**IN THE COURT OF APPEALS OF IOWA**

No. 6-069 / 05-0304
Filed April 26, 2006

**LEROY LATIKER,**
Plaintiff-Appellant,

**vs.**

**CITY OF COUNCIL BLUFFS,**
Defendant-Appellee.

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Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady Judge.

Leroy Latiker appeals from the district court order affirming the order of the Board of Public Health for the City of Council Bluffs and dismissing his action for damages against the City. **AFFIRMED.**

Anthony W. Tauke of Porter, Tauke & Ebke, Council Bluffs, for appellant.

Michael A. Sciortino and Don Bauermeister, Council Bluffs, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

**EISENHAUER, J.**

Leroy Latiker appeals from the district court order affirming the order of the Board of Public Health for the City of Council Bluffs (the City) and dismissing his action for damages against the City. He contends certain ordinances of the City of Council Bluffs are unconstitutionally vague, violate his procedural and substantive due process rights, and are preempted by State law. We affirm.

***I. Background Facts and Proceedings.*** On December 6, 2003, DeAnn Nelson, an animal control officer for the City of Council Bluffs, received a complaint. Latiker's neighbor's children alleged Latiker was beating his doberman/rottweiler puppy, "Shockey II," with a two-by-two board. Upon arriving at Latiker's residence, Nelson observed long nails driven through the porch door from the outside protruding through the door and exposed on the inside. Shards of glass were on the ground where the dog was kept. An open wound was observed on the dog's snout.

When questioned about hitting the dog with a board, Latiker denied it. However, Latiker admitted to hitting the dog with a smaller stick with nails hammered into the end of it. He also admitted to hitting the dog with a metal broom handle. He stated he had hit the dog four or five times on its hindquarters as discipline. Latiker admitted he had hit the dog enough times to make it yelp. When Nelson informed Latiker he could not hit the dog because it was animal cruelty, Latiker stated that he had a right to discipline his dog.

Nelson informed Latiker she was impounding the dog for its safety. She also issued him a municipal citation for animal cruelty pursuant to City of Council

Bluffs ordinance section 4.20.030. Although Latiker claims Nelson told him he would never get the dog back, Nelson denies it.

The municipal citation was later dismissed, apparently so the State could pursue more serious charges against Latiker for animal cruelty under Iowa Code chapter 717B (2003). On March 1, 2004, Latiker, although charged with serious misdemeanors, was convicted of two counts of simple misdemeanor animal neglect under Iowa Code section 717B.3(3). The City apparently wished to keep the puppy from Latiker. However, as a result of the misdemeanor convictions, forfeiture of the animal was not available under chapter 809A and forfeiture under section 717B.5 was also unavailable due to time restrictions set forth in the statute.

On March 5, 2004, the Director of Public Health informed Latiker by letter that the City was forfeiting the dog under the authority of ordinance section 4.20.030. Latiker appealed the decision to the Board of Health (the Board) and a hearing was held on April 7, 2004. The Board affirmed the Director's decision pursuant to ordinance sections 4.20.030, 4.20.060, and 4.20.070.

On April 23, 2004, Latiker appealed the Board's decision to the district court, seeking a stay of disposal by adoption of the dog and damages under 42 U.S.C. section 1983. Latiker posted a $500 bond and the court stayed the adoption of the dog.

On June 1, 2004, Latiker filed a motion for partial summary judgment, alleging ordinance section 4.20.030 is void because it is unconstitutionally vague. Following a July 12, 2004 hearing, the court denied the motion. Latiker filed a second motion for partial summary judgment on November 5, 2004, alleging

violations of procedural and substantive due process and that the city ordinances were preempted by State law. Following a November 22, 2004 hearing, the court denied this motion as well.

The matter came to trial on December 3, 2004. On January 18, 2005, the court entered its order dismissing Latiker's petition and affirming the Board of Health. Latiker filed his notice of appeal on February 15, 2005.

***II. Scope and Standard of Review.*** Because this case was tried as a law action, our review is for errors at law. *Frontier Prop. Corp. v. Swanberg,* 488 N.W.2d 146, 147 (Iowa 1992). In a case tried at law, the findings of fact are binding upon us if supported by substantial evidence. *Id.* Evidence is substantial if reasonable minds would find it adequate to reach the same conclusion, even if we might draw a contrary inference. *Id.* However, where constitutional issues are raised, we must make an independent evaluation of the totality of the evidence and our review is de novo. *Brummer v. Iowa Dep't of Corr.*, 661 N.W.2d 167, 171 (Iowa 2003). Although Latiker makes constitutional claims, he does not indicate whether he bases these claims on the United States or Iowa Constitution. However, our analysis is the same. *See Davenport Water Co. v. Iowa State Commerce Comm'n,* 190 N.W.2d 583, 593 (Iowa 1971) (holding that when constitutional provisions of both the federal Constitution and Iowa Constitution contain a similar guarantee, they are usually deemed to be identical in scope, import and purpose, and cases interpreting the federal standard are consulted for such light and guidance as they may afford).

***III. Vagueness.*** Latiker first contends the court erred in failing to determine ordinance section 4.20.030 is void because it is unconstitutionally vague. The ordinance reads in pertinent part:

> Except as hereinafter provided in Section 4.20.040, it shall be prohibited and a misdemeanor for any person, firm, or corporation to trap, poison, shoot, harm, treat cruelly, injure, torture, or destroy any animal within the city of Council Bluffs, Iowa. The director shall promptly investigate all reported cases of neglect, injury, or cruelty, and shall take such actions as he may deem appropriate.

Latiker asserts the portion of the ordinance referring to the director's ability to take "such actions as he may deem appropriate" is unconstitutionally vague.

When an ordinance is challenged on constitutional grounds, a presumption of constitutionality exists that can only be overcome by negating every reasonable basis upon which the ordinance could otherwise be sustained. *Cyclone Sand & Gravel Co. v. Zoning Bd. of Adjustment*, 351 N.W.2d 778, 780 (Iowa 1984). If vagueness can be avoided by a reasonable construction, consistent with the statute's purpose and traditional restraints against judicial legislation the ordinance must be interpreted in that way. *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 814 (Iowa 1983). We consider the entire legislative act and, so far as possible, interpret its various provisions in light of their relation to the whole. *MRM, Inc. v. City of Davenport*, 290 N.W.2d 338, 345 (Iowa 1980).

To sustain a challenge based on vagueness, the aggrieved party must show that the language in the ordinance does not convey a sufficiently definite warning of proscribed conduct, when measured by common understanding or practice. *Cyclone Sand*, 351 N.W.2d at 780. A statute is not vague when the meaning of its terms can be fairly ascertained by reference to a dictionary or if the words themselves have a common and generally accepted meaning. *Id.* at

782. Literal exactitude or precision is not required. *Devault v. City of Council Bluffs*, 671 N.W.2d 448, 451 (Iowa 2003). A statute is not unconstitutionally vague merely because a key word has not been specifically defined. *Id*.

In construing the questioned portion of ordinance section 4.20.030 regarding the actions that may be taken by the director, we must consider the other ordinances in the chapter. Ordinance section 4.20.010 gives those persons charged with enforcing the provisions of the chapter "the authority to seize and impound animals pursuant to the provisions of the chapter." Ordinance section 4.20.060 sets forth the procedure for impounding animals. Ordinance section 4.20.070 sets forth the three methods by which the City may dispose of an animal, including adoption. We conclude ordinance section 4.20.030 can be interpreted to allow the director to take the actions provided in the other ordinance sections in the same chapter. Accordingly, the section is not unconstitutionally vague.

***IV. Procedural Due Process.*** Latiker next contends the impoundment of animals as set forth in ordinance section 4.20.030 through section 4.20.060 is a violation of the right to procedural due process. He contends section 4.20.030 makes no provision for forfeiture of an animal, written notice to the owner, or a procedure to demand an explanation or receive a hearing.

Both the Iowa and United States Constitutions mandate that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. 1, § 9; U.S. Const. amend. XIV. A person is entitled to procedural due process when state action threatens to deprive the person of a protected liberty or property interest. *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682,

690 (Iowa 2002). Procedural due process requires that before there can be a deprivation of a protected interest, there must be notice and opportunity to be heard in a proceeding that is "adequate to safeguard the right for which the constitutional protection is invoked." *Id.* at 690-91.

Procedural due process requires, at a minimum, notice and an opportunity to be heard in a proceeding that is adequate to safeguard the right for which the constitutional protection is invoked. *City of Cedar Rapids v. Mun. Fire & Police Ret. Sys.*, 526 N.W.2d 284, 291 (Iowa 1995). We conclude due process was given. Latiker received oral notice of the impoundment of his dog on December 6, 2003 when Nelson removed the dog. Latiker received additional notice of the City's intention to forfeit the dog through adoption. This was provided in a letter he received March 5, 2004. That letter gave him the opportunity to be heard in an appeal to the Board of Health. In fact, a hearing was held on April 7, 2004 and Latiker and his attorney were present and participated.

Latiker argues he was not given notice of his ability to redeem his animal within three days of impoundment. Ordinance section 4.20.060 states that if the owner of an apprehended and impounded animal has not redeemed their animal within three days, they forfeit the animal. Here, Latiker's dog was not available for redemption because he was not apprehended and impounded under the provisions of section 4.20.060. Rather, the dog was impounded under the section 4.20.030 power to take action in cases of animal cruelty. As such, no notice of a three-day redemption period was required.

Because Latiker received notice and an opportunity to be heard, his procedural due process rights were not violated.

***V. Substantive Due Process.*** Latiker next contends the impoundment of animals as set forth in ordinance section 4.20.030 through section 4.20.060 is a violation of his substantive due process rights. He contends section 4.20.060 is unconstitutional as it applies to him specifically because it was applied in an arbitrary, capricious, and unreasonable manner.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects the individual from the arbitrary exercise of powers of government. *Hurtado v. California,* 110 U.S. 516, 527, 4 S. Ct. 111, 117, 28 L. Ed. 232, 236 (1884). To be constitutional, an ordinance must have a definite, rational relationship to the ends sought to be obtained. *City of Cedar Falls v. Flett,* 330 N.W.2d 251, 255 (Iowa 1983). The party challenging an ordinance has the burden of proving it unconstitutional and must negate every reasonable basis upon which the ordinance may be sustained. *Des Moines Metro. Solid Waste Agency v. City of* Grimes, 495 N.W.2d 746, 748 (Iowa 1993). When the reasonableness of a city ordinance is questioned, the ordinance will be presumed reasonable, unless the contrary appears on the face of the ordinance or is established by proper evidence. *Iowa City v. Glassman,* 155 Iowa 671, 674, 136 N.W. 899, 901 (1912).

Substantive due process violations are not easy to prove. *Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255, 265 (Iowa 2001). The substantive due process doctrine does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. *Id.* Rather, substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that shock the

conscience or otherwise offend judicial notions of fairness and that are offensive to human dignity. *Id.* With the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily shocked. *Id.*

Substantive due process forbids the government from infringing certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Bowers*, 638 N.W.2d at 694. The courts accord legislatures a highly deferential standard of review, although of course the legislature must stay within certain parameters. *Gravert v. Nebergall*, 539 N.W.2d 184, 186 (Iowa 1995).

> The state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

*Id.* (quoting *Lawton v. Steele*, 152 U.S. 133, 136-37, 14 S. Ct. 499, 501, 38 L. Ed. 385, 388 (1894)).

Latiker contends the ordinance is unduly oppressive as applied to him. He argues ordinance section 4.20.060 only applies to animals at large. He contends it is unduly oppressive then to use section 4.20.030 to impound or forfeit an animal that was at the owner's home. We disagree.

As previously discussed, ordinance section 4.20.030 allows the director to "take such actions as he may deem appropriate." When read in conjunction with the rest of the chapter, these actions may include the impounding of animals and

their forfeiture. The fact that ordinance section 4.20.030 does not specifically mention impoundment and forfeiture does not make it unconstitutional. It is in the interest of the public, generally, to protect animals from abuse by their owners. It is not unduly oppressive to impound and forfeit animals that have been abused by their owners as outlined in ordinance section 4.20.030.

***VI. Preemption.*** Latiker next contends that section 4.20.030 is preempted by Iowa Code sections 717B.3 and 809A.3.

A municipal ordinance is "inconsistent" with a law of the State and, therefore, preempted by it, when the ordinance prohibits an act permitted by a statute, or permits an act prohibited by the statute. *Goodenow v. City Council of Maquoketa*, 574 N.W.2d 18, 26 (Iowa 1998). When considering whether a city ordinance violates "home rule" powers, we seek to interpret the state law in such a manner as to render it harmonious with the ordinance. *Id.* If the ordinance cannot be reconciled with the statute, the statute prevails. *Id.*

When read in conjunction, Iowa Code sections 717B.3 and 809A.3 state that a person guilty of a simple misdemeanor, such as Latiker, is not subject to forfeiture of his animal. Latiker argues that these sections preempt the City's ordinances, making forfeiture an unavailable option. However, Iowa Code section 364.3(3) allows a city to "set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise." There is no provision in the law cited by Latiker stating a city cannot set more stringent rules than that set by the State; in other words, a city may allow for forfeiture of an animal in a simple misdemeanor case, as

occurred here. Accordingly, we conclude the city ordinance is not preempted by State law.

***VII. Double Jeopardy.*** Finally, Latiker contends his right to freedom from double jeopardy was violated when he was punished criminally for cruel treatment of animals pursuant to Iowa Code section 717B.3, as well as forfeiting his dog under ordinance section 4.20.030.

The Double Jeopardy Clause is intended to protect against: (1) retrial following an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense. *State v. Winstead*, 552 N.W.2d 651, 654 (Iowa Ct. App. 1996). Latiker alleges that the civil penalty of forfeiture arising out of ordinance section 4.20.030 is an additional punishment to the criminal penalties incurred for violation of section 717B.3. However, it has been determined that a dominant remedial purpose renders a civil penalty nonpunitive for double jeopardy purposes even if the penalty serves in some respect to act as a deterrent. *State v. Hill*, 555 N.W.2d 697, 702 (Iowa 1996). The purpose of forfeiture under ordinance section 4.20.030 is indisputably remedial in nature. Accordingly, no violation of double jeopardy has occurred.

As Latiker's claims fail, we affirm the district court's order affirming the order of the Board of Public Health for the City of Council Bluffs and dismissing his action for damages against the City.

**AFFIRMED.**