

HUSCH BLACKWELL

Eric M. McLeod
Partner

33 E. Main Street, Suite 300, P.O. Box 1379
Madison, WI 53701-1379
Direct: 608.234.6056
Fax: 608.258.7138
Eric.McLeod@huschblackwell.com

July 31, 2018

VIA E-MAIL

Livestock Facility Siting Review Board
c/o Wis. Dept. of Ag. Trade and Consumer Protection
2811 Agriculture Drive, PO Box 8911
Madison, WI 53708-8911

Re: Ledgeview Farms, LLC v. Town of Ledgeview, Docket No. 18-LFSRB-02

Dear Livestock Facility Siting Review Board,

The purpose of this letter is to address matters that are central to Ledgeview Farms' Request for Review in the above-referenced matter. Specifically, Issues 2 and 3 concern the Town of Ledgeview's application of local ordinance standards that are more stringent than the state standards contained in the Siting Law. The Town adopted amendments to its Ordinance purporting to impose a more stringent set back under §§ 135-85(D) and 135-226(B)(2), and require a construction performance bond under § 135-232. The Town denied Ledgeview Farms' application on the basis of these more stringent standards.

In its Request for Review, Ledgeview Farms contends that these more stringent standards may not be applied here, because these standards fail to comply with the requirements in the Siting Law for adopting more stringent local standards. Pursuant to Wis. Stat. § 93.90(3)(a)6., a political subdivision may disapprove an application on the basis of more stringent local standards, "if the political subdivision does all of the following: **a.** Adopts the requirement by ordinance before the applicant files the application for approval [and] **b.** *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.*" (Emphasis added).

The Siting Law expressly allows for an aggrieved party to request review of a political subdivision's decision that is based on the application of more stringent local standards. Pursuant to Wis. Stat. § 93.90(5)(b), "[a]n aggrieved person may challenge the decision of a political subdivision on an application for approval on the grounds that the political subdivision

... violated sub. (3)[.]” As referenced above, Wis. Stat. § 93.90(3) sets forth the uniform state requirements that a political subdivision must follow in establishing more stringent local standards. Failure to comply with those uniform state requirements in promulgating more stringent local standards necessarily means that those local standards may not be applied to a siting application and, by applying them, a political subdivision has “violated sub. (3).”

Issues 2 and 3 in Ledgeview Farms’ Request for Review outlines the Town’s violation of sub. (3). Those matters are further addressed in a letter Ledgeview Farms submitted to the Town on May 25, 2018. That letter is a part of the record the Town has provided to Ledgeview Farms and, we presume, will be included in the record supplied to this Board. For the Board’s convenience, a copy of Ledgeview Farms’ May 25th letter is enclosed herewith.

However, the record we have received from the Town is incomplete as it fails to include the third-party sources that constitute the findings of fact that form the purported basis for the Town’s adoption of more stringent standards in Ordinance No. 2017-13. (A copy of the Town’s Ordinance No. 2017-13 is included with this letter for the Board’s convenience.) Specifically, Town Ordinance No. 2017-13 provides that the “regulations and standards created by the Town are based upon the following reasonable and scientifically defensible findings of fact which are adopted and incorporated herein by reference[.]” (Ord. No. 2017-13, p. 4). The Ordinance then references the following third-party sources:

1. The Report of the Livestock Facility Siting Technical Expert Committee Recommendations, dated December 21, 2010;¹
2. A two-year study by the Wisconsin Department of Agriculture, Trade and Consumer Protection and the Wisconsin Department of Natural Resources entitled “Final Report On Wisconsin’s Dairy And Livestock Odor And Air Emission Project,” dated September 2009;
3. An article in the July 1, 2001 Appraisal Journal, pages 301 — 306, titled, “Concentrated Animal Feeding Operations and Proximate Property Values” by John A. Kilpatrick;
4. A University of Minnesota Extension publication written by Larry Jacobson, David Schmidt, and Susan Wood, “Offset Odor From Feedlots Setback Estimation Tool;”
5. A Purdue University project, presented by the Purdue Agricultural Air Quality Laboratory, “Odor Based Setbacks;”

¹ The Ordinance refers to this report dated December 21, 2010. Ledgeview Farms submitted a public records request to the Town of Ledgeview requesting all the third-party sources incorporated by reference into the Ordinance. In response, the Town of Ledgeview provided nine of those sources, plus a “Livestock Facility Siting Four-Year Review: Report and Recommendations from the Technical Expert Committee” dated September 22, 2015. Ledgeview Farms thus does not have the report dated December 21, 2010.

6. A research article by Susan S. Schiffman, Clare E. Studwell, Lawrence R. Landerman, Katherine Berman, and John S. Sundy, “Symptomatic Effects of Exposure to Diluted Air Sampled from a Swine Confinement Atmosphere on Healthy Human Subjects,” Volume 113, Number 5, Environmental Health Perspectives, pages 567-576, (2005);
7. A research mini-monograph by Kelley J. Donham, Steven Wing, David Osterberg, Jan L. Flora, Carol Hodne, Kendall M. Thu, and Peter S. Thorne, “Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations,” Volume 115, Number 2, Environmental Health Perspectives, pages 317-320 (2007); and
8. A study by Steven J. Taff, Douglas Tiffany, and Sanford Weisberg, “Measured Effects of Feedlots on Residential Property Values in Minnesota: A Report to the Legislature,” University of Minnesota Staff Paper Series (July, 1996).

In other words, by incorporating them by reference the foregoing third-party sources are a part of the Town’s Ordinance No. 2017-13. These third-party sources *are* the Town’s findings of fact. Yet, these third-party sources are not included in the record.

To evaluate whether the Town’s more stringent standards are based on “reasonable and scientifically defensible findings of fact that clearly show that the requirement[s] [are] necessary to protect public health or safety[,]” the Board must actually have those “findings of fact” that purportedly support the Town’s adoption and application of those local standards. The Town has failed to include these materials either as part of Ordinance No. 2017-13 or as part of the record. Accordingly, enclosed with this letter are nine of the above-referenced materials that the Town contends support its adoption of the more stringent set back standard and the performance bond requirement, plus the September 22, 2015 report that the Town of Ledgeview provided to Ledgeview Farms, which was never adopted as a finding of fact.

In the alternative, even if these materials were not included as part of the Board’s review in this matter, none of the purported “findings of fact” set forth in the text of Ordinance No. 2017-13 constitute findings that the Town’s more stringent standards are necessary to protect public health or safety in the Town of Ledgeview. Indeed, none of these third-party sources referenced in the Ordinance relate to the Town of Ledgeview. These “findings of fact” are clearly insufficient to justify the adoption of more stringent local standards.

A central purpose of the legislature’s creation of this Board was to provide an efficient and comprehensive administrative review of a political subdivision’s decision on a livestock siting application. Where such a decision is based on more stringent local standards promulgated pursuant to the requirements of Wis. Stat. § 93.90(3), a meaningful review by this Board must include a determination of whether the political subdivision complied with the promulgation requirements.

Best regards,

A handwritten signature in dark ink, appearing to read "Eric M. McLeod", written in a cursive style.

Eric M. McLeod

Enclosures