

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **KISHIA MITCHELL AND**  
4 **TRACY H. MCFADDEN,**

5 **Appellants,**

6 **v.**

7 **CITY OF TACOMA,**  
8 **ANIMAL CONTROL AND**  
9 **COMPLIANCE,**

10 **Respondent.**

**HEX2021-026**

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

11 **THIS MATTER** came on for hearing before JEFF H. CAPELL, the Hearing Examiner  
12 for the City of Tacoma, Washington, on December 16, 2021.<sup>1</sup> Deputy City Attorney Jennifer  
13 Taylor appeared as legal counsel for Respondent City of Tacoma (the “City”), Animal Control  
14 and Compliance (separately “Animal Control” or “ACC”). Chauntel Evans, MyKalae Landry,  
15 Jacob Ambrozic, and Animal Control Officer Mia Salisbury were also present as the City’s  
16 witnesses. All four witnesses testified. Appellants Kishia Mitchell and Tracy McFadden  
17 appeared at hearing represented by attorney Leila Arefi-Pour. Both Mitchell and McFadden  
18 testified.<sup>2</sup>

19 From the evidence in the hearing record, the Hearing Examiner makes the following:  
20

21 <sup>1</sup> Due to ongoing State and City in-person meeting restrictions, the Office of the Hearing Examiner is continuing to conduct hearings over Zoom. This hearing was conducted over Zoom at no cost to any participant with video, internet audio, and telephonic access.

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

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

1 **FINDINGS OF FACT<sup>3</sup>**

2 1. Appellants Kishia Mitchell and Tracy H. McFadden currently reside within the  
3 Tacoma city limits at 2408 Yakima Ct., Tacoma, WA 98405. Mitchell and McFadden are  
4 owners of a spayed white female pit Bull named Frosty (“Frosty” or the “Dog”). *Ex. R-1 and*  
5 *Ex. R-2.* Frosty is somewhat advanced in years, is deaf, arthritic, and many of her teeth are  
6 significantly worn down. Mitchell and McFadden have owned Frosty for approximately four  
7 years after adopting her from the Humane Society. Frosty weighs in at around 60 lbs.  
8 *Mitchell Testimony, McFadden Testimony; Exs. A-9~A-11.*

9 2. This appeal stems from Animal Control’s having issued a Potentially Dangerous  
10 Dog Notice for Frosty dated September 22, 2021 (the “PDDN”). The PDDN imposed  
11 restrictions on Frosty. *See Ex. R-1 for the full list of restrictions originally imposed.* Animal  
12 Control imposed these restrictions in conformance with applicable provisions of the Tacoma  
13 Municipal Code (“TMC”) and state law.<sup>4</sup> *Ex.R-1.*

14 3. The PDDN was issued as the result of an incident that occurred on August 21,  
15 2021, at around 10:30 am (the “Incident”), on the sidewalk in front of the Landry/Ambrozic  
16 residence in Tacoma, Washington. *Evans Testimony, McFadden Testimony; Exs. R-1~Ex. R-4.*

17 4. On that day, Landry and Ambrozic had paid a friend, Chauntel Evans, to walk  
18 their dog Bentley during their absence out of town to get married. Bentley was a neutered male  
19 Chihuahua/Yorkie mix also somewhat advanced in years. Landry owned Bentley for many  
20 years prior to the Incident. Bentley tipped the scale at just under 10 lbs. *Evans Testimony,*  
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<sup>3</sup> The Examiner notes here that the hearing witnesses testified to an abundance of additional facts that are not listed here as formal Findings of Fact, because, although part of the overall story of events that lead to the hearing, they are not elemental, or otherwise germane to the Examiner’s determination as to whether the PDDN should be upheld.

<sup>4</sup> TMC 17.01.010.27, TMC 17.04.050 and RCW 16.08.

1 *Landry Testimony; Exs. R-5a~R-5c.* Evans was familiar with Bentley prior to the incident from  
2 her friendship with Landry, but she had not walked Bentley prior to that time, nor is she a  
3 vocational dog walker. *Evans Testimony.*<sup>5</sup>

4 5. At the hearing, both Evans and McFadden offered testimony giving their accounts  
5 of what happened during the Incident. Their accounts are different in several respects and these  
6 differences are dealt with below.

7 6. The Incident arose as Evans and Bentley were concluding their walk and returning  
8 to the Landry/Ambrozic residence—Bentley’s home. At that time, McFadden was also out  
9 walking Frosty, and the Frosty team was on the sidewalk in front of the Landry/Ambrozic  
10 residence. The Examiner finds that the following are undisputed facts regarding the Incident:

- 11 a. Both Frosty and Bentley were present in front of the Landry/Ambrozic  
12 residence at the same time;
- 13 b. Bentley was concluding his walk with Evans and was at least preparing to  
14 enter the property and go home;
- 15 c. Frosty was harnessed and on a leash; Frosty never left the sidewalk;
- 16 d. Frosty bit Bentley on the neck and his hold on Bentley had to be  
17 relinquished through the use of a broomstick;<sup>6</sup>
- 18 e. Bentley had noticeable puncture wounds on his neck from Frosty’s bite-  
19 and-hold; and

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<sup>5</sup> Evans could not attend Landry’s wedding due to her work, and therefore ended up on dog duty.

<sup>6</sup> Because it was heavily inferred at the hearing, the Examiner notes here that pitbulls do not have locking jaws. That is somewhat of a myth. No dogs have locking jaws, but pit bulls can be exceptionally strong and tenacious. <https://wagwalking.com/sense/can-dogs-jaws-lock>. A fair bit was made about the condition of Frosty’s teeth at the hearing and whether they were capable of injuring Bentley as severely as Bentley seemed to have been injured. This line of argument is ultimately immaterial as will become clear below, and because the severity of the injury is not at issue in a TMC 17.01.010.27.a Potentially Dangerous Dog appeal.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
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1 f. Bentley received significant veterinary care for the injuries sustained in the  
2 Incident.<sup>7</sup>

3 7. The following are points on which Evans' and McFadden's testimony regarding  
4 the Incident differ:<sup>8</sup>

5 a. Evans testified that just prior to the Incident, Bentley had been on his  
6 leash and that he had walked at least two steps into the Landry/Ambrozic  
7 property away from the sidewalk.

8 b. McFadden testified that as he and Frosty walked toward the front of the  
9 Landry/ Ambrozic property, he saw Evans pick Bentley up and that Bentley  
10 appeared to be off his leash. McFadden continued that, because Evans had  
11 picked Bentley up, he considered it safe to proceed on the sidewalk, rather  
12 than moving farther out into the street. When he got to the front of the  
13 Landry/Ambrozic property, Evans set Bentley down and then Bentley lunged  
14 at Frosty precipitating Frosty's (uncontroverted) bite-and-hold attack.

15 c. Evans testified that, after Bentley (still on leash) had started making his  
16 way into the Landry/Ambrozic property heading toward the steps, he  
17 appeared "skittish" and freed himself from his collar. Evans said she heard a  
18 "small growl" as Bentley changed course and ran toward where Frosty was a  
19 small distance away on the sidewalk. Evans testified that, as this was  
20 happening, Bentley barked in an "unaggressive" way. Evans testified that  
21 she had no time to react, that she had never seen an incident like this, and  
that she was in "shock" and "froze" and had no time to react. She testified  
that by the time she turned to where Bentley had run and where Frosty was  
standing, Frosty already had a hold of Bentley's neck.

d. Evans testified that in her opinion Bentley was not aggressive and had not  
provoked Frosty. Evans testified that Bentley ran at Frosty in a "skittish"  
way and not in order to attack Frosty.

e. McFadden testified that Bentley had provoked the attack by lunging at  
Frosty.

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<sup>7</sup> Tragically, Bentley was euthanized not too long after the incident due to his deteriorating condition and age. *Landry Testimony*. This is also undisputed, but Bentley's tragic end is not an element of the issues on appeal here.  
<sup>8</sup> The Examiner notes here that it is indeed a fact that these items (7.a. through 7.e.) were testified to at the hearing. By listing them here the Examiner is not finding them all as true and correct Findings of Fact. That would be impossible since some of them cannot be reconciled necessarily. Material discrepancies are dealt with below.

1           8. Landry testified that the Incident occurred while she and Ambrozic were getting  
2 married in Ocean Shores, Washington. After the Incident, Evans contacted the wedding party  
3 and Landry was able to arrange for Bentley to get veterinary care even though she was out of  
4 town. The costs for Bentley's care were significant. *Evans Testimony, Landry Testimony.*

5           9. Animal Control Officer Mia Salisbury testified regarding her investigation of the  
6 Incident after it was reported to Animal Control. Both she and Landry confirmed that, at one  
7 point, presumably prior to actual issuance of the PDDN, Landry asked that the investigation be  
8 dropped without any designation issuing from Animal Control. Landry said she did this  
9 because she understood that provocation from Bentley may have been involved, and that she  
10 has owned a pit bull in the past and did not want to see Frosty euthanized.<sup>9</sup> She changed her  
11 mind regarding the ACC prosecution at some point, and ACC continued with, and concluded  
12 its investigation. *Landry Testimony, Salisbury Testimony.*

13           10. Salisbury testified that a significant factor in deciding to issue the PDDN was that,  
14 in her estimation, Evans never changed her story, and McFadden seemed to by the time he  
15 submitted his written statement (*Ex. R-4*). Specifically, Salisbury stated that McFadden had  
16 never mentioned Bentley nipping at Frosty until he submitted his written statement. McFadden  
17 had stated to Salisbury prior to that time that the Incident was not Frosty's fault, however.  
18 *Salisbury Testimony.*

19           11. Salisbury further testified that she had seen smaller dogs that were in fear of a  
20 bigger dog slip their leashes in order to get away from the larger dog. Regardless of that  
21 testimony, that is not what happened in the Incident. Even if McFadden's account is entirely

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<sup>9</sup> Based on ACC's having charged this matter as a Potentially Dangerous Dog, euthanization has never been at issue.

1 disregarded, Bentley slipped his leash and then changed directions in order to run at Frosty.

2 *Evans Testimony.*

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

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

6 **CONCLUSIONS OF LAW**

7 1. The Hearing Examiner has jurisdiction in this matter pursuant to Tacoma  
8 Municipal Code (“TMC”) 1.23.050.B.8 and 17.04.032.

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

13 [A] “potentially dangerous dog” means any dog which:

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

20 3. The above criteria are disjunctive. As a result, the City must only prove that one  
21 of the three criteria were met for a designation to be upheld on appeal. Animal Control alleged

1 that subsection a. was the basis for its PDDN, and therefore, the Examiner views the facts  
2 presented against that criterion. *See Ex. R-1.*

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

8 5. The presence of provocation can negate conduct that would otherwise make a dog  
9 potentially dangerous. TMC Title 17 does not define the term “unprovoked” as it is used in  
10 TMC 17.01.010.27, or otherwise. In the present case, if Frosty’s bite on Bentley was provoked,  
11 that provocation would negate the bite being grounds for upholding Frosty’s declaration as a  
12 Potentially Dangerous Dog.

13 6. In other places in the TMC, where a material word is not expressly defined, one is  
14 directed to turn to Webster’s dictionary.<sup>10</sup> Webster’s Online Dictionary defines “provoke” as  
15 follows:

- 16 **1a:** to call forth (a feeling, an action, etc.)...  
17 **b:** to stir up purposely [as in] *provoke* a fight  
**c:** to provide the needed stimulus for...  
18 **2a:** to incite to anger...

19 7. At hearing, the City appeared to argue that the size disparity between Frosty and  
20 Bentley should somehow factor into the consideration of whether Frosty is a Potentially  
21 Dangerous Dog, or somehow make provocation impossible. The City seemed to advance the

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<sup>10</sup> *See e.g., TMC 13.01.010, TMC 13.01.060.*

1 theory that Frosty could not be provoked because Bentley posed, literally, so little a threat. No  
2 support from either the TMC or applicable case law was offered in support of that proposition,  
3 however, and the Examiner has found none in his own perusal of the law. Despite their small  
4 size, Chihuahuas are almost notoriously territorial and aggressive.<sup>11</sup>

5 8. There is no evidence of Frosty showing aggression<sup>12</sup> prior to Bentley slipping his  
6 leash and running back at Frosty over the short distance that separated the two. Given that short  
7 distance, McFadden’s characterization of Bentley’s actions as a “lunge” also seems reasonable.  
8 The Examiner does not conclude that either Evans or McFadden lack credibility necessarily,  
9 but the differences in their testimony are prime examples of how the same event can be  
10 experienced and recounted differently. Ultimately, Evans’ opinion testimony about Bentley’s  
11 demeanor being skittish and not aggressive is unconvincing and is negated by Bentley’s actual  
12 actions, i.e., running or lunging at Frosty rather than running away.

13 9. In either version of the Incident, it appears by a preponderance of the evidence  
14 that Frosty’s bite-and-hold on Bentley’s neck would not have occurred, *but for* Bentley’s  
15 actions—whether that was a lunge and nip at Frosty, or whether as the City’s witness Evans  
16 testified, Bentley slipped his collar/leash and ran at Frosty. The evidence shows by a  
17 preponderance that Bentley’s actions provided the stimulus for Frosty’s unfortunate response.  
18 This is provocation by definition. Again, no authority was provided that would require Frosty  
19 to simply shrug off Bentley’ actions because of the disparity in size.

21 \_\_\_\_\_  
<sup>11</sup> See e.g., <https://dogleashpro.com/chihuahua/why-are-chihuahuas-so-aggressive/>. For their own part, Yorkies were originally bred to be vermin hunters in the mills of industrial England. <https://www.vetinfo.com/from-the-park-to-park-avenue-how-yorkies-went-from-pest-control-to-purse-guards.html>.

<sup>12</sup> Evans could not positively identify where the “small growl” originated, but then later tried to attribute growling to Frosty although her testimony was less than certain on this point throughout.

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



1           10. Any Finding of Fact, which may be more properly deemed or considered a  
2 Conclusion of Law, is hereby adopted as such.

3           Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing  
4 Examiner issues the following:

**ORDER**

6           Based on the above Findings and Conclusions, the present appeal is GRANTED and  
7 the City of Tacoma’s Potentially Dangerous Dog Notice issued to Frosty is reversed and  
8 rescinded, together with the restrictions imposed therein, due to Bentley’s actions having  
9 provoked the bite from Frosty. Because the bite was not “unprovoked” the elements the City  
10 must show are not met by a preponderance of the evidence.

11           **DATED** this 22nd day of December, 2021.

  
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**JEFF H. CAPELL, Hearing Examiner**

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 twenty-one (21) days after service of  
the final Order from the Office of the Hearing Examiner.

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