

2. The Complaint and Proper Notice

The question of whether a dog should be taken for a walk over Rainbow Bridge (humanely disposed of) most frequently arises in the context of a “vicious dog” hearing that results from receipt of a written dog bite complaint. Certain conditions must be met in order to trigger a mandated hearing in which the selectboard will sit in judgment. First, the person lodging the complaint must have been bitten off the premises of the owner or keeper of the dog. “Premises” is defined as “(a) house or building, along with its grounds” which is different from the broader term “property” which is defined as “(a)ny external thing over which the rights of possession, use, and enjoyment are exercised.”¹⁸ This distinction is important because while a car or truck is property it is not considered “premises” in the eyes of the law and therefore a hearing would still have to be held if a dog bit a person while it was confined within a person’s vehicle. Second, the complainant must have required medical attention for the attack. The complaint must include the time, date, and place where the attack took place, the name and address of the victim(s), and any other facts that could aid in the selectboard’s investigation. Selectboards should follow up with complainants when this information is incomplete and inform them that, absent the required information, the request for a hearing cannot be honored. Towns may utilize the model dog bite complaint form found in Appendix A to assist in the administration of complaints.

It should be noted that towns are only required to perform their statutorily imposed duty to investigate and control vicious dogs upon receipt of a written complaint. A town’s obligation to destroy or to even impound dogs in this regard is discretionary, not mandatory. Generally speaking, government employees are shielded from exposure to personal tort liability under the doctrine of qualified official immunity when performing discretionary acts within the scope of their authority. In addition, towns themselves are generally shielded from liability for their negligent acts, so long as those acts occur while the town is acting in its “governmental” (as opposed to proprietary) capacity. Furthermore, generally speaking, absence a duty of care, an action in negligence will fail. Here the duty of care rests with the owner or keeper of the dogs who is responsible for his or her dogs’ actions, not the town.¹⁹ Even if an individual was attacked by a dog that the town knew had a vicious disposition, an action in negligence will likely fail. Commenting on a town’s failure to act when notified of such a propensity, the Vermont Supreme Court ruled that “Despite the statute’s general title, ‘investigation of vicious dogs,’ it deals specifically with investigation of dogs that bite rather than any general right to control dogs. In this case, defendants’ ability to exercise control over dogs exists in narrowly circumscribed conditions and is statutory, not contractual, in nature. ... The town’s right to control dogs that bite does not give rise to a generalized duty to control vicious dogs.” *Rubin v. Town of Poultney*, 168 Vt. 624 (1998).

The selectboard’s window for action is short. It must complete its investigation and hold its hearing within seven days from receipt of the written complaint. If the complaint is incomplete, the selectboard should begin counting from the date the amended complete complaint form is returned to the town. The relatively quick turnaround most likely reflects the immediacy of addressing an ongoing potential public safety hazard because the controlling statute doesn’t give any indication that the dog suspected of being vicious has actually been impounded. The threat of another bite presumably would be prevented because this seven-day timeframe falls within the

¹⁸ Black’s Law Dictionary (7th ed. 1999).

¹⁹ The elements of negligence include: 1. a duty of care; 2. breach of that duty; and 3. damages. A duty of care derives from the idea that is the party in control who is in the best position to protect against harm.

ten-day quarantine period, which is the time designated by the Vermont Department of Health that the dog must be kept from any contact with all people and other animals. Of course, if the dog has already been impounded, the threat it poses to the general public is neutralized, abating the urgency to act within this narrow timeframe. The requirement that the selectboard conduct its investigation and hearing within seven days then begs the question: how much notice should be provided the dog's owner? 20 V.S.A. § 3546(b).

The only mention of notice in this context are the words "said owner shall be provided with a written notice of the time, date and place of hearing and the facts of the complaint." The law informs us what the notice for a vicious dog hearing must include and to whom it must be sent, but it is silent as to when it must be provided. This is one of those areas of the law that the legislature tells you what you must do and when to do it, but omits the detailed steps of how you actually do it. That's where we as attorneys come in, balance the rights and interests at play, take into consideration past case law, look at how other hearings are conducted, and provide guidance to help you fill in the gaps to avoid being sued. Knowing that the selectboard must conduct its investigation and hold a hearing "within seven days from receipt of the complaint" we can deduce that the notice which precedes the hearing falls within a seven-day timeframe. But how much notice is enough? One day? Two days? Seven? This is a question of first impression, meaning that it hasn't been resolved by the Vermont Supreme Court. Until this question is fully litigated, we can't provide you with an answer that we're 100 percent confident in. However, certainly the more notice, the better – which means that processing the complaint will need to be handled quickly in order for a hearing date to be set and notice delivered as soon as possible. (A Model Notice to Owner of Vicious Dog Hearing and Response to Vicious Dog Complaint can found in Appendices D and B, respectively.) It shouldn't go without notice that the legislature contemplated instances when no notice would be provided. "***If*** the owner of the domestic pet or wolf-hybrid which is the subject of the complaint can be ascertained with due diligence, said owner shall be provided with a written notice of the time, date and place of hearing and the facts of the complaint." 20 V.S.A. § 3546(b), emphasis added. If your animal control ordinance specifies a period of time for providing notice that is greater than the seven days the law provides for holding its hearing, it should be followed. The rationale behind this approach is that it is more important to be mindful of the dog owner's due process rights than strict compliance with a statutory deadline lacking an enforcement mechanism.²⁰ Because 20 V.S.A. § 3546 does not provide a negative consequence for failure to comply with the time requirements set forth therein, the legislature intended it to be directory rather than mandatory. And since the due process rights of the owner are given greater protection when more notice is provided, towns shouldn't feel beholden to this seven-day timeframe. Still, if you can't hold the hearing within this seven-day timeframe we would recommend that you, at the very least, warn it within this timeframe counting the seven days from the date of receipt of the complaint.

As for delivery, we recommend sending the notice via certified mail, return receipt requested, which is the best method for guaranteeing delivery and obtaining documented proof of receipt. The person setting all this in motion (the complainant) should also be notified of the hearing's time and date, despite the lack of a requirement in the law. His or her attendance will help

²⁰ In the case of *In re Mullestein* the Vermont Supreme Court held that a statutory time period such as that for holding a vicious dog hearing is not mandatory "unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision." 148 Vt. 170, at 173-74 (1987).

substantiate the allegations made by answering any questions the selectboard may have and aid it in assessing how much weight to give his or her testimony. Yet in the final analysis, neither complainant nor even the owner's presence has a bearing on the selectboard's statutory obligation to investigate the incident and conduct the hearing. If it were, it would be impossible to determine what to do with a stray dog that has bitten someone. Anyone can testify who has relevant information about the incident, and it is the testimony received during the hearing that will be a basis for the selectboard's findings of facts, conclusions of law, and decision.

There is one final notice that must be provided and that's the public notice – but you wouldn't be aware of it by reading the vicious dog hearing statute. Though vicious dog hearings lack a specific statutory public notice requirement, they, like other quasi-judicial hearings, must also be held in the public²¹ and must be adjudicated by at least a bare quorum of the selectboard. Providing public notice also accomplishes another important objective: it informs those other than the owner and the complainant (victim) of the opportunity to testify. There may be people who witnessed the attack or who have had past experiences with the dog in question who can help inform your decision. Also, keep in mind that the incident prompting the hearing and demanding your attention is a potential public safety hazard and some in the public will be concerned about whether the threat is real and how it is addressed. More likely than not, unless the hearing falls within the timeframe for the selectboard's next regularly scheduled meeting, it will have to be warned as a special meeting. The time, place, and purpose of a special meeting must be publicly announced at least 24 hours prior to the meeting. The notice must be posted in or near the town clerk's office and in at least two other public places in town. Also, unless waived previously, notice must be given orally or in writing to each member of the board. Any editor, publisher, or news director of any newspaper or radio or television station serving the area that requests notification of special meetings must also be notified. 1 V.S.A. § 312(c),(5). (A Model Vicious Dog Public Hearing Notice is in Appendix C.)

3. What to Do With the Dog During the Hearing?

Ideally, the dog which is the subject of the complaint would be impounded pending the duration of the hearing and the issuance of the selectboard's protective order, but if the town doesn't have its own pound but rather contracts with the regional animal humane society, this may not be possible. Many humane societies will refuse to house a dog accused of committing a vicious attack. In that instance, the dog most likely will stay with its owner during this time. If the selectboard fears another attack or that the dog will be removed from the town, it should attempt to impound the dog and shelter it temporarily with a local kennel and allocate the costs to the dog's owner. If the dog is already in the town's possession, then it should have a provision in its animal/dog control ordinance that the dog will not be released (if at all) until the selectboard renders its decision as to whether or not it is vicious and the boarding fees are paid.

4. The Purpose of the Hearing

Before we walk through the hearing, it is important to know what the selectboard is trying to achieve. The hearing has two principal objectives. The first is to determine whether “the domestic pet or wolf-hybrid is found to have bitten a victim without provocation...” If the

²¹ Only the deliberations of quasi-judicial proceedings are specifically exempted from Vermont's Open Meeting Law.

selectboard finds this to be the case, then the selectboard “shall make such order for the protection of persons as the facts and circumstances of the case may require...” So your first objective is to find out whether the dog bit someone without provocation. This should be revealed easy enough by asking the victim and any available witness questions surrounding how the attack occurred. If the selectboard finds that the dog was provoked, it would state in its written opinion that, given the following facts, the selectboard finds that the dog was provoked and therefore is not considered vicious. If the dog was not provoked, then your second objective is to determine what measure the selectboard should impose to protect the public from this dog. The punishment imposed must be warranted by “the facts and circumstances of the case...” The imposition of this next level of inquiry necessitates additional fact finding on behalf of the selectboard. Failure to fit the punishment to the crime increases the likelihood that the selectboard’s decision will be appealed and its protective order vacated or modified.

That is exactly what happened to the City of Rutland Board of Aldermen in the case of *Miller v. City of Rutland*, Docket No. 513-7-10 Rdev. The facts of the case date from April 3, 2010: Rutland resident John Moore was walking his dog in Ciofreddi Park when he noticed two dogs running towards them. Both were leashed, however neither was under the control of their owner, William Miller. One of the dogs, a black lab-mix named Zoey, attacked Mr. Moore’s rat-terrier mix by grabbing it around its neck. Mr. Moore was injured trying to protect his dog, but it should be noted that Zoey did not bite him. Rather, he cut his thumb on her tooth trying to extricate his dog from her clutches. Both Mr. Moore and his dog received medical attention for their wounds and Mr. Miller was cited for Zoey’s bad behavior. This wasn’t the first time that Zoey had exhibited aggressive behavior. With an obvious fondness for clichés, Zoey twice attacked the Millers’ mailman, who had to fight her off with his mailbag, though the dog did not bite him either time. The Rutland City Board of Aldermen held a hearing and found Zoey to be a vicious dog under a provision of its ordinance defining a vicious dog as one “which attacks or bites a person or other domestic pet and the person or pet attacked or bitten requires medical attention.” City of Rutland Ordinance § 13-2552(e). The ordinance, like the state’s vicious dog statute, requires the aldermen to hold a hearing upon written complaint and make an order to protect the public if the dog is found to be vicious. Having found Zoey to be vicious, the aldermen permanently barred her from the city limits.

The Millers, unwilling to give up Zoey without a fight, appealed the City’s decision. The Rutland Superior Court agreed with the aldermen that Zoey did commit a vicious act and fit the City’s definition of a “vicious” dog. However, it did not agree with its protective measure to banish her. Instead the court appointed a veterinarian to examine Zoey for aggressive and vicious behavior. On the basis of the veterinarian’s findings, the court lifted the aldermen’s protective order and found Zoey’s actions warranted no more than to be kept under the control of its owners at all times, to avoid engaging in further vicious acts, and that she be examined by a veterinarian who the Millers must also consult with regarding aggression training.

The *Rutland* case highlights this two-tiered analysis by a selectboard in conducting a vicious dog hearing:

1. determining whether the dog bit the victim without provocation; and
2. rendering a protective order commensurate with the facts and circumstances of the case.

Returning to our original question: Is it the job of the selectboard in these instances to find that a dog committed a vicious act or, alternatively, to find that it is a “vicious” dog? The answer is that

it's really its job to do both. This doesn't mean that, like the Rutland Superior Court, the selectboard must bring in an experienced veterinarian or local animal shelter employee who conducts such tests as part of the intake process for determining whether dogs are "adoptable" to conduct a vicious dog assessment – though this is certainly something that an owner could do and enter into evidence or an evaluation that the selectboard could order and attribute the costs to the owner of the dog. What it does mean is that the selectboard should do its due diligence to ensure its protective order emanates from the facts and circumstances of the particular case before it, is reasonably related to protecting the public safety, and is fair to the dog and its owner.

THE HEARING

Now that we've gotten the notice, what to do with the dog during the hearing, and the hearing's purpose out of the way, we can turn our attention to the hearing itself.

What does the legislature mean when it says you must conduct a vicious dog hearing? What is meant by the word "hearing"? State law gives us a definition of what a "quasi-judicial hearing" is, and since you're not actually a court of law, this definition describes the proceedings of local bodies that are acting like a court. A quasi-judicial proceeding is a "case in which the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, and the result of which is appealable to a higher authority." 1 V.S.A. § 310(5). The selectboard is a quasi-judicial board in this context because it is acting "like" a court. Breaking this definition down into its component parts, we can see the process of a hearing take shape: (1) the rights of persons are being considered; (2) the parties must have an opportunity to present evidence; (3) parties may cross-examine witnesses and question evidence presented; (4) the hearing must result in a written decision; and (5) the decisions is appealable to a higher authority (in this instance, superior court).

The legislature directs you to provide notice to the person (owner) whose dog (property) he or she may lose (be deprived of) with a hearing (an opportunity to be heard). If the combination of these parentheticals sounds familiar, it should. The Fourteenth Amendment to the U.S. Constitution states in part, "... nor shall any state deprive any person of life, liberty, or property, without due process of law ...". We know from this, therefore, that the due process rights of dog owners are at play here. But what does that mean? Due process is the administration of justice by government according to established rules. It protects citizens from the abuses of government power by ensuring that the hearing process under valid laws is fair and impartial. Essential elements of procedural due process therefore include not only one's rights to notice and an opportunity to be heard but also the right to a fair hearing before an impartial decision maker. (That's you!)²² There are many elements to a fair hearing, but at a minimum they include the right to know and confront all evidence (which requires all evidence to be presented only in the context of the open hearing and managed properly), the right to an orderly proceeding (which requires rules governing process and participation), and the right to a hearing free of ethical dilemmas (which requires the management of conflicts of interests, including *ex parte* communications— i.e., speaking with participants outside of the proceeding – and prejudging the

²² On this point the U.S. Supreme Court has held that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Murchison, supra*, at 136, 75 S.Ct. 623.

matter before the case is heard). So constitutional considerations give us some further indication of what a hearing looks like and how it should be conducted.

1. Rules of Procedure

With these factors in mind, we can now establish rules of procedure to ensure these constitutional protections are in place and to facilitate an efficient and effective hearing. (Those rules, VLCT Model Rules of Procedure for Selectboard Vicious Dog/Wolf-Hybrid Hearings, can be found in Appendix E). The rules are important not only to ensure that a fair hearing is protective of the dog owner's rights but also serve as a road map for the selectboard.

Each hearing should be conducted according to the selectboard's rules of procedure setting forth the sequence of events governing the proceeding. A copy of these rules should be made available to all selectboard members, parties, and the public prior to the commencement of the hearing so that all are aware of what is to be expected. The chair opens the hearing by reading the warning for the hearing, followed by the victim's complaint, and a statement that the hearing is mandated by Vermont State Title 20, Section 3546. The chair should also remind all attendees that the hearing is *in* the public, not *of* the public. As such it will be conducted in an orderly manner according to the selectboard's rules of procedure, and that no public comment will be taken unless it is relevant to the complaint made and the dog subject to the hearing. Selectboard members should be asked to disclose any conflicts of interest or ex parte communications with the participants and recuse themselves from the hearing when a conflict or the appearance of a conflict is present. The complainant, dog owner, and all others testifying are then sworn in prior to testifying.

2. Managing Evidence and Testimony

It is important for the selectboard to properly manage the evidence it receives. Each document it receives should be marked with any necessary identifying information. A participant may submit any evidence. It is up to the selectboard to determine what submitted evidence is credible and relevant to the disposition of the matter before it.

The chair should manage the testimony by requiring speakers to introduce themselves and to prevent participants from talking to or over each other. Selectboard members should ask all those appearing any questions they deem necessary to determine whether the dog bit someone off the owner's premises without having been provoked and, if so, what protective order is warranted by the facts and circumstances of the attack.

3. Concluding the Hearing, Deliberations and the Written Decision

Upon motion and majority approval, the chair can either adjourn the hearing to a time and date certain (e.g., to obtain additional evidence), or close the proceedings by stating that this is the final public hearing on the matter. The selectboard will then conduct a public deliberation, or may vote to enter into a private deliberative session, in which case the written decision of the selectboard setting forth its findings of facts, conclusion of law, and decision with or without a protective order for the dog will be delivered to the owner by certified mail. A public deliberation allows the public to observe but not participate in the consideration. A private

deliberative session allows a selectboard to make its decision in a neutral environment, where it is able to freely discuss, without undue pressure, the reasons for and against granting its decision and order. This is an exemption to Vermont's Open Meeting Law (OML) that allows the selectboard to weigh, examine, and discuss the reasons for and against issuing a protective order and what form it should take. The OML does not extend to "the judicial branch of the government of Vermont or of any part of the same or to the public service board; nor shall it extend to the deliberations of any public body in connection with a quasi-judicial proceeding." 1 V.S.A. § 312(e). This process is analogous to a jury deliberating in private during a court proceeding. The written decision of the selectboard will serve as its final decision.

Each written decision should include such basic information as the names of the complainant and dog owner, a description and name of the dog, its license number and whether it has a current rabies vaccination, the date and time of the hearing, the names of selectboard members who participated in the hearing, all persons who testified, and should reference the written evidence proffered. In addition to the selectboard's conclusion as to whether the bite occurred off the owner's premises and without provocation, the decision should include the selectboard's findings of fact. These are facts gleaned from the evidence presented at the hearing that the selectboard deems credible and relevant and which it will use to develop and support the reasons for its decision and order. There is no statutory deadline for issuance of vicious dog decisions. The selectboard should take whatever reasonable amount of time is necessary to prepare a complete and accurate decision and, if applicable, protective order. Just as with any action by the selectboard, a majority of the members of the board must concur in their vote to render a decision. The law governing taking action states that "When joint authority is given to three or more, the concurrence of a majority of such number shall be sufficient and shall be required in its exercise." 1 V.S.A. § 172. This means that if only three members of a five-member board are available, the board is able to convene, but all three must agree in order to take any action.

THE PROTECTIVE ORDER

The decision/protective order is the articulation of the selectboard's determination of whether the dog is found to have bitten the victim *without provocation* and, if it has, its order for the "protection of persons." The "persons" to be protected include not only the victim but the public at large. A protective order that compels the humane disposition of every dog found to have bitten a person without provocation will certainly protect the public from the dogs subject to the order, but it will also likely lead to increased appeals to your decisions to superior court. In addition, it doesn't prevent the owner who may have been responsible for the dog's behavior from acquiring another dog, nor is it fair to the dog that may not have been acting viciously and suffers the consequences of an irresponsible owner. Arriving at a protective order that balances the rights of owners and the safety of the public is not an onerous task, but it does require having a rudimentary understanding of dog behavior in general (namely, how they communicate with us and distinguishing between acceptable or normal aggressive behavior and abnormal aggressive behavior) and engaging in some simple fact-finding to tailor your order to the specific factors causing the behavior that is driving the complaint. To highlight the potential benefits of this approach, consider the following hypothetical scenario: a person comes across a dog running at large with a tennis ball in its mouth. The dog is a small breed, doesn't seem threatening, and has a collar and tag. Assuming that the dog is not a stray, but rather someone's pet, the person deduces that the dog is accustomed to a certain level of human engagement and reaches for the ball to play a game of fetch. The dog is silent. It doesn't bark, grunt, or growl, but stares intently