

**LEGAL MEMORANDUM**

**TO:** Wisconsin Counties Association

**FROM:** Andrew T. Phillips  
von Briesen & Roper, s.c.

**RE:** Letter to Polk County Board from Venture Dairy Cooperative, Wisconsin Dairy Alliance, and Wisconsin Manufacturers & Commerce, Dated September 14, 2020

**DATE:** October 28, 2020

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You have asked us to review a letter the Polk County Board (the “Board”) received on September 14, 2020, from the Venture Dairy Cooperative, Wisconsin Dairy Alliance, and Wisconsin Manufacturers & Commerce (the “Letter”) and comment on certain statements contained in the Letter. The Letter addresses the Board’s consideration of a Resolution amending Polk County’s Comprehensive Land Use Ordinance related to Swine CAFOs (the “Resolution”).

While the Letter’s analysis surrounding the County’s legal authority to adopt the Resolution may be an appropriate topic of discussion with the Board and Polk County’s corporation counsel, the Letter’s characterization of the Board’s activities in considering the Resolution cause concern. Specifically, the Letter provides (in relevant part):

- “It is deeply concerning to Wisconsin’s business community, especially Wisconsin’s agricultural sector, that the County continues to recklessly move forward with these unlawful proposals.”
- “The County’s unlawful actions will harm local farmers and likely lead to costly and reputation-damaging litigation, for which your taxpayers (the very farmers you are harming) will have to foot the bill.”

The Letter closes with the following admonition:

- “If supervisors enacted the Proposed Ordinance and Proposed Moratorium, they would be unlawful, unenforceable, and be in excess of the county board’s authority to enact, which is a felony in Wisconsin. Wis. Stat. § 946.12(2). When you were sworn in to serve, you took an oath to uphold the laws of the State of Wisconsin and the Wisconsin Constitution. We ask that you honor that oath, and reject these proposals that are clearly at odds with state law.”

Certain Board supervisors, and other county board supervisors around the state, interpreted these statements, and the tenor of the Letter, as a threat – *i.e.*, if the Board adopted the proposed Resolution, the Letter’s authors (or others) were prepared to sue Polk County, refer the Board supervisors for felony prosecution, or both. While this memorandum will not address the merits

of any potential legal challenge to the Resolution, it is important to clarify that the Board and its supervisors did not commit a felony under Wis. Stat. § 946.12(2) by simply considering or adopting the Resolution.

Section 946.12(2) of the Wisconsin Statutes provides that a public officer or public employee is guilty of a Class I felony if he or she engages in the following conduct:

In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity

In order to establish a violation of this statute, the prosecutor must prove beyond a reasonable doubt the following four elements:

1. At the time of the alleged offense, the defendant was a public officer;
2. The defendant, in his or her capacity as a public officer, engaged in the conduct complained of;
3. The conduct complained of was either in excess of the defendant's lawful authority or conduct in which the defendant was forbidden by law to engage in his or her official capacity; and
4. The defendant knew that the conduct was in excess of his or her lawful authority or that he or she was forbidden by law to engage in the conduct in her or her official capacity.

WIS JI-CRIMINAL 1731.

While the first two elements of the offense are seemingly simple to establish in this circumstance, it is apparent the third and fourth elements would be incredibly difficult, if not impossible, to prove beyond a reasonable doubt.

With respect to the third element, the conduct complained of in the Letter is a Board supervisor's official action on the Resolution. The Resolution had been prepared by a committee of the Board and, based upon the signatures appearing on the second page of the Resolution, reviewed by Polk County's corporation counsel. One of corporation counsel's roles is to provide legal advice to the Board. *See* Wis. Stat. § 59.42(2)(b)3. It would be illogical to conclude that Polk County's corporation counsel believed the Resolution to be contrary to law, yet nonetheless approved the Resolution, at least as to form. The Board, in good faith, relied upon corporation counsel's review prior to taking any official action on the Resolution. As a result, it would be nearly impossible to establish beyond a reasonable doubt that a Board supervisor was acting in excess of his or her authority or was otherwise forbidden by law from taking action on the Resolution.

Nonetheless, even assuming the third element could be satisfied, the fourth element would require proof beyond a reasonable doubt that a Board supervisor knew that taking action on the Resolution would be in excess of his or her authority or otherwise forbidden by law. According to Wisconsin Jury Instruction CRIMINAL 1731, such knowledge “must be found, if found at all, from the [Board supervisor’s] acts, words, and statements, if any, and from all the facts and circumstances ... bearing upon knowledge.” As indicated above, it is apparent the Board proceeded in considering the Resolution upon the advice of corporation counsel. As a result, even if it could be shown that a Board supervisor acted in excess of his or her authority or was otherwise forbidden by law from taking action on the Resolution, which is highly doubtful, it would be seemingly impossible to prove that a Board supervisor knowingly undertook such action.

In conclusion, we believe the Board and Board supervisors acted appropriately in considering the Resolution, without any comment on the merits of the Resolution or outcome of any official action. Moreover, we do not believe that a county board supervisor would be found to have acted contrary to Wis. Stat. § 946.12(2) when taking official action on a resolution that corporation counsel has reviewed except in the most unusual of circumstances, none of which are present here.

If you have any questions surrounding this memorandum, please do not hesitate to contact us. We appreciate the opportunity to be of service to the Association.