

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. 10-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  
Fran 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 February 10, 2010. 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 January 14, 2010. The Notice of Request for Review contained a position statement by Larson.

On February 22, 2010, 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 April 2, 2010 for all Statements of Position to be postmarked to the Board.

On March 17, 2010, the Town sent the complete certified copy of the decision-making record for the Larson case. That record consisted of 20 Exhibits. No position statement was filed by the Town nor any person who lives or owns land within two miles of the Larson facility in question.

On April 16, 2010, 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. 10-L-01.

Therefore, based upon the record in the matter, including the certified record submitted by the Town and the statement of position by Larson, the Board issues the following decision.

#### ISSUES FOR DECISION

1. Was it appropriate for the Town of Magnolia to grant the conditional use permit?
2. May a political subdivision, in granting a conditional use permit under s. 93.90, Stats., set conditions as part of the conditional use permit?
3. What are the standards by which any conditions set be judged?
4. 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 July 17, 2009, Larson Acres, Inc. filed an application for local approval for an expansion of its home farm located at 18218 W. State Road 59 in the Town of Magnolia.
2. After a hearing was held and approval was recommended by the Town Planning and Zoning Committee, the Town held public hearings on November 12 and December 17, 2009.
3. On January 14, 2010, the Town granted a conditional use permit (CUP) to Larson for the expansion of a livestock facility to 4380 animal units.
4. The Town set six specific conditions in its decision for Larson to comply with in being granted the CUP as follows:
  1. *Larson will exchange information with the Town concerning management practices of the Main Facility, including notification to the Town Chair of all changes in circumstances.*
  2. *Larson will allow access for testing well water at the Facilities and access for the Town to test surface and ground water or tile lines for water quality monitoring purposes, upon proper notice to the owners, 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.*
  3. *Larson will submit nutrient plans and update annually as required under WPDES to the Town of Magnolia and to the DNR.*
  4. *Larson will comply with all provisions of the Town of Magnolia Zoning Ordinance and any other applicable federal, state, and local regulations and laws.*
  5. *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.*

6. Access for testing tile lines shall not be effective unless and until a final decision is reached in the pending action on appeal, *Adams, et al. v. State of Wisconsin Livestock Facilities Siting Review Board, et al.*, Appeal No. 2009 AP 608, including any further appeals or proceedings on remand.

*In Re: Larson Acres' 2009 Conditional Use Permit Application For an Expansion to a 4,380 Animal Unit Facility. (Before the Town Board of the Town of Magnolia, January 14, 2010)*

5. On February 10, 2010, 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 2 and 4 in granting the permit as a violation of s. 93.90(3), Stats., and s. ATCP 51.34, Wis. Adm. Code.
8. On February 22, 2010, 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.
9. On April 16, 2010, 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 January 14, 2010.

#### 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. Under s. 93.90, Stats, and ch. ATCP 51, Wis. Adm. Code, the Town was correct in granting Larson's permit on January 14, 2010.
3. 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.
4. Pursuant to s. 93.90(5)(a) and (b), Stats, and the Board's decision in *Larson v. Town of Magnolia, Docket No. 07-L-01*, the applicant Larson may challenge the specific conditions set forth in the Town's January 14, 2010 granting of the CUP for a 4,380 animal unit 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.
5. 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.

6. In requesting that Larson allow for testing well water at the facility and access for the Town to test surface and ground water or 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.

7. In requesting 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 their authority under s. 93.90(3)(ae), Stats.

8. 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.

#### ORDER

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

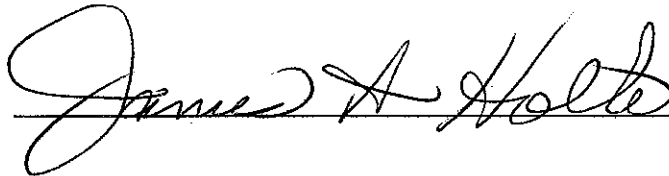
1. The grant of a conditional use permit to Larson Acres, Inc. for a 4,380 animal unit facility by the Town of Magnolia on January 14, 2010 is affirmed.
2. Condition #1 in the CUP stating that Larson will exchange information with the Town concerning management practices at the facility is affirmed but 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.
3. Condition #2 in the CUP requiring access for testing well water and testing surface and ground water or tile lines testing, upon proper notice to the owners, is reversed.
4. Condition #3 in the CUP was not challenged and is, therefore, affirmed.
5. Condition #4 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.
6. Condition #5 in the CUP was not challenged and is, therefore, affirmed.
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.



Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

STATE OF WISCONSIN  
LIVESTOCK FACILITY SITING REVIEW BOARD

James Holte, Chair



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Andrew Johnson, Vice Chair

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Robert Selk, Secretary

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Fran Byerly

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Lee Engelbrecht

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Jerome Gaska

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Bob Topel

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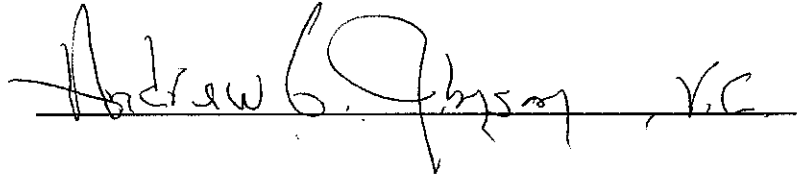
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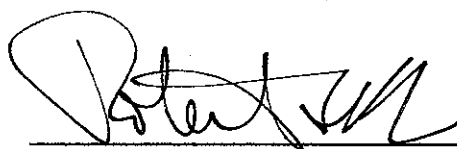
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 7 June 2010

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Lee Engelbrecht \_\_\_\_\_

Jerome Gaska \_\_\_\_\_

Bob Topel \_\_\_\_\_

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Bob Topel \_\_\_\_\_

8. The Town of Magnolia shall reissue the conditional use permit for a 4,380 animal unit facility to Larson Acres, Inc. consistent with #1-7 of this Order.

Dated this 21 day of May, 2010.

STATE OF WISCONSIN  
LIVESTOCK FACILITY SITING REVIEW BOARD

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Dated this 21st day of May, 2010.

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Jerome Gaska \_\_\_\_\_

*Jerome M. Dubs*

Bob Topel \_\_\_\_\_

Dated this 21 day of May, 2010.

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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. 10-L-01 OPINION OF THE BOARD</p>
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This case follows from an earlier case involving the exact same parties, dealing with a different facility of the applicant. That decision of the Board, *Larson Acres, Inc. v. Town of Magnolia, Docket No. 07-L-01*, set forth the reasoning that guides the decision in this matter. 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, their authority to set conditions was equally constrained by the standards under that statute and administrative code chapter. This is based upon the criteria set forth in the earlier case.

Each specified condition has been judged on the basis of whether it was incorrect under the state standards in s. 93.90(2)(a) applicable to the facility siting expansion in this case. Condition #1, while allowable as far as the Town's ability to monitoring compliance, needed to be understood as limited to requesting information pertaining to compliance with the state standards. Conditions #2 and #4 are reversed as being more stringent than state standards allowed. As in the earlier case, the Town had not included a correct provision that mirrored the requirements for compliance to be written into the CUP, pursuant to s. 93.90(3)(ae), Stats. This needs to be a part of the CUP.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

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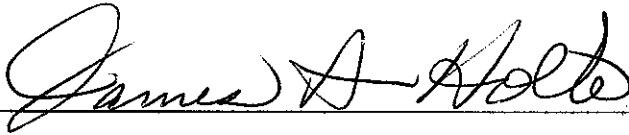
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8. The Town of Magnolia shall reissue the conditional use permit for a 4,380 animal unit facility to Larson Acres, Inc. consistent with #1-7 of this Order.

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Andrew Johnson, Vice Chair

*Andrew B. Johnson, V.C.*  
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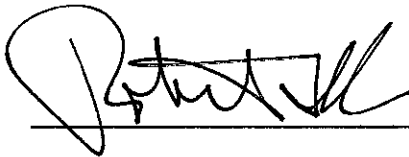
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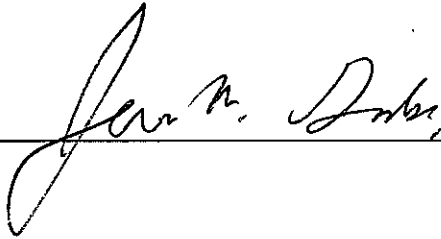
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