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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re the Appeal of:

BRENT IRVIN and YING QUAN, as
Owners of dog named Austin,

Appellants,

v.

CITY OF MERCER ISLAND,
Respondent.

NO. APL23-005

MEMORANDUM OF LAW

COMES NOW Appellants, Brent Ivryn and Ying Quan (hereinafter, “Appellants”), by and through their attorneys of record, Aric S. Bomsztyk of Tomlinson Bomsztyk Russ, in support of their appeal, assets as follows:

I. BACKGROUND

On July 3, 2023, Appellants received notice that their 2-year-old Australian Shepherd, a neutered male named Austin, would be considered a “potentially dangerous dog” following the report of a disgruntled neighbor. This is the second report of this nature from the same neighbor. Expected testimony will show neighbor’s allegations are unsubstantiated, and many witnesses have provided statements attesting to Austin’s gentle, friendly nature. Further testimony will reveal that this neighbor has specific propensity to provoke, and that City cannot

1 meet their burden of proof. As such, Austin has been wrongfully classified as a potentially
2 dangerous dog and an appeal hearing has been set for October 30, 2023.

3 **II. LEGAL STANDARD**

4 A dog is potentially dangerous if “when unprovoked: [it] (a) inflicts bites on a human
5 or a domestic animal either on public or private property, or (b) chases or approaches a person
6 upon the streets, sidewalks, or any public grounds in a menacing fashion or apparent attitude
7 of attack, or [c] any dog with a known propensity, tendency, or disposition to attack
8 unprovoked, to cause injury, or to cause injury or otherwise to threaten the safety of humans
9 or domestic animals.” MICC 7.04.020.¹

10 Pursuant to Mercer Island Code 7.04.235(G), the City (through the animal control
11 authority) has the burden of proof to prove that the dog is a potentially dangerous dog by a
12 preponderance of the evidence.

13 **III. ARGUMENT**

14 **1. Austin is not a “potentially dangerous dog” under MICC 7.04.12 nor** 15 **RCW 16.08.070.**

16 Austin does not meet the criteria of qualifying for qualifying as a potentially dangerous
17 dog.

18 Again, a potentially dangerous dog is defined as any dog that when unprovoked: (a) inflicts
19 bites on a human or a domestic animal either on public or private property, or (b) chases or
20 approaches a person upon the streets, sidewalks, or any public grounds in a menacing fashion
21 or apparent attitude of attack, or (c) any dog with a known propensity, tendency, or disposition

22 ¹ See also RCW 16.08.070 (“ ‘Potentially dangerous dog’ means any dog that when unprovoked: (a) Inflicts bites
23 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.”)

1 to attack unprovoked, to cause injury, or to cause injury or otherwise to threaten the safety of
2 humans or domestic animals. MICC 7.04.12; RCW 16.08.070. For all three criteria, the dog
3 must be unprovoked, yet no evidence has been presented, beyond Dr. Lampon’s testimony,
4 that that this incident was unprovoked attack. Indeed, testimony will show Dr. Lampon has
5 known propensity to provoke, and escalate situations. It is more likely than not that this pattern
6 of behavior occurred during the alleged incident. For example, as shown by Exhibit 1003, Dr.
7 Lampson previously threatened Austin’s dog walker, Ms. Rivarde, by angrily yelling at her
8 and stating something along the lines of “This is my neighborhood, you need to go away.”
9 During this encounter, Dr. Lampon’s dachshund barked and launched towards Austin.
10 Testimony will show that this is within the normal pattern of behavior for Dr. Lampon’s dog,
11 and a provoking stimulus to a reasonable person (or dog).

12 Further, no evidence has been presented, beyond testimony and reporting of displeased
13 neighbor, that Austin (a) inflicted a bite wound during this incident; (b) menacingly chased or
14 approached a person or displayed an apparent attitude of attack; or (c) has a known propensity,
15 tendency, or disposition to attack unprovoked, to cause injury, or to cause injury or otherwise
16 to threaten the safety of humans or domestic animals. Testimony will only reveal Austin is
17 happy, friendly dog that does not engage in aggressive behavior unprovoked.

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19 **2. The City cannot meet its burden of proof under MICC 7.04.235(G).**

20 Following Mercer Island Code 7.04.235(G), “at the appeal hearing before the hearing
21 examiner, the animal control authority shall have the burden of proving that the dog is a
22 potentially dangerous dog or dangerous dog by a preponderance of the evidence.” Thus, the
23 City of Mercer Island (“City”), through its contracted animal control authority, Regional

1 Animal Services of King County (“RASKC), bears the burden of proving a dog is potentially
2 dangerous, which in this instance, they cannot do.

3 Preponderance of the evidence is not a term not defined in the MICC, but rather a well
4 know concept of black letter law. Defined in many Washington Pattern Jury Instructions, in
5 civil cases, the proponent has the burden of proving each essential element of their claim by a
6 “preponderance of the evidence.” 6 WAPRAC WPI 21.01; *see also* 6A WAPRAC WPI 160.02.
7 The party who has the burden must present the more convincing evidence to succeed on their
8 claim. *Id.* To prove an element by a preponderance of the evidence simply means to prove that
9 something is more likely than not. In other words, in light of the evidence and the law, whether
10 a reasonable person can be persuaded to believe that each element of the claim is more likely
11 true than not. *Id.* Courts have further equated preponderance of the evidence or more likely
12 than not with “more than 50 percent.” *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593,
13 608, 260 P.3d 857, 865 (2011). In determining whether a fact, claim or defense has been
14 proven by a preponderance of the evidence, the examiner may consider the relevant testimony
15 of all witnesses, regardless of who may have called them, and all the relevant exhibits received
16 in evidence.

17 Here, the City has no evidence to support the City’s ruling as presented, beyond testimony
18 and the reporting of disgruntled neighbor, to substantiate the elements of MICC 7.04.12 or
19 RCW 16.08.070. Moreover, Appellant’s testimony and evidence will only reveal Austin is
20 happy, friendly dog that does not engage in aggressive behavior unprovoked. As such, it is
21 more likely than not Austin is a temperate dog and Dr. Lampon is an irate neighbor.

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IV. CONCLUSION

In conclusion, Austin is a gentle, friendly dog that does not meet the criteria for a “potentially dangerous dog” and the City cannot meet their burden of proof. Accordingly, Appellants request the Hearing Examiner vacate the potentially dangerous dog notice issues for Austin.

DATED this 23rd day of October 2023.

TOMLINSON BOMSZTYK RUSS

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