

STATE OF MINNESOTA
COUNTY OF COOK

IN DISTRICT COURT
SIXTH JUDICIAL DISTRICT

In Re: Application for an Order for
Inspection of David Berglund and
Lake View Natural Dairy, 140 County
Road 56, Grand Marais, MN 55604

ORDER

File No. 16-CV-14-212

The above-entitled matter came on for hearing before the Court, the Honorable Michael J. Cuzzo presiding, on October 13, 2015, pursuant to David Berglund's challenge of the constitutionality and enforceability of this Court's October 14, 2014 Administrative Inspection Order. Assistant Attorney General Max Kieley appeared on behalf of the Minnesota Department of Agriculture. David Berglund appeared with counsel, Zenas Baer.

Upon the arguments of the parties, and upon all the files and records herein, the Court makes the following:

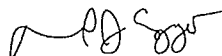
ORDER

1. The Court's October 14, 2014 Administrative Inspection Order is valid and enforceable. David Berglund and Lake View Natural Dairy shall comply with that Order.
2. Mr. Berglund's claims that the Administrative Inspection Order violates his right to contract, right to privacy, right of association, right of due process, and right of equal protection are dismissed.
3. Mr. Berglund's request for an evidentiary hearing is denied.
4. This Order shall be stayed for a period of 60 days.
5. The attached memorandum is incorporated into this Order.

FILED IN COOK COUNTY
Office of Court Administration

Mar 11 2016 1:40 PM

BY THE COURT:



Cuzzo, Michael
Mar 11 2016 1:34 PM

Hon. Michael J. Cuzzo
Judge of District Court

FINDINGS OF FACT AND MEMORANDUM

I. UNDISPUTED FACTS

In January 2013, the Minnesota Department of Agriculture (the "MDA") learned that David Berglund and his family were operating a dairy farm in Grand Marais, Minnesota, under the name of Lake View Natural Dairy (the "Dairy"). The MDA also suspected that Mr. Berglund was selling milk products from the farm to consumers. The MDA confirmed that the Dairy was advertising unpasteurized milk products on the internet.

As a result of the information gathered, the MDA conducted an onsite visit to the Dairy on February 26, 2013. Mr. Berglund refused to allow the MDA inspectors access to the Dairy.

In a letter dated April 1, 2013, the MDA informed the Berglunds that it was scheduling a meeting to discuss possibilities for voluntary compliance with Minnesota rules and regulations relating to the manufacture and sale of unpasteurized dairy products. In the letter, the MDA noted that Mr. Berglund refused to allow the previous inspection based on his constitutional right to sell the products of his farm or garden. The meeting was scheduled for April 12, 2013, at 11:30 a.m. at the Department of Health District Office in Duluth, Minnesota. The meeting was subsequently rescheduled for April 26, 2013.

In a letter dated May 17, 2013, the MDA explained to the Berglunds that the compliance meeting was rescheduled to May 30, 2013, via telephone, to accommodate the Berglunds' previous unavailability to appear in person for the meeting in Duluth. The MDA explained to the Berglunds that, according to its interpretation of Minnesota law, certain persons that sell or peddle the products of their farm are exempt from licensing requirements, but are not exempt from complying with pertinent regulations. Further, the MDA explained to the Berglunds that the Dairy is considered a dairy plant because the Dairy manufactures, packages, and sells dairy products such as yogurt, butter, and buttermilk. The MDA explained that dairy plants are subject to additional statutory regulations.

In a letter dated July 11, 2013, the MDA informed the Berglunds that they had failed to meet in person or by telephone for any of the scheduled compliance meetings. The MDA notified the Berglunds that it had made a determination that the Dairy was in violation of numerous regulations, including: 1) operating without an appropriate dairy producer permit or certification; 2) operating without an appropriate dairy plant permit; and 3) manufacturing and selling to the public unpasteurized yogurt, butter, and buttermilk.

The MDA ordered the Berglunds to cease manufacturing and selling yogurt, butter, and buttermilk to the public until the Dairy could obtain the appropriate permits and meet the required health and food safety laws. The MDA further stated that the Berglunds could "continue to sell unpasteurized milk or fluid milk products from [the] farm that meet the exemption in Minn. Stat. 32.393." Finally, the MDA noted that the Dairy may be required to obtain a license for the manufacture of dairy products such as yogurt, butter, and buttermilk. The MDA stated that it did not have enough information to determine if a license was required because the Dairy

had not provided the MDA with a list of the ingredients that the Dairy used to manufacture certain products.

On September 27, 2013, MDA inspectors traveled to Grand Marais and went to the Dairy. The store that the Berglunds kept in one of the barns was open, but there was no one present in the area. The inspectors took numerous photographs of the exterior and interior of buildings on the property, a product order sheet, and the products that were marked for sale in the store. These products included unpasteurized whole milk, skim milk, chocolate milk, colostrum, cream, yogurt, and buttermilk. After taking the photographs, the inspectors found Mr. Berglund and requested a full inspection. Mr. Berglund refused the inspection. The MDA inspectors left a Food Establishment Inspection Report in Mr. Berglund's vehicle, as requested by Mr. Berglund.

The Food Establishment Inspection Report ordered Mr. Berglund and the Dairy to "[d]iscontinue the manufacturing of dairy products without the appropriate permits and approvals. Minn. Stat. 32.392. Comply immediately." The Report further stated: "[t]he refusal to permit entry or inspection is a prohibited act under Minn. Stat. 31.02." Finally, the Report noted that Mr. Berglund had 20 days to appeal any orders in writing to the Commissioner.

In a letter dated October 4, 2013, and entitled "Notice of Amended Report," the MDA ordered the Berglunds and the Dairy to: 1) "Discontinue the manufacture and sale of misbranded food"; 2) "Discontinue the sale of food from an unapproved source, not in compliance with the law and rules of Minnesota"; 3) "Discontinue the manufacture and sale of unpasteurized dairy products"; and 4) "Obtain licensure for the manufacture and sale of products not produced from the farm or garden." Once again, the Berglunds were informed that they had 20 days to appeal the orders in writing to the Commissioner.

On October 18, 2013, Mr. Berglund sent a letter to the MDA explaining that he did not agree with any of the procedures that had occurred up to that point, and that he believed the MDA was violating his constitutional rights.

On November 4, 2013, the MDA replied to Mr. Berglund, stating in part: "the Department is treating this as an appeal of the order the department issued to you on September 27, 2013, and amended in our October 4, 2013, letter. The Department will be forwarding your appeal to the Minnesota Attorney General's office to set up a hearing in front of an administrative law judge. You will receive documentation from the Attorney General's Office indicating that a hearing is being set up. At this hearing, you have a right to be represented by an attorney."

On November 15, 2013, Mr. Berglund replied to the MDA, stating, "[in the October 18, 2013] letter, I in no way asked for any benefit, privilege, or appeal, but gave you notice of your illegal activities. I do not accept this offer to contract and do not consent to these proceedings." Mr. Berglund remained unrepresented by legal counsel.

On January 6, 2014, the Minnesota Attorney General's Office replied to Mr. Berglund, writing that "[t]his letter is to give you notice that unless you successfully appeal the order, you

are bound by its terms. If you wish to dispute the order, please notify [the Attorney General's Office] in writing by January 24, 2014."

On January 21, 2014, Mr. Berglund responded to the Attorney General's Office, explaining his position in the matter. He stated that the MDA had not proven that he was not in compliance with the Minnesota Constitution, and thus he believed he need not take any action.

On February 3, 2014, the Attorney General's Office sent Mr. Berglund a letter explaining that no appeal would occur, and that the MDA orders were final. Mr. Berglund was advised, once again, to seek legal counsel regarding the matter.

There is no evidence that any further correspondence occurred between the MDA and Mr. Berglund over the next eight months. On October 14, 2014, the MDA filed an ex-parte Application for Administrative Inspection Order with this Court, commencing the current case. The MDA stated that an inspection would take place on October 22, 2014, and that the Order was requested in ex-parte form for two reasons: 1) because Mr. Berglund had a history of failing to comply with inspections, and 2) because the MDA has an interest in inspecting the Dairy in its normal, everyday state, without providing those being inspected an opportunity to obscure any existing violations on the property. The Court signed the ex-parte order, allowing an inspection of the Dairy to commence on October 22, 2014. The MDA attempted an inspection on October 22, 2014, but Mr. Berglund continued to refuse inspection.

On January 12, 2015, the MDA filed an ex-parte Motion for an Order to Show Cause why Mr. Berglund should not be held in contempt of court for refusing the court-ordered inspection. The Court issued an Order to Show Cause on January 13, 2015, and set a hearing date of February 9, 2015. This hearing would be Mr. Berglund's first opportunity to appear before the Court in this matter.

In response to the Court's issuance of the Order to Show Cause, Mr. Berglund obtained legal counsel. As a result, the Order to Show Cause hearing was reset to March 9, 2015. On March 2, 2015, in response to the Order to Show Cause, Mr. Berglund filed a "Reply to MDA's Application for an Order for Inspection of David Berglund and Lake View Natural Dairy. . . ." The responsive pleading laid out numerous constitutional challenges to the MDA's authority to regulate and inspect the Dairy.

In light of the constitutional challenges raised, and because the ex-parte nature of the Administrative Inspection Order had not previously given Mr. Berglund a chance to contest the order, the Court denied the MDA's request for an order holding Mr. Berglund in contempt of court. The Court set additional proceedings for argument of Mr. Berglund's challenge to the Administrative Inspection Order. At a June 23, 2015 scheduling conference, the Court set a briefing schedule for written arguments. A motion hearing was then held on October 13, 2015 to address Mr. Berglund's challenge.

Mr. Berglund argues that the MDA lacks the statutory authority to inspect the Dairy. Mr. Berglund also argues that inspection of the Dairy is prohibited by article XIII, section 7 of the Minnesota Constitution. Finally, Mr. Berglund raises numerous other constitutional challenges,

including the right to contract, right to privacy, right of association, due process, and equal protection.

II. ANALYSIS

A. Inspection Not Prohibited by Minnesota Constitution Article XIII, Section 7

Article XIII, section 7 of the Constitution of the State of Minnesota is titled “No license required to peddle.” It reads: “Any person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefor.” Mr. Berglund argues that the Dairy is exempt from licensure under this provision, and that it is therefore exempt from any inspection.

Article XIII, section 7 was examined by the Supreme Court of Minnesota in an appeal of a conviction for failure to obtain a license to sell meat, as required by statute. *State v. Hartmann*, 700 N.W.2d 449 (Minn. 2005). The court recognized that article XIII, section 7 permits the unlicensed selling of the product of a farm or garden that is occupied and cultivated by the seller. *Id.* at 453. However, the Court held that a farmer exempt from licensing requirements is not also exempt from “substantive regulation of the production or sale of their farm products.” *Id.* at 455. The Court held that article XIII, section 7 therefore “grants farmers the right to sell products of the farm or garden *that they are not otherwise legally prohibited from selling*, without obtaining a license. *Id.* (emphasis added). The *Hartmann* court cited *State v. Wright*, 588 N.W.2d 166, 167 (Minn. Ct. App. 1998), in which the Minnesota Court of Appeals held that the State’s police powers to prevent the sale of illegal products of the farm were not preempted by Article XIII, section 7. *Id.* at 168. *Wright* also held that the right to sell or peddle farm products is not a fundamental liberty. *Id.*

Article XIII, section 7 gives Mr. Berglund the right to sell or peddle the products of his farm without a license. It does not, however, exempt him from the regulation of such products. If the MDA is authorized by statute to regulate Mr. Berglund’s products, and to inspect the premises for the purposes of ensuring that the products comply with statutory requirements, its statutory authority would not be invalidated by article XIII, section 7.

B. Statutory Authority for Inspection:

The MDA cites several statutes that purportedly give it the authority to inspect Berglund’s property. The Court will examine each statute individually.

1. Inspection of Premises Subject to MDA’s Chapter 32 Enforcement Authority

Minn. Stat. § 17.984 – Investigation

Subdivision 1. Authority. To carry out the commissioner's enforcement duties under chapter 32, the commissioner may, upon presenting appropriate credentials, during regular working hours and at other reasonable times, inspect premises subject to the commissioner's enforcement and licensing authority for reasons related to the commissioner's enforcement and licensing authority; request information from persons

with information relevant to an inspection; and inspect relevant papers and records, including business records. The commissioner may issue notices in lieu of citations for minor violations if a notice is in the public interest.

Subd. 2. Failure to comply. The commissioner may administer oaths, take and cause to be taken depositions of witnesses, and issue subpoenas, and may petition the district court in the county in which the premises is located to compel compliance with subpoenas or to permit an inspection.

Minn. Stat. § 17.984 gives the MDA broad authority to inspect premises subject to its enforcement and licensing authority under Minnesota Statutes Chapter 32. The MDA argues that Berglund operates a “dairy plant,” as defined by Minn. Stat. § 32.01, subd. 6, and that any dairy plant is subject to the MDA’s enforcement and licensing authority pursuant to Minn. Stat. § 32.392. The MDA also argues that the Dairy is subject to inspection under Minn. Stat. § 32.103. The Court will separately examine whether the statutes contained in Chapter 32 and cited by the MDA subject the Dairy to the MDA’s enforcement and licensing authority.

a. Inspection of Dairy Plants

Minn. Stat. § 32.392 – Approval of dairy plants

No person shall operate a dairy plant in this state unless the dairy plant, and the equipment, water supply and plumbing system connected therewith shall have been first approved by the commissioner and a permit issued to operate the same. . . .

If the Dairy falls under the statutory definition of a “dairy plant” enumerated by Minn. Stat. § 32.01, subd. 6, operation of the Dairy would be subject to the inspection and approval of the MDA. However, Berglund argues that because of an exception contained in Minn. Stat. § 32.01, subd. 6 for “dairy farms,” the Dairy does not meet the definition of “dairy plant.”

Minn. Stat. § 32.01, subd. 6 – Definition of “dairy plant”

“Dairy plant” means any place where a dairy product is manufactured, processed, or handled and includes milk-receiving stations, creameries, cheese factories, condenseries, milk plants, transfer stations, cream stations, marketing organizations not operating dairy plants, but purchasing milk and cream directly from producers for resale, and other establishments, as those terms are used in this chapter and chapters 17, 27, 31, and 33; *but does not include a dairy farm or an establishment where no dairy products are processed, but dairy products are sold at wholesale or retail only.* (Emphasis added).

The parties differ in their interpretation of the definition statute. Mr. Berglund believes that the language “does not include a dairy farm” means that the Dairy does not fall under the definition of a dairy plant. The MDA points to the language immediately thereafter, which reads: “or an establishment where no dairy products are processed, but dairy products are sold at wholesale or retail only.” Mr. Berglund has admitted that he processes dairy products. *Affidavit of Todd Whalen, dated August 24, 2015 at ¶ 7.* The parties disagree as to whether the language after the word “or” creates additional conditions that a dairy farm must meet in order to be

exempt from the “dairy plant” definition, or if it describes another type of operation, separate from a dairy farm, that is exempt from the definition. The term “dairy farm” is not defined by statute.

The Court recognizes that the statute is somewhat vague. Especially given the lack of a statutory definition for “dairy farm,” it is difficult to determine whether the Dairy is appropriately classified as a dairy plant. However, the Court believes the Dairy is properly considered a “dairy farm” under the commonly understood meaning of the term, as it is a place where cows are kept for the production of milk products. The word “or” as it is used in the statute seems to create a separate exemption for a “dairy farm,” even one that also processes dairy products. The Court finds that the Dairy does not meet the definition of a “dairy plant” under Minn. Stat. § 32.01, subd. 6, and that it is therefore not subject to inspection under Minn. Stat. § 32.392.

b. Inspection of Dairies

Minn. Stat. § 32.103 – Inspection of Dairies

(a) At times the commissioner determines proper, the commissioner shall cause to be inspected all places where dairy products are made, stored, or served as food for pay, and all places where cows are kept by persons engaged in the sale of milk, and shall require the correction of all insanitary conditions and practices found. During routine inspections or as necessary, the commissioner shall inspect for:

- (1) evidence of use of rBGH in violation of section 32.75, by producers providing affidavits of nontreatment under that section; and
- (2) mercury manometers in violation of section 116.92.

(b) A refusal or physical threat that prevents the completion of an inspection or neglect to obey a lawful direction of the commissioner or the commissioner's agent given while carrying out this section may result in the suspension of the offender's permit or certification. The offender is required to meet with a representative of the offender's plant or marketing organization and a representative of the commissioner within 48 hours excluding holidays or weekends or the suspension will take effect. A producer may request a hearing before the commissioner or the commissioner's agent if a serious concern exists relative to the retention of the offender's permit or certification to sell milk.

The Dairy sells raw milk, and makes and sells products derived from raw milk, including cream, skim milk, butter, yogurt and buttermilk. *Berglund July 23, 2015 Memorandum, p. 8.* Therefore, the Dairy falls under the scope of Minn. Stat. § 32.103(a).

While Minn. Stat. § 32.103 provides for the MDA to require correction of any insanitary conditions, the statute does not limit inspection solely to the purposes delineated by the statute. In fact, historically, Minn. Stat. § 32.104 sanctioned local inspection of any business selling dairy products, seemingly for any purpose not contrary to state law. Although since repealed, legislative history shows that the reason for the repeal was only to “remov[e] obsolete, redundant, and unnecessary laws administered by the Department of Agriculture.” *Chapter 181—H.F. No. 2746 (2014)*. This mildly suggests that the legislature intended that dairy producers be subject to any inspection authorized by statute.

Mr. Berglund notes that the sole consequence for refusal of inspection under Minn. Stat. § 32.103(b) is “the suspension of the offender’s permit or certification.” Mr. Berglund argues that he is not subject to licensing requirements under article XIII, section 7 of the Minnesota Constitution, and that Minn. Stat. § 32.103 therefore should not apply to the Dairy.

While the Court is troubled by the legislature’s failure to articulate what specific remedies are appropriate regarding a small family farm that is not subject to licensure, the ultimate purpose of the statute is to see that insanitary conditions and practices are corrected, and that the products produced and sold are safe for consumption. The Dairy is a place where dairy products are made and sold, and where cows are kept by persons engaging in the sale of milk. Therefore, the Dairy falls under the scope of Minn. Stat. § 32.103(a), and is subject to inspection under the statute.

2. Inspection of Food Manufacturers, Processers, and Packagers

Minn. Stat. § 31.04, subd. 1 – Inspection Authority – Allowable Actions

For purposes of enforcement of the Minnesota Food Law, the commissioner, or any of the commissioner’s authorized agents, is authorized upon presenting appropriate credentials to the owner, operator or agent in charge:

- (a) To enter at reasonable times any factory, warehouse, or establishment in which food is manufactured, processed, packed or held for introduction into commerce or after such introduction or to enter any vehicle being used to transport or hold such food in commerce;
- (b) To inspect at reasonable times and within reasonable limits and in a reasonable manner such factory, warehouse, establishment or vehicle and all pertinent equipment, finished and unfinished materials, containers and labeling therein; and to obtain samples necessary to the enforcement of the Minnesota Food Law . . .

Mr. Berglund claims that Minn. Stat. § 31.04, subd. 1 does not apply to the Dairy because he does not introduce his products into commerce. “Commerce” is not defined by the statute. Mr. Berglund admits selling his products to the public, but claims he “does not introduce his food products into commerce but rather offers his products for sale to informed, willing buyers . . .” Mr. Berglund appears to argue that sales of the products are not made on a sufficiently large scale to constitute introduction “into commerce.”

Mr. Berglund previously filed a petition containing the signatures of 146 individuals who indicated that they not only supported the Dairy but purchased products from the Dairy. *March 2, 2015 Berglund Petition*. Furthermore, the MDA’s application for the Administrative Inspection Order was based on information that Mr. Berglund was operating a retail store that sold various products. *Affidavit of Todd Whalen, dated August 24, 2015 at ¶¶ 6, 7, 9*. There is also evidence that Mr. Berglund advertises the sale of his products. *Whalen Affidavit at ¶ 9*. The available evidence suggests that Mr. Berglund may run a modest-sized operation meeting the common definition of a commercial enterprise.

Furthermore, the MDA is unable to make an accurate assessment of the size of the Dairy and the sales operation without being allowed to conduct an inspection. The application for the Administrative Inspection Order included a request for inspection of inventory. *October 14, 2014 Application for Administrative Inspection Order*, p. 6. Inspection of inventory would allow the MDA to make a determination whether the sales operation constitutes “introduction into commerce.” Mr. Berglund’s claim that he does not introduce products into commerce, with evidence to the contrary, does not exempt him from the inspection authority of Minn. Stat. § 31.04. Furthermore, the MDA should not be required to exempt the operation from inspection simply based upon the owner’s statement that the operation is small, or that it does not introduce products into commerce. The MDA is authorized to inspect the dairy pursuant to Minn. Stat. § 31.04.

3. Claimed Exemption for Farmers Selling Products of the Farm

Minn. Stat. § 28A.15 – Exclusions

Subdivision 1. Licensing provisions applicability. The licensing provisions of sections 28A.01 to 28A.16 shall not apply to the following:

Subdivision 2. Sales by farmers; others not in food business. Persons selling the products of the farm or garden occupied and cultivated by them . . .

Mr. Berglund argues that the provision of § 28A.15 exempting sales by farmers exempts the dairy from food handling licensure. However, as correctly noted by the MDA, § 28A.15 only provides exceptions to the licensing provisions of Minn. Stat. §§ 28A.01 to 28A.16. Minn. Stat. § 28A.15 therefore has no bearing on the statutes cited by the MDA, none of which fall within Minn. Stat. §§ 28A.01 to 28A.16. The Dairy is exempt from licensure, but not regulation, under Article XIII, Section 7 (see section 1, above). Minn. Stat. § 28A.15 does not exempt the Dairy from inspection.

C. Statutes Allow for Inspection

Although the Dairy is exempt from inspections under Minn. Stat. § 32.392 due to its status as a dairy farm, inspection is authorized by Minn. Stat. § 17.984, § 31.04, subd. 1, and § 32.103. The MDA has sufficient statutory authority to inspect the Dairy.

D. Fourth Amendment - Limits on Scope of Inspection

Mr. Berglund argues that inspection of the Dairy violates his Fourth Amendment rights because the scope of the MDA’s inspection authority is not sufficiently limited. The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. Administrative searches of commercial property generally must be supported by a warrant. *New York v. Burger*, 482 U.S. 691 (1987). In this case, the MDA did eventually obtain a warrant in the form of the Administrative Inspection Order. However, the warrant was based partially on the statutes which allow for warrantless inspection. The need for the warrant, in this case, is obviously based upon Mr. Berglund’s refusal to allow warrantless inspection.

The United States Supreme Court has recognized an exception to the warrant requirement for “closely regulated” industries, noting that in such industries the privacy interests of the owner are weakened, and government interests in regulating such industries are heightened. *Id.* at 701. The Supreme Court held that the government may conduct a warrantless inspection of a closely regulated business if: (1) a substantial government interest supports the regulatory scheme relating to the inspection; (2) the inspection is necessary to further that regulatory scheme; and (3) the regulatory scheme provides a constitutionally adequate substitute for a warrant. *Id.* at 692.

Due to the extensive regulations for dairies, the Dairy is part of a “closely regulated” industry. The regulatory scheme allowing the MDA to inspect the Dairy is supported by the substantial government interest of verifying the integrity and safety of the Minnesota food supply. Inspection is necessary to further the regulatory scheme, as it is the only way that the MDA can ensure that the food being sold meets proper integrity and safety standards. The only *Burger* factor at issue is whether the regulatory statutes provide a constitutionally adequate substitute for a warrant.

While the inspection statutes do impose some limits on the time and manner of permissible inspections, the limits are quite broad. Minn. Stat. § 17.984 requires the MDA, while carrying out its enforcement duties under Chapter 32, to inspect premises subject to its enforcement and licensing authority only during regular working hours and at other reasonable times, and only for reasons related to its enforcement and licensing authority.

The Court of Appeals of Minnesota has analyzed the constitutionality of a similar regulatory scheme governed by Minn. Stat. § 18J.04, subds. 1, 2, which permits warrantless inspection of certain facilities, including seed-growing and seed-handling facilities. *Gunnink v. State*, No. A09-396, 2010 WL 10388 (Minn. Ct. App. Jan. 5, 2010). The appellant in *Gunnink* owned a seed-growing and seed-handling facility. The appellant argued that the statute violated his Fourth Amendment right to be free from unreasonable searches and seizures. The Court of Appeals analyzed the constitutionality of the inspection statute using the *Burger* factors. The court determined that a substantial government interest supported the regulatory scheme, and that the inspection was necessary to further that regulatory scheme. The key issue in *Gunnink* was also whether the regulatory statute provided a constitutionally adequate substitute for a warrant.

Minn. Stat. § 18J.04, subds. 1, 2 contains broad limitations on the MDA’s inspection authority. The limitations are very similar to those imposed by the statutes allowing for regulation of milk producers. Despite the lack of specific limitations, the Court of Appeals found that the statute provided a constitutionally adequate substitute for a warrant. The court noted that Minn. Stat. § 18J.04, subds. 1, 2 limits the inspections to “reasonable times,” and the location of inspections to sites where seed is stored, manufactured, distributed, used, handled, disposed of, or transported. The statute also limits the purposes for which the inspector can enter the premises to those related to compliance and implementation of the seed law. The Court found that the *Burger* test was satisfied, that the statute did not violate the appellant’s Fourth Amendment rights, and that the MDA had proper inspection authority.

The Court recognizes that the limits imposed by the dairy inspection statutes are broad. However, the statutes do impose some restrictions, which are almost identical to the broad

restrictions imposed by Minn. Stat. § 18J.04, subs. 1, 2, which the Court of Appeals of Minnesota found to be constitutional. The inspection statutes contain sufficient limitations on the time and scope of inspection to provide a constitutionally adequate substitute for a warrant. The statutes therefore do not violate Mr. Berglund's Fourth Amendment rights.

E. Validity of Administrative Inspection Order

Probable cause in the criminal sense is not required for the issuance of an administrative inspection order. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978). An agency must only show either "specific evidence of an existing violation," or that "reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular [establishment]." *Marshall*, 436 U.S. at 320 (citing *Camara v. Mun. Court of City and County of S.F.*, 387 U.S. 523, 538 (1967)).

The MDA argues that it has shown specific evidence that Mr. Berglund is violating Minnesota Statutes both by operating a "dairy plant" without a permit, in violation of Minn. Stat. § 32.392, and by selling milk products that are not pasteurized, in violation of Minn. Stat. § 32.393. The Court has determined that the Dairy does not meet the "dairy plant" definition, and Minn. Stat. § 32.392 cannot be used to show evidence of an existing violation. However, Mr. Berglund admittedly sells unpasteurized milk and milk products, which is prohibited by Minn. Stat. § 32.393.

Mr. Berglund argues that he falls under an exception to Minn. Stat. § 32.393 allowing for sales of unpasteurized "milk, cream, skim milk, goat milk, or sheep milk *occasionally* secured or purchased for personal use by any consumer at the place or farm where the milk is produced (emphasis added)." The petition signed by 146 individuals who claim to buy products from Mr. Berglund establishes that Mr. Berglund makes more than merely occasional sales. Furthermore, "fluid milk products" are not exempted under the occasional sale provision. There is evidence that Mr. Berglund sells unpasteurized buttermilk and chocolate milk, which are defined as "fluid milk products" under Minn. Stat. § 32.391, subd. 1e. *Affidavit of Todd Whalen, dated August 24, 2015 at ¶ 9.*

Mr. Berglund has also refused inspection, in violation of Minn. Stat. § 17.984, § 31.04, subd. 1, and § 32.103. The MDA has shown sufficient evidence of an existing violation. The Administrative Inspection Order is valid and enforceable.

F. Additional Constitutional Challenges

The Supreme Court of Minnesota in *State v. Hartmann*, 700 N.W.2d 449 (Minn. 2005), as mentioned in section 1, above, noted that the appellants had made a terse reference to a due process claim in their written arguments, but held that the appellants had failed to sufficiently argue the issue. The court held that the appellants had waived any constitutional claims other than those based on article XIII, section 7. Mr. Berglund contends that he has properly raised other constitutional issues, including the right to contract, right to privacy, right of association, due process, and equal protection. Mr. Berglund argues that the *Hartmann* decision should have

no bearing on these claims, since the *Hartmann* court declined to examine any additional constitutional issues.

The MDA argues that Mr. Berglund's additional constitutional challenges should fail because the claims are unripe and not justiciable because they "relate to future actions the MDA might take as the result of an inspection and have no bearing on the validity or enforceability of the AIO itself."

Mr. Berglund's additional constitutional challenges rely on the argument that some fundamental right would be violated if the MDA interfered with the voluntary decisions of Mr. Berglund and his customers to buy and sell raw milk products. However, enforcement of the Administrative Inspection Order would not by itself prevent Mr. Berglund from selling raw milk products. The argument relies on speculation as to future actions that the MDA might take following an inspection. Accordingly, the additional constitutional arguments are unripe and not justiciable, and are dismissed.

G. Rational Basis Test

Because Mr. Berglund has not shown that the regulations infringe on a fundamental liberty or that he is part of a suspect class, the constitutionality of the regulatory scheme is properly analyzed using the rational basis test. *Essling v. Markman*, 335 N.W.2d 237 (Minn. 1983). To satisfy the rational basis test, the regulation must be rationally related to achievement of a legitimate governmental purpose. *Id.* at 239.

The regulatory scheme that gives the MDA authority to inspect dairy producers serves to ensure the integrity and safety of the state's food supply. Ensuring that food products offered for sale are safe for consumption is a legitimate governmental purpose. The regulations allowing for inspection are rationally related to achievement of that purpose, as inspection is the only way that the MDA can make a reliable determination of whether the food products are safe.

The Administrative Inspection Order and the regulatory scheme upon which it relies are rationally related to a legitimate governmental purpose. The MDA's regulatory and inspection authority does not violate Mr. Berglund's constitutional rights.

H. Request for Evidentiary Hearing

Mr. Berglund requested an evidentiary hearing on his constitutional challenges. Since Mr. Berglund claimed that the regulatory scheme infringes upon a fundamental right, Mr. Berglund argued that the MDA should be required at the hearing to make a showing that the statutes are narrowly tailored to achieve a compelling governmental interest. However, the Court has found that the regulatory scheme does not infringe upon a fundamental right, and the Court has accordingly examined the regulatory scheme under the rational basis test. In ruling that the regulatory scheme passes the rational basis test, the Court has relied on the complete record, which contains sufficient evidence to make a proper determination. There are no additional issues to be developed, and an evidentiary hearing is unnecessary.

III. CONCLUSION

Article XIII, section 7 of the Minnesota Constitution allows for a family farm to sell the products produced by that farm, free from licensing requirements. However, a farmer who is exempt from licensing requirements is still subject to the MDA's regulation of the production or sale of the farm products. These regulations include the statutory authority given to the MDA to inspect milk producers. The legislature has singled out the area of milk production for inspection, apparently due to peculiar risks involved in milk production.

While the Dairy is exempt from inspection under Minn. Stat. § 32.392 due to its status as a dairy farm, the MDA has statutory authority to inspect pursuant to Minn. Stat. § 17.984, § 31.04, subd. 1, and § 32.103. The statutes meet the rational basis test. The MDA has the authority to inspect the Dairy under Minnesota Statute, and this authority does not violate the Minnesota Constitution or the United States Constitution. The MDA has also made a sufficient showing for the issuance of an Administrative Inspection Order. Accordingly, the Administrative Inspection Order is valid and enforceable. In recognition of some of the constitutional issues raised, the Court will stay the Administrative Inspection Order for a period of 60 days, for the parties to consider appeal.

As an aside, decisions on motion hearings such as this one are normally decided within 90 days of the parties' final submissions. That did not happen in this case due to two separate and, thankfully, temporary medical conditions, both of which limited my capacity and kept me away from work for a substantial period. I extend my thanks and appreciation to the parties and counsel for their graciousness in extending the deadline to issue this decision.

MJC/jkp