

NO. A10-2143

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State of Minnesota  
**In Court of Appeals**

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Mitchell Sawh,

*Relator,*

v.

City of Lino Lakes,

*Respondent.*

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**BRIEF AND ADDENDUM OF RELATOR**

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MANSFIELD, TANICK  
& COHEN, P.A.  
Marshall H. Tanick (#108303)  
Teresa J. Ayling (#157478)  
1700 U.S. Bank Plaza South  
220 South Sixth Street  
Minneapolis, MN 55402  
(612) 339-4295

*Attorneys for Relator Mitchell Sawh*

MINNESOTA LEAGUE OF CITIES  
James J. Monge, III, Esq.  
Patricia Y. Beety, Esq.  
League of Minnesota Cities  
145 University Avenue West  
St. Paul, MN 55101-2044

*Attorneys for Respondent City of Lino Lakes*

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).

## TABLE OF CONTENTS

	<b>Page</b>
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	4
STATEMENT OF THE FACTS.....	6
A. The Parties.....	6
B. The Incidents .....	7
1. The April 8 <sup>th</sup> Incident.....	7
2. Incident of October 15, 2010 .....	10
3. Incident of November 9, 2010 .....	13
SUMMARY OF ARGUMENT .....	21
STANDARD OF REVIEW .....	23
ARGUMENT .....	24
I. Consideration of the “Potentially Dangerous” Designation In Subsequent Proceedings Was Unreasonable, Arbitrary and Capricious, An Error of Law, and Violated Due Process .....	24
II. The “Dangerous Dog” Designation Was Unreasonable, Arbitrary, Capricious, and An Error of Law.....	27
A. The “Potentially Dangerous” Determination Relied On By The City Was Factually Erroneous.....	27
B. The Finding of “Dangerous” After The October 15, 2010 Incident Was Unreasonable, Arbitrary, Capricious, Or An Error of Law .....	30
III. The Order To Destroy Brody Due To The November 9, 2010 Incident Is Arbitrary, Capricious, Unreasonable, or an Error of Law .....	32

A. The Destruction Order Is Defective Because It Relies On Two Prior Flawed Rulings.....	32
B. The Destruction Order Must Be Reversed Because Brody Was Provoked.....	33
C. The City Relied On Flawed Expert Testimony Outside The Record .....	37
D. The City Erred In Its Finding, As A Matter Of Law, That Its Only Option Under Its Ordinance Was To Order That Brody Be Destroyed.....	39
1. <i>Sawh, as owner, did not violate the ordinance</i> .....	40
2. <i>The City erred in interpreting the     Ordinance as mandatory</i> .....	40
CONCLUSION.....	43

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Ayala v. Ayala</i> , 749 N.W.2d 817 (Minn. App. 2008) .....	35
<i>Bd. of Regents v. Roth</i> , 408 U.S. 564 (1972) .....	1, 25, 35
<i>Boitz v. Preblich</i> , 405 NW2d 907 (Minn. App. 1987) .....	29
<i>Bolander &amp; Sons, Inc., v. City of Minneapolis</i> , 488 N.W.2d 804 (Minn. Ct. App. 1992), <i>aff'd</i> 502 N.W.2d 203 (Minn. 1993).....	3, 42
<i>Brookfield Trade Ctr., Inc. v. County of Ramsey</i> , 584 N.W.2d 390 (Minn. 1998) .....	23
<i>Brunotte v. City of St. Paul Office Safety &amp; Inspections</i> , No. A08-0173, 2009 WL 305152 (Minn. App. Feb. 10, 2009) .....	25, 35
<i>Corn v. Sheppard</i> , 179 Minn. 490, 229 N.W.869 (1930) .....	1, 25, 35
<i>County of Freeborn v. Claussen</i> , 295 Minn. 96, 203 N.W.2d 323 (Minn. 1972) .....	35
<i>Dillard v. Tahash</i> , 265 Minn. 322, 121 N.W.2d 602 (1963) .....	3, 42
<i>Erlandson v. Kiffmeyer</i> , 659 N.W.2d 724 (Minn. 2003) .....	35
<i>Fedziuk v. Comm'r of Pub. Safety</i> , 696 N.W.2d 340 (Minn. 2005) .....	25, 28
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972) .....	25, 35
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970) .....	1, 2, 25, 28, 38

<i>Hannan v. City of Minneapolis</i> , 623 N.W.2d 281 (Minn. App. 2001) .....	23
<i>Harford v. Univ. of Minn.</i> , 494 N.W.2d 903 (Minn. App. 1983) review denied (March 30, 1993), overruled on other grounds, <i>Shaw v. Bd. of Regents of the Univ. of Minn.</i> 594 N.W.2d 187 (Minn. App. 1999) .....	38
<i>Head v. Special Sch. Dist. No. 1</i> , 288 Minn. 496, 182 N.W.2d 887 (1970) .....	36
<i>Holt v. City of Sauk Rapids</i> , 559 N.W.2d 444 (Minn. App. 1997), (Minn. Apr. 24, 1997).....	25, 35
<i>Hutchinson Tech., Inc. v. Comm’r of Revenue</i> , 698 N.W.2d 1 (Minn. 2005) .....	36
<i>In re Appeal of Rocheleau</i> , 686 N.W.2d 882 (Minn. App. 2004) .....	23
<i>In re Blilie</i> , 494 N.W.2d 877 (Minn. 1993) .....	23
<i>In re Molly</i> , 712 N.W.2d 567 (Minn. App. 2006) .....	23
<i>In re The Matter of the Recommendation For The Discharge of Francis M. Nelson</i> , No. A07-1355, 2008 WL 2651155 (Minn. Ct. App. July 8, 2008), review denied (Minn. Sept. 23, 2008) .....	3, 41
<i>In re: Trusteeship Under Will of Jones v. First Minneapolis Trust Co.</i> , 202 Minn. 187, 277 N.W. 899 (1938) .....	41
<i>Senior v. City of Edina</i> , 547 N.W.2d 411 (Minn. App. 1996) .....	23
<i>State v. Hyland</i> , 431 N.W.2d 868 (Minn. App. 1988) .....	35
<i>Thompson v. Commissioner of Health</i> , 778 N.W.2d 401 (Minn. Ct. App. 2010) .....	2, 25, 28
<i>Trade Ctr., Inc. v. County of Ramsey</i> , 584 N.W.2d 390 (Minn. 1998) .....	23

*Winegar v. Des Moines Indep. Cmty. Sch. Dist.*,  
 20 F.3d 895 (8th Cir. 1994), *cert. denied*, 513 U.S. 964 (1994) .....38

**STATUTES**

Minn. Stat. § 347.22 .....29  
 Minn. Stat. § 630.30 .....42  
 Minn. Stat. § 645.17(3) .....35

**OTHER AUTHORITIES**

Minnesota Constitution, Article 1, Section 7 .....2, 24, 26, 35  
 Lino Lakes Ordinance, § 503.15 ..... 6, 9-10, 12, 14, 24, 26-27, 30, 32-34, 36, 39-40  
 Lino Lakes Ordinance, § 503.16 .....13, 14, 20, 33, 39, 40  
 United States Constitution, Amendment 14.....2, 24, 26, 34  
 Webster’s New World College Dictionary, 4<sup>th</sup> ed., p.91 .....29

## **STATEMENT OF THE ISSUES**

**Issue Number 1:** Was the determination by the City of Lino Lakes that Relator's dog Brody, is "dangerous," arbitrary, capricious, unreasonable, made under an erroneous theory of law, or without evidentiary support?

**How Issue Was Raised Below:** The issue was raised in a meeting before the Lino Lakes City Council. Add. 2, A-6.

**Ruling Below:** The Lino Lakes City Council determined that Relator's dog was dangerous. Add. 3-4.

**How Issue Was Preserved for Appeal:** This matter was preserved for appeal because the issue was raised in the proceedings below and in the Statement of the Case. See Add. 2-3 and Statement of the Case of Relator, p. 3.

**Apposite Cases:**

*Board of Regents v. Roth*, 408 U.S. 564 (1972);

*Goldberg v. Kelly*, 397 U.S. 254 (1970);

*Corn v. Sheppard*, 179 Minn. 490, 229 N.W.869 (1930).

\* \* \* \* \*

**Issue Number 2:** Was the determination of the City of Lino Lakes that Relator's dog, Brody be seized and the order that it be destroyed arbitrary, capricious, unreasonable, made under an erroneous theory of law, or without evidentiary support?

**How Issue Was Raised Below:** The issue was raised in a meeting before the Lino Lakes City Council. Add. 7, A-8.

**Ruling Below:** The Lino Lakes City Council ordered that Relator’s dog, Brody, be seized and destroyed. Add. 8-9.

**How Issue Was Preserved for Appeal:** This matter was preserved for appeal because the issue was raised in the proceedings before the Lino Lakes City Council and in the Statement of the Case. See Add. 8-9 and Statement of the Case of Relator, p. 3.

**Apposite Cases:**

*Goldberg v. Kelly*, 397 U.S. 254 (1970);

*Thompson v. Commissioner of Health*, 778 N.W.2d 401 (Minn. Ct. App. 2010).

\* \* \* \* \*

**Issue Number 3:** Do the ordinances of the City of Lino Lakes concerning the declaration of an animal as “dangerous,” and for seizure and destruction of an animal, or the application of those ordinances in this matter violate Due Process of law under the Fourteenth Amendment to the United States Constitution and Article 1, Section 7 of the Minnesota Constitution?

**How Issue Was Raised Below:** The issue was raised in the Statement of the Case on appeal. Statement of the Case of Relator, p. 3.

**Ruling Below:** The Lino Lakes City Council did not address the issue.

**How Issue Was Preserved for Appeal:** This matter was preserved for Appeal because it was raised in the Statement of the Case. *See* Statement of the Case of Relator, p. 3.

**Apposite Cases:**

*Dillard v. Tahash*, 265 Minn. 322, 121 N.W.2d 602 (1963);

*Bolander & Sons, Inc., v. City of Minneapolis*, 488 N.W.2d 804 (Minn. Ct. App. 1992), *aff'd* 502 N.W.2d 203 (Minn. 1993).

*In re the Matter of the Recommendation For the Discharge of Francis M. Nelson*, No. A07-1355, 2008 WL 2651155 (Minn. Ct. App. July 8, 2008) (unpublished), review denied (Minn. Sept. 23, 2008).

United States Constitution; Fourteenth Amendment;

Minnesota Constitution, Article 1, Section 7.

## STATEMENT OF THE CASE

This case arises out of a determination by the City of Lino Lakes that a 2 ½ year old dog named Brody, owned by Mitchell Sawh, is “dangerous” because it bit persons on three occasions and that the dog be seized and destroyed, despite evidence that one of the incidents involved a scratch which occurred while the dog was being playful, and the other two bites occurred while persons were trespassing and the dog was provoked.

After the first incident, the dog was deemed “potentially dangerous” by the City. The City has no mechanism to contest the “potentially dangerous” designation. After the second incident, the City declared the dog “dangerous.” Sawh appealed that determination to the City Council, which affirmed the designation on November 8, 2010.

After the third incident, the City seized Brody, and ordered him destroyed. Sawh appealed that ruling to the Lino Lakes City Council as well, which affirmed the determination and ordered that the dog be destroyed on November 22, 2010.

The City, upon further appeal, stayed its order on January 4, 2011, and the dog has been boarded and kenneled at a privately-owned facility at considerable expense for Sawh since that time. Tr. 32-33 (1/4/11).

Relator Sawh brings this Certiorari appeal challenging both the November 8, 2010, determination that Brody is dangerous, and the November 22, 2010, order that he be seized and destroyed.

## STATEMENT OF THE FACTS

### A. The Parties

Mitchell Sawh, a resident of the City of Lino Lakes (“City”), is the owner of the dog, Brody, a 2 ½ year old<sup>1</sup> Golden Retriever mix, whose fate is at issue here. Sawh, who works for the City of Minneapolis, has lived with his family in Lino Lakes since June 2002.

The City regulates the keeping of domestic animals within the City under its “Dangerous and Potentially Dangerous Animals” Ordinances, § 503.15, *et seq.* Add. 13.<sup>2</sup> The measure provides for designation of a dog as “potentially dangerous” after an initial incident, which may be enhanced to a “dangerous” designation upon subsequent incidents, and allows seizure and destruction of a canine for improprieties following an incident after the canine has been declared “dangerous.”

Following an incident on April 8, 2010, a Lakes Lino Lakes Community Service Officer declared Brody “potentially dangerous.” A-4. There is no mechanism to appeal the “potentially dangerous” designation.

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<sup>1</sup> Brody was 2 ½ at the time of the incidents at issue. He was born on March 3, 2008, and recently had his 3rd birthday.

<sup>2</sup> “Add.” Refers to the Addendum attached hereto. “A-\_\_\_\_” refers to the Appendix of Relator. “Tr.” is the larger bound transcript of the City Council Meetings of November 8 and November 22, 2010 and the City Council Work Sessions of November 22 and December 6, 2010. “Tr. \_\_\_\_ (1/4/11)” refers to the smaller bound Transcript of the City Council Meeting of January 4, 2011.

After an incident on October 15, 2010, the City of Lino Lakes Community Service Officer declared the dog “dangerous” and Sawh appealed that determination to the City Council. A-5, 6. The determination was affirmed by the Lino Lakes City Council on November 8, 2010. Add. 4. After a subsequent incident on November 9, 2010, the Police Chief ordered that Brody be seized and destroyed, which subsequently was stayed pending this appeal. A-7. Relator Sawh timely appealed that determination which the Lino Lakes City Council upheld on November 22, 2010. A-8, Add. 9. Sawh now brings this Writ of Certiorari challenging both the November 8, 2010, and November 22, 2010, determinations. A-1-3.

## **B. The Incidents**

This case arises out of three incidents occurring over the course of 7 ½ months. Each of the incidents arose under different circumstances and must be evaluated separately. Taken together, the three incidents do not justify the destruction of Brody.

### *1. The April 8<sup>th</sup> Incident*

The first incident occurred on April 8, 2010, when Brody was in the yard with Sawh’s 24-year old son. Brody was contained in the yard by an electric

fence, which malfunctioned, allowing the dog to get out of the yard. Tr. 12-13, 15.<sup>3</sup> The youth went after Brody, attempting to get him back on his leash. As Raun Sawh reported “he wasn’t running, but he knows when he’s in trouble and when he was out he wouldn’t come back. So I was trying to get him under control. This man was walking by and he was wagging his tail, wasn’t growling, and then I saw him jump up.” Tr. 15.

The person who was scratched did not testify in any of the hearings before the City Council. According to a police report, the individual reported a bite. Tr. 12 (1/4/11). But the picture taken after the incident has been interpreted differently by different people. Mayor Reinert conceded that the photograph of the injury “does look like a scratch,” and Sawh believes that the marks clearly indicate scratch marks rather than a bite. Tr. 12, 13 (1/4/11), Tr. 12-13. Another Council member saw it differently, as a bite, rather than a scratch. Tr. 43.

Only one eye witness to that incident testified to what occurred, Sawh’s son. He explained that he did not see the injury occur, but did observe Brody walking, and happily wagging his tail – not growling when he jumped up on the passerby.

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<sup>3</sup> The electric fence began to malfunction in March, 2010, and the manufacturer replaced the collar and wall unit, but it malfunctioned again on April 8, 2010. Tr. 11 (1/4/11). After the April 8, 2010 incident, Sawh tried to get the electric fence repaired, but the company was unable to fix it and ultimately gave Sawh a refund. Tr. 13. Because Sawh lives in a community that does not allow physical fences, Add. 3, Brody was kept on a leash or tie-out when outdoors thereafter. Tr. 13-14.

Tr. 15. Neither the officer who took a report from the individual nor the injured person testified.

The City Council Minutes of the November 8, 2010, reflect the ambiguity of the incident referring to as the “biting/scratching incident.” Add. 2.

Sawh’s son was notified in a letter from a Lino Lakes Community Service Officer, that Brody had been labeled as a “potentially dangerous” dog as a result of the April 8, 2010 incident. The letter was accompanied by a copy of the City Ordinance. A- 4. The letter to Raun Sawh did not provide any indication that there was a right to appeal the finding, which is understandable because the ordinance does not provide a right to appeal a “potentially dangerous” designation. Lino Lakes Ordinance § 503.15(4). Add. 14.

Under the Lino Lakes Ordinance:

A POTENTIALLY DANGEROUS ANIMAL is an animal which has:

1. Bitten a human or a domestic animal on public or private property;
2. When unprovoked, chased or approached a person upon the streets, sidewalks, or any public property in an apparent attitude of attack; or
3. Has engaged in unprovoked attacks causing injury or otherwise threatening the safety of humans or domestic animals.

Lino Lakes Ordinance § 503.15(3)(b). Add. 13.

The Ordinance § 503.15 (4) provides that “The animal control officer shall designate any animal as a potentially dangerous animal upon receiving evidence that a potentially dangerous animal has, when unprovoked, then bitten, attacked or threatened the safety of a person or a domestic animal as stated in division (3)(b) above.” Add. 14.

“Unprovoked” is defined as “the condition in which the animal is not purposely excited, stimulated, agitated or disturbed.” Lino Lakes Ordinance § 503.15 (3)(d). Add. 14.

Sawh did not immediately appeal the “potentially dangerous” designation, because the City, in its letter, did not mention an appeal mechanism, and there is no provision in the Ordinance for appeal. Add. 13-16. Had Sawh been given the opportunity to do so, he could have challenged the designation because Brody did not bite, he did not “approach a person ... in an apparent attitude of attack,” nor did he “engage in unprovoked attacks causing injury or otherwise threatening the safety of humans ....” Lino Lakes Ordinance §§ 503.15 (3)(b), 503.15 (3)(d) and 503.15 (4).

## *2. Incident of October 15, 2010*

The second incident occurred in the front yard of the Sawh home in mid-October, 2010, while Sawh’s wife was outside grooming Brody. Brody was wearing his collar, which was attached to a 25 foot leash secured to a tree. Tr. 21.

A woman who owns a home cleaning business was cleaning a house across the street from the Sawh's, when she saw smoke coming from the back yard of the house next to the Sawh's. While calling 911 on her cell phone, she was asked by the operator to check the smoke to see if there was an uncontrolled fire. Tr. 6. As she did, she crossed Sawh's property and, as she later stated, Brody bit her on the arm and, as she ran away, he bit her on the hip. Tr. 7-8.

The testimony of Sawh's wife concurs with the woman, and also notes that as she was talking on her cell phone, she was waiving her hands, throwing them up in the air, and speaking in a loud tone of voice. Tr. 20-21.

The house cleaner acknowledged that she was on the Sawh's property, and that her behavior may have aggravated Brody. Tr. 8. She testified: "I thought the fact of the smoke and that I was nervous *aggravated the dog* possibly." Tr. 8. (emphasis supplied). She told Sawh's wife several times that she "provoked the dog." Tr. 21-22. She stated "she was sorry that she had provoked the dog ... Again she repeated – she stated – she stated she provoked the dog, and she was fine." Tr. 7 (1/4/11).

The bites sustained by the woman were innocuous. She said "I don't think it's that bad" and "I really still to this day am not that concerned about the bite." Tr. 8, 10.

Nonetheless, the Community Service Officer declared the dog “dangerous” and ordered that it be “permanently removed from the city ....” A-5. Her action was taken under the portion of the Ordinance, 503.15, which states that:

“The animal control officer shall have the authority to designate any animal as a dangerous animal upon receiving evidence of the following:

(a) The animal has, when unprovoked, bitten, attacked or threatened the safety of a person or domestic animal as stated in division (3)(a) above; or

(b) The animal has been declared potentially dangerous and the animal has then bitten, attacked or threatened the safety of a person or domestic animal as stated in division (3)(a) above.”

Add. 13. The Ordinance defines a “dangerous animal” as one which has:

1. Caused bodily injury or disfigurement to any person on public or private property;
2. Engaged in any attack on any person under circumstances which would indicate danger to personal safety;
3. Exhibited unusually aggressive behavior, such as an attack on another animal;
4. Bitten one or more persons on two or more occasions; or
5. Been found to be potentially dangerous and/or the owner has personal knowledge of the same, the animal aggressively bites, attacks or endangers the safety of humans or domestic animals.

Lino Lakes Ordinance 503.15(3)(a). Add. 13.

The “dangerous animal” provision, unlike the “potentially dangerous” measure, does allow an appeal, and Sawh utilized it. A-6. He appealed to the City Council, which heard it on November 8, 2010, and voted to allow the dog to remain in the city, but imposed significant restrictions on Sawh and the dog, including that Brody be registered as a dangerous dog, that a dangerous dog sign be posted, that the dog be muzzled and on a short leash while outdoors, and that if the dog is to be left outdoors, it be placed in a proper enclosure as defined by the statute. Sawh was also required to purchase a minimum of \$300,000 liability insurance and notify the neighbors of the designation. Add. 3-4. Agreeing to abide by those restrictions, Sawh had 14 days, under the ordinance, to put the restrictions in place. Lino Lakes Ordinance § 503.16 (1)(f). Add. 15-16; Tr. 61-62. This appeal challenges the November 8, 2010, “dangerous” designation. A-1-3.

### *3. Incident of November 9, 2010*

The next day, a delivery person came to the Sawh residence to deliver a piece of furniture, known as a curio cabinet, and a sofa. Sawh’s wife, who was home at the time, told him to “bring in the curio to place it upstairs.” Tr. 112. But he “decided to go downstairs while [she] was getting the pads for the bottom of the curio ....” Tr. 112. Defying her directive, he went downstairs to look at the location where other furniture was to be placed. Before Mrs. Sawh was able to secure Brody, he came out of a kennel in the basement where he had been resting,

and bit the delivery man's hand. Tr. 112. The Lino Lakes police department seized Brody and directed that he be destroyed. A-7. The action was taken under § 503.16(4), which provides that:

“If an owner of an animal has subsequently violated the provisions under § 503.15 with the same animal, the animal must be seized by animal control. The owner may request a hearing as defined in § 503.15(7). If the owner is found to have violated the provisions for which the animal was seized, the animal control officer shall order the animal destroyed in a proper and humane manner and the owner shall pay the costs of confining the animal. If the person is found not to have violated the provisions for which the animal was seized, the owner may reclaim the animal under the provisions of division (3) above. If the animal is not yet reclaimed by the owner within 14 days after the date the owner is notified that the animal may be reclaimed, the animal may be disposed of as provided under § 503.15(6) and the owner is liable to the animal control for the costs incurred in confining, impounding and disposing of the animal.

Add. 16.

Sawh timely appealed the recommendation to destroy Brody to the City Council and presented a great deal of evidence in support of maintaining Brody's life. A-8. The evidence included:

- A letter from the delivery man who stated “*I don't blame the dog or wish that the dog suffer the consequences of termination. I hope that alternative methods can be taken to remedy the situation and that the dog's life be spared. I hope you will seriously consider my request as the victim of the situation.*” A-19 (emphasis supplied).

- The Sawh family pastor, Mark Poorman, who wrote “I have interacted with this family pet from time to time when he was brought to the park this past summer when our church was playing softball. Brody is an active, friendly dog and I certainly had no problems in my contacts with him.” He added “I believe that Mitchell [Sawh] is a man of integrity and that he will carry out any requirements asked of him or any requirements that he imposes upon himself in the care and training of Brody.” A-20.

- Todd Fruetel, who plays softball with Sawh’s son, wrote about his interactions with Brody when the dog came to the team’s softball games. He wrote: “At all times, Brody was kept on a leash. From time to time, I would walk over to Brody to pet him or sit down to play with him. My three boys loved to be able to play with Brody, and I never had any concern about them playing with Brody. In fact, the park was usually crowded with a number of children, and I cannot recall a single incident that caused concern in any of the parents or adults that were there.” A-21.

- Mark Newman, a doctor of pharmacology, wrote that Brody has been in his home on “numerous occasions” and “Brody has not once

shown any signs of a demeanor in which I was uncomfortable or feared.” He suggested that the Sawh family may need some instruction on handling the dog when unknown individuals enter the home, something that the Sawh family agreed to do. A-22.

- Walter Rauen wrote that he “can attest to Brody’s personality being one of great character. He is a sweet, loving dog. Brody was in attendance nearly every Tuesday this summer for softball games, where there were literally hundreds of people, and several other dogs. Dogs ranging from, rat terriers to pit bulls, to great danes. With all the people, dogs and general commotion of a softball setting, Brody never showed any sign of aggression.” A-23.

- Dominick Palma attested to Brody’s friendliness. He described “a specific instance where I entered the Sawh’s house without being let in by a family member .... Brody came running down the stairs and rushed me in the entryway. He ... put his front legs on my waist to do nothing more than lick my face. He was so welcoming ... that he reminded me exactly of my two pups as I entered my own home.” A-24.

- Elizabeth Cardinal declared that Brody is a “wonderful family dog and is one that I know will always be comfortable around.” A-25.

- Jon Halloran explained that he has known the Sawh family “for a long time and have been over to their home many times.” He observed “I have never seen [Brody] to be a violent or aggressive dog. He has always been very playful and full of energy but not violent in the least bit.” A-26.
- Kirsten Neilson described Brody as “a sweet, loving, playful dog. I do not find him threatening in the least.” A-27.
- Thomas Graf said he “never saw any threatening behavior or signs of malicious intent” in his interactions with Brody. “He has always been very loving, caring and playful during my interactions. I do not see him as a threat to society.” A-28.
- Troy Poorman, who has known Brody since he was a puppy, stated that “Brody is not a danger to society” and that he “loves people and playing with everyone.” A-29.

Council Member Rafferty spoke with Sawh’s neighbors who told him Brody was “friendly” and they “had no issues whatsoever” with him. Tr. 28.

An expert witness also testified on Brody’s behalf. Carol Propotnik, a high-level Animal Behaviorist, examined Brody at the animal care facility where he is being confined during this appeal. Tr. 88. She prepared a report which was

presented to the City Council, A-39, and testified at the hearing. She testified that Brody is suffering from “traditional confinement anxiety” from being caged or kenneled since the November 9, 2010 incident and explained that an Italian basket muzzle would prevent him from biting. Tr. 88-89. She also opined that with training of Brody and the Sawh family members, Brody could be properly socialized.<sup>4</sup> As she testified:

“So, you know, he was friendly to me, he was licking at me as Mitchell [Sawh] witnessed on – I saw absolutely no aggression in this dog. What I did see was protective behavior.”

Tr. 91.

She explained that she would train the Sawh family members to provide “cues to Brody so that he would “understand []that it’s not his job to protect the family.” Tr. 91. She explained in her report that she had agreed to work with Brody and the Sawh family if he is released “on a weekly basis ... **not** due to any threat posed by Brody, but purely for Mr. Sawh and his family’s peace of mind, as well as for the Council and Animal Control’s ....” A-41. Advocating that Brody not be euthanized, she explained that she was “staking my reputation on what I am

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<sup>4</sup> Ms. Propotnik explained that Italian basket muzzles are padded and are made with fabric that allows the dog to pant through it. She stated that “dogs get used to them very – very quickly.” Tr. 115-17. The Italian basket muzzle could be worn in comfort at all times, even when Brody is in the house, and even when he sleeps. Tr. 115-17.

telling you tonight.” Tr. 99.<sup>5</sup> She assured the Council in her report “in my 15 ½ years of work in Minnesota, Brody is one of the most affectionate and compliant dogs I have ever worked with. I hope to work with your jurisdiction again, and I know that you must trust me in order for this to happen.” A-41.

The Mayor demurred, stating that someone “advised staff that because the dog is two and a half years old, that the behavior is likely not to change in training.” Tr. 108. This differed from Ms. Propotnik, who explained that in her expertise “in the field of behavior, we used to believe that there is a very important socialization period between 5 and 12 weeks. And the belief was that if you missed that period, you were pretty much out of luck ... Well, everyone in behavior now knows that you can socialize a dog after that period, it just takes a little bit longer.” Tr. 114.

In spite of the testimony by the animal behaviorist expert and others who had contact with Brody, the City Council felt that the only option under the ordinance was to destroy Brody. During the hearing, various council members sought clarification whether there was any alternative at all other than to seize and destroy the dog, Tr. 117-119, but the Police Chief told them there are none. He stated:

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<sup>5</sup> Ms. Propotnik testified that one of the workers at the animal shelter “very much wanted to write a letter in support of Brody and came up to us a couple of times and expressed this feeling to us. She later came back and said that she was told by her supervisor that she could not do that ....” Tr. 92.

If you look under 503.16 no. 4 under Subsequent Offenses. Under that part: If an animal has subsequently violated the provisions, that the animal must be seized by animal control, they can – the owner may request a hearing. If it has been found to violate the provisions for which the animal was seized, in this case, that would be the bite, the animal control officer shall order the animal destroyed in the proper, humane manner.

Tr. 119.<sup>6</sup>

The Chief's analysis was incorrect. He should have instructed the Council members and the Mayor that even if they found that Brody bit the delivery person, they were not necessarily required to order Brody's destruction, because that provision does not apply in these circumstances, and, even if it did, "shall" is not mandatory. *See* pp. 39-43, *supra*.

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<sup>6</sup> The Chief expressed this same opinion in his memo to the City Council before the November 22, 2010 meeting, stating "The city ordinance states the dog shall now be destroyed. Staff recommendation is the ordinance be followed and the dog destroyed." A-9.

Accepting his erroneous analysis – and believing it had no other option – the City Council denied Sawh’s appeal, affirming the determination that Brody be seized and destroyed. Add. 8-9. Sawh timely appealed to this Court.<sup>7</sup> A-1-3.

### **SUMMARY OF ARGUMENT**

The dog should not be destroyed because of fatal flaws in the process leading to the City Council’s determination that he be killed. In order for a dog to be destroyed under the Lino Lakes Ordinances, a dog first must be declared “dangerous” and then the owner must fail to comply with conditions imposed. The classification of “dangerous” can occur after an initial incident leading to a “potentially dangerous” designation, followed by a second incident. The first incident in this case led to a designation of “potentially dangerous.” But the ordinances did not allow Sawh, the owner, to appeal that appellation. The absence of any right to appeal is a Due Process constitutional defect because it deprived Sawh of a right to a hearing before his property was taken.

The second incident, a slight innocuous bite of a trespasser did not meet requirements for a “dangerous” designation. The person who was bit was

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<sup>7</sup> In the interim, the City agreed, upon Motion by Sawh, to stay the execution of Brody, pending this appeal. Meanwhile, Brody has been incarcerated at a privately-owned kennel facility in White Bear Lake for which Sawh pays \$30 per day or about \$900 per month. Tr. 33 (1/4/11).

trespassing on Sawh's property; provoked the canine; and as she, herself, described it "I don't think it's that bad" and she was "not that concerned."

Because the first incident did not allow an appeal, and the second was innocuous, it was arbitrary, capricious, and legally improper to deem the dog "dangerous."

The third incident, which triggered the dog to be seized and ordered destroyed, also was defective. As indicated, the dog should not have been deemed "dangerous" based on the prior incidents. Moreover, the third incident also was de minimis and occurred to a trespasser. Above all, the City erroneously believed it had no discretion to spare the dog's life under its ordinance, which only allows but does not mandate destruction.

Under these circumstances, the City acted arbitrarily, capriciously, unreasonably, and based on an error of law in directing the dog to be destroyed, and its decision should be reversed and the dog should be allowed to live and be returned to its owner.

## STANDARD OF REVIEW

On an appeal by a writ of certiorari from a municipality's decision, an appellate court reviews whether the "decision was unreasonable, oppressive, arbitrary, fraudulent, without evidentiary support, or based on an incorrect theory of law." *In re Appeal of Rocheleau*, 686 N.W.2d 882, 891 (Minn. App. 2004) (quoting *Hannan v. City of Minneapolis*, 623 N.W.2d 281, 283-84 (Minn. App. 2001)). The appellate court does not "retry the facts or make credibility determinations." *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996).

However, this court reviews questions of law and the construction of statutes and ordinances de novo. *In re Molly*, 712 N.W.2d 567, 571 (Minn. App. 2006). *See also Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). Likewise, the constitutionality of a statute is reviewed de novo. *In re Blilie*, 494 N.W.2d 877, 881 (Minn. 1993).

## ARGUMENT

### I. CONSIDERATION OF THE “POTENTIALLY DANGEROUS” DESIGNATION IN SUBSEQUENT PROCEEDINGS WAS UNREASONABLE, ARBITRARY AND CAPRICIOUS, AN ERROR OF LAW, AND VIOLATED DUE PROCESS

Both the November 8, 2010, and the November 22, 2010, determinations by the City Council are fatally flawed because they rely on the finding of the Lino Lakes Community Service Officer that Brody was “potentially dangerous,” which was made without allowing Sawh any opportunity for a hearing of any kind.

Sawh’s son was notified in a letter from the Community Service Officer that Brody had been labeled as a “potentially dangerous” dog as a result of the April 8, 2010 incident; a copy of the city ordinance was attached to the letter. A-4. The letter did not provide any indication that there was a right to appeal the finding, comporting with the Ordinance which provides no right to appeal a “potentially dangerous” designation. Lino Lakes Ordinance § 503.15(4). Add. 14.

The failure to provide a hearing or other opportunity to appeal the “potentially dangerous” animal designation violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the parallel provision of Article 1, Section 7 of the Minnesota Constitution. The tainted “potentially dangerous” designation is significant because it formed the underpinning for the subsequent decisions by the Council to deem Brody “dangerous” and order him

killed. Because the dangerous dog designation was fatally flawed, the subsequent rulings of the City which relied on it are, therefore, invalid and must be reversed.

Property cannot be taken by a municipality without Due Process of law. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972). A dog is personal property. *Corn v. Sheppard*, 179 Minn. 490, 492, 229 N.W.2d 869, 870 (1930); *Brunotte v. City of St. Paul Office Safety & Inspections*, No. A08-0173, 2009 WL 305152, at \*2 (Minn. App. Feb. 10, 2009) (unpublished). A-51. Consequently, dog owners like Sawh are entitled to constitutional protection against “unreasonable” intrusion into their ownership rights. *See Holt v. City of Sauk Rapids*, 559 N.W.2d 444, 445 (Minn. App. 1997), review denied, (Minn. Apr. 24, 1997).

Due process requires a hearing. The provision of a full and fair hearing is a fundamental aspect of Due Process. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”); *Fedziuk v. Comm’r of Pub. Safety*, 696 N.W.2d 340, 346 (Minn. 2005) (in drivers license revocation action, at a minimum “the petitioner [must] be given the right to compel witnesses to attend the hearing and to cross-examine persons who prepared [police or lab] reports”); *Thompson v. Comm’r of Health*, 778 N.W.2d 401, 408 (Minn. App. 2010) (due process requires right to hearing

before disqualification of social worker to work in certain positions). The failure to provide Sawh with an opportunity to contest the April 8, 2010 “potentially dangerous” dog designation violated Due Process of law.

The April 8, 2010 “potentially dangerous” dog designation led to the October 15, 2010 “dangerous animal” designation under Lino Lakes Ordinance § 503.15(3)(a). A-11, ¶ 6; Tr. 49. As Police Chief Strege testified before the Council “It’s not the first bite here that takes it to that dangerous level, so we’re onto that next bite already. So that’s why it obtains this dangerous level at that point.” Tr. 49. That incident bootstrapped the subsequent October 15<sup>th</sup> incident into “dangerous dog” category. *Id.* The incident of October 15, 2010, which should, at most, have led to a potentially dangerous designation, was utilized in the reasoning that the dog be destroyed. A-12, ¶ 10. But the “potentially dangerous” dog designation, which was made without a hearing as required by the Due Process clauses predicated the order for destruction. Since the “potentially dangerous” designation was unconstitutional for want of a hearing, the subsequent use of that designation to attach a “dangerous” label, and then an order of destruction, offends Due Process.

## **II. THE “DANGEROUS DOG” DESIGNATION WAS UNREASONABLE, ARBITRARY, CAPRICIOUS, AND AN ERROR OF LAW**

The finding by the City that Brody is “dangerous” is unreasonable, arbitrary, and capricious, and an error of law because (1) the City improperly relied upon the constitutionally-defective “potentially dangerous” designation; (2) the City failed to consider that Brody was provoked.

### **A. The “Potentially Dangerous” Determination Relied On By The City Was Factually Erroneous**

Even if Sawh had been provided Due Process in regard to the “potentially dangerous” animal designation in April 2010, *which he was not*, that classification was arbitrary, capricious, and unreasonable.

Under the Ordinance, to designate an animal as “potentially dangerous,” there must be a finding that the dog, “when unprovoked, then bitten, attacked or threatened the safety of a person as stated in division 3(b) above.” Lino Lakes Ordinance 503.15 (4). Add. 14. In turn, Lino Lakes Ordinance 503.15(3)(b) provides that a dog is “potentially dangerous” if it has:

1. “Bitten a human ... on public or private property;
2. When unprovoked, chased or approached a person upon the streets, sidewalks, or any public property in an apparent attitude of attack ....”

Add. 13.

The City did not establish that the April incident satisfies either one of these prongs. The pedestrian was not bitten or approached “in an apparent attitude of attack....” Because he did not testify at any of the hearings, he was not available for cross examination. The officer who spoke to him did not testify, either. Add. 2, 7-9; Tr. 4. The only evidence entered by the City regarding the first incident was a picture of the injury and a hearsay police report. Tr. 4<sup>8</sup> The picture and police report should be disregarded because the police officer who wrote the report was not present to testify. As the Court explained in *Fedziuk*, 696 N.W.2d at 348, “[b]ecause a successful review may depend on proving the inaccuracy of police reports or lab results, minimal due process requires that the petitioner be given the right to compel witness to attend the hearing and to cross-examine persons who prepared these reports.”

Sawh’s son was the only witness to the incident who did testify. He explained that Brody was in the yard confined by an electric fence, but the fence malfunctioned and Brody got out, and wandered off. Tr. 15. The youth went after the dog, and saw Brody walk up to a passerby, and wagging his tail, playfully jump up on him. *Id.* The dog did not growl or act aggressively. Sawh and the Mayor

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<sup>8</sup> In order to meet the requirements of Due Process, there must be an opportunity to cross examine witnesses. *Goldberg*, 397 U.S. at 268; *Fedziuk*, 696 N.W.2d at 346-48; *Thompson*, 778 N.W.2d at 407-08. Because neither the man in the April incident nor a police officer who responded at the scene were present at the hearing and available for cross examination, neither the police report or other hearsay evidence of the person’s statements should be considered.

agree that the picture of the injury is consistent with a “scratch.” Tr. 12-13; Tr. 12-13 (1/14/11).

Under the definition in the Ordinance, a canine that injures someone when engaged in playful activity is not “potentially dangerous”. To obtain that sobriquet, there must be either a bite or an injury caused by an “attack” which “implies vigorous, aggressive action.” Webster’s New World College Dictionary, 4<sup>th</sup> ed., p.91 (20032). A-57. Attack is defined as “to use force against in order to harm; start a fight with; strike out at with physical or military force; assault ....” *Id.* A dog that causes an injury while engaging in playful activity or other non-aggressive activity is not considered “potentially dangerous” under the measure.<sup>9</sup>

Thus, even though there may have been a “scratch” in April, imposition of the “potentially dangerous” moniker is unreasonable, arbitrary and capricious under these circumstances.

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<sup>9</sup> While a dog who injures another at play or other non-aggressive activity might not be considered “potentially dangerous” the owner could still be civilly liable for injuries caused by the dog. *See Boitz v. Preblich*, 405 NW2d 907, 910 (Minn. App. 1987) (dog owner liable for injuries caused by dog under strict liability statute, Minn. Stat. § 347.22, even though the dog was not acting aggressively, and the injuries were accidental).

**B. THE FINDING OF “DANGEROUS” AFTER THE OCTOBER 15, 2010 INCIDENT WAS UNREASONABLE, ARBITRARY, CAPRICIOUS, OR AN ERROR OF LAW**

The City’s finding that Brody was “dangerous” as a result of the ensuing incident in mid-October was unreasonable, arbitrary, and capricious. Under the Ordinance:

The animal control officer shall have the authority to designate any animal as a dangerous animal upon receiving evidence of the following:

- i. The animal has, when unprovoked, bitten, attacked, or threatened the safety of a person or domestic animal as stated in division (3)(a) above; or
- ii. The animal has been declared potentially dangerous and the animal has then bitten, attacked or threatened the safety of a person or domestic animal as stated in divisions (3)(a) above.

Lino Lakes Ordinance 503.15 (5). Add. 14. “Unprovoked” is defined in the Ordinance as: “the condition in which the animal is not purposely excited, stimulated, agitated or disturbed.” Lino Lakes Ordinance 503.15(3)(d). Add. 14.

The City’s November 8, 2010 determination that Brody was “dangerous” as a result of the October 15, 2010 incident was unreasonable, arbitrary, capricious, or an error of law because (1) the City improperly relied on the April 2010 determination that Brody was “potentially dangerous” in applying the “dangerous”

label when Sawh was not allowed to appeal that decision; and (2) the City failed to consider the uncontradicted evidence that the dog was “aggravated” or “provoked” by the conduct of the complainant.

The house cleaner who crossed Sawh’s property admitted the bites were not serious when she walked through the yard without permission to investigate smoke coming from a controlled fire in the back yard of Sawh’s neighbor. Tr. 8. The lady was talking on her cell phone, waving her hands, throwing them up in the air, and speaking in a loud tone of voice. Tr. 21. She recognized that her behavior, coupled with the smoke, possibly “aggravated” Brody. Tr. 8. This is underscored by her statements to Sawh’s wife that she “provoked the dog.” Tr. 21-22. Further, she noted that the bite isn’t “that bad” and “I really still to this day am not that concerned about the bite.” Tr. 8, 10.<sup>10</sup>

Under these circumstances, the “dangerous” finding is unfounded because the April 2010 situation should be disregarded, the October 15, 2010 incident should have resulted in, at most, in a “potentially dangerous” finding. However, since both a finding of “potentially dangerous” and “dangerous” require a finding that the dog was not provoked, neither apply to this incident. Because the conduct of the house cleaner, in trespassing on the Sawh property where Brody was confined, waving her arms around while talking loudly on her cell phone

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<sup>10</sup> There actually were two bites, one to the hand and another to the hip while she was crossing the Sawh’s yard. Tr. 7-8.

constituted purposeful conduct that “excited, stimulated, agitated, or disturbed” Brody, a “dangerous” finding is precluded. Lino Lakes Ordinance 503.15(3)(d).  
Add. 14.

**III. THE ORDER TO DESTROY BRODY DUE TO THE NOVEMBER 9, 2010 INCIDENT IS ARBITRARY, CAPRICIOUS, REASONABLE, OR AN ERROR OF LAW**

The seizure of Brody and order to destroy him after the November 9, 2010, incident with the home delivery person is arbitrary, capricious, unreasonable, or an error of law and must be reversed because (1) it is based on the two earlier flawed findings; (2) this incident, too, was provoked; (3) the City relied on flawed expert evidence outside of the record; and (4) the City erred as a matter of law in its finding that the order to destroy is mandatory – with no other options – under its Ordinance.

**A. The Destruction Order Is Defective Because It Relies On Two Prior Flawed Rulings**

The November 22, 2010, order to destroy Brody rests on the April 2010, “potentially dangerous” and November 8, 2010 “dangerous” rulings. Like a house of cards, if the two earlier rulings fall, this one must too.

The Ordinance, as erroneously interpreted by the Council, basically is built on a three-strikes and you're out concept. A first incident, unless very serious,<sup>11</sup> results in a "potentially dangerous" ruling. Lino Lakes Ordinance §§ 503.15 (3) (a) and (b) and 503.15 (4) and (5). Add. 13-14. A second incident results in a dangerous finding. Lino Lakes Ordinance 503.15(a)(4), Add. 13. Another bite, after the "dangerous" designation, results in the automatic death penalty as the Ordinance was interpreted by the City (and as contested by Sawh below). Lino Lakes Ordinance § 503.16(4). Add. 16. In short, a destruction order must rest on a "dangerous" designation, which depends on a prior "potentially dangerous" classification.

Therefore, if either – or both – of the earlier findings fall, the order to destroy Brody also falls.

**B. The Destruction Order Must Be Reversed Because Brody Was Provoked.**

The November 22, 2010 order to destroy Brody must be reversed because the underlying incident of November 9, 2010 also was a result of trespass and was provoked. Under the Ordinance, if a dog is provoked, there can be no finding of "dangerous" or "potentially dangerous" or an ensuing order to destroy. Lino Lakes Ordinance § 503.15(4) and (5). Add. 13.

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<sup>11</sup> If sufficiently serious, even one bite could result in a destruction order under the Ordinance. Lino Lakes Ordinance § 503.15(6). Add. 14.

The delivery man, who did not testify at the hearing, was at the Sawh home on November 9 to move furniture. He was told by Sawh's wife "to bring in the curio to place it upstairs." Tr. 112. When Ms. Sawh temporarily left, unbeknownst to her, the furniture mover "decided to go downstairs" on his own, where Brody was sleeping in a kennel. When the furniture mover appeared, without warning, Brody was awakened and bit his hand.

The delivery man expressed remorse for his gaffe in this incident, writing a letter to spare Brody. He stated: "*I don't blame the dog* or wish that the dog suffer the consequences of termination. I hope that alternative methods can be taken to remedy the situation and that the dog's life be spared. I hope you will seriously consider my request as the victim of the situation." A- 19. (emphasis supplied).

While not heinous, the delivery man did, in fact, go where he did not belong, into the basement where Brody was sleeping. This constitutes a trespass, which makes the incident not "unprovoked" under the Ordinance, which is defined as "the condition in which the animal is not purposely excited, stimulated, agitated, or disturbed." Lino Lakes Ordinance 503.15(3)(d). Add. 14. Since Brody was not "unprovoked," there can be no valid finding of "dangerous" or order for destruction.

If a finding of "provocation" is not required under the Ordinance for a dog to be declared dangerous, then the Ordinance is unconstitutional under the Due

Process Clauses of the 14th Amendment to the United States Constitution and Article 1, Section 7 of the Minnesota Constitution, and the rulings below are invalid and must be reversed.<sup>12</sup>

A “potentially dangerous” designation can – and did here – lead to seizure of Sawh’s property, his dog. Property cannot be taken by the State without Due Process. *Bd. of Regents*, 408 U.S. at 570-71; *Fuentes*, 407 U.S. at 67, 80-81. Because a dog is personal property, *Brunotte*, 2009 WL 305152 at \*2, A-41; *Corn*, 179 Minn. at 492, 229 N.W.2d at 870 The owner is entitled to constitutional protection against an “unreasonable” intrusion into their ownership rights. *Holt*, 559 N.W.2d at 445.

An ordinance is unreasonable if it “has no substantial relationship to the public health, safety, morals or general welfare.” *Id.* (quoting *State v. Hyland*, 431 N.W.2d 868, 872 (Minn. App. 1988) and *County of Freeborn v. Claussen*, 295 Minn. 96, 100, 203 N.W.2d 323, 326 (Minn. 1972)). In other words, an ordinance is unconstitutional if there is lacking “a rational relationship between an ordinance and the general [public] well-being. . . .” *Holt*, 559 N.W.2d at 445.

As an initial matter, courts seek to interpret legal provisions in a manner which would save them from constitutional invalidation. *See* Minn. Stat. §

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<sup>12</sup> The constitutionality issue need not be reached if the Ordinance is construed to include a provocation element. *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 732 n.7 (Minn. 2003) (“[o]ur general practice is to avoid a constitutional ruling if there is another basis on which a case can be decided); *Ayala v. Ayala*, 749 N.W.2d 817, 822 (Minn. App. 2008).

645.17(3) (“In ascertaining the intention of the legislature the courts may be guided by the following presumptions: . . . the legislature does not intend to violate the Constitution of the United States of this state . . .”). *See also Hutchinson Tech., Inc. v. Comm’r of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005) (quoting *Head v. Special Sch. Dist. No. 1*, 288 Minn. 496, 506, 182 N.W.2d 887, 893 (1970)), “[i]f the language of a law can be given two constructions, one constitutional and the other unconstitutional, the constitutional one must be adopted, although the unconstitutional construction may be more natural.”)

This case calls for the same approach. If not, the ordinance is unconstitutional, the proceedings below invalid, the orders must be reversed, and Brody returned to his owner.

If the Ordinance is not construed to require provocation for a “dangerous” finding and seizure and destruction of an animal, the constitutionally required “rational relationship” would be lacking. The public is not served by declaring a dog “dangerous” and destroying it, if the dog injures an individual who is trespassing on the property of the dog owner, and engaging in behavior that would “excite[], stimulate[], agitate[] or disturb[]” a dog. Lino Lakes Ordinance § 503.15 (3)(d). Add. 14. The City recognized this principle when it included the exception in the Ordinance for provocation. To interpret the Ordinance to exclude this element would render it violative of Due Process.

For this reason, the “dangerous” designation and destruction order must be reversed.

**C. The City Relied On Flawed Expert  
Testimony Outside The Record.**

In the November 22, 2010, “destruction” hearing, Sawh introduced the testimony of a very experienced expert witness who examined Brody, and offered an opinion that with training of the Sawh family and Brody, the dog could be returned home.

Animal Behaviorist Carol Propotnik, who examined Brody, testified that although he is suffering from “traditional confinement anxiety” from being caged or kenneled since the November 9, 2010 incident he should not be destroyed and could be returned safely to the Sawh’s. Tr. 89-91; A-41. She advised that the family would use an Italian basket muzzle at all times to prevent him from biting and she would train Brody and the Sawh family members, allowing Brody to be properly socialized. Tr. 91; A-39-41.

As she testified:

“So, you know, he was friendly to me, he was licking at me as Mitchell [Sawh] witnessed on -- I saw absolutely no aggression in this dog. What I did see was protective behavior.”

Tr. 91. She repeatedly explained that she was “staking my reputation on what I am telling you tonight,” that Brody need not be euthanized. Tr. 98-99.

In contrast to her expectation, the Mayor stated that some undetermined person “advised staff that because the dog is two and a half years old, that the behavior is not likely to change in training.” Tr. 108. The Mayor did not identify who provided that advice to the staff or the qualifications of the person who provided the advice. He did not identify who conveyed the information to him either. Neither the unnamed staff member nor the unnamed supposed expert was available for cross examination, yet another due process violation. *Goldberg*, 397 U.S. at 269; *Harford v. Univ. of Minn.*, 494 N.W.2d 903, 909 (Minn. App. 1983), review denied (March 30, 1993), overruled on other grounds, *Shaw v. Bd. of Regents of the Univ. of Minn.*, 594 N.W.2d 187, 190 (Minn. App. 1999) (due process requires notice, a hearing, an opportunity to present witness and an opportunity to cross examine witnesses).

Behaviorist Propotnik attempted to correct the misimpression from the unsupported opinion that older animals cannot be trained. She explained that “in the field of behavior, we used to believe that there is a very important socialization period between 5 and 12 weeks. And the belief was that if you missed that period, you were pretty much out of luck ... well, everybody in behavior now knows that you can socialize a dog after that period, it just takes a little bit longer.” Tr. 114.

The statement of the Mayor that older dogs cannot be trained, tainted the process. It unfairly undermined the testimony of Sawh’s expert witness, who was

present at the hearing and available for cross examination. Because the ability to train Brody is central to the issue whether he be destroyed, the destruction order should be reversed on that basis.

**D. The City Erred In Its Finding, As A Matter of Law, That its Only Option Under Its Ordinance Was To Order That Brody Be Destroyed.**

The City interpreted its Ordinance as providing that if it found that Brody bit the furniture delivery man, it was required to order that Brody be destroyed. That interpretation of the Ordinance is incorrect as a matter of law. Because the City failed to correctly interpret its Ordinance, its destruction order must be reversed.

Lino Lakes Ordinance 503.16 (4) provides “If an **owner of an animal** has subsequently violated the provisions under § 503.15 with the same animal, the animal must be seized by animal control. ... **If the owner is found to have violated the provisions for which the animal was seized,** the animal control officer shall order the animal destroyed....” Id. (emphasis added). Add. 16.

The City made two legal errors in its interpretation of the Ordinance. First, it improperly equated the acts of the dog with those of “the owner.” Second, it concluded that if Brody bit the delivery man, it had no choice but to put him down. Both were wrong.

*1. Sawh, as owner, did not violate the ordinance*

The provisions concerning the designation of a dog as “potentially dangerous” or “dangerous” address the conduct of the dog, not the conduct of the dog owner. There are other aspects of § 503.15 that specifically address the conduct of the dog owner. Those involve taking certain precautions *after* a dog has been declared dangerous. Lino Lakes Ordinance 503.16(1). Although Sawh was ordered to take such precautions in the City Council meeting on November 8, 2010, he was given 14 days to implement the precautions. Lino Lakes Ordinance 503.16(2), Add. 14-15. *See also* Tr. 131. Moreover, there is no evidence that the bite to the delivery man was due to Sawh’s failure, as owner, to take any of the precautions that had not yet gone into effect.

*2. The City erred in interpreting the Ordinance as mandatory*

The City also erred when it interpreted the Ordinance as *requiring* it to destroy Brody if he found he bit a second time after being declared “dangerous.” The failure to recognize that it had discretion to follow another course of action renders its determination reversible.

During the hearing, various council members sought clarification whether there was any option other than to seize and destroy the dog. Tr. 117-119. The

Chief of Police told them there was no other alternative under the Ordinance but destruction of Brody. He stated:

“If you look under 503.16 no. 4 under Subsequent Offenses. Under that part: If an animal has subsequently violated the provisions, that the animal must be seized by animal control, they can – may request a hearing. If it has been found to violate the provisions for which the animal has been seized, in this case, that would be the bite, the animal control officers shall order the animal to be destroyed in the proper humane manner.”

Tr. 119.

Thus, the City Council members and the Mayor were told – and believed – that they had only one option under their ordinance, to order the dog destroyed.

Tr. 117-119. But that view is erroneous. The word “shall,” as used in a municipal ordinance, can be directory, and not mandatory.

As the Court held in *In re: Trusteeship Under Will of Jones v. First Minneapolis Trust Co.*, 202 Minn. 187, 190-92, 277 N.W. 899, 901 (1938):

Ordinarily, the word single ‘may’ is directory and ‘shall’ is mandatory in meaning, but not always so.

\* \* \* \* \*

Provisions which are mandatory in form and often held to be directory in which are directory in form are often held to be mandatory because words such as “may,” “shall,” “must,” and “will” are often used without discrimination. All of them are elastic and frequently treated as interchangeable.

In *In re the Matter of the Recommendation for Discharge of Francis M. Nelson*, No. A07-1355, 2008 WL 2651155, \*5-6 (Minn. Ct. App. 2008),

(unpublished) *rev. denied* (Minn. Sept. 23, 2008) A-50-51, the Court refused to invalidate a civil service commission ruling issued 452 days after the hearing even though the City's Civil Service rule required that the hearing officer "shall" file its findings, conclusion and recommendation "within 45 days from the close of the hearing record." The Court, citing *Bolander & Sons Co. v. City of Minneapolis*, 488 N.W.2d 804, 809-10 (Minn. Ct. App. 1992), *aff'd* 502 N.W.2d 203 (1983) explained that "when a statute would fairly include a rule contains no language that provides consequences for failure to comply, the language of the rule is construed as directory only." 488 N.W.2d at 806.

Likewise, in *Dillard v. Tahash*, 265 Minn. 322, 121 N.W.2d 602 (Minn. 1963). the Court denied habeas corpus to a criminal defendant who had pled guilty even though the Court had not stated on the record its reasons for accepting the plea of guilty to a lesser included offense as was required by Minn. Stat. § 630.30. The Court explained that even though the statute used the word "shall" the statute was directory rather than mandatory because "its provisions are intended for the protection of the public and not for the defendant." *Id.*, 265 Minn. at 324, 121 N.W. 2d at 603.

Likewise here, the use of the word "shall" in the City ordinance is directory rather than mandatory. Its intent relates to the public welfare, rather than the protection of the dog or its owner. More significantly, there is no penalty or

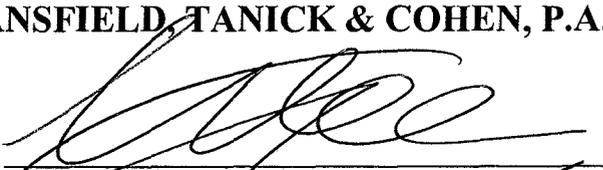
sanction if the dog is not destroyed. Therefore, members of the City Council and the Mayor acted under a mistake of law when they voted (1) based on the conduct of the dog, rather than its owner, and (2) based on an erroneous belief that there was no choice other than to destroy the dog. For this reason, this matter must be reversed, or, at a minimum, remanded to the City for further proceedings utilizing the appropriate legal standard.

### CONCLUSION

For the above reasons, the determination of the City of Lino Lakes that Mitchell Sawh's dog Brody is "dangerous" and the order that he be seized and destroyed should be reversed, and the City should be directed to return Brody to his owner, Relator Sawh.

**MANSFIELD, TANICK & COHEN, P.A.**

Date: March 3, 2011

By: 

Marshall H. Tanick (108303)

Teresa J. Ayling (157478)

220 South Sixth Street, #1700

Minneapolis, MN 55402-4511

(612) 339-4295

**ATTORNEYS FOR RELATOR  
MITCHELL SAWH**