

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE

THE LOUISVILLE KENNEL CLUB, INC., ET AL.

PLAINTIFF

v.

CIVIL ACTION NO. 3:07-CV-230-S

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT

DEFENDANTS

**ORDER**

For the reasons stated in the Memorandum Opinion entered this date, **IT IS HEREBY**

**ORDERED AND ADJUDGED:**

1. Section 91.022 of the Louisville/Jefferson County Metro Government Code of Ordinances is declared unconstitutional insofar as it requires owners of unaltered dogs to obtain written approval of their enclosures. Plaintiffs' motion for summary judgment (DN 20) is **GRANTED** in this respect, and Metro's motion for summary judgment (DN 27) is **DENIED** to the same extent. Metro is hereby enjoined from enforcing § 91.022's written approval requirement.
2. Section 91.101 of the Louisville/Jefferson County Metro Government Code of Ordinances is declared unconstitutional insofar as it threatens to deprive pet owners of their property rights without a finding of guilt. Plaintiffs' motion for summary judgment (DN 20) is **GRANTED** in this respect, and Metro's motion for summary judgment (DN 27) is **DENIED** to the same extent. Metro is hereby enjoined from enforcing § 91.101 in the manner just described.
3. Plaintiffs' Fourth Amendment claims regarding §§ 91.073(D), 91.094(A), and 91.101(A) are hereby **DISMISSED** for lack of subject-matter jurisdiction. The Court is without authority to rule on the parties' motions for summary judgment as regards those claims.
4. With respect to all other claims presented in this case, Metro's motion for summary judgment (DN 27) is **GRANTED**, and plaintiffs' motion for summary judgment (DN 20) is **DENIED**.



**Charles R. Simpson III, Judge**  
**United States District Court**

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**MEMORANDUM OPINION**

This matter is before the Court on cross-motions for summary judgment. Plaintiffs (several pet-owners' groups, pet-related businesses, veterinarians, and individual pet owners) seek to overturn an amendment<sup>1</sup> to Chapter 91 of the Louisville/Jefferson County Metro Government Code of Ordinances on numerous grounds. They argue that various sections of the amended Code violate the federal Constitution and Kentucky law. Because of the pervasiveness of the alleged defects, Plaintiffs seek declaratory and injunctive relief voiding the ordinance *in toto*. Defendant, the Louisville/Jefferson County Metro Government ("Metro"), of course, disputes these allegations.

The parties (and the Court) agree that the case is ripe for summary judgment. There are no disputed facts; the only question is which side is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

Plaintiffs' objections to the ordinance in question may be grouped under five headings. First, plaintiffs argue that several sections of the ordinance are unconstitutionally vague. Others, they say, lack a rational relationship to a legitimate legislative purpose and therefore violate the Equal Protection Clause and the "substantive" component of the Due Process Clause. One provision

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<sup>1</sup> Ordinance No. 290, Series 2007, "An Ordinance Amending Chapter 91 of the Louisville/Jefferson County Metro Government Code of Ordinances ("Code") Pertaining to Unaltered Dogs, the Waiver of Metro Animal Service Fees Due to Financial Hardship, and the Quarantine of Animals (Amended by Substitution)." The Court will refer to this legislation as "the ordinance."

allegedly requires forfeiture of certain pets without adequate “procedural” Due Process. A fourth set of provisions, it is argued, authorize illegal warrantless searches and seizures of pet owners’ homes and property. Finally, plaintiffs argue that various sections of this local ordinance stand in conflict with state law. The Court will address plaintiffs’ arguments in turn.

## I. Vagueness

### A. Legal Standard

The “vagueness” doctrine stems from the Due Process Clauses of the Fifth and (here) Fourteenth Amendments. A vague law offends constitutional norms in that it fails both “(1) to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct, and (2) to establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner.” *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 556 (6th Cir. 1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). These standards are not to be “mechanistically applied,” *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982), and the Sixth Circuit has concluded that it is the “second prong—providing minimal guidelines to govern the conduct of law enforcement—[that] constitutes the more important aspect of the vagueness doctrine. *Belle Maer Harbor*, 170 F.3d at 556-57 (citing *Smith v. Goguen*, 415 U.S. 566 (1974)).

The rejection of “mechanistic” application of the terms of the vagueness standard means that “[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment.” *Hoffman Estates*, 455 U.S. at 498. A criminal statute or one that threatens constitutionally protected rights (particularly the First Amendment right to freedom of speech) is subject to more stringent review than an

economic regulation or an enactment enforced only by civil sanctions. Specifically, “an enactment imposing criminal sanctions or reaching a substantial amount of constitutionally protected conduct may withstand facial constitutional scrutiny only if it incorporates a high level of definiteness.” *Belle Maer Harbor*, 170 F.3d at 557 (citing *Hoffman Estates*, 455 U.S. at 494). The ordinance at issue imposes both civil and criminal penalties;<sup>2</sup> a higher degree of clarity is therefore required if it is to be upheld.

Counterbalancing this demand for heightened clarity is the fact that the plaintiffs have raised a facial vagueness challenge to the ordinance. They have alleged no facts regarding the ordinance’s enforcement; none of the plaintiffs has a specific “dog in this fight.” Moreover, the ordinance does not reach constitutionally protected conduct such as speech. Consequently, to show that a section of the ordinance is unconstitutional, they “must demonstrate that the law is impermissibly vague in all of its applications.” *Hoffman Estates*, 455 U.S. at 497. “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

### **B. Application**

Plaintiffs allege that the following provisions of the ordinance are unconstitutionally vague: its definitions of “dangerous dog” and “potentially dangerous dog,” and the exemptions from these definitions; its requirement of “proper” enclosures for unaltered dogs (that is, dogs that have not been spayed or neutered); its definitions of “nuisance,” “attack,” “restraint,” and “cruelty”; its impoundment provision; and its tethering requirements.

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<sup>2</sup> See Louisville/Jefferson County Code of Ordinances § 91.999 (2007).

### 1. “Dangerous” and “Potentially Dangerous” Dogs

(a) Section 91.001 of the ordinance defines as “dangerous” any dog that, *inter alia*, “maims or kills domestic pets or livestock when not under restraint.”<sup>3</sup> Plaintiffs argue that “[a]ny dog will ‘maim or kill’ any number of [domestic pets]—rabbit, mouse, rat, etc.—if presented with the opportunity.” (Pl.’s Br. 20.) Consequently, they argue, every dog in the city falls under the statutory definition of “dangerous.” On their view this is problematic because the ordinance’s breadth necessarily gives enforcement officers undue discretion in how it is enforced.

As noted above, however, the plaintiffs have the burden of showing that there is no case in which the application of the ordinance is clear. There are some animals that plainly fall within the statutory definition—one might think of an aggressive wolf-dog hybrid. Others—a lame, aging, well-trained lapdog, perhaps—obviously lack the propensity (or physical capacity) to chase and kill small pets. Moreover, the wording of the ordinance (active, present-tense verbs) indicate that a past history of attacking pets or livestock, or a known propensity to do so, is required for a finding of dangerousness. Because there are at least some applications of the ordinance that are clear, plaintiffs’ facial challenge to the ordinance’s “maim or kill” definition fails.

(b) The ordinance alternatively defines “dangerous dog” as “[a]ny dog which is declared by the Director [of Metro Animal Services] to be a dangerous dog under the procedures set forth in this chapter.”<sup>4</sup> Plaintiffs place significant emphasis on their assertion that the referenced sections do not further define “dangerous dog.” In their view this renders the definition hopelessly circular, leaving it completely up to the unfettered discretion of a government agent. In support, they cite a

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<sup>3</sup> A dog otherwise fitting this definition is considered “potentially dangerous” while it is properly restrained.

<sup>4</sup> An analogous definition applies to “potentially dangerous dogs.”

superficially similar case, *Folkers v. City of Waterloo*, 2007 U.S. Dist. LEXIS 76101 (D. Iowa 2007). In *Folkers*, the statute in question defined “dangerous dog” as “[a]ny dog declared to be dangerous by the city council or an animal control officer.” *Id.* at 28. The magistrate judge held (and the district judge adopted his reasoning) that “this circular definition does not provide any guidance to the public and is unconstitutionally vague.” *Id.* at 29. The apparent similarity of that ordinance to the one *sub judice* suggests to the plaintiffs that this Court should follow suit.

However, a careful reading of the ordinance rids us of this vagueness problem. The definition in question refers the reader to “the procedures set forth in this chapter,” which are contained in § 91.151, and specifically in two subsections, (C) and (D). The first instructs the Director to determine whether a dog found “at risk”<sup>5</sup> is “dangerous” or “potentially dangerous,” “as defined in this chapter.” Returning to the definitions section of the ordinance, one finds four definitions of “dangerous dog” and two definitions of “potentially dangerous dog” that the Director might use in determining whether a given animal is legally dangerous. This is not an endless circle between two code sections, or the kind of limitless grant of discretion to an animal control officer that the court confronted in *Folkers*.

Further, § 91.151(D) provides a definition of “dangerous dog” not seen in § 91.001: “If an at-risk dog under investigation has previously been classified as a potentially dangerous dog and exhibits escalating aggressive behaviors which threaten public safety or welfare, that circumstance alone may be grounds for . . . the Director to determine that the dog is a dangerous dog.” This procedure for declaring a dog “dangerous” gives specific external content to § 91.001's reference to “procedures set forth in this chapter.”

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<sup>5</sup> I.e. one found off of its owner's premises threatening or harming a person or animal, or walking free without restraint.

It may be argued that the definitions in question are inordinately convoluted, or poorly drafted, but they do not constitute the sort of unbounded discretion that should be declared unconstitutionally vague on its face. Accordingly the Court will grant summary judgment for the defendants as to these sections of the ordinance.

(c) Plaintiffs further ask the Court to void certain exemptions from the definitions of “dangerous” and “potentially dangerous” dogs, as set forth in § 91.150(B). Subsection (B)(1) states that an animal is not to be deemed (potentially) dangerous solely because it bites “[a]nyone assaulting its owner,” but not including a police officer attempting to subdue a suspect. Subsection (B)(4) exempts a dog from classification as dangerous if it attacks a person committing criminal trespass, but not if that person had committed merely a simple trespass.

Plaintiffs are surely correct to claim that these sections put impossible burdens on the cognitive ability of dogs. A dog in all likelihood cannot distinguish a police officer from anyone else subduing its owner; nor can it perceive the mental state of an individual entering onto its territory.

But that does not mean the law is vague. Plaintiffs claim that these exemptions set forth “incomprehensible standards,” such that neither citizens nor enforcement officers can understand their meaning sufficiently well to act in accordance with the law. (Pl.’s Br. 22.) This claim is simply in error. The question is whether the law is vague, and it is not. A dog may be deemed “dangerous” if it attacks a police officer or a non-criminal trespasser. An owner may avoid a declaration of dangerousness by restraining his dog unless and until he knows that a trespasser is a criminal or that an assailant is not a policeman. This may have the effects of limiting some lawful activity (i.e. the use of dogs for protection), and of offering some security to criminals who might otherwise expect

to be attacked more often by dogs. That policy choice, however, is for the Metro Council to make. It has not done so in an unconstitutional manner.

## **2. The Enclosure Requirement**

Plaintiffs next argue that § 91.022(A) is vague. That section provides that unaltered dogs are to be maintained “[i]n a proper enclosure as defined in this chapter; and as approved by the Director in writing.” Plaintiffs first contend that “because the Director cannot possibly enforce the provision against everyone to whom it applies, he must enforce it selectively.” (Pl.’s Br. 26.) The same could be said for speed limits, jaywalking laws, and the prohibition on underage drinking. There are far too many laws in 21st-century America for law enforcement to enforce every one of them every time it is broken. Certainly this state of affairs does not render every law and regulation that is not scrupulously enforced unconstitutionally vague.

Plaintiffs further claim that this enclosure requirement is illegally vague because it does not define what it means for an enclosure to be “proper.” “Enclosure” itself is defined by § 91.001 of the ordinance as “a fence or structure of sufficient height and construction to prevent the animal from leaving the owner’s property,” and to include (with certain exclusions) electric fences. True, it does not define “proper,” but the Court reads this adjective as a modifier, not as a word creating an entirely new term. The Oxford English Dictionary defines “proper” as “[s]uitable for a specified or implicit purpose or requirement; appropriate to the circumstances or conditions; of the requisite standard or type.” Thus “proper enclosure as defined in this chapter” simply means an enclosure meeting the specifications outlined in § 91.001. This section is not vague.

## **3. “Nuisance”**

Plaintiffs next argue that the ordinance is unconstitutionally vague in its definition of “nuisance.” That definition (again, part of § 91.001) begins as follows:

Any act of an animal or its owner that irritates, perturbs or damages rights and privileges common to the public or enjoyment of private property or indirectly injures or threatens the safety of a member of the general public.

True, the bare words of the first paragraph of the definition bear some resemblance to a statute criminalizing assembly on the sidewalk “in a manner annoying to persons passing by.” *Coates v. Cincinnati*, 402 U.S. 611, 611 & n.1 (1971). The *Coates* Court declared that ordinance unconstitutionally vague, *id.* at 614,<sup>6</sup> but the enactment at bar differs from the *Cincinnati* law in a crucial respect: It contains a long list of forms of conduct that are, *ipso facto*, nuisances. These include allowing an animal to make so much noise as to “result in a serious annoyance or interference with the reasonable use and enjoyment of neighboring premises”; permitting an animal to damage another’s property; allowing an animal to chase or attack passers-by, vehicles, or other animals, and so forth.<sup>7</sup>

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<sup>6</sup> The Court also found that it violated the constitutional rights of free assembly and association, 402 U.S. at 615, but those rights are not at issue here.

<sup>7</sup> The complete enumeration is as follows:

(a) Allowing or permitting an animal to habitually bark, whine, howl, mew, crow or cackle in an excessive or continual fashion or make other noise in such a manner so as to result in a serious annoyance or interference with the reasonable use and enjoyment of neighboring premises.

(b) Allowing or permitting an animal to damage the property of any person other than its owner or caretaker, including but not limited to getting into or turning garbage containers or damaging gardens, flowers, plants or other real or personal property or leaving fecal material on the property of another person.

(c) Allowing or permitting an animal to molest, chase, snap at, attack or attempt to attack passers-by, vehicles, domestic pets or livestock.

(d) Allowing or permitting an animal to habitually or continually roam or be found on property of other than its owners or caretakers, trespassing school grounds, parks or the property of any person.

(continued...)

“Where a statute lists specific things followed by a more general one, the canon of *ejusdem generis* provides guidance.” *United States v. Mabry*, 518 F.3d 442, 447 (6th Cir. 2008). This canon serves just as well when the specific items follow the general one. It instructs us to “attribute ‘the same characteristic of discreteness shared by all the [following] items’ to the term in question.” *Id.* (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004)); see also *Canton Police Benevolent Ass’n of Canton v. United States*, 844 F.2d 1231, 1236 (6th Cir. 1988) (under the “time-honored rule of *ejusdem generis*, . . . a general word in a statute takes its character from the specific words with which it appears”).

Applying *ejusdem generis* to the ordinance at hand, the broad terms of the preamble paragraph are significantly narrowed. A “nuisance” is not just *any* act that irritates or perturbs another. Rather, it is an act having the same general characteristics as the acts enumerated in the rest of the section: allowing an animal to threaten or injure another’s person or property, or his enjoyment thereof. The ordinance’s definition of “nuisance” is sufficiently clear that it cannot be held unconstitutionally vague on its face.

#### 4. “Attack”

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<sup>7</sup>(...continued)

(e) Allowing or permitting an animal to be housed or restrained at a distance, that, in the discretion of the animal control officer, poses a threat to the general safety, health and welfare of the general public.

(f) Allowing or permitting an animal to be maintained in an unsanitary condition.

(g) Allowing or permitting an animal to habitually charge in an aggressive manner a fence separating from another property when the usual residents are taking pleasure in such property without provoking such animal.

The ordinance (again, in § 91.001) defines “attack” (circularly) as “[a]n unprovoked attack in an aggressive manner on a human that causes a scratch, abrasion, or bruising, or on a domestic pet or livestock that causes death or injury.” Plaintiffs claim this is unconstitutionally vague for two reasons.

First, they argue that “it sweeps into its limitless reach all dogs that would cause ‘injury’ to a ‘domestic pet.’” (Pl.’s Br. 36.) This, they say, “results in a definition that effectively includes every dog in Louisville.” (*Id.*) Plaintiffs’ suggestion is that because a dog can be declared (potentially) dangerous if it has attacked another animal, and because any dog is likely to attack a rat or guinea pig given the opportunity, the ordinance treats an irrationally large number of dogs as “dangerous.” This argument would bear some weight if a dog could be seized and declared dangerous because of the hypothetical possibility that it *might* commit an attack, but those consequences follow only on the occasion of an *actual* attack.<sup>8</sup> There is nothing vague about the ordinance’s definition of “attack” once we get past its circularity.<sup>9</sup>

Second, plaintiffs claim that the definition applied to human victims is vague. Any dog in Louisville, they say, could legally “attack” someone by causing a scratch or bruise in some “harmless situation[.]” This argument ignores the first half of the sentence defining the word in question: “An *unprovoked attack in an aggressive manner . . .*” (emphasis added). Plaintiffs fail to suggest even a hypothetical situation in which a dog could, without provocation, harmlessly (but in an aggressive manner) assault a human being and thereby cause a scratch, abrasion, or bruising. Even if they had done so (the Court does not see how they could), the nature of their facial challenge

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<sup>8</sup> See Louisville/Jefferson County Metro Government Code of Ordinances § 91.150(A).

<sup>9</sup> Say, by substituting a common English understanding of the word “attack” into the statutory definition.

