

Superior Court of the State of Washington  
for the County of Spokane

Department No. 1

Robert D. Austin  
Judge

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**SCHOENDORF, PATTY ETAL VS CITY OF SPOKANE ET AL**  
No. 2007-02-03992-3

Dear Counsel:

Appellants argue that the city's administrative dangerous dog determination procedure violated their due process rights both on its face and as applied and ask for declarative judgment. The court, in deciding this case, is limited to the record provided below and will not take into consideration declarations made subsequent to the administrative hearing, except as they apply to the appellants claims that the hearing did not provide adequate due process.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth Amendment.<sup>1</sup> In determining what process is due, a court weighs (1) the private interest affected by the official action, (2) the risk of an erroneous deprivation of that interest through the procedures used, (3) the probable value of additional procedural safeguards, and (4) the government interest involved.<sup>2</sup> Due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner."<sup>3</sup> The process followed meets minimum constitutional requirements when it provides a citizen with sufficient safeguards in a state action.<sup>4</sup>

The instant case deals with the impounding of appellant's dogs. Due process rights attach to dog ownership.<sup>5</sup> This court must decide then, if enough due process was provided to

<sup>1</sup> *Nguyen v. Dep't of Health Med. Quality Assurance Comm'n.*, 144 Wn.2d, 522-23 (2001) quoting *Matthews v. Eldridge*, 424, U.S. 319, 332, cert denied, 535 U.S. 904 (2002).

<sup>2</sup> *Mansour v. King County*, 131 Wn. App. 255 (2006) quoting *Matthews*, 424 U.S. at 335.

<sup>3</sup> *Rabon v. City of Seattle (Rabon II)*, 107 Wn.App. 734, 743-44 (2001) (citing *Matthews*, 424 U.S. at 333).

<sup>4</sup> *Nguyen*, 144 Wn.2d at 524.

<sup>5</sup> *Rabon II*, 107 Wn.App. at 743-44

the appellants before they were deprived of their property.

### Private Interest

The private interest affected by the official action here is the confiscation of the appellant's dog. Family pets are important and mean a great deal to the families who own them and care for them. Often they are considered part of the family and treated as such. Therefore, the private interest of the appellants is weighed heavily in determination of whether or not enough due process was provided.

### Risk of Erroneous Deprivation

In this case, the record shows that the appellant's dogs were declared dangerous and confiscated by Spokane animal after eye witnesses identified them as allegedly roaming at large, attacking and killing a cat, and threatening a jogger. The dogs were taken away and boarded at a rate of \$7 a day. According to Spokane Municipal Code 10.03.020 subsection F and section 10.03.050, the owners of the dogs must pay an advance payment of 14 days and continue to pay for any additional days of boarding before an appeal is allowed. If no appeal is filed, or if the owner fails to register the dog as a dangerous dog within 14 days of the hearing examiner's decision affirming the declaration, and no restraining order has been served, the dog is euthanized. The owner is then billed for the euthanization. The Supreme Court has stated "If the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when the deprivation can still be prevented...No later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred."<sup>6</sup> In this case, the monetary bar to appeal and the drastic action of destroying the property (killing the animal) if there isn't a timely restraining order filed, raise serious concerns about whether enough due process is provided.

The city also argues that *Mansour* should not apply except in that it cites the proper standard of proof for a dangerous dog determination. Their argument is not persuasive. In his declaration, Spokane City Hearing examiner Greg Smith states repeatedly that a preponderance of the evidence standard was used in his determination. However, nowhere in Spokane animal's notice of declaration of a dangerous dog, nor in the record of the hearing provided, is there any mention of what standard of proof was required or used. In fact, even Mr. Smith's summary of findings fails to explain what standard of proof was used in his determination. The city can point to no published regulations anywhere that establish what the standard of proof is for this type of hearing. "An adequate standard of proof is a mandatory safeguard. The standard of proof instructs the fact finder concerning the degree of confidence our society thinks he should have in the correctness of the factual conclusions for a particular type of adjudication."<sup>7</sup>

In *Mansour*, the appellant was given the right to have counsel, offer witnesses and evidence on their behalf, examine and cross-examine witnesses, impeach and witness, rebut evidence against them.<sup>8</sup> However, the court there also found that the board's refusal to allow discovery violated the appellant's due process rights.<sup>9</sup> Similarly, in this case, the appellant was at no time during the hearing allowed to cross-examine the witnesses testifying against them. In addition, the appellant was not given, prior to the hearing, certain documents used in the hearing

<sup>6</sup> *Fuentes v. Sheven*, 407 U.S. 67, 92, (1972)

<sup>7</sup> *Mansour* at 264

<sup>8</sup> *Mansour* at 269

<sup>9</sup> *Id.*

examiner's decision, such as the written statement of Mrs. Taylor, the letter from an additional eye witness, Mrs. Hunt, the written explanation of the dangerous dog charges, and the Police incident report. In fact, the Spokane code guarantees none of the protections offered in *Mansour*. It may or may not allow for these rights, but because there are no official rules to be found, neither the appellant nor the appellee are sure what is or is not allowed with respect to discovery and examination of witnesses.

Finally, the appellant argues that the burden of proof shifted to them during the hearing. In Mr. Smith's findings and conclusions, he states that the appellant failed to present any evidence of other dogs that look like the dogs charged living within the neighborhood. Once again, the lack of any clear rules cloud what the appellant could have known they were responsible to prove or disprove.

All of these issues weigh extremely heavily in creating a high risk of an erroneous result with respect to individuals' due process rights.

### **Probable Value of Additional Safeguards**

The addition of specific safeguards to guarantee due process for all individuals is both inexpensive and minutely burdensome. The city needs to create specific rules that give notice as to how the dangerous dog procedures operate, what they can expect from the city, what they are required to prove, what the city is required to prove and by what standard it must be proven. Additionally, the city needs to examine the process of appealing a dangerous dog determination and ensure that they are not permanently depriving someone of their property interest before there is a chance to appeal, because of financial reasons.

### **Government Interest**

The government's interest here is public safety. Keeping dangerous animals off of the streets and preventing them from causing harm to people, other animals, and property is extremely important and is also given significant weight in determining what process is due.

### **Conclusion**

In weighing the factors above it is clear that the procedures used by the City of Spokane in dangerous dog determination appeals includes important interests for both the city and the individuals involved. However, under the current procedures, there is a very high risk of an erroneous deprivation of property and great value to reduce these risks through additional safeguards. The additional safeguards suggested by the Court are not unduly burdensome upon the city. The appellant's procedural due process rights were violated by the use of these administrative procedures and they are entitled to declaratory judgment.

### **Attorney's Fees**

Under Washington law, the Court has the power to allow for attorney's fees under its equitable powers if the litigation will benefit persons other than the individual litigant.<sup>10</sup> The Court has no doubt that countless other citizens will benefit from the declaratory judgment granted today.

### **Declaratory Judgment**

As a matter of law, the administrative procedures used in the City of Spokane regarding

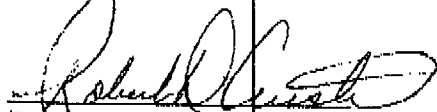
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<sup>10</sup> *Hsu Ying Li v Tang*, 87 Wn.2d 796 (1976)

dangerous dog determinations and appeals from those determinations violate the due process rights both on their face and as applied. Appellant's dogs should be released to them immediately and reasonable attorney's fees should be paid by the city.

Please prepare and submit for signature the appropriate orders.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert D. Austin".

Robert D. Austin  
Superior Court Judge

rda/kk