989, p. 2; June 27, 1989, p. 1-2; July 11, 1989, p. 1-2.

⁶ Minutes, Council of the City and County of Denver, Monday, July 24, 1989, p. 1-2.

⁷ Minutes, Council of the City and County of Denver, Monday, July 31, 1989, p. 4-5; Recording of Public Hearing on Council Bills No. 433 and 434, before the Denver City Council, Monday, July 31, 1989 – Three (3) Audio-Tape Cassettes; and Certified Copy of Ordinance No. 404, Series of 1989.

⁸ Memorandum, dated October 16, 1989, From Elbra Wedgeworth, Council Staff to Members of Council, Subject: C.B. 672, and the Amendment to it, Regarding Pit Bull Dogs.

⁹ *The Colorado Dog Fanciers, Inc., et. al., Plaintiffs-Appellants and Cross-Appellees, v. The City and County Of Denver, et. al., Defendants-Appellees and Cross-Appellants*, Case No. 90SA342, 820 P.2d 644.

ABOUT THE AUTHOR:



KORY A. NELSON has been an Assistant City Attorney assigned to the Prosecution and Code Enforcement Section since 1989. He was born and raised in Fremont, Nebraska. Mr. Nelson earned his Bachelor of Science degree from Arizona State University's Criminal Justice Program in 1985 with honors, after serving three years in the U.S. Army in West Berlin, Germany, and Ft. Huachuca, Arizona. He graduated from the Arizona State College of Law in 1989. Mr. Nelson was the recipient of the Truman Young Memorial Prosecutorial Fellowship, which allowed him the opportunity to work as a student attorney actively prosecuting criminal cases in trial courts and handling appellate responses with the Phoenix Municipal Prosecutor's Office, the Maricopa County Attorney's Office, the United States Attorney's Office for the District of Arizona, and the Arizona Attorney General's Criminal Appellate Division. Mr. Nelson has practiced in the following areas: Traffic, General Sessions, and General Violations. Mr. Nelson also served as the City's legal council in administrative hearings for the Department of Excise & Licenses and as the Denver Public Nuisance Abatement Coordinator. Mr. Nelson has many favorable decisions in high-profile cases before the County, State, and Federal Appellate Courts. One of his high-profile cases was the successful prosecution of Douglas Bruce for building code violations in 1995 that was upheld by the 10th Circuit Court of Appeals. He has been an Instructor for the Denver Sheriff's Training Academy and has provided several legal training seminars for many Denver municipal agencies and inspectors.
