

# 2020 Town Law Conference

## Local Control of Siting and Expansion of Large Livestock Agriculture Operations – Sixteen Years of Livestock Siting Law Lessons

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# Local Control of Siting and Expansion of Large Livestock Agriculture Operations

## *Sixteen Years of Livestock Siting Law Lessons*

### 2020 TOWN LAW CONFERENCE

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#### WHAT IS THE LIVESTOCK SITING LAW?

1. **Wis. Stat. § 93.90**

A. The livestock siting law imposes *restrictions on local government control* of the siting and expansion of large livestock facilities.

- Applies to towns, counties, villages, and cities.

B. A political subdivision *may not disapprove or prohibit* a livestock facility siting or expansion unless one of a specified list of statutory conditions are met<sup>1</sup>

**ALL farms, regardless of size:**

- The site is located in a zoning district that is not an agricultural zoning district.
- The site is located in an agricultural zoning district in which the proposed new or expanded livestock facility is prohibited, *subject to [Wis. Stat. § 93.90(3)](b) and (c).*
  - Paragraph (b) - a political subdivision may not prohibit a type of livestock facility in an agricultural zoning district *based on number*

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<sup>1</sup> Other appropriate reasons for denial of a siting application not addressed in this presentation include restrictions related to shoreland zoning, floodplain zoning, erosion and stormwater, wetlands, or building, electrical, or plumbing codes. A siting application may also be denied under a qualifying local ordinance that existed prior to the enactment of the siting law.

*of animal units* if livestock facilities of that type with *fewer animal units* are allowed in that zoning district, unless the political subdivision also has an agricultural zoning district in which livestock facilities of that type are permitted or conditional uses *without respect to number of animal units*.

- Paragraph (c) – a political subdivision may not enact or enforce a zoning ordinance with a category of agricultural district in which *livestock facilities are prohibited* unless the political subdivision *bases that prohibition on reasonable and scientifically defensible findings of fact, adopted by the political subdivision, that clearly show that the prohibition is necessary to protect public health or safety*.

**Farms with 500 animal units or more:**

- The facility violates a state standard under [Wis. Stat. §93.90](2)(a).
  - The facility violates a more stringent local requirement, adopted by ordinance before the applicant is filed, and based 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*.
- C. These statutes specify required process and timelines for application review and the local government’s decision on an application.
- Decision standard: If an applicant complies with information submission requirements in DATCP rules and 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.

**2. Wis. Admin Code ch. ATCP 51**

- A. DATCP is required to adopt “rules specifying standards for siting and expanding livestock facilities.” [Wis. Stat. § 93.90(2).]
- B. In developing these rules, DATCP shall consider whether the standards are:
- Protective of public health or safety.
  - Practical and workable.
  - Cost-effective.
  - Objective.

- Based on available scientific information that has been subjected to peer review.
- Designed to promote the growth and viability of animal agriculture in this state.
- Designed to balance the economic viability of farm operations with protecting natural resources and other community interests.
- Usable by officials of political subdivisions.

C. DATCP has promulgated the state standards required under Wis. Stat. § 93.90(2)(a) in subchapter II of ATCP 51. These standards include regulations regarding structures, odor and air emissions, nutrient management, waste storage facilities, and runoff management.

D. Subchapter III of ATCP 51 includes required process, notice, timelines, and approval standards.

- A political subdivision *shall grant* a siting application if application requirements are met and “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.”
- A siting approval is conditioned on the operator’s compliance with [Wis. Admin Code ch. ATCP 51]subch. II and representations made in the application for approval.
- A political subdivision may monitor compliance and *may withdraw* an approval, or seek other legal remedies, if the operator materially misrepresented relevant information in the siting application, fails to honor relevant commitments made in the application, or fails to maintain compliance with the standards in [Wis. Admin Code ch. ATCP 51]subch. II.

**3. Livestock Facility Siting Review Board [Wis. Stat. §§ 15.135 and 93.90(5)]**

A. Seven-member quasi-judicial body attached to DATCP

B. Appeals to the Siting Board may be made by a limited group of defined “aggrieved persons.”

C. NOT the exclusive remedy for a challenge to a local decision on a siting application.

D. Grounds for a challenge to the Siting Board – “the political subdivision incorrectly applied state standards under [Wis. Stat § 93.90](2)(a) (promulgated

under Wis. Admin. Code ch. ATCP 51) **OR** the political subdivision violated the requirements described in Section 1.B. above.

- E. Siting Board process – the Board “shall determine whether the challenge is valid” and shall make its decision without deference to the decision of the political subdivision and based only on the evidence in the record.
- F. The decision of the board is binding on the political subdivision, unless successfully appealed.
- G. Appeals of Siting Board decisions are to the circuit court. Review is on the record.

## **WHY DID THE LEGISLATURE CREATE THE SITING LAW?**

“[Wis. Stat. § 93.90] is an enactment of statewide concern for the purpose of providing *uniform regulation* of livestock facilities.”

## **HISTORY OF INTERPRETATIONS**

For as long as this law has been in place and as many large farms have been built or expanded since its enactment, there has been little caselaw or Siting Board action.

### **1. *Adams v. State*, 2012 WI 85**

- The only reported cases on the livestock siting law.
- The Supreme Court ruled strongly in favor of the applicants, Larson Acres, and against the Town of Magnolia.
- The siting law preempted the Town's actions, the Town did not adopt the required scientific findings needed to support more stringent standards, and the Siting Board had the authority to modify individual improper conditions the Town's approval.

### **2. Siting Board Decisions**

- Only 14 formal Siting Board decisions in 16 years, including:
  - Five decisions in which the Siting Board, at least in part, determined that it did not have review authority over the filed challenges or the challenge had become moot.
  - Four decisions in which the Siting Board invalidated certain conditions in a local *approval* and either remanded the case back to the local government or ordered that the permit be issued as modified.

- Two decisions where the Siting Board invalidated certain conditions in a local *denial* and upheld the denial.
- Three decisions in which the Siting Board upheld local government *approval* of a farm's application under a challenge by third parties.

## **FAILED ADMINISTRATIVE RULE AND STATUTORY REVISIONS**

1. Failed efforts to change ATCP 51 were made in the last session of Gov. Walker's tenure, and last year under Gov. Evers.
  - Both proposals included some significant modifications.
  - \$1,000 cap on local application review fees was proposed to be removed.
2. Assembly Bill 894/Senate Bill 808
  - Failed to pass before the end of the regular legislative session.
  - Major effort by agriculture groups and local government associations to compromise on cost control and other issues.
  - Would have re-shaped the role of local governments in the livestock facility siting process by providing more application review responsibility to DATCP while leaving local zoning authority intact.
  - Might be resurrected next legislative session?

## **REMAINING CONFUSION AND UNCERTAINTY**

1. Vague terms and concepts in the siting law create uncertainty.
2. Clarity needed for local governments to opt to use softer touch zoning methods that are not as disruptive to farmers.
3. How does/should a local government impose more stringent standards?
4. What administrative rule or statutory changes are on the horizon?
5. Will local governments that feel forced to approve large farms simply revoke an approval due to minor violations?
6. What is the appropriate scope of Siting Board review?