

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3453/P1dn  
RCT:kjf:pg

January 21, 2004

This is a preliminary version of the proposal on siting livestock facilities based on instructions dated November 12, 2003. There are a number of notes in the draft with my questions and comments. I am certain that the draft raises other questions that have not occurred to me. The draft should be reviewed very carefully to ensure that it is workable and that it carries out the intent of the proposal.

With regard to proposed s. 93.90 (3) (a), it is important to specify the sources of local authority for imposing requirements on the siting or expansion of livestock facilities that are wanted to be preempted to ensure that there are no conflicts in the statutes that could cause ambiguity and might allow a court to interpret the statutes in a way that is inconsistent with the intent of the proposal. The list of statutes in proposed s. 93.90 (3) (a) represents my first attempt to identify these sources of local authority. I reviewed the list of statutes in the definition of "local approval" in s. 289.33 (3) (d) for possible use in this provision, as suggested in the instructions. That definition includes cross-references to a number of statutes that are not relevant to this proposal, for example, provisions relating to county authority to remit forfeited bail bonds and regulation of obscenity. That definition also excludes some statutory provisions that should probably be "notwithstanding" in this provision.

Proposed s. 93.90 (3) (a) provides that the standards promulgated by DATCP under this proposal prevail over the authority for zoning of shorelands and construction site erosion control and storm water management zoning. It seems that shoreland zoning requirements, for example, might be more restrictive in some ways than the standards that DATCP would promulgate under this proposal. Should the standards that DATCP promulgates control over the authority for zoning of shorelands and construction site erosion control and storm water management zoning? Should the draft "notwithstanding" s. 87.30? Note that there may be federal requirements that relate to shoreland and floodplain zoning. Might there be other statutes that provide authority to political subdivisions that should not be preempted?

The "smart growth" law requires that beginning on January 1, 2010, any action of a political subdivision that affects land use must be consistent with the political subdivision's comprehensive plan (s. 66.1001 (3)). Unless language is added to this draft requiring political subdivisions to enact DATCP's standards, rather than just applying them, s. 66.1001 (3) should be added to the list of statutes in proposed s. 93.90 (3) (a). Might the standards promulgated by DATCP cover matters also covered by

building codes? If so, which should prevail? See s. 59.70 (1). What about construction site erosion control requirements under s. 101.1205?

Does s. 66.0415 provide authority to cities, villages, or towns that could interfere with the intent of this proposal? What about s. 33.455 (3), 60.10 (2) (i), or 236.45?

This proposal might be challenged as violating the home rule provision of article XI, section 3, of the Wisconsin Constitution. The home rule amendment to the constitution was adopted to empower cities and villages to determine their own local affairs, and “makes a direct grant of legislative power to municipalities,” subject only to the constitution and legislative enactments of statewide concern. See *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526 (1977), citing *State ex rel. Ekern v. City of Milwaukee*, 190 Wis. 633, 637 (1926).

The provision also stands for the proposition that the state legislature is limited “in its enactments in the field of local affairs of cities and villages” (*Michalek*, 526 citing *Ekern*, 638) and cannot prohibit a city or village from acting in an area that solely involves local affairs and that is not a matter of statewide concern. In effect, this proposal limits local zoning and regulatory authority in the area of livestock facilities, as defined in the bill. It could be argued that these zoning and regulatory issues, if not solely a “local affair,” are at least areas of predominantly local concern. The Wisconsin Supreme Court “recognize[s] that many matters while of ‘state-wide concern,’ affecting the people and state at large somewhat remotely and indirectly, yet at the same time affect the individual municipalities directly and intimately, can consistently be, and are, ‘local affairs’ of this [home rule] amendment.” *Ekern*, at 640 and *Michalek*, 527, citing *Ekern*.

In *Ekern*, the Supreme Court held that a state statute that regulated the heights of buildings in all cities violated the home rule authority of cities. See *Ekern*, at 639. Consequently, under *Ekern* and *Michalek*, a court could hold that a statute that limits city and village authority in the area of livestock facility siting and expansion violates article XI, section 3, of the Wisconsin Constitution because the statute deals with a local affair. If a court so held, a city or village could elect not to be governed by the statute. See *Ekern*, at 642.

A court could also hold that the proposal does not violate constitutional home rule provisions because of the statewide importance of agriculture.

We try to avoid including cross-references to administrative rules in the statutes. Rule numbers can be changed, making references in the statutes incorrect. For the most part, I have tried to refer to rules that are referenced in the instructions by referring to the statutes that authorize them. I used a cross-reference to the rule containing DNR’s definition of “animal unit” because there did not seem to be a good alternative in that instance.

The instructions included some references to July 19, 2003. I did not understand the intended legal effect of those references and, therefore, did not include them in the draft.

Should any funding or positions be provided in this draft?

Please contact me with any questions or redraft instructions.

Rebecca C. Tradewell  
Managing Attorney  
Phone: (608) 266-7290  
E-mail: [becky.tradewell@legis.state.wi.us](mailto:becky.tradewell@legis.state.wi.us)