

December 8, 2020

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

King County Courthouse
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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file no. **V20010613-A20011021**

TACY AND MARK BOWERS
Animal Services Enforcement Appeal

Activity no.: A20011021

Appellants: **Tacy and Mark Bowers**



King County: Regional Animal Services of King County
represented by **Shelby Russell**
Regional Animal Services of King County
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Kent, WA 98032
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FINDINGS AND CONCLUSIONS:

Overview

1. Regional Animal Services of King County (Animal Services) asserts that Tacy and Mark Bowers' dogs, Bella and Lola, were running-at-large and that Bella qualifies as vicious. The Bowers timely appealed. After hearing the witnesses' testimony, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, we overturn the running-at-large violation for Lola, sustain the running-at-large and viciousness violations for Bella, and reduce the monetary penalties.

Background

2. The basic events of April 14 are not really in dispute. Ms. Bosworth was taking a walk in her neighborhood. As she walked along SE 88th St., she passed the Bowers house on the opposite side of the street. (Ms. Bosworth was on the left side of the street, while the Bowers house was on the right side of the street.) A German Shepherd [Bella] came towards her, with a Doberman [Lola] in tow, snarling. As Bella reached her, Ms. Bosworth tried to turn away, but Bella jumped and bit her on the elbow, jumped at her again, and continued snarling. Ex. D6 at 002.
3. A woman [Ms. Bowers] called the dogs back and put them inside. Ms. Bowers was apologetic and said the dog was protective. Ms. Bosworth appreciated that Ms. Bowers came out to assist; she was very helpful. Ms. Bosworth went to the doctor, who gave her a prescription and suggested she report the bite to Animal Services.
4. Mr. Bowers testified that they are sorry for what happened. He explained that:

Bella has a history of being really protective. She has snipped at people. I don't know that she has actually bitten someone, but she definitely is an intimidating dog and that's just the nature of a German Shepard... She is by nature protective.

At some point in the past, they had a beware of dog sign and a no trespass sign on the road, but somebody took those down. They have since posted beware-of-dog signs and taken other steps, such as fencing and dog collars, to avoid a repeat.
5. SE 88th St. is signed as a “Private Road.” Ex. D3 at 018-021. It is an “easement road” created as part of two short plats to provide ingress and egress to various lots. Ex. A7 at 013, 017. The Bowers are one of seven owners along the road with a maintenance agreement for that road. Ex. A7. 009. The Bowers assert that Ms. Bosworth was walking on a private road without permission from the owners.
6. Ms. Bosworth testified that she did not know what the sign “private road” meant, and she believed she could walk there. She had met and talked to [Robert] King before on an adjacent private road, and he did not tell her she was trespassing. She also spoke with Ms. Teresa Schmoe, who also did not tell her she was trespassing.¹ Other neighbors in the area had told her how pretty that road was to walk on. She thought it was okay for her to walk on SE 88th St.
7. We held the record open at the conclusion of the hearing so we could establish the facts on which to analyze whether something about Ms. Bosworth's presence on the road should impact our analysis of the appealed violations here.

¹ Mr. King and Ms. Schmoe are both owners with an interest in SE 88th St. Ex. D3 at 12.

8. We emailed the parties and Leslie Drake, the County’s Road Property Program Director, to ask whether SE 88th St. is a public road.² Ms. Drake researched it and found no public right-of-way area interest in the area. Ex. A3. Animal Services responded with an Assessor print out showing that the Bowers parcel is served by a public road. Ex. D9. The Bowers contacted the Assessor, who noted that they would be correcting the data to show that the road in front of the Bowers is private and not public.³ Ex. A8.
9. The Bowers also submitted a declaration from Mr. King. Mr. King provided some background. Having lived in their current location since 1987, in 2016 they purchased additional property directly below their property on a different private road, 303rd Pl. SE. He recalls one day having a conversation with the woman he now believes was Ms. Bosworth, as she walked along 303rd Pl. SE. He explained to her how she could get to the main road. She was the only unknown solo female walker he has ever encountered. During the conversation his only concern was trying to help Ms. Bosworth get back to the main road. He did not either grant or deny her permission to use 303rd Pl. SE, let alone say anything about SE. 88th St. He typically stops strangers (on foot, bicycle, motorcycle, or vehicle), politely informs them they are on a private road, and requests they leave. Ex. A5.
10. In response, Animal Services showed that Ms. Bosworth was not living in the area in 2016. Ex. D10.

Legal Standard

11. Animal Services cited Bella and Lola for “running at large” on April 14, meaning “off the premises of the owner and not under the control of the owner, or competent person authorized by the owner, either by leash, verbal voice or signal control,” with “under control” itself including “restrained from approaching any bystander or other animal” when “off the premises of the owner.” KCC 11.04.020.W, .AA; .230.B.
12. More significantly, Animal Services cited Bella as “vicious,” which KCC 11.04.020.BB defines 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, including, but not limited to, biting a human being or attacking a human being or domesticated animal without provocation.

² As seen on the map, SE 88th St. curves into 300th Pl. SE. Ex. D8. Because the Bowers are on, and the attack occurred along, SE 88th St., and to avoid confusion with the separate 303rd Pl. SE discussed below, we will not mention 300th Pl. SE again.

³ Earlier today, our office received an email from Mr. Bowers which, apparently, confirms the corrected private road status. The document could not be opened, and it was well after we closed the record. However, as discussed below in paragraph 21, even without today’s email. we find that SE 88th St. is private.

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. Thus, a vicious designation does not mean a dog is mean-spirited, only that it meets the code criteria. A viciousness designation is fundamentally about the dog, not the owner; it is not a proxy for how much or how little care an owner is exercising. If an owner shows the violation occurred despite (not because of) the owner’s actions, that figures into the *remedy* (such as whether and by how much we reduce the penalty), but not whether the dog qualifies as “vicious.”⁴
14. In analyzing those issues, we do not grant substantial weight or otherwise accord deference to agency determinations. Exam. R. XV.F.3. 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.

Analysis

Running-at-Large

15. As to the running-at-large, Bella was not “under control...so as to be restrained from approaching any bystander.” KCC 11.04.020.AA. The violation only applies to dogs “off the premises of the owner.” An easement road that the owners of seven properties, plus at least each owner’s invitees and guests, have a right to be on is not “the premises of the [Bowers].” This issue comes up most frequently in the context of incidents occurring at a condominium. We have consistently ruled that common areas, such as lobbies, hallways, and walkways, do not qualify as “the premises of the owner” for purposes of KCC chapter 11.04, even though only a subset of people (owners, tenants, invitees, etc.), and not the general public, are allowed in such areas. Bella was off the Bowers’ premises and not under control when she exited the Bowers’ property and accosted Ms. Bosworth on the road. We sustain Bella’s running-at-large violation.
16. The evidence is not so clear with regard to Lola. Ms. Bowers was in the general vicinity, so this is not the scenario of a dog roaming the neighborhood with no owner in sight to even arguably assert sufficient control. Ms. Bowers was able to call Lola back before she actually engaged with Ms. Bosworth. Ms. Bosworth testified that Lola came off the property and snarled at her, but she did not discuss how close Lola got to her. Based on our record, we cannot definitively say that Lola “approached” Ms. Bowers, and thus we cannot say whether Lola was “under control... so as to be restrained from approaching

⁴ In one of our earliest appeals (which thus stands out among our almost 700 animal-related appeal), an appellant was walking her dog down the sidewalk, on a harness, with her body between her dog and oncoming pedestrians. She was acting exactly like a responsible dog owner should. Despite the care she was taking, without warning her dog suddenly darted behind her, lunged, and bit a passerby binding his own business. We reduced the monetary penalty significantly, but still upheld the viciousness designation, not because the owner was culpable but because the dog met the code criteria.

any bystander.” KCC 11.04.020.AA. As Animal Services bears the burden of proof, we overturn Lola’s running-at-large violation.

Vicious

17. The Bowers assert that Ms. Bosworth was trespassing on April 14. They point to RCW 46.04.420, which states that:

“Private road or driveway” includes every way or place in private ownership and used for travel of vehicles by the owner or those having express or implied permission from the owner, but not by other persons.
18. That RCW section is from the definition chapter, Chapter 4, within Title 46, “Motor Vehicles.” Other than being used in RCW 46.09.310(7) as part of the definition of another term (“nonhighway road”), “private road” is employed only in Chapter 61, “Rules of the road.” Within Chapter 61, it is used in the context of: exceptions to the requirement to drive in the right-hand lane (RCW 46.61.100), limitations on driving left of the center of the roadway (RCW 46.61.125), setting no-passing zones (RCW 46.61.130), vehicle drivers yielding to other vehicles when making a left-hand turn (RCW 46.61.185), drivers yielding to vehicles on a highway (RCW 46.61.250), speed enforcement (RCW 46.61.419), and when bicyclists are not required to stay near the right side of the road (RCW 46.61.770).
19. Thus, RCW 46.04.420 is a definition the legislature crafted to use in its “rules of the road” for drivers (and, in the context of RCW 46.61.770, bicyclists). It is, by definition, about a “way or place...used for travel of vehicles.” It defines—for traffic rule purposes—what characteristics qualify a road as a private road or driveway, instead of as an “arterial highway” (RCW 46.04.030), “city street” (RCW 46.04.120), “county road” (RCW 46.04.150), “highway” (RCW 46.04.197), “laned highway” (RCW 46.04.260), “roadway” (RCW 46.04.500), or “state highway” (RCW 46.04.560) for traffic rule purposes. It does not speak to whether someone is or is not allowed to walk in an area. RCW 46.04.420 is thus not directly relevant to the issues before us.
20. That does not mean that the status of SE 88th St. and Ms. Bosworth’s presence on SE 88th St. are not relevant.
21. As to the status of the road, the County’s Road Property Program Director has confirmed that SE 88th Pl. is not a public right-of-way, status the Assessor has echoed. Exs. A3 & A8. In answer to Mr. King and the Bowers’ concern about opening up public access to a private road, we presume that members of the public are not allowed in that area, absent some sort of express or implied consent. *See* Ex. A5 at 004. The traffic code the Bowers cited does not get them there, but we presume that the public is not generally allowed on SE 88th Pl. or the other private roads in the area. The issue is how that plays into whether Bella meets the code criteria for the violation.
22. On first blush a section from the RCW chapter labeled “Dogs” seemed pertinent to our scenario. RCW 16.08.050 states:

A person is lawfully upon the private property of such owner within the meaning of RCW 16.08.040 when such person is upon the property of the owner with the express or implied consent of the owner: PROVIDED, That said consent shall not be presumed when the property of the owner is fenced or reasonably posted.

23. Our court thoroughly analyzed RCW 16.08.050 and .040 in *Sligar v. Odell*, 156 Wn. App. 720, 233 P.3d 914 (2010). *Sligar* and section .050 jumped to mind as potentially the appropriate standard to apply in our jurisprudence. On closer analysis, however, RCW 16.08.050 and *Sligar* are of limited value for us.
24. By its own terms, RCW 16.08.050 is confined to describing when a person is deemed “lawfully upon the private property of such owner within the meaning of RCW 16.08.040” (underscore added). Section .040 is the section abrogating the common law rule that a non-negligent dog owner is not liable to a victim unless the owner knew or should have known the dog’s propensities; section .040 replaces it with a rule that lack of owner knowledge or of past dog behavior does not eliminate liability for bites to a person in a lawful place. *Sligar*, 156 Wn. App. at 728. Section .050’s definition of “lawfully upon private property” does not—given its express statement that it is setting the ground rules for section .040—even govern other tort causes of action. *Sligar* at 731-33 (later analyzing common-law negligence and strict liability claims).
25. More to the point, section .050 does not govern other portions within the “Dog” chapter of the RCW (16.08), such as whether a dog qualifies as “dangerous.” RCW 16.08.090(3) uses very different language in determining how the legality of the victim’s presence on the property impacts the *dog’s* designation (as opposed to the dog *owner’s* culpability):

Dogs shall not be declared dangerous if the threat, injury, or damage was sustained by a person who, at the time, was committing a wilful trespass or other tort upon the premises occupied by the owner of the dog, or was tormenting, abusing, or assaulting the dog or has, in the past, been observed or reported to have tormented, abused, or assaulted the dog or was committing or attempting to commit a crime.⁵
26. That seems intuitive, that the threshold for how illicit a person’s presence must be to negate her ability to recover damages (in the absence of a dog owner’s knowledge or negligence) would be lower than the threshold for how illicit a person’s presence must be to negate a designation for a dog that otherwise meets the code criteria. Thus, to the extent Chapter 16.08 RCW guides whether Bella qualifies as vicious under the County code, the RCW section (.090) focusing on whether a *dog* deserves a certain designation is significantly more relevant than RCW sections (.040 and .050) regarding the specific criteria for when an *owner* is liable for tort damages.
27. Given the massive consequences of a dangerous dog designation, the threshold level of bite victim misconduct negating a dangerous dog designation should, if anything, be *lower*

⁵ “Wilful” is the British spelling, but has been replaced in America by “willful.” <http://volokh.com/2011/10/19/wilful-vs-willful/>. We keep the quote intact but otherwise employ “willful.”

than the misconduct required to negate a comparably less onerous vicious dog designation.⁶ In fact, subsection .090(2) notes that nothing in section .090 is meant to limit restrictions on *potentially* dangerous dogs, a lower designation. However, because “vicious” is the County’s highest (and only) designation, we hold that, absent some truly compelling circumstances, if a section .090(3) condition is met, no viciousness designation may attach.⁷

28. As to Ms. Bosworth’s status on that road, we do not find any significant discrepancy between her and Mr. King’s testimony. While Animal Services treats Mr. King’s statement as meaning that the conversation he was recalling occurred in 2016—before Ms. Bosworth moved to the area in 2017—Mr. King did not write that. Instead, he explained that 2016 was the year they added onto their 1987 holdings with the purchase of a property on 303rd Pl. SE. Ex. A5.
29. We find that Ms. Bosworth and Mr. King are describing the same conversation, and actually in a similar way. They both agreed the conversation was not on SE 88th Pl., but on a separate private street, which we find was 303rd Pl. SE. And there is no dispute as to what was said and not said:
- Mr. King wrote that while he typically stops strangers (on foot, bicycle, motorcycle, or vehicle). politely informs them they are on a private road, and requests they leave, he did not do this during his conversation with Ms. Bosworth. He was focused on trying to help her get back to the main road and he did not grant or deny her permission to walk the private 303rd Pl. SE, let alone comment on SE 88th St.
 - Ms. Bosworth did not say that Mr. King—or Ms. Schmoe (another owner) when Ms. Bosworth talked to her—affirmatively said she could walk there, only that they talked and neither owner told her she could not walk on the private road; from those conversations, along with other conversations with others in the larger neighborhood, she concluded it was fine for her to walk there.
30. We presume that Ms. Bosworth was trespassing on April 14. However, based on her earlier conversations with Mr. King and Ms. Schmoe (where neither one told her she was not allowed to walk their “private road”), her conversations with other neighbors who told her what a pretty road it was to walk on, the lack of something like a “No Trespassing” sign,⁸ and because while we presume her walking SE 88th Pl. was a trespass the traffic code the Bowers cited to support this proposition does not show that, we find

⁶ Compare RCW 16.08.080(6) (requiring owners of dangerous dogs to keep dogs in a proper enclosure, obtain a \$250,000 surety bond, plus a \$250,000 liability insurance policy required *and* RCW 16.08.090(1) (dangerous dog must be muzzled anytime outside a proper enclosure) *with* the standard vicious dog restrictions here—no surety or insurance conditions, secured area only required when dog outside the home and unattended, and collar or harness (not muzzle) required off the property. Ex. D3 at 003.

⁷ For example, a thief is attempting to steal a package from an owner’s front stoop. The owner’s dog comes out and bites the man; that is all well and good. But then, after the man falls down and becomes incapacitated, the dog continues the mauling, eventually ripping out the prone man’s throat and killing him. With such a grossly disproportionate response, we would be hard-pressed to overturn a viciousness designation, even though the man entered the property to steal a package.

⁸ The sign says, “Private Road; No Access to Tiger Mt.; Residence Access Only.” Ex. D3 at 018.

it reasonable (albeit probably erroneous) for her to conclude she was allowed to walk on SE 88th St. that day. Set in the context of RCW 16.08.090(3) limiting the criteria to extreme actions—tormenting, abusing, or assaulting a dog; attempting to commit a crime; and committing a *willful* trespass or other tort—we find that on April 14, Ms. Bosworth was not willfully trespassing or otherwise triggering any RCW 16.08.090(3) threshold.

31. That is not the end of the analysis, because, as *Sligar* reminds us, the words the legislature chooses in drafting its code matter very much. So, we turn to KCC chapter 11.04 in determining how our situation impacts whether Bella qualifies as vicious.

32. The “vicious” definition itself does not reference location or legality, instead stating,

Having performed the act of, or having the propensity to do any act, endangering the safety of any person, animal or property of another, including, but not limited to, biting a human being or attacking a human being or domesticated animal without provocation.

KCC 11.04.020.BB.

33. The specifics of a person’s entrance onto the property, and location of the incident, do play into “provocation.” The “provocation” inquiry “focuses ‘on how an average dog, neither unusually aggressive nor unusually docile, would react to an alleged act of provocation.’” *Bradacs v. Jacobone*, 244 Mich. App. 263, 273, 625 N.W.2d 108, 113 (2001) (citing *Kirkham v. Will*, 311 Ill. App. 3d 787, 792, 724 N.E.2d 1062 (2000)). And provocation requires the dog’s reaction to be proportional to the victim’s act. *Bradacs* at 273–75; *Kirkham*, at 792; *Stroop v. Day*, 271 Mont. 314, 319, 896 P.2d 439 (1995).

34. If, for example, Ms. Bosworth entered the Bowers property and got too close to Ms. Bowers or the dogs, that might have amounted to “provocation.” Here, in contrast, Ms. Bosworth was on the opposite side of the street from the Bowers home and not doing anything other than walking. After reviewing almost 700 animal-related appeals, Lola’s reaction (a dog, neither unusually aggressive nor usually docile, sees a strange person on the opposite street, and comes out for some warning barks) seems significantly more average than Bella’s. Bella has a history of being really protective and has snipped at people. Actually, running up to Ms. Bosworth, jumping up and biting her in the elbow, through the sleeve hard enough to slice her, then jumping at her again, was grossly disproportionate to any provocation Ms. Bosworth’s presence on the street created.

35. Lawfulness does come into play in KCC 11.04.230.H, which declares a nuisance, “Any animal that has exhibited vicious propensities [*here, Bella biting Ms. Bosworth, without provocation on April 14*] and constitutes a danger to the safety of persons or property off the animal’s premises or lawfully on the animal’s premises.” As analyzed above in paragraph 15, we find the road on which Ms. Bosworth was walking when she was attacked was not Bella’s premises, so Ms. Bosworth was off Bella’s premises. More to the point, whether on or off the premises, there are scenarios where a dog’s unprovoked bite

is not strong evidence that the dog constitutes a danger.⁹ But here we do not see how the situation would have been any different if, instead of a Ms. Bosworth walking on the road, it would be someone walking to fulfil a delivery order for one of the houses. Even without the testimony that Bella has a history of being really protective and of snipping at people—meaning April 14 was not some one-off, a scenario where a docile animal did a 180—we find that Bella constitutes a danger to the safety of persons off her premises or lawfully on her premises. We sustain her viciousness violation.

Penalty

36. As to the penalty amount, where an incident happens despite, not because of, the owners' efforts, and/or where the owners take steps after the fact to address the issue, we have reduced the penalty. It is not clear exactly what system they had in place, before April 14, to contain a dog with Bella's history or why, for example, they had not re-posted the "Beware of Dog" sign. But Ms. Bowers came out that day immediately, called off the dogs, apologized to Ms. Bosworth, and provided her prompt (and appreciated) medical treatment. And, at least since April 14, they have re-posted the beware of dog sign and a no trespass sign and have taken other steps, such as fencing and dog collars, to avoid a repeat performance. We think a penalty reduction is in order.

DECISION:

1. We GRANT the appeal as to Lola's running-at-large violation.
2. We DENY the appeal as to Bella's running-at-large and viciousness violations, but we REDUCE the cumulative penalties (\$50 plus \$500) to \$300.

ORDERED December 8, 2020.



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 7, 2021*. Either party may appeal this decision by applying for a writ of review in superior court in accordance with chapter 7.16 RCW.

⁹ For example, someone is blowing soap bubbles to a girl and a dog. The dog and girl chase the bubbles to pop them, the girl with her hands, the dog with his mouth. At some point they both lunge for the same bubble, with her hand reaching it just as his mouth clamps down on both hand and bubble, injuring her hand. The dog has "exhibited vicious propensities" by having "bit[] a human being...without provocation." Despite that, under those facts we would not find that the dog "constitutes a danger to [] safety."

**MINUTES OF THE OCTOBER 7, 2020, HEARING IN THE APPEAL OF TACY
AND MARK BOWERS, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE
NO. V20010613-A20011021**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Shelby Russell, Theresa Bosworth, and Mark Bowers. A verbatim recording of the hearing is available in the Hearing Examiner’s Office. The hearing record closed on October 14, 2020.

The following exhibits were offered and entered into the record by Animal Services:

Exhibit no. D1	Regional Animal Services of King County staff report to the Hearing Examiner
Exhibit no. D2	Notice of violation no. V20010613-A20011021, issued August 15, 2020
Exhibit no. D3	Appeal, received August 24, 2020
Exhibit no. D4	RASKC investigation report no. A20011021
Exhibit no. D5	Online Complaint form of April 14, 2020 incident by Theresa Bosworth, dated April 14, 2020
Exhibit no. D6	Photograph of torn clothes and injuries
Exhibit no. D7	Free Dictionary definition of Private Roads
Exhibit no. D8	Map of subject area
Exhibit no. D9	Department of Assessments Property details
Exhibit no. D10	Email correspondence and Property details document, dated November 4, 2020

The following exhibits were offered and entered into the record by the Appellant:

Exhibit no. A1	RCW 46.04.420 Private road or driveway
Exhibit no. A2	Letter to the Hearing Examiner, submitted October 6, 2020
Exhibit no. A3	Email thread on response from Roads, submitted October 14, 2020
Exhibit no. A4	Email thread on response from Hearing Examiner, submitted October 25, 2020
Exhibit no. A5	Email thread including Robert King’s statement, submitted October 29, 2020
Exhibit no. A6	Email thread on response from Mr. Bower’s road description, submitted November 5, 2020
Exhibit no. A7	Email thread and Tigercrest Road Agreement document, submitted November 10, 2020
Exhibit no. A8	Email correspondence from Carolyn Liepelt, dated November 17, 2020

December 8, 2020

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KING COUNTY, WASHINGTON**

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V20010613-A20011021**

TACY AND MARK BOWERS
Animal Services Enforcement Appeal

I, Lauren Olson, 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.
- 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 8, 2020.



Lauren Olson
Legislative Secretary

Bosworth, Theresa

Hardcopy

Bowers, Tacy/Mark

Hardcopy

Russell, Shelby

Regional Animal Services of King County