STATE OF VERMONT
ORANGE COUNTY, SS

David & Lori Cogswell,
et al.

v.

Town of Thetford, Vermont

Orange Superior Court

Docket No. S91-93 OeC

Decision and Order:

Cross-Motions for Summary Judgment

This is a declaratory judgment action, instituted by plaintiffs in order to challenge certain provisions of the Thetford dog ordinance, and also the application of that ordinance by the Town to the plaintiffs' individual circumstances. Plaintiffs are each and all dog owners who claim to be impacted by the ordinance. They claim that the relevant provision of the ordinance has not been validly adopted and/ or amended, and that, even if properly implemented, the relevant provision of the ordinance is nonetheless invalid for other reasons. Plaintiffs are represented by Colin Robinson, Esq. The Town, which insists that the ordinance is valid, both in form and as implemented, is represented by Claude Buttrey, Esq.

By way of background, plaintiffs each own one or more dogs which are kept within the Town of Thetford. Plaintiffs have each attempted to license their dogs, and have, as part of that process, furnished proof of vaccination against rabies. Plaintiffs's attempts at licensing apparently took place after the deadline set forth by the State dog licensing statute, 20 V.S.A. §3581. Section 4 of the Thetford dog ordinance requires that all dog owners within the town license their dogs as provided in 20 V.S.A. §§3581-3592.

Plaintiffs claim that the Town refused to license plaintiffs' dogs unless and until the plaintiffs each paid the $25.00 fine imposed by Section 9 of the

Thetford ordinance for the keeping of an unlicensed dog after the April 1 deadline. They argue that the Town has not followed the proper procedures in adopting and/ or amending the relevant portions of the ordinance. Plaintiffs assert that the Town does not have the authority to impose any fine or late fee other than such as that explicitly provided for, in the explicit form of a late surcharge, in 20 V.S.A. §3581(a).

The Town, meanwhile, claims that it has properly adopted and amended the relevant portions of the ordinance. The Town acknowledges the existence of the portion of 20 V.S.A. §3581(a) which provides that a town may impose an surcharge of 50% over and above the ordinary license fee for those who license their dogs after April 1. However, it also points to 20 V.S.A. §3582(b), which provides that "[i]n addition to the penalty of increased license fees, the owner of a dog who fails to follow the requirements of section 3581 of this title shall be fined an amount not more than $250.00." The Town emphasizes the word "shall," suggesting that it makes such a fine mandatory. It argues that its imposition of the $25.00 late licensing fine is well within the $250.00 ceiling which it claims is created by 20 V.S.A. §3582(b). On this basis, the Town claims that it could impose the $25.00 fine even if, for purposes of argument, it had failed to properly adopt the portion of its dog ordinance which creates the specific $25.00 fine for late licensing.

Plaintiffs respond to this position by arguing that the portion of 20 V.S.A. §3582(b) which allows for the fine of up to $250.00 is a penal provision which is intended for implementation through some form of judicial process, rather than through an administrative process at the level of town government. They argue that the discretionary nature of the provision ("not more than $250.00") would result in an impermissibly unguided vesting of discretion in

Town officials if it were to be construed to allow Town officials to set penalties from case to case as they saw fit. Plaintiffs argue that such unguided and unfettered administrative discretion would render the scheme unconstitutionally arbitrary.

Plaintiffs have moved for summary judgment. In support of this motion, they claim that defendant has failed to produce evidence that it actually complied with all of the necessary statutory procedures when it amended §9 of the ordinance to include a 25 dollar fine for late licensing. Plaintiffs assert that the defendant's failure to produce this evidence of compliance with the statutory procedures for amendment of ordinances establishes, as an undisputed material fact, that the Town did not, in fact, follow the proper procedures in amending the ordinance to provide for this fine. Plaintiffs argue that, without that amendment, the prior ordinance, with its provision for a fine of up to $100.00 "is unconstitutional as a violation of due process and therefore invalid because it vests arbitrary and therefore impermissible discretion in Defendant to deprive Plaintiffs of property for violation of the law."

The defendant Town, meanwhile, has cross-moved for summary judgment in its favor. It asserts that the plaintiffs have not borne the burden of showing that the Town actually failed to follow the proper procedures in amending its dog ordinance to include the specific provision for the $25.00 fine which is at issue in this case. It also argues that the plaintiffs have failed to advance sufficiently specific argument or authority to overcome the presumption of constitutionality which attaches to statutes and ordinances.

The court has reviewed the record in this case in order to ascertain exactly what facts are or are not conclusively established beyond dispute.

Plaintiffs have made clear that the defendant Town, in its responses to their discovery requests, has not affirmatively documented that it complied with each and every specific statutory requirement involved in the valid amendment of a municipal ordinance. However, as will become clear upon application of the relevant law, this falls short of proving, as a matter of undisputed fact, that the Town actually failed to comply with the required steps in amending the ordinance.

Conclusions of Law

The Vermont Legislature has given municipalities the power to "regulate the keeping of dogs, and to provide for their leashing, muzzling, or restraint." 24 V.S.A. §2291(10). It has also provided that a town may "regulate the keeping of dogs and their running at large." 20 V.S.A. §3549. The Legislature has also taken its own steps to regulate the keeping of dogs, by requiring that dog owners have their dogs vaccinated against rabies and register and license their dogs with the municipal authorities in the town in which the dogs are kept. 20 V.S.A. §3581. Thus, the Legislature has created a system where there are certain general requirements imposed by the State upon all dog owners in all towns, but individual towns have also been granted the authority to impose additional or more detailed requirements upon dog owners.

Plaintiffs note that the defendant Town, in its responses to their discovery requests, has not affirmatively produced evidence that it complied with each and every statutory requirement for the amendment of an ordinance in amending its dog ordinance to provide for the imposition of a $25.00 fine upon dog owners who do not license their dogs within the deadlines imposed by state statutes. As noted by plaintiffs, a municipality must follow certain very

specific steps in order to enact an ordinance. 24 V.S.A. §1972. A municipality must also follow the same protocol in order to amend an existing ordinance. 24 V.S.A. §1976.

Ordinances are presumed to have been validly enacted, with the burden falling upon the party challenging the ordinance to produce evidence demonstrating a lack of compliance with statutory procedures. Kalakowski v. John A. Russell Corp., 137 Vt. 219, 226 (1979); 56 Am. Jur. 2d Municipal Corporations, §355, at 382. Only once the challenging party produces evidence tending to suggest lack of strict compliance with the adoption procedures does this presumption disappear, and the burden shift to the municipality to show that it did, in fact, follow all the proper procedures. Id. Absent some specific evidence to the contrary, an ordinance is presumed to have been adopted in compliance with all necessary procedural steps. 56 Am. Jur. 2d, Municipal Corporations, at 382-83.

Here, plaintiffs claim, in essence, that the Town's responses to plaintiff's discovery requests fail to demonstrate that the Town complied with each and every step necessary to properly amend its dog ordinance to include a provision imposing a $25.00 fine upon those who do not license their dogs prior to the deadline imposed by State statutes. Unfortunately for plaintiffs, this argument is contrary to the principles just related: what plaintiffs are presently arguing is that the amendment to the dog ordinance is invalid because the Town has failed to bear the burden of demonstrating that it took all of the proper steps to amend the ordinance.[1] The burden is not on the Town to

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1. See Plaintiffs' "Proposed Rulings of Law on Cross-Motions for Summary Judgment," at paragraph 5, which boldly asserts, without any citation to authority, that "Defendant bears the burden of showing compliance with the statutory procedure by producing evidence of recording of adoption of an ordinance in compliance with [24 V.S.A.] §1972(b), and additionally, by

demonstrate that it did properly adopt the ordinance; the burden, at least initially, is squarely on the plaintiffs to point to specific facts, as opposed to mere possibilities, which illustrate that the Town actually did not follow the proper procedures.[2] It is only once plaintiffs initially point to such specific facts suggesting non-compliance that the burden shifts to the Town to prove, step by step, that it properly followed each and every step in adopting the amendment imposing the $25.00 fine. See Kalakowski, supra; 56 Am. Jur. 2d Municipal Corporations, supra.

This presumption, and the allocation of burdens that it creates, are each all the more important in light of the fact that the issue is presently before the court on a motion for summary judgment.

> Summary judgment is appropriate only where the moving party establishes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law.

Murray v. White, 155 Vt. 621, 628 (1991).

The party against whom summary judgment is sought is entitled to the

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producing evidence of compliance with the posting and publishing requirements, either by a certificate permitted under [24 V.S.A.] §1975 or by other competent evidence." In light of the principles set forth in Kalakowski, supra, and in 56 Am. Jur. 2d Municipal Corporations §355, this assertion is wholly erroneous: the Town must only show compliance with the statutory procedures if the plaintiffs have first borne their initial burden of producing actual evidence which suggests that the Town did not follow the proper procedures. Plaintiffs argument turns this principle on its head.

2. Plaintiffs appear to believe that they have rebutted this presumption. See plaintiffs' August 31, 1993 motion for summary judgment, incorporating by reference page two of their earlier June 6, 1993 memorandum in support of their petition for declaratory judgment, which, in turn, states "Plaintiff's Petition, as amended, alleges specific facts demonstrating Defendant's noncompliance with statutory enactment procedures, sufficient to negate the presumption." The court concludes that mere allegations, unsupported by specific evidence, cannot cause a presumption to go for naught: "Presumptions disappear when facts appear, and facts are deemed to appear when evidence is introduced from which they could be found." Tyrell v. Prudential Ins. Co. of America, 109 Vt. 6, 24 (1937). Allegations, by themselves, are neither facts nor evidence.

> benefit of all reasonable doubts and inferences in determining whether or not a genuine issue of material fact exists.... The facts bearing on the issue must be clear, undisputed, or unrefuted.

Toys, Inc. v. F.M. Burlington Co., 155 Vt. 44, 49 (1990). If the moving party does offer supporting materials "formally and substantively sufficient to show the absence of a fact question," and that it is entitled to judgment as a matter of law, then the burden shifts to the nonmoving party to show that there indeed exists a genuine issue of material fact, or that some provision of law precludes a clear outcome for the moving party. Middlebury American Legion Post v. Peck, 139 Vt. 628, 631-32 (1981).

In light of the foregoing principles, the Court concludes that the plaintiffs have not shown, as an undisputed material fact, that the Town failed to properly amend the ordinance to specifically provide for the $25.00 fine in the event of late licensing. Plaintiffs have produced no evidence suggesting non-compliance by the Town, and they cannot evade this burden and overcome the initial presumption by instead focusing on the Town's failure, thus far, to document that it did actually dot all necessary "i"s and cross all necessary "t"s in amending the ordinance. Plaintiff's unsupported allegations are insufficient to rebut the presumption that the Town complied with the necessary and proper steps in amending the ordinance to include the fine. Until that presumption is rebutted, the Town simply does not have the burden of coming forward with any evidence that it did comply with the proper amendment procedures. Accordingly, the court concludes that plaintiffs are not entitled to summary judgment on their theory that the $25.00 fine has never properly been made a part of Section 9 of the Thetford dog ordinance.

Plaintiffs also claim that Section 9 of the dog ordinance violates their rights to due process by "vesting arbitrary and therefore impermissible

discretion" in town officials to set the level of the actual fine to be imposed by the Town on a particular dog owner who does not license their dog in a timely manner. This argument is seemingly contingent upon an assumption by plaintiffs that the court would agree with their argument that they had demonstrated that the Town did not properly amend the ordinance to specifically include a $25.00 fine for late licensing. If that were the case, according to plaintiffs' reasoning, then Section 9 of the ordinance would only contain its pre-existing general provision that a failure to comply with any section of the ordinance would subject a dog owner or dog keeper to a fine of "up to $100.00." Plaintiffs' argument regarding a violation of due process as a result of unguided discretion focuses upon this possibility of a fine of "up to" this amount; conceivably, according to plaintiffs argument, Town officials could choose to charge one person a ninety-nine cent fine for late licensing, while charging another individual a fine of $99.99 for the same violation, and yet both would fall within the general range of the ordinance's maximum penalty.

The court need not address this argument, as it has already concluded that plaintiffs are not entitled to summary judgment on their threshold claim that the Town has failed to properly effectuate the amendment providing for a specific $25.00 fine for late licensing. Under the existing Section 9 of the ordinance, there is no discretion involved: a person who licenses their dog after the deadline must pay a fine of $25.00. As the validity of this specific $25.00 fine for late licensing stands yet unassailed, and as plaintiffs have not alleged that they are in danger of being fined for any violation of the ordinance other than late licensing, the court concludes that plaintiffs do not presently have standing to raise any due process issues which might be implicated by the tendency of the "up to $100.00" provision to confer unguided,

and thus potentially arbitrary, discretion upon Town officials or employees.[3]

The Town, in its cross-motion for summary judgment, argues that, even if it were to concede, arguendo, that the amendment providing for the specific $25.00 late licensing fine were improperly enacted, its imposition of a fine in this amount would nonetheless be valid under the general "up to $100.00" provision contained in the original Section 9 of the ordinance, or, in the alternative, that a $25.00 penalty would be within the maximum limit set by 20 V.S.A. §3582(b), which provides that "the owner of a dog who fails to follow the requirements of section 3581 of this title or this section shall be fined not more than $250.00." The court notes that there might indeed be due process issues of the sort argued by plaintiffs if the Town had no basis for imposition of the $25.00 fine, other than that it happens to be less than the $100.00 maximum amount set by the original Section 9 of the ordinance, or less than the $250.00 maximum amount set by 20 V.S.A. §3582. However, as already explained, the plaintiffs' failure thus far to rebut the presumption of validity attaching to the amended Section 9, providing for a specific $25.00 fine for late licensing, renders this possibility too speculative to deserve present consideration.

The Town's cross-motion for summary judgment also seeks judgment in its favor in regard to the basic validity of the amended portion of the ordinance

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[3]. Standing, for purposes of a declaratory judgment action, depends on the existence of a foreseeable, rather than hypothetical, controversy:

> Unless an actual or justiciable controversy is present, a declaratory judgment is merely an advisory opinion which we lack the constitutional authority to render. .... Thus, declaratory relief is available only when a party is suffering from "the threat of actual injury to a protected legal interest." ....

Doria v. University of Vermont, 156 Vt. 114, 117 (1991)(citations omitted).

which creates the $25.00 fine for late licensing. It argues, accurately, that the plaintiffs have thus far failed to set forth specific evidence which would undermine the presumption that the Town complied with all necessary procedures in amending the dog ordinance to include this specific fine. The Town asserts that this absence of evidence establishes, as an undisputed material fact, that the Town did properly follow all procedures which were necessary to amend its ordinance.

As previously noted:

> Summary judgment is appropriate only where the moving party establishes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law.

Murray v. White, 155 Vt. 621, 628 (1991). If the moving party does offer supporting materials "formally and substantively sufficient to show the absence of a fact question," and that it is entitled to judgment as a matter of law, then the burden shifts to the nonmoving party to show that there indeed exists a genuine issue of material fact, or that some provision of law precludes a clear outcome for the moving party. Middlebury American Legion Post v. Peck, 139 Vt. 628, 631-32 (1981). However,

> [T]o preserve the parties' right to trial, the moving party must "demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the nonmoving party has introduced no evidence whatsoever."

Marqison v. Spriggs, 146 Vt. 116, 118-19 (1985) (citations omitted).

In assessing the Town's cross-motion for summary judgment as to the validity of the portion of the dog ordinance, as amended, which provides for the $25.00 fine, the court returns to the nature and role of the presumption that the Town properly followed the procedures necessary to amend the ordinance. As has been noted, ordinances are presumed to have been validly

adopted until the party challenging the validity of the ordinance introduces specific evidence suggesting that the Town failed to comply with the proper procedures. Kalakowski, supra, 137 Vt. at 224. However, this rebuttable presumption merely locates the burden of going forward with the evidence, and, of itself, is not evidence:

> [A presumption] points out the party on whom lies the duty of going forward with evidence on the fact presumed. .... [A]ll such presumptions are locative, merely. A presumption, of itself alone, contributes no evidence and has no probative quality. It takes the place of evidence, temporarily,at least, but if and when enough rebutting evidence is admitted to make a question for the jury on the fact involved, the presumption disappears and goes for naught. In such a case, the presumption does not have to be overcome by evidence; once it is confronted by evidence of the character referred to, it immediately quits the arena.

Tyrell, supra, note 2, 109 Vt. at 22-23. It is reversible error for a tribunal to give any actual evidentiary weight to a presumption. Gardner v. Department of Social Welfare, 135 Vt. 504, 507 (1977).

For purposes of its cross-motion for summary judgment, the Town, being the moving party, bears the initial burden of affirmatively demonstrating an absence of disputed material facts. Murray, supra, 155 Vt. at 628. The non-moving party in the summary judgment context (here the plaintiffs) must only introduce evidence if the Town has first substantively demonstrated an absence of disputed material facts. See, e.g. V.R.C.P. 56(c); Gore v. Green Mountain Lakes, Inc., 140 Vt. 262, 265-66 (1981).

The Town has not yet introduced any evidence which actually demonstrates that it complied with all proper steps to amend its ordinance to include the $25.00 fine. Though the ordinance is deemed to have been validly amended, this presumption does not carry the evidentiary weight which is necessary to show an absence of disputed material facts for purposes of a motion for summary judgment. Thus, though the ordinance, as amended, continues to be presumed

valid, the Town is not entitled to summary judgment unless it affirmatively demonstrates that it did follow all steps necessary to amend the ordinance. As the Town has not demonstrated that it is entitled to summary judgment, its request for attorney's fees is premature.

Thus, as the matter now stands, neither party is entitled to summary judgment as to the validity of the amended ordinance, nor are any potential constitutional issues ripe for decision. At trial, the presumption of validity attaching to the ordinance will place on the plaintiffs the burden of producing specific evidence tending to show that the Town did not comply with the procedures required to amend the ordinance. Kalakowski, supra, 137 Vt. at 226. Unless and until plaintiffs do produce such specific evidence,[4] the Town need do nothing at all; in the absence of such a showing by plaintiffs, the Town will be entitled to a directed verdict that the ordinance, as amended, is valid. If the plaintiffs do produce evidence at trial which seriously suggests that the Town failed to follow the proper procedures to amend the ordinance, then, and only then, the burden will shift to the Town to systematically document its compliance with the statutory procedures necessary to amend the ordinance.

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[4]. At trial, just as has been explained in this decision, plaintiffs cannot meet this burden by claiming that the Town has failed to produce, in response to their discovery requests, proof that it did take each and every step necessary to properly amend the ordinance. As has been explained, if the court were to allow this strategy to succeed, it would have the effect of unravelling the presumption that laws and ordinances have been enacted in compliance with all proper procedural prerequisites.

Order

Both parties' motions for summary judgment are hereby DENIED. The matter shall proceed in accordance with the principles set forth herein.

Dated this 30th day of June, 1994, at Chelsea, Vermont.

Mary Miles Teachout
Presiding Judge