# OFFICE OF THE HEARING EXAMINER KING COUNTY, WASHINGTON

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#### REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file nos. V22013489 and V22013667

#### TRISHA AND COLLEEN DRAKE

Animal Services Enforcement Appeal

Activity nos.: A22004507 and A22005463

Appellants: Trisha and Colleen Drake

Maple Valley, WA 98038

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King County: Regional Animal Services of King County

represented by Chelsea Eykel

Regional Animal Services of King County

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#### FINDINGS AND CONCLUSIONS:

#### Overview

1. Trisha and Colleen Drake appeal noise violations. After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, we sustain violation V22013667. We also dismiss without prejudice violation V22013489.

## **Background**

- 2. On August 29, 2022, Animal Services issued violation notice V22013<u>489</u>-A22004507 to Colleen Drake for her daughter's dogs, Skoll and Sage, making excessive noise. Ex. D4. Trisha Drake timely appealed on September 6. Ex. D12. We originally set a hearing for October 18. We rescheduled the hearing to January 11, 2023.
- 3. On October 18, 2022, Animal Services issued violation notice V22013<u>667</u>-A22005463 for Skoll and Sage making excessive noise, second violation, a violation Ms. Drake appealed. We were unaware of this before our January 11, 2023, hearing, so we did not include it in our hearing notice. On January 17, Animal Services forwarded us the appeal transmittal. Ex. D14.

# Hearing Testimony

# Testimony of Mandi Lapointe

- 4. Mandi Lapointe testified that the barking from the Drake dogs is impacting her sleep and work. Her house was peaceful until three years ago, which was when Trisha Drake and her two dogs moved in with her parents. The situation is emotional for everyone because Ms. Lapointe is losing sleep and the Drakes now have fines to deal with. Ms. Lapointe has a Frenchie and a Chihuahua, and she has trained them to not bark.
- 5. The barking from the Drakes dogs is nonstop, and Ms. Lapointe does not think there is anything in particular that is triggering the dogs. On a typical day, there is a short-lived barking session when the dogs are let out around 5:30 AM or 6 AM. The dogs are then let out around 8:30 AM or 9 AM and stay out until around dinnertime. While out during the day, the dogs bark for fifteen minutes and then take a break for around five minutes and then start barking again.
- 6. She does not have videos of the barking from early in the morning because it is right after she has been woken up and she is not composed or appropriately dressed to go outside. She has messaged Colleen Drake from bed when the dogs are barking early in the morning.
- 7. Exhibit D11 is Ms. Lapointe's bark log. Ms. Lapointe said it was a part-time job trying to document the barking. The barking goes well beyond the submitted log. Ms. Lapointe clarified that the dogs do not bark twenty-four hours a day. The times listed in her complaint were individual barking sessions, probably around fifteen minutes each, on different days. Ex. D2-002.
- 8. To disrupt the dog noise, she sleeps with her TV on and air purifier running, which acts as white noise. Ms. Lapointe does not believe it should be her responsibility to curb the noise. The noise wakes her up even with the TV and white noise going. Ms. Lapointe's expectation during sleeping hours is zero barking. Skoll's bark is so deep that it comes through her walls.

- 9. The noise also disrupts Ms. Lapointe's work. She works from home and her office is on the opposite side of the house, furthest away from the Drake property. She keeps the windows and doors closed. She is unable to function at work, and her coworkers even comment on the dog noise. In early 2021, Ms. Lapointe moved out of her house so she could get work done.
- 10. Ms. Lapointe tried to reach out to the Drakes; she was not hiding the fact that she was the complainant. When Ms. Lapointe tried reaching out, Colleen Drake [the mom] yelled and screamed at her. Ms. Lapointe messaged Colleen Drake about shock collars, training, and bringing the dogs in when they bark. Ms. Lapointe also spoke with Trisha Drake [the daughter] about the dogs, and Trisha Drake said they use a doggie door. From the end of 2020 to early January 2021, Ms. Lapointe saw no change in the noise. The only difference was that Colleen Drake started yelling at the dogs if they started barking. Ms. Lapointe has not seen any improvement. Two years ago, Ms. Lapointe directed the sound machines towards the Drake property.
- 11. Ms. Lapointe has reached out to another neighbor about their Corgis barking. That neighbor now either uses a shock collar or brings the dogs in. Ms. Lapointe does not feel the need to file a complaint when those dogs bark because she has good communication with the owners.
- 12. Prior to the issue with the Drakes' dogs, Ms. Lapointe filed a complaint about dog noise from another neighbor across the street. She decided to file a complaint after she approached the neighbors and they were unfriendly.
- 13. Ms. Lapointe opined that the other neighbors do not want to come forward with complaints because of the unfriendly response Ms. Lapointe has receive from the Drakes. Her roommates and tenants have also complained to her about the barking. She even had a roommate move out and a house-sitter reluctant to stay due to the noise.

## Testimony of Trisha Drake

- 14. Trisha Drake [the daughter] testified that she understands that the noise is a problem, and she is trying to find solutions. The Drakes do not want to be a nuisance. She wants her dogs to be alert but not a nuisance. It is difficult to balance this, but she is trying her best.
- 15. Since the initial complaint, Ms. Drake has blacked out the fence on both sides so the dogs cannot see out. Additionally, in May she added a secondary fence so her dogs cannot go nose-to-nose with the neighboring Corgis. With this addition, the dogs are not as prone to go to the fence to bark. At the end of December 2022, the Drakes started testing a sound machine. When the dogs bark, a sound is emitted that is only heard by dogs.
- 16. In the past six or seven months, the Drakes added a tenant to their household. This tenant brings the dogs in when the barking is excessive during the daytime. Once the Drakes return from work in the evening, the dogs will bark while they play. The dogs are locked inside after 8:30-9 PM. Before the new tenant moved in, her mom would let the

dogs out sometime between 4 AM and 6:30 AM. The Drakes would only hush the dogs. Since May, the Drakes have been bringing the dogs in when they bark for ten to twenty minutes, and then let them out again. Since August, the Drakes bring the dogs inside when they bark or put the dogs in the garage to play. The Drakes currently let the dogs out between 5 AM and 7 AM.

- 17. Ms. Drake is in the process of teaching the dogs to not bark. The Drakes are trying to find ways to play with the dogs inside in the morning, so they do not have to be out as much. There has been an improvement with the barking in the morning when they are let out; the barking is brief. Since August, when the dogs are out in the morning, they only bark twice and then stop. The barking still happens, but it is less than five minutes. The Drakes security camera footage does not show the dogs barking excessively or barking for fifteen minutes straight.
- 18. The Drakes start work early and get back late at night. When it is dark, the Drakes do not walk the dogs because the neighborhood is not the safest.
- 19. Ms. Drake believes that shock collars are cruel, and she will not use them on her dogs. She does not want her dogs to believe that they deserve to be in pain. She knew a neighbor dog that lost its voice because it continued to bark with the collar on.
- 20. The dogs are communal with each other; Sage will bark at Skoll when they play. Ms. Drake does not want to change or downplay that barking. Also, the Drakes backyard seems to be a superhighway for critters like racoons, possums, and feral cats, and her dogs bark at them.
- 21. The day where there was extended howling was the day Sage was spayed, and the Drakes separated the two dogs due to the procedure. Skoll had separation anxiety because he was not with Sage. It was an odd day, but Ms. Drake did not think that Skoll would have that reaction.

## Legal Standards

- 22. The legal standard is easy to state—does the animal bark "to an unreasonable degree, in such a manner as to disturb a person or neighborhood," KCC 11.04.230.J—and more complex to apply. However, we have established consistent benchmarks, two of which are applicable here.
- 23. First, we draw a sharp distinction between nighttime barking and daytime barking, construing section .230.J consistently with the general County noise code, which makes numerous daytime v. nighttime distinctions. That the timing of a noise matters

<sup>&</sup>lt;sup>1</sup> 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.

significantly is not controversial, nor new. For example, as one pre-Civil War court described it, "The peace of Sunday may be disturbed by acts which, on other days, cannot be complained of." Replace "Sunday" with "midnight" and "on other days" with "noon," and that proposition remains true 164 years later. Animal Services carries a significantly higher burden for appeals involving daytime noise (meaning after 7:00 a.m. on weekdays/9:00 a.m. on weekends and before 10:00 p.m. every evening) than for nighttime noise.

- 24. Second, while the noise need not disturb a neighborhood (the code standard being disturbing a person or neighborhood), in analyzing whether noise truly "disturbs," our Court reminds us to focus on an objective "unreasonableness" standard, and to not allow any given complainant to make a "subjective determination" of a noise violation.<sup>3</sup> Similarly, our Court instructs us to guard against measuring conduct "by its effect on those who are inordinately timorous or belligerent."<sup>4</sup> And 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.<sup>5</sup>
- 25. The examiner does 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**

- 26. One part of this dispute is relatively simple. Ms. Lapointe documented almost daily occurrences of the dogs barking prior to 7 AM—as early as 5:43 AM—in the August and September timeframe. Ex. D11. We return to Ms. Lapointe's credibility below, but Ms. Drake admitted that her family routinely let their dogs out after her mom got up, brought them back inside but only if they felt they were barking for too long, and then let them back out again, all prior to 7 AM.
- 27. The Drakes' approach to early morning noise during that time frame is not even close to acceptable. The day/night distinction is especially glaring 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." During the day, a dog barking for several minutes, several times a day, does not even approach "unreasonable." Conversely, during nighttime hours (i.e., after 10 PM and before 7 AM on weekdays and 9 AM on weekends), whether a dog barks six seconds or sixty seconds or six minutes or sixty minutes is somewhat irrelevant. If the barking wakes someone up from sleep, even quickly quieting the dog down after each episode is like locking the barn door after the

<sup>&</sup>lt;sup>2</sup> Commonwealth v. Jendell, 2 Grant 506, 509 (Pa. 1859).

<sup>&</sup>lt;sup>3</sup> City of Spokane v. Fischer, 110 Wn.2d 541, 544-45, 754 P.2d 1241 (1988).

<sup>&</sup>lt;sup>4</sup> Seattle v. Eze, 111 Wn.2d 22, 29–30, 759 P.2d 366 (1988) (citations omitted).

<sup>&</sup>lt;sup>5</sup> See, e.g., State v. Acrey, 148 Wn.2d 738, 748-49, 64 P.3d 594 (2003) ("reasonable" depends on balancing competing interests).

- horse is gone—the damage for a given night's sleep is already done. If that happens enough nights, that is a violation, even if each episode is relatively brief.
- 28. Thus, there is not really a factual dispute about the early morning barking covered by V22013489. Ex. D4 at 001. In a sense, Ms. Drake's testimony standing alone is essentially enough to show a violation, without much more analysis. We easily uphold the violation.
- 29. However, an ongoing dispute involves daytime barking. Daytime barking must be far 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 beeping. Children scream as they play. Power tools screech. 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. And it is here where credibility and the accuracy of perception comes into play.
- 30. We have entertained approximately 90 noise appeals. And we cannot think of a single one that did not feature a complaining witness testifying to some variation of: "I get that some dogs bark a lot. I have never ever had a real problem with any dogs' barking other than the barking from this appellant's dog. But there is something way different about the [quantity/quality/timing/duration, etc.] here versus anything I have ever experienced." Yet Ms. Lapointe admitted that she took exception to not one but two other neighbors' dogs' barking, and even filing a complaint against one of those neighbors (in addition to her complaint against the Drakes.
- One can view dog barking along a bell curve, starting with (1) a thin slice of unusually quiet dogs, moving to (2) the fat part of the bell curve with the vast majority of dogs making less than average through average through more than average noise, and ending with (3) a thin slice of unusually noisy dogs at the far end of the curve. Simply making more noise than average does not begin to cut it. The noise must be at the (3) far end of the bell curve to be a violation. It is theoretically possible that Ms. Lapointe just happened to be in a perfect storm of not one, not two, but three almost off-the-charts barking situations. But it is far more likely that she is overly sensitive to noise, with an unrealistic view of what standards her neighbors must meet.
- 32. Even her expectation that there will be "zero" barking during sleeping hours is off the mark. Our standard has never been, that if a dog wakes up a neighbor once, standing alone that is a violation. Today's is the easy case, because at least at the late-summer timeframe covered by V22013489, the Drakes set themselves up for failure by consistently letting their dogs out—and not just for a few seconds on a leash, fully-supervised, to relieve themselves before quickly hauling them back in—and they routinely woke up Ms. Lapointe. But even in the nighttime context, there is no strict liability, once-is-enough rule.
- 33. Moreover, Ms. Lapointe expressly took the position that it should not be her responsibility to try to minimize the barking's impact. That is not our standard; in

analyzing both "unreasonable" and "disturb," we have consistently reviewed the steps a complainant took to mitigate the noise's impact, along with steps an appellant took to control the noise. And while Ms. Lapointe discussed night-time efforts like sleeping with the TV on and an air purifier white noise, it was not clear what steps, beyond the location of her office, she had taken to muffle or reduce the impact while she is working from home. The Drakes do not need to meet some higher duty of care because Ms. Lapointe chooses to work from home—choices have consequences—and has a greater-than-average sensitivity to barking from the Drakes and other neighbors.

- That is not to let the Drakes off the hook. At least with respect to the pre-7 AM barking, 34. letting the dogs out to run around the backyard, without a shock collar, is not going to cut it—instead, play with the dogs inside or put shock collars on them (more on that below) when they let them out. Daytime-wise, the Drakes have taken some steps like blacking out the fence, adding a fence, and a newly installed dog whistle; those might or might not, in combination, work. If they do not, we understand why Ms. Drake does not want to do anything that would shock her dogs. That is commendable, but that too is a choice, and her choices also have consequences. Shock collars have worked well to successfully solve past noise disputes, without damage to the dogs (after an initial rude awakening period). And affixing bark collars for, say, a few moments in the early morning when the dogs go out would not mean 24/7 collar usage. Yet professional training focused specifically on barking (as opposed to the wide range of behaviors addressed in the typical training) could be a more humane first step. And, again, the responsibility an owner has to take to keep quiet hours quiet is obviously more than during daytime hours.
- 35. So, forward-looking, we are left without a complainant or appellant with an accurate barometer of what qualifies as "unreasonable" or as an acceptable level of disturbance. Mediation could be of great assistance, since a mediator is focused on solutions, not judgment.<sup>6</sup> And if we go to another hearing, it would be helpful for the Drakes and Ms. Lapointe to elicit witness testimony, either pro or con, from other households, especially the two households who share a common fence line with the Drakes and thus should presumably be more impacted by the barking. Typically, people will participate in a hearing (especially where they need only click on a link, versus physically coming to the courthouse) voluntarily, if requested. And if not, a party can ask us to issue a subpoena to compel a witnesses' presence.
- 36. That leaves an outstanding violation notice and appeal, V22013<u>667</u>. It was discussed for the first time at our January 11 hearing in V22013<u>489</u>. There seems little point in tackling

For most decisions we impose on the parties, one party—but not both—is likely to walk away angry. Yet in a noise cases, where we must consider an appellant's and complainant's reasonableness, we not infrequently wind up publicly criticizing both the complainant and appellant, which means neither party leaves satisfied. By comparison, mediation allows the parties to retain control of their dispute and to negotiate a satisfactory, face-saving outcome.

<sup>&</sup>lt;sup>6</sup> Our original notice setting a pre-hearing conference noted that:

that, since it would be another retroactive look at the situation in the fall, not the current situation, and it was based on a complaint, violation notice, and appeal filed before we offer today's clarification. It seems a poor use of public resources to hold a hearing on that. We thus dismiss V22013667 without prejudice, meaning there is no finding, pro or con, on the merits of that alleged violation. If a later conflict arises, and Animal Services concludes there has been a new violation, it may issue a violation notice that includes that same time period covered by V22013667.

#### **DECISION:**

- 1. We uphold V22013489 and its \$100 penalty.
- 2. We dismiss, without prejudice, V22013<u>667</u>.

ORDERED January 26, 2023.

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 *February 27, 2023*. 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 JANUARY 11, 2023, HEARING IN THE APPEAL OF TRISHA AND COLLEEN DRAKE, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NOS. V22013489 & V22013667

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Chelsea Eykel, Mandi Lapointe, and Trisha Drake. 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	Online Noise Complaint form of August 12, 13, 15, 16, 17, and 21
	incidents by Mandi Lapointe, dated August 22, 2022
Exhibit no. D3	RASKC investigation report no. A22004507
Exhibit no. D4	Notice of violation no. V22013489-A22004507, issued August 29, 2022
Exhibit no. D5	NVOC mailing/tracking history
Exhibit no. D6	Video of barking on August 12th
Exhibit no. D7	Video of dogs barking inside house August 28th
Exhibit no. D8	Video of dogs still barking August 28th
Exhibit no. D9	Email correspondence, dated August 21 and 22
Exhibit no. D10	Text Message, dated August 12
Exhibit no. D11	Barking log
Exhibit no. D12	Appeal, received September 6, 2022
Exhibit no. D13	Map of subject area
Exhibit no. D14	Appeal Transmittal V22013667-A22005463

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

Email, dated October 7, 2022
Photographs
Drake Cam_2022_09_12_185204
Drake Cam_2022_09_28_141757
Drake Cam_2022_10_05_103043
Drake Cam_2022_10_06_113703

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## **CERTIFICATE OF SERVICE**

SUBJECT: Regional Animal Services of King County file nos. V22013489 and V22013667

## TRISHA AND COLLEEN DRAKE

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 Coun	ty staff listed a	is parties,	/interested	persons	and parties	with	e-mail
addresses on record.							

$\boxtimes$	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 January 26, 2023.

Lauren Olson

Legislative Secretary

# Drake, Trisha/Colleen

Hardcopy

## Eykel, Chelsea

Regional Animal Services of King County

## Lapointe, Mandi

Hardcopy