

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **JAZMINE CARTER**

**HEX2020-021**

4 **Appellant,**

**DECISION AND ORDER ON  
REQUEST FOR  
RECONSIDERATION**

5 **v.**

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

7 **Respondent.**

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9  
10 This matter was decided in written Findings of Fact, Conclusions of Law, and an Order  
11 dated August 7, 2020 (the “Decision”). Thereafter, an emailed request for reconsideration was  
12 received in the Office of the Hearing Examiner (the “HEX Office”) dated August 14, 2020, but  
13 not time stamped until 5:54 pm, after HEX Office operating hours. Despite the after-hours  
14 submittal, Carter’s request for reconsideration was timely pursuant to Tacoma Municipal Code  
15 (“TMC”) 1.23.140.

16 TMC 1.23.140 does not specify any particular physical form for a request for  
17 reconsideration other than that it must be “in writing.” As a result, an emailed request is  
18 acceptable under the circumstances. TMC 1.23.140 does, however, require that any request for  
19 “reconsideration must...set forth the alleged errors of procedure, fact, or law.” Carter’s request  
20 appears to allege as follows:  
21

**DECISION ON REQUEST  
FOR RECONSIDERATION**

- 1 -

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1 **Alleged Errors of Fact**

- 2 1. Carter points out that the incident did not occur “on or around June 29,  
3 2020” as stated in Finding of Fact 3 in the Decision. The actual date was  
4 June 25, 2020.
- 5 2. Carter clarified that her and Lanz’s apartments do not face each other across  
6 a hallway/entranceway as set forth in Finding of Fact 3 in the Decision. They  
7 actually are side-by-side.
- 8 3. Carter disputes that she witnessed the end of Flash’s attack on Lanz as stated  
9 in Findings of Fact 4 and 6.
- 10 4. Carter disputes the number of people it took to get Flash off of Lanz. *See*  
11 *FoF 5*.
- 12 5. Carter contends Lanz did play beer pong after going into Carter’s apartment  
13 prior to requesting that she take him to the hospital. This allegation disputes  
14 a contrary finding at Finding of Fact 6.

15 **Alleged Errors of Law**

- 16 1. Citing to RCW 16.08.090, Carter appears to allege that the Examiner has erred in  
17 concluding that there was no provocation here sufficient to justify Flash’s attack  
18 on Lanz. This allegation is based on her contention that Lanz has tormented Flash  
19 in the past.
- 20 2. Carter also appears to allege that the Examiner wrongly relied on the previous  
21 King County incident in upholding Animal Control’s issuance of the Dangerous  
Dog Notice in Tacoma.

The above alleged errors of fact and law will each be addressed in turn below. There do not appear to be any allegations of procedural errors, however, on a somewhat procedural front, Carter appears now to be requesting to invoke TMC 17.04.031.C.2 in order to obtain authorization to remove or relocate Flash out of the city limits of Tacoma. This request will also be dealt with below.

1 Reconsideration is generally not an opportunity to establish a position that the moving  
2 party failed to establish during the main course of the proceedings.<sup>1</sup> New evidence is typically  
3 only considered on reconsideration if it is not just new, but also “newly discovered.” Generally,  
4 in most Washington State cases, in order to qualify as “newly discovered,” the evidence must  
5 meet the test set forth in Civil Rule 59(a)(4)<sup>2</sup> which states in pertinent part as follows:

6 (a) Grounds for New Trial or Reconsideration. On the motion of the party  
7 aggrieved,...reconsideration [may be] granted. Such motion may be granted  
8 for any one of the following causes materially affecting the substantial rights  
9 of such parties:

10 ....

11 (4) Newly discovered evidence, material for the party making the  
12 application, which the party could not with reasonable diligence have  
13 discovered and produced at the trial;

14 Nothing Carter submitted with her request for reconsideration appeared to be newly  
15 discovered evidence. Rather, she submitted additional, and in some cases repeat unsworn  
16 statements from friends regarding Flash’s character, along with correspondence referencing  
17 Flash as a support animal. As such, the Examiner disregards it as both cumulative and  
18 inappropriate on reconsideration.

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<sup>1</sup> Reconsideration is not intended to be a second bite at the apple. 15A Karl B. Tegland & Douglas J. Ende, *Washington Practice: Handbook On Civil Procedure* § 65.1 at 520 (2009).

<sup>2</sup> The Examiner recognizes that the requests for reconsideration addressed here are not Superior Court proceedings, and therefore, the Civil Rules (“CR”) do not strictly apply. That said, the CRs are, by analogy, a good guide to follow for procedural and evidentiary issues, even in these proceedings.

1 ANALYSIS

2 **Errors of Fact**

3 1. Carter is correct that the statement “on or around June 29, 2020”<sup>3</sup> in Finding of  
4 Fact 3 of the Decision is in error. It appear that this was a typographical error and it should be  
5 corrected. Exhibit C-3 (as well as other evidence in the record) indicates that the social  
6 gathering at Carter’s apartment started on June 25, 2020, and that the attack took place in the  
7 waning minutes of June 25, 2020, with subsequent events and the visit to the hospital taking  
8 place in the early AM hours of June 26, 2020. As a result, the opening sentence of Finding of  
9 Fact 3 is corrected to read as follows:

10 The DDN was issued based on an incident that occurred on or around June 25, 2020,  
11 at 5412 South Steele Street in the city of Tacoma (the “Subject Property”) where  
Carter and Zac Lanz were residing in separate apartments.

12 The above correction notwithstanding, the date on which the attack occurred is not elemental to  
13 the issue of whether the DDN should be upheld. The correction being made, this error of fact  
14 does not change the result set forth in the Decision.

15 2. Carter’s clarification regarding the location of her and Lanz’s apartments is also  
16 welcomed. The record was not entirely clear on this point, and again for the sake of precision,  
17 the final sentence of Finding of Fact 3 in the Decision is corrected to read as follows:

18 Carter and Lanz’s apartments abut each other on a common hallway.

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<sup>3</sup> Because the attack is noted as taking place in the final minutes of the 11 o’clock hour of June 25, 2020, the Examiner’s intention was for this statement in Finding of Fact 3 to read “on or around June 26, 2020…” since it very nearly was June 26, 2020, and later recounted events actually did take place after the calendar page had flipped. Nonetheless, for the sake of added precision, Finding of Fact 3 is revised as above.

1 As with paragraph 1 above, this correction is made simply for the sake of accuracy. The  
2 location of the apartments has no bearing on the ultimate issue of this appeal—whether the  
3 DDN should be upheld.

4 3. In her request for reconsideration, Carter disputes that she witnessed the end of  
5 Flash’s attack on Lanz as stated in Findings of Fact 4 and 6 of the Decision. Since she disputes  
6 this now, and (a) because there is really no contradictory evidence from another source in the  
7 record, and (b) because it has no bearing on the issues for determination here, the Examiner has  
8 no problem revising the last sentence of Finding of Fact 4 and striking the first sentence of  
9 Finding of Fact 6 to reflect Carter’s clarified position as follows:

10 Carter did not see what happened after the Dog escaped her control momentarily,  
11 until she went out the front door to find the Dog had attacked Lanz.

12 This revision notwithstanding, the same as with 1 and 2 above, whether Carter saw the end of the  
13 attack or not changes nothing in the record regarding the attack itself, and therefore has no bearing  
14 on whether the DDN should be upheld.

15 4. No changes will be made to the Decision in regard to Carter now disputing the  
16 number of people it took to get Flash off of Lanz. *See FoF 5*. At best, this is a disputed fact.  
17 Lantz’s statement (*Exhibit C-3*) and testimony indicated multiple people involved in getting  
18 Flash to detach. If Carter did not see the attack, she cannot refute this of herself. Carter’s  
19 submitted statement from Jada Louis indicates multiple people were involved in removing Flash  
20 from Lanz’s side. There is no error here.

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1           5.    Lastly, the contention over whether Lanz did or did not play beer pong after going  
2 into Carter’s apartment prior to requesting that she take him to the hospital is simply  
3 immaterial. Lanz contended in his testimony that he did not. Others say otherwise. It does not  
4 matter. Whether he played beer pong prior to going to the hospital has no bearing on the attack,  
5 or on the injuries that resulted. No changes will be made to the Decision regarding this disputed  
6 fact.

7 **Alleged Errors of Law**

8           1.    Carter’s first alleged error of law is essentially a revisitation of her contention  
9 from the hearing that the attack should be excused due to provocation, or as she argues now,  
10 due to past torment. Carter cites to RCW 16.08.090<sup>4</sup> as her authority, presumably relying on  
11 the language from the statute that provides a potential defense if the person attacked has been  
12 observed or reported in the past to have tormented the dog. At the hearing, Lanz testified that  
13 he had never tormented or provoked Flash, and that his meowing was directed at his own cats.  
14 Carter testified that Lanz had told her differently, and that he had meowed at Flash to “mess  
15 with him.” The Examiner disregards any third party (i.e., not Lanz or Carter) statements on this  
16 issue because they are unsworn hearsay that the Examiner does not find to be reliable enough to  
17 use as a tipping factor on this disputed issue.

18           This evidentiary dispute notwithstanding, and even assuming Carter’s side of this issue  
19 to be correct, the Examiner cannot conclude that meowing, whether directed at Flash or not,  
20 constitutes tormenting him for purposes of RCW 16.08.090, or that such constitutes  
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<sup>4</sup> Whether this provision of the RCW is applicable here, or its relation to the provisions of TMC 17.04 generally, does not need to be addressed because the Examiner cannot find that any prior torment took place in any event.

1 provocation under TMC 17.04. Presumably, Lanz’s cats make meowing noises themselves that  
2 Flash hears from his home next door. Such is apartment life. If meowing noises are all it takes  
3 to incite an attack from Flash, he truly is a dangerous dog that would have to be kept segregated  
4 from all cats, as well as the odd person who meows from time to time, in order to avoid the  
5 kind of attack that was proven here. The Examiner made no error in regard to provocation, and  
6 there was no evidence that Lanz was meowing at Flash when the attack occurred in any event.

7 The RCW 16.08.090 issue of prior torment was not raised at the hearing. Nonetheless,  
8 the Examiner concludes that meowing does not constitute torment as that term is defined.<sup>5</sup>

9 2. Carter’s apparent allegation that the Examiner wrongly relied on the previous  
10 King County incident in upholding Animal Control’s issuance of the DDN is not well-founded.  
11 The King County incident was made a part of the record, and was mentioned in the Decision,  
12 in part, as refutation that Flash had no history of similar incidents and, in part to establish that  
13 King County is no longer a welcoming home for Flash for purposes of any TMC 17.04.031.C.2  
14 removal request, and none other. The Examiner did not rely on anything other than the June  
15 25/26, 2020 incident in deciding whether to uphold the DDN. That incident alone is sufficient  
16 to require upholding the DDN under the applicable TMC provisions.

17 Lastly, the Examiner addresses what now appears to be a request from Carter for  
18 authorization to remove Flash from Tacoma pursuant to TMC 17.04.031.C.2. This section of  
19 the TMC has no timing requirement. It merely indicates that removal of the dog from the city  
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<sup>5</sup> Webster’s online defines torment as NOUN-1 : extreme pain or anguish of body or mind; 2 : a source of vexation or pain; 3 : the infliction of torture; VERB-: to cause severe usually persistent or recurrent distress of body or mind.

1 limits of Tacoma is an alternative to being humanely euthanized. With no timing requirement  
2 in the TMC, making this request as part of the reconsideration process is acceptable.


3 TMC 17.04.031.D.1 and D.2 set forth that the burden of establishing that removal  
4 requirements can be met is on the dog owner as well as the burden to show that the actual  
5 requirements will be met. While Carter has made the removal request, she has not as yet  
6 offered proof of being able to meet the TMC 17.04.031.D.2 criteria.

7 **DECISION AND ORDER**

8 Inasmuch as some factual misstatements were made in the Decision, they are now  
9 corrected above. None of these factual misstatements were elemental to the issue of whether  
10 the DDN should be upheld. Carter's alleged errors of law were not well founded AND  
11 THEREFORE the request for reconsideration is DENIED and the DDN remains upheld as  
12 determined in the August 7, 2020 Decision.

13 As a result, the Dog Flash is to be humanely euthanized, unless within fifteen calendar  
14 days from the date of issuance below, Appellant Carter can submit written proof<sup>6</sup> that she can  
15 meet all the requirements for removal set forth in TMC 17.04.031.D, together with proof of  
16 payment for all boarding fees for Flash due and payable to the Humane Society of Tacoma  
17 Pierce County.

18 **DATED** this 24th day of August, 2020.

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**JEFF H. CAPELL, Hearing Examiner**

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<sup>6</sup> Submission should be to the Office of the Hearing Examiner with copy to the City/Animal Control legal counsel.



**NOTICE**

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.

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