

CASE NO. A10-2143

STATE OF MINNESOTA
IN SUPREME COURT

Mitchell Sawh,

Respondent/Cross-Appellant,

vs.

City of Lino Lakes,

Appellant/Cross-Respondent.

APPELLANT/CROSS-RESPONDENT CITY OF LINO LAKES'S
BRIEF AND ADDENDUM

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

Patricia Y. Beety (#227390)
James J. Mongé III (#29200X)
League of Minnesota Cities
145 University Avenue West
St. Paul, MN 55103-2044
Telephone: (651) 281-1200

*Attorneys for Respondent/Cross-
Appellant Mitchell Sawh*

*Attorneys for Appellant/Cross Respondent
City of Lino Lakes*

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

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE LEGAL ISSUES.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	3
STANDARD OF REVIEW	12
LEGAL ARGUMENT.....	14
I. THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE CITY DENIED RESPONDENT PROCEDURAL DUE PROCESS.	14
A. Respondent was not deprived of any property interest when the City declared the dog potentially dangerous.	16
B. Respondent received notice and a meaningful opportunity to be heard before being deprived of any property interest.....	17
II. ASSUMING <i>ARGUENDO</i> THE PROCESS AFFORDED RESPONDENT WAS TECHNICALLY INSUFFICIENT, THE PROPER REMEDY IS REMAND OF THE CASE BACK TO THE CITY COUNCIL FOR REHEARING.	28
III. THE COURT OF APPEALS ERRED IN DECLARING LINO LAKES CITY CODE § 503.15 UNCONSTITUTIONAL ON ITS FACE.	31
CONCLUSION	32

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Bd. of Regents of State Colleges v. Roth</i> , 408 U.S. 564, 92 S.Ct. 2701 (1972)	16
<i>Bishop v. Tice</i> , 622 F.2d 349 (8th Cir. 1980).....	30
<i>Cafeteria Workers v. McElroy</i> , 367 U.S. 886, 81 S.Ct. 1743 (1961)	15
<i>Carey v. Piphus</i> , 435 U.S. 247, 98 S.Ct. 1042 (1978)	30
<i>Golderg v. Kelly</i> , 397 U.S. 254, 90 S.Ct. 1011 (1970)	16
<i>Hogue v. Clinton</i> , 791 F.2d 1318 (8th Cir. 1986)	30
<i>Joint Anti-Fascist Comm. v. McGrath</i> , 341 U.S. 123, 71 S.Ct. 624 (1951)	15
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893 (1976).....	passim
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 92 S.Ct. 2593 (1972)	1, 15, 17, 24
<i>Sentell v. New Orleans & Carrollton R.R. Co.</i> , 166 U.S. 698, 17 S.Ct. 693 (1897)	23
<i>Wolff v. McDonnell</i> , 418 U.S. 539, 94 S.Ct. 2963 (1974)	15

Statutes

Minnesota Statute § 347.52.....	24
Minnesota Statute § 347.541, subd. 3(2) (2008).....	22
Minnesota Statutes § 347.53 (2008)	23

State Cases

<i>Axelson v. Minneapolis Teachers' Retirement Fund Ass'n</i> , 544 N.W.2d 297 (Minn. 1996)	13
<i>Beck v. Council of St. Paul</i> , 235 Minn. 56, 50 N.W.2d 81 (Minn. 1951).....	13
<i>Big Lake Ass'n v. St. Louis County</i> , 761 N.W.2d 487 (Minn. 2009).....	13
<i>Citizens Nat'l Bank of Madelia v. Mankato Implement, Inc.</i> , 441 N.W.2d 483 (Minn. 1989)	13
<i>City of St. Paul v. Kekedakis</i> , 293 Minn. 334, 199 N.W.2d 151 (1972).....	14
<i>Corn v. Sheppard</i> , 179 Minn. 490, 229 N.W. 869 (1930)	18
<i>Dead Lake Assoc. Inc. v. Otter Tail County</i> , 695 N.W.2d 129 (Minn. 2005)	32
<i>Dietz v. Dodge County</i> , 487 N.W.2d 237 (Minn. 1992)	13
<i>Dokmo v. Ind. Sch. Dist. No. 11</i> , 459 N.W.2d 671 (Minn. 1990).....	13
<i>Fosselman v. Commissioner of Human Services</i> , 612 N.W.2d 456 (Minn. App. 2000) ..	31
<i>Hansen v. City of St. Paul</i> , 298 Minn. 205 N.W.2d 346 (1974)	23
<i>Harrow v. St. Paul & D.R.R.</i> , 43 Minn. 71, 44 N.W.2d 881 (1890).....	18
<i>Heddan v. Dirkswager</i> , 336 N.W.2d 54 (Minn. 1983).....	18
<i>Honn v. City of Coon Rapids</i> , 313 N.W.2d 409 (Minn. 1981)	32
<i>In re Senty-Haugen</i> , 583 N.W.2d 266 (Minn. 1998)	30
<i>Meath v. Harmful Substance Comp. Bd.</i> , 550 N.W.2d 275 (Minn. 1996).....	13
<i>Minn. Dept. of Public Safety v. Elk River Ready Mix Co, Inc.</i> , 430 N.W.2d 261 (Minn. 1988)	16
<i>Sartori v. Harnischfeger Corp.</i> , 432 N.W.2d 448 (Minn. 1988)	14, 15

<i>Sawh v. Lino Lakes</i> , 800 N.W.2d 663 (Minn. App. 2011).....	12, 29, 31
<i>Schulte v. Transportation Unlimited</i> , 354 N.W.2d 830 (Minn. 1984).....	1, 30
<i>State v. Behl</i> , 564 N.W.2d 560 (Minn. 1997).....	14
<i>State v. Taubert</i> , 126 Minn. 371, 148 N.W.2d 281 (1914).....	14
<i>Tews v. Geo. A. Hormel & Co.</i> , 430 N.W.2d 178 (Minn. 1988).....	13
<i>Thompson v. Commissioner of Health</i> , 778 N.W.2d 401 (Minn. App. 2010).....	31
<i>Whaley v. Anoka-Hennepin Indep. Sch Dist. No. 11</i> , 325 N.W.2d 128 (Minn. 1982).....	13
<i>White Bear Rod and Gun Club v. City of Hugo</i> , 388 N.W.2d 739 (Minn. 1986).....	30

Ordinance/City Code

Golden Valley City Code § 10.30.....	24
Lino Lakes Code § 503.15.....	passim
Lino Lakes Code § 503.16.....	3, 10, 12, 22
Minneapolis City Code § 64.110.....	25
St. Cloud Ordinance § 1040:80.....	26
St. Paul City Code § 200.11.....	26, 27

Constitutional Provisions

Minnesota Constitution, Art. 1, § 7.....	1
United States Constitution, Amend. XIV.....	1

STATEMENT OF THE LEGAL ISSUES

Is there a due process violation when Respondent was afforded and participated in two hearings prior to any deprivation of his property?

Ruling below: The Court of Appeals held that the City violated Respondent's right to procedural due process because the City did not provide an opportunity for a hearing immediately after the Animal Control Officer declared the dog a potentially dangerous animal, despite affording Respondent a hearing before affirming the Animal Control Officer's dangerous animal declaration and a second hearing before affirming the Animal Control Officer's declaration that Respondent committed a subsequent offense with the dog. The Court of Appeals also held that the language of the City's ordinance, which does not provide an opportunity to challenge a potentially dangerous declaration, violates Respondent's due process rights on its face.

Apposite cases: *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972); *Schulte v. Transportation Unlimited*, 354 N.W.2d 830 (Minn. 1984).

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

STATEMENT OF THE CASE

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

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

On November 9, 2010, the day after the hearing, Respondent's dog bit a third person causing puncture wounds to his hand. The person was delivering furniture to Respondent's house. The Police Department determined that this third unprovoked biting

incident was a subsequent offense under Lino Lakes Code § 503.16(4) and ordered the dog destroyed. Respondent appealed the order to the City Council. On November 22, 2010, the City Council, after a hearing, unanimously affirmed the Police Department's determination that a subsequent offense had occurred.

Respondent appealed the City Council's quasi-judicial decisions affirming the declaration that the dog is a dangerous animal and affirming the determination that a subsequent offense occurred by writ of certiorari to the Court of Appeals.

The Court of Appeals reversed the City Council's decisions, holding that the City violated Respondent's procedural due process rights.

The City petitioned the Minnesota Supreme Court for review of the Court of Appeals' decision. Respondent requested conditional review. The Court granted the City's petition and Respondent's request for conditional cross-review.

STATEMENT OF FACTS

First Biting Incident

Respondent is the owner of a Labrador Retriever/Rottweiler mixed breed dog. (*App. 3.*)¹ On April 8, 2010, Respondent's dog ran through the invisible fence around Respondent's yard and traveled approximately one block to the intersection of Timberwolf Trail and Wolf Circle where it bit Carl S. a pedestrian.² (*T. at 3,*

¹ "App. ___" refers to the City's Appendix. "Add." refers to City's Addendum.

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

15; *App. 6, 9.*)³ Mr. S told the investigating Lino Lakes Police Officer that the dog came at him aggressively, jumped on him and bit his left arm causing injury. (*App. 7.*) The Police Officer also observed a large series of bloody marks on Mr. Schi left inner-bicep area consistent with a dog's teeth. (*Id.; App. 9.*)

The Lino Lakes Code contains Animal Control Regulations that regulate dangerous and potentially dangerous animals. (*Add. 2.*) Lino Lakes Code § 503.15(4) governs designation of an animal as potentially dangerous. (*Add. 5-8.*)

The animal control officer shall designate any animal as a potentially dangerous animal upon receiving evidence that a potentially dangerous animal has, when unprovoked, then bitten, attacked or threatened the safety of a person or domestic animal as stated in division (3)(b) above. When an animal is declared potentially dangerous, the animal control officer shall cause one owner of the potentially dangerous animal to be notified in writing that the animal is potentially dangerous.

(*Add. 7.*) Under Lino Lakes Code § 503.15(3)(b) a “potentially dangerous animal” is defined as an animal that has:

1. Bitten a human or domestic animal on public or private property;
2. When unprovoked, chased or approached a person upon the streets, sidewalks, or any public property in an apparent attitude of attack; or
3. Has engaged in unprovoked attacks causing injury or otherwise threatening the safety of humans or domestic animals.

(*Add. 6.*)

³ “T. at ___” refers to the larger bound Transcript of the City Council Meetings of November 8, 2010 and November 22, 2010 and the City Council Work Sessions of November 22 and December 6, 2010. “T. at ___ (1/4/11)” refers to the smaller bound Transcript of the City Council Meeting of January 4, 2011.

As a result of the April 8, 2010 unprovoked biting incident, the Lino Lakes Police Department Animal Control Officer notified Respondent's son by letter that the dog was now classified as a "potentially dangerous animal" as defined by Lino Lakes Code § 503.15(3)(b). (*App. 10.*) The letter also warned "[i]f your dog aggressively bites, attacks or endangers the safety of humans or domestic animals in the future we will have the authority to deem your dog dangerous and also have the authority to order destruction." (*Id.*) Lino Lakes City Code § 503.15(4) does not place any restrictions upon a dog that is declared potentially dangerous. (*Add. 7.*) When an animal is classified as potentially dangerous, the Animal Control Officer notifies the owner in writing that the dog is potentially dangerous. (*Id.*) Thus, no restrictions were placed on the dog as a result of the April 8, 2010 biting incident and potentially dangerous animal classification. (*App. 10.*) The dog remained in Respondent's possession without restrictions. (*Id.*)

Second Biting Incident

On October 15, 2010, Diane I was cleaning a house across the street from Respondent's house when she observed smoke rising from the backyard of the house next door to Respondent's house. (*T. at 6.*) Concerned that the smoke was coming from an unattended fire, Ms. I called 911 and the emergency operator told her go outside and ascertain if the fire was controlled. (*Id.*) Ms. I walked across Respondent's yard and observed that the fire was under control. (*Id.*) She hung up with the 911 operator and placed her cell phone back into her pocket. (*Id.*) As Ms. I was walking back towards the street, Respondent's wife approached her. (*Id.*) As Ms. I and Respondent's wife discussed the fire, the dog attacked Ms. Ir (*T. at 6-10; 18-21;*

App. 11, 17.) According to Ms. I the dog approached her menacingly, jumped up and bit her on the arm. (*T. at 7.*) Ms. I let the dog pull her jacket off her arm in order to get away from it. (*T. at 7.*)

Respondent's wife took the dog back to the front stoop and then returned Ms. Irwin's jacket to her. (*T. at 7.*) But, Respondent's wife lost control of the dog again and it pursued Ms. Irwin out to the street where it bit her on the right elbow leaving a puncture wound.⁴ (*T. at 7; App. 17.*) The wound was very deep. (*T. at 7-10; App. 26.*) It penetrated every layer of skin. (*T. at 8.*) The dog also bit Ms. Irwin on the left hip. (*T. at 8.*)

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

The animal control officer shall have the authority to designate any animal as a dangerous animal upon receiving evidence of the following:

(a) The animal has, when unprovoked, bitten, attacked or threatened the safety of a person or domestic animal as stated in division (3)(a) above; or

(b) The animal has been declared potentially dangerous and the animal has then bitten, attacked [sic] or threatened the safety of a person or domestic animal as stated in division (3)(a) above.

(*Add. 7.*) Lino Lakes Code § 503.15(3)(a) defines "dangerous animal" as an animal which has:

1. Caused bodily injury or disfigurement to any person on public or private property;

⁴ The dog was on a leash but the leash was not anchored to anything. (*T. at 7.*)

2. Engaged in any attack on any person under circumstances which would indicate danger to personal safety;
3. Exhibited unusually aggressive behavior, such as an attack on another animal;
4. Bitten one or more persons on two or more occasions; or
5. Been found to be potentially dangerous and/or the owner has personal knowledge of the same, the animal aggressively bites, attacks or endangers the safety of humans or domestic animals.

(Add. 6.)

On October 20, 2010, the Police Department notified Respondent by letter that

[d]ue to incidents that occurred on 04/08/2010 and 10/15/ 2010, your dog has been classified as a “dangerous animal” pursuant to Lino Lakes Code § 503.15. As a result of this classification you are to have your dog permanently removed from the city within 14 days.

If you wish to appeal the “dangerous animal” classification, you must contact the Lino Lakes City Hall by November 3 at 4:30pm to schedule a hearing before the city council. Failure to take any action within the given 14 day period will result in the immediate seizure and destruction of your dog at your expense.

*(App. 15, 27.)*⁵ Respondent’s wife also received a citation for violating the dangerous animal ordinance with the letter. *(App. 28.)*

⁵ Under the plain language of the City’s dangerous dog ordinance, Respondent’s dog met the definition of a dangerous animal even if it had not been previously designated potentially dangerous because without provocation it (1) caused bodily injury to a person on public or private property; (2) engaged in an attack on a person under circumstances that would indicate danger to personal safety; (3) exhibited unusually aggressive behavior and (4) had bitten one or more persons on two or more occasions. *See Add. 6*, Lino Lakes City Code § 503.15(3)(a)(4). In addition, Respondent’s dog could have been designated as dangerous even if the first incident had not occurred. The dog’s conduct on October 15, 2010 1) caused bodily injury to a person on public or private property and 2) was an attack on a person under circumstances which would indicate danger to personal safety. *See Add. 6*, Lino Lakes Code 503.15(3)(a) (1) and 503.15(3)(a)(2).

Respondent appealed the dangerous animal designation to the City Council. (*T. at 3.*) The City Council held a hearing on the matter on November 8, 2010. (*T. at 2-74; Add. 10-13.*) At the hearing, Respondent was given a full opportunity to present testimony and documentary evidence on both the April 8, 2010 biting incident and the October 15, 2010 biting incident. (*T. at 11-23.*) Respondent admitted at the hearing that there had been a “series of unfortunate incidents” and said he was sorry for the injuries caused to others because of his dog. (*T. at 11.*)

Respondent was not present when the April 8, 2010 biting incident occurred but he offered the testimony of his son who was a witness to it. (*T. at 13.*) Respondent’s son testified that the dog breached the invisible fence surrounding Respondent’s yard. (*T. at 15.*) He was chasing after the dog and did not have control of it when it bit Mr. Sc [redacted] (*T. at 15.*) He saw the dog jump up on Mr. Sc [redacted] but did not see whether the dog bit him. (*T. at 15.*) Respondent admitted his dog had injured Mr. Schmuland. (*T. at 11-13, 14.*) However, Respondent failed to provide any evidence to suggest Mr. S [redacted] provoked the dog. (*T. 12-16.*)

With respect to the second biting incident that occurred on October 15, 2010, the victim, Ms. Ir [redacted] testified that the dog bit her first on the arm. (*T. at 6.*) Then, after the dog got free again, it chased her down and bit her on the right elbow and left hip. (*T. at 7.*) Ms. Ir [redacted] testified that she did not believe Respondent’s family could control the dog. (*T. at 8, 10.*) Ms. Ir [redacted] also testified that she received medical treatment due to the extent of her injuries and the doctor told her the wound on her elbow was very deep. (*T.*

at 8-9.) Ms. I worried that if the dog attacked a toddler or an older, weaker person it would injure them severely. (T. at 10.)

Respondent admitted that the dog bit Ms. Ir (T. at 11-14.) Respondent failed to provide any evidence suggesting Ms. I provoked the dog. (T. at 18-23.)

Respondent's wife admitted she lost control of the dog when it bit Ms. Ir (T. at 21.)

At the close of the hearing, the City Council considered the evidence presented regarding both the April 8, 2010 and October 15, 2010 biting incidents. (T. at 29-57.) Based upon all of testimony and documentary evidence presented, the City Council unanimously affirmed the dangerous animal designation. (T. at 56-57.) Although, under its ordinance the City Council could have ordered the dog destroyed based upon the dangerous animal designation, it allowed the dog to remain living in the City in Respondent's care provided Respondent took several mandatory precautions to protect the public from the dog. (T. at 66-74.) These precautions required Respondent to: (1) register the dog as a dangerous animal; (2) tag the dog as a dangerous animal; (3) leash and muzzle the dog or keep the dog in a proper enclosure when outdoors; (4) implant the dog with microchip identification; and (5) obtain a policy of insurance in the amount of \$300,000 covering the dog. (T. at 57-74.)

Third Biting Incident

The dog bit a third person, Christopher H on November 9, 2010, less than one month after the second biting incident and the day after the City Council affirmed the dangerous animal declaration and mandated Respondent take specific precautions to ensure against future attacks upon the public. (T. at 76.) Mr. H was delivering

furniture to Respondent's house. (*T. at 76, 112.*) Respondent's wife was at home to receive the furniture delivery. (*T. at 112.*) Mr. H walked into Respondent's basement to determine where the furniture would be placed. (*App. 2, 38.*) Respondent's wife had not warned him that the dog was in the basement nor did she provide information verbally or by postings that the house contained a dangerous animal. (*Id.*) When Mr. H walked into the basement area, the dog came at him and bit him on the left hand leaving two puncture wounds.⁶ (*App. 2, 35, 38.*)

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

If an owner of an animal has subsequently violated the provisions under § 503.15 with the same animal, the animal must be seized by animal control. The owner may request a hearing as defined in § 503.15(7). If the owner is found to have violated the provisions for which the animal was seized, the animal control officer shall order the animal destroyed in a proper and humane manner and the owner shall pay the costs of confining the animal.

(*Add. 9.*) Pursuant to Lino Lakes Code § 503.16(4), Lino Lakes Police Chief Kent Stregge notified Respondent by letter dated November 10, 2010 that the November 9, 2010.

bite is considered a subsequent bite per the city ordinance (503.16(4)) and thus the animal was seized and is currently being held at the designated facility. Per ordinance this dog is to be destroyed in a proper and humane manner and you as the owner shall pay the cost of confining the animal.

The City ordinance states you have 14 days from the above listed date to appeal this order by contacting the Lino Lakes City Clerk.

⁶ When a Police Officer arrived at Respondent's residence and asked Respondent's wife to muzzle and transport the dog to quarantine, Respondent's wife told the officer she was uncomfortable attempting to muzzle and transport the dog. (*App. 3.*)

(*App.* 36.) Respondent appealed the determination that a subsequent offense occurred and requested a hearing before the City Council. (*T.* at 77.)

The City Council held another hearing to consider Respondent's appeal on November 22, 2010. (*T.* at 75-128; *Add.* 15-18.) At the hearing, the City Council received the police report of the third biting incident and a photograph of the deep gashes on Mr. Han's hand. (*App.* 35; 45-47.) Respondent introduced a letter from Mr. Han. (*App.* 53.) In the letter Mr. Han states that the dog bit him and that the biting incident was "completely preventable." (*Id.*) Respondent also introduced several letters and emails from family friends in support of the dog. (*App.* 48-64, 72-75.) None of the letters refuted that the dog had been involved in three unprovoked biting incidents in a seven month period. (*Id.*) In addition, these letters established that Respondent's dog is commonly in situations where significant harm can occur; i.e, frequent events involving children and "playful" situations involving strangers. (*Id.*)

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

Following the hearing, the City Council adopted the following findings unanimously. (*T.* at 122-124; *Add.* 17-18.)

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

(Id.) Respondent appealed the City Council's quasi-judicial decisions of November 8, 2010 and November 22, 2010 by writ of certiorari to the Court of Appeals. *(App. 106.)*

In an opinion dated July 25, 2011, the Court of Appeals reversed the City Council's November 8, 2010 decision that the dog is a dangerous animal and its November 22, 2010 destruction order. *(Add. 22; Sawh v. Lino Lakes, 800 N.W.2d 663 (Minn. App. 2011))*. The City petitioned the Minnesota Supreme Court for review of the Court of Appeals' opinion. *(Add. 1.)* Respondent requested conditional review. *(Id.)* The Court granted the City's petition and Respondent's request for conditional cross-review. *(Id.)*

STANDARD OF REVIEW

Respondent challenges by writ of certiorari the City Council's quasi-judicial decisions (1) to affirm the Animal Control Officer's determination that the dog is a dangerous animal; and (2) to affirm the Animal Control Officer's determination that under Lino Lakes Code § 503.16(4) a subsequent offense occurred after the dog was

declared a dangerous animal. Certiorari “mandates nonintrusive and expedient judicial review.” *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992). It “ensures that the judiciary does not encroach upon the constitutional power spheres of the other two branches.” *Meath v. Harmful Substance Comp. Bd.*, 550 N.W.2d 275, 281 n. 2 (Minn. 1996).

The standard of review for quasi-judicial decisions is limited and deferential. *Big Lake Ass'n v. St. Louis County*, 761 N.W.2d 487, 491 (Minn. 2009). “A quasi-judicial decision of an agency that does not have statewide jurisdiction will be reversed if the decision is fraudulent, arbitrary, unreasonable, unsupported by substantial evidence, not within its jurisdiction, or based on an error of law.” *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 544 N.W.2d 297, 299 (Minn. 1996). The appellate court reviews evidence only to determine whether it supports the findings of fact or the conclusions of law, and whether the municipality's decision was arbitrary and capricious. *Dokmo v. Ind. Sch. Dist. No. 11*, 459 N.W.2d 671, 674-75 (Minn. 1990). The reviewing court may not retry facts or make independent credibility determinations. See *Citizens Nat'l Bank of Madelia v. Mankato Implement, Inc.*, 441 N.W.2d 483, 485 (Minn. 1989); *Tews v. Geo. A. Hormel & Co.*, 430 N.W.2d 178, 180 (Minn. 1988); *Whaley v. Anoka-Hennepin Indep. Sch Dist. No. 11*, 325 N.W.2d 128, 130-31 (Minn. 1982). The court will uphold the decision if the lower tribunal “furnished any legal and substantial basis for the action taken.” *Beck v. Council of St. Paul*, 235 Minn. 56, 58, 50 N.W.2d 81, 82 (Minn. 1951).

Respondent also challenges by writ of certiorari the City Council's legislative decision in enacting Lino Lakes City Code § 503.15 because it does not provide for an

opportunity to challenge a potentially dangerous designation. Although certiorari does not envision review of legislative acts by local governments, Respondent asserts procedural due process violations. This Court has held that the constitutionality of a statute is a question of law and is therefore subject to de novo review. *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997). “Ordinances as well as statutes are presumed to be valid, and are not to be set aside by the courts unless their invalidity is clear.” *City of St. Paul v. Kekedakis*, 293 Minn. 334, 336, 199 N.W.2d 151, 153 (1972) (quoting *State v. Taubert*, 126 Minn. 371, 372, 148 N.W.2d 281, 282 (1914)). A party challenging a statute carries the heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional. *Behl*, 694 N.W.2d at 566. “The power to declare a statute unconstitutional is to be exercised only when absolutely necessary and then only with extreme caution.” *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988).

LEGAL ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE CITY DENIED RESPONDENT PROCEDURAL DUE PROCESS.

The Court of Appeals’ holding that the procedures provided to Respondent were unlawful is not supported by the facts or law. Respondent was not denied procedural due process because Respondent was given notice and a meaningful opportunity to be heard before the City deprived him of any interest in his property. The record before the Court is undisputed that Respondent’s dog has been involved in three unprovoked biting incidents. Respondent was provided with a full hearing before the City Council following the April 8, 2010 and October 15, 2010 biting incidents and prior to the dog

being designated a dangerous animal and prior to any restrictions being imposed upon it. Respondent was also provided with another hearing following the November 9, 2010 biting incident. Therefore, Respondent was not denied due process and the Court of Appeals decision should be reversed.

“[T]he due process protections granted under the United States and Minnesota Constitutions are identical.” *Sartori*, 432 N.W.d at 453. “The touchstone of due process is protection of the individual against arbitrary action of government.” *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976 (1974). “The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and an opportunity to meet it.’” *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 909 (1976) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72, 71 S.Ct. 624, 649 (1951) (Frankfurter concurring)). “Due process, unlike some legal rules is not a technical conception with a fixed content unrelated to time place and circumstances.” *Mathews*, 424 U.S. at 334, 96 S.Ct. at 902 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748 (1961)). “Due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972). “The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” *Cafeteria Workers v. McElroy*, 367 U.S. at 895, 92 S.Ct. at 1748. “[N]ot all situations calling for procedural safeguards call for the same kind of procedure.” *Morrissey*, 408 U.S. at 481, 92 S.Ct. at 2600. “All that is necessary is that the procedures be tailored in light of the decision to be made, to ‘the capacities and circumstances of

those who are to be heard' to insure that they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 348, 96 S.Ct. at 909 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-269, 90 S.Ct. 1011, 1021 (1970)).

Courts employ a two-step analysis to determine whether or not a violation of procedural due process has occurred under any given set of circumstances. *Mathews*, 424 U.S. at 322, 335, 96 S.Ct. at 903. First, the court determines whether a property interest is implicated. (*Id.*) Then, if the court finds that a litigant has been deprived of a property interest, the court determines what process was due by applying the *Mathews* balancing test. (*Id.*) Respondent cannot establish a violation of due process under this analysis.

A. Respondent was not deprived of any property interest when the City declared the dog potentially dangerous.

The City does not dispute that the dog is personal property. However, designating Respondent's dog potentially dangerous did not deprive him of a property interest. The record is undisputed that the dog remained in Respondent's possession without any restrictions. Since designating the dog potentially dangerous did not deprive Respondent of the dog or even place any restrictions on the dog, there is no violation of procedural due process. See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78, 92 S.Ct. 2701, 2709-10 (1972)(finding no violation of procedural due process where no deprivation of a property interest); *Minn. Dept. of Public Safety v. Elk River Ready Mix Co, Inc.*, 430 N.W.2d 261, 264 (Minn. 1988) (notice informing defendant that overweight vehicle violations which could result in civil penalty did not violate defendant's

procedural due process rights because it did not subject defendant to deprivation of property).

All due process requires is some form of hearing before a person is finally deprived of their property interest. *Mathews*, 424 U.S. at 333, 96 S.Ct. at 902. In the present case, Respondent was given a meaningful opportunity to be heard following the April 8, 2010 and October 15, 2010 biting incidents at the November 8, 2010 Hearing before any deprivation of property occurred. Therefore, Respondent received all the due process he was entitled to under the law. *See Id.* (“Eldridge agrees that the review procedures available to claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process.”).

B. Respondent received notice and a meaningful opportunity to be heard before being deprived of any property interest.

Generally, due process requires adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews*, 424 U.S. at 333, 96 S.Ct. at 902. “But adequate notice and a meaningful opportunity to be heard are flexible concepts depending on the circumstances.” *Morrissey*, 408 U.S. at 481, 92 S.Ct. at 2600. To determine whether a litigant received the process that was due the court balances four factors:

First the private interest that will be affected by the official action; second the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335, 96 S.Ct. at 903; *Heddan v. Dirskswager*, 336 N.W.2d 54, 59 (Minn. 1983). Here, review of the *Mathews* factors establishes that Respondent was not denied due process.

1. Respondent's interest was minimal.

The Court of Appeals correctly held that this factor weighs in favor of the City. Under Minnesota law dogs are personal property. *Corn v. Sheppard*, 179 Minn. 490, 492, 229 N.W. 869, 870 (1930). The proper measure of compensatory damages for destroying a dog is the fair market value of the animal. *Harrow v. St. Paul & D.R.R.*, 43 Minn. 71, 72, 44 N.W.2d 881, 881 (1890). Respondent has little interest in keeping a dangerous animal that has already bitten and injured three people.

2. There was no risk of erroneous deprivation through the procedures used.

The Court of Appeals erred when it held that there was a significant risk of erroneous deprivation. As the record before the Court clearly sets forth, Respondent received a full hearing to challenge and contest both the April 8, 2010 and October 15, 2010 biting incidents before the City Council affirmed the dangerous animal designation. Moreover, Respondent received a second full hearing to contest the November 9, 2010 biting incident before the City Council affirmed the destruction order. Thus, the Court of Appeals determination of risk of erroneous deprivation is unsubstantiated by the record in this case.

Lino Lakes City Code § 503.15(C) sets forth the criteria for designating a dog a dangerous animal.

The animal control officer shall have the authority to designate any animal as a dangerous animal upon receiving evidence of the following:

(a) The animal has, when unprovoked, bitten, attacked or threatened the safety of a person or domestic animal as stated in division (3)(a) above; or

(b) The animal has been declared potentially dangerous and the animal has then bitten, attacked [sic] or threatened the safety of a person or domestic animal as stated in division (3)(a) above.

Under Lino Lakes City Code § 503.15(3)(a) a dangerous animal is an animal which has

1. Caused bodily injury or disfigurement to any person on public or private property;
2. Engaged in an attack on any person under circumstances which would indicate danger to personal safety;
3. Exhibited unusually aggressive behavior, such as an attack on another animal;
4. Bitten one or more persons on two or more occasions; or
5. Been found potentially dangerous and/or the owner has personal knowledge of the same, the animal aggressively bites, attacks or endangers the safety of humans or domestic animals.

Lino Lakes Code § 503.15(7)(a) provides for a hearing before the City Council to contest the Animal Control Officer's determination that the dog is a dangerous animal. (*Add. 7.*)

On October 20, 2010, the City notified Respondent by letter that

[d]ue to incidents that occurred on 04/08/2010 and 10/15/2010, your dog has been classified as a "dangerous animal" pursuant to Lino Lakes Code § 503.15. As a result of this classification you are to have your dog permanently removed from the city within 14 days.

If you wish to appeal the "dangerous animal" classification, you must contact the Lino Lakes City Hall by November 3 at 4:30 pm to schedule a hearing before the city council. Failure to take any action within the given

14 day period will result in the immediate seizure and destruction of your dog at your expense.

(App. 15, 27.)

On November 8, 2010, Respondent received a hearing and was given a full opportunity to contest both the April 8, 2010 biting incident and the October 15, 2010 biting incident before the City Council affirmed the Police Department's decision to declare the dog as a dangerous animal. At this hearing, the City Council received evidence in the form of a police report that the dog bit Mr. S on April 8, 2010 and a photograph of Mr. Sch injury. *(App. 9.)* Respondent never contended that the April 8, 2010 biting incident involved any element of provocation. *(T. at 11, 13, 15.)* Instead, Respondent readily admitted that the dog jumped on and injured Mr. Sc *(T. at 11, 13.)* In addition, Respondent's son, who was the only witness to the biting incident other than Mr. Sc admitted that he saw the dog jump on Mr. Sc *(T. at 15.)*

The Council also received evidence regarding the October 15, 2010 biting incident. Ms. I testified the dog bit her three times. *(T. at 6-10.)* The City Council reviewed a photograph of Ms. Irw injury. *(App. 26.)* Respondent's wife admitted that she lost control of the dog. *(T. at 21.)* Respondent did not dispute that the dog bit Ms. Ir

Thus, the evidence before the City Council at the November 8, 2010 hearing established that the dog had bitten two people without provocation and caused them

bodily injury. Under Lino Lakes City Code §§ 503.15(3)(a) and 503.15(4) the dog qualified for designation as a dangerous animal because without provocation it

1. Caused bodily injury or disfigurement to any person on public or private property;
2. Engaged in an attack on any person under circumstances which would indicate danger to personal safety;
3. Exhibited unusually aggressive behavior, such as an attack on another animal;
4. Bitten one or more persons on two or more occasions.

See Add. 6, Lino Lakes City Code § 503.15(3)(a). The evidence established that the dog qualified as a dangerous animal under these first four criteria identified in Lino Lakes City Code § 503.15(3)(a). In addition, the dog qualified as a dangerous animal under the fifth criterion of the definition of dangerous animal because it had been found potentially dangerous after the April 8, 2010 biting incident and the animal aggressively bit, attacked or endangered the safety of Ms. I on October 15, 2010.

The Court of Appeals held there was a risk of erroneous deprivation because Respondent did not receive an opportunity to be heard until after the second biting incident at the dangerous animal hearing. However, importantly, even if the dog had not been declared as potentially dangerous after the first incident, it still would have been designated as dangerous under the Lino Lakes City Code § 503.15 because without provocation it had bitten one or more persons on two or more occasions: April 8, 2010 and October 15, 2010. Furthermore, under the Lino Lakes Code simply declaring the dog a potentially dangerous animal does not result in the City seizing or destroying the

animal. All that happens is the Police Department notifies the owner in writing that the dog is potentially dangerous. *See Add. 14*, Lino Lakes Code § 503.15(4). The owner maintains possession of the dog and there are no restrictions placed on the dog. Thus, there is no risk of erroneous deprivation.

Moreover, Respondent has offered no evidence to support his claim of erroneous deprivation. At the November 8, 2010 hearing, Respondent's son testified that he did not see whether the dog bit Mr. Sc. Therefore, despite being given a full opportunity to dispute the April 8, 2010 biting incident, none of the evidence offered by Respondent refutes that the dog bit Mr. Sc. Additionally, the City's procedure which involved considering the April 8, 2010 biting incident at the same time it considered the dangerous animal designation follows the exact same due process procedure outlined in Minn. Stat. § 347.541, subd. 3(2) (2008), which states that when a dog is declared dangerous "the owner of the dog may request a hearing concerning the dangerous dog declaration and, if applicable, prior potentially dangerous dog declarations for the dog."

Lino Lakes Code § 503.16(4) also provides for a City Council hearing after the Police Department determines that a subsequent offense has occurred. (*Add. 9.*) On November 22, 2010, Respondent received a second hearing and presented evidence before the City Council decided to affirm the Police Department's determination that a subsequent offense occurred. Additional procedures would have no value because Respondent was provided two meaningful opportunities to be heard prior to any potential

property interest deprivation and he failed to provide any evidence to refute the April 8, 2010, October 15, 2010 and November 9, 2010 unprovoked biting incidents.⁷

There was no risk of erroneous deprivation under the procedure followed by the City (which as previously noted, follows the state statute procedure). Respondent received two hearings before the City Council affirmed the destruction order but failed to offer evidence that refuted any of the three biting incidents. Clearly, Respondent was provided with more than ample due process to be heard under the Lino Lakes Code. As a result, the Court of Appeals erred when it held that this factor favored Respondent.

3. The government interest in regulating dangerous animals is high.

The Court of Appeals erred when it held this factor favored Respondent. Cities have a high interest in regulating to protect the public from dangerous animals within their jurisdiction.⁸ *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 704, 17 S.Ct. 693, 695-96 (1897) (holding the destruction or other regulation of dogs for the safety of the public is well within the police power of the state.) The Minnesota Legislature has also expressly provided for local regulation of potentially dangerous and dangerous dogs. *See* Minn. Stat. § 347.53 (2008) (“Any statutory or home rule charter city, or any county, may regulate potentially dangerous and dangerous dogs.”). Putting Respondent on notice that his dog is a potentially dangerous animal when without

⁷ Respondent has the burden of establishing the value of additional procedural safeguards to prevent an erroneous deprivation. *Mathews*, 424 U.S. 319, 334-35, 96 S.Ct. 893.

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

provocation, it chased down and bit a pedestrian walking on a public street is just such an appropriate measure. Requiring the City to incur additional costs and administrative burdens prior to warning Respondent that his dog is a potentially dangerous animal, especially when the designation does not impact the property interest of the dog owner, is not reasonable nor justified under the law.

The Court of Appeals recognized that the City has a high interest in taking appropriate measures for animal control, but then erroneously determined that this factor somehow weighs in favor of Respondent. In so holding, the Court of Appeals relied on the fact that some Minnesota cities provide additional process when declaring a dog potentially dangerous. However, the animal control procedures of other communities are not determinative of whether City of Lino Lakes procedures complied with due process. Simply because other government entities provided additional due process procedures does not establish that the City of Lino Lakes' procedures (which again follow the state statute procedure) are insufficient. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey*, 408 U.S. at 481, 92 S.Ct. at 2600.

Moreover, the other city ordinances relied on by the Court of Appeals place significant restrictions on dogs classified as potentially dangerous, which is not the case under the Lino Lakes City Code. For example, under Golden Valley City Code § 10.30, subd. 7(C), a dog that is declared potentially dangerous must be licensed and the owner must comply with the requirements of Minn. Stat. § 347.52(a) and (c) regarding leashing, muzzling and proper enclosures and notification to the City upon transfer or death of the

dog. (*App. 81.*) Additionally, the owner of a potentially dangerous dog cannot obtain a license unless microchip identification is implanted in the dog. If the owner of a dog classified as potentially dangerous fails to meet these conditions, the dog may be seized by animal control and destroyed.

Under Minneapolis City Code § 64.110, no person may own or house a potentially dangerous animal unless the following requirements are met (1) animal is microchipped; (2) animal has current vaccinations; (3) animal has current annual license for a declared animal; (4) animal is muzzled with three foot leash held by an adult when outside a proper enclosure; (5) animal has a proper kennel; (6) animal has a secured area maintained inside the home where the animal will stay when persons other than family members are present; (7) animal has annual registration and payment of all applicable fees including submission of photographs of the required kennel and secured area and current photograph of the animal; (8) animal may not be possessed or maintained at any location other than the owner's property; (9) owner or custodian of animal may not be a minor under eighteen years of age; (10) animal shall not be subjected to neglect, suffering, cruelty, or abuse; (11) the location where the animal is possessed or maintained shall be kept clean and sanitary with proper and adequate food, water, ventilation, shelter, and care at all times; (12) the owner of the potentially dangerous or dangerous animal may be required to complete an approved obedience class, at the direction of the manager of animal care and control or the manager's designee; (13) if the animal is to move from the approved location, written notification shall be provided to the manager of animal care and control within ten business days prior to relocation; (14) the manager of animal

care and control, or the manager's designee, shall be allowed at any reasonable time to inspect the animal, the animal's muzzle and leash, and the place where the animal is located; and (15) Minneapolis Animal Care and Control may require that any animal deemed potentially dangerous and any puppies of the animal in the care and custody of the owner be sterilized at owner's expense. If the owner of a dog classified as potentially dangerous fails to meet these conditions, the dog may be seized by animal control and destroyed. (*App. 95.*)

Under St. Paul City Code § 200.11(a) a dog that is declared potentially dangerous must be microchipped and may be subject to one or more other conditions including (1) the owner of a dog may be required to complete an approved dog obedience class; (2) the animal may be required to be restrained on a chain or leash not to exceed six feet and/or muzzled and under the control of a person eighteen years or older when outdoors and not in a proper enclosure; (3) the owner may be required to show proof of up to date rabies vaccination and, if required, licensing; and (4) if the animal is a dog, the owner shall purchase a lifetime dog license. If the owner of a dog classified as potentially dangerous fails to meet these conditions, the dog may be seized by animal control and destroyed. (*App. 102.*)

Under St. Cloud Ordinance § 1040:80 an owner of an animal determined to be potentially dangerous must do the following: (1) the animal may be required to be restrained by a leash not to exceed six feet and/or be muzzled and under the control of a person eighteen years of age or older at all times it is outdoors and not inside a proper enclosure; (2) the owner shall provide proof of spay or neuter; (3) the owner of the dog

may be required to complete an approved obedience class; and (4) owner is required to have a microchip implanted in the animal. If the owner of a dog classified as potentially dangerous fails to meet these conditions, the dog may be seized by animal control and destroyed. (*App. 103.*) Thus, none of the other city ordinances relied on by the Court of Appeals is apposite to the Lino Lakes City Code, which places no restrictions on a dog designated as potentially dangerous.

The Court of Appeals also determined that “other cities have also found ways to keep the fiscal and administrative burden for such an appeal low” because one city ordinance requires the dog owner to pay a \$50 administrative fee and another ordinance requires the dog owner to pay a \$100 administrative fee. However, the minimal fee other cities charge a dog owner to contest a potentially dangerous animal determination does not establish that the fiscal and administrative burden of providing for an additional hearing is low. St. Paul City Code § 200.11(b)(2), cited by the Court of Appeals, provides “[i]f the declaration that the dog is potentially dangerous is upheld by the hearing officer, the actual expenses of the hearing, *up to a maximum of one thousand dollars (\$1,000)* will be the responsibility of the dog’s owner.” (*App. 102, emphasis added.*) Clearly, there would be significant additional fiscal and administrative burdens in providing additional process, which is unnecessary because under the Lino Lakes City Code there is no deprivation of property when a dog is declared potentially dangerous.

The government interest in effective procedures for regulating dangerous animals is high. The additional fiscal and administrative burdens that substitute procedural requirements would entail are not justified here because under the Lino Lakes City Code

there is no deprivation of a property interest when a dog is declared potentially dangerous. Therefore, this factor favors the City.

In sum, all three *Mathews* factors favor the City. The procedures afforded by the Lino Lakes City Code comport with the requirements of the due process clause under both the United States and Minnesota Constitutions. The City's decisions were not arbitrary, but rationally related to protecting the public from a dangerous animal. There is no dispute that the dog bit three people within a seven month period. Respondent received two meaningful hearings. At the first hearing, Respondent was given the opportunity to fully contest both the April 8, 2010 and October 15, 2010 biting incidents, but failed to offer any evidence to refute that the dog bit two people without provocation. The City Council did not order the dog destroyed after the first hearing, but decided instead to return the dog to Respondent with restrictions, further demonstrating that the November 8, 2010 hearing was meaningful. Respondent also received a second opportunity to be heard before the City Council affirmed the destruction order. Under these circumstances, the process Respondent received was more than adequate. As a result, his procedural due process claim fails.

II. ASSUMING ARGUENDO THE PROCESS AFFORDED RESPONDENT WAS TECHNICALLY INSUFFICIENT, THE PROPER REMEDY IS REMAND OF THE CASE BACK TO THE CITY COUNCIL FOR REHEARING.

If this Court were to determine that the due process provided by the Lino Lakes City Code (as well as state statute) was somehow insufficient, the proper remedy would be a remand to provide Respondent with the process that was due and at the same time

provide the City Council with the ability to protect the public from dangerous animals. The underlying facts of the case do not simply vanish because of a procedural flaw. The dog has still bitten three people and remains a danger to public safety. The record establishes several grounds for the dangerous dog designation. Without provocation the dog

1. Caused bodily injury or disfigurement to any person on public or private property;
2. Engaged in any attack on any person under circumstances which would indicate danger to personal safety;
3. Exhibited unusually aggressive behavior, such as an attack on another animal;
4. Bitten one or more persons on two or more occasions

See Add. 6-7, Lino Lakes City Code § 503.15(3)(a) and (5)(a). Any one of these is grounds for determining that the dog is dangerous. Therefore, even if declaring the dog dangerous based upon a prior potentially dangerous designation violated the procedural due process rights of Respondent, the fact remains that the dog still qualifies as dangerous on other grounds.

In reaching its decisions that the City denied Respondent due process, the Court of Appeals found that “[a]lthough the city did not make specific findings after the hearing on November 8, 2010, based on our review of the record, we conclude that the City deemed [Respondent’s] dog ‘dangerous’ because the dog had already been declared ‘potentially dangerous’ and subsequently bit a person.” *Sawh*, 800 N.W.2d at 669. However, that was not the sole basis for declaring the dog dangerous. If the record is

unclear, the Court of Appeals should have remanded the matter to the City Council to prepare appropriate findings for its decision that the dog was a dangerous animal instead of rushing to find a constitutional violation. See *White Bear Rod and Gun Club v. City of Hugo*, 388 N.W.2d 739, 742-43 (Minn. 1986) (remanding City's quasi-judicial decision for additional finding.); *In re Senty-Haugen*, 583 N.W.2d 266, 270-71 n. 3 (Minn. 1998) (it is well-settled law that appellate courts avoid ruling on constitutional issues if there is another basis on which case can be decided).

Procedural due process is meant to protect people not simply from a deprivation of property interest, but from the *mistaken or unjustified* deprivation of property. *Carey v. Piphus*, 435 U.S. 247, 259-60, 98 S.Ct. 1042, 1050 (1978). Where the deprivation of a property interest is substantively justified deficient procedures do not cause any actual harm. *Id.* at 265, 98 S.Ct. at 1052. Therefore, in order to obtain substantive relief a plaintiff must also prove that denial of procedural due process caused actual injury. See *Id.*; *Hogue v. Clinton*, 791 F.2d 1318, 1323 (8th Cir. 1986); *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980). By reversing the City Council's decision without remanding it, the Court of Appeals improperly granted Respondent substantive relief by preventing the City from reexamining whether the dog was dangerous. However, Respondent is not entitled to substantive relief because the procedural irregularities alleged by Respondent caused no actual injury.

Schulte v. Transportation Unlimited, Inc., 354 N.W.2d 830 (Minn. 1984) is analogous to the present case. Schulte was denied unemployment benefits by the Commissioner of Economic Security. *Id.* at 831. Schulte appealed the Commissioner's

decision to this Court claiming that an inadequate hearing notice deprived him of procedural due process. *Id.* This Court held that the notice was misleading and therefore resulted in a denial of Schulte's right to due process. *Id.* at 835. The Court then remanded the case back to the Commissioner for a new hearing. *Id.* In the present case, if the Court were to determine that the City did not provide adequate due process to Respondent, it should follow its protocol in *Schulte* and remand the case back to the City Council for rehearing.⁹

III. THE COURT OF APPEALS ERRED IN DECLARING LINO LAKES CITY CODE § 503.15 UNCONSTITUTIONAL ON ITS FACE.

In addition to reviewing the procedures provided to Respondent prior to deprivation of his property interest, the Court of Appeals also improperly expanded its review into the legislative actions of the City in enacting Lino Lakes City Code § 503.15 holding

[b]ecause the city's declaration of the dog as a dangerous animal is predicated on the dog's earlier declaration as a potentially dangerous animal, which the city's ordinance provided no meaningful opportunity to challenge, *the city's ordinance* violates [Respondent's] due process rights.

Sawh, 800 N.W.2d at 664-65 (emphasis added). However, Respondent received more than enough process through the two hearings on the dog. Therefore, there was no need for the Court of Appeals to facially review the ordinance. Since, Respondent received ample process in this case, his facial challenge to the ordinance is moot.

⁹ The Minnesota Court of Appeals has also remanded cases to the agency when it found the agency's hearing procedures resulted in a denial of procedural due process. *See Thompson v. Commissioner of Health*, 778 N.W.2d 401 (Minn. App. 2010); *Fosselman v. Commissioner of Human Services*, 612 N.W.2d 456 (Minn. App. 2000).

Moreover, while the appellate courts have subject matter jurisdiction by means of writ of certiorari to review the quasi-judicial decisions of political subdivisions such as cities, certiorari is not available for review of legislative acts by local governments. *Dead Lake Assoc. Inc. v. Otter Tail County*, 695 N.W.2d 129, 134 (Minn. 2005) (citing *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 414 (Minn. 1981)). Therefore to the extent Respondent's procedural due process claim is a facial attack upon the Lino Lakes City Code, the appellate courts are without subject matter jurisdiction on certiorari to review the adoption of an ordinance because it is a legislative act. *Dead Lake Assoc.*, 695 N.W.2d at 135. The Court of Appeals' decision invalidating Lino Lakes City Code § 503.15 should be reversed.

CONCLUSION

Respondent has not been denied procedural due process because he received adequate notice and hearing before the dog was designated a dangerous animal and again before the City Council affirmed the destruction order. Therefore, the Court of Appeals' decision should be reversed. However, in the event the Court finds that the procedural due process provided by the City in this matter was inadequate, then the proper remedy is to remand the case for rehearing to the City Council.

LEAGUE OF MINNESOTA CITIES

Date: November 17, 2011


James J. Monge III (#29200X)
Patricia Y. Beety (#227390)
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1200

Attorneys for Appellant/Cross-Respondent