

# OREGON DOG CONTROL LAWS AND DUE PROCESS: A CASE STUDY

By  
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*"The greatness of a nation and its moral progress can be judged by the way its animals are treated."*<sup>1</sup> Mahatma Gandhi. In early 1997, this notion was put to the test in Oregon.

## I. INTRODUCTION

Oregon dog control laws provide for the release of a dog impounded for chasing a person, but require the killing of a dog impounded for chasing livestock.<sup>2</sup> All attempts to correct this inconsistency at the state legislature have failed.<sup>3</sup> However, the Oregon legislature has empowered individual counties to correct the inconsistency by ordinance.<sup>4</sup> It is time for Oregon counties to take corrective action.

This article reviews the state of dog control laws in Oregon and argues that the Oregon state laws (and similar laws in almost all fifty states) burden pet owners while heavily favoring the livestock industry. Section II reviews current Oregon law and uncovers the inequities in the law. Section III discusses the slow movement towards reform in Oregon.

Section IV begins a case study of *Stone v. Board of Supervisors of Deschutes County, Oregon*.<sup>5</sup> The *Stone* case made national attention in 1997 when two dogs, a golden retriever and a beagle puppy, were given death sentences for chasing a neighbor's sheep. The government action was attacked as a Constitutional Due Process violation. The legal approach used by the pet owner in this case provides a useful tool to other animal welfare attorneys throughout the nation. Section V outlines the legal approach used in *Stone*, which argued that pet owners are entitled to due process under the Constitution for illegal deprivation of "property." In

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<sup>1</sup> Literary cite (source not known).

<sup>2</sup> See *infra* notes 6-9, and accompanying text.

<sup>3</sup> See *infra* notes 10-14, and accompanying text.

<sup>4</sup> See *infra* note 32, and accompanying text.

<sup>5</sup> No. 97-CV0021ST (Or. Cir. Ct. filed March 4, 1997).

Section VI, the authors conclude that, while animal welfare advocates should continue to push for legal rights for animals because of their inherent nature as living things, attorneys defending pet owners should make use of every legal tool in their arsenal to slow the arbitrary and thoughtless execution of pets nationwide.

## II. OREGON'S DOG CONTROL LAW

If a dog chases a person, Oregon law permits an animal control officer to impound the dog, bring the dog's owner into court, or both.<sup>6</sup> If the dog is impounded, the owner can redeem the dog by simply paying certain impound fees.<sup>7</sup> Even if the dog has injured or killed a person, the dog need not be killed if the county governing body finds that "the dog is not dangerous and can be safely kept" by a "responsible person" that will "properly care for the dog and not allow it to become a nuisance."<sup>8</sup>

In contrast, if a dog chases, injures, or kills livestock, Oregon law requires that the dog be impounded and killed.<sup>9</sup> Since the time the statute

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<sup>6</sup> Or. Rev. Stat. §§ 609.090(1), 609.095(1)(b) (1995).

<sup>7</sup> Or. Rev. Stat. § 609.090(2) (1995). The statute also requires the payment of certain license fees if the dog is unlicensed. *Id.* As originally enacted in 1919, this statute required that animal control officers kill all dogs found to be running at large in districts in which dogs were prohibited from running at large. 1919 Or. Laws 186, § 7 (codified as amended at Or. Laws (Olson's) § 9366 (1920), Oregon Code Ann. § 20-2316 (1930), Oregon Compiled Laws Ann. § 32-2413 (1940)). In 1949, the statute was amended to require impounding with the right of redemption, rather than killing. 1949 Or. Laws 249, § 1. In 1953, the statute was amended to permit release of the impounded dog to a responsible person, if the owner failed to redeem the dog and if certain findings could be made. 1953 Or. Laws 571, § 2. In 1969, the statute was amended to include the impounding of dogs that chased, injured, or killed livestock. 1969 Or. Laws 677, § 4. In 1973, the statute was amended to permit the citing of the dog owner or keeper into court, as an alternative to impounding the dog. 1973 Or. Laws 655, § 3. In 1975, the statute was amended to include dogs that were public nuisances, including, among other offenses, dogs that had chased, injured, or killed a person. 1975 Or. Laws 499, § 1; *see also* Jones v. City of Prairie City, 740 P.2d 236, 237 n.1 (Or. Ct. App. 1987) ("[t]he legislative history demonstrates that, before the 1975 amendment of ORS 609.090, cities had no express authority to destroy vicious dogs. They could destroy only stray dogs that were unclaimed after five days. Senator Heard, the bill's sponsor, stated that the purpose of the bill was to authorize cities to destroy a dog that had severely injured or killed a person. The bill was drafted in response to a specific incident in which a child was badly injured by a dog"). The statute was most recently amended in 1977 to give discretion to the animal control officer to impound the dog, cite the owner or keeper into court, or both. 1977 Or. Laws 802, § 6.

<sup>8</sup> OR. REV. STAT. § 609.090(2) (1995); *see also* 42 Op. Att'y Gen. 297 (Or. 1982) ("[a]t the end of the redemption period, the county may release the animal to a new owner or kill it in a humane manner"). Oregon law does permit the health inspector to impound and kill a dog that has injured a person and is suspected of having rabies, for purposes of examining the dog's body tissues. OR. REV. STAT. § 433.350 (1995).

<sup>9</sup> OR. REV. STAT. § 609.155 (1995); *see also* 42 Op. Att'y Gen. 297 (Or. 1982) ("ORS 609.155 requires that counties kill dogs engaged in the killing, wounding, injuring or chasing of livestock"). For purposes of this statute, Oregon law defines the term "livestock" to mean "ratites, psittacines, horses, mules, jackasses, cattle, llamas, sheep, goats, swine, domesticated fowl and any fur-bearing animal bred and maintained commercially or otherwise, within pens, cages and hutches." OR. REV. STAT. § 609.010(1) (1995). A "ratite" is a bird with a flat breastbone, and a "psittacine" is a parrot. WEBSTER'S SEVENTH NEW COLLEGIATE DICTION-

was enacted in 1975,<sup>10</sup> there have been attempts to enact legislation that would eliminate this harshness, but they have all failed. In 1985, at the request of some county commissioners, a bill was sponsored that would have given counties the discretion to kill or release a dog that had merely chased livestock.<sup>11</sup> That bill was tabled in legislative committee after a hearing in which the Oregon livestock industry appeared in massive force to oppose the bill.<sup>12</sup> In 1993, a bill was sponsored that would have required counties to release and "impose reasonable restraints" on a dog impounded for a first offense, and only require the killing of a dog for a second or subsequent offense.<sup>13</sup> That bill never received a hearing.<sup>14</sup>

The harshness and inflexibility of this law were challenged in a series of court actions stemming from the impounding of a dog named Taz, who allegedly injured a number of llamas.<sup>15</sup> After a hearing, the county commissioners found that Taz had committed the alleged acts, and ordered that Taz be killed.<sup>16</sup> In an effort to save Taz, his owners appealed the county's decision to the state trial court, asserting that llamas did not qualify as "livestock."<sup>17</sup> The trial court rejected their argument, and the owners

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ARY 688, 710 (1969); *see also* Hogan v. Gridelli, 879 P.2d 896, 898 (Or. Ct. App. 1994) (gamecocks are "domesticated fowl" within the meaning of ORS 609.010(1)).

<sup>10</sup> 1975 Or. Laws 749, § 4. The enactment of this statute was not necessary to protect a livestock owner's right to kill a dog that was in the process of chasing, injuring, or killing livestock: for more than a century prior to the enactment of this statute, Oregon law had specifically given any person the right to kill a dog that was in the process of chasing, injuring, or killing livestock. 1860 Or. Laws 11, § 2 (amended by 1845-1864 Deady's Gen. Laws of Or. 678 (1866), Deady and Lane's Gen. Laws of Or., Chap. 12, § 2 (1874), Hill's Ann. Laws of Or. § 3422 (1887), Bellinger's and Cotton's Ann. Codes and Stat. of Or. § 4199 (1892), Lord's Or. Laws § 5523 (1910), Or. Laws (Olson's) § 9359 (1920), Oregon Code Ann. § 20-2306 (1930), Oregon Compiled Laws Ann. § 32-2403 (1940), Or. Rev. Stat. § 609.150 (1953)); *see* Eaton v. Lake, 197 P. 292, 294 (Or. 1921) ("[f]rom time immemorial the law has recognized the right of a master of the flock to kill a sheep-killing dog caught in the commission of the act"); *see also* White v. Maxwell, 547 P.2d 117 (Or. 1976) (the relative value of a dog as compared to the relative value of livestock is not relevant to the right to kill the dog if it is engaged in the chasing, injuring, or killing of the livestock). Oregon law also provides the owner of livestock that has been chased, injured, or killed by a dog, with a cause of action against the dog owner for double damages or, alternatively, a right to make a claim for damages against the county dog fund. Or. Rev. Stat. §§ 609.140, 609.170-609.190 (1995); Columbia County v. Randall, 620 P.2d 937, 940-941 (Or. Ct. App. 1980) (claim against dog fund precluded claim against dog owner for same damage).

<sup>11</sup> H.B. 2307, 63rd Leg. (Or. 1985).

<sup>12</sup> *Hearing on H.B. 2307 Before the House Comm. on Intergovernmental Affairs*, 63rd Leg. (Or. 1985).

<sup>13</sup> S.B. 836, 67th Leg. (Or. 1993).

<sup>14</sup> The bill was referred to the Oregon Senate Agriculture and Natural Resources Committee on March 25, 1993, where it remained upon adjournment of the 1993 Oregon legislative session on August 5, 1993.

<sup>15</sup> *Bowlin v. Deschutes County*, Deschutes County Circuit Court No. 87-CV-0050-TM, *aff'd* 91 Or. App. 155 (1988), *rev. den.* 761 P.2d 928 (1988); *Bowlin v. Deschutes County*, 712 F. Supp. 803 (D. Or. 1988), *aff'd without pub. op.* 918 F.2d 181 (9th Cir. 1990). Those court actions involved a county ordinance that mirrored the provisions of Oregon Revised Statutes § 609.155.

<sup>16</sup> *Bowlin v. Deschutes County*, 754 P.2d 30 (Or. Ct. App. 1988).

<sup>17</sup> *Id.*

then appealed to the Oregon Court of Appeals, which also rejected their efforts.<sup>18</sup> The owners then petitioned for review by the Oregon Supreme Court, which rejected their petition.<sup>19</sup> Refusing to give up and permit Taz to be killed, the owners then filed an action in federal district court, alleging a number of constitutional violations in the proceedings before the county commissioners.<sup>20</sup> The federal district court rejected their arguments,<sup>21</sup> and they appealed to the federal court of appeals, which affirmed the decision of the district court.<sup>22</sup> In all, the Oregon law has survived these court challenges intact.

In a recently publicized case, Nadas, a malamute-collie mix, was seized in Jackson County when a neighbor reported that he was seen chasing her horse.<sup>23</sup> The Jackson County Board of Commissioners ordered that Nadas be destroyed.<sup>24</sup> The state circuit court and the court of appeals affirmed the Board's order and the Oregon Supreme Court denied review.<sup>25</sup> After Nadas' story appeared on the television show *Hard Copy*, Jackson County officials were deluged with calls and letters from around the country.<sup>26</sup> They agreed to commute Nadas' sentence, but only if his owner agreed to drop a lawsuit filed against the county and send Nadas out of state.<sup>27</sup> After a year and a half, Nadas left death row for Best Friends Animal Sanctuary in Kanab, Utah, where he will spend the rest of his days without contact with the owner who fought so diligently for his life.<sup>28</sup>

Although the harsh punishment meted out by Oregon's dog law draws the most media coverage and evokes the strongest emotions, it is not the law's only inherent problem. Dogs are further endangered when their owners are denied due process at county hearings. The discussion that follows

<sup>18</sup> *Id.*

<sup>19</sup> *Bowlin v. Deschutes County*, 761 P.2d 928 (Or. 1988).

<sup>20</sup> *Bowlin v. Deschutes County*, 712 F. Supp. 803 (D. Or. 1988).

<sup>21</sup> Before proceeding to examine the facts and decide the applicable law, Federal District Court Judge James Burns made an interesting introductory remark:

Federal Courts used to be viewed as austere, even learned tribunals, normally charged with such duties as the interpretation of statutes enacted by Congress; once in a while we are asked to consider one of the cherished clauses of our Constitution; and for the rest we would on occasion ponder over lofty—and legally difficult—questions which may even on occasion attract the attention of the highest court in the land. Not any more.

Thanks to the expansion of civil rights jurisprudence, this is now a "doggie" court. Indeed this case is an animal "double header" since it involves both dogs and llamas!

*Id.* at 803-04 (citations omitted).

<sup>22</sup> *Bowlin v. Deschutes County*, 918 F.2d 181 (9th Cir. 1990).

<sup>23</sup> *Roach v. Jackson County*, 949 P.2d 1227, 1228 (Or. Ct. App. 1997), *rev. den.* 952 P.2d 928 (Or. 1998).

<sup>24</sup> *Id.*

<sup>25</sup> *Roach v. Jackson County*, 952 P.2d 62 (Or. 1998).

<sup>26</sup> Jeff Barnard, *Horse-Chasing Dog Reunites with Former Owner*, *Idaho Statesman*, March 4, 1998, at 6B.

<sup>27</sup> Howard Rosenberg, *In Praise of 'Hard Copy' (Sort of)*, *L.A. Times*, Feb. 16, 1998, at F1.

<sup>28</sup> Barnard, *supra* note 26, at 6B.

details the story of Jessie, a seven-year-old Golden retriever, and Chase, a nine-month-old Beagle puppy, who were taken from their owner and sentenced to death for chasing sheep in Deschutes County.<sup>29</sup> Although Deschutes County has passed an ordinance that allows a reprieve for dogs found guilty of a first offense of chasing livestock, it does not include provisions to insure due process for the dogs' owners.<sup>30</sup> In Chase and Jessie's case, their owner was given less than twenty-four hours notice of the hearing and not allowed to cross-examine witnesses during the hearing.<sup>31</sup>

### III. A CHANCE FOR REFORM

Amid all this bad news, there is some hope. In 1967, the Oregon legislature enacted a law that permits counties to supersede a number of dog control statutes by ordinance, including the harsh and inflexible dog and livestock statute.<sup>32</sup> At least three Oregon counties have enacted an ordinance under this law.<sup>33</sup> At least one not only corrects the inequity of the dog and livestock statute, but also codifies a uniform procedure for the disposition of dogs that are impounded for allegedly having chased, injured, or killed a person or livestock.<sup>34</sup>

Despite the efforts made in a few counties, too many innocent dogs are still subject to the State's harsh dog control laws. An effort is being made to get an initiative before the Oregon voters to replace these heartless laws.<sup>35</sup> If passed, it will provide more humane alternatives to destruction of these dogs and will also require fair hearings for the dogs' owners.<sup>36</sup> It is time for Oregonians interested in the rights of animals to take action to ensure that their legislators and county commissioners know their feelings regarding the unnecessary harshness and inflexibility of the current dog and livestock law.

### IV. DOGS VS. SHEEP: THE *STONE* CASE ERUPTS

Early one Sunday morning a Golden Retriever and a Beagle puppy were impounded by the Deschutes County Sheriff as a result of a complaint made by a neighbor that the dogs had chased his sheep.<sup>37</sup> The next day the dog owner received a telephone call from the Deschutes County

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<sup>29</sup> *A Capital Chase: Dogs in Doghouse over Sheep*, 83 A.B.A. J. 12 (1997) [hereinafter *A Capital Chase*].

<sup>30</sup> *Id.*

<sup>31</sup> See *infra* notes 37-50 and accompanying text.

<sup>32</sup> 1967 Or. Laws 496, § 3 (codified as amended at Or. Rev. Stat. § 609.015(1)).

<sup>33</sup> *A Capital Chase*, *supra* note 29, at 12.

<sup>34</sup> Lincoln County, Or., Ordinance 360, § 2 (August 14, 1996), as amended by Lincoln County, Or., Ordinance 380, § 6 (June 24, 1998), codified at Lincoln County, Or., Code (LCC) § 2.720 (1998). The Lincoln County Code can be accessed on the Internet at <<http://www.co.lincoln.or.us/counsel/page4.html>>.

<sup>35</sup> Patrick O'Neil, *Spotlight on Dog Law Has Officials Chasing Change*, *Oregonian*, Feb. 15, 1998, at B1.

<sup>36</sup> *Id.*

<sup>37</sup> *Stone/Kays Dog Hearing Transcript*, Deschutes County Dog Control Board (1997) [hereinafter *Hearing Transcript*]. The facts of this case were developed from the transcript

Animal Control Officer informing her that her dogs had been impounded on the basis of a neighbor's complaint. The Animal Control Officer explained to the owner that under Deschutes County Code (hereinafter DCC) section 6.12, she could either consent to the killing of her dogs for the alleged violation or she could request a hearing in front of the Deschutes County dog control board, known as the Board of Supervisors for Deschutes County (hereinafter the Board).<sup>38</sup> The Animal Control Officer also asked the owner to come down to the Sheriff's office to pick up a copy of a document entitled "Dog Owner Rights When Dog Has Engaged in Killing, Wounding, Injuring or Chasing Livestock."

The owner promptly went down to the Sheriff's Department and signed the Dog Owner Rights statement by which she requested a hearing before the Board of Supervisors. The Dog Owner Rights statement provided, in part:

The only question to be considered at such hearing is whether the allegation that the dog chased, wounded, injured, or killed livestock is true. NO other issues are relevant and other issues will not be considered.<sup>39</sup>

The Animal Control Officer then informed the owner that the hearing would be set in one to three weeks, and that the earliest the owner could expect to hear anything would be the following Monday.<sup>40</sup>

However, just two days later, upon returning to her home at approximately nine p.m., the owner discovered a notice from the Deschutes County Sheriff's Office on her front door. Attached to the notice was a letter dated the same day that advised the owner that her hearing had been scheduled for four p.m. the next day. The notice indicated that it was hung on the owner's door at four-thirty p.m. on that day.<sup>41</sup>

Nineteen hours after receiving notice, the owner appeared without legal representation in front of the Board along with the livestock owner, the Deschutes County Animal Control Officer, the responding Reserve Deputy from the Sheriff's Department, and an Assistant Deschutes County Counsel.<sup>42</sup> At no time prior to or during the hearing was the owner advised of her right to have the assistance of private counsel, of her right to confront and cross-examine adverse witnesses, how the hearing would be conducted, or of her right to appeal the Board's decision.

During the hearing, the owner attempted to ask the livestock owner a question at the conclusion of his direct testimony. In response, the Assistant County Counsel instructed the owner to give her testimony prior to asking questions of the livestock owner.<sup>43</sup>

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of the hearing before the Deschutes County Board of Supervisors on Jan. 9, 1997 (hearing transcript and witness statements on file with author).

<sup>38</sup> Petitioner's Memorandum in Support of Petition for Writ of Review at 1, Stone v. Board of Super., No. 97-CV0021ST (Or. Cir. Ct. 1997) [hereinafter Stone Brief].

<sup>39</sup> Deschutes County, Oregon, Sheriff's Office, *Dog Owners Rights Statement* (emphasis in original) (on file with author).

<sup>40</sup> Stone Brief, *supra* note 38, at 2.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Hearing Transcript, *supra* note 37, at 5.

Later in the hearing, the livestock owner stated that he did not know what the format was for the hearing and wondered whether he was supposed to answer the owner. Again, the Assistant County Counsel instructed the parties that any questions could be handled later.<sup>44</sup> However, no time was allocated for cross-examination.

Because the owner received less than twenty-four hours notice of the hearing, her ability to gather evidence in support of her case was compromised. For example, the owner stated at the hearing that she had not yet received a letter from a veterinarian that had treated her dogs.<sup>45</sup> In addition, she noted that she would have been able to talk to other people to see if they had witnessed the dogs chasing the sheep.<sup>46</sup>

At the conclusion of the hearing the Board found that the Golden Retriever and Beagle puppy had engaged in the chasing of livestock and ordered that the dogs be immediately killed.<sup>47</sup> The Animal Control Officer planned to drive from the hearing to the animal shelter to kill the dogs. However, upon an emotional plea by the owner, the execution was delayed until the next day so the owner could determine what, if any, were her appeal rights.

At approximately three-thirty p.m. the next day, the owner retained legal counsel who obtained a stay of execution and filed a petition for writ of review under Oregon Revised Statutes section 34.040.<sup>48</sup> The petition alleged that the Board failed to follow procedures which gave the owner the right to "reasonable notice" of the hearing, and that the manner of notice, the timing thereof and the manner in which the hearing was conducted, denied the owner her constitutional rights to due process of law.<sup>49</sup> The petition also alleged that the Board's findings and order were not supported by substantial evidence in the record.<sup>50</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 7.

<sup>46</sup> *Id.* at 11.

<sup>47</sup> Board of Supervisor's Order No. 97-013 (Jan. 9, 1997).

<sup>48</sup> Oregon Revised Statutes section 34.040 provides:

(1) The writ shall be allowed in all cases in which a substantial interest of a plaintiff has been injured and an inferior court including a district court, officer, or tribunal other than an agency as defined in ORS 183.310 (1) in the exercise of judicial or quasi-judicial functions appears to have:

- (a) Exceeded its jurisdiction;
- (b) Failed to follow the procedure applicable to the matter before it;
- (c) Made a finding or order not supported by substantial evidence in the whole record;
- (d) Improperly construed the applicable law; or
- (e) Rendered a decision that is unconstitutional, to the injury of some substantial interest of the plaintiff, and not otherwise.

(2) The fact that the right of appeal exists is no bar to the issuance of the writ.

OR. REV. STAT. § 34.040 (1995).

<sup>49</sup> Stone Brief, *supra* note 38, at 4.

<sup>50</sup> *Id.* at 14-16.

## V. LEGAL STANDARDS FOR CONSTITUTIONAL RIGHT OF DUE PROCESS

The procedural due process provisions of the federal and Oregon state constitutions impose constraints on governmental decisions that deprive individuals of their private property.<sup>51</sup> The fundamental requirement of due process is that the government must provide the private citizen the opportunity to be heard "at a meaningful time and in a meaningful manner."<sup>52</sup>

Included within due process are the rights of the citizen to be informed of (1) how the hearing will be conducted, (2) the right to the assistance of private counsel, (3) the right to confront and cross-examine adverse witness, and (4) how to appeal from the governmental decision.<sup>53</sup> In addition, due process affords the private citizen the right to an impartial decision-maker.<sup>54</sup>

The extent to which procedural due process must be afforded turns on the extent to which the private citizen may be "condemned to suffer grievous loss" at the hands of the government.<sup>55</sup> In other words, due process depends upon the demands of the particular situation.<sup>56</sup>

The U.S. Supreme Court has developed a three-part test to assess what procedural protections are due in a given situation.<sup>57</sup> The first factor to consider is the private interest that will be affected by the governmental action.<sup>58</sup> The second factor to be considered is the risk of an erroneous deprivation of the private interest through the procedures that were used and the probable value of additional procedural safeguards.<sup>59</sup> The final factor focuses on the government's interest, including the governmental function involved and the fiscal and administrative burdens that providing additional procedural requirements would entail.<sup>60</sup>

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<sup>51</sup> *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976); *Carr v. SAIF*, 670 P.2d 1037 (Or. Ct. App. 1983), *rev. dismissed* 297 Or. 82 (1984) (procedural due process under state constitution is essentially the same as Fourteenth Amendment of U.S. Constitution); *Tupper v. Fairview Hosp. & Training Ctr.*, 556 P.2d 1340 (Or. 1976).

<sup>52</sup> *Mathews*, 424 U.S. at 333.

<sup>53</sup> *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). For comparison, Oregon Revised Statutes sections 183.413(2) to 183.415 provide extensive and detailed requirements for ensuring that citizens of Oregon be "fully informed" of the substantive and procedural rules governing administrative contested cases. Or. Rev. Stat. §§ 183.413-183.415 (1995).

<sup>54</sup> *Goldberg*, 397 U.S. at 271; *see also* 1000 *Friends of Oregon v. Wasco County Court*, 742 P.2d 39 (Or. 1987) ("appearance" of personal interest in the case not enough to demonstrate unconstitutionality).

<sup>55</sup> *Goldberg*, 397 U.S. at 263.

<sup>56</sup> *Mathews*, 424 U.S. at 334.

<sup>57</sup> *Id.* at 335.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*



### A. A Dog Owner Is Entitled to Due Process

An owner's interest in her dogs is a property interest entitled to protection under the United States and Oregon constitutions.<sup>61</sup> An Oregon statute expressly declares that dogs are personal property.<sup>62</sup>

In *Rose v. City of Salem*,<sup>63</sup> the Supreme Court of Oregon considered the constitutionality of the City of Salem's ordinance that provided for three days advance notice to a dog owner before his impounded dog could be killed for running at large.<sup>64</sup> In finding the ordinance unconstitutional, the court stated that "in this state dogs are regarded as being just as important a class of personal property as any other domestic animal and equally entitled to the protection of the law."<sup>65</sup>

In applying the three-part due process test discussed above, there is little doubt that the owner in the *Stone* case was not afforded the procedural protections to which she was entitled. The owner was facing a very real and serious risk of suffering "grievous loss" because her dogs were facing the death penalty. In fact, the sole and exclusive penalty the Board could impose was death.<sup>66</sup> The private interest to be affected by the governmental action was protected under Oregon statutory and case law, and was deserving of far more protection than what was afforded to the owner.

A second reason a pet owner should be afforded additional due process protection is that, as a consequence of death being the sole and exclusive penalty to result from the hearing, the risk of an erroneous decision based on minimal procedures provided was the gravest possible. In other words, an erroneous decision reached because of a rush to justice meant that two living creatures would be permanently and irreversibly destroyed. It is hard to imagine any higher risk to property.

The third and final factor also weighed heavily in favor of requiring additional procedural safeguards. It would not have cost Deschutes County any more to have provided personal service of the hearing notice, since the Sheriff's office had personally hung the notice on the owner's door. In addition, providing the owner more than twenty-four hours notice would not have cost Deschutes County any money since the expense of storing the dogs at a shelter would either be born by the complaining livestock owner or the dog owner, depending upon the outcome of the hearing. Nor would it have required any additional expense for the Assistant County Counsel to describe to the owner how the hearing would be conducted, that she had the right to the assistance of her own counsel, that she had the right to cross-examine the complaining livestock owner or any other adverse witness, and how she could appeal from the Board's decision.

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<sup>61</sup> *Rose v. City of Salem*, 150 P. 276 (Or. 1915).

<sup>62</sup> OR REV. STAT. § 609.020 (1995).

<sup>63</sup> 150 P. 276.

<sup>64</sup> *Id.* at 277.

<sup>65</sup> *Id.*

<sup>66</sup> DESCHUTES COUNTY, OR., CODE § 6.12.060(A) (1997).

Even if these actions did cost more, these ordinary costs cannot outweigh the constitutional rights to due process.<sup>67</sup> Procedural due process is not about promoting efficiency; it is intended to protect the particular interest of the citizen whose private property is about to be taken.<sup>68</sup> In other words, the constitution recognizes higher values than speed and efficiency.<sup>69</sup> Moreover, since the dogs were impounded pending the hearing, there was no emergency that justified the county's fast track. There was no way that these dogs could have endangered any other livestock.

Under the three-part test outlined above, the scale is weighted heavily in favor of requiring that (1) notice be given in a manner reasonably calculated to apprise the dog owner of his or her rights under the law, (2) such notice be given more than twenty-four hours before the hearing, and (3) an explanation of how the hearing will be conducted is given to the dog owner. Further, due process requires the dog owner to be appraised of his or her rights to have assistance of counsel, cross-examine adverse witnesses, and appeal the Board's decision.

*B. Providing Only Twenty-four Hours Notice of the Hearing Was Unreasonable*

The posting of the hearing notice less than twenty-four hours prior to the scheduled hearing was not "reasonable notice as required by Federal law."<sup>70</sup> Deschutes County Code (DCC) section 2.50.040(B) provides that "[i]nvolved dog owners and livestock owners shall be given reasonable notice of hearings."<sup>71</sup>

In addition, DCC section 6.12.060(B) provides that "[t]he owner or keeper of a dog shall be . . . afforded the opportunity to present evidence to the Board during such hearing."<sup>72</sup> As a direct result of the manner in which notice was provided to Chase and Jessie's owner, she was not afforded a meaningful opportunity to present evidence at the hearing.

In *Rose v. City of Salem*,<sup>73</sup> the dog owner contended that the notice provision in Salem's ordinance violated the fundamental principle that no person should be deprived of his property without due process of law.<sup>74</sup> The Supreme Court of Oregon agreed with this contention, stating that "an ordinance could doubtless be readily framed which would accomplish the purposes desired and yet protect private property from forfeiture or destruction without due process of law."<sup>75</sup> The court found that the municipi-

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<sup>67</sup> *Fuentes v. Shevin*, 407 U.S. 67, 92 n.22 (1972).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>71</sup> DESCHUTES COUNTY, OR., CODE § 2.50.040(B) (1997). The state law upon which the county ordinance was based, Oregon Revised Statute § 609.155, did not contain any provision requiring either notice to the dog owner or an opportunity to be heard on the complaint of a livestock owner.

<sup>72</sup> *Id.* § 6.12.060(B).

<sup>73</sup> 150 P. 276 (Or. 1915).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 277.

pal ordinance in question, which provided three days advance notice to the dog owner, was unconstitutional.<sup>76</sup>

There was no doubt that Deschutes County could have framed an ordinance which required that notice be given to the dog owner in a manner which would ensure that the dog owner was made aware of the hearing in a timely way, for example through personal service, and that the notice would be delivered more than twenty-four hours prior to the scheduled hearing. The county ordinance failed to do so, and this resulted in an unconstitutional deprivation of the dog owner's protected private property rights.

Although Deschutes County had the power to enact legislation dealing with dog control, the question still remains whether the county, in exercising that power, went beyond its constitutional bounds.<sup>77</sup> It is within the power, and in fact it is the duty, of the courts to be the final judge of whether the legislature properly exercised its police power and whether the particular regulation at hand is unconstitutional.<sup>78</sup>

As the *Bowden* court noted:

It is only when the interests and welfare of the public in general are clearly threatened by the unrestricted exercise of the individual right that the individual right must give way to reasonable limitation and regulation for the public good. It is the duty of the courts ever to be watchful to protect the personal rights guaranteed by state and federal constitutions and to prevent encroachment thereon by legislative fiat, unless actually essential to the protection of the public welfare.<sup>79</sup>

In *Bowden*, the court held that a state statute, which provided two days *actual* notice to the owner prior to the sale of impounded horses, was unconstitutional. The court stated:

Mere convenience, expediency, danger of losing a profit (whose profit?), or added expense will never justify a denial of an individual's constitutional right to due process—reasonable notice and an opportunity to be heard before his lawful property is taken by the state. Summary action is never justified in cases involving property having a lawful use, unless absolute necessity for the immediate protection of the public health, safety, or welfare demands it. No such necessity exists with respect to these comparatively few privately owned animals, even though they were trespassing upon the public domain.<sup>80</sup>

The court recognized that since the horses at issue were corralled, they presented no further menace to the public welfare. Therefore, two days *actual* notice prior to their sale or destruction was not reasonable.<sup>81</sup>

It is important to note that in *Bowden*, the statute provided that the two-day time period did not begin to run until the horse owner actually received the notice and that advance notice of the horse roundup was

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<sup>76</sup> *Id.*

<sup>77</sup> *Bowden v. Davis*, 289 P.2d 1100 (Or. 1955).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1106.

<sup>80</sup> *Id.* at 1114.

<sup>81</sup> *Id.*

required to be published not less than twice, ten days prior to the time the roundup was to begin.<sup>82</sup> If two days after actual notice was not sufficient under these circumstances, then clearly, non-actual notice given less than twenty-four hours prior to the killing of impounded dogs is unreasonable and therefore, unconstitutional.

*C. Due Process Requires the Opportunity to be Heard in a Meaningful Manner*

In addition to requiring the government to provide adequate notice, due process requires that the government provide an opportunity to be heard "in a meaningful manner."<sup>83</sup> Included within this concept are the rights of the affected citizen to be informed that she can confront adverse witnesses through cross-examination, to have the assistance of private counsel, and to actually have the opportunity to cross-examine witnesses and seek assistance of private counsel.<sup>84</sup>

The Deschutes County Code does not require the county to advise the animal owner of her right to have the assistance of her own counsel or the right to confront or cross-examine adverse witnesses. In addition, the Assistant County Counsel and the Board failed to inform the owner that she had these rights.<sup>85</sup> In simple terms, the owner was not informed of her constitutional rights.

The transcript of the hearing reveals that the parties were unaware of the format for the hearing and their rights to cross-examine witnesses. For example, at the conclusion of the livestock owner's direct testimony, the dog owner asked: "May I ask you a question?"<sup>86</sup> The Assistant County Counsel replied: "Let's hear your testimony first and then we will have a time for questions."<sup>87</sup> This response denied the dog owner the opportunity to cross-examine the livestock owner.

Later in the hearing, the livestock owner stated: "I don't know what the format is for these hearings but am I suppose to answer these statements . . . . [?]"<sup>88</sup> Again, the Assistant County Counsel responded: "Let's get her information on the tape first . . . ."<sup>89</sup> The transcript reveals that the hearing was concluded shortly thereafter without the dog owner ever having the opportunity to cross-examine the livestock owner, or any of the other witnesses.<sup>90</sup>

<sup>82</sup> *Id.* at 1103.

<sup>83</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>84</sup> *Goldberg*, 397 U.S. at 267-68; *see also State ex rel. Juvenile Department of Multnomah County v. Geist*, 796 P.2d 1193 (Or. 1990) (fundamental fairness emphasizes fact-finding procedures which include notice, adequate counsel, confrontation, cross-examination, and standards of proof).

<sup>85</sup> Stone Brief, *supra* note 38, at 7.

<sup>86</sup> Hearing Transcript, *supra* note 37, at 5.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 9.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

In the first instance, any question of procedure should have been answered and ruled upon by the Board rather than the Assistant County Counsel. The Board was the decision-maker and the Assistant County Counsel was present as either the prosecutor or legal adviser to the Board. Second, it is clear from a review of the transcript that the owner was obstructed in her attempt to cross-examine the livestock owner, and that her lack of sophistication or intimidation by the proceedings prevented her from challenging the Assistant County Counsel's repeated efforts to limit cross-examination.<sup>91</sup> Under these circumstances, the owner was denied due process.

This same contention was accepted by the Marion County Circuit Court in *Blue Two v. Marion County Dog Control*,<sup>92</sup> in which the court held that the fact-finding tribunal's ruling deprived the dog owner of personal property without due process of law as guaranteed by the United States and Oregon Constitutions.<sup>93</sup> The court specifically relied on its review of the transcript where it was "evident that the owners of the dog were completely without sophistication or even knowledge of the procedures."<sup>94</sup>

In addition, the dog owners were not advised of their right to have an attorney. The court further found that, even if the dog owners had been aware of their right to counsel, they "certainly should have had the right to cross-examine the witnesses."<sup>95</sup> These deficiencies resulted in the deprivation of the due process rights of the dog owners and the Circuit Court reversed the ruling that ordered the dog to be destroyed.<sup>96</sup>

#### D. *The Board Was Not an Impartial Decision Maker*

A final element of the constitutional right of due process is the right of a private citizen to an impartial decision-maker.<sup>97</sup> Both Deschutes County ordinance and Oregon state law mandate that the dog control board (also known as the Board of Supervisors) be comprised of at least

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<sup>91</sup> Stone Brief, *supra* note 38, at 10.

<sup>92</sup> Marion County Circuit Case No. 89C-11559 (1989).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> In addition to the obstacles presented during the hearing, prior to the hearing the owner was required to sign (as part of her hearing request) a Dog Owner Rights statement that advised her in bold and capital letters that "NO" issues other than the allegation of the dogs chasing would be relevant or considered at the hearing. This statement limited the owner's ability to present relevant evidence at the hearing. For example, the subject Deschutes County ordinance only applies when the livestock are within pens, cages and hutches. Deschutes County, Or., Code § 6.12.020 (1997). If the complaining livestock owner's animals were not within a pen, cage or hutch, then the dogs could not be found to have violated the ordinance. However, given the Dog Owner Rights statement that was forced upon the dog owner, this issue was deemed irrelevant. Under these circumstances, the owner was affirmatively hamstrung in the presentation of her case to the extent that she was denied her constitutional right to a meaningful hearing.

<sup>97</sup> *Goldberg*, 397 U.S. at 271; *see also* 1000 Friends of Oregon v. Wasco County Court, 742 P.2d 39 (Or. 1987).

two members (of a total of five) who are directly or indirectly connected with the livestock industry.<sup>98</sup> By requiring that forty percent of the Board be connected with the livestock industry, Deschutes County unconstitutionally denied the owner her right to an impartial decision-maker.

The Board does not set policy or otherwise adopt legislation because its only function is to adjudicate complaints of injury to livestock by dogs.<sup>99</sup> Thus, the Board conducts "classic adjudications, decisions that an individual had violated a law," as distinguished from legislative or quasi-judicial proceedings.<sup>100</sup>

The government cannot require its judicial, or quasi-judicial, members to pass a litmus test, such as requiring them to belong to a certain organization, represent a specific industry, or otherwise adhere to a particular point of view, as a precondition to serving as an adjudicator.<sup>101</sup> "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."<sup>102</sup> To perform its high function in the best way "justice must satisfy the appearance of justice."<sup>103</sup>

There is no question that the majority of the Board was comprised of members from the livestock industry, and that these individuals stood to gain indirectly by their ability to enforce a law designed exclusively to protect livestock owners. This "possible personal interest" is sufficient in and of itself to render the makeup of the Board unconstitutional.<sup>104</sup>

In *Gibson v. Berryhill*, the Supreme Court agreed with the trial court's finding that the constitutional right to an impartial decision maker was violated when a state optometry board (comprised of self-employed optometrists) made a decision revoking the licenses of certain optometrists who practiced optometry as employees of a corporation.<sup>105</sup> Since the optometry board denied membership to optometrists who were not self-employed, the court felt that the members of the board would gain financially in an indirect way by revoking the licenses of those optometrists who were practicing with corporations and perhaps were competing with the self-employed optometrists.<sup>106</sup> The court emphasized that the disqualifying pecuniary interest in the proceeding need not be direct or posi-

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<sup>98</sup> DESCHUTES COUNTY, OR., CODE § 2.50.020(A) (1997); OR. REV. STAT. § 609.030(2). Under Deschutes County Code section 2.50.040(D), the majority of the board constituted a quorum. Thus, three members constituted a quorum. Accordingly, it only took two of three members present to act on behalf of the Board. So although there may be only two of five members that are required to be from the livestock industry, it is possible that those two individuals could constitute the decision of the Board. In the subject case, only three Board members were present although all three Board members present signed the order.

<sup>99</sup> DESCHUTES COUNTY, OR., CODE § 2.50 (1997).

<sup>100</sup> *1000 Friends of Oregon*, 742 P.2d at 45.

<sup>101</sup> *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Gibson v. Berryhill*, 411 U.S. 564 (1973).

<sup>105</sup> *Id.* at 578-79.

<sup>106</sup> *Id.* at 579.

tive, but could be found where a decision-maker would possibly reap some personal benefit in general from a decision.<sup>107</sup> Since the optometry board's decision regarding the licenses of competing optometrists "would possibly redound to the personal benefit of the members of the Board," the board was disqualified from hearing the matter.<sup>108</sup>

Under *Gibson*, the constitutional right to an impartial decision-maker is violated when the decision-maker has the ability to make a decision that could be viewed as protecting the decision-maker's personal interest. Just as the state optometry board would have gained in general by protecting their livelihood from the competition of corporations offering optometry services, the several livestock members of the Board of Supervisors for Deschutes County stood to indirectly gain by deciding that dogs in Deschutes County accused of chasing livestock are killed.

Given the emotional nature of the issues involved, as witnessed by the intense media and citizen attention to this particular case, Deschutes County should have been more vigilant in assuring that the decision-maker was truly impartial. The County had a responsibility to ensure that the Board members did not represent a particular industry, let alone the very industry which the law is exclusively designed to protect. By requiring the Board to be composed of at least two members directly linked to the livestock industry, and stacking the Board with a majority of livestock industry members, the dog owner's constitutional right to an impartial decision maker was violated.<sup>109</sup>

## VI. CONCLUSION

Albert Schweitzer, the 1952 Noble Peace Prize recipient and noted ethical philosopher, once wrote:

before I began going to school . . . in my evening prayers [I was told] I should pray for human beings only. So when my mother had prayed with me and had kissed me good-night, I used to add silently a prayer that I had composed myself for all living creatures.<sup>110</sup>

Dogs are not fungible commodities; nor are their owners' rights beneath the protection of our laws. A dog owner is entitled to be heard on

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 578.

<sup>109</sup> Another potential ground for reversal is to allege that the decision was not supported by substantial evidence in the record. Or. Rev. Stat. § 34.040(1)(c) (1995). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Menges v. Board of County Commissioners*, 621 P.2d. 562 (Or. 1980). What evidence a reasonable mind would accept as adequate to support a conclusion must be considered in reference to the gravity of the conclusion reached. For example, what evidence a reasonable mind might accept as adequate to support a conclusion that an individual was speeding, should not be same amount or quality of evidence a reasonable mind might accept as adequate to support a conclusion that a living creature should be killed. In any event, this allegation is the hardest to sustain.

<sup>110</sup> ALBERT SCHWEITZER, *THE LIGHT WITHIN US* 11-12 (1959).

grave allegations against her dogs "at a meaningful time and in a meaningful manner."<sup>111</sup>

In *Stone*,<sup>112</sup> Oregon Circuit Court Judge Stephen Tiktin granted the dog owner's petition for writ of review. Based upon the arguments presented above, the Judge held that the Board of Supervisors had not provided the dog owner with due process.<sup>113</sup> The case was remanded to the Board to be reheard. In the meantime, the dog owner and the livestock owner settled their dispute, and, as a consequence, both dogs were freed and their lives were spared.<sup>114</sup>

Decision-makers in Oregon continue applying the dog law in the same manner as did the Deschutes County Board of Supervisors, and these laws continue to be challenged. Most recently, these laws received national attention in the case of *Nadas*, mentioned in Part II of this article.<sup>115</sup>

Conflicts between pets and livestock will undoubtedly continue and pets will likely keep getting the short end of the stick under current Oregon law. However, attorneys defending pets have powerful constitutional protections against unreasonable government actions. Attorneys can claim due process violations when government moves improperly to deny a pet "owner" of their "property." Across the nation there are many similar dog control laws and many more animal welfare attorneys and other citizens working to reform these laws. Hopefully, more people will realize the inequity in the current statutes and move to reform them. In the meantime, the Due Process clause of the Constitution provides attorneys with a useful tool in successfully defending pets nationwide.

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<sup>111</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>112</sup> *Stone v. Board of Super.*, No. 97-CV0021ST (Or. Cir. Ct. 1997)

<sup>113</sup> *Id.*

<sup>114</sup> Barney Lerten, *Looking Back on 1997*, Bulletin, Dec. 28, 1997, at B1.

<sup>115</sup> See *supra* notes 23-25 and accompanying text.