

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD
2811 Agriculture Drive, P.O. Box 8911
Madison, Wisconsin 53708-8911

Ledgeview Farms, Inc,	Aggrieved Person	DOCKET NO. 18-LFSRB-02 DECISION OF THE BOARD
v.		
Town of Ledgeview	Political Subdivision	

BEFORE the Wisconsin Livestock Facility Siting Review Board:

Bob Topel, Chair; Dr. Jerome Gaska, DVM, Vice Chair; Robert Selk, Secretary;
Raymond Diederich, Lee Engelbrecht, Scott Godfrey, Scott Sand

PROCEDURAL HISTORY

Ledgeview Farms, Inc. (“Applicant”) filed a Request for Review with the Wisconsin Livestock Facility Siting Review Board (“LFSRB”) on June 22, 2018. The Applicant challenged the decision of the political subdivision, Town of Ledgeview (“Town”), denying a Conditional Use Permit (“CUP”) to expand the Applicant’s dairy and beef operation to 3,483 animal units. The Request for Review identified seven (7) issues in its challenge of the Town’s decision.

On July 2, 2018, pursuant to authority of the LFSRB and its bylaws, LFSRB Attorney Cheryl Furstace Daniels provided electronic notice to the Applicant, Town and their attorneys that included a Notice of Request for Review and Request for Certified Copy of Decision-Making Record. These documents set July 31, 2018 as the date for the LFSRB to receive a certified copy of the record from the Town and position statements from any aggrieved persons, who are defined in Wis. Stat. § 93.90(5) (a) as any person who lives or owns land within two miles of the Applicant’s facility, and the Town.

On July 2, 2018, the LFSRB Attorney authorized the sending of a news release to media outlets that cover the area where the Applicant’s facility is located or are statewide news outlets covering the agricultural subject matter under review. This was to give notice, per the LFSRB bylaws, to all potential

aggrieved persons, as defined in Wis. Stat. § 93.90(5) (a), that they could file a statement of position on this particular review.

By July 31, 2018, the LFSRB received the Town's Certified Decision-Making Record. Within the period allowed for filing, the LFSRB received Statements of Position from the Applicant, the Town, and 66 e-mails from other aggrieved persons.

Prior to holding a hearing on the merits of the appeal, the LFSRB held two meetings to address preliminary matters in the case. At a meeting held on August 10, 2018, the LFSRB approved the request of the Wisconsin Towns Association and the League of Wisconsin Municipalities to file a joint amicus brief and to strike the portion of Ledgeview Farm's position statement, which were attachments that exceeded the 10 page maximum. Based on the complexity of the case, the LFSRB voted to extend the time for making its decision to November 30, 2018, which was written in the LFSRB's August 10, 2018 meeting minutes.

On September 7, 2018, the LFSRB met to review and finalize the issues on appeal including those raised in the request for review. The LFSRB also directed staff to prepare supporting documents to better understand the issues in case. On October 24, 2018, the LFSRB held a meeting, properly noticed under the Wisconsin Open Meetings Law, to review the appeal in this matter. Based upon the record in the matter, including the certified record submitted by the Town, the submitted statements of position, the discussion by the LFSRB at the meeting, and the vote of the LFSRB, the LFSRB issues the following decision.

ISSUES FOR DECISION

- A. What are the legal implications of modifications to the siting application submitted after the Town made its April 20, 2018 determination of completeness?
- 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)?
- C. Did the Town have a basis for denying the permit on the grounds that Ledgeview Farms design for the manure storage structure at the heifer site failed to meet the local setback standard of 1320 feet from the property line.

- D. Did the Town have the authority to enforce requirements for a performance bond, as part of issuing the siting permit?
- 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?
- 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?
- G. Did the Town have a legal basis for denying the farm'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?
- 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?
- 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?"
- 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?
- 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?

RELEVANT STATUTES AND RULES

S. 93.90 Livestock facility siting and expansion.

(2) DEPARTMENT DUTIES. (a) For the purposes of this section, the department shall promulgate rules specifying standards for siting and expanding livestock facilities. . .

(3) POLITICAL SUBDIVISION AUTHORITY.

(ae) A political subdivision that requires a special exception or conditional use permit for the siting or expansion of any of the following livestock facilities shall require compliance with the applicable state standards under sub. (2) (a) as a condition of issuing the special exception or conditional use permit:

1. A new or expanded livestock facility that will have 500 or more animal units.

(ar) Notwithstanding par. (ae) a political subdivision may apply to a new or expanded livestock facility described in par. (ae) 1. or 2., as a condition of issuing a special exception or conditional use permit, a requirement that is more stringent than the state standards under sub. (2) (a) if the political subdivision does all of the following:

1. Adopts the requirement by ordinance before the applicant files the application for approval.

2. 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.

(4) POLITICAL SUBDIVISION PROCEDURE

(a) No later than 45 days after a political subdivision receives an application for approval, the political subdivision shall notify the applicant whether the application for approval is complete and, if it is not complete, what information is needed to complete the application for approval. As soon as the applicant has provided all of the required information, the political subdivision shall notify the applicant that the application for approval is complete.

(b) A political subdivision shall make a record of its decision making on an application for approval, including a recording of any public hearing, copies of documents submitted at any public hearing, and copies of any other documents provided to the political subdivision in connection with the application for approval.

(c) A political subdivision shall base its decision on an application for approval on written findings of fact that are supported by the evidence in the record under par. (b).

(d) Except as provided in par. (e), a political subdivision shall approve or disapprove an application for approval no more than 90 days after the day on which it notifies the applicant that the application for approval is complete. If an applicant complies with the rules promulgated under sub. (2) (e) 1. and 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.

(e) A political subdivision may extend the time limit in par. (d) if the political subdivision needs additional information to determine whether to approve or deny the application for approval, if the applicant makes a material modification to the application for approval, or for other good cause specified in writing by the political subdivision.

(5) REVIEW OF SITING DECISIONS.

(a) In this subsection “aggrieved person” means a person who applied to a political subdivision for approval of a livestock facility siting or expansion, a person who lives within 2 miles of a livestock facility that is proposed to be sited or expanded, or a person who owns land within 2 miles of a livestock facility that is proposed to be sited or expanded.

(b) An aggrieved person may challenge the decision of a political subdivision on an application for approval on the grounds that the political subdivision incorrectly applied the state standards under sub. (2)(a) that are applicable to the livestock facility siting or expansion or violated sub. (3), by requesting the board to review the decision. . .

(bm) Upon receiving a request under par. (b), the board shall notify the political subdivision of the request. The political subdivision shall provide a certified copy of the record under sub. (4) to the board within 30 days after the day on which it receives the notice.

(c) Upon receiving the certified copy of the record under par. (bm), the board shall determine whether the challenge is valid. The board shall make its decision without deference to the decision of the political subdivision and shall base its decision only on the evidence in the record under sub. (4) (b). . . The board shall make its decision within 60 days after the day on which it receives the certified copy of the record under par. (bm), except that the board may extend this time limit for good cause specified in writing by the board.

(d) If the board determines that a challenge is valid, the board shall reverse the decision of the political subdivision. The decision of the board is binding on the political subdivision, subject to par. (e). If a political subdivision fails to comply with a decision of the board that has not been appealed under par. (e), an aggrieved person may bring an action to enforce the decision.

Chapter ATCP 51 LIVESTOCK FACILITY SITING

ATCP 51.10 (2) STATE STANDARDS INCORPORATED IN LOCAL ORDINANCE. Beginning on November 1, 2006, a political subdivision may not deny a local approval covered by this chapter unless the political subdivision incorporates by local ordinance the standards in this subchapter and the application requirements in subch. III. A local ordinance may incorporate the standards and application requirements by reference, without reproducing them in full.

(3) MORE STRINGENT LOCAL STANDARDS. A political subdivision may not apply local standards that are more stringent than the standards in this subchapter unless all of the following apply:

(a) The political subdivision is authorized to adopt the local standards under other applicable law.

(b) The political subdivision enacted the standards by local ordinance, before the livestock facility operator filed the application for local approval.

(c) The political subdivision enacted the standards based on reasonable and scientifically defensible findings of fact adopted by the political subdivision's governing authority.

(d) The findings of fact under par. (c) clearly show that the standards are needed to protect public health or safety.

ATCP 51.12 Livestock structures; location on property. (2) MANURE STORAGE STRUCTURE; SETBACK. A waste storage structure may not be located within 350 feet of any property line, or within 350 feet of the nearest point of any public road right-of-way, unless one of the following applies:

(a) The location of the waste storage structure complies with a local ordinance that specifies a shorter setback that is specific to waste storage facilities or waste storage structures.

(b) The waste storage structure existed prior to May 1, 2006. This paragraph does not authorize an expansion, toward a property line or public road right-of-way, of a waste storage structure that is located within 350 feet of that property line or public road right-of-way.

(c) The waste storage structure is a single new waste storage structure constructed no closer to the relevant property line or public road than a waste storage structure that existed on the same tax parcel prior to May 1, 2006, provided that the new structure is no larger than the existing structure and is located within 50 feet of the existing structure.

ATCP 51.14 Odor and air emissions.

(1) **ODOR STANDARD.** Except as provided in subs. (2) to (4), a livestock facility shall have an odor score of at least 500. The operator shall calculate the odor score according to *Appendix A, worksheet 2*, or by using the equivalent spreadsheet provided on the department's website. An application for local approval shall include *worksheet 2* or the spreadsheet output.

(3) **CLUSTERS.** If all of the livestock structures in a livestock facility are divided among 2 or more clusters, such that no cluster is located closer than 750 feet to any other cluster, an operator may choose to calculate an odor score under sub. (1) for each cluster rather than for the entire livestock facility. Each cluster shall comply with the odor standards in sub. (1).

ATCP 51.18 Waste storage facilities.

(1) **DESIGN, CONSTRUCTION AND MAINTENANCE; GENERAL.** All waste storage facilities for a livestock facility shall be designed, constructed and maintained to minimize the risk of structural failure, and to minimize the potential for waste discharge to surface water or groundwater. A waste storage facility may not lack structural integrity or have significant leakage. An unlined earthen waste storage facility may not be located on a site that is susceptible to groundwater contamination.

Note: A "site that is susceptible to groundwater contamination" is defined in s. ATCP 51.01 (39).

(2) **EXISTING FACILITIES.** For purposes of local approval, an existing waste storage facility is presumed to comply with sub. (1) if a registered professional engineer or certified agricultural engineering practitioner certifies one of the following in the application for local approval:

(a) The facility is constructed of concrete or steel or both, was constructed within the last 10 years according to then-existing NRCS standards, and shows no apparent signs of structural failure or significant leakage.

(b) The facility was constructed within the last 3 years according to then-existing NRCS standards, and shows no apparent signs of structural failure or significant leakage.

(c) The facility was constructed according to NRCS standards that existed at the time of construction, is in good condition and repair, and shows no apparent signs of structural failure or significant leakage.

(d) The facility is in good condition and repair, shows no apparent signs of structural failure or significant leakage, and is located on a site at which the soils and separation distances to groundwater comply with *NRCS technical guide manure storage facility standard 313, table 1 (November, 2004)*.

(e) The facility is in good condition and repair, shows no apparent signs of structural failure or significant leakage, is located entirely above ground, and is located on a site at which the soils comply with *NRCS technical guide manure storage facility standard 313, table 5 (November, 2004)*.

(4) **CLOSED FACILITIES.** If a waste storage facility is closed as part of the construction or expansion of a livestock facility, the closure shall comply with *NRCS technical guide closure of waste impoundments standard 360 (December, 2002)*. A closure is presumed to comply with this subsection, for purposes of local approval, if the application for local approval includes the closure plan and certification required under s. ATCP 51.30.

ATCP 51.20 Runoff management.

(1) **NEW OR SUBSTANTIALLY ALTERED ANIMAL LOTS.** New or substantially altered animal lots shall comply with *NRCS technical guide wastewater treatment strip standard 635 (January, 2002)*.

(2) **EXISTING ANIMAL LOTS.**

(a) The predicted average annual phosphorus runoff from each existing animal lot to the end of the runoff treatment area, as determined by the *BARNY* model, shall be less than the following applicable amount:

1. Fifteen pounds if no part of the animal lot is located within 1,000 feet of a navigable lake or 300 feet of a navigable stream.

2. Five pounds if any part of the animal lot is located within 1,000 feet of a navigable lake or 300 feet of a navigable stream.

Note: The *BARNY* model is a computer model that predicts nutrient runoff from animal lots. Copies of the *BARNY* model are on file with the department and the legislative reference bureau. An Excel spreadsheet version may be obtained from the NRCS Wisconsin website (engineering directory).

(b) Runoff from an animal lot may not discharge to any direct conduit to groundwater.

(3) FEED STORAGE.

(a) Feed storage shall be managed to prevent any significant discharge of leachate or polluted runoff from stored feed to waters of the state.

(b) If an existing paved area may be used, without substantial alteration, to store or handle feed with a 70% or higher moisture content:

1. Surface water runoff shall be diverted from entering the paved area.

2. Surface discharge of leachate from stored feed shall be collected before it leaves the paved area, if the paved area covers more than one acre. Collected leachate shall be stored and disposed of in a manner that prevents discharge to waters of the state.

(4) CLEAN WATER DIVERSION. Runoff from a livestock facility shall be diverted from contact with animal lots, waste storage facilities, paved feed storage areas and manure piles within 1,000 feet of a navigable lake or 300 feet of a navigable stream.

Note: See ss. NR 151.06 and ATCP 50.04 (1). Runoff may be diverted by means of earthen diversions, curbs, gutters, waterways, drains or other practices, as appropriate.

(5) OVERFLOW OF WASTE STORAGE FACILITIES. A livestock facility shall be designed, constructed and maintained to prevent overflow of waste storage facilities.

(6) UNCONFINED MANURE PILES. A livestock facility may not have any unconfined manure piles within 1,000 feet of a navigable lake or 300 feet of a navigable stream.

(7) LIVESTOCK ACCESS TO SURFACE WATERS OF THE STATE. A livestock facility shall be designed, constructed and maintained to prevent unrestricted livestock access to surface waters of the state, if that access will prevent adequate vegetative cover on banks adjoining the water. This subsection does not prohibit a properly designed, installed and maintained livestock crossing or machinery crossing.

ATCP 51.30 Application. (1) GENERAL. If local approval is required for a new or expanded livestock facility, a person seeking local approval shall complete and file with the political subdivision the application form shown in *Appendix A*. The application shall include all of the information required by *Appendix A* and attached *worksheets*, including any authorized modifications made by the political subdivision under sub. (2). The information contained in the application shall be credible and internally consistent.

(4) LOCAL FEES

(b) A political subdivision may not require an applicant to pay any fee, or post any bond or security with the political subdivision, except as provided in par. (a).

(5) COMPLETE APPLICATION. Within 45 days after a political subdivision receives an application under sub. (1), the political subdivision shall notify the applicant whether the application contains everything required under subs. (1) to (4). If the application is not complete, the notice shall specifically describe what else is needed. Within 14 days after the applicant has provided everything required under subs. (1) to (4), the political subdivision shall notify the applicant that the application is complete. A notice of completeness does not constitute an approval of the proposed livestock facility.

ATCP 51.34 Granting or denying an application. (1) GRANTING AN APPLICATION. Except as provided in sub. (2), a political subdivision shall grant an application under s. ATCP 51.30(1) if all of the following apply:

(a) The application complies with s. ATCP 51.30.

(b) The application contains sufficient credible information to show, in the absence of clear and convincing information to the contrary, that the proposed livestock facility meets or is exempt from the standards in subch. II. To the extent that a standard under subch. II vests discretion in a political subdivision, the political subdivision may exercise that discretion.

(3) WRITTEN DECISION. (a) A political subdivision shall issue its decision under sub. (1) or (2) in writing. The decision shall be based on written findings of fact included in the decision. The findings of fact shall be supported by evidence in the record under s. ATCP 51.36. Findings may be based on presumptions created by this chapter.

(4) TERMS OF APPROVAL. An approval under sub. (1) is conditioned on the operator's compliance with subch. II and representations made in the application for approval. This chapter does not limit a political subdivision's authority to do any of the following:

(a) Monitor compliance.

(b) Withdraw an approval, or seek other redress provided by law, if any of the following apply:

1. The operator materially misrepresented relevant information in the application for local approval.

2. The operator, without authorization from the political subdivision, fails to honor relevant commitments made in the application for local approval. A political subdivision may not withhold authorization, under this subdivision, for reasonable changes that maintain compliance with the standards in subch. II.

3. The livestock facility fails to comply with applicable standards in subch. II.

FINDINGS OF FACT

1. Sec. 135-79 B. of the Town's zoning ordinance (Part 1 p. 14, Part 6 p. 3087) provides that "the livestock facility siting standards established in Wis. Admin. Code Ch. ATCP 51, including all appendixes, worksheets, and any future amendments to that chapter, are incorporated by reference and adopted."

2. Sec. 135-81 B. of the Town's zoning ordinance (Part 1 p. 20, Part 6 p. 3091) requires a conditional use permit for "[a] new or expanded facility that will be used to keep cattle, swine, poultry, sheep or goats, and that will have more than 500 animal units, if the proposed facility meets the standards prescribed in §§ 92.16 and 93.90, Wis. Stats., Ch. ATCP 51, Wis. Adm. Code, and § 135-85 of the Town of Ledgeview Zoning Code."

3. Sec. 135-85 C., D. and E. of the Town's zoning ordinance established a more stringent property line setback for waste storage facilities (1320 feet for livestock facilities with over 500 animal units), livestock structures, and feed storage but did not alter the 350 foot public-road-right-of-way for waste storage facilities established in Wis. Admin. Code §ATCP 51.12(2). (Part 1 pp. 21-22 Part 6 p. 3093)

4. Sec. 135-79 D. of the Town's zoning ordinance (Part 1 pp. 15-17, 30, Part 6 pp. 3087-88) included a list of studies, research and reports and other references numbered (1)–(8) that represented the Town's findings in support of its more stringent local standards. No specific findings of fact were

associated with these references. These findings were incorporated into the Town's ordinance prior to the Applicant's submission of an application for local approval.

5. Secs. 135-221 through 232 of the Town's zoning ordinance requires a separate conditional use permit for man-made bodies of water, which by definition includes facilities or structures designed to contain or manage animal waste or manure and to contain drainage that has come through or across a feed storage or manure storage area, including leachate. (Part 1 pp. 23-28, Part 6 pp. 3178-3183) Permits can be issued only if applicants obtain a performance bond and meet the setback requirement of 1,320 feet. (Part 1 p. 28, Part 6 pp. 3182-3183)

6. On December 6, 2017, the Applicant filed an application with the Town for local approval of a livestock facility (Part 2 pp. 420-891). On or about February 2, 2018, the Applicant filed an amended application for local approval that included the following:

- a. The main application (Part 3, p. 928-932), which included an unsigned signature block for Jason Pansier dated February 2, 2018, documenting that the waste storage structures comply with the setbacks in Wis. Admin. Code §ATCP 51.12(2).
- b. Worksheet 1 (Part 3, p. 933), signed by Jason Pansier and dated February 2, 2018, identifying 3,483 animal units as the maximum number of animal units to be kept at two related sites: the headquarter facility (Cluster A) and heifer facility (Cluster B).
- c. As allowed in Wis. Admin. Code §ATCP 51.14(3), Worksheet 2 – Odor Management – was separately prepared for the two livestock facility clusters as follows:
 - i. An amended Worksheet 2 signed by Jason Pansier on February 2, 2018 incorrectly presented a passing odor score of 591 for Cluster A. (Part 3 p. 934) An amended spreadsheet for Cluster A, which was modified to eliminate natural crust as an odor control practice of the waste storage facility (Part 3 p. 1096), documents a passing score of 513 from the N1 neighbor. (Part 3 p. 1079)
 - ii. An advanced odor management plan, submitted to earn 20 additional points (Part 3 p. 934), was necessary to achieving a passing odor score over 500 points for Cluster A. The plan (Part 3 pp. 1052-1053) identifies practices to control odor including frequent cleaning of housing, moisture management in housing, covering feed storage, removal of excess and waste feed, manure application strategies such as incorporation shortly after application.
 - iii. An amended worksheet 2 for Cluster B, which was signed and dated by Jason Pansier, presented a passing odor score of 554 (Part 3 p. 935). The accompanying spreadsheets (Part 3 pp. 1086-1087) showed identical scores of 554 measured from two different neighbors and included the following odor sources: an existing and expanded freestall heifer barn (L2) of 81,532 sq. ft. and animal lot (Y2) of 4,494 sq. ft.
 - iv. A February 2, 2018 report submitted by the Applicant's consultant with the amended application, advised that the Applicant "decided not to construct the Heifer Barn expansion at the Heifer Site" (Part 3 p. 1096) and "decided not to construct the Y2 Lot" and "the Lot has been removed from the maps." (Part 3 p. 1098)
 - v. Worksheet 2 and the accompanying spreadsheets submitted for Cluster B relied on the formation of a natural crust to control odor from a proposed waste storage facility (W2) and attain a passing odor score. To provide assurances regarding the formation of a natural crust in the W2 storage, the applicant submitted a natural

crust management plan with its amended application (Part 3 pp. 1096-1097) which includes transferring manure with straw bedding from a calf barn and heifer bedded pack barn located at the headquarter facility to the new waste storage structure at the heifer facility.

- d. Worksheet 4, (Part 3 p. 971), signed by the Applicant's consulting engineer, certifying that the waste storage facility at Cluster A (WSF 1) was constructed within 3 years according to NRCS 313 technical standards, and showed no signs of structural failure or significant leakage.
- e. By letter dated February 2, 2018, accompanying the amended application, the Applicant's engineering consultant notified the Town of the Applicant's intent to close Pits 1 and 2 (Part 3 pp. 1098) and submitted plans for closure of these facilities. (Part 3 pp. 1101-1117)
- f. Worksheet 5 (Part 3 pp. 972-977), signed by the Applicant's engineering consultant and the Applicant included the following:
 - i. A hand written insertion for an alternative method to control runoff from existing animal lots at the Headquarter (Y1-Cluster A) and Heifer facilities (Y1-Cluster B) that proposed collection and transfer of potential runoff to storage. Engineering documentation submitted with the original application for local approval includes plans and other documentation for a system to contain and transfer the runoff from Y1-Cluster B. (Part 2 pp. 596-639)
 - ii. BARNY models submitted documenting that annual phosphorus discharges from Y1-Cluster A of 22.2 lbs. and from Y1-Cluster B of 116.6 lbs., which are above the allowable rates of 5 lbs. of P annually within 1,000 feet of a lake or 300 feet of a stream, or 15 lbs. of P outside those areas. (Part 3 pp. 974, 976)
 - iii. Commitments to manage feed storage to prevent significant discharge of leachate or polluted runoff to waters of the state, divert runoff from contact with animal lots, waste storage facilities, paved feed storage areas or manure piles within 300 ft. of a stream or 1,000 ft. of a lake; prevent any overflow of waste storage facilities, and restrict livestock access to waters of the state, as necessary to maintain adequate vegetative cover on banks adjoining the water. (Part 3 pp. 972, 977)

7. The Applicant and Town exchanged correspondence relating to the completeness of the application including two requests by the Town for additional information and responses from the Applicant's consultant. (Part 4 pp. 1566-1591)

8. As part of a March 19, 2018 submission by its engineering consultant (Part 4 pp. 1576-1577), the Applicant presented amended odor worksheets for Cluster B that included an additional manure storage odor source (DB with a predicted odor score of 28), increasing the final passing score to 558. (Part 4 pp. 1584-1585) The submission also includes design changes to control animal lot runoff the animal lot (Y1-Cluster A) at headquarter site. (Part 4 p. 1581)

9. By letter dated April 20, 2018, the Town through its attorney notified Ledgeview Farms that its application was complete. (Part 4 p. 1592)

10. As part of the June 1, 2018 submission by its attorney, the Applicant presented amended odor worksheets for Cluster B, increasing the separation of the manure storage facility (WSF 2) and retaining the final passing score of 558. (Part 6 pp. 2854-2855) The submission also provided a site plan for WSF 2 that shows a boundary line for the 350 foot ROW bisecting the berm of the proposed storage facility, and a notation indicating that the setback from ROW still needs “to be verified.” (Part 6 p. 2842)

11. None of the post February 2018 submissions related to Worksheet 2 for Cluster B were amended to correctly depict the livestock structures on the site or to include a first page cover sheet signed by the Applicant with a correct passing score and supporting numbers.

12. The Town’s record of decision-making contains evidence and documents obtained by the Town and submitted by participants at a May 29, 2018 public hearing (Part 5 pp. 1643-2831) that establish a pattern of noncompliance on the part of the Applicant:

- a. A February 19, 2009 notice of violation based on the Applicant’s operation of a CAFO without a permit and documented discharges from an animal lot. (Part 5 pp. 2161-2163)
- b. A Sept. 13, 2013 EPA Administrative Order for Compliance (Part 5 pp. 2086-2121, 2219-2389) based on findings of discharges from feed bunkers and open lots at the headquarter and heifer facilities, a discharge of a septic like waste and process waste water from a concrete pit at the headquarter facility, animals that had direct access to a waterway, and manure runoff in a waterway. The order established compliance requirements including a schedule.
- c. A December 14, 2015 EPA notice of failure to submit a compliance plan (Part 5 pp. 2034-2037) and Dec. 8, 2015 written report concerning the April 9th inspection (Part 5 pp. 2038-2049, 2446-2616), documenting manure and process discharges from various livestock structures.
- d. A November 29, 2016 EPA Notice of Intent to file a Civil Administrative Complaint against the Applicant seeking a \$128,000 penalty. (Part 5 pp. 2029-2031, 2437-2439)
- e. A September 21, 2017 DNR compliance inspection report and notification of actions required by the Applicant to address discharges and other noncompliance including runoff controls for feed storage, barns, stacking areas and animal lots, with October 2017 deadlines for taking interim actions. (Part 5 pp. 2632-2634)
- f. The related CAFO compliance report (Part 5 pp. 2635-2688), based on July 18, 2017 inspection, documents continued discharges from barns, feed storage, stacking areas, and animal lots. The violations were not confined to negligent behavior but rise to the level of deliberate deception and avoidance of legal responsibilities. For example, there was evidence of deliberate acts to deceive regulators by promising to reduce the animal units below 1,000, to avoid a CAFO permit, while continuing to operate at above that threshold. (Part 5 pp. 1974-2051)
- g. A December 6, 2017 notice of violation and scheduling an enforcement conference for failure to submit required documentation. (Part 5 pp. 2703-2706)

- h. A May 3, 2018 DNR evaluation of the CAFO application identified the absence of runoff controls for feed storage and an animal lot (creating risk of continuing discharge to nearby waterways), and the need to close a manure storage that was structurally defective. (Part 6 pp. 2859-2860)

13. The Town's record of decision-making contains evidence and documents that the Applicant engaged in a level of deliberate deception and avoidance of legal responsibilities, including deliberate acts to deceive regulators by promising to reduce the animal units below 1,000, to avoid a CAFO permit, while continuing to operate at above that threshold. (Part 5 pp. 1974-2051)

14. In its final decision, the Town denied the applicant's request for approval on the following grounds:

- a. The failure of WSF 2 to meet the 350-foot setback requirement from the road right-of-way ("ROW") under Wis. Admin. Code § ATCP 51.12 (2). (Part 6 p. 3006)
- b. The failure to meet local standards including a 1,320 foot property line setback for waste storage facilities and requirements for a performance bond, adopted either as more stringent standards under ch. ATCP 51 or as separate zoning requirements. In support of its local standards, the Town referenced its "findings" in the zoning ordinance, documents included in the record, and the public hearing testimony of two experts whose testimony supported the conclusion that "there is a significant likelihood – far greater than the state-wide average – of high nitrates and coliforms within 2,500-feet of a waste storage facility." (Part 6 pp. 3006-3009)
- c. The failure of existing waste storage facilities to meet requirements under Wis. Adm. Code § ATCP 51.18 (2) and (3) including the absence of emergency overflow protections for WSF 1 and clear signs of structural failure and/or structural leakage in existing waste storage facilities in violation of Wis. Admin. Code § ATCP 51.18 (2). (Part 6 p. 3005-3006)
- d. The failure of animal lots and other livestock structures to meet the discharge and other runoff management standards in Wis. Admin. Code § ATCP 51.20. (Part 6 pp. 3005-3006)
- e. The lack of sufficient credible information to show compliance with standards in Wis. Admin. Code ch. ATCP 51, given the largely unrefuted evidence of the Applicant's history of non-compliance. The Town specifically identified the lack of evidence to verify that the Applicant had restricted access of livestock access to streams as required by Wis. Admin. Code § ATCP 51.20 (7). (Part 6 p. 3005)
- f. The failure of the Applicant to satisfy the following conditions generally applicable to CUPs under the Town's zoning ordinance (Part 6 pp. 3010-3013):
 - i. 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.
 - ii. The proposed use and its location of the storage structure at Heifer Site is not reasonable and appropriate use given the neighbor residential neighbors.
 - iii. Ledgeview Farms failed to pursue reasonable alternatives to mitigate impacts.
 - iv. Ledgeview Farms failed to show that it will immunize and repair damage incurred during construction.

- v. 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.
- vi. 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.

CONCLUSIONS OF LAW

1. Following the April 20, 2018 completeness determination, the Applicant made changes to its application for local approval that constitute a material modification, as defined under Wis. Stats. § 93.90(4)(e), that would authorize the Town to extend the time for making its decision.

2. If a political subdivision determines that an application for local approval is complete but then receives a material modification of the application, the political subdivision should determine whether that modification undermines the original completeness determination. In effect, it should conduct a new completeness determination and resolve concerns about the completeness of the application. A new review of completeness enables the parties to resolve issues regarding the completeness, credibility and internal consistency of the information instead of, as happened in this case, the local government denied the modified application for local approval based on the failure to meet the requirements of Wis. Admin. Code § ATCP 51.30 for completeness, credibility or internal consistency, in part because these modifications undermined the original completeness determination. See Wis. Admin. Code § ATCP 51.34(2).

3. The Town had a legal basis to deny the application for local approval based on the failure of the proposed waste storage facility (WSF 2) at the heifer facility to meet the 350-foot setback for a road right of way (ROW). ROW setbacks should be measured from the edge of livestock structures, which includes edges integral to the structure. By this measurement, the evidence shows that the proposed structure failed to meet the ROW setback. In a later submission, the notation that the ROW setback of 350 feet was "to be verified" did not rehabilitate the failure. The Town did have the authority to deny the permit on the basis that the manure storage structure proposed for the heifer facility did not meet the 350-foot setback from the public road right of way.

4. The Town failed to meet requirements in Wis. Admin. Code § ATCP 51.10(3) c. for adopting the more stringent setback of 1,320 feet from a manure storage structures to the property line. The Town's ordinance in which it adopted its justification for the more stringent standards failed to include adequate findings of fact, only making a recitation of studies, research and reports that did not incorporate any reasonable and scientifically defensible findings of fact to clearly show that the 1,320-foot requirement is necessary to protect public health or safety, pursuant to Wis. Stat. § 93.90(3) (a) 9. b. The testimony provided at the public hearing cannot form the basis for adopting more stringent standards, because the Town did not include this justification among the findings adopted by the Town in its ordinance.

5. While the Town's ordinance failed to meet the requirement in statute for adopting more stringent setback standards, the Town may enforce the 350-foot setback from a manure storage structure to the property line, which would apply since the town's ordinance incorporates ATCP 51 standards.

6. The Town may not enforce the requirements for a performance bond from applicants seeking local approval because Wis. Admin. Code §. 51.34 bans performance bonds and this requirement cannot be adopted as a more stringent standard.

7. To document compliance with Wis. Admin. Code § ATCP 51.20(2) for existing animal lots, an applicant must demonstrate that each lot has an average annual phosphorus runoff, as determined using the BARNY model, within certain allowable limits. Evidence in the record showed that the applicant failed to submit documentation establishing allowable runoff from both animal lots, and, therefore, the application did not meet the runoff management standards. Furthermore, the Town was allowed to consider the Applicant's past practices related to continuing runoff violations, because these past practices were linked to information in the application promising to rectify continuing discharges. The Town had legal grounds to deny local approval based upon a determination that the application lacked credible information as it relates to the applicant's commitments to rectify continuing discharges.

8. The Town did not have authority, under applicable technical standards, to require emergency overflow protection on waste storage facility WSF 1 and did not have a legal basis, pursuant to Wis. Admin. Code § ATCP 51.18 for denying the farm's siting application on the grounds that the facility lacked emergency overflow protection.

9. The Town did not have the authority to deny the local approval of the application based on structural failure or leakage from an existing waste storage facility, in violation of Wis. Admin. Code § ATCP 51.18, because the application contained the information required for the closure of two existing waste storage facilities.

10. The Town had the authority to deny the application for local approval based on the inconsistencies and lack of completeness in the odor spreadsheet and Worksheet 2 required by Wis. Admin. Code § ATCP 51.14(1). With this conclusion, the LFSRB does not need to reach the issues of whether the Town could consider the credibility of the information submitted by the Applicant regarding the plan to ensure formation of a natural crust at WSF 2 or the advanced odor management plan.

11. The Town did not have authority to enforce requirements for performance bonds or setbacks, through a separate construction or building permit for a "man-made body of water", that does not conform to the exceptions provided in Wis. Stat. § 93.90 or 92.16.

12. The Town did not have the authority to deny the siting application based on the findings in Sections 20-24 of the Town's decision, specified in Finding of Fact 14. f., as these are not allowable conditions for denying a livestock facility siting application.

13. The Applicant'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 LFSRB does not have the authority to review the Town's procedure, pursuant to Wis. Stat. § 93.90(4).

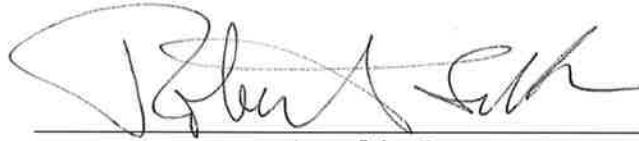
ORDER

NOW, THEREFORE, IT IS ORDERED, pursuant to Wis. Stat. § 93.90(5) (d):

1. The Town of Ledgeview's June 4, 2018 denial of a conditional use permit to Ledgeview Farms, Inc., for expanding its operation to a 3,483 animal units is affirmed on the basis of Conclusions of Law Numbers. 3, 7, and 10.
2. With this affirmation, Ledgeview Farms, Inc. is required to re-apply for a conditional use permit in order to obtain a local approval of its livestock siting application from the Town of Ledgeview.
3. The Town, when making a decision to approve or deny a CUP for a new or expanding livestock facility, shall not deny local approval on any of the grounds identified in Conclusions of Law Numbers 4, 6, 8, 9, 11 or 12.

Dated this 30th day of November, 2018.

ON BEHALF OF THE STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD



Member of the Board
ROBERT SELK