

Midwest Environmental
ADVOCATES
pro bono publico

February 4, 2002

Mr. Richard Castelnovo
Department of Agriculture, Trade, and Consumer Protection
2811 Agriculture Dr.
PO Box 8911
Madison, WI 53708-8911

RE: COMMENTS ON THE THIRD DRAFT OF THE MODEL LIVESTOCK
ORDINANCE ADVISORY COMMITTEE GUIDELINES AND SAMPLE
ORDINANCE PROVISIONS

Dear Mr. Castelnovo:

Midwest Environmental Advocates, Inc. (MEA) is a 501(c)(3) nonprofit environmental law center. MEA is pleased to have the opportunity to comment on the Third Draft of the Model Livestock Ordinance Advisory Committee Guidelines and Sample Ordinance Provisions.

I would like to take the opportunity to thank DATCP and the Advisory Committee for considering our previous comments to the Model Ordinance and Guidelines. We were encouraged to find that DATCP modified the Guidelines to provide a more balanced discussion of conditional use permits.¹ Relatedly, we were pleased to note that DATCP concluded from its survey of livestock ordinances that local governments rarely use their discretion to deny permits for livestock operations. We were also pleased that DATCP tempered the section on setbacks to suggest that setbacks may be measured from property lines rather than structures.² Overall, the Guidelines have come a step closer to providing helpful information to local governments as they develop livestock zoning controls.

¹ DEPARTMENT OF AGRICULTURE, TRADE, AND CONSUMER PROTECTION, LOCAL PLANNING AND REGULATION OF LIVESTOCK OPERATIONS, THIRD DRAFT, 14-16 (2002) (*hereinafter* DATCP Model Ordinance Guidelines, at 14-16).

² *Id.* at 16.

Our comments below focus on points in which the Guidelines should more accurately or completely describe the authorities and limitations on local governments enacting livestock controls.

COMMENT 1

DATCP position: DATCP has not clearly provided a discussion of possible bans on livestock operations within a jurisdiction, despite meeting minutes reflecting that committee members have requested it.

MEA's comment: According to the committee's request, DATCP should include a brief discussion of the legal ramifications of banning livestock operations of certain sizes. Such information would be useful guidance to local governments developing livestock controls.

Discussion

In the minutes to the October 30, 2001 Model Livestock Ordinance Advisory Committee, meeting participants stated that they desired a more positive discussion of banning livestock facilities. The Guidelines should include this discussion. It may provide useful guidance to local governments seeking to develop livestock controls.

It is unlikely that a local government can entirely prohibit a use or class of uses.³ As a result, an outright ban on livestock operations of all sizes would be vulnerable to challenge and, in any event, unwise. However, a local government may have broad authority to limit the size of operations within its boundaries based on soil and water conservation needs if it has studied those impacts from large livestock operations.⁴

Further, although there is no precedent in Wisconsin for ordinances setting direct limits on livestock operation sizes, these limits have been imposed in conditional use permits.⁵ Additionally, the Minnesota Court of Appeals recently upheld a local feedlot ordinance capping the number of animal units at feedlots in a Minnesota township.⁶ The court held that because the town had relied on detailed studies conducted prior to enacting the ordinance, its enactment was not arbitrary or capricious.⁷ This case may provide guidance to Wisconsin local governments seeking to limit the size of animal feeding operations.

³ *Town of Hobart v. Collier*, 87 NW2d 868 (Wis. 1958) (zoning entire town as residential to exclude salvage yard).

⁴ WIS. STAT. CH. 92.

⁵ See Spring Grove Dairy Conditional Use Permit, Green County Board of Adjustment.

⁶ *Altenburg v. Bd. of Supervisors of Pleasant Mound Township*, 615 NW2d 874 (Minn. App. 2000).

⁷ *Id.* at 881.

COMMENT 2

DATCP/DNR position: DATCP and DNR have relied on an informal Department of Justice opinion stating that Wis. Stat. 92.15 requires that any local zoning ordinance, regardless of the basis of its statutory authority, is subject to DNR or DATCP review if it has the effect of requiring a livestock operation to exceed standards under §281.16(3).

MEA's comment: To the extent that the Guidelines will address §92.15, DATCP and DNR should carefully and completely describe the purpose and boundaries of that provision as a source of guidance for local governments.

Discussion

The meeting minutes reflect that Mr. Kurtz, Chief Legal Counsel to the DNR, stated that any zoning ordinance or regulation, regardless of statutory authority, would be subject to review under §92.15. To the extent that the Guidelines will address this interpretation of §92.15, the Guidelines should carefully describe the purpose and limitations of that provision. MEA cautions against merely excerpting that portion discussed in the meeting minutes, as it may intimidate towns from enacting zoning controls if they believe that their authority to do so has been severely limited.

For example, the Guidelines should make clear that §92.15 only applies to “livestock operations” as they are defined under 92.15(1)(a). This definition is limited to “a feedlot or other facility or a pasture where animals are fed, confined, maintained, or stabled.”⁸ As a result, an ordinance which limits or restricts offsite manure spreading would not be subject to review under §92.15 because it is not a regulation of the “feedlot or other facility...” Likewise, an ordinance requiring a crop farmer who spreads manure as fertilizer to maintain vegetative buffer strips would also not fall within §92.15’s reach.⁹ As a result, these local ordinances would not be subject to review.

Second, the Guidelines should make clear that §92.15 applies only to state water quality regulation under §281.16(3), not nuisance odors or other problems created by large livestock operations. For example, a manure storage ordinance limiting the size of manure pits, the timing and frequency of manure spreading, or requiring the installation of best management practices to control nuisance odors would not fall within 92.15’s reach because they are not standards under §281.16.

Third, the Guidelines should reflect that the DNR has interpreted §92.15 to be inapplicable to ordinances which exceed the standards in §281.16 and were in

⁸ WIS. STAT. §92.15(1)(a).

⁹ Although the Wisconsin Court of Appeals has held that the DNR has authority to regulate off-site manure spreading, the basis for its holding was Wis. Stat. Ch. 283, not Ch. 281. See *Maple Leaf Farms v. Wisconsin Department of Natural Resources*, 633 NW2d 720 (Wis. App. 2001). Midwest Environmental Advocates

existence prior to the effective date of proposed Ch. NR 151.¹⁰ As a result, the DNR has not interpreted §92.15 to require local governments to alter or amend their ordinances to conform to the requirements in Ch. NR 151 as it relates to livestock operations.

COMMENT 3

DATCP position: The Guidelines imply that local governments have very limited discretion in developing zoning controls and disposing of conditional use permits.

MEA's comment: MEA recommends that the guidelines contain a separate section discussing the level of discretion local governments are permitted to exercise in making administrative/quasi-judicial or legislative decisions.

Discussion

The Guidelines would be greatly enhanced by a section describing the discretion afforded local governments in making land use decisions. Currently, the Guidelines imply that local governments have very limited discretion in developing zoning controls and disposing of conditional use permits.

First, DATCP states that a landowner should be allowed to “put a property to a use covered by the conditional use permit if the landowner meets certain conditions.”¹¹ However, a local government is not limited to the specific standards articulated in the ordinance, but can rely on more general “public health, safety, and welfare” concerns.¹²

Second, DATCP states that in order to avoid arbitrary actions, local governments “should set clear standards for conditional use permits and follow basic procedures to ensure fairness in reviewing permit applications.”¹³ All local governments should be aware that a court will uphold a final decision on a conditional use permit as long as the local government has a reasonable basis for it, and the decision was not arbitrary or oppressive. More recently, the Wisconsin Court of Appeals has stated that a denial to rezone property must “shock the conscience” and not merely be irrational or arbitrary.¹⁴ Although local governments should not act unfairly, they are granted considerable discretion under the law.

¹⁰ Wisconsin Department of Natural Resources, *Proposed NR §151.096 (2002)*.

¹¹ DATCP Model Ordinance Guidelines, at 13, *citing State ex rel. Skelly Oil Co. v. Common Council*, 207 NW2d 585, 587 (Wis. 1973).

¹² *Edward Kraemer & Sons*, 515 NW2d 256, 260 (Wis. App. 1994), *distinguishing State ex rel. Skelly Oil. Co.*, 207 NW2d at 587.

¹³ DATCP Model Ordinance Guidelines, at 14.

¹⁴ *Eternalist Foundation, Inc. v. City of Platteville*, 593 NW2d 84, 91 (Wis. App. 1999).

Likewise, legislative functions such as development and enactment of an ordinance are also granted discretion by reviewing courts.¹⁵ Specifically, an ordinance or action is only unconstitutional when there is “no legitimate purpose and is arbitrary and unreasonable, having no substantial relationship to public health or safety.”¹⁶ Local governments have considerable freedom and MEA recommends that the Guidelines reflect that principle.

COMMENT 4

DATCP’s position: Vague standards in disposing of conditional use permits lead to arbitrary results and raise due process and notice issues.

MEA’s comment: The Guidelines should recognize that conditional use permit denials in Wisconsin have been upheld on the basis of very general language such as compatibility with “public health, welfare, and morals” or the statement of purpose in an ordinance.

DATCP similarly raises concerns about “vague standards” in deciding conditional uses.¹⁷ Specifically, DATCP states that “[i]t is important for ordinances to precisely spell out the set of standards for granting a conditional use permit.”¹⁸ Further, DATCP states that vague standards present “a problem for landowners who have a right to know how zoning restrictions affect the use of their property.”¹⁹

Conditional use permit denials in Wisconsin have been upheld on the basis of very general language such as compatibility with “public health, welfare, and morals” or the statement of purpose in an ordinance.²⁰ This is despite that the more specific criteria in the ordinance may have been met by the applicant.²¹

Relatedly, DATCP suggests that the more general criteria lead to “improper” decisions. Although zoning decisions may be made for improper reasons, more general permit criteria are not necessarily the reason. These criteria ensure that the proper degree of flexibility be afforded to local governments and that decisions reflect the legitimate concerns raised by the community.²² The “public health, welfare, and morals” language would be superfluous if a local government were not allowed to consider it in disposing of a conditional use permit.

¹⁵ *Willow Creek v. Town of Shelby*, 611 NW2d 693, 703 (Wis. 2000).

¹⁶ *Id.*

¹⁷ DATCP Model Ordinance Guidelines, at 15.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Edward Kraemer & Sons*, 515 NW2d at 260. See also *Town of Grand Chute v. U.S. Paper Converters*, 600 NW2d 33 (Wis. App. 1999) (town ordinance need only be specific enough to give reasonable notice to developer of general areas of inquiry).

²¹ *Kraemer & Sons*, 515 NW2d at 256.

²² See *Weber v. Town of Saukville*, 562 NW2d 412, 416, 421, n.12 (Wis. App. 1997).

CONCLUSION

In summary, MEA makes the following comments:

1. Per the committee's request, DATCP should include a brief discussion of the legal ramifications of banning livestock operations of certain sizes because such information would be useful guidance to local governments developing livestock controls.
2. To the extent that the Guidelines will address §92.15, DATCP and the DNR should carefully and completely describe the purpose and boundaries of that provision as a source of guidance for local governments.
3. MEA recommends that the guidelines contain a separate section discussing the level of discretion local governments are permitted to exercise in making administrative/quasi-judicial or legislative decisions.
4. The Guidelines should recognize that conditional use permit denials in Wisconsin have been upheld on the basis of very general language such as compatibility with "public health, welfare, and morals" or the statement of purpose in an ordinance.

Thank you again for the opportunity to comment on the Third Draft of the Model Livestock Ordinance Advisory Committee Guidelines and Sample Ordinance Provisions.

Sincerely,

Andrew C. Hanson, Attorney
Midwest Environmental Advocates, Inc.