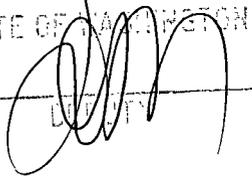


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DIVISION II

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STATE OF WASHINGTON

BY  COUNTY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II  
CAUSE NO. 44542-5-II

PIERCE COUNTY SUPERIOR COURT  
CAUSE NO. 12-2-09295-3

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THOMAS MORAWEK,

Appellant,

v.

CITY OF BONNEY LAKE,

Respondent.

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**REPLY BRIEF OF APPELLANT**

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**ORIGINAL**

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## **I. IDENTITY OF APPELLANT**

Appellant, Thomas Morawek, submits this Reply in support of his request that the Court overturn the Hearing Examiner's Dangerous Dog determination.

## **II. REPLY**

There is no evidence or testimony in this case (let alone substantial evidence) that would support the conclusion that the provocation element of the Dangerous Dog statute was satisfied. The Bonney Lake City Council determined and set forth the requirements for a dog to be deemed dangerous. The Bonney Lake Municipal Code requires the Respondent City of Bonney Lake ("City") to prove that a killing by a dog was done **without provocation**. The City fails to identify facts or evidence from the record to support the Hearing Examiner's determination that the provocation element was satisfied. Instead, the City attempts to redefine the word "provocation" and recreate the facts in this case.

The Hearing Examiner's Dangerous Dog Determination was not supported by substantial evidence and must be reversed.

### **A. The Hearing Examiner's Decision is Not Supported by Substantial Evidence**

There is no dispute over the standard of review. The Court reviews de novo a hearing examiner's decision, not the superior court

decision on review.<sup>1</sup> The first question is whether substantial evidence supports the hearing examiner's findings of fact.<sup>2</sup> “Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.”<sup>3</sup> The Court next reviews de novo whether the findings support the hearing examiner's conclusions of law.<sup>4</sup> The Court should treat any findings of fact or conclusions of law the superior court made as surplusage.<sup>5</sup>

A review of the record reveals that the Hearing Examiner's decision was not supported by substantial evidence.

**B. The City Cannot Avoid Proving the Provocation Element**

The City should not be permitted to avoid proving an essential and clearly articulated requirement of the Dangerous Dog statute.

Pursuant to BLMC 6.04.010(G), “ ‘Dangerous dog’ means any dog that **kills a domestic animal without provocation** while the dog is **off the owner's property**.” For a dog to be declared dangerous, it must be proved by a preponderance of the evidence that the dog meets the definition of a “Dangerous Dog.”<sup>6</sup>

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<sup>1</sup> *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 483–84, 61 P.3d 1141 (2003).

<sup>2</sup> *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001).

<sup>3</sup> *Holland v. Boeing Co.*, 90 Wn.2d 384, 390–91, 583 P.2d 621 (1978).

<sup>4</sup> *City of Univ. Place*, 144 Wn.2d at 652, 30 P.3d 453.

<sup>5</sup> *Humbert/Birch Creek Constr. v. Walla Walla County*, 145 Wn. App. 185, 192, 185 P.3d 660 (2008).

<sup>6</sup> BLMC 6.04.185(A).

The Court’s primary duty in interpreting any statute is to discern and implement the intent of the legislature.<sup>7</sup> The Court’s starting point must always be “the statute’s plain language and ordinary meaning.”<sup>8</sup> When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and the Court should not construe the statute otherwise.<sup>9</sup> Just as the Court “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language,” the Court may not delete language from an unambiguous statute: “ ‘Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.’ ”<sup>10</sup>

Here, it should go without saying that the City has the obligation to prove that the provocation element was satisfied. It is not proper for the City to propose an alternative standard to proving that an animal is dangerous. Equally, the City cannot avoid establishing the provocation element by arguing that provocation means something that it does not. The Dangerous Dog statute, BLMC 6.04.010(G), must be interpreted and

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<sup>7</sup> *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999).

<sup>8</sup> *Id.*

<sup>9</sup> *State v. Wilson*, 125 Wash.2d 212, 217, 883 P.2d 320 (1994).

<sup>10</sup> *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318, 320 (2003).

construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.

*1. The City Offers No Evidence of Provocation*

The City's brief fails to offer any evidence from the record to support the Hearing Examiner's holding that the provocation element was established. "Provocation" by its very meaning requires evidence of the act of inciting another to do something (such as words or actions) that affects self-control.<sup>11</sup> This requires the City to direct this Court to evidence demonstrating how the incident between the animals started; however, the only witnesses the City can rely upon, the Strongs, did **not** observe any interaction between the animals before hearing a disturbance under the deck. There is no evidence in the record on how the incident started and there was no evidence regarding whether Scout's interaction with Ms. Strong's cat was unprovoked.

*2. The Hearing Examiner's Analysis was Fatally Flawed*

The City has not responded to Mr. Morawek's assertion that the Hearing Examiner's decision was **not** supported by substantial evidence and was completely **void** of any analysis of the provocation element. In fact, the Hearing Examiner's lack of analysis on the provocation issues was evidenced during when it was stated,

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<sup>11</sup> Black's Law Dictionary (9th ed. 2009).

“I just think the evidence is clear that the dog attacked this cat and killed the cat on private property, not his own. **How he got there, I don’t know**; but he was there and he killed the cat.”<sup>12</sup>

Knowing how the dog got under Ms. Strong’s deck is essential for being able to determine whether the provocation element was satisfied. By the Hearing Examiner’s own words, it is clear that the issue of provocation was not properly reviewed and there was not substantial evidence to support a finding that the provocation element of the Dangerous Dog statute was established.

This City may not like the conclusion that evidence demonstrating how the incident started is necessary to prove that an animal is dangerous; however, that is exactly what the statute requires and exactly what the Bonney Lake City Council agreed is required. The Hearing Examiner’s ruling is not supported by substantial evidence and must be overturned.

**C. The *Downey* Decision is Directly on Point and Instructive Here**

The City’s argument that the *Downey*<sup>13</sup> decision was premised on “where” the attack occurred is a complete misstatement of the holding. On appeal, Downey challenged the hearing examiner's findings that (1) Blizzard acted without provocation; and (2) the incident occurred while

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<sup>12</sup> CP 93, lines: 6-9.

<sup>13</sup> 165 Wn. App. 152, 267 P.3d 445 (2011) review denied, 174 Wn.2d 1016, 281 P.3d 688 (2012).

Blizzard was off of Downey's property.<sup>14</sup> Downey argued that the County did not carry its burden of establishing lack of provocation because Steiner had her back turned when the incident started.<sup>15</sup> This Court expressly reasoned:

Downey argues that the County did not carry its burden of establishing lack of provocation because Steiner had her back turned when the incident started. We agree. At best, Steiner testified that she turned her back on Kayla, heard Kayla bark or “yip,” and then turned to see Blizzard with Kayla in his mouth. **Steiner did not see Blizzard approach Kayla and did not observe any interaction between the two dogs before seeing Kayla in Blizzard's mouth.** Because no one saw how the incident started, there was no evidence regarding whether Blizzard's apparent attack of Kayla was unprovoked...<sup>16</sup>

In conclusion, this Court determined that Downey was correct that the record did not support the hearing examiner's finding that Blizzard acted without provocation.<sup>17</sup>

The City's attempt to distinguish the instant case from the Downey decision should be rejected. The two cases are identical with regard to the lack of evidence on the issue of provocation. The Strongs did **not** observe any interaction between the animals before hearing a disturbance under the deck. There is no evidence in the record on how the incident started and there was no evidence regarding whether Scout's interaction with Ms.

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<sup>14</sup> *Id.* at 171.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Strong's cat was unprovoked. Reversal of the Hearing Examiner's decision is warranted because the Dangerous Dog Determination is not supported by substantial evidence.

**D. The City's Trespassing Argument is Inchoate and Unsupported**

As an initial matter, the City's statement that "[N]either parties [sic] dispute the location of the attack" is completely false. Equally troubling is the City's assertion that the Strong's witnessed the beginning or inception of the interaction between the animals. This entire appeal concerns analyzing whether there is substantial evidence on the element of provocation. The City cannot unilaterally and **without** any evidence in the record determine when and how the interaction between the animals originated. There is nothing in the record that can demonstrate when the interaction between the animals started.

Disingenuously, the City provides a citation to AR 6 and asserts that "Lynn's cat was on her property and safely under the four foot porch;" however, the record is completely void of any such evidence. There is absolutely no testimony from the Strong's related to what occurred prior to them hearing noises. As such, it is impossible for Ms. Strong to provide testimony concerning "where" her cat was prior to hearing the noises, "when" the cat arrived under the deck, "how" the cat arrived under

the deck, or the health of the cat prior to hearing noises. The City is attempting to rewrite the facts in this case. The record before this Court is clear. No evidence or testimony was offered to demonstrate how the interaction between the animals started and looking to the middle of an event does not provide guidance.

The City's contention that Mr. Morawek's dog trespassed is also not established by the record in this case. Similarly, the City's attempt to redefine the Dangerous Dog statute, BLMC 6.04.010(G), to equate trespass with provocation is not supported by the statute or the facts. This new theory is being offered for the first time on appeal and ignores the testimony from Ms. Strong that her cat was an outdoor animal that came and went as it pleased.<sup>18</sup> In addition, the City ignores the fact that Scout was trained to stay on Mr. Morawek's property and Mr. Morawek submitted evidence that the Strong's cat would walk across his yard.<sup>19</sup> By the City's own misguided definition, the fact that Ms. Strong's cat trespassed on Mr. Morawek's property would amount to a provocation that would justify Mr. Morawek's dog defending itself and defeat any claim that the dog should be deemed dangerous. Ms. Strong testified that

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<sup>18</sup> CP 70, lines: 18-20.

<sup>19</sup> *Id.*

Scout had never caused any problem and would remain on Mr. Morawek's property.<sup>20</sup>

The City submitted no case law and there is nothing in the Bonney Lake Municipal Code to substantiate the conclusion that a trespass amounts to provocation. Even more, the City cannot refute or offer evidence to contradict the position that the provocation could have caused Mr. Morawek's dog to be on the Strong's property. How does the City know that the cat did not chase the dog under the Strong's deck and after being cornered the dog defended itself? The simple fact is that the City nor anyone else knows because there were no witnesses and there is no evidence on how the incident between the animals started. The City's position is not supported and should be rejected by the Court.

**E. Size has Absolutely Nothing to do with Provocation**

By the City's definition of provocation, a smaller person could never provoke a larger person. This is illogical and does not make sense. Again, the City's attempt to redefine the Dangerous Dog statute, BLMC 6.04.010(G), to equate size with provocation is not supported by the statute or the facts.

Relying on Judge Serko's comments during the oral argument is not evidence. The City did not direct this Court to a single piece of

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<sup>20</sup> CP 69; p.7:4-7.

testimony or evidence regarding the size of the animals. Any such argument is not properly before this Court.

Finally, the City's inventive story and conclusions about how the scratch on Scout's nose occurred are equally without merit. Again, the City did not provide this Court with a single citation to the record to support its conclusions. If anything, the City's willingness to invent how the incident started between the animals supports Mr. Morawek's position that there is no substantial evidence in the record to substantiate the Hearing Examiner's ruling. If the City has to make-up the facts in this case, it is difficult to understand how the Hearing Examiner's decision was supported by substantial evidence.

**F. The City has No Way to Prove When the Interaction between the Animals Started**

It is as if the City cannot envision any factual scenario or situation where a cat provokes a dog. The City has gone to great efforts to invent or piece together what it believes happened. However, the City's inability to articulate what occurred in this case is exactly why the Hearing Examiner's decision should be overturned.

The City's position that the Strongs heard the "beginning" of the interaction between the animals is a complete fallacy. It is impossible for the City to argue that there is evidence of when the events began because

there have been no witnesses to provide testimony as to what happened. There is a huge gap in time that the City cannot account for and simply calling an event the beginning does not make it so.

The City's version of the facts is not supported by the record and should be rejected.

**G. Request for an Award of Fees and Costs**

An agency action is "substantially justified" if it "has a reasonable basis in law and fact."<sup>21</sup>

The City's reliance on the holding in *Gorman v. Pierce Cnty.*<sup>22</sup> is misplaced. In *Gorman*, the court held that an ordinance creates a statutory duty to take corrective action **if** it mandates a specific action when the ordinance is violated. To determine whether the ordinance is mandatory, the court determined that it must apply the rules of statutory interpretation to the ordinance.<sup>23</sup>

Here, the City fails to identify any provision of the Bonney Lake Municipal Code that mandates a specific action. The *Gorman* decision is distinguishable from the applicable statutory provision being analyzed here.

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<sup>21</sup> *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007) (quoting *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 420, 97 P.3d 17 (2004)).

<sup>22</sup> 176 Wn. App. 63, 77-78, 307 P.3d 795, 802 (2013).

<sup>23</sup> *Id.* at 77-78.

Further, the City's reliance on *Downey* to object to Mr. Morawek's request for attorney fees is also not appropriate under the facts of this case. In that case, Downey requested attorney fees on appeal, arguing that she was entitled to attorney fees "on the equitable basis that they are conferring a substantial benefit to an ascertainable class (taxpayers and dog owners), and protecting constitutional principles."<sup>24</sup> Mr. Morawek does not seek an award of attorney fees for this reason.

Mr. Morawek respectfully requests an award of reasonable fees and costs pursuant to RCW 4.84.350(1). Upon overturning the Hearing Examiner's decision, Mr. Morawek will be the prevailing party in a judicial review of an agency action, and thereby entitled to an award of reasonable attorney fees and costs.<sup>25</sup> Since his initial opposition to the Dangerous Dog designation, Mr. Morawek challenged the sufficiency of the evidence and argued that there was absolutely no evidence to sustain the designation. The record in this case clearly demonstrates that no one witnessed how the incident started, and as a result, the City was entirely unable to prove each of the required elements of the Dangerous Dog statute. The City was not substantially justified in pursuing the Dangerous Dog designation in light of the fact that there was **no evidence** of provocation.

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<sup>24</sup> 165 Wn. App. at 171, 267 P.3d 445.

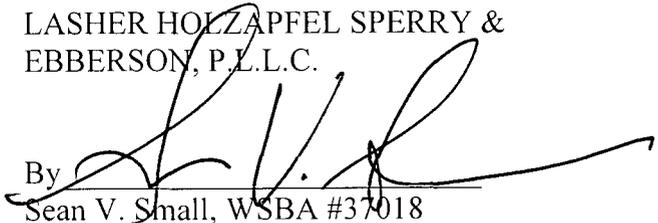
<sup>25</sup> See RCW 34.05.010(3).

**III. CONCLUSION**

For all of the foregoing reasons, Mr. Morawek respectfully requests that the Court overturn the Hearing Examiner's Dangerous Dog designation.

Respectfully submitted this 17 day of January, 2014.

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

The undersigned, Ellen M. Krachunis, certifies that on the 17<sup>th</sup> day of January 2014, she caused to be served by legal messenger, the DEPUTY REPLY BRIEF OF APPELLANT to the following:

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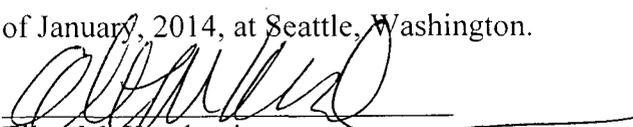
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I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Dated this 17<sup>th</sup> day of January, 2014, at Seattle, Washington.

  
Ellen M. Krachunis