

A06-0518
A06-0387

STATE OF MINNESOTA
IN COURT OF APPEALS

IN THE MATTER OF AN APPLICATION BY
HARVEY BLOCK AND GARY MCDUFFEE FOR
A CONDITIONAL USE PERMIT

BRIEF OF RELATOR
MINNESOTA FEDERATED HUMANE SOCIETIES

Richard D. Snyder (#191292)
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Telephone: (612) 492-7145
Fax: (612) 492-7077

and

Timothy J. Shields
6613 Penn Avenue South, Suite 100
Richfield, MN 55423
Telephone: (612) 861-1776

Attorneys for Relator
Minnesota Federated Humane Societies

Marshall H. Tanick
Teresa J. Ayling
Beth Erickson
Mansfield, Tanick & Cohen, P.A.
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402-4511
Telephone: (612) 339-4295
Fax: (612) 339-3161

*Attorneys for Relators Roger E. Nelson, Deborah A.
Nelson, Jeremy G. Dickmann and Sara L. Dickmann*

Conrad Freeberg
Morrison County Attorney
Government Center
213 Southeast First Avenue
Little Falls, MN 56345-3196
Telephone: (320) 632-0190
Fax: (320) 632-0193

and

Michael T. Rengel
Pemberton, Sorlie, Ruger & Kershner, P.L.L.P.
110 North Mill Street
P.O. Box 866
Fergus Falls, MN 56537
Telephone: (218) 736-5493

Attorneys for Respondent Morrison County

Konstandinos Nicklow
Meshbesh & Spence, Ltd.
1616 Park Avenue
Minneapolis, MN 55404
Telephone: (612) 339-9121
Fax: (612) 339-9188

and

Douglas P. Anderson
Rosenmier, Anderson & Vogel
210 Second Street N.E.
Little Falls, MN 56345
Telephone: (320) 632-5458

Attorneys for Respondent Gary McDuffee

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
STATEMENT OF ISSUES	2
STATEMENT OF THE FACTS.....	2
I. The CUP Application.....	3
II. The Planning Commission’s December 19, 2005 Meeting.	4
III. The County Board Hearing.	6
IV. The County Board’s Refusal to Revoke the Conditional Use Permit.....	7
V. The County Board’s February 7, 2006 Letter.....	7
ARGUMENT	8
I. An Ill-Informed Decision by the County is Not Entitled to a Deferential Standard of Review.	8
II. The Strong Public Policy of Minnesota is to Protect Animals From Inhumane Treatment.	10
III. The County Board’s Inclusion of the Debarking Condition was Arbitrary and Capricious.....	11
A. The County Board Did Not Consider Whether a Debarking Condition Would Be Illegal under Minnesota Animal Cruelty Laws.	11
B. The County Board Arbitrarily Assumed, Without Considering any Evidence, that the Number of Dogs that Would be Affected by the “Debarking” Condition Would be Low.	13
IV. The County Board Acted Arbitrarily by Not Considering Whether Such a Large Number of Dogs Could Humanely be Kept at the Facility.	14
V. The County’s February 7 Letter Has No Legally Binding Effect on the Applicant and Does Not Amend the Conditional Use Permit.	15
VI. The Court Should Reverse the County Board’s Decision to Grant the Conditional Use Permit Because It was Arbitrary, Capricious, and Unreasonable.....	16
CONCLUSION.....	16

TABLE OF AUTHORITIES

STATE CASES

<u>In re Charges of Unprofessional Conduct Contained in Panel File 98-26, 597</u> N.W.2d 563 (Minn. 1999).....	9
<u>Citizens Advocating Responsible Development v. Kandiyohi County Board of</u> <u>Commissioners, ___ N.W.2d ___, 2006 WL 1278604 (Minn. 2006)</u>	9
<u>Dead Lake Ass'n Inc. v. Otter Tail County, 2005 WL 271773 (Minn. Ct. App.</u> 2005)	9
<u>Interstate Power Co. v. Nobles County Bd. of Commissioners, 617 N.W.2d 566</u> (Minn. 2000)	8
<u>Minnesota Center for Environmental Advocacy v. City of St. Paul Park, 711</u> N.W.2d 526 (Minn. Ct. App. 2006).....	9
<u>Neitzel v. County of Redwood, 521 N.W.2d 73 (Minn. Ct. App. 1994).....</u>	8
<u>Rostamkhani v. City of St. Paul, 645 N.W.2d 479 (Minn. Ct. App. 2002)</u>	9
<u>Schwardt v. County of Watonwan, 656 N.W.2d 383 (Minn. 2003).....</u>	9

STATE STATUTES

Minn. Stat. § 343.01	10
Minn. Stat. § 343.20	2, 12
Minn. Stat. § 343.21	2, 10, 11
Minn. Stat. § 346.39	2, 11, 13, 14

INTRODUCTION

Morrison County's decision to permit Respondents to operate a massive dog breeding facility that requires dogs to be continuously confined to small quarters indoors and not be allowed to enjoy any outdoor exercise unless they have been "debarked" was arbitrary and capricious because it failed to consider whether such practices would amount to cruel or inhumane treatment under Minnesota's animal welfare laws. In granting the CUP and imposing the debarking condition, the County Board did not even discuss the debarking condition until after the CUP was granted.

A hallmark of an arbitrary and capricious decision is the failure to consider important aspects of the issue under consideration. The County Board's failure to consider any evidence regarding the legality or practicality of the debarking condition renders its decision to grant the CUP arbitrary, capricious, and unreasonable. Here, the County Board blithely imposed a condition in the Conditional Use Permit that all animals that are permitted to go outside of the crowded dog breeding facility must first have their vocal cords severed, without even a rudimentary consideration of the effects of doing so. The "debarking" condition was imposed in the CUP without any understanding of how the applicant would perform the procedure -- e.g., surgically under anesthesia or simply by inserting a sharp metal object down the throats of the dogs to sever their vocal cords. It was imposed without consideration of whether the dogs would be subjected to unnecessary pain. It was imposed without consideration of any other effects the procedure would have on the dogs.

Minnesota has a well-established public policy of preventing cruel or inhumane treatment of animals. The policy is reflected in Minnesota's animal welfare statutes. Any decision by a governmental entity which impacts or has the potential for impacting animals in the way that the County Board's decision will affect or potentially affect hundreds of dogs must involve a reasoned consideration of Minnesota's animal welfare laws. Here, the record is silent on the welfare of these dogs and therefore the County Board's decision is arbitrary and capricious for failure to consider important aspects of the issue. The decision to grant the CUP should be reversed and remanded to the County for a more thorough consideration of the issues at stake.

STATEMENT OF ISSUES

- I. Whether the County's decision to issue the CUP was arbitrary and capricious in that it included a condition that had not been studied?
- II. Whether the County's decision to issue the CUP was contrary to law because it requires the applicant to violate or potentially violate subdivision 7 of Minn. Stat. § 343.21 and/or Minn. Stat. § 346.39?

Apposite Cases and Statutory Authority:

- Minn. Stat. § 343.20 (2005).
- Minn. Stat. § 343.21 (2005).

STATEMENT OF THE FACTS

Respondent McDuffee sought to purchase a forty-acre agricultural site located at 17513 185th Avenue in Belle Prairie Township in Morrison County from Respondents Harvey and Donna Block in order to operate a massive dog breeding operation. (Nelson

App. 55.)¹ The property is located in an agricultural zone and dog kennels are only allowed in such zones with a Conditional Use Permit.

When a person requests a land use permit from Morrison County, the Morrison County Land Use Ordinance governs the procedure by which the request is reviewed. First, the Planning Commission must hold a public hearing on the proposal. Morrison County Land Use Ordinance § 507.4(d). The Planning Commission then makes a report and recommendation to the County Board. Thereafter, the County Board may hold an additional public hearing, if it determines it would be necessary, and must then make a decision upon the Planning Commission's proposal to grant or deny the CUP. (*Id.* at § 507.5(b)). The County Board must consider the effect of the proposed use on the health, safety, morals, and general welfare of occupants of surrounding lands and water areas. (*Id.* at 507.3.)

I. The CUP Application.

On November 8, 2005, Block, on behalf of McDuffee, applied to the Morrison County Board of Commissioners for a CUP. (*Id.* at 56.) The application provided little or no detail about how the facility would operate. For example, the application contained no information about how many breeding dogs would be kept.² The application provided no information about the number of expected puppies that would be kept at the facility at

¹ Citations to "Nelson App." refer to the separate appendix submitted by Relators Nelson and Dickmann in this consolidated appeal.

² Despite the lack of information about the number of dogs, the Planning Commission assumed that there could be anywhere between 400 and 800 adult dogs. (12/19/05 Tr. at 5.)

any one time. The application proposed the construction of a 28' x 151' building, and a 17' x 157' building with a 26' x 26' connection, but did not enclose a drawing to show how the dogs would be housed, and did not explain how overcrowding would be avoided. (Nelson App. 55.) It provided no information about how the animals would be confined, whether enough space would exist to house the animals in a humane manner, whether the dogs would be permitted to leave their separate kennels and whether they would be allowed to receive exercise. The application provided no information about how much waste would be generated or how it would be handled and disposed of. Regarding noise, the application merely states that "All adult dogs will be debarked to alleviate noise." (Id. at 58) (emphasis added). However, no details were provided about the manner in which "debarking" would be accomplished on the hundreds of breeding dogs at the facility.

II. The Planning Commission's December 19, 2005 Meeting.

The public hearing before the Planning Commission took place on December 19, 2005. The hearing began with a brief presentation by Commission staff, which reiterated the information provided in the application. (12/19/05 Tr. at 2-7.) No substantive discussion occurred concerning the debarking issue. The hearing was then opened up for public comment, including further explanation by the applicant. However, the applicant provided no information concerning the plans for debarking, how the debarking would

occur, the effects of the debarking on the animals, the number of animals that would be debarked, or any other details concerning his plan to debark the dogs.³

Similarly, the applicant provided no further details concerning the manner in which the dogs would be kept at the facility, the total number of breeding dogs and puppies that would be present at one time, how the animals could be kept without inhumane overcrowding, how the animals would be exercised, if at all, or any other details concerning the manner in which the business would operate.

Finally, in coming to a vote on the conditions, the Planning Commission stressed that all adult dogs going on the inside-outside running tracks would be debarked and confirmed that the proposed kennel would have a cap of 600 adult breeders. (Id. at 43.) Moreover, those dogs that reach an adult age would all be allowed out and trained on the indoor-outdoor runs. (Id.) After this discussion, the Planning Commission took a vote and approved the cap of 600 dogs with the condition that all dogs that have access to the outside be debarked. (Id. at 44–45.)

The scant administrative record regarding the debarking condition is limited to the above references. No discussion occurred and no evidence was presented about the legality or practicality of debarking a large number of dogs, the effect of doing so, or the specifics for how the debarking would occur. Nothing in the Planning Commission's recommendation would limit or restrict the number of dogs debarked or limit how the

³ The only mention of debarking at the hearing came when an individual from the audience, who identified himself as a veterinarian, discussed in general debarking of dogs through surgical procedures. However, nothing in the record indicates the manner in which the applicant in this case would debark dogs.

procedure would take place, for example, prohibiting debarking by thrusting a metal rod into a dog's throat to sever vocal cords. Under the current wording of the CUP, this method of debarking apparently would not be proscribed.

III. The County Board Hearing.

The Morrison County Board's meeting regarding the application for a CUP occurred on January 10, 2006. (See 1/10/06 Tr.) The County Board did not choose to have another public hearing regarding the CUP and instead adopted the Planning Commission's findings of fact and recommendations without much discussion. (See id.) Other than a mention by the Chairman of the County Board that debarking will take care of any noise pollution, the debarking condition was not discussed in any fashion. (Id. at 7.) The County Board did not discuss the legality or practicality of the condition and did not consider any alternatives to debarking. Thus, the County Board's grant of the CUP was as uninformed as the Planning Commission's recommendation.

The County thereafter adopted its Findings of Fact and Decision approving the CUP. (Nelson App. 1.) The conditions imposed on the applicant were that:

1. The facility be limited to no more than 600 adult breeding dogs.
2. A privacy fence be erected.
3. All dogs which have access to the outside must be debarked.

(Nelson App. 2.) Again, no efforts were made to understand the nature of the debarking required by the CUP, the effect it would have on the dogs, or the legality and practicality of the procedure.

IV. The County Board's Refusal to Revoke the Conditional Use Permit.

After receiving many letters condemning the County Board's decision to grant the CUP on the condition that all dogs that have access to the outside be debarked, the County Board met on February 7, 2006. (2/7/06 Tr.) The County Board acknowledged that if it had received the feedback before action on the application for the CUP had occurred, "it would have been very, very pertinent information." (Id. at 4.)

Nevertheless, the County Board declined to reverse itself. (Id. at 6–8.) The primary reason the County Board cited for declining to reverse the issuance of the CUP was that it desired to avoid financial liability. (Id. at 9.) Instead, the County Board chose to leave it up to a court to determine whether its decision should be overturned. (Id.)

V. The County Board's February 7, 2006 Letter.

On February 7, 2006, County Administrator, Timothy J. Houle, and County Attorney, Conrad Freeberg, wrote the applicant a letter to purportedly clarify the County Board's interpretation of the "debarking" condition on the Conditional Use Permit. (Nelson App. 4.) First, the letter explained that it was the County's understanding that "the number of dogs to which this would apply is low" and "is only a concern for those [dogs] that have outside access." (Id.) Then the letter indicated that the County's position is that "the use of barking collars instead of surgical debarking" would best meet the debarking permit condition. (Id.) The letter described a barking collar as "a collar that delivers a mild shock whenever the dog barks to condition it to bark less." (Id.) The letter attributed the suggestion to the County's newly acquired awareness that "surgical debarking is overwhelmingly disfavored within the veterinary community and many

allege that it is inhumane. It is also a permanent and irreversible approach to the problem of noise.” (Id.)

The letter explicitly stated that the choice of whether to use a barking collar or another method of debarking a dog is “ultimately your [the applicant’s] choice, not ours.” (Id.) Despite the letter, the County Board chose not to reopen the proceedings or change the conditions in the CUP in any manner. The conditions remain as originally adopted.

ARGUMENT

Because neither the County Board nor the Planning Commission adequately analyzed or considered the legality and practicality of the debarking condition, the County Board’s decision to issue the CUP was not based on evidence in the record. Instead, its decision was arbitrary, capricious, and unreasonable. As such, the Court should reverse the grant of the CUP.

I. An Ill-Informed Decision by the County is Not Entitled to a Deferential Standard of Review.

Because a county board’s decision on a conditional use permit application is a quasi-judicial act, the decision is reviewable in the Court of Appeals on a writ of certiorari. Interstate Power Co. v. Nobles County Bd. of Commissioners, 617 N.W.2d 566, 574–75 (Minn. 2000); Neitzel v. County of Redwood, 521 N.W.2d 73, 75 (Minn. Ct. App. 1994) (“A county board’s decision to grant or deny a conditional use permit is a quasi-judicial decision because it requires a county board to determine facts about the nature and effects of the proposed use and then exercise its discretion in determining whether to allow the use”).

This Court may set aside the County Board's decision if it finds that the decision was arbitrary, capricious, or unreasonable. Schwardt v. County of Watonwan, 656 N.W.2d 383, 386 (Minn. 2003). The deferential standard of review given to decisions of local governing units is premised upon the notion that the local governmental unit is engaged in a reasoned decision making process, that it is considering all important aspects of the decision that it is called upon to make, and that it is basing its decision upon appropriate evidence in the record. Thus, the Court's "role when reviewing agency action is to determine whether the agency has taken a 'hard look' at the problems involved, and whether it has 'generally engaged in reasoned decision-making.'" Citizens Advocating Responsible Development v. Kandiyohi County Board of Commissioners, ___ N.W.2d ___, 2006 WL 1278604 (Minn. 2006). In cases where the local governing body has not taken a sufficiently "hard look" at the problems involved, the Court should not afford its decision any particular deference. A decision is arbitrary and subject to reversal where a governing body "entirely failed to consider an important aspect of the problem." Id. (citing In re Charges of Unprofessional Conduct Contained in Panel File 98-26, 597 N.W.2d 563, 567 (Minn. 1999); Minnesota Center for Environmental Advocacy v. City of St. Paul Park, 711 N.W.2d 526 (Minn. Ct. App. 2006) (decision is arbitrary where the local unit of government "failed to consider an important aspect of the problem"); Dead Lake Ass'n Inc. v. Otter Tail County, 2005 WL 271773 (Minn. Ct. App. 2005); Rostamkhani v. City of St. Paul, 645 N.W.2d 479 (Minn. Ct. App. 2002).

Here, the County Board's decision is not entitled to deferential review, and is arbitrary and capricious, because the County Board failed to consider important aspects

of the problem. The Board's cursory analysis was anything but the necessary "hard look" at the problems presented. The Board failed to take into account Minnesota policy concerning animal cruelty and inhumane treatment. It failed to consider the ramifications of its decision to impose a "condition" on the operation of the kennel that all outside dogs be "debarked." It failed to analyze the issues of crowding and lack of exercise in the breeding dogs kept in the kennel. The result was an ill-informed decision that was based upon only a cursory analysis in which the County Board did not meaningfully consider, let alone resolve, important aspects of the issues presented to it. The County Board's decision therefore is arbitrary and should be reversed.

II. The Strong Public Policy of Minnesota is to Protect Animals From Inhumane Treatment.

The Minnesota Legislature has enacted numerous laws to protect animals from the possibility of inhumane treatment. Minn. Stat. § 343.01 permits the formation of state federations and county and district societies for the prevention of cruelty to animals. The purpose of the humane societies is to "assist in the enforcement of the laws for the prevention of wrongs to animals" and to aid "in the enforcement of the laws for the prevention of wrongs to animals which may now or hereafter exist, and to promote the growth of education and sentiment favorable to the protection of animals."

A fundamental policy of Minnesota law is the prevention of cruelty to animals. As discussed below, Minn. Stat. § 343.21 prohibits torture or cruel treatment of animals. "Torture" and "cruelty" are defined as "every act, omission, or neglect which causes or permits unnecessary or unjustifiable pain, suffering, or death." *Id.* § 343.21, subd. 3.

Subdivision 7 of Minn. Stat. § 343.21 prevents cruelty to animals, providing that “No persons shall willfully instigate or in any way further any act of cruelty to any animal or animals, or any act tending to produce cruelty to animals.” Minnesota law also has detailed provisions requiring humane treatment of dogs. See Minn. Stat. § 346.39. Many other laws exist mandating humane treatment of animals. These are laws that any decision maker must consider when addressing an issue that implicates the treatment of animals, as the CUP application in this case did.

III. The County Board’s Inclusion of the Debarking Condition was Arbitrary and Capricious.

The County Board’s failure to consider the illegality and impracticality of the debarking condition demonstrates that its decision was arbitrary, capricious, and unreasonable. Deciding to impose a vague and illegal condition upon the applicant as part of the CUP is not a decision that is based on evidence in the record. Instead, the administrative record contains no evidence that the legality of the debarking condition was ever considered. The County Board did not consider it as a factor. Moreover, no evidence exists that any consideration was ever given to the manner in which the applicant would satisfy the condition in the CUP, and whether it would be legal under the animal welfare laws. As such, the County Board’s decision to impose the debarking condition was not an informed decision, but was wholly arbitrary.

A. The County Board Did Not Consider Whether a Debarking Condition Would Be Illegal under Minnesota Animal Cruelty Laws.

Under Minn. Stat. § 343.21 subd. 7, “no person shall willfully instigate or in any way further any act of cruelty to any animal or animals, or any act tending to produce

cruelty to animals.” Cruelty to animals is broadly defined under Minnesota law to include “every act, omission, or neglect which causes or permits unnecessary or unjustifiable pain, suffering or death.” Minn. Stat. § 343.20, subd. 3. Moreover, substantial bodily harm is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss of impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member to a service animal or a pet or companion animal.” Minn. Stat. § 343.20, subd. 8. Similarly, great bodily harm is defined as “bodily injury . . . which causes a permanent or protracted loss or impairment of the function of any bodily member or organ” *Id.*, subd. 9.

The statutes define a “pet” as any animal owned, possessed by, cared for, or controlled by a person for the present or future enjoyment of that person or another as a pet or companion. § 343.20, subd. 6. Naturally, dogs are considered pets. Even those dogs that are used for breeding could potentially become pets through future adoption. As debarking permanently removes a dog’s vocal cords, debarking a dog violates the above cruelty statutes. Regardless of whether the vocal cords are removed by properly conducted surgical procedure or through a make-shift home method, debarking a dog results in a permanent loss or impairment to the function of the dog’s vocal cords. Moreover, debarking a dog, even through a surgical procedure, may result in infections, laryngeal paralysis, and airway stenosis. Canadian Veterinary Medical Ass’n, Devocalization of Dogs, March 2004, <http://canadianveterinarians.net/ShowText.aspx?ResourceID=43>. The procedure is considered to be cruel and inhumane treatment and is

not appropriate for routine treatment of large numbers of dogs. (Nelson App. 158, 159.) Because of the significant amount of bodily harm that debarking can cause to the dogs, the CUP's condition to debark the dogs on its face violates the animal cruelty statutes.

Here, the County Board failed to conduct any analysis of the legality of the debarking condition. It failed to conduct any inquiry into how the condition would be satisfied, and therefore also was in no position to know if the manner in which the applicant might meet the condition imposed by the Board would violate Minnesota law. The failure to address this important issue exemplifies the arbitrary and capricious nature of the Board's decision to issue the CUP with the debarking condition.

B. The County Board Arbitrarily Assumed, Without Considering any Evidence, that the Number of Dogs that Would be Affected by the "Debarking" Condition Would be Low.

Apparently, the County Board believed that the harshness of the debarking condition would be lessened if only a small number of dogs, which had access to the outdoors, would undergo the procedure. (Nelson App. 4) However, nothing in the administrative record addresses the issue of the number of dogs that would be debarked.

Indeed, it may be that all 600 breeding dogs contemplated for the facility will need to be debarked. Under Minnesota law, all dogs are required to be provided the opportunity for periodic exercise. Minn. Stat. § 346.39, subd. 5. Nothing in the record suggests how the exercise requirement would be met by the applicant. Presumably because of the large number of dogs at the facility, outdoor exercise would be a necessity. In such case, a large number of dogs conceivably could be subject to the debarking condition. This is another example where the County Board's review of the application

was deficient. The Board was not informed of the manner in which the dog breeding facility would be operated, and therefore was in no position to analyze the extent to which the debarking condition would need to be implemented. The Board's assumption that only a small number of dogs would be debarked is unsupported in the record.

IV. The County Board Acted Arbitrarily by Not Considering Whether Such a Large Number of Dogs Could Humanely be Kept at the Facility.

The permit allows the applicant to maintain 600 breeding dogs, and an unlimited number of puppies. Conspicuously absent from the record, however, is any discussion concerning how the dogs would be kept, the space that would be provided for the dogs, the size of the kennels, the layout of the operation, or any other information that would be necessary for the Board to consider whether such a large number of dogs and puppies could be kept in a humane manner.

The size of a dog's kennel is governed by Minn. Stat. § 346.39, subd. 4. As noted, Minn. Stat. § 346.39, subd. 5, requires all dogs to be provided an opportunity to exercise. The record is silent concerning how the applicant would meet these provisions of Minnesota law. Indeed, the applicant never explained how he could fit 600 breeding dogs, together with countless litters of puppies, into the building proposed for the operation. Again, the County Board failed to consider the legality of the proposed operation as part of its review of the conditional use permit. The record is absent of any evidence that the operation will conform with Minnesota law. Again, the decision to grant the permit, made without consideration of important provisions of Minnesota law, was arbitrary and capricious.

V. The County's February 7 Letter Has No Legally Binding Effect on the Applicant and Does Not Amend the Conditional Use Permit.

In order to amend a CUP, the County Board and Planning Commission would have had to go through the same process as if they were issuing a new CUP. Pursuant to the Morrison County Land Use Control Ordinances, “[a]n amended conditional use permit application shall be administered in a manner similar to that required for a new conditional use permit.” Ordinance § 507.4(g). “Any change . . . not specifically permitted by the conditional use permit 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 including information on the use, location, and conditions imposed by the Planning Commission . . .” *Id.* § 507.7. Moreover, if additional conditions are to be imposed, “the Planning Commission shall report to the County Board its findings and recommendations, including the stipulation of additional conditions. . . .” Although these ordinances are aimed at an applicant’s desire to modify a conditional use permit, they demonstrate that in order for any amendment to a conditional use permit to be effective, it must go through the same hearing and approval process as if it were a new permit.

The February 7, 2006 letter from County Administrator, Timothy J. Houle, and County Attorney, Conrad Freeberg, did not alter the CUP. (Nelson App. 4.) First, it is clear from the face of the letter that the county did not intend for it to be binding on the applicant. The letter explicitly states that the choice of whether to use a barking collar or another method of silencing a dog is “ultimately your [the applicant’s] choice, not ours.” Second, the letter was neither voted upon nor signed by the County Board, meaning that

it was not an official action of the Board. 2/7/06 Tr. at 30. Thus, because the letter had no effect on the CUP, the applicant is still bound by the original condition in the CUP, requiring the applicant to debark, in any manner he chooses, any dogs which will have access to the outside

VI. The Court Should Reverse the County Board's Decision to Grant the Conditional Use Permit Because It was Arbitrary, Capricious, and Unreasonable.

The County Board has acknowledged through its February 7 letter to McDuffee that its decision to issue the debarking condition as part of the CUP was uninformed. The letter states, "we have learned that surgical debarking is overwhelmingly disfavored within the veterinary community." (Nelson App. 4.) The fact that the County Board learned after-the-fact that debarking is disfavored demonstrates that its decision to issue the CUP was arbitrary, capricious, and unreasonable.

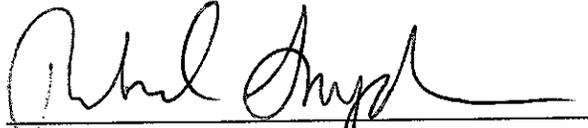
When a decision by a county board to grant a CUP is arbitrary, capricious, or unreasonable, the Court must reverse the grant of the CUP.

CONCLUSION

When the Morrison County Board of Commissioners decided to grant the applicant a CUP to operate a 600-plus dog breeding facility, it did not base its decision to impose a debarking condition in any evidence in the record. The County Board's decision making process did not include consideration of whether the debarking condition was illegal or impractical. As the County Board has itself acknowledged, its decision to impose a debarking condition on the applicant was uninformed. The County Board's subsequent effort to correct this decision through an informal letter was

insufficient. As such, the Court must reverse the County Board's grant of the CUP as its decision was arbitrary, capricious, and unreasonable.

Respectfully submitted,



Dated: May 31, 2006

Richard D. Snyder (#194292)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, #4000
Minneapolis MN 55402-1425
Telephone: (612) 492-7145
Fax: (612) 492-7077

- and -

Timothy J. Shields (#130916)
6613 Penn Avenue South, Suite 100
Richfield, MN 55423
Telephone: (612) 861-1776

*Attorneys for Relator
Minnesota Federated Humane Societies*

4020018.2--0531560.0099