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H2409 has passed the House and is on its way to the Senate. Attached please find relevant comments and case law opposing HB2409. We believe that the bill as drafted deprives persons of constitutionally guaranteed rights to procedural due process and has other significant issues. We support the goal of the bill and have suggested ways to remedy its deficiencies.

If you have further questions, please free to contact me.

Sincerely,

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Pennsylvania Federation of Dog Clubs
Position Statement OPPOSING as drafted
HB2409
An Act Providing for the Care of Seized Animals

This well-intentioned bill attempts to address a serious question facing the law enforcement community in the Commonwealth: how to ensure adequate funding for the care and treatment of animals seized as evidence of a violation of 18 P.A.C.S. §5511.

There is universal agreement that the burden for these costs unfairly falls on those enforcing these laws, including humane societies, counties and municipalities. Unless ownership is voluntarily relinquished, the animals must be held pending final adjudication of the legal case against the accused. Currently, the costs for the care, rehabilitation and treatment of these animals are borne by the entities seizing and holding the animals. Given the nature of criminal proceedings, this can result in an extended period of care.

This bill proposes to remove this unjustified burden on the humane society, county or municipality by permitting them to petition for relief in the magisterial district court where the related charges are filed. After proper notice and service to the defendant, an expeditious hearing is held to demonstrate that the seizure was warranted and the amount of the reasonable costs for the care required for the seized animals. The defendant or owner is granted the right to have one opportunity to examine the animal for purposes of preserving evidence not later than the commencement of the hearing.

If the court grants the petition, its order shall include the amount of reasonable costs to be paid by the respondent to the court for the benefit of the petitioner. Payments shall be made monthly and the defendant's ability to pay shall not affect the court's determination of the amount required to be paid. Failure to pay timely under the order shall result in the automatic forfeiture of the seized animal by operation of law to the petitioner and the petitioner is granted all rights and privileges in and over the animal. After the final order on the criminal charges, any unused portion of the reasonable costs of care of the animals shall be remitted to the defendant or owner.

The bill further provides immunity for the petitioner for civil liability for damages alleged by a defendant or owner concerning the care provided by the petitioner.

While we support requiring payment for the care of their animals by those convicted of violations of 18 P.A.C.S. §5511, we cannot support the current bill. As discussed below, we believe that the bill as presently constructed, is deficient in that it: the deprives persons of property rights without a conviction on the underlying offense, fails to include the State Police in the covered entities, fails to return all monies paid for the care of the animals if the defendant is not convicted, provides immunity from civil prosecution of individuals who may have violated 18 P.A.C.S. §5511, and creates a system subject to potential criminal abuse.

The most significant problem relates to the deprivation of the property rights of the accused or owner even if acquitted of the charges. This issue has been addressed in an ordinance with substantially similar provisions in *The Louisville Kennel Club, Inc., et al. v. Louisville/Jefferson County Metro Government* (No. 3:07-CV-230-S, 2009 WL 3210690, at *10 (W.D. Ky. Oct. 2, 2009) (unpublished opinion). The holding declared the ordinance unconstitutional on procedural due process grounds insofar as it threatened to deprive owners of their property rights without a finding of guilt. While not directly controlling in this jurisdiction, the holding is instructive given the similarity of the processes involved. The relevant portions of the opinion succinctly state the argument:

III. Procedural Due Process

Plaintiffs claim that § 91.101 of the ordinance threatens a citizen's right to a fair hearing before being deprived of property. Before delving into the governing jurisprudence, we think it wise to determine how the ordinance operates.

As with other sections of the ordinance in question, § 91.101 seems to be the victim of hasty drafting. Entitled "Confiscation of Victimized Animal," its purpose is to allow the authorities to take possession of an animal that has been the victim of any of several forms of inhumane treatment. These include (*inter alia*) failure to provide necessities, abandonment, mutilation, and "exhibition fighting." Section 91.101(A) provides that an animal found involved in a violation of any of these prohibitions may be confiscated by an animal control officer, evidently for its protection.

Once an animal has been confiscated, subsection (B) provides for a hearing before a judge. That judge is to determine whether probable cause existed for the confiscation. If so, the owner must post a \$450 bond within 24 hours to cover the cost of 30 days' boarding and veterinary care for the animal, which remains in the city's possession. A new bond must be posted every 30 days, and failure to do so results in immediate forfeiture of the animal. The ordinance does not say what happens if no probable cause is found, but the implication of the bond and forfeiture provisions, coupled with general background notions of justice, must be that absent probable cause the animal is to be returned to its owner.

Section 91.101(B)(1) goes on to provide that upon a plea or finding of guilt, the animal's owner becomes responsible for all costs created by the impoundment. (That is, any bond he has posted is not returned, and he must pay any outstanding amount due.) Further, the animal in question becomes property of the city. If the accused is found innocent, subsection (B)(2) provides that any posted bond is to be returned to the owner. The ordinance does not explicitly provide for return of a seized animal if its owner is found to be innocent. Again, however, context leads the Court to conclude that returning the animal on a finding of innocence must have been the Metro Council's intent. There is, first, the obvious fact that this is the just result of such an adjudication. In addition, it makes little sense for

the government to return the posted bond—leaving it on the hook for all the animal's expenses up to the acquittal—and then to hold onto the animal at its own further expense. Finally, the last sentence of subsection (B)(1) states: "Upon conviction, all animals not forfeited pursuant to subsection (B) herein above shall become the property of the Metro Government." This implies that, prior to conviction, ownership of the animal does not change. After an acquittal, then, the original owner retains his rights, and the city has no further basis for holding the animal.

The construction offered above solves two problems with § 91.101, allowing for the return of a confiscated animal upon a finding of either no probable cause or innocence (if the bond has been duly paid). But a third problem lingers. It is undoubtedly the case that the ordinance mandates permanent forfeiture of a seized animal if the judge finds probable cause and the owner fails to timely post the appropriate bond. This provision is evidently meant to ensure that the owner of a confiscated dog has an interest in posting the bond: If he could refuse to do so and then wait for an adjudication of guilt, he might never have to post before getting the dog back (if he is found innocent), or he might lose his ownership of the dog (if he is found guilty) and thus any incentive to pay the past-due boarding and veterinary costs. The result is that a person whose dog has been confiscated, and against whom there is probable cause that he violated one of the humane treatment requirements, will lose his dog permanently unless he posts bond, even if he is ultimately found innocent of the underlying charge. This possibility presents a legitimate due process claim.

Claims under the "procedural" arm of the Due Process Clause are governed by the balancing framework set up by *Mathews v. Eldridge*, 424 U.S. 319 (1976). Determining how much process is due in a given case involves consideration of three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

As plaintiffs argue, pet owners clearly have a property interest in their animals. See *Bess v. Bracken County Fiscal Court*, 210 S.W.3d 177, 180 (Ky. 2006) (recognizing that dogs are personal property). This interest is not absolute and is subject to regulation by state and municipal governments. *Id.* Nonetheless, the government is not permitted to deprive an animal owner of his property without due process of law. The question is not whether process is due, but rather how much is required.

We therefore inquire into the second prong of the *Mathews* test. As the procedure stands, the risk of erroneous deprivation of this property interest is significant. It is perfectly possible for a judge to find probable

cause that a person has committed an offense, but for that person later to be found innocent. Under the scheme set up in § 91.101, if such a person was unable to put up \$450 immediately upon the probable cause finding, his pet is forfeit and he has no apparent recourse for its recovery, even if he is ultimately found innocent of the underlying charge. There is thus a high risk of erroneous deprivation, which some sort of additional hearing, appeal, or late-payment process could remedy. Moreover, the government has little interest in keeping ownership of pets belonging to innocent citizens. Presumably most of the animals kept under this ordinance have to be euthanized, lest the burden of boarding and caring for them grow too high. The government does not articulate any interest whatsoever in its brief—it does not even cite *Mathews*—and the Court is unwilling to fabricate one. Consequently we must hold that the portion of § 91.101 that would permanently deprive a pet owner of his property, absent a finding of guilt, is unconstitutional.

It seems likely that § 91.101 is poorly drafted and does not properly represent the intent of its authors. However, this Court is not in the business of authoring or revising legislation. As a remedy for the constitutional failing just described, the Court will therefore enter an injunction against enforcement of the ordinance in the manner just described. Applications of § 91.101 that do not infringe the constitutional right to due process of law may continue.

The difference between the *Louisville* case and the present bill is that here an argument *de novo* can be made with regard to the third prong of the *Mathews* test: "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." There is no disagreement that the government has a legitimate interest in providing for the welfare of animals and convicting those guilty of abuse. There is also no disagreement that the burden for the costs of care of the animals prior to a conviction should borne by the guilty party. The issue then resolves to whether the fiscal or administrative burdens of additional or substitute procedural requirements would justify the deprivation of property rights under the circumstances.

18 P.A.C.S. §5511(l) already provides for a process that comports with the holdings in the *Louisville* decision by permitting the authority that imposes sentence to require payment for the keeping, care and destruction of the seized animal after conviction. While it creates a lien on the animals for such costs prior to conviction, it does not require pre-conviction payment to avoid loss of property rights. 18 P.A.C.S. §5511 (m) permits an order of forfeiture, but it is described as an additional penalty and therefore is a post conviction action. The law does not permit criminal penalties to be imposed on persons without a conviction. The instant issue apparently resolves into finding a mechanism to reduce the pre-conviction burden on the petitioners for the cost of care and to ensure payment for the expenses of the care of animals pending conviction after the conviction has been obtained.

However, this still places the burden on the seizing organization to pay for the care of the animal pending resolution of the court case. As the *Louisville* decision makes clear, after conviction there is little incentive for the guilty party to pay the costs of care. It is also inequitable to have the organization caring for the animals have to advance the funds for their care and risk not

being repaid. While we cannot speak for the Legislature or the court system regarding their view of the fiscal and administrative burdens, we can suggest alternatives to meet the legislative goals without impermissibly taking property in violation of substantive due process.

First, the lien for the payment of costs could be levied on more than the animal seized; it could be placed on any property owned by the accused. This would provide for a larger reservoir for the potential repayment for expenses. While this would increase the likelihood of eventual payment, it only partially addresses the problem since there is still the need to cover expenses pending the resolution of the underlying case.

The issue then becomes who is responsible to insure that payment for costs is provided pending the court's decision, what source is available for funding and what happens in the event of a not guilty verdict. While the bill requires that any monies in excess of the cost of care must be returned after the final order in the criminal case, the time for repayment is not limited in the bill. Whoever covers the cost of care, excess funds should be expeditiously returned after the case is resolved.

The bill also does not provide for reimbursement of the monies posted if there is not a conviction. An owner whose dog is seized is required to pay for the costs of maintaining the dog during the seizure even when a court ultimately determines there was not sufficient evidence for a conviction. This encourages seizures by authorized organizations, but shifts the burden of paying for a seizure based on insufficient evidence for conviction to the accused. This violates the principles underlying fundamental fairness forming the foundation of our judicial system. If there is insufficient evidence for a finding of guilt, or at least an adjournment in contemplation of dismissal, why is a person who is not found guilty and did not initiate the seizure responsible for the costs? The fact that an animal may be lawfully seized should not create liability on the part of the accused when the charges are not proven in court. The bill should be amended to provide for the return in full for all monies paid for the care of animals where there is not a conviction in the underlying case.

To determine who should be responsible for the cost of care prior to conviction, let's look at how the animals were seized. Someone with the authority to do so would have petitioned a court for a warrant based on probable cause to believe a crime had been committed to search a property and seize evidence of that crime – in this case abused animals – or there might be demonstrated exigent circumstances. To ensure conviction, an investigation should have been done, evidence gathered and preserved and a solid case made for prosecution. This case can be made by state or local police officers or humane society police officers. We note that the bill does not include the state police in the covered organizations and believe this is an error. We do not believe that the legislature intends to remove the burden for humane societies, county and municipal police and still leave the state police without redress when they make valid cases against those who abuse animals.

In each case, a different organization is responsible for bringing the prosecution. Where a governmental body brings the case, the relevant level of government should be responsible for ensuring the care of the animals pending trial. Given that there is currently no funding for this purpose presently available, where can these funds be obtained and how can the administrative issues be resolved?

One solution would be for the state to establish a restricted account to receive these funds or establish a quasi-governmental not for profit corporation to perform this function. If a corporation were used, its Board could be set in its by-laws to consist of the following individuals (or their designees): The governor, the Attorney General, the Chief Justice of Pennsylvania, the State Police Commissioner, the Secretary of Agriculture, and a member each appointed by the Majority Leader of the House, President Pro Tempore of the Senate, and the minority leaders in the House and Senate.

This account or non-profit organization could be funded, for example, from a surcharge on dog licenses, payments obtained for reimbursement for expenses after conviction, and donations from the public. Since no place currently exists to care for these animals, the original monies devoted to this would have to cover the full costs of the operation (acquisition of a facility, equipping and staffing it, and the cost of care) until the account was established at the level needed to cover the ongoing costs. A temporary initial 50% surcharge on dog and kennel licenses would result in the following fee and surcharge for each category of license (excluding boarding kennels):

Neutered dogs and spayed bitches	-	\$7.50 (up from \$5.00)
All other male and female dogs	-	\$10.50 (up from \$7.00)
Disabled and seniors		
Spayed and neutered animals	-	\$4.50 (up from \$3.00)
All other dogs	-	\$7.50 (up from \$5.00)
C or K Kennel for up to 50 dogs	-	\$112.50 (up form \$75)
C or K Kennel for 51 to 100 dogs	-	\$300 (up form \$200)
C or K Kennel for 101 to 150 dogs	-	\$450 (up from \$300)
C or K Kennel for 151 to 250 dogs	-	\$600 (up from \$400)
C or K Kennel for 251-500 dogs	-	\$750 (up from \$500)
C or K Kennel for more than 500 dogs	-	\$1,125 (up from \$750)

This level of surcharge would produce about \$2,700,000 from dog license fees and approximately \$200,000 from kennel license fees for a total annual amount of \$2,900,000 annually to cover the costs of housing and care for animals seized by the government in cruelty cases. This amount would be increased, as would the funds available for the Dog Law Restricted Account, if lifetime licenses were either eliminated or the costs were brought into line with the annual license fees.

After the start-up costs were covered, the surcharge could be reduced to the level needed to provide funding for the marginal costs above the level not funded by post conviction reimbursements and voluntary donations. This is only one potential source if funds; others can be considered. If publicized as a service provided by the government to protect the welfare of animals and the public, not only would this be acceptable to the vast majority of the voting public, as demonstrated by the wide support for the revision of the dog law, but it could also receive significant voluntary public donations to keep the fund solvent.

The case is somewhat different where a private not for profit humane society originates the case. First, a humane society is not required to hire Humane Society Police Officers. They can refer situations warranting police action to local or state police for investigation and further warranted action. The decision to voluntarily assume the responsibility for law enforcement

initially rests solely with the corporate board. If they so choose, they may apply to the State for the appointment of Humane Society Police Officers to serve within a County. After approval and training, each officer works solely for the Humane Society within the designated county or counties. The County District attorney must approve each search warrant application prior to filing.

After investigation, the power and decision to issue a summons or make an arrest and seizure rests solely with the Humane Society Police Officer. It makes little fiscal sense for the state to assume responsibility for the costs of a seizure where the evidence collected by the Humane Society Police Officer is insufficient for a conviction. Similarly, there are real constitutional due process concerns with permitting a private corporation employee who is empowered under state law to charge an individual with an offense to seized and cause property to be forfeit for failure to pay prior to a conviction.

It is especially important to avoid even the appearance of impropriety when a private organization is authorized to use the police powers of the state. Permitting any private organization to do so creates a potential appearance of impropriety when they engage in state action, seize the property of an individual and take that property unless on-going costs of care are paid in a timely manner before a final adjudication. This is especially troublesome where the accused is not found guilty.

Also a problem, the bill grants immunity from a civil suit for damages accruing from the care, or lack thereof, of the animal while in its custody. The owner is thus deprived of a civil remedy for the negligent care of the animal by the seizing organization, even though the failure to care for an animal to which a duty of care is owed is a chargeable offense under 18 P.A.C.S. §5511. Furthermore, since the humane society may euthanize animals based on the opinion of a single veterinarian, an individual not found guilty might be deprived of his property without any opportunity to preserve evidence for his trial. Again, the voluntary assumption of police powers should not be the basis for the state granting immunity for actions arising from intentional, reckless or negligent actions by those who seek such power.

Compounding the due process issues, the bill only provides the accused one opportunity to access to the animals for purposes of preserving evidence prior to the hearing on cost of care. Such a restriction of access to the animals, the potentially long time between the seizure and the opportunity to examine the animals and the potentially short time before the hearing to examine the animals combine to reduce the defendant's right to effective counsel and to preserve evidence in his or her defense. At a minimum the defendant should have the ability to have the animals examined by a veterinarian of his choice within a day or two of seizure and reasonable access to evaluate the animal's care before and during the court proceedings. They are still legally his or her property until convicted and he has a vital interest in their care. Any longer than that raises a question of whether the defendant has any real opportunity to view evidence close to the state in which it was seized.

Finally, if the bill is approved, there is still a question of how costs are determined. The bill authorizes "reasonable costs of caring for the seized animals, including the provision of food, water, shelter, and medical care. . . ." The issue is how are these costs to be computed and what standard applies. In a real sense, the cost to the organization is the additional cost resulting from caring for the animal. We strongly believe that only the marginal cost of care directly related to the animals should be chargeable, not the fully loaded costs of the

organization. For example, if a dog is housed in an empty, unused, run in a facility with 50 runs, there is no additional operational cost associated with obtaining shelter, even though 2% of the housing is devoted to care for the animal. On the other hand, if additional staff are needed or overtime required beyond that normally expended without housing the animals seized, that portion of the additional costs is properly associated with the cost of care for the animals. The legislation needs to specify how these costs are computed.

Please consider the above when reviewing this bill for a vote in the Senate.