

FOSTER COUNTY
ZONING ORDINANCE
FOR
ANIMAL FEEDING OPERATIONS

ADOPTED APRIL 19, 2005

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PREAMBLE

Public concern about odors produced by animal feeding operations and agricultural concern for rights to practice farming and ranching emerged within North Dakota during 1998. As remedies for these concerns, the 1999 North Dakota Legislative Assembly approved amendments to law that (1) limited the powers of local governments to prohibit or prevent the use of land or buildings for farming or ranching but allowed local governments to regulate the nature and scope of concentrated feeding operations, and (2) established a state standard for odors. The 1999 legislation was Senate Bills 2355 and 2365.

Subsequent to signing this legislation, Governor Edward T. Schafer issued Executive Order 1999-03, which reads in part:

The Department of Health shall . . . take steps reasonably necessary to protect the environment of the state of North Dakota, according to its responsibilities under law; and,

The Department shall establish a working group with interested political subdivisions, or their associations to develop model zoning regulations for the subdivisions to implement as they deem appropriate; . . .

The Department of Health arranged for and facilitated meetings of the work group and a committee of the work group. The work group was comprised of representatives of two livestock producer associations, three boards of county commissioners, two township officers associations, two city officers and the Department of Health. At times, several other people participated in meetings or assisted the work group, including county planners and land-use administrators.

This document is the product of the work group. It represents the consensus recommendation of the work group for zoning of concentrated feeding operations, sometimes referred to as feedlots or animal feeding operations. Its purpose is to:

- ☞ Provide a reference, or model, for zoning and ordinances pertaining to concentrated feeding operations for use by the local governments across North Dakota.
- ☞ Remind local governments of their roles in protecting public safety and health and in planning the uses, conservation and protection of natural resources, including land for farming and ranching.
- ☞ Foster uniform zoning ordinances for concentrated feeding operations among counties and townships. Since regional differences in population density, climate, and soil and water resources occur across the state, local governments can revise the model as appropriate.
- ☞ Avoid duplication among state environmental protection rules and local government zoning ordinances.

INTRODUCTORY COMMENTARY

A summary of the reasons for, and the content of, an ordinance for animal feeding operations.

DEVELOPER AWARENESS

As some counties or townships in North Dakota become increasingly urban, especially those that contain the larger population centers, there is a need to reduce the conflict between farms and ranches and rural property owners. Normal facets of farming and ranching must be recognized by new and potential rural property owners and developers who make these properties available for non-farming or non-ranching uses.

Counties and townships should consider preparing educational materials for potential property developers and buyers; the materials should explain that aspects of some normal activities of farming or ranching can be displeasing to non-farm or non-ranch occupants. For example, informational materials were developed by Spokane County and are available: "Code of the West: Agriculture, Access and Mother Nature." Long Range Planning Department, Public Works Building, 1116 W. Broadway, Spokane, WA.

Normal farming and ranching practices can create these conditions:

- ✓ Animal production can cause odors, flies and noise.
- ✓ Crop production can create road and field dust.
- ✓ Applications of fertilizers and pesticides are common.
- ✓ Slow-moving vehicles and extra-wide equipment are common on roadways.
- ✓ Early morning or late evening truck traffic or chemical applications can occur.

State law places limitations on the ability of people affected by agricultural operations to bring nuisance actions to limit or stop such activities. (See N.D.C.C. chapter 42-04.)

LEGAL AUTHORITY

The North Dakota legislature has given political subdivisions the authority to enact local zoning ordinances for the purpose of promoting health, safety, morals, public convenience, general prosperity and public welfare. (See, for example, N.D.C.C. § 11-33-01, which is the county zoning authority.) In general, however, the law does not allow political subdivisions to enact any regulation or restriction that prohibits or prevents "the use of land or buildings for farming or ranching or any of the normal incidents of farming or ranching." (See, for example, N.D.C.C. § 11-33-02, subsection 1.)

The 1999 amendments to the law addressed an important legal question: whether concentrated feeding operations were “industrial” operations over which counties and townships could exercise their traditional zoning authority, or whether they were “farming” operations over which political subdivisions had no zoning authority? The legislature answered this question. First, it defined farming and ranching to include livestock “feeding”; second, it gave counties and townships authority to “regulate the nature and scope of concentrated feeding operations” permissible within their jurisdictions and to “set reasonable standards, based on the size of the operation” to govern its location. The legislation also forbids counties and townships from banning concentrated feeding operations from their jurisdictions and from prohibiting the reasonable diversification or expansion of farming or ranching operations. The amendments give counties and townships discretion to adopt their own standards regulating the size, nature and location of feedlots subject to the limitations outlined above. The amended law is provided in Appendix I.

FUNCTION OF AN ORDINANCE

There appears to be a misunderstanding among many people in North Dakota as to how zoning functions. Many believe that, because rural areas beyond incorporated cities have historically been agricultural production areas, they are zoned agriculture and are entitled to protection from encroachment of non-agricultural land use. This is not the case. Zoning authorities maintain that farming and ranching areas are not protected from encroachment until they are delineated in comprehensive land-use plans. Comprehensive land-use plans are required by law before adoption of land-use ordinances. Apparently, most rural areas of the state are not covered by comprehensive land-use plans; therefore, there is no protection from encroachment by incompatible land use.

If conflict in land use is to be constrained by local governments so as to protect the right to practice farming or ranching and to foster compatibility with nearby land use, local government officials choosing to adopt an ordinance for animal feeding operations must:

- Adopt comprehensive land-use plans, which delineate land uses and specify land use objectives and policies.
- Adopt separation distances (aka setbacks or reverse setbacks) that reflect qualifiable or quantifiable odor characteristics and odor dispersal. (Compliance with the odor provisions of 1999 SB2365 is not a defense in nuisance litigation, N.D.C.C. chapter 42-01.)
- Identify those new land uses that do not conform to the objectives and policies for delineated agricultural areas so as to infringe on the rights of farming or ranching (not included in the model zoning ordinance for animal feeding operations).
- Identify those new and existing animal feeding operations that, due to size (e.g., number of animal units), present safety hazards, affect natural resources, affect surrounding areas or other means of infringing on the rights of others.

FOSTER COUNTY LAND-USE POLICY

LAND-USE COORDINATION

Development within the zoning jurisdiction of a city shall be determined by that city. Development within the zoning jurisdiction of a county or township that may affect property within a city's zoning limits should be reviewed cooperatively by the board of county commissioners or the township board and the city.

ENVIRONMENT AND PUBLIC SAFETY AND HEALTH

Goal: Develop, adopt and administer zoning ordinances that are consistent with the objectives and policies of this comprehensive land use plan.

Objective A: Manage new development.

Policy A1: Encourage rural residential development, as needed, to locate areas that are in non-productive for farming or ranching.

Policy A2: Protect farming or ranching from non-agricultural development of land uses that would hinder the operations or productivity of farming or ranching. A proposed change in land use should not cause conflict with existing farming or ranching.

Objective B: Promote conservation of natural resources.

Policy B1: Encourage development in ways that conserve natural and agricultural resources. Developments or land use should not pose unacceptable exploitation of natural and agricultural resources or unacceptable risk of polluting air, land or water.

Policy B2: Encourage programs and activities that reduce and control soil erosion and that prevent the growth and spread of weeds.

Objective C: Promote public safety and health.

Policy C1: Encourage programs and activities that discourage siting of development in a flood way or flood plain and that reduce and prevent air, soil or water pollution.

FOSTER COUNTY AFO ZONING ORDINANCE

This land-use ordinance for animal feeding operations includes the following sections.

1. General Provisions
 - 1.1 Definitions
 - 1.2 Equivalent Animal Numbers
 - 1.3 Environmental Provisions
 - 1.4 Enforcement
 - 1.5 Severability
2. Setback Requirements
 - 2.1 Water Resource Setbacks
 - 2.2 Odor Setbacks
3. Conditional Uses
 - 3.1 Permit Procedures
 - 3.2 Ownership Change
 - 3.3 Operational Change

1. GENERAL PROVISIONS

1.1 DEFINITIONS

Terms used in this ordinance have the same meaning as given by the laws and rules of the state of North Dakota, specifically chapter 33-16-03 of the North Dakota Administrative Code. The definitions for these terms and for additional terms (bold print) are:

“Animal feeding operation” means a place where: livestock have been, are, or will be confined, concentrated and fed for 45 or more days in any 12 month period; pasture, crops, or other vegetation are not normally managed or sustained for grazing during the normal growing season; and, animal waste or *manure* accumulates. Adjoining animal feeding operations under common ownership are considered to be one animal feeding operation, if they use common areas or systems for *manure* handling.

“Concentrated animal feeding operation” means a place that meets the regulatory definition of an “Animal feeding operation” and has greater than 1000 animal units or is a “Medium AFO” or “Small AFO” and meets **one** of the following criteria (called “discharge criteria”) i) a man-made ditch, pipe, or similar device carries manure or process wastewater from the operation to surface water or ii) the animals come into contact with surface water that runs through the area where they’re confined.

“**Due process**” involves two essential elements; (1) notice and (2) an opportunity for a hearing. The notice must adequately describe the potential action that might affect the

person(s) being notified and it must provide the person(s) a reasonable time to respond. If the person(s) request(s) a hearing, the hearing must be fair and allow the person(s) to present relevant evidence and arguments.

“Existing” means in place and operating on the date this ordinance is effective.

“Livestock” means any animal raised for food, raw materials or pleasure, including, but not limited to, beef and dairy cattle, bison, sheep, swine, poultry and horses. Livestock also includes fur animals raised for pelts.

“Manure” means fecal material and urine from livestock, as well as animal-housing wash water, bedding material, rainwater or snow melt that comes in contact with fecal material or urine.

“Medium AFO” means 300 to 999 animal units.

“Nutrient management plan” means a written description of the equipment method(s) and schedule(s) by which (1) manure, litter and process wastewater is beneficially reused in an environmentally safe manner such as being applied to land at appropriate agronomic rates as nutrients or fertilizers, and (2) water pollution and air pollution (including odors) are controlled sufficiently to protect the environment and public health.

“Operator” means an individual or group of individuals, a partnership, a corporation, a joint venture, or any other entity owning or controlling one or more *animal feeding operations*.

“Sensitive Waters” includes Pipestem Creek, Dry Lake, Juanita Lake, James River, Kelly Creek, Baldhill Creek, Jack Lake and others as deemed sensitive by the Foster County Zoning and Planning Board.

“**Shall**” means that the requirement is mandatory, rather than optional.

“Small AFO” means under 300 animal units.

“Surface water” means *waters of the state* located on the ground surface such as lakes, reservoirs, rivers and creeks.

“Waters of the state” means all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering upon the state, except those private waters that do not combine or effect a junction with natural surface or underground waters just defined.

1.2 EQUIVALENT ANIMAL NUMBERS

An “animal unit equivalent” is a unitless number developed from the nutrient and volume characteristics of *manure* for a specific *livestock* type. The term “animal units” is used to normalize the number of animals (e.g., head) for each specific *livestock* type which produce comparable bulk quantities of *manure*. The animal unit equivalents for types of *livestock* and the numbers of *livestock* for facility size thresholds of 300 animal units (a.u.), and so forth, are listed in the following table.

Livestock Type	Animal Unit Equivalent	Equivalent Numbers of the Livestock (hd) for Four Sizes (a.u.) of Animal Feeding Operations			
		300 a.u.	1,000 a.u.	2,000 a.u.	5,000 a.u.
1 horse	2.0	150 hd	500 hd	1,000 hd	2,500 hd
1 dairy cow	1.33	225	750	1,500	3,750
1 mature beef	1.0	300	1,000	2,000	5,000
1 beef feeder - finishing	1.0	300	1,000	2,000	5,000
1 beef feeder - backgrounding	0.75	400	1,333	2,667	6,667
1 mature bison	1.0	300	1,000	2,000	5,000
1 bison feeder	1.0	300	1,000	2,000	5,000
1 swine, > 55 lbs	0.4	750	2,500	5,000	12,500
1 goose or duck	0.2	1,500	5,000	10,000	25,000
1 sheep	0.1	3,000	10,000	20,000	50,000
1 swine, nursery	0.1	3,000	10,000	20,000	50,000
1 turkey	0.0182	16,500	55,000	110,000	275,000
1 chicken	0.01	30,000	100,000	200,000	500,000

1.3 ENVIRONMENTAL PROTECTION

The *operator* of a new facility for animal feeding is expected to locate, construct, operate and maintain the facility so as to minimize, reduce or abate effects of pollution on environmental resources and on public safety and health. The *operator* of an existing facility is expected to operate and maintain the facility so as to minimize, reduce or abate effects of pollution on environmental resources and on public safety and health. Each *operator* shall comply with

applicable state laws and rules, including the laws and rules administered by the North Dakota Department of Health and with any permits granted by that department. An operator is responsible for applying best management practices to ensure compliance with the requirements of this ordinance and the permit and to prevent pollution of waters of the state. The best management practices used shall be included in the operation and maintenance plan or in the nutrient management plan.

1.4 ENFORCEMENT

In the event of a violation of this ordinance or a judgement on a civil action by the North Dakota Department of Health, the local unit of government, after due process, can order cessation of a facility for animal feeding within a reasonable period of time and until such time as the *operator* corrects or abates the cause(s) of the violation. If the cause(s) of the violation are not remedied within a reasonable period of time as set by the local unit of government, the permit may be revoked.

1.5 SEVERABILITY

If any paragraph, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portion of this ordinance .

2. SETBACK REQUIREMENTS

2.1 WATER RESOURCE SETBACKS

The *operator* of a new *animal feeding operation* that has more than 1,000 animal units, or is defined as a CAFO, shall not locate or establish that operation:

- A. Within a delineated source water protection area for a public water system. The source water protection areas for water supply wells include the entire wellhead protection area. For the *surface-water* intakes of public water systems, source water protection areas include all or portions of the surface water that supplies the water for the public water system, including all or portions of the surface-water's shoreline.
- B. Within 1,200 feet (365.6 meters) of a private ground water well which is; i) used for domestic use only, and ii) not owned by the *operator* or within 1,500 feet (457.1 meters) of a public ground water well which does not have a delineated source water protection area.)
- C. Within 1,000 feet (304.7 meters) of surface water which is not included in a source water protection area.)

- D. Within the extra-territorial jurisdiction of any incorporated city.
- E. Within one half mile of sensitive waters.
- F. A local unit of government may, upon recommendation of the zoning commission or land use administrator, increase or decrease a setback distance for a new *animal feeding operation* after consideration of the proposed operation's plans, if it determines that a greater or lesser setback distance is necessary or acceptable, respectively, based upon site conditions or demonstrable safety, health, environmental or public welfare concerns.

2.2 ODOR SETBACKS

The *operator* of a new facility for an *animal feeding operation* shall not locate that operation within the extra territorial zoning jurisdiction of an incorporated city.

An owner of property shall locate and establish a residence, business, church, school, public park or zone for residential use so as to provide a separation distance from any *existing animal feeding operation*. The separation distances, or setbacks, are listed in the following table. An owner of property who is an *operator* may locate the owner's residence or business within the setbacks.

Setback Distances for <i>Animal Feeding Operations</i>		
Number of Animal Units	Hog Operations	Other Animal Operations
fewer than 300	none	none
300 - 1000	0.50 mi (0.805 km)	0.50 mi (0.805 km)
1001 or more	0.75 mi (1.207 km)	0.50 mi (0.805 km)
2001 or more	1.5 1.00 mi (1.609 km)	0.75 mi (1.207 km)
5001 or more	1.50 mi (2.414 km)	1.00 mi (1.609 km)

1.5
miles -

The *operator* of a new *animal feeding operation* shall locate the site of that operation from existing residences, businesses, churches, schools, public parks and areas of property that are zoned residential so as to exceed the corresponding listed setback from these places.

If notified in writing by an *operator* of a planned future expansion of an *animal feeding operation*, the local unit of government may implement the corresponding odor setback for a temporary time period not to exceed two years, after which time the setback will remain in effect only if the expansion was completed.

3. CONDITIONAL USES

3.1 PERMIT PROCEDURES

3.1.A. Applicability.

The *operator* of a new *livestock* facility or an *existing livestock* facility, which meets the definition of an *animal feeding operation* and which is a conditional (or special) use of land as listed below, shall apply for and obtain a conditional (or special) use permit.

1. A new *animal feeding operation* that would be capable of handling, or that expands to handle, more than 1,000 animal units is a conditional (or special) use of land.
2. An *existing animal feeding operation* that expands to handle more than 1,000 animal units is a conditional (or special) use of land.

Whenever the capacity of an *animal feeding operation* is expanded to handle more than 2,000 or 5,000 animal units, the *operator* shall apply for a new conditional (or special) use permit.

3.1.B. Procedure.

The local unit of government may practice any or all of the provisions in the following subparagraphs in harmony with the permitting process of its general zoning regulations.

1. Application for a conditional use (or special use) permit shall be submitted to the local unit of government for tentative approval. The designated form for making application to the local unit of government shall be the same form that is utilized by the North Dakota Department of Health. The local unit of government shall notify the Department of Health that it has received such application and approved such application.
2. The local unit of government shall notify by certified mail all property owners having property within the corresponding odor setback distance of a proposed new *animal feeding operation*. This notification must occur within 21 days of receiving the application. The approval process utilized by the local unit of government may include at least one advertised public hearing.
3. Following tentative approval or denial of the application by the local unit of government, the applicant shall be notified by letter of the decision, including conditions imposed, if any.
4. The applicant shall then forward its application for a conditional (or special) use permit, together with the tentative approval by the local government, to the North Dakota Department of Health.

5. Following a review by the Department of Health of the operator's application for a state permit, the Department of Health will notify the local unit of government of its decision.
6. The conditional (or special) use permit will become final following the granting of a permit by the Department of Health.
7. A conditional (or special) use permit granted to the operator of a new animal feeding operation shall be put into use within twenty-four (24) months, or the permit shall lapse and the operator may re-apply.

3.1.C. Application Requirements.

The application for a conditional use (or special use) permit to operate a facility for an *animal feeding operation* shall include a scaled site plan. If the facility will handle more than 1,000 animal units, the scaled site plan shall be prepared by a registered land surveyor, a civil engineer or other person having comparable experience or qualifications. The local unit of government may require any or all of the following elements, or require additional elements, in its site plan review process when needed to determine the nature and scope of the animal feeding operation.

1. Proposed number of animal units.
2. Total acreage of the site of the facility.
3. Existing and proposed roads and access ways within and adjacent to the site of the facility.
4. Surrounding land uses and ownership, if the operation will have the capacity to handle more than 1,000 animal units.
5. A copy of the permit application submitted by the applicant to the Department of Health.
6. A copy of the nutrient management plan.
7. Payment of an application fee of \$0.50 per animal unit.

3.2 OWNERSHIP CHANGE

An *operator* of a facility that includes an *animal feeding operation* having a permit granted by this ordinance shall notify the local unit of government of the sale, or the transfer of the ownership of that operation.

3.3 OPERATING CHANGE

An *operator* of a facility that includes an *animal feeding operation* having a permit granted by this ordinance shall notify the local unit of government of intent to include an alternate *livestock* type. The notice shall be given at least 120 days prior to the anticipated date of the change.

STATUTORY AUTHORITY FOR JOINT POWERS AGREEMENTS

Cooperative or Joint Administration by Counties and Townships of Authority to Regulate Concentrated Feeding Operations

N.D.C.C. § 54-40.3-01 allows counties, townships or other political subdivisions to enter into agreements with other political subdivisions for the cooperative or joint administration of any power or function authorized by law or assigned to one or more of them. Counties and townships may use this authority to pool resources, cut red tape, and make their services and functions more cost effective, timely, efficient and responsive.

The 1999 Legislature amended N.D.C.C. § 11-33-02 and N.D.C.C. § 58-03-11 to clarify the power and function of counties and townships to regulate animal feeding operations. Counties and townships may wish to explore the possibility of cooperative or joint regulation of concentrated feeding operations to avoid unnecessary duplication of these regulations and to satisfy the purpose and intent of N.D.C.C. § 11-33-02 and N.D.C.C. § 58-03-11.

1. Factors Relevant Under Amended Law.

The 1999 Legislature amended N.D.C.C. § 11-33-02 and N.D.C.C. § 58-03-11 to clarify that counties and townships may "regulate the nature and scope of concentrated [animal] feeding operations." These amendments are given under the "INTRODUCTORY COMMENTARY" of this document.

In implementation of the amended laws, counties and townships may find it easier to ensure there are places for the development of animal feeding operations within their jurisdictions and to ensure there are reasonable and consistent regulations governing the nature and scope of operations, if they adopt one regulation for both counties and townships. One way of doing this would be for townships to relinquish their zoning authority over concentrated feeding operations to counties. Another way would be to enter into an agreement for cooperative or joint administration.

2. Decision Choices for a Cooperative or Joint Administration Agreement.

Counties and townships can structure agreements for joint or cooperative regulation of animal feeding operations in several ways. The factors, which are relevant to determining whether a county or township should enter into a cooperative or joint administration agreement with other counties or townships, are listed in Appendix II. One factor is cost. Another is representation. A third is working out the details of such an agreement. There are almost endless ways of structuring such agreements. state agencies and county and township organizations may be willing to help if interest is shown.

CLOSING COMMENTARY

A summary of the prevailing work group discussion that governed the substance of the model zoning ordinance for animal feeding operations.

The work group acknowledges that many counties and townships within the state have constraints on the resources needed for effective administration of zoning and zoning ordinances. The work group also acknowledges that compliance with detailed requirements of zoning and zoning ordinances by many people who practice farming and ranching could be a significant burden. Thus, the work group endeavored to achieve a practical and functional model ordinance supported with a model land use policy (required by law).

A report titled “History of the Development of a Model Zoning Ordinance for Animal Feeding Operations” provides information about the work group and its meetings.

The work group recognizes that the model zoning ordinance likely does not accommodate all existing zoning preferences and provisions of local units of government across the state. Thus, the model ordinance may be amended by a local unit of government as deemed appropriate. A **summary** of the prevailing discussion governing the substance of the model ordinance is provided below.

ROLE OF THE ND DEPARTMENT OF HEALTH (DoH)

- ▶ Local units of government, as well as the livestock producers, prefer that the Department of Health shoulder responsibility for protection of natural resources from pollution via its rules for animal feeding operations, including land application of manure, without additional detail in a local ordinance for animal feeding operations.
- ▶ An ordinance for animal feeding operations should be consistent in choice and use of terms as applied or defined in state laws and rules.

PUBLIC WATER SYSTEM SOURCE WATER SETBACKS

- ▶ New animal feeding operations should avoid locating in areas which have been delineated for the protection of waters of the state, including both surface water and ground water, which are used as drinking water. The federal Safe Drinking Water Act requires EPA-approved state plans for the delineation of those waters-of-the-state used as water resources for public water systems. While the state plan for North Dakota does not prohibit location of new animal feeding operations within delineated areas, the best interests of the owners/operators of animal feeding operations and the owners of the public water systems are not served by siting these operations within delineated source water protection areas.

- ▶ Maps of delineated source water protection areas for public water systems are available on the World Wide Web.
- ▶ The model ordinance does not propose setbacks from those portions of flood plains that are not within delineated source water protection areas of Public Water Systems. Local governments should include a provision concerning land uses in flood plain areas.

ODOR SETBACKS

- ▶ The choices for separation distances (setbacks) for animal feeding operations were balanced with the state odor standard (1999 SB 2365, N.D.C.C. chapter 23-25). The state odor standard makes an odor concentration of seven or more odor concentration units a violation of the standard at distances greater than one-half mile. This standard applies to all animal feeding operations, regardless of the type of livestock or the number confined and fed by the operation.
- ▶ Reported information indicates that amount of odors produced by confined swine feeding operations are greater than amounts of odors produced by other livestock types. After odors are released from animal-housing or manure-storage structures, the atmosphere governs the downwind transport and dispersion of the odors.
- ▶ The strength of odors released into ambient air and transported from animal feeding operations depends upon the construction of the animal housing and manure storage units and the topography of the site, as well as the type and number of animals. There is no apparent threshold based solely on the numbers of animals at which the downwind odor possibly could become a troublesome issue.
- ▶ General zoning provisions usually establish setbacks for buildings and structures from roadways; thus, no specific roadway setback for animal feeding operations is necessary.
- ▶ A framework for odor easements should be developed by the local unit of government when deemed appropriate. State law indicates that odor easements can be obtained by the owners/operators of animal feeding operations from owners of other property located beyond one-half mile (subparagraph b of paragraph 2 of section 11 of N.D.C.C. chapter 23-25).

CONDITIONAL-USE SIZE THRESHOLD

- ▶ The state laws which allow zoning indicate that a local unit of government "... can not prohibit through regulation, the reasonable diversification or expansion of a farming or ranching operation." The interpretation of the words "prohibit" and

“reasonable” intertwine with selection of the appropriate regulatory (in the model ordinance) size threshold for animal feeding operations.

- ▶ The number of animal feeding operations that have been issued permits by the Department of Health is about 440. (The Department presently requires any livestock feeding operation with more than 200 animals units to obtain a permit, and it anticipates a rule change adjusting this threshold to 300 animal units so as to be consistent with federal regulation.) Currently, there are: about 80 operations with 300 or more animal units; nearly 60 operations with more than 500 animal units; and nearly 30 operations with more than 1,000 animal units. Based upon a recent survey, other livestock feeding operations may not have permits because the operators are unaware of the rule permit requirements. The total number of animal feeding operations is unknown.
- ▶ While a local permit requirement for animal feeding operations with less than 1,000 animal units would involve some paperwork, public hearings, etc., on the part of owners/operators, matters of public safety, health, and general public welfare should not be overlooked.

F. Additional summary details of the work group’s discussion of this issue are provided in Appendix I of the report titled “History of the Development of a Model Zoning Ordinance for Animal Feeding Operations.”

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Local government roles.

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Odor emissions.

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APPENDIX I

Legislative Revisions of Local Zoning Law

ROLE OF LOCAL GOVERNMENTS

Although the North Dakota's constitution (Article VII, section 6) and law (NDCC chapter 11-09.1) grant home rule authority to counties, the model language proposed herein assumes that local governments in the state have only those powers expressly granted, or reasonably implied in, the law.

The 1999 North Dakota Legislative Assembly increased protection of farming and ranching in the state by amending laws that allow a county and/or a township to divide, or zone, all or any parts of the county or township into districts. Section 11-33-02 of the North Dakota Century Code, which grants zoning authority to counties, now states:

1. For any or all of the purposes designated in section 11-33-01, the board of county commissioners may divide by resolution all or any parts of the county, subject to section 11-33-20, into districts of such number, shape, and area as may be determined necessary, and likewise may enact suitable regulations to carry out the purposes of this chapter. These regulations must be uniform in each district, but the regulations in one district may differ from those in other districts. A regulation or restriction may not prohibit or prevent the use of land or buildings for farming or ranching or any of the normal incidents of farming or ranching. For purposes of this section, "farming or ranching" means cultivating land for production of agricultural crops or livestock, or raising, feeding, or producing livestock, poultry, milk, or fruit. The term does not include producing timber or forest products, nor does the term include a contract whereby a processor or distributor of farm products or supplies provides grain, harvesting, or other farm services.
2. A board of county commissioners may regulate the nature and scope of concentrated feeding operations permissible in the county; however, if a regulation would impose a substantial economic burden on a concentrated feeding operation in existence before the effective date of the regulation, the board of county commissioners shall declare that the regulation is ineffective with respect to any concentrated feeding operation in existence before the effective date of the regulation.
3. A regulation may not preclude the development of a concentrated feeding operation in the county. A regulation addressing the development of a concentrated feeding operation in the county may set reasonable standards, based on the size of the operation, to govern its location.
4. For purposes of this section, "concentrated feeding operation" means any livestock feeding, handling, or holding operation, or feed yard, where animals are concentrated in an area that is not normally used for pasture or for growing crops and in which animal wastes may accumulate, or in an area where the space per animal unit is less than six hundred square feet [55.74 square meters]. The term does not include normal wintering operations for cattle. For purposes of this section, "livestock" includes beef cattle, dairy cattle, sheep, swine, poultry, horses, and fur animals raised for their pelts.
5. A board of county commissioners may not prohibit, through regulation, the reasonable diversification or expansion of a farming or ranching operation.

6. This chapter does not include any power relating to the establishment, repair, and maintenance of highways or roads.

COUNTY POWERS

First. state law allows, but does not require, boards of county commissioners to take action to promote safety, health and public welfare. Section 11-33-01 of the North Dakota Century Code states, in part:

For the purpose of promoting health, safety, morals, public convenience, general prosperity, and public welfare, the board of county commissioners of any county may regulate and restrict within the county, subject to section 11-33-20 and chapter 54-21.3, the location and the use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation, and other purposes.

However, section 11-33-02, as quoted under the “Role of Local Governments” above, defines the scope of zoning regulations that pertain to farming or ranching and concentrated feeding operations.

Second. Zoning divides land into districts so as to enable compatible and adjoining land uses to co-exist in each district and to separate incompatible land uses from each other. Thus, a zoning ordinance consists of: (1) a map that divides the jurisdiction (county or township) into districts for classes of use, which typically are residential, recreational, commercial, industrial, agricultural and other; and (2) written conditions that establish criteria under which the land may be developed and used for the particular land use class. Section 11-33-02, as quoted earlier in this chapter, grants authority to county commissions to divide the county and to set reasonable standards, based upon size, to govern locations of concentrated feeding operations.

Third. A prerequisite for adopting a zoning ordinance is a comprehensive land use plan for the jurisdiction. Section 11-33-03 of the North Dakota Century Code states, in part:

These regulations shall be made in accordance with a comprehensive plan and designed for any or all of the following purposes:

1. To protect and guide the development of non-urban areas.
2. To secure safety from fire, flood, and other dangers.
5. To conserve and develop natural resources.

These regulations shall be made with a reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses. The comprehensive plan shall be a statement in documented text setting forth explicit goals, objectives, policies and standards of the jurisdiction to guide public and private development within its control.

TOWNSHIP POWERS

Sections 58-03-11, 58-03-12 and 58-03-13 of the North Dakota Century Code contain similar requirements, as described above, for townships that choose to establish zoning districts and regulate development.

APPENDIX II

Elements of a Cooperative or Joint Administration Agreement

N.D.C.C. § 54-40.3-01 provides:

1. Any county, city, township, city park district, school district or other political subdivision of this state, upon approval of its respective governing body, may enter into an agreement with any other political subdivision of this state for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them. Any political subdivision of this state may enter into a joint powers agreement with a political subdivision of another state or political subdivision of a Canadian province if the power or function to be jointly administered is a power or function authorized by the laws of this state for a political subdivision of this state and is authorized by the laws of the other state or province. A joint powers agreement may provide for:
 - a. The purpose of the agreement or the power or function to be exercised or carried out.
 - b. The duration of the agreement and the permissible method to be employed in accomplishing the partial or complete termination of the agreement and for disposing of any property upon the partial or complete termination.
 - c. The precise organization, composition, and nature of any separate administrative or legal entity, including an administrator or a joint board, committee, or joint service council or network, responsible for administering the cooperative or joint undertaking. Two or more political subdivisions which enter into a number of joint powers agreements may provide a master administrative structure for the joint administration of any number of those agreements, rather than creating separate administrative structures for each agreement. However, no essential legislative powers, taxing authority, or eminent domain power may be delegated by an agreement to a separate administrative or legal entity.
 - d. The manner in which the parties to the agreement will finance the cooperative or joint undertaking and establish and maintain a budget for that undertaking. The parties to the agreement may expend funds pursuant to the agreement, use unexpended balances of their respective current funds, enter into a lease-option to buy and contract for deed agreements between themselves and with private parties, accumulate funds from year to year for the provision of services and facilities, and otherwise share or contribute property in accordance with the agreement in cooperatively or jointly exercising or carrying out the power or function. The agreement may include the provision of personnel, equipment, or property of one or more of the parties to the agreement that may be used instead of other financial support.
 - e. The manner of acquiring, holding, or disposing of real and personal property used in the cooperative or joint undertaking.

- f. The acceptance of gifts, grants, or other assistance and the manner in which those gifts, grants, or assistance may be used for the purposes set forth in the agreement.
 - g. The process to apply for federal or state aid, or funds from other public and private sources, to the parties for furthering the purposes of the agreement.
 - h. The manner of responding for any liability that might be incurred through performance of the agreement and insuring against that liability.
 - i. Any other necessary and proper matters agreed upon by the parties to the agreement.
- 2. Any county, city, township, city park district, school district, or other political subdivision of this state may enter into an agreement in the manner provided in subsection 1 with any agency, board, or institution of the state for the undertaking of any power or function which any of the parties is permitted by law to undertake. Before an agreement entered into pursuant to this subsection is effective, the respective governing body or officer of the state agency, board, or institution must approve the agreement and the attorney general must determine that the agreement is legally sufficient.
 - 3. An agreement made pursuant to this chapter does not relieve any political subdivision or the state of any obligation or responsibility imposed by law except to the extent of actual and timely performance by a separate administrative or legal entity created by the agreement. This actual and timely performance satisfies the obligation or responsibility of the political subdivision.

Thus, as defined by N.D.C.C. § 54-40.3-01, a cooperative or joint administration agreement relating to regulating concentrated animal feeding operations may contain the following elements:

- 1. The purpose of the agreement;
- 2. The duration of the agreement and procedure for termination;
- 3. The organization, composition and nature of its administering board;
- 4. Budget and financing;
- 5. Location and who will own or lease the property, if needed;
- 6. How to handle gifts, grants or other assistance, if needed or relevant;
- 7. The process to apply for federal or state aid, or other funds, if relevant;
- 8. Liability and insurance; and
- 9. Any other necessary and proper matters agreed upon by the parties to the agreement.