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ATTORNEYS AT LAW

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PERSONAL AND CONFIDENTIAL
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Matthew Stohr, Legislative Associate
WISCONSIN COUNTIES ASSOCIATION
22 E. Mifflin Street, Suite 900
Madison, WI 53703

Re: County Regulation of Large Livestock Facilities Based Upon "Public Health or Safety Concerns"

Dear Mr. Stohr:

You have asked for our opinion concerning the interpretation of a "public health or safety" in the context of a county's ability to regulate livestock facilities in a manner more stringent than that set forth in ATCP 51. Our analysis of the relevant regulations and precedent follows.

REGULATORY REQUIREMENTS ESTABLISHED IN ATCP 51

ATCP 51 interprets the livestock facility siting law and establishes siting standards relative to facilities covered by the law. A political subdivision that chooses to regulate large livestock facilities must apply the siting standards in ATCP 51. Despite the requirement that local standards conform to the standards set forth in ATCP 51, a political subdivision can establish local standards that are more stringent than those set forth in ATCP 51 in certain circumstances. *See* ATCP 51.10(3). Specifically, a political subdivision can establish more stringent standards if the following conditions are met:

- (a) The political subdivision is authorized to adopt the local standards under other applicable law.
- (b) The political subdivision enacted the standards by local ordinance before the livestock facility operator filed the application for local approval
- (c) The political subdivision enacted the standards based on reasonable and scientifically defensible findings of fact

adopted by the political subdivision's governing authority.

- (d) The findings of fact under par. (c) clearly show that the standards are needed to protect public health or safety.

ATCP 51.10(3) (emphasis added).

As set forth above, our analysis here focuses on condition (d) – *i.e.*, what will constitute a sufficient basis for regulating in the interest of protecting “public health or safety.”

ANALYSIS

Municipal Regulations Utilizing Police Powers

Courts have consistently recognized that municipalities, pursuant to their police powers, can enact ordinances for the protection of the health and safety of the public. McQuillin, *Municipal Corporations*, § 24:223. Moreover, “[a] county may enact regulations to protect the health, safety, and general welfare of the public under its police powers.” *Bd. of Commissioners of Atkinson County v. Guthrie*, 273 Ga. 1, 3, 537 S.E.2d 329, 331-32 (2000). Given this broad mandate, when reviewing a local ordinance that seeks to regulate in the interest of public health or safety, courts are generally hesitant to invalidate the ordinance. McQuillin, *supra*, § 24:224.

In this case, a county's regulatory authority derives from its general zoning powers. In fact, a county's zoning powers under § 59.69 are to be liberally construed in favor of the county. Wis. Stat. § 59.69(13). *See also Cushman v. City of Racine*, 39 Wis. 2d 303, 306, 159, N.W.2d 67, 68 (a local zoning ordinance created under Wis. Stat. § 62.23(7) is to be liberally construed in the favor of the municipality.)

Based upon the applicable precedent, it is clear that a county can regulate under its police powers and general zoning authority and that such regulation will be entitled to deference. However, given the strict enforcement guidelines established in ATCP 51, counties should be careful to frame the regulation in a manner consistent with past application of the phrase “in the interest of public health or safety,” as is explained in further detail below.

Definition of “public health or safety”

The term “public health or safety” is defined only once in the statutes. Wis. Stat. § 254.61, which articulates definitions for the statutory provisions regarding lodging and food protection, defines the term as “the highest degree of protection against infection, contagion or disease and freedom from the danger of fire or accident that can be reasonably maintained in the operation of a hotel, restaurant, tourist rooming house, bed and breakfast establishment, vending machine, or vending machine commissary.”

Unfortunately, because of the statute's specific purpose, application of this definition provides very little interpretive guidance in answering the question presented here.

Despite the absence of any published case specifically defining the term "public health or safety," there is one Wisconsin case that provides insight as to how courts will view the issue. In *Menzer v. Village of Elkhart Lake*, 51 Wis. 2d 70, 186 N.W.2d 290 (1971), an individual claimed that a local ordinance, enacted pursuant to Wis. Stat. § 30.77, that prohibited the use of power boats on Elkhart Lake during certain Sundays was invalid. According to Wis. Stat. § 30.77, any town, village, or city may, in the interest of "public health or safety," adopt local regulations regarding the use of boats. *Id.* at 74. One of the arguments the aggrieved individual made in seeking to overturn the ordinance was that there was no justifiable nexus between the absolute prohibition on the use of power boats on Sundays and the furtherance of any interest in "public health or safety." *Id.* at 80.

The Supreme Court of Wisconsin disagreed with the aggrieved individual, but upheld the trial court's determination that the issue should be resolved after a trial and based upon the facts in the record. *Id.* Specifically, the Court held that the issue of what constitutes a valid local regulation in the interest of "public health or safety" would need to be determined after examination of all relevant factors. *Id.* at 84. *Menzer* demonstrates that while the "public health or safety" standard is sufficiently specific from a constitutional regulatory standpoint, the question of whether an ordinance meets the "public health or safety" standard is fact-specific and will be answered on a case by case basis.

Public Health vs. Public Safety

Although there is a relative dearth of interpretive guidance on the definition of "public health or safety," courts have had occasion to address the differences between the terms "public health" and "public safety."

Municipal power relative to the public health has been distinguished from municipal power relative to the public safety. The distinction in general is between control of causes of disease and control of causes of personal injuries and property damages. Power as to the public health will not justify measures as to public safety, and the converse proposition likewise is true.

McQuillin, *supra*, § 24:222.

The issue of what constitutes a public health interest was discussed in *Vinson v. Howe Builders Assoc. of Atlanta*, 233 Ga. 948, 213 S.E.2d 890 (1975). In *Vinson*, a group of swimming pool owners challenged a set of swimming pool regulations adopted by the County's Board of Health. *Id.* at 948. The owners claimed that the regulations were invalid because they exceeded the Board's authority, which was limited to "matters

of public health.” *Id.* According to state statute, the Board had the authority to adopt regulations regarding swimming pools that are “necessary to prevent and suppress disease and conditions deleterious to health.” *Id.* at 948-49. As a result, an ordinance or regulation enacted as a health measure must be reasonably related to public health. *Id.* at 949.

The trial court concluded that the state statute authorizing county boards of health to enact ordinances for the prevention and suppression of disease and other conditions that are deleterious to health did not include matters of “public safety.” Because the regulations related to “public safety” issues only (as opposed to public health), the trial court enjoined enforcement of the county board’s swimming pool ordinance.

On appeal, the Supreme Court of Georgia affirmed the trial court’s determination and held: “[w]e decline to rule, as defendants urge, that traumatic death or drowning is ‘deleterious to health,’ within the meaning of the statute and that safety regulations to prevent those occurrences are within the scope of the board’s powers.”

Based upon this precedent, courts have recognized a distinct difference between a regulation in the interest of “public health” and a regulation in the interest of “public safety.” In summary, “public health” refers to control of disease and “public safety” refers to the protection of people and property.

CONCLUSION

Unfortunately, there is no clear blueprint to guide a county in drafting a more stringent regulation than that set forth in ATCP 51 based upon “public health or safety” concerns. Nonetheless, the following points must be considered.

1. A county’s regulation must be scientifically defensible. In other words, prior to enacting the regulation, a county should be in possession of a study or report, specific to the county, that establishes the scientific need for a more stringent regulation.
2. A more stringent regulation necessitated by a concern for “public health” must involve the control of causes of disease. For example, if a county can scientifically show that the more stringent regulation is necessary to quarantine and/or abate infectious disease, the regulation has a good chance of being upheld under a “public health” analysis. Another example of a valid regulation would be if a county has soil or geological conditions that require more landspreading precautions in order to protect drinking water wells.
3. A more stringent regulation necessitated by a concern for “public safety” must relate to the control of causes of personal injuries and property damage. If a county can show that a large livestock facility would cause

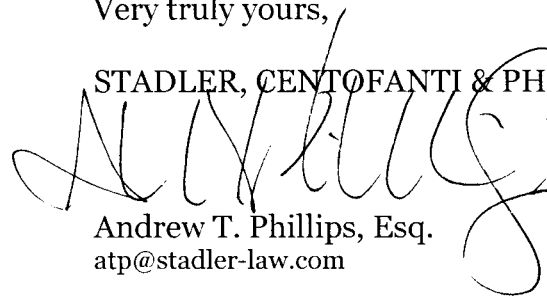
harm to a neighboring population center, the regulation would be valid under the "public safety" analysis.

It is impossible to conceive of every circumstance where a county would wish to implement a more stringent regulation than that set forth in ATCP 51. We recommend that counties first identify the nature of the harm the county seeks to eliminate and then work in conjunction with the scientific community in establishing appropriate standards necessary to eliminate the harm based upon either "public health" or "public safety" concerns.

If you have any further inquiries regarding this matter, please do not hesitate to contact us. We appreciate the opportunity to be of service.

Very truly yours,

STADLER, CENTOFANTI & PHILLIPS, S.C.

A handwritten signature in black ink, appearing to read "Andrew T. Phillips", is written over the typed name and firm name.

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ATP/jjc
c: Mark O'Connell