From: Joe Ruth <joe.ruth@wisctowns.com>
Sent: Monday, July 6, 2020, 08:32:31 PM CDT
To: Bruce Paulsen
Subject: RE: Requesting legal opinion re: CAFO

Thanks for reaching out to WTA about the recent livestock siting bill. Attorney Lara Carlson asked me to respond to your question because I was more closely involved with the proposed rule changes. I will focus my response on the two issues you presented, fees and bonding, but I am happy to go into detail about other aspects of the siting law as well if you'd like.

The decision to implement livestock siting regulation (or not) is up to the local government, but the state sets the standards that must be followed. In other words, if a town decides to regulate livestock siting then it must implement Department of Agriculture, Trade, and Consumer Protection (DATCP) rule ATCP 51. ATCP 51 currently prohibits the town from charging more than $1,000 for a livestock siting application. ATCP 51 also currently prohibits the town from requiring financial assurances.

WTA believes, however, that DATCP does not have the authority to impose these restrictions on fees and financial assurances. In fact, DATCP staff agrees with us. Basically, the Wisconsin statute which authorizes DATCP to adopt statewide livestock siting rules only authorizes them to promulgate livestock siting "standards." See s. 93.90(2), Wis. Stat. Neither fees nor financial assurances are livestock siting "standards," so WTA feels that those provisions in ATCP 51 are unfounded and unenforceable. In our opinion, a town could adopt a higher fee and/or require bonding under the current rules.

Even though these provisions may be unenforceable, a town that charged a higher fee or required bonding today would be likely to face litigation because of the confusion created by the current rule. WTA is therefore looking at a variety of option for clarifying this law. One avenue that we have pursued is through legislation. The bill that WTA supported (AB894/SB808) was an attempt to address these concerns and many more that were shared by local governments and farmers alike. This bill is incredibly complex and therefore generally misunderstood.

While the bill did maintain the $1,000 application fee limit, it also removed almost all of the financial burden that towns face when implementing livestock siting. This bill recognized that livestock siting standards are already set by the state and shifted the burden of the technical review of those standards onto the state rather than forcing a town to hire engineers and attorneys to determine compliance with those standards. Towns would have been left with the same level of control as they have under current law but would have been relieved of all but the typical zoning or licensing expense. The state would determine if standards are met and inform the town so that the town could then process or deny the application.

As far as bonding goes, this bill would have codified the prohibition on financial assurance in part because of the shift of application review costs away from the local government and in part because there is little that a local government could require bonding for anyways. Take environmental cleanup as an example. A town might want to require bonding in case a livestock facility polluted local water or otherwise necessitated environmental cleanup efforts, but bonding would not help a town in these situations. DNR regulates pollution discharge and cleanup not local governments, and a town could never collect on this type of bond because the town would never be in the position where it became financially responsible for cleanup (the DNR would). This analysis is different than local mining reclamation, for example, because a town could become financially responsible for mining reclamation efforts under NR 135 (which is why NR 135 allows for financial assurances).

In the end, this bill would have maintained **ALL** local control over livestock siting while making siting cheaper and easier for towns to implement. This bill did not become law, however, and the fee limit and prohibition on financial assurances are still (technically) in ATCP 51.

I attached a letter that WTA put together with the Wisconsin Counties Association earlier this year addressing these concerns about the bill and more. I would also be happy to plan a time for us to talk on the phone so that we can go over any questions or concerns you might have in more detail. Again, thank you for taking the time to reach out and let me know if I can help as you research these regulations.

Joe Ruth
Legal Counsel

Wisconsin Towns Association - (715) 526-3157

December 12, 2019 Department of Agriculture and Consumer Protection (DATCP) Board Minutes,

Page 1: Public Appearance by Joe Ruth - Wisconsin Towns Association (WTA) Legal Counsel

> **"Public Appearances**
> Joe Ruth, on behalf of the Wisconsin Towns Association, appeared before the Board to speak on livestock siting. Mr. Ruth is very interested to see where this rule goes in the future. He is looking forward to working with the Department and stakeholders to come to a workable rule that is beneficial for everyone. Mr. Ruth wanted to remind the board of 2011 Act 21 and 2017 Act 108, and request that the Board stop enforcing and implementing the rule fee restrictions and the prohibition on financial assurances, which are not allowed by statue."