
STETSON LAW REVIEW

VOLUME 40

WINTER 2011

NUMBER 2

ARTICLE

IT'S RAINING CATS AND DOGS . . . GOVERNMENT LAWYERS TAKE NOTE: DIFFERENTIAL LICENSING LAWS GENERATE REVENUE, REDUCE COSTS, PROTECT CITIZENS, AND SAVE LIVES*

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I. INTRODUCTION

Municipalities in Florida and throughout the United States are battling dog and cat overpopulation issues that impact local government policy and budgets. Dogs and cats are reproducing at an exponential rate that outstrips the number of people who can provide homes for them. According to some experts' projections, just one unaltered dog and her progeny can produce an estimated

* © 2011, Phyllis Coleman, Heather Veleanu & Sandra Wolkov. All rights reserved. The Authors would like to thank Barbara Bancker, Jim Dunn, and Jaime Watkins-Gillham for their help in drafting and promoting the model ordinance, and Mitchell Nathan for his research assistance. We dedicate this Article in memory of Mushy Veleanu, the bravest cat who ever lived.

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67,000 puppies in a six-year period.¹ A single fertile cat and her offspring can spawn approximately 420,000 kittens in seven years.²

It is generally accepted that the best way to reduce the number of unwanted animals is to make it impossible for those who³ already exist to reproduce,⁴ which is effectively accomplished through spay/neuter legislation.⁵ This Article recommends enacting ordinances that provide for a substantially higher license fee for unsterilized dogs and cats as a critical step to eliminating overpopulation and the resulting burdens imposed on

1. PETA, *Spay and Neuter*, <http://www.peta.org/issues/companion-animals/spay-neuter.aspx> (accessed Mar. 7, 2011). Estimates vary because there is neither the time nor money to keep official figures. "Some shelters [do not] have the resources to perform their basic jobs and also track this data," while others feel uncomfortable releasing pet euthanasia information to the public, fearing the figures might "be misunderstood and misused." Natl. Animal Interest Alliance, *About NAIA Shelter Project*, <http://www.naiashelterproject.org/about.cfm> (accessed Mar. 7, 2011) For example, private shelters, especially those that depend on donations, have been unjustly criticized for euthanizing animals, even when they were doing so to prevent suffering or to comply with local animal-control policies. *Id.* Further, records may not be uniform. There might be input errors, missing and incomplete numbers for some years, and many other problems that make it difficult, if not impossible, to compare data confidently. *See id.* (noting that all these factors complicate any attempt to "understand pet population dynamics well enough to define and solve the problems"). To minimize these difficulties, this Article uses figures from recognized animal-protection organizations and shelters. *See e.g.* Peter Marsh, *Strategy for Tomorrow*, <http://www.saveourstrays.com/Marsh.htm> (accessed Mar. 7, 2011) (advocating ways to eliminate pet overpopulation).

2. PETA, *supra* n. 1, at ¶ 2. Of course, one fertile male can father an almost infinite number of descendants. Fla. Spay Neuter Assistance Directory, <http://www.spayneuterpets.com/index.html> (accessed Mar. 7, 2011) (noting that "[t]heoretically there is NO LIMIT to the number of offspring an unaltered male cat or dog can father!").

3. Although most courts treat animals as property, the Authors of this Article believe this is inappropriate because animals are not inanimate objects but rather sentient beings who are entitled to respect. As a result, when referring to dogs and cats, this Article uses the word "who" rather than "that." *See also infra* n. 65 (explaining that some advocates believe changing terminology can better reflect the human/non-human animal relationship and may actually improve the way dogs and cats are treated).

4. The American Society for the Prevention of Cruelty to Animals (ASPCA) agrees. "[T]he only method of population control that has demonstrated long-term efficacy in significantly reducing the number of animals entering animal shelters is the voluntary sterilization of owned pets." ASPCA, *Position Statement on Mandatory Spay/Neuter Laws*, <http://www.aspc.org/about-us/policy-positions/mandatory-spay-neuter-laws.aspx> (accessed Mar. 7, 2011) [hereinafter *Position on Spay/Neuter Laws*]; *see also* Humane Socy. U.S., *Why You Should Spay or Neuter Your Pet*, http://www.humanesociety.org/issues/pet_overpopulation/facts/why_spay_neuter.html (Oct. 13, 2009) (stating that "the only permanent, [hundred] percent effective method of birth control for dogs and cats" is spay/neutering).

5. *Infra* pt. III (discussing spay/neuter laws).

municipalities.⁶ The idea is that these laws will motivate owners to spay/neuter their pets, thereby reducing the number of unwanted animals. This in turn will:

- substantially increase revenue, which will help defray local governments' costs of capturing, sheltering, and euthanizing animals;⁷
- reduce local governments' costs because there are fewer animals to process at their shelters;⁸
- protect residents and their animals from unaltered male dogs, who represent the group most likely to bite;⁹ and
- save the lives of many of the millions of dogs and cats being euthanized in shelters.¹⁰

Part II of this Article describes the dog and cat overpopulation problem and its costs to local governments. It outlines the multiple causes of overpopulation: homeless animals roaming free and breeding without limitation; breeders who potentially increase the number of unwanted animals; and pet owners who choose to breed their animals or fail to spay/neuter them and unwittingly end up with unplanned litters of puppies and kittens.

6. Marsh, *supra* n. 1 (explaining that the "fairness and effectiveness of differential licensing fees is widely accepted").

7. *Infra* nn. 63–64 and accompanying text (discussing how revenue is increased while costs are decreased under such programs).

8. See e.g. L.A. Animal Servs., *Los Angeles Animal Services 2008 Statistical Report*, <http://www.laanimalservices.com/PDF/reports/annual/2008%20Statistical%20Report%20LA%20Animal%20Services.pdf> (accessed Mar. 7, 2011) (providing statistics related to the city's progress toward its goal of euthanasia reduction). The report reveals a steady decline in the number of dogs sheltered from a high of 40,442 in 2001 to a low of 24,999 in 2006 and states that this decline is because of "an effective dog licensing program that encourages spay/neuter through a differential licensing fee." *Id.* at 10.

9. See e.g. Karen Delise, *Fatal Dog Attacks: The Stories Behind the Statistics* 14 (Anubis Press 2002) (discussing fatal dog attacks); Natl. Canine Research Found., *Fatal Dog Attack Studies*, <http://www.americancaninefoundation.com/images/FatalDogAttackStudy2.htm> (accessed Mar. 7, 2011) (revealing that of the 134 fatal attacks between June 30, 1999 and June 30, 2005, a male dog was involved in more than 92% of the cases and 94% of the animals were unaltered).

10. Marsh, *supra* n. 1 (pointing out that, although initial sterilization programs were effective, to save the lives of many more animals, it is now necessary to take the next step and develop affordable neutering programs so that low-income families can spay/neuter their pets).

This Part further delineates the related public safety and health threats posed by dog bites, which are primarily inflicted by unaltered male dogs. Finally, it explores the economic cost and humane concerns of euthanizing millions of unwanted dogs and cats each year.¹¹

Part III suggests spay/neuter legislation as a meaningful method of reducing overpopulation. Specifically, it advocates the effectiveness of laws that encourage spay/neutering by employing a higher cost to register fertile animals and a lower cost to register altered animals. A proposed model ordinance for Florida municipalities is included in the Appendix.¹² An important component of this recommended ordinance is that it funds spay/neuter programs, including low-cost, feral cat, and educational programs, through revenue generated from the differential license structure.

Part IV explores legal challenges to spay/neuter ordinances using the handful of cases that have considered, and usually rejected, constitutional and other challenges to such laws.¹³ Based on these decisions, this Article concludes it is unlikely that passage of spay/neuter ordinances would lead to protracted litigation.

11. See Gary Patronek et al., *Risk Factors for Relinquishment of Dogs to an Animal Shelter*, 209(3) J. Am. Vet. Med. Assn. 572, 572 (1996) (stating that the leading cause of death for dogs is believed to be “[e]uthanasia of healthy, but unwanted, pets in animal shelters”); Gary Patronek et al., *Risk Factors for Relinquishment of Cats to an Animal Shelter*, 209(3) J. Am. Vet. Med. Assn. 582, 582 (1996) (stating that the leading cause of death for cats is believed to be “[e]uthanasia of healthy, but unwanted, pets by animal shelters”). Similar to the research in these articles, most of the relevant animal studies were conducted years ago. Unfortunately, follow-ups have not been done. See generally Rebecca J. Huss, *Rescue Me: Legislating Cooperation Between Animal Control Authorities and Rescue Organizations*, 39 Conn. L. Rev. 2059, 2059 (2007) (arguing for legislative solutions that are nonlethal and increase the number of adoptions, sterilized animals, and animals retained in homes).

12. For a sample ordinance written to conform to the Broward County Code, consult *infra* Appendix.

13. Such challenges include standing, procedural due process, preemption, equal protection, Takings Clause, Commerce Clause, freedom of contract, vagueness, freedom of association, ex post facto laws, reasonableness of fee structure, unreasonable search and seizure, and state claims. *Infra* pt. IV (discussing each challenge).

II. OVERPOPULATION: THE PROBLEM AND ITS COSTS TO LOCAL GOVERNMENTS

While the animal overpopulation crisis is multifaceted, it can be analyzed in terms of its causes and costs for purposes of framing a legislative solution.

A. Causes

The origins of the current overpopulation problem can be traced to the post-World War II era, during which the number of pets grew rapidly.¹⁴ Americans were enjoying higher incomes and the birth of suburban housing developments, which made it possible for many more families to acquire companion animals for the first time.¹⁵ Simultaneously, advances in veterinary medicine and the growth of and improvements in the pet-food industry caused dogs and cats to live longer and reproduce more.¹⁶

Today, more than seventy million American families have pets.¹⁷ But many other dogs and cats are still forced to live on the streets. Because there are not enough homes for existing animals, at the current seven to one ratio of dog and cat births to human births, it is clear there will never be enough families to support the animals' offspring.¹⁸

Individuals who buy from breeders or pet stores rather than adopt "used" dogs and cats from shelters make the problem worse¹⁹ because each puppy or kitten purchased creates a demand

14. Stephen Zawistowski et al., *Population Dynamics, Overpopulation, and the Welfare of Companion Animals: New Insights on Old and New Data*, 1(3) *J. Applied Animal Welfare Sci.* 193, 194 (1998).

15. Samantha Markham, *How Did Cats Become Our Pets?* <http://ezinearticles.com/?How-Did-Cats-Become-Our-Pets?&id=3877753> (Mar. 5, 2010).

16. Zawistowski, *supra* n. 14, at 194.

17. See generally Am. Pet Products. Assn., *Industry Statistics & Trends*, http://www.americanpetproducts.org/press_industrytrends.asp (accessed Mar. 7, 2011) (providing statistics on pet ownership and expenses).

18. High Desert Humane Socy., *Halt a Litter Today*, <http://www.highdeserthumane.org/halt.htm> (accessed Mar. 7, 2011) (determining the "average family of 4 would have to house, clean, feed, and pay vet bills for 60 animals").

19. See Steven G. Rogelberg et al., *What Shelters Can Do about Euthanasia-Related Stress: An Examination of Recommendations from Those on the Front Line*, 10(4) *J. Applied Animal Welfare Sci.* 331, 332 (2007) (noting that euthanasia will continue to be a problem for a number of societal reasons, including that people generally do not want to adopt shelter animals).

for breeders to produce additional animals.²⁰ At the same time, each sale reduces the available adoptive homes and decreases the likelihood that a shelter animal will be adopted;²¹ this makes it more likely he or she will be euthanized to reduce the numbers in overcrowded facilities.²²

The problem is further exacerbated by irresponsible owners who fail to care properly for or monitor their dogs and cats, allowing them to roam free and mate with each other as well as with stray or abandoned animals. These couplings result in more kittens and puppies who in turn birth more babies, which aggravates and perpetuates the overpopulation problem.²³

Of course, some pet owners make the conscious choice to have their animals reproduce. Thus, the number of dogs and cats is swelled by the birth of even more babies, including those who result from individuals wanting their pets or children to experience “the miracle of birth.”²⁴ Vast numbers of other pet owners end up having to deal with unplanned births of puppies and kit-

20. See *infra* n. 22 (reiterating that buying a pet from a breeder or pet shop contributes to overpopulation).

21. See PETA, *supra* n. 1 (warning that, even if people who allow their animals to reproduce can find good, loving homes for every one of their offspring, “that means that there will be that many fewer homes for puppies and kittens in animal shelters who desperately need to be adopted,” and explaining that, unless all are spay/neutered before going to their new homes, they can, and probably will, go on to produce many litters themselves).

22. See Natl. Humane Socy., *Dog and Cat Overpopulation—The Problems*, http://www.humanesocietynational.org/overpopulation.html#_ftnref1 (accessed Mar. 7, 2011) (noting that by purchasing pets from breeders, retail shops, and neighbors who have a new litter, people actually “contribute[] to the mass killing[s]”).

23. City of Wichita, *Lease Law FAQ's*, <http://www.wichita.gov/CityOffices/Police/Support+Services/Administrative+Bureau/AnimalServices/LeashLaw.htm> (accessed Mar. 7, 2011) (explaining that leash laws are necessary because animals permitted to roam “contribute markedly to pet overpopulation”). To deal with the problem caused by these “[f]ree roaming, unaltered pets breed[ing] indiscriminately,” shelters are forced to euthanize millions of dogs and cats every year. *Id.* An additional problem is the economic downturn that caused millions of Americans to lose their homes and their ability to afford their pets. Meghan Cooke, *Animal Shelter Concerns Growing, County Says It Will Address High Euthanasia Rates*, *Charlotte Observer* (N.C.) (July 28, 2010) (available at <http://www.charlotteobserver.com/2010/07/28/1577457/animal-shelter-concerns-growing.html>).

24. While some people believe it is important for their children to experience “the miracle of birth” by watching their dog or cat give birth, many others believe that it is much more important to “[t]each children that all life is precious by spaying and neutering . . . pets” to avoid the need to euthanize shelter animals. Humane Socy. U.S., *Myths and Facts about Spaying and Neutering*, http://www.humanesociety.org/issues/pet_overpopulation/facts/spay_neuter_myths_facts.html (Oct. 13, 2009); see also *Jacque Estes, Two Words to Live by: Spay, Neuter*, *Daytona News J.* 10A (Sept. 27, 2008) (available at 2008 WLNR 18567675) (noting that such “excuses just don’t cut it”).

tens,²⁵ including those who feel that “castrati[ng]” their pets robs them of their masculinity.²⁶

Individual owners’ commitment to keep their pets intact also contributes to the related problem of dog bites.²⁷ There are 4.7 million dog bites per year in the United States.²⁸ Such bites pose a serious public-safety threat to residents, inflicting considerable physical damage.²⁹ They are particularly dangerous to children, who are the most common victims³⁰ and most likely to suffer severe injuries or death.³¹ In addition, dog bites exact a high financial cost.³² The spay/neuter issue is particularly important in addressing these concerns because studies reveal that unaltered dogs are statistically 2.6 times more likely to bite than sterilized animals, and males are 6.2 times more likely to bite than females.³³ In fact, although unaltered males represent “only about

25. See Sharon L. Peters, *Sterilizing Pets Isn't a Priority for New Owners*, USA Today (Jan. 12, 2010) (available at http://www.usatoday.com/life/lifestyle/pets/2010-01-13-petsurvey13_ST_N.htm) (discussing a national survey of companion animal owners, including those who have obtained a dog or cat in the last year). In this study, 48% of the dogs and cats acquired within the previous twelve months who were unsterilized when purchased still had not been sterilized at the time of the survey; about 38% of companion animal owners aged eighteen to thirty-four years old had not sterilized their pets; and nearly one-quarter (24%) of those aged fifty-five and older also had not done so. *Id.* As a result, “13% of [all] dog owners and 19% of [all] cat owners” ended up “with litters, more than half of them unintentional.” *Id.*

26. David W. Zanders, *Dispelling the Myths of Spay/Neuter*, <http://www.feralcat.com/zanders.html> (updated Nov. 2009) (suggesting artificial testicles for the animal whose owner has a difficult time with the concept of neutering his or her pet).

27. Ctrs. Disease Control & Prevention, *Dog Bite Prevention*, <http://www.cdc.gov/HomeandRecreationalSafety/Dog-Bites/biteprevention.html> (accessed Mar. 7, 2011).

28. Kenneth Phillips, *Dog Bite Law, Statistics*, <http://www.dogbitelaw.com/PAGES/statistics.html> (last modified Jan. 15, 2011) (citing Ctrs. Disease Control & Prevention, *Nonfatal Dog Bite-Related Injuries Treated in Hospital Emergency Departments—United States, 2001*, 52(26) *Morbidity & Mortality Wkly. Rep.* 605, 605 (July 4, 2003) (available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5226a1.htm>) (noting additionally that each year dog bites send approximately 368,000 victims—more than 1,000 per day—to hospital emergency rooms in the United States).

29. Ctrs. Disease Control & Prevention, *supra* n. 27 (discussing the effects of dog bites on the community).

30. Phillips, *supra* n. 28.

31. Delise, *supra* n. 9, at 13–14. Children between one day and twelve years old are the victims in 79% of all fatal attacks. *Id.* They are particularly vulnerable for several reasons, including their size. *Id.* In addition, they are less likely to recognize and be able to deal with the threat. *Id.*

32. See Phillips, *supra* n. 28 (noting that insurance sources estimate the monetary losses associated with dog bites range between one and two billion dollars each year).

33. Delise, *supra* n. 9, at 13–14; see also Jamey Medlin, Student Author, *Pit Bull Bans and the Human Factors Affecting Canine Behavior*, 56 *DePaul L. Rev.* 1285, 1308–1309 (2007) (explaining that unaltered dogs react to hormonal urges causing them to bite more

40% of the household dog population[, they] account for more than 80% of all dog bites and an even higher percentage of serious” injuries and deaths.³⁴ The greater the number of unaltered dogs in the population, the higher the risk to citizens. As a result, the Centers for Disease Control and Prevention recommends spay/neutering dogs to lower aggressive tendencies and reduce the number of dog bites.³⁵

B. Costs

The pet-overpopulation crisis places a significant financial burden on municipalities—and on every taxpayer. Already struggling to provide necessary services, cities and counties must allocate funds to run shelters competently, promote adoptions and low-cost spay/neuter programs, and provide other typical animal-control functions.³⁶ Although it is difficult to quantify comprehensively the actual costs incurred by local governments in providing

than altered dogs); Jonathan R. Shulan, Student Author, *Animal Law—When Dogs Bite: A Fair, Effective, and Comprehensive Solution to the Contemporary Problem of Dog Attacks*, 32 UALR L. Rev. 259, 283 (2010) (concluding sterilized dogs “act more peaceably”).

34. Best Friends Animal Socy., *No More Homeless Pets Forum, Creating Spay/Neuter Programs That Really Work*, <http://www.bestfriends.org/archives/forums/112904spay.html> (Nov. 29, 2004) (warning that public-health costs associated with unaltered male dogs are “enormous” and, thus, recommending passing and enforcing ordinances that impose “a significant surcharge to license unsterilized dogs”).

35. Ctrs. Disease Control & Prevention, *supra* n. 27. The American Veterinary Medical Association agrees. Am. Veterinary Med. Assn., *Public Health, Dog Bite Prevention*, http://www.avma.org/public_health/dogbite/default.asp (accessed Mar. 7, 2011). Advocates also support laws mandating spay/neutering of dangerous dogs. *E.g.* U.S. Search & Rescue Task Force, *Dog Bite Safety, Preventing and Avoiding Dog Bites*, http://www.ussartf.org/dog_bite_safety.htm (accessed Mar. 7, 2011).

36. Disposal of euthanized dogs and cats poses a further task for municipalities and a public-health issue to residents. Municipalities must coordinate and pay for the disposal of a vast number of animal bodies after they have been euthanized. *See* Jared Hunt, *Euthanized Animal Discovery Puts Spotlight on Animal Shelter Policies*, The Jackson Star-News (W. Va.) (Jan. 14, 2010) (available at <http://www.jacksonnewspapers.com/news/x1672010244/Euthanized-animal-discovery-puts-spotlight-on-Animal-Shelter-policies>)

(noting that animals are incinerated, disposed of in landfills, or sent to rendering plants); *see also* L.A. Co., Dept. of Animal Care & Control, Animal Rendering Fact Sheet, *Disposal (Rendering) of Deceased Animals from Los Angeles County Animal Shelters*, http://www.animalcare.lacounty.gov/cms1_031226.pdf (Apr. 8, 2004) (explaining that animals from the Los Angeles County shelter are picked up by a rendering plant and turned into animal by-products). Rendering of deceased animals is safer than burying euthanized animals in landfills because the sodium pentobarbital is still present in their bodies and may be ingested by scavenging animals such as bald eagles (who have been killed by such ingestion in the past), and large scale incineration could negatively affect air quality. *Id.*

animal control services,³⁷ the numbers that exist demonstrate that “[e]very year, communities spend tens of millions in tax dollars on catching, sheltering, euthanizing and disposing of homeless cats and dogs.”³⁸

In addition to this heavy financial burden, local governments are faced with the moral predicament of regularly and systematically euthanizing millions of healthy dogs and cats. Individual employees involved in the euthanasia process often suffer in a variety of ways.³⁹ Shelter workers charged with euthanizing dozens of animals a day have been diagnosed with a variety of psychological, emotional, and physical ailments, including high blood pressure, ulcers, unresolved grief, depression, and substance abuse, and some have even committed suicide.⁴⁰

Ultimately, those who are most directly and adversely affected by the overpopulation crisis are the dogs and cats themselves. Sadly, a staggering number of homeless, abandoned, and stray animals spend their lives subjected to harsh weather, lack of food, predators, traffic, and disease.⁴¹ Approximately six to

37. Animal-protection organizations recognize the value of keeping and comparing such data and are working together to better access and maintain the statistics. See Natl. Council Pet Population Study & Policy, *The Shelter Population Index Study*, <http://www.petpopulation.org/index.htm> (updated Mar. 4, 2009) (promoting an index aimed at reducing pet homelessness).

38. Def. of Animals, Facts: Spay/Neuter Ordinances, *Spaying and Neutering, A Humane Solution to Animal Companion Overpopulation*, <http://www.idausa.org/facts/spayneuter.html> (accessed Mar. 7, 2011). See also Humane Socy. of Catawba Co., *Shelter, Neuter, and Protect, The Capital Campaign for a Permanent No-Kill Shelter and Regional Spay/Neuter Clinic in which to Shelter, Neuter and Protect Animals*, 3 <http://www.dembicki.com/pdfs/HSCCBrochure.pdf> (accessed Mar. 7, 2011) (estimating it costs “\$2 billion each year to round up, house, kill and dispose of homeless animals”); Marylou Doehrman, *Colorado Springs Cuts Budget for Animal Control and Contracts with Outside Agency*, Colo. Springs Bus. J. (Dec. 12, 2003) (available at <http://www.allbusiness.com/human-resources/workforce-management-hiring-consulting/1094035-1.html>) (calculating a national average-annual-cost per citizen for animal-control services of \$4.25 in 2003); Def. of Animals, *supra* n. 38, at ¶ 13 (computing that “[t]he average cost per animal can be [as] much as \$300”).

39. Rogelberg, *supra* n. 19, at 333.

40. *Id.* Unfortunately, although commenters are beginning to acknowledge and discuss the adverse effects on shelter workers, it appears that volunteers, whose passion for helping animals may cause them to extend themselves financially as well as emotionally, are still forgotten. See Faith Maloney, Best Friends Animal Socy., No More Homeless Pets Forum, *Burnout*, <http://www.bestfriends.org/archives/forums/burnout.html> (Nov. 11, 2002) (discussing ways for those who care for unwanted animals to cope with burnout).

41. See Brenda Nelson, *Keeping Outdoor Pets Safe from Predators*, <http://gomestic.com/pets/keeping-outdoor-pets-safe-from-predators> (Dec. 23, 2009) (explaining the danger that many predators pose to pets left outdoors); see also Mass. Socy. Prevention Cruelty

eight million dogs and cats enter shelters annually,⁴² where they are either adopted or euthanized.⁴³ It is estimated that country-wide, only 24.9% of dogs and 23.4% of cats in shelters are adopted into new homes.⁴⁴ According to the Humane Society, “[f]our million cats and dogs—about one every eight seconds—are put down in [United States] shelters each year.”⁴⁵ Other cats and dogs are

Animals-Angell Animal Med. Ctr., *Issues & Answers: Feral and Free-roaming Cats*, <http://www.mspca.org/programs/cat-campaign/feral-cats.html> (accessed Mar. 7, 2011) (noting the risks to outdoor cats can be life-threatening, and contrasting the two-to-five-year average lifespan of cats permitted to roam freely with that of indoor-only cats who can live to be eighteen years or more).

42. Humane Socy. U.S., *Pet Overpopulation*, http://www.humanesociety.org/issues/pet_overpopulation/ (accessed Mar. 7, 2011) [hereinafter *Pet Overpopulation*].

43. The euthanasia of dogs and cats by lethal injection is currently accepted as the most-humane response to the massive numbers of animals entering shelters. See Humane Socy. U.S., *Policies and Guidelines, The HSUS Statement on Euthanasia Methods for Animals in Shelters*, http://www.animalsheltering.org/resource_library/policies_and_guidelines/statement_on_euthanasia.html (updated Mar. 31, 2009) (stating that “injection of sodium pentobarbital, . . . properly performed, has been deemed the most humane, least stressful, safest, and most professional choice by The HSUS, the American Veterinary Medical Association, The American Society for the Prevention of Cruelty to Animals, American Humane Association, and the National Animal Control Association”). Unfortunately, not all euthanasia is as its name implies—a painless or easy death. One Web site notes that the following methods are still used in this country:

[A]nimals are placed in metal or wood boxes or used oil drums, and hot, lung-searing (or sometimes pre-cooled) carbon monoxide fumes are pumped in; or they are suffocated with carbon dioxide; or they are placed in decompression chambers; or given painful lethal injections jabbed directly into the[ir] heart[s]; or placed in freezers while still alive; or they are drowned, or shot, or electrocuted. Some are dragged clawing and screaming to their deaths. Some are kicked and choked on the way to the killing. When multiple animals are gassed together, they injure themselves and each other in their terror.

The “Killing with Kindness” Campaign—An Act of Compassion, <http://www.crean.com/kindness/letter.html> (accessed Mar. 7, 2011). Although local groups and government agencies have been successful in eradicating some of these cruel practices, they still occur in some facilities. *Id.* Concerns about this type of abuse caused the Humane Society of the United States to promulgate guidelines for acceptable methods of humanely putting animals to sleep. See Humane Socy. U.S., *supra* n. 43 (listing and explaining the most humane methods of euthanasia).

44. Natl. Council Pet Population Study & Policy, *Frequently Asked Questions*, <http://www.petpopulation.org/faq.html> (updated Mar. 4, 2009) [hereinafter *Frequently Asked Questions*].

45. *Pet Overpopulation*, *supra* n. 42. Most experts calculate that at least half of all animals who enter shelters are euthanized. *Id.* at http://www.humanesociety.org/issues/pet_overpopulation/facts/overpopulation_estimates.html. In 2008, Florida’s Manatee County shelters fell within the average range; the three shelters admitted 9,117 animals and euthanized 4,294. Timothy R. Wolfrum, *Area Shelters Euthanize Nearly Half of Animals*, Bradenton Herald (Oct. 22, 2009) (available at <http://www.bradenton.com/2009/10/22/1796674/area-shelters-euthanize-nearly.html>). Not surprisingly given the wide disparity in other statistics involving animals, other organizations estimate that 56.5% of dogs and 71.1% of cats are euthanized. *Frequently Asked Questions*, *supra* n. 44; see also Linda C.

shuffled through well-meaning foster homes or warehoused in cages, overcrowded rooms, runs, or pens in “no-kill” shelters.⁴⁶ Even though a patchwork of public and private facilities continually try to help with the steady influx of these animals, the conditions at some shelters are so awful that death actually may be a more humane option.⁴⁷ Among the least fortunate are victims of animal fighting,⁴⁸ “Class B” dealers,⁴⁹ and hoarders.⁵⁰

Marston et al., *What Happens to Shelter Dogs? An Analysis of Data for 1 Year from Three Australian Shelters*, 7(1) *J. Applied Animal Welfare Sci.* 27, 27–29 (2004) (comparing statistics from the United States where euthanasia reportedly “accounts for one third of all canine deaths and has been [one of the] leading cause[s] of canine death for the past [thirty years]”).

46. See Lisa Sorg, *No-Kill Shelters Defend Practices, State Regulators Question Animal Welfare at Three Large Operations*, *Indep. Wkly. (N.C.)* (Aug. 8, 2007) (available at <http://www.indyweek.com/indyweek/no-kill-shelters-defend-practices/Content?oid=1203180> (detailing conditions at large no-kill shelters in North Carolina)).

47. *Id.* (maintaining that conditions are so bad at the North Carolina shelters that, according to a veterinarian and assistant professor at the North Carolina State University Veterinary School, “[d]eath is not always the worst option”). Lengthy confinement at such shelters often also causes the animals to suffer from a condition known as “kennel crazy,” or compulsive behavior disorder. See John Davidson, *DenverPost.com Fetch Blog, Saving Dogs from Going “Kennel Crazy”*, <http://blogs.denverpost.com/fetch/2010/08/22/saving-dogs-from-going-kennel-crazy/1580/> (Aug. 22, 2010, 8:28 p.m. MT) (discussing Camp Bow Wow, which partners with nonprofit animal agencies to provide more exercise and socialization in shelters, and education and training to the workers, with the goal of avoiding “kennel crazy” animals and thus improving their chances of adoption).

48. See generally PetFinder, *Dog Fighting Fact Sheet*, <http://www.petfinder.com/how-to-help-pets/dogfighting-fact-sheet.html> (accessed Mar. 7, 2011) (discussing dog fighting and its negative implications). Other animals are also frequently sacrificed. *Id.* at ¶ 3. For example, “[s]ome owners train their dogs for fights using smaller animals such as cats, rabbits, or small dogs [as] ‘bait.’” *Id.* These animals are “often stolen pets or . . . obtained through ‘free to good home’ advertisements.” *Id.*

49. Humane Socy. U.S., *Pets Used in Experiments*, http://www.humanesociety.org/issues/pets_experiments/ (accessed Mar. 7, 2011). “Class B” dealers “round up thousands of dogs and cats each year and sell them to research facilities.” *Id.* at ¶ 2. They purchase animals from “flea markets, auctions, shelters, and other . . . ‘random sources,’ including [unsavory people] known as bunchers, who often resort to . . . theft of pets and misrepresentation when responding to free-to-good-home ads.” *Id.* Inspections by the United States Department of Agriculture (the agency that licenses Class B dealers) have revealed “undernourished, sick dogs and cats living in filth amidst dead animals, receiving little if any veterinary care, and being abused by handlers.” *Id.* at ¶ 3.

50. Humane Socy. U.S., *Hoarding*, http://www.humanesociety.org/issues/abuse_neglect/facts/hoarding.html (Nov. 2, 2009). Animal victims often suffer extreme neglect that includes lack of food, little or no veterinary care, and horribly unsanitary conditions leading to serious illness and even death. *Id.* Notably, the home’s human occupants are also at risk for numerous health problems, including disease from rodents and insects attracted by the filthy conditions. *Id.* Neighbors may be threatened, and sometimes the situation is so bad that the house must be condemned. *Id.* Of course, when the situation is discovered, already overcrowded shelters are overburdened by an influx of rescued animals, many of whom need immediate medical care. *Id.* The causes are not clear, but a general consensus exists that animal hoarding is a symptom of psychological and neurolog-

III. REDUCING OVERPOPULATION THROUGH SPAY/NEUTER LAWS

Broad agreement exists among humane organizations, animal professional associations, and public and private shelters that spay/neutering is crucial to solving the overpopulation crisis.⁵¹ In addition to reducing overpopulation, sterilization provides benefits to individual animals and their families.⁵² For example, compared to their intact counterparts, altered dogs live an average of one to three years longer and altered cats three to five extra years.⁵³ Further, contrary to some misconceptions, fertile animals are subject to many more medical problems.⁵⁴ Spay/neutering also reduces behavioral issues and risks associated with roaming.⁵⁵ In fact, surveys indicate that as many as 85% of dogs hit by cars are intact.⁵⁶

Thus, it is not surprising that the veterinary community has acknowledged that “safe, efficient, [and] accessible sterilization programs [are] ‘the best antidote to the mass euthanasia of cats and dogs resulting from overpopulation.’”⁵⁷ In fact, one of the most productive ways local municipalities have found to reduce the population is to pass laws that require or encourage steriliza-

ical malfunctioning, which might involve dementia and other diseases, including obsessive-compulsive disorder, post-traumatic stress, and attention-deficit hyperactivity. *Id.* Sadly, although removing animals from the situation can help solve the problem temporarily, without long-term psychological intervention, animal hoarding has a nearly 100% recidivism rate. *Id.*; see generally Lisa Avery, *From Helping to Hoarding to Hurting: When the Acts of “Good Samaritans” Become Felony Animal Cruelty*, 39 Val. U. L. Rev. 815, 817 (2005) (proposing that to protect animals and to prevent the inevitable victimization of those in shelters impacted by hoarder rescues, the common perception that hoarders are Good Samaritans whose intentions have gone awry must be exposed and people must be educated to the severe animal, human, and economic harm these psychologically impaired people cause).

51. Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 Rutgers L. J. 247, 312 (2008) (stating owners who fail to spay/neuter “are the greatest single cause of the companion animal tragedy”).

52. See Spay USA, *Benefits of Spay/Neuter for Cats and Dogs*, http://www.spayusa.org/main_directory/02-facts_and_education/benefits_sn.asp (accessed Mar. 7, 2011) (listing the benefits of spay/neutering).

53. *Id.*

54. *Id.* These include mammary gland tumors or cancer; prostate cancer; perianal tumors; pyometra; and uterine, ovarian, and testicular cancers. *Id.*

55. *Id.*

56. *Id.*

57. *Position on Spay/Neuter Laws*, *supra* n. 4.

tion.⁵⁸ The support for these programs is evidenced by the fact that more than half of the United States has laws requiring spay/neutering dogs and cats adopted from shelters.⁵⁹ These laws have been supported by community members, including veterinarians and rescue groups,⁶⁰ as a necessary means of reducing the growing numbers of animals in shelters.⁶¹

This Article focuses on legislation that creates a financial incentive for owners to spay/neuter their animals by requiring them to pay higher license fees should they choose to keep their

58. Am. Veterinary Med. Assn., *State Legislative Resources, Summary Report: Mandatory Spay/Neuter Laws*, http://www.avma.org/advocacy/state/issues/sr_spay_neuter_laws.asp (updated Nov. 2009) [hereinafter *Summary Report*].

59. *Id.* Some jurisdictions are stricter than others. For example, in New York City, even dogs and cats sold by pet stores must be spay/neutered. N.Y.C. Admin. Code (N.Y.) § 17-804 (current through Oct. 29, 2010). The following states have laws requiring the sterilization of animals, or at least a written commitment or monetary deposit for sterilization, before someone can adopt an animal from a shelter or animal rescue (although the majority provide exceptions): Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, New Mexico, New York, Nevada, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and West Virginia. *Summary Report, supra* n. 58. Rhode Island has a statute that requires sterilization of all dogs and cats acquired from any “[l]icensed releasing agency.” R.I. Gen. Laws § 4-19-16 (2008).

60. *See e.g. Summary Report, supra* n. 58 (referring to 2008 and 2009 Las Vegas ordinances supported by a number of local veterinarians and animal-rescue groups in response to a significant increase in the number of impounded dogs and cats in the city’s shelters over a three-year period).

61. *See* L.A. Animal Servs., *supra* n. 8, at 10 (explaining that Los Angeles attributes a consistent reduction in intake of lost and homeless dogs due to that city’s higher fees for unaltered animals); *see also* Lindsay Barnett, LATimes.com: L.A. Unleashed, *Pet Responsibility Act Clears State Senate Hurdle; Bill Would Mandate Spay/Neuter for California Dogs*, <http://latimesblogs.latimes.com/unleashed/2009/06/pet-responsibility-act-clears-state-senate-hurdle-bill-would-mandate-spayneuter-for-california-dogs.html> (June 2, 2009, 6:07 p.m. PT) (reporting that “[s]upporters of the Pet Responsibility Act point to Santa Cruz’s success when similar legislation was approved; they say euthanasia rates dropped by 60% after its passage”). In 2007, three years after the passage of a spay/neuter ordinance in Buncombe County, North Carolina, two University of North Carolina students set out to provide a preliminary assessment of the effectiveness of the ordinance. Jennifer Reed & Courtney Pierce, *Preliminary Assessment of the Effects of Recent Spay/Neuter Legislation in Buncombe County, NC 2*, <http://www.sog.unc.edu/programs/ncphl/AnimalControl/pdfs/FinalReportPierceReed.pdf> (June 2007). They evaluated euthanasia data, animal-intake data, enforcement of the spay/neuter ordinance, spay/neuter data, potential differences in data related to dogs versus cats, concurrent programs promoting pet depopulation, and the economic impact on the animal-control budget and enforcement. *Id.* As a result, they determined the ordinance “has a significant impact on actual spay and neuter rates within shelter and low income clinic companion animal populations and that subsequently, euthanasia rates of unwanted pets are reduced.” *Id.* (also pointing out, however, that a recurring frustration for those encouraging the adoption of sterilization laws is the lack of scientific study concerning the effects of such laws on population over time).

animals intact.⁶² At the same time, funds generated by the increased fees for non-sterilized animals provide a fiscal benefit⁶³ that offsets the high financial costs cities and counties spend on sheltering, euthanizing, and disposing of homeless dogs and cats.⁶⁴ In this sense, these ordinances serve local governments by simultaneously reducing costs and increasing revenue.

A. Fee Differential and Mandatory Spay/Neuter Ordinances

In response to the overpopulation crisis, municipalities have enacted ordinances that encourage spay/neutering by employing a higher cost to register fertile animals and a lower cost for those who are altered.⁶⁵ These may be generally categorized as fee differentials or mandatory spay/neuter laws.⁶⁶

62. Those intending to breed may do so, but at a higher cost—designed to generate funds needed to address the overpopulation crisis (which exists at least in part as a result of continued breeding). See *supra* nn. 19–22 and accompanying text (discussing how breeding contributes to the problem); see also Ohio SPCA, *Pet Overpopulation Is an American Tragedy*, <http://www.ohiospca.org/pet-overpopulation> (accessed Mar. 7, 2011) (noting that, although failure to spay/neuter pets is the major cause of overpopulation, breeder and puppy-mill sales, as well as irresponsible owners who abandon their dogs and cats, also perpetuate the problem and create the necessity to kill millions of healthy animals). The Ohio Society for the Prevention of Cruelty to Animals posits that “[f]or every animal killed—be it a dog, cat, pig, rabbit, or bird—there is a human outside the walls of the shelter responsible.” *Id.*

63. For example, extra income from license fees have topped half a million dollars following Palm Beach County’s adoption of its licensing fee ordinance in 2008. Palm Beach Co., Fla., Animal Care & Control Div., *Animal Services Monthly Operational Reports, 2007–2009* (on file with Authors) (charting revenues from dog and cat license-tag fees in Palm Beach County for 2007–2009).

64. One author notes:

Loose, stray, and unwanted animals are the most costly part of animal control ([animal control officers] to pick them up, vehicles to transport them, kennels to house them[,], as well as food, water[,], and, unfortunately, the costs of euthanasia in most cases). By reducing the numbers of stray, unwanted[,], and loose animals through spay/neuter programs, the costs of animal control will be significantly reduced over time.

Christopher Richey, *Reasons for Animal Licensing*, <http://www.petdata.com/company/news/news050204-1.html> (accessed Mar. 7, 2011). That cost could potentially be further reduced by microchipping, which may increase the number of successful reunions of lost dogs and cats with their human families (and thus decrease the number of animals in shelters). See PAWS, *Microchip Facts*, <http://www.paws.org/microchips.html> (accessed Mar. 7, 2011) (describing the benefits and process of microchipping).

65. Some states have passed similar statutes. See e.g. N.Y. Agric. & Mkts. Law § 110 (McKinney 2004) (listing the schedule of license fees for all dogs; authorizing local governments to enact licensing ordinances in addition to the fee established in the statute; and providing that extra revenue be used only for controlling dogs and enforcing this or related rules, regulations, or ordinances, including subsidizing spay/neutering of dogs and

Fee differentials are generally found within the traditional framework of municipalities' pet registration or licensing fee schedules.⁶⁷ They simply apply a lower registration cost for dogs and cats who are spay/neutered and a higher price for those who are intact.⁶⁸ To be effective, the cost difference must "be sufficient to encourage the [sterilization] surgery."⁶⁹ Substantial fee differentials promote spay/neutering by forcing owners buying license tags to choose *consciously* whether to sterilize their animals and pay the lower fee or pay a much-higher price to maintain an intact dog or cat.⁷⁰ This should encourage those *not* intending to breed to opt for spay/neutering, thus reducing the vast number of unplanned puppies and kittens, and becoming a primary means of combating the overpopulation problem.⁷¹

public humane-education programs about responsible ownership); R.I. Gen. Laws § 4-24-3 (2008) (requiring all cats to be spay/neutered unless the caretaker purchases an unaltered license or breeding permit, or has a letter from a veterinarian stating that "due to age, health[,] or illness it would be inappropriate to spay or neuter the cat"). Notably, along with a few other jurisdictions, Rhode Island refers to owners as "caretaker[s]," *id.*, or "[g]uardian[s]." *Id.* at § 4-19-2(28). Advocates believe this terminology better reflects the relationship between humans and the companion animals with whom they share their homes. See generally Susan J. Hankin, *Making Decisions about Our Animals' Health Care: Does It Matter Whether We Are Owners or Guardians?* 2 *Stan. J. Animal L. & Policy* 1 (2009) (discussing whether changing the terminology would provide additional benefits, including a possible increase in veterinary care).

66. However they are described, these laws attempt to accomplish a zero population growth—the spay/neutering of dogs and cats at a rate that will lead to a static population. See Mark Lawrie et al., *The Issue of Unwanted Animals: Adopting a Strategic and Practical Approach*, Urban Animal Management Conference Proceedings (1996) (available at http://www.ccac.net.au/files/The_issue_of_unwanted_animals_UAM06Lawrie.pdf) (explaining the concept of zero population growth).

67. See e.g. Broward Co. Code Ordin. (Fla.) § 4–11 (2009) (allowing the board of county commissioners to include discounts for sterilized animals in the fee schedules).

68. *Id.*

69. ASPCA, *Position Statement on Licensing*, <http://www.asPCA.org/about-us/policy-positions/licensing.html> (accessed Mar. 7, 2011) [hereinafter *Position Statement on Licensing*]. For example, the 2010 licensing differential in Broward County was \$15 per year for each altered pet and \$31 per year for each intact animal. Broward Co. Animal Care, *Resources, Fees and Fines*, <http://www.broward.org/ANIMAL/RESOURCES/Pages/FeesAndFines.aspx> (accessed Mar. 7, 2011). Such a small differential may provide little incentive to owners to opt to spay/neuter. *Id.* In contrast, in St. Lucie County, Florida, the 2010 fee for each non-sterilized dog or cat was \$75, compared with \$10 for the first sterilized dog or cat, \$8 for the second sterilized pet, and \$6 for the third. Humane Socy. St. Lucie Co., *St. Lucie County Differential Animal Licensing*, <http://www.hsslc.org/animallicensing.html> (accessed Mar. 7, 2011).

70. *Position Statement on Licensing*, supra n. 69.

71. See Humane Alliance, *Fix Your Pet*, <http://humanealliance.org/index.php/fix-your-pet> (accessed Mar. 7, 2011) (stating that the millions of cats and dogs who are euthanized annually or who have horrible lives as strays are the result of unwanted, unplanned litters

So-called mandatory spay/neuter laws are usually included in chapters of city or county codes dealing with animals or pets, and are generally identified by their use of language that tracks the following specific example: “No person may own, keep, or harbor a dog or cat six (6) months of age or older that has not been spayed or neutered”⁷² This language appears to be mandatory in that it seemingly requires sterilization for all dogs and cats over a certain age.⁷³ But even mandatory laws typically include exceptions for animals who meet certain criteria, such as old, sick, or service animals,⁷⁴ as well as language providing the owner with the option of purchasing an intact permit⁷⁵ or a breeding permit.⁷⁶ Thus, it appears that the combination of exceptions and the choice of purchasing permits exempting owners from the requirement that their dog or cat be spay/neutered means that, despite the language and common beliefs, these laws are not truly mandatory.⁷⁷

that could have been prevented by spay/neutering).

72. *E.g.* Palm Beach Co. Code Ordin. (Fla.) § 4-28 (2010).

73. Additionally, mandatory laws can include dogs and cats or just one or the other. *Compare e.g.* Mun. Code Las Vegas (Nev.) § 7.14.010 (2010) (dogs and cats) *with e.g.* Mansfield Code (Conn.) § 102-3 (2010) (cats). These laws can target specific breeds. *See e.g.* City & Co. S.F. Health Code (Cal.) § 43.1 (2010) (pit bulls only). These laws can also provide incentives to sterilize impounded pets. *See e.g.* Mendocino Co. Health & Human Servs. Agency, *Fee Schedule*, <http://www.co.mendocino.ca.us/hhsa/chs/animal/fees.htm#dlf> (accessed Mar. 7, 2011) (requiring an increase in fees depending on number of impounds but reducing the amount if the animal is sterilized within thirty days).

74. Common exceptions are for (1) competition dogs, (2) dogs used by a law enforcement agency for law enforcement purposes, (3) qualified service or assistance dogs, and (4) dogs who cannot be spay/neutered without suffering serious bodily harm or death due to age or infirmity. *E.g.* L.A. Co. Code at § 10.20.355(A).

75. *See e.g.* Code Ordin. Laguna Woods (Cal.) § 5.05.010 (2010) (mandating spay/neutering of all dogs and cats six months or older but providing exceptions and allowing unaltered permits for certain categories of animals).

76. Breeding permits are typically at a price higher than, or in addition to, the price for the license-tag fee for an altered animal. *See e.g.* Palm Beach Co. Code Ordin. at § 4-29 (providing for breeding permits); Palm Beach Co. Code Ordin. at § 4-28 (allowing for the purchase of an unaltered license tag despite the purportedly mandatory nature of the spay/neuter law). Palm Beach County's 2010 license ordinance provides for a registration fee for each non-sterilized dog or cat of \$75, compared with \$15 for those who are sterilized. Palm Beach Co. Pub. Safety Dept. Animal Care & Control Div., *Revised Fees*, http://www.pbcgov.com/publicsafety/animalcare/pdf/Fee_Schedule.pdf (Jan. 1, 2008). Although the higher fee for intact animals does not permit breeding, an additional \$150 per year hobby permit may be purchased. Palm Beach Co. Animal Care, *Breeder Permits*, http://www.pbcgov.com/publicsafety/animalcare/breeder_permits.htm (accessed Mar. 7, 2011). Commercial breeders in Palm Beach County (those breeding twenty or more puppies or kittens per year) are licensed under a separate and more-expansive scheme. *Id.*

77. *Summary Report*, *supra* n. 58 (stating that, although “a number of states have

B. A Model Ordinance for Florida Municipalities

The general characteristics of the fee differential and mandatory sterilization ordinances provide a roadmap for drafting a model ordinance for Florida municipalities seeking to reduce dog and cat overpopulation systematically. Such a model (drafted to be incorporated in the code for Broward County, Florida) is included in the Appendix to this Article. This example combines elements of both approaches into a hybrid structure. Specifically, the model ordinance provides that

- all dogs and cats over four months old be spay/neutered (this is the “mandatory” language);
- *unless* their owners buy an unaltered license tag (this is the element of choice that makes the ordinance not in fact “mandatory” because owners can opt to pay the higher fee to keep their animal intact);
- for a substantially higher license fee than the discounted fee for sterilized animals—both fees are listed in the ordinance (this is the fee differential aspect).⁷⁸

In the proposed ordinance, applicable to Broward County, the discounted licensing fee for sterilized dogs and cats is \$15 and the higher undiscounted fee for intact animals is \$95.⁷⁹ Obviously, the magnitude of the fee differential should be decided by the

proposed mandatory spay/neuter laws, there are currently no state laws requiring *all* pet owners to sterilize their animals” (emphasis in original)). This might explain why, according to the ASPCA, there seems to be no “credible evidence” that mandatory programs are more effective than voluntary programs in reducing shelter intake or euthanasia. *Position on Spay/Neuter Laws, supra* n. 4.

78. Specifically, the proposed ordinance provides: “No person may own, keep, or harbor in Broward County a dog or cat four (4) months of age or older who has not been spayed or neutered unless such person holds an unaltered license tag issued for the unaltered dog or cat . . .” *Infra* app., § 4-11.5(1).

79. The proposed ordinance does not provide for a separate breeder permit. Other local governments such as Palm Beach County, however, have determined that their jurisdictions have the resources to issue and enforce such permits. *See* Palm Beach Co. Code Ordin. at § 4-29 (requiring breeders, inter alia, to account for the number of litters they breed each year). The proposed ordinance allows local governments the cost-saving and revenue-generating benefit by simply providing for a general “intact” fee that is applicable to anyone who, for whatever reason, chooses not to spay/neuter, be they private individual or commercial breeder. *Infra* app., § 4-11.5(1).

individual municipality based on its specific circumstances. Government officials in each area will need to determine the fees that best apply to their locale, keeping in mind, of course, that the higher the fee differential, the more incentive to spay/neuter.⁸⁰

The model ordinance also contains a series of “exemptions” that enable some owners to not sterilize their dog or cat without having to pay the higher undiscounted fee. Those exemptions include: (a) medical infirmity,⁸¹ (b) law enforcement dogs,⁸² (c) service animals,⁸³ and (d) nonresidents.⁸⁴ Additionally, the ordinance defines the mechanics for obtaining an unaltered license tag⁸⁵ and establishes criteria for denial and revocation of unaltered tags.⁸⁶ The ordinance also provides for a “late penalty of one hundred dollars (\$100) for each month the unaltered license-tag fee is more than thirty (30) days overdue, with a maximum penalty of five hundred dollars (\$500) per violation.”⁸⁷

A critical component of the suggested ordinance is that it ties the revenue generated from the increased undiscounted license fees to funding spay/neuter programs for the county.⁸⁸ These

80. For a discussion of the effects of higher differentials, consult *supra* note 69 and accompanying text. Moreover, the proposed ordinance provides that the fees must be reviewed every seven years, which serves to ensure that the value of the fee is kept current with the economy. *Infra* app., Review (requiring the county commission to review the fee structure every seven years beginning in 2018).

81. The medical infirmity exemption includes veterinary certification that a dog or cat is unfit or too aged to undergo sterilization surgery safely. *Infra* app., § 4-11.5(2)(a).

82. The law enforcement exemption includes dogs being used, bred, or trained for use by a recognized law enforcement agency, and waives the license-tag fee for such dogs. *Infra* app., § 4-11.5(2)(b).

83. The service animal exemption applies to dogs or cats who are currently service dogs or are involved in a recognized service dog breeding program, and waives the license-tag fee for these dogs. *Infra* app., § 4-11.5(2)(c).

84. The nonresident exemption applies to dogs or cats harbored in Broward County for thirty days or fewer. *Infra* app., § 4-11.5(2)(d).

85. *Infra* app., § 4-11.5(4). The ordinance further contains a grace period of sixty days from the date the ordinance becomes effective to allow additional time for current dog and cat owners to comply with the law. *Infra* app., Grace Period.

86. Namely, failure to comply with the ordinance; two or more complaints that the owner has allowed the animal to run loose or neglected the animal; violation of laws relating to care and control of animals; potentially dangerous or nuisance dogs; prior revocation of an unaltered animal license; or material misrepresentations on application. *Infra* app., § 4-11.5(5).

87. *Infra* app., § 4-11.5(6).

88. *Infra* app., § 4-30(f). By tying revenue to funding spay/neuter programs, the model ordinance avoids being considered an “excise tax.” For a discussion of the “excise tax” challenge to these laws, consult *infra* notes 147–150 and accompanying text. See also St. Lucie Co. Code (Fla.) § 1-4-30(f) (2010) (providing fees collected from the county’s licensing pro-

include low-cost programs to assist individuals financially with paying for sterilizing their pets⁸⁹ and feral-cat programs that address sterilization of feral-cat colonies.⁹⁰ In addition, the model ordinance provides for funding educational programs to encourage spay/neutering by the public.⁹¹ “Using the money raised through differentials to pay for solutions multiplies their impact.”⁹²

IV. CHALLENGING SPAY/NEUTER LEGISLATION

Recognizing the need to decrease humanely, and eventually eradicate, animal homelessness and overpopulation, local governments in Florida and other states have enacted several different types of spay/neuter ordinances.⁹³ Predictably, organizations, breeders, unhappy owners, and some veterinarians object to government attempts to regulate animal reproduction.⁹⁴ Nevertheless, although hundreds of spay/neuter laws have been passed, no more than a few reported appellate court decisions exist. Only one involved a fee differential based on the animal’s reproductive status.⁹⁵ The issue was whether the fee structure was reasonably

gram go into a designated fund for spay/neuter programs).

89. *Infra* app., § 4-30(f) (providing for low-cost programs to ensure that cost is not a reason for individuals failing to spay/neuter).

90. *Infra* app., § 4-30(f).

91. *Infra* app., § 4-30(f). “Efforts to increase both adoptions and spay/neuter through marketing and financial incentives is the most effective way to reduce euthanasia rates going forward.” L.A. Animal Servs., *supra* n. 8, at 3.

92. Marsh, *supra* n. 1. Peter Marsh, an attorney who successfully spearheaded New Hampshire’s movement for a publicly funded spay/neuter program, states, “We’ve finally turned the tide in the century-long struggle against pet overpopulation.” *Id.* But he explains that, to complete the mission of ending, rather than just reducing, overpopulation, two changes must be made to current laws. *Id.* He argues for increasing the difference in fees and earmarking the revenue from differential license surcharges to pay for programs to curb overpopulation. *Id.* Both encouraging shelter adoptions and low-cost spay/neuter services have been found to be effective tools to address overpopulation. Joshua M. Frank & Pamela L. Carlisle-Frank, *Analysis of Programs to Reduce Overpopulation of Companion Animals: Do Adoption and Low-Cost Spay/Neuter Programs Merely Cause Substitution of Sources?* 4–5, <http://www.firepaw.org/analysisprogramswebversion.pdf> (accessed Mar. 7, 2011).

93. See *Summary Report*, *supra* n. 58 (surveying ordinances around the country).

94. See e.g. Sandy Miller, *Proposed Mandatory Spay-Neuter Ordinance Has Serious Flaws*, <http://network.bestfriends.org/golocal/nevada/13563/news.aspx> (Nov. 3, 2009 10:30 a.m. MT) (suggesting that Las Vegas’ mandatory spay/neuter ordinance penalizes the poor and will result in more pets being given up for adoption if their owners cannot afford to have them spay/neutered).

95. Cf. *Tarpy v. County of San Diego*. 1 Cal. Rptr. 3d 607 (Cal. App. 4th Dist. 2003)

related to the financial burden on the municipality.⁹⁶ Based on the dearth of cases, Florida officials should take comfort in the fact that there is very little chance of lengthy court fights should they pass laws charging significantly higher fees for unsterilized animals. This Part supports that conclusion by discussing typical legal claims and explaining why judges have generally rejected them.

As an initial matter, plaintiffs must prove they have standing to sue. Notably, the litigants in these cases are frequently groups.⁹⁷ This is important because organizations must prove

(involving fees for retrieving an impounded dog). The ordinance mandated that if intact dogs were caught running free more than once, their owners had to pay several different fees to get them back. *Id.* at 609–610. But for those who participated in the voluntary spay/neuter program and signed a waiver of liability before surgery, the county reduced the amount required to reclaim those animals. *Id.* at 610. When Joseph Tarp’s dog was picked up for the second time, he said he could not afford to pay but did not want to either abandon Luke or have him neutered. *Id.* Because it was the only way the Department of Animal Control would return Luke, however, Tarp eventually agreed to sterilization. *Id.* Nevertheless, he expressed his objection to signing the waiver by handwriting in the phrase “under duress.” *Id.* at 611. When Luke died from internal bleeding because of a loose suture following the operation, Tarp sued, raising two arguments: (1) the statutory provision providing immunity did not apply, and (2) his consent had not been voluntarily given. *Id.* at 609–611. Although the appellate court agreed the immunity clause was ambiguous on its face, and thus failed to protect the county from civil liability, *id.* at 611–614, it rejected Tarp’s request for damages because it held that his signed release was valid and enforceable. *Id.* at 614–616.

96. *Rio Grande Kennel Club v. City of Albuquerque* involved fee differentials. 190 P.3d 1131 (N.M. App. 2008). The Albuquerque Humane and Ethical Animal Regulations and Treatment ordinance (HEART) provided for a \$6 license fee for each companion animal. Rev. Ordin. Albuquerque (N.M.) § 9-2-3-16(B) (2010). But the ordinance required owners of certain other categories of animals to purchase special permits, and the cost for an intact companion animal was \$150. *Id.* at § 9-2-3-16(C)(1). A litter permit fee was \$150 per litter. *Id.* at § 9-2-3-16(C)(2). The Rio Grande Kennel Club, individual dog and kennel owners, and veterinarians (who asserted the law impermissibly compelled them to tell the city information about their human clients but, because they failed to provide support for this argument, neither the trial judge, nor the court of appeals ruled on it) filed suit on the basis that HEART was unconstitutional on several grounds, including that license and permit fees were not reasonably related to the cost of regulating permit and license holders. *Rio Grande Kennel Club*, 190 P.3d at 1135–1138. Although the district judge apparently had concluded the costs were valid, the appellate court remanded for a determination regarding the fee structure’s reasonableness based on further development of the factual record. *Id.* at 1139. The opinion pointed out that, because a substantial period of time had elapsed since HEART became effective in October 2006, ample data should exist on whether the fees collected were unreasonably higher than the cost of regulation. *Id.*

97. Of course, sometimes organizations and individuals join together to sue. For example, in *Rio Grande Kennel Club*, in addition to the Kennel Club, a number of dog and kennel owners, as well as veterinarians, challenged the ordinance. 190 P.3d at 1135.

more than individuals to satisfy their burden and establish standing.⁹⁸ They must demonstrate:

- at least one person in the association suffered (1) “an ‘injury in fact’ that is ‘concrete and particularized,’” (2) the existence of a causal relationship between the injury and the conduct, and (3) a likelihood that the “injury will be redressed by a favorable decision”;⁹⁹
- “the interests [they seek] to protect are germane to [their] purpose”;¹⁰⁰ and
- “neither the claim asserted nor the relief requested requires” that individual members participate in the lawsuit.¹⁰¹

Although certain alliances, as well as some individual owners of unaltered pets, *have* been able to establish standing,¹⁰² the fol-

98. See *Coalition of Human Advoc. for K9's & Owners v. City & County of S.F.*, 2007 WL 641197 at *3 (N.D. Cal. Feb. 27, 2007) (noting that associations must prove their individual members have standing to sue in their own right in addition to the other associational standing requirements); *Am. Canine Found. v. Sun (Am. Canine Found. III)*, 2007 WL 4208358 at *3 n. 2 (N.D. Cal. Nov. 27, 2007) (“The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action[.]”) (internal quotation omitted, alteration in original).

99. An individual has standing to sue

if (1) he has suffered an “injury in fact” that is “concrete and particularized,” and “actual or imminent, not conjectural or hypothetical,” (2) the injury is traceable to the challenged action of the defendant and not the result of the independent action of a third party not before the Court, and (3) it is likely that the injury will be redressed by a favorable decision.

Am. Canine Found. III, 2007 WL 4208358 at *3 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

100. *Id.*

101. *Id.*

102. *E.g. Rio Grande Kennel Club*, 190 P.3d at 1136. Of course, some have not. *E.g. Am. Canine Found. III*, 2007 WL 4208358 at *4. In *American Canine Foundation III*, the American Canine Foundation (ACF) challenged the legality of a Los Angeles ordinance establishing what was called a mandatory program that required dogs more than four months old be spay/neutered and implanted with an identifying microchip. *Id.* at *1. Although the ordinance permitted owners or custodians of certain categories of unaltered dogs to obtain an intact license, ACF argued that the ordinance was invalid based on all the typical claims generally raised. See *supra* n. 13 (listing the typical claims). The court granted the county’s motion to dismiss with prejudice after (1) finding that ACF failed to meet the first two prongs for associational standing, and (2) rejecting each of its other arguments. *Am. Canine Found. III*, 2007 WL 4208358 at *13.

There were also two earlier-reported opinions. In the first, at least partially because of a similar case challenging the same statute and ordinance in the Northern District of

lowing discussion of the objections they raised explains why almost all their arguments ultimately failed in court.

Procedural Due Process

Challenger claim:

Spay/neuter ordinances are unconstitutional because citizens may face criminal sanctions and loss of property (dogs and cats) without a hearing that determines whether their animal is dangerous.¹⁰³

Judicial response:

The belief that spay/neuter ordinances relate to the aggressiveness of the individual animal highlights the fundamental confusion about these laws. Courts do not provide such hearings because they do not need to; dangerousness is not the issue. Instead, the only question involves sterilizing dogs and cats of a certain age who are not eligible for an unaltered license. Consequently, notice of intent to deny or revoke a license and a hearing

California, the district judge granted the defendants' motion to transfer. *See Am. Canine Found. v. Sun*, 2006 WL 2092614 at **2-4 (E.D. Cal. July 27, 2006) (finding all the standards for a motion to transfer to be met). In the second, the state defendants filed a motion to dismiss claiming they were immune from suit in federal court. *Am. Canine Found. v. Sun*, 2007 WL 549749 at *1 (N.D. Cal. Feb. 16, 2007). The judge agreed that the Eleventh Amendment prohibits federal actions against a state or one of its agencies or departments. *Id.* at *2. The court found that none of the three exceptions ((1) a state may explicitly waive Eleventh Amendment immunity, (2) "Congress may abrogate states' immunity by unequivocally expressing its intent to do so in a statute enacted pursuant to Section 5 of the Fourteenth Amendment," and (3) state agencies operating independently "are not immune from suit in federal court") applied. *Id.* at *2 n. 3. Therefore, the state agencies' motion to dismiss was granted. *Id.* at *2. The court also granted the motion to dismiss the causes of action against Dr. Ben Sun (Public Health Veterinarian for the State of California) because the Eleventh Amendment also protects state officials from suit in federal court for state law violations, and the two exceptions to this protection ((1) when "a plaintiff alleges enforcement of a state law violates federal law, and seeks to enjoin such enforcement, the Eleventh Amendment does not bar a federal action against a state official who has a duty to enforce the challenged state law," and (2) when the challenged state statute does not lead to enforcement proceedings, "federal courts have jurisdiction to hear a suit for prospective injunctive relief against a state officer where the statute is 'being given effect' by such officer") were not relevant. *Id.*

103. *Am. Canine Found. III*, 2007 WL 4208358 at *5.

to appeal an adverse outcome are all that the Constitution requires.¹⁰⁴

To determine what process is due, courts balance the private interest, the risk of erroneous deprivation, and the public interest.¹⁰⁵ Because people have been found to have a very-limited property interest in their pets, animals can be subjected “to peculiar and drastic police regulations . . . without depriving their owners of any federal right.”¹⁰⁶ As part of this determination, it is important to recognize certain facts about these laws, including: (1) the penalties they establish do not result in killing the animal but simply fine the owner and (2) they typically provide for notice and a hearing following revocation or denial of an unaltered license.¹⁰⁷ Moreover, with respect to canines, counties often enact these laws at least in part to increase safety after finding in a public hearing that, not only are unaltered dogs more likely to stray and bite, or attack people or other animals, but also that they “cause traffic accidents, spread disease, damage property[,] and harm the quality of life for residents in a community.”¹⁰⁸ Therefore, based on the county’s important interest in public safety, owners’ less-significant property interests in their animals, and the availability of notice and a hearing following revocation or denial of an unaltered license, these laws have been found to satisfy procedural due process requirements.

Preemption

Challenger claim:

Many ordinances mandate that an owner obtain a license for unaltered dogs or cats. But because the Animal Welfare Act (AWA) permits limited breeding without a license, local legislation is trumped by federal law.¹⁰⁹

104. *Id.*

105. *Id.* at *6.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Rio Grande Kennel Club*, 190 P.3d at 1142.

Judicial response:

The AWA does not prohibit states or their political subdivisions from requiring licensing. In fact, the Act's language explicitly provides that the statute "shall not prohibit any State (or a political subdivision of such State) from promulgating standards in addition to those standards promulgated by the Secretary."¹¹⁰ Thus, consistent with this federal legislation, municipalities may impose licensing requirements.

Equal Protection**Challenger claim:**

Spay/neuter ordinances do not serve a legitimate government purpose and, as a result, they violate the constitutional right to equal protection.¹¹¹

Judicial response:

Absent a suspect class or fundamental right, even when groups receive different treatment, it is only necessary that the law pass rational basis analysis.¹¹² The stated purpose for the legislation is to encourage or mandate pet sterilization "to increase the safety of its citizens, to reduce animal overpopulation, and to aid in animal identification and reunification."¹¹³ Courts have concluded the ordinances survive this lowest level of scrutiny.¹¹⁴

110. 7 U.S.C. § 2143(a)(8) (2006).

111. See *Am. Canine Found. III*, 2007 WL 4208358 at *7 (alleging mandatory spay/neuter programs "serve no legitimate government purpose").

112. *Id.*

113. *Id.*

114. *Id.* The court reached a similar conclusion in a different case three months earlier. See *Coalition of Human Advocs. for K9's and Owners*, 2007 WL 641197 at *13 (holding that mandating sterilization of all pit bulls decreased the population and, consequently, the number of attacks by pit bulls on children, and therefore, "cannot be said to be irrational"). The challenged ordinance, enacted in response to the "mauling and killing of a [twelve] year old child in San Francisco by two pit bulls," and the subsequent directive to minimize future attacks, prohibited anyone from possessing pit bulls who had not been spayed/neutered. *Id.* at *1.

The Coalition of Human Advocates for K9's & Owners (CHAKO) challenged the ban and raised the same constitutional arguments asserted against other spay/neuter legislation. *Id.* at *1. As was true in the other cases, the judge rejected the claims. *Id.* at **11-14. CHAKO's claim that this specific law violated the Americans with Disabilities Act (ADA)

Takings Clause

Challenger claim:

The ordinances constitute an unlawful taking because compelling sterilization deprives owners of their property interests if they either show dogs or breed them as a hobby.¹¹⁵

Judicial response:

The Fifth Amendment does not prevent the government from taking private property; it only prohibits seizure “without just compensation.”¹¹⁶ When the action merely regulates rather than transfers title, however, owners must show that they have been unfairly singled out before they can recover.¹¹⁷ This is not the situation with spay/neuter ordinances because, although the laws can, they typically do not target either a specific breed or locality.¹¹⁸ Moreover, because they generally provide an exception for animals who compete or breed, owners have a choice to either spay/neuter their animals or purchase unaltered licenses.¹¹⁹

presented an unusual and more problematic issue. *Id.* Nevertheless, the organization failed to allege that intact pit bulls provide unique assistance as opposed to neutered pit bulls or any other breeds. *Id.* As a result, the court found that the group could not show the law prevented people with disabilities from accessing San Francisco’s activities and services because they were not permitted to have an intact pit bull. *Id.* at *14. In other words, different breeds and altered pits could provide comparable aid so the ban complied with the ADA as to people who did not already own a fertile pit bull. But compelling people who already had pit bull service animals to sterilize their dogs meant they would be deprived of needed assistance during the surgery and recovery. Even though the loss was temporary (probably no more than ten days), the judge refused to grant the motion to dismiss only to the very limited extent that it applied to people with disabilities who already owned an intact pit bull. *Id.* at **7–8. Of course, this holding is specific to this unusual San Francisco law and should not impact governments contemplating spay/neuter legislation or higher fees for intact animals for at least two reasons: such laws generally contain exceptions for service animals and do not focus on specific breeds. *But see supra* n. 73 (discussing laws that focus on specific breed or animals); *infra* n. 118 and accompanying text (explaining that, although unusual, such laws can focus on specific breeds).

115. *See Am. Canine Found. III*, 2007 WL 4208358 at *8 (articulating the challengers’ claim that surgically altered dogs cannot be breeders and cannot participate in United Kennel Club, American Dog Breeders Association, or American Kennel Club events).

116. *Rio Grande Kennel Club*, 190 P.3d at 1140.

117. *Id.*

118. *Am. Canine Found. III*, 2007 WL 4208358 at *8.

119. *Id.* at *9.

It is also important to note that to be ripe for judicial consideration, the government entity that implements regulations must reach a final decision “regarding the application of the regulations to the property at issue.”¹²⁰ This means that, unless challengers allege initiation of an enforcement action, a takings claim is entirely theoretical and, therefore, premature.¹²¹ Further, even in a compensable taking, there must be an allegation that “just compensation” would be unavailable, thereby causing economic harm. In other words, challengers must assert that they sought and were denied compensation.¹²²

Commerce Clause

Challenger claim:

These ordinances violate the Commerce Clause because they (1) adversely impact residents of other states from relocating and moving freely in interstate commerce if they have a dog subject to the law, and (2) make it difficult for those outside the jurisdiction to travel with show dogs to participate in “canine events.”¹²³

Judicial response:

Only regulations that either (1) “unjustifiably discriminate” against entities from other states or (2) “impose burdens on interstate trade that are clearly excessive in relation to the putative local benefits violate the dormant Commerce Clause.”¹²⁴ Thus, because these ordinances simply require that owners purchase an unaltered-dog license if they do not want to comply, when the issue is breeding, selling, and showing, these laws do not inhibit movement.¹²⁵ As a result, “such a neutral, locally focused regula-

120. *Rio Grande Kennel Club*, 190 P.3d at 1139 (citing *Williamson County Regl. Plan. Commn. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)).

121. *Id.*

122. *Id.*

123. *Coalition of Human Advocs. for K9's and Owners*, 2007 WL 641197 at *13.

124. *Am. Canine Found. III*, 2007 WL 4208358 at *9. “The Supreme Court has held that the Commerce Clause contains a further, negative command, known as the dormant Commerce Clause” that is at issue here. *Id.*

125. *Id.* The court found that the ordinance “regulates evenhandedly” because “it requires all dogs within the County’s jurisdiction be spayed or neutered.” *Id.*

tion is consistent with the Commerce Clause.”¹²⁶ Decreasing the number of unwanted animals who must be euthanized is a legitimate local public interest and, on balance, the burden on commerce is not excessive in relation to the benefit.¹²⁷

Freedom of Contract

Challenger claim:

These ordinances infringe on the constitutional right to contract because they interfere with a business’ ability to buy and sell dogs.¹²⁸

Judicial response:

There are several problems with this argument. For one thing, this right generally is limited by the state’s reasonable exercise of its police power.¹²⁹ Further, as far back as 1897, the Supreme Court stated explicitly that dogs are subject to the police power.¹³⁰ Moreover, although ordinances require that an owner obtain an unaltered-dog license, they typically do not bar the sale of fertile canines.¹³¹ Finally, because one purpose of these laws is to increase public safety, even if they do infringe on business, they fall within the police power.¹³²

126. *Id.*

127. *Id.* at *10. The appellate court in *Rio Grande Kennel Club* remanded based on a similar argument, but it is important to recognize that it did not reach a decision on the merits. 190 P.3d at 1145. Just like determining whether a fee is reasonable, deciding the impact on interstate commerce is a question of fact that requires weighing the evidence. *Id.* at 1144. Thus, because (1) the city housed many kennels, (2) numerous well-bred pets originated locally, (3) animals shipped outside the area would be “adversely and significantly affected, if not eliminated,” as a result of mandatory spay/neuter provisions, and (4) two individuals submitted affidavits claiming the ordinance would impair their ability to sell and ship dogs outside the city, plaintiffs should have been given an opportunity to develop a record and present evidence regarding the ordinance’s effect on interstate commerce. *Id.*

128. *Am. Canine Found. III*, 2007 WL 4208358 at *10.

129. *Id.*

130. *Id.* (quoting *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 703 (1897), which held that “[e]ven if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens”).

131. *Id.*

132. *Id.*

Vagueness

Challenger claim:

Spay/neuter ordinances are poorly drafted so it is impossible for the ordinary person to understand them. As a result, they are “unconstitutionally vague”¹³³ and will lead to “arbitrary arrests and prosecutions.”¹³⁴

Judicial response:

Parties raising facial invalidity on vagueness grounds must generally¹³⁵ demonstrate that the legislation is impermissibly ambiguous in all situations.¹³⁶ This requisite high burden cannot be satisfied when laws clearly and explicitly apply to every dog or cat of a certain age.¹³⁷ Thus, while ordinances may be found to be impermissibly vague if they allow or encourage “arbitrary and discriminatory enforcement,”¹³⁸ they are valid if they include requirements for obtaining an unaltered-dog license, the grounds for denying or revoking such license, and the penalties for violations.¹³⁹

Freedom of Association

Challenger claim:

These ordinances violate the First Amendment right to associate because they force owners to join specific groups or organizations so their animals can compete in dog shows and be eligible for an unaltered license.¹⁴⁰

133. *Id.*

134. *Id.* In *American Canine Foundation III*, challengers also alleged this would all happen “while animal control enforcement goes house to house looking for intact dogs.” Despite this assertion, however, the ordinance did not even mention “house-to-house searches.” *Id.*

135. This rule does not apply in First Amendment cases. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at *11.

139. *Id.* This statement provides a blueprint for drafting such a provision.

140. *Id.*

Judicial response:

Contrary to this argument, membership in a specific breed club generally is not the only way for competition dogs to be eligible for unaltered licenses.¹⁴¹ Owners have two ways to comply with the ordinance: spay/neutering their canine or showing he or she falls within an exemption.¹⁴² Therefore, neither an unaltered-dog license nor obeying the ordinance depends on association membership.¹⁴³

Ex Post Facto Laws***Challenger claim:***

Because dogs and cats purchased before the law was passed are not exempted, owners face punishment based on conduct that was legal at the time.¹⁴⁴

Judicial response:

Similar to the preemption argument,¹⁴⁵ this claim is contrary to what the laws actually say. Ordinances typically provide a grace period to allow additional time for current owners to comply, which is all that is constitutionally required.¹⁴⁶

141. *Id.* For example, in *American Canine Foundation III*, the judge interpreted the language of the ordinance to mean that competition dogs are eligible in other ways, including if the animal is registered with the American Kennel Club or other approved organization and has competed within a year or “earned a conformation, obedience, agility . . . or other title from a purebred dog registry.” *Id.*

142. *Id.* The exemptions include documentation that the dog is unable to be spay/neutered due to age or infirmity or that he or she is a law enforcement or service animal. *Id.*

143. *Id.*

144. *Id.* at *8.

145. *See supra* nn. 109–110 and accompanying text (discussing how the preemption argument is not supported by the language of the AWA).

146. *Am. Canine Found. III*, 2007 WL 4208358 at *8.

Reasonableness of Fee Structure

Challenger claim:

The fee structure is invalid because it is not reasonably related to the cost of regulating permit and license holders. Rather, it was primarily created to raise revenue.¹⁴⁷

Judicial response:

It is true that a municipality's license fee must bear a reasonable relation to the city's added burden and expense attributable to the law.¹⁴⁸ But although fees should not be implemented just to raise money for the government, it does not mean that legislation is necessarily invalid simply because it produces revenue.¹⁴⁹ These laws are intended to defray costs associated with regulation. An ordinance is valid so long as the fee structure is reasonable.¹⁵⁰

Unreasonable Search and Seizure

Challenger claim:

Authorization of warrantless, unannounced inspections violates the constitutional protections provided by the Fourth Amendment.¹⁵¹

147. *Rio Grande Kennel Club*, 190 P.3d at 1138. In this case, challengers raised a second argument for invalidity. *Id.* As is common, the city allocates a portion of all net license and permit fees to provide free microchipping and sterilization of animals owned by low-income families. *Id.* But officials failed to seek the required majority vote approval and plaintiffs asserted it was an invalid excise tax. *Id.*

148. *Id.*

149. *Id.* Although a New Mexico appellate panel remanded on this issue, it was not because the court disagreed with the lower court's conclusion that the fee structure was reasonable. *Id.* Instead, the opinion explained the problem was that reasonableness of fees presents a question of fact that requires weighing the evidence. *Id.* As the trial judge failed to do this, the case was sent back to develop the factual record. *Id.*

150. *Id.*

151. *Id.* at 1135.

Judicial response:

The court agreed.¹⁵² For at least two reasons, however, this decision should be of little concern to Florida state officials who are considering adopting spay/neuter legislation. First, such inspection provisions are both rare and unnecessary. Therefore, when drafting an ordinance, legislators should not provide for warrantless searches. Second, even with this offensive clause, the judges rejected the request to invalidate the law and merely struck this unconstitutional portion.¹⁵³

State Claims

Not surprisingly, disgruntled plaintiffs may also raise state law issues. Obviously, these claims vary depending on each jurisdiction's constitution and statutes, but most tend to follow federal arguments and are also rejected.¹⁵⁴

Florida law does not seem to present any particular obstacles to spay/neuter ordinances in general, or to ordinances charging more to license unaltered pets specifically. In fact, some localities have taken the lead and have already passed such legislation.¹⁵⁵

V. CONCLUSION

Local governments face financial, safety, health, and ethical issues resulting from a serious animal-overpopulation crisis. There are just not enough people to care for all these animals who are reproducing at a much higher rate than humans are. The current response—a euthanasia policy that routinely kills half the approximately eight million dogs and cats sheltered each year—is expensive, cruel, and wasteful. The answer is sterilization. Spay/neuter legislation that establishes a licensing scheme charg-

152. *Id.*

153. *Id.* at 1135–1136. This ordinance also mandated certain requirements for kennels, including the addition of fire suppression and radiant floor-heating systems. *Id.* The court found these constituted a substantive due process violation and struck this provision as well. *Id.*

154. *See e.g. Am. Canine Found. III*, 2007 WL 4208358 at *12 (stating that, “[a]s discussed earlier in connection with Article I, § 10 of the United States Constitution, the Ordinance does not retroactively make it unlawful to own an unsterilized dog”).

155. *E.g.* Palm Beach Code at § 4-28.

ing a substantially higher fee to register fertile animals simply and effectively promotes such sterilization by encouraging people to choose to prevent their pets from breeding. The additional money paid by those who opt to keep their dog or cat intact should be used for defraying the costs to the municipality of running shelters, supporting low-cost spay/neuter and feral-cat programs, and educating people about being responsible owners, including the need to spay/neuter.

Based on the few existing cases, local governments should realize that there is a very-low risk of lengthy or successful legal challenges to such spay/neuter laws. Indeed, cities and counties that pass similar ordinances will benefit in several ways: generating more revenue from the higher fees for intact licenses; saving money because there will be fewer animals to shelter and euthanize; protecting citizens and their pets; and rescuing many dogs and cats from horrible lives and deaths.

APPENDIX

Proposed DRAFT Ordinance for Broward County¹⁵⁶

DOG AND CAT OVERPOPULATION

—*SPAYING, NEUTERING OF DOGS AND CATS*

ORDINANCE NO. 20____ - _____

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA, AMENDING CHAPTER 4 OF THE BROWARD COUNTY CODE PERTAINING TO ANIMAL CARE AND CONTROL; AMENDING SECTION 4-11 OF THE BROWARD COUNTY CODE (LICENSING OF DOGS AND CATS); AMENDING SECTION 4-30 OF THE BROWARD COUNTY CODE (ANIMAL CARE TRUST FUND ACCOUNT); CREATING A NEW SECTION 4-11.5 (DOG AND CAT OVERPOPULATION—*SPAYING, NEUTERING OF DOGS AND CATS*); REPEALING LAWS IN CONFLICT; PROVIDING FOR SAVINGS CLAUSE; PROVIDING FOR SEVERABILITY; PROVIDING FOR INCLUSION IN THE CODE OF LAWS AND ORDINANCES; PROVIDING FOR ENFORCEMENT; PROVIDING FOR PENALTY; PROVIDING FOR CAPTIONS; AND PROVIDING FOR AN EFFECTIVE DATE.

156. Underlined portions in the text (not the headings) indicate existing portions of the 2010 Broward County Code that are included here to put the proposed amendments in context.

WHEREAS, Section 125.01, Florida Statutes, authorizes the Board of County Commissioners of Broward County to adopt ordinances to protect the health, safety, and welfare of the citizens and animals of Broward County; and

WHEREAS, pursuant to its authority, the Board of County Commissioners enacted Chapter 4 of the Broward County Code pertaining to animal care and control; and

WHEREAS, the Board of County Commissioners has determined that the unintended or uncontrolled breeding of dogs and cats within the County leads to thousands of dogs, cats, puppies, and kittens being unwanted, becoming strays, suffering misery and death, being impounded and euthanized at great expense to the community, and/or constituting a public nuisance and/or public health hazard; and

WHEREAS, in 2009, the Animal Care and Regulation Division for Broward County sheltered at least 21,438 animals and euthanized at least 10,388 dogs and cats, most of whom were adoptable but were not adopted; and

WHEREAS, the Board of County Commissioners of Broward County hereby declares it to be the public policy of Broward County to promote the health, safety, and general welfare of the residents of Broward County by reducing the excessive numbers of unwanted dogs, cats, puppies, and kittens who the County euthanizes by restricting the breeding practices of pet owners and breeders through legislation that is both reasonable and enforceable; and

WHEREAS, it is now necessary to amend Chapter 4 of the Broward County Code, pertaining to animal care and control, in order to implement a licensing program designed to reduce dog and cat overpopulation.

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It's Raining Cats and Dogs

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NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA, that:

I. Chapter 4, Section 11, entitled *Licensing of dogs and cats*, is amended to read as follows:

Sec. 4-11. Licensing of dogs and cats.

(a) Any person who owns or keeps in Broward County a dog or cat two (2) months of age or older shall have such dog or cat licensed by and in Broward County

(1) A license for a juvenile animal shall consist of a juvenile tag for the juvenile animal's collar or harness. Every person or entity that obtains a juvenile dog or cat license as required by this section shall have the dog or cat vaccinated against rabies by the age of four (4) months and shall comply with the provisions of Section 4-11.5 regarding spaying and neutering of cats and dogs.

• • •

(c) The license required by this section shall be renewed annually by the person owning the dog or cat provided said dog or cat (i) has a current rabies vaccination or is exempt from such vaccination under the terms of this chapter, and (ii) has complied with the provisions of Section 4-11.5 regarding spaying and neutering of cats and dogs.

(d) The juvenile license required by this section shall expire twelve (12) months from the date the owner obtains a rabies vaccination provided (i) the animal receives the rabies vaccination by the time he or she is four (4) months old, and (ii) has complied with the provisions of Section 4-11.5 regarding spaying and neutering of cats and dogs. Failure to (i) obtain a rabies vaccination and (ii) comply with the provisions of Section 4-11.5 regarding spaying and neutering of cats and dogs by four (4) months of age shall void the juvenile license

(f) The board of county commissioners shall establish by resolution the fees to be charged for licensing. This shall include discount fees for sterilized dogs and cats. The license-tag fee for a sterilized dog or cat shall be the discounted fee of fifteen dollars (\$15). Such discount shall be allowed only upon presentation of a certificate of sterilization or of the dog's or cat's inability to reproduce, signed by a veterinarian licensed in any state, or upon presentation of proof of prior issuance of a license for the dog or cat at a similarly discounted fee. The fee for an unaltered license tag for an unsterilized dog or cat shall be ninety-five dollars (\$95)

II. Chapter 4, Section 30, entitled *Animal care trust fund account*, is amended to read as follows:

• • •

(f) Fifty percent (50%) of all funds from each license tag sold for sterilized dogs and cats, and one hundred percent (100%) of all funds obtained from each license tag sold for unsterilized dogs and cats, shall be deposited into the Animal Care Trust Fund Account to be reserved for the exclusive use of funding (i) spay/neuter programs in the County, including a low-cost spay/neuter program for the animals of persons who qualify for a federal or state public-assistance program approved by the Director, as well as a program for the spay/neuter of feral cats; and (ii) spay/neuter education programs for the public. The Animal Care and Regulation Division shall administer programs consistent with this Ordinance.

III. A new Section 11.5, entitled *Dog and cat overpopulation—spaying, neutering of dogs and cats is hereby created as follows:*

Sec. 4-11.5. Dog and cat overpopulation—*spaying, neutering of dogs and cats.*

(1) Spaying, neutering of dogs or cats over 4 months required unless unaltered license tag issued

No person may own, keep, or harbor in Broward County a dog or cat four (4) months of age or older who has not been spayed or neutered unless such person holds an unaltered license tag issued for the unaltered dog or cat by the Animal Care and Regulation Division for Broward County or any successor agency authorized by law to issue such a license.

Where issued, an unaltered license tag identifies the animal as an unaltered animal and must be displayed at all times on the animal.

The license-tag fee for a sterilized dog or cat, or an unsterilized dog or cat qualifying for an exemption under this section, shall be the discounted fee of fifteen dollars (\$15) unless otherwise provided herein. The fee for an unaltered license tag for an unsterilized dog or cat who is not exempt under this Section shall be ninety-five dollars (\$95).

(2) Obtaining an unaltered license tag due to exemption from spay/neutering

An unaltered license tag accompanied by a discounted license fee may be issued when any of the following circumstances exist:

a. Medical infirmity

A veterinarian licensed in the State of Florida certifies in writing that a specific dog or cat is medically unfit to undergo the required spay/neuter procedure because of a medical condition, including but not limited to age, which would be substantially aggravated by such procedure or would likely cause the dog or cat's death. The writing must state the date by which the dog or cat may be safely spayed or neutered. The Animal Care and Regulation Division for Broward County may extend the time for spay/neutering a dog or cat, or may exempt such dog or cat from the spay/neuter requirement based upon the written medical recommendation of a licensed veterinarian.

The owner of such dog or cat must have the animal spayed or neutered, or must pay the ninety-five dollar (\$95) undiscounted fee for an unaltered license tag for an unsterilized dog or cat within two calendar months from the date the medical condition that prevents the dog or cat from being spayed or neutered ceases to exist.

For a dog or cat who is not spayed or neutered due to a health condition as provided herein, the fifteen dollar (\$15) license-tag fee established by the Broward County Board of Commissioners for sterilized dogs or cats shall apply.

b. Law enforcement dogs

The dog is currently used or being bred or trained for law enforcement purposes by a law enforcement agency recognized by the Director of the Animal Care and Regulation Division for Broward County. For such law enforcement dogs, no license-tag fee shall apply.

c. Service animals

The dog or cat is a qualified service animal as defined in Section 4.2(v) of this Ordinance or is part of a recognized service animal breeding program approved by the Director of the Animal Care and Regulation Division for Broward County and is currently being bred or evaluated to produce service animals. For such service dogs or cats, no license-tag fee shall apply.

d. Nonresidents exempt

Dogs or cats who are temporarily harbored within Broward County for fewer than thirty (30) days within any calendar year are exempt from this section.

e. Animal shelters exempt

Dogs or cats being harbored by a pound, shelter, humane society, or similar organization, whether public or private, whose principal purpose is securing the adoption of dogs or cats or offering sanctuary for dogs or cats, are exempt from this section provided that the dog or cat is spayed or neutered prior to being placed for adoption or transferred by such organization.

(3) Obtaining an unaltered license tag absent exemption

If a person owns a dog or cat four (4) months of age or older who has not been spayed or neutered and who is not specifically exempted from the requirements provided herein, such person

shall obtain an unaltered license tag for the dog or cat upon payment of the undiscounted license fee of ninety-five dollars (\$95).

(4) Applying for unaltered license tag

An unaltered license tag shall be obtained in accordance with the following schedule:

- a. on or before the date the dog or cat is four (4) months of age; or
- b. within thirty (30) calendar days of acquiring the dog or cat; or
- c. within thirty (30) calendar days after the dog or cat enters Broward County.

An unaltered license tag is valid for a period of twelve (12) months.

The address of the owner shall be presumed to be the residence of the dog or cat. All changes of address must be reported to the Animal Care and Regulation Division for Broward County within thirty (30) calendar days following such change.

Any change of ownership of any dog or cat, by sale, transfer or otherwise, shall be reported in writing to the Animal Care and Regulation Division for Broward County by the old and the new owner within thirty (30) calendar days after ownership changes.

(5) Denial or revocation of unaltered license

The Animal Care and Regulation Division for Broward County may deny or revoke an unaltered license for one or more of the following reasons:

- a. The applicant or licensee has failed to comply with a requirement of this section;
- b. The County has received two complaints, each verified by the complainant under penalty of perjury that the applicant or licensee has allowed a dog or cat to run loose or escape, or has otherwise been found to be neglectful of his or her dog, cat, or other animals;
- c. The applicant or licensee has been previously cited for violating a federal or state law, county code, or

other municipal provision relating to the care and control of animals;

- d. The unaltered dog has been adjudicated by a court or an agency of appropriate jurisdiction to be a potentially dangerous or vicious dog, or to be a nuisance within the meaning of the Broward County Code or under state law;
- e. Any unaltered animal license held by the applicant has been revoked; or
- f. The license application is discovered to contain a material misrepresentation of fact.

(6) Late Penalty

Any person who fails to pay an unaltered license-tag fee when it is due shall, in addition to paying any past due license fees, also pay a late penalty of a hundred dollars (\$100) for each month the unaltered license-tag fee is more than thirty (30) days overdue, with a maximum penalty of five hundred dollars (\$500) per violation of this provision.

(7) Counterfeiting, destruction, or fraud

It shall be unlawful to counterfeit a license tag, to destroy a license tag maliciously, or to obtain a license tag fraudulently.

REPEAL OF LAWS IN CONFLICT:

All local laws and ordinances in conflict with any provisions of this Ordinance are hereby repealed to the extent of such conflict.

SAVINGS CLAUSE:

Notwithstanding anything herein to the contrary, all provisions of Broward County Ordinance No. _____, and all licenses, permits, enforcement orders, and ongoing enforcement actions issued thereunder are specifically preserved and remain in full force and effect.

2011]

It's Raining Cats and Dogs

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SEVERABILITY:

If one or more section(s), paragraph(s), sentence(s), clause(s), phrase(s), or word(s) of this Ordinance is for any reason held by a Court of competent jurisdiction to be unconstitutional, inoperative, or void, such holding shall not affect the remainder of this Ordinance.

INCLUSION IN THE CODE OF LAWS AND ORDINANCES:

The provisions of this Ordinance shall become and be made a part of the Broward County Code. The sections of this Ordinance may be renumbered or relettered to accomplish such, and the word "ordinance" may be changed to "section," "article," or other appropriate word.

ENFORCEMENT:

This Ordinance is enforceable by all means provided by law. Additionally, the County may choose to enforce this Ordinance by seeking injunctive relief in a Circuit Court of Broward County.

PENALTY:

Any violation of any portion of this Ordinance shall be punishable as provided by law.

CAPTIONS:

The captions, section headings, and section designations used in this Ordinance are for convenience only and shall have no effect on the interpretation of the provisions of this Ordinance.

REVIEW:

The Broward County Commission shall review the license-tag fees established in this ordinance every seven (7) years, beginning in 2018.

EFFECTIVE DATE:

The provisions of this Ordinance shall become effective upon filing with the Department of State.

GRACE PERIOD:

A grace period of sixty (60) days shall apply from the date this ordinance becomes effective to allow additional time for current dog and cat owners to comply with the law. Owners who purchase a ninety-five dollar (\$95) unaltered license tag within the grace period shall receive a fifteen dollar (\$15) credit toward the unaltered license tag. The County shall notify the public of the enactment of this ordinance within fourteen (14) days of its effective date.

APPROVED and ADOPTED by the Board of County Commissioners of Broward County, Florida, on this the ____ day of _____, 20____.

_____, **CLERK, BROWARD COUNTY, FLORIDA, BY ITS BOARD OF COUNTY COMMISSIONERS**

By:_____ By:_____

Deputy Clerk _____

APPROVED AS TO FORM AND LEGAL SUFFICIENCY

By:_____

County Attorney

EFFECTIVE DATE: Filed with the Department of State on the ____ day of _____, 2011.