

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

IN THE MATTER OF LARSON ACRES, INC., Aggrieved Person v. TOWN OF MAGNOLIA, Political Subdivision	DOCKET NO. 07-L-01 DECISION
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BEFORE the Wisconsin Livestock Facility Siting Review Board:

James Holte, Chair
Andrew Johnson, Vice Chair
Robert Selk, Secretary
Francis Byerly
Lee Engelbrecht
Jerome Gaska
Bob Topel

NATURE OF THE CASE

Aggrieved Person Larson Acres, Inc. ("Larson") filed a challenge against the political subdivision Town of Magnolia ("Town") to the Wisconsin Livestock Facility Siting Board ("Board") on April 25, 2007. In the challenge, Larson alleged that the Town exceeded its authority under s. 93.90(3), Stats., in attaching certain conditions to the granting of a conditional use permit to Larson Acres, Inc. on March 27, 2007.

On April 30, 2007, under the authority of the Board and its bylaws, Board Attorney Cheryl Furstace Daniels sent a Notice of Request for Review and a Request for Certified Copy of Decision-Making Record to the Town and Larson Acres, Inc. The Request for Review included a date of June 29, 2007 for all Statements of Position to be postmarked to the Board.

On May 15, 2007, Attorney Peter McKeever sent a Notice of Appearance to the Board on behalf of 10 persons who had standing to appear before the board in this matter as owners of property located within two miles of the proposed facility.

On May 30, 2007, the Town sent the complete certified copy of the decision-making record for the Larson case. That record consisted of 97 Exhibits in 10 Volumes.

On June 28, 2007, the Board received a Request for Leave to File Brief as Amicus Curiae and Brief on Amicus Curiae signed and filed by the Wisconsin Department of Agriculture's ("Department") Division of Agricultural Resource Management ("Division").

By June 29, 2007, 22 Statements of Position had been filed by owners of property located with two miles of the proposed facility. In addition, Attorney McKeever sent a position statement on behalf of 10 of those owners.

On July 3, 2007, the Town filed a Statement of Position. On July 11, 2007, the Board received a motion by Larson to strike the Town's Statement of Position. On July 13, 2007 the Board received a statement from Larson in response to the position statements filed by the Town and some of the property owners.

On July 16, 2007, the Board received an Objection from some of the property owners living within two miles of the proposed facility to the filing of the Amicus Curiae brief submitted by the Division and a motion to strike Larson's response received July 13, 2007.

On July 16, 2007, the Board received the Town's response to Larson's Motion to Strike the Town's position Statement. The Town also requested oral argument before the Board.

On July 17, 2007, the Board received Larson's response opposing both the Motion to Strike the Amicus Brief and the Motion to Present Oral Argument. On July 18, 2007, the Board received the Town's response to Larson's responses. On July 19, 2007, the Board received Larson's response to the Town's response to Larson's response to the Town's motions.

Finally, on July 19, 2007, the Town submitted a Motion to Correct the Record to include a letter of February 13, 2007.

On July 20, 2007, the Board held a meeting, properly noticed under the Wisconsin Open Meetings Law, to review the appeal in *Larson Acres, Inc. v. Town of Magnolia*, Docket No. 07-L-01. At the beginning of the meeting, the Board reviewed all the preliminary appeals by the parties. As to the various motions concerning striking statements by the parties, the Board decided to deny all those motions and accept all statements only for this particular matter as the first case before the Board. The Board also decided to deny the motion to strike the amicus brief and accept the brief for the value it brings to the Board's discussion and decision. Finally, the Board decided to deny the request for oral argument by the Town.

Therefore, based upon the record in the matter, including the certified record submitted by the Town including the corrected additional letter, the statements of position by all the parties, and the Division's amicus brief, the Board issues the following decision.

ISSUES FOR DECISION

1. What are the siting standards under s. 93.90, Stats., by which the decision of the Town of Magnolia on March 27, 2007 on a request by Larson Acres, Inc. for a conditional use permit will be judged?
2. Has the applicant, Larson Acres, Inc., satisfied those standards?
3. Was it appropriate for the Town of Magnolia to grant the conditional use permit?
4. May a political subdivision, in granting a conditional use permit under s. 93.90, Stats., set conditions as part of the conditional use permit?
5. What are the standards by which any conditions set be judged?
6. Does the Wisconsin Livestock Facility Siting Review Board have the authority to review any challenge to conditions placed by a political subdivision on a livestock facility siting permit as to whether those conditions comply with the law?
7. For each of the challenged conditions, did the Town of Magnolia incorrectly apply the state standards under s. 93.90(2)(a), Stats., or violate s. 93.90(3), Stats.?

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.

(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 51.16 Nutrient management. (1) NUTRIENT MANAGEMENT STANDARD. (a) Except as provided in par. (c):

1. Land applications of waste from a livestock facility approved under this chapter shall comply with NRCS nutrient management technical standard 590 (September, 2005), except for sections V.A.2.b.(2), V.D., V.E. and VI.

(2) PRESUMPTION. For purposes of local approval, an operator is presumed to comply with sub. (1) if the application for local approval complies with s. ATCP 51.30.

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.

(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. On September 15, 2005, the Town of Magnolia in Rock County adopted s. 93.90, Stats., the Livestock Facility Siting Law, as part of its town zoning ordinance.
2. On May 2, 2006, Larson Acres, Inc. filed an application for local approval for an expansion of his livestock facility to a 1500 animal unit heifer facility.
3. On November 14, 2006, the Town issued a determination that the Larson application was complete under s. 93.90(4)(a), Stats.
4. On March 27, 2007, the Town granted a conditional use permit (CUP) to Larson for the expansion of a livestock facility to 1500 animal units.
5. Within that decision, the Town found that Larson's current operation of its facility had not complied with s. ATCP 51.30, Wis. Adm. Code, as to meeting the standards in subch. II, ch. 51, Wis. Adm. Code.
6. However, the record indicated Larson's application showed that Larson intended to comply with the requirements of NRCS 590 for its future expansion.
7. To overcome what the Town deemed as non-compliance within the application for the CUP, in its decision the Town prescribed the following seven conditions:
 1. *Larson shall provide the Town, within 60 days of this decision, a plan to utilize land use, farming and nutrient management practices to substantially reduce and thereafter minimize nitrogen loading to surface and ground water using the following strategies:*
 - a. *No fall spreading of manure on tile drained or upland fields on the Cook Farm until nitrate pollution is substantially reduced.*
 - b. *Crop rotation to include alfalfa on the entire Cook farm in 3-4 year rotations beginning in 2008 and continuing over a 4-year period until the entire Cook Farm has been rotated and is consistent with the current farm conservation plan. The rotation plan shall include no less than 3 years of alfalfa for every year of corn planted on each acre.*
 - c. *Increased frequency of soil testing from once every four years to once a year, focusing on phosphorus and nitrogen contents of the soil to account for residual nitrogen in calculating spreading plans for the upcoming growing season.*
 2. *Larson will exchange information with the Town concerning management practices of the Facility, including notification to the Town Chair of all changes in circumstances.*

3. *Larson will allow access for testing well water at the Facility and access for the Town to test tile lines for water quality monitoring purposes monthly, upon proper notice to the owners of the Facility unless such testing is required under the terms of a Wisconsin Pollution Discharge Elimination System Permit as issued by the Wisconsin Department of Natural Resources.*
4. *Larson will submit nutrient plans and update annually as required under WPDES to the Town of Magnolia as well as to the DNR.*
5. *Larson will comply with all provisions of the Town of Magnolia Zoning Ordinance and any other applicable federal, state, and local regulations and laws.*
6. *If water quality monitoring or testing is required under the terms of a WPDES permit as issued by the Wisconsin Department of Natural Resources, the Town shall be provided with all records and information provided by Larson Acres to the DNR.*
7. *The Town Board shall review the CUP annually to assure itself that Larson is in compliance with the permit.*

In Re: Larson Acres' Conditional Use Permit Application for a 1,500 Animal Unit Heifer Facility. (Before the Town Board of the Town of Magnolia, March 27, 2007)

8. On April 25, 2007, Larson appealed the decision of the Town to the Wisconsin Livestock Facility Siting Review Board. In that appeal, Larson challenged the setting of specific conditions 1, 2, 3, 5 and 7 in granting the permit as a violation of s. 93.90(3), Stats., and s. ATCP 51.34, Wis. Adm. Code.
9. On April 27, 2007, Board Attorney Cheryl Furstace Daniels sent a Notice of Request for Review and a Request for Certified Copy of Decision-Making Record to the Town and its attorney, with copies to Larson and his attorney, stating that the Board would take up Larson's challenge at the Board's scheduled July 20, 2007 meeting.
10. On July 20, 2007, the Board met to decide the challenge by Larson Acres, Inc. to set certain specific conditions to the CUP granted by the Town of Magnolia to Larson Acres, Inc. on March 27, 2007.

CONCLUSIONS OF LAW

1. The standards to be applied in this matter are those under s. 93.90, Stats., and ch. ATCP 51, Wis. Adm. Code, as there is nothing in the record to show the Town adopted more stringent standards in the manner required by s. 93.90(3)(ar), Stats.
2. As the Town agreed Larson's application for the CUP was complete on November 14, 2006, and the record indicated that Larson would comply with the standards under s. 93.90, Stats., and ch. ATCP 51, Wis. Adm. Code, the applicant has satisfied the standards to receive the conditional use permit.

3. Under s. 93.90, Stats, and ch. ATCP 51, Wis. Adm. Code, the Town was correct in granting Larson's permit on March 27, 2007.
4. In granting that permit, under s. 93.90, Stats., and ch. ATCP 51, the Town retains the authority to set conditions of the permit but is limited in that authority to applying only those standards under s. 93.90(2)(a), Stats., that are applicable to Larson's facility expansion.
5. Pursuant to s. 93.90(5)(a) and (b), Stats, the applicant Larson may challenge the specific conditions set forth in the Town's March 27, 2007 granting of the CUP for a 1,500 animal unit heifer facility, as incorrectly applying the state standards under s. 93.90(2)(a), Stats., or violating s. 93.90(3), Stats. Therefore, the Board has jurisdiction to hear these challenges.
6. In specifying strategies or methods that Larson is required to utilize as management practices under condition (1) in order to comply with state standards, the Town incorrectly applied the state standards under s. 93.90(2)(a), Stats, and ch. ATCP 51, Wis. Adm. Code.
7. In specifying that Larson will exchange information with the Town concerning management practices of the Facility, including notification to the Town Chair of all changes in circumstances, the Town has the authority to request information under s. ATCP, 51.34(4)(a), Wis. Adm. Code, for monitoring compliance. However, this monitoring, including requests for information, must be harmonized with s. ATCP 51.34(4)(b), Wis. Adm. Code, which speaks to withdrawing the approval or seeking other redress provided by law, for non-compliance with standards under ch. ATCP 51, subchapter II. Therefore, the information requested must be limited to information needed to monitor compliance with standards pursuant to ch. ATCP 51, subchapter II, Wis. Adm. Code.
8. In requesting that Larson allow for testing well water at the facility and access for the Town to test tile lines for water quality monitoring purposes monthly, the Town incorrectly applied the state standards under s. 93.90(2)(a), Stats., and ch. ATCP 51, Wis. Adm. Code
9. In requiring, as a condition of the permit, that Larson comply with all provisions of the Town of Magnolia Zoning Ordinance and any other applicable federal, state, and local regulations and laws, the Town exceeded its authority under s. 93.90(3)(ae), Stats.
10. In not requiring that Larson comply with the applicable state standards under s. 93.90(2)(a), Stats., as a condition of issuing the CUP, the Town did not meet the requirements for the CUP under s. 93.90(3)(ae), Stats.

11. In requiring as a condition of the CUP that the Town Board review the CUP annually to assure itself that Larson is in compliance with the permit, the Town exceeded its authority under s. 93.90(3), Stats., and s. ATCP 51.34(4)(a), Wis. Adm. Code, by including a provision in the CUP over which the applicant has no control.

ORDER

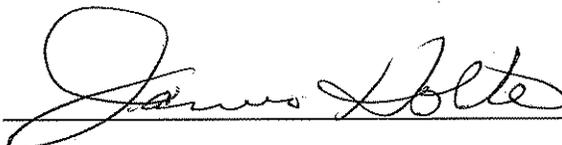
NOW, THEREFORE, IT IS ORDERED, pursuant to s. 93.90(5)(d), Stats.

1. The grant of a conditional use permit to Larson Acres, Inc. for a 1,500 animal unit heifer facility by the Town of Magnolia on March 27, 2007 is affirmed.
2. Condition #1 in the CUP specifying land use, farming, and nutrient management strategies to be utilized by Larson is reversed.
3. Condition #2 in the CUP stating that Larson will exchange information with the Town concerning management practices at the facility is affirmed but such information will be limited by law to information needed by the Town to monitor compliance with the livestock facility siting standards in s. 93.90, Stats., and ch. ATCP 51, Wis. Adm. Code.
4. Condition #3 in the CUP requiring monthly access for well water and tile lines testing is reversed.
5. Condition #4 in the CUP was not challenged and is, therefore, affirmed.
6. Condition #5 in the CUP requiring compliance with all provisions of the Town of Magnolia Zoning Ordinance and any other applicable federal, state and local regulations and laws is reversed.
7. The Town will, under s. 93.90(3)(ae), Stats., require a condition in the CUP that Larson comply with the applicable state standards under s. 93.90(2)(a), Stats.
8. Condition #6 in the CUP was not challenged and is, therefore, affirmed.
9. Condition #7 in the CUP requiring the Town Board to review the CUP annually to assure itself that Larson is in compliance with the permit is reversed.
10. The Town of Magnolia shall reissue the conditional use permit for a 1,500 animal unit heifer facility to Larson Acres, Inc. consistent with #1-9 of this Order.

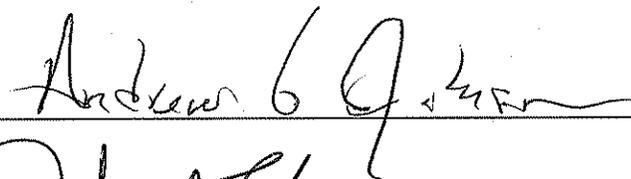
Dated this 17th day of August, 2007.

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD

James Holte, Chair



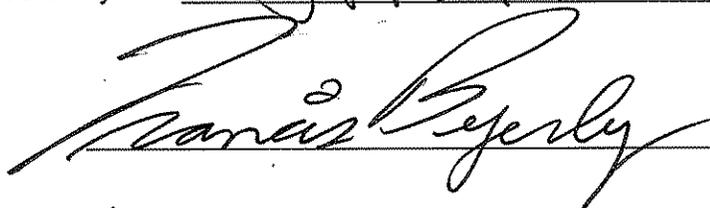
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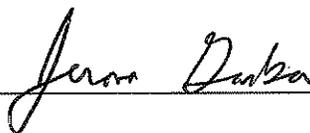
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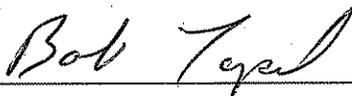
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STATE OF WISCONSIN
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<p>IN THE MATTER OF LARSON ACRES, INC., Aggrieved Person</p> <p>v.</p> <p>TOWN OF MAGNOLIA Political Subdivision</p>	<p>DOCKET NO. 07-L-01 OPINION OF THE BOARD</p>
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This is the first case to come before the Wisconsin Livestock Facility Siting Review Board under s. 93.90, Stats. The Board is very well aware of the importance to both the individual applicant, to have consistent standards to meet, as well as to the political subdivision in assuring its citizens that the applicant does comply with applicable laws and standards.

In judging the preliminary motions, involving the submission by the parties of additional position statements, the Board has allowed these submissions to stand in this case. However, in allowing these submissions, the Board is determined that this will not set precedence for future cases and will review the Board's procedures at the first available opportunity to determine how to have staff meet the procedures established by the Board in 2006.

In addition, the Board has allowed the submission of an amicus curiae brief of the Division. The Board may continue to allow such briefs in the future for assisting the Board in making its determinations. However, as the Wisconsin Supreme Court has made clear in a very recent decision, the administrative entity with authority to conduct the hearing with its final decision subject to judicial review is the entity whose interpretation of the

statute under question is given any deference by the court. *Racine Harley-Davidson, Inc. v. State of Wisconsin Division of Hearings and Appeals*, 2006 WI 86, 292 Wis.2d 549, 586-87. Therefore, in this case, the Board has been given the authority to conduct the appeals hearing and makes the final decision under s. 93.90, Stats. The board's interpretations of that statute will be the ones which will be given deference, if any, by the court.

The Board, too, denied the motion for oral arguments. This comports with the Board's bylaws in Appendix A, C.3., which permits oral argument only if requested by Board members, if they deem it necessary.

As to the Board's jurisdiction in this case generally, although the Board discussed the fact that this was a facility already built, the Board concluded that this was a request for an expansion to house up to 1,500 animal units. Therefore, Larson was correct in his right to appeal the Town's decision to the Board.

While the Board discussed at length its understanding of the Town's concerns for the well-being of its citizens and their responsibilities for enforcing other laws and rules that apply within the Town, the Board concluded that the Livestock Siting Law sets limits on a local political subdivision's authority to enforce other laws and rules in the siting process. Therefore, while the Town was correct in granting the CUP to Larson under the standards set in s. 93.90, Stats., and ch. ATCP 51, Wis. Adm. Code, the Town's authority to set conditions was equally constrained by the standards under that statute and administrative code chapter. This is particularly true because the Town had not set more stringent standards pursuant to the authority granted to them by s. 93.90(3), Stats.

In addition, because any conditions written into the conditional use permit are constrained by the terms of s. 93.90, Stats., the Board found that it must have the authority to review any conditions placed by the political subdivision on a livestock facility siting permit as to whether those conditions comply with the law. The Board is the administrative body appointed to hear appeals involving the grant or denial of a CUP by a local political subdivision and any conditions placed by the political subdivision must necessarily also comply with this statute. The language in s. 93.90(5)(b), Stats., by granting the right to challenge the political subdivision's decision in these cases to the Board, authorizes the Board to address the scope of conditions within that decision.

Each specified condition, therefore, has been judged on the basis of whether it was authorized under the state standards in s. 93.90(2)(a) applicable to the facility siting expansion in this case.

In Condition #1, the Town prescribed a limited set of specific methods for achieving the standards, whereas the standards themselves provide a full range of methods to achieve expected outcomes that balance both management and resource protection. The Town exceeded its authority by specifying which of these methods Larson was required to use.

The Board agreed Condition #2 is within the Town's authority to monitor compliance. However, the Board decided that the Town's requests are limited to only that information necessary for monitoring compliance with the law.

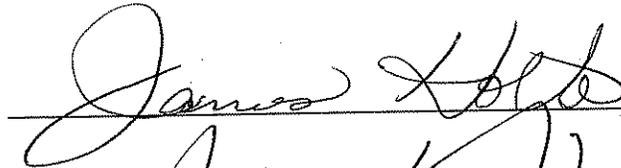
Condition #3 was reversed as being more stringent than state standards allowed. Condition #5 was similarly overbroad as to compliance but the Town had not included a required provision for compliance to be written into the CUP, pursuant to s. 93.90(3)(ae),

Stats. Finally, Condition #7 set a requirement for the Town to review the CUP which the Board deemed as outside the control of the applicant and, therefore, should not be a condition of the permit.

Dated this 17th day of August, 2007.

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD

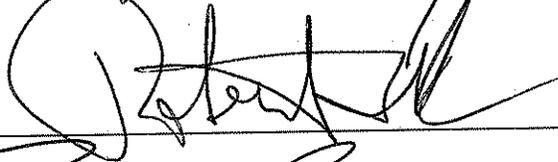
James Holte, Chair



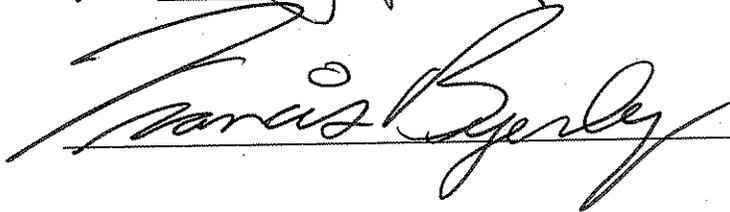
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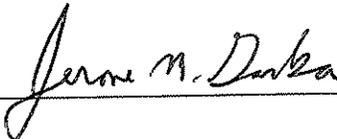
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