



## **DENVER'S PIT BULL ORDINANCE: A REVIEW OF ITS HISTORY AND JUDICIAL RULINGS**

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This article is intended to provide a review of both the history behind Denver's pit bull ordinance, found in Section 8-55 of the Denver Revised Municipal Code, and a review of the legal litigation that has successfully defended the ordinance. A copy of the text of the ordinance can be found at <http://www.municode.com>. At the very end of this article is a list of both sources used for this article, additional resources, and media stories surrounding this topic.

### **I. Historical Background of Pit Bull Attacks in Local Community.**

Between 1984 and May of 1989, pit bulls attacked and seriously injured more than 20 people in Colorado, including three years old Fernando Salazar, who was fatally mauled by a pit bull in southwest Denver in October of 1986.<sup>1</sup>

On May 8, 1989, 58 year-old Reverend Wilber Billingsley was attacked and bitten by a pit bull in the alley behind his home at 1075 Emerson Street, Denver. The pit bull's attack was sustained over a long period of time, and a neighbor, Mr. Norman Cable, attempted to stop the attack by hitting the pit bull with a 2 x 4 piece of wood lumber, which had no effect. Mr. Cable eventually was able to stop the attack only by shooting the pit bull with a shotgun. The victim suffered serious injuries over 70 bites, with both of his legs being broken.<sup>2</sup>

As a result of these attacks, the opinion of the local community, as evidenced by editorials by the two leading newspapers, was in support of increased regulation over pit bulls.<sup>3</sup>

### **II. Legislative History of Pit Bull Ordinance.**

On May 22, 1989, the Denver Board of Health and Hospitals received a briefing on the issue of Pit Bulls and Dangerous Dogs. The Board forwarded their briefing report to the Denver City Council's Committee on Health, Housing, and Human Services, with additional information, recommending a ban on pit bulls.

Between May and July, 1989 the Denver City Council's Committee on Health, Housing, and Human Services held four separate meetings that included a discussion on the issue of pit bulls. Sterling Drumwright, the Director of Environmental Health, stated there are 224 licensed dogs in Denver that were recorded as being a "pit bull". City Councilman Doering stated that the confinement ordinance [D.R.M.C. § 8-52] was not adequate. A draft of an ordinance was presented for discussion. Discussions included a reference to a draft ordinance to ban pit bulls that had been presented to the Council three years previously, after a fatal pit bull attack upon a 3-year old child in Denver, which was not passed. The Committee instructed the City Attorney's Office to file the proposed ordinance, prohibiting the ownership or harboring of pit bulls in the City and County of Denver.

On July 24, 1989, during a regular session of the Denver City Council, Denver City Council Bill No. 434, Series 1989, proposing to enact **D.R.M.C. § 8-55 Pit bulls prohibited** was introduced.

During the evening of July 31 – August 1, 1989, during a regular session of the Denver City Council, a public hearing was held on the proposed pit bull ban. A number of witnesses appeared to give testimony on the bill. On a motion by Councilmember Ortega, the Bill passed by a vote of 9 Ayes, 2 Nays, and 1 Abstaining.

On August 2, 1989, Mayor Fredrico Peña signed the Ordinance.

On October 16, 1989, City Council Bill 672 was introduced during a regular session of the City Council. The bill proposed three specific changes to D.R.M.C. § 8-55(d), two of which dealt with the liability insurance requirement for owners of pit bull that were “grandfathered”, and one change dealt with the implementation date of the ordinance.

On October 23, 1989, City Council Bill 672 was passed, and redesignated Ordinance No. 631, Series of 1989, which was signed by Mayor Fredrico Peña on October 27, 1989.

### **III. HISTORY OF JUDICIAL REVIEW**

#### **A. *Colorado Dog Fanciers v. Denver -1989-1990 Denver District Court***

In the fall of 1989, several parties initiated two separate civil lawsuits in the Denver District Court against the City and County of Denver, seeking a Temporary Restraining Order against the implementation of the pit bull ordinance, and a judicial determination that the ordinance violated the plaintiff’s constitutional rights, rendering the ordinance unenforceable. The two lawsuits were consolidated for trial before District Judge Rothenberg in Denver District Court Case No. 89CV11714 (Consolidated with 89CV12348).(hereinafter referred to as “*Colorado Dog Fanciers*”)

On May 23, 1990, the Denver District Court trial commenced and was concluded after nine days, on June 1, 1990. Both sides called a number of expert witnesses. The trial transcript is 1370 pages in length.

On June 28, 1990, the Denver District Court issued a written decision upholding Denver’s pit bull ordinance as a constitutional exercise of legislative authority, stating, “This Court has no authority to substitute its own judgment regarding the wisdom, desirability or ultimate effectiveness of the Ordinance.” The District Court made several specific factual findings that supported the City’s claim that there was a rational basis for differential treatment of pit bulls, stating: “It cannot be proven that pit bull dogs bite more than other dogs. However, there is credible evidence that pit bull dog attacks are more severe and more likely to result in fatalities.” The District Court did find that the burden of proof in the ordinance’s civil administrative process needed changing, so the Court ordered the burden to be placed on the City, and not the dog owner.

The plaintiffs filed an appeal of the District Court’s decision with the Colorado Supreme Court, and the City cross-appealed on the issue of the burden of proof in the civil administrative hearing.

## **B. Colorado Supreme Court Decision in *Colorado Dog Fanciers***

On November 12, 1991, the Colorado Supreme Court issued its decision, reported at 820 P.2d 644, affirming the constitutionality of the pit bull ordinance against attacks based upon the following issues:

### **1. Substantive due process**

1. Dog owners claimed a lack of scientific proof that an individual dog can meet a scientifically confirmable definition violates their right to due process. The Supreme Court ruled that the city is not required to meet its burden of proof with the mathematical certainty of scientific evidence. Therefore, even though section 8-55 permits a finding of pit bull status to be based on an expert opinion or on nonscientific evidence, such a procedure does not violate the dog owners' due process rights.

2. The dog owners also asserted that the city ordinance treats all pit bulls and substantially similar dogs as inherently dangerous and is, therefore, unconstitutionally overbroad. The Supreme Court rejected the claim, as outside the limited area of fundamental constitutional rights such as, for example, first amendment rights of speech or association, a statute may not be attacked as overbroad. Also, the Court found that upon choosing to regulate a hazard, a legislature is not required to simultaneously regulate every similar hazard.

### **2. Equal protection**

The dog owners argued that the ordinance violates the Equal Protection Clause by creating an irrational distinction between one who owns a dog with the physical characteristics of a pit bull and one who owns a dog lacking those characteristics. The Supreme Court upheld the trial court's ruling, as the trial court found that pit bull attacks, unlike attacks by other dogs, are more severe, and are more likely to result in fatalities. The trial court also found that pit bulls tend to be stronger than other dogs, often give no warning signals before attacking, and are less willing than other dogs to retreat from an attack, even when they are in considerable pain. Since "ample evidence exists" to establish a rational relationship between the city's classification of certain dogs as pit bulls, and since there is a legitimate governmental purpose of protecting the health and safety of the city's residents and dogs, the trial court correctly concluded that the ordinance did not violate the dog owners' right to equal protection of the laws.

### **3. Vagueness**

The dog owners argued that the term "pit bull" is imprecise and, thus, unconstitutionally vague because the average dog owner is not afforded fair warning of the act prohibited by the ordinance. The Supreme Court rejected the argument, as there is no constitutional requirement that legislation be written with scientific precision to be enforceable. Since the standards for determining whether a dog is a pit bull are readily accessible to dog owners, and because most dog owners are capable of determining the breed or phenotype of their dog, the trial court properly determined that the ordinance provides adequate notice to dog owners and is not unconstitutionally vague.

### **4. Taking of private property**

The dog owners claimed that section 8-55 is an abuse of the city's police power and constitutes an unconstitutional taking of private property. The Supreme Court ruled that in Colorado, dogs

are accorded “qualified property” status, and are, thus, subject to the proper exercise of police power for the protection of the public's health, safety, and welfare. The trial court found that the classification of pit bulls as dangerous animals had a rational basis in fact and that the prohibition of their possession bears a rational relationship to the legitimate governmental objective of protecting the public's health, safety, and welfare. The Supreme Court found that these findings were adequately supported by the record of the evidence before the trial court.

### **III. 2004 COLORADO LEGISLATURE & HB04-1279**

On April 21, 2004, Governor Bill Owens signed House Bill 04-1279, which contained a provision prohibiting Colorado municipalities and counties from regulating dangerous dangers through specific breed legislation.

#### **A. Denver’s Voluntarily Suspension of Enforcement Actions**

On April 21, 2004, Nancy Severson, the Manager of the Denver Department of Environmental Health issued a public announcement announcing that Denver would temporarily suspend enforcement of the ordinance.

#### **B. Denver City Council Resolution 31-2004.**

On April 26, 2004, the Denver City Council adopted Resolution Number 31, Series of 2004, directing the City Attorney to institute legal action as necessary and appropriate to preserve Denver’s home rule authority in regard to animal control legislation. The resolution was sponsored by Council members Boigon, Brown, Garcia, Hancock, Lehmann, Linkhart, Montero, Robb, Rodriguez, and Wedgeworth.

#### **C. *City & County of Denver v. State of Colorado, 04CV3756***

On May 13, 2004, the Denver City Attorney’s Office, on behalf of the City & County of Denver, and Mayor John Hickenlooper, filed a civil complaint in Denver District Court, under case number 04CV3756, against the State of Colorado and Governor Bill Owens. The complaint asked for the Denver District Court for the following relief:

1. A judgment declaring that neither C.R.S. § 18-9-204.5, nor any other state statute is or ever was the source of Denver’s authority to regulate dangerous dogs, and accordingly any limitation on municipal regulatory authority contained in § 18-9-204.5 shall not be deemed to be binding upon Denver.
2. A judgment declaring that the Denver Animal Code addresses matters of local and municipal concern upon which Denver has the right to enact and enforce its own ordinances without interference from or preemption by state law.
3. A judgment declaring the purported preemption of Denver's authority to regulate specific breeds of dogs as contained in HB 1279 is unconstitutional and invalid under the Home Rule Amendment, Art. XX of the Colorado Constitution; and
4. A judgment declaring that Section 8-55 of the Denver Animal Code is not preempted by HB 1279.

The Colorado Attorney General’s Office filed a response on behalf of the State of Colorado and Governor Owens, denying the City’s allegations, and raised three affirmative defenses:

1. Regulation of dog ownership is a matter of mixed state and local concern. Denver Municipal Ordinance 8-55 is preempted to the extent it conflicts with House Bill 04-1279.
2. Denver's breed-specific prohibition of pit bull ownership has no rational relationship to the governmental objective of protecting public health, safety, or welfare, and is not a valid exercise of Denver's police power.
3. Denver's restrictions regarding the transport of pit bulls through Denver is a matter of statewide concern. Municipal Ordinance 8-55 is preempted by HB 1279 to the extent it regulates the transportation of pit bulls through Denver on a breed-specific basis.

## **1. District Court Ruling on State Constitutional Home Rule Issue**

On December 9, 2004, Denver District Court Judge Martin Egelhoff issued a ruling on the parties' cross-motions for summary judgment. The Court ruled as follows:

Based on the foregoing conclusions of law and the determination in *Colorado Dog Fanciers v. City and County of Denver*, 820 P.2d 644 (Colo. 1991), that Section 8-55 is otherwise constitutional, the Court hereby orders as follows:

1. C.R.S. § 18-9-204.5, insofar as this statute purports to preempt the intra-city breed-based regulations contained in D.R.M.C. § 8-55, is invalid and unconstitutional under the Home Rule Amendment. (Intra-city regulations include the regulation of ownership, possession, ability to keep, ability to exercise control over, maintenance, ability to harbor, sale and transportation from point to point within the city.)
2. C.R.S. § 18-9-204.5 remains valid and enforceable to the extent that it relates to the inter-city transportation of dogs.
3. D.R.M.C. § 8-55 remains valid and enforceable to the extent that it imposes intra-city restrictions on pit bulls. The State is and shall be permanently enjoined from enforcing against the City the preemptive language of C.R.S. § 18-9-204.5 regarding Denver's intra-city prohibition on pit bulls.
4. D.R.M.C. § 8-55 is invalid insofar as it restricts the inter-city transportation of pit bulls.

Both parties recognize that, in the *Colorado Dog Fanciers* case, the Supreme Court ruled Section 8-55 constitutional, finding a rational relationship between Denver's prohibition on pit bulls and the protection of the health and safety of the city's residents and dogs. 820 P.2d at 652. It is the State's position that Section 8-55 has now become unconstitutional, as new facts and/or science developed since 1991 have undermined the rationality of breed-based regulations. The parties agree that there are material disputed facts with respect to this issue. Therefore, this case will proceed to trial on the State's rational relationship affirmative defense.

## **2. Notice of Appeal Filed By State on Home Rule Decision**

Within the mandatory 30-day period after Judge Egelhoff's ruling, the Colorado Attorney General's Office did timely file a notice of appeal with the Colorado District Court and the Colorado Court Appeals regarding Judge Egelhoff's ruling on the state constitutional home rule issues. This action properly preserved the State's ability to have the Colorado Court of Appeal review the record before the trial court and the judge's ruling. Should this occur, the Court of Appeal's decision would have a binding effect upon all District Court within the State of Colorado, preventing other home rule municipalities from having to separately litigate the issue in their District Court. As the trial court has already prepared and transmitted the record of the trial court to the Colorado Court of Appeals, the parties are awaiting the Clerk of the Court of Appeals to certify the record, which should then result in a briefing schedule being issued by the

Court. Of course, the Colorado Attorney General's Office could, at any time, decide not to proceed forward with the appeal, and accept the ruling of Judge Egelhoff.

### **3. 4/07/05 District Court Trial on State's Affirmative Defense**

On Thursday, April 7, 2005, the trial on the State's affirmative defense commenced. Judge Egelhoff determined the parameters of the trial to be that the State Attorney General's Office carried the burden of proof to prove, beyond a reasonable doubt, that since the time of Judge Rothenberg's original ruling 1990, that there have been sufficient changes in the facts or the scientific field of ethology (the study of animal behavior) so as to prove that there is currently no rational basis to justify the pit bull ban, requiring the Court to reverse of the Colorado Dog Fanciers decision.

### **4. Judge Egelhoff's Ruling**

At the conclusion of the evidence on Thursday, April 7, 2005, Denver District Court Judge Martin Egelhoff issued an oral ruling from the bench on the State's Affirmative Defense. The Judge found that the State failed to provide any new evidence to undermine Judge Rothenberg's original 1990 findings regarding the differences between pit bulls and other dogs. The Judge also found that the City had provided new evidence to provide additional support for Judge Rothenberg's findings. As Judge Rothenberg's decision was not based upon the claim that pit bulls have a higher propensity to bite or attack humans, the new Sacks/Lockwood study on fatal dog bite attacks was not relevant to the narrow issues presented in paragraphs 27 and 28 of that decision.

The Court agreed with the City's argument that State failed to meet its burden of proof to establish beyond a reasonable doubt that no rational basis for Denver's pit bull ban existed. The Court found that pursuant to the rule of stare decisis, the Colorado Supreme Court's ruling in the Colorado Dog Fancier's case that Denver's ordinance is constitutional is still valid, and therefore the ordinance is still constitutional.

### **E. Resumption of Enforcement Actions**

On Friday, April 8, 2005, the City & County announced that it would resume enforcement of its pit bull ordinance starting Monday, May 9, 2005. This 30 day time period will give pit bull owners in Denver sufficient time to remove their dogs from the City. Due to Judge Egelhoff's ruling in December of 2004, it is permissible to transport a pit bull directly through Denver, from a starting point outside of Denver to another destination outside of Denver, provided the pit bull dog remains in the vehicle.

## **IV. CONCLUSION**

Denver Revised Municipal Code Section 8-55 is a constitutional exercise of the Denver City Council's authority to protect the health and safety of its citizens and guests. The Denver District Court has now verified the common sense conclusion that home rule municipalities have the legal authority to make independent decisions as to how to regulate dangerous dogs within its community.

The Denver District Court has now twice confirmed that there is objective evidence that supports a rational conclusion that pit bulls are more dangerous than other breeds of dogs because they are more likely to inflict serious injuries and cause death, and therefore there is a logical reason for the city to prohibit them within its urban jurisdiction. The Colorado Supreme Court has affirmed this ruling in 1991, and now the latest judicial review by the Denver District Court verifies there is no new evidence that undermines that ruling, but in fact, the new evidence supports and strengthens Judge Rothenberg's decision.

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### **END NOTES**

<sup>1</sup> *Pit bull mauls Denver man, 58: Neighbor kills dog after 70 bites, 100 stitches, 2 broken legs*, by Jim Kirskey, Denver Post, May 9, 1989.

<sup>2</sup> *Pit bull mauls Denver man, 58: Neighbor kills dog after 70 bites, 100 stitches, 2 broken legs*, by Jim Kirskey, Denver Post, May 9, 1989; *Pit Bull Bit 3 Others Since '86: Denver Minister mauled by terrier was fourth victim*, by Karen Bowers, Rocky Mountain News, May 10, 1989.

<sup>3</sup> *Let's outlaw killer dogs*, editorial, Denver Post, June 12, 1998; and *Tougher rules and stronger enforcement on pit bulls*, editorial, Rocky Mountain News, May 12, 1989.