

1989

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

Utah Supreme Court

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890355

IN THE UTAH SUPREME COURT

KATE GREENWOOD and ANDREW
GREENWOOD, personally, and
RALPH GREENWOOD both
personally and as President
and member of American Dog
Breeders' Association, Inc.

Plaintiffs and Appellants,

vs.

CITY OF NORTH SALT LAKE, an
incorporated municipality,

Defendant and Respondent.

Supreme Court Case

No. 890355

District Court Case

No. 40876

RESPONDENT'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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19 1990

Utah Supreme Court, Utah

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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 dogs?

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.

RULE 52(a) UTAH RULES OF CIVIL PROCEDURE

. . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.
. . . .

STATEMENT OF THE CASE

1. In January 1987, the City Council of North Salt Lake unanimously passed and adopted the North Salt Lake Animal Control Ordinance, Chapter 13-20-1 et seq. The ordinance was thereafter amended on August 4, 1987, to primarily provide an administrative remedy for any person or entity challenging enforcement of the ordinance.

2. On or about February 3, 1987, Kate Greenwood,

Andrew Greenwood, Ralph Greenwood, and the American Dog Breeders Association (hereinafter referred to collectively as "Greenwoods") filed suit against the City claiming (a) that the provisions of the ordinance constituted a "taking of property" without due process in violation of the Fourteenth Amendment to the U.S. Constitution, (b) that the ordinance violated their Fourteenth Amendment rights of "equal protection" because the language was too vague and ambiguous to be enforceable, and (c) that the ordinance was both overinclusive and underinclusive and bore no rational relationship to its objective, making its enforcement an "unconstitutional exercise of police power" under the Fourteenth Amendment.

3. The North Salt Lake Animal Control ordinance is some twenty-two (22) typewritten pages long. The particular language which is the subject of this lawsuit, however, is as follows:

Section 13-20-01:

"22. VICIOUS ANIMAL: Any animal which is dangerously aggressive or uncontrollable, including but not limited to, any animal which has bitten or in any manner attacked any person or animal. Any animal by its unique nature or breeding which 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. HEREDITARY CHARACTERISTICS: Certain breeds of dogs which by their unique hereditary characteristics, owner training or instruction, or mistreatment, have a propensity to be vicious. These breeds include, but are not limited to the Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, Tosa, Shar-pei, and any dog determined to be vicious under Subsection B of this Section."

"F. LICENSING REQUIREMENTS:

The dogs identified under this Section:

1. Must be licensed under the procedures and fees set forth in this ordinance.

2. Must be kept in a fenced yard, dog run, or other structure which is at least 6 feet in height, by 6 feet wide, by 10 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.

Section 13-20-31.1:

ADMINISTRATIVE REMEDY: Any person required to license any animal under the provisions of this ordinance, or any person who is or may be subject to the enforcement of any provision of this ordinance in a civil or criminal proceeding who disagrees with the interpretation or application of any provision of this ordinance shall make a written request to the city manager to determine whether and how the provisions of this ordinance apply to him or her and to the animals subject to the provisions of this ordinance. During the time

that the written request is being considered by the city manager, no criminal action shall be enforced under this ordinance against the person that has made the request. The city manager shall rule on the request within five days after it is received by the city manager. The decision of the city manager shall advise the recipient of whether and how the provisions of this ordinance applies to the request, and if any provision applies, the decision shall inform the recipient of how many days the person has to comply with the ordinance before the ordinance will be enforced against him or her and the animal which may be affected by the ordinance. If any person affected by the provisions of this ordinance takes the position that his or her animal is not within the classifications established by this ordinance, he or she shall make a written request to the city manager under this section. The city manager may appoint an expert to advise him on matters requiring special knowledge. Where an expert is required to advise the city manager, the city manager may delay his decision until he has received the recommendation of the expert. Nothing in this ordinance requires the city to dismiss any criminal or civil action brought by the city pending his decision.

4. The matter was heard by the Honorable Rodney S. Page, District Court Judge for the Second Judicial District Court in a three day non-jury trial on January 12, 13, and 27, 1989.

5. On May 8, 1989, Judge Page issued his Memorandum Decision, finding that the North Salt Lake Ordinance, Section 13-20-01 et seq. was constitutionally valid under the due process and equal protection clauses of the United States Constitution and the Utah State Constitution. The trial court determined, however, that part of the definitional provision of "vicious animal" found in section 13-20-1(22) of the ordinance, which defined "Any

animal by its unique nature or breed which has known propensities to be aggressive towards any person or animal" as vicious, was constitutionally void.

6. On July 14, 1989, the trial court entered its Findings of Fact and Conclusions of Law and Judgment.

7. On August 17, 1989, Greenwoods filed their Notice of Appeal seeking review by the Utah Supreme Court of the trial court's Findings and Judgment.

8. The three issues raised by the Greenwoods in their appeal of the trial court's findings and judgment, involve claims that the trial court erred in determining that the North Salt Lake ordinance was constitutionally valid under the Fourteenth Amendment to the U.S. Constitution and the Utah State Constitution. More particularly, Greenwoods claim (a) that the trial court erred in finding that the ordinance did not violate their Fourteenth Amendment rights of "equal protection", in that it was not void for vagueness, and (b) that the trial court committed error in determining that the ordinance was not overinclusive nor underinclusive, and that its provisions bore a rational relationship to its objective, making its enforcement a "constitutional exercise of police power" under the Fourteenth Amendment, and finally, (c) that the trial court committed reversible error in finding that the evidence at trial established that the breed of a dog is typically determined by its predominant physical

characteristics [and registration].¹

9. The City of North Salt Lake as respondents, contend that all three of the challenges asserted by Greenwoods in this appeal, are without merit.

STATEMENT OF RELEVANT FACTS

Respondent, the City of North Salt Lake, takes issue with some of the representations made in the Greenwood's Statement of Relevant Facts, and submit the following testimony from the trial court record in support of their response to the issues raised therein.

Concerning the issue of vagueness, trial testimony established that the typical method of dog breed determination is visual identification based on a dog's predominate physical characteristics. (Record, Day 1, pp. 238-240; Record, Day 1, p. 51. lines 5-25 and p. 52, line 1-2; Record, Day 1, p. 24, lines 2-11; Record, Day 1, p. 60, lines 14-21; Record, Day 1, p. 213-218; Record, Day 1, p. 232, lines 6-25 and p. 233, lines 1-12; Record, Day 2, p. 21, lines 14-17; Record, Day 3, p. 61, lines 10-25 and p. 62, lines 1-14).

The Greenwoods seem to also discount the expert testimony of Dr. Gary Peterson, wherein Dr. Peterson, after being qualified as an expert in dog identification and

¹Greenwoods agree that the breed of dog may be determined by its registration.

characteristics of specific breeds, responded as follows:

Q. "Doctor, in your opinion, based on a visual inspection of the predominate physical characteristics of the breeds listed in the AKC, is it possible to identify the breed of any given dog?"

A. "Certainly of the true breed, yes. They fit in certain standards. Of the major characteristics if they are dominate major characteristics they should fit into a general breed standard."

(Record, Day 3, p. 61, lines 10-17).

Greenwoods also argue that the language of Section 13-20-16E which imposes six additional safeguards on dogs deemed to be "vicious", and which reads "These breeds include, but are not limited to...", fails to give the reasonable person notice if his dog is contemplated by the ordinance. (Appellant's brief at 6 and 12). Unfortunately, appellant has overlooked the fact that Section 13-20-16E refers to Section 13-20-16B which defines "Uncontrollable Vicious Animal", and by reference makes such animals subject to the provisions of Section 13-20-16E. Inasmuch as there could be breeds of dogs deemed vicious under 13-20-16B, different than those specifically listed in 13-20-16E, the language "not limited to" is clear on its face. (See Record, Day 3, p. 46, lines 11-25, p. 47, lines 1-22).

The Greenwoods continue their argument for arbitrariness claiming that training is the only factor involved in a dog's aggressiveness or propensity for viciousness. (Appellant's brief at 6).

Dr. Peterson testified as follows:

Q. "Ok. Do you have an opinion as to, ah, to the historical background of the breeding of the Pit Bull and how that breed might have been affected with regard to those characteristics?

A. "Well from my understanding of the historical background these breeds were used primarily for Pit fighting, starting in the middle ages. Ah, they were bred for those characteristics.

Q. "Ok. And is it your understanding that not only can a dog be bred for physical characteristics, but also behavioral characteristics?

A. "Yes I think so."

(Record, Day 3, p. 64, lines 19-25 and p. 65, lines 1-5).

Lou Lynes, also testified that:

Q. (Mr. Christiansen): Mr. Lynes could you describe briefly for me, the characteristics of a Pit Bull in your mind that make it unique from all other dogs?

A. Well when we describe the breed as a Pit Bull, the originally bred dog was from a Terrier and a Bull Dog, we are looking at a breed that in its conception was bred primarily for the fighting aspects of the breed itself. Then we have gone over into the Staffordshire Terrier and other breeds off of that. But basically the breed is, ah, originally was bred for a fighting dog and has been classified as the Pit Bull or the Pit Dog or the dog used in the pit for pit fighting.

(Record, Day 2, p. 138, lines 21-25 and p. 139, lines 1-7).

The most telling flaw in appellant's argument is their assertion that "...the only valid determination of breed is by having a dog's registration papers or pedigree charts." (Appellant's brief at 6). The record is replete

with testimony from both sides that substantiate the fact that observation of a dog's predominant physical characteristics is the method used in determining its breed. (Record, Day 1, pp. 238-240; Record, Day 1, p. 51, lines 5-25 and p. 52, line 1-2; Record, Day 1, p. 24, lines 2-11; Record, Day 1, p. 60, lines 14-21; Record, Day 1, pp. 213-218; Record, Day 1, p. 232, lines 6-25 and p. 233, lines 1-12; Record, Day 2, p. 21, lines 14-17; Record, Day 3, p. 61, lines 10-25 and p. 62, lines 1-14). Even the breed established in a dog's registration papers is based upon its predominant physical characteristics. (Record, Day 1, p. 231, lines 8-25 and p. 232, lines 1-5). In addition, the City has never taken issue with the fact that the breed of a dog cannot be determined from blood or tissue analysis. (Record, Day 1, p. 43, lines 19-25).

Contrary to the Greenwood's assertions (Appellant's brief at 7 and 8), numerous witnesses testified that the "pit bull" breeds of dogs possess unique hereditary characteristics which make them more vicious or dangerous than other breeds. (Record, Day 3, p. 7, lines 20-25, p. 8, lines 1-25; Record, Day 2, p. 138, lines 21-25 and p. 139, p. 140, lines 1-7; Record, Day 2, p. 141, lines 12-25; Record, Day 2, p. 174, lines 11-14; Record, Day 3, p. 10, lines 7-25, p. 11, lines 1-16; Record Day 3, p. 46, lines 11-25, p. 47, lines 1-4; Record, Day 3, p. 51, lines 8-25, p. 52, lines 1-23; Record, Day 3, p. 62, lines 15-25, p. 63, and p. 64,

lines 1-8).

The Greenwoods also argue in their brief that dog bite reports are inconclusive in showing a higher incidence of attack and biting for the "pit bull" when compared to other breeds. (Appellant's brief at 8). However, testimony at trial did indicate that in North Salt Lake during the year 1987, there was one bite for every four pit bulls registered as compared to one bite for every twenty dogs that were registered of all other breeds. (Record, Day 2, p. 76, lines 20-23). In 1988, the ratio in North Salt Lake was one bite for every five pit bulls compared to one bite for every thirty-five other breeds registered. (Record, Day 3, p. 76, lines 1-4).

In the neighboring city of Salt Lake, where bite statistics had been tabulated for a number of years, the "pit bull" dogs also had a higher bite incidence than most other dogs. (Record, Day 2, p. 169, lines 15-19). Testimony at trial also established that the "pit bull" was capable of causing severe harm and even death to its victims, (Record, Day 2, p. 154, lines 10-25 and p. 155, lines 1-22; Record, Day 3, p. 6, lines 11-16), and that animal control officers typically handle "pit bulls" more cautiously and different than any other dog. (Record, Day 2, p. 141, lines 12-25; Record, Day 3, p. 42, lines 14-25 and p. 43, lines 1-5).

As a result of several attack incidents involving the "pit bull" breeds within the limits of the City, North

Salt Lake enacted the ordinance to protect the health, safety and welfare of its citizens. (Record, Day 2, pp. 119-124).

SUMMARY OF ARGUMENT

The trial court correctly held that the North Salt Lake ordinance met the constitutional requirements for due process and equal protection under the Fourteenth Amendment to the United States Constitution and Article I, Section 24 of the Utah State Constitution. The findings and judgment of the trial court are substantiated by the evidence adduced at trial, and the caselaw upon which the trial court's decision is based.

The trial court correctly found that the breed of a dog is determined by registration or by its predominant physical characteristics, and, that to be registered, a dog must possess the predominant physical characteristics of the breed as set forth by the registering association. Further, the lower court properly found that the breed of a dog is determined by a visual inspection of the dog's predominant characteristics, and that the "pit bull" dogs manifest certain unique physical characteristics so that they are easily discernible from other breeds. Because of their unique combination of proportionate strength, agility, aggressiveness, courage, intelligence, high tolerance for pain, tenacity and gameness, they pose a greater threat than other dogs to the health and safety of the citizens of the

city so as to warrant additional regulation.

The trial court properly concluded that the Greenwoods failed at trial to overcome the strong presumption in favor of the ordinance by a clear and compelling showing. Because this case did not involve a fundamental right, nor did it involve a suspect class, the trial court correctly determined that the object of the enactment involved a legitimate state interest and that its classification bore a rational relationship to the objective sought.

Finally, the trial court correctly found that the ordinance was not vague in that it is sufficiently clear so as to inform the ordinary reader of common intelligence what breeds of dogs were subject to the ordinance. The court's finding that the predominant characteristics of the "pit bull" 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 is extensively supported by the evidence.

Because the Greenwoods have failed to meet their burden in showing that the trial court erred in its decision, accordingly, the judgment of the trial court must be affirmed.

ARGUMENT

I.

THE GREENWOODS HAVE FAILED TO MEET THEIR BURDEN OF SHOWING SUBSTANTIAL ERROR ON THE PART OF THE TRIAL COURT SO AS TO WARRANT A CHALLENGE TO THE TRIAL COURT'S FINDINGS AND JUDGMENT

As appellants, the Greenwoods bear the substantial burden of establishing that the trial court committed reversible error. Their challenge to the findings and judgment of the trial court requires that they sustain the burden of showing "clearly erroneous" reversible error. Rule 52(a) Utah Rules of Civil Procedure.

The appropriate standard of review applicable to a challenge of the trial court's findings and judgment is that the appellate court should regard the trial court's finding and judgment with a presumption of validity and correctness. Rule 52(a) Utah R.Civ.P.; Doelle v. Bradley, 124 Ut.Adv.Rep. 20 (Utah 1989); Hatcheson v. Gleave, 632 P.2d 815 (1981); Kohler v. Garden City, 639 P.2d 162 (1981).

The Greenwoods are required to sustain that burden of showing error, based upon a review by the appellate court with a presumption of validity to the findings and judgment of the trial court, and that the record be construed in the light most favorable to the prevailing party at the trial court level. The decision of the trial court should not be disturbed unless the appellate court finds substantial support for such reversal in the evidence. Doelle v.

Bradley, supra, 124 Ut.Adv.Rep at 21; Hatcheson v. Gleave, supra; Kohler v. Garden City, supra.

To successfully attack findings of fact, an appellant must first marshall all the evidence supporting the findings and then demonstrate that, even if viewed in light most favorable to the trial court, the evidence is legally insufficient to support the findings. Doelle v. Bradley, 124 Ut.Adv.Rep 20, 21 (1989); Reid v. Mutual of Omaha Insurance Company, 776 P. 2d 896, 899 (Utah 1989); In re Estate of Bartell, 776 P. 2d 885, 886 (Utah 1989); Scharf v. BMG Corp., 700 P. 2d 1068, 1070 (Utah 1985). The legal sufficiency of the evidence is determined under Rule 52(a) Utah Rules of Civil Procedure, which provides: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(A). A trial court's factual finding is deemed "clearly erroneous" only if it is against the clear weight of evidence. Reid v. Mutual of Omaha Insurance Company, supra, 776 P. 2d at 899-900; In re Estate of Bartell, supra, 776 P. 2d at 886; See Western Kane County Special Service, Dist. No. 1 v. Jackson Cattle Co., 744 P. 2d 1376, 1377 (Utah 1987).

In the present case, the Greenwoods have not attempted to marshal the evidence in support of the trial court's findings and demonstrate that the evidence supporting

the findings is legally insufficient. Their brief presents the conflicting evidence in light most favorable to their position and largely ignores the contrary evidence. There is therefore no reason to disturb the trial court's findings.

The Greenwoods base their appeal on basically three areas in which they claim the trial court committed reversible error. First they claim that the trial court erred when it found that ordinance 13-20-16E was not vague and violative of substantive due process. (Appellant's Brief at pp. 10-20). Secondly, they claim that the trial court committed reversible error when it found that the North Salt Lake Ordinance was not discriminatory and did not violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 24 of the Utah State Constitution. (Appellant's brief pp. 20-24).

Finally, the Greenwoods claim that the court erred in determining that the evidence at trial established that the combination of a dog's predominant physical characteristics or registration determine its breed. (Appellant's brief pp. 24-25).

On the issue of substantive due process, and more particularly, vagueness, the trial court, after hearing three full days of testimony from some sixteen witnesses, many of which were experts in the field of breed identification, held 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." (Trial Court Findings of Fact and Conclusions of Law, hereinafter "Findings", p. 10, para. 24). The evidence adduced at trial repeatedly affirmed the unique characteristics of the "pit bull" breeds of dogs which makes their identification readily ascertainable. (See Statement of Relevant Facts, supra).

The Greenwood's second claim that the trial court erred in determining the ordinance was not discriminatory, and thus not violative of equal protection under the Fourteenth Amendment and the Utah State Constitution is also without merit. The trial court, again, after considering all of the evidence presented to it and applying the well-settled principles of law surrounding the doctrine of equal protection, held "that there was 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 and mistreatment, cause them to have a greater propensity to be vicious." (Findings p. 10, para. 23). Relative to Greenwood's claim that the ordinance unlawfully discriminated against "pit bulls", the trial court found 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." (Findings p. 11, para. 25).

Lastly, the court's finding that the breed of a dog is determined by either its registration or predominant physical characteristics (Findings p. 3, para. 9), and that for a dog to be registered it must possess the predominant physical characteristics of the particular breed as established by the registering association (Finding at p. 3, para. 10), is supported throughout the record via testimony of witnesses on both sides. Appellant's claim that the evidence does not support such a finding borders on the ridiculous.

Based upon the evidence adduced at trial, again by witnesses for both of the parties, the court found that "the combination of predominant physical characteristics determine the dog's breed." (Findings p. 3, para. 12.) "The breed of most dogs can be determined by visual inspection of the particular dog's predominant physical characteristics." (Findings at p. 3, para. 13). Further, that " All of the "Pit bull" breeds manifest unique physical characteristics of the breed generally so that they are easily discernible from other breeds." (Findings at p. 3, para. 14).

Clearly, the trial court was very careful to consider each of the issues which the Greenwoods have raised

on appeal. The trial court heard and received extensive evidence on the issues of vagueness and substantive due process, equal protection, and the related factual question of breed identification. The standard of appellate review as enumerated in Rule 52(a), and recent decisions of the Utah Supreme Court, dictate that appellants bear a significant burden to show the trial court committed substantial error in making the findings and judgment which it did. The legal presumption that the trial court's findings and judgment are valid and correct must be overcome by a compelling showing that the trial court committed reversible error.

The Greenwoods have not made such a showing nor have they overcome that burden, particularly when one considers that the record on review must be construed in the light most favorable to the City of North Salt Lake in this case. The evidence, on both sides at the trial level, is simply too overwhelming to make such a showing.

II.

THE GREENWOODS FAILED AT TRIAL TO MEET THEIR BURDEN OF OVERCOMING THE PRESUMPTION OF CONSTITUTIONAL VALIDITY WHICH ATTACHES TO THE ORDINANCE

In reviewing an ordinance or statute to ascertain its constitutionality, certain rules of construction must be applied:

(a) A legislative enactment is presumed to be valid and in conformity with the Constitution. Salt Lake City v. Savage, 541 P.2d 1035, 1037, (Utah 1979); Trade

Commission v. Skaggs Drug Centers, Inc., Utah 2d 431, 446 P.2d 958 (1968); Snow v. Keddington, 113 Utah 325, 195 P. 2d 234 (1948).

(b) It should not be held to be invalid unless it is shown beyond a reasonable doubt to be incompatible with some particular Constitutional provision. Id.

(c) The burden of showing invalidity of an ordinance or statute is upon the one who makes the challenge. Salt Lake City V. Savage, supra, 541 P.2d at 1037; Trade Commission v. Skaggs Drug Centers, Inc., supra.

In the case of State v. Packard 122 Utah 369, 373, 250 P.2d 561, 563 (1952), it was stated:

It is recognized that statutes should not be declared unconstitutional if there is any reasonable basis upon which they may be sustained as falling within the constitutional framework [citations omitted], and that a statute will not be held void for uncertainty if any sort of sensible, practical effect may be given it. [Citations omitted.] Id.

The Supreme Court of the United States in Roth v. U.S. 354 U.S. 476, 491, (1956), said:

. . . This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ". . . [T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . ." United States v. Petrillo, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 91 l.Ed. 1877.

The case of Sunset Amusement Co. v. Board of Police Commissioners of the City of Los Angeles, 7 Cal.3d 64, 101

Cal.Rptr. 768, 773, 496 P.2d 840, 845 (1972), is also on point:

. . . It should be kept in mind that there are an infinite variety of activities or conduct which could result in potential or actual danger to the "peace, health, safety, convenience, good morals, and general welfare" of the public. A municipality cannot reasonably be expected to isolate and specify those precise activities or conduct which are intended to be proscribed. As stated in Daniel, quoting from an earlier case, "To make a statute sufficiently certain to comply with constitutional requirements [of due process of law] it is not necessary that it furnishes detailed plans and specifications of the acts or conduct prohibited." . . . Id.

There is no question that a city may enact ordinances concerning the keeping, use and enjoyment of animals, including dogs, within its borders, under its police power. 7th Ed. McQuillan, The Law of Municipal Corporations, Sec. 24.284 (1981), 62 C.J.S. Municipal Corporations, Sec. 212, 218. A city's police power extends even to the destruction of dogs in proper cases. As stated in McQuillan, Municipal Corporations, supra:

From time immemorial these animals have been considered as holding their lives at the will of the legislative power. The primary purpose of legislation for the destruction of dogs without redress to their owner is the protection of persons and property. Such legislation is justifiable under the police power to protect life, health and property and under power to declare and abate nuisances.

Id. Section 24.289 at 140.

In this case, the governing body of the City of North Salt Lake made a legislative determination that the keeping of certain breeds of dogs (generically "pit bulls"

and certain other "fighting dogs") within the city limits of North Salt Lake, without additional regulation, poses such a threat to the health, safety, and welfare of the citizens of North Salt Lake. The governing body's decision was based upon evidence of the inherent aggressiveness of such dogs; the unpredictability of these breeds of dogs; their potential to harm its citizens; and, the inadequacy of protection measures which can be taken by owners of said breeds to restrain them from coming into contact with members of the general public and other animals.

The fact that the City of North Salt Lake has chosen to regulate only these certain breeds in the manner it has, does not make the ordinance invalid. As long as that regulation bears a real and substantial relation to the public health, safety, morals or general welfare, it must be upheld by the court. Bastian v. King, 661 P.2d 953 (Utah 1983); City of Warren v. Testa, 461 N.E.2d 1354 (Ohio Com. Pl. 1983).

In a case very similar to ours, the United States District Court for the Eastern District of Pennsylvania was called upon to review the constitutionality of Chester, Pennsylvania's "Pit Bull" ordinance. That city's ordinance specified that "Pit Bulls are considered dangerous dogs and potentially hazardous to the community." See opinion in Starkey v. Township of Chester, 628 F.Supp. 196, 197 (E.D.Pa. 1986). The ordinance further required that a license be

purchased for \$500 for each dog less than three, and \$3,000 per dog above three. Owners were required to post a \$20,000 injury bond, confine their dogs to a secure place, be leashed and muzzled when not confined, and be destroyed or removed from the township if they attacked any person. Id.

In the Starkey v. Township of Chester, supra, case, the plaintiffs claimed that the ordinance was (1) discriminatory for applying just to pit bulls, thus violating the plaintiff's Fourteenth Amendment rights, (2) that it violated their First Amendment rights, (3) their due process rights, (4) that it violated the interstate commerce clause, and finally, (5) that it imposed license fees for pit bulls and no other breeds and that the fees were not "reasonably related to the costs of the costs of the license fees." Id. at 197.

The court held that despite plaintiff's claims, the ordinance met the traditional rational basis test for judging equal protection under the Fourteenth Amendment. The Starkey, supra, court also found that it was reasonable for the township to determine that pit bulls are dangerous. The court states, "The township does not have to regulate every dangerous animal at the same time in the same manner to pass constitutional muster." Id. at 197. The court concluded, the "township has not gone too far, insofar as the present record shows in regulating, licensing and charging fees for pit bulls (Citations omitted). The First Amendment and Commerce

Clause claims are frivolous on this record." Id. 197-98.

III.

THE TRIAL COURT CORRECTLY HELD THAT THE NORTH SALT LAKE
ORDINANCE, SECTION 13-20-16E WAS NOT VAGUE NOR
VIOLATIVE OF THE GREENWOOD'S SUBSTANTIVE DUE PROCESS
RIGHTS, AS MEASURED BY CONSTITUTIONAL STANDARDS

The Greenwood's claim that the trial court committed reversible error because the language of the North Salt Lake ordinance is too vague and ambiguous to meet constitutional muster is without merit. Greenwoods argue that the trial court was wrong in not making a finding that the ordinance was too vague and violated their substantive due process rights. Despite overwhelming evidence at trial to the contrary, they claim that it is impossible for dog owners or law enforcement officers to readily determine the breeds of dogs specified in the ordinance. (See Appellant's Brief at 11-14).

Before the court ever gets to that question, however, they must first determine if the ordinance will significantly compromise any First Amendment protections. As stated in 16 C.J.S. Constitutional Law, Section 66:

"Where a statute or regulation is clear as applied to him, he cannot challenge the statute on the ground that it is vague as applied to others, at least in the absence of a regulation of a First Amendment freedom. The First Amendment vagueness doctrine cannot be invoked by a party who is within the hard core prohibitions of an otherwise valid statute or regulation whose outer limit may be vague as to others." Emphasis added.

Where no fundamental or First Amendment rights are

involved, the appellant cannot raise the issue of vagueness as it applies to others. The Greenwoods attack the North Salt Lake ordinance on the ground that the ordinance is vague as applied to themselves and other persons similarly situated. "In order to challenge a statute for vagueness, a litigant must show that the statute is vague as applied to his conduct,...[W]here a statute or regulation is clear as applied to him, he cannot challenge the statute on the grounds that it is vague as applied to others,..." 16 C.J.S. Constitutional Law, Section 66b, at 179-80 (1985).

Where no fundamental constitutional or First Amendment rights are involved, to succeed, the appellant must demonstrate that the law is impermissibly vague in all of its applications. Village of Hoffman Estates vs. Flipside, Hoffman Estate, 102 S.Ct. 1186 (1982). Therein it was stated:

"In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of Constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The Court should then examine the facial vagueness challenge, and assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications." (p.1191) (Emphasis supplied).

See also, State v. Hoffman, 733 P.2d 502 (Utah 1987).

The Greenwoods apparently make no claim that their First Amendment rights have been affected by the North Salt Lake ordinance, hence their assertion that the ordinance is

overbroad must fail. The standard of review then focuses on whether the language of the ordinance is impermissibly vague in all of its applications. Id.

1. ADEQUATE NOTICE

The Greenwoods cite the U.S. Supreme Court case of Grayned v. City of Rockford, 408 U.S. 104 (1972), as support for their claim that the North Salt Lake ordinance is vague and violative of their substantive due process rights. (Appellant's brief at 11).

The Grayned, supra, case involved a challenge to the Rockford City ordinance which made it unlawful to willfully make a noise that disturbs or tends to disturb the peace and good order of a school session. Grayned, who was a participant in a public demonstration outside a Rockford High School was charged with violating the Rockford noise ordinance. He argued that his First Amendment rights had been violated, and that the ordinance was vague and deprived him of his substantive due process rights. The Court, even after applying the strict scrutiny for First Amendment claims, held that the ordinance was not invalid. 408 U.S. at 121.

In the case at bar, Greenwoods argue that the North Salt Lake ordinance fails to provide the average person of ordinary intelligence fair and adequate notice of what breeds are covered by the ordinance. (Appellant's brief at p. 12). However, the ordinance specifically enumerates at Section 13-

20-16E the Bull Terrier, the American Staffordshire Terrier, Staffordshire Terrier, Staffordshire Bull Terrier, American Pit Bull Terrier, Tosa, Shar-pei, and any other dog determined to be vicious under subsection B. (North Salt Lake Ordinances, Section 13-20-16E). The trial court below made a specific finding that the Bull Terrier, the American Staffordshire Terrier, Staffordshire Terrier, Staffordshire Bull Terrier, American Pit Bull Terrier, (generically referred to as "pit bulls") "manifest unique physical characteristics of the breed generally so that they are easily discernible from other breeds." (Findings at p. 3, para. 14). Obviously, if a dog is not registered as one of the above breeds, and if it does not manifest the predominate physical characteristics of the named breeds, it would not be subject to the ordinance.

Greenwoods also argue that the language of Section 13-20-16E which imposes six additional safeguards on dogs deemed to be "vicious", and which reads "These breeds include, but are not limited to...", fails to give the reasonable person notice if his dog is contemplated by the ordinance. (Appellant's brief at 12). Unfortunately, they have overlooked the fact that Section 13-20-16E refers to Section 13-20-16B which defines "Uncontrollable Vicious Animal", and by reference makes such animals subject to the provisions of Section 13-20-16E. Inasmuch as there could be breeds of dogs deemed vicious under 13-20-16B, different than

those specifically listed in 13-20-16E, the language "not limited to" is clear on its face.

2. ADMINISTRATIVE REMEDY

In their brief, the Greenwoods totally ignore the fact that the North Salt Lake ordinance also makes provision for an administrative remedy for any person aggrieved by its application. Section 13-20-31.1 states as follows:

ADMINISTRATIVE REMEDY: Any person required to license any animal under the provisions of this ordinance, or any person who is or may be subject to the enforcement of any provision of this ordinance in a civil or criminal proceeding who disagrees with the interpretation or application of any provision of this ordinance shall make a written request to the city manager to determine whether and how the provisions of this ordinance apply to him or her and to the animals subject to the provisions of this ordinance. During the time that the written request is being considered by the city manager, no criminal action shall be enforced under this ordinance against the person that has made the request. The city manager shall rule on the request within five days after it is received by the city manager. The decision of the city manager shall advise the recipient of whether and how the provisions of this ordinance applies to the request, and if any provision applies, the decision shall inform the recipient of how many days the person has to comply with the ordinance before the ordinance will be enforced against him or her and the animal which may be affected by the ordinance. If any person affected by the provisions of this ordinance takes position that his or her animal is not within the classifications established by this ordinance, he or she shall make a written request to the city manager under this section. The city manager may appoint an expert to advise him on matters requiring special knowledge. Where an expert is required to advise the city manager, the city manager may delay his decision until he has received the recommendation of the expert. Nothing in this ordinance requires the city to dismiss any criminal or civil action brought by the city pending his decision.

The effect of this provision is to allow any person who may be concerned about the application of the ordinance to him or her, an additional forum for review and protection.

3. ENFORCEMENT

The Greenwoods further claim that law enforcement officers and those administering the ordinance are unable to determine the extent and application of the ordinance. (Appellant's brief at 14). They go so far as to state in their brief that:

"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." (Appellant's brief at 15).

At the trial of this matter, witnesses on both sides of the case testified over and over again that a dog's breed membership was determined by the visual observation of its predominate physical characteristics. (Record, Day 1, pp. 238-240; Record, Day 1, p.51. lines 5-25 and p.52, line 1-2; Record, Day 1, p. 24, lines 2-11; Record, Day 1, p. 60, lines 14-21; Record, Day 1, p. 213-218; Record, Day 1, p. 232, lines 6-25 and p. 233, lines 1-12; Record, Day 3, p. 61, lines 10-25 and p. 62, lines 1-14).

North Salt Lake Animal Control Officer Jeff Tingey, at the first day of the trial, testified that given the opportunity to visually observe any dog, he could determine

the predominate breed of that dog. (Record, Day 1, p.22, lines 8-11, 21-25; Record, Day 1, p.23, lines 19-25, and p.24, line 1). Animal control officers further testified that visual observation of the predominate physical characteristics of a dog was typically how breeds of dogs are identified in animal control, and that enforcement of the North Salt Lake ordinance would not pose a problem to them. (Record, Day 1, p. 24, lines 2-11; Record, Day 3, p. 11, lines 11-16).

The appellate court, in determining constitutionally where vagueness is alleged, is obligated to construe the ordinance in a manner that will avoid an unconstitutional infirmity, if possible. People vs. Ortiz, 479 N.Y.2d 613 (1986).

In the Ortiz, supra, case the court stated that:

"The Constitution only requires reasonable precision from the legislative drafting; it does not impose impossible standards. Ordinary terminology may be used to express idea that find adequate interpretation in common usage and understanding. If the general class of offenses to which the statute is directed is plain within its terms, the statute will not be struck down as vague even though marginal cases may be put where doubt might arise."

Id. at 613.

The evidence adduced at trial clearly supports the trial court's finding that the language of the ordinance was such that the person of ordinary and common intelligence would know whether or not his breed of dog was subject

thereto. The evidence also supported the court's finding that the breed of a dog is determined by registration or its predominate physical characteristics, and that the "pit bull" breeds of dogs possessed certain unique characteristics which make them discernible from other breeds.

Based upon the evidence, the court determined that the North Salt Lake ordinance, Section 13-20-16E was not vague, and that appellant's substantive due process rights had not be violated. That finding and judgment is supported by the evidence and the applicable caselaw and should be upheld.

IV.

THE TRIAL COURT PROPERLY HELD THAT
THE NORTH SALT LAKE ORDINANCE DOES NOT VIOLATE THE EQUAL
PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S.
CONSTITUTION, IS NOT VIOLATIVE OF ARTICLE I,
SECTION 24 OF THE UTAH STATE CONSTITUTION, AND THAT
ITS ENACTMENT WAS A VALID EXERCISE OF THE CITY'S POLICE POWER

The Greenwoods have raised on appeal, the question as to whether the North Salt Lake ordinance is a valid exercise of police power under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 24 of the Utah State Constitution. (Appellant's brief at 21). Police power includes all laws, restraining or prohibiting, anything harmful to the welfare of the public. State v. Hoffman, supra; Kalodimos vs. Morton Grove, 470 N.E.2d 266 (Ill. 1984).

The enactment of North Salt Lake's ordinance by its

governing body was an exercise of the City's police power. It is well settled that an exercise of police power which has the effect of depriving a person of property will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public. Peck v. Dunn, 574 P.2d 367 (Utah 1978); City of Lyons v. Suttle, 209 Kan. 735, 498 P.2d 9 (1972).

It is also well established in Utah that the constitutionality of a statute or ordinance is presumed, and that the burden is upon one attacking its validity to clearly show that it violates the Constitution. Provo City Corp. v. Willden, 768 P.2d 455, 458 (1989); Salt Lake City Corporation v. Savage, 541 P.2d 1035, cert. denied, 96 S.Ct. 1514, 425 U.S. 915 (Utah 1975). Thus, an ordinance passed pursuant to a city's police power will be held invalid only if it bears no real and substantial relation to the public health, safety, morals or general welfare of the public. In Grigsby v. Mitchum, 380 P.2d 363 (1963), it was held:

Whether an exercise of the police power does bear a real and substantial relation to the public health, basic morals or general welfare of the public, and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and unless the decisions of such legislative body on those questions appear to be clearly erroneous, the court will not invalidate them.

Id. at 365.

In the present appeal, the appellants claim that the ordinance in question is arbitrary and capricious because

it selects for regulation certain breeds of animal. There is no merit to such a contention, however. In City of Warren v. Testa, 461 N.E.2d 1354 (Ohio Com. Pl. 1983) the court addressed a similar issue with respect to an ordinance which prohibited the keeping and harboring of lions within the City of Warren. The Court stated:

It is a fact that other animals or various species have the ability to bite and do harm . . . a fact confirmed by witnesses on both sides of the case. The Defendant's claim of selectivity of the ordinance fails in view of the long established principle of law that a legislative authority has the right to legislate out nuisances as they are called to said legislative authority's attention. Perhaps the lion could argue the principle of selectivity; however, certainly the City Council has the right to legislate here, supplement later, and address each so called "nuisance" as it arises.

Id. 461 N.E.2d at 1357.

The governing body of the City of North Salt Lake determined that the breeds of dogs commonly known as the "pit bull", the shar-pei, and the tosa, pose such an immediate and serious threat to the public health, safety and welfare, that an ordinance regulating their possession was necessary to protect the citizens of North Salt Lake. Though it may be true that other breeds of dogs, as well as other species of animals, not currently prohibited from being kept or otherwise regulated within the City of North Salt Lake's limits are also dangerous, the governing body of North Salt Lake obviously felt that the breeds of dogs named in the ordinance pose a greater and more immediate threat of harm to the public health, safety and welfare than such other

animals. There is certainly no Constitutional requirement that a city must regulate all breeds or none at all. Starkey v. Township of Chester, supra, 628 F.2d at 197.

The minimal showing of relation to the public welfare necessary to uphold the constitutionality of a legislative enactment is illustrated by the decision in Quilici vs. Village of Morton Grove, 695 Fed.2d 261 (1982), where the Court upheld an ordinance totally banning handguns within the borders of the Village, stating that:

"...there is at least some empirical evidence that gun control legislation may reduce the number of deaths and accidents caused by handguns. This evidence is sufficient to sustain the conclusion that Ordinance No. 81-11 is not wholly arbitrary not completely unsupported by any set of facts. Accordingly, we decline to consider Plaintiff's argument that Ordinance No. 81-11 will not make Morton Grove a safer more peaceful place."

This celebrated decision is a significant and persuasive illustration of the broad scope of the police power of a municipality as it pertains to instrumentalities with potential to do harm. Further, the Starkey, supra, case held "The township does not have to regulate every dangerous animal at the same time in the same manner to pass constitutional muster." 628 F.Supp. at 197 (E.D.Pa. 1986)

The court in Starkey, supra, said that "The township could reasonably determine, as it did, that pit bulls are dangerous. The Township's Health Officer testified that the regulation was necessary in this densely populated Township the pit bull bites to kill without signal." Id. 628

F.Supp. at 197.

As a municipal corporation, the City of North Salt Lake is interested in, and charged with, the protection of the health, safety and welfare of its citizens. Its governing body has determined that the breeds of dogs specified in the ordinance are dangerous and pose a threat to the public's health, safety and welfare. The governing body, therefore, properly passed the subject ordinance to protect its citizen's health, safety and welfare.

Substantial evidence adduced at trial established that the breeds specified in the ordinance (commonly referred to as "pit bulls"), are dangerous and pose a greater potential to do harm to other animals and people, than other breeds of dogs. The City therefore was justified in its determination that without additional regulation, those particular breeds posed a significant threat to the citizens of North Salt Lake. The Greenwood's argument that the North Salt Lake ordinance violates rights protected under the equal protection clause of the Fourteenth Amendment and Article 1, Section 24 of the Utah Constitution is groundless.

V.

THE EVIDENCE AT TRIAL SUPPORTS THE TRIAL COURT'S
FINDING THAT THE BREED OF A DOG IS DETERMINED
BY REGISTRATION OR BY PREDOMINANT PHYSICAL CHARACTERISTICS

In Section III of their brief, the Greenwoods argue that the trial court made an erroneous finding that the breed of a dog was determined by its predominant physical

characteristics. (Appellant's brief at 24).

The trial court did in fact make a finding that "The breed of a dog is determined by registration or by predominant physical characteristics." (Findings at p. 3, para. 9). The Greenwoods do not challenge the fact that breed may be indicated by registration papers, but they do claim the evidence did not support a finding that the predominant physical characteristics of a dog determine its breed classification.

The Greenwood brief recognizes that evidence at trial concerning breed identification came from both sides (Appellant's brief at 24). In fact, evidence at trial confirming that the predominant physical characteristics do determine the breed classification of a dog was overwhelming from witnesses and evidence offered by both of the parties. (Record, Day 1, pp. 238-240; Record, Day 1, p. 51. lines 5-25 and p. 52, line 1-2; Record, Day 1, p. 24, lines 2-11; Record, Day 1, p. 60, lines 14-21; Record, Day 1, pp. 213-218; Record, Day 1, p. 232, lines 6-25 and p. 233, lines 1-12; Record, Day 2, p. 21, lines 14-17; Record, Day 3, p. 61, lines 10-25 and p. 62, lines 1-14).

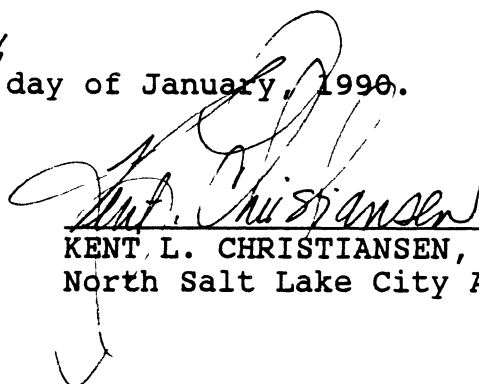
The Greenwood's suggestion that "the trial court should have found breed identification only by use of registration and pedigree charts as such are the only objective method of accurate breed identification", is circuitous. (Appellant's brief at 25). Registration itself

is based on a visual observation of a dog's predominant physical characteristics. (See Statement of Relevant Facts, supra at 9). Pedigree charts themselves rely solely on the dog owner's observation of the dog's predominant characteristics and his determination of the breed of the parents of the dog. The record below clearly supports the trial court's determination that breed is determined by a dog's predominant physical characteristics.

CONCLUSION

Based on the trial court's findings and judgment, the overwhelming weight of evidence in the record and legal precedent which supports the finding and judgment, coupled with the foregoing arguments, the City of North Salt Lake respectfully submits that the decision of the trial court must be upheld.

DATED this 18th day of January, 1990.



KENT L. CHRISTIANSEN, P.C.
North Salt Lake City Attorney

EXHIBIT "A"

Section 13-20-01:

"22. VIOIOUS ANIMAL: Any animal which is dangerously aggressive or uncontrollable, including but not limited to, any animal which has bitten or in any manner attacked any person or animal. Any animal by its unique nature or breeding which 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. HEREDITARY CHARACTERISTICS: Certain breeds of dogs which by their unique hereditary characteristics, owner training or instruction, or mistreatment, have a propensity to be vicious. These breeds include, but are not limited to the Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, Tosa, Shar-pei, and any dog determined to be vicious under Subsection B of this Section."

"F. LICENSING REQUIREMENTS:

The dogs identified under this Section:

1. Must be licensed under the procedures and fees set forth in this ordinance.
2. Must be kept in a fenced yard, dog run, or other structure which is at least 6 feet in height, by 6 feet wide, by 10 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.

Section 13-20-31.1:

ADMINISTRATIVE REMEDY: Any person required to license any animal under the provisions of this ordinance, or any person who is or may be subject to the enforcement of any provision of this ordinance in a civil or criminal proceeding who disagrees with the interpretation or application of any provision of this ordinance shall make a written request to the city manager to determine whether and how the provisions of this ordinance apply to him or her and to the animals subject to the provisions of this ordinance. During the time that the written request is being considered by the city manager, no criminal action shall be enforced under this ordinance against the person that has made the request. The city manager shall rule on the request within five days after it is received by the city manager. The decision of the city manager shall advise the recipient of whether and how the provisions of this ordinance applies to the request, and if any provision applies, the decision shall inform the recipient of how many days the person has to comply with the ordinance before the ordinance will be enforced against him or her and the animal which may be affected by the ordinance. If any person affected by the provisions of this ordinance takes the position that his or her animal is not within the classifications established by this ordinance, he or she shall make a written request to the city manager under this section. The city manager may appoint an expert to advise him on matters requiring special knowledge. Where an expert is required to advise the city manager, the city manager may delay his decision until he has received the recommendation of the expert. Nothing in this ordinance requires the city to dismiss any criminal or civil action brought by the city pending his decision.

EXHIBIT "B"

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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

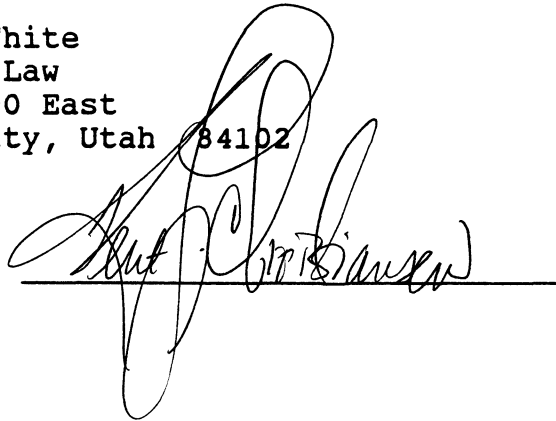
Approved as to Form:

By: 
David Paul White
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on the 19th day of January, 1990, pursuant to Rule 26(b) of the Rules of the Utah Supreme Court, I served four (4) copies of Respondent's Brief to the following by hand delivering those same copies to the following:

David Paul White
Attorney at Law
144 South 500 East
Salt Lake City, Utah 84102



A handwritten signature, likely of the server, is written over a horizontal line. The signature is cursive and appears to read "Butler".