

5/5/06 - 11

John Murray

From: Stephen Anderson
Sent: Thursday, May 04, 2006 3:32 PM
To: Don Johnson; John Murray
Cc: Mary Liz Brenninkmeyer
Subject: Acton/Gen: Sullo Dog Hearing
Attachments: Order-Show-Cause.doc; 140-157.htm; 140-158.htm

<<Order-Show-Cause.doc>> <<140-157.htm>> <<140-158.htm>>

Gentlemen:

You have asked for guidance for the Selectmen conducting a hearing as to whether the Sullo dogs should be put down or banned from town as a “nuisance by reason of vicious disposition.” G.L. ch. 140, § 157.

1. Order to Show Cause

Upon a written complaint to the Selectmen concerning a dog that is a “nuisance by reason of vicious disposition”, the Selectmen must investigate that complaint. G.L. ch. 140, § 157. The Selectmen should provide written notice to the owner of the dog of their intention to hold a hearing on the complaint. This written notice, in the form of an order to show cause, should at a minimum cite to Section 157, enclose a copy of Section 157, state that the Selectmen will question any complainants under oath, and provide a specified time and place for the hearing. Commonwealth v. Ferreri, 30 Mass. App. Ct. 966, 967-968 (1991). A draft of a proposed Order to Show Cause is attached.

The Order to Show Cause should be served by a constable and a formal return of service made to the Board.

2. The Hearing

At the investigatory hearing, the Selectmen should question any witnesses under oath including the complainant. G.L. ch. 140, § 157. The hearing should be transcribed and a transcript of the hearing should be prepared by a court reporter. Exhibits (such as police reports) should be marked by the court reporter and introduced into evidence.

We are available to assist the Board at the hearing on request.

3. The Order

After the investigation, the selectmen “may make such order concerning the restraint or disposal of such dog as may be deemed necessary.” Id. The statute allows for broad discretion in the crafting of an order. Schiller v. Uxbridge Div. of the District Court Dep’t, 17 Mass. L. Rptr. 260 (2003), 2003 WL 23213396, at *2.

If the Selectmen order that the dogs be put down, the Selectmen should indicate in the order to dispose of the dogs that they considered and determined that no less severe alternative exists. See Cullinane v.

Selectmen of Maynard, 50 Mass. App. Ct. 851, 854 (2001) (“The order for disposal of the pair, however, was subject to the possible criticism that it was reached without sufficient consideration of the several forms of the alternative of ‘restraint’”). But see Durbin v. Bd. of Selectmen of Kingston, 62 Mass. App. Ct. 1, 11 (2004) (finding that the dicta in Cullinane “did not announce a general principle that an order to dispose of a dog whose vicious disposition has been established by the evidence cannot stand unless it is clearly demonstrated that no less severe alternative exists.”).

The order should enclose a copy of Section 157 and should also expressly indicate that the dog owner has the right to appeal any order, within ten days of the order, to the district court. Clay v. Derrivan, 2001 Mass. App. Div. 67 (2001), 2001 WL 527629, at *2.

4. Consequences of Failure to Comply

Chapter 140, § 158 provides that a police officer or dog officer “shall kill a dog which the selectmen of a town ... shall have ordered restrained if such dog is again found outside the enclosure of its owner or keeper and not under his immediate care.” The only case we were able to locate which cites to this section, indicates, but does not discuss the fact that one town’s selectmen have apparently used this section as authority for an order to kill a dog that was previously ordered to be restrained. Moore v. Callahan, 10 Mass. L. Rptr. 743 (1999), 1999 WL 1295109, at *1 (“Six days after the 1996 attack on Ms. Moore, the Board of Selectmen ordered that Harley be killed. See G.L. c. 140, sec. 158.”)

In addition, the failure to comply with a restraining order is a criminal offense under the last sentence of the first paragraph of Section 157, punishable by a fine of not more than twenty-five dollars or by imprisonment of no more than thirty days for a first offense and no more than sixty days for a second offense. G.L. ch. 140, § 157.

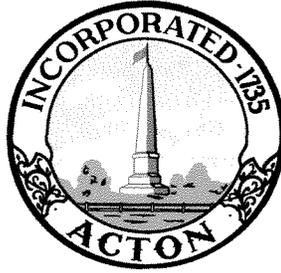
5. Complexities Involving Two Dogs

As to the question whether any future order to kill the dogs that may be issued could address both dogs, if the investigation focuses on the unity of the dogs’ action, a destruction order could be issued on that basis. Durbin, 62 Mass. App. Ct. at 7-8 (substantial evidence supported a finding that two dogs were of vicious disposition and should be destroyed where all of the evidence of their aggressive behavior had involved both of the dogs acting together); Cullinane, 50 Mass. App. Ct. at 854 (indicating that the findings of record and the order of disposal were directed to the dogs “as a pair or team” and that the ruling that the pair had a vicious disposition was a plausible result even though one of the dogs was the dominant member of the team and the other the follower).

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5/4/2006



ORDER TO SHOW CAUSE

TO: Mr. Gerard (Jerry) Sullo
62 Maple Street
Acton, MA 01720

FROM: Acton Board of Selectmen

RE: Nuisance Dog Hearing Under General Laws, Chapter 140, s. 157

DATE: May __, 2006

Pursuant to the provisions of Massachusetts General Laws, Chapter 140, § 157, the Acton Board of Selectmen (the "Board") orders that Mr. Gerard (Jerry) Sullo of 62 Maple Street, Acton, MA 01720 ("Mr. Sullo" or "you") **shall appear** at a hearing before the Board at _____ p.m. on _____, 2006, in the Francis Faulkner Hearing Room on the third level (Floor #2) of the Acton Town Hall, 472 Main Street, Acton MA 01720, **and show cause** as to why the Board should not order that two German Shepherd dogs which you own and house at 62 Maple Street, Acton, shall be permanently banned from the Town of Acton or disposed of as the Board may be deemed necessary. The dogs are further identified in the records of the Town of Acton as follows:

- Male German Shepherd named Baxter, Tag # 24, License Date 1/3/06; and
- Female German Shepherd named Brandy, Tag # 25, License Date 1/3/06.

The hearing will be stenographically recorded by a notary public or other officer authorized by law to administer oaths. The hearing will continue from day to day until completed.

You have the right to be present at the hearing, to have a counsel or a representative of your own choosing present for the purpose of advising you, and to speak in your own behalf.

You and other witnesses may be called by the Board and/or its representative to testify at the hearing. You are invited to cross-examine these witnesses and to call witnesses of your own, who shall then be subject to cross-examination by the Board and/or its representative. All testimony by witnesses shall be given under oath.

The Board's investigation into the question of whether Baxter and/or Brandy shall be permanently banned from the Town of Acton or disposed of as the Board may be deemed necessary shall inquire into facts pertaining to the following sequence of events:

DATE	OCCURRENCE
6/19/03	<ul style="list-style-type: none"> • Mr. Sullo's dog bit jogger and quarantine issued against both dogs • Both dogs chased jogger and one bit her right calf
3/17/04	<ul style="list-style-type: none"> • Neighbor at 58 Maple St. was charged by both dogs, and one dog jumped up and bit through his clothing on his arm • Mr. Sullo fined for his dogs' "roaming off his property and creating a nuisance"
4/26/04	<ul style="list-style-type: none"> • Mr. Sullo's dog bit someone and quarantine issued against both dogs • Mr. Sullo fined for his dogs' "roaming off his property and creating a nuisance"
10/1/05	<ul style="list-style-type: none"> • Both dogs cornered a Maple St. neighbor near his home • Earlier in the same evening the dogs had tried to corner another neighbor as he exited his basement and he had to run into his car to escape • Upon arrival of officers, dogs continued to circle around officers and were "growling and barking and charging" at the officers • One of the dogs ran at one of the officers with her head down and snapping her teeth and the officer had to spray her with pepper spray which deterred the dog • Another neighbor reported prior incidents where he had been nipped by one of the dogs and had also had the back of his pants ripped by one of the dogs the year before • Mr. Sullo fined for his dogs' "roaming off his property and creating a nuisance"
10/11/2005	Letter from Dog Officer to Chief of Police re prior incidents concerning Mr. Sullo's dogs and requesting that the Board of Selectmen have a hearing to discuss this problem
10/12/2005	Chief of Police memo to Town Manager requesting that Town Manager schedule a hearing with the Board of Selectmen to discuss dog nuisance complaint concerning Mr. Sullo's dogs for various prior incidents
11/17/2005	Notice letter from Town Manager to Mr. Sullo re hearing to be held by Board of

DATE	OCCURRENCE
	Selectmen regarding complaints against Mr. Sullo's two German Shepards
12/12/2005	Hearing held by Board of Selectmen regarding complaints against Mr. Sullo's two German Shepards
12/14/2005	<p>Dog Officer issues order providing that:</p> <p>"1. Your two dogs are under a permanent restraint order and must be kept within your house or in an enclosed structure on your property. Whenever the dogs leave your property they must be leashed and under your control at all times.</p> <p>2. At no time will your dogs be allowed to run free within the Town of Acton boundaries.</p> <p>Any deviation from the above rules will result in the permanent banishment or destruction of your dogs."</p>
At some point after 12/14/2005	Mr. Sullo letter to Board of Selectmen states that "I promise to abide by all restrictions [in 12/14/2005 order] in regard to our neighborhood. My dogs will never break loose or show aggression toward any people in the community" and seeks certain amendments to the restrictions in the 12/14/2005 Order.
12/20/2005	Jerry Sullo letter to <i>Beacon</i> editor states that " I have agreed to abide by the Acton Board of Selectmen's restrictions, and my dogs will never be loose in the neighborhood."
4/16/2006	<ul style="list-style-type: none"> • 12:18 AM Office Collins investigated report of two vicious dogs outside 62 Maple St. • Dogs were acting very aggressively towards neighbor's dogs and were "terrifying him and his dogs" • Upon investigation one dog ran toward police officer barking repeatedly, running in a circle about 6-8 feet from officer and showing its teeth • After the officer located the owner of the dogs at a local bar, the owner, after becoming verbally abusive towards the officer, then secured both dogs in his house at 64 Maple St.
4/18/2006	Chief of Police requests Town Manager to schedule a hearing with the Board of Selectmen to discuss incident on April 16, 2004

The Board will investigate whether this chronology (including without limitation information provided by neighbors, by the Acton Police Department, and by the Acton Dog Officer relative to numerous complaints concerning Baxter and Brandy), together with the history of citations, fines and orders issued to you regarding Baxter and Brandy, and/or the apparent violation on April 16, 2006 of the most recent order regarding Baxter and Brandy issued after the Board's hearing of December 12, 2005, warrant (a) a finding that these dogs are a nuisance by reason of vicious disposition and (b) an order that these dogs shall be permanently banned from the Town of Acton or disposed of as the Board may be deemed necessary.

Copies of the complaints from the Police Chief and Dog Officer, as well as a copy of Massachusetts General Laws, Chapter 140, s. 157, are attached for your information.

THE TOWN OF ACTON,
By and through the
Acton Board of Selectmen,

Peter K. Ashton, Chairman

F. Dore' Hunter

Lauren S. Rosenzweig

Walter M. Foster

Andrew D. Magee

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF MIDDLESEX

On this ____ day of _____, 2006, before me, the undersigned Notary Public, personally appeared each of the foregoing named members of the Board of Selectmen of the Town of Acton , proved to me through satisfactory evidence of identification, which was: examination of _____, to be the person whose name is signed on the preceding document, and acknowledged to me that he/she signed it voluntarily for its stated purpose as the foregoing named members of the Board of Selectmen of the Town of Acton, a municipal corporation.

(Official signature and seal of notary)

Notary Public: _____

My Commission Expires: _____

The General Laws of Massachusetts

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PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE XX. PUBLIC SAFETY AND GOOD ORDER

CHAPTER 140. LICENSES

DOGS

Chapter 140: Section 157. Vicious dogs; nuisance; barking or other disturbance; annoyance to sick person; attacks on other dogs

Section 157. If any person shall make complaint in writing to the selectmen of a town, the officer in charge of the animal commission or person charged with the responsibility of handling dog complaints of a city, or the county commissioners, that any dog owned or harbored within his or their jurisdiction is a nuisance by reason of vicious disposition or excessive barking or other disturbance, or that any such dog by such barking or other disturbance is a source of annoyance to any sick person residing in the vicinity such selectmen, officer in charge of the animal commission or person charged with the responsibility of handling dog complaints or county commissioners shall investigate or cause to be investigated such complaint, including an examination on oath of the complainant, and may make such order concerning the restraint or disposal of such dog as may be deemed necessary. Within ten days after such order the owner or keeper of such dog may bring a petition in the district court within the judicial district of which the dog is owned or kept, addressed to the justice of the court, praying that the order may be reviewed by the court, or magistrate thereof, and after such notice to the officer or officers involved as the magistrate deem necessary the magistrate shall review such action, hear the witnesses and affirm such order unless it shall appear that it was made without proper cause or in bad faith, in which case such order shall be reversed. Any party shall have the right to request a de novo hearing on the petition before a justice of the court. The decision of the court shall be final and conclusive upon the parties. Any person owning or harboring such dog who shall fail to comply with any order of the selectmen, officer in charge of the animal commission or person charged with the responsibility of handling dog complaints, county commissioners or district court, as the case may be shall be punished by a fine of not more than twenty-five dollars for the first offense and not more than one hundred dollars for a second or subsequent offense, or by imprisonment for not more than thirty days, for the first offense and not more than sixty days for a second or subsequent offense, or both.

The act of a dog in attacking or biting another dog or other animal may be made the subject of a complaint under the provisions of this section.

Magistrates shall exercise their authority hereunder subject to the limitations of section sixty-two C of chapter two hundred and twenty-one.

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PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE XX. PUBLIC SAFETY AND GOOD ORDER

CHAPTER 140. LICENSES

DOGS

Chapter 140: Section 158. Killing unrestrained dogs or dogs in wild state

Section 158. Any police officer, constable or dog officer shall kill a dog which the selectmen of a town, chief of police of a city, or the county commissioners, or, upon review, the district court, shall have ordered to be restrained if such dog is again found outside the enclosure of its owner or keeper and not under his immediate care, and may kill a dog which is living in a wild state.

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