



Livestock Facility Siting Review Board

October 24, 2018 Minutes

Livestock Facility Siting Review Board Meeting
Department of Agriculture, Trade and Consumer Protection (DATCP)
Dane County UW-Extension
5201 Fen Oak Drive, Madison, WI

CALL TO ORDER— Bob Topel, LFSRB Chair

The meeting was called to order by Chairman Bob Topel at 8:30 am. Topel, Raymond Diederich, Lee Engelbrecht, Dr. Jerome Gaska, Scott Sand, Scott Godfrey, and Bob Selk were present. Also present were Attorney Cheryl Daniels, Richard Castelnuovo, Chris Clayton, Lisa Trumble, and Katy Smith of DATCP.

Daniels confirmed that the meeting was publicly noticed as required. Daniels called roll, confirming that a quorum was present.

Gaska moved to approve the agenda as presented, seconded by Diederich, and the motion carried.

The September 7, 2018 meeting minutes were presented for approval. Engelbrecht made a motion to approve the minutes, adding Scott Godfrey to the list of LFSRB members present at the meeting, seconded by Diederich, and the motion carried.

LEDGEVIEW FARMS V. TOWN OF LEDGEVIEW, NO. 18-LFRSB-02— Cheryl Daniels, Board Attorney

The LFSRB addressed the following issues, which were identified by the LFSRB during their September 7, 2018, meeting, including those specifically asserted by Ledgeview Farms in their request for review. The LFSRB-identified issues were presented in the DATCP memo, dated September 17, 2018.

A. What are the legal implications of modifications to the siting application submitted after the town made its April 20, 2018 determination of completeness (Part 4, p. 1592).

Castelnuovo described the connection between this issue and later issues: presumption of compliance may be affected by inconsistencies presented by the applicant's modifications to the application before and after the town issued a completeness determination.

1. Can the application be amended by the submission of part but not all of worksheet components? For example, if the Applicant resubmits new odor spreadsheets, must the Applicant prepare and sign a new cover page for Worksheet 2 with the odor score. See Issue H.
2. Does the Town have a right to revisit the application to determine its completeness or otherwise verify the submission provided after the completeness determination? See issues B and H.
3. If an application is amended to remove animal lots or eliminate proposed expansion of housing, is the completeness of the application at issue if the Applicant does not modify other aspects of the application to reflect the changes to housing and lots? For example, change maximum animal units in Worksheet 1 to reflect smaller capacity to house animal units?
4. For any worksheets that have been amended after the completeness determination, does the Applicant retain a presumption of compliance granted under ss. ATCP 51.12(6), ATCP 51.16(2) ATCP 51.14(7) ATCP 51.18(5)(c), ATCP 51.20(8). Is the presumption lost if the application fails to comply with s. ATCP 51.30 because it is not credible, complete or lacks internal consistency?

Daniels advised the LFSRB to review the substance of the information presented in the application – both the modified application and the information submitted following the Town’s completeness determination – and determine whether the town made the correct decision based on this information.

The LFSRB discussed the following: whether a political subdivision should redetermine completeness if presented with substantive changes to a complete application; what constitutes a substantive change to a complete application; whether a political subdivision starts over with the application review process when the applicant submits substantive modifications to a complete application; assuming an applicant submits substantive changes to a complete application, a political subdivision might avoid issues coming before the siting review LFSRB by redoing a completeness determination.

B. Did the Town have the authority to deny the siting permit because the Applicant’s design for the manure storage structure at the heifer facility failed to meet the 350-foot setback for a road right of way (ROW)?

1. How should a political subdivision measure building setbacks in a zoning ordinance in the case of a storage facility: from the outside edge of a structure (i.e. outside of the berm) or the interior where manure is stored, (i.e. the odor source used in measuring odor)?
2. Should the LFSRB look to the definition section in the Town’s zoning ordinance to determine how setbacks are measured? Are there state or other laws that might be determinative in establishing how a setback is measured?
3. The site map submitted on June 1st was one of several modifications of the siting application presented following the completeness determination. In this instance, the applicant amended the design of the storage facility to meet setback requirements and included the notation “to be verified,” on the June 1, 2018 site map (p. 2842) in regard to the ROW setback.

The LFSRB specifically reviewed the following evidence in the record: a statement from the Town’s engineer that the manure storage structure was designed 270 feet from the ROW, a map submitted by the applicant’s attorney following the completeness determination showing the ROW setback cutting through the manure storage structure’s berm and stating the setback was “to be verified”, and a statement from the applicant’s attorney that the applicant will make a good faith effort to meet the 350-foot setback requirement.

The LFSRB considered the following:

- a. The Town was consistent in how it measured the setback from the road right of way.
- b. Setbacks should be measured from the edge of the structure that keeps the integrity of the structure, in this case, the outside of the berm.
- c. Measurements to meet the setback standards in ATCP 51, which are traditional zoning setbacks, are done differently than measurements to meet the odor standard.
- d. The berm surrounding a manure storage structure is integral to the structure, therefore, the measurement should be taken from the road right of way to the edge of the berm.
- e. Language in the Town’s ordinance, instructing how to measure setbacks, matches the LFSRB’s determination of measuring setbacks.

The LFSRB found that the structure’s plan does not meet the setback requirement and the Town had the authority to deny the application for failure to meet the ROW setback standard.

C. Did the Town have the authority to deny the siting permit because the Applicant’s design for the manure storage structure at the heifer facility failed to meet the local setback standard of 1320 feet from the property line?



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1. Is a challenge, based on the failure to adopt a local standard according to the requirements in ch. 93, Stat., reviewable by the LFSRB as a violation of Wis. Stat. § 93.90 (3)?
2. At the time that the Town adopted the findings of fact in support of its more stringent setback standard, was it required to have the documentation referenced in the findings in its possession similar to incorporation by reference concept that applies to state rule making?
3. When adopting a local standard, does a political subdivision need to identify specific local conditions that justify the specific standards?
4. What is the scope of the term “public health and safety?” Does it include exposure to odor from manure that can affect health and create a public nuisance? *State v. Quality Egg Farm, Inc.*, 104 Wis.2d 506, 311 N.W.2d 650 (1981). Does it include a reduction in property values?
5. Is the Town’s recitation of studies, research and other information adequate to show the need for more stringent regulation? What threshold of findings relating to public health or safety does the Town need to meet? What is the significance of the terms “clear” and “necessary” in the following requirement for adoption:

“Bases the requirement on reasonable and scientifically defensible findings of fact, adopted by the political subdivision, that clearly show that the requirement is necessary to protect public health or safety.” Sec. 93.90(3) (ar) 2.
6. May a political subdivision rely on expert testimony presented at the public hearing, after the fact, as findings to justify or support an ordinance’s more stringent standards?
7. May a political subdivision use evidence of violations of environmental law, related to public health and safety, to justify the more stringent setback requirement?

The LFSRB considered the following:

1. The Town must meet the requirements for adopting a more stringent standard to impose an increased setback for manure storage structures.
2. The Town adopted findings of fact in ordinance prior to receiving the application from Ledgeview Farms.
3. Findings of fact in ordinance must clearly support the increased setback.
4. Oral comments provided during the Town’s public hearing on the farm’s siting application cannot form a basis of support for more stringent standards.
5. The Town adopted scientific articles as findings of fact, but scientific articles, alone, do not sufficiently provide clear support for a more stringent standard. In this case, the scientific articles adopted as findings of fact represented studies on a variety of issues (e.g. odor, water quality, ground water contamination, property values) and different types of livestock operations (e.g. swine and dairy operations).
6. Findings of fact must elaborate on the scientific support cited in ordinance, providing logical reasoning that leads to the conclusion in this case that 1,320 feet is a necessary setback, and the Town’s ordinance did not include findings to arrive at a reasoned conclusion for adopting an increased setback.

7. There is a way for the Town to properly adopt a more stringent setback for manure storage structures based on public health and safety; the Town could, for example, use expert opinion that logically leads to an increased setback requirement or use a science based model to justify an increase setback.
8. The criteria for setting a more stringent standard needs to be clarified in ATCP 51.

Therefore, the LFSRB found that the Town's ordinance requirement reverts to the 350-foot setback to property line because the Town's ordinance adopted the standards in ATCP 51 and its more stringent standard failed to meet the statutory requirements for adopting a more stringent standard.

D. Did the Town have the authority to enforce requirements for a performance bond, as part of issuing the siting permit?

- May a political subdivision adopt a bond requirement, as a more stringent standard, given the prohibition in Wis. Admin. Code ch. ATCP 51? If so, is one finding in the ordinance adequate to support the performance bond standard as a more stringent standard?

The LFSRB discussed and found that Wis. Admin. Code § ATCP 51.30(4) (b) is clear that the Town may not impose a performance bond. A bond cannot be applied as a more stringent standard because it is banned in the rule. The Town does not have the authority to deny the application based upon this unauthorized requirement.

E. In denying the Applicant a permit based on failure to comply with the runoff standards in Wis. Admin. Code § ATCP 51.20, did the Town have the authority to consider the Applicant's history of violations of state and federal law, in determining the credibility of the information in the application?

1. BARNY modeling results submitted to the Town for existing animal lots show that the existing animal lots in their current state cannot meet phosphorus runoff requirements in the rule and that some action was necessary to meet the standard. May the applicant satisfy the runoff requirements by collecting and storing the runoff, even though the standard in the rule requires the submission of BARNY models to demonstrate the effectiveness of runoff treatment areas designed for existing lots?
2. May a political subdivision consider the credibility of the information and commitments in an application? May it evaluate an applicant's credibility in the light of past violations and patterns of documented behavior? Is there a distinction between past violations and ongoing violations?

The LFSRB considered the following:

1. Whether there was a link between the applicant's past history of compliance and the information presented in the application, since the Town did consider the credibility of the information.
2. If the basis of denial was due to past violations, then this is an issue of enforcement outside of the Town's authority through the siting law. However, if the basis of denial was due to information in the application, then this can form a basis for denying a siting permit.
3. An applicant's past history of compliance may be relevant when there are questions about whether the applicant will follow through with promises made on a siting application and, therefore, whether the promises to follow through are credible. Evidence in the record demonstrates a history of noncompliance – eleven years of violations – with promises made and no actions taken, and deliberate deception. However, an engineering firm was hired to help reach compliance.
4. When a siting permit is issued, the applicant has two years to build and possibly two years to rectify issues of noncompliance.
5. The DNR and EPA can pursue enforcement for unlawful runoff as it occurs. However, the applicant has to construct the facilities promised, and during this time period, the Town may not withdraw the permit as to runoff until the construction of the facilities is completed.



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6. The LFSRB does not have the authority to place conditions on a siting permit that might help address ongoing compliance issues.
7. The Town cannot deny a permit based on past violations, but the Town may withdraw a permit under ATCP 51.08(2) or take other enforcement actions.
8. The LFSRB agrees that a permit should not be a license to discharge for up to two years.
9. Wis. Admin. Code § ATCP 51.30 provides language allowing the Town to determine the application is not credible based on information in the record.
10. What information might provide credibility if a local government determines that information in a submitted application is not credible? The applicant might first obtain a WPDES permit or resolve existing violations, then reapply for a siting permit.
11. The LFSRB could say that the presumption of compliance was overcome and the Town had the authority to deny the permit, and that the applicant can fix the problems and reapply.
12. The applicant's signature constitutes a promise, and this applicant has promised in the past without follow through. The Town can consider this and come to a finding that the application is not credible.
13. There are options available to the applicant to move forward on having a successful siting application.

F. Did the Town have the authority to deny the Applicant a permit because the manure storage at the headquarter facility did not have emergency overflow protection?

- May a political subdivision deny a siting permit based on the applicant's failure to meet a requirement that is not included in the NRCS 313 referenced in the rule?

The LFSRB considered the following: while manure storage structures must meet the NRCS Conservation Practice Standard 313, emergency overflow protection is not required in the NRCS Conservation Practice Standard 313.

G. Did the Town have a legal basis for denying the Applicant's permit based on structural failure or leakage from existing waste storage facilities in violation of Wis. Admin. Code § ATCP 51.18 (2), as documented by the EPA and the DNR?

1. Is there evidence in the record – documentation by the EPA and/or DNR, as contended – indicating structural failure or leakage from a waste storage facility, and if so, which waste storage facility?
2. What evidence is necessary to show structural failure or leakage from a storage facility when the applicant's engineer in Worksheet 4 certified that the existing manure storage facility at the headquarters was recently constructed to standards, and showed no signs of leaks or failures?

The LFSRB considered the following: the Applicant promised to close Pits 1 and 2, the waste storage facilities in question, by submitting plans for proper closure of these facilities, and therefore, the Town could not deny the application on the basis of failure or leakage from these facilities.

H. Did the Town have the authority to deny the Applicant a permit, based upon inconsistencies in the odor spreadsheets and Worksheet 2, combined with findings about the Applicant's credibility?

1. If an applicant submits a revised odor spreadsheets to reflect changes in livestock structures, odor control practices or separation distances, but the applicant fails to sign and submit a new Worksheet 2 to reflect changes to the odor scoring, what is the significance of this inconsistency?
2. If applicant fails to update an odor management spreadsheet to remove an animal lot and expanded housing facility, what is the significance of this inconsistency?
3. If the Applicant submitted Worksheet 2 showing a passing odor score, based on implementation of odor control practices and an odor management plan, may the Town find the Applicant failed to meet the odor standard, based on past violations evidencing a lack of credibility to honor commitments?

The LFSRB considered the following: the Applicant did not sign an odor worksheet #2 showing the revised odor scores, meaning that the Applicant did not certify the revised odor scores. The Town may deny the permit based on inconsistencies in the odor worksheets, including the lack of certification by the Applicant of the revised odor scores.

I. To what extent could the Town enforce requirements on the Applicant for a performance bond or setbacks through a separate construction or building permit for a “man-made body of water?”

- Wis. Stat. § 93.90(3) (a) 3. and 4. authorize a local government to disapprove a livestock facility if the proposed new or expanded livestock facility violates an ordinance adopted under Wis. Stat. § 60.627, 61.351, 61.353, 61.354, 62.231, 62.233, 62.234, or 87.30 or violates a building, electrical, or plumbing code that is consistent with the state building, electrical, or plumbing code for that type of facility.

Castelnuovo summarized the issue for the LFSRB, stating that siting allows counties to use other authorities to approve an animal waste facility, and in this case, the LFSRB should ask whether the Town adopted this ordinance based on authorities accepted in the siting law.

The LFSRB considered the following:

1. The ordinance is not a building, electrical, or plumbing code consistent with state building, electrical, or plumbing code for this type of facility.
2. The Town’s decision did not adequately justify how this ordinance allowed denial under Wis. Stat. § 93.90(3) (a) 3. and 4. In its decision, the Town believed it had the authority to adopt requirements under general zoning authority, similar to how counties regulate manure storage under Wis. Stat. ch. 92. However, the Town did not cite this chapter as its authority.
3. The LFSRB already addressed the Town’s denial based on the increased setback requirement and the performance bond requirement.
4. Local governments need clear statutory authority to regulate manure storage structures, and absent such authority, the siting law preempts the Town’s authority.

J. Besides the setback requirement discussed above, did the Town have the authority to rely on additional grounds for denying the Applicant a siting permit, not authorized under Wis. Stat. § 93.90, if the Town had other authority to deny the permit?

- Findings and Conclusions Sections 20-24 of the Town’s decision (p. 3010-3013) rely on the following criteria as reasons to deny the Applicant a siting permit:
 - a. The proposed use by Ledgeview Farms is not consistent with the purposes of the Farmland Zoning Preservation Zoning District. See Town Ord. § 135-81 A. (1). 21.



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- b. The proposed use and its location of the storage structure at Heifer Site is not reasonable and appropriate use given the neighbor residential neighbors.
- c. Ledgeview Farms failed to pursue reasonable alternatives, to mitigate impacts.
- d. Ledgeview Farms failed to show that it will minimize and repair damage incurred during construction.
- e. Ledgeview Farms' proposed livestock facility expansion and new manure storage lagoon would have a detrimental impact on public health and safety, comfort, convenience and general welfare and would harm the aesthetic appearances and scenic values of the Town.
- f. The proposed use does not foster a more rational pattern of relationship among agricultural, residential, business, commercial and manufacturing uses for the mutual benefit of all.

The LFSRB considered the following:

1. In a past decision, the LFSRB stated that, even if a permit was legally denied, there cannot be unauthorized reasons in the decision to deny a siting permit. These are grounds, not authorized by the statute and administrative rules, for denying a permit.
2. The siting law does not allow denial based on any of the Town's stated reasons and none of these grounds have been adopted in ordinance as more stringent standards. The siting law would require adoption in ordinance as more stringent standards and, as such, they must be shown to be clearly necessary to protect public health or safety.

K. Did the Town base the decision to deny the Applicant a siting permit on written findings of fact supported by evidence in the record?

- Can the Town meet the requirement of preparing written decision with findings of fact if it makes its decision on one date, and issues its decision on later date? Must the Town specifically approve its written findings of fact or may it authorize the issuance of written decision consistent with its decision at a meeting?

The LFSRB considered the following: The decision is valid because it is signed by the Town chair. Evidence in the record shows that the Town's decision was made verbally and the Town board instructed the decision to be reduced to writing. The LFSRB did not take up this challenge because it does not have the authority to review the Town's procedure pursuant to s. 93.90(4), Wis. Stat.

The LFSRB reviewed all eleven issues and reaching decisions on all issues by consensus. Daniels summarized the conclusions, as follows:

- A. Any material modification to a livestock siting application, which raises the issue of whether the application is complete, for purposes of making a final determination if the application is credible, and internally consistent, requires a new determination of application completion by the political subdivision, as authorized in Wis. Stat. § 93.90(4) (e).
- B. Setbacks should be measured from the edge of livestock structures, which includes any edges integral to the structure's integrity. The Town did have the authority to deny the permit on the basis that the

manure storage structure proposed for the Heifer Site did not meet the 350-foot setback from the public road right of way.

- C. The Town did not meet the requirements for adopting the more stringent setback standard of 1,320 feet from manure storage structures to the property line. The testimony provided at the public hearing cannot form the basis for adopting more stringent standards because it was provided after the Town's ordinance was adopted, and the Town did not have the logically reasonable scientific findings of fact needed to justify adopting the more stringent setback standard to protect public health and safety. To justify adopting more stringent standards, expert testimony is paramount and, in future cases, the LFSRB needs to see in the local ordinance a sequence of findings of fact that logically describes the reason for the more stringent standard. The Town's ordinance failed to meet the statutory requirement for adopting more stringent standards. Because the Town's ordinance includes the standards in Wis. Admin. Code ch. ATCP 51, the requirement in that administrative rule for 350-foot setback from a manure storage structure to the property line would apply.
- D. The Town may not enforce the requirements for a performance bond as part of the issuance of a siting permit because Wis. Admin. Code § ATCP 51.34 bans performance bonds and this is not allowed as a more stringent standard.
- E. Evidence in the record showed that the applicant failed to meet the BARNY requirements in the application so, therefore, the application did not meet the runoff management standards. Furthermore, the Town was allowed to consider the applicant's past practices, related to ongoing runoff violations, because these past practices were linked to information in the application promising to rectify ongoing discharges. The Town's denial of the permit, based in part on a finding that the information in the application was not credible, is upheld due to the failure to meet the BARNY requirements and, in addition, the specific linkage between past practices and the information in the application.
- F. The Town did not have the authority to deny the siting permit based on the lack of emergency overflow protection on a manure storage structure because the applicable standards do not require emergency overflow protection.
- G. The Town did not have the authority to deny the siting permit, based on structural failure or leakage from an existing manure storage facility in violation of Wis. Admin. Code § ATCP 51.18, because the application contained the promise that, as part of the permit grant, the applicant would close the two existing failed or leaking manure structures.
- H. The Town had the authority to deny the siting permit on the basis of inconsistencies and lack of completeness in the odor spreadsheet and Worksheet 2.
- I. The Town did not have authority to enforce requirements for performance bonds or setbacks through an ordinance that does not conform to the requirements of Wis. Stat. § 93.90 or 92.16,
- J. The Town did not have the authority to deny the siting permit based on the findings in Sections 20-24 of the Town's decision, as these are not allowable criteria for denying a livestock siting application.
- K. The aggrieved party's challenge to the Town's decision concerning whether there were written findings of fact supported by evidence in the record is not valid as the board does not have the authority to review the Town's procedure under s. 93.90(4), Wis. Stat.

Daniels clarified that the LFSRB's decisions on the issues means that the Town's decision to deny the siting permit is upheld on certain, but not all, grounds. The LFSRB specifically stated that the applicant may remedy these issues, but is required to reapply with a new application for a livestock siting permit from the Town.

Engelbrecht motioned to direct staff to memorialize the LFSRB's conclusions in a draft final decision upholding denial of the siting permit on certain, but not all, grounds, Diederich seconded, and the motion carried unanimously.

The LFSRB decided to schedule an in-person meeting at the DATCP offices in Madison to finalize the decision on November 30, 2018.



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ADJOURN

Selk moved to adjourn the meeting, seconded by Gaska, and the motion passed. The meeting ended at 1:25 p.m.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'Robert Selk', written over a horizontal line.

Robert Selk, Secretary

Date: 12.10.2018

Recorder: CC