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SUBJECT: LB 373 – County Zoning Provisions for Wind Energy Generation Projects

REQUESTED BY: Senator Tom Brewer
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
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INTRODUCTION

You have requested our opinion on two questions with regard to county zoning authority. As we have frequently stated, we will limit our opinions for members of the Legislature to instances where the questions posed to us involve a legislative purpose growing out of pending or proposed legislation. Op. Att’y Gen. No. 157 (December 24, 1985). Under that standard, it appears that your questions may relate to LB 373, which you mention in your request letter.¹ The Introducer’s Statement of Intent for the legislation states “LB 373 creates a law that requires counties to have zoning if the county wishes to host wind energy facilities. The zoning must address three subjects (set-backs, noise, decommissioning) but leaves the establishment of particular values for these subjects up to the county.” Committee Records on LB 373, 106th Neb. Leg., 1st Sess. (Introducer’s Statement of Intent) (January 31, 2019). Your specific questions are:

¹ Your request letter also references LB 155, recently passed by the Legislature and signed by the Governor, which pertains to the exercise of eminent domain, and LB 700, which pertains to the decommissioning of wind energy systems.

1. Does Nebraska case law, including but not limited to the *Lincoln Dairy Company v. Finigan*, 170 Neb. 777 (1960) and *Gillette Dairy, Inc. v. Nebraska Dairy Products Bd.*, 192 Neb. 89 (1974) line of cases, stand for the proposition that counties and other political subdivisions may not (a) altogether prohibit or (b) in practice prevent the undertaking of an otherwise lawful occupation or activity?
2. Do Nebraska counties have the lawful authority, e.g., under Neb. Rev. Stat. § 66-913, to impose zoning or other restrictions that prohibit the construction of wind turbines whose height is in excess of a certain specified maximum height?

ANALYSIS

I. *Lincoln Dairy Company and Gillette Dairy, Inc.*

Your first question is whether two cases which you cite stand for the proposition that counties and other political subdivisions may not prohibit or prevent the undertaking of an otherwise lawful occupation or activity. In *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960), the court considered the constitutionality of the Grade A Milk Act and determined that it unconstitutionally delegated legislative powers to the director of the Department of Agriculture, including the power to define crimes. The court also found provisions of the Act violated the due process clause at Neb. Const. art. I, § 3, stating:

A citizen clearly has the right to engage in any occupation not detrimental to the public health, safety, and welfare. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property, and if it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. *Id.* at 785-86, 104 N.W.2d at 233.

The Court further explained:

It is elementary that courts do not determine economic policies of legislation It is just as elementary, however, that in order for such legislation to be valid under the police power of the state it cannot be arbitrary or discriminatory, but must have a real and substantial relation to the objects sought to be attained. *Id.* at 787, 104 N.W.2d at 234.

In *Gillette Dairy, Inc. v. Nebraska Dairy Products Bd.*, 192 Neb. 89, 219 N.W.2d 214 (1974), the court held that certain provisions of the Dairy Industry Trade Practices

Act were unconstitutional, finding that the primary purpose of the act was price fixing. "Whether a business is charged with such a public interest as to warrant its regulation is a legislative question in which the courts ordinarily will not interfere. The Legislature may not, however, under the guise of regulation, impose conditions which are unreasonable, arbitrary, discriminatory, or confiscatory. *Id.* at 96, 219 N.W.2d at 219. "While the exercise of the police power in the milk industry is essential to assure a wholesome product, price fixing is not essential to attain that end." *Id.* at 98, 219 N.W.2d at 220.

In both of these cases the Nebraska Supreme Court held that the right to conduct a lawful business is a constitutionally protected right. However, that right is not absolute and may be curtailed by a proper exercise of the police power of the State. The court's due process analysis focused on whether there was a reasonable relationship to protecting the public health, safety, and welfare. In a more recent case, *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994), the court held that, while the right to conduct a lawful business or occupation is a constitutionally protected right, statutes which required an equine dentist to be licensed by the State did not infringe upon his due process rights.

LB 373, § 1(2), as originally introduced, would provide that "no wind turbine (as part of a wind energy generation project) will be located within three miles of any residential dwelling without the written permission of the owner of the dwelling" AM428, a pending amendment to LB 373, would replace that language with a requirement that "no wind energy generation project shall be constructed unless the county in which the project would be located has zoning regulations or a zoning resolution described in section 23-114 as prescribed in subsection (3) of this section." Subsection (3) then requires zoning provisions to address setbacks, noise standards, decommissioning, and fees for conditional use permits.

As LB 373 concerns the regulation of wind energy generation projects through county zoning, we will briefly discuss Nebraska case law with regard to zoning provisions. While we have found no Nebraska cases which address the constitutionality of zoning provisions for wind energy generation projects, the Nebraska Supreme Court has discussed the test for determining the validity of other zoning ordinances. "County zoning regulations are intended to promote the health, safety, and general welfare of the community by regulating and restricting the use of the land within the area zoned." *Crane v. Board of County Com'rs of Sarpy County*, 175 Neb. 568, 572-73, 122 N.W.2d 520, 523 (1963) (upholding the denial of a special permit to construct a trailer court). "The owner's right to use his property is subject, however, to reasonable regulation, restriction, and control by the state in the legitimate exercise of its police powers. The test of legitimacy is the existence of a real and substantial relationship between the exercise of those powers in a particular manner, and the peace, public health, public morality, public safety, or the general welfare of the city." *Eckstein v. City of Lincoln*, 202 Neb. 741, 744, 277 N.W.2d 91, 93 (1979) (holding that a city ordinance which absolutely prohibited the use of private wells within the city was overbroad). Generally, a legislative act is a valid exercise of the police power if the act is "rationally related to a legitimate state interest."

State v. Champoux, 252 Neb. 769, 772, 566 N.W.2d 763, 765 (1997) (finding that a municipal zoning ordinance which defined “family” as any number of related individuals living together and not more than two additional unrelated individuals did not violate the due process clause).

A “question of the validity or invalidity of a zoning ordinance presents a question to be determined on examination of the facts in each particular case presented.” *Dundee Realty Co. v. City of Omaha*, 144 Neb. 448, 459, 13 N.W.2d 634, 639 (1944). Further, in the context of cases concerning the regulation of livestock operations and confinement facilities, the Nebraska Supreme Court has stated that the “validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.” *Coffey v. County of Otoe*, 274 Neb. 796, 803, 743 N.W.2d 632, 637 (2008). See also *Premium Farms v. County of Holt*, 263 Neb. 415, 640 Neb. 633 (2002) (finding that regulations requiring a confined livestock operation to obtain a conditional use permit and adhere to certain standards concerning manure removal and setbacks were within the county’s statutory authority).

II. County Authority Under Neb. Rev. Stat. § 66-913

Your second question is whether counties have authority under Neb. Rev. Stat. § 66-913 (2018) to adopt zoning regulations that “prohibit the construction of industrial wind turbines whose height is in excess of a certain specified maximum height.” Section 66-913 provides, in pertinent part:

All counties or municipalities having zoning or subdivision jurisdiction are hereby authorized to include considerations for the encouragement of solar energy and wind energy use and the protection of access to solar energy and wind energy in all applicable zoning regulations or ordinances and comprehensive development plans. Such considerations may include, but not be limited to, regulation of height, location, setback, and use of structures, . . . the type and location of energy systems or their components, and the use of districts to encourage the use of solar energy systems and wind energy conversion systems and protect access to solar energy and wind energy.

Neb. Rev. Stat. § 66-913 falls within a series of statutes, enacted as LB 353 in 1979, which originally pertained only to solar energy. Neb. Rev. Stat. §§ 66-901 to 66-914 (2018). These statutes were expanded, by LB 140 in 1997, to also include wind energy. The Legislature describes the purpose of these statutes as “to promote the public health, safety, and welfare by protecting access to solar energy and wind energy” Neb. Rev. Stat. § 66-901. Sections 66-909, 66-909.04 and 66-910 provide for written agreements between landowners pertaining to solar energy systems and wind energy conversion systems. These agreements must be in writing and filed with the county register of deeds. The agreements then run with the land until terminated pursuant to § 66-912.01.

We first point out the expressed intent of the statutes is to promote solar energy and wind energy. And, if a county zoning regulation totally excluded a land use recognized by state law, that regulation might be found invalid under the court's due process analysis. Yet, we note that § 66-913 allows, but does not require, counties to include considerations for the encouragement of solar energy and wind energy in their zoning regulations and comprehensive development plans. We find support for this interpretation in the legislative history of the statutes. It indicates that the Legislature's purpose in enacting the statutes was to provide for these voluntary agreements between neighbors and to "permit local zoning authorities to zone to protect existing solar units." They "permit local zoning board authorities to take into consideration existing solar units when they zone for such things as vegetation or the number of stories permitted in a structure" Floor Debate on LB 353, 86th Neb. Leg., 1st Sess. 2527-2528 (March 30, 1979) (Statement of Sen. Hoagland). The provisions were described as "permissive" and giving local zoning authorities "the opportunity to say this is the way this is going to be zoned and people when they buy their lots know exactly what they are getting." *Id.* at 2531. Senator Hoagland also pointed out that LB 353, § 14 (now § 66-914) "grants local zoning authorities the right to grant a variance in the event that existing solar regulations don't permit the protection of a standing solar unit." *Id.* at 2529.² With regard to LB 140 in 1997, the bill was briefly described as expanding current statutes "to include wind energy easements with other easements." Floor Debate on LB 140, 95th Neb. Leg., 1st Sess. 1067 (February 13, 1997) (Statement of Sen. Preister).

As you inquire whether counties, in particular, have statutory authority to impose height restrictions for industrial wind turbines, we also include a brief summary of the statutes in Chapter 23 which pertain to county zoning authority. A county board is authorized to create a planning commission, to adopt a county comprehensive development plan and to adopt a zoning resolution. Neb. Rev. Stat. § 23-114(1) (2012). A zoning resolution may regulate the location and height of buildings and other structures. Neb. Rev. Stat. § 23-114(2) (2012). The county board may adopt zoning regulations subsequent to the adoption of a comprehensive development plan and, for zoning purposes, divide the county into districts best suited to carrying out the purposes of the plan, including regulation of nonfarm buildings and structures. Neb. Rev. Stat. § 23-114.03 (2012). If authorized by the county board, the county planning commission may grant conditional uses or special exceptions to property owners for the use of their property. Neb. Rev. Stat. § 23-114.01(4), (5) and (6) (2012). Finally, a board of adjustment, appointed by the county board, may, in limited circumstances grant variances from the strict application of the zoning resolution. Neb. Rev. Stat. § 23-168.03 (2012). These statutes, thus, provide general authority for counties to regulate the height of structures.

² LB 373 would amend § 66-914 to remove references to wind energy systems in this authorization for a county to grant variances.

CONCLUSION

The answer to your first question is that the Nebraska Supreme Court, in the two cases which you cite, employed a due process analysis that focused on whether there was a reasonable relationship between the exercise of the state's police power and the protection of the public health, safety, and welfare. Similarly, with regard to the validity of zoning provisions, the court has determined, based on the facts of each particular case, whether the provision was rationally related to a legitimate governmental purpose.

The answer to your second question is that Neb. Rev. Stat. § 66-913 seems to authorize, but not require, counties to take into consideration both solar energy and wind energy when adopting zoning resolutions or regulations. In addition, there is general statutory authority for county zoning in Chapter 23, which may include reasonable regulation of such matters as the height of structures.

Sincerely,

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Approved by:



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pc. Patrick J. O'Donnell
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