

NO. A10-2143

State of Minnesota
In Court of Appeals

Mitchell Sawh,

Relator,

v.

City of Lino Lakes,

Respondent.

**REPLY BRIEF AND SUPPLEMENTAL APPENDIX
OF RELATOR**

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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).

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I. INTRODUCTION

The life of a dog is at stake in this case. Brody, a three-year old mixed breed, staple of the family of Relator Mitchell Sawh, should not be put to death for several reasons.

First, the predicate for ordering the seizure and destruction of Brody, that he bit someone after he had been declared a “dangerous dog,” is faulty because the “dangerous” designation came about after a prior incident that resulted in a “potentially dangerous” designation, which Sawh was not allowed to contest through notice and hearing. This constitutes a deprivation of Due Process, which flawed the ensuing proceedings.

Additionally, the requirements of the “dangerous dog” designation were not satisfied because the dog was not at fault in the two subsequent incidents that led to the Order for Destruction. In each instance, the dog naturally or reflexively responded to the untoward circumstances that he confronted. His conduct, once in response to someone who admittedly “aggravated” and “provoked” the incident, and the other, to an in-house intrusion, does not warrant a death sentence for this dog.

Further, the City Council was misinformed that it had no discretion, when it had ample leeway. By blinding itself to its own discretion, the Council decision making was flawed and warrants reversal to save this dog’s life.

II. DESIGNATION OF THE DOG AS “POTENTIALLY DANGEROUS” VIOLATES DUE PROCESS

Classifying the dog as potentially “dangerous” without notice and hearing offends Due Process and undermines the subsequent proceedings.

Brody would not be facing imminent destruction if he had not been declared “potentially dangerous” as a result of the first instance that occurred in April, 2010. That incident, whether labeled a “bite” or “scratch” or both “biting/scratching” (as the City did), *Add. 2*, was the basis for the subsequent determination that the dog was “dangerous,” which activated the order for Brody’s seizure and destruction.

It is undisputed that Sawh was not provided with notice or hearing of the designation of his dog as “potentially dangerous.” The failure to do so constitutes a violation of Due Process under the 14th Amendment of the U.S. Constitution and the parallel provision of Article I, Section 7 of the Minnesota Constitution.¹

As a threshold matter, Sawh’s failure to raise the Due Process issue below should not bar its consideration here. Sawh, like most dog owners, did not have an attorney at the City Council proceedings, although the City did. It would elevate form over substance to expect that he, as a lay person (an engineer with the City of Minneapolis) would have the ability and acumen to raise a fairly complex Constitutional issue at these informal proceedings.

While this Court, as a general rule, does not consider issues not raised below, it will do so in circumstances like this one. *See* Minn. R. Civ. App. P. 103.04 (Appellate Court “may” review “any” matter as “justice may require”). *See Cohen v. Cowles Media*

¹ The Due Process clause of the Minnesota Constitution may be construed more broadly than its federal counterpart. *State v. Wicklund*, 589 N.W.2d 793, 798 (Minn. 1999) (“We have long recognized that we may articulate independent and more protective standards under our state constitution than are accorded under comparable provisions of the Federal Constitution.”); *State v. Oman*, 261 Minn. 10, 21, 110 N.W.2d 514, 522-23 (1961) (state due process clause may be interpreted independent of Fourteenth Amendment).

Co., 479 N.W.2d 387, 390 (Minn. 1992) (appellate courts have discretion “to allow a party to proceed on a theory not raised at trial”); *In Matter of Daniel Bowers*, 456 N.W.2d 734, 737 (Minn. Ct. App. 1990) (Commissioner of Human Services allowed to raise legal issue on appeal even though not raised below).

A number of factors are considered in determining whether to exercise its discretion to hear matters not argued below. “Factors favoring review include: the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was ‘implicit’ or ‘closely akin to’ the arguments below; and the issue is not dependent on any new or controverted facts.” *Watson v. United Servs. Auto Ass’n*, 566 N.W.2d 683, 687-88 (Minn. 1997). *See also Roth v. Weir*, 690 N.W.2d 410, 413-14 (Minn. Ct. App. 2005).

In this case, the issue whether Due Process requires a hearing in regard to a “potentially dangerous” dog designation is a novel legal issue of first impression, it was raised prominently in the briefing in this matter, and the *pro se* party raised the unfairness of the potentially dangerous designation in the two subsequent dangerous dog hearings. Further, whether a hearing is required on this issue is purely a legal issue, not dependent on factual circumstances. Since legal issues are reviewed *de novo*, *In re Molly*, 712 N.W.2d 567, 571 (Minn. Ct. App. 2006), the lack of consideration of this issue by the Lino Lakes City Council does not prejudice either party.

If the Due Process issue is addressed, as it should be, the question is whether the right was transgressed here. The answer is: “Yes, it was.”

Due Process requires notice and a hearing which was not provided to Sawh before his personal property, his dog, was deemed “potentially dangerous.” *See Relator’s Brief*, pp. 25-26.

The City’s contention that Sawh was not entitled to a hearing because the City did not deprive him of any “property” since the dog “remained in [his] possession” is a perversion of the law of Due Process. *City’s Brief*, p. 15. While the dog “remained in Sawh’s possession after it was classified as “potentially dangerous,” the appellation affixed a stigma to the dog. That affixation to Sawh’s property gives rise to Due Process rights. *Holt v. City of Sauk Rapids*, 559 N.W.2d 444, 445 (Minn. Ct. App. 1997), *review denied*, (Minn. Apr. 24, 1997) (dog owners are entitled to constitutional protection against “unreasonable” intrusion into ownership rights),. *See also Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972) (at will employee entitled to “name-clearing” hearing to defend constitutionally protected liberty interest in his “good name, reputation, honor or integrity” if it is tarnished in the process of a job termination); *Hogue v. Clinton*, 791 F.2d 1318, 1323-24 (8th Cir. 1986), *cert. denied* 479 U.S. 1008 (1986) (claimant who did not have a property interest in job entitled to a “name-clearing” hearing to defend liberty interest).

The designation as Sawh’s dog as “potentially dangerous” was not merely an innocuous designation. The original “potentially dangerous” designation formed the basis for the later “dangerous” classification and the subsequent Order for Destruction. The City relied upon the initial “potentially dangerous” classification as a boot strap for defining the dog to be “dangerous” after the second incident, and the “dangerous”

designation formed the basis for the subsequent Order for Destruction after the third incident. *See City's Brief*, p. 23. Thus, substantial adverse consequences flowed from the original "potentially dangerous" designation, which Sawh never had an opportunity to challenge.

The City's contention that Sawh was given Due Process by virtue of two other hearings, which dealt with the "dangerous" designation and the Order for Destruction, does not salvage the Due Process violation here. *See City's Brief*, p. 17. The gravamen of Sawh's Due Process claim is that he was not given notice or a hearing for the "potentially dangerous" designation, and it was too late for him to challenge it in subsequent proceedings.² The "potentially dangerous" designation, which Sawh could not challenge, formed the first nail in what may, regrettably, be Brody's undeserved coffin.

The City's claim that it has a "high" interest in precluding notice and a hearing before declaring a dog "potentially dangerous" is specious. *City's Brief*, p. 18. The "additional costs and administrative burdens" that the City refers to are vague and lack specificity. The same argument could be made in any case in which the government imposes adverse sanctions upon an individual or property. Under the City's argument, no one should be allowed a right to a criminal trial, if charged with an offense, because of the "additional costs and administrative burdens" it may impose upon the prosecution.

² Indeed, the City contends that it is too late to raise it now. So, how could he have raised it in subsequent "dangerous dog" proceedings?

In fact, notice and a hearing before a dog is designated as “potentially dangerous” can be easily done, with very little cost, other than a piece of paper and, perhaps, a stamp, which now costs 44¢, and a short hearing before some administrative official, which might cost nothing at all. Other municipalities, large and small, routinely provide these type of hearings without whining about the “additional costs and administrative burdens” in doing so. *See* St. Paul Code of Ordinances, Part II, Title XX, Chapter 200, § 200.11, Supp. App. 1, (requiring the city to provide 14 days for the dog owner to appeal potentially dangerous dog determination or imposition of conditions on maintaining the dog and providing for an appeal hearing); Minneapolis Code of Ordinance, Chapter 64, § 64.110, subd. (f)(1), Supp. App. 2, (allowing owner of potentially dangerous dog to contest designation through written evidence and/or affidavits); Savage City Code § 91.11(C), Supp. App. 3, (allowing hearing to contest potentially dangerous dog determination); City of Golden Valley City Code, § 10.30, subd. 7 (I) (2) (b) and (e) and § 10.30, subd. 7 (I) (3), Supp. App. 4-5, (city to provide notice of right to appeal and appeal hearing before an impartial hearing officer to contest potentially dangerous designation); St. Cloud City Ordinance, § 1040:80, subd. 2a, Supp. App. 6-7 (requiring the city to provide dog owner 14 days to appeal a potentially dangerous dog designation or imposition of conditions on maintaining the dog).³

In sum, the initial “potentially dangerous” designation was fatally flawed by lack of notice and a hearing to Sawh. It formed the basis for subsequent actions, the

³ “Supp. App. ___” refers to Supplemental Appendix attached to this Brief; “A-___” refers to Relator’s Appendix.

designation of “dangerous” and the Order for Destruction, which resulted in the deprivation of Sawh’s property.

Due Process dictates that Sawh be given notice and a hearing before his dog is destroyed. The City’s failure to do so eviscerates the proceedings and requires reversal.

III. THE “DANGEROUS DOG” DESIGNATION WAS ARBITRARY AND CAPRICIOUS

Brody will be killed, unless this Court intervenes, because of an incident for which he was not at fault. It is arbitrary and capricious to kill a dog, or anyone for that matter, when they are not culpable. *Corn v. Sheppard*, 179 Minn. 490, 492, 229 N.W. 869, 870 (1930) (“It is unlawful to kill [a dog] except when necessary to save persons, domestic animals, or poultry from injury”). The City correctly notes that its ordinance does not have an explicit “provocation” requirement. *City’s Brief*, p. 24. But the measure, Ordinance 503.15(3)(a)(4) & (5), does require that before a dog is designated as “dangerous,” the dog have been found to be “potentially dangerous” or have bitten on two prior occurrences. As noted above, Brody was improperly designated as “potentially dangerous” without a notice and hearing, which eviscerates the first prong of the statute.

The second prong was not satisfied here, either. The “two bite” provision contemplates some type of wrongful behavior by the dog, whether provoked or not. Otherwise, any innocent dog could be deemed “dangerous” for protecting its owner, engaging in self-defense, or other legitimate behavior. To impose capital punishment on a dog, or anyone else, without any wrongdoing by the alleged perpetrator violates fundamental principals of jurisprudence. *House v. Bell*, 547 U.S. 518 (2006) (Federal

habeas corpus action proceeds even though procedurally barred under state law were there was compelling evidence of “actual innocence”).

The second and third incidents, which form the basis for the “dangerous” designation and the Order to seize and destroy the dog, respectively, did not involve any fault on the part of the dog. In the first one, a woman crossing the Sawh’s property, admitted that she “aggravated Brody and provoked him.” *Tr.* 8, 21-22 and *Tr.* 7 (Jan. 4, 2011). The woman also said that “I don’t think it’s that bad,” referring to the bite and “I really still to this day am not that concerned about the bite.” *Tr.* 8, 10. In the subsequent incident, the furniture delivery man was told to bring an item upstairs, but he decided, on his own, to go downstairs, without permission, where Brody was located and protecting his territory. *Tr.* 112. He, too, like the woman on the lawn, stated “I don’t blame the dog or wish that the dog suffer the consequence of termination” in beseeching the City that the “dog’s life be spared.” A-19.

In each incident, there was no wrongdoing by the dog. While the individuals who were bitten are certainly not “bad” people, their behavior caused the dog to react naturally in its surroundings. Whether the term “provoked” appears in the ordinance or not, the reality is that it is arbitrary and capricious to kill a dog who did nothing wrong.

The City’s contention that the definition of provoked under a different portion of the ordinance requires that action be “purposely taken” is not controlling here. *City’s Brief*, p. 24. The case relied upon by the City, *Engquist v. Loyas*, 787 N.W.2d 220 (Minn. Ct. App. 2010), involved a civil dog bite lawsuit, that defined “provocation” as conduct that “invites or induces injury,” without any intent element. 787 N.W.2d at 225-

26. While “inadvertent” conduct may not constitute provocation, in this case the action of the woman crossing the lawn without permission of Sawh’s wife, which was the second incident, and the behavior of the delivery man who went in the basement when he was supposed to stay upstairs, was more than inadvertent. They directly prodded the dog’s defensive reaction. Whether or not either of them was a trespasser is of secondary importance to the key point: the acts of both of them aggravated, invited, or induced the dog to react as it did, and Brody would not have done so had they not been in the place at the wrong time doing the wrong thing. Brody should not suffer the consequences of death when he did nothing wrong.⁴

This is not a dog that deserves to die. The Council’s decision directing his destruction is arbitrary and capricious and should be reversed.

IV. THE CITY ACTED ON ERRONEOUS INFORMATION

Another reason the City’s plan to kill Brody is arbitrary and capricious is because of erroneous information upon which the City acted. The Mayor was given mistaken information from the City staff that the dog was too old to change its behavior, second-hand hearsay, which directly contradicted the firsthand testimony of an Animal Behaviorist Expert, who attested that a dog’s behavior can be modified, although it is somewhat more difficult at its age (then 2-1/2) than if it were younger. *Tr.* 114.

⁴ Brody’s good character is attested to in the testimony of numerous people, including the pastor, a professional pharmacologist, neighbors, even a city council member (Brody is “friendly” and neighbors “had no issues whatsoever with the dog.”), as well as an expert animal behaviorist, Carole Propotnik-Newby, who saw “absolutely no aggression in this dog. What I did see was *protective behavior*.” See *Relator’s Brief*, pp. 14-19; *Tr.* 91.

More significantly, and ominously, the Mayor and City Council was informed by the Police Chief that it had no choice but to destroy the dog under the Chief's reading of the ordinance, which says that the City "shall" order destruction of a dog for a subsequent violation after it has been deemed "dangerous." *Tr.* 119. As the City now acknowledges, that provision is "directory," not mandatory. *City's Brief*, p. 33. The City's contention now that the ordinance gave the Council discretion to destroy the dog, but did not obligate it to do so, is precisely why the decision was arbitrary and capricious. When the vote was taken, the City officials thought they only had one choice, destroy the dog. The City was not informed that it had the option, as it now recognizes, not to do so. Had it been told that it had the discretion not to destroy the dog, despite the "shall" language of the ordinance, it may not have done so. But, given the Chief's admonition, that it must destroy the dog, the Council was deprived of its discretion.

The City's claim that it does not have "unfettered discretion to disregard" the law misses the point. *City's Brief*, p. 34. Sawh does not maintain that the City must violate the law; he contends that the City should follow it by exercising its discretion not to destroy the dog. The City was misinformed when it was told that it had no choice. Ordering the dog to be destroyed, without exercising any discretion, was arbitrary and capricious. If the matter is not reversed, as it should be, it should at least be remanded with that option available in the City's discretion.

If the City were, in the exercise of its discretion, to determine that the dog should be destroyed, it should specify the facts that it relied upon in making its determination. *See In Re Petition for Disciplinary Action Against Allan/Allen J. Albrecht*, 779 N.W.2d

530, 538 (Minn. 2010) (referee erred in failing to make factual findings on issue of remorse); *White Bear Rod & Gun Club v. City of Hugo*, 388 N.W.2d 739, 742-43 (Minn. 1986) (on certiorari review where city council had prepared conclusory findings rather than specific findings of fact and separate conclusions of law, matter was reversed and remanded); *In Re O'Boyle*, 655 N.W.2d 331 (Minn. Ct. App. 2002) (the failure of the Department of Human Services to make factual findings on whether a therapeutic-conduct exception applies precludes finding of maltreatment and requires remand to DHS). The required specificity was lacking here because the City erroneously thought it had no discretion, based upon what it was mistakenly told by the Police Chief.

Both the failure of the City to apply the appropriate standard in rendering its decision and the failure to provide the detailed findings on this issue require reversal.

V. CONCLUSION

For the above reason, the determination by the City of Lino Lakes to destroy Relator's dog, Brody, should be reversed or, at a minimum, remanded.

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