*Chapter 3*

## Putting Public Safety First: Why Breed-Specific and Discriminatory Laws are the Wrong Choice for Your Community

### Introduction

We all share the same goal of a safe and humane community for people and their pets. This chapter is meant to offer practical guidance to municipalities in the drafting of your dangerous dog ordinance. That guidance is based on nearly two-decades worth of peer-reviewed research on dog behavior, and it represents the most current and effective approach available.

### The Power to Regulate Dogs

It is long established that local governments may regulate the keeping of animals as a valid exercise of their police power. In *Sentell v. New Orleans & Carrolton R.R.*, the United States Supreme Court held that dogs are subject to the full force of the local police power and may be "destroyed" or otherwise regulated by the city in any reasonable manner as a means of protecting its citizens.[1]

Since then, similar authority has been upheld in state courts across the country, where it has consistently been found that a legislative body has broad police powers to control dogs as a way to protect and regulate against the threats posed to people. Typical of these holdings is *Thiele v. Denver*, in which the Colorado Supreme Court stated unequivocally that a dog, like all other property, is held by its owner subject to the inherent police power of the state and cannot be used or held in such way as to injure others or their property.[2] Similarly, the Virginia Supreme Court has held that a county law making it illegal to keep a dog known to be vicious or which has evidenced a disposition to attack human beings was a valid exercise of the county's police power.[3]

However, it is important to note that evidence considered in evaluating issues like a dog's "known propensity" for dangerousness is likely to be contested, so it is more effective to list specific behaviors over general terms.[4] Still, when the property in question is a beloved pet, even the most carefully drafted ordinance will not fully insulate a municipality from costly litigation, especially if friendly dogs and responsible owners are targeted for enforcement.

Further complicating matters is our culture's continuing evolution as to how we perceive, treat and legislate around companion animals, especially dogs. As the Oregon Supreme Court stated in the *Fessenden case:*

> "As we continue to learn more about the interrelated nature of all life, the day may come when humans perceive less separation between themselves and other living beings than the law now reflects. However, we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still[.]"[5]

The recognition that our pets transcend mere property (and their attendant protections) is reflected by the public's attitude towards these cherished family members. In fact, a 2015 Harris Poll found that nearly all owners (95%, up 7 points since the question was originally asked in 2007) consider their pet to be a member of the family.[6] What's more, according to a survey conducted by Luntz Global, 84% of Americans do not want the government to place arbitrary restrictions on the kind of pet dog they can love and own, which is unsurprising given the Harris findings.

All of this is to say that the way a municipality regulates dogs should reflect these realities, from the drafting of behavior-based ordinances to enforcement by animal control or other law enforcement. Public safety and public sentiment demand a 21st century approach that is data-driven, fact-based and scientifically-proven to be effective.

## Breed Specific and Discriminatory Ordinances: An outdated and failed approach

Starting in the late 1980s, municipalities across the country began passing breed-specific and discriminatory ordinances, often under the false assumption that they would make their community a safer place to live. These laws, which often target responsible owners of pit-bull-terrier-like dogs, have had a devastating effect on communities. Thankfully, over the subsequent decades, as more science and data were analyzed, and as our understanding of canine behavior evolved, cities, towns and counties have increasingly replaced these outdated laws with breed-neutral ordinances that focus on the behavior of every dog and owner in the community. That is now the preferred model for maximizing public safety and the model this manual strongly recommends.

Today, the vast majority of communities regulate dogs based on an objective behavioral standard. And while a number of communities hold on to their breed-based laws, more and more municipalities are abandoning them and adopting the behavior-based, breed-neutral model that has proven itself to be the more effective approach to promoting public safety.

In fact, in 2018 the IMLA itself updated its previous model dangerous dog ordinance, replacing its previous breed-specific and discriminatory provision with safety-focused breed-neutral language.[7] That model ordinance now serves as the standard that municipalities look to when crafting their own laws. (see Appendix)

The arguments against targeting specific breeds (or types) of dogs are many, but they boil down to these three main points. First and foremost, these laws have been shown, through vigorous peer-reviewed study, to completely fail at their stated objective of promoting public safety.[8] They also improperly interfere with a responsible owner's property rights. And lastly, they are hugely expensive for municipalities to enforce.[9]

In fact, in addition to IMLA, organizations like the American Veterinary Medical Association (AVMA), the National Animal Care and Control Association (NACA), the Centers for Disease Control and Prevention (CDC), and the American Kennel Club (AKC) all have publicly urged municipalities to repeal any breed specific and discriminatory provisions in their laws and policies and to replace them with breed-neutral ones that are behavior-focused and protective of owner's rights. Twenty-two states have also passed preemption laws that prohibit nearly all types of local breed-discriminatory ordinances.

In addition to IMLA, the American Bar Association (ABA) has even passed a resolution urging all local governments to repeal breed specific ordinances and enact comprehensive breed neutral laws.

*"Resolved, that the American Bar Association urges all state, territorial, and local legislative bodies and governmental agencies to adopt comprehensive breed-neutral dangerous dog/reckless owner laws that ensure due process protections for owners, encourage responsible pet ownership and focus on the behavior of both dog owners and dogs, and to repeal any breed-discriminatory or breed-specific provisions."[10]*

Further complicating breed-based laws is the presumption underlying them that behavioral traits are dominated by genetics as opposed to environmental factors. This presumption has been repeatedly proven to be unfounded, most notably in a 2013 study published in the Journal of the American Veterinary Medical Association. The authors found that there are multiple factors involved in dog-bite-related-fatalities and that most are under the control of the dog's owner (e.g., isolation from positive family interaction; abuse or neglect; unsterilized dogs, and; leaving dogs unaccompanied with children). Importantly, the authors could only reliably determine the breed of dog involved in the incidents in 18 percent of the cases (out of 256 total incidents), and more than 20 different breeds were involved.[11] The authors conclude that breed is not a factor in a dog's propensity to act aggressively, a finding that comports with other peer-reviewed research on the subject.

There is also the problem of visual breed identification. In order to determine if a dog complies (or not) with a breed specific and discriminatory law, enforcement typically relies on a visual identification of the dog in question's breed. This is problematic because research has consistently found that this form of breed-identification is inherently flawed, especially when compared to tests that check a dog's actual genetic breed ancestry.[12] The problems with visual breed identification are not resolved by having a licensed veterinarian or trained animal control officer perform the task; the research finds that it's flawed no matter who is making the determination.

Besides the problems mentioned above, there are also tremendous costs to municipalities that should be considered for places that have or are considering breed-based laws. The laws themselves require animal control departments to divert resources towards enforcement, including obvious ones like staff time for impounding and visually identifying the dogs, kennel costs to house the dogs (including food, space and medical care), euthanasia drugs, and the cost of disposing of the bodies of the pets that are euthanized. There are also less obvious costs, including staff turnover and leave due to the mental strain of being tasked with enforcement of these arbitrary laws.

Lastly and importantly, unlike breed-neutral dog ordinances, breed-specific and discriminatory laws are not automatically accepted by courts as a valid exercise of police powers. They are likely to lead to costly litigation, with challenges typically based on allegations of overinclusiveness, underinclusiveness, vagueness, a violation of equal protection, and/or that the laws lack a rational basis.[13] We anticipate this trend continuing as more of the aforementioned research makes its way into future court cases.

Taken as a whole, it's little wonder that so many places have rejected these outdated laws in favor of effective, cost-efficient laws that make their communities safer.

## The IMLA Model: The 21st century approach to regulation

The IMLA Model Ordinance Regulating Dangerous Dogs (the "Model") was drafted with input from dozens of municipal attorneys, representing a diversity of communities from across the country. It brings together ideas and language that have been successfully adopted and implemented, including links and citations to a number of helpful source materials that informed the drafters.

The most impactful change from its previous iteration is the move to a breed-neutral approach that regulates the behavior of every dog and owner in a community. As discussed, this is now the consensus approach to creating safe and humane communities.

Additionally, the Model urges a tiered approach to regulation, with different definitional thresholds for "potentially dangerous", "dangerous" and vicious." This was added to respond to a common frustration from practitioners, that many of the ordinances are too rigid for the wide range of behaviors that dogs exhibit. Not all dog-related incidents represent the highest level of danger to a community and a one- size-fits all scheme that fails to account for this range is unhelpful.

Another innovative aspect of the Model is the addition of a "Reckless Dog Owner" provision that limits a person's ownership rights if they violate the Code a number of times. This type of language has been used with great success in Skokie, IL.[14] And some state statutes similarly restrict ownership rights if a person violates certain animal-related statutes.[15] Whatever the form or title, these provisions are important to include since so many dog-related problems are human-focused.

The Model includes other important reminders to drafters, including:

- Establish procedures by which a dog comes to be classified as "potentially dangerous," "dangerous" or "vicious."
- Establish the actions/hearings that satisfy the due process clause that a pet owner may take to contest the designation of his or her dog.
- State the burden of proof in the ordinance. If there are criminal penalties, the burden of proof must be beyond a reasonable doubt for each element.
- Specify the actions that a dog owner must take if the dog is finally declared dangerous at the end of an administrative hearing or court proceeding.
- Describe the penalties that the local government will impose if the dog owner does not comply with the established requirements.

The Model's practical guidance on drafting offers a blueprint for municipalities to help ensure that their dog laws are effective, enforceable, and humane.

## Notes

1. *See Sentell v. New Orleans & Carrolton R.R.*, 166 U.S. 698 (1897).
2. *See Thiele v. Denver*, 312 P.2d 786, 789 (Colo. 1957).
3. *See King v. Arlington County*, 81 S.E.2d 587, 589 (Va. 1954).
4. *See e.g. State v. Hanson*, No. 90,372 (Kan. 2004).
5. *State v. Fessenden/Dicke*, 355 Or 769-70 (Or. 2014).
6. https://theharrispoll.com/whether-furry-feathered-or-flippers-a-flapping-americans-continue-to-display-close-relationships-with-their-pets-2015-is-expected-to-continue-the-pet-industrys-more-than-two-decades-strong/.
7. *See* IMLA Model Ordinance Regulating Dangerous Dogs (IMLA 2018).
8. *E.g.*, *Does the Dangerous Dog Act Protect Against Animal Attacks? A Prospective Study of Mammalian Bites in the Accident and Emergency Department*, Injury 27, no. 2 (1996): 89-91; B. Rosado et al., *Spanish Dangerous Animals Act: Effect of the Epidemiology of Dog Bites,* Journal of Veterinary Behavior 2, no. 5 (2007): 166-74.
9. *See e.g.* City of Topeka, Proposed Ordinance on Animal Cruelty and Dangerous Dogs, https://www.pitbullinfo.org/uploads/7/8/9/7/7897520/topeka_kansas_against_bsl.pdf (last visited Aug. 20, 2018); Prince George's County, *Report of the Vicious Animal Legislation Task Force* (2003); Prince George's County, *Report of the Vicious Animal Legislation Task Force: Appendices* (2003).
10. American Bar Association Resolution 100, Aug. 6-7, 2012, *available at https://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/Resolution_100.authcheckdam.pdf*.
11. *Co-occurrence of Potentially Preventable Factors in 256 Dog-Bite-Related Fatalities in the United States (2000- 2009)*, Journal of the American Veterinary Medical Association 243, no. 12 (December 15, 2013).
12. *See* Victoria L. Voith, *Shelter Medicine: A Comparison of Visual and DNA Identification of Breeds of Dogs;* Kimberly L. Olson, *Pit Bull Identification in Animal Shelters*, University of Florida, 2012; Kathleen C. Croy, et al., *What kind or [sic] dog is that? Accuracy of dog breed assessment by canine stakeholders,* Abstract online; and Victoria L. Voith, et al., *Comparison of Visual and DNA Breed Identification of Dogs and Inter-Observer Reliability*, 3 Am. J. of Sociological Research 17 (2013).
13. *See e.g.* Complaint, *Nelson v. Town of New Llano*, No. 2:14-cv-00803 (W.D. La May 26, 2014); Plaintiff's Motion for Preliminary Injunction, *Nelson v. Town of New Llano*, No. 2:14-cv-00803 (W.D. La May 26, 2014); Plaintiff's Memorandum in Support of Motion for Preliminary Injunction, *Nelson v. Town of New Llano*, No. 2:14- cv-00803 (W.D. La May 26, 2014); *Schreiner v. City of Clay*, No. CV2013- 903036.00, (Ala. Cir. Ct. Sept. 14, 2014).
14. Skokie, IL, Municipal Code § 18-40.
15. 9 Ohio Rev. Code. § 955.54 (2012), available at http://codes.ohio.gov/orc/955.54.