# Coates' Canons Blog: Is the Dog Really "Potentially Dangerous?"

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Under state law a local government official or board may determine that a dog is "potentially dangerous." When that happens, the dog's owner has a right to appeal the decision. What rules govern these appeals? The statute is a little sparse but these are clearly quasi-judicial proceedings. Based on similar procedures used in other areas, such as land use, this blog sets out some general guidelines and practices for local governments to use when conducting these appeals.

## Background

First, let's take a moment to review the law on dangerous dogs. State law establishes a general framework: it defines some terms, outlines some procedures, specifies the restrictions that apply to such dogs, and imposes penalties on owners who fail to comply with the restrictions. These laws are found in Chapter 67, Article 1A (see also discussion in this book chapter).

This body of state law does not, however, prevent a local government from "adopting or enforcing its own program for control of dangerous dogs." G.S. 67-4.5. Because the state law is not very detailed and does not expressly preempt local laws in this area, many local governments have adopted ordinances that supplement state law in a variety of ways. Some jurisdictions have, for example, relied on ordinances to redefine terms, establish detailed housing requirements for dangerous dogs, and impose additional penalties on owners. Some jurisdictions enforce only their local ordinance, others enforce only the state law, and a handful enforce both. The guidelines discussed below relate only to the *state law*, not to any variations that may exist in local ordinance.

## Separate Board Must Hear Appeals

The state statute provides that a local government's initial determination that a dog is potentially dangerous may be made by a person or a board. These decisions are often made by animal control officers, supervisors, and department directors. The local government must, however, appoint "a separate Board" that is empowered to hear appeals from that initial determination. There is no other guidance in the state law about this appeals board. The one issue that seems clear is that the appeals board must be made up of two or more individuals and all members of the board must be people who were not involved in the initial decision to designate the dog potentially dangerous.

Local governments have adopted a variety of approaches for establishing these appeals boards. Examples of approaches I have heard over the years include:

- An existing appointed board, such as the board of health or animal services advisory committee;
- An existing elected body, such as the town council;
- A pre-established, regular subcommittee of an existing board or body;
- An ad hoc committee drawn from the members of an existing board or body; and
- A board with members drawn from different bodies or groups (for example, see Lincoln County § 92.07(E)(5)).

What is the "best" type of board? It's hard to say. The statutes don't provide any clear direction so there is no legislative intent to use for guidance. North Carolina has such a tremendous variety of animal control programs across the state so it is impossible to develop an approach that will work everywhere. Some small towns with programs may have one dog-related incident every three years while a neighboring county with a program may have a dog incident every three weeks. The available resources and needs in these communities are obviously very different and state law provides them with some flexibility to adapt their processes accordingly.

## Role of Staff

I have been asked whether animal control staff members should be involved in managing the work of the appeals board and conducting the hearing. Staff members are often responsible for managing the administrative tasks involved in organizing the hearing (coordinating schedules, arranging space, preparing meeting notices, notifying participants). This seems reasonable, given that many of these boards are made up of volunteers and the statute prescribes relatively tight timelines for scheduling. Staff members should not, however, run the hearing, draft the board's decision, or otherwise blur the lines between the roles of the agency and the decision-makers. Staff members are one of the primary sources of information about the facts of the case. In order to preserve the integrity of the board's fact-gathering process, it is important that the board and staff limit discussions and interactions related to the details of the case once an appeal has been filed. See this post by David Owens about ex parte evidence.

**Notice**

Before a dog is officially considered potentially dangerous, the local government must provide the owner with written notice of the decision. The notice must inform the owner that the dog has been found to be potentially dangerous and the reasons for that determination. Local governments should use this notice as an opportunity to notify the owner that the decision may be appealed, and should include an explanation of the process and timelines that apply to the appeal.

**Timelines**

State law does not require that the initial determination be made within any specific period of time. Once the written notice has been delivered, however, the clock begins to tick. The owner has three days to file written objections. Local governments may provide the owner with more time to file objections, but not less.

If the owner files a written objection, the appeals board has 10 days to "schedule" a hearing. I have interpreted the term "schedule" to mean "hold" or "conduct" the hearing, but I believe others take the position that it simply means that the hearing date must calendared. Both interpretations require the local government to act quickly, which is good reason to have an established, experienced, already-trained board in place before any determinations are made rather than rely on assembling an ad hoc board on a case-by-case basis.

**Quasi-Judicial Hearing**

While there are not specific state laws or court decisions that describe the appropriate procedures for a dangerous dog hearing, there is quite a bit of law in other areas that we can look to for guidance. My colleagues, David Owens and Adam Lovelady, have written about quasi-judicial proceedings several times in the land use context. In that arena, it is clear that the courts expect these quasi-judicial proceedings to be more informal than judicial proceedings but still conducted fairly and consistent with general principles of due process. See Humble Oil & Refining Co. v. Board of Alderman, 284 N.C. 458, 471, 202 S.E.2d 129, 138 (1974). Four principles outlined by the North Carolina Supreme Court in *Humble* for proceedings in land use hearings translate fairly easily to dangerous dog hearings because the hearings have a common purpose: to gather reliable facts for the decision-makers. Below is high level attempt to apply these four principles to dangerous dog hearings:

(1) **Follow procedures in the statute and any included in the ordinance**: As mentioned above, the state law is sparse but many local governments have supplemented the state law with more detailed directions for these appeals. These procedures are sometimes found in ordinance but they are also found in departmental or board policies and procedures. Animal control officials should be aware of any such procedures that have been formally adopted and comply with them carefully.

(2) **Conduct hearings in accordance with fair-trial standards**: This is an important principle but it is also one of the most complex because it involves many different practices and concerns. David Owens has written several blog posts that are helpful in thinking about what these fair-trial standards may be. See these posts on testimony, opinions, and ex parte evidence. There are several differences between the powers and duties of a board of adjustment and a dangerous dog appeals board but the general principles of fairness are the same. Because this is a challenging area and also because the composition of these appellate boards can change regularly, some local governments have worked with their county attorneys to adopt written procedures to help guide the board members as they conduct these hearings.

(3) **Base findings of fact only upon competent, material, and substantial evidence**: In the judicial system,

extraordinarily complex rules of evidence help preserve and protect the integrity of the process. While dangerous dog appeals boards are not required to adhere to these rules of evidence, courts would still expect them to handle introduction and consideration of evidence carefully. With respect to quasi-judicial proceedings in the land use context, David Owens explains that “The court held that one of the ‘essential elements’ of a fair trial is that each party have an opportunity to review all of the evidence being considered and have the chance to rebut that evidence. All of the decision-makers must see the same evidence and have a chance to assess the credibility of the witnesses, as well as the opportunity to ask questions of the witnesses.” (see post here).

(4) **In the decision, state the facts on which the appeals board relied**. State law does not require that the board issue a written decision but many do. Indeed, the standards for quasi-judicial decisions probably require a written statement of facts supporting the decision. If the board upholds the initial determination that the dog is potentially dangerous, the owner has only 10 days to file a notice of appeal with superior court. Therefore, I encourage boards to explain the right of appeal to the owner at the same time it issues a written decision.

If the dog owner appeals the decision to superior court, the court is tasked with hearing the appeal *de novo*, which (probably) means that the judge will take a fresh look at the facts as well as the law. I am not convinced that every attorney and court is interpreting and applying this standard of review in the same way. This may be a topic for a future blog post. At this point, I would simply say that that the local government appellate board has an opportunity and an obligation to develop a solid and consistent review process that reflects basic principles of due process and provides the dog owner with a fair and reasonable opportunity to be heard.

## Links

- www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_67/Article_1A.pdf
- www.iog.unc.edu/pubs/electronicversions/ncacl/documents/ch04.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_67/GS_67-4.5.html
- www.sog.unc.edu/sites/www.sog.unc.edu/files/Lincoln%20County%2011.2013.pdf
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