

CASE NO. A10-2143

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**STATE OF MINNESOTA  
IN SUPREME COURT**

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Mitchell Sawh,

*Respondent/Cross-Appellant,*

vs.

City of Lino Lakes,

*Appellant/Cross-Respondent.*

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**APPELLANT/CROSS-RESPONDENT CITY OF LINO LAKES'S  
RESPONSE AND REPLY BRIEF**

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## INTRODUCTION

Respondent's arguments would have this Court usurp the power of local elected officials to protect the public from dangerous animals and impose unreasonable burdens, including providing hearings for warnings where no property right is burdened, all for the benefit of a dog that bit three people in a seven month period. Respondent fails to acknowledge the undisputed fact that his property rights were not impacted whatsoever when his dog was declared potentially dangerous. Due process does not require a hearing when any speculative future deprivation is contingent upon circumstances entirely outside a government entity's knowledge or control.

Respondent also fails to acknowledge the scope and breadth of the two hearings provided before any governmental action was taken that deprived him of his property. Not only was no error of law committed by the City, substantial evidence in the record establishes the City had rational bases to find the dog dangerous after the second and third unprovoked biting incidents. The deferential standard of review accorded on certiorari review prevents the Court from supplanting the City Council's factual findings. *See Whaley v. Anoka-Hennepin Indep. Sch. Dist., No. 11*, 325 N.W.2d 128, 130-31 (Minn. 1982). As a result, the Court of Appeals' decision should be reversed or, should this Court deem any of the City's process or findings lacking, the matter should be remanded to the City Council.

## LEGAL ARGUMENT

### I. PROCEDURAL DUE PROCESS IS NOT TRIGGERED BY A WARNING WITHOUT DEPRIVATION OF PROPERTY.

Respondent's entire due process case is founded on the flawed premise that he was entitled to "a hearing *at the beginning of the process* when the dog was declared 'potentially dangerous.'" *Respondent's Brief* p. 38. Respondent concedes that the potentially dangerous declaration did not result in any "immediate sanctions." *Respondent's Brief* p. 28. The law is clear that where there is no deprivation of a property interest there is no violation of procedural due process. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78, 92 S.Ct. 2701, 2709-10 (1972). While due process requires notice and a hearing before a deprivation of property, where the deprivation is only speculative and contingent upon future events that have not occurred and may never occur, no hearing is required.

Declaring the dog potentially dangerous did not deprive Respondent of any property interest, nor did it even implicate Respondent's rights to own and maintain a pet. It is undisputed the dog remained in Respondent's possession without *any* restrictions -- all the "potentially dangerous" declaration did was alert Respondent that his dog *could possibly have* restrictions imposed by the City should the warned of behavior reoccur. Respondent has failed to cite any authority that would entitle him to a hearing when there is no present deprivation and the only potential for a future deprivation is contingent upon further ordinance violations that might never happen.

Respondent proffers nothing to justify the cost and administrative burden of providing a hearing whenever a municipality issues a code compliance warning. Such a rule would unduly burden municipalities with providing hearings when no deprivation is imminent. Requiring the City to provide a hearing when it merely issues a warning that has no actual impact on any property right is neither reasonable nor required by due process.

Respondent's references to other municipalities with procedures for a hearing upon designating an animal "potentially dangerous" are misplaced. The City of Lino Lakes, unlike the other entities cited, actually allows citizens greater control without government involvement by issuing warnings without sanctions. Providing a warning that the government might need to act in the future, and that such actions could implicate an individual's property rights, is significantly less intrusive and offensive to personal property than immediately acting to impose restrictions upon a first legal violation.

Significantly, the City could have declared the dog dangerous after the April 8, 2010 biting incident pursuant to Lino Lakes Code § 503.15 (3)(a). *Add. 6*. Had the City declared the dog dangerous, then significant restrictions could have been imposed on the dog. Instead, the City gave Respondent the benefit of the doubt that he would take the precautions necessary to prevent his dog from menacing the public after receiving the potentially dangerous warning. Unfortunately, Respondent failed to control his dog to prevent additional violations of the City's ordinance in accordance with the warning's purpose.

This Court should hold Respondent was not deprived of any property interest, and not entitled to any due process, at the time his dog was declared potentially dangerous.

**II. TWO HEARINGS CONSTITUTE SUFFICIENT DUE PROCESS.**

The law is well-established that the flexible procedural due process standard simply requires some form of hearing before a person is *finally* deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976). Here, Respondent was not deprived of a hearing. In fact, he received notice and two meaningful opportunities to be heard. As discussed above, declaring the dog potentially dangerous did not deprive Respondent of any property interest in the dog. Unfortunately, Respondent did not heed the City’s warning that the dog was potentially dangerous and the dog bit a second person on October 15, 2010. As a result of that biting incident, the dog was declared dangerous and a hearing to challenge the designation was offered. The City’s notice to Respondent states:

[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. 27.* The notice is clear that the dog was declared a “dangerous animal” because of “the incidents that occurred on 04/08/2010 and 10/15/ 2010” and that Respondent can appeal the dangerous animal classification.<sup>1</sup>

Respondent asserts that the City Council did not consider the April 8, 2010 biting incident at any hearing and because the “potentially dangerous” label was used as predicate on which to base subsequent violations, the lack of hearing on the April 8, 2010 incident is a fatal flaw in the process.<sup>2</sup> However, while Respondent continues to argue that the hearings conducted by the City Council only concerned the last two incidents (10/15/10 and 11/9/10) the record reflects otherwise. The City Council considered the facts of both the April 8, 2010 and October 15, 2010 incidents at its November 8, 2010 hearing. At the start of the hearing Police Chief Kent Strege stated:

Council Members, in April of this year the dog residing at 1366 Wolf Circle bit one gentleman and again in October of the same year, the dog bit another person. The first time this would declare it as a potentially dangerous dog on the first bite, the second bite classified it then as a dangerous dog.

*T. at 3.* In addition, Community Service Officer Kristen Wills stated:

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<sup>1</sup>Respondent’s dog qualified as dangerous even if the first incident had not occurred. On October 15, 2010, the dog: 1) caused bodily injury to a person on public or private property; 2) was an attack on a person under circumstances which would indicate danger to personal safety; and (3) exhibited unusually aggressive behavior, such as an attack on another animal. *See Add. 6*, Lino Lakes Code 503.15(3)(a) (1)-(3).

<sup>2</sup> Both Respondent and the Court of Appeals cited to statements in the record from the City Attorney and Police Chief that they claim support Respondent’s “bootstrapping” argument. However, a cursory review of the record reveals that neither statement supports the claim that the “potentially dangerous” declaration was used as a predicate for the dangerous animal declaration. *T. at 48-49, 52.*

Mayor and Council members, I'll be reading the facts of both incidents in this case. On April 8, 2010, Seargent Libel responded to a dog bite report that occurred at Timberwolf Trail and Wolf Circle. The dog – or the victim was off the property at the time of the dog bite. Kyle Libel documented the bite, took pictures of it. I followed up by advising the owners that it was going to be deemed a potentially dangerous dog based on the facts and also gave them a copy of the city ordinance and advised them that another incident could result in the dog being deemed dangerous.

On October 15th of this year, I responded to another dog bite incident which occurred at 1366 Wolf Circle. The victim was bitten once on the property and once off the property.

*T. at 4.* Moreover, Respondent was given a full and fair opportunity to challenge the April 8, 2010 incident and in fact he presented specific testimony in regards to that incident. *T. at 11-15.* Respondent's son testified before the City Council including stating that he did not see whether or not the dog bit the pedestrian. *T. at 15.* A photograph of the April 8, 2010 injury was also displayed and discussed.<sup>3</sup> *T. at 29.*

During the Council's discussion Mayor Reinert noted

[T]here has been two instances of dog bites. And so just looking at the facts of the situation that we have a dog that has shown aggression twice and has bitten twice. You know we have to deal with those are the facts.

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<sup>3</sup>Respondent argues that the police reports which include statements of victims and photographs of their injuries should be excluded as hearsay. At the same time, Respondent relies on several non-sworn "witness" written statements and emails. While the police reports are public/business records and thus are admissible, the nature of these administrative hearings and the standard of review applied by this Court in reviewing the City Council's actions make Respondent's hearsay arguments moot and inapplicable. *See Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978). The Court must look at the record presented including evidence submitted by both parties. *The Big Lake Assoc. v. St. Louis County Planning Comm'n*, 761 N.W.2d 487, 490-91 (Minn. 2009) (*citing Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988)) (review of quasi-judicial decisions is generally limited to examination of the record made by the local government).

*T. at 31.* With regard to the photograph of the April 18, 2010 injury Council Member Rafferty observed, “Those are not scratches. Those are clearly bite marks.” *T. at 43.* Thus, Respondent’s misstatement of the record is clear. The City Council considered both incidents before it took action and declared Respondent’s dog dangerous – the first action taken by the City Council which attached any conditions on Respondent’s use or maintenance of personal property.

Although the City was not required to provide a hearing after the potentially dangerous designation because a property right was not implicated, Respondent cannot escape the fact that he was afforded two meaningful hearings before the City deprived him of the dog. Following the November 8, 2010 hearing, the City Council permitted the dog to return to Respondent’s home even though sufficient facts existed to permit seizure and destruction of the animal. However, the City Council’s optimism was rewarded the very next day when Respondent’s dog bit yet another innocent victim. This third bite amounted to a subsequent offence under Lino Lakes Code § 503.16 (4). Respondent was provided with a second exhaustive hearing to contest whether a subsequent offense occurred. Respondent has not argued that the hearings on the second and third incidents were untimely or insufficient. Deprivation of Respondent’s property did not occur until after the second hearing, where evidence was presented confirming the dog had been involved in another unprovoked biting incident. This process was more than adequate under *Mathews* factors.

Finally, Respondent argues that even if the two City Council hearings met due process requirements, the process given was simply too little too late. Respondent labels

the potentially dangerous designation a “*fait accompli*” at the subsequent hearings. *Respondent’s Brief*, p. 29. The Court of Appeals also expressed concern over the timing of the hearings, implying that something more immediate in time to the potentially dangerous designation was contemplated by the Constitution. *See Add. 27, Sawh*, 800 N.W.2d 663, 669 (Minn. App. 2011). Notwithstanding both the Court of Appeals’ and Respondent’s erroneous conclusion that a warning without sanctions triggered due process protections, a seven month delay between designating Respondent’s dog as potentially dangerous and the hearing in which evidence was submitted relevant to the incident giving rise to such designation, is not insufficient due process as a matter of law. *See Mathews*, 424 U.S. 319, 96 S.Ct. 893 (where property interest is at stake, meaningful time means before one is finally deprived of the property interest); *Morrissey v. Brewer*, 408 U.S. 471, 488; 92 S.Ct. 2593, 2603-04 (1972) (holding lapse of two months between arrest for parole violation and hearing on final decision to revoke parole did not violate due process); *Shulte v. Transportation Unlimited, Inc.*, 354 N.W.2d 830, 835 (Minn. 1984) (remanding case for de novo hearing over a year after relator was denied unemployment benefits).

In fact, if this Court were to agree with the Court of Appeals’ “concerns” about timeliness of the hearings provided, such a holding would be at odds with the legislature’s decision to incorporate an open ended timeframe for challenging previous incidents under the dangerous dog statute. If the City’s ordinance procedures violated due process because a hearing on the potentially dangerous designation is untimely as a matter of law, then by implication Minn. Stat. § 347.541, subd. 3, which provides that

when a dog is declared dangerous, the authority must provide notice that “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” is also constitutionally infirm.

This Court should hold Respondent was provided with constitutional due process as a result of the two hearings provided.

### **III. THE CITY’S ACTIONS WERE NOT ARBITRARY OR ERRONEOUS.**

Respondent argues that even if his due process rights were not violated, this Court should reverse the City Council on the basis that its decisions were unreasonable, arbitrary, and capricious, or based on an error of law. *Respondent’s Brief* p. 33. Much of Respondent’s argument relies on promoting his interpretation of events and his own credibility assessment of witnesses as opposed to giving deference to the City Council’s fact finding. However, the deferential standard of review accorded cities on certiorari review does not permit Respondent to second guess the City’s findings of fact. This Court has repeatedly held that de novo review of city council decisions is improper because it permits a court to substitute its judgment for that of the city council in violation of the separation of powers doctrine. *State ex. rel. Ging v. Bd. of Education*, 213 Minn. 550, 571, 7 N.W.2d 544, 556 (1942) *overruled in part on other grounds*; *Foesch v. Indep. Sch. Dist.*, 300 Minn. 478, 485, 223 N.W.2d 371 (1974); *Tischer v. Housing and Redevelopment Authority of Cambridge*, 693 N.W.2d 426, 429 (Minn. 2005); *Whaley v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 325 N.W.2d 128, 130-31 (Minn. 1982); *Dietz v. Dodge County*, 487 N.W.2d 237, 239-40 (Minn. 1992); *White*

*Bear Docking and Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982). This Court has repeatedly recognized constitutional barriers involved in the judicial review of a political subdivision's administrative decision making. To illustrate the need for judicial restraint in these circumstances, this Court has stated:

The issue which [the public employee] would have the court review demands scrutiny of the manner in which the [public body] has discharged its administrative function; the very type of scrutiny that runs a grave risk of usurping the [public body's] administrative prerogative.

*Dietz*, 487 N.W.2d at 240.

Respondent ignores this required standard of review and advocates this Court adopt his version of the findings of fact instead of those of the City Council. However, the Court is obligated to give deference to the City Council's findings. *Id.* In this case, each of the City Council's decisions is supported by evidence in the record and there was no legal error. As a result the certiorari standard of review requires affirming the City's decisions.

**A. Evidence supports the dog was unprovoked when it bit a person on April 8, 2010.**

Substantial evidence in the record establishes that without provocation the dog bit a pedestrian walking on a public street. The dog escaped from an invisible fence enclosure, chased down a pedestrian who was walking on a public street a block away from Respondent's house and bit him on the arm causing injury. *App. 6.* The pedestrian told police that the dog ran at him barking aggressively and then jumped up and bit him on the left arm breaking the skin. *Id.* There is a photograph of the pedestrian's injury showing red marks on his arm consistent with a dog's teeth. *Id.; App. 9.*

There is nothing in the record to establish that the red marks on the pedestrian's arm were caused by anything other than a dog bite, except Respondent's unsupported speculation. Respondent admits that the dog caused the injury. *T. at 11, 13.*

Respondent's son, who was the only person other than the pedestrian who was present when the bite occurred, testified that he saw the dog jump up on the pedestrian, and "I didn't see what happened." *T. at 15.* The City Council reasonably concluded that the dog bit the pedestrian. As this Court has repeatedly held, it will not substitute its findings of fact for those of the City Council. *See Ging*, 213 Minn. at 571, 7 N.W.2d at 556; *Tischer*, 693 N.W.2d at 429; *Whaley*, 325 N.W.2d at 130-31; *Dietz*, 487 N.W.2d at 239-40; *White Bear Docking and Storage, Inc.*, 324 N.W.2d at 176.

Respondent tries to characterize the dog as just being "playful." *Respondent's Briefp. 29.* However, there was no testimony that the dog was being playful. Respondent's son testified that the dog was in trouble for leaving the yard and would not obey. *T. at 15.* The dog bit the pedestrian a block away from Respondent's yard and the pedestrian told police the dog came at him aggressively. *App. 6.* Moreover, the ordinance makes no exception for a bite caused while a dog is being playful. Whether a dog associates gnawing on a pedestrian's arm with play doesn't make it any less of a danger. Thus, the City Council had a rational basis to conclude the dog bit the pedestrian without provocation on April 8, 2010.

**B. Evidence supports the dog was unprovoked when it bit a person on October 15, 2010.**

Respondent argues that the second biting incident occurred because his dog was provoked. Respondent calls the City's findings on this incident arbitrary and claims the City Council erred in failing to consider the "uncontradicted evidence that the dog was 'aggravated' or 'provoked.'" *Respondent's Brief*, p. 36. Evidence in the record, however, supports the City's conclusion that this attack was unprovoked.

Respondent claims that the dog was provoked because Ms. Ir while investigating a fire of unknown origin, trespassed on the Sawh property while waving her arms and talking on her cell phone. However, this conduct did not amount to provocation under the City Code. Under the Lino Lakes Code § 503.15 (3)(d), "unprovoked" is defined as: "the condition in which the animal is not *purposely* excited, stimulated, agitated or disturbed." *Add. 7 (emphasis added)*. The definition is consistent with this Court's recent decision in *Engquist v. Loyas*, 803 N.W.2d 400, 406 (Minn. 2010) holding that "provocation involves voluntary conduct that exposes the person to a risk of harm from the dog, where the person had knowledge of the risk at the time of the incident. The question of whether a dog was provoked in a given case is primarily a question for the jury." The definition is also consistent with the Court's decision in *Fake v. Addicks*, 45 Minn. 37, 47 N.W.2d 450 (1890) where it held that inadvertently stepping on a dog did not amount to provocation.

In this case, there is nothing in the record to establish that Ms. I provoked the dog. None of her actions were taken to *purposely* excite, stimulate, agitate or disturb the

dog, but rather to investigate the fire. She did not knowingly and voluntarily expose herself to a risk of harm from the dog. The most that can be said is that she was talking on a cell phone to a 911 operator and gesturing to Respondent's wife while crossing Respondent's yard to investigate a fire of unknown origin when the dog suddenly and viciously attacked and bit her not once but three times. *T. at 6, 20-21*. That does not amount to provocation under the City Code or any other legal definition.

The record establishes that Ms. I was not trespassing. Trespass is not committed where there is consent, which may be implied from the circumstances.

*Meixner v. Buecksler*, 216 Minn. 586, 590, 13 N.W.2d 754, 756 (Minn. 1944).

Respondent's wife testified that she permitted Ms. I to be on the property.

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

*T. at 20-21*. The record is clear that Respondent's wife permitted Ms. I to be on the property because they were communicating with each other about the fire.

Furthermore, Ms. I was privileged to be on Respondent's property for public necessity.

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

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

**C. Evidence supports the City's dangerous animal designation.**

The City Council had a rational basis to affirm the dangerous animal designation because evidence in the record supports Respondent's dog engaged in two unprovoked biting incidents. In this case, Respondent's dog qualified as a dangerous animal under Lino Lakes Code § 503.15(3)(a)(1)-(5). The ordinance does not require multiple bites and attacks for a dog to fit under the dangerous animal definition. *See Add. 6*, Lino Lakes Code § 503.15(3)(a)(1)-(3). The dog bit two people on two or more occasions: Mr. S on April 8, 2010 and Ms. I on October 15, 2010. *See Add. 6*, Lino Lakes Code § 503.15(3)(a)(4). The dog also was found to be a potentially dangerous animal after the April 8, 2010 biting incident and then bit again on October 15, 2010. *See Add. 6*, Lino Lakes Code § 503.15(3)(a)(5). Thus, under the plain language of the ordinance and the facts presented, the City Council had several rational bases to affirm the Police Department's determination that the dog was a dangerous animal, any one is enough to uphold the decision. *See White Bear Docking & Storage, Inc.*, 324 N.W.2d at 176 (holding routine municipal decisions should be set aside only in those rare instances

where the decision lacks any rational basis, and court must exercise restraint and give deference to city's decision).

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

Respondent attempts to mischaracterize the October 15, 2010 bites as "not serious." *Respondent's Brief p. 36-37.* However, that mischaracterization is belied by the photograph of the deep puncture wound on Ms. Irwin's elbow. *App. 26.* As well as, Ms. Irwin's testimony that the puncture wound on her elbow was "very deep" and went "through every layer of skin." *T. at 8, 10.* The record establishes that the dog bit Ms. Irwin and the bites were serious.

**D. Evidence supports a subsequent offense occurred.**

Respondent argues the City Council's decision to affirm the Police Department's determination that a subsequent offense occurred under Lino Lakes Code § 503.16 (4) was arbitrary and capricious because "(1) it is based on two earlier flawed findings; (2) this incident too was provoked; (3) the City relied on flawed expert evidence outside the record; and (4) the City misinterpreted its Ordinance in refusing to exercise its discretion." *Respondent's Brief p. 39.* However, the record is clear that the City Council

had a rational basis to affirm the Police Department's determination that a subsequent offense occurred.

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

Respondent argues the City Council erred when it considered the two prior biting incidents in affirming the Police Department's determination that a subsequent offense occurred. However, as discussed above, the City has a rational basis to declare the dog dangerous after the April 8, 2010 and October 15, 2010 biting incidents. Thus, the City Council properly considered the two prior biting incidents when it determined that the dog committed a subsequent offense after being declared dangerous.

Respondent again improperly attempts to push his version of events in arguing that the third victim also provoked his dog. However, there is no evidence whatsoever in the record to indicate that Mr. H “purposely excited, stimulated, agitated or disturbed” the dog when he walked downstairs to Respondent’s basement. *Add. 6*, Lino Lakes Code § 503.15 (3)(d) (emphasis added). Respondent states Mr. H trespassed by entering his basement (although invited) and that this act of “trespassing” provoked the dog to bite. However, this misstates the record. Mr. H was invited into Respondent’s home to deliver furniture. *T. at 76, 83, 112*. He was never told not to go down the basement where the furniture was to go or warned about the dog. *App. 2; T. at 112*. He did not even know the dog was in the basement until it bit him. All he did was walk down to the basement, where the dog bit him. *T. at 76, 83, 112, 113*. Andra Sawh testified

I was home when the furniture guy come. He was told to bring in the curio and place it upstairs. And I had other furniture coming in. We were supposed to work upstairs. He decided to go downstairs while I was getting the pads for the bottom of the curio, so he walked downstairs before I did. And by the time I got there, he had already gotten bit. And so it was not a case of being negligent, it was I wasn’t ready for him to go down and he walked down.

*T. at 112*. Trespass is not committed where there is consent, which may be implied from the circumstances. *Meixner*, 216 Minn. at 590, 13 N.W.2d at 756. “The general rule is that permission to do a particular act carries with it authority and right by implication to do all that is necessary to effect the principal object and to avail the licensee of his rights under the license.” *Id.*

Finally, Respondent argues the City Council's findings and decision are arbitrary because of "flawed expert opinion testimony outside the record." *Respondent's Brief* p. 43. However, expert testimony was not any part of the City Council's November 22, 2010 decision. The decision the City Council had to make was whether to affirm the Police Department's determination that a subsequent offense had occurred under Lino Lakes Code § 503.16 (4). Expert testimony about whether or not the dog could be rehabilitated was irrelevant to this inquiry. Furthermore, Respondent's own "expert" testified that the dog had behavioral problems and needed correction. The dog exhibited "aggressive behavior," "confinement anxiety," and "protective behavior." *T. at 88, 91, 92.* She also testified that the older the dog, the harder it is train. *T. at 114.* The City Council was free to weigh all evidence including the dog's age (3 years old), its past conduct, and the testimony of an animal behaviorist who visited the dog and determined training was needed for its "confinement anxiety" and "aggressive behavior."

The findings of a subsequent offense resulted in a destruction order. Respondent has not cited any authority to support his argument that the destruction order should be reversed. Respondent asserts that the City misapplied § 503.16(4) because his dog rather than Mr. Sawh himself committed a subsequent offense. However, Respondent is the dog's owner and he cannot escape his responsibility to control it. Under the plain language of § 503.16 if the City Council does not order the destruction of an animal that has been declared dangerous, a subsequent offense occurs "if the owner of an animal has subsequently violated the provisions under § 503.15 with the same animal." That is precisely what occurred here.

**E. The City did not err in interpreting its ordinance.**

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

In this case, even if Lino Lakes Code § 503.16 (4) is characterized as directory, that does not prevent the City Council from following it. In other words, regardless of whether § 503.16(4) is mandatory or directory, the City is free to act in conformity with it. In this case, the City Council weighed all of the evidence presented regarding November 9, 2010 biting incident, including balancing Respondent's interest with the public safety interests when it voted unanimously to affirm the destruction order. Respondent's argument assumes that the City Council would have decided to unleash this dangerous animal back upon the public after three unprovoked biting incidents. The argument is absurd and ignores the substantial evidence weighed and decisions made by the City Council over the course of seven months and two public hearings. In sum, there was no error of law and the City's decision should be affirmed.

**IV. REMAND IS THE PROPER REMEDY FOR ANY REQUIRED CLARIFICATION OF THE RECORD.**

While this Court should reverse the Court of Appeals as argued above, should further process be required or should questions exist relevant to the City Council's decision-making and findings of fact, remand, not reversal, is the appropriate remedy. *See Shulte*, 354 N.W.2d at 835. Respondent argues against remand citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (1988). However, Respondent's waiver argument is based on erroneous facts. The remedy of remand was raised below. Respondent raised the issue of remand in his Court of Appeals Reply Brief and at oral argument in response to the City's argument that the City Council's decisions should be affirmed. *Relator's Court of Appeals Reply Brief* p. 11. Furthermore, the City argued below, as it does here, that Respondent had not been denied procedural due process and therefore the City Council's decision should be upheld. No new issue is being raised and no new facts need to be developed. The only question is the proper remedy if the Court finds the record is lacking in some respect. Thus, the issue is properly before the Court. *See Jacobson v. \$55,900 in United States Currency*, 728 N.W.2d 510, 522-23 (Minn. 2007) (refusing to bar appellant from making a "refined" argument where the facts necessary to evaluate the argument were already present in the record).

Respondent cites an unpublished Court of Appeals decision, *In re Ha*, 2008 WL 4133837 (Minn. App. 2008) (unpublished opinion), in support of his argument that this matter should not be remanded back to the City Council. *RA-59*. However, while having no precedential value, *Ha* actually supports the City's position that should it

be necessary, this case should be remanded not reversed.<sup>4</sup> The Court of Appeals in *H* : remanded the case to the PERA Board “for appropriate proceedings through which evidence may be received and specific findings and conclusions drawn and decision made regarding relator’s correctional-plan membership.” *RA-60*.

Respondent’s reliance on another Court of Appeals decision, *Northern States Power Co. v. Blue Earth County*, 473 N.W.2d 920 (Minn. App. 1991) is also misplaced. In *Northern States Power*, the Court of Appeals reversed the County’s decision to deny an application for a solid waste license. *Id.* at 923. The Court of Appeals decided not to remand the case because there was no evidence in the stipulated record to support denying the license and no additional evidence was available to support the County’s decision. *Id.* The present case is distinguishable because there is ample evidence in the record to support the City Council’s decisions.

Respondent argues this case should not be remanded because “the City Council appears significantly invested in rubber stamping its earlier decision.” *Respondent’s Briefp.* 52. However, the City permitted the dog to remain living at Respondent’s home after the first and second biting incidents. In addition, the City Council stayed its decision to have the dog destroyed pending this appeal. Clearly, the City Council is not invested in rubber stamping or it would have simply denied Respondent’s request for a

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<sup>4</sup> *Interstate Power Co, Inc. v. Nobles County*, 617 N.W.2d 566 (Minn. 2000) also cited by Respondent supports the City’s argument for remand. The procedural history shows that prior to reaching the Minnesota Supreme Court, the Court of Appeals had remanded the case “for additional proceedings and appropriate findings.” *Id.* at 577.

stay of the destruction order. The City Council has treated Respondent fairly throughout this process and there is no reason to think it would not continue to do so.

The law is clear regarding remand. Where a municipal board's decision lacks specific findings or explanations to facilitate judicial review, the appellate court is compelled to offer it the opportunity to develop a record to allow meaningful appellate review. *Earthburners, Inc. v. County of Carlton*, 513 N.W.2d 460, 462-63 (Minn. 1994); *White Bear Rod and Gun Club v. City of Hugo*, 388 N.W.2d 739, 742-43 (Minn. 1986). In this case, the Court of Appeals found that "the city did not make specific findings after the hearing on November 8, 2010" and then concluded that the City deemed the dog dangerous because the dog had been declared potentially dangerous and subsequently bit a person. *Add. 26-27, Sawh*, 800 N.W.2d at 669. Although the record and law does not support this conclusion, should this Court determine the record is lacking, the case should be remanded to the Lino Lakes City Council for specific findings to facilitate judicial review.

### 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. The City Council's decisions were not arbitrary and are supported by the factual record. Therefore, the Court of Appeals decision should be reversed. However, in the event the Court finds that the process or record in this matter is inadequate, then the proper remedy is to remand the case for rehearing to the City Council.

LEAGUE OF MINNESOTA CITIES

Date: January 19, 2012

A handwritten signature in black ink, appearing to read "James J. Mongé III". The signature is written in a cursive style with a horizontal line underneath it.

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