

1 MICHAEL ROTSTEN, SBN 45861
16133 Ventura Boulevard
2 Suite 700
Encino, CA 91436-2431
3 818)789-0256

4
5 Attorney for Petitioner,
STEPHEN WILLIAMS
6
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ORANGE

11	STEPHEN WILLIAMS,	)	CASE NO.
)	
12	Petitioner,)	
)	
13		)	PRELIMINARY
		)	MEMORANDUM OF POINTS AND
14	v.	)	AUTHORITIES IN SUPPORT
		)	OF PETITION FOR WRIT
		)	OF ADMINISTRATIVE
15	ORANGE COUNTY ANIMAL CONTROL,	)	MANDAMUS; TEMPORARY
		)	RESTRAINING ORDER;
16	Respondent.	)	PRELIMINARY AND PERMANENT
		)	INJUNCTION

17
18 INTRODUCTION

19 Petitioner hereby submits his preliminary Points and Authorities
20 in support of his Petition for Administrative Writ of Mandamus,
21 Temporary Restraining Order, Preliminary and Permanent Injunction.
22 Upon receipt and review of the certified record, Petitioner will
23 submit an amended Memorandum of Points and Authorities including more
24 specific argument with citations to the record.

25 SUMMARY OF CASE

26 On or about December 26, 1995, an incident occurred at
27 Petitioner's residence in Yorba Linda, California, wherein
28 Petitioner's dog, "Boo," (hereinafter "Boo") allegedly bit

1 Petitioner's neighbor's son, Zack. The entire incident was observed
2 by Petitioner's son, Justin. Justin saw Boo knock down his friend, but
3 did not see Boo bite him.

4 As a result of this incident a report was filed with the ORANGE
5 COUNTY ANIMAL CONTROL (hereinafter "OCAC").

6 Boo was subsequently seized and impounded, without a warrant,
7 without consent and without any exigent circumstances. Boo did not
8 manifest signs of any dangerous behavior. Petitioner was notified by
9 letter dated January 12, 1996, of OCAC's summary decision that Boo was
10 "vicious" and ordered that the dog be destroyed. Thereafter,
11 Petitioner requested a hearing.

12 An Administrative Hearing was conducted before Judy Maitlen,
13 Director of OCAC. Petitioner offered eyewitness testimony, expert
14 testimony and evidence, all negating that the complainant's injuries
15 were dog bites, or that Boo was a "vicious" dog and should be
16 destroyed. On February 8, 1996, OCAC sent their decision that Boo is
17 "vicious" and ordered the dog to be destroyed.

18 On February 14, 1996, Petitioner filed a Writ for Administrative
19 Mandamus to stay the execution of his dog. A hearing was conducted
20 before the Court on April 5, 1996. The Court found that the
21 Respondent's order was in violation of Due Process and remanded the
22 case for rehearing.

23 Commencing May 6, 1996, a rehearing was conducted at the Orange
24 County Animal facility. On June 4, 1996, Orange County Animal Control
25 rendered their decision that Boo is "vicious" and ordered him to be
26 destroyed on June 11, 1996, at 8:00 a.m. The Orange County Ordinances
27 do not provide for any further remedies and was final. Accordingly,
28 Petitioner has filed this Writ of Administrative Mandamus to stay the

1 execution of his dog and to vacate the Respondent's decision.

2 LEGAL ARGUMENT

3 I.

4 THIS COURT HAS THE POWER TO STAY THE OPERATION OF THE
5 ADMINISTRATIVE ORDER TO DESTROY PETITIONER'S PROPERTY

6 A reviewing court possesses inherent power to stay the effect of
7 any judgment or order where it is necessary or proper to complete the
8 exercise of its appellate jurisdiction and where the denial of such a
9 stay would result in depriving appellant of the fruits of his appeal
10 should be successful. Deepwell Homeowners Protection Assn. v. City
11 Council of Palm Springs (1965) 239 C.A.2d 63; Code of Civil Procedure
12 Section 1094.5(g). (See also Code of Civil Procedure Section 527(a).)

13 Here, unless a Preliminary and Permanent Injunction are granted
14 in the instant case, Petitioner will be irreparably injured and will
15 permanently lose a valuable right to own, possess and keep his
16 companion dog, lose the right to preserve and prevent destruction of
17 evidence, for the impending civil case, and to preserve his pet's life
18 from wrongful destruction. (See Code Civ. Proc. Section 525 et. seq.)

19 Imposition of the Injunction will not be against the public
20 interest in that there is no threat. OCAC can impose specific
21 reasonable restrictions and conditions for the maintenance of Boo.

22 II.

23 PROPER SCOPE OF REVIEW IS INDEPENDENT JUDGMENT TEST

24 Whether the Administrative Board's decision is supported by the
25 findings, and the findings are supported by the evidence, the
26 reviewing court may exercise its independent judgment. DeRasmo v.
27 Smith (1971) 15 Cal.App.3d 601, 609.

28 In determining whether Petitioners' right is sufficiently basic

1 and fundamental to justify the Court's independent judgment review, an
2 important consideration is the degree to which that right is "vested,"
3 or already possessed, by the individual. Bixby v. Pierno (1971) 4
4 Cal.3d 130, 146. In making a determination as to whether the right in
5 question is fundamental, the court may weigh its effect in human
6 terms, i.e., its importance to the individual in their life situation.
7 Lowe v. Civil Service Com. (1985) 164 Cal.App.3d 667, 674-675.

8 Penal Code Section 491 provides that "Dogs are personal property
9 and their value is to be ascertained in the same manner as the value
10 of other property." Johnson vs. McConnell (1921) 80 C. 545; People
11 vs. Spencer (1921) 54 C.A. 54; 28 Ops. Atty. Gen. 90, 8-24-56.

12 Civil Code Section 655 provides that "there may be ownership of
13 all inanimate things which are capable of appropriation or of manual
14 delivery; of all domestic animals; of all obligations; of such
15 products of labor or skills as the composition of an author, the
16 goodwill of a business, trade marks and signs, and of rights created
17 or granted by statute." (Emphasis added).

18 Here, Petitioner has the right to own, possess and maintain his
19 association with his companion animal, Boo. Under California law,
20 such a right must be considered a fundamental vested right. Under
21 Bixby, supra, said right was already vested in Petitioner, and its
22 importance to Petitioner cannot be overemphasized.

23 III.

24 THE FINDINGS AND DECISION OF RESPONDENT ARE IN VIOLATION OF
25 1094.5 CODE OF CIVIL PROCEDURE IN THAT THE FINDINGS ARE NOT SUPPORTED
26 BY THE FACTS AND THE DECISION IS NOT SUPPORTED BY THE FINDINGS

27 Petitioner contends that the written findings and decision of
28 Respondent is devoid of correct standards as well as critical and

1 substantial evidence, all of which impeach the decision rendered. A
2 copy of Respondent's decision dated June 4, 1996 is attached to
3 Petitioner's Petition as Exhibit 4. Petitioner contends that
4 Respondent blantly ignored evidence and testimony, including but
5 not limited to:

- 6 ■ The appropriate issues for consideration at the time of
7 hearing are: (1) Is the dog vicious? and (2) What is
8 the appropriate disposition, rather than (2) Should the
9 dog be euthanized?
- 10 ■ Failing to include the testimony of the boy and his
11 father, admitting that the boy knew he was not allowed
12 in the yard where the incident occurred.
- 13 ■ Concluding that the injuries to the head were dog bites
14 when the evidence showed that the injuries were due to
15 claw marks.
- 16 ■ Concluding that there was no teasing, tormenting or
17 trespassing, in view of uncontroverted evidence to the
18 contrary.
- 19 ■ Relying on Carol Bean who has no expertise in dog
20 training and/or animal behavior, and who never handled
21 or worked with the dog, recommending that the dog be
22 destroyed, in lieu of the opinions of three experts
23 called by Petitioner.
- 24 ■ Summarily rejects Petitioner's abatement plan, ordering
25 the dog destroyed, rather than proposing appropriate
26 terms and conditions as specified in Orange County
27 Codified Ordinance Section 4-1-95(5).
- 28 ■ Claims that Bud Brownhill has no success working with

1 aggressive dogs when Carol Kanofsky testified that Mr.
2 Brownhill worked with her dog after it had attacked
3 three people and was successful in its rehabilitation.
4 ■ Claims that the dog's behavior is unpredictable when
5 this dog (a Bullmastiff) did as it was bred to do,
6 which is to knock down and pin an intruder.

7 Accordingly, the findings and decision of the hearing examiner
8 are without merit.

9 IV.

10 RESPONDENT'S ADMINISTRATIVE PROCEEDING WAS IN VIOLATION OF DUE PROCESS
11 OF LAW AND THEREFORE IT'S ORDER TO DESTROY PETITIONER'S DOG MUST BE
12 VACATED

13 Armistead v. City of Los Angeles, (1957) 152 C.A.2d 319, is
14 instructive in the present case. In Armistead, the Court was
15 presented with a proceeding in Mandamus to compel a Municipal Board to
16 set aside its order to vacate and demolish a building. At the
17 Hearing, testimony and documentary evidence was received.
18 Thereafter, the Municipal Board issued an order to demolish the
19 building because of its many defects and because it was of wooden
20 construction within a fire district.

21 The Appellate Court affirmed the judgment for a Peremptory Writ
22 of Mandate, commanding the board to set aside its order. The Court
23 found that there was no substantial or competent evidence in the
24 record that the building was so dangerous and substandard that it
25 could not be reasonably repaired as permitted by the Municipal Code.
26 Further, that "while the police power is very broad in concept, it is
27 not without restriction in relation to the taking or damaging of
28 property." Armistead at 325.

1 The Armistead Court specifically held in pertinent part that:

2 (c) "Due Process of law requires that any order of demolition
3 of private property under the police power must be based
4 on competent sworn evidence that the property falls within
5 the legal concept of a nuisance, and that in fairness and in
6 justice there is no other way reasonably to correct the
7 nuisance."

8 Armistead at 324.

9 In the present case, the evidence at the hearing revealed that
10 Boo should not be deemed "vicious" and should not be destroyed. The
11 original treating physicians all state that they can't state that the
12 injuries were in fact dog bites. Petitioner's son, Justin, witnessed
13 the entire incident. He saw Boo knock down and pin his friend, Zack,
14 and did not see him bite him. Twenty four character letters and
15 expert testimony contradicted all claims of "viciousness" were
16 submitted. There are no instances that Boo has ever attacked or
17 bitten in the past.

18 Respondent declared Boo "vicious" solely upon the nature of the
19 injury and the lack of cooperation of the Petitioner. It is erroneous
20 to determine the "viciousness" of a dog by the nature of the injury
21 unless there is a nexus. By definition the term "vicious" implies a
22 hostile motive. However, all evidence regarding this incident is also
23 consistent with the theory that Boo, without intent to harm, knocked
24 down Zack, but because of his size, Zack fell and unfortunately was
25 injured.

26 By virtue of Respondent's own Code, Boo is not "vicious." Orange
27 County Codified Ordinance Section 4-1-23(5) provides in pertinent
28 part:

1 "Provided, no dog may be determined to be a vicious
2 dog if any such bite, threat, injury or damage was
3 sustained by a person who, at the time was committing a
4 willful trespass upon the premises occupied by the owner
5 or custodian of the dog, or was committing or attempting
6 to commit a crime upon the premises occupied by the
7 owner..." (Emphasis added.)

8 At the time of the incident herein, Zack was a willful trespasser upon
9 Petitioner's premises. Because of Boo's barking and size, Zack was
10 afraid of him. He knew that he was not permitted to go into the yard
11 where Boo was. He was instructed to enter Petitioner's home through
12 the front entrance, and not through the garage entrance, which opens
13 up to the yard area where Boo is. However, Zack, on his own accord
14 still went where he was instructed not to go and therefore, was
15 trespassing.

16 Although Zack was not committing a criminal trespass, Petitioner
17 contends that a distinction made on this ground is illogical. To
18 declare a dog not "vicious" if a criminal intruder comes upon the
19 premises, and "vicious" if a trespassing neighbor does, is unsound.
20 Is it the Government's position that the dog will be held to be able
21 to comprehend the difference or die? Accordingly, by Respondent's
22 own exception, Boo is not "vicious."

23 There are clearly other reasonable ways of dealing with this dog,
24 other than killing him. It is improper for the government to destroy
25 property without consideration of alternative least restrictive means
26 other than destruction. Petitioner submitted to Respondent a
27 disposition proposal, which was summarily rejected. Petitioner
28 contends that Respondent is obligated under Orange County Codified

1 Ordinance section 4-1-95(5) to provide a remedy which is less
2 restrictive than death.

3 Petitioner is entitled to but was not afforded, reasonable terms,
4 conditions, or restrictions to abate the condition. The Order to kill
5 Boo is arbitrary, capricious, and without question, unreasonable.
6 The Order to destroy Boo must be vacated.

7 V.

8 THE GOVERNMENT LACKS AUTHORITY TO TAKE OR DESTROY PROPERTY
9 DECLARED A NUISANCE IN THE ABSENCE OF AN IMPACT UPON THE HEALTH,
10 SAFETY, OR WELFARE OF ITS CITIZENRY

11 Civil Code Section 3479 provides in pertinent part:

12 "Anything which is injurious to health, or is indecent
13 or offensive to the senses, or an obstruction to the
14 free use of property, so as to interfere with the
15 comfortable enjoyment of life or property, ... is a
16 nuisance."

17 Civil Code Section 3480 provides:

18 "A public nuisance is one which affects at the same
19 time an entire community or neighborhood, or any
20 considerable number of persons, although the extent
21 of the annoyance or damage inflicted upon individuals
22 may be unequal."

23 "Public necessity is the limit of the government's right to
24 destroy property that is a menace to the public health or safety, and
25 the property cannot be destroyed if the conditions that make it a
26 menace can be abated in any other recognized way. Destruction of
27 property is a drastic remedy, and it must necessarily be a remedy of
28 last resort. Hawthorne Savings & Loan Assn. v. City of Signal Hill

1 (1993) 19 Cal.App.4th 148. A public nuisance cannot be ordered abated
2 by demolition unless the nuisance it creates cannot be otherwise
3 abated. Takata v. City of Los Angeles (1960) 184 C.A.2d 154. Police
4 power applies to public nuisances and not to a private nuisance.
5 Doyle v. Board of Barber Examiners (1963) 219 C.A.2d 504.

6 Here, the incident and injuries create at most a private nuisance
7 and cause of action for damages. There is no basis upon which the
8 government can construe the event to be a public nuisance and take
9 action under its police power. Furthermore, even if construed as a
10 public nuisance, the property to wit: Boo, cannot be destroyed because
11 the conditions that may deem him a menace could be abated in another
12 less intrusive manner.

13 VI.

14 **ORANGE COUNTY CODIFIED ORDINANCES FAIL TO DELINEATE STANDARDS FOR**
15 **DESTROYING A DOG, THEREBY ARE VOID AS WELL AS ARE IN CONFLICT WITH**
16 **AND PREEMPTED BY STATE LAW**

17 Article XI, § 7 of the California Constitution states that "a
18 county or city may make and enforce within its limits all local,
19 police, sanitary, and other ordinances and regulations not in conflict
20 with general laws." (Emphasis added).

21 In construing local enactments which tread upon areas preempted
22 by State law, it is the duty of the courts to construe doubts in favor
23 of the State law: "[I]f there is a doubt as to whether or not such
24 regulation is a Municipal affair, that doubt must be resolved in favor
25 of the legislative authority of the State. Aguilar v. Municipal Court
26 (1982) 130 Cal.App.3d 34, 37.

27 Regarding the issues before this Court, the California Supreme
28 Court has declared that "in our opinion, the licensing, impounding,

1 and disposition of dogs is not exclusively a Municipal affair, and
2 therefore, if there is any conflict between the Ordinance and the
3 State law, the latter will prevail. Simpson v. City of Los Angeles
4 (1953) 40 Cal.2d 271, 278. Also, if the Ordinance contains no
5 standard by which to regulate conduct, it is void for uncertainty.
6 In Re Peppers (1922) 189 Cal. 686.

7 Food and Agricultural Code Section 31645 mandates that before a
8 dog can be destroyed there must be a finding that, "the release of the
9 dog would create a significant threat to the public, health, safety,
10 and welfare." Further, if a dog is determined to be vicious but not a
11 significant threat to the public safety, the Statute provides that
12 conditions shall be imposed upon the ownership of the dog to protect
13 the public. Food and Agricultural Code Section 31645. Additionally,
14 Civil Code Section 3342.5 requires that only if a dog has bitten a
15 human being on at least two separate occasions, can there be the
16 consideration of destruction, and only if necessary.

17 In the instant case, Orange County Code Section 4-1-95, allows
18 the Director to abate any "vicious dog" by any means reasonably
19 necessary to ensure the health, safety and welfare of the public,
20 including but not limited to, the destruction of the dog or by the
21 imposition upon the owner of reasonable restrictions and conditions
22 for the maintenance of the dog. Absent within the Ordinance, are any
23 standards setting out the conditions for destruction. Therefore, when
24 is it appropriate to order a dog destroyed? Is a dog destroyed
25 merely because he knocks someone down and the person hits his head?
26 Or is he destroyed because he inflicted injury with malicious
27 intention to cause the injury?

28 Here, the original treating physicians could not confirm a

1 dog bite caused the injuries. Nor is there any evidence or findings,
2 of previous bites or that Boo is a "substantial threat" to society, or
3 that is necessary to destroy him.

4 It was admitted by Chief McDormant that he was responsible for
5 the decision to recommend that Boo be declared vicious and destroyed.
6 Additionally, Judy Maitlen, Director of Orange County Animal Control,
7 testified. Both admitted that the Orange County Codified Ordinance
8 governing this incident, does not have criteria for the destruction of
9 dogs declared vicious and that such a decision to destroy an animal is
10 entirely based on the opinion of Chief McDormant and his self ordained
11 criteria. Chief McDormant further stated that his own criteria used
12 to determine whether to destroy an animal is limited to: (1) the
13 nature of the injuries and (2) the owner's willingness to cooperate.
14 Chief McDormant admitted that there have been numerous cases where
15 dogs have done more severe damage than in this case and the dogs were
16 permitted to live and returned to their owner. Further, he came to
17 the conclusion that the dog should be destroyed upon receiving the
18 initial report from Sgt. Beames, which was made without speaking to
19 Petitioner and/or his family. Further, that he sent out animal
20 control Sgt. Wheeler on December 29, 1995, to obtain Petitioner's
21 consent to destroy the dog. He further stated that Petitioner's
22 unwillingness to voluntarily agree to let Boo be destroyed was and is
23 a primary factor in his decision that killing the dog is the only
24 option. Accordingly, the hearing examiner ordered the dog destroyed.

25 Local government is required to follow minimum standards of Due
26 Process. They are required to enact laws which are definitive as to
27 the type of conduct regulated. It is repugnant to our system of laws
28 to punish an act, the criminality of which depends, not upon any

1 standard erected by the law, but upon the arbitrary, unfettered
2 discretion of an animal control representative. In Re Peppers, supra.

3 VII.

4 ORANGE COUNTY CODIFIED ORDINANCE SECTIONS 4-1-23 AND 4-1-95 AS
5 APPLIED HEREIN ARE UNCONSTITUTIONALLY VAGUE, UNCERTAIN AND ALLOWS
6 ARBITRARY, CAPRICIOUS AND UNREASONABLE GOVERNMENT CONDUCT

7 "Due Process demands only that law shall not be unreasonable,
8 arbitrary, or capricious, and that means selected shall have real and
9 substantial relation to object." U.S. Constitution Amendments 5 and
10 14. Nebbia v. People of State of New York (1934) 291 U.S 502; In Re
11 John Kelso (1905) 147 Cal. 609.

12 California Supreme Court requirement that a law be definite and
13 its meaning ascertainable by those whose rights and duties are
14 governed thereby applies not only to Penal Statues, but to laws
15 governing fundamental rights and liberties. In Re Peppers supra at
16 686; Hewitt v. Board of Medical Examiners 184 Cal. 590. Although a
17 provision seems clear on its face, "an act is void where its language
18 appears on its face to have a meaning, but it is impossible to give it
19 any precise or intelligible application in the circumstances under
20 which it was intended to operate." Perez v. Sharp (1948) 32 Cal.2d
21 711, 728; citations omitted.

22 As applied to the present case, Orange County Code Section 4-1-23
23 allows an arbitrary, capricious, and uncertain decision. The
24 Ordinance can only be interpreted to grant to the animal control
25 Director, carte blanche power to order killed, any dog that has bitten
26 regardless of the mitigating circumstances.

27 Section 4-1-23 of the Code defines "vicious" in pertinent part,
28 as any dog which "as determined by the Director: (1) Has attacked or

1 bitten a person causing death or substantial physical injury." To
2 "attack" implies a hostile state of mind. Here, all evidence shows
3 that Boo jumped on Zack, but not that he intended harm. Furthermore,
4 if Zack suffered a dog bite, the treating doctors could not confirm
5 that his injury was caused by a dog bite. Do we kill the dog based on
6 maybe? Due Process mandates that we do not.

7 VIII.

8 THE EXCLUSIONARY RULE APPLIES IN ADMINISTRATIVE
9 PROCEEDINGS

10 "The Fourth Amendment to the United States Constitution provides
11 against unreasonable searched and seizures of a person's house, papers
12 and effects. A search of private property without proper consent is
13 unreasonable unless it has been authorized by a valid search warrant."

14 In re Ouackenbush (1996) 41 Cal.App.4th 1301. The Fourth Amendment
15 applies to the seizure of a dog from private property. Id.

16 "A governmental Administrative agency is not in a special or
17 privileged category, exempt from the right of privacy requirement
18 which must be met and honored generally by law enforcement officials."

19 Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal.App.3d
20 669. Evidence seized in violation of Due Process and attempted to be
21 used in an Administrative Hearing will be subjected to the
22 Exclusionary Rule. Id.; Hanna v. City of Los Angeles (1989) 212
23 Cal.App.3d 363.

24 In this case, Boo was seized from Petitioner's home without
25 consent and without a search warrant. Therefore, Boo seized in
26 violation of the Fourth Amendment cannot be destroyed.

27 IX.

28 PETITIONER IS ENTITLED TO ATTORNEY FEES UNDER

- 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

GOVERNMENT CODE SECTION 800

Petitioner is personally obligated to pay his attorney for attorney services to prosecute this action. Petitioner is entitled to recover attorney's fees as provided in Government Code Section 800 if he prevails in the within action, on the ground that Respondent's order was the result of arbitrary and capricious conduct.

The government's position to destroy this dog, without credible, conclusive evidence that Boo is in fact "vicious" and without implementing any standard to justify the destruction of Boo, as required by due process of law, is arbitrary, and capricious. Furthermore, it is unreasonable to order the dog killed, as there was clear evidence to negate that Boo is "vicious" pursuant to Article 6, section 4-1-23(5), Orange County Code. If this Court would grant the Writ requiring OCAC to conform to a definitive minimum standard before they arbitrarily kill a person's pet, as required by Due Process of law, society will benefit.

CONCLUSION

For the above and foregoing reasons, the Declarations, Exhibits and Verified Petition of Petitioner, and other evidence considered, the Petitioner respectfully urges this Court to stay the killing of Boo and Grant Petitioner's Writ of Administrative Mandamus.

DATED: June 10, 1996

Respectfully submitted,

MICHAEL ROTSTEN
Attorney for Petitioner

