

**Before the HEARING EXAMINER for the
CITY of MERCER ISLAND**

DECISION

FILE NUMBER: APL23-005
(Ref. Animal Control Case No. RASKC A23-003981)

APPELLANT: Brent Irvin/Ying (Molly) Quan
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Mercer Island, 98040
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RESPONDENT: Animal Control Officer
City of Mercer Island
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AND

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TYPE OF CASE: Appeal from a Declaration of Potentially Dangerous Dog (“Austin”)

EXAMINER DECISION: Declaration of Potentially Dangerous Dog **DISMISSED**

DATE OF DECISION: November 6, 2023

INTRODUCTION ¹

Brent Irvin (“Irvin”) and Ying (Molly) Quan (“Quan”) filed an appeal on July 22, 2023, from a Declaration of Potentially Dangerous Dog (“Declaration”) issued on July 3, 2023, against “Austin” by an Animal

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

Control Officer ("ACO") from Regional Animal Services of King County ("RASKC").² (Exhibits 19 & 1, respectively³)

John E. Galt, Mercer Island Hearing Examiner ("Examiner"), held a remote open record hearing on October 30, 2023. The City gave notice of the hearing as required by the Mercer Island City Code ("MICC"). (Exhibit 20)

Testimony under oath was presented by:

Kim Lampson Reiff
Brent Irvin

Michael Carlson

Respondent ACO was represented by Eileen Keiffer, Attorney at Law.

Appellants Irvin/Quan were represented by Blair Russ, Attorney at Law.

The following exhibits were offered and admitted:

Exhibits 1 – 22: As listed on Respondent's Exhibit List⁴
Exhibits 1001 – 1011: As listed on Appellants' Exhibit List

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law.

FINDINGS OF FACT

1. On July 3, 2023, the ACO issued the Declaration against Austin based on probable cause to believe that Austin met the City's definition of a Potentially Dangerous Dog. The Declaration was issued pursuant to MICC 7.04.120. (Exhibit 1)
2. Austin is owned by Irvin and Quan, whose residence is located at 7510 SE 71st Street within the City of Mercer Island ("City"). Austin is a tri-colored, neutered male Australian shepherd. (Exhibit 1) Irvin/Quan appealed the Declaration on July 22, 2023. (Exhibit 19)
3. Under MICC 7.04.020, the term "potentially dangerous dog"

² Mercer Island contracts with RASKC for animal control services.

³ Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.

⁴ Appellants objected to entry of Exhibits 10, 12, and 17 on relevance. After hearing brief oral argument, the Examiner overruled the objection.

means any dog that when unprovoked: (a) inflicts bites on a human or a domestic animal either on public or private property, or (b) chases or approaches a person upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude of attack, or any dog with a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or to cause injury or otherwise to threaten the safety of humans or domestic animals.

4. A declaration of potentially dangerous dog must be based upon the following types of evidence, any amount or combination of which results in probable cause:
 1. A declaration of a person that the animal has acted in a manner which causes it to fall within the definition of "potentially dangerous dog;"
 2. Animal bite report(s) filed with the animal control authority;
 3. Action(s) of the animal witnessed by any employee of the animal control authority or law enforcement officer; or
 4. Other substantial evidence, such as photographs of injuries caused by the animal, medical reports, etc.

[MICC 7.04.120(A)]

5. On June 22, 2023, Kim Lampson Reiff ("Lampson") filed a RASKC Online Complaint Form, signed under penalty of perjury, asserting that Austin, unprovoked, bit her on June 19, 2023. (Exhibit 2)
6. Irvin/Quan and Lampson both live on SE 71st Street, Irvin/Quan at 7510 and Lampson at 7540. (Exhibits 1; 2) SE 71st Street slopes downhill towards the west and terminates in a large loop (not a cul-de-sac) within which there are five homes. There are no sidewalks along SE 71st Street. The Irvin/Quan residence is located on the north side of the street, slightly downhill of the upper end of the loop. The Lampson residence is three residences uphill from the Irvin/Quan residence on the same side of the street. (Testimony; Google Earth imagery ⁵)

The Irvin residence is on a downward slope to the west and sits at an angle to SE 71st Street. A short driveway angles uphill to the garage. The garage has a deck on its flat roof that looks southwesterly over the driveway to SE 71st Street. In addition to a normal deck railing, Irvin/Quan have wrapped the railing with tall thin slats that appear to be bamboo (or its equivalent). A sliding door leads from the deck into the Irvin/Quan house. Stairs lead down from the deck to the yard, with access to the driveway. Irvin/Quan have an "Invisible Fence" installed in their yard. (Testimony; Google Earth imagery)

⁵ Appellants used Google Earth Street View imagery for demonstrative purposes during the hearing. The Examiner has supplemented the Google Earth Street View imagery displayed during the hearing with Google Earth Overhead imagery to better understand the configuration of SE 71st Street and the relative placement of the residences.

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7. According to the Complaint Form and Lampson's testimony, Lampson frequently walks her 2-year old miniature Dachshund "Merlin" on a leash around the SE 71st Street "loop." On the morning of June 19, 2023, Lampson was walking Merlin uphill on the right (south) side of the street, with Merlin on her left side. As they approached the Irvin/Quan driveway Lampson heard a dog barking and saw Austin on the Irvin/Quan deck. Austin ran down the deck stairs, crossed through the Invisible fence, ran across the street and bit her on her upper left thigh. Lampson picked up Merlin at that point. Lampson said that Irvin came out and crossed the street to talk to her. According to Lampson, Irvin said that Austin had recently been to a dog psychiatrist ⁶ and he asked her to not report the incident.
8. According to Irvin's testimony, Austin is a little over three years old, very energetic and friendly, and a little "goofy." (Testimony)

According to Irvin, he had just finished walking Austin and had the slider onto the deck open. Austin heard barking from the street area and went out onto the deck to investigate. Irvin did not want Austin to bark so much, so he went to get a bark deterrent. At that time Austin left the deck and Irvin heard screaming from the direction of the street. Irvin saw Lampson holding Merlin, who was barking, with Austin about one foot away barking at them. Irvin went over and grabbed Austin by his collar and took him back inside their house. Irvin went back outside and spoke with Lampson. (Testimony)

9. Lampson reported the incident (apparently through the 911 system). About one-half hour after the incident Mercer Island Police Officer Owen ("Owen") visited Lampson. While Owen was there, the Fire Department responded and determined that Lampson did not need immediate medical care nor sutures, but advised her to see a doctor. Owen then visited Irvin. During his visit with Irvin, Owen observed Austin to be very obedient and calm. Owen concluded that Austin had scratched Lampson, not bitten her. (Exhibit 21)
10. RASKC became involved on or about June 22, 2023, when Lampson filed the Online Complaint Form. The case was assigned to ACO Carlson ("Carlson"). Carlson investigated and spoke with both Lampson and Irvin. On June 28, 2023, Carlson spoke with Lampson by telephone and visited Irvin. Irvin told Carlson that the only incidents of violence by Austin were against Lampson; Irvin was unsure why. Carlson showed Irvin a picture of the injury that Lampson had suffered. Carlson opined that he thought it was a bite. (Exhibit 6)
11. On or about June 21, 2023, Irvin drove Austin to Arizona to stay with Irvin's parents, primarily to remove him from the neighborhood until this situation was resolved. While there, Irvin arranged for Austin to participate in a 4-week dog obedience program at Complete Transformations, a dog training facility near Tucson. Upon completion of that program, the trainer wrote the following about Austin:

⁶ Irvin had taken Austin to "Bark Busters" about a week prior to try to help Austin control his barking. (Testimony) That is likely the "psychiatrist" to which Lampson is referring.

While Austin was here he had the opportunity to interact with my dogs. I did not see any aggressive behavior displayed by Austin. I did not observe Austin go out of his way to display behavior with intent to harm. To the contrary, Austin participated in back and forth play with my dogs. While training in public spaces, I also did not see any aggressive behavior displayed toward dogs or people.

(Exhibit 1001, PDF 1) Videos taken during Austin's training show him behaving well in store, pathway, and play environments. (Exhibits 1005 – 1010)

12. A somewhat similar incident occurred in 2022. On August 30, 2022, Lampson filed a RASKC Online Incident Report regarding an incident that occurred the previous day. On that occasion, Lampson was walking Merlin around the loop. As she neared the intersection, Austin, trailing his leash, suddenly appeared around the corner of the street and ran at Lampson and Merlin. Lampson picked up Merlin and Austin reportedly bit her on her upper leg.⁷ Austin was being walked that day by Quan's mother, who doesn't speak English and who had lost control of Austin. (Exhibits 10; 11; 17)
 13. A statement made under penalty of perjury by Brad Stone ("Stone") avers that in retirement in Arizona he has taken up dog walking. Stone currently, as of October 17, 2023, is Austin's dog walker in Arizona. Stone describes Austin as energetic, but not aggressive. He has never experienced an aggressive encounter between Austin and any of the dogs they meet while walking. (Exhibit 1002)
 14. A statement made under penalty of perjury by Gaby Rivarde ("Rivarde") avers that she walked Austin frequently on Mercer Island between May 25 and June 15, 2023. Rivarde recalls two incidents between herself with Austin and Lampson with Merlin. In both incidents Merlin initiated barking and lunging upon seeing Austin; Austin responded in like kind. According to Rivarde, Lampson yelled at Rivarde and told her to get out of the neighborhood. (Exhibit 1003)
- According to Lampson, at least one of the encounters occurred near her driveway and she was telling Rivarde to get away from the driveway opening so she, Lampson, could take Merlin home. (Testimony)
15. A declaration made under penalty of perjury by Jonathan Rackoff ("Rackoff") avers that he owns a Golden retriever named "Maggie" and is a friend of Irvin's. Rackoff and Irvin frequently walked their dogs together in Kirkland and along the Lake Sammamish Trail. Rackoff estimates that they encountered at least 500 dogs during these walks. At no time did Austin ever exhibit any aggression towards dogs they met or their handlers. (Exhibit 1004)
 16. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

⁷ The picture of that injury does not show a puncture of the skin. (Exhibit 17)

LEGAL FRAMEWORK ⁸

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

The Examiner has authority under MICC 7.04.235(C) and (E) to hear and decide appeals from Declarations of Potentially Dangerous Dog issued pursuant to Chapter 7.04 MICC by the ACO. The Examiner issues a written decision following an open record appeal hearing. [MICC 7.04.235(C), (E), and (F)] The Examiner's Decision is not subject to reconsideration. [MICC 7.04.235(I)] The Examiner's final decision is conclusive and may be reviewed in Superior Court. [MICC 3.40.100]

Review Criteria

The Examiner is the trier of fact and must determine if the cited dog meets the definition of a potentially dangerous dog as quoted in Finding of Fact 3, above. "The [Examiner] may uphold, dismiss, or modify the potentially dangerous dog declaration or final dangerous dog determination." [MICC 7.04.235(E)]

Vested Rights

There are no vested rights considerations in this case.

Standard of Review

The ACO has the burden of proving the violation by a preponderance of the evidence. [MICC 7.04.235(G)]

CONCLUSIONS OF LAW

1. The standard of proof to be applied in this case is "preponderance of the evidence."

The quantum of evidence that constitutes a preponderance cannot be reduced to a simple formula. A preponderance of evidence has been described as just enough evidence to make it more likely than not that the fact the claimant seeks to prove is true.

["Preponderance of Evidence" West's Encyclopedia of American Law. 2005. *Encyclopedia.com*, <http://www.encyclopedia.com/doc/1G2-3437700874.html> (last visited December 13, 2011)] The preponderance of the evidence standard thus essentially requires that something be found to be more probable than not – essentially that something is more than 50% likely to be true.

2. The Examiner is left with the definite, troubling impression that there is more to the Lampson/Merlin – Irvin/Austin relationship than is present in this hearing record. It seems apparent from the preponderance of the evidence that the only "people" Austin reacts negatively to are Lampson and Merlin. Whether the adverse reaction is more towards Merlin or more towards Lampson cannot be

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determined from this record. What is abundantly clear is that Austin is fine with everyone but Lampson and Merlin. There is something between Austin on the one hand and Lampson/Merlin on the other hand that provokes Austin. There seems to be some memory that triggers an adverse reaction in Austin.

3. The Examiner cannot conclude that a preponderance of the evidence shows that Austin's actions on June 19, 2023, were unprovoked. It seems true that Lampson did not overtly do something on that particular occasion to provoke Austin, but it is equally true that something in the past of their relationship clearly provokes Austin.
4. Given the above, the Examiner cannot conclude by a preponderance of the evidence that Austin should be declared a Potentially Dangerous Dog.
5. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner hereby **DISMISSES** the Declaration of Potentially Dangerous Dog issued against "Austin" under file number RASKC A23-003981.

Decision issued November 6, 2023.

John E. Galt

John E. Galt
Hearing Examiner

NOTICE OF RIGHT OF APPEAL

This decision is final and conclusive and may be reviewable by an action for writ of review filed in King County Superior Court. [MICC 3.40.100] Applicable statutes and court rules govern any appeal to Superior Court.

Reconsideration of the Examiner's Decision in animal control appeal cases is not allowed under the MICC. [MICC 7.04.235(I)]