


Overview

- Many legal aspects of animal agriculture relate to land use
- Nuisance claims, waste runoff, and conditional or special uses are common causes of conflict
- Today, we will focus on approval or denial of conditional or special uses
 - What is in the county zoning board's discretion
 - What is mandated by state statute
 - Options for dealing with potential conflicts

Commercial Feedlots

- Also called:
 - Animal Feeding Operations (AFOs), Concentrated Animal Feeding Operations (CAFOs), Livestock Feeding Operations (LFOs), Confined Animal Feeding, or Intensive Animal Feeding
- Operations which raise and feed animals in a confined space.
- Typically considered conditional or special uses in areas zoned for agriculture



Conditional or Special Uses

- “[T]hose uses specifically identified in the county zoning regulations as classifications of uses which may require special conditions or requirements to be met by the owners before a use permit or building permit is authorized.”
 - Neb. Rev. Stat. § 23-114.01(4)

Conditional or Special Uses

- “[T]he county board of commissioners or supervisors may choose to retain for itself the power to grant conditional uses or special exceptions for those classifications of uses specified in the county zoning regulations.”
- Alternatively:
 - The Planning Commission “may grant conditional uses or special exceptions to property owners for the use of their property if”
 - The county board of commissioners or supervisors has so authorized the commission AND
 - Has approved the standards and procedures the commission adopted for equitably and judiciously granting such conditional or special uses
 - Neb. Rev. Stat. 23-114.01(4).
- Almost always done in concert

Application Requirements

Application for a Conditional or Special Use

- Application requirements are governed by county regulations
 - Requirements vary widely by county
- At a minimum, generally:
 - Must be in writing
 - Must state location of property
 - Must describe proposed use of property

Application: Buffalo County

- “Livestock confinement facilities/operations defined by Article 3 or Class III or larger shall be allowed only by special permit in the AG Agricultural District.”
- “Such application shall be in writing, filed in the Office of the County Clerk, state the proposed location and use of the property, and such other relevant matters as may be requested by the County.”

Application: Cedar County

- Conditional Uses in the “A-1” Agricultural-Intensive District:
 - 17. Livestock Feeding Operations, subject to the license requirements, waste disposal requirements and recommendations of the State of Nebraska and the Land Use specifications in the Cedar County Comprehensive Plan.
- “Conditional Use Permits shall be approved by the Planning Commission and County Board of Supervisors based upon a **proposed site plan and conditions or requirements pending approval of application for a proposed operation and waste disposal plan from the Nebraska Department of Environmental Quality (DEQ)**. . . . The applicant shall file a copy of his/her **Operation and Maintenance Plan and Manure Management Plan as filed with DEQ** with the Zoning Administrator, and shall also file a copy of all **approved DEQ plans and permits** with the Zoning Administrator within thirty (30) days after they are issued by the DEQ.”

Application: Cherry County

- “Agricultural Use” generally does not require a permit in the two agricultural districts
- “Agricultural Use” means “[t]he business and science of cultivating the soil, producing crops or breeding, feeding, pasturing of livestock . . . Buffalo, elk, and other animals, dairying, raising and management of poultry, fish, bees and other animals . . .”
- “Agricultural Use” does not mean: a confined or intensive animal feeding use
- Confined and intensive animal feeding uses: conditional uses

Application: Cherry County

- Written application for conditional uses shall include, at a minimum:
 - The section of the regulations that the proposed use qualifies for
 - Legal description
 - Size and location of all existing and proposed buildings and structures
 - Detailed description of the use proposed
 - Locations of access to public roadways
 - Type and locations of easements
 - Description of provisions for water supply, sewage, public utilities and erosion control
 - Extent and location of parking, loading and refuse disposal
 - Location of residential dwellings and non-ag land within minimum separation distance requirements
 - Indication of surface water drainage after proposed use implementation
 - For industrial uses, and confined or intensive animal feeding uses, a description of how the use will address the compatibility issues of traffic generation, noise, odor, dust, radiation or potential air, water or soil pollution or explosion hazards
 - Any areas on the property subject to flooding or considered a wetland

Minimum Setback Requirements for Animal Feeding Operations

**Minimum Setback Requirements:
Buffalo County**

Minimum distances from a residence, industrial or commercial facility, church, school, etc.

- 1 to 300 animal units
 - No Minimum
- 301 to 1,000 animal units
 - ¼ Mile
- 1,001 to 5,000 animal units
 - ½ Mile
- 5,001 to 10,000 animal units
 - ¾ Mile
- 10,001 animal units and above
 - 1 Mile

**Minimum Setback Requirements:
Cuming County**

- New non-farm residences, as defined in the regulations, shall be located no less than 3,960 feet (3/4 mile) from a livestock operation or LFO under 5,000 animal units and 5,280 feet (one mile) from LFOs having more than 5,000 animal units.

Coffey v. County of Otoe, 274 Neb. 796 (2008)

- Coffey wanted to put a residential development within ½ mile of a hog operation in an agriculturally zoned district
- Zoning regulations required an “impact easement” mutually agreed to with the owner of the operation; the owner declined to agree in this case
- Coffey applied for a variance, which was also denied

Coffey v. County of Otoe

- Coffey challenged both the denial of a variance and the requirement of an “impact easement,” and the District Court found that the easement requirement was an “unlawful delegation of the county’s legislative authority” and violated Coffey’s due process and equal protection rights
- However, the District Court found the minimum setback requirement valid, meaning Coffey still could not build his houses within ½ mile of the hog operation

Coffey v. County of Otoe

- On appeal, the Neb. Supreme Court recognized that:
 - if the action of the property owner “creates the restriction or prohibition” then the ordinance or statute is invalid
 - if the consent is used for no other purpose than to *waive or modify* a restriction created by the governing body, then the ordinance or statute is valid
- Because the Otoe County easement regulation allows a landowner to release another from a lawfully imposed restriction, the Court found it valid
- The Court spoke approvingly of the minimum setback requirement as a valid exercise of county police power, but did not decide the case on that issue

The Process of Obtaining a Conditional or Special Use Permit

Typical Example: Buffalo County

- Upon receipt, the zoning administrator forwards application to the Planning Commission for recommendation
- Upon hearing, the Planning Commission forwards its recommendation to the County Board within 30 days
- Upon hearing, the County Board allows or denies the application in whole or in part or prescribes terms
 - Two hearings are required in total; Notice provisions must also be complied with for both hearings
 - Record – recorded and proper minutes
 - Typically like a trial with exhibits either for or against marked and offered

Statutory Requirements for Conditional or Special Use Permits

- Adopted in 2003 by LB 754
- (6) “[T]he planning commission or county board **shall**, with its decision to grant or deny a conditional use permit or special exception, **issue a statement of factual findings arising from the record of proceedings that support the granting or denial. . .**”
 - Neb. Rev. Stat. § 23-114.01
- Issuing authority **MUST** issue findings of fact.

Statutory Livestock Provisions

- Beyond required procedure, not all substantive zoning decisions are left to the county
- Legislature makes statutory pronouncements to require certain action by county zoning boards
- Livestock Waste Management Act
 - Neb. Rev. Stat. §§ 54-2417 et seq.
 - Adopted in 2006 by LB 975

Livestock Waste Management Act

- 54-2437(1): A county planning commission or county board **shall** grant a conditional use permit or special exception to an existing animal feeding operation seeking to construct or modify a livestock waste control facility if:
 - the purpose is to comply with federal or state regulations pertaining to livestock waste management,
 - the operation has complied with inspection requirements pursuant to section 54-2423, **and**
 - The construction or modification of the livestock waste control facility will not increase the animal capacity of such operation

Section 54-2437(1) in short

- IF the applicant is an animal feeding operation that
 - is forced to comply with fed. or state requirements
 - Has complied with inspection requirements AND
 - Is not enlarging the facility
- THEN the county board **shall** issue the permit/exception

- **Essentially any existing animal feeding operation can get a conditional use permit**

Livestock Waste Management Act

- 54-2437(2): A county planning commission or county board **shall** grant a conditional use permit or special exception to an existing beef cattle or dairy cattle animal feeding operation that has an animal capacity of five thousand or fewer beef cattle or three thousand five hundred or fewer dairy cattle that is seeking to construct or modify a livestock waste control facility if:
 - The purpose is to comply with federal or state regulations pertaining to livestock waste management,
 - The operation has complied with inspection requirements pursuant to section 54-2423, AND
 - Construction or modification of the livestock waste control facility would allow the animal capacity of the operation to increase not more than:
 - If 3,000 beef cattle or fewer = no more than 500 beef cattle
 - If more than 3,000 beef cattle but no more than 5,000 = no more than 300 beef cattle
 - If 2,000 dairy cattle or fewer = no more than 350 dairy cattle
 - If more than 2,000 but no more than 3,000 = no more than 210 dairy cattle
 - Only one condition use permit/special exception per operation

**Section 54-2437(2) in short:
Expansion Provision**

- IF the applicant is a beef cattle or dairy cattle operation that
 - is forced to comply with fed. or state requirements
 - Has complied with inspection requirements AND
 - Is not enlarging their facility by more than:
 - Beef Cattle ($\leq 3,000$) = ≤ 500
 - Beef Cattle ($3,000 < x \leq 5,000$) = ≤ 300
 - Dairy Cattle ($\leq 2,000$) = ≤ 350
 - Dairy Cattle ($2,000 < x \leq 3,500$) = ≤ 210
- THEN the county board **shall** issue the permit/exception

- **This provision expands the mandate to grant conditional uses for dairy or beef cattle operations with limited expansion**

**Appealing the Denial of a
Permit**

Former Appeals Procedure

- Appeals from a denial of a conditional use permit had to be taken to the County Board of Adjustment

- Dictated by the Nebraska Supreme Court in the case *Mogensen v. Board of Supervisors*, 268 Neb. 26 (2004)

- In 2004, the Legislature passed LB 973 in response to *Mogensen*, which changed the appeal procedure found in Neb. Rev. Stat. § 23-114.01

Conditional Use Permits & Special Exceptions Under § 23-114.01

(5) In any county other than a county in which is located a city of the primary class, an appeal of a decision by the county planning commission or county board of commissioners or supervisors regarding a conditional use or special exception **shall be made to the District Court.**

In re Olmer, 275 Neb. 852 (2008)

- A denial of Olmer's application for a conditional use permit by the board of commissioners was appealed to the District Court, and then the Nebraska Supreme Court.
- The issue in the case was whether Olmer was allowed a new trial when appealing to the District Court.
- The Supreme Court found that "appeals from a planning commission, county board, or board of supervisors are not to be made to the board of adjustment. Instead, these appeals are now taken directly to the district court," and that such appeals are to be considered "de novo".

Important Point

If the applicant meets the statutory or county zoning regulation requirements for a conditional use or special exception, the board should grant the application.

If not, you will end up in District Court defending an appeal under a "de novo" standard of review.

Role of Board of Adjustment in Animal Agriculture

Neb. Rev. Stat. § 23-168.01 et seq.: Board of Adjustment

- Consists of 5 members, one of which must be from the Planning Commission
 - Neb. Rev. Stat. § 23-168.01
- The Board is granted only limited powers:
 - To hear and decide appeals when an error is alleged in any order, requirement, decision, or refusal made by an administrative official or agency based on or made in the enforcement of any zoning regulation
 - To hear and decide requests for interpretation of any map
 - To grant variances, subject to statutory limitations
 - Neb. Rev. Stat. § 23-168.03

Appeals to the Board of Adjustment

- May be taken by “any person or persons aggrieved, or by any officer, department, board, or bureau of the county affected by any decision of an administrative officer or planning commission.”
 - Neb. Rev. Stat. § 23-168.02(1)
- Does not include appeal of the denial of a conditional use permit
 - Remember *In Re Olmer*
- Statutory Requirements:
 - Taken within a reasonable time (as determined by the rules of Board)
 - Filing a notice of appeal with the Board specifying the grounds

Hanchera v. Board of Adjustment, Red Willow County, 269 Neb. 623 (2005)

- Red Willow County Board passed county zoning regulations on 9/25/2001, to take effect after publishing on 10/16/2001, which limited placement of CAFOs
- Furnas County Farms, with knowledge of the zoning regulations, started construction on a CAFO after 9/25 but before 10/16
- The Zoning Administrator, affirmed by the Board of Adjustment, found that because substantial construction had begun, it was outside the newly passed zoning regulations
- The Board of Adjustment decision was appealed to the District Court, which affirmed, and then on to the Nebraska Supreme Court

Hanchera v. Board of Adjustment: Standards

- The Standard of Review at the District Court:
 - “A district court may disturb the decision of a board of adjustment if the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.”
- The Standard of Review at the Appellate Court:
 - “In appeals involving a decision of a board of adjustment, an appellate court reviews the decision of the district court, and . . . The appellate court is to decide if . . . The district court abused its discretion or made an error of law”
- These are fairly deferential standards

Hanchera v. Board of Adjustment

- However, the Nebraska Supreme Court reversed and remanded to the District Court with instructions to remand back to the Board of Adjustment
- Because Furnas County Farms did not act in “good faith” (meaning that they had knowledge of the impending regulations), they were to be governed by the new regulations

Old 76 Group v. Board of Adjustment & West Blue Pork, LLC

- A dispute over a permit granted to West Blue Pork by the zoning administrator was taken before the Board of Adjustment, where the Board affirmed the zoning administrator
- Appeal was taken to the District Court of York County
- Judge Gless held that:
 - "A district court reviewing a decision of a zoning board of adjustment, without the taking of additional evidence or the appointing of a referee for that purpose, functions as an intermediate court of appeals and reviews the case on the record made in the board of adjustment."
 - However, the Court "conducts a *de novo* review of the board's legal interpretations."
- The ruling was affirmed

Alternative Options for Dealing with Agricultural Land



Cuming County Waiver

- Restrictive covenant, release, and waiver
- Residential dwellers in an "A-1" (Agricultural-Intensive) District are subject to the realities of agriculture, e.g.:
 - Odor
 - Dust
 - Noise
 - Smoke
 - Chemicals
- Waive all risks to property stemming from agricultural activities
- Filed with the Cuming County Clerk/Register of Deeds

**Cherry County
“Cattle Country Easement”**

303.17 CATTLE COUNTRY EASEMENT: A perpetual, non-exclusive, easement which runs with the land, granted by the purchaser of any property for development of any non-farm or non-ranch building or use to all adjacent property owners, which acknowledges that said property is located in an agricultural area and may be subjected to impacts from agricultural operations including noise, dust, odors, heavy truck traffic and other conditions which are normal and necessary for cultivation, application of chemicals, irrigation and harvesting of crops, for raising of livestock, and for other normal and customary agricultural activities and holding the owners of all adjacent properties harmless from objection to all such agricultural activities when legally conducted regardless of any conflict with the grantor's property.

**Cherry County
“Cattle Country Easement”**

- Must be granted to build any non-agricultural building in the agricultural district
- Filed with the Register of Deeds
- Selected language from the easement:
 - “Grantors hereby waive all objections to normal and necessary agricultural activities legally conducted on adjacent lands regardless of their conflict with Grantors’ use of Grantors’ property, and hereby grant an easement to adjacent property for such activities.”

Questions?

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