



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

Thomas P. Quinlan, Smith Alling, P.S. Attorneys at Law, 1501 Dock Street,  
Tacoma, WA 98402-3209

Town Strength and Conditioning, 2201 Crystal Springs Rd W, Tacoma, WA 98466-2925

Town Strength and Conditioning/Town Athletics, 3914 6<sup>th</sup> Avenue, Tacoma, WA 98406-4941

Jennifer Taylor, Deputy City Attorney, 747 Market Street, Room 1120, Tacoma WA 98402

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North Bay LLC, PO Box 7334, Tacoma, WA 98417-0334

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Cc: Dan McConaughy, City of Tacoma, NCSD (Interoffice Mail Delivery)

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 6<sup>th</sup> 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 6<sup>th</sup> 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 6<sup>th</sup> 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

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

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 6<sup>th</sup> 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”<sup>1</sup> 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

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<sup>1</sup> “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-Klein<sup>2</sup> 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 LMax<sup>3</sup>; and
- 19 F. in establishing an ambient baseline, extraneous, loud outlier sounds should be  
20 removed from the mix.<sup>4</sup> *Adkins Testimony, Miller-Klein Testimony.*

21 <sup>2</sup> 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 A<sup>3</sup> 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.

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

<sup>4</sup> 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.<sup>5</sup> 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 <sup>5</sup> 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.<sup>6</sup> 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)

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<sup>6</sup> 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.