

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.

**BRIEF OF AMICI CURIAE
THE HUMANE SOCIETY OF THE UNITED STATES
AND ANIMAL LEGAL DEFENSE FUND**

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ARGUMENT

Pursuant to this Court’s August 19, 2016 Order, as well as Rules 129 and 132 of the Minnesota Rules of Civil Appellate Procedure, *amici* The Humane Society of the United States (“HSUS”) and Animal Legal Defense Fund (“ALDF”) submit the following brief in support of Appellants.¹

I. INTRODUCTION.

In their challenge to the approval of Masching, LLC hog feedlot conditional use permit (“CUP”), Appellants Lowell and Evelyn Trom did not receive the agency and judicial review they deserved. The Dodge County Planning Commission and Board of Commissioners (collectively, “the County”), and subsequently the Dodge County District Court, approved the Masching CUP without full inquiry into the hog feedlot’s public health threat, opening the door for disease and infection to enter easily into the Appellants’ community. In support of Appellants, HSUS and ALDF respectfully submit this *amicus* brief to assist the Court in understanding two critical errors that occurred within the CUP approval and judicial review decisions below.

First, the County and the District Court both failed to consider a serious threat to public health and animal welfare: the spread of antibiotic-resistant bacteria. Appellants repeatedly explained to the County how the hog feedlot CUP risked developing and widely spreading antibiotic-resistant bacteria in the area, posing a specific public health threat to feedlot workers, neighbors, and County residents. The Masching feedlot will

¹ No party’s counsel authored this brief in whole or in part, and no person or entity other than *amici* and their counsel contributed to the preparation and submission of this brief.

produce manure that will first pile up inside the feedlot building, and will then be spread over *at least* 244 acres. Antibiotic-resistant bacteria from the manure can jump to human populations via various environmental pathways—through the air as dust, up from the soil into edible crops, and into groundwater and surface waterways. Yet the County did not press pause on its fast-track approval of the Masching CUP—*i.e.*, what the District Court called a “cart-ahead-of-the-horse approach to CUP analysis and approval”—to assess the potential health risks. Nor did the District Court acknowledge the serious threat of increased antibiotic resistance. In spite of broad scientific consensus that the continuous, herd-wide use of antibiotics to raise pigs has led to the development and spread of antibiotic-resistant bacteria,² both the County and the District Court erred by failing to consider *whether* and *how* the Masching CUP would contribute to the presence of antibiotic-resistant bacteria in the area.

Second, the District Court gave far too much deference to the County in its decision to approve the Masching CUP. The County gave no indication that it had even considered the spread of antibiotic resistance in its CUP decision. But because the County approved the Masching CUP application, the District Court assumed that the County *must have implicitly* considered the antibiotic resistance public health threat. The District Court then deferred to the County decision. This conflicts with longstanding principles of administrative law, which do not permit the District Court to engage in blind deference to

² Producers at hog feedlots routinely provide low level doses of antibiotics to every animal in the facility, regardless of whether a specific animal is sick. See Björn Bengtson & Christina Greko, *Antibiotic Resistance – Consequences for Animal Health, Welfare, and Food Production*, 119 *Upsala J. Med. Scis.* 96 (2014).

the County—especially on this important public health issue. The District Court erred in upholding the CUP decision despite there being nothing in the record to permit meaningful judicial review of the County’s consideration of the consequences of large-scale antibiotic usage at the Masching facility.

Antibiotic-resistant bacteria are so significant a threat that the United Nations General Assembly, acting for fourth time ever on a public health issue and the first time since the Ebola emergency of 2014, declared resistance a “most urgent global risk.”³ If a county were to fail to consider public health implications in approving a CUP that increased the risk of Ebola, a reviewing court would surely intervene—yet here, the District Court allowed the County to ignore a similar risk.

Accordingly, for the reasons described below, *amici* HSUS and ALDF support Appellants’ position that this Court should reverse the District Court and vacate the Masching CUP.

II. THE PLANNING COMMISSION, DODGE COUNTY BOARD, AND TRIAL COURT ALL ERRED IN IGNORING ANTIBIOTIC RESISTANCE IN BACTERIA AS A RISK TO THE PUBLIC HEALTH.

a. The County and the District Court Failed to Consider Appellants’ Significant Health Concerns of Increased Antibiotic Resistance from the Masching Feedlot Approval.

Before the County, the Appellants repeatedly expressed concern about how the Masching CUP posed a risk of increased antibiotic resistance. When the County first

³ Press Release, United Nations, High-Level Meeting on Antimicrobial Resistance (Sept. 21, 2016), at <http://www.un.org/pga/71/2016/09/21/press-release-hl-meeting-on-antimicrobial-resistance/>.

considered the Masching CUP application, in April 2014, Appellants' counsel James Peters submitted a letter explaining:

MRSA [bacterium named methicillin-resistant *Staphylococcus aureus*] is considered a major threat to public health with the FDA taking action against hog production facilities to reduce this threat. Among other things, the FDA announced in December 2013 that it is implementing a voluntary plan with the industry to phase out the use of antibiotics for enhanced food production. Antibiotics used in hog feed is a factor in the development of drug-resistant bacteria. Industrial farm workers have been contaminated with pig MRSA, an antibiotic resistant bacteria, that is increasingly found in hogs. *The Project would in Dodge County add to what governments consider a major public health threat.*

AR 065 (emphasis added). The Peters letter included an exhibit listing multiple studies that explain how CAFOs generally, and hog feedlots in particular, increase the risk of creating and spreading antibiotic-resistant bacteria. AR 069-70. Soon after receiving the Peters letter, the County approved the CUP without considering the feedlot's impact on developing antibiotic-resistant bacteria. *See* AR 70A-77.

Appellants appealed the April 2014 CUP approval, and the District Court vacated the CUP on November 18, 2014. *See* Mem. Order 5, *Trom et al. v. Dodge County*, 20-cv-15-17 (3d Judicial Dist. Ct. May 13, 2016) [*hereinafter* "May 2016 Order"]. Two days later, Masching applied for a new CUP for the same project. AR 122. Appellants again submitted information identifying serious concerns with how concentrated feedlots like the Masching CUP proposal contribute to an increase in antibiotic-resistant bacteria. For instance, Appellants submitted a letter from Michael Williamson asking that the County not approve the Masching CUP because hog feedlots "cause health problems." AR 629. The Williamson letter included, as an exhibit, a white paper from the National

Association of Local Boards of Health. The white paper described how feedlots like the Masching CUP feedlot can create public health harms:

The trend of using antibiotics in feed has increased with the greater numbers of animals held in confinement. The more animals that are kept in close quarters, the more likely it is that infection or bacteria can spread among the animals. Seventy percent of all antibiotics and related drugs used in the U.S. each year are given to beef cattle, hogs, and chickens as feed additives. Nearly half of the antibiotics used are nearly identical to ones given to humans.

There is strong evidence that the use of antibiotics in animal feed is contributing to an increase in antibiotic-resistant microbes and causing antibiotics to be less effective for humans. Resistant strains of pathogenic bacteria in animals, which can be transferred to humans [through] the handling or eating of meat, have increased recently. This is a serious threat to human health because fewer options exist to help people overcome disease when infected with antibiotic-resistant pathogens. The antibiotics often are not fully metabolized by animals, and can be present in their manure. If manure pollutes a water supply, antibiotics can also leach into groundwater or surface water.

AR 651 (internal citations omitted).

Even though the County decision-makers claimed they “all had a chance to read” the letters they received, *see* AR 959,⁴ neither the County Planning Commission nor the County Board considered, or even *referenced*, the threat of increased antibiotic resistance in their reports and meetings. *See, e.g.*, AR 779-84, 785-87, 884-971, 986-1007.

The District Court similarly did not consider the risk of increased antibiotic resistance. Appellants directed the District Court to their submissions before the County,

⁴ *See also* AR 961 (“Okay, we got this big binder here that was handed to us yesterday and that we all read last night”) (transcript of Dec. 11, 2014 Dodge County Planning Commission meeting); AR 994 (“We also received the letters that was [sic] talked about earlier so we’ll – we’ll put that into the – packet”) (transcript of Dec. 11, 2014 Dodge County Board of Commissioners meeting).

which discussed their suite of public health concerns, including the increased development of antibiotic resistance. *See* Pls.’ Mot. for Summ. J. Br. 11-12, 18-19. In its decision, the District Court only reviewed the County’s consideration (or lack thereof) of one public health issue—the “alleged connection” of feedlots to “development of a ‘cancer cluster.’” May 2016 Order 14. This was the totality of the District Court’s discussion of whether the CUP will endanger the public health. Neither the Appellants’ antibiotic resistance concerns nor the County’s failure to consider such concerns appeared in the District Court’s Order.⁵

b. The Dodge County Zoning Ordinance Requires Consideration of Antibiotic Resistance and Its Public Health Implications.

As part of its authority to carry out planning and zoning activities, Dodge County may designate a process for permitting “conditional uses.” *See* Minn. Stat. § 394.301, subd. 1. The County has made such a designation through its zoning ordinance. *See* AR 439 (Dodge County Zoning Ordinance § 18.13.8) [hereinafter “Zoning Ordinance”].

“Conditional uses may be approved upon a showing by an applicant that the standards and criteria stated in the ordinance will be satisfied.” Minn. Stat. § 394.301, subd. 1. However, the County decision approving a CUP is arbitrary or capricious if, among other reasons, “it entirely failed to consider an important aspect of the problem.”

⁵ The District Court may have been referencing the Williamson letter when it wrote, “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.’” May 2016 Order 14. If so, the District Court’s review skipped over the *public health* concerns in the letter. The court focused exclusively on one of the environmental problems identified, simply stating, “there is no evidence in the record adequate to support a conclusion that *this* project will damage the habitat of protected species.” *Id.* at 14-15 (emphasis in original).

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

Multiple Zoning Ordinance criteria, which require the County to make findings before it may grant a CUP, encompass the public health threats of increasing antibiotic-resistant bacteria. In relevant part, the Zoning Ordinance states that before approving a 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 [. . .]
- 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 control offensive odor, fumes, dust, noise, and vibration, so that none of these will constitute a nuisance⁶ [. . . and]
- IX. That existing groundwater, surface water and air quality are or will be adequately protected.

Zoning Ordinance § 18.13.8.

With regard to ordinance criteria like these, this Court has held that “[a] legally sufficient reason [to deny a CUP] is one reasonably related to the promotion of the public health, safety, morals and general welfare of the community.” *BECA of Alexandria, LLP v. County of Douglas ex rel. Bd. of Comm’rs*, 607 N.W.2d 459, 463 (Minn. App. 2000) (quotation omitted).

⁶ The Minnesota Supreme Court has read human health concerns into the “broad language” of another county’s zoning ordinance provision that ensured “that the proposed use will not interfere with neighbors’ enjoyment of their property or create a nuisance.” *Schwardt v. County of Wantonwan*, 656 N.W.2d 383, 387 (Minn. 2003).

c. The Addition of a Large Hog Feedlot Significantly Increases the Risk of Proliferation of Antibiotic-Resistant Bacteria.

A broad array of scientific research and governmental findings ties antibiotic use in the raising and slaughter of food-producing animals, such as pigs, to increased antibiotic resistance in bacterial populations in animals, the environment, and humans. *See, e.g.,* Timothy A. Johnson et al., *Clusters of Antibiotic Resistance Genes Enriched Together Stay Together in Swine Agriculture*, 7 *mBio* e2214-15 (Mar./Apr. 2016) (“In this study, we identify high correlations in the cooccurrence of clusters of identical antibiotic resistance genes (ARGs) and mobile genetic element sequences in Chinese swine farms and farm-impacted soils as well as U.S. laboratory swine.”); Jim O’Neill et al., *Tackling Drug-Resistant Infections Globally: Final Report and Recommendations*, The Review on Antimicrobial Resistance, at 24 (May 2016). According to a 2014 blue-ribbon report to the President of the United States, “[a]ll uses of antibiotics – whether in human or animal populations – promote the emergence and spread of antibiotic resistance by selecting for microbes able to grow well despite the presence of antibiotics.” John P. Holdren & Eric Lander (co-chairs), President’s Council of Advisors on Sci. & Tech., *Report to the President on Combating Antibiotic Resistance* 50 (2014) [hereinafter “2014 Report to President”].⁷

⁷ The Mayo Clinic, located about 20 miles from Dodge County, has on its website an easy-to-understand multimedia description of how antibiotics given to farm animals can lead to illness or even death in humans, titled, “Antibiotic Resistance from Farm to Table.” *See* Mayo Clinic, “Animal use in agriculture,” *available at* <http://www.mayoclinic.org/diseases-conditions/infectious-diseases/multimedia/img-20144910> (last visited Sept. 15, 2016).

Bacteria are promiscuous organisms that can “adapt rapidly to new environmental conditions and can acquire genes or undergo molecular changes with increasing exposure to antimicrobials in human and veterinary medicine, leading to resistance to these agents.” European Ctr. for Disease Prevention & Control et al., *Joint Opinion on Antimicrobial Resistance Focused on Zoonotic Infections* 7 (2009) [hereinafter “2009 European Centre for Disease Prevention Opinion”]. Through contact, antibiotic-resistant bacteria can disseminate resistant genes by injecting other bacteria with copies of mobile genetic elements called plasmids—stretches of DNA containing multiple genes, each of which may confer increased resistance to different antibiotics. *See* U.S. Gov’t Accounting Office, No. GAO-04-490, *Antibiotic Resistance: Federal Agencies Need to Better Focus Efforts to Address Risk to Humans from Antibiotic Use in Animals* 9 (2004) [hereinafter “2004 GAO Report”]. Bacteria may also develop resistance through mutations in their own DNA. *Id.*

“The dose of antibiotic and length of time bacteria are exposed to the antibiotic are major factors affecting whether the resistant bacteria population will dominate.” *Id.* The provision of antibiotics to an entire group of animals at a facility in steady, low doses “strongly encourages” drug resistance, “especially when provided in feed or water, where they remain active and are widely dispersed.” Stuart B. Levy, *Multidrug Resistance—A Sign of the Times*, 338 *New Eng. J. of Med.* 1376, 1377 (1998); *see also* White House, *National Action Plan for Combating Antibiotic-Resistant Bacteria* 20 (2015) (“Because antibiotics in feed or water are typically administered to herds or flocks of food-producing animals, in-feed or in-water antibiotic use leads to an increased risk of

selecting for resistance”); 2009 European Centre for Disease Prevention Opinion, at 9 (“Flock or herd administration of antimicrobials, which in most cases is given orally is considered one of the most important factors contributing to the selection of antimicrobial-resistant zoonotic bacteria”).

Hog feedlot operations are particularly susceptible to the development of antibiotic-resistant bacteria. *See* Rebecca Goldberg et al., *The Risks of Pigging Out on Antibiotics*, 321 *Science* 1294 (2008) (finding 70% of pigs tested in Iowa and Illinois were carrying MRSA); Shylo E. Wardyn et al., *Swine Farming is a Risk Factor for Infection With and High Prevalence of Carriage of Multidrug-Resistant Staphylococcus Aureus*, 61 *Clinical Infectious Diseases* 59 (2016). Operators consistently provide antibiotics to their entire herd through feed or water, for both growth-promotion and prevention purposes. *See generally*, Bengston & Greko, *supra* note 2.

Moreover, keeping pigs in the confinement conditions of a feedlot increases the animals’ stress. Stress can increase antibiotic resistance in pig pathogens. Cold stress, heat stress, and simply moving pigs into and out of pens can increase the prevalence of antibiotic-resistant bacteria. *See* M.H. Moro et al., *Effects of Cold Stress on the Antimicrobial Drug Resistance of Escherichia Coli of the Intestinal Flora of Swine*, 27 *Letters Applied Microbiology* 251 (1998); M.H. Moro et al., *Effects of Heat Stress on the Antimicrobial Drug Resistance of Escherichia Coli of the Intestinal Flora of Swine*, 88 *J. Applied Microbiology* 836 (2000); A.J. Hedges & A.H. Linton, *Olaquinox Resistance in the Coliform Flora of Pigs and Their Environment: an Ecological Study*, 64 *J. Applied*

Bacteriology 429 (1988).⁸ As a result, it is unsurprising that bacteria with genes resistant to tetracycline and sulfonamide antibiotics—both of which are medically important—have been found in soils adjacent to hog feedlots. See N. Wu et al., *Abundance and Diversity of Tetracycline Resistance Genes in Soils Adjacent to Representative Swine Feedlots in China*, 44 *Envtl. Sci. & Tech.* 6933 (2010).

Exposure to one antibiotic may “co-select” for resistance to multiple antibiotics. See A. Carattoli, *Plasmids and the Spread of Resistance*, 303 *Int’l J. Med. Microbiology* 298 (2013). One study of antibiotic resistance on hog farms discovered that “resistance genes found in our samples were not limited to the antibiotics administered,” and stated the phenomenon “is most likely due to aggregation of resistance genes on mobile genetic elements.” Yong-Guan Zhu et al., *Diverse and Abundant Antibiotic Resistance Genes in Chinese Swine Farms*, 110 *Proceedings of Nat’l Acad. of Scis.* 3435, 3437 (2013). In this way, even feedlots that give animals an antimicrobial class of drug that is not used in clinical medicine may still cause bacteria to select for genes resistant to drugs that *are* used in medicine. For example, U.S. Department of Agriculture researchers have shown that antibiotics in feed given to hogs cause a significant increase in the abundance of

⁸ According to one experiment concerning stress and pigs, “only 25% of the pre-stress isolates showed multiple antimicrobial resistance patterns, in contrast to 85% of isolates from post-stress. Moreover, a significant difference was observed for tetracycline resistance between isolates obtained from the carcasses of the control (40%) versus the stressed group (80%), suggesting that stressed animals were shedding higher numbers of resistant bacteria that contaminated the carcasses.” M.H. Rostagno et al., *Split Marketing as a Risk Factor for Salmonella Enterica Infection in Swine*, 6 *Foodborne Pathogens & Disease* 865 (2009). Tetracycline is a very important antibiotic in human medicine, used to treat *Brucella*, *Chlamydia*, and *Rickettsia* infections. See World Health Org., Advisory Group on Integrated Surveillance of Antimicrobial Resistance, *Critically Important Microbials for Human Medicine* 7, 20 (2011).

genes resistant to antibiotics not appearing in the feed. Torey Looft et al., *In-Feed Antibiotic Effects on the Swine Intestinal Microbiome*, 109 Proceedings of the Nat'l Acad. of Scis. 1691 (2012). Similarly, treating chickens with antibiotic streptomycin not only selects for bacteria with streptomycin resistance, but can also create resistance to sulfonamides, an unrelated class of antibiotics considered very important to human medicine. M. Faldynova et al., *Prevalence of Antibiotic Resistance Genes in Faecal Samples from Cattle, Pigs and Poultry*, 58 Veterinarni Medicina 298 (2013).

The antibiotic-resistant bacterial populations in food-producing animals are capable of transferring to humans. See, e.g., FDA Guidance for Industry #209, *The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals* 12 (Apr. 2012) (performing literature review and describing, among others, the 2004 GAO Report, which definitively concluded that “antibiotic-resistant bacteria have been transferred from animals to humans”). A recent study of veterans in rural Iowa found that the frequency of antibiotic-resistant *Staphylococcus aureus* was 88% higher among veterans living within one mile of high-density hog feedlots. M. Carrell et al., *Residential Proximity to Large Numbers of Swine in Feeding Operations is Associated with Increased Risk of Methicillin-Resistant *Staphylococcus Aureus* Colonization at Time of Hospital Admission in Rural Iowa Veterans*, 35 Infection Control & Hosp. Control Epidemiology 190 (2014).⁹

⁹ According to the District Court, the Appellant Troms and other neighbors live within one mile of the Masching feedlot at issue here. See May 2016 Order 16 n.13.

Antibiotic-resistant bacteria jump from farm animals, like pigs, to humans, in a variety of ways. First, as studies from the Administrative Record show, a high percentage of feed antibiotics “pass unchanged into manure waste” and end up in nature. Am. Pub. Health Ass’n Policy 2003-7, “Precautionary Moratorium on New Concentrated Animal Feed Operations,” *available at* <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/24/11/17/precautionary-moratorium-on-new-concentrated-animal-feed-operations> (last visited Oct. 7, 2016) (listed on AR 069); *see also* Yogesh Chander et al., *Antibacterial Activity of Soil-Bound Antibiotics*, 34 J. Env’tl. Quality 1952 (Nov./Dec. 2005) (listed on AR 069); K. Kumar et al., *Antibiotic Uptake by Plants from Soil Fertilized with Animal Manure*, 34 J. Env’tl. Quality 2082 (Nov./Dec. 2005) (listed on AR 069).

When applied on land, the manure and its antibiotic-resistant bacteria can enter the soil, groundwater or surface water through runoff. *Id.* According to an article that Appellants identified in the Administrative Record, “genes resistant to tetracycline, a common antibiotic, have been found in groundwater as far as a sixth of a mile downstream from two swine facilities that use antibiotics as growth promoters.” Env’tl. News Service, “Antibiotic Resistant Genes Traced from Farms to Groundwater,” May 1, 2001 (listed on AR 69); *see also* Bridgett M. West et al., *Antibiotic Resistance, Gene Transfer, and Water Quality Patterns Observed in Waterways near CAFO Farms and Wastewater Treatment Facilities*, 217 *Water, Air, & Soil Pollution* 473, 473 (May 2011) (studying six sites in Michigan and finding results that “indicate that CAFO farms not

only impair traditional measures of water quality but may also increase the prevalence of multi-drug-resistant bacteria in natural waters”).

Bacteria also enter into soil “when manure from antibiotic-fed animals is land applied as a source of crop nutrients.” Chander et al., 34 J. Env'tl. Quality at 1952 (listed on AR 069). A 2005 study found that two antibiotics used in hog production, tetracycline and tylosin, remained active in soil, allowing for “emergence of antibiotic resistant bacteria in the environment.” *Id.* at 1956. In addition, antibiotics and antibiotic-resistant bacteria in soil can contaminate plants grown on the manure-applied lands, such that “[a]ntibiotics present in plant materials ingested by humans may provide resistance to human pathogens thus resulting in illnesses that may be difficult to cure with presently available antibiotics.” Kumar et al., 34 J. Env'tl. Quality at 2084 (listed on AR 069); *see also* 2014 Report to President at 50-51 n.84.

Second, antibiotic-resistant bacteria can enter the air, where they can infect feedlot workers and neighbors. According to a description of a Johns Hopkins study of air inside large-scale hog production facilities, which Appellants also identified in the Administrative Record, “bacteria resistant to at least two antibiotics [appeared] in air samples collected from inside” the facilities. Science Daily, “Multidrug-Resistant Bacteria Found to be Airborne in Concentrated Swine Operation,” *available at* <https://www.sciencedaily.com/releases/2004/12/041206213925.htm> (last visited Oct. 7, 2016) (listed on AR 070). The finding led researchers to believe that feedlot workers have a great risk of airborne exposure to antibiotic-resistant bacteria, and “may also become reservoirs of drug-resistant bacteria that can be spread to family and the broader

community.” *Id.*; see also Gerd Hamscher et al., *Antibiotics in Dust Originating from a Pig-Fattening Farm*, 111 *Envtl. Health Perspectives* 1590, 1592 (2003) (finding that “dust originating from a pig-fattening farm represents a new route of entry into the environment for drugs applied in animal houses,” which poses a risk of antibiotic resistance in humans from dust inhalation); Jessica L. Rinsky et al., *Livestock-associated Methicillin and Multidrug resistant Staphylococcus aureus is Present among Industrial, Not Antibiotic-free Livestock Operation Workers in North Carolina*, 8 *PLoS ONE* e67641 (2013) (finding MRSA transferred from livestock to workers).

Downwind neighbors can also be exposed to antibiotics and antibiotic-resistant bacteria present in dust. See generally, Eva Hershaw, “When the Dust Settles,” *Texas Monthly* (Sept. 2016) (describing 2011 event in Missouri, where a tornado carried a fungus and antibiotic-resistant bacteria “over long distances”). According to a recent study, “feedlot-derived microbes, including those possessing antibiotic resistance, can be transported to new locations where they may occupy new niches.” See A.D. McEachran et al., *Antibiotics, Bacteria, and Antibiotic Resistant Genes: Aerial Transport from Cattle Feed Yards via Particulate Matter*, 123 *Envtl. Health Perspectives* 337, 342 (2015).

Third, bacteria that develop antibiotic resistance in animals can affect public health through human handling and consumption of meat. 2004 GAO Report at 11. “Most food-borne infections originate from faecal contamination of carcasses during slaughter or cross-contamination during subsequent processing.” 2009 European Centre for Disease Prevention Opinion at 8-9. The Centers for Disease Control and Prevention (“CDC”) observed that in 2015, 192 cases and 30 hospitalizations arose from antibiotic-

resistant salmonella linked to pork products. CDC, “Multistate outbreak of multidrug-resistant Salmonella and Salmonella Infantis infections linked to pork (final update),” Dec. 2, 2015, *available at* <http://www.cdc.gov/salmonella/pork-08-15>.

Upon human exposure, the resistant bacteria, or “superbugs,” can colonize the human gut and cause illnesses resistant to clinically important antibiotics. *See* Mayo Clinic, “Antibiotic resistance: Understanding the connection to antibiotic use in animals raised for food,” *available at* <http://www.mayoclinic.org/diseases-conditions/infectious-diseases/in-depth/antibiotic-resistance/art-20135516>; *see also* 2009 European Centre for Disease Prevention Opinion at 9 (“[H]umans can become more susceptible to infection with antimicrobial-resistant zoonotic bacteria to which they are exposed”).

Thus, according to the President of the United States, antibiotic-resistant bacteria from animal agriculture pose a serious threat to public health, and “[c]ombating antibiotic resistant bacteria is a national security policy.” Exec. Order No. 13676 (Sept. 18, 2014) (citing CDC estimates that annually at least two million illnesses and 23,000 deaths are caused by antibiotic-resistant bacteria alone); *see id.* §§ 5, 7. Scientists have estimated that, by 2050, antimicrobial resistance would be related to ten million deaths per year, overtaking the current rates of cancer-related deaths. Jim O’Neill, *Antimicrobial Resistance: Tackling a crisis for the health and wealth of nations*, Review on Antimicrobial Resistance, at 5 (Dec. 2014). The threat of antibiotic-resistant bacteria to public health—especially to the health of feedlot workers and neighbors—is so severe that the American Public Health Association has issued a policy document calling on

“federal, state and local governments to impose a moratorium on new Concentrated Animal Feed Operations.” *See* Am. Pub. Health Ass’n Policy 2003-7.¹⁰

The continuous provision of antibiotics to food-producing animals such as pigs also increases the risk of harm to the animals themselves. A number of different contagious bacterial diseases cause suffering in animals raised for food. *See* J. Vaarten, *Clinical impact of antimicrobial resistance in animals*, 31 *Scientific and Technical Review of the Office International des Epizooties* 221 (2012). As the blue-ribbon panel reporting to the President acknowledged, “antibiotic resistance also limits the therapeutic effectiveness of antibiotics in animals themselves; this further supports the need to reduce resistance in animal agriculture.” 2014 Report to President at 51. MRSA has become common among pigs. *See* Verkade & Kluytmans, *Livestock-associated Staphylococcus*

¹⁰ Out of concern for the spread of antibiotic resistance, in 2013 the FDA sought “voluntary” drug industry phase out of distributing antibiotics for animal growth-promotion reasons. But a recent report found that one in three animal drugs will not meet the use restrictions in FDA’s voluntary standards. *See* Pew Charitable Trusts, *Judicious Animal Antibiotic Use Requires Drug Label Refinements* (Oct. 2016), at <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/10/judicious-animal-antibiotic-use-requires-drug-label-refinements>. Moreover, experts expect that feedlot operators, like Masching, will “simply shift their rationale for adding low doses of antibiotics to the feed and water of animals from production purposes to disease prevention purposes.” Lisa Heinzerling, *The FDA’s Incapacity on Antibiotics*, 33 *Stan. Envtl. L. J.* 325, 333, 337-43 (2014); *see also* U.S. Gov’t Accounting Office, *Agencies Have Made Limited Progress Addressing Antibiotic Use in Animals*, No. GAO-11-801, at 27-28 (2011) (“One veterinarian told us that if FDA withdrew an antibiotic’s approval for growth promotion, he could continue to give the antibiotic to the animals under his care at higher doses for prevention of a disease commonly found in this species”). Indeed, total sales of antibiotics for use in animal agriculture actually *increased* 22 percent from 2009 and 2014, and four percent between 2013 and 2014, despite FDA’s “voluntary” phase out in 2013. *See* FDA, 2014 Summary Report on Antimicrobials Sold or Distributed for Use in Food-Producing Animals 6 (Dec. 2015), *available at* <http://www.fda.gov/downloads/ForIndustry/UserFees/AnimalDrugUserFeeActADUFA/UCM476258.pdf>.

aureus CC398: *animal reservoirs and human infections*, 21 *Infection, Genetics and Evolution* 523 (2014). In addition, producers are reportedly having difficulty controlling dysentery—a painful illness—in pigs. *See* Frank Aerstrup et al., *Antimicrobial resistance in swine production*, 9 *Animal Health Research Revs.* 135 (2008). Increased antibiotic resistance from feedlot conditions causes significant harm to pig welfare.

Here, the Masching feedlot is certain to increase the number of bacteria in the area, which will develop antibiotic resistance. As the District Court observed in colloquy with Appellants’ counsel, the area around the Masching feedlot is saturated with other feedlots and the manure they produce. *See* Mot. Summ. J. Hearing Tr. 40-41. Moreover, the District Court concluded that the manure from the Masching facility alone will be spread over at least 244 acres, and near manure coming from other feedlots. May 2016 Order 9-11. As explained above, the bacteria in the Masching manure can interact with other feedlot manure to share or accept new antibiotic resistance, and can easily enter the soil, crops, groundwater and waterways—environmental pathways to the surrounding human population. Moreover, the Masching feedlot neighbors—including Appellants, who are older and, thus, more susceptible to illness—live quite close. *Cf.* M. Carrell et al., 35 *Infection Control & Hospital Control Epidemiology* 190 (Iowa study finding higher percentage of veterans with MRSA living within one mile of hog confinement facilities). The threat of antibiotic-resistant bacteria poses a “salient problem” to which the County must give a “hard look.” *See Pope County Mothers*, 594 N.W.2d at 236.

d. The County Decision to Approve the Masching Feedlot Conditional Use Permit without Any Consideration to the Risk of Increased Antibiotic Resistance Was Arbitrary and Capricious.

Neither the County Planning Commission nor the Board considered the increased presence of antibiotic-resistant bacteria, even though the County is tasked with ensuring the protection of public health when evaluating a CUP application. *See* Section II.a-b, *supra*. For example, the County failed to investigate how, if at all, Masching plans to protect its workers and neighbors from exposure to antibiotic-resistant bacteria. *See generally*, AR 779-81, 785-86, 884-971, 986-1007. And despite the fact that continuous use of antibiotics is common at facilities like the Masching feedlot, *see* notes 2 and 10, *supra*, the County did not even ask the obvious questions of whether Masching plans to feed its hogs antibiotics, and assuming so, what kinds of antibiotics, and for what duration.¹¹ *See* AR 779-81, 785-86, 884-971, 986-1007. By overlooking the public health risk that the Masching feedlot will increase the threat of antibiotic resistance in the community, and the risk that antibiotic-resistant bacteria will enter the local environment, the County bypassed multiple specific requirements in its own ordinance. *See* Zoning Ordinance § 18.13.8(A)(I), (IV), (IX). The County, therefore, acted arbitrarily and capriciously because it “entirely failed to consider an important aspect of the problem.” *See Pope County Mothers*, 594 N.W.2d at 236; *BECA of Alexandria*, 607 N.W.2d at 463.

¹¹ Appellants and other local residents raised the issue of how the Masching CUP will contribute to the spread of antibiotic-resistant bacteria early and often. *See* Section II.a, *supra* (describing comments from the community concerning antibiotic resistance during the County’s consideration of *both* the Masching 2014 *and* 2016 CUP applications). Defendant Masching had plenty of opportunities to remove the public health threat of antibiotic resistance as an issue by disclaiming plans to use continuous doses of antibiotics at the feedlot, but never did so.

III. THE DISTRICT COURT'S STANDARD OF REVIEW WAS FAR TOO DEFERENTIAL TO COUNTY DECISION-MAKERS.

The District Court applied an overly deferential standard in reviewing the County's approval of the Masching CUP. Referencing *Schwardt v. County of Wantonwan*, the District Court stated that it would provide heightened deference to the local authority for the approval of a CUP. May 2016 Order 4. But the Supreme Court's directions on deference to CUP approvals are not so clear cut. In fact, by providing more judicial deference to a CUP approval than it would provide to a CUP denial, and consequently blessing the CUP approval even though the County completely failed to consider an important public health issue, the District Court contravened core principles of Minnesota administrative law.

In *Schwardt*, the Minnesota Supreme Court acknowledged it had “traditionally held CUP approvals to a more deferential standard of review than CUP denials.” 656 N.W.2d at 389 n.4 (citing *Interstate Power Co. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566 (Minn. 2000) and *Corwine v. Crow Wing County*, 244 N.W.2d 482 (Minn. 1976)). The Court still accepted the deferential standard because “[n]either party argued that this distinction is unwarranted.” *Id.* This observation that a “traditional” standard of review went uncontested suggests that the Supreme Court may not believe there is a valid reason for the distinction in judicial deference between CUP approvals and CUP denials.

The *Schwardt* decision cites two cases—*Interstate Power* and *Corwine*—for why courts have “traditionally” applied a heightened deference standard of review to CUP approvals. Both cases explain that “[w]hen a use permit is approved, the decision-making

body is always implicitly giving the same reason – all requirements for the issuance of the permit have been met.” *Corwine*, 244 N.W.2d at 486; *see also Interstate Power*, 617 N.W.2d at 579-80.

But the *increase* of deference to an administrative entity, based on the assumption that the entity considered all relevant issues *sub silentio*, conflicts with administrative law doctrines.

According to the Minnesota Supreme Court, judicial deference to an agency is “rooted in the separation of powers doctrine and the agency’s training and expertise in the subject matter.” *In re City of Annandale*, 731 N.W.2d 502, 512 (Minn. 2007). Agencies deserve deference when they employ their expertise and “special knowledge in the field of their technical training, education, and experience.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977). Thus, to receive judicial deference, the County must actually engage with the issues within its field of expertise—it “necessarily requires application of the agency’s technical knowledge and expertise to the facts presented.” *Minn. Ctr. for Env’tl. Advocacy (MCEA) v. MPCA*, 644 N.W.2d 457, 464 (Minn. 2002).

Indeed, the requirement that an agency must actually *apply* its technical training and expertise to the facts of the controversy to receive judicial deference is a corollary to the “arbitrary and capricious” standard of review in administrative law. “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.” *In re Block*, 727 N.W.2d 166, 177-78 (Minn. App. 2007). Similarly, courts will intervene “when a ‘combination of danger signals . . . suggest the agency has not taken a hard look at the salient problems’ and the decision lacks ‘articulated standards and reflective findings.’” *MCEA v. City of St. Paul Park*, 711 N.W.2d 526, 534 (Minn. App. 2006) (quoting *Reserve Mining Co.*, 256 N.W.2d at 825). The presumption against deference in the absence of agency findings reflects the “general rule” that an agency “should state with clarity and completeness the facts and conclusions essential to its decision so that a reviewing court can determine from the record whether the facts furnish justifiable reason for its action.” *Minn. Transitions Charter Sch. v. Minn. Dep’t of Educ.*, 2004 Minn. App. LEXIS 525, *10 (Minn. App. May 11, 2014). Judicial review has no meaning if the decision-making record is absent a key issue relevant to the decision.

Thus, a County cannot receive heightened deference for approving a CUP based on an assumption that the County’s approval implicitly—*i.e.*, *silently*—found that all relevant issues underlying the required criteria have been considered. Because a CUP is a variation from a normal land use, county ordinances contain material obligations, and applicants must demonstrate that all of the “standards and criteria stated in the ordinance *will be satisfied*.” Minn. Stat. § 394.301, subd. 1 (emphasis added); *see also RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 78 (Minn. 2015) (explaining that the “burden was on [the applicant] to show that it could satisfy the standards specified by ordinance”).¹²

¹² A CUP approval requires the county to ensure that an applicant satisfy each and every standard set out in a county ordinance, and a CUP denial only requires the county to find

Courts cannot assume, without any showing in the record, that applicants, and the county agencies that approved the applicants' permits, have met their burden. *See Murphy v. Comm'r of Econ. Sec.*, 1998 Minn. App. LEXIS 1125, *15-16 (Minn. App. Oct. 6, 1998) (“Although our standard of review is deferential and we afford due regard to agency expertise, due process prohibits us from affirming a factual finding based on an entirely silent record where the underlying facts are not of such common knowledge that we may take judicial notice of them”); *see also Loncorich v. Buss*, 868 N.W.2d 755, 765 (unpublished Minn. App. 2015) (Hudson, concurring) (“[O]ur courts should require more by mandating that CUP applicants strictly comply with ordinance requirements by submitting all required information with the application *so that a full, meaningful hearing on the merits can be properly conducted*”) (emphasis added). As the Minnesota Supreme Court has explained, such a judicial assumption unfairly makes Appellants guess at an agency's reasons while also endorsing *post hoc* agency rationalizations:

[A]n appellant in this situation must intuit the rationale for the agency's decision and prepare argument based on their speculation as to the agency's thinking. The agency, on the other hand, is able to rationalize its decision in retrospect and in direct response to an appellant's contentions. Sanctioning this procedure would be unfair to appellants and runs the risk inherent in any opportunity to rationalize or justify what one has done before.

Reserve Mining Co. v. MPCA, 364 N.W.2d 411, 415 (Minn. 1985) (internal quotation omitted).

the applicant to fall short of one ordinance standard. *See* Minn. Stat. § 394.301, subd. 1; *see also Schwardt*, 656 N.W.2d at 387 (explaining how a county acts unlawfully if it approves a CUP application that does not meet one of the standards set out in ordinance). Thus, if courts must apply different levels of deference to county CUP decisions, one would expect CUP application *denials* to receive more deference than *approvals*.

Increased deference, premised on the assumption that the County considered and determined that the CUP applicant met all ordinance criteria, is especially inappropriate for the facts here. Masching filed the application at issue on November 20, 2014. The very next day, well before the public had time to submit comments, the County had already prepared a Staff Report recommending approval of the CUP. *See* AR 199. After denying requests to extend the permit application consideration period, the County Planning Commission approved the CUP on December 11, 2014, a mere 13 business days after the application was filed. *See* AR 530-31, 1008-09. This short turnaround between application and approval does not and cannot “implicitly” suggest that the County considered all Zoning Ordinance criteria and assured itself that the application met them. To the contrary, as the District Court found, the County took a “cart-ahead-of-the-horse approach to CUP analysis and approval,” thinking “it could act on a CUP application without having information important to the question of its issuance.” May 2016 Order 7. The County did not apply technical knowledge and expertise to the facts presented. *See, e.g.*, Section II, *supra* (detailing how the County did not confront the serious public health concerns presented during the CUP application process, including concerns about how CUP approval might lead to increased antibiotic resistance in the area). Accordingly, the County does not deserve more judicial deference for approving the Masching CUP application than it would have received for a denial. *See City of Annandale*, 731 N.W.2d at 512.¹³

¹³ Moreover, there is no evidence of any Dodge County legislative intent for applying increased deference to a CUP approval. The CUP judicial review provision of the Zoning

IV. CONCLUSION.

The development of antibiotic resistance from pig feedlot operations is a serious threat to public health and animal welfare. The District Court erred when it did not find that the County had failed to evaluate the critical health risk that the Masching feedlot may pose to its workers, neighbors, and consumers. Moreover, the District Court afforded far too much deference to the County, even in the face of a complete lack of evidence in the decision-making record of *any* consideration of a crucial public health concern, in reviewing the County's CUP approval decision. For the foregoing reasons, this Court should reverse the District Court's decision upholding the County's approval of the Masching CUP.

Respectfully submitted,

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Ordinance, titled "Appeal of County Board Decision," makes no distinction between review of a CUP approval and a CUP denial. *See* Zoning Ordinance § 18.13.12 ("Any aggrieved person or persons, or any department, board or commission of the jurisdiction, or of the state shall have the right to appeal the decision of the County Board to the District Court on questions of law and fact").

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure. The length of this brief is 6,974 words. The brief was prepared using Microsoft Word 2010.

By,

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