

2007

# Kanab City v. Jeff Popowich : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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KANAB CITY,	:	
	:	<b>BRIEF OF APPELLEE</b>
Plaintiff/Appellee,	:	<b>KANAB CITY</b>
	:	
v.	:	
	:	
JEFF POPOWICH,	:	Case No. 20070768-CA
	:	
Defendant/Appellant.	:	

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APPEAL FROM A DECISION OF THE  
SIXTH JUDICIAL DISTRICT COURT, KANE COUNTY  
HONORABLE DAVID L. MOWER, DISTRICT COURT JUDGE

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## **STATEMENT OF JURISDICTION**

The Court of Appeals has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e).

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

1. Did the trial court correctly decline to dismiss the charges after presentation of the City's case in chief?

The issue was preserved by Appellant's motion to the trial court. (Tr. 22:1-5.) Decisions on a motion to dismiss are questions of law afforded no deference to the trial court's ruling. State v. Krueger, 1999 UT App. 54, 975 P.2d 489, 493.<sup>1</sup>

2. Did the trial court correctly rule that the ordinances are not unconstitutionally vague?

The issue was preserved by Appellant's argument. (Tr. 26:19-23.) Claims of unconstitutionality based upon vagueness are questions of law reviewed for correctness. Krueger at 495.

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<sup>1</sup>Mr. Popowich's motion is more correctly characterized as a motion for directed verdict. The standard of review, however, is the same. State v. Hirschi, 2007 UT App 255, ¶ 15, 167 P.3d 503, 508.

**PROVISIONS OF CONSTITUTION, STATUTES,  
ORDINANCES AND RULES**

The governing provisions are those contained in the City's animal ordinances at § 13-200.01 et seq contained in Appellant's Addendum 2.

**STATEMENT OF THE CASE**

**A. NATURE OF THE CASE**

This case arises from a criminal prosecution for the violation of ordinances of Kanab City which limit the number of dogs kept on residential premises, require licensing of the dogs and impose kennel licensing requirements for keeping more than two dogs on residential property.

**B. COURSE OF PROCEEDINGS**

On May 8, 2006, the City filed an information in Justice Court alleging against Jeff Popowich four counts of violation of § 13-200.02.010 of the Revised Ordinances of Kanab City for owning, keeping or harboring a dog over three months of age within the City limits without licensing the animal and one count of illegally operating a kennel. (R. 6-8.) The Justice Court, Honorable Gary Johnson, entered a judgment, imposition of sentence and probation on January 3, 2007. (R. 18-19.) Mr. Popowich filed a notice of appeal to the Sixth District Court on January 5, 2007. (R. 20-21.)

The matter was tried de novo to the district court on May 11, 2007. Upon completion of the City's case, Mr. Popowich moved to dismiss. (Tr. 22:1-5.) After arguments on the motion, the trial court took the motion under advisement. (Tr. 33:24.) In a carefully reasoned memorandum opinion dated June 3, 2007, the district court denied Mr. Popowich's motion to dismiss, ruled against his claims of constitutionality, and entered judgment in favor of the City. (Addendum A, R. 36-45, 57-59). Mr. Popowich entered his notice of appeal to this Court on September 13, 2007.

### **C. STATEMENT OF FACTS**

In December of 2005, Cecil Campbell, the City's animal control officer, received "numerous anonymous complaints" of barking dogs and an illegal kennel at the residence of Mr. Popowich. (Tr. 10:24 through 11:7.) Upon inspection, Mr. Campbell observed four dogs over the age of three months on the premises twice during the month of December. (Tr. 11:9 through 12:18.) Mr. Campbell was aware that Mr. Popowich had licensed two dogs in 2005 matching the descriptions of two of the ones he saw in December. (Tr. 12:19 through 13:1.)

Mr. Campbell observed the same four dogs at the Popowich residence in January, February, March and April of 2006. (Tr. 15:20 through 15:6.)

Mr. Campbell notified Mr. Popowich, along with other previous dog licensees, that licensing in 2006 was required. (Tr. 13:7 through 14:21.) From City licensing information, Mr. Campbell determined that Mr. Popowich's dogs were not licensed in 2006. (Tr. 22 through 18:22. *See also* Trial Exhibit 7.)

On examination by his counsel, Mr. Popowich testified that he did not apply for a kennel license in 2006. (Tr. 35:20 through 36:11.) He also admitted that he did not license his two dogs in 2006. (Tr. 36:1-2.) He testified that the two other dogs at the residence belonged to his ex-girlfriend. (Tr. 36:12-22.) He also testified that those dogs were at his residence three or more days at a time. (Tr. 37:17-19.)

### **SUMMARY OF ARGUMENT**

Mr. Popowich's appeal challenges the trial court's conclusions that the City's animal ordinances are constitutional and were properly applied to him under the facts of this case. While Mr. Popowich challenges the trial court's factual findings, he does so in a legally insufficient way. He has failed to marshal all of the evidence in favor of the court's findings and, more significantly, failed to demonstrate that those findings are flawed in light of the marshaled evidence. Having failed the marshaling requirement, Mr. Popowich lacks any basis for challenging those findings.

The constitutional challenges raised by Mr. Popowich fail on several counts. There is no constitutionally protected interest in the ownership or keeping of dogs. Therefore, no due process concern, including that of vagueness, is presented by the ordinances at issue here. Moreover, the ordinances are not vague. It is clear on their face that: 1) Mr. Popowich is required to license his dogs and failure to do so may result in prosecution; and 2) maintaining more than two dogs on a residential premise requires a kennel license and failure to obtain the license may result in prosecution. Whether, as alleged by Mr. Popowich, the kennel license provisions may be unconstitutional as applied to him or others is a question which is not properly before this Court because that issue is not ripe and not justiciable because he did not apply for a kennel license.

Mr. Popowich did not license any of the four dogs kept on his premises in 2006. The trial court properly concluded that Mr. Popowich had violated the licensing requirement. Mr. Popowich, by his own testimony, established that the four dogs were kept on the premises for more than the three-day period provided by the ordinance. Therefore, as a matter of statutory construction, Mr. Popowich violated the kennel licensing requirements. Whether those requirements may be unconstitutionally vague as applied to others is an issue Mr. Popowich lacks standing to raise.

The factual conclusions of the trial court are not really in dispute in this matter, partially due to the failure to adequately marshal the evidence, but also because the facts are undisputed. The trial court's legal conclusions are correct as a matter of law. The decision of the trial court should, therefore, be affirmed.

### **ARGUMENT**

#### **I. MR. POPOWICH HAS FAILED TO MARSHAL ALL OF THE EVIDENCE TO CHALLENGE THE TRIAL COURT'S FINDINGS.**

Utah courts have always imposed a significant burden to marshal the evidence supporting a trial court's findings in order to challenge the findings on appeal.

To mount a successful attack upon a trial court's findings of fact, an applicant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below. In other words, an appellant who challenges the sufficiency of the evidence supporting a finding of fact has the burden of combing the record for and compiling all of the evidence that supports the finding of fact and explaining why that evidence is legally insufficient to support the finding of fact.

Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶ 21, 54 P.3d 1177, 1183

(emphasis added). Selective citation of some or most of the facts is insufficient.

State v. Waldron, 2002 UT App 175, ¶ 15, 52 P.3d 21, 23. *See also* Rule 24(a)(9),

Utah R. App. P. (requiring marshaling of all record evidence). To satisfy the

marshaling requirement, a party must “present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.” Chen v. Stewart 2004 UT 82, ¶ 77, 100 P.3d 1177, 1195 (emphasis added, citation omitted).

Mr. Popowich has failed to carry his marshaling burden in two respects. He has not marshaled all of the evidence. One example of this failure is particularly egregious because it supports the conclusion that the two dogs allegedly belonging to his girlfriend were in the Popowich residence for more than three days.

Q. Okay. Ah, were her dogs ever there, ah, three or more days at a time?

A. Yes.

(Tr. 37:17-19.)

Mr. Popowich’s second failure is that he merely makes his marshaling statement without giving any indication which findings might be supported by the evidence and demonstrating that the evidence is insufficient as to any particular finding by failing to “ferret out the fatal flaw in the evidence.” West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah 1991).

Given the failure to meet the significant marshaling burden, this Court “need not consider the challenge to the sufficiency of the findings.” Tanner v. Carter, 2001

UT 18, ¶ 17, 20 P.3d 332, 336.

## **II. THE TRIAL COURT CORRECTLY DECLINED TO GRANT MR. POPOWICH'S MOTION TO DISMISS.**

Mr. Popowich maintains that the City failed to establish prima facie violations of the ordinances at issue. In doing so, he argues that the City was essentially required to prove several negatives at trial, specifically that the City must show that the dogs do not fall within exceptions to the ordinances to establish a prima facie case of violation of those ordinances. That simply is not the law in Utah. *See State v. Smith*, 2005 UT 57, ¶ 19, 122 P.3d 615, 621 (noting that the law does not often impose upon the prosecution the burden to prove a negative). The *Smith* court concluded that exemptions from laws are typically construed as affirmative defenses which the defendant must prove rather than having the prosecution disprove. *Id.* *See also State v. Ansari*, 2004 UT App 326, ¶ 10 100 P.3d 231, 235 (holding that the State need not “affirmatively prove absence of attempt, conspiracy, and solicitation” to establish a prima facie case). *State v. Swenson*, 838 P.2d 1136, 1138 (Utah 1992) (holding that the defendant had the initial burden to establish that he was eligible for an exemption from security laws); *State v. Knoll*, 712 P.2d 211, 214 (Utah 1985) (holding that self defense is a justification for killing but that the prosecution was not required to establish lack of self defense to establish a prima

facie case).

By the close of the City's case, the evidence established without doubt that Mr. Popowich licensed his two dogs in 2005 and 2007, but did not license them in 2006 and still kept the dogs in his home. That evidence established a prima facie showing of violation of the licensing ordinance. There was, therefore, no basis for dismissing that part of the action.

Arguably, at that point in the trial, the presence of the dogs for three consecutive days had not been established. That, however, is not significant for two reasons. First, Mr. Popowich moved to dismiss all of the charges, not just the charges of operating an illegal kennel. Given that a significant portion of the charges had been established (4 of the 5 counts in the information), and absent a more specific motion to dismiss, the trial court properly declined to grant dismissal at that time.

Secondly, however, the trial court's ultimate ruling did not rely on the three-day requirement for harboring, even though that was eventually established by testimony from Mr. Popowich.<sup>2</sup> The trial court concluded that "there is a prima

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<sup>2</sup>The trial court incorrectly found that there was "no evidence that the Defendant sheltered the dogs for three consecutive days or more." (R. 39; *See* Tr. 37:17-18.) That error, however, is harmless.

facie showing that the Defendant kept the dogs.” (Memorandum Decision, R. 39.)

It was appropriate for the trial court to defer the ruling on the motion to dismiss. The charge of failing to license the additional dogs was supported by the evidence. As a result, there was no basis for its dismissal en masse with the other charges, as requested by Mr. Popowich.

### **III. MR. POPOWICH HAS FAILED TO CARRY HIS BURDEN TO ESTABLISH THAT THE ORDINANCES ARE UNCONSTITUTIONAL.**

“It is a basic principle that legislative enactments are endowed with a strong presumption of validity.” State v. Mohi, 901 P.2d 991, 1009 (Utah 1995). “The burden of successfully challenging the constitutionality of a statute is on the appellant, and this burden is a heavy one.” *Id.* Mr. Popowich simply has not carried the heavy burden to establish unconstitutionality of the ordinances.

Mr. Popowich provides a muddled analysis of the constitutional issues which he attempts to establish. What is discernable from his argument is that he is basing his claim on alleged vagueness of the ordinances. The claim of vagueness is a due process claim.

In order to establish that statutes are so vague that they violate due process, a defendant must demonstrate either (1) that the statutes do not provide the kind of notice that enables ordinary people to understand what conduct is prohibited, or (2) that the

statutes encourage arbitrary and discriminatory enforcement. And where, as here, a defendant's claim does not concern an alleged infringement of a First Amendment right, the defendant must first show that the statute is vague as applied to his conduct, before he can attempt to show that the statute is vague in all of its applications. This means that a defendant may not complain of the vagueness of the law as applied to others if its language affords the defendant adequate notice that his conduct was proscribed.

State v. Ross, 2007 UT 89, ¶ 27, 174 P.3d 628, 633 (punctuation, citations omitted.) Mr. Popowich has failed to satisfy the requirements for demonstrating a vagueness/due process claim.

The threshold issue in a substantive due process challenge is whether a plaintiff has identified a property interest subject to constitutional protections. Where a plaintiff fails to provide an identifiable, constitutionally protected property interest, he fails to state a claim for due process violations. Goss v. Lopez, 419 U.S. 565, 572-73, 95 S. Ct. 729, 735, 42 L. Ed. 2d 725 (1975); Bd. of Regents v. Roth, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972). If a sufficient property interest is demonstrated, substantive due process claims are limited to determining whether the governmental action is arbitrary, without a rational basis, or shocks the conscience. Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 528 (10th Cir. 1998).

Where there is no constitutionally protected property interest restricted by the ordinance or the convictions under the ordinance, it is inappropriate for the court to consider an asserted facial challenge. State v. Holm, 2006 UT 31, ¶ 77, 137 P.3d 726, 747. Because there is no protected property interest involved here, Mr. Popowich's vagueness challenge is a limited as-applied challenge. *Id.* (noting that "[a] plaintiff who engages in some conduct that is clearly proscribed [by statute] cannot complain of the vagueness of the law as applied to the conduct of others." (citation omitted)).

The U.S. Supreme Court has long treated ownership of dogs as only a qualified property right. "Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens." Sentell v. New Orleans & C.R. Co., 166 U.S. 698, 704, 17 S. Ct. 693, 695, 41 L. Ed. 1169 (1897). Citing Sentell, the Supreme court later concluded that "[p]roperty 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." Nicchia v. New York, 254 U.S. 228, 230, 41 S. Ct. 103, 65 L. Ed. 2d 235 (1920). As a result,

there is no constitutionally protected property interest which is impacted by regulation of dog ownership or possession.

More recently, the South Dakota Supreme Court has observed that “[in almost all jurisdictions, municipal power to regulate animals kept as pets is broadly construed.” City of Marion v. Schoenwald, 631 N.W.2d 213, 217 (S.D. 2001). “Restrictions on the aggregate number of dogs in households are commonly upheld against constitutional attacks.” *Id.* (citations omitted).

In City of Marion, the City ordinance limited households to owning four dogs, only two of which could weigh over 25 pounds. The plaintiff brought a substantive due process challenge to the weight restriction in the ordinance. The court reviewed the issue in the light of a broad legislative grant of police power to municipalities and the judicial deference which preclude courts from substituting their judgment for that of local decision makers. *Id.* at 216-17. The court noted that pet ordinances meet legitimate public safety objectives. *Id.* at 218. It concluded that legislating numbers of dogs over a certain weight was sufficiently related to public health and safety and that there was a rational relationship between the ordinance and the problems caused by large dogs. *Id.* at 218-19.

An ordinance restricting ownership to two dogs at one residence was at issue in Bal Harbour Village v. Welsh, 879 So. 2d 1265 (Fla. App. 2004). The primary challenge raised by the plaintiff in Welsh was a grandfathering argument, *i.e.*, that he owned more than two dogs before the ordinance was enacted and that it could not therefore be enforced against him. Applying a rational basis analysis, the court relied on the municipal police power to regulate and abate nuisances. The nuisance abatement discussion was based upon the procedural posture of the case. The ordinance was substantive and, therefore, could not be retroactively applied were it not for the exception for government enactments to abate nuisances. The court concluded that any property right in ownership of more than two dogs was properly compromised by police power regulations for health and welfare.

In Holt v. City of Sack Rapids, 559 N.W.2d 444 (Minn. App. 1997) *review denied*, the court dealt with ordinances regulating temporary housing of animals. The ordinance at issue was fairly liberal and the facts related to the plaintiffs were straightforward.

Respondent City of Sack Rapids passed ordinances in February and March 1995 limiting the number of dogs that can be kept on residential premises. The significant provisions of the ordinances are: (1) only two dogs over six months of age may be kept in one residential unit; (2) persons wishing to have three or four adult dogs in their residential unit may apply for a permit to do

so; and (3) anyone legally keeping more than four adult dogs on a residential premises on the effective date of the ordinance can obtain an exemption and retain those dogs, provided every owner of property within 100 feet of the dog owner's premises consents. Permits for keeping three or four dogs are obtainable on a showing that the dogs are licensed and vaccinated; testimony indicated that at least four such permits have been granted.

Holt at 444.

In responding to the constitutional challenge, the Holt court applied the rational basis scrutiny of due process challenges to health and safety ordinances. It rejected an argument that the City had failed to consider empirical evidence in reaching its legislative result. The court noted that “[it is at least debatable that limiting the number of dogs per residential unit is substantially related to controlling the problems of dog noise and odor, or to the health and general welfare of the community as affected by dogs.” Holt at 446. The court concluded that there was a rational relationship between the ordinance and dog problems. The plaintiffs then argued that there was no evidence that limiting the number of dogs would prevent noise and odor problems and that the real problem is that of owners and not the dogs. The court deferred to the City’s legislative judgment. “Neither the existence of alternative methods for resolving the dog problems nor a debate as to the best methods provides a basis for declaring ordinances unconstitutional.” *Id.* The court

then reviewed the number of cases upholding limits on numbers of dogs and cats.

Finally, we note that many jurisdictions have upheld similar ordinances. *See, e.g., Gates v. City of Sanford*, 566 So.2d 47, 49 (D.C. Fla.1990) (upholding ordinance limiting number of dogs and cats to three of each in a residence); *People v. Strobridge*, 127 Mich. App. 705, 339 N.W.2d 531, 535 (1983) (upholding ordinance prohibiting keeping more than three dogs per residential unit); *People v. Yeo*, 103 Mich. App. 418, 302 N.W.2d 883, 885- 86 (1981), cert. denied, 457 U.S. 1134, 102 S. Ct. 2961, 73 L. Ed. 2d 1351 (1982) (same); *Downing v. Cook*, 69 Ohio St.2d 149, 431 N.E.2d 995, 997 (1982) (upholding ordinance prohibiting keeping more than three adult dogs on comparatively small residential lots); *Village of Carpentersville v. Fiala*, 98 Ill. App. 3d 1005, 54 Ill. Dec. 521, 522, 425 N.E.2d 33, 34 (1981), cert. denied, 456 U.S. 990, 102 S. Ct. 2271, 73 L. Ed. 2d 1285 (1982) (upholding ordinance limiting the number of dogs in a single-family residence to two and the number of dogs in a single-family unit in a multiple housing building to one); *State v. Mueller*, 220 Wis. 435, 265 NW 103, 105-06 (1936) (holding that limiting to two the number of dogs kept per residential unit was not an unreasonable exercise of police power).

Holt at 446-47. The Holt court summarized its analysis in its statement of its decision.

To prevail, appellants must show that the lack of any rational relationship between Sack Rapids' ordinances limiting the number of dogs per residential unit and the public health, safety, or general welfare is not even debatable. They do not meet this burden; therefore, the ordinances cannot be held unconstitutional.

Holt at 447.

A Florida appellate court addressed limitations on pets in Gates v. City of Sanford, 566 So.2d 47 (Fla. App. 1990), *rev. dismissed* 576 So.2d 287 (Fla. 1990).

In Gates, the ordinance limited each residence to three dogs and three cats. The plaintiff challenged the ordinance because it was “based solely on the number of animals as opposed to type of animals, weight of animals, size of property, etc.”

Gates at 49. The holding was simple.

We find that the City’s ordinance limiting each residence to three dogs and three cats is not unreasonable in light of the potential detriment to public health, safety and general welfare because of an overabundance of animals in a residential area. We further find that the constitution does not require a case specific classification such as type of dog, size of dog, or size of residence. The difficulty in enforcing such an ordinance would, in effect, render the ordinance meaningless.

Gates at 49.

In Downing v. Cook, 431 N.E.2d 995 (Ohio 1982), the issue was the constitutionality of an ordinance limiting the number of dogs kept on a 4000 square foot lot to three. The plaintiff had four dogs and wanted to have an additional puppy for show purposes. As in other cases, the court relied on the scope of police powers and applied a rational basis analysis, concluding that the ordinances were constitutional. Addressing concerns raised by the plaintiff, the court found no constitutional infirmities in the other arguments.

[The ordinance] is not invalidated by the fact that appellant could conceivably keep four dogs on her premises without creating undue noise, odor, filth, danger or other conditions traditionally characterized as nuisance conditions. Nor is applicant precluded by the ordinance from engaging in her hobby of breeding and showing dogs, but only from keeping more than three adult dogs in her home.

Because appellant failed to prove that [the ordinance] is unreasonable, arbitrary or unrelated to the public health, safety, morals or general welfare of the public, the judgment of the Court of Appeals upholding the ordinance is affirmed.

Downing at 997.<sup>3</sup>

In Village of Carpentersville v. Fiala, 425 N.E.2d 33 (Ill. App. 1981) *cert. denied*, 456 U.S. 990, 102 S.Ct. 2271, 73 L. Ed.2d 1285 (1982), the court analyzed an equal protection challenge as well as the substantive due process issues related to police powers, affirming the ordinances.

In State v. Hutchinson, 624 P.2d 1116 (Utah 1980), the Supreme Court held that cities and counties have broad discretion under the legislative grant of general welfare powers to address their individual problems.

The complexities confronting local governments, and the degree to which the nature of those problems varies from county to county and city to city, has changed since the Dillon Rule was

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<sup>3</sup>Reaching the same conclusion, the court in Gates noted that “the Gates were found to have maintained their residence and animals in an admirable fashion,” but that the ordinance was nonetheless enforceable against them. Gates at 48-49.

formulated. Several counties in this State, for example, currently confront large and serious problems caused by accelerated urban growth. The same problems, however, are not so acute in many other counties. Some counties are experiencing, and others may soon be experiencing, explosive economic growth as the result of development of natural resources. The problems that must be solved by those counties are to some extent unique to them. According a plain meaning to the legislative grant of general welfare power to local governmental units allows each local government to be responsive to the particular problems facing it.

Hutchinson at 1126. The court held that a statute which grants municipalities the power to act for the general welfare of its citizens must be “liberally construed to accord to a municipality wide discretion in the exercise of the police power.”

Hutchinson at 1125.

[C]ourts uniformly regard the [general welfare] clause as ample authority for a reasonable exercise, in good faith, of broad and varied municipal activity to protect the health, morals, peace and good order of the community . . . and to carry out every appropriate object contemplated in the creation of the municipal corporation.

Hutchinson at 1125 (emphasis added).

Consistent with the dog licensing cases from other jurisdictions, Utah courts also apply a broad “reasonably debatable” standard in substantive due process challenges to ordinances. “[I]f an ordinance could promote the general welfare; or even if it is reasonably debatable that it is in the interest of the general welfare we will uphold it.” Smith Inv. Co. v. Sandy City. 958 P.2d 245, 252 (Utah App.

1998). Courts will not substitute their judgment for that of local decision makers. “If the ordinance and the stated policies and reasons underlying it do, within reason, debatably promote the legitimate goals of increased public health, safety, or general welfare, we must allow [the City’s] legislative judgment to control.” *Id.* at 253.

Here, the City has exercised its legislative judgment to limit the number of dogs which may be maintained on or in residential premises as a matter of public health and welfare. The ordinances are not vague on their face. It is clear that one who keeps dogs must license them and that failure to do so will result in prosecution. It is also clear that if an individual wishes to keep more than two dogs over three months old, that person must comply with the kennel licensing requirements or risk prosecution. The ownership or keeping of dogs is not a constitutionally protected right which is free from police power regulation. There is no evidence that the City’s ordinances are irrational on their face. There is, as correctly determined by the trial court, no basis for Mr. Popowich to assert a facial challenge to the ordinances.

The trial court also correctly concludes that Mr. Popowich must demonstrate the ordinances to be unconstitutionally vague as applied to him. The evidence, however, fails to support an as-applied challenge. There is no question that

Mr. Popowich chose not to license his dogs in 2006. That is a clear violation of the licensing ordinance. Moreover, the evidence, by Mr. Popowich's own testimony, established that the other two dogs were at his residence on occasion for three or more consecutive days. That would require that he obtain a private kennel license and satisfy the conditions of the ordinance for doing so. He never applied for the license, making an as-applied challenge to the kennel ordinance moot and not ripe as a matter of law. In short, the trial court correctly concluded that there was no as-applied constitutional violation in charging Mr. Popowich with the ordinance violations.

The ordinances at issue here are presumed to be valid as a matter of law. Mr. Popowich has failed to satisfy the "heavy" burden to demonstrate that they are unconstitutional. Moreover, they are not, as a matter of law, unconstitutionally vague as argued by Mr. Popowich.

### **CONCLUSION**


Mr. Popowich has failed to adequately challenge the factual findings of the trial court. Based upon the clear weight of the evidence presented at trial, Mr. Popowich violated the City's licensing and kennel ordinances. Those ordinances are constitutional and were properly applied by the trial court in this matter. It is

therefore appropriate for this Court to affirm the trial court's ruling and the City respectfully requests that it do so.

DATED this 25<sup>th</sup> day of February, 2008.

**WILLIAMS & HUNT**

By

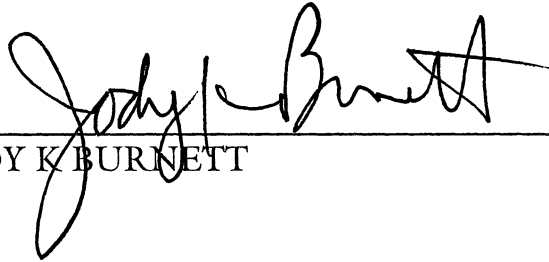
  
\_\_\_\_\_  
JODY K BURNETT  
Attorneys for Plaintiff/Appellee Kanab City

140539.1

**CERTIFICATE OF SERVICE**

I hereby certify that on the 25<sup>th</sup> day of February, 2008, two (2) true and correct copies of the foregoing **Brief of Appellee Kanab City** were mailed postage prepaid thereon, by first class mail in the United States mail, to the following:

**Counsel for Defendant/Appellants**  
**ARIC CRAMER**  
**Cramer Latham, LLC**  
90 East 100 South, Suite 201  
St. George, UT 84770

  
\_\_\_\_\_  
JODY K BURNETT


## ADDENDUM

### Addendum A.

Memorandum Decision on Motion to  
Dismiss; Findings of Fact and Conclusions of  
Law

KANE COUNTY

JUN 11 2007

 Clerk  
DISTRICT COURT

DISTRICT COURT, KANE COUNTY, UTAH

76 NORTH MAIN

KANAB, UT 84741

Telephone: (435) 644-2458 Fax: (435) 644-2052

CITY OF KANAB,

Plaintiff,

vs.

JEFF POPOWICH,

Defendant.

**MEMORANDUM DECISION ON  
MOTION TO DISMISS; FINDINGS  
OF FACT AND CONCLUSIONS  
OF LAW**

Case No. 071600013

Assigned Judge: DAVID L. MOWER

This case is an appeal from the conviction and sentence in the justice court. Trial de novo was held on May 11, 2007. Plaintiff was represented by Van Mackelprang. Defendant was present and represented by Aric Cramer. At the close of the Plaintiff's evidence, Defendant made a Motion to Dismiss. The Court took this Motion under advisement. The Defendant presented his evidence.

Based on the evidence heard, the Court now enters the following

**FINDINGS OF FACT**

1. At the time of the events in this case, the Defendant resided at 213 East 330 North in Kanab City, Utah.
2. In December of 2005, Cecil Campbell received anonymous complaints about the dogs at the Defendant's home at the above address. People complained that there were more than two dogs in the residence, and that they were barking.

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MEMORANDUM DECISION ON MOTION TO DISMISS; FINDINGS OF FACT AND  
CONCLUSIONS OF LAW, Case number 071600013, Page -2-

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3. Mr. Campbell has been employed by Kanab City as an animal control officer for more than fourteen years.
4. Mr. Campbell is also responsible for reading water meters on people's properties in Kanab City. He goes to every residence in Kanab City at least once a month.
5. After receiving complaints about the dogs, Mr. Campbell went onto Defendant's property in conjunction with reading the water meter.
6. Mr. Campbell was on the property on two separate dates in December of 2005. Each time he saw four dogs on the couch in the front window. The window had no curtains.
  - a. He saw a Shepherd, a Rottweiler, and two mixed-breed dogs.
  - b. He testified that all dogs were over one year old based on their size.
7. Mr. Campbell knew that the Defendant licensed two dogs in year 2005. He had licenses for the Shepherd and the Rottweiler. See Plaintiff's Exhibits 4 and 5 .
8. Mr. Campbell testified that the appearance of the two dogs (the Shepherd and the Rottweiler) that he saw in the window on two separate dates in December of 2005 matched the description on the licenses that the Defendant obtained for these animals.
9. In January of 2006, Mr. Campbell sent out a reminder to all the residents of Kanab City to license their dogs for the year 2006. This reminder was sent to the

MEMORANDUM DECISION ON MOTION TO DISMISS; FINDINGS OF FACT AND  
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Defendant. It is marked as Plaintiff's Exhibit 1.

10. In February of 2006, Mr. Campbell sent out a second reminder to everyone whose dogs were licensed in 2005 but had not yet been licensed in 2006. This second reminder was also sent to the Defendant. It is marked as Plaintiff's Exhibit 2.
11. Defendant failed to renew his two licenses in 2006. His name appears twice on the Kanab City Expired Licenses list for 2006 marked as Plaintiff's Exhibit 6.
12. In 2006, Mr. Campbell was on the Defendant's property in January, February, March, and April.
13. Every time he was on the Defendant's property, he saw the same four dogs in the large window of the Defendant's home that he witnessed in December of 2005. Two of the dogs were the dogs that were previously licensed in 2005.
14. On April 13, 2006, a police officer gave the Defendant a citation for having an illegal kennel and for not licensing his dogs.
15. Defendant licensed the Shepherd and the Rottweiler in year 2007. See Plaintiff's Exhibits 8 and 9.
16. Plaintiff's evidence ends here.
17. Defendant testified that he has never applied for a kennel license and did not apply for dog licenses in the year of 2006.

MEMORANDUM DECISION ON MOTION TO DISMISS; FINDINGS OF FACT AND  
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18. Defendant failed to do so because he believed that signing the license application would include his consent to searches of his house. He did not desire to give such consent.
19. The two mixed-breed dogs seen in his house were his ex-girlfriend's dogs. The ex-girlfriend's name is Bonnie Allred.
20. She stayed at the Defendant's home when the Defendant was out of town.
21. Her dogs were in the Defendant's home more than three to four days at a time.
22. The Shepherd and the Rottweiler are six (6) and four (4) years old respectively.
23. The two mixed-breed dogs that belong to Bonnie Allred are three (3) and five (5) years old.
24. Defendant licensed the Shepherd and the Rottweiler in 2005 and 2007.

**MOTION TO DISMISS**

The Motion to Dismiss came at the close of the Plaintiff's evidence. I analyze this Motion by looking at the Plaintiff's evidence only.

Defendant is charged with five counts: (1) Counts 1 through 4 - Dog License Violation and (2) Count 5 - Illegal Dog Kennel. Defendant argues that Count 5 should be dismissed because the ordinance under which Defendant was charged is unconstitutionally vague. He argues that Counts 1 through 4 should be dismissed because the Plaintiff failed to present prima facie evidence of its accusations. I analyze each of these arguments.

MEMORANDUM DECISION ON MOTION TO DISMISS; FINDINGS OF FACT AND  
CONCLUSIONS OF LAW, Case number 071600013, Page -5-

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**A. Vagueness**

Defendant claims that Kanab City Ordinance, Subsection 13-200.04.050 is unconstitutionally vague. (The Ordinance is marked as Plaintiff's Exhibit 11.) This Subsection reads: "[i]t shall be the duty of the animal control officer or police officer to periodically inspect all registered kennels ... ." Defendant explains that it is vague because it is unclear how the inspection is going to be carried out. It is not specified whether an animal control officer would inspect the premises or the house. Therefore, a person reading this provision does not know what to expect.

The Defendant urges me to look at the Ordinance as a whole and declare the entire Section 13-200.04 under which Subsection 13-200.04.050 is found to be unconstitutional for vagueness. I do not agree with this analysis.

Generally, a law may be challenged for vagueness either (1) on its face or (2) as applied to the facts of a particular case. See *State v. Green*, 99 P.3d 820, 831 (Utah 2004). Here, Defendant cannot argue that the Ordinance is vague on its face because the Ordinance (and specifically Section 13-200.04 Kennels) does not implicate constitutionally protected conduct. *Id.* Thus, the Ordinance must be vague as applied to the facts of this case to be unconstitutional.

In this case, the Defendant has never applied for a kennel license. He is not facing inspections. Thus, it is impossible to analyze whether the subsection about inspections is vague

MEMORANDUM DECISION ON MOTION TO DISMISS; FINDINGS OF FACT AND  
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as applied to the facts of this case.

I conclude that Defendant's vagueness argument fails. Defendant's Motion to Dismiss should be denied as to Count 5.

**B. Sufficiency of the Evidence, Counts 1 and 2**

To survive the Motion to Dismiss on Counts 1 and 2, the Plaintiff must make a prima facie showing that the Defendant violated Subsection 13-200.02.010(A)(1). This Subsection says that

[i]t is unlawful for any person to own, keep or harbor a dog over the age of three months within the limits of this city without making application to the city for that purpose and paying to the city an annual registration fee.

Counts 1 and 2 concern the Shepherd and the Rottweiler that were licensed in 2005 and 2007. There is proof that the Defendant licensed these dogs under his name in years 2005 and 2007.

The verb "to own" is not defined in the Ordinance. Therefore, I interpret this term according to its commonly accepted meaning. See *State v. Souza*, 846 P.2d 1313, 1317 (Utah App. 1993). "To own" is defined in the Merriam-Webster Online Dictionary as "to have or hold as property; ... to have power or mastery over." The evidence of licensing in the years 2005 and 2007 is sufficient to show that the Defendant was the owner of these two dogs in 2006. The dogs are over three months of age. They were kept in the Defendant's home which is located in the Kanab City.

MEMORANDUM DECISION ON MOTION TO DISMISS; FINDINGS OF FACT AND  
CONCLUSIONS OF LAW, Case number 071600013, Page -7-

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Defendant failed to license these dogs in year of 2006. I conclude that there is evidence on each element of the crime sufficient to establish a prima facie case that the Defendant violated Subsection 13-200.02.010(A)(1).

Defendant's motion to dismiss Counts 1 and 2 is denied.

**C. Sufficiency of the Evidence Counts 3 and 4**

Counts 3 and 4 concern the two mixed-breed dogs. The evidence shows that Mr. Campbell saw these dogs in the Defendant's home on two separate dates in December of 2005 and in January, February, March, and April of 2006. These dogs were never licensed under the Defendant's name.

I need to analyze whether the Defendant owned, kept or harbored these dogs. The Ordinance contains no definition of "own" or "keep" but there is a definition of "harbor" in Subsection 13-200.01.010. It is under the definition of owner. It is defined as follows: "[a]n animal shall be deemed to be harbored if it is fed or sheltered for three consecutive days or more."

There is no evidence that the Defendant sheltered the dogs for three consecutive days or more. I know that the dogs were in the home on two separate occasions in December of 2005 and at least one day in January, February, March, and April of 2006. Therefore, the Defendant did not harbor the dogs.

However, I think that there is a prima facie showing that the Defendant kept the dogs.

MEMORANDUM DECISION ON MOTION TO DISMISS; FINDINGS OF FACT AND  
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“Keep” is also not defined in the Ordinance, which means that the standard dictionary definition applies. The applicable definition from the Merriam-Webster Online Dictionary is “to retain in one’s possession or power.”

It is not difficult to conclude that if the dogs were seen in the Defendant’s house on random days for five months, the dogs were retained by the Defendant in his possession.

Defendant is the owner and the resident of the house.

Defendant’s Motion to Dismiss should also be denied as to Counts 3 and 4.

**D. Conclusion**

Defendant’s Motion to Dismiss is denied.

Based on all the evidence heard, the Court enters the following

**CONCLUSIONS OF LAW**

1. Defendant violated Subsection 13-200.02.010(A)(1) of the Kanab City Ordinance.
2. Defendant is the owner of the Shepherd and the Rottweiler.
3. These dogs are over the age of three months.
4. Defendant did not apply for dog licenses for these dogs in year of 2006.
5. The dogs were not licensed in year of 2006.
6. In 2006, they were kept in the Defendant’s home located at 213 East 330 North in Kanab City, Utah.

MEMORANDUM DECISION ON MOTION TO DISMISS; FINDINGS OF FACT AND  
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7. It is proven beyond a reasonable doubt that the Defendant is guilty on Counts 1 and 2.
8. Defendant kept and harbored the other two mixed-breed dogs in his house in Kanab City in 2005 and 2006. See Findings of Fact, ¶21.
9. These dogs are over the age of three months.
10. Defendant did not apply for dog licenses for these dogs in years 2005 and 2006.
11. These dogs were not licensed in 2005 and 2006.
12. It is proven beyond a reasonable doubt that the Defendant is guilty on Counts 2 and 3.
13. Defendant violated Subsection 13-200.04.010 of the Kanab City Ordinance.
14. Subsection 13-200.04.010 reads: “[e]xcept as otherwise provided in this chapter, no more than two(2) dogs ... which are three (3) months of age or older shall be kept at any residence at any time.”
15. In December of 2005 and January, February, March, and April of 2006, Defendant kept four dogs over three months of age in his residence.
16. Defendant did not apply for a kennel permit in 2005 and 2006.
17. Defendant had an illegal kennel in his home.
18. It is proven beyond a reasonable doubt that the Defendant is guilty on Count 5.

MEMORANDUM DECISION ON MOTION TO DISMISS; FINDINGS OF FACT AND  
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Date 6.9, 2007

Digitally signed by David L Mower  
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certificate, OU = DST TrustID Personal Certificate  
Reason: I am the author of this document  
Date: 2007.06.08 15:27:43 -06'00'

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David L. Mower  
District Court Judge

**Certificate of Notification**

On 6.12, 2007, a copy of the above was sent to:

Van Mackelprang  
Kanab City Attorney  
126 East 100 South #3  
Kanab, Utah 84741

Aric Cramer  
Attorney for Defendant  
20 North Main Street, Suite 313  
St. George, Utah 84770

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Holly Ramsey