

Nos. A06-0387 and A06-518

State of Minnesota
In Court of Appeals

In the Matter of an Application by Harvey Block and
Gary McDuffee for A Conditional Use Permit

RELATORS NELSONS' AND DICKMANNS' BRIEF AND APPENDIX, VOLUME I

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ISSUES PRESENTED

1. Did the Morrison County Board of Commissioners act in an arbitrary, capricious or unreasonable manner in issuing a Conditional Use Permit ("CUP") allowing construction and operation of a large, 600-plus dog breeding facility or "puppy mill."

The County Board issued the CUP.

Apposite Cases and Statutory Authority:

Schwardt v. County of Wantonwan, 656 N.W.2d 383 (Minn. 2003);

Sunrise Lake Ass'n, Inc. v. Chisago County Bd. of Comm'rs, 633 N.W.2d 59 (Minn. Ct. App. 2001).

2. Did the County Board act in an arbitrary, capricious, or unreasonable manner in issuing a CUP to construct and operate a 600-plus "puppy mill" facility by failing to consider reports of the U.S. Department of Agriculture concerning problems at kennels previously run by the prospective owner and failing to prescribe the appropriate conditions for the care and treatment of the dogs?

The County Board issued the CUP.

Apposite Cases and Statutory Authority:

Picha v. County of McLeod, 634 N.W.2d 739 (Minn. Ct. App. 2001);

Sunrise Lake Ass'n, Inc. v. Chisago County Bd. of Comm'rs, 633 N.W.2d 59 (Minn. Ct. App. 2001);

Morrison County, Minn., Land Use Control Ordinance §§507.1, 507.2;

7 U.S.C. § 2132-2134;

9 CFR § 3.1, *et seq.*

7 U.S.C. §2132(f);

9 C.F.R. §§2.40, 2.75, 3.1-3.12;

Minn. Stat. §§346.39, 346.58, 347.22;

Minnesota Best Management Standards for Care of Dogs and Cats by Dealers, Commercial Breeders and Brokers, Commissioner's Order (Minnesota Department of Agriculture 1995).

3. Did the County Board act in an arbitrary, capricious, or unreasonable manner in issuing a CUP to construct and operate a 600-plus "puppy mill" which included conditions which required, or permitted, violations of Minnesota law concerning the care and treatment of the dogs?

The County Board required routine use of a devocalization procedure which constitutes animal cruelty in violation of Minn. Stat. §343.21.

Apposite Cases and Statutory Authority:

Madson v. Overby, 425 N.W.2d 270 (Minn. Ct. App. 1988);

Minn. Stat. §§343.20, 343.21.

4. Did the County violate its own ordinance and state law by modifying the CUP for a 600-plus "puppy mill" without notice, hearing, or findings?

The County sua sponte amended the CUP, eliminating one of the conditions without notice, hearing, or findings.

Apposite Cases and Statutory Authority:

Morrison County, Minn., Land Use Control Ordinance §§507.4, subd. d; and 507.7;

Minn. Stat. § 394.26, subd. 2.

5. Did the County act arbitrarily, capriciously, or unreasonably in refusing to permit neighbors of the "puppy mill" site to submit data reflecting that the CUP application contained inaccurate, incomplete, false, and misleading information including omission of prior regulatory violations, on grounds that such material would be "one-sided and therefore unproductive."

The County Board refused to consider the data.

Apposite Cases and Statutory Authority:

Morrison County, Minn., Land Use Control Ordinance §§507, subds. a and l, and 508.5

STATEMENT OF THE CASE

Relators are two rural couples seeking review by certiorari of the issuance of a Conditional Use Permit (CUP) allowing construction and operation of a large commercial dog breeding facility or "puppy mill" capable of holding an unlimited number of dogs in Belle Prairie Township in Morrison County. A CUP was issued on January 10, 2006, allowing construction of a facility to hold 600 adult breeding dogs and an unspecified number of puppies, provided that dogs with access to the outdoors are debarked.

The Permit subsequently was modified on February 7, 2006 by the County, through its County Administrator and County Attorney, without notice, hearing or findings by the Planning Commission or County Board. The modification removed the debarking requirement and recommended the use of shock collars to prevent barking.

The Petitioners seek review of both of these CUP determinations by Morrison County.

I. STATEMENT OF THE FACTS

A. The Dog-Breeding Site

This action challenges issuance by the Morrison County Board of Commissioners of a CUP for a huge dog-breeding facility at a 40 acre site located at 17513 185th Avenue in Belle Prairie Township, about five miles north of Little Falls in Morrison County. (App. 1-2.)¹ The facility consists of a dog shelter 28 feet x 150 feet and 17 feet x 157 feet, and a third adjoining 26 foot x 26 foot structure. (Tr. PC 3; Record 47.) The property is located in the Southeast Quarter of the Southeast Quarter, Section 20, Belle Prairie Township. (Tr. CB1 11; Record 158.) The parcel is on high land and includes tillable farmland. (Tr. PC 6; Record 50.) It is “bordered on the south by a stream which leads to several lakes and on the north by a wild life pond and pool.” (App. 73.)

¹ “App. ____” refers to the Appendix appended hereto. App. II refers to the second separate volume of the Appendix. “Tr. ____” refers to the transcripts of the meetings of the Morrison Planning Commission on December 19, 2005, which approved the CUP, and County Board of Commissioners January 10, 2006, and a meeting of the County Board on February 9, 2006. The record, as reported by a certified court reporter, misidentifies the first two proceedings, referring to the Planning and Zoning Commission as the County Board and the latter as the Planning and Zoning Commission. The transcript of the December 19, 2005 meeting of the Planning and Zoning Commission (mis-labeled as “County Board”) is referenced as “TR PC” and the County and Zoning Board meeting on January 10, 2006 (mis-labeled as “Planning Commission”), and February 7, 2006 are referenced as “TR CB1” and TR CB2”, respectively. Reference also will be made to the Bate stamp in the Record as “Record ____.”

B. The Parties

Relators Roger and Deborah Nelson and Jeremy and Sara Dickmann are a pair of married couples who live adjacent to the property where the dog-breeding facility is to be located. The Nelson's home abuts the property on the north end and the Dickmann's live across the road to the east of the puppy mill. (App. 60.) Harvey Block and his former spouse purchased the property at issue in February, 2002, and conveyed it earlier this year to Respondent Gary McDuffee. (App. 57, 43.)

Although Harvey Block nominally applied for the CUP, the interested party who sought and obtained the CUP was McDuffee who previously operated dog-breeding facilities with his ex-wife and wanted to relocate his part of the business. (App. 43, 56).²

The Federated Humane Societies subsequently commenced a separate challenge to the CUP. The two matters were then consolidated. (App. 41-42.)

C. The CUP Process

The property is zoned "agricultural." (App. 1.) Dog kennels are not allowed in agricultural areas without a CUP. Morrison County, Minn., Land Use Ordinance §801. (App. 53; Tr. PC 3; Record 47; App. 64-66.) McDuffee and Block applied to the Morrison County Board of Commissioners on November 8, 2005 for a CUP, which is required under the Morrison County Land Use Control Ordinance for a property to be

² Block, a party to the original litigation, was dismissed after the property was sold to McDuffee. (App. 43.)

used in a way that “may not be compatible” with the permitted uses in a zoning district. (App. 46, 55-63.)

The standard for obtaining a CUP, as set forth in §507.2 of the Ordinance, includes “the effect of the proposed use upon the health, safety, morals, and general welfare of occupants of surrounding lands and water bodies.” (App. 46.) The County makes this determination first through its Planning and Zoning Commission, which renders a recommendation, and then ultimately by the Board of Commissioners, which is to consider whether the proposed use will “create an excessive burden” on existing facilities; whether existing homes “will not be depreciated in value;” whether development of vacant land may be deterred; whether the appearance of any structure has “an adverse effect upon adjacent properties,” whether the proposed use is “reasonably related to the existing land use and the environment;” whether the use is “consistent” with the purposes of the Ordinance and the Zoning district; whether the use conflicts with the County’s Comprehensive Plan; and whether nearby residents “will not be adversely affected (sic) because of curtailment of customer trade” due to “noise, odor, glare, or general unsightfulness.” Morrison County, Minn., Land Use Control Ordinance §§507.2, 507.4. (App. 46-47.) In issuing a CUP, the Board is obligated under §507.2 to make specific findings regarding the criteria. (App. 46.)

D. The Dog-Breeding CUP

McDuffee did not state how many dogs he wanted to breed at the site in his application. (Tr. PC 5; Record 49.) He later told the County that he planned to have 600 adult breeding dogs attended by “2-3 full-time employees,” and that the premises would

be “federally licensed by the USDA.” (App. 58.) He also stated that “all adult dogs will be debarked to alleviate noise.” *Id.*

A substantial segment of the community opposed the CUP. Twenty-nine neighbors raised environmental concerns and petitioned the Environmental Quality Board (“EQB”) to require an Environment Assessment Worksheet (“EAW”) to determine if further environmental review was appropriate. (App. 79-80.) The EQB turned the matter over to the County Board, as the Responsible Government Unit (“RGU”).³ (App. 71.)

The County Board received letters raising environmental concerns. The Board entered these letters into the record, but did not discuss or address the concerns raised in the letters at the County Board meeting or make findings regarding the concerns raised. (App. 70-80.) The District Manager for the County Soil and Water Conservation District reported to the Environmental Quality Board, which forwarded to the County Board a letter stating that “there is a type 3 wetland on one side and a county ditch on the other,” and that the soil on the fields on which the dog manure was proposed to be spread had “poor drainage and rapid permeability,” and a “shallow water table.” (App. 70.) The Manager further stated that a “600 dog structure will produce a sizable amount of animal waste,” and that that soil and manure testing should be required because she did not know “how long the field can sustain dog feces application and what the environmental effects on the shallow water table might be over a prolonged period of time.” *Id.* She also recommended that the “setback from the water feature should be addressed.” *Id.*

In issuing the CUP, the County Board made findings about the type of soil and nearby wetlands and drainage ditch, but did not discuss, or make any findings, about how the application of dog feces to these soils would affect the shallow water table, the nearby wetlands drainage ditch. (App. 1-2.) The County Board did not address the issues raised by the Soil and Conservation Manager, either in discussion at the County Board meeting or in its findings. *Id.* The Manager noted that “the burden of showing an environmentally safe operation is placed on the applicant.” (App. 70.) Yet, neither the applicant nor the County addressed these issues. (App. 1-2.)

Relator Roger Nelson also addressed a couple of letters to the Minnesota Planning Environmental Quality Board, which were forwarded to the County and received prior to the issuance of the CUP. (App. 73, 74.) Again, the Board acknowledged receipt of these letters at its meeting, but did not address the issues raised by Mr. Nelson. Particularly, Nelson noted that the property “is bordered on the south side by a stream which leads to several lakes and on the north by a wildlife pond and pool.” (App. 73). The U.S [sic] Fish and Wildlife Department has expressed concerns along with many of the adjacent property owners as to the affects and impact that this could cause to the surrounding habitat and environment.” *Id.*

³ Whether an EAW was required is the subject of litigation, along with a common law nuisance issue, in proceedings in Morrison County District Court, *Nelson, et al. v. Morrison County, et al.*, Morrison County District Court No. XC-06-162.

In subsequent correspondence, Nelson notes that the U.S. Fish and Wildlife Department spent \$15,000 to benefit the natural habitat in the area, and the noise pollution, waste disposal, and runoff from McDuffee's operations could have a huge negative impact on that investment. (App. 74.) Again, the County Board acknowledge receipt of these documents in the hearings concerning the request for an EAW and CUP, but did not discuss or consider the concerns raised in those letters during public discussions or in the findings made in denying the EAW or granting the CUP. (App. 1, 84.) Rather, the record reflects that the County Board did not make any particularized findings about noise, or effects on the soil and water from dog feces. *Id.*

Rather than discuss and make findings, the Board simply decided to deny the EAW and selected one of two sets of nearly identical findings presented to the County Board by the Zoning Administrator. (App. 81-84.) The two versions are somewhat different, and reached different conclusions. (App. 82 and 83.) While Version A, the one that was accepted, denies an EAW; Version B would have required one. *Id.* The differences between the two versions are as follows:

- Version B, Paragraph 7, provides: "There would be a potential the kennel could have an impact on nearby groundwater and wetland." This finding does not appear in Version A. However, the finding was supported by the Morrison Soil and Water Conservation District Manager, and was not refuted by anyone. (App. 70, 82, 83.)
- Finding No. 10 on Version B states: "The proposed kennel has a number of animals exposed to the outside." Version A contains a nearly identical

finding, paragraph 9, that inserts the word “limited” before the phrase “number of animals.” (App. 82, 83.)

- Paragraph 11 states: “Even though the outside dogs would be debarked, noise would be an issue to nearby residents.” Version A, paragraph 10, deletes the second clause of that sentence. However, in both versions, that finding is inaccurate, since the County later determined that debarking constitutes animal cruelty, and the outside dogs will not be debarked. (App. 4, 82, 83.)
- Finding 14 in Version B does not appear in Version A. That finding states: “There would be a potential for runoff from the stock-piled waste to nearby wetlands and drainage ditches.” This finding, absent from Version A, which the County Board actually signed, is supported by the letter from the Morrison County Soil and Water Conservation District Manager and was not refuted by any other witnesses or documents. (App. 70, 82, 83.)

Thus, Version B, which was rejected, was supported by the evidence, and Version A, which was at odds with the County’s own evidence, was adopted.

The County Board also noted that the proposed dog-breeding facility was located “approximately 200 feet from the wetlands and drainage ditch.” (App. 84.) However, it did not find whether the animal waste emanating from the site would drain into or affect the wetlands, drainage ditch or water table, discuss the runoff issues on the other land to which the feces would be applied, or address the affect of the pathogens peculiar to dog

feces on the environment; or discuss the cumulative effect of other similar uses in the surrounding area.

The County Board Chair concluded that animal waste would not be an issue because the dogs would be kept in a “self contained...building.” This finding, however, ignores that McDuffee’s plan is to spread the dog waste on the property in the summer, to store the dog waste over the winter, and spread it on nearby farm fields in the spring. (App. 1-2; Tr. PC 17; Record 154.). Another Board Member compared the dog waste to that of 15 grazing cattle, even though the 600-plus dogs would not be grazing, but their feces and urine was to be spread over concentrated areas, and, as discussed more fully below, may contain hazardous pathogens not typically found in cow manure. *Id.*

The County Board also did not do any additional research, as suggested by District Manager McLennan, to determine the “proper application of dog feces.” (App. 70.) Had the Board done so, it would have learned that dog feces is considerably different from the feces of cows, pigs, and other livestock, which are mainly herbivores. (App. 119.) In an article from the University of Illinois College of Veterinary Medicine, it is noted that the parasites ringworm and hookworm are common in dog feces and are “very common in puppies...” (App. 114.) The article notes that children are especially prone to become infected with these parasites, as well as people who work with the soil. (App. 115.) Humans can acquire roundworm by ingestion and hookworm through ingestion or contact with the skin. (App. 114-115.) Dogs also are known to carry coliform bacteria, such as Ecoli, as well as Salmonella, and Giardia. (App. 117.) These bacteria contaminates found in rivers and streams have been attributed to pet dogs. (App. 116-

119, 141-46, 148, 153-54.) If these types of serious problems can be caused by neighborhood pets, spreading the feces of over 600 dogs in a concentrated area near a drainage ditch and wetlands is also likely to cause a very serious problem with these types of contaminants, an issue which was not addressed by the County Board.

E. Approval of the CUP

The Planning Commission recommended approval of the CUP on December 19, 2005, stating that "the animals are mostly confined to the barn and there is minimal exposure to the outside." (App. 67.)

On January 10, 2006 the Morrison County Board, by a vote of 4-1, approved the CUP, subject to three requirements. (Tr. CB1 13; Record 160.) The Board found that the kennel would not "create an unreasonable excessive burden" on roads or utilities; "is compatible with the surrounding area," "will not significantly depreciate nearby properties," the appearance of the building and use will not unreasonably adversely effect nearby properties; the use is compatible with existing land use, the environment, and the zoning ordinance and does not conflict with the Comprehensive Plan; and will not have an "unreasonably adverse affect because of noise, odor, glare, or general unsightliness for nearby property owner. (App. 1 and 2).

In approving the CUP, the Board imposed the following conditions:

1. The facility be limited to no more than 600 adult breeding dogs.

2. A privacy fence be erected which must run thirty (30) feet north of the building and 75 feet *west* of the building.⁴
3. All dogs with access to the outdoors be debarked.

(App. 2.) (emphasis added).

The Board did not require any EAW. It reasoned that the dogs with exterior access would be debarked “so as to control noise, the dog manure would be spread on the 10-12 available acres on the proposed site” and manure accumulated over the winter would be spread on nearby dairy farms. (App. 84.) The Board concluded that the “600-unit dog kennel would not have a significant impact on water quality, noise pollution or runoff issues in the immediate area.” *Id.* Neither the Planning Commission nor the Board relied upon the “feedlot” exception in refusing to require an EAW.

F. The Amended CUP

As the public became aware of what occurred, opposition mounted from the community. The Board subsequently received numerous letters from veterinarians and others decrying the process of debarking as inhumane. (App. 97, 102, 103, 104, 105, 106, 107, 111; App. II 197, 203, 211, 219, 237, 248, 252, 270, 276, 277, 290, 293, 298, 301, 304, 306, 310, 313, 315, 320-21, 323, 325, 326, 327-28, 335-36, 339, 341, 248-49, 361-62, 369, 371-72, 380, 384, 388, 399, 400, 403, 405-06, 408, 415-16, 418-19, 421-24, 426, 436, 441-42, 446, 459, 461, 465, 474, 476, 479, 480, 484, 488, 490.)

⁴ There are no neighbors to the immediate *west* of the site, which consists of wetlands, and other natural foliage. The Relator Dickmann family live immediately *east* of the puppy mill property. Thus, they would have no privacy protection under the CUP, as approved by the Board. (App. 60.)

The Board met again, this time in front of a larger – and more hostile – audience on February 7, 2005. There was no formal notice that the CUP may be amended or any hearing on that prospect. The Board approved a one-year moratorium on future dog-breeding facilities in the county, urged better inspection by the Department of Agriculture of such facilities, and supported communications to Federal and State elected officials addressing concerns about dog-breeding facilities. (Tr. CB2 12-18, Record 192-198.) However, the Board did not discuss, or approve, any changes in the CUP it had issued to McDuffee for his particular facility. Rather, a letter was sent to McDuffee from the County Administrator and County Attorney that amended the CUP to provide that the dogs did not need to be debarked and recommended a system utilizing shock collars to decrease barking. (App. 4; Tr. CB2 19-20; Record 199-200.) In so doing, the County Attorney told the Board that “we have learned that surgical debarking is overwhelmingly disfavored with the veterinary community and many allege that it is inhumane.” (App. 4; Tr. CB2 19; Record 199.)

G. The Refusal To Reconsider

On February 13, 2006, the two neighboring Relator couples, the Nelson's and the Dickmann's, asked that the County revoke the CUP because it contained “inaccurate, incomplete, false and misleading information.”⁵ The revocation was sought under §507.4

⁵ The County received numerous letters and e-mails opposing the puppy mill. (App. 97-113; App. II 197-500. Some members of the public specifically sought reconsideration or revocation of the CUP. (App. II 203, 205-07, 212, 214-18, 222-24, 228, 250, 260, 262-63, 268, 270, 274, 276, 279, 284, 287, 295, 299, 301, 303-04, 306, 310, 314, 322, 328-29, 335-36, 339, 361, 364-65, 370-72, 377-78, 386-88, 390, 393, 398-400, 402, 405-

and §908.3 of the Ordinance which requires that a CUP applicant provide the Board with certain information. (App. 6 and 7.) The improprieties cited by the neighbors included erroneous data about the owner of the property as well as failure to apprise the County of prior violations of requirements of the U.S. Department of Agriculture in other dog-breeding facilities operated by McDuffee and his ex-wife elsewhere in Minnesota, described in documents submitted by the neighbors. (App. 8-33.)

For example, McDuffee furnished inaccurate information, including a statement from his veterinarian that his former breeding facility “has been and presently is in compliance with USDA and state regulations.” (App. 62.) McDuffee, however, knew this statement to be inaccurate because on no less than a dozen occasions he had been cited for multiple violations, including, but not limited to, the failure to provide adequate veterinary care, outdated and expired medication, improper recordkeeping, insufficient lighting, insufficient dry bedding, failure to repair primary enclosures resulting in rusted feeders, sharp edges, broken flooring, inadequate space, and inadequate cleaning, sanitizing, and pest control. (App. 8-33.) A former employee of McDuffee also wrote to the Board decrying the deplorable conditions at the prior facility. (App. 109-10).

The neighbors sought to have the request for reconsideration placed on the Board's upcoming agenda and to require the Zoning Administrator to order cessation of work on the property pursuant to §508.5 of the Ordinance. (App. 7.) The Board declined “to

07, 410, 412-13, 415, 417, 424, 426, 433-35, 441, 452-53, 456, 461-462, 470-72, 474-76, 478-81, 483-84, 486, 491-92, 495-96, 498-502.)

place this issue on our agenda” because the neighbor’s “presentation would be necessarily one-sided and therefore unproductive.” (App. 34.)

This appeal ensued by Writ of Certiorari issued on February 27, 2006. (App. 36-37.)

SUMMARY OF ARGUMENT

Morrison County abused its discretion and acted in an arbitrary, capricious, or unreasonable manner in issuing a CUP for a 600 plus dog breeding facility in Morrison County. The County Board failed to apply its zoning ordinance requiring the consideration of the burden on existing public roadways and utilities, the compatibility with adjacent agriculturally zoned land, environmental issues, and the adverse effect on the owners of the adjacent land brought about by noise, odor, or general unsightliness. Likewise, the County failed to make findings concerning the application of the ordinance.

In addition, the Board acted in an arbitrary, capricious, or unreasonable manner when it applied its ordinance without considering existing state and federal law. In particular, the County Board’s failure to consider the actual number of employees McDuffee will be required to operate the kennel consistent with federal and state law resulted in its failure to consider the actual traffic, parking, and congestion issues which will arise. Further, in conditioning the CUP on McDuffee, debarking all dogs kept outdoors, and later recommending the use of shock collars, the Board failed to take into account Minnesota laws preventing cruelty and torture to animals. In allowing McDuffee to spread dog feces and urine on agricultural land, the Board failed to take into account

existing scientific data on the public health and environmental risks involved. Its refusal to follow the suggestion of its own official and to further look at potential environmental effects was unreasonable, arbitrary or capricious.

The County Board violated its own ordinances, and Minnesota law, when it modified the Conditional Use Permit without notice and hearing. It also violated its own ordinance when it failed to hold a hearing at the request of the Relators who were seeking to offer new evidence in regard to the issuance of the CUP, including the veracity of information provided by McDuffee when seeking the CUP.

For these reasons, the decision of the Morrison County Board in issuing the CUP should be vacated or the matter should be remanded to the Morrison County Board for further consideration.

ARGUMENT

II. THE LEGAL STANDARD

A County's determination to grant or deny a CUP is a quasi-judicial decision reviewable by Writ of Certiorari. *Picha v. County of McLeod*, 634 N.W.2d 739, 741 (Minn. Ct. App. 2001). The decision may be set aside if it is arbitrary, capricious, or unreasonable. *Honn. v. City of Coon Rapids*, 313 N.W.2d 409, 416-17 (Minn. 1981); *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. Ct. App. 2003).

The first step in reviewing the grant of a CUP is "to determine whether the County's explanation for its reasons for granting the CUP is sufficient to allow judicial review." *Sunrise Lake Ass'n, Inc. v. Chisago County Bd. of Comm'rs*, 633 N.W.2d 59, 61 (Minn. Ct. App. 2001). The decision granting a CUP "shall demonstrate the board's

conclusion that the proposal has satisfied *each of the zoning ordinance's conditions for approval.*" *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 389 (Minn. 2003) (emphasis supplied); *see also* Minn. Stat. § 394.301, subd.1 (2002). The reasons for the County's decision must be recorded or in writing, and must be more than conclusory findings. *Picha v. County of McLeod*, 634 N.W.2d 739, 741 (Minn. Ct. App. 2001).

Certain matters raised in this proceeding constitute legal issues subject to *de novo* review. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980); *State v. Nelson*, 499 N.W.2d 512, 514 (Minn. Ct. App. 1993) *rev. denied* (Minn. June 22, 1993) (interpretation of a zoning ordinance is a question of law to be reviewed *de novo*). Thus, the County Board's interpretation of its ordinances is not entitled to any deference. *Zawels v. Edutronics, Inc.*, 520 N.W.2d 520, 523 (Minn. Ct. App. 1994); *Franzen v. Borders*, 521 N.W.2d 626, 628 (Minn. Ct. App. 1994).

III. THE COUNTY'S ISSUANCE OF THE CUP WAS ARBITRARY, CAPRICIOUS, OR UNREASONABLE

The County Board's failure to consider a number of factors germane to the issuance of a CUP renders its decision arbitrary, capricious, or unreasonable.

Dog breeding operations of this type and magnitude are unusual and subject to regulatory oversight under State and Federal laws concerning the humane handling, care requirements, and treatment of dogs. These laws and regulations affect the number of employees necessary to operate the site in compliance with these laws and limit methods that can be used to mitigate the barking of dogs. The County Board misinterpreted environmental regulations, and as a result, failed to consider the deleterious effects of

such an unusually large breeding operation. The findings of the board were conclusory, and inadequate for issuance of a CUP. These improprieties, individually and collectively, render the issuance of the CUP arbitrary, capricious or unreasonable.

A. Traffic, Parking, And Congestion

The Board erroneously determined that McDuffee met the first criteria under §507.2(a)(1) of the Ordinance, whether there will be an "excessive burden on ... public roadways." (App. 1.) In issuing the CUP, the County Board failed to consider the increased traffic, parking and congestion on the property for the number of employees that would be necessary to operate the kennel in compliance with Federal and State laws and regulations. The failure to take into account these factors is unreasonable, arbitrary, or capricious. *Sunrise Lake Ass'n v. Chisago County Bd. of Comm'rs*, 633 N.W.2d 59, 61 (Minn. Ct. App. 2001).

McDuffee told the County Board that he would have two or three full time employees at the kennel. (App. 58.) In a subsequent document submitted to the County, McDuffee raised the number, stating that he expects "to employ 3-5 full-time and 2-3 part-time employees" at the breeding site. (App. 61.) The Planning Commission did not specifically address the issue of the number of employees and resulting traffic, but found, in conclusory fashion, that "the requested use will not create an unreasonably excessive burden on the existing roads or other utilities." (App. 69.) The County Board accepted the recommendation of the Planning Commission without making any additional findings concerning traffic, parking, or congestion. (App. 1.)

An analysis of McDuffee's representations of the number of people he expects to employ reflects that the Board, in adopting the Planning Commission's reasoning, failed to consider the traffic, parking, and congestion that would be caused by the number of employees necessary to run such a large dog breeding facility in compliance with state and federal laws.

1. Federal Regulations

Dog kennels are heavily regulated under both Federal and State laws. As a commercial dog handler, McDuffee is subject to regulation by the Department of Agriculture. *See* 7 U.S.C. § 2132(f). He is required to have a Federal license issued by the Secretary of Agriculture, 7 U.S.C. § 2133; 7 U.S.C. § 2134, and must follow Federal standards for humane handling, care and treatment of dogs. *See* 7 U.S.C. § 2143.

The regulations promulgated by the Department of Agriculture concerning the care and treatment of animals are numerous, ranging from periodic maintenance to daily requirements. A breeding facility must, on a daily basis, provide the following care:

- Cleaning: "hard surfaces with which the dogs ... come in contact must be spot cleaned daily and sanitized ... to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta." 9 CFR § 3.1(c)(3).
- Daily Exercise must be provided for the dogs.⁶ 9 CFR § 3.8, and 9 CFR § 3.6.

⁶ If the dogs are kept in cages, pens or runs which provide them with two times the required floor space for that dog, they need not be taken out of their cage for exercise. The calculation for required floor space is set forth in 9 CFR § 3.8 and 9 CFR 3.6 (c) (1). According to those calculations, a fourteen inch dog would require 800 square inches or 5.4 square feet of floor space in order for the dealer to be relieved of it's obligation to remove the dog from the cage for exercise on a daily basis. When two or more dogs are housed together the required floor space is the sum of the required floor space for each

- The dogs must be fed at least once per day. 9 CFR § 3.9.
- Clean water must be provided either continuously or at least twice a day for at least one hour at a time. 9 CFR § 10.
- In addition to the daily cleaning, the cages, and food and water receptacles must be sanitized at least every two weeks using live steam under pressure, hot water with soap or detergent, or other approved detergent solutions. 9 CFR § 3.11(b). Those areas that cannot be sanitized such as gravel, sand, grass, earth or absorbent bedding must be removed as necessary to prevent odor, disease, pest, insect and varmint infestation. 9 CFR § 3.11. Housekeeping and pest control of other areas of the kennel are required as well. 9 CFR § 3.11(c) and (d).⁷
- Dogs must be monitored to ensure they have sufficient space under the regulations and, if kenneled with other dogs, to ensure they are compatible. 9 CFR § 3.6(c) ; 9 CFR § 3.7; and Footnote 6, p. 21 *supra*.
- The personnel must monitor the health, behavior and well-being of the dogs daily and convey timely and accurate information to the attending veterinarian. Regular veterinary care is required, along with a program to prevent, control, diagnose, and treat diseases and injuries. 9 CFR § 2.40.
- Detailed records must be kept on each dog. 9 CFR §2.75.
- The owner of a facility is required to have sufficient employees who are trained and experienced with animal husbandry to abide by the federal regulations. 9 CFR § 3.12.

2. *Minnesota State Law Regulations*

Minnesota law also has minimum requirements for the care and treatment of dogs, which are similar to the Federal standards. *See* Minn. Stat. §§346.39 and 347.32. In addition, Best Management Standards for Care of Dogs and Cats by Dealers, Commercial

dog individually. It is unlikely that McDuffee would provide the double floor space. At previous kennels McDuffee was sighted on a number of occasions for failure to provide even the minimally required floor space. (App. 11, 14, 15, 16, 25.)

⁷ If McDuffee performed this thorough cleaning daily on an equal number of cages he would have to thoroughly clean 42-43 cages per day to finish all 600 cages in 2 weeks.

Breeders and Brokers have been promulgated under Minn. Stat. §346.58 by the Commissioner of the Minnesota Department of Agriculture to provide further guidance on the care of dogs by commercial breeders.

The state's Best Management Standards provide that litters of puppies should “be provided socialization by physical contact with other animals and human beings” and recommends that litters be “handled by humans at least two times per day to prevent future biting behavior.” Minnesota Best Management Standards for Care of Dogs and Cats by Dealers, Commercial Breeders and Borders, Commissioner’s Order (Minnesota Department of Agriculture 1995). While not mandatory, Minnesota law requires that the Commissioner of Agriculture “urge” commercial breeders to follow the Best Care Standards. Minn. Stat. § 346.58.

McDuffee initially represented that he planned to hire 2-3 full-time employees to assist him with the care of the 600 adult breeding dogs and an unspecified number of additional puppies. (App. 58.) It is unclear whether McDuffee counted himself within the 2-3 employees.⁸ Even if McDuffee did not include himself in that count of full-time employees, and he intends to personally devote full-time care to the dogs, he still would lack sufficient staffing to meet the minimal requirements under Federal and State law.

⁸ McDuffee is currently employed full-time as a school teacher with the Little Falls Middle School, but it is believed he is planning to retire this spring.

Four full-time employees, working 40 hours per week, yields 160 hours per week with the dogs.⁹ Those 160 hours per week spread between 600 adult dogs yields 2.29 minutes per day, per adult dog.

McDuffee's upward revised estimate of 3-5 full-time and 2-3 part-time employees cannot satisfy the care requirements, either. (App. 61.) Six full-time employees (including McDuffee) and 3 part-time employees at 32 hours a week (probably a high estimate) would yield 336 hours per week or 20,160 minutes per week, which is 2,880 minutes per day. Dividing those minutes among 600 adult dogs yields 4.8 minutes per adult dog per day, without any time for the numerous puppies on the site.

Because of the large number of puppies and the time required for the breeding operation, the employees would be spread even more thinly. It is unfathomable that the employees could complete their work of daily cage cleaning, feeding, watering, record keeping exercising and socializing the adult dogs, much less the puppies, with only 2.29 or even 4.2 minutes per day to devote to each adult dog, not taking into account additional time for the numerous puppies. Thus, the number of employees proposed by McDuffee cannot possibly operate the facility in compliance with Federal and state law.

McDuffee, theoretically, could hire an adequate number of employees to run the operation in compliance with the laws. But, in reviewing the burden on the public roadways under the Ordinance, § 507.2, the County Board relied solely on the figure

⁹ These figures would be even smaller if legally required breaks for employees had been taken into account, which they were not. *See* Minn. Stat. § 177.253, subd. 1 (requiring employers to allow employees adequate time to use the restroom at least once in each four consecutive hours of work).

provided by McDuffee for employees, not the number of employees that **actually** will be required to operate the kennel in compliance with State and Federal law. If McDuffee employed 50 workers, 28.5 minutes could be spent on each adult dog. Even this amount of time probably is inadequate to clean each cage daily, clean and refill the water and food receptacles, and exercise and socialize the dogs on a daily basis, do 1/14 of the more thorough sanitizing of the cages, and keep up with the required paperwork. Further, this figure does not include the unlimited number of puppies McDuffee would house at the kennel. But Morrison County simply did not consider the impact of 50 or more workers at the site, utilizing the roadways coming and going from the site before and after work and for meal breaks, and their attendant parking needs.

In sum, McDuffee cannot operate a dog breeding site with 600 adult dogs and an unlimited number of puppies in compliance with Federal and State laws with the minimal staffing levels he represented to the County.

Granting a CUP, or other zoning provision, that would result in violation of laws, whether Federal or State, is impermissible. *Madson v. Overby*, 425 N.W.2d 270, 277 (Minn. Ct. App. 1988). The County Board acted in an unreasonable, arbitrary, or capricious manner in relying on McDuffee's staffing numbers, and by not considering the effect on traffic and roadways that the actual staffing levels necessary to operate the business in compliance with the laws would have on the area.

B. Noise

Under the Morrison County Ordinance, § 507.2, the Board must consider "the effect of the proposed use upon the health, safety, morals, and general welfare of the

occupants surrounding land and water bodies.” In conducting that evaluation, the Planning Commission and County Board made improper, unreasonable, arbitrary and capricious findings and conclusions concerning the emanation of noise and noise pollution from the site.

McDuffee represented to the Planning Commission and County Board that dogs having access to the outdoors would be debarked. (App. 58.) In issuing the CUP, the County Board required that “outside dogs be debarked.” (App. 1.) The County purported to modify that condition in a letter to McDuffee dated February 7, 2006, without notice or hearing. The revision lifted the requirement that outside dogs be debarked and suggested that shock collars could be used to prevent barking. (App. 4.)

The process for modification of the CUP utilized by the County violated Minnesota law. Morrison County, Minn., Land Use Control Ordinance 507.4, subd. 4, requires a public hearing when issuing or modifying a CUP. Likewise, under Minn. Stat. § 394.26, subd. 2, a public hearing is required for issuance or modification of a CUP, and all property owners within one-quarter mile of the affected property, or the ten nearest properties, whichever is greater, must be provided notice of the hearing.

However, no notice was provided when the County was considering modifying the CUP. While the County Board was notified of the modification at a meeting on February 2, 2006, it did not provide notice or conduct a public hearing. Neither the public nor the neighbors were given notice of a hearing because none was conducted. Had a hearing been conducted the Nelsons, Dickmanns, and other affected residents could have objected both to debarking and the use of shock collars as inhumane, and

would have asked the County Board to rescind the CUP or substantially reduce the number of dogs permitted at the site to limit noise and traffic.¹⁰ Thus, at a minimum, the issue of modification of the CUP should be remanded to the County so that the statutorily required public notice can be given and hearings conducted on this issue. But even without notice and a hearing, the County's amended requirement that dogs kept outside be debarked or subjected to shock collars violates state laws prohibiting cruelty to animals. Minnesota law prohibits torture and cruelty to animals. Minn. Stat. § 343.21, subd. 1 provides that "no person shall ... torture..., unjustifiably injure, maim, or mutilate any animal... ." Minn. Stat. § 343.21, subd. 7 provides that "no person shall willfully instigate or in any way further an act of cruelty to an animal or animals, or any act tending to produce cruelty to animals." "Torture" or "cruelty" means "every act, omission, or neglect which causes or permits unnecessary or unjustifiable pain, suffering, or death." Minn. Stat. § 343.20, subd. 3.¹¹ The County Attorney acknowledged that debarking constitutes cruelty in the modification to the CUP in which the County stated it

¹⁰ The American Veterinary Medical Association opposes debarking or devocalizing of dogs. The American Veterinary Medical Association Position Adopted to Protect Animal Welfare Concerning Canine Devocalization provides "information collected by the committee indicates that only a small number of legitimate devocalization procedures are performed on dogs, *i.e.*, after behavioral modification efforts to correct excessive vocalization fail. Non-legitimate requests are still a problem, however, and unscrupulous individuals may request the procedure." (App. 157.) The American Animal Hospital Association has promulgated a similar position. Its Canine Devocalization Position Statement is that "canine devocalization should only be performed by qualified, licensed veterinarians as a final alternative after behavioral modification efforts to correct excessive vocalization have failed." (App. 158.)

¹¹ Animal torture and cruelty are categorized as misdemeanors or gross misdemeanors, depending on the nature, severity, and frequency of the offense. Minn. Stat. § 343.21, subd. 9.

was aware that "surgical debarking is overwhelmingly disfavored within the veterinary community and many allege that it is inhumane." (App. 4.)

In suggesting to McDuffee that he use shock collars rather than debarking to prevent noise, the County Board did not discuss the issue at an open hearing, and therefore, did not consider on the record whether the indiscriminate use of shock collars also violates state law prohibiting cruelty or torture, or allow evidence of the lack of effectiveness of this device to ameliorate noise. Had it conducted such hearings, evidence would have been presented that shock collars also run afoul of those laws. The Humane Society of the United States has stated "we don't recommend an electric shock collar to control your dog's barking. The electric shock collar is painful to your dog and many dogs will choose to endure the pain and continue barking. The success rate of this type of collar is less than 50%."¹² (App. 168, *see also* App. 161-165.) The Society recognizes that the electric shock collar may cause other, even more troublesome problems than barking such as "digging, escaping, or becoming destructive or even aggressive." (App. 168.) In an article by the Kentucky Humane Society, the problems with electric shock collars are illuminated as follows:

The electric shock collars generally do not have a high success rate and have the potential to have horrific side effects. Aside from your dog being delivered an electrical shock which is bound to inflict pain, shock collars can create aggression problems. For instance, your dog barks when the

¹² The Humane Society article "Bark! Bark! Bark!" has been reprinted by the Humane Society for Southwest Washington; the Animal Control Division of the Department of Business and Community Development in Multnomah County, Oregon; the Humane Society of Missouri; the Idaho Humane Society, the Humane Society SPCA of Bexar County, Texas; and the Progressive Animal Welfare Society; among others. (App. 166-68, 173-87.)

mailman comes each day. At the bark, the collar shocks the dog. After a few repetitions, the dog has figured out that he gets shocked every time the mailman comes and, therefore, the mailman must be causing the shock. Now you have a dog that believes that the mailman is causing him pain, and this can evolve into full-blown aggression at the mailman. Now, consider how many times a day this scenario happens when people and dogs pass the house. You can create a dog that is, at best, fearful of people and dogs and, at worst, aggressive toward them. These collars are absolutely NOT recommended.

(App. 189.)

Since McDuffee's dogs are bred to be sold as companion animals, "destructive or even aggressive" behavior would be undesirable. In addition, the escape of an aggressive dog would be particularly troublesome to the neighbors, as well as to wildlife in the area.

In finding that persons living within the neighborhood of the kennel would not be subjected to excess barking and noise, the County Board did not consider the noise that would be created if McDuffee did not utilize debarking or shock collars, which violate state law. The failure to consider this issue transgresses one of the explicit criteria that the ordinance requires be taken into account, the deleterious "intrusion of noise." Morrison County, Minn., Land Use Control Ordinance § 507.2, subd. a.7. (App. 47.)

C. Environmental Effects

The Board also disregarded the clear signals of adverse environmental impact of the proposed use. Under §507.2, subd. a.4. of the Ordinance, the County must determine if the proposal is "reasonably related to the existing land use and the environment."¹³

¹³ While the failure to grant an EAW is the subject of a claim in Morrison County District Court, that does not preclude this court from considering the County's failure to address environmental issues as required in its Ordinance, which is a matter that cannot be

The Board made such a conclusory determination in the face of contrary information from the County's own Soil and Water Conservation Manager that a "sizeable amount of animal waste" would be spread, that the soil had "poor drainage and rapid permeability," and a "shallow water table" and is near a type 3 wetland and a County drainage ditch. (App. 70.) She recommended soil and manure testing because of concerns over whether the field can handle the feces and the "environmental effects on the shallow water table" in the vicinity. (App. 70.)

The Board, however, did not pay heed to this clarion call of its conservation manager. Instead, it insouciantly concluded that the feces and waste from the dog-breeding facility would be "compatible" with the environment. That determination was unreasonable, arbitrary, or capricious, and inexcusable in light of the undisputed and serious concerns regarding potential environmental degradation. In ignoring its own official, the County closed its eyes to reality and did so arbitrarily, capriciously, or unreasonably. *Madson*, 425 N.W.2d at 277; *Nelson*, 499 N.W.2d at 514.

As noted above, in spite of the admonitions of the County Soil and Water Conservation District Manager, the Board did not study the hazards of dog feces and urine. Had it made a simple search on the United States Center for Disease Control

brought before the District Court, but must be brought before this court under certiorari review. *Picha*, 634 N.W.2d at 741.

(“CDC”) web site, it would have learned that the following pathogens can be spread through the feces or urine of dogs:

Pathogen	How a Dog Transmits	Method Spread to Humans	Symptoms in Humans
Campylobacter (bacteria)	Dog feces [also spread by other farm animals and cats]	Contact with dog feces or contaminated food.	“[M]ild to severe infection of the gastrointestinal system, including watery or bloody diarrhea, fever, abdominal cramps, nausea, and vomiting. A rare complication of <i>campylobacter</i> infection is Guillian-Barre syndrome , a nervous system disorder... .” (App. 122 (emphasis added)).
Cryptosporidium (parasite)	Dog feces [also spread by other farm animals and cats]	Contact with dog feces.	“[M]ild to severe infection of the gastrointestinal system, including water diarrhea, fever, abdominal cramps, nausea, and vomiting.” (App. 124.)
Dipylidium (tapeworm)	Dog feces/fleas [also spread by cats]	Swallowing an infected flea.	Potential weight loss and itching in the anal area. (App. 127.)
Ascarids (parasites)	Dog feces or infected soil [also spread by cats]	Contact with dog feces or contaminated soil.	“The signs and symptoms seen in humans are determined by the tissues of organs damaged by larval migration. Organs commonly effected are the eye, brain, liver, and lung, where infections can cause permanent visual, neurologic, and other tissue damage. ” (App. 131 (emphasis added)).

Pathogen	How a Dog Transmits	Method Spread to Humans	Symptoms in Humans
Hookworms (parasite)	Dog feces or infected soil [also spread by cats]	Contact with dog feces or contaminated soil.	<p>“Hookworms commonly cause pruritic, linear, eruptive lesions which become progressively worse. The “larvae” may also penetrate into deeper tissue and induce symptoms of visceral larvae migrans, or migrate to the intestine and produce an eosinophilic enteritis.” A CDC survey of shelters revealed that almost 36% of dogs nationwide harbor the pathogen capable of causing disease in humans. (App. 130-132 (emphasis added)).</p>
Giardiasis (parasite)	Dog feces [also spread by other animals]	<p>Contact with soil, food, water, or surfaces that have been contaminated with the feces of infected dogs, including swallowing water in lakes, rivers, springs, ponds, or streams that have been contaminated with feces, eating uncooked food, which has been contaminated.</p>	<p>• Diarrhea</p> <ul style="list-style-type: none"> • Gas or flatulence • Greasy stools that tend to float • Stomach cramps • Upset stomach or nausea.” <p>“These symptoms may lead to weight loss and diarrhea.” (App. 142.)</p>

Pathogen	How a Dog Transmits	Method Spread to Humans	Symptoms in Humans
Leptospirosis (bacteria)	Dog urine [also spread by other animals]	Contact with contaminated dog urine or contaminated water or soil.	“In people, the symptoms are often like the flu, but sometimes leptospirosis can develop into a more severe, life-threatening illness with infections in the kidney, liver, brain, lung, and heart. ” (App. 148 (emphasis added)).
Salmonella (bacteria)	Dog feces [also spread by other animals]	Contact with dog feces or eating food that has been contaminated, such as raw vegetables. Salmonella can also contaminate private wells and other water. “Waste can enter the water through various ways, including sewage overflows, polluted storm water runoff and agricultural runoff. ”	“The most common symptoms of Salmonellosis include diarrhea, fever, and abdominal cramps. Symptoms develop 12-72 hours after infection and usually last 4-7 days. Most people recover without treatment. Some people may have severe diarrhea and may need to be hospitalized. In these people, the bacteria may spread from the intestines to the blood, and then to other parts of the body. Such infections can cause death if the person is not treated in time with antibiotics. The elderly, infants, and those with weakened immune systems are more likely to have a severe illness.” (App. 153 (emphasis added)).

Thus, the spreading of feces on farmland creates serious health risks and is contrary to the CDC recommendations. In order to prevent ascarids and hookworms, for example, the CDC suggests:

it is ... important to clean up pet feces on a regular basis and to remove potentially infected eggs before they become disseminated in the environment via rain, insects, or the act of migration of larvae. Hookworm eggs can develop into infective larvae stage larvae in the soil in as little as 5 days, and ascarid eggs within 2 weeks, depending on the temperature and humidity. To illustrate the extent of environmental contamination that can occur as the result of one infected puppy, a single female ascarid can produce as many as 10,000 eggs/day resulting in millions of potentially infected ascarid eggs per day spread throughout the area the puppy is allowed to roam. Once the eggs become infective, they can remain infective in the environment for years.

(App. 132.)

The potential for environmental contamination from the feces of 600 adult dogs and an unlimited number of puppies is astronomical and potentially devastating to the environment.

Giardiasis also poses a great risk of environmental contamination. As the CDC notes, “because the parasite is protected by an outer shell, it can survive outside the body and in the environment for long periods of time. During the past two decades, Giardia infection has become recognized as **one of the most common causes of water born disease** (found in both drinking and recreational water) in humans in the United States.” (App. 141 (emphasis added)). Giardia can make its way into community water supplies. (App. 143.) According to the CDC, “several community-wide outbreaks of Giardiasis have been linked to municipal drinking water or recreational water contaminated with Giardia.” *Id.* Giardia can also attach itself to food. The CDC recommends washing or peeling all raw fruits and vegetables that might be contaminated. (App. 145.) Thus, growing crops in an area that has been spread with dog feces appears to create a high risk of contamination for many years after dog feces have been spread.

Salmonella also can make its way into the water systems and can also be spread on vegetables and other contaminated foods. (App. 153.) The CDC notes that Salmonella can be found in private wells that have been contaminated with infected feces. *Id.* The CDC continues, “waste can enter the water through various ways, including sewage overflows, polluted storm water runoff and agricultural runoff.” *Id.* Thus, if feces contaminated with Salmonella is spread on farmland, it can drain through the soils into the groundwater, and make its way into private wells, can enter the nearby stream and drainage ditch, and make its way into other nearby lakes and rivers. Wildlife drinking from those bodies of water risk infection, as does wildlife eating contaminated vegetation in the nearby wetlands.

The County Board's failure to consider well-established scientific information about the harmful effects of pathogens carried in dog feces reflects the arbitrary, capricious, or unreasonable character of the CUP. The United States Center for Disease Control strenuously warns about the risk of environmental contamination, and spread of serious diseases relating to the failure to pick up and properly dispose of feces of pet dogs in neighborhoods. (App. 155.) Contamination of municipal drinking water and recreation water have been attributed to the failure of dog owners to pick up the feces of their pets. (App. 116-119, 142-45, 153-54.) The CDC recommends washing and peeling raw fruits and vegetables that might be contaminated with dog feces. (App. 145, 153.)

If such serious consequences can result from the failure of a dog owner to pick up after their pets, the potential for severe environmental degradation and community health problems could be astronomical if the feces and urine of 600-plus dogs is spread in a

concentrated area in porous soil which could allow these pathogens to drain through to the groundwater and make their way to nearby wells, wetlands, the county drainage ditch, and other bodies of water.

In sum, dog feces and urine carry a wide variety of bacteria and parasites that can cause numerous health problems in humans and wildlife, ranging from mild to fatal. Because some of these parasites and bacteria can survive in the environment for years, the spreading of dog feces on farmland poses a risk of substantial health problems in the community for many years to come, and creates a substantial environmental risk. The County should have considered these serious public health risks before granting the CUP. The failure to do so is unreasonable, arbitrary or capricious and contrary to the Land Use Control Ordinance which requires consideration of environmental factors.

D. Inadequate Findings.

The findings of a County Board in the issuance of CUP “must, at a minimum, be recorded or reduced to writing in more than a conclusory fashion.” *Dead Lake Ass’n, Inc. v. Otter Tail County*, No. A03-750, 2004 WL 422570, *3 (Minn. Ct. App. 2004), *vacated in part on other grounds*, 695 N.W.2d 129 (Minn. 2005) (unpublished) (App. 192); *Picha v. County of McLeod*, 634 N.W.2d 739, 742 (Minn. Ct. App. 2001). The County’s findings here were conclusory and lack the sufficient explanation to allow judicial review. *Sunrise Lake Ass’n, Inc. v. Chisago County Bd. Of Comm’rs*, 633 N.W.2d 59, 61 (Minn. Ct. App. 2001).

The County Board merely tracked the language of the ordinance without delineating how or why it came to the conclusion that McDuffee’s dog breeding kennel

complied with the Ordinance. For example, the County concluded that the kennel “will not create an unreasonably excessive burden on the existing roads or other utilities” without discussing the traffic it will create or utility use necessary. (App. 1.) The County concluded that the kennel “will not significantly depreciate nearby properties,” and “is reasonably related to existing land use and environment” without considering the effect of the pathogens commonly found in dog manure which can infect humans and wildlife who come in contact with it. (App. 1.) *see also* pp. 29-36, *supra*. The County must consider the effect of the potential spread of pathogens to the nearby wetlands, streams, lakes, and fields on which crops are grown, cows graze, wildlife roam and people work, walk or play.

While the County limited the kennel to 600 adult breeding dogs, the County failed to consider and make any findings about the unlimited number of puppies and non-breeding dogs which would be kept at the facility.

For these reasons, the CUP should be reversed or, at a minimum, this matter must be remanded to the County for further public hearings and reconsideration of its prior decision.

IV. THE COUNTY BOARD VIOLATED COUNTY ORDINANCES AND ACTED IN AN ARBITRARY, CAPRICIOUS, AND UNREASONABLE MANNER IN ITS *SUA SPONTE* MODIFICATION OF THE CONDITIONAL USE PERMIT.

The *sua sponte* modification of the CUP by the County on February 7, 2006, also was unlawful. The County officials, by letter to McDuffee, rescinded the requirement that the dogs be debarked, and instead recommended the use of shock collars to control

barking. The County officials stated: "We have learned that surgical debarking is overwhelmingly disfavored within the veterinary community and many allege that it is inhumane. As such, we encourage the use of debarking [shock] collars in place of surgical debarking. While we realize that this is ultimately your choice, not ours, we will not defend your use of surgical practice to any or all inquiries." (App. 4.) The issue was not the subject of a public hearing, was not presented to the County Board, and was not voted on by the County Board.

The Morrison County Land Use Ordinance requires that "any change involving structural alterations, enlargement, intensification of use, or similar change not specifically permitted by the CUP issued, shall require an Amended Conditional Use Permit and all procedures and a new permit fee shall apply as if a new permit were being issued." Morrison County, Minn., Land Use Control Ordinance § 507.7. (App. 49.) The same is required under state law. Minn. Stat. § 394.26, subd. 2 (notice and hearing required for amendment of CUP).

In issuing or changing a CUP, the Planning Commission is required under the Ordinance to hold a public hearing on the proposal and make a recommendation to the Board. Morrison County, Minn., Land Use Control Ordinance §507.4, subd. d. (App. 47). State law requires that property owners within one quarter mile of the affected properties, or the ten properties nearest the affected property, whichever is greater, be provided notice of the hearing. Minn. Stat. § 394.26, subd. 2.

But no notice of a hearing was provided to the neighbors and no hearing conducted on the modification. By the Planning Commission and it made no

recommendation to the Board, which likewise held no hearing and took no action. Rather than complying with the hearing requirement, a letter signed by the Morrison County Administrator, Tim Houle, and Morrison County Attorney, Conrad Freeberg, was sent to McDuffee. The County Board noted at its meeting of February 7, 2006, that a letter had been sent to McDuffee about the issue of debarking and reminding him of the need for a license from the Department of Agriculture. (Tr. CB2 19-20; Record 199-200.) The letter was not accompanied by any notice to neighbors, public hearing, or any other record.

Not only was there no notice of hearing, as required by law, but neither the Planning Commission nor the County Board made any findings or took official action. (Tr. CB2 19; Record 199.) Ironically, one County Commissioner, Tim Houle, noted the sparse attendance of residents at prior meetings of the Planning Commission and County Board, when **notice had been given**, compared to the larger throng who showed up at the February 7th meeting without formal notice. (Tr. CB2 28; Record 208).

Had a public hearing been held, Relators and members of the public would have been able to comment on the issue of debarking, which Relators characterize as inhumane, (App. 157-160), and the use of shock collars, to which they also object, (App. 161-189 and pages 26-28 *supra*), as well as other requirements which should have been imposed given the information provided to the County Board by various veterinarians and citizens, as well as the information from the U.S. Department of Agriculture concerning previous violations at a kennel that McDuffee operated with his former spouse. (App. 8-33.)

Instead, the County Board, through its public officials, acted in an unreasonable, arbitrary, or capricious manner in changing the CUP without allowing public input and about the modification of the CUP. Thus, even if the Court does not overturn the issuance of the CUP, it should remand this matter for public hearings with respect to the modification of the February 7, 2006 for further public input and information about any necessary modifications to the CUP.

V. THE BOARD SHOULD HAVE ALLOWED A HEARING ON NEW EVIDENCE

The lack of notice, hearing, or findings on this critical issue is compounded by the County's unwillingness to hear additional evidence submitted by the neighbors. The community opponents sought to do so under § 507.4 and § 908.3 of the Ordinance. (App. 41-43, 54.) They asked for a hearing to present data raising issues regarding the proper identity of the property owners under § 507.4, subd. a of the Ordinance.¹⁴ (App. 6-7.)

More importantly, they submitted documents reflecting apparent violations of USDA kennel requirements at a prior McDuffee-operated puppy mill, which were not previously called to the attention of the Board, and misrepresentations by McDuffee about his prior operations. (App. 8-33.) Members of the public did not present this data

¹⁴ The ownership issue was whether the CUP application was made in the name of the actual owner of the property. At the time of the application, the property was owned by Harvey Block and Donna Block. (App. 57.) But, only Harvey, and not his former spouse, Donna, signed the application as required by the ordinance. (App. 55-56.) McDuffee, the proposed purchaser, who bought the site after the CUP was sought was also listed as an applicant, even though he did not own the property until sometime after the CUP was issued. (App. 56.)

at the public hearing on December 19, 2005 because it was not available at that time. Notice of the public hearing was issued on December 4, 2005, just 15 days before the hearing. (App. 64.) As the County Board acknowledges and laments, the Department of Agriculture reports obtained under the Freedom of Information Act take at least two months to obtain. (Tr. CB2 16, 23; Record 196, 203.) Once these documents were obtained, however, the County Board refused to consider them even though one of its members acknowledged that "I believe the truth never came out from the applicant totally...." (Tr. CB2 26; Record 206.) The failure to consider this data tainted the proceedings under § 507.4, subd. a, and warranted action by the Zoning Administrator to require McDuffee to stop work on and at the kennel, under §508.5. (App. 47, 49.)

The Board, however, blinded itself to this data and acted on the untenable premise that the presentation would be "one-sided and therefore unproductive." (App. 34.) The reasoning is specious. Presentations by advocates usually are "one-sided" in the sense that they present the views of the proponent. That was true of the CUP application as well, which was "one-sided" for the applicant. The neighbors did not seek a "one-sided" proceeding but merely sought to have the issue placed on the agenda for a public hearing, which would have allowed full and complete airing of all sides of these issues. The applicant certainly can attend any meeting of the Board and present his point of view.

The County's conclusion that a hearing would be "unproductive," and refusing to hold a hearing, was arbitrary, capricious, or unreasonable and warrants remand. It is tantamount to a Court refusing one side or the other to be heard in a case because that party would assert a "one-sided" position. Any such curtailment would plainly violate

Due Process. *Holmes v. South Carolina*, 126 S.Ct. 1727, 1735 (2006). The same is true here. The opponents of this puppy mill should have been allowed to make their presentation, "one-sided," or not, accompanied by full-scale, open debate by all sides, and a determination by a fully-informed Board.

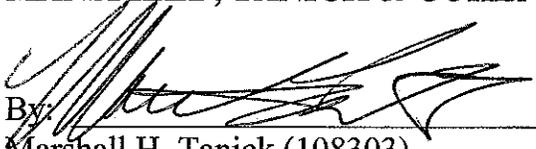
This impropriety can – and should – be cured. If the CUP is not vacated, as it should be, the Board should be required to allow community residents to make their presentation for revocation, as contemplated by § 507.4, subd. 1, and § 908.3 of the County Ordinance, and make a determination whether or not to proceed with revocation.

VI. CONCLUSION

For the above reasons, the Conditional Use Permit issued by the Morrison County Board on January 10, 2006, as modified on February 7, 2006, should be vacated, or the matter remanded for further proceedings.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).