No. A16-1099

State of Minnesota

In Court of Appeals

Lowell Trom, et al., Appellants,

v.

County of Dodge, et. al.,

Respondents

and

Masching Swine Farms, LLC,

Respondent.

APPELLANTS' BRIEF AND ADDENDUM

JAMES P PETERS (#0177623)
Law Offices of James P Peters PLLC
460 Franklin St N #100
PO Box 313
Glenwood MN 56334
(320) 634-3778
Attorney for Appellants

JACK Y. PERRY (#0209272)
Briggs and Morgan
80 South 8th St
Minneapolis MN 55402
(612) 977-8400
Attorney for Respondent MSF, LLC

KEVIN P LEE (#0395933)
MN Center for Environmental Advocacy
26 E. Exchange Street, Suite 206
St. Paul MN 55101
Telephone: (651) 223-5969
Attorney for Amicus Curiae MCEA ET AL

PAUL D. REUVERS (#0217700)
Iverson Reuvers Condon
9321 Ensign Avenue So.
Bloomington, MN 55438
(952) 548-7205
Attorney for Respondent County

JENNEANE JANSEN (#236792)
Kris Palmer (#240138)
Jansen & Palmer, LLC
4746 Elliot Avenue South
Minneapolis, MN 55407
(612) 823-9088
Attorneys for Petitioners, Dr. Robert S. Lawrence, MD, Dr. Keeve E. Nachman, Ph.D., MSPH, Mr. Robert P. Martin, BA, Dr. Lillian P. Fry, Ph.D.,MPH, Ms. Claire M. Fitch, MSPH, Ms. Carolyn R. Hricko, MPH

BRUCE D NESTOR (#0318024)
DE LEÓN & NESTOR, LLC
3547 Cedar Ave. South
Minneapolis, MN 55407
Tel: (612) 659-9019
Attorney for Applicants HSUS and ALDF

DANIEL H LUTZ
THE HUMANE SOCIETY OF THE UNITED STATES
1255 23rd Street NW
Washington, DC 20037
Tel: (240) 388-5023
Attorney for Applicants HSUS and ALDF

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The District Court held that service of process was effective.

STATEMENT OF THE CASE

This case presents the question of whether Respondent Dodge County's ("County") December 11, 2014, decision to grant a conditional use permit ("CUP") to the proposed total confinement hog barn of Respondent Masching Swine Farms, LLC ("MSF") under Minn. Stat. 394.301 and the Dodge County Zoning Ordinance ("Ordinance") was unreasonable and arbitrary. MSF proposes the hog barn for 6 acres in Westfield Township, Dodge County, Minnesota ("Project").

Appellants respectfully request that this Court of Appeals reverse the December 11, 2014 decision of Respondent County and vacate the CUP granted to the Project of MSF as arbitrary and unreasonable.

STATEMENT OF FACTS

A. **Parties. Appellants.** Appellant Lowell Trom is a life-long resident of Dodge County who with his wife Evelyn own the family farm in Westfield Township located at 12451 – 700th Street, Blooming Prairie. He was born there in 1929. The home place is about 1/2 mile east of the project. His parents, Elmer and Marie Trom, moved onto the farm in about 1925. Lowell Trom has been active in the community and formerly served as the Chair of the Dodge County Board, the Westfield Township Board and other elected positions.

Appellant Evelyn Trom is married to Lowell. They have spent their entire lifetimes building their farm and farming operations in Westfield Township and raising their family. The Trom home place has served as the central location for numerous multi-

generation family events including receptions, family reunions and a wedding. The Trom home place has been featured as a show place. AR593-99.

Dodge County. Respondent Dodge County is a political subdivision of the State of Minnesota, which is created pursuant to Minn. Stat. Ch. 373 ("County"). The County has adopted and amended the Zoning Ordinance, including an amendment in February 2015 to Section 16.24.3. The County acts through the elected Board of 5 members ("Board") and the appointed planning commission ("PC") of 7. The PC is to "provide assistance to the County Board and Zoning Administrator in the administration of [local] ordinance and shall review, hold public hearings, and make recommendations to the County Board on all applications for Zoning Amendments, Conditional Use Permits, Interim Use Permit, Temporary Use Permits and Subdivision proposals using the criteria listed in [Chapter 18]." Dodge County Zoning Ordinance 18.4.2. The County is a delegated County for purposes of the feedlot program of the MPCA under the Minnesota feedlot program Rules, Minn.R. Ch. 7020.

The PC is comprised primarily of registered feedlot operators. At the public hearing on December 11, 2014, at least 5 of the 7 PC members were registered feedlot operators. AR897. The PC includes Joshua Toquam, the son of Roger Toquam, who has a direct financial interest in the proposed Project. Roger sold 6 acres of bare land for the Project. Toquam has a manure spreading agreement ("MSA") for liquid manure, which swine operators consider valuable. Joshua Toquam participated as a member of the PC at the public hearing on December 11, 2014, despite his father's interest in the Project and,

although abstaining from the final vote (AR967). There was no indication that the County enforced the term limits for PC members. AR987.

MSF. Respondent MSF is a limited liability company set up for the Project. MSF owns 6 acres in Westfield Township having purchased that from Roger Toquam. The location is in the Cedar River Watershed District, only a few feet from the drainage ditch that feeds into the Cedar River that runs through Austin. AR57.

B. Dodge County Zoning Ordinance. The Ordinance contains mandatory provisions and defines "shall" means mandatory and not discretionary. Chapter 2; 2.3.2E; AR-80; Chapter 4; 4.1.3: "The word 'shall' is mandatory and not discretionary." AR82.

Section 16 sets standards for all land uses, including feedlots. AR88. All uses "shall comply with all applicable Federal, State and County laws, rules and regulations..." AR-88. Section 16.24.3 requires a complete application from the applicant for a feedlot CUP and formerly included a listing of information about the proposal. AR91-92. The manure management plan information is also part of required information for a Certificate of Compliance from MPCA.

The April 2014 version of the County Application form for a feedlot CUP required the same information from the applicant at the time of application as did these Minnesota Rules, Ch. 7020. AR1-3. Section 16.24.1 requires an applicant for a new feedlot to apply for a Certificate of Compliance when applying: "A Certificate of Compliance must be applied for from the MPCA at any time: A. A new feedlot is proposed where a feedlot did not previously exist . . .". AR90. After the filing of the Trom's first appeal in May 2014, the County twice changed the Application form to reduce the required information.

Section 18.13.5 in effect in December 2014 requires all applicants for a feedlot CUP to submit a complete application on a form provided by the County and information that contains all required information for review of the proposal and for any CUP. AR102. In February 2015, and after the District Court in November 2014 vacated the original CUP for processing an incomplete application, the County amended Section 16.24.3 of the Ordinance to strip out the complete information requirements for a feedlot. Where the application is incomplete, Section 18.13.5 requires the County to return the application for the complete information: "If the request does not contain all required information or sufficient information for the permit to be issued, it shall be returned within fifteen (15) days with a written request for additional information." AR102. Section 18.13.6 allows the County to forward to the PC for public hearing only a completed application: "Upon receipt of a complete application and other required supporting material, the Zoning Administrator shall forward a copy of the completed application and attachments to the Planning Commission prior to hearing." AR102. By amending Section 16.24.3 in February 2015, the County seeks to sharply limit the information required for a complete application.

Section 18.13.8 sets forth the criteria for granting CUPs:

> A. CRITERIA FOR GRANTING ALL CUPS - Conditional uses may be approved, by the County Board, upon a showing by the applicant that the use or development conforms to the comprehensive land use plan of the County and is compatible with the existing neighborhood. For approval of the CUP, the County Board shall find that:
>
> I. The establishment, maintenance or operation will not be detrimental to or endanger the public health, safety, or general welfare

II. The proposed use will be able to meet the standards of this Ordinance or any other applicable County Ordinance and is not contrary to established standards, regulations or ordinances of other governmental agencies;

III. Each structure or improvement is so designed and constructed that it is not unsightly, undesirable or obnoxious in appearance to the extent that it will hinder the orderly and harmonious development of the County and the use district wherein proposed;

IV. The proposed use is compatible with adjacent uses of land. The use shall not be substantially injurious to the permitted uses nor unduly restrict the enjoyment of other property in the immediate vicinity. This includes whether the applicant has ensured adequate measures have been or will be taken to prevent or Dodge County Zoning Ordinance 18- 38 control offensive odor, fumes, dust, noise, and vibration, so that none of these will constitute a nuisance, and to control signs and other lights in such a manner that no disturbance to neighboring properties will result.

V. The proposed use shall not substantially diminish and impair property values within the area;

VI. The establishment of the use will not impede the orderly and normal development and improvement of the surrounding properties for uses permitted in the Zoning District;

VII. The proposed use will not have a detrimental effect on existing parks, schools, roads and other public facilities;

VIII. Adequate water supply and sewage disposal facilities are provided and in accordance with the Minnesota Department of Health and the Dodge County Subsurface Sewage Treatment Ordinance No. 4, or successor;

IX. That existing groundwater, surface water and air quality are or will be adequately protected; X. Adequate utilities, access roads, on-site parking, onsite loading and unloading berths and drainage have been or will be provided;

XI. Adequate measures have been taken to provide ingress and egress so designed as to minimize traffic congestion on public roads; AR103-104.

C. **First CUP Application.** On February 10, 2014, Masching submitted his Application for the Project with one page of information (AR1; AR53) and one aerial photo (AR4). Pages 2 and 3 of the application were blank. AR2-3. The project, 2,400 head of finishing hogs, equals 720 animal units under the MPCA guidelines, which generate manure equivalent to a city of 7,200 people.

D. **County April 2014 CUP Approval.** On February 26, 2014, the County deemed the Application complete. AR28. The County sent out Notice and request for comment to various entities, including Westfield Township, the County SWCD, County Highway Department, MN DNR, MNDOT and the CRWD. AR5-7. On March 4, 2014, the County Feedlot Advisory Committee ("FAC") met for a site visit, including the applicant, and Nick Masching's dad, Scott Masching, and viewed the proposed feedlot site. Of the 6 people present, 2 were Maschings. The FAC recommended approval of the proposal with 10 conditions. AR13-15. Missing were soil borings, design plans, manure management plans, land spreading agreements and information about the composting facility for dead animal disposal. AR14-15.

On March 19, 2014, the County mailed notice to neighbors and published notice of a public hearing for April 2, 2014. AR16-17.

Of note, Westfield Township officials involved in recommending approval of the proposed Project to the County had a financial stake with family members related to the proposers of the Project. Treasurer, Larry Schmeling, signed a MSA effective March 28, 2014, with James and Rebecca Masching and signed on April 12, 2014. Dodge County Recorder Document No.A205533. Supervisor, Bruce Wolf, signed the same MSA. Document No. A205534. The same for Supervisor, Bruce Fiebiger. Document No. A205535. These were never disclosed to the public. Jane Masching, Nick Masching's (owner of Respondent MSF) mother, a loan officer at Citizens State Bank of Hayfield that funded the Project, notarized all the MSAs. Document No. A209498.

The County prepared a set of proposed Findings of Fact and Recommendations for approval. AR43-52. The County sent the Staff Report to Westfield Township for review with the statement that if no comments were received back, the County would take that as an approval. AR43.

The PC public hearing took place on April 2, 2014 and the 8 page transcript is on file herein. AR-77-83. Masching presented about 2 sentences of information. There was no presentation of any staff report and essentially no public input. PC minutes: AR28-29. The minutes of the PC establish that the County relied on the OFFSET model. AR684.

The public hearing is required by statute, as well. The Minnesota Legislature amended Minn. Stat. 116D.04, subd. 2a, to exempt feedlots under 1,000 animal units from the environmental review process. The legislature included as a trade-off the requirement that notice and a public hearing before the County Board be held that included all of the feedlot permit application materials available for the public in lieu of the full environmental review process. Minn.Stat. 116D.04, subd. 2a(d). For the public hearing to have any meaning, all of the information must be available.

On April 8, 2014, the Trom Family submitted a comment letter on the project. AR-63-70. The Comment letter raised concerns for, among other things, the public health and the neighborhood. AR63. Concerns were raised for the creation of antibiotic resistant bacteria in this cluster of feedlots: "MRSA is considered a major threat to the public health." AR65. Submitted were numerous studies on threats to the public health from clusters of hog confinements like this spreading disease and creating antibiotic resistant bacteria, including from Johns Hopkins University and Bloomberg School of Public

Health, the University of Cincinnati, the University of Illinois, the University of Minnesota, Duke University, the University of North Carolina and the University of Iowa, among others. AR69-70. The issue remains important. The Court of Appeals can take judicial notice that in September 2016 the United Nations and World Health Organization consider the creation of antibiotic resistant bacteria from hog confinements as a "fundamental threat to human health, development and security". This is only the fourth time that a General Assembly has addressed public health related issues with the prior being HIV/AIDs, non-communicable diseases such as diabetes and heart disease and the Ebola virus.

On April 8, 2014, the Board held the regular meeting, went into closed session without explanation or mention in the minutes and approved the CUP without discussion. AR71. Brad Trom stated that the County did not allow public input. AR600-01. Lowell Trom stated as follows with regard to this April 8, 2014 public meeting:

> My son, Brad, and I attended the meeting of the Dodge County Board of Commissioners on April 8, 2014. I was denied the opportunity to comment on this huge project with far-reaching implications. The County Board did not allow any discussion nor did they even acknowledge that my son and I were present at the meeting as afterward, Commissioner Erickson approached me and stated that they did not have any choice and had to approve the project. AR574.

E. **2014 Appeal to District Court.** On May 5, 2014, this appeal followed in the Dodge County District Court. The Ordinance creates such appeal jurisdiction. AR109.

F. **November 18, 2014 Order and Judgment.** After hearing, the District Court vacated the CUP. *Trom, et al., v. Dodge County,* Dodge County District Court Case No. 20-CV-14-293 (November 18, 2014). AR323.

G. **November 20, 2014 Application.** Less than 48 hours later, MSF submitted a new application dated November 20, 2014 on a new form. AR122. The new form allowed the County to defer from consideration at the CUP hearing all MPCA required information about the Project, including information about manure management. AR122.

Although the project was put on notice that it went ahead at its own risk, the project went ahead with MPCA permitting in July 2014 and began construction in August 2014. AR772-74.

Of particular significance, MSF did submit a MSA with Roger Toquam for 490 acres. AR141-145. Included is a MPCA Manure Ownership Transfer Form. AR146-150. Roger Toquam had already pledged 190 of these acres in Ripley Township to AgStar Financial Services for a MSA on another project on March 3, 2009. Document No. 180943. There is no reference to the March/April 2014 MSAs with the Westfield Township.

The November 2014 Application came in on a third application form that does not require any of the MPCA information. AR122. The stripped down third Application form allows the County to issue the CUP without consideration of the required information.

H. **November 21, 2014 Staff Report and Scheduling.** The County prepared a new Staff Report dated November 21, 2014. AR199-201. The Staff Report provides in part:

> Feedlots inherently pose a risk to groundwater and surface water because of manure storage, handling and land spreading agreements. These risks will be considered when reviewing the application for feedlot construction permit in accordance to MN Rule 7020. Feedlots of this size also present a risk for nuisance related to noise, odor and traffic. The County is currently requesting additional information from the applicant regarding these potential impacts and information required in the County Zoning Ordinance and MN Rule 7020. AR200.

By the morning of November 21, 2014, the County: (a) prepared a Staff Report recommending approval of the CUP for the Project (AR199); (b) scheduled a special meeting of the PC for December 11, 2014 to approve the CUP (AR281); and (c) included the CUP on a rescheduled Board meeting set to reconvene specifically for this (AR 281). By 9:15 am on the morning of November 21, 2014, the County received comments from the County Engineer stating no concerns. AR523. By 11:14 am, the County received comments from the County SWCD stating no concerns. AR524. By 11:17 am, the County received the same from MN DOT. AR522. The County had also emailed the Staff Report directly to the attorneys who represented the Project and Westfield Township for review and comment under the County practice of obtaining Township "comments, concerns and opinions regarding the proposed land use." AR199.

The County held a Feedlot Advisory Committee ("FAC") review on November 26, 2014. AR518. Scott Masching attended the meeting of the advisory committee with Nick Masching, his son. AR518. The minutes show no manure application plans and a needed preconstruction meeting. AR520. Construction was already complete. AR520.

The Public was later notified of Public Hearing for December 11, 2014. AR283. The County denied a request for a short continuance of the hearing. AR530-531.

On December 9, 2015, the County received written objections to the CUP from counsel for the Trom Family. AR286. The Trom Family raised concerns about threats to air and water quality and the public health, as well as to the unfair, flawed and biased process and procedures. AR286; 293. The County also included in the record the April 8, 2014 comment letter with studies. AR63-70.

The County received written objections dated December 10, 2014, from Dodge County Concerned Citizens ("DCCC"). AR294. DCCC objected to the public health concerns from the project and cumulatively as the tipping point with the 10 other existing hog confinements within a 3 mile radius. AR295. DCCC had asked: "Saturation . . . How much is enough". AR738. DCCC objected to the "environmental toxins". AR296. DCCC objected to the unfair, rushed and biased process in which the County appeared to be serving as an advocate for the Project. AR298. DCCC commented: "As detailed in Exhibits 7 and 8, there are at least 10 hog confinement units within a 3-mile radius of the Trom farm, several of which exceed 1,000 animal units." AR300. DCCC raised concerns for the health of animals and people in the area, including "respiratory problems, skin infections, nausea, depression and even death". AR300. DCCC provided evidence as follows regarding the health of the dogs:

> As detailed in the affidavit of Brad Trom dated September 7, 2014 (Exhibit 13), Brad noticed several years ago that his dogs vomited around dusk. This is the time of day that the numerous hog confinement facilities in the area open their windows and allow fresh air into the units. Brad's dogs are kenneled outdoors much of the year. With their highly sensitive sense of smell, they are especially vulnerable to the stench and noxious fumes from these facilities. AR-300.

DCCC also provided: "There is a suspected cancer cluster in the area near the Trom farm. Within a 3-mile radius of the Trom farm, there have been at least 13 individuals who have been diagnosed or died as a result of cancer. Within this same 3-mile radius, there are at least 10 hog confinement units, several of which exceed 2,000 animal units. AR295. DCCC also commented that the manure management plan is inadequate. AR302. DCCC provided a listing of supporting documents and information.

AR306-07. Submitted were the Affidavits filed in the prior civil appeal in Dodge County, including those of Lowell Trom (AR573), Sonja Trom Eayrs (AR589), Brad Trom (AR600), James Trom (AR608) and Douglas Eayrs (AR612). Randy Trom submitted a separate letter of objection dated December 7, 2014. AR621. Michael Williamson submitted a separate letter of objection dated December 7, 2014. AR629. Peggy Trom submitted a separate letter of objection dated December 8, 2014. AR623.

Lowell Trom complained that: "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". AR577.

I. **December 11, 2014 County Approvals.** The County held the public hearing and special meeting of the PC on December 11, 2014. The minutes are at AR870. The record also includes the transcript. AR884. Despite setting aside about 3 hours, the County limited presentations to just a few minutes. The County shut down public comment from attorney Peters based on the stated allotted three minutes. The County also shut down Sonja Trom Eayrs from giving complete public input for herself and several family members either unable to attend or unable to speak for themselves. AR893 & 898-899. Although Eayrs presented 8 signed authorizations to speak on behalf of other family members, including her mother, Evelyn Trom, who suffers from Advanced Parkinson's Disease and cannot speak for herself, the PC limited Eayrs to five minutes. AR917-919. Also speaking were: Douglas Eayrs, Brad Trom, Lowell Trom and Jim Trom.

For Westfield Township, Owen Kirkebon, supervisor, testified that the township believed that the County should issue the CUP. AR908. Ken Folie spoke stating that he

was representing himself. AR911. Folie stated that the County did not need to evaluate effects from manure management. AR911-12. Because the project only owned 6 acres and relied on transfer of manure to a licensed applicator for spreading on other's fields, Folie asserted that the County did not need to evaluate this. Id. Folie had attended the FAC site visit on November 26, 2014. AR518.

After the public input, the PC moved to close the public hearing and then allowed County staff presented to the PC, including responding to the objections. AR922.

The PC agenda is part of the record. AR424. Also included in the record are the proposed findings of the County. AR428. The PC voted to approve the CUP with the addition of biofilters on the Project. AR969.

The record also includes information on the County Board meeting of December 11, 2014, which started out in a prior morning session and then reconvened in the afternoon following the PC public hearing for the sole purpose of approving the CUP. In the morning session, the County Board waived the application fees of Masching LLC. AR981. In the reconvened meeting in the afternoon, the County Board voted to approve a resolution that approved the CUP for the Project. AR973. The Resolution for Approval of the CUP is in the record. AR983 & AR1008. The transcript of the County Board afternoon session is part of the record, as well. AR987.

Despite litigation with Appellants for months, nowhere in the record did the County ever address or respond to numerous concerns raised by Appellants and others public health concerns about, among other things, antibiotic resistant bacteria and

spreading of disease from this proposed project in the cluster of 10 others within the 3 mile radius. Nowhere in the record did the County respond.

J. **2015 Appeal Action in District Court.** In January 2015, Plaintiffs filed this appeal action in the Dodge County District Court. Appellants served the appeal documents three different ways. First, service was on counsel of record by US Mail consistent with the Minn.R.Civ.App.P. on January 7, 2015, with copies to attorney Paul Reuvers for Respondent County and attorney Jack Perry for Respondent Masching. Peters Affidavit in COA, August 5, 2016; para. 5; Exhibit B. Second, Appellants on January 7, 2015, mailed the appeal documents to the Dodge County Sheriff for service of process consistent with Minn.R.Civ.P. on the office of the Board Chair of Dodge County who had presided over the meeting on December 11, 2014, who was then Rodney Peterson, with the address being at the official address for the Respondent County Board, Courthouse of Dodge County, 22 6th Street East, Dept. 31, Mantorville. Peters Aff., para. 9; Exhibit C. Appellants did not request service on Rodney Peterson in a personal capacity and did not ask the Sheriff to serve Rodney Peterson at home or at any law offices. Peters Aff., para. 11. In addition to being the Board Chair on December 11, 2014 and continuing as a board member throughout, Rodney Peterson is a licensed attorney with Lawyer ID #0220565.

Appellants on January 7, 2015, checked the Dodge County website and confirmed on the official site of Dodge County that Rodney Peterson continued to be the Chair of the Board so that Appellants had no notice that Dodge County had changed board chairs the previous day on January 6, 2015. Peters Aff., para. 12. Appellants confirmed via USPS tracking that the Sheriff received the appeal documents on January 8, 2015, at 9:55

a.m. Peters Aff., para. 13. The Sheriff never returned the appeal documents indicating that Rodney Peterson was not the Board Chair and never contacted counsel to inform counsel that Rodney Peterson was no longer the Board Chair. Peters Aff., para. 14. The Sheriff's Certificates of Service show service on Respondent County and Respondent Board by Rodney Peterson on January 13, 2015, at 11:33 a.m. Exhibit D. Third, as discussed below, Appellants later instructed the Sheriff to again serve the County.

In the District Court, Respondents conceded these three methods of service, never argued a lack of actual notice and never argued any prejudice. Respondents admittedly received the appeal documents in a timely manner. While Respondents included the affirmative defense of insufficient service of process in their Answers to Complaint, they failed to plead the specifics as required by Minn.R.Civ.P. 9, including as to how service of process was insufficient regarding the capacity of Peterson to be served in the office as board chair. Respondents never filed any Motion to Dismiss in the District Court and instead raised the service of process issue as an "aha!" in opposition to Appellants' Motion to Amend. Respondent County had timely notice of the appeal documents in the District Court and promptly made their Answer to Complaint and managed to file their Notice to Remove the Honorable Judge Jodi Williamson on February 2, 2015. Peters Aff., para. 19.

With regard to mailing the CUP to Appellants, at all times up to February 4, 2015, Respondent County had still sent no written permit approvals, findings, conditions or the CUP from Respondent County to Appellants following up on the December 11, 2014 hearing and meeting on the Masching CUP and had not sent the official minutes of the

December 11, 2014 meeting triggering notice of decision. Peters Aff., para. 20. On February 4, 2015, Appellants made another formal request on Respondent County via letter and email for a written copy of the December 11, 2014 minutes, findings and conditional use permit ("CUP") for MSF, in accordance with Ordinance Section 18.13.11. Exhibit E. On February 9, 2015, Respondent County mailed the December 11, 2014 minutes of meeting, which mailing did not include a copy of the actual CUP granted to Respondent Masching. Exhibit F.

On April 13, 2015, Appellants effected personal delivery for the third time, this by delivery of the appeal documents to the Respondent County Sheriff for personal service on the office of the Board Chair of Respondent County who had been assigned on January 6, 2015, John Allen, at the official address for the County. Exhibit G. Despite the instructions to serve the office of the board chair on John Allen at the official office of the County - the Courthouse - on April 14, 2015, the Sheriff served the appeal documents on Respondent County by service upon Lisa Kramer - Finance - Auditor. Exhibit H. On April 15, 2015, the Sheriff served the appeal documents on Respondent County by service upon Carol Allen at her home. Exhibit I.

K. May 13, 2016 Order and Judgment. The District Court heard cross motions for summary judgment at the hearing on February 16, 2016. The entire transcript of the hearing is on file herein. Appellants argued, among other things, that the County had failed to consider that this project represented a tipping point in cumulative negative effects to the public health and the environment. Judge Chase stated as follows during the oral arguments on the motions:

What you're saying is, Judge, this is in a way the straw that's breaking the camel's back for the folks in this area of Westfield Township. This is the one that makes it intolerable." D.Ct. Transcript, p. 37; lines 15-18.

Counsel for Appellants argued:

they can't look at this in a vacuum. They have to look at this project in the context of the neighborhood. That's the CARD case that talks about cumulative impacts. It's the Pratt expert report from the Pope County Mother's case that talks about—when you're talking about impacts from feedlots you talk about the cumulative impact of the feedlots in the area. D.Ct. Transcript, pp. 41-42; lines 23-25; 1-6.

The District Court entered judgment on May 13, 2016 affirming the grant of the CUP. In the memorandum, the District Court at page 4 granted a greater deference to the County based on the appeal from an issuance of a CUP, instead of a denial, citing to *Schwardt v. County of Watowan,* 656 N.W.2d 383 (Minn. 2003).

K. **The Instant Appeal.** Appellants timely commenced the instant appeal from the Dodge County District Court judgment by filing a Notice of Appeal and Statement of the Case with this Court of Appeals.

ARGUMENT

I. STANDARD OF REVIEW.

The Court of Appeals will vacate the grant of a CUP where a proposal fails to meet the standards of an ordinance and the grant of a conditional use permit is arbitrary. *In re Block*, 727 N.W.2d 166, 180 (Minn. App. 2007); *Sunrise Lake Ass'n, Inc. v. Chisago County Bd. Of Comm'rs,* 633 N.W.2d 59, 61 (Minn. App. 2001).

The Court of Appeals will affirm approval of a CUP where the proposal meets the standards of the ordinance and the approval is reasonable having fairly considered all relevant factors. *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003).

Minnesota Courts have in the past granted more deference to municipal decisions granting CUPs than to those denying an application. *Corwine v. Crow Wing County,* 309 Minn. 345, 352, 244 N.W.2d 482, 486 (1976); *Zylka v. City of Crystal*, 283 Minn. 192, 196, 167 N.W.2d 45, 49 (Minn. 1969).

Reviewing courts must provide deference to the quasi-judicial decision-making body and temper the reasonableness inquiry to avoid merely substituting their judgment for that of the decision-making body. *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 509 (Minn. 1983). "The court's authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked." *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 175 (Minn. 1982).

Violation of rules and procedures related to handling the quasi-judicial process and failure to consider important aspects of impacts from a project constitute evidence of arbitrary decision making. *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 838 (Minn. 2006); *Pope County Mothers v. Minnesota Pollution Control Agency,* 594 N.W.2d 233, 235 (Minn.App. 1999).

Construction and interpretation of statutes, ordinances and rules is a question of law for de novo review by the appellate courts. *Canadian Connection v. New Prairie Township,* 581 N.W.2d 391 (Minn. App. 1998); *Duncanson v. Board of Supervisors of Danville Tp.*, 551 N.W.2d 248 (Minn. App. 1996).

The Court of Appeals gives no deference to the District Court in a permit appeal based on the Administrative Record. *Iron Rangers for Responsible Ridge Action v. Iron Range Res.,* 531 N.W.2d 874, 879 (Minn.App. 1995), *review denied* (Minn. July 28, 1995).

II. RESPONDENT COUNTY FAILED TO TAKE A HARD LOOK AT THE ENVIRONMENTAL CONCERNS RELATED TO THE PROPOSED PROJECT, INCLUDING CUMULATIVE NUISANCE ODORS AND AIR EMISSIONS, MANURE MANAGEMENT AND WATER CONTAMINATION AS REQUIRED BY THE COUNTY ORDINANCE. THE ISSUANCE OF THE CUP BY RESPONDENT COUNTY FOR THIS PROJECT BASED ON THE ADMINISTRATIVE RECORD WAS UNREASONABLE AND ARBITRARY.

The Court of Appeals should reverse and vacate the County's December 11, 2014, decision to grant the CUP to MSF as arbitrary for failure to consider important aspects of the proposal, including the cumulative effect of nuisance odors and air emissions from the proposed project in addition to those from other existing projects, among other things. The record includes numerous comments that the proposed project in combination with others threatens a tipping point to the environment in this part of Minnesota. Respondent County erred as a matter of law by evaluating this proposal in isolation.

Where a County fails to take a hard look at the evidence pertinent to the enumerated criteria in the Ordinance for a CUP, the Court of Appeals will vacate the grant of a CUP approval as unreasonable, arbitrary and an abuse of discretion. *In re Block*, 727 N.W.2d 166, 180 (Minn. App. 2007). The Court of Appeals will vacate a CUP granted to a project that fails to demonstrate that it will meet the ordinance. *Sunrise Lake Ass'n, Inc. v. Chisago County Bd. Of Comm'rs,* 633 N.W.2d 59, 61 (Minn. App. 2001).

In re Block demonstrates that our Courts will still reverse the unreasonable approval of a CUP where the County has, within the process of analyzing whether a proposed project meets the ordinance standards, failed to adequately consider a significant aspect of a proposed project. The *In re Block* project was a commercial kennel

proposing to raise hundreds of dogs for sale in pet stores. The dogs outside of the kennel project had the potential to create s significant amount of noise in the neighborhood. The project's proposed solution to reduce noise was to cut the vocal cords of all the dogs through a controversial medical procedure of "debarking" all of the hundreds of dogs. Evidence established that "surgical debarking is overwhelmingly disfavored within the veterinary community and many allege that it is inhumane". Despite the concerns, the County went ahead and approved the CUP.

The Court of Appeals acted and reversed the approval of the project *In re Block* for failure of the County Board to adequately consider the issues arising from the proposed surgically debarking of all the dogs. The Court of Appeals reversed based on the "scarcity of information provided" and remanded.

Minnesota Courts have also reversed an approval through a quasi-judicial process for review of a land use proposal where the County (or agency) wholly failed to consider and analyze an important issue about the proposal, such as the failure to consider the cumulative effects of the proposed project in addition to existing conditions created by other projects. *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 838 (Minn. 2006) (reversing and remanding where the County considered the proposal in isolation and there was insufficient evidence in the record to show that county evaluated cumulative effects in combination with other projects existing in the vicinity). In CARD, the County failed to consider the cumulative effect of the proposed gravel pit on ground water in combination with the other existing gravel pits in the immediate area.

Where a quasi-judicial agency violates rules and procedures related to handling the quasi-judicial process, the Court will reverse the decision as arbitrary because the violations show a combination of danger signals that the decision resulted from the unreasonable will of the agency, rather than a deliberated judgment . *Pope County Mothers v. Minnesota Pollution Control Agency,* 594 N.W.2d 233, 235 (Minn.App. 1999) (issuance of several site permits by MPCA in violation of prohibition rule during the review process demonstrated will of agency rather than a deliberated judgment). In *Pope County Mothers,* MPCA was evaluating a proposed multi-site hog feedlot project. MPCA was asked to analyze the cumulative effect of odors and air emissions from the combination of emissions from all of the proposed multiple hog confinement barns and the existing barns in the vicinity. MPCA and the project argued that there was no information on the cumulative effect of odors from the hog confinement barns, approved and moved the project forward.

Because of the seriousness of the issue of cumulative effects on odors and air emissions, MPCA concurrently commissioned the Pratt expert report to review and evaluate the potential cumulative effects on air quality from the accumulation of odors and air emissions from the multiple barns in the vicinity. The report was completed within weeks. MPCA's Pratt expert report demonstrated that a cumulative effect existed and that when the odors and air emissions from the several barns was considered, there would be a predicted violation of air quality standards. The District Court considered the Pratt expert report as part of the judicial review, determined that MPCA failed to consider this and other aspects of the proposal and reversed.

The Court of Appeals in *Pope County Mothers* affirmed the District Court on other grounds and did not reach an analysis of the Pratt expert report because the record otherwise supported reversal. The Court of Appeals discussed the issue and in footnote 2 addressed the standard by which the Court considered the report:

> "a May 1998 MPCA report ("the Pratt report") on cumulative air emissions from 60 feedlots, including all the feedlots in the HPP project. We do not and need not consider the Pratt report to determine that the MPCA's negative declaration on the need for an EIS was arbitrary and capricious. FN2. The administrative record before us demonstrates that the MPCA did not genuinely engage in the reasoned decision making the law requires." 594 N.W.2d at 238-239.

Here, Appellants presented Respondent County with substantial evidence of the existing daily stench from the 10 hog barns already operating in the 3 mile area and presented evidence that combining additional stench from the proposed project would represent a breaking point making the odors and air emissions unbearable. AR577-578. There are at least 10 units within a 3 mile radius of the Trom home place. AR602; 609. The Lowell Trom and other Affidavits gave details on the "stinking mess" from the "daily stench" of existing nuisance odors from the barns in the area. Id. Trom testified: "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." AR577-78. Lowell Trom testified at public hearing on December 11, 2014, as to the "stinking mess" from all the feedlots. AR907-08. The record includes a map of the existing hog barns. AR544; 586; 739. The record includes a listing of existing hog barns in Dodge County, including Westfield Township. AR532-43.

The record includes a listing of hog barns over 1,000 animal units in Dodge County.

AR548. Brad Trom provided the County with the following information:

> The proposed hog facility raises significant health concerns for the health of my rare breed dogs (Chinese Foo dogs). Several years ago, I noticed that my dogs vomited around dusk. This is the time of day that the numerous hog confinement facilities in the immediate area open their windows and allow fresh air into the unit(s). My dogs are kenneled outdoors much of the year. With their highly sensitive sense of smell, they are especially sensitive to the stench and noxious fumes from these facilities. AR601-02.
> The stench from the numerous hog confinement units in the immediate area is unbearable and interferes with the daily use and enjoyment of our farm. Regardless of the wind direction and air speed, we must work outdoors. 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 around dusk and, on those days that the barns are being cleaned, these facilities crate such extreme and noxious odors that it is impossible to be outside. The pungent smell of hog manure permeates the air - there is no escaping the stench. The numerous hog facilities which are already in the immediate area are offensive to the senses. The odors take your breath away at times. 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. AR 603-04.

The District Court heard at oral argument that the County failed to consider the cumulative effects of this project on the existing conditions:

> Judge Chase: "You feel it's incumbent on the county to do that? To study the additive impact of the feedlot on all the other feedlots around."
>
> Counsel: "I think when you have the residents there and they're complaining about the odors. They're talking about the multiple facilities in the area, then it's incumbent upon the agency to respond meaningfully to that issue."
> District Court Transcript, 2/16/2016, p. 38, lines 7-14.
>
> Counsel: "If you had two projects next to each other, did they impact a neighboring at say a .5 level or was it a 1.0 level, a cumulative impact is much like a wave theory. If you have two waves, they come together, they go up. They don't just balance out. The MPCA commissioned the Pratt Report two months after the decisions were made and the Pratt Report shows that adjacent feedlots do accumulate the impact".

District Court Transcript, 2/16/2016, p. 31, lines 3-11.

Respondent County evaluated the proposed project in isolation and without consideration of the additive effect of odors and air emissions from the proposed project with the existing conditions from other projects identified by Lowell Trom in the record. Respondent County considered setbacks from this barn to residences, considered the design of this proposed hog barn and utilized the OFFSET model to analyze odors and air emissions from this hog barn. None of these evaluate the combination of the odors and air emissions of the proposed project with those from the 10 existing hog barns in the vicinity already causing problems. Respondent's use of the OFFSET model failed to consider cumulative effects so that the County wholly failed to consider this aspect of the problem, just as Kandiyohi County failed to consider the combination of impacts on ground water from the proposed gravel pit with the existing and just as MPCA failed to consider odors and air emissions from the proposed hog barns with the multiple existing hog barns in the vicinity. The OFFSET is a single site model that nowhere factors in cumulative conditions from other existing facilities. Respondent's proposed Findings regarding the OFFSET model provide in part:

> Although not required for establishment purposes, OFFSET was run to determine potential nuisance odors to the closest dwelling (other than the owner/operator). The OFFSET predicts an annoyance free value of 98% 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 towards 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. AR433.

Respondent County explained the OFFSET model to the PC on December 11, 2014, as a single site model that evaluates wind direction and other factors from the

single facility. AR932-34. Unfortunately, the OFFSET model fails to take into consideration cumulative effects from the numerous projects and is incomplete. Respondent County failed completely to analyze the existing conditions and the additive effect of the odors and air emissions from the proposed project in combination with those existing conditions. Like the dozens of applications before, Respondent County rubber stamped approval of this CUP.

Although Respondents argue that the approval of the CUP is consistent with industry practice and regulations, the approval falls outside industry regulations because of the failure to consider cumulative effects of the project in addition to the existing conditions of the 10 other hog barns in the vicinity.

The Order and Memorandum of the District Court at pages 16-18 affirmed the County's decision, accepted the results of the OFFSET model without considering cumulative effects and provided too much deference to the County decision. The District Court included information on personal experiences with hog odors in his own neighborhood and indicated at page 18 that the Court "might disagree" with the conclusions of the County regarding odor during pit agitation. The District Court granted too much deference to the County without considering whether the OFFSET model was in fact fundamentally flawed and allowing the project in isolation.

The Court of Appeals should reverse the grant of the CUP for the failure of the County to consider and evaluate cumulative effects of odors and air emissions from the proposed facility in combination with the existing conditions from other facilities.

Respondent County also failed to adequately consider the effects on the environment from manure spreading, including having enough acres to take up all the nitrogen and phosphorus. The record shows that the County has over 200 permitted feedlots; AR532-43; AR548. The Zoning Administrator has been involved in permitting and review of hog barns in Dodge county since March 2007. AR668-69. Despite what should be significant experience, the County could not address the issue of acreage required for manure application and needed to call MPCA at the last minute to try and sort out the acreage requirements for manure spreading (AR928-932), received information on the number of acres required for a corn and bean crop rotation and never made any calculation of the number of acres required for corn on corn rotation, which requires additional nutrients. If the zoning administrator had been working on hog barn permits since 2007, why did the zoning administrator have no information on the number of required acres and have to call MPCA at the last? The record lacks proof that the County has any practice of adequately reviewing and maintaining manure management plans on the 234 feedlots already in the County. The public process on December 11, 2014 lacked any information rebutting the concerns of cumulative effects of the manure from this barn, together with the existing feedlots in the vicinity and deferred analysis of manure spreading because of a manure transfer form.

While the record does include the MSA signed by Roger Toquam in August 2014 for 490 acres (AR140), the County accepted this without question, including the 190 acres in Section 29, Township 106, Range 18 of Ripley Township. AR144; AR806; AR810. The County never analyzed whether the manure spreading acres were actually

available to this project. The public commented that Toquam had already pledged and was already using that 190 acres of land in Ripley Township, Section 29, for manure spreading from his own existing feedlot. AR291. The County heard objections to the double use of the land in the transcript of public hearing. AR890. [T]"hey're already using that land for manure application from some other site". AR890. Toquam had already pledged this 190 acres in Ripley Township to AgStar Financial Services for a manure spreading easement on another project in 2009. Document No. 180943. The County rebuffed any concerns, did not consider the issue of the double pledge, relied on the manure transfer form and deferred manure management to MCPA. AR950.

Again granting a high level of deference to the County decision, the District Court accepted that 244 acres was enough for a corn and bean rotation and decided that, even if there was a double pledge, 300 acres was still enough for a corn and bean rotation. There was no analysis of corn on corn rotation and no analysis of phosphorus build up, which would have required hundreds of additional acres of land for manure spreading. By deferring to MPCA and granting too much deference to the County, no one is in charge.

Respondent County also failed to adequately consider the cumulative effect of use of groundwater by this proposed hog barn, including well interference. Appellants provided the County with information about excessive water appropriation by hog barns in the vicinity. AR578. Brad Trom notified the County that at least one neighboring well had already gone dry from the well interference. AR605.

In affirming a process that lacked any cumulative effect analysis and lacked essential information on manure spreading, the District Court gave the County a pass

based on an unduly deferential standard of review for an approval of a CUP. The District Court granted more deference to the County's decision to grant the CUP than a decision to deny the CUP, following *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). The Minnesota Court of Appeals has held that, since zoning laws are a restriction on the use of private property, a landowner whose application for a conditional use permit has been denied has a lighter burden than one who challenges approval of a permit. *Bd. of Supervisors of Benton Twp. v. Carver Cnty. Bd. of Comm'rs*, 302 Minn. 493, 499, 225 N.W.2d 815, 819 (Minn. 1975). Here, the District Court granted the County too much deference under this standard by allowing the County to ignore cumulative effects on odors and air emissions despite the detailed concerns of neighbors and despite the record of saturation from existing feedlots. Too much deference was granted given based on the record of the County not having given a hard look at the environmental effects from manure handling.

III. RESPONDENT COUNTY WHOLLY FAILED TO CONSIDER AND EVALUATE PUBLIC HEALTH CONCERNS REGARDING THE CREATION OF ANTIBIOTIC RESISTANT BACTERIA, AMONG OTHER THINGS, AS REQUIRED BY THE COUNTY ORDINANCE. THE ISSUANCE OF THE CUP BY RESPONDENT COUNTY FOR THIS PROJECT BASED ON THE ADMINISTRATIVE RECORD WAS UNREASONABLE AND ARBITRARY.

The Court of Appeals should reverse and vacate the CUP because Respondent County wholly failed to consider effects of this project on the public health. The administrative record establishes that the County never evaluated whether the proposed project meets the Ordinance requirement that the project has no adverse public health impacts on the neighborhood. This is the first listed criteria in Section 18.13.8 for CUPs:

"The establishment, maintenance or operation will not be detrimental to or endanger the public health." The record establishes that Respondent County disregarded and never analyzed articulated concerns for the public health, thereby rendering arbitrary and unreasonable the approval of the CUP on December 11, 2014.

Failing to consider and evaluate evidence bearing on listed Ordinance criteria for a CUP with more than a scant record makes a decision arbitrary and unreasonable. *In re Block*, 727 N.W.2d 166, 180 (Minn. App. 2007). The record must show a reasoned response to substantial concerns about important factors and demonstrate that the proposal will meet ordinance standards. *Sunrise Lake Ass'n, Inc. v. Chisago County Bd. Of Comm'rs,* 633 N.W.2d 59, 61 (Minn. App. 2001). The failure to address a relevant issue is evidence of an unreasonable decision. *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 838 (Minn. 2006).

Here, the Affidavits and information submitted by the Trom Family and other property owners demonstrated for the record threats to the public health from this project in addition to the existing facilities in the vicinity. The Affidavits and letters included the following: 1) Lowell Trom Affidavit, AR573; 2) Sonja Trom Eayrs Affidavit, AR589; 3) Brad Trom Affidavit, AR600; 4) James Trom Affidavit, AR608; 5) Douglas Eayrs Affidavit, AR612; 6) Randy Trom letter, AR621; 7) Peggy Trom letter, AR623; 8) Michael Williamson letter, AR629; and 9) Patricia Derby letter, AR759.

For example, the record shows that Lowell Trom submitted in his affidavit:

> The proposed hog confinement unit raises significant health concerns which impair our continued use and enjoyment of the family farm. There are a number of

> individuals in the immediate area who have suffered from or died as a result of environmentally-related diseases. . .
> The proposed hog confinement unit will only add to the already elevated concern of family members and neighbors that pollution to the air and water is directly affecting the health of local families. AR575-76.

The record establishes that Brad Trom raised concerns about environmentally-related diseases from the proposed hog barn. AR602. Peggy Trom raised concerns as follows: "The pollution from animal wastes causes respiratory problems, skin infections, nausea, depression and even death for people who live near factory farms. Centers for Disease Control, Mortality Weekly Report, July 5, 1996." AR624. Peggy Trom submitted an extensive discussion of the public health impacts. AR625-28.

The Williamson letter attached the study: "Understanding Animal Feeding Operations and their Impact on Communities". AR635. This study presents concerns about the spreading of disease and infections from hog confinements to humans and animals. AR649. The study also presents concerns about the low level use of antibiotics:

> There is strong evidence that the use of antibiotics in animal feed is contributing to an increase in anti-biotic resistant microbes and causing antibiotics to be less effective for humans. . .The World Health Organization is also widely opposed to the use of antibiotics, calling for a cease of their low-level use in 2003. AR651.

The Court of Appeals can take judicial notice that public health concerns from hog confinements have continued and accelerated. In September 2016, the United Nations and World Health Organization considered the creation of antibiotic resistant bacteria from hog confinements as a "fundamental threat to human health, development and security": www.who.int/antimicrobial-resistance/en/. This only the fourth time that a General Assembly has addressed public health related issues with the prior being

HIV/AIDs, non-communicable diseases such as diabetes and heart disease and the Ebola virus. The World Health Organization issued a press release, which is located at: www.who.int/mediacentre/news/releases/2016/commitment-antimicrobial-resistance/en/

Minnesota appellate courts may take judicial notice of facts, even for the first time on appeal. *Smisek v. Comm'r of Pub. Safety*, 400 N.W.2d 766, 768 (Minn. App. 1987) (taking judicial notice of trial court order in related proceeding).

The evidence submitted by the Trom Family to Respondent County for evaluation included the April 8, 2014, letter raising, among other things, public health concerns about the project proposed for this area of the County with all the other facilities already there. AR-63-70. Concerns were raised specifically for the creation of antibiotic resistant bacteria in this cluster of feedlots: "MRSA is considered a major threat to the public health." AR65. Exhibit B to the April 8, 2014 letter included the numerous studies on threats to the public health from clusters of hog confinements like this spreading disease and creating antibiotic resistant bacteria from numerous reputable Universities. AR69-70. The record also includes the December 9, 2015, written objections. AR286.

The County received written objections dated December 10, 2014, from Dodge County Concerned Citizens ("DCCC"). AR294. DCCC objected to the "public health concerns" from the project and cumulatively as the breaking point with the 10 other existing hog confinements within a 3 mile radius. AR295; 609. DCCC objected to the "environmental toxins". AR296. DCCC commented: "As detailed in Exhibits 7 and 8, there are at least 10 hog confinement units within a 3-mile radius of the Trom farm, several of which exceed 1,000 animal units" AR300. DCCC raised concerns for the

health of animals and people in the area, including "respiratory problems, skin infections, nausea, depression and even death". AR300. DCCC provided evidence as follows regarding the health of their dogs:

> "As detailed in the affidavit of Brad Trom dated September 7, 2014 (Exhibit 13), Brad noticed several years ago that his dogs vomited around dusk. This is the time of day that the numerous hog confinement facilities in the area open their windows and allow fresh air into the units. Brad's dogs are kenneled outdoors much of the year. With their highly sensitive sense of smell, they are especially vulnerable to the stench and noxious fumes from these facilities." AR-300.

DCCC also provided: "There is a suspected cancer cluster in the area near the Trom farm. Within a 3-mile radius of the Trom farm, there have been at least 13 individuals who have been diagnosed or died as a result of cancer. Within this same 3-mile radius, there are at least 10 hog confinement units, several of which exceed 2,000 animal units. AR295. DCCC provided a listing of supporting documents. AR306-07.

Respondent County failed to consider and evaluate the threat to the public health posed by this project in addition to the others in the vicinity. The PC referenced the hundreds of pages received by the County on December 10, 2014 and baldly asserted for the record that they "all had a chance to read" the materials. AR 959. The PC made a motion to accept the binder of materials in the record, but nowhere held a discussion on the materials as they pertained to the Ordinance criteria. AR 961. Neither the PC nor the County Board considered, or even referenced, the threat of increased antibiotic resistance in their minutes, reports and findings. AR 779-81, 785-86, 884-971, 986-1007.

In Mantorville, Dodge County is handing out CUPs to hog confinements, such as this one, without regard to the creation of antibiotic resistant bacteria that are considered

one of the world's fundamental threats to public health. Less than 20 miles away, the Mayo Clinic in Rochester, which US News and World Report ranked as the best hospital in the nation, is trying it's best to continue to use antibiotics to help treat people. A serious threat to the public health should be noticed by the County, especially in the shadow of the world renowned Mayo Clinic.

IV. RESPONDENT COUNTY APPROVED THE CUP FOR THE PROPOSED PROJECT THROUGH AN EXPEDITED PROCESS LACKING FUNDAMENTAL FAIRNESS THAT INVOLVED A STAFF REPORT THAT SERVED AS AN ADVOCACY PIECE FOR THE PROJECT, A BIASED, FLAWED AND UNFAIR PUBLIC HEARING PROCESS AND A FAILURE TO MANAGE AND ADDRESS THE VOLUMINOUS RECORD OF CONCERNS. THE ISSUANCE OF THE CUP BY RESPONDENT COUNTY WAS UNREASONABLE AND ARBITRARY.

Minnesota law provides that a quasi-judicial decision on a land development project is arbitrary and capricious if it reflects the will, rather than the judgment, of the decision maker, which can be shown by the failure of the decision maker to follow applicable process and procedure. *Pope County Mothers v. Minnesota Pollution Control Agency,* 594 N.W.2d 233, 235 (Minn.App. 1999). Neighboring property owners have the right under Minnesota law to a fair and impartial quasi-judicial process in zoning decisions, including the right to impartial decision makers who lack a direct financial stake in the decision. *E.T.O., Inc. v. Town of Marion,* 375 N.W.2d 815, 820 (Minn.1985); *Lenz v. Coon Creek Watershed District,* 153 N.W.2d 209 (Minn. 1967).

Another danger signal on the approval of the CUP is the pervasive bias in favor of approving feedlots demonstrated by the PC and County Board, including based on the recommendation of the Town Board. While the bias may not have risen to the level of

disqualification of officials from voting for a direct financial stake in the outcome (other than Joshua Masching), the acknowledged bias remains a danger signal to be considered in combination with the others as to the reasonableness of the decision. The Township Officials involved in recommending approval had a financial stake with the family related to the feedlot operations of the Project. Schmeling, Wolf and Fiebiger all signed MSAs with James and Rebecca Masching, who are related to the owner of MSF. The Township Officials never disclosed the MSAs. Westfield Township was on record as having no objection to the Project, as evidenced by the County proposed Findings. AR431. Owen Kirkebon, supervisor testified at the public hearing on December 11, 2014, on behalf of Westfield Township in support of the CUP for the Project. Kirkebon stated as follows: "Well, we kind of feel that they should have the permit." AR908.

The County heard objections that five of the seven members of the PC were financially benefiting from the feedlot industry so that there was an industry bias. AR897. Richard Wolf, Chair of the PC and a registered feedlot operator, stated at public hearing:

> I'd like to maybe address the statement that, 'this is a livestock board.' Yes, it may not—it may look like that, but I think as of right now there's two positions available, or soon to be I believe, that if anybody else would like to be on this board you sure can. AR954.

There are a number of additional danger signals, including the fact that the County rushed the process, prejudged the application and held an unfair hearing. The County had already on November 21, 2014, issued a Staff Report recommending approval of a new CUP before counsel for Appellant had even received in the mail the District Court order vacating the prior CUP. The District Court Order vacating the initial CUP issued on

November 18, 2014. AR323. The County granted approval of the second CUP on December 11, 2014. Section 18.13.13 of the Ordinance provides that: "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." AR109. Ordinances such as this contemplate that the County should wait a minimum of six months before considering once again the resubmission of an application. Although the District Court considered otherwise, this is a question of law. The reversal and vacating of the CUP on November 18, 2014, constituted an effective denial of the CUP for purposes of Minnesota law. Such an Order has greater weight than a denial because of the deferential standard of review. The goal of the Court is to effectuate the legislative intent. Minn. Stat. 645.16. Minnesota courts have defined what constitutes an effective denial of a permit application for purposes of Minnesota law. *Demolition Landfill Services, LLC v. City of Duluth*, 609 N.W.2d 278, 281-82 (Minn. App. 2000), *review denied* (Minn. July 25, 2000); Minn.Stat. 15.99; *Calm Waters, LLC v. Kanabec County Bd. of Com'rs,* 756 N.W.2d 716, 719 (Minn.2008). Respondent County should have waited 6 months.

The County received from MSF the new application on November 20, 2014. AR124. The County prepared and issued the new Staff Report within hours and no later than early in the morning of November 21, 2014. The County had submitted the new Staff Report the morning of November 21, 2014 to various agencies and was receiving back agency comments already that morning. AR522-24 . The County first published

Notice of the Public Hearing on the resubmitted CUP application in the newspaper that went out on November 26, 2014. AR284.

Another danger signal of arbitrary decision making is the County's ongoing refusal to hold a public hearing that considers and evaluates all the relevant issues, documents and information contemplated by the then existing Ordinance, Minnesota Rules, Ch. 7020 and Minn.Stat. 116D.04. The Ordinance required a public hearing on the CUP application and in December 2014 included a number of items of required information pertaining to the project to include manure management, most of which were previously missing on this Project as detailed in the November 18, 2014, Order. The public hearing that the County holds on a CUP does double duty by satisfying the requirement in Minnesota Statutes that states that a public hearing must take place on all feedlot applications for projects under 1,000 animal units, such as this, that also seek to avoid an environmental assessment worksheet ("EAW"). Minn.Stat. 116D.04. Sometime between April 2014 and November 2014, Respondent County changed the application form to defer the required information under the Ordinance and the Minnesota Rules, Ch. 7020. Respondent County changed the application form 3 times since April 2014 each time reducing the information required and thereby rendering meaningless the public hearing process and the fundamental right to be heard. Respondent County's application seeks to defer all the relevant information: "Upon approval of the Conditional Use Permit for the feedlot additional information is required . . . ". AR 123. This is a violation of Minn.R. 7020.2225, Subp. 4, and Minn. Stat. 116D.04, subd. 2a(d).

The County unreasonably limited public input and cut off public comment at the hearing on December 11, 2014. The County had set aside 3.5 hours for the public hearing and yet they limited public input to 3 minutes per person or 5 minutes for a person representing multiple citizens and property owners so that total public input was limited to less than an hour. The County heard objections to this bias, as follows: "What's the hurry, you set aside from one until 4:30 I think for the public hearing." AR921. Despite having written authorizations to speak on behalf of 8 family members and citizens, the County cut off Sonja Trom Eayrs from comment after only 5 minutes of input. AR893; AR919. Sonja Trom Eayrs stated that she had 8 signed authorizations and should be permitted to speak for 24 minutes. AR893. The County refused and instead stated: "You've got five minutes right now." AR894. The County shut down input from Sonja Trom Eayrs after 5 minutes. AR897.

In conclusion, the process for review and approval of this project lacked fundamental fairness at every stage of the proceeding -- a biased PC stacked with fellow registered feedlot operators (akin to putting the fox in charge of the henhouse); a rushed process that limited public input by those it affected directly; reliance upon an advocacy report prepared by Melissa DeVetter, the local planning and zoning administrator that did not address a single concern raised by the appellants; and fast-tracking of this controversial project in back-to-back special meetings of the PC and the Dodge County Board of Commissioners called for this single project just days after the District Court vacated the initial permit. The biased, unfair, and rushed process can only lead to one conclusion -- Dodge County did not take a hard look at this project.

V. THE COURT OF APPEALS SHOULD REVERSE THE GRANT OF THE CUP AND VACATE SO THAT THE COUNTY EXERCISES ITS AUTHORITY TO REMEDY THE SITUTION ANEW WITHOUT REFERENCE TO ITS PRIOR DECISIONS AND CONSISTENT WITH CURRENT MINNESOTA STATUTES AND RULES.

In reversing the CUP, the Court of Appeals should vacate the approval rather than remand. *BECA of Alexandria, L.L.P. v. Cnty. of Douglas ex rel Bd. of Comm'rs*, 607 N.W.2d 459, 464 (Minn. App. 2000) ("We are not required to remand where a zoning authority's decision is arbitrary because it is unsupported by legally sufficient reasons."). Respondent County should review the proposed project without being constrained by the prior proceedings and in compliance with Minnesota law. The project should go through a full and fair hearing and process in compliance with Minnesota law unfettered by attachment to the prior approvals. Such a process should consider cumulative effects, a response to concerns for the public health, possible mitigation measures and protection of the public health. The effects are not just from a single project. This appeal is an opportunity for the Minnesota Court of Appeals to send a strong message to every local unit of government facing a land use decision -- the public health of all Minnesotans comes first. A hard look under Minnesota law demands review of public health concerns. The public health of our citizens is paramount to profit.

Amicus participation by leading public health, environmental and other groups, including professionals at Johns Hopkins Center for a Livable Future, Humane Society of the United States, Animal Legal Defense Fund, Minnesota Center for Environmental Advocacy, Environment Minnesota and Food & Water Watch underscore the need for reversal and vacating the CUP granted on December 11, 2014.

VI. THE DISTRICT COURT CORRECTLY DECIDED THAT SERVICE OF PROCESS WAS EFFECTIVE TO OBTAIN JURISDICATION.

Respondent MSF argues in cross appeal that the Court of Appeals lacks subject matter jurisdiction over this appeal based on allegedly defective service of process on Respondent County. MSF brought a motion to dismiss in this Court of Appeals based on this argument. In support of its motion, MSF argued that Minnesota case law has referred to compliance with time limits for serving process as subject matter jurisdiction citing to *In re Skyline Materials, Ltd.,* 835 N.W.2d 472 (Minn. 2013).

The Special Term Panel of this Court denied the MSF motion on August 16, 2016 on other grounds and ordered that: "In their briefs, the parties shall clarify whether the service issue relates to personal or subject-matter jurisdiction".

The District Court correctly ruled in its Order that service of process was timely and effective upon Respondent County in the District Court to establish jurisdiction for this appeal. Appellants served the District Court appeal three times, complied with the rules on service of process and, moreover, Respondents waived any objections to any allegedly improper service of process.

Under Minnesota law, objections to service of process relate to personal jurisdiction and not to subject matter jurisdiction. The Court of Appeals conducts a de novo review of whether service of process was effective to obtain personal jurisdiction. The Minnesota Supreme Court has held: "Whether service of process was effective, and personal jurisdiction therefore exists, is a question of law that we review de novo."

Shamrock Dev., Inc. v. Smith, 754 N.W.2d 377, 382 (Minn. 2008); *Roehrdanz v. Brill,* 682 N.W.2d 626, 629 (Minn.2004).

The Minnesota Supreme Court recently clarified that time limits for service are claim processing rules, rather than jurisdictional requirements. *McCullough and Sons, Inc. v. City of Vadnais Heights,* A14-1992, A15-0064, __ N.W.2d ___ (Minn. 2016).

Subject matter jurisdiction exists in the Dodge County District Court pursuant to Dodge County Zoning Ordinance, Section 18.13.12 and Minn. Stat. 394.301. *See, Toby's of Alexandria, Inc. v. County of Douglas*, 545 N.W.2d 54 (Minn. App. 1996), *review denied* (Minn. May 21, 1996). The time limit placed on bringing an appeal is a claim processing rule.

Appellants properly commenced the appeal in the District Court by service of process three times that acquired personal jurisdiction over Respondent County. In any event, Respondent County waived the issue of improper service.

The Court of Appeals reviews de novo the interpretation and application of the Minnesota Rules of Civil Procedure. *St. Croix Dev., LLC v. Gossman,* 735 N.W.2d 320, 324 (Minn.2007); *Mingen v. Mingen,* 679 N.W.2d 724, 727 (Minn.2004). This standard is established. *House v. Hanson,* 245 Minn. 466, 473, 72 N.W.2d 874, 878 (1955).

The Court of Appeals reviews the relevant findings of fact by the District Court regarding service of process under the clearly erroneous standard of review. Minn. R. Civ. P. 52.01; *Fletcher v. St. Paul Pioneer Press,* 589 N.W.2d 96, 101 (Minn.1999).

The District Court properly concluded that service of process in the District Court proceedings was proper and timely under Minn.R.Civ.P. 3.01. Personal service on the

office of the board chair, Rodney Peterson, at the official address for the County by delivery to the Sheriff of the appeal documents by letter of January 7, 2015, establishes proper service for jurisdiction for this appeal in compliance with Rules 3 and 4 of the Minnesota Rules of Civil Procedure for District Courts. *Erickson v. Coast Catamaran Corporation,* 414 N.W.2d 180 (Minn. 1987). Delivery of the summons and complaint to the sheriff of the county is effective where that county was the residence of the defendant agent identified in Rule 4.03 as the proper party to receive service. The Minnesota Supreme Court referenced the policy of broad construction of the rules of civil procedure and cited *Love v. Anderson,* 240 Minn. 312, 314, 61 N.W.2d 419, 421 (1953), for the proposition that the Minnesota rules "reflect a well-considered policy to discourage technicalities and from . . . [and] should be liberally construed in the interests of justice".

The Minnesota Supreme Court has held that substantial compliance with the rules for service of process coupled with actual notice will subject the defendant to jurisdiction. *In re Disciplinary Action Against Coleman,* 793 N.W.2d 296, 302 (Minn. 2011).

The District Court correctly concluded that Appellants complied with the Rule 4.03 and with Rule 3.01(c) by submitting the appeal documents to the Dodge County Sheriff by letter dated January 7, 2015, actually received January 8, 2015, for service on the office of the Board Chair, Rodney Peterson with directions to serve the office of the board chair at the official address of the County Board, the Courthouse. Peterson was the Board Chair on the decisional meeting of December 11, 2014. The letter of January 7, 2015 requested service on Peterson as the Board Chair in a representative capacity, rather than as Rodney Peterson, personally. The address for service was for the office of the

board chair as the official address for Dodge County, which is the Courthouse, and no personal residence and no law offices of an attorney.

The District Court found as a matter of fact that, while the County changed board chairs on January 6, 2015, Appellants confirmed with the official site of Dodge County on January 7, 2015, that Rodney Peterson continued as the board chair. The District Court concluded as a matter of fact that the County gave no notice to Appellants or any other person of the change as of January 7, 2015, so that Appellants had no notice of the change in the board chair. Service of process substantially complied.

The Dodge County Sheriff followed through with service on the office of the board chair on Rodney Peterson in a representative capacity as Board Chair for Dodge County and the Dodge County Board on January 13, 2015. The Dodge County Sheriff did not return the documents to Appellants' counsel unserved and did not contact Appellants' counsel to make alternative arrangements for service.

The District Court correctly held that Appellants also served the attorneys for Respondents with the appeal documents by mail on January 7, 2015, thereby ensuring that Respondents had timely notice and made no arguments of prejudice from lack of notice. The District Court properly found that Appellants substantially complied with Minn.R.Civ.P. 4 and that service of process was accordingly accomplished. The District Court noted that this conclusion is consistent with Minnesota policy that the rules of civil procedure are intended to provide for a resolution of the case on the merits. *Save Our Creeks v. City of Brooklyn Park,* 699 N.W.2d 307, 310 (Minn. 2005).

Respondents have waived and are estopped under Minn.R.Civ.P. 9.01 from asserting the lack of jurisdiction from service of process. In their Answers to Complaint of February 2015, Respondents assert that service was improper, but fail to specifically negatively aver the alleged lack of capacity of board member Peterson to be served in a representative capacity as the Board Chair. Minn.R.Civ.P. 9.01 requires a party who desires to raise an issue as to the legal capacity of a person to be sued in a representative capacity to specifically state all supporting particulars. Respondents failed to meet the requirements of Minn.R.Civ.P. 9.01 to state that board member Peterson allegedly lacked capacity to be served in a representative capacity for the County and the Board and failed to aver that John Allen was the new Board Chair. Respondents further failed to plead that an official act of the County of January 6, 2015 to name John Allen as Board Chair deprived Peterson of the ability to be served in a representative capacity. Minn.R.Civ.P. 9.04 requires an averment of the official act done in compliance with law. The Answers Respondents contain no such averment and waived the objection. Respondents waited until the last minute to object to service of process and only did so informally in an argument in response to Appellants' motion to amend. There was no motion to dismiss in the District Court.

Service via US mail on counsel is also sufficient in the circumstances of an appeal to District Court of a municipal decision made under Minn. Stat. 394. *Savre v. Independent School Dist. No. 283,* 642 N.W.2d 467 (Minn.App. 2002). As an appeal action under Minn.Stat. 606.01, jurisdiction under the statute and appellate rules is invoked by service by mail on an attorney representing a party. Minn.R.Civ.App.P. 125.03. The instant appeal action is by Minn.Stat. 606.01 an appellate continuation of the legal process before the

County Board. Minn.R.Civ.P. Rule 5.01 provides: "every pleading subsequent to the original complaint . . . and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar document shall be served upon each of the parties." Minn. R. Civ. P. 5.01. Rule 5.02(a) provides that such "service shall be made upon the [party's] attorney unless service upon the party is ordered by the court." Minn. R. Civ. P. 5.02(a).

In addition, Respondents argue that personal service of the Summons and Complaint was not accomplished on newly named Board Chair John Allen within 30 days of the grant of the CUP on December 11, 2015 as required by the Zoning Ordinance and that Appellants had verbal notice of the grant of the CUP at the Board meeting of December 11, 2014, which is actual notice triggering the limitations period. Respondent County argues that the Zoning Ordinance does not specify the type of notice to be given and that the practice of the County is to send notice only to the applicant and not to other interested parties.

Minnesota Courts have recognized that appeals of CUP decisions are to the Minnesota Court of Appeals via Writ of Certiorari, which appeal actions are governed by the applicable statute, Minn. Stat. 606.01-06. *Neitzel v. County of Redwood,* 521 N.W.2d 73, 76 (Minn.App. 1994), rev.den. (Minn. Oct. 27, 1994).

Minn. Stat. 606.02 establishes that the deadline for an appeal to the Minnesota Court of Appeals via Writ of Certiorari is within 60 days after due notice of the decision. Due notice of decision under Minnesota law constitutes written notice so that the deadline for a certiorari appeal of the granting of a CUP runs from the County giving of written notice to interested parties. Minnesota courts have held - since 1925 - that the 60

day period for an appeal runs from written notice of the decision and not from actual or verbal notice because the term "due notice" under 606.01 requires written notice; verbal notice at a meeting or otherwise obtaining actual notice of a decision fails to constitute due notice to trigger the running of the 60 day period for the public policy reason that the deadlines are clear, established and without dispute. *Picha v. County of McLeod,* 634 N.W.2d 739 (Minn.App. 2001); *In re Judicial Ditch No. 2,* 163 Minn. 383, 202 N.W.2d 52 (Minn. 1925). Written notice solves any issues of timely notice given.

The plain language of the Dodge County Zoning Ordinance requires written notice to interested parties who request such notice, such as Appellants. Section 18.13.11 of the Zoning Ordinance states that the zoning administrator must forward written notice of the County Board's decision to the applicant and any other person who requests notice. This is consistent with Minnesota law on notice. *Matter of Saldana,* 444 N.W.2d 892 (Minn.App. 1989). Appellants formally in writing in 2014 requested notice from Respondent County of all permit actions concerning Respondent Masching. Respondent County did not provide any written notice to Appellants of the CUP until February 2015.

A County may not alter the statutory procedures for establishing jurisdiction of the certiorari appeal, such as the 60 day period for commencement of the appeal and service. Minn.R.Civ. App.P. 115.01 provides that: "The appeal period and the acts required to invoke appellate jurisdiction are governed by the applicable statute".

The time for an appeal of a CUP under Minnesota statute is 60 days after written notice of the decision. Minn.Stat. 606.02 requires service of an appeal action in the Minnesota Court of Appeals within 60 days after due notice of the decision even where

the local zoning ordinance attempts to reduce the time period to 30 days. *United Migrant Opportunity Services, Inc. v. Dodge County Planning Commission,* 636 N.W.2d 813 (Minn.App. 2001). The County may not reduce the 60 day period from due notice of the decision to a lesser period, such as 30 days. *Id.*

The deadline for an appeal of the CUP granted by Respondent County Board to Respondent Masching in this action is 60 days from due notice of the decision. Minn.Stat. 606.02. Although Section 18.13.12 of the Dodge County Zoning Ordinance attempts to reduce the time for an appeal from 60 to 30 days, the statutory period of 60 days controls under Minnesota law.

Appellants received due notice of the decision as required by Minn.Stat. 606.01 no earlier than February 12, 2015. Attached to the Peters Affidavit is the July 22, 2014, formal request by letter and email to the County for, among other things, written notice of all approvals or permits granted for the feedlot project of Respondent Masching. Appellants followed Section 18.13.11 of the Zoning Ordinance, which provides for such a request. Respondent County gave no written notice of decision to Appellants at any time prior to February 9, 2015 by mail, as documented in the Peters Affidavit and have never provided a copy of the CUP. On January 28, 2015, Appellants checked the County's website and did not see any findings or the CUP as part of the minutes of meetings. On February 4, 2015, having not yet received any written notice, counsel for Appellants requested the minutes of the December 11, 2014 meeting via email and letter to the County, as documented by the exhibits to the Peters Affidavit. On February 9, 2015, Respondent County mailed the minutes of the December 11, 2014 meeting to

counsel for Appellants without the actual CUP. Adding 3 days for mailing as specified for by Minnesota law, the minutes were provided to Appellants' counsel effective as of February 12, 2015.

Respondent Dodge County did provide written findings to Appellants by mail effective February 12, 2015. The earliest possible date the 60 day time limitation for an appeal of the granting of the CUP would have started running under Minnesota law would be February 12, 2015 so that jurisdiction would be obtained through service within 60 days, which would establish a deadline of April 13, 2015.

Appellants also secured personal jurisdiction for this appeal by personal service for a third time of the appeal documents on the County Auditor and current board chair John Allen, which service is effective April 13, 2015. Appellants caused hand delivery on April 13, 2015 of the appeal documents to the Dodge County Sheriff for service on the Board Chair, John Allen. A copy of the letter with signed acknowledgement of receipt by the Sheriff is attached to the Peters Affidavit. This service is effective April 13, 2015, which is the date of delivery of the documents to the Sheriff for service on a defendant or agent who resides within the County. Minn.R.Civ.P. 3.01; *Erickson v. Coast Coast Catamaran Corporation,* 414 N.W.2d 180 (Minn. 1987). April 13, 2015 is 60 days of February 12, 2015, which is the earliest possible date for due notice of decision to Appellants as the date effective on which the County first provided the findings to the Appellants. The Sheriff thereafter served the Auditor and also served Allen's spouse at their home. Service on the Auditor complies with Minn.R.Civ.P. 3 and 4.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court of Appeals reverse and vacate the December 11, 2014, decision of Respondent County to grant a CUP to Respondent Masching Swine Farms, LLC. *BECA of Alexandria, L.L.P. v. Cnty. of Douglas ex rel Bd. of Comm'rs*, 607 N.W.2d 459, 464 (Minn. App. 2000).

LAW OFFICES OF JAMES P PETERS PLLC

DATED: October 3, 2016

By: /s James P Peters #0177623
Attorney for Appellants
460 Franklin St N #100
PO Box 313
Glenwood MN 56334
(320) 634-3778

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn.R.Civ. App. 132.01, subds. 1 and 3 for a brief produced with a proportional font. The length of this brief is 13,998 words. This brief was prepared using Microsoft Word 2007.

LAW OFFICES OF JAMES P PETERS PLLC

DATED: October 3, 2016

By: /s/ James P Peters #0177623
Attorney for Appellants
460 Franklin St N #100
PO Box 313
Glenwood MN 56334
(320) 634-3778

ADDENDUM

Order and Judgment in *Trom, et al., v. Dodge County,* Dodge County District Court Case No. 20-CV-15-17 (May 13, 2016).