Constitutional Law: Procedural Due Process on Doggie Death Row: Using Unreviewable Warning Notices as Predicates to Deprive Property—Sawh v. City of Lino Lakes

Christopher L. Mishek

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CONSTITUTIONAL LAW: PROCEDURAL DUE PROCESS ON “DOGGIE DEATH ROW”: USING UNREVIEWABLE WARNING NOTICES AS PREDICATES TO DEPRIVE PROPERTY—SAWH V. CITY OF LINO LAKES

Christopher L. Mishek†

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I. INTRODUCTION

In Sawh v. City of Lino Lakes, the Minnesota Supreme Court settled the fate of a dog named Brody, who was put on “Doggie Death Row” by the City of Lino Lakes, Minnesota, in 2010 after he injured three people—biting at least two of the three. The supreme court held that Brody’s owner, Sawh, had no procedural due process right to a hearing on the City’s first designation of Brody as “potentially dangerous,” because the City could not restrict or deprive Sawh’s property interest in Brody at the time of the designation. The court also held the potentially dangerous designation simply functioned as a warning rather than a predicate to subsequently designate Brody “dangerous” and order his destruction.

Sawh v. City of Lino Lakes is not a case about a dog; it is about whether the government may issue a warning giving an individual notice that he or she is not in accordance with the law, and then use the mere existence of the warning as a predicate offense in a subsequent charge, without giving the individual a chance to refute the correctness of the issuance of the warning. While the Minnesota Supreme Court ruled this result does not offend the Due Process Clause, this note argues to the contrary.

1. Sawh v. City of Lino Lakes (Sawh II), 823 N.W.2d 627 (Minn. 2012).
3. Sawh II, 823 N.W.2d at 630–31. The parties and courts disagreed on whether the first incident was a bite. See infra note 65 and accompanying text.
4. Sawh II, 823 N.W.2d at 632.
5. Id. at 635.
This note begins by discussing the history of the Due Process Clause, cases involving procedural due process rights, and the history of Minnesota's "dangerous dog" laws. The note then discusses the facts of Sawh, and the opinions issued by the Minnesota Court of Appeals and Minnesota Supreme Court. This note primarily argues that while the Minnesota Supreme Court correctly determined Sawh had no procedural due process right to a hearing at the time Brody was designated "potentially dangerous," Sawh had a due process right to a post hoc hearing on the correctness of the potentially dangerous designation because the designation was used as a predicate to later deprive Sawh of his property. This note also argues that the supreme court in Sawh erred in minimizing Sawh’s property interest in his dog, Brody, by determining the value of a dog is measured by its "fair market value."

II. HISTORY

A. Origins and Principles of the Due Process Clause

The Fifth and Fourteenth Amendments of the U.S. Constitution prohibit the federal government and the states, respectively, from depriving any person of "life, liberty, or property without due process of law." The Minnesota State Constitution has an identical due process provision, which provides identical protections as the Due Process Clauses of the U.S. Constitution. However, the Minnesota Supreme Court is only bound by the decisions of the U.S. Supreme Court as to what the Due Process Clause prohibits, and "may interpret the Minnesota Constitution

6. See infra Part II.
7. See infra Part III.
8. See infra Part IV.A.2.
10. U.S. Const. amend. V; id. amend. XIV, § 1. See generally 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.2, at 803 (5th ed. 2012) (explaining the Fourteenth Amendment was designed to ensure that former slaves were not deprived of newly gained freedoms from the states).
11. Minn. Const. art. I, § 7 ("No person shall be . . . deprived of life, liberty or property without due process of law.").
to afford more protection than provided under the U.S. Constitution.\footnote{14}

The U.S. Supreme Court interprets the Due Process Clause as imposing two limits on government: procedural due process and substantive due process.\footnote{15} Procedural due process refers to the procedures that the government must follow before it deprives someone of life, liberty, or property.\footnote{16} Substantive due process “asks whether the government has an adequate reason for taking away a person’s life, liberty, or property.”\footnote{17} This note is only concerned with procedural due process, specifically in relation to property rights.

Since the Due Process Clause’s origin in the Magna Carta in 1215, the requirement for “due process of law” has meant to prohibit the state from conducting arbitrary proceedings and to require certain procedures to ensure fairness.\footnote{18} Procedural due process at its core requires notice and an opportunity to be heard “at a meaningful time and in a meaningful manner.”\footnote{19} Its essence ensures individuals will be protected by rudimentary requirements of “fair play.”\footnote{20} The Due Process Clause is flexible and calls for such procedural protections as the particular situation demands.\footnote{21} For example, depending on the circumstances, constitutionally sufficient due process can range from the full panoply of trial rights in a criminal proceeding to an informal hearing to review a school disciplinary decision.\footnote{22}

\footnotetext[15]{ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 7.1, at 557 (4th ed. 2013).}
\footnotetext[16]{Id.}
\footnotetext[17]{Id. at 558.}
\footnotetext[18]{See MAGNA CARTA § 39 (1215) (“No Freeman shall be taken, imprisoned or disseized . . . unless by the legal judgment of his peers or by the law of the land.”); JOHN V. ORTH, DUE PROCESS OF LAW 7–8 (2003) (explaining how “law of the land” became synonymous with “due process of law”). For a general history of the Due Process Clause, see LUCIUS POLK MCGEHEE, DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION (1906); ORTH, supra; RHONDA WASSERMAN, PROCEDURAL DUE PROCESS (Jack Stark ed., 2004).}
\footnotetext[19]{Armstrong v. Manzo, 380 U.S. 545, 552 (1965); see Grannis v. Ordean, 234 U.S. 385, 394 (1914); CHEMERINSKY, supra note 15, § 7.1, at 558.}
\footnotetext[22]{E.g., Goss v. Lopez, 419 U.S. 565, 581 (1975) (approving the use of an informal hearing to review a decision to suspend a student).}
B. From New Property to the Mathews Balancing Test

After the New Deal and the growth of the administrative state disbursing new benefits to its citizenry, the Supreme Court grappled with the question of what constitutes a property interest that triggers the Due Process Clause. 23

Before the 1970s the U.S. Supreme Court maintained a categorical distinction between a property right and a privilege: “If an individual owned some object of value like a house or car, he had a property ‘right’ protected from arbitrary government deprivation by Due Process.” 24 A government bestowed “privilege” did not require the government to provide due process. 25 In 1892 then-state court justice Oliver Wendell Holmes illustrated the right/privilege distinction in a case where a police officer was fired from his job for expressing unpopular views: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” 26 The U.S. Supreme Court followed Holmes’s lead, finding that an individual had no due process rights “if a person was fired from a government job, or had government benefits terminated or had an occupational license revoked.” 27

In the 1960s Professor Charles Reich argued that with the growth of the administrative state, a variety of new forms of government wealth were created, which Reich labeled as “new property.” 28 Reich wrote that society today is built around state-granted entitlements, such as public education, Social Security, occupational licenses, and welfare benefits. 29 By the 1960s, society no longer viewed these entitlements as gratuities or charity,

25. Chemerinsky, supra note 15, § 7.3.1, at 569.
29. Reich, Individual Rights, supra note 28, at 1255.
but rather as fully deserved essentials. Reich argued that because government benefits hold the same place in a person’s life traditionally occupied by property, sufficient due process is required upon their termination or restriction. In 1970 the U.S. Supreme Court repudiated its right/privilege distinction in Goldberg v. Kelly. Citing Reich’s law review articles, the Court in Goldberg recognized that welfare benefits were a property right affording the recipient an evidentiary hearing before those benefits were terminated. Because the Court recognized “statutory entitlement[s]” as a new source of property implicating the Due Process Clause, the Goldberg opinion triggered a “due process explosion.” Expanding the modern meaning of property, the Court subsequently found that certain state-granted benefits, such as food stamps, public employment, driver’s licenses, and professional licenses, were potentially property, thus triggering the Due Process Clause and a right to some sort of hearing before deprivation.

Given that these new forms of property recognized by the Supreme Court may vary in weight and importance, in the 1970s the Court set up a two-question analysis to determine how much and what type of procedural due process is required.

The first question the Court asks is a threshold determination: has a state action deprived or restricted a person’s life, liberty, or property interest? In Board of Regents of State Colleges v. Roth, the

30. Id.
31. CHEMERINSKY, supra note 15, § 7.3.1, at 571.
33. Id. at 262. See generally 3 ROTUND & NOWAK, supra note 10, § 17.2, at 5 (stating that hearings and processes are owed when government action impairs an individual’s property); Reich, New Property, supra note 28, at 733 (stating that valuables dispensed by the government supplant traditional forms of private property wealth).
34. CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE 75 (Marlin Volz et al. eds., 2d ed. 1997); see Goldberg, 397 U.S. at 262.
35. Goldberg, 397 U.S. at 262.
36. Perry v. Sindermann, 408 U.S. 593, 599–600 (1972). But see Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 578 (1972) (finding a state college professor had no property interest where the employment contract was for only one year).
39. 3 ROTUND & NOWAK, supra note 10, § 17.2, at 6–8.
41. Roth, 408 U.S. at 569–70; cf. State, Dep’t of Pub. Safety v. Elk River Ready Mix Co., 430 N.W.2d 261, 264 (Minn. Ct. App. 1988) (finding a person was not
Court held that to have a property interest in a benefit, a person must have more than an abstract need or desire for it—"[h]e must, instead, have a legitimate claim of entitlement to it."\(^{42}\)

The second question the Court asks is whether the procedures used by the state to deprive a person’s property were constitutionally sufficient.\(^ {43}\) The Court in *Mathews v. Eldridge*\(^ {44}\) created a three-part balancing test to determine the constitutional sufficiency of the procedures.\(^ {45}\) The Court balances:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\(^ {46}\)

Professor Richard J. Pierce criticizes the *Mathews* test for two related reasons. First, Pierce notes that in determining the weight of the private interest, the *Mathews* test requires each judge to insert his or her subjective view concerning the relative value of hundreds of incomparable interests.\(^ {47}\) Such interests, for example, could range from welfare benefits to a household pet. Second, Professor Pierce notes that because each judge may put different values on various liberty and property interests and the value of additional procedures, the result of the application of the *Mathews* balancing test can be unpredictable.\(^ {48}\)

Despite these criticisms, the *Mathews* test has shown to be durable and flexible. Since 2003 the U.S. Supreme Court has employed the test in deciding matters as practical as how long a city may delay holding a hearing after a person’s car is towed.\(^ {49}\) On the

subjected to a deprivation of property where a notice was purely informational).\(^ {42}\) *Roth*, 408 U.S. at 577. The court in *Roth* upheld its repudiation of the right/privilege distinction and ruled that majestic terms like “liberty” and “property” must be given some meaning. *Id.* at 571–72.


\(^ {44}\) *Id.*

\(^ {45}\) *Id.*

\(^ {46}\) *Id.*

\(^ {47}\) PIERCE ET AL., *supra* note 24, § 6.3.4d, at 275.

\(^ {48}\) *Id.* at 276. Despite these criticisms Professor Pierce prefers the *Mathews* test to any alternative that has been identified to date. *Id.; see infra* notes 150–54 and accompanying text.

other end of the spectrum, the Court has also used the test to
decide national security matters as imperative as how much
procedure is due to suspected Al-Qaeda terrorists held at
Guantanamo Bay, Cuba.50

C. Dangerous Dog Laws in Minnesota

The majority of states now regulate dogs through dangerous
dog statutes.51 Minnesota’s dangerous dog statute, which was passed
in 1988,52 was a reaction to several vicious dog bite incidents in the
state.53 The law, like other dangerous dog statutes around the
country, seemed to be a preventive measure to identify dogs before
they bite people.54

Minnesota Statutes section 347.50 defines a “dangerous dog”
as any dog that has:

(1) without provocation, inflicted substantial bodily harm
on a human being on public or private property;

(2) killed a domestic animal without provocation while off
the owner’s property; or

(3) been found to be potentially dangerous, and after the
owner has notice that the dog is potentially dangerous,
the dog aggressively bites, attacks, or endangers the safety
of humans or domestic animals.55

A “potentially dangerous dog” is defined as any dog that:

51.  Cynthia A. Mcneely & Sarah A. Lindquist, Dangerous Dog Laws: Failing to
Give Man’s Best Friend a Fair Shake at Justice, 3 J. ANIMAL L. 99, 112 (2007)
(discussing commonly shared characteristics of states’ dangerous dog laws).
53.  Dennis J. McGrath, Son’s Injury Led Woman to Seek Dog Legislation,
STAR TRIB. (Minneapolis), Mar. 5, 1988, at B1, available at 1988 WLNR 1657941
(describing the pit bull mauling of a six-year-old boy and his mother’s efforts to
lobby the Minnesota Legislature).
(notting that in the 1970s state legislatures began to pass dangerous dog statutes as
preventive measures); Ellen Foley, Officials Preparing a Hearing on Pit Bull that Bit St.
Paul Boy, STAR TRIB. (Minneapolis), Aug. 29, 1987, at B3, available at 1987 WLNR
1363674 (“H[health] officials are eagerly awaiting the passage of a proposed dog-
control ordinance that could identify dangerous dogs before they bite people.”).
A more complete account of the legislative intent behind Minnesota’s dangerous
dog statute is not possible because audio recordings of the Minnesota Legislature
floor debates and committee hearings prior to the year 1991 are not available.
55.  MINN. STAT. § 347.50, subdiv. 2 (2012) (emphasis added).
(1) when unprovoked, inflicts bites on a human or domestic animal on public or private property;
(2) when unprovoked, chases or approaches a person, including a person on a bicycle, upon the streets, sidewalks, or any public or private property, other than the dog owner’s property, in an apparent attitude of attack; or
(3) has a known propensity, tendency, or disposition to attack unprovoked, causing injury or otherwise threatening the safety of humans or domestic animals. 56

Once a dog has been declared “dangerous” by an animal control authority, its owner is required to follow a number of restrictions, such as registering the dog, posting visible signs warning the public of a dangerous dog, and obtaining liability insurance of at least $300,000. 57 A person that does not comply with these restrictions is guilty of a misdemeanor, and any subsequent offenses are charged as gross misdemeanors. 58

Under Minnesota Statutes section 347.541, an owner of any dog declared “dangerous” has the right to notice and a hearing by an impartial hearing officer. 59 An owner also has the right to a hearing when an animal control authority orders a dog to be euthanized in the event of a subsequent offense after the dangerous dog designation. 60

Finally, the Minnesota Legislature enabled any city or county to regulate potentially dangerous and dangerous dogs in a more

56. Id. § 347.50, subdiv. 3.
57. Id. § 347.51.
58. Id. § 347.55(a), (c). In Minnesota, a misdemeanor has a sentence of up to ninety days in jail, a $1000 fine, or both. Id. § 609.02, subdiv. 3. A gross misdemeanor has a sentence of up to one year in jail, a $3,000 fine, or both. Id. § 609.02, subdiv. 4. Under Minnesota law a person may also be convicted of a crime for not following the restrictions placed on his or her dog deemed “potentially dangerous” under the statute. Id. § 347.515 (providing an owner of a potentially dangerous dog must have a microchip implanted in the dog); id. § 347.55(a) (providing that it is a misdemeanor to violate a provision of section 347.515). Even though the statute places restrictions on a potentially dangerous dog, the dog’s owner has no right to challenge the potentially dangerous designation that served as a predicate—as there need be no hearing to determine the validity of the potentially dangerous designation under the statute. See id. § 347.541, subdiv. 1, 4; cf. State v. Cowan, 814 N.E.2d 846, 848–50 (Ohio 2004) (finding an ordinance unconstitutional where an unreviewable vicious dog designation was used as an element of a “failing to confine a vicious dog” criminal offense).
60. Id. § 347.54, subdiv. 3.
restrictive manner.61 Minnesota’s dangerous dog laws, though, are not self-executing, meaning cities lack the authority to enforce the laws where the city has not adopted a procedure for the provision’s implementation.62 Therefore, many cities have their own dangerous dog ordinances, with varying procedures, to control dangerous dogs or animals.63

III. THE SAWH DECISION

A. Facts

Mitchell Sawh, a Lino Lakes, Minnesota resident, owned a dog named Brody.64 In 2010, Brody injured three individuals—biting at least two of the three.65 After the third incident and a number of appeals to the City of Lino Lakes, the City ordered that Brody be euthanized.66

1. The April 8th Incident

On April 8, 2010, Sawh’s dog Brody either bit or scratched the left arm of a pedestrian near Sawh’s home.67 According to the City, Brody bit the pedestrian.68 The victim told an investigating officer...
that Brody came up to him “aggressively” and “ended up . . . biting his left arm causing the injury.”  The officer observed a “fairly large series of bloody scratches” on the pedestrian’s arm that were “consistent with a dog’s teeth.” According to Sawh, Brody was walking and “happily wagging his tail,” and then he “simply jumped up on a pedestrian in a playful manner, and the pedestrian, unfortunately, was scratched.”

In response to the April 8 incident, the City designated Brody as “potentially dangerous” under section 503.15 of the Lino Lakes, Minnesota, Code of Ordinances (“City Code”). The City Code gave Sawh no right to appeal the potentially dangerous designation; however, the City placed no restrictions on Brody.

2. The October 15th Bite and Appeal

On October 15, 2010, Brody undisputedly bit a second passerby. The City then designated Brody as “dangerous” under the City Code, informing Sawh he must remove Brody from the

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69. Respondent City of Lino Lakes’ Brief and Appendix at Appendix, Sawh I, 800 N.W.2d 663 (No. A10-2143) 2011 WL 3799463, app. at CA-6 [hereinafter City’s Appeals Court Brief]. Only the PDF image of the City’s brief on Westlaw contains the appendix.

70. Id.

71. Sawh’s Supreme Court Brief, supra note 2, at *8–10.

72. Sawh II, 823 N.W.2d at 630. The relevant portions of the Lino Lakes City Code are reprinted in the appendix of the City of Lino Lakes’ brief to the Minnesota Court of Appeals. See City’s Appeals Court Brief, supra note 69, app. at CA-31 to -35. The City Code’s statutory scheme allows an animal control officer to designate a dog as “potentially dangerous. . . upon receiving evidence that a[n] . . . animal has, when unprovoked, then bitten, attacked or threatened the safety of a person or a domestic animal as stated in division (3)(b) above.” LINO LAKES, MINN., CODE OF ORDINANCES § 503.15(4) (2010), reprinted in City’s Appeals Court Brief, supra note 69, app. at CA-32. Section 503.15(3)(b) defines a “potentially dangerous” animal 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 other 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.

73. Sawh II, 823 N.W.2d at 630; Sawh I, 800 N.W.2d at 665 (“Neither the written notification nor the ordinance provided [Sawh] a meaningful opportunity to challenge the potentially dangerous animal declaration.”).

74. Sawh II, 823 N.W.2d at 630.

75. Id.

76. Id.; see also LINO LAKES, MINN., CODE OF ORDINANCES § 503.15(5)(b),
city within fourteen days. The City Code allows an officer to designate an animal as “dangerous” where an animal has previously been declared “potentially dangerous” and then subsequently bites, attacks, or threatens the safety of a person or animal, pursuant to section 503.15(3)(a) of the City Code. The relevant clauses of section 503.15(3)(a) define a dangerous animal as one that has:

“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.”

Sawh appealed the dangerous designation at a November 8, 2010, hearing before the Lino Lakes City Council; however, the Council did not formally review the potentially dangerous designation. Sawh argued that both the Lino Lakes Police Chief and City Attorney made a presentation to the City Council that Brody was conclusively deemed “potentially dangerous,” and that the issue would not be revisited.

The City Council classified Brody as “dangerous” pursuant to section 503.15(3)(a)(5) because Brody had been designated “potentially dangerous” and then subsequently bit another person. The City required Sawh to comply with a series of restrictions, such as posting a dangerous dog sign, keeping Brody enclosed and muzzled at all times, and maintaining $300,000 in liability insurance.

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77.  Lino Lakes, Minn., Code of Ordinances § 503.15(7), reprinted in City’s Appeals Court Brief, supra note 69, app. at CA-33.
78.  Lino Lakes, Minn., Code of Ordinances § 503.15(5), quoted in Sawh II, 823 N.W.2d at 635.
79.  Id. § 503.15(3)(a), quoted in Sawh II, 823 N.W.2d at 636.
80.  See Sawh II, 823 N.W.2d at 630.
82.  Sawh’s Supreme Court Brief, supra note 2, at *12–13.
83.  Id.; see also Sawh I, 800 N.W.2d at 669 (“[W]e conclude that the city deemed [Sawh]’s dog ‘dangerous’ because the dog had already been declared ‘potentially dangerous’ and subsequently bit a person.”).
84.  Lino Lakes, Minn., Code of Ordinances § 503.16(1) (providing a list of restrictions the City may impose on an owner of a dog designated as “dangerous”), reprinted in City’s Appeals Court Brief, supra note 69, app. at CA-34.
3. The November 9th Bite and Appeal

On November 9, 2010, a day after the dangerous dog hearing, Brody bit a third person.\(^{85}\) The Police Chief impounded Brody, informing Sawh the incident was a “subsequent bite” under the City Code, which required the City to destroy Brody.\(^{86}\) Sawh appealed and was granted a hearing where the City Council found the biting was a “subsequent offense” under the City Code, which required the City to kill Brody.\(^{87}\)

B. The Minnesota Court of Appeals Decision

Sawh appealed the City Council’s decisions to the Minnesota Court of Appeals.\(^{88}\) Under the Roth threshold question, the appeals court found that a protected property interest had been implicated because dogs are considered private property.\(^{89}\) Balancing the three Mathews factors, the appeals court reversed the City Council’s decisions. The appeals court held that Sawh was denied sufficient procedural due process when the dangerous designation and the City Council’s order to euthanize Brody were predicated on the City’s potentially dangerous designation, which Sawh was not given a right to challenge.\(^{90}\)

The appeals court found that Sawh had “little interest in harboring animals that may be dangerous.”\(^{91}\) The court, however, agreed with Sawh under the second Mathews factor that there was a significant risk of an erroneous deprivation of property because Sawh was not provided with an opportunity to challenge the potentially dangerous designation, which acted as a predicate offense and not a mere warning notice.\(^{92}\) The court weighed the

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85. Sawh II, 823 N.W.2d at 631.
86. LINO LAKES, MINN., CODE OF ORDINANCES § 503.16(4) (providing that if an animal designated as “dangerous” is found to have committed a “subsequent offense” the animal control officer shall order the animal destroyed), quoted in Sawh II, 823 N.W.2d at 636–37.
87. Sawh II, 823 N.W.2d at 631.
88. Id.
89. Sawh I, 800 N.W.2d 663, 668 (Minn. Ct. App. 2011), rev’d, 823 N.W.2d 627 (Minn. 2012); see Sawh II, 823 N.W.2d at 633 (explaining the Roth standard).
90. Sawh I, 800 N.W.2d at 670.
91. Id. at 668 (quoting Am. Dog Owners Ass’n v. City of Minneapolis, 453 N.W.2d 69, 71 (Minn. Ct. App 1990)).
92. Id. at 668–69. The appeals court agreed with Sawh that the potentially dangerous designation at the November 8 dangerous dog hearing was not up for debate because the Lino Lakes City Attorney and Chief of Police treated the
third *Mathews* factor in favor of Sawh because it found many municipalities around the state provide some sort of review after a city designates a dog “potentially dangerous.”

### C. The Minnesota Supreme Court Opinion

The Minnesota Supreme Court also conducted the two-step analysis to determine if Sawh’s due process rights had been violated. Under the *Roth* threshold question, while the court recognized that dogs have long been considered personal property, the court ruled that Sawh had no right to challenge the potentially dangerous designation because “procedural due process protections do not apply when government action may lead to a deprivation . . . [of property] at some indeterminate point.” The court determined Sawh’s property was deprived when the City designated Brody as “dangerous” and ordered Brody’s destruction.

Balancing the three *Mathews* factors, the Minnesota Supreme Court concluded the City’s procedures used to deprive Sawh of his property were constitutionally sufficient. Measuring Sawh’s private interest under the first *Mathews* factor, the court noted that while animal owners may have sentimental attachments to their pets, under Minnesota law a dog is measured by its “fair market value” and is treated like any other piece of tangible property.

Under the second *Mathews* factor, the court found that the City’s procedures used to designate Brody as “dangerous” and issue a destruction order did not create a risk of an erroneous

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93. Id. at 670 (referencing city ordinances from Golden Valley, Plymouth, Minneapolis, and St. Paul, Minnesota, which all provide a right to appeal or review of a potentially dangerous designation).

94. *See Sawh II*, 823 N.W.2d at 692 (citing Ky. Dept. of Corr. v. Thompson, 490 U.S. 454, 460 (1989); Carillo v. Fabian, 701 N.W.2d 763, 768 (Minn. 2005)); supra Part II.

95. *Sawh II*, 823 N.W.2d at 632 (citing Corn v. Sheppard, 179 Minn. 490, 492, 229 N.W. 869, 870 (1930)).

96. Id. at 633 (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569 (1972)).

97. Id.

98. Id. (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

99. *Id.* (citing *Corn*, 179 Minn. at 492, 229 N.W. at 870; Smith v. St. Paul City Ry. Co., 79 Minn. 254, 256, 82 N.W. 577, 578 (1900); Harrow v. St. Paul & Duluth R.R. Co., 43 Minn. 71, 72, 44 N.W. 881, 881 (1890)).
The court reasoned that because Sawh was able to present witnesses, explain his version of the events, and argue against the City’s findings at two separate hearings, the City’s procedures were “consistent with the requirements of due process,” even if weightier interests had been at stake. Setting aside the question about whether Sawh’s property interest was implicated, the state supreme court’s conclusion differed with both Sawh’s argument and the court of appeals’ holding that the potentially dangerous designation functioned as a predicate. The Minnesota Supreme Court instead found that “the purpose of the ‘potentially dangerous’ designation is simply to put owners on notice of their animal’s dangerous tendencies.” The court supported its argument by construing section 503.15(5)(b) of the City Code as requiring the mere existence—not the correctness—of a potentially dangerous designation, as well as written notice to the owner, for the City to declare an animal “dangerous,” after a subsequent bite or attack.

Under the third Mathews factor, the supreme court found “that the City ha[d] a compelling interest in insuring the health and safety of its citizens,” and had an interest in avoiding administrative and financial burdens with additional hearings.

IV. ANALYSIS

The Minnesota Supreme Court was correct that, under Board of Regents of State Colleges v. Roth, Sawh had no due process right to challenge the City’s potentially dangerous designation at the time the designation was issued because Sawh’s property could not be restricted or deprived. However, the Minnesota Supreme Court

100. Sawh II, 823 N.W.2d at 634–35.
101. Id. at 634 (citing Goss v. Lopez, 419 U.S. 565, 581 (1975) (approving of an informal hearing by a school to review a decision to discipline a student)).
102. See id. at 634–35.
103. Id. at 635.
105. Id. at 635 (citing State v. Wiltgen, 737 N.W.2d 561, 570 (Minn. 2007)).
106. Id. (citing Mathews v. Eldridge, 424 U.S. 319, 348 (1976)).
107. Id. at 633; see Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–75 (1972). While outside the scope of this note because the author agrees with the Minnesota Supreme Court’s determination that the potentially dangerous designation alone does not implicate the Due Process Clause, some have argued that Roth set too high of a bar for what types of interests trigger a right to due process. See 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 11:2, at 344.
erred in its reasoning in several respects and failed to properly balance the interests involved when it applied the *Mathews* test.

Section A.1 examines how the court under-weighed Sawh’s private interest in the life of his companion animal and explains why the court should abandon its treatment of companion animals as mere “tangible property” that is measured by the animal’s “fair market value.” Section A.2.a demonstrates how the court’s construction of the Lino Lakes dangerous dog ordinance, as only requiring the existence and not correctness of the potentially dangerous designation, leads to absurd and unreasonable results. Section A.2.b finds that the facts of *Sawh* are sufficiently analogous to a series of cases from the U.S., Minnesota, and Ohio Supreme Courts, which hold that an individual has a due process right to a hearing on an unreviewed designation or offense that is subsequently used as a predicate offense. Section A.3 discusses the government’s interest and the potential financial burdens to cities by providing additional process. Finally, section B proposes an alternative holding to the Minnesota Supreme Court’s ruling.

A. *Sawh’s Right to Due Process Under the Mathews Test*

1. *The Court Minimized Sawh’s Private Interest*

Under the first *Mathews* factor, the court minimized Sawh’s private property interest in his dog Brody. The *Sawh* court missed an opportunity to recognize our society’s overwhelming consensus that animals in general, and “companion animals”108 in particular,

108. See MINN. STAT. § 343.20, subdiv. 6 (2012) (defining pets and companion animals synonymously as including “any animal owned, possessed by, cared for, or controlled by a person for the present or future enjoyment of that person or another as a pet or companion”); Definition of Companion Animal, A.S.P.C.A., http://www.aspca.org/about-us/aspca-policy-and-position-statements/definition-of-companion-animal (last visited Sept. 19, 2013) (defining companion animals as domesticated or domestic-bred animals “whose physical, emotional, behavioral and social needs can be readily met as companions in the home, or in a close daily relationship with humans”), cited in Sabrina DeFabritiis, *Barking Up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary’s Failure to Keep Pace,*
are something more than mere property and are often times considered members of the family.\textsuperscript{109}

Invoking century-old precedent on animal law, the court determined that Minnesota currently treats animals “like any other item of tangible personal property.”\textsuperscript{110} This determination, however, is outdated and incorrect. Minnesota, like almost all of the states\textsuperscript{111} and the federal government, affords extra protection to animals—especially companion animals—through animal anti-cruelty laws.\textsuperscript{112} Second, animals are treated differently from property in other areas of the law, such as inheritance and tort law.\textsuperscript{113} Minnesota’s common-law notion that dog owners should only receive fair market value for their pets should be ignored as a legal anachronism. The notion stems from the fact that dogs were traditionally not considered property and were subsequently given the same method of valuation as farm animals, which do have an ascertainable market value.\textsuperscript{114} Finally, because courts employing the \textit{Mathews} test are balancing interests and not awarding exact monetary values, like in torts cases, courts should recognize animal owners’ more ethereal interests in an animal’s companionship,
similar to how courts handle the ethereal interests in “new property.”

a. Minnesota’s Animal Anti-Cruelty Statute

Minnesota broadly defines an animal as “every living creature except members of the human race.” Pet or “companion animal” is separately defined as “any animal owned, possessed by, cared for, or controlled by a person for the present or future enjoyment of that person or another as a pet or companion.”

Demonstrating an intent to protect companion animals from cruelty, in 2001 the Minnesota Legislature created harsher penalties for violating Minnesota’s animal anti-cruelty law when a pet or companion animal is harmed. The current animal anti-cruelty statute makes it a misdemeanor where an individual, among other things, tortures, neglects, abandons, or acts cruelly toward any animal. It is a felony for an individual to mistreat a companion animal in certain ways that cause “great bodily harm” or death to the animal. Minnesota has banned animal fighting events since 1905, and since 1981 dogfighting or promoting any fighting between domestic animals has been a felony-level offense.

Like an owner of any property, the owners of companion animals have a certain “bundle of rights”: the right to possess, use,
exclude, and transfer title through a sale or gift. Similar to other forms of property, not all of these rights attach to companion animals. For example, an owner’s right to use a car and a pet in certain ways is restricted: there are speed limits and a pet owner is not allowed to torture or use his or her animal in an animal fight. However, there is a major distinction between “use restrictions” on companion animals and other tangible pieces of property, such as a car or house. Use restrictions on animals, as codified in Minnesota’s anti-cruelty laws, are for the welfare and benefit of the animal, and thus are more similar to child protection laws, while use restrictions on property such as cars, lawn mowers, or toxic chemicals are for the benefits of both the owner and the wider population.

Animal anti-cruelty laws distinguish animals as property from other tangible property because the law stems from our understanding that both vertebrate non-human animals and humans have complex central nervous systems able to experience physical pain and suffering. As an early proponent for “animal rights,” English barrister Jeremy Bentham argued animals’ capacity for suffering is a vital characteristic that gives them, as living beings, the right to legal consideration.

123. Jesse Dukeminier et al., Property 83 (7th ed. 2010).
124. Id. at 84.
125. See David Favre, Living Property: A New Status for Animals Within the Legal System, 93 MARQ. L. REV. 1021, 1028–29 (2010) (explaining how early animal anti-cruelty laws in the 1860s reflected a shift in the law because they put restrictions on animal owners out of concerns for the animals themselves). But see Kruse, supra note 118, at 1409 (explaining that to a great extent animal-protection efforts have still been about the protection of humans in that legislators link animal abuse with the health of the family). In fact, in 1905 the Minnesota Legislature empowered the Minnesota Society for the Prevention of Cruelty, the precursor for the Minnesota Humane Society, to enforce laws and prosecute those who are guilty of cruelty “to children and dumb animals.” Act approved Apr. 18, 1905, ch. 274, § 3, 1905 Minn. Laws 409, 409 (emphasis added) (codified as amended at MINN. STAT. § 343.01 (2012)).
126. Favre notes that scientists studying pain in invertebrate animals found that invertebrates such as crabs and lobsters have only about 100,000 neurons compared to 100 billion in people and other vertebrates. Favre, supra note 54, at 17–18.
b. The Treatment of Animals in Other Areas of the Law

Animals are treated differently from inanimate property in other areas of the law, such as inheritance and tort law. In inheritance law, a majority of states have pet trust laws either adopted from or modeled after the Uniform Probate Code or the Uniform Trust Code, allowing pet owners to provide for the care of their animal after the owner’s death. A number of state courts void clauses in wills on public policy grounds that demand the destruction of the testator’s animals.

In a lost and found property case, the Vermont Supreme Court refused to apply the state’s lost property statute to pets, which it interpreted to apply to farm animals but not companion animals. The court reasoned that pets’ worth, unlike agricultural animals, is not primarily financial, but emotional: “[The dog’s] value derives from the animal’s relationship with its human companions.”

In tort law, a minority of courts have approved damages for owners whose companion animals have been killed by a negligent act, even when the “actual value” or “intrinsic value” of the pet to its owner is beyond the fair market value of the animal. Courts

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129. See, e.g., In re Capers’ Estate, 34 Pa. D. & C.2d 121, 141 (Pa. Orphans’ Ct. 1963) (voiding a testatrix’s will clause to destroy her Irish Setters); see also In re Brand’s Estate, No. 28473 (Vt. Prob. Ct. Mar. 17, 1999) (finding testator’s will clause to destroy his horses void as against public policy), reprinted in WAGMAN ET AL., supra note 128, at 598. Professor Susan J. Hankin writes that the case of In re Brand’s Estate is “often cited because it so well exemplifies the difference between animals and inanimate property.” Susan J. Hankin, Not a Living Room Sofa: Changing the Legal Status of Companion Animals, 4 RUTGERS J.L. & PUB. POL’Y 314, 353 (2007). Hankin explained when the provisions of the Brand will (giving the testator’s wishes for his car and horses both to be destroyed and killed) became known “there was very little concern expressed about crushing the car, but a great deal of public outcry about the fate of horses.” Id.


131. Id. at 633 (emphasis added).

132. “Actual” or “intrinsic” value refers to the value of property to the specific person who happens to own it, as opposed to the value the property would receive on the actual market. In re McCannel, 301 N.W.2d 910, 924, n.11 (Minn. 1980). The court in Petco Animal Supplies, Inc. v. Schuster, defined “intrinsic value” as “an inherent value not established by market forces; it is a personal or sentimental value. For example, the intrinsic value of trees is said to be comprised of both an
“have adopted an ‘actual value’ approach when the market value for [a piece of property] (1) is nonexistent, (2) cannot be ascertained, or (3) is not a true measure of its worth.” Courts using the “actual value” approach will award an animal owner reasonable replacement costs, for example, “the cost of purchasing a puppy of the same breed, the cost of immunization, the cost of neutering the pet, and the cost of comparable training.”

While the Minnesota Court of Appeals has rejected the “actual value” approach to pet damages, the Minnesota Supreme Court awarded the “actual value” of a grove of ornamental trees to plaintiffs who brought a negligence claim. In *C.S. McCrossan*, the supreme court held that the plaintiffs were entitled to the actual value of the trees, beyond their market value, because the trees had “substantial value for shade and ornamental purposes” to the landowners, which no market could reflect. The *C.S. McCrossan* case provides an analogy to the valuation of companion animals: like the trees’ “intrinsic value” to the landowners for their shade and ornamental purpose, any court in the future measuring a pet owner’s interest could find a pet has a substantial “intrinsic value” to its owner for its companionship purposes. The supreme court in *Sawh* missed this opportunity.

Today, Alaska, California, Florida, Hawaii, Idaho, and Kentucky allow pain and suffering or “loss of companionship” ornamental (aesthetic) value and a utility (shade) value.”

138. *Id* at 144, 235 N.W.2d at 610.
139. *Id. Contra Strickland*, 397 S.W.3d at 190. The Texas Supreme Court rejected this analogy by noting a similar Texas case about the “intrinsic value” of the “ornamental” or “aesthetic” trees was not rooted in the owner’s “subjective emotions.” *Id*.
damages beyond the fair market value of an animal to be recovered when a pet has been killed by a tortious act.\textsuperscript{146} States that do not allow for non-economic emotional damages in animal torts cases mostly base their reasoning on a public policy rationale that the “flood gates” will open and a deluge of civil pet litigation will result.\textsuperscript{147} While the majority of states refuse to award emotional distress or “loss of companionship” damages to pet owners whose animals have been negligently or intentionally killed,\textsuperscript{148} many courts will preface their holdings with strong language indicating their discomfort in labeling pets as mere property with a financial value.\textsuperscript{149}

A valid criticism of considering Sawh’s “loss of companionship” in Brody, or Brody’s “intrinsic value” to Sawh, as part of Sawh’s

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\item \footnotesize Plotnik v. Meihaus, 146 Cal. Rptr. 3d 585, 599–600 (Ct. App. 2012), review denied, No. S205836, 2012 Cal. LEXIS 11667 (Dec. 12, 2012) (holding California law allows a pet owner to recover for mental suffering caused by another’s intentional act that injures or kills his or her animal).
\item La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 269 (Fla. 1964) (“[W]e feel that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover. . . .”)
\item Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1071 (Haw. 1981) (allowing for “recovery for mental distress suffered as the result of the negligent destruction of property”).
\item Burgess v. Taylor, 44 S.W.3d 806, 813 (Ky. Ct. App. 2001).
\item See Strickland v. Medlen, 397 S.W.3d 184, 194 (Tex. 2013) (quoting pet welfare agencies’ concern that “‘pet litigation will become a cottage industry,’ exposing veterinarians, shelter and kennel workers, animal-rescue workers, even dog sitters, to increased liability”; Rabideau v. City of Racine, 627 N.W.2d 795, 799 (Wis. 2001) (“Were we to recognize a claim for damages for the negligent loss of a dog, we can find little basis for rationally distinguishing other categories of animal companion.”).)
\item See \textit{Strickland}, 397 S.W.3d at 191 n.49 (providing a state survey of courts’ recognition of pet “loss of companionship” damages).
\item See, e.g., Corso v. Crawford Dog & Cat Hosp., Inc., 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979) (finding plaintiff is entitled to damages beyond the market value of the dog because “a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property”); Rabideau, 627 N.W.2d at 798 (“Labeling a dog ‘property’ fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other forms of property.”). Despite these cases’ strong language, Hankin notes they have little precedential value. Hankin, \textit{supra} note 129, at 343–47.
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private interest in the *Mathews* test is that it would require a judge to insert his or her subjective viewpoint into the test. However, as Professor Pierce notes, judges often insert their subjective view while balancing the private interests in the *Mathews* test by assessing the relative value of such things as “welfare benefits, . . . a government job, a person’s reputation, access to government provided educational benefits, freedom from corporal punishment, and hundreds of other objectively incomparable interests that qualify as life, liberty, or property.”

Second, Pierce notes that a judge’s subjective view in balancing the *Mathews* factors only creates “modest differences in the required procedural safeguards,” which are flexible. This is far preferable, Pierce argues, to the right/privilege distinction where a judge’s subjective view was *sub rosa* and was dispositive on whether a hearing was granted or denied. Furthermore, Pierce argues “[o]bjective [judicial] valuation of protected interests is both impossible and inappropriate”: “If the judiciary does not insert its subjective values, some other government institution must.”

Outside tort law, measuring Brody’s value as Brody’s “actual value” to Sawh, or as Sawh’s loss of companionship, is more appropriate in light of the *Mathews* test, which balances subjective *interests* rather than exact monetary values in determining damages. For example, in *Goldberg v. Kelly*, the Supreme Court did not weigh the Goldbergs’ welfare benefits in monetary terms, which would have been ascertainable. Rather, the Court weighed the Goldbergs’ interest in receiving public assistance in terms of the “intrinsic value” to them as a family: a “means to obtain essential food, clothing, housing, and medical care.”

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150. PIERCE ET AL., supra note 24, § 6.3.4d, at 275.
151. Id.
152. Id. at 276.
153. Id.
154. Id.
155. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (“[R]esolution of the issue whether the . . . procedures . . . are constitutionally sufficient requires analysis of the governmental and private *interests* that are affected.”) (emphasis added); cf. Strickland v. Medlen, 397 S.W.3d 184, 192–93 (Tex. 2013) (making a distinction between a dog’s “value” measured by the market, which the court held should be used in tort damages cases, and the relational and emotional *worth* of a dog).
157. Id. at 264.
Finally, the Alaska Supreme Court,\textsuperscript{158} the Washington State Court of Appeals,\textsuperscript{159} and a California appeals court,\textsuperscript{160} have all weighed the private interest of a pet owner in the \textit{Mathews} test beyond the pet’s fair market value.

c. Departing from the “Fair Market” Valuation of Companion Animals

The \textit{Sawh} court cited century-old animal law precedent holding that dogs, like domestic farm animals, should be measured by their fair market value.\textsuperscript{161} Measuring companion animals by their fair market value, though, stems from a legal anachronism where dogs traditionally had a “special status” under the law and were not treated as full property.\textsuperscript{162} Animals traditionally were separated into two categories: unowned wild animals (\textit{feræ naturæ}), which, “until killed or subdued, there is no property,”\textsuperscript{163} and domestic animals (\textit{feræ domitæ}), in which the right of property is “perfect and complete.”\textsuperscript{164} Because the crime of larceny was punishable by death in some periods of English history, courts limited the scope of what was considered property.\textsuperscript{165} In limiting the scope of property before the twentieth century, courts held that dogs were not domestic animals, and thus were not property.\textsuperscript{166}

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\item\textsuperscript{158} Haggblom v. City of Dillingham, 191 P.3d 991, 996 (Alaska 2008) (“While pets are considered property under the law of Alaska, we agree with the parties that the emotional bond people feel toward their pets elevates this interest above most property.”) (footnote omitted).
\item\textsuperscript{159} Mansour v. King County, 128 P.3d 1241, 1246 (Wash. Ct. App. 2006) (“[T]he bond between [the] pet and [the] owner often runs deep and . . . many people consider pets part of the family.”); Rhoades v. City of Battle Ground, 63 P.3d 142, 150 (Wash. Ct. App. 2002) (finding an interest in a pet is greater than mere economic interest because pets are not fungible).
\item\textsuperscript{160} Phillips v. San Luis Obispo Cnty. Dept. of Animal Regulation, 183 Cal. App. 3d 372, 377 (1986) (“[I]t is equally true [that] there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt.” (quoting Johnson v. McConnell, 22 P. 219, 200 (Cal. 1889))).
\item\textsuperscript{161} \textit{See Sawh II}, 823 N.W.2d 627, 633 (Minn. 2012) (citing Harrow v. St. Paul & Duluth R.R. Co., 43 Minn. 71, 72, 44 N.W. 881, 881 (1890); Smith v. St. Paul City Ry. Co., 79 Minn. 254, 82 N.W. 577 (1900)).
\item\textsuperscript{162} FAVRE, supra note 54, at 36–38.
\item\textsuperscript{163} \textit{See}, e.g., Pierson v. Post, 3 Cai. 175, 177 (N.Y. Sup. Ct. 1805) (“It is admitted that a fox is an animal \textit{feræ naturæ}, and that property in such animals is acquired by occupancy only.”).
\item\textsuperscript{164} \textit{See} Sentell v. New Orleans & C.R. Co., 166 U.S. 698, 701 (1897).
\item\textsuperscript{165} FAVRE, supra note 54, at 37.
\item\textsuperscript{166} \textit{Id}.; \textit{see} United States v. Gideon, 1 Minn. 292, 295 (1856) (finding the
Beginning in the 1930s courts began to eliminate the special status of dogs as “imperfect or qualified” property and put dogs in the same category as domesticated farm animals, whose value was measured by the market.\(^{167}\) Companion animals, though, are unlike domestic animals, such as horses, pigs, or cows, because they have no ascertainable economic value measured by what their owner could receive for them on the existing market.\(^{168}\) While the fair market value for farm animals, such as cattle, is a viable method of valuation because a cattle rancher owns cattle for economic reasons, pets are owned for their companionship, and therefore their value is unconnected to any market force.\(^{169}\) If Sawh’s interest in Brody was economic, Sawh would have just replaced Brody with another dog rather than spend tens of thousands of dollars on appeals and Brody’s boarding costs at the pound.\(^{170}\)

The Sawh court, therefore, should have ignored this antiquated precedent, which has no basis in today’s realities, of valuing companion animals under their fair market value. This is especially true in the Mathews balancing test, which weighs interests, not mere economic value.

2. \textit{The Risk of an Erroneous Deprivation}

Under the second Mathews factor, disallowing Sawh to be heard on the potentially dangerous designation significantly increased the risk of an erroneous deprivation of property because, despite the court’s finding, the designation was used as a predicate element of the dangerous designation, and ultimately led to the City euthanizing Brody. First, the court erred in determining the potentially dangerous designation was merely a warning notice, and misconstrued the City Code as only requiring the existence and not the correctness of the potentially dangerous designation. Second, the court’s ruling that the dangerous designation only required the killing of a dog is not an indictable offense because animals with no value, such as dogs, are not in the meaning of “beasts” in the statute, which includes animals that have an “intrinsic value,” such as horses, oxen and cows).

\(^{167}\) \textit{Favre}, supra note 54, at 36–37.

\(^{168}\) \textit{Id.} at 36.

\(^{169}\) See DeFabritiis, supra note 108, at 239–44 (noting that by the end of the twentieth century the role of pets had evolved from service to pure companionship). Many animal owners treat their pets as children—they purchase pet holiday gifts, travel with their pets, schedule play dates with their dogs, and provide their pets with health insurance and day-care. \textit{Id.} at 241–42.

\(^{170}\) See Simons, \textit{supra} note 66.
existence of the potentially dangerous designation conflicts with U.S. Supreme Court precedent, the court’s own precedent, and a similar case from the Ohio Supreme Court. Third, the value of giving additional process is high because the dispute of whether Brody bit or playfully scratched the first person involves “adjudicative” facts, which are best dealt with at a hearing where the parties are present. Finally, because the City could determine the validity of a potentially dangerous designation at the same hearing on the dangerous dog designation, the court failed to recognize that the financial and administrative burdens to the City would be low.

a. “Potentially Dangerous”: A Simple Warning, Predicate Offense, or Both?

One crucial issue in Sawh was whether the potentially dangerous designation functioned as a warning notice or a predicate offense under the plain language of the City Code. The mere issuance of a warning from a city to put owners on notice of their animal’s dangerous tendencies would not trigger the Due Process Clause because no property interest has been restricted. However, a predicate offense that provides a basis on which a city later deems a dog “dangerous” may trigger the Due Process Clause where the predicate is an element used to deprive property.

The City Code is subject to the same rules of statutory construction as the Minnesota Statutes. When interpreting a statute, courts “first look to see whether the statute’s language, on its face, is clear or ambiguous.” “An unambiguous statute must be construed according to its plain language.” Only if the statute is ambiguous will courts look outside the statutory text to ascertain legislative intent. In ascertaining legislative intent, courts presume the legislature did “not intend a result that is absurd,

172.  See *id*. at 632, 635.
176.  *Minn. Stat.* § 645.16; *Sanchez v. State*, 816 N.W.2d 550, 556 (Minn. 2012) (citing *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002)).
impossible of execution, or unreasonable,"178 or intend to violate the Minnesota or United States Constitution.179

Section 503.15(5) of the City Code provided that an animal control officer shall have the authority to designate an 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, attached [sic] or threatened the safety of a person or domestic animal as stated in division (3)(a) above.180

The court of appeals concluded that “the city deemed [Sawh’s] dog ‘dangerous’ because the dog had already been declared ‘potentially dangerous’ and subsequently bit a person” under the meaning of section 503.15(5) (b).181 The Minnesota Supreme Court did not disturb this conclusion. In construing section 503.15(5) (b) the supreme court found:

To uphold the designation of an animal as “dangerous,” the City must find only that an animal control officer has previously declared an animal “potentially dangerous” and provided written notice of that fact to the owner, not that the “potentially dangerous” designation was correct. . . . In other words, the purpose of the “potentially dangerous” designation is simply to put owners on notice of their animal’s dangerous tendencies. . . . Accordingly, because the City Code requires only the existence of a “potentially dangerous” designation to declare an animal “dangerous,” the City was not required to provide Sawh with an opportunity to challenge the correctness of that designation at a later hearing.182

The City Code is ambiguous because it is susceptible to more than one reasonable interpretation.183 On the one hand, the

178. MINN. STAT. § 645.17(1); Schroedl, 616 N.W.2d at 278 (“[C]ourts should construe a statute to avoid absurd results and unjust consequences.”).
179. MINN. STAT. § 645.17(3).
182. Sawh II, 823 N.W.2d at 634–35 (citations omitted).
183. Schroedl, 616 N.W.2d at 278 (quoting Amaral v. St. Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999)).
Minnesota Court of Appeals found that the potentially dangerous designation was more than a mere warning because the designation could act as a predicate on which the City later could deem the dog “dangerous” under section 503.15(3)(a). This section defines a “dangerous animal,” among other things, as an animal that has (1) “been found to be potentially dangerous and . . . [(2)] aggressively bites, attacks or endangers the safety of humans or domestic animals.” On the other hand, the supreme court’s interpretation that the potentially dangerous designation acts only as a warning is also reasonable because section 503.15(4), which defines when an animal control officer may designate a dog as “potentially dangerous,” provides that an officer shall cause the owner of the potentially dangerous animal to be notified in writing. The City also could not place any restrictions on a dog designated as “potentially dangerous.”

The Minnesota Supreme Court’s construction of the ambiguous section of the Lino Lake’s City Code is erroneous because its interpretation leads to absurd and unreasonable results. Under the court’s construction, for example, a city could lawfully pass an ordinance providing that a driver will be given two speeding “warning notices” where no fine or penalty is imposed and on the third speeding incident the driver will suffer a mandatory one-year license revocation. Allowing the underlying facts behind the prior warnings to be unreviewable at a subsequent hearing, as the supreme court did in Sawh, creates a substantial risk of an erroneous property deprivation because an officer working for the city may have made an innocent mistake, or may have been acting arbitrarily. Under the supreme court’s ruling in Sawh,

184. Sawh I, 800 N.W.2d at 668.
185. LINO LAKES, MINN., CODE OF ORDINANCES § 503.15(3)(a)(5) (emphasis added), quoted in Sawh II, 823 N.W.2d at 636. Although the court of appeals cited the definitional section of the ordinance, the section construed by the supreme court was section 503.15(5)(b), which permits an animal control officer the authority to designate a dog as “dangerous” based on two elements: (1) a dog is found to be “potentially dangerous,” and (2) the same animal is involved in a subsequent bite or attack. Id. § 503.15(5)(b), quoted in Sawh II, 823 N.W.2d at 635.
186. Sawh II, 823 N.W.2d at 635 (citing LINO LAKES, MINN., CODE OF ORDINANCES § 503.15(4)).
187. Id. at 633.
188. See MNI, STAT. § 645.17(1) (2012) (providing that in interpreting statutes courts should presume “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable”).
though, the city would be free to issue arbitrary warnings because the Due Process Clause was not triggered.

The above scenario is antithetical to the “fair play” essence of the Due Process Clause, which seeks to protect the individual against arbitrary government action and to provide procedural safeguards to illuminate underlying facts to prevent erroneous decisions from innocent error.

A better construction of the ordinance is one that recognizes that the potentially dangerous designation in the City Code functions both as a warning and as a predicate at various stages of the procedures provided in the City Code regulating dogs. The potentially dangerous designation originally functions as a warning notice when first issued, thus not triggering a hearing. This effectuates the original intent of dangerous dog laws in preventing and not merely reacting to dangerous animals. When the potentially dangerous designation subsequently is an element of the dangerous dog designation, then a better construction of the ordinance is that the potentially dangerous designation acts as a predicate offense. Given that the purpose of statutory construction is to “[s]ave and not to destroy” a legislative act, this interpretation saves the ordinance from absurd, unreasonable, and unconstitutional results.

b. The Court’s Construction of the City Code Contradicts Precedent on Due Process and Predicate Offenses

At oral arguments, Justice Stras of the Minnesota Supreme Court asked the counsel for both the City and Sawh why the U.S. Supreme Court case of Bell v. Burson should not give Sawh a right to a hearing on the potentially dangerous designation. Justice

192. See supra notes 51–54 and accompanying text (discussing the probable legislative intent of the dangerous dog laws).
Stras was not given a complete answer of why the facts of Sawh are analogous to or distinguishable from Bell to demand a similar or different result—at no fault of either counsel since the case was never discussed in their briefs. To answer Justice Stras’s question, Bell, along with other similar cases concerning due process and predicate offenses, would guarantee Sawh a hearing on the potentially dangerous designation at the subsequent dangerous dog hearing.

In Bell, after an uninsured driver was involved in a car accident, Georgia law required the driver to either post a bond or security cash deposit of the amount of damages the injured party claimed in a pending civil suit, or the Georgia Department of Public Safety would revoke his license.\(^\text{197}\) The driver requested an administrative hearing where he asserted he was not liable for the accident; however, the Georgia Department of Public Safety would only review (1) if the driver was involved in the accident (i.e., the mere existence of the accident), and (2) if the driver had posted the cash bond (i.e., whether the driver failed to comply with the subsequent condition resulting in the driver’s license revocation).\(^\text{198}\)

The Court in Bell held that because the possibility of liability acted as a predicate for the license revocation, when the driver did not pay the cash bond, the driver had a right to be heard on whether there was a reasonable possibility he was liable for the amounts claimed.\(^\text{199}\) The driver, therefore, had a right to judicial review of the probable correctness of his liability—not merely the existence of his possible liability.

Similarly, the Court in United States v. Mendoza-Lopez\(^\text{200}\) found that immigrant defendants had the due process right to challenge the lawfulness and not the mere existence of their prior deportations, which were used as an element of a felony offense of illegally reentering the United States after deportation.\(^\text{201}\) The defendants argued the prior deportations were unlawful because they were not informed of their right to counsel and therefore the deportations could not be used as predicate offenses.\(^\text{202}\) While the

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197. Bell, 402 U.S. at 537.
198. Id. at 537–38.
199. Id. at 541–42.
201. Id. at 837–40.
202. Id. at 831–32.
Court found no congressional intent to sanction challenges of the lawfulness of the deportation,\(^{203}\) the Court also found that to impose criminal sanctions predicated on any deportation, regardless of how violative of the rights of an alien the hearing may have been, does not comport with procedural due process.\(^{204}\)

The Court found:

> Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding. . . . This principle means at the very least . . . an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.\(^{205}\)

In *State v. Cowan*, a county dog warden in Ohio declared Cowan’s dog as “vicious” under a county ordinance, placing restrictions on the dog.\(^{206}\) Cowan later failed to abide by the vicious dog restrictions and was charged with various misdemeanor charges, where the vicious dog designation was used as a predicate offense.\(^{207}\) The Ohio Supreme Court held that using an unreviewable vicious dog designation by an animal control officer as an element of a crime violates procedural due process.\(^{208}\) The court found the law unconstitutional on its face because the vicious dog designation restricted the defendant’s property without a right to a hearing.\(^{209}\) Finally, the court found the law unconstitutional as applied because the vicious dog designation was used as an unreviewable and conclusive element of the charged crime.\(^{210}\)

\(^{203}\) Id. at 833–37.

\(^{204}\) Id. at 837. Therefore, even if the Minnesota Supreme Court was correct that the ordinance only required the existence of the potentially dangerous designation, under *Mendoza-Lopez*, the court must determine whether declaring a dog “dangerous” based on any potentially dangerous designation—no matter how arbitrary or erroneous the original designation was—comports with the constitutional requirement of due process. Id. at 837–38.

\(^{205}\) Id. at 837–38 (citations omitted).

\(^{206}\) 814 N.E.2d 846, 847 (Ohio 2004).

\(^{207}\) Id. at 848.

\(^{208}\) Id. at 850.

\(^{209}\) Id.

\(^{210}\) Id. Similar to how the Lino Lakes City Attorney and Chief of Police told the City Council the potentially dangerous designation was conclusive, *see Sawh I*, 800 N.W.2d 663, 669 (Minn. Ct. App. 2011), the *Cowan* court disapproved of the state repeatedly telling the jury that the warden had determined that the dogs
In *State v. Wiltgen*, the Minnesota Supreme Court held that a judicially unreviewed license revocation from a prior driving while intoxicated (DWI) offense cannot be used as a predicate to enhance a future DWI charge when the defendant has not waived review of the license revocation.\textsuperscript{211} Wiltgen was charged with a third-degree DWI and her license was automatically revoked.\textsuperscript{212} While Wiltgen requested judicial review on her license revocation, she was arrested for another DWI and was charged with an enhanced second-degree DWI based on two aggravating factors, one of which was the unreviewed license revocation.\textsuperscript{213} Employing the *Mathews* test, and relying on *Mendoza-Lopez*, the court held that Wiltgen’s procedural due process rights were violated because her liberty interest was high, and using the existence of a stayed license revocation as a “conclusive element of a crime . . . greatly increases the risk of an erroneous deprivation.”\textsuperscript{214}

The chart below provides a quick comparison of the four previously mentioned cases to the facts in *Sawh*:

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\textsuperscript{211} 737 N.W.2d 561, 569–70 (Minn. 2007). Under Minnesota DWI law when an individual refuses a test to determine blood alcohol level, the individual can be charged with a crime, such as a higher-level third-degree DWI offense, and the individual’s license is automatically revoked. MINN. STAT. §§ 169A.20, subdiv. 2, 169A.26, subdiv. 1(b), 169A.52, subdiv. 1, 3 (2012). However, the individual may request judicial review on the license revocation. *Id.* § 169A.53, subdiv. 2.

\textsuperscript{212} *Wiltgen*, 737 N.W.2d at 565.

\textsuperscript{213} *Id.;* see MINN. STAT. § 169A.25, subdiv. 1(a) (providing that a person who is driving while impaired where two aggravating factors are present is guilty of DWI in the second degree). An “aggravating factor” means a “qualified prior impaired driving incident,” which includes “prior impaired driving-related losses of license.” *Id.* § 169A.03, subdiv. 3.

\textsuperscript{214} *Wiltgen*, 737 N.W.2d at 569.
### Case 1st Incident or Offense 1st Hearing Result or Adverse Designation 2nd Incident or Offense Issue Sought to be Barred at 2nd Hearing Potential Result

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At first glance, the supreme court’s decision in Sawh seems distinguishable from the above cases because the first adverse decision against Sawh, unlike the four other cases, could not alone result in a deprivation of life, liberty, or property. However, this is not important because the other courts were not examining whether the parties deserved a hearing at the time of the first adverse decision, but rather if the parties had a right to a hearing about the correctness of the first adverse decision when it was later used as an element or predicate of the second offense.

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218. 737 N.W.2d 561 (Minn. 2007).
219. 823 N.W.2d 627 (Minn. 2012).
220. *See Sawh II, 823 N.W.2d at 633* (observing that the government is to provide sufficient process “only when the government has the ability to deprive an individual of a protected interest” (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569 (1972))).
221. *Mendoza-Lopez, 481 U.S. at 834* (“The issue before us is whether a federal
The Cowan court found regardless of whether the defendant was afforded a hearing on the vicious dog determination, the law was unconstitutional as applied because the vicious dog element of the crime was removed from the jury’s consideration (i.e., its existence was conclusive). 222 The court said that due process guarantees a person the right of “controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, such is not due process of law.” 223

The five cases share two interrelated propositions. First, in cases where an adverse decision or designation is used as a predicate offense or element of a subsequent offense, the original adverse decision or designation plays a crucial role in a statutory scheme where its absence will release or reduce the individual of criminal or civil consequences. 224 For example, in Cowan, without a vicious dog designation, the misdemeanor charges are dismissed. 225 In Wiltgen, if a judge finds in favor of the defendant at the revocation hearing, the prosecutor cannot use the revocation as a predicate to enhance the DWI charge. 226

Second, because the existence of the prior offense or designation is needed to support a second subsequent offense, which can deprive someone of their liberty or property, a person has a due process right to have a hearing on the correctness or lawfulness of the prior adjudication or designation, before it is used as a conclusive element. 227 To allow the unreviewed predicate offense to be a conclusive element would risk an erroneous

court must always accept as conclusive the fact of the deportation order . . . .”); Bell v. Burson, 402 U.S. 535, 540 (1971) (finding the original question of full liability would be adjudicated in a civil case between the parties involved); Wiltgen, 737 N.W.2d at 566 (finding the issue in the case was whether using an unreviewed license revocation as an aggravating factor in a subsequent DWI charge violated due process); cf. Cowan, 814 N.E.2d at 850 (holding that the appellee had a right to a hearing on the original vicious dog designation, but also that the vicious dog designation cannot be used as a conclusive element of a subsequent criminal offense).

222. Cowan, 814 N.E.2d at 850.

223. Id. (quoting Williams v. Dollison, 405 N.E.2d 714, 716 (Ohio 1980)).

224. See Bell, 402 U.S. at 541.


226. See Wiltgen, 737 N.W.2d at 565 (explaining how a license revocation can lead to a higher-level DWI charge).

deprivation of life, liberty, or property.\textsuperscript{228} For example, the Court in \textit{Bell} found that a hearing should determine if there is a “reasonable possibility of a judgment being rendered” against the petitioner so the required cash bond, loss, or license would not be taken erroneously because of an unfounded civil claim.\textsuperscript{229}

The \textit{Bell}, \textit{Mendoza-Lopez}, \textit{Cowan}, and \textit{Wilgen} court decisions create the rule that where an adverse decision or designation by the government could potentially deprive an individual of life, liberty, or property in the future based on the action or inaction of an individual, and that original designation is used as a predicate or element of a subsequent offense, then the defendant has a procedural due process right to a fair hearing to review the correctness of the original offense.

The facts and the scheme of the ordinance in \textit{Sawh} are sufficiently analogous to these cases to demand a similar result of the right to a hearing of the potentially dangerous designation in order to mitigate the risk of an erroneous deprivation of property. The potentially dangerous designation is not merely a warning but plays a crucial role in the scheme of the ordinance because it can be used as one of two elements to declare a dog “dangerous.”\textsuperscript{230} If the potentially dangerous designation is found to be issued in error then the dangerous dog designation should fail.\textsuperscript{231}

In addition, allowing the potentially dangerous designation to be used as a conclusive element in the dangerous dog designation creates a substantial risk that \textit{Sawh}’s property could erroneously be restricted or deprived.\textsuperscript{232} Even if Brody bit a person at the second incident, without a review of why Brody was designated as “potentially dangerous,” an animal control officer’s innocent mistake or arbitrary, capricious, or irrational decision would remain uncorrected.

\begin{footnotes}
\item[228] \textit{Wilgen}, 737 N.W.2d at 569.
\item[229] \textit{Bell}, 402 U.S. at 540.
\item[230] \textit{Lino Lakes, Minn.}, Code of Ordinances § 503.15(3)(a), (5)(b) (2010) (providing that an animal can be found “dangerous” if it 1) has been declared to be “potentially dangerous” and 2) subsequently bit, attacked, or threatened the safety of someone), quoted in \textit{Sawh II}, 823 N.W.2d 627, 635–36 (Minn. 2012).
\item[231] Lino Lakes will not have this problem anymore because it has subsequently revised its City Code to no longer have a potentially dangerous designation. See \textit{Lino Lakes, Minn.}, Code of Ordinances § 503.01 (2013).
\item[232] \textit{See Wilgen}, 737 N.W.2d at 570 (“[T]he opportunity for erroneous deprivation is more significant where judicial review has not been provided . . . .”).
\end{footnotes}
In determining the risk of an erroneous deprivation of property, the Mathews test also asks courts to weigh the probable value, if any, of additional or substitute procedural safeguards.\textsuperscript{233} Because this note disagrees with the Minnesota Supreme Court that the City Code only requires the existence of the potentially dangerous designation, additional procedures to determine the correctness of the designation would have value, especially since the designation can form one of the two elements to deprive or restrict an individual of his or her property.\textsuperscript{234}

Additional procedures are not always valuable. Professor Davis writes that the valuableness of the additional procedures and safeguards is dependent on whether the facts of the case are “adjudicative” or “legislative” in nature.\textsuperscript{235} “Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case.”\textsuperscript{236} “Legislative facts do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of law and policy and discretion,” so additional trial-like procedures are not always useful.\textsuperscript{237}

The question of whether Brody bit or scratched the first individual and whether the animal control officer was correct in designating Brody as “potentially dangerous” involve classic adjudicative facts because the parties are “particularly well-situated to assist the trier-of-facts in resolving the issue.”\textsuperscript{238} Therefore, an additional hearing would be valuable to prevent the risk of an erroneous deprivation of property because the parties—the Sawhs, the pedestrian, and the animal control officer—were all at the incident and are well suited to help the trier of fact to determine the correctness of the potentially dangerous designation.

\textsuperscript{233} Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
\textsuperscript{234} See LINO LAKES, MINN., CODE OF ORDINANCES § 503.15(5)(b), quoted in Sawh II, 823 N.W.2d at 635.
\textsuperscript{235} PIERCE ET AL., supra note 24, § 6.3.4b, at 271.
\textsuperscript{236} Id. (citing 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 9.2 (4th ed. 2002)).
\textsuperscript{237} Id. For example, the question in Brown v. Board of Education of whether separate educational facilities are inherently unequal concern legislative facts. Id. at 272.
\textsuperscript{238} Id. The Minnesota Court of Appeals determined there was a factual dispute about whether Brody bit or scratched the first passerby. Sawh I, 800 N.W.2d 663, 665 (Minn. Ct. App. 2011), rev’d, 823 N.W.2d 627 (Minn. 2012).
3. The Government Interest, Including Administrative Burdens

Under the third *Mathews* factor, courts consider the government’s interest, which includes “the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” The supreme court was correct to determine the government has a compelling interest in ensuring the health and safety of its citizens, and this includes the regulation of dangerous dogs. However, if Sawh was given a right to challenge only the potentially dangerous designation when it was used as a predicate for the dangerous designation, then the supreme court failed to recognize that the administrative and financial burdens to the city in providing a brief hearing would be minimal. Many of the same parties and witnesses to the incident leading to the potentially dangerous designation, as well as the same city officials, would all be present at the dangerous dog hearing. Although the City Council did not formally review the potentially dangerous designation, the parties did present facts about the incident, demonstrating that any additional time spent on considering the potentially dangerous designation would not be burdensome.

Second, as the Minnesota Court of Appeals noted, many other municipalities provide some sort of review after the city designates a dog “potentially dangerous.” A review of the twenty most populous cities in Minnesota reveals that of the eighteen cities that adopted the Minnesota Legislature’s dangerous dog statute, only four—Burnsville, Eden Prairie, Minnetonka, and

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240. *See Sawh II*, 823 N.W.2d 627, 635 (Minn. 2012).
241. *See id.*
242. *See id.* at 630–31 (discussing how the animal control officer, the Sawhs, and the police chief were present at the dangerous dog hearing).
243. *Id.* at 631.
246. *Burnsville, Minn.*, CITY CODE § 6-2-17 (2013). Burnsville’s ordinance is facially unconstitutional because it provides numerous restrictions on dogs designated “potentially dangerous” but provides the owners no right to review. *Id.*
Rochester—do not provide a right to appeal a potentially dangerous designation.\(^{247}\)

Other ordinances demonstrate the host of ways Minnesota cities handle the administrative and financial costs of providing a right to a hearing on a potentially dangerous designation. For example, to appeal a potentially dangerous designation in the City of St. Paul, an animal owner must initially post a $50 fee to cover administrative costs of scheduling a hearing, and if the dog owner loses the appeal, the owner will be responsible for the actual expenses of the hearing, up to $1000.\(^ {249}\) The City of Minneapolis requires the animal owner to pay $250 prior to receiving a hearing, but imposes no fee if the designation is upheld.\(^ {250}\) Cities also reduce costs by holding hearings in front of hearing officers, or by accepting into evidence reports by animal control officers without requiring them to testify.\(^ {251}\)

The City of Lino Lakes argued to the Minnesota Supreme Court that even though other cities provide hearings on a potentially dangerous designation, Lino Lakes should not be forced to incur additional fiscal and administrative burdens in providing additional process when, unlike these other cities, Lino Lakes did not place restrictions on potentially dangerous animals.\(^ {252}\) However, the City assumed that any ruling adverse to its position would require it to grant a hearing after the potentially dangerous designation. This is not the case, though, because a hearing on the

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248. The following fourteen city ordinances provide a right to appeal a potentially dangerous designation: Apple Valley, Minn., Code of Ordinances § 91.20(C)(1) (2013); Bloomington, Minn., City Code § 12.105(c) (2013); Brooklyn Park, Minn., Code of Ordinances § 92.25(B) (2013); Coon Rapids, Minn., City Code § 6-122(2) (2011); Duluth, Minn., Legislative Code § 6-98 (2015); Eagan, Minn., Code of Ordinances § 10.11, subdiv. 7(C) (2012); Edina, Minn., City Code § 300.17, subdiv. 6(D) (2011); Lakeville, Minn., City Code § 5-1-9(B)(1)(c) (2013); Maple Grove, Minn., Code of Ordinances § 6-13(j) (2013); Minneapolis, Minn., Code of Ordinances § 64-110(f) (2013); Plymouth, Minn., City Code § 915.25, subdiv. 6 (2013); St. Cloud, Minn., Code of Ordinances § 1040:80, subdiv. 2(a) (2009); St. Louis Park, Minn., City Code § 4-89(d) (2013); St. Paul, Minn., Code of Ordinances § 200.11(b) (2013).


251. See, e.g., Plymouth, Minn., City Code § 915.25, subdiv. 6 (2013).

252. City’s Supreme Court Brief, supra note 68, at *3.
potentially dangerous designation would only be required once the designation was used as a predicate to deprive an owner of the property if his animal was declared “dangerous.” The various city ordinances providing a hearing on a potentially dangerous designation demonstrate that providing such hearings is common and not unduly burdensome. Cities would stop placing restrictions on potentially dangerous animals if the hearings were too burdensome.

B. Alternatives to the Court’s Ruling: A Proposed Holding

A better alternative to the Minnesota Supreme Court’s ruling in Sawh can be summed up in the following holding: an individual has a due process right to a post hoc hearing to review the correctness of a government-issued warning notice, but only when the warning is later used by the government as a predicate to deprive an individual of property.

This alternative holding better aligns with U.S. and Minnesota Supreme Court precedent in Bell, Mendoza-Lopez, and Wiltgen, along with the Ohio Supreme Court’s decision in Cowan, which all stand for the principle that where a government’s adverse decision is subsequently used against an individual as a predicate offense to deprive him or her of life, liberty, or property, then that individual has a due process right to review the correctness of the predicate offense.253

The Minnesota Supreme Court should have also held that the post hoc review on a predicate offense must, at the earliest, be conducted at the hearing requested by the individual on the subsequent offense that can deprive the individual of their property. Due process requires that an individual be heard at a “meaningful time and in a meaningful manner.”254 The meaningful time to be heard is when a warning, originally used by the government to give notice, is transformed into a predicate to an offense that can deprive the person of his or her liberty or property.255

253. See supra Part IV.A.2.b.
255. The court in Cowan held that the defendant had a due process right to be heard immediately on the predicate vicious dog determination. State v. Cowan, 814 N.E.2d 846, 850 (Ohio 2004). However, unlike the potentially dangerous dog designation in Sawh, the vicious dog designation restricted Cowan of her property at its issuance. Id.
Whether a hearing allows an individual to be heard in a “meaningful manner” is context driven, because due process is flexible and “is not a technical conception with a fixed content unrelated to time, place, and circumstances.” Because Sawh’s case involves classic adjudicative facts, a post hoc hearing to review the potentially dangerous designation should afford Sawh the right to present evidence in the form of testimony and exhibits. In accordance with multiple municipal ordinances, and Minnesota’s dangerous dog law, the trier of fact should be a hearing officer or an administrative judge who is neutral and impartial. Live testimony and a chance for cross-examination of city officials is preferable. Considering the financial burdens on cities, however, and the fact that a potentially dangerous designation could be challenged years later when it is used as a predicate offense, cities should be allowed to present evidence—such as police reports or animal control records—without further foundation. However, cities should be required, as was the practice in Lino Lakes, to adequately document the reasons for the original adverse designation in case such designation is later used as a predicate for a subsequent offense.

This alternative holding satisfies the Mathews test. Allowing a post hoc hearing on the potentially dangerous designation only when the designation is used as a predicate at a subsequent hearing

259. But cf. Peter N. Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 Calif. L. Rev. 146, 157 (1983) (arguing that a requirement for a statement of reasons for any adverse issued decision against a person undermines administrative discretion and the freedom to rely on intuition and impressions to pursue institutional goals). Professor Simon’s critique of “reason requirements” can be distinguished because “intuition and impressions” are not useful for an animal control officer in determining whether a dog bit or attacked a person.
corresponds to Sawh’s weightier property interest in Brody as a companion animal. Such a hearing is valuable because it cures the substantial risk of an erroneous deprivation of property based on either an innocent mistake or an arbitrary decision by a city official in declaring Brody “potentially dangerous.” Finally, this type of hearing also recognizes cities’ interest in saving administrative resources and costs because most of the parties, witnesses, and city officials will already be present at the dangerous dog hearing.

V. CONCLUSION

The Minnesota Supreme Court was correct to find the Due Process Clause was not triggered at the time the potentially dangerous designation was issued. However, the court erred in determining that, once Sawh’s property could be restricted and deprived, Sawh had no due process right to be heard about the correctness of the potentially dangerous designation.

Under the Mathews due process test, the court undervalued Sawh’s private interest in the life of his dog by relying on century-old animal law precedent, which holds that the value of a dog, like other domesticated farm animals, is its fair market value. The court also erred in its construction of the City Code because its interpretation led to unreasonable results that are contrary to the purpose of the Due Process Clause: the protection of the individual against arbitrary state action. The court’s determination that the City Code only required the existence and not the correctness of the designation ran contrary to its own precedent in Wiltgen, U.S. Supreme Court precedent in Bell and Mendoza-Lopez, and the Cowan case from the Ohio Supreme Court. Sawh is sufficiently analogous to these cases, which stand for the proposition that to allow an unreviewed offense or adverse designation to be used as a conclusive predicate on a subsequent offense creates a substantial risk of an erroneous property deprivation, and violates the requirements of procedural due process.

Because due process is flexible, the court should have determined under the Mathews test that Sawh had a due process right to a post hoc hearing on the potentially dangerous

260. See supra Part IV.A.1.

designation at the subsequent dangerous dog or destruction order hearings.