

72622-6

72622-6

Washington State Court of Appeals
Division I

—◆—
Docket No. 72622-6

King Cy. Sup. Ct. Cause No. 14-2-20857-0KNT

CLORRISSA ESTRELLA,

Petitioner-Appellant,

-against-

KING COUNTY, et al.,

Defendants-Respondents.

APPELLANT'S BRIEF

ORIGINAL

ADAM P. KARP, ESQ.
Attorney for Clorrissa Estrella
114 W. Magnolia St., Ste. 425
Bellingham, WA 98225
(888) 430-0001
WSBA No. 28622

FILED
CLERK OF COURT
JAN 21 2015
10:23 AM
BELLINGHAM, WA

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR (WITH ISSUES).....	1
II.	STATEMENT OF THE CASE.....	2
III.	ARGUMENT	10
	A. Insufficient Time Allotted.....	11
	B. Proper Interpretation of KCC 11.04.230(H).....	15
	1. <i>One incident does not suffice</i>	15
	2. <i>A dead dog cannot be a danger</i>	18
	3. <i>No direct evidence of viciousness</i>	18
	4. <i>Misidentification and suggestive cross-species lineup</i>	19
	5. <i>Unable to prove culpable mental state</i>	22
	C. Culpable Mental State and KCC 11.04.230(K).....	28
	D. “Vicious” and KCC 11.04.290 Restraints.....	29
	E. Evidentiary Rulings	30
	F. Request for Reasonable Attorney’s Fees	31
IV.	CONCLUSION.....	31

TABLE OF AUTHORITIES

CASES

Alvarez v. Ketchikan Gateway Borough, 91 P.3d 289 (Ak.App.2004)26

Atherton Condo. Apartment-Owners Ass'n Bd. v. Blume Dev. Co., 115 Wn.2d 506 (1990)24

City of Bexley v. Selcer, 129 Ohio App.3d 72 (1998).....26

Clark v. Martinez, 543 U.S. 371 (2005)17

Dempere v. Nelson, 76 Wash.App. 403 (1994)31

General Signal Corp. v. MCI Telecomm. Corp., 66 F.3d 1500 (9th Cir.1995).....13

Harris v. Turner, 1 Wash.App. 1023 (1970)25

Hernandez-Canton v. Miami City Comm., 971 So.2d 829 (Fla.App.2008).....12

Hobbs v. Kent Cy. SPCA, Inc., 2011 WL 773448 (Del.Com.Pl.2011).....19

Internet Comm. & Entertainment Corp. v. State, 148 Wash.App. 795 (2009).....7

Leocal v. Ashcroft, 543 U.S. 1 (2004).....17

Maloney v. Brassfield, 251 P.3d 1097 (Colo.App.2010).....13

Mansour v. King Cy., 131 Wash.App. 255 (2006)10

Morawek v. City of Bonney Lake, 337 P.3d 1097 (Wash.App.II, 2014).....10

People v. Noga, 168 Misc.2d 131 (N.Y.App.1996).....19

Simmons v. U.S., 390 U.S. 377 (1968).....21

State v. Ankney, 53 Wash.App. 393 (1989)16

State v. Bash, 130 Wn.2d 594 (1996)24

State v. Burrell, 28 Wash.App. 606 (1981).....21

State v. Jacobs, 154 Wn.2d 596 (2005)16

State v. Jaime, 168 Wn.2d 857 (2010).....21

State v. Maupin, 63 Wash.App. 887 (1992).....21

<i>State v. McGee</i> , 122 Wn.2d 783 (1993).....	16
<i>State v. Traweek</i> , 43 Wash.App. 99 (1986)	21
<i>Stone v. Chelan Cy. Sheriff's Dept.</i> , 110 Wn.2d 806 (1988).....	16
<i>U.S. v. Plaza Health Labs.</i> , 3 F.3d 643 (2 nd Cir.1993)	17
<i>U.S. v. Thompson/Center Arms Co.</i> , 504 U.S. 505 (1992)	17
<i>U.S. v. Wade</i> , 388 U.S. 218 (1967).....	21
<i>Weiss v. Bruno</i> , 83 Wn.2d 911 (1974).....	31

STATUTES AND REGULATIONS AND RULES

Board Rule 25	11
KCC 11.04.020(BB)	29
KCC 11.04.190	25
KCC 11.04.200	27
KCC 11.04.230(H).....	15
KCC 11.04.230(K).....	28
RAP 18.1.....	31

TREATISES

John E. Rumel, <i>The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials</i> , 26 U.S.F.L. Rev. 237 (1992).....	14
---	----

I. ASSIGNMENTS OF ERROR

1. Refusing to interpret KCC 11.04.230(H) and 11.04.230(K) in accordance with principles of well-established tenets of statutory construction and constitutional law.

2. Refusing to grant declaratory judgment on Ms. Estrella's facial challenge to the time allotment protocols of the King County Board of Appeals.

3. Refusing to enjoin the King County Board of Appeals to comply with procedural due process in allotting time.

Issues Pertaining to Assignments of Error

A. Did the Board and superior court err by finding that KCC 11.04.230(H) does not require proof of two incidents?

B. Did the Board and superior court err by finding that KCC 11.04.230(H) and 11.04.230(K) do not require proof of a culpable mental state?

C. Did the Board and superior court err by finding that KCC 11.04.230(H) may apply to a dog deceased prior to the date of issuance of the citation or criminal charge?

D. Did the Board and superior court err by finding that KCC 11.04.230(H) does not require the County to prove, without speculation, which dog in fact bit, injured, or killed another?

E. Did the Board err in allowing late-submitted, unsworn statements from Ryan Harrigan and Walter Weston and other hearsay?

F. Did the superior court err by failing to find that the Board's allotment of 10-15 minutes to the appellant-petitioner to present evidence, cross-examine, give an opening, closing, and rebuttal – without the opportunity to seek leave for additional time – facially violates the constitutional right to procedural due process?

II. STATEMENT OF THE CASE

On Dec. 23, 2013, Ron and Laura Weston of Vashon Is., Wash., reported finding several geese and two goats deceased on their property. Mr. Weston shot and killed Godric, Ms. Estrella's dog, when seen on the Westons' property but undisputedly not in the act of chasing, attacking, biting, or killing any animal or person.

Defendant Regional Animal Services of King County ("RASKC") issued Ms. Estrella a *Notice and Order of Violation with Order to Confine* ("NVOC"), alleging two violations of KCC 11.04.230(K), for which a fine of one hundred (\$100) dollars was levied, and two violations of KCC 11.04.230(H), for which a fine of one thousand (\$1000) dollars was levied. The Order also deemed Ms. Estrella's dog Cortana "vicious" and subjected her to a confinement order per KCC 11.04.290.

The stated Date and time of violation(s) was "12/23/13 15:15" at

“19034 RIDGE RD SW/ VASHON” wherein it was further alleged that:

On the above date and approximate time the 2 dogs owned by the defendant were seen trespassing on private property. The property owner saw the dogs inside his goat pen and 2 of his goats had been killed. Also dead in the yard was several of the complainant’s geese and many of the remaining animals had been injured.

RASKC held Ms. Estrella’s two dogs, Godric and Cortana, responsible.

1. Ron Weston.

On the stand, Ron Weston testified that at about 3:15 p.m. on Dec. 23, 2013, he saw two dogs in his cattle-fenced, one-fifth acre, goat enclosure with dimensions of 100 by 75-80 feet. **VRP 7:9-15, 23:14-18.**¹ After closing a dutch door to his goat *pen*, a small structure situated in the much larger goat *enclosure* and within which were four or five unharmed goats were huddled (**VRP 8:3-8**), Mr. Weston drove to his house, retrieved a shotgun, and drove back to the enclosure. Ms. Estrella does not dispute that one of her dogs, Godric, was in the enclosure (but not the pen).

Mr. Weston then described Godric’s demeanor, noting he was “still roaming around in the enclosure. I wasn’t conscious of him barking or growling.” Mr. Weston then “fired one shot,” missing. When Godric “circled around and tried to come past him” to escape, Mr. Weston fired

¹ The Verbatim Report of Proceedings (“VRP”) is subjoined to *Appellant’s Brief*, **CP 33-46**.

again, killing him, even though Godric “was trying to evade [him]” and not acting aggressively toward him or any other animal at the time. **VRP 9:11-21, 21:1-8.**

Importantly, no witness, including Mr. Weston, ever saw Godric or Cortana touch any of his animals that day. **VRP 14:25—15:3.** In fact, Mr. Weston’s own statement to RASKC on Dec. 24, 2013 confirms it could *not* have been Cortana, for he claimed to be “certain” that the two dogs in his enclosure the day prior were the ones who killed his neighbor Gus Schairer’s cat. Ms. Estrella submitted animal control records appended to her hearing brief demonstrating that the dogs responsible for killing the feline belonged to Dee Stoddard and her daughter, not Ms. Estrella. **CP 172-73, 178-83.** At hearing, Mr. Weston admitted that his statement identifying Ms. Estrella’s dogs as the ones who attacked Mr. Schairer’s cat “was inaccurate” and “incorrect.” **VRP 16:24—17:5.**

Mr. Weston’s statement also contended that he did not get to the enclosure and first observe the dogs until 3:15 p.m. that day. **VRP 10-15.** This time point is germane for two reasons: *first*, it proves that one dog he saw could not have been Cortana, who was contained inside Ms. Estrella’s home at that hour; *second*, it confirms that the killing of his geese occurred while Ms. Estrella was placing her dogs in her kennel. Mr. Weston claimed that the dogs were probably on his property for “several hours”

based on the “unexpected appearance of two geese at [his] home earlier in the afternoon several hundred feet away from where they normally are[.]”
VRP 17:16-24.

2. Walter Weston.

Walter Weston, the complainants’ son, testified that on Dec. 23, 2013, he first saw two dogs in the goat enclosure from the family residence, a considerable distance away or certainly far enough to require Mr. Weston to drive. When Walter observed the aftermath, he saw “blood—lots of it.” **VRP 25:1-2.** However, no witness saw any blood on Cortana or Godric. **VRP 21:15-20** (R. Weston saw no blood anywhere on the dogs); **VRP 33:24—34:8, 34:11-13** (Kellogg); see Ms. Estrella’s offer of proof re: Thomas Ranada, discussed below.

Further, Walter Weston had never seen the dog he claimed to be Cortana prior to that day. **VRP 25:21-24.** Yet, he later identified her under highly questionable circumstances, i.e., “based on the photos that were posted online” by Ms. Estrella after RASKC accused Cortana of being involved. **VRP 25:25—26:3** (seeing photograph of only Godric and Cortana on a website prepared by Ms. Estrella to raise money for her appeal); **CP 325-329.**

3. Leon Kellogg

On Dec. 23, 2013, Ms. Estrella lived with her boyfriend Leon

Kellogg and two roommates, Cindy Moreno and Michael Didrickson. Mr. Kellogg testified that at about 9 a.m. on Dec. 23, 2013, he placed Godric and Cortana in a secure kennel on her property and then left for work. There had been no prior issues with its security. **VRP 30:2-13.** Neither dog had ever escaped prior to that day. **VRP 30:11-17.** He received a panicked call from Ms. Estrella at about 1:45 p.m. stating that she came home to find the dogs gone. Mr. Kellogg returned home and began fixing the kennel when Cortana arrived at about 2 p.m. **VRP 31:7-13; VRP 38:11-18** (confirmed by Ms. Estrella). He immediately took Cortana inside and locked her in the room where she remained the rest of the night. He then went outside to continue fixing the enclosure. **VRP 31:13-19.** About two hours later he received a call from Ms. Estrella to meet her at the Weston property. He arrived and found Godric's body lying in front of a large tree, observing no feathers, blood, or defensive wounds. **VRP 33:24—34:8.** When he returned home he inspected Cortana as well, finding no signs of blood or feathers on her. **VRP 34:11-13.** If there were a blood bath as contended by the County, where was a trace of blood on either allegedly vicious dog?

4. Clorrissa Estrella.

Ms. Estrella lived on Vashon Is. since 1996 and testified that loose dogs were a "common sight," including in the six months around the time

of the incident. **VRP 35:12-18.** An animal caretaker, entrusted by her clients to walk dogs, care for cats and horses, and make private house-calls to animals all over Vashon, Ms. Estrella had a firm grasp of geography and animal movement patterns. **VRP 35:19—36:1.** At no time prior to Dec. 23, 2013, did Cortana or Godric ever escape or had been reported to show aggression to any animal or person. **VRP 36:2-9.** Indeed, she submitted photographs showing Godric peaceably in the presence of a raccoon and a mouse. **VRP 35:10-15; CP 193-198.**

While Mr. Kellogg left earlier in the morning, Ms. Estrella testified that she last saw her dogs at about 1 p.m., when leaving for work, at which time she put them in the kennel. While engaged in this activity, she heard a loud ruckus of agitated and scared geese honking from the Weston property.² **VRP 36:16—37:5.** Ms. Estrella then drove off to care for four dogs and twelve cats, distribute medication and clean litter boxes, after which she returned home between 1:30 and 1:45 p.m. to find her dogs missing. **VRP 37:6-14.** Mr. Didrickson told her that her dogs escaped, that he put them back, and they escaped again. **VRP 37:15-19.**

The County may attempt to leave the misimpression that Ms.

² Between Ms. Estrella's home and the Westons are many livestock enclosures and free-roaming chickens, a point of note for if Cortana and Godric had an alleged thirst for such creatures, one would expect to find a string of dead bodies between their two residences. **VRP 40:5-8.**

Estrella allowed her dogs to escape *twice* on Dec. 23, 2013. However, the only evidence before the Board indicated that the dogs had not escaped prior to Ms. Estrella placing them in her secure kennel at about 1 p.m.

Meanwhile, Ms. Estrella continued searching for Godric. Her cell phone lost service, but when regained, she noticed a voicemail from a woman down the street, prompting her to call and speak to Mrs. Weston. On reaching Mrs. Weston, she told Ms. Estrella that her “dog,” *not* “dogs,” killed their livestock. **VRP 39:19-25.** When Ms. Estrella arrived to the Westons’ property to find Godric with a bullet in his head, Mrs. Weston volunteered, “You know your dogs were involved in killing my neighbor’s cat last summer or ... a couple of summers ago[.]” **VRP 41:12-14.** Aside from the fact that Mr. Weston later recanted on this point, it was simply not possible, as Cortana was not even alive.³

5. Cindy Moreno.

Testifying by declaration, Cindy Moreno stated that she saw Cortana and Godric break free from the kennel at about 1:30 p.m. and Cortana return at about 2:30 p.m. while Mr. Kellogg repaired it. **CP 176-77.**

6. Other declarants.

Ms. Estrella submitted declarations from several individuals,

³ Cortana was born Sept. 13, 2012.

incorporated by reference here. All confirmed that neither Cortana nor Godric ever showed a vicious propensity. For instance, see *Yelinek Decl.* (Godric would not even snarl at another living thing, would not chase cats, hide from puppies at times) [CP 169-71]; *Carey Decl.* (volunteer with Vashon Island Pet Protectors, testifying that Dee Stoddard, on same street as Westons, reported that the Stoddards' dogs were at large at least half a dozen times and that others reported them being at large "on at least a monthly basis"; that the Westons' dog was picked up and returned more than once after being at-large; and that since 2011, she received hundreds of calls from individuals seeing dogs at large on the island, including the generalized area near where the Westons live) [CP 172-73]; *Miksch Decl.* (Godric sweet, pleasant) [CP 174-75]; *Britz Decl.* (Godric showed no aggression toward livestock or chickens, though he had opportunity) [CP 184-86]; *Smith Decl.* (Godric played with baby raccoon and bugs) [CP 187-88]; *Housholder Decl.* (Cortana's gentle temperament) [CP 189-90].

7. Procedural History

On May 21, 2014, the King County Board of Appeals conducted an evidentiary hearing on RASKC's Mar. 3, 2014 NVOC. On Jun. 30, 2014, it upheld the NVOC. CP 5-9. Ms. Estrella timely sought a writ of review before the King County Superior Court. CP 1-4, 10-11. The parties stipulated to issuance of the writ. CP 13-14. King County Superior Court

Judge John Chun heard oral argument on the writ and request for declaratory and injunctive relief on Oct. 10, 2014. On Oct. 13, 2014, Judge Chun reversed and remanded for further proceedings by the Board, noting that it “deprived plaintiff of procedural due process.” CP 69-70. Seeking clarification as to the several other issues presented, Ms. Estrella filed a motion. CP 66-68. Judge Chun issued an order on clarification as stated in CP 71-72. Thereafter, Ms. Estrella timely sought review as of right from this court. CP 353-63.

III. ARGUMENT

This court review a trial court’s decision on a writ of certiorari involves scrutiny of the “decision of the body that makes the findings and conclusions relevant to the decision.” *Mansour v. King Cy.*, 131 Wash.App. 255, 262 (I, 2006). Functioning in an appellate capacity, this court “considers questions of law de novo and evaluat[es] factual determinations under a substantial evidence standard.” *Id.* It gives no deference to the superior court. “We treat any findings of fact or conclusions of law the superior court made as surplusage.” *Morawek v. City of Bonney Lake*, 337 P.3d 1097, 1099 (Wash.App.II, 2014). Rules of statutory construction apply to local ordinances. *Id.*, at 1100.

Ms. Estrella contends that the Board violated her right to due process by furnishing insufficient time, making erroneous evidentiary

rulings, conducting the proceeding in an irregular and unfair fashion, misapplying the law, and rendering arbitrary and capricious findings and conclusions.⁴ Recall that the County bore the burden of proof by evidentiary preponderance. Board Rule 25(D)(1)(a).

A. Insufficient Time Allotted

At the outset of the hearing, the Chair informed Ms. Estrella that she would only have 15 minutes to put on her main presentation, exclusive of time for questions and closing. **VRP 4:17-20**. Before the hearing, Mr. Karp requested that Ms. Estrella's matter be given a double slot of 60 minutes, instead of 45 minutes. It was then only recently discovered by Mr. Karp⁵ that the board furnished a single, 20-25 minute slot for each contested matter. Even Ms. Balin anticipated a 60-minute (not 45-minute) hearing. **VRP 5:10-18**.

For the uninitiated, i.e., everyone else without counsel who has appeared before the Board at an earlier time, litigants are ambushed

⁴ See Board Rule 25(C)(3-6)(right of appellant includes offering witnesses and evidence in his/her behalf; to examine and cross-examine witnesses; to impeach (challenge the credibility of) any witness whether such witness has testified for or against the appellant; to rebut evidence against him/her).

⁵ In an earlier matter, Mr. Karp showed up with his clients and learned at the outset, without any prior warning, that he only had 10 minutes to present his case. That matter, *Catunda v. King Cy.*, KCSC No. 14-2-11135-5SEA, is set for oral argument before Judge Halpert on Dec. 16, 2014.

without advance notification that they must put on all evidence, opening, closing, and cross-examination in the space of a 20-25-minute hearing. As a result, litigants rush, fumble, forget to present evidence, or lose the opportunity to present a complete case. In this instance, Mr. Karp anticipated having at least 30 minutes, not *half* that. Concerned about the ability to cross-examine potentially three witnesses and put on three of his own witnesses, Mr. Karp expressed his concerns at the outset and was told, “Please do your best, Mr. Karp.” No further allowances were made. **VRP 4:23—5:6.**

When Mr. Karp tried to cross-examine the County’s first witness, the Board attempted to cut Mr. Karp off and block his line of questioning by telling him to “move along,” forcing him to make an offer of proof that the culprit was in fact the Westons’ own Great Pyrenees, not Ms. Estrella’s dogs. **VRP 19:3-22.** After the County accused Mr. Karp of “wasting time,” Mr. Karp noted that he had more questioning of Mr. Weston but cut his cross-examination short “to ensure that [he had the] ability to put on [his client’s] case.” **VRP 22:1-14.**

During examination of Ms. Estrella’s witness Leon Kellogg, Mr. Karp asked him to draw a map on the chalkboard but was told, “We don’t have time.” **VRP 32:7.** Mr. Karp was again thwarted in his attempt to call Ms. Estrella’s father as a witness even for two or three minutes. **VRP**

42:18—43:6. Such allotment violated due process.

Such allotment violates due process. *See Hernandez-Canton v. Miami City Comm.*, 971 So.2d 829 (Fla.App.2008)(holding that eight minutes per side was too short a time allotment in zoning/design review hearing). The Colorado Court of Appeals recognized the due process implications of time limits:

Time limits may violate a party's due process rights. *In re Marriage of Ihle*, 577 N.W.2d at 67.

[A]rbitrary, inflexible time limits can impose a serious threat to due process principles. Justice cannot always be achieved within the orderly environment of an assembly line.... Thus, judges must not sacrifice their primary goal of justice by rigidly adhering to time limits in the name of efficiency.

Maloney v. Brassfield, 251 P.3d 1097 (Colo.App.2010)(quoting *In re Marriage of Ihle*, 577 N.W.2d 64, 68 (Iowa App.1998) and setting forth general principles by which to determine adequacy of limit, to include unfair surprise, deprivation of ability of party to make own strategic decision, adequate communication of elapsed or remaining time, impracticality of limit due to unexpected development, flexibility in response to unexpected development, sufficiency of proffer for extra time); *see also General Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500 (9th Cir.1995)(accord that courts look upon rigid hour limits for trials with disfavor even though, generally, a district court may impose

reasonable time limits).

The private right to due process requires that a litigant have an opportunity to be heard.¹⁰⁹ This includes a hearing before a fair and neutral tribunal,¹¹⁰ so that the litigant can protect liberty and property,¹¹¹ and a meaningful opportunity to present evidence and cross-examine witnesses.¹¹² Although not basing their analysis on due process, the two circuit courts most recently addressing the propriety of time and witness limitations have defined a fair hearing as one which strives for “accuracy of factual determination”¹¹³ and allows the parties to present “sufficient evidence on which to base a reliable judgment.”¹¹⁴ In other words, due process to the litigant means a trial that seeks to ascertain the truth. This goal is consistent with both the express terms of Federal Rules of Evidence 102 and 611(a) and the Supreme Court decisions discussing the trial courts' broad discretion to regulate their own proceedings.¹¹⁵ Thus, to the litigant, a trial that satisfies due process by seeking to ascertain the truth will also lead to a reliable judgment.¹¹⁶

John E. Rumel, *The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials*, 26 U.S.F.L. Rev. 237, 251 (1992). Among several guidelines for time allotting, one requires its imposition “before trial, if at all, and before either party presents evidence.” *Id.*, at 256 (citing James W. Moore, et al., *Moore’s Federal Practice* ¶ 21.643, at 114).

Considering the criminal repercussions for noncompliance with the confinement order and risk of euthanasia of her beloved dog Cortana, as well as fines of \$1100, fifteen minutes was hardly sufficient. The Board deprived Ms. Estrella of due process. Superior Court Judge John Chun agreed *as applied*. CP 69.

On its *face*, however, a policy that does not reveal time limits until the beginning of the hearing, and then only confers 10 minutes to the appellant, with no opportunity to request additional time, cannot conceivably pass constitutional muster. Neither the Board Rules nor County Code inform dog owners that they must put on their entire case within 10 minutes. *See attached Board Rules (Exh. A)*.

B. Proper Interpretation of KCC 11.04.230(H)

For purposes of this chapter, nuisances are violations of this chapter and shall be defined as follows:

(H) Any animal that has exhibited vicious propensities and constitutes a danger to the safety of persons or property off the animal's premises or lawfully on the animal's premises. However, in addition to other remedies and penalties, the provisions of this chapter relating to vicious animals shall apply;

KCC 11.04.230(H). The Board lacked substantial evidence to support factual findings that Cortana and Godric violated KCC 11.04.230(H).

1. One incident does not suffice.

Only one incident is described in the NVOC. However, KCC 11.04.230(H) requires proof of at least two – the *prior one* where the animal “exhibited” vicious propensities, and a *subsequent one* where the animal “constitutes” a danger. Note the difference in verb tense. If the County Council intended to deem a dog a public nuisance for a single incident, as alleged, it would have used the past tense form of the verbs

“exhibit” and “constitute.” A plain reading requires proof of distinct elements at two different time points. Any other reading would render the phrase “and constitutes a danger to the safety of persons or property of the animal’s premises or lawfully on the animal’s premises” mere surplusage, contrary to the rules of statutory construction. *Stone v. Chelan Cy. Sheriff’s Dept.*, 110 Wn.2d 806, 810 (1988)(statutes must be interpreted and construed so all language used is given effect, with no portion rendered meaningless or superfluous).

While there is nothing ambiguous about past tense and present tense, if the court finds it such, then Ms. Estrella’s strict reading is required under the rule of lenity, given that a violation of KCC 11.04.230(H) is also a crime. KCC 11.04.190; see also *State v. Ankney*, 53 Wash.App. 393 (I, 1989)(finding no equal protection violation in criminal prosecution under KCC 11.04.230(H), versus civil fine, as here). “If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.” *State v. Jacobs*, 154 Wn.2d 596, 600 (cit. om.) (2005). “A statute is ambiguous if it is subject to two or more reasonable interpretations.” *State v. McGee*, 122 Wn.2d 783, 787 (1993). “Under the rule of lenity, the court must adopt the interpretation most favorable to the criminal defendant.” *Id.*

In construing the terms in dispute, the rule of lenity serves an important tie-breaking function, in favor of Ms. Estrella. While it is true that the lenity rule is traditionally a method of statutory construction applicable to criminal, not civil, proceedings, civil lenity applications have been endorsed by the United States Supreme Court. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Clark v. Martinez*, 543 U.S. 371 (2005); *United States v. Plaza Health Laboratories*, 3 F.3d 643 (2nd Cir.1993); *Internet Community & Entertainment Corp. v. State*, 148 Wash.App. 795 (2009).

In attempting to elide the distinction, the County claims that KCC 11.04.230 “obvious[ly]” provides that “any animal which has exhibited vicious propensities *some time before the moment the owner was cited*, and *still* constitutes a danger to the safety of persons or property, is a nuisance.” In so doing, it inserts language (i.e., the citing moment) not found in the code. The County’s reading into the ordinance a time-of-citing element proves the ordinance’s vagueness. While Ms. Estrella disputes the County’s interpretation, its own logic necessarily excuses at least one \$500 fine since the County impliedly concedes that Godric would not still constitute a danger after the date cited. **CP 56:10-11** (“Both dogs met the definition of vicious, including Godric, for as long as he lived between killing the livestock and being shot himself...”).

The rule of lenity requires that this court construe KCC 11.04.230(H) with the meaning most favorable to Ms. Estrella. In other words, the County must prove not only that each dog “exhibited vicious propensities” but *also*, at some later time point, that each constituted a danger as stated. To have probable cause to issue a notice of infraction, it follows further that the County needed to furnish proof of both temporal elements *at the time of issuing the citation*. This is could not do. Further, the actual NVOC issued to Ms. Estrella failed to allege as much. On its face, therefore, both KCC 11.04.230(H) charges fail.

2. A dead dog cannot be a danger.

As to Godric, whom Mr. Weston killed on Dec. 23, 2013 without lawful authorization, it is simply impossible to assert that he “constitutes a danger to the safety of [anyone].” For that reason, too, the citation fails. Even the County implicitly conceded this point in briefing. CP 216:1-3(emphasis added) (“Cortana continues to constitute a danger **because she is still alive** and could be involved in another such attack.”).

3. No direct evidence of viciousness.

Additionally, the County had no direct evidence that Cortana and Godric were involved in harming any animal or exhibiting any vicious propensities. Assuming for the sake of argument that Cortana was even on the Westons’ property, there was no admissible evidence that Cortana (or

Godric, for that matter) were observed chasing, biting, attacking, injuring, or killing any person or animal. More to the point, the NVOC is premised upon goats being killed and geese injured, yet RASKC had no eyewitness to same. In an effort to establish guilt by mere association, however, the County declared both dogs vicious although it could not prove *which* dog allegedly injured or killed the complainant's animals. Both KCC 11.04.230(H) charges therefore fail on that basis, as well.

A New York court refused to declare a bystander dog dangerous and lifted the destruction order where two dogs escaped together, but only one inflicted severe injury to a poodle while the other stood near and exhibited no aggressive behavior. *People v. Noga*, 168 Misc.2d 131 (N.Y.App.1996). A Delaware court reversed a dangerous dog designation of a dog who allegedly bit the victim due to insubstantial evidence given the victim's absence from the contested hearing and hearsay evidence by the victim that she saw *three* dogs being walked earlier in the day she was bitten, meaning any of the three (not necessarily the one declared) could have borne responsibility. *Hobbs v. Kent Cy. SPCA, Inc.*, No. CPU5-10-001252, Judge Reigle (Feb. 4 2011), 2011 WL 773448 (Del.Com.Pl.2011).⁶

⁶ Cited in accordance with GR 14.1 and Del. Sup. Ct. R. 14(g)(ii) and 17(a).

4. Misidentification and suggestive cross-species lineup.

The complainants clearly misidentified the dogs involved, throwing into doubt their reliability and veracity. As noted in the complainant's Dec. 24, 2013 email to RASKC (**CP 120-121**):

1. The Westons acknowledge that geese appeared "unexpected[ly]" at their home "several hours" earlier and "several hundred feet away" from where they were normally stationed, yet neither of them set out to investigate. Instead, they allowed many hours to elapse without efforts to intervene, inspect, or potentially defuse a killing spree. And they failed to use that opportunity to actually identify the animals responsible.

2. Mr. Weston stated that the two dogs he allegedly saw in the goat enclosure at 3:15 p.m. were the "**same two dogs** [who] had been on our property last summer and had chased our geese and chickens[.]" (emphasis added). He adds that his wife Laura Weston "held one of the dogs after the attack [on Sabby, Gus Schairer's cat], so **we are certain** they were the same animals." (emphasis added). Gus Schairer independently confirmed that those "two dogs" were not Godric and Cortana, but Cleo and Knawknee, owned by the Stoddards. *Schairer Decl. CP 180-83*. Furthermore, Godric and Cortana were never accused, nor found, to have been the ones involved in the Schairer incident of October 2013.

3. Mr. Weston repeats his belief that Godric and Cortana were the same ones who attacked the Schairer's cat and marauded on the Weston property earlier in 2013 – even though the belief is provably false.

Also consider Laura Weston's own letter to the editor in 2008 identifying other dogs (who could not possibly be Cortana and Godric) responsible for attacking and injuring goats (**CP 202**), as well as the declaration of Amy Carey, an active officer in Vashon Island Pet Protectors ("VIPPP"), noting that many dogs run loose in the rural part of the island where the complainants reside, and adding that Dee Stoddard,

owner and caretaker of the two dogs who killed Mr. Schairer's cat in October 2013, were called in loose and missing by her on nearly half a dozen occasions (**CP 172-73**).

Walter Weston's identification is also highly deficient and ruined by suggestion. No reported cases exist in which a court has applied the law of lineups, showups or a photo montage or array in the dangerous dog context. Nor do reported cases discussing an in-court identification of a dog exist to Ms. Estrella's knowledge. Due process nonetheless attaches to the pretrial identification procedures because the "vagaries of eyewitness identification are well-known" to the courts. *U.S. v. Wade*, 388 U.S. 218, 228 (1967), *State v. Burrell*, 28 Wash.App. 606, 609 (1981). A pretrial identification procedure violates due process if the procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. U.S.*, 390 U.S. 377, 384 (1968).

The showing of a single photograph is impermissibly suggestive, though not necessarily violative of due process in the criminal context. *State v. Maupin*, 63 Wash.App. 887, 896 (1992). Where the line-up is formed with the defendant appearing as the only potential suspect, as the "only possible choice," the procedure is unnecessarily suggestive. *State v. Traweck*, 43 Wash.App. 99, 103 (1986). Amplifying the risk of error of eyewitness identification, at a level of magnitude beyond the

scientifically-proved problems with cross-*race* identification is the difficulty of cross-*species* identification. See *State v. Jaime*, 168 Wn.2d 857, 870-71 (2010)(noting relevance of cross-racial identification on accuracy of witness identification).

In this matter, Walter Weston saw Ms. Estrella's website seeking justice for her falsely accused dogs. Animal control had already fingered Godric and Cortana, Ms. Estrella reported that fact, and Mr. Weston saw only those dogs in an uncontrolled, nonblind, and biased setting, rendering his identification highly suspect. **CP 323-29**. This court should not sanction the admission of such pre-hearing identification.

5. Unable to prove culpable mental state.

The Board never made a finding or conclusion that Ms. Estrella acted carelessly, knowingly, or intentionally in permitting Godric and Cortana to enter the Westons' property and/or harm their animals. Nor that she knew or should have known that her dogs were wont to escape or maim. Yet the County and Board appear to believe that all it needed to prove was that something happened (*actus reus*), not that Ms. Estrella harbored a culpable mental state (*mens rea*) when she acted or failed to act in a way that caused the prohibited conduct. Without attempting to justify a strict liability analysis, the County instead just argued that because the dogs escaped, Ms. Estrella must be liable. Such assessment fails to

acknowledge the important distinction between *actus reus* and *mens rea*. It also ignores the abundant evidence that two independent witnesses – Cindy Moreno, and Leon Kellogg – confirmed that Cortana was on Ms. Estrella’s property, inside the house, at the time that the Westons claim she was in the goat enclosure with Godric.

The County could not prove a culpable mental state given that neither dog had ever exhibited vicious propensities, to person, dog, cat, farmed animal, or wildlife (see photographs of Godric with a raccoon, mouse, cat, and read declarations of Amiee Yelinek, Ann F. Miksch, Nicholas J. Britz, Matt Smith, and Trevi E. Housholder). RASKC appeared to believe that Ms. Estrella was liable for committing the violation of public nuisance regardless of whether the alleged behavior occurred intentionally, knowingly, negligently, or completely innocently. In short, it approached the matter as though KCC 11.04.230 set forth strict liability offenses. However, the very first “public nuisance” in the enumerated list states, “Any public nuisance relating to animal care and control known at common law or in equity jurisprudence.” KCC 11.04.230(A).

At common law, nuisances are not strict. This is evidenced by the *Atherton* doctrine, which states that negligence in the garb of nuisance

remains negligence; in other words, something more than negligence is required to plead and prove nuisance:

... In Washington, a “negligence claim presented in the garb of nuisance” need not be considered apart from the negligence claim. *Hostetler v. Ward*, 41 Wash.App. 343, 360, 704 P.2d 1193 (1985), *review denied*, 106 Wash.2d 1004 (1986). *See also Re v. Tenney*, 56 Wash.App. 394, 398 n. 3, 783 P.2d 632 (1989). In those situations where the alleged nuisance is the result of the defendant's alleged negligent conduct, rules of negligence are applied. *Hostetler*, 41 Wash.App. at 360, 704 P.2d 1193. *Cf. Albin v. National Bank of Commerce*, 60 Wash.2d 745, 753, 375 P.2d 487 (1962) (trial court properly refused to give a proposed instruction *528 on nuisance which was based on the same omission to perform a duty which allegedly constituted negligence).

Owners' contention that Atherton is a nuisance is premised on their argument that Blume was negligent in failing to construct Atherton in compliance with the applicable building code. In other words, even if Atherton does constitute a nuisance, the nuisance would be solely the result of Blume's alleged negligent construction. Accordingly, we do not consider the nuisance claim apart from the negligence claim, discussed *supra*. We conclude that the trial court properly dismissed Owners' nuisance claim.

Atherton Condominium Apartment-Owners Ass'n Bd. v. Blume Dev. Co., 115 Wn.2d 506, 527-28 (1990)(en banc). The Washington Supreme Court also does not favor strict liability interpretations where imprisonment is possible. *State v. Bash*, 130 Wn.2d 594, 604-05, 609-10 (1996)(finding that RCW 16.08.100(3) does not set forth a strict liability offense, in part because of penalty of imprisonment; reading into statute a knowledge

element that requires state to prove that dog owner knew or should have known of dog's vicious propensity). As noted above, KCC 11.04.190 states:

Any person who allows an animal to be maintained in violation of this chapter is guilty of a misdemeanor punishable by fine of not more than two hundred fifty dollars and/or imprisonment for a term not to exceed ninety days.

The county council recognized these holdings by using the word "allows" – viz., that Ms. Estrella "allowed" Godric and Cortana to exhibit vicious propensities and "allowed" Godric and Cortana to thereafter constitute a danger. "Allow" means "To forbear or neglect to restrain or prevent." Merriam-Webster's Online Dictionary. The verb "allow," like the word "permit," necessarily requires proof of at least knowledge. *See Harris v. Turner*, 1 Wash.App. 1023, 1027 (1970), which states:

In *Willis v. Gerking*, 109 Wash. 382, 186 P. 1064 (1920), our Supreme Court held that the word 'suffer' means 'permit' and permit requires consent or knowledge. This is consistent with decisions dating back to the early leading case of *Gregory v. United States*, 10 Fed.Cas. pp. 1195, 1198 (No. 5803) (C.C.S.D.N.Y.1879), wherein the court stated that '(e)very definition of 'suffer' and 'permit' includes knowledge of what is to be done under the sufferance and permission, * * *.' We conclude that in order for the owner of a dog to suffer or permit the dog to do something, he must have actual or constructive knowledge of the dangerous propensities of the dog in question.

Other jurisdictions agree.⁷

⁷ In *City of Bexley v. Selcer*, 129 Ohio App.3d 72 (1998), Susan Selcer was found guilty of a leash law crime when a malfunctioning Invisible Fence resulted in her dog being videotaped off-premises by an officious neighbor. At trial, the city claimed the ordinance required “no culpable mental state” and imposed strict liability. The trial court found Selcer guilty of BCO 618.01(b) for “permit[ting her dog] to go beyond the premises” without a leash because Selcer “knew there was a risk [the invisible fence] might fail” based on the “prior failure.” Selcer argued that the court improperly grafted a strict liability provision into the ordinance. *Id.*, at 76. As to whether the ordinance stated a strict liability offense, in specifically evaluating the meaning of the phrase “to permit,” the appellate court stated:

The word “permit” is defined as “[t]o suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act.” Black’s Law Dictionary (5 Ed.Rev.1979) 1026. Other Ohio courts have held that this definition “connote[s] some affirmative act or omission.” *Akron v. Meissner* (1993), 92 Ohio App.3d 1, 4, 633 N.E.2d 1201, 1203.

Id., at 77. Reading the term “permit” in conjunction with language of BCO 618.01(d)(concerning “at large” conduct), the court concluded the city must prove that the owner “‘permitted’ the dog to go beyond the premises of the owner, *i.e.*, by an intentional or negligent act.” *Id.*, at 78. Absent evidence indicating the defendant “acquiesced in the dog’s leaving the premises[,]” the court reversed the conviction. *Id.*

In *Alvarez v. Ketchikan Gateway Borough*, 91 P.3d 289 (Ak.App.2004), while evaluating KGB 20.70.005, providing that a person who owns or is responsible for a dog “shall not permit [the] dog to be at large,” and KGB 20.80.010, providing that a person who owns or is responsible for an animal “shall [not] permit or allow such animal ... [t]o molest a person,” the court rejected the Borough’s argument that they were strict liability offenses, agreeing with the defendant that,

RASKC may argue that Ms. Estrella is not being criminally prosecuted. But, as illustrated in *Ankney*, she could have. KCC 11.04.200 uses similar language relative to a civil penalty by stating that “any person whose animal is maintained in violation of this chapter[.]”:

Violations – civil penalty. In addition to or as an alternative to any other penalty provided in this chapter or by law, any person whose animal is maintained in violation of this chapter shall incur a civil penalty in an amount not to exceed one thousand dollars per violation to be directly assessed by the manager of the animal care and control authority plus billable costs of the animal care and control authority. ...

KCC 11.04.200. The implication of the word “maintained” is that the owner, Ms. Estrella, must have caused (i.e., “allowed” or “permitted”) her dogs to so be in violation.⁸ Merely proving the act is not enough.

Undisputed, admissible testimony confirmed that Cortana and Godric had never trespassed on another’s property before, much less

The verbs ‘permit’ and ‘allow’ are commonly understood to imply some volition on the part of the actor. And other jurisdictions having similar laws-laws providing that the owner of an animal shall not ‘permit,’ ‘allow’ or ‘suffer’ the animal to run at-large-require proof of at least negligence.

Id., at 291-92.

⁸ “Maintain” is defined as “to cause (something) to exist or continue without changing; to keep (something) in good condition by making repairs, correcting problems, etc.; to continue having or doing (something).” Merriam-Webster Online Dictionary (www.merriam-webster.com/dictionary/maintain).

exhibited vicious propensities or presented a danger to others. On Dec. 23, 2013, Ms. Estrella responsibly put both dogs in the secure kennel on her property, then left for work. Somehow, for the very first time, the dogs made their way out at about 1 p.m. Ms. Estrella returned home shortly thereafter to find the dogs missing. She immediately commenced searching, as did her boyfriend Leon Kellogg. Meanwhile, as Mr. Kellogg was repairing the kennel, Cortana returned on her own volition at about 2:15 p.m. The complainant claims to have shot and killed Godric over an hour later. Again, that Godric was on the complainant's property does not alone state a violation. The county needed to prove that Ms. Estrella knowingly permitted, allowed, or caused Godric and Cortana to enter and remain (for KCC 11.04.230(K)), and then to allegedly exhibit vicious propensities and thereafter constitute a danger (for KCC 11.04.230(H)). This it could not do. For the above reasons, the court should reverse the determination that Ms. Estrella violated KCC 11.04.230(H) and, thus, that Cortana was vicious.

C. Culpable Mental State and KCC 11.04.230(K).

For purposes of this chapter, nuisances are violations of this chapter and shall be defined as follows:

(K) Any domesticated animal that enters upon a person's property without the permission of that person;

KCC 11.04.230(K). As noted above, Ms. Estrella disputes that Cortana was ever on the complainant's property. The first that the complainant allegedly saw Cortana was at least 45 minutes after she was confined at Ms. Estrella's home. Alternatively, even if it were Cortana, the County could not prove the requisite culpable mental state of Ms. Estrella as to either of her dogs.

D. "Vicious" and KCC 11.04.290 Restraints.

"Vicious" is defined as:

having performed the act of, or having the propensity to do any act, endangering the safety of any person, animal or property of another, including, but not limited to, biting a human being or attacking a human being or domesticated animal without provocation.

KCC 11.04.020(BB). Vicious animals are subject to corrective action to include erection of fencing, construction of runs, leash control, or removal.

KCC 11.04.290(2). There was no evidence that Cortana endangered the safety of any person. And there was no eyewitness to her so much as touching a hair or feather on any of the Westons' animals, putting aside that she was not present at 3:15 p.m. when Mr. Weston first saw two dogs. For the aforementioned reasons and argument, including no percipient witness as to *which dog* (if either of them, and not a coyote or other

trespassing dog run off by Godric) harmed the Westons' animals,⁹ legal and factual grounds did not exist to deem Cortana "vicious" and impose the confinement order.

E. Evidentiary Rulings.

While Ms. Estrella anticipates that this court will reverse on the merits and vacate the NVOC in its entirety, should it nonetheless remand, she asks that the court address evidentiary issues capable of repetition in her and other cases.

At another point in the cross-examination of Mr. Weston, he volunteered information concerning a 2008 incident, basing it on hearsay. When Mr. Karp tried to *voir dire* the witness (an inactive lawyer) as to whether he had personal knowledge, the county objected, saying, "It's a legal question that doesn't belong here." Mr. Karp then moved to strike Mr. Weston's answer. The Board never ruled on that objection. **VRP**

⁹ **VRP 49:17-50:2** (R Weston not reliable witness based on admitted error); **VRP 50:3-14** (VIPP volunteer Ms. Carey noted that Stoddard dogs were previously deemed vicious for killing neighbor Schairer's cat, were at large over a dozen times; and hundreds of calls of loose dogs were received across the island); **VRP 50:19—51:3** (three witnesses placed Cortana at home 45-75 minutes before seen by Weston); **VRP 51:14-23** (ruckus of geese heard by Ms. Estrella at about 12:45 p.m., as she was putting dogs in kennel, consistent with R. Weston seeing geese at unexpected location several hours before); **VRP 51:4-13** (identification by W. Weston self-directed, suggestive, no photo montage); **VRP 52:13-20** (no person witnessed Godric or Cortana harm any animal; Godric could have arrived after the mayhem or to scare off other attackers).

20:2-24. The Board's consideration of a 2008 incident may have prejudiced Ms. Estrella given his assertion that the dogs involved belonged to renters in Ms. Estrella's present residence.

After defense rested, and Mr. Karp attempted to call his witnesses, the County then offered a statement from Ryan Harrigan and Walter Weston. Mr. Karp objected, saying that it was untimely to submit a five-to-six-page statement from Walter Weston after he had testified and there was no further time for cross-examination (or even direct examination of Ms. Estrella's witnesses), and that Ryan Harrigan's statement was not in declaration form. **VRP 44:22—45:19; CP 322-29.** The Board nonetheless admitted the tardy and inadmissible evidence based on the strange view that, "Now, both of you are offering after testimony has been —after you've made your presentations, so we will consider both." **VRP 46:10-12.** It should be noted that Mr. Karp was merely making an offer of proof as to the anticipated testimony of Mr. Renata, who was prevented from testifying earlier. *See* **VRP 42:18—43:6, 45:23—46:1, 46:19—47:9.** The Board should not have considered the Harrigan or W. Weston statements.

F. Request for Reasonable Attorney's Fees.

Pursuant to RAP 18.1, Ms. Estrella seeks fees on the equitable basis that she is conferring a substantial benefit to an ascertainable class (taxpayers and dog owners) by protecting constitutional principles.

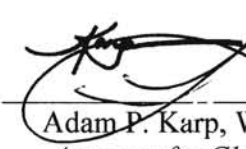
Dempere v. Nelson, 76 Wash.App. 403, 407 (1994); *Weiss v. Bruno*, 83 Wn.2d 911 (1974)(constitutional protection variant of common fund).

IV. CONCLUSION

The court should vacate the Board order and NVOC and free Cortana of her restraints. It should also provide declaratory and injunctive relief as sought and award fees and costs for Ms. Estrella's catalytic impact on conferring procedural due process for all dog owners subject to the County's jurisdiction.

Dated this Dec. 15, 2014

ANIMAL LAW OFFICES

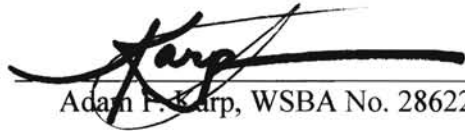

Digitally signed by Adam P. Karp,
JD, MS
DN: cn=Adam P. Karp, JD, MS,
o=Animal Law Offices, ou,
email=adam@animal-lawyer.com,
c=US
Date: 2014.12.15 13:13:46 -08'00'
Adam P. Karp, WSB No. 28622
Attorney for Clorrissa Estrella

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Dec. 15, 2014, I caused a true and correct copy of the foregoing, to be served upon the following person(s) in the following manner:

Email (stipulated)

Nancy Balin (nancy.balin@kingcounty.gov)


Adam F. Karp, WSBA No. 28622

KING COUNTY BOARD OF APPEALS AND EQUALIZATION
RULES OF PRACTICE AND PROCEDURES
Passed and approved on December 19, 2012

PREAMBLE

The Board of Appeals is an independent Board of the County organized to carry on certain functions of County Government with statutory authority as generally set forth in the Home Rule Charter under the Board of Appeals, Article III, Section 340.40 and 340.60; Article VII, and the King County Code, Section 2.34.

The Board of Equalization is organized to examine, compare and equalize the assessment of property in King County, real and personal, and adjudicate appeals of various determinations made by the Assessor. The Board acts under the authority of Revised Code of Washington (RCW) 84.48, Washington Administrative Code (WAC) Chapter 458-14 and the King County Code, Section 2.34.

These Rules are applicable to both above described Boards, except as otherwise provided in Sections 25 and 26.

RULES

Sections:

- 1 Membership
- 2 Removal
- 3 Compensation
- 4 Officers
- 5 Duties of chairperson
- 6 Committees
- 7 Chairperson as ex officio member
- 8 Acts as a body
- 9 Address
- 10 Public meetings
- 11 Special meetings
- 12 Executive sessions
- 13 Special sessions
- 14 Place of public meeting
- 15 Scheduling of public hearings
- 16 Conduct of hearings
- 17 Ex parte communication
- 18 Conflict of interest
- 19 Decisions of the board
- 20 Reasons for recommendations
- 21 Voting procedure
- 22 Roberts Rules of Parliamentary Procedure Revised
- 23 Adoption of rules
- 24 Severability clause
- 25 Additional rules specific to the Board of Appeals
- 26 Additional rules specific to the Board of Equalization

1 Membership. The Board is composed of seven (7) members appointed by the County Executive, subject to confirmation by a majority of the County Council and shall serve as set forth under Section 710 of Article VII, and Section 980 of Article IX, of the Home Rule Charter of King County.

2 Removal. The majority of the County Council may remove a Board member for just cause. Prior to Council action, written charges must have been served upon the Board member and a public hearing held by the County Council. See Section 306.60, Article III, and Section 710, Article VII, Home Rule Charter of King County.

3 Compensation. The County Council provides for the compensation of the Board members and Examiners other than Board members on a per diem basis.

4 Officers.

A. Officers of the Board shall be Chairperson, Vice-Chairperson, and Secretary. The Officers shall each be elected by the majority of the Board at the July Board meeting each year, in accordance with WAC 458-14-035.

B. The Vice-Chairperson shall serve in the absence of the Chairperson.

C. The Secretary shall keep the records of meetings and special meetings, shall sign the official minutes, and shall preside in the absence of both the Chairperson and Vice-Chairperson.

D. In the anticipated absence of the Chairperson, the Vice-Chairperson and the Secretary, the Chairperson may designate a Chairperson Pro Tempore; if this has not been done, the members present at a meeting shall elect a Chairperson Pro Tempore.

E. The Board may appoint a Clerk of the Board and any assistants the Board might need, in accordance with RCW 84.48.028.

5 Duties of the chairperson.

A. The Chairperson shall preside at all meetings and have those powers generally assigned to such officer. The Chairperson shall also have the sole responsibility of scheduling Board members and Examiners for all hearings. The Chairperson shall act as sole spokesperson for the Board and shall be its representative at meetings with other organizations and committees unless otherwise specified by the Board; provided that such Chairperson may delegate to any other Board member any duties imposed by this section. The Chairperson shall not have authority to obligate nor commit the Board by any statement made except where expressly authorized by the Board or by these rules.

B. The Chairperson shall perform those duties incident to the office and those that are required to be performed by the Home Rule Charter for King County, statute, ordinance, regulation, Board procedure and direction of the Board. The Chairperson shall ensure that the transactions of the Board shall be conducted in accordance with the law and these Rules.

C. The Chairperson may adjust for good and sufficient reason the regular convening time and date of meetings and hearings provided in these Rules. In the event of a change in the time and/or date of a meeting, notice must be provided at least twenty-four (24) hours in advance of the adjusted convening time to Board members, affected parties and, if appropriate, to the public. This notice requirement may be waived by consent of affected parties.

6 Committees. The Chairperson may, subject to the approval of the Board, appoint such committees, either standing or special, as he/she shall deem necessary, defining the terms and duties for such purpose. Committees shall function in an advisory capacity only unless further instructions or approval are given by a majority of the Board.

7 Chairperson as ex-officio member. The Chairperson shall be an ex-officio member of all committees.

8 Acts as a Body. The Board shall act as a whole in making and announcing its decisions. No member shall discuss any matter pertaining to hearings pending before the Board with persons other than staff or other members of the Board, nor shall a member, other than the Chair, speak or act for the Board without prior authorization from the Board. {Rev.7/29/08}

9 Address. The address of the Board is Room 510 of the King County Administration Building - Fourth and James Street - Seattle, Washington 98104. The Clerk or Clerk/Manager is designated to receive any legal service upon the Board.

10 Public meetings. All Board meetings, except executive sessions, shall be open to the public with such notice as required by chapter 42.30 RCW.

11 Special meetings. Special meetings of the Board may be called at the discretion of the Chairperson or by request of any two members of the Board.

12 Executive sessions. A majority of the Board may at any time hold executive sessions to the extent permitted by chapter 42.30 RCW.

13 Special sessions. The Board may authorize the holding of special sessions for the members of the Board, to be scheduled at their convenience, which may include viewing trips and site investigations. Members participating in such sessions shall be entitled to per diem and reimbursement for necessary travel expenses.

14 Place of public meetings. All regular meetings shall be held in Room 510 - King County Administration Building - Fourth and James Street - Seattle, Washington 98104. A majority of the Board may designate a different meeting place within the County.

15 Scheduling of public hearings.

A. Scheduling of the hearings on appeals shall conform to applicable statutes, King County Ordinances, and the regulations of the Washington Administrative Code. Should no definite time be set by law, the Board shall determine the times of hearings.

B. The administrative staff, in cooperation with the Chairperson or designee of the Board, shall determine the scheduling of matters for public hearings.

C. Should there be more appeals filed for consideration than can be completed at the public hearings provided in this section, the Chairperson may continue the hearing to another date.

D. Written notice of public hearings shall be given to appellants according to statute, King County Ordinance, and the regulations of the Washington Administrative Code.

E. The Board may grant a continuance upon its own motion or, upon request, for good cause shown.

16 Conduct of hearings.

A. The Chairperson shall, upon the opening of the meeting, state the purpose of the meeting, review generally the procedure for conducting the meeting, and advise those present of their rights under these rules.

B. All public hearings shall be commenced as closely as possible to the time stated in the notice to the appellant. All hearings shall be open to the public except those hearings which are restricted by law concerning confidentiality.

C. Testimony before the Board shall be given under oath or affirmation administered by a designated member or administrative staff member. Testimony by a phone conference call may be accepted in lieu of a personal appearance.

D. The complete files of proceedings and actions taken in connection with the Board meetings shall be maintained pursuant to RCW 40.14.070 and shall be made available to all parties and the public except where restricted by statutes concerning confidentiality. A recording shall be made of all hearings, a copy of which may be obtained upon request. The party requesting the tape shall bear the cost at a rate to be determined by the Board, as provided in KCC 2.99.020(c).

E. The appellant shall present statements and evidence in his/her behalf. The agency which has an order or action appealed shall then present statements and evidence in response to the appeal. An exception is allowed in Section 25C8. At the discretion of the Chairperson, both the agency and the appellant may submit further rebuttal and response.

17 Ex Parte communication. Ex parte communication on the substance of an appeal before the Board with one party without the other party present or involved is prohibited.

18 Conflict of interest. Any member of the Board having a personal or financial interest as defined by County Ordinance in any matter before the Board shall reveal that interest, shall leave the meeting or hearing during the period of discussion and shall refrain from any discussion of such matter with any members of the Board or staff and shall not participate in the decision. No Board member shall use his/her appointment for personal or political gain.

19 Decisions of the Board. The Board shall consider all testimony and evidence presented in the hearings as well as other matters contained in the file of the agency pertaining to the appeal, provided that the appellant has been afforded an opportunity to examine such materials. The decision of the Board shall be by majority vote of at least a quorum of the members, unless all parties to the appeal agree to waive this requirement when no less than three members are present to hear the appeal. The decision may be verbally announced at the hearing or the Board may take the matter under advisement and announce its decision at a later date. In the event of a tie vote, the Chair, if not present during the hearing, or, in the alternative, a member designated by the Chair who was not present during the hearing, shall resolve the deadlock by casting the deciding vote after reviewing all testimony and evidence.

20 Reasons for recommendations. Any Board member making a recommendation on any decision or ruling by the Board shall state as concisely as possible the reasons for the recommendation.

21 Voting Procedure. All members of the Board present at the hearing of a matter, including the Chairperson and Vice-Chairperson, shall vote upon such matters unless a valid reason for abstaining is given. A member voting on a particular matter must have been present at the entire hearing of said matter, except where the hearing has been held by a Mini Board or an Examiner under Section 26 of these rules, or when resolving a tie vote as set forth in Section 19 above.

22 Roberts Rules of parliamentary procedure revised. Roberts Rules of Order Revised shall govern the conduct of the meeting of the Board insofar as they do not conflict with these rules.

23 Adoption of rules. These rules of practice and procedure shall supplant and replace all rules formerly adopted by the Board, and said rules shall be published and adopted as provided by the Home Rule Charter for King County, and its subsequent ordinances thereunder, and the laws of the State of Washington.

24 Severability clause. These rules shall be considered as a whole, but in the event that any one or more of the rules is declared invalid, then that rule only shall be removed and the rest of the rules shall stand as adopted.

25 Additional rules specific to the Board of Appeals.

A. Hearings. The Board of Appeals shall hold public hearings on a day selected by the Board.

B. Form and filing of appeals to Board of Appeals.

1. An appeal to the Board of Appeals shall be commenced by a written appeal filed at the office of the director of the executive agency issuing the contested ruling in the format and time period required by the King County Code. The appeal shall be heard by the Board at its next regular meeting or as otherwise provided in these rules.

2. The appeal shall be in writing and shall state:

- a. Name of all appellants participating in the appeal;
- b. Name of the executive department or administrative office whose order or action is being appealed;
- c. A brief statement of the order or action objected to;
- d. A brief statement as to why the order should be modified, reversed or otherwise set aside;
- e. The signature and official mailing address of the appellant; and
- f. Appellant's signature on appeal form shall signify certification.

C. Rights of the appellant:

1. To appear before the Board in person;
2. To have counsel;
3. To offer witnesses and evidence in his/her behalf;
4. To examine and cross-examine witnesses;
5. To impeach (challenge the credibility of) any witness whether such witness has testified for or against the appellant;
6. To rebut evidence against him/her;
7. To represent himself/herself or to be represented by anyone of his/her choice who is lawfully permitted to do so; and
8. To choose to present his/her case following the presentation by the respondent.

D. Rules of evidence - Board of Appeals.

1. *Admissibility.* The Board of Appeals should be liberal in passing on the admissibility of evidence. All relevant evidence shall be admitted if it is the type of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might otherwise bar the admission of such in civil actions in courts of competent jurisdiction.

a. *Standard of proof:* Preponderance of the evidence. (*Court of Appeals in 2006, Mansour v. King County.*)

b. The Chairperson shall rule on all questions of admissibility of evidence, subject to review by a majority of the Board then present.

2. *Exclusion of evidence.* Irrelevant and unduly repetitious evidence may be excluded.

3. *Oral testimony.* Oral testimony shall be taken only on oath or affirmation.

4. *Hearsay testimony.* Hearsay testimony may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action in courts of competent jurisdiction of this State.

E. Subpoenas. Upon a showing of reasonableness and materiality to the case before it, the Board may issue subpoenas to compel the appearance of witnesses and production of documents at the request of a party. All requests for subpoenas shall be in writing with a copy to the opposing party. The party requesting issuance of a subpoena shall be responsible for serving the subpoena in the manner for service of subpoenas in civil actions in the superior courts of this state. The party requesting the subpoena shall also be responsible for payment of fees and allowance for witnesses and the cost of producing records required to be produced by subpoena. Fees for witnesses shall be fixed in the same manner as provided for witnesses in the courts of this state by chapter 2.40 RCW and RCW 5.56.010, except the Board of Appeals shall have the power to fix the allowance for meals and lodging.

F. Quorum. The quorum of the Board of Appeals shall consist of four (4) members.

G. Decisions. The Board of Appeals shall make written findings of fact and conclusions of law, which shall be signed by the Chairperson or another Board member who was present at the hearing. Copies of the decisions shall be mailed to all parties concerned. The decision shall be final on the day it is signed and appealable by applying for a Writ of Review in the Superior Court of Washington in and for King County in accordance with chapter 7.16 RCW and other applicable law and local court rules within thirty (30) days.

26 Additional rules specific to Board of Equalization.

A. Waivers of deadline. The Board delegates to the Clerk the authority to approve, for good cause, waivers to the deadline for filing of petitions, in accordance with the provisions set forth in RCW 84.40.038(2) and WAC 458-14-056(3). These good cause reasons are:

1. Death or serious illness of the taxpayer or his or her immediate family;
2. The taxpayer was absent from the address where the taxpayer normally receives the assessment or value change notice, was absent for more than fifteen days before the filing deadline, and the filing deadline is after July 1;
3. Incorrect written advice regarding filing requirements received from board of equalization staff, county assessor's staff, or staff of the tax advisor's office;
4. Natural disaster such as flood or earthquake;
5. Delay or loss related to the delivery of the petition by the postal service, and documented by the postal service.

A challenge to the Clerk's decision to deny waivers pursuant to RCW 84.40.038 will be decided by the Board. When the sixty-day deadline for filing is later than July 1st of the assessment year, and one of the two months immediately preceding the deadline has 31 days, and the petition is filed late due to the common error of not calculating the extra day in the month(s), the Board will waive the deadline.

B. Submission of evidence. The timely submission of evidence by both parties is essential to the fair hearings process. WAC 458-14-066 sets forth the timing requirements for each party, stating: 1) the Assessor must provide valuation information to the Taxpayer and to the Board at least fourteen (14) business days prior to the hearing; and 2) the Taxpayer must provide valuation information to the Assessor and to the Board at least seven (7) business days prior to the hearing. Valuation information includes: comparable sales; income data & analysis; construction cost analysis; independent appraisals; contractor estimates of costs to repair building or land defects; documents delineating development limitations or easements; etc. Narrative arguments, videos, compact discs, photographs, maps, site plans, etc., used to clarify timely submitted evidence may be presented during the hearing.

C. Complete petition. A petition is properly completed when all relevant questions on the appropriate form provided or approved by the Board, as approved by the Department of Revenue, have been answered and the answers contain sufficient information or statements to apprise the Board and the Assessor of the reasons for the appeal. A petition which merely states that the Assessor's valuation is too high or that property taxes are excessive, or similar such statements, is not properly completed and shall not be considered by the Board. If, at the time of filing the petition, the taxpayer does not have all the documentary evidence available which he or she intends to present at the hearing, the petition will be deemed to be properly completed for purposes of preserving the taxpayer's right of appeal, if it is otherwise fully and properly filled out. However, any comparable sales or other valuation evidence not submitted at the time the petition is filed must be provided by the taxpayer to the Assessor and the Board at least seven business days, excluding legal holidays, prior to the Board hearing. Any petition not fully and properly completed shall not be considered by the Board. The Board will allow taxpayers thirty days following the filing deadline to submit sufficient information to complete their petition. The Board will, for good cause, further extend the time limit an additional 14 calendar days. The staff will not schedule a hearing on an incomplete petition.

D. Notice of hearing. The Appellant shall be notified of the hearing pursuant to the requirements of WAC 458-14-076(2). The hearing will not be re-scheduled unless:

1. The Appellant requests a re-schedule within 7 days of the mailing date on the hearing notice;
2. The Appellant cannot attend the hearing due to serious illness of the Appellant or family member, or death of a family member.

E. Hearings.

1. The Board of Equalization shall hold public hearings on such days as shall be selected by the Board as provided by statute, ordinance and regulation.

2. Hearings may be closed to the public pursuant to law providing for confidentiality of income data, RCW 42.17.310, and records, accounts and inventories of personal property, RCW 84.40.340.

3. When the presentation of a petition to the Board of Equalization concerning real or personal property is made, the petitioner shall present statements and evidence on his/her behalf. The Assessor shall then respond to the case of the appellant. At the discretion of the Chairperson, each side may present further rebuttal and response.

F. Withdrawals. Appellants may withdraw their petition(s) anytime prior to the commencement of the hearing. {Rev. August 31, 2004}

G. Recommendation to lower value. When there is an Assessor's recommendation to lower the value acceptable to the taxpayer and a hearing is not held, the Board upon a finding that the Assessor's recommendation is not supported by the file will continue the hearing with notice to the taxpayer.

H. Decisions. The Board of Equalization shall issue its decision, which shall contain a statement giving the basis for the decision. The decision of the Board is final except for the correction of clerical and manifest errors. The appellant shall have the right to appeal this decision to the State Board of Tax Appeals. The written decision shall be signed by the Clerk/Manager.

I. Disposition of appeals with conflict of Interest. On appeals to the Board of Equalization by certain County officials and employees who are deemed to have a conflict of interest as defined by King County Code 3.04, or if a quorum cannot be achieved due to members disqualifying themselves because of a conflict of interest or appearance of fairness question, the Board shall find that the Assessor is sustained because of conflict of interest preventing the Board from giving further consideration to the appeal. The appellant shall then be advised of the right of appeal to the State Board of Tax Appeals.

J. Hearings by Mini Boards and Examiners.

1. *Appointment.* The Board of Equalization may appoint one or more of its members to hear appeals as Mini Boards of two or three people or as individual hearing examiners or may employ others by majority vote of the Board to assist the Board in such matters as assigned by the Chairperson or designee. Such employees shall be selected on the basis of their knowledge of property values in the County (WAC 458.14.136).

2. *Functions.* Members of the Board and Examiners employed by the Board may hold hearings separate from the Board and take testimony from both the petitioner and the Assessor's staff. Examiners and Mini Board members shall submit the testimony of the petitioner and the Assessor's staff and report his/her findings to the Board. The report to the Board will be in lieu of the appearance of the appellant and the Assessor's personnel. If the Board so desires, further testimony may be taken from the appellant and the Assessor's personnel. The Board shall propose and make the final decision as to the value of the property under appeal.

3. *Oath.* Persons employed as Hearing Examiners shall take and subscribe to the same oath as the Board members subscribe to as required by statute or code.

4. *Scheduling and procedures.* Mini Board and Examiner hearings shall be scheduled by the Chairperson or designee. The giving of notice, the rights of the appellant, and the conduct of hearings shall be as provided in Sections 15, 16 and 26 of these Rules of Procedures.

5. *Place of Meeting.* Hearings or conferences by Mini Boards and Examiners shall be at the offices of the Board in the King County Administration Building, or at such other place within King County as shall be designated by the Chairperson or designee.

THE ABOVE RULES PASSED AND APPROVED pursuant to rulemaking authority on the 15th day of July 2010.

BOARD OF APPEALS AND EQUALIZATION OF KING COUNTY, WASHINGTON

CHAIRPERSON

SECRETARY