

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

|                             |   |                      |
|-----------------------------|---|----------------------|
| IN THE MATTER OF THE        | ) | HP 22-002            |
| APPLICATION OF NAVIGATOR    | ) |                      |
| HEARTLAND GREENWAY LLC FOR  | ) |                      |
| A PERMIT UNDER THE SOUTH    | ) | MINNEHAHA COUNTY’S   |
| DAKOTA ENERGY CONVERSION    | ) | PROPOSED FINDINGS OF |
| AND TRANSMISSION FACILITIES | ) | FACT AND CONCLUSIONS |
| ACT TO CONSTRUCT THE        | ) | OF LAW               |
| HEARTLAND GREENWAY PIPELINE | ) |                      |
| IN SOUTH DAKOTA             | ) |                      |

Minnehaha County, by and through the undersigned counsel of record, hereby submits the following as its Proposed Findings of Fact and Conclusions of Law.

**Findings of Fact and Conclusions of Law**

1. Discussions among Minnehaha County Planning & Zoning staff and the Minnehaha County State’s Attorney occurred over a number of months in late 2022 and early 2023 about the potential form of a transmission pipeline regulation.
2. Planning Director Scott Anderson submitted a staff report addressing the amendment to the 1990 Revised Zoning Ordinance to the Minnehaha Planning Commission before its April 24, 2023 meeting
3. On April 24, 2023, the Minnehaha County Planning Commission held a public hearing which involved extensive public discussion and lasted until approximately midnight.
4. After hearing comments from individuals and representatives of Navigator, the Planning Commission voted 6-0 to approve the proposed amendments to the Zoning Ordinance.
5. Approval from the Planning Commission does not amend a zoning ordinance, but functions as a recommendation to the Board of County Commissioners, which may adopt, amend, or reject the Planning Commission’s recommendation.

6. The first reading of the proposed amendment occurred at the May 2, 2023 County Commission meeting. The proposed amendment was subject of public comment at that meeting, but no action was taken.

7. The second reading of the proposed amendment occurred at the May 23, 2023 meeting.

8. At the May 23, 2023 meeting, a number of amendments to MC 16-173-23 were proposed, some of which were adopted.

9. A motion to amend the setback requirement relating to dwellings, churches, and businesses was deadlocked at 2-2, which meant that the Minnehaha County Commission would consider the amendment at its next meeting on June 6, 2023.

10. On June 6, 2023, the Minnehaha County Commission adopted MC16-173-23, as amended, and the Ordinance became effective on July 13, 2023.

11. MC16-173-23 amends and is made part of the 1990 Revised Land Use Ordinance.

12. The stated purpose of MC16-173-23 is to implement new provisions of the ordinance addressing transmission pipelines in a manner that (a) is not inconsistent with federal or state law; (b) treats all transmission pipelines in a similar manner, to the extent they are similarly situated; and (c) utilizes to the greatest extent feasible the land use and zoning regulations and processes already utilized in Minnehaha County.

13. The stated purposes of MC16-173-23 are legitimate and rationally related to the terms of the ordinance itself.

14. The Minnehaha County Commission made a finding that the proposed establishment of transmission pipelines “would constitute a new land use” that “will significantly impact future development of the County’s land-use planning vision.”

15. The Commission made a finding that this new and expanded use would “adversely impact the traditional and predominant mixed-uses throughout Minnehaha County” and that establishment, development, and expansion of transmission pipelines “would be inconsistent with the 1990 Revised Zoning Ordinance.”

16. The evidence adduced by Minnehaha County substantiated its findings with respect to MC16-173-23.

17. The evidence also established that this amendment to the 1990 Revised Land Use Ordinance is intended to and does address the nature and scope of land use and orderly development within Minnehaha County.

18. MC16-173-23 is intended to be, and actually functions as, a land-use ordinance and is a valid exercise of Minnehaha County’s authority.

19. Before the Minnehaha County Commission enacted MC16-173-23, Navigator was afforded the opportunity to submit public comment.

20. Though the County Commission did not accept every proposal that Navigator submitted, its comments and feedback were considered.

21. For example, the County Commission considered feedback from Navigator with respect to the provision outlining the time by which an applicant must submit written notice of application and related materials to the Minnehaha County Planning Director.

22. Originally, applicants would have 7 days to submit applications at the county level after having filed an application to the PUC or after the ordinance became effective, whichever was later. In the final enacted version of the Ordinance, the time period to submit an Application to the Office of Planning and Zoning was extended to 30 days.

23. Navigator was afforded a meaningful opportunity to participate in public discussion about MC16-173-23 and was not treated differently than other citizens who addressed the Planning Commission and the County Commission.

24. Under the terms of the Ordinance, Navigator was to have submitted a written notice of application to Minnehaha County within 30 days after MC16-173-23 became effective.

25. MC16-163-23 became effective July 13, 2023.

26. Navigator has not complied with the Ordinance by submitting a written notice of application to Minnehaha County as of August 24, 2023.

27. Navigator also has made no effort to submit additional information along with its written notice of application under MC16-163-23.

28. Because Navigator has not provided written notice of application and has not provided Minnehaha County with the information required under 12.18(A), Minnehaha County has not determined whether Navigator's route will qualify as a special permitted use under MC16-173-23 and under the 1990 Revised Zoning Ordinance.

29. If an applicant submits information required under the Ordinance and shows that its proposed route complies with the setback requirements, the application will be deemed a "special permitted use."

30. Any applicant whose application does not qualify as a "special permitted use" because it does not conform with the setback requirements has other options to proceed with its proposed non-qualifying route.

31. An applicant may receive waivers from affected landowner(s) and/or any municipality in order to reduce the applicable setback and bring a non-qualifying route into conformance with the criteria for a "special permitted use."

32. Alternatively, an applicant may seek a conditional use permit to receive approval for a non-qualifying route.

33. Navigator believes that there are 29 landowners from whom it would need to obtain a waiver in order for its route to qualify as a special permitted use.

34. Navigator believes that it will need to obtain easements from 16 of those 29 landowners.

35. Navigator has not made any effort to contact any of the affected landowners from whom it believes that it will need to obtain a waiver in order to proceed with the route for the transmission pipeline that it has submitted to the PUC.

36. Because Navigator has not attempted to contact any of the affected landowners, it is unknown whether it could obtain the necessary waivers that would bring its preferred route into conformance with the Ordinance's setback requirements for a transmission pipeline and thereby qualify as a special permitted use.

37. Navigator has failed to show that it cannot comply with the Ordinance because it has not made an attempt to invoke the waiver provision in the Ordinance.

38. Navigator has not submitted an application for a conditional use permit for its transmission pipeline, despite having this option available under the plain terms of the Ordinance.

39. The evidence shows that Navigator has made a strategic choice not to comply with the initial procedural steps required to submit an application to Minnehaha County, which must occur before the Planning Director may determine whether the proposal qualifies as a special permitted used.

40. Navigator has also made a strategic choice not to invoke the options afforded it if its proposed route does not initially qualify as a “special permitted use.”

41. Navigator has claimed it cannot “comply” with the Ordinance, but this claim is unfounded and contrary to undisputed evidence showing that Navigator has elected not to make use of the waiver procedure or the conditional use permit procedure.

42. Navigator’s preemption motion is not ripe as it has not established that the operation of the Ordinance will cause it injury or burden it.

43. Navigator’s preemption motion is procedurally flawed, as it has not exhausted its administrative remedies afforded under the Ordinance.

44. Until and unless Navigator attempts to make use of alternative procedures available in the Ordinance, it cannot show that the Ordinance will have any effect – much less an “unreasonably restrictive” effect – on its proposed route.

45. Monica Howard is the only witness from Navigator who offered testimony and evidence in support of the Motion to Preempt County Ordinances.

46. An applicant seeking to pre-empt a local control is obligated to provide a “detailed explanation of the reasons why the proposed facility should preempt the local controls” under South Dakota Administrative Rule 20:10:22:19.

47. Howard’s pre-filed testimony, as it relates to Minnehaha County, consists of approximately two and a half written pages.

48. When subject to cross-examination, Howard’s testimony was repeatedly shown to be inaccurate and incomplete.

49. Howard's testimony – the sole evidentiary basis on which Navigator relies in support of its Motion – does not constitute a “detailed explanation” of the reasons why the Ordinance should be pre-empted.

50. Given the deficiencies in Howard's testimony, Navigator's request for preemption fails to include the required “detail description of the restrictiveness of the local controls in view of existing technology, factors of cost, economics, needs of the parties, or any additional information” that is required under Administrative Rule 20:10:22:19.

51. A number of statements in Ms. Howard's testimony lacked credibility or were contradicted by other witnesses whose testimony was credible.

52. For example, Howard stated that based on its route, Navigator “would need to seek waivers from as many or more landowners that it seeks easements on in the county.” N15, at 23.

53. Howard acknowledged that the number of waivers Navigator would need to obtain is substantially lower than the number of easements.

54. Howard maintains that MC 16-173-23 “fails to specify what the criteria are for the County to determine whether a conditional use is appropriate.” N15, at 24.

55. Howard acknowledged that she did not seek to contact Minnehaha County officials to seek clarity on which criteria apply to a conditional use permit for a transmission pipeline before submitting her prefiled testimony.

56. Testimony adduced by Minnehaha County confirmed that an application for a conditional use permit for a transmission pipeline is assessed under the same six criteria that apply to any other conditional use permit application.

57. In Minnehaha County, each conditional use permit is evaluated based on six criteria, regardless of the specific conditional use for which the applicant seeks permission. The six criteria are as follows:

- 1) The effect upon the use and enjoyment of other property in the immediate vicinity for the uses already permitted, and upon property values in the immediate vicinity.
- 2) The effect upon the normal and orderly development and improvement of surrounding vacant property for uses predominant in the area.
- 3) That utilities, access roads, drainage and/or other necessary facilities are provided.
- 4) That the off-street parking and loading requirements are met.
- 5) That measures are taken to control offensive odor, fumes, dust, noise, vibration, and lighting (inclusive of lighted signs), so that none of these will constitute a nuisance.
- 6) Health, safety, general welfare of the public.

58. Minnehaha County submitted evidence showing that while the Planning Commission considers all applicable criteria in deciding whether to approve the conditional use permit, certain criteria may carry less weight or significance than others, depending on the nature of the request for a conditional use permit.

59. Minnehaha County also adduced evidence showing that neither Ms. Howard nor anyone from Navigator contacted the planning department to seek clarification as to what criteria would apply if Navigator submitted an application for a conditional use permit.



60. Ms. Howard testified that in more than two decades of experience routing pipelines, she had been involved in dozens of situations where her employer or principal had sought conditional use permits.

61. She further testified that she could only recall two instances in which a conditional use permit for a project in which she was involved had been denied.

62. The record is devoid of any evidence to suggest a conditional use permit filed by Navigator or any other transmission pipeline would not be viewed objectively and fairly.

### **Alternative Claims**

63. Navigator previously claimed that the Ordinance should be preempted based on factors that are unrelated to the routing of its pipeline, including the information that is required to be submitted under ¶ 12.18(B) and fees that may be imposed under ¶24.05.

64. The provisions relating to information required by the Ordinance and fees that may be required under the Ordinance are not grounds upon which the PUC may preempt an otherwise valid zoning ordinance under SDCL 49-41B-28.

65. Even if these were valid grounds for preemption, the PUC finds that there is no basis to conclude that these provisions render the Ordinance unreasonably restrictive.

66. Navigator claims that MC16-173-23 is unreasonably restrictive because it “requires that Navigator submit some of the same information to the County that it must submit to the [PUC]” and further maintains that this is “unnecessary given that the PUC filings are a matter of public record and the County is entitled to party status before the Commission and the applicant is required by SDCL §49-41B-5.2 to provide a hard copy of its PUC application to the County Auditor in each county affected.”

67. The information required of Navigator under MC16-173-23 is not “unreasonably restrictive,” but is reasonably related and appropriate for Minnehaha County to evaluate a proposed application and determine, among other things, whether it qualifies as a special permitted use.

68. Navigator also maintained that the \$25,000 filing fee for a conditional use permit is unreasonably restrictive.

69. Ms. Howard admitted that she had no personal knowledge as to what costs Minnehaha County will incur in the event that an applicant seeks a conditional use permit for a transmission pipeline.

70. Ms. Howard’s testimony regarding the application fees is not based on her personal knowledge, lacks the requisite evidentiary foundation, and is inadmissible.

71. Furthermore and in the alternative, if Ms. Howard’s testimony regarding the application fee was admissible, it lacks credibility and is not persuasive.

72. Minnehaha County introduced evidence indicating that the review of a conditional use permit will require substantially more time and resources from the Planning and Zoning Department. This evidence was un rebutted at the hearing.

73. Furthermore, because Navigator has not submitted an application under the Ordinance or made any effort to attempt to secure waivers from any landowner whose property is within the 330 foot setback buffer, Navigator has not shown that it faces a legitimate threat that it will need to seek a conditional use permit in order to proceed with its preferred route.

74. The \$25,000 fee provision set out in ¶24.05(b)(1) of the Ordinance is not unreasonably restrictive.

75. Ms. Howard also maintained that the \$300 per linear mile assessment set out in ¶24.05(b)(2) of the Ordinance renders the Ordinance unreasonably restrictive.

76. The \$300 per linear mile fee that is assessed applies only to an applicant who seeks and obtains a conditional use permit.

77. Navigator has not shown that it is likely that it will need to seek a conditional use permit for its preferred route and therefore has not shown that it faces a legitimate threat of being subject to the \$300 per linear mile fee.

78. Even if Navigator can make a showing that it faces a legitimate threat of being subject to the \$300 per linear mile fee, it has not offered evidence to support its claim that such a fee is “unreasonably restrictive.”

79. The \$300 per linear mile fee provision is not unreasonably restrictive.

80. Navigator also claims that the timing of the enactment of the Ordinance is “unreasonably restrictive due to the burdensome routing requirements imposed after years of project development, planning, routing, surveys, engineering, and permitting.”

81. At the hearing, Ms. Howard indicated that this single sentence in Ms. Howard’s testimony was the primary basis upon which Navigator was seeking to pre-empt Minnehaha County’s Ordinance.

82. Ms. Howard’s testimony as to ways in which timing of the enactment of the ordinance was unreasonably restrictive was not persuasive or credible.

83. Navigator has not shown that it faces “burdensome routing requirements” under the Ordinance. It has available to it two options under which it could seek and obtain approval for its proposed route – the waiver option and the conditional use permit option – and it has strategically chosen not to pursue either option.

84. There is no evidence in the record to suggest that Minnehaha County had any obligation to pass land-use provisions or any other local control in advance of any proposal to route a captured carbon pipeline or other transmission pipeline through its jurisdiction.

85. Minnehaha County held hearings to ascertain the views of citizens and affected parties, including Navigator; took those views into consideration; and acted within its authority in passing MC16-173-23.

86. Navigator's chief complaint – that a duly-enacted ordinance should be deemed inapplicable in Navigator's case because the Ordinance was passed after Navigator had filed its PUC application – is unpersuasive.

87. Ms. Howard acknowledged that Minnehaha County, as a public body, is obligated to follow legal requirements in which a proposed ordinance is subject to advanced notice requirements before a public body takes a vote on whether to enact it.

88. Ms. Howard acknowledged that the ordinance was enacted in accordance with the deliberative process and acknowledged that Navigator had every opportunity to participate in that process.

89. The Commission finds that the timing of MC16-173-23's enactment is not a valid basis for preemption in this instance and that Navigator has not met its burden in arguing otherwise.

90. Even if timing of the enactment of MC16-173-23 was a valid basis for preemption, Navigator has not shown that such timing renders the Ordinance unreasonably restrictive as applied to its proposed routing.

91. Navigator also maintains that the effect of MC16-173-23, as it amends and is incorporated into the 1990 Revised Ordinance, is to prohibit routing a pipeline through Minnehaha County. The evidence does not support this claim.

92. Navigator has not met its burden of proof and has failed to show that MC16-173-23 is unreasonably restrictive as applied to its proposed route.

Date: September 4, 2023.

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