

Livestock Nuisance Litigation and the Odor Footprint Tool

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overview

- Neighbors sued to disallow Lancaster county zoning permit issued to construct three chicken barns by Costco contractor.
- Nebraska Supreme Court ruled county zoning permit was validly granted
- Court indicated that odor footprint tool analysis indicating neighbor would be free of livestock odor 94% of the time showed that county had considered public health, safety & welfare in considering the zoning permit
- likely that odor footprint tool may be used in future lawsuits over livestock odor

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facts

- Producer wish to contract poultry production with Lincoln Premium Poultry (LPP), who would sell processed poultry to Costco.
- land was in agricultural district in Lancaster county.
- producer applied for a special use permit 5-14-18
- planning commission approved permit 6-3
- county board approved permit 3-2
- two neighbors appealed the zoning permit approval
 - neighbor who lived on acreage 12.7 miles was ultimately dismissed from the lawsuit

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district court

- other neighbor lived 0.6 miles away
- LPP consultant prepared nutrient management plan
- county planner testified operation would meet all county zoning requirements
- also approved by Neb Dep't Env & Energy, Lower Platte South NRD and Lancaster county health department
- district court in Oct 2019 dismissed the distant neighbor from the case, concluded that the poultry operation exceed all county zoning requirements, and ruled that the special use permit had been properly granted

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Supreme Court

- Supreme Court ruled that distant neighbor was properly dismissed from the case because she did not prove that she would be harmed by the poultry operation
- the near neighbor largely relied on public testimony by those opposing the poultry facility to support her contention that granting the permit would not protect the public health, safety & welfare.
- Supreme Court noted testimony from county officials contradicting much of that testimony.

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odor issue

- neighbor contended that poultry facility would produce odors damaging her property and property value, but offered no objective proof thereof IMO
- Neb Supreme Court referred to UNL-IANR tool estimated that "even the immediate vicinity of the proposed facility would be free of odor 94 percent of the time."
 - apparent reference to IANR odor footprint tool.
- Lancaster county health dept testified that it could ensure that producer was using reasonable odor control techniques (as required for DEE permit).

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conclusion & implications

- court ruled that county had appropriately considered the public health, safety and general welfare impacts of the proposed facility in an agricultural zone and that the zoning permit was properly granted – 7-0 decision.
- a perennial issue in livestock nuisance litigation is odor. If the only testimony received is the subjective opinions of neighbors or folks who travel past the livestock operation is that “it smells bad” and no testimony is offered to rebut that evidence, that typically is the ballgame and the producer loses.

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implications, con't

- advantage of the odor footprint tool is that it provides a more objective evaluation of the livestock facility's odor footprint, i.e. the area where facility odors may reach.
- here the tool analysis indicated that the surrounding area would be odor free 94% of the time, as described by the court.
- this is more concrete information regarding how bad livestock odors from the facility would likely be.
- 94% odor free = ~22 days when livestock odors will be noticeable and perhaps objectionable

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implications, con't

- implicit in the court's opinion is that 22 days of livestock odors in an agricultural zoning district is not unreasonable.
- but that is not a guarantee that if you are at 94% non-interference that your facility will never be in trouble legally ☺
- I expect that odor footprints will become a common tool and element in future livestock nuisance litigation
- producers will argue that their odor levels are reasonable and opponents will argue that e.g. 22 days is too many.

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conclusion

- odor footprints are a great tool, give producer the opportunity to determine the best mix of facilities and practices to reduce their odor footprint and reduce the odors that neighbors would experience
- will add an important concrete estimate of odor interference to balance the “it is going to smell really bad” more subjective evidence that has been the norm in livestock nuisance lawsuits.
- producers should know their odor footprint scores & use them to evaluate how best to reduce neighbor odor nuisance & lawsuit potential.

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questions? ☺

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Thank you! ☺