



Livestock Facility Siting Review Board

June 28, 2019 Minutes

Livestock Facility Siting Review Board Meeting
Department of Agriculture, Trade and Consumer Protection (DATCP)
Boardroom 106
2811 Agriculture Drive, Madison, WI

CALL TO ORDER— Bob Topel, LFSRB Chair

The meeting was called to order by Chairman Bob Topel at 10:00 am. Topel, Raymond Diederich, Lee Engelbrecht, Dr. Jerome Gaska, Scott Sand, Scott Godfrey, and Bob Selk were present. Also present were Attorney Cheryl Daniels, Richard Castelnuovo, and Chris Clayton of DATCP.

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

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

The November 30, 2018 meeting minutes were presented for approval. Engelbrecht made a motion to approve the minutes with a minor edit, seconded by Godfrey, and the motion carried.

LEDGEVIEW FARMS V. TOWN OF LEDGEVIEW, NO. 19-LFRSB-01— Cheryl Daniels, Board Attorney

The LFSRB addressed the following issues, which were identified in the DATCP memo dated May 31, 2019, including those specifically asserted by Ledgeview Farms in their request for review.

- A. By failing to cooperate with a lawful inspection of the livestock facility undertaken to verify the conditions on farm and the credibility of the information related to commitments in the application, did the Applicant's actions constitute a constructive withdrawal of its application or provide another basis for the denial of the permit?**

Daniels reviewed Issue A and the Board's authority under the livestock siting law to review the Town's decision to deny the permit. The Board asked Daniels to clarify the issue of constructive withdrawal of a siting application and whether the Board has the authority to review the Town's decision based on this issue. Daniels advised the Board that the court has jurisdiction over the issue of constructive withdrawal of a siting application.

The LFSRB also considered the following:

- a. Despite a disagreement between the applicant and the Town over the information required to determine completeness of the application, the Town decided to move forward with the decision making process, treating the application as complete and issuing a final written decision.
- b. The Town's actions demonstrate that constructive withdrawal could not form a basis for the Town's denial of the siting permit.
- c. The issue for the Board may be narrowed to "another basis for the denial of the permit," or in this case, denial based on refusing to allow inspection.
- d. The siting law does not give the Town authority to deny a siting permit based on the applicant's refusal to allow inspection, alone. See Issue G.

The LFSRB found that the applicant's refusal to allow a lawful inspection by the Town does not constitute constructive withdrawal of the application. Selk made a motion that the challenge on Issue A was upheld, seconded by Gaska, and the motion carried.

- B. May the Town deny the CUP application based on Applicant's failure to provide information that is complete, consistent or credible regarding the current number of animal units at the livestock facility or the planned number to be housed on the livestock operation as demonstrated by:**
- 1. Deliberate actions to mislead DNR to avoid a CAFO Permit?**
 - 2. Inconsistencies in the reporting of animal units in submissions to the Town for a CUP?**
 - 3. Deliberate actions to block access to accurate information by refusing to allow an inspection authorized by a warrant to determine the conditions on the farm?**

Daniels reviewed Issue B, and the Board considered the following:

- a. The Town has an interest in the number of animal units present at the farm due to its jurisdiction over livestock facility expansions.
- b. The livestock siting application requires applicants to identify the maximum number of animal units that will be kept at the facility.
- c. DATCP should consider revising the siting application to require verification of the number of animal units kept at the facility at the time the local siting ordinance was adopted.
- d. The applicant's refusal to provide the Town with the number of animal units kept at the facility goes to the issue of credibility, yet refusing to verify the number of animal units may not be sufficient, by itself, to serve as a basis for denying the permit.
- e. The fact that a judge issued a warrant in part to verify the number of animal units demonstrates the Town's lawful authority to use inspections within the framework of siting.
- f. An applicant can gain the presumption of compliance with a complete application. Although inspections sit outside the process of determining a complete application, information acquired through an inspection may be useful for verifying the complete information in the application for compliance with the standards.

The LFSRB found that the Town may not deny a siting permit based on the applicant's failure to provide the existing number of animal units. Gaska made a motion that the challenge on Issue B was upheld, seconded by Diederich, and the motion carried.

- C. Was the Town required to consider a CAFO (WPDES) in determining compliance with siting standards if the CAFO permit was not referenced in the application for local approval and issued to the Applicant after the Town's final decision to deny the siting application?**

The Board considered that the applicant did not substitute a WPDES permit for Worksheets 3, 4, and 5 in the siting application.

Selk made a motion that the challenge on Issue C was denied, seconded by Engelbrecht, and the motion carried.

- D. May the Town deny the CUP application under Wis. Admin. Code §§ ATCP 51.34(1)(b) and 51.34(4), on the grounds that Ledgeview Farms did not correctly characterize its status as a CAFO and the permits issued to the farm?**
- 1. Do misstatements in the application go to the issue of the credibility of the application, which under ATCP 51.30(1) must contain information that is credible and internally consistent?**

The Board considered that the record showed that the Town did not believe the applicant's misstatement that the facility was covered by a CAFO permit, and therefore, the issue was not relevant.

Selk made a motion that the challenge on Issue D was upheld, seconded by Godfrey, and the motion carried.



Livestock Facility Siting Review Board

E. May the Town deny the CUP application under Wis. Admin. Code § ATCP 51.34(4) on the grounds that Ledgeview Farms has violations that would warrant a revocation of a permit?

- 1. How soon must the Applicant act on commitments made in the application to install practices or perform management activities to address ongoing violations of the siting standards?**

The Board considered the following:

- Applicants submit information in an application that make commitments to achieving compliance with the standards in the siting rule.
- If a siting application meets the conditions for approval, then the application must be approved.
- The window for achieving compliance may vary by standard. There is a two-year window for constructing new or expanded livestock structures, but the siting rule does not specify a timeline for installation of proposed management practices.

Selk made a motion that the challenge on Issue E was upheld, seconded by Diederich, and the motion carried.

F. Was there sufficient evidence in the record to overcome the presumption of compliance arising from the engineer certification in Worksheet 4 that existing manure storage structures were not failing or leaking?

The Board considered that the applicant's engineer certified that the existing manure storage structure at the headquarter facility met standards and provided closure plans for two other storage structures at the facility. The Board found there to be a lack of evidence in the record to support the claim by the Town that an unspecified manure storage structure was failing or leaking.

Godfrey made a motion that the challenge on Issue F was upheld, seconded by Sand, and the motion carried.

G. Was there sufficient evidence in the record to overcome the presumption of compliance arising from the commitments in Worksheets 2 and 5 to:

- 1. Meet the odor standard by maintaining a bio-cover as an odor control practice for the proposed Heifer Site manure storage structure and implement the odor management plan?**
- 2. Prevent significant discharges of manure and process waste water into waters of the state from existing livestock structures?**
- 3. Prevent unrestricted livestock access to surface waters of the state?**

To what extent could the Town base its denial of a permit on the following factors affecting the credibility of the information relating to the Applicant's commitments to rectify continuing discharges and meet other ATCP 51 requirements:

- 1. The Applicant's history of violations of state and federal law including the ongoing violations determined by DNR in its November 14, 2018 inspection report prepared shortly after Ledgeview Farms submitted its second siting permit application?**
- 2. The refusal to provide the Town access to the farm after be served with a warrant for inspection?**

The Board considered the following:

- There was no evidence in the record to show that the proposed bio-cover does not meet the technical standard in the rule, nor was there evidence in the record to deny the permit on the basis of the other issues.
- The commitments made in the application are underpinned by the issue of credibility.

- c. A number of actions taken by the applicant demonstrate a lack of credibility, including barring the Town from inspecting the facility, submitting the application to the Town before the LFSRB issued a final decision in the last case, and an unresolved record of non-compliance with state and federal law.
- d. The issue is whether there is clear and convincing evidence in the record to show that the facility as proposed will not comply with the standards. ATCP 51.34(1)(b) requires that the information contained in a siting application be credible.
- e. The LFSRB in Ledgeview 1 found evidence in the record to support the Town's decision to deny the siting permit based on a lack of credible information in the application, and there was no evidence in the record to show that the issue of credibility had been resolved.
- f. Inspections related to livestock siting must proceed under proper authorities outside of siting law, yet inspections may be useful to the siting application process.

Godfrey made a motion that the challenge on Issue G was denied, seconded by Sand, and the motion carried.

H. Did the Town meet the criteria for adopting and enforcing the following more stringent local standards:

1. **An increased property line setback of 1,320 feet for the manure storage structure planned for the heifer site?**
2. **The general CUP conditions in Sections 20-24 of the Town's June, 2018 decision?**

The Board considered the following:

- a. Prior to submittal of the siting application on November 4, 2018, the Town had not revised its ordinance to reflect new findings of fact in support of a more stringent setback for manure storage structures. See 18-LFSRB-02 Final Decision, Conclusion of Law Number 4.
- b. During the first Ledgeview case, the Board made a decision on the issue of the general CUP conditions in Sections 20-24 of the Town's ordinance. See 18-LFSRB-02 Final Decision, Conclusion of Law Number 12.

Godfrey made a motion that the challenge on Issue H1 was upheld, seconded by Sand, and the motion carried. Diederich made a motion that the challenge on Issue H2 was upheld, seconded by Gaska, and the motion carried.

Daniels clarified that the LFSRB's decisions on the issues means that the Town's decision to deny the siting permit is upheld based on the lack of credible information contained in the application. The LFSRB stated that the applicant may remedy these issues, but is required to reapply with a new application for a livestock siting permit from the Town.

The LFSRB decided to schedule a telephonic meeting on July 12th at 10am to finalize the decision and elect officers. The Board agreed to review the draft siting rule and bylaws at a meeting in fall.

ADJOURN

Engelbrecht moved to adjourn the meeting, seconded by Selk, and the motion passed. The meeting ended at 1:30 p.m.

Respectfully submitted,

Robert Selk, Secretary

Date: 7.18.2019

Recorder: CC