

LIVESTOCK FACILITY SITING REVIEW BOARD
c/o Wisconsin Department of Agriculture, Trade and Consumer Protection
2811 Agriculture Drive, PO Box 8911
Madison, WI 53708-8911

<u>Ledgeview Farms, LLC</u> , <p style="text-align: center;">Aggrieved Person(s)</p> v. <u>Town of Ledgeview</u> , <p style="text-align: center;">City, Village, Town, or County</p>	<p style="text-align: center;">REQUEST FOR REVIEW OF A DECISION REGARDING AN APPLICATION FOR LOCAL APPROVAL</p> <p>Docket No. _____</p>
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Notice is hereby given that Ledgeview Farms, LLC (“Aggrieved Person”) hereby requests review of the decision of the following political subdivision:

NAME: Town of Ledgeview

CITY, TOWN, VILLAGE or COUNTY (please circle)

COUNTY WHERE POLITICAL SUBDIVISION IS LOCATED: Brown County

ADDRESS: 3700 Dickinson Road, De Pere, WI 54115

regarding the application of local approval submitted by the following applicant:

NAME: Ledgeview Farms, LLC

ADDRESS: 3870 Dickinson Road, De Pere, WI 54115
(Provide information from Lines 1, 4 and 5 of Application of Local Approval).

The request for review is requested by a person who (check all that apply):

- Applied to a political subdivision for approval of a livestock facility siting or expansion.**
- Lives within 2 miles of a livestock facility that is proposed to be sited or expanded.**
- Who owns land within 2 miles of a livestock facility that is proposed to be sited or expanded.**

An aggrieved person may challenge the decision of a political subdivision on the grounds that the political subdivision incorrectly applied the state standards that are applicable to new and expanded livestock facilities, or violated s. 93.90(3), Wis. Stats.

ATTACHED IS A CONCISE STATEMENT OF THE ISSUE OR ISSUES YOU ARE CHALLENGING, PROVIDING THE GROUNDS AND ARGUMENTS IN SUPPORT OF YOUR CHALLENGE. DO NOT EXCEED TEN (8 1/2" x 11") PAGES WITH A FONT NO SMALLER THAN 12 POINT.

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

All communications, documents and papers submitted to the board by any attorney, and preferably by any aggrieved person, shall be one copy by an electronically transmitted .pdf file which can be read and copied easily with current technology. The e-mail address is: SitingBoard@wisconsin.gov

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 (Ledgeview) challenges the Town of Ledgeview’s (the Town’s) denial of a livestock facility siting permit.

BACKGROUND

Since December 2017, Ledgeview has been seeking approval of a livestock facility siting permit to expand its existing livestock facility. The Town denied Ledgeview’s initial application. Ledgeview challenged that denial before this Board, and the Board issued a written decision affirming the Town’s denial on limited grounds. *Ledgeview Farms v. Town of Ledgeview*, No. 18-LFSRB-02 (Decision, Nov. 30, 2018) (*Ledgeview Farms I*).

On November 5, 2018, Ledgeview filed a new application with the Town. In this application, Ledgeview seeks approval of a livestock facility siting permit to: increase the number of animal units, construct a waste storage facility, expand an existing feed storage area, construct a new feed storage area, and construct a yard runoff transfer system.

Before and during the approval process, Ledgeview was working closely with the Wisconsin DNR to obtain a WPDES permit. Ledgeview repeatedly informed the Town that it would be receiving a WPDES permit imminently. Knowing that a WPDES permit would hamstring its ability to deny Ledgeview’s application—and knowing that DNR was planning to issue the WPDES permit—the Town sped up its process for considering Ledgeview’s application. (*See* Town’s Decision ¶ 8.)¹ At a

¹ In a February 18, 2019 letter from the Town to Ledgeview, the Town stated that it was “treating [Ledgeview’s] application as complete” under Wisconsin Statutes section 93.90(4)(a), even though it had not yet received information it considered necessary. (*See* Exhibit A, attached.) This letter further shows that the Town accelerated its decisionmaking process to dodge an issued WPDES permit.

meeting on March 4, 2019, before DNR could issue the WPDES permit, the Town voted to deny Ledgeview’s application. The Town issued a written decision bearing the same date. On March 14, 2019—just days after the Town meeting—DNR issued WPDES Permit No. WI-0065421-01-0 to Ledgeview.

ISSUES FOR REVIEW

The Town offered multiple reasons for denying Ledgeview’s application. None of these reasons is valid under Wisconsin’s Livestock Facility Siting Law and implementing regulations. *See* Wis. Stat. § 93.90; Wis. Admin. Code ch. ATCP 51.

Town’s Reason No. 1

According to the Town, Ledgeview constructively withdrew its application when it did not permit Town inspectors to enter its farm. (*See* Town’s Decision ¶ 23.)

Why It’s Not Valid

Under the Siting Law, the Town can deny an application for a livestock facility siting permit *only* for limited, enumerated reasons. Wis. Stat. § 93.90(3)(a); *see also* Wis. Admin. Code § ATCP 51.02 Note (“A political subdivision may *not* consider other siting criteria, or apply standards that differ from this chapter, except as provided in the livestock facility siting law or this chapter.”). The Siting Law provides that “a political subdivision *may not* disapprove or prohibit livestock facility siting or expansion *unless* at least one of the following applies” Wis. Stat. § 93.90(3)(a) (emphases added). “[T]he following” refers to statutorily enumerated reasons that can support disapproval. *See id.*; *see also Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 40, 342 Wis. 2d 444, 820 N.W.2d 404 (“The Siting Law expressly withdraws political subdivisions’ authority to disapprove livestock facility siting permits *unless* one of [the] narrow exceptions applies.” (Emphasis added).) If none of those enumerated reasons applies, then the Town “may not disapprove or prohibit” Ledgeview’s proposed livestock facility. Refusing to permit Town inspectors to enter a farm *is not* among the enumerated reasons in section 93.90(3)(a). The Town thus had no authority to deny Ledgeview’s application based on Reason No. 1.²

Town’s Reason No. 2

Recounting instances of Ledgeview’s past regulatory noncompliance, the Town denied Ledgeview’s application “under Wis. Admin. Code § ATCP 51.34(1)(b) because [Ledgeview] has failed to present the relevant *credible* information for Town approval.” (Town’s Decision ¶ 24.)

Why It’s Not Valid

A. Based on the text of section ATCP 51.34(1)(b), whether Ledgeview presented “sufficient credible information” relates to whether its proposed facility

² Besides, none of the other reasons the Town cites in support of denial could have been cured by allowing the inspection, regardless of what the inspection revealed.

“meets or is exempt from the standards in subch. II.” That is, an alleged lack of sufficient credible information must be tied *specifically* to the standards in subchapter II. Generalized doubts about an applicant’s credibility, untethered to subchapter II, are not a valid reason for denial. Here, the Town’s commentary on Ledgeview’s credibility is generalized and does not relate specifically to subchapter II.³ On this basis alone, Reason No. 2 is not valid.

B. The application before the Town—and the application before this Board—is for the *siting* of a *proposed* expanded livestock facility. The subject matter of the application does not relate to past or existing operations. The Town cannot deny Ledgeview’s application based on *operational* aspects of the livestock facility, especially ones in the past. *See Adams*, 2012 WI 85, ¶ 51 & n.24.⁴

Section 93.90(4)(d), moreover, provides that “[i]f an applicant complies with [chapter 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 past noncompliance.

Neither section 93.90 nor chapter ATCP 51 contemplates conditioning approval of a proposed facility on another aspect of the applicant’s operation *that is not the subject of the application*. Doing so would amount to enforcing a more stringent standard. *See Wis. Stat. § 93.90(3); Wis. Admin. Code § ATCP 51.10(3)*.

Town’s Reason No. 3

The Town denied Ledgeview’s application “under Wis. Admin. Code § ATCP 51.34(4) because [Ledgeview] has made material misrepresentations in its siting permit application.” (Town’s Decision ¶ 25.)

Why It’s Not Valid

A. Under the Siting Law, the Town can deny a livestock permit only for certain enumerated reasons. Reason No. 3 *is not* among them. *See supra* Reason No. 1.

³ Regarding the Town’s denial based on specific standards in subchapter II, see Reason No. 4, below.

⁴ The same analysis defeats the Town’s argument that “Ledgeview Farms is making a somewhat unique request of the Town under the livestock siting law.” (Town’s Decision p. 14.) Suppose someone constructs a building without a building permit. Later, she decides to expand the building and this time requests a building permit. Should she have to tear down the original building to obtain a permit for the expansion?

B. Section ATCP 51.34(4) relates to a political subdivision’s ability to enforce compliance with an approved permit. It does not apply to the initial approval or denial of a permit, nor does it govern the approval process. Indeed, subsection (4) states that chapter ATCP 51 “does not limit a political subdivision’s authority to” either “[m]onitor compliance” or “[w]ithdraw an approval” under circumstances. Wis. Admin. Code § 51.34(4)(a), (b); *compare id.* § ATCP 51.34(1)(b) (requiring an application for a “proposed livestock facility” to “meet[]” state standards) *with* § ATCP 51.34(4)(b)3. (authorizing withdrawal of an approved permit if an existing “livestock facility” fails to “comply with” state standards).⁵ Also, a note following the subsection states multiple times that the subsection addresses a political subdivision’s “compliance action.”

Because section ATCP 51.34(4) relates solely to compliance with an approved permit—and not to initial approval or denial, or to the approval process—the Town cannot rely on it as a reason for denying Ledgeview’s application.

Town’s Reason No. 4

The Town denied Ledgeview’s application because “the proposed expanded livestock facility violates multiple state standards” under subchapter II of chapter ATCP 51, including sections ATCP 51.18 and ATCP 51.20. (Town’s Decision ¶ 26.)

Why It’s Not Valid

Normally, a permit applicant must satisfy the state standards set forth in sections ATCP 51.18 and ATCP 51.20. But an applicant is exempt from having to do so if the applicant holds a WPDES permit issued by DNR. Wis. Admin. Code §§ 51.18(7); 51.20(10). Ledgeview holds a WPDES permit. It is therefore exempt from having to satisfy sections ATCP 51.18 and ATCP 51.20—and the Town cannot deny Ledgeview’s application based on an alleged violation of either section.

Although DNR did not finally issue a WPDES permit until ten days after the Town denied Ledgeview’s application, Ledgeview repeatedly informed the Town that it would be receiving a WPDES permit imminently. The Town knew that Ledgeview would hold a WPDES permit. In response, the Town sped up its process for considering Ledgeview’s application, (*see* Town’s Decision ¶ 8; *supra* note 1; Ex. A), in order to avoid the exempting effect of sections ATCP 51.18(7) and ATCP 51.20(10). This timing reveals the arbitrary and biased nature of the Town’s

⁵ *See State ex rel. Dep’t of Nat. Res. v. Wis. Ct. of Appeals, Dist. IV*, 2018 WI 25, ¶ 28, 380 Wis. 2d 354, 909 N.W.2d 114 (quoting *Gister v. Am. Family Mut. Ins. Co.*, 2012 WI 86, ¶ 33, 342 Wis. 2d 496, 818 N.W.2d 880) (“[W]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings.”); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) (“[W]here [a legal text] has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.”).

decisionmaking. To ensure that the decision on Ledgeview’s application is not arbitrary or biased, and for all the additional reasons below, the Board should consider Ledgeview’s issued WPDES permit as part of Ledgeview’s application. *See* Wis. Stat. § 93.90(5)(c) (directing the Board review application decisions *de novo* and without deference).

A. The Legislature enacted the Siting Law to advance two primary purposes. First, the Siting Law is intended to provide “uniform regulation of livestock facilities” across the state. Wis. Stat. § 93.90(1); *Adams*, 2012 WI 85, ¶ 37. Second, the Siting Law is intended to foster efficiency in the permit approval process. *See Adams*, 2012 WI 85, ¶¶ 62–65.

B. The Board has the implied power to take action to effectuate the purposes of the Siting Law. *Adams*, 2012 WI 85, ¶ 62–65 (quoting *Wis. Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶ 14, 270 Wis.2d 318, 677 N.W.2d 612) (An administrative agency has “those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates.”). The *Adams* Court, for example, recognized the Board’s implied power to craft remedies in furtherance of the Siting Law’s purposes. *See id.* If the Board has that implied power, then it logically also has the implied power to review the underlying validity of a political subdivision’s decision and to consider materials relevant to that validity, so long as doing so furthers the Siting Law’s purposes. Specifically, because a political subdivision may consider—and ultimately must recognize the exempting effect of—a permit applicant’s WPDES permit, then the Board has the implied power and duty to do so, too.

Considering Ledgeview’s WPDES permit would further the Siting Law’s purposes of uniformity and efficiency. The Legislature “clearly and unambiguously empower[ed] the DNR to regulate where groundwater may be affected by the discharge of pollutants.” *Maple Leaf Farms, Inc. v. State, Dep’t of Nat. Res.*, 2001 WI App 170, ¶ 15, 247 Wis. 2d 96, 633 N.W.2d 720 (citing Wis. Stat. § 283.001(2)). To that end, DNR administers the WPDES permitting program in a uniform manner across the state. Sections 51.18(7) and 51.20(10), in furtherance of the Siting Law’s purposes of uniformity and efficiency, defer to DNR when DNR has taken action by issuing a WPDES permit. This deference recognizes that DNR is already uniformly and comprehensively regulating discharges. Allowing the statewide WPDES permitting program to per se satisfy DATCP’s environmental concerns helps advance the Siting Law’s purposes of uniformity and efficiency. Exercising implied power to consider Ledgeview’s WPDES permit would further those purposes; refusing to consider that permit, by contrast would thwart those purposes.

In addition, the Court in *Adams* held that the Board “acted properly pursuant to an implied power” when it reversed and modified the decision of a political subdivision, rather than remanding the decision for further consideration, because doing so furthered the Siting Law’s purpose of efficiency. *Id.* ¶ 65; *see also id.* ¶¶ 63–64. Similarly here, the Board has the implied power to consider Ledgeview’s

WPDES permit, and to recognize its exempting effect, because doing so would be more efficient than any alternative.

C. The Board is preempted from taking action that affirms the preempted action of a political subdivision. The Siting Law preempts certain aspects of a political subdivision’s authority to regulate livestock facility siting. *See Adams*, 2012 WI 85, ¶¶ 32–38. To reach this conclusion, the Wisconsin Supreme Court applied the preemption test announced in *Anchor Savings & Loan Ass’n v. Equal Opportunities Comm’n*, 120 Wis. 2d 391, 395–96, 355 N.W.2d 234 (1984). Under that test, four factors determine whether a political subdivision’s actions are preempted by state legislation:

- (1) whether the legislature has expressly withdrawn the power of political subdivisions to act; or
- (2) whether the political subdivision’s actions logically conflict with the state legislation; or
- (3) whether the political subdivision’s actions defeat the purpose of the state legislation; or
- (4) whether the political subdivision’s actions are contrary to the spirit of the state legislation.

Adams, 2012 WI 85, ¶ 32 (quoting *Jackson Cty. v. DNR*, 2006 WI 96, ¶¶ 19–20, 293 Wis. 2d 497, 717 N.W.2d 713). “Because the test is formulated in the disjunctive, if any one of the factors is met, the political subdivision’s conflicting action is void.” *Id.*

Under the *Anchor* test, not only does the Siting Law preempt local action, but it also necessarily preempts the Board from taking action that affirms or permits preempted local action. *Cf. Lopez v. Labor & Indus. Review Comm’n*, 2002 WI App 63, ¶ 16, 252 Wis. 2d 476, 642 N.W.2d 561 (Agency action is “unreasonable if it directly contravenes the words of the statute, is clearly contrary to legislative intent, or is without a rational basis.”).

As mentioned, the Legislature “clearly and unambiguously empower[ed] the DNR to regulate where groundwater may be affected by the discharge of pollutants.” *Maple Leaf Farms*, 2001 WI App 170, ¶ 15 (citing Wis. Stat. § 283.001(2)). To that end, DNR administers the WPDES permitting program in a uniform manner across the state. Sections 51.18(7) and 51.20(10),⁶ in furtherance of the Siting Law’s purposes of uniformity and efficiency, defer to DNR when DNR has taken action with respect to a facility by issuing a WPDES permit. This deference recognizes that DNR is already uniformly and comprehensively regulating discharges, thereby fostering interagency harmony and cooperation—which, in turn, advances the Siting Law’s purposes of uniformity and efficiency. So, too, does the

⁶ DATCP’s duly authorized regulations have a preemptive effect, just like statutes. *See Adams*, 2012 WI 85, ¶ 38.

text of the WPDES statute contemplate interagency communication and cooperation. *See, e.g.*, Wis. Stat. § 283.41.

Failing to consider an issued WPDES permit, by contrast, would instead foment interagency friction. It would also create confusion for parties, such as Ledgeview, that are regulated by multiple agencies (DATCP and DNR) on the same subject matter. Doing so, then, would “defeat the purpose[s]” of, and would be “contrary to the spirit of,” the Siting Law, *Adams*, 2012 WI 85, ¶ 32—and, hence, is preempted under the *Anchor* test, *see id.*

D. The Town might argue that the Board cannot consider Ledgeview’s WPDES permit on the grounds that the Board “shall base its decision only on the evidence in the record” Wis. Stat. § 93.90(4)(c). But section 93.90(4)(c) does not preclude the Board from considering the WPDES permit, because a WPDES permit is not “evidence.” Evidence is anything, such as testimony, that “tends to prove or disprove the existence of an alleged fact.” “Evidence,” *Black’s Law Dictionary* (10th ed. 2014); *see also* 31A C.J.S. Evidence § 3. A WPDES permit, by contrast, does not “tend to prove or disprove the existence of an[y] alleged *fact*.” Rather, it per se establishes that Ledgeview is covered by the *legal* exemptions in sections ATCP 51.18(7) and ATCP 51.20(10).

Moreover, even if the WPDES permit were “evidence,” the Board can and should still consider it. Section 93.90(4)(c) restates the traditional rule that appellate tribunals, such as the Board, generally cannot consider evidence for the first time. *See Coopman v. State Farm Fire & Cas. Co.*, 179 Wis. 2d 548, 556, 508 N.W.2d 610 (Ct. App. 1993). But that rule has an exception: appellate tribunals can consider new evidence if that evidence is susceptible to proof by judicial notice. *Mayer v. Mayer*, 91 Wis. 2d 342, 353, 283 N.W.2d 591 (Ct. App. 1979) (quoting *Afram v. Balfour, Maclaine, Inc.*, 63 Wis. 2d 702, 218 N.W.2d 288 (1974)); *cf. Edward E. Gillen Co. v. John H. Parker Co.*, 170 Wis. 2d 264, 174 N.W. 546 (1919) (announcing rule that an appellate tribunal should consider a conceded fact that occurs subsequently to the original decision below). In particular, appellate tribunals take judicial notice of “matters of record in government files,” *Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶ 11, 313 Wis. 2d 411, 756 N.W.2d 667, such as issued permits, *id.*; *see also, e.g., In re Country Side Rest., Inc.*, 2012 WI 46, ¶ 7 n.2, 340 Wis. 2d 335, 814 N.W.2d 159. Thus, the Board can and should take notice of Ledgeview’s issued WPDES permit.

In the end, refusing to consider the WPDES permit, far from violating section 93.90(4)(c), would actually violate the deliberate framework set up by the Legislature and DATCP that encourages deference to DNR on matters regulated by WPDES permits. *See supra* Parts B–C.

E. In sum, the Siting Law is intended to provide uniform regulation of livestock facility siting across the state and to foster efficiency in the permit approval process. The Board has implied power—and implied duty—to take action that effectuates the Siting Law’s purposes. At the same time, the Board is

preempted from taking action that “defeat the purpose[s]” of, and would be “contrary to the spirit of,” the Siting Law. *Adams*, 2012 WI 85, ¶ 32. The Board should exercise its implied power to consider the WPDES permit, and on the basis of that permit, reverse the Town’s decision that “the proposed expanded livestock facility violates multiple state standards” under subchapter II of chapter ATCP 51, including sections ATCP 51.18 and ATCP 51.20. To rule otherwise would defeat the purposes of, and violate the spirit of, the Siting Law.

Ultimately, if the Board upholds the Town’s denial on the basis of Reason No. 4, the Board would implicitly refuse to recognize the existence and effect of the WPDES permit. Doing so would violate sections ATCP 51.18(7) and ATCP 51.20(10), and by extension, section 93.90(2).

Town’s Reason No. 5

Relying on its authority to withdraw an approval under section ATCP 51.34(4)(b)3. for failure to comply with applicable standards in subchapter II of chapter ATCP 51, the Town denied Ledgeview’s application “because it cannot be required to issue an approval that it could revoke immediately thereafter.” (Town’s Decision ¶ 27.)

Why It’s Not Valid

A. Under the Siting Law, the Town can deny a livestock permit only for certain enumerated reasons. Reason No. 5 *is not* among them. *See supra* Reason No. 1.

B. Because section ATCP 51.34(4) relates solely to compliance with an approved permit—and not to initial approval or denial, or to the approval process—the Town cannot rely on it as a reason for denying Ledgeview’s application. *See supra* Reason No. 3.

C. Section ATCP 51.34(4) authorizes a Town to withdraw an approved permit if “[t]he livestock facility fails to comply with *applicable standards* in subch. II.” Wis. Admin. Code § ATCP 51.34(4)(b)3. (emphasis added). It is undisputed that the applicable standards here are found in sections ATCP 51.18 and ATCP 51.20. (*See supra* Reason No. 4.) Yet because it holds a WPDES permit, Ledgeview is exempt from having to separately satisfy those standards. *See* Wis. Admin. Code §§ ATCP 51.18(7), 51.20(10). In short, the WPDES permit would preclude the Town’s ability to revoke an approved permit under section ATCP 51.34(4)(b)3.—and it therefore is not a valid reason to deny a permit in the first instance.

D. The Town cannot base a *siting* permitting decision on post-decision *operational* aspects of the livestock facility. *See Adams*, 2012 WI 85, ¶ 51 & n.24; *see supra* Reason No. 2.

Town's Reason No. 6

The Town denied Ledgeview's application because "[t]he proposed manure storage facility . . . does not meet the Town's [1,320-foot] setback requirement" (Town's Decision ¶ 28.)

Why It's Not Valid

The Board has already ruled that this reason is not valid. In its decision in *Ledgeview Farms I*, the Board concluded that:

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 structure[] to the property line. The Town's ordinance in which it adopted its justification for the more stringent standards failed to include 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.

(*Ledgeview Farms I*, Concl. of Law ¶ 4.) The Board also concluded that "[t]he Town, when making a decision to approve or deny a CUP for a new or expanding livestock facility, shall not deny local approval" based on the same ordinance. (*Id.* at Order ¶ 3.)

The same ordinance was still in effect when Ledgeview filed the application before the Board now. A political subdivision can only deny an application based on an enforceable ordinance that is in effect at the time an application is *filed*:

[A] political subdivision may not disapprove or prohibit a livestock facility siting or expansion unless . . . [t]he proposed new or expanded livestock facility . . . violates a requirement that is more stringent than the state standards . . . if the political subdivision . . . [a]dopts the requirement by ordinance *before* the applicant *files* the application for approval.

Wis. Stat. § 93.90(3)(a)6.a. (emphases added). As the Town concedes in its decision, "[t]he second application, which is the subject of this decision, was initially delivered to the Town"—and hence, was *filed*, see "File," *Black's Law Dictionary* ("To *deliver* a legal document to the . . . record custodian for placement into the official record." (Emphasis added.))—"on November 5, 2018," (Town's Decision ¶ 6). The Town did not "bolster" or change its setback ordinance until December 18, 2018, (Town's Decision ¶ 28)—over a month after Ledgeview filed the current application. When Ledgeview filed the current application, then, the Town was still enforcing the setback ordinance the Board had ruled unenforceable in *Ledgeview Farms I*.

In its decision, the Town suggests that it can deny Ledgeview's application based on the "bolster[ed]" setback ordinance. (*See id.*) Regardless of when Ledgeview filed its application, the argument goes, the Town did not deem the application complete until after it updated the ordinance.

But when the application was deemed “complete” does not matter. In some places in the Siting Law, the Legislature used the word “complete” in relation to a pending application. *See* Wis. Stat. § 93.90(4). Here, by contrast, the Legislature used the word “filed.” § 93.90(3)(a)6.a. Applying well-worn statutory interpretation principles, “filed” has a different meaning from “complete.” *See Dep’t of Nat. Res.*, 2018 WI 25, ¶ 28 (quoting *Gister*, 2012 WI 86, ¶ 33) (“[W]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings.”); *see also* Scalia & Garner, *supra*, at 170 (“[W]here [a legal text] has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.”). Whereas an application’s “complete[d]” date matters under section 93.90(4), an application’s “file[d]” date matters under section 93.90(3)(a)6.a. Regardless of whether it was complete at the time, Ledgeview filed its application on November 5, 2018. The Town cannot escape the fact that its ordinance was unenforceable as of that date.

Town’s Reason No. 7

According to the Town, Ledgeview’s application fails to meet the Town’s general CUP approval criteria. (Town’s Decision ¶ 29.) Specifically, in its decision, the Town “incorporate[d] the findings and conclusions in Sections 20-24 of the Town’s June, 2018 decision.” (*Id.*)

Why It’s Not Valid

As the Town concedes, the Board has already ruled that Reason No. 7 is not valid. (*See* Town’s Decision ¶ 29 (“[T]he Siting Board concluded that the Town did not have the authority to deny the application based on general CUP approval criteria in the Town’s ordinances”)) In its decision in *Ledgeview Farms I*, the Board concluded that “[t]he Town did not have the authority to deny the siting application based on the findings in Sections 20-24 of the Town’s [June 2018] decision,” (*Ledgeview Farms I*, Concl. of Law ¶ 12), and that “[t]he Town, when making a decision to approve or deny a CUP for a new or expanding livestock facility, shall not deny local approval” for this reason, (*id.* at Order ¶ 3).

CONCLUSION

Because none of the Town’s reasons for denying Ledgeview’s application is valid under applicable law, the Board should reverse the Town’s decision and approve Ledgeview’s application for a livestock facility siting permit.

Dated: April 3, 2019

HUSCH BLACKWELL LLP
Attorneys for Ledgeview Farms, LLC

By: s/ Joseph S. Diedrich
Eric M. McLeod
Joseph S. Diedrich



February 18, 2019

VIA EMAIL AND U.S. MAIL
(jasonpansier@gmail.com)

Ledgeview Farm, LLC
c/o Jason Pansier
3875 Dickinson Road
DePere, WI 54115

RE: Ledgeview Farm, LLC
Second Application for Livestock Siting Approval

Dear Mr. Pansier:

You submitted a request to the Town of Ledgeview for a livestock siting approval and made additional insertions to that submittal through November 20, 2018. On January 4, 2019, the Town provided a request for additional information to complete your application. In a response to that request dated January 11, some, but not all, of the requested information was provided.

In particular, the Town noted that the application did not include sufficient information about the current number of animal units present on the site to allow accurate total animal unit calculations, and requested sufficient information to do so. In its response to that request, Ledgeview Farms declined to provide that information, despite the siting requirements contained in Wis. Stat. § 93.90 (3) (e) and Wis. Admin. Code § 51.06 (2) (b).

Under Wis. Stat. § 93.90 (4) (a), the Town is required to notify you that your application is complete as soon as you provide the information identified by the Town as being required to complete your application. We recognize that you dispute whether the information that you declined to share with the Town is required to complete your application. Therefore, in the interest of moving this matter forward, the Town is hereby notifying Ledgeview Farms that it will treat the application as complete under Wis. Stat. § 93.90 (4) (a), despite the fact that you declined to provide all requested information. Please note that the Town remains willing to consider the additional requested information if it is presented to the Town within sufficient time to be considered in this application review process.

Therefore, the Town will proceed with a decision on the appropriateness of this this application and the application's approvability within 90 days of the date of this letter.

3700 Dickinson Road
De Pere WI 54115
P: 920/336/3360 F: 920/336/8517
www.ledgeviewwisconsin.com



February 18, 2019

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Please note that the issuance of this completeness determination is not an acknowledgement by the Town that the application was timely or appropriately filed with the Town, and does not constitute an approval of the application or a determination that the application is approvable.

Sincerely,

A handwritten signature in cursive script that reads "Philip J. Danen" followed by the initials "SLB" written below the end of the signature.

Philip J. Danen, -Chairman
Town of Ledgerview

Enclosure

cc: Stafford Rosenbaum, LLP (via email)
Eric M. McLeod, Husch Blackwell (via email)