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Dodge County, MN

STATE OF MINNESOTA

COUNTY OF DODGE

DISTRICT COURT
CIVIL DIVISION
THIRD JUDICIAL DISTRICT

Lowell Trom and Evelyn Trom,

Plaintiffs,

vs.

County of Dodge, Dodge County Board of Commissioners, and Masching Swine Farms, LLC,

Defendants.

ORDER

Court File No. 20-CV-15-17

The matter came on for hearing before District Court Judge Joseph F. Chase on February 16, 2016, at the Olmsted County Courthouse in Rochester, Minnesota, on the parties' cross-motions for summary judgment. Attorney James P. Peters appeared for Plaintiffs Lowell and Evelyn Trom (Troms). Attorney Paul D. Reuvers appeared for Defendants County of Dodge and Dodge County Board of Commissioners (County). Attorney Jack Y. Perry appeared for Defendant Masching Swine Farms, LLC (Masching).

Based on the files, records, and proceedings herein,

IT IS HEREBY ORDERED:

1. Masching's Motion for Summary Judgment is GRANTED;

2. County's Motion for Summary Judgment is GRANTED;

3. Troms' Motion for Summary Judgment is DENIED;

4. County's approval of Masching's November 20, 2014 application for Conditional Use Permit was reasonable, was not arbitrary or capricious, and is affirmed.

The Court's Memorandum, filed herewith, is incorporated herein.

Dated: May 12, 2016

BY THE COURT:

Joseph F. Chase
Judge of District Court

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I hereby certify that the forgoing Order dated May 12, 2016, by the Honorable Joseph F. Chase constitutes the judgment of this Court.

Dated _____.

Lea Hall
Court Administrator

By: Cindy Cwade May 13 2016 12:17 PM
Deputy Clerk

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MEMORANDUM

INTRODUCTION

The Parties and Their Positions

Plaintiffs Lowell and Evelyn Trom ("Troms") appeal the Dodge County ("the County") Board's December 11, 2014 issuance of a Conditional Use Permit ("CUP") to Masching Swine Farms, LLC ("Masching") for a 720 "Animal Unit" swine feedlot in Westfield Township. Troms contend that the County "failed to hold a fair hearing on a complete [CUP] application and...fail[ed] to take a hard look at the relevant issues." More specifically, Troms argue that:

- Consideration of the application violated a six-month waiting period following denial of a prior application;
- The application was improperly "fast-tracked" and "rushed" to approval;
- The application was "prejudged" and considered via a process that was "biased [and] unfair," including "pervasive bias" of the Westfield Town Board and the Dodge County Planning Commission, which recommended approval of the CUP;
- The public hearing on the CUP application was conducted in an unfair manner improperly limiting comment from opponents of the application;
- The application is deficient in its omission of complete, adequate, and accurate information on manure management planning;
- As a result, the County "never took a hard look at the adequacy of manure spreading acres pledged to the project," as well as other public health, welfare, and environmental concerns relating to air and water quality, wildlife habitat, and diminished property values.

Troms assert that a combination of multiple "danger signals" evident in the procedure followed by the County, and in the result the County reached, indicate that Dodge County's decision on the CUP was arbitrary and capricious, representing the County Board's will rather than its judgment. Based on these assertions, Troms ask that the Court "reverse the decision of Dodge County and vacate the CUP...without remand."

The County and Masching dispute all of Troms' arguments. Defendants assert that:

- The six-month waiting period following County Board denial of a previous CUP application does not apply where (as here) the prior application was *approved* by the County Board, but vacated by Court order on appeal, for procedural deficiencies;

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- Masching's November 20, 2014 application was submitted with all required supporting materials and information required by the applicable Dodge County ordinance, and is therefore complete;

- Maschings have submitted adequate information demonstrating that manure management planning necessary for issuance of the CUP is in place;

- The alleged personal and "industry" bias of members of the Westfield Town Board and Dodge County Planning Commission is not the sort of direct pecuniary interest that disqualifies governmental decision-makers, and in any event, those bodies are only advisory;

- The County's process in considering the application was prompt, not rushed, and complied with all legal notice and timing requirements;

- The December 11, 2014 public hearing before the Planning Commission was conducted in a proper manner that placed appropriate time limits on presentations from members of the public speaking to the issues, while allowing those presenters fair and adequate opportunity to state their views;

- The objections of CUP opponents were all specifically responded to and "refuted" by county planning staff in written recommended findings and in oral remarks delivered at the December 11 hearing following public comment;

- Troms' request that the Court consider material(s) not contained in the Administrative Record should be rejected, as Troms did not make a timely request to expand the Administrative Record;

- The CUP satisfied all substantive criteria for issuance of such a permit under Dodge County's ordinance;

- Approval of the CUP followed adequate due process, was based on substantial evidence, and was reasonable and not arbitrary and capricious.

Summary Judgment Standard

The parties have made cross-motions for summary judgment.

Rule 56.01 of the Minnesota Rules of Civil Procedure states that "[a] party seeking to recover upon a claim ... may ... move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." Minn. R. Civ. P. 56.01. The trial court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03.

"Summary judgment is a 'blunt instrument' and...should be employed only where it is perfectly clear that no issue of fact is involved, and that it is not desirable or necessary to inquire into facts which might clarify the application of the law." *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966). "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *D.L.H., Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

I conclude – and the parties do not appear to dispute – that this appeal presents only questions of law, appropriate for decision by the Court on summary judgment.

Scope and Standard of Review

"Quasi-judicial acts" of a governmental entity "affect the rights of a few individuals analogous to the way they are affected by court proceedings." *Interstate Power Co., Inc. v. Nobles County Board of Commissioners*, 617 N.W.2d 566, 574 (Minn. 2000). "Ruling on a Conditional Use Permit application is a quasi-judicial act." *Id.* "[T]he general standard of review for quasi-judicial zoning matters is whether the action was arbitrary and capricious." *Handicraft Block Ltd. Partnership v. City of Minneapolis*, 611 N.W.2d 16, 23 (Minn. 2000). "A county has broad discretion in deciding whether to grant or deny a Conditional Use Permit." *BECA of Alexandria, L.L.P. v. County of Douglas ex rel. Board of Commissioners*, 607 N.W.2d 559, 563 (Minn. App. 2000).

In *Big Lake Association v. Saint Louis County Planning Commission*, 761 N.W.2d 487 (Minn. 2009), the Minnesota Supreme Court described judicial review of a county's decision on a Conditional Use Permit as follows:

> A county may approve a conditional use permit "upon a showing by an applicant that standards and criteria stated in the ordinance will be satisfied." Minn. Stat. § 394.301, subd. 1. The decision of a county zoning authority to approve a conditional use permit constitutes a quasi-judicial decision. *Dead Lake Ass'n v. Otter Tail County,* 695 N.W.2d 129, 134 (Minn.2005); *see Honn v. City of Coon Rapids,* 313 N.W.2d 409, 417 (Minn.1981) (explaining that the decision to grant a zoning variance or special use permit is quasi-judicial because "the zoning authority is applying specific use standards set by the zoning ordinance to a particular individual use")...Generally, our review of a quasi-judicial decision is limited to an examination of the record made by the local zoning authority. *E.g., Swanson v. City of Bloomington,* 421 N.W.2d 307, 313 (Minn.1988) ("Where the municipal proceeding was fair and the record clear and complete, review should be on the record."). For example, we have noted that when a county zoning authority makes a decision on a conditional use permit, the reviewing court typically should "confine itself at all times to the facts and circumstances developed before that body." *In re Livingood,* 594 N.W.2d 889, 893 n. 3 (Minn.1999) (internal quotation marks omitted).

> Further, our standard of review is deferential, particularly when the local zoning authority has made the decision to approve a conditional use permit. *Schwardt v. County of Watonwan,* 656 N.W.2d 383, 389 n. 4 (Minn.2003) (noting that "[w]e have traditionally held CUP approvals to a more deferential standard of review than CUP denials"). "We review a county's decision to approve a CUP independently to see whether there was a reasonable basis for the decision, or whether the county acted unreasonably, arbitrarily, or capriciously." *Id.* at 386.
>
> Our limited and deferential review of a quasi-judicial decision is rooted in separation of powers principles. *See Dead Lake Ass'n,* 695 N.W.2d at 134. County zoning authorities have "wide latitude" in making decisions on conditional use permits, *Schwardt,* 656 N.W.2d at 386, and except in rare cases where there is no rational basis for the decision, "it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities" in routine zoning matters, *White Bear Docking & Storage, Inc. v. City of White Bear Lake,* 324 N.W.2d 174, 176 (Minn.1982). Certiorari "mandates nonintrusive and expedient judicial review," *Dietz v. Dodge County,* 487 N.W.2d 237, 239 (Minn.1992), which "ensures that the judiciary does not encroach upon the constitutional power spheres of the other two branches of government," *Meath v. Harmful Substance Comp. Bd.,* 550 N.W.2d 275, 281 n. 2 (Minn.1996) (Anderson, J., concurring specially). We have stressed the limited role of the judiciary in reviewing zoning decisions, stating that "[t]he court's authority to interfere" in these matters should be "sparingly invoked." *White Bear Docking,* 324 N.W.2d at 175.

Id. at 490-491.

For a challenge to a CUP to succeed, there must be a showing "that the proposal did not meet one of the standards set out in the ordinance and that the grant of the cup was an abuse of discretion." *In Re Block,* 727 N.W.2d 166, 177-78 (Minn. App. 2007).

> An agency's decision is arbitrary or capricious if the agency relied on factors the legislature never intended it to consider, if it entirely failed to consider an important aspect of the problem, if it offered an explanation for the decision that runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

Id., quoting *Pope County Mothers v. Minnesota Pollution Control Agency,* 594 *N.W.2d 233, 236 (Minn. App. 1999).*

> If an agency engages in reasoned decision-making, we will affirm, even though we may have reached a different conclusion had we been the fact-finder. *Cable Communications [Board v. Nor-West Cable Communications Partnership],* 356 N.W.2d [658] at 669 [(Minn. 1984)]. But when a 'combination of danger signals...suggests the agency has not taken a 'hard look' at the salient problems'

> and the decision lacks 'articulated standards and reflective findings' we will intervene. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).[1]

Minnesota Center for Environmental Advocacy v. City of St. Paul Park, 711 N.W.2d 526, 534 (Minn. App. 2006). The party challenging a local governmental body's decision on a CUP "has the burden of persuasion." *Vigstol v. Isanti County Board of Commissioners*, 2014 W.L. 6862933 (Minn. App. 2014), citing *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982).

ANALYSIS

Six-Month Waiting Period

Let us begin with the threshold issue of whether Masching's November 20, 2014 application was even entitled to consideration. Troms argue that Dodge County Ordinance Section 18.13.13 prevents the Masching application from being approved, because it came less than six months after "denial" of the prior CUP application relating to this project. The ordinance reads as follows:

> Whenever an application for a CUP has been considered and denied by the County Board, a similar application for a CUP affecting the same property shall not be considered again by the Planning Commission or County Board for at least six (6) months from the date of its denial.

Troms contend that Judge Williamson's November 18, 2014, order vacating the County's approval of Masching's first CUP application, amounts to a "denial," preventing another "application for a CUP affecting the same property" from being considered until at least May, 2015.

I cannot agree. The ordinance addresses a second CUP application filed after a first application "has been...*denied by the County Board.*" Judge Williamson's order effectively reaches the conclusion that the Board *should* have denied Masching's first, incomplete application. But the County Board did not deny it; rather, the Board approved it. Under the plain language of the ordinance, the six-month waiting period does not apply to this situation.

The Board plainly did not think it applied. And Judge Williamson, in vacating the CUP, specifically noted that she was making no ruling "on the merits of the Masching feedlot proposal." She noted that "Masching is at liberty to re-apply for a CUP."

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[1] "[W]e will intervene if a 'combination of danger signals...suggests the agency has not taken a 'hard look' at the salient problems and 'has not genuinely engaged in reasoned decision-making.'" *In Re Reichmann Land and Cattle, LLP*, 867 N.W.2d 502, 512 (Minn. App. 2015).

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I am not certain that I know the policy that underlies the six-month waiting period, but I gather that it prevents a kind of *Groundhog Day* scenario in which a disappointed CUP applicant might otherwise unduly burden (perhaps purposefully) County staff and decision-makers by compelling them to immediately and repeatedly take up, re-hear, and revisit the denied CUP on unchanged facts. The present case does not involve that situation.

I conclude that Ordinance Section 18.13.13 did not prohibit Masching from filing its second application on November 20, 2014.

Completeness of the Application

Judge Williamson vacated the first application because it failed to contain "substantial and material information" called for by Ordinance Section 16.24.3, and thus "was clearly incomplete." Judge Williamson specifically noted in her order five informational items required by the ordinance that were not provided with Masching's first application:

- A description of the geological condition, soil type, and seasonal high water table for the proposed site;
- An aerial photo showing the area within a half mile of the proposed feedlot;
- Manure management planning information;
- A map of the proposed site showing the location and dimension of any manure storage facility, the location of any well, and drainage patterns on the site;
- A site plan showing the location and dimensions of road access, parking, and loading facilities.

Before examining whether the information presented with Masching's second application satisfies the deficiencies of the first, I would make an observation: County planning staff seem reluctant to concede that Judge Williamson's decision was correct. They explain that decision in terms of Judge Williamson "interpret[ing]" the ordinance in a manner different than "Dodge County has historically interpreted" it – implying, I think, that reasonable minds could disagree regarding *when* the ordinance required CUP applicants to provide the information the ordinance calls for. I do not see it that way. First, Judge Williamson's decision, not appealed by the County, is the law of the case. Further, I think her reading of the ordinance is plainly correct, and that County staff's "historical" understanding and application of it is just as plainly incorrect. This ordinance is not ambiguous.

I do not fault County staff for being slow to accept the idea that they were wrong. I have been reversed by appellate courts any number of times; and while, of course, I accept those decisions, a stubborn voice in the back of my mind always says, "That's what *they* think.") However, to the degree that County staff reluctance to give up the former position may have

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affected the handling of the *second* Masching application, it takes on significance to the present appeal. The notion that the "INFORMATION REQUIREMENTS FOR A FEEDLOT CONDITIONAL USE PERMIT" are actually requirements for an applicant to "fulfill [later] as conditions of the [granted] CUP," implies that the County thought that it could act on a CUP application without having information important to the question of its issuance. This cart-ahead-of-the-horse approach to CUP analysis and approval is pointed to by Troms as a systemic flaw in the County's process. That County planning staff, in the face of Judge Williamson's order, seem grudgingly reluctant to give up the position that this "ready, fire, aim" approach is actually *correct*, lends some credence to Troms' argument that the same approach was again applied by the County to the *second* application.

Let us examine what Masching presented with their second application.

Masching's second application was submitted with much more information than the first.[2] The "geological condition" report is found at AR 125-132. The aerial photo of "the area within a half mile" is at AR 139. The maps of the proposed site and site plan showing manure storage facilities, well, drainage patterns, and so forth, are at AR 193-195. These items, missing from the application Judge Williamson reviewed, have now been provided.

Troms assert that the second application is still not "complete and adequate." But the only specific deficiency to which Troms now direct the court is a supposed "lack [of] complete information...regarding manure management of the project." Troms acknowledge that the second application contains "the Land Application Agreement for Receiving Manure on Cropland" signed by Roger Toquam. This document describes Mr. Toquam's undertaking to receive manure from Masching's facility; describes 490 acres on which Toquam says the manure would be spread; contains maps and aerial photos describing those parcels; and a filled-out MPCA "Manure Management Plan" outlining Masching's plan to have "long-term written agreements" for land application of 1.1 million gallons of manure "stored in a concrete pit below building for 9-12 months."

The deficiencies Troms point out with these manure management plans relate to acreage necessary and available for the spreading of this volume of manure. And that contention has two components. The first was raised by Troms at the December 11, 2014 hearing. Troms contend that "about 800 acres" would be necessary to annually spread, "at agronomic rates," the amount of manure Masching's feedlot would produce.[3]

This question of the number of acres necessary for this volume of manure was specifically discussed at the Planning Commission hearing (Commissioner Wyttenbach inquiring "Why the big discrepancy in acres?"). Ms. DeVetter of the County's planning staff explained why the available acres were adequate, her explanation beginning with the fact that: "All manure

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[2] The first application was four pages long, including one aerial photograph of the site showing the location and dimensions of the proposed building. The second application, with its attachments, is 74 pages long.

[3] The Planning Commission minutes state Troms' argument as follows: "The manure manage (sic) plan is not adequate[.] There is not enough acres. This project is going to generate 1.1 million gallons and they will need 800 acres on a corn soil (sic) bean rotation to prevent nitrate and phosphorous buildup. They have 490 acres...The 490 acres is not enough[. Y]ou need 800 acres and you need more verification here." (AR 871)

is transferred. Mr. Masching has submitted [a] transfer of manure management plan. This complies with Minnesota Rules, Chapter 7020. The soil test and application volume are not the responsibility of the receiver -- but are -- are the responsibility of the receiver of the manure, they are not the responsibility of Mr. Masching." (AR 924) She then went on to explain that Troms' 800 acre calculation seemed to be based on a phosphorous element which MPCA no longer requires to be included in the calculation. Her remarks at the December 11 hearing on this topic were as follows:

> MS. DEVETTER: Okay, one thing that I guess that was claimed was that there is a requirement for there to be 800 acres associated with this facility in order for it to meet 7020 requirements. That is not correct at all by any stretch of the imagination. I did talk with Paul Brietzke, who is a Minnesota Pollution Control Agency representative regarding what kind of acreage would be needed for a facility of Mr. Masching's size. He has provided me with the most recent University of Minnesota Extension recommendations. The recommendations that Mr. Peters used to do his calculations were older. Minnesota Rules indicated that you must use the newer ones, so he has provided me with a step-by-step application and it -- it -- it appears they are close to twice as much acreage as they actually need. By law they have to require -- they are required to apply manure on a nitrate -- a nitrogen scale, but not a phosphorous scale.
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> In Mr. Peters -- the -- in the information provided as far as 40(b), he talks about a phosphorous management, that was part of that PCA guidance in determining the -- determining when phosphorous management is required. So, basically, phosphorous management would be required if it's within 300 feet of a intermittent stream, less than 300 feet from waters, so that includes lakes, rivers, streams, intermittent streams, protected wetlands, unburmed drainage ditches, tile intakes when the soil key level's about 75 grade.
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> Now, going beyond the fact that Mr. Masching is not responsible for applications, he's responsible for providing information to Mr. Toquam to properly apply it. Basically, Mr. -- Mr. Toquam is regulated by the PCA. Also, he is required to report how this manure is being applied and where it's being applied, so that level is taken care of at the state level for this facility. There is no phosphorous requirement, there is a phosphorous recommendation. They're claiming this is going to be unacceptable as far as the phosphorous and based on the calculations that -- that Mr. Brietzke provided -- walked me through, he is estimating that based upon acreage available to the applicant that they could likely apply manure on half of it every other year and still be adding only six pounds of phosphorous. There is -- he said at that rate that -- that it's not a pollution concern, and if the soil tests that come from Mr. Toquam indicate that there is a problem that the minimum state soil phosphorous requirements, if you look under -- under "E", that if Mr. Toquam, although already has buffers that are established along his water courses, some of them are 35 feet and others are over 50 feet, and, basically, what it says here is that the phosphorous restrictions in these requirements don't apply if you have a hundred feet of non-manure vegetative

buffer along lakes or streams or 50 feet of non-manure vegetative buffer along intermittent streams, protected wetlands, and unburmed drainage ditches, so in -- in the long-term case, should Mr. Toquam need to address this, the solution is adding an additional buffer.

(AR 928-931.)

Later in the hearing the following exchange took place:

MR. WYTTENBACH: Why the big discrepancy in acres, that's what I'm trying to figure out here, from what they're stating and what we're looking at?

MS. DEVETTER: I think it might be based on a -- a phosphorous requirement. Right now MPCA rules only require they you apply at a nitrogen rate. They have phosphorous recommendations, but they're not required, so if they're doing that -- they might be doing it but, again, I had MPCA do the calculations on it so I'm pretty confident in my--

MR. WYTTENBACH: Do you got an exact number?

MS. DEVETTER: What I have --

MR. WYTTENBACH: Just an exact so we kind of know? Well you said it's --

MS. DEVETTER: I had two statements --

MR. WYTTENBACH: Less than 490, you said?

MS. DEVETTER: These -- When he went through the calculations he was assuming 200 bushels, and he says, is that impossible, no, when he did it, yeah. His calculations indicate that -- oh where is it, 4,500 gallons an acre every other year he's indicating that you would need 244 acres in order to spread at a rate that's acceptable to the MPCA, 244 acres.

MR. WYTTENBACH: And this is from who?

MS. DEVETTER: Paul Brietzke, Minnesota Pollution Control Agency.

(AR 941-943.)

The other part of Troms' inadequate acreage argument relates to the representation of Mr. Toquam regarding the 490 acres he was supposedly pledging for spreading of Masching's manure. Troms argued at the Planning Commission hearing that these acres were "not verified;" Mr. Peters more specifically indicating that: "They've been tankering manure down -- down to the Westfield Township land, so they're -- they're bringing -- they're already using that land for

manure application from some other site. You guys need to get a handle on the manure management before you approve another permit." (AR 890) In his December 9, 2014 letter to the County, Mr. Peters wrote: "Toquam also feeds hogs in CAFO [Concentrated Animal Feeding Operations] too so there is no showing that Toquam has enough land to dedicate this 490 acres to the project." (AR 291)

Apparently after the Planning Commission hearing, Troms turned up more specific information supporting their general contention that acres supposedly available for spreading Masching's manure were in fact not. Troms ask the Court to take judicial notice of Document Number 180943 in the Dodge County Recorder's Office, which they represent as proof that "Roger Toquam has already pledged this 190 acres in Ripley Township...for a manure spreading easement on another project." Defendants object to Troms' request that the Court consider this document. It is not part of the record that was before the County on December 11, 2014; and Troms did not request augmentation of the Administrative Record by the October 1, 2015 deadline set for such request in the Court's scheduling order. Neither the County nor Masching disputes the substance of Troms' "double pledge" contention relating to the 190 acres.

I am not convinced by either part of Troms' inadequate-acres argument. The County had a reasonable basis to conclude that 244 acres was adequate to spread the manure from this feedlot. This answers Troms' 800 acres contention. County staff advised the Planning Commission and County Board that the 800-acre number appeared to be based on consideration of phosphorous, which is not required under the circumstances of this case. Specifically asked about the big acreage "discrepancy," Ms. DeVetter explained the source of her information and why Troms' number (apparently based on an outdated standard) was mistaken.

Generally, decisions of administrative agencies, including municipalities, "enjoy a presumption of correctness and will be reversed only when they reflect an error of law or where the findings are arbitrary, capricious, or unsupported by substantial evidence." *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 562 (Minn. App. 2001). Courts "defer to an agency's conclusions in the area of its expertise." *Cable Communications Board v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 668 (Minn. 1984). I am not certain that this proposition applies as readily to the actions of a county board as it does, for example, to state administrative agencies that exist exclusively to regulate matters in particular scientific or technical fields.[4] However, here the Dodge County Board was called upon to make a decision based in part on the technical determination of how many acres would be necessary to properly spread the manure from this feedlot. To make that decision the County Board called upon its staff to gather the necessary technical information; Ms. DeVetter described how she did that; and the Planning Commission and County Board made their decision based thereon. Troms have not presented any technical information to rebut the calculations of Mr. Brietzke, which were brought by Ms. DeVetter to the Planning Commission and County Board. This record provided

[4] For example: "Although the MCEA contends that the phosphorous limits in the permit are not stringent enough, we defer to MPCA's technical knowledge and expertise in calculating the specific numeric water quality criteria under 40 C.F.R. §122.44(d)(1)(vi)(A)." *In Re Alexandria Lake Area Sanitary District NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 314-15 (Minn. 2009).

the Board with substantial evidence on which to make the reasoned determination that 244 acres was adequate.[5]

The 244-acre calculation also answers Troms' double-pledge argument. Let us assume that Mr. Toquam cannot use the 190-acre parcel to spread Masching's manure, as Troms claim. That still leaves the 300-acre parcel described in Toquam's agreement – 56 acres more than necessary – available to receive the manure from this feedlot. Troms have not persuaded me that the manure management planning for Masching's project is deficient or incomplete.

As inadequate manure management planning is the only alleged informational deficiency pointed to by Troms in the second application; and as the Court finds that information adequate; I conclude that Masching presented a "completed permit application" in November, 2014. Thus, the flaw in the County's CUP approval that was determinative before Judge Williamson has been remedied in the second application.

Biased Decision-Makers

Troms argue that Masching's CUP must be vacated because of alleged "pervasive bias" of officials who approved it. Let us begin with the Westfield Town Board. Troms assert that in 2014, "Westfield Township officials" – specifically two Town Board supervisors (Wolf and Fiebiger) and the treasurer (Schmeling) – had manure spreading agreements with "James and Rebecca Masching," who are described by Troms as "family members related to the proposers of the project." Troms assert that these manure spreading agreements did not require the recipients "to pay Jim Masching any dollar amount for the liquid manure." Troms allege that these "valuable agreements with the Masching family" gave these officials "a direct financial stake" which went undisclosed while both CUP applications were being considered by Dodge County. Troms assert that "these township officials were charged with review and input on the proposed project." When the County solicited comment, "officials of Westfield Township either supported the November application or stated no concerns or opposition to [it] and...actively supported the application at the December 11, 2014 public hearing."[6] In short, Troms suggest that the Westfield Town Board supported the CUP application because "township officials" had been paid off with *free manure* by the Masching "family."

I am not convinced that any of this undermines the CUP approval. First, the Westfield Town Board had no authority to approve or reject Masching's CUP application. Although its comment on the application was sought by the County, the Town Board – unlike the Feedlot Advisory Board and Planning Commission – had no official role under the ordinance in the

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[5] Troms argued to the County that approval of this CUP, for a feedlot built on just six acres of land, sets a troubling precedent that "pav[es] the way for construction of these feedlots" on "postage stamp" sites "all over the county." (AR 297) It seems clear, however, that the acreage consideration that will ultimately control and limit the number and density of feedlots in Dodge County is the amount of land necessary for manure disposal. Dodge County's Feedlot CUP Ordinance provides that "Conditional Use Permits shall be in effect only as long as sufficient land specified for spreading manure is available and is being used for such purposes as regulated otherwise by this ordinance." (AR 91) *If* an acreage number derived from this case might be useable as a predictor of future feedlot density in Dodge County, that number is 244, not six.

[6] Town Board member Owen Kirkebon stated at the December 11, 2014 hearing: "Well, we kind of feel that they should have the permit."

County's application evaluation process. Second, the supposed "direct financial stake" of three "Township Officials" is based on contracts with "James and Rebecca Masching," *not* Nick Masching, the principal in Defendant Masching Swine Farms, LLC. The Administrative Record contains the names of half a dozen Maschings, all of whom, I presume, are relatives, and perhaps all raising hogs in Dodge County. But there is no evidence in this record to support the idea that one who has a business connection with *Jim* Masching must also be assumed to have a business connection with *Nick* Masching. The supposed financial connections between the Town Board and Defendant Masching is too speculative, and the Town Board's role in the decision too attenuated, for Troms' bribery-by-manure argument to be persuasive.

Troms also assert that the Planning Commission was biased. Specifically, Troms assert "that five of the seven members of the Planning Commission were financially benefitting from the feedlot industry so that there was an industry and actual bias, including Joshua Toquam, the son of Roger Toquam."[7] The Planning Commission, unlike the Westfield Town Board, *did* play an official part under Dodge County's Ordinance in the evaluation process of a CUP application. Under Ordinance Section 18.4.2(C), "The Planning Commission shall...hold public hearings and make recommendations to the County Board on all applications for...Conditional Use Permits." The Planning Commission conducted the December 11, 2014 public hearing on the CUP application, and recommended its approval. Ultimately the Planning Commission's role was advisory only; the decision to grant or deny the CUP was solely the County Board's. Does alleged "industry" bias in an advisory body present a legal flaw in the CUP approval process?

It appears that the seminal Minnesota case on decision-maker conflict of interest remains *Lenz v. Coon Creek Watershed District*, 153 N.W.2d 209 (Minn. 1967), where the court stated:

> The purpose behind the creation of a rule which would disqualify public officials from participating in proceedings in a decision-making capacity when they have a ***direct interest*** in its outcome is to insure that their decision will not be an arbitrary reflection of their own selfish interests. There is no settled general rule as to whether such an interest will disqualify an official. Each case must be decided on the basis of the particular facts present. Among the relevant factors that should be considered in making this determination are: (1) The nature of the decision being made; (2) the nature of the ***pecuniary interest***; (3) the number of officials making the decision who are interested; (4) the need, if any, to have interested persons make the decision; and (5) the other means available, if any, such as the opportunity for review, that serve to insure that the officials will not act arbitrarily to further their selfish interests.

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[7] Troms assert that: "The Dodge County Planning Commission is comprised primarily of registered feedlot operators." Although it appears that three members of the Commission may in fact be involved with truly large feedlots at or near 1000 animal units (see Ms. Trom Eayrs' remarks at AR 897), it also seems to be true that *anyone* who engages in for-profit livestock farming – and many who do not – qualifies as a "registered feedlot operator." In fact, I note in reviewing the listing of Dodge County feedlots contained in the Administrative Record (AR 532-543) that approximately half a dozen of Dodge County's "registered feedlots" are two-*horse* feedlots. Presumably this means that over in Olmsted County, my two saddle horses may make *me* a "feedlot operator."

Lenz Id. at 219 (bold and italics added).[8]

I see no impropriety, under *Lenz*, in the Dodge County Planning Commission advising the County Board on Masching's CUP application. Defendants argue that the issue is settled by the fact that the Planning Commission did not act "in a decision-making capacity." I am not so sure. While it is true that the Planning Commission only *recommended* CUP approval, it did so in an official capacity. It was entrusted with conducting the public hearing and in that capacity limited CUP opponents' comments. If the Commission did not act as decision-*maker*, it was certainly in a prime position to be a decision-*influencer*. I am not confident that a true conflict of interest in such a public body may safely be ignored because its role was "merely advisory."

However, there is no evidence that any Planning Commission member had a "direct interest" in the outcome of the Masching CUP application. The type of disqualifying interest the *Lenz* court discussed was a "pecuniary interest." In *E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815, 820 (Minn. 1985), the court applied *Lenz* in a case in which a town board member's "personal *financial* interest in an action performed in his official capacity" disqualified him. There is no suggestion here that any Planning Commission member had such an interest in this CUP decision. Even Joshua Toquam, the Commissioner who recused himself from voting on the Commission's recommendation because his father did business relating to this feedlot with Defendant Masching, does not appear to have had any direct or personal financial interest in this project.

What Troms propose with their "industry bias" argument boils down to a rule that would disqualify farmers from voting on other farmers' applications. Troms have brought to the Court's attention no case law holding that such alleged "industry bias" disqualifies either decision-makers or official decision-advisors.

Rushed Process and Unfair Hearing

Masching's second CUP application went from initial filing to County Board approval in just 22 days. Troms argue that "the County prejudged the application by recommending approval almost immediately after receipt of [Judge Williamson's] order and failed to give time and attention to the relevant issues." Troms contend that the speed with which the second application was addressed by County Planning staff, the Planning Commission, and the County Board suggests that it was prejudged and unfairly rushed to approval. Troms contend that this is further evidence the County never took a "hard look" at issues important to the application.

I am not convinced that the pace with which the second application moved to approval is an indication that it was not appropriately considered. What Troms characterize as unfairly "rushed" may also be seen as laudably prompt. There is no claim that any required scheduling milestone or interval (other than the six-month waiting period discussed above) was violated or ignored here. All required notices were timely given, procedural steps taken, and opportunity for public written and oral comment afforded.

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[8] The "*Lenz* factors" have been cited and applied as recently as *Ruhland v. City of Eden Prairie*, 2013 WL 3285019 (Minn. App. 2013).

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Troms also fault the manner in which the December 11, 2014 public hearing was run, asserting that the short time limits set for speakers "sharply limited public input and cut off public comment." *Perhaps* if I had chaired the December 11, 2014 public hearing I would have given speakers more time to talk. "One of the purposes of procedural due process 'is to convey to the individual a feeling that the government has dealt with him fairly.'" *State v. LeDoux*, 770 N.W.2d 504, 514 (Minn. 2009), quoting *Carey v. Piphus*, 435 U.S. 247, 262 (1978). Troms did not feel they were dealt with fairly by their county government at the December 11, 2014 hearing.

But this was the Planning Commission's meeting to run, and it was entitled to set reasonable ground rules. I cannot find that the time limits the Commission set were outside the range of reasonableness. While oral comments at the hearing were brief, parties were also permitted to submit written commentary and other material. Troms and Dodge County Concerned Citizens did so. I do not find due process lacking.[9]

The County Board's Decision

Let us turn to the merits of the County Board decision at issue on this appeal. The Board unanimously voted to grant the CUP, "adopt[ing] the recommendation of the Planning Commission,[10] the County staff's detailed Findings of Fact and Recommendations, and the recommendations of the Feedlot Advisory Committee with conditions, adding the bio-filter condition." (AR 1009) The Board's adopted findings included analysis and specific findings on all 11 of the CUP criteria listed in Ordinance Section 18.13.8(A) (AR 103-104).

Troms challenged the County's decision on several key CUP criteria. The first is the County's finding that the permitted "operation will not be detrimental to or endanger the public, safety, or general welfare." (AR 779) This finding is supported by the fact that the feedlot will be required to comply with all applicable MPCA 7020 rules, including those on appropriate manure management.

Troms suggest that the concentration of Dodge County feedlots has contributed to development of a "cancer cluster" in their neighborhood. There is no persuasive evidence offered to support the alleged connection.

Troms assert that their farm is currently habitat for "protected species," including snowy owls and tundra and trumpeter swans; and that that habitat may be damaged by air and water pollution from the project. However, while Troms and Dodge County Concerned Citizens have presented articles indicating that "concentrated animal feeding operations or large industrial farms can cause a myriad of environmental and public health problems" (AR 635-667), there is no evidence in the record adequate to support a conclusion that *this* project will damage the

[9] Counsel for the County reminds us of the "lost virtue" of brevity, and cites Lincoln as one who "knew the power of brevity." I do not doubt it. But Lincoln also spoke at length when the occasion and subject matter required it. At each of the famous debates with Douglas in 1858, he spoke for an hour and a half.

[10] The Planning Commission's action is described in its minutes as a motion "to recommend approval of the Findings of Fact and Recommendations of the Agenda Report" with conditions that included installation of "bio-filters for the purpose of odor reduction." (AR 882)

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habitat of protected species. Indeed, to the degree that these species are still currently being sighted in Westfield Township, it would seem that they are tolerating an environment which Plaintiffs would characterize as already "saturated" with feedlots.[11]

Troms contend that this feedlot will "undoubtedly pollute the Ripley/Westfield Ditch (part of the Cedar River Watershed District)." The only information offered to support this assertion, however, is the project's proximity (800 to 1000 feet) from the ditch. (AR 302) Ms. DeVetter responded to this issue at the December 11, 2014 hearing as follows:

> MS. DEVETTER: These total confinement hog barns are designed, they -- they have to be zero discharge facilities, they're not open lots, they're pits that are pumped once a year so they -- they have a year's worth of capacity in them, and so I guess you can't come off on the assumption that it's -- just because it's a feedlot it's a polluter. It's a closed system, *there isn't going to be anything discharged into the ditch that flows into the Cedar River*. The Cedar River Watershed District has commented on it twice. They have indicated that all of their concerns have been dressed -- addressed by the Construction Short Form Permit and as long as they have complied with that then their concerns are addressed.

(AR 937)

The Board's adopted findings also include a specific determination of "adequate water supply" ("A 164-foot deep well serving the hog barn has been established.") and "that existing groundwater…are or will be adequately protected." (AR 785) Troms assert that Masching's feedlot, requiring 3.5 million gallons of water per year, will deplete a groundwater supply already reduced by the demands of "several large feedlots in the immediate area" and an irrigation system. The only evidence presented to support this assertion, however, is the experience of a Trom nephew who had to replace a well "soon after installation" of a nearby 1,080-animal unit feedlot. Troms also allege knowledge of "other citizens in the county" who have "had to replace their wells" because of "huge feedlots." (AR 303-04) This information is too vague to establish the causal connection necessary to support Troms' groundwater depletion allegation.

The Board's adopted findings include the determination that "the proposed use shall not substantially diminish and impair property values within the area." (AR 784) Troms and Dodge County Concerned Citizens contend that feedlots lessen the value of surrounding properties.[12] They presented articles supporting that assertion. At the December 11, 2014 hearing, Ms. DeVetter responded to this claim with information from the Dodge County Assessor indicating that, while "it would be very difficult to determine an impact to value," "properties that sell within the feedlot buffer did not appear to sell

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[11] The record indicates that Westfield Township already has 11,364 animal units, to which the Masching project at issue will add 720 – an addition of 6 percent. (AR 296)

[12] "If this feedlot is approved by Dodge County, the farm that generations of Trom family members have worked hard to improve will be destroyed. Research indicates that feedlots negatively affect real estate values." (AR 299)

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for less than the properties that are located outside the regulated area." (AR 934-936) The Commission and the County Board had a substantial and reasonable basis to reject claims that Masching's feedlot would diminish the value of Troms' and other neighboring properties.

The Board's adopted findings also include the determination that "the proposed use is compatible with adjacent uses of land. The use shall not be substantially injurious to the permitted use nor unduly restrict the enjoyment of other property in the immediate vicinity." (AR 782) This is the subject matter that is at the heart of this controversy. The Troms' position was described at the December 11, 2014 hearing by 87-year-old Lowell Trom, a lifelong resident of Dodge County, farmer, and former chair of the Dodge County Board, as follows: "They got all these hog facilities built up and you can't even drive down the road without smelling an old hog building all the time. As you drive by those places, if you go to open all your doors and windows and get out of the car, what a stinking mess, that's not right." (AR 907-908) In a number of affidavits filed in opposition to the first application, Troms described "the daily stench" which they anticipate would be "associated with this huge hog confinement facility directly west of our farm." (AR 577) Lowell Trom's affidavit stated as follows:

> Construction of the proposed hog confinement unit will only add to the already noxious odors from other hog confinement units in the immediate area. Dodge County is already saturated with 227 feedlots in the County. Within a three-mile radius of our farm, there are at least 10 hog confinement units, several of which exceed 2,000 head. The stench from these units is unbearable. The odors from these neighboring hog confinement units interfere with the daily use and enjoyment of our farm. When the air is still, the stench hangs in the air for hours and it is impossible to know which facilities are producing the noxious odors. The stench is overwhelming. The window vents to these facilities are frequently opened and on those days that the barns are being cleaned, these facilities create such extreme and noxious odors that it is impossible to be outside. The pungent smell of hog manure permeates the area – there is no escaping the stench. The numerous hog facilities which are already in the immediate area are offensive to the senses. ...If this proposed hog confinement facility is allowed to proceed, it will significantly add to the level of noxious odors from the numerous facilities in the immediate area. The combination will be intolerable.

(AR 577-578).

The information which indicated that odor from the feedlot project should *not* be a serious problem for neighboring properties, is described in the Board's findings at AR 782-784. The closest residence (Darrell Trom Trust) is 3,845 feet away.[13] This distance is well beyond the minimum 1,000-foot setback. The Masching barn is *not* the "curtain-sided" type most often associated with odor complaints. Further, the "OFFSET" model calculation that was "run to determine potential nuisance odors to the closest dwelling" predicted "an annoyance free value

[13] If I understand the record correctly, the Lowell and Evelyn Trom residence, situated northeast of the Darrell Trom Trust residence, is just a bit further away from the Masching feedlot.

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of 98 percent at the closest dwelling, or an estimated odor impact of 15 hours per month from the months of April to October without odor mitigation. Also, the prevailing winds do not blow toward the Troms, who have opposed this project. The closest dwelling that would be within the path of the prevailing wind is over a mile away." (AR 783) Ms. DeVetter specifically discussed this information at the December 11, 2014 hearing:

> I think that it might be beneficial at this time to discuss -- to discuss maybe a little bit more about offset if anybody has any more questions about that process.
>
> Underneath the ordinance Dodge County only requires an offset evaluation if there is a producer that is within that 1,000' setback if they want to expand, so in this case offset was not required. However, it was still run to try to determine what kind of odor would be expected from the months of April through October. If Ryan was here, our -- our feedlot person, formally, that amount, it was 98 percent which -- without bio-filters. The University of Minnesota has estimated that this is, you know, this could be 15 hours per month from the months April through October. If you were 99 percent it would be seven hours a month from April through October. The one thing I guess that really wasn't said much about the offset is that it's a very conservative model, it is kind of a worse case scenario model. Again, it is just a model so, you know, not everything is a hundred percent right, but it is a model that the University developed that's based on science. This model assumes that you're going to have -- that you, basically, have an open pit situation, you don't have any kind of disturbances from the weather that would break up any kind of odor coming from the pit. That -- also that you're (sic) nearest receptor is going to be downwind in the prevailing wind. That's not the case in this situation, so what they said is that you -- you kind of, you know, the wind isn't coming from direct – the wind isn't coming from the same place in all directions and you have things like trees, you have just normal weather patterns, and you have the fans that disperse it, so they're saying when -- when they do this model it's really supposed to be a worse case scenario, so again, they did -- the Feedlot Advisory Board they discussed that on site, and you can talk with them how -- why it is they came to this -- the recommendations that they did regarding bio-filters.[14] Bio-filters are not required by the Dodge County Ordinance.

(AR 932-34).

As I mentioned at the hearing on the present motions, my home in rural Olmsted County is several miles from the closest hog confinement facility. It is corn, soybeans, and beef cows and calves in our part of Elmira Township. So I have no personal experience with what might be termed the "day-to-day" smell of a large hog feedlot next-door. But the owners of large hog and beef feedlots elsewhere in Olmsted County own the pasture land just across the road northwest of our house; and once a year in August they bring semi-tanker loads of liquid manure out to our neighborhood for spreading. When that manure is being spread and for about a week thereafter,

[14] The Feedlot Advisory Board recommended no bio-filters. (AR 1014) The CUP was approved with the requirement that bio-filters be installed.

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the smell is incredibly bad. Activities outside at our place are, if not quite "impossible" during that time, then certainly unpleasant. If we were not able to close the windows and turn on the air conditioning, our house would be uninhabitable for that week.[15] My experience is consistent with the Dodge County Planning Office's Findings of Facts and Recommendations on this project, which indicate that "***stronger odor resulting in nuisance complaints can also occur when the pit is agitated and manure is land applied.*** Due to the required capacity of the pits, pumping and land application ***only occurs once per year.***" (AR 782)

If I understand the OFFSET modeling correctly, it is intended to predict the impact on neighboring properties of the "day-to-day" smell of the feedlot; *not* the "stronger odor" connected with once-per-year land application of the manure. I see nothing in the Administrative Record that analyzes the odor impact on neighboring properties of Mr. Toquam spreading 1.1 million gallons of manure pumped from the pit beneath the Masching hog barn on the parcels Toquam has pledged for that purpose. It appears that because this "only occurs once per year," Dodge County Planning does not consider that odor impact to be particularly problematic. Were I the factfinder here, based on the personal experience described above, I might disagree. I note that the 300-acre Section 5, Westfield Township parcel Mr. Toquam has pledged for spreading this manure is all within a mile and a half directly west of the Lowell Trom residence; and the 190 acres in Section 29 of Ripley Township – the allegedly double-pledge parcel – is two miles northwest (meaning it is upwind) of the Trom place. In other words, Lowell and Evelyn Trom will get not only the OFFSET-analyzed "daily" odor of the feedlot, but also the annual, off-the-charts "stronger odor" when the manure comes out of the barn for land application to the farm west of theirs.

But the Court is *not* the factfinder here: I am not in a position to substitute my judgment for that of the Dodge County Board. The evidence before the County Board, including the OFFSET calculation; evidence that the type of "stronger odor resulting in nuisance complaints" "only occurs once per year" "when the pit is agitated and manure is land applied;" and the Feedlot Advisory Board's finding that "the issue of odor will not be nuisance to surrounding people due to neighbor distances and the prevailing wind direction" (AR 1014); provided the County Board a reasonable basis to conclude that odor would not be substantially injurious to nor unduly restrict the enjoyment of neighboring properties.

Before leaving the subject matter, I would make an observation. With this order I uphold Dodge County's approval of this CUP; and I do so despite the fact that I think Lowell Trom's description of the smell of hog feedlots in Westfield Township is, at least at times, entirely accurate. In this situation, what recourse, if any, do Troms and similarly situated parties have?

Lowell Trom's complaints would generally come under the heading of the tort of nuisance. See Minn. Stat. Sec. 561.01: "Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any

[15] I grew up with the smell of hogs. My dad's main enterprise was a beef cow herd, but he also had a small farrow-to-finish hog operation. My mom used to say that the smell of hogs was "the smell of money." But the smell that arrives in our neighborhood and stays for a week every August is not the smell of hogs that I knew as a kid. It is that smell distilled, concentrated, and magnified exponentially.

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person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered."[16] However, "Agricultural Operations," to the degree they "operate[ ] according to generally accepted agricultural practices," enjoy significant statutory protection from nuisance liability. See Minn. Stat. Sec. 561.19, subd. 2. Presumably this statutory provision reflects a policy judgment that a society that eats as many bacon cheeseburgers as ours does, cannot be heard to complain when it catches a whiff of a feedlot. So practical availability of nuisance-based relief for offensive odors from a feedlot of this size (less than 1,000 animal units) is questionable under Minnesota law.

This specialized treatment carved out for and afforded Agricultural Operations by statute illustrates the fact that this feedlot odor question is a policy issue at multiple levels of government. Elected *legislative* bodies make the policies that determine just how much of a "stinking mess" Minnesotans will be required to put up with when they "open [their] doors and windows and get out of the car" in Dodge and other farming counties.

CONCLUSION

I am not persuaded that the supposed "danger signals" pointed out by Troms, either singly or in the aggregate, show that the County failed to give the issues important to this CUP application – including Plaintiffs' objections – appropriate consideration. Despite County staff's apparent continuing opinion that there was nothing actually wrong with Masching's *first* application, I find that the *second* application received the requisite "hard look" from the Dodge County Board.

I conclude that the County's approval of Masching's CUP application was not arbitrary or capricious; that it was based upon substantial evidence; that the procedure the County followed was fair, and afforded due process to interested parties; that the process followed and the result reached are consistent with the applicable ordinances; and that the outcome evidences, and is the result of, reasoned decision-making. I therefore deny Plaintiffs' Motion for Summary Judgment. I grant Defendants' Motion and uphold Dodge County's approval of the CUP.

J.F.C.

[16] A case discussing the viability of a nuisance claim brought against operators of a hog feedlot by a neighbor is *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. App. 2003). The nuisance statute, however, was amended the year after *Wendinger*, possibly in response to that decision.