

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

**Sunset Poultry, LLC, Wayne Greve,
and Charlene Greve,**

Plaintiffs/Appellants,

v.

**The County of Lancaster, Nebraska, on
behalf of The Board of County
Commissioners of Lancaster County,
Nebraska,**

Defendant/Appellee,

v.

**Jory and Lori Heiss, Kevin and Jil-Beth
Svoboda, Charissa Hofpar, Brad and
Angie Peterson, James and Marla
Matulka, D. Steve & Jennifer
Brinkerhoff, Andy and Dana Cotter,
Shane and Cindra Jensen, Gary and
Lorelei Waldron, Kevin Wolfe, Affected
Landowners, and Raymond Central
Board of Education,**

Intervenors.

**Case No. CI 19-4038
Hon. Jodi L. Nelson**

ORDER

LANCASTER COUNTY
2021 MAY 27 PM 2:56
CLERK OF THE
DISTRICT COURT

This matter came before the court on May 10 and 11, 2021, for a trial on an appeal from a November 19, 2019 decision of the Lancaster Board of Commissioners (the "Board") to deny a special use permit to Sunset Poultry, LLC ("Sunset"), pursuant to Sunset's Application for Special Use Permit No. 19035. This special permit seeks to construct and operate a commercial feedlot on property Wayne and Charlene Greve own at 2342 Ashland Road in Lancaster County, Nebraska.



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Appellant appeared with counsel Mary Jacobson and Paul Lembrick. Appellee, the Lancaster County Board of Commissioners were represented by Deputy County Attorneys Jenifer Holloway and Daniel Zieg. Intervenors appeared with counsel, Brian Jorde.

This appeal is brought pursuant to Neb. Rev. Stat. § 25-1937 (Reissue 2016) The procedures for this appeal are governed by the precedent set forth in *Olmer v. Madison Cty. Bd of Comm'rs*, 275 Neb. 852, 752 N.W.2d 124 (2008). Accordingly, the matter was heard *de novo* with the burden of proof resting on Sunset. The question to be decided by this court is whether Sunset has carried that burden based on the testimony and evidence received at trial to show Special Use permit No. 19035 should be approved.

The parties did not stipulate that the record of the public hearings held by the Lancaster County Planning Commission or the Lancaster County Board of Commissioners would become a part of the record before this court, therefore, the only evidence before the court are the exhibits received during trial and trial testimony. During trial the court received the following exhibits: 18, 19, 21, 23, 31, 36, 40, 41, 42, 43, 44, 45, 46, 47, 48, 51, 52, 53, 57, 59, 73, 74, 75, 77, 80, 81, 82, 84, 94, 97, 116, 117, 118, 119, 136, 137, and 138. Appellants presented sworn testimony of Tonya Bussard, Walt Shafer, Andy Scholting, and Thomas Cajka. Intervenors presented sworn testimony of Dr. Derrick Joel, Lori Heiss, Matt Hardesty, Bill Lange, Gary Waldron, Kevin Svoboda and Dr. James Merchant. Appellees did not present witnesses.

At the end of Appellants case in chief, Intervenors were heard on their 12(b)(1) motion to dismiss and their motion for judgment as a matter of law. Both motions were

overruled. Appellees then made a motion for judgment as a matter of law and that motion was overruled. After the close of all evidence, Intervenor renewed their 12(b)(1) motion and made a motion for judgment as a matter of law. Those motions were overruled. Appellees then made a motion for judgment as a matter of law and that motion was taken under advisement. Now being fully informed, the court finds as follows:

1. Sunset’s Application for Special Permit No. 19035

Exhibit 21 established that on or about July 1, 2019 Sunset filled out and signed an application for Special Permit No. 19035 seeking a special permit to operate a commercial feedlot on land located at 2316-2324 Ashland Rd., Ceresco, Nebraska. The record is not clear as to what date the Special Permit was filed with the Planning department. Exhibit 21 states “THE FOLLOWING INFORMATION IS NECESSARY TO HAVE A COMPLETE APPLICATION: 1. LETTER stating purpose of application. This statement should include information concerning the reason for the request(s), any associated applications, projects or other information related to the application... 3. SITE PLAN The site plan shall be submitted electronically using e-plan...” No “LETTER” and no “SITE PLAN” accompanied the Application and neither were received into evidence.

Lancaster County carries out its zoning powers through the enactment and enforcement of its zoning regulations. The court received the Lancaster County Zoning Regulations as Exhibit 18 (“Zoning Regulations”). Article 13.035 Commercial Feedlot as found in Exhibit 18 reads as follows:

“Commercial feedlot facilities for livestock and poultry may be allowed by special permit in the AG zoning district. The application for a special permit shall be accompanied by a statement from the Department of

Environmental Quality (DEQ) that either the facility does not need to provide for anti-pollution controls, or that the applicant has received approval from DEQ for anti-pollution controls...”

The Application before the court is not accompanied by any statement or letter from DEQ or its successor agency, DEE, and none were received into evidence.

The court received Exhibit 51 which are the current zoning regulations related to Article 13.035 commercial feedlots, such as the subject of the Special Permit Application. These regulations became effective as of March 10, 2020 and postdate the Application. Thomas Cajka testified that under the existing zoning regulations of 13.035, the Special Permit would be denied as the proposed location does not conform to the current setbacks for Large Animal Feeding Operations, which the proposed use is, since there are both residences within the current 0.75 mile setback requirement and a school within the current 1.5 mile setback requirement.

The Zoning Regulations designate various base zoning districts. One of those zoning districts is an “agricultural” (“AG”) district. The Greve’s land and where Sunset seeks to operate a poultry feedlot is within the AG district.

There is no evidence in the record as to any findings or recommendations, if any, from the Lincoln/Lancaster County Health Department or any Natural Resource District. There is no evidence of the percentage of time the proposed poultry operation would be odor-annoyance free.

2. Zoning Article 13.002 Factors

Article 13.002 provides factors that shall be considered prior to issuing a special permit. This includes “..... the effect of such proposed building or uses upon the character of the neighborhood, traffic conditions, public utility facilities, the Comprehensive Plan and other matters relating to the public health, safety and general welfare.” (Exhibit 36)

Character of the Neighborhood

The character of a neighborhood is different from an area’s zoning designation. Mr. Cajka confirmed this fact. Testimony and aerial maps received as evidence establish there are no small, medium, or large CAFOs (Concentrated Animal Feeding Operation) in or near the area in question. There is no industry either and the neighborhood is characterized by rural-residential acreages, row crop farm land, and the Raymond Central Jr/Sr Highschool. Dr. Joel discussed the character of the neighborhood in some detail as related to the school and as shown in Exhibits 40 through 48. Exhibit 47, an aerial photo containing property designations, the LPP (“Lincoln Premium Poultry”) truck route, and location of the proposed CAFO, shows the proximity of many residences and the school to the proposed site. It was determined the proposed site and the school property are approximately one (1) mile apart. Testimony established the school is growing in student population and that it has land available for planned expansion which would bring more students and more faculty to the school. The school is used for conference and district wide activities, community activities, and its facilities are utilized all year round, including its outdoor facilities such as its track and sports fields. Although the zoning is AG and AG zoning does allow for commercial feedlots subject to satisfaction of special

permit requirements and satisfaction of 13.002 factors, here the character of the neighborhood, as it exists, would be materially changed by the construction and operation of eight (8) 66 feet by 600 feet chicken barns, two (2) “at least 12’ by 60’ ” (Exhibit 31) outdoor mortality sheds open or partially open on all four sides, as well as other necessary infrastructure and a substantial increase in expected truck traffic which is discussed more fully in the roads section below.

Under Ex 51, the current zoning regulations and setbacks applicable to such a commercial feedlot and large AFO, the Special Permit Application would be denied on its face. The proposed location is immediately adjacent on the west to two residential properties, Heiss and Svoboda, and to the north, the Waldrons, and is less than 1.5 miles from the Raymond Central school. Appellants argue this is irrelevant given they applied for the Special Permit months prior to this zoning change. Intervenors argue this evidence can be considered to show how the County has acknowledged the character of the neighborhood to be and what it no longer would allow at the proposed location. Further, Intervenors argue that if the 2040 Comprehensive plan is to be considered, then the current zoning regulations as they actually are today should be considered as reflecting Lancaster County’s intent and desire to further regulate the placement of commercial feedlots to preserve the character of existing neighborhoods and other 13.002 factors.

Traffic Conditions

Mrs. Bussard testified Appellant initially planned to access the proposed site from Ashland Road but changed that to NW 27th Street due to Ashland Road being inadequate for the truck traffic that would service the proposed location. Mr. Cajka, Dr. Joel, Mrs.

Heiss, Mr. Waldron, and Mr. Svoboda who each confirmed based on personal experiences and observations that Ashland Road did not provide feasible access to the proposed location and exhibits were received confirming this testimony. Attention turned to NW 27th Street as the only access to and from the proposed CAFO. Testimony was heard from Mrs. Heiss and Mr. Svoboda, who each live on NW 27th and along with their family members travel that road every day throughout the year. Dr. Joel testified to personal familiarity with NW 27th and as to the school buses that travel it. Mr. Waldron, a former school bus driver for Raymond Central, discussed his experiences with NW 27th. Significant photographic evidence was received documenting NW 27th in dry, wet, and snow-covered conditions. Simulations of school bus and semi-truck traffic on the road and pick-up truck and SUV traffic were received. It was established NW 27th was a one-and-a-half lane gravel road with a crown in the center slopping towards soft and narrow shoulders on each side and then into a ditch on each side. Photos were received establishing that in snowy conditions minimal distance is available for vehicles to safely pass in opposite directions. Testimony established the county does not remove snowfall unless greater than four (4) inches, it is difficult to get vehicles out of the ditch, that it is the only reliable access to the Heiss and Svoboda residences which was a concern especially in case of emergency, that the school has issued warnings about such conditions before and that school busses have been unable to safely travel on NW 27th after rainy or snowy conditions. Appellants countered that all of these conditions already exist and are realities the residents and neighbors have to deal with and in terms of gravel roads they often present such challenges and those are not unique just to NW 27th.

Intervenors agreed but stated the issue is that this reality and the challenges already present will be compounded with nearly 1100 new trips of truck traffic per year on the only ingress/egress to the Heiss and Svoboda homes, among others. The challenges are not only the safe use of NW 27th but the effects on the conditions including evidence of large ruts in the road after truck traffic making such gravel roads undrivable, as discussed by Mr. Svoboda who testified as to following LPP trucks and measured ruts caused on a gravel road after it had rained. Mr. Scholting testified his barns are accessed via “black top” road then to a private drive rather than from a gravel road. Appellants did not present evidence that there are any existing barn locations that only have one reasonably accessible ingress/egress as would be the case here.

Testimony and exhibits, including Exhibit 59, a video of the NW 27th and Agnew Rd intersection, show that this intersection is a “blind intersection” as Agnew Rd. slopes up heading west from the intersection. The video primarily illustrates the difficulty and potential risks of vehicles turning east onto Agnew from NW 27th and in front of the oncoming westbound traffic. Similarly, the video highlight risks from turning into the eastbound lane with traffic quickly approaching coming from behind. Testimony was heard that younger drivers, such as the hundreds of current and future Raymond high school students each year that will be driving on Agnew to and from school, are less experienced, often more distracted, and not as equipped to deal with what would be a significant increase in truck traffic for the area. Such increase in traffic would also have an impact on all visitors to Raymond Central as it too only has one access point without a stop light.

Public Utility Facilities

Tom Cajka confirmed there is no city or public water on site. No evidence was presented of any challenges related to future energy use or electrical needs if the barns were constructed and operated.

Comprehensive Plan

It is not disputed that the 2040 Comprehensive Plan, Exhibit 19, shows the area in question continuing to be zoned AG.

Public Health

Intervenors called Dr. James A. Merchant, MD, DrPH as an expert and his resume was received as Exhibit 138. Dr. Merchant testified about fugitive dusts arising from broiler facilities, such as the proposed project here. Fugitive dusts are predominantly organic dust composed of feed, microorganisms and chemicals, including antibiotics. These organic dusts, like other well studied organic dust exposures from CAFOs, are rich in bacterial endotoxins in dried chicken feces. Endotoxins are also common to other types of CAFOs (swine, dairy and cattle). Endotoxins are well recognized to be potent inflammatory components of respirable particles that have been implicated in causing asthma, bronchitis and airway obstruction among numerous populations exposed at low levels. Other components of respirable organic dusts are also bioactive. As chicken litter is dry, dusts from these chicken facilities would travel, with prevailing winds from the north, to the Raymond School facility. Ammonia arising from chicken waste is a second important respiratory irritant that would travel with prevailing winds toward the Raymond Central school and its facilities. Ammonia is readily adsorbed onto respirable

organic dust particles but would also appear as a gas and also as secondary ammonia particles known to be important agricultural sources of fine air pollutants and all are well documented to arise from all types of CAFOs including poultry or broiler barns. The concentration of community exposures to endotoxins and ammonia is determined by the number and size of the CAFOs, wind speed and wind direction. Low wind speeds result in higher concentrations of these irritant agents over a longer period of time. Dr. Merchant testified that an eight (8) barn site is one of the largest that were subject of the studies and research he discussed.

Dr. Merchant testified that epidemiological studies of children living up to three (3) miles from a CAFO have consistently found increased rates of asthma. A North Carolina study found that children attending school within three (3) miles of a CAFO, where CAFO odor was noted, had significantly higher rates of asthma, doctor/emergency room visits, asthma medication, activity limitation and school absence. Childhood asthma is the most common childhood chronic disease and a well-documented frequent cause of emergency room/doctor visits, school absences, enormous health care and medication costs and also, rarely, death. Studies of adults living within a mile and a half of CAFOs have been found to result in increased rates of asthma and loss in lung function related to CAFO concentration, distance, and endotoxin exposures. Given these aforementioned anticipated exposures and the documented literature on asthma and loss in lung function, especially related to childhood asthma, Dr. Merchant opined it is more likely than not that children and adults at or near the Raymond High School would suffer from increased rates of asthma, together with related health care costs and loss of productivity, as the

result of the aforementioned environmental exposures arising from the proposed Sunset Poultry CAFO.

Lastly, Dr. Merchant discussed a second major exposure that would arise from the proposed Sunset Poultry CAFO would be infectious agents, some of which are well recognized pathogens to which children and adults living downwind from the proposed poultry facility would be exposed as they travel with respirable dust. A second mode of transmission of infectious agents are flies that would be present in the thousands on the nearly 20,000 dead chickens at the open composting facilities (mortality sheds) at any given time. Flies are known to carry infectious agents and have a typical range of two miles, but can travel as far as 20 miles. It is well documented that these pathogens are common contaminants of chicken litter that is planned to usually remain, after turning which would create more dust clouds, with the scheduled changes in flocks in the eight chick barns. Some of these pathogens are known to be antibiotic resistant which is well known to be promoted by addition of antibiotics to feed. Some of these antibiotics are important to the treatment of human infections. Multiple scientific reports and public health agencies, including the Pew Commission on Industrial Farm Animal Production, for which Dr. Merchant served as a commissioner, have recommended phasing out or banning the use of antibiotics in feed as growth promoters. Finally, epidemiological studies have found significant increases in pneumonia among residents living more than a mile from CAFOs. Dr. Merchant opined it is more likely than not, that students and staff at the Raymond Central school facility would be at increased risk to infections from microbes arising from the proposed Sunset Poultry CAFO.

Safety

In addition to the testimony about roads, traffic conditions and public health, as all relate to safety, Intervenors discussed water and fire concerns. First, Appellants have not done any water or hydrologic studies to indicate availability of water to service the annual needs of nearly 8 million gallons of water or to show the lack of negative effects on the existing higher priority water users, the nearby residences and the school. Dr. Joel testified it was difficult for the school to find adequate water.

Exhibits 116, 117, 118, and 119 were received. These are aerial photos showing the location of the three surrounding volunteer fire departments with approximate travel times, after assembling at each respective firehouse, and the proposed CAFO location. Mr. Waldron, a former volunteer firefighter with Valparaiso, testified it would take about thirty (30) minutes from the time of notification or a fire or emergency in the area in question until the Valparaiso volunteer fire department would arrive given the fact each firefighter has to be notified of the emergency, then travel to the firehouse, wait for their partner, be assigned a vehicle, and then travel to location in need. Mrs. Bussard and Mr. Cajka were cross-examined about prior LPP representative statements that the fans in the barns would act as an accelerant in case of a fire since they are designed to keep the temperature in the barns at a manageable level and the that barns would be a total loss before any fire-fighting assistance could arrive. Mrs. Bussard and Mr. Cajka acknowledged that statement and did not disagree and no contradictory evidence was admitted. Mrs. Bussard further acknowledged a large fire at a poultry CAFO in Bloomfield, Nebraska killing approximately 400,000 chickens.

General Welfare

Two real estate experts testified, Matt Hardesty, managing broker at Woods Bros Realty, and Bill Lange, who is a realtor and commercial and agricultural appraiser. Their resumes were received as evidence, Exhibits 136 and 137 respectively. Each had familiarity with the area and properties in question and with properties similar to the residences in question. Each testified that the proposed project would have a negative effect on the market values of the existing residences in the immediate area, such as the Heiss, Svoboda, and Waldron residences. They also testified to buyer perceptions and preferences and opined it would be more difficult for owners in the area to sell their properties, that days on market would be longer than a comparable property without the existence of a large CAFO nearby, and that this would most likely lead to lower selling prices than what sellers could reasonably expect than if the large CAFO was not constructed.

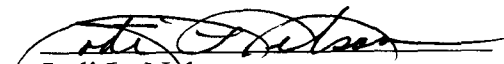
Mrs. Bussard confirmed that numerous neighbors and surrounding landowners previously testified in opposition to their Application and no one, other than Applicants and LPP representatives and Nutrient Advisors, each who have economic relationships with Appellants, testified in support of the proposed CAFO.

Lastly, Appellants did not offer any concessions or solutions to Intervenors' or Appellees' concerns and when asked if Appellants would comply with conditions if required, Mrs. Bussard said they would have to consider them and determine if Sunset believed they were financially doable. However, no conditions were offered.

Having considered Exhibit 21, the Application for Special Permit No. 19035, in conjunction with the applicable Zoning Regulations contained in Exhibit 18, and including full consideration of the evidence presented relating to the effect of the proposed eight (8) barns and use upon the character of the neighborhood, traffic conditions, public utility facilities, the Comprehensive Plan, and other matters relating to public health, safety and general welfare, the court finds that the Application on its face is missing required information and that in weighting 13.002 factors construction and operation of eight (8) large poultry barns housing up to 380,000 chickens per flock and two (2) large out door open air mortality sheds on the proposed location is not consistent with the character of the neighborhood as it exists and would more likely than not have negative effects upon traffic conditions, and other matters relating to public health, safety, and general welfare. As such, the court finds that Special Permit No. 19035 should be, and hereby is denied.

DATED this 27 day of May, 2021.

BY THE COURT:


Jodi L. Nelson
District Judge

cc: Mary E. Jacobson
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