

Attachment 10.1

Dog attack review – Lydiate Street, Noarlunga Downs

12 pages



City of
Onkaparinga

COPY

9 September 2009

Wallmans Lawyers
GPO Box 1018
ADELAIDE SA 5001

Attn: Ms Cimon Burke

Dear Sir/Madam

Council rangers have recently been investigating the behaviour of dogs from 14 Lydiate Road, Noarlunga Downs. The neighbours of this property are not satisfied with our actions to date and on 1 September 2009 one of these neighbours made a deputation to Council, expressing their concerns. After considering the deputation, Council resolved:

'that Council review the investigation of the matter of dog behaviour at 14 Lydiate Road Noarlunga Downs including the viability of a dangerous dog order'.

To undertake this review, we are seeking your services and provide the following instructions:

- undertake a review of the reported attacks by dogs from 14 Lydiate Road, Noarlunga Downs on 16 July and 1 August 2009
- review the course of action taken by council officers and provide opinion regarding the appropriateness of these actions in terms of statutory compliance, compliance with council policy, procedural fairness and any other relevant matter
- the viability of issuing a dangerous dog order (noting that we have issued a menacing dog order at this stage)
- provide general advice on the circumstances appropriate to the issue of various orders available under Section 50 of the Dog and Cat Management Act 1995 and the implications of issuing an order that is not appropriate to the circumstances
- provide advice on the legal interpretation of what constitutes an 'enclosure' under Section 50 of the Act.

A package of documents outlining our investigations has been forwarded to your office. In order to provide a timely report to Council, your advice on these matters is sought by 2 October 2009.

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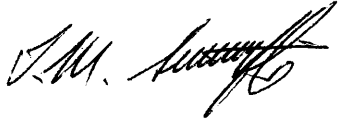
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Please direct any queries in relation to this matter to Chris Button, Manager Public Health and Safety on 8384 0765 in the first instance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'T. M. Sutcliffe', written in a cursive style.

Terry Sutcliffe
General Manager City Development



**WALLMANS
LAWYERS**

Our Ref: CXB:ksm:092148

1 October 2009

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Dear Terry

14 LYDIATE STREET: DOG ATTACK REVIEW

I refer to my recent meeting with Chris Button and your subsequent letter of instruction dated 9 September 2009, concerning incidents involving the dogs kept at 14 Lydiate Street, Noarlunga Downs ('the property').

BACKGROUND

The dogs in question belong to Mr James Stark and include an Irish Wolf Hound X (Buddy) and a Great Dane (Molly) ('the dogs'). The incidents involve the dogs escaping from the property into neighbouring properties where they have attacked and harassed pets kept on those premises. Ultimately, as a result of the incidents, the Council issued Mr Stark with Control (Menacing Dog) Orders in respect of both Buddy and Molly.

Mr Stark's neighbours, Jason Jordan and Kerri Walker, remain dissatisfied with the course of action taken by the Council. Mr Jordan appeared as a deputation before Council to express his concerns regarding the manner in which the matter has been managed by Council staff. Following Mr Jordan's deputation, the Council resolved that the Council's investigation of the matter be reviewed and that the review address *'the viability of a dangerous dog order'*.

I have been engaged as an objective expert third party to conduct the review and in doing so, have assessed both the incidents in question and the course of action taken by Council officers in response. Accordingly, I set out my advice below.

1. THE FACTS

1.1. In undertaking the review, I have had regard to the following information:

- the Council's Customer Request records detailing inspection of the property by Council officers;
- copy of letter to Mr Jason Jordan of 1 September 2009 regarding the Council's decision to issue Control (Menacing Dog) Orders and the associated orders;
- statement of Donna Shaw regarding the incident of 16 July 2009;

- statement of Jason Jordan of 25 Barcelona Road, Noarlunga Downs regarding the incident of 1 August 2009;
- letter to the Council dated 5 August 2009 from Ben Jordan of 12 Lydiate Road, Noarlunga Downs regarding his concern about the dogs;
- summary documents prepared by Kerri Walker of 24 Barcelona Road, Noarlunga Downs dated 6 September 2009;
- veterinary records in respect of a 2008 incident involving the dogs and the Cavalier King Charles Spaniel belonging to Mr Ben Jordan, which was not reported to the Council;
- the submissions of Jason Jordan which constituted his deputation to Council at its meeting of 2 September 2009; and
- photographs taken by Council officers of the new fencing constructed at 14 Lydiate Street, Noarlunga Downs.

Having had regard to the above information, I confirm the facts upon which I premise my advice, as follows:

1.2. The Incident of 16 July 2009

1.2.1 This incident occurred after the 3 dogs kept at the property (including Molly and Buddy) jumped the fence to the neighbouring property at 24 Barcelona Road and attacked the dogs on that property belonging to Ms Walker, namely a Labrador, a small Terrier and a Pomeranian. During the course of the attack, 2 of Mr Stark's dogs retreated over the fence to the property and the third dog remained in Ms Walker's yard. The incident was immediately reported to Council and a Ranger attended the property and seized the dog from Ms Walker's yard. The Ranger observed that the fencing surrounding the property was inadequate because as a result of the height difference between the two properties (i.e. 14 Lydiate Street and 24 Barcelona Road) and the size of the dogs, the dogs were able to easily jump over the fence. The Ranger further observed that Mr Stark's dogs are hunting dogs and that despite being aggressive towards animals, the dogs did not display any signs of aggression towards humans.

1.2.2 As a result of the attack, Ms Walker's dogs sustained minor injuries which required veterinary treatment. Her dogs have since recovered and Mr Stark has reimbursed Ms Walker for her veterinary expenses. Whilst it is not clear which of Mr Stark's dogs inflicted the injuries to Ms Walker's dogs, having regard to the evidence, I am satisfied that all of Mr Stark's dogs were involved in the attack and thereby contributed to the outcome.

1.2.3 Whilst attending the incident, the Council Ranger advised Mr Stark that he was unable to keep 3 dogs at the property without a permit and that in the circumstances, it would be unlikely that the Council would issue a permit. The Ranger further advised that given the inadequacy of the fencing, if the dogs were to remain at the property they would need to be restrained (tied up) until the fence height was increased. Mr Stark agreed to relocate one of the dogs and to

replace the fences. The Ranger agreed to release the seized dog on the condition that the dogs would be restrained or removed from the property until the new fencing was completed.

1.3. The incident of 1 August 2009

- 1.3.1 Following the July incident, Mr Stark erected a new and higher fence around his property to enclose the back yard. Whilst the fence was under construction, the dogs (which were unrestrained at the time), managed to escape beneath the unfinished fence and entered the property at 25 Barcelona Road. On this occasion, the dogs chased a cat on the premises before being chased from the property by Mr Rick Jordan who was wielding a crow bar. Neither Mr Jordan nor his cat was injured as a result of the incident. Council staff attended the property and advised Mr Stark the dogs must be tied up to prevent them from escaping and that the Council would consider issuing orders in light of the incident.
- 1.3.2 I am instructed that Mr Stark's mother is keeping the third dog that was originally kept on the property with Molly and Buddy. Since the relocation of the third dog, the Council received complaints from Mr Jordan that three dogs were still present on the property. The Council investigated and Mr Stark confirmed that his Mother had brought the third dog with her during a visit to the property and that only Buddy and Molly were actually being kept there.
- 1.3.3 The Council's records detail the inspections of the property by Council staff. Specifically, the Council's Ranger attended the property on 14 August 2009 and noted that the fences, with the exception of one small section, had been replaced with new fences that are 2.1 meters in height. Mr Stark has since replaced the small section of fence to the Council's satisfaction.

1.4. The (unreported) incident of June 2008

Chris Button met with Ms Walker and Ben and Jason Jordan on 6 August 2009 to hear their concerns about the dogs. During the meeting Chris Button was informed that the dogs had previously attacked Ben Jordan's dog in June 2008, however this attack had not been reported to the Council. As part of his submissions to the Council, Jason Jordan provided copies of the veterinary report detailing the treatment Ben Jordan's dog, a Cavalier King Charles Spaniel, received as a result of being attacked by the dogs. Specifically Mr Jordan's dog was treated for shock and puncture wounds. I am satisfied on the evidence that the dogs did attack Mr Jordan's dog in June 2008.

1.5. The Council's Response

- 1.5.1 In light of the incidents of 16 July and 1 August and Mr Jordan and Ms Walker's concerns, the Council decided to issue Mr Stark with Control (Menacing Dog) Orders in respect of both Buddy and Molly. Before the Orders were issued, Mr Stark was notified of the Council's intention to issue the Orders in accordance with section 52 of the *Dog and Cat Management Act 1995* ('the Act'). The Council did not receive any submissions from Mr Stark in response to the notification. Chris Button also informed Ms Walker and Mr Jordan of

the Council's intended course of action. I have been instructed that Mr Stark has complied with all the requirements and directions attached to the Control Orders.

- 1.5.2 The Council's inspection records evidence that Council staff attended the property on a number of occasions following the incidents for the purposes of inspecting both the status of the fence construction works and the number of dogs on the premises. Council staff also arranged for the dogs to undergo a temperament test by an expert in dog behavior. However, the results of the test were not available at the time this advice was prepared. Further, at all times, Council staff ensured Ms Walker and Mr Jordan were kept informed.
- 1.5.3 The Council did not issue any expiation fines to Mr Stark in respect of either of the incidents.

2. OPINION

2.1. The Council's Response

- 2.1.1 In investigating the matter, Council observed the principals of natural justice in that it afforded Mr Stark the opportunity to make submissions before proceeding to issue an Order under the Act. Further, Council staff had regard to the concerns of Ms Walker and Mr Jordan. In my view, as the victims, their concerns were relevant considerations that the Council was obliged to take into account in determining how to progress the matter. To that end, Council staff acted in accordance with due process in providing Mr Jordan and Ms Walker sufficient opportunity to express their concerns.
- 2.1.2 In assessing the action taken by Council staff, I have had regard to the summary document prepared by Ms Walker in which she expresses concern about a statement that she alleges was made by the Council's Ranger when he attended her premises on 16 July. Specifically, Ms Walker contends that the Ranger suggested that the incident (of 16 July) was 'nothing' for him given it was the third attack he had attended for the day. My view is that this comment (if it was indeed made by the Ranger) demonstrated a degree of insensitivity towards Ms Walker and, therefore, was inappropriate and unprofessional. Whilst the comment raises a customer service issue for the Council, it does not, in my view, highlight any failure on the part of the Council to follow due process in respect of the investigation. In any event, I am instructed that Chris Button has since spoken to the Ranger in respect of this comment.
- 2.1.3 In regards to the Council's decision not to expiate, I note that Mr Stark readily paid Ms Walker's veterinary bills that arose from the 16 July incident. Furthermore, immediately after the 16 July incident, Mr Stark arranged to replace the fence surrounding the property which, in my view, would have amounted to a significant cost. The requirements of the Control Orders are also relatively onerous and involved additional costs to Mr Stark. My view is that in the circumstances, given the significant costs borne by Mr Stark in his efforts to rectify and prevent another incident and, in complying with the Control Orders, the Council's decision not to issue an expiation notice in addition to the Orders was reasonable.

- 2.1.4 I have also considered the implications of the Ranger's decision to return the third dog to Mr Stark following its seizure from Ms Walker's property. The Ranger appropriately exercised his powers under section 60(1)(a) of the Act in seizing the dog from 25 Barcelona Road given it was wandering at large for the purposes of the Act. Once a dog has been seized, the Act requires that it be returned to its owner or, detained by the Council at an approved facility.
- 2.1.5 The decision to return the dog to the owner is a discretionary one. In the circumstances, in light of the attack upon Ms Walker's pets and, given the keeping of three dogs without a permit constitutes an offence under the Council's by-laws, my view is that once seized, it would have been more appropriate for the Council to detain the third dog until such time as alternate arrangements were in place for it to be kept elsewhere. Of course, if Mr Stark became entitled to the return of the dog under section 62 of the Act, the Council would be obliged to return it to him regardless of there being two dogs on the property. The issue would then need to be separately addressed under the Council's by-law.
- 2.1.6 That being said, my view is that it was not *unreasonable* for the dog to be returned to Mr Stark, however, the detention of the dog would have communicated a stronger message to Mr Jordan and Ms Walker that the Council was being proactive in enforcing the breach of the by-law and in turn, may have prevented criticism from them regarding what, in their view, amounted to the Council's 'lack of enforcement'.

2.2. The Appropriateness of the Order

- 2.2.1 The Council issued Mr Stark with Control (Menacing Dog) Orders in accordance with section 50(4) of the Act. The decision to issue any Order under section 50 of the Act is discretionary and the Council's ability to issue such is contingent upon the Council being satisfied that the dog is either dangerous, menacing or a nuisance and, that it has attacked, harassed or chased a person or animal owned by another in circumstances that would constitute an offence against this Act¹.
- 2.2.2 In the circumstances, all the incidents (including the unreported incident of 2008) give rise to circumstances that constitute an offence under section 44(2) of the Act. Therefore, the Council's decision to issue the Control (Menacing Dog) Orders invariably turned upon the relevant decision-maker's finding that the dogs are menacing dogs. In order to assess the appropriateness of the Orders issued, it is necessary to have regard to Parliament's intent in establishing classes of Orders under Section 50.

2.3. The Statutory Framework & Classes of Orders

- 2.3.1 It is clear from the structure of the Act that the Orders council's are empowered to make under section 50, relate to a graduated scale of risk. This is consistent with the District Court's interpretation of section 50 Control Orders in the *Crawford*² case. In that case, Judge

¹ refer section 51 of the *Dog and Cat Management Act 2005*.

² *Clare and Gilbert Valleys v Crawford* [2005] SADC 135.

Millstead logically assesses the classes of dog that may attract section 50 Orders based upon a scale of the risk of danger (or nuisance) that the dog poses (unduly dangerous dogs occupy the top end of the scale). His Honour's assessment has been applied in a number of subsequent cases³ and, is a useful tool in assessing the appropriateness of the use of a particular type of order.

- 2.3.2 Specifically, at the lower end of the scale, a nuisance dog order does not require a dog to be muzzled. Accordingly, the inference that can be drawn is that a nuisance dog is not one that has a propensity to bite people or animals. Rather, nuisance dogs are likely to unreasonably interfere with property and the comfort or convenience of people or animals. Behaviour that would constitute a nuisance would, in my view, include wandering at large, chasing pets, and incessant barking.
- 2.3.3 With regard to dangerous dog and menacing dog Orders, these place similar obligations upon dog owners with some exceptions. Specifically, in addition to the obligations of an owner of a menacing dog, the owner of a dangerous dog must also ensure the animal is de-sexed, that warning signs are displayed at the property where the dog is kept, that the dog is kept within an enclosure (whereas the Control (Menacing Dog) Order refers to the dog being kept in a fenced yard) and, the owner and dog is required to attend an approved training course. It can be inferred from the requirements of the Control Orders that a menacing dog is, *less* dangerous than a dangerous dog.
- 2.3.4 That being said, in determining whether a dangerous dog Order is appropriate, the question arises as to what constitutes a 'dangerous dog' for the purposes of the Act. In the absence of any definition of 'dangerous' under the Act, the answer hinges upon the ordinary meaning of the word, which encompasses the existence of an '*appreciable or substantial risk of harm*'.⁴ Therefore, a dog may be classed as dangerous where it exposes people and/or animals to an appreciable or substantial risk of harm or injury. Certainly, the question as to which Order is appropriate will also hinge upon the degree of harm a dog may be likely to inflict. To that end, in the *Crawford Case*, Judge Millstead expressed the view that '*a dog should not be categorized as dangerous if it exposes a person (or animal) to no more than a slight. . . injury*'.
- 2.3.5 With this in mind, it logically follows that a menacing dog is one that may threaten harm and may cause minor injury, but does not inflict serious harm. I note that like a dangerous dog order, a menacing dog order requires the dog to be muzzled so as to prevent it biting any person or animal which arguably infers that a menacing dog *may* possess a tendency to bite.
- 2.3.6 This assessment is consistent with the '*Incident Severity Scale*' guidelines released by the Dog and Cat Management Board, which council's are encouraged to use as a guide in their decisions to issue Orders under the Act. However, the guidelines reinforce that the circumstances in every attack are relevant towards any

³ see *District Council of Grant v Tremelling* [2007] SAMC 3.

⁴ *Clare and Gilbert Valleys v Crawford* [2005] SADC 135 at pgph 69.

determination that a dog is either claimed as dangerous, menacing or a nuisance.

2.4. The Viability of Issuing a Dangerous Dog Order & Relevant Considerations

2.4.1 You have specifically requested that I comment upon the viability of the Council issuing a Control (Dangerous Dog) Order in the circumstances.

2.4.2 Having regard to the relevant case authorities, it is apparent that in determining the appropriate order required in any given circumstances, the following are relevant considerations:

- the circumstances involving the incidents and whether the dogs were provoked in any way;
- the nature of the injuries caused by the dogs;
- the general temperament of the dogs and the likelihood they will attack again;
- the effect of the proposed order in preventing a repeat of the incidents;
- the willingness of the dog owner to cooperate with the Council's directions;
- the history of the behaviour of the dogs;

2.4.3 In the circumstances, there is no evidence to suggest the incidents were a result of the dogs having been provoked. Rather, they are hunting dogs and, as such, are predisposed to chasing animals (such as cats and other dogs). The dogs caused injuries to pets on two occasions and in both cases, the injuries were relatively minor in nature and (I am instructed), were consistent with the behaviour of hunting dogs holding down prey. Given the history, my view is that if not under effective control by their owner, the dogs certainly have the potential to cause harm to pets. On that basis, my view is that there is an appreciable risk that the dogs may, at the very least, cause some harm to another animal.

2.4.4 That being said, there is no evidence of the dogs having displayed aggression towards humans nor (to my knowledge) is there any history of the dogs having caused harm to a person. Indeed, Council staff noted that that in general terms, the dogs are well behaved and are not aggressive towards people. This is an important distinction as, in my view, there is a strong argument that a dog that is aggressive towards humans is more dangerous and poses a greater risk than a dog that is aggressive towards only animals. Having regard to the framework of the Act, my view is that Parliament did not intend that a dog that imposes a lesser risk of harm be the subject of the stringent requirements of a Control (Dangerous Dog) Order.

- 2.4.5 My view is that Council staff appropriately tailored the Orders to the circumstances by the inclusion of additional directions. These directions require self closing devices to be affixed to the gates of the property and the gates to be padlocked when not in use, thereby minimising the potential for a gate to be unintentionally left open. Further, Mr Stark's cooperation with the Council's directions and his ongoing compliance with the Order will significantly reduce any prospect of a repeat of the incident.
- 2.4.6 On balance, the fact that the dogs have attacked and caused harm to an animal on two occasions may, on the face of it, justify a Control (Dangerous Dog) Order being issued. However, my view is that in the circumstances, there are mitigating factors which warranted the issue of Control (Menacing Dog) Orders. In particular, the fact the dogs have not shown any signs of aggression towards humans and that the requirements of the Orders issued are sufficient to prevent a repeat of the attacks. On that basis, my view is that Council did not err in issuing Control (Menacing Dog) Orders and that its decision to issue these Orders is justified and appropriate.
- 2.4.7 Given Control (Menacing Dog) Orders have been issued and Mr Stark has complied with them in full, it would be inappropriate for the Council to issue alternate Orders (such as Control (Dangerous Dog) Orders) in respect of Molly and Buddy unless the dogs were involved in a further incident and/or there is additional evidence to support such a course of action being taken.

2.5. Implication of an Inappropriate Order Being Issued

- 2.5.1 In general terms, if a council issues a Control Order that is not appropriate in the circumstances, the council risks its decision to issue the Order being challenged. Specifically, if the Order is inappropriate, a person may successfully appeal the Order which, at the very least, will have negative resource implications for the Council. Further, where a person other than the dog owner is aggrieved by a Council's decision regarding the issue (or non-issue) of an Order under the Act (such as a person who has been victim of a serious dog attack), that person may have cause to challenge the Council's decision by way of judicial review or through a complaint to the Ombudsman.
- 2.5.2 In my view, liability issues for the Council may also arise in circumstances where there are grounds to issue a Control (Dog Destruction) Order and the Council issues a Control (Dangerous Dog) Order instead. For example, should the dog that is the subject of the Order seriously attack a person or animal again, there is a risk that the victim of the attack may bring a civil action against not only the dog owner, but also the Council. My view is that such a risk may be remote, however, it is to be noted as a possibility.
- 2.5.3 Given these risks, it is essential that in issuing any Order under the Act, the Council records sufficient reasons and evidence to justify its decision.

3. THE MEANING OF ENCLOSURE

- 3.1. You have requested that I provide advice regarding the meaning of "enclosure" under section 50 of the Act. Specifically, enclosure is referred to under the requirements of both a Control (Dangerous Dog) Order⁵ and a Control (Nuisance Dog) Order⁶. Alternatively, a Control (Menacing Dog) Order, requires a dog be kept in premises that are fenced.
- 3.2. The term 'enclosure' is not defined under the Act. Accordingly, in accordance with the principles of statutory interpretation, the word is to be given its ordinary meaning, providing this is consistent with the intent of the Act. The Macquarie dictionary defines an 'enclosure' as '*an area of land surrounded by a fence*' or '*the act of enclosing*' (which is '*to shut in or close in on all sides*' or, '*to surround as with a fence or wall*').
- 3.3. Having regard to the wording of section 50, the purpose of the 'enclosure' is to prevent a dangerous or nuisance dog from escaping the area in which it is enclosed. On that basis, my view is compliance with the enclosure requirement will be achieved where the enclosure is sufficient to prevent a dog from escaping from the enclosure.
- 3.4. I am aware of the view that for the purposes of a Control (Dangerous Dog) Order, the requirement for the dog to be kept in an enclosure requires the dog to be kept in a pen. However, in my view, the need to construct a pen may not be necessary in all circumstances to satisfy the requirements of the Act.
- 3.5. The question as to whether an enclosure is suitable to meet the requirements of the Act is a question of fact and degree that will turn upon individual circumstances. Relevant factors will certainly include the size of the enclosure, the ability of the dogs to escape from it and the degree of accessibility to the enclosure. My view is that an enclosure may constitute a back yard that is fenced on all sides and to which access is restricted. For example, in the present circumstances, if Molly and Buddy were the subject of Control (Dangerous Dog) Orders, my view is that Mr Stark's back yard, which is enclosed by a 2.1m high fence, would satisfy the requirements of an enclosure under the Act given the dogs are no longer able to escape from it as they have done in the past.

4. CONCLUSION

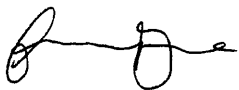
Taking the above into account, it is apparent that in their management of the matter, Council staff complied with Council's legal obligations under the Act, observed the principles of natural justice and acted in accordance with due process. Further, my view is that, on balance, the actions taken by Council staff, including the decision to issue the Control (Menacing Dog) Orders, were appropriate and reasonable in all the circumstances. For this reason, in the absence of any further incident involving the dogs and/or additional evidence, at this point, it would be inappropriate for the Council to issue Control (Dangerous Dog) Orders in respect of Molly and Buddy.

⁵ refer section 50(3)(c) of the *Dog and Cat Management Act 1995*.

⁶ refer section 50(5)(a) of the *Dog and Cat Management Act 1995*.

Please contact me if you have any further questions.

Yours sincerely
WALLMANS LAWYERS

A handwritten signature in black ink, appearing to read 'Cimon Burke', with a stylized flourish at the end.

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