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VIA ELECTRONIC MAIL
Maryland General Assembly
Senate Judicial Proceedings Committee

Re: **Supplemental Testimony, S.B. 0152 (Amending Md. Crim. Law § 10-615)**

Dear Chairman Zirkin and Judicial Proceedings Committee Members:

Thank you very much for the opportunity to briefly address your committee last Thursday providing testimony on proposed Senate Bill ("S.B.") 152. Owing to the number of issues raised during the hearing and the limited time available, I thought it may be helpful to provide additional information through a brief written supplement. Please note that I am available and more than happy to continue to discuss any of my observations at the convenience of the Committee Members or its staff.[1] To begin, as I alluded during my verbal remarks, there are three types of issues that I have seen emerge related to seizures of animals under § 10-615, and subsequent judicial efforts by owners to secure their return, and elaborate on each below.

I. Practical Issues Associated With Dual Criminal & Civil Proceedings

Within the overall statutory scheme prohibiting various acts against animals (§§ 10-601 through 10-626), § 10-615 appears to perform several functions related to authorities in seizing animals in cases of cruelty or abuse.[2] First, it provides authority for a judge *following a*

1 As noted in my oral remarks, I am not directly taking a position advocating for or against the proposed bill, but owing to my current association with three active § 10-615 petitions currently pending in various courts, seek only to highlight issues that have arisen for your consideration. These issues are inherent in the current statutory scheme and its implementation, and also somewhat implicated in the proposed changes reflected in S.B. 152, so their review may prove of use in considering any potential changes to the current structure. I try not to however directly comment on specific proposals within S.B. 152, nor do I directly advocate for any particular policy position.

2 In the only appellate opinion addressing § 10-615, the Court of Appeals in *Rohrer v. Humane Soc'y of Wash. Cnty.*, 454 Md. 1, 163 A.3d 146 (Md. 2017), reviewed available legislative history of § 10-615. The Court of Appeals found the section was originally intended to provide separate authorities for animal control officers to take possession of animals to protect them from neglect or cruelty, either following a conviction, or upon

conviction for animal cruelty to order the removal of any animals for their protection under subsection (a).[3] Second, it provides authority to animal control officers to *temporarily* seize animals to protect them from cruelty even absent a conviction under subsections (b) & (c).[4] Third, in subsections (d) & (e) it addresses logistics associated with *temporarily* seized animals, requiring notice to be provided to owners of their right to petition for return through a District court proceeding, and direct disposition of animals where owners do not do so or cannot be found (*e.g.*, designation as a stray and ownership rights forfeited).

This framework has the effect of creating two separate and potentially parallel sets of procedures that can allow for the disposition of animals:

a) a criminal track, where animals are seized, criminal charges filed against an owner for cruelty, that process proceeds, and he or she is eventually convicted and the animals potentially forfeited for their protection; and
b) where animal control officers witness cruelty or abuse and act to temporarily seize animals for their protection without prior judicial review or authorization.

As an initial observation, there appear to be few instances in which an animal control officer exercising his authorities to temporarily seize animals to protect them from abuse or cruelty would not subsequently set in motion a criminal investigation, which may or may not result in charges being filed.[5] Practically then, where a criminal investigation has been initiated

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witnessing an act of cruelty where removal was necessary to protect an animal. Notably, although the original version of the statute required notice to be provided to owners in the event of the latter (assuming the owner wasn't present at the time of any seizure that might occur), the statute didn't expand upon any particular form of notice, or what an owner's options were following seizure to recover their animal. Subsequently, in 1975 the statute was amended to provide for more specific notice requirements, and following notice, that an owner might seek return of any seized animal through a petition filed in District court, if no other administrative remedy existed.

3 Two other provisions containing criminal prohibitions against cruelty to animals additionally directly provide trial judges authority to prohibit *those convicted* from owning or possessing animals as part of any sentence or penalty. *See* §§ 10-604(b)(3) & 10-606(b)(2)(ii).

4 As noted by the Court of Appeals in *Rohrer*, subsections (b) and (c) largely conflate and are not separate authorities, although subsection (c) additionally acts to exclude animal control officers from liability where they must enter onto private land to execute their authorities. Practically, the seizure of animals by animal control officers under this authority appears to be exercised both pursuant to other law enforcement's actions under a search warrant, and also independently. Although neither subsection (b) nor (c) facially notes animal control officers' actions taken apart from pursuant to a search warrant are done under a theory of exigent circumstances or otherwise, the underlying legislative history suggests an extension of authorities where animal control officers themselves witness the commission of violations. Moreover, § 10-615(f) would appear to restrict animal control officers' exercise of these authorities to either plain sight (*e.g.*, exigent circumstances) or where a search warrant has issued providing additional authorities.

5 Indeed, the statutory scheme seems to anticipate such an investigation and potential filing of criminal charges, as even under subsection (b) if animals are seized from certain facilities under the purview of the Maryland

which could result in charges, or indeed where charges have already been filed, meaningful participation by an individual at any civil judicial proceeding on whether the seizure was justified is likely to be extremely limited.

In the three anecdotal matters I have been associated with, all three civil return proceedings have been stayed at the request of the owner, until companion criminal matters have been resolved.[6] Although a civil return proceeding may theoretically fulfill some function allowing for the early return of seized animals, that function remains unclear. Where criminal charges are filed or appear likely following a seizure, owing to obvious Fifth Amendment concerns, companion civil return proceedings as they are currently contemplated in the statutory scheme appear to serve little purpose apart from placing the Humane Society on "notice" that an owner does not intend to relinquish ownership of animals seized. Ultimate determinations of possession however – much less ownership – appear unlikely to be resolved through companion civil proceedings until months or even years following animals' seizure.[7]

Moreover, marginal changes of the time allotted to owners to exercise their right to seek return of their seized animals through such a process, or mandates imposed upon District courts to schedule initial hearings promptly,[8] appear unlikely to alter this underlying dynamic. Where prompt civil proceedings might truly affect quicker resolution of issues appears to be limited to where criminal charges are not filed following an initial investigation, although practically, given the time required for most initial investigations, it would appear more likely that arriving at any decision to not file criminal charges would still take several weeks, depending on the scale of any investigation.

Further, owing to the relative uncertainty of the legal standards to be applied during quasi-civil proceedings in the District court (*see* section below) and the potentially large amounts of evidence and witnesses for such proceedings, even once hearings are scheduled they often must be re-scheduled depending on the availability of judges.[9]

Department of Health, that department "shall conduct an investigation" and within 24 hours report the matter to the local State's Attorney.

6 Indeed, even in *Rohrer* the original owner of the animals, after initially filing a request in District court seeking their return, stayed those proceedings until after the resolution of companion criminal charges.

7 In the matters I am currently involved in, one has proceeded two years since the seizures (currently Circuit court appeal of District court decision, which occurred months after the resolution of the criminal charges); one has proceeded 8 months (criminal resolved and now beginning District court trial); and one has continued 10 months (disposition of criminal and no trial date set yet for District court proceedings).

8 Although § 10-615 currently requires only that owners file petitions for return within 10 days, S.B. 152 does contain a provision directing District courts to schedule an initial hearing within 14 days.

9 In two of the three anecdotal 10-615 cases I have been involved in, one required multiple weeks of trial at the

Finally, as an incidental observation which may or may not be endemic to the current structure, it should also be noted that during these proceedings, although Humane Societies and animal control offices may be resource-constrained in some areas, they may also benefit from legal representation from county attorneys, and often employ at trial multiple direct or related staff members that often become qualified as experts. Practically, this puts the onus on an owner seeking return of their own animals to retain – and expend funds for – their own experts, in District court proceedings that may occur regardless of the disposition of criminal charges, as expanded upon below.

II. Legal & Constitutional Issues Associated With Dual Criminal & Civil Proceedings

Apart from the practical issues outlined above, several legal and constitutional issues are raised by the current employment of dual criminal and civil proceedings. First, the current scheme by which animals may be seized independently of a search warrant, and then owners must act to petition for their return through a civil procedure raise due process concerns over what are essentially pre-judicial process seizures. As noted above, where criminal charges are pending or contemplated, resolution of possession issues through a companion civil case is not likely to occur for months, if not years following any seizure, which may directly implicate due process requirements for deprivations of the use of private property. *See, e.g.*, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (deprivation hearings "must be granted at a meaningful time and in a meaningful manner."). Further, the lack of any requirement to demonstrate probable cause through affidavit or application for a search warrant, and potentially light burden on animal control officers at any eventual civil hearing to demonstrate their actions were necessary to prevent cruelty, may also run afoul of other due process considerations – exacerbated by the extreme length of time owners are deprived of the return of their animals. *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972) (invalidating replevin statutes which authorized authorities to seize goods simply upon the filing of an ex parte application and the posting of bond).

Second, and perhaps more importantly, there does not appear to be any direct correlation or explicit link between the disposition of criminal charges and the resolution of any companion civil proceeding. Although § 10-615(a) provides and outlines a mechanism to address potential forfeiture of animals where an individual has been convicted of a crime, the scheme is facially silent as regards other outcomes. Although the Court of Appeals in *Rohrer* somewhat lamented this lack of guidance given to trial courts regarding standards to apply in civil cases, and noted

District court level, and required over six days at the Circuit, while another still proceeding at a District court level has been delayed several months owing to blocking several days of trial schedule before the same judge.

that the disposition of criminal charges would be highly relevant to any companion civil process, owing at least in part to the particular facts of *Rohrer* (where there were convictions on five counts), it remains apparently an open question as to how civil cases should be resolved where an individual is acquitted of all criminal charges. Anecdotally, of the three matters I am involved in, one featured a full acquittal after a multiple day trial of all criminal charges; one featured an entry of a nulle prosequi on all criminal charges; and one featured a nulle prosequi of all criminal charges relating to cruelty or abuse -- all with no direct effect on the need to continue a companion civil process for the owners to recover their animals. Such outcomes are troubling for several reasons, given the backdrop of the current procedures employed by District courts, in which in essence the core question of whether individuals committed cruelty (or under *Rohrer* the potential for cruelty still exists at the time of any potential release) against animals is addressed twice – both in any criminal case, and also in any companion civil case.

Such outcomes – where owners must in essence prove they did not expose animals to cruelty again in a civil case to have their animals returned after having already done so in a criminal case, implicates double jeopardy and related concerns of res judicata and or collateral estoppel. To illustrate, although the Court of Appeals in *Rohrer* neglected to state which procedure was required under what circumstances (*see* below, addressing open questions of whether replevin, "10-615 petitions," or existing criminal procedural rules should be used), procedures outlined by that Court for "10-615 petitions" require addressing two sets of factual issues: whether it was originally necessary at a time of a seizure to protect animals from cruelty or for their health; and whether it still remains necessary, to allow for continued possession of animals by Humane Societies. Although the Court in that opinion clarified that it was the Humane Societies that had the burden of establishing both predicates to continue to possess seized animals, the mechanics of trial essentially require owners to demonstrate the opposite to secure the release of their animals. So, even where an individual has been tried criminally for abuse or cruelty against an animal, that individual must still address the same facts regardless of whether they have been convicted of counts against all animals, only certain animals, where they have been acquitted, or where all criminal charges have been dismissed.

The easiest quandary emerges where an individual has been acquitted of all criminal charges relating to the same animals, as that individual must still demonstrate at a civil trial but to a lesser standard, that they did not abuse or expose their animals to cruelty. Here, in a criminal context, the State has the burden to prove abuse or cruelty beyond a reasonable doubt, meaning that in some instances 90-10 or even 50-50 splits of evidence against an individual might result in acquittals. Yet in a companion civil case, where the District court is likely to employ a

preponderance of the evidence standard,[10] the exact same evidence would result in the Humane Society's meeting its burden to justify continued possession of any animals. Although arguably the current statutory scheme promotes this possibility, questions remain whether such a possible outcome is consistent with the legislative intent, and whether it runs afoul of double jeopardy considerations. Although an exact analysis of the extent of the application of double jeopardy concerns in civil matters following criminal trials is beyond the scope of this brief supplement, the penalty of continued deprivation and in the proposed outcome of forfeiture or bond costs, appear to raise serious constitutional infirmities.[11]

III. Other Issues Raised By Current Implementation Of The Civil Return Process

Currently, as observed anecdotally, given the absolute lack of facial guidance within the statutory scheme and the relative dearth of judicial opinions, District courts are proceeding with "10-615 petitions" regardless of the outcome of any companion criminal case, and those petitions require establishment of certain issues (*e.g.*, then and current likelihood of cruelty or medical necessity). However, confusion exists, potentially exacerbated by various statements contained within *Rohrer*, of the differing mechanisms that may be employed in seeking return of seized animals. Notably, § 10-615(d)(2) provides that owners may petition the District court for return if no other administrative remedies exist, but is silent as to the form of that petition, or whether other judicial remedies may be allowable. For example, replevin actions, traditionally brought by owners to retrieve personal property from others, may still be employed even after *Rohrer*. Yet it remains unclear whether those actions are as an alternative to a "10-615 petition," as they devolve around fundamentally different factual issues.[12] Additionally, for items seized initially pursuant to search warrants, Criminal Procedure § 1-203(c) and (d) appear to impose mandates for the return of those items either when they are no longer needed for the criminal matter, or upon an acquittal, nulle prosequi, or dismissal and the State has either not noted an appeal, or the time for an appeal has expired. The Court of Appeals in *Rohrer* appeared to suggest that neither mechanism was displaced by § 10-615, but regrettably provided little other guidance as to which mechanism might be more appropriate under any particular circumstance. Similarly, as the

10 Although the current scheme does not dicate this standard, such is the default standard of proof employed in civil matters, which the proposed bill appears to codify.

11 Similarly, even if consensus exists on whether civil return procedures must be employed where an individual is acquitted of all criminal charges for the same animals, other questions remain unaddressed in the statutory scheme where the extent of criminal charges and animals seized is not coextensive, where criminal charges are disposed of through the entry of nulle prosequi, and even where convictions have occurred but either not for all animals seized or conditions have changed since conviction.

12 Traditional replevin actions are brought in District courts, and focus primarily on establishing *ownership* of disputed items, with little regard for factual issues relating to the care or employ of those items.

Court in *Rohrer* focused in one aspect on whether § 10-615 could act to affect ownership (rather than rights of possession), that Court left open the possibility that an owner could file multiple actions seeking the return of their animals, yet there is no guidance as to which mechanism is to be used in which situation.

Finally, the issue remains of recompense sought by Humane Societies for the care of animals they've seized for the time period they remain in the possession of the Societies. Anecdotally, the issue has arisen in each of the § 10-615 matters I have been involved in, either as elements raised in settlement discussions, discussed generally as an issue which might be raised in subsequent litigation against an owner, or as part of monetary bond requirements while a District court decision was being appealed. Here too, the current statutory scheme appears to leave open certain questions – somewhat addressed by the proposed bill – which also raise legal and constitutional questions.

Trial court judges in criminal matters are generally accorded authority to order restitution in criminal matters, either directly, or as a condition on probation. *See, e.g.*, Md. Crim. Proc. § 11–603 (generally); § 6–221 (as a condition on probation). These authorities have been judicially reviewed, and extended to animal abuse cases – notably though only to costs of care for animals where a conviction occurred. *See Silver v. State*, 420 Md. 415, 23 A.3d 867 (Md. 2011). Although the specific criminal prohibitions relating to abuse or cruelty often provide judges separate discretion to order fines or the removal of animals following a conviction, none appear to directly address recompense, either as an element of restitution or otherwise.

Within the current statutory scheme, three general provisions exist that do somewhat directly address aspects of recompense, but under discrete circumstances:

- where animals are considered stray (*e.g.*, where seized and owners do not timely act to reclaim or owners cannot be identified);
- a general provision appearing to allow recompense for short-term impoundments; and
- a provision added last year establishing a state-wide fund that assists in channeling collected fines imposed after guilty verdicts back to the Humane Societies as recompense for costs incurred.

Although neither of these three provisions have been invoked in cases I have been exposed to, they each appear to contain ambiguities or limitations. For example, § 10-626 establishes an animal abuse emergency compensation fund, which receives apart from state appropriations, "fines levied as a result of conviction of an animal abuse crime," but restricts the

use of funds to defray costs incurred by Societies for care of animals "*from the time of seizure until the outcome of the criminal case*." As was noted above, linking the return of animals seized to the outcome of a dual civil case which is most likely to be resolved only well after the resolution of any criminal case, suggests even if § 10-626 is fully funded it would only be authorized to provide a fraction of true costs incurred.

Similarly, § 10-615(e) provides that animals may be considered stray if an owner is notified of a seizure but fails to file a petition for their return within 10 days, or if an owner remains unknown after 20 days of reasonable efforts. Separately within the Agricultural Code, entities that collect strays which ostensibly could include the Humane Societies under these circumstances, are empowered to either seek recompense for "damage" caused by the stray, or alternatively to sell the animals unless damage and "a reasonable compensation for feeding the animal while impounded are paid or tendered." Md. Ag. Code § 3-603. Yet application of this provision where owners do seek their animals' return and are therefore not considered stray appears limited.

Finally, while § 10-617 would appear to provide for a more general option to impose costs of care on owners, its provisions have not been judicially reviewed apart from *dicta* contained within *Rohrer*, (and anecdotally I am unfamiliar with its invocation), and it may only offer limited relief as the intent appears to be limited to strays or animals of unknown ownership. For example, while it does provide discretion to Humane Societies to adopt out or continue to care for animals, and explicitly requires owners redeeming animals to "pay all fees, costs, and expenses incurred by the animal control unit," several related sections appear facially limited to animals that are "unclaimed."[13] Although this section's provisions could be invoked by a Humane Society seeking costs of care following a seizure and retention of an animal, it is unclear whether any costs could be awarded beyond where an owner notifies the Society it seeks to reclaim his animals. Also, and as noted above, the prohibitions contained within *Silver* relating to limiting restitution for care of animals only following convictions, may further limit this section's utility as a vehicle seeking long term cost of care where no conviction has occurred.

13 *See, e.g.*, § 10-617 (a) (defining animal control units as organization designated to "house, care for, and control domestic animals of unknown ownership"); (b) (restricting methods of disposal only of "an unclaimed dog or cat"); (c) (imposing waiting periods before disposal action consistent with unclaimed animals).

Sincerely,

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