

1 ROBIN A. DUBNER
Attorney at Law
2 2515 Ivy Drive
Oakland, CA 94606
3 (415) 452-1195

4 Attorney for Respondent, TIM ORTEGA

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BEFORE THE MARIN COUNTY ANIMAL SERVICES

Hearing To Determine If Dog) Re: TIM ORTEGA's dog,
Is Vicious Or Unsafe And) ROCKY
Constitutes An Immediate)
11 Threat To The Public)
12

TRIAL BRIEF
Marin Civic Center
Room 319
August 26, 1987
9:00 a.m.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>Page</u>
I. FACTS OF THE CASE	1
II. MARIN ORDINANCE 8.04.181 IS UNCONSTITUTIONAL	2
A. The Ordinance Is Vague and Contradictory	2
B. Marin County Animal Services Has The Burden Of Proof Of The Nuisance And The Necessity For Its Immediate Abatement	4
III. PIT BULLS ARE THE LATEST FAD SCARE	5
IV. ROCKY IS NOT VICIOUS AND UNSAFE AND DOES NOT CONSTITUTE AN IMMEDIATE HAZARD TO PERSONS	8
A. Rocky Does Not Have Vicious Propensities	8
B. Rocky's Actions Were Provoked	12
C. Rocky Is Not An Immediate Hazard To The Public	14
V. CONCLUSION	14

1 cat's yowling or crying. SHARON tried to pull Mrs. BATES out
2 by lifting her under her arms. But SHARON couldn't lift her
3 and grew afraid of possibly compounding Mrs. BATES' injuries
4 by dislocating or breaking her frail bones. Throughout this
5 procedure, Mrs. BATES continued to scream and flail about.

6 SHARON ceased her efforts and then ROCKY, who had
7 followed SHARON out of her apartment and up to Mrs. BATES'
8 apartment went up to Mrs. BATES. SHARON, who had no reason
9 to suspect that ROCKY was a danger in any way to Mrs. BATES,
10 assumed ROCKY was just licking her face. SHARON called to
11 ROCKY, "ROCKY, come here." ROCKY immediately stopped what he
12 was doing and went straight to SHARON. When SHARON then
13 noticed blood on Mrs. BATES' head, she jerked ROCKY even
14 further away by pulling on his choker collar which came off
15 in her hand.

16 Another neighbor, MAIA McGEHEE, arrived and SHARON
17 asked MAIA to take ROCKY away to her apartment. ROCKY obeyed
18 MAIA's verbal command to follow.

19 II
20 MARIN ORDINANCE 8.04.181 IS UNCONSTITUTIONAL

21 A. The Ordinance Is Vague and
22 Contradictory

23 To satisfy due process requirements, a statute or an
24 ordinance that deprives a person of property must contain
25 language of sufficient certainty to provide notice of what is
26 prohibited and what may be done without violating one of its
27 provisions. U.S. Constitution, Amend. XIV, Section 1, Calif.

1 Const., Art. 1, Section 13.

2 When a statute or ordinance has a potentially
3 inhibiting effect on fundamental constitutional rights,
4 strict standards of statutory vagueness may be applied.
5 Smith v. California (1959) 361 U.S. 147, 151; People v.
6 Barksdale (1972) 8 Cal.3d 320, 327. The U.S. and California
7 Constitutions explicitly state that no person can be deprived
8 of property without due process of law.

9 The Marin ordinance is vague in three instances.
10 First, the ordinance specifies in section (d) that the animal
11 in question must be found "vicious or unsafe." In section
12 (b) the ordinance refers to "vicious and unsafe." In one
13 section, the conjunctive is used, and in another the
14 disjunctive is used.

15 Second, the ordinance does not define its terms. It is
16 so vague that persons of common intelligence must necessarily
17 guess at its meaning and would differ as to its application.
18 Connally v. General Constr. Co. (1926) 269 U.S. 385; People
19 v. Barksdale, supra. The ordinance does not define the term
20 "vicious propensities."

21 Third, section (d) of the ordinance first addresses
22 itself to the question of whether the owner of the animal is
23 able to confine or restrain the animal as ordered. The next
24 sentence continues on the same vein but suddenly mentions the
25 ability of the owner to dispose of the animal as ordered.
26 The section is very confusing. It starts out with a

1 discussion of confining or restraining and suddenly the
2 ordinance mentions destruction of the animal.

3 B. Marin County Animal Services Has
4 The Burden Of Proof Of The Nuisance
5 And The Necessity For Its Immediate
6 Abatement

7 Marin Ordinance 8.04.181 states that a vicious and
8 unsafe animal which also poses a threat to the public
9 constitutes a public nuisance. The ordinance specifies the
10 steps that the poundkeeper may take in order to abate such
11 nuisance. Section (d) of the ordinance empowers the
12 poundkeeper to declare the animal a public nuisance and order
13 it destroyed before any hearing is held, and to issue an
14 order to the owner of the animal to show cause why it should
15 not be destroyed.

16 Such a provision is contrary to both the U.S. and
17 California Constitutions. The poundkeeper may not
18 unilaterally make the decision that the animal is a nuisance.
19 That determination must be made upon competent sworn evidence
20 presented at a due process hearing.

21 It is said that even at common law a city or town
22 has power to abate a public nuisance. Usually it
23 has statutory power, vested in its governing
24 body, to declare and abate public nuisances. But
25 neither at common law nor under such express
26 power can it, by its mere declaration that
27 specified property is a nuisance, make it one
28 when in fact it is not.

24 Armistead v. City of Los Angeles (1957) 152 Cal.App.2d 319,
25 313 P.2d 127.

26 To require the property owner to prove that his dog is
27
28

1 not a public nuisance would vitiate the requirements of
2 article I, section 13 of the California Constitution that no
3 person shall be deprived of property without due process.
4 Leppo v. City of Petaluma (1971) 20 Cal.App.3d 711, 97 CR
5 840. The court, in Leppo, ruled that the municipality has
6 the burden of proof of the nuisance and the necessity for its
7 immediate abatement. See also Lawton v. Steele (1893) 152
8 U.S. 153; Neuber v. Royal Realty Co. (1948) 86 Cal.App.2d
9 596, 195 P.2d 501 (overruled on other grounds Porter v.
10 Montgomery Ward & Co. (1957) 48 Cal.2d 846, 313 P.2d 854.

11 The ordinance, by allowing the poundkeeper to make a
12 unilateral determination that the dog is a nuisance and then
13 by placing the burden of proving it is not a nuisance on the
14 owner, is clearly contrary and offensive to our
15 constitutional guarantees of due process.

16 III
17 PIT BULLS ARE THE LATEST FAD SCARE

18 American Pit Bull Terriers, Bull Terriers,
19 Staffordshire Bull Terriers and American Staffordshire
20 Terriers are the four breeds of dog commonly referred to as
21 pit bulls.

22 Although they were originally bred for sport, as were
23 most breeds of dogs, the pit bull easily became integrated
24 into society as house pets. Pit bulls have been in this
25 country since the nineteenth century. The RCA Victor dog,
26 with its head cocked inquisitively to the gramophone, is a
27 pit bull. Pete, the dog with one black eye from Our Gang,

1 was the first dog registered with the American Kennel Club as
2 an American Staffordshire Terrier.

3 Most people didn't think twice about pit bulls until
4 this spring when pit bull horror stories began to dominate
5 television and the printed media. The reporting of pit bull
6 stories has turned into media sensationalism at its worst. A
7 recent survey of articles concerning dogs published in the
8 Marin Independent Journal illustrates the evolution of the
9 current pit bull scare.

10 The Marin Independent Journal did not publish one
11 single article regarding a pit bull between January, 1985 and
12 June, 1987. Not one single report of a pit bull was
13 published in two and a half years. Then, during a four week
14 period of time, June 17, 1987 to July 17, 1987, the newspaper
15 published no less than fourteen (14) pit bull horror stories.
16 There are no more pit bulls in existence now than there were
17 two and a half years ago. What has changed, though, is the
18 media's willingness to sell papers and air time by pandering
19 to the fears of the uninformed public.

20 There is no real evidence that pit bulls attack more
21 frequently than other breeds. In 1984, Los Angeles County
22 estimated that German Shepherds were responsible for 35.8% of
23 the city's dog bites. The pit bull estimate was 4.6%, half
24 that of labrador retrievers. Cocker Spaniels accounted for
25 7.1%. These are facts not reported by newspapers and
26 television and therefore not known by the general public.

1 See Exhibit "A".

2 The public has been fooled into thinking that pit bulls
3 are evil and need to be destroyed. The Marin Independent
4 Journal reported on June 17, 1987 that a Marin man
5 voluntarily had his two pit bulls destroyed by the pound,
6 despite their history of never having bitten or harmed
7 anyone. JUDY CARROL, the Marin Humane Society spokesperson,
8 was reported as commenting, "I think it was a very
9 responsible thing for him to do." If the facts get out that
10 more people were bitten by Cocker Spaniels than pit bulls,
11 will people be encouraged to voluntarily turn in their pet
12 Cocker Spaniels to be killed? It seems unlikely.

13 The San Francisco Chronicle published an article on
14 August 15, 1987 (Exhibit "B") reporting that a special
15 hotline has been set up in Contra Costa County for reporting
16 "pit bulls and other vicious dogs." Evidently, the mere
17 existence of a pit bull is to be reported regardless of
18 whether the dog is vicious. One can only conclude that all
19 pit bulls are vicious and therefore all pit bulls must be
20 destroyed.

21 ROCKY is a mutt. A mongrel. His mother was presumably
22 part pit bull and his father is unknown. ROCKY is also part
23 black Labrador Retriever, a breed known for its gentleness
24 and eagerness to obey commands. Labrador Retrievers are used
25 more than any other breed as guide dogs for the visually or
26 hearing impaired. But, because ROCKY has some pit bull in

1 him, he has been labeled as such by the pound and the public,
2 and he has been condemned by all. It is of tremendous
3 importance that the trier of fact at this hearing appreciate
4 the extent of the current pit bull hysteria and not fall prey
5 to it.

6 IV
7 ROCKY IS NOT VICIOUS AND UNSAFE
8 AND DOES NOT CONSTITUTE AN IMMEDIATE
9 HAZARD TO PERSONS

10 A. Rocky Does Not Have Vicious
11 Propensities

12 Marin Ordinance 8.04.181(d) enables the poundkeeper to
13 confine, restrain or destroy an animal after it has been
14 determined at a hearing that the animal is "vicious or unsafe
15 and constitutes an immediate hazard to persons."

16 The ordinance defines "vicious and unsafe" as having
17 vicious propensities and likely to attack, bite and injure
18 persons without provocation. Marin Ordinance 8.04.181(b).
19 Because the ordinance does not include a definition of
20 vicious propensities, we must turn to case law for a workable
21 definition of that statement.

22 Vicious propensities has been defined as "any
23 propensity on the part of a domestic animal, which is likely
24 to cause injury to human beings under the circumstances in
25 which the party controlling the animal places him." Talizin
26 v. Oak Creek Riding Club (1959) 176 Cal.App.2d 429, 1 CR 514,
27 citing as authority Hillman v. Garcia-Robu (1955) 44 Cal.2d
28 625, 283 P.2d 1033.

1 spotlessly clean. ROCKY often spent weekdays in his owner's
2 retail store in San Francisco in constant contact with the
3 public. On occasion, a disgruntled customer would raise his
4 voice in anger, but ROCKY never reacted violently.

5 Numerous people who know him from this context will
6 offer their testimony in evidence at the trial. Further
7 testimony as to ROCKY's friendly and benevolent nature is
8 attached to this brief as Exhibits "C-1" - "C-30".

9 One night this April, ROCKY attended a party at Noe's
10 Bar in San Francisco, while accompanied by his owner. The
11 party was a celebration of Budweiser Beer's newest
12 advertising campaign featuring Spuds MacKenzie. Spuds,
13 incidentally, a bull terrier, is one of the four breeds
14 commonly referred to as a pit bull. It was a rowdy party,
15 with loud music and drunken patrons running around, yelling,
16 and trying to pet ROCKY. At one point during the evening, a
17 couple of dogs ran into the tavern. ROCKY maintained his
18 calm, even-tempered disposition throughout the evening.

19 Based upon the authorities cited above, we conclude
20 that vicious propensities means that the animal has a
21 tendency or habit of biting people when placed in a
22 particular set of circumstances. What were the circumstances
23 in this case? They were similar to a certain degree to the
24 loud arguments he witnessed in his owner's store or his
25 evening at the bar last April. In all those previous
26 circumstances, ROCKY did not react.

1 violence. In the one situation where any dog would have
2 perceived an immediate physical threat, ROCKY acted as any
3 dog would. ROCKY does not have a habit of biting and
4 therefore he does not have vicious propensities.

5 B. Rocky's Actions Were Provoked

6 According to Marin Ordinance 8.04.181(b) the
7 determination of whether an animal is vicious or unsafe
8 consists of two elements: vicious propensities and likely to
9 attack or bite persons without provocation. The ordinance
10 does not distinguish between intentional and unintentional
11 acts of provocation. Thus, an unintentional act, so long as
12 it provokes an animal or dog, may constitute provocation.
13 The mental state of the actor who provokes a dog is
14 irrelevant.

15 In Nelson v. Lewis (Ct. App. III. 1976) 344 NE.2d 268,
16 it was held that this position is consistent with the
17 commonly understood meaning of provocation. "Provocation is
18 defined as an act or process of provoking, stimulation or
19 incitement. Webster's Third New International Dictionary.
20 Thus it would appear that an unintentional act can constitute
21 provocation within the plain meaning of the statute." 344
22 NE.2d at 270-271.

23 In Nelson v. Lewis, a two and a half year old girl
24 stepped on the dog's tail while the dog was chewing a bone.
25 The dog, a large Dalmatian, reacted by scratching the
26 plaintiff in her left eye. The court held that under these

1 circumstances, the dog was provoked, although the provocation
2 was not intentional.

3 A determination of provocation does not require
4 consideration of the degree of willfulness which
5 motivates the provoking cause. Had the
6 legislature intended only intentional provocation
7 ... we think it would have so specified. Its
8 conclusion apparently was that an owner or keeper
9 of a dog who would attack or injure someone
10 without provocation should be liable. This
11 implies that the intent of the plaintiff is
12 immaterial.

13 344 NE.2d at 272.

14 The more recent decision of Stehl v. Dose (Ct. App.
15 Ill. 1980) 403 NE.2d 1301 affirmed Nelson v. Lewis and added,
16 "We believe it important to note that the question of what
17 conduct constitutes provocation is primarily a question of
18 whether plaintiff's actions would be provocative to the dog."
19 403 NE.2d at 1303.

20 In the instant case, Mrs. BATES' continual screaming,
21 high pitched mewling and flailing arms was provocative to
22 ROCKY. ROCKY acted in response to Mrs. BATES' provocative
23 behavior. That his response was duly provoked by Mrs. BATES
24 is supported by PAT MILLER, Operations Officer of the Marin
25 County Animal Services and TERRY JESTER, animal behavior
26 consultant with the Marin Humane Society.

27 In a video-taped interview that will be offered in
28 evidence at the trial, PAT MILLER commented upon Mrs. BATES'
screams and said "That's the kind of thing that will excite a
dog."

TERRY JESTER was quoted in the Marin Independent

1 Journal on July 11, 1987 (Exhibit "D") as saying screaming
2 often elicits an attack, "Anybody's Cocker Spaniel would have
3 done the same thing."

4 It is clear that provocation need not be intentional,
5 and ROCKY was provoked.

6 C. Rocky Is Not An Immediate
7 Hazard To The Public

8 Marin Ordinance 8.04.181(d) specifies that the animal
9 must constitute "an immediate hazard to persons" before it
10 can be confined, restrained or destroyed by the poundkeeper.

11 ROCKY's past history of gentleness and sociability has
12 been detailed in this brief. ROCKY is not a threat to the
13 public. On the contrary, ROCKY has made many friends during
14 his days at his owner's retail store in San Francisco.

15 Testimony at the trial from his many friends, including the
16 mail carrier, will establish beyond a doubt, that ROCKY is
17 not a threat to public safety.

18 V
19 CONCLUSION

20 ROCKY is an individual and must be judged accordingly.
21 It is imperative that the trier of fact disregard the pit
22 bull horror stories that are reported daily in response to
23 the latest media fad scare.

24 ROCKY does not have vicious propensities. He is not in
25 the habit of biting. He acted the way any dog would have in
26 that situation. Rocky did not bite without provocation. He
27 thought he was protecting his owner's girlfriend from harm.

1 Rocky is not a threat to the public. Marin County Animal
2 Services has not met its burden of proving by a preponderance
3 of the evidence that ROCKY is vicious or unsafe and is a
4 threat to the community.

5 California law requires that any order of destruction
6 of private property under the police power must be based upon
7 the determination that in fairness and justice there is no
8 other way reasonably to correct the nuisance. Armistead v.
9 City of Los Angeles (1957) 152 Cal.App.2d 319, 131 P.2d 127.

10 To order ROCKY destroyed without first trying less
11 drastic alternatives vitiates the due process protections
12 contained in the U.S. and California Constitutions. ROCKY
13 should not be destroyed.

14 Dated: August 24, 1987

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16 Robin A. Dubner
17 ROBIN A. DUBNER
18 Attorney for Respondent
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NUMBER OF DOGS ON LICENSING RECORDS
AND ESTIMATED PERCENTAGE OF BITES
BY DOG BREED
CITY OF LOS ANGELES
FISCAL YEAR 1964-65

BREED	NUMBER OF DOGS ON RECORD	ESTIMATED PERCENTAGE OF BITES BY BREED	ESTIMATED BITES BY DOG BREED	PERCENT OF BITES REPORTED BY
OTHER DOGS OF RECORD	113,647	0.7%	760	
TERRIER (MIXED BREED)	10,859	4.3%	463	
LABRADOR RETRIEVER	14,093	5.2%	735	
SHEPHERD (MIXED BREED)	11,534	5.4%	619	
AMERICAN COCKER SPANIEL	9,835	6.0%	586	
AUSTRALIAN SHEPHERD	3,342	7.9%	264	
STAFFORDSHIRE TERRIER	4,696	8.1%	380	
DOBERMAN PINSCHER	10,803	8.4%	909	
HUSKY	3,127	8.7%	273	
COLLIE	2,933	9.3%	273	
GERMAN SHEPHERD	26,025	10.6%	2,957	
BULL TERRIER	347	11.8%	41	
	213,441		8,260	

EXHIBIT "A"

SF Chronicle 8/15/67

A Way to Report Vicious Dogs

Special hot lines for reporting vicious dogs will be operating today in Contra Costa County.

Ted Brasier, chief animal control supervisor, said that six special hot lines will be staffed by volunteers to take reports on pit bulls and other vicious dogs. The reports will be passed on to the county Animal Services Department for investigation and will be kept on file.

County residents who wish to report a vicious or threatening dog in their community can call the office of their representative on the county Board of Supervisors between 10 a.m. and 2 p.m. today or the animal services office for central and east county at (415) 372-2998.

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EXHIBIT "B"

had been illegally sold to it by an animal dealer who obtained the animals without their owners' consent. The University has informally indicated that it will review its acquisition policies for dogs to be used in research.

COMPANION ANIMALS

KENTUCKY DOG WARDEN SUED OVER SHOOTING OF DOG

Attorney Katie Brophy, representing the family of a dog named Hair Bear, has filed suit in U.S. District Court, KY, against a county dog warden who shot and killed Hair Bear. Also named as a defendant is the neighbor who turned the dog in and allegedly made untrue statements regarding the dog's ownership. The suit alleges destruction of property without due process, in violation of the U.S. Constitution, Amendment XIV and Title 42, U.S. Code. Hair Bear's owners further allege that the warden failed to observe a seven day waiting period required by state law. The dog's owners are seeking \$105,000 in damages. (*Ammon v. Welty*, PF 231.10)

VICIOUS DOG DEFENSE IN ILLINOIS

Attorneys Kenneth Ross and Thomas Kanyock saved the life of a dog who had been declared vicious and was scheduled to be destroyed. The suit alleged that the Village of Glenview's handling of the matter, including its failure to provide for a hearing, violated the owner's right to due process under the U.S. and IL Constitutions. The Village agreed to drop the case, when Ross and Kanyock obtained an order transferring ownership of the dog to a friend who would provide a responsible home. (*Ananda v. Village of Glenview*, PF 230.90)

RULING IN AIRLINE CASE DECLARES DOG "BAGGAGE"

On February 9, 1994, the U. S. District Court, S.D.N.Y., ruled that a dog, who died as the result of traveling in an unventilated airline cargo hold, was to be considered the equivalent of lost luggage.

The judge dismissed all of the tort claims, leaving a claim for breach of contract, which is scheduled to go to trial. Attorney Michael Gregorek is representing the plaintiff. (*Gluckman v. American Airlines*, PF 281.80)