

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)	RESPONSE TO APPLICANT’S
AND TRANSMISSION FACILITIES)	INTERROGATORIES (FIRST
ACT TO CONSTRUCT THE)	SET)
HEARTLAND GREENWAY PIPELINE)	
IN SOUTH DAKOTA)	

STATE OF _____)
: SS
COUNTY OF _____)

_____, being first duly sworn, states that she has read Minnehaha County’s Responses to Applicant’s Interrogatories and the following answers thereto; that the answers were prepared with the assistance and information of others upon whom she has relied, including other County officials and employees and the undersigned counsel; that the answers, subject to inadvertent or undiscovered errors, are based on and are therefore necessarily limited by the record and information still in existence, presently recollected and thus far discovered in the course of the preparation of these answers; that consequently she reserves the right to make any changes in the answers if it appears at any time that omissions or errors have been made in those answers or that more accurate information is available; that subject to those limitations, the answers are true to the best of her knowledge, information and belief.

Jean Bender, Chair,
Minnehaha County Board of Commissioners

Subscribed and sworn to before me this
____ day of _____, 2023.

GENERAL OBJECTIONS

1. Objection on grounds of Legislative Privilege:

A number of interrogatories propounded by Applicant call for disclosure of information that is protected by the “legislative privilege,” and what follows is expressly incorporated by reference as if fully reinstated on each occasion where Intervenors invoke the legislative privilege in response to one of the interrogatories.

The legislative privilege has its roots in the Speech or Debate Clause of the United States Constitution. U.S. Const., Art. I, § 6. The U.S. Supreme Court recognized common-law immunity for state legislators in *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). In *Tenney*, the Court created absolute immunity from civil suit for state legislators acting within “the sphere of legitimate legislative activity.” *Id.* at 376. Legislative acts include passing generally applicable, prospective laws or regulations, including zoning ordinances.

Furthermore, numerous courts have recognized that the legislative privilege also applies to local governmental bodies, including elected bodies authorized to pass zoning ordinances. *See, e.g., Northfield Dev. Co. v. City of Burlington*, 136 N.C. App. 272, 281-282. The Restatement (Second) of Torts recognizes that legislative immunity applies to “members of subordinate legislative bodies to which the State has delegated legislative power, such as a city council or a county board.” Restatement (Second) of Torts § 590 (1977), cmt. c. The South Dakota Supreme Court has repeatedly relied on the Restatement (Second) of Torts in interpreting and defining the contours of South Dakota common law. *See Burgi v. E. Winds Court, Inc.*, 2022 S.D. 6, ¶ 17, 969 N.W.2d 919, 923; *Koenig v. London*, 2021 S.D. 69, ¶¶ 22-24, 968 N.W.2d 646, 653.

There is no claim against any individual commissioner that is part of this proceeding. Nonetheless, the legislative privilege “also functions as an evidentiary and testimonial privilege.”

2BD Ltd. Pshp. v. County Comm'rs, 896 F. Supp. 528, 531 (D. Md. 1995); *see also Schlitz v. Commonwealth of Virginia*, 854 F.2d 43, 46 (4th Cir. 1988) ("the purpose of the doctrine is to prevent legislators from having to testify regarding matters of legislative conduct, *whether or not they are testifying to defend themselves*") (emphasis supplied). Accordingly, the legislative privilege extends to depositions and other forms of discovery that would call for disclosure of the motives, reasoning, or rationale behind legitimate legislative activity. A number of interrogatories call for precisely this type of information.

2. Objection on Grounds of Attorney-Client Privilege

Employees and officials of Minnehaha County consulted with attorneys within the Office of Minnehaha County State's Attorney for purposes of facilitating the rendition and receipt of legal advice relating to the Transmission Pipeline Ordinance. Minnehaha County is not producing communications or documents that are protected by the attorney-client privilege or the work-product protection and is not producing a privilege log identifying those documents that being withheld on grounds thereof.

INTERROGATORY 1: Identify all persons not employed by Minnehaha County with whom any employee or agent of Minnehaha County, including any Commissioner or elected official, has communicated or consulted with concerning any proposed ordinance that would affect the proposed Navigator Heartland Greenway pipeline in Minnehaha County, including Ordinance MC16-179-23.

ANSWER: Minnehaha County officials have communicated with representatives of Navigator and Summit Carbon Solutions LLC, each of which is proposing to build a pipeline that would traverse through portions of Minnehaha County. Minnehaha county officials have also heard from multiple landowners and concerned citizens at public meetings. The meeting minutes and publicly-available audio and video recordings of Planning Commission and County Commission meetings will reflect the identity of individuals who spoke on issues relevant to the ordinance. In addition, transcripts of the May 23, 2023 and June 6, 2023 meetings are being produced herewith.

INTERROGATORY 2: Identify all persons employed by Minnehaha County, including any Commissioner or elected official other than a lawyer in the office of the State’s Attorney, who have been involved with the research or writing related to any proposed ordinance that would affect the proposed Navigator Heartland Greenway pipeline in Minnehaha County, including Ordinance MC16-179-23.

ANSWER: Members of the Zoning and Planning Department and Minnehaha County were involved in research and writing relating to the proposed ordinance, as is customarily the case. Those individuals include Scott Anderson, Heide Jerke, Kyle Vande Weerd, Kevin Hoekman, and Carol Mueller. Members of the Planning Commission and the County Commission reviewed and were given opportunity to ask questions about the ordinance and various proposed versions thereof, as is also customarily the case. All such communications are subject to the legislative privilege and/or attorney-client privilege, which are specifically and expressly invoked.

INTERROGATORY 3: Identify all subject-matter experts with whom Minnehaha County has consulted about any proposed ordinance that would affect the proposed Navigator Heartland Greenway pipeline in Minnehaha County, including Ordinance MC16-179-23.

OBJECTION, Intervenor’s object to this Interrogatory on the grounds that it is vague and ambiguous as to what is meant by “subject-matter” experts and the request does not reasonably identify the information being sought. Intervenor’s further object to the extent that the Interrogatory calls upon disclosure of any communications that are protected by the legislative privilege and/or attorney-client privilege. Subject to and without waiving this Objection, Intervenor’s respond as follows:

Other than experts on land-use planning and zoning employed by Minnehaha County, Intervenor’s did not hire or retain third parties to consult on the ordinance. Interested parties provided Minnehaha County with various materials, as reflected in the document production, which may qualify as materials authored or produced by subject-matter experts.

INTERROGATORY 4: State all facts establishing that the separation distances required under Ordinance MC16-179-23 are necessary to protect the public health, safety, or welfare.

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application for a permit should be granted or, alternatively, in showing that Intervenor’s ordinance is unreasonably restrictive according to the factors set forth in SDCL 22-41B-28. The duly-enacted Ordinance amending the 1990 Revised Zoning Ordinance is presumptively reasonable and enforceable as a matter of law. Intervenor’s

further object to the extent that the Interrogatory calls for disclosure of information, analysis, rationale, or communications that are protected by the legislative privilege. Subject to and without waiving this Objection, Intervenor responds as follows:

The Ordinance amends the 1990 Revised Zoning Ordinance, which aligns with and helps to effectuate the County's comprehensive plan, as adopted by the County pursuant to SDCL § 11-2-12. The stated purposes of the Ordinance and the 1990 Revised Zoning Ordinance that it amends are set forth in each respective document, and transcripts relating to the public meetings held by the Minnehaha County Commission are being produced herewith.

INTERROGATORY 5: State all facts, including any route you have identified, showing that it is possible for Navigator to construct its proposed pipeline in Minnehaha County with a separation distance of 330 feet from dwellings, churches, and businesses measured from the center line of the proposed pipeline to the closest parcel boundary of a use.

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application should be granted or, alternatively, in showing that Intervenor's ordinance is unreasonably restrictive according to the factors set forth in SDCL 22-41B-28. The duly-enacted Ordinance amending the 1990 Revised Zoning Ordinance is presumptively reasonable and enforceable as a matter of law. Intervenor further object to the extent that the Interrogatory calls for disclosure of information, analysis, rationale, or communications that are protected by the legislative privilege. Subject to and without waiving this Objection, Intervenor responds as follows:

To date no person or entity has sought a determination as to whether a proposed pipeline constitutes a "special permissive use" under the Ordinance, nor has Navigator or any other party submitted an application in accordance with the Ordinance. Further, Navigator has not provided the County or the PUC with a route that it deems to be final, as it has claimed authority to modify the proposed route or "corridor" that has been identified by making modifications or changes in routing up to a half mile in distance. Additionally, Navigator personnel have testified that the route may change based on responsiveness of individual landowners to proposed easements or the terms thereof or based on other factors.

In any event, if there is a section or sections of a route that is subject of Ordinance MC16-179-23 that would not comply with the buffer or setback set out in the Ordinance, the applicant may seek waivers from the affected landowner(s) or municipality and thereby bring the application back into conforming use as a "special permitted use" under the terms of the Ordinance. Alternatively, the applicant may choose to invoke the conditional use permit process and seek approval of its route through this process.

INTERROGATORY 6: State all facts explaining why it is necessary to the protection of public health, safety, or welfare to measure the separation distance from the centerline of the proposed pipeline to the closest parcel boundary of a use.

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application should be granted or, alternatively, in showing that Intervenor’s ordinance is unreasonably restrictive according to the factors set forth in SDCL 22-41B-28. The duly-enacted Ordinance amending the 1990 Revised Zoning Ordinance is presumptively reasonable and enforceable as a matter of law. Intervenor further object to the extent that the Interrogatory calls for disclosure of information, analysis, rationale, or communications that are protected by the legislative privilege.

Subject to and without waiving this Objection, see documents being separately produced, including transcripts from the May 23, 2023 and June 6, 2023 County Commission meetings.

INTERROGATORY 7: State all facts supporting the statement in Ordinance MC16-179-23 that “the proposed establishment of the bulk transportation of toxic, hazardous and regulated substances and gases by Transmission Pipeline (as defined below) through the County would constitute a new land use.”

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application should be granted or, alternatively, in showing that Intervenor’s ordinance is unreasonably restrictive according to the factors set forth in SDCL 22-41B-28. The duly-enacted Ordinance amending the 1990 Revised Zoning Ordinance is presumptively reasonable and enforceable as a matter of law. Intervenor further object to the extent that the Interrogatory calls for disclosure of information, analysis, rationale, or communications that are protected by the legislative privilege.

Subject to and without waiving this Objection, see documents being separately produced, including transcripts from the May 23, 2023 and June 6, 2023 County Commission meetings.

INTERROGATORY 8: Identify by name and location all existing pipelines in Minnehaha County that meet the definition of a “transmission pipeline” in Ordinance MC16-179-23.

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application should be granted or, alternatively, in showing that Intervenor’s ordinance is unreasonably restrictive according to the factors set forth in SDCL 22-41B-28. The duly-enacted Ordinance amending the 1990 Revised Zoning Ordinance is presumptively reasonable and enforceable as a matter of law. Intervenor further object on the grounds that the Interrogatory calls for a prospective or advisory opinion in the form of a legal conclusion.

INTERROGATORY 9: State all facts that permitting new “transmission pipelines” in Minnehaha County would “adversely impact the traditional and predominant mixed-uses through Minnehaha County” as stated in Ordinance MC16-179-23.

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application should be granted or,

alternatively, in showing that Intervenor’s ordinance is unreasonably restrictive according to the factors set forth in SDCL 22-41B-28. The duly-enacted Ordinance amending the 1990 Revised Zoning Ordinance is presumptively reasonable and enforceable as a matter of law. Intervenor further object to the extent that the Interrogatory calls for disclosure of information, analysis, rationale, or communications relating to this finding that are protected by the legislative privilege.

Subject to and without waiving this Objection, see documents being separately produced, including transcripts from the May 23, 2023 and June 6, 2023 County Commission meetings.

INTERROGATORY 10. State all facts that permitting new “transmission pipelines” in Minnehaha County would “significantly impair future development of the County’s land-use planning vision” as stated in Ordinance MC16-179-23.

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application should be granted or, alternatively, in showing that Intervenor’s ordinance is unreasonably restrictive according to the factors set forth in SDCL 22-41B-28. The duly-enacted Ordinance amending the 1990 Revised Zoning Ordinance is presumptively reasonable and enforceable as a matter of law. Intervenor further object to the extent that the Interrogatory calls for disclosure of information, analysis, rationale, or communications relating to this finding that are protected by the legislative privilege.

Subject to and without waiving this Objection, see documents being separately produced, including transcripts from the May 23, 2023 and June 6, 2023 County Commission meetings.

INTERROGATORY 11: State all facts that permitting new “transmission pipelines” in Minnehaha County would be inconsistent with the 1990 Revised Zoning Ordinance for Minnehaha County as stated in Ordinance MC16-179-23.

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application should be granted or, alternatively, in showing that Intervenor’s ordinance is unreasonably restrictive according to the factors set forth in SDCL 22-41B-28. The duly-enacted Ordinance amending the 1990 Revised Zoning Ordinance is presumptively reasonable and enforceable as a matter of law. Intervenor further object to the extent that the Interrogatory calls for disclosure of information, analysis, rationale, or communications relating to this finding that are protected by the legislative privilege.

Subject to and without waiving this Objection, see documents being separately produced, including transcripts from the May 23, 2023 and June 6, 2023 County Commission meetings.

INTERROGATORY 12: Explain the criteria that the Planning Director must use to evaluate an application pursuant to paragraph 12.18(A)(2) of Ordinance MC16-179-23.

OBJECTION, Intervenor's object to the Interrogatory to the extent it calls for a legal conclusion. Subject to and without waiving this objection, Intervenor's respond as follows:

The criteria used to determine whether a proposed transmission pipeline qualifies as a special permitted use under ¶ 12.18(B)(8) are set out in the Ordinance, *see, e.g.*, ¶12.18(A)(2). The criteria include, for example, separation requirements set out in ¶12.18(C), which may be reduced in accordance with the provisions of ¶12.18(E) and (F).

INTERROGATORY 13: Explain the criteria that will be used to determine whether a proposed transmission pipeline will be deemed a permitted use or will require a conditional use permit under paragraph 12.18(B)(8) of Ordinance MC16-179-23.

OBJECTION, the Interrogatory is vague, ambiguous, and does not reasonably identify the responsive information that it seeks. Intervenor's more specifically object to the extent the Interrogatory proceeds from assumptions contrary to the procedural and substantive provisions of the Ordinance, including asking for a set of criteria that will determine "whether a proposed transmission pipeline will be deemed a permitted use or will require a conditional use permit." Intervenor's further object to the extent that the Interrogatory calls for disclosure of information, analysis, rationale, or communications that are protected by the legislative privilege. Subject to and without waiving this Objection, Intervenor's respond as follows:

Under the Ordinance, if an applicant submits the required information and it is determined that some aspect of the application (e.g., routing) does not conform to the specific requirements of the Ordinance or otherwise qualify under an exception to those requirements, then the project to which the application refers will not qualify as a special permitted use under the Ordinance and the applicant will be notified of such determination in accordance with ¶12.18(b)(8). If the project does not qualify as a special permitted use, the applicant may, if it chooses, seek a conditional use permit.

INTERROGATORY 14: State the facts explaining the amount of the fee, \$25,000, for filing an application under Ordinance MC16-179-23.

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application for a permit should be granted or, alternatively, in showing that Intervenor's ordinance is unreasonably restrictive according to the factors set forth in SDCL 22-41B-28. Intervenor's further object to the extent that the Interrogatory calls for disclosure of information, analysis, rationale, or communications that are protected by the legislative privilege.

INTERROGATORY 15: State the facts justifying payment of an annual fee of \$300 per linear mile of pipeline within the County if a conditional use permit is granted.

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application for a permit should be granted or, alternatively, in showing that Intervenor’s ordinance is unreasonably restrictive according to the factors set forth in SDCL 22-41B-28. Intervenors further object to the extent that the Interrogatory calls for disclosure of information, analysis, rationale, or communications which are protected by the legislative privilege.

Subject to and without waiving this Objection, see the text of Ordinance MC16-179-23 and documents being separately produced, including transcripts from the May 23, 2023 and June 6, 2023 County Commission meetings.

INTERROGATORY 16: State why natural gas lines are exempted from Ordinance MC16-179-23.

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application for a permit should be granted or, alternatively, in showing that Intervenor’s ordinance is unreasonably restrictive according to the factors set forth in SDCL 22-41B-28. Whether natural gas lines are exempted from Ordinance MC 16-179-23 does not bear on whether Navigator has met its burden on either of these two issues. Intervenors further object on the grounds that the Interrogatory calls for a legal conclusion or disclosure of legal advice that is covered by the attorney-client privilege.

INTERROGATORY 17: State all facts establishing why Ordinance MC16-179-23 requires in paragraph 12.18(B) that an applicant submit some of the same information to Minnehaha County as must be submitted to the South Dakota Public Utilities Commission under SDCL Ch. 49-41B.

OBJECTION, the information sought is not relevant to the determination of whether Navigator has met its burden of proof in showing that its application for a permit should be granted or, alternatively, in showing that Intervenor’s ordinance is unreasonably restrictive according to the factors set forth in SDCL §22-41B-28. Intervenors further object on grounds of vagueness and ambiguity, inasmuch as the Interrogatory fails to identify to what it is referring with the phrase “some of the same information” and to the extent that the Interrogatory calls for disclosure of information, analysis, rationale, or communications relating to this finding that are protected by the legislative privilege.

Subject to and without waiving this Objection, see documents being separately produced, including transcripts from the May 23, 2023 and June 6, 2023 County Commission meetings. More generally, an applicant is required to submit the information sought in ¶12.18(B) in order to permit evaluation and meaningful review of the project in accordance with Article 12.18 of MC 16-179-23.

Date: August 21, 2023.

AS TO OBJECTIONS:

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing was served on those listed below on August 21, 2023:

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