

## **Dangerous Dog Ordinances**

## Texas Cities Run Afoul of State Law

BY DONALD D. FEARE

midst the increased media coverage over dog bites, cities are passing ordinances regarding dangerous dogs that often flout state law — and the constitutions of the United States and Texas. The Texas Health and Safety Code already governs dangerous dog cases, providing definitions, procedures for deeming a dog dangerous, notice and hearing requirements, and disposition options for the court. The actual need for complex and stringent local ordinances can be questionable and even motivated by political and public perception. Regardless of the reasons, it is clear that animal law practitioners can no longer rely on the language of the state statute but must be prepared to deal with additional provisions found in city ordinances. There are now almost as many different definitions of a dangerous dog as there are city ordinances, making it difficult for lawyers, owners, and dogs.



Some of the most common municipal provisions not found in the state statute include:

- (1) A dog that attacks another animal is a dangerous dog regardless of whether the other animal was also at large at the time. The statute does not contain a provision for deeming a dog dangerous because it bit another animal.
- (2) Appeals from animal control deeming a dog dangerous may only be taken to the municipal court. The statute provides that the owner may appeal to the municipal, justice, or county court.
- (3) Ruling by the municipal court is final and may not be further appealed. The statute provides that the owner may appeal that ruling in the manner of normal appeals from the initial court.
- (4) The hearing before the municipal court is by way of a substantial evidence review rather than an evidentiary trial. The statute has no such restriction.
- (5) Insurance required for keeping a dangerous dog, if allowed to remain in the city, must also name the city as co-insured. The statute merely requires the owner to carry liability insurance.
- (6) Brick homes are not considered sufficiently safe enclosures. The statute has no such restriction. Justification for this particular restriction is usually claimed under the authority given local animal control to adopt additional requirements.
- (7) A dog that bites another animal may be euthanized. Since dog-on-dog bites are not included in the definition of dangerous dog in the statute, no such euthanasia provision appears in the state statute.
- (8) Various ordinances provide for a limited time in which the owner may file the appeal. The statute provides the time available to the owner to file an appeal from the determination that the owner's dog is dangerous.

These are but a few examples of the ordinance conflicts found in various jurisdictions throughout the state.

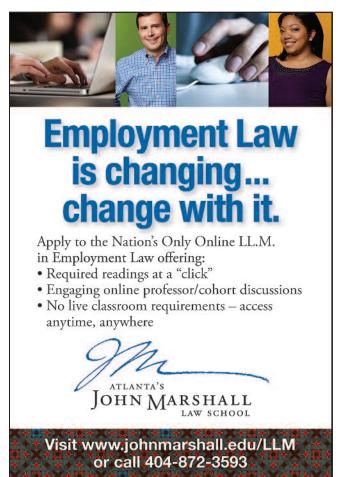
The requirement that the municipality be named as a coinsured is particularly problematic. Most homeowners have sufficient homeowner's insurance to satisfy the requirement for liability insurance and, if they do not, additional insurance can be obtained. However, in Texas, a homeowner may not add a third party (including a municipality) to a homeowner policy of insurance.

The municipalities claim concern about their liability if they release a dog that has been deemed dangerous back to its owner and thereafter it attacks another person. Municipal animal control is a governmental function for which no waiver of govern-

mental immunity exists.2 The concern voiced by the municipalities has already been settled by case law in their favor. A city adopting out a dog from animal control that then attacked a child did not permit a suit against the city as animal control is a government function and governmental immunity insulates the city from suit.3 Even taking the situation a step further, a city that had released a dog after it attacked a person and then attacked yet another person did not provide a waiver of governmental immunity.4 Given the cases cited, it appears the city has no insurable interest and, thus, the question is raised as to whether any binding insurance policy could even be issued naming the city as a co-insured.

A city ordinance may not contain any provision inconsistent with the Texas Constitution or the general laws enacted by the Texas Legislature.5 Thus, when a municipality adopts an ordinance that contains provisions for dangerous dogs that are inconsistent with the statutory language, such ordinance runs afoul of the power and law of the state.

The Texas attorney general recently weighed in on the question of whether municipalities may adopt ordinances that limit the courts to which a dangerous dog appeal may be taken.<sup>6</sup> His formal opinion announced that any such limitation conflicted with the state statute. Therefore, a municipality may not, by order of its animal control authority or otherwise, limit the





courts to which a dog owner may appeal where the Texas Legislature has provided, without limitation, that more than one court has subject-matter jurisdiction. Additionally, the opinion confirms that the dog owner may choose to file the appeal in any county, justice, or municipal court that has subject-matter jurisdiction, including territorial jurisdiction.

Texas courts have consistently upheld the doctrine that no municipal ordinance may conflict with a state statute.7 The Supreme Court of Texas has held that the Texas Constitution prohibits municipal ordinances that are inconsistent with state statutes and when such inconsistencies exist, the ordinance is void.8

When an ordinance conflicts with a statute, the only way the ordinance may stand is if it can be reconciled with the statute and such a construction will leave both enactments in effect.9 Restricting appeal to the municipal court appears to offer no construction that would leave both the statute and ordinance in effect. An analysis of various other conflicts noted result in the same conclusion: "A municipal ordinance in conflict with a state statute is unconstitutional and therefore, void."10 The Supreme Court of Texas has long held: "Clearly, an ordinance which conflicts with or is inconsistent with the state legislation is impermissible."11

Given that the conflicting ordinance is void, it follows that a court receiving an appeal limited to it by the ordinance language gains no subject-matter jurisdiction. A judgment is void when the court issuing the judgment had no jurisdiction over the subject matter.12 Put another way, "[A] void law is no law and confers no rights, bestows no power on anyone, and justifies no acts performed under it."13 As a result, the Texas Supreme Court has specifically stated that "when a court lacks jurisdiction, its only legitimate choice is to dismiss."14

It is not uncommon for a local magistrate or prosecutor to take the position that the dog owner confers jurisdiction on the court by filing an appeal in that court. However, the choice of court is not a free election, but one mandated by the ordinance. The dog owner cannot convey jurisdiction by filing an appeal. It is "well established that subject-matter jurisdiction is conferred by constitution or statute and is not something the parties can confer by consent or waiver or abrogate by agreement."15 And, as has been held, any order arising out of a

Experienced in State & Federal Cases FREE - No Obligation - Confidential Consultation RestaurantExpertWitness.com 800-300-5764 Our experts do NOT charge for travel "Unbiased opinions, reports, testimony and consultation since 1987 ruling by a court that received the case by way of an ordinance conflicting with the state statute is void and unenforceable.<sup>16</sup>

In those instances in which the review by the municipal court does not provide an evidentiary trial but rather a substantial evidence review, the dog owner is being deprived of due process of law. The state statute provides for an appeal to a trial court (municipal, justice, or county) and does not limit the procedure before that court to one of a substantial evidence review. 17 Had the Texas Legislature elected to limit the procedure to a substantial evidence review, it certainly could have. It is apparent, by our basic rules of statutory construction, that the Legislature intended the owner to have a trial.

Saving clauses in ordinances would probably not serve to salvage them. Taking the court designation out of the ordinance or the manner of handling or the disposition of the dog would do such violence to the ordinance that it would no longer make sense.

There is sound reasoning behind prohibiting municipalities from adopting ordinances in direct conflict with statutes, which cities should take seriously when drafting dangerous dog ordinances. Lawyers should be prepared to either attack the legality of city ordinances or move to appeal a dangerous dog determination to one of the courts provided by the state statute that would best serve the client. Dog owners must decide the level of conflict with the municipal government they are willing to go to in order to save their dogs or avoid unduly restrictive conditions for keeping them. One of the best ways to avoid the necessity of such conflict is to ensure that conditions and conduct that would permit deeming the family dog dangerous do not exist.

## **Notes**

- 1. V.T.C.A. Health & Safety Code, Ch. 822.
- 2. Powers v. City of Conroe, 2008 WL 2917052 (Tex. App. Beaumont).
- City of Elgin v. Reagan, 2009 WL 483344 (Tex. App. Austin). Churchwell v. City of Big Spring, 2004 WL 905951 (Tex. App. Eastland).
- V.T.C.A. Tex. Constitution Art. XI, §5.
- Tex. Atty. Gen. Op. GA-0660, 2008 WL 4066438 (Tex. A.G.).
- West End Pink, Ltd. v. City of Irving, 22 S.W.3d 5, 7 (Tex. App. Dallas 1999 pet.
- Baytown v. Angel, 469 S.W.2d 923, 925 (Tex. App. Houston. [14th Dist.] 1971, reh denied).
- International Ass'n. of Firefighters Local 1173 v. City of Baytown, 837 S.W.2d 783, 787 (Tex. App. — Houston. [1st Dist.] 1992).
- 10. Lopez v. State, 756 S.W.2d 49, 50 (Tex. App. Houston. [1st Dist.] 1988, reh. ref'd.).
- 11. City of Brookside Village v. Comeau, 633 S.W.2d 790, 796 (Tex.1982).
- 12. Cook v. Cameron, 733 S.W.2d 137, 140 (Tex.1987).
- 13. Newsome v. Starkey, 572 S.W.2d 29, 30 (Tex. App. Dallas 1978, no writ).
- 14. State v. Morales, 869 S.W.2d 941, 949 (Tex.1994).
- 15. Vantage Systems Design, Inc. v. Raymondville Indep. Sch. Dist., 290 S.W.3d 312, 317 (Tex. App. — Corpus Christi-Edinburg 2009, no writ).
- 17. Tex. Health & Safety Code, §822.0421(b).



## **DONALD D. FEARE**

is a sole practitioner in Arlington and an adjunct professor of animal law at Texas Wesleyan School of Law. His practice focuses on animal and consumer law.