

Name(s) of Aggrieved Person(s): Jason Pansier, Ledgeview Farms, LLC

Signature(s) of Aggrieved Person(s): Jason Pansier

Address: 3870 Dickinson Road, De Pere, WI 54115

Telephone: (920) 655-3875

Representative (if any): Eric McLeod, Joseph S. Diedrich, Husch Blackwell LLP

Address: 33 East Main Street, Suite 300, Madison, WI 53703

Telephone: (608) 234-6056

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LIVESTOCK FACILITY SITING REVIEW BOARD

LEDGEVIEW FARMS, LLC
3870 Dickinson Road
De Pere, WI 54115,

v.

TOWN OF LEDGEVIEW
3700 Dickinson Road
De Pere, WI 54115.

Docket No. _____

STATEMENT OF THE ISSUES

Ledgeview Farms, LLC seeks review of the Town of Ledgeview’s denial of a livestock facility siting permit.

BACKGROUND

On December 6, 2017, Ledgeview Farms submitted an application to the Town for approval for the siting of new and expanded livestock facilities. Specifically, Ledgeview Farms sought approval to: expand to 3,483 animal units; construct a new manure storage facility; expand an existing feed storage area; construct a feed storage and animal lot leachate runoff management system; and construct a yard runoff transfer system to collect leachate and contaminated runoff and transfer it to the proposed waste storage facility.

The Town delayed consideration of the application. Under Wis. Stat. § 93.90(4)(a), political subdivisions have 45 days to notify an applicant whether the application is complete, and if not, what is missing. That section also requires political subdivisions to notify the applicant that the application is complete “[a]s soon as the applicant has provided all of the required information.” Here, Ledgeview Farms provided all the required information for a complete application no later than February 5, 2018. But the Town did not issue a completeness determination until 74 days later on April 20—hardly “as soon as” possible.

The Town Board voted to deny the application in its entirety at a meeting on June 4, 2018. The next day, the Town issued a written decision on the application.¹ On June 6, counsel for Ledgeview Farms submitted a public records request to the Town, asking for a recording of the June 4 meeting, materials considered by the Town Board in reaching its decision, and other information. Despite the time-sensitive nature of this appeal, the requested recording was not

¹ The Town did not properly base its decision on written findings of fact. Wis. Stat. § 93.90(4)(c) requires political subdivisions to base decisions “on written findings of fact that are supported by the evidence ...” The Town Board did not base its June 4, 2018 decision and did not vote on any written findings. Although the Town subsequently issued a document with written findings of fact, that document was not considered, voted on, or adopted at the June 4 meeting.

provided until June 19. The remaining requested items have not yet been provided. Ledgeview Farms proceeds with this appeal nonetheless, reserving its right to amend this Statement of the Issues if the Town's response to the public records request discloses information that presents additional issues for review.

ISSUES FOR REVIEW

Under Wis. Stat. § 93.90(4)(d) and Wis. Admin. Code § 51.34, the Town was required to approve Ledgeview Farms' application. It did not. Ledgeview Farms thus appeals to this board under Wis. Stat. § 93.90(5)(b), on the grounds that the Town both incorrectly applied the state standards under Wis. Stat. § 93.90(2)(a) and violated Wis. Stat. § 93.90(3). Specifically, Ledgeview Farms raises the following issues for review.

Issue 1: The Town incorrectly applied the state standards when it determined that the proposed manure storage facility violates the state-law setback requirement.

Wis. Admin. Code §§ ATCP 51.12(1)–(2) provide a setback requirement of 350 feet for manure storage facilities. As shown in the plans submitted with its application, Ledgeview Farms' proposed manure storage facility is set back at least 355 feet on all sides. The Town, however, denied the application on the grounds that the proposed manure storage facility does not satisfy the setback requirement. This was error.

Issue 2: The Town violated Wis. Stat. § 93.90(3) when it denied the application based on an unenforceable setback requirement.

The Town's ordinances purport to impose a setback requirement for manure storage facilities of 1,320 feet. Town Ord. §§ 135-85(D), 135-226(B)(2). The Town denied the application because the proposed manure storage facility does not meet this setback requirement. Doing so violated state law, however, because the Town's setback requirement is preempted and unenforceable.

Wisconsin law establishes a statewide regulatory framework governing livestock facility siting. Wis. Stat. § 93.90. Under § 93.90, political subdivisions can enact ordinances relating to livestock facility siting, but those ordinances must be consistent with state law. Inconsistent local standards are preempted. *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶¶ 40–52, 342 Wis. 2d 444, 820 N.W.2d 404.

Sections of the Wisconsin Administrative Code implement Wis. Stat. § 93.90. *See* Wis. Admin. Code ch. ATCP 51. If a political subdivision wants to adopt a more stringent standard than the standards provided in chapter ATCP 51, it must: (1) adopt the standard by ordinance before an applicant files the application for approval, and (2) base the standard on reasonable and scientifically defensible findings of fact that clearly show that the requirement is necessary to protect public health or safety. Wis. Stat. § 93.90(3)(ar); Wis. Admin. Code § ATCP 51.10(3); *Adams*, 2012 WI 85, ¶¶ 54–59.

Sections ATCP 51.12(1)–(2) provide a setback requirement for manure storage facilities of 350 feet. Thus, unless it completes the process outlined above, a political subdivision may not adopt a setback requirement of greater than 350 feet.

The Town did not base its 1,320-foot setback requirement on reasonable and scientifically defensible findings of fact that clearly show that the requirement is necessary to protect public health or safety. As described, section 135-79(D) of Ordinance No. 2017-13 purports to set forth factual findings designed to adequately support the Town’s setback requirement. But these findings fail to satisfy the requirements of Wis. Stat. § 93.90 and Wis. Admin. Code ch. ATCP 51.

For its proffered factual findings, Ordinance No. 2017-13 incorporates by reference eight third-party sources. For multiple reasons, these factual findings—and thus, the setback requirement at issue—fail to meet the requisite standard. First, and most problematically, neither the findings nor the proffered support for those findings relates to local conditions in the Town suggesting that more stringent standards are needed. This lack of any locale-specific findings contravenes Wis. Stat. § 93.90’s fundamental purpose of “providing uniform regulation of livestock facilities.” *See* Wis. Stat. § 93.90(1); *Adams*, 2012 WI 85, ¶¶ 37–50. Second, the factual findings largely do not relate to public health or safety, which is required for the adoption of more stringent local standards. Third, the remaining factual findings do not *clearly* show that the setback or performance-bond requirements are *necessary*.

In addition, none of the findings presented by the EPA, Dr. Muldoon, or Dr. Borchardt satisfy Wis. Stat. § 93.90. The Town never adopted these findings, and they therefore cannot be used to support more stringent standards. *Adams*, 2012 WI 85, ¶¶ 53–59.

Issue 3: The Town violated Wis. Stat. § 93.90(3) when it denied the application based on an unenforceable performance-bond requirement.

The Town purports to impose a performance-bond requirement on certain livestock facility siting applicants. Town Ord. § 135-232. The Town denied the application because the Ledgeview Farms did not post a performance bond. Doing so violated state law, however, because the Town’s performance bond requirement is preempted and unenforceable.

Wis. Admin. Code ch. ATCP 51 does not list performance bonds as a permissible standard or condition of granting a permit. By mandating a performance bond, then, the Town adopted a more stringent standard than under state law. For the same reasons as above, *see* Issue 2, the Town’s required factual findings fail to support this more stringent standard under Wis. Stat. § 93.90 and Wis. Admin. Code ch. ATCP 51.

Further, a performance bond requirement is unlawful under Wis. Stat. § 93.90 regardless of the process followed to adopt it. Section ATCP 51.10(3) permits political subdivisions to apply more stringent standards “that are more stringent than the standards in this subchapter” Nothing in ch. ATCP 51 refers to performance bonds. Thus, a performance-bond requirement—a means of enforcement—is not available to any political subdivision, no matter what process the political subdivision follows to adopt it.

Issue 4: The Town violated Wis. Stat. § 93.90(3) when it denied the application based on Ledgeview Farms’ alleged past noncompliance.

The Town denied the application based on allegations that Ledgeview Farms has not complied with various local, state, and federal requirements. For several reasons, the Town cannot deny an application based on such noncompliance.

As a threshold matter, the application before the Town—and the application before this board—is for *proposed* new and expanded facilities. The subject matter of the application does not relate to past or existing operations at Ledgeview Farms. To that end, the only way a *proposed* facility can fail to comply is if the plans for it are deficient in some respect. That is not the case here, and the Town’s denial on the basis of alleged past noncompliance was improper.

Wis. Stat. § 93.90(4)(d) provides that “[i]f an applicant complies with [Wis. Admin. Code ch. ATCP 51, and if] the information and documentation provided by the applicant is sufficient to establish, *without considering any other information or documentation*, that the application complies with applicable requirements for approval, the political subdivision shall approve the application unless the political subdivision finds, based on other clear and convincing information or documentation in the record, that the application does not comply with applicable requirements.” (Emphasis added.) This language precludes political subdivisions from considering factors like alleged past noncompliance.²

Relatedly, under Wis. Admin Code § ATCP 51.34(1), a political subdivision such as the Town is *required* to grant Ledgeview Farms’ application if the following two factors are met: (1) the application complies with Wis. Admin Code § ATCP 51.30; and (2) the *proposed livestock facility* meets (or is exempt from) the livestock standards contained in subchapter II. The subchapter II standards relate to the location of livestock structures on a property, odor and air emissions, nutrient management, waste storage facilities and runoff management. Wis. Admin. Code §§ ATCP 51.12–51.20.

Despite this fact, the Town devoted a substantial portion of its decision to addressing its concerns about Ledgeview Farms’ failure to previously obtain a Wisconsin Pollution Discharge Elimination System (“WPDES”) permit from Wisconsin Department of Natural Resources (“WDNR”). Ledgeview Farms, however, has submitted its application for a WPDES permit and has been working closely with WDNR to facilitate prompt approval of the permit application. The public notice period for that pending application began on May 30, 2018, and a public hearing is scheduled for July 10, 2018. Importantly, while Ledgeview Farms needs to and will obtain a WPDES permit (likely within the next few months), approval of the pending siting application is not dependent upon the issuance of the WPDES permit. Wis. Admin. Code § ATCP 51.34(1). Indeed, under the siting regulations in that section, if an applicant already has a WPDES permit, it is exempt from having to demonstrate the proposed livestock facility’s compliance with the technical standards of subchapter II.

² Because it is not contemplated in Wis. Stat. § 93.90 or Wis. Admin. Code ch. 51, conditioning the approval of a proposed facility on another aspect of the applicant’s operation *that is not the subject of the application* amounts to enforcing a more stringent standard. Although a political subdivision can lawfully adopt more stringent standards, the Town has not done so here.

The Town also notes that Ledgeview constructed its existing manure storage facility in 2015 without first obtaining building and soil disturbance permits from the Town. The issuance of such permits is routine and ministerial and it is unclear what the Town's concern is about such permits as it relates to the pending application. If the Town has concerns about the failure to obtain those permits before construction, the Town could and should address those matters in the same manner it does for any other land owner who inadvertently begins a construction project before obtaining a building or soil disturbance permit.

Moreover, the existing manure storage facility was permitted by Brown County Land and Water Conservation in 2015. As part of the WPDES permit application, Roach & Associates, LLC prepared and submitted an evaluation of the facility to the WDNR. On May 3, 2018, WDNR approved the facility, conditioned on the addition of an emergency overflow. The overflow can be installed as maintenance, and no plans or specifications are required.

The plans and specifications submitted with the application are, by definition, designed to resolve any issues of past noncompliance. The Town's decision fails to acknowledge this point.

Ultimately, alleged past noncompliance is irrelevant and should have been disregarded by the Town in the first instance. The Town's extensive focus on alleged past noncompliance not only is beside the point, but it also suggests bias and prejudice in the decisionmaking process. The only question the Town should have addressed in deciding to approve Ledgeview Farms' application is whether the information submitted shows that the *proposed livestock facility* will satisfy the state-law standards. The information submitted in the application makes that showing.

Issue 5: The Town incorrectly applied the state standards when it denied the application based on Ledgeview Farms' lack of a WPDES permit.

Closely related to the previous issue, the Town incorrectly denied the application due to Ledgeview Farms' current lack of a WPDES permit. This is not a valid basis for denial. Wis. Admin. Code §§ 51.16(4), 51.18(7), and 51.20(10) provide exemptions from certain requirements for holders of WPDES permits; that is, if a livestock facility siting applicant already holds a WPDES permit, it does not have to independently satisfy the requirements of sections 51.16(4), 51.18(7), or 51.20(10). By implication, then, chapter 51 contemplates applicants that *do not* already hold WPDES permits. If those applicants were categorically precluded from approval, as the Town believes, then the exemptions would be superfluous.

Issue 6: The Town violated Wis. Stat. § 93.90(3) when it denied the application based on "the equities."

The Town denied the application because, it claimed, "the equities" required denial. Equitable considerations, balancing of interests, and the like are not consistent with the purpose of the comprehensive statutory framework set forth in Wis. Stat. § 93.90. Section 93.90(1) provides that the purpose of the siting statute is to provide "*uniform* regulation of livestock facilities" across the state. (Emphasis added.) *See Adams*, 2012 WI 85, ¶ 37.

Considering "the equities" also runs afoul of Wis. Stat. 93.90(4)(d), which provides that "[i]f an applicant complies with [Wis. Admin. Code ch. ATCP 51, and if] the information and documentation provided by the applicant is sufficient to establish, *without considering any other*

information or documentation, that the application complies with applicable requirements for approval, the political subdivision shall approve the application unless the political subdivision finds, based on other clear and convincing information or documentation in the record, that the application does not comply with applicable requirements.” (Emphasis added.) The Town thus erred when it denied the application based on “the equities.”

Issue 7: The Town violated Wis. Stat. § 93.90(3) when it denied the application based on additional standards in its zoning ordinance not enforceable against a livestock facilities siting applicant.

Although its reasoning is not entirely clear, the Town apparently believes that it denied Ledgeview Farms both a livestock facility siting approval and, separately, a conditional use permit. That distinction finds no basis in law. To the contrary, the purpose of the livestock facility statute is to provide “uniform regulation of livestock facilities” across the state. Wis. Stat. § 93.90(1); *see Adams*, 2012 WI 85, ¶ 37. Although sections 93.90(ae)–(ar) allow political subdivisions to preserve their permitting procedures, state law does not allow them to supplant the livestock facility siting statute.

Further, under Wis. Stat. § 93.90, political subdivisions can enact ordinances relating to livestock facility siting, but those ordinances must be consistent with state law. Inconsistent local standards are preempted. *Adams*, 2012 WI 85, ¶¶ 40–52. And while a political subdivision can lawfully adopt more stringent standards, the Town has not done so here. *See* Issue 2, above.

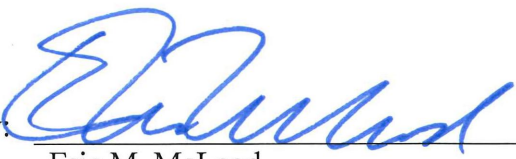
These background principles preclude the Town from considering or applying any conditional-use-permit standards that are inconsistent with Wis. Stat. § 93.90 or Wis. Admin. Code ch. 51. Specifically, then, the Town exceeded its authority when it denied the application based on: lack of consideration of alternatives; inconsistency with the purposes of zoning district; the impact on public health, safety, comfort, convenience, and the general welfare; failure to demonstrate minimized damage to land and repair to the extent feasible; impact to the aesthetic appearance and scenic values; property values; and failure to foster a more rational pattern of relationship of uses.

CONCLUSION

The Town’s conduct both prior to and throughout the course of these proceedings demonstrates clear bias and prejudgment against Ledgeview Farms’ lawful facility expansion efforts. There is no factual or legal basis for the Town’s decision. Ledgeview Farms respectfully requests that the Livestock Facility Siting Review Board reverse the Town’s decision and approve Ledgeview Farms’ application in its entirety.

Dated: 6-22-18

HUSCH BLACKWELL LLP
Attorneys for Ledgeview Farms, LLC

By: 
Eric M. McLeod
Joseph S. Diedrich