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Tim Bates, Chairman
Town of Rock Elm
N5412 170th Street
Elmwood, WI 54740

Via Email: townchairmanrockelmtownship@gmail.com

Re: CAFO Ordinance

Dear Tim:

This follows our visit on February 17, 2025. You dropped off a copy of a possible 2025 CAFO Ordinance the Town is considering adopting. Apparently this comes from Teresa Davis who must lead some group or committee with a multi-jurisdictional reach which is advising and encouraging the adoption of such an Ordinance.

I did not read the Findings, other than to peruse a few of them. I did not read the Appendixes. I did review the proposed Ordinance. Here are some thoughts:

1. The numbering does not lend itself to easy reference. When referring to the Ordinance, say Section 3, Subdivision 3, one would refer to 3 3 much better to renumber this. Instead of numbers following a Section there would be letters. So under Section 3 instead of seven numbered paragraphs there would be seven lettered paragraphs, capital letters A-G. Subparagraphs would be numbers and any sub – sub paragraphs would be small letters. If you don't go that route, then at least put parenthesis around the numbers under each Section. Then, for instance, Section 3 3 would read 3(3). That would be easier to follow.
2. If you adopt this Ordinance let me know. It can be adopted using a Short Form Ordinance which indicates the Ordinance has been on file with the Town Clerk for a period of at least 2 weeks and has been open for public inspection. The Short Form Ordinance would be less than one page in length and would then be easy to post and/or publish.
3. At Section 6, second paragraph, reference is made to holding a "Public Hearing on the Application." I would not advocate a Public Hearing. What is the purpose? The public doesn't get to vote on this. If the proposed use is legal you would have no rational basis to deny it. If you likened this to the Statutes concerning Conditional Use Permits issued under Zoning Ordinances, if an Applicant agrees to be bound by the conditions established in the Zoning Ordinance for the particular conditional use then the municipality must issue the CUP. There is no discretion.

4. At Section 6, third paragraph reference is made to the fact that conditions can be imposed by the Town. You may want to better define what those conditions will be. They are going to have to be the same for everybody. Note, Section 8 7 fairly much reiterates the language of this paragraph in Section 6. If there is any modification both should be modified.
5. Section 8 2 requires and Applicant to agree to pay costs incurred by the Town. I suggest you add language that says the Town Clerk will notify the Applicant of the amount of a required deposit that must be paid with the Application. You could establish a deposit in the Ordinance, which would eliminate claims of inconsistency (in other words everyone would be treated the same).
6. Section 8 6 refers to the fact that the Town Board will be acting in a "quasi-judicial" capacity in determining whether to approve and issue a permit. I don't know what authority there is to say that the Board will act in a "quasi-judicial" capacity. That suggests the Board is sitting much like a Court, just not quite. A Board of Appeals established under a Zoning Ordinance hears appeals from decisions of Plan Commissions. When it does so it acts in a quasi-judicial capacity. Your Town Board is a legislative body. I shouldn't think that your consideration whether to issue a permit should cast your Board in a quasi-judicial role as opposed to the normal legislative function that you serve every time you have a Town Board Meeting.
7. Section 3.3. You ask if the Town can define a CAFO Operation with barns, waste storage, etc. outside of your Town. I think you're looking at Section 3.3(b). It seems to be a reasonable definition. If a facility in a location outside of the Town uses land in the Town to manage waste, it becomes subject to the terms of the Ordinance. The Ordinance is to regulate operation of CAFOs. The regulation wouldn't be of the CAFO itself in the other municipal jurisdiction. Instead, it would apply to management of waste products emanating from the CAFO which are disposed of in the Town. That said, unless there is an attempt to enforce this Ordinance, and litigation ensues, you won't know the answer until a Court renders an opinion. Even then, you wouldn't know the final answer unless the case was appealed and an Appeals Court ruled on the matter. That would then set precedent.
8. Section 9. This Section deals with assuring there are sufficient funds available for pollution cleanup, nuisance abatement and closure of an operation that is abandoned. Obviously the first two examples would apply to waste haulage and disposal in your Town. It seems you would have a decent chance of a Court agreeing that you had authority not only to license the activity as per Section 3, but also to require financial surety. That said, just as I state above, until there is actual litigation you are not going to have a firm answer.
9. Section 15.4. Here you are looking at the last paragraph and asking me to help interpret what it means. It simply means that in addition to any other penalty that may be imposed the Town may commence an action for abatement of the nuisance, in other words an action seeking a Court Order/Injunction requiring certain action to be

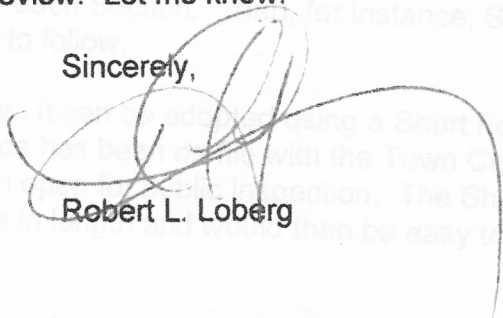
taken by the offender to eliminate the nuisance. If you undertake such legal action, and if you prevail, this Section provides you may collect the costs of the action against the owner of the real estate upon which the nuisance took place or exists. Costs do not likely include all legal fees. That is up to the Court and its interpretation of the Statutes. Note, if the nuisance is spillage of waste on a public highway this provision obviously wouldn't apply. In such a case as that, while you could perhaps take abatement action to prevent future hauling you wouldn't be able to assess the enforcement cost against any property because it took place on public property.

Remember what I have said in other instances, and in our recent phone call. There is no way that you should have fines as low as \$100 and a maximum of \$1,000. Under no circumstance would the Town ever issue a citation to a CAFO for \$100, then proceed to spend thousands of dollars litigating whether a violation took place, or whether the Ordinance was valid. You would want substantial minimum fines. This is a common refrain municipalities hear from me. Before you would issue a citation you would pull out all stops trying to amicably resolve the offending circumstances. You would only issue a citation in the event the alleged offender refused to modify behavior. Then you better have really substantial fines. For something like this I can't imagine your fine would be anything less than \$5,000. Maximum, perhaps \$10,000. Also perhaps a provision that each second and subsequent violation would call for a forfeiture of at least \$10,000, not the initial \$5,000. You aren't talking about speeding tickets and other mundane issues here. I think you are talking about very serious circumstances and the penalties should reflect that.

10. Section 17. You asked what the word "severability" meant. It simply means that if a part of the Ordinance is held invalid by a Court the balance of it remains enforceable. That is fairly standard language in many Ordinances and contracts. Of course, it may be that if a very substantial portion of the Ordinance was held violative of the law, it might eviscerate the Ordinance such that the entire thing would be unenforceable anyway. You wouldn't know this until a Court ruled on the matter. The bottom line is it's standard language.

You may want to discuss this further after review. Let me know.

Sincerely,


Robert L. Loberg

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