

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)	PREFILED TESTIMONY OF
A PERMIT UNDER THE SOUTH)	JOSEPH KIPPLEY,
DAKOTA ENERGY CONVERSION)	MINNEHABA COUNTY
AND TRANSMISSION FACILITIES)	COMMISSIONER
ACT TO CONSTRU THE)	
HEARTLAND GREENWAY PIPELIN)	
IN SOUTH DAKOTA)	
)	
)	

1. Please introduce yourself to the PUC.

My name is Joe Kippley. I was born and raised in South Dakota. I obtained my undergraduate degree from the University of Notre Dame, and I attended the University of South Dakota Law School where I obtained my juris doctorate. After law school, I obtained a Masters in Health Administration from the University of Iowa. I am presently employed by Sanford, where I work as a clinic director in Sioux Falls.

2. What public office do you currently hold?

I was elected to serve on the Minnehaha County Board of Commissioners in November 2022. As a County Commissioner, I also sit on the Minnehaha County Planning Commission.

3. What is the purpose of the testimony you are submitting as part of this proceeding?

I am offering this testimony to provide the PUC with information on the lengthy process in which citizens and Minnehaha County officials engaged before adopting MC 16-179-23. My

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testimony reflects my own participation in that process and summarizes statements that were made by myself or other commissioners at public meetings. Exhibit A to my testimony is the Hearing Transcript from the May 23, 2023 County Commission Meeting, and Exhibit B is Hearing Transcript from the June 6, 2023, County Commission Meeting.

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.

4. What was your initial involvement in considering amending the Minnehaha County's land use ordinance to address transmission pipelines?

Before I was elected to serve on the Commission, I attended meetings in the summer and fall of 2022 where proposed pipeline projects were a subject of public comment. After I took office, I participated in meetings of the Planning Commission where the Pipeline Transmission Ordinance (which eventually was passed as MC 16-179-23) was considered. I also communicated with opponents and proponents of the Pipeline Transmission Ordinance, including representatives of Navigator, throughout the process.

5. What role did the Planning Commission have in considering transmission pipelines?

The Planning Commission heard public comment at various meetings and worked with staff in the Planning and Zoning Department and the Office of the Minnehaha County State's Attorney on the Pipeline Transmission Ordinance.

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6. What did the Planning Commission eventually do?

The Planning Commission adopted a resolution approving Zoning Text Amendment #23-02 the draft amendment to the 1990 Land Use Ordinance. This occurred at the April 24, 2023 meeting, at which the Planning Commission heard public comment and discussed the ordinance over an approximately two-hour period. At the conclusion of this discussion, the Planning Commission unanimously voted to approve a draft ordinance that included, among other things, an application process, a set of separation criteria that would need to be met in order for a proposed Transmission Pipeline to qualify as a special permitted use, and a set of procedures available to an applicant whose proposed route did not initially qualify as a special permitted use.

7. Was the version adopted by the Planning Commission the same version that was eventually enacted by the Minnehaha County Commission?

No, there were several amendments that were proposed to modify the version that had been recommended by the Planning Commission.

8. What were some of the proposed amendments that were eventually adopted into the Ordinance?

We received feedback from representatives of Navigator and Summit Carbon Solutions regarding the time period within which applications would be submitted. 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. *See Exhibit C, May 23 Commission Meeting Packet, at p 127 (§12.18(A)(1)).* 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.

One version of the Ordinance that was discussed at the County Commission level would have required submission of a letter of intent from an applicant. That proposal was not included

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in the final version of ordinance, which was changed to require written notice of the application. *See* Hearing Transcript (hereafter, “HT”), June 6, 2023 Mtg., at 30-31. As reflected in public comments at the May 23, 2023 and June 6, 2023 meetings, the County Commission wanted to assure that application included enough information to permit a meaningful review, without overburdening the applicant or the Planning and Zoning Department. I believe the text of the final Ordinance accomplishes that.

9. What were some amendments that were proposed, but not adopted, at the May 23, 2023 meeting?

As shown in the transcript of the May 23, 2023 meeting, the County Commissioners discussed the various alternatives that could be used to measure the separation criteria. Originally, I had drafted an amendment that would measure the separation distance from the center of the pipeline to existing dwellings, churches, and business, rather than the property line, and that would also change the separation distance from 750 feet to 330 feet. That amendment was broken into two separate motions.

I moved to amend the ordinance to change the methodology for measurement from an existing structure, rather than from a property line. *See* HT, May 23, 2023 Mtg., at 69. That was an issue that had been discussed by myself and other commissioners at the May 23, 2023 meeting before I made the motion. That motion did not receive a second vote, so the motion itself was not considered or subject to a vote.

10. What was your perception as to why this proposed amendment did not garner a second?

I won't speculate about what may have motivated other Commissioners. Based only on what was said at the meeting, I believe that Commissioner Bleyenbergh had concerns that measuring the setback distance from existing homes would not sufficiently protect landowners

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who had unused building eligibilities on their land. I understand that point, and I think she made an effective case for it in her comments at the hearing:

[If] somebody makes an investment in an acreage or in a farm or property outside of town, that investment is not just in the house. If it was, they would live in town. So that whole parcel is the purchase, and I know from my personal experience, when we bought our first acreage, we purchased an additional five acres with the option to build there later and live in the smaller, older house in the meantime. And I think that's a relatively common practice that you see people buy the land for the land with the intent to build somewhere else on the property later.

We all know the eligibility restrictions, so I think a lot of times it doesn't have to do with the eligibility, it has to do with the location, maybe the school district, for me, the trees in the area, and then we, you know, project where we would like to build down the road.

HT, May 23, 2023 Mtg., 61:16-62:9. Commissioner Beninga agreed with Commissioner Bleyenbergs comments cited above. *See id.* at 62:15-18. Based on his comments at the meeting, my perception was that Commissioner Beninga also believed that a setback distance of greater than 330 feet from the property line was appropriate. Though I did not ultimately share that view, I respect Commissioner Beninga's perspective as well.

11. Are there other components of MC 16-179-23 based on distances from the property line?

Yes, all of the separation criteria are based on the property line boundary. So, for example, the 1,000-foot separation requirement for schools and public parks is based on the property line. Additionally, the 1990 Revised Land Use Ordinance includes at least one other setback based on the property lines. One of the criteria governing the construction and placement of Wind Energy Conversation Systems calls for a setback that is based on the height of the tower, and that setback is measured from the property line of a parcel where a wind tower is placed.

12. Were there other proposed amendments at the May 23, 2023 meeting?

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Yes, I offered a separate amendment to change the separation criterion for dwellings, buildings, and schools from 750 feet to 330 feet. The Commissioners discussed the setback and the merits of the proposal before I formally moved to amend the ordinance. Some of that discussion was also directed at the appropriate methodology for measuring the setback criteria. After the motion was seconded, we engaged in further discussion and heard comments from citizens in attendance.

13. Did you explain the thinking behind the amendment to the separation criteria at the May 23, 2023 meeting?

Yes, I did. I discussed what I understood the role of the County Commission to be in this particular context, as follows:

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.

HT, May 23, 2023 Mtg., at 26:18-28:25.

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I would add that the Commissioners who did not share my view as to whether 750 feet or 330 feet was an appropriate setback expressed similar sentiments about our role and limiting our focus to land-use and future economic development. For example, Commissioner Bleyenberg stated: “I don't think any of our goal is to limit economic development in the county in the least, but I feel like this ordinance really helps to channel the growth and the development in a way that we would want to see it go.” HT, May 23, 2023 Mtg., 23:23-24:3.

14. What was the origin of the 330-foot figure?

It was set out in a Department of Transportation/PHMSA publication entitled the 2020 Emergency Response Guidebook that I had at the hearing and that I referenced during my comments about the proposed amendment. HT, May 23, 2023 Mtg., at 58. The electronic version of this publication is being submitted with my testimony. At various points the Guidebook referred to a 100-meter minimum, or 330 feet, as minimum distance to isolate in the event of an incident involving various substances that would fall within the Transmission Pipeline definition.

15. Were there individuals at the May 23, 2023 and June 6, 2023 who opposed a reduction in the setback criterion?

Yes, a number of citizens spoke against the amendment at both meetings. As reflected in the transcript, some raised concerns about safety, and others indicated that it would be an intrusion on privacy and autonomy to have a pipeline be that close to the property line of an existing dwelling.

16. Did Commissioner Karsky, who seconded your motion to reduce the setback from 750 feet to 330 feet, comment on that proposal directly at the May 23, 2023 meeting?

Yes, Commissioner Karsky made a number of comments on this issue, including the following:

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The other thing is when I look at the map and I see the circles on the 750 feet, from what I can see, and I haven't taken that hard of a look, it does appear to really eliminate a lot of places that -- or eliminate totally the ability to permit a pipeline based on the 750-foot setback.

I am not in favor of that. I think we have to allow free enterprise, and there's a lot of people that are for this. There's a lot of people that are against it. We're just trying to come up with reasonable rules for us to move this forward.

HT, May 23, 2023 Mtg., at 85:9-19. I also expressed reservations that the 750-foot setback would limit the potential pipeline routes that would be feasible. And that issue came up again at the June 6, 2023 meeting.

17. How did the Commission resolve the motion to change the setback criterion at the May 23, 2023?

When the motion was taken up for a vote, Commissioner Karsky and I voted in favor of it, and Commissioners Beninga and Bleyenbergh voted against it. HT May 23, 2023 Mtg., at 86-87. Because the vote was 2-2, we were informed that the motion would have to be continued and taken up at the next meeting pursuant to a state law. *Id.* at 87-88. As outlined below, we came back on June 6, 2023 and eventually passed the amendment by a vote of 4-1.

18. Were there any other amendments that you proposed at the May 23, 2023?

Yes, I proposed that we maintain the \$25,000 application fee for a conditional use permit for a Transmission Pipeline, but eliminate the annual fee that would apply to a transmission pipeline that was granted a conditional use permit under §24.05(b)(2).

19. Was there any other discussion about this particular proposal?

Yes, Scott Anderson was asked to discuss the fee that the County charged for conditional use permits that are granted for sand and gravel exploration. He also confirmed that if any fees

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were collected under this provision of the Pipeline Transmission Ordinance, they would go into the County's general fund. Commissioner Beninga also made the following comment:

I don't think the \$300 per linear mile is going to put anybody in the pipeline industry out of business. The other piece of that is we're going to ongoing issues to provide townships and rural communities with support of their volunteer fire departments, and all that kind of stuff, so I have no problem with the \$300.

HT, May 23, 2023 Mtg., at 96.

20. What was the outcome of that proposed amendment?

The motion did not receive a second, so it was not voted on.

21. Are you aware of testimony from Monica Howard, a representative of Navigator, opining that the \$25,000 application fee to submit a conditional use permit and the annual fee of \$300 for those applicants are granted is unreasonably restrictive?

I am generally aware that Navigator has taken that position, and I strongly disagree with it.

22. Why?

I think that both provisions are reasonable. Assessing a conditional use permit for a transmission pipeline will involve a significant amount of resources from the Planning and Zoning Department, and I think \$25,000 is justified in light of what we would expect that review and assessment process to entail. Though I sought to eliminate the \$300-per-mile fee, I do not see it as too high or as unreasonable or arbitrary. My view – as I stated at the May 23, 2023 hearing – was that the income ultimately generated from that provision may not justify the work of sending out invoices and keeping track of it. So it was more a question of whether charging a fee was an efficient use of resources. On a more fundamental level, I also do not understand that

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the PUC's oversight authority of local land-use controls, including Minnehaha County's Ordinance, actually reaches provisions that set out an application procedure or fees that a county charges. That may be more of a legal question, but I would be surprised if it were held that county commissions lack authority to set fee structures relating to conditional use permits.

23. What happened at the June 6, 2023 meeting?

At the June 6, 2023 meeting, I again moved to adopt an amendment that would change the building setback from 750 feet to 330 feet.

24. What additional issues arose from the discussion at the June 6, 2023?

Commissioner Bender was not at the May 23, 2023 meeting, and she shared her views at the June 6 meeting before we heard comments from the public. Among other things, she stated:

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.

HT, June 6, 2023 Mtg., at 25:8-26:5.

Commissioner Bender also addressed the question of timing and wanting to have the Ordinance in place. She stated:

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I do think we want to get an ordinance passed before the PUC process starts so that everybody understands the rules of the road here in Minnehaha County, and so I will be supporting this amendment.

Id. at 26:21-25.

25. What was the outcome of the amendment to change the setback from 750 feet to 330 feet with respect to dwellings, buildings, and churches?

After discussion among Commission members and comment from citizens in attendance, that motion was passed 4-1. *See id.* at 26-27.

26. You participated in discussions of the ordinance as a member of the Planning Commission and of the County Commission. What were some common points of consensus among members of both bodies?

There was significant appreciation for the work performed by the Planning and Zoning Department and the Office of the Minnehaha County State's Attorney. There was also significant appreciation for the level of informed and considerate engagement we received from residents of Minnehaha County, regardless of their views.

As far as the County Commission goes, I think each Commissioner understood and agreed that we needed to address transmission pipelines as part of our ordinance and as part of the Comprehensive Plan that the Ordinance is intended to advance and implement. Obviously, there were different views as to what the Ordinance should say, but everyone agreed that this was an issue that the County needed to address and that failing to address the issue would be a disservice to our constituents.

The exchange of views at the public meetings also made clear that each Commissioner understood that regulation at the county level was appropriate, but that the exercise of our authority should be focused on issues relating to land use and the ways in which zoning, land use, and economic development all intersect.

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In my view, everyone had substantially the same underlying purpose as to what a Transmission Pipeline Ordinance should accomplish. We had respectful disagreements about which specific policies were most appropriate to accomplish that purpose, but that is the nature of the legislative process.

27. What is the Minnehaha County Commission's position with respect to Navigator's Motion to Pre-empt County Ordinances?

We do not believe the Ordinance is unreasonably restrictive. Navigator's Motion should be denied with respect to Minnehaha County.

28. Does that conclude your testimony?

Yes.

Date: August 21, 2023.

/s/ Joseph Kippley
Joseph Kippley, Commissioner, Minnehaha County Board of
Commissioners

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EXCERPTS:

May 23, 2023 meeting, at 28:9-25

What is our role?