DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: City & County Building 1437 Bannock Street Denver, Colorado 80202 **Plaintiff(s):** CITY AND COUNTY OF DENVER, a home rule municipal corporation of the State of Colorado; and JOHN W. HICKENLOOPER, as Mayor of the City and County of Denver v. **Defendant(s):** STATE OF COLORADO; and BILL OWENS, in his official capacity as Governor of the State of Colorado	▲ COURT USE ONLY ▲ Case Number: 04CV3756 Ctrm.: 7

ORDER
(Re: Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Partial Summary Judgment)

FACTUAL AND PROCEDURAL BACKGROUND

The City and County of Denver is a "home rule city" created and organized under Article XX, Section 6 of the Colorado Constitution (the "Home Rule Amendment"). Under the Home Rule Amendment, a home rule municipality has the supreme power to legislate in matters of local concern. Historically, Denver has had a range of animal control ordinances. This case concerns Denver's prohibition on pit bull dogs, contained in D.R.M.C. § 8-55 ("Section 8-55").[1] With a few enumerated and restricted exceptions, Section 8-55 makes it "unlawful for any person to own, possess, keep, exercise control over, maintain, harbor, transport, or sell within the city any pit bull." D.R.M.C. § 8-55(a).

In the 2004 legislative session, the Colorado General Assembly passed House Bill 04-1279 ("HB04-1279"), dealing with liability regarding the behavior of dogs. This bill was signed into law by Governor Owens on April 21, 2004, and became effective immediately. This case involves the portion of HB04-1279 that prohibits municipalities from adopting any breed-specific dangerous dog law, dog control and licensing resolution, or dog destruction policy.

[1] Chapter 8 of the Denver Revised Municipal Code is known as the "Denver Animal Code."

C.R.S. § 18-9-204.5(5). HB04-1279 contains a legislative declaration that "[t]he regulation and control of dangerous dogs is a matter of statewide concern." C.R.S. § 18-9-204.5(1)(b).

Plaintiff City and County of Denver (the "City") instituted this action for declaratory judgment. The City contends that regulation of pit bulls is solely a matter of local concern. Thus, the City seeks a determination that Section 8-55 preempts state law, and that the portion of C.R.S. § 18-9-204.5 preventing municipal regulation of breeds is unconstitutional and invalid under the Home Rule Amendment. Defendant State of Colorado (the "State") agrees that declaratory relief is appropriate under the circumstances. However, the State contends that the general regulation of breeds is a matter of mixed state and local concern, and the transportation of specific dog breeds through cities is a matter of statewide concern. Thus, the State asserts that HB04-1279 is a valid exercise of the state's authority and C.R.S. § 18-9-204.5 preempts Section 8-55. By way of affirmative defense, the State also argues that, in the event the regulation of dog breeds is deemed a local issue, Section 8-55 is nevertheless unconstitutional on the basis that breed-specific regulations are not rationally related to the health, safety, and welfare of Denver's citizens.

The City filed a Motion for Summary Judgment on all its claims, and the State filed a Cross-Motion for Partial Summary Judgment addressing the issue of transporting pit bulls. Under C.R.C.P. 56(c), summary judgment is proper only if the pleadings and supporting documents establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). At the pretrial conference on December 6, 2004, the parties agreed that there are no disputed issues of fact as to whether regulation of dogs on the basis of breed is a matter of local, statewide, or mixed concern. Therefore, the Court will make this legal determination on cross motions for summary judgment.

The Court has reviewed the motions, the responses filed thereto and the replies, as well as the Court's file and applicable authorities. Upon consideration thereof, the Court enters the following findings and order.

HOME RULE PRINCIPLES

Article XX, Section 6 of the Colorado Constitution grants home rule status to municipalities with a population over 2,000 that adopt home rule charters:

> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.
>
> The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superceded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

Article XX, Section 6, Colo. Const.

The Home Rule Amendment, added to the Constitution in 1912, abrogated Dillon's Rule, which stated that municipal corporations owe their origin to, and derive their powers and rights from, the legislature. The effect of the amendment was to grant home rule municipalities "every power theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs." *City and County of Denver v. State*, 788 P.2d 764, 767 (Colo. 1990) (quoting *Four-County Metro. Capital Improvement Dist. v. Bd. of County Comm'rs.*, 369 P.2d 67, 72 (Colo. 1962)). Although the legislature continues to exercise supreme authority over matters of statewide concern, a home rule city is not inferior to the General Assembly with respect to local matters.

There are three broad categories of regulatory matters used to determine the relative authority between the General Assembly and home rule municipalities. In matters of local concern, a home rule municipality has plenary authority. *City and County of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001). While the state may legislate in areas of local concern, home rule ordinances or regulations control in the event of a conflict with state legislation. *City and County of Denver v. State*, 788 P.2d at 767. By contrast, the General Assembly has exclusive authority to legislate in areas of statewide concern. In these areas, home rule cities are without power to act unless authorized by the constitution or state law. *Id.*; *Trinen v. City and County of Denver*, 53 P.3d 754, 758 (Colo. App. 2002); *Qwest Corp.*, 18 P.3d at 754. If the matter is one of mixed local and statewide concern, home rule provisions and state statutes may coexist when the measures can be harmonized. In the event of a conflict, however, the state statute supercedes the home rule provision. *City and County of Denver v. State*, 788 P.2d at 767; *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 37 (Colo. 2000); *Qwest Corp.*, 18 P.3d at 754.

Therefore, resolving whether House Bill 04-1279's prohibition on breed-specific dog regulations preempts the prohibition on pit bulls contained in Section 8-55 of the Denver Animal Code, or vice versa, involves a categorization of the issue as one of local, statewide, or mixed concern. Although this determination is a matter of law, *City of Commerce City*, 40 P.3d 1273, 1279-80 (Colo. 2002), the Colorado Supreme Court has not adopted a particular test, *Walgreen Co. v. Charnes*, 819 P.2d 1039, 1045 (Colo. 1991)(*en banc*). Rather, courts decide on an *ad hoc* basis, considering the specific facts and circumstances surrounding each challenged regulation. *Nat'l Adver. v. Dep't of Highways*, 751 P.2d 632, 635 (Colo. 1988) (*en banc*). Further complicating the analysis, these categories are not perfectly distinct or mutually exclusive. *City and County of Denver v. State*, 788 P.2d at 767. Even when a home rule city has local interests at stake, a particular issue may be characterized as one of mixed concern when sufficient state interests are also implicated. *Town of Telluride*, 3 P.3d at 37; *but see* J. Coats dissent in *City of Northglenn v. Ibarra*, 62 P.3d 151, 165 (Colo. 2003) ("the General Assembly cannot make a matter of local concern any less so by imposing its own regulatory scheme, even where it has legitimate statewide concerns"). Ultimately, it is a matter of balancing the respective local and state interests. *Town of Telluride*, 3 P.3d at 37.

To aid courts in determining whether a state interest is sufficient to justify preemption of an inconsistent home rule ordinance, the Supreme Court has articulated general factors to be considered: 1) the need for statewide uniformity of regulation, 2) the extraterritorial impact of

the municipal regulation, 2) historical considerations, 4) the need for cooperation among governmental units, and 5) whether the Colorado Constitution specifically commits a particular matter to state or local regulation. *City and County of Denver v. State*, 788 P.2d at 767. In addition, as the legislature has the authority to declare the public policy of the state, the Supreme Court has accorded "great weight" to legislative declarations of statewide interest or concern. *Nat'l Adver. v. Dep't of Highways*, 751 P.2d at 635. However, such declarations are not binding. *City and County of Denver v. State*, 788 P.2d at 768 n.6; *Walgreen Co. v. Charnes*, 819 P.2d at 1045.

ANALYSIS

In applying these principles to the present case, the parties have agreed that it is appropriate to divide the matter of breed-specific dog regulations into two separate issues. First, the Court will consider whether the intra-city regulation of breeds is a matter of local or mixed concern.[2] Then, the Court will consider whether the inter-city transportation of specific breeds is a matter of local, statewide, or mixed concern.[3] With respect to both, the Court notes that neither party has cited a constitutional provision committing these issues to a particular level of government.

Intra-City Breed Restrictions

The Court concludes that the issue of which dog breeds are permitted, prohibited, or restricted within a city is a matter of purely local concern. The State has not articulated, and the Court cannot conceive, a need for statewide uniformity. In fact, there seems to be a need for local control in this area. Each community has its own attitudes and preferences with respect to dogs. In each community, depending on culture and demographics, dogs occupy a different role. It would not make sense for the owners of mountain dogs in Telluride, farm dogs in Lamar, and urban dogs in Denver to be subject to the same kinds of laws and restrictions. This point is reinforced by the state statute at issue in this case. The relevant portion of C.R.S. § 18-9-204.5 does not implement a scheme to replace municipal rules regarding dogs. Rather, it affirms municipal rulemaking authority, with the sole exception that cities cannot regulate dogs in a manner specific to breed. However, local control of breeds means flexibility in crafting locally-acceptable solutions to the problems created by dogs. As the largest and most populous metropolitan area in Colorado, Denver faces unique challenges in ensuring that dogs enhance the lives of citizens rather than threaten their safety.

The other relevant factors also support the conclusion that this is a matter of local concern. In the Court's estimation, the intra-city regulation of dog breeds has minimal extraterritorial impact. Extraterritorial impact is defined as the impact of the municipal regulation on persons living outside municipal limits. *City and County of Denver v. State*, 788 P.2d at 768. Local dog regulations are implemented for the safety and peace of mind of

---

[2] The Court employs the term "intra-city regulation of breeds" as a shorthand reference to Denver's general prohibition on owning, possessing, keeping, exercising control over, maintaining, harboring, transporting, or selling pit bulls within the city. Section 8-55(a).

[3] " Inter-city transportation of specific breeds" refers to the Denver's restrictions on the transportation of pit bulls through the city. Section 8-55(c)(5). Although an exception to the general ban, such transportation requires compliance with specific requirements, including a permit issued by the city upon particular proof.

residents. Dogs generally remain at their owner's residence, and the state does not have an interest in allowing dogs to accompany their owners everywhere they go. Outside necessary and temporary transportation through the city (discussed below), non-residents coming to Denver can simply refrain from bringing prohibited breeds into the city. Section 8-55 contains an exception for dog show participants. D.R.M.C. § 8-55(c)(4). In addition, if an escaped pit bull wanders inside city limits and is caught by authorities, Section 8-55(f) provides that the pit bull may be released to the owner, provided that the dog will be permanently removed from Denver and the owner pays the cost of impoundment.

Historical considerations also favor local control. The City presented proof that it has consistently restricted animals since 1886. These regulations have included both the types of animals permitted within city limits, as well as how these animals must be handled. Currently, Denver has a comprehensive regulatory scheme of dog control. This scheme includes provisions for licensing, vaccinations, spay/neutering, leashes, barking nuisances, excrement, damage to private property, liability for dog bites or attacks, confinement of dangerous dogs, and the impoundment and release, adoption, or destruction of dogs. In contrast, state regulation of dogs is historically much more limited. The State concedes that it has only imposed statewide criminal penalties for dangerous dogs since 1991.

Finally, there is little need for cooperation between city and state governments for the enforcement of municipal intra-city breed restrictions. In this case, the Denver Animal Code is the responsibility of Denver's Division of Animal Control, a large municipal agency. The Division of Animal Control operates every day of the year on a $2.3 million budget derived solely from the General Fund of the City and County of Denver. No state funds, personnel, vehicles, or equipment have been received or used in the enforcement of Denver's pit bull ban.

Therefore, considering all the factors and balancing the relative interests, the Court concludes that the intra-city regulation of dogs by breed is an issue of local concern. The Court reaches this conclusion despite the declaration contained in HB04-1279 that the regulation and control of dangerous dogs is a matter of statewide concern. First, this declaration is more general than the issue addressed by this case. By this Order, the Court does not determine that all regulations for the control of dangerous dogs are of purely local concern. Rather, the Court simply determines that the issue of which dog breeds are permitted, prohibited, or restricted within a city is a local issue. Second, legislative declarations should be afforded deference in recognition of the legislature's authority to declare public policy. However, they are not binding and, without more, cannot establish a significant state interest. Relying on declarations alone to demonstrate the state's interest would render the Home Rule Amendment meaningless.

Inter-City Transportation of Specific Dog Breeds

The Court concludes that regulating the inter-city transportation of dogs is a matter of mixed local and statewide concern. Certainly, for the protection of the health, safety, and welfare of citizens, home rule cities have a legitimate interest in how and under what circumstances dogs come within their borders (see discussion above). However, the state's interest in the transportation of dogs through cities is not insignificant.

Colorado has a complex system of roads and highways. *City of Commerce City*, 40 P.3d at 1281. The City admits that Denver is at the crossroads of many of Colorado's major transportation corridors. The statewide interest in the flow of inter-city travel, *see Pub. Util. Comm'n v. Manley*, 60 P.2d 913, 919 (Colo. 1936), as well as the promotion of safety along the state highway system, *see Nat'l Adver. v. Dep't of Highways*, 751 P.2d at 636, is well-established. When necessarily and temporarily transporting their dogs between cities and through the state, travelers in Colorado may be subject to a patchwork of inconsistent requirements. Such conflicts increase the potential for confusion and delay. *See City of Commerce City*, 40 P.3d at 1281. The City speculates, without support, that the number of people who transport pit bulls through Denver is quite small. However, of those who do need to transport a pit bull through Denver, the percentage of non-residents is likely to be high. *See e.g. id.* at 1282 (ninety percent of automated traffic tickets issued in Commerce City were issued to non-residents). Given the "practicalities of our commuter culture and our integrated highway system," *id.* at 1284, the Court cannot conclude that the state's interest is so insignificant as to render the issue purely local. Accordingly, the Court concludes that the inter-city transportation of dogs is an issue of mixed concern.

There is no dispute that the City's breed-specific pit bull ordinance expressly conflicts with the State's prohibition on the municipal regulation of dogs on the basis of breed. Therefore, with respect to inter-city transportation, the state statute supercedes Denver's ordinance. The City has requested, in this event, that the Court sever the offending language and enforce the remainder of Section 8-55. At the pretrial conference on December 6, 2004, the State indicated that severance is an appropriate remedy. The Denver Revised Municipal Code contains a severability provision. D.R.M.C. § 1-12.

CONCLUSION, DECLARATION AND INJUNCTION

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,[4] is invalid and unconstitutional under the Home Rule Amendment.

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] 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.

4. D.R.M.C. § 8-55 is invalid insofar as it restricts the inter-city transportation of pit bulls. The following offending language will be severed from D.R.M.C. § 8-55:

(c) Exceptions. The prohibition in subsection (a) of this section shall not apply in the following enumerated circumstances . . . .
(5) Except as provided in subdivision (4), above, the owner of a pit bull may temporarily transport through the city a pit bull only if such ~~owner has obtained a valid transport permit from the manager. Upon request, the manager shall issue such permits only upon a showing by the owner that the~~ pit bull is being transported either from a point outside the city to a destination outside the city, or from a point outside the city to an airport, train station or bus station within the city~~. In the latter case, such owner must provide evidence of an intent~~ to send or take the pit bull outside of the city ~~by producing an airline, train or bus ticket, or other equivalent document, showing a departure time within six (6) hours of the time of transport. At all times when the pit bull is being transported within the city, it must be kept confined in a "secure temporary enclosure" as defined in subdivision (b)(3) of this section. In all cases before issuing a transport permit, the manager must find that the transport would not constitute an unnecessary or undue danger to the public health, welfare or safety, and shall not issue the permit where the manager cannot so find. All transport permits issued shall only be valid for the time, date, and pit bull specified in the permit, and shall not be construed to permit any activity otherwise prohibited~~.

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.

SO ORDERED this 9 day of December, 2004.

BY THE COURT

Martin F. Egelhoff
District Court Judge

cc: