

Nos. A06-0387 and A06-518

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State of Minnesota  
**In Court of Appeals**

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

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**REPLY BRIEF OF RELATORS ROGER E. NELSON, DEBORAH A. NELSON,  
JEREMY G. DICKMANN AND SARA L. DICKMANN  
AND SUPPLEMENTAL APPENDIX**

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**I. THE CONDITIONAL USE PERMIT WAS GRANTED ARBITRARILY, CAPRICIOUSLY, AND UNREASONABLY**

The Conditional Use Permit (“CUP”) for McDuffee to run a large-scale dog-breeding operation was granted arbitrarily, capriciously, and unreasonably by the Morrison County Board of Commissioners (“County”). The Respondents County and CUP applicant Gary McDuffee seek to avoid the merits of the issues by claiming that none of them is properly before the Court.

They incorrectly assert that Relators have waived most of their arguments by not raising them during the zoning process before the Planning Commission and County Board, that the matters they now raise are “speculative,” that this Court lacks jurisdiction over environmental-related concerns, and that the County need not reopen the proceedings to accept the new data submitted by Relators because the County Board members already had made their minds up and did not need to be bothered by any new information.

These arguments lack merit. In granting the CUP, the County glossed over, or ignored, important information and blatantly disregarded other highly pertinent data. In so doing, the County gave a free-pass to McDuffee to operate a facility that is incompatible with the County’s own zoning requirements, as well as State and Federal law. Accordingly, the CUP should be reversed.

**II. RELATORS HAVE NOT “WAIVED” THEIR CONCERNS**

Both the County and McDuffee contend that Relators cannot raise most of the issues they now assert because they did not bring them up during the County’s zoning

process. (McDuffee's Brief 25-27; County's Brief 23.) Their argument is both ironic and incorrect.

It is ironic because the County failed to give notice to Relators when it *de facto* amended the CUP on February 7, 2006, and refused to allow the Relators to present evidence when they sought reconsideration under zoning ordinance § 507.4 and § 908.3, which allows the County to revoke a CUP because of false or inaccurate information. Relators and others presented information that McDuffee had failed to apprise the County, during the CUP process, of information that the County Administrator himself deemed to be "very, very useful information, very, very pertinent information." (Record<sup>1</sup> at 184; TR CB2, p. 4.) Despite its relevance, the County Board refused to consider it, purportedly because it was "one sided and it would be unproductive," although it had previously received ample data from McDuffee that certainly was "one sided" from his standpoint, too. (App. 34.) Condemning Relators for not raising certain issues that the County refused to allow them to address is a bit like the proverbial pot calling the kettle black.

But Relators did, in fact, raise critical zoning-related concerns to the Planning Commission and County Board prior to issuance of the CUP. McDuffee erroneously states that Relator Sara Dickmann objected at the Planning Commission hearing "only on the ground of alleged activities of other kennels" affiliated with McDuffee. (McDuffee's Brief 27.) In fact, she specifically raised "concerns regarding noise and odor" at the Planning Commission. (McDuffee's Brief 10.)

The County recognizes that there was considerable discussion at the meetings regarding “manure practices,” which is a vital underlying issue in this proceeding. (County’s Brief 17.) Relator Roger Nelson, for his part, expressed that he and the neighbors were “very concerned about the environmental effects” of the proposed CUP. (McDuffee’s Brief 11.) Prior to the meeting, he had sent two letters to the Minnesota Planning Environmental Quality Board. In the first letter, which he copied to the Morrison County Zoning and Planning Administrator, he raised concerns about the stream on the south side of the property “which leads to several lakes” and the “wildlife pond and pool” on the property. He noted that the “U.S. Fish and Wildlife Department has expressed concerns ... as to the affect and impact this could have to the surrounding habitat and environment.” (App. 73, R. at 96.) In a subsequent letter, which was forwarded to the County, Relator Nelson expresses concerns about the impact from runoff and noise on the area and notes that the U.S. Fish and Wildlife Department expressed concern about the potential impact to the \$15,000 worth of improvements to the natural habitat it recently had made. (App. 74, R. at 97.)

Nelson was not alone in raising concerns about environmental effects. The District Manager for the County Soil and Water Conservation District pointed out a number of problems arising out of animal run-off and its potential deleterious impact on nearby ground water, wetlands, drainage ditches, and surrounding properties. (App. 70, R. at 104; Relators’ Brief 9-10.)

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<sup>1</sup> Citations to the record will hereinafter be abbreviated to “R.”

The County blithely disregarded these concerns, insouciantly pointing out that McDuffee planned to store animal waste on the premises in the winter and then have it spread on a neighboring farmer's fields during the summer, (County's Brief 9). But this does not allay the environmental concerns raised by the County's own personnel, much less those raised by Relators.

In short, the County turned a blind eye to the serious environmental concerns raised. Addressing environmental concerns is a necessary criteria for determine whether to grant a CUP under § 507.2.a.4. of the zoning ordinance, which requires the Board to take into account the effect of the CUP upon the "existing land use and the environment." (App. 46, R. at 262.)

Not only did the County turn a blind eye to environmental concerns, but it gave a deaf ear to noise problems, as alluded to by Relator Dickmann. The noise and related congestion stems from the number of employees that will be needed at the facility in order to provide minimally-adequate care and treatment for the 600 adult dogs and unlimited puppies that are allowed under the CUP. (Relators' Brief 19-24.)

McDuffee's observation that the 600 dog limit is a maximum, and that he is "currently operating the kennel with substantially less than 600 dogs and keeping them all inside" is irrelevant. (McDuffee's Brief 28.) There is no support in the record for what McDuffee has done since the CUP has been granted. Even if such support existed, the allegation that McDuffee currently has less than 600 dogs is not relevant to whether

the CUP was properly issued.<sup>2</sup> The permit allows him to have 600 dogs and he has not committed to a lesser number. *See Edling v. Isanti County*, A05-1946, 2006 WL 1806397, \*3 (Minn. Ct. App. 2006) (unpublished) (Reply App. 3) (CUP revoked where land owner exceeded use he represented he would maintain).<sup>3</sup>

McDuffee's contention that Relators' calculations of the number of employees and concomitant congestion and noise consists of "speculative predictions" is not so. (McDuffee's Brief 30.) Neither an expert witness nor precise scientific data is required to take a neighbor's concerns out of the realm of speculation and have them classified as sufficient specific to support a revocation determination. For example, in *Edling* (Supp. App. 1), the court held that public concerns about the "lack of fencing around large pits, excessive dust, and traffic concerns" were sufficiently specific to provide a legally sufficient reason for revocation of a CUP. *Id.* at \*4 (Supp. App. 3-4.)

The points raised by Relators are not the type of speculative, vague opinions condemned by the case law, but rational assumptions based on the minimum care required under federal and state law, elementary mathematical calculations, and a

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<sup>2</sup> McDuffee states in his brief that "decisions whether to fill the dog kennel to the allowed 600 maximum or to allow any dogs outside are McDuffee's decisions." (McDuffee's Brief 28.)

<sup>3</sup> In another bit of irony, the County and McDuffee decry Relators for submitting evidence outside of the record, consisting of health-related and scientific data from unimpeachable sources such as the Center for Disease Control, while they themselves argue facts not in the record, and not even in existence, at the time of the zoning proceedings.

common sense conclusion that it is not possible for an employee in 4.2 minutes to clean a dog's cage, feed, and water, socialize and exercise the dog, perform a portion of the more thorough cleaning required, perform record keeping, take care of the numerous puppies and more. (Relators' Brief 20-24.<sup>4</sup>) Rather than relying on baseless speculation, which is impermissible, Relators predicate their position on mathematical calculations showing that substantially more employees would be needed to operate the kennel, in accordance with the law, resulting in a substantial amount of congestion and related noise that would occur if McDuffee carries out his plans to the maximum allowed by the CUP.

The County's contention that the concerns about noise and congestion raised by Relators are derived from compliance with "best standards" practices, which are only recommendatory and not required under Minn. Stat. § 346.58 is equally specious. (County's Brief 15.) The figures used to approximate the necessary number of employees and related congestion and noise are conservative ones based upon minimally-acceptable standards under federal laws and regulations which are mandatory. 7 U.S.C. §§ 2132(f), 2133, 2134 and 2143; 9 C.F.R. §§ 2.40 (health monitoring), 2.75 (recordkeeping), 3.1 (cleaning), 3.8 (exercise), 3.9 (feeding), 3.10 (watering), 3.11 (housekeeping and pest control), 3.12 (employee training). (See Relators' Brief 20-21.)

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<sup>4</sup> McDuffee's contention that the "Relators' concerns as to overcrowding are based on speculation" is disingenuous. (McDuffee's Brief 37.) A Department of Agriculture Inspection of March 1, 2006 at the new kennel again showed failure to comply with space requirements for the dogs, although he subsequently corrected the problem. (Supp. App. 6-8.) This violation is one of the types of violations McDuffee has had repeatedly at prior kennels. (App. 11, 14, 15, 16, 19, 21, 24, 25, 27, 30.)

Nor is Relators' argument predicated upon the kind of general, unsupported neighborhood opposition that the courts have found to be an impermissible consideration. *E.g., Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335 (Minn. 1984). That line of cases involves anecdotal, unsubstantiated tales by neighbors, which the courts have found wanting. In the present case, Relators have relied upon empirical, mathematical, medical, and scientific data that goes beyond shrill outcries to reflect that there will be too many tales at this facility. *See Edling*, 2006 WL 1806397, \*4. (Supp. App. 3-4.)

### **III. THE BOARD DISREGARDED THE NEGATIVE EFFECTS OF WASTE UPON THE ENVIRONMENT**

The Board acted even more arbitrarily, capriciously, and unreasonably in how it handled the environmental and public health issues. As indicated, its own District Manager for Soil and Water Conservation raised serious concerns about the run-off of feces and urine from the premises and their degradation on the surrounding environment, a concern shared, and expressed, by Relators. (*See* Appellants' Brief 7, 28-34.) The Board and County now respond by attacking the need for an Environmental Assessment Worksheet (EAW), an issue not raised by Relators in this proceeding nor before this Court.<sup>5</sup>

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<sup>5</sup> A separate proceeding was brought by Relators against the County and McDuffee in Morrison County District Court that specifically addresses the EAW issue, along with the common law nuisance claim. *Nelson, et al. v. Morrison County*, File No. CX-06-162. Under Minn. Stat. § 116D.04, subd. 10, that issue must be raised, in the first instance, before the trial court and not this court.

The County goes to great lengths to defend the lack of an EAW, *even though it is not an issue before this court.* (County's Brief 8.<sup>6</sup>) Likewise, McDuffee vehemently argues that this court currently has "no jurisdiction" over the EAW issue. (McDuffee's Brief 39-40.) But Relators do not argue against either of those propositions in the context of this appeal. The EAW issue is to be decided, in the first instance, in the trial court, where it now is pending, not by this court.

The question of whether an EAW is required does, however, implicate an important issue that was raised by Relators in the zoning proceedings and addressed in this appeal: whether the CUP comports with the "existing land use and the environment," as required by § 507.2.a.4. of the zoning code. (App. 46, R. at 262.) The adverse environmental affects of the waste run-off were attested to by the County's own District Manager for Soil and Water Conservation. (App. 70, R. at 104.)

The District Manager points out that because the facility "will produce a sizable amount of animal waste," that soil and manure testing should be required in order to

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<sup>6</sup> McDuffee maintains that the puppy mill is a feedlot and is exempt from the EAW process because he is limited to 600 breeding dogs. Relators maintain that the puppy mill is not a feedlot because McDuffee is raising dogs as companion animals, not as livestock for consumption and therefore, the Department of Agriculture Regulations apply, not feedlot regulations, which do not mention dogs. *See* 40 C.F.R. 123.23, 7 U.S.C. 2132-2134, 2143, and 9 C.F.R. 2.4-3.12. Even if it is a feedlot, the number of animal units is unlimited because no restriction was set on the number of puppies or non-breeding dogs. *See Berne Area Alliance for Quality Living v. Dodge County Bd. of Comm'rs*, 694 N.W.2d 577 (Minn. Ct. App. 2005).

determine “how long the field can sustain dog feces application and what the environmental effects on the shallow water table might be over a prolonged period of time .... ” *Id.* She made a number of other suggestions, including addressing the “set back from the water features” because the soil in the field where the dog waste was proposed to be spread by McDuffee has “poor drainage and rapid permeability ... and a shallow water table....” *Id.* She also recommended additional study on these issues, a recommendation the County ignored. *Id.*

Her concerns are amplified by the type of waste at issue, and its effect on the environment, as reflected in well-established scientific literature. (Relators’ Brief 28-35.) The information furnished by Appellants, although not formally before the County, may be taken into account in this proceeding because they come from the public domain and reflect unrefuted scientific data. (*See* Relators’ Memorandum of Law in Opposition to Motion to Strike 8-11.)

By disregarding this data, or failing to inquire into it, the County acted in an unreasonable, arbitrary and capricious way. A legally sufficient reason to overturn the decision of a county’s land use decision is one “reasonably related to the promotion of the public health, safety, morals and general welfare of the community.” *St. Croix Dev. Inc. v. City of Apple Valley*, 446 N.W.2d 392, 398 (Minn. Ct. App. 1989), *rev. denied* (Minn. Dec. 1, 1989); *R.L. Hexum & Assoc., Inc. v. Rochester Tp. Bd. of Sup’rs.*, 609 N.W.2d 271, 277 (Minn. Ct. App. 2000). A public body can and should take judicial notice of matters of public health concerns even if not specifically raised by members of the public. *State v. Zeno*, 79 Minn. 80, 81 N.W. 748, 749 (1900) (judicial notice taken

“that the interests of the public health require and demand” that barbers be trained on “ordinary rules of cleanliness; that diseases of the face and skin are spread from barber shops”); *Gardner v. Michigan*, 199 U.S. 325, 331 (1905) (“[t]he court may well take judicial notice that table refuse, when dumped into receptacles kept for that purpose, will speedily ferment and emit noisome odors, calculated to affect the public health”); *Leighton v. City of Minneapolis*, 222 Minn. 516, 25 N.W.2d 263 (Minn. 1946) (judicial notice taken of the fact that Minneapolis is a city with a population of over 450,000 and has problems distinct from smaller cities including “marginal income workers and potential indigents; . . . complicated problems of public health and relief . . . underhousing . . . a general shrinkage in its overall assessed values for purposes of taxation” and the like).

“An appellate court may take judicial notice of a fact for the first time on appeal.” *Smisek v. Comm’r of Pub. Safety*, 400 N.W.2d 766, 768 (Minn. Ct. App. 1987); *Accord Gustafson v. Cornelius Co.*, 724 F.2d 75, 79 (8th Cir. 1983); *King v. King*, 368 N.W.2d 317, 319 (Minn. Ct. App. 1985). In particular, courts may take judicial notice of facts which are generally known or capable of accurate determination. Minn. R. Evid. 201(b); *see also Howard, McRoberts & Murray v. Starry*, 382 N.W.2d 293, 297 (Minn. Ct. App. 1986); *see generally Sorensen v. Maski*, 361 N.W.2d 498, 501 (Minn. Ct. App. 1985) (“published treatises . . . established as a reliable authority by the testimony or admission of the witness or by other expert testimony” are not considered hearsay). Even if the above standards do not apply here, which they do, this court may consider additional evidence on substantive issues decided by a county board if the evidence is material and

there was a good reason for failing to produce it at the hearing. *Swanson v. City of Bloomington*, 421 N.W.2d 307, 312-13 (Minn. 1988). Here, the County's Soil and Conservation District Manager had recommended that the County further look into the effect of spreading dog feces on farm fields. (App. 70, R. at 104.) Instead of following that admonition, the County rushed through denial of the EAW request and approval of the CUP just a dozen business days later without further study. The Relators simply could not have anticipated this rush to judgment over the Christmas and New Year's holidays without the further study recommended by the County's Soil and Conservation Manager. The County's own Administrator recognized that there may be issues "as to whether or not there was a flaw in the process." (McDuffee's Brief at 15.) But the Board eschewed any such inquiry, fearing that any information presented by Relators might be "one sided," even though all of McDuffee's information that the Board accepted was of the same character, but all tilted to his "side."

One of the Commissioners declared in a state of exasperation, that "we done it to the best of our ability," (R. at 205, TR CB2, p. 25) describing the County's process as imperfect "but at least we tried...." *Id.*, p. 25. But that is not the standard in zoning decisions. Whether the County tried "to the best of [its] ability" or not, it failed to take into account important data regarding the adverse effects that the CUP would have on the public health and environment due to run-off of dog waste, which is confirmed by scientific and medical studies by the Center of Disease Control and other reputable and highly-regarded organizations, the accuracy of which neither McDuffee nor the County contest. (See Relators' Brief 29-35 and App. 114-156.)

McDuffee's reliance on the recent unpublished decision of this court in *Eureka Township v. Kraupu*, No. A05-1345, 2006 WL 1738039 (Minn. Ct. App. June 27, 2006) (unpublished) (M. App. 33) is misguided. *Kraupu* involved a significantly different issue, the refusal of a County Board to grant a CUP because of unsubstantiated opposition by neighbors that was both "speculative" and "conclusory." *Id.* \*4 (M. App. 36). The unsubstantiated opposition in *Kraupu* was based on environmental concerns which were "unidentified" and were devoid of any evidence that the proposed CUP "will actually create any actual environmental problem." *Id.*

In contrast, in this case, the County's own Soil and Conservation expert acknowledges the public health issues and environmental degradation which will be caused by animal waste run-off, which is substantiated by medical and scientific evidence, a far cry from the dearth of data in *Kraupu*. (App. 70, 114-156, R. at 104.) The only similarity between *Kraupu* and the present case is that they both involve dog breeding facilities; otherwise, they are different in the type and extent of concerns regarding this proposed CUP compared to the one in *Kraupu*.

The County Board's failure to take into account environmental concerns under § 507.2.a.4. of its zoning ordinance was compounded by its misdirection in one of the conditions for the CUP: that McDuffee create a privacy fence on the "west" side of the property. (App. 2, R. at 130.) That portion of the property is bordered by wetlands and foliage, and needs no privacy. Unfortunately, the property of Relator Dickmann family adjoins McDuffee's property to the *east*, not west, and it is afforded no "privacy" protection by the County. This may be a cartographic, or perhaps typographic, error, but

it is further reflective of the arbitrary, capricious, and unreasonable nature of the County's decision making process. Had the County been paying attention to the important environmental concerns raised by Relators, as well as its own personnel, it could not have rationally granted the CUP because of its impact upon the "existing land use and the environment," as required under § 507.2.a.4. of the zoning ordinance. (App. 46, R. at 262.) The County's decision granting a CUP in derogation of the requirements of its own zoning ordinance, therefore, was arbitrary, capricious, and unreasonable.

#### **IV. THE BOARD IMPROPERLY DENIED RELATORS' REQUEST FOR RECONSIDERATION**

The County Board also acted arbitrarily, capriciously, and unreasonably in refusing to consider the data submitted by Relators reflecting inaccuracies, or outright falsifications, in McDuffee's CUP application. The Board recognized that the data consisted of "very, very useful information; very, very pertinent information." (R. at 184; TR CB2, p.4.) Nevertheless, it refused to receive the information because it was "necessarily one-sided and therefore unproductive." (App. 34.)<sup>7</sup>

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<sup>7</sup> McDuffee and the County's contention that Relators' appendix materials dated after January 10, 2006, should be stricken from the record lacks merit for the reasons set forth in the Memorandum of Law of Relators Nelsons and Dickmanns in Opposition to Motion to Strike. In sum, the Relators appealed from the modification of the CUP on February 7, 2006 so documents prior to that date are relevant. The other documents include those which may have been submitted had a hearing been scheduled for modification of the CUP, while others relate to the request for reconsideration which the County denied.

The County's recognition of the relevance of the data, while refusing to consider it, is consistent with its overall see-no-evil, hear-no-evil approach to this matter. Conversely, it accepted McDuffee's one-sided presentation from past and present neighbors and one veterinarian, (McDuffee's Brief 6-8), while refusing to accept contrary information from the opposing neighbors and veterinarians, and a former employee of McDuffee.

The County should have reconsidered the CUP, pursuant to its authority under § 507.4 and § 908.3 of the Zoning Ordinance, which allows revocation of a CUP for falsification or other inaccuracies. The Board's refusal to even consider the matter, despite the "very, very pertinent information" submitted by the Relators, is further indication that the Board acted arbitrarily, capriciously, and unreasonably, belies the type of "hard look" that it is required to do, *Citizens Advocating Responsible Development v. Kandiyohi County Board of Commissioners*, 713 N.W.2d 817 (Minn. 2006), and illustrates that the County Board "failed to consider an important aspect of the problem." *Minn. Ctr. for Env'tl. Advocacy v. City of St. Paul Park*, 711 N.W.2d 526, 534 (Minn. Ct. App. 2006).

**V. THE "SUGGESTED" SUBSTITUTION OF DOG SHOCK COLLARS FOR "DEBARKING" IS AN UNREASONABLE CONDITION**

The County modified one of the conditions of the CUP, that the dogs be "debarked," by sending a letter to McDuffee removing the debarking condition and

suggesting to him the option of using shock collars. (App. 4, R. at 214.)<sup>8</sup> The County did so, however, without any notice, hearing, or findings, in violation of its zoning ordinance and state law.

Both McDuffee and the County now claim that the communication from the County Administrator and the County Attorney removing the debarking condition did not constitute a modification of the CUP. If it did, it was violative of the zoning ordinance and state law and should be reversed. Morrison County, Minn. Land Use Control Ordinance, § 507.4.d (App. 47, R. at 263), and Minn. Stat. § 394.26, subd. 2. If it did not, it highlights that the “debarking” requirement was arbitrary, capricious, and unreasonable, especially in light of the arguments advanced by the Minnesota Federal Humane Societies (“MFHS”) concerning the impropriety of such a requirement. (See MFHS’s Brief 11-13; *see also* Relators’ Brief 38.) (App. 102-108, 157-189.)<sup>9</sup>

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<sup>8</sup> McDuffee’s suggestion that he legally can cause “substantial bodily harm” or “great bodily harm” to dogs he uses for breeding is a misstatement of the law and further demonstrates his unfitness to keep dogs. (McDuffee Brief 33-34.) Torture or cruelty to any animal is a crime. Minn. Stat. § 343.21, subds. 1, 7, 9(a).

<sup>9</sup> McDuffee has sought to exclude these materials from Relators’ appendix. The documents are presented as examples of materials Relators’ likely would have submitted had a public hearing been held as required, and App. 157-62 constitute facts generally known or capable of accurate determination which should be considered for the proposition that debarking, and the indiscriminate use of shock collars, violate the Minnesota cruelty laws, Minn. Stat. §§ 343.20, subd. 3, and 343.21, subds. 1, 7; *Smisek*, 400 N.W.2d at 768; *King*, 368 N.W.2d at 319; *Gustafson*, 724 F.2d at 79; *Howard*, 382 N.W.2d at 297; *see generally*, *Sorensen*, 361 N.W.2d at 501. (Relators’ Memorandum of Law 24-28; Relators’ Memorandum of Law in Opposition to Motion to Strike 9-15.)

McDuffee concludes by asserting that this case basically involves a dispute between a “landowner versus neighbors.” (McDuffee’s Brief 45.) That truism applies to nearly all zoning disputes. Neighbors often raise issues about the use of property by other landowners because it may detrimentally affect them or their land. But this case involves broader issues, too. The noise, congestion, public health concerns and environmental degradation resulting from waste run-off will not just affect a few people, but a large number of landowners and those who use and enjoy the neighboring wetlands and other natural features, as well as consumers of produce grown on the fields “fertilized” by the dog manure. The “debarking” issue also has broad implications, not only for the surrounding neighbors but for all Minnesotans who are concerned about the humane care and treatment of animals.

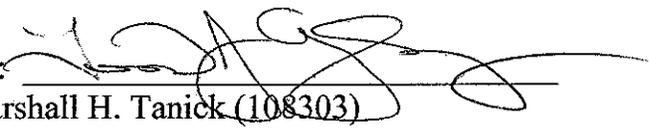
Therefore, to label this as a “landowner v. neighbors” dispute minimizes the important public policies involved in this case and marginalizes those neighbors and others who are attempting to preserve and protect their rights and those of the dogs at the facility. They all deserve better treatment than they received from the Morrison County Board of Commissioners, which has acted arbitrarily, capriciously, and unreasonably in granting the CUP without paying heed to the noise, congestion, public health, serious adverse environmental affects, and inhumanity to the dogs that will occur at this facility.

## VI. CONCLUSION

For the above reasons, the Conditional Use Permit (CUP) granted by Morrison County to applicant Gary McDuffee should be vacated, or the matter remanded for further proceedings.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).