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STATE OF MINNESOTA
IN COURT OF APPEALS

APPEAL NOS. A06-0387 and A06-518

IN THE MATTER OF AN APPLICATION BY HARVEY BLOCK AND
GARY McDUFFEE FOR A CONDITIONAL USE PERMIT

RESPONDENT GARY McDUFFEE'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

NOTE:

Respondent Gary McDuffee objects to the use by the Nelson/Dickmann Relators of the term "puppy mill" in their Statement of the Issues. "A 'puppy mill' is a dog breeding operation in which the health of the dogs is disregarded in order to maintain a low overhead and maximize profits." Avenson v. Zegart, 577 F.Supp. 958, 960 (D.Minn. 1984). See also Animal Humane Society Stand on Puppy Mills, AHS News, June 16, 2006, (M-App.1) (a "puppy mill" is generally "characterized by: an absence of adequate facilities, absence of veterinary history, lack of staff leading to inconsistent provisional care and inadequate sanitation, chronic and repetitive disease and a history of complaints subsequent to point of sale.").

The County Board approved an application to operate a dog kennel and this is the term which should be used by all parties throughout these consolidated appeals.

ISSUES:

1. Whether a reasonable basis existed for the approval by the Morrison County Board of Commissioners of the application for a Conditional Use Permit to operate a dog kennel, with the conditions that (1) the facility be limited to 600 adult breeding dogs, (2) a privacy fence be erected and (3) all dogs having access to the outside be debarked.

Determination by the County Board: The County Board approved and issued the permit.

Apposite Cases and Statutory Authority:

Schwardt v. County of Watonwan, 656 N.W.2d 383, 386-87 (Minn.2003)
Minn.Stat. § 394.301, subd. 1 (2004)
Morrison County Land Use Control Ordinance, ss. 507.1 - 507.7; s. 800

2. Whether Relators have waived their right to argue to this Court their concerns as to traffic, maximum number of dogs or alleged inhumane treatment of animals?

Determination by the County Board: The County Board did not determine the concerns raised by Relators in their appellate Briefs as these concerns were not raised before it.

Thiele v. Stich, 425 N.W.2d 580, 582 (Minn.1988)

In re Application of Minnegasco, 565 N.W.2d 706, 713 (Minn.1997)

Hoskin v. City of Eagan, 632 N.W.2d 256, 258 (Minn.Ct.App.2001)

Graham v. Itasca County Planning Comm'n, 601 N.W.2d 461, 468 (Minn.Ct.App.1999).

3. Whether this Court has jurisdiction to determine if the County Board disregarded the environmental impact of the proposed use when this issue is the subject matter of an action brought by the Nelson/Dickmann Relators in Morrison County District Court challenging the County Board's denial of a petition for an Environmental Worksheet.

Determination by the County Board: The County Board approved and issued the permit after making a separate determination that an EAW was not required.

Apposite Cases and Statutory Authority:

Dietz v. Dodge County, 487 N.W.2d 237, 239 (Minn.1992)

AAA Striping Service Co. v. Minnesota Dept. of Transp., 681 N.W.2d 706, 715 (Minn.Ct.App. 2004)

Minn. Stat. § 116D.04, subd. 10

Minn.R.4410.0400, subpart 4

4. Whether "debarking" of dogs is prohibited by any federal or state law.

Determination by the County Board: The County Board approved and issued the permit relying on the United States Department of Agriculture to ensure compliance with all federal animal welfare laws and regulations.

Apposite Cases and Statutory Authority:

There is none.

STATEMENT OF THE CASE

Tribunal below: Morrison County Board of Commissioners

Nature of the case:

In late 2005, Respondent Gary McDuffee ("McDuffee") and Harvey Block ("Block") jointly applied to Morrison County for a Conditional Use Permit ("CUP") to operate a dog kennel on certain property located in Belle Prairie Township, Morrison County, Minnesota ("the property"). Block was one of the owners of the property and McDuffee was a potential purchaser and operator of the proposed dog kennel. The property is in an area zoned agriculture and pursuant to the Morrison County Land Use Control Ordinance ("the Ordinance") kennels are a permitted use thereon with a CUP.

McDuffee provided responses to the County's Conditional Use Criteria Questions showing the potential use would satisfy all the criteria for the issuance of a CUP as set out in the Ordinance. McDuffee also provided, among other things, letters from neighbors of his former facility confirming that it had created no nuisance, and from potential neighbors of the proposed new facility stating they had no objection to the dog kennel.

On December 19, 2005, the Morrison County Planning Commission ("MCPC") held a duly advertised and noticed public hearing to discuss the application. The matters discussed included the proposed number of dogs to be kept at the facility and the proposed surgical debarking of outside dogs to reduce noise. Relators Roger E. Nelson

("Nelson") and Sara L. Dickmann ("Dickmann"), who attended the public hearing and heard these discussions, objected to the application, but their objections were not based on either of these grounds or on the grounds of increased traffic. The MCPC determined the application satisfied each of the criteria of the Ordinance and recommended the application be approved with the conditions (1) the facility be limited to 600 adult breeding dogs, (2) a privacy fence be erected and (3) all dogs having access to the outside be debarked.

Disposition of the case:

On January 10, 2006, the Morrison County Board of Commissioners approved the application with the conditions recommended by the MCPC, and issued Findings of Fact accordingly, including a finding the MCPC had found all the criteria of the Ordinance satisfied. On January 12, 2006, Morrison County issued a CUP to McDuffee to operate the dog kennel with these same three conditions.

McDuffee subsequently purchased the property. On February 7, 2006, the Morrison County Administrator and County Attorney, independent of County Board action, sent McDuffee a letter "clarifying" the County's interpretation of the condition regarding "debarking," encouraging the use of barking collars in place of surgical debarking, stating "we realize that this is ultimately your choice, not ours." McDuffee is currently operating a kennel on the property without allowing any dogs outside, making the "debarking" issue moot.

STATEMENT OF THE FACTS¹

This case concerns the issuance of a Conditional Use Permit (CUP) by the Morrison County Board of Commissioners (“the County Board”) to operate a dog breeding kennel on real property located at 17513 185th Avenue, Little Falls, in Belle Prairie Township, Morrison County, Minnesota legally described as the SE 1/4 of the SE 1/4 Section 20, Township 41, Range 31, Belle Prairie Township, (“the property”). The property is zoned agriculture. Morrison County Land Use Control Ordinance (“the Ordinance”), s. 800 provides that kennels are a permitted use on land zoned agriculture but a CUP is required (App. 53).

Morrison County Comprehensive Land Use Plan for 2005-2015.

Agriculture accounts for over 70% of the total acreage of Morrison County (Record 371), and the County Commissioners all come from an agricultural background (TR CB2 26:25-27:1). CUP applications are first reviewed by the MCPC, which holds

¹ Relators Roger E. Nelson, Deborah A. Nelson, Jeremy G. Dickmann and Sara L. Dickmann, or the Nelson/Dickmann Relators, are referred to herein as “the Nelson Dickmanns.” Relator Minnesota Federated Humane Societies is referred to as “the Humane Societies.” For the convenience of the Court, citation references in this Brief are as in the Brief of the Nelson/Dickmann Relators, i.e. “App. ___” and “App. II ___” refer to the first and second volumes respectively of the Nelson/Dickmann Relators’ Appendix; “TR PC ___” refers to the transcript of the December 19, 2005 public hearing of the Morrison County Planning Commission; “TR CB1 ___” and “TR CB2 ___” refer to the respective transcripts of the January 10, 2006 and February 7, 2006 meetings of the Morrison County Board of Commissioners; and “Record ___” refers to the Bate-stamped page of the Record produced by Morrison County.

In addition, “M-App. ___” refers to Respondent McDuffee’s Appendix.

duly noticed public hearings and makes recommendations to the County Board. The County Board makes the final decisions, but does not “rubber-stamp” the MCPC (TR CB2 26:22-23).

The CUP Application. The CUP was sought by McDuffee, who has been in the dog breeding business for 24 years (TR PC 11:1,7;25:13-14;Record 38), having previously worked together with his now ex-wife, Wanda McDuffee. In late 2005 McDuffee was interested in purchasing the property from the then owners, Harvey Block and Donna Block for the purpose of constructing and operating his own dog breeding kennel thereon. On November 8, 2005 McDuffee submitted his CUP application jointly with owner Harvey Block, thereby complying with s. 507.4a of the Ordinance requiring applications to be made by an owner. (App. 56).

As part of the application, McDuffee completed the Conditional Use Criteria questions (App. 58), which track the criteria for granting CUPs set out in s. 507.2 of the Ordinance (App. 46-47). McDuffee also submitted letters from neighbors of his former facility confirming it had created no nuisance, from potential neighbors of the proposed new facility stating they had no objection to it, and from his accountant stating that based on past performance the potential business should be well-run and profitable (Record 18-27: M-App. 3-12). These letters were not included in the Nelson/Dickmann’s Appendix.

Letters from McDuffee’s past and current neighbors provided, in part, as follows:

1. “My names (sic) is James Skoog and I was Gary McDuffee’s neighbor when he owned the dog kennel in the Randall area. My

property line runs approximately one hundred feet from his operation. While he was living in the area, the noise level was nominal and any odors could not be detected. In fact, I rented Mr. McDuffee's land for crop farming and the manure was always plowed under. Gary ran a very neat and clean business and I can easily vouch for his character." (November 21, 2005) (M-App. 3);

2. "*** Considering the number of years (15 or close to it) that dogs were being raised in very close proximity to our residences – actually three homes ranging from approximately 1,000 to 1,500 feet – we never found that operation to be an inconvenience or aggravation to our daily living, nor has it been a devaluation to our properties. ***

While many people consider your type of operation the so-called "puppy-mill" – I/we do not see it as anything different than a cow or hog operation. These dogs have been raised within the system, receive excellent care, inspected by government standards, and are seen regularly by vet's. Having spent years in a cattle barn, I don't find your kennels or dog "poop" any more offensive than cattle barns of today, manure pit cleaning, or other types of manufacturing odors. ***

America was founded on free enterprise, and some times we tend to forget that unless it pertains to something we personally want to do. To those who would object to your use of the land as you are requesting I would say having had you as a neighbor/business person for as many years as we did, they would find out that given the chance, you are as good neighbor, businessman and as concerned about the environment as much as anyone else." (November 27, 2005) (M-App. 5);

3. "Your former dog raising business in our neighborhood did nothing to create an adverse quality of living for us. Over the years I purchased two puppies, one for my mother, later on one for my grandmother and we found them both to be very healthy and well cared for animals." (December 15, 2005) (M-App. 6);

4. “*** I can say truthfully that during the number of years we were an across the road neighbor, the dogs nor any portion of the operation were a problem for us. *** The short term barking at feeding time certainly was no more disruptive to our lives than were “hot-rodding” vehicle drivers, snowmobilers and/or 4 wheelers snorting by and many times trespassing in the process. I would classify your business to be nothing more than another form of farming with no more intrusions on my life than if you were raising cattle, pigs, goats, chickens, ducks, or other form of livestock – in fact give me dogs instead of a chicken barn.” (December 17, 2005) (M-App. 7);
5. “I/we have had an opportunity to visit with Gary McDuffee and Harvey Block and ask questions regarding their request for a Conditional Use Permit for the SE 1/4 of SE 1/4 Sec. 20 Twn. 41 Rge 31 of Belle Prairie township and to build a facility for his professional dog breeding business. We/I have no objections to the Conditional Use Permit and building permit being approved for construction of the proposed dog breeding facility.” (November 20, 2005, December 4, 2005) (M-App. 8-11);

McDuffee also included a letter from his long-time veterinarian, Charles Extrand,

D.V.M. which stated, among other things:

Noise generated from a dog kennel can be a very serious environmental factor and could affect surrounding inhabitants. With this in mind, Gary has contacted me about doing a debarking procedure to lower the noise volume. Contrary to what animal activists claim, this procedure does not “silence” a dog but rather mellows the high pitch sounds.

(App. 62).

Ordinance, s. 507.4d. requires the MCPC to hold a public hearing on the proposal, notice of which must be given as required by Minn. Stat. §394.26 (App.47). The County

duly published notice of the public hearing before the MCPC on December 19, 2005, in accordance with the statutory requirements, and mailed a notice to the ten closest property owners (App. 64-66).

The staff opinion/recommendation to the MCPC was as follows:

The applicant requires a conditional use permit to operate a dog kennel. The applicant operated a kennel in Cushing Township which was approved in 2001. The proposed kennel would breed and raise dogs for sale. A large housing barn is being proposed on the site. The applicant did not indicate the number of animals that are being proposed at the site. The **Cushing site had a maximum cap of 800 adult dogs.** There are neighbors within 900-1,000 feet from this proposed site. We have also received concerns from neighbors regarding this proposal. It is **our understanding the animals are mostly confined to the barn and there is minimal exposure to the outside. It is indicated that those dogs out side will be debarked.** A septic system is being proposed by the applicant. There appears to be tillable land for manure application. The property also has some wetlands. The ordinance does not have any specific standards for kennels. The conditional use criteria questions must be satisfied.

App. 67, (emphasis added).

The December 19, 2005 Public Hearing. The public hearing before the MCPC was held December 19, 2005. The transcript of that hearing (TR PC) is partially incomplete but the written minutes of that hearing (Record 37-44A; M-App. 13-21) fill in the gaps.

According to the minutes, County Zoning Administrator Roger Kuklok entered into the record a plat map, conditional use criteria form, site plan, staff opinion report and the voting sheet, and gave the staff opinion/recommendation, and McDuffee handed out

packets which included letters from neighbors, from his veterinarian, and his accountant.

(M-App. 14). The minutes show, among other things, the following:

Joe (Barach) asked if the kennel is still operating in Cushing. Mr. McDuffee answered it is. He and his wife are parted **and she still has the operation of that kennel.**

Chuck (Parins) asked how many animals will be at this site. Mr. McDuffee said he wishes to have 600 as a cap for adult breeding dogs.

Manure was addressed - it will be raked up and stockpiled on a slab during the winter. In the spring, a neighbor Mike Waytashek will pick it up and spread it on his fields. Mr. McDuffee stated they have to follow USDA guidelines.

Commissioner Tom Wenzel asked how many puppies there would be per year. Mr. McDuffee stated about 500 the first year, more later one. Size of the breeds will be cocker spaniel and smaller. **They will average ten (10) pounds in size.**

Audience comment-

Greg Colombe, Belle Prairie Township Supervisor, said the Township has some major complaints with an existing kennel in their township. They are opposed to this request.

Angie Rybaski, employee for Mr. McDuffee, said Mr. McDuffee gives great love and care to the dogs. She is in favor of this request.

John Hallberg, neighbor to the southeast, has concerns about this kennel. He said he is against the request.

Sarah Dickmann- lives across the road and had some concerns regarding noise and odor. She added she is with the Animal Humane Society and has received many complaints about the Cushing kennel site. They included: injured animals, sick animals, bad living conditions and

sick puppies were purchased from the kennel. She is against this request.

Roger Nelson state he is about 100 feet away from the property line. He is very concerned about the environmental affects. He is against this request. He added he is the one that started the petition which was sent to the EQB.

10 property owners were notified. There was no correspondence received.

M-App. 38-39 (amplification added).

It is, however, clear from the transcript that the members of the MCPC did discuss the application and asked many questions of McDuffee which he answered (TR CP 15-40), that veterinarian Extrand stated that debarking consists of removing a dog's vocal cords under anaesthesia which removes a high pitched bark but that the dogs still make noise and communicate (*id.*, 26:30-8) and that the members of the MCPC voted on each of the CUP criteria (*id.*, 30-31), and voted, with eight in favor and one abstention, that the CUP be issued with three conditions, namely a cap of 600 adult dogs, the erection of a privacy fence to the north, and that all outside dogs be debarked (*id.*, 44-45).

Of the ten nearest neighbors who were given notice of the public hearing (App. 66), only the Hallbergs, Nelsons, and Dickmanns attended the meeting (Record 44-44-A), and only John Hallberg, Dickmann and Nelson voiced objections; McDuffee submitted letters from four of these closest neighbors stating they had no objections, namely Waytashek, Brutcher, Sobnia and Banick (Record, 23-26; M-App. 8-11), and neighbors

Jacobs and Januschka neither attended the public hearing nor wrote to the County objecting to it.

The January 10, 2006 County Board Meeting. The MCPC's recommendation the CUP be granted with the three conditions was considered by the County Board at its January 10, 2006 meeting. The transcript (TR CB1 11-13) shows the County Board was free to add to or delete from the recommended conditions (id., 10-12) and that McDuffee, who was in attendance, confirmed that the 600 adult breeding dogs included male and female dogs and that only the adult dogs would be debarked since the puppies would not go outside (id., 12-1-13:11). The County Board then voted, with only one opposed, to adopt the CUP with the conditions (id., 13:19-20), and by its Chairman and Clerk executed the following Findings of Fact:

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

The above application came on for consideration on January 10, 2006.
Based on the application, information reviewed at the public hearing, the recommendation of staff and all files and records relating to the application, the Morrison County Board of Commissioners makes the following:

Findings of Fact

1. Harvey & Donna Block are the owners of the SE 1/4 of the SE 1/4, Section 20, Township 41, Range 31, Belle Prairie Township.
2. Gary McDuffee is the prospective buyer of the property and was requesting the Conditional Use permit.
3. The request is to operate a dog kennel on the property which is zoned agriculture.

4. Dog kennels are allowed in the ag zone with a Conditional Use Permit.
5. The proposed kennel would require the construction of a 28' x 151' building,
6. The buildings would be used to house and shelter up to 600 adult breeding dogs.
7. Part of the buildings would have outside dog runs.
8. The proposed kennel is located on a 40-acre tract of land.
9. Part of the 40 acres have wetlands, with approximately 12-14 acres of high tillable land.
10. Dog kennels are required to have a State License from the United States Department of Agriculture.
11. The manure management plan consists of stock piling during the winter months and land applying on area agriculture fields during the summer.
12. The Morrison County Planning Commission found that:
 - a. The requested use will not create an unreasonably excessive burden on the existing roads or other utilities.
 - b. The requested use is compatible with the surrounding area and will not significantly depreciate near-by properties.
 - c. The structure and the use shall have an appearance that will not have an unreasonably adverse effect on near-by properties.
 - d. The requested use, in the opinion of the Planning Commission, is reasonably related to the existing land use and environment.
 - e. The requested use is consistent with the Morrison County Land Use Control Ordinance.
 - f. The requested use is not in conflict with the Morrison County Comprehensive Plan.
 - g. The requested use will not create an unreasonably adverse affect because of noise, odor, glare or general unsightliness for near-by property owners.
13. The Planning Commission moved and second to recommend approval

of this application with the following conditions:

1. The facility to be limited to no more than 600 adult breeding dogs.
2. A privacy fence be erected which must run thirty (30) feet north of the building and 75 feet west of the building.
3. All dogs which have access to the outside be debarked.

The motion carried.

(Record 143-44; App. 1-2). (emphasis added). On January 12, 2006, the County Board issued the CUP, with the conditions (Record 134; App.3).

After the Fact Objections. Significantly, between December 19, 2005 when the MCPC recommended issuance of the CUP with the conditions and January 10, 2006, when the County Board adopted the recommendation, the Relators made no objection. The Nelson/Dickmanns were present at the public hearing and heard the recommended conditions, and the date when the recommendation would come before the County Board, but they took no steps to dissuade the County Board from approving the application and recommendation.

However, after the CUP was issued, a campaign was instigated through the media and the Internet which exhorted all persons opposed to commercial dog breeding kennels to write to Morrison County asking that the County not allow the facility. See e.g M-App. 22-23. The County received multiple emails asking both that the facility not be allowed to operate and that dogs not be debarked, none of which form part of the record.

The February 7, 2006 County Board Meeting. Overwhelmed by the extent of the opposition to dog breeding facilities and surgical debarking, the County staff recommended to the County Board at its February 7, 2006 meeting that there be a one year moratorium on granting CUPs for dog breeding kennels and that, in the meantime, the County should seek clarification from its federal and state legislators as to whether the County should have some control over the operation of such facilities (TR CB2). The County Board accepted the staff recommendation (id., 25:9-11, 28:8; 30:1-31:5).

The County Administrator also advised the County Board that County staff was writing a letter to McDuffee clarifying that in light of the feedback on debarking the County was not requiring surgical debarking but suggesting that barking collars be used instead (TC CB2 19:6-20:7.) This letter did not require Board action (id., 19:1-5).

The County Administrator pointed out that the feedback the County was now receiving could not be used in the same way as if it had been received during the public hearing phase of the process and that

There has to be some judgment based on the earlier record because that's what the courts are going to get, is the earlier record. What did we have front of us at the time the decision was made not what do we have in front of us today to make a determination as to whether or not there was a flaw in the process.

(Id. 6:1-11.) The Administrator also pointed out the County could have some liability to McDuffee, who had now purchased the property from Harvey Block, if the County Board

attempted to withdraw the CUP and that issue should therefore be decided by a court (id., 6:12-10:12).

Both the Administrator and members of the County Board were clearly concerned that the persons now opposing the CUP had not come forward and voiced their opposition at the advertised public hearing (id., 25:20-29:11). Commissioner Gene Young stated, in relation to the public hearing:

There were a lot of questions asked that night and answered and we done it to the best of our ability. Maybe we weren't perfect, but at least we tried.

(Id., 25, 20-23).

An unidentified speaker responded:

And I think the record that was established by the Planning Commission was based on the testimony that was part of a public hearing process. So I think, Commissioner Young, you're correct in that assumption. And the information that we had was properly disseminated through the findings that are currently the record.

(Id., 26:3-9).

Relying on the issuance of the CUP, McDuffee has purchased the property from Harvey and Donna Block and is currently operating a dog breeding kennel on the property, with substantially less than 600 adult breeding dogs, keeping all dogs inside. As a result there is no necessity to debark the dogs by any method and there is no noise nuisance.

The Nelson/Dickmanns Application for an EAW. The Nelson/Dickmanns have

included in their Appeal Brief to this Court facts relating to their Petition for an Environmental Assessment Worksheet ("EAW"), which they admit is the subject of an action in Morrison County District Court (Nelson/Dickmann's Brief, p. 8, n3 and see M-App. 24-31). While McDuffee believes that this issue is not part of this appeal, and that this Court has no jurisdiction to hear it, see Argument IVA infra, a brief outline of the history of that Petition insofar as it has any relevance to this appeal is set out here.

The Petition was presented to the MCPC at the December 19, 2005 public hearing but not acted on; instead it was considered at the meeting of the County Board on January 10, 2006, when the County Board denied the petition. See TR PC and TR CB1 and App. 84. In denying the Petition, the County Board found that "the proposed 600-unit dog kennel would not have a significant impact on water quality, noise pollution or runoff issues in the immediate area." (App. 84). On February 7, 2006, the Nelson/Dickmanns filed their action challenging denial of their petition for an EAW with the Morrison County District Court (M-App. 24-31).

The Petition is relevant to this appeal only to the extent that the need for an EAW was discussed both by the MCPC and the County Board prior to approving the CUP in that they were aware of any possible environmental concerns. In this connection, the Environmental Quality Board ("EQB"), in forwarding the Petition to Morrison County's Zoning Administrator advised that:

A first step in making the decision on the need for an EAW would be to compare the project to the mandatory EAW, EIS,

and exemption categories listed in parts 4410. 4300, 4410. 4400, and 4410. 4600 [of the Minnesota Rules] respectively. ... If the project should fit any of these categories, environmental review is automatically required or is prohibited.

(App. 71-72). (emphasis added).

Pursuant to Minn. Stat. §116D.04, subd.2a (d) and Minnesota Rule 4410.4600, subpart 19, there is an exception to the requirement for an EAW for “an animal feedlot facility with a capacity of less than 1,000 animal units.” Id Pursuant to Minnesota Rules 7020.0300, subpart 5, “animal unit” quantities are given for various cattle, etc. but for animals not listed the number of animal units is the average weight of the animal in pounds divided by 1000 pounds. Id.

Members of the County Board, being familiar with agricultural matters, were aware of the feedlot exemption and most of the discussion on the need for an EAW focused on the number of “animal units” at the proposed facility, which would not be more than 6-8 animal units (TR CB1 7-10). The County Board was therefore clearly of the opinion that the feedlot exemption applied (id.). On January 11, 2006, the Zoning Administrator reported back to the EQB that the County Board found the proposed application for a 600-unit dog breeding facility (kennel) was exempt under Rules 4410.4600 subpart 19 (Record 162; M-App. 32). In addition, paragraph 8 of the district court action alleges:

The Board of Commissioners dispensed with the need for EAW on grounds that the facility was exempt from

compliance with submitting an EAW pursuant to Minn. Stat. §116D.04, subd.2a(d).

(M-App. 26-31).

The relief sought in the district court action is for a declaratory judgment that Morrison County must undertake an EAW with respect to the CUP application, and enjoining issuance of any approval or permits for the facility pending completion of an EAW, and enjoining and restraining McDuffee from constructing, maintaining and operating the facility (*id.*).

On February 21, 2006, the County Board denied the Nelson/Dickmann's request for a further public hearing on the CUP, because suit had already been filed in the district court challenging the Board's decision:

and that is the right and proper venue for such an appeal. **Our practice is not to comment on pending litigation** and so any presentation would be necessarily one-sided and therefore unproductive.

(App. 34, emphasis added).

INTRODUCTION TO ARGUMENT

[L]and use deals with setback and separation kind of issues and how far away from the road something is. It's stuff that's outside the building.

...

[W]e don't think we have the authority to regulate what's going on inside that building through a land use ordinance.

*Tim Houle, Morrison County Administrator
(TR CB2, 15:6-8; 17:16-19).*

It is difficult to prevent commercial dog breeders and land owners who fulfill legal requirements for obtaining permits and operate according to current laws and statutes from doing business.

Animal Humane Society Stand On Puppy Mills

AHS News- June 16, 2006

http://www.animalhumanesociety.org/news_standon_mills.asp

Dog kennels are an approved use in Morrison County on land zoned agriculture with a CUP. The role of the County Board is to authorize a land use, not to regulate the internal operation of an approved land use. For example, in Eureka Township. v. Krapu, 2006 WL 1738039 (Minn.Ct.App. 2006) (June 27, 2006), the Court of Appeals recently affirmed a district court's order directing a township to grant a CUP for the operation of a dog kennel, holding the township's findings unsupported and incapable of providing a reasonable basis to deny the permit; the record indicated that excess barking at the proposed kennel would be restricted by the use of "bark-collars," but whether the township, as part of the CUP process, should regulate the means by which barking is reduced was not even brought into question. Nevertheless, the Morrison County Board's grant of McDuffee's CUP application has engendered a national campaign by animal rights activists, through the Internet and the media, against debarking and the operation of commercial dog breeding kennels in general and against McDuffee's kennel in particular.

By using the term "puppy mill" throughout their Statement of the Issues and Brief, the Nelson/Dickmann Relators clearly show where their sympathies lie. They have attempted to

taint the record on this appeal by citing to and incorporating in their appendix materials clearly outside the record, such as multiple emails from around the nation opposing dog breeding kennels, reports of non-compliance with USDA regulations at kennels with which McDuffee was previously associated, and details of the alleged deleterious effects of dog waste on the environment which properly belongs in their district court action challenging the denial of an EAW.

Determination of these consolidated appeals should focus on whether there was a reasonable basis for the County Board's decision to issue the CUP on the record as it was before the County Board, and not as the Nelson/Dickmann Relators, in their zeal to promote their cause, would like it to be, and not on how McDuffee's dog kennel should be operated or whether it should be operated at all.

ARGUMENT

I. SCOPE AND STANDARD OF REVIEW

Decisions made by a county board regarding a CUP are quasi-judicial and reviewable by a writ of certiorari. Interstate Power Co., Inc. v. Nobles County Bd. of Comm'rs, 617 N.W.2d 566, 574 (Minn.2000); Picha v. County of McLeod, 634 N.W.2d 739, 741 (Minn.Ct.App.2001). The Court of Appeals independently reviews the decision to grant a CUP to determine whether a reasonable basis existed for the county board's decision or whether the county board acted unreasonably, arbitrarily, or capriciously. Schwardt v. County of Watonwan, 656 N.W.2d 383, 386 (Minn.2003).

The standard of review "is a deferential one, as counties have wide latitude in making decisions about [conditional] use permits," id.(amplification added), and this Court has "traditionally held CUP approvals to a more deferential standard of review than CUP denials." Id. at 389 n. 4, citing Interstate Power Co., supra, at 579. Since zoning laws are a restriction on the use of private property, the party challenging the approval of a CUP has a heavier burden of proof than a landowner whose application is denied. Bd. of Supervisors v. Carver County Bd. of Comm'rs, 302 Minn. 493, 499, 225 N.W.2d 815, 819 (1975).

By statute, "[c]onditional uses may be approved upon a showing by an applicant that standards and criteria stated in the ordinance will be satisfied." Minn.Stat. 394.301, subd. 1 (2004). "Reasonableness is measured by examining whether the standards in the ordinance have been satisfied." City of Barnum v. Carlton County, 386 N.W.2d 770, 775 (Minn.Ct.App.1986), citing White Bear Docking & Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 176 (Minn.1982).

II. A REASONABLE BASIS EXISTS FOR THE COUNTY BOARD'S DECISION TO ISSUE THE CUP AS ALL THE CONDITIONS OF THE ORDINANCE WERE SATISFIED.

Relators can discharge their burden of showing the County Board acted unreasonably only if they can establish that the proposed CUP did not meet one of the standards set out in the Ordinance, and that the grant of the CUP was an abuse of discretion. Schwardt, supra, 656 N.W.2d at 387.

In Morrison County, the criteria for granting CUPs are as follows:

a. In granting a conditional use permit, the Planning Commission shall consider the effect of the proposed use upon the health, safety, morals, and general welfare of occupants of surrounding lands and water bodies. Among other things, the Planning Commission shall make the following findings where applicable:

1. The use will not create an excessive burden on existing parks, schools, public roadways and other public facilities and utilities which serve or are proposed to serve the area.
2. The use will be sufficiently compatible or separated by distance or screening from adjacent agricultural or residentially zoned land so that existing homes will not be depreciated in value and there will be no deterrence to development of vacant land.
3. The structure and site shall have an appearance that will not have an adverse effect upon adjacent properties.
4. The use in the opinion of the Planning Commission is reasonably related to the existing land use and the environment.
5. The use is consistent with the purposes of the Zoning Ordinance and the purposes of the zoning district in which the applicant intends to locate the proposed use.
6. The use is not in conflict with the Comprehensive Plan of the county.
7. Existing occupants of nearby structures will not be adversely affected because of curtailment of customer trade brought about by intrusion of noise, odor, glare or general unsightliness.

Ordinance s.507.2 (App. 46-47).

The County's Conditional Use Criteria Questions track these conditions and McDuffee answered each question to the satisfaction of the MCPC, which by an affirmative

vote found every condition satisfied. The County Board then made Findings of Fact including that the MCPC had found all the conditions satisfied. That the County Board's Findings track the language of s.507.2 of the Ordinance does not make the Findings conclusory or inadequate. See In re Cities of Annandale, Maple Lake, 2005 WL 14915 at *2 (Minn.Ct.App. 2005) (M-App. 43) ("The fact that the findings mirror the language of the ordinance is not fatal to the commission's decision"), citing Schwardt, *supra*, 656 N.W.2d at 389 (stating that a county board's use of a checklist was "a sufficient expression of the board's conclusion that the conditions for approval have been met," and noting that a board or commission "should not have to find negatively that alleged failures to meet [ordinance] requirements are without merit." (Amplification added in In re Cities of Annandale)).

In this case there was more than a checklist; the Transcript of the December 19, 2005 public hearing shows the MCPC discussed the application and voted on each condition separately, and the County Board's Findings indicate that the MCPC had found each of the conditions of the Ordinance satisfied. See Corwine v. Crow Wing County, 309 Minn. 345, 352, 244 N.W.2d 482, 486 (1976). ("When a use permit is approved, the decision-making body is always implicitly giving the same reason - all requirements for the issuance of the permit have been met"), *overruled in part on other grounds by* Northwestern College v. City of Arden Hills, 281 N.W.2d 865 (Minn.1979).

That there was neighborhood opposition does not make the County Board's approval of the CUP unreasonable. Neighborhood opposition alone is not a legally sufficient reason

to deny a CUP, and denial of a conditional use must be based on something more concrete than neighborhood opposition and expressions of concern for public safety and welfare. Chanhassen Estates Residents Ass'n v. City of Chanhassen, 342 N.W.2d 335, 340 (Minn.1984). Accord, Eureka Township v. Krapu, 2006 WL 1738039 (Minn.Ct.App. 2006) (June 27, 2006) (M-App. 33-40), a very recent decision affirming the district court's order directing the township to issue a CUP to operate a dog kennel.

In Eureka Township, the township made a finding that neighborhood opposition was "significant" to the decision to deny the CUP. Id. at *4 (M-App. 36). The Court of Appeals, however, held this finding did not support the denial because the concerns raised by the opposing neighbors "are chiefly anecdotal and only speculate that a kennel *might* result in such things as intolerable noise, environmental pollution, increased traffic, and the blemishing of aesthetic views." Id. (italicized emphasis in original). The same is true of the neighborhood opposition here.

III. RELATORS' CONCERNS AS TO POTENTIAL TRAFFIC CONGESTION, MAXIMUM NUMBER OF DOGS AT THE FACILITY, DEBARKING OF OUTSIDE DOGS OR OTHER ALLEGED INHUMANE TREATMENT OF ANIMALS DO NOT MAKE THE COUNTY BOARD'S ISSUANCE OF THE CUP UNREASONABLE, ARBITRARY OR CAPRICIOUS.

A. RELATORS HAVE WAIVED THEIR RIGHT TO ARGUE THESE ISSUES ON APPEAL.

Appellate courts will not entertain arguments made for the first time on appeal. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn.1988). In Steiger v. Douglas County Board of Com'rs, 2005 WL 1869471 (Minn.Ct.App. 2005) (M-App. 48-53), where the relator Steiger,

challenging the county board's grant of a CUP, argued for the first time on appeal that the CUP application had contained no map, the Court of Appeals stated that, as a general rule,

failure to raise an issue in a trial court precludes raising that issue for the first time on appeal. See In re Application of Minnegasco, 565 N.W.2d 706, 713 (Minn.1997) (explaining that issues not raised in earlier proceedings are waived). That same principle exists in judicial review of quasi-judicial decisions of administrative agencies and of local government. See Hoskin v. City of Eagan, 632 N.W.2d 256, 258 (Minn.App.2001); Graham v. Itasca County Planning Comm'n, 601 N.W.2d 461, 468 (Minn.App.1999).

Steiger at *2 (M-App. 50) (emphasis added).

The record showed that Steiger had voiced an objection to the CUP application before the Douglas County Planning Advisory Commission [PAC], but not regarding the lack of a map. Id. at *3. In the opinion of the Court of Appeals:

[I]f this issue had been presented to the PAC, it could have been easily addressed and probably resolved. Raising the issue for the first time on appeal blindsides the respondents. It does not allow the PAC to address this question.

Id. (emphasis added).

Similarly here, for the first time on appeal, the Nelson/Dickmanns raise objections on the grounds of potential traffic congestion and noise and allege debarking collars are cruel. The Humane Societies object to the conditions of the CUP, alleging that debarking is cruel and inhumane and in violation of Minnesota Animal Cruelty Laws, and that keeping 600 breeding dogs and an unlimited number of puppies at the facility would likewise be illegal and inhumane in that the facility would allegedly not allow the dogs sufficient

opportunity for exercise.

The record, however, shows that neither the alleged traffic concerns nor concerns as to the alleged inhumane and/or illegal treatment of animals, whether by debarking or alleged overcrowding, were raised by any of the Relators either to the MCPC or to the County Board before the CUP was issued. Relators Nelson and Dickmann attended the December 19, 2005 public hearing before the MCPC. After Roger Nelson and Sara Dickmann heard McDuffee's proposal of a maximum of 600 dogs at the facility, and heard his veterinarian proposing that outside dogs be debarked, the floor was opened up for public comment. Dickmann objected to the CUP application, but only on the ground of alleged complaints at other kennels with which McDuffee had previously been associated. Nelson objected only on environmental grounds. The Humane Societies did not appear and were not represented at the public hearing, unless they were represented by Dickmann who identified herself as being with the Humane Society. No objections were raised as to the maximum number of dogs, possible traffic congestion, or the debarking of outside dogs.

At the conclusion of the public hearing, while Nelson and Dickmann were still present, announcements were made that the MCPC recommended issuance of the CUP with the 600 adult dog cap and debarking conditions, and that the matter would be referred to the County Board at its January 10, 2006 meeting. Yet, none of the Relators presented the County Board with objections to these conditions either before or at the County Board's January 10, 2006 meeting. Indeed, as far as McDuffee is aware, the Relators' objections to

debarking were first raised in each of their petitions for certiorari and the Nelson/Dickmanns' traffic congestion argument is raised for the first time in their Appeal Brief.

Because these arguments were not raised before the County Board they have been waived and should be disregarded.

B. EVEN IF, ARGUENDO, THESE ISSUES WERE NOT WAIVED, THEY DO NOT MAKE THE COUNTY BOARD'S ISSUANCE OF THE CUP UNREASONABLE, ARBITRARY OR CAPRICIOUS

Even if not waived, these newly-raised concerns do not render the County Board's decision to issue the CUP unreasonable. Rather, it is the arguments of the Relators which are unreasonable, being based on conjecture and supposition without any basis in fact.

1. Concerns Based on a 600 Adult Dog Cap and Debarking of Outside Dogs.

Just as the County Staff's February 7, 2006 letter to McDuffee advised him that the decision whether to use debarking collars instead of surgical debarking of outside dogs was his decision alone, the decisions whether to fill the dog kennel to the allowed 600 maximum or to allow any dogs outside are McDuffee's decisions. To comply with the CUP, McDuffee cannot keep more than 600 adult breeding dogs and must debark any dogs allowed outside, but the CUP does not require him to do either. In fact, McDuffee is currently operating the kennel with substantially less than 600 dogs and keeping them all inside so there is no debarking issue. Accordingly, any calculations or arguments based on these conditions of the CUP will be valid only at such time as there are 600 adult dogs at the facility and/or when any dogs are allowed outside. Under any other circumstances, Relators' arguments and

calculations have no validity and should be disregarded.

2. Concerns as to Traffic Congestion are Mere Speculative Predictions.

The Nelson/Dickmanns argue, at pages 19-28 of their Brief, that according to their calculations and projections, based on the dog kennel being operated with a full complement of 600 adult dogs in compliance with federal and state animal welfare regulations, McDuffee will need to employ 50 or more workers, and that the County Board did not consider the impact of 50 or more workers utilizing the roadways to and from the site and their attendant parking needs. This is pure speculation, unsubstantiated by independent analysis or reliable facts in the record.

The Nelson/Dickmanns argument here is similar to the unsuccessful argument made by the respondent county in Yang v. County of Carver, 660 N.W.2d 828 (Minn.Ct.App. 2003), an authority relied on by the Nelson/Dickmanns. In that case, the Court of Appeals reversed the county board's denial of a CUP for a slaughterhouse which had been based largely on findings that the proposed slaughterhouse would generate excessive traffic on the gravel township road accessing Yang's property. Id. at 832. The record there showed the planning and zoning commission's traffic estimates were derived solely from daily road-use estimates provided by Yang himself in his operational plan, and were

augmented by the commission staff on the grounds that Yang repeatedly "appear[ed] to" understate or underestimate the operation's intensity, hours of operation, and delivery and service visits. The planning commission's traffic estimates, as adopted by the board of commissioners, are not substantiated by independent analysis or reliable facts

in the record. Rather, the estimates represent speculative predictions on the possible maximum number of customers the operation will attract, and the potential intensity of the operation. The board's order provides no explanation for rejecting Yang's figures or crediting its own figures other than to repeatedly state Yang's estimates appear unreasonable, unrealistic, and inaccurate.

Id. at 833 (emphasis added).

So too in the present case the Nelson/Dickmanns' estimates represent speculative predictions on the possible maximum 600 adult dogs. However, the Yang court found no basis in the record for the board's conclusions and held the board acted arbitrarily in concluding that excessive traffic generated by the proposed use was a valid reason to deny Yang's application. Id. at 834, citing C.R. Investments, Inc.v. Village of Shoreview, 304 N.W.2d 320, 325-28 (Minn. 1981) (overturning CUP denial where no concrete evidence warranted an inference that the proposed use would substantially aggravate traffic); Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee, 303 Minn. 79, 85, 226 N.W.2d 306, 309 (1975) (holding that unsubstantiated speculation about increased traffic does not support denial of a CUP application).

In Minnetonka Congregation of Jehovah's Witnesses, the City of Minnetonka denied a CUP to construct a church, making a finding based on an idea that it was self-evident that the construction of a church would substantially increase traffic. Id. at 85, 226 N.W.2d at 309. The Supreme Court held this an insufficient basis for a finding that a traffic problem would exist, since while it might be "self-evident" that the use would "cause heavier

vehicular traffic,” increased traffic in itself is “far from the creation of a traffic hazard” sufficient to deny the permit. *Id.*

The very recent decision in *Eureka Township. v. Krapu*, *supra*, is in accord. There, the township’s Finding 5 in support of its denial of the Krapus’ CUP application for a dog kennel indicated “transportation safety” as a contributing factor and declared that additional traffic “is a safety concern.” *Id.* at *5 (M-App. 36). The Court of Appeals explained that this was insufficient to deny the CUP:

[S]everal neighbors did speak of “concerns” about potential traffic increases that they believe will result from the Krapus’ proposed kennel. But the township’s finding that the burden on a shared driveway and the excessive car traffic and customer trips would create safety hazards simply lacks any “concrete,” or real, support in the record.

....

Here, although residents expressed *concern* about additional traffic burdens and speculated about hazardous traffic conditions, they provided no actual evidence, such as traffic studies, to substantiate that any real hazards would likely result from increased traffic. In *Yang*, we rejected a county board’s conclusion that a proposed use would create excessive traffic because the conclusion rested on neighbors’ personal observations of increased vehicular traffic from the use. 660 N.W.2d at 834. We explained that “the neighbors’ anecdotal comments contain no detail as to how the cars they witnessed might affect circulation or the general welfare, and are insufficiently concrete to substantiate a finding that the proposed [custom slaughterhouse] would create excess traffic.” *Id.* Following *Svee* and *Yang*, we see no basis in the record to support the township’s Finding 5 that the Krapus’ proposed kennel will likely result in excess traffic and impair public safety.

Eureka Township at *5 (M-App. 37) (italicized emphasis in original).

Even had the Nelson/Dickmanns' traffic congestion concerns in the present case been raised before the County Board, the Board would not have acted unreasonably, arbitrarily or capriciously in granting the CUP. To the contrary, given the above case law, it would have been unreasonable, arbitrary and capricious of the County Board to have denied the CUP on that ground.

3. Concerns as to Alleged Inhumane Treatment of Dogs Such as Debarking, Overcrowding or Lack of Outside Exercise

McDuffee has the highest regard for the Humane Societies and the work it does in ensuring animal welfare and preventing cruelty to animals. Nevertheless, the arguments raised by the Humane Societies in their Brief have no validity unless based on statutes which would specifically prohibit the grant of the CUP. None of the Relators has cited to any federal or Minnesota statute or regulatory rule which prohibits debarking of dogs, and there is none².

The Humane Societies cite to Minn.Stat. §343.21, prohibiting torture and cruelty, i.e.:

Torture. No person shall overdrive, overload, torture, cruelly beat, neglect, or unjustifiably injure, maim, mutilate, or kill any animal, or cruelly work any animal when it is unfit for labor, whether it belongs to that person or to another person. (§343.21, subd. 1)

Cruelty. No person shall willfully instigate or in any way further any act of cruelty to any animal or animals, or any act tending to produce cruelty to animals. (§343.21, subd. 7).

² Counsel for McDuffee have run a Westlaw search in both federal and Minnesota statutory databases on "dogs" and "debarking" and "dogs" and "outside exercise" without obtaining any result.

Minn.Stat. §343.20 is the definition section for purposes of §§ 343.20 - 343.36. The Humane Societies rely on the definitions in §343.20, subd. 3 (erroneously cited by the Humane Societies as §343.21, subd. 3), defining "torture" or "cruelty" as "every act, omission, or neglect which causes or permits unnecessary or unjustifiable pain, suffering, or death." Id.(emphasis added). There is however nothing to suggest that, should McDuffee have any outside dogs debarked, the procedure will cause them any pain or suffering, as McDuffee's veterinarian Dr. Extrand stated on the record that the vocal cords are removed under anesthesia. Further, none of the Relators suggest that debarking will lead to death.

Minn. Stat. §343.21, subd. 9, sets out the penalties for violations of subdivisions 1 or 7 of that Statute, see supra, which result in either "substantial bodily harm," §343.21, subd. 9 (b), or "great bodily harm." Minn. Stat. §343.21, subd. 9 (d). The Humane Societies rely on the definitions of "substantial bodily harm" and "great bodily harm" in Minn. Stat. §343.20, subs. 8 and 9, respectively, as causing either temporary or permanent loss or impairment of the function of any bodily member or organ to a "pet or companion animal." However, as debarking is not a violation of either §343.21, subd. 1 or subd. 7, the penalty provision of §343.21, subd. 9 does not apply, and the definitions of "substantial" or "great" bodily harm are irrelevant.

In any event, the Humane Societies concede that the statutory definition of a "pet" is an animal owned, possessed by, cared for or controlled by a person for the present or future enjoyment of that person or another as a pet or companion. Minn. Stat. §343.20, subd. 6.

While this definition includes the puppies bred or to be bred at McDuffee's dog kennel, which are raised to be pets, McDuffee confirmed on the record that puppies would not go outside the facility and would not be debarked. Adult breeding dogs in a dog breeding facility are not "pets" within the Statute. The Humane Societies' argument that dogs used for breeding could potentially become pets through future adoption must be disregarded as mere speculation. See C.R. Investments, supra, 304 N.W.2d at 325 (objections to CUP must be based on more than conjecture or speculation); Yang, supra. The Humane Societies suggest, without any evidence in the record, that debarking a dog results in a permanent loss or impairment to the function of the dog's vocal cords. However, in Schneider v. Fromm Laboratories, 262 Wis. 21, 53 N.W.2d 737 (1952), affirming the denial of injunctive relief sought to abate an alleged nuisance of barking dogs kept at the defendant's laboratories because, in part, they were debarked to control noise, the record showed that

new dogs are admitted from time to time and upon their admission are partially **debarked** by an **approved medical operation** consisting of removing the vocal cord. Thereafter the dogs are capable of emitting a muffled or hoarse bark which is about sixty-five per cent of the normal sound. **As connective tissue grows in the location of the vocal cords the dogs regain their ability to bark** and are again subjected to the debarking operation.

Id., 262 Wis. at 22-23, 53 N.W.2d at 738 (emphasis added).

The only evidence in the record and before the County Board is that of McDuffee's veterinarian Dr. Extrand who explained to the MCPC at the December 19, 2005 public hearing

that the debarking operation, carried out humanely under anesthesia, does not totally remove the dog's ability to bark, and still allows them to communicate. There was no evidence in the record that debarking is a "permanent" condition.

Given that there is no federal or Minnesota statute enjoining debarking, and that the record contained nothing to alert the County Board that debarking is allegedly disfavored by the veterinary community except in cases of last resort, the County Board was under no obligation to have studied the debarking issue before issuing the CUP with the debarking condition. Significantly, the articles relied on by Relators are cited for the first time in their Briefs, and the County Board received no correspondence opposing debarking until after the CUP was issued. McDuffee is moving to strike all materials not in the record. See Minn.R.Civ.App.P. 110.01 ("The papers filed in the trial court, the exhibits and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases") and McDuffee's separate Motion to Strike. In any event, as McDuffee has decided not to allow any dogs outside, the debarking issue is moot.

The Humane Societies also argue that keeping the dogs indoors will deprive them of outdoor exercise. Again, there is no federal or Minnesota statute requiring that dogs be exercised outdoors. To the contrary, pursuant to Minn. Stat. §343.40, it is a misdemeanor to keep a dog outdoors without providing the dog, at a minimum, shelter and bedding as prescribed in the Statute. Id. See also Rae v. Flynn, 690 So. 2d 1341 (Fla. Dist. Ct. App. 3d Dist. 1997) (affirming permanent injunction prohibiting dog owner from housing her pets

outdoors to abate a nuisance).

Federal regulations, enforced by the USDA, govern the sizes of cages, according to the size of the dogs, in dog breeding facilities and where necessary, sufficient space is allowed for the dogs to exercise indoors. It is for the USDA, and not the Humane Society or the County Board, to regulate compliance with the animal welfare laws in the operation of breeding facilities. As the Nelson/Dickmanns state in their Brief:

Dog kennels are heavily regulated under both Federal and State laws. As a commercial dog handler, McDuffee is subject to regulation by the Department of Agriculture. *See* 7 U.S.C. §2132(f). He is required to have a Federal license issued by the Secretary of Agriculture, 7 U.S.C. §2133; 7 U.S.C. §2134, and must follow Federal standards for humane handling, care and treatment of dogs. *See* 7 U.S.C. §2143.

Nelson/Dickmanns' Brief, p. 20.

The Nelson/Dickmanns also point out and concede that while the USDA regulations covering the daily care of dogs in any breeding facility include the requirement that daily exercise must be provided for the dogs, 9 CFR §§ 3.6 and 3.8, there is no requirement for outdoor exercise. The Nelson/Dickmanns note:

If the dogs are kept in cages, pens or runs which provide them with two times the required floor space for that dog, **they need not be taken out of their cage for exercise.** The calculation for required floor space is set forth in 9 CFR §3.8 and 9 CFR 3.6 (c)(1). According to those calculations, a fourteen inch dog would require 800 square inches or 5.4 square feet of floor space in order for the dealer to be relieved of it's [sic] obligation to remove the dog from the cage for exercise on a daily basis.

When two or more dogs are housed together the required floor space is the sum of the required floor space for each dog individually.

Nelson/Dickmanns' Brief, pp. 20-21, n.6 (emphasis added).

The comment by the Nelson/Dickmanns in the same footnote that it is "unlikely that McDuffee would provide the double floor space" is mere conjecture and should be disregarded, as should the reference to conditions at previous kennels with which McDuffee was associated, and reference to App. 11, 14, 15, 16 and 25 as this information was not before the County Board when it issued the CUP and does not form part of the record. See McDuffee's separate Motion to Strike.

The Humane Societies' concerns as to overcrowding are again based on speculation. A dog kennel with a maximum of 600 adult breeding dogs is not unusually large or immense; in 2001 the County Board approved a CUP for another kennel with which McDuffee was associated in Cushing with a maximum of 800 adult dogs. See M-App. 14.

McDuffee advised the County Board that he would comply with all USDA regulations in operating the kennel. His compliance is not a matter for the County Board. As the Court of Appeals stated in Yang:

Where state standards are set and enforced by state agencies and where a conditional use permit applicant informs the board of commissioners of his intention to comply with all applicable standards, the board need not resolve specific compliance issues prior to granting a conditional use permit. See Schwardt, 656 N.W.2d at 388-89 (holding that county board

of commissioners may not deny conditional use permit application on grounds proposed use does not comply with county setback requirement where it was zoning administrator's duty to enforce the setback requirement and where applicant promises that he will comply with requirement). **The board of commissioners had no duty to ensure state regulations were met**, and should have reserved the question of regulatory compliance for the relevant state agencies by conditioning issuance of the conditional use permit on Yang's confirmed compliance with state standards. See id.

Yang at 835 (emphasis added). The Yang court therefore held that the county acted arbitrarily in denying Yang's application on the grounds that his operational plan inadequately described his compliance with state standards. Id.

Given the record before the County Board, the decision to issue the CUP with a cap of 600 adult dogs and a requirement that outside dogs be debarked was not unreasonable, arbitrary or capricious.

IV. THE NELSON/DICKMANN'S ENVIRONMENTAL CONCERNS DO NOT MAKE THE COUNTY BOARD'S ISSUANCE OF THE CUP UNREASONABLE, ARBITRARY OR CAPRICIOUS.

A. ONLY THE DISTRICT COURT HAS JURISDICTION OVER THE ENVIRONMENTAL ISSUES.

The Nelson/Dickmanns devote pages 7 through the top of page 12 under the heading "The Dog Breeding CUP" in their Statement of Facts to environmental concerns. Specifically, these pages relate to McDuffee's proposal that dog waste be spread on his and a neighboring property, which is relevant to their Petition for an EAW which was denied by the County Board. The Nelson/Dickmanns also devote a significant part of their argument,

from pages 28 - 35 under the hearing "Environmental Effects," to the alleged deleterious effects of dog waste, including at pages 30-32 information obtained from the Center for Disease Control which is presented for the first time in this appeal.

These environmental concerns of the Nelson/Dickmanns are the basis of their petition for an EAW, and their challenge to the County Board's denial of their petition is not properly before this Court. Judicial review of the quasi-judicial decisions of administrative bodies can be invoked by certiorari only absent an established method of review or other clear legal remedy. AAA Striping Service Co. v. Minnesota Dept. of Transp., 681 N.W.2d 706, 715 (Minn.Ct.App. 2004), citing Dietz v. Dodge County, 487 N.W.2d 237, 239 (Minn.1992); however, this Court has jurisdiction to review, by writ of certiorari, a quasi-judicial zoning decision made by a county board. Interstate Power Co., Inc. v. Nobles County Bd. of Com'rs, 617 N.W.2d 566, 574 (Minn. 2000).

In this case there is an established method of review of decisions relating to the need for an EAW. Minnesota Statutes and Rules clearly provide for judicial review by declaratory judgment action in the district court of the county where the proposed project would be undertaken. See Minn. Stat. § 116D.04, subd. 10 ("Decisions on the need for an environmental assessment worksheet . . . may be reviewed by a declaratory judgment action in the district court of the county . . ."); Minn.R.4410.0400, subpart 4 ("Decisions by a RGU on the need for an EAW . . . are final decisions and may be reviewed by a declaratory judgment action . . . in the district court of the county . . ."). See also Kreuz v. St. Louis

County Planning and Zoning Com'n, 1996 WL 469486 (Minn.Ct.App. 1996) (M-App. 54), involving concurrent appeals, i.e. a district court declaratory judgment action challenging an EAW and certiorari to the Court of Appeals challenging a CUP. In Kreuz, because certiorari was “the sole remedy available to obtain review of a county board’s decision” on CUP’s, Kreuz at *1 (M-App. 54), and because Minn.R.4410.0400, subp 4 required review of a decision on an EAW to be made by declaratory judgment action in the district court, and which was therefore not before the Court of Appeals, id. at *2 (M-App. 55), a request to stay the certiorari proceedings pending resolution of the declaratory judgment was refused. Id. at * 1 (M-App. 54).

Given the statutorily established method of review of decisions relating to the need for an EAW, this Court has no jurisdiction to review the Nelson/Dickmanns’ environmental concerns which properly relate to their challenge to the denial of their petition for an EAW; that challenge must be decided in the district court. Indeed, on February 7, 2006, the Nelson/Dickmanns filed a summons and complaint in the Morrison County District Court seeking, among other things, a declaratory judgment that the County undertake an EAW with respect to McDuffee’s application for a CUP. Any determination as to the reasonableness of the County Board in denying the application for an EAW is for the district court to decide in that action; this Court has no jurisdiction over this issue.

The Nelson/Dickmanns acknowledge that the failure to grant an EAW is the subject of a claim in the district court but attempt to justify the inclusion of their environmental

concerns in this appeal by citing to Picha v. County of McLeod, 634 N.W.2d 739 (Minn.App.2001), at p. 741, for the proposition that the district court action “does not preclude this court from considering the county’s failure to address environmental issues as required in its Ordinance, which is a matter that cannot be brought before the District Court, but must be brought before this court under certiorari review.” Nelson/Dickmanns’ Brief, pp. 28-29, n.13. In fact, Picha does not justify raising environmental concerns in this Court; Picha does not even mention environmental issues and merely holds that decisions made by a county board regarding a CUP are quasi-judicial and reviewable by a writ of certiorari. Id. at 741. This Court simply has no jurisdiction to hear the Nelson/Dickmanns environmental concerns.

B. EVEN IF, ARGUENDO, THIS COURT HAS JURISDICTION OVER THE ENVIRONMENTAL CONCERNS, THIS ISSUE DOES NOT MAKE THE COUNTY BOARD’S ISSUANCE OF THE CUP UNREASONABLE, ARBITRARY OR CAPRICIOUS.

Even if, arguendo, the Court of Appeals has jurisdiction over the Nelson/Dickmanns’ environmental concerns, these concerns do not make the County Board’s approval of the CUP unreasonable. This discussion is necessarily brief, as McDuffee does not believe it is properly before this Court; however, should the Court so request, it can be expanded at oral argument.

First, any material which was not on the record before the County Board, such as the information from the Center for Disease Control, must be excluded. See McDuffee’s

separate Motion to Strike. Second, the requirement in the Ordinance that the planning commission shall consider the effect of the proposed use on the "Health, Safety, Morals, and General Welfare of Occupants of Surrounding Lands and Waterbodies," is satisfied when all the listed criteria are satisfied, as set out in the Findings of Fact, see Argument II, supra. No separate finding as to health and welfare is required. The County Board's approval of McDuffee's application implies that all requirements for the issuance of the CUP have been met. Corwine, supra, 309 Minn. at 352, 244 N.W 2d at 486.

Finally, the County Board discussed the petition for an EAW and the Nelson/Dickmanns' environmental concerns prior to making the determination to grant the CUP. In deciding that an EAW was not necessary, the County Board, familiar with agricultural matters, relied on the "feedlot exemption" under Minn. Stat. §116D.04, subd.2a (d) and Minnesota Rule 4410.4600, subpart 19, pursuant to which, based on the number of potential "animal units" at McDuffee's facility, there is no need for an EAW. The "feedlot exemption," accordingly, provided the County Board with a reasonable basis for Finding 12d that "[t]he requested use, in the opinion of the Planning Commission, is reasonably related to the existing land use and environment."

V. BECAUSE THE COUNTY BOARD DID NOT MODIFY THE CUP THERE WAS NO VIOLATION OF ANY NOTICE OR HEARING REQUIREMENTS.

The Nelson/Dickmanns' argument that the County Board violated the ordinance and acted arbitrarily in not holding a public hearing prior to the February 7, 2006 letter to McDuffee recommending the use of debarking collars rather than surgical debarking is based

on their contention that the February 7, 2006 letter modified the CUP. This not the case. The February 7, 2006 letter was not an action of the County Board. Indeed, the Nelson/Dickmanns acknowledge “the Board did not discuss, or approve, any changes in the CUP it had issued to McDuffee for his particular facility. Rather, a letter was sent to McDuffee from the County Administrator and County Attorney . . .” Nelson/Dickmanns’ Brief, p. 14. Absent action of the County Board, the CUP has not been modified.

McDuffee relies on and incorporates herein Argument V of the Humane Societies’ Brief, at page 15-16, line 4, headed “The County’s February 7 Letter Has No Legally Binding Effect on the Applicant and Does Not Amend the Conditional Use Permit.”

Since there was no modification of McDuffee’s CUP, there was no violation of any notice of hearing requirements in the Ordinance. For the same reason, the Nelson/Dickmanns’ argument at pages 24-28 of their Brief under the heading “B. Noise” must also fail.

VI. THE COUNTY BOARD DID NOT ACT UNREASONABLY, ARBITRARILY OR CAPRICIOUSLY IN REFUSING TO GRANT A NEW HEARING ON THE CUP BECAUSE NONE WAS REQUIRED.

The Nelson/Dickmanns assert, at Argument V of their Brief, that the County Board should have allowed a new public hearing on what they describe as “new evidence”, i.e. documents submitted by them to the County Board after the issuance of the CUP alleging violation of USDA kennel requirements at facilities with which McDuffee was previously related.

The County Board did not act arbitrarily. Sections 507.4 and 908.3 of the Ordinance, relied on by the Nelson/Dickmanns in support of this argument, do not provide for a new public hearing, and the alleged “new evidence” was not new. The issue of alleged violations at other dog breeding facilities with which McDuffee was associated was raised at the December 19, 2005 public hearing by both Relator Sara Dickmann and Greg Colombe, the Belle Prairie Township Supervisor. The MCPC was therefore aware of these allegations, yet nonetheless recommended the grant of the CUP. Accordingly, the Nelson/Dickmanns have not shown, and cannot show, that even had these documents been made available earlier, the result would not have been the same.

In any event, any such allegations of violation of USDA requirements at other facilities relate to those facilities only, and not to the new facility proposed in the CUP application. The other “new” objections of the Nelson/Dickmanns are likewise invalid. Because McDuffee’s CUP application was made jointly with Harvey Block, an owner of the property, it complied with s. 507.4a. of the Ordinance. Relators Nelson and Dickmann were present at the December 19, 2005 public hearing when it was announced that the CUP application was being made by the Blocks “with the potential buyer Gary McDuffee” (TR PC 3:2-3). The Nelson/Dickmanns have thus been aware of McDuffee’s application from the outset but as they have made no prior objection they have waived this issue. That McDuffee was only a prospective purchaser at the time is immaterial. See Northpointe Plaza v. City of Rochester, 465 N.W.2d 686, 698 (Minn. 1991) (the CUP application made by

respective purchaser) and Schwardt, supra at 385 (son-in-law applied for CUP on land owned by his father-in-law).

As the Eureka Township opined in concluding that the township had wrongfully denied the CUP to operate a dog kennel:

[T]his case ultimately reduces to a contest between landowners and neighbors. The landowners want to enjoy the use of their property in a manner **that happens to fall within the zoning scheme**, but in a manner inconsistent with the preferences of several of their neighbors.

Id. at *8 (M-App. 39) (emphasis added).

CONCLUSION

The respective certiorari appeals of the Nelson/Dickmanns and the Minnesota Federated Humane Societies should be denied in all respects.

Respectfully submitted,
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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).