

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

To: Mayor Paul Soglin; Common Council

From: Michael P. May, City Attorney
Kevin Ramakrishna, Assistant City Attorney

RE: Legistar 32949: Response to Statements on Proposed Ordinance Regarding Mandatory Spaying/Neutering of Pit Bulls

Date: February 12, 2014

The City has received communications from the American Dog Breeders Association (ADBA) and the Best Friends Animal Society voicing their disagreement with the proposed ordinance requiring dogs meeting the definition of a pit bull to be spayed or neutered unless the dog meets certain exemption requirements. Specifically, the ADBA has issued a “cease and desist” request pursuant to copyright law, in addition to claiming the ordinance is invalid under the Constitution for due process and equal protection violations. The Best Friends Animal Society forwarded a resolution from the Tort Trial and Insurance Practice (TTIP) Section of the American Bar Association urging against “breed discrimination” on due process and other policy based grounds. These communications were forwarded to our office.

Analysis

The Wisconsin Court of Appeals has taken up the issues of due process and equal protection in *Dog Federation of Wis. v. City of South Milwaukee*, 178 Wis.2d 353 (Wis. Ct. App. 1993). In that case, the City of South Milwaukee passed an ordinance imposing a ban on ownership of “pit bulls” within the city. *Id.* at 356-359. Action was brought against the city arguing that the ordinance was unconstitutionally vague in violation of due process based on the difficulty in defining “pit bull” because the term represents a group of dogs rather than a specific breed. *Id.* at 358, 362. They also argued that the ordinance was a violation of equal protection for treating pit bulls differently than other dogs. *Id.* at 367. The court denied these arguments.

First, the court found due process was not violated because the ordinance was not impermissibly vague to dog owners. It stated “[A] person acquires a dog for certain physical and mental characteristics. The ordinance puts persons who have or acquire dogs on sufficient notice of the type of dog that is prohibited.” *Id.* at 364. Additionally, the court determined “whether a dog is within the ordinance ‘is a matter of evidence, not constitutional law.’” *Id. citing Florida v. Peters*, 534 So.2d 760 (Fla. Dist. Ct. App. 1988).

Second, no equal protection violation existed since the law did not impact a fundamental right or suspect classification and only required that the city show a reasonable purpose or justifiable

policy for enacting the law. *Dog Federation of Wis.*, 178 Wis.2d at 367. The court found that the record reflected a justifiable policy based on police reports and published articles for distinguishing between pit bulls and other breeds. *Id.* at 368-369.

These are the same legal arguments presented by Best Friends Animal Society, the TTIP Section of the ABA and the ADBA. While these groups are clearly opposed to these kinds of laws on policy grounds, the legal grounds are settled.

Please note, the ADBA letter makes cursory arguments related to procedural due process violations on the grounds of “forced deprivation” of property and to regulatory taking. Both issues have been discussed in other courts previously and no constitutional violations have been found. *See Wilkins v. Daniels*, 913 F.Supp.2d 517 (S.D. Ohio) (2012) (denying a temporary restraining order and injunction and finding no constitutional violations resulting from regulation of dangerous and exotic animals where plaintiffs were using such animals in business for profit); *Nicchia v. New York*, 25 U.S. 228, 230 (1920) (“Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the State without depriving their owners of any federal right.”) It is relevant for due process purposes that the City of Madison’s proposed ordinance does contain a review component for determining whether a dog is covered under the ordinance. *Id.* at 539.

As for the copyright issue presented by the ADBA, the ordinance does not copy any protected work from ADBA. The ordinance references breed standards from the AKC and UKC, not the ADBA, and no conformation standards are being published in the ordinance. Furthermore, the ADBA breed conformance standards are technical descriptors, and no specific language that was used from those standards without permission. Even if such language were used, the use would likely be deemed acceptable as a “fair use” of the material, but, under the circumstances, that analysis is beyond the scope of this memo.

This memo does not address the policy questions presented.

Conclusion

While it is clear that certain groups have taken a position against the proposed ordinance requiring spaying/neutering of pit bulls, the proposed ordinance does not violate constitutional standards or copyright law.