INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Work Session: X. Animal Control: Addressing the Dangerous Dog Issue.

Title: Regulating Dangerous Dogs: To Ban or Not To Ban

by

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I. Introduction

This paper is intended to be a practical guide to assist municipal attorneys in understanding the general legal issues surrounding the regulation of dangerous dogs as well as the practical and political pitfalls associated with dog attacks and the municipal regulations used to address such incidents.

Background:

'Dogs are man's best friend' or so the saying goes. The dog is generally accepted as the first species to be domesticated by man and this link goes back between 10,000 and 12,000 years. [1] The domestication of the dog may have occurred for a variety of reasons with hunting being only one. Pet ownership is well documented in even primitive communities [2] and few can argue with the obvious companionship and affection humans share with dogs today. A recent survey conducted by the American Pet Products Manufacturers Association found that there are 74.8 million dogs owned by 44.8 million United States households. Additionally, pet owners spent $41.2 *billion* on their pets in 2007 (all pets, not solely dogs). [3]

While it is apparent that dogs and humans have such a relationship as to give rise to the byword 'dogs are man's best friend', there is also a clear legal history involving the regulation of dangerous dogs stretching back to the colonization of America. In 1868, the Supreme Court of Massachusetts upheld the summary destruction of three unlicensed dogs by a town constable (via shooting) based on the police power of the state. [4] That case made it clear that its holding was based on longstanding common and statutory law flowing from the Massachusetts Province Charter. Further, it noted that a 1715 Massachusetts statute included a provision for the killing of unruly and ravenous dogs. [5]

Also useful to understanding the practical issues in regulating dangerous dogs is the history of a particular breed, the pit bull. The term 'pit bull' is a loaded question in itself due to a lack of national consensus regarding the breed and the fact that dogs popularly referred to as pit bulls are associated with at least three different breed names, and arguably more. Those three breeds are the American Staffordshire Terrier recognized by the American Kennel Club (AKC), [6] the American Pit Bull and the Staffordshire Bull Terrier both recognized by the United Kennel Club (UKC).[7]

Setting the aside the various underlying breed names and using just the popular term 'pit bull', it takes only cursory research to find that it is mostly held that the pit bull was developed in England during the early 19th century as an enhancement to the practice of bull-baiting. Briefly put, bull-baiting was a cruel practice wherein a bull was confined to a ring or pit and bulldogs were loosed upon the bull with the object being for the dogs to immobilize the bull or in some variations, to latch onto the bull's snout and not let go. [8] Pit bulls were developed by crossbreeding bulldogs and terriers in an attempt to obtain a dog with tremendous endurance, courage, and agility. [9] The epitome of the desired characteristics can be described as 'gameness', defined as unflagging courage and the determination not to quit regardless of extreme pain or injury. [10] Understanding this history of the pit bull is useful in

framing the title question of this paper, to ban or not to ban, which will be discussed in a practical context.

Practical application:

The regulation of dangerous dogs is sadly much more than an academic exercise of municipal powers. Dogs are often loved like just another family member and are defended as such. However, dogs do bite and there are tragic fatalities each year. The Center for Disease control estimates that there over 4.7 million instances of dogs biting humans each year and approximately 18 dog bite related fatalities annually. [11] There is no standard means for collecting dog bite and fatality data and most publications and websites base their figures on news reports, meaning that the statistics are approximations and not wholly consistent.

Dog bite related fatalities often receive massive coverage in the media and evoke very strong emotions. Many of the cases cited in this paper or listed as resources flow from ordinances adopted after such an incident occurred in a given jurisdiction. In some years, as many as 80% of the fatalities are children and often such attacks involve multiple dogs (64% in 1995-1996). [12] The high percentage of child fatalities is frightening and makes headlines. Local governments faced with such an event often turn to their attorney to learn what can be done to stop such dangerous dogs. The following sections will help to answer the question of 'what can we do?'

II. Dangerous Dog Regulation

Can municipalities regulate dangerous dogs?

The answer is almost uniformly, Yes. The United States Supreme Court has made it clear in two cases that dogs are considered a type of property subject to drastic regulation [13] via the police power of the state. "Even if it were assumed that dogs are property in the fullest sense of the word, they would still be subject to the police power of the state, and might be destroyed or otherwise dealt with, as in the judgment of the legislature as is necessary for the protection of its citizens." [14] From a federal constitutional perspective, states and hence political subdivisions of states may regulate dangerous dogs even to the point of authorizing summary destruction when the safety and health of the community is threatened. [15] The question then becomes how to regulate, and many times whether to ban or not to ban.

Breed Specific Legislation vs. Non-Breed Specific Legislation.

If a specific dog has been shown to be vicious or dangerous (most often by that particular dog's history of attacks) it is difficult to argue against the dogs destruction. Many communities already have dangerous dog ordinances that define certain behaviors as triggers to classify a particular dog as dangerous, and then allow the local animal control agency to take specific steps to control the particular dog, often including humane destruction. However, some argue that there are specific breeds of dogs that by their

genetic nature are more prone to attack, or are more prone to engage in a prolonged or continued attack. Hence, these 'more dangerous' breeds should be banned altogether or more tightly controlled by regulations. For many communities that are considering enacting or enhancing a dangerous dog ordinance, the gateway question to be answered is should the regulation address or restrict a specific breed?

Breed Specific Legislation, is it Legal?

The short answer to this question is a qualified yes. The qualification comes from the fact that eleven states have passed statutes that limit or forbid their political subdivisions from enacting breed specific ordinances. Those states and the relevant statutory citations are included in the table below.

States Forbidding or Limiting Local Breed Specific Legislation	
California	*Cal. Food & Agr. Code s 31683*
Colorado	*Colo. Rev. Stat. 18-9-204.5(5)*
Florida	*Fla. Stat. Ann. 767.14*
Maine	*Me. Rev Stat. Ann. Tit. 7, 3950*
Minnesota	*Minn. Stat. Ann. 347.51*
New Jersey	*N.J. Stat. Ann. 4:19-36*
New York	*N.Y. Agric. & Mkts. Law 107*
Oklahoma	*Okla. Stat. Ann. Tit. 4, 46(B)*
Pennsylvania	*3 Pa. Cons. Stat. Ann. 459-507-A(b)*
Texas	*Tex. Health & Safety Code Ann. 822.047*
Virginia	*Va. Code Ann. 3.1-796.93:1(2)*

Municipalities located in one of the above states likely cannot implement breed specific legislation, though the applicable state law should be carefully reviewed. California has amended its statute and now allows municipalities to require sterilization of some breeds. Municipalities not restricted from breed specific legislation by state law may generally enact such regulations. Nationally, several cities and towns have done so and those ordinances have generally been upheld by the courts as constitutional.

Constitutional Challenges to Breed Specific Legislation

The constitutional challenges to breed specific legislation have been based upon the following constitutional clauses:

Equal Protection

The Equal Protection Clause of the 14th Amendment has been used to argue that breed specific ordinances are unconstitutionally broad and also that they are underinclusive. The gist of each argument is:

Overbroad: Not all pit bulls (or whatever breed is deemed dangerous) are actually dangerous, and hence the breed classification is inherently overbroad and unconstitutional.

Underinclusive: There are other breeds that are dangerous (or specific dogs of other breeds that are dangerous) that are not specifically regulated. Because the ordinance only targets one or more dangerous breeds, but not all of them, the ordinance is underinclusive and unconstitutional.

Neither of the above arguments has been successful. The courts have found that breed of dog is not a suspect classification. Since no suspect classification is at issue, the lowest level of constitutional scrutiny (rational relation test) is applicable and courts have had little trouble finding that the breed specific regulations are rationally related to the preservation of public safety. "[T]he constitutional guarantee of equal protection of the laws does not guarantee that all dog owners will be treated alike; at most, the only guarantee is that all owners of defined pit bulls will be treated alike." [16]

Takings Clause

The Takings Clause of the 5th Amendment requires that government give fair and just compensation whenever it takes private property for public use. Some opponents of breed specific legislation decry that the banning of a breed is a taking, but with little success. [17] The banning of a specific breed by a municipality, especially if a period of time is given for such dogs to be re-located by their owners, is not likely to be considered a taking requiring compensation. Such ordinances are considered an exercise of the general police power as opposed to a taking. [18]

Due Process

The Due Process Clause of the 5th and 14th Amendments requires any municipal ordinance to be both substantively and procedurally fair. Due process based attacks on breed specific legislation have had some success. The issue of vagueness as to how a given breed is defined, as well as the process required to determine if a given dog is banned, are areas in which careful drafting is required. (It should be noted that the due process requirement of sufficient notice and hearing apply equally to non-breed specific ordinances, though the issues are usually less murky when dealing with the dog's factual behavior as opposed to breed and heredity.) Despite the fact that the right of a person to own or possess a specific breed of dog is not considered a fundamental right, [19] and only the rational relation test applies, some courts have struck down ordinances or parts of ordinances based upon the above issues. [20]

The pit bull breed is an excellent example of the difficulty in crafting a definition of the breed that is being specifically regulated. There are three different names used for what is popularly thought of as the pit bull breed, with numerous other breeds that some would argue should also be considered pit bulls. The method used by the City of North Miami is perhaps the easiest way to sufficiently give notice to the public as to which dogs are regulated by breed. That ordinance refers to the physical description of the three pit bull breeds (American Staffordshire Terrier, American Pit Bull and the Staffordshire Bull Terrier) as set forth by the AKC or the UKC and defines the banned pit bull breed as any

dog that substantially conforms to those distinguishing physical characteristics. [21] The strength of this method is that it addresses the issue of pit bull hybrids and cross-breeds without a need to look at the dog's actual ancestry (often an impossible task). That ordinance and its definitional method was examined and upheld by the Florida Court of Appeals. [22]

Breed Specific Legislation – Opposition.

Consideration must be given to the opposition there is to breed specific legislation. As stated above, eleven states have forbidden or limited its use. Additionally, the Humane Society of the United States (HSUS) opposes such legislation and has issued a position statement reproduced in part below:

> The HSUS opposes legislation aimed at eradicating or strictly regulating dogs based solely on their breed for a number of reasons. Breed Specific Legislation (BSL) is a common first approach that many communities take. Thankfully, once research is conducted most community leaders correctly realize that BSL won't solve the problems they face with dangerous dogs. [23]

The full statement is available on the HSUS's website. Numerous other groups also oppose such legislation (including the American Veterinary Medical Association [24]). Any municipality considering enacting breed specific legislation should expect boisterous and well organized opposition to such legislation.

Breed Specific Legislation – Practical Issues.

There are several practical issues that should also be considered. They are as follows:

Slippery Slope: Breed specific legislation is often called for after a particular tragic attack involving a given breed. Banning the currently perceived dangerous breed opens the door to banning subsequent breeds that are involved in another incident. Culturally, the perceived most dangerous breed seems to shift with time and notoriety. Many readers may recall times in which German shepherds, Doberman pinchers, Rottweilers, or perhaps Akitas were the breed in the spotlight.

Notoriety: Breed specific legislation obviously calls attention to a given breed. Often, such attention makes the breed more attractive to those that seek to own and use an aggressive or vicious dog for immoral or illegal purposes.

Moving Target: Many argue that regardless of genetic traits, human mishandling and aggression training of dogs is largely to blame for dangerous dogs. Banning one breed only causes another breed to become the breed of choice for such mishandling.

Enforcement Costs: For any regulation to be effective it must be enforced and the costs of enforcing a ban of an entire breed, especially if the breed is popular and kept in large numbers can be prohibitive. Prince George's County, Maryland formed a task force to evaluate the cost versus effectiveness of its own pit bull ban and the task force found that cost outweighed effectiveness and recommended that the ban be repealed. [25] Currently, the ban has not been repealed.

Humane Concerns: Breed bans that include humane destruction can obviously cause a large increase in the number of dogs euthanized. Morally, many citizens and voters do not find that aspect of such legislation appealing in the long term.

Non-Breed Specific Legislation

As stated previously, the regulation of dangerous dogs has been common to American law since colonial days. States, and hence municipalities, have the power to regulate dangerous dogs and many do so. Dog specific regulation is common place and but for due process challenges to a particular jurisdiction's notice and hearing process for determining a dog's dangerous status, not very controversial. However, a strong and well written dangerous dog ordinance is not necessarily easy to produce. Often, such ordinances have simply been on the books for years and are suddenly thrown into the spotlight when a tragedy occurs. For that reason, municipal attorney's should consider reviewing their current dangerous dog ordinance and look for, revise, or consider adding, the following:

- Broad definition of dangerous

  Many ordinances only consider a dog dangerous after it has bitten. A stronger approach is to define a dog (or any animal) as dangerous when under the **totality of the circumstances** it presents a reasonable risk of injuring a human or damaging property. Determining that a dog is dangerous is usually the threshold for triggering appropriate restraint measures. By using a broad definition of dangerous, animal control officials can address probable accidental injuries caused by large dogs that are not vicious, and have an easier legal standard to prove when dealing with dogs that are borderline aggressive.

- Broad Seizure power

  Dangerous, or destructive, dogs very often present an exigency that animal control officers need to have the express legal authority to address, and that means seizing the animal. Also, possession of the dog is often the only means to actually obtain compliance of the owner. Conditioning the return of a seized dog upon appropriate restraint/containment measures being taken is quite effective.

- Address Aggression trained dogs specifically

Requiring any aggression trained dog (specifically defined as any training conducted by the owner or another) to be specially licensed can be a very useful tool in avoiding such aggression training or ensuring that aggression trained dogs are properly contained.

- Multiple dogs

  As stated above, dog bite related fatalities often involve multiple dogs. Permit requirements for multiple dog ownership, or for keeping multiple dogs outdoors, can be a useful tool for animal control.

- Mandatory restraint methods

  With a broad definition of dangerous as discussed above, obviously not every dog that is declared dangerous under the circumstances is appropriate for destruction. If such a dog is to be maintained by its owner, appropriate restraint/containment measures must be in the discretion of animal control or a hearing officer to order – with seizure and destruction of the animal suspended during compliance with such a restraint requirement. Though sometimes costly, many owners are willing to install completely enclosed and concreted kennels in lieu of losing their dog. Allowing reasonable options often avoids litigation and fosters a reputation of prudence and cooperation for a municipality's animal control.

- Insurance requirements

  As with mandatory restraint methods above, it is prudent for a dangerous dog ordinance to require, or allow animal control the discretion to require in defined circumstances, liability insurance to be maintained for certain dogs under certain circumstances. It should be noted, however, that some insurers will not insure certain breeds, or charge an enhanced premium for doing so. [26]

- Fertility

  It is noted in the article "Breeds of dogs involved in fatal human attacks in the United States between 1979 and 1998" [27] that sexually intact dogs have been found to be 2.6 times more likely to attack than altered dogs. One website listing 2007 dog bite related fatalities notes that of the 33 fatalities it reports, 25 involved intact dogs. [28]

- Termination of ownership / Destruction

  Obviously, a dangerous dog ordinance must expressly authorize the termination of ownership rights and destruction of dangerous dogs in order to be effective. A key to effectiveness, however, is the ability of animal control to have guided discretion in crafting lesser alternatives while suspending such destruction.

III. CONCLUSION

Animal Control is often a component of governance that does not receive much attention until it is thrust to the forefront by a tragedy. Local governments wrangle with police and crime issues, transportation and economic development routinely. Those areas often overshadow the need for animal control resources, until a dog bite fatality makes the headlines. The best time to review and revise a dangerous dog ordinance and process is before such a tragic event occurs. It is then that breed specific vs. dog specific options can best be weighed and solid policy adopted – policy that just may prevent the next headline.

Special thanks to Christine Volponi, Charlotte City Attorney Intern, since she did all the rest.

Endnotes

1. The International Encyclopedia of Dogs 7 (Anne Rogers Clark & Andrew H. Brace eds., 1995).
2. The International Encyclopedia of Dogs 7 (Anne Rogers Clark & Andrew H. Brace eds., 1995).
3. American Pet Products Manufacturer's Association, Inc. http://www.apppma.org/press_industrytrends.asp.
4. *Blair v. Forehand*, 100 Mass. 136.
5. *Id.* at 141 (citing Prov. St. 2 Geo. I. *c*. 3; Mass. Prov. Laws, (ed. 1726) 243).
6. http://www.akc.org/breeds/american_staffordshire_terrier/history.cfm
7. http://www.ukcdogs.com/website.nsf/breeds
8. http://en.wikipedia.org/wiki/bullbaiting
9. The International Encyclopedia of Dogs 450 (Anne Rogers Clark & Andrew H. Brace eds., 1995).
10. Safia Gray Hussain, *Attacking the Dog-bite Epidemic: Why Breed Specific Legislation Won't Solve the Dangerous-dog Dilemma*, 74 Fordham L. Rev. 2847.
11. http://www.cdc.gov/ncipc/duip/biteprevention.htm. MMWR, May 30, 1997, http://www.cdc.gov/mmwr/preview/mmwrhtml/00047723.htm.
12. MMWR, May 30, 1997, http://www.cdc.gov/mmwr/preview/mmwrhtml/00047723.htm.
13. *Nicchia v. People of the State of New York*, 254 U.S. 228, 41 S.Ct. 103, 65 L.Ed. 235.
14. *Sentell v. New Orleans and Carrollton Railroad Company*, 166 U.S. 698, 704, 17 S.Ct. 693, 695, 41 L.Ed. 1169.
15. *Nicchia v. People of the State of New York*, 254 U.S. 228, 41 S.Ct. 103, 65 L.Ed. 235.
16. *State of Florida v. Peters*, 534 So. 2d 760, 763 (Fl. 1988)
17. *Garcia v. Village of Tijeras*, 108 N.M. 116 (1988). *Colorado Dog Fanciers v. City and County of Denver*, 820 P.2d 644 (Colo. 1991).

18. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980).
19. *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 17 S.Ct. 693, 41 L.Ed. 1169 (1897).
20. *American Dog Owners Assn. v. City of Lynn*, 533 N.E.2d 642 (Mass. 1989). *American Dog Owners Assn. v. City of Des Moines*, 469 N.W.2d 416 (Iowa 1991). *Phillips v. San Luis Obispo County Dept. of Animal Reg.*, 228 Cal. Rptr. 2d 101 (Ct. App. 1986).
21. City of North Miami, Ordinance 422.5
22. *State of Florida v. Peters*, 534 So. 2d 760 (Fl. 1988)
23. *HSUS Statement on Dangerous Dogs and Breed-Specific Legislation*, http://www.hsus.org/pets/issues_affecting_our_pets/dangerous_dogs.html
24. American Veterinary Medical Association, policy. Dangerous Animal Legislation, http://www.avma.org/issues/policy/dangerous_animal_legislation.asp
25. http://www.akc.org/news/index.cfm?article_id=2608
26. http://www.insurance.com/article.aspx/Will_your_homeowners_insurance_go_up_if_you_buy_a_pit_bull/artid/44
27. Jeffrey J. Sacks, M.D., M.P.H., Leslie Sinclair, D.V.M., Julie Gilchrist, M.D., Gail C. Golab, Ph.D., D.V.M. & Randall Lockwood, Ph.D., *Breeds of dogs involved in fatal human attackes in the United States between 1979 and 1998*, JAVMA, Vol 217, No. 6, September 15, 2000.
28. Canine Agression Issues with Jim Crosby, 2007 – Fatal Attack Facts and Figures, http://canineaggression.blogspot.com/2008/01/2007-fatal-attack-facts-and-figures.html

Resource List

Websites

American Dog Owners Association
www.adoa.org

American Kennel Club
www.akc.org

Dog Bite Law
www.dogbitelaw.com

Dogsbite.org
www.dogsbite.org

The Human Society of the United States
www.hsus.org

Rott-N-Chatter
www.rott-n-chatter.com

United Kennel Club
www.ukcdogs.com

Codes and Ordinances

States that Ban Breed Specific Legislation
California: *Cal. Food & Agr. Code § 31683*
Colorado: *C.R.S. 18-9-204.5**
Florida: *Fla. Stat. § 767-14*
Maine: *7 M.R.S. § 3950*
Minnesota: *Minn. Stat. § 347.51*
New Jersey: *N.J. Stat. § 4:19-36*
New York: *NY CLS Agr. & M. § 107*
Oklahoma: *4 Okl. St. § 46*
Pennsylvania: *3 P.S. § 459-507-A*
Texas: Tex. Health & Safety Code § 822.047
Virginia: Va. Code Ann. § 3.2-6540

State that utilizes Breed Specific Legislation
Ohio: *ORC Ann. 955.11*

Charlotte City Code § 3-3
www.municode.com

England
Dangerous Dog Act 1991
http://www.opsi.gov.uk/acts/acts1991/Ukpga_19910065_en_1

Dangerous Dog (Amendment) Act 1997
www.opsi.gov.uk/acts/acts1997/ukpga_19970053_en_1