

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

CHELSEY V. MORTON and JENNIFER
ROBINSON,

Plaintiffs,

v.

STATE OF GEORGIA DEPARTMENT
AGRICULTURE, and TOMMY IRVIN,
In his Official Capacity as Commissioner,

Defendants.

Civil Action File No. 2007-CV-130839



ORDER ON MOTION TO DISMISS

This matter is before the Court for consideration of Defendants' Motion to Dismiss. Plaintiff has brought this action to compel the Defendant, the Georgia Department of Agriculture, to enforce O.C.G.A. § 4-11-5.1. That statute, a part of the Georgia Animal Protection Act, sets the standard in Georgia for the humane euthanasia of dogs and cats. Plaintiffs allege that Defendants have continued to license shelters that use non-statutory means of euthanasia and to encourage and promote such practice, an act which Defendants have no discretion to do. Defendant seeks to dismiss Plaintiffs' complaint on a number of grounds. The Court, having reviewed the briefs, arguments and citation of authority presented by counsel, enters the following order:

Defendant asserts that this action against the Georgia Department of Agriculture must be dismissed because: (1) Injunctive relief is not the proper remedy; (2) Plaintiffs do not assert a valid basis for declaratory judgment; (3) Plaintiffs lack standing to bring suit; and, (4) an award of injunctive relief would violate the due process rights of the

animal shelters who currently have been issued licenses. A motion to dismiss should only be granted if the allegations of the complaint, construed most favorably to the plaintiff, disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts. *Cooper v. Unified Govt. of Athens-Clarke County*, 275 Ga. 433 (2002).

“There is no doubt but that equity will exercise jurisdiction to restrain acts or threatened acts of public officers which are *ultra vires* and beyond the scope of their authority, outside their jurisdiction, unlawful or without authority.” *Head v. Browning*, 215 Ga. 263, 267 (109 S.E.2d 798) (1959). Defendants do not have discretion under O.C.G.A. § 4-11-7 to authorize or encourage the use of euthanasia measures prohibited by law. For purposes of a motion to dismiss, the Court construes the allegations set forth in the complaint in the Plaintiff’s favor, and, in doing so, Plaintiff has sufficiently alleged that Defendant is acting in an *ultra vires* manner for which no legal remedy is available. As Plaintiff seeks to enjoin acts that are not within the discretion of the Defendant, injunction is the proper remedy.

Plaintiffs seek declaratory relief from the Court clarifying that Defendants have exceeded their authority in permitting animals to be euthanized in a manner forbidden under Georgia law. Defendant seeks to dismiss the claim for declaratory judgment, asserting there is no actual controversy which would warrant the issuance of a declaratory judgment. The Georgia Declaratory Judgment Act is intended to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. Ga. Code Ann. § 9-4-1. Declaratory relief is not available unless there is an actual, justiciable controversy between the parties. Ga. Code Ann. § 9-4-2(a). The controversy cannot be merely hypothetical, abstract, academic, or moot. *Bd. of Trustees &c. v.*

Kenworthy, 253 Ga. 554 (1984). “[F]or a controversy to justify the making of a declaration, it must include a right claimed by one party and denied by the other, and not merely a question as to the abstract meaning or validity of a statute. There can be no justiciable controversy unless there are interested parties asserting adverse claims upon a state of facts which have accrued.” *Pilgrim v. First Nat. Bank &c.*, 235 Ga. 172, 174 (1975). On the facts and claims Plaintiffs have asserted, there is clearly an actual controversy, as animal shelters are alleged to be using methods that are in violation of the law and Defendant is sanctioning such activity. This is not an abstract or academic question of law but an actual dispute between the parties, and a genuine uncertainty as to the rights and duties of the parties under the law exists.

Defendants further assert Plaintiffs lack the proper standing to bring forward this claim. The standing requirement prevents parties from seeking advisory opinions from the judiciary and assures that decisions are only rendered in cases of actual controversy. *Waller v. Georgia*, 467 U.S. 39 (1984). Plaintiffs are citizens and taxpayers, and therefore have standing under Georgia statute to seek an injunction to restrain the *ultra vires* acts of public officials.

Under O.C.G.A. § 9-6-24, “Where the question is one of public right and the object is to procure the enforcement of a public duty, no legal or special interest need be shown, but it shall be sufficient that a plaintiff is interested in having the laws executed and the duty in question enforced.” Although codified alongside statutes regarding the proper issuance of writ for mandamus, the statute is not limited to that remedy alone, and standing is authorized under it where Plaintiffs seek injunctive relief to restrain the *ultra vires* acts of officials. *Head v. Browning*, 215 Ga. 263 (Ga. 1959). Moreover, Plaintiffs’


status as taxpayers also grants them the requisite standing. "This court has many times recognized the right of a taxpayer to apply to a court of equity to prevent public officers from taking action or performing acts which they have no authority to do. ... There is no doubt but that equity will exercise jurisdiction to restrain acts or threatened acts of . . . public officers . . . which are ultra vires and beyond the scope of their authority, outside their jurisdiction, unlawful or without authority." *Irwin v. Crawford*, 210 Ga. 222, 224 (1953). Accordingly, Plaintiffs have standing to bring this action.

Defendant's final argument is that if Plaintiffs' are awarded injunctive relief, it will violate the due process rights of the animal shelters. Granting the relief Plaintiffs seek "would result in the unconstitutional denial of due process to those shelters whose licenses were withheld." (Defendant's Brief in Support of its Motion to Dismiss, pg. 10).

A due process right only exists, however, where there is a vested property interest. *Bd. of Comm'rs v. Farmer*, 228 Ga. App. 819, 820 (Ga. Ct. App. 1997). A license issued for either an illegal use or an illegal non-conforming use is void and it does not vest constitutional rights. *See Corey Outdoor Advertising, Inc. v. City of Atlanta*, 254 Ga. 221, 227 (1985). Accordingly, injunctive relief is proper and would not affect any third party's due process rights.

Defendant's motion for dismissal is **DENIED**.

SO ORDERED this 27th day of July, 2008.


Hon. Tom Campbell, Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

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