

STATE OF NORTH CAROLINA

COUNTY OF WILSON

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 DAG 09366

For the Love of Dogs, Max and  
wife Della Fitz-Gerald,  
Petitioners,

v.

NC Department of Agriculture  
& Consumer Services  
Respondent

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**FINAL DECISION**

Pursuant to N.C. Gen. Stat. § 150B-23, on December 7, 2015, Petitioners filed a petition for a contested case hearing appealing Respondent's October 30, 2015 Notice of Violation and \$10,800 Civil Penalty Assessment for violating 02 NCAC 52J .0206. On June 21, 2016, Administrative Law Judge Melissa Owens Lassiter conducted a contested case hearing at the Town of Farmville Courtroom in Farmville, North Carolina. On July 20, 2016 and July 21, 2016 respectively, the parties filed their proposed Final Decisions with the Office of Administrative Hearings.

**APPEARANCES**

For Petitioner: William MJ Farris, Farris & Farris PA, Attorneys at Law, PO Box 2727, Wilson, North Carolina 27894

For Respondent: Christopher R McLennan, Assistant Attorney General, 9001 Mail Service Center, Raleigh, North Carolina 27699

**APPLICABLE STATUTES AND RULES**

North Carolina Animal Welfare Act - N.C. Gen. Stat. §§ 19A-20 et seq, 19A-23(5), 19A-24, 19A-26, 19A-30(3), 19A-40.  
02 NCAC 52J .0206.

**ISSUES**

1. Whether Petitioners denied fifty-four animals "continuous access to water" in violation of 02 NCAC 52J .0206?
2. Whether Respondent lawfully assessed Petitioner a \$10,800.00 civil penalty assessment, pursuant to N.C. Gen. Stat. §19A-40, for violating 02 NCAC 52J .0206?

## **EXHIBITS ADMITTED BY STIPULATION OF PARTIES**

For Petitioners: 1 – 8

For Respondent: 1 - 19

### **FINDINGS OF FACT**

#### **Constitutional Argument**

At the beginning of the administrative hearing, Petitioners properly preserved their arguments regarding the constitutionality of 02 NCAC 52J .0206, and its application to N.C. Gen. Stat. § 19A-40 *et seq* for a higher court, as the Office of Administrative Hearings lacks the statutory authority to rule on such arguments.

#### **Procedural Background**

1. On October 30, 2015, Respondent issued a Notice of Violations and Civil Penalty Assessment to Petitioners for violating 02 NCAC 52J .0206 for failing to provide fifty-four (54) animals at Petitioners' animal shelter with "continuous access to fresh water, except as might otherwise be required to provide adequate veterinary care."

a. Specifically, Respondent found that on October 22, 2015, there were 28 dogs present in the Sanctuary building at Petitioners' shelter, and "no dog had any water present in its primary enclosure." "There were two horse-type troughs present on the porch area" that were "filled with dirty water which was green in color." (Resp. Exh. 4; Pet. Exh. 1)

b. Respondent also found that there were 26 dogs present in the Family House at Petitioners' shelter, but "no dog had any water present in its primary enclosure." "The horse-type trough in the adjacent area was filled about ½ full of greenish water. Two buckets of clear water were present on the porch." (Resp. Exh. 4; Pet. Exh. 1)

c. Respondent assessed a \$10,800.00 civil penalty against Petitioners for such violations by assessing \$200.00 for each of the 54 animals (1 animal = 1 violation) of 02 NCAC 52J .0206. (Resp. Exh. 4; Pet. Exh. 1)

2. In their December 7, 2015 petition for contested case hearing, Petitioners alleged the following grounds as the basis for their appeal:

a. Respondent applied a vague and otherwise unconstitutionally impermissible administrative code provision, 02 NCAC 52J .0206, as the word "continuous," in 02 NCAC 52J .0206, is not defined, does not provide Petitioners with adequate notice of what is prohibited, and is unconstitutionally void for vagueness;

b. 02 NCAC 52J .0206, coupled with N.C. Gen. Stat. § 19A-40, is unconstitutionally overbroad and directly violates Amendment VIII of the United States Constitution and

Article 1, Section 27 of the North Carolina Constitution, as there are no findings by Respondent which create any rubric or establish the basis for establishing a \$200.00 civil penalty for each of the 54 alleged violations of 02 NCAC 52J .0206, and is at its best, arbitrary;

c. Respondent failed to demonstrate, in the Findings of Fact in the October 30, 2015 Notice of Violation, that any of the animals on Petitioners' property were in jeopardy, harmed, or even thirsty;

d. Respondent failed to demonstrate any causal nexus between providing the animals with more water than the amount currently provided, and their welfare;

e. The amount in controversy is \$10,800.00; and

f. Because of Respondent's action, the State has deprived Petitioners of property, ordered Petitioners to pay a civil penalty, substantially prejudiced their constitutional rights, acted arbitrarily, and acted erroneously.

### **Parties/Witnesses**

3. At all times relevant to this case, Petitioners operated For the Love of Dogs, Inc. (FLOD) in Wilson, North Carolina as an "animal shelter" as defined by N.C. Gen. Stat. § 19A-23(5), and held such animal shelter certificate of registration number 72.

4. Respondent is the North Carolina Department of Agriculture and Consumer Services Animal Welfare Section ("AWS"), the State agency responsible for enforcing the provision of the North Carolina Animal Welfare Act (N.C. Gen. Stat. § 19A-20 *et seq.*) and the rules promulgated thereunder (02 NCAC 52J .0101 *et seq.*).

5. Respondent's primary concern is achieving the purpose of the Animal Welfare Act, including attempting to ensure the "humane care and treatment" of animals confined to animal shelters and other regulated facilities. N.C. Gen. Stat. § 19A-21.

6. Respondent regulates approximately 866 facilities under the Animal Welfare Act, 229 of which are animal shelters.

7. Lisa Carlson is an Animal Health Technician for Respondent. As part of her job duties, she is responsible for inspecting facilities located in the Northeastern part of North Carolina, which includes the FLOD shelter. Before becoming an inspector for Respondent in 2012, Inspector Carlson managed an animal shelter for six (6) years.

8. Joe Blomquist is the AWS Outreach Coordinator for Respondent. Coordinator Blomquist was an animal control officer for 30 years before starting his employment with the AWS in 2006. Coordinator Blomquist is responsible for inspecting 116 facilities, and serves as a Field Supervisor to the other AWS inspectors, including Lisa Carlson. In 2012, before becoming the

Field Supervisor, Blomquist was the Inspector assigned to FLOD, and conducted regular inspections of FLOD.

9. Patricia Norris, DVM is the Director of the AWS for Respondent as contemplated by N.C. Gen. Stat. § 19A-22. As Director, Dr. Norris is responsible for overseeing the AWS' operations, including inspecting facilities and issuing civil penalties, pursuant to N.C. Gen. Stat. § 19A-40, to any establishment governed by the Animal Welfare Act. Dr. Norris has been a licensed veterinarian for thirty years and holds a Master's Degree in Veterinary Forensic Science. Throughout her career, Dr. Norris has acquired extensive training and experience in fields related to shelter medicine. Dr. Norris supervises Inspector Joe Blomquist and Inspector Lisa Carlson.

10. Bettie Gilpin and Rod Chandler were former volunteers at FLOD during the period at issue in the instant action.

11. Dr. Abby Gaoma is a licensed veterinarian in the State of North Carolina, who owns and operates two clinics, Vets for Pets in Dunn, NC and The Cottage Animal Clinic in Stantonsburg, NC. Dr. Gaoma testified at hearing as an expert in veterinary care.

12. Dr. Dale Paley is a licensed veterinarian in North Carolina who testified at hearing as an expert in veterinary care. Dr. Paley was the resident veterinarian at FLOD when Petitioners started FLOD in 2004 until 2005. In 2007, Dr. Paley moved to South Carolina, and discontinued her employment with FLOD. Dr. Paley has not been employed by, or a part of the FLOD since that time, but remained in contact with Max and Della Fitz-Gerald.

### **Before October 20, 2015**

13. Animals at FLOD are kept in three buildings: the "Clinic," the "Sanctuary," and the "Family House." Animals in the Clinic are housed in individual cages. Animals in the Sanctuary are housed in individually segregated cages called "runs." Animals in the Family House are housed in individual kennels.

14. AWS inspectors have routinely inspected FLOD for a number of years before this subject incident as part of their routine regulatory duties. Inspector Blomquist never had any problems with FLOD, except for Petitioners not filling the holes that dogs were digging outside.

15. Before October 20, 2015, Respondent had not inspected the "Family House" at FLOD, because Petitioners stated that they were not housing animals belonging to the animal shelter in the Family House, and that the Family House contained only their personal animals.

16. In each of the inspections before October 20, 2015, Respondent noted that Petitioners were providing all observed animals with continuous access to water by providing water bowls in each dog's kennel/cage.

17. From 2012 to 2015, Inspector Lisa Carlson inspected Petitioner's premises numerous times for licensing purposes and for compliance with the Animal Welfare Act. During

those inspections, there were no problems at FLOD, except for the holes the dogs had dug in the ground that needed to be repaired.

18. In October 2015, Petitioner Max Fitz-Gerald removed the individual water bowls from each of the kennels/cages at FLOD. From October 16, 2015 thru October 20, 2015, Respondent received six (6) complaints from different people alleging that the dogs held at the facility were not being given continuous access to fresh water in violation of 02 NCAC 52J .0206, and that the animals were not given more than ten (10) or fifteen (15) minute breaks three times a day where they have access to water.

19. Bette Gilpin worked at FLOD from January 2015 until May 2016. Gilpin's duties included letting the dogs out, sweeping out and cleaning the kennels, refilling water bowls, and loving the dogs. When she volunteered in the Clinic at FLOD, she observed water bowls being taken away from the dog enclosures. Gilpin believed the dogs were agitated more than usual, and were licking the bars after the water was removed. When the dogs were given breaks outside, the dogs went directly to the water bowls.

a. On one occasion, Ms. Gilpin believed the dogs were agitated because they did not have any water in their kennels, so she used a hose to spray water on the trays inside the kennels where the water bowls had previously been to provide hydration to the dogs. The dogs responded by immediately licking up every drop of water.

b. Ms. Gilpin remembers four particular days when she was present at FLOD and there was no water in the dog kennels. She was not happy about the decision to not have water in the kennels in the Clinic area.

c. Ms. Gilpin had no formal training in dog behavior or veterinarian training. Her occupational background was as an assistant to an attorney.

20. Rod Chandler previously volunteered at FLOD for approximately two years, although he lacked any formal training for the care of animals. Chandler spent more time with, and had more access to, the dogs in the Clinic area, and therefore, his knowledge was primarily about the Clinic area.

21. On October 16, 2015, Mr. Chandler filed a complaint that the dogs at FLOD did not have access to fresh clean water in the Clinic. In his complaint, Chandler alleged that the dogs were only outside for thirty (30) minutes per day. At the administrative hearing, Chandler alleged that the dogs at FLOD had breaks ten (10) to fifteen (15) minutes three times per day where they had access to water.

a. Chandler previously confronted Mr. and Mrs. Fitz-Gerald after Max Fitz- Gerald removed the water from the kennels in the Clinic, and would not return the water to the kennels. Mr. Chandler told the Fitz-Gerald's that he would not volunteer any longer. After that, Mrs. Fitz-Gerald began to put the water back in the enclosures.

b. On another occasion, Max and Della Fitz-Gerald went out of town for a weekend. Some of the volunteers purchased buckets for the animals in the Clinic, filled them with water, and placed the buckets in the kennels. When Max returned to town, he removed the buckets. At other times, Della Fitz-Gerald placed buckets for water in the kennels in the Clinic at night, but then, Max discarded the buckets.

c. Chandler described how the dogs jump, lay down, and play in the water in a horse trough located outside the Sanctuary. Another trough of water, along with buckets of clean water, are located outside the Family House. The dogs from the Sanctuary and the Family House were allowed outside in large groups, while the dogs from the Clinic had outside breaks individually.

d. Chandler indicated that Max told him it was too time intensive to keep bowls in the dogs' kennels.

e. At no point during his testimony did Mr. Chandler mention any distress or physical problems the dogs ever exhibited while he volunteered.

22. After Blomquist received the initial complaints about FLOD, he instructed Inspector Carlson to conduct an inspection at FLOD at 5146 Quaker Road in Wilson, North Carolina. (Resp. Exh. 1)

### **October 20, 2015 Inspection**

23. On October 20, 2015, Carlson visited FLOD, and spoke with Petitioners Max and Della Fitz-Gerald. Carlson asked Petitioners if they were restricting water access to the dogs housed on the premise. Max explained that he no longer allowed water in the kennels or cages due to safety issues and lack of time. Inspector Carlson explained to both Max and Della Fitz-Gerald that the Animal Welfare Act required continuous access to fresh water, and that Respondent believed that the statute required the water to be in the kennels at all times, not just during breaks. Max Fitz-Gerald explained that he would comply, and begin to put water in all the kennels, but that he would take the water buckets if it would aid in getting the media involved.

24. When Inspector Carlson subsequently inspected the facility she did not see any water in any of the three buildings where kennels and cages housed the dogs. She did observe buckets outside the buildings that appeared to have water, although in her opinion, such water was not clean and possibly contained algae. Carlson also observed troughs in some areas that had water, but she believed that water was not clean, and was warm.

25. Carlson found all the records and files for all the animals and for the facility in order. She observed that no dogs were in physical distress or injured. Inspector Carlson believed that a large majority of animals were exhibiting long-term sheltering behavioral issues. However, on cross-examination at the hearing, Carlson admitted she has no specific veterinarian training, and is not qualified to diagnosis "long term sheltering behavioral" issues with dogs. Before Inspector Carlson left FLOD, she gave the Petitioners copies of the Animal Welfare Act, and of the specific code related to continuous access to fresh water and highlighted the specific section therein. As she left the facility, Inspector Carlson saw Della Fitz-Gerald begin to provide water to

the dogs in the Clinic building where the veterinarian practice is housed. Carlson reported her findings to Joe Blomquist. (Resp. Exh. 2A)

26. Inspector Carlson completed her inspection, and prepared her report for the October 20, 2015 inspection. Inspector Blomquist decided that he and Carlson would conduct a follow-up inspection to FLOD.

### **October 22, 2015 Inspection**

27. At the October 22, 2015 inspection, Carlson and Mr. Blomquist observed water being provided to the animals in the Clinic building that housed 38 or 39 dogs. There were 28 dogs housed in individual kennels inside the Sanctuary building with no water buckets/bowls located in any of the kennels. Outside the Sanctuary, there were two rubber type horse troughs on the front porch area of the Sanctuary. Carlson thought the two troughs were full of dirty, greenish water.

28. There were 23 dogs inside their individual kennels/cages, and three dogs out of their crates in the Family House. The crates were large enough for the dogs to turn around and lay down. There were no water buckets or bowls observed in any of the large black crates or primary enclosures for these dogs. While Blomquist did not observe any water bowls located outside the Family House, Carlson saw two buckets of clear water on the outside porch of the Family House, and one rubber trough in the adjacent yard filled approximately 1/2 full. Carlson thought the water in the rubber trough was greenish in color.

29. Inspector Carlson prepared two written reports, and aided Blomquist in taking the photographs of the facility. She did not take any written statements from Petitioners or record any of the conversations between she and Petitioners. Carlson and Blomquist examined the records of all the dogs, and found all records were in compliance. Blomquist thought Petitioners were very cooperative. (Resp. Exh. 2B) Mr. Blomquist prepared a report for this inspection, and gave his report and the reports of Inspectors Carlson to Dr. Patricia Norris, Director of the Animal Welfare Section, and his immediate supervisor.

### **Notice of Violation and Civil Penalty Assessment**

30. On October 30, 2015, pursuant to her authority as the Director of Respondent's Animal Welfare Section under N.C. Gen. Stat. § 19A-40, Dr. Patricia Norris issued Petitioners the Notice of Violations and \$10,800.00 Civil Penalty Assessment for violating 02 NCAC 52J .0206 on October 22, 2015 for denying 54 animals continuous access to fresh water in their primary enclosures, and for allowing such animals to have access to dirty, greenish water. (Resp. Exh. 4)

### **November 23, 2015 Inspection**

31. After Respondent received two additional complaints regarding FLOD on November 6, 2015 and November 23, 2015, Inspector Carlson returned to FLOD on November 23, 2015. Carlson observed no water in any of the enclosures for the 27 dogs housed in the Sanctuary, and for the 31 dogs housed in the Family House. However, there was water in each kennel in the Clinic. There were two buckets of fresh clean water outside the Family House.

Carlson saw two large rubber troughs outside on the front porch of the Sanctuary full of clear water. Carlson thought there was algae on the inside walls of the water, but she did not perform any testing on the water. In her opinion, no dogs appeared to be in physical distress or dehydrated. Inspector Carlson determined that 58 dogs did not have direct access to water that day. (Resp. Exh. 2C)

### **December 2, 2015 Visit**

32. On December 2, 2015, Inspector Blomquist and Dr. Patricia Norris visited FLOD. Dr. Norris visited FLOD that day as a “last ditch hope” that Petitioners would come into compliance, although she did not intend to discuss the appeal proceedings with Petitioners. Blomquist and Dr. Norris observed that the animals in the Family House and the Sanctuary had food within their individual enclosures, but did not have direct access to water within their enclosures. Dawn Tucker, a volunteer at FLOD, informed Blomquist and Norris that the water troughs located outside the Sanctuary building and the pond on the property were for the dogs to swim in and drink. (Resp. Exh. 2D)

33. Dr. Norris observed the dogs in the entire FLOD facility, and did not see the outward symptoms she would be concerned about for dogs in immediate physical distress. She heard the dogs barking excessively, saw dogs licking the bars of their kennels, and observed dogs spinning in circles.

34. During the December 2, 2015 visit, Mr. Blomquist and Dr. Norris spoke with Petitioners and their counsel. Dr. Norris explained the Animal Welfare Act requirements that each animal must have continuous access to fresh water, and suggested that Petitioners do so while their appeal of the Notice of Violation and Civil Penalty Assessment continued. Mr. Blomquist heard Dr. Norris explain that if Petitioners intended on providing the water, they would need to send a letter to Dr. Norris. Mr. Blomquist did not hear what Dr. Norris said would occur if the water was not provided. (Resp. Exh. 2D)

35. In addition, there were no notes in Blomquist’s written reports that suggested that any dogs at the FLOD facility were in an unhealthy condition, or that any of the dogs were in any sort of physical distress, dehydrated, or injured in any way.

36. After the December 2, 2015 visit, Dr. Norris received a letter from Respondent's counsel that FLOD would remain in compliance as Norris suggested, including the interpretation that the water had to be provided in the kennels at all times.

### **December 16, 2015 Inspection**

37. On December 16, 2015, Inspector Carlson returned to FLOD. Volunteer Dawn Tucker was present. Carlson found that all dogs in the Clinic and the Family House had continuous access to water inside their kennels or cages. All dogs in the Sanctuary had stainless water buckets in their kennels. Carlson noted in her report that “11 of the 28 dogs in here [Sanctuary] do not have access to continuous water. Their water buckets do show signs that water has been recently present.” (Resp. Exh. 2E)



### **Basis for Notice of Violation/Civil Penalty Assessment**

38. On October 30, 2015, Dr. Norris drafted and sent the “Notice of Violations, Assessment of Civil Penalty and Findings of Fact” to FLOD, and assessed a \$10,800.00 Civil Penalty.

39. Before taking any action, Norris reviewed the entire case, the history of the facility, if the violations were repeated, ongoing, intentional or inadvertent, and the degree of harm caused to the animals. She also considered the purpose and intent of the Animal Welfare Act, and reviewed other disciplinary actions at other facilities. Dr. Norris did not visit FLOD before assessing the penalty and preparing the Notice of Violations.

40. Dr. Norris substantiated the violation, because she had a reasonable belief that Petitioner would pull the water from the kennels once Inspector Lisa Carlson left FLOD. She assessed a civil penalty against Petitioners as a disciplinary action to bring FLOD into compliance. Additionally, Dr. Norris opined that dogs having access to water three times a day was not in compliance with 02 NCAC 52J .0206.

41. Dr. Norris agreed with the AMA guidelines and other studies contained in the Respondent's exhibits. These guidelines and reports note that fresh clean water is a basic nutritional requirement for dogs, and fresh clean water must be accessible to animals at all times, unless there is a medical reason to withhold water. Dr. Norris noted that dogs self-regulate best with free access to water. (See Resp. Exhs. 13-18)

42. At hearing, Norris explained that dogs replace their body temperature by panting, which results in a constant loss of hydration and need for replenishment. She opined that such behavior could be signs of long-term shelter containment. While these dogs at FLOD did not appear to be in acute distress such that law enforcement intervention regarding potential cruelty charges were immediately warranted, she thought these animals were being placed at severe risk of long-term dehydration. Dr. Norris also thought these dogs could have gastric problems due to not having continuous access to water.

43. Norris further expounded that while the early stages of long-term dehydration are unlikely to show outward manifestations, once these symptoms become outwardly apparent, the dogs are in severe distress and at significant risk of death. She admitted that no testing was done on the dogs at FLOD to determine if any of the potential problems, that could occur without continuous access to water, actually existed with the dogs at FLOD. As a veterinarian, she was also concerned about the dogs drinking water that may have algae. However, she admitted that no tests were performed on the water that FLOD provided to their dogs.

44. Dr. Norris acknowledged that she is taxed with the job of making sure animals are properly cared for, and it was not her job to regulate dogs in private care not covered under the Animal Welfare Act. She agreed that the “purpose” of the Animal Welfare Act, contained in N.C. Gen. Stat. § 19A-21, was to insure, among other things, that animals contained in shelters are

“provided humane care and treatment.” In her opinion as a vet, Dr. Norris thought that deprivation of water for 23-24 hours is inhumane.

45. Dr. Norris defined “continuous” access to water as access to water “at all times.” She opined that Petitioners did not provide their animals with the “freedom from thirst,” as discussed on page 10 of Respondent’s Exhibit 14, because they denied their dogs continuous access to water.

46. In Norris’ opinion, the degree of harm in this case was the endangered animals caused by deprivation of continuous access to water.

47. Based on Norris’ veterinary expertise, she further opined that it is insufficient to provide water to dogs three times daily. She opined that dogs not having water in their kennels at all times could cause permanent damage, such as kidney damage and blood pressure problems, because dogs cannot store water for future cellular needs. Unless there is a reason for restriction, she would require, as a veterinarian and as Director, using water constantly. Dr. Norris acknowledged that exposure to spilled water overnight could cause chronic skin issues for a dog. However, she opined that water deprivation is more potentially harmful than getting wet by spilled water.

48. Based on her opinion and what was reported to her, Dr. Norris based the monetary amount of the civil penalty on the fact that fifty-four (54) dogs did not have “continuous access” to fresh water. Dr. Norris assessed a \$200 penalty per dog for Petitioner’s depriving each dog of water on October 22, 2015 in violation of the Animal Welfare Care Act requirements. She acknowledged that N.C. Gen. Stat. § 19A-40 only authorizes a civil penalty of not more than \$5000.00, but explained that she was breaking down this figure based on each occurrence or violation with each dog.

49. Dr. Norris recognized that N.C. Gen. Stat. § 19A-39 specifically exempts “kennels or establishments operated primarily for the purpose of boarding or training hunting dogs” from the Animal Welfare Act.

### **Petitioners’ Experts**

50. Dr. Abby Gaoma is a licensed veterinarian in the State of North Carolina who owns and operates two clinics, Vets for Pets in Dunn, NC and The Cottage Animal Clinic in Stantonsburg, NC. Dr. Gaoma is the emergency vet for FLOD. She has provided care and administered tests on many of the dogs housed at FLOD for about three years. At hearing, she was qualified to testify as an expert in veterinary care.

51. Dr. Gaoma works in the Clinic building at FLOD. From a window in the Clinic, Dr. Gaoma regularly sees three to four dogs take breaks for about forty-five minutes at a time. She can perform two or three surgeries while one group of dogs is on their break. Dr. Gaoma regularly comes into contact with the dogs housed at FLOD and, in her expert medical opinion, believes they are well cared for, nourished, and sometimes are overweight as a result of Max Fitzgerald not wanting to withhold any necessities. At no point during her care for these animals has Dr. Gaoma

ever been concerned with or determined there was long-term or short-term problems with the health of the dogs as a result of being housed at FLOD.

52. Dr. Gaoma has never found, after performing any blood or urine panels on the dogs housed at FLOD, that there was any concern for the health of the dogs there, including any conditions previously testified to by Dr. Norris. She has never treated any dogs having symptoms consistent with long-term damage resulting from a lack of "continuous" access to water; that is, her blood work has not shown the dogs experience any kidney problems caused by dehydration. Dr. Gaoma always requests and suggests certain care for dogs housed at FLOD, and she is never denied the ability to provide exceptional veterinary care to the dogs at FLOD.

53. On numerous occasions she has explained to Petitioners that certain dogs need advanced treatment for other conditions. At no point have Petitioners ever decided not to provide that care, or prevent the dogs from going to specialists in other facilities or counties. In her expert opinion, Dr. Gaoma explained that there are numerous safety issues, such as yeast infections and skin infections, associated with having animals lay in water on the kennel floor.

54. Dr. Gaoma is familiar with the Animal Welfare Act and the regulation regarding continuous access to water. She opined that Respondent's definition of "continuous" is too rigid. In her opinion, ideally, a dog's access to water should be dependent upon each dog. Dr. Gaoma acknowledged that an animal needs to have water during the day, but she opined that a 30 minute to one-hour break three times a day is sufficient time for a dog to hydrate. She admitted that a fifteen-minute break, three times a day, is not sufficient for a dog to hydrate. Dr. Gaoma conceded that she did not know the amount of water the dogs at FLOD drink while on their breaks.

55. In the Clinic at FLOD, dogs are provided IV fluids, or provided continuous access to water if in recovery or depending on their situation. Dr. Gaoma has not observed the dogs in the Family House or Sanctuary buildings.

56. Dr. Dale Paley is a licensed veterinarian in North Carolina. She was qualified to testify as an expert in veterinary care at the administrative hearing. Dr. Paley was the resident veterinarian when FLOD opened, and was actively involved during the beginning operation of FLOD from 2004-2005.

57. While Dr. Paley has not been employed by, or part of, FLOD for a long time, she has remained in contact with Petitioners. Dr. Paley has always been impressed with the level of care and compassion Petitioners have offered to dogs at FLOD.

58. In Dr. Paley's expert opinion, FLOD provides above adequate care for the dogs housed at the facility. Three days before the contested case hearing, Dr. Paley spent two days observing the animals at the facility. The dogs had 30 minute breaks to play and rest. She observed similar behavior at FLOD, as she has seen before, such as animals jumping, barking, circling or what some call "kennel craze." In her opinion, Paley thought such behavior was typical of dogs contained in cages, or typical of dogs when they see strangers. She explained that such behavior was not abnormal.

59. Dr. Paley opined there is a large distinction between regular animal shelters and FLOD, due to Petitioners' higher level of dedication, and the larger amount of contact, care, and exercise that FLOD provides its animals. Dr. Paley noted that Petitioners always listens to their veterinarians, no expense is too much, and the medical care provided to the animals is excellent.

60. Dr. Paley has been involved with and provided emergency care at over one hundred (100) practices and rescue groups, and seen many dehydrated animals in various scenarios. In her expert opinion, she sees no problems with the way the dogs at FLOD have been given water, although she acknowledged that continuous access to water is ideal. Dr. Paley saw no physical problems, such as dehydration, with the animals at FLOD. Dr. Paley noted that the majority of these dogs at FLOD need less water because the dogs are short-haired dogs, are around ten years old, and live in air-conditioned and heated buildings. All the buildings at FLOD are air-conditioned and heated.

61. Dr. Paley further opined the dogs at FLOD have a larger than usual amount of space to exercise. The fact that the dogs may drink pond water or water in the troughs is counterbalanced by the exceptional care provided to the dogs at FLOD, and the monthly medicines given to the dogs to take care of any issues that may arrive. In her opinion, these dogs are healthy. If there was a problem with how Petitioners provide water to these dogs, she would have seen medical issues such as kidney problems. However, she didn't see any such problems with the dogs at FLOD.

### **Petitioners**

62. Petitioners Della and Max Fitz-Gerald did not initially plan for FLOD to become an animal shelter, but it has grown and it is Della Fitz-Gerald's life. Mrs. Fitz-Gerald sees her primary responsibility as being in charge of everything in the Clinic area and the kennels therein. The dogs living in the Sanctuary and the Family House have never had water within their kennels, whereas the dogs living in the Clinic have always had water in their enclosures.

63. Petitioners designed a container for the food and water, and had it built into these kennels in the Sanctuary and Family House. Yet, after the dogs continuously knocked their water bowls out, and the edges of these containers caused injuries to some dogs, Max Fitz-Gerald decided to cover those areas with plexi-glass to prevent further injuries. The complaints to Respondent only arose after Petitioners shifted to the bucket policy because the animals cut their feet on the water holders.

64. At hearing, Mrs. Fitz-Gerald explained that all dogs get at least an hour outside three times daily, and they have access to water at all times during these periods. Often, the dogs do not go directly to the water when they are let out of their kennels. Mrs. Fitz-Gerald noted that they provide wet and dry food to dogs at the facility. The reason the animals in the Clinic were provided water in their kennels, and not the other areas, is that the Clinic animals do not usually get as long for breaks as the dogs in the other two buildings.

65. At hearing, Mrs. Fitz-Gerald used fifty-three (53) photos of their property to describe and illustrate the conditions at FLOD. Neither she nor her husband ever wanted to

prohibit a dog from getting the appropriate necessities such as food and water. Before October 2015, Respondent's inspectors never had an issue with the way Petitioners allowed the dogs to have water only at breaks.

66. Max Fitz-Gerald sees himself as the co-owner of FLOD with his wife, although FLOD is a nonprofit rescue group. He no longer works, and commits himself full time to the care of the dogs at the facility and the rescue of other dogs. His day starts with giving the dogs their first break of three throughout the day. The breaks are staggered, and usually last at least one hour, if not more.

67. Mr. Fitz-Gerald explained at hearing that before this matter arose, all his dogs had constant access to water while they were outside their kennels and on their break. The facility that they operate is fully air-conditioned and heated, and he has spent thousands of his own dollars and a lot of donations to maintain the facility.

68. Mr. Fitz-Gerald was the one who contacted the State of North Carolina, and asked to be inspected when he first began operating. He has always been fully cooperative during investigations. He admitted that he removed the water from the dogs in the Clinic area, because the water in the kennels was causing a safety issue, and some dogs had been injured. The animals in the Sanctuary and the Family House have never had water in their kennels during the prior inspections or otherwise.

69. Mr. Fitz-Gerald admitted that he removed the water in the Clinic on October 20, 2015 after Inspector Lisa Carlson told him to put water in every kennel to be compliant with how Respondent interpreted the Animal Welfare Act. Before Ms. Carlson's October 20, 2015 inspection, Mr. Fitz-Gerald was unaware of the "continuous access to water" requirement.

70. Mr. Fitz-Gerald insisted that he would never do anything to harm a dog or animal, and would never deprive his animals of their necessary water and food or veterinary care. He opined that none of his dogs ever showed signs of dehydration or health problems resulting from the way he allowed them access to fresh water. He has always continuously allowed them access to fresh water three times a day.

71. Mr. Fitz-Gerald admitted that he provided water in the kennels in the Clinic, only after being advised to do so by his attorney following the December 2, 2015 visit from Dr. Norris. He felt that if he didn't provide the water in the kennels, Respondent would seize the dogs, although Dr. Norris never actually said that to him.

72. Mr. Fitz-Gerald thought the proposed \$10,800.00 fine was excessive. However, he admitted that it would not be a big burden on him if he was made to pay the fine as he would just have to transfer personal funds from his personal account to cover the bill. FLOD, according to Mr. Fitz-Gerald, usually requires approximately \$15,000 per month to operate; however, operation of FLOD during the month of May was closer to \$36,000.

73. Mr. Fitz-Gerald opposes the proposed fine and violation, because he does not think the Animal Welfare Act was constructed for facilities such as FLOD. Rather, he opined that the

rule on watering [2 NCAC 52J .0206] was specifically meant to regulate puppy mills. He thinks the statutes are not fair to all parties, are overly broad, and paint everyone in the dog sheltering business with the same broad brush.

74. Mr. Fitz-Gerald acknowledged that he could comply with the watering requirements, as interpreted by the Animal Welfare Section, if required to do so. However, he believes the statute should be modified, and be more specific to certain animal facilities.

75. In this case, the preponderance of evidence proved that Respondent's inspectors and Dr. Norris never knew how long the dogs at FLOD were without water. The evidence merely showed that Petitioners did not provide the dogs in the Family House and Sanctuary with continuous access to water in their kennels on October 22, 2015.

76. There was absolutely no evidence presented at hearing that proved the dogs at issue were harmed by not having water in their kennels/enclosure at all times.

77. Dr. Norris failed to identify any rational standard, basis, or rubric that she used in assessing Petitioner \$200.00 for each of the 54 alleged violations, in determining the total civil penalty amount of \$10,500.00

78. During the hearing, the undersigned took official notice that the Webster's New World College Dictionary (2016) defines the word "continuous" as "going on or extending without interruption or break."

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case pursuant to Chapters 150B and 19A of the North Carolina General Statutes. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder and the notice of hearing was proper.

3. Pursuant to N.C. Gen. Stat. § 19A-21, the purposes of the Animal Welfare Care Act, are, in pertinent part:

. . . (iii) to insure that animals, as items of commerce, are provided humane care and treatment by regulating the transportation, sale, purchase, housing, care, handling and treatment of such animals by persons or organizations engaged in transporting, buying, or selling them for such use. (iv) to insure that animals confined in pet shops, kennels, animal shelters and auction markets are provided humane care and treatment.

4. Specifically, N.C. Gen. Stat. § 19A-26 prohibits any person from operating an

animal shelter, as defined by N.C. Gen. Stat. § 19A-23(5), without first receiving a certificate of registration issued by Respondent's Director of the Animal Welfare Section.

5. 02 NCAC 52J .0206 Watering provides as follows:

Animals shall have continuous access to fresh water, except as might otherwise be required to provide adequate veterinary care. Watering receptacles shall be durable and kept clean and sanitized. Damaged receptacles shall be replaced. (*History Note: Authority G.S. 19A-24, Eff. April 1, 1984. Amended Eff. January 1, 2005.*)

6. Petitioner's argument regarding the constitutionality of 02 NCAC 52J .0206 as applied to N.C. Gen. Stat. § 19A-40 et seq., is preserved for the appropriate venue, pending further appeal of this case, as the Office of Administrative Hearings lacks the statutory authority to rule on such arguments.

7. Since Petitioners operated FLOD in Wilson, North Carolina as an "animal shelter" as defined by N.C. Gen. Stat. § 19A-23(5), and held such animal shelter certificate of registration number 72, Petitioners were required to comply with N.C. Gen. Stat. 19A, the Animal Welfare Act, and the rules promulgated thereunder.

8. The issues in this case are whether (1) Petitioner violated 02 NCAC 52J .0206 by denying 54 animals continuous access to water on October 22, 2015, and (2) Respondent's assessment of a \$10,800.00 civil penalty was justified.

9. 02 NCAC 52J .0104 and N.C. Gen. Stat. § 19A-23 define certain terms that apply in Subchapter J and N.C. Gen. Stat. § 19A-23 respectively. However, neither 02 NCAC 52J .0104 nor N.C. Gen. Stat. § 19A-23 define the term "continuous."

10. The words of a statute should be given their ordinary meaning, unless it appears from the context, or otherwise in the statute, that a different sense was intended. *Abernethy v. Board of Com'rs of Pitt County*, 86 S.E. 577, 169 N.C. 631. For the purpose of statutory construction, when the words are unambiguous, they are to be given their plain and ordinary meanings. *State v. Rawls*, 207 N.C.App. 415, 700 S.E. 2d 112 (2010). *State v. Rawls*, 207 N.C.App. 415, 700 S.E. 2d 112 (2010).

11. Webster's New World College Dictionary (2010) defines the word "continuous" as "going on or extending without interruption or break; unbroken; connected." Similarly, Merriam-Webster's Learner's Dictionary (2016) defines the word "continuous" as "continuing without stopping; happening or existing without a break or interruption."

12. Applying the plain ordinary meaning of "continuous" to this case, the preponderance of the evidence showed that Petitioners violated 02 NCAC 52J .0206 by failing to provide continuous access to water to 54 dogs at FLOD on October 22, 2015.

13. N.C. Gen. Stat. § 19A-40 Civil Penalties authorizes:

The Director may assess a civil penalty of not more than five thousand dollars (\$5,000) against any person who violates a provision of this Article or any rule promulgated thereunder. In determining the amount of the penalty, the Director shall consider the **degree and extent of harm caused by the violation**. The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(Emphasis added)

14. There was no evidence produced at hearing proving that the 54 dogs at FLOD suffered any degree or extent of harm, or were in jeopardy of harm on October 22, 2015 as a result of (1) Petitioners' failing to provide such animals "continuous" access to water, or due to (2) Petitioners' method of watering their dogs on October 22, 2015. Neither Inspector Carlson nor Supervisor Blomquist was able to show that any harm occurred to the dogs at FLOD. Respondent failed to establish that the water provided to the 54 dogs was unsafe or otherwise non-potable. Respondent did not test the water in the horse troughs or outside containers, but only made subjective findings as to the color of such water. In addition, Dr. Paley and Dr. Gaoma observed the animals at FLOD, and concluded that no animals were ever in any jeopardy or physical distress.

15. Since there was no evidence that the animals at FLOD suffered any degree or extent of harm as a result of Petitioners failing to provide continuous access to water for 54 dogs on October 22, 2015, Respondent acted erroneously when it assessed a \$10,800.00 civil penalty against Petitioner for violating 02 NCAC 52J .0506.

16. Respondent also acted erroneously in assessing a civil penalty assessment against Petitioner as Dr. Norris failed to provide any rational basis, standard, or rubric establishing why she assessed a civil penalty of \$200.00 for each dog and/or violation in determining the total civil penalty amount to impose on Petitioner for violating 02 NCAC 52 J.0206.

### **FINAL DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's finding that Petitioner violated 02 NCAC 52J .0206 on October 22, 2015, but **OVERTURNS** and vacates the \$10,800.00 civil penalty assessed against Petitioner.

### **NOTICE**

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under N.C. Gen. Stat. § 150B-45, any party wishing to appeal this Final Decision must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the Final Decision was filed. **The appealing party must file a Petition for Judicial Review within 30 days after being served with a written copy of this Final Decision.**



Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition for Judicial Review, and requires service of the Petition for Judicial Review on all parties. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 22nd day of September, 2016.

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Melissa Owens Lassiter  
Administrative Law Judge