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COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

SUSAN PHILLIPS, RUSSELL PHILLIPS, AND MARY PHILLIPS, Appellants, v. DIRECTOR OF THE DEPARTMENT OF ANIMAL REGULATION, et al., Respondents.	2 CIVIL B015913 (Superior Court No. 60146 (San Luis Obispo County)

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PETITION FOR REHEARING

APPEAL FROM THE SUPERIOR COURT OF THE
COUNTY OF SAN LUIS OBISPO

HONORABLE BARRY HAMMER, JUDGE

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INTRODUCTION

Respondents on the appeal, Director of the Department of Animal Regulation San Luis Obispo County, the Chief of Police of the City of Atascadero, and the City of Atascadero do hereby request this Honorable Court for an opportunity to present matters which Respondents contend are urgent and necessary and should be reconsidered by the Court. Such issues as will be presented in this request, it is hoped, will persuade this Court of the gravity of the necessity of reconsidering its proposed published decision in this case.

II

ISSUES

1. A Petition for Rehearing is permitted for the purpose of correcting any error which the Court may have made in its opinion.

2. The Court's decision misstates crucial facts concerning the operation of the subject ordinance.

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III

DISCUSSION

1. Petitions for Rehearing are permitted for the purpose of correcting any error which the Court may have made in its opinion.

The Court of Appeal may grant a rehearing after its own decision. Rule 27(a), California Rules of Court. This rule has been explained by various commentators as follows:

> "Petitions for rehearing are permitted by the rules of court, for the purpose of correcting any error which the Court may have made in its opinion, or enabling counsel to direct the attention of the Court to matters presented at argument which have been overlooked in the decision." 44 Cal.L.Rev. 632; Witkin, California Procedure, Third Edition, Vol. 9, Section 683, page 656.

This Court has distinguished the present case from Simpson v. City of Los Angeles (1953) 40 Cal.2d 271 on the grounds that Simpson dealt with stray dogs, that the Atascadero ordinance dealt separately with strays and biting dogs, and that the ordinance provisions dealing with the impounding of biting dogs must be read without reference to the other ordinance provisions for hearings concerning impounded dogs (Court's decision at 9-10). Petitioners for rehearing are concerned that in its present form the Court's decision contains certain factual errors concerning the application and operation of the subject ordinances.

2. The Court's decision misstates certain crucial facts concerning the operation of the subject ordinance.

It is noted at page 12 of the Court's decision that in the Simpson case the necessity of a hearing was implied from that portion of the ordinance which read:

> "No fees whatsoever shall be charged or collected for or on account of any animal which has been unlawfully taken up or impounded, and any such animal shall be immediately delivered upon demand therefore to the owner or person entitled to custody thereof." (Simpson at 281-282)

This Court notes that in the Simpson case "The requirement of a hearing could be implied from the phrase requiring return of unlawfully seized animals." This Court concludes however, that "Here the ordinance does not provide for the return of a dog and there is no room to imply the necessity of a hearing." (page 12 of the decision).

Unfortunately, language in the Atascadero Ordinance which is crucial to the Court's conclusion appears to have been overlooked. Atascadero Ordinance Section 4-1.207(b), contains the following language:

> ". . . No fees whatsoever shall be charged or collected for or on account of any dog which has been unlawfully taken up or impounded. If the owner or person entitled to the custody of the dog believes that the dog has been unlawfully taken up or impounded, that owner or person may, within the seventy-two (72) hour redemption period, request that an impartial hearing be conducted to determine the sole issue of whether the dog was lawfully seized and impounded. If a dog has been unlawfully taken up or impounded, it shall be returned to its owner or the person entitled to the custody thereof." [Emphasis added] (Clerks Transcript p. 226)

Thus it appears that this Court was incorrect in its conclusion in that Section 4-1.207(b), in language which is virtually identical to that found in the Simpson ordinance, provides for the return of a dog. Since this language is present it should be the basis for implying the requirement of a hearing as in the Simpson case as is discussed below in more detail.

However, the Atascadero ordinance exceeds the requirements of Simpson and it is not necessary to imply a hearing because the ordinance specifically provides for a hearing.

This Court rejects this argument because it determined that Section 4-1.207 applies only to stray or trespassing dogs as evidenced by the placement of the section within the code. However, it is submitted that Section 4-1.207(b) was intended to apply to all "impounded" dogs, regardless of the reason for which they were impounded. For example, Section 4-1.207(b) procedures apply to biting dogs which have been impounded for quarantine under Section 4-1.214(b) entitled "Impounding of Biting Dogs." This section provides that if during the quarantine the dog is determined not be diseased,

> " . . . the Poundmaster shall notify the person owning . . . the dog . . . and shall, upon demand, release the dog to the owner . . ., provided however, that if no person lawfully entitled to such dog shall within three (3) days after giving the last mentioned notice, appear at the public pound and request the release . . . The dog may be sold or destroyed by the Poundmaster in the same manner therein before provided." (Clerks Transcript p. 228)

Here, as in virtually all other biting incident cases, the dog was subject to the health officer's quarantine order. The appellant's requested and received a hearing before the quarantine was over. The hearing occurred pursuant to Section 4-1.207(b). Characterizing the action of holding the hearing as one of "courtesy" (at p. 13 of the decision) may be incorrect because it ignores the interrelationship between these two sections of the Atascadero ordinance, and the fact that Section 4-1.207(b) calls for a hearing to determine the legality of the impoundment.

However, even if it is determined that the express hearing provision applies only to stray and trespassing dogs, the language of the ordinance is a more than sufficient basis for implying the necessity of a hearing as was done by the California Supreme Court in the Simpson case and the trial court in the present case. The trial court's conclusion that the determinations required by Section 4-1.212 are well-supported of the ordinance. The entire ordinance is set up with the intention of providing full notice to dog owners. After the owners are given notice, certain determinations are made by the animal control officer. It would certainly be logical to conclude that the owner would have input to these decisions and to further imply a hearing. For example, 4-1.212 itself provides for notice to keep or surrender the dog followed by a determination as to whether or not the dog can be "properly controlled in order to ensure public safety." Section 4-1.206 requires notice of impoundment "As soon as possible but not later than twenty-four hours after impounding." Section 4-1.214 concerning impounding of biting dogs, requires written notice as well as the other procedures discussed above.

In this context, it seems reasonable to conclude, as did the trial court, that the ordinance should be read to require notice and hearing.

Where the ordinances may be reasonably read to require notice and hearing they will be upheld. In Roth v. City of Los Angeles (1975) 53 Cal.App.3d 679, 691, the Court stated:

> "The statutory scheme provides for notice and an opportunity to be heard; it would be contrary to settled rules of construction to presume in the absence of any supporting evidence, that the procedures utilized thereunder are constitutionally defective. 'The familiar rules, however, require that 'The Constitution and the statute are to be read together,' and that if 'the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution.'. . .' The presumption must be in favor of the validity of the statute and consistency with constitutional requirements if this is possible under a reasonable interpretation, as it is here. . . . The important factor in each instance was determined to be whether the minimum requirements for due process had been satisfied-not whether they were statutorily required." (12 Cal.3d at p. 30.)

Once it is concluded that a hearing is specifically required by the ordinance or that one should be implied, the question becomes one of when the hearing must be held.

This Court's decision appears to establish new law by providing that under certain circumstances a pre-seizure hearing must be held. At page 6 of its decision this Court says that " . . . due process requires that a dog owner have an opportunity to be heard prior to the destruction of his dog unless there is a need for prompt government action." (Emphasis added) This would appear to imply that summary seizure is appropriate if followed by a hearing prior to destruction. At page 10 this Court states " . . . whether special circumstances warrant summary seizure depend upon the nature of the governmental interest, the need for 'very prompt action,' and the duty of the seizing official under the standards of a narrowly drawn statute." At page 11 this

Court states "It is obvious that summary seizure of dogs must be permitted to protect others, as when a dog is rabid" and that the validity of seizure further depends on provision for a prompt post-seizure hearing.

With this discussion this Court has neglected to set any standard for summary seizure. Is it only allowed when a dog is rabid or may it be used to quarantine a dog to determine whether or not it is rabid? Is the fact that a dog may bite again a reason to impound to protect others? Does the fact that one, two, three or four days have expired since the last bite make it less likely that a dog which has bitten four times will not bite again pending a pre-seizure hearing? If the dog does bite again while its owners await a pre-seizure hearing what may be done to protect society?

This Court notes that Simpson concluded that the pre-seizure hearing requirement does not apply to stray dogs. The paradox to such a conclusion is that a biting dog may also be a stray dog and that if it were only a stray dog it would not be entitled to a pre-seizure hearing. Of course, if a pre-seizure hearing were required for stray or trespassing dogs enforcement of these regulations would become impractical.

The nature of the hearing required, which is also unclear, becomes important because unless it is held very promptly, the dog may remain in the same status as that which it was in when it last bit; without any assurances as to society's protection.

It is submitted that summary seizures followed by post-seizure hearings are necessary to protect society from biting dogs and meet the requirements of due process.

3. Hearings required under the Atascadero ordinance apply to all dogs not just stray dogs.

The Atascadero Ordinance Code regulates dog ownership in Article 2 (Clerk's transcript at 224-238). The various sections of Article 2 operate together to form an integrated system for control of all dogs found within the City. To say that this system must come into focus only through its segments, with each section independent of the others, ignores the repeated usage of common words and phrases throughout the Article, and in particular ignores the use of the word "impounded". As mentioned above, that word appears to be a justification for the requirement of a hearing in Section 4-1.207(b) and is the phrase used for gaining control of a biting animal in Section 4-1.214. Furthermore, if each section must be read independently of the others, the Article becomes nonsensical in several significant ways.

For example, a dog that has strayed and bitten, would under the Court's present interpretation, be the subject of two distinct processes; a post-seizure hearing consistent with Simpson concerning the dogs status as a stray, and a pre-seizure hearing to determine the propriety of impounding the animal as a biting dog. Such an approach will prove unworkable.

Another example of the difficulties that arise from a segmented interpretation of the Article is that a licensed stray dog may be properly seized without prior notice or hearing. Atascadero Ordinance § 4-1.206 and 4-1.207(b). Yet under the approach adopted by the Court a biting dog, such as Missy, is

entitled to a hearing prior to seizure (page 11 of the Decision). The threat posed to public health and safety by a dog that has bitten children on four separate occasions is under all circumstances greater than that posed by a common stray, yet a post-seizure hearing will suffice under the Court's view of Simpson for strays, but not for biting dogs. This entire approach seems to lose track of the very reason for the regulatory system--the protection of the health and safety of the community.

Present language of the Opinion offers very little guidance concerning the constitutional standard which will be utilized to review the factual circumstances justifying post-seizure hearings. This will be source of confusion statewide, because the decision does not specify when a summary seizure is permitted to protect the community. The decision suggests that summary seizures are appropriate for rabid animals, but under most animal regulatory systems biting dogs must be quarantined in order to rule out the presence of this disease. All biting dogs present a danger to society, yet the decision offers no standard for determining the circumstances which would distinguish the need for affording pre-seizure as opposed to post-seizure hearings for biting dogs.

Atascadero Ordinance § 4-1.207 and 4-1.214 have been interpreted by the agency charged with enforcement of these provisions to require a hearing upon the request of an owner of an animal impounded for biting. Section 4-1.212 specifically treats the issue of how a vicious and dangerous dog is to be taken up and handled. Within that section the ordinance places

the duty upon the Chief Animal Control Officer to determine whether the dog can be properly controlled in order to ensure public safety. Such a determination it is submitted, can only be made after the officer has made full inquiry into the facts of the viciousness or biting. A hearing may not only be implied, but is seen to be that same hearing anticipated by Section 4-1.207 after the notice provided in Section 4-1.206. This procedure is also that anticipated by our Supreme Court in the Simpson case at page 282:

> "The ordinance thus contemplates that a factual or mixed factual and legal determination shall be made by the department, and under these circumstances it must be interpreted to provide for a hearing, when requested by the owner, upon the question of whether a dog has been legally seized."

Since the ordinance considered by this Court strictly complied with the directions advanced by our Supreme Court in Simpson, and since, it would appear that this Court's decision does not presently accurately reflect either the state of the language of the article or its careful subscription to the rules set down in Simpson it would be appropriate for this Court to reconsider its decision.

4. Because the Atascadero Ordinance requires notice upon the impounding of a dog, this Court may have been misled in its decision to conclude that no notice had been required.

The Atascadero Ordinance (similar to that of the County's and other ordinances of Cities throughout the County of San Luis Obispo) is a legislative enactment drafted in reliance upon Simpson v. City of Los Angeles, supra. As such, and as reflected

by Respondent's briefs before this Court, the County Department of Animal Regulation and the Cities in adopting said ordinances relied upon the concept that the Supreme Court in its direction was regulating all dogs whether they were estray, diseased (rabid) or vicious-biting dogs. As a consequence, it should be recognized by the Court that Atascadero's ordinance was developed with a singleness of purpose.

Notice provisions concerning impounding of a biting dog are expressly contained within Atascadero Ordinance Code Section 4-1.214, entitled "Impounding of Biting Dogs."

In the Court's decision at page 13 the Court issued the following language: "Moreover, a notice and hearing requirement is prominent in other Atascadero City ordinances concerning the regulation of dogs." But again, unfortunately, while the Court considered kennel licensing and impound fee charges, the notice provisions concerning a dog which has been impounded because of biting appear to have been overlooked.

IV

CONCLUSION

Respondents on appeal are naturally disappointed that the ordinances which were drafted in reliance upon Simpson have been declared unconstitutional by this Court after distinguishing Simpson by concluding that it is a decision applicable only to strays. Respondents concede that the last thirty years have been a growing time of the development of newly considered

constitutional application to rights newly afforded a varying range of "due process protection". Still, it is suggested that the unintended consequences of the Phillips v. Department decision might be more extreme than this Court has contemplated. Respondents implore this Court to reconsider its decision in light of the points raised herein.

Dated July 29, 1986

Respectfully submitted,

JAMES B. LINDHOLM, JR.
County Counsel

/s/ John Paul Daly
By: John Paul Daly
Deputy County Counsel

3784e/r

STATE OF CALIFORNIA)
) ss
COUNTY OF SAN LUIS OBISPO)

I am and at all times herein mentioned was a citizen of the United States and a resident of the County of San Luis Obispo, over the age of 18 years and not a party to the within entitled action; that my business address is County Government Center, Room 386, San Luis Obispo, CA 93408.

That on July 29, 1986, I served the documents, to-wit:

PETITION FOR REHEARING

on: Court of Appeal of the State of California
The Supreme Court of the State of California
Office of the Attorney General
San Luis Obispo County Superior Court
Shaunna Sullivan
Joyce S. A. Tischler

by placing a true copy thereof in a sealed envelope with postage thereon, fully prepaid, in the United States mail at San Luis Obispo, California, addressed as follows:

Court of Appeal of the State of California
Second Appellate District, Division Six
1280 So. Victoria Ave.
Ventura, Ca. 93003 (Original & 4 copies)

The Supreme Court of the State of California
3580 Wilshire Blvd., Rm. 213
Los Angeles, Ca. 90010 (7 copies)

Office of the Attorney General
6000 State Bldg., 350 McAllister St.
San Francisco, Ca. 94102 (1 copy)

San Luis Obispo County Superior Court
County Government Center, Rm. 385
San Luis Obispo, Ca. 93408 (1 copy)

(See Attached Page)

Executed at San Luis Obispo, California, on July 29, 1986.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Rachel Flores

ATTACHED PAGE FOR PROOF OF SERVICE BY MAIL

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