

NO. A10-2143

State of Minnesota
In Supreme Court

Mitchell Sawh,

Respondent/Cross-Appellant,

v.

City of Lino Lakes,

Appellant/Cross-Respondent.

**BRIEF AND APPENDIX OF
RESPONDENT/CROSS-APPELLANT MITCHELL SAWH**

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 Respondent/Cross-Appellant
Mitchell Sawh*

LEAGUE OF MINNESOTA CITIES
Patricia Y. Beety, Esq. (#227390)
James J. Monge, III, Esq. (#29200X)
145 University Avenue West
St. Paul, MN 55101-2044
(651) 281-1200

*Attorneys for Appellant/Cross-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

STATEMENT OF THE ISSUES.....1

STATEMENT OF THE CASE.....4

STATEMENT OF THE FACTS.....6

 A. THE PARTIES6

 B. THE INCIDENTS.....7

 1. THE APRIL 8TH INCIDENT.....7

 2. INCIDENT OF OCTOBER 15, 2010.....10

 3. INCIDENT OF NOVEMBER 9, 2010.....14

SUMMARY OF ARGUMENT 20

STANDARD OF REVIEW 20

ARGUMENT 23

 I. THE FAILURE TO PROVIDE A HEARING ON THE
 “POTENTIALLY DANGEROUS” DESIGNATION
 VIOLATES DUE PROCESS..... 23

 A. SAWH WAS DEPRIVED OF A HEARING 23

 B. SAWH WAS ENTITLED TO A HEARING 24

 C. SAWH DID NOT GET A HEARING..... 25

 D. DENIAL OF A HEARING VIOLATES DUE PROCESS 26

 1. THE PRIVATE INTEREST27

 2. RISK OF ERRONEOUS DEPRIVATION 28

 3. GOVERNMENTAL INTEREST 29

II.	THE “DANGEROUS DOG” DESIGNATION WAS UNREASONABLE, ARBITRARY, CAPRICIOUS, AND AN ERROR OF LAW.....	33
A.	THE “POTENTIALLY DANGEROUS” DETERMINATION RELIED ON BY THE CITY WAS FACTUALLY ERRONEOUS.....	33
B.	THE FINDING OF “DANGEROUS” WAS UNREASONABLE, ARBITRARY, CAPRICIOUS, OR AN ERROR OF LAW	36
III.	THE ORDER TO DESTROY BRODY IS ARBITRARY, CAPRICIOUS, UNREASONABLE, OR AN ERROR OF LAW.....	39
A.	THE DESTRUCTION ORDER RELIES ON TWO PRIOR FLAWED RULINGS.....	39
B.	THE DESTRUCTION IS DEFECTIVE BECAUSE BRODY WAS PROVOKED.....	40
C.	THE CITY RELIED ON FLAWED EXPERT TESTIMONY OUTSIDE THE RECORD.	43
D.	THE CITY ERRED IN FINDING THAT ITS ONLY OPTION WAS TO ORDER BRODY BE DESTROYED.....	45
1.	THE DESTRUCTION PROVISION WAS MISINTERPRETED	45
2.	DESTRUCTION IS NOT MANDATORY	46
IV.	REMAND IS INAPPROPRIATE.....	48
	CONCLUSION.....	53

TABLE OF AUTHORITIES

	Page(s)
<i>American Dog Owners Association, Inc. v. City of Minneapolis</i> , 453 N.W.2d 69 (Minn. Ct. App. 1990).....	27
<i>Black v. State</i> , 725 N.W.2d 772 (Minn. Ct. App. 2007).....	50
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972).....	1, 24, 41
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971).....	27
<i>Boitz v. Preblich</i> , 405 N.W.2d 907 (Minn. Ct. App. 1987).....	35
<i>Bolander & 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).....	2, 47
<i>Brookfield Trade Ctr., Inc. v. County of Ramsey</i> , 584 N.W.2d 390 (Minn. 1998).....	22
<i>Brown v. Dayton Hudson Corp.</i> , 314 N.W.2d 210 (Minn. 1981).....	31
<i>Brunotte v. City of St. Paul Office Safety & Inspections</i> , No. A08-0173, 2009 WL 305152 (Minn. Ct. App. Feb. 10, 2009)(unpublished) ..	24, 41
<i>Carey v. Phipus</i> , 435 U.S. 247 (1978).....	3, 27, 51
<i>City of Barnum v. County of Carleton</i> , 394 N.W.2d 246 (Minn. Ct. App. 1986), <i>petition for review denied</i> (Minn. Dec. 17, 1986).....	3, 52
<i>Corn v. Sheppard</i> , 179 Minn. 490, 229 N.W. 869 (1930).....	1, 24, 41
<i>County of Freeborn v. Claussen</i> , 295 Minn. 96, 203 N.W.2d 323 (1972).....	42

<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	34
<i>Curtis Oil v. City of North Branch</i> , 364 N.W.2d 880 (Minn. Ct. App. 1985).....	3, 52
<i>Dietz v. Dodge County</i> , 487 N.W.2d 237 (Minn. 1992)	22
<i>Dillard v. Tahash</i> , 265 Minn. 322, 121 N.W.2d 602 (1963)	2, 47
<i>Divens v. Commissioner of Human Services</i> , No. A06-1353, 2007 WL 1470484 (unpublished)	49
<i>Fedziuk v. Comm’r of Pub. Safety</i> , 696 N.W.2d 340 (Minn. 2005)	24, 34
<i>Fuentes v. Schevin</i> , 407 U.S. 67 (1972)	24, 41, 51
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	1, 25, 44
<i>Handicraft Block Limited P’ship v. City of Minneapolis</i> , 611 N.W.2d 16 (Minn. 2000).....	31
<i>Hannan v. City of Minneapolis</i> , 623 N.W.2d 281 (Minn. Ct. App. 2001)	22
<i>Hansen v. City of St. Paul</i> , 298 Minn. 205, 214 N.W.2d 346 (1974)	31
<i>Harford v. Bd. of Regents of the Univ. of Minn.</i> , 494 N.W.2d 903 (Minn. Ct. App. 1993).....	44
<i>Head v. Special Sch. Dist. No. 1</i> , 288 Minn. 496, 182 N.W.2d 887 (1970)	42
<i>Hogue v. Clinton</i> , 791 F.2d 1318 (8th Cir. 1986)	50
<i>Holt v. City of Sauk Rapids</i> , 559 N.W.2d 444 (Minn. Ct. App. 1997), review denied (Minn. Apr. 24, 1997)	24, 41, 42

<i>Hutchinson Tech., Inc. v. Comm’r of Revenue,</i> 698 N.W.2d 1 (Minn. 2005).....	42
<i>In re Appeal of Rocheleau,</i> 686 N.W.2d 882 (Minn. Ct. App. 2004).....	22
<i>In re Blilie,</i> 494 N.W.2d 877 (Minn. 1993)	22
<i>In re Hanson,</i> No. A07-1841, 2008 WL 4133837 (Minn. Ct. App. Sept. 9, 2008), <i>rev. denied</i> (Minn. Nov. 25, 2008) (unpublished)	49
<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) (unpublished)	2, 47
<i>In re Molly,</i> 712 N.W.2d 567 (Minn. Ct. App. 2006).....	22
<i>In re: Trusteeship of First Minneapolis Trust Co.,</i> 202 Minn. 187, 277 N.W. 899 (1938).....	47
<i>Interstate Power Co., Inc. v. Nobles County Bd. Of Comm’rs,</i> 617 N.W.2d 566 (Minn. 2000)	49
<i>Mathews v. Eldridge,</i> 424 U.S. 319 (1976).....	26- 29, 32
<i>Melendez-Diaz v. Massachusetts, -- U.S. --, 129 S. Ct. 2527 (2009)</i>	34
<i>Nexus v. Swift,</i> 785 N.W.2d 771 (Minn. Ct. App. 2010).....	25
<i>Northern States Power Co. v. Blue Earth County,</i> 473 N.W.2d 920 (Minn. Ct. App. 1991) <i>rev. denied</i> (Oct. 11, 1991).....	3, 52
<i>Perovich v. Bituminous Consulting & Contracting Co., Inc.,</i> 614 N.W.2d 753 (Minn. Ct. App. 2000).....	48
<i>Riley v. Jankowski,</i> 713 N.W.2d 379 (Minn. Ct. App. 2006).....	48
<i>Sabes v. City of Minneapolis,</i> 265 Minn. 166, 120 N.W.2d 871 (1963)	34

Sawh v. City of Lino Lakes,
800 N.W.2d 663 (Minn. Ct. App. 2011)..... passim

Schober v. Comm’r of Revenue,
778 N.W.2d 289 (Minn. 2010)48

Senior v. City of Edina,
547 N.W.2d 411 (Minn. Ct. App. 1996).....22

State ex rel Indep. Sch. Dist. No. 276 v. Dep’t. of Educ.,
256 N.W.2d 619 (Minn. 1977)34, 44

State v. Behl,
564 N.W.2d 560 (Minn. 1997)22

State v. Hyland,
431 N.W.2d 868 (Minn. Ct. App. 1988).....42

Thiele v. Stich,
425 N.W.2d 580 (Minn. 1988)48

Thompson v. Comm’r,
778 N.W.2d 401 (Minn. App. 2010).....25

Tischer v. Housing and Redevelopment Authority of Cambridge,
693 N.W.2d 426 (Minn. 2005)22

Yennie v. Thompson,
No. A10-1069, 2010 WL 5293813 (Minn. Ct. App. Dec. 28, 2010) *review denied* (Mar. 15, 2011) (unpublished)31

STATUTES

42 U.S.C. § 198351

Minn. Const. art. I, §72, 23-27, 30, 32, 40-43

Minn. Stat. § 347.2235

Minn. Stat. § 347.541, subd. 3(2).....38

Minn. Stat. § 630.3047

Minn. Stat. § 645.17(3).....42

U.S. Const. amend. XIV, §1.....2, 23-27, 30, 32, 40-43

OTHER AUTHORITIES

Brooklyn Center, MN Ordinance § 1-255(5).....30

Edina, MN City Code § 300.17.....30

Hugo, MN Code of Ordinances § 10-35(5) and (6)30

Lino Lakes Ordinance 503.15.....11, 14, 45

Lino Lakes Ordinance 503.15(3)..... 9, 10, 12, 13, 28, 33, 36-41, 43

Lino Lakes Ordinance 503.15(4).....9, 10, 23, 33, 40

Lino Lakes Ordinance 503.15(5)..... 11, 36-38, 40

Lino Lakes Ordinance 503.15(6).....40

Lino Lakes Ordinance 503.15(7).....14

Lino Lakes Ordinance 503.16.....14, 19, 40, 45, 46

Moorhead, MN City Code § 3-7-13(B).....30

Golden Valley, MN Code of Ordinances § 10.03, subd. 7(I)(2)(b), (3) (2010).....30

Plymouth, MN Code of Ordinances § 915.25, subd. 6 (2010).....30

Savage, MN Code of Ordinances, § 91.11(C) and (E)(2),30

St. Cloud, MN Code of Ordinances, § 1040:80, subd. (2)(a), App. 103-10430

St. Paul, MN Code of Ordinances, § 200.11(b) (2010)30

Webster’s New World College Dictionary, 4th ed., p.9135

STATEMENT OF THE ISSUES

Issue Number 1: Did the City erroneously interpret its own Animal Control Ordinance to require that the dog be destroyed, even though it had the discretion to impose a lesser sanction?

How Issue Was Raised Below: The issue was raised in a meeting before the Lino Lakes City Council, and in the Court of Appeals below. Add. 11, App. 37.

Ruling Below: Although raised below by the Respondent/Cross-Appellant, the Appellate Court did not address this issue. Add. 28; App. 106.

How Issue Was Preserved for Appeal: This matter was preserved for appeal because the issue was raised in the proceedings below and in Respondent's Petition for conditional Review. See Add. 11-12 and Statement of the Case of Relator to Court of Appeals, 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: Did the City of Lino Lakes violate the Due Process rights of Respondent/Cross-Appellant by failing to provide him a hearing before designating his dog "potentially dangerous," prior to determining the dog "dangerous," which led to the dog being seized and ordered destroyed?

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

Ruling Below: The Court of Appeals ruled in the affirmative, holding that the failure to provide a hearing constituted a violation of Due Process. Add. 28.

How Issue Was Preserved for Appeal: This matter was preserved for Appeal because it was raised in the Statement of the Case before the Court of Appeals. *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);

U.S. Const. amend. XIV, §1; and

Minn. Const. art. I, §7.

Issue Number 3: Did the Court of Appeals correctly act within its discretion in reversing the decision of the City of Lino Lakes without remanding for further proceedings?

How Issue Was Raised Below: The City did not seek remand of the matter in the event of a reversal in the Court of Appeals.

Ruling Below: The Court of Appeals ruled in the affirmative, directing that the matter be reversed without remand. Add. 27, 28.

How Issue Was Preserved for Appeal: This matter was not preserved for Appeal because the City did not ask the Court of Appeals to remand the matter in the event of reversal in its briefing or at oral argument and did not delineate it as an issue in its Statement of Legal Issues in the Petition for Review.

Apposite Cases:

Carey v. Phipps, 435 U.S. 247 (1978);

Northern States Power Co. v. Blue Earth County, 473 N.W.2d 920 (Minn. Ct. App. 1991) *rev. denied* (Oct. 11, 1991);

City of Barnum v. County of Carleton, 394 N.W.2d 246, 250 (Minn. Ct. App. 1986), *petition for review denied* (Minn. Dec. 17, 1986);

Curtis Oil v. City of North Branch, 364 N.W.2d 880, 883 (Minn. Ct. App. 1985).

STATEMENT OF THE CASE

This case arises out of a determination by the City of Lino Lakes that (1) a 2 ½ year old dog named Brody, owned by Mitchell Sawh, is “dangerous” because he bit a person on three occasions; and (2) the dog be seized and destroyed, despite evidence that one of the incidents involved a scratch which occurred while Brody was being playful, and the other two bites occurred while persons were trespassing and the dog was provoked.

After the first incident, Brody was deemed “potentially dangerous” by the City. The City has no mechanism to contest the “potentially dangerous” designation and gave Sawh no opportunity to address or challenge that classification. After the second incident, the City declared the dog “dangerous.” Sawh appealed that determination and was given a hearing by the City Council, which affirmed the designation on November 8, 2010 based on the prior “potentially dangerous” designation.

The next day, another incident occurred, after which the City seized Brody, and ordered him destroyed. Sawh appealed that ruling to the City Council as well, which affirmed the determination and ordered that Brody be destroyed on November 22, 2010.

The City, upon further appeal, stayed its order on January 4, 2011, on condition that the dog be kenneled at a privately-owned facility at Sawh’s considerable expense. Tr. 32-33 (1/4/11).

Sawh then brought a Certiorari appeal before the Court of Appeals challenging on Due Process and other grounds both the November 8, 2010 determination that Brody is

dangerous, and the November 22, 2010 order that he be destroyed. The Court of Appeals reversed, holding that the failure to grant Sawh a hearing on the initial “potentially dangerous” designation fatally infected the subsequent proceedings. It stated: “[W]hen a city relies on the potentially dangerous declaration as a predicate for a dangerous-animal declaration, as it did in this case, the dog owner must be afforded a meaningful opportunity to challenge the potentially dangerous declaration in order for the city to satisfy the dog owner’s right to procedural due process.” *Sawh v. City of Lino Lakes*, 800 N.W.2d 663, 670 (Minn. Ct. App. 2011). The Court of Appeals declined to address the other issues raised by Sawh, including whether its determination was otherwise arbitrary, capricious and unreasonable and whether it misinterpreted its own statute. *Id.*

This Court granted the City’s Petition for Review on the issue whether a hearing was constitutionally required, and a cross-petition by Sawh regarding the City’s misinterpretation of its statute and order to destroy the dog.

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 Golden Retriever mix, whose fate is at issue here.¹ 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. 5.² 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.” App. 10. There is no mechanism to appeal the “potentially dangerous” designation, and Sawh was given no opportunity to address the classification or challenge it through any form of hearing.

¹ Brody was 2 ½ at the time of the incidents at issue. Born on March 3, 2008, he is now approaching 4 years old, having spent more than a year kenneled away from his family, awaiting his fate.

² “Add.” refers to the Addendum of Appellant/Cross-Respondent. App. refers to the Appendix of Appellant/Cross-Respondent. “RA.” refers to the Appendix of Respondent/Cross-Appellant. “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's Community Service Officer declared Brody "dangerous." Sawh appealed that determination to the City Council, as allowed under the City Ordinances. App. 27, 29. The determination was affirmed by the City Council on November 8, 2010. Add. 13. After a subsequent incident on November 9, 2010, the Police Chief ordered that Brody be seized and destroyed, which subsequently was stayed during appeal. App. 36.

After the Court of Appeals reversed due to lack of a hearing for the threshold "potentially dangerous" determination, Sawh sought to lift the stay and allow Brody to be returned to him and his family. RA-17-19. The City refused the request, RA-20, as did this Court "without prejudice to . . . any other issues that may be raised subsequently in connection with the boarding of the dog during pendency of this appeal." RA-16.

B. The Incidents

The three incidents underlying this case occurred over the course of 7 ½ months in 2010. Each arose under different circumstances and taken together, do not justify killing Brody.

1. The April 8th Incident

The first incident took place 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 him to leave the yard. Tr. 12-13, 15.³ The youth went after Brody, attempting to retrieve him. As the son reported, “[h]e 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 Brody encountered did not testify in any proceeding 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 others. The Mayor thought that a 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.

The only eye witness to that incident who testified was Sawh’s son, who observed Brody walking, and happily wagging his tail – not growling when he jumped up on the passerby. Tr. 15. Neither the officer who made a report nor the passer-by testified.

The City Council Minutes of the November 8, 2010, reflect the ambiguity of the incident denoting it a “biting/scratching incident.” Add. 11. The Court of Appeals

³ The electric fence began to malfunction in March, 2010. 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. 12, Brody was kept on a leash or tie-out when outdoors thereafter. Tr. 13-14.

agreed that “[t]he record is unclear about whether Brody scratched or bit the pedestrian” *Sawh*, 800 N.W.2d at 665, Add. 24.

Sawh’s son was notified in a letter from the City’s Community Service Officer, that Brody had been labeled a “potentially dangerous” dog as a result of the incident, accompanied by a copy of the City Ordinance. App. 10. The letter to Raun Sawh did not indicate any right to appeal the finding. The failure to do so is understandable because the Ordinance does **not** provide a right to an appeal or hearing of a “potentially dangerous” designation. Lino Lakes Ordinance § 503.15(4). Add. 7.

The Ordinance defines a “potentially dangerous animal” as one that 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. 6.

The Ordinance § 503.15(4) provides that “[t]he 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. 7.

“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. 7.

Sawh could not appeal the “potentially dangerous” designation. As the Court of Appeals found, “[n]either the written notification nor the ordinance provided relator a meaningful opportunity to challenge the potentially dangerous-animal declaration.” *Sawh*, 800 N.W.2d at 665, Add. 24. *See also* Add. 5-9. Had Sawh been given the opportunity to do so, he could have challenged the designation because Brody did not commit any of the three transgressions listed in the law: he did not “approach a person ... in an apparent attitude of attack,” did not bite anyone, and did not “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). He simply jumped up on a pedestrian in a playful manner, and the pedestrian, unfortunately, was scratched.

2. *Incident of October 15, 2010*

The second incident occurred in the Sawh’s front yard in mid-October, 2010, while Sawh’s wife was outside grooming Brody. The dog 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, the operator asked her to check whether the smoke was from 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, bit her on the hip. Tr. 7-8.

The testimony of Sawh's wife concurs with the woman, and also notes that the woman was talking on her cell phone, waiving her hands, throwing them up in the air, and speaking in a loud voice. Tr. 20-21. *Sawh*, 800 N.W.2d at 665, Add. 24.

The house cleaner acknowledged 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," and repeated several times that "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 he be "permanently removed from the city." App. 27. In her notification to Sawh, she states: "Due to incidents that occurred on 04/08/2010 and 10/15/2010, your dog has been classified as a 'dangerous animal' per Lino Lakes Ordinance 503.15. As a result of this classification you are to have your dog permanently removed from the city within 14 days." Add. 27. *See also Sawh*, 800 N.W. 2d at 665, Add. 24.

Lino Lakes Ordinance, § 503.15(5) provides for a "dangerous animal" designation when:

- (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. 7. Subdivision (3)(a) 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. 6.

The “dangerous animal” provision, unlike the “potentially dangerous” measure, does allow an appeal, which *Sawh* utilized. App. 29. The City Council heard the matter on November 8, 2010, and upheld the determination.

Affirming the “dangerous” designation, the City Council relied on the prior “potentially dangerous” designation, which *Sawh* never had an opportunity to challenge. Although there was some discussion at the hearing about the earlier incident, it was clear, as the Court of Appeals observed, that the prior “potentially dangerous” declaration was not examined by the Council, which “acted as though that declaration was not up for debate.” *Sawh*, 800 N.W.2d at 669, Add. 27. The Police Chief and City Attorney both made presentations to the Council that the dog was conclusively deemed “potentially

dangerous,” due to the April incident, the issue would not be revisited, and it formed the predicate for deciding if Brody should now be classified as “dangerous” because of the second incident, pursuant to the fifth clause, which allows an animal to be classified “dangerous” if it engages in a second incident after having been declared “potentially dangerous.”

The Police Chief’s statement was telling. He informed the Council that because the dog is “listed as potentially dangerous . . . it reached that first threshold.” He added:

“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.

The Council found the dog “dangerous” under §503.15(3)(a)(5) because Brody had previously been deemed “potentially dangerous” in April and now had a second incident in October.

The City Council based the determination of “dangerous” on the “potentially dangerous” declaration from the first incident, which Sawh was never given the right or opportunity to appeal or challenge.

While allowing Brody to remain in Sawh’s home, the Council imposed significant restrictions, including registration as a “dangerous dog”, a “dangerous” dog sign posting, the dog be muzzled and on a short leash while outdoors, and if he is left outdoors, placed in a proper enclosure. Sawh was also required to purchase a minimum of \$300,000 liability insurance and notify the neighbors of the designation. Add. 12-13. Sawh had 14

days after notice, under the ordinance, to put the restrictions in place. Lino Lakes Ordinance § 503.16(1)(f). Add. 8-9; Tr. 61-62.

3. *Incident of November 9, 2010*

The third incident occurred the day after the “dangerous dog” hearing, but before Sawh received the written notification of the findings and restrictions, and before the 14 days allowed under the Ordinance to implement the restrictions. A delivery man came to the Sawh residence with a curio cabinet. Sawh’s wife 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, and without telling her, the delivery man went downstairs to see where other furniture was to be placed. Before Mrs. Sawh could secure Brody, he came out of a kennel in the basement where he had been resting, and bit the delivery man’s hand. *Sawh*, 800 N.W.2d at 666. Tr. 112.

The Lino Lakes Police seized Brody and the Chief directed that he be destroyed under § 503.16(4), App. 36, which provides in part:

“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.”

Add. 9.

Sawh timely appealed the directive to destroy Brody to the City Council and presented a great deal of evidence in support of maintaining Brody's life. App. 37. This time he was given a hearing and submitted evidence that:

- A letter from the delivery man involved in third incident, 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." App. 53.
- The Sawh family pastor, Mark Poorman, who wrote that he had "interacted with this family pet from time to time ... [and] Brody is an active, friendly dog and I certainly had no problems in my contacts with him." He added that "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." App. 54.
- Todd Fruetel, who plays softball with Sawh's son, wrote about interactions with Brody when the dog came to the team's softball games. "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." App. 55.

- 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. App. 56.
- 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 With all the people, dogs and general commotion of a softball setting, Brody never showed any sign of aggression.” App. 57.
- Dominick Palma attested to Brody’s friendliness. He described a visit to the Sawh home when “Brody came running down the stairs ... put his front legs on my waist to do nothing more than lick my face. He was so welcoming ... he reminded me exactly of my two pups as I entered my own home.” App. 58.
- Elizabeth Cardinal declared that Brody is a “wonderful family dog and is one that I know I will always be comfortable around.” App. 59.
- 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.” App. 60.

- Kirsten Neilson described Brody as “a sweet, loving, playful dog. I do not find him threatening in the least.” App. 61.

- 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.” App. 62.

- 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.” App. 63.

See also Sawh, 800 N.W.2d at 666, Add. 25.

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

An experienced Animal Behaviorist, Carol Propotnik, examined Brody at the animal care facility where he is confined during the appeals. Tr. 88. Her report was presented to the City Council, RA-1, and she testified at the hearing 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.⁴ 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” RA-3. Advocating that Brody not be euthanized, she explained she was “staking my reputation on what I am telling you tonight.” Tr. 99.⁵ She told the Council that “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.” RA-3.

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.

⁴ 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 while he sleeps. Tr. 115-17.

⁵ Propotnik testified that an employee of 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....” Tr. 92.

This differed from 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 the *only* option under the Ordinance was to destroy Brody. During the hearing, various Council members questioned whether there was any alternative other than to destroy the dog. Tr. 117-119. The Police Chief erroneously told them there are none. He stated:

If you look under [503.16(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. 119.⁶

The Chief’s analysis was incorrect. He should have pointed out that, even if Brody bit the delivery person, the Council is not required to order Brody’s destruction, because that provision does not apply in these circumstances, and, even if it did, the term “shall” is not mandatory, as used in the Ordinance. *See infra* pp. 47-48. *Intra*.

⁶ The Chief expressed this same opinion in his memo to the City Council before the November 22, 2010 meeting, stating “[t]he city ordinance states the dog shall now be destroyed. Staff recommendation is the ordinance be followed and the dog destroyed.” App. 38.

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. 17-18. Sawh timely sought Certiorari review with the Court of Appeals, App. 106, which reversed on grounds that the City violated Sawh’s Due Process rights. The City sought review and Sawh sought conditional cross-review, which this Court accepted. Meanwhile, the dog has been in a private boarding kennel for more than a year, costing Sawh and his family some \$23.14 per day, or more than \$9,796 through the end of December, 2011. R.A. 18.

SUMMARY OF ARGUMENT

The determination of the Court of Appeals should be affirmed. The classification of Brody as “dangerous” was incorrect and he should not be destroyed because of fatal flaws in the process that led to the City’s determination that he be killed.

In order for a dog to be destroyed under 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 Ordinance did not allow Sawh, the dog’s owner, to appeal or challenge that appellation. That classification precipitated the ensuing “dangerous” designation, which then prompted the subsequent seizure and destruction order. Brody would not be on Doggie Death Row now but for the initial “potentially dangerous” determination, which was made with no hearing or right of

appeal. The lack of hearing and right to appeal is a Due Process constitutional defect because it deprived Sawh of a right to a hearing before his property was impaired.

The second incident, an innocuous bite of a trespasser, did not meet the requirements for a “dangerous” designation. The person who was bit was trespassing on Sawh’s property; provoked the canine; and as she, herself, described it, “I don’t think it’s that bad,” and “[I am] not that concerned.”

Because the first incident did not allow an appeal, and the second was provoked and 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. At the time of the third incident, Sawh had not received written notice of the decision on his appeal to the City, and resulting sanctions. In addition, the dog should not have been deemed “dangerous” based on the prior incidents. Because the “potentially dangerous” determination was defective due to a lack of a Due Process hearing, it could not form the basis for the “dangerous” determination that precipitated the order to destroy Brody. Additionally, the City erroneously believed it had no discretion to spare the dog’s life under its Ordinance, which permits, but does not mandate, destruction.

The Appellate Court’s determination that the City violated Due Process by failing to provide Sawh a hearing in connection with the “potentially dangerous” designation, and that tainted the subsequent “dangerous” designation and destruction order should be affirmed. The defective designation should be deleted, and Brody returned to his loving

family. Alternatively, the matter should be remanded to allow the City to exercise its discretion, which it erroneously failed to use before, in deciding if Brody should be killed.

STANDARD OF REVIEW

In reviewing a municipality's decision on certiorari, this Court reviews "whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992) (quotations omitted). See also *Tischer v. Housing and Redevelopment Authority of Cambridge*, 693 N.W.2d 426, 431 (Minn. 2005) (decision of public body may be reversed on certiorari review when "not supported by substantial evidence in the record"); *In re Appeal of Rocheleau*, 686 N.W.2d 882, 891 (Minn. Ct. App. 2004); *Hannan v. City of Minneapolis*, 623 N.W.2d 281, 283-84 (Minn. Ct. App. 2001). The appellate courts do not "retry the facts or make credibility determinations." *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. Ct. App. 1996).

However, this Court reviews questions of law and the construction of statutes and ordinances *de novo*. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). See also *In re Molly*, 712 N.W.2d 567, 571 (Minn. Ct. App. 2006). Likewise, the constitutionality of a statute is reviewed *de novo*. *In re Blilie*, 494 N.W.2d 877, 881 (Minn. 1993). Therefore, the lack of a right to a hearing under the Lino Lakes Ordinance must be reviewed *de novo*, as must the interpretation of the destruction provision. *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997).

ARGUMENT

I. THE FAILURE TO PROVIDE A HEARING ON THE “POTENTIALLY DANGEROUS” DESIGNATION VIOLATES DUE PROCESS

A. Sawh Was Deprived of a Hearing

The Court of Appeals correctly held that both the November 8, 2010 and the November 22, 2010 determinations by the City Council are fatally flawed because they relied 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. *Sawh*, 800 N.W.2d at 669, Add. 27.

Sawh’s son was notified in a letter from the Community Service Officer that Brody had been unilaterally labeled “potentially dangerous” because of the April 8, 2010 incident. A copy of the ordinance was attached to the letter. App. 10. The letter did not indicate there was a right to appeal, comporting with the Ordinance which provides no right to a hearing for “potentially dangerous” designations. Lino Lakes Ordinance § 503.15(4). Add. 7.

The Appellate Court held that the failure to provide a hearing or other opportunity to appeal the “potentially dangerous” designation violated Sawh’s rights under 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. *Sawh*, 800 N.W.2d at 667, 670, Add. 26, 28. It reasoned that Due Process demands that a dog owner be given a “hearing or other appeal opportunity” before a “potentially dangerous” designation is imposed and the failure to do so created “a significant risk of erroneous

deprivation of [Relator's] property . . . and additional safeguards would be beneficial.”

Id. at 669-70, Add. 27.

The tainted “potentially dangerous” designation was highly significant because, as the Court below observed, it was “used as a predicate” for the subsequent decisions by the City Council to: a) deem Brody “dangerous” and 2) order him seized and killed. Thus, the Appellate Court properly reversed the subsequent “dangerous” and “destruction” rulings of the City because both relied on the fatally flawed “potentially dangerous” designation. *Id.* at 670, Add. 28.

B. Sawh Was Entitled to a Hearing

As a threshold matter, Sawh was entitled to, but deprived of a hearing on the initial “potentially dangerous” declaration.

Property cannot be taken by a municipality without Due Process of law. *Bd. of Regents of State Colleges 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. Ct. App. Feb. 10, 2009) (unpublished). RA-76-77. Consequently, dog owners like Sawh are entitled to Constitutional protection against “unreasonable” intrusion into their ownership rights of their dogs. *See Holt v. City of Sauk Rapids*, 559 N.W.2d 444, 445 (Minn. Ct. App. 1997), review denied, (Minn. Apr. 24, 1997).

The provision of a full and fair hearing is a fundamental aspect of Due Process. As the Appellate Court recognized, “procedural due process guarantees reasonable notice

and a meaningful opportunity to be heard.” *Sawh*, 800 N.W.2d at 668 (citing *Nexus v. Swift*, 785 N.W.2d 771, 779 (Minn. Ct. App. 2010)). See also *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, 348 (Minn. 2005) (in driver’s license revocation action, at 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*, 778 N.W.2d 401, 408 (Minn. App. 2010). The failure to provide Sawh an opportunity to contest the April “potentially dangerous” dog designation violated Due Process.

C. Sawh Did Not Get A Hearing

Contrary to the City’s protestations, Sawh never received a timely hearing or other opportunity to appeal the “potentially dangerous” designation. The City’s observation that it held “two hearings” is correct. *City’s Brief*, p. 2. But they concerned the last two incidents in October and November, not the one in April that triggered the “potentially dangerous” declaration.

The “two hearings” it later conducted did not allow Sawh to challenge the “potentially dangerous” classification, which formed “the predicate” in the words of the Appellate Court, for the later “dangerous” determination and death penalty of Brody. This is abundantly clear from the record of the November 8th hearing after the second incident. The City Attorney opened that session telling the Council that “the first step is . . . to determine whether the dog is declared dangerous,” without any reference to the

“potentially dangerous” classification which had been unilaterally determined without a hearing. If there was any doubt – and there was none – that the “potentially dangerous” designation was beyond challenge, it was dispelled by the Police Chief’s remarks echoing the City’s counsel. The Chief told the Council that because “the dog was at that point listed as potentially dangerous. So it reached that first threshold.” *Sawh*, 800 N.W.2d at 669, Add. 27.

The Court of Appeals correctly found, “that [t]he record reflects that the city never notified relator that he could challenge the ‘potentially dangerous’ declaration at the November 8 hearing.” *Id.* Even though *Sawh* tried to introduce evidence at the City Council hearing concerning the October 15, 2010 incident, the Court pointed out that City Council “did not review the potentially dangerous declaration but, rather, acted as though that declaration was not up for debate.” *Id.* The Court of Appeals correctly concluded that “[n]othing in the record suggests that the city or relator approached the hearing on November 8 with an understanding that the potentially dangerous declaration was before the city for review or reconsideration.” *Id.*

D. Denial of a Hearing Violates Due Process

The U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) adopted a three factor test to determine what type of procedural protection is required. Those factors include: (1) “the private interest . . . affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) “the [g]overnment’s interest, including the function involved and the fiscal and administrative

burdens that the additional or substitute procedural requirement would entail.” *Id.* at 335. The *Mathews* test, adopted by Minnesota Courts in *American Dog Owners Association, Inc. v. City of Minneapolis*, 453 N.W.2d 69, 71 (Minn. Ct. App. 1990) was applied below in this case and is satisfied here. *Sawh*, 800 N.W.2d at 668, Add. 26.

1. *The Private Interest*

While the City has an interest in identifying and controlling potentially dangerous dogs, it has no interest in misidentifying dogs as “potentially dangerous” or “dangerous,” when they are not. *See Sawh*, 800 N.W.2d at 668, Add. 26 (emphasizing that a city has a high interest in identifying dogs that are actually dangerous). Providing no hearing before a dog is declared “potentially dangerous” and then using that label in subsequent “dangerous dog” proceedings can lead to dogs being misidentified. The misidentification of dogs as “potentially dangerous” or “dangerous,” and imposing serious sanctions on those dog owners, not only deprives the family of full enjoyment of the family pet, but also could lead members of the public to disregard such designations, much like the public would disregard tornado warnings if they were sounded each time inclement weather is on the horizon.

Sawh’s interest in Due Process cannot be minimized as the City does here.⁷

⁷ The Supreme Court has venerated Due Process: “Because the right to procedural due process is ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.” *Carey v. Piphus*, 435 U.S. 247, 266 (1978), citing *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971).

The impairment imposed by a dog owner by a “potentially dangerous” appellation is not slight. Although Brody was not taken from the Sawh family at that time, the designation constituted an impediment on the dog because it earmarked him in a way that led to the later designation as “dangerous” and then marked him for destruction. While there were no immediate sanctions, as ordered by many other municipalities, *City’s Brief*, pp. 24-25, the City’s declaration was an impediment that became dispositive at later stages.

2. *Risk of Erroneous Deprivation*

A substantial risk of erroneous deprivation, the second *Mathews* factor, exists when a dog can be labeled as “potentially dangerous” without a hearing and then that designation is used against the owner in subsequent, more serious proceedings. The “potentially dangerous” dog designation led to the October “dangerous” designation under Lino Lakes Ordinance § 503.15(3)(a). RA-27, ¶ 6; Tr. 49. Not only did the city attorney instruct the council “the first step is . . . to determine whether the dog is declared dangerous,” without mentioning the option of a potentially dangerous declaration; but the Police Chief told the Council “[i]t’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.” *Sawh*, 800 N.W.2d at 669, Add. 27. Tr. 49.

Thus, the April incident bootstrapped the subsequent October 15th incident into the “dangerous dog” category. *Id.* The October incident, based on the “potentially dangerous” designation, was then utilized in reasoning that the dog be destroyed after the

third incident with the furniture delivery man. In short, the “potentially dangerous” classification was a bootstrap – and an essential one, at that – for the later orders that Brody is “dangerous” and that he should be destroyed.

The City’s other arguments are unavailing. As indicated, Sawh never had a “meaningful opportunity” or any chance at all, to challenge the “potentially dangerous” designation, which was a *fait accompli*, at the subsequent hearings. Even if he had, *which he did not*, it would have been too little, too late. Those “two hearings” did not occur until the late fall, some eight months after the incident in April that triggered the “potentially dangerous” classification. As the Appellate Court noted, any belated opportunity to challenge the designation would be violative of Due Process because it would not be “heard at a meaningful time.” *Sawh*, 800 N.W.2d at 669, Add. 27.

Because the “potentially dangerous” designation was unconstitutional for want of a hearing, the subsequent reliance on that designation as a “predicate” to attach a “dangerous” label, and then for the order of destruction, offends Due Process.

3. *Governmental Interest*

The third factor favors a hearing, too. While the City has a strong interest in animal control, it can satisfy that interest by providing a hearing before declaring a dog “potentially dangerous.” The City does allow hearings before the City Council when a dog is to be declared “dangerous,” as Sawh received here, and there is no reason, other than administrative “concerns,” (a euphemism for laziness) to disallow one for a “potentially dangerous” classification.

The feasibility of providing a hearing is reflected in the experience of other communities that provide notice of the right to appeal and an in-person hearing for a “potentially dangerous” designation. See *Golden Valley, MN Code of Ordinances* § 10.03, subd. 7(I)(2)(b), (3) (2010), App. 84-85; *Plymouth, MN Code of Ordinances* § 915.25, subd. 6 (2010), RA-31-32; *St. Paul, MN Code of Ordinances*, (SPCO) § 200.11(b) (2010), App. 102; *St. Cloud, MN Code of Ordinances*, § 1040:80, subd. (2)(a), App. 103-104; *Savage, MN Code of Ordinances*, § 91.11(C) and (E)(2), RA-33. The cost is minimal, but the value to the dog owner is substantial.

The City’s plea for Due Process to be “flexible” *City Brief*, p. 17, is laudable and practical. But the issue here is not flexibility. A “potentially dangerous” hearing may not partake all the features of a formal judicial proceeding, but it requires something more than nothing, which is what the City gave Sawh.

The City’s argument that the hearing afforded by four other municipalities cited below involves more onerous sanctions accompanying “potentially dangerous” designations is not dispositive. *City Brief*, pp. 24-25. The point is those municipalities – and others – do not find it overly burdensome or expensive to accord a dog owner a hearing before deeming a canine “potentially dangerous.” The Due Process rights of dog owners in Minnesota ought not vary – or be diminished – because of where they happen to live.⁸

⁸ In addition to the cities referenced by the Court of Appeals, other Minnesota municipalities grant hearings on “potentially dangerous” animals. *E.g.* Brooklyn Center Ordinance, § 1-255 (5), RA-37-38; Edina City Code, § 300.17, RA-45-46; Hugo Code of Ordinances, § 10-35 (5) and (6), RA-49; Moorhead City Code § 3-7-13 (B), RA-51.

Finally, the City's argument that it should not give dog owners a hearing for fear of potential civil liability against the municipality under *Hansen v. City of St. Paul*, 298 Minn. 205, 214 N.W.2d 346 (1974) is mistaken. The City overstates prospective municipal liability by disregarding immunity doctrines that would impede any such litigation. In *Hansen*, the City received a report of a severe attack by two dogs which remained at large. Two officers assigned to pursue the dogs took a lunch break rather than continue pursuit. During that lunch break the dogs attacked and injured Hansen. *Id.* at 298 Minn. at 206-7, 214 N.W.2d 347-48.

But this situation is different. Where a City conducts a hearing to determine whether a dog is potentially dangerous or dangerous, the exercise of that discretion is protected by quasi-judicial immunity. See *Handicraft Block Limited P'ship v. City of Minneapolis*, 611 N.W.2d 16, 24 (Minn. 2000) (quasi-judicial immunity attaches to City's designation of buildings for heritage preservation even if decision erroneous or ill-advised); *Brown v. Dayton Hudson Corp.*, 314 N.W.2d 210, 214 (Minn. 1981) (city council acts in quasi-judicial capacity when it investigates a situation, considers facts in light of a prescribed standard, and renders a binding decision on the claim); *Yennie v. Thompson*, No. A10-1069, 2010 WL 5293813, at *5 (Minn. Ct. App. Dec. 28, 2010) *review denied* (Mar. 15, 2011) (unpublished), RA-73.

Since the City's determinations here are quasi-judicial, it could defend any such claim based on quasi-judicial immunity. Moreover, the argument assumes that the designation is correct, without giving the owner an opportunity to challenge it, which is

anathema to Due Process. Under the City's argument, it need not give a dog owner any hearing ever because the owner might prevail.⁹

In sum, the three *Mathews* prongs are satisfied here, activating the right to a Due Process hearing. The City denied Sawh of a hearing on the "potentially dangerous" classification. Sawh was severely prejudiced by the deprivation because that fiat, beyond appeal or other challenge, formed the basis for the later decision to classify Brody as "dangerous" and for the order that he be destroyed. Because the "potentially dangerous" designation prompted the "dangerous" one, which triggered the destruction order, the lack of a hearing taints them all and warrants reversal.

Because the *Mathews* standards are satisfied, Sawh was entitled to a hearing before his dog was declared "potentially dangerous." As the Court of Appeals correctly found, the City's failure to provide him a hearing, and then using the tainted "potentially dangerous" label against him in two subsequent hearings, transgressed his Due Process rights under the Federal and State Constitutions. *Sawh*, 800 N.W.2d. at 670, Add. 28. This dereliction requires reversal of both determinations.

⁹ The City's argument could be extended to denying trials to anyone accused of an offense for fear that they might be acquitted and then, if they transgress again, the City could be sued by a victim. This argument is an equivalent to saying no process is due to anyone.

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

Having found that the City transgressed Sawh’s constitutional rights by failing to provide a hearing on the “potentially dangerous” designation, the Court of Appeals did not address whether the City’s findings were otherwise faulty.

But they were. 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; and (3) the City failed to exercise its discretion in determining whether Brody should be executed.

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

Even if Sawh had been provided Due Process regarding the “potentially dangerous” designation, *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. 7. 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. 6.

The City did not establish that the April incident satisfies either of these prongs. The pedestrian was not bitten or approached “in an apparent attitude of attack....” Neither the pedestrian nor the animal control officer who spoke to him testified at any of the hearings, and were not available for cross examination. Add. 11, 16-18; Tr. 4. Thus, the only evidence entered by the City regarding the first incident, a picture of the injury and a hearsay police report, Tr. 4, should be disregarded as hearsay. 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 witnesses to attend the hearing and to cross-examine persons who prepared these reports.” *See also State ex rel Indep. Sch. Dist. No. 276 v. Dep’t. of Educ.*, 256 N.W.2d 619, 627 (Minn. 1977) (citation omitted) (“administrative agency cannot, at least over objection, rest its findings of fact solely upon hearsay evidence which is inadmissible in a judicial proceeding”); *Sabes v. City of Minneapolis*, 265 Minn. 166, 176, 120 N.W.2d 871, 876 (1963). The reports of the animal control officers do not fill that void. *See Crawford v. Washington*, 541 U.S. 36, 54 (2004) (“testimonial” hearsay not admissible unless witness appears at trial or defendant had prior opportunity to cross-examine); *Melendez-Diaz v. Massachusetts*, -- U.S. --, 129 S. Ct. 2527, 2532 (2009) (technician who performed forensic analysis must testify in person, subject to cross-examination).

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 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, 4th ed., p.91 (2004). RA-55. 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 or other non-aggressive activity is not "potentially dangerous" under the measure.¹⁰

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

¹⁰ While a dog that injures another during non-aggressive activity is not "potentially dangerous" the owner could still be civilly liable for injuries caused by the dog. *See Boitz v. Preblich*, 405 N.W.2d 907, 910 (Minn. Ct. 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” 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 also was unreasonable, arbitrary, and capricious. Under the Ordinance, an animal may be deemed “dangerous” if:

- 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
- a. 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. 7. “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. 7.

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 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 complainant’s conduct.

The house cleaner who walked through Sawh’s yard without permission to investigate smoke coming from a controlled fire in the backyard of Sawh’s neighbor admitted the bites were not serious. Tr. 8. The lady was talking on her cell phone, waving her hands, throwing them up in the air, and speaking loudly. 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 the bite isn’t “that bad” and “I really still to this day am not that concerned about the bite.” Tr. 8, 10.¹¹

The City’s contention that Brody could have been labeled “dangerous” irrespective of the prior “potentially dangerous” designation is incorrect. City’s Brief, p. 21. The April incident, which led to the “potentially dangerous” designation, was essential to the Council’s subsequent “dangerous” appellation after the October incident. The City Attorney said so, as did the Police Chief. *Sawh*, 800 N.W.2d at 669, Add. 27.

The Council based its “dangerous” designation on the portion of its Ordinance that allows a dog to be deemed “dangerous” if it bites someone after having been previously declared “potentially dangerous.” § 503.15(3)(a)(5), Add. 6. This was the sole expressed basis for that decision. *Sawh*, 800 N.W.2d 669, Add. 27. Nothing in the record suggests otherwise.

The City’s new argument that the dog could have been declared “dangerous” for some other reason under the Ordinance is a retroactive attempt to re-invent reality. None of the City’s arguments support reversal of the Appellate Court’s decision.

A dog may be “dangerous” if it has, when unprovoked, bit, attacked, or threatened someone under § 503.15(5)(a). Section 503.15(5)(a) refers to the definition of damages in § 503.15(3)(a), but all of those elements require a finding of lack of provocation.

¹¹ 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.

Brody was provoked by the woman walking across the Sawh's lawn and waving her arms in a way that she admitted possibly "aggravated" the dog. Tr. 8.

The City's claim that Brody could have been called "dangerous" after the October incident under its "2 bite" provision, § 503.15(3)(a)(4), Add. 6, also is misleading. Sawh never had a chance to contest whether the first incident was a bite or scratch. Moreover, that provision applies only to unprovoked attacks, § 503.15(5)(a), Add. 7, which the City never found occurred on these occasions. Sawh was not given an "opportunity at a meaningful time" to raise either issue, and it is way too late for the City to address them now.

The City's reference to state law allowing a hearing does not aid its position depriving Sawh of one. *City's Brief*, p. 22. Although Minn. Stat. § 347.541, subd. 3(2) allows owners to request a hearing on a "dangerous" designation and, "if applicable prior potentially dangerous dog declarations," the City never granted that opportunity to Sawh. It cannot justify its Due Process deprivation on a statutory scheme that it never activated or implemented.

Finally, the City's assertion that it gave Sawh a hearing before Brody was ordered destroyed is, again, too little, too late. *City's Brief*, p. 22. The gravamen here is the failure to grant a hearing at the *beginning of the process*, when the dog was declared "potentially dangerous," which was a predicate for the later "dangerous" determination and ensuing destruction hearing. Granting a hearing at the end is akin to denying an accused a trial but then giving a hearing after sentencing.

Under these circumstances, the “dangerous” finding is unfounded because the April designation should be disregarded, and the October incident should have resulted, 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 here. 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 constituted purposeful conduct that “excited, stimulated, agitated, or disturbed” Brody, a “dangerous” finding is precluded under the Ordinance § 503.15(3)(d). Add. 7.

III. THE ORDER TO DESTROY BRODY IS ARBITRARY, CAPRICIOUS, UNREASONABLE, OR AN ERROR OF LAW

The seizure of Brody and order to destroy him after the November incident with the furniture delivery man 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 the record; and (4) the City misinterpreted its Ordinance in refusing to exercise its discretion.

A. The Destruction Order Relies On Two Prior Flawed Rulings

The 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, *as they should*, 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, can result in a

“potentially dangerous” ruling. Lino Lakes Ordinance §§ 503.15(3) (a) and (b) and 503.15(4) and (5). Add. 6-7.¹² A second incident results in a dangerous finding. Lino Lakes Ordinance 503.15(3)(a)(4), Add. 6. 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. 9. 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 are defective, the order to destroy Brody also falls.

B. The Destruction Is Defective Because Brody Was Provoked

The destruction order 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 order to destroy. Lino Lakes Ordinance § 503.15(4) and (5). Add. 7.

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.

¹² If sufficiently serious, even one bite could result in a destruction order under the Ordinance. Lino Lakes Ordinance § 503.15(6). Add. 7.

The delivery man expressed remorse for his gaffe, 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." App. 53: (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 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. 7. 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.

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, RA-76-77; *Corn*, 179 Minn. at 492, 229 N.W.2d at 870, Sawh is entitled to constitutional protection against an "unreasonable" intrusion into his 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. Ct. App. 1988) and *County of Freeborn v. Claussen*, 295 Minn. 96, 100, 203 N.W.2d 323, 326 (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. § 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 or of this state . . .”). *See also Hutchinson Tech., Inc. v. Comm’r of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005) (“[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”) (quoting *Head v. Special Sch. Dist. No. 1*, 288 Minn. 496, 506, 182 N.W.2d 887, 893 (1970)).

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. 7. 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 “destruction” hearing, Sawh introduced the testimony of an 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 kenneled since the November 2010 incident, he should not be destroyed and could be returned safely to the Sawh’s. Tr. 89-91. 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, allowing Brody to be properly socialized. Tr. 91; RA-3. 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 was “staking my reputation on what I am telling you tonight,” that Brody need not be euthanized. Tr. 98-99.

In contrast to her expert opinion, the Mayor stated that some unidentified 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 gave that palpably incorrect advice to staff or the qualifications of that person. Nor did he say who conveyed the information to him. 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. Ct. App. 1993), *overruled on other grounds*, *Shaw v. Bd. of Regents of the Univ. of Minn.*, 594 N.W.2d 187, 190 (Minn. Ct. App. 1999) (due process requires notice, a hearing, an opportunity to present witness and an opportunity to cross examine witnesses). *State ex rel. Indep. Sch. Dist. No. 276*, 256 N.W.2d at 627. See pp. 25, 34-35, *supra*.

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 ... [w]ell, everybody in behavior now knows that you can socialize a dog after that period, it just takes a little bit longer.” Tr. 114.

The Mayor’s statement citing an unidentified source from another unknown one 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 Finding That Its Only Option Was To Order Brody Be Destroyed.

1. *The Destruction Provision Was Misinterpreted.*

The City erroneously interpreted its Ordinance as providing that if it found Brody bit the furniture deliveryman, it was required to order 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.

The Ordinance 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). § 503.16(4), Add. 9.

The City erred in interpreting its Ordinance by improperly equating the acts of the dog with those of “the owner.”

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 under the terms of the Ordinance. Lino Lakes Ordinance 503.16(2), Add. 9-10. *See also* Tr. 131. Moreover, there is no evidence that the bite to the deliveryman was

due to Sawh's failure, as owner, to take any of the precautions that had not yet gone into effect.

2. *Destruction Is Not Mandatory*

The City also erred when it interpreted the Ordinance as *requiring* it to destroy Brody if a second bite occurred after being declared "dangerous." The failure to recognize it had discretion to follow another course of action is an error of law requiring reversal.

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 Police Chief erroneously instructed 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 – the owner 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 Council members and Mayor were told – and believed – that they had only one option under their Ordinance, to order Brody 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 of First Minneapolis Trust Co.*, 202 Minn. 187, 190-92, 277 N.W. 899, 901 (1938):

Ordinarily, the word '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 and those 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 Nelson*, No. A07-1355, 2008 WL 2651155, *5-6 (Minn. Ct. App. 2008), (unpublished) *rev. denied* (Minn. Sept. 23, 2008), RA-61, the Court refused to invalidate a civil service commission ruling issued 452 days after the hearing despite a Civil Service Rule required that the hearing officer "shall" file its determination "within forty-five 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 "when a statute – which 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. *See also Dillard v. Tahash*, 265 Minn. 322, 324, 121 N.W.2d 602, 603 (1963), (habeas corpus denied to criminal defendant who 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 required by Minn. Stat. § 630.30, because although the statute used the word "shall," "its provisions are intended for the protection of the public and not for the defendant").

Likewise here, the word “shall” in the 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, the City Council members and 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. Because they relied on erroneous legal premises, their decision must be reversed. *See Riley v. Jankowski*, 713 N.W.2d 379, 401 (Minn. Ct. App. 2006) (reversing ALJ Panel Determination on Certiorari review, in part, “[b]ecause the panel acted under an erroneous theory of law ...”); *Perovich v. Bituminous Consulting & Contracting Co., Inc.*, 614 N.W.2d 753, 755-56 (Minn. Ct. App. 2000) (on Certiorari review, reversing decision of the Department of Economic Security based on error of law).

IV. REMAND IS INAPPROPRIATE

Due to the series of errors, by the City, reversal is required. Remand is not.

While now urging remand, *City's Brief*, pp. 28-30, the City did not seek remand before the Court of Appeals. It should not be heard to complain that it did not get the relief it now seeks when it did not request that relief below. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (reviewing court will not address issues not raised below); *Schober v. Comm'r of Revenue*, 778 N.W.2d 289, 294 (Minn. 2010) (“We generally do not address issues not raised below”).

Even if the City had sought remand below, *which it did not*, in this certiorari appeal the court should not remand. On certiorari review “[T]he court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision *Divens v. Commissioner of Human Services*, No. A06-1353, 2007 WL 1470484, *2 (Minn. Ct. App. 2007, review denied (Aug. 7, 2007) (quoting Minn. Stat. § 14.69 (2006)). RA-83. The Appellate Court did not abuse its discretion when it reversed, without remand.

As stated in *In re Hanson*, No. A07-1841, 2008 WL 4133837, *4, (Minn. Ct. App. Sept. 9, 2008), rev. denied, (Minn. Nov. 25, 2008) (unpublished), “[g]enerally, if a decision is not supported by substantial evidence, it is simply reversed.” RA-59, citing *Interstate Power Co., Inc. v. Nobles County Bd. of Comm’rs*, 617 N.W.2d 566, 577 (Minn. 2000) (recognizing the “general principle that when a governmental body denies a permit with such insufficient evidence ... the decision is arbitrary and capricious, [and] the court should order issuance of the permit”).

There may be instances when the record “is so inadequate that judicial review is impossible,” and remand is needed to flesh out the record, *In re Hanson*, 2008 WL 4133837, *4, but this is not one of them. RA-60. The Court of Appeals did not find the record inadequate, but deemed the record of the April incident non-existent because no hearing was conducted. The Court explained, “(e)ven if the city council would have reviewed the April 2010 potentially dangerous declaration of Brody at the November 8 hearing, we question whether the review would have been timely.” *Sawh*, 800 N.W.2d at 669. Add. 27. In fact, the City did not review the April incident at all in November

because both the City Attorney and Police Chief told the Council members they did not have to.

The Court of Appeals also was correct in questioning the timeliness and difficulty of reviewing the matter on a potential remand. *Id.* If remanded, any new hearing would occur about two years after the incident. It would be hard to track down witnesses and difficult for the witnesses to remember the alleged incident after the passage of so much time. *See Black v. State*, 725 N.W.2d 772, 776 (Minn. Ct. App. 2007) (motion to withdraw guilty plea denied because although not untimely, certain evidence had been “destroyed, and witnesses’ memories of the events have likely faded”).

The case of *Hogue v. Clinton*, 791 F.2d 1318 (8th Cir. 1986), relied on by the City, does not support remand. In *Hogue*, the Federal District Court held that the Plaintiff had been deprived of liberty and property interests without Due Process of law when discharged from government employment. The Eighth Circuit reversed, holding that as an at-will employee, Hogue had no property interest in continued employment, but found that the district court’s findings were insufficient to determine whether he had a liberty interest claim, and was, therefore entitled to a “name clearing hearing.” *Id.* at 1325. The Eighth Circuit remanded the matter to the District Court, not to the governmental entity, to make those determinations, and to award damages if a violation was found. *Id.* at 1323, 1325.

The City’s claim that Sawh suffered no prejudice by the lack of a hearing concerning the April incident is wrong. The record clearly reflects that the City Council relied upon the constitutionally infirm April “potentially dangerous” finding for the

November 8 determination, rendering it in violation of Due Process, and relied on both the improper April and the tainted November 8 “dangerous” decision for the November 22 Order finding that Brody’s life be terminated. Because all the City’s decisions bore the unconstitutional taint of April decision, which was made without notice and a hearing in violation of Due Process, the City’s determinations cannot be corrected by remand.

The City’s reliance upon *Carey v. Piphus*, 435 U.S. 247 (1978) also is misplaced. *Carey* concerned a claim under 42 U.S.C. § 1983, for injunctive relief and damages for failure to provide a hearing in violation of Due Process in suspensions of two public school students, one for smoking marijuana and the second for violating the school’s policy against male students wearing earrings. The District Court held that the students were entitled to declaratory and injunctive relief, but not damages. *Id.* at 251-52.¹³ The Federal Appellate Court agreed Due Process had been violated, but reversed the limitation on damages and remanded for additional evidence. On appeal, the Supreme Court further expanded the scope of damages. *Id.* at 252, 263-64.¹⁴

Thus, *Carey* was remanded not to the school board for the chance to conduct the improperly omitted hearing, but to the Federal District Court for a determination of damages. *Id.* at 266-67.

¹³ The Supreme Court notes that “for reasons that are not apparent the court failed to enter an order to that effect. Instead, it simply dismissed the complaints.” *Carey*, 435 U.S. at 252.

¹⁴ The *Carey* Court noted “It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing” *Carey*, 435 U.S. at 266 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972)).

Even if this matter had not been overturned based on a Constitutional violation, *which it was*, remand is inappropriate because of the risk the Council may simply rubber stamp its earlier decision. In *Northern States Power Co. v. Blue Earth County*, 473 N.W.2d 920 (Minn. Ct. App. 1991) *rev. denied* (Oct. 11, 1991) the county denied NSP's application for an ash landfill operation license. The Court held that the license denial was not supported by the record and, ordered the county to issue the license rather than remand. The Court noting that it "may decide not to remand where there is a risk that any later findings made by the County Board would merely rationalize its previous decision." *Id.* at 923, citing *City of Barnum v. County of Carleton*, 394 N.W.2d 246, 250 (Minn. Ct. App. 1986), *petition for review denied* (Minn. Dec. 17, 1986); *Curtis Oil v. City of North Branch*, 364 N.W.2d 880, 883 (Minn. Ct. App. 1985).

Here, the City Council appears significantly invested in rubber stamping its earlier decision. Its findings tend to ignore the mitigating testimony of witnesses, while exaggerating the negative testimony against Brody. See pp. 15-19, *supra*.

Thus, remand would be a waste of time, expense, and judicial resources. Brody should be removed from Doggie "Death Row" and returned home, not remanded. The poor dog has been away from his family for more than a year, kenneled at a cost in excess of \$23.14 per day. RA-18. Any remand would prolong the separation and unreasonably increase the costs for everyone.

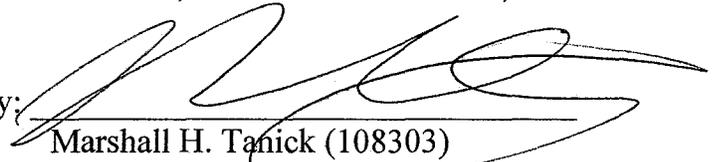
CONCLUSION

For the above reasons, the determination of the Court of Appeals reversing the decision of the City of Lino Lakes that Mitchell Sawh's dog Brody is "dangerous" and reversing the Order of the City of Lino Lakes that he be seized and destroyed should be affirmed, and the City should be directed to return Brody to his owner, Respondent/Cross-Appellant Sawh, without delay or limitation.

MANSFIELD, TANICK & COHEN, P.A.

Date: December 15, 2011

By:



Marshall H. Tanick (108303)
Teresa J. Ayling (157478)
220 South Sixth Street, #1700
Minneapolis, MN 55402-4511
(612) 339-4295

**ATTORNEYS FOR
RESPONDENT/CROSS-APPELLANT
MITCHELL SAWH**