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Nebraska "Grade A" Dairy Regulation—A Study in Regulative Overlap

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I. INTRODUCTION

In 1957, the Nebraska Legislature passed L.B. 584 which requires, after July 1, 1959, that all milk and specified milk products sold by milk plants in Nebraska meet what are known as "Grade A" standards.[1]

The statute authorizes the director of the Department of Agriculture and Inspection to adopt by regulation "minimum" Grade A requirements which are to "comply generally"[2] with the 1953 edition of the model milk ordinance and code promulgated by the United States Public Health Service.[3]

Although in terms only a regulation of milk plants, the statute necessarily contemplates extensive regulation of the dairy farm. Under the regulations, a plant cannot sell Grade A pasteurized milk unless Grade A raw milk is purchased from the farmer for pasteurization.[4] In order to produce Grade A raw milk, the farmer

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[1] Neb. Laws c. 370 (1957), amending Neb. Rev. Stat. §§ 81-263.02, .06, .07, .08 (Supp. 1955).

[2] Id. § 1, amending 81-263.02.

[3] U.S. Dep't of Health, Education and Welfare, Milk Ordinance and Code (Public Health Service Pub. No. 229, 1953), hereinafter cited as USPHS Milk Ordinance and Code.

[4] The USPHS Milk Ordinance and Code 22, 25-27 (1953) contemplates provisions for retail raw milk and for Grades B and C milk when communities are just beginning a milk control program. The regulations issued under the 1951 Act were issued pursuant to a labeling statute for only Grade A products. Infra note 11. The new statute recognizes only Grade A milk, so no changes are necessary in the regulations.

must submit to regulation as to cattle health, building and equipment construction, and sanitation standards.[5] There is no governmental penalty for the farmer's failure to produce Grade A raw milk, but if he does not, the plants are unable to re-sell it as milk or use it in one of the specified products, and will not buy it for those purposes.

The 1957 Act is the first mandatory program on a state-wide basis which attempts comprehensively to regulate the dairy industry. Not only are quality standards for milk prescribed, but cattle health, building and equipment construction, and definite sanitation methods are prescribed in elaborate detail for both the farm and milk plant. The regulations call for inspection of each dairy farm and each milk plant at least once every six months, and a sampling and examination of milk and cream from each dairy farm and each milk plant four times within every six-month period.[6] The statute permits the entry into Nebraska of milk produced and processed under substantially equivalent regulations in other states, without the necessity of continuous inspection by Nebraska officials.[7]

The distinction should be made between "fluid" and "manufacturing" quality milk. The statute only applies to the former. Thus, butter, ice cream, and most cheeses are not within the definition of "milk products" as used in the statute, nor does this statute regulate the production of raw milk or cream used in the manufacture of such products.[8] There is also an exemption in the statute for the farmer who peddles his own milk to not over thirty customers per day.[9]

The new Grade A law is not the first entry of the State into the field of milk regulation. There are still on the books a number of state statutes covering the dairy industry and a large number of municipal milk control ordinances. It is the purpose of this paper to examine the relation between the new statute and already existing state and municipal legislation in the field. Before beginning the analysis, a general description of pre-existing milk regulation seems useful.

[5] Neb. Grade A Regs. § 7 (1953).

[6] Id. §§ 5, 6, 7.

[7] Neb. Laws c. 370, § 3 (1957), amending Neb. Rev. Stat. § 81-263.07 (Supp. 1955).

[8] Neb. Laws c. 370, § 3 (1957), amending Neb. Rev. Stat. § 81-263.06 (Supp. 1955); USPHS Milk Ordinance and Code 35.

[9] Neb. Laws c. 370, § 2 (1957), amending Neb. Rev. Stat. § 81-263.06 (Supp. 1955).

A. STATE STATUTES PREDATING THE 1957 "GRADE A" LAW

1. *1951 Grade A Labeling Law*

It had been reported in 1951 that in some areas of Nebraska, milk was being indiscriminately labeled and sold as "Grade A" with no attempt at compliance with the prerequisites set out in the USPHS Milk Ordinance and Code.[10] The Legislature then passed an Act which required all milk and milk products *labeled* Grade A to meet those standards.[11] The 1957 Act amended the existing statute and made it mandatory that milk and milk products be labeled Grade A and be produced and processed in accordance with the specifications set out in the model ordinance and code.

2. *General Milk Statutes*

The State also has general legislation regarding milk and milk products. In a subsection of the Nebraska statutes entitled: "Control of Dairy Industry"[12] is found a hodgepodge of rules pitched on the general level of forbidding the sale of milk or cream "that is not pure, clean, and handled in clean utensils; or which was taken . . . from any animal kept in a crowded or unhealthful condition."[13] Nebraska also maintains a pure food law[14] patterned after the 1906 federal statute (which has been superseded on the federal level for twenty years), and a "sanitary food law"[15] which governs an assorted series of steps in the production and processing of food.

B. MUNICIPAL ORDINANCES

Before the Grade A statutes were adopted, many Nebraska municipalities had adopted some sort of milk regulation. Requests for copies of ordinances were sent to 129 municipalities in every county in Nebraska. Seventy-two replied, and of these, forty-three municipalities were found to have a milk ordinance. Of these forty-three, twenty-eight had adopted and retained an ordinance patterned after the USPHS Milk Ordinance and Code. This model ordinance is amended from time to time, and we found that the

[10] Statement by Robert H. Miller, President of the Milk Dealers Association of Holdrege, Nebraska. Hearings before Committee on Agriculture on L.B. 333, Neb. Legis., 62d Sess. (Feb. 19, 1951).

[11] Neb. Laws c. 308 (1951).

[12] Neb. Rev. Stat. §§ 81-229 to 81-263 (Reissue 1950).

[13] Id. § 81-235 (Reissue 1950).

[14] Id. §§ 81-203 to 215 (Reissue 1950).

[15] Id. §§ 81-2,111 to 2,121 (Reissue 1950).

city ordinances using it as a standard ranged in vintage from the 1936 USPHS edition to the 1953 edition. The remainder had ordinances which varied greatly, both in substance and in enforcement provisions.

One outstanding criticism of the Grade A statute is its lack of correlation with existing regulatory measures. As will be developed later, it does not satisfactorily define the status of municipal legislation, nor does it entirely mesh into existing statutory law. The purpose of this article is to highlight the problems and to suggest changes to alleviate the confusion and uncertainty.

II. THE NEW "GRADE A" LAW AND MUNICIPAL MILK CONTROL

A. Basic Policy Factors in Municipal Milk Control

Until recently, milk regulation has been carried on primarily by the municipalities. This "historical accident"[16] resulted from the attitude of state and federal governments in the past that control of milk quality was a purely local matter with which the city governments could cope. That the small unit of the municipality should perform the inspection service for a national dairy industry was described twenty years ago as "an extravagance in paradox."[17]

In the absence of overriding state or federal regulation, the setting of quality standards and inspection of supplies by municipalities is a legitimate exercise of the police power to prevent unfit milk from being sold for human consumption.

It is of course impractical for the health officers of each municipality to inspect producers and plants in the four corners of the nation or even the state to determine whether milk is acceptable for sale within their jurisdiction. Thus, in some states, municipalities have placed limits beyond which they will not send inspectors. This raises the cry of trade barrier. The claim is made that under the guise of health regulation, the municipality is really erecting economic walls to protect the producers and plants within the immediate locale from competition by milk produced and processed in other parts of the state or nation.[18] The same claim is made when the municipality refuses to permit the sale of milk

[16] Hamilton, Price and Price Policies 463 (1938).

[17] Id. at 462.

[18] For recent studies of "trade barriers," see U.S. Dep't of Agriculture, Regulations Affecting the Movement and Merchandising of Milk (Marketing Research Report No. 98, 1955); Hillman, Rowell, and Israelsen, Barriers To The Interstate Movement of Milk and Dairy Products in The Eleven Western States (Ariz. Exp. Station Bull. No. 255, 1954).

produced under the inspection of other health officials. The municipalities' position in answer to this may be (1) that the standards of the other governmental unit are not as protective of health as those of the local municipality, or (2) the local municipality has no control over the adequacy of enforcement by the foreign inspectors.

Nebraska, under the new Grade A law, will have statewide minimum standards, and milk not meeting such standards cannot be sold. Milk and milk products shipped into Nebraska under a valid Grade A label are accepted for sale in Nebraska as of Grade A quality, unless the Department of Agriculture and Inspection determines that the inspection made by the shipper state is not in accordance with the rules and regulations for Grade A milk in Nebraska.[19] But this in terms only removes the necessity of submitting to the inconvenience and expense of inspection by state officials. The question remains as to the power of the individual municipality to impose standards of its own and to demand inspection by its own officers.

B. Validity of Existing Municipal Ordinances

A municipal ordinance stands in the same position as a statute insofar as it is subject to state and federal constitutions. E.g., if a provision of a municipal ordinance constitutes an undue burden on interstate commerce, it is void, just as a state statute would be void.[20] But a municipal ordinance, in addition to conforming to constitutions, must also be harmonized with state statutes. The state statutes demanding clean barns and pure milk have been on the books for years. Superimposed on these general rules were the municipal ordinances which established the standards for milk sold within their jurisdiction. The question is: What is the standing of these ordinances since the passage of the Grade A law?

1. *Power of the Municipality to Legislate*

When inquiring into the validity of municipal milk ordinances, the first question is whether the municipality has any power at all. There are two different types of municipalities: home rule and non-home rule. The non-home rule city must have authority from the state legislature for all municipal legislative acts.[21] The home-rule city generally derives its power from its home-rule charter.

[19] Neb. Laws c. 370, § 3 (1957), amending Neb. Rev. Stat. § 81-263.07 (Supp. 1955).

[20] Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

Municipalities of all population classes have been granted statutory authority to regulate the sales of milk within their jurisdiction, either expressly or through general power to secure the health and welfare of the community.[22] The home-rule charters of all three Nebraska home-rule cities also grant such power to their legislative bodies.[23]

There is some authority for the proposition that the power to regulate milk sold within the city does not grant authority to impose standards upon, or to inspect, dairy farms and plants located outside the municipality, in the absence of express words to that effect.[24] Most courts, however, assume the contrary without statement. Where the question is raised, it is almost universally held that the power to regulate milk sold within the municipality implies power to state the conditions under which the milk must have been produced and processed, and to inspect the sources of the milk to insure compliance, even though the sources be located outside the city.[25]

[21] For a discussion of the concept that the municipalities have inherent power in the absence of a delegation by the legislature, see: McBain, The Doctrine of an Inherent Right of Local Self-Government, 16 Colum. L. Rev. 190, 299 (1916).

[22] Metropolitan: Neb. Rev. Stat. §§ 14-102(3)(7) (Reissue 1954) the power to provide all needful rules and regulations for the protection and preservation of health, and to license and regulate the inspection and sale of milk and other articles of food. Primary: §§ 15-236, 15-237 (Reissue 1954) power to make regulations to prevent the introduction or spread of contagious diseases, and to secure the general health of the city. § 15-263 (Supp. 1955) gives a primary city power to make regulations to secure the general welfare. First class: §§ 16-240, 16-246 (Reissue 1954) gives power to make regulations to secure the general health of the city and maintain the general welfare. Second class: §§ 17-123, 17-505 (Reissue 1954) give power to make regulations to secure the general health of the city and to make regulations expedient for maintaining the welfare of the corporation. Village: §§ 17-207, 17-208 (Reissue 1954) give the village the power to make regulations to prevent the introduction and spread of contagious diseases and to maintain the welfare of the village. The village board of health may also enact rules and regulations to safeguard the health of the people.

[23] Omaha Home Rule Charter § 1.03 (1956) grants all powers which are granted by the state of Nebraska to metropolitan cities. Lincoln Home Rule Charter, Art. II, §§ 28, 29, 50 (1949). Grand Island Home Rule Charter, Art. 12, § 1, Art. 2, § 7 (1928).

[24] Dean Milk Co. v. Aurora, 404 Ill. 331, 88 N.E.2d 827 (1949); 14 A.L.R.2d 98.

[25] Felt v. Des Moines, 247 Iowa 1269, 78 N.W.2d 857 (1956); Korth v. Portland, 123 Ore. 180, 261 Pac. 895 (1927); Norfolk v. Flynn, 101 Va. 473, 44 S.E. 717 (1903).

Since all Nebraska cities and villages are granted the authority to regulate milk sold within their jurisdiction, the effect of the Grade A law on the ordinances passed pursuant to that power must be determined.

2. *Pre-emption and Conflict — State Versus Municipal Control*

Where there are municipal ordinances, enacted pursuant to statutory authority, and the municipal ordinance regulates a subject which is also regulated by statute, the following propositions are considered to govern the question of the validity of the municipal ordinance:[26]

> If the state statute is intended to *occupy the field* with which the ordinance attempts to deal, the ordinance is invalid.
>
> If the legislature did not intend to occupy the field, but the ordinance *conflicts* with the statute, the ordinance falls. [Emphasis supplied.]

A further distinction must be drawn between home-rule and non-home-rule municipalities. In a situation where an ordinance of a non-home-rule city would be void because overridden by a state statute, if the ordinance in question is that of a home-rule city it must be determined whether the matter is of *local* or *state-wide* concern. If it is of local concern, the ordinance of a home-rule city would remain valid, but if it is a matter of state-wide concern, the state statute overrides the ordinance of a home-rule city and a non-home-rule city alike.[27]

It is rather difficult to predict what the Nebraska court may hold to be of "local" and what is of "state-wide" concern.[28] Nebraska has, however, held that public health is a matter of state-wide concern,[29] and milk regulation obviously has some basis in public health. Milk regulation has been held, in other jurisdictions, to be of state-wide concern, either to protect the public health,[30]

[26] Axelrod, Home Rule, 30 Neb. L. Rev. 224, 225 (1951). The discussion there refers to non-home rule cities, but the rule is the same when a matter is of state-wide concern.

[27] See generally: Axelrod, Home Rule, 30 Neb. L. Rev. 224 (1951); Rhyne, Statutory Construction in Resolving Conflicts Between State and Local Legislation, 3 Vand. L. Rev. 509 (1950).

[28] For a discussion of the nebulous distinctions made between "local" and "state-wide" matters, see Axelrod, Home Rule, 30 Neb. L. Rev. 224, 233 (1950); Winter, Municipal Home Rule, A Progress Report?, 36 Neb. L. Rev. 447, 462 (1957).

[29] Michelson v. Grand Island, 154 Neb. 654, 48 N.W.2d 769 (1951); Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942).

[30] Flagstaff v. Associated Dairy Products Co., 75 Ariz. 254, 255 P.2d 191 (1953).

or to protect the economic prosperity of the state which would be hampered if a municipality could set up "trade barriers."[31]

Assuming therefore, that the Nebraska Court would hold regulation of the dairy industry to be of state-wide concern, the above rules regarding pre-emption of the field and state-municipal conflict would be in effect whether or not the particular municipality has a home-rule charter.

a. *Occupation or Pre-emption of the Field*

The decisions as to whether or not statutes occupy a given field are not particularly illuminating or consistent. In Connecticut, the state statute established a rather comprehensive scheme of dairy regulation, which essentially forbade the sale of milk with certain labels, unless established prerequisites were met. Thus, milk could not be sold under a "pasteurized" label unless it was in fact pasteurized, nor could it be represented as being taken from tuberculin tested cattle unless that were true. A municipal ordinance required as an absolute condition of sale that the milk either be pasteurized or be taken from tuberculin tested cattle. The court, after examining the extensive state regulations, determined that the state had occupied the field. Since the state regulations only demanded pasteurization or tuberculin testing if the milk were so labeled, the municipality could not demand pasteurization or tuberculin testing as an absolute condition precedent to sale.[32]

A recent Texas case appears to be contra.[33] The Texas statute set up a comprehensive system of grades for milk, including both raw and pasteurized milk. The municipality permitted only pasteurized milk to be sold. This statute appears to be at least as comprehensive as the one in Connecticut, but the court found no occupation of the field and held the ordinance valid. No express legislative intent was available in either case.

The published committee hearings pertinent to the passage of the Nebraska statute do not reflect any particular awareness of the problem.[34] The statute itself contains two provisions which may be relevant. It is provided that when a milk plant has been issued a Grade A license by a municipality having a "substantially equivalent" ordinance that is "properly enforced," then the plant can

[31] Meridian Ltd. v. Sippy, 54 Cal.App.2d 24, 128 P.2d 884 (1942).

[32] Shelton v. City of Shelton, 111 Conn. 433, 150 Atl. 811 (1930).

[33] City of Weslaco v. Melton, 308 S.W.2d 18 (Tex. 1957).

[34] Hearing before Public Health Committee on L.B. 584, Neb. Legis., 68th Sess. (March 15, 1957).

operate under its municipal license without independent state inspection.[35] This is not an adoption of existing municipal permits merely to facilitate the inauguration of a state controlled inspection system.[36] The statute provides for much smaller state inspection fees when the State's approval is based on a municipal license.[37] This clearly contemplates a continuing inspection service under a valid municipal ordinance. These ordinances at least are not invalidated by the state statute. As to ordinances not "substantially equivalent" to the state regulations, it may be argued: (1) by continuing in effect those particular municipal ordinances, the legislature intended to invalidate all other municipal regulation, or (2) the statute, by this provision takes express cognizance of the existence of municipal milk regulation, and the only step taken was to utilize municipal health officers in the state inspection system when they were enforcing "substantially equivalent" regulations. Although obviously cognizant of the fact that some ordinances were not "substantially equivalent," the legislature took no steps to limit the regulatory power previously granted. Thus, there is no intent to occupy the field. These arguments are of course equally plausible and equally inconclusive.

The same type of argument may be maintained on the fact that the director's regulations are designated by statute as "minimum standards."[38] It may be said: (1) by designating these as "minimum standards" to be enforced over the state, the legislature recognized that particular areas in the state might need peculiar additional regulations, thus clearly *not* occupying the field, or (2) this is no expression of legislative intent regarding municipal power, but merely means that the standards do not prohibit the sale of milk which is of higher quality.

There is nothing *compelling* a decision either of occupation or that there has been no occupation of the field. The most that may be said is that the power previously granted to municipalities has not clearly been taken away.

b. *State-Municipal Conflict*

If the statute has not pre-empted the field, the next question is whether an ordinance might *conflict* with the state law. Two situa-

[35] Neb. Laws c. 370, § 3 (1957); Neb. Rev. Stat. §§ 81-263.04, 263.07 (Supp. 1955).

[36] See Flagstaff v. Associated Dairy Products, 75 Ariz. 254, 255 P.2d 191 (1953).

[37] Neb. Laws c. 370, § 3 (1957), amending Neb. Rev. Stat. § 81-263.07 (Supp. 1955).

[38] Id. at § 1, amending Neb. Rev. Stat. § 81-263.02.

tions immediately present themselves: (1) the municipal standards may be higher or contain additional requirements not found in the state law, or (2) the municipal standards may be lower or not require all the sanitation methods prescribed under the Grade A regulations. Both may be found in the same ordinance. For example, there may be an omission of sanitation practice requirements which the state demands, but the municipality may demand more butterfat or less bacteria than prescribed by the state standards.

The question is: does a municipal standard *conflict* with a state standard if it establishes: (1) a higher or more rigorous standard than that provided by the state, or (2) a standard lower than that set by the state? As might be expected in the field of municipal corporation law, conflicting authority can be found on both propositions among the states.

When a Kansas municipality forbade the sale of milk containing less than 8.75% nonfat milk solids, while the state demanded only 8.5%, the court held that the ordinance was valid and did not conflict with the state law.[39] But when the state of Illinois forbade the sale of milk in paper containers unless certain precautions were taken, and an Illinois municipality forbade the sale of milk in paper containers altogether, the ordinance was held to conflict with the state law in that it had forbidden what the state had impliedly permitted.[40]

The state of Missouri forbade the sale of milk containing less than 8.75% nonfat milk solids, and St. Louis placed its standard at 8.5%. *Held*: the municipal ordinance was valid, and a violation thereof was punishable.[41] The court reasoned that the lower municipal standard was not in the nature of an authorization to sell in violation of the state law. It did not permit or invite a violation of

[39] Kansas City v. Henre, 96 Kan. 794, 797, 153 Pac. 548, 549 (1915). "An ordinance enacted in the exercise of the police power is not necessarily inconsistent with a state law on the same subject because the city provides for greater restrictions or makes higher standards than is provided or made by the statute." Accord: Ex parte Hoffman, 155 Cal. 114, 99 Pac. 517 (1909).

[40] Fieldcrest Dairies, Inc. v. Chicago, 122 F.2d 132 (7th Cir. 1941), *rev'd.* 316 U.S. 168 (1942) on the ground that the identical issues were pending in the state courts, and the federal courts should have stayed decision pending the construction to be determined by the state court. The state decision was contra. Dean Milk Co. v. Chicago, 385 Ill. 565, 53 N.E.2d 612 (1944).

[41] St. Louis v. Scheer, 235 Mo. 721, 139 S.W. 434 (1911); following St. Louis v. Klausmeier, 213 Mo. 119, 112 S.W. 516 (1908).

the statute.[42] The California court, on the other hand stated the contrary: "If the city of Los Angeles had provided that milk might be vended which contained less per centum of milk fats than that exacted by the state law, there would be presented a plain case of conflict."[43]

It is difficult to see how the lower standard of a municipality can conflict with a state law. The idea apparently is that the ordinance permits what the statute prohibits. Upon slight reflection, however, this is obviously not the case. The fact that the municipality forbids the sale of milk with less than 8.5% nonfat milk solids, while the state forbids the sale of milk with less than 8.75% in no way interferes with the state's ability to prosecute an operator selling milk with 8.6%.[44] This argument is a mere technical defense on the part of a person prosecuted under the city ordinance for selling products not even meeting the lower standard.

As to the matter of higher municipal standards, the technical argument, on its face, at least appears more acceptable. If the state sets a particular standard, one may feel entitled to sell if he meets that standard, and that if the municipality sets higher standards, it is in effect prohibiting what the statute permitted. The Nebraska cases on point are not very helpful. In the *Phelps*[45] case, it is said:

> A city with authority delegated to it to regulate a licensed business, not inconsistent with the licensing statute, may properly impose *stricter* regulations than the statute without being inconsistent with such statute. [Emphasis supplied.]

In that case, the complainant had a license from the State Liquor Control Commission to sell beer and alcoholic beverages other than beer in the same room, which license was issued pursuant to statute. A Hastings municipal ordinance forbade the sale of both in the same room. The court held that the ordinance was not "inconsistent" with the state statute, and was valid. A later case, *State v. Kubik*,[46] appears to be squarely contra, although the court does not

[42] St. Louis v. Scheer, 235 Mo. 721, 729, 139 S.W. 434, 436 (1911).

[43] Ex part Hoffman, 155 Cal. 114, 99 Pac. 517, 519 (1909) (dictum); cited with approval again as dictum, La Franchi v. Santa Rosa, 8 Cal.2d 331, 336, 65 P.2d 1301, 1303 (1937).

[44] Note 39, supra.

[45] Phelps Inc. v. Hastings, 152 Neb. 651, 655, 42 N.W.2d 300, 303 (1950). To the same effect, see Bodkin v. State, 132 Neb. 535, 272 N.W. 547 (1937). Held: A municipality could punish under an ordinance which absolutely forbade the sale of liquor to minors, even though the state statute only made such sale punishable when the vendor sold to minors *"knowing* them to be such." (Emphasis supplied.)

[46] 159 Neb. 509, 67 N.W.2d 775 (1954).

expressly so state. In that case, the state statute provided that nothing contained in the statute was to prevent the possession of alcoholic liquor for the personal use of the possessor, his family, and guests. An Omaha ordinance required a liquor license for a private club to which persons brought and checked liquor which was then served only to that person and his family and guests. In effect, this is a *stricter* regulation than the state statute. The court found that the municipal ordinance was "inconsistent" with the state law and therefore invalid. No helpful generalization can be drawn from an analysis of the two cases.

The wording of the statute which describes the director's regulations as "minimum standards" is also pertinent here. It may be argued that since these are clearly designated as no more than minimum standards, compliance with such standards does not imply permission to sell in places where standards might be higher. Since no express permission to sell is granted, a municipality has not prohibited anything the statute permits by imposing higher standards, and thus there is no conflict. The opposing argument is the same as that discussed under the "pre-emption" question, to wit: the use of the word "minimum" means only that the standards do not prohibit the sale of milk which is of higher quality. The statute could be held to imply that permission to sell is granted upon compliance with the minimum standards, and an ordinance imposing higher standards conflicts with the state law in that it prohibits what the statute permits.

One application of this problem may be recognized in the situation of the farmer who peddles his own milk. The statute[47] provides that the act requiring all milk sold to meet Grade A standards does not apply to the farmer who sells to not over thirty consumers per day, but he must file certain reports. Does this imply an intent of the legislature that this man is *permitted* to sell non Grade A milk if he stays within the restrictions? If so, would a municipality be forbidding what the state permitted if it demanded compliance with its own Grade A ordinance?

Once again, all that can be stated is that it is not clear that a municipal ordinance is void merely because it imposes standards higher or lower than those of the state.

3. *Interference with Liberty*

Some cases raise a question on the position of municipal milk ordinances with regard to constitutionally guaranteed liberties.

[47] Neb. Laws c. 370, § 2 (1957), amending Neb. Rev. Stat. § 81-263.06 (Supp. 1955).

Assume a municipal ordinance which requires that milk contain 3.5% milkfat. No one argues that this in itself would violate any constitutional rights. But suppose also that the state standard is 3.25%. There seems to be at least some authority for the proposition that the municipal standard is an unconstitutional deprivation of liberty — not because the municipal standard is in itself unreasonably high, but merely because it is higher than the state standard. The New Jersey Court declared:[48]

> A local board of health, by incorporating in its ordinance abitrary and unnecessary provisions, cannot preclude the prosecutor from engaging in a lawful business, merely on the theory that his milk and cream contains [sic] slightly less butterfat or the bacteria count is slightly different.

The Texas court, in the same vein stated:[49]

> The 4% milk fat requirement of the ordinance in suit is, in terms, a prohibition of the sale of milk lawful elsewhere, and so viewed is void as an interference with the sale of property . . . .

The effect of the latter language is weakened by the fact that the court further held that the state had occupied the field. But the New Jersey decision cannot be fitted into either an occupation of the field or a conflict classification. The court felt that this was part of a scheme to erect trade barriers, and struck down the municipal rules. As long as the regulations, in themselves, were not unreasonable, and the state had no "conflicting" or "pre-emptive" regulation, this reasoning altogether overlooks the concept of municipal control over local affairs.

C. Effect if Municipal Ordinances are Generally Valid

Under the foregoing analysis, it cannot be categorically stated whether or not the municipal ordinances have been superseded. If they have been overridden, then there is a single standard common throughout the state. It would be useful, however, to consider the results if it were held that the local ordinances are still in full effect.

1. *Confusion of Standards*

The first problem would involve the time-honored "trade barrier" caused by multiple sets of standards administered by a number of regulatory agencies. In the words of the New Jersey court:[50]

[48] Urban v. Taylor, 144 N.J. Misc. 887, 188 A.H. 232, 233 (Sup.Ct. 1936).

[49] Cabell's Inc. v. Nacogdoches, 288 S.W.2d 154, 159 (Tex. Civ. App. 1956).

[50] Borden's Farm Products v. Somerville, 36 N.J. Super. 104, 113, 114 A.2d 788, 793 (1955).

> If it is to be held that the local board may enact mandatory, higher, or more stringent requirements than the State, then it must necessarily follow that a chaotic condition would exist in so far as meeting the requirements of every local municipality in the production, sale, and distribution of milk products.

The potential consequences on a plant desiring to sell on a state-wide or interstate basis may be demonstrated by a brief comparison of Grade A provisions with provisions found in Nebraska municipalities.

The Grade A regulations, in effect, only require inspection of herds for tuberculosis every six years.[51] There are municipal ordinances forbidding the sale of milk taken from cows not inspected annually.[52] The Grade A regulations require milk delivered from the farm to contain not over 200,000 bacteria per milliliter,[53] but there are municipal ordinances setting the limit at 100,000.[54] There is at least one municipality in Nebraska[55] which has a requirement that milk contain at least 3.5% milkfat, while Grade A approval only necessitates 3.25%.[56] The Grade A regulations permit the milk room to be located in the barn,[57] but municipal provisions may be found which call for a separate milk house.[58]

Enforcement of such municipal provisions as these would tend to restrict the sale of milk to small local plants supplying only that one municipality. Large-scale plants selling on a state-wide or interstate basis might find it impractical to require all producers to have cattle tested annually or to build separate milk houses. The alternative of segregating milk from certain producers who meet the peculiar technicalities of each ordinance would be a further burden and expense to such a plant. Likewise, a plant standardizing its milk at 3.25% milkfat according to state standards would be forced to conduct a completely separate process to supply milk containing 3.5%

[51] Neb. Grade A Regs. § 7, Item 1r (1953).

[52] E.g., Oshkosh Municipal Code § 10(e) (Amendment 1947).

[53] Neb. Grade A Regs. § 7 (1953).

[54] E.g., Bayard Municipal Code § 10 (b). This ordinance refers to the sale of milk for consumption generally, thus apparently including the farmer's sale.

[55] Fremont Municipal Code § 8-125(c) (1953). This ordinance is rather confusing, as sections 8-139 and 8-140 adopt by reference the USPHS Milk Ordinance and Code.

[56] Neb. Grade A Regs. § 1-A (1953).

[57] Neb. Grade A Regs. § 7, Item 8r (1953).

[58] E.g., Oshkosh Municipal Code § 9 (Amendment 1947).

milkfat for one community. These considerations may well make it uneconomical for a large plant to market in that community.[59]

Even when the municipality has adopted the most recent edition of the USPHS Milk Ordinance and Code, there is no assurance that the standards will be identical with those of the state. There is no uniform control over enforcement policies. For example, many dairy farmers are installing bulk tank and pipe-line milker systems. These are regulated generally by the Grade A provisions regarding "utensils."[60] A steering committee established by statute[61] has prepared an elaborate set of suggested rules governing these specific installations.[62] The director of the Department of Agriculture and Inspection, however, has refrained from adopting these suggestions. The reason is that the department does not wish to force all the changes necessary to comply with these, and then later require it all to be done over to comply with new standards which are expected to be promulgated by the United States Public Health Service.[63] Compliance with these suggested regulations could entail substantial cash outlay[64] in addition to the equipment itself. At least one municipal enforcement agency has taken them up and demands compliance when such equipment is installed.[65] This is an additional requirement for the farmer selling to a plant that markets Grade A milk within that municipality.

Another area of confusion appears when specific Grade A milk

[59] Generally, see U.S. Dep't of Agriculture, Regulations Affecting the Movement and Merchandising of Milk. (A.M.S. Market Research Report No. 98, June 1955); Cabell's Inc. v. Nacogdoches, 288 S.W.2d 154, 159 (Tex. Civ. App. 1956).

[60] USPHS Milk Ordinance and Code 62, 68, 69, 70, 71, 72, 90 (1953).

[61] Neb. Rev. Stat. § 81-263.03 (Supp. 1955).

[62] Recommended Policies Governing Handling of Grade A Bulk Milk from Dairy Farm to Dairy Plant (May 27, 1957). Suggested Standards to Serve as a Guide for the Installation and Cleaning of Cleaned-in-Place Sanitary Pipe Lines (May 27, 1957).

[63] Conversation with G. B. Flagg, Chief, Bureau of Dairies and Foods, Department of Agriculture and Inspection, Dec. 11, 1957.

[64] For example, the recommended policies on bulk tank installation require a certain milk room floor-area and gallonage production correlation, as well as minimal clearance space around the tank. If the existing space is not sufficient, apparently the farmer must rebuild. Port holes have to be constructed in a certain manner to admit flexible tubing of the pickup truck. Certain electrical switch connections are prescribed which will without any doubt necessitate rewiring. Specific hot water gallonage requirements are set. See note 59, supra.

[65] Conversation with L. A. Sanger, Lincoln-Lancaster County Health Department.

products are defined for sale in the state, but not in the municipality. Under Grade A regulations, the director may designate new "milk products."[66] Pursuant to this power, the director has designated as milk products fortified skimmed milk[67] and fortified vitamin-mineral milk.[68]

The above are in addition to those milk products defined in the USPHS Milk Ordinance and Code. If the plant should, for example, sell milk to which minerals have been added, in a municipality which has not changed its ordinance to recognize these "milk products," the product would be "adulterated" if sold as "milk" in such a municipality.[69] Thus, in order to market the product on a statewide basis, he must convince not only the state officials, but also the officials of each community with a Grade A ordinance that they should designate his product as a recognized "milk product." In some municipalities it is forbidden to sell milk to which "foreign substances" have been added.[70] The question of whether these elements constitute "foreign substances" will be considered later with reference to a state statute to the same effect.

2. *Inspection by Local Officials*

The question of inspection raises additional problems. Under the State Grade A law, if a plant is licensed by a municipality or another state which properly enforces a substantially equivalent law, Nebraska will not demand inspection by State officials.[71] But what if the municipality demands that no milk be sold within its limits unless produced and processed under the scrutiny of local inspectors? If local standards are equivalent to or lower than the state law, it may be unreasonable to demand inspection by local

[66] Neb. Grade A Regs. § 1-K (as amended Nov. 15, 1957); USPHS Milk Ordinance and Code § 1-K (1953).

[67] Neb. Grade A Regs. § 1 H-3 (1953).

[68] Id. § 1 G-1; § 1 J-1 is the same for homogenized milk. The vitamin mineral milk designations are effective as of January 1, 1958.

[69] USPHS Milk Ordinance and Code § 1 M (1953). "Any . . . milk or milk products . . . which if defined in this ordinance does not conform with its definition shall be deemed to be adulterated." § 1 A defines "milk" and does not include added vitamins and minerals. Since § 1 G makes a separate definition for Vitamin D milk, it would certainly not be contemplated that additional vitamins and minerals could be added and still have the product come within the definition of "milk."

[70] E.g., Oshkosh Municipal Code § 10 (a) (Amendment 1947).

[71] Neb. Laws c. 370, § 3 (1957) amending Neb. Rev. Stat. §§ 81-263.04, 81,-263.07 (Supp. 1955).

officers in the name of public health.[72] The United States Supreme Court, however, in holding that a municipality could not set fixed mileage inspection limits which unduly restricted commerce, suggested that the municipality need not rely on inspection by other officials, but could send out its own inspectors, and charge for their services.[73] This of course, relates to the constitutional issues involved in a dual system of inspection. If such local demands conflicted with the state law, or if inspection were pre-empted by the state, under the concepts discussed above, the constitutional issue would never be reached.

If the municipal standards are higher than the state, the municipality would have no assurance that its rules are met, unless it can demand inspection by its own officials. The Grade A law contains no provision authorizing Grade A inspectors to enforce municipal regulations more strict than the Grade A requirements. Thus, there may be one inspection by the municipal officers to ensure that specific strict requirements are met, and another by the state to insure compliance with the detailed sanitation and construction standards of the Grade A law. If the municipality can demand local inspection, this raises the question of limiting the area of inspection. None of the Nebraska municipalities, whose ordinances were studied, fixed any set limit beyond which the inspectors would not go. Either they were silent regarding producers and plants beyond the limits of inspection, or permits were authorized to those so situated on the basis of "proper evidence"[74] of the prospective licensee's compliance with the ordinance. If absolute limits are set administratively so as to exclude milk produced and processed beyond fixed mileage limits, there is presented this additional facet of the "barrier" problem. On the one hand, it is argued that these limits are practical necessities to keep the municipal officers from going all over the state and nation to make sure the supplies are satisfactory.[75] On the other hand, it is answered that this consti-

[72] Falfurrias Creamery Co. v. Laredo, 276 S.W.2d 351 (Tex. Civ. App. 1955); McClendon v. Hope, 217 Ark. 367, 230 S.W.2d 57 (1950). These two cases hold that it is an infringement of the constitutional rights of plant or producer to demand routine inspection by local officers, when state officials are enforcing regulations at least as strict as the local ordinance. The municipal officers could satisfy themselves that the ordinance was complied with by assuring themselves that the state officials were properly doing their job. A double inspection was not necessary to protect the public health.

[73] Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

[74] E.g., Oshkosh Municipal Code § 5 (Amendment 1947).

[75] Witt v. Klimm, 97 Cal. App. 131, 274 Pac. 1039 (1929). See dissent in Dean Milk Co. v. Madison, 340 U.S. 349, 357 (1951).

tutes an unreasonable burden on interstate commerce,[76] because the municipality could charge for distant inspection or accept the findings of foreign inspectors. It has also been held that such requirements deny equal protection of the law to those persons not located within the favored radius.[77]

As a practical matter it may be that these ordinances pose no real threat because of lack of enforcement. Although this study does not purport to reflect a complete collection of data regarding enforcement, it appears that the ordinances are not uniformly enforced. Of the forty-two ordinances studied, twenty-eight were patterned after the USPHS Milk Ordinance and Code. The State Department of Agriculture and Inspection only considered that nine of these municipalities enforced their ordinance so sufficiently as to permit plants operating under a municipal license to use the Grade A label without regular state inspection.[78] In checking the codified ordinances of these municipalities, the impression became rather strong that in many cases, the adoption of the USPHS Milk Ordinance and Code was attributable, not so much to a desire of the city council to improve the local milk supply, but rather to the fact that the cities had selected a common author to "codify" their ordinances. The codifier had apparently used this as his "formbook" in drafting municipal milk ordinances.

In two cases, the local officials included gratuitous comments represented by the following:

> The City's milk ordinances have been in our book for many years, and for the past twenty years has [sic] not been in force.

The fact that some municipalities may not be presently enforcing their laws does not seem any reason to declare the problems only theoretical. Enforcement could begin at any time; particularly if local pressure were applied in the traditional "trade barrier" sense to exclude outside competition.

D. The Reference Problem

Those municipalities which have ordinances based on the model ordinance promulgated by the United States Public Health Service are specifically recognized in the new state statute, and the plants licensed by such municipalities can avoid state inspection if the

[76] Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

[77] Moultrie Milk Shed, Inc. v. Cairo, 206 Ga. 348, 57 S.E.2d 199 (1950).

[78] Conference with G. B. Flagg, Chief, Bureau of Dairies and Foods, February 20, 1957.

ordinance is properly enforced.[79] But some of those very ordinances are subject to serious doubt as to their meaning and constitutionality.

Along with the model "ordinance" is published a "code" which is an interpretation for uniform enforcement of the ordinance. In at least one municipality, the city adopted the 1939 ordinance, but provided that it was to be enforced by the health officer in accordance with the interpretations in the "latest" edition of the code.[80] Since the 1953 edition contains substantial changes[81] in both the ordinance and code, there is the rather obvious problem of whether the 1939 or 1953 provisions are to be followed.

In addition to the doubt as to the meaning of certain provisions, some portions of the municipal ordinances are of doubtful constitutionality, because of the problem of delegation or abdication of legislative power.[82] It seems settled that legislative power is not unconstitutionally delegated by adopting an *existing* document promulgated by a foreign agency.[83] But some Nebraska municipalities have adopted the model ordinance and code with the provision that ". . . any subsequent amendments or additions to said code the ordinance, if any, are hereby adopted by the mayor and council and also incorporated by reference herein when three printed copies of said amendments and additions be filed in the office of said city clerk from time to time."[84] The adoption of this type of referential ordinance is specifically authorized by statute.[85]

[79] Neb. Rev. Stat. § 81-263.04 (Supp. 1955). Note that many municipalities have adopted the 1939 edition of the USPHS Milk Ordinance and Code, and the state regulations adopt the 1953 edition. As to whether those municipalities which haven't adopted the 1953 edition possess "substantially equivalent" regulations, the Department of Agriculture and Inspection has accepted, for example, the city of Kearney, which had, at the time of acceptance, the 1939 edition. Conversation with G. B. Flagg, Chief, Bureau of Dairies and Foods, February 20, 1957.

[80] Beatrice Municipal Code c. 9, Art. V, § 9-515 (1941). The Lincoln Municipal Code, Group I, Division 9 (1951) contained the same provision until amended on October 7, 1957 by Ordinance No. 6655.

[81] See FSA Release, Jan. 27, 1953: "Summary of the Significant Changes and Modifications Incorporated into the Milk Ordinance and Code—1953 Recommendations of the Public Health Service."

[82] Prohibitions against the delegation of municipal legislative authority are substantially the same as those against the delegation of state legislative authority. Harrison v. Snyder, 217 Ark. 528, 231 S.W.2d 95 (1950); People v. Sell, 310 Mich. 305, 17 N.W.2d 193 (1945).

[83] State ex rel Martin v. Howard, 96 Neb. 278, 147 N.W. 689 (1914).

[84] Loup City Municipal Code, c. 9, Art. IV, § 1 (1942).

[85] Neb. Rev. Stat. § 18-132 (Reissue 1954).

The municipal corporation, however, is merely a subdivision of the state created for the administration of government in local affairs,[86] and if the legislature itself could not delegate its power to a foreign agency, it would be inconceivable that it could validly permit the municipalities to so delegate their legislative power.[87]

This adoption of the acts of a foreign body, *in futuro,* is open to serious question. In an early case, the Nebraska Court considered a statute which adopted the New York insurance forms. The court said:[88]

> That portion of the section which provides the form shall be used as it "may be hereafter" constituted is too indefinite and uncertain to be valid. It would leave the form to the future action of the New York legislature or insurance commission, is surplusage, unconstitutional, and void.

In 1935, the Nebraska Court had before it the case of *Smithberger v. Banning.*[89] The legislature had levied a tax on gasoline, the amount and duration of which were dependent on future acts of the United States Congress. The court held this an unconstitutional abdication of legislative powers.

There seems little room for doubt that municipalities adopting provisions as set out above have attempted to abdicate their power to the United States Public Health Service. It is true that the purpose of the model ordinance and code is to permit uniform enforcement of a common standard,[90] and there is authority for the proposition that the adoption of present legislation, together with future amendments, is valid when designed to promote uniformity.[91] But the adoption of the New York insurance forms as they might be amended in the future would also have promoted uniformity.[92]

[86] Seward County Rural Fire Protection Dist. v. County of Seward, 156 Neb. 516, 56 N.W.2d 700 (1953).

[87] See note 82, supra.

[88] State ex rel. Martin v. Howard, 96 Neb. 278, 291, 147 N.W. 689, 693 (1914).

[89] 129 Neb. 651, 262 N.W. 492 (1935).

[90] USPHS Milk Ordinance and Code iv, v, vi, x, xi, xii (1953).

[91] Alaska Steamship Co. v. Mullaney, 180 F.2d 805, 816 (9th Cir. 1950).

[92] In answer to the proposition that the statute had unconstitutionally delegated power to the insurance board because it was to prepare a form "as nearly as practicable in the form known as the New York Standard," the court said: "The form of insurance policy which the legislature adopted, known as the New York standard, is a definite and well-known form of contract. Its characteristics, terms and conditions are known and recognized by the legislature of New York and other states, and are familiar to all carrying on the business of fire insurance." The court was not willing to accept future amendments even in this case. State ex rel. Martin v. Howard, 96 Neb. 278, 287, 147 N.W. 689, 692 (1914).

Nevertheless, the court summarily invalidated that portion of the act which adopted for Nebraska future changes to be made by the New York legislature or insurance commission.

It may be that the court could be induced to repudiate its prior decisions. The United States Public Health Service is no doubt better qualified to establish health regulations than the usual group of businessmen who comprise the city council. Since milk is a rather homogeneous product, and is transported from state to state, an argument can be made that municipalities ought to be free to adopt a common standard which is automatically amended when the Public Health Service makes an amendment. There is also the basic argument concerning the question of delegation to the effect that the city could always repeal its ordinance or specifically negate adoption of a particular provision found to be objectionable. However, when the municipality adopts future amendments, as they are routinely filed, the USPHS amendment would go into immediate effect, and the industry would be subject to a particular regulation even though the municipal legislators might have willed otherwise had they been given the chance. During the interim period after amendment is made by the USPHS and before the time that the knowledge and realization of the import of the regulation is communicated to the municipal legislators, there has been a loss of power to the foreign body. Except for this period, however, the municipality really has not lost its power, since it can revoke or specifically negate adoption of an objectionable amendment.

The many ramifications involved in the "reference" problem are beyond the scope of this article.[93] It is only desired here to point out the question which is raised by this form of adoption.

If that part of the ordinance which adopts future amendments is unconstitutional, the remainder of the ordinance is probably still valid in its original form. The test when part of a legislative act is declared invalid is (1) does the elimination of the invalid portion leave a complete existing law to be administered, and if so, (2) did the unconstitutional portion "induce" the passage of the act in its entirety?[94] Since the existing ordinance is a complete law which can be administered, the first test is met. The adoption of the future amendments would be no more of an "inducement" to

[93] For recent treatment of the problem see: Poldervaart, Legislation by Reference—A Statutory Jungle, 38 Iowa L. Rev. 705 (1953); Jaffee, An Essay on Delegation of Legislative Power, 47 Colum. L. Rev. 359, 561 (1947).

[94] Midwest Popcorn Company v. Johnson, 152 Neb. 867, 43 N.W.2d 174 (1950).

the adoption of the rest of the ordinance than was true in the insurance form case.[95]

This leaves the ordinance in its original form, unless and until the municipal legislative body acts to change it. Since the state Grade A regulations are based on the 1953 edition of the USPHS Milk Ordinance and Code, there might arise a question as to whether the local ordinance is "substantially equivalent" to the state regulations.[96] If not, the municipally licensed plants could not avoid state inspection.

III. "GRADE A" AND OTHER NEBRASKA DAIRY STATUTES

In addition to the conflicts between state and municipal regulation, there is also some conflict between the Grade A laws and existing state laws. For example, there is an old statute which appears to require that cattle from which milk is taken for consumption be inspected and certified free of tuberculosis every three years.[97] The Grade A regulations permit the sale of milk from herds located within accredited areas, which generally means that the cattle need not be retested more often than every six years.[98] Since the entire state of Nebraska has the required accreditation,[99] the old statute is obsolete, but it still remains on the books.[100]

Another statute of early vintage sets the minimum milkfat for fluid milk at 3%.[101] That statute was referred to by the new law,

[95] State ex. rel. Martin v. Howard, 96 Neb. 278, 147 N.W. 689 (1914).

[96] For a comparison explaining the changes in the 1953 edition, see FSA Release, "Summary of the Significant Changes and Modifications Incorporated into the Milk Ordinance and Code—1953 Recommendations of the Public Health Service" (Jan. 27, 1953). See note 76, supra.

[97] Neb. Rev. Stat. § 81-235 (2) (Reissue 1950).

[98] Neb. Grade A Regs. § 7, Item 1r (1953); USPHS Milk Ordinance and Code, Appendix A, p. 148 (1953).

[99] Conversation with D. F. Werring, Veterinarian in Charge, Animal Disease Eradication, U.S.D.A., Lincoln, Nebraska, July 29, 1957.

[100] From 1925 to 1937, milk could be sold from animals located within an established inspection area without the mandatory inspection at stated intervals. Just the inspection in conjunction with the area inspection and accreditation service was required. Neb. Laws c. 9, § 1, p. 75 (1925). That provision was deleted in 1937 when the stated interval was changed from one to three years. Neb. Laws c. 7, § 10, p. 89 (1937). See also, Neb. Rev. Stat. § 81-236 (Reissue 1950). This requires the owner to pay inspection fees when inspection is required by § 81-233(2) and the owner is not under a supervised plan to eradicate the disease.

[101] Neb. Rev. Stat. § 81-233(2) (Reissue 1950).

and it was stated that milk plants must comply with it as a condition for a Grade A permit.[102] The regulations which the director is authorized to adopt must "comply generally" with the USPHS Milk Ordinance and Code.[103] The argument can be made that this means he is to adopt the model except insofar as necessary to align the regulations with existing Nebraska statutes. Otherwise, he is not given proper "standards" as to how he may deviate from the model, and the familiar concept of improper delegation of authority appears.[104] The Nebraska regulations adopt a minimum standard of 3.25% milkfat[105] in conformance with the model ordinance. Query if the director was given power to issue a regulation setting a higher minimum standard than that set by the existing state statutes?[106] If the legislators had thought of this, they probably would have wanted the USPHS Grade A regulations to be followed on this point, so that Nebraska milk could be sent to other states under a Grade A permit.[107] There is, however, no coherent expression of this intent, either in the statute or in the committee hearings.[108]

Another problem which is potentially more troublesome than the last, is raised when flavoring, vitamins, minerals, and nonfat dry milk solids are added to milk and milk products. The new Grade A law requires specifically that all Grade A milk and milk

[102] Neb. Laws c. 370, § 2 (1957), amending Neb. Rev. Stat. § 81-263.06 (Supp. 1955).

[103] Id. at § 1; Neb. Rev. Stat. § 81-263.02.

[104] State ex. rel. Martin v. Howard, 96 Neb. 278, 290, 147 N.W. 689, 693 (1914). Held: Statutory direction to insurance board to adopt the New York form of insurance policy "as nearly as practicable" meant "as nearly as practicable considering the other provisions contained in the [Nebraska] insurance code which in anywise are inconsistent with or modify the provisions of the New York standard form. . . ."

[105] Neb. Grade A Regs., § 1-A (1953).

[106] State ex rel. Martin v. Howard, 96 Neb. 278, 147 N.W. 689 (1914). The "standards" test is still in current use as a method of declaring a *carte blanche* grant of authority to be invalid. School District No. 39 of Washington County v. Decker, 159 Neb. 693, 68 N.W.2d 354 (1955).

[107] This can be concluded from the provision which admits milk of other jurisdictions under a Grade A label; presupposing that Nebraska's Grade A milk would be reciprocally admitted in other states. If Nebraska's milk were not required to contain more than 3% minimum milkfat, it would not comply with the USPHS Milk Ordinance and Code as adopted by other states and a Nebraska Grade A label would not be sufficient to justify admittance elsewhere. The Nebraska legislative hearings are silent on the point. Hearings before the Public Health Committee on L.B. 584, Neb. Legis., 68th Sess. (March 15, 1957).

[108] Ibid.

products meet the standards prescribed by section 81-233 of the Nebraska statutes.[109] That statute provides:

> No person shall sell or deliver for consumption as milk, cream, or cheese, or have in his possession with intent to sell or deliver for consumption:
>
> (1) Milk to which water or *other foreign substance* has been added . . . . [Emphasis supplied.]

The question is: to what extent may Grade A products run afoul of the prohibitions against adding "foreign substances?"

The USPHS Milk Ordinance and Code makes specific recognition of milk to which Vitamin D has been added.[110] It also recognizes reconstituted milk products—that is, products to which dried skimmed milk solids have been added, but provides that when the state law does not permit the sale of such milk or milk products, the latter provisions should be omitted.[111] In addition to adopting regulations authorizing the addition of those ingredients, the Nebraska regulations now permit the addition of Vitamin A, Vitamin B_1, Vitamin B_2, Thiamin, Riboflavin, Niacin, Iron, and Iodine to certain products.[112]

This article does not intend to express any opinion as to the necessity or desirability of the addition of such items. The USPHS Milk Ordinance and Code generally opposes the addition of vitamins and minerals other than Vitamin D.[113] For the purposes of this article, the question is whether these ingredients are forbidden by the statutory prohibition against the addition of "foreign substances." It may be that since the nonfat milk solids are taken from milk itself, they are not "foreign" to milk and thus are not forbidden.[114] As to vitamins and minerals, however, it appears much more questionable. If they are foreign, the specific reference to, and adoption of, section 81-233 would preclude any argument that the absolute requirements of the old statute had been impliedly overruled by the later one. The validity of these regulations, and the protection they afford to the milk plants adding such items is open to serious question. Probably, however, these items are wholesome, and there is some doubt in Nebraska whether it is constitutional to forbid the sale of wholesome food. In striking down the

[109] Neb. Laws c. 370, § 2 (1957), amending Neb. Rev. Stat. § 81-263.06 (Supp. 1955).

[110] USPHS Milk Ordinance and Code § 1 G (1953).

[111] Id. at p. 4, footnote 13.

[112] Neb. Grade A Regs. §§ 1 G, G-1, H-3, J-1, K (Revised Nov. 15, 1957).

[113] USPHS Milk Ordinance and Code 33 (1953).

[114] Op. Neb. Atty. Gen., March 5, 1952.

Nebraska filled milk act, the State court held that the legislature could regulate the sale of food to which non-natural items (coconut oil) had been added, but since the food was wholesome, its sale could not be absolutely forbidden.[115] The decisions on this point are in conflict, and the United States Supreme Court held contra in a case involving the federal filled milk act.[116] This type of constitutional argument would cut across the entire dairy control program. For example, it might be argued that raw milk is generally wholesome. Therefore, the state may properly set sanitation limits for raw milk, but cannot entirely forbid its sale if wholesome.

IV. DESIRABILITY OF THE USPHS MILK ORDINANCE AND CODE

It is not intended here to weigh the merits of the substantive provisions of the USPHS Milk Ordinance and Code. This ordinance is the product of continuous study and revision. The 1953 edition is the twelfth major revision since the first Standard Milk Ordinance was published in 1924. These standards have been incorporated into the Federal Specifications established for purchases by federal agencies,[117] and are required for milk served on interstate carriers.[118] The latest count shows that the Ordinance and Code serves as the basis of regulation in thirty-four states and two territories. It has been adopted by 478 counties and 1,399 municipalities.[119]

The Public Health Service has set up, in cooperation with the states, a rating system, which rates compliance with the milk ordinance. This enables states or municipalities to import milk from other areas without the expense of multiple and distant inspection.[120] The federal marketing orders, which guarantee minimum

[115] Carolene Products Co. v. Banning, 131 Neb. 429, 268 N.W. 313 (1936).

[116] Carolene Products Co. v. United States, 323 U.S. 18 (1944).

[117] Fed. Specs. C-M-381e, §§ 3.1, 3.5.1, 3.6 (1950); C-C-67lb, § 3.1, 3.4.1 (1951).

[118] 42 C.F.R. § 72.165 (Supp. 1954) of the Quarantine Regulations gives the Surgeon General authority to approve sources of fluid milk products for consumption on interstate carriers. The USPHS Milk Ordinance and Code is the basis used in approving sources. Letter of August 6, 1957 from Harold B. Robinson, Chief, Milk Sanitation Section, Milk and Food Program, Division of Sanitary Engineering Services, Department of Health, Education, and Welfare.

[119] Letter of March 7, 1958 from Harold B. Robinson, supra.

[120] USPHS Milk Ordinance and Code 144 (1953) provides: "Subject to laboratory tests upon arrival, the health officer should approve, without his inspection, supplies of milk or milk products from any area or shipper

prices to dairy farmers, supposedly do not establish sanitary or quality standards.[121] However, it may be noted that the orders in effect in Nebraska protect only farmers producing Grade A milk.[122]

There are those who maintain that the entire farm inspection program (which is of course a vital part of the model ordinance) is merely a hangover from an earlier stage of technological development—that is, before the advent of pasteurization.[123] A few disease organisms are not killed by pasteurization,[124] and farm inspection may generally be said to guard against those. The argument is also made that the farm inspection and controlled building and sanitation standards serve to preserve the aesthetic values of milk, but recent scientific studies indicate that at least some of the strict standards regarding barn and milkhouse construction are of no real value in producing better milk.[125] There is some evidence

not under his routine inspection (1) when they are produced and processed under regulations substantially equivalent to those of this Ordinance, (2) when they are under routine official supervision, and (3) when they have been awarded, by the milk sanitation authority of the State of origin, a milk sanitation rating equal to that of the local supply, or if lower than that of the local supply, equal to 90 percent or more, on the basis of the Public Health Service rating method. Lists of interstate milk shippers and their ratings, as reported by the State health authorities and spot-checked by the Public Health Service, are issued periodically by the Public Health Service for the information of receiving communities. These lists may be obtained either from the State health authority or from the Public Health Service." For the history and operation of the National Conference of Interstate Milk Shippers which utilizes the rating system, see: National Conference on Interstate Milk Shipments, Summary of Policies (Public Health Service Publication 1953); Surgeon General's Letter to all State Milk Control Authorities (Dec. 31, 1946).

[121] U.S. Dep't of Agriculture, Federal Milk Marketing Orders (AMS Misc. Pub. No. 732, Oct. 1956).

[122] 7 C.F.R. § 935.5 (1955); 7 C.F.R. § 948.5 (1955); 7 C.F.R. § 1013.7, as published in 22 Fed. Reg. 2529 (1957).

[123] Hamilton, Price and Price Policies 520 (1938).

[124] Those reported not killed by pasteurization are staphyloccus enterotoxin, which causes food poisonings, and possibly pasteurization does not destroy rickettsia, viruses, and Q fever. U.S. Dep't of Agriculture, Regulations Affecting the Movement and Merchandising of Milk 13 (A.M.S. Market Research Report No. 98, 1955).

[125] Fenzau and Van Arsdall, Economies in Farm Dairy Buildings and Equipment in Relation to Sanitary Quality of Milk 1, 5 (Agricultural Information Bull. No. 153 (1957)). On page 5 is noted, for example, that the erection of a partition between the milking area and the milk handling area did not improve the sanitary quality of the milk. When the partition did exist, no improvement in sanitary quality was noted by the addi-

that a large amount (one plant reported 80% to 90%) of manufacturing quality milk would meet laboratory tests as Grade A milk, but cannot be sold as Grade A quality because the barn and equipment do not comply with Grade A specifications.[126]

One tendency of these laws may be to drive the small farmer out of the better-paying Grade A milk production, because he cannot stand the cost of the equipment, construction, and upkeep demanded. As stated above, no attempt is made to evaluate the merits of the Grade A law. It is at present a nationally accepted standard for dairy regulation. The State of Nebraska has adopted it, and this paper merely attempts to show certain problems which have attended the adoption of this law. It may be noted in passing, however, that one recent technological innovation has caused many farmers in this area to cease production of Grade A milk. A drive has been put on to convert all Grade A farms in the Omaha, Council Bluffs, and Lincoln milkshed to the use of bulk tanks on the farm instead of milk cans and coolers.[127] This is not a formal requirement for Grade A milk, but when the bulk tank was installed, the health officials of at least the Lincoln milkshed demanded compliance with rigorous installation requirements which were al-

tion of a vestibule (short hall with door on each end to be sure one door was always closed) between the milking area and the milk handling area. The Public Health Service Code, p. 65, requires a room for the handling of the milk which is separate from the milking area. If the barn is used for cattle housing, a vestibule between the two areas must be constructed. If the barn is used only for milking and feeding of concentrates, but not for housing the cattle, the farmer is permitted to dispense with the vestibule "when a solid, self-closing door, opening outward from the milk house, is provided." To the same effect, see Dahlberg, Adams and Held, Sanitary Milk Control and Its Relation to the Sanitary, Nutritive, and Other Qualities of Milk 121, 123 (National Academy of Sciences—National Research Council, Pub. No. 250, 1953). "The findings of this study indicate the need for only a limited number of basic requirements to insure a wholesome milk supply, as given below. Other conditions which are required in many laws and ordinances may be desirable, but are not essential. . . . The many details of sanitary milk production found in some ordinances, including such items as detailed specifications for the construction of barns and milk houses, feed storage arrangements, walkways, etc., may be very useful in promoting sanitary milk production but, when used, they should be recommended only and not required."

[126] Hillman, Rowell, and Israelsen, Barriers To The Interstate Movement of Milk and Dairy Products in The Eleven Western States 68 (Ariz. Ag. Exp. Station Bull. No. 255, 1954).

[127] Conference with Dean James Doyle, College of Law, Creighton University, Omaha, Nebraska; attorney for the Nebraska-Iowa Non-Stock Cooperative Milk Association, July 24, 1957.

most certain to entail additional expense.[128] It is reported that of an approximate 2,000 farmers in the Lincoln, Omaha, and Council Bluffs milkshed who were already meeting the Grade A requirements, about 500 are ceasing production of Grade A milk for failing to convert to bulk tanks.[129]

Having examined a number of problems attending the adoption of the Grade A law, a few recommendations for changes are in order.

V. SUGGESTED CHANGES

The Nebraska Grade A law is almost certain to come up for amendment in the 1959 legislative session. The 1957 bill was rushed through at the last minute and contained a provision requiring the dating of milk containers which the legislature intended to delete.[130] While in the process of amendment, it is suggested that the following be considered:

A. Adoption of the USPHS Milk Ordinance and Code

The director is now authorized to adopt regulations for Grade A products which comply generally with the 1953 edition of the USPHS Milk Ordinance and Code.[131] That publication is amended from time to time. Furthermore, the Ordinance and Code adopts by reference another publication entitled: "Standard Methods for the Examination of Dairy Products."[132] This, too, is subject to revision from time to time.

There are several ways to keep the Nebraska regulations current with amendments made in those two publications. As indicated above, it would invite a holding of unconstitutionality to immediately adopt all future changes. One manner in which all doubt of unconstitutional delegation of authority would be avoided would be to require the director to submit a report detailing any amendments to the appropriate legislative committee at each regular session of the legislature. The report should contain the director's recommendations as to whether Nebraska should adopt the changes. The law could be thus kept current (avoiding the fate of the Nebraska Pure Food Law) with no danger of an unconstitutional dele-

[128] Supra, notes 62, 64.

[129] Supra, note 127.

[130] Neb. Leg. J. 2011, 68th Sess. (1957).

[131] Neb. Laws c. 370, § 1 (1957), amending Neb. Rev. Stat. § 81-263.02 (Supp. 1955).

[132] USPHS Milk Ordinance and Code § 6 (1953).

gation or abdication of authority. This would cause a time lag between the USPHS and the Nebraska adoptions, but it should not be enough to cause any difficulty with the Grade A shipments in interstate commerce. Even in 1958, the interstate milk ratings are based on compliance with the 1939 edition of the USPHS Milk Ordinance and Code and not on compliance with the 1953 edition.[133]

It may be that the authority granted to the director by the state statute to adopt regulations which "comply generally" with the 1953 edition of the USPHS publication is itself authority for the director to adopt future amendments if he so chooses. If the legislature so intends, the director could be authorized to consider new amendments as a standard in determining how his regulations might differ from the 1953 edition. He might also be directed to examine the amendments and to decide in each case whether he will adopt the amendments. In light of the Nebraska position on adoption by reference, however, this latter provision might be in more danger of being held unconstitutional. The provision may be held an improper standard because measured by the policy standard of a foreign body and not that of the State.

It would also be prudent to set further standards surrounding the power of the director to vary from the USPHS Milk Ordinance and Code. Language authorizing the regulations adopted to comply generally with the USPHS Milk Ordinance and Code should be amended to state that the regulations are to comply generally with that publication, in light of the Nebraska statutes, but in no case to be lower than those of the 1953 edition of the USPHS Milk Ordinance and Code. This would have the effect of (1) providing an additional standard which would lessen the possibility that the court might find an unconstitutional delegation of authority for lack of proper standards, and (2) granting authority to adopt regulations equally as high as the USPHS Milk Ordinance and Code, though a general statute regarding milk might impose a lesser standard. In order to ship freely under a Grade A label, Nebraska standards must be "substantially equivalent" to USPHS recommendations.[134]

B. State-Municipal Control

As outlined above, there is considerable difficulty presented when the state and municipality both purport to maintain and enforce a complete system of dairy regulation within their respective jurisdictions.

[133] U.S. Dep't of Health, Education, and Welfare, Public Health Service, Compliance Ratings of Interstate Milk Shippers (Jan. 1, 1958).

[134] USPHS Milk Ordinance and Code § 11 (1953).

Since the state has adopted the Grade A law, and machinery is established to systematically enforce it, it becomes preferable to exclude municipal regulation. There are, however, a number of local enforcement agencies which the state officials have decided are doing an adequate job of enforcement. Rather than destroy these bodies and replace them with state officials, it appears more desirable to incorporate them into the state enforcement system. To accomplish this, the following are recommended:

1. The statute should declare that the regulation of the dairy industry is a matter of state-wide concern. This would, as far as legislatively possible, subject home-rule cities to the same restrictions as non-home-rule cities.

2. It should be declared to be the intent of the legislature to occupy the field of dairy regulation applicable to milk and milk products, as defined, to the exclusion of all municipal regulation.

3. Local health officials who were properly enforcing a Grade A milk regulation (as determined by the director) at the time the mandatory Grade A law becomes effective should be permitted to continue in operation, enforcing *only* official state regulations. If it reasonably appears to the director that the local officials are not adequately enforcing the state regulations, or are purporting to enforce regulations other than those issued by the director, the local officials must thereafter be forbidden to act, and the enforcement should be taken over by state officials.

4. Those cities which continue their inspection program will have to pay their inspectors and should therefore receive the inspection fees. Under the system contemplated by the 1957 Act, the milk plants pay an inspection fee of two cents per hundred pounds of Grade A raw milk purchased. If the plant is certified on the basis of a municipal license, the state charges an inspection fee of only two-tenths of one cent per hundred pounds.[135] The latter sum apparently represents the fees for the cost of the State's supervision of municipal officials. On that basis, all plants could be charged two cents per hundred pounds, with all but the two-tenths of one cent being paid to the municipality. It is not here represented that these figures are reasonable or even realistic inspection fees, but are used merely to illustrate on the basis of the figures in present use.

C. Grade A and Other Nebraska Statutes

It perhaps would be advisable to completely re-cast the Nebraska dairy laws, but that is beyond the scope of this article. The

[135] Neb. Laws c. 370, § 3 (1957), amending Neb. Rev. Stat. § 81-263.07 (Supp. 1955).

following are suggested to take care of obvious inconsistencies between the general laws and the Grade A regulations. Part A dealt with the case where statutory standards are lower than the Grade A regulations. This section concerns State statutes more strict than the Grade A provisions.

1. *Foreign substances.* Section 81-233(1) forbids the sale of milk to which foreign substances have been added. The Grade A regulations of Nebraska provide for the addition of flavoring, vitamins, minerals, and nonfat dry milk solids. No opinion is expressed as to whether or not it should be permissible to add these items. The statute and regulations should be clarified to either permit or deny the addition. As it now stands there appears to be a flat conflict.

2. *Nonfat solids in skim milk.* Section 81-233(4) requires skimmed milk to contain 9.25 (nonfat) milk solids. Grade A regulations fix no set standards of nonfat milk solids in skimmed milk, but provide that skimmed milk is *milk* with less than 3.25% milkfat. "Milk" need only contain 8.25% nonfat milk solids.[136] A single standard should be set.

3. *Bacteria.* Section 81-233(5) forbids the sale of milk or cream containing or which has been exposed to *any* disease-producing bacteria. This, in its literal sense, is so broad as to be nugatory. The Grade A laws permit up to certain maximum amounts of bacteria to be present in milk, without distinguishing between the harmless and the disease-producing variety. The latter approach is more realistic.

4. *Tuberculosis inspection.* Section 81-235(2) makes it unlawful to sell milk from an animal not examined and certified free of tuberculosis within three years prior to the sale of the milk. This should be expressly amended to provide that if the animal is located within a modified accredited tuberculosis free area, milk may be sold from the animal upon only such inspection as is required by the director in conjunction with the accreditation program.

VI. CONCLUSION

There are no doubt other statutory provisions which could be deemed inconsistent with the Grade A provisions. This study has attempted to illustrate the most troublesome and most obvious problems which are caused by Nebraska's adoption of a Grade A dairy law without adequate correlation to existing regulatory measures.

[136] USPHS Milk Ordinance and Code, § 1 A, D (1953)