September 7, 2007

The Honorable Eugene Baten
Vice Chairman, Sumter County Council
13 E. Canal Street
Sumter, South Carolina 29150

Dear Mr. Baten:

In a letter to this office you referenced proposed ordinance 07-647 dealing with restrictions on "fighting dogs" in Sumter County. The term "fighting dog" as used in the ordinance is defined as "...a dog whose breeding includes the bloodlines of the American Pit Bull Terrier." You have questioned the constitutionality of targeting a particular breed of dog as dangerous and the constitutionality of targeting the number of animals a citizen can own if they are deemed dangerous.

As to ordinances generally, as indicated in a prior opinion of this office dated December 14, 2006

> ...an ordinance is a legislative enactment and therefore, is presumed constitutional. Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). Our Supreme Court "has held that a duly enacted ordinance is presumed constitutional; the party attacking the ordinance bears the burden of proving its unconstitutionality beyond a reasonable doubt. City of Beaufort v. Baker, 315 S.C. 146, 153, 432 S.E.2d 470, 474 (1993). Moreover, "[w]hile this office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

Therefore, if enacted, the ordinance referenced by you would be enforceable until declared otherwise by a court.

The proposed ordinance places certain restrictions on breeders, owners and those who possess "fighting dogs" which, as specified above, is defined as a dog whose breeding includes the bloodlines of an American pit bull terrier. Generally, pursuant to S.C. Code Ann. §47-3-20, a county is authorized to enact ordinances "...for the care and control of dogs, cats, and other animals and to prescribe penalties for violations." As to the constitutionality of targeting a particular breed of dogs

as dangerous, it must be first noted that Article VIII, Section 14(5) of the State Constitution requires statewide uniformity of general law provisions regarding "criminal laws and the penalties and sanctions for the transgression thereof." As a result, local governments may not criminalize conduct that is legal under a statewide criminal law. Connor v. Town of Hilton Head, 314 S.C. 251, 442 S.E.2d 608 (1994) (a municipality cannot criminalize nude dancing where relevant State law does not); City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991) (local government cannot impose different penalties for possession of marijuana than those established under state law).

With regard to such, it must be noted that S.C. Code Ann. §§ 47-3-710 et seq. provide for the regulation of dangerous animals generally. For instance, Section 47-3-740 states that

> (B) [n]o person may possess with intent to sell, offer for sale, breed, or buy or attempt to buy a known dangerous animal....

However, Section 47-3-710(C) states that "[a]n animal is not a 'dangerous animal' solely by virtue of its breed or species." Therefore, state law has precluded determining a breed of dog as dangerous solely by virtue of its breed or species. An analysis of the proposed ordinance would have to be made in association with such general statewide prohibition. As stated above, a local government may not criminalize conduct that is otherwise legal under state law.

Aside from state law considerations, courts in other jurisdictions have upheld the constitutionality of legislation targeting a particular breed of dogs as dangerous. The Fourteenth Amendment to the United States Constitution provides for equal protection of the laws. Dog owners have argued that ordinances such as suggested by you that target a specific breed of dogs violate the equal protection clause by creating irrational distinctions between various breeds of dogs.

It is generally recognized that legislation which does not involve a fundamental right or involve a suspect class will be upheld against an equal protection challenge if it is rationally related to a legitimate government purpose. Kelley v. Johnson, 425 U.S. 238 (1976); Bibco Corp. v. City of Sumter, 332 S.C. 45, 504 S.E.2d 112 (1998). As referenced in a prior opinion of this office dated April 22, 1999,

> [t]he determination of whether a classification is rational is initially one for the legislative body and will be upheld if it is not plainly arbitrary and there is a reasonable hypothesis to support it...Great deference must be given to the classification passed by the legislation...No statute is subject to an equal protection challenge as long as the classification drawn by the legislation bears a rational relationship to a legitimate governmental policy.

As determined in Colorado Dog Fanciers, Inc. v. City and Council of Denver, 820 P.2d 644 (Col. 1991), since owners of dogs are not a suspect classification and an ordinance placing restrictions on pit bull dogs does not implicate a fundamental right, the rational basis test is applicable.

In Colorado Dog Fanciers, Inc., supra, the supreme court referenced findings by the trial court that pit bull dog attacks were often more severe than attacks by other dogs and findings that pit bulls tend to be stronger than other dogs in its holding that an ordinance placing restrictions on pit bull owners did not violate the dog owners' right to equal protection of the laws. The court stated that

> [s]ince ample evidence exists to establish a rational relationship between the city's classification of certain dogs as pit bulls and the legitimate governmental purpose of protecting the health and safety of the city's residents and dogs, the trial court correctly concluded that the ordinance did not violate the dog owners' right to equal protection of the laws.

820 P.2d at 652.

In Greenwood v. City of North Salt Lake, 817 P.2d 816 (Utah, 1991), owners and breeders of pit bull terriers initiated an action which challenged the constitutionality of a city animal control ordinance. The Utah Supreme Court held that a city ordinance imposing special licensing, confinement, muzzling and insurance requirements for dogs classified as "fierce, dangerous or vicious" was rationally related to the valid purpose of protecting public safety and, therefore, did not violate equal protection. The Court found that

> [a]lthough it may be true that not all pit bulls are dangerous, the evidence supports the conclusion that, as a group, pit bulls are dangerous animals. Clearly, the ordinance's classification treating pit bull breeds differently than other breeds reasonably furthers and is rationally related to public safety.

817 P.2d at 821. Courts in other jurisdictions have upheld against equal protection challenges similar ordinances relating to types of dogs and particularly pit bull dogs. See: Starkey v. Chester Township, 628 F.Supp. 196 (E.D.Pa.1986); Hearn v. City of Overland Park, 772 P.2d 758, *cert. denied*, 493 U.S. 976 (Kan. 1989); Garcia v. Village of Tijeras, 767 P.2d 355 (N. Mex. 1988); State v. Peters, 534 So.2d 760 (Fla. 1988); Vanater v. Village of South Point, 717 F.Supp. 1236 (S.D.Ohio, 1989); Singer v. Cincinnati, 566 N.E.2d 190 (Ohio, 1990); City of Toledo v. Tellings, 2007 WL 2331906 (Ohio, 2007). See also: cases cited in 80 A.L.R.4th 70 (1990) "Validity and construction of statute, ordinance, or regulation applying to specific dog breeds, such as "pit bulls" or "bull terriers"; 4 Am.Jur.2d Animals, Section 25 ("Ordinances specifically enacted regarding pit bull terriers have been upheld as constitutional. Such statutes have withstood allegations that such statutes deny the owner...equal protection under the law."). Consistent with such, there is support for upholding the constitutionality of an ordinance targeting a particular breed of dog as dangerous. But see: American Dog Owners Association v. Des Moines, 469 N.W.2d 416 (Iowa, 1991) and American Dog Owners Association v. Lynn, 533 N.E.2d 642 (Mass. 1989) (statutes in question were void for vagueness in that statutes failed to enumerate standards for determination of what dog was a pit bull); State v.

Murphy, 860 N.E.2d 1068 (Ohio, 2006) (evidence did not support verdict that defendant's dogs were vicious simply because they were of a breed known as pit bulls).

You also questioned the constitutionality of the provision of the ordinance targeting the number of animals a citizen can own if they are deemed dangerous. Courts in other jurisdictions have upheld ordinances placing a limit on the number of dogs generally that can be owned by a particular owner. In State v. Reinke, 702 N.W.2d 308 (Minn. 2005), the Minnesota Court of Appeals construed an ordinance which prohibited three or more dogs on property owned by an individual residing in a high density population area. The court in upholding the ordinance stated that

> ...appellant has failed to meet her burden of proving it is not even debatable that regulating the number of dogs per residence has a substantial relationship to controlling the problems of dog noise, temperament, and odor as they affect the public health, safety, and welfare. It is at least debatable that the limitation of two dogs per residential premises in a high density population area protects public health.

702 N.W.2d at 312. See also: Bar Harbour Village v. Welsh, 879 So.2d 1265 (Fla. 2004); Holt v. City of Sauk Rapids, 559 N.W.2d 444 (Minn. 1997); Kourlis v. Port, 18 P.3d 770 (Colo. 2001).

Several cases have upheld ordinances limiting the number of dogs and cats to three each at a particular residence. See: Gates v. City of Sanford, 566 So.2d 47 (Fla. 1990); People v. Stobridge, 339 N.W.2d 531 (Mich., 1983); People v. Yeo, 302 N.W.2d 883 (Mich. 1981); Downing v. Cook, 431 N.E.2d 995 (Ohio,1982). As to pit bulls, in City of Toldeo v. Tellings, supra, the Ohio Supreme Court held that an ordinance limiting ownership of one pit bull per person was "...rationally related to the city's interest in protecting its citizens from harm caused by pit bulls." Evidence was cited that pit bulls "...cause more damage than other dogs when they attack, cause more fatalities in Ohio than other dogs, and cause Toledo police officers to fire their weapons more often than people or other breeds of dogs cause them to fire their weapons."

Therefore, consistent with the above, there is a basis to uphold the referenced ordinance on questions dealing with the constitutionality of targeting a particular breed of dogs as dangerous and the constitutionality of targeting the number of animals a citizen can own if they are deemed dangerous. However, with regard to the particular ordinance addressed by you, the issue is arguably fact specific in that the term "fighting dog" is defined as "...a dog whose breeding includes the bloodlines of the American Pit Bull Terrier". Therefore, only a court could resolve the issue with finality. I would only further advise that I have attempted to outline the law generally in this area and any opinion of the Attorney General is advisory only. Inasmuch as there are no South Carolina cases that I am aware of that have interpreted similar ordinances, I strongly suggest that a declaratory judgment action be brought to determine the constitutionality of such an ordinance with finality.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General