IN THE SUPREME COURT OF IOWA

No. 17-0794

DIANNA HELMERS,

Appellant,

v.

CITY OF DES MOINES,

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY

HON. LAWRENCE McCLELLAN, PRESIDING JUDGE

PETITIONER APPELLEE'S APPLICATION TO THE SUPREME COURT FOR FURTHER REVIEW OF THE APRIL 4, 2018 COURT OF APPEALS DECISION

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN RULING THAT MUNICIPAL ORDINANCE 18-196(6) WAS UNCONSTITUTIONALLY VAGUE?

II. DID THE COURT OF APPEALS ERR IN APPLYING AN INPROPER STANDARD IN INTERPRETING A MUNICIPAL ORDINANCE?

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STATEMENT SUPPORTING FURTHER REVIEW

Applicant/Appellee City of Des Moines files this Application for Further Review pursuant to Iowa R. App. P. 6.1103(1)(b)(1), (3) and (4) and respectfully states:

1. Appellee requests further review of the Court of Appeals majority opinion which reversed the determination of a hearing officer, subsequently affirmed by a district court on Writ of Certiorari, that the dog "Pinky" was properly declared a Dangerous Animal pursuant to Des Moines Municipal Ordinance 18-196(6). *Dianna Helmers v. City of Des Moines*, 17-0794, (Iowa Ct. App. April 4, 2018)

2. The Court of Appeals majority found Des Moines Municipal Ordinance §18-196(6) to be unconstitutional under the Iowa Constitution Art. I, §9 on the basis of vagueness as applied to this dog. However, in doing so, it erroneously applied or was contrary to the controlling precedent of this Court in the statutory interpretation of ordinances. See, *State v. Showens*, 845 N.W.2d 436, 441 (Iowa 2014); *Ackman v. Bd. of Adjustment*, 596 N.W.2d 96, 104-5 (Iowa 1999); *State v. White*, 545 N.W.2d 552, 557 (Iowa 1996).

3. Further, the Court of Appeals found Des Moines Municipal Ordinance §18-196(6) to be unconstitutional under the Iowa Constitution Art. I, §9 on the basis of vagueness as applied to this dog. However, in doing so, it erroneously

applied and contradicted *its own existing precedent* in statutory interpretation of ordinances, including the ordinance at issue in this matter. See, *Hildreth v. City of Des Moines*, 15-0961, 2016 Wl 7403705, at *3, (Iowa Ct. App., Dec. 21, 2016)

4. The Court of Appeals majority contradicted prior precedent of this Court as well as its own past precedent in ignoring it is the Appellant with the burden of proof in administrative cases under Des Moines Municipal Ordinance §3-21, thereby misapplying an important question of legal principal as well as precedent. *Abbas v. Iowa Insurance Division*, 893 N.W.2d 879, 891 (Iowa 2017)

5. The Court of Appeals majority relied upon impermissible settlement discussions that are irrelevant from a decision on the legal merits under Iowa Rule of Evidence 5.408 and, in addition, incorrectly interpreted what the parties settlement positions were for the purpose of a result-driven decision. *Lewis v. Kennison*, 278 N.W.2d 12, 14 (Iowa 1979)

6. The Court of Appeals error would present to this Court a case where there is an important question of a change in legal principals.

BRIEF SUPPORTING FURTHER REVIEW

I. STATEMENT OF THE CASE

On April 5, 2016, Sergeant Butler, Chief Humane Officer of the City of Des Moines, issued a Dangerous Animal Declaration to Charles Bickel, the then owner of the dog "Pinky," on the basis of the dog's actions pursuant to City Ordinance 18-

196(3) and (6). (Ex. 6, App. 135) The declaration was upheld by a hearing officer at a contested hearing and the Iowa District Court for Polk County upon Writ of Certiorari.

Ultimately, City Ordinance 18-196(6) was at issue before the Court of Appeals it states: "*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)

> (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)

Mr. Bickel was advised in the notice that he 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 relinquishing his ownership rights to the ARL. (Id.) Mr. Bickel voluntarily surrendered his ownership rights to Pinky after thinking about the matter overnight. (Ex. 6, Tr. pg. 47, l. 1-6, App. 142)

However, the following afternoon, April 7, 2016, Mr. Bickel 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 Hearing Officer Jonathan Gallagher, who upheld the dangerous animal declaration on April 27, 2016 pursuant to 18-196(6). On April 28, 2016, Mr. Bickel sold his ownership of Pinky to Dianna Helmers.

A timely Writ of Certiorari was filed to the Iowa District Court for Polk County. 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 Hearing Officer Kathleen O'Neill. On November 27, 2016, Hearing Officer O'Neill upheld the declaration yet again pursuant to 18-196(6). (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.

Oral argument was held before a five-judge panel of the Iowa Court of

Appeals at Grand View University on February 21, 2018. On April 4, 2018, a split decision with opinions from all five judges overturned the prior rulings, reversed the decision that the dog was a "dangerous animal," and remanded the matter to Iowa District Court. This Application for Further Review follows.

II. FACTUAL BACKGROUND

At the time of event giving rise to this matter, Charles Bickel ("Bickel") was the owner of Pinky, previously classified as a "vicious dog" per City ordinance on or about June 4, 2010. (Amended Ex. 7, App. 149-158) 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 "high-risk" dog, Bickel agreed to various requirements including: (A) keeping the dog in the house at all times unless the dog is securely leashed with a leash no longer than 6 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.

The uncontested facts are that the cat's owner saw Pinky in ***her*** yard with ***her*** cat, Rebel, being shaken while in the dog's jaws. (Ex. 2, pg. 2, App. 94). The cat's

owner yelled at the dog who then dropped the cat and ran off. The cat's owner indicated she believed this action saved the cat's life. (Ex. 5, App.135) When the cat was retrieved, it had various injuries including "punctures on her chest" and was taken to a veterinarian where the cat required surgery. (Ex. 2 App. 93) Rebel's subsequent medical care indicates the cat had two surgical procedures to close wounds caused by Pinky. (Ex. 3, App. 99-126) Among the injuries Rebel suffered were 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) Along with being unattended, this violated the June 3, 2010 agreement Mr. Bickel had entered into with the City in obtaining Pinky. At the time, Pinky had last been licensed in 2010. The license had never been renewed. (Tr. 33)

The dog was impounded and quarantined for ten days per City Ordinance. (Ex. 2, Tr. 31, 32, App. 95) The Dangerous Animal Declaration was issued on April 5, 2016 before the quarantine ended.

III. THE COURT OF APPEALS ERRED IN RULING THAT MUNICIPAL ORDINANCE 18-196(6) WAS UNCONSTITUTIONAL

A. Error in Ruling 18-196(6) was Unconstitutionally Vague

In Iowa reviewing court must presumes an ordinance is constitutional and gives the ordinance any reasonable construction to uphold it. See, *State v. Showens,*

845 N.W.2d 436, 441 (Iowa 2014) The Court of Appeals majority, as noted by Judge McDonald in dissent, did the complete opposite.

The Court of Appeals majority held that Des Moines Municipal Code 18-196(6) is unconstitutionally vague as applied to Pinky. (Opinion at 13-14)

The majority of the Court of Appeals majority found no person of reasonable intelligence could understand that Pinky's actions toward the cat would be covered by the terms "[h]as bitten another animal or human that causes a fracture, muscle tear, disfiguring lacerations or injury requiring corrective or cosmetic surgery." The City asserts this finding was clear error.

As stated by Judge McDonald in dissent, 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.") The majority never noted this in their opinions.

Further, the Court of Appeals majority stated that the phrase "corrective surgery" is also ambiguous. But again, as stated by the hearing officer and the district court, the appellees and Judge McDonald in dissent, there is no functional ambiguity in the terms. The majority's claim of there being no commonly understood term for "corrective surgery" is demonstrated to be incorrect by the hearing officer 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."

As Judge McDonald states, the phrase "corrective surgery" is easy to resolve and controlling precedent demands it be resolved in favor of the validity of the ordinance. 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).

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)).

Likewise, 18-196 (6) establishes a particular and substantive behavior that the dog caused a fracture, muscle tear, disfiguring laceration or an injury requiring corrective or cosmetic surgery. The evidence showed the dog caused the cat's injuries.

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").

It is undisputed that Pinky bit Rebel. The evidence demonstrated the dog broke the skin of the cat when it had the latter in its jaws while violently shaking it. This caused gruesome injuries of deep lacerations requiring 36 staples to close. (Ex. 4, App. 109) This trauma is sufficient to demonstrate an injury requiring corrective surgery. The veterinary records are uncontested and show 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) It is therefore not surprising that the district court adopted as its factual finding that the dog injured the cat through biting requiring corrective surgery. 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). The "common and generally accepted meaning" as stated by the hearing officer 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 (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 caused by the dog clearly satisfy the definition of dangerous animal under the code. The alternative offered by the Court of Appeals majority would imply without supporting evidence that the cat would have been just fine without requiring three-dozen staples

closing its wounds and other surgical services. To posit that this does not qualify as "corrective" or "cosmetic" as commonly understood is ludicrous and clear error.

The hypotheticals of the majority do not support a contention that 18-196(6) is vague. But, as noted by Judge McDonald, the hypotheticals are also *irrelevant and improper*. It is constitutionally immaterial that the word "animal" includes birds, opossums, or any other animal. The use of marginal hypotheticals is pointedly disallowed in as-applied challenges. See, *State v. Dalton*, 674 N.W.2d 111, 121 (Iowa 2004); *Devault v. City of Council Bluffs*, 671 N.W.2d 448, 451 (Iowa 2003). Yet, the Court of Appeals majority used them for the purpose of reaching their desired result, regardless of precedent. That is clear error.

The word "animal" is clear enough to provide constitutionally sufficient guidance to law enforcement officials. Whether the city would choose to enforce the ordinance following a dog bite of a bird or opossum is properly left to the discretion of city officials. "To avoid a rule from unduly restricting the regulation of certain matters, a certain degree of indefiniteness is necessary." *Fisher v. Iowa Bd. of Optometry Exam'rs*, 510 N.W.2d 873, 876 (Iowa 1994).

Therefore, Judge McDonald reasonably states that the majority's concern was less a constitutional one than a policy disagreement with the City's decision to permit enforcement where a dog bites an "animal" resulting in a specified injury. This is improper. *See, e.g., Haggblom v. City of Dillingham*, 191 P.3d 991 (Alaska

2008)(rejecting vagueness challenge, stating "[i]t is hardly surprising that a law enforcement officer uses his judgment in applying the law," and stating the use of "one's own judgment is hardly a concession of arbitrary action"); *Zollar v. City of Chicago Dept. of Admin. Hearings*, 44 N.E.3d 419, 422 (Ill. Ct. App. 2015) ("Zollar's real complaint is that the Chicago city council did not elect to include provocation by other animals within the definition of 'provocation' in the ordinance. But this does not make the ordinance vague as applied here. We will not second-guess the city council's decision.")

B. Error in Interpretation of "Vicious Propensities"

The majority of the Court of Appeals also concluded the ordinance is unconstitutionally vague because the term "vicious propensities" is not specifically defined and a reasonably intelligent person would not understand the scope of prohibited conduct. This was error as it ignored the long-standing legal precedent.

There is nothing inherently ambiguous in the phrase "vicious properties". "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). An ordinance is not unconstitutionally vague for lack of notice even when a key word is undefined. *See Lewis v. Jaeger*, 818 N.W.2d 165, 183 (Iowa 2012).

Ironically the majority provided a workable definition of "vicious propensities" as one exhibiting aggressive tendencies. That definition is based on the

common understanding of the words "vicious" and "propensities." That definition is sufficiently clear to provide a workable standard. As noted by the dissent, the term seems more clear and less vague than other language nonetheless held constitutional. *See, e.g.*, *Grayned*, 408 U.S. at 108 (holding ordinance prohibiting "noise or diversion which disturbs or tends to disturb the peace or good order" to be constitutional); *Showens*, 845 N.W.2d at 449 (noting "reasonable person standards" in criminal law are not constitutionally infirm); *Lewis*, 818 N.W.2d at 184 ("In looking at the ordinance in question, there is good reason to use an elastic term such as 'emergency.' In order to protect public safety, the ordinance must necessarily use language that is sufficiently flexible to cover a wide variety of factual situations that may arise. We do not require a legislative body to define every term.").

To the extent the term "vicious propensities," standing alone, might be Constitutionally vague, the ordinance actually defines and limits the term. Section 18-196 provides a "dangerous animal" is "any animal that has exhibited vicious propensities in present or past conduct." The ordinance then identifies seven instances in which an animal can be found to have exhibited vicious propensities. In 18-196(6) the city can declare an animal dangerous where the animal "[h]as bitten another animal or human that causes a fracture, muscle tear, disfiguring lacerations or injury requiring corrective or cosmetic surgery." The ordinance's identification of these seven instances removes any constitutional ambiguity

regarding the scope of prohibited conduct. See *State v. Coleman*, 907 N.W.2d 124, 146-47 (Iowa 2018)(ambiguity in statute not unconstitutional where provision was "understandable based on the greater context" of the remainder of the statute).

Despite this workable definition, the majority found the ordinance unconstitutionally vague because it is unclear whether the seven subparagraphs in section 18-196 are illustrative or exclusive. In reaching this conclusion, the majority misapplied the void-for-vagueness doctrine.

A court is required to affirmatively interpret and construe the ordinance "in a fashion to avoid a constitutional infirmity where possible." *Showens*, 845 N.W.2d at 441. For example, as noted by Judge McDonald, the majority could hold the seven subparagraphs under section 18-196 are the exclusive means by which the City could prove vicious propensities. This construction would be clear and consistent with case law, requiring a clarifying construction to preserve the constitutionality of an ordinance. *See, e.g.*, *State v. Coleman*, 907 N.W.2d 124, 146 (Iowa 2018) (stating ambiguous statute was not unconstitutional where the ambiguous provision was "understandable based on the greater context" of the remainder of the statute); *Showens*, 845 N.W.2d at 445 (we interpret the phrase 'to enable a sex offender to become familiar with a location where a potential victim may be found' as requiring a determination that familiarity was tied to the potential presence of victims."); *Lewis*, 818 N.W.2d at 185 (holding ordinance that vested discretion in city manager

to determine when an "emergency" required remedial action was not vague when the court added an implied term of "objective reasonableness") But the majority of the Court of Appeals did the opposite. As Judge McDonald noted the majority *applied the doctrine to create ambiguity instead of clarity and to find constitutional infirmity rather than preserve constitutional validity*. By doing so, the majority of the Court of Appeals, did not judge the case on the merits, but rather were driven by a desired result. This is clear error.

C. Error in Finding 18-196(6) Allowed too Much Discretion to City Officials

The majority's use of hypotheticals to demonstrate too much discretion being left to City officials by the ordinance was erroneous for an additional reason. The threshold inquiry in any void-for-vagueness challenge is whether the challenged ordinance is actually vague in the constitutional sense. As Judge McDonald noted, precedent has found that the vagueness doctrine does not prohibit the exercise of discretion—even unbridled discretion—in the enforcement of the law. *See State v. Iowa Dist. Ct. for Johnson Cty.*, 568 N.W.2d 505, 508 (Iowa 1997) ("In our criminal justice system, the decision whether to prosecute, and if so on what charges, is a matter ordinarily within the discretion of the duly elected prosecutor.").

An analogous example was provided by Judge McDonald comparing 18-196(6) to Iowa Code Chapter 321 which sets forth numerous traffic and vehicle equipment offenses with great specificity. Courts recognize "nearly all vehicles, if

followed for any substantial amount of time, commit minor traffic offenses" for which the driver could be punished. *See State v. Pals*, 805 N.W.2d 767, 776 (Iowa 2011). Regardless, the enforcement of the traffic laws is left wholly in the discretion of law enforcement officials. *See State v. Iowa Dist. Ct. for Johnson Cty.*, 568 N.W.2d at 508. No particular offense is unconstitutionally vague simply because law enforcement officials have complete discretion in enforcing the law.

A more applicable case to the present was the Court of Appeals recent decision *In re C.B.*, No. 16-2117, 2018 WL 347539, at *1 (Iowa Ct. App. Jan. 10, 2018). In that case, a child was adjudicated delinquent for committing sex acts against underage children. The child contended the law was vague as applied to him because he was also an underage child. He was thus both perpetrator and victim. The prosecutor had complete discretion to choose whom to prosecute, if anyone. The same Court of Appeals rejected the constitutional challenge, concluding the "prohibited conduct is well defined" and the prosecutor's "exercise of discretion… does not create a constitutional problem." *Id.* at *6. Again, the majority of the Court of Appeals rejected its own precedent.

When these precedents are applied to this matter the Court of Appeals majority's conclusion that 18-196(6) vests the chief humane officer with unlawful discretion must fail. The challenged ordinance provides a dangerous animal is an animal that "[h]as bitten another animal or human that causes a fracture, muscle tear,

disfiguring lacerations or injury requiring corrective or cosmetic surgery." The operative terms—animal, human, fracture, muscle tear, disfiguring lacerations, injury, and corrective or cosmetic surgery—are clear, readily capable of interpretation and construction, and sufficient to provide guidance in the enforcement of the law.

The majority of the Court of Appeals thus failed to establish that the challenged language is legally vague. This is simply a case in which a law enforcement officer has discretion to enforce or not enforce a relatively clear law. This does not rise to the level of a constitutional violation. *See, e.g., United States v. Foster*, 754 F.3d 1186, 1193 (10th Cir. 2014) (rejecting argument that existence of discretion to charge multiple offenses for the same conduct rendered statute vague).

D. Error in Deciding Concurrence Focus on Irrelevant Matters

The majority opinions of Judges Tabor and Danielson erred in the manner of interpretations of the ordinance under existing precedent, the concurrence of Judge Doyle must be addressed given the fractious nature of the Court of Appeals decision. The panel was a rarity, as it involved five-judges; all of whom wrote an opinion, four judges, two in the majority and two in the minority wrote detailed opinions. However, the fifth and determining vote creating the majority was by Judge Doyle which contained not a single citation to precedent, the record, or the ordinance.

Instead, Judge Doyle's opinion focused not upon merit, but settlement discussions. A subject that is not related to the legal merits of the case. As Iowa Rule of Evidence 5.408 states:

> Evidence of the following is not admissible--on behalf of any party--to prove the validity or amount of a disputed claim:
>
> (1) Furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim that was disputed on either validity or amount.
>
> (2) Conduct or a statement made during compromise negotiations about the claim.
>
> b. *Exceptions.* The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

None of the exceptions under IRE 5.408(b) were present. It is correct that the parties had made proposals to resolve this dispute after the hearing officer upheld the dangerous dog declaration, continuing from the affirmance of the district court to the time of the argument before the court of Appeals.

However, those discussions have nothing to do with the merits of the case, and an appellate decision which used such negotiations as the basis to render a decision on the merits is wholly inappropriate. Offers to compromise disputed claims are generally inadmissible as an admission of liability. See *Lewis v. Kennison*, 278 N.W.2d 12, 14 (Iowa 1979); *Lynch v. Egypt Coal Co*., 190 Iowa 1272, 1278,

181 N.W. 385, 387 (1921); Accord, *Hiram Ricker & Sons v. Students International Meditation Society*, 501 F.2d 550, 553 (1st Cir. 1974); *Sandman v. Hagan*, 261 Iowa 560, 571, 154 N.W.2d 113, 120 (1967); *Fed.R.Evid.* 408. There is therefore no basis for their use in determining the merits of whether a dog actions were violative of a City ordinance.

Compounding this error was that Judge Doyle's recitation of the City's position and proposals were false. Judge Doyle stated, *"…after issuing a dangerous dog declaration on April 5, 2016, the City of Des Moines has been unwavering in its mission to kill Pinky."* This is legally irrelevant and also incorrect. At the appellate argument, the panel, including Judge Doyle, asked or heard about the parties' settlement proposals. This included the fact that the City of Des Moines had consistently proposed sending the dog to a no-kill shelter in another state as an offer of compromise. For this error to be the determining reason for the Court of Appeals decision is plain error and calls for this Court to provide clarity and reverse the decision.

IV. THE COURT OF APPEALS ERRED IN THE STANDARD TO BE USED IN INTERPRETING A MUNICIPAL ORDINANCE

In this case, the hearing officer affirmed the chief humane officer's determination that the dog was a dangerous animal as set forth in 18-196(6). To determine whether the hearing officer's conduct was illegal, it is necessary to consider the rules governing the administrative hearing. The City's municipal code

provides that "formal and technical rules of evidence shall not apply in the conduct of the hearing." Des Moines, Iowa, Code § 3-21(g). Hearsay may be admitted if "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." *Id.* Notably, the municipal code places the burden of proof upon Helmers. Further, "[a]n appealable decision which has been memorialized in writing and signed by a city officer shall be prima facie evidence of the correctness of the facts specified therein." *Id.* § 3-22.

In the administrative hearing, it was Helmers' burden to establish by a preponderance of the evidence that the dangerous dog declaration was contrary to the law or this code or unsupported by the facts." *Id.*

Given these requirements, it was improper of the majority of the Court of Appeals to conclude that the hearing officer acted illegally in challenging the dangerous dog declaration pursuant to section 18-196(6).

There was substantial evidence in the record establishing the cat suffered an "injury" within the meaning of section 18-196(6). The veterinary records show the cat suffered a "large laceration/wound on the right side of the dorsal pelvic area, approximately 6 cm in diameter." The cat also suffered "punctures on the right thorax, just caudal to the thoracic limb." The dog inflicted "crushing injury to tissues resulting in devitalization" and "severe degloving wounds." A degloving wound is one in which an extensive section of skin is completely torn off the underlying tissue,

severing the blood supply, in essence, being flayed.

The substantial evidence established corrective surgery was undertaken to address the injuries sustained. As Judge McDonald pointed out in his dissent, "corrective" is defined as "having the power or property of correcting, counteracting, or restoring to a normal condition." *Corrective*, Webster's Third New International Dictionary Unabridged (1993). Surgery is commonly defined as "[t]he branch of medicine that deals with the diagnosis and treatment of injury, deformity, and disease by the use of instruments" and more specifically "[t]reatment based on such medicine, typically involving the removal or replacement of diseased tissue by cutting." *Surgery*, American Heritage Medical Dictionary (2007), https://medical-dictionary.thefreedictionary.com/surgery. The term corrective surgery thus means a manual or operative procedure to repair an injury and restore the injury to a normal condition.

Further supporting that there was corrective surgery, the veterinarian cleaned and debrided the cat's wounds. Debridement is the "usually surgical removal of lacerated, devitalized, or contaminated tissue." *Debridement*, Merriam-Webster Dictionary, https://www.merriamwebster.com/dictionary/debridement. The veterinary records show the providers used a Jackson-Pratt drain during the course of treatment. A Jackson-Pratt drain is "a special tube that prevents body

fluid from collecting near the site of . . . surgery." National Institutes of Health, *How to Care for the Jackson-Pratt Drain*, 1,1 (2008), https://www.cc.nih.gov/ccc/patient_education/pepubs/jp.pdf.

Images taken at the time of surgery show that 36 surgical staples ran the length of the cat's body. Finally, the veterinary records show billing for surgical services. The record establishes clearly that the cat underwent corrective surgery as would be reasonably be understood supporting the hearing officer's finding of the same.

In finding otherwise, the Court of Appeals majority erred. "Our charge is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence . . . supports the findings actually made." *Abbas v. Iowa Insurance Division*, 893 N.W.2d 879, 891 (Iowa 2017). "Evidence is substantial when a reasonable mind would accept it as adequate to reach the findings, even though the evidence would support contrary inferences." *City of Carroll v. Mun. Fire & Police Retirement Sys. of Iowa*, 554 N.W.2d 286, 288 (Iowa Ct. App. 1996). The cat's owner observed the dog violently shaking the cat, observed the cat run up a tree, and shortly thereafter observed the cat with significant injuries requiring corrective surgery. The only reasonable finding drawn from the facts is the dog caused the injury. One can safely conclude the hearing officer did not act

illegally in inferring the dog caused the cat's injuries rather than some other possible cause.

Likewise, the implication of the Court of Appeal's majority that under 18-196(6) "vicious propensities" seemingly needs some showing of prior incidents is mistaken. The provision at issue here does not have a requirement of multiple incidents as a prerequisite to establishing dangerousness. The inclusion of language in some provisions requiring multiple incidents to establish dangerousness does not call 18-196(6) into question, rather it supports the inference the city intentionally did not require multiple incidents to establish dangerousness under the provision at issue. *See Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 194 (Iowa 2011) ("Where the legislature includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion."). Again, the Court of Appeals majority's interpretation is error.

CONCLUSION

For all the reasons stated above, the dog was properly classified as a dangerous animal under 18-196(6). The Court of Appeals majority opinion of April 4, 2018 should be overturned and the district court's ruling affirmed and reinstated. 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

This Application for Further Review complies with the type-volume requirements of Iowa R. App. P. 6.1103(4)(no more than 5,600 words) because:

This Application has been prepared in a proportionally spaced typeface using 14-point Times New Roman and contains 5,439 words, excluding the parts of the Application exempted by Iowa R. App. P. 6.1103(4)(a).

Respectfully submitted,

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CERTIFICATE OF FILING

The undersigned counsel certifies that I did file the attached Application for Further Review with the Clerk of the Iowa Court via EDMS on April 11, 2018 and to all registered filers listed for the case.

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COST CERTIFICATE

I certify that, as this Brief was filed via EDMS, the Appellee did not incur a cost in printing.

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PROOF OF SERVICE

I, John O. Haraldson, attorney for Appellee, hereby certify that I served the Petitioner/Appellee's Application for Further Review to all parties of record by EDMS to the following counsel and further that I did additionally on April 11, 2018 I did also serve the Petitioner/Appellee's Application for Further Review to the same at:

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