

POLITICS AND POINTS OF VIEW:
ANIMAL CONTROL ISSUES AFFECTING CITIES

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I. INTRODUCTION

The purpose of this paper is to outline the various ways in which cities play a role in regulation of animals and to outline the tools available for addressing animal related issues. Depending on the size of the population, the character of the land, wildlife in the area, and of course politics, the approach to animal regulation will vary from location to location. At the low end of the spectrum is the jurisdiction that does nothing but enforce state laws (e.g. animal cruelty, wildlife control, etc.). The other end of the spectrum includes cities that actively engage to address specific issues through adoption of ordinances (zoning, nuisances, etc.), employment of animal control officers, and sometimes the operation of a city animal shelter (a/k/a dog pound). This paper is intended to serve as an overview of all the laws, regulations, and case law related to the regulation and protection of animals as well as the operation of animal control departments and municipally run shelters.

II. ABOUT THE AUTHOR

After graduating Cum Laude with a degree in Political Science and French from Austin College, Jonathan received his law degree from the Southern Methodist University Dedman School of Law. While primarily focused on public service, Jonathan has worked for private firms as well as governmental entities prior to joining the City of Bryan's legal team. Jonathan's practice focuses on municipal law, providing general legal services for the City of Bryan covering code enforcement, animal control, real estate, economic development, and other areas as needed. In 2011, Jonathan assisted with the creation and operation of the City of Bryan's animal shelter (the Bryan Animal Center), which included receiving certification from the Texas Academy of Animal Control Officers for a professional humane law enforcement training course in shelter management. Jonathan lives in Bryan with his two dogs Chewie and Catelyn.

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III. BASIC REGULATION – ENFORCEMENT OF STATE LAWS

For cities that have not adopted ordinances to actively engage in the regulation of animals, there are still a number of tools available, although primarily for law enforcement. Most cities without animal control officers typically rely on peace officers when issues arise requiring the city's involvement.

A. Wildlife

The Texas Parks & Wildlife Code regulates hunting and wildlife management generally and empowers the Department of Parks and Wildlife to act on behalf of the state. While cities will not typically have much influence or involvement, the Code requires permits and provides regulations for special circumstances including:

- the power to destroy dangerous wildlife, TEX. PARKS & WILD. CODE ANN. § 43.151 et seq;
- ownership or transportation of non-indigenous snakes, *id* at § 43.851 et seq; and
- trapping and relocating game animals (including deer), *id* at § 43.061 et seq.

Failure to obtain required permits constitutes a criminal violation. The code also criminalizes some conduct, for example it is a violation to hunt exotic big game (e.g. lions, tigers, and bears oh my). *Id* at § 62.101 et seq. Each of these regulations specifically provide penalty provisions stating whether conduct is a misdemeanor or felony. *E.g. id* at § 62.107. Citations for these violations are handled in the same manner as other criminal citations. *Id* at § 12.401.

There are federal laws that are similarly related to wildlife control, but in those cases they limit the power of cities as well as citizens. The federal Migratory Bird Treaty Act requires a person to obtain a permit before killing, injuring, owning, or transporting (or any other related verb you can think of) a migratory bird, egg, or nest. 16 U.S.C. § 703(a). The federal Endangered Species Act similarly prohibits ownership, control, transport, import, or export of

endangered species. 16 U.S.C. § 1538. The Secretary of the Interior (or Commerce or Agriculture) creates the list of endangered species and adopts regulations to protect and promote their rehabilitation. 16 U.S.C. § 1533. Again, since both of these laws are federal and not state matters, local law enforcement is not typically involved.

B. County Responsibility

For cities without an existing animal control department, the County is generally going to be held responsible, whether through a county animal control office or through the sheriff's department. Different state laws that govern the regulation and treatment of animals will delegate responsibility to the sheriff, in the absence of an office of animal control specifically. In the case of dealing with dangerous dogs, under Chapter 822 of the Health & Safety Code, Animal Control Authority is defined as the municipal or county animal control office with authority over the area in which the dog is kept or the county sheriff in an area that does not have an animal control office. With regards to stray livestock, under Agriculture Code Chapter 142, the sheriff is responsible for the impoundment, redemption, and disposition of strays caught on public and private property.¹ The statute and interpretative attorney general opinions indicate that this is a duty of the sheriff. TEX. AGRIC. CODE ANN § 142.003; Tex. Att'y Gen. Op. MW-588 (1982). The Health & Safety Code permits counties to have an election to register and license dogs (only in counties that do not register dogs pursuant to Chapter 826 Rabies Control, see section V below). See TEX. HEALTH & SAFETY CODE Ch. 822, subchapter C. Most of the state laws granting cities the authority to regulate animals have similar provisions for counties,

¹ The Texas Local Government Code also gives Type A municipalities the ability to prohibit horses, mules, cattle, sheep, swine, or goats from running at large within the city, allow for the capture, impoundment, disposition, and enforcement of penalties on the owner. TEX. LOC. GOV'T CODE ANN. § 215.026.

so if your city does not have an animal control department, the county might have taken on that responsibility.

C. Animal Cruelty

A much more typical issue for cities to get involved in is when pets or livestock are being abused or neglected. The Texas Penal Code makes it an offense to torture, neglect, or intentionally injure animals. *See* TEX. PEN. CODE § 42.09 (livestock); *id* at § 42.092 (non livestock). The Health & Safety Code makes it a crime to unreasonably restrain a dog outside at night, within 500 feet of a school, or during adverse weather conditions (e.g. too hot, too cold, hurricane, etc.). TEX. HEALTH & SAFETY CODE § 821.077. The restraint is unreasonable if it is a pinch, prong, or choke collar; is too short (ten feet or five times the length of the dog, whichever is more); or if it is unsafe/injurious. *Id.* In addition to prosecuting the owner for the offense, a cruelly treated animal can be taken away from the owner. A peace officer (or animal control officer) can petition a justice court to issue a warrant authorizing the officer to seize a cruelly treated animal. TEX. HEALTH & SAFETY CODE § 821.022. Upon a showing of probable cause, the court will issue the warrant authorizing the immediate seizure and schedule a hearing within ten days. *Id.* The purpose of the hearing is only partially to give the owner an opportunity to raise a defense, a conviction under Penal Code sections 42.09 or 42.092 is prima facie evidence of cruelty, making a defense a moot point. For practical purposes, the primary reason for the hearing is to determine what to do with the animal, and to allow the city to recoup the costs involved. Upon a finding that the animal was cruelly treated, the court will determine the disposition of the animal in one of three ways 1) sold at auction, 2) given to a shelter, or 3) humanely destroyed. *Id* at § 821.023. The city, or other enforcing agency, can recoup the costs of the sale, seizure, care, treatment, and disposition of the animal by providing the court evidence

of those costs, which can be assessed against the former owner. *Id.* The owner can appeal to the county court by filing a notice of appeal and a cash bond within ten days. *Id.* at § 821.025.

A countervailing issue is when animals become a threat to other animals. Under Texas law, any dog or coyote that has attacked or is about to attack livestock, fowl, or domestic animals (i.e. pets) can be summarily killed by any person witnessing the attack. *Id.* at § 822.013(a). The owner of the animal being attacked, or someone acting on his or her behalf, does not need to be a witness but need only have knowledge of the attack. *Id.* at § 822.013(a)(2). As an alternative, the dog or coyote can be detained and/or delivered to the local animal control authority. *Id.* at § 822.013(c).

D. Political Issue: Dog Fighting and Cockfighting

A lot of recent attention has been paid to the problem of dog fighting and cockfighting. Dog fighting has been criminal for some time, but recent legislation (H.B. 1043) adopted similar regulations for cockfights. There is a separate part of the Penal Code that specifically addresses dog fighting and cockfighting. TEX. PEN. CODE § 42.010, 42.105. Because of the nature of this particular kind of cruelty, a range of activities are included within the scope of this crime, some of which are deemed more severe than others. Specifically, the legislature has made it a Class A misdemeanor to

- (1) own or possesses dog-fighting equipment;
- (2) use or permit another to use the venue for a cockfight
- (3) own or train a dog for dog fighting;
- (4) own or train a cock for cockfighting;
- (5) manufacture, buy, sell, exchange, possess, or advertise cockfighting equipment; or
- (6) attend as a spectator a dog fight or a cockfight (except that attendance at a cockfight is only a Class C misdemeanor for a first offense). *Id.*

These provisions deal with activities which, in and of themselves, would not be inherently criminal but become criminal because of the relation to the fighting. Like drug paraphernalia

laws, there are other elements related to mental state and intent that make the activity criminal. *See id* at § 42.10(c)(5) (owning a fighting dog is not a violation unless the owner intends to use the dog for fighting). It is easier to punish more direct involvement in the fighting, and because of the increased culpability, the punishment is more severe. It is a state jail felony to:

- (1) cause a dog to fight with another dog (except in the defense of livestock, property, or a person);
- (2) cause a cock to fight with another cock
- (3) participate in the earnings of a cock fight
- (4) participate in the earnings of or operation a facility used for dog fighting; or
- (5) use or permit another to use any real estate, building, room, tent, arena, or other property for dog fighting. *Id.*

Part of the concern facing cities that address dog fighting and cockfighting is the difficult choices faced when these animals are seized. Dogs rescued from fighting can be dangerous, especially to other dogs.² While there are rescue groups who specialize in rehabilitation of these dogs (e.g. Humane Society of the United States - Dogfighting Rescue Coalition) it is not always possible, and dogs should be evaluated by behaviorists before being rescued. The sad fact is that most animals trained for fighting, especially game cocks, are too dangerous to serve any lawful purpose and must be humanely euthanized. Even the “bait dogs” (dogs that are used to train the fighting dogs) can pose problems because of injuries, both physical and psychological.

Another concern that animal rights advocates have with regards to this kind of cruelty is that it is difficult to prosecute. Because dogs are common pets, finding the dogs used for fighting is like finding a needle in a stack of needles. Legislatures have attempted to increase enforcement by broadening the scope of the crime. In 1999, a Federal law was passed making depictions of animal cruelty a federal crime. 18 U.S.C. § 48. That law, however, was struck down in 2010 on First Amendment grounds. *U.S. v. Stevens*, 559 U.S. 460 (2010). Under Texas

² American Society for the Prevention of Cruelty to Animals (ASPCA) FAQ on Dog Fighting, <http://www.asPCA.org/Fight-Animal-Cruelty/dog-fighting/dog-fighting-faq>.

law, as explained above, ownership of the equipment is, in and of itself, a criminal activity. By so expanding the definition of the crime, the police do not need to be present for the actual fight for there to be a crime, which also expands the scope of probable cause needed for searches. Additionally, some shelters are keeping track of adoptions of dogs commonly used for fighting, and in some cases conducting background checks before the adoption is allowed to proceed.

IV. OPTIONAL REGULATIONS – MUNICIPAL ORDINANCES

A. Dangerous Dogs

The Health & Safety Code provides a procedure for regulating dangerous dogs. A city with an animal control office is the animal control authority for the purposes of this regulation; otherwise the county sheriff has the authority. TEX. HEALTH & SAFETY CODE ANN. § 822.041(1). Generally speaking, a dog is considered dangerous if it:

“(A) makes an unprovoked attack on a person that causes bodily injury and occurs in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own; or
(B) commits unprovoked acts in a place other than an enclosure in which the dog was being kept and that was reasonably certain to prevent the dog from leaving the enclosure on its own and those acts cause a person to reasonably believe that the dog will attack and cause bodily injury to that person.” *Id* at § 822.041(2).

An attack on a non-human, e.g. dog attacks livestock or pets, will satisfy subsection (2)(B). Tex. Att’y Gen. Op. No. LO 93-13 (holding that section (2)(B) is redundant *unless* it is intended to account for non-human attacks). If a person reports such an incident, the animal control authority may investigate the incident, collect witness statements, and make a determination. TEX. HEALTH & SAFETY CODE ANN. § 822.0421. The city must notify the owner, who has fifteen days to file an appeal with a justice, county, or municipal court of competent jurisdiction.

Id. If they do not appeal, or if the dog is determined by the court to be dangerous, the owner has thirty days to:

1. register the dog with the city;
2. restrain the dog at all times on a leash in the immediate control of a person or in a secure enclosure;
3. obtain liability insurance (or show financial responsibility) in an amount of at least \$100,000 to cover damages resulting from an attack by the dog causing bodily injury to a person and provide proof to the city; and
4. comply with any applicable municipal or county regulation, requirement, or restriction on dangerous dogs. *Id* at § 822.042 (a)

or

1. deliver the dog to the city. *Id* at § 822.042(b)

If the owner fails to do so, the any person (including the city) can petition a justice, county, or municipal court to issue notice, conduct a hearing, and issue a warrant ordering the city to seize the dog and provide for the impoundment of the dog in secure and humane conditions. *Id* at (c).

If the owner does not comply with the registration and insurance requirements, the dog will be humanely destroyed and the owner assessed for the costs related to the seizure, acceptance, impoundment, and destruction of the dog. *Id* at (d). The owner of the dog may appeal the decision of the justice, county, or municipal court in the same manner as other appeals from that court. *Id* at § 822.0423(d).

In addition to the process described above, there is another process for addressing dogs that have killed or seriously injured a person. *Id* at § 822.001-007. A justice, county, or municipal court shall order the seizure of a dog that has killed or seriously injured a person upon a sworn complaint and a showing of probable cause. *Id* at § 822.002. A hearing will be held within ten days of the warrant for seizure being issued. *Id* at § 822.003. If the dog was found to have caused the death or serious injury of a person, it shall be humanely destroyed, and if not, it shall be released. *Id* at § 822.003(d)

B. Point of View: Breed Specific Regulation

Cities may adopt more stringent regulations regarding the registration, care, and treatment of dangerous dogs. TEX. HEALTH & SAFETY CODE § 822.047. However, cities are specifically prohibited from passing breed-specific regulations. *Id.* There is a heated debate between people who want to ban “dangerous” breeds and advocates who argue that the breeds are misunderstood. Typically the regulations are proposed by opponents of breeds with demonstrated propensities towards aggression and violent behavior.³ This typically includes Pit Bulls, Chows, Rottweilers, German Shepherds, Doberman Pinschers, and others.⁴ Opponents of such legislation argue that banning a breed just creates a moving target, because trainers will just switch breeds.⁵ They also argue that the problem of dangerous dogs stems from the training or neglect by irresponsible owners, not from a particular breed or mix.⁶ Since Texas law currently bans breed-specific regulation by cities, the issue could be considered settled, however city attorneys will continue to get proposals from citizens and public officials who are concerned that these breeds pose an inherent risk.

C. Zoning

Chapter 211 of the Texas Local Government Code allows cities to regulate development within their boundaries and to promote health, safety, and welfare of their citizens by regulating the size of buildings, size of lots, and uses within different areas of the city. TEX. LOC. GOV'T CODE ANN. § 211.003. It is the definition of uses, conditional uses, and accessory uses that most directly relates to the regulation of animals. Some cities will classify livestock (or other large

³ Linda Weiss, “Breed-Specific Legislation in the United States” Michigan State University College of Law, Animal Legal and Historical Web Center (2001).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

animals), poultry, etc. as a specific kind of use, and them will specify which districts in which it is a permissible use.⁷ Often this is a use only permitted in agricultural districts, but sometimes it is allowed in other districts under certain restrictions or with a CUP. Sometimes domestic animals (e.g. dogs, cats, birds, fish, hamsters, etc.) will similarly be defined as a use and permitted in specified districts.⁸ Alternatively, some cities classify which animals are excluded from a particular district, for example: horses, goats, cows, and pigs are typically not allowed in residential districts.⁹ In some cases, regulations relating to animals will be found in a separate ordinance but will refer back to the districts as defined by the zoning ordinance.¹⁰ Cities often using zoning to limit the number of animals allowed in a particular district or as an accessory use. For example, in a residential district, four pets would be an accessory use for a residence, any more pets and you are deemed to be operating a kennel. In this manner a city can allow breeders or even volunteer shelters to exist, but only if they do so in a manner that does not conflict with the comprehensive plan for the city.

D. Political Issue: Green Zoning

There is an emerging trend to change, or at least be more flexible, in some of these restrictions. There are arguments for green friendly regulations and sustainable development that support more locally grown produce and farm products. In particular, some cities are allowing chicken coops on residential property, with certain conditions (e.g. waste removal, design standards for coops, set backs from property lines, etc.). Cities can achieve this by adding conditional overlays to residential zones that allow certain uses, provided that permission is

⁷ See e.g. City of Forth Worth Code of Ordinances § 9.101 (large animals defined as horses, cows, etc.); § 4.602 (large animals only permitted in agricultural districts).

⁸ See e.g. City of Cedar Park Code of Ordinances § 11.12.002 (defining Domestic Animals); § 11.02.036 (Domestic animals allowed in single family residential district).

⁹ See e.g. City of College Station Code of Ordinances § 2-3(a), (b) (keeping of livestock and poultry is not permitted except in agricultural open and rural residential subdivision districts).

¹⁰ *Id.*

obtained from the city. A similar trend is to allow bee keeping (under certain conditions and up to specific standards). Even livestock are being allowed in residential districts, provided that the animal is strictly for the personal use of the residents (e.g. milk cow/goat).

E. Nuisance Regulations

The tool that provides cities with the most flexibility with regards to addressing specific concerns are the nuisance statutes in Chapter 217 of the Local Government Code. Home rule and Type A cities are permitted to define by ordinance what constitutes a nuisance and abate those nuisances within their city. TEX. LOC. GOV'T CODE ANN. § 217.002; § 217.042. Home rule cities can exercise that authority up to 5,000 feet beyond their boundaries. *Id* at § 217.042. Because of the flexibility these statutes provide, cities have taken a variety of approaches to animal control regulation. The following are some examples of typical provisions:

- An owner or handler shall promptly remove and sanitarily dispose of feces left on public or private property by a dog or cat being handled by the person, other than property owned by the owner or handler of the dog or cat.
City of Austin Code of Ordinances § 3-4-6 Defecation by Dog or Cat.
- The owner or keeper of any animal in the city is responsible for the behavior and conduct of that animal at all times including the creation of a public nuisance. Violations of the following acts or omissions are public nuisances:
 - (a) The owner or keeper shall keep the animal (except cats) restrained at all times and insure that the animal (except cats) does not roam or run at large at will;
 - (b) The owner or keeper shall not keep any dog which barks or whines in such a manner, with such intensity, or with such continued duration, or keep any other animal, fowl, or bird, which makes frequent or long, continued noise, so as to annoy, distress or disturb the quiet comfort or repose of persons of normal nervous sensibilities within the vicinity of hearing thereof;
 - (c) The owner or keeper shall prevent his animal from biting or injuring without provocation, any animal or person;
 - (d) The owner or keeper shall prevent his animal from damaging or destroying public property or property other than its owner's private property;
 - (e) The owner or keeper shall not keep more than the number of animals allowed under this chapter;
 - (f) An owner or keeper creates an animal nuisance by the keeping, frequent feeding or harboring of any poisonous or inherently dangerous or prohibited animal.

City of San Antonio Code of Ordinances § 5-150 Animal nuisances.

- A person commits an offense if, either through his action or omission, he:
 - (1) Docks the tail or removes the dew claws of an animal over five (5) days of age, or crops the ears of an animal of any age, unless he is licensed to practice veterinary medicine in the State of Texas;
 - (2) Transfers ownership or otherwise physically removes from its mother any dog, cat, ferret, or rabbit less than six (6) weeks old, or any other animal that is not yet weaned, except as advised by a licensed veterinarian;
 - (3) Dyes or otherwise artificially colors any animal;
 - (4) Displays, transfers ownership, or offers to transfer ownership of any dyed or otherwise artificially colored animal;
 - (5) Abandons any animal that they have possession of at the Animal Services Facility, any other business, on public property, or with any other person that has not agreed to be responsible for the care of the pet;
 - (6) Fails to reclaim any animal that he owns from the person who had temporary possession of the animal;
 - (7) Fails to notify the Division when any motor vehicle that he is in control of strikes an animal;
 - (8) Euthanizes his own animal in a manner other than one defined in this chapter;
 - (9) Carries or transports an animal in any vehicle or conveyance and fails to effectively restrain the animal so as to prevent the animal from leaving or being accidentally thrown from the vehicle;
 - (10) Places or confines an animal, or allows the animal to be placed or confined, in a motor vehicle or trailer under conditions which may endanger the health of the animal due to temperature, lack of food or water, or under other circumstances which may cause bodily injury, serious bodily injury or death of the animal;
 - (11) Causes, allows, or permits any animal to remain in its own filth;
 - (12) Owns any animal having an infestation of ticks, fleas, or other parasites which has not been treated by a veterinarian or with appropriate commercially available treatments;
 - (13) Owns any animal having any obvious illness, or injury, or any communicable illness transmittable to animal or human without having followed a proper treatment regimen for the infestation or illness;
 - (14) Fails to provide basic grooming for any animal;
 - (15) Causes, allows, or trains any animal to fight another animal; is in possession of any animal fighting paraphernalia or training equipment;
 - (16) Fails to provide, at all times, any animal under his care with adequate wholesome food, potable water, and shelter;
 - (17) Transfers ownership or offers to transfer ownership of any chickens, ducklings, or rabbits younger than sixteen (16) weeks of age in quantities of less than twelve (12) to a single purchaser;
 - (18) Mutilates any dead animal for reasons other than food preparation or taxidermy. Dissection in compliance with medical or veterinary research, medical or veterinary necropsy, and bona fide educational use of dead animals shall not be considered mutilation;

- (19) Attaches a collar or harness to an animal that is of an inadequate size so that it restricts the animal's growth or causes damage to the animal's skin;
 - (20) Attaches a tether that is not appropriately sized for the animal and so heavy as to restrict or burden the animal's movements;
 - (21) Displays, transfers ownership or offers to transfer ownership of any turtle with a carapace of less than four (4) inches in length;
 - (22) Teases or taunts any animal and provokes an aggressive reaction from an animal.
- City of Plano Code of Ordinances § 4-26 Inhumane treatment of animals.*

Often you will find that nuisance regulations and zoning regulations tend to dovetail. A particular activity or use that is appropriate in an agricultural district is a nuisance when located in a residential district. Some cities will pass nuisance ordinances that cross reference zoning, (e.g. it is a nuisance to have more than 4 domestic animals per household in a residential district) because the activity is only a nuisance because of the location.

V. ANIMAL CONTROL AND SHELTERS

A. Animal Control Officers

It is not necessary for a city to employ a licensed animal control officer to have an animal control department or a rabies control authority. However, if the city wants to employ someone to serve under the title Animal Control Officer, the person must be licensed by the Department of State Health Services, and must complete the basic animal control course within the first year of employment and an additional thirty hours of continuing education each following three year period. TEX. HEALTH & SAFETY CODE ANN. § 829.002. The topics for the basic course and the continuing education include:

- (1) state laws governing animal control and protection and animal cruelty;
- (2) animal health and disease recognition, control, and prevention;
- (3) the humane care and treatment of animals;
- (4) standards for care and control of animals in an animal shelter;
- (5) standards and procedures for the transportation of animals;
- (6) principles and procedures for capturing and handling stray domestic animals and wildlife, including principles and procedures to be followed with respect to an instrument used specifically for deterring the bite of an animal;

- (7) first aid for injured animals;
- (8) the documentation of animal cruelty evidence and courtroom procedures;
- (9) animal shelter operations and administration;
- (10) spaying and neutering, microchipping, and adoption;
- (11) communications and public relations;
- (12) state and federal laws for possession of controlled substances and other medications; and
- (13) any other topics pertinent to animal control and animal shelter personnel. *Id* at § 829.003.

Having a licensed animal control officer can be beneficial because the training involved provides information that is not necessarily part of the training of most law enforcement. Because of the increased potential for exposure to rabies, animal control officers are typically vaccinated, a somewhat involved process taking several injections over an extended period of time. The result being that most law enforcement will not be as qualified or as protected when handling dangerous animals. Because animal control officers are not required to be peace officers, they can be found in other departments, including code enforcement, health and sanitation, or environmental services.

B. Rabies Control Authority

Cities are allowed, but not required, to adopt Chapter 826 of the Health & Safety Code and create a local rabies control program. *Id* at § 826.015. The city can appoint a peace officer, health official, animal control officer, or any other qualified person or entity as a rabies control authority. *Id* at § 826.017. The rabies control authority is responsible for the two basic aspects of a rabies control program, vaccination and quarantine. *Id* at § 826.001 et seq.

Quarantine is necessary when an animal is rabid, may have been exposed to rabies, or may have exposed a human to rabies. *Id* at § 826.042(b). Quarantine can be with a veterinarian, in the owner's home, or in a licensed rabies quarantine facility. 25 T.A.C. § 169.27(a). A licensed facility must be inspected prior to construction, must have standard operating

procedures for quarantine in place, and must meet the structural requirements established by the Department of State Health Services. *Id* at § 169.26, 169.28. These requirements can be expensive because they require specialized cages, handling, and disposition. *Id*. While there are variations possible, the goal of the regulations is to ensure that the quarantined animal comes into contact with other animals or shelter personnel as little as possible during the quarantine. Animals in rabies quarantine must be held for ten days. *Id* at § 169.27. If an animal is held in a veterinarian's office or in a licensed quarantine facility, the owner may be billed for the cost of the care and treatment of the animal. TEX. HEALTH & SAFETY CODE ANN. § 826.043. If the owner does not pay the cost and take possession of the animal within four days after the end of the quarantine period, the animal can be sold, adopted, or humanely destroyed. *Id*. Because this can be an expensive prospect, some owners would prefer to conduct a home quarantine. That is authorized if the following requirements are met.

- (1) A secure enclosure approved by the local rabies control authority must be used to prevent escape.
- (2) The animal has a current vaccination or an unvaccinated animal sixteen weeks old or younger at the time of the potential exposure.
- (3) The local rabies control authority or a veterinarian must observe the animal at least on the first and last days of the home confinement.
- (4) The animal was not a stray at the time of the potential exposure. 25 T.A.C. 169.027(a).

The other duty of a rabies control authority is to implement the registration program, the primary purpose of which is to ensure that all dogs and cats are vaccinated against rabies. TEX. HEALTH & SAFETY CODE ANN. § 826.021. In its most basic form, cities adopt an ordinance that requires all dogs and cats to be licensed, and requires that licenses may not be issued unless the animal has been vaccinated. *Id*. Some cities contract with veterinarians to issue the licenses when they administer the vaccine. Some cities will issue the license when the owner provides them with a certificate issued by their veterinarian proving that the vaccine is current and the

certificate is presented to the city so a license can be issued. *Id.* There are advantages and disadvantages to either process, e.g. a two step process discourages compliance but allows the city greater control over information. In either case, the information contained on the certificates or records of licenses is confidential and not subject to release under the Public Information Act. *Id* at § 826.0211; 826.0311. Having control over the information prevents breaches of that confidentiality, but also provides the city with the data for more efficient location of lost pets, especially if the city operates its own shelter. Fees charged by the city for the registration of cats and dogs may only be used to defray the cost of administering the rabies control program and issuing the licenses. *Id* at § 826.031.

C. Animal Shelter Licensing and Regulation

The State regulates the operation of animal shelters, which are defined as facilities that keep or legally impound stray, homeless, abandoned, or unwanted animals (not including veterinary clinics, a livestock commission facility, or shelters in counties with less than 75,000 people). *Id* at § 823.001, 823.002. Animal shelters must comply with the housing and sanitation standards for rabies control, must separate healthy animals from sick or injured, must get an annual inspection from a veterinarian, and must maintain the records of the date and disposition of animals in its custody. *Id* at § 823.004. Shelters that serve as a rabies quarantine facility must also get a separate inspection from the state. *Id* at § 829.007. A person who operates a shelter must have the same training as an animal control officer as required by the above statute. *Id* at § 823.003. In addition, there is additional course work that the Department of State Health Services offers, including basic, advanced, and administrative courses, with different foci for each. 25 Tex. Admin. Code § 169.3. The basic and advanced courses cover health and disease control, humane care and treatment, control of animals in an animal shelter, and transportation.

Id at § 169.5. The administrative course covers supervisory and management skills needed to implement and support the activities taught in the other courses. *Id.*

If there is a shelter within your city limits, whether public or private, the city is required to have an Animal Shelter Advisory Committee. TEX. HEALTH & SAFETY CODE ANN. § 823.005. The committee must meet at least three times a year and be composed of at least one licensed veterinarian, one city official, one person whose duties include the daily operation of an animal shelter, and one representative from an animal welfare organization. *Id.*

Recently adopted legislation established Chapter 802 of the Texas Occupations Code, which licenses Dog and Cat Breeders. See Acts 2011, 82nd Leg., R.S., Ch. 1284, Sec. 2, eff. June 17, 2011. A person may not act as a dog or cat breeder unless the person has obtained a license as required by the chapter. TEX. OCC. CODE ANN. § 802.101. The definition of “breeder” is unfortunately broad and includes a person who possesses eleven or more adult intact female animals and is engaged in the business of breeding those animals for direct or indirect sale or for exchange in return for consideration and who sells or exchanges, or offers to sell or exchange, not fewer than twenty animals in a calendar year. *Id* at § 802.002(8). The Texas Municipal League recently requested clarification that the rule would not apply to animal shelters because they are not engaged in the business of breeding, however the Department of Licensing and Regulation refused to provide a bright line rule excluding shelters.¹¹ It should be noted that there is a presumption that intact female dogs are used for breeding unless “the person establishes to the satisfaction of the department, based on the person's breeding records or other evidence reasonably acceptable to the department, that the animal is not used for breeding.” *Id* at § 802.004. While a bright-line exception would be safer for cities, publicly owned shelters are

¹¹ See “Dog or Cat Breeders Program: Will It Impact Cities?” Texas Municipal League Legislative Update No. 5, May 12, 2012. http://www.tml.org/leg_updates/legis_update052512f_breeder_program.asp.

statutorily required to spay intact females before they are adopted which should, in and of itself, establish that the females are not be kept for breeding purposes. Public shelters typically have high turn over, and it may be difficult to establish that the shelter has eleven intact, adult, female animals at a given time because they do not remain intact or in the shelter's possession for very long. Additionally, the statute creates a further ambiguity by stating the chapter does not affect the applicability of any other law, rule, order, ordinance, or other legal requirement of the federal government, this state, or a political subdivision of this state. *Id* at § 802.003. It could be argued that existing laws and ordinance related to the operation of shelters, restraint of animals, and redemption of strays continue to apply and exempt shelters from the application of Chapter 802. Until further guidance has been provided by the Texas Department of Licensing and Regulation, or the Attorney General, cities should consult with their City attorneys to determine if this license should be obtained.

D. Adoption and Disposition of Animals

One fundamental issue regarding animal control is that once an animal is seized, found, or rescued, it needs to go somewhere. In the absence of publicly owned shelters in the area, there are private shelters that can serve, and in some cases rescue groups will take in animals as well. Depending on the size of the city, having a designated shelter to serve as intake for animal control may be a necessity for health and safety reasons. Cities have the power to place animals in a shelter because, in addition to the general nuisance regulations discussed earlier, cities can adopt an ordinance that requires that dogs and cats be restrained, declares strays to be a nuisance, authorizes their impoundment, and provides for their humane disposition after a period set by ordinance or rule. TEX. HEALTH & SAFETY CODE ANN. § 826.033. In this manner, when cities pick up strays and deliver them to an animal shelter, after a certain period of time ownership

transfers to the city and the animal may be adopted, fostered, or humanely destroyed. In the case of owners whose pets escaped or were lost, the city can adopt an impoundment fee that must be paid before the animal can be redeemed, but the fees can only be used to defray the cost of animal control. *Id.* Once the animal has been held by the shelter for the required period of time (commonly referred to as the “impoundment period” or the “redemption period”), the animal becomes the property of the shelter to be adopted, put into temporary foster care, or humanely euthanized. A city or shelter may set standards for adoption, but must apply those standards in a fair and equitable manner. *Id.* at § 828.011. If the city is operating the shelter, the standards must be reasonably related to the prevention of cruelty to animals and the responsible management of dogs and cats in the interest of preserving public health and welfare. *Id.* One additional requirement before an animal can be adopted by a new owner is that it must be sterilized (i.e. spayed or neutered). *Id.* at § 828.002. In the case of an animal that has been sterilized while in the custody of a city shelter must be microchipped and tattooed. 24 TAC § 573.76. The tattoo will identify for future reference that the animal has already been spayed or neutered, preventing exploratory surgery in the future. *Id.* There have been recent attempts to pass legislation making this a requirement for all shelters. Senate Bill 1517 82nd regular legislative session. If the animal is not already sterilized, the new owner must sign an agreement to do so, which must contain:

- (1) the date of the agreement;
- (2) the names, addresses, and signatures of the releasing agency and the new owner;
- (3) a description of the animal to be adopted;
- (4) the sterilization completion date (30 days after adoption for an adult, or 30 days after it is safe to do so for infants); and
- (5) a statement, printed in conspicuous, bold print, that sterilization of the animal is required under Chapter 828, Health & Safety Code, and that a violation of this chapter is a criminal offense punishable as a Class C misdemeanor. TEX. HEALTH & SAFETY CODE ANN. § 828.003.

The city can extend the deadline when provided a written report from a veterinarian stating that the life or health of the animal would be jeopardized. *Id* at § 828.004. The sterilization must be confirmed by the city, or the animal will be reclaimed. *Id* at § 828.005, 828.009. This requirement does not apply to animals being reclaimed by existing owners, animals being obtained by an institution of higher education for research/testing/teaching, or cities with population of 10,000 or less. *Id* at § 828.013.

An unfortunate part of the operation of any animal shelter, or most animal control departments, is the euthanasia of sick, injured, or unadoptable animals. For larger jurisdictions with a significant stray problem, this can be especially burdensome. Often healthy, adoptable animals must be euthanized to make room for incoming strays.¹² Many pet owners do not spay or neuter their pets, and most litters result in more puppies or kittens than one owner wants or is allowed to own. Stray cats and dogs will have litters when they are in season, resulting in cyclical increases in the number of strays being caught by animal control departments. The unfortunate result is that some animals are euthanized simply because there must be room to accommodate the new seizures. Understandably, there are other circumstances where shelters euthanize, injured or sick animals with little or no hope of recovery, violent or aggressive animals which pose a danger, etc. There are only two acceptable methods for euthanizing a dog or cat, which is an injection of sodium pentobarbital or a gas chamber with commercially compressed carbon monoxide. *Id* at § 821.052. All other animals must be euthanized in accordance with the applicable methods, recommendations, and procedures set forth in the 2000 Report of the American Veterinary Medical Association Panel on Euthanasia as modified or superseded by a subsequent report of the American Veterinary Medical Association Panel on

¹² See Associated Press “Overcrowded Shelter May Euthanize Healthy Animals”; <http://www.nbcdfw.com/news/local/Overcrowded-Shelter-May-Euthanize-Healthy-Animals-152529785.html>.

Euthanasia. *Id.* State regulations require that animals should first be scanned for microchip identification and searched for other identification and reasonable efforts to locate and notify the owner shall be made prior to euthanasia. 25 TAC § 169.83. There are specific rules adopted for the administration of both methods of euthanasia, as set forth in the administrative code, for example, each animal must be monitored until death has been confirmed by examination. *Id.* at § 169.84. Only a licensed veterinarian or a person who has successfully completed training on the proper methods and techniques may euthanize an animal in the custody of an animal shelter.

TEX. HEALTH & SAFETY CODE ANN. § 821.055. The training includes:

- (1) the pharmacology, proper administration, and storage of euthanasia solutions;
- (2) federal and state law regulating the storage and accountability of euthanasia solutions;
- (3) euthanasia technician stress management;
- (4) proper restraint and handling of an animal during euthanasia;
- (5) the procedures for administering commercially compressed carbon monoxide to an animal;
- (6) techniques for verifying an animal's death; and
- (7) the proper disposal of a euthanized animal. *Id.*

Because the drugs involved are controlled substances under federal law, DEA authorization must be obtained to prescribe them. See 21 C.F.R § 1308.12. The drugs should be kept in a locked cabinet or other secured storage container with limited access by staff.¹³

E. Operation of a Shelter

There are a number of practical considerations to be addressed by cities considering the creation of an animal control department that stem from the care and disposition of the animals found or seized by the department. The animals that have been seized or found must be placed somewhere and there must be a mechanism for their disposition. One option is to contract with a shelter (whether public or private) for animal sheltering services. This provides the consistency

¹³ U.S. Dept. of Justice, Drug Enforcement Administration, Office of Diversion Control, Questions & Answers, <http://www.dea/diversion.usdoj.gov/faq/general.htm#sec-1>.

and economy of scale that would be lost if the city simply boarded animals with local veterinarians or boarding facilities. The alternative is for the city to operate its own shelter. Either of these two options (contracting with a third party or operating a public shelter) will have different implications.

When operating with another entity to provide services, the city should consider what services are going to be provided. Licensing of animals, and verification of vaccination for rabies, is an activity to be performed by the rabies control authority of the city. The city can designate a third party to provide that service, but note that the fees charged for the issuance of a city tag must be used to defray the cost of implementing the registration and rabies control ordinances. TEX. HEALTH & SAFETY CODE ANN. § 826.031(c). Similarly, the fees charged to pet owners when they come to redeem lost pets must also be used to defray the cost of implementing the registration and rabies control ordinances. *Id.* at § 826.033(d). A number of other considerations will also weigh heavily into the analysis of a public private partnership, cost of services, euthanasia rates, and capacity. When an animal control officer finds an animal, there must be somewhere for the animal to go, which means a private shelter partnering with a city cannot be a no-kill shelter.

There are a number of other hurdles to be considered when operating a publicly owned animal shelter. One specific issue is that state law requires any animal adopted from a public shelter to be sterilized. *Id.* at § 828.002; 22 Tex. Admin Code § 573.77. Animals cannot be released without having been sterilized, or without having a written agreement from the new owner that the animal will be sterilized within a prescribed period of time. *Id.* There are follow up requirements for the new owners to provide proof of sterilization or the city is required to reclaim the unsterilized animal. TEX. HEALTH & SAFETY CODE ANN. § 828.009. Each adopted,

sterilized animal is required to be tattooed on their thigh with the male or female symbol with a line drawn through it so as to indicate that the surgery has been performed. 22 Tex. Admin Code § 573.77. In addition, there are all the obligations associated with operating a shelter:

- The shelter is required to document the intake, treatment, and disposition of animals that are cared for by the shelter, and some of that information (personal information of adoptive owners) is required to be kept confidential. TEX. HEALTH & SAFETY CODE ANN. § 826.0211; § 826.0311.
- There are specific design considerations related to the construction of animal shelters. In particular, there are very specific requirements for rabies quarantine facilities that are necessary to ensure the safety of staff and other animals while an animal is in rabies quarantine. A poorly designed shelter can make animal care extremely labor intensive, while at the same time providing a poor environment for the animals.
- There are psychological considerations as well, especially in communities with large stray populations because shelter personnel will be responsible for euthanizing a lot of the animals that they care for, and this can take a significant emotional toll on the shelter employees.

Again, one of the principle driving factors behind the operation of a shelter is going to be the local politics. There are competing concerns of cost to taxpayers versus welfare of animals and citizens. Many public shelters have high euthanasia rates simply because there are limited resources, a surplus of animals, and no additional space to house and care for the incoming. Rural jurisdictions may have to contend with stray livestock, wildlife, and other difficult to control, contain, and care for animals.

F. Point of View: Liability for Sentimental Value of Pets

It has been long settled Texas law that the measure of damages for the loss of a pet is the market value, or in the case of working animals, the pecuniary value of the work they perform. *See Heiligmann v. Rose*, 16 S.W. 931 (Tex.1891). It has been widely understood that the loss of a pet, while tragic, was not (really) compensable, however a recent 11th Circuit Court of Appeals case has challenged that long standing position. *Medlen v. Strickland*, 353 S.W.3d 576 (Tex. App.—Fort Worth 2011, pet. filed). Kathryn and Jeremy Medlen’s dog, Avery, was picked up by Fort Worth’s animal control when he escaped from their back yard. *Id.* Jeremy went to the shelter to retrieve him, but did not have enough money to pay the redemption fee. *Id.* He was told he could return for the dog, and a “hold for owner” tag was placed on Avery’s cage. *Id.* Unfortunately, Strickland, a shelter employee, mistakenly put Avery on the list of animals to be put down, and Avery was euthanized before the Medlens returned for Avery. The Medlens sued Strickland for negligence, seeking damages for the intrinsic value of Avery, as opposed to the market value. The Medlens’ attorney, Randall Turner, represented the Medlens pro bono because the issue was a personal cause célèbre.¹⁴ As a dog lover he promised “before I die or retire, I’m going to get this law changed.”¹⁵

The Fort Worth court agreed with the Medlens, finding that market value was not the only measure of damages for lost pets, and that intrinsic value can be claimed for the loss of man’s best friend. *Medlen*, 353 S.W.3d at 580-581. The court interpreted *Heiligmann* as allowing for market value *or* other special pecuniary value based on the dog’s usefulness. *Id.* at 579. A recent case in the Court of Appeals in Austin reached the opposite conclusion. *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554 (Tex. App.—Austin 2004, no pet.). The

¹⁴ See John Council “For the Love of Avery: Dog Owners Can Recover Sentimental-Value Damages for Lost Pets” Texas Lawyer magazine. November 14, 2011.

¹⁵ *Id.*

Austin court interpreted *Heiligmann* to mean that special or pecuniary value can only be derived solely from the dog's usefulness or services, not from companionship or other sentimental considerations. However, the court in *Medlen* pointed out that at the time of the *Heiligmann* decision, Texas law did not allow intrinsic value for any kind of personal property. *Medlen*, 353 S.W.3d at 580. The law has since changed, as plaintiffs are now able to recover damages for the loss of photographs, heirlooms, personal records, and other items where the market value is de minimis and the primary value is one of sentiment. *See City of Tyler v. Lykes*, 962 S.W.2d 489 (Tex. 1997). The Fort Worth Court held that because an owner may be awarded sentimental damages for loss of personal property, and since dogs are personal property, the trial court erred in dismissing the case. *Medlen*, 353 at 581.

The Supreme Court disagreed, overruling the court of appeals and rendering judgment for Strickland. *Strickland v. Medlen*, -- S.W.3d --, WL 1366033, 56 Tex. Sup. Ct. J. 470 (Tex. 2013). The Court went out of its way to point out that they love dogs as much as the next person, but the long settled rule has been that pets are property and only economic damages are compensable. *Id* at 2-3. In its analysis, the Court reaffirmed the holding from *Heiligmann* stating that a dog's special or pecuniary value is derived from its usefulness and services. *Id* at 9. While the Court recognized that post *Heiligmann* cases have allowed sentimental damages for personal property, the Court distinguished the cited cases stating that the sentimental value of heirlooms is demonstrably different from that of pets. *Id* at 12. Specifically, the value of heirlooms is derived from a specific connection with the past, whereas the value of pets is derived from the future value of their companionship. *Id*. This distinction matters as loss of companionship is a personal injury damage, and thus there would be a compensable claim from the loss of a pet where there would be no such claim from the loss of a grandparent or sibling. *Id*

at 19. While it is clear the line being drawn is a fine one, the Court determined that extending the past precedent to overrule Heiligmann would have such a wide ranging impact that it refused to do so. *Id* at 12. Another basis for the decision was the wide ranging impact that such an extension would have on animal welfare. *Id* at 17. Higher prices for veterinary care, lack of availability of care, increased liability for cities, shelters, veterinarians, etc. are just some of the unintended consequences of allowing this change in the law. *Id* at 18. In the end, because pets are so ubiquitous and yet their value is primarily sentimental, the impact of allowing sentimental damages would be so far reaching that the Court determined that the decision to do so rests with the legislature. *Id* at 21.

VI. CONCLUSION

Cities can take different approaches to animal control depending largely upon the issues that are of concern to its citizens. State law provides a great deal of guidance for those cities that have not adopted ordinances of their own. Nevertheless, local politics and the points of view of the decision makers and concerned citizens will have a significant impact on how these laws, regulations, and ordinances are enforced.