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Supreme Court Rules against Attempt to Beat County Zoning Deadline

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Market Report	Yr Ago	4 Wks Ago	4/22/05
Livestock and Products,			
Weekly Average			
Nebraska Slaughter Steers, 35-65% Choice, Live Weight	\$85.75	\$91.06	\$93.73
Nebraska Feeder Steers, Med. & Large Frame, 550-600 lb	117.77	128.04	141.57
Nebraska Feeder Steers, Med. & Large Frame 750-800 lb	102.65	109.75	115.50
Choice Boxed Beef, 600-750 lb. Carcass	159.93	151.68	157.84
Western Corn Belt Base Hog Price Carcass, Negotiated	66.68	65.25	70.08
Feeder Pigs, National Direct 45 lbs, FOB	48.09	73.22	63.87
Pork Carcass Cutout, 185 lb. Carcass, 51-52% Lean	70.52	71.05	68.08
Slaughter Lambs, Ch. & Pr., 90-160 lbs., Shorn, Midwest	94.00	109.00	105.75
National Carcass Lamb Cutout, FOB	227.64	272.43	252.93
Crops,			
Daily Spot Prices			
Wheat, No. 1, H.W. Omaha, bu	3.73	3.09	2.99
Corn, No. 2, Yellow Omaha, bu	2.86	1.82	1.90
Soybeans, No. 1, Yellow Omaha, bu	9.65	5.91	6.21
Grain Sorghum, No. 2, Yellow Columbus, cwt	4.82	2.70	2.73
Oats, No. 2, Heavy Minneapolis, MN, bu	1.93	1.87	1.79
Hay			
Alfalfa, Large Square Bales, Good to Premium, RFV 160-185 Northeast Nebraska, ton	115.00	115.00	117.50
Alfalfa, Large Rounds, Good Platte Valley, ton	62.50	62.50	62.50
Grass Hay, Large Rounds, Good Northeast Nebraska, ton	57.50	57.50	57.50
* No market.			

One of the most misunderstood concepts in zoning law is that of non-conforming uses, or “grandfathering.” Most zoning regulations exempt existing uses that would not conform to the new (or revised) zoning regulation. These uses (land uses or buildings) are called non-conforming uses because they do not conform to the new (or revised) zoning regulation. The often mistaken belief is that zoning regulations must leave non-conforming uses alone. This is incorrect: Neb.Rev.Stat. § 23-173.01 allows non-conforming uses to be terminated, continued or regulated by a county zoning regulation. As a practical matter, however, most counties will not regulate or terminate non-conforming uses; doing so would often make adoption of the proposed zoning regulation or amendment difficult if not impossible.

When zoning is being adopted for the first time, some property owners may attempt to establish a non-conforming use before the zoning regulation is legally implemented, in order to qualify for the zoning regulation’s non-conforming use exception. In Nebraska, many county zoning regulations have been adopted in recent years to restrict the location and operation of animal feeding operations (AFOs). It is not surprising, then, that a firm attempted to develop two AFOs in Red Willow County before county zoning regulations restricting AFOs were adopted, seeking to grandfather them. This was the issue before the Nebraska Supreme Court in *Hanchera v. Board of Adjustment*, 269 Neb. 623 (April 8, 2005).

In *Hanchera*, Furnas County Farms was attempting to develop two swine AFOs in Red Willow County before the county’s new zoning regulation took effect. Mr. Hanchera filed a complaint with the county zoning

administrator that Furnas County Farms' two AFOs did not meet the new county zoning regulations. The zoning administrator concluded that the two AFOs qualified as non-conforming uses and were grandfathered. This conclusion was affirmed by the County Zoning Board of Adjustment and the County District Court, but was reversed on appeal to the Nebraska Supreme Court.

The court noted that in 2001 the county was in the process of adopting a comprehensive development plan and accompanying zoning regulations, which would have restricted AFO location. Furnas County Farms had participated in this process by attending public hearings and public meetings on the proposed zoning regulations. The comprehensive plan and zoning regulations were adopted by the Red Willow Planning Commission and recommended to the county commissioners on September 24, 2001. On the next day the county commissioners adopted the Comprehensive Plan and Zoning Regulations, with the effective date of October 16, 2001.

Regarding Furnas County Farm's attempt to grandfather their two new AFOs, the court indicated the following activities (all in 2001):

- \$1,320 spent for easements and state AFO environmental permit applications, August 1-6;
- \$93,533 spent as down payments to purchase the two sites, September 30;
- \$4,000 spent for down payment for one site, October 5;
- \$11,480 spent for pouring concrete, October 13; and
- \$138 spent for electrical inspections, October 15.

The court also noted that Furnas County Farm had not entered into a land purchase agreement on the two sites until October 4, 2001 and did not take title to the land until December 2001. The decision does not indicate whether Furnas County Farms had received the state AFO permits, but it is not likely that they had in 2001 as it often takes several months for the AFO permit process to be completed.

After reviewing these facts, the court noted that under previous Nebraska court decisions, a new zoning regulation will not have a retroactive effect where a landowner, in good faith reliance on existing zoning regulations, has spent substantially on construction where the new construction would not meet the new zoning regulations. The landowner, however, has the burden of proving that it did not know that the new construction would violate the new zoning regulations.

The court then quoted from a North Carolina decision,

Good faith . . . is not present when the landowner, with knowledge that the adoption of the zoning ordinance is imminent and that, if adopted, will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations [such as land purchase agreement or a construction contract] before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him.

The court also referenced several additional cases from other states to the same effect.

The court ruled that Furnas County Farms was aware that Red Willow County was in the process of adopting zoning regulations that would restrict if not prohibit its proposed AFOs. All the AFO construction activities at the two sites occurred after the zoning regulations were adopted by the county commissioners on September 25, 2001. The court characterized these construction activities as an obvious attempt to circumvent the zoning regulations, and therefore were not undertaken in good faith. The court ruled that the two AFOs were not grandfathered, and were required to comply with the new county zoning regulations. The AFOs will likely have to be abandoned as a result of this decision.

This is the latest chapter in what I refer to as the Nebraska Hog Wars, in which swine facility operators suffered yet another legal defeat. Similar conflicts regarding new swine developments may arise if and when the U.S. District Court and 8th Circuit Court of Appeals invalidates the corporate farming provision (Initiative 300) of the Nebraska Constitution as conflicting with the interstate commerce clause of the Federal Constitution, as may occur in the next year or so.

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