

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	)	FINAL BRIEF IN
A PERMIT UNDER THE SOUTH	)	OPPOSITION TO
DAKOTA ENERGY CONVERSION	)	NAVIGATOR’S MOTION TO
AND TRANSMISSION FACILITIES	)	PREEMPT COUNTY
ACT TO CONSTRUCT THE	)	ORDINANCES UNDER SDCL
HEARTLAND GREENWAY PIPELINE	)	§ 49-41B-28
IN SOUTH DAKOTA	)	
	)	
	)	

Minnehaha County, by and through the undersigned counsel of record, submits the following as its Final Brief in Opposition to Navigator’s Motion to Preempt County Ordinances under SDCL § 49-41B-28.

**INTRODUCTION**

Navigator filed its Motion to Preempt County Ordinances on June 26, 2023. The relief Navigator seeks is historically unprecedented in South Dakota. The PUC has never invoked its preemption authority to invalidate a county zoning ordinance and it should not do so here. Three independently sufficient reasons mandate denial of Navigator’s Motion:

1. Navigator seeks preemption on grounds that the preemption statute does not recognize and thereby asks the PUC to exercise authority it does not have.
2. Navigator’s preemption motion is not ripe because it has neither sought approval for its proposed route pursuant to the Ordinance, nor exhausted administrative remedies that may permit it to use precisely the route that it wants to use.
3. Navigator has not produced evidence that would support a finding that the ordinance is “unreasonably restrictive” as applied to its proposed route.

Although Navigator is eager to criticize Minnehaha County’s Ordinance, it has made a strategic decision not to make use of provisions in the Ordinance that would alleviate any burden that it claims it may suffer. Navigator has elected not to seek an initial determination of whether its route qualifies as a “special permitted use” under the Ordinance and has elected not to invoke waiver and conditional use permit procedures that act as alternative ways of obtaining approval if the route does not qualify as a special permitted use. Having made these strategic decisions, Navigator has not shown – and cannot show – that the Ordinance will restrict its plans, much less impose an “unreasonably restrictive” burden that would justify preemption.

At bottom, Navigator is attempting to end-run around Minnehaha County’s zoning laws and the democratic process that produced those laws. Its Motion is procedurally flawed and factually unsupported and should be denied.

## **STATEMENT OF THE CASE**

### **A. Procedural Background**

Navigator filed an application for a siting permit under SDCL Chapter 49-41B on September 27, 2022. In mid-January 2023, the PUC set a procedural schedule for the hearing and adjudication of Navigator’s petition. On March 22, 2023, Minnehaha County submitted a letter to the docket signed by Commissioner Jean Bender, Chair of the Minnehaha County Board of Commissioners. The letter acknowledged receipt of Navigator’s application by the Minnehaha County Auditor and indicated that the proposed transmission pipeline would cover approximately 28.05 miles of the eastern portion of Minnehaha County. The letter continued:

We remain concerned about carbon dioxide transmission pipelines. We would encourage the PUC to use its opportunity within its upcoming hearings to establish a clear record of the scope and scale of any potential hazards that will now affect County Emergency Management Plans. Navigator has held on training for first responders in Minnehaha County, which two of our commissioners attended. Navigators is also offering additional

virtual training for first responders. While this is a good start, more training and assistance will be needed.

Commissioner Bender, writing on behalf of the Board of Commissioners, stated: ***“[W]e also reserve all rights as a county to regulate aspects of the pipeline consistent with state and federal law.”*** *Id.* (emphasis supplied).

As outlined in greater detail below, the Minnehaha County Commission enacted MC 16-163-23 (the “Transmission Pipeline Ordinance”) on June 6, 2023. The passage of the Transmission Pipeline Ordinance occurred after months of public discussion and input in which Navigator played an active role. The Transmission Pipeline Ordinance is not a stand-alone ordinance, but amends and is incorporated in the 1990 Revised Land Use Ordinance. The enactment became effective July 13, 2023.

On June 26, 2023, Navigator filed Applicant’s Motion to Preempt County Ordinances under SDCL § 49-41B-28. Though the Motion asked the PUC to preempt Minnehaha County’s Transmission Pipeline Ordinance, Minnehaha County was not served with the Motion. After being informally apprised of the Motion, Minnehaha County filed its Motion to Intervene for Limited Purpose, To Hold in Abeyance Applicant’s Motion to Preempt County Ordinances, and for Scheduling Order on July 21, 2023.

On July 28, 2023, the PUC entered its Order Granting Minnehaha County’s Motion to Intervene for Limited Purpose and Denying its Motion to Hold in Abeyance Applicant’s Motion to Pre-Empt County Ordinances. At the close of evidence on July 27, 2023, the PUC indicated that interested parties would be afforded the opportunity to offer evidence concerning Navigator’s Motion to Preempt on August 24 and 25, 2023.

At the evidentiary hearing, Navigator offered that portion of Monica Howard’s prefiled testimony that had not previously been admitted and that addressed its Preemption Motion,

which was admitted. *See* N15, at 21-26. Minnehaha County offered prefiled testimony of Commissioner Joseph Kippley, along with three attached exhibits, *see* Ex. M4, M4a-c, and prefiled testimony of Scott Anderson, with four attached exhibits, *see* Ex M5, M5a-d. The prefiled testimony from these two witnesses and the attachments thereto were all admitted into evidence.

## **B. Factual Background**

### ***1. MC 16-179-23 Is Part of the Regulatory Land-Use and Zoning Framework that Implements Minnehaha County's Comprehensive Land-Use Plan.***

Minnehaha County's zoning laws are set out in the 1990 Revised Zoning Ordinance. The goals and objectives of the 1990 Revised Ordinance are to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration or scattering of population; and to encourage a distribution of population or mode of land utilization that will facilitate the economical and adequate provision of transportation, water, drainage, sewerage, schools, parks, or other public requirements. *See* Ex M5, Anderson Testimony, at 2.

In June 2015, the Minnehaha County Commission adopted Envision 2035, a long-term comprehensive planning document that provides additional guidance and direction in making land use and development decisions in Minnehaha County. *Id.* Envision 2035 is intended to update the Comprehensive Plan adopted in 1998 and to serve as a resource to address future agricultural, rural and urban choices and development. The Envision 2035 Comprehensive Plan includes several elements: a population and employment analysis, existing land use analysis, growth management, rural conservation, environmental stewardship, transportation, a future land use plan, and steps to implement the Plan. *Id.* at 3. These implementation steps include

continued reliance on and review of the existing zoning ordinance, as well as continued use of the GIS technology when evaluating proposed land uses. *Id.* at 4.

**2. *Minnehaha County Engaged in a Deliberate, Collaborative, and Measured Policy-Making Process in Adopting MC 16-179-23 to Amend and Update its 1990 Revised Zoning Ordinance.***

The passage of MC 16-179-23 was the culmination of months of public debate and study by stakeholders who sought to have their voices heard regarding what steps, if any, Minnehaha County should take to make revisions to land-use regulations so as to address transmission pipelines. The debate was lively and the level of engagement was consistently high. Citizens of Minnehaha County, affected landowners, and representatives of Navigator and Summit Carbon Solutions all participated in public meetings held by Minnehaha County Planning Commission and the Minnehaha County Commission as part of the process.

Navigator not only attended these public meetings, but also contacted public officials outside of meetings to offer additional comments on various drafts of the Transmission Pipeline Ordinance. At the evidentiary hearing, Monica Howard agreed that Navigator had a full and fair opportunity to participate in the deliberative process. HT 3508-09.

The County Commission was cognizant that the scope of its policy-making must remain focused on land-use policy. Testimony from County Commissioner Joseph Kippley evinces the extent to which the Commission as a whole was conscious of the nature and scope of land-use authority that could be legitimately exercised to address the emergent land use:

Our role is not to permit the pipeline in its nature as a pipeline as that permitting process is with the state's Public Utilities Commission. And our role -- I know one topic that came up quite a bit yet today was still safety concerns, and I think that's a natural human instinct, and that's going to be at least a subcomponent of what we're talking about even in a planning and zoning circumstance. But our role is really not to second-guess any safety specifications of the pipeline, you know, such as thickness of the pipe or its depth in the ground and some other safety

circumstances. That's left to the federal government and its Pipeline and Hazardous Materials Safety Administration.

So what is our role? And our role as the county is firmly grounded in principles of traditional planning and zoning. So this involves considerations for future growth, land use, suitability for certain land use adjacent to other types of land use, et cetera.

So as local leaders, I do believe we play an important role in aspects of routing that will make a substantial and essentially permanent impact on land in our county.

So while ours is an important role, that doesn't necessarily require us to take up an adversarial role. I've sought some neutral principles and objective guidelines grounded in existing federal regulatory structure to try to keep us as neutral and not out to kill any particular project or take sides in this.

Ex M4, Kippley Pre-filed Testimony at ¶13 (quoting HT, May 23, 2023 Mtg., at 26:18-28:25).

Kippley also referred to comments from Commission Jean Bender, chair of the Board of Commissioners, who stated at the June 6, 2023 meeting:

When we talked about trying to see what we could do as a county to bring forward a planning ordinance that, in my mind, would balance the interest of the people with -- who are sharing space, which is a lot of what planning and zoning is, it's intelligent land use, trying to balance the interest of various competing interests.

My goal was not to shut down pipelines. And my goal was to try to balance those interests. And so I would have to tell you that my initial reaction to the map was very much similar to what Commissioner Karsky -- or what Commissioner Kippley said. It looks to me like it does away with the special permitted use. It -- it would make it virtually impossible to thread through the county, and that was not my goal. And so I think that overall -- obviously, people I respect a lot, a lot of you are in this room, clearly I respect the commissioners I serve with, and we make tough decisions all the time. Reasonable people can very much disagree on this. But I don't think the pipelines hinder development.

*Id.* at ¶24 (quoting HT, June 6, 2023 Mtg., at 25:8-26:5).

As part of his prefiled testimony, Kippley offered the following summation in defense of MC 16-179-23 and the process used to adopt it:

I do not purport to speak for my fellow Commissioners, except to communicate this point, on which we all agree: We believe that MC 16-179-23 is a vital component

to the County's land-use ordinance and the comprehensive plan that it implements and that passage of the ordinance is a valid and legitimate exercise of the County Commission's authority. We do not believe that MC 16-179-23 places unreasonable restrictions on the construction and operation of a transmission pipeline and we oppose any effort to persuade the PUC to pre-empt or supersede the Ordinance.

*Id.*

The Commission made specific findings with respect to the need for MC 16-179-23 and its underlying purpose. It found 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." The Commission determined 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." Ex. M5, Anderson Pre-filed Testimony, at 4.

The purpose of MC16-179-23 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." *Id.* at 5.

### ***3. The Procedural and Substantive Provisions of the Enacted Amendment to the 1990 Revised Zoning Ordinance***

MC16-179-23 is not a stand-alone ordinance, but is part of the comprehensive zoning regulation that governs land use and zoning in Minnehaha County. To a significant degree, the provisions of MC16-179-23 refer to and incorporate procedures and substantive provisions that

were already in place in the 1990 Revised Zoning Ordinance. But a number of provisions set out in Article 12.18 apply only to transmission pipelines.

Article 12.18(A)(1)-(6) of MC 16-179-23 identifies documents and information that an applicant for a transmission pipeline must submit at the request of the Planning Director, Scott Anderson. Thereafter, the applicant “will be notified of a determination of its project as a special permitted use or the need to apply for a conditional use permit as soon as practicable but in no event more than 30 days after receiving approval of its permit by the PUC.”

Article 12.18(b) establishes setback criteria that a proposed route must follow in order to be classified as a “special permitted use.” Those setback criteria are as follows:

- |  |                         |
|--|-------------------------|
| (1) Dwellings, churches, and businesses: | 330 feet                |
| (2) Public Parks and Schools:            | 1,000 feet              |
| (3) First Class municipality             | 5,280 feet              |
| Second Class municipality                | 3,960 feet              |
| Third Class municipality                 | 2,640 feet <sup>1</sup> |

Under ¶ 12.18(d), the separation distance is to be measured from the center line of the proposed pipeline to the closest parcel boundary of a use or municipal boundary.

Critically, a proposal that does not initially satisfy these setback criteria may nonetheless still be approved. If a proposed routing does not qualify as a special permitted use, that does not mean the pipeline cannot be built or that the project is “blocked” by enforcing provisions of the Ordinance. *See Ex. M5, Anderson Pre-Filed Testimony, at 15.* First, the applicant may invoke the waiver provision set out in in order to reduce the setback that applies to dwellings, churches, and businesses or that applies to municipalities. This provision makes it possible for an applicant

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<sup>1</sup> The classes of municipality are based on the most recent census data, with first class municipalities having a population of at least 5,000 residents, second class municipality having a population of between 500 and 5,000 residents; and third class municipality having a population having 500 or fewer residents.



to persuade affected landowners to waive the setback requirement and therefore conform to the criteria for a special permitted use. *Id.* Ms. Howard acknowledged this option during cross-examination. HT 3496:8-11. (Q: You can be found that you're not a special permitted use and then go out and get the waivers and conform to the criteria and become a special permitted use, correct? A: Correct.”).

If the applicant's efforts to obtain waivers are unsuccessful, or if the applicant decides not to make an effort to obtain waivers, that does not mean the applicant is “blocked” or “banned” from pursuing its project. The applicant remains free to file a conditional use permit. *See* Ex. M5, Anderson Pre-Filed Testimony, at 15. The conditional use permit application is assessed in view of six criteria 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 and the Comprehensive Plan

*See* Anderson Pre-Filed Testimony, at 9; *see also* Ex M5a (1990 Revised Ordinance, at ¶ 19.05(d)). The conditional use application is originally heard before the Planning Commission. The decision rendered by the Planning Commission on a conditional use permit may be appealed to the Board of County Commissioners. *Id.* (1990 Revised Ordinance, at ¶ 19.06).

**4. *A Single Witness Offers Testimony in Support of Navigator's Preemption Motion.***

Ms. Howard's prefiled testimony is the only evidence Navigator submitted in support of preempting Minnehaha County's Ordinance. The weight of Ms. Howard's prefiled testimony is negligible, at best. Under cross-examination, she was forced to qualify, revise, and recant much of what it said.

Howard also made assertions that are ultimately immaterial to the Transmission Pipeline Ordinance or to the PUC's preemption authority. For example, Howard was asked "Do you think that the setback distances are unreasonably restrictive within the meaning of SDCL § 49-41B-28?" and gave the following response:

Yes. When developing a pipeline project, we identify risks and measures to avoid, minimize, and mitigate those risks. This is also a requirement for a pipeline companies under PHMSA[']s regulations and Navigator is subject to 44 CFR Part 195 [*sic*] and has taken extensive and conservative measures to comply with and exceed those regulations.

Howard's response does not in any way support a finding that the setbacks are unreasonably restrictive, as it literally says nothing about the setbacks or their purported effects. Nor, for that matter, does Howard's response acknowledge that the setbacks are a component of a comprehensive land-use ordinance which (a) addresses ways in which the emergence of a new land use will affect land use and development in the County; and (b) includes two options that can reduce or bypass the setbacks altogether.

Howard's prefiled testimony not only lacks substance, but also turned out to be inaccurate in several important instances. During her live testimony, Ms. Howard specifically qualified or recanted a number of assertions that she made as part of this submission, including the following:

**Assertion:** Navigator "would need to seek waivers from as many or more landowners that it seeks easements on in the county." Howard admitted that it

would need to obtain waivers from 29 landowners and would need to negotiate easements with 16 of that group of 29. The number of landowners from whom it would need to obtain easements was significantly larger.

**Assertion: “A re-route through the County is not possible based on the abundance of overlapping exclusion zones.”** Howard testified that there was no available route to cross Interstate 90, but then appears to have conceded that a re-route would be possible if it proceeded to the east of Sioux Falls instead of to the west of Sioux Falls. *See* HT 3502:18-25.

**Assertion: The Ordinance fails to specify “what the criteria are for the County to determine whether a conditional use permit is appropriate.”** Howard conceded that, after reading through testimony from Minnehaha County officials, she understood that the same six criteria that apply to other conditional use permit applications apply to one for a transmission pipeline and that the criteria are set out in the 1990 Revised Land Use Ordinance. HT3505:7-12. She also admitted that she never attempted to contact any Minnehaha County official relating to this issue before she submitted her pre-trial testimony. HT 3504:25-3505:5.

On a number of other occasions, Howard’s live testimony showed that she failed to understand the Ordinance or was willfully misreading it to create confusion where none exists.

For example, Ms. Howard persisted in stating that an applicant would not obtain a determination of whether its proposal would qualify as a “special permitted use” until after the PUC had issued a decision on its permit application. HT 3492:12-15. The provision in question does not support such a reading. It provides that a determination shall be made “as soon as practicable, but in no event more than 30 days after receiving approval of its permit by the PUC.”

After cross-examination from Intervenors, Ms. Howard responded to questions from the PUC Commissioners. She and Commissioner Nelson engaged in the following exchange:

Q: [I]s your concern and your request for preemption largely because of when they passed them as opposed to what is contained in the ordinances?

A: Yes. So there are other routes that can go through. And there is the ability to get waivers, at least in Minnehaha County for their conditional use permit and a process if you can’t.

3713:17-24. Though Howard’s response acknowledges that “there are other routes that can go through” and that “there is the ability to get waivers” in Minnehaha County, she appears to have concluded that an applicant must obtain waivers from affected landowners in order to be able to apply for a conditional use permit. That is inaccurate. An applicant need not invoke the waiver procedure if it chooses not to do so. Further, obtaining waivers from landowners is not a precondition to applying for or obtaining a conditional use permit for a transmission pipeline. The conditional use permit process is a separate administrative procedure, which may be invoked regardless of whether the applicant has obtained, or has tried to obtain, waivers from affected landowners.

The evidence also shows that the conditional use permit process is a common and often successful option for parties whose proposed land uses do not otherwise qualify as permitted uses or special permitted uses under the 1990 Resized Zoning Ordinance. Ms. Howard’s testimony confirms as much. She stated that she had over 20 years of experience in the pipeline industry, had been involved in dozens of conditional use applications as part of her work, and had been denied on only two occasions. HT 3605:4-7.

***5. Navigator Has Failed to Even Attempt to Comply with MC 16-179-23.***

Under the terms of the Ordinance, Navigator was to have submitted a written notice of application to Minnehaha County within 30 days after MC16-179-23 became effective. MC 16-179-23 became effective July 13, 2023. Navigator has not complied with the Ordinance by submitting a written notice of application to Minnehaha County within 30 days after it became effective. Navigator also has made no effort to submit additional information along with its written notice of application under MC 16-179-23. HT3500-01.

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 MC16-179-23 and under the 1990 Revised Zoning Ordinance.

Navigator has taken no action to try to obtain waivers from any of the affected landowners from whom it believes that it will need to obtain a waiver in order to qualify as a "special permitted use" and proceed with the route for the transmission pipeline that it has submitted to the PUC. *Id.* at 3514:16-19. 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. HT, 3510:19-21; 3513:4-8 (confirming that Navigator need obtain no more than 30 waivers from landowners "in order to come into conformity with Minnehaha County's setback requirements"). Navigator believes that it will also need to obtain easements from 16 of those 29 landowners. HT 3693:17-23.

Because Navigator has not attempted to contact any of the affected landowners, it is unknown whether it could obtain the necessary waivers to bring its preferred route into conformance with the Ordinance's setback requirements and thereby qualify as a special permitted use. HT 3513:9-17.

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. HT 3515:25-3516:3; 3521:7-9. Furthermore, Navigator understands and has conceded that the conditional use permit is a procedure under the Ordinance under which it can receive approval for its proposed route, even if the route does not comply with the setback requirements. HT 3503:11-4.

## ARGUMENT

The PUC's preemption authority is limited and specific to one question: whether an applicant has met its burden in establishing that a local ordinance or control is "unreasonably restrictive" as applied to its proposed route. Despite what Navigator has argued, the PUC does not have preemption authority based on inapplicable theories of "field preemption" or "conflict preemption." The PUC is not charged with addressing whether provisions in the Ordinance are reasonably related to the ends that it seeks to accomplish. Navigator's attempts to refashion the preemption statute into an all-purpose tool misstate applicable law and should be rejected.

Navigator's preemption motion also fails because it is premature and not ripe. As made clear during Monica Howard's cross-examination, Navigator elected not to seek an initial determination of whether its route qualifies as a "special permitted use" under the Ordinance and has elected not to invoke waiver and conditional use permit procedures that act as alternative ways of obtaining approval if the route does not qualify as a special permitted use. Because of these strategic decisions, Navigator cannot show that the Ordinance will have *any* effect on the proposed route, much less an effect that is so "unreasonably restrictive" as might justify preemption.

Finally, the preemption motion must be rejected because Navigator has not met its burden. In a case that involved twelve days of testimony, thousands of pages of documents, more than forty fact witnesses, and a litany of paid experts, the evidence on which Navigator relies to pre-empt Minnehaha County's ordinance is exceedingly thin. Navigator's evidence falls woefully short of establishing by a preponderance of the evidence that is "unreasonably restrictive" as applied to its route.

**I. The PUC should not accept Navigator’s invitation to exceed the scope of PUC preemption authority or consider arguments that are invalid under § SDCL 49-41B-28.**

Navigator’s preemption motion arises under SDCL § 49-41B-28, but many of its arguments are inconsistent with the limited authority granted to the PUC therein. The preemption statute states:

A permit for the construction of a transmission facility within a designated area may supersede or preempt any county or municipal land use, zoning, or building rules, regulations, or ordinances upon a finding by the Public Utilities Commission that such rules, or regulation, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost, or economics, or needs of parties where located in or out of the county or municipality. Without such a finding by the commission, no route shall be designated which violates local land-use zoning, or building rules, or regulations, or ordinances.

SDCL § 49-41B-28.

SDCL § 49-41B-28’s use of the word “may” confirms the statute is discretionary. *See In re Groseth Int’l, Inc.*, 442 N.W.2d 229, 231 (S.D. 1989) (“Ordinarily, the word ‘may’ in a statute is given a permissive or discretionary meaning. It is not obligatory or mandatory as is the word ‘shall.’ ”). No party has identified a case in which the PUC has exercised this discretion to preempt a valid ordinance or locally-enacted law. There is good reason for this.

First, “[a] zoning law is a legislative act representing a legislative determination and judgment, and like all legislative enactments a zoning law is presumed to be reasonable, valid and constitutional.” *Schrank v. Pennington County Bd. of Comm’rs*, 610 N.W.2d 90, 92 (S.D. 2000). Second, the scope of the PUC’s preemption authority is narrow: it is limited to considering local controls “as applied to the proposed route.” Thus, the only basis for preemption is if an applicant meets its burden of proof in showing that the Ordinance is “unreasonably restrictive” as applied to that applicant.

Navigator has attempted to apply a very different standard in its previous arguments addressing its preemption motion, and the PUC must ignore any arguments in favor of preemption that are not tied to the specific language of SDCL § 49-41B-28. Navigator assumes that PUC has exclusive authority to approve siting decisions, as though such decisions occur in a vacuum without reference to local regulations and zoning ordinances. Stated differently, Navigator assumes that the PUC “occupies the field” when it comes to where pipelines may be routed.<sup>2</sup> In fact, the opposite is true. Under South Dakota law, locally-enacted zoning ordinances are presumptively valid as against all land-uses to which they are addressed, including the routing of a transmission pipeline.

Indeed, under SDCL § 49-41B-22(4), an applicant has an affirmative duty to prove that its proposal gives “due consideration” to “the views of governing bodies of affected local units of government.” There is no clearer or more definitive view of a local unit of government than the legislative policies that its legislative officials enacted. It is hard to fathom how Navigator can claim that it is giving due consideration to the views of Minnehaha County while simultaneously asking that provisions of a land-use ordinance specifically addressing transmission pipelines be preempted.

In its previous submission, Navigator also argued that the PUC should preempt the Transmission Pipeline Ordinance because its setback distances were developed without considering the same factors that the PUC must consider in deciding whether Navigator has met its burden of proof to obtain a permit. *See Navigator Motion to Preempt*, at 4-5 (citing factors of Navigator’s pipeline design, plume dispersion modeling, analysis of weather and terrain, high

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<sup>2</sup> *See, e.g., Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018) (noting that “field preemption occurs when federal law occupies a ‘field’ of regulation ‘so comprehensively that it has left no room for supplementary state legislation.’”).



consequence areas, integrity management plan, emergency response planning, among others). Navigator appears to argue that the PUC should preempt a generally applicable ordinance if it imposes a standard that varies from that which the PUC applies in making a permit decision for a specific pipeline project. That is not only an apples-to-oranges comparison, but also has no support in the statutory language. Here, too, Navigator asks the PUC to exercise authority that the Legislature did not confer and to make a finding of preemption that the South Dakota Legislature did not authorize the PUC to make under SDCL § 49-41B-28.

Navigator also previously focused on a supposed conflict between the waiver provision in the Transmission Pipeline Ordinance and state law regarding eminent domain. *See, e.g., Navigator's Response to Minnehaha County's Motion for Intervention for Limited Purpose*, at 12. Navigator claimed that the waiver provision would treat assent of all landowners a precondition of its ability to construct the pipeline and that this somehow creates “an irreconcilable conflict” with the power of a common carrier to invoke the power of eminent domain. *Id.* Each premise of this argument is fundamentally flawed. Universal assent from affected landowners is not a precondition to approval of a transmission pipeline application under the Transmission Pipeline Ordinance. The “waiver” procedure is a tool that applicants can use to bring non-qualifying routes into conformity with setback criteria. It does not grant landowners veto power, and it has no effect on the ability of a common carrier to invoke eminent domain. Navigator’s so-called “irreconcilable conflict” is a strawman argument built from two fallacious premises.

In sum, Navigator’s previously stated theories of preemption misinterpret the purpose, intent, and text of § 49-41B-28 and ask the PUC to exercise powers it does not have. Nothing in the text of statute assigns the PUC the job of determining whether a local control “conflicts with”

a provision of SDCL Chapter 49-41B. By suggesting that preemption is justified to the extent a local ordinance conflicts with or varies from some provision in SDCL Chapter 49-41B, Navigator asks the PUC to play a different role and exercise greater authority than the Legislature actually conferred.

The PUC should not be misled by arguments that make a case for preempting a validly-enacted legislative policy based on illusory conflicts that do not reflect what the Transmission Pipeline Ordinance actually says or how it actually functions. The PUC is not authorized to set aside a local control, unless the applicant has made a sufficient showing – with substantive evidence, not conclusory assertion – that it is unreasonably restrictive.

**II. Navigator’s motion is not ripe because of its self-defeating decision not to apply for approval under the Ordinance or exhaust the administrative remedies provided therein.**

SDCL § 49-41B-28 undoubtedly contemplates relief only in response to an as-applied challenge to local ordinances, rather than a facial challenge. *See* SDCL § 49-41B-28 (providing that a county ordinance “*as applied to the proposed route*” may be preempted). That language confirms that facial challenges are impermissible.

Before an applicant seeks preemption, it must show that the ordinance, as applied to it, has caused it injury or that such injury is imminent. Thus, an applicant cannot seek preemption until it demonstrates, through evidence, that it has been or will be injured, denied, or otherwise aggrieved under the local ordinance. “Generally, courts should decide only mature controversies, eschewing advisory opinions and conjectural questions.” *Lewis & Clark Rural Water Sys. V. Seeba*, 709 N.W.2d 824, 835 (S.D. 2006) (internal quotation omitted). “Even if a court has jurisdiction to decide the question, ‘it should decline to do so if the issue is so

premature that the court would have to speculate as to the presence of a real injury.” *Id.* (quoting *Boever v. SD Board of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995)).

Here, Navigator cannot bring a viable preemption motion because it has not taken any action under the Transmission Pipeline Ordinance, i.e., it has not applied for a special permitted use and has not invoked the waiver process or conditional use process that are available administrative remedies under the Transmission Pipeline Ordinance. Nothing in SDCL chapter 49-41B grants the PUC authority to nullify the local land use administrative process, and Navigator cannot bypass that process under the guise of arguments about what may or may not occur in the future. *See Boever*, 526 N.W.2d at 750 (noting that “courts ordinarily will not render decisions involving future rights contingent upon events that may or may not occur”).

In *Lamar Advertising of SD, LLC v. City of Rapid City*, 944 N.W.2d 793 (S.D. 2020), the South Dakota Supreme Court considered whether the trial court erred in declining to exercise jurisdiction over a declaratory judgment action where the plaintiff sought to challenge the granting of sign permits to one of its competitors. The South Dakota Supreme Court agreed that the plaintiff had failed to exhaust its administrative remedies when it did not appeal the City Building Official’s permitting decision to the Board of Adjustment. Noting that the “doctrine of exhaustion of administrative remedies is one of the fundamental principles of administrative law and jurisprudence,” the South Dakota Supreme Court held that the plaintiff had failed to follow the administrative process and affirmed the trial court’s decision not to consider plaintiff’s declaratory action. *Id.* at 807.

Another instructive example is *Delta Wetlands Props. v. Cty. of San Joaquin*, 121 Cal. App. 4th 128, 146 (Cal. Ct. App. 2004), in which a property owner sought to set aside and declare void a zoning ordinance adopted by San Joaquin County to prohibit the location of water

reservoirs in certain zones within the county. The appellate court found that the property-owner could not make an as-applied challenge to the ordinance, since it had not applied for a permit under the ordinance. It held that “[u]ntil such time as the ordinance has been applied to DW, such a claim is not ripe for adjudication.” *Id.*<sup>3</sup>

The ripeness doctrine also plays a central role in the law of regulatory takings, where a landowner claims to be injured or aggrieved by operation of an otherwise valid statute or ordinance under a theory of inverse condemnation. Such claims allege that a local law or ordinance effects a regulatory “taking” of the landowner’s property that requires just compensation under the Fifth Amendment of the United States Constitution.

The United States Supreme Court has held that a claimant must satisfy two conditions before its regulatory takings claim becomes ripe. First, “a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1982). Second, “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.” *Id.*

This is not a regulatory takings case, but the principles regarding administrative exhaustion in that context help demonstrate the basic flaw in Navigator’s request for preemption here. Navigator complains that Minnehaha County’s setback requirements are unreasonably

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<sup>3</sup> In *San Joaquin County*, the appellate court recognized that the property owner could make a facial challenge to the county ordinance – an option that is not available to Navigator here.

restrictive. But those requirements are not absolute, and there are administrative remedies that Navigator may use to diminish the setbacks or obtain a determination that they do not apply.

Navigator has not previously argued that the administrative options of seeking waivers or asking for a conditional use permit are inadequate or futile and it cannot raise that eleventh-hour argument now.<sup>4</sup> Even if that were not the case, the waiver option and conditional use process are credible, substantive options for any applicant seeking approval for its transmission pipeline. Thus, any attempt to excuse Navigator's failure to exhaust administrative remedies must be rejected.

By seeking to preempt the Ordinance before it has invoked these administrative remedies, Navigator is in effect asking the PUC to speculate and assume that Navigator will suffer an injury under Minnehaha County's ordinance when that, in fact, may not be the case. Unless and until Navigator actually invokes the administrative process and exhausts the remedies afforded therein, it cannot say that the Ordinance will have any effect whatsoever on its proposed route. Accordingly, any claim that the Ordinance is "unreasonably restrictive" as applied to Navigator's proposed route is pure, unadulterated speculation.

**III. Navigator cannot meet its burden in showing that Minnehaha County's Ordinance is "unreasonably restrictive" in view of "existing technology, factors of cost, or economics, or needs of parties where located in or out of the county or municipality."**

Because Navigator has elected not to pursue available remedies, the entire premise of its Motion for Preemption is flawed. Thus, the PUC need not assess other evidence that Navigator has offered in support of its Motion. But if the PUC proceeds to that step, it is readily apparent

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<sup>4</sup> To the extent that Navigator attempts to raise these claims in the first time in its final brief, the PUC should reject them. *See, e.g., Ellingson v. Ammann*, 2013 S.D. 32, ¶ 10, 830 N.W.2d 99, 102.

that Navigator's evidence in support of its preemption motion is lacking in quantity and quality and does not suffice to meet its burden.

Ms. Howard's pre-filed testimony was full of conclusory statements that do not satisfy the *de minimis* standard of a "detailed explanation" that is required under the PUC's Administrative Rule 20:10:22:19 (stating that if a proposed project "violates local land use controls, the applicant shall provide the commission with a detailed explanation of the reasons why the proposed facility should preempt the local controls"). Ms. Howard's live testimony further weakened the tenuous evidentiary basis on which Navigator's Motion ultimately rests because of numerous concessions, qualifications, and recantations to statements made in her prefiled testimony.

Navigator's evidence is not only insufficient, but it also seeks preemption on grounds that are beyond the scope of what SDCL § 49-41B-28 permits. For example, Navigator continues to maintain that the \$25,000 conditional use application fee and the \$300 per linear mile annual fee contained within Minnehaha County's pipeline ordinance are "factors" supporting its position that the ordinance is unreasonably restrictive. *See* HT 3515:1-4; 3518:1-16. Navigator also challenges requirements that an applicant provide certain information as part of its application and provide notice to affected landowners, claiming that such requirements are a "redundant process or arbitrary process" that "seems unreasonably restrictive." HT 3583:9-12.

These arguments are dead on arrival, as these aspects of Minnehaha County's ordinance are unrelated to the question of Navigator's proposed route. The PUC cannot hold that a land-use ordinance is preempted because of the information that the ordinance requires an applicant to provide or the fees that an applicant must pay to pursue an administrative process. Those

aspects of the ordinance are not related to the “proposed route” and do not furnish a valid basis for preemption under the plain language of SDCL 49-41B-28.

Navigator’s objection to the timing of Minnehaha County’s adoption of the Transmission Pipeline Ordinance is a pillar of its argument in favor of preemption. *See* HT 3508:5-10. It also is singularly unpersuasive. Navigator affirmatively chose to route its pipeline through the most populous county in South Dakota. Minnehaha County, in publicly writing to the PUC Commissioners in March 2023, expressly noted that it reserved all rights “as a county to regulate aspects of the pipeline consistent with state and federal law.” As of that writing, Minnehaha County officials were in the process of considering whether to address transmission pipeline as part of its zoning regime. Navigator was involved in the conversations with Minnehaha County at every step. *See* HT 3508:25-3509:6. In fact, Minnehaha County’s final ordinance included amendments as requested by Navigator.

In seeking to preempt Minnehaha County’s ordinance based on the timing of its enactment, Navigator appears to maintain that democratically-elected bodies should be denied the opportunity to respond to new developments and emergent issues of pressing public concern by enacting ordinances and other regulations. Such a view is inherently anti-democratic and assumes that locally-elected bodies must stand silent and passive in the face of new or emergent issues that will have meaningful impact on the lives of their constituents. Indeed, the fact that Minnehaha County adopted its Transmission Pipeline Ordinance in June 2023 is immaterial to the issue of preemption and the factors that are enumerated in SDCL 49-41B-28.

Moreover, Navigator cannot avoid taking responsibility for its own decisions to press forward in seeking a ruling from the PUC before exhausting its options at the county level. It is quite possible, and perhaps prudent, for a PUC applicant to first satisfy (or attempt to satisfy) all

local ordinances—regardless of when those local ordinances were adopted—before the PUC Commissioners render their final decision under SDCL § 49-41B-24. This is particularly true in light of the applicant’s burden of proof under SDCL § 49-41B-22(4).

Consider, by way of example, the recent experience of Crowned Ridge Wind II, LLC. It sought to construct and operate a wind farm in several South Dakota counties. On August 14, 2018, it sought a special exception permit (SEP) from the Deuel County Board of Adjustment to construct its wind farm in Deuel County pursuant to Deuel County ordinances. *See Ehlebracht v. Deuel Cnty. Planning Comm’n*, 972 N.W.2d 464, 468 (S.D. 2022). Crowned Ridge followed Deuel County’s zoning ordinance, and the County Board held a public hearing in September and October 2018. *Id.* at 468-69. The County Board unanimously voted to approve the SEP application sometime thereafter, despite objections of affected landowners. *Id.* at 469.

Some affected landowners sought certiorari review of the Board’s decision in Circuit Court and the South Dakota Supreme Court, which both affirmed the County Board’s decision. *Id.* After Crowned Ridge obtained its SEP from Deuel County, Crowned Ridge submitted its application for a permit with the PUC on July 9, 2019. *See In re Admin. Appeal of Ehlebracht*, 972 N.W.2d 477, 480 (S.D. 2022). Crowned Ridge’s contested hearing at the PUC took place in February 2020. Ultimately, Crowned Ridge prevailed in upholding the SEP granted by Deuel County and the permit granted by the PUC.

The *Ehlebracht* cases demonstrate that a party appearing before the PUC may choose to first obtain a special or conditional use permit from a local governmental authority before asking for a permit from the PUC on the same project. Obviously, Navigator could have requested a delay of its contested hearing and the PUC Commissioners’ decision in order to give it time to comply with Minnehaha County’s ordinance, either via the waiver process or by seeking a



conditional use permit from Minnehaha County.<sup>5</sup> But it strategically chose not to do any of that. For inexplicable reasons, Navigator assumed that the nascent carbon sequestration pipeline industry would not be addressed by local bodies charged with establishing zoning and other land-use laws and instead charged ahead with its application. For equally inexplicable reasons, Navigator chose not to hold its application in abeyance, so that it could use the waiver procedure or conditional use permit process that the Ordinance offers.

One thing, at least, is clear: Navigator has not claimed, and has no basis to claim, that these administrative remedies are futile and has not offered any evidence in support of such a claim. With respect to the efficacy of the waiver process, Navigator has trumpeted the virtue of its projects and indicated that many landowners support its project and have been eager to enter into easement agreements with it. In view of these statements, the PUC should reject any attempt by Navigator the efficacy of the “waiver” procedure afforded under the Ordinance. Navigator cannot show that the Ordinance is unreasonably restrictive when it has not availed itself of a “waiver” option that could diminish or even eliminate problematic effects of the setback criteria.

The same holds true of the conditional use permit option that Navigator has thus far decided not to invoke. Minnehaha County officials have expressed no latent hostility toward transmission pipeline projects generally or toward Navigator generally. Indeed, a number Commissioners expressly stated that the point of adopting the Transmission Pipeline Ordinance was not to block all pipeline projects or any particular pipeline project, but to assure that they proceed within a set of reasonable rules, standards, and procedures set. Commissioner Kippley

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<sup>5</sup> Navigator had sole control over the deadline by which a decision on its application would be rendered. Under SDCL § 49-41B-24.1, the Commission may extend the one-year time frame to issues only “upon request of the applicant.”

spoke directly to this issue in his prefiled testimony and when testifying before the PUC. *See* Exhibit M4, ¶¶ 13, 24; HT 3617:21-3618:7. In addition to this, Navigator’s witnesses repeatedly commented on the good working relationship that it had with Minnehaha County and made much of Navigator’s desire and willingness to work cooperatively with local officials. Howard testified that she had been involved in “dozens” of CUP applications and was aware of only two that had been declined.

The PUC should not accept at face value the alarmist, feverish rhetoric that Navigator employs to describe the potential effects of the Ordinance. The sky is not falling, and recognizing and upholding the valid legislative policies enacted by the elected officials from the most populous county in South Dakota is not at odds with any provision in SDCL Chapter 49-41B. Navigator is not lacking for options to modify its preferred route or to seek approval of its preferred route without modification. What it lacks is evidence showing that the Ordinance, as applied to its proposed route, is “unreasonably restrictive.”

### **CONCLUSION**

There is no valid basis to preempt Minnehaha County’s Transmission Pipeline Ordinance, and Navigator’s Motion should be rejected with respect to Minnehaha County. Minnehaha County takes no position on whether Navigator has met its burden in establishing that its project should receive a permit from the PUC. But if a permit is granted, Minnehaha County joins in the recommendation of PUC staff that Navigator be subject to the condition that it “shall comply with all applicable laws and regulations in its construction and operation of the Project” and “shall obtain all permits required by the applicable federal, state, or local agency prior to engaging in the particular activity covered by the permit.”

