December 9, 2020

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file no. **V20010905-A20012642**

NATALIE AND MICHAEL DE MAAR
Animal Services Enforcement Appeal

Activity no.: A20012642

Appellants: **Natalie and Michael de Maar**

King County: Regional Animal Services of King County
represented by **Tim Anderson**
Regional Animal Services of King County
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FINDINGS AND CONCLUSIONS:

Overview

1. Regional Animal Services of King County served Natalie and Michael de Maar with a notice and order asserting that their dogs, Scarlett and Rhett, qualified as vicious. We went to hearing, then held the record open for some briefing. After hearing the witnesses' testimony, studying the exhibits admitted into evidence, considering the parties' arguments and well-written briefs, and analyzing the relevant law, we overturn Rhett's viciousness designation, uphold Scarlett's, and reduce the monetary penalty.

Relevant Testimony and Evidence

From Seth Saunders

2. Mr. Saunders testified that on July 7, 2020, he was canvassing for High Performance Homes (HPH), part of an HPH team with Deshawn Johnson (his supervisor that day) and Tenishia Newton. Mr. Saunders was in the backseat. An office manager decides where the team goes, and then the team manager (that day, Mr. Johnson) decides the precise route.

3. Mr. Saunders did not see a no solicitation sign at the entrance to the de Maars' community, and he looks for those things, having been advised that he is not allowed to enter a property with no solicitation sign. Towards the end of their eight-hour workday, which included stops at several houses in the vicinity, they parked on the street near the entrance to what would turn out to be the de Maar house.

4. While his coworkers stayed in the car, Mr. Saunders hopped out. He did not see any signs for no solicitation, no trespassing, or beware of dog. He walked the de Maar driveway to the front door. There was no gate he needed to pass. There were no dogs as he approached. He noticed the car in the driveway (Ms. de Maar's), but he is not 100% sure if he saw someone in the car.

5. At the front door, Mr. Saunders knocked and then moved back off the steps. He waited, and then a man (Mr. de Maar) opened the door. As Mr. de Maar turned back to get the door, two large dogs came out and darted at him. He did not recall any growling or barking, but there was no playfulness—just a straight shot at him. As one dog went low to his groin, he tried to drop his hand, but the dog shoved his head forcefully into Mr. Saunders' crotch, chomping on his testicles and giving a slight rotation. As he was hunched over trying to get the dog off his crotch, his elbow was exposed to the outside; the other dog came around from behind and bit that arm. Ex. D6 at 001. The dog that bit his crotch was a large German Shepherd, but he was not so sure the breed of the second dog, as he was not really focused on the second dog. Mr. de Maar gave a command, and the dogs let go.

6. After the German Shepherd clamped on his testicles, the wind went out of him, like a temperature/altitude change. He lost his breath and was in a state of shock, not really understanding what was happening. His adrenaline kicked in. Mr. Saunders pitched why he was there, but Mr. de Maar was not interested in HPH's services. He told Mr. de Maar he thought the dogs got him pretty good.

7. He was feeling nausea and pain as he got back to the car, but once he checked his pants and saw blood, a second wave hit him. One of his coworkers took a picture of his crotch to document the wound.

8. Mr. Johnson wanted to stop and see if the dog was up-to-date on his shots. They drove down the de Maar driveway, with Mr. Saunders in the backseat applying napkins to try to stop the blood. Mr. Saunders cannot recall if he saw Ms. de Maar in her car before, but he saw her when Mr. Johnson drove in. Ms. de Maar said it was baloney and she was a

lawyer. He remembers something about Ms. Newton offering to show Ms. de Maar pictures of his wound, but he does not remember specifics of the conversation.

9. They googled urgent care facilities and drove to the nearest one, Concentra. He was not sure how long he waited in the Concentra lobby, maybe 5 to 10 minutes, which he later amended to maybe 20 minutes. When he got in to see the doctor there, the examination was brief. The doctor told him that because of the nature and location (his testicles) of his wounds, they could not treat him, and he would need to go to an actual ER. His coworkers then took him to Overlake and dropped him off.

10. After a wait at the ER, they checked him in. After he was taken into the examination room, the doctor came in and told him he was lucky the cut did not go deeper. Instead, they described it as "all meat," a rip-and-tear they could stitch up. His scrotum required seven sutures; his arm did not require any. He got follow-up care for the sutures. When they removed the sutures, they said he would be okay and need not worry about reproductive issues.

11. Overlake's records read, "presents with dog bite to the left upper arm at the area of the tricep[s] and injury to the scrotum." Ex. D7 at 001. More specifically, "Genital exam performed with a nurse at the bedside. At the mid inferior scrotum there is a 2 cm superficial laceration. This involves the skin and does not penetrate the diagnosis fashion. No testicular pain or swelling." Ex. D7 at 002. In addition, "Physical exam reveals scrotal laceration. I will treat this patient with laceration repair," which amounted to seven sutures. Ex. D7 at 002. The assessment was a "dog bite with left arm and scrotum injury. This patient[']s symptoms appear most consistent with bite with superficial scrotal laceration…. I did not see evidence of testicular injury or scrotal penetration…. Left arm injury: Consistent with contusion and abrasions and possible puncture. No laceration." Ex. D7 at 003.

12. Mr. Saunders stated that he missed about two weeks of work, but his supervisor told him he would remain on the payroll while he recovered. As to why HPH's tracking system shows his shift ending at 9:24 PM that day, exhibit A5, he explained they get clocked out after the car gets back to the HPH office. He did not return to the office that evening, but his coworkers did. He thought the incident occurred maybe 6 to 6:30 PM, but he was not sure, only that it was towards the end of the scheduled day.

<u>From DeShawn Johnson</u>

13. Mr. Johnson testified that on July 7 he, Ms. Newton, and Mr. Saunders were driving the HPH car. He did not see a no solicitation sign. Mr. Saunders was in the back seat. After they pulled up on the street a few meters from the de Maar's driveway, Mr. Saunders got out and walked down. Because of vegetation screening their view, they could not see Mr. Saunders as he approached the front door. He heard a man calling for the dogs and telling them to get off; he did not hear anything from Mr. Saunders

14. When Mr. Saunders came back to the car, he got in directly behind Mr. Johnson. Mr. Saunders said he was done for the day. When asked why, Mr. Saunders said a dog bit him in the groin and he was in shock. Mr. Saunders was not crying or saying he was in a lot

of pain. Mr. Johnson explained that his company's protocol is to document dog bites and check if the dog is current on its shots, so they took Mr. Saunders back up the driveway. Mr. Johnson did not exit the car, as he did not know where the dogs were. After he honked the horn, Ms. de Maar came to the upstairs window. He explained to her what happened, but she denied there had been a bite, told them she was an attorney, and refused to give them any information.

15. They drove Mr. Saunders to urgent care, a drive he estimated to be about 20 minutes. He thought they were waiting at the clinic for a while, maybe an hour or two. He called the office to let them know they would be late. When Mr. Saunders came back, he told them he had to go to the hospital because his injuries were too bad for urgent care. Mr. Johnson recalled Mr. Saunders telling them they could leave. He thinks they left urgent care about 8:30 or 9 and not taking Mr. Saunders to Overlake, because Mr. Saunders said his girlfriend would come.

16. Mr. Johnson explained how their shift ends when they get back to the HPH office and they send their manager a text.

From Michael de Maar

17. Mr. de Maar testified he was sitting in his office that evening. From there he had a partial, though mostly bush-obscured view, of events. He saw his wife drive down in her car and park, but then remain in her vehicle. His dogs bark especially, when they know she is there. He usually goes out to help her, in case she has heavy stuff to carry in. He was unaware anyone else was near the house. Mr. Saunders did not knock or ring the door; when someone does that, the dogs bark.

18. When Mr. de Maar opened the door, Mr. Saunders was standing about 10 yards away from the door. The dogs approached Mr. Saunders. He did not see either Scarlett (the German Shepherd) or Rhett bite Mr. Saunders. He does not remember if he turned his back as he closed the door. He does remember that, after the dogs reached Mr. Saunders, he grabbed Scarlett and Rhett ran to Ms. de Maar in the driveway.

19. He did not see Mr. Saunders bleeding, and Mr. Saunders calmly asked him about his roof. After he said no, Mr. Saunders asked about siding and windows. Mr. Saunders did mention he thought the dog bit him in the testicles, but Mr. de Maar saw no evidence of that, as Mr. Saunders tried to sell him services. Mr. Saunders then walked away, and Ms. de Maar entered the house.

20. Several minutes later, he heard a commotion and saw the white car. From the kitchen he could hear Ms. de Maar talking from their upstairs window. Afterwards, she came down and said two people asked her if she wanted to see photos of genitals, and that she thought this was a scam, because there had been burglaries in the neighborhood involving a white car.

21. As to the dogs, Scarlett has been starting to show mental issues in the last year. She also has dysplasia, and cannot mount steps or leap up. She is approximately 130 pounds. Rhett, the brindled Dutch Shepherd, is about half her size (75 pounds).

From Natalie de Maar

22. Ms. de Maar explained that they live in a U-shaped neighborhood of about 70 homes. The houses are set back. There was no car in the street when she pulled into their driveway. She saw Mr. Saunders out the corner of her eye, as he walked towards the door. When she eventually opened the car door, Rhett jumped in. Rhett is a three-year-old small, active dog; both dogs are very friendly.

23. She saw Mr. Saunders on the walkway, chatting with Mr. de Maar, while Mr. de Maar had Scarlett in a sitting position. Mr. Saunders tried to upsell them products. She asked him to leave.

24. After Ms. de Maar went inside the house, she heard voices and went to her bedroom window. She saw a man and a woman, but not a third person. The man (Mr. Johnson) said their dog had bitten a canvasser, and the woman (Ms. Newton) asked if she wanted to see pictures. Ms. de Maar said no, and that they could have their attorney call her.

25. She then told Mr. de Maar she thought they were about to be scammed. There have been robberies where "canvassers" came to the door and then robbed the place. She was spooked and called her insurance company and the sheriff. She thinks Mr. Saunders' assertion is a precursor to something further. She cannot say for sure what happened on July 7, but her immediate reaction was that there was more to the story than Mr. Saunders was conveying.[1]

26. People do not usually solicit in their neighborhood. The homeowners' association board made a choice to put up a no solicitation sign at the entrance to the neighborhood. Ex. A4 at 002. Their house is the second house past the sign. She does not think Mr. Saunders was properly on their property, and him not seeing signs is not a defense. She thinks he was a trespasser.

27. Having had six sons, it is indescribable to her that Mr. Saunders could be struck in the groin, show no visible reaction or distress, and keep trying to sell HPH services. She thinks maybe the dogs could have run by and "brushed" Mr. Saunders, but she does not believe her dogs bit him. She does not think the wound on his arm is a bite. The testimony is inconsistent, the timeline is all over the place, and the medical evidence does not support his claims. She thinks Mr. Saunders concocted these bites.

Legal Standard

28. Scarlett did not have a valid license at the time of the incident, and Animal Services included that as a violation. Ex. D3 at 003. The de Marrs explained that this was an oversight, they have since rectified it for Scarlett; Rhett was always licensed. Exs. D8 & D9; Ex. A1 at 001. At hearing, Animal Services waived the licensing issue. Thus, there is no licensing violation to discuss.

[1] The de Maars have opined both that Mr. Saunders' claim was part of a scam to find expensive homes with dogs, make false claims to animal control, and then follow-up with demands for money, and also that Mr. Saunders was part of a burglary ring. Ex. D3 at 001; Ex. A3 at 001.

29. The remaining issue is Animal Services' assertion that Scarlett and Rhett qualify as vicious. The code defines "vicious" 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.

KCC 11.04.020.BB. And the code declares 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." KCC 11.04.230.H.

30. 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 compliance terms and whether and by how much we reduce the penalty), but not whether the dog qualifies as "vicious."[2]

31. In answering those questions, we do not grant substantial weight or otherwise accord deference to agency determinations. Exam. R. XV.F.3. It is a *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.

Analysis

What Happened on July 7?

32. We do not doubt Mr. de Maar's veracity when he says he did not see his dogs bite Mr. Saunders. We have reviewed approximately 320 vicious dog cases in our four years handling animal-related appeals. It is not uncommon, even in hearings where the fact of a bite is not in dispute, that an eyewitness standing right there later notes not actually seeing the bite. Sometimes even the victim acknowledges not immediately noticing being bitten. On top of that, Mr. de Maar reached back to close the door after the dogs got out. In any event, even though we conclude he is being honest, his testimony is far from dispositive as to whether one or both dogs actually bit Mr. Saunders.[3]

33. There were inconsistencies in Mr. Saunders' statements. For example, in his complaint filed two days after the incident, he wrote that he rang the doorbell, while in his

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[2] In one of our earliest animal cases (which thus stands out among our almost 700 animal-related appeals), 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.

[3] Ms. de Maar observed Mr. Saunders with her husband and the dogs only *after* Rhett had left the scene and come to her and after Mr. de Maar had restrained Scarlett. She thus had no eyewitness testimony about the critical moments.

testimony three months later he stated that he knocked on the door. Ex. D5 at 002. In that complaint he wrote that the altercation occurred at 7:20 PM, while at hearing three months later he opined 6 or 6:30 but that he did not recall, other than it was towards the end of his shift. In his original interview he stated that Ms. de Maar "came outside," when the weight of the evidence is that Ms. de Maar only stuck her head out the window to talk with Mr. Johnson and Ms. Newton. Ex. D4 at 003. And he varied his estimate of the time he spent at the urgent care lobby from 5 to 10 to 15 minutes.

34. Oftentimes, very minute details matter. For example, where animal identification is the crux of the appeal (was the animal that attacked the complaint the appellant's, or another similar-looking animal from the neighborhood? how did the complainant know the nighttime barking she was hearing was all coming from appellant's animal?), a lack of precise recall can be dispositive. Here, however, the de Maar theory is that Mr. Saunders slit his own scrotum and bloodied his own arm as part of some burglary ring or personal injury claim scam. Ex. D3 at 001; Ex. A3 at 001. So, we are faced not with a nuanced scenario—where a witness's inability to recall exact details is often outcome-determinative—but one that comes down to whether or not Mr. Saunders (and presumably Mr. Johnson and Ms. Newton, as they would seem to have had to be in on the scam) is lying through his teeth and fabricating an attack that never happened.

35. We take judicial notice that Ms. de Maar's assertion that would-be burglars use solicitation as a cover to case a joint for robbery is relatively common knowledge; thus, her initial suspicion seems reasonable. A fly-by-night operation could be a front for a robbery ring, with solicitation a convenient excuse to get brigands onto properties with plausible denial. But there is no indication HPH (UBI #603 231 615) is anything but a large, multi-branch roofing/siding/windows company. Mr. Saunders, along with Ms. Newton and Mr. Johnson, all have thorough corporate employment agreements. Ex. A5 at 006-060. So, Mr. Saunders, Ms. Newton, and Mr. Johnson would have had to be running their own side scam, all while trying to meet their daily quotas and sales figures to remain employed at HPH and thus retain their cover. That is theoretically possible, but a highly doubtful proposition.

36. We also take judicial notice that Ms. de Maar's assertion that scammers fake a bite to eventually make a fraudulent personal injury claims scams is also a thing; thus, her initial suspicion seems reasonable.[4] And we hear witnesses embellish or fabricate many things under oath. However, such witnesses typically do not volunteer[5] the type of undercutting information Mr. Saunders did, such he was not really focused on the dog biting his arm, he was "lucky" the injury to his private parts was superficial, and the doctors assured him the bite would not cause him any reproductive issues. If he was looking to make a case, why not put on a show for the de Maars—double over and scream, then pitch them a story of excruciating suffering? Why, a few hours later, would he tell the treating physician at Overlake that his testicles themselves were not causing him pain? Ex. D7 at 002. Why, when he went to his follow-up medical appointment ten days later (with enough time to get his claim straight), would he tell the urologist there was only

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[4] *See, e.g.*, https://viraltab.news/fraudsters-targeting-dog-owners-with-new-fake-bite-scam/.

[5] By "volunteer," we mean something the witness unilaterally offered during their narrative, and not something admitted to on cross-examination.

"minimal tenderness at the injury site" and then affirmatively "den[y] any deeper testicular pain." Ex. D7 at 004. Why would he then volunteer at hearing that while he did miss some work, his employer had his back and kept him on the payroll?

37. Perhaps Mr. Saunders is the least effective personal injury scammer ever—going to the trouble of slicing his own scrotum, jabbing and scraping his arm in meticulous detail to look remarkably like a dog bite (yet only a very mild bite), and concocting an elaborate ruse, but then undercutting his potential damages claim with almost every word that came out of his mouth, and with every scream and protestation of pain that did not come out of his mouth. A far more likely explanation is that he was just a canvasser who got bit doing his job and had no reason to embellish anything.

38. As to the timing and specifics of Mr. Saunders' medical care that evening, Ms. de Maar asserted that Mr. Saunders did not arrive at urgent care until 10:52 PM. Ex. A4 at 001. That seems incorrect. Mr. Saunders arrived at Overlake at some point before the intake person clocked him in, apparently at 9:22 PM. Ex. D7 at 001. Mr. Saunders statement, two days after the event, was that the altercation occurred at about 7:20 PM. Ex. D5 at 002. For Mr. Saunders to talk to the de Marrs, walk back to the car, explain the situation to his coworkers, have them take photographs, have them drive onto the property, honk the horn, wait, have them argue with Ms. de Maar, search for an urgent care facility, have them drive him there, wait to be seen, get taken back to an examination room, have the doctor examine him and explain why they could not treat him there, come back to the car, be driven from urgent care to the ER, enter the ER, wait for intake, and then get entered into the Overlake system, in a two-hour, or even three-hour, period does not seem like much of a gap.

39. Moreover, everyone agrees that, within minutes of the altercation, Ms. Newton offered pictures of Mr. Saunders' injury. That is a strong indication that the wound—from a bite or self-inflicted—had already occurred. Thus, this is not a scenario where they had hours to concoct some story and fabricate the evidence. Either Ms. Saunders slit his own scrotum within a few minutes of the "altercation," or Scarlett slit it for him. The post-incident treatment timing issue is a red herring.

40. The only significant inconsistency in the treatment testimony is who drove Mr. Saunders from urgent care to the ER. Mr. Johnson recalled Mr. Saunders say his girlfriend would pick him up, so they left him at urgent care. Mr. Saunders said no, he told them his girlfriend would come to the ER, so they could leave him at the ER. If this was a robbery or personal injury scam, that seems a pretty basic point to get straight. Again, this is not a case that turns on precise recollection of minute details. Either Mr. Saunders sliced his own scrotum, jabbed and scraped his own arm, and faked the whole thing, or he was just trying to get treated that night, his co-workers did the best they could to help him out, and three months later some of the details are a little hazy.

41. That still leaves the de Maar's strongest point, the best reason from them—and us—to remain suspicious: if Mr. Saunders had just been bitten in his privates, why would he proceed with his sales pitch and not exhibit more physical signs of distress? That gives us serious pause, but one takeaway point from entertaining hundreds of vicious dog appeals

is that once an altercation starts, the adrenaline starts pumping, and people do some bizarre things and fail to do some commonsense things that would (under normal circumstances) be bizarre not to do. So we are comparing a version of events that is not what we would expect (after a dog bit a man's testicles, not to mention his arm, the man did not exhibit common distress signs and even gave a sales pitch before exiting) with another version that a man sliced his own scrotum and wounded his own arm as part of a scam to case the joint for robbery or to fake an injury to extract pain and suffering damages—damages he then took seemingly every step to downplay.

42. The de Maar's theory might be enough to create reasonable doubt if this were a criminal trial. However, we employ a preponderance of the evidence standard.[6] And after weighing the testimony, physical evidence, witness credibility, and story plausibility, we find Mr. Saunders credible, and find his version significantly more probable than the de Maars' theory. On July 7, Scarlett bit Mr. Saunders' scrotum, and Rhett bit his arm.

Initial Application of Law to Facts

43. As noted above, KCC 11.04.020.BB defines "vicious" 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.

44. The de Maars did not raise provocation, and our appeals are limited to issues raised in an appeal statement or amended statement. KCC 20.22.080.G. However, even if they had raised it, Animal Services would have met its burden here of showing the bites were without legal 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. Jiacobone*, 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)).[7]

45. Per Mr. de Maar's version, when he opened the door, Mr. Saunders was standing ten yards away from the door.[8] Even if Mr. Saunders were a little closer, this was not a scenario where, for example, Mr. Saunders was right at the door, a few inches from Mr. de Maar and right in the dogs' grill, and a split-second reaction happened. Instead, Mr.

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[6] KCC 20.22.210.B. *See also Mansour v. King County*, 131 Wn. App. 255, 265, 128 P.3d 1241, 1246 (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 than the examiner entertained animal enforcement appeals.

[7] Our High Court instructs us, when analyzing "terms of art," to look to "well-established meanings" of words in their specific context. *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 the term in depth have noted that although dictionary definitions of "provocation" can be quite broad, the term applies more narrowly in the dog bite context. Otherwise, animal control ordinances "could be interpreted to mean that provocation exists whenever any external stimulus has precipitated the attack or injury by an animal, *i.e.*, whenever the animal's actions are not completely spontaneous." *Robinson v. Meadows*, 203 Ill. App. 3d 706, 710, 561 N.E.2d 111 (1990).

[8] Mr. Saunders did not offer a distance estimate.

Saunders was standing back from the door, and the dogs had to charge some distance to get to him and bite him. Having read dozens of provocation cases, the facts here do not rise close to what the jurisprudence deems legal provocation. Scarlett's and Rhett's actions were grossly disproportionate to any incitement Mr. Saunders' presence created. They endangered the safety of a person, here by biting Mr. Saunders without sufficient provocation. Both dogs meet KCC 11.04.020.BB's definition of vicious.

46. That is not the end of the analysis, as the violation itself applies to "[a]ny animal that has exhibit<u>ed</u> vicious propensities <u>and</u> constitut<u>es</u> a danger to the safety of persons or property off the animal's premises or lawfully on the animal's premises." KCC 11.04.020.230.H (italics added). Rhett and Scarlett met the backwards-looking part of that, having exhibited vicious propensities on July 7, when they bit Mr. Saunders without provocation. Whether one or both meets the constitutes-a-danger element is more interesting.

47. A dog biting someone, unprovoked, is typically strong evidence that the dog constitutes a danger. There are exceptions—scenarios where a dog's unprovoked bite would not be strong evidence of the dog posing a safety risk.[9] In general, vicious behavior has warranted a viciousness designation and the requirement to contain the dog to prevent the dog from again endangering more people or their pets. We return to that topic below, but the twist here is the "and constitutes a danger to the safety of persons or property off the animal's premises or <u>lawfully on the animal's premises</u>." And that leads us to the next section in our analysis.

<u>Application of Law to Facts, Given Mr. Saunders' Presence on the de Maar Property</u>

48. On July 7, Mr. Saunders was on the de Maar property to try to facilitate a sale of HPH's services. The de Maars point to KCC 12.66.010, which states that:

> If a person has not been requested or invited by the occupant, the person shall not enter or remain upon any private premises for the purpose of contacting the occupant to solicit the immediate or future purchase or sale of goods, services or any other thing of value if a sign stating "No Solicitation" or "No Trespassing" is posted at or near the entrance to the premises.

49. The de Maars did not request or invite HPH or Mr. Saunders. The de Maars do not have a sign on their property, but the entrance to the neighborhood has a signpost with a no solicitation sign tacked on below a larger crime watch sign. Ex. A4 at 002. That sign is approximately 250 yards from the de Maar's property. Ex. A7 at 002. The de Maars argued that Mr. Saunders was a trespasser, and therefore the viciousness designations should be dismissed. Ex. A3 at 002.

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[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."

50. We held the record open after the hearing and requested briefing. The parties focused on, and thoroughly analyzed, *Sligar v. Odell*, 156 Wn. App. 720, 233 P.3d 914 (2010). *Sligar* was the case that jumped to our mind too. *Sligar* provides a detailed analysis of RCW 16.08.050. On closer inspection, however, RCW 16.08.050, and thus *Sligar*, are of limited value to our analysis.

51. 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.

By own terms, RCW 16.08.050 is confined to describing when a person is deemed "lawfully upon the private property of such owner <u>within the meaning of RCW 16.08.040</u>" (underscore added). Section .040 is the section abrogating the common law rule that a non-negligent dog owner is not liable for tort damages 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).

52. More to the point, section .050 does not govern other portions within Chapter 16.08 RCW, such as whether a dog qualifies as "dangerous." Section .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 liability):

> Dogs shall not be declared dangerous if the threat, injury, or damage was sustained by a <u>person who, at the time, was committing a wilful trespass or other tort upon the premises</u> 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.[10]

53. It 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 Rhett and Scarlett qualify 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.

[10] "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."

54. 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* than the misconduct required to negate a comparatively less onerous vicious dog designation.[11] 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.[12] Our facts, however, do not show the altercation occurred during a willful trespass or other tort upon the premises.

55. We were initially skeptical of Mr. Saunders' and Mr. Johnson's claims not to have seen a no solicitation sign; it seemed so convenient. However, per their contracts, if they arrange for a follow-up appointment for a salesman to visit the home to try to close a deal, homes with no soliciting or no trespassing signs explicitly do not count for the canvasser's requirement of arranging for two appointments with prospective clients per day. Ex. A5 at 048 & 049 (comparing "Canvasser Fulfillment" with "Disqualified Appointments"). More importantly, not only was the no soliciting sign approximately 250 yards away from the de Maar property, but it was in a small font, a tiny sign tucked below a much larger "WARNING" sign, with a fair amount of text about a neighborhood watch one would have to read through to get to the bottom. We are not surprised one would claim not to have seen the "No Solicitation" as they drove by; we would be more surprised if one driving by would have time to read to the bottom and see the "No Solicitation" add-on at the bottom.

56. In sum, we do not find that a small "No Solicitation" sign, tucked below a larger sign, resting 250 yards away from a property, qualifies as "a sign stating 'No Solicitation'… posted at or near the entrance to the premises." We do not find a violation of KCC 12.66.010. Moreover, even if Mr. Saunders was violating KCC 12.66.010, that would make it a class 2 civil infraction, not a "tort upon the premises." KCC 12.66.040; RCW 16.08.090(3). Such violations are enforced by the Sheriff under the code enforcement provisions of KCC Title 23. KCC 12.66.030.

57. Similarly, if we were to find RCW 16.08.050 applicable (which we do not), consent to be on the property is not presumed "when the property of the owner is fenced or reasonably posted." Unlike KCC 12.66.010, there is no "posted at *or near* the entrance to the premises" expansion. With a small sign, tacked below a larger sign 250 feet away from the de Maar's property, the de Maar property does not qualify as "property…

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[11] *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.

[12] For example, a thief is attempting to steal a package from an owner's front stoop. The owner's dog comes out and inflicts "severe injury," causing broken bones and disfiguring lacerations requiring multiple sutures or cosmetic surgery. RCW 16.08.070(2-3). Perhaps that is fine. But then, after the man falls down and becomes incapacitated, the dog continues the mauling, eventually ripping out the 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.

reasonably posted." Unless we have misread the (non)applicability of RCW 16.08.040 and .050 beyond one specific tort context, this paragraph is admittedly *dicta*, because even if Mr. Saunders failed RCW 16.08.050's test, that would not control whether one or both of the de Maar dogs qualify as vicious under the County code.

58. Framed within the context of the RCW code we do find controlling, RCW 16.08.090(3) limits the qualifying 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 Mr. Saunders was not committing a willful trespass or otherwise doing anything to trigger any of RCW 16.08.090(3) thresholds.

59. Turning back to *Sligar*, the court's real lesson for us here is that the words the legislature chooses in drafting its code matter very much. So, while the parties assert, based on *Sligar*, that the appropriate legal standard is whether Mr. Saunders was lawfully on the de Maar's premises, and not whether Mr. Saunders was a trespasser, that misses *Sligar* framing its pronouncement not as a general axiom applicable to all animal disputes, but as a reflection that section .050 did not employ the word "trespass." *Sligar* at 730 (whether plaintiff a "trespasser" irrelevant under .050 because .050's plain words focus instead on express or implied consent). So, we turn to the specific language of KCC chapter 11.04.

60. KCC 11.04.020.BB does not define "vicious" as something like, "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 [*off the animal's premises or lawfully on the animal's premises and*] without provocation." The specifics of a person's entrance on the property, and location of the incident, do play into "provocation"—if, for, example, Mr. Saunders barged into the de Maar home, a place neither he, or even someone like a postal worker, had a right to be—that entrance might have amounted to "provocation."[13] But KCC 11.04.020.BB's inquiry, looking at whether the animal endangered the safety of a person or their animal, does not list a separate inquiry related to location or the legality of being in that location.

61. Instead, the legislature drafted lawfulness as kicking in at the second step. The code declares a nuisance, "Any animal that has exhibit<u>ed</u> vicious propensities [*here, Scarlett and Rhett biting Mr. Saunders, without provocation*] <u>and</u> constitut<u>es</u> a danger to the safety of persons or property off the animal's premises or lawfully on the animal's premises." KCC 11.04.230.H.

62. Looking at Scarlett's actions, we conclude she constitutes a danger to the safety of persons lawfully on the premises. Even if we assumed that the de Maar's posted their property with no large "No Solicitation" and that solicitors were barred from entrance by KCC 12.66.010, KCC 12.66.020 exempts from KCC 12.66.010's prohibitions:

> A. The leaving at private premises printed materials advertising products or services;

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[13] Here, in contrast, Mr. Saunders was standing approximately ten yards away from the door when the dogs ran at him.

B. Solicitations by organizations that are charitable, nonprofit, religious or political in nature, or by government agencies; and

C. Solicitations by farmers exempted under chapter 36.71.090 RCW.

We find nothing differentiating the scenario under which Scarlett attacked Mr. Saunders from the scenario where, say, Mr. Saunders was simply coming to leave printed materials advertising HPH's services, or a girl was selling Girl Scouts cookies, or someone was doing a get-out-the-vote push. We uphold Scarlett's viciousness designation.

63. However, a few elements differentiate Rhett from Scarlett.

- Scarlett bit with enough violence to go through pants and underwear and slice Mr. Saunders' scrotum to the tune of seven stitches; conversely, Rhett bit Mr. Saunders' bare arm, yet the bite was more superficial, medically described as, "Consistent with contusion and abrasions and possible puncture. No laceration." Ex. D7 at 003.

- While Mr. Saunders needed to try to physically pry Scarlett's jaws off him, and Scarlett needed to be restrained after biting Mr. Saunders, Rhett bit and then ran off and jumped in Ms. de Maar's car.

- Per Mr. Saunders' account, Scarlett initiated the violence, with Rhett looping around from behind and biting Mr. Saunders only *after* Scarlett bit Mr. Saunders and Mr. Saunders dropped his arm to engage with Scarlett to remove her jaws from his crotch. That does not excuse Rhett's actions, but it does raise a serious question in our mind of whether, if Scarlett had not already attacked, Rhett would have unilaterally gone after Mr. Saunders. And if Scarlett were contained in the future, would an unconstrained Rhett still pose a danger to, say, someone making a delivery?

64. Thus, in our final analysis, while we can write with confidence that Scarlett constitutes a danger to the safety of persons lawfully on the de Maar property, we would not have nearly that confidence level writing that same finding for Rhett. As Animal Services bears the burden of proof on this issue, we overturn Rhett's viciousness designation.

Penalty

65. That leaves the penalty amount associated with Scarlett's viciousness violation. While Mr. de Maar noted that Scarlet had been showing mental impairment in the last year, we see no indication that they should have had an inkling that this would translate into Scarlett charging at and biting a man. This is not a scenario where the attack happened because the de Maars were being irresponsible with their dogs or were somehow negligent. We have no reason to doubt that Mr. de Maar did not hear or see anyone other than Ms. de Maar on the property before he opened the door to let the dogs run to greet her. We reduce the applicable penalty from $500 down to $200.

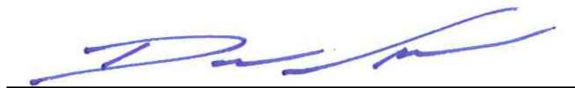
DECISION:

1. Animal Services has RESCINDED the licensing violation.

2. We DENY the de Maars' appeal as to Scarlett's viciousness designation and compliance terms, but we REDUCE the applicable penalty from $500 to $200.

3. We GRANT the de Maars' appeal as to Rhett's viciousness designation, compliance terms, and monetary penalty.

ORDERED December 9, 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 8, 2021*. 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 OCTOBER 20, 2020, HEARING IN THE APPEAL OF NATALIE AND MICHAEL DE MAAR, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V20010905-A20012642

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Tim Anderson, Seth Saunders, Michael De Maar, DeShawn Johnson, and Natalie De Maar. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

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. V20010905-A20012642, issued July 14, 2020
Exhibit no. D3	Appeal, received July 20, 2020
Exhibit no. D4	RASKC investigation report no. A20012642
Exhibit no. D5	Online Complaint form of date July 7, 2020 incident by Seth Saunders, dated July 9, 2020
Exhibit no. D6	Photograph of injury
Exhibit no. D7	Medical record, dated July 7, 2020
Exhibit no. D8	Scarlett's license history
Exhibit no. D9	Rhett's license history
Exhibit no. D10	Map of subject area
Exhibit no. D11	Initial brief, dated November 3, 2020

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

Exhibit no. A1	September 23, 2020 brief, with medical history, and microchip details
Exhibit no. A2	Neighborhood sign
Exhibit no. A3	Updated response, submitted September 30, 2020
Exhibit no. A4	Email, sent October 19, 2020
Exhibit no. A5	Timesheet report for June 28, 2020 to July 11, 2020, sent October 19, 2020
Exhibit no. A6	Initial brief, dated November 3, 2020
Exhibit no. A7	Brief in Reply, dated November 6, 2020

DS/lo

December 9, 2020

OFFICE OF THE HEARING EXAMINER
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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V20010905-A20012642**

NATALIE AND MICHAEL DE MAAR
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 9, 2020.

Lauren Olson
Legislative Secretary

Anderson, Tim
Regional Animal Services of King County

De Maar, Natalie/Michael
Hardcopy

Johnson, DeShawn

Russell, Shelby
Regional Animal Services of King County

Saunders, Seth
Hardcopy