IN THE SUPREME COURT OF IOWA

No. 17-0794

Polk County No. CVCV050086

DIANNA HELMERS,

Appellant,

v.

CITY OF DES MOINES,

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY

HON. LAWRENCE McCLELLAN, PRESIDING JUDGE

APPELLEE'S FINAL BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (Cont.)

Statutes, Rules and Ordinances **Page(s)**

ISSUES PRESENTED FOR REVIEW

I. THE SEIZURE OF THE DOG WAS LAWFUL AND PROPER UNDER THE APPLICABLE SECTIONS OF THE MUNICIPAL CODE

Cases: *State v. Gonzales*, 718 N.W.2d 304 (Iowa 2006)

Ordinances: Des Moines Municipal Ordinances 18-59(e), 18-64(b), 18-167, 18-202 (e)

II. THE DOG WAS PROPERLY DECLARED A DANGEROUS ANIMAL UNDER CITY ORDINANCE 18-196

Cases: *Eyecare v. Dep't of Human Servs.*, 770 N.W.2d 832 (Iowa 2009)

O'Malley v. Gundermann, 618 N.W.2d 286 (Iowa 2000)

State v. Prince, 666 N.W.2d 620 (Iowa Ct. App. Apr. 30, 2003)

Ordinance: Des Moines Municipal Ordinance 18-196

III. THE DOG WAS PROPERLY DECLARED A HIGH RISK DOG

Cases: *Shors v. Johnson,* 581 N.W.2d 648 (Iowa 1998)

Ordinance: Des Moines Municipal Ordinance 18-58

IV. THE APPELLEE'S ORDINANCES ARE CONSTITUTIONAL

Cases: *American Dog Owners Ass'n, Inc. v. City of Des Moines,* 469 N.W.2d 416 (Iowa 1991)

Egan v. United States, 137 F.2d 369, 375 (8th Cir.1943)

Racing Ass'n of Cent. Iowa, 675 N.W.2d 1 (Iowa 2004)

Scott County Prop. Taxpayers Ass'n, Inc. v. Scott County, 473 N.W.2d 28 (Iowa 1991)

Ordinances: Des Moines Municipal Ordinances 18-58, 18-196

ROUTING STATEMENT

Appellee, City of Des Moines, ("the City") believes that this case involves no new or novel aspects of law and the matter should be heard at the Iowa Court of Appeals.

STATEMENT OF THE CASE

This case has as its central premise the proper interpretation of Des Moines Municipal Ordinance 18-196 and whether the subject animal, a dog named "Pinky," was a dangerous animal as defined by the ordinance when it caused injury to a cat upon the property of the cat's owner. There are other ancillary issues concerning the animal such as the timing of the issuance of the declaration, and the long-standing and never appealed classification of the dog as a high-risk breed, but the dog's definition as a dangerous animal is central to all.

The City asserts that its ordinance is proper, its definitions clear, and that the dog was properly found to be dangerous by the City's Chief Humane Officer, the Administrative Law Judge following a hearing, and the District Court Judge.

STATEMENT OF THE FACTS

At the time of events giving rise to this matter, Charles Bickel ("Bickel") was the owner of Pinky, a dog that had been classified as a "vicious dog" per City ordinance on or about June 4, 2010. (Amended Ex. 7, App. 149-158) Pinky possessed the characteristics of "a Staffordshire Terrier, an American Pitbull Terrier,

and American Staffordshire Terrier." (Amended Ex. 7, pg. 8, App. 155). Bickel did not appeal the designation. (Tr. 34, l. 9-14) The term "vicious dog" was subsequently changed to a "high risk dog" by ordinance. (Tr. 74, l. 13-22) As a condition of owning a dog designated as "high risk", Bickel agreed to various items including: (A) keeping the dog in the house at all times unless the dog is securely leashed with a leash no longer than six feet in length and under control of a person 18 years or older; (B) keeping $100,000 liability coverage protecting against animal bites in effect at all times; and (C) displaying a current city license and rabies tag on the dog at all times. (Amended Ex. 7, App. 156)

On March 27, 2016, Pinky escaped from Bickel's home through the front door. It is undisputed that Pinky left Bickel's property and was involved in an altercation with a neighbor's cat, named Rebel, in which Pinky caused Rebel injury. (Ex. 4, App. 129) The incident report states in part:

> …met with Elizabeth Moldovan at her home. Elizabeth stated yesterday her cat "Rebel" had managed to sneak out of the house and was in her backyard. Elizabeth looked out the back window to see the neighbor's white Pit Bull type dog named "Pinky" shaking Rebel in her mouth. Elizabeth ran outside and yelled[.] Pinky dropped Rebel and Rebel ran up a tree where she stayed for an hour…When Rebel came down, Elizabeth found punctures on her chest and took her to [Iowa Vet Specialties ("IVS"). Currently, Rebel is still at IVS because she had to have surgery. (Ex. 2, App. 93)

There is no evidence as to which animal was the aggressor in the altercation because only the end of the event, with the cat between the dog's teeth while being shaken, was observed. (Ex. 1, Tr. 28, App. 93)

Ms. Helmers asserts there is no evidence justifying the use of the word "attack" per 18-196 of the ordinance. At the hearing, Ms. Helmers speculated on where the interaction between the two animals began, whether another animal was involved, or that the tree the cat climbed somehow inflicted serious lacerations. (Tr. 113, l. 16-23) The known and uncontested facts are that the cat's owner, Elizabeth Moldovan, saw Pinky in *her* yard (3321 Crocker) with *her* cat being shaken while in the dog's jaws. (Ex. 2, pg. 2, App. 94). Moldavan yelled at the dog who dropped the cat. Moldovan later indicated she believed this action saved the cat's life. (Ex. 5, App.135) When Ms. Moldovan retrieved her cat she "found punctures on her chest and took her to IVS because she had to have surgery." (Ex. 2 App. 93) Rebel's subsequent medical care indicates the cat had two procedures to close wounds caused by Pinky. (Ex. 3, App. 99-126) Rebel suffered severe lacerations requiring "approximately 36 staples" to close the wounds. *Id*.

At the time of the incident, Pinky was wearing neither a license nor a current rabies tag. (Ex. 2, App. 94) Pinky was not currently licensed. (Ex. 2, App. 94-95) While Mr. Bickel asserted he would have kept Pinky currently licensed if he knew he was supposed to, the documents he signed for the possession of Pinky under the

"vicious dog" classification on June 3, 2010 explicitly required a "current City license and rabies tag on the dog" be displayed at all times. (Ex. 7, App. 156) He did not abide by this requirement. (Tr. 31-35, 117, 133-3) In fact, at the time, Pinky had last been licensed when Mr. Bickel adopted the dog in 2010. The license had not been subsequently renewed. (Tr. 33) This, along with maintaining current rabies vaccinations, had been what Mr. Bickel had agreed to in order to adopt a "high risk" dog. (Tr. 41)

The City contacted Mr. Bickel on March 29, 2016. (Ex. 2, App. 95) Mr. Bickel testified consistent with what he told an ARL officer at the time: Pinky must have escaped his home through the actions of a friend while he was in the shower. *Id*.

The ARL officer correctly believed that the dog was not licensed nor had a current rabies vaccination. The dog was impounded and quarantined. (Ex. 2, Tr. 31, 32, App. 95) The quarantine was released on April 6, 2016 per City Ordinance 18-167. (Ex. 2, App. 97)

The City's Humane Officer, Sergeant Butler, had numerous reasons to quarantine the dog at the ARL. The dog was not licensed and did not have an indication of current rabies inoculation. (Tr. 31-33, 35, 117, 133-34) The dog had not been licensed in six years, though high-risk dogs required annual licensing and

current rabies vaccinations. (Tr. 33, 34, 133) Finally, the dog had caused significant injuries to the cat. (Tr. 33)

The Appellant's brief claims Mr. Bickel updated the dog's rabies vaccinations, but the record does not support this. The only existing valid rabies vaccination in the record was done as part of Bickel's adoption of the dog in 2010. There is no other evidence of vaccination other than expired non-current tags. (Appellant's Brief at 8, Tr. 31-35, 133-34)

The day before Pinky was to be released from quarantine, April 5, 2016, Sergeant Butler issued a Dangerous Animal Declaration by Behavior Notice to Mr. Bickel pursuant to City Ordinance 18-196(3) and (6). (Ex. 6, App. 135)

City Ordinances 18-196(3) and (6) state:

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**: (Emphasis Added)

> (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

The declaration further noted that Pinky was an unlicensed high risk dog pursuant to City Ordinance 18-58. (Ex. 6, App. 135-36)

The Declaration stated that Mr. Bickel could file a written appeal with the Des Moines City Clerk's Office within three business days of the April 5th letter or Pinky may be destroyed in a humane manner. (Id.)

Sergeant Butler and Mr. Bickel discussed the option of the latter relinquishing his ownership rights to the ARL. (Id.) This was an option to consider because of the time, expense and likelihood of success of an appeal. Mr. Bickel and Sergeant Butler disagree on how the latter described the likelihood of a successful appeal (though both agree it was described as a low probability). Mr. Bickel stated Sergeant Butler was professional and considerate throughout. Sergeant Butler suggested that Mr. Bickel think the matter over before making a decision. Mr. Bickel did think about the matter overnight and signed paperwork surrendering possession of Pinky to the ARL on April 6, 2016. (Ex. 6, App.141) Mr. Bickel testified his surrender of rights to Pinky was voluntary. (Ex. 6, Tr. pg. 47, l. 1-6, App. 142)

However, the next afternoon, April 7, 2016, Mr. Bickel nonetheless also filed an appeal of the dangerous animal declaration. (Ex. 6, App. 141)

On April 20, 2016 a hearing was held, and exhibits and testimony were taken before Administrative Law Judge Jonathan Gallagher, who upheld the dangerous

animal declaration on April 27, 2016. On April 28, 2016, Mr. Bickel sold his ownership of Pinky to Dianna Helmers.

A timely Writ of Certiorari was filed in this matter in the Iowa District Court for Polk County. It was discovered during the time in which the administrative record was being assembled that a recording of the April 20, 2016 hearing did not exist. Therefore the district court remanded the matter back for a new hearing. A new hearing took place on September 13, 2016 before Administrative Law Judge Kathleen O'Neill. On November 27, 2016, Judge O'Neill upheld the declaration yet again. (App. 242, 253)

Ms. Helmers filed a Writ of Certiorari and Writ of Replevin on November 29, 2016. Transcripts and exhibits from the latter administrative hearing were submitted to the court on December 29, 2016. The district court heard the matter on February 17, 2017. On April 17, 2017, the district court entered an Order denying the Writs of Certiorari and Replevin. Ms. Helmers filed a timely Motion to Enlarge and/or Amend the Record, which was denied on May 20, 2017. A timely Notice of Appeal was filed May 23, 2017.

SUMMARY OF ARGUMENT

Ms. Helmers makes a series of arguments that the dangerous animal declaration was invalid and should be overturned. They assert the seizure of the dog violated City Ordinance 18-202(a) and (b) as well as an improper quarantine under

18-167(a). She asserts the dog did not exhibit "vicious propensities" as defined by 18-196. Ms. Helmers also asserts that Pinky is improperly designated a high risk dog under 18-58. Finally, she asserts several of the City's ordinances are unconstitutional. The City resists each of Helmers's assertions as stated below.

ARGUMENT

Preservation of Error: Appellee agrees with the Appellant's recitation.

Standard of Review: Review of certiorari proceeding from a district court's judgment is for errors at law and the Appellate Court is bound by the district court's findings of fact if supported by substantial evidence. *Sergeant Bluff-Luton Sch. Dist. V. City Council of Sioux City*, 605 N.W.2d 294, 297 (Iowa 2000).

I. THE SEIZURE OF THE DOG WAS LAWFUL AND PROPER UNDER THE APPLICABLE SECTIONS OF THE MUNICIPAL CODE

With respect to whether Pinky was properly declared a dangerous animal, City Ordinance 18-202(b) requires any notice declaring an animal dangerous to have "an order that the owner cause the animal to be destroyed in a humane manner within three days of service of the notice" and "notice that such animal will be subject to seizure if not destroyed within three days of service of the notice." Des Moines Municipal Code § 18-202(b). Here, it was stated instead, "If you do nothing, Pinky may be destroyed in a humane manner." (Ex. 5, App. 136) However, as it occurred

in this case, this is undoubtedly enough. Logically, as found by the ALJ and the district court, the City could not have released Pinky to Bickel pursuant to provisions in the City Municipal Code governing quarantines (Sections 18-59(e) and 18-167). Without the ability to release Pinky, no requirement existed to include language indicating Bickel could take the animal to have it destroyed or face the seizure of the animal.

Section 18-167 of the City Code provides for a mandatory quarantine when an animal, amongst other things, bites another animal, stating:

> It shall be the duty of the chief humane officer to order the owner of any animal which has bitten a person or another animal or any animal suspected of being infected with rabies to confine such animal for a period of ten days at the animal shelter, a veterinary clinic, or a registered kennel.

It is correct that Mr. Bickel was not given an option of home or other manner of quarantine. However, no option existed other than the location Pinky was actually quarantined because of the language of 18-59(e) and 18-167(a) and (b), which do not allow the option of home sheltering when a high risk dog has bitten an animal and is suspected of having rabies. (Tr. 31-35) Further supporting the confinement, Pinky was not properly licensed [18-167(b)(2)] nor displaying the required tags, including a valid rabies tag. (Ex. 2, Tr. 31-35, 117, 133-34, App. 94).

Des Moines Ordinance 18-202(e) provides, "[A]ny animal alleged to be dangerous and which is under impoundment or quarantine shall not be released to

the owner." Since Pinky was under quarantine and ineligible to be released, the City's ordinance does not require the Appellee provide notice to the owners that they may take the animal to have it euthanized or be subject to the animal's seizure because requiring such a result would be absurd. See, *State v. Gonzales*, 718 N.W.2d 304, 308 (Iowa 2006) (statutory interpretation requires interpretation of entire statute not just isolated words, a reasonable interpretation of the statute's purposes is encouraged and absurd results are to be avoided).

Due to the lack of evidence of a current license or rabies vaccination (there was none), the City had the authority to have Pinky placed in quarantine for at least ten days from March 27, 2016. In doing so, the Appellee made the dog ineligible to be released during the quarantine period. The dangerous animal declaration of April 5, 2016 was issued during this quarantine period. Thus, the declaration is procedurally proper even without the explicit provisions of 18-202(b).

Ms. Helmers argues that the City could have permitted a quarantine at some location other than the ARL. Under Section 18-167, the City may permit a home quarantine only if certain conditions are met, including that the animal "is properly licensed, in the case of dogs." Des Moines Municipal Code § 18-167(b)(2). There is no dispute that Pinky was not licensed at the time; the license lapsed after 2010. (Ex 2, App. 94) Further, Pinky was a "high risk" dog, unlicensed, running unsecured, and without a current rabies vaccination. Animals meeting that definition cannot be

redeemed from impoundment by the owner while under quarantine. See, Des Moines Municipal Code 18-59(e). As such, the City could not have permitted the home quarantine, nor quarantine at another location.

Ms. Helmers argues that this procedure is invalid, citing *Chelsea Rae Jacques v. City of Des Moines*, Case No.CVCV049515, Ruling on Petition for Writ of Certiorari (Iowa Dist. Ct. June 10, 2015). However, the district court in *Jacques* never cited the quarantine provision in Section 18-167. *Ruling on Petition for Writ of Certiorari*, at 8-9. In fact, the notice in *Jacques* was served several days after the ten-day quarantine period had run. In this case, it was issued during the quarantine period. As such, *Jacques* is a different case. Rather, the case is similar to two other recent cases. In *Rumsey v. City of Des Moines*, CVCV049602, Findings of Fact, Conclusions of Law and Order filed July 29, 2015, pgs. 10-12:

> Plaintiff asserts that the dog was seized on March 13, 2015, which was prior to the time the City issued the dangerous dog declaration on March 18, 2015, and that she was not given three days to euthanize her dog....
>
> During this ten-day quarantine, the City issued the dangerous dog declaration on March 18, 2015. It declares Malice a dangerous dog, states that the dog is in quarantine until March 23, that Rumsey has the right to appeal -within three business days, and that if she does nothing the dog may be destroyed at the conclusion of the appeal period. Ex. D. Given that the dog was already in quarantine at the ARL [pursuant to Des Moines Municipal Code section 18-167] **when the dangerous dog declaration was issued, Ms. Rumsey was not in possession of the dog. Under these circumstances, the declaration is in compliance with Section 18-202(b).** (Emphasis added)

A more recent case is *Fahrney v. City of Des Moines*, EQCE079408, Ruling on Writ of Certiorari, Sept. 8, 2016, pgs. 6-7:

> As the court discussed in its March 14, 2016 ruling on Fahrney's request for an injunction, this case is distinguishable from the *Jacques* case because here, unlike *Jacques*, Diesel was required to be quarantined under section 18-167(a)…Diesel bit a person. Because he was behind on his rabies vaccinations, the City could legitimately have suspected he was infected with rabies**. Thus, he was required to be quarantined and was in quarantine when Fahrney was given the dangerous dog declaration. Diesel could not have been released at that time.** (Emphasis added)

Therefore, Ms. Helmers's reliance upon the *Jacques* case is misplaced. Section 18-202(e) prevents the City from releasing impounded animals in addition to quarantined animals. See Des Moines Municipal Code § 18-64(b) (noting that an owner can only redeem an impounded animal after "showing of the appropriate license for such dog"). Since the City could not release Pinky under any circumstances, it was procedurally proper to not include language in the declaration stating Bickel could take Pinky to have the dog destroyed or have the City seize Pinky to do so.

The City properly followed the applicable ordinances in seizing, impounding, quarantining and issuing a dangerous animal declaration in this matter and, on this issue, the Court should affirm the district court.

II. THE DOG WAS PROPERLY DECLARED A DANGEROUS ANIMAL UNDER CITY ORDINANCE 18-196

The City's ordinance states a dangerous animal "means any animal, including a dog,. . . that has exhibited vicious propensities in present or past conduct, including such that the animal: ... (6) Has bitten another animal or human that causes a fracture, muscle tear, disfiguring lacerations or injury requiring corrective or cosmetic surgery[.]" Id. § 18-196. In the use of the term "including," the ordinance signifies that one such instance of an animal exhibiting vicious propensities sufficient to be declared a dangerous animal is biting in such a way to cause a fracture, muscle tear, disfiguring lacerations or injury requiring corrective or cosmetic surgery. See *Eyecare v. Dep't of Human Servs.*, 770 N.W.2d 832, 837 (Iowa 2009) ("the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition").

Here, it is undisputed that Pinky bit Rebel because the evidence supports that the dog broke the skin of the cat when it had the latter in its jaws while shaking it. This created deep lacerations requiring approximately 36 staples to close. (Ex. 4, App. 109) This trauma is sufficient to satisfy the remaining portion of the definition. According to the veterinary records, Rebel had: a "crushing injury to tissue resulting in devitalization"; a "large laceration/wound on the right side of the dorsal pelvic area, approximately 6 cm in diameter, with an additional wound"; and "punctures on the right thorax, just caudal to the thoracic limb." (Ex. 4, pg. 6, App. 104) The only

evidence existing as to the cause of the injuries to Rebel was being shaken while being bitten by the dog. Ms. Helmers has put forward a series of speculative causes such as “another animal did it” or “the tree did it” all without merit given the nature of the cat’s injuries and an eyewitness observation of the actual event. It is therefore not surprising that the district court adopted as its factual finding that the dog injured the cat through biting and shaking it. See, *O’Malley v. Gundermann*, 618 N.W.2d 286, 290 (Iowa 2000) (the factual findings of the district court when supported by substantial evidence are binding on appeal).

As a result of the injuries inflicted, Rebel received significant medical care, including what is described within the veterinary records as "surgical services" and the owner described as two surgeries to close the wounds with staples. (Ex. 4, App. 107) These descriptions are supported by the pictures of the injured cat. The photos demonstrate a muscle tear, disfiguring lacerations, and injuries that required corrective surgery. Ex. 4 (App. 107). Indeed, with respect to the term surgery, the "common and generally accepted meaning" is:

> (1) a branch of medicine concerned with diseases and conditions requiring or amenable to operative or manual procedures, (2) alterations made as if by surgery, (3) the work done by a surgeon, or (4) an operation. Webster's Ninth New Collegiate Dictionary 1188 (1986).

State v. Prince, 666 N.W.2d 620, 2003WL1967456 (Iowa Ct. App. Apr. 30, 2003). The injuries Rebel suffered required corrective surgery as their treatment involved an operative and manual procedure of closing, suctioning, and draining the wounds

by a surgeon in an operation to restore the animal's health. (Ex. 4, App. 99-109) The injuries Pinky caused to Rebel clearly satisfy the definition of dangerous animal under the Code, the alternative offered by Ms. Helmers would imply that Pinky would have been just fine without requiring three-dozen staples closing her wounds, that somehow this does not qualify as “corrective” or “cosmetic” as commonly understood. Such an interpretation is ludicrous and violates clear precedent as well as meaning.

Ms. Helmers also claims the City must prove an animal was not provoked at the time of an attack to meet the definition of dangerous animal. But, the City code clearly states several types of actions or injuries do not require a showing of provocation. Des Moines Municipal Code § 18-196. While it is correct that provocation is at issue when the City is proceeding under the first portion of the ordinance for animals that have "bitten or clawed a person while running at large and the attack was unprovoked," it is not an issue under the second definition related to vicious propensities. *Id*. This is because a lack of provocation is not identified in any of the seven more detailed and specific actions, including those at issue here. As one Iowa District Court stated:

> The part of Section 18-196 on which the City relied in this case defines as dangerous “. . .any animal that has exhibited vicious propensities in present or past conduct, including such that the animal . . . (2) Did bite or claw once causing injuries above the shoulders of a person . . .” This portion of Section 18-196 does not include any reference to whether

> or not the animal was provoked. The fact that Diesel bit HP on the neck places this case squarely under Section 18-196(2). **Under that provision, provocation is no defense**. The ALJ's conclusion regarding the irrelevance of evidence of provocation was therefore not unreasonable, arbitrary, or capricious. (Emphasis added)

Fahrney v. City of Des Moines, EQCE079408, Ruling on Writ of Certiorari, Sept. 8, 2016, pg. 10

Ms. Helmers has made an effort to parse the definition of "attack" and proclaim what Pinky's behavior does not apply. This is without merit. To be seen shaking the cat about while it is within the dog's jaws, causing hospitalization, surgery, and 36 staples meets any reasonable interpretation of "to act violently against," to "try to hurt, injure or destroy." Ms. Helmers's arguments run counter to the only real evidence and logic, given Pinky was observed to have Rebel in its jaws and violently shaking the cat.

Ms. Helmers also claims Pinky could not have violated of 18-196(3) because Pinky could have been "controlled" or "restrained" if Mr. Bickel had only been there. Of course one cannot have control or restrain what one does not possess. Pinky could not be controlled because the dog escaped from Mr. Bickel's house and attacked his neighbor's cat on that same neighbor's property. Pinky's being there and injuring Ms. Moldovan's cat upon Ms. Moldovan's property is obviously outside of Mr. Bickel's control or restraint.

The evidence established that Pinky escaped the control or restraint of his

owner by being on another's property while unlicensed and without evidence of rabies inoculation, inflicting an injury with his jaws upon an animal causing a fracture, muscle tear, disfiguring lacerations or injury requiring corrective or cosmetic surgery. For all these reasons, Pinky was properly designated a dangerous animal under the City's ordinance and the district court's decision should be affirmed.

III. THE DOG WAS PROPERLY DECLARED A HIGH RISK DOG

To a certain extent, the fact that Pinky was designated a high risk dog under 18-58 is irrelevant. As Sergeant Butler testified, any dog, regardless of breed would be subjected to a designation as a dangerous animal if the other facts described above occurred. (Tr. 98-99)

However, Mr. Bickel agreed to the designation of "high risk" in June 2010. (Ex. 7, App. 156) He was given three business days to appeal the designation. He did not appeal and nearly six years passed. The claim that Pinky was improperly declared a high risk dog is therefore moot. See generally, *Shors v. Johnson,* 581 N.W.2d 648, 650 (Iowa 1998)(failure to appeal in a timely basis is failure to exhaust administrative remedies and not reviewable by district court)

To the extent it applies to this case, Mr. Bickel agreed to certain conditions in June 2010 to then take possession of Pinky from impoundment, including keeping the dog in the house at all times unless the dog is securely leashed. (Ex. 7, App.

156) Further, he agreed to display "current City license" and "rabies" tags upon the dog. *Id.* In March 2016, this "high risk" dog was impounded with neither a current license nor valid rabies vaccination tags. (Tr. 31-35, 117, 133-34) The failure to follow these requirements directly led to the impounding and quarantine.

IV. THE APPELLEE'S ORDINANCES ARE CONSTITUTIONAL

A. Appellant's Assertions Re: Dangerous Animal Ordinance

Ms. Helmers proclaims the dangerous animal declaration within the ordinance is unconstitutionally vague and overbroad. She does so without authority. A statute or ordinance is presumed constitutional and the challenging party has the burden to prove otherwise by negating every reasonable basis supporting the law. *Racing Ass'n of Cent. Iowa*, 675 N.W.2d 1, 8 (Iowa 2004). The City is not required, nor expected, to produce evidence to justify its legislative action. *Heller v. Doe by Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257, 271 (1993). "A legislative judgment is presumed to be supported by facts known to the [city council], unless facts judicially known or proved preclude that possibility." *Egan v. United States,* 137 F.2d 369, 375 (8th Cir.1943) (citations omitted).

Ms. Helmers argues that provocation or self-defense must be considered as to the provisions of the applicable Ordinance 18-196(3) and (6). The fact that some portions of 18-196 require provocation but others such as (3) and (6) do not was addressed in the *Fahrney* decision:

> The portion of the ordinance under which Diesel was declared dangerous [18-196(2)] establishes a different substantive standard of behavior – biting above the shoulder – than that part of the ordinance which permits provocation as a defense. Thus, there are not two identical standards for a dangerousness declaration, one permitting a provocation defense and the other not permitting it.
> -*Fahrney v. City of Des Moines*, EQCE079408, Ruling on Writ of Certiorari, Sept. 8, 2016, pg. 11

Likewise 18-196(3) and (6) establish a particular and substantive behavior that the dog (3) could not be controlled or restrained at the time of the attack and (6) caused a fracture, muscle tear, disfiguring laceration or an injury requiring corrective or cosmetic surgery.

Ms. Helmers then proclaimed that Sergeant Butler has no capacity to interpret the City's Ordinance in regard to Pinky because he's not an animal expert, nor has extensive training in animal behavior. But Butler is interpreting an Ordinance, not providing diagnosis or treatment. This argument is akin to saying a police officer cannot arrest a person because they have little training in psychology. If an individual is observed to commit assault or public intoxication they are analyzed by the language of the statute or ordinance listing the observed violation, not whether the arrestee's behavior is listed in the DSM-V.

Ms. Helmers alternatively argues the definition of "dangerous animal" is unconstitutionally vague, thereby rendering it impossible to discern if Pinky meets the definition of a dangerous animal. Ms. Helmers first takes issue with whether an injury to an animal or individual is required, arguing that the phrase "[h]as bitten

another animal or human that causes a fracture, muscle tear, disfiguring lacerations or injury requiring corrective or cosmetic surgery" is ambiguous. However, notably the ordinance uses the disjunctive term "or." See, e.g.. *State v. Houston,* 211 N.W.2d 598, 600 (Iowa 1973) ("The legislature has stated 'buy, receive, or aid in concealing' disjunctively in this particular statute and the crime can be committed in any of those ways."). Second, Ms. Helmers argues that the phrases "corrective surgery" and "disfiguring laceration" are ambiguous. In actuality, there is little functional ambiguity in those terms. As such, the substance of the declaration declaring Pinky a dangerous dog is also correct. The canard over a literal definition of the phrase "corrective surgery" asserted by Helmers was best described by the Administrative Law Judge in her ruling of November 17, 2016. (Hearing Order pg. 8-9, App. 250-51)

> The injuries to Rebel required closing, suctioning, and draining the wounds by a surgeon in an operation to restore the animal's health. As a result, Rebel received significant care, including what the veterinary records describe as "surgical staples for skin" and "surgical services," and as Rebel's owner described as Rebel undergoing two surgeries. The undersigned finds that the record contains sufficient evidence to meet the definition, "injury requiring corrective or cosmetic surgery."

An ordinance does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Scott County Prop. Taxpayers Ass'n, Inc. v. Scott County,* 473 N.W.2d 28, 31 (Iowa 1991) (quoting *United States R.R. Retirement Bd. v. Fritz,* 449

U.S. 166, 175, 101 S.Ct. 453, 459, 66 L.Ed.2d 368, 376 (1980)). For legislation to violate the Iowa Constitution under the rational basis test, the classification must involve "*extreme* degrees of overinclusion and under inclusion in relation to any particular goal." *Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 10. The manner in which the City has chosen to declare dangerous animals that cause a substantial injury to another animal while out of the owners control easily passes the rational basis test.

B. High Risk Dog Ordinance is Constitutional

It should be re-emphasized that to the extent Ms. Helmers may have had a claim regarding the constitutionality of 18-58 of the Des Moines City Code if that issue arose in 2010 when the dog was first so-classified. At that time, the dog's owner was given a deadline to challenge the classification and several years then passed before the current matter. As such, any argument relating to this animal's classification is well-passed viability. *Shors*, 581 N.W.2d at 651.

Even if mootness is not an issue, the argument that 18-58 is unconstitutionally vague fails as there is direct contradictory authority. The City's Ordinance was challenged in *American Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416 (Iowa 1991). This portion of the ordinance was found to be constitutional. See, 469 N.W.2d at 418. Therefore, this argument must also be denied.

C. Helmers' Argument Regarding the Application of the Ordinance is Not Supported by Evidence of Law

Helmers last claim is that the City "arbitrarily applies the dangerous dog and high risk dog ordinance to residents of lower income and who own breeds resembling pit bulls." (Appellant's Brief at 42)

Notably the evidence presented for this claim is based on nothing but conjecture. There is no evidence in the administrative record to support such an argument. Indeed, the only evidence of a class or economic status in application is Ms. Helmers claiming "she knows of three other" individuals with pit bulls and dangerous animal designation who are of lower economic status. (Cert. Tr. 29-31). Many people can claim they know three people who may have something, or even *two things*, in common. However, that is more a sketchily constructed "telephone game" than evidence. By this logic one could argue the City must be applying the Ordinance disproportionately to three brunettes a person knows; or three I.P.A. aficionados; or perhaps the City is focused upon the dangerous animals belonging to those who pirate their parent's *Netflix* account. Helmer's claim is supported by the same absurd non-contextual logic.

CONCLUSION

For all the reasons stated above, the dog at issue in this matter was properly classified as a dangerous animal and the District Court's Ruling should be affirmed. Further, the Appellee should be allowed to take all measures to enforce the matter including an award of its costs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this brief contains 5,524 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF FILING

The undersigned counsel certifies that I did file the attached Brief with the Clerk of the Iowa Court via EDMS on October 30, 2017.

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COST CERTIFICATE

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