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(ENDORSED)
FILED

JUN 23 1965

Attorneys for Plaintiff

FRANCIS M. COONEY, COUNTY CLERK
By TAMI BISANTZ
DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

SUSAN PHILLIPS, RUSSELL PHILLIPS,
and MARY PHILLIPS,

Petitioners,

v.

DIRECTOR OF THE DEPARTMENT OF ANIMAL
REGULATION, SAN LUIS OBISPO COUNTY
HEALTH AGENCY, COUNTY OF SAN LUIS
OBISPO, CITY OF ATASCADERO,
A Municipal Corporation, the CHIEF
OF POLICE for the CITY OF ATASCADERO,
and DOES 1 through XXV, Inclusive,

Respondents.

Case No. 60146

PETITION FOR WRIT
OF MANDAMUS

Petitioners Mary Phillips and Susan Phillips petition this court for a Writ of Mandamus under Code of Civil Procedure section 1085 directed to Respondents Director of the San Luis Obispo Department of Animal Regulation, San Luis Obispo Health Agency, the County of San Luis Obispo, the City of Atascadero, A Municipal Corporation, the Chief of Police of the City of Atascadero, and Does I through XXV, Inclusive, and by this verified petition represent that:

1 remedy in the ordinary course of law. Traditional Mandamus
2 under Code of Civil Procedure section 1085 is available in
3 situations to control or to correct abuses of discretion by
4 administrative offices and agencies if no administrative
5 hearing is required by statute, regulation, or ordinance. When
6 due process requirements for notice of hearing and procedural
7 fairness are in issue, the matter should not be remanded to the
8 agency for a hearing, but is reviewed in a trial de novo
9 proceeding under ordinary Mandamus (see *Alta-Dena Dairy v.*
10 *County of San Diego* (1969) 271 Cal.App.2d 66, 77). Although
11 Respondent's administrative actions are discretionary, the
12 local ordinances provide for no adjudicatory hearing subject to
13 review pursuant to Code of Civil Procedure section 1094.5 and
14 therefore extraordinary relief in the nature of traditional
15 mandamus is appropriate.

16 Even if a hearing is held, if it is not required by
17 statute or ordinance to be held, or held without jurisdiction,
18 review of that agency decision is reviewable pursuant to Code
19 of Civil Procedure section 1085. If no hearing is required
20 Code of Civil Procedure section 1094.5 does not apply even if
21 the agency has the authority to grant hearings and even if a
22 hearing is granted (*Weary v. Civil Serve Comm'n* (1983) 140
23 *Cal.App.3d* 189; *Royal Convalescent Hosp., Inc. v. State Board*
24 *of Control* (1979) 99 *Cal.App.3d* 788, 793; *Keeler v. Superior*
25 *Court* (1956) 46 *Cal.2d* 596.

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II

PETITIONERS ARE ENTITLED TO A FULL HEARING PURSUANT TO CIVIL CODE SECTION 3342.5.

A City of County is authorized to implement legislation in the field of dog control. However, the licensing, impounding, and disposition of dogs is not exclusively a municipal affair and therefore if there is any conflict between the ordinance and state laws the latter will prevail (Const., Art. XI, Sec. 11; *Simpson v. City of Los Angeles* (1953) 40 Cal.2d 271). Petitioners contend that Respondent City and County have failed to enact under their police powers local rules or regulations requiring any hearing prior to the destruction of dogs pursuant to Atascadero City Code section 4-1.212 and County Code 9.08.130. The subject code sections grant unlimited power in the Chief Animal Control Officer to determine without a hearing that the dog has in fact bitten two or more persons and cannot be properly controlled. Petitioners contend that the Chief Animal Control Officer cannot make such a determination without a hearing, and that the dog owners are entitled to a full hearing prior to the destruction of dogs pursuant to those local ordinances.

As stated in *Alta-Dena Dairy v. County of San Diego* (1969) 271 Cal.App.2d 66, page 77,

"Whereas here the order of an administrative officer adversely affects valuable and existing property rights, where it is made without notice or hearing under a regulation which makes no provision for hearing or administrative review, the fundamental principles of due process come into play. Somewhere along the line Appellant is entitled to meet its adversary on equal footing in a full and fair hearing before an impartial tribunal with a full and complete right to present evidence and cross-examine witnesses"

1 (Bess v. Park, 144 Cal.App.2d 798,807 [Citations].
2 Unless such right is available to Appellant by a trial
3 de novo in the Superior Court, the very regulation
under which Respondent Askew acted would violate due
process and thus be unconstitutional."

4 Respondent City and County ordinances pertaining to
5 the regulation of animal control contain no provision requiring
6 an administrative hearing prior to the destruction of a dog.
7 The only provision in those ordinances which provides for a
8 hearing is in the event of the refusal to permit the
9 maintenance and operation of a boarding kennel or a pet shop
10 (Atascadero City Code section 4-1.116).

11 Civil Code section 3342.5 subdivision (b) provides
12 for a full hearing in the municipal court against the owner of
13 an animal to determine if the dog has bitten two or more
14 persons, if conditions of the treatment or confinement of the
15 dog or other circumstances in existence at the time of the
16 proven bites have been changed so as to remove the danger to
17 other persons presented by such an animal. Said statute
18 provides the court after hearing may make any order it deems
19 appropriate to prevent the reoccurrence of such an incident,
20 including, but no limited to, the removal of the animal from
21 the area or its destruction if necessary. Subdivision (e) of
22 that statute provides that "nothing in this section should be
23 construed to prevent legislation in the field of dog control by
24 any City, County, or City and County".

25 Petitioners contend in the absence of legislation
26 affording a hearing by the City of County, section 3342.5
27 governs and a hearing must be had in a municipal court. Thus,
28 in the absence of local legislation guaranteeing the

1 Fundamental right of due process and a full hearing prior to
2 the destruction of a dog, section 3342.5 preempts the field.
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5 III

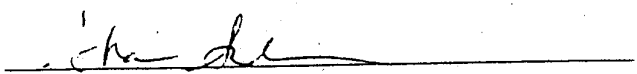
6 AN ORDER TO SHOW CAUSE AND TEMPORARY STAY ORDER ARE PROPER
7 AND SHOULD BE ISSUED IN CONJUNCTION WITH THIS ACTION.

8 Petitioners have requested a temporary stay order to
9 restrain the destruction of Missy pending the outcome of this
10 proceeding. Courts have the power to issue a stay and original
11 mandamus under their inherent power to preserve or aid their
12 own jurisdiction (see *People v. Emeryville* (1968) 69 Cal.2d
13 533). Under all circumstances granting of a stay is within the
14 court's discretion (*West Coast Home Improvement Co. v.*
15 *Contractor's State License Board* (1945) 68 Cal.App.2d 1). The
16 court is authorized to stay execution of the administrative
17 decision before it has been put into effect pending the outcome
18 of the Petition for Writ of Mandamus (Code Civ. Proc.
19 §1094.5(f)).

20 Petitioners request that a temporary stay order and
21 order to show cause be immediately issued to prevent the
22 destruction of Missy pending the outcome of this action, and
23 that an alternative Writ of Mandamus issue setting aside the
24 decision ordering destruction of the Petitioner's dog.

25 Respectfully submitted,

26 GEORGE & COLLINS

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28 By: Shaunna Sullivan
Attorneys for Petitioners

1 fair trial and failed to provide sufficient competent
2 evidence to support their findings confirming the
3 Director's destruction order.

4 e) Respondents committed a prejudicial abuse
5 of discretion in that Respondents failed to proceed in the
6 manner required by law (to wit, pursuant to Civil Code
7 section 3342.5.)

8 f) Respondent's findings are not supported by
9 the weight of the evidence in that there was insufficient
10 evidence to support any finding that Missy in fact bit any
11 person, that any alleged bite victims were treated by
12 physicians for injuries caused by Missy, that the
13 confinement order condition number 10 prohibiting the dog
14 from running at large was violated, or that Missy cannot
15 be properly controlled in order to ensure public safety as
16 further alleged in the Declarations attached hereto as
17 Exhibit B.

18 12. Petitioners have exhausted all available
19 administrative remedies and have no appeal nor any plain,
20 speedy, or adequate remedy at law. According to an official of
21 the Department of Animal Regulation, Missy is scheduled to be
22 destroyed in the afternoon of Thursday, June 27, 1985.

23 13. If Respondent's decision is allowed to be
24 executed, Petitioners will be irreparably injured in that Missy
25 will be destroyed and they will be deprived of their pet dog
26 Missy.

27 14. Petitioners allege that Director Robert
28 Dollahite's Order of Destruction was the result of arbitrary

1 and capricious action by an officer of a public entity in his
2 official capacity, that such action was capricious and
3 retaliatory as a result of Petitioner's outspoken objections
4 and complaints to various entities which contributed to an
5 eventual grand jury investigation of Rodney Dollahite's
6 operation of the Animal Control Facility, and that Petitioner
7 is entitled to collect reasonable attorney's fees pursuant to
8 Government Code section 800.

9 15. That in bringing the within action to seek to
10 have the San Luis Obispo County and City of Atascadero Animal
11 Control Ordinance declared unconstitutional as violative of the
12 due process rights of Petitioners and all resident dog owners
13 within San Luis Obispo County, Petitioners are attempting to
14 enforce an important right affecting the public interest and
15 therefore under the provisions of Code of Civil Procedure
16 section 1021.5 Petitioners request the court to order
17 Respondents to be responsible for attorneys fees and costs in
18 maintaining the instant action.

19 WHEREFORE PETITIONERS PRAY THAT:

20 1. An alternative Writ of Mandamus or prohibition
21 be issued ex parte in the form attached hereto;

22 2. An ex parte order be issued staying Respondent's
23 destruction order and ordering Respondents to show cause why an
24 order should not be granted further staying that order;

25 3. A peremptory Writ of Mandamus be issued ordering
26 Respondent to set aside its decision;

27 4. The Petitioners recover their costs in this
28 action and attorney's fees pursuant to Government Code section

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800 and Code of Civil Procedure section 1021.5; and

5. Other relief be granted that the court considers proper.

Dated: June 24, 1985

GEORGE & COLLINS

By: Shauna Sullivan
Attorneys for Petitioner

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Attorneys for Plaintiff

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

SUSAN PHILLIPS, RUSSELL PHILLIPS,
and MARY PHILLIPS,

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DIRECTOR OF THE DEPARTMENT OF ANIMAL
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HEALTH AGENCY, COUNTY OF SAN LUIS
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A Municipal Corporation, the CHIEF
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Respondents.

Case No. 60146

ORDER TO SHOW CAUSE
AND TEMPORARY STAY
ORDER

To: Director of the Department of Animal Regulations, San
Luis Obispo County Health Agency, County of San Luis Obispo,
City of Atascadero, A Municipal Corporation, the Chief of Police
of the City of Atascadero, and Does I through XXV, Inclusive,

Respondent: Good cause appearing from the Verified Petition for
Writ of Mandamus on file in this action:

IT IS ORDERED, that you show cause before this court
on 7-16, 1985 at 9:00 AM or as soon
thereafter as the matter may be heard in Department I, of

1 the above entitled court located at the County Government
2 Center, 1000 Monterey Street, San Luis Obispo, California then
3 and there to show cause if any they have, why an order should
4 not be granted staying the operation of the San Luis Obispo
5 County Department of Animal Regulation and Health Agency
6 decision ordering destruction of Petitioners labrador dog,
7 "Missy" and authorizing release of the dog "Missy" to either a
8 licensed veterinarian or confinement to the kennel constructed
9 by Petitioner in compliance with the Department of Animal
10 Regulation's confinement order pending the entering of the
11 judgment of the court in this action.

12 IT IS FURTHER ORDERED that you stay the operation of
13 that order to destroy pending the hearing of this Order to Show
14 Cause.

15 IT IS FURTHER ORDERED that a copy of this Order and a
16 copy of the Petition for Writ of Mandate and any supporting
17 declarations and points and authorities be served on Respondents
18 at least 15 days prior to the hearing of the above Order to
19 Show Cause.

20 Dated: 6-26, 1985.

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22 HARRY E. WOOLPERT
23 Judge of the Superior Court
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