

NO. A16-1099

State of Minnesota
In Court of Appeals

Lowell Trom, et al.,

Appellants,

vs.

County of Dodge, et al.,

Respondents,

Masching Swine Farms, LLC,

Respondent.

**BRIEF OF AMICI CURIAE
MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY,
ENVIRONMENT AMERICA, d/b/a ENVIRONMENT MINNESOTA,
AND FOOD & WATER WATCH**

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INTRODUCTION AND INTEREST OF THE AMICI CURIAE¹

On December 11, 2014 the Dodge County Planning Commission (“Commission”) and Board of Commissioners (“Board”) held specially arranged sessions to reapprove a feedlot conditional use permit (“CUP”) application submitted by Masching Swine Farms, LLC (“MSF”). AR 884-971, 981-85. Concentrated animal feeding operations (“CAFOs”) such as MSF pose a series of significant threats to water, air, and land. While a handful of federal and state laws regulate CAFO activity generally, county-level zoning ordinances often provide the only means to determine when a CAFO is not an appropriate operation for its proposed location. Where, as here, a Board fails to uphold its ordinance, the environmental and public health and welfare concerns protected by the ordinance are undermined.

The Minnesota Center for Environmental Advocacy (“MCEA”), Environment Minnesota, and Food & Water Watch (“FWW”) (collectively “*amici*”) are concerned that upholding the MSF feedlot CUP has implications beyond the parties to this litigation. The issues in this case concern the duties of delegated counties such as Dodge to properly exercise their permitting and regulatory authority over feedlots. In addition, issues in this case concern and will likely affect citizens’ ability to meaningfully participate in the permitting and citing processes for feedlots, during which a critical and unique opportunity is guaranteed to the public both to protect one’s property rights and health

¹ Pursuant to Minn. R. Civ. App. P. 129.03, *amici* hereby state that no counsel for a party authored this brief in whole or in part and no person other than the *amici*, their members, or their counsels made any monetary contribution to the preparation or submission of this brief.

concerns and to encourage environmental protection. *Amici* submit this brief in support of the Plaintiff-Appellants Lowell Trom and Evelyn Trom, respectfully requesting that this Court reverse the district court and Board and vacate the CUP granted to Defendant-Respondent MSF.

MCEA is a Minnesota non-profit organization founded in 1974 whose mission is to use law, science, and research to preserve and protect Minnesota's natural resources, wildlife, and the health of its people. MCEA is engaged in public policy advocacy and education in five program areas, including water quality and natural resources. As part of its advocacy, MCEA has participated in administrative rulemaking proceedings (Minn. R., Ch. 7020) concerning the regulation of pollutants discharged to surface and ground waters from CAFOs. MCEA's continued participation in such matters since 1974 is unique, and gives MCEA specific expertise and experience in the local regulation of animal feedlot operations. MCEA has a distinct interest in ensuring that local regulations properly implement state laws intended to prevent pollution of rivers, streams and lakes from animal feedlot operations. MCEA also has a distinct interest in ensuring that local regulations preserve and respect the procedural rights of itself and other citizens or organizations working to protect the natural resources of this state. MCEA has state-wide membership, and many of those members individually participate in proceedings of the sort at issue in this particular appeal.

Environment Minnesota is the state affiliate of Environment America, a 501(c)(4) organization doing business as Environment Minnesota on behalf of its thousands of supporters in the state. As part of its longstanding commitment to protect our rivers,

lakes, streams and other water resources, Environment Minnesota is deeply concerned by the water pollution impacts of industrial livestock operations, such as the MSF feedlot.

Environment Minnesota has expertise particular to this case, and recently published a national report outlining the water pollution threats of industrial agribusiness operations, including animal feedlots of the type at issue in this matter.

FWW is a national, non-profit consumer advocacy organization with its headquarters in Washington, D.C. and several offices throughout the United States. FWW's mission is to champion healthy food and clean water for all by standing up to corporations that put profits before people, and advocating for a democracy that improves people's lives and protects our environment. FWW works to ensure safe food and clean water, advocating for safe, wholesome food produced in a humane and sustainable manner and the public, rather than private, control of water resources. FWW has more than 900,000 members and supporters in the United States. More than 28,000 of these members and supporters are Minnesota residents, and at least 30 live in Dodge County.

ARGUMENT

I. THE MSF FEEDLOT POSES A KNOWN THREAT TO THE ENVIRONMENT.

Swine CAFOs such as the MSF feedlot² pose several significant threats to the environment and to public health, both individually and in the aggregate.³ A primary

² Assuming the 2,400 finishing-swine legal capacity is not exceeded, the MSF feedlot meets the size threshold definition of a medium CAFO. 40 C.F.R. 122.23 (b)(6); Minn. R. 7020.0300, subp. 7d.

³ Nat. Ass'n of Local Bds. of Health, *Understanding Concentrated Animal Feeding*

threat is due to the quantity of manure they produce.⁴ One hog produces roughly ten times more fecal waste than a human.⁵ The Minnesota Pollution Control Agency (“MPCA”) estimates that the amount of manure generated in Minnesota is equivalent to a human population of about 50 million.⁶ At full legal capacity, the MSF CAFO alone will produce more fecal waste than the total human population of Dodge.⁷ Pig manure contains high levels of several potential contaminants such as nitrogen, phosphorus, ammonia, nitrate, hydrogen sulfide, and methane, in addition to any pathogens, hormones, antibiotics, and chemicals used or produced at the feedlot, which pose a variety of distinct threats to water and air.⁸

The MPCA’s water monitoring suggests that about 40 percent of Minnesota’s lakes, rivers, and streams are impaired, failing to meet one or more water quality

Operations and Their Impact on Communities (2010), available at www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

⁴ *Id.*

⁵ Mark Sobsey & Vincent Hill, *Hog Waste Treatment to Control Microbial Contamination*, Report No. 380 (June 2008) available at <https://repository.lib.ncsu.edu/bitstream/handle/1840.4/4110/NC-WRRI-380.pdf?sequence=1&isAllowed=y>.

⁶ MPCA, *Livestock and the environment* (December 2014), available at www.pca.state.mn.us/sites/default/files/wq-f1-01.pdf.

⁷ In 2010, Minnesota’s census-reported human population was 5,303,925, of which 20,087 resided in Dodge. U.S. Census Bureau, QuickFacts-Minnesota, available at www.census.gov/quickfacts/table/PST045215/27. Minnesota’s current hog population is an estimated 8,100,000 (accounting for 11.7% of the national inventory), with a Dodge County pig population in 2012 of 163,874. U.S. Dept. of Agriculture—National Agricultural Statistics Service, Quick Stats, available at quickstats.nass.usda.gov/. Pigs in Dodge are thus producing the fecal equivalent of more than 1,638,740 humans.

⁸ Nat. Ass’n of Local Bds. of Health, *supra* at 2; see generally, Marc Ribaldo et al., *USDA—Manure Management for Water Quality*, Agricultural Economic Report No. 824 (June 2003).

standards.⁹ The majority of impaired waters are in the southern half of Minnesota, which has the highest number of stressors related to excess nutrients, such as nitrogen and phosphorus, excess sediment, lack of habitat and connectivity, and impaired biological communities.¹⁰ More than half of these southern waters fail to meet swimmable or fishable standards.¹¹ Several “fish-kills” have occurred in Southeastern Minnesota: In July 2015, 10,000 fish died after heavy rains, which saw nutrient levels exceed drinking water standards by 400 percent.¹² In 1998, a 100,000 gallon manure spill into a creek killed nearly 700,000 fish along 19 miles of stream.¹³

Westfield-Ripley Drainage Ditch runs through the Toquam land on which MSF is located and on which MSF manure is to be applied. A few hundred feet from the CAFO the ditch turns and runs less than a mile downstream and empties into the Little Cedar River, which is an impaired water listed as “non-supporting of aquatic life for aquatic macroinvertebrate communities” due, in part, to low oxygen caused by high concentrations of nitrogen and phosphorus.¹⁴ The Little Cedar River, in turn, empties into

⁹ MPCA, *Minnesota’s Impaired Waters List*, www.pca.state.mn.us/water/minnesotas-impaired-waters-list (last accessed October 9, 2016).

¹⁰ MPCA, *Swimmable, Fishable, Fixable?* (April 28, 2015), available at www.pca.state.mn.us/news/swimmable-fishable-fixable.

¹¹ *Id.*

¹² Mark Zdechlik, *Trouble in the Water*, MPRNews, May 16, 2016 available at www.mprnews.org/story/2016/05/16/water-can-minnesota-stop-polluting-lakes-rivers. Another fish kill occurred after a 252,000 gallon manure spill in 2009. MPCA, *Pipestone County Dairy Receives \$10,000 Penalty for Manure Spill Resulting in Beach Closing, Fish Kill*, available at www.pca.state.mn.us/news/pipestone-county-dairy-receives-10000-penalty-manure-spill-resulting-beach-closing-fish-kill.

¹³ Ted Williams, *Assembly Line Swine*, Audubon, Mar.-Apr. 1998, 26, 31.

¹⁴ MPCA, *Cedar River Watershed Stressor Identification Report* (June 2016) at 46, available at <https://www.pca.state.mn.us/sites/default/files/wq-ws5-07080201a.pdf>.

the impaired Cedar River, a tributary of the impaired Iowa River, and ultimately into the Mississippi River.¹⁵

The MSF CUP application estimates that its pigs will produce 1.1 million gallons of swine manure that requires land application. AR 146. It also anticipates that its 1.1 million gallons of manure will contain 55,000 pounds of nitrogen and 48,400 pounds of phosphorus. AR 147. Nitrogen and phosphorus in manure applied to land will runoff into the watershed's already impaired waters at varying rates depending on rain levels, soil permeability, and method of application.¹⁶ This excess nutrient runoff directly contributes to algal blooms, decreased oxygen levels, and other surface water impairments.¹⁷

Nitrogen also converts in the soil to nitrate, which is a potential drinking water contaminant that is of serious concern for infant health.¹⁸

As early as 1992, agricultural sources discharged 4.65 million tons of nitrogen and 1.16 million tons of phosphorus into surface waters each year.¹⁹ Since 1992, agricultural waste has dramatically increased, with operations consolidating and growing at a high

¹⁵ *Id.*

¹⁶ University of Minnesota—Extension, *Manure management—WW-07401* (2013), available at www.extension.umn.edu/agriculture/tillage/soil-management/soil-management-series/manure-management/.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Charles M. Cooper & William M. Lipe, *Water Quality and Agriculture: Mississippi Experiences*, 47 J. Soil & Water Conservation 220, 200 (1992)

rate in the interim.²⁰ In 1994, land use models indicated that agriculture was the leading source of nitrogen (76 percent) and phosphorus (56 percent) in the environment.²¹

Since crop absorption rates for nitrogen and phosphorus differ, farms may apply manure to cropland according to a nitrogen or phosphorus standard.²² One study estimated that 51 percent of nitrogen in pig manure and 64 percent of its phosphorus, applied nationally in 1997, was in excess of crop needs at the farm level.²³ In 1998, most farms, regardless of size, failed to meet recommended nitrogen based standards for application of manure.²⁴ Only 18 percent of large farms met recommended nitrogen application standards.²⁵ Even then, fewer farms were applying manure to meet a phosphorus standard, because the high phosphorus content of manure relative to crop needs significantly reduces the quantity of manure that can be applied on an acre of land.²⁶ No large farms in the Eastern Corn Belt, Mid-Atlantic, or West met a phosphorus based standard.²⁷ Slurry systems, such as MSF's, preserve more of the nutrients in manure than do lagoon systems, which lose a significant amount of nitrogen to the atmosphere and phosphorus to the sludge at the lagoon bottom.²⁸ As a result, more land per animal is necessary under a slurry system than a lagoon system in order to meet either

²⁰ Curt Zimmerman, *Minn. Dept. of Agriculture—2015 Livestock Industry Study* (February 1, 2016), at 3.

²¹ James Stephen Carpenter, *Farm Chemicals, Soil Erosion, and Sustainable Agriculture*, *Stanford Env. L.J.* 190, 201 (1994).

²² Ribaldo et al., *supra*.

²³ *Id.* at 14.

²⁴ *Id.* at 17.

²⁵ *Id.* at 14.

²⁶ *Id.* at 16.

²⁷ *Id.*

²⁸ *Id.* at 18.

nutrient standard.²⁹ When a phosphorus-based standard is required, producers require even more land for application; large farms, on average, would need to spread on over 1,000 additional acres of land to meet a phosphorus-based standard.³⁰

This water quality threat is not limited to the immediate locality. The same heavy June rains throughout the Corn Belt that initiated the 2015 Minnesota fish-kill expanded a dead-zone in the Gulf of Mexico to 6,474 square miles in which oxygen levels were too low to support fish and marine life.³¹ The National Oceanic and Atmospheric Administration stated that agricultural pollutant-nutrient runoff directly caused the growth of the dead-zone in the Gulf.³² MSF seems a long way from the world's second-largest dead-zone, but the few maps submitted with the CUP application show that runoff produced by MSF manure has a direct hydrological connection to the Gulf of Mexico. AR 140-45.

In an attempt to limit this environmental threat to surface waters, the feedlot rules require manure management plans (“MMPs”) that “help ensure that application rates do not exceed crop nutrient needs, and that setback from waters and drain tile intakes are observed.”³³ The determination of how much of MSF’s 103,000 pounds of pollutant-nutrients will runoff into impaired surface waters is complicated and depends on weather,

²⁹ *Id.*

³⁰ *Id.*

³¹ Nat. Oceanic and Atmospheric Admin., *2015 Gulf of Mexico dead zone ‘above average,’* available at www.noaanews.noaa.gov/stories2015/080415-gulf-of-mexico-dead-zone-above-average.html.

³² *Id.*

³³ MPCA, *Livestock and the environment, supra.*; Minn. R. 7020.2225.

method of application, crop rotations, and expected yield.³⁴ In light of this difficulty, the feedlot rules do not provide a specific application rate for nitrogen or phosphorus, but instead require application rates in line with current recommendations from the University of Minnesota—Extension. Minn. R. 7020.2225. The current MPCA recommendation provides a maximum recommendation of 180 pounds per acre.³⁵ The requirements also confirm that other pollutant-nutrients often exceed crop needs when manure is applied at a nitrogen standard and that “[s]ometimes there are economic and environmental benefits of applying manure at rates lower than [nitrogen] needs.”³⁶

Dodge’s zoning administrator, advising the Board, failed to detail the calculations behind her estimation that just 244 acres were required for the land application of the annual 1.1 million gallons of manure produced by MSF. AR 941-43. However, if manure is applied at her suggested rate, more than 225 pounds of nitrogen and 196 pounds of phosphorus would be applied to each acre, well in excess of MPCA recommended guidance that determines feedlot rule compliance.³⁷ This suggests that land application of MSF manure is unlikely to comply with the manure management requirements of the feedlot rules. Citizens submitted detailed evidence, arbitrarily and unreasonably set-aside by the Board, that there was insufficient land to support MSF’s manure footprint and that at least 190 of the 490 acres reserved for MSF manure had been doubly-pledged, as was

³⁴ University of Minnesota—Extension, *supra*.

³⁵ Jose A. Fernandez & Michael A. Schmitt, *Manure management in Minnesota—WW-03553* (revised 2012), available at <https://www.extension.umn.edu/agriculture/manure-management-and-air-quality/manure-application/manure-management-in-minnesota/docs/manure-management-in-minnesota.pdf>.

³⁶ *Id.*

³⁷ Fernandez & Schmitt, *supra*.

later verified. AR 291, 890; Appellants' Brief at 27. The Board's role, confirmed by the district court and contrary to the advice it received from its zoning administrator, is to satisfy the express requirements of its ordinance in order to protect environmental interests and its public's health, welfare, and property from uses inappropriate to the proposed location. AR 323-41.

II. THE BOARD FAILED TO TAKE THE REQUIRED HARD LOOK AT THE ISSUES RELEVANT TO ITS MSF CUP DETERMINATION.

Under Minn. Stat. § 394.21, “[f]or the purpose of promoting the health, safety, morals, and general welfare of the community any county in the state having less than 300,000 population...is authorized to carry on county planning and zoning activities.” So empowered, a county board may designate by ordinance certain developments or activities as conditional uses. Minn. Stat. § 394.301. In approving a CUP, a county board's action must accord with the requirements of its relevant planning and zoning ordinances. *Eagle Lake of Becker Lake Ass'n v. Becker Cty. Bd. of Comm'rs*, 738 N.W.2d 788, 797 (Minn. App. 2007). Where, as here, a county board failed to take a hard look at the relevant issues in a zoning decision, such as the granting of a CUP, the board's decision is arbitrary and subject to reversal. *In re Block*, 727 N.W.2d 166, 180 (Minn. App. 2007). Further, a municipality acts consistent with Minnesota law in refusing to issue a permit based on an incomplete application. *Application of Q Petroleum*, 498 N.W.2d 320, 325 (Minn. 1981).

The ordinance clearly articulates its purpose in Chapter 1:

Section 1.2—Purpose

1.2.1—This Ordinance is adopted for the purpose of:

A. Protecting and promoting public health, safety, general welfare and morals of the citizens of Dodge County;

B. Protecting and preserving agricultural land, productivity of such land and animal agriculture;

C. Promoting and providing for orderly, responsible, and sustainable development of agricultural, residential, commercial, industrial, recreational, conservation and public areas and land uses;

D. Promoting compatible development and uses to prevent land use conflicts, conserve the value of properties and preserve the quality of life for the citizens of the county;

E. Promoting appropriate development and use of land located within the shoreland to preserve and enhance the quality of surface waters, conserve the economic and natural environmental values of shorelands and provide for the wise use of water and related land resources;

F. Promoting appropriate development of floodplains and limiting the development or use of land which could result in the potential for loss of life and property, create health and safety hazards, and lead to extraordinary public expenditures for flood protection and relief;

G. Protecting and preserving historical, archeological, scenic and other natural resources which are significant to Dodge County;

H. Protect groundwater water quality and quantity and quality by facilitating the adequate provision of water, sewage treatment, manure storage and application and management of all land uses within the county;

J. Protecting the environment;

L. Administering the planning and zoning activities pursuant to Minnesota Statutes 394.21, as amended.

Ordinance § 1.2. Chapter 1 further requires that “no structure shall be erected, converted, enlarged, reconstructed or altered, and no structure or land shall be used for any purpose or in any manner which is not in conformity with this ordinance.” Ordinance § 1.5.

A conditional use is defined as a “land use or development as defined by Ordinance that would be *inappropriate generally* but may be allowed with appropriate restrictions as provided by official controls upon a finding that (1) certain conditions as detailed in the Zoning Ordinance exist; (2) the use or development conforms to the comprehensive land use plan of the County; and (3) is compatible with the existing neighborhood.” Ordinance § 4.2 (emphasis added). “Conditional uses may be approved upon a showing by an applicant that standards and criteria stated in the ordinance will be satisfied. Such standards and criteria shall include both general requirements for all conditional uses and, insofar as practicable, requirements specific to each designated conditional use.” Minn. Stat. § 394.301. Chapters 16 and 18 of the ordinance, among others, provide two such sets of standards and criteria. Where, as here, a county board fails to take a hard look at whether the criteria of its ordinance are met, the decision is arbitrary and subject to reversal. *In re Block*, 727 N.W.2d, at 180.

A. Approval Of The MSF CUP Failed To Satisfy The Requirements Of Ordinance § 18.13.8, Endangering The Environment And The Public’s Welfare.

The ordinance also requires that the County exercise its authority within the limits of Chapter 18, which details the powers, duties, and limitations vested in the Commission and its advisory boards, and which lists the many requirements for conditional uses at the planning, application, vetting, permitting, and rescinding or discontinuance stages. These requirements are not displaced by the feedlot-specific requirements of Chapter 16; indeed, the “findings and recommendations” section of Chapter 18 provides eleven

additional “criteria for granting all CUPS,” which appear on both iterations of the MSF CUP application. AR 2, 122; Ordinance § 18.13.8.

The ordinance first requires that an incomplete application must be returned prior to consideration, and requires that an application will not be considered complete until the fee is submitted. Ordinance §18.13.5. The applicant must show that the use or development conforms to the comprehensive land use plan and is compatible with the existing neighborhood. Ordinance § 18.13.8 (A). The Board may then approve the conditional use, but only upon a finding that the proposed conditional use meets each of the eleven criteria. *Id.* The first criterion requires a Board finding that “[t]he establishment, maintenance, or operation will not be detrimental to or endanger the public health, safety, or general welfare.” *Id.* This language echoes the first express purpose listed by the ordinance in Chapter 1 and the express purpose of relevant state statutes, underscoring the critical duty of the County to protect its citizens from conditional uses inappropriate to the area. Ordinance §§ 1.2.1, 4.2, 18.13.1, 18.13.8; Minn. Stat. § 394.21. The fourth criterion requires a Board finding that proposed use will not “unduly restrict the enjoyment of other property in the immediate vicinity” including whether the applicant has ensured that the use will not constitute a nuisance. Ordinance § 18.13.8 (A). The fifth criterion requires a Board finding that “the proposed use shall not substantially diminish and impair property values within the area.” *Id.* The ninth criterion requires “[t]hat existing groundwater, surface water and air quality are or will be adequately

protected.”³⁸ *Id.* Also, under the ordinance, “minutes of the County Board shall constitute written findings for its decisions.” Ordinance § 18.13.11.

Here, the MSF application fee was waived weeks after it was accepted, in violation of Ordinance § 18.13.5. AR 981. Prior to the fee waiver request and grant on December 11, 2014, the MSF application was incomplete under the ordinance and required to be returned by the zoning administrator. Ordinance § 18.13.5. The county failed to return the incomplete application, but instead (a) prepared a staff report urging approval of the MSF CUP, (b) scheduled special sessions of the Board and Commission, (c) fielded comments from relevant state and county officials otherwise required by the ordinance, (d) organized and held a Feedlot Advisory Committee (“FAC”) review on-site at MSF, and (e) prepared a Feedlot Advisory Report urging approval of the CUP. AR 199, 281, 283, 518-220, 522-24, 778-87.

While the second application was swollen with lengthy construction details pertaining to a building already constructed, it failed to convey information sufficient to support Board findings on whether the criteria of § 18.13.5 were met. AR 986-1007. The public, through extensive written and oral commentary opposing the feedlot, presented detailed evidence of known environmental, public health, and property value threats posed by the feedlot. AR 294-300, 573-667, 871-75, 888-909. These public submissions included comments on the existing oversaturation of feedlots in Dodge, the impaired

³⁸ In 2011, the legislature amended law pertaining to surface waters, limiting MPCA’s ability to set more stringent Clean Water Act requirements than those set by federal law. Minn. Stat. § 116.07, subd. 7(c). Despite this limitation, legislature left standing the right for counties to adopt and enforce zoning ordinances or plans, even resulting in more strict standards than under the feedlot rules. Minn. R. 7020.0200.

nature of local surface waters into which MSF manure would runoff, the known, ongoing violations of feedlots in the vicinity, and the distinct threat to nearby property values, amongst other concerns. *Id.*

Having received this public commentary, the Commission and Board closed their public hearings and assessed the application, relying almost exclusively on the opinion of the county's zoning administrator, Melissa DeVetter. AR 875-82, 922-67, 984. She opined that the ordinance's many express requirements under Chapter 18 might be assumed satisfied because compliance with the feedlot rules would later be required of the feedlot.³⁹ AR 938. When questioned by the Commission, with the Board present, about sufficiency of the MMP and the acreage required to support MSF, DeVetter

³⁹ DeVetter stated to the Board, with respect to the first criteria of § 18.13.8: "The first is to establish the maintenance and operation will be detrimental or endanger public health, safety, and welfare. Again, [MSF is] designed to be a zero discharge facility if it's—if—I'm not sure, this is—what it was trying to relay previously was that this program is so highly regulated by both the county and the state that everything—everything from the engineered plans to how they keep their records has to be in a way that's defined by the state." AR 938. With respect to whether MSF's proposed use was appropriate to its location, DeVetter provided that "the area is zoned agriculture. Conditional—I mean, feedlots, and this could be any kind of feedlot, it could be anything from a small, you know, a couple horses on a lot up to, you know, up to 3,000 animal units, because that's where half is of, you know, dairy, hogs, beef. It—it is an appropriate use in the agricultural district, and so I'm not sure—I—I'm not sure where else you would put these facilities. If that's not an appropriate use out in the agricultural district we're not exactly sure where you would put them." AR 938-39. Finally, regarding her assessment of MSF's compatibility and potential to diminish or impair property values, she stated that "the real issue I think here appears to be compatibility with the one adjacent land unit—land owner. Again, this indicates that we have one person that is within, you know, 3,845. As you are aware, they are very opposed to the project, but I'm—I cannot—they have expressed that they would be injured by this. It is our opinion that it—it meets all the ordinance requirements so. We talked about substantially diminishing and impairing property values within the area, we have records that the property wouldn't be devalued on that." AR 939

advised that the MPCA feedlot rules concerning manure management would require just 244 acres for application of the annual 1.1 million gallons of MSF manure. AR 941-43. DeVetter arrived at this figure with the assistance of “Paul Brietzke, Minnesota Pollution Control Agency . . . not speaking on behalf of the Pollution Control Agency.” AR 943. A Commissioner then asked DeVetter to clarify that MPCA takes “precedence over anything we would even do anyway, right, the state?” DeVetter responded that the MPCA “regulates air quality. They regulate surface water quality, so they have the standards.” AR 943. The Commissioner stated, “That we use?” to which DeVetter replied, “Correct.” AR 943-44. This interpretation, that the county’s oversight can be substituted with that of the state, evinces a fundamental misunderstanding of CAFO regulation and delegation under state law.

The Board then granted the MSF CUP, finding that “the application and materials submitted by the applicant provide the County Board with all of the information required by the Ordinance and further, provide the County Board with sufficient information to fully evaluate the proposal under the criteria set forth in the County’s Ordinance.” AR 983. “The County Board has considered [] the objections and materials submitted by the project opponents, and rejects their conclusion. The County Board specifically credits the information provided by [DeVetter], who refuted all of their objections.” AR 984.

The Board’s finding that DeVetter refuted all objections presented against the feedlot is incorrect. The Board did not consider evidence of doubly-pledged land, did not consider or weigh evidence of known local impaired surface waters, did not consider evidence of improper application techniques, did not consider the likelihood of nuisance

conditions arising from the feedlot, did not consider the likelihood of surface water pollution from antibiotic use, and, critically, did not consider either the existing oversaturation of the immediate area and county or the cumulative impact of existing feedlots.⁴⁰ See AR 779-84, 785-87, 884-971, 986-1007. The Board thus failed to satisfy the requirements of § 18.13.8 (A) with respect, at least, to the first, fourth, fifth, and ninth criteria, instead arbitrarily and capriciously relying on the incomplete and erroneous interpretation of the ordinance and the potential impact of MSF presented by the zoning administrator—against the weight of public showings of known threats to the environment, public’s health, safety, and general welfare. Under *In re Block* and *Application of Q Petroleum*, this court should reverse the determination of the Board and vacate the MSF CUP.

B. The Board’s Refusal To Enforce Informational Requirements Under The Ordinance Deprived The Public Of Its Ability To Evaluate And Challenge A Feedlot That Posed A Significant, Known Risk To Its Environment And Welfare.

Due to the failure of MSF to submit a completed feedlot CUP application, the public and Board did not have the requisite information to assess the conditional use with respect to the express purpose of its ordinance, which protects environmental and public health and welfare considerations. Chapter 16 sets standards for specific uses and structures, which are the “minimum requirements for the use or structure and are in addition to any other requirement of this Ordinance . . . [a]ll uses . . . whether Permitted,

⁴⁰ Regardless of whether cumulative impacts are relevant to feedlot rule considerations, they are imperative for the determination of whether a conditional use is appropriate where proposed.

Interim, or Conditional shall comply with all applicable Federal, State and County laws, rules and regulations . . .” Ordinance §§ 16.1, 16.2.1. Chapter 16 also lists feedlot specific permitting criteria delineating feedlot CUP standards, siting requirements, manure management planning, and compliance certifications. Ordinance § 16.24.

Section 16.24.3 of the ordinance, since amended, provided informational requirements for a feedlot CUP application.⁴¹ These informational requirements, also detailed on the County’s CUP application itself as of the February 10, 2014 first MSF application (AR 2), were found lacking by the district court, a decision that was not appealed. *Trom et al., v. County of Dodge et al.*, 20-CV-14-293 (3d Jud. Dist. Ct.) (November 18, 2014) (provided at AR 323-41). MSF submitted a second application, dated two days after the court’s reversal order, on a form recently updated by the County. AR 122-24. The feedlot section of the ordinance had not been amended in the interim. Yet where the earlier CUP form had provided spaces for applicants to fill in the “[a]dditional information requirements,” of § 16.24.3 (AR 2), the new form removed spaces for the required information, merely listing the requirements of § 16.24.3 as post hoc conditions of a CUP grant: “Upon approval of the [CUP] for the feedlot additional information is required.” AR 123. This update may have reflected a Board intention to no longer hold feedlot applicants to the informational requirements of § 16.24.3, which it has

⁴¹ In February 2015, the Board amended the § 16.24.3 feedlot CUP informational requirements as advised by its zoning administrator and county attorney, replacing thirteen informational requirements with the sole requirement that “[a]n application for a CUP shall be submitted on forms provided by the County.” Dodge County, *Planning Minutes (February 4, 2015)*, available at www.co.dodge.mn.us/EnvironmentalServices/2_4_2015_Planning_minutes.pdf

since amended; but at the time of the second MSF CUP approval, the detailed informational requirements were intact and required strict compliance in order to support valid Board approval of a feedlot CUP. *See* Ordinance § 16.2.1.

MSF's second application on the updated form was more expansive, but still failed to meet the requirements of Chapter 16. AR 122-96. First, the MMP remained inadequate, failing to describe how 1,100,000 million gallons of MSF manure could legally be spread on the pledged land. AR 146-47. Second, the aerial photos, required under § 16.24.3 (F) (I), do not provide enough information for the Board to properly determine that the land is available and sufficient. AR 140-45. Third, the application does not provide information of a "pollution abatement structure." AR 92.

Despite extensive public commentary on the issues of insufficient acreage for application and of doubly pledged land, the Board refused to take the required hard look at whether enough land was available to support the manure footprint of the MSF feedlot. *See* AR 779-84, 785-87, 884-971, 986-1007. Instead, the Board took the same approach as when it approved the first MSF CUP, assuming the feedlot was an appropriate use because it would later be subject to feedlot rules once in operation. AR 938-39. However, as stressed by the district court vacating the first MSF CUP, the mere possibility, or even likelihood, of subsequent and alternative regulatory compliance does not relieve the Board of its duty to uphold its ordinance. AR 330.

Because the MSF application was incomplete, failing in part to meet the clear requirements of § 16.24.3, the conditional use did not comply with applicable county and state laws, as required by § 16.2.1. The Board thus did not, and could not, take the

hard look required under *In re Block*. This court should vacate the CUP, as the determination was based on an incomplete application. *Application of Q Petroleum*, 498 N.W.2d at 325.

III. THE BOARD IMPROPERLY SUBSTITUTED THE REQUIREMENTS OF THE FEEDLOT RULES FOR THE REQUIREMENTS OF THE ORDINANCE, UNDERMINING THE EXPRESS PURPOSE OF COUNTY AND STATE ZONING LAWS.

Most regulated sectors are subject to various labor, anti-trust, animal welfare, and environmental laws, but agricultural producers enjoy a unique level of freedom from regulation. *See e.g.*, 7 U.S.C. §§ 291, 2131; 11 U.S.C. §303(a); 29 U.S.C. §§ 152(3), 213; 33 U.S.C. § 1362; 42 U.S.C. §§ 7412, 7521-7590, 9601; 42 U.S.C. § 11021(e)(5); 40 C.F.R. 68.125, 355.40(2); Minn. Stat. § 116.0713; Minn. Stat. § 116D.04, subd. 2a (d); Minn. Stat. § 561.19; Minn. R. 4410.0300, subp. 3; Minn. R. 7020.2002. Authority over the few remaining environmental regulations from which CAFOs have not been exempted has been largely delegated from federal to state agencies. *See, e.g.*, 33 U.S.C. § 1342. In Minnesota, where the bulk of feedlot regulation is codified in the feedlot rules, the MPCA may further delegate responsibility to the county level, as it has in Dodge. Minn. Stat. § 116.07, subd. 7; Minn. R. § 7020.1500. Under this delegation program, in which “most of the state’s major feedlot areas participate,” counties must designate a County Feedlot Officer (“CFO”), who is charged with monitoring and enforcing the feedlot rules.⁴² Minn. R. 7020.1600, subp. 3a (D).

⁴² MPCA, *Delegated County Feedlot Program*, (January 2015) available at <https://www.pca.state.mn.us/sites/default/files/wq-f6-51.pdf>.

In Dodge, the CFO is a member of the Environmental Services staff, which also includes the zoning administrator, DeVetter.⁴³ Before his 2011 retirement, Ken Folie was Dodge's CFO; he does not sit on the FAC, but attended both FAC visits to the MSF feedlot and spoke in support of CUP approval at the second public hearing, claiming an individual interest. AR 911. Ryan Thesing was Dodge's CFO until the special session approval of the second MSF CUP session, at which his departure was approved. AR 681, 699, 976. Chad Knudson was later introduced as the new CFO.⁴⁴

Nowhere in the administrative record is DeVetter listed as Dodge's CFO, yet she is held out as the CFO to the state and public across various media: She appears as the contact person on Dodge's 2011, 2012, 2014, and 2015 MPCA Annual CFO and Performance Credit Reports required of a county CFO under Minn. R. § 7020.1600.⁴⁵ DeVetter is listed online as the "County Agricultural Inspector & Designated Employee."⁴⁶ She is also listed as Dodge's primary contact and CFO on the current MPCA delegated county list, with actual CFO Knudson included as an assistant.⁴⁷

DeVetter was also involved in Planning Commission appointment decisions, recommending soon after the Board's approval of the first MSF CUP that Commissioner

⁴³ Dodge County, Environmental Services, www.co.dodge.mn.us/departments/environmental_services/index.php (last accessed October 9, 2016).

⁴⁴ Dodge County, Board Minutes (January 27, 2015), *available at* www.co.dodge.mn.us/County_Board/2015_Board_Minutes/01_27_15.pdf.

⁴⁵ *See* Dodge County, Feedlots, www.co.dodge.mn.us/departments/feedlots.php, last accessed October 9, 2016.

⁴⁶ Minn. Dept. of Agriculture, *County Agricultural Inspectors & Designated Employees*, *available at* www.mda.state.mn.us/plants/pestmanagement/weedcontrol/caillist.aspx (last accessed October 9, 2016).

⁴⁷ MPCA, *County Feedlot Contacts 2016*, updated June 2016, *available at* www.pca.state.mn.us/sites/default/files/wq-f1-13.pdf.

Jessica Masching be replaced with Joshua Toquam.⁴⁸ DeVetter also participated in closed sessions with the Board and the county's attorney, one week after the district court's reversal of the Board's decision and five days after MSF submitted a second CUP application to DeVetter, in order to "discuss options and receive direction from the Board" regarding the MSF CUP.⁴⁹ AR 122, 205, 348, 788. DeVetter featured heavily in the each of the County's MSF CUP determinations, advocating for the CAFO and providing her interpretation of the purpose and requirements of the feedlot rules, the ordinance, and the district court's order to vacate the first CUP. AR 28-29, 117-19, 673-80, 875-82, 922-46, 952-54, 963-67, 981-85.

In a sworn affidavit, DeVetter stated that she was initially hired as a compliance officer, "responsible for inspecting zoning permits, processing violations, . . . evaluating compliance with CUP conditions, and performing compliance inspections on feedlots under [the feedlot rules]." AR 668-69. She also swore that the CUP "application and ordinance do not indicate that all of the information [required by the ordinance] has to be submitted up front as part of the application, but is satisfied with conditions placed upon the CUP and the numerous requirements of the county delegated feedlot program and [the feedlot rules.]" *Id.* This interpretation, which played a critical role in the reasoning of the Board (*see* AR 943-44), is inaccurate; the informational requirements for a feedlot CUP are clear and unambiguously enumerated in Chapters 16 and 18 of the ordinance

⁴⁸ Dodge County, *Board Meeting Minutes (April 22, 2014)*, at 116, available at www.co.dodge.mn.us/County_Board/2014_Board_Minutes/04_22_2014.pdf.

⁴⁹ Dodge County, *Board Meeting Minutes (November 25, 2014)*, at 312, available at www.co.dodge.mn.us/County_Board/2014_Board_Minutes/11_25_2014.pdf;

and informed by the clear purpose in Chapter 1. Such requirements are not duplicative of those controlled by the feedlot rules, but are distinct requirements that exist for the express purpose of protecting public health and environmental considerations, as provided by the ordinance and state law. Ordinance §§ 1.2.1, 4.2, 18.13.1, and 18.13.8; Minn. Stat. § 394.21.

Fulfilling dual-functions of zoning administrator and acting-CFO, DeVetter encouraged the county to take a mistaken view of the interplay between the requirements of the ordinance and the feedlot rules. AR 943-44. Minnesota's feedlot rules exist so that the state can satisfy its duty as a state delegated Clean Water Act authority and to protect, if minimally, environmental and human health concerns related to water and air quality threats posed by CAFOs. Minn. R. 7020.2000, 7020.2002. While permits or certificates may be required of a facility under the feedlot rules, these rules are distinct from zoning regulations and do not directly or sufficiently protect the interest of the neighboring citizens from the impact to their health, environment, and enjoyment of property, as does Dodge's ordinance. Ordinance §§ 1.2.1, 4.2, 18.13.1, and 18.13.8; Minn. Stat. § 394.21.

The district court order denying the first MSP application identified DeVetter and the Board's misstep: the county "argues that all the information required by § 16.23.4 will eventually be submitted to the County as Mr. Masching continues the process of approval for his feedlot. For instance, . . . it must comply with [the feedlot rules]. Dodge County argues that, by conditioning Mr. Masching's CUP on complying with state and local law, it has sufficiently addressed the feedlot CUP requirements of § 16.24.3. This argument is unconvincing. Indeed, the fact that the County found it necessary to

condition the CUP on Mr. Masching's later completion of certain requirements shows clearly that the County did not have any facts regarding these requirements." AR 338.

In this context, it is especially troubling that the Environmental Services office, to which the CFO—whether DeVetter or Knudson—belongs, publically acknowledges its awareness of multiple violations of the feedlot rules against which it has not acted.⁵⁰ The same office—perhaps the very individual—that is charged with and knowingly fails to enforce the feedlot rules also holds a key advisory position with respect to the Board's zoning decisions under the ordinance.

The unambiguous purpose of the ordinance focuses heavily on environmental, public health, and protection of citizens' property rights. Ordinance § 1.2.1. Yet such concerns were effectively stripped from the Board's determination process, when it failed to evaluate the evidence before it that the MSF feedlot was incomplete and failed to satisfy multiple requirements of the relevant ordinance. Despite the clear purpose and requirements of the ordinance under Chapters 1, 16, and 18, the Board inquired only whether the feedlot would later be required to comply with the feedlot rules. AR 984. Advised by DeVetter that the state has precedence over any of the Board's determinations and that MSF would later face state feedlot regulation, the Board refused to otherwise consider the known likelihood of environmental and public health threats

⁵⁰ "This year we received over 30 calls related to [air quality exemptions for] manure applications. . . . The County knows the number of applications is much greater. It is required by MN Rule 7020.2002 to call in for an air quality exemption before manure application occurs. This call gives the applicator legal coverage related to any odor nuisance complaints that may filed [sic]. Dodge County, *Feedlot Flyer (December 2015)*, available at www.co.dodge.mn.us/EnvironmentalServices/Feedlot%20newsletter%2012072015.pdf.

extensively documented by the public. AR 938-39, 943-44, 984. Ordinance requirements, not the feedlot rules, are due the hard look of the Board, which it failed to give in granting the second MSF CUP.

CONCLUSION

Failure by the Board to take a hard look at the requisite criteria of the ordinance is grounds for reversal by this court. The Board failed to meet its duty under, at least, Chapters 16 and 18, failing the purpose of the ordinance expressly provided in Chapter 1. As such, and because the feedlot application proposes an inappropriate use in an unsuitable area, which poses a distinct threat and non-speculative detriment to the environment, public health, safety, welfare, and property interests, this court should reverse the Board and district court, vacating the MSF CUP.

Dated: October 10, 2014

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the form requirements and length limits of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The brief was prepared using Microsoft Word 2007, which reports that the brief contains 6,832 words.

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