IN THE CIRCUIT FOURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, FLORIDA

DOTTYE BENTON,

Petitioner,

vs. CASE NO.: 2018-CA-000292

CITY OF PALM COAST,

Respondent.
_________________________________/

CITY OF PALM COAST'S RESPONSE
TO PETITION FOR WRIT OF CERTIORARI

Respondent, the City of Palm Coast, Florida ("City"), by and through its undersigned counsel and pursuant to this Court's Order dated August 22, 2018, hereby responds to the Petition for Writ of Certiorari ("Petition") filed May 18, 2018, by Dottye Benton. For the reasons set forth below, the City respectfully requests that this Court deny the Petition.

FACTS

In this action, Benton seeks certiorari review of an order rendered by the Hearing Officer for the City of Palm Coast ("Hearing Officer") that: (1) upheld City Staff's determination that Benton's dog named "Cooper," which was previously declared dangerous by the City of Port Orange on February 21, 2018, again without provocation attacked and caused severe injury to a human, named Mr. Terry Sandt, on February 24, 2018, this time within the City of Palm Coast; and (2) in accordance

with the requirements of section 767.13(2), Florida Statutes, ordered that said dog must be destroyed in an expeditious and humane manner.

On Monday, April 16, 2018, a hearing was held before the City of Palm Coast's Hearing Officer in this matter. *See* Transcript of Hearing held April 16, 2018, before City of Palm Coast Hearing Officer Nicole Turcotte, in lower tribunal case number 2018 021254 (hereinafter referred to as "T" followed by the corresponding page number), which was filed with this Court on June 8, 2018.

At said hearing, the City presented an opening statement, but Petitioner, who was represented by counsel who is an animal law attorney (T. 58), declined to present an opening statement. (T. 9). The City thereafter presented the testimony of: (1) Terry Sandt, the individual who was attacked and bitten in the face, hand, and leg in the City of Palm Coast by Benton's dog Cooper (T. 10-25), and (2) City of Palm Coast Animal Control Officer Eva Rodriguez (T. 25-64). In addition, the City presented a Composite Exhibit of multiple documents to the Hearing Officer. Contrary to Petitioner's assertion on page 3 of her Petition for Writ of Certiorari that said exhibits were never admitted into evidence, that Composite Exhibit was admitted into evidence without any objection from Petitioner, as City's Exhibit One. (*See* Petition, p. 3; T. 9-10, 47).[1] Petitioner testified, and also presented the

[1] A complete copy of the City's Composite Exhibit A (which became City's Exhibit One once it was admitted into evidence) is being filed herewith as an Appendix to this Response. The Appendix will be referred to herein as "App." followed by the

testimony of Jason Moreland, an employee at the Flagler County Humane Society, and Joseph Pimental, who owns a Rottweiler rescue. The evidence contained within Composite Exhibit One and the testimony of the witnesses at the hearing establishes the following relevant facts.

Mr. Sandt, who owns a carpet and tile cleaning company, was called by Petitioner to do a job at her home. (T. 10, 65-66; App. 18). On February 24, 2018, after arriving at Petitioner's home, Mr. Sandt entered the house and was petting two small dogs that had met him at the door when he entered the house. (T. 11, 23, 66; App. 18).

According to Mr. Sandt, Petitioner was trying to get the two small dogs to follow her to the porch and go outside so that he could clean Petitioner's carpets, but the dogs wanted to stay with Mr. Sandt so that he would continue to pet them. (T. 11, 12, 21, 24, 30; App. 18). Mr. Sandt can't clean carpets with dogs in the room, so he ordinarily tries to get dogs to go outside or into a room that does not have to be cleaned. (T. 24). Thus, in an effort to help Petitioner get the dogs outside, Mr.

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corresponding page number that is set forth on the bottom right-hand corner of each page. The City's Composite Exhibit A that was filed at the hearing had tabs indicating each of the respective subparts of the Composite Exhibit. In order to be able to identify those subparts of the Appendix once it is filed electronically with this Court, divider pages have been inserted in between each subpart. For example, there is a divider page labeled A-1 before subpart 1 of Composite Exhibit A, in the e-filed Appendix.

Sandt followed Petitioner to the porch, where he bent down in order to continue to pet the two small dogs. (T. 11-12, 24, 30; App. 18).

Cooper, Petitioner's bigger dog, was outside. (T. 12; *see also* App. 9 (photo of Cooper)). According to Mr. Sandt, Petitioner asked him if he wanted to meet Cooper. (T. 11, 30; App. 18). Mr. Sandt responded "if he's nice and doesn't bite." (T. 11, 30; App. 18).

Petitioner, on the other hand, contends that she told Mr. Sandt that she had a dangerous dog when she initially spoke with him to make the appointment to clean the carpets, and that upon Mr. Sandt's arrival to the house, Mr. Sandt asked her where her dangerous dog was located. (T. 66). Petitioner contends that Mr. Sandt then insisted that he meet the dangerous dog, and that he walked to the sliding glass door, opened the door, stepped out onto her porch, and then bent down to meet Cooper, the dangerous dog. (T. 28, 66-68, 73-74).

As soon as the door was opened, Cooper went up to Mr. Sandt and bit him on the lip. (T. 11, 12, 30, 67). Mr. Sandt threw Cooper off, but Cooper shook and tore Mr. Sandt's lip off. (T. 11, 30-31). Cooper then jumped right back on Mr. Sandt's leg and started biting his leg. (T. 11-12, 30-31). Mr. Sandt contends he was able to get out the sliding glass door, and make his way to the back yard and through the back gate. (T. 12). In contrast, Petitioner contends that she "wrestled Cooper back out and put him in the yard and shut the door." (T 67). She further stated: "I was

not going to remove my two small dogs from the house, because they're so small, they're not going to be in the same room with him anyway." (T. 67).

Petitioner then took Mr. Sandt to the hospital. (T. 12, 19, 31, 68). Petitioner testified that while she was at the hospital with Mr. Sandt, when they were describing what happened to Mr. Sandt, Petitioner told a member of the hospital staff that Cooper had bitten a woman in Port Orange. (T. 68). Petitioner told the people at the hospital that she had an appointment to have Cooper put down the following Monday. (T. 13, 21).

As a result of the dog bite, Mr. Sandt sustained three bites to his leg, a bite to his hand, and a portion of his face was torn off. (T. 13, 14; App. 11-16 (photos of Mr. Sandt's injuries)). The wound to Mr. Sandt's face was described in the emergency room notes as follows:

> [T]he mucosal surface is intact, but there is significant irregular laceration on the right side of the upper lip with avulsion of tissue approximately one centimeter by two centimeters. The wound margins cannot be approximated without significant deformity. There is significant edema on the right cheek adjacent to the wound, with additional bite marks present. The bite marks do not appear to penetrate the skin.

(T. 17-18; App. 26). The emergency room notes further state: "The patient will likely require a full thickness repair of this injury, which will have to be performed in the operating room." (T. 18; App. 27). According to Petitioner, the doctor who examined Mr. Sandt at the emergency room told him that he could not sew Mr.

Sandt's face back together because he had a quarter of an inch of his face missing. (T. 68; *see also* App. 11, 12 (photos of the damage to Mr. Sandt's face)). Mr. Sandt was told that he would need to see a plastic surgeon to have the damage to his face repaired. (T. 16, 69; App. 27). Petitioner, who works for an attorney (T. 23-24, 68, 74-75), called her boss and obtained the name of a plastic surgeon for Mr. Sandt to see. (T. 69). Mr. Sandt saw a plastic surgeon the next day. (T. 17).

Mr. Sandt incurred an initial bill from the hospital, and Petitioner paid it. (T. 15, 70). After leaving the hospital, Petitioner and Mr. Sandt went to Walgreen's, where Petitioner bought bandages for Mr. Sandt's face and an antibiotic for Mr. Sandt. (T. 70). They then returned to Petitioner's house, and Mr. Sandt went inside and cleaned Petitioner's carpet. (T. 71).

Mr. Sandt identified Petitioner's dog Cooper as the dog that attacked him. (T. 14; App. 9-10). Additionally, Mr. Sandt testified that the photographs contained within Composite Exhibit A are of the injuries inflicted upon him by Cooper (T. 13-14), and that the medical bills contained within Composite Exhibit A are his records and medical bills. (T. 15).

Petitioner testified that Cooper had been declared a dangerous dog and that she knew this because she was at the Port Orange hearing when that determination was made. (T. 73). Thus, Petitioner's contention on page 3 of her Petition for Writ of Certiorari that "there was no non-hearsay testimony establishing that Cooper had

been declared a dangerous dog" is belied by Petitioner's very own testimony. (*See* Petition, p. 3; T. 73).

Additionally, the documentation from the City of Port Orange establishing that Cooper had been declared a dangerous dog was admitted into evidence as part of Composite Exhibit A. (T. 47; App. 80-90). That evidence shows that Cooper bit the victim in that case multiple times and that one of the bites required numerous sutures to close. (*See* App. 87-89 (photos of victim's injuries)). That evidence also states that at the time of the hearing before the Port Orange Dangerous Dog Board, Cooper had been moved to Palm Coast. (App. 85). The Port Orange City Staff recommended that Cooper be euthanized. (App. 90). The City of Port Orange Dangerous Dog Board upheld the City Staff's Dangerous Dog Determination but did not order that Cooper be euthanized. (App. 81). No appeal was taken from that Dangerous Dog Determination, and it, therefore, became final.

Eva Rodriguez, Animal Control Officer for the City of Palm Coast ("ACO Rodriguez"), testified that on January 31, 2018, she was contacted by Officer Chris Filbert from the City of Port Orange, advising her that a dog that had bitten an individual in Port Orange was moved to 29 Ryder Drive, in the City of Palm Coast. (T. 26). Officer Filbert asked that the dog, which was identified as the dog Cooper, be quarantined at 29 Ryder Drive. (T. 26). By the time that ACO Rodriguez was contacted by Officer Filbert and notified that a dog that was the subject of dangerous

dog proceedings had moved into Palm Coast, however, the quarantine period had already expired. (T. 26). ACO Rodriguez then just needed to go to 29 Ryder Drive to make sure the dog was alive and well as requested by the City of Port Orange, so that Cooper could be released from quarantine. (T. 26).

On February 1, 2018, ACO Rodriguez made contact with Petitioner to check on Cooper to make sure that he was alive and well. (T. 27). At that time, Petitioner took ACO Rodriguez to her back porch, where she saw that Cooper was alive and well. (T. 27). ACO Rodriguez, therefore, released Cooper from quarantine. (T. 27). Cooper barked at ACO Rodriguez the entire time she was there, causing ACO Rodriguez to comment to Petitioner that she believed the animal was territorial. (T. 27, 47).

On February 26, 2018, ACO Rodriguez contacted Petitioner regarding Cooper's second biting incident, i.e., his multiple bites of Mr. Sandt. (T. 27). At that time, ACO Rodriguez advised Petitioner that Cooper would have to spend his quarantine at the Flagler Humane Society ("Humane Society"). (T. 28).

On February 27, 2018, Petitioner brought Cooper to the Humane Society for his quarantine. (T. 28). Petitioner told ACO Rodriguez that Cooper was sedated before he was driven to the Humane Society. (T. 28). ACO Rodriguez and Petitioner discussed Petitioner's desire to have Cooper euthanized at her vet's office, and ACO Rodriguez advised her that Cooper would first need to be quarantined at

the Humane Society for ten days, unless her vet would test Cooper's brain tissue for rabies. (T. 28, 29). Petitioner's vet did not, however, want to test Cooper's brain tissue. (T. 28). Petitioner advised that Cooper should remain at the Humane Society and be euthanized there. (T. 28). Petitioner, however, thereafter changed her mind about having Cooper euthanized, and instead, instituted this proceeding. (T. 58).

After Cooper had been declared a dangerous dog by the Port Orange Dangerous Dog Board, and after the quarantine period ended, but while Cooper remained at the Humane Society pending resolution of this matter, ACO Rodriguez observed Cooper being walked by one of the Humane Society kennel attendants named Jason without a muzzle. (T. 28). ACO Rodriguez also observed Cooper barking, jumping, and growling in his cage. (T. 28).

ACO Rodriguez opined that since Cooper has had two serious biting incidents and since the owner has displayed a lack of responsibility in the handling of him, for the safety of the public, it would be best to have Cooper euthanized. (T. 50). She further testified that euthanasia was mandated by section 767.13(2), Florida Statutes, and that the decision to euthanize Cooper was made by her and her manager, Barbara Grossman. (T. 33, 51-52). Based upon that determination, on March 6, 2018, Code Enforcement Manager Barbara Grossman sent correspondence to Petitioner advising her that Cooper was in quarantine and that in accordance with section 767.13(2), Florida Statutes, and Section 8-41 of the Code of Ordinances for the City of Palm

Coast, Florida, Cooper would be held for ten business days after the date of the written notification, and then would be destroyed in an expeditious and humane manner. (App 5).

Jason Moreland testified that he works at the Flagler Humane Society, and that he has been responsible for taking care of Cooper. (T. 77-78). He testified that while he was caring for Cooper at the Humane Society, he had not seen any aggression out of Cooper. (T. 78). He testified that he has had Cooper - a dog which, again, has been declared a dangerous dog under section 767.12, Florida Statutes, and which was being held at the Humane Society for biting and severely injuring another person - around at least 30 people including other staff members at the Humane Society and "everybody in the lobby" and that "[t]hey love him to death." (T. 78). Mr. Moreland further stated that Cooper "met two complete strangers yesterday and was loving all over them." (T. 78).

Joseph Pimentel testified that he owns a Rottweiler rescue, and that he is willing to take Cooper. (T. 81). He testified that he would house Cooper like the seven other aggressive dogs that he keeps at his compound, and that they have "10x10 inside kennels that are covered, 10x10 outside kennels that are covered, and locks on their cages." (T. 81). He stated that he is the only one who has a key to the locks on the cages and that he is the only one who feeds them and shows them attention. (T. 81).

At the conclusion of the hearing, the Hearing Officer orally stated that she found the testimony of Mr. Sandt to be more credible than the testimony of Petitioner,[2] announced her ruling and the reasons for it (T. 89-93), and subsequently issued her detailed written "Order on Final Hearing." (*See* Appendix to Petition for Writ of Certiorari, pp. 1-8). Petitioner now seeks certiorari review of that "Order on Final Hearing."

CHAPTER 767, FLORIDA STATUTES

Section 767.12, Florida Statutes governs the classification of dogs as dangerous, the certification of registration of a dangerous dog, notice and hearing requirements for declaring a dog as a dangerous dog, and requirements for confining a dog that has been declared dangerous. Section 767.12 provides:

> (1) An animal control authority shall investigate reported incidents involving any dog that may be dangerous and, if possible, shall interview the owner and require a sworn affidavit from any person, including any animal control officer or enforcement officer, desiring to have a dog classified as dangerous.
>
> (a) **An animal that is the subject of a dangerous dog investigation because of severe injury to a human being may be immediately confiscated by an animal control authority, placed in quarantine, if necessary, for the proper length of time, or impounded and held**. The animal may be held pending the outcome of the investigation and any hearings or appeals related to the dangerous dog classification or any penalty imposed under this section. If the dog is to be destroyed,

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[2] *See* "Order on Final Hearing," p. 3, ¶ 12 ("The undersigned hearing officer finds the testimony of Mr. Sandt to be more credible."); T. 91 (commenting that Mr. Sandt's testimony has been consistent since day one, while Petitioner's testimony has been inconsistent).

the dog may not be destroyed while an appeal is pending. The owner is responsible for payment of all boarding costs and other fees as may be required to humanely and safely keep the animal pending any hearing or appeal.

(b) **An animal that is the subject of a dangerous dog investigation which is not impounded with the animal control authority must be humanely and safely confined by the owner in a securely fenced or enclosed area.** The animal shall be confined in such manner pending the outcome of the investigation and the resolution of any hearings or appeals related to the dangerous dog classification or any penalty imposed under this section. **The address at which the animal resides shall be provided to the animal control authority. A dog that is the subject of a dangerous dog investigation may not be relocated or its ownership transferred pending the outcome of the investigation and any hearings or appeals related to the dangerous dog classification or any penalty imposed under this section. If a dog is to be destroyed, the dog may not be relocated or its ownership transferred.**

(2) A dog may not be declared dangerous if:

(a) The threat, injury, or damage was sustained by a person who, at the time, was unlawfully on the property or who, while lawfully on the property, was tormenting, abusing, or assaulting the dog or its owner or a family member.

(b) The dog was protecting or defending a human being within the immediate vicinity of the dog from an unjustified attack or assault.

(3) After the investigation, the animal control authority shall make an initial determination as to whether there is sufficient cause to classify the dog as dangerous and, if sufficient cause is found, as to the appropriate penalty under subsection (5). The animal control authority shall afford the owner an opportunity for a hearing prior to making a final determination regarding the classification or penalty. The animal control authority shall provide written notification of the sufficient cause finding and proposed penalty to the owner by registered mail, certified hand delivery, or service in conformance with the provisions of chapter 48 relating to service of process. The owner may file a

written request for a hearing regarding the dangerous dog classification, penalty, or both, within 7 calendar days after receipt of the notification of the sufficient cause finding and proposed penalty. If the owner requests a hearing, the hearing shall be held as soon as possible, but not later than 21 calendar days and not sooner than 5 days after receipt of the request from the owner. If a hearing is not timely requested regarding the dangerous dog classification or proposed penalty, the determination of the animal control authority as to such matter shall become final. Each applicable local governing authority shall establish hearing procedures that conform to this subsection.

(4) **Upon a dangerous dog classification and penalty becoming final after a hearing or by operation of law pursuant to subsection (3), the animal control authority shall provide a written final order to the owner by registered mail, certified hand delivery or service. The owner may appeal the classification, penalty, or both, to the circuit court in accordance with the Florida Rules of Appellate Procedure after receipt of the final order.** If the dog is not held by the animal control authority, the owner must confine the dog in a securely fenced or enclosed area pending resolution of the appeal. Each applicable local governing authority must establish appeal procedures that conform to this subsection.

(5) (a) Except as otherwise provided in paragraph (b), the owner of a dog classified as a dangerous dog shall:

1. **Within 14 days after issuance of the final order classifying the dog as dangerous or the conclusion of any appeal that affirms such final order, obtain a certificate of registration for the dog from the animal control authority serving the area in which he or she resides, and renew the certificate annually.** Animal control authorities are authorized to issue such certificates of registration, and renewals thereof, only to persons who are at least 18 years of age and who present to the animal control authority sufficient evidence of:

a. A current certificate of rabies vaccination for the dog.

b. A proper enclosure to confine a dangerous dog and the posting of the premises with a clearly visible warning sign at all entry points which informs both children and adults of the presence of a dangerous dog on the property.

c. Permanent identification of the dog, such as a tattoo on the inside thigh or electronic implantation.

The appropriate governmental unit may impose an annual fee for the issuance of certificates of registration required by this section.

2. Immediately notify the appropriate animal control authority when the dog:

a. Is loose or unconfined.
b. Has bitten a human being or attacked another animal.
c. Is sold, given away, or dies.
d. **Is moved to another address.**

Before a dangerous dog is sold or given away, the owner shall provide the name, address, and telephone number of the new owner to the animal control authority. The new owner must comply with all of the requirements of this section and implementing local ordinances, even if the animal is moved from one local jurisdiction to another within the state. The animal control officer must be notified by the owner of a dog classified as dangerous that the dog is in his or her jurisdiction.

3. **Not permit the dog to be outside a proper enclosure unless the dog is muzzled and restrained by a substantial chain or leash and under control of a competent person.** The muzzle must be made in a manner that will not cause injury to the dog or interfere with its vision or respiration but will prevent it from biting a person or animal. The owner may exercise the dog in a securely fenced or enclosed area that does not have a top, without a muzzle or leash, if the dog remains within his or her sight and only members of the immediate household or persons 18 years of age or older are allowed in the enclosure when the dog is present. When being transported, such dogs must be safely and securely restrained within a vehicle.

(b) **If a dog is classified as a dangerous dog due to an incident that causes severe injury to a human being, based upon the nature and circumstances of the injury and the likelihood of a future threat to the public safety, health, and welfare, the dog may be destroyed in an expeditious and humane manner.**

> (6) Hunting dogs are exempt from this section when engaged in any legal hunt or training procedure. Dogs engaged in training or exhibiting in legal sports such as obedience trials, conformation shows, field trials, hunting/retrieving trials, and herding trials are exempt from this section when engaged in any legal procedures. However, such dogs at all other times in all other respects are subject to this and local laws. Dogs that have been classified as dangerous may not be used for hunting purposes.
> (7) **A person who violates any provision of this section commits a noncriminal infraction, punishable by a fine not to exceed $500.**

§ 767.12, Fla. Stat. (emphasis added). Similar provisions are found within Palm Coast's City Code. *See* Code of Ordinances, City of Palm Coast, Fla. (hereinafter "City Code"), Ch. 8, Art. II, Sec. 8-40 (Classification of Dogs as Dangerous) (emphasis added).

If a dog that has previously been declared dangerous attacks or bites again, the provisions of section 767.13, Florida Statutes apply. Section 767.13 provides:

> (1) If a dog that has previously been declared dangerous attacks or bites a person or a domestic animal without provocation, the owner is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. In addition, the dangerous dog shall be immediately confiscated by an animal control authority, placed in quarantine, if necessary, for the proper length of time, or impounded and held for 10 business days after the owner is given written notification under s. 767.12, and thereafter destroyed in an expeditious and humane manner. This 10-day time period shall allow the owner to request a hearing under s. 767.12. The owner shall be responsible for payment of all boarding costs and other fees as may be required to humanely and safely keep the animal during any appeal procedure.
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> (2) **If a dog that has previously been declared dangerous attacks and causes severe injury to** or death of **any human, the owner is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084**. In addition, **the dog <u>shall</u> be**

> **immediately confiscated** by an animal control authority, **placed in quarantine**, if necessary, **for the proper length of time or held for 10 business days after the owner is given written notification under s. 767.12, and thereafter destroyed in an expeditious and humane manner**. **This 10-day time period shall allow the owner to request a hearing under s. 767.12**. The owner shall be responsible for payment of all boarding costs and other fees as may be required to humanely and safely keep the animal during any appeal procedure.
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> (3) If the owner files a written appeal under s. 767.12 or this section, the dog must be held and may not be destroyed while the appeal is pending.
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> (4) If a dog attacks or bites a person who is engaged in or attempting to engage in a criminal activity at the time of the attack, the owner is not guilty of any crime specified under this section.

§ 767.13, Fla. Stat. (emphasis added).

The City Code, likewise, has a provision specifically pertaining to dogs that were previously declared dangerous and which have bitten and caused severe injury to a human again. Section 8-41 of the City Code provides:

> **Any dog previously classified as dangerous that attacks or bites a person or a domestic animal without provocation shall be immediately confiscated** by an animal control officer. **The dog shall be placed in quarantine**, if necessary, for the proper length of time in accordance with state law, **or impounded and held for ten business days after the owner is given written notification of the impoundment and penalty in accordance with the notice provisions of section 8-40(a)(7), and thereafter destroyed in an expeditious and humane manner**. The ten-day time period shall allow for the owner to request a hearing pursuant to section 8-40(a)(8). The owner shall be responsible for payment of all boarding costs and other fees as may be required to humanely and safely keep the dog during any appeal procedure. If the owner files a written appeal, the dog must be held by

the animal control authority, or its designee, and may not be destroyed while the appeal is pending.

City Code, Ch. 8, Art II, Sec. 8-41 (Attack or bite by dangerous dog) (emphasis added).

In this case, since Cooper had previously been declared dangerous by the City of Port Orange, before he attacked, bit, and caused severe injury to another human being in the City of Palm Coast, the City proceeded under section 767.13(2), Florida Statutes, and Section 8-41 of the City Code. (App. 5).

STANDARD OF REVIEW

When conducting certiorari review of a decision of a local governmental body or hearing officer, the circuit court may determine only whether: (1) procedural due process was accorded; (2) the essential requirements of law were observed; and (3) the administrative findings and judgment are supported by competent substantial evidence. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995); *Educ. Dev. Ctr., Inc. v. City of W. Palm Beach Zoning Bd. of Appeals*, 541 So. 2d 106 (Fla. 1989). *See, e.g., Hughes v. Department of Public Safety, Div. of Animal Care and Control*, 11 Fla. L. Weekly Supp. 307b (Fla. 15th Jud. Cir. Ct., Feb. 3, 2004) (on certiorari review of an order declaring a dog vicious under the Palm Beach County Code and § 767.13(2), Florida Statutes, the circuit court is "constrained to review the record" to determine whether procedural due process was accorded, the essential requirements of law were observed, and the administrative findings and judgment

are supported by competent, substantial evidence). During the course of that review, the court is not permitted to reweigh the evidence or substitute its judgment for the judgment of the lower tribunal. *Haines City Cmty. Dev.*, 658 So. 2d at 530; *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1093 (Fla. 2000). Further, "[t]he issue before the [circuit] court is not whether the agency's decision is the 'best' decision or the 'right' decision or even a 'wise' decision, for these are technical and policy-based determinations properly within the purview of the agency." *Dusseau v. Meto Dade County Bd. of County Comm'rs*, 794 So. 2d 1270, 1276 (Fla. 2001). Furthermore, "a circuit court applies the 'wrong' or 'incorrect' law when it reweighs or reevaluates conflicting evidence and decides the merits of the underlying dispute anew." *City of Satellite Beach v. Goersch*, 217 So. 3d 1143, 1145 (Fla. 5th DCA 2017) (quoting *State, Dep't of Highway Safety & Motor Vehicles v. Wiggins*, 151 So. 3d 457, 463 (Fla. 1st DCA 2014)). Certiorari review is reserved for those situations where "there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Haines City Cmty. Dev.*, 658 So. 2d at 528 (quoting *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983)). As such, the writ of certiorari is intended to function "as a safety net" which "gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists." *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 842 (Fla. 2001).

ARGUMENT

I. PETITIONER WAS AFFORDED DUE PROCESS.

A. Petitioner received all of the process to which she was due in a proceeding held pursuant to section 767.13(2), Florida Statutes, and Palm Coast City Code Section 8-41.

Petitioner initially argues that she was not afforded due process because "the procedure does not establish a burden of proof or contain a standard of proof." (Petition, p. 4). She contends that the notice of hearing did not contain any information regarding how the hearing would be conducted, and that the City's ordinance governing dangerous dog proceedings "does not indicate which party has the burden of proof, or provide a standard of proof to be applied by the hearing officer." (Petitioner, pp. 56). In this argument, Petitioner equates this action to a forfeiture proceeding, relies on case law pertaining to forfeitures, and asserts that her "due process rights were violated when the hearing was held in the absence of established rules placing upon the City the burden to justify by clear and convincing evidence extinguishing Petitioner's property rights." (Petitioner, pp. 5-6).

The concept of procedural due process has been described as follows:

> Due process of law is not an exact concept, nor is it a technical concept with a fixed content unrelated to time, place, and circumstances; rather, it is a flexible concept that varies with the particular situation.
>
> . . . .
>
> Due process must be adapted to the end to be attained and shaped to the requirements of each class of litigation. Due process thus refers to the process that is appropriate to the case and just to the parties to be affected. It calls for such procedural protections as the particular

> situation demands. Any concept of rigid procedure is thus incompatible with the elastic nature of due process.

10A Fla. Jur. 2d Constitutional Law § 477 (2008) (citations omitted); *see also Student Alpha Id No. Guja v. Sch. Bd. of Volusia County*, 616 So. 2d 1011, 1017 (Fla. 5th DCA 1993) (quoting *Keough v. Tate County Bd. of Educ.*, 748 F.2d 1077, 1081 (5th Cir. 1984)) (The requirements of procedural due process "are not 'wooden absolutes.' The sufficiency of the procedures employed in any particular situation must be judged in light of the parties, the subject matter and the circumstances involved.").

Furthermore, with regard to administrative proceedings, participants are absolutely entitled to some measure of due process, but the nature of that due process depends upon the function of the proceeding, as well as the nature of interests affected. *See Florida Water Services Corp. v. Robinson*, 856 So. 2d 1035 (Fla. 5th DCA 2003). The concept of procedural due process in an administrative proceeding has been explained as follows:

> While "the concepts of due process in an administrative proceeding are less stringent than in a judicial proceeding, they nonetheless apply." *A.J. v. State, Dep't of HRS*, 630 So. 2d 1187, 1189 (Fla. 2d DCA 1994); *see also Hadley v. Dep't of Admin.*, 411 So. 2d 184, 187 (Fla. 1982) ("In such proceedings, it is sufficient if the accused . . . has reasonable opportunity to defend against attempted proof of such charges . . ..."). This opportunity to he heard must be meaningful. *See Metropolitan Dade Co. v. Sokolowski*, 439 So. 2d 932, 934 (Fla. 3d DCA 1983); *Rucker v. City of Ocala*, 684 So. 2d 836, 841 (Fla. 1st DCA 1996) ("To qualify under due process standards, the opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive

> (sic).”). “Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties.” *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990).

Miami-Dade County v. Reyes, 772 So. 2d 24, 28-29 (Fla. 3d DCA 2000).

Under section 767.13(2), Florida Statutes, and Section 8-41 of the City Code, the owner of a dog previously classified as dangerous that attacks or bites a person or a domestic animal without provocation and causes severe injury to that person may request a hearing regarding said matter. *See* § 767.13(2), Fla. Stat.; City Code, Sec. 8-41. Section 767.12(3), Florida Statutes, charges the City with the responsibility of establishing procedures for said hearings. The City’s procedures for those hearings are set forth in Section 8-40(c), and they provide:

> (1) If the owner requests a hearing, the hearing shall be held before an appointed hearing officer as soon as possible, but not later than 21 calendar days and not sooner than five calendar days from the date the animal control authority receives the appeal request from the owner.
>
> (2) A notice of hearing shall be sent to the owner by registered mail, or certified hand delivery at the address included on the written request for appeal. A hearing shall not be postponed or continued unless a request for continuance, showing good cause for such continuance, is received by the animal control authority at least five calendar days prior to the date set for the hearing. Upon proper notice to the owner, failure of the owner to appear personally or through legal counsel at the hearing shall result in an order affirming the initial determination.
>
> (3) All hearings shall be open to the public. **At the hearing, the owner or his or her representative and any other interested persons may present any evidence relevant to a determination of whether said animal is dangerous. Formal rules of evidence shall not apply but**

> **fundamental due process shall be observed and shall govern all proceedings.**
>
> (4) **The hearing officer shall hear and consider the evidence presented at said hearing and make a determination as to whether or not to uphold the determination of the animal control authority regarding classification, penalty, or both, in accordance with the provisions herein and F.S. § 767.12**.
>
> (5) At the conclusion of the hearing, the hearing officer shall issue findings of fact, based on evidence of record, and conclusions of law in an order affording the proper relief, said findings and relief being consistent with local and State law. The written order shall be filed with the animal control authority and the City Clerk promptly after issuance and shall be deemed entered upon the date of said filing. The animal control authority shall provide a copy of the written order to the owner or the owner's legal counsel by certified mail, return receipt requested, certified hand delivery, or service in conformance with the provisions of F.S. ch. 48, relating to service of process.
>
> (6) The owner may appeal the hearing officer's written order relating to the classification, penalty, or both to the circuit court in accordance with the Florida Rules of Appellate Procedure. Each party shall be responsible for its own fees and costs associated with the appeal. If an appeal is not timely filed, the written order of the hearing officer shall become final.

City Code, Sec. 8-40(c) (emphasis added).

It goes without saying that the City has the burden of proving that the animal was previously declared dangerous and that it has once again attacked or bitten another human and inflicted a severe injury on that human. The procedures set forth in Section 8-40(c), when judged in light of the parties, the subject matter, and the circumstances involved, afford adequate due process to a person whose dog has been previously declared dangerous and then bites and severely injures another human

being. *See generally Student Alpha Id No. Guja*, 616 So. 2d at 1017; *Reyes*, 772 So. 2d at 28-29.

Furthermore, even if the "clear and convincing evidence" standard had been applicable at the hearing, that standard would have been met. At the hearing, Petitioner admitted that Cooper bit Mr. Sandt. (T. 67). Petitioner also admitted that Cooper had previously bitten a woman in Port Orange. (T. 68). In addition, Petitioner admitted that she knew that the City of Port Orange had declared Cooper a dangerous dog because she was at the Port Orange hearing when that declaration was made. (T. 73). The documentation regarding the Port Orange bite was admitted into evidence without any objection from Petitioner. (T. 47; App. 80-90). The record also undeniably establishes that Mr. Sandt sustained severe injury as a result of Cooper biting him. (App. 11-16). Specifically, Mr. Sandt's testimony, Petitioner's testimony, and the photographs and medical records admitted into evidence show that Mr. Sandt sustained three bites to his leg and a bite to his hand, and that a portion of his face was torn off. (T. 13, 14; App. 11-16). The Hearing Officer found Mr. Sandt's testimony to be more credible than Petitioner's testimony, and thus, accepted Mr. Sandt's version of the events. (*See* "Order on Final Hearing," p. 3, ¶ 12 ("The undersigned hearing officer finds the testimony of Mr. Sandt to be more credible."); T. 91 (commenting that Mr. Sandt's testimony has been consistent since day one, while Petitioner's testimony has been inconsistent)). There is

absolutely no evidence in the record that Mr. Sandt provoked Cooper to bite him or that Mr. Sandt was engaged in threatening or criminal activity when Cooper bit him. The record, thus, contains clear and convincing evidence, much of which was provided by Petitioner herself, supporting the Hearing Officer's Final Order declaring that in accordance with section 767.13(2), Florida Statutes, and Section 8-41 of the City Code, Cooper shall be destroyed in an expeditious and humane manner. The evidence shows that Petitioner's desired standard of proof and burden of proof were indeed met, and that the failure of the Notice of Hearing or the City Code to specify that burden of proof or standard of proof did not result in a denial of Petitioner's due process rights.

B. Petitioner was afforded due process because neither Florida Statutes nor the City Code permit a dog owner, whose dog has previously been declared dangerous and subsequently attacks and bites another human and causes severe injury to that human, to simply find a new home for the dog.

Petitioner next argues that she "was not afforded due process because there is a less drastic alternative to killing Cooper." (Petition, p. 8). She contends, specifically, that Cooper should be sent to live with Rottweiler rescuer Joseph Pimental, whom she contends has a "proven track record of caring for dogs that have a history of aggression" and who "stands ready to provide Cooper a loving home"

in a secure enclosure that would provide him with a humane existence, where he would not be exposed to the public.[3] (Petition, p. 8).

It is unclear how the Hearing Officer's decision to reject a "less drastic alternative" that is not provided for in either Florida Statutes or the City Code amounts to a violation of Petitioner's right to due process. It seems that in this argument, Petitioner is essentially asking this Court to apply the strict scrutiny test that is applicable to a determination of whether there has been a deprivation of a fundamental right, as a means to avoid having her dog, that as of the time that the Hearing Officer entered her Final Order in this matter had bitten and severely injured two different individuals within a span of less than two months, put to sleep.

To the extent that Petitioner's argument raises a challenge to the constitutionality of section 767.13(2), Florida Statutes, or Section 8-41 of the City Code, Petitioner's argument must be denied. It is well-established that "a petition seeking certiorari review is not the proper procedural vehicle to challenge the constitutionality of a statute or ordinance." *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003) (citing *City of Deerfield Beach v.*

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[3] Mr. Pimental testified at the hearing that the "loving home" and humane existence that he would provide to Cooper would be to house Cooper like the seven other aggressive dogs that he keeps at his compound, in a 10x10 inside kennel that is covered and locked and a 10x10 outside kennel that is covered and locked, where Cooper would interact with, be fed by, and receive attention from only Mr. Pimental. (T. 81).

Vaillant, 419 So. 2d 624, 626 (Fla. 1982)). Thus, this Court should decline to address this argument and should deny the Petition for Writ of Certiorari.

If this Court is inclined to address this argument, it still should be denied. It is well-established that if a law impairs a fundamental right, that is, a right which has its source in and is explicitly guaranteed by, the federal and/or Florida constitutions, the court strictly scrutinizes the law. *See, e.g., Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004) (A fundamental right is one which has its source in and is explicitly guaranteed by the federal or Florida Constitution.). Under the strict scrutiny test, the law must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest. *See id.*; *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir.1993) (applying strict scrutiny to review Dallas ordinance). In other words, the law must advance a compelling state interest by the least restrictive means possible.

If, however, the court determines that the right at issue is not a fundamental right, the rational basis test applies. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). To withstand a rational basis review, the law must "bear some rational relationship to legitimate state purposes." *Id.* This standard is highly deferential. *See New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976) ("[T]he judiciary may not sit as a

superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.").

The right to own and keep dogs is not a fundamental right. *Nicchia v. New York*, 254 U.S. 228, 230, 41 S. Ct. 103, 65 L. Ed. 235 (1920) (property in dogs is "of an imperfect or qualified nature and [dogs] may be subjected to peculiar and drastic police regulations by the state without depriving their owners of any federal right"). *See also Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 704, 17 S. Ct. 693, 41 L. Ed. 1169 (1897) ("Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the State, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens."); *American Dog Owners Ass'n, Inc. v. Dade County, Fla.*, 728 F. Supp. 1533, 1541 (S.D. Fla. 1989) ("The weight of authority, however, demonstrates that ownership of dogs does not implicate fundamental constitutional rights."); *Gates v. City of Sanford*, 566 So. 2d 47, 49 (Fla. 5th DCA 1990) (recognizing that the regulation of animals has a long-standing history of constitutionality); *Bess v. Bracken Cnty. Fiscal Court*, 210 S.W.3d 177, 182 (Ky. Ct. App. 2006) (dog regulations are within the scope of a state's general police power, which "authorizes regulation and destruction of property without compensation if it promotes the general welfare of the citizens") (internal quotation

marks omitted). Thus, it is well-established that: the right to own and keep a dog is not a fundamental right; governmental entities may regulate and order the destruction of dogs in order to protect the health, safety, and welfare of their citizens; and when reviewing an order to destroy a dog, a court should not apply the "least restrictive means" test, but instead, should apply the rational basis test.

Under the aforementioned authorities, Petitioner has no fundamental right to own or keep Cooper, a dog which after being declared dangerous by another municipality, attacked, bit, and caused severe injury to a human being in the City of Palm Coast. The City was well within its power under section 767.13, Florida Statutes and its City Code to require, in order to protect the health, safety, and welfare of its citizens, that a dog that was previously classified as dangerous that again attacks or bites a person without provocation "shall" be immediately confiscated, placed in quarantine for the proper length of time in accordance with state law, or impounded and held for ten business days after the owner is given written notification of the impoundment and penalty in accordance with the notice provisions of its Code, and thereafter destroyed in an expeditious and humane manner. City Code, Sec. 8-27(a) ("This article establishes, under the City's 'policing powers' enforcement standards in regard to controlling the animal population in the City of Palm Coast for the health, safety and general welfare of its residents."). Section 767.13 and the City's Code are rationally related to the City's legitimate

interest in protecting the health, safety, and general welfare of the City's residents, and thus, Petitioner's argument on this point should be rejected by this Court.

II. The Essential Requirements of Law Were Observed.

Petitioner next argues that no competent substantial evidence was presented to establish that Cooper was declared dangerous in another municipality. She contends that unauthenticated hearsay documents are the only evidence in the record that Cooper was declared a dangerous dog by another municipality. (Petition, p. 11)

Petitioner's argument is refuted by her own testimony at the hearing. Petitioner testified that she knew that Cooper had been declared a dangerous dog because she was at the Port Orange hearing when that determination was made. (T. 73). Thus, Petitioner's contention that "[n]o witness with firsthand knowledge of the proceeding testified, and no witness established that the dog was the subject of the proceeding in Port Orange was the same dog that bit Mr. Sandt on February 24, 2018," is completely refuted by Petitioner's very own testimony. (*See* Petition, pp. 3, 11; T. 73).

Petitioner's testimony that Cooper was declared a dangerous dog by the City of Port Orange is buttressed by the Port Orange documentation establishing that Cooper was declared a dangerous dog by Port Orange's Dangerous Dog Board. (App. 85-90). Thus, Petitioner's testimony, along with the documents admitted into evidence without any objection from Petitioner, constitute competent substantial

evidence in the record establishing that Cooper had been declared a dangerous dog before he attacked and bit Mr. Sandt.

Petitioner next argues that the Port Orange determination that Cooper is a dangerous dog was *ultra vires* and void because at that time that determination was made, Cooper was no longer located in Port Orange, but was instead, located in Palm Coast. (Petition, p. 11). Under Petitioner's argument, any individual whose dog is the subject of dangerous dog proceedings under chapter 767, Florida Statutes, could either prevent said dangerous dog proceedings, or evade a dangerous dog determination by simply moving the dog outside the jurisdictional limits of the city or county that had initiated the dangerous dog proceedings. That would lead to absurd results.

Section 767.12(1)(b) clearly precludes the owner of a dog that is the subject of a dangerous dog investigation from relocating the dog or transferring ownership of the dog pending the outcome of the investigation and any hearings or appeals related to the dangerous dog classification or any penalty imposed under this section. The purpose of that requirement is obviously so that the municipality or local governmental entity knows the location of the dog and so that it can enforce the registration and other requirements set forth in section 767.12(5)(a) in the event the dog is declared dangerous but not ordered to be destroyed in a humane and expeditious manner. Petitioner and her daughter defied that law by transferring

Cooper's ownership to Petitioner and moving him to Palm Coast. (App. 85 ("Mrs. Benton already moved the dog to her mothers [sic] house in Palm Coast.")). Their actions do not render the Port Orange determination *ultra vires* or void. Petitioner's argument on this point should, therefore, be rejected by this Court.

III. The Hearing Officer's Final Order Is Supported By Competent, Substantial Evidence.

In this argument, Petitioner again asserts that "there is no non-hearsay evidence in record that establishes that Cooper was declared dangerous as no witness with firsthand knowledge regarding the proceeding or determination testified and no witness with firsthand knowledge identified Cooper as the same dog that was declared dangerous by Port Orange." (Petition, p. 13). Again, Petitioner's argument is completely refuted by her very own testimony. As set forth above, Petitioner testified that she knew that Cooper had been declared dangerous by Port Orange because she was present at the Port Orange hearing when the Port Orange Dangerous Dog Board declared Cooper to be a dangerous dog. (T. 73).

Thus, the record in this matter unequivocally establishes that more than hearsay evidence was introduced to establish that Cooper was declared dangerous by the City of Port Orange. Accordingly, the record contains competent substantial evidence to support the Hearing Officer's Final Order and Petitioner's argument on this point should be rejected by this Court.

CONCLUSION

WHEREFORE, based upon the foregoing, Respondent, the City of Palm Coast, respectfully requests that this Honorable Court conclude that Petitioner received due process, the essential requirements were observed, and the Hearing Officer's Findings and Judgment are supported by competent, substantial evidence, and deny the Petition for Writ of Certiorari.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of September, 2018, this document was filed with the Clerk of this Court via the Florida Courts E-Filing Portal, and that a true and correct copy of the foregoing was served via electronic mail on: **Marcy**

LaHart, Esq.,, marcy@floridaanimallawyer.com, Marcy I. LaHart, P.A., 207 SE Tuscawilla Rd., Micanopy, FL 32667-4222, counsel for Petitioner.

/s/ *Erin J. O'Leary*
ERIN J. O'LEARY
Florida Bar No.: 0001510

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response to Petition for Writ of Certiorari complies with the font requirements of Florida Rule of Appellate Procedure 9.100(*l*).

/s/ *Erin J. O'Leary*
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