UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

LANEA KOLLENBURN and CALEB KOLLENBURN, Plaintiffs, vs. **COUNTY OF CLACKAMAS,** an Oregon municipal corporation; **CLACKAMAS BOARD OF COUNTY COMMISSIONERS;** Defendants.	Case No.: 3:21-CV-00049-MAH **PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER** **Noting Date: January 12, 2021** ***Clerk's Action Required***

Per FRCP 65(b), the *Complaint,* and *L. Kollenburn Decl.,* Plaintiffs **KOLLENBURN,** through counsel **ADAM P. KARP**, move the court for a temporary restraining order ("TRO") to stay the euthanasia of **LLADK**, the dog at issue, until further briefing, argument, adjudication, and order by this court. A motion for preliminary injunction will be filed for consideration within fourteen days.

I. FACTS

1. The Kollenburns are a married couple residing at 2801 SE Concord Rd., Milwaukie, Ore. 97267.

2. They co-own **LLADK**, an approximately four-year-old, neutered male Alaskan Malamute.

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3. Each of the Kollenburns has a qualifying disability for purposes of the ADA, FHA, and OLAD. *Lanea Kollenburn Decl ("LK"),* ¶¶ 7-8, 13 & *Cmpt.,* **KOLLENBURN 1.**

4. Lladk has been individually trained to perform tasks and functions to ameliorate Caleb and Lanea's emotional disabilities. *LK* ¶¶ 9-12.

5. On or about July 11, 2020, Lladk inflicted a single provoked bite to **I.K.**, the Kollenburns' then 15-month-old son. The incident was provoked and resulted from momentary inattention by Lanea as more fully described in her declaration and the appeal to the dangerous dog notice as more fully described below. *LK* ¶¶ 14-19.

6. The Kollenburns' son sustained a single bite to his head but did not lose consciousness or suffer any mentally inappropriate behavior so as to suggest neurological harm. The two lacerations did not penetrate beyond the subcutaneous layer and caused no skull fracture or intracranial bleeding. I.K. was taken by his parents to the hospital but, after local anesthesia, cleaning, and eight staples, I.K. was given Tylenol and released that day. He suffered no lasting injury from the interaction with Lladk. *LK* ¶¶ 20-23.

7. A responsible adult, Caleb self-reported the incident to the County.

8. County animal control services characterized the bite as "provoked." *Cmpt.,* **KOLLENBURN 2**.

9. Without Lanea's consent, in a period of heightened emotion, attributable to his disabilities, Caleb delivered possession of Lladk to the County and signed a surrender form, but had great misgivings and urged his return at the expiration of the rabies quarantine. The County agreed to void the surrender but declared him dangerous under County code on July 20, 2020. *LK* ¶¶ 25-27.

10. On July 22, 2020, Caleb appealed the dangerous dog notice in timely fashion. *LK*

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¶¶ 29-30 & *Cmpt.*, **KOLLENBURN 3-5.**

11. Prior to the hearing of July 30, 2020, County animal services recommended either euthanasia or return of Lladk to the Kollenburns per specific restrictions. *LK* ¶ 28 & attached exhibit thereto.

12. On July 30, 2020, in case A20-105694, County Hearings Officer Joe Turner issued findings and an order mandating Lladk's euthanasia. Turner found that Lladk met the County definition of dangerous dog in having bitten a person per CCC 5.01.020(A)(4). Turner further found, per CCC 5.01.050(C)(3) and ORS 609.093, that Lladk be "immediately deemed property of the County for purposes of euthanasia." *LK* ¶ 31 & *Cmpt.,* **KOLLENBBURN 6-13.**

13. At the time of Turner's decision, the County had possession of Lladk and they have kept him from the Kollenburns for now six months.

14. The Kollenburns timely appealed same to the Clackamas County Circuit Court by writ. Despite their efforts, however, the writ was denied, but none of the issues raised herein were considered by Turner or the court. Meanwhile, the County threatened to kill Lladk, causing Lanea to suffer a miscarriage due to the stress. *LK* ¶¶ 33-34.

15. On December 15, 2020, Karp transmitted a letter to Scott C. Ciecko, Assistant County Counsel, requesting a reasonable accommodation/modification per the ADA, FHA, and OLAD pertaining to Lladk, which, through subsequent communications, took the form of return of Lladk to the Kollenburns subject to reasonable restrictions resembling those proposed by CCDS on July 27, 2020. *LK* ¶¶ 35.

16. Karp and Ciecko exchanged various proposals as part of a dialectic. Primarily, the Kollenburns urged that Lladk be returned to them subject to various conditions such as obtaining a $100,000 insurance/bond for any harm Lladk might cause in the future; maintaining Lladk in a

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secure 6.5' x 10' 6-sided enclosure with perimeter fencing surrounding it; ensuring Lladk would have no access to children under the age of 12; implantation of a microchip; affixation of a blaze collar; posting "Beware of Dog" signs at the home and on the enclosure; 6' leashing under control of a competent adult when outside the enclosure but behind the secure fence on their premises; 6' leashing under control of a competent adult and muzzling when outside the fenced area; professional training by a CPDT-K(S)A, CBCC-K(S)A, or equivalent trainer at an expense of at least $300 and following the trainer's recommendations; and moving out of the County never to return Lladk there by February 28, 2021. *LK* ¶ 36.

17. Through Karp, the Kollenburns alternatively, as a disfavored fallback for purposes of settlement and to spare Lladk's life, offered relocation of Lladk to a rescue all parties approved. *LK* ¶ 37.

18. In the midst of negotiations, on December 15, 2020, County Counsel Stephen L. Madkour implicitly threatened in writing to report the Kollenburns to the Oregon Department of Human Services as a purported mandatory reporter of child abuse. While the Kollenburns strongly deny that their actions in any way constitute a crime or warranted involvement of ODHS, Madkour's statement may have violated Oregon's DR 7-102(A)(1) and possibly DR 7-105, but most certainly added to the discriminatory and retaliatory effect upon the Kollenburns, who were seeking an accommodation under federal and state law, not a frivolous threat of being reported for child abuse. *LK* ¶ 38.

19. The threat was made again by Madkour during a phone call with Karp and Ciecko on December 16, 2020. Indeed, on information and belief, at least one attorney member of the Board made clear her intention of reporting the Kollenburns to ODHS, which the Kollenburns also took as a discriminatory and retaliatory act in violation of their civil rights. *LK* ¶¶ 39-40.

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20. Media and the public have been rallying to support the Kollenburns and avert euthanasia of Lladk but the County has remained intractable. *LK* ¶ 41 & exhibit thereto.

21. While at the shelter, notes from kennel workers confirm Lladk's promising and compliant, even joyful, behavior. *LK* ¶ 42 & exhibits thereto (e.g,. from 7.17.20 through 11.17.20). Negotiations continued until January 12, 2021.

22. Negotiations continued until January 12, 2021. The Board refused to allow return of Lladk to the Kollenburns under any circumstances, though the Kollenburns invited discourse. The Board also refused to release Lladk to Best Friends Animal Society ("BFAS"), who was prepared to take him, because BFAS could not and would not promise that Lladk would be kept at BFAS for life and never adopted out, even if they promised not to place him with a family without children. *LK* ¶ 43.

23. At about 9:35 a.m. on January 12, 2021, Ciecko informed Karp that the Board made a final decision to kill Lladk within 24 hours. Karp had been in dialogue with Ciecko by phone and email on January 12, 2021 informing him of the Kollenburns' intent to file, and filing of, this action, as well as seeking a TRO. All pleadings have been emailed to Ciecko by Karp, including informing him of the assignment of this case to Chief Judge Hernández, and the possibility that the court might not be able to consider this TRO tomorrow due to a full day hearing. Ciecko kindly indicated he would accept service on the County.

24. The impact of irreversibly killing Lladk, who has been held at the County since Turner's July 30, 2020 euthanasia directive, and has shown no concerning signs of aggression toward staff, when a few extra weeks would allow the Kollenburns' claims to briefed and argued in at least a thorough, though preliminary, fashion would cause irreparable harm to the Kollenburns, but especially due to their diagnosed disabilities of which the Defendants are aware.

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25. The factual bases for the Kollenburns' claims arises under state and federal antidiscrimination law, to be sure, but also under the federal and state constitutions given the due process infirmities associated with the municipal and state dog codes.

26. CCC 5.01.020(A)(4) defines a "dangerous dog" as one who "menaces, bites, injures or kills a person, domestic animal, or livestock." Notably, this section does not excuse such behavior if provoked. Nor is the severity of any bite or injury anywhere parameterized. CCC 5.01.020(A)(3) defines "bite, biting, bitten" as "the breaking of skin of a person, domestic animal, or livestock by the teeth of a dog." No evidence of medical treatment, sutures, surgery, pain, suffering, or protracted disfigurement or injury need be demonstrated. In this respect, it is overbroad, unduly oppressive, and violative of substantive due process.

27. CCC 5.01.050(C)(2)(b)(ii) provides that the Hearings Officer may refrain from classifying a dog as dangerous upon finding that the behavior resulted from a wrongful assault upon the dog or owner, or other similar provocation, or when the dog's behavior is directed toward a trespasser, or extenuating circumstances establishing the dog does not constitute an unreasonable risk to life or property. Lladk was provoked by the County's own admission. Yet Turner did not invoke this provision.

28. It is uncertain if CCC 5.01.050(C)(2)(b)(ii) constitutes an affirmative defense or element to be disproved by the County, but regardless, the code improperly confers discretion upon the Officer; it does not mandate exception, which alone engenders serious concerns of equal protection and due process for it does not explain under what circumstances a hearings officer may decline to refrain from classifying a dog as dangerous even where he finds that provocation did, in fact occur. Further, no part of CCC 5.01.050(C)(2)(b)(ii), nor CCC 5.01.070(D)(2) [if applicable to a dangerous dog notice at all], indicates which party carries the burden of production or risk of

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nonpersuasion on the question of refraining per CCC 5.01.050(C)(2)(b)(ii). Nor is provocation defined anywhere in the code. In these respects, constitutional infirmity abounds.

29. CCC 5.01.050(C)(5) provides for a declassification process where owners of dangerous dogs may request such status change upon two years of no further incidents, yet the County did not even consider affording the Kollenburns this possibility.

30. State law contributes its own problems. ORS 609.098(1)(a) defines in relevant part, a dog as "dangerous" who "without provocation and in an aggressive manner inflicts serious physical injury, as defined in ORS 161.015, on a person or kills a person." ORS 161.015(8) defines "serious physical injury" as one that creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." Lladk did not inflict a "serious physical injury" per ORS 161.015(8). Lladk is not "dangerous" per ORS 609.098(1)(a), (1)(b), or (1)(c).

31. Even if the County is free to declare a dog "dangerous" in conflict with that defined under State law (a point that the Kollenburns do not concede at this time), CCC 5.01.050(C)(3)(g), in purporting to give the Hearings Officer authority to order killed a dog who has merely bitten a person, even if provoked, violates procedural and substantive due process and constitutes an unreasonable seizure under the state and federal constitutions. To the extent it does not require consideration of the needs of disabled owners, it violates the ADA, FFHA, and OLAD.

32. ORS 609.093, to the extent it vests in municipalities sole discretion to kill any dog not deemed dangerous under State law but who nonetheless menaces or bites a person and whose owners has not been charged with violating ORS 609.0095(2, 3) or ORS 609.098, violates procedural and substantive due process and constitutes an unreasonable seizure under the federal and state constitutions.

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33. Should ORS 5.01.070(D)(2) apply to dangerous dog proceedings before the Hearings Officer, it fails to provide a sufficient standard of proof where irreversible dispossession by means of euthanasia is considered. As forfeitures are disfavored forfeiture requires at least clear and convincing evidence, which was not provided. *Jackson Cy. v. Compton,* 41 Or.App. 417, 421 (1979) ("Forfeiture is a harsh remedy which is generally disfavored"), *rev. o.g.,* 289 Or. 21 (1980); *Johnson v. Feskens,* 146 Or. 657 (1934)(party insisting on forfeiture must establish right by clear and convincing proof); *Schlegel v. Hough,* 182 Or. 441 (1947) (clear and convincing proof for forfeiture of unpatented placer mining claims).

34. Further, to the extent ORS 609.093 does not require municipalities to consider the effect a decision to kill will have on disabled owners, it invites violations of the ADA, FFHA, and OLAD.

35. Though denominated a "dangerous dog proceeding," where confiscation and euthanasia is dictated, as here, ORS 609.093 and CCC 5.01.050 in fact result in a forfeiture of personalty, viz., dogs. Indeed, Turner ordered that Lladk be "immediately deemed property of the County." In so doing, ORS 609.093, CCC 5.01.050, and the Defendants violated and violate the Oregon Property Protection Act of 2000, Or. Const. Art. XV, § 10 because they permit forfeiture of personalty (which dogs are so declared unqualifiedly and without any legal imperfection per ORS 609.020) in cases where the dog's owner has not been convicted of a crime, and where the animal exemption of subsection (10) does not apply (i.e., where the animals were not abused, neglected, or abandoned).

36. Defendants' actions, including but not limited to the order directing euthanasia of Lladk, threatening to kill Lladk, and withholding him from the Kollenburns, violates the Kollenburns' constitutional and statutory rights described herein, as well as denies them the

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benefits of housing and government benefits and services enjoyed by nondisabled individuals. It further causes ongoing, foreseeable emotional distress. *LK* ¶¶ 45-46.

II. ARGUMENT

A. Standard for Issuance: CR 65(b)

The Federal standard is well articulated in several 9th Circuit cases.

> [T]he moving party must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor. We also have observed frequently that the greater the relative hardship to the moving party, the less strong need be the showing of probable success that is required.

Beltran v. Myers, 677 F.2d 1317, 1320 (9th Cir. 1982). *See also Wm. Ingles & Sons Baking v. ITT Cont. Baking Co*., 526 F.2d 86, 88 (9th Cir. 1975)("If the harm that may occur to the plaintiff is sufficiently serious, it is only necessary that there be a fair chance of success on the merits.") To obtain a preliminary injunction, a party must establish either: (1) *probable success on the merits* and irreparable injury, or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in its favor." *Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097, 1100 (9th Cir.1998)(emphasis added), *rev. o.g., Dream Palace v. County of Maricopa,* 384 F.3d 990 (9th Cir.2004). These are not two distinct tests, but rather opposite ends of a single continuum where showing of harm varies inversely with the required showing of merit. *Miss World (UK) Ltd. v. Mrs. America Pageants, Inc.,* 856 F.2d 1445, 1448 (9th Cir. 1988). The moving party need not show actual harm, but only the threat of irreparable harm. *Diamontiney v. Borg,* 918 F.2d 793, 795 (9th Cir. 1990).

The Kollenburns' submission amply meets the test for a TRO, as well as a preliminary

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injunction.[1] They need only show a "likelihood" of success on the merits. Add the equitable considerations described herein, as well as the irreversible nature of euthanasia, and relief should be granted.

None other will adequately protect the Kollenburns' property and liberty interests in Lladk. The court should consider that the Kollenburns' acted swiftly, coming to this court with clean hands. Furthermore, the County suffers no discernible injury from waiting until further order from the court, which will likely issue within thirty days following the filing of the motion for preliminary injunction, and where Lladk has been a perfect gentleman with glowing kennel reviews. The soundest ruling is for injunctive relief to be granted. Harm to the Kollenburns and Lladk himself is neither imagined nor speculative, but real and ongoing.

B. Likelihood of Success on the Merits of Legal & Equitable Claims

The stronger the case on the merits, the less proof of harm required. Success on the merits is extremely likely based on the authorities discussed in this motion.

1. Antidiscrimination Law.

The discriminatory onus the County code, Hearings Officer's euthanasia directive, and Board's shortsightedness places on the Kollenburns endorses a policy that too broadly applies an unconstitutional ordinance so as to screen out from protection those with disabilities by failing to protect them from suffering adverse impacts as already visited upon the Kollenburns, and only made worse by the acts and omissions described herein. Lladk meets the definition of a service animal, assistance animal, and emotional support animal given his individualized training to learn task and functions to aid in at least one qualifying disability of the Kollenburns, and each of them.

[1] Such motion will be filed in the coming week. This motion for a TRO was filed to secure instant relief that cannot be obtained in the ordinary course of scheduling a preliminary injunction hearing.

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In so taking Lladk from them, Defendants violate the ADA, for under Title II, public entities must reasonably accommodate disabled individuals. 42 USC 12132 prohibits discrimination in the form of exclusion from participation in or denial of benefits of services, programs, or activities of a public entity, or to be subjected to discrimination by same. Local governments have a duty to make reasonable modifications unless such would create undue burden or fundamentally alter the nature of the government program. 28 CFR 35.164. Modifications must be made for service animals, explicitly. 28 CFR 35.136 (requiring public entity to modify policies, practices, and procedures to permit use of service animal by individual with disability). While an exception is made if the animal is "out of control and the animal's handler does not take effective action to control it," here Lladk was never running at large or endangering any individual outside the Kollenburns' household; nor have the Kollenburns been given *any* opportunity to demonstrate that Lladk will be effectively controlled so as to eliminate any direct threat. Failure to modify County policies (here, euthanasia order) furnishes a freestanding claim regardless of discriminatory animus or class-based evidence of disparate impact.

The actions of the County violate the Federal Fair Housing Act, 42 U.S.C. § 3601, as well. Detaining and killing Lladk would "make unavailable or deny" the Kollenburns the same ability to enjoy a dwelling within County limits as nondisabled counterparts, "discriminating" against them in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith," violating 42 U.S.C. § 3604(f)(1)(A) and (2)(A). Failing to reasonably accommodate that class of individuals states a further violation of § 3604(f)(3)(B). The FFHA defines "handicap," or disability, as "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h)(1). "Major life activities" mean functions such as caring for one's self, performing

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manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 24 CFR 100.201(b). This list is illustrative, not exhaustive. Indeed, this Circuit has also found that sleeping and thinking are major life activities. *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1060 (9th Cir. 2005).

To prevail on a reasonable accommodation claim under the FHA, the Kollenburns "must prove the following: (1) that each is handicapped under 42 U.S.C. § 3602(h); (2) that the Defendants knew or should reasonably be expected to know of the handicap; (3) that accommodation of the handicap may be necessary to afford her an equal opportunity to use and enjoy the dwelling; (4) that the accommodation is reasonable; and (5) that Defendants refused to make the requested accommodation." *Dubois v. Ass'n of Apt. Owners*, 453 F.3d 1175, 1179 (9th Cir. 2006). Notably, unlike disparate treatment claims, "Denial of reasonable accommodation claims do not require that the Plaintiff show intent." *Howard v. Gutierrez*, 405 F. Supp. 2d 13, 15 (D.D.C. 2005); *Nadler v. Harvey*, 19 Am. Disabilities Cas. (BNA) 1084, 2007 U.S. App. LEXIS 20272, *10-11 (11th Cir. 2007) (same). "[T]he plaintiff need only show that an accommodation 'seems reasonable on its face, i.e., ordinarily or in the run of cases.' Once the plaintiff has made this showing, the burden shifts to the defendant to demonstrate that the accommodation would cause undue hardship in the particular circumstances." *Giebeler v. M&B Assocs.*, 343 F.3d 1143, 1156 (9th Cir. 2003) (citation omitted).

The burdens on defendants are balanced against the benefits to plaintiffs by any accommodation. *See Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1041 (6th Cir. 2001). In the Ninth Circuit, the interactive process is mandatory. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002) (citing with approval *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) (en banc), vacated on other grounds, *U.S. Airways, Inc. v. Barnett*, 535 U.S.

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391 (2002)). Indeed, it is essential to achieving the goals of anti-discrimination laws protecting persons with disabilities. *Barnett*, 228 F.3d at 1113. Allowing the Kollenburns to keep Lladk under reasonable conditions of restraint as already proposed would do justice to the principles underlying the FFHA.

In 2008, HUD enacted a clarifying Final Rule entitled, "Pet Ownership for the Elderly and Persons with Disabilities." 73 FR 63834 (Oct. 27, 2008). In essence, it provided that untrained animal companions who by mere presence ameliorate disabling conditions (also known as "emotional support animals") must be accommodated under the FHA. This Rule has been recently relied upon by federal courts, who grant considerable deference to HUD interpretations of the FHA. HUD's guidance contained in the commentary to the 2008 final rule reflects HUD's fair housing enforcement stance on emotional support and service animals, and at least one federal court has found HUD's guidance persuasive, holding that animals needed for disabilities in housing need not be trained, and HUD and DOH are actively pursuing enforcement actions based on this position. *See Overlook Mutual Homes, Inc. v. Spencer,* 666 F.Fupp.2d 850, 859-60 (S.D.Ohio, 2009); *U.S. v. Kenna Homes Cooperative Corp.,* Case No. 2:04-783 (S.D.W.Va.) at Doc. #1 (consent decree, doc. #7 (agreeing to permit disabled residents to have service or emotional support animals, the latter defined as an animal "the presence of which ameliorates the effects of a mental or emotional disability.") ***Of course, Lladk meets the standard of not just an ESA, but a service animal as well.***

Anderson v. City of Blue Ash, 798 F.3d 338 (6 Cir.2015), examined the enforceability of a municipal law banning equines in residential zoned areas, C.A., a minor individual with a disability, and Ellie, an equine. Noting that no minimum regulatory requirements for animals informed the reasonable accommodation analysis, the court instead focused on whether Ellie was

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"necessary" and "reasonable" to afford C.A. an "equal opportunity" to enjoy the residential property. Rejecting the City's contention that C.A. could obtain therapy from a horse at a nearby farm or stable and did not need to house the equine at her home, the Court referenced Dr. Levin's letter stating that she could not seize the same benefit after traveling and, besides, "the availability of an alternative treatment away from the plaintiff's dwelling is irrelevant to the FHAA, which requires reasonable accommodations necessary for a disabled individual to receive the '*same* enjoyment from the property as a non-disabled person would receive,' … not merely those accommodations that the disabled individual cannot function without or for which no alternative is available away from the dwelling."

Furthermore, that C.A. could ambulate without Ellie was legally irrelevant since the FHA required accommodations needed to achieve housing equality, not only those that were absolutely needed for her treatment or basic ability to function. *Id.,* at 361-62. Unavailing was the City's argument that to allow Ellie would require a fundamental alteration of the City's zoning scheme that seeks to manage and order health, aesthetics, and property values. "Requiring public entities to make exceptions to their rules and zoning policies is exactly what the FHAA does. The fact that the City banned horses from residential property does not mean that any modification permitting a horse necessarily amounts to a fundamental alteration." *Id.,* at 363.

While the FFHA considers whether an animal presents a "direct threat," that assessment cannot be based on fear, speculation or stereotype but requires reliable objective evidence and such considerations as (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate the direct threat. Joint Statement of the Department of HUD and DOJ, Reasonable Accommodations Under the Fair Housing Act, at 4 (May 17, 2004)

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https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf; *Douglas v. Kriegsfeld Corp.,* 884 A.2d 1109, 1121 fn. 19 (D.C.App.2005) held that the Joint Statement is entitled to substantial deference. Other HUD Notices enjoy deference, too, such as FHEO-2013-01 (*Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-funded Programs*). https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF.

Dr. Vassal, a psychiatrist, diagnosed Paul Warren with Severe Major Depression Disorder and PTSD and "strongly recommended" that the Delvista Towers Condominium Association reasonably accommodate Warren by making an exception to its "no pet" policy so he could live with Amir, an assistance animal. Delvista argued that the requested accommodation was per se unreasonable because Miami-Dade County banned pit bulls by ordinance and Amir was allegedly a pit bull. In finding for Warren, the court in *Warren v. Delvista Towers Condominium Assoc., Inc*., 49 F.Supp.3d 1082 (2014), noted that the HUD Rule permits denial of a reasonable accommodation in the form of allowing an emotional support animal if the "animal's behavior poses a direct threat and its owner takes no effective action to control the animal's behavior so that the threat is mitigated or eliminated," such threat must nonetheless be a "significant" one, "not a remote or speculative risk," and the landlord must abide the directive to engage in a case-by-case examination of the threat profile of "the specific assistance animal in question." *Id*., at 1087-88. Furthermore, the HUD rule imposed yet another layer of accommodation where the specific assistance animal might pose a direct threat or cause substantial physical damage:

> Particularly, HUD promulgated a notice stating that a request to accommodate an assistance animal can be denied if "(1) the specific assistance animal in question poses a direct threat to the health or safety of others that ***cannot be reduced or eliminated by another reasonable accommodation***, or (2) the specific assistance animal in question would cause substantial physical damage to the property of others that ***cannot be reduced or eliminated by another reasonable***

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> ***accommodation***."[5] HUD Notice at 3 (alterations in original omitted) (emphasis added). Of note is HUD's emphasis on an assessment of "the specific assistance animal in question." Accordingly, determining whether Amir poses a direct threat that cannot be mitigated by another reasonable accommodations is not a question of law, it is distinctly a ***question of fact***. As such, it is inappropriate for the Court to decide this issue.

Id. (emphasis added) In other words, even rowdy emotional support animals may be entitled to their own accommodation before they are excluded from the premises, much less killed. The County has offered no such opportunity to the Kollenburns.

Lladk was individually trained to ameliorate the Kollenburns's disabilities, rendering him an assistance animal (or at the very least an assistance animal trainee, defined under ORS 659A.143(1)(a)-(b)), and is protected under state law (OLAD), viz., ORS 659A.143(6) and ORS 659A.143(7) relative to denying the Kollenburns the right to be accompanied by Lladk within the County limits and not making reasonable modifications to allow them to benefit from Lladk's therapeutic presence to obtain and enjoy goods, services, and use of advantages, facilities, and privileges of the County.[2] The detention and threat to kill Lladk has plunged both the Kollenburns into extreme anxiety and depression and causes daily harm, which may be rectified by accommodation required by state and federal law.

2. Constitutional Rights.

Substantive and procedural due process concerns have been interspersed through Section II herein. Fourth Amendment rights also apply and vest in possessors of dogs. *Fuller v. Vines,* 36 F.3d 65 (9th Cir.1994), *rev. o.g., Robinson v. Solano Cy.,* 278 F.3d 1007 (9th Cir.2002). "A 'seizure' of property occurs, within the meaning of the Fourth Amendment, when 'there is some meaningful interference with an individual's possessory interests in that property.'" *Id.,* at 68 (quoting *U.S. v. Jacobsen,* 466 U.S. 109, 113 (1984) (emphasis added)). Turner's order to immediately deem Lladk

[2] Clackamas County is a place of public accommodation, per ORS 659A.400, 174.109.

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County property and order his death constitutes a seizure and, for the reasons set forth herein, is unreasonable. Warrantless searches seizures are unreasonable and invalid generally. *Katz v. U.S.,* 389 U.S. 347, 357 (1967); *Johnson v. U.S.,* 333 U.S. 10, 14-15 (1948).

The Kollenburns have also raised challenges under the Oregon Property Protection Act of 2000, amending the Oregon Constitution at Art. XV, § 10. Though not denominated a civil forfeiture proceeding, the absence of the word "forfeit" or "forfeiture" is not of legal moment given the unambiguous order that Lladk be confiscated more or less as contraband and ownership passing to the City as a type of escheat, whereupon he would be destroyed. Escheats, forfeitures, confiscations are disfavored by law. *In re Wakefield's Estate,* 161 Or. 330, 336 (1939). The OPPA, which specifically references animals, makes clear that the government may not take a person's property (and dogs are property) unless convicted of a crime. Having not been charged, nor Lladk having been deemed the instrumentality of any criminal misconduct, the entire process of confiscating and ordering the death of Lladk violates the Oregon Constitution.

C. Imminent Harm

The Kollenburns' certain irreparable harm and the balance of the hardships in this case are inextricably linked. Without immediate assistance, they will continue to stare down, with terrifying trepidation, the guillotine poised above Lladk's neck. And if it is released, Lladk will be killed, and the Kollenburns forever haunted by such ignominious slaying. Further, not granting injunctive relief will reward the County for acting antithetical to fundamental notions of fairness, antidiscrimination, and civil rights that underlie this dispute.

The court should also consider the irreparable harm to Lladk. Though not a legal person, his interests are no doubt germane to this dispute. Unlike other personalty or realty, which lack sentience, animals like Lladk merit the protections of Oregon's strict anticruelty laws and benefit

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from the constitutional rights that inhere in their owners or keepers (i.e., Fourth, Fifth, and Fourteenth Amendments). Animals are of a different order than other types of mere property. This Circuit held in *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose,* 402 F.3d 962, 975 (9th Cir.(Cal.)2005), "The emotional attachment to a family's dog is not comparable to a possessory interest in furniture."

D. Security

Though required by FRCP 65, the projected costs and damages to be potentially sustained by the County if this TRO is held to have been wrongfully entered are *de minimis* for the Kollenburns are already being charged daily board. Under these circumstances, no bond should issue or, alternatively, it should be nominal.

III. CONCLUSION

The Kollenburns respectfully request that a TRO issue compelling the County to bar Lladk's euthanasia until further adjudication. A proposed order attaches.

Dated this 1.12.21,

ANIMAL LAW OFFICES

/s/ Adam P. Karp

Adam P. Karp, OSB 011336
Attorney for Plaintiffs

CERTIFICATION

I, Adam P. Karp, certify that I transmitted the *foregoing,* the *Complaint,* and the *Kollenburn Decl.* on the following individuals in the following manner:

By Email (1.12.21)
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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

LANEA KOLLENBURN and CALEB KOLLENBURN, Plaintiffs, vs. **COUNTY OF CLACKAMAS,** an Oregon municipal corporation; **CLACKAMAS BOARD OF COUNTY COMMISSIONERS;** Defendants.	Case No.: 3:21-CV-00049-MAH **TEMPORARY RESTRAINING ORDER** ***Clerk's Action Required***

This matter came on with notice by Plaintiffs to Defendants seeking a temporary restraining order concerning an approximately four-and-a-half-year-old, neutered male Alaskan Malamute named Lladk, presently held at Clackamas County Dog Services. The court considered Plaintiffs' motion and supporting declaration.

Although no final findings of fact or conclusions of law are herein made, the Court in the interim finds that Lladk faces the threat of euthanasia on January 13, 2021, which the County will only halt by order from a judicial officer. Plaintiffs filed this action on January 12, 2021, the same day they were informed of the County's final decision on their request for a reasonable accommodation and modification under the Americans with Disabilities Act, Fair Housing Act,

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and Oregon Law Against Discrimination, and, further, Plaintiffs' counsel notified Defendants' counsel of the filing and intent to seek a TRO in this matter.

Accordingly, due to irreparable injury, the raising of serious questions, and the balance of hardships tipping sharply in their favor, Plaintiffs have persuaded the court that good cause existed to halt euthanasia until further briefing, argument, and adjudication.

Based on the foregoing findings, the Court **ORDERS, ADJUDGES, AND DECREES**:

1. Clackamas County shall not euthanize Lladk without this court's order.

2. The order shall take effect immediately, but Plaintiffs remain obligated to post security in the sum of $1 to be deposited into the court registry within the next ten (10) business days, and which the court finds to be just and proper given the foregoing findings.

<<END OF ORDER>>

Presented by:

ANIMAL LAW OFFICES

Adam P. Karp, OSB 011336
Attorney for Defendants

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