

# LOCAL GOVERNMENT LAW BULLETIN

No. 112 June 2007

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## ANIMAL CRUELTY, PART II: AN OVERVIEW OF NORTH CAROLINA'S CIVIL REMEDIES

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North Carolina has a variety of legal tools available for addressing situations in which animals are being abused, neglected or otherwise cruelly treated. Part I of this two-part series reviewed the criminal animal cruelty laws, including laws governing animal fighting.<sup>1</sup> Part II addresses the civil remedies available for protecting animals. It will first summarize the process through which any person, regardless of the person's relationship to an animal, may ask a court to order another person to stop treating the animal cruelly. Next, it will address the laws governing animal cruelty investigators. Finally, it will briefly review three mechanisms available for recovering some of the costs a plaintiff might incur related to the sheltering of and care for animals that are taken from the owner while a civil cruelty case is pending.

### Civil Cruelty Actions Under State Law

North Carolina state law establishes a civil process that allows a court to impose the restrictions it deems necessary to protect an animal that is being cruelly treated.<sup>2</sup> It is found in Chapter 19A, Article 1 of the North Carolina General Statutes and is entitled "Civil Remedy for the Protection of Animals." In general, this civil remedy is designed to stop someone from treating an animal cruelly. It is not designed to compensate a person financially for harm that he or she may have suffered when an animal was harmed. For example, if Andy is upset with Bob because Bob injured or killed Andy's prize-winning pet, Andy may want to pursue criminal cruelty charges

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<sup>1</sup> Aimee N. Wall, *Animal Cruelty, Part I: An Overview of North Carolina's Criminal Remedies*, Local Government Law Bulletin No. 110 (May 2007), available at [www.ncanimalcontrol.unc.edu](http://www.ncanimalcontrol.unc.edu).

<sup>2</sup> North Carolina General Statutes Chapter 19A, Article 1 [hereinafter G.S.].

against Bob to see that he is punished or perhaps file a civil tort claim against Bob in order to recover money damages. The civil remedy discussed in this bulletin provides primarily for injunctions – which are court orders “prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.”<sup>3</sup>

The civil remedy is available to protect any “animal.” The term “animal” is defined to include “every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings.”<sup>4</sup> The term “cruelty” includes “every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted.”<sup>5</sup> These two definitions mirror definitions used in the criminal cruelty laws.<sup>6</sup>

## Standing

In general, only certain classes of individuals are allowed to bring a civil lawsuit. These classes of people are said to have “standing” to bring the legal action. According to some animal rights advocates, the issue of standing is often “inevitably” argued as the first round in any cruelty litigation.<sup>7</sup> In North

<sup>3</sup> *Black’s Law Dictionary*, 800 (8<sup>th</sup> ed. 2004).

<sup>4</sup> G.S. 19A(1). One scholar recommends expanding the definition to include the class Pisces (fish). See William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39, 45 (2005).

<sup>5</sup> G.S. 19A(2).

<sup>6</sup> G.S. 14-360(c) (definitions of “cruelly” and “animal”); see also Wall, *supra* note 1, at 2, note 5 (discussion of the evolution of the definition of the term “animal”).

<sup>7</sup> See Delcianna J. Winders, *Confronting Barriers to the Courtroom for Animal Advocates*, 13 ANIMAL L. 1, 6 (2006) (quoting one animal rights litigator as saying “We didn’t set out to make standing law. We didn’t want to become standing experts. Dealing with the issue of standing...has become a practical necessity, because we are challenged in every case we file.” (citing symposium commentary offered by Joyce Tischler, co-founder of the Animal Legal Defense Fund)). There are several examples of reported decisions addressing the issue of standing in cruelty cases. See, e.g., *Am. Society Prevention Cruelty Animals v. Ringling Bros. & Barnum & Bailey*, 317 F.3d 334, 338 (D.C. Cir. 2003) (holding that an circus animal handler had standing); *Animal Legal Defense Fund v.*

Carolina, though, standing is not an issue in civil animal cruelty cases. This is because the state’s law allows *any* person to bring a civil action for animal cruelty. The law provides that a case may be initiated by “any person even though the person does not have a possessory or ownership right in an animal.”<sup>8</sup> Under the law, a “person” includes individuals and political and corporate bodies.<sup>9</sup> This means that an animal protection society, a local government, a person’s neighbor, or a perfect stranger can bring private lawsuit alleging animal cruelty.<sup>10</sup>

## Process

The law provides two basic tools for addressing cruelty – a preliminary injunction and a permanent injunction. Plaintiffs will typically request a preliminary injunction and then return to court later to request a permanent injunction. There will be two primary players in these actions: the plaintiff and the defendant. The plaintiff is the person who files the action alleging that another person is treating an animal cruelly. The defendant in a civil cruelty case may be any person who owns or has possession of an animal.<sup>11</sup>

Glickman, 154 F.3d 426, 445 (D.C. Cir. 1998) (recognizing that a visitor to a zoo had standing).

<sup>8</sup> G.S. 19A-2.

<sup>9</sup> G.S. 19A-1(3). The cruelty law refers to the definition of “person” in G.S. 12-3, which includes “bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary.” See Reppy, *supra* note 4, at 41-44 (discussing the broad standing provisions and explaining that the statute was amended in 2003 in order to clarify that local governments had standing).

<sup>10</sup> Before the civil cruelty law was adopted, the court was unwilling to issue an injunction as a means of preventing treatment of animals that may have constituted cruelty under the existing criminal law. The North Carolina Supreme Court rejected a plaintiff’s request to enjoin a rabbit hunt that was allegedly conducted in a cruel manner. *Yandell v. American Legion Post No. 113*, 256 N.C. 691, 693, 124 S.E.2d 885, 886-87 (1962). The court explained that “ordinarily the violation of a criminal statute is not sufficient to invoke equitable jurisdiction of the court.” *Id.*

<sup>11</sup> G.S. 19A-2 (“a real party in interest as defendant shall include any person who owns or has possession of an animal.”). Recall that the term “person” is defined broadly to include both individuals and political and corporate bodies. G.S. 12-3. A defendant could be, for example, a

### ***Preliminary Injunction***

In order to obtain a preliminary injunction, the plaintiff must first file a verified complaint in the district court in the county where the cruelty allegedly occurred. The law requires that the complaint be “verified.” Verification means that the person filing the complaint must also file an affidavit. An affidavit is a sworn statement; it should be a written document signed by the person making the statement (the affiant) and notarized. It should explain clearly the facts supporting the request for an injunction.<sup>12</sup>

Under the state’s rules of civil procedure, the defendant must be served with notice that the complaint has been filed.<sup>13</sup> A court may decide to issue a preliminary injunction if, based only upon the complaint, it appears that the plaintiff is entitled to relief.<sup>14</sup>

Before a court will issue a preliminary injunction, plaintiffs in most cases will be required to post a bond sufficient to cover any costs that a defendant might incur. The bond could be used to reimburse the defendant if the court later determines that the injunction was improper.<sup>15</sup> The court will set the amount of the bond and may conclude that no bond is required in some situations.<sup>16</sup> If the case is

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private individual, an animal shelter, a circus company, or a pet store.

<sup>12</sup> G.S. 1A-1, Rule 11(b)

<sup>13</sup> G.S. 1A-1, Rule 65(a). At one time, the cruelty law allowed for a temporary restraining order, which authorized the court to issue a temporary order in some cases before the defendant received notice of the suit. The language was removed in 1979. *See* Reppy, *supra* note 4, at 51-52 (arguing that the language authorizing a temporary restraining order in these cases should be restored).

<sup>14</sup> G.S. 1-485. The statute cited outlines three circumstances in which preliminary injunctions may be granted, but only the one mentioned above appears relevant to cruelty cases. The other two grounds relate to (1) interfering with rights of the parties to the litigation in such a way that the judgment would be ineffectual, and (2) the defendant is about to remove or dispose of property with an intent to defraud the plaintiff.

<sup>15</sup> G.S. 1A-1, Rule 65(c) (“No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”).

<sup>16</sup> *See* Keith v. Day, 60 N.C. App. 559, 561-62, 299 S.E.2d 296, 297-98 (1983).

initiated by an animal cruelty investigator, for example, no bond will be required.<sup>17</sup> Also, no bond will be required if the State or a local government requests the injunction, but the court could later assess damages against a government plaintiff if, for example, it decides not to issue a permanent injunction.<sup>18</sup>

The plaintiff may request permission to take custody of and provide suitable care for the animal. The court has the discretion to issue such an order if it concludes, based on the plaintiff’s complaint, that the “condition giving rise to the cruel treatment ... requires the animal to be removed”<sup>19</sup> from defendant’s custody. If temporary custody is awarded to the plaintiff, the plaintiff is allowed to place the animal with a foster care provider.<sup>20</sup>

While the animal is in the plaintiff’s temporary custody, the plaintiff may decide that the animal needs veterinary care. The law provides the plaintiff with clear authority to obtain such care (except euthanasia).<sup>21</sup> Before seeking veterinary care, however, the plaintiff is required to consult with or attempt to consult with the defendant about the care. Note that the law does not require the plaintiff to obtain the defendant’s *permission* to seek veterinary care; it only requires a consultation or an attempt to consult. Even if the defendant disagrees with the plaintiff’s decision, the plaintiff may still proceed with obtaining care for the animal.

If the plaintiff concludes that the animal should be euthanized, the plaintiff must obtain either the written consent of the defendant or a court order. The court may issue such an order if it finds that the animal is suffering due to either terminal illness or terminal injury.

### ***Permanent Injunction***

Typically, after a preliminary injunction is issued, the plaintiff will pursue a permanent injunction.<sup>22</sup> A

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<sup>17</sup> G.S. 19A-45(c). For a more complete discussion of the role of animal cruelty investigators, see *infra* pages 5-6.

<sup>18</sup> G.S. 1A-1, Rule 65(c) (“No such security shall be required of the State of North Carolina or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity, but damages may be awarded against such a party in accord with this rule.”).

<sup>19</sup> G.S. 19A-3(a).

<sup>20</sup> G.S. 19A-3(c).

<sup>21</sup> G.S. 19A-3(b).

<sup>22</sup> G.S. 19A-4. Typically, a plaintiff would seek a permanent injunction after having succeeded in securing a

district court judge<sup>23</sup> will provide an opportunity for both the plaintiff and the defendant to offer evidence and then the judge may then issue a permanent injunction.

If the judge decides not to issue a permanent injunction, the plaintiff's action will be dismissed and the preliminary injunction will be dissolved. If the animal is in the care of a custodian, the judge will probably direct the custodian to return it to the defendant.<sup>24</sup> The judge has the option, however, of extending the alternative custody and care arrangements until the time to appeal expires or until all appeals have been exhausted.<sup>25</sup>

If the judge issues the permanent injunction, the order will outline the restrictions placed upon the defendant.<sup>26</sup> For example, if a dog was kept outside without shelter from the elements, the judge could order the defendant to provide it with appropriate shelter. The judge might also impose restrictions on the defendant's ability to acquire, own or possess animals in the future.

The judge may conclude that there would be a "substantial risk that the animal would be subjected to further cruelty if returned to the possession of the defendant."<sup>27</sup> If so, the judge may terminate the defendant's ownership and right of possession, which means that the defendant would no longer have a right to own or keep the animal. The judge could then

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preliminary injunction. It is possible, though, that a plaintiff could skip the preliminary injunction stage and seek a permanent injunction first. It is also possible that a plaintiff could seek a permanent injunction after the court rejects his or her request for a preliminary injunction.

<sup>23</sup> Civil cruelty proceedings are held before a judge, not a jury. G.S. 19A-4(a).

<sup>24</sup> If the animal is to be returned to the defendant, it is the custodian's responsibility to ensure that it happens. The law states that "[i]f the final judgment entitles the defendant to regain possession of the animal, the custodian shall return the animal, including taking any necessary steps to retrieve the animal from a foster care provider." G.S. 19A-4(c).

<sup>25</sup> G.S. 19A-4(d).

<sup>26</sup> The order must explain the reasons for the order and describe in detail the act or acts enjoined or restrained. G.S. 1A-65(d).

<sup>27</sup> G.S. 19A-4(b). The judge must make this determination based upon a "preponderance of the evidence," which is also referred to as the "greater weight of the evidence." *See, e.g., Cincinnati Butchers Supply Co. v. Conoly*, 204 N.C. 677, 679, 169 S.E. 415, 416 (1933) (explaining that "greater weight of the evidence" and "preponderance of the evidence" are synonymous).

transfer the ownership and right of possession to another person or entity such as the plaintiff or a foster care provider.

### *Duty to Exhaust Administrative Remedies*

Before initiating the injunction process discussed above, plaintiffs should ensure that they have exhausted all available administrative remedies. In general, the term administrative remedies encompasses remedies available to a plaintiff that do not involve going to court. For example, some laws allow a person who is unhappy with a local government's permitting decision to appeal the decision to a local board or to the Office of Administrative Hearings at the state level.<sup>28</sup> These remedies are outside the traditional judicial system but, when such administrative remedies are available, they are an important first step for any plaintiff.

In a relatively recent case, an animal welfare organization and an animal welfare advocate brought an action against a local government alleging that the government's euthanasia procedures constituted cruelty.<sup>29</sup> The court never addressed the merits of the case – i.e., whether the government's euthanasia methods constituted cruelty. Instead, it dismissed the case on the grounds that the plaintiffs should have exhausted their administrative remedies before requesting an injunction. The court explained that, because the county animal control program operated in large part under the authority of local board of health rules and the rules required that animals be euthanized "in a humane manner," the plaintiffs should have first filed an appeal with the board of

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<sup>28</sup> *See, e.g.,* G.S. 130A-24 (addressing administrative remedies available in the public health context).

<sup>29</sup> *Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 595 S.E.2d 773 (2004) ("Specifically, plaintiffs allege that the Robeson County Animal Control Facility injects animals in their hearts without anesthesia resulting in pain, discomfort, and convulsive behavior, and euthanizes cats with a drug not approved for usage on cats."). The plaintiffs also alleged that the county failed to keep adequate records (as required by a local board of health rule) and therefore it unjustifiably euthanized animals before the animals' owners had the chance to reclaim them from the shelter. *Id.* at 368, 595 S.E.2d at 775.

health regarding the county's enforcement of the rule.<sup>30</sup>

Another recent case echoed the directive to plaintiffs to ensure that all administrative remedies had been exhausted.<sup>31</sup> In this second case, the plaintiffs alleged that a private, non-profit animal shelter was euthanizing animals in violation of requirements specified in state statute.<sup>32</sup> The court concluded that the plaintiffs should have gone first to the Office of Administrative Hearings, which is the state office charged with hearing appeals concerning the enforcement of state public health rules.<sup>33</sup> The reasoning in this decision is problematic for several reasons,<sup>34</sup> but the restatement of the duty to first exhaust administrative remedies should be observed. Plaintiffs and their attorneys should ensure that they have pursued all possible administrative avenues before filing a complaint in court.

## Exceptions

The following seven activities are excepted from the civil remedy statute:

- taking of animals under the jurisdiction of the Wildlife Resources Commission,<sup>35</sup>
- activities conducted for purposes of biomedical research or training,

<sup>30</sup> *Id.* at 371-72, 595 S.E.2d at 777 (citing G.S. 130A-24, which governs appeals related to local board of health rules).

<sup>31</sup> *Justice for Animals, Inc. v. Lenoir County SPCA, Inc.*, 168 N.C.App. 298, 607 S.E.2d 317, *modified and affirmed*, 360 N.C. 48, 619 S.E.2d 494 (2005).

<sup>32</sup> *Id.* at 300-03, 607 S.E.2d 319-21.

<sup>33</sup> *Id.* at 303-04, 607 S.E.2d at 321.

<sup>34</sup> For example, the decision suggests that the plaintiffs should have proceeded against "the local board of health in the Office of Administrative Hearings." *Id.* at 304, 607 S.E.2d at 321. This statement significantly confuses the relationship between local boards of health (local administrative agencies) and the state administrative agencies.

<sup>35</sup> The law provides that if a bird is a "wild bird" that is exempt from regulation by the Wildlife Resources Commission pursuant to G.S. 113-129(15a), it may be the subject of a civil cruelty action. G.S. 19A-1.1(1). The same language is used in the criminal cruelty law and was the subject of extensive litigation. For a detailed discussion of the litigation related to the wild bird provision, see Wall, *supra* note 1, at 5-6.

- activities conducted for purposes of production of livestock, poultry, or aquatic species,
- activities conducted for the primary purpose of providing food for human or animal consumption,
- activities conducted for veterinary purposes,
- destruction of any animal for the purposes of protecting the public, other animals, or the public health, and
- activities for sport.<sup>36</sup>

A court may not issue an injunction for any of these activities, as long as they are carried out lawfully. For example, if a person is using an animal for biomedical research in a way that is not authorized by law and is causing the animal unjustifiable pain, a person could seek to enjoin the researcher's activities.

## Cruelty Investigators

Counties have the option of enlisting private citizens to assist in cruelty investigations. Article 4 of Chapter 19A provides the framework for appointing volunteers as "animal cruelty investigators" and outlines the investigators' authority and responsibilities.

## Appointment

Boards of county commissioners may appoint one or more persons to serve as animal cruelty investigators.<sup>37</sup> These investigators must serve "without any compensation or other employee benefits" which strongly suggests that they may *not* be county employees. Some jurisdictions have elected to appoint their animal control officers (employed by the county) as cruelty investigators. Such appointments should be avoided because they appear to be contrary to the state law establishing the office of cruelty investigator.

The commissioners are allowed to consider candidates nominated by animal welfare organizations but they may consider other candidates

<sup>36</sup> The six exceptions to the criminal cruelty statute mirror the civil remedy's first six exceptions. G.S. 14-360(c). The seventh exception – lawful activities for sport – is only provided for in the civil remedy.

<sup>37</sup> G.S. 19A-45(a).

as well.<sup>38</sup> Investigators are required to have at least six hours of continuing education each year. The training must be approved by the board of county commissioners and must be “designed to give the investigator expertise in the investigation of complaints relating to the care and treatment of animals.”<sup>39</sup>

Before an appointment is made, the commissioners may choose to enter into an agreement that requires the investigator or an animal welfare organization to assume responsibility for the costs of caring for animals seized by the investigator. Note that this type of agreement is permitted, not required, by state law. The board of commissioners also may agree to reimburse the investigator for necessary and actual expenses.<sup>40</sup>

Cruelty investigators may be appointed for one year terms. The law does not limit the number of terms an investigator may serve. Investigators must take the oath of office<sup>41</sup> and wear badges that (1) are approved by the boards of commissioners and (2) identify them as animal cruelty investigators.<sup>42</sup>

## Seizure Authority

A cruelty investigator will pursue a civil animal cruelty case in the same manner as described above – he or she will typically seek a preliminary injunction and then a permanent injunction. Cruelty investigators are unique, however, because they have the authority to request, obtain and execute a seizure order *before* requesting an injunction.

Prior to seizing an animal, the investigator must file a sworn complaint with a magistrate. If the magistrate finds “probable cause to believe that the animal is being cruelly treated and that it is necessary

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<sup>38</sup> The law specifically authorizes the board to consider “persons nominated by any society incorporated under North Carolina law for the prevention of cruelty to animals.” G.S. 19A-45(a).

<sup>39</sup> G.S. 19A-49.

<sup>40</sup> G.S. 19A-45(d).

<sup>41</sup> Chapter 11 of the North Carolina General Statutes governs the administration of oaths to members of the General Assembly and others appointed or elected to public office. For example, the law identifies who may administer the oath, when affirmation may be substituted for an oath, as well as the specific language of the oath.

<sup>42</sup> The investigator must supply and pay for the badge. G.S. 19A-45(b) (the badge must be “provided at no cost to the county”).

for the investigator to immediately take custody of it,” the magistrate may issue an order authorizing immediate seizure.<sup>43</sup> The order, which is only valid for 24 hours, may allow the investigator to take immediate custody of and provide suitable care for the animal.

When seizing the animal, the investigator must leave with the owner a copy of the magistrate’s order and a written statement describing:

- The animal seized,
- The place where the animal will be taken,
- The reason for taking the animal, and
- The investigator’s intent to file a civil cruelty case.

If the investigator does not know who owns the animal, the information described above should be affixed to the premises or vehicle where the animal was found.<sup>44</sup> If a person is present when the investigator arrives, the investigator must identify himself and his purpose before entering the premises or vehicle.

For any seizure, an investigator may ask to be accompanied by an animal control or law enforcement officer. An investigator may *forcibly* enter premises or a vehicle in order to seize an animal only if:

- The investigator reasonably believes that the animal is on the premises or in the vehicle,
- The investigator reasonably believes that no people are on the premises or in the vehicle,
- Forcible entry is necessary to seize the animal as authorized by the order,
- The investigator is accompanied by a law enforcement officer,
- Entry is made during daylight hours, and
- The order is issued by a district court judge (rather than a magistrate).

After seizing the animal, the investigator must return the seizure order to the clerk of court along with a written inventory of the animals seized.<sup>45</sup> The investigator must take the animal to a safe and secure place and provide suitable care for it.

A person may be charged with a misdemeanor for interfering with an animal cruelty investigator in the performance of his or her official duties.<sup>46</sup>

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<sup>43</sup> G.S. 19A-46(a).

<sup>44</sup> G.S. 19A-46(c).

<sup>45</sup> G.S. 19A-46(a).

<sup>46</sup> G.S. 19A-48 (Class 1 misdemeanor).

## Recovering the Custodian's Costs

If a plaintiff assumes custody of an animal during the course of a civil cruelty case, the custodian will incur some costs related to the animal's care, including food, shelter, and veterinary care. A plaintiff also assumes responsibility for some court costs and fees associated with bringing such an action, but the law provides that such costs do not need to be paid until the court makes its decision.<sup>47</sup>

The law provides three mechanisms for recovering some or all of those costs. The first mechanism is fairly simple. If the plaintiff wins a civil animal cruelty case, state law provides that court costs are to be paid by the defendant.<sup>48</sup> Costs typically include the filing fees and other court-related expenses involved in bringing the action.<sup>49</sup> In cruelty cases, however, the judge may include as part of the costs any food, water, shelter, and care, including medical care, provided to the animal during the course of the proceeding. If the judge decides to include those expenses as "costs," the defendant will be required to pay for them.

The second cost-recovery mechanism is only available to animal cruelty investigators. If an investigator seizes and provides care for an animal during the course of a civil cruelty case, the animal's owner may be held liable for the "necessary expenses" incurred in caring for the animal, including veterinary care.<sup>50</sup> If the animal's owner fails to pay for the care, the investigator may have a lien on the animal. This means that if the owner fails to pay for the care provided to the animal after it was seized by the investigator, the investigator may be able to sell the animal in order to recover some or all of his or her expenses. The state provides a detailed framework for enforcing liens through public or

<sup>47</sup> G.S. 19A-46(d) ("...any person who commences a proceeding under this article [Article 4; animal cruelty investigators] or Article 1 [civil remedy for the protection of animals] shall not be required to pay any court costs or fees prior to a final judicial determination as provided in G.S. 19A-4 [permanent injunction], at which time those costs shall be paid pursuant to the provisions of G.S. 6-18.").

<sup>48</sup> G.S. 6-18(5) ("Costs shall be allowed of course to the plaintiff, upon a recovery, in...an action brought under Article 1 of Chapter 19A.").

<sup>49</sup> See G.S. 7A-305 (specifying the court costs that apply in civil actions).

<sup>50</sup> G.S. 19A-47.

private sale, including deadlines and specific notice requirements.<sup>51</sup>

The third cost-recovery mechanism is the most recent addition to the law and is somewhat more complex than the first two. Basically, it allows certain plaintiffs to limit their own out-of-pocket expenditures by getting money from the defendant up front rather than waiting for the proceeding to conclude.<sup>52</sup> This option is primarily designed to protect the financial interests of local governments and those that work with local governments. As such, it is only available if the cruelty action is initiated by one of the following:

- A county or municipality,
- A county or municipal official,
- A county-approved animal cruelty investigator, or
- An organization operating a county or municipal shelter under contract.<sup>53</sup>

If one of these four groups files a civil cruelty action and an animal shelter assumes custody of the animal, the shelter operator may petition the court to request that the defendant deposit with the court enough money to cover the "reasonable expenses" of caring for the animal while the litigation is pending. "Reasonable expenses" include the cost of providing food, water, shelter, and care, including medical care. The initial petition should itemize the costs expected to be incurred for 30 days.

Once such a petition is filed, the court is required to conduct a hearing no earlier than 10 business days and no later than 15 business days after the filing date. The shelter operator must mail a written notice of the hearing and a copy of the petition to the defendant.<sup>54</sup> At the hearing, the judge should determine how much money is needed to care for the animal for 30 calendar days (not business

<sup>51</sup> G.S. 44A-4.

<sup>52</sup> G.S. 19A-70. This cost-recovery option is also available to local governments if an animal is seized and sheltered after a person is arrested for (1) criminal cruelty (G.S. Chapter 14, Article 47) or (2) an attack by a dangerous dog (G.S. 67-4.3). In the criminal context, the law requires that the defendant be *arrested*, which may present a challenge for jurisdictions that typically address misdemeanor cruelty and dangerous dog cases through the issuance of criminal summons rather than arrest warrants.

<sup>53</sup> G.S. 19A-70(a).

<sup>54</sup> If the defendant is in jail, the shelter operator must also provide notice to the custodian of the jail. G.S. 19A-70(b).

days). In making this determination, the judge should not only consider the needs of the animal but also the defendant's ability to pay.

At this point in the proceeding, the judge may either:

- Order the defendant to deposit funds sufficient to care for the animal for 30 days, or
- Order the defendant to provide suitable care for the animal (only if the judge concludes that the defendant lacks the ability to deposit the necessary funds).

When the judge orders the defendant to deposit funds, the money must be deposited with the clerk of superior court within five days of the initial hearing. Once the funds are posted, the shelter operator is allowed to draw from the funds the actual costs incurred in caring for the animal. If the defendant fails to deposit the funds within that period, the animal is automatically forfeited.

If the case has not been resolved in the initial 30 day period, the shelter operator may request an extension of the order for additional 30 day time periods until the litigation is resolved. In order to have the order extended, the shelter operator must file an affidavit with the clerk of superior court stating that to the best of his or her knowledge, the case has not been resolved. This affidavit must be filed at least two business days prior to the expiration of each 30-day period. Upon receipt of the affidavit, the initial order is automatically renewed for an additional 30 days.

While the litigation is pending, the defendant is required to continue depositing funds within five business days of every 30-day period, unless the defendant requests a hearing at least five business days before the expiration of the period.<sup>55</sup> If the defendant fails to either request a hearing or deposit the funds as required, the animal is automatically forfeited.

The deadlines provided for in the law are somewhat confusing because they combine both calendar and business days. If a judge enters an initial

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<sup>55</sup> Interestingly, it appears that the defendant's duty to deposit funds every 30 days is independent of the plaintiff's duty to submit an affidavit to request an extension of the order. This may, however, simply be a drafting error. It would be reasonable for a court to infer that, in the absence of a request to have the order extended, the original order automatically expires.

order on March 1 requiring the defendant to deposit funds, the following deadlines are triggered:

- Defendant must deposit the funds within five business days of March 1.
- Shelter operator's affidavit requesting an extension of the order must be filed two business days before March 30;
- If the defendant wants to try to reduce or eliminate the obligation, the defendant must request a hearing five business days before March 30.
- Unless a hearing was requested and assuming the shelter operator requested an extension of the order, the defendant must deposit new funds five business days after March 31.

If, after calculating the amount required to provide care for the animals, the judge concludes that the defendant lacks the resources to pay the full amount, the judge may order the defendant to care for the animal while the litigation is pending. In conjunction with such an order, an animal control or law enforcement officer must make regular visits to the animal to ensure that it is receiving proper care.<sup>56</sup> If the officer concludes that the animal is not being cared for appropriately, the animal may be impounded.

## Local Laws

Local governments have long had the authority to adopt laws governing the treatment of animals. Cities and counties have specific statutory authority to "define and prohibit the abuse of animals."<sup>57</sup> In addition, local governments have the authority to "define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city [county], and may define and abate nuisances."<sup>58</sup> The combination of these two statutory grants of authority provides local governments with relatively broad ordinance-making power in this field.

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<sup>56</sup> G.S. 19A-70(f).

<sup>57</sup> G.S. 153A-127 (counties); 160A-182 (cities).

<sup>58</sup> G.S. 160A-174(a) (cities); *see also* G.S. 153A-121(a) (the section of the statute granting general ordinance making authority to counties is almost identical to that for cities).



This authority is not, however, without limits. Specifically, an ordinance must not:

- infringe a liberty guaranteed to the people by the State or federal Constitution;
- make unlawful an act, omission or condition which is expressly made lawful by State or federal law;
- make lawful an act, omission, or condition which is expressly made unlawful by State or federal law;
- purport to regulate a subject that [local governments] are expressly forbidden to regulate by State or federal law;
- purport to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation; or
- define the elements of an offense such that they are identical to the elements of an offense defined by State or federal law.<sup>59</sup>

In short, a local ordinance may regulate the same conduct as a state or federal law, but it must not duplicate or undermine the other law. Rather, it may impose higher standards or expectations on people within the jurisdiction.

Violations of local ordinances are often misdemeanors, but some jurisdictions also enforce them civilly in the form of monetary fines or through seeking injunctions or other equitable relief.<sup>60</sup> Therefore, if a local ordinance is in place, it may provide an alternative mechanism for enjoining animal cruelty. Jurisdictions should, however, exercise caution in enforcing any ordinance that duplicates or conflicts with the state law because the validity of the ordinance could be challenged.<sup>61</sup>

Some jurisdictions have board of health rules governing animal control, which may include provisions related to cruelty or abuse. A board of health may become involved in animal control if the local health department is the agency with administrative responsibility for animal control activities within the county. While boards of health

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<sup>59</sup> G.S. 160A-174(b). While these limitations are named only in the law governing municipalities, the courts have consistently applied them to counties as well. *See* State v. Tenore, 280 N.C. 238, 248, 185 S.E.2d 644, 650 (1972).

<sup>60</sup> G.S. 153A-123 (specifying the enforcement mechanisms for local ordinances).

<sup>61</sup> G.S. 160A-174(b).

may have some role in oversight of the animal control activities by virtue of the health department's role in administering the program, it is not clear that boards of health have the legal authority to adopt comprehensive animal control rules. Under state law, the rulemaking authority of boards of health is limited to rules necessary to "protect and promote the public health."<sup>62</sup> The term "public health" is often used to refer to issues affecting human health.<sup>63</sup> Therefore, while it would be appropriate for a board of health to adopt a rule governing rabies, it may not be appropriate for the board to adopt rules on animal issues that are unrelated to human health, such as cruelty or nuisance animals.

## Conclusion

This bulletin, in conjunction with Part I of this series, offers a summary and analysis of the many different legal tools available under state law for addressing animal cruelty. In some situations, an injunction may be the most appropriate remedy while in others a criminal prosecution may prove more effective. Hopefully, the information provided in this series will help interested parties better understand the options available and the parameters of the law.

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<sup>62</sup> G.S. 130A-39(a).

<sup>63</sup> *See, e.g.*, Institute of Medicine, National Academy of Sciences, *The Future of Public Health*, National Academy Press (Wash. D.C. 1988) (characterizing public health's mission as "fulfilling society's interest in assuring conditions in which people can be healthy").

## Appendix: Relevant State Statutes

### § 19A-1. Definitions.

The following definitions apply in this Article:

- (1) The term "animals" includes every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings.
- (2) The terms "cruelty" and "cruel treatment" include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted.
- (3) The term "person" has the same meaning as in G.S. 12-3.

### § 19A-1.1. Exemptions.

This Article shall not apply to the following:

- (1) The lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission, except that this Article applies to those birds exempted by the Wildlife Resources Commission from its definition of "wild birds" pursuant to G.S. 113-129(15a).
- (2) Lawful activities conducted for purposes of biomedical research or training or for purposes of production of livestock, poultry, or aquatic species.
- (3) Lawful activities conducted for the primary purpose of providing food for human or animal consumption.
- (4) Activities conducted for lawful veterinary purposes.
- (5) The lawful destruction of any animal for the purposes of protecting the public, other animals, or the public health.
- (6) Lawful activities for sport.

### § 19A-2. Purpose.

It shall be the purpose of this Article to provide a civil remedy for the protection and humane treatment of animals in addition to any criminal remedies that are available and it shall be proper in any action to combine causes of action against one or more defendants for the protection of one or more animals. A real party in interest as plaintiff shall be held to include any person even though the person does not have a possessory or ownership right in an animal; a real party in interest as defendant shall include any person who owns or has possession of an animal.

### § 19A-3. Preliminary injunction; care of animal pending hearing on the merits.

(a) Upon the filing of a verified complaint in the district court in the county in which cruelty to an animal has allegedly occurred, the judge may, as a matter of discretion, issue a preliminary injunction in accordance with the procedures set forth in G.S. 1A-1, Rule 65. Every such preliminary injunction, if the plaintiff so requests, may give the plaintiff the right to provide suitable care for the animal. If it appears on the face of the complaint that the condition giving rise to the cruel treatment of an animal requires the animal to be removed from its owner or other person who possesses it, then it shall be proper for the court in the preliminary injunction to allow the plaintiff to take possession of the animal as custodian.

(b) The plaintiff as custodian may employ a veterinarian to provide necessary medical care for the animal without any additional court order. Prior to taking such action, the plaintiff as custodian shall consult with, or attempt to consult with, the defendant in the action, but the plaintiff as custodian may authorize such care without the defendant's consent. Notwithstanding the provisions of this subsection, the plaintiff as custodian may not have an animal euthanized without written consent of the defendant or a court order that authorizes euthanasia upon the court's finding that the animal is suffering due to terminal illness or terminal injury.

(c) The plaintiff as custodian may place an animal with a foster care provider. The foster care provider shall return the animal to the plaintiff as custodian on demand.

### § 19A-4. Permanent injunction.

(a) In accordance with G.S. 1A-1, Rule 65, a district court judge in the county in which the original action was brought shall determine the merits of the action by trial without a jury, and upon hearing such evidence as may be presented, shall enter orders as the court deems appropriate, including a permanent injunction and dismissal of the action along with dissolution of any preliminary injunction that had been issued.

(b) If the plaintiff prevails, the court in its discretion may include the costs of food, water, shelter, and care, including medical care, provided to the animal, less any amounts deposited by the defendant under G.S. 19A-70, as part of the costs allowed to the plaintiff under G.S. 6-18. In addition, if the court finds by a preponderance of the evidence

that even if a permanent injunction were issued there would exist a substantial risk that the animal would be subjected to further cruelty if returned to the possession of the defendant, the court may terminate the defendant's ownership and right of possession of the animal and transfer ownership and right of possession to the plaintiff or other appropriate successor owner. For good cause shown, the court may also enjoin the defendant from acquiring new animals for a specified period of time or limit the number of animals the defendant may own or possess during a specified period of time.

(c) If the final judgment entitles the defendant to regain possession of the animal, the custodian shall return the animal, including taking any necessary steps to retrieve the animal from a foster care provider.

(d) The court shall consider and may provide for custody and care of the animal until the time to appeal expires or all appeals have been exhausted.

**§ 19A-45. Appointment of animal cruelty investigators; term of office; removal; badge; oath; bond.**

(a) The board of county commissioners is authorized to appoint one or more animal cruelty investigators to serve without any compensation or other employee benefits in his county. In making these appointments, the board may consider persons nominated by any society incorporated under North Carolina law for the prevention of cruelty to animals. Prior to making any such appointment, the board of county commissioners is authorized to enter into an agreement whereby any necessary expenses of caring for seized animals not collectable pursuant to G.S. 19A-47 may be paid by the animal cruelty investigator or by any society incorporated under North Carolina law for the prevention of cruelty to animals that is willing to bear such expense.

(b) Animal cruelty investigators shall serve a one-year term subject to removal for cause by the board of county commissioners. Animal cruelty investigators shall, while in the performance of their official duties, wear in plain view a badge of a design approved by the board identifying them as animal cruelty investigators, and provided at no cost to the county.

(c) Animal cruelty investigators shall take and subscribe the oath of office required of public officials. The oath shall be filed with the clerk of superior court. Animal cruelty investigators shall not be required to post any bond.

(d) Upon approval by the board of county commissioners, the animal cruelty investigator or investigators may be reimbursed for all necessary and actual expenses, to be paid by the county.

**§ 19A-46. Powers; magistrate's order; execution of order; petition; notice to owner.**

(a) Whenever any animal is being cruelly treated as defined in G.S. 19A-1(2), an animal cruelty investigator may file with a magistrate a sworn complaint requesting an order allowing the investigator to provide suitable care for and take immediate custody of the animal. The magistrate shall issue the order only when he finds probable cause to believe that the animal is being cruelly treated and that it is necessary for the investigator to immediately take custody of it. Any magistrate's order issued under this section shall be valid for only 24 hours after its issuance. After he executes the order, the animal cruelty investigator shall return it with a written inventory of the animals seized to the clerk of court in the county where the order was issued.

(b) The animal cruelty investigator may request a law-enforcement officer or animal control officer to accompany him to help him seize the animal. An investigator may forcibly enter any premises or vehicle when necessary to execute the order only if he reasonably believes that the premises or vehicle is unoccupied by any person and that the animal is on the premises or in the vehicle. Forcible entry shall be used only when the animal cruelty investigator is accompanied by a law-enforcement officer. In any case, he must give notice of his identity and purpose to anyone who may be present before entering said premises. Forcible entry shall only be used during the daylight hours.

(c) When he has taken custody of such an animal, the animal cruelty investigator shall file a complaint pursuant to Article 1 of this Chapter as soon as possible. When he seizes the animal, he shall leave with the owner, if known, or affixed to the premises or vehicle a copy of the magistrate's order and a written notice of a description of the animal, the place where the animal will be taken, the reason for taking the animal, and the investigator's intent to file a complaint in district court requesting custody of the animal pursuant to Article 1 of this Chapter.

(d) Notwithstanding the provisions of G.S. 7A-305(c), any person who commences a proceeding under this Article or Article 1 of this Chapter shall

not be required to pay any court costs or fees prior to a final judicial determination as provided in G.S. 19A-4, at which time those costs shall be paid pursuant to the provisions of G.S. 6-18.

(e) Any judicial order authorizing forcible entry shall be issued by a district court judge.

**§ 19A-47. Care of seized animals.**

The investigator must take any animal he seizes directly to some safe and secure place and provide suitable care for it. The necessary expenses of caring for seized animals, including necessary veterinary care, shall be a charge against the animal's owner and a lien on the animal to be enforced as provided by G.S. 44A-4.

**§ 19A-48. Interference unlawful.**

It shall be a Class 1 misdemeanor, to interfere with an animal cruelty investigator in the performance of his official duties.

**§ 19A-49. Educational requirements.**

Each animal cruelty investigator at his own expense must attend annually a course of at least six hours instruction offered by the North Carolina Humane Federation or some other agency. The course shall be designed to give the investigator expertise in the investigation of complaints relating to the care and treatment of animals. Failure to attend a course approved by the board of county commissioners shall be cause for removal from office.

**§ 19A-70. Care of animal subjected to illegal treatment.**

(a) In every arrest under any provision of Article 47 of Chapter 14 of the General Statutes or under G.S. 67-4.3 or upon the commencement of an action under Article 1 of this Chapter by a county or municipality, by a county-approved animal cruelty investigator, by other county or municipal official, or by an organization operating a county or municipal shelter under contract, if an animal shelter takes custody of an animal, the operator of the shelter may file a petition with the court requesting that the defendant be ordered to deposit funds in an amount sufficient to secure payment of all the reasonable expenses expected to be incurred by the animal shelter in caring for and providing for the animal

pending the disposition of the litigation. For purposes of this section, "reasonable expenses" includes the cost of providing food, water, shelter, and care, including medical care, for at least 30 days.

(b) Upon receipt of a petition, the court shall set a hearing on the petition to determine the need to care for and provide for the animal pending the disposition of the litigation. The hearing shall be conducted no less than 10 and no more than 15 business days after the petition is filed. The operator of the animal shelter shall mail written notice of the hearing and a copy of the petition to the defendant at the address contained in the criminal charges or the complaint or summons by which a civil action was initiated. If the defendant is in a local detention facility at the time the petition is filed, the operator of the animal shelter shall also provide notice to the custodian of the detention facility.

(c) The court shall set the amount of funds necessary for 30 days' care after taking into consideration all of the facts and circumstances of the case, including the need to care for and provide for the animal pending the disposition of the litigation, the recommendation of the operator of the animal shelter, the estimated cost of caring for and providing for the animal, and the defendant's ability to pay. If the court determines that the defendant is unable to deposit funds, the court may consider issuing an order under subsection (f) of this section.

Any order for funds to be deposited pursuant to this section shall state that if the operator of the animal shelter files an affidavit with the clerk of superior court, at least two business days prior to the expiration of a 30-day period, stating that, to the best of the affiant's knowledge, the case against the defendant has not yet been resolved, the order shall be automatically renewed every 30 days until the case is resolved.

(d) If the court orders that funds be deposited, the amount of funds necessary for 30 days shall be posted with the clerk of superior court. The defendant shall also deposit the same amount with the clerk of superior court every 30 days thereafter until the litigation is resolved, unless the defendant requests a hearing no less than five business days prior to the expiration of a 30-day period. If the defendant fails to deposit the funds within five business days of the initial hearing, or five business days of the expiration of a 30-day period, the animal is forfeited by operation of law. If funds have been deposited in accordance with this section, the operator of the animal shelter may draw from the funds the actual costs incurred in caring for the animal.

In the event of forfeiture, the animal shelter may determine whether the animal is suitable for adoption and whether adoption can be arranged for the animal. The animal may not be adopted by the defendant or by any person residing in the defendant's household. If the adopted animal is a dog used for fighting, the animal shelter shall notify any persons adopting the dog of the liability provisions for owners of dangerous dogs under Article 1A of Chapter 67 of the General Statutes. If no adoption can be arranged after the forfeiture, or the animal is unsuitable for adoption, the shelter shall humanely euthanize the animal.

(e) The deposit of funds shall not prevent the animal shelter from disposing of the animal prior to the expiration of the 30-day period covered by the deposit if the court makes a final determination of the charges or claims against the defendant. Upon determination, the defendant is entitled to a refund for any portion of the deposit not incurred as expenses by the animal shelter. A person who is acquitted of all criminal charges or not found to have committed animal cruelty in a civil action under Article 1 of this Chapter is entitled to a refund of the deposit remaining after any draws from the deposit in accordance with subsection (d) of this section.

(f) Pursuant to subsection (c) of this section, the court may order a defendant to provide necessary food, water, shelter, and care, including any necessary medical care, for any animal that is the basis of the charges or claims against the defendant without the removal of the animal from the existing location and until the charges or claims against the defendant are adjudicated. If the court issues such an order, the court shall provide for an animal control officer or other law enforcement officer to make regular visits to the location to ensure that the animal is receiving necessary food, water, shelter, and care, including any necessary medical care, and to impound the animal if it is not receiving those necessities.

**§ 153A-127. Abuse of animals.**

A county may by ordinance define and prohibit the abuse of animals.

**§ 160A-182. Abuse of animals.**

A city may by ordinance define and prohibit the abuse of animals.

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