

November 3, 2023

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

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

REPORT AND DECISION

SUBJECT: Regional Animal Services of King County file no. **V23014564-A23004977**

CONNIE ELLIOTT

Animal Services Enforcement Appeal

Activity no.: A23004977

Appellant: **Conni Elliott**

[REDACTED]
Covington, WA 98042

Telephone: [REDACTED]

Email: [REDACTED]

King County: Regional Animal Services of King County
represented by Chelsea Eykel
Regional Animal Services of King County
21615 64th Avenue S
Kent, WA 98032
Telephone: (206) 263-5968
Email: raskcappeals@kingcounty.gov

FINDINGS AND CONCLUSIONS:

Overview

1. Conni Elliott appeals a violation notice related to barking from her dogs, Thor and Rusty. 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 easily overturn Rusty's violation notice. The case against Thor is much closer to the line; ultimately we find that Animal Services has not quite met its burden to prove that Thor violated the code, so we overturn Thor's violation notice as well.

Background

2. On August 12, 2023, Regional Animal Services of King County (Animal Services) issued violation notice V23014564-A23004977 to Conni Elliott for her dogs, Thor and Rusty, making excessive noise. Ex. D6.
3. Ms. Elliott timely appealed. Ex. D12. We went to hearing on October 20.

Hearing Testimony

Linda Green Testimony

4. Linda Green testified that she was woken up by Thor's barking multiple times between July and September this year. She and her husband sleep with the windows open in the summer due to the heat and their lack of air conditioning. When she was woken up, she would write down the time of the disturbance. Once the barking woke Ms. Green up, it took a long time for her to fall back asleep. She kept thinking, "When is he going to go off again?" She has tried using earplugs and putting a pillow over her head, and it does not help. Her fan adds white noise, but that also does not help.
5. Ms. Green has walked through the greenbelt between her house and Ms. Elliott's house and seen Thor on the Elliott property. However, she cannot see Thor when she is woken up in the middle of the night from her bedroom. Ms. Green has also heard Thor go ballistic during the day; it is a very recognizable, deep bark. The barking during the day is the same barking she hears at night. His barking sounds different than the barking from the other dogs on the street. She has heard the owners yell "Thor" during the day to stop barking. The barking is also coming directly behind their house. Ms. Green has heard Thor barking for a long time; it finally got to the point that something needed to be done.

Don Green Testimony

6. Don Green testified that Thor's barking has also woken him up. Once Mr. Green is woken up, he cannot get back to sleep. So, consequently, he goes without sleep due to the barking. He is 89 years old, and he knows the lack of sleep is bad for his health.
7. Mr. Green knows the barking dog is Thor because on a couple occasions, he heard Ms. Elliott yell "Thor" to cease the barking. The barking came from the Elliott backyard, which is directly behind his house, and he has heard the barking many times. When the greenbelt is not thick with foliage, he can see Thor. Thor will also bark in response to hearing other dogs' bark. Mr. Green went to Ms. Elliott's house and asked her to alleviate the barking, and she said it was not her dog.
8. After the complaint and Animal Services' investigation, the lack of barking has been fantastic. Now the barking only happens once in a blue moon. He still hears the same dog bark; however, it is now less frequent.
9. The barking in video exhibit A1 sounds quieter than the barking he has heard in the past.

Jim Peterson Testimony

10. Jim Peterson testified that he now sleeps on the side of the house that is closer to the Elliott property, and he hears the dog barking. He hears the barking during the day, but getting woken up in the middle of the night from the barking is the issue. He can get back to sleep, but it is annoying. He closes the windows to minimize the sound.
11. Mr. Peterson knows where the barking is coming from, but he cannot point to a specific house. He has not heard anyone yelling "Thor." He does not know if it is Thor or another dog. It sounds the same dog as the dog in the recording.
12. In the past month, it has been awesome with the lack of barking; it is night and day. He has heard the dog in the summer while he is outside but not at all at night.

Lorna Miss Testimony

13. Lorna Miss testified that she rents a room from the Greens, and her bedroom faces the Elliott's house. She keeps the windows open all the time. The owners yell "Thor shut up" and then the dog will quiet. She has not heard another dog in the neighborhood that sounds like Thor's bark. Thor has a distinctive, deep bark that is excruciating.
14. Ms. Miss just heard Thor barking two mornings before our hearing at 6:50 a.m. It has been better recently, but it is still there. The dog is still barking, but not as much as it used to.
15. She uses a fan for white noise, but she can easily hear the barking over it. She puts a pillow over her head and uses headphones to try to mitigate the noise.
16. The barking in video exhibit A1 does not sound like the barking she has heard.

Connie Elliott Testimony

17. Connie Elliott testified that Thor is a puppy; he just turned one year old. Thor's bark is deep at first but then gets higher pitched. It is higher than the barking in video exhibits D14. She took a video from 10 feet away from Thor. Ex. A1. When Ms. Elliott was trying to video Thor barking, he would not do so when she was in the same room, so she had to take the video from another room. Thor's bark was less mature [i.e. even higher] in the past compared to now.
18. Ms. Elliott testified that the neighbor with the dog that was doing the nighttime barking has since moved. That dog's bark carried, and it was deep and husky. She recognized the barking in video exhibits D14 as the neighbor dog. She heard that barking during the day but not at night.
19. Ms. Elliott's dogs sleep in her room every night. She keeps them in her room from around 10:00 p.m. to 6:00 a.m. or 6:30 a.m. So, it is possible the dog Ms. Miss heard around 6:30 a.m. a few days ago was Thor. It would be out of the ordinary for him to be

out before 6:30 a.m. Ms. Elliott has three flood lights that go off when there is movement outside, and it picks up movement from dogs.

20. When the neighbors or Animal Services approached Ms. Elliott about the barking, she tried to direct them to her neighbor, the one with the barking dog that she heard, but they all refused.
21. Ms. Elliott will happily take responsibility for her animals. She even purchased a dog whistle to deter any unwanted behavior. In addition to Thor, Ms. Elliott has a female German Shepherd, who does not go outside much, and a terrier (Rusty). Her lab mix passed. She also has a friend who does handyman work around her house who brings his dog when he comes.

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.¹ That the timing of a noise matters 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.”² Replace “Sunday” with “midnight” and “on other days” with “noon,” and that proposition remains true 164 years later.
24. This day/night distinction is especially true when it comes to barking duration. At night, whether a dog barks six seconds or sixty seconds or six minutes or sixty minutes is somewhat irrelevant. If the barking is enough to repeatedly wake someone up from sleep, even quickly quieting the dog down after each episode is like locking the barn door after the horse is gone—the damage for a given night is already done. If that happens enough nights, it is a violation. Conversely, during the day, a dog would have to bark for much, much longer to even be in the ballpark of a violation. Animal Services carries a significantly lower burden for appeals involving nighttime noise (meaning before 7:00 a.m. on weekdays/9:00 a.m. on weekends and after 10:00 p.m. each evening) than for daytime noise.

¹ 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>.

² *Commonwealth v. Jendell*, 2 Grant 506, 509 (Pa. 1859).

25. 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.³ Similarly, our Court instructs us to guard against measuring conduct “by its effect on those who are inordinately timorous or belligerent.”⁴ 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.⁵
26. 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.B.

Analysis

27. We start with the low-hanging fruit. In addition to Thor, Animal Services cited a second Elliott dog, Rusty, as violating the noise code. Ex. D6 at 001. That is a head-scratcher, because none of the complainants even mentioned a dog other than Thor. Animal Services does not come close to meeting its burden on Rusty.
28. While in her earlier statements Ms. Elliott questioned the legal standard for a noise code violation (exhibit D11), at hearing she did not dispute that the nighttime barking the complainants were experiencing met the code definition, only that it was not Thor. Much of her pre-hearing approach came across like past appellants caught red handed and grasping at straws for a defense; on first blush nothing seemed particularly credible about her response, and it is not at all surprising that Animal Services cited her for Thor. But there appears more to the story.
29. For example, Ms. Elliott’s victim-blaming approach—accusing her neighbors of being “mentally ill nonagenarians”—was petty and vindictive. Ex. D11 at 001. We actually found the complainants very credible—they described what they knew, how they came to those conclusions, and were clear about what they did *not* know. Conversely, Ms. Elliott’s wild spin about being owed compensatory and punitive damages, threatening civil actions, and wanting public records removed, all sounded like an unhinged person trapped in a corner and lashing out to avoid the consequences of a violation. Exs. D11 & D12. Yet Ms. Elliott came across much more credibly at hearing.
30. Similarly, some of Ms. Elliot’s not-my-dog-defense, both in her initial July 28 statement to the responding officer (exhibit D7 at 002, n.1) and her August 8 response (exhibit D10) to a warning, contained the usual, generalized, lots-of-other-dogs-in-the-neighborhood argument we hear time and time again. That defense was easily shot

³ *City of Spokane v. Fischer*, 110 Wn.2d 541, 544–45, 754 P.2d 1241 (1988).

⁴ *Seattle v. Eze*, 111 Wn.2d 22, 29–30, 759 P.2d 366 (1988) (citations omitted).

⁵ *See, e.g., State v. Acrey*, 148 Wn.2d 738, 748-49, 64 P.3d 594 (2003) (“reasonable” depends on balancing competing interests).

through with the middle-of-the-night recordings Ms. Green produced, which had a distinctive signature (similar barking cadence, with a similarly deep sound), strong evidence that they are from the same dog. Ex. D14. However, Ms. Elliot also pointed, both in her July 28 comments and in her August 15 appeal statement, to a *particular* neighboring home as the source of the barking. Ex. D7 at 002, n.1 & D12. That the middle-of-the-night recordings illustrate what appears to be the same dog barking completely undermines the lots-of-other-dogs-in-the-neighborhood defense Ms. Elliott raised prehearing, but it does not undermine her testimony at hearing that she agreed the recordings were from the same dog, but from her then-neighbor's dog, not from Thor.

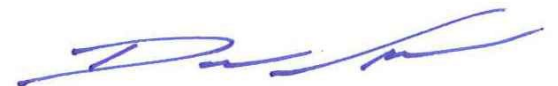
31. Still, the direct evidence that the presumptively same dog in the nighttime videos was Thor at first seemed iron-clad. The complaints were credible, and their explanation for why they concluded it was Thor were completely plausible. The middle-of-the night recordings Ms. Green produced sounded nearly identical—the same pattern of barking, and with a deep sound. They had repeatedly heard similar-sounding barking during daytime hours, followed by Ms. Elliott or someone else shouting at “Thor” to quiet down. It all made logical sense.
32. However, Ms. Elliott submitted a video of what she said was Thor barking inside her house. The complainants agreed (again, the complainants all came across as even-handed and credible) that the dog heard on exhibit A1 did not sound like the same dog as on the recordings. To us exhibit A1 sounds significantly higher pitched than the dog in Ms. Green's recording (exhibit D14). Animal Services raised the question about why Ms. Elliott's video did not show Thor, but she had a very common-sense explanation: Thor would not bark when she was in his line of sight. Her statement that Thor is one-year-old who has not fully matured enough to have a consistently deep bark passed the smell test.
33. None of that direct evidence is definitive. Ms. Elliott certainly could be lying, either about it being Thor on her video, or that her dogs are contained in her bedroom from approximately 10:00 p.m. to 6:00 a.m. or 6:30 a.m. We have certainly entertained past cases where an appellant swears up and down that their dog was with them at the time of the violation but, Ring cameras with automatic timestamps capture their dog. Yet again, Ms. Elliott's presentation at hearing was far more plausible than how she came across in her pre-hearing statements.
34. It is unfortunate that neither side submitted what could have been definitive direct evidence. If a complainant had recorded and submitted a video showing them, during the day, walking up to the Elliott fence line, and we could hear (or better yet also see) a dog on the Elliott side of the fence barking in a tenor and cadence that matched the middle-of-the-night recordings, that would make our decision easy. Conversely, if Ms. Elliott had recorded and submitted a video of her walking up to her then-neighbor's fence line and we could hear (or better yet also see) a dog on the neighbor's yard barking in a tenor and cadence that matched the middle-of-the-night barking, that also would have made our decision easy. Neither of those happened.

35. Direct evidence is not the only type of evidence; circumstantial evidence can be as equally reliable as direct evidence.⁶ The complainants noted that the barking has dropped dramatically in the last month or so, with Mr. Green describing the situation as “fantastic” and Mr. Peterson as “awesome.” Where Animal Services serves a violation notice and the barking magically drops off, that is typically strong circumstantial evidence that the barking was coming from the violation recipient’s dog. But here Ms. Elliott has an equally plausible explanation for the barking decline the neighbors (and she) agreed has happened in the last month or so: the neighbor with the dog she has originally pointed Animal Services to recently moved away.
36. Even the one specific recent time of nighttime barking that could not have been from the since-departed neighbor’s dog—Ms. Miss being woken up at 6:50 a.m. in the days leading up to our hearing—does not undercut Ms. Elliott’s broader defense about the middle-of-the-night barking. Ms. Elliott noted that after she and her dogs wake up in their bedroom about 6:30 a.m., she lets her dogs out, and so she agreed that the recent 6:50 a.m. barking Ms. Miss described could have been Thor. There is nothing inconsistent between Ms. Miss recently hearing Thor at 6:50 a.m. and Thor not being the dog recorded at 4:50 a.m. on earlier dates.
37. So where does that leave us? In most hearings, “burden of proof” is a topic lawyers spend a lot of time on but winds up not being particularly relevant. That is, for the overwhelming majority of cases, the evidence is clear enough that our decision would be the same regardless of whether the agency had the burden to prove it got it right or the appellant had the burden to prove the agency got it wrong. But here we are left essentially a tossup. And because Animal Services bears the burden of proof, that is fatal to its case.
38. Going forwards Ms. Elliott should keep her dogs contained or quiet before 7:00 a.m. weekdays (9:00 on weekends). If quiet hours barking happens enough nights, that would be a *future* violation. But barking slightly before 7:00 a.m. was not the crux of *today’s* case.

DECISION:

We grant Ms. Elliott’s appeal.

ORDERED November 3, 2023.



David Spohr
Hearing Examiner

⁶ *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014). The inferences based on circumstantial evidence must, of course, be reasonable and not based on speculation. *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

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 *December 4, 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 OCTOBER 20, 2023, HEARING IN THE APPEAL OF CONNI ELLIOTT, REGIONAL ANIMAL SERVICES OF KING COUNTY FILE NO. V23014564-A23004977

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Chels himea Eykel, Linda Green, Donald Green, Jim Peterson, Lorna Miss, and Conni Elliott. 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
Exhibit no. D2	RASKC investigation report no. A23004977
Exhibit no. D3	Online Complaint form of July 21, 22, and 23 incidents by Don Green, dated August 11, 2023
Exhibit no. D4	Emails from the Greens, dated August 10, 2023
Exhibit no. D5	Online Complaint form of August 18, 19 and 20 incidents by Don Green, dated August 20, 2023
Exhibit no. D6	Notice of violation no. V23014564-A23004977, issued August 12, 2023
Exhibit no. D7	RASKC investigation report no. A23004630
Exhibit no. D8	Online Complaint form of July 21, 22, and 23 incidents by Donald Green, dated July 25, 2023
Exhibit no. D9	Email from Mr. Green, dated August 1, 2023
Exhibit no. D10	Warning Notice
Exhibit no. D11	Response from Ms. Elliott, dated August 8, 2023
Exhibit no. D12	Appeal, received August 18, 2023
Exhibit no. D13	Map of subject area
Exhibit no. D14	Videos

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

Exhibit no. A1	Video recording, dated October 18
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November 3, 2023

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CERTIFICATE OF SERVICE

SUBJECT: Regional Animal Services of King County file no. **V23014564-A23004977**

CONNI ELLIOTT

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, through Quadient-Impress, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED November 3, 2023.



Lauren Olson
Legislative Secretary

Elliott, Conni

Hardcopy

Eykel, Chelsea

Regional Animal Services of King County

Green, Donald/Linda

Hardcopy

Miss, Lorna

Hardcopy

Petersen, Jim

Hardcopy