

Agribusiness Alert: Wisconsin Court Rides Herd on Town's Attempt to Regulate Livestock Operation

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In a victory for agricultural interests, the Wisconsin Supreme Court (the "Court") prevented local governments from imposing conditions on new or expanding livestock operations except as authorized by the state's livestock facilities siting law. (See *Adams v. State Livestock Facilities Siting Review Bd.*, No. 2009AP608, 2012 Wisc. LEXIS 381 (Wis. July 11, 2012) ("*Adams*").) The "long and arduous" saga in *Adams* began in May of 2006, when Larson Acres, Inc. ("Larson") applied for a Conditional Use Permit ("CUP") from the Town of Magnolia ("Town") to expand its livestock operation by 1,500 animal units.

The Town's Amended Ordinance: Three weeks later, the Town revised and expanded its water quality zoning ordinance. The modified ordinance prohibited discharges that might contribute to an exceedance of several state and federal water laws that had not previously been identified in Magnolia's laws. The Town also expanded the ordinance to include laws applying to groundwater, drinking water, and navigable waters, from laws applying only to "navigable waters."

The Prior Proceedings: As to Larson's CUP application, the Town persisted for some time in claiming that the application was insufficient. Ultimately, the Town did accept the application which then received a hearing before the Town Board.

At the Town Board hearing, expert testimony and reports were presented on behalf of proponents and opponents of the CUP application. Their primary focus was whether alleged water quality issues in the local stream and Town drinking water were affected by the Larson livestock operations. Following this hearing, the Town approved Larson's CUP in late March of 2007. However, the CUP imposed seven conditions on Larson, allegedly designed to protect the Town's ground and surface waters. These included providing the Town a plan to reduce nutrient loading to ground and surface waters by crop rotation, conducting more frequent soil testing, and not performing land applications of manure in the fall. The conditions also required Larson to provide access to the livestock facility so that the Town could test water wells and tile lines located there.

Larson appealed to the State Livestock Facilities Siting Review Board ("Siting Board") challenging the Town's CUP conditions. When Larson won before the Siting Board, the Town appealed to the Circuit Court. Appeals followed to the Wisconsin Court of Appeals and ultimately to the Wisconsin Supreme Court.

The Outcome. Six years after applying for the CUP, the Court ruled in Larson's favor, finding that the Siting Law preempts local governments from permitting livestock farm operations in a manner inconsistent with its provisions. The Court also concluded that the Town violated the Siting Law. Finally, the Court empowered the Siting Board to modify the CUPs of local governments.

The Wisconsin Siting Law. The "Siting Law", passed in 2004 (Wis. Stat. §93.90), created a uniform application process for obtaining livestock farm permits from local governments, and it established the Siting Board to adjudicate siting disputes. The Siting Law also set forth uniform standards for livestock operation permits, and required local governments to approve CUPs for livestock facilities, with eight narrow exceptions. Pursuant to the Siting Law, the Wisconsin Department of Agriculture, Trade and Consumer Protection promulgated rules for the new permitting process in 2006. See Wis. Adm. Code Ch. ATCP 51 ("ATCP 51"). Larson's permit application was filed the day after these rules became effective.

The Court's Analysis. Adams begins with the premise that Wisconsin's "home rule" doctrine, expressed in its Constitution, gives political subdivisions authority over their local affairs and their government. Nevertheless, state legislation can limit the home rule doctrine. The Court observed that state law may be preemptive on matters of statewide concern, and to a lesser extent, on matters involving a combination of statewide and local concerns. Livestock facility siting, according to Adams, is a "mixed bag" of statewide and local concerns.

To evaluate whether state law preempts local law in this "mixed bag" context, the Court applied the "Anchor test." (See *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 355 N.W.2d 234 (Wis. 1984)). Under the Anchor test, if any one of the following four factors applies, state law preempts local law:

1. has the legislature expressly withdrawn power of local government to act;
2. do the local government's actions conflict with the legislation;
3. do the local government's actions defeat the legislative purpose; or
4. are the local government's actions contrary to the spirit of the state law?

In Adams, the Court only needed to consider the first of these factors. It found that under the plain language of the Siting Law, the Wisconsin legislature expressly withdrew the power of local governments to act in a manner contrary to that law.

The Court next evaluated the Town's actions and found them inconsistent with the Siting Law. Under the Siting Law, CUP conditions based on local laws cannot be imposed on an applicant, unless such laws are enacted before the CUP application is filed and are supported with reasoned factual findings. Here, the Town failed to include reasonable and scientific findings to support the revised ordinance it enacted, and it passed its ordinance amendments three weeks after Larson's CUP application was filed. The Town argued that it



had conducted fact findings by implicitly adopting the facts used by the Wisconsin Department of Natural Resources ("WDNR") to justify WDNR's own state standards. The Court rejected this argument because the Siting Law requires local governments to engage in independent fact-finding when passing laws designed to avoid the state siting standards.

Finally, the Court authorized the Siting Board to modify CUPs to conform to the Siting Law and its rules. A lower court in the proceedings had ruled that the Siting Board could approve or reject—but not modify—the local CUPs, and must remand them to local governments for further proceedings. The Adams Court disagreed; to limit the Siting Board's powers in this manner was an inefficient use of government resources. It seemed absurd to the Adams Justices that a farmer who prevails before the Siting Board should be forced to start the application process over because the local forum erred in its initial decision.

Conclusion. While questions remain on the full extent of local governments' authority under the Siting Law, the Adams decision will help promote a robust agricultural economy in Wisconsin. It allows livestock farm operators to develop new and expanded operations under a regulatory framework that balances the interest of the environment with economic growth. In the wake of Adams, Wisconsin counties, cities, and townships cannot pass laws diverging from the standards imposed by the Siting Law without reasoned and scientific fact-finding that occurs before a livestock CUP application is filed.

Gray Plant Mooty is a full-service law firm with specialized practices in agribusiness and environmental law. Contact Nancy Quattlebaum Burke or Jeffrey Peterson if you have any questions regarding this alert.

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