

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **MICHEAL D. BROWN,**

HEX2021-021

4 **Appellant,**

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

5 **v.**

6 **CITY OF TACOMA,
ANIMAL CONTROL AND
COMPLIANCE,**

7 **Respondent.**

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10 **THIS MATTER** came on for hearing before JEFF H. CAPELL, the Hearing Examiner
11 for the City of Tacoma, Washington, on August 26, 2021.¹ Deputy City Attorney Jennifer
12 Taylor appeared as legal counsel for Respondent City of Tacoma (the “City”), Animal Control
13 and Compliance (separately “Animal Control” or “ACC”). Rebecca O’Hagan and Animal
14 Control Officers Joe Satter-Hunt and Robin Bowerman were also present as the City’s
15 witnesses. All three testified.² Appellant Micheal D. Brown (“Appellant” or “Brown”)
16 appeared at hearing without legal counsel and also testified.

17 From the evidence in the hearing record, the Hearing Examiner makes the following:

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21 ¹ Although State and City in-person meeting restrictions were previously relaxed, the Office of the Hearing Examiner is continuing to conduct hearings over Zoom unless an in-person hearing is needed for some reason or expressly requested by a party. This hearing was conducted over Zoom at no cost to any participant with video, internet audio, and telephonic access.

² For ease of reference, and without meaning any disrespect, after initial introduction of parties and witnesses, they will occasionally be referred to by last name only.

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

1 **FINDINGS OF FACT**

2 1. Appellant Micheal D. Brown currently resides within the Tacoma city limits at
3 238 East 68th Street, Tacoma, WA 98404 (the “Subject Property”). Brown is the owner of a
4 black colored German Shepherd named Midnight (“Midnight” or the “Dog”).³ *Ex. R-1 and*
5 *Ex. R-2.*

6 2. Animal Control issued a Dangerous Dog Notice for Midnight dated July 30, 2021
7 (the “DDN”). The DDN alleged conduct that could qualify Midnight as a Dangerous Dog under
8 Tacoma Municipal Code (“TMC”) section 17.01.010.15, and the DDN ordered Midnight be
9 impounded. Midnight was still in the custody of the Humane Society of Tacoma and Pierce
10 County (“Humane Society”) at the time the hearing was held. *Ex. R-1.*

11 3. The DDN was issued as the result of an incident that occurred on July 23, 2021,
12 around 9:45 am, on East 68th Street across the street from the Subject Property (the
13 “Incident”). *O’Hagan Testimony, Bowerman Testimony; Ex. R-1, Ex. R-2, Ex. R-4.*

14 4. O’Hagan owns a male Mini Pinscher named “Sampson” that weighs in around 15
15 pounds. She was out walking her dog on a leash along East 68th Street across from the Subject
16 Property at the date and time of the Incident. She testified that “out of nowhere” Midnight ran
17 up to her barking and growling. O’Hagan’s dog then began barking and so she picked him up
18 in her arms and turned her back to Midnight. Midnight then bit O’Hagan on the back of the
19 right arm above her elbow. *Id.*

20 5. Brown came to the scene and called his dog off getting him to release O’Hagan’s
21

³ Brown owns at least one other dog as well, as will be seen below.

1 arm. He apologized for the incident,⁴ and suggested to O'Hagan that she should have the injury
2 examined. O'Hagan asked Brown if the Dog's vaccinations were up to date and he responded
3 that they were. Brown also indicated to O'Hagan where he lived. *Id.*

4 6. Brown told O'Hagan that he did not think Midnight intended to bite her, but rather
5 that he was probably going after her dog. Brown testified that he has allowed Midnight to go
6 after rabbits in the past and he thinks that may have made Midnight aggressive toward animals.
7 *O'Hagan Testimony, Brown Testimony.*

8 7. O'Hagan went to an urgent care facility that same day to obtain treatment for the
9 bite. She received five stitches to the largest wound (there were other abrasions in addition) at
10 the back of her right arm, and she was given a tetanus shot and medication. O'Hagan's injuries
11 are depicted in Exhibit R-6. Officer Bowerman saw O'Hagan's injuries first-hand during an in-
12 person meeting with her several days after the Incident. *O'Hagan Testimony, Bowerman*
13 *Testimony; Ex. R-5.*

14 8. O'Hagan initially reported the Incident by calling 911. Animal Control called her
15 after it got word of the Incident through the "pet line," and then first contacted O'Hagan the
16 same day of the Incident by phone. Officer Bowerman went to the Subject Property the same
17 day as the Incident and saw Brown putting up additional fencing around his yard. She also
18 observed Midnight in the yard with the gate open. Bowerman made this observation pointing
19 out that conditions were such that Midnight could have escaped the yard. There was no
20 testimony that he did, however, prior to being impounded. After some discussion between
21 Bowerman and Brown, ACC impounded Midnight with Brown's cooperation. ACC initially

⁴ Brown offered his apologies at the hearing as well.

1 indicated that it would be investigating the incident for a possible Potentially Dangerous Dog
2 designation on Midnight. *O'Hagan Testimony, Bowerman Testimony; Ex. R-1, Ex. R-2, Ex. R-*
3 *4.*

4 9. In questioning from both City legal counsel and from the Examiner, ACC's
5 witnesses indicated that the decision to issue Midnight the DDN, rather than a Potentially
6 Dangerous Dog Notice ("PDDN"), was thought over well, but was primarily based on Animal
7 Control having prior issues with a different dog that Brown owns named "Gypsy." Gypsy has
8 gotten loose from the confines of the Subject Property and has engaged in dangerous behavior.⁵
9 ACC witnesses confirmed that there have been no prior incidents with Midnight. ACC
10 indicated that it does not trust Brown to keep either dog confined under the current
11 circumstances at the Subject Property. Officer Satter-Hunt, the ACC supervisor of 16 years,
12 indicated that he would have no problem treating this case as a Potentially Dangerous Dog
13 matter if a requirement were imposed that Midnight can only be outside the house on the
14 Subject Property if secured in an ACC-inspected-and-approved, five-sided enclosure.

15 *Bowerman Testimony, Satter-Hunt Testimony.*

16 10. ACC witnesses also testified that the severity of O'Hagan's injury played at least
17 some part in charging this matter as a Dangerous Dog designation rather than a Potentially
18 Dangerous Dog designation. That notwithstanding, the ACC testimony was significantly
19 weighted to the decision being based on what ACC witnesses referred to as "previous history
20 with this other dog." In inquiry, when the Examiner compared this case to another recent case
21 with similar, and in the Examiner's estimation more severe facts, the City seemed to

⁵ The City's Exhibit R-3 is more or less devoted to ACC activity regarding Gypsy.

1 misremember the facts of that previous case and did not offer anything helpful to the Examiner
2 to differentiate the two before the Examiner moved on. *Id.*

3 11. For his part, Brown indicated that he “saw what happened”—in reference to the
4 Incident—and he did not contest any of the Findings of Fact established above. He did concede
5 that Midnight is aggressive toward animals, but he does not believe Midnight is dangerous. He
6 offered that if Midnight is released to him that “nothing like this will happen again.” *Brown*
7 *Testimony.*

8 12. Any Conclusion of Law below which may be more properly deemed or considered
9 a Finding of Fact, is hereby adopted as such.

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

11 **CONCLUSIONS OF LAW**

12 1. The Hearing Examiner has jurisdiction in Dangerous Dog and Potentially
13 Dangerous Dog hearings pursuant to Tacoma Municipal Code (again, the “TMC”) sections
14 1.23.050.B.8, 17.04.031 and 17.04.032.

15 2. Pursuant to TMC 17.04.031.B, in appeal proceedings before the Hearing
16 Examiner challenging a Dangerous Dog Declaration, Animal Control bears the burden of
17 proving, by a preponderance of the evidence, that the animal in question meets the definition of
18 a Dangerous Dog. This definition is as follows:

19 “Dangerous dog” means any dog that, according to the records of the
20 appropriate authority:

21 a. unprovoked, inflicts severe injury on or kills a human being on public or
private property; or

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

- b. unprovoked, inflicts injuries requiring a domestic animal to be euthanized or kills a domestic animal while the dog is off the owner's property; or
- c. while under quarantine for rabies bites a person or domestic animal; or
- d. was previously declared to be a potentially dangerous dog, the owner having received notice of such declaration, and the dog is again found to have engaged in potentially dangerous behavior; or
- e. is owned or harbored primarily or in part for the purpose of dog fighting or is a dog trained for dog fighting; or
- f. unprovoked, attacks a "dog guide" or "service animal" as defined in Chapter 70.84 RCW and inflicts injuries that render the dog guide or service animal to be permanently unable to perform its guide or service duties. *TMC 17.01.010.15.*

3. Pursuant to TMC 17.04.032.B, in appeal proceedings before the Hearing Examiner challenging a Potentially Dangerous Dog declaration, Animal Control bears the burden of proving, by a preponderance of the evidence, that the animal in question meets the definition of a Potentially Dangerous Dog. This definition is as follows:

[A] "potentially dangerous dog" means any dog which:

- a. unprovoked, bites or injures a human or domestic animal on public or private property; or
- b. unprovoked, chases or approaches a person or domestic animal upon the streets, sidewalks, or any public or private property in a menacing fashion or apparent attitude of attack; or
- c. has a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or to otherwise threaten the safety of humans or domestic animals. *TMC 17.01.010.27.*

3. The above criteria for both types of declarations are disjunctive. Accordingly, the City must only prove that one of the criteria was met for a particular designation to be upheld

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

1 on appeal. Animal Control alleged that subsection a. of TMC 17.01.010.15 was the basis for its
2 DDN issued to Midnight. *See Ex. R-1 and Ex. R-2.*

3 4. When a dog is declared dangerous, and that declaration is upheld after a hearing,
4 “[t]he Hearing Examiner shall enter an order so stating and shall direct that the dog be
5 humanely euthanized.” *TMC 17.04.031*. As alternative to being humanely euthanized, TMC
6 17.04.031.C provides the following:

7 Upon application of the owner, however, a dangerous dog may be either (1) sent
8 at the owner’s expense to a secure animal shelter and maintained at all times in
9 compliance with RCW Chapter 16.08; or (2) removed from the City and
maintained at all times in compliance with RCW Chapter 16.08 at the owner’s
expense.

10 Brown has made no request (application) under TMC 17.04.031.C, either at the hearing or
11 otherwise.

12 5. When a dog is declared potentially dangerous, and that declaration is upheld after
13 a hearing, the Hearing Examiner has the authority to impose conditions or restrictions in
14 conformance with TMC Title 17 and RCW 16.08. *TMC 17.04.032, TMC 17.04.050*. State law,
15 at RCW 16.08.080(9), gives a local authority a fair amount of latitude in placing additional
16 restrictions upon owners of dangerous, and presumably potentially dangerous dogs.

17 6. Although provocation can be a defense to conduct that would otherwise make a
18 dog dangerous or potentially dangerous, there was no evidence of provocation here. The
19 evidence did show by a preponderance that Midnight attacked and bit O’Hagan causing her
20 injury on public right-of-way.

21 7. TMC 17.01.010.31 defines “Severe injury” as “[a]ny physical injury that results in

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

1 (a) broken bones, (b) muscle, ligament, or tendon tears, (c) skin lacerations or puncture wounds
2 which require sutures or surgery, or (d) transmission of an infectious or contagious disease.

3 O'Hagan's injury was sutured by her medical provider. *Finding of Fact 7.*

4 8. The foregoing notwithstanding, and not in any way diminishing O'Hagan's injury,
5 the Examiner finds it difficult here to maintain the DNN on the principle of equal protection.
6 Washington courts have held that "A denial of equal protection may occur when a valid law is
7 administered in a manner that unjustly discriminates between similarly situated persons."
8 *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 811, 756 P.2d 736 (1988). Stated
9 slightly differently, the courts have also held that "The constitutional right to equal protection
10 of the law requires that similarly situated persons receive like treatment under the law." *State v.*
11 *Shawn P.*, 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

12 9. Although Brown owns both Gypsy and Midnight, holding Midnight accountable
13 with the City's harshest designation because of the past actions of Gypsy does not square with
14 any provision of applicable law of which the Examiner is aware, nor did the City cite to any
15 controlling authority on that point.⁶ This crossover of accountability from one dog to the other
16 raises equal protection issues.

17 10. More troubling on the equal protection front is the fact that in a recent hearing
18 where (a) two dogs of similar size to Midnight attacked a person out walking her dog, (b) at
19 least one of the dogs bit both the person and the dog, and (c) the bite to the person's hand
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⁶ In argument, the City made a passing reference to charging decisions based on prior criminal history. The Examiner is not aware of any situation where charging decisions based on another actor's prior conduct is appropriate. The Examiner is aware that the City may be referring to Brown's negligence in regard to Gypsy's prior conduct more than Gypsy's own actions. Still, somehow punishing Brown by euthanizing Midnight based on prior incidents with Gypsy seems too convoluted a path to take here.

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

1 appeared even more severe, requiring seven stitches, ACC charged, and the appeal concluded
2 as a PDDN. In addition to the foregoing, there had been reports of the two dogs in this prior
3 case being out previously unattended and acting menacingly, and on the day of the incident in
4 that matter, the dogs ended up being loose and roving the neighborhood for hours before their
5 owners retrieved them. If anything, that PDDN hearing's facts seem more extreme than the
6 present DDN appeal.⁷

7 11. In order to avoid potential equal protection problems here, the Examiner
8 concludes that this matter is more appropriately handled *provisionally* as a PDDN. The
9 amendment herein below is provisioned on whether Brown meets the conditions now imposed.
10 If met, Midnight will be designated a Potentially Dangerous Dog. If the conditions are not
11 timely met, the DDN determination will stay in place and Midnight will need to be humanely
12 euthanized in accordance with TMC 17.04.031.

13 12. All restrictions set forth below and imposed herein are designed to deter any
14 future dangerous behavior by Midnight, and to help Brown keep his promise of nothing like
15 this (the Incident) ever happening again. *Finding of Fact 11*. They serve to protect members of
16 the community from menacing behavior and attacks because a restricted dog should not be able
17 to get loose and engage in such behavior if the restrictions are met. The restrictions also protect
18 the life of the dog from coming into possible jeopardy (again) by preventing future attacks that
19 could lead to more severe consequences than those conditionally imposed here through
20 amendment of the designation.
21

⁷ The Examiner is not necessarily insinuating after the fact that this prior matter should have been "charged" as a DDN, however.

1 13. RCW 16.08.100 requires that for dangerous dogs, “The owner must pay the costs
2 of confinement and control.” In that same vein, TMC 17.04.031.C states “The owner is
3 responsible for paying all fees owed to the City for the care of the animal.” Brown owes these
4 costs in reimbursement to the City, as further addressed in the Order below, in order for the
5 amendment to become permanently effective.

6 14. Any Finding of Fact, which may be more properly deemed or considered a
7 Conclusion of Law, is hereby adopted as such.

8 **ORDER**

9 Based on the above Findings and Conclusions, the present appeal is conditionally
10 amended to a Potentially Dangerous Dog determination/notice from the City’s original
11 Dangerous Dog Notice, if the following conditions are met within one month’s time from the
12 date of this Decision and Order:

- 13 1. Brown must provide a five-sided enclosure on the Subject Property of suitable
14 size and security to contain Midnight in the yard of the Subject Property; and
- 15 2. Brown must have the enclosure inspected by ACC in order for ACC to
reasonably approve the enclosure; and
- 16 3. Midnight will remain in the City’s (Humane Society) custody until the
17 enclosure is in place on the Subject Property and ACC has approved it;⁸ and
- 18 4. Brown shall pay all accrued costs for Midnight’s care to the City (Humane
Society) in order for Midnight to be released.

19 If the foregoing conditions are met, Midnight shall be released back to Brown’s
20 custody and Midnight shall be officially designated a Potentially Dangerous Dog. ACC may
21 choose to issue a new PDDN on its usual paperwork, but this Decision and Order may serve

⁸ If the parties are in disagreement as to what constitutes an approvable five-sided enclosure, they may request to reconvene before the Hearing Examiner for resolution of said disagreement.

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

1 the same purpose. The PDDN/designation will not be appealable separate from this Decision
2 and Order under legal principles applicable to an already decided matter.

3 If the above conditions are not timely met, the DDN will be considered UPHELD, and
4 Midnight shall be humanely euthanized in accordance with TMC 17.04.031.

5 If the conditions of amendment and release are met, from that point forward Midnight
6 shall be considered a Potentially Dangerous Dog, as stated above, and all of the following
7 restrictions must be adhered to at all times:

- 8 1. Midnight must not be outside the house of his owner unattended unless
9 securely contained within the proper (as inspected and approved by ACC)
10 five-sided enclosure on the premises; and
- 11 2. Midnight must not go beyond the proper enclosure on the premises of the
12 owner (either being in the house or a five-sided enclosure) unless he is
13 securely leashed and humanely muzzled in a manner that will prevent him
14 from biting any person or animal and is under the physical control of a
15 responsible person; this condition applies even while in the yard if
16 Midnight is not in the enclosure; and
- 17 3. A clearly visible warning sign informing that there is a potentially
18 dangerous dog on the property must be posted conspicuously and such sign
19 must include a warning symbol that informs children of the presence of a
20 potentially dangerous dog; and
- 21 4. No use of any kind of tie-out in the yard is permitted.

17 The following notification obligations of the PDDN also remain in full force and
18 effect:

19 The owner shall immediately notify Tacoma Animal Control, followed by written
20 notice, when a dog which has been classified as potentially dangerous:

- 21 A. is loose or unconfined; provided that, the owner shall first call 911;

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

1 B. has bitten a human being or attacked another animal; provided, the
owner shall first call 911;

2 C. is sold or given away, or dies; or

3 D. is moved to another address.

4 The parties shall report to the Office of the Hearing Examiner whether the conditions
5 of amendment and Midnight's release have been met, or whether the DDN remains in place
6 from failure to meet the amendment/release conditions and Midnight is humanely euthanized.
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8 **DATED** this 3rd day of September, 2021.

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10 **JEFF H. CAPELL, Hearing Examiner**

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

1 **NOTICE**

2 **RECONSIDERATION/APPEAL OF EXAMINER'S DECISION**

3 **RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:**

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

20 **NOTICE**

21 This matter may be appealed to Superior Court under applicable laws. If appealable, the
petition for review likely will have to be filed within thirty (30) days after service of the
final Order from the Office of the Hearing Examiner.

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