

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

WALBRIDGE V. CITY OF LINCOLN

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JAMES WALBRIDGE AND SARA KAY, APPELLANTS,  
V.  
CITY OF LINCOLN, NEBRASKA, AND LINCOLN-LANCASTER COUNTY  
HEALTH DEPARTMENT-ANIMAL CONTROL DIVISION, APPELLEES.

Filed July 24, 2012. No. A-11-692.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Abby Osborn and Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellants.

Rodney M. Confer, Lincoln City Attorney, and Timothy S. Sieh for appellees.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

PIRTLE, Judge.

INTRODUCTION

The Lincoln-Lancaster County Health Department-Animal Control Division (the Department), an agency of the City of Lincoln, declared the dog owned by appellants, James Walbridge and Sara Kay, to be a “dangerous dog” as defined in the Lincoln Municipal Code. The director of the Department (Director) upheld the declaration. Appellants filed a petition in error in the district court for Lancaster County seeking review of the Director’s decision, arguing that there was insufficient evidence to uphold the dangerous dog declaration and challenging the constitutionality of the appeal process. The district court denied the petition and affirmed the decision of the Director. Appellants now appeal from the district court’s ruling. Based on the reasons that follow, we affirm.

## BACKGROUND

On September 10, 2010, the Department investigated an incident in which 7-year-old Cade R. was bitten by appellants' dog, a Cairn Terrier named "Booker." Cade received medical treatment, including seven stitches for two lacerations on his right leg. The bite occurred inside appellants' residence in Lincoln, Nebraska. Appellants' son had come inside the house to ask Kay for permission for the boys to play inside the house. When appellants' son entered the house, Cade followed behind through the door that had been left open and entered the laundry room. After Cade entered the laundry room, Booker bit him on the right leg.

Following an initial investigation, the Department declared Booker to be a "dangerous dog" pursuant to Lincoln Mun. Code § 6.10.030 (1991) and Neb. Rev. Stat. §§ 54-617 to 54-624 (Reissue 2010). The Department sent a letter to appellants on September 18, 2010, notifying them of the declaration and the requirements that come with such a declaration, as well as informing them that they could appeal the decision to the Director.

On September 24, 2010, the Department received a letter from appellants indicating that they wished to appeal the dangerous dog declaration. Subsequently, on September 28, the Department received appellants' appeal form and supporting documentation. Appellants' written evidence described Booker's behavior in various situations, including those around children, as well as explaining past interactions between Booker and Cade, which interactions appellants characterized as "torment" of Booker. Appellants also included numerous letters from individuals who have been around Booker and do not believe he is a dangerous dog.

After considering the evidence presented by appellants, along with an Animal Control officer's notes from a followup interview with Cade, the Director issued a finding on October 11, 2010, upholding the dangerous dog declaration previously issued for Booker. The letter sent to appellants specifically stated: "Based on the information presented in your appeal and through additional investigation, it has been determined that there are no new facts or evidence that would result in a decision to rescind the original declaration. Therefore, I'm upholding the Dangerous Dog declaration on 'Booker.'"

Appellants filed a petition in error in the district court contending that the decision of the Director was not supported by sufficient evidence and arguing that the appeal process is unconstitutional as it does not afford the accused sufficient due process prior to the deprivation of their property. The district court affirmed the decision of the Director, finding that there was sufficient evidence to support the Director's decision to uphold the dangerous dog declaration for Booker and that the procedure for appealing such a declaration satisfies the requirements of due process.

## ASSIGNMENTS OF ERROR

Appellants assign, restated, that the district court erred in (1) finding that the decision of the Director was supported by sufficient evidence and was not arbitrary and capricious and (2) failing to find the appeal process outlined in Lincoln Mun. Code § 6.10.110 (1991) unconstitutional, because it does not afford the accused sufficient due process prior to the deprivation of their property.

## STANDARD OF REVIEW

In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011).

The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Id.* On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

## ANALYSIS

### *Sufficiency of Evidence.*

Appellants first argue that the determination that Booker is a dangerous dog is not supported by sufficient evidence and that the decision of the Director was arbitrary and capricious. Lincoln Mun. Code § 6.02.160 (2002) defines “dangerous dog” as follows:

(a) Dangerous dog shall mean any dog that:

....

(2) has inflicted injury on a human being that required medical treatment;

....

(b) Exceptions:

(1) If the dog was not running at large, a dog shall not be defined as a dangerous dog under subsection (a)(2) of this section if the human being was tormenting, abusing, or assaulting the dog at the time of the injury or has, in the past, been observed or reported to have tormented, abused, or assaulted the dog.

The evidence clearly establishes that Booker inflicted injury on a human being requiring medical treatment. The evidence before the Director showed that Booker bit Cade on the leg, requiring him to get seven stitches. Appellants do not dispute that Booker injured Cade. Rather, appellants argue that the exception in § 6.02.160(b)(1) of the Lincoln Municipal Code applies in this case. Appellants contend that they presented significant evidence that Cade had tormented Booker in the past and that therefore, the Director should have found that the exception applied and that Booker could not be declared a dangerous dog.

The Director, without directly stating so, apparently concluded the evidence did not support a finding that Cade had tormented Booker in the past. Appellants suggest that the Director could only have come to this conclusion by ignoring their evidence and that therefore, the Director’s decision is not based on the evidence presented and is arbitrary and capricious. The question we must address is whether the evidence supports the Director’s finding that there was sufficient evidence to find that Booker was a dangerous dog and that no exception applied.

Appellants’ evidence included their description of Cade’s interactions with Booker before the bite occurred. Specifically, appellants presented the following statements in regard to Cade’s alleged torment of Booker:

We have witnessed on more than a few occasions Cade and [his brother] taunting and tormenting Booker from the outside by screaming at him, making facial gestures and

waving their arms from the lawn. Obviously, the dog does not respond well to this and continues to bark and jump up and down until this type of teasing behavior ceases. We have walked outside to tell these boys not to tease the dog through the window.

....

We have also witnessed this same type of tormenting behavior when Cade and [his brother] have come in the house to play with [appellants' son] inside. We immediately bring the dog outside and keep him there while the children are playing. . . . The same tormenting and teasing has occurred where the two boys, Cade and [his brother], have come directly up [to] the glass sliding door and banged against the glass while yelling at the dog causing him to become very agitated. [Kay] has caught this action at least two times and has had to stop the boys from teasing the dog while on the inside of the home.

Appellants argue that the statements demonstrate that Cade had tormented Booker in the past and that when considered in conjunction with their other evidence that Booker behaves well around other children and has never shown any aggressive behavior toward any other children or any adults, the evidence establishes that the exception to the dangerous dog ordinance applies.

However, the evidence presented in regard to Booker's behavior and interaction with individuals other than Cade is irrelevant in determining whether the exception applies. What matters is the evidence of the past interactions between Cade and Booker and whether Cade's actions "tormented" Booker. The exception specifically provides that a dog will not be defined as a dangerous dog if the human being that was injured, in this case Cade, has, "in the past, been observed or reported to have tormented . . . the dog."

In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011). The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Id.* The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Id.* Finally, agency action is "arbitrary and capricious" if it is "taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion." *Id.* at 1019, 792 N.W.2d at 877, quoting *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007).

After reviewing appellants' evidence in regard to Cade's past interactions with Booker as set forth above, we cannot say that the Director erred in failing to find that Cade's prior actions amounted to "tormenting" of Booker such that the exception should be applied. The Director's decision upholding the original dangerous dog declaration for Booker is supported by sufficient evidence and is not arbitrary and capricious. Accordingly, the district court did not err in affirming the Director's decision. Appellants' first assignment of error is without merit.

*Procedural Due Process.*

Appellants next argue that the district court erred in failing to find the appeal process in § 6.10.110 of the Lincoln Municipal Code unconstitutional under both the Nebraska Constitution and the U.S. Constitution. Appellants contend that the ordinance is unconstitutional because it does not afford the accused sufficient due process prior to the deprivation of their property.

As acknowledged by appellants' counsel at oral argument, appellants' challenge to the constitutionality of § 6.10.110 is a "facial challenge." A facial challenge to a law asserts that no valid application of the statute exists because it is unconstitutional on its face. See *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011). A plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications. *Id.* The U.S. Supreme Court has stated that a facial challenge to a legislative act is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which that act would be valid. *U.S. v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). A facial challenge is contrasted to a challenge to an ordinance or statute "as applied" to the individual. *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006).

Section 6.10.110 provides the following procedure for appeals:

The determination that any dog is dangerous or potentially dangerous as defined herein shall be deemed to have been made upon notice to the owner of such dog as provided in Section 6.10.030. After the expiration of eleven days from the date of such notice, the determination shall be final and binding upon the city and upon the owner unless within ten days after notice, the owner requests, in writing, a review of the determination by the Director. At such review the owner may present any written statements or documentary evidence relevant to the determination. The Director shall make a final and binding determination after such review within fifteen days of the date of review. The owner may appeal any final determination to the district court as provided by law.

Appellants argue that they are immediately deprived of their property rights upon a declaration that their dog is a dangerous dog prior to any meaningful opportunity to be heard and that the review available is insufficient to provide them an opportunity to address the finding against them as they are unable to confront witnesses or provide oral testimony.

Procedural due process limits the ability of the government to deprive persons of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 997, 792 N.W.2d 484 (2011). The concept of due process embodies the notion of fundamental fairness and defies precise definition. *Id.* The due process requirements of the Nebraska Constitution are similar to those of the federal Constitution. *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006).

The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005). In the instant case, it is clear, and the Department does not dispute, that appellants hold a property interest in

their dog Booker and that the additional requirements imposed on them as owners of a dangerous dog deprive them of the enjoyment of their property to some extent. See Neb. Rev. Stat. § 54-601(1) (Reissue 2010) (“[d]ogs are hereby declared to be personal property for all intents and purposes . . .”).

Once it is determined that due process applies, the question remains what process is due. *Chase v. Neth, supra*. Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.*

Upon the initial declaration of Booker as a dangerous dog, appellants received a written notice informing them that Booker had been declared a dangerous dog. The notice stated that the declaration was based on the incident “[o]n September 10, 2010, [where] in an unprovoked manner, ‘Booker’ bit a person who required medical treatment resulting in sutures.” The notice also informed appellants of the registration process and the requirements for keeping a dangerous dog, as well as explaining their right to appeal the declaration. After appellants filed their appeal to the Director, they were given an opportunity to present written evidence to the Director, which they did. The Director reviewed the evidence and issued a written decision that was sent to appellants.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the U.S. Supreme Court set forth three factors to be considered when determining the adequacy of due process afforded a party: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail. *Chase v. Neth, supra*.

The private interest at issue in this case is appellants’ interest in their continued ownership and enjoyment of their dog Booker without the burden of the requirements imposed by a dangerous dog declaration. The registration process and requirements for keeping a dangerous dog require owners to neuter or spay the dog and have it implanted with a microchip identification number; to pay an additional registration fee; to keep the dog on a leash and muzzled when in public; to maintain adequate fencing to prevent the animal from escaping; and to post signs warning others that a dangerous dog is present in their home. See Lincoln Mun. Code §§ 6.10.040, 6.10.060, 6.10.070, and 6.10.080 (1991). Such requirements pose an inconvenience upon appellants, but do not deprive them of their daily enjoyment and interaction with Booker. Many of the requirements are one-time expenses that do not affect appellants’ ownership of Booker after they are paid. The private interests affected are not the most serious deprivations appellants could face, such as if the dog was removed from their home or euthanized.

We also note that appellants contend that the ordinance requires immediate action by the owners once a dog is declared dangerous, depriving the right to their property prior to any meaningful opportunity to be heard. As the district court found, under the plain language of

§ 6.10.110, the dangerous dog declaration is not binding upon the owner while the owner's appeal is pending before the Director. Thus, the requirements imposed upon dangerous dog owners do not apply until after the Director's final determination, and appellants were not deprived of the right to their property prior to any meaningful opportunity to be heard.

The second factor to be considered under the *Mathews* analysis is the risk of an erroneous determination and the value, if any, of alternative procedures. *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005). Appellants argue that the appeal procedures under the ordinance are insufficient because they were required to present all their evidence in written form, while the Department was allowed to obtain additional oral testimony from Cade, and because appellants did not have any opportunity to cross-examine Cade. Appellants argue that absent a formal hearing or opportunity to confront witnesses against them, they were deprived of the opportunity to be heard in a meaningful manner.

The "oral testimony" that appellants reference is an interview with Cade conducted by an Animal Control officer after appellants filed their appeal to the Director. Cade did not provide live testimony to the Director, nor was there a transcription of the Animal Control officer's interview with Cade. Rather, the Director only reviewed the Animal Control officer's notes from the interview. In summary, the officer's notes indicate that he spoke with Cade on October 6, 2010, and that Cade indicated Booker liked him and Cade had not had trouble with Booker in the past. The officer's notes further indicate that Cade also told him that Booker does not like people very much, other than his owners, and does not like children.

Further, it does not appear that oral presentation of appellants' evidence would have significantly improved their ability to present their case or contradict Cade's version of events. In addition, oral evidence would not add to the reliability of the proceedings. Appellants presented extensive evidence in writing, including letters from numerous individuals attesting to Booker's character and past behavior, which also included evidence to contradict Cade's statement regarding his lack of problems with Booker in the past and Booker's behavior around children in general. The evidence presented by appellants challenged the credibility of Cade. Although the appeal process did not allow appellants to confront and cross-examine Cade, there was no testimony, either live or by deposition, from Cade presented to the Director. We conclude, as did the district court, that a formal evidentiary hearing would not have a significant effect on the accuracy or reliability of a determination that Booker is dangerous as defined by the ordinance. The current appeal process gives a dog owner a reasonable time and opportunity to present evidence, albeit in writing, to show that a dog should not be declared dangerous.

The third and final *Mathews* factor to be considered is the governmental interest at stake, including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail. *Chase v. Neth, supra*. Clearly, if oral testimony was allowed when an owner appeals from a dangerous dog declaration, there would be additional costs associated with such formal evidentiary hearings, such as recording and transcription costs. There would be administrative burdens as well, such as providing hearing officers, procuring witnesses, and reducing the time Animal Control officers have to respond to calls. The costs and administrative burdens of requiring such a hearing far outweigh any benefit they may achieve.

After considering the three *Mathews* factors, we agree with the district court that the appeal process in § 6.10.110 provided appellants with meaningful notice and an opportunity to

be heard in a meaningful manner and, thus, afforded them sufficient due process. Having concluded that the ordinance at issue is constitutional as applied to appellants, it therefore follows that the ordinance is not facially invalid.

#### CONCLUSION

We conclude that there was sufficient evidence to declare appellants' dog Booker a dangerous dog and that the appeal process provided in § 6.10.110 of the Lincoln Municipal Code satisfies the requirements of procedural due process. Accordingly, the order of the district court affirming the Director's decision to uphold the dangerous dog declaration of appellants' dog Booker and denying appellants' constitutional challenge to the ordinance is affirmed.

AFFIRMED.