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## Nebraska Supreme Court Rules City Can Regulate Animal Feeding Operation

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Table 4. Land areas excluded from livestock facility expansion or construction for given setback distances.

Setback distance from residences, mile	Acres excluded	Square miles excluded	Percent of county excluded
1/4	224,264	350	61
3/8	313,495	490	85
1/2	353,697	553	96
3/4	367,643	557	99.8
1	367,694	575	99.99

Table 5. Resulting land area excluded and available for residential development in rural areas based on a reciprocal setbacks.

All set backs from animal feeding operations	Land area excluded from new home construction (acres)	Land area excluded from new home construction (sq miles)	Percent of county new home construction	Percent of county available for new home construction
All current livestock facilities	74,810	117	20	80

leaves only 15% of the county available. An additional constraint for a potential livestock entrepreneur would be to find a location large enough for a new livestock operation at the larger class sizes. That constraint is not shown in Table 4, but it can be observed in Figures 2-6.

The expansion of existing livestock facilities would be restrained

by the required setbacks. This analysis assumes that the land available is not being used for another purpose, such as other agricultural uses, so the actual land available would be expected to be less than reported in Table 4.

In general terms, it is likely that operations with less than 5,000 AU's could locate in Cuming County, but larger operations would essentially

be excluded by the sliding scale setbacks. Facilities with less than 1,001 AU should be able to locate without much difficulty in satisfying setback requirements. It is not clear how many existing operations would be excluded from expanding, but they would have to be located in the white areas shown in Figures 2-6. The colored areas in Figures 2-6 show the land area that livestock facilities could not be located. Areas in white would be available to build or expand livestock facilities.

The results of implementing setbacks from livestock facilities reciprocally to new residential construction are shown in Figure 7 and Table 5. Even with these setbacks, over 80% of the county is still open to new housing construction, primarily in the rural areas of the county.

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# Nebraska Supreme Court Rules City Can Regulate Animal Feeding Operation

J. David Aiken<sup>1</sup>

*municipal regulations may be vulnerable to future legal attacks.*

## Summary and Implications

*Nebraska statutes authorize second class cities and villages to adopt regulations protecting municipal water supplies from pollution within 15 miles of their community borders. Livestock facility regulations implemented by the second class city of Alma that were stricter than those of the Nebraska Department of Environmental Quality were upheld by the Nebraska Supreme Court. However, similar*

The construction of large swine facilities has been very controversial in Nebraska for the past several years. A major focus of the "hog wars" has been county livestock zoning regulations. In Nebraska livestock facilities are subject to state environmental regulation by the Nebraska Department of Environmental Quality (NDEQ) and also to local zoning regulations if the county is zoned (or if the livestock facility will be

located near a zoned community). The number of zoned counties has more than doubled in the last decade, from 36 to at least 80. Most of the newly zoned counties have adopted zoning in order to regulate the size and location of confined livestock facilities. The legal ability of counties to regulate livestock facilities through zoning regulations was confirmed by the Nebraska Supreme Court in 2002, when the court ruled that a Holt County zoning regulation could require a conditional use zoning

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permit before swine production facilities could be developed. *Premium Farms v Holt County*, 263 Neb 415 (2002).

Concern regarding the negative effect of some county zoning regulations on livestock expansion has led to the formation of the "Nebraska Agriculture Industry Partnership," a wide-ranging coalition of livestock industry supporters endorsed by Gov. Mike Johanns and Rep. Tom Osborne (see the NAIP website at <http://nebraskalivestock.com>).

While most of the hog-war battles have involved county zoning, at least one community has joined the fray. In 1997, the community of Alma (pop. 1,214) learned that Furnas County Farms (FCF) and Sand Livestock Systems planned to build a large swine confinement approximately eight miles northwest of the Alma city limits in Harlan County. The proposed finishing facility would have a one-time capacity of 30,000-36,000 hogs. The city hired an environmental engineer to prepare a report on the potential impact of the swine facility upon Alma's water supply. On the basis of the consultant's report Alma adopted five municipal ordinances, based on Nebraska Revised Statutes §§17-536 and 17-537. Section 17-536 establishes that the authority of cities of the second class (population of 801-5000) and villages (up to 800 population) "to prevent any pollution or injury to the stream or source of water for the supply of such [community] waterworks, shall extend fifteen miles beyond its corporate limits." The Alma ordinances required livestock producers to obtain permits from the city before developing livestock facilities within 15 miles of the city limits. The permit process required the applicant among other things to line waste lagoons with a synthetic liner, to install monitoring wells for ground water pol-

lution detection, and to submit a financial bond for cleanup.

Alma notified FCF of the permit requirements. FCF informed the city that FCF believed the city ordinances to be legally invalid, and stated its intention to proceed with construction activities. The city filed suit, and FCF stopped facility construction.

FCF contended in court that the 15 mile municipal water pollution control authority was preempted by the Nebraska Environmental Protection Act (NEPA), and because FCF had received its state permits from the NDEQ, FCF therefore was legally entitled to construct its livestock facilities without regard to the Alma ordinances. The district judge ruled in favor of Alma. An appeal to the Nebraska Supreme Court resulted in the matter being returned to the district court in 2001 for further proceedings. The district judge again ruled for Alma, and this decision again was appealed.

The Nebraska Supreme Court ruled that the 15 mile municipal water pollution control authority was not preempted by NEPA. Normally, the courts will attempt to validate both state law and local ordinances if they are clearly inconsistent. In its NEPA analysis, the court noted several NEPA provisions encouraging municipalities to establish their own local pollution control programs. The court did, however, invalidate the Alma cleanup bond requirement as being inconsistent with NEPA. The court also ruled that FCF could not raise the issue of whether the Alma ordinances conflicted with the NDEQ title 130 livestock waste control facility regulations and the Livestock Waste Management Act (LWMA) because such issues had not been raised in the district court. The *Alma* decision is another judicial warning to livestock facility developers that they ignore local regulations at their peril.

## Commentary

The outcome of the *Alma* case may have been different if FCF had been able to argue that the title 130 regulations and the LWMA preempted the Alma water quality regulations. If the Alma lagoon lining requirements and monitoring well requirements were different than those established by NDEQ in approving FCF's construction permit, FCF would have had a strong argument that the Alma ordinances were preempted by NDEQ's title 130 permit requirements. Further, neither title 130 nor the LWMA have provisions paralleling the NEPA provisions encouraging the development of local pollution control programs (although §52-2404.01 acknowledges county zoning). These differences could persuade a court to reach a different conclusion from the *Alma* court. These issues are likely to be raised if municipal regulation of livestock facilities are challenged in court again.

Municipal and county livestock regulations will continue to generate controversy. Most zoned counties establish setbacks for livestock operations, and some counties have larger setbacks (up to 2 miles) for very large facilities. These types of zoning regulations make livestock expansion difficult in much of Nebraska. Hopefully, future livestock production techniques will be improved such that the nuisance aspects of livestock production (odors, flies, etc.) are significantly reduced. Until such improved production practices materialize, however, few Nebraska cities and counties significantly restricting livestock facility development are likely to relax those restrictions.

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