SUPREME COURT NO. 17-0794
POLK COUNTY CASE NO. CVCV053097

IN THE SUPREME COURT OF IOWA

DIANNA HELMERS

Plaintiff-Appellant,

v.

CITY OF DES MOINES

Defendant-Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE LAWRENCE MCLELLAN, DISTRICT COURT JUDGE

FINAL BRIEF FOR APPELLANT

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CERTIFICATE OF FILING

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ROUTING STATEMENT

Because this case involves the application of facts to existing law, transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

This appeal arises after the district court denied Plaintiff's writ of certiorari and upheld the City of Des Moines' dangerous dog declaration, which declared a 7-year-old mixed breed dog, "Pinky," as dangerous, after an altercation involving an at-large cat.

STATEMENT OF FACTS

Charles Bickel was the owner of Pinky, an approximately 7-year-old female, spayed, mixed-breed dog. Pinky resided with Bickel and his now-teenage son since late 2009. Prior to the Bickels acquiring Pinky, on April 9, 2009, the City of Des Moines had seized and impounded her for an unknown reason. At that time, Pinky was under six months old and owned by a man named Kanin Pierce. (Ex. 7; App. 149). While in impound, the City of Des Moines declared that Pinky had the "predominant characteristics of the American Staffordshire Terrier breed." The City made this determination contrary to its own policy (and standard practice) that the breed of a dog cannot be determined while it is under six months old. (Ex. T; App. 236).

After retrieving Pinky back from animal control in April 2009, Pierce transferred ownership of the puppy to Charles Bickel. In June 2010, an animal

control officer came to Bickel's home because it had received information that a "pit bull" was living there. Pinky was again seized and impounded simply because she looked like a "pit bull." The City saw that Pinky had been labeled an American Staffordshire terrier breed back in 2009 and, as a result, declared Pinky to be a "vicious" dog[1]. The City demanded that Bickel comply with its "vicious dog" requirements, which included providing proof of spaying/neutering, displaying current city license and rabies tags, and keeping $100,000 liability coverage on her. Bickel agreed to these conditions and licensed Pinky, updated her rabies vaccinations, and has always maintained liability coverage on her.

For the next six years, Pinky lived happily with Bickel and his son without incident. (Ex. A; App. 159). Bickel testified that over the years, he had a couple different roommates and one of those roommates also had a cat. (Hearing Tr. at 101). Bickel was very social and his home often served as a gathering spot for friends and family. (Hearing Tr. 104). He regularly kept his house unlocked and Pinky was never kenneled. Friends and family would come and go while Pinky would always be happy to see them. Bickel never had issues of Pinky being aggressive, and Pinky was regularly around other animals and children. Several of these friends and relatives wrote letters on behalf of

[1] The City has since revised its ordinance to use the term "high risk" dog instead of "vicious," although the definition for the purposes of this case remains the same.

Pinky, describing her as an "exceptionally friendly dog that has zero history of biting anyone or other animals," has shown "no signs of aggression," was "playful, affectionate, and obedient," and demonstrated a "sweet and docile demeanor," who had a "loving relationship between her and Charles as well as his son." (Ex. B; App. 179-83).

On March 27, 2016, while Bickel was in the shower, Bickel's friend accidentally let Pinky outside, where an unlicensed cat named Rebel was roaming at-large. Bickel's neighbor, Elizabeth Moldovan, was the owner of both Rebel and another cat, both of whom frequently roamed outside unattended. Bickel testified that he would often find both cats roaming in his own yard, but Pinky had never chased after them. (Hearing Tr. 109-11).

At some point, Pinky and Rebel became involved in an altercation. No one saw how the encounter began, and Chief Humane Officer James Butler conceded that it was possible it could have started on Pinky's yard. (Hearing Tr. at 54). Butler also conceded that it was possible that other animals could have been involved and could have initiated the altercation. . (Hearing Tr. at 54). The first eyewitness to the scene was Moldovan, who came outside and saw Pinky holding Rebel in her mouth. Moldovan yelled at Pinky to drop Rebel, and Pinky immediately complied. Rebel ran up a tree, where she remained for several hours.

When Bickel got out of the shower, he saw Pinky coming back into the house, bleeding, with scratches and cuts on her face. (Hearing Tr. 108, 112) Moldovan initially told Bickel's friend that it "looks like Rebel got the better of Pinky." (Hearing Tr. at 112). Bickel then had to go to work, and he noticed that Rebel was still up in a tree. (Hearing Tr. at 112).

After Rebel came down from the tree, she was taken to Iowa Veterinary Specialties, where she received approximately 36 stitches. Moldovan did not testify at the rehearing, but, by all accounts, Rebel has made a full recovery. Moldovan did tell animal control that she did not want Bickel cited and that Rebel "scratched Pinky up." (Ex. 2; App. 94). Bickel's insurance covered Rebel's veterinary expenses. Following the hearing, a concerned citizen named Rita Mason went to Moldovan's home to check on Rebel. Rita had the opportunity to observe Rebel, who did not have any visible injuries and appeared to be moving around fine. Rita took a photo of Rebel, which was introduced at the district court hearing. (Hearing Ex. 10; App. 238). Bickel testified that Rebel continues to roam around the neighborhood and that he looks the same as prior to the altercation with Pinky. (Hearing Tr. 126).

On March 28, 2016, the day after the incident, an animal control officer came to Bickel's home to seize Pinky and place her in quarantine. Although Pinky was wearing her rabies and license tags at the time of the incident, both

tags were expired. Bickel acknowledged that the license had expired, although Pinky did still have insurance coverage.

Pursuant to Des Moines Municipal Code § 18-167, the chief humane officer can "order the owner of any animal which has bitten a person or another animal . . . to confine such animal for a period of ten days at the animal shelter, a veterinary clinic, or a registered kennel." Instead of ordering Bickel to quarantine Pinky at an animal shelter, a veterinary clinic, or registered kennel, the animal control officer simply seized Pinky without a warrant or consent and took Pinky to the Animal Rescue League of Iowa (ARL). In doing so, the City violated § 18-167 in not even giving Bickel the opportunity to comply with the quarantine requirement.

BICKEL: They said, do you have a dog? I said, yes. They said, there was an incident next door. I said, I heard about it. And they said, you need to surrender your dog. And I said, okay. Do I have any choice? And they said, not surrender her and we have to get a police officer here to take her. Those are my only two choices? Those are your only two choices. I don't want an officer over at my house – no disrespect intended. I just – I'm not that guy. I'm not here to break the law.

Q: Were you given the option that Pinky could be quarantined at somewhere other than animal control or the ARL?

BICKEL: No options – nothing, huh uh.

Q: Would you have preferred Pinky to have been quarantined somewhere else?

BICKEL: Yep.

(Hearing Tr. 115).

The quarantine was released on April 6, 2016. However, on April 5, Bickel was served with a dangerous dog declaration notice. (App. 135). The notice declared Pinky a dangerous animal pursuant to sections 18-196(3), (6), and 18-58. Chief Humane Officer Butler personally served Bickel with this notice. Bickel asked Butler about the appeal process, and Butler told him that Pinky's chance of success on appeal was "between zero and one percent, closer to zero." (Ex. C, App. 184; Hearing Tr. 118). Bickel was asked to surrender Pinky to the ARL. However, the following day, Bickel went to City Hall to file a notice of appeal. (Hearing Tr. 115).

The first appeal hearing was held on April 20, 2016. Des Moines Municipal Code § 3-21(h) states, in relevant part, that the record of all hearings before an administrative hearing officer **shall** include, "a record of the testimony presented at the hearing, which may be made by tape recording or other appropriate means." Despite this, no record was made of the original hearing.

Following the hearing, Bickel transferred ownership of Pinky to Dianna Helmers, of Agape Fosters, to continue the legal battle for Pinky's life. (Hearing Tr. 122-23). Agape Fosters is a state-licensed, non-profit rescue

shelter located in rural Reinbeck, Iowa.[2] Helmers filed her first petition for writ of certiorari in the district court of Polk County. The district court remanded the case for rehearing because the City failed make a record of the original hearing. (*Helmers v. City of Des Moines*, CVCV051895). Helmers was ordered to pay court costs which were incurred as the result of the City's failure.

A rehearing took place before an Administrative Law Judge on September 13, 2016, at which time the City argued for the first time that Helmers did not have standing to appeal the matter because Bickel had surrendered his interest in Pinky to the ARL. On November 17, the ALJ affirmed the dangerous dog declaration and also sided with the City on the issue of standing. Helmers again filed a petition for writ of certiorari in the district court of Polk County.

On February 17, the hearing on Helmers' writ of certiorari was finally held in Polk County district court. In addition to requesting that the court sustain the writ, Helmers again asked for Pinky's release, or, in the alternative, visits. In its April 17 ruling, the district court found that the hearing officer "failed to consider all of the evidence on the [standing] issue" and found the hearing officer's decision that Helmers did not have standing to pursue the appeal was illegal because it was not supported by substantial evidence. (Ruling at 8; App. 71). However, the court went on to uphold the hearing officer's

[2] Agape Fosters, http://awos.petfinder.com/shelters/IA54.html (last accessed 7/17/17)

affirmation of Pinky as a dangerous dog, and denied the writ. The court further denied Helmers' request for Pinky's release or visits. (Ruling at 16; App. 79). Helmers filed a motion to reconsider, which was also denied. A timely notice of appeal was filed.

Despite repeated requests throughout this case, the City has refused to allow anyone to visit Pinky, including Bickel, Helmers, and her attorney. The City has also denied numerous requests for Helmers, through Agape Fosters, to shelter Pinky while the case is pending. Pinky has been held in isolation at the ARL by animal control since March 28, 2016.

ARGUMENT

Preservation of Error

Helmers filed petition for writ of certiorari following the administrative ruling. A hearing was held, and the court denied Helmers' petition on April 17, 2017. Helmers filed a motion pursuant to Iowa Rule of Civil Procedure 1.904, which was denied on May 22.

Standard of Review

Rules applicable to appeals in ordinary actions govern review of an appeal from a district court's judgment in a certiorari proceeding. Iowa R. Civ. P. 1.1412; *see O'Malley v. Gundermann*, 618 N.W.2d 286, 290 (Iowa 2000). Review is for errors at law, and the court is bound by the findings of the district court if supported by substantial evidence." *Id.* at 290. To the extent constitutional

issues are involved, however, review is de novo. *Pfister v. Iowa Dist. Court for Polk County*, 688 N.W.2d 793, 794 (2004).

I. PINKY'S SEIZURE WAS ILLEGAL

A. Pinky's seizure was in violation of Des Moines Municipal Code.

Pinky's initial seizure on March 28 and continued detention was in violation of multiple sections of Des Moines Municipal Code. First, Des Moines Municipal Code section 18-167(a) provides that it is the duty of the chief humane officer to order the owner of any animal which has bitten another animal "to confine such animal for a period of ten days at the animal shelter, a veterinary clinic, or a registered kennel." § 18-167(a).

Section 18-167 states very clearly that it is the duty of the pet owner to confine their pet at an animal shelter, veterinary clinic, or a registered kennel. In this case, that would mean that the City would have been within its rights to order Bickel to quarantine Pinky for ten days. However, that is not what the City did. Instead, an animal control officer showed up at Bickel's home, seized Pinky, and took Pinky to the ARL to be quarantined – where the City has a multi-million dollar contract for animal control services. (Dist. Ct. Ex. 12; App. 239). Chief Humane Officer Sergeant Butler actually admitted that he did not order Bickel to confine Pinky at an animal shelter, veterinary clinic, or a registered kennel.

Q: And under [18-167(a)], it allows for animal to be quarantined at an animal shelter, a veterinary clinic or a registered kennel, correct?

BUTLER: That's correct.

…

Q: You didn't give Pinky the option to go to a different animal shelter or vet clinic or registered kennel, is that correct?

BUTLER: Well, I wasn't there when Pinky was impounded so no. She was impounded before the case came to me.

Q: So you personally didn't give Pinky that option?

BUTLER: Pinky was already in my building, impounded already, before the case even came to me so no, I wasn't there when the attack happened. No, I wasn't there a day later when Pinky was impounded so it would be impossible for me to tell Mr. Bickel, hey can take Pinky here instead.

Q: Sure, and to your knowledge, then, the officer impounding Pinky also didn't give the option of taking her to (inaudible) animal shelter, a vet clinic, or a kennel?

BUTLER: I would say that would be correct.

(Hearing Tr. 58-59). Notably, nothing in section 18-167, or anywhere in the code for that matter, authorizes the City to seize animals without notice; although, that is exactly what the City did.

The hearing officer largely ignored this argument in its ruling, by merely concluding that, although Butler "could have chosen a veterinary clinic or

shelter, placing Pinky at the ARL did not violate section 18-167." (Administrative Ruling at 7; App. 249). This was an incorrect reading of section 18-167. There is no provision that authorizes Butler or the City to seize an animal or to choose where to quarantine the animal. Butler only had the authority to order the pet owner (Bickel) to quarantine Pinky, which Butler did not do. Thus, the seizure was illegal. The City's newfound emphasis on Pinky's expired license is nothing more than a red herring. The status of the license had nothing to do with the quarantine procedure set forth in section 18-167(a), and the fact that Bickel had not yet renewed Pinky's license does not excuse the City from failing to follow its ordinance.

The district court ignored this argument altogether, and instead held the City was authorized to seize Pinky under section 18-59, which provides that

> (d) The chief humane officer may seize and impound any dog which has been declared to be a high risk dog pursuant to this section unless is dog is licensed . . . A dog so seized and not redeemed shall be impounded for a period of seven days.

It is true that Pinky was declared a high risk/vicious dog back in 2009 when she was just a puppy, and it is true that Pinky's license had expired. However, Chief Humane Officer Butler admitted that was not why the City seized Pinky and it should not excuse the City from following section 18-167. The district court seemingly bent over backwards in attempt to find any excuse that would justify Pinky's seizure. Ultimately, the proffered justification that Pinky

theoretically could have been seized under section 18-59 is inconsistent with the sworn testimony of the City's own chief humane officer.

Additionally, when an animal is seized pursuant to section 18-59, the owner has the opportunity to redeem the dog before the 7-day impound period is up. If Pinky had truly been seized under section 18-59, Bickel should have been allowed to pay the licensing fee to update Pinky's license, redeem her, and then quarantine her at a shelter, vet clinic, or kennel of his choice.

Section 18-59 also allows for the owner to redeem the dog at the end of the impoundment period, which, again, Bickel was never allowed to redeem Pinky. Because the City did not follow the requirements of section 18-59, it cannot now be used to justify Pinky's seizure and continued impoundment. By illegally seizing Pinky for quarantine pursuant to section 18-167, and then later justifying it by finding that Pinky could have been seized as an unlicensed dog under section 18-59 – but did not follow any of the other requirements of section 18-59 – Bickel's due process rights were violated.

Finally, as discussed below, Pinky was improperly declared a vicious/high risk dog. Her high risk label should be void as a matter of law and should not have been used as a justification to seize and impound Pinky.

For all of these reasons, the district court erred in finding that Pinky's seizure and impoundment did not violate city code.

Next, the City also failed to follow Des Moines Municipal Code section 18-202, which sets forth the chief humane officer's duties after a determination that a dangerous animal is being kept. Specifically, § 18-202(a) requires that the officer shall order the person owning the animal

> "to cause it to be destroyed in a humane manner within three days of the service of the notice of the order, and **keep the animal securely confined or leased [sic] under the actual control of a person 18 years or older until so destroyed."**

Additionally, pursuant to § 18-202(b), notice that an animal has been declared a dangerous animal shall be promptly served upon an owner.

> **The notice shall include**: a description of the animal; a declaration that such animal is a dangerous animal; the basis for such a declaration; an order that the owner cause the animal to be destroyed in a humane manner within three days of service of the notice; **notice that such animal will be subject to seizure if not destroyed within three days of service of the notice**; and notice that the decision to declare the animal a dangerous animal may be appealed by filing a written notice of appeal with the city clerk within three business days of the date the notice is served.

§ 18-202(b) (emphasis added).

Butler testified that he personally drafts these dangerous dog notices and personally serves them on the pet owner. He further testified that he became the chief humane officer after "twenty minutes of training," and that he had never been told what to put in dangerous dog declaration notices, but he tries to include what he thinks is important. (Hearing Tr. 20, 64-65).

Indeed, it appears that somehow Butler was unaware of section 18-202 when drafting Pinky's dangerous dog declaration notice. The declaration failed to include "an order that the owner cause the animal to be destroyed in a humane manner within three days of service of the notice." Further, the declaration failed to include "notice that such animal will be the subject to seizure if not destroyed within three days of service of the notice," as required by § 18-202. While Butler claimed to be unaware of the code requirements for these notices, the City has certainly been put on notice that it was not following its own law. In fact, it is somewhat baffling that Butler continues to claim ignorance as to the clear requirements set forth in section 18-202 when, at the time the deficient notice in this case was served, there were at least three other recent cases in the district court for Polk County where dog owners complained that Butler failed to follow the requirements of section 18-202. (See *Fahrney v. City of Des Moines,* EQCE079408 (filed 12/28/15); *Hildreth v. City of Des Moines*, CVCV048734 (filed 10/28/14); *Jacques v. City of Des Moines*, CVCV049515 (filed 3/18/15)). It is unknown how many deficient notices were issued by the City to dog owners that did not pursue legal action.

In one recent analogous case, *Jacques v. City of Des Moines*, CVCV049515 the district court found that, like here, the "City animal control officer seized the dog on the spot without any notice and without any prior opportunity for the owner to comply with a properly drafted dangerous dog declaration." (Ex.

R; App. 214). In *Jacques*, at the time the animal control officer impounded the dog for quarantine, it had not been declared "dangerous" or "vicious," and at the time of impound, the City did not serve any form of notice other than a verbal notification that the owner would be cited for dog at large. (Ex. R at 2; App. 206).

Similarly, animal control impounded Pinky on March 28 for quarantine without service any type of notice and without Bickel's consent. He was not served with the deficient dangerous dog declaration until April 5. The facts surrounding the seizure of Pinky are remarkably similar to the facts surrounding the illegal seizure in *Jacques*.

In *Jacques*, the district court went on to find, "the numerous procedural errors in this case at nearly every stage of this process demonstrate that the City repeatedly disregarded Jacques' rights to procedural fairness as established by the City's own code of ordinances. The City seized this dog without a declaration and with no prior notice. When the City did provide notice, it was defective and untimely . . . The process adopted by the City in this case was a mere gesture of due process." (*Id.*).

The instant case is analogous to *Jacques* as it relates to the City's illegal seizure without notice and failure to follow its own ordinances for the quarantine, impound, and notice requirements. This is especially concerning considering the *Jacques* decision was issued less than a year prior to the Pinky's

seizure, yet the City apparently did not feel that it was important to make sure its chief humane officer was aware that the requirements of § 18-202 even existed, let alone ensure that the ordinance was followed. Additionally, when Jacques' dog was initially seized, it did not have a current license. (Ex. R at 10; App. 214). As is the case with Pinky, whether the dog was licensed is immaterial to City's due process violations.

In Pinky's case, the hearing officer agreed that the City "failed to include the proper verbiage in the Declaration," but then found that there was no procedural deficiency. This determination was premised on the incorrect assumption that Pinky was "properly impounded." The Ruling also focuses on Pinky's expired license; however, Butler specifically testified that he did not seize Pinky because of her expired license. (Hearing Tr. 31-32). Butler further testified that Rebel was also not licensed, yet he was not impounded.[3] (Hearing Tr. 55). Bickel testified that, if given the opportunity, he would have paid the fees to get her license updated after he was informed it had expired. Bickel was never given the opportunity to update Pinky's license as the code allows – instead, he was served with a deficient dangerous dog declaration that stated

[3] Chief Humane Officer Butler also testified that Des Moines does not have an at-large ordinance for cats. (Hearing Tr. at 55). A review of Des Moines Municipal Code section 18-103(b) would suggest otherwise: "A cat shall be deemed at large if it is not properly licensed or if it is not housed, restrained, or controlled in one of the methods set forth in subsection(a) of this section." The undisputed facts of this case demonstrate that Rebel would be classified "at large," despite the chief humane officer's unfamiliarity with the code.

Pinky was going to be destroyed. As a practical matter, it would make no sense for Bickel to then go to city hall to pay licensing fees for a dog that had already been seized and was about to be destroyed. Regardless, the status of Pinky's license has no effect on the City's failure to follow section 18-202.

The City failed to follow its own ordinances when it seized Pinky and again when it labeled and held her as a dangerous dog, further violating Bickel's due process rights. Because the City failed to follow proper notice and procedural requirements, the declaration must be reversed and Pinky should immediately be released from the ARL and returned to her owner.

B. Pinky's seizure was in violation of the 4th Amendment of the U.S. Constitution, and article 1, section 8 of the Iowa Constitution.

The Fourth Amendment of the United States Constitution, as well as article I, section 8 of the Iowa Constitution protects citizens from warrantless and unreasonable search and seizures. A warrantless search is per se unreasonable unless it falls within one of the few "specifically established and well-delineated exceptions." *State v. Baldon*, 829 N.W.2d 785, 791 (Iowa 2013).

The City did not have a warrant when its animal control officers seized Pinky on March 28. When animal control officers came to his home on March 28, they flat-out told Bickel he did not have an option – he could surrender Pinky now, or wait for police officers to come and seize her. In light of these factors, the Court must conclude that Bickel's consent – to the extent

he did consent - was not voluntary under article I, section 8 of the Iowa Constitution. To conclude otherwise would "give too much weight to words spoken by an individual and ignore the surrounding conditions strongly pointing to involuntariness of the consent." *Id.*

For reasons previously explained, Pinky's seizure was not authorized by a city ordinance; nor did the City have a warrant to enter Bickel's home and seize Pinky. The district court erred in bypassing Pinky's illegal seizure and instead only focusing on the substance of the dangerous dog declaration. If the City had not illegally seized Pinky, Pinky's owner could have removed her from the city, and Pinky would not have spent the last eighteen months (and counting) confined to a cage in the back room of the ARL.

II. THE DISTRICT COURT ERRED IN FINDING SUFFICIENT EVIDENCE THAT PINKY EXHIBITED "VICIOUS PROPENSITIES"

There is insufficient evidentiary support to uphold the dangerous dog declaration because Pinky has never exhibited any vicious propensities. "A party may commence a certiorari action when authorized by statute or when the party claims an inferior tribunal, board, or officer, exercising judicial functions, or a judicial magistrate exceeded proper jurisdiction or otherwise acted illegally." Iowa R. Civ. P. 1.1401. Illegality exists when the court's findings lack substantial evidentiary support or when the court has not properly applied the law. *State of Iowa v. Iowa Dist. Court for Warren County*, 828 N.W.2d

607 (Iowa 2013). Evidence is considered to be "substantial" if a reasonable mind would find it sufficient to reach the conclusion at issue. *Suluki v. Employment Appeal Bd.*, 508 N.W.2d 402 (Iowa 1993).

In relevant part, the City defines a dangerous animal as any animal that has:

> bitten or clawed a person while running at large and the attack was unprovoked, or any animal that has exhibited vicious propensities in present or past conduct, including such that the animal:
>
> . . .
>
> (3) Could not be controlled or restrained by the owner at the time of the attack to prevent the occurrence; or
>
> . . .
>
> (6) Has bitten another animal or human that causes a fracture, muscle tear, disfiguring lacerations, or injury requiring corrective or cosmetic surgery.

Des Moines Municipal Code §§ 18-196(3), (6) (emphasis added).

It is undisputed that no one saw how the encounter between Pinky and Rebel began; therefore, there is no evidence to suggest that there was an "attack" or that any attack was "unprovoked" pursuant to the first part of the statute. Therefore, the City must prove that Pinky has exhibited "vicious propensities." The chief humane officer is charged with determining whether an animal is a dangerous dog after an investigation. Des Moines Municipal Code § 18-202(1). However, as part of Chief Humane Officer Butler's

semblance of an investigation, he did not inspect Pinky (and was not even aware that Pinky had injuries), did not speak with the vet that treated Rebel, did not have any vet or animal expert examine Pinky, or even speak to Bickel or anyone who knew Pinky's history or demeanor, prior to declaring Pinky a dangerous animal. (Hearing Tr. at 49). His "investigation" solely focused on the injury to Rebel. Even as of the time of the hearing, Sergeant Butler still did not know the age of Pinky[4], the sex of Pinky, and had not examined Pinky. Basically, he knew next to nothing about Pinky before giving her the dangerous dog declaration and the death sentence that follows.

Bickel testified that Pinky has been a part of their family for over 6 years. Bickel testified that he was very social and often had friends and family over at his home, and Pinky did great with everyone – adults, children, and other animals, including cats. To those who knew her best, Pinky was described as an "exceptionally friendly dog that has zero history of biting anyone or other animals," has shown "no signs of aggression," was "playful, affectionate, and obedient," and demonstrated a "sweet and docile demeanor," who had a "loving relationship between her and Charles as well as his son." (Ex. B; App. 149). Additionally, Pinky has never bitten a human and she had no history of

[4]The City has conflicting records as to Pinky's age. Butler testified that Pinky was born in 2007, and her ARL kennel card stated she was 8 years, 10 months, and 1 week old. (App. 91; Hearing Tr. 97). However, the breed determination checklist noted that Pinky was under six months old on April 9, 2009, the date of the evaluation. (App. 98). Bickel confirmed that Pinky was born in 2009.

being at-large until the March 27 incident. By all accounts, Pinky was a sweet, happy dog and a beloved member of the Bickel family.

The district court, in its ruling on Helmers' Rule 1.904 motion, held that even though "vicious propensities" is plural, the City intended that an animal could be declared dangerous after only one incident listed in section 18-196(3) or (6). The district court erred in this reading.

However, even if just one incident could constitute "vicious propensities," the court further erred in finding substantial evidence that a violation of subsection (3) or (6) took place.

Des Moines Municipal Code § 19-196 sets forth different ways that an animal could demonstrate a vicious propensity. One such definition is that the animal "could not be controlled or restrained by the owner at the time of the attack to prevent the occurrence." This theory is premised on the fact that an attack took place. "Attack" is not specifically defined in the Des Moines Municipal Code; however, Merriam-Webster defines it as "to act violently against (someone or something): to try to hurt, injure, or destroy (something or someone)."[5] There is no evidence that Pinky was trying to hurt, injure, or destroy Rebel. Pinky had scratches and bleeding on her face. After seeing Pinky's injuries, Rebel's owner commented that "it looks like Rebel got the best of Pinky." It is likely that Pinky was acting in self-defense or reacting to a

[5] http://www.merriam-webster.com/dictionary/attack

threat when she had Rebel in her mouth. Darcy Emehiser, a professional dog trainer who has worked with over 4000 dogs, testified to the differences between a dog who is acting aggressively and a dog who is acting reactively. Emehiser opined that Pinky was merely reacting to something on March 27. Emehiser further testified that if Pinky was trying to destroy Rebel, she could have, and would have – Pinky would not have dropped Rebel as soon as Rebel's owner yelled at her. Emehiser pointed out that the fact that Pinky dropped Rebel as soon as Rebel's owner ran outside and yelled was crucial information – an aggressive dog would not have let loose. (Hearing Tr. at 156). The fact that Pinky immediately let go when an unfamiliar woman yelled demonstrates that Pinky was not acting aggressively and this was not an "attack." (Hearing Tr. at 156). Further, it is common for cats to provoke dogs. (Hearing Tr. at 156). Dogs chasing cats is typically instinctual. (Hearing Tr. at 156). Emehiser further testified that she could "list so many dogs right now" that have chased cats . . . "dogs chase cats. It's a very common scenario." (Hearing Tr. at 158). For these reasons, there is no evidence that Pinky attacked Rebel.

Moreover, the vicious propensity theory under § 18-196(3) must also fail because there is no evidence that Pinky "could not be controlled or restrained by the owner at the time of the attack." Even if there was an "attack," Pinky's owner was not *unable* to control or restrain her. Bickel was in the shower

getting ready for work at the time of the encounter, and was unaware that his friend had let Pinky outside. The evidence actually suggests that Pinky could easily have been controlled or restrained by her owner, as evidenced by the fact that Pinky dropped Rebel as soon as Rebel's owner – someone that Pinky was not familiar with, and thus, not used to obeying commands from - yelled at her. Therefore, this was not a scenario where Pinky could not have been controlled or restrained. Both animals were outside, unattended. Pinky has no history of aggression or vicious propensities prior to the altercation on March 27, and the elements of § 18-196(3) have not been met.

The City's argument also fails under § 18-196(6), which includes any animal that "has bitten another animal or human **that causes a fracture, muscle tear, disfiguring lacerations or injury requiring corrective or cosmetic surgery**." First of all, there is insufficient evidence that Pinky's actions caused the injury to Rebel. No one saw the beginning of the altercation. Another animal certainly could have bitten Rebel. It is also important to note that Rebel was not examined immediately after the altercation with Pinky. Rebel ran up into a tree and remained there for hours. Rebel could have injured himself running up the tree, or a minor puncture or bite by Pinky that would not have required stitches could easily have been exasperated and torn when Rebel climbed the tree. It is unknown what caused Rebel's injuries, or to what extent Rebel's injuries can be attributed to Pinky.

Additionally, under 18-196(6), Rebel must have received a fracture, muscle tear, disfiguring laceration, or injury requiring corrective or cosmetic surgery. Nothing in Rebel's vet records specifically states that he received any of the above. The vet records do show that Rebel received a suture for skin. The billing statement noted that a miso suture was used. A suture is a "medical device used to hold body tissues together after an injury or a surgery." (Ex. H; App. 191) (Emphasis added). Suture and surgery are not synonymous. There was no testimony that Rebel ever received "surgery." Butler testified that he believed the staples constituted surgery; however, he also repeatedly acknowledged that he was not a doctor of veterinary medicine, he did not have any animal expertise, and, in fact, he had only received about twenty minutes of training to become chief humane officer. Surgery is not defined in the city code. Because sutures are not only used in the event of a surgery, and there is no evidence that Rebel received anything other than sutures/staples, Pinky should not have been declared a dangerous dog based on "corrective or cosmetic surgery." Moreover, the district court found that stitching Rebel's wound was considered "surgery" based on the Webster's dictionary definition. However, the Webster's dictionary does not define "corrective surgery," nor did the district court attempt to define "corrective surgery." While the City submitted Rebel's veterinary records into evidence, it did not provide any

evidence or testimony that closing Rebel's wounds constituted "corrective surgery."

Similarly, there is no evidence that Rebel received a "disfiguring laceration." To the contrary, Bickel testified that Rebel continues to roam on Bickel's yard and Rebel appears and acts the same as she did prior to March 27. Rebel's vet records report that her recovery was "unremarkable" and note no lasting effects or disfigurements. In reviewing the evidence, Rebel did not have a fracture, muscle tear, disfiguring laceration, or surgery; let alone any of the above that were caused by Pinky. Rita Mason testified that she observed Rebel in September 2016, and he looked normal and had no observable injuries or disfigurements. For these reasons, the theory that Pinky was dangerous under section 18-196(6) also must fail.

To quote ARL Manager of Special Gifts and Partnerships Stephanie Filer in an email to Animal Control Services Manager Josh Colvin, "I'm assuming there is a lot more to the story since a dog wouldn't be euthanized for biting a cat!" (Ex. G; App. 186). Astonishingly, there is nothing more to the story. No one witnessed how the altercation started, both animals received injuries, both animals were "at-large," and both animals have fully recovered. Sadly, one of those animals has been locked up without visitors for the past eighteen months.

In sum, Pinky did not display *any* vicious propensity, let alone multiple vicious propensities that the ordinance requires. Moreover, while the word "provocation" does not specifically appear in sections 18-196(3) and (6), Pinky still must have exhibited "vicious propensities" in order to be declared dangerous. Provocation is intrinsically an element of the definition of vicious propensities. (*See, e.g., Bush v. Anderson*, 360 S.W.2d 251 (Missouri App. 1962) (discussing "vicious propensities" as a propensity to bite without provocation.)). Because provocation is an element of vicious propensities, it would be redundant for the term to be added to the ordinance. To find otherwise could result in the destruction of a dog that was acting purely in self-defense, which would be an absurd and inhumane result. For these reasons, this court should find that the statute requires provocation. It is undisputed that the City has not shown by substantial evidence that Pinky was unprovoked.

Because it is unknown how this incident began, there cannot be a finding that she exhibited "vicious propensities" after one incident with a cat. Pinky should not have been declared dangerous under section 18-196, and the declaration must be reversed.

III. PINKY WAS IMPROPERLY DECLARED A HIGH RISK DOG

The dangerous dog declaration also declared Pinky to be an unlicensed high risk dog pursuant to § 18-58. Bickel admitted that he had licensed Pinky

in 2010 and did not realize it was something he was required to do annually. He repeatedly testified that, if given the opportunity, he would have paid the licensing fee and done whatever was necessary to get Pinky's license current. Bickel did maintain insurance on Pinky, which completely covered Rebel's vet bill. Butler did not seem to be concerned with Pinky's expired license, as he testified that he routinely allows pet owners to pay the fees to get the license updated and does not typically impound pets solely due to an expired license. Indeed, Rebel was not licensed and would have been at-large under Des Moines Municipal Code section 18-103, yet Rebel's owner did not receive any type of ticket and Rebel was not seized. However, Bickel was not allowed to simply go down to city hall and pay the required licensing fees; instead, Pinky was immediately seized.

Des Moines Municipal Code section 18-58 states as follows:

> All unlicensed high risk dogs shall be deemed illegal and shall be destroyed except as provided in section 18-66 of this chapter. This section shall not apply to a dog, which, upon initial notice to its owner, the owner agrees to properly license and confine or to a dog for which a hearing has been requested under this article to determine if it is high risk until there has a been a final decision on the question raised at hearing at which time the owner may, if the dog is found high risk, properly license and confine the dog.

As noted above, Bickel was not given the option to license Pinky after he was notified that her license had expired. Bickel further contends that Pinky was improperly declared a high risk dog back in 2009. Pinky's records show

that she was first examined by the City on April 9, 2009, when she was under the age of six months and only weighed 15.5 pounds. (App. 98). According to records, in April 2009, DVM Gregg Berry determined that Pinky had "predominant characteristics of the American Staffordshire Terrier breed" based on a checklist. Every single feature on the City's checklist is marked except for "glossy coat" and "straight front legs." A handwritten note of "pup" is written next to the moderate size feet feature and also next to strong and muscular shoulders. (App. 98).

Pinky was seized by the City in June 2010, after a report that a pitbull looking dog resided at Bickel's home. Butler testified that before he became chief humane officer, the City used to be more "proactive" about going out, seizing pitbull-looking dogs, and examining them using the vicious dog checklist. In 2010, Pinky's records note that she is now over six months old, 20 inches in height, and a weight that appears to be illegible. (App. 98).

The six-month-old distinction is important. Breeds cannot be identified so early on in a young pup's life. Josh Colvin, Animal Control Services Manager, has stated the ARL does not apply the checklist to puppies. (Ex. T; App. 236). Dog expert Darcy Emehiser testified that you can't even try to determine the breed of a dog until it is mature, and a small dog doesn't mature until around 18 months, while a large dog matures around 3 years. (Hearing Tr. at 150). Even Butler testified that he did not think a puppy could be declared a

high risk dog. However, that is exactly what happened back in 2009 – the City declared Pinky a vicious dog back in when she was under six months old and still a "pup." This checklist was then inappropriately used as the basis of Pinky's vicious/high risk dog label in 2010. As a result, Pinky was improperly declared a vicious/high risk dog, and the declaration stating Pinky was an unlicensed, high risk dog under § 18-58 cannot stand. Even if Pinky was properly declared an unlicensed, high risk dog, the code then allows the owner the opportunity to properly license and confine the dog.

Finally, in denying Helmers' writ of certiorari, this Court found that the City was initially authorized to seize and impound Pinky as an unlicensed, high risk dog pursuant to section 18-59 (even though, according to Chief Humane Officer Butler, that is decidedly not why Pinky was seized and impounded). Section 18-59 governs the seizure, impoundment, and disposition of high risk dogs. Pinky was improperly declared a vicious/high risk dog after she was seized by the City when she was under six months old, and after the City/ARL applied an arbitrary checklist to determine that she had characteristics of the American Staffordshire Terrier breed. The City's application of this checklist, which is not referenced anywhere in the city code, has since been determined to be unconstitutional. *See Abigail Jacques v. City of Des Moines*, 15DSM002. (Ex. S; App. 228). The high risk label thus is void as a matter of law and could not have been relied upon as justification to seize Pinky.

IV. THE CITY'S ANIMAL ORDINANCES VIOLATE DUE PROCESS UNDER THE UNITED STATES AND IOWA CONSTITUTIONS

Preservation of Error

Helmers preserved error by attempting to raise constitutional issues at the administrative hearing, which the hearing officer declined to rule on. Helmers further preserved error by offering additional evidence and testimony on the constitutional errors at the district court hearing.

Standard of Review

Rules applicable to appeals in ordinary actions govern review of an appeal from a district court's judgment in a certiorari proceeding. Iowa R. Civ. P. 1.1412; *see O'Malley v. Gundermann*, 618 N.W.2d 286, 290 (Iowa 2000). To the extent constitutional issues are involved, review is de novo. *Pfister v. Iowa Dist. Court for Polk County*, 688 N.W.2d 793, 794 (2004).

Merits

Helmers submits that this court does not need to reach the constitutional issues in this case, as the dangerous dog declaration should be reversed under any of the reasons stated above. Regardless, the City's dangerous dog and high risk dog ordinances violate the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and article I, sections 8, 9 of the Iowa Constitution. Due process requires notice and an opportunity to be heard. *In re Estate of Adams*, 599 N.W.2d 707 (Iowa 1999). A

city ordinance is unconstitutionally vague under the due process clause 'when its language does not convey a sufficiently definite warning of the proscribed conduct.'" *Lewis v. Jaeger*, 818 N.W.2d 165, 183 (Iowa 2012). A statute or ordinance is unconstitutionally vague when a person must guess as to the meaning of a statute or ordinance and its applicability. *Id.* When individuals must guess at the meaning of a statute and its applicability, the statute is unconstitutionally vague. *Knepper v. Monticello State Bank*, 450 N.W.2d 833 (Iowa 1990).

A. Dangerous Dog ordinance provides for the warrantless seizure of family pets without due process of law.

The dangerous animal ordinance and procedures found in sections 18-196 and 18-202 of the city code are unconstitutional in a number of ways. First of all, it provides for the seizure and detention of a family pet without permission or a warrant. As discussed above, Helmers contends that the City's initial seizure of Pinky was unlawful. However, to the extent that this court determines that Pinky's seizure was allowable by Des Moines city code, that code section must be found unconstitutional for allowing the deprivation of property without due process of law. The City will always be able to seize and confine a family pet any time the chief humane officer decides to declare it "dangerous" by taking that animal from its home without consent, holding it in quarantine, issuing a dangerous dog declaration while the animal is in

quarantine, and then refusing to release it. In Pinky's case, this has caused her to remain locked up at the ARL out of public view without so much as a visit from her owner since March 28, 2016– eighteen months and counting. In theory, section 18-202(b) gives the pet owner three days notice that the "dangerous dog" could be subject to seizure. In reality, the City abuses the quarantine provision of section 18-167, which then allows them to circumvent the three day notice requirement of section 18-202(b). If this court determines that the City followed its ordinance, its ordinances must then be found unconstitutional for complete lack of due process.

Additionally, the definition of dangerous animal is unconstitutionally vague and broad. Section 18-196 states as follows:

> Dangerous animal means any animal, including a dog, except for an illegal animal per se, as listed in the definition of illegal animal, that has bitten or clawed a person while running at large and the attack was unprovoked, or any animal that has exhibited vicious propensities in present or past conduct, including such that the animal
>
> (1) Has bitten or clawed a person on two separate occasions within a 12-month period;
> (2) Did bite or claw once causing injuries above the shoulders of a person;
> (3) Could not be controlled or restrained by the owner at the time of the attack to prevent the occurrence; or
> (4) Has attacked any domestic animal or fowl on three or more separate occasions within the lifetime of the attacking animal.
> (5) Has killed any domestic animal while off of the property where the attacking animal is kept by its owner.

> (6) Has bitten another animal or human that causes a fracture, muscle tear, disfiguring lacerations or injury requiring corrective or cosmetic surgery; or
> (7) Any animal that was required to be removed from another city or county because of behavior that would also meet the definition of "dangerous animal" as set out in this section.

Under the subsections to 18-196, there is no provision for self-defense and the City argues that provocation is not required. As written, a dog who was attacked first by one or more at-large, vicious animals could be considered "dangerous," even though the dog was acting solely in self-defense. Similarly, a dog attacked by another human could be considered dangerous if it then bit the human in self-defense, or a dog protecting its owner from an intruder could likewise be declared dangerous. The City's interest in protecting its residents can not reasonably include labeling dogs acting merely in self-defense as dangerous and then destroying them.

Further, the code tasks the dangerous dog determination solely to the chief humane officer. Since 2012, James Butler has been the chief humane officer for the City of Des Moines. (Hearing Tr. at 17). Butler testified that he was the only individual to make the determination that Pinky was a dangerous animal. (Hearing Tr. at 18). Butler admitted that he only had "twenty minutes of training," before becoming chief humane officer. (Hearing Tr. at 20, 62). He was never given any training as to how to determine a dangerous dog and he has, on numerous occasions, self-proclaimed that he is "not an animal

expert.[6]" (Hearing Tr. at 62, 64, 71, 72). Pinky has never been evaluated by any animal expert to determine whether she is dangerous or vicious. (Hearing Tr. at 63).

The code declares that a dog is vicious if it has bitten an animal that requires "corrective surgery," yet, "corrective surgery" is not defined. Butler has not had any training in this area, but considers "stitching tissue back together," to be surgery. (Hearing Tr. at 64). Similarly, "disfiguring laceration" is not defined, nor has Butler had any training in this area.

B. Because the City's use of a subjective checklist to determine a dog's breed does not comply with due process, the "high risk dog" ordinance is unconstitutional

The City's high risk dog ordinance is also unconstitutional. The City's method of identifying and labeling mixed breed dogs is arbitrary and does not comply with due process. As it pertains to Pinky, section 18-41 defines "high risk" as a Staffordshire terrier, American pit bull terrier, or American Staffordshire terrier breed of dog. The ordinance provides that when "determining whether a dog is high risk by breed" the opinion of the city veterinarian, or a veterinarian who is an agent or employee of a contractor controls. § 18-44(c). In Pinky's case, a city veterinarian labeled Pinky high risk

[6] Butler proclaimed that he was not an "animal expert" at least six different times during his testimony on September 13. It is concerning that the determination as to whether a dog is "dangerous," and thus, must be killed, is made solely by an individual who is so adamant about not being an animal expert.

when she was under six months old by using an arbitrary checklist that is not found in the city code. (App. 98).

Both Emehiser and Helmers, who have a combined experience of over 50 years working with dogs, testified that breed does not determine temperament, so the City's use of breed specific laws is not rationally related to the purpose of keeping the community safer. The high risk dog ordinance has already been found unconstitutionally vague under the due process clause in *Abigail Jacques v. City of Des Moines*, 15DSM002. (Ex. S; App. 228) (finding that the checklist is not referenced in the city code; the characteristics or traits of the Staffordshire terrier, American pit bull terrier, and American Staffordshire terrier are not commonly known or defined; and the City's reliance on the unpublished and unreferenced criteria for labeling dogs is improper). As in *Abigail Jacques*, the labeling of Pinky as a "vicious dog" (now "high risk dog") in 2010 was in violation of Bickel's constitutional rights. Similarly, the City did not provide notice to Bickel of the criteria used for determining whether Pinky was "predominantly" an American Staffordshire terrier, American pit bull terrier, or Staffordshire terrier, and the City's reliance on the unpublished and unreferenced criteria was improper. *See Anderson v. Iowa Dept. of Human Services*, 368 N.W.2d 104, 108 (Iowa 1985). The instant case is even more egregious than *Jacques* becuause Pinky was classified as a vicious/high risk dog when she was *under* six months old, and it is undisputed that it is inappropriate to identify

a puppy's breed at that age. In fact, the City does not require residents to license dogs until they reach six months. § 18-43. As such, Pinky's classification as a vicious/high risk dog cannot stand, and neither should the City's belated justification for seizing Pinky as a high risk dog.

C. The City's ordinances are unconstitutional as applied

Even if this court upholds the City's dangerous dog and high risk dog ordinances as constitutional on their face, they are nonetheless unconstitutional as applied. A party's actions are illegal if they are arbitrary and unreasonable. *Bontrager Auto Serv., Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483 (Iowa 2008). The City arbitrarily applies the dangerous dog and high risk dog ordinance to residents of lower income and who own breeds resembling pit bulls. Helmers testified that she has had previous conversations with Butler about his enforcement of the dangerous dog ordinance and admitted to her in private that he does have discretion and that he does give people "breaks." (Hearing Tr. at 175). She testified that she has knowledge of at least three other recent dangerous dog cases involving Butler and the City of Des Moines, all of which whose owners are of lower social and economic status and the dog at issue resembles a pit bull. (Cert Tr. 29-31). In March 2016, Butler told Helmers that there were currently two dogs being held at the ARL as "dangerous" – Diesel and Malice. (Hearing Tr. at 174). Both dogs are classified as pit bulls, and both dogs' owners are of lower income (one is homeless) and

are represented by a nonprofit that provides legal aid to pet owners.[7] (See *Fahrney v. City of Des Moines,* EQCE079408; *Rumsey v. City of Des Moines*, EQCE078795). Based on the cases that Helmers has personally reviewed, the City does not apply the dangerous animal declaration equally to all types of dogs and to pet owners of all income levels. (Hearing Tr. at 179).

Additionally, a Des Moines resident named Carol Marcsisak spoke at a recent Des Moines City Council meeting about her observation and belief that the City is not equally applying its ordinances to residents of lower socioeconomic status and dog type. (Cert. Tr. at 36). She reiterated this testimony at the hearing on February 17, citing an encounter where she and her friend were walking her dog down the sidewalk in their neighborhood. (Cert. Tr. at 36-40). A neighbor's dog ran towards them and started attacking Marcsisak's dog, and Marcsisak and her friend had to physically lay on top of her dog to prevent further injuries. *Id.* Marcsisak testified that the attack lasted 20-30 minutes before a friend drove by in a van that Marcsisak and her dog were able to escape into. (Cert. Tr. at 42). 911 was called, and the animal control officer who reported to the scene told Marcsisak that he knew the attacking dog's owner, who was a local businessman, and that animal control had been called out on reports of this dog's aggressive behavior three or four

[7] Bela Animal Legal Defense and Rescue, https://sites.google.com/site/belaanimallegaldefense/home (last accessed 3/12/17).

times before. (Cert. Tr. at 39). The attacking dog was held in quarantine for ten days, then released back to its owner. (Cert. Tr. at 39-40). The dog was not declared dangerous or high risk.

By comparison, Bickel works in the restaurant service industry, has no friends in animal control, or any known connections to the ARL. Pinky had no history of aggression, biting, or even being at-large in the nearly seven years she resided with the Bickels. However, after one incident involving a cat that routinely roams free throughout the neighborhood, Pinky now has a death sentence. These examples demonstrate that the City's dangerous dog ordinances are not consistently and fairly applied. Because they have been arbitrarily enforced against Pinky, the case must be reversed.

CONCLUSION

For the reasons articulated herein, Helmers requests this court reverse the district court's order and sustain the writ, and order for the immediate release of Pinky.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing this brief was $0 because it was electronically submitted.

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