

Appellate Court Case Nos. A06-0387 and A06-518

STATE OF MINNESOTA

IN COURT OF APPEALS

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

RESPONDENT MORRISON COUNTY'S BRIEF AND APPENDIX

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LEGAL ISSUE

WAS MORRISON COUNTY UNREASONABLE, ARBITRARY AND CAPRICIOUS OR CONTRARY TO LAW IN GRANTING THE CONDITIONAL USE PERMIT?

Morrison County answers: No. The decision must be upheld.

STATEMENT OF FACTS

On November 8, 2005 Harvey Block, owner of the Southeast Quarter of the Southeast Quarter in Section 20, Township 41, Range 31, zoned as agricultural property, submitted a conditional use permit application for relocation of a professional dog breeding facility, with a building 151 feet by 28 feet, 26 feet by 26 feet, and 157 feet by 17 feet, which will be used to house dogs. Record Nos. 0002-0003. Gary McDuffee (McDuffee) was actually planning to purchase the property from Harvey Block with the intent to operate a dog kennel, and the sale was at first conditioned on obtaining the permit. It is believed that McDuffee is now owner of the property in question. The conditional use permit application further set forth that the building would be located so there should be no adverse effect on the environment or neighbors, that they did not plan on cutting any trees on the property, and that the septic system would be designed by a professional septic designer with the utmost concern given to the environment. Record No. 0002.

Section 507.2 under the Morrison County Land Use Control Ordinance sets forth the criteria for evaluating conditional use permits. Record Nos. 0262-0263. The hearing for the application for conditional use was set for December 19, 2005. Record No. 0004. Notice was published and sent to all interested land owners on December 4, 2005, pursuant to Minnesota Statutes §394.26. Record Nos. 0005-0007. Written comments against the conditional use application permit were presented prior to the meeting. Record Nos. 0008-0016. Written comments for the kennel were presented during the meeting. Record Nos. 0017-0030. A staff opinion report was given finding that the

ordinance does not have any specific standards for kennels and that the conditional use criteria questions must be satisfied. Record No. 0032. The applicant gave written explanations as to the criteria of the conditional use standards of the Morrison County Land Use Control Ordinance in regards to his dog kennel. Record Nos. 0032-0035. On December 19, 2005, the Morrison County Planning Commission meeting was held addressing McDuffee's conditional use permit application. Record Nos. 0037-0090. A transcript and minutes of the meeting was taken. Record Nos. 0037-0090. At the meeting, the Morrison County Planning Commission opened the discussion to oral comment. Record No. 0054. Oral testimony consisted of positions both for and against the dog kennel. Record No. 0054-0084. Concerns and questions were voiced and addressed. Id.

At the conclusion of the meeting on December 19, 2005, after listening to all the oral testimony and considering the written comment and documentation prior to the meeting, the Morrison County Planning Commission completed a conditional use criteria checklist based on Section 507.2 of the Morrison County Land Use Control Ordinance. The checklist was completed by each present Morrison County Planning Commission member which provided that "if all answers are 'yes' by a majority of the planning commission, the criteria for granting of the conditional use permit have been met. The conditional use permit will maintain the goals or safety, health and general welfare of the public." Under the listed criteria, a majority of the Morrison County Planning Commission members voted "yes" for each of the criteria. A majority of the members voted "yes" for all the criteria under Section 507.2 of the Morrison County Land Use Control Ordinance. Record No.0036. As a result of the application, prior documentation,

comments prior to the hearing, and testimony at the hearing which constitute the record, the Morrison County Planning Commission recommended the approval of the conditional use permit and suggested the following conditions:

- “1. A privacy fence be placed on the north side of the property to prevent any visibility from the road.
2. Outside dogs be debarked.
3. Animal cap of 600 adult breeding dogs.” Record Nos. 0037-0090.

After the Morrison County Planning Commission meeting on December 19, 2005, the Environmental Quality Board (EQB) appointed Morrison County as the Responsible Governmental Unit (RGU) for the determination of the need for an environmental assessment worksheet (EAW). Record Nos. 0094-0104. A meeting was then scheduled in front of the Morrison County Board of Commissioners on January 10, 2006, to consider the Morrison County Planning Commission’s recommendations as to the conditional use permit and consider whether an EAW was necessary for the project. Record No. 0116. One written comment was submitted with the position that there was no need for an EAW because of the small number of animal units prior to the meeting on January 10, 2006. Record Nos. 0091-0092. Information was supplied to the Morrison County Board of Commissioners by the Morrison County Zoning Administrator regarding a guide to environmental review rules, soil types, and wetland locations and possible findings and rationale for either position in denying or approving the need for an EAW. Record Nos. 0105-0114, 0116-0126. On January 10, 2006, the Morrison County Board of Commissioners held a meeting on the determination for the need of an EAW and conditional use permit application. Record Nos. 0116, 0135-0161. As a result of the

record in front of the Morrison County Board of Commissioners in regards to the EAW, the Morrison County Board of Commissioners found that there was not a need for an EAW and adopted findings as follows:

- “1. The proposed application is to operate a 600-unit dog kennel in an area zoned agriculture.
2. The proposed kennel is to be located on a 40-acre parcel.
3. The proposed 40-acre parcel has wetlands and seasonal drainage ditch.
4. The proposed location of the kennel is (sic) located approximately 200 feet from the wetlands and drainage ditch.
5. The Morrison County Soil Survey indicates Isan (261) and Meehan (202) soils in the area of the proposed kennel.
6. Isan and Meehan soils are poorly drained soils and are located on broad flats and are nearly level.
7. The proposed kennel includes structures which house and shelter the dogs.
8. The proposed structures confine all of the dogs.
9. The proposed kennel has a limited number of animals exposed to the outside.
10. Those animals exposed to the outside would be debarked so as to control the noise.
11. All the animal waste will be land applied to the available 10 to 12 acres at the proposed site.
12. All stock pile waste accumulated during the winter will be land applied by a near-by dairy farm.
13. The proposed kennel is located approximately 940 feet from the nearest dwelling.
14. A proposed fence will shield the north and west side.

Therefore, based on these findings, the proposed 600-unit dog kennel would not have a significant impact on water quality, noise pollution or runoff issues in the immediate area. Based on these findings the Morrison County Board of Commissioners hereby determines a negative declaration of need for an Environmental Assessment Worksheet (EAW) for the proposed 600-unit dog kennel located in the SE1/4 of the SE1/4, Section 20, Township 41, Range 31, Belle Prairie Township.” Record Nos. 0127-0128.

After determination that an EAW was not required, the Morrison County Board of Commissioners considered the conditional use permit application. Record Nos. 0116, 0121-0126, 0135-0161. After deliberation, consideration of documentation, testimony, and comment submitted to the Morrison County Planning Commission and deliberation and suggested findings by the Morrison County Planning Commission, the Morrison County Board of Commissioners determined that a conditional use permit should be granted and adopted the following findings:

- “1. Harvey & Donna Block are the owners of the SE 1/4 of the SE 1/4, Section 20, Township 41, Range 31, Belle Prairie Township.
2. Gary McDuffee is the prospective buyer of the property and was requesting the Conditional Use Permit.
3. The request is to operate a dog kennel on the property which is zoned agriculture.
4. Dog kennels are allowed in the ag zone with a conditional use permit.
5. The proposed kennel would require the construction of a 28' x 151' building, and a 17' x 157' building with a 26' x 26' connection between them.
6. The buildings would be used to house and shelter up to 600 adult breeding dogs.
7. Part of the buildings would have outside dog runs.
8. The proposed kennel is located on a 40-acre tract of land.
9. Part of the 40 acres have wetlands, with approximately 12-14 acres of high tillable land.
10. Dog kennels are required to have a State License from the United States Department of Agriculture.
11. The manure management plan consists of stock piling during the winter months and land applying on area agriculture fields during the summer.
12. The Morrison County Planning Commission found that:
 - a. The requested use will not create an unreasonably excessive burden on the existing roads or other utilities.
 - b. The requested use is compatible with the surrounding area and will not significantly depreciate near-by properties.
 - c. The structure and the use shall have an appearance that will not have an unreasonably adverse effect on near-by properties

- d. The requested use, in the opinion of the Planning Commission, is reasonably related to the existing land use and environment.
 - e. The requested use is consistent with the Morrison County Land Use Control Ordinance.
 - f. The requested use is not in conflict with the Morrison County Comprehensive Plan.
 - g. The requested use will not create an unreasonably adverse affect because of noise, odor, glare or general unsightliness for near-by property owners.
13. The Planning Commission moved and second to recommend approval of this application with the following conditions:
1. The facility to 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.
 3. All dogs which have access to the outside be debarked.

* * *

Wherefore, the Morrison County Board of Commissioners herby approves the application for a Conditional Use Permit to operate a dog kennel in an area zoned agriculture, located at the SE ¼ of the SE ¼, Section 20, Township 41, Range 31, Belle Prairie Township, with the conditions stated in Item #13 above.” Record Nos. 0129-0133.

An Order of Conditional Use with conditions was issued by the Morrison County Board of Commissioners. Record No. 0134. A meeting was held February 7, 2006, by Morrison County Board of Commissioners, reviewing the process of the application for the conditional use permit and passing of a moratorium for commercial dog breeding kennels for up to a period of one year. Record Nos. 0174-0213. A letter was also sent by the Morrison County Administrator and Morrison County Attorney to McDuffee suggesting that this “permit condition can best be met with the use of barking collars instead of surgical debarking . . . [and] that this is ultimately your choice, not ours, we will not defend your use of the surgical practice to any or all inquirers.” Record

No. 0214. The letter also reminded McDuffee that he “must maintain a USDA license and be in compliance with . . . license requirements at all times.” Record No. 0214. Letters were written to Senators and Representatives regarding the concern for dog breeding kennels. Record Nos. 0215-0218. A press release was issued regarding the moratorium on dog breeding kennels in Morrison County for up to one year. Record No. 0219-0222.

Relators have now brought this action in the Court of Appeals pursuant to a writ of certiorari contesting Morrison County’s determination in approving the conditional use permit. A separate district court action has also been filed in regards to Morrison County’s determination that an EAW was not required.

ARGUMENT

I. STANDARD OF REVIEW

A decision to grant or deny a conditional use permit is a quasi-judicial decision because it requires the county to determine facts about the nature of the proposed use and then exercise its discretion in determining whether to allow the use. Neitzel v. County of Redwood, 521 N.W.2d 73, 75 (Minn.App. 1994) (rev. den. Oct. 27, 1994). An appellate court will uphold a county's decision to approve or deny a conditional use permit only unless the court's independent review of the record determines the decision was arbitrary, capricious, or unreasonable. Yang v. County of Carver, 660 N.W.2d 828, 832 (Minn.App. 2003). “Where a zoning ordinance specifies standards which must be applied in determining whether or not to grant a conditional use permit, and the applicant fully complies with the specified standards, a denial of the permit is arbitrary as a matter

of law.” Scott County Lumber Co., Inc. v. City of Shakopee, 417 N.W.2d 721, 727 (Minn.App. 1988) (rev. den. March 23, 1988), citing Hay v. Township of Grow, 296 Minn. 1, 5, 206 N.W.2d 19, 22 (1973).

Counties have wide latitude in making decisions about special use permits. Zylka v. City of Crystal, 283 Minn. 192, 195-96, 167 N.W.2d 45, 49 (Minn. 1969). In reviewing a county's decision to approve a CUP independently, the Court of Appeals examines whether there was a reasonable basis for the decision, or whether the county acted unreasonably, arbitrarily, or capriciously. Swanson v. City of Bloomington, 421 N.W.2d 307, 311 (Minn. 1988); Northwestern College v. City of Arden Hills, 281 N.W.2d 865, 868 (Minn. 1979). Land use decisions are entitled to great deference and will not be disturbed on appeal unless the decision has no rational basis. SuperAmerica Group, Inc., a Div. of Ashland Oil, Inc. v. City of Little Canada, 539 N.W.2d 264 (Minn.App. 1995) (rev. den. Jan. 5, 1996). A challenge to the approval of a CUP must meet a higher burden of proof than a landowner's challenge to a denial of a CUP. R.L. Hexum & Associates, Inc. v. Rochester Tp., Bd. of Sup'rs, 609 N.W.2d 271, 277 (Minn.App. 2000), citing Board of Sup'rs of Benton Tp. v. Carver County Bd. of Com'rs, 302 Minn. 493, 498-99, 225 N.W.2d 815, 818-19 (Minn. 1975). When reviewing the denial of a permit, the court must determine if there is a rational basis for the municipality's decision; this court may not substitute its judgment, if there is a legally sufficient reason for the decision, even if it would have reached a different conclusion. St. Croix Dev., Inc. v. City of Apple Valley, 446 N.W.2d 392, 398 (Minn.App. 1989). To show that the board acted unreasonably, it must be established that the proposal did not

meet one of the standards set out in the ordinance and that the grant of the CUP was an abuse of discretion. See Corwine v. Crow Wing County, 309 Minn. 345, 352, 244 N.W.2d 482, 486 (1976) (ruling that individuals challenging CUPs have the burden “to establish the alleged failures [of the proposal to meet county standards] and show an abuse of discretion”).

II. THE MORRISON COUNTY BOARD OF COMMISSIONERS DID NOT ACT UNREASONABLE, ARBITRARY AND CAPRICIOUS OR CONTRARY TO LAW IN GRANTING THE CONDITIONAL USE PERMIT

Minnesota Statutes §394.301 provides counties with the authority to carry out planning and zoning activities and provides for the conditional use permit approval process based on the county’s review for compliance with general county requirements and imposes requirements specific to the proposed project. Minn. Stat. §394.301. "By statute, counties may approve conditional uses if the applicant satisfies the standards set out in the county ordinance." Schwardt v. County of Watonwan, 656 N.W.2d 383, 387 (Minn. 2003); M.S.A. §394.301, Subd. 1. Morrison County clearly followed the standards in the Morrison County Land Use Control Ordinance in approving the conditional use permit.

A. Morrison County Reasonably Upheld the Conditional Use Permit Because the Applicant Met the Criteria Under Section 507.2 of the Morrison County Land Use Control Ordinance

The criteria for granting conditional use permits under the Morrison Land Use Control Ordinance under Section 507.2 are as follows:

- “a. In granting a conditional use permit, the Planning Commission shall consider the effect of the proposed use upon the health, safety, morals, and general welfare of occupants of surrounding lands and

water bodies. Among other things, the Planning Commission shall make the following findings where applicable:

1. The use will not create an excessive burden on existing parks, schools, public roadways and other public facilities and utilities which serve or are proposed to serve the area.
2. The use will be sufficiently compatible or separated by distance or screening from adjacent agricultural or residentially zoned land so that existing homes will not be depreciated in value and there will be no deterrence to development of vacant land.
3. The structure and site shall have an appearance that will not have an adverse effect upon adjacent properties.
4. The use in the opinion of the Planning Commission is reasonably related to the existing land use and the environment.
5. The use is consistent with the purposes of the Zoning Ordinance and the purposes of the zoning district in which the applicant intends to locate the proposed use.
6. The use is not in conflict with the Comprehensive Plan of the county.
7. Existing occupants of nearby structures will not be adversely affected because of curtailment of customer trade brought about by intrusion of noise, odor, glare or general unsightliness." Record Nos. 0262-0263.

Each of these criteria was addressed at the Morrison County Planning Commission meeting and subsequent Morrison County Board of Commissioners meeting in approving the conditional use permit. "Where a zoning ordinance specifies standards which must be applied in determining whether or not to grant a conditional use permit, and the applicant fully complies with the specified standards, a denial of the permit is arbitrary as a matter of law." Scott County Lumber Co., Inc. v. City of Shakopee, 417 N.W.2d 721, 727 (Minn.App. 1988) (rev. den. March 23, 1988).

Regarding the first criteria, the applicant stated that with two to three full time employees, that it should not create an excessive burden on roads or utilities. Record No.

0033. No comment contested this position before or during the Morrison County Planning Commission meeting or the Morrison County Board of Commissioners meeting. Morrison County would be reasonable in believing that the addition of four or five cars on a township road would not be excessive. The relators in their briefing attempt to argue that under this criterion that there will need to be an additional amount of workers because more time needs to be spent with the dogs; however, this is based only on suggestions by the best care standards of Minn. Stat. §346.58 and there is no specific amount of time designated to each dog or amount of workers required to work for each dog in attempting to satisfy this suggestion. Minn. Stat. §346.58. "A municipality may not base the denial of a conditional use permit on land use standards that are 'unreasonably vague' or 'unreasonably subjective'." Trisko v. City of Waite Park, 566 N.W.2d 349, 353 (Minn.App. 1997). Further, this information was never presented in front of the Morrison County Planning Commission or the Morrison County Board of Commissioners when they made their decision and there has been no reason why this was not presented. The Minnesota Supreme Court was very clear that additional evidence should be considered only on substantive issues raised and decided by the board if the Court determines the additional evidence is material and there was a good reason for failing to produce it at the hearing before the board. Swanson v. City of Bloomington, 421 N.W.2d 307, 312-313 (Minn.1988.) Here, neither is present. Therefore, the determination to approve the conditional use application under this criterion was reasonable.

Under the next criterion, that the use is sufficiently compatible or separated by distance or screening from adjacent agricultural or residentially zoned land so that existing homes will not be depreciated in value, the applicant pointed out that new buildings will be constructed on the property by local contractors which will increase the value of the land and that this property is in an agriculturally zoned district with surrounding agricultural properties of similar buildings. Record No. 0033. Written letters were submitted by former neighbors of the applicant's previous 800-dog kennel in support of the application and stating that there were not problems with noise or odors or nuisances. Record Nos. 0018-0022. In addition, there was written comment in support of the kennel from his new neighbors. Record Nos. 0023-0026. Testimony was presented at the meeting in support of the kennel and also there were a couple of individuals who expressed some concern regarding the location of the facility. Record No. 0072, 0074. A map was submitted showing the distances of the buildings in relation to the property lines. Record No. 0034. In addressing the potential concern, the Morrison County Board of Commissioners adopted a condition to the conditional use requiring a privacy fence be erected running 30 feet north and 75 feet west of the building. Record Nos. 0129-0133. A decision regarding a permit should be upheld as long as the permit is not "injurious to public health, safety, or welfare and when conditions attached to permit adequately addressed issues raised in opposition." R.L. Hexum & Associates, Inc. v. Rochester Tp., Bd. of Sup'rs, 609 N.W.2d 271, 277 (Minn.App. 2000). In considering the comment and testimony and applying the condition Morrison County was reasonable under this criterion.

Criteria three, that the use will have an appearance that will not have an adverse effect upon adjacent properties, the applicant explained that the buildings would be built brand new by a professional contractor and testimony throughout the record makes it clear that this is agricultural property with buildings consistent with agricultural properties. Record No. 0033. No comment was provided against the appearance of the property. The Court of Appeals in Steiger v. Douglas County Bd. of Com'rs held that:

“In reviewing local government matters that have not been the subject of serious dispute, this court should avoid imposing requirements regarding a record and detailed findings in addition to those mandated by statute or ordinance. The detail required for effective judicial review depends on the nature and extent of the dispute. The more significant the dispute, the more detailed the record and findings should be. Unless a party makes a significant objection before the governmental body, he or she cannot expect this court to impose substantial, formal requirements. If a written or oral objection indicates a serious factual controversy or legal shortcoming, it is significant. Absent such an objection, the local body ought to be able to consider matters on what would be comparable to a default calendar in the courts.” Steiger v. Douglas County Bd. of Com'rs, 2005 WL 1869471 *2 (Minn.App. 2005).

Although some matters were in dispute at the meetings, this particular issue was not and therefore, Morrison County was correct in considering it satisfied once presented by the applicant with no dispute. “[T]he county should not have to find negatively that alleged failures to meet requirements are without merit.” Schwardt, 656 N.W.2d at 389.

Under criterion four, the use is reasonably related to the existing land use and the environment, there was testimony stating that this was agricultural property located on 40 acres of land. Record No. 0050. Discussion was held at the meetings regarding the manure practices that would be utilized and that if the average dog was ten pounds, and according to a letter received by Morrison County, even if all the dogs were 16 pounds

for all 600 dogs this would equate to only 9.6 animal units and that seven cows equate to 9.8 animal units, which was consistent with other properties in the area and exempt from an EAW in the area. Record No. 0091-0092. An animal unit under Minn. Stat. §116.06 is “a unit of measure used to compare differences in the production of animal manure that employs as a standard the amount of manure produced on a regular basis by ...the number of animal units is the average weight of the animal in pounds divided by 1,000 pounds.” Even with the amount of dogs the amount of feces would be relatively small compared to other farms with livestock in the area. Record No. 0091-0092. The Morrison County Planning Commission also noted that the runoff issue may be an issue for an EAW but that the EAW was not before them and that under the conditional use criterion it was satisfied.¹ Record No. 0085. The Morrison County Planning Commission also confirmed with the applicant that USDA requires a waste management plan that he would have to conform with. Record No. 079. Relators now raise issues related to potential problems with dog feces, but this was once again never presented through written comment or testimony to the Morrison County Planning Commission or the Morrison County Board of Commissioners. Relators fail to provide a good reason for their failure to present this information to the Morrison County Board of Commissioners to consider in their decision and for the applicant to address, and therefore it should be disregarded. See Swanson v. City of Bloomington, 421 N.W.2d 307, 312-313 (Minn.

¹ Even if the EAW was conducted prior to the Morrison County Planning Commission’s determination of the conditional use permit, the EAW would not properly be in front of this Court since an EAW is reviewed by a declaratory judgment action in district court and there is a pending action in district court regarding the EAW.

1988) (holding additional evidence is only allowed when it is material and there was a good reason for failing to produce it at the hearing before the board). The inherent problem with the relators' approach of submitting all this information after the conditional use permit is already granted and the hearings completed, is that Morrison County through the Morrison County Planning Commission and Morrison County Board of Commissioners is acting in a quasi-judicial position, like a Court, by taking the facts in front of them at the time and making a decision. Neitzel v. County of Redwood, 521 N.W.2d 73, 75 (Minn.App. 1994) (rev. den. Oct. 27, 1994) (holding that this is a quasi-judicial decision because it requires the county to determine facts about the nature of the proposed use and then exercise its discretion). This Court is limited to only reviewing if the board was reasonable in their decision based on sufficient evidence before them at the time they were making their decision. Minnesota Power and Light Co. v. Minnesota Public Utilities Commission, 342 N.W.2d 324, 328 (Minn. 1983) (holding that the decision will be upheld if in considering the entire record, it is supported by evidence that a reasonable mind might accept as adequate). "As a general rule, failure to raise an issue in a trial court precludes raising that issue for the first time on appeal. That same principle exists in judicial review of quasi-judicial decisions of administrative agencies and of local government." Steiger v. Douglas County Bd. of Com'rs, 2005 WL 1869471 *2 (Minn.App. 2005) citing In re Application of Minnegasco, 565 N.W.2d 706, 713 (Minn. 1997) (explaining that issues not raised in earlier proceedings are waived). See Hoskin v. City of Eagan, 632 N.W.2d 256, 258 (Minn.App. 2001); Graham v. Itasca County Planning Comm'n, 601 N.W.2d 461, 468 (Minn.App. 1999). This Court must

find that Morrison County was reasonable in their decision and not arbitrary and capricious based on the record before them.

Under criterion five and six, this is agricultural property located on 40 acres and the use is consistent with other past kennel facilities that have been approved in Morrison County as positioned by the applicant. Record Nos. 0033, 0077. There was no comment contesting this compliance. See Schwardt, 656 N.W.2d at 389 (holding “the county should not have to find negatively that alleged failures to meet requirements are without merit”).

Finally, under criterion seven, there was extensive testimony and comment dealing with how the site will not be adversely affected by odor or noise. Record Nos. 0057-0072. At the hearing, and prior to the hearing through written comment, a veterinarian in medicine for 26 years and 24 year veterinarian for the McDuffee, Charles Extrand, explained how McDuffee has been and is presently in full compliance with USDA and state regulations and is inspected annually. Record Nos. 0029-0030, 0069-0070. The veterinarian explained the regulations and how application of the regulations would reduce the odor, noise, and environmental concern regarding the dog excrement. Record No. 0029-0030. Odor would be very minimal indoors and non-existent outdoors due to the healthy environment for the dogs and the ventilation within the units. Record Nos. 0029-0030. The veterinarian also explained that noise would be regulated through lowering the high pitch sounds of the dogs through a surgical process, under anesthesia, of “debarking” which he has done over 10,000 times. Record Nos. 0069-0070. SuperAmerica Group, Inc., a Div. of Ashland Oil, Inc. v. City of Little Canada,

539 N.W.2d 264, 267 (Minn.App. 1995) (rev. den. Jan. 5, 1996) (holding non-experts can supply adequate reasons to counter or reject expert opinions, but those reasons must be concrete and based on observations, not merely on fears or speculation). There was testimony on the record that the amount of the dogs actually debarked would be few. Record Nos. 0032, 0127-0128. There was no comment, and certainly no experts, contesting the debarking procedure at the either of the hearings in front of the Morrison County Planning Commission or the Morrison County Board of Commissioners. There was some testimony regarding concern about the noise and odor but comment from former neighbors explained how neither barking nor noise was an issue next to the 800-dog kennel. Record No. 0018-0022. The conditions of debarking and a privacy screen were placed on the conditional use permit in lieu of the record. A decision regarding a permit should be upheld as long as the permit is not "injurious to public health, safety, or welfare and when conditions attached to permit adequately addressed issues raised in opposition." R.L. Hexum & Associates, Inc. v. Rochester Tp., Bd. of Sup'rs, 609 N.W.2d 271, 277 (Minn.App. 2000). The relators allude to the position that debarking is against the law in that it constitutes cruelty to animals, but none of relators' citations provide any law or case law supporting their position that the procedure of debarking in itself is illegal or defined as cruelty to animals. They provide position papers explaining the procedures and how it is disfavored by some in the animal community, but have not shown that this procedure, nor shock collars, is illegal. Regardless, once again, this information was not presented to either the Morrison County Board of Commissioners nor the Morrison County Planning Commission and there has been no good reason for

failing to do so, so this information should not be considered in reviewing Morrison County's decision.

Based on all the factors set forth under Section 507.2 of the Morrison County Land Use Control Ordinance, Morrison County was reasonable and not arbitrary and capricious in their decision to uphold the conditional use permit. A county's denial of a conditional use permit is arbitrary where the applicant establishes that all of the standards specified by the zoning ordinance as conditions of granting the permit have been met. Zylka v. City of Crystal, 283 Minn. 192, 196, 167 N.W.2d 45, 49 (Minn.1969) “[S]pecial - or conditional - use permits, which generally should be granted when an applicant meets the conditions specified in the ordinance, and for which the burden rests with the opposing party to show facts compelling denial.” Kismet Investors, Inc. v. County of Benton, 617 N.W.2d 85, 90 (Minn.App. 2000); Westling v. City of St. Louis Park, 284 Minn. 351, 355-56, 170 N.W.2d 218, 221-22 (1969); see SuperAmerica Group, Inc., a Div. of Ashland Oil, Inc. v. City of Little Canada, 539 N.W.2d 264, 267 (Minn.App. 1995) (rev. den. Jan. 5, 1996) (stating "city council may deny a conditional use permit only for reasons relating to the public health, safety, and general welfare”).

B. Morrison County Made Adequate Contemporaneous Findings Based Upon the Record Before It

1. The Record Before Morrison County

It must be clear to this Court that “the ‘record’ for judicial review must be confined to the record before the administrative body at the time it made its decision.” Buss v. Johnson, 624 N.W.2d 781, 789 (Minn.App. 2001) citing In re License No.

000337 West Side Pawn, 587 N.W.2d 521, 523 (Minn.App. 1998), (rev. den. March 30, 1999). Relators attempt to inundate the Court with their voluminous appendix consisting of emails, articles, critiques, and assessments of the decisions made by Morrison County in this matter, but review of Morrison County's approval of the conditional use permit must be confined to all documentation, comment, and testimony before Morrison County and up to their determination on January 10, 2006. Almost all of the arguments and positions that the relators rely on are based on information acquired after the decision on January 10, 2006, and never submitted to the Morrison County Board of Commissioners or the Morrison County Planning Commission prior to making their decision. As previously cited, the Minnesota Supreme Court was clear that additional evidence should be considered only on substantive issues raised and decided by the board if the Court determines the additional evidence is material and there was a good reason for failing to produce it at the hearing before the board. Swanson v. City of Bloomington, 421 N.W.2d 307, 312-313 (Minn.1988).

The crux of the relators' position is that when the Morrison County Administrator and the Morrison County Attorney wrote McDuffee a letter suggesting that this "permit condition can best be met with the use of barking collars instead of surgical debarking . . . [and] that this is ultimately your choice, not ours, we will not defend your use of the surgical practice to any or all inquirers" that this somehow constituted a change in the conditional use permit warranting a new hearing and opening the door for the relators to submit all the information that they failed to previously submit. Record No. 0214. This

position is not warranted under the Morrison County Land Use Control Ordinance. Under Section 507.7 "Changes of Conditional Use Permits," the ordinance states:

"Any change involving structural alterations, enlargement, intensification of use, or similar 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, time limits, review dates, and such other information as may be appropriate." Record No. 0265.

The terms of the condition of debarking under the conditional use permit was to address the issue of noise. This was in no way changing the "use" as set forth in the conditional use permit. Once again, the number of dogs to be debarked is few due to the primary confinement of most of the dogs in the indoor facility. However, when the Morrison County Administrator and the Morrison County Attorney wrote a letter suggesting the use of barking collars, which would also address the issue of noise as in debarking, there was no structural alteration, enlargement, intensification, or similar change requiring an amended conditional use permit under Section 507.7 of the Morrison County Land Use Control Ordinance as argued by the relators. The nature of Section 507.7, requiring a new permit fee, suggests a permit that is undertaken by the applicant for a greater benefit, not based on suggestion by Morrison County. Once Morrison County approved the conditional use permit, they were not warranted to consider this a change of the conditional use permit under Section 507.7 of the Morrison County Land Use Control Ordinance. There is not a provision allowing Morrison County to reconsider the conditional use permit.

2. The Findings Were Sufficient

As for the findings, the recent Minnesota Supreme Court case, Schwardt v. County of Watonwan, is directly on point to the case at bar. 656 N.W.2d 383, 389 (Minn. 2003). In Schwardt, an application for a conditional use permit was for a hog-feeding operation. Id. at 385. Pursuant to the record, the county board of commissioners approved the permit based on their written findings consisting of a checklist, whereby each standard for a conditional use under their county ordinance was checked off. Id. at 386. The Supreme Court in upholding the county's findings held that:

“In this case, the board did indicate on a checklist that the Kueker CUP, with conditions, met the standards in the Ordinance. The board's use of a checklist is a sufficient expression of the board's conclusion that the conditions for approval have been met. FN4 As we reasoned in Corwine, the county ‘should not have to find negatively that alleged failures to meet requirements are without merit.’ Corwine, 244 N.W.2d at 486. Although there may be instances where the evidence submitted in opposition to a CUP is so compelling that it would suggest an abuse of discretion if the board approved the permit absent an explanation, this is not one of those cases. The board's use of a checklist and the grant of the CUP was not arbitrary because the board received and considered all proffered evidence, gave both sides an opportunity to be heard, and the evidence is not so significant and one-sided as to render the approval arbitrary.

FN4 We have traditionally held CUP approvals to a more deferential standard of review than CUP denials. See, e.g., Interstate Power Co. v. Nobles County Bd. of Comm'rs, 617 N.W.2d 566, 579 (Minn. 2000); Corwine, 244 N.W.2d at 486.” Schwardt v. County of Watonwan, 656 N.W.2d 383, 389 (Minn. 2003).

In our case, Morrison County utilized a checklist in determining that the conditional use permit complied with the standards set forth in the Morrison County Land Use Control Ordinance but clearly based the results of the checklist on the documentation, comment, and testimony consisting of the record in making their

decision. Record No. 36. In fact, the Minnesota Court of Appeals has gone as far as to say that “[w]hen an application for a special use permit is approved, the decision-making body has implicitly determined that all requirements for the issuance of the permit have been met . . . Therefore express written findings are unnecessary.” Haen v. Renville County, 495 N.W.2d 466, 471 (Minn.App. 1993). In Earthburners, Inc. v. County of Carlton, the Minnesota Court of Appeals held that, “[i]f the permit is granted, the order must demonstrate the board’s conclusion that the applicant has satisfied each of the five conditions for approval.” 513 N.W.2d 460 (Minn. 1994). As discussed in detail above, Morrison County went through each of their requirements under the Morrison County Land Use Control Ordinance in arriving at their findings to grant the conditional use permit.

The relators erroneously focus on the treatment for animals as grounds for their position that the findings are inadequate, but as relators set forth in their brief, “[d]og kennels are heavily regulated under both Federal and State laws” and are “subject to regulation by the Department of Agriculture.” Relators Nelsons’ and Dickmanns’ Brief and Appendix, p. 20, citing 7 U.S.C. 2132(f). The Morrison County Board of Commissioners considered this factor in their conditional use permit stating in their findings of fact that “Dog kennels are required to have a State License from the United States Department of Agriculture.” Record Nos. 0129-0133. At the Morrison County Planning Commission meeting, the Morrison County Planning Commission discussed how a conditional use permit could be revoked upon violations of these standards. Record Nos. 0075-0081. At the hearing, in addition to the veterinarian discussing the regulations

that dog breeders have to follow in making sure it was properly maintained, there was also testimony from a worker explaining how well the dogs are cared for and the regulations that need to be followed. Record No. 0069-0071. In the recent Court of Appeals case Yang v. County of Carver, 660 N.W.2d 828 (Minn. App. 2003), the Court was clear that the County does not have discretion to deny a conditional use permit:

“Where state standards are set and enforced by state agencies and where a conditional use permit applicant informs the board of commissioners of his intention to comply with all applicable standards, the board need not resolve specific compliance issues prior to granting a conditional use permit. See Schwardt, 656 N.W.2d at 388-89 (holding that county board of commissioners may not deny conditional use permit application on grounds proposed use does not comply with county setback requirement where it was zoning administrator's duty to enforce the setback requirement and where applicant promises that he will comply with requirement). The board of commissioners had no duty to ensure state regulations were met, and should have reserved the question of regulatory compliance for the relevant state agencies by conditioning issuance of the conditional use permit on Yang's confirmed compliance with state standards.” Yang v. County of Carver, 660 N.W.2d at 835.

Therefore, Morrison County was reasonable in relying on the “heavily regulated” standards that dog kennels must follow and their decision was not arbitrary or capricious.

CONCLUSION

Respondent Morrison County asks this Court to uphold the action of the Morrison County Board of Commissioners in upholding the approval of the conditional use permit.

Respectfully Submitted,

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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).