

December 18, 2019

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

King County Courthouse
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SUMMARY ORDER

SUBJECT: Regional Animal Services of King County file no. **V19009535**

ROSS PEARSON

Animal Services Enforcement Appeal

Activity no.: A19003326

Appellant: **Ross Pearson**

Woodinville, WA 98077

Telephone: [REDACTED]

Email: [REDACTED]

King County: Regional Animal Services of King County
represented by **Shelby Russell**
Regional Animal Services of King County
21615 64th Avenue S
Kent, WA 98032
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Introduction

Regional Animal Services of King County served a violation notice on Ross Pearson related to his dogs' barking. Mr. Pearson timely appealed, and we went to hearing on December 4. After reviewing the evidence his neighbors, Mr. and Ms. Thomas, had amassed, Mr. Pearson agreed there had been a violation. Our order today is thus truncated to only hit those highlights that frame the issue moving forward; it does not provide a detailed analysis of the evidence.

Overview

Our inquiry is whether dogs bark “to an unreasonable degree, in such a manner as to disturb a person or neighborhood.” KCC 11.04.230.J. We draw a stark distinction between nighttime barking and daytime barking, construing section 230.J consistently with the general County noise code, KCC chapter 12.86. KCC 11.04.230.J and KCC chapter 12.86 were jointly amended by Ordinance 18000 in 2015.

The noise code lists numerous sounds exempt from noise code limitations between 7:00 a.m. (9:00 a.m. on weekends) and 10:00 p.m. KCC 12.86.510. In that same ordinance, the Council amended the law to explicitly add that, “The hour of the day at which the sound occurs may be a factor in determining reasonableness.” Ord. 18000 at § 72 (codified at KCC 12.86.410.A.). Although decibels are not determinative, from 10 p.m. and 7:00 a.m. (9:00 a.m. on weekends) the maximum permissible sound levels are reduced by ten decibels. KCC 12.86.120.A. Ten decibels may not seem like much; however, reducing the decibel level by 10 dBs *halves* the perceived loudness. <http://www.siue.edu/~gengel/ece476WebStuff/SPL.pdf>.

Even absent the noise code’s daytime/nighttime delineation, we would still draw such a distinction. That the timing of a noise matters significantly is not controversial, nor new. For example, in one pre-Civil War noise case, the court stated that, “The peace of Sunday may be disturbed by acts which, on other days, cannot be complained of.” *Commonwealth v. Jendell*, 2 Grant 506, 509 (Pa. 1859). Replace “Sunday” with “3:00 a.m.” and “on other days” with “at 3:00 p.m.,” and that proposition remains true 160 years later. One’s right to make nighttime noise “must be limited by the right of the neighbors in the area to be free of disturbing noises during normal sleeping hours.” *Altman v. Ryan*, 435 Pa. 401, 407, 257 A.2d 583, 605 (1969).

What the noise code provides us is a clear, objective line for how late or early is too late or too early, or what “normal sleeping hours” are. Instead of allowing a complainant’s “subjective determination” to prevail,¹ or wildly swinging the hours according to the calendar—we take judicial notice that in Seattle the sun sets by 4:20 p.m. around the winter solstice and rises by 5:10 a.m. around the summer solstice—the noise code essentially defines for King County what qualifies as “nighttime” noise: after 10 p.m., and before 7 a.m. (9 a.m. on weekends).²

Thus, in each of our numerous barking dog decisions, we have held that daytime barking must be much more significant than nighttime barking to qualify as “unreasonable.” There is simply not the same reasonable expectation that daytime hours will be fairly quiet. During the day lawnmowers whirr. Trucks back up and emit loud warning beepings. Children scream; if our household is representative, parents of young children scream much more than we ever thought

¹ Albeit in the criminal context (which raises heightened due process concerns) our Court has disallowed a statutory noise crime ordinance that did not include an objective “unreasonableness” standard and instead let any given complainant make a “subjective determination that a crime has been committed.” *City of Spokane v. Fischer*, 110 Wn.2d 541, 544–45, 754 P.2d 1241, 1242 (1988). In contrast, KCC 11.04.230.J. covers only barking to “an unreasonable degree,” and the noise code provides fixed, discernible hours.

² We do not discount the impact of, say, 8 p.m. barking on the Thomas children’s bedtimes, or on the Thomas’ ability to sleep off a cold or migraines during the day, but we accord no special significance to that barking. Analogizing outside the animal context, UPS has no duty to avoid a neighborhood or turn off its loud truck-backing-up warning noise in the afternoon just because it learns a resident happens to work the graveyard shift and sleep during the day. To personalize it, we curse the fates each time our attempt to take a Sunday nap to catch up on missed sleep during the workweek is frustrated by a neighbor mowing a lawn or using power tools; yet that is how the cookie crumbles, much to our chagrin.

(pre-kid) possible. Power tools create a cacophony. Waste collectors bang trash cans. Cars honk. And dogs bark. At some point, the quality and quantity of such daytime barking becomes legally unreasonable, but it is a high threshold.

This day/night distinction is especially true when it comes to how long (duration-wise) barking must occur for us to find it to an “unreasonable degree, in such a manner as to disturb a person or neighborhood.” At night, whether a dog barks six seconds or sixty seconds or six minutes or sixty minutes is somewhat irrelevant. If the barking is enough to repeatedly wake someone up from sleep, even quickly quieting the dog down after each episode is a bit like locking the barn door after the horse is gone—the damage for a given night is already done. Conversely, during the day, a dog barking for a minute while a driver drops off a delivery is different from a dog going off for twenty additional minutes after the person has driven away.

In analyzing whether noise truly “disturbs” (interferes with normal functioning, such as sleep) versus merely “annoys” (irritates), we have to guard against measuring conduct “by its effect on those who are inordinately timorous.” *Seattle v. Eze*, 111 Wn.2d 22, 29–30, 759 P.2d 366 (1988). In looking at both “unreasonable” and “disturb,” we review the steps an appellant took to control the noise and the steps a complainant took to mitigate the noise’s impact, both internally (i.e. within their property) and externally (such as addressing the issue with their neighbor). *See, e.g., State v. Acrey*, 148 Wn.2d 738, 748-49, 64 P.3d 594 (2003) (whether something is “reasonable” often depends on “a balancing of the competing interests involved in light of all the surrounding facts and circumstances”). We have overturned violation notices even where we found the barking excessive and disturbing but also found a complainant had been equally unreasonable.

That detailed explanation sets our standard and expectations:

- the quantum and quality of the proof Animal Services must provide for upholding a noise violation for barking between 7:00 a.m. (9:00 a.m. on weekends) and 10:00 p.m. is significantly higher than what is required for nighttime barking;
- the noise must truly “disturb” a life function instead of merely annoy;
- the inquiry cannot be based on the subjective determination of an inordinately sensitive complainant; and
- we consider the steps the appellant has taken to reduce the noise and the complainant has taken to mitigate the noise’s impact.

Application

Despite the high burden discussed above for daytime barking, the Thomases checked all those boxes with a thick marker.

The Thomases contacted Mr. Pearson in person and later provided him text alerts and videos for something like twenty barking instances prior to their June 2019 complaint to Animal Services. Mr. Thomas also kept a log of incidents where the dogs barked at least five minutes

and even for twenty minutes-plus. At hearing, we listened to a sampling of the dozens of videos showing the dogs barking on and on.

Outside, Mr. Thomas explained that his kids get continually barked at when they attempt to play in their yard. He has had to cancel dinner parties on their deck and has been unable to relax outside. The barking has effectively curtailed the Thomases use of their property. Inside, Mr. Thomas explained the barking's impact on his kids being unable to concentrate on their homework. The barking interrupts their sleep; he described one memorable event packing his daughter in the truck and driving several blocks away, so his daughter could get some sleep. He sound-proofed his windows, putting in six double-paned windows and a sliding glass door. He remodeled to move the TV room downstairs, and he turns up the speakers. However, the barking continues to come through.

Ms. Thomas explained the distraction of trying to work from home. She described the anxiety the long-running issue has caused, with everyone tensing up when a barking incident ramps up. To her, the sheer quantity of the barking is the main issue.

While Animal Services met its burden in its case-in-chief of establishing a violation, Mr. Pearson—as any appellant—had the right to try to push the proverbial ball back over the 50-yard line in his case-in-chief. However, to his credit, Mr. Pearson accepted that there been a violation. He explained that the texts Mr. Thomas sent captured an incident, on average, only every few weeks. Assuming that this was the full set of lengthy barking incidents, Mr. Pearson had disputed that those cumulatively amounted to a violation. That was not an unreasonable position—even *nighttime* barking occurring only once every few weeks might not amount to a violation.

The problem, as Mr. Pearson recognized, was that his starting premise that the incidents Mr. Thomas texted about were close to the full set of events (and thus that barking was only intermittent) was incorrect. Instead those were only a sampling. Mr. Pearson was “flabbergasted” when he looked at the “overwhelming” evidence for the hearing and learned the full extent of the problem. He apologized to the Thomases.

Mr. Pearson explained the steps he had taken, like installing a camera device that allows him to yell at and shush his dogs from work when Mr. Thomas texts him about an incident. Mr. Pearson noted that he had reduced the presence on the property for the most vociferous barker, Tatum, from a routine occurrence to only twice since June. He explained that the videos showed much of the barking was coming from one of his dogs that he did not suspect would have been a big source of the problem and so had not outfitted with an anti-bark collar. (He had—erroneously as it turns out—been focusing his efforts on another dog he assumed was the source of most of the post-Tatum barking).

Mr. Thomas described building a kennel and re-configuring the fencing so the dogs will shift to the front yard (and away from the Thomases). Mr. Pearson's wife plans to leave her off-site employment later this month and work from home in 2020, meaning a mature adult will be on-site and able to monitor and influence the barking. He suggested introducing the Thomases, especially their kids, to his dogs, so the dogs will not be so reactive when the Thomases are outside.

Conclusion

As we noted at hearing, there is only so much finality an appeal of a violation notice assessing a \$100 penalty can bring. We hope the above discussion is helpful, but unlike something like animal trespass—where a dog is either over a property line or it is not—concepts such as “unreasonable” and “disturb” do not lend themselves to bright lines. That we would have (absent a tremendous showing from Mr. Pearson) upheld the violation here based on the timeframe and events to date does not prejudice how we would rule on a *future* set of facts and circumstances and more limited barking. We encourage the Pearsons in their efforts to continue reducing the barking and encourage the Thomases to work cooperatively with them (for example, by introducing the dogs to the Thomases to decrease the dogs’ reactivity).

ORDERED December 18, 2019.



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 *January 17, 2020*. 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 DECEMBER 4, 2019, HEARING IN THE APPEAL OF ROSS PEARSON, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V19009535

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Shelby Russell, Tyler and Yvonne Thomas, and Ross Pearson. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

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 |
| Exhibit no. 2 | Notice of violation no. V19009535 with proof of service, issued June 26, 2019 |
| Exhibit no. 3 | RASKC investigation report no. A19003326 |
| Exhibit no. 4 | Appeal, received July 8, 2019 |
| Exhibit no. 5 | Online Complaint form of June incidents including 9 video disks by Tyler Thomas, dated June 25, 2019 |
| Exhibit no. 6 | RASKC investigation report no. A19002708 |
| Exhibit no. 7 | RASKC investigation report no. A17009129 |
| Exhibit no. 8 | Notice of violation no. V17007634, issued November 23, 2017 |
| Exhibit no. 9 | RASKC investigation report no. A17004516 |
| Exhibit no. 10 | Map of subject area |
| Exhibit no. 11 | Log of barking intervals, submitted December 4, 2019 |

DS/jo

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V19009535**

ROSS PEARSON

Animal Services Enforcement Appeal

I, Jessica Oscoy, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **SUMMARY ORDER** 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.
- 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 December 18, 2019.



Jessica Oscoy
Legislative Secretary

Pearson, Michelle

Pearson, Ross

Hardcopy

Russell, Shelby

Regional Animal Services of King County

Thomas, Tyler/Ivonne

Hardcopy