January 18, 2018

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file no. **V17007549**

ALLISON AABY
Animal Services Enforcement Appeal

Activity no.: A17008763

Appellants: **Allison and David Aaby**
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King County: Regional Animal Services of King County
represented by **Michael Lindquist**
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal, but reduce penalty

EXAMINER PROCEEDINGS:

Hearing Opened:	January 3, 2018
Hearing Closed:	January 3, 2018

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, the examiner hereby makes the following findings, conclusions, and decision.

FINDINGS AND CONCLUSIONS:

1. Elaina and Ryan Kuffler live next door from David and Alison Aaby, separated by a backyard border fence. Each family has two dogs. The Kufflers have a tiny six-pounder, along with a Labrador named Riggins. The Aabys have Chloe and Cal. The Kufflers described the Aabys' dogs as often being outside barking all day long. Mr. Abby described the Kufflers' dogs as barking at and riling up his dogs, sometimes coming right up to the fence line.

2. Mr. Kuffler described an incident in 2016, when their tiny dog went to their fence. Mr. Kuffler heard barking and then discovered his dog was bleeding heavily from his paw, requiring a visit to the emergency room and resulting in an overnight stay and a $500 bill. As Mr. Aaby's picture showed, there was a loose board in their common fence at that time. Ex. 9. Mr. Kuffler surmised that his tiny dog may have stuck his paw through the hole in the fence and into the Aabys' yard and then got bit. Mr. Kuffler testified that he would have filed complaint, except he recognized it was a "gray area" (i.e., if his dog stuck his paw through the fence and into the Aabys' yard and got bit, was that actionable?).[1] He did go over to the Aabys and knock on their door, but got no answer.

3. There was another incident when Mr. Kuffler was walking his dogs on a leash, and the Aabys' dogs came out. Cal was aggressive, but there were no injuries. He knocked on the Aabys' door but no one was home. He came back the next day and knocked and also got no response.

4. More recently, Ms. Kuffler had noticed Cal was climbing up on top of the Aabys' hot tub and sticking his head over the common fence. She worried to Mr. Kuffler that Cal was getting bolder and might jump the fence. The Kufflers did not communicate this concern to the Aabys.

5. On October 20, 2017, Ms. Kuffler was home with her infant and their two dogs. She let the dogs into her fenced backyard to go to the bathroom. After about 30 seconds or at most a minute, she heard a thud in the backyard and heard barking. Her tiny dog came running in. She went outside and she saw Cal fighting with Riggins.

[1] Although not a lawyer, Mr. Kuffler actually nailed the analysis. For example, where a neighbor stuck her finger through a chain-link fence and got bit, the court found that the neighbor could not recover damages from her injury. *Sligar v. Odell*, 156 Wn. App. 720, 233 P.2d 914 (2010). However, the state statute the court was applying in reaching its result is a tort damages rule, and does not directly preclude animal control enforcement. It is indeed a "gray area" whether a dog biting the paw of another animal protruding through the fence could be the basis for an Animal Services' enforcement action.

6. Riggins ran inside, and Ms. Kuffler did too, closing the sliding glass door behind her. Cal continued to bark and lunge at the glass door. She called Mr. Kuffler, who came home. As the Aabys were not home, they tried Animal Services. As Animal Services was closed (it being after hours), they called the police, who sent out an officer out that night.

7. At first Ms. Kuffler thought Riggins was okay. However, the next day Riggins was lethargic, so she took him to the veterinarian. The veterinarian found "fluid filled swelling–filled with purulent material, associated with the ventral bite wound. Bite wound on right lumbar area." Ex. 6 at 003. The veterinarian lanced and sterilized Riggins's abscess and placed a drain in Riggins; he dispensed antibiotics and recommended warm compress and keeping the area clean. *Id.*

8. Mr. Aaby does not believe Cal is vicious. He noted that the dogs agitate each other through the fence, and it is this barrier fence that leads to aggression. He observes Riggins going out often and barking at his dogs across the fence, sometimes even going right up to the fence line. He questioned why the Kufflers did not talk to him about previous incidents.

9. As to the events of October 20, he does not see how Cal can be seen to have caused this. He noted that the Kufflers told the police that night that Riggins was not injured. His internet research revealed that sepsis typically takes two to five days to set in, so he questions whether something or someone else injured Riggins *before* October 20. He agreed Cal entered the Kufflers' yard, but he does not think Cal is vicious because he plays so well with kids or with dogs that visit the house. He wants to be a peaceful neighbor, but the Kufflers ignore him when he waves. He wants the "doggie drama" to end.

10. Animal Services' Notice of Violation and Order to Comply (NVOC) asserts that Cal was vicious and had trespassed. Ex. 5. Mr. Aaby timely challenged the viciousness designation. Ex. 8. Unless directed to by law—and no special directive applies to today's case—the examiner does not grant substantial weight or otherwise accord deference to agency determinations. Exam. R. XV.F.3. Ours is a true *de novo* hearing. For those matters or issues raised in an appeal statement, Animal Services bears "the burden of proving by a preponderance of the evidence both the violation and the appropriateness of the remedy it has imposed." KCC 20.22.080.G; .210.

11. The more minor alleged violation is that Cal trespassed, defined as a "domesticated animal that enters upon a person's property without the permission of that person." KCC 11.04.230.K.[2] The Aabys did not appeal this, and even if they had, there is no question that Cal entered the Kufflers' property without the Kufflers' permission.

12. As to whether Cal is vicious, KCC 11.04.020.BB defines it as:

> Having performed the act of, or having the propensity to do any act, endangering the safety of any person, animal or property of another,

[2] The parties reside in Enumclaw. However, in Enumclaw has adopted KCC chapter 11.04 in full. EMC 7.01.010. Thus, all references here are to the KCC.

> including, but not limited to, biting a human being or attacking a human being or domesticated animal without provocation.

KCC 11.04.230.H declares as a nuisance, "Any animal that has exhibited vicious propensities and constitutes a danger to the safety of persons or property off the animal's premises or lawfully on the animal's premises."

13. The meaning of the word "vicious" in the animal control context is thus somewhat broader than the word's everyday usage (which might be "mean–spirited or deliberately hurtful; malicious"). A vicious dog designation also requires less proof than a *dangerous* dog designation under the state system, where a dog can only be declared "dangerous" after a dog-on-domestic animal incident if the dog actually killed the other animal. RCW 16.08.070(2). We now turn to that analysis.

14. Mr. Aaby questions whether Cal bit Riggins, because the Kufflers told the responding officer after the incident that Riggins was not hurt and because (apparently) sepsis typically kicks in only two or more days after an incident. Yet there is nothing inconsistent with the Kufflers telling the police right after the incident that they did not think Cal had hurt Riggins, and then re-assessing the incident next day, after Riggins appeared lethargic. As to whether someone *else* caused what the veterinarian described as "fluid filled swelling–filled with purulent material, associated with the ventral bite wound," such arguments may work in the "beyond a reasonable doubt" criminal context, but typically come across as grasping at straws in the "preponderance of the evidence" context we operate in. KCC 20.22.210.B.[3] As between the alternatives—that the bite wound the veterinarian examined on October 21 was caused by Cal on October 20 versus by some random, amazingly coincidental bite from another animal a few days earlier—we find the former far, far more likely.

15. Although the Aabys do not exactly claim that Cal was "provoked" to hop the fence to get at the Kufflers' dogs, the references about how much the Kufflers' dogs barked through the fence at Cal and Chloe, along with the argument that the fence/barrier caused aggression, implies this. Thus we entertain the "provocation" question.

16. Provocation is a "term of art," and so we look to "well-established meanings" of words in their specific context. *Cf. State, Dept. of Ecology v. Theodoratus*, 135 Wn.2d 586, 589, 957 P.2d 1241 (1998). "Provocation" is a staple of animal jurisprudence, and numerous courts that have analyzed its meaning in the dog bite scenario in depth have noted that although dictionary definitions of "provocation" can be quite broad, the term as it has developed in dog bite jurisprudence is more circumspect. *See, e.g., Robinson v. Meadows*, 203 Ill. App.3d 706, 710, 561 N.E.2d 111 (1990); *Stroop v. Day*, 271 Mont. 314, 318, 896 P.2d 439 (1995); *Engquist v. Loyas*, 787 N.W.2d 220, 225 (Minn. 2010); *Bradacs v. Jiacobone*, 244 Mich. App. 263, 273–75, 625 N.W.2d 108 (2001); *Kirkham v. Will*, 311 Ill. App.3d 787, 792, 724 N.E.2d 1062 (2000). Having read dozens of

[3] *See also Mansour v. King County*, 131 Wn. App. 255, 265, 128 P.3d 1241 (2006) (rejecting "arbitrary and capricious" as too low a standard, but rejecting "beyond a reasonable doubt" and "clear and convincing evidence" as too high a standard, and determining that a "preponderance of the evidence" was the correct standard for animal enforcement cases). *Mansour* occurred during an era where a different County tribunal, not the examiner, entertained animal enforcement appeals.

"provocation" cases from our state and others, dogs barking across a fence line is nowhere close to the legal "provocation" that would justify a dog jumping over a fence to come after a barker.

17. Mr. Aaby questions why the Kufflers did not warn him about Cal's behavior, and notes his family's responsible care for their dogs. That is relevant to the penalty amount (discussed below) but not to whether the viciousness designation should stand. Instead, the focus of a viciousness appeal hearing is on the dog.

18. So, for example, in one past case an appellant irresponsibly let his dog escape from his yard and onto the street, where an altercation ensued with a jogger and her dog. After hearing all the testimony, we concluded that the appellant's dog's behavior during the altercation did *not* meet the code criteria (above) for a viciousness designation. We thus overturned the viciousness designation, explaining that a viciousness designation is not a proxy for an owner's lack of care. Conversely, in a separate case, an appellant was walking her dog down the sidewalk, on a harness, with her body between her dog and oncoming pedestrians. Despite the care she was taking, her dog unexpectedly darted behind her, lunged, and bit a passerby minding his own business. We reduced the $500 monetary penalty significantly, but still upheld the viciousness designation, because the dog met the code criteria.

19. And that later situation is the one we face here. Cal clearly meets the KCC 11.04.020.BB definition and created a KCC 11.04.230.H nuisance. So we uphold the viciousness designation. But the Aabys voluntarily paid the Kufflers' vet bill, which both shows responsible behavior and means they have already taken a monetary hit based on Cal's behavior. Plus, they have already taken steps to avoid a repeat performance. So we conclude that a $250 penalty reduction is warranted.

20. Finally, the code is clear that a vicious dog may remain in King County only upon compliance with the requirements prescribed in the October NVOC, and if an owner fails to comply with any such requirement, the "animal shall not be kept in King County." KCC 11.04.270.A.1 & 3. Thus the Aabys should re-read those requirements carefully, especially securing Cal in a fenced area when unattended and outside the home and locking all passages with a padlock to prevent accidental release, but not ignoring the other three items either. Ex. 5. As we have written in several decisions sustaining removal orders where owners failed to comply with NVOC requirements, the code typically gives a second chance (i.e. allowing a dog being declared vicious after a first-time incident to remain in the jurisdiction under certain conditions), but it does not give a third chance. Let us stay far away from that line here.

DECISION:

1. The Aabys' appeal is denied as to the violations.

2. The Aabys' appeal is partially granted as to $250 of the $550 penalty. The remaining $300 shall be due to Animal Services by **February 20, 2018**.

ORDERED January 18, 2018.

David Spohr
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County's final decision for this type of case. This decision shall be final and conclusive unless appealed to superior court by *February 20, 2018.* Either party may appeal this decision by applying for a writ of review in superior court in accordance with chapter 7.16 RCW.

MINUTES OF THE JANUARY 3, 2018, HEARING IN THE APPEAL OF ALLISON AABY, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V17007549

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Sergeant Michael Lindquist, Elaina Kuffler, Ryan Kuffler, and David Aaby.

The following exhibits were offered and entered into the record:

Exhibit no. 1	Regional Animal Services of King County staff report to the Hearing Examiner for file no. V17007549
Exhibit no. 2	RASKC investigation report no. A17008763
Exhibit no. 3	Enumclaw Police Department incident no. 174605 officer report, dated October 20, 2017
Exhibit no. 4	Complaint form of October 20, 2017 incident by Elana Kuffler, dated October 21, 2017
Exhibit no. 5	Notice of violation no. V17007549, issued October 21, 2017
Exhibit no. 6	Email from Dr. Art Khachatryan with medical record, dated October 22, 2017; and Sumner Veterinary Hospital patient chart, dated October 22, 2017
Exhibit no. 7	Email from Ryan Kuffler with photographs of wounds, dated October 24, 2017; and Photograph of wound
Exhibit no. 8	Appeal, received November 8, 2017
Exhibit no. 9	Photograph of fence

DS/ed

January 18, 2018

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V17007549**

ALLISON AABY
Animal Services Enforcement Appeal

I, Vonetta Mangaoang, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND DECISION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

☒ caused to be placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED January 18, 2018.

Vonetta Mangaoang

Vonetta Mangaoang
Senior Administrator

January 18, 2018

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DATED January 18, 2018.

Vonetta Mangaoang

Vonetta Mangaoang
Senior Administrator

Aaby, Allison-David
Hardcopy

Kuffler, Elana and Ryan
Hardcopy

Lindquist, Michael
Regional Animal Services of King County