

STATE OF NORTH CAROLINA
COUNTY OF ROBESON

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
File No. 10CV01237

SUSAN BARRETT,)
)
 Plaintiff,)
)
 v.)
)
 ROBESON COUNTY, WILLIAM SMITH,)
 DIRECTOR OF PUBLIC HEALTH,)
 ROBESON COUNTY HEALTH)
 DEPARTMENT, JEFFREY BASS,)
 MANAGER, ROBESON COUNTY)
 ANIMAL CONTROL FACILITY, ALBERT)
 LOCKLEAR, DIRECTOR OF)
 ENVIRONMENTAL HEALTH, ROBESON)
 COUNTY,)
)
 Defendants.)

**MOTION TO DISSOLVE
TEMPORARY
RESTRAINING ORDER**

Pursuant to N.C. R. Civ. P. 65(b) and 65(e), Defendants, by and through the undersigned counsel, hereby move the Court to dissolve the Temporary Restraining Order entered in this case and to award them damages. In support thereof, Defendants show unto the Court as follows:

1. The Temporary Restraining Order was improperly obtained without notice in that counsel for Plaintiff failed to present the Court reasons in writing why the order should be granted without notice.
2. The Temporary Restraining Order violates the requirements of Rule 65 of the North Carolina Rules of Civil Procedure that require the order to state why it was granted without notice.

3. The underlying action is brought under N.C. Gen. Stat. 19A-1.1 et seq. which does authorize injunctive relief. However, N.C. Gen. Stat. § 19A-1.1(5) specifically exempts “[t]he lawful destruction of any animal for the purposes of protecting the public, other animals, or the public health” from that statute. Defendants are Robeson County and the officers, employees, and agencies responsible for administering the Robeson County Shelter under Chapter 130A of the North Carolina General Statutes for the purposes of protecting the public, other animals, and the public health.

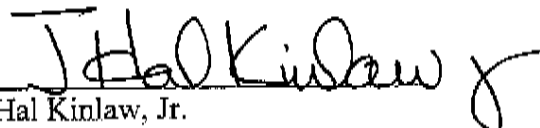
4. Further, Plaintiff’s Complaint fails to identify any unlawful act of defendants or any statute that Defendants have violated. To the extent Plaintiff contends that Defendants are somehow operating the Robeson County Shelter improperly or illegally, she has failed to exhaust her administrative remedies set forth in N.C. Gen. Stat. § 130A-24(b) or state valid reason for said failure. Thus, as set forth more fully in the Memorandum of Law accompanying this motion and Defendants’ Motion to Dismiss, this Court lacks subject matter jurisdiction over Plaintiff’s claims and Plaintiff has failed to state a claim upon which relief may be granted.

5. Defendants have been damaged by the Temporary Restraining Order obtained by Plaintiff. Defendants intend to establish their damages at the hearing currently noticed in this matter on May 7, 2010. Although a showing of malice or want of probable cause is not required to award damages to Defendants, Defendants contend that these circumstances existed in the obtaining of the Temporary Restraining Order.

6. The Temporary Restraining Order has an adverse impact upon the public health in that, as a result of the Temporary Restraining Order, the Robeson County Shelter is not accepting any further animals until the situation is resolved.

WHEREFORE, Defendants respectfully request that the Court dissolve the Temporary Restraining Order, grant Defendants' Motion to Dismiss, award damages as found at the May 7, 2010 hearing, and grant whatsoever other relief the Court may find just and proper.

Respectfully submitted this the ___ day of May, 2010.



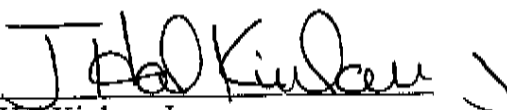
J. Hal Kinlaw, Jr.
N.C. Bar No. 8355
P.O. Box 1371
Lumberton, NC 28359
Phone: (910) 739-0621
Fax: (910) 738-6643
Email: hkinlaw@aol.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served via facsimile and First Class mail a copy of the foregoing Motion to Dissolve Temporary Restraining Order to the following:

Ms. Calley Gerber
4030 Wake Forest Rd., Ste. 300
Raleigh, NC 27609

This the 9th day of May, 2010.



J. Hal Kinlaw, Jr.
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 Defendants.)

**MOTION TO SHORTEN
TIME**

Pursuant to N.C. R. Civ. P. 6(b) Defendants, by and through the undersigned counsel, hereby move the Court to shorten the time required for service of their Motion to Dismiss and their Brief in Support and hear the Motion to Dismiss at the May 7, 2010 hearing previously scheduled in this matter. In support thereof, Defendants show unto the Court as follows:

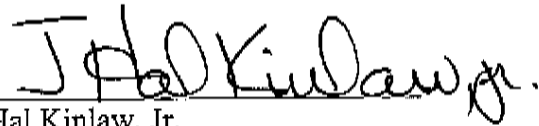
1. This matter is currently scheduled for May 7, 2010 on the Temporary Restraining Order entered on April 29, 2010.
2. Defendants have filed contemporaneously with their Motion to Dismiss and this Motion a Motion to Dissolve the TRO, to be heard at the May 7, 2010 hearing.
3. It is in the interests of judicial economy to hear Defendants' meritorious Motion to Dismiss at the same time the Court is determining whether to continue the injunctive relief granted by the Temporary Restraining Order. The issues in the Motion to Dismiss and the

Motion to Dissolve the Temporary Restraining Order are overlapping and interconnected, and are best dealt with in a unitary hearing.

4. Plaintiff will not be prejudiced by hearing the Motion to Dismiss on May 7, 2010. Counsel for Plaintiff set the hearing date for May 7, 2010, and presumably will be available at that time for hearing the Motion to Dismiss.

WHEREFORE, Defendants respectfully request that the Court shorten time for serving their Motion to Dismiss, hear the Motion to Dismiss on its merits on May 7, 2010, and grant whatsoever other relief the Court may find just and proper.

Respectfully submitted this the 5th day of May, 2010.



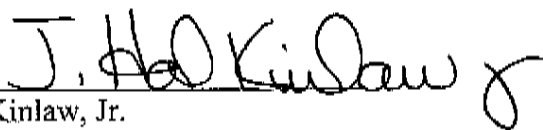
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served via facsimile and First Class mail a copy of the foregoing Motion to Shorten Time to the following:

Ms. Calley Gerber
4030 Wake Forest Rd., Ste. 300
Raleigh, NC 27609

This the 5th day of May, 2010.



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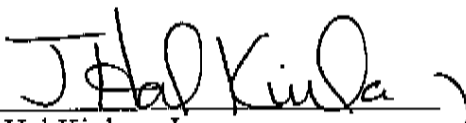
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LOCKLEAR, DIRECTOR OF)
ENVIRONMENTAL HEALTH, ROBESON)
COUNTY,)
)
Defendants.)

MOTION TO DISMISS

Pursuant to N.C. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6), Defendants, by and through the undersigned counsel, hereby move the Court to dismiss this action with prejudice for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief may be granted.

Respectfully submitted this the 5th day of May, 2010.



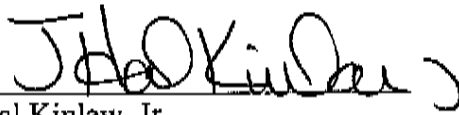
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served via facsimile and First Class mail a copy of the foregoing Motion to Dismiss to the following:

Ms. Calley Gerber
4030 Wake Forest Rd., Ste. 300
Raleigh, NC 27609

This the 5th day of May, 2010.



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 Defendants.)

**BRIEF IN SUPPORT OF
DEFENDANTS' MOTION TO
DISSOLVE TEMPORARY
RESTRAINING ORDER AND
DEFENDANTS' MOTION TO
DISMISS**

Defendants, by and through their undersigned Counsel, respectfully submit the following Brief in support of their Motion to Dissolve the Temporary Restraining Order and their Motion to Dismiss.

STATEMENT OF THE CASE

On April 29, 2010, Plaintiff filed her Complaint in this action and obtained a Temporary Restraining Order against Defendants. The named Defendants are Robeson County and three County officials who are in charge of the Robeson County Animal Shelter. The Complaint alleges that Defendants are engaged in animal cruelty and seeks injunctive relief pursuant to N.C. Gen. Stat. § 19A-1.1 et seq. The Complaint's First Cause of Action asserts that Defendants are engaged in animal cruelty as defined in that statute because Defendants refused to allow Plaintiff to put a "hold" on animals in the Robeson County Animal Shelter to prevent them from being

euthanized after 120 hours.¹ The Complaint's Second Cause of Action asserts that Defendants are engaged in animal cruelty enjoined under Chapter 19A by failing to keep all of their kennels full prior to euthanizing dogs.

The Complaint, taken in the light most favorable to the Plaintiff, does not allege any actual violations of any North Carolina law. See Compl. The First "Cause of Action" references N.C. Gen. Stat. 130A-192 but does not allege that the Robeson County Animal Shelter failed to allow animals to be adopted during the 120 hour period. Instead, it complains that the Robeson County Animal Shelter refused to allow animals to be adopted *after* the 120 hour period had expired. The second "Cause of Action" makes no reference to any statute whatsoever, but merely alleges that Defendants are engaged in animal cruelty enjoined under Chapter 19A because they euthanized animals even though kennel space to hold them was available. See Compl.

ARGUMENT

I. The Complaint Should Be Dismissed for Lack of Subject Matter Jurisdiction.

Plaintiff's complaint should be dismissed pursuant to N.C. R. Civ. P. 12(b)(1) and the Temporary Restraining Order should be dissolved because N.C. Gen. Stat. § 19A-1.1(5) specifically states that Chapter 19A "shall not apply to the lawful destruction of any animal for the purposes of protecting the public, other animals, or the public health." On the face of the complaint, Defendants are government entities and officials responsible for protecting the public health and other animals. Thus, this action is frivolous and should be summarily dismissed.

The only case referencing this exception to Chapter 19A that Defendants have located is Justice for Animals, Inc. v. Lenoir County SPCA, Inc., 168 N.C. App. 298, 304 (2005). In

¹ Although the statutory minimum time in the shelter for animals is 72 hours pursuant to N.C. Gen. Stat. §

Lenoir County SPCA, Inc., the Court of Appeals observed that N.C. Gen. Stat. § 19A-1.1 did not apply because the action was filed prior to its effective date. Id. Otherwise, the public health exception would have prevented that action, which attempted to enforce provisions of N.C. Gen. Stat. 130A-192 through Chapter 19A. See id.

II. The Action is Barred by County Governmental Immunity.

In addition, the Court lacks subject matter jurisdiction and personal jurisdiction because Defendants are protected by the doctrine of sovereign immunity.

Sovereign immunity ordinarily grants the state, its counties, and its public officials, in their official capacity, an unqualified and absolute immunity from law suits. Messick v. Catawba County, N.C., 110 N.C. App. 707, 717, 431 S.E.2d 489, 493 (1993). The rule of sovereign immunity applies when the governmental entity is being sued for the performance of a governmental, rather than proprietary, function. Id. "It [is] well-settled that when an action is brought against individual officers in their official capacities the action is one against the state for the purposes of applying the doctrine of sovereign immunity." Whitaker v. Clark, 109 N.C. App. 379, 381-82, 427 S.E.2d 142, 143-44 (1993).

A county may waive its sovereign immunity by purchasing liability insurance pursuant to N.C. Gen. Stat. § 153A-435(a). In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Clark v. Burke County, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994). "Absent such an allegation, the complaint fails to state a cause of action." Paquette v. County of Durham, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002).

130A-192, the complaint states that the Robeson County Animal Shelter policy is to hold them an additional two days.

Here, Plaintiff failed to allege waiver of immunity as to the Defendants sued in their official capacity. In any event, no waiver by Robeson County action exists for the governmental function of running an animal shelter. Thus, the action must be dismissed with prejudice under the doctrine of sovereign immunity.

III. Plaintiff Failed to Use Her Administrative Remedies.

As held in Justice for Animals, Inc. v. Robeson County, 164 N.C. App. 366, 595 S.E.2d 773, 775 (2004), Plaintiff was required to exhaust her administrative remedies prior to filing this action. In Justice for Animals, Inc. v. Robeson County, the plaintiffs filed a complaint alleging that "the treatment of animals at the Animal Control Facility is cruel and unlawful under N.C. Gen. Stat. § 19A-1 et seq., § 130A-192, and § 14-360." The Court of Appeals held that the plaintiffs were "aggrieved persons" whose claims fell within the scope of N.C. Gen. Stat. § 130A-24(b). Id. at 368, 595 S.E.2d at 776-77. The Court of Appeals affirmed the trial court's dismissal of the plaintiffs' complaint for lack of personal and subject matter jurisdiction because plaintiffs failed to exhaust the administrative remedies available under N.C. Gen. Stat. § 130A-24(b) and or to plead a valid basis for avoiding the exhaustion requirement. Id. at 372, 595 S.E.2d at 777-78.

It is true that exhaustion of administrative remedies prior to seeking judicial review may not be required in exceptional circumstances. See Orange County v. North Carolina Dept. of Transportation, 46 N.C. App. 350, 376-77, 265 S.E.2d 890, 907-08 (1980). However, allegations of the facts justifying avoidance of the administrative process must be pled in the complaint. See Huang v. N.C. State University, 107 N.C. App. 710, 715-16, 421 S.E.2d 812, 815-16 (1992) (summary judgment properly granted when plaintiff failed to allege inadequacy of administrative remedy). Plaintiff's assertions in her complaint that she had talked to the Defendants about the

subject and thus should be excused from the administrative process do not constitute exceptional circumstances. See, e.g., Bryant v. Hogarth, 127 N.C. App. 79, 86 (N.C. Ct. App. 1997) ("The assertion by plaintiffs' counsel to the trial court in oral argument that "we want to come here and we don't want to go to the Marine Fisheries," does not constitute the requisite circumstance.). "To the extent plaintiff's complaint alleges an action pursuant to this statute, it must seek administrative remedies, including its rights to appeal, against the local health department and local health director." Justice for Animals, Inc. v. Lenoir County SPCA, Inc., 168 N.C. App. 298, 303 (2005). Thus, the Complaint should be dismissed and the Temporary Restraining Order dissolved because of Plaintiff's failure to exhaust her administrative remedies.

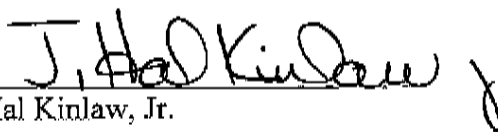
IV. Plaintiff has Failed to State a Claim For Which Relief May Be Granted.

In view of the above, Plaintiff has also failed to state a claim for which relief may be granted, and the Complaint should also be dismissed with prejudice pursuant to N.C. R. Civ. P. 12(b)(6). Plaintiff has failed to state a claim under Chapter 19A, which specifically excludes the activities Plaintiff complains of. Even if she had exhausted her administrative remedies, Plaintiff would still have failed to state a claim under N.C. Gen. Stat. § 130A-192. Nothing in that or any other North Carolina law requires Defendants to keep animals longer than the County policy, whether or not Plaintiff may have asked them to do so or whether or not there is still room in the shelter. In essence, Plaintiff is asking the Court to change the way the shelter is being run just because it bothers her. Neither she nor this Court has the legal right to legislate policy to the Robeson County Animal Shelter. The Temporary Restraining Order should be dissolved and the action dismissed with prejudice pursuant to N.C. R. Civ. P. 12(b)(6).

CONCLUSION

For the above stated reasons, Defendants request that the Court dissolve the Temporary Restraining Order, award damages against Plaintiff pursuant to N.C. R. Civ. P. 65(b) and 65(e), dismiss the action with prejudice, and grant whatsoever other relief the Court may find just and proper.

Respectfully submitted this the 5th day of May, 2010.



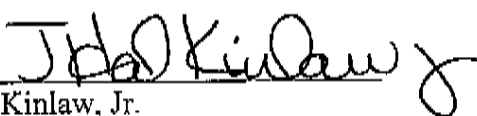
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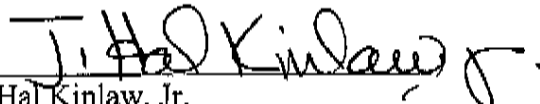
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Defendants.)

NOTICE OF HEARING

Defendants, by and through the undersigned Counsel, hereby give notice that they will bring on for hearing their Motion to Dissolve Temporary Restraining Order, Motion to Dismiss, and Motion to Shorten Time before the Robeson County District Court at Robeson County Court House, 500 North Elm Street, Lumberton , North Carolina, Courtroom 3A, at 9:00 a.m. or at such time thereafter as the Court determines

Respectfully submitted this the 5th day of May, 2010.



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