



City of Tacoma
Hearing Examiner

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through City of Tacoma Mail Services to the parties or attorneys of record herein. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED October 24, 2017, at Tacoma, WA.

Louisa Legg

October 24, 2017

First Class Mail Delivery

See Transmittal List

Re: File No. HEX 2017-006 (Notice of Violation 500051176)

Town Athletics v. City of Tacoma, Neighborhood and Community Services Department

Dear Parties,

Enclosed please find your copy of the Hearing Examiner's Findings of Fact, Conclusions of Law, and Order entered on October 24, 2017, as the result of a hearing held on September 20, 2017.

Sincerely,

Louisa Legg
Office Administrator

Enclosure: Findings, Conclusions, and Order

Transmittal List

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1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **TOWN ATHLETICS,**

4 **Appellant,**

5 **v.**

6 **CITY OF TACOMA**, a Washington
7 Municipal corporation, through its
8 Neighborhood and Community Services
9 Department,

Respondent.

HEX NO. 2017-006
(Notice of Violation 500051176)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

10 **THIS MATTER** came on for hearing before JEFF H. CAPELL, Hearing Examiner for
11 the City of Tacoma, Washington, on September 21, 2017. In all its pleadings and
12 correspondence with the Hearing Examiner’s office, Appellant billed itself as “Town
13 Athletics.” As of this writing, “Town Athletics” is not a registered business entity with the state
14 of Washington. At the hearing, Appellant’s legal counsel asked witness Austin Kemink
15 (“Kemink”) whether he was a principal/owner of “Town Strength and Fitness, LLC,” to which
16 Kemink replied in the affirmative. There is also no “Town Strength and Fitness, LLC,”
17 registered to do business with the state of Washington. There is an entity registered with the
18 state as “Town Strength and Conditioning, LLC” in which Kemink is listed as a governor, but
19 there is nothing conclusive before the Examiner to indicate that “Town Strength and
20 Conditioning, LLC” is the Appellant here. Based on the foregoing, the Examiner will follow
21 the pleadings and refer to the Appellant herein either as “Appellant” or as “Town Athletics”

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768

ORIGINAL

1 when referring to the business entity that conducts its operations at 3914 6th Avenue, Tacoma,
2 Washington.

3 The present appeal is of a Notice of Violation issued by the City of Tacoma (the "City")
4 for a \$1,000 civil penalty, third violation, Noise Enforcement, arising from a City inspection on
5 or about March 14, 2017. As just stated, the real property where the violation is alleged, is
6 located at 3914 6th Avenue in Tacoma, Washington. Town Athletics appeared through its
7 attorney Thomas P. Quinlan of the Smith Alling firm. The City of Tacoma was represented by
8 Deputy City Attorney Jennifer Taylor. Witnesses were placed under oath and testified. Exhibits
9 were admitted and reviewed, and the parties presented opening arguments and closing
10 statements. Based upon the evidence submitted, the Hearing Examiner makes the following:

11 **FINDINGS OF FACT**

12 1. Town Athletics has been in business at 3914 6th Avenue, Tacoma, Washington for
13 approximately two (2) years. *Kemink Testimony, Schafer Testimony.* Town Athletics' business
14 is essentially fitness training, with approximately 30 to 40% of its business involving the lifting
15 of weights to shoulder height or overhead before dropping those weights to the gym floor.
16 *Kemink Testimony.* Weights used in this process can be as heavy as 225 pounds and the gym
17 can accommodate up to 12 lifters at a time. *Kemink Testimony.*

18 2. Town Athletics leases its space from North Bay LLC, a Washington limited
19 liability company ("North Bay"). Town Athletics' leased space is approximately 1,944 square
20 feet in area, approximately 1,500 square feet of which is devoted to Town Athletics' clientele
21 as exercise area. *Kemink Testimony.* In its building, Town Athletics occupies the eastern side

1 across a demising wall from a spa business run by Sue Hartzell (“Hartzell”). *Hartzell*
2 *Testimony, Kemink Testimony.* Town Athletics’ space is closest to 3912 6th Avenue where Scott
3 Schafer (“Schafer”) operates the Flaming Dragon LLC, a Washington limited liability company
4 (the “Flaming Dragon”).

5 3. Schafer has operated the Flaming Dragon at this location since 1998. *Schafer*
6 *Testimony.* The Flaming Dragon’s open business hours are from noon to 9:00 pm every day
7 except Sunday when the Flaming Dragon is closed. *Schafer Testimony.* Schafer testified that he
8 is frequently at the Flaming Dragon premises before and after business hours doing drawings
9 and conducting other business activities such as ordering supplies. Music is often played in the
10 background at the Flaming Dragon. *Schafer Testimony, Adkins Testimony, Miller-Klein*
11 *Testimony.* At times, Schafer turns the music louder than normal to try to drown out the noise
12 emanating from Town Athletics. *Schafer Testimony.*

13 4. The Flaming Dragon’s building is an older craftsman style house built in 1918 on
14 a cinderblock/concrete foundation with lath and plaster interior wall construction. *Schafer*
15 *Testimony.* There is a space of approximately ten (10) feet between the outer wall of Town
16 Athletics’ space and the Flaming Dragon building. *Schafer Testimony.* Schafer testified that he
17 believes cracks have formed in the lath and plaster walls of his building because of Town
18 Athletics’ fitness activities, specifically the dropping of weights from shoulder and overhead
19 heights.

20 5. Schafer testified that Town Athletics’ building was constructed around 2006 or
21 2007, and that prior to Town Athletics’ occupancy, there had been no problems with noise

1 emanating from that building onto the premises of the Flaming Dragon. Schafer testified that
2 the noise impacts on his business were felt immediately upon Town Athletics' commencement
3 of operations, approximately two (2) years ago. Schafer testified that the noise and vibration
4 from weights being dropped from shoulder and overhead heights shakes his entire building and
5 can be heard as a very deep "boom." According to Schafer, the level of noise varies during the
6 day becoming louder in the mornings and then again in the evenings after 5:00 pm.

7 6. Schafer testified that he can tell how many people are doing shoulder height and
8 overhead lifting at Town Athletics at any given time from the noise that results, and that it is
9 obvious that as many as five (5) or six (6) people are lifting at the same time on many
10 occasions. Schafer testified that the noise emanating from Town Athletics' space is detrimental
11 to the concentration needed for his work and that it annoys his clientele. As a result, he
12 contacted Town Athletics' landlord (North Bay) and the operators of Town Athletics' business
13 in late 2015. *Schafer Testimony*. Thereafter, Schafer contacted the City to complain. *Schafer*
14 *Testimony*.

15 7. City code compliance personnel first responded to Schafer's complaint in
16 December of 2016, by visiting the Flaming Dragon. For purposes of sounds emanating from
17 Town Athletics' space, the Flaming Dragon is a "receiving property" per Tacoma Municipal
18 Code ("TMC") 8.122.010.AA. *See also Adkins Testimony (sound measurements must be taken*
19 *from a receiving property)*. At this time, according to testimony from both Kemink and Adkins,
20 City Code Compliance Officer Keith Williams visited both the Flaming Dragon and Town
21 Athletics, and he took sound measurements. Adkins' and Kemink's testimony, as to the

1 result of that visit, conflicted. Keith Williams was not present to testify on his own behalf.

2 8. Subsequent to this first City visit, Adkins responded to the Flaming Dragon to
3 take sound measurements on December 27, 2016 (*Exhibit R-1 and R-2*), January 25, 2017
4 (*Exhibit R-3*), March 9, 2017 (*Exhibit R-4*), and on or about March 14, 2017 (*Exhibit R-6 and*
5 *R-7 Adkins Testimony*). Adkins found violations of TMC 8.122 on each of these visits and
6 issued violation notices to North Bay as the record owner of the property. *Adkins Testimony*;
7 *Exhibits R-1 – R-7*. Town Athletics only appealed the violation arising from Adkins' visit and
8 measurements from on or around March 14, 2017. Kemink testified that he was unaware of all
9 violation notices prior to the March 14, 2017 violation notice.

10 9. For all visits to the Flaming Dragon, Adkins used an Ono Sokki, LA-1250 sound
11 level meter (the "Meter") to take sound readings. The Meter was calibrated using an Ono Sokki
12 calibrator model SC-2120. *Adkins Testimony; Exhibits R-5 and R-7*. Adkins has been a code
13 compliance officer with the City for approximately seventeen (17) years. *Adkins Testimony*.
14 She has received approximately sixteen (16) hours of training in noise enforcement from
15 Rutgers University in a program it puts on in Seattle. *Adkins Testimony*. This training includes
16 instruction on how to use sound measuring equipment, and how to conduct field work, among
17 others. *Adkins Testimony*. She was trained in how to use the Meter appropriately in 2011, is
18 familiar with its manual, and has used this Meter in excess of 100 times since being trained.
19 *Adkins Testimony*. The Meter is sent to New Jersey once a year for calibration and certification.
20 *Adkins Testimony*. The Meter used on or about March 14, 2017, was last calibrated and
21 certified on October 13, 2016. *Exhibit R-7*.

1 10. Adkins’ measurements from the inspection on or about March 14, 2017, included
2 establishing two ambient baseline readings: one of 51.15 dBC, when music was off in the
3 Flaming Dragon, with little talking, and tattoo guns off, and another of 58.4 dBC, with music
4 playing, six (6) people talking, and three (3) tattoo guns in use. *Adkins Testimony; Exhibit R-7.*
5 Thereafter, she took approximately 14 measurements, all of which exceeded the higher ambient
6 baseline of 58.4 dBC in excess of 6 dBC indicating a violation of TMC 8.122.060 for the time
7 period in question (4:49 p.m. – 4:59 p.m.). *Adkins Testimony; Exhibit R-7.*

8 11. For all visits to the Flaming Dragon, including the visit on or about March 14,
9 2017, Adkins testified that she followed all the proper protocols, checks, and calibrations prior
10 to taking any readings that led to violation notices. *Adkins Testimony.* On cross-examination
11 from the City, Town Athletics’ acoustical engineer witness, Erik Miller-Klein (“Miller-Klein”),
12 declined to offer testimony that would show any defect in Adkins’ pre-measurement regimen or
13 in her use of the Meter. *Miller-Klein Testimony.* Adkins testified that, before every use, the
14 Meter was calibrated, and that during any investigation, the Meter would be recalibrated every
15 hour.

16 12. Adkins testified that there are two different “scales” or “networks”¹ used for
17 measuring sound under the TMC—the C-scale and the A-scale. Adkins testified that the A-
18 scale is used for outdoor measurement and the C-scale for indoor readings. This comports with
19 Table 1 at TMC 8.122.060.A that shows A-scale (dBA measurement) as appropriate for
20 outdoor measurements, and C-scale (dBC measurement) as appropriate for indoor readings. On
21 cross-examination from the City, Miller-Klein agreed that C-scale is proper for indoor sound

¹ “Scale” and “network” in this context are used interchangeably hereafter.

1 measuring. By contrast, TMC 8.122.050.D indicates that “Impulsive sound levels shall be
2 measured in the A-weighting network with the sound level meter set to fast response, and shall
3 be measured from any point within the receiving property.” This provision appears to be at least
4 partially in conflict with Table 1 at TMC 8.122.060.A. Adkins testified further that, within
5 either scale, an LMax setting is used. The LMax setting records the highest reading within a
6 thirty (30) second time frame. Using the LMax setting comports with TMC 8.122.050.E, which
7 states: “All sound level measurements under this code shall be taken in LMax, as equipment
8 allows.”

9 13. Miller-Klein² testified that the City’s use of LMax readings in its code makes it
10 unique. Both Miller-Klein and Adkins testified that LMax readings can fluctuate at a given
11 location and over time. Miller-Klein and Adkins were also in agreement that:

- 12 A. C-scale is proper for indoor measurements;
- 13 B. the dropping of weights in Town Athletics’ space creates a short duration
14 impulse sound;
- 15 C. impulse sounds are best measured using a fast response setting;
- 16 D. the sound of weights dropping in Town Athletics’ space can be heard at the
17 Flaming Dragon;
- 18 E. the TMC requires sound measurements to be taken in LMax³; and
- 19 F. in establishing an ambient baseline, extraneous, loud outlier sounds should be
20 removed from the mix.⁴ *Adkins Testimony, Miller-Klein Testimony.*

21 ² Among other qualifications, Miller-Klein has a B.A. in music with a minor in Physics from Whitman College and a second B.A. in Mechanical Engineering with a concentration in Acoustical Engineering from the University of Hartford. He works for A³ Acoustics, an acoustical consulting firm that addresses sound design and remediation issues. *Miller-Klein Testimony*. Despite his background, no motion was made to qualify Miller-Klein as an expert witness.

³ TMC 8.122.050.E. conditions this requirement with the phrase “as equipment allows.”

⁴ By definition, TMC 8.122.010 excludes these kinds of “extraneous sounds” from being part of the ambient background.

1 14. Miller-Klein testified that he interprets TMC 8.122.050.E to require a single
2 LMax reading as the mandated process for establishing an ambient baseline. *Miller-Klein*
3 *Testimony*. He also testified that because this approach takes only one, very short duration
4 measurement, it leaves room for inconsistencies and discrepancies, and that the TMC's use of
5 LMax leaves a lot open to interpretation.⁵ Miller-Klein testified that his interpretation of the
6 TMC does not allow any room for averaging LMax readings in order to establish an ambient
7 baseline, as is the City's practice. *Miller-Klein Testimony, Adkins Testimony*. Miller-Klein is
8 correct that TMC 8.122 does not specifically set forth an averaging approach such as the City
9 employs. That said, Miller-Klein's single sample interpretation is not expressly mandated in the
10 TMC either. To the contrary, Miller-Klein's own testimony strongly suggested that averaging
11 LMax readings to arrive at an ambient baseline would result in greater accuracy.

12 15. As stated above, Miller-Klein is correct that TMC 8.122.050.E requires that "All
13 sound level measurements under this code shall be taken in LMax,..." but this requirement is
14 conditioned by the phrase, "as equipment allows," making it, on its face, less than absolute.
15 Nonetheless, the City did take all of its measurements in LMax, but rather than single LMax
16 readings, it took multiple readings and then averaged them to establish its ambient baseline.
17 *Adkins Testimony*. Again, nothing in TMC 8.122 requires averaging, but nothing prevents this

18 //

19 //

20 _____
21 ⁵ Miller-Klein seemed to indicate in his testimony that these inconsistencies would potentially result from picking
and choosing a single LMax reading that might not accurately reflect the ambient background sound levels. This is
not what the City does, however, when it goes through its process of averaging multiple LMax readings to arrive at
its baseline. Adkins' testimony was that at least three (3) readings were taken and then averaged, throwing out any
extraneous readings along the way.

1 approach either.⁶ Adkins' testimony was that multiple readings are taken and averaged in order
2 to more accurately reflect the ambient sound condition in the receiving property.

3 16. On the surface, TMC 8.122.050.D and Table 1 at TMC 8.122.060.A appear to be
4 in conflict regarding whether A-scale or C-scale is appropriate to use in measuring "impulsive
5 sound levels" indoors. Although TMC 8.122.050.D specifies the "A-weighting network," for
6 impulsive sound level measurements, the second sentence of section D sets forth an exception
7 to using "A-weighted measurements" for "impulsive sounds arising from amplified sound
8 sources, when measured indoors." The sounds in question here are not "sounds arising from
9 amplified sound sources." They were, however, measured indoors at the Flaming Dragon.
10 Measuring an impulsive sound "from any point within the receiving property" does not, of
11 necessity, indicate an indoor or outdoor measurement. In many instances, unlike here, sound
12 measurements could be taken "within the receiving property" from a point out of doors.
13 Although argued by Town Athletics' counsel as the clear requirement of TMC 8.122.050.D,
14 there was no testimony from Town Athletics' witnesses that the A-scale should be used
15 indoors, even for measuring impulsive sounds not arising from amplified sound sources.

16 17. On April 7, 2017, Miller-Klein conducted a "noise impact analysis" at Town
17 Athletics and the Flaming Dragon. *Miller-Klein Testimony; Exhibit A-1*. Miller-Klein took
18 seven sound measurements from the front entryway area of the Flaming Dragon. *Miller-Klein*
19 *Testimony; Exhibit A-1*. All sound measurements were of controlled drops from one lifter
20 (Kemink) and one barbell of 225 pounds, dropped from an approximate height of seven (7)

21

⁶ To the extent that the TMC were amended to expressly allow, or even require the City's practice of averaging LMax readings to obtain an ambient baseline, confusion over that issue could be minimized in future proceedings.

1 feet, but onto different surfaces as the analysis progressed. *Miller-Klein Testimony; Exhibit A-1.*
2 In conducting his noise impact analysis, Miller-Klein used industry accepted Apparatus⁷
3 calibrated to industry accepted, and TMC compliant standards. *Miller-Klein Testimony; Exhibit*
4 *A-1.* Miller-Klein conducted his tests during “normal business hours and operations” without
5 specifying an exact time. *Exhibit A-1.* Miller-Klein took ambient measurements both with
6 music playing in the background at the Flaming Dragon, and with music off. *Miller-Klein*
7 *Testimony; Exhibit A-1.*

8 18. According to Miller-Klein’s written report, three (3) of the seven (7) drops
9 measured the sound from weights impacting “the existing floor within Town Athletics [sic]
10 building,” and “The second through fifth drops measured sound of impact onto different fitness
11 flooring/weight cushion options.” *Exhibit A-1; Miller-Klein Testimony.* Miller-Klein’s written
12 report states that his measurements were “completed by...aligning the drops to the C-Weighted
13 Lmax...”⁸ *Exhibit A-1.* Miller-Klein noted that while conducting his tests, Schafer commented
14 that the sounds heard within the Flaming Dragon from the controlled drops “were comparable
15 to the sounds he normally heard, although he pointed out then [sic] when larger classes are
16 active it seems louder.” *Exhibit A-1.*

17 19. Regarding the measurements from controlled drops onto the existing floor
18 material at Town Athletics, Miller-Klein testified that under the TMC “as written” “it looked
19 like” Town Athletics was in compliance, but “with LMax, things that change in time can
20 heavily influence the way you measure these values.” Upon conclusion of his testimony
21

⁷ As defined at TMC 8.122.010.D.

⁸ Miller-Klein’s Apparatus was able to take A-scale and C-scale measurements at the same time. *Miller-Klein Testimony; Exhibit A-1.*

1 regarding his noise impact analysis, Miller-Klein was asked his opinion as to whether Town
2 Athletics' activities put it in violation of the TMC. Miller-Klein's response was that he did not
3 think Town Athletics was "necessarily in violation," but that sound from Town Athletics can be
4 heard next door at the Flaming Dragon.⁹

5 20. In addition to the above, in response to a request for an opinion on the validity of
6 the City's measurements over the course of all City visits, Miller-Klein testified that there were
7 some discrepancies and that he was surprised to see readings in the 80s in December of 2016
8 followed by readings in the high 60s in March of 2017, but he concluded his opinion by stating
9 that the City's measurements were basically similar to his own (on the same order of magnitude
10 to what he measured).

11 21. Any Conclusion of Law deemed to be properly considered a Finding of Fact is
12 hereby adopted as such.

13 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

14 **CONCLUSIONS OF LAW**

15 1. The Hearing Examiner has jurisdiction over this case under Tacoma Municipal
16 Code ("TMC") 1.23.050.B.39 and Chapter 8.122.130. The proceedings are conducted *de novo*.
17 The City of Tacoma has the burden of proof to establish, by a preponderance of the evidence,
18 that a violation has occurred and that the corrective action is reasonable. *TMC 8.122.130.D*.

19 2. The alleged violation arising from the City's inspection on or about March 14,
20 2017, is the only one being timely appealed in the present proceeding.

21

⁹ For her part, Hartzell also testified that the sound of weights being dropped in Town Athletics' space can be heard in her spa and that it vibrates the walls, but the sound and vibration does not bother her or her clients.

1 3. Whether a noise violation has been committed is measured against the provisions
2 of TMC 8.122.060 which reads as follows:

3 **8.122.060 General provisions.**

4 A. No person shall make, continue, or cause or permit to be made or continued any
5 continuous sound attributable to any source that increases the total sound level above
6 the ambient sound level by the limits in Table 1 when measured at or within a receiving
7 property:

8 Table 1. Maximum permissible sound level in excess of the ambient sound level:

	Outdoors	Indoors
7:00 a.m. to 10:00 p.m.	10 dBA	6 dBC
10:00 p.m. to 7:00 a.m.	5 dBA	3 dBC

9 B. No person shall make, continue, or cause or permit to be made or continued any
10 impulsive sound, attributable to the source, that increases the total sound level by 15
11 dB(A) or more above the ambient sound level, when there are less than ten impulses per
12 hour between the hours of 7:00 a.m. and 10:00 p.m., less than four impulses within one
13 hour between the hours of 10:00 p.m. and 7:00 a.m. If the number of impulses exceeds
14 that set forth in this subsection, the sound level limits in Table 1 of subsection A shall
15 apply.

16 Town Athletics was cited under TMC 8.122.060.A. *Exhibit R-6*.

17 4. Sound level measurements relied on to issue a violation must be taken in
18 compliance with the procedures set forth at TMC 8.122.050, which reads as follows:

19 **8.122.050 Procedures for the determination of sound levels.**

20 Unless otherwise specifically provided, sound levels shall be determined as
21 follows:

 A. The sound level shall be measured with a sound level meter. The sound
level meter and calibrator must be recertified annually at a laboratory
approved by the Director. A field check of meter calibration and batteries
must be conducted before and after every set of measurements, and at least
every hour as necessary.

1 B. Total and ambient sound level measurements shall be conducted in
2 accordance with procedures for training approved by the Director.
Calculation of source sound levels shall conform to accepted practice.

3 C. Ambient sound level measurements shall be conducted on the A-
4 weighting network or the C-weighting network, as appropriate.

5 D. Impulsive sound levels shall be measured in the A-weighting network
6 with the sound level meter set to fast response, and shall be measured from
any point within the receiving property. The requirement for A-weighted
7 measurements shall not apply to impulsive sounds arising from amplified
8 sound sources, when measured indoors.

9 E. All sound level measurements under this code shall be taken in LMax, as
10 equipment allows.

11 F. Total sound level measurements shall be conducted for a minimum of
12 three 30-second intervals within a 30-minute period, unless the duty cycle of
13 the sound source precludes multiple measurements.

14 5. Adkins' testimony showed compliance with the above requirements. *Adkins*
15 *Testimony as referenced at FoF 9-12.* That notwithstanding, Town Athletics' counsel appeared
16 to argue that the City's measurements were defective because they were of impulse sounds not
17 taken in "A-weighting network" and therefore not in compliance with TMC 8.122.050.D.
18 While counsel was certainly free to make this argument based on the language of the TMC,
19 there was no testimony to support the "A-weighting network," or A-scale, as the appropriate
20 method for measuring an indoor, impulsive sound. To the contrary, Miller-Klein and Adkins
21 testified that the C-scale is properly used for indoor readings.

6. The first line of Subsection D does state that "Impulsive sound levels shall be
measured in the A-weighting network," but this requirement comes without any distinction
about being indoors or out, only that measurements must be taken from "any point within the

1 receiving property.”¹⁰ Moreover, TMC 8.122.050, when read in its entirety,¹¹ provides a good
2 deal of latitude in applying its procedures with conditioning phrases such as “as appropriate,”¹²
3 allowing for “conform[ance] to accepted practice,”¹³ and “as equipment allows.”¹⁴ Here, based
4 on Miller-Klein’s testimony, “conformance to accepted practice” appears to support the use of
5 the C-scale for indoor readings as set forth in TMC 8.122.060. This apparent conflict in the
6 TMC was not enough to cause Miller-Klein any confusion in which scale/network was to be
7 used for indoor readings when he conducted his noise impact analysis.

8 7. Mr. Quinlan’s interpretation of Subsection D is not entirely unreasonable,
9 however.¹⁵ That said, it does conflict with City practice, the testimony of his own sound
10 engineer witness, and with TMC 8.122.060, which is the specific Section of the TMC used for
11 determining noise violations, somewhat ironically, for purposes of this proceeding, titled
12 “General provisions.” To that extent, these two Sections of the TMC 8.122 (.050 and .060) are
13 ambiguous when read together.¹⁶ Given that ambiguity, and in light of reading Subsection D in
14 the context of the other five Subsections of TMC 8.122.050, with TMC 8.122.060, and
15 additionally coupled with the testimony from the hearing, it makes no sense to allow Town
16 Athletics’ argument to rule the day here and force the use of the incorrect A-weighted network

17 _____
18 ¹⁰ In addition, as referenced above at FoF 16, Subsection D already contains one exception for indoor readings.

19 ¹¹ Statutes or ordinances should be read in their entire context and not in isolation. *Tesoro Ref. & Mktg. Co. v. Dep’t of Revenue*, 164 Wn.2d 310, 323, 190 P.3d 28 (2008) citing *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002).

20 ¹² At the end of TMC 8.122.050.C.

21 ¹³ At the end of TMC 8.122.050.B.

¹⁴ At the end of TMC 8.122.050.E.

¹⁵ “A provision [of a statute or ordinance] is ambiguous if it is reasonably subject to multiple interpretations. *Wash. Fed., Nat’l Ass’n v. Azure Chelan LLC*, 195 Wn. App. 644, 652-653, 382 P.3d 20, 25 (2016), citing *State v. Engel*, 166 Wn.2d 572, 579, 210 P.3d 1007 (2009).

¹⁶ “Susceptibility to more than one reasonable interpretation renders the statute ambiguous and allows the court to employ tools of statutory construction...” *Tesoro Ref. & Mktg. Co.*, 164 Wn.2d at 318 (2008) citing *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

1 for indoor measurements, or otherwise find the City's readings invalid because it did not use
2 the scale/network all witnesses agree would be incorrect (the A-scale). Although the clarity of
3 the City's Code could certainly be improved, considerable deference is to be given to the
4 interpretation made by the agency charged with enforcing the statute or ordinance in question.¹⁷
5 In the absence of evidence disputing the City's use of the C-scale here, and as actually
6 supported by Town Athletics' own sound engineer, use of the C-scale was proper. To that
7 extent, Table 1 of TMC 8.122.060 controls over the unartful language in TMC 8.122.050.D that
8 leaves the open question regarding any distinction between indoor and outdoor measurements
9 of impulsive sounds.

10 8. In a similar manner, the City's use of averaging to arrive at an ambient baseline
11 for sound in the receiving property (the Flaming Dragon) is not improper. Nothing in the TMC
12 prohibits it, and again, TMC 8.122.050 has a certain flexibility built into it that would not
13 preclude using averaging of LMax readings to arrive at a more dependable baseline reading.
14 Miller-Klein's interpretation of TMC 8.122.050.E to require single LMax readings to establish
15 an ambient baseline is unsupported by the language of TMC 8.122 or the testimony from the
16 hearing. While express language in TMC 8.122.050 either allowing averaging, or even
17 requiring it, might make things clearer in cases like this one, the City's use of averaging is not
18 fatal to its investigation or the charged violation. If anything, using averaging, by Miller-Klein's
19 own testimony, would seem to help in eliminating potential inconsistencies, and the room for
20 interpretation that he testified exists in the TMC based on his unsupported interpretation of
21

¹⁷ *Bravern Residential II, LLC v. Dep't of Revenue*, 183 Wn. App. 769, 777-778, 334 P.3d 1182, 1186-1187 (2014).

1 TMC 8.122 that would preclude the use of averaging.

2 9. With the use of averaging deemed not improper, and the C-scale also deemed
3 appropriate, discussion must turn to whether the City met its burden of proof to show by a
4 preponderance of the evidence that the noise violation in question dated March 14, 2017, was
5 committed. The City established that the Meter was properly calibrated and properly used,
6 without refutation from Appellant. *Adkins Testimony, Miller-Klein Testimony*. The City
7 established an ambient baseline for sound in the receiving property using averaged LMax
8 readings. *Adkins Testimony; Exhibit R-7*. The City established that the timeframe for the
9 readings that followed was between 7:00 am to 10:00 pm (the 4:00 pm hour) putting the
10 determination of violation in the first row category of Table 1 in TMC 8.122.060.A. *Id.* The
11 City took approximately fourteen (14) LMax sound measurements from the receiving property
12 (the Flaming Dragon), all of which exceeded the established baseline of 58.4 dBC by more than
13 6 dBC. *Id.* The City proved the violation by a preponderance of the evidence.

14 10. For its part, Town Athletics attacked the City's case on two fronts: (1) compliance
15 with the TMC, which has been addressed above, and (2) the accuracy of the City's
16 measurements. Although Miller-Klein testified that he found some of the City's measurements
17 surprising, and that he did not think Town Athletics was necessarily in violation of the TMC,
18 he also stated that, even though surprising, the City's measurements were of the same order of
19 magnitude as his own. His testimony regarding the City's procedures, the accuracy of the City's
20 measurements, and whether his own noise impact analysis disproved the City's results was
21 equivocal, and did not overcome the City's establishment of its case. While the Examiner finds

1 nothing wrong with how Miller-Klein conducted his noise impact analysis, because it was
2 conducted in a limited and very controlled manner, potentially very different from the
3 circumstance leading to what the City measured on or about March 14, 2017, and because
4 Miller-Klein himself was equivocal as to what his results meant in relation to the City's
5 measurements, Miller-Klein's testimony was unpersuasive in regard to whether a violation
6 occurred on or about March 14, 2017.

7 11. Any Finding of Fact deemed to be properly considered a Conclusion of Law is
8 hereby adopted as such.

9 Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner
10 enters the following:

11 **ORDER**

12 1. The City's violation from its investigation dated March 14, 2017, together with
13 the corresponding civil penalty, are affirmed.

14 2. Town Athletics is hereby ordered to submit a noise control plan in accordance
15 with Tacoma Municipal Code Section 8.122.120. This requirement is issued in lieu of the
16 Examiner ordering specific, "required corrective action" under TMC 8.122.130.F.2. Inasmuch
17 as Town Athletics has already established a relationship with A³ Acoustics ("A3"), Town
18 Athletics is encouraged to consult with A³, or another sound engineer of its choice in
19 completing the required noise control plan.

20 3. Town Athletics shall submit its noise control plan to the City no later than forty-
21 five (45) days from the date of this Decision, unless good cause is shown for the need for

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

1 additional time. Town Athletics shall submit the noise control plan to the City through its
2 Neighborhood and Community Services Department, with a copy to the Hearing Examiner's
3 Office.

4 4. When submitted, the noise control plan must contain a reasonable timeline for
5 implementing the proposed measures to bring Town Athletics into compliance with TMC 8.122
6 and the measures must be implemented on that timeline.

7 5. Once the noise control plan has been fully implemented, the City shall notify
8 Town Athletics of its next intended site inspection (day and time). To the extent that Town
9 Athletics desires to have its own sound engineer present at that inspection in order to consult
10 and coordinate with the City's inspectors, Town Athletics may do so.

11 **DONE** this 24th day of October, 2017.

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13 JEFF H. CAPELL, Hearing Examiner

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ORIGINAL

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

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NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code 1.23.140*)

NOTICE

APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing Examiner's decisions are appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review, or otherwise challenge decisions of the Hearing Examiner shall be commenced within 21 days of the entering of the decision by the Examiner, unless otherwise provided by statute.