

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

FILED IN OFFICE  
MAR 12 2007  
Deputy Clerk Superior Court  
Fulton County, Georgia

CHESLEY V. MORTON and JENNIFER ROBINSON,

Plaintiffs,

v.

STATE OF GEORGIA DEPARTMENT OF AGRICULTURE and TOMMY IRVIN, in His Official Capacity as Commissioner,

Defendants.

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CIVIL ACTION FILE NO: 2007 CV 130839

**PLAINTIFFS' VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

Plaintiffs Chesley V. Morton and Jennifer Robinson (collectively "Plaintiffs") file this, their Complaint for Injunctive and Declaratory Relief against Defendants State of Georgia Department of Agriculture (the "Department") and Tommy Irvin, in His Official Capacity as Commissioner (the "Commissioner") (the Department and the Commissioner, collectively "Defendants"), and respectfully show the Court as follows:

**INTRODUCTION**

1. Every day, hundreds of adoptable but unwanted puppies, kittens, dogs and cats are euthanized or killed in animal shelters across the State. More than a thousand are killed each week, and tens of thousands die in shelters every year. The Commissioner, Defendant Tommy Irvin, recognizes the crisis: "[m]any Georgians do not spay or neuter their animals, resulting in thousands of dogs and cats being euthanized because only a few are adopted."

2. In 1990, the General Assembly recognized that euthanasia is a tragic but necessary method of reducing the number of unwanted dogs and cats who have been discarded

and must be killed in public and private animal shelters, and determined that dogs and cats who have to be killed in shelters must be given the most humane and stress-free death possible under the circumstances.

3. To effect that goal, then-Representative Chesley V. Morton sponsored a bill which ultimately became O.C.G.A. § 4-11-5.1 (the “Humane Euthanasia Act”). With the intent of eliminating as much distress, pain and suffering as possible, the statute mandates: “the use of sodium pentobarbital or a derivative of it shall be the exclusive method for euthanasia of dogs and cats by animal shelters or other facilities which are operated for the collection and care of stray, neglected, abandoned, or unwanted animals.” O.C.G.A. § 4-11-5.1(a). The Department’s regulations impose the same requirement. Ga. Comp. R. & Regs. 40-13-13-.08(1).

4. The statute also requires that animals must not be “left unattended between the time euthanasia procedures are first begun and the time death occurs.” O.C.G.A. § 4-11-5.1(f).

5. Defendants have a duty to inspect shelters throughout the state, to enforce all applicable laws and regulations, and to issue licenses or renewals only to those facilities in compliance with all applicable laws, including the Humane Euthanasia Act.

6. Many shelters in Georgia continue to utilize carbon monoxide gas chambers to kill kittens, puppies, dogs and cats. This is a method of killing expressly prohibited by the Humane Euthanasia Act. Defendants have inspected shelters which continue to use gas chambers, inspected the gas chambers, and subsequently licensed and relicensed these facilities. Furthermore, Defendants have affirmatively approved this method of killing on multiple occasions, despite the fact that it is illegal and can cause extreme distress to animals.

7. Euthanasia by carbon monoxide gassing creates the potential for severe suffering.

For example, in shelters in the State:

- (a) Several dogs or cats are often forced into small cages and then rolled into the gas chamber, which resembles a steel box. After they are loaded into the chamber they can be heard scratching at the cages as if they are trying to get out. Some of the animals begin twitching and others begin to run frantically back and forth in their cages (where possible), as if they are desperate to find a way out of the cage. This is especially true with cats.
- (b) After the gas comes on inside the chamber, dogs often howl, as if they are experiencing agony and fear, and this sometimes goes on for as long as two minutes.
- (c) Kittens and puppies are sometimes gassed multiple times, because they do not absorb sufficient amounts of gas to die the first time, and they are often put into the gas chamber in the same cage with dogs and cats who are dying, howling and scratching to get out as they suffocate. When the kittens and puppies come out of the chamber, if they have not died, they are usually sick from the gas and are then put back in until they finally suffocate and die.
- (d) Like kittens and puppies, pregnant and sick animals may not die quickly from gassing, and so they may have to go through multiple gassings before they are killed.

- (e) A dog named Grace came out of the gas chamber, alive, after a full cycle. She was covered in the blood and body secretions of the dogs who had died in the cage with her, and she was violently shaking.
- (f) Many dogs and cats who are gassed are not given any food or water for at least a day before they are killed, so that they are further stressed. Food and water are withheld as a matter of convenience, since that reduces the amount of feces and urine inside the chamber.

8. Defendants are in violation of their duty pursuant to the Humane Euthanasia Act and the Georgia Animal Protection Act, O.C.G.A. § 4-11-1 *et seq.*, by both permitting and approving use of carbon monoxide gas chambers at shelters around the state. This complaint for injunctive and declaratory relief is based on the Defendants' failure to uphold Georgia law and the Department's own rules and regulations, which require euthanasia by injection.

### **PARTIES**

- 9. Plaintiff Chesley V. Morton is a citizen and taxpayer of the State of Georgia.
- 10. Plaintiff Chesley V. Morton is a former member of the Georgia House of Representatives and was the sponsor of the Humane Euthanasia Act.
- 11. Plaintiff Jennifer Robinson is a citizen and taxpayer of the State of Georgia. She is a former humane society employee with a longstanding commitment to animal protection, sheltering and welfare. Her two-and-a-half-year-old dog Pacino was killed in a gas chamber at Clayton County Animal Control, a facility that is licensed by the Department and which kills dogs and cats by carbon monoxide gassing.
- 12. The Department is an administrative regulatory and enforcement agency of the State of Georgia established pursuant to O.C.G.A. § 2-2-1. The Department is required to inspect

animal shelters to ensure proper licensure and compliance with all applicable laws and regulations. O.C.G.A. § 4-11-9.2.

13. The Commissioner is the chief administrative officer of the Department, pursuant to O.C.G.A. § 2-2-7. The Commissioner is responsible for licensing animal shelters throughout the State. O.C.G.A. § 4-11-3.

### **JURISDICTION AND VENUE**

14. This Court has jurisdiction over Defendants pursuant to, *inter alia*, GA. CONST. ART. 6, § 4, ¶ I and O.C.G.A. §§ 9-4-2, 15-6-8.

15. Venue is proper pursuant to, *inter alia*, GA. CONST. ART. 6, § 2, ¶ III and O.C.G.A. §§ 9-10-30, 14-2-510.

### **THE HUMANE EUTHANASIA ACT AND DEFENDANTS' ILLEGAL ACTS**

#### **The Humane Euthanasia Act**

16. The Humane Euthanasia Act is part of the Georgia Animal Protection Act—a comprehensive statutory scheme that establishes minimum standards of animal care and vests oversight, licensing, and enforcement authority with the Department.

17. The Humane Euthanasia Act was enacted in 1990 with the intention of eliminating potentially painful and extremely stressful circumstances for dogs and cats dying in Georgia shelters.

18. The Humane Euthanasia Act states that sodium pentobarbital shall be the exclusive method for euthanasia of stray, neglected, abandoned, or unwanted dogs and cats. Sodium pentobarbital belongs to a class of pharmacological agents known as barbiturates which act as central nervous system depressants, *i.e.*, sedatives.

19. In addition to restricting the method of euthanasia, the Act prescribes the manner in which the euthanasia procedure is to be carried out. Euthanasia must be performed by either a licensed veterinarian or a properly trained euthanasia technician working under the supervision of a licensed veterinarian. O.C.G.A. § 4-11-5.1(e). In cases where euthanasia is not performed by a licensed veterinarian, at least one employee of the shelter must observe the technician perform the procedure. *Id.*; Ga. Comp. R. & Regs. § 40-13-13-.08(6). The law further requires that the veterinarian or technician be present with the animal from the time the euthanasia procedure is initiated until the time of death occurs. O.C.G.A. § 4-11-5.1(e)-(g).

20. When a proper dose of sodium pentobarbital is administered by trained personnel, the drug causes rapid loss of consciousness followed shortly thereafter by physical death. In most cases it can be administered without causing fear or distress in the animal. For these reasons, euthanasia by injection is superior to other methods of euthanasia.

21. Other methods of taking the life of a dog or cat are prohibited by the Act either expressly, *e.g.*, decompression chambers, or by implication, *e.g.*, carbon monoxide chambers which were not grandfathered in pursuant to O.C.G.A. § 4-11-5.1(b)(1), which allowed the continued use of specific gas chambers *if* that gas chamber was in use prior to July 1, 1990.

22. The Humane Euthanasia Act's requirement that animal shelters employ the most humane method of euthanasia comports with widely accepted standards in the professional animal sheltering community including those adopted by the American Veterinary Medical Association, the National Animal Control Association, the Humane Society of the United States, the American Society for the Prevention of Cruelty to Animals, and the American Humane Association.

23. For more than twenty years, experts impaneled by the American Veterinary Medical Association (“AVMA”), have consistently concluded that “the intravenous injection of barbituric acid derivatives [*e.g.*, sodium pentobarbital] is the preferred method for euthanasia of dogs [and] cats[.]”

24. The Humane Euthanasia Act sets forth exceptions so that euthanasia can be performed (a) with “[a]ny substance which is clinically proven to be as humane as sodium pentobarbital and which has been officially recognized as such by the American Veterinary Medical Association,” but neuromuscular blocking agents may never be used, O.C.G.A. § 4-11-5.1(b)(2); or (b) by other humane methods only where an individual dog or cat “poses an extreme risk or danger to the veterinarian, physician, or lay person performing euthanasia.”

25. In 1994, the General Assembly adopted O.C.G.A. § 4-14-1, finding that overbreeding of dogs and cats “results in the birth of thousands of animals who become strays, suffer privation and death, constitute a public nuisance and health hazard, and, ultimately, are impounded and destroyed at great public expense.”

26. In July 2001, the Commissioner acknowledged the gas chamber ban, and rejected a request to seek a change in the Humane Euthanasia Act which would have allowed the installation of new gas chambers in county shelters.

27. In 2002, a significant majority of the Georgia electorate reiterated the majority sentiment regarding the crisis caused by dog and cat overpopulation. Article 3, Section IX, ¶ VI(m) of the Georgia Constitution, adopted after a ballot referendum, authorizes the appropriation of funds for sterilization (spay/neuter) programs to “control dog and cat overpopulation and thereby reduce the number of animals housed and killed in animal shelters[.]”

28. The problems contributing to the need for humane euthanasia remain a focus for the Department, which is charged with oversight and enforcement responsibilities of companion animal issues: “Dog and cat overpopulation is a tragic problem in all areas of Georgia. Each year thousands of healthy, friendly dogs and cats are euthanized in Georgia’s animal shelters because people have allowed them to stray and breed.” (*available at* [http://agr.georgia.gov/vgn/images/portal/cit\\_1210/2/19/41263904DCSF\\_Tifold\\_11-20-03-OFFICIAL.pdf](http://agr.georgia.gov/vgn/images/portal/cit_1210/2/19/41263904DCSF_Tifold_11-20-03-OFFICIAL.pdf), accessed Feb. 10, 2007).

**Licensing of Animal Shelters Under the Animal Protection Act**

29. The Department is the regulatory agency of the State government which oversees various plant and animal industries. Ga. Comp. R. & Regs. § 40-13-13-.01 *et seq.* The Animal Protection Section of the Department was created in 1986 following the passage of the Georgia Animal Protection Act. O.C.G.A. § 4-11-3. The Department regulates shelters by licensing, permitting, and inspecting and has the authority to withhold, suspend, or revoke licenses and permits for noncompliance. Ga. Comp. R. & Regs. §§ 40-13-13-.02; 40-13-13-.03; 40-13-13-.09.

30. The Animal Protection Section conducts pre-license inspections of new applicants, issues and renews licenses, and “investigates complaints of people and/or facilities required to be in compliance with the Animal Protection Act... [and] the Animal Protection Rules and Regulations...” Animal Protection – FAQ’s (*available at* [http://agr.georgia.gov/00/article/0,2086,38902732\\_0\\_40729045,00.html](http://agr.georgia.gov/00/article/0,2086,38902732_0_40729045,00.html), accessed Feb. 9, 2007).

31. The Animal Protection Section employs inspectors and field supervisors “who are responsible for enforcing the Animal Protection Act... [and] Animal Protection Rules and Regulations[.]” Ga. Comp. R. & Regs. § 40-1-1-.01(5). According to the Department’s web site,



the duties of the Animal Protection Section inspectors and field supervisors include “[i]nspecting animal shelters [and] taking appropriate regulatory action when guidelines are not met.”

32. It is unlawful for any person to operate an animal shelter without a valid license issued by the Commissioner. O.C.G.A. § 4-11-3; Ga. Comp. R. & Regs. § 40-13-13-.09(1). Willful disregard or violation of the Georgia Animal Protection Act or its related rules and regulations is grounds for refusal to issue, renew, suspend or revoke a license. O.C.G.A. § 4-11-7(2).

**Defendants’ Illegal Acts in Authorizing Carbon Monoxide Gassing**

33. Defendants are aware of multiple, serious, ongoing violations of the Humane Euthanasia Act and the Animal Protection Rules and Regulations. The Department openly flouts the Humane Euthanasia Act and its own rules and regulations by licensing animal shelters that unlawfully kill dogs and cats with carbon monoxide gas, by inspecting illegal gas chambers, and by renewing licenses for shelters with gas chambers. Moreover, the Department purports to authorize the killing of dogs and cats in carbon monoxide gas chambers upon the request of licensees. The following examples are illustrative but not exhaustive of these violations:

- (a) In August 1998, the Department inspected and approved use of a carbon monoxide gas chamber at the Chatham County Animal Shelter.
- (b) In February 2002, a routine inspection of the Bulloch County Animal Shelter by the Department approved the use of a carbon monoxide gas chamber to kill animals at the shelter.
- (c) In June 2002, the Department received a letter from a veterinarian describing the use of the carbon monoxide gas chamber at the Bulloch County Animal Shelter.

- (d) On March 18, 2005, a Department inspector conducting a routine inspection at Tifton-Tift County Animal Shelter (“TTCAS”) discussed the shelter director’s request “to install a gas chamber for their facility.”
- (e) In October 2005, TTCAS acquired a carbon monoxide gas chamber. Approximately five months later, TTCAS began using its carbon monoxide chamber to kill dogs and cats.
- (f) On May 26, 2006, an inspector for the Department observed TTCAS’ director killing animals by carbon monoxide gassing. On information and belief, no enforcement or corrective action was taken by the Department.

34. The Department may lawfully do only those things which are necessarily incident to the proper discharge of its statutory duties and obligations. The Department is not authorized to sanction violations of Georgia law by licensing animal shelters that kill dogs and cats in a manner that has been prohibited by statute and the Department’s own regulations for more than sixteen years.

35. The Department’s actions in authorizing and allowing the killing of dogs and cats by carbon monoxide gassing are beyond the scope of the agency’s power. As such, the agency’s conduct is a violation of Georgia law and *ultra vires*.

#### **COUNT I: INJUNCTION**

36. Plaintiffs reallege and incorporate by reference each and every allegation contained in this Complaint as if fully set forth herein.

37. Plaintiffs seek temporary and permanent injunctive relief to restrain the *ultra vires* acts of Defendants pursuant to O.C.G.A. § 9-5-1 which provides for injunctive relief to restrain

acts which are “illegal or contrary to equity and good conscience and for which no adequate remedy is provided by law.”

38. The action of a state agency is *ultra vires* when the action is beyond the scope of the powers that been expressly or impliedly conferred on the agency. *Newsome v. City of Union Point*, 249 Ga. 434, 436, 291 S.E.2d 712, 714 (1982).

39. The Humane Euthanasia Act requires animal shelters to euthanize unwanted dogs and cats with sodium pentobarbital in accordance with the procedures prescribed by the Act. Killing unwanted dogs and cats by carbon monoxide gassing violates O.C.G.A. § 4-11-5.1 and Ga. Comp. R. & Regs. § 40-13-13-.08, and is *per se* unlawful.

40. The Department’s actions in inspecting and licensing animal shelters that unlawfully kill dogs and cats by carbon monoxide gassing are *ultra vires*.

41. The State government and its agencies must perform their duties faithfully. O.C.G.A. § 9-6-20; *Head v. Browning*, 215 Ga. 263, 109 S.E.2d 798 (1959). At a minimum, the obligation of faithful execution imposes a duty to uphold and enforce the law and to refrain from authorizing violations of the law. *See, e.g., Moore v. Robinson*, 206 Ga. 27, 36, 55 S.E.2d 711, 718 (1949).

42. The Department and its agents are charged with ensuring that licensed facilities comply with the Humane Euthanasia Act and the Department’s own rules and regulations. The Department is not authorized to ignore the law or to sanction violations thereof.

43. As taxpayers of the State of Georgia, Plaintiffs have an interest in having the laws executed and the Defendants’ duties enforced where, as here, the question is one of public right and the object is to procure enforcement of a public duty. O.C.G.A. § 9-6-24.

44. The Department's actions are manifestly *ultra vires*, illegal, contrary to good conscience and Plaintiffs have no adequate remedy at law.

45. If emergency relief is not granted, Plaintiffs will continue to suffer harm each day that animals are forced to endure death by the prohibited and cruel method of gassing by carbon monoxide.

46. Defendants have no legitimate basis to authorize or allow violations of the law, nor could they have such a basis under the law. As such, there is a substantial likelihood that Plaintiffs will prevail on the merits of their claims.

47. The equities weigh in Plaintiffs' favor. There can be no argument that Defendants will suffer any cognizable injury from the requested action because Defendants cannot be harmed by complying with the Humane Euthanasia Act and the Department's own implementing regulations. Moreover, it is the Department's own *ultra vires* acts which have caused the need for injunctive relief to issue.

48. Plaintiffs request a temporary restraining order and preliminary and permanent injunctive relief to restrain Defendants from licensing or renewing the licenses of animal shelters that fail to comply with the Humane Euthanasia Act and to restrain the Defendants from authorizing or purporting to authorize the acquisition or use of carbon monoxide gas chambers to kill unwanted dogs and cats at any facility that is required to be licensed by the Department.

## **COUNT II: DECLARATORY RELIEF**

49. Plaintiffs reallege and incorporate by reference each and every allegation contained in this Complaint as if fully set forth herein.

50. Plaintiffs request declaratory relief pursuant to O.C.G.A. § 9-4-2 which authorizes declaratory relief upon the petition of any interested party “in any civil case in which it appears to the court that the ends of justice require that the declaration should be made; and the declaration shall have the force and effect of a final judgment or decree and be reviewable as such.”

51. The Commissioner, having acted outside his authority and in violation of his oath and duty, has issued Animal Protection Licenses to animal shelters that unlawfully kill dogs and cats by carbon monoxide gassing. Pursuant to O.C.G.A. § 9-4-2, Plaintiffs request declaratory relief to the effect that the Commissioner’s acts in licensing animal shelters using carbon monoxide gas chambers were unlawful and *ultra vires* and that the licenses are therefore invalid. Plaintiffs seek a declaratory judgment that licenses held by county shelters are invalid, where those shelters are using carbon monoxide gas chambers to kill excess animals.

### **PRAYER**

**WHEREFORE**, Plaintiffs respectfully request that this Court:

1. enter a temporary and permanent injunction prohibiting the Department from issuing any licenses to any shelter that utilizes a carbon monoxide gas chamber to kill animals;
2. enter a temporary and permanent injunction prohibiting the Department from renewing any licenses for any shelter that utilizes a carbon monoxide gas chamber to kill animals;
3. issue a judgment declaring that the Department is acting in violation of State law by approving the use of a carbon monoxide gas chamber in any animal shelter;

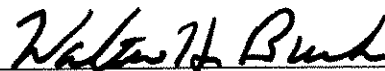
4. issue a judgment declaring that the Department is acting in violation of State law by renewing the license of any shelter that utilizes a carbon monoxide gas chamber to kill animals;

5. issue a judgment declaring void and invalid any license to operate a shelter, issued by the Department, to any shelter currently using a carbon monoxide gas chamber to kill animals; and

6. for any other relief that this Court should deem just, proper, necessary, and appropriate.

Respectfully submitted this 12<sup>th</sup> day of March 2007.

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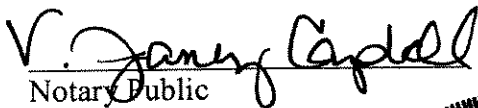
**VERIFICATION OF COMPLAINT**

I state that I have made inquiry into the subject matter of the allegations set forth in the Complaint. The Complaint, as assembled by myself and counsel, is true to the best of my knowledge, information, and belief.

This 5 day of March 2007.

  
\_\_\_\_\_  
Chesley V. Morton

Sworn to and subscribed before  
me this 5<sup>th</sup> day of March 2007  
and notarized by me on said day.

  
Notary Public

My commission expires \_\_\_\_\_

