

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 14, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 97-2902**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

---

**JEROME SELMER,**

**PETITIONER-APPELLANT,**

**v.**

**MADISON DEPARTMENT OF PUBLIC HEALTH,**

**RESPONDENT-RESPONDENT.**

---

APPEAL from an order of the circuit court for Dane County:  
GERALD C. NICHOL, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. Jerome Selmer appeals from an order affirming a decision of the City of Madison Public Health Commission Subcommittee (subcommittee) that concluded Selmer's dog was a dangerous animal that must be destroyed. We affirm.

Selmer's dog, Caesar, was involved in several attacks on humans. The City's Department of Public Health determined that he was dangerous and ordered him destroyed. Selmer appealed that decision to the subcommittee, which affirmed the order. He then appealed to the circuit court by certiorari petition. The court affirmed the order.

The Department, in making its decision, applied the terms of Madison General Ordinance § 25.22, which provides a standard for when an animal may be considered dangerous and destroyed. Selmer argues that the ordinance is preempted by § 174.02(3), STATS., which provides a different standard under which a court may issue an order to kill a dog. Selmer argues, and the city apparently does not dispute, that his dog cannot be destroyed if § 174.02(3) controls.

However, the city argues that Selmer waived this issue by not raising it earlier in the proceedings. We agree. Selmer did not raise any question about the applicable standard in the proceedings before the city body. He accepted the city's standard for determining dangerousness and argued only for an alternative disposition. In his brief to the trial court, Selmer was represented by new counsel, and he argued that the facts did not satisfy the standard provided in § 174.02(3), STATS. However, in making this argument, Selmer did not argue that the city ordinance was preempted, or acknowledge the existence of the ordinance in any way. The city's trial court brief is not of record.

The trial court, perhaps concluding that new counsel was not aware of the ordinance, relied solely on the ordinance and did not address any question of preemption or otherwise discuss § 174.02, STATS. Therefore, although Selmer attempted to rely on § 174.02 in the trial court, the question of whether that statute

preempts the city's ordinance is raised for the first time on appeal. We ordinarily do not address issues raised for the first time on appeal. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). We see no grounds to depart from that practice in this case.

Selmer next argues that the city's order to kill Caesar was arbitrary and capricious. His focus is on the subcommittee's rejection of his proposed alternatives to destroying the dog. The subcommittee wrote in its finding of fact: "The appellant was unconvincing in presenting alternatives to euthanasia in this case." Selmer argues that without any discussion of why the alternatives were unconvincing or why destruction was preferable, the subcommittee's finding was unreasonable, arbitrary and capricious. However, Selmer does not discuss what his proposed alternatives were or why they were more reasonable; his argument is directed solely at the subcommittee's failure to explain.

We reject the argument. A decision is arbitrary and capricious if it lacks a rational basis or results from an unconsidered, willful and irrational choice of conduct. *See State ex rel. Young v. Shaw*, 165 Wis.2d 276, 294, 477 N.W.2d 340, 347 (Ct. App. 1991). The explanation here, while not detailed, is sufficient to demonstrate that the decision was not arbitrary and capricious.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

