



AGENDA BILL

Agenda Item No. 4(B)

Date: February 6, 2012
To: El Cerrito City Council
From: Sky Woodruff, City Attorney
Karen Pinkos, Assistant City Manager
Subject: Direction on Residential Animal Slaughter Regulations

ACTION REQUESTED

Provide direction to staff whether to amend El Cerrito Municipal Code Title 7, "Animals", to include regulations on residential animal slaughter.

BACKGROUND

Beginning in 2009, the Environmental Quality Committee (EQC) and staff held a series of public meetings to address amendments to El Cerrito Municipal Code (ECMC) Title 7, "Animals." These amendments responded to an interest voiced by residents to keep certain animals that can be raised for sustainable purposes and food production. Based on these meetings and the recommendations of the EQC, Planning Commission, and City Council, staff developed a revised ordinance including new provisions for keeping chickens, bees, goats and other animals. The City Council passed Ordinance 2011-05 on November 21, 2011 with an effective date of April 1, 2012.

In its review of the ordinance on November 21, the Council requested that the City Attorney elaborate on the legal considerations and risks involved in choosing to regulate or not to regulate animal slaughter. The ordinance includes language that strengthened sanitation and nuisance requirements in order to address potential impacts of animal slaughter. This is the approach that staff recommended to mitigate any impacts resulting from animal slaughter on residentially zoned properties. The sanitation language in the ordinance requires areas where animals are to be kept clean and waste to be removed daily (or more often as necessary to maintain a sanitary environment). In addition, the ordinance contains an explicit reference to the ECMC Chapter governing nuisances so that the City has enforcement authority over any nuisance conditions which resulted from animal slaughter. Finally, the ordinance has a standard for animal noise in addition to the standards in the County Animal Code.

ANALYSIS

The attached memorandum from the City Attorney discusses various policy and legal issues the Council may consider when determining whether to regulate residential animal slaughter.

Reviewed by:



Scott Hanin, City Manager

Attachment:

1. City Attorney Memorandum on Animal Slaughter Regulations

555 12th Street, Suite 1500
Oakland, California 94607
tel 510.808.2000
fax 510.444.1108
www.meyersnave.com

Sky Woodruff
Attorney at Law
swoodruff@meyersnave.com



DATE: January 31, 2012
TO: Hon. Mayor and City Council
City of El Cerrito
FROM: Sky Woodruff, City Attorney
BY: Erin E. Burg Hupp, Attorney
COPY: Scott, Hanin, City Manager
Karen Pinkos, Assistant City Manager
Jennifer Carman, Planning Manager
Sean Moss, Senior Planner
RE: **Animal Slaughter Policy Considerations and Options for Regulation**

I. Background

Since May of 2009, the Environmental Quality Committee, the Planning Commission and the City Council ("Council") have been working with the public to update the Animal Ordinance in order to allow the small scale, non-commercial keeping of backyard animals that are sources of food. On November 21, the Council reviewed the proposed draft of the Animal Ordinance. At that time, the staff report reflected this office's recommendation that, rather than specifically regulate residential slaughter, the Council should instead use existing nuisance abatement tools, with potential adjustments related to slaughter, to address the secondary effects of slaughter if El Cerrito residents choose to engage in the practice. The Council requested that this office elaborate on the legal considerations and risks involved in choosing to regulate or not to regulate animal slaughter. This memorandum summarizes the push and pull of the different policies affected by the options available to the Council for regulating residential slaughter (or not) and the legal risks involved based on various policy priorities the Council may choose.

II. Policy Considerations

In determining whether and how to address the issue of residential animal slaughter, we think it would be helpful to lay out for the Council the different policy interests at play so that the Council can prioritize its policy interests and consider how giving one policy goal a higher priority may incidentally affect another. For example, at the public hearing on Animal

To: Hon. Mayor and City Council
From: Sky Woodruff, City Attorney
Re: Animal Slaughter Policy Considerations and Options for Regulation
Date: January 31, 2012
Page: 2

Ordinance, members of the public and representatives of the Animal Legal Defense Fund advised the Council that it could lawfully prohibit residential slaughter, even though doing so would affect recognized religious practice. Knowing that the Council may lawfully restrict religious exercise does not answer the question *whether* the Council wishes to adopt regulations or prohibitions that limit expressive activity. Thus, in considering its options for addressing residential animal slaughter, the Council may wish to weigh the different policies at play and its goals for regulation. The legal risks and considerations involved change depending on which policy goal the Council prioritizes. The law does not provide bright line rules. There are at least four main policy issues that the Council may want to weigh: 1) the implications of allowing the raising of animals, but prohibiting slaughter; 2) sanitation, nuisance and noise issues related to allowing or enacting no regulation particularly targeting slaughter; 3) incidental regulation of First Amendment expressive conduct – whether religious or speech, and even if such limitations would be constitutional; and 4) animal cruelty and welfare. We recommend that the Council consider which policy goals are most important and then assess the legal risks of furthering that policy goal before providing direction regarding developing a policy toward residential slaughter.

The first policy consideration is whether the Council would like to allow the keeping of animals, but ban slaughter. The Animal Ordinance was written to allow citizens to raise a limited number of animals (such as four chickens and one beehive; or goats and pigs with a administrative use permit) on private property for the purpose of consuming those animals and/or their by-products. One question the Council may wish to consider is whether banning slaughter for the purpose of consumption would be at odds with the purpose the of the Animal Ordinance to allow the ability of citizens to raise animals expressly for food production. Another consideration is the practical implications of banning slaughter such as the cost of having animals slaughtered at a slaughterhouse, whether such slaughterhouses exist near the City, or how citizens are slaughtering their animals under the current law.

Second, the Council may wish to consider how to most effectively regulate issues regarding the undesirable effects of slaughter, such as noise, sanitation, smell, and neighbor complaints. Would it be more efficient and cost-effective to regulate the effects of slaughter through nuisance and noise regulations, regulations concerning the keeping of animals, or the time-intensive task of crafting a general ban on slaughter? If the City chooses to allow slaughter, regulations requiring slaughter to occur indoors or a certain number of feet from the property line could minimize the effects the slaughter would have on neighbors, but they may also impair religious conduct or speech.

Third, the City may wish to consider whether it is willing to incidentally limit First Amendment rights regarding speech and religious expressive conduct as a result of a ban slaughter, or in the alternative, spend the time and City resources to craft a defensible ban that includes a religious and/or expressive carve out. In crafting a defensible ban, City staff may start with the considerations outlined below as well as those included in the ALDF

To: Hon. Mayor and City Council
From: Sky Woodruff, City Attorney
Re: Animal Slaughter Policy Considerations and Options for Regulation
Date: January 31, 2012
Page: 3

memorandum (which outlines two and a half pages of guidance staff and counsel may followed when drafting a defensible ban). A good example of a city currently considering backyard slaughter regulations in its urban farming ordinance is the City of Oakland, California. Oakland has devoted considerable employee time to researching the issues involved in a backyard slaughter ban or regulation, as well as holding several public hearings and workshops.

A fourth policy consideration is the welfare of backyard animals during the slaughter process. Those advocating animal *rights* would likely prioritize a ban on slaughter, possibly at the cost of truncating religious expression. Those advocating animal *welfare* may wish to allow slaughter under a regulated atmosphere to ensure that the killing is humane. In considering this policy objective, the Council may wish to determine where citizens would go to have their animals (chickens, rabbits, goats, and pigs) slaughtered for consumption if there is a City-wide ban on slaughter, and whether these places would be more humane than backyard slaughter. In other words, would banning slaughter within the City ultimately result in more or less humane slaughtering of the animals elsewhere? Or would transportation of the animal, and the method used by a citizen outside of City limits be more cruel than backyard slaughter? These issues have become an issue of national debate. On September 13, 2011, the columnist James McWilliams, for the national publication The Atlantic, wrote a piece about the possibility of inhumane treatment in backyard slaughter at the hand of inexperienced citizens using Oakland as a case study.¹ The article garnered a considerable amount of national debate between animal rights activists and urban farmers and put the spotlight of this debate on Oakland.

III. Legal Issues

A. Existing state and federal law regarding animal welfare and slaughter

State law only governs the slaughter of animals for the sale to and consumption by people other than the owner of the animal; federal law does not govern the slaughter of backyard animals, such as goats, chicken, and rabbits. Therefore, localities are left to determine how to regulate backyard slaughter in residential areas for the owner's consumption.

California state laws provide the following regarding animal cruelty:

- Cruelty to animals, including malicious mutilation, wounding or killing of a live animal, neglect of a live animal (and the same against those animals

¹ For the full article, go here: <http://www.theatlantic.com/health/archive/2011/09/the-locavore-movements-mistake-deregulating-animal-slaughter/244897/>

To: Hon. Mayor and City Council
From: Sky Woodruff, City Attorney
Re: Animal Slaughter Policy Considerations and Options for Regulation
Date: January 31, 2012
Page: 4

protected by state or federal laws) is an offense subject to imprisonment or a fine not to exceed \$20,000.²

- Poisoning animals (except for predatory animals and livestock-killing dogs) is a misdemeanor.³
- Cruelty to animals being transported is prohibited.⁴
- Willful abandonment, neglect or failure to care for animals is prohibited.⁵
- Abandonment of domesticated animals is prohibited.⁶
- Confinement of animals is a misdemeanor if any person who keeps a confined animal fails to provide it with an adequate exercise area, or allows it to be injured or entangled so as not to reach adequate shelter, food and water.⁷

State law defines “animals” as “every dumb creature”⁸ and applies to the killing of animals. Statutory exceptions to the preceding prohibitions include the killing of animals for food; game animals; venomous reptiles; other dangerous animals that threaten life, limb or property; and scientific experiments performed by academic institutions.⁹

Additionally, there are state laws pertaining to health and sanitation of slaughter; however, these laws expressly exempt owners that slaughter animals for the owner’s own consumption (not for sale).¹⁰ The State also regulates some aspects of the commercial slaughter of cattle, such as the State law that requires euthanasia of “downer” animals unable to walk in commercial slaughterhouses.¹¹ However, this State law does not apply to the slaughter of common backyard animals at issue in the City’s Animal Ordinance.

Federal regulations occupy most of the field of law pertaining to commercial processing of animals for the consumption of and sale to others, but do not regulate the backyard slaughter of animals for consumption by the owner of such animals. For example, the

² Penal Code § 597(a)-(c).

³ Penal Code § 596.

⁴ Penal Code § 597(a).

⁵ Penal Code § 597f, 597.1.

⁶ Penal Code § 597(s).

⁷ Penal Code § 597t.

⁸ Penal Code § 599b, 599c.

⁹ *Id.*

¹⁰ See Section 19020 of the Food and Agriculture Code, which exempts the slaughter of certain livestock (cattle, sheep, swine, and goat) for the owner’s consumption.

¹¹ Penal Code § 599f. As an interesting aside, this law was recently invalidated by the United States Supreme Court in the case *National Meat Association v. Harris*. The Court held that California Penal Code section 599f is preempted by the Federal Meat Inspection Act, which regulates slaughterhouses’ handling and treatment of non-ambulatory pigs – essentially the same thing as Penal Code 599f.

To: Hon. Mayor and City Council
From: Sky Woodruff, City Attorney
Re: Animal Slaughter Policy Considerations and Options for Regulation
Date: January 31, 2012
Page: 5

Federal Meat Inspection Act governs the sanitary regulation of commercial slaughterhouses.¹² The Federal Humane Slaughter Act (the "Slaughter Act") applies to the slaughter of cattle, calves, horses, mules, sheep and swine (NOT chickens, fish or rabbits).¹³ The Slaughter Act defines two humane methods of slaughter: 1) animals rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other rapid and effective means; or 2) slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith.

B. Legal Risks and Considerations

There are various legal considerations the Council should review once it determines its desired policy goals, whether that policy goal be: the promotion of urban farming; the control of nuisance factors and neighbor complaints; protecting religious freedom of expression; or animal rights and welfare.

1. Banning Slaughter (with or without religious exception)

If the Council wishes to ban slaughter, it must carefully craft a ban that would avoid constitutional issues and unintended restrictions on religion and speech. The Council may not directly and intentionally interfere with religious expression by adopting a regulation that bans specific religious conduct, such as animal sacrifice. Unfortunately, the leading case on this issue, *Church of Lukumi Babalu Aye v. City of Hialeah*,¹⁴ is not entirely applicable. In *Hialeah*, the city blatantly attempted to keep a certain church out of the city by adopting a series of animal slaughter regulations. The U.S. Supreme Court held that the city's ordinances were not neutral, nor of general applicability, and that the governmental interest asserted by the city did not justify its restraint on religious activity – the ordinances violated the First Amendment's Free Exercise Clause. However, as we explained in the staff report accompanying the Animal Ordinance, this case is not instructive since the Council is not interested in intentionally regulating a specific religious group, nor is it attempting to ban a certain church from the City. Few cities have chosen to directly regulate religious animal sacrifice. The City of San Francisco currently bans any religious slaughter in Section 1A of its Health Code.¹⁵ San Francisco would likely have a difficult time defending the prohibition, if challenged.

¹² 21 U.S.C. section 608; 9 CFR 416.

¹³ 7 U.S.C. 1901 et seq.

¹⁴ 508 U.S. 520 (1993).

¹⁵ San Francisco Health Code Article 1A.

[http://www.amlegal.com/nxt/gateway.dll/California/health/healthcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$sync=1](http://www.amlegal.com/nxt/gateway.dll/California/health/healthcode?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca$sync=1)

To: Hon. Mayor and City Council
From: Sky Woodruff, City Attorney
Re: Animal Slaughter Policy Considerations and Options for Regulation
Date: January 31, 2012
Page: 6

If the Council's main policy goal is animal welfare, the Council may choose to enact a general ban on slaughter without reference to religious activities. The case *Employment Div., Department of Human Resources Res. of Oregon v. Smith*¹⁶ supports the notion that a city may constitutionally prohibit religious practice if the prohibition is incidental to an otherwise generally neutral regulation. As long as a general ban by the City did not intentionally restrict religious behavior on its face, and the City applied the law neutrally and without reference to religious practice, a court would apply the so-called rational basis test, which is a low level of scrutiny that requires only a legitimate government interest in the ban. The court would look at the record for the adoption of the ban and any findings that the Council made in adopting it. It is likely that such a ban, neutrally enforced, would therefore survive judicial scrutiny.

The Council's ability to ban residential animal slaughter is not, however, the only consideration. Among the policy questions that remain is whether the risk of (incidentally) prohibiting religious practice within the City's jurisdiction is outweighed by the reasons for adopting a ban on slaughter. In other words, is a general ban the most effective use of resources in order to address the Council's concerns regarding sanitation, noise, and animal welfare; or, could these concerns be minimized through other regulations that do not affect religious activity within the City or through enforcement of existing provisions of the Municipal Code? Further, the Council may wish to explore whether religious practice falls within the definition of inhumane treatment or whether an outright ban may incidentally cause increased inhumane killing of animals, depending on the other methods used to slaughter backyard livestock.

In considering whether to ban all residential animal slaughter, the Council should also be aware of "hybrid claims" in which a plaintiff alleges abridgement of free speech in conjunction with violation of the free exercise clause. In such a case, instead of the rational basis test, the court might apply the so-called strict scrutiny standard, which is notoriously difficult to pass. If the City's regulation was challenged as unconstitutional, the court would analyze whether the ordinance is impermissibly overinclusive (overbroad) or underinclusive (overly narrow).

As an example of "overbroad" regulation, in the case *United States vs. Stevens*, the Supreme Court invalidated a law that aimed to curb the market for "crush videos" (fetish videos in which an animal¹⁷ is crushed by a person, often with high heels) and other animal mutilation.¹⁸ The law banned *depictions* of cruelty "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" for sale or commerce but exempted depictions possessing "serious religious, political, scientific, educational, journalistic,

¹⁶ 494 U.S. 872 (1990).

¹⁷ Anything from invertebrates such as worms to mammals and reptiles.

¹⁸ *United States v. Stevens* 559 U.S. ____, 130 S.Ct. 1577 (2010).

To: Hon. Mayor and City Council
From: Sky Woodruff, City Attorney
Re: Animal Slaughter Policy Considerations and Options for Regulation
Date: January 31, 2012
Page: 7

historical or artistic value.”¹⁹ The court found this to be “overbroad” and invalid under the First Amendment of the U.S. Constitution because it regulated depictions based on content. The First Amendment has permitted content-based restrictions on only a few historic categories of speech—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. The Court found that the law may be applied unconstitutionally and therefore found it to be invalid. On the other hand, justifying a ban solely on animal rights would likely be invalidated as underinclusive – factory farms and slaughterhouses may arguably inflict greater cruelty on animals than backyard animal slaughter performed by an informed animal owner. Similarly, an ordinance that prohibits slaughtering animals for *food* may be found to be too narrow because it allows the killing of animals for other purposes.

Assuming that the Council does not wish to incidentally limit religious practice, City staff, legal counsel, and the Council would need to spend a great deal of time carefully crafting a ban on backyard animal slaughter with a religious carve-out and findings to support it. Such complex drafting exercises necessarily lead to uncertainty about the defensibility of the law, and thus about what behavior is actually allowed or prohibited. What constitutes slaughter would need to be clearly defined. Even with a religious exception, the regulations may also need to avoid regulating *how* animals are killed in order to avoid singling out Kosher or Halal slaughtering practices (Shechita and Dhabihah), which require a conscious animal. The City would need to enforce the restriction equally, enumerate substantial interests in regulating this conduct, and make appropriate findings regarding the reasons for such regulation, such as health and sanitation. It would be very important for the City to provide clear reasons for prohibiting backyard slaughter, bearing in mind that the factual record might not support a finding that factory farms and slaughterhouses cause less cruelty to animals than backyard animal slaughter performed by an informed animal owner. Thus, the findings adopted in association with such an ordinance would need to be specific and backed by an evidentiary record.

The Council should also consider the possible expense of defending challenges to a City ban on slaughter. In addition to its own legal fees, if a challenger prevailed in court, the City might be responsible for the prevailing party’s legal fees. Section 1983 of Title 42 of the United States Code creates tort-like liability for any deprivation of rights secured by the United States Constitution and federal law. Courts have ruled that local government agencies may be held liable under Section 1983. Moreover, local governing bodies and officials can be sued directly in their official capacities for monetary, declaratory, and injunctive relief for an allegedly unconstitutional ordinance.²⁰ It is not clear whether a plaintiff would succeed in

¹⁹ 18 U.S.C. Section 48.

²⁰ See, e.g. *Owen v. City of Independence*, 445 U.S. 622, 645 (1980) (Section 1983 creates tort liability that has no immunities for municipal constitutional violations.)

To: Hon. Mayor and City Council
From: Sky Woodruff, City Attorney
Re: Animal Slaughter Policy Considerations and Options for Regulation
Date: January 31, 2012
Page: 8

challenging a City ban on animal slaughter under a Section 1983 claim, on the ground that the ban deprived the person of rights protected by the First Amendment. Several cases have held, however, that damages can be recovered under a Section 1983 claim when land is overregulated by a public entity.²¹ The threat of an adverse ruling on a Section 1983 case should be factored into the Council's analysis of this issue because the Civil Rights Attorney's Fees Awards Act of 1976 provides that a party who prevails in a Section 1983 action may be entitled to recover attorneys' fees.²² Thus, if the court ruled against the City in such a challenge, the City might have to pay damages to the plaintiff and might have to cover not only its own legal fees but also the attorneys' fees of the plaintiff.

2. Regulating Slaughter

As an alternative to an outright ban, the Council could choose to expressly allow backyard slaughter but regulate it so that it be performed in a sanitary and/or "humane" manner, or to prevent inadvertent viewing of the slaughter from adjoining properties. However, this is also a difficult drafting exercise – perhaps more difficult than an outright ban with a religious carve-out. The City would need similarly to ensure that the ordinance is not impermissibly overinclusive (overbroad) or underinclusive (overly narrow) (see discussion in previous section).

The City would need to determine which animals may or may not be slaughtered. For example, would lobsters, rats, and mice be exempted? Perhaps the City could differentiate between small livestock (rabbits, chickens, etc.) that could be slaughtered on site, and large livestock (goats, pigs, etc.) that would still need to be slaughtered off-site. The restrictions could be stringent, such as requiring an animal husbandry plan, which would outline the proposed manner of raising, caring for and killing animals (similar to a development plan) before practicing any slaughter. Or the regulations could simply include requirements regarding nuisance, cleanliness, setbacks from the property line and/or requiring slaughter to be performed in an enclosed area so neighbors are not able to view such slaughter. If the regulations include requirements regarding "humane" slaughter, considerable resources (staff time, public outreach) would be required to determine what constitutes "humane." A prohibition on slaughter viewable from adjoining properties would be difficult to draft because of the unique circumstances of each residence, and failing to be sufficiently detailed could make the ordinance susceptible to claims of overinclusiveness or underinclusiveness. Assuming that the Council does not want to incidentally limit religious expression as part of regulations, it should consider including a religious carve-out and/or avoid regulating *how* animals are killed in order to avoid singling out Kosher or Halal slaughtering practices

²¹ There may be an argument that regulating slaughter falls within a 1983 claim. *See* 41 U.S.C. Section 1983; *See, eg. San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621, 654 (1981).

²² 42 U.S.C. § 1988.

To: Hon. Mayor and City Council
From: Sky Woodruff, City Attorney
Re: Animal Slaughter Policy Considerations and Options for Regulation
Date: January 31, 2012
Page: 9

(Shechita and Dhabihah), which require a conscious animal. That carve-out, however, would lead to all of the drafting and defensibility issues discussed as part of a ban with a carve-out, above.

3. Regulate the effects of slaughter while not expressly allowing or banning slaughter.

A third options is to focus on regulating *effects* of animal slaughter through regulations regarding nuisance, noise, pest and sanitation regulations, rather than the act of animal slaughter. A generally useful rule to apply when considering drafting legislation that has the potential to create issues with First Amendment protections is: if a city is concerned about the secondary effects of a protected activity (rather than the activity itself) the legislation could focus on regulating those secondary effects rather than the speech or religious practice. The Council has voiced concerns about the noise, sanitation and health impacts of animal slaughter –such as the noise of an animal dying, or the remains (blood, bones) of a slaughtered animal. These issues are addressed by the nuisance abatement tools available in the Municipal Code, or could be made to fit with minor amendments. Therefore, we had recommended that the Council preliminarily enforce the existing rules if complaints arise regarding animal slaughter and, if necessary based on experience, update them for animal slaughter that occurs in residentially zoned parcels within the City.

This approach would not prevent residents from cooking live animals, such as lobsters, or killing pests such as rats. The test the court would use in evaluating this approach would be whether the sanitation and nuisance regulations are reasonable. The court would only enjoin a city regulation that has no reasonable and just relation to a city's intentions to preserve or protect the public health and safety. Nuisance regulations must be specific, as the court may find that they are void for vagueness. Therefore, if the City found that amendments to existing nuisance abatement tools were necessary after some period of using those already in effect, the City might have to provide additional guidance as to what would constitute unsanitary conditions and excessive noise. To this end, the amended Animal Regulations could reference existing City Code nuisance provisions, such as Chapter 8.34 Nuisance Abatement, and specifically Section 8.34.040 N, W; Section 8.08.010 "Nuisances Unlawful"; Section 8.08.060 "Premises, Cleanliness", specifically prohibiting pests; Chapter 8.16 "Flies"; and Section 7.08.040 "Animal Noise".

Because this option does not directly regulate religious practice or the act of slaughter it is less likely to be challenged on constitutional grounds. This option also avoids the complicated research, drafting and public input process that would be required for the other options (regulating slaughter directly, or banning slaughter with a religious carve out). If the Council would like to specifically regulate nuisance and noise particular to slaughter, it may need draft cautiously, as explained above.

To: Hon. Mayor and City Council
From: Sky Woodruff, City Attorney
Re: Animal Slaughter Policy Considerations and Options for Regulation
Date: January 31, 2012
Page: 10

4. Enforcement

For the options above that include direct regulation of slaughter (as opposed to regulating the nuisance effects of slaughter), the City would also need to determine methods of enforcement. The nuisance regulations already have established code enforcement protocols. If City officials are called to a property on a noise or smell complaint, what would be the criteria in determining whether the slaughter was done in a clean and humane manner? Or what is “religious” in nature – does that include less common religions? Penalties for those that violate the law would need to be determined. If there is a religious exception, the City code enforcement team would need to be instructed on how to determine what is and is not religious slaughter and avoid any situations in which regulations “as applied” would violate religious or constitutional rights.

C. Recommendation

We recommend that the City determine its policy objectives with regard to regulation of backyard animal slaughter, and then assess the legal and practical risks to determine the preferred course of action. In reaching our previous recommendation to use existing (or slightly modified) nuisance abatement tools to address undesirable effects of slaughter, we assumed that the Council would want to avoid incidental restrictions on religious and other expressive conduct; limit the time and resources devoted to this area of regulation; and avoid or significantly reduce the risks of litigation. If those assumptions were incorrect, and the Council’s priorities are different, then a different approach would be appropriate. Otherwise, we continue to recommend that using the nuisance abatement approach would be the most effective means of dealing with animal slaughter, at least until there is some evidence that the practice is being used widely in the City to the detriment of the public health, safety, and welfare.

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