

CASE NO. A10-2143

STATE OF MINNESOTA
IN COURT OF APPEALS

Mitchell Sawh

Relator,

vs.

City of Lino Lakes,

Respondent.

RESPONDENT CITY OF LINO LAKES'S BRIEF AND APPENDIX

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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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STATEMENT OF THE LEGAL ISSUES

- I. Did the Lino Lakes City Council have a rational basis to affirm the Lino Lakes Police Department's decision that Relator's dog was a dangerous animal pursuant to Lino Lakes Code § 503.15 after it was involved in two unprovoked biting incidents?

How issue was raised below: Relator appealed the Lino Lakes Police Department's decision that Relator's dog was a dangerous animal to the Lino Lakes City Council.

Ruling below: The Lino Lakes City Council affirmed the Lino Lakes Police Department's decision that Relator's dog was a dangerous animal because it was involved in two unprovoked biting incidents.

Apposite cases: *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712 (Minn. 1972); *Meixner v. Buecksler*, 216 Minn. 586, 13 N.W.2d 754 (Minn. 1944); *Engquist v. Loyas*, 787 N.W.2d 220 (Minn. App. 2010); *Grams v. Howard's O.K. Hardware Co.*, 446 N.W.2d 687 (Minn. App. 1989) *pet. for review denied* (Minn. Dec. 15, 1989).

Apposite statutes: Lino Lakes Code § 503.15.

- II. Did the Lino Lakes City Council have a rational basis to affirm the Lino Lakes Police Department's determination that under Lino Lakes Code § 503.16(4) a subsequent offense occurred when after being declared a dangerous animal Relator's dog was involved in a third unprovoked biting incident in violation of Lino Lakes Code § 503.15?

How issue was raised below: Relator appealed the Lino Lakes Police Department's determination that a subsequent offense occurred to the Lino Lakes City Council.

Ruling below: The Lino Lakes City Council affirmed the Lino Lakes Police Department's destruction order because after being declared a dangerous animal Relator's dog was involved in a third biting incident in violation of Lino Lakes Code §§ 503.15 and 503.16 (4)

Apposite cases: *Johnson v. Cook County*, 786 N.W.2d 291 (Minn. 2009); *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536 (Minn. 2007); *In re Senty-Haugen*, 583 N.W.2d 266 (Minn. 1998); *Meixner v. Buecksler*, 216 Minn. 586, 13 N.W.2d 754 (Minn. 1944).

Apposite statutes: Lino Lakes Code §§ 503.15, 503.16, 503.20.

- III. Did the Lino Lakes City Council violate Relator's right to procedural due process under U.S. Const. amend. XIV and Minn. Const. art. 1, § 7 when (1) after notice and hearing it affirmed the Lino Lakes Police Department's decision that the dog was a dangerous animal, and (2) after notice and hearing it affirmed the Lino Lakes Police Department's determination that Relator's dog committed a subsequent offense pursuant to Lino Lakes Code § 503.16(4).

How issue was raised below: This issue was not raised in the proceedings before the Lino Lakes City Council.

Ruling below: The Lino Lakes City Council never ruled on this issue because it was not raised in the proceedings before it.

Apposite cases: *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972); *Theile v. Stich*, 425 N.W.2d 580 (Minn. 1988); *Sweet v. Comm'r of Human Services*, 702 N.W.2d 314 (Minn. App. 2005) *review denied* (Minn. Nov. 15, 2005); *American Dog Owners Assoc., Inc. v. City of Minneapolis*, 453 N.W.2d 69 (Minn. App. 1990).

Apposite statutes: U.S. Const. amend. XIV; Minn. Const. art. 1, § 7.

STATEMENT OF THE CASE

On April 8, 2010, Relator's dog bit a pedestrian walking near the intersection of Timberwolf Trail and Wolf Circle in the City of Lino Lakes, Minnesota. The Lino Lakes Police Department (hereinafter the "Police Department") was notified and a City Police Officer investigated the biting incident. The pedestrian told the investigating officer that the dog bit him. Relator's son admitted to the investigating officer that the dog ran through the invisible fence around their property and jumped up on the pedestrian. As a result of this biting incident, the City notified Relator that because the dog had bitten someone without provocation it was classified as a potentially dangerous animal pursuant to Lino Lakes Code § 503.15.

On October 15, 2010, Relator's dog bit a woman who was walking across Relator's yard to investigate a fire burning on a neighbor's property. The dog bit the woman twice resulting in puncture wounds to her elbow and left hip. Because this was the second time that the dog had bitten a person without provocation, it was now classified by the Police Department as a dangerous animal pursuant to Lino Lakes Code § 503.15. Relator appealed the dangerous animal determination to the Lino Lakes City Council (hereinafter "City Council") which, after a public hearing, affirmed the determination that the dog was a dangerous animal. The City Council allowed the dog to remain living at Relator's home provided certain conditions were met for the safety of the public.

On November 9, 2010, the day after the public hearing, Relator's dog bit a third person causing puncture wounds to his hand. The person was delivering furniture to

Relator's house. The Police Department determined that this third biting incident amounted to a subsequent offense under Lino Lakes Code § 503.16(4) and ordered the dog destroyed. Relator appealed the order to the City Council. On November 22, 2010, the City Council, after a public hearing, unanimously affirmed the Police Department's determination that a subsequent offense had occurred.

Relator now appeals the City Council's quasi-judicial decisions affirming the determination that the dog is a dangerous animal and affirming the determination that a subsequent offense occurred. Relator also asserts that the City's Ordinances, as applied, and the City's actions violate the Due Process clause of the 14th Amendment to the United States Constitution and the Article 1, Section 7 of the Minnesota Constitution. Based on the evidence in the record, both the City's decision that the dog was a dangerous animal and that a subsequent offense occurred were reasonable. In addition, Relator's right to due process has not been violated.

STATEMENT OF FACTS

First Biting Incident

Relator is the owner of a Labrador Retriever/Rottweiler mixed breed dog. (*ICR 10258649, CA-1-3.*)¹ On April 8, 2010, Relator's dog ran through the invisible fence around Relator's yard and bit a pedestrian named Carl Schmuland at the intersection of Timberwolf Trail and Wolf Circle.² (*T. at 3, 15; ICR for Case 10075361, CA-6;*

¹ "CA-__" refers to the Respondent City's Appendix.

² The record does not support the contention that the invisible fence was malfunctioning. All the record shows is that the dog could not be effectively contained by the fence. (*T. at 11-13, 15, 27*)

*Photograph of bite marks, CA-9.)*³ Mr. Schmuland told the investigating Lino Lakes Police Officer that the dog came at him aggressively, jumped on him and bit his left arm causing injury. *(CA-6)* The Police Officer also observed a large series of bloody marks on Mr. Schmuland's left inner-bicep area that appeared consistent with a dog's teeth. *(Id.; CA-9.)*

The Lino Lakes Code contains Animal Control Regulations that regulate dangerous and potentially dangerous animals. *(Add. 13-16.)* Lino Lakes Code § 503.15(4) governs designation of an animal as potentially dangerous.

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 domestic animal as stated in division (3)(b) above. When an animal is declared potentially dangerous, the animal control officer shall cause one owner of the potentially dangerous animal to be notified in writing that the animal is potentially dangerous.

(Add. 14.) Under Lino Lakes Code § 503.15(3)(b) a "potentially dangerous animal" is defined as an animal that has:

1. Bitten a human or 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.

³ "Add." refers to Relator's Addendum. "A-___" refers to the Appendix of Relator. "T. at ___" refers to the larger bound Transcript of the City Council Meetings of November 8, 2010 and November 22, 2010 and the City Council Work Sessions of November 22 and December 6, 2010. "T. at ___ (1/4/11)" refers to the smaller bound Transcript of the City Council Meeting of January 4, 2011.

(Add. 13.)

As a result of this April 8, 2010 unprovoked biting incident, the Lino Lakes Police Department notified Relator's son by letter that the dog was now classified as a "potentially dangerous animal" as defined by Lino Lakes Code § 503.15(3)(b). *(A-4.)* The letter also warned "[i]f your dog aggressively bites, attacks or endangers the safety of humans or domestic animals in the future we will have the authority to deem your dog dangerous and also have the authority to order destruction." *(A-4)*

Second Biting Incident

On October 15, 2010, a woman named Diane Irwin was cleaning a house across the street from Relator's house when she observed a lot of smoke coming up from the backyard of the house next door to Relator's house. *(T. at 6.)* Concerned, Ms. Irwin called 911 and the emergency operator told her go outside and look to see if it was a controlled fire. *(Id.)* Ms. Irwin walked across Relator's yard and observed that it was a controlled fire, so she hung up with the 911 operator and put her cell phone back into her pocket. *(Id.)* As Ms. Irwin was walking back towards the street, Relator's wife approached her. *(Id.)* Suddenly Relator's dog viciously attacked Ms. Irwin. *(T. at 6-10; 18-21; ICR for Case 10238471, CA-10; Police Chief Memo. for Hearing Date November 8, 2010, CA-28.)* The dog came at her menacingly, jumped up and bit her on the right elbow leaving a puncture wound. *(T. at 8, 10; Photograph of puncture wound to elbow, CA-16.)* The bite wound was very deep. *(T. at 8.)* It penetrated every layer of skin. *(T. at 8.)* Then Relator's wife took the dog back to the front stoop. *(T. at 7.)* But,

she lost control of the dog again and it pursued Ms. Irwin out into the street where it savagely bit her a second time on the left hip. (*T. at 7-8.*)

Lino Lakes Code § 503.15(5) sets forth the criteria for classifying an animal as dangerous.

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 [sic] or threatened the safety of a person or domestic animal as stated in division (3)(a) above.

(*Add. 14.*) Lino Lakes Code § 503.15(3)(a) defines “dangerous animal” as an animal 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.

(*Add. 13.*)

The Police Department notified Relator by letter that due to the two unprovoked biting incidents that occurred on April 8, 2010 and October 15, 2010, Relator's dog was now classified as a "dangerous animal" pursuant to Lino Lakes Code § 503.15.⁴ (A-5) Relator's wife also received a citation for violating the dangerous animal ordinance. (Citation, CA-17.)

Relator appealed the dangerous animal designation to the City Council. (T. at 3.) The City Council held a Public Hearing on the matter on November 8, 2010. (T. at 2-74; Add. 2-4.) At the Public Hearing, Ms. Irwin, the victim of the second incident occurring on October 15, 2010, testified that she did not believe that Relator's family could control the dog. (T. at 8, 10.) Ms. Irwin also noted that the injuries would be much worse if the person attacked had been a toddler or an older, weaker person. (T. at 10.) Relator's wife admitted that she lost control of the dog when it bit Ms. Irwin. (T. at 21.) Relator admitted that the dog injured Ms. Irwin. (T. at 11-13, 14.) At this hearing, Relator also failed to provide any evidence suggesting Ms. Irwin provoked the dog.

In regard to the first incident occurring on April 8, 2010, Relator's son testified that the dog breached the invisible fence surrounding Relator's yard. (T. at 15.) Relator's son admitted that he did not have control of the dog when it bit Mr. Schmuland. (T. at 15.) Relator also admitted that his dog had injured Mr. Schmuland. (T. at 11-13,

⁴ Under the plain language of the City's dangerous dog ordinance, Relator's dog could have been classified as dangerous even if the first incident had not occurred. The dog's conduct on October 15, 2010 1) caused bodily injury to a person on public or private property and 2) was the result of an attack on a person under circumstances which would indicate danger to personal safety. See Lino LakesCode 503.15(3)(a) (1) and 503.15(3)(a)(2).

14.) Again, however, Relator failed to provide any evidence suggesting that the dog's victim, this time Mr. Schmuland, provoked the behavior.

Following the Public Hearing, the City Council unanimously affirmed the dangerous animal designation. (*T at 56-57.*) Although, under its ordinance the City Council could have ordered the dog destroyed, it allowed the dog to remain living in the City provided that Relator took several mandatory precautions to protect the public from the dog. (*T. at 66-74.*)

Third Biting Incident

On November 9, 2010, the day after the City Council affirmed the dangerous dog designation and mandated Relator take specific precautions to ensure against future attacks, the dog bit a third person, Christopher Hanson. (*T. at 76.*) Mr. Hanson was delivering furniture at Relator's house. (*T. at 76, 112.*) Relator's wife was at home to receive the furniture delivery. (*T. at 112.*) Mr. Hanson walked into Relator's basement to see where the furniture would be placed. (*CA-1.*) Relator's wife had not warned him that the dog was in the basement nor did she provide information verbally or by postings that the house contained a dog designated as dangerous. (*Id.*) When Mr. Hanson simply walked into the basement area, the dog came at him and bit him on the left hand leaving two puncture wounds.⁵ (*Id.; Photographs of puncture wounds, CA-18.*)

Lino Lakes Code § 503.16(4) governs when the owner of an animal that has been declared dangerous commits a subsequent violation with the same animal.

⁵ When a Police Officer arrived at Relator's residence and asked Relator's wife to muzzle and transport the dog to quarantine, Relator's wife told the officer she was uncomfortable attempting to muzzle and transport the dog. (*CA-1.*)

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.

(Add. 16.) Pursuant to Lino Lakes Code § 503.16(4), Lino Lakes Police Chief Kent Strege notified Relator by letter dated November 10, 2010 that the bite was considered a subsequent offense. *(A-7; CA-19.)* Relator appealed the determination that a subsequent offense occurred and requested a hearing before the City Council. *(T. at 77.)*

A Public Hearing to consider Relator's appeal was held on November 22, 2010. *(T. at 75-128; Add 2-4.)* At the Public Hearing, the City Council received the police report of the third biting incident and a photograph of the deep gashes on Mr. Hanson's hand. *(CA-1; CA-18.)* Relator introduced a letter from Mr. Hanson. *(A-19.)* In the letter Mr. Hanson states that the dog bit him and that the biting incident was "completely preventable." *(A-19.)* Relator also introduced several letters and emails from family friends in support of the dog. *(A-20-30.)*⁶ None of the letters refuted that the dog had been involved in three unprovoked biting incidents in a seven month period. *(Id.)* In

⁶ Relator argues that the police reports which include statements of victims should be excluded as hearsay. At the same time, Relator relies on several non-sworn statements, "witness" written statements, and emails. While the police reports are public/business records and thus are admissible, the nature of these administrative hearings and the standard of review applied by this Court in reviewing the City Council's actions make Relator's hearsay arguments moot and inapplicable. The Court must look at the record presented including evidence submitted by both parties. *The Big Lake Assoc. v. St. Louis County Planning Comm'n*, 761 N.W.2d 487, 490-91 (Minn. 2009) (*citing Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988)) (review of quasi-judicial decisions is generally limited to examination of the record made by the local government).

addition, these letters can be viewed as support that Relator's dog is commonly in situations where significant harm can occur; i.e, frequent events involving children and "playful" situations involving strangers. (*Id.*)

At the November 22, 2010 hearing, Relator also introduced the testimony of Animal Behaviorist Carol Propotnik. (*T. at 87-99, 102-06, 114-17.*) Ms. Propotnik's testimony did not refute that the dog had been involved in three biting incidents. (*Id.*) Ms. Propotnik spent time with the dog and found it to display "protective behavior" which she recommended training to control. (*Id.*) Although Ms. Propotnik acknowledged that the dog's age would make this training more difficult than if she were dealing with a puppy, she told the City Council that an older dog such as Relator's can be trained; it will just take longer. (*Id.*)

Following the Public Hearing, the City Council adopted the following findings unanimously. (*T. at 122-124; Add. 7-9.*)

Following a public hearing on November 8, 2010 at the owners' request, the council confirmed the police department's finding that the dog, Brody, is deemed to be dangerous as that term is defined by city ordinance and state law. The following day, an individual, Chris Hanson, was invited into the Sawh's home for the purpose of delivering furniture. Hanson proceeded down the stairs at the home to view the basement. Hanson was bitten on the left hand by the dog, Brody. There is no evidence of provocation by Mr. Hanson prior to the bite, nor is there any indication that Mr. Hanson was informed that the dog was in the basement or that the dog had been deemed dangerous by the city. Following the bite, Mrs. Sawh gained control of the dog and secured it. The bite on November 9, 2010 constitutes a violation of city ordinance 503.15 and constitutes a subsequent offense under 503.16 paragraph 4. The aforementioned letters dated November 10, 2010 were sent to the dog owners pursuant to city ordinance.

Relator appealed the City Council's quasi-judicial decisions of November 8, 2010 and November 22, 2010 by writ of certiorari. (A-1-3.)

STANDARD OF REVIEW

Relator challenges the City Council's quasi-judicial decisions (1) to affirm the Police Department's determination that the dog is a dangerous animal; and (2) to affirm the Police Department's determination that a under Lino Lakes Code § 503.16(4) a subsequent offense occurred after the dog was declared a dangerous animal. The standard of review for quasi-judicial decisions is narrow. *W. Area Bus. & Civic Club v. Duluth Sch. Bd. Indep. Distr. No. 709*, 324 N.W.2d 361, 365 (Minn. 1982). "A quasi-judicial decision of an agency that does not have statewide jurisdiction will be reversed if the decision is fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within its jurisdiction, or based on an error of law." *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 544 N.W.2d 297, 299 (Minn. 1996). The appellate court reviews evidence "only to determine whether it supports the findings of fact or the conclusions of law, and whether the municipality's decision was arbitrary and capricious." *In re Dakota Telecomms. Group*, 590 N.W.2d 644, 646 (Minn. App. 1999). The reviewing court may not retry facts or make independent credibility determinations. *See Citizens Nat'l Bank of Madelia v. Mankato Implement, Inc.*, 441 N.W.2d 483, 485 (Minn. 1989); *Tews v. Geo. A. Hormel & Co.*, 430 N.W.2d 178, 180 (Minn. 1988); *Whaley v. Anoka-Hennepin Indep. Sch Dist. No. 11*, 325 N.W.2d 128, 130-31 (Minn. 1982). The court will uphold the decision "if the lower tribunal furnished any legal and

substantial basis for the action taken.” *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007).

Relator also asserts procedural due process violations. Courts review the procedural due process afforded a party under a de novo standard of review. *Plocher v. Comm’r of Pub. Safety*, 681 N.W.2d 698, 702 (Minn. App. 2004). The constitutionality of a statute is a question of law and is therefore subject to de novo review. *Sweet v. Comm’r of Human Services*, 702 N.W.2d 314, 319 (Minn. App. 2005) *review denied* (Minn. Nov. 15, 2005). “Ordinances as well as statutes are presumed to be valid, and are not to be set aside by the courts unless their invalidity is clear.” *City of St. Paul v. Kekedakis*, 293 Minn. 334, 336, 199 N.W.2d 151, 153 (1972) (*quoting State v. Taubert*, 126 Minn. 371, 372, 148 N.W.2d 281, 282 (1914)). “A party challenging a statute carries the heavy burden of demonstrating beyond a reasonable doubt that a statute is unconstitutional.” *Sweet*, 702 N.W.2d at 319.

LEGAL ARGUMENT

I. THE CITY COUNCIL’S CONSIDERATION OF THE POTENTIALLY DANGEROUS ANIMAL DESIGNATION IN SUBSEQUENT PROCEEDINGS DID NOT DENY RELATOR PROCEDURAL DUE PROCESS.

Relator claims that the City Council’s November 8, 2010 decision to affirm the Lino Lakes Police Department’s determination that the dog was a dangerous animal, and the November 22, 2010 determination that Relator’s dog committed a subsequent offense after being declared dangerous were erroneous because the City Council was aware that the Police Department had declared the dog a potentially dangerous animal after the

April 8, 2010 biting incident and Relator did not have an opportunity to be heard on the issue of whether his dog was potentially dangerous. *Relator's Brief* p. 24. As a threshold matter, this claim was not raised below, and therefore it is not properly before the Court on appeal. *See Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts only review issues presented to and considered by the district court); *The Big Lake Assoc.*, 761 N.W.2d at 491 (holding that allowing parties to litigate an issue on certiorari review that was not raised in the local government's quasi-judicial proceedings violates separation of powers principles and encroaches upon the broad authority accorded local government when making quasi-judicial decisions).

Even if the claim were properly before the Court it would still fail because Relator was not denied procedural due process when the Police Department designated the dog a potentially dangerous animal pursuant to Lino Lakes Code § 503.15(3)(b), (4) after the April 8, 2010 biting incident. “[T]he due process protections granted under the United States and Minnesota Constitutions are identical.” *Satori v. Harnischfeger Corp.*, 432 N.W.d 448, 453 (Minn. 1988). Courts employ a two-step analysis to determine whether or not a violation of procedural due process has occurred. *Sweet v. Comm’r of Human Services*, 702 N.W.2d 314, 319 (Minn. App. 2005) *review denied* (Minn. Nov. 15, 2005) (*citing Mathews v. Eldridge*, 424 U.S. 319, 322, 335, 96 S.Ct. 893, 903 (1976)). First, the court determines whether a property interest is implicated. (*Id.*) Then, if the court finds that a litigant has been deprived of a property interest, the court determines what process was due by applying the *Mathews* balancing test. (*Id.*) Relator cannot establish a violation of due process under this analysis.

A. Relator was not deprived of a property interest when the Police Department designated the dog a potentially dangerous animal.

No property interest was implicated when the Police Department declared Relator's dog to be a potentially dangerous animal. The City does not dispute that the dog is personal property. However, designating the dog a potentially dangerous animal did not deprive Relator of the dog. It was essentially a warning to the owner to take precautions to prevent it from biting again. The dog remained in Relator's possession without any restrictions. Since the designation of the dog as a potentially dangerous animal did not deprive Relator of the dog, there can be no violation of procedural due process. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78; 92 S.Ct. 2701, 2709-10 (1972)(finding no violation of procedural due process where no deprivation of a property interest).

B. Even assuming *arguendo* that Relator could establish a property interest, he still cannot establish that he was denied procedural due process.

"Generally, due process requires adequate notice and a meaningful opportunity to be heard." *Staheli*, 723 N.W.2d at 304 (*citing Mathews*, 434 U.S. at 333, 96 S.Ct. at 902.) "But adequate notice and a meaningful opportunity to be heard are flexible concepts depending on the circumstances." *Staheli*, 723 N.W.2d at 304 (*citing Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972)). Therefore, to determine whether a litigant received the process that was due the court balances four factors:

First the private interest that will be affected by the official action; second the risk of erroneous deprivation of such interest through the procedures

used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

American Dog Owners Assoc., Inc. v. City of Minneapolis, 453 N.W.2d 69, 71 (Minn. App. 1990)(quoting *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903). Here, review of the four *Mathews* factors establishes that Relator was not denied due process.

Relator's interest was minimal. First, Relator was not deprived of the dog. He was simply put on notice that the dog was a potentially dangerous animal. Second, it is well-established that "[p]rivate parties have little interest in harboring animals that may be dangerous." *American Dog Owner's Assoc., Inc.*, 453 N.W.2d at 71. They have even less interest in not knowing that they are harboring an animal that is potentially dangerous.

There was also no risk of erroneous deprivation because under the Lino Lakes Code simply designating the dog a potentially dangerous animal does not result in the City seizing or destroying the animal. All that happens is the Police Department notifies the owner in writing that the dog is potentially dangerous. *See* Lino Lakes Code § 503.15(4). The owner maintains possession of the dog. Thus, there is no risk of erroneous deprivation. Additional procedures would have no value because Relator was not deprived of a property interest when the Police Department designated the dog a potentially dangerous animal.

Furthermore, Relator was provided with ample opportunity to be heard under the Lino Lakes Code. Lino Lakes Code § 503.15(7)(a) provides for a hearing before the City

Council after the Police Department declares the dog to be a dangerous animal. (*Add. 14.*) Lino Lakes Code § 503.16(4) also provides for a hearing before the City Council after the Police Department determines that a subsequent offense has occurred. (*Add. 16.*) On November 8, 2010, Relator received a hearing and presented evidence before the City Council affirmed the Police Department's decision to designate the dog a dangerous animal. At this hearing, Relator did not contend that the incident giving rise to the potentially dangerous dog designation (the April 8, 2010 biting incident) involved any element of provocation. (*T. at 11, 13, 15.*) Relator admitted that the dog jumped up on and injured Mr. Schmuland. (*T. at 11, 13.*) In addition, Relator's son, who was the only witness to the biting incident other than Mr. Schmuland, admitted that "I didn't see what happened." (*T. at 15.*)⁷

On November 22, 2010, Relator received another hearing and presented evidence before the City Council decided to affirm the Police Department's determination that a subsequent offense occurred. Once again, Relator failed to present any evidence to dispute that the April 8, 2010 biting incident occurred without provocation. Additional procedures would have no value because Relator was provided two hearings and failed to refute the facts established by the Police Department regarding the April 8, 2010 biting incident.

⁷ There is no dispute that the dog jumped on Mr. Schmuland and caused him injury. While the evidence supports the Police Department's and City Council's reasonable conclusion that a bite had occurred, Relator ignores the fact the ordinance allows for a potentially dangerous designation for incidents other than bites. Thus, Relator's argument that Mr. Schmuland was scratched, not bitten, is of no consequence.

The government interest is high. “The City has a high interest in taking appropriate measures for animal control.”⁸ *American Dog Owner’s Assoc. Inc.*, 453 N.W.2d at 72. Putting Relator on notice that his dog is a potentially dangerous animal when without provocation, it chased down and bit a pedestrian walking on a public street is just such an appropriate measure. Requiring the City to incur additional costs and administrative burdens before warning Relator that his dog is a potentially dangerous animal would not be reasonable or justified.

Review of the four *Mathews* factors clearly demonstrates that the procedures afforded by the Lino Lakes Code comport with the requirements of the due process clause because all of its factors weigh in favor of the City. *See American Dog Owner’s Ass’n, Inc.*, 425 N.W.2d at 71-72 (holding procedural due process challenge failed where none of the *Mathews* factors weighed in favor of party making challenge).

Relator failed to raise a procedural due process challenge below; no property interest was implicated when the City designated Relator’s dog a potentially dangerous animal; and he had two meaningful opportunities to be heard prior to any government action that implicated his property. As a result, his procedural due process claim fails.

⁸ The City also has a vital interest in avoiding tort liability for injuries caused by a dog where it has knowledge that the dog is dangerous and that the owner is unable or unwilling to control the dog. *See Hansen v. City of St. Paul*, 298 Minn. 205, 214 N.W.2d 346 (1974).

II. THE CITY HAD A RATIONAL BASIS TO UPHOLD THE POLICE DEPARTMENT'S DESIGNATION OF THE DOG AS A DANGEROUS ANIMAL.

Relator asserts that “[t]he 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.” *Relator’s Brief* p. 27.

However, the City Council properly considered the April 8, 2010 biting incident and the Police Department’s resulting designation of the dog as a potentially dangerous animal and the record is clear that the City had a rational basis to determine that the dog was a dangerous animal because the second biting incident was unprovoked.

A. The City Council did not err when it considered the April 8, 2010 biting incident and the potentially dangerous animal designation that stemmed from it, in subsequent proceedings because the Police Department had a rational basis under Lino Lakes Code § 503.15(4) to designate the dog a potentially dangerous animal.

Under Lino Lakes Code § 503.15(4) the animal control officer shall designate an animal as potentially dangerous upon receiving evidence that the 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.*) Under Lino Lakes Code § 503.15(3)(b)

(b) **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.

(Add. 13.)

In this case, all of the evidence in the record establishes that the dog qualified as a potentially dangerous animal under Lino Lakes Code § 503.15(3)(b) because without provocation the dog bit a human walking on a public street. The dog escaped from an invisible fence enclosure, chased down a pedestrian, Mr. Schmuland, who was walking on a public street a block away from Relator's house and bit him on the arm causing injury. (CA-6.) There is no testimony in the record to establish that the invisible fence was not functioning properly nor would this evidence be relevant to the determination of potentially dangerous under the ordinance. It is undisputed that the invisible fence did not contain the dog. Mr. Schmuland told police that the dog ran at him barking aggressively and then jumped up and bit him on the left arm. (*Id.*) There is a photograph of Mr. Schmuland's injury showing that he suffered red marks on his arm consistent with a dog's teeth. (*Id.*; CA-9).⁹

⁹ Relator claims the picture of the dog bite and the Police Report should be excluded because he was not allowed to cross-examine Mr. Schmuland or the reporting officer. However, Relator waived that argument by not requesting the opportunity to cross-examine witnesses. The City ordinance and the City Council did not preclude Relator from presenting testimony from witnesses, including Mr. Schmuland, at either of the two public hearings. Moreover, "cross-examination is not an essential element of procedural due process in [quasi-judicial] hearings." *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978). Nor is the presentation of evidence in quasi-judicial proceedings limited by traditional rules of evidence. (*Id.*) In addition, Lino Lakes Code

There is nothing in the record, other than Relator's unsupported speculation, to establish that the red mark on the pedestrian's arm was caused by anything other than a dog bite. Relator admitted that the dog caused the injury. (*T. at 11, 13.*) Relator was not present when the biting incident occurred. (*T. at 13.*) However, Relator's son, who was the only person other than Mr. Schmuland who was present when the bite occurred, testified that when the dog escaped the invisible fence he saw it jump up on Mr Schmuland, but "I didn't see what happened."¹⁰ (*T. at 15.*)

Relator tries to characterize the dog as just being "playful". *Relator's Brief p. 29.* However, there was no testimony that the dog was being playful. Relator's son testified that the dog was in trouble for leaving the yard and would not obey. (*T. at 15.*) Moreover, the ordinance makes no exception for a bite caused while a dog is being playful. Whether a dog associates gnawing on a pedestrian's arm with play doesn't make it any less of a potential danger. The City Police Department had a rational basis to classify this dog as a potentially dangerous animal because the evidence supports the dog bit Mr. Schmuland without provocation while he was walking on a public street.

Thus, the Police Department had a rational basis to declare the dog a potentially dangerous animal after the April 8, 2010 biting incident and the City Council did not err

§ 503.15(7)(a) provides that "[t]he records of animal control or City Clerk's office shall be admissible for consideration by the animal control officer without further foundation." (*Add. 15.*)

¹⁰ Again, Relator ignores the fact that Lino Lakes Code § 503.15(3)(b) allows for a potentially dangerous designation for incidents other than bites. Thus, Relator's argument that Mr. Schmuland was scratched, not bitten, is meritless.

in considering the incident or the potentially dangerous animal determination in subsequent proceedings.

B. The City had a rational basis to find that the dog was a dangerous animal after the October 15, 2010 biting incident.

Under Lino Lakes Code § 503.15(5)

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, attached [sic] or threatened the safety of a person or domestic animal as stated in division (3)(a) above.

(Add. 14.) Under Lino Lakes Code § 503.15(3)(a)

A ***DANGEROUS ANIMAL*** is an animal 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 a 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;
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 Code § 503.15(3)(a).

In this case, the dog qualified as a dangerous animal under 1, 2, 4 and 5.¹¹ While the City ordinance does not require multiple bites and attacks for a dog to fit under the dangerous animal definition (see 1 and 2), the record in this case reflects that Relator was given the benefit of the doubt; the City followed the progression of aggressive behavior identified under the code. Relator's dog qualified under 4 because it bit Mr. Schmuland on April 8, 2010 and bit Ms. Irwin on October 15, 2010. It qualified under 5 because it was found to be a potentially dangerous animal after the April 8, 2010 biting incident and then bit again on October 15, 2010. Thus, under the plain language of the ordinance and the facts presented, the City Council had a rational basis to affirm the Police Department's decision that the dog was a dangerous animal.

Relator claims that the determination that the dog was dangerous after the second biting incident that occurred on October 15, 2010 was arbitrary and capricious because the City relied on the prior determination that the dog was a potentially dangerous animal when it determined that the dog was a dangerous animal. However, Relator has not proffered any valid basis to disregard the April 8, 2010 biting incident that resulted in the potentially dangerous animal designation. Relator does not dispute that the incident occurred or that the dog injured Mr. Schmuland. (*T. at 11, 13.*)

Relator also incorrectly asserts that the dog should not have been found to be a dangerous animal because it was provoked. However, under the plain language of Lino

¹¹ It appears that the third element of the dangerous animal designation applies to aggressive behavior associated with other animals and does not include attacks on persons. However, the evidence in this record could be argued to also fit within this definition as Relator's dog clearly exhibited "unusually aggressive behavior" on one or more occasions.

Lakes Code § 503.15(3)(a)(4) and (5) there is no requirement that the dog be unprovoked. A dog that has “[b]itten one or more persons on two or more occasions” unambiguously meets the definition of dangerous animal without the presence of provocation, as does a dog that has “[b]een 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.” See *Nelson v. City of St. Paul*, 2001 Minn. App. LEXIS 423 *6-7 (holding that plain language of an ordinance defining a dangerous dog as one that has “bitten one . . . or more persons on two . . . or more occasions” did not require finding that the dog was unprovoked) (*unpublished opinion*, CA-22). Thus, it was not necessary for the City Council to find the dog was unprovoked in order for it to affirm the Police Department’s dangerous animal determination after the dog’s second biting incident.

What is more, there is no evidence in the record suggesting the dog was provoked. Relator claims that the dog was provoked because Ms. Irwin, while investigating a fire of unknown origin, trespassed on the Sawh property while waving her arms and talking on her cell phone. However, this conduct did not amount to provocation under the City Code. Under the Lino Lakes Code § 503.15(3)(d) “Unprovoked” is defined as: “the condition in which the animal is not *purposely* excited, stimulated, agitated or disturbed.” (*Add. 14 (emphasis added).*) This definition is consistent with the Court of Appeals decision in *Engquist v. Loyas*, 787 N.W.2d 220, 225-26 (Minn. App. 2010) where the Court suggested the following jury instruction on provocation:

A person provokes a dog when, by voluntary conduct, and not by inadvertence, the person invites or induces injury. Mere physical contact with a dog or conduct that results in stimulating the dog, does not constitute provocation unless the danger of injury is apparent when the person acts to invite or induce injury.

The definition is also consistent with the Minnesota Supreme Court's decision in *Fake v. Addicks*, 45 Minn. 37, 47 N.W.2d 450 (1890) where it held that inadvertently stepping on a dog did not amount to provocation and the Court of Appeals decision in *Grams v. Howard's O.K. Hardware Co.*, 446 N.W.2d 687 (Minn. App. 1989) *pet. for review denied* (Minn. Dec. 15, 1989) holding that inadvertent acts are not a proper basis for finding provocation.

In this case, there is nothing in the record to establish that Ms. Irwin provoked the dog. None of her actions were taken to *purposely* excite, stimulate, agitate or disturb the dog, but rather to investigate the fire. The most that can be said is that she was talking on a cell phone to a 911 operator and gesturing to Relator's wife while crossing Relator's yard to investigate a fire of unknown origin when the dog suddenly and viciously attacked and bit her not once but two separate times.¹² (*T. at 6, 20-21.*) This does not amount to provocation under the City Code.

Furthermore, there is nothing in the record to establish that Ms. Irwin was trespassing. Trespass is not committed where there is consent, which may be implied

¹² Relator attempts to mischaracterize the bites as "not serious." *Relator's Brief p. 31.* However, that mischaracterization is contrary to the picture of the open wound and Ms. Irwin's testimony that the puncture wound on her elbow was "very deep" and went "through every layer of skin." (*T. at 8, 10; CA-16.*) Moreover, nothing in the Lino Lakes Code requires that a dog maim or kill an innocent victim before it is determined to be dangerous.

from the circumstances. *Meixner v. Bueckler*, 216 Minn. 586, 590, 13 N.W.2d 754, 756 (Minn. 1944). Relator's wife testified that she saw Ms. Irwin come onto her property and did nothing to stop her.

So I'm still sitting with Brody and she's walking and I'm like, okay. Then I decided what's going on. And she turned to me and said: Is he okay? Is he okay? Does he have it under control? And she's yelling back -- I was back under the patio area. And I was there -- sorry. And so I got up and started to approach her. And I got -- by that time she had gone, stood there and Mike Richie, the neighbor, just sat there and is looking at her and not saying anything, because he was there with his rake and she's worried about the smoke and asking him if it's okay. And so at the end of it he said: Well, I'm standing here. Why wouldn't it be okay? So she stood there, and she turned to me and she said: Do you think he has this under control? And she's still on her phone and throwing her arms up. And by that time I approached her and Brody was -- came -- he had a long leash attached. And he followed me and I -- when I look back in retrospect is with the hands going and her talking on the phone and with her voice louder. And I was approaching -- I don't -- the only thing I could figure out was that he was acting in self-defense for me.

(*T. at 20-21.*) Clearly, Relator's wife permitted Ms. Irwin to be on the property because they were communicating with each other about the fire. Furthermore, Ms. Irwin was privileged to be on Relator's property for public necessity.

One is privileged to enter land in possession of another if it is, or the actor reasonably believes it to be, necessary for the purpose of averting an imminent disaster.

Restatement (Second) of Torts § 196 (1965). Here, Ms. Irwin entered Relator's property at the request of the 911 operator to investigate a fire of unknown origin. She was acting under the privilege of public necessity and therefore was not trespassing.

The City Council had a rational basis to affirm the dangerous animal designation because the evidence supports the dog had two unprovoked biting incidents.

III. UNDER LINO LAKES CODE § 503.16(4) THE CITY HAD A RATIONAL BASIS TO AFFIRM THE POLICE DEPARTMENT'S DETERMINATION THAT A SUBSEQUENT OFFENSE OCCURRED WHEN RELATOR'S DOG HAD A THIRD BITING INCIDENT AFTER BEING DECLARED A DANGEROUS ANIMAL.

Relator asserts that the City Council's decision to affirm the Police Department's determination that a subsequent offense occurred under Lino Lakes Code § 503.16(4) was arbitrary and capricious because "(1) it is based on two earlier flawed findings; (2) this incident too was provoked; (3) the City relied on flawed expert evidence outside 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." *Relator's Brief* p. 32.

However, the record is clear that the City Council had a rational basis to affirm the Police Department's determination that a subsequent offense occurred.

A. The City Council had a rational basis to affirm the Police Department's determination that a subsequent offense occurred when the dog bit a third person after being declared a dangerous animal.

The Lino Lakes Code contains a procedure to be followed when the owner of a dog that has been declared a dangerous animal allows it to commit a subsequent violation of the Code. Lino Lakes Code § 503.16(4) provides for this subsequent offense procedure.

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.

(Add. 16.) In this case, the City Council affirmed the Police Department's determination that the dog was a dangerous animal on November 8, 2010. The very next day, November 9, 2010, the dog bit again without provocation in violation of Lino Lakes Code § 503.15. Relator admits that the dog bit Mr. Hanson as he was delivering furniture. *(T. at 83, 113-14.)* Mr. Hanson did nothing to provoke the dog. *(T. at 112.)* All he did was walk down into Relator's basement and the dog bit him. *(T. at 112.)* As a result, the City Council found that the dog bit Mr. Hanson on the hand without provocation and that this bite constituted a violation of Lino Lakes Code § 503.15 and a subsequent offense under Lino Lakes Code § 503.16(4). *(T. at 122-23.)* Thus, the City Council unanimously affirmed the Police Department's determination that a subsequent offense occurred. Clearly, there was a rational basis for this decision because after being determined to be a dangerous animal, the dog bit again without provocation in violation of Lino Lakes Code § 503.15.

Relator asserts that the City Council erred when it considered the two prior biting incidents in affirming the Police Department's determination that a subsequent offense occurred. However, as discussed above at Part II A and B, the Police Department had a rational basis for declaring the dog to be a potentially dangerous animal after the April 8, 2010 biting incident and the City Council had a rational basis to affirm the Police Department's determination that the dog was a dangerous animal after the October 15, 2010 biting incident. Thus, the City Council properly considered the two prior biting incidents when it determined that the dog committed a subsequent offense.

B. The dog was “unprovoked” within the meaning of Lino Lakes Code § 503.15(3)(d).

Relator also asserts that this third biting incident was provoked. However, there is no provocation requirement within the plain language of Lino Lakes Code § 503.16(4). All that is required is a subsequent offense after the dog has been declared a dangerous animal. Likewise, there is no provocation requirement in Lino Lakes Code § 503.15 (3)(a)(4) when a dog has bitten a person on more than one occasion. *See discussion at Part II B above.*

Relator asserts that lack of a provocation requirement in Lino Lakes Code § 503.15 violates due process. This argument was not raised below in spite of the fact that Relator had already consulted with his attorney prior to the November 22, 2010 City Council Meeting. (*T. at 87; A-36-37.*) Therefore, it is not properly before the Court on appeal. *See Theile*, 425 N.W.2d at 582. Furthermore, the Court need not reach the constitutional issue because the record is clear that that Mr. Hanson did not provoke the dog. *See In re: Senty-Haugen*, 583 N.W.2d 266, 269-70 n. 3 (Minn. 1998) (“It is well-settled law that courts should not reach constitutional issues if matters can be resolved otherwise.”)

Relator asserts that Mr. Hanson trespassed in the basement of Relator’s house and that this act of trespassing provoked the dog to bite. That is not enough to establish provocation under the City Code. Under the plain language of Lino Lakes Code § 503.15(3)(d), provocation requires that the dog be *purposefully* excited, stimulated, agitated or disturbed. However, there is nothing in the record to indicate that Mr. Hanson

purposefully excited, stimulated, agitated or disturbed the dog when he walked downstairs to Relator's basement.

Nor does the record establish that Mr. Hanson was trespassing. Trespass is not committed where there is consent, which may be implied from the circumstances. *Meixner*, 216 Minn. at 590, 13 N.W.2d at 756. "The general rule is that permission to do a particular act carries with it authority and right by implication to do all that is necessary to effect the principal object and to avail the licensee of his rights under the license." (*Id.*) In this case, Mr. Hanson was invited into Relator's home to deliver furniture. (*T. at 76, 83, 112.*) He was never told not to go down the basement where the furniture was to go or warned about the dog. (*T. at 112.*) All he did was walk down to the basement, where the dog bit him on the left hand causing two puncture wounds. (*T. at 76, 83, 112, 113.*) He did nothing to purposefully excite, stimulate, agitate or disturb the dog, which is why the City Council properly found that there was no evidence of provocation by Mr. Hanson prior to the bite. (*T. at 122.*)

Since the dangerous animal bit again without provocation, the City Council had a rational basis to affirm the Police Department's determination that a subsequent offense occurred.

- C. Testimony about whether or not the dog could be rehabilitated is not relevant to the City Council's decision to affirm the Police Department's determination that a subsequent offense occurred pursuant to Lino Lakes Code § 503.16(4) because the dog had already bitten three people in seven months.**

Relator asserts that the City Council's decision to affirm the Police Department's determination that a subsequent offense occurred under Lino Lakes Code § 503.16(4)

should be overturned because it is based upon “flawed expert opinion testimony outside the record.” *Relator’s Brief* p. 37. However, expert testimony was not necessary to support the City Council’s November 22, 2010 decision. The decision the City Council had to make on November 22, 2010 was whether to affirm the Police Department’s determination that a subsequent offense had occurred under Lino Lakes Code § 503.16(4). Expert testimony about whether or not the dog could be rehabilitated is completely irrelevant to this inquiry.

Relator claims that his right to procedural due process was violated because the Mayor said that a staff person at Otter Lake Animal Care Center had “advised staff that because the dog was two and a half years old, the behavior was not likely to change with training.” (*T. at 108.*) Again, this argument was not raised below and therefore is not properly before the Court on appeal. *See Theile*, 425 N.W.2d at 582. Moreover, since the testimony of both Relator’s Animal Behaviorist and the Otter Lake Animal Care Center employee was irrelevant to the determination of whether a subsequent offense had occurred, there was no due process violation in not having the staffer present for cross-examination. In addition, Relator’s own “expert” testified that the older the dog, the harder it is train. (*T. at 114.*) The City Council was free to weigh all evidence including the dog’s age (3 years old), its past conduct, and the testimony of an animal behaviorist who visited with the dog and determined training was needed for its “protective behavior.”

D. The City did not err when it affirmed the Police Department's order that the dog be destroyed.

i. Mr. Sawh violated Lino Lakes Code § 503.15 three times with the same dog in a seven month period.

Relator argues that Mr. Sawh himself did not commit a subsequent offense and therefore § 503.16(4) should not apply. However, under the plain language of § 503.16(4) a subsequent offense occurs “if the owner of an animal has subsequently violated the provisions under § 503.15 with the same animal.” That is precisely what occurred here when Relator’s dog violated § 503.15 by biting a person without provocation after being determined to be dangerous. Relator admits that he owns the dog and the dog is his property. He may not now avoid his duty to control his dangerous animal. Furthermore, Relator did violate the law. Under Lino Lakes Code § 503.15(1) “[i]t shall be unlawful for any person’s animal to inflict or attempt to inflict bodily injury to any person or animal whether or not the owner is present” and under Lino Lakes Code § 503.20 “[a] violation of any section of Chapter 503 is a misdemeanor.” (*Add. 13; CA-27.*)

ii. The City Council did not err in interpreting Lino Lakes Code § 503.16(4).

Relator’s assertion that the City Council had discretion to determine whether or not to destroy the dog after a subsequent offense is a fundamental misapplication of law. *Relator’s Brief p. 40.* Whether or not Lino Lakes Code § 503.16(4) is characterized as mandatory or directory, the City Council weighed all of the evidence, including balancing

Relator's interest with the public safety interests, in determining whether or not to destroy the dog after it found there had been a subsequent offense.

Under Lino Lakes Code § 503.16(4) if the City Council finds that a subsequent offense occurred then "the animal control officer shall order the animal destroyed." (*Add. 16.*) In this case, the Police Chief determined that the ordinance requires the dog be destroyed. After its November 22, 2010 hearing, the City Council unanimously found that "[t]he bite on November 9, 2010 constitutes a violation of City Ordinance 503.15 and constitutes a subsequent offense under 503.16, paragraph 4." (*T. at 122-24.*) Since the City Council found that a subsequent violation occurred, it concurred with the Police Chief's conclusion that the animal control officer destroy the dog pursuant to Lino Lakes Code § 503.16(4).¹³ The plain language of Section 503.16(4) provides the City Council with authority to determine whether or not to destroy the dog.

Relator's discussion of whether § 503.16(4) is mandatory or directory is misplaced. Whether a law is mandatory or directory depends upon whether there is a consequence for noncompliance. "A statute may contain a requirement, but provide no consequence for noncompliance, in which case we regard the statute as directory, not mandatory." *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 541 (Minn. 2007) accord *Johnson v. Cook County*, 786 N.W.2d 291, 295 (Minn. 2010).

¹³ Relator requested a hearing to present evidence and argument against the destruction order and to seek a stay of enforcement pending this appeal. The City Council granted this request and stayed its order on January 4, 2011, provided Relator continue to kennel the dog at a professional boarding facility.

However, even if there is no consequence for failure to comply with a law, the government is expected to follow the law.

The failure of a statute to provide consequences for noncompliance with its requirements does not make the statute ineffective. When a statute requires a governmental body to perform some act, it is reasonable to assume the governmental body will do so or it could be compelled to do so by mandamus.

Hans Hagen, 728 N.W.2d at 541. Thus, even if a law is directory it still must be followed, there is simply no penalty for failing to follow it.

In this case, the City Council followed Lino Lakes Code § 503.16(4). The fact that § 503.16(4) does not contain a penalty for failure to comply does not give the City Council unfettered discretion to disregard its requirements. Furthermore, even if § 503.16(4) is characterized as directory, that does not prevent the City Council from following it. In other words, regardless of the whether § 503.16(4) is mandatory or directory, the City is free to act in conformity with it. Moreover, Relator's argument assumes that the City Council would have decided to unleash this dangerous animal back upon the public after three unprovoked biting incidents. The argument is absurd and ignores the substantial evidence weighed and decisions made by the Lino Lakes City Council over the course of seven months and three public hearings.

CONCLUSION

The City Council had a rational basis to affirm the Police Department's determination that the dog was a dangerous animal pursuant to Lino Lakes Code § 503.15 after its second unprovoked biting incident. The City Council also had a rational basis to affirm the Police Department's determination that a subsequent offense occurred pursuant

to Lino Lakes Code § 503.16(4) after the third unprovoked biting incident. Additionally, Relator's procedural due process claims are not properly before the Court because they were not raised below, and Relator has failed to carry his burden of establishing a denial of due process. Therefore, the City Council's November 8, 2010 and November 22, 2010 decisions should be affirmed.

LEAGUE OF MINNESOTA CITIES

Date: April 6, 2011



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