

1989

Kate Greenwood; Andrew Greenwood; and Ralph Greenwood, President Of American Dog Breeders' Association, Inc. v. City of North Salt Lake : Brief of Appellant

Utah Supreme Court

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BRIEF

890355

IN THE UTAH SUPREME COURT

KATE GREENWOOD and ANDREW)	
GREENWOOD, personally, and)	
RALPH GREENWOOD both personally	)	Supreme Court Case
and as president and member of	)	No. 890355
American Dog Breeders')	
Association, Inc.,)	
)	
Plaintiffs and Appellants,)	
)	
vs.	)	District Court Case
	)	No. 40876
CITY OF NORTH SALT LAKE, an)	
incorporated municipality,)	
)	
Defendant and Respondent.)	

APPELLANT'S BRIEF

Appeal from the Findings and Judgment of the
Second District Court, State of Utah
Honorable Rodney S. Page, of the Constitutionality
of North Salt Lake City's breed specific vicious dog ordinance.

ARGUMENT PRIORITY CLASSIFICATION NO. 14(b)

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TABLE OF CONTENTS

<u>Section</u>	<u>Page No.</u>
Table of Authorities.	ii
Jurisdiction and Nature of Proceeding	1
Statement of Issues	1
Determinative Provisions.	2
Statement of The Case	2
Statement of Relevant Facts	5
Summary of Arguments.	9
Argument.	10
Conclusion.	26

Addendum

Exhibit A: North Salt Lake City Ordinance
13-20-16E

Exhibit B: District Court's Findings of Fact

Certificate of Delivery

TABLE OF AUTHORITIES

Cases Cited

<u>Baggett v. Bullitt</u> , 377 U.S. 360 (1964) . . . . .	.14
<u>Grayned v. City of Rockford</u> , 408 U.S. 104 (1972) . . . . .	.11
<u>Malan v. Lewis</u> , 693 P.2d 661 (Utah 1984) . . . . .	.21
<u>Papachristou v. City of Jacksonville</u> , 405 U.S. 156 (1972). . .	.15
<u>Royster Guano Co. v. Virginia</u> , 253 U.S. 412 (1920) . . . . .	.19
<u>Smith v. Goguen</u> , 415 U.S. 566 (1974) . . . . .	.13

Statutes Cited

Utah Code Annotated, Section 10-8-65, as amended . . . . .	.17
Utah Code Annotated, Section 78-2-2(3)(j), as amended.	1

Constitutional Provisions Cited

Constitution of the United States, Amendment XIV, Section 1	2
Constitution of the State of Utah, Article I, Section 24.	2

JURISDICTION AND NATURE OF PROCEEDING

Jurisdiction is conferred upon the Utah Supreme Court to hear this appeal by Utah Code Annotated, Section 78-2-2(3)(j), 1953 as amended. This statute sets forth the Utah Supreme Court's appellate jurisdiction over "orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction." The nature of this proceeding is an appeal from a final order of Second District Court, the Honorable Rodney S. Page, in and for Davis County, State of Utah. The order of that Court found North Salt Lake City's breed specific vicious dog law to be constitutionally valid. There is no grant of original appellate jurisdiction to the Court of Appeals as would be applicable to this case.

STATEMENT OF ISSUES

I. Whether the trial court erred in ruling that North Salt Lake City Ordinance 13-20-16E was not vague and violative of substantive due process, as measured by constitutional standards?

II. Whether the trial court erred in ruling that the North Salt Lake Ordinance does not violate constitutional standards of equal protection of the law under the Fourteenth Amendment of the U.S. Constitution and violate Article I, Section 24 of the Constitution of the State of Utah.

III. Whether the trial court erred in ruling that the

evidence established that predominant physical characteristics are determinative of breed differentiation in the species of dog?

DETERMINATIVE PROVISIONS

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV,

Section 1, [Citizenship - Due process of law - Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF UTAH, ARTICLE I, SECTION 24:

[Uniform operation of law.]

All laws of a general nature shall have uniform operation.

STATEMENT OF THE CASE

In January, 1987, the City Council of Defendant-Respondent, North Salt Lake (hereinafter "North Salt Lake") adopted the North Salt Lake Animal Control Ordinance, chapter 13-20-1, et seq. The ordinance was thereafter amended in August, 1987, to include the American Pit Bull Terrier as a specified breed, and as well, to include an administrative remedy provision.

On or about February 3, 1987, Kate Greenwood, Andrew Greenwood, Ralph Greenwood and American Dog Breeders Association filed suit against North Salt Lake City in response to certain

breed specific portions of the afore-mentioned animal control ordinance. The substance of the Plaintiffs-Appellants' (hereinafter "Greenwoods") claims were that the ordinance constituted a "taking" of property without due process of law, that the ordinance denied equal protection of the laws, that the ordinance was too vague and ambiguous to be enforceable, and that the ordinance bore no rational relationship to its objective, all in violation of Greenwoods' constitutional rights.

The particular language of the North Salt Lake animal control ordinance, as was made subject of this lawsuit, is as follows:

Section 13-20-1: DEFINITIONS

"22. VICIOUS ANIMAL: Any animal which is dangerously aggressive or uncontrollable, including but not limited to, any animal which has bitten or in any other manner attacked any person or animal. Any animal by its unique nature or breeding has known propensities to be aggressive towards any person or animal."

Section 13-20-16:

- "A. PREMISES, MUZZLE: It shall be unlawful for the owner of any fierce, dangerous, or vicious animal to permit such animal to go or be off the premises of the owner unless such animal is under restraint and properly muzzled as to prevent it from injuring any person or property."
- "E. HEREDITY CHARACTERISTICS: Certain breeds of dogs which by their unique hereditary characteristics, owner, training, and instruction, or mistreatment has a propensity to be vicious. These breeds include, but are not limited to, the Bull Terrier, the American Staffordshire Terrier, Staffordshire Terrier, staffordshire [sic] Bull Terrier, American Pit Bull Terrier, Tosa, Shar-pei, and any other dog determined to be vicious [determined to be vicious under subsection B]."

"F. LICENSING REQUIREMENTS: The dogs identified under this Section:

1. Must be licensed under the procedures and fee set forth in this ordinance.
2. Must be kept in a fenced yard, dog run, or other structure which is at least six feet in height, by six feet wide, by ten feet in length.
3. Must be on a leash and properly muzzled when they are out of a fenced area.
4. Must, at the time of licensing, provide proof of a fully paid homeowners or rental insurance policy containing a personal liability clause in the amount of \$100,000.
5. The insurance policy, agent and number will be recorded upon licensing, and the agent will be notified if the dog is cited for violating this chapter.
6. These requirements must be met before a dog license will be issued."

Subsequently, the matter came before the trial court in a non-jury trial, on January 12, 13, and 27, 1989. Prior to the time of trial, Ralph Greenwood passed away and his name was deleted as a party, his daughter Kate Greenwood replaced him as President of American Dog Breeders Association, which was also noted at trial. At trial of this matter, multiple witnesses were brought forward to testify on behalf of each party.

As a result of said hearings before the Court, the Honorable Rodney S. Page issued a Memorandum Decision in this case on May 8, 1989. The Court held that the ordinance provision defining a

vicious animal as "any animal by its unique nature or breed which has known propensities to be aggressive towards any person or animal", was vague and overbroad, and thus unconstitutional. The Court further concluded there was no basis in law or fact for finding that the ordinance constituted an unlawful taking. The Court then went on to find that the remainder of the ordinance was constitutionally valid as to the equal protection and due process challenges.

Pursuant to the Court's requirement, Counsel for North Salt Lake duly prepared Findings of Fact and Judgment, the final and approved copies of which were entered in the court's file on July 14, 1989. It is from these Findings of Fact (Exhibit B) and Judgment that Greenwoods now appeal.

STATEMENT OF RELEVANT FACTS

Testimony at trial, relevant to issues herein presented, is as follows:

With regards to vagueness, as to visual identification of a breed, North Salt Lake City produced evidence that the typical animal control method of breed determination is visual observation of a particular dog. Record, Day 1, at 24. However, this same witness, who is charged with enforcement of this ordinance, is aware that on cross-breed dogs, this visual observation is only as accurate in determining specific breed make-up as to which characteristics are dominant in the animal. Record, day 1 at 34.

Other witnesses also testified as to visual observation being part of determination, but by no means an exclusive and comprehensive test. Record, day 1, at 46, 47. That is, if the particular dog fits in with the breed standard as published by any given dog registry it is somewhat helpful to determine the breed. Record, day 3, at 61.

Facts relied upon to show arbitrariness, and thus vagueness include testimony from the North Salt Lake Animal Control Director that the wording of the statute, "not limited to" would allow enforcing officers to include any dog under the umbrella of the ordinance if they wanted to. Record, day 3, at 107.

Further arbitrariness in application was testified to by a couple of witnesses with regard to factors of heredity versus factors of training as to propensity of a dog to be vicious. Such testimony clearly shows that training is the operative factor in determining a dog's behavior (i.e., propensity for viciousness). Record, day 2, 50-51, 52, 58, 62-63, 67, 74, 103; day 3, at 23, 25, 48. There is also basis for showing some tendency to be aggressive can be bred for, but only in individual dog cases, not as extending to the entire breed. Record, day 2, at 63; day 3, at 65.

Much testimony was elicited at trial regarding the only valid determination of breed is by having a dog's registration papers or pedigree charts. Record, day 1, at 151, 247; day 2 at 30; day 3, at 15. By stipulation, there is no scientific method by which the

breed of any particular dog can be determined. Record, day 1, at 44.

Finally, the only expert testimony with regards to animal behavioralism, was to effect that classification of a breed of dog as vicious based on unique hereditary characteristics is an arbitrary classification and not founded upon scientific knowledge of behavior of dogs. Record, day 2, at 71-72.

Facts relative to substantive due process fall into three (3) general areas. The first is the classification of certain breeds of dog as inherently vicious. Testimony at trial was that all dogs, regardless of breed, have a propensity to be aggressive. Record, day 2, at 47; day 3, at 62. There was no testimony that any breed of dog is inherently vicious, or has unique hereditary characteristics of a propensity to be vicious. In fact, the only testimony touching on this important concern was that of Greenwoods' animal behavioralist who testified to the effect that no breed of dog has propensity to be any more vicious than another breed of dog. Record, dog 2, at 52, 62-63. He further testified to the effect that no breed exhibits more aggressions than any other breed on a breed to breed comparison. Record, day 2, at 71.

The second general factual area relevant to substantive due process is as to the objective sought by the legislation. Testimony of a council woman brought out concerns of her constituency about dogs scaring and biting people in her

neighborhood. She sought legislation to give safety to the citizens and to preserve the neighborhood's quality of life. Record, day 2, at 129. However, on direct examination when asked whether the breeds specified in the ordinance, in her view, possessed a threat or were particularly dangerous to the citizens of North Salt Lake, she unqualifiedly answered, "No." Record, day 2, at 130.

The third general area of substantive due process relevance are factors regarding the narrow classification of the seven (7) specified breeds as inherently vicious. All records as produced by the animal control director as far as bites per dog registered with the city and actual dog bite reports are incomplete and/or inconclusive as to providing lines of demarcation between inherently vicious breeds and "other" breeds. The records of bites per dog registered is of no comparative value. Bites per breed of other dogs had not been computed to show any greater danger. Record, day 3, at 95-98. As far as dog bite incident reports, all as were brought forth at trial depicted a remarkably average-type bite for any dog -- a puncture wound. Record, day 3, at 78, 80, 85, 87.

Facts previously set forth apply to the equal protection argument hereunder. The only further fact of noteworthiness is testimony that all dogs will bite, and that is what ought to be controlled - the actual number of bites. Record, day 3, at 28-29.

Facts also previously set forth, supra, show indisputably that registration papers or pedigree charts are the only valid and reliable means of breed identification. Especially in attempting to determine cross-breeds, visual determination breaks down and is an unreliable means to determine breed.

SUMMARY OF ARGUMENT

North Salt Lake City Ordinance, Section 13-20-16E is violative of due process because it is impermissibly vague. Such vagueness arises from the ordinances' inadequate notice to the average dog-owner of an unregistered or mixed-breed dog whether the ordinance is controlling of the licensing of this type of animal. It is further vague in its failure to set up clear guidelines by which animal control officers can objectively apply the ordinance. The only factors as set forth in the ordinance involve subjective matters of ownership training or instruction and do not deal with objective matters specific to a breed of dog. The ordinance is also vague and arbitrary by its wording, "include, but are not limited to," which gives total discretion to the enforcement agency as to what dogs fall under this ordinance. Furthermore, there is not evidence showing anything remarkably unique about the ordinance-specified breeds as compared to all other breeds in North Salt Lake City as far as incidents of biting or types of wounds inflicted.

The ordinance in question does not apply equally to all persons within the class of owners of dogs. The ordinance is overbroad in that it regulates all owners of all specified breeds despite substantial evidence that a propensity for viciousness is not a breed specific trait. The ordinance is under-inclusive in regulating only a few breeds of dogs where substantial evidence shows all breeds, including mixed-breeds contain dogs that bite, and dogs that may seem to have propensity to be vicious. The ordinance undoubtedly seeks to protect public health and welfare against dog bites and attacks, but the discriminatory classifications in this ordinance do not further this objective.

The trial court made a specific finding that where registration was not available, the breed of the dog could be determined by its predominant physical characteristics. Evidence produced at trial does not substantiate this finding. Evidence at trial merely stated to the effect that if an animal fit within the characteristics of an ideal member of the breed, then its breed could be determined by visual observation of predominant physical characteristics. However, evidence further shows that many members of a breed do not fit the physically ideal standard of the breed and so cannot be classified visually.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING NORTH SALT LAKE CITY ORDINANCE, SECTION 13-20-16E, WAS NOT VAGUE AND VIOLATIVE OF SUBSTANTIVE DUE PROCESS, AS MEASURED BY CONSTITUTIONAL STANDARDS.

A. The Ordinance is impermissibly vague. The key Supreme Court case discussing vagueness and its elements is Grayned v. City of Rockford, 408 U.S. 104 (1972). The Court has said in Grayned, at 108-109, that:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [Footnotes omitted].

Greenwoods contend that North Salt Lake's breed specific vicious dog legislation, North Salt Lake City Animal Control Ordinance, Section 13-20-16E, is lacking in terms susceptible of objective measurement as it applies to them and their dogs of unknown origins, as well as being generally vague as applied to other dog owners within the city's jurisdiction.

The basis of due process, as broken down by Grayned, supra, applies in the instant matter as follows:

1. INADEQUATE NOTICE.

In accord with the first basic principle of due process elicited from Grayned, supra Greenwoods contend that the ordinance fails to give fair and adequate notice. The ordinance, by stating

vicious dogs "include, but are not limited to" the specified breeds, does not give the average person of ordinary intelligence a reasonable opportunity to know what breeds are actually covered by the ordinance, so that he may act accordingly to conform with the requirements.

Owners of unregistered dogs or mixed breed dogs have no means or ways of knowing whether their dog is one of the breeds listed and whether they can or should comply with licensing requirements.

Greenwoods do not question North Salt Lake's authority to take proper measures to safeguard the public from vicious animals. However, the particular methods employed by North Salt Lake must allow Greenwoods, and other citizens similarly situated, to know what is, and what is not, a vicious animal. With regard to breed registered dogs the ordinance gives some notice, but as to dogs sharing some predominant characteristics with the specified breeds the ordinance lacks clarity. North Salt Lake would have us believe that each and every dog of a breed can be identified by visual perception. However, Greenwoods, who are involved in the dog business, are aware of many purebreeds which do not conform to standards for such breeds in the sharing of predominant characteristics. This factor of uncertainty in all cases was shown forth at trial through many knowledgeable witnesses. Extrapolating from this knowledge of purebreeds, it becomes apparent that many unregistered and mixed breed dogs likely have few, if any,

predominant characteristics of the specified breeds, but under the ordinance, would still need to comply with special provisions listed therein. Conversely, owners of unregistered and mixed-breed dogs that are not of the specified breeds but have certain physical features of the specified breeds will not know whether they must comply or not. The vagueness here arises where an owner of an unregistered or mixed breed dog is not aware he has ownership of a dog falling under purview of this ordinance. Effectively, the owner does not know whether he must comply. If he does not comply and the Animal Control Department determines the ordinance is applicable; whose determination is applicable as to the effect of the ordinance, Animal Control's or the dog owner's? On one hand, the citizen owner of a mixed breed has no notice he must comply with the ordinance; on the other hand, no objective standard is set whereby the Animal Control Department can objectively determine whether the owner has or should comply.

2. ARBITRARY ENFORCEMENT.

The second element of procedural due process with respect to vagueness is that due process "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." [Footnote omitted]. Smith v. Goguen, 415 U.S. 566, 572-573 (1974).

The Supreme Court set forth the standard, in Baggett v. Bullitt, 377 U.S. 360, 366-367 (1964), for invalidating a state statute because of vagueness:

because . . . [the statutory provision] was lacking in "terms susceptible of objective measurement" and failed to inform as to what the State commanded or forbade. The statute therefore fell within the compass of those decisions of the Court holding that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. [Citations omitted].

North Salt Lake's ordinance is not set up around reasonably clear guidelines, by which animal control enforcement officers, the City Manager, or triers of fact can objectively determine the extent and applications of the ordinance.

The ordinance allows for unlimited induction of any breed of dog under the purview of the ordinance as was testified to by North Salt Lake's Animal Control Director. Further, Greenwoods contend and evidence at trial has shown that there are no objective guidelines or standards for determining a hereditary characteristic of propensity for viciousness. A propensity for viciousness mostly is determined by training, a very subjective factor not related to breed at all. There are also no objective legislated guidelines for determining breeds of dogs. The only dogs and dog owners which this law can be enforced against, in an objective manner, absent the requirement of constitutional equal protection and the requirement of delineating of properly legislated classifications,

would be registered dogs of a specified breed certain, on which dog the animal control department and the dog owner had the registration papers. The registration papers, evincing a dog's genealogy, are the only reasonably accurate means of determining a particular dog's breed membership. No other methods, observations, or perceptions exist whereby breed can, accurately and without great subjectivity, be determined.

In Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), the Supreme Court of the United States found a city vagrancy ordinance void for vagueness in commenting that:

[w]here, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." [Citation omitted].

Id., at 170. This same comment holds true regarding the North Salt Lake City vicious dog ordinance, inasmuch as the Defendant's ordinance sets no standards for an objective determination of either breed of a dog or even parameters of what constitutes viciousness.

The ordinance is indefinite in application. This indefiniteness is illustrated by the wording of the ordinance wherein it states:

HEREDITARY CHARACTERISTICS: There are certain breeds of dogs which by their unique hereditary characteristics, owner training and instruction, or through mistreatment have a propensity to be vicious. These breeds include,

but are not limited to, . . . [Emphasis Added]

North Salt Lake Animal Control Ordinance 13-20-16E.

The phrases, "unique hereditary characteristics" and "include, but are not limited to" result in much of the vagueness about this ordinance in its notice to owners and its practical application.

First, the phrase "unique hereditary characteristics" presupposes that each and every owner of each and every dog within the jurisdiction of North Salt Lake City knows the ancestry of the dog he owns, as well as any and all hereditary characteristics which may run through the breed or breeds involved. The ability to know the ancestry of many dogs falling under this ordinance is a practical impossibility. Generally, the only owners who are reasonably certain of their dog's ancestry are those who own a dog registered with one of the dog registries wherein knowledge of ancestry is the key to being able to register. Such registered animals rarely are the problem animals involved in attacks. Registered animals are more expensive, and usually are valued show or "contest" dogs who are very well-behaved, especially around strange people, due to their training.

Second, the phrase "include, but are not limited to," could reasonably be interpreted to mean that the ordinance applies to all breeds of dogs in the city, a few other breeds of dogs in the city, or no other breeds of dogs in the city. This particular phraseology in the ordinance allows for no definite construction

whereby an owner of a dog, whether he knows the breed thereof or not, can be sure he is or must be in full compliance in licensing and keeping his dog in North Salt Lake City.

B. The Ordinance is violative of Substantive Due Process.

Plaintiffs do not dispute that Defendant has authority to regulate dogs. That power is specifically given to cities under Utah Code Annotated, Section 10-8-65, 1953 as amended. However, the Defendant must comply with constitutional aspects in the use of that regulatory power. In this instance, Defendant has sought to regulate specific breeds of dogs which it terms as hereditarily vicious, but the wording of that ordinance does not specifically limit the inherently vicious breeds to those so named or specified. This legislation is violative of substantive due process in two respects.

First, absent any scientific evidence that the specified breeds, i.e., Bull Terrier, American Staffordshire Terrier, Staffordshire Terrier, Staffordshire Bull Terrier, American Pit Bull Terrier, Tosa and Shar-pei, have unique hereditary characteristics giving them propensity to be vicious as a breed of dog, the classification of these specified breeds as inherently "vicious" is clearly an arbitrary and unreasonable classification. Furthermore, the singling out of these named breeds does not bear a fair and substantial relation to the object of the legislation.

The object of the legislation is, or at least ought to be, to prevent dog attacks or dog bites by any dog of any breed within North Salt Lake City's boundaries. The fundamental basis for regulatory legislation is to protect the health, safety and welfare of the citizenry. The singling out of the named breeds in Defendant's ordinance is not fairly and substantially related to the protection of citizens' welfare. Defendant does not, and cannot, show that these named breeds have inflicted more injury or duress on the citizens of North Salt Lake. If anything, other breeds of dogs and mixed breeds of dogs have inflicted much more injury, damage and duress, and are more numerous; yet are not named or otherwise affected directly by this ordinance. If the ordinance were fair and substantially related to protection of the citizenry, it would specify those other injurious and damaging breeds as being inherently vicious as well.

Second, the ordinance also goes further to state that hereditary characteristics are not limited to the specifically named breeds but may be, and are to be, determined to be vicious by subjective standards of owner, training, and instruction, or mistreatment. This classification is also of an arbitrary nature in that owner, training, instruction or mistreatment are not defined by an objective test nor is the decision maker who will apply this standard set forth. This subjective classification is also clearly arbitrary and has no grounds as a fair and substantial

relation to the object of legislation, so that those of similar circumstances have an expectation of being treated alike. It is obviously not the case that only the specified breeds have behavioral problems as results of their owner, his training or his mistreatment. These factors affect all dogs wherever located. Because of the subjectivity involved in classifying dogs as vicious or not in the context of owner training, instruction, or mistreatment, the enforcement officers have too much discretion, thereby creating another constitutional infirmity in this ordinance.

The seminal case on this point of constitutional law is Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). In that case the Supreme Court set forth the standard whereby States may resort to classification for purposes of legislation. The Court stated: "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Id., at 415.

In Royster, legislation was challenged which taxed domestic corporations transacting business, both within the State of Virginia, and beyond the boundaries of that state, on the aggregate income of such business transacted, while not placing the burden of taxation on domestically incorporated businesses that did not transact business within the State. In determining that the effect

of the legislation was to only assess taxes on corporations actively involved in the State, so that by taxing only them, these corporations would be less likely to incorporate elsewhere, the Court found that:

It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; [Emphasis added].

Royster Guano Co. at 416.

In the instant case, North Salt Lake's exercise of police power in regulating specified breeds as vicious dogs, bears no fair or substantial relation to the objective of protecting the citizens and visitors of North Salt Lake City from all dog attacks and bites. Any dog can attack and/or bite, such actions are not the result of unique hereditary characteristics and do not lend themselves to specific breed classifications.

Based on the foregoing, Greenwoods contend that there is no substantial rational connection between the ordinance's regulation of specific breeds and the promotion of safety of persons and property.

II. THE ORDINANCE IS DISCRIMINATORY AND VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IS VIOLATIVE OF ARTICLE I, SECTION 24 OF THE UTAH STATE CONSTITUTION.

Greenwoods contend that the North Salt Lake Animal Control Ordinance is discriminatory and violative of equal protection of

the laws as guaranteed by the Utah State Constitution and the United States Constitution. Summarily the standard for equal protection is:

Article I, section 24 of the Utah Constitution states: "All laws of a general nature shall have uniform operation." The Fourteenth Amendment of the United States Constitution prohibits the states from enacting laws that deny "any person within its jurisdiction equal protection of the laws." Although their language is dissimilar, these provisions embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same. [Footnote and citations omitted].

Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984).

Malan, at 670, goes on to define the protection offered by the Utah Constitution:

Article I, section 24 protects against two types of discrimination. First, a law must apply equally to all persons within a class. [citation omitted]. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute. [citations omitted].

In the instant case, the ordinance does not apply equally to all persons within a class. In the class of owners of dogs, specific breeds are singled out based on either unidentifiable factors or highly subjective factors. Also, owners of unregistered dogs may easily be treated differently, and less or more stringently, than owners of registered dogs, given the fact that registration documents are the only reasonably accurate means for determination of a breed.

Basically, it is that, North Salt Lake's ordinance violates provisions of the equal protection of laws as guaranteed under the fourteenth amendment to the United States Constitution, and Utah State constitution, Article I, Section 24, for being both overbroad and underinclusive.

1. The North Salt Lake Ordinance is Overbroad in Application.

The ordinance is overbroad in that it regulates all owners of dogs of all the named breeds--the Bull Terrier, the American Staffordshire Terrier, Staffordshire Terrier, Staffordshire Bull Terrier, American Pit Bull Terrier, Tosa, Shar-pei-- as vicious dogs, despite substantial evidence that viciousness is not a specific breed characteristic. Evidence at trial has shown that viciousness can, and does, occur in any breed of dog. As corollary to that showing, most dogs within the classifications of the ordinance do not exhibit vicious characteristics or tendencies. Therefore, this ordinance is unnecessarily broad in its regulation inasmuch as it regulates owners of non-vicious dogs as though their dogs were vicious.

2. The North Salt Lake Ordinance is Underinclusive.

The ordinance is also underinclusive. This underinclusion arises from North Salt Lake's regulation of owners of only a few breeds of dogs, where substantial evidence shows all breeds, including mixed-breeds, contain vicious dogs. All breeds of dogs are capable of biting, killing, and being vicious. By singling

out only seven (7) breeds for special regulation, North Salt Lake has failed to include breeds of dogs that include biters and vicious dogs, i.e., German Shepherds, Doberman Pinschers, Chow-Chows, etc. This underinclusion substantially burdens owners of dogs specified in the ordinance, while allowing owners of dogs, not so listed, to escape this stringent regulation although their dog belongs to a breed which statistically outranks the specified breeds in bite statistics data.

The ordinance classifications and the different treatments given the classes are not based on differences having a tendency to further the objectives of the ordinance. The ordinance, undoubtedly, seeks to protect public health and welfare against dog bites and attacks. It is a fact that all dogs can and do bite. This biting or tendency to bite, is not breed specific, it is not a "breed" problem, it is an "owner's" problem. Substantial evidence has been produced that viciousness is not a hereditary characteristic but that it is a learned behavior. All dogs are capable of learning good or bad behavior, that too is not breed specific.

In order to further the objectives of the ordinance, the legislation should cover only owners of dogs whose dogs have behavioral problems giving them a propensity to bite and/or attack. This objective is not furthered by naming specific breeds. There is no scientific evidence relating behavioral problems to breeds.

Rather behavioral problems are dog specific, based on the individual dog's personality, treatment and instruction.

Because the ordinance does not apply equally to dogs and owners of dogs within the specified classes, by singling out the ideal registered standard of the breed for special legislation, and also because the differential treatment given the classes does not further the objective of the ordinance by protecting the public's health and welfare from all dog bites and attacks, regardless of breed, the ordinance violates equal protection of the laws.

III. THE TRIAL COURT ERRED IN RULING THAT THE EVIDENCE ESTABLISHED THAT PREDOMINANT PHYSICAL CHARACTERISTICS ARE DETERMINATIVE OF BREED DIFFERENTIATION WITHIN THE SPECIES OF DOG.

The trial court herein made a specific finding that the breed of a dog is determined by registration or by predominant physical characteristics. It is a recognized fact by Experts in the breeding field that breed of dog is determined by registration and pedigree. The basic issue herein is whether facts produced at trial allow for a finding of fact that breed can be determined by predominant physical characteristics? It cannot.

By the very definition of "Findings of Fact", such findings are made based on evidence adduced at trial. These are to be the facts as found to exist in the particular matter by the trial court. It should be noted that evidence produced at trial as concerns breed identification came from all expert witnesses on both sides of the case. Even at that, determination of breed by

examination only of predominant physical characteristics was admittedly only guesswork. There was no assuredness, nor certainty of identification. Also, such visual observation only works on dogs fitting certain standards, it is wholly ineffective as to dogs of certain breeds not fitting the ideal standard of that breed. Our standards of law, by which such identification should be judged, however, calls for reason to know of the particular breed by the average, common citizen, not an animal expert. Therefore, by a preponderance of evidence, the lack of certainty by experts as to determining breed by predominant physical characteristics should be recognized. The trial court should have found breed identification only by use of registration and pedigree charts as such are the only objective method of accurate breed determination.

Arguendo, even if experts could determine the breed of a particular dog by its physical characteristics, the Fourteenth Amendment applies to all citizens rather than to only experts in a particular field. Evidence on the record clearly demonstrates that the average citizen-dog owner could not, with that degree of certainty required by the Fourteenth Amendment, identify the breed of a particular dog simply by its physical characteristics. The evidence on the record demonstrates that most experts cannot identify the breed of a particular dog by its physical characteristics.

CONCLUSION

Based upon the foregoing arguments, to wit: that the trial court erred in finding the ordinance was not void for vagueness and violative of due process; that the ordinance is discriminatory and violative of equal protection of hte laws; and that the trial court erred in finding as a fact that breed can be determined by predominant physical characteristics where registration is unavailable; the Plaintiff-Appellants respectfully request a determination of this court that based upon the record and evidence in this matter, North Salt Lake City Ordinance 13-20-16E is vague in its application and therefore void, is violative of due process and equal protection of hte laws, and therefore should be stricken, and is not based upon substantiated findings of fact in the trial court, which would support the conclusion of constitutionality. Plaintiffs-Appellants request this case be remanded to the District Court with appropriate instructions, or in the alternative, be dismissed.

DATED this 22 day of November, 1989.


David Paul White
Attorney for Plaintiffs-Appellants

EXHIBIT A

Section 13-20-16:

- "A. PREMISES, MUZZLE: It shall be unlawful for the owner of any fierce, dangerous, or vicious animal to permit such animal to go or be off the premises of the owner unless such animal is under restraint and properly muzzled as to prevent it from injuring any person or property."
- "E. HEREDITY CHARACTERISTICS: Certain breeds of dogs which by their unique hereditary characteristics, owner, training, and instruction, or mistreatment has a propensity to be vicious. These breeds include, but are not limited to, the Bull Terrier, the American Staffordshire Terrier, Staffordshire Terrier, staffordshire [sic] Bull Terrier, American Pit Bull Terrier, Tosa, Shar-pei, and any other dog determined to be vicious [determined to be vicious under subsection B]."
- "F. LICENSING REQUIREMENTS: The dogs identified under this Section:
1. Must be licensed under the procedures and fee set forth in this ordinance.
 2. Must be kept in a fenced yard, dog run, or other structure which is at least six feet in height, by six feet wide, by ten feet in length.
 3. Must be on a leash and properly muzzled when they are out of a fenced area.
 4. Must, at the time of licensing, provide proof of a fully paid homeowners or rental insurance policy containing a personal liability clause in the amount of \$100,000.

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Attorneys for Defendant,

IN THE SECOND DISTRICT COURT, DAVIS COUNTY

STATE OF UTAH

KATE GREENWOOD, et al.,

Plaintiffs,

VS.

**CITY OF NORTH SALT LAKE, an
incorporated Municipality,**

Defendants.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Civil No. 40876
Judge Rodney S. Page

This matter came on regularly before the court for a non-jury trial, on January 12, 13, and 27, 1989, the Honorable Rodney S. Page, Utah State District Judge, presiding: David Paul White appearing for the plaintiffs, Kate Greenwood, Andrew Greenwood, and the American Dog Breeders Association (hereinafter "Greenwood"); Kent L. Christiansen of Mueller & Christiansen, appearing for the defendant City of North Salt Lake (hereinafter "North Salt Lake"); and the parties having adduced evidence by way of

testimony and documentary exhibits and having argued the matter to the court, and the court having reviewed the file exhibits and memoranda submitted by the parties and being fully advised in the premises, and good cause appearing, now, therefore, the court hereby makes the following:

FINDINGS OF FACT

1. Certain of the plaintiffs reside within the City of North Salt Lake.

2. Said residents own dogs of the breed known as the American Pit Bull Terrier.

3. That plaintiffs own a kennel in North Salt Lake which raises, breeds, boards and sells dogs of the American Pit Bull Terrier breed.

4. The plaintiff, Kate Greenwood, is president of the American Dog Breeders Association, which has its principal office in North Salt Lake and which recognized and registers the American Pit Bull Terrier breed.

5. "Pit bull" is a generic term generally referring to breeds made up of the Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier and the American Pit Bull Terrier and when the Court uses the term "pit bull" it uses it in its generic sense.

6. The American Staffordshire Terrier and the American Pit Bull Terrier are generally recognized as the same breed.

7. The most generally accepted association for

registering and classifying dogs in the United States is the American Kennel Club or AKC as it is commonly known.

8. The AKC recognizes three breeds of "pit bulls": The American Staffordshire Terrier, the Bull Terrier, and the Staffordshire Bull Terrier.

9. The breed of a dog is determined by registration or by predominant physical characteristics.

10. To be registered, a dog must possess the predominant physical characteristics of the particular breed as set by the registering association.

11. There is no scientific method for determining a dog's breed such as blood test, x-rays or scientific tests.

12. The combination of predominant physical characteristics determine the dog's breed.

13. The breed of most dogs can be determined by visual inspection of the particular dog's predominant physical characteristics.

14. All of the "pit bull" breeds manifest unique physical characteristics of the breed generally so that they are easily discernible from other breeds.

15. The "pit bull" breeds are known for their unique combination of proportionate strength, agility, aggressiveness, courage, intelligence, high tolerance for pain, tenacity and gameness.

16. The "pit bull" breeds were historically bred exclusively for fighting and killing other animals; namely,

other dogs.

17. North Salt Lake City is primarily a residential community.

18. North Salt Lake City has experienced over the years a number of bites and attacks by "pit bulls". These bites and attacks are substantially higher among "pit bull" breeds than any other breed given the proportionate number of "pit bulls" in the City's dog population.

19. "Pit bulls" have killed other dogs, attacked people and on one occasion attempted on numerous occasions to attack humans through a glass door.

20. In Salt Lake City, a neighboring community, in 1988 there were 295 dog bites; 28 were from "pit bull". The only breed with more bites in total number was the German Shepherd of which there were five or six times as many as "pit bulls" in the dog population.

21. Bites by "pit bulls" in Salt Lake City were proportionately higher than any other breed.

22. Animal Control treats "pit bulls" differently than any other breed: They are kept separate from other dogs and behind solid walls where possible; a breaking stick is often required to loosen their jaws from the grip of a victim; they are treated with more caution than any other breed.

23. Because of the reputation of the "pit bull" breeds they are acquired by certain people in order to

capitalize on their reputation and natural characteristics and make them mean and aggressive.

24. In 1986, the North Salt Lake City council adopted the ordinance herein question. It was amended in 1987 to add the breed of the American Pit Bull Terrier to the breed specific portion of the ordinance and to provide for administrative review for those aggrieved by the ordinance.

25. The City considered the facts set forth above concerning the "pit bull" breeds prior to adopting the ordinance.

26. Among other things, the ordinance categorized certain animals as "fierce, dangerous, or vicious animals" in terms of certain breeds which by their unique hereditary characteristics, owner training and instruction or mistreatment had propensity to be vicious. The "pit bull" breeds (along with other breeds not at issue here) were named. These breeds were made subject to special licensing, confinement restrictions and insurance provisions.

27. The ordinance also defined "vicious animals", among other things, as "any animal by its unique nature or breeding that has known propensities to be aggressive towards any person or animal".

28. The plaintiffs who own dogs of the "pit bull" breed, named and carry on a business concerned with the breed, filed this action challenging the constitutionality of the provisions in question,

29. The plaintiffs' challenge to the ordinance in question center around their claim that it violates the due process clause of the Fourteenth Amendment and the "equal protection" clause of the Fourteenth Amendment and Article I, Section XXIV of the Utah Constitution. They further claim that the ordinance constitutes an unlawful taking.

From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

1. That the evidence adduced at trial requires the Court to conclude that plaintiffs have standing to challenge the validity of the terms of the ordinance in question, in light of the fact that the provisions challenged are applicable to them and will be enforced against them.

2. In reviewing any ordinance or statute to ascertain its constitutionality, this Court is bound by certain well-settled general rules of construction.

3. Legislative enactments are endowed with a strong presumption of validity, and they should not be declared unconstitutional if there is any reasonable basis upon which they can be found to come within the constitutional framework.

4. They should not be held unconstitutional unless there is a clear and compelling showing that they are incompatible with some particular constitutional provision.

5. The burden of showing invalidity of a

legislative enactment is on the one who makes the challenge.

6. The concept of due process, as guaranteed by the U.S. Constitution and our own State Constitution is somewhat difficult to define. However, generally it is broken down into the concept of substantive due process and procedural due process.

7. Substantive due process generally embodies the concept of equal protection and freedom from arbitrary action. The essence of substantive due process is characterized as "a standard of reasonableness" which is similar to the test of "rational grounds" used to evaluate equal protection claims under the Fourteenth Amendment.

8. Procedural due process revolves around the idea of notice, jurisdiction, right of hearing and fairness.

9. It is also fair to say that the two concepts are not completely separate and that certain aspects of each intertwine with the other.

10. In reviewing any legislative act, in light of the challenge for violation of due process and equal protection, the initial inquiry must be as to whether or not the enactment in question seeks to interfere with a fundamental right or operates to the particular disadvantage of a suspect class. If it does, then the latitude given the governmental agency is much reduced and the inquiry of the court is one of strict scrutiny. There must be a compelling state interest to allow the intrusion or the classification

and the means chosen for such intrusion must be the least intrusive possible.

11. On the other hand, if we are not dealing with a fundamental right nor a suspect class, the legislative body is given much more flexibility and latitude in regulating and classifying and the Court's only inquiry is to determine if the object of the enactment concerns a legitimate State interest and whether any classification bears a reasonable relationship to that objective and whether there is a reasonable basis for the distinction between the classes.

12. The Court does not substitute its opinion for that of the legislative body. The Court presumes that the local authorities are familiar with local conditions and know the needs of the community nor is the Court concerned that the same objective may be arrived at by a less intrusive manner.

13. Classifications are not unreasonable or arbitrary as long as similar situated people are dealt with in a similar manner and people situated differently are not treated as if their circumstances were the same.

14. Classifications need not be applied with mathematical exactness.

15. It is also clear that if a classification is not arbitrary and is founded on any substantial distinction or apparent natural reason which suggests a necessity or propriety of the special legislation, a Court has no right to

interfere with the exercise of legislative discretion.

16. The concept of vagueness is one which involves both principles of due process and equal protection. These concepts require an enactment to be sufficiently explicit and clear so as to inform the ordinary reader of common intelligence what conduct is prohibited. There is no vagueness when the enactment contains terms which the ordinary person exercising ordinary common sense can understand and comply with.

17. It is not the Court's duty to indulge in conjecture that the ordinance may be so distorted or unreasonably applied that some innocent person might come within its terms. The Court is required to assume that those who administer an ordinance will do so within reason and common sense, and in accordance with its language and intent.

18. If there is a choice as to the manner of its interpretation and application, that should be done in a manner which will make it constitutional as opposed to one which would make it invalid.

19. The Court further recognizes that this case does not involve any fundamental rights or suspect classifications.

20. One of the major points of contention between the parties is one of whether the breed specific provision of the ordinance bears a reasonable, rational relationship to the objectives sought to be accomplished and whether there is

a reasonable basis to specify the "pit bull" breeds for special classification.

21. The object of the legislation is obvious in attempting to specify those breeds of dogs which constitute an unreasonably high risk of danger to the public and then in requiring certain precautions so as to reduce that risk.

22. That none of the parties dispute that the controlling of vicious animals and the protection of citizens therefrom is a legitimate State interest, nor that North Salt Lake City has authority to address the same by ordinance.

23. That based upon the evidence adduced at trial the Court concludes that there is a rational basis for the North Salt Lake City council to have determined that the "pit bull" breeds do have a unique combination of inherited traits which, when coupled with owner training and instruction or mistreatment, cause them to have a greater propensity to be vicious.

24. Further, that based upon the evidence adduced at trial, the Court concludes that the breeds of "pit bull" terriers specified in the North Salt Lake City ordinance are breeds of such unique physical characteristics that they are reasonably distinguishable from other breeds. The predominant characteristics of the breed are such that a person of ordinary intelligence and common sense would be able to ascertain if his particular animal was of the breed specified.

25. The Court finds that the fact that the ordinance was not extended to other breeds similarly situated or that it did not extend to all of the evils it could have is not a basis for constitutional challenge.

26. That based upon the evidence adduced at trial the Court concludes the designation of "pit bull" as a class and the requirement of special licensing and the compliance with special conditions and handling has a reasonable and rational relationship with one of the objectives of the ordinance, which is to protect the citizens and other animals from attack by dogs.

27. That the plaintiffs' challenge to the breed specific provision of the ordinance on the basis of equal protection and due process fail even when exposed to the slightly more intensive scrutiny required by the Utah Supreme Court under our Constitution in the commercial setting.

28. That relative to the provision of the ordinance, which among other things defines a vicious animal as "any animal by its unique nature or breeding which has known propensities to be aggressive towards any person or animal", the Court concludes that the said provision is vague and overbroad in that it would leave the ordinary reader of common intelligence at a loss to determine whether his particular animal came within the purview of the ordinance and thus could only guess as to its applicability to him. Accordingly, said provision fails to meet due

process requirements as to definiteness and therefore the Court concludes that that portion of the definition of vicious animals which define the same in terms of a "propensity for aggressiveness as a result of unique nature or breeding" to be void for vagueness.


29. Based upon the evidence adduced at trial, the Court further concludes that plaintiffs' argument as to the unlawful taking is without basis in law or fact and rejects the same.

DATED this _____ day of May, 1989.

BY THE COURT:

RODNEY S. PAGE
District Court Judge

Approved as to Form:

By: 
David Paul White
Attorney for Plaintiffs

CERTIFICATE OF DELIVERY

I hereby certify that I hand delivered a true and correct copy
of Appellant's Brief, to the following:

Kent L. Christianson
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this 22 day of November, 1989.

David Paul White