

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

Nos. 29865, 29870, and 29871

JEFFREY K. POWERS and VICKY URBAN-REASONOVER,

Petitioners/Appellants,

vs.

TURNER COUNTY BOARD OF ADJUSTMENT,

Respondent/Appellee,

and

STEVE AND ETHAN SCHMEICHEL, and NORWAY PORK OP, LLC

Intervenors.

**Appeal from the Circuit Court
First Judicial Circuit
Turner County, South Dakota
The Honorable Chris S. Giles, Presiding Judge**

**BRIEF OF APPELLANTS JEFFREY K. POWERS and
VICKY URBAN-REASONOVER**

Notice of Appeal Filed December 28, 2021

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Oral Argument Requested

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PRELIMINARY STATEMENT

Petitioners/Appellants Jeffrey K. Powers and Vicky Urban-Reasonover will be referred to by their names individually and collectively as “Petitioners.” Respondent/Appellee the Turner County Board of Adjustment will be referred to as “the Board.” Intervenors Steve and Ethan Schmeichel, and Norway Pork Op, LLC, will be referred to by their names individually and collectively as “Intervenors.”

Citations to the settled record in this matter appear as “SR.” followed by the page number assigned by the Turner County Clerk of Courts in its indices. The transcript of the bench trial held on August 5 – 6, 2021, is included in the Appendix of this Brief at (Appellant Appx. 19-555). For clarity, citations to that transcript will be denoted as “Tr.,” followed by the page and line numbers as they appear in the transcript. Exhibits introduced during the bench trial will be denoted as “Tr. Ex.,” followed by the exhibit number. Excerpts from the relevant Turner County Zoning Ordinances, which are set forth in the Return on Writ of Certiorari (Tr. Ex. 14), are included in the Appendix of this Brief at (Appellant Appx. 590-602) and will be referred to as “the Ordinances.”

The Circuit Court’s Findings of Fact and Conclusions of Law, dated November 29, 2021, are included in the Appendix of this Brief at (Appellant Appx. 1-12), and will be cited as “Findings of Fact” and “Conclusions of Law”

as appropriate, followed by the corresponding paragraph number. Finally, the transcript of the hearing held on January 3, 2022, on the motions for attorneys' fees and costs filed separately by the Board and by Intervenor is included in the Appendix of this Brief at (Appellant Appx. 556-589). For clarity, citations to that transcript will be denoted as "Fees Tr.," followed by the page and line numbers as they appear in the transcript.

JURISDICTIONAL STATEMENT

Petitioners appeal from the Findings of Fact, Conclusions of Law, and Order, each dated November 29, 2021, in the matter numbered 62CIV21-000003, in the First Judicial Circuit Court of South Dakota, the Honorable Chris S. Giles, Circuit Court Judge, presiding, following a bench trial in which the Court affirmed the Board's decision to grant a conditional use permit to Intervenor. This Court has jurisdiction pursuant to SDCL 15-26A-3(1), as the Circuit Court's Order is the final adjudication and affirmation of the Board's decision to grant Intervenor's application for a conditional use permit. Notice of Entry of the Circuit Court's Findings of Fact, Conclusions of Law, and Order were each given on November 30, 2021. Appellant Appx. 1-16. Notice of Appeal was filed on December 28, 2021. Appellant Appx. 17-18.

STATEMENT OF THE ISSUES

- 1) Whether Petitioners' due process rights were violated when the Board granted a conditional use permit to Intervenor?

The Circuit Court held in the negative.

- *Miles v. Spink Cty. Bd. of Adjustment*, 2022 S.D. 15, ___ N.W.2d ___
- *Armstrong v. Turner Cty. Bd. of Adjustment*, 2009 S.D. 81, 772 N.W.2d 643
- *Hanig v. City of Winner*, 2005 S.D. 10, 692 N.W.2d 202
- *Schafer v. Deuel Cty. Bd. of Comm'rs*, 2006 S.D. 106, 725 N.W.2d 241

2) Whether the Board erred when it granted a conditional use permit to Intervenor?

The Circuit Court held in the negative.

- *Miles v. Spink Cty. Bd. of Adjustment*, 2022 S.D. 15, ___ N.W.2d ___
- *Hines v. Bd. of Adjustment of City of Miller*, 2004 S.D. 13, 675 N.W.2d 231
- *Armstrong v. Turner Cty. Bd. of Adjustment*, 2009 S.D. 81, 772 N.W.2d 643
- *Lamar Outdoor Adver. of S.D., Inc. v. Rapid City*, 2007 S.D. 35, 731 N.W.2d 199
- SDCL 11-2-62

STATEMENT OF THE CASE

The Board issued a conditional use permit to Intervenor for a large, concentrated animal feeding operation (CAFO). Tr. Ex. 14, pp. 314. Petitioners timely appealed and challenged that decision through a duly verified petition to the Circuit Court for a writ of certiorari under SDCL 11-2-61. SR. 1-10. The matter proceeded to a bench trial, after which the Circuit Court concluded Petitioners had standing to challenge the Board's decision to grant the permit but, nonetheless, that the Board's decision comported with South Dakota law.

See Tr. 429:19-25 (standing); 464:22-25 (legality). Findings of Fact, Conclusions of Law, and an Order to this effect were each dated November 29, 2021, with Notice of Entry collectively given on November 30, 2021. Appellant Appx. 1-16. Notice of Appeal was filed on December 28, 2021. Appellant Appx. 17-18.

Following trial, and pursuant to SDCL 11-2-65, Intervenor and the Board each filed separate motions seeking attorneys' fees and costs on December 13, 2021, and on December 14, 2021, respectively. SR. 1634-39; 1654-56. Those motions were brought on for a hearing before the Circuit Court on January 3, 2022. *See* Fees Tr. 1. The Circuit Court announced its decisions from the bench and denied both motions. Fees Tr. 23:10 – 27:8. An Order to this effect was filed on January 7, 2022, and Notice of Entry was given on January 12, 2022. SR. 1780-81; 1783-86.

STATEMENT OF FACTS

This Court has familiarity with portions of the background to this dispute. *See Powers v. Turner Cty. Bd. of Adjustment*, 2020 S.D. 60, 951 N.W.2d 284, 285. In 2018, Intervenor applied for a conditional use permit to build a CAFO in Turner County, South Dakota, and near land owned by Petitioners. *Id.*, ¶ 2. Specifically, Intervenor's proposed CAFO would house 7,400 head of swine, of which 5,400 were sows and 2,000 were swine over 55

pounds. *Id.* The proposed facility was classified as a “Large” CAFO under the Ordinances. *See* Appellant Appx. 591 (Ordinances § 13.09(D)).

On April 10, 2018, the Board voted in favor of the application and granted the permit. *Powers*, 2020 S.D. 60, ¶ 2 (the “2018 Permit”). On September 20, 2018, Petitioners filed a duly verified petition for a writ of certiorari with the Circuit Court in matter numbered 62CIV18-102, which challenged the Board’s decision to issue the 2018 Permit. *Id.*, ¶ 3 (the “2018 Petition”). Intervenors, who were named as respondent parties in that case, filed a motion for summary judgment asserting that Petitioners were not “aggrieved by” a decision of the Board, and so they lacked standing to challenge the Board’s decision under SDCL 11-2-61. *Id.*, ¶ 4.

The Circuit Court agreed and dismissed the 2018 Petition for lack of standing. *Id.*, ¶ 8. On November 4, 2020, this Court reversed the Circuit Court, and held Petitioners had introduced sufficient evidence which, if accepted by the fact finder, would establish their standing for purposes of SDCL 11-2-61. *Id.*, ¶¶ 20-23. Thus, the matter was remanded for further proceedings. *Id.*, ¶ 24.

Following this Court’s remand, and while the matter remained pending, Intervenors filed another application for a conditional use permit for the same CAFO project at issue in the existing 2018 Permit. Tr. Ex. 14, pp. 115-127. On November 17, 2020, notice was provided to the public that the application

would be heard on December 8, 2020. Tr. Ex. 14, p. 311. The Board voted unanimously in favor of the application and granted the permit at the December 8, 2020 hearing. *See* Tr. Ex 14, p. 314 (the “2020 Permit”). On January 5, 2021, Petitioners filed a duly verified petition for a writ of certiorari with the Circuit Court in matter numbered 62CIV21-03, challenging the Board’s decision to issue the 2020 Permit. (the “2021 Petition”). SR. 1-10. Petitioners and the Board were the only named parties in the 2021 Petition. *See id.*

On April 13, 2021, and over Petitioners’ objections, Intervenors were allowed to intervene in the 2021 Petition. SR. 105-06. Litigation concerning the 2018 Petition was dismissed as moot by stipulation of the parties and due to Intervenors’ voluntary withdrawal and relinquishment of the 2018 Permit. (Appellant Appx. 603-05).

On May 17, 2021, Petitioners issued a discovery subpoena to Dr. Richard Nicolai. SR. 580-81. Dr. Nicolai had presented data and other testimony to the Board at the December 8, 2020, hearing on the prospective odor impact of Intervenors’ CAFO. *See* Tr. Ex. 11, pp. 21-29 (Part I of 12/08/20 Hearing Transcript). The subpoena sought copies Dr. Nicolai’s investigation, his findings, and related data. *See* SR. 580-81. On May 19, 2021, Intervenors moved to quash the subpoena, and on June 9, 2021, Petitioners filed a motion to compel compliance with it. SR. 583-84; 612-13. Petitioners

also sought attorneys' fees as permitted by SDCL 15-6-37(a)(4)(A). SR. 612-13. On June 28, 2021, the Circuit Court denied Intervenors' motion to quash, and granted Petitioners' motion to compel, but denied Petitioners' request for attorneys' fees. SR. 708-09.

The 2021 Petition then proceeded to a bench trial, which was conducted on August 5-6, 2021. *See* Tr. 1. Persons testifying at the bench trial were: Petitioners' land valuation expert, Steve Shaykett (Tr. 5 – 55), along with Petitioners Vicky Urban-Reasonover (Tr. 56-94), and Dr. Jeffrey Powers (Tr. 95 – 138), and Board members Mick Miller (Tr. 139 – 184), Anthony Champa (Tr. 261 – 32), Richard Vasgaard (Tr. 322 – 349), Dean Austin (349 – 400), and former Turner County zoning administrator, Faye Dubbelde (Tr. 184 – 238). The video-recorded deposition of Petitioners' odor modeling expert, Dr. Ardevan Bakhtari, was also received. Tr. 256:1-8; Tr. Ex. 22.

Section 13.09 of the Ordinances establishes the parameters within which the Board can grant a conditional use permit for a CAFO. Appellant Appx. 590-96. Section 13.09(D) of the Ordinances contains a table that delineates CAFOs into "small," "medium," and "large" facility categories, depending on the number of "animal units" housed there. Appellant Appx. 592. The animal unit calculations and thresholds are further divided based on the type and/or size of animal present. For CAFOs involving swine, there are three animal

types listed: finisher swine (weighing over 55 lbs); nursery swine (weighing less than 55 lbs), and farrow-to-finish (sows). *Id.*

Additionally, pursuant to Ordinances § 19.04(E), the Board must also calculate the setback required for each proposed facility, which also depends on its number of animal units. Appellant Appx. 594-95. For a large CAFO, for example, the facility must be set back 3/8 of a mile (*i.e.*, 1,980 feet) from the nearest dwelling home, plus 100 feet farther for each additional 500 animal units over the applicable “large” CAFO category threshold. *Id.* Petitioner Vicky Urban-Reasonover’s home is located 3,020 feet from Intervenors’ proposed CAFO site. Tr. 57:11-24.

As noted above, Intervenors’ proposed CAFO would house 7,400 head of hogs, of which 5,400 were sows and 2,000 were swine over 55 pounds. *See* Tr. Ex. 14, pp. 115-122. The proposed CAFO was described as a “farrow-to-wean” operation. Tr. 267:22-23. The Board members were aware the CAFO under consideration for the 2020 Permit had earlier been approved and received the 2018 Permit, and they were also aware of the litigation associated with the Board’s decision to grant the 2018 Permit. Tr. 151:11-14 (Miller); 278:25-79:10 (Champa); 332:8-333:2 (Vasgaard); 363:5-22 (Austin); *see also* Tr. Ex. 13, p. 1 (Part III of 12/08/20 Hearing Transcript) (referring to the 2018 Permit as “a granted permit that’s in the courts right now under appeal.”).

The type of swine operation and the number of head determine the number of animal units, which in turn is used to determine: the class (small, medium, or large); the minimum setback for that class; and the additional setback based on 100-foot increments for overages (animal units over the base amount included for the class). Each Board member agreed that Intervenor's proposed facility does not fit into one of the three swine categories listed in the table provided in Ordinances § 19.04(D). *See, e.g.*, Tr. 142:6-12; 188:16-18 (Miller); 267:22-25 (Champa); 329:6-19 (Vasgaard); 359:11-22 (Austin). For unlisted categories, § 19.04(D) further provides that "[o]ther animal types not listed in the above table may be considered on a case-by-case basis." Appellant Appx. 592. However, members of the Board who were asked about this case-by-case basis provision were unaware of it and confirmed the Board did not follow it.

For example, Mr. Champa was asked about the case-by-case basis inquiry, and testified as follows:

Q: And this case-by-case determination, that didn't happen in this case, did it?

A: Not that I'm aware of, sir.

Tr. 268:23-25. When asked whether it was a topic of discussion among other Board members at the December 8, 2020 hearing, Mr. Champa testified as follows:

Q: And I don't see any discussion [in the hearing transcript] about viewing this on a case-by-case basis because it doesn't fit into the animal feeding operation chart. Do you believe that was actually discussed and deliberated?

A: No, sir.

Tr. 278:19-24. Mr. Austin was asked similar questions and testified as follows:

Q: But under 13.09D, . . . if there's an animal feeding operation that isn't on the chart, you can look at it on a case-by-case basis.

A: Ok. Yeah.

Q: Did you know you could do that?

A: No.

Q: Okay. That was going to be my next question: In this particular case did you know you were being asked to make a one-off case-by-case decision because the chart doesn't fit with what's being asked; were you aware you were making that kind of decision at the time?

A: No.

Tr. 359:23 – 360:10.

Each Board member confirmed that none of them independently calculated the number of animal units for the proposed CAFO or the appropriate setback for the facility pursuant to § 13.09(E) of the Ordinances.

Tr. 142:22-23 (Miller); Tr. 264:6-12 (Champa); 324:22-24 (Vasgaard); 353:18-22 (Austin). Mr. Austin also agreed he “did not independently give thought to what the setback should be and calculate it yourself,” and that he “did not give

any independent thought to what the base amount [of the setback] should be because the farrow-to-wean isn't on the chart." Tr. 395:2-8.

Rather, the Board delegated responsibility for calculating the setback to Ms. Dubbelde, and then deferred to her calculation while not even knowing that a case-by-case determination was supposed to be made by the Board. For example, Mr. Miller confirmed "that's the job of our administrator [Ms. Dubbelde,] and she does her job very well." Tr. 143:9-10. Mr. Champa similarly testified the Board "took her expertise, as we always do." Tr. 269:1-4. Likewise, Mr. Vasgaard testified "I rely on Faye. She's the expert and does this frequently." Tr. 325:2-5. And Mr. Austin similarly confirmed "the [B]oard never made that [setback] determination, [it] just accepted Faye's calculation." Tr. 387:1-5. Each member of the Board also confirmed they accepted Ms. Dubbelde's setback calculation without knowing how she calculated it. Tr. 143:21-24 (Miller); 266:3-22 (Champa); 326:3-6 (Vasgaard); 387:1-4 (Austin). In addition, each member of the Board confirmed that no attempt was made to recalculate or otherwise verify Ms. Dubbelde's setback calculation after Petitioners challenged it at the December 8, 2020 hearing. Tr. 150:15-23 (Miller); 269:5-18 (Champa); 328:8-23 (Vasgaard); 354:25 – 355:22 (Austin).

It is unclear, however, what setback Ms. Dubbelde calculated. She confirmed her calculation differed from that submitted by Intervenors in their

application. Tr. 200:22-201:1; 202:7-12. Nonetheless, there is not a setback separately listed on either Ms. Dubbelde's summary of the December 8, 2020 hearing, Tr. Ex. 14, p. 313, or on the Board's official minutes and findings. Tr. Ex. 14, p. 314.

As noted above, Dr. Nicolai testified at the December 8, 2020, hearing and, among other things, he opined that Petitioners (or anyone living beyond one-half mile from Intervenor's CAFO) would "be greater than 95 percent annoyance-free" with respect to odor. Tr. Ex. 11, p. 25. Prior to the December 8, 2020 hearing, Petitioners submitted copies of their expert reports from Mr. Shaykett and Dr. Bakhtari to the Board in support of their concerns that the CAFO would adversely impact their property values and also produce invasive and obnoxious odors. Tr. Ex. 14, p. 428. However, none of the Board members read or considered those materials before granting the 2020 Permit. Tr. 154:15 – 155:3 (Miller); 262:16-23 and 319:11-22 (Champa); 324:8-21 (Vasgaard); 355:23 – 356:11 (Austin). The Board's decision was also not tabled until the Board could review and consider these materials. *See* Tr. 155:24 – 156:4.

In addition, certain members of the Board testified they would not consider Petitioners' concerns regarding odor and/or a diminution of their property values. For example, Mr. Champa answered "No, sir" in response to whether "these claims that there would be additional odor beyond the setback"

was “something that had to be addressed as part of [his] determination on whether to vote yes in favor of the applicant.” Tr. 307:16-21. Mr. Champa similarly stated he did not believe he needed to consider Petitioners’ property devaluation concerns because “[i]t doesn’t fall within the ordinances.” Tr. 319:23-25. Similarly, Mr. Vasgaard also agreed he “did not look at odor; is that correct?” Tr. 331:6-8. So, too, did Mr. Austin. Tr. 357:16-18 (answering “Correct” to “you didn’t consider how the odor would affect the neighbors?”).

At the bench trial, Intervenorors again challenged whether Petitioners’ had standing as persons “aggrieved by” a decision of the Board under SDCL 11-2-61. Intervenorors also raised a *Daubert* challenge to Petitioners’ expert witnesses. However, the Circuit Court concluded Petitioners had standing, and also that Petitioners’ experts were credible. *See Findings of Fact*, ¶¶ 1, 3-4, 11-12, 16, 19-20, *Conclusions of Law*, ¶¶ 2, 3. Nonetheless, the Circuit Court ultimately concluded the Board’s decision to grant the 2020 Permit was not unlawful. *Conclusions of Law*, ¶ 20.

The Circuit Court’s Findings of Fact, Conclusions of Law, and its Order were dated November 29, 2021, with notice of entry collectively given on November 30, 2021. Appellant Appx. 1-16. On December 13, 2021, Intervenorors filed a motion for attorneys’ fees and costs pursuant to SDCL 11-2-65. The Board similarly filed a motion for attorneys’ fees and costs pursuant to

SDCL 11-2-65 on December 14, 2021. Petitioners objected to both motions, and the two motions were brought on for a hearing on January 3, 2022.

Following oral argument, the Circuit Court announced its ruling on the two attorneys' fees motions from the bench. The Circuit Court observed an award of attorneys' fees under SDCL 11-2-65 is discretionary. Fees Tr. 26:5-6. The Circuit Court also opined that, although Petitioners did not prevail, they raised "a very good argument" concerning the setback requirements, and that "there were legitimate and debatable issues" presented and considered at trial. Fees Tr. 23:13-19, 24:11-15; *see also* Tr. 25:23-25 ("But, there was a legitimate and contested and debatable issue on both sides."). The Circuit Court also emphasized it believed its ruling on Petitioners' standing "was clearly the correct ruling," and that "they had a right to have their day in court to be heard." Tr. 24:15-17. Ultimately, the Court denied both attorneys' fees motions, again reiterating that "we had a legitimate issue that was in controversy and needed to be resolved." Tr. 26:5-10. An Order to this effect was dated January 11, 2022, with Notice of Entry given on January 12, 2022.

ARGUMENT

I. Standard of Review

This Court's review of the Board's decision to grant the 2020 Permit is conducted under the certiorari standard of review. SDCL 11-2-62. "A writ of

certiorari may be granted by the Supreme and circuit courts when the inferior courts, officers, boards, or tribunals have exceeded their jurisdiction.” SDCL 21-31-1; *see also Lamar Outdoor Adver. of S.D., Inc. v. Rapid City*, 2007 S.D. 35 ¶ 14, 731 N.W.2d 199. The scope of this Court’s review is tailored to “whether [the Board] had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it.” *Miles v. Spink Cty. Bd. of Adjustment*, 2022 S.D. 15, ¶ 31, ___ N.W.2d ___ (quotation omitted). The Board’s actions cannot be sustained if “it did some act forbidden by law or neglected to do some act required by law.” *Id.* (quotation omitted).

The Court’s review extends beyond the certiorari standard if the Board acted in “arbitrary or willful disregard of undisputed and indisputable proof;” the Court can then review the merits of the underlying decision for its correctness. *Lamar*, 2007 S.D. 35, at ¶ 21 (quoting *Cole v. Bd. of Adjustment of the City of Huron*, 1999 S.D. 54, ¶ 10, 592 N.W.2d 175); *Willard v. Civil Service Bd. of Sioux Falls*, 63 N.W.2d 801, 801 (S.D. 1954); *see also Lamar*, 2007 S.D. 35, at ¶ 26 (“Certiorari cannot be used to examine evidence for the purpose of determining the correctness of a finding, at least in the absence of fraud, or willful and arbitrary disregard of undisputed and indisputable proof[.]”). If this Court finds that the Board failed to contribute independent thought and “did not fulfill its duty to follow the guidelines of the [county]

ordinances . . . this case must be remanded to the board for a proper determination.” *Hines v. Bd. of Adjustment of City of Miller*, 2004 S.D. 13, ¶ 16, 675 N.W.2d 231, 236.

Finally, courts “interpret zoning laws according to the rules of statutory construction and any rules of construction included in the enactments themselves. The interpretation of an ordinance presents a question of law reviewable de novo.” *City of Marion v. Rapp*, 2002 S.D. 146, ¶ 5, 655 N.W.2d 88, 90.

II. The Board’s Predisposition to Grant the 2020 Permit Violates Petitioners’ Due Process Rights

This Court has recently reaffirmed “that the decision to grant or deny a conditional use permit is quasi-judicial and therefore is subject to due process constraints.” *Miles*, 2022 S.D. 15, at ¶ 32 (quotation omitted). A fundamental requirement of “due process includes fair and impartial consideration by a local governing board.” *Armstrong v. Turner Cty. Bd. of Adjustment*, 2009 S.D. 81, ¶ 19, 772 N.W.2d 643, 651 (quotation omitted). Without specifically stating it, this Court has adopted the “appearance of fairness” doctrine, which requires the Board to “be free from bias or predisposition of the outcome and [the Board] must consider the matter with the appearance of complete fairness.” *Id.*, at ¶ 21; see 2 Rathkopf’s *The Law of Zoning and Planning* § 32:17 (4th ed.)

(“Court decisions in a number of states have developed ‘appearance of fairness’ doctrines that attempt to restrict and prohibit conflicts of interest and bias that may undermine public confidence in the integrity of the zoning decision-making process”).

Accordingly, this Court has recognized actual bias or prejudgment need not be demonstrated; rather, due process is offended when the record shows “an *unacceptable risk* of actual bias or prejudgment inhered in the tribunal’s procedure.” *Armstrong*, 2009 S.D. 81, at ¶ 21 (emphasis added); *see also Hanig v. City of Winner*, 2005 S.D. 10, ¶ 11, 692 N.W.2d 202, 206 (“Thus to prove his hearing was not fair and impartial, Hanig need only show an unacceptable risk of actual bias, and he is not necessarily required to show actual bias”). Thus, “our system of law has [therefore] always endeavored to prevent even the *probability* of unfairness.” *Armstrong*, 2009 S.D. 81, at ¶ 21 (quotation omitted) (emphasis added).

Here, the argument sections below each focus on a particular aspect of December 8, 2020, hearing and the Board’s decision. Whether viewed individually or collectively, the Board violated Petitioners’ due process rights in several respects. Thus, this Court should reverse the Board’s approval of the 2020 Permit and the Circuit Court’s decision.

A. The Previously Approved 2018 Permit

Here, it is undisputed the CAFO under consideration for the 2020 Permit was the same one as the Board previously approved in the 2018 Permit. As Intervenor told the Board at the December 8, 2020, hearing, they were “proposing to use the same nutrient management plan, the same setback plan, the same facilities management descriptions and other things because those have not changed for the proposed operation that you’re being asked to consider today.” Tr. Ex. 11, p. 7 (Part I of 12/08/20 Hearing Transcript). Rather, the only superficial difference between the two permits was that Intervenor Steve and Ethan Schmeichel had together formed Intervenor Norway Pork Op, LLC, which would own the land where the CAFO would be sited and also operate it. *Id.*, p. 6. Ms. Dubbelde’s summary of the December 8, 2020, hearing similarly notes Intervenor “wish to submit this application for the same facility and operation previously approved” in 2018 and that they “are seeking approval today as if the previous permit has not been issued.” Tr. Ex. 14, p. 313.

It is also undisputed Intervenor applied for the 2020 Permit following this Court’s remand in *Powers* and while litigation concerning the 2018 Permit was still pending. *See* Tr. Ex. 14, pp. 115-122. Ms. Dubbelde’s summary likewise notes this earlier permit “was appealed and is still in litigation.” Tr.

Ex. 14, p. 313. The Board members were all aware the 2018 Permit and 2020 Permit concerned the same CAFO, and they were aware of the ongoing litigation associated with the Board's decision to grant the 2018 Permit while the 2020 Permit was still under consideration. Tr. 151:11-14 (Miller); 278:25-79:10 (Champa); 332:8-333:2 (Vasgaard); 363:5-22 (Austin); *See also* Tr. Ex. 13, p. 1 (Part III of 12/08/20 Hearing Transcript) (referring to the 2018 Permit as "a granted permit that's in the courts right now under appeal.").

These facts demonstrate "an unacceptable risk of actual bias or prejudgment inhered" with the Board's decision to grant the 2020 Permit. *Armstrong*, 2009 S.D. 81, at ¶ 21 (assessing the "*probability* of unfairness") (emphasis added). This is so because the 2018 Permit and 2020 Permit concerned the same facility with the same number of animals to be built at the same location, which would be operated under the same proposed set of plans and conditions and by the same individuals (under the veneer of an entity for the latter permit). Further, the Board knew the legality of its decision to grant the 2018 Permit was still pending in active litigation at the time the 2020 Permit was under consideration. As such, there was no way the Board could deny the 2020 Permit without at least tacitly admitting the 2018 Permit should have also been denied. Therefore, the Board was not "free from bias or predisposition of the outcome" and the Board could not "consider the matter

with the appearance of complete fairness.” *Id.*, ¶ 21. Thus, the Court should conclude Petitioners’ due process rights were violated, and *Armstrong* requires “a new hearing before a neutral Board[.]” *Id.*, at ¶ 32.

B. Assignment of Tax Rebate Funds

The Court should also consider the financial incentives Intervenor proposed to the Board as an inducement to grant the 2020 Permit. Beginning in 2019, the Governor’s Office of Economic Development expanded the South Dakota Jobs Grant and Reinvestment Repayment Program sales and use tax rebates to be available for livestock producers. *See* A.R.S.D. 68:02:07, *et seq.*; A.R.S.D. 68:02:10, *et seq.*; *see also* Governor’s Office of Economic Development, *Sales and Use Tax Rebate Programs Available for Livestock Development*, <https://sdgoed.com/media-center/press-releases/sales-and-use-tax-rebate-programs-available-for-livestock-development/> (last visited March 31, 2022). These rebate dollars can be used or assigned to a third-party, including local government entities. In their application, Intervenor stated they would “pursue [this] State sales tax rebate for economic development,” and the rebate dollars would be “paid to Turner County.” Tr. Ex. 14, p. 122.

With one exception, each member of the Board acknowledged Intervenor’s pledge and that this rebate money represented dollars that the county could not receive without approving the 2020 Permit. Tr. 157:8158:1

(Miller); 283:16-284:4 (Champa); 334:22-335:13 (Vasgaard). Only Mr. Austin could not recall the issue being discussed or appearing in Intervenors' application, Tr. 364:6-17, though the application clearly states as much.

Sections 13.09(E)(1) – (9) confine the standards within which the Board's decision to grant or deny a CAFO permit must ("shall") be made. Appellant Appx. 590-602. These criteria include determining an appropriate setback, assessing whether the facility has adequate odor control mechanisms in place, and taking into consideration any past permit violations for the facility operator. In other words, these metrics are intended to focus the Board's attention solely on the health and safety concerns in the local community attendant with operating a CAFO. None of the criteria, however, direct the Board to consider the potential financial incentives of permitting such a facility. Yet, by telegraphing the assignment of their tax rebate dollars to the County, Intervenors added an improper criterion for the Board's consideration, and fewer things have—or at least can outwardly appear to have—a greater corrupting effect than money.

As such, the court should conclude the "*probability* of unfairness" in this matter was unacceptably high, and that Petitioners' due process rights were violated. *Armstrong*, 2009 S.D. 81, at ¶ 21 (quotation omitted) (emphasis added). Thus, remand is warranted.

C. Participation of Steve Schmeichel

In *Armstrong*, Lyle Van Hove, a member of the Turner County Commission, sat on this very Board and participated as an advocate during a hearing on a conditional use permit. *Armstrong*, 2009 S.D. 81, at ¶¶ 7, 29. Van Hove did not, however, cast a vote. *Id.*, at ¶ 31. Even so, this Court found his participation in the hearing “as the only county commissioner on the board conceivably carried some weight with the other board members.” *Id.*, at ¶ 32. This Court concluded the permit at issue should be vacated and a new hearing be held without Van Hove’s participation due to “the possible influence on the other board members’ votes.” *Id.*

Here, Intervenor Steve Schmeichel was a member of the Board at the time of the December 8, 2020, hearing. *See* Tr. 280:14-20. He recused himself from voting on the 2020 Petition, but participated in the proceeding as an advocate for granting the 2020 Permit. Tr. 280:21-23. As in *Armstrong*, his membership on the Board conceivably carried some weight with the other Board members. Like in *Armstrong*, his participation in the hearing potentially influenced the other members’ votes. There was also no reason for Steve’s participation, given that his counsel (Mr. Donahoe) and business partner (his son, Ethan) were present and fully capable of representing his interests at the hearing.

For this reason, as well as those previously discussed, the December 8, 2020, hearing was not conducted with the appearance of complete fairness. Rather, the Court should find the entire proceeding carried with it an unacceptable risk of bias or prejudgment on the part of the Board. Thus, as in *Armstrong*, the matter should be remanded, and the matter reconsidered at a new hearing and without Intervenor Steve Schmeichel's participation.

III. The Board Failed to Adhere to the Ordinances and Thus Improperly Granted the 2020 Permit

The Board's authority and jurisdiction are ultimately limited to the powers set forth in the Ordinances. SDCL 21-31-1; *see also Lamar*, 2007 S.D. 35, at ¶ 14 (explaining this Court may grant a writ of certiorari when a local government body has exceeded its jurisdiction). This Court has held it will not sustain a county board's decision if it failed to regularly pursue its authority, engaged in a forbidden act, or "neglected to do some act required by law." *Tibbs v. Moody Cty. Bd. of Comm'rs*, 2014 S.D. 44, ¶ 22, 851 N.W.2d 208, 216 (quoting *Armstrong*, 2009 S.D. 81, at ¶ 12); *see also Lamar*, 2007 S.D. 35, at ¶ 21 (noting this Court may review the merits of a petition or evidence when there is a showing that the Board "acted fraudulently or in arbitrary or willful disregard of undisputed and indisputable proof"). If a county board fails to follow the guidelines of the county's ordinances, then the Court cannot uphold its decision. *Hines*, 2004 S.D. 13, at ¶ 16.

Although the legislature requires county boards to determine whether applications are acceptable, the “discretion of a board to decide such . . . is not limitless.” *Id.* Rather, if this Court finds a county board provided no independent thought, or made an arbitrary decision based on rationales outside of the county’s guidelines, then this Court has explicitly stated that it will “condemn” that decision. *Id.*, at ¶ 15.

Here, the Board’s approval of the 2020 Permit contravenes several requirements of the Ordinances. The argument sections below focus on particular aspects of the Ordinances and how this Court’s standard of review and precedent applies to the Board’s decision to grant the 2020 Permit. In several respects, the Board granted the 2020 Permit in direct violation of the Ordinances, and is thus unlawful. The Court should, therefore, reverse the Board’s approval of the 2020 Permit and the Circuit Court’s decision.

A. The Board improperly delegated its decisional authority to Faye Dubbelde

Applicants seeking a conditional use permit for a CAFO in Turner County shall provide with their application “[t]he number and type of animals to be housed” and “[i]nformation on ability to meet designated setback requirements.” Appellant Appx. 595. (Ordinances § 13.09(F)(3), (5)). The Ordinances specifies this information is submitted for “consideration by the Board of Adjustment[.]” *Id.*

As relevant here, this information is used for at least two decision-making purposes. First, for the Board to determine, based on the number of “animal units” present, whether the facility is a “small,” “medium,” or “large” CAFO pursuant to § 19.04(D) of the Ordinances. Appellant Appx. 590-91. Second, the information is also for the Board to determine the base setback and additional 100-foot increments required for each proposed facility pursuant to § 13.09(E) of the Ordinances, which also depends on the CAFO’s type, class, and number of animal units. Appellant Appx. 591-92.

As described more fully, *infra*, the animal units calculation is made by reference to § 27.02(12) of the Ordinances, which provides a species-to-animal-unit conversion table. Appellant Appx. 601-02. It is undisputed, however, that no member of the Board independently calculated the number of animal units for Intervenors’ CAFO, or the appropriate setback for the facility. Tr. 142:22-23 (Miller); Tr. 264:6-12 (Champa); 324:22-24 (Vasgaard); 353:18-22 (Austin). Likewise, it is undisputed Intervenors’ proposed CAFO does not fit into one of the three swine categories listed in the table provided in § 19.04(D) of the Ordinances. *See, e.g.*, Tr. 142:6-12 (Miller); 267:22-25 (Champa); 329:6-19 (Vasgaard); 359:11-22 (Austin). Further, while § 19.04(D) of the Ordinances in such circumstances requires the Board to make a case-by-case basis assessment of the proposed facility, it is undisputed the members of

the Board who were asked about this provision were unaware of it and confirmed the Board did not follow it. *See, e.g.*, Tr. 268:23-25; Tr. 278:19-24 (Champa); Tr. 359:23 – 360:10 (Austin).

Rather, the Board unknowingly ceded its responsibility for making the case-by-case determination as to the proposed facility's classification, the base setback, and additional 100-foot increments for the setback to Ms. Dubbelde, and then deferred to her judgment and calculations. For example, Mr. Miller confirmed "that's the job of our administrator [Ms. Dubbelde,] and she does her job very well." Tr. 143:9-10. Mr. Champa similarly testified the Board "took her expertise, as we always do." Tr. 269:1-4. Likewise, Mr. Vasgaard testified "I rely on Faye. She the expert and does this frequently." Tr. 325:2-5. And Mr. Austin similarly confirmed "the [B]oard never made that [setback] determination, [it] just accepted Faye's calculation." Tr. 387:1-5.

Each member of the Board also confirmed they accepted Ms. Dubbelde's calculations without knowing how she calculated them. Tr. 143:21-24 (Miller); 266:3-22 (Champa); 326:3-6 (Vasgaard); 387:1-4. In addition, each member of the Board confirmed that no attempt was made to recalculate or otherwise verify Ms. Dubbelde's calculations after Petitioners challenged them at the December 8, 2020 hearing. Tr. 150:15-23 (Miller); 269:5-18 (Champa); 328:8-23 (Vasgaard); 354:25 – 355:22 (Austin). Rather, again, the

Board deferred entirely to Ms. Dubbelde's calculations. Ms. Dubbelde's calculation was not a mere exercise in arithmetic. Rather, she made a judgment about how to classify the farrow-to-wean operation, what the base setback is, and how much the base setback should be increased due to overages beyond the base number of animal units included for that type and size of facility. This was the Board's judgment to make and it abdicated its responsibility. In fact, the Board was unaware that such a judgment even needed to be made.

“The zoning board of adjustment is not a legislative body and can neither ignore nor amend the ordinances under which it functions.” *Graves v. Johnson*, 63 N.W.2d 341, 343 (S.D. 1954). There is no authority set forth in the Ordinances that permits the Board to delegate its fact-finding and decisional responsibility to an outsider. *Accord Cutshaw v. Karim*, 256 N.W.2d 566, 568 (S.D. 1977) (observing reviewing board “may not delegate duties which are decisional in nature”). In *Hines*, for example, this Court condemned as arbitrary the permitting decision of a board of adjustment, where the board simply deferred to the opinions of members of the public who attended the hearing. *Hines*, 2004 S.D. 13, at ¶¶ 15-16 (“To base a decision solely on the opinion of neighbors was arbitrary and beyond its jurisdiction.”). By doing so, the board failed to follow the guidelines of its ordinances, and it failed to engage in independent thought. *Id.*, ¶ 16.

The Board's conduct here is more egregious than that condemned in *Hines* for at least five reasons. First, because unlike in *Hines* where the board arguably made its decision based upon an informal vote of the public, the Board here rested its decision based upon the opinion of a single person, Ms. Dubbelde. Second, in *Hines* the board ostensibly knew of the objectors' rationale, *i.e.*, they did not want a mobile home placed on the lots at issue. Here, however, the Board had no idea how Ms. Dubbelde made her calculations.

Third, and despite the fact that Petitioners challenged Ms. Dubbelde's calculations, the Board still made no effort at that time (or any time) to either verify Ms. Dubbelde's calculations or to independently calculate them. Fourth, the Board was unaware of its obligation to make a case-by-case basis determination of the CAFO's size and resulting setback under § 19.04(D) of the Ordinances. As a result, the Board was also unaware it deferred to Ms. Dubbelde to make that assessment as well. And fifth, the Board's comments concerning Ms. Dubbelde's status as "the expert" and how the Board "always" defers to her shows the Board was predisposed to accepting her conclusions and that the Board failed to engage in independent thought on the matter. Indeed, Mr. Austin agreed as much. Tr. 395:2-8 (agreeing he "did not independently give thought to what the setback should be and calculate it

yourself,” and that he “did not give any independent thought to what the base amount [of the setback] should be because the farrow-to-wean isn’t on the chart” in § 19.04(D) of the Ordinances). Therefore, the Board acted arbitrarily and it failed to follow the guidelines of the Ordinances. Thus, the Board’s exceeded its jurisdiction, and its decision must be reversed.

Likewise, the Board applied an incorrect legal standard requiring reversal. In *Adolph v. Grant County Board of Adjustment*, the ordinances required the board of adjustment to “take into consideration current and past violations relating to [CAFOs] that the applicant has an interest in.” 2017 S.D. 5, ¶ 17, 891 N.W.2d 377, 383. However, the board of adjustment testified that it did not consider the current or past violations of the applicant. *Id.*, at ¶¶ 17-18. This Court reversed the board of adjustment, because it failed to consider a factor (environmental violations) that the ordinances required to be considered:

The foregoing views are inconsistent with the text of §§ 218 and 1304(11)(D) of the ZOGC. Those ordinances require the Board to consider past environmental violations of an applicant (which includes the individual having charge or control of the CAFO). Therefore, *the Board's view that the past violations of a prospective operator are always irrelevant is an error of law. Because the Board applied an incorrect legal standard, its decision was illegal.*

Id., at ¶ 19 (emphasis added) (citing *Duffy v. Cir. Ct., 7th Jud. Cir.*, 2004 S.D. 19, ¶ 19, 676 N.W.2d 126, 135). Like the board ignoring environmental violations in *Adolph*, the Board here ignored its obligation to make a case-by-

case determination for this uncategorized farrow-to-wean operation, and then determine the applicable setback and whether Petitioner Vicky Urban-Reasonover's home was within the setback. The Board's decision was illegal, "[b]ecause the Board applied an incorrect legal standard." *See id.*, at ¶ 19.

B. The Board failed to follow the Ordinances with respect to the setback calculation

Section 13.09(E) of the Ordinances sets forth the manner in which the Board must calculate a setback for each proposed CAFO. Appellant Appx. 591-92. However, the setback calculation is also tied to how the Board determines whether a CAFO is a small, medium, or large one, as well as which particular sub-category (*i.e.*, finisher swine, nursery swine, or farrow-to-finish) applied to that determination. This is so because, for a large CAFO, the facility must be set back 3/8 of a mile (*i.e.*, 1,980 feet) from the nearest dwelling home, plus 100 feet further for each additional 500 "animal units" housed at the facility. *Id.* Thus, because each of the three subcategories in § 19.04(D) has a different threshold before the facility is classified as a large one, each also has a different threshold before the 100-foot additions begin to apply. Again, there is no dispute Intervenor's proposed CAFO is not captured by the chart in § 19.04(D), and so the "case-by-case basis" determination requirement would apply, which the Board was unaware of and did not follow.

Nonetheless, the animal units calculation is made by reference to § 27.02(12) of the Ordinances. *See* Appellant Appx. 601-02. With respect to hogs, the Ordinances specifies that animal units are calculated as follows:

ANIMAL SPECIES	ANIMAL UNIT EQUIVALENT (AU/HEAD)
Finisher Swine (over 55 lbs)	0.4
Nursery Swine (less than 55 lbs)	0.1
Farrow-to-Finish (sows)	3.7
Swine Production Units (sows breeding, gestating and farrowing)	0.47

See id. (Ordinances § 27.02(12)). These “Animal Species” terms are not further defined.

Intervenors’ proposed CAFO would house 7,400 head of hogs, of which 5,400 were sows and 2,000 were swine over 55 pounds. *See* Tr. Ex. 14, pp. 115-127. Ms. Dubbelde testified the 2,000 swine over 55 pounds were categorized as “finisher swine.” Tr. 194:24-195:5. Thus, and using the conversion chart in the Ordinances, those 2,000 hogs were the equivalent of 800 animal units. Next, Ms. Dubbelde testified the 5,400 sows were categorized as “swine production units,” which would correlate with an additional 2,538 animal units (for a total of 3,338). Tr. 195:6-12. This number

of animal units correlates with an approximate 2,540 foot setback (Intervenors' application stated 2,580). Tr. 202:7-9; Appellant Appx. 601-02.

However, it is unclear what setback Ms. Dubbelde calculated. She confirmed her calculation differed from that submitted by Intervenors in their application. Tr. 200:22-201:1; 202:7-12. Nonetheless, there is not a setback separately listed on either Ms. Dubbelde's summary of the December 8, 2020 hearing, Tr. Ex. 14, p. 313, or on the Board's official minutes and findings. Tr. Ex. 14, p. 314. Thus, the actual setback applied to Intervenors' CAFO is unknown, as is whether Petitioner Vicky Urban-Reasonover's home is impermissibly within that unknown setback.

Nonetheless, because the "swine production unit" definition ends when a pregnant sow gives birth (*i.e.*, at "farrowing"), Ms. Dubblede was also asked how those tens of thousands of piglets would be categorized. Tr. 195:13-15. Despite the limitations of the Ordinances, Ms. Dubbelde testified the piglets were still accounted for within the "swine production unit" definition. Tr. 199:8-15. Further, Ms. Dubblede disagreed the piglets should be counted as "nursery swine," even though they weigh less than 55 pounds. Tr. 199:19-200:14. Rather, she testified that the piglets would not be classified as "nursery swine" until after they were weaned. Tr. 207:19-21. In other words, according to Ms. Dubbelde, "farrowing" continues after birth and up until a piglet is

weaned. Tr. 210:10-13. Ms. Dubbelde agreed, however, that the Ordinances did not contain such language. Tr. 230:3-21.

The Court should conclude Ms. Dubblede's setback calculation is arbitrary and contrary to the Ordinances. In *Miles*, this Court looked to the Encyclopedia Britannica to interpret similar ordinance language. *Miles*, 2022 S.D. 15, ¶ 5, n.7 (defining "farrow-to-finish"). This source states in no uncertain terms that "[f]arrowing refers to a sow giving birth." Encyclopedia Britannica, *Livestock farming: Production systems*, <https://www.britannica.com/topic/livestock-farming/Production-systems> (last visited March 30, 2022). Similarly, it states with respect to feeding piglets that "[a]fter farrowing, a lactating sow's first milk is called colostrum, which lasts about three days." *Id.* (emphasis added). In other words, and contrary to Ms. Dubblede's contention, farrowing does not continue for some additional period beyond the piglet's birth. Thus, piglets cannot be considered as part of a "swine production unit," which also makes logical sense given that piglets are too young to produce other swine, as the term implies.

Accordingly, the piglets, which consume food and produce manure, must be accounted for. Because a piglet is very young and weighs under 55 pounds, the "nursey swine" category is naturally the closest and most

appropriate fit. Thus, the Board / Ms. Dubbelde's failure to consider and follow this aspect of the Ordinances was legal error.

Moreover, this error was significant. "Sows have an average litter size of 12 piglets (somewhat fewer for a first pregnancy and somewhat more for certain Asian breeds), each piglet with a birth weight of about 1.4 kg (3 pounds), and typically produce two litters per year." Encyclopedia Britannica, *Livestock production: Breeding and growth*, <https://www.britannica.com/topic/livestock-farming/Diseases-of-beef-and-dairy-cattle#ref272271> (last visited March 30, 2022). Ms. Dubbelde was actually posed a much more conservative hypothetical, which asked her to consider if the 5,400 sows each produced a single litter of only ten (10) piglets on average (*i.e.*, 54,000 piglets total per year). *See* Tr. 195:18-21.

Ms. Dubbelde agreed that, if the "nursery swine" categorization was applied to those piglets, then the animal units calculation would be increased by .1 per piglet, or 5,400 additional animal units in total. Tr. 202:13-16. Doing so, and going by Intervenors' application, Tr. Ex. 14, p. 123, would add approximately 1,080 feet (or twice as much with two litters per year) to the required setback (*i.e.*, $5,400 / 500 = 10.8$, and $10.8 * 100 = 1,080$ feet), which would require a total setback of 3,620 feet ($2,540 + 1,080$). Petitioner Vicky Urban-Reasonover's home is located 3,020 feet from the site of Intervenors'

proposed CAFO site. Tr. 57:11-24. Consequently, Intervenor's proposed CAFO facility could not comply with the setback requirements set forth in § 13.09(E) of the Ordinances. Appellant Appx. 592 ("No [CAFO] shall be permitted that is closer than the separation distances set forth in this Ordinance," unless certain exceptions that are inapplicable here are satisfied). Thus, the Board's / Ms. Dubblede's approval of it was not only erroneous, but resulted in a violation the Ordinances.

C. The Board Failed to Consider the Effects of Odor and/or Diminution of Petitioners' Property Values

This Court has long recognized that the loathsome, distasteful, and pungent nature of animal manure, even to those accustomed to living on farms, is common knowledge. *Johnson v. Drysdale*, 285 N.W. 301, 305 (S.D. 1939). Intervenor's proposed CAFO would house 7,400 head of hogs (plus piglets), all of which obviously will produce manure. Petitioners are undeniably concerned Intervenor's proposed CAFO will produce noxious odors that will affect their everyday lives, and that the facility would impair the values of their properties. Tr. 67:7-12 (Urban-Reasonover); Tr. 99:5-101:2(Powers).

The Ordinances specifically require the Board to consider the presence and effect of noxious odors for any proposed CAFO. For example, § 13.09(E)(2) requires the Board to assess "whether adequate safeguards exist to protect the public from flies and odor." Appellant Appx. 593. If not, the Board

has discretion to deny the permit. *Coyote Flats, L.L.C. v. Sanborn Cty. Comm'n*, 1999 S.D. 87, 596 N.W.2d 347, 352 (affirming denial of permit and noting “[t]here is no other finding more supported in the record than the fact this facility will give out a very powerful and offensive odor”) The Board may also impose a number of additional conditions to mitigate noxious odors. *See* Appellant Appx. 593-94 (Ordinances § 13.09(E)(3)(a) – (i).

Further, § 13.09(E)(9) of the Ordinances directs the Board to consider the criteria set out in Ordinances § 20.09. *See* Appellant Appx. 595. This section requires (“shall”) the Board to assess whether “[t]he effects of noise, odor, traffic, air and water pollution, and other negative factors shall be controlled through the use of screening, setbacks, and orientation.” Appellant Appx. 599 (Ordinances § 20.09). In addition to odors, these “other negative factors” include the diminution of property values suffered by those nearby the proposed facility. *See, e.g., Miles*, 2022 S.D. 15, at ¶ 53; *Powers*, 2020 S.D. 60, at ¶ 23; *Coyote Flats, L.L.C.*, 1999 S.D. 87, at ¶ 22.

It is undisputed Petitioners submitted copies of their expert reports from Mr. Shaykett and Dr. Bakhtari to the Board in support of their concerns that the CAFO would adversely impact their property values and also produce invasive and obnoxious odors. Tr. Ex. 14, p. 428. However, none of the Board members read or considered those materials before granting the 2020 Permit. Tr. 154:15

– 155:3 (Miller); 262:16-23 and 319:11-22 (Champa); 324:8-21 (Vasgaard); 355:23 – 356:11 (Austin).

In addition, certain members of the Board testified they would not consider Petitioners concerns regarding odor and/or a diminution of their property values. For example, Mr. Champa answered “No, sir” in response to whether “these claims that there would be additional odor beyond the setback” was “something that had to be addressed as part of [his] determination on whether to vote yes in favor of the applicant.” Tr. 307:16-21. Mr. Champa similarly stated he did not believe he needed to consider Petitioners’ property devaluation concerns because “[i]t doesn’t fall within the ordinances.” Tr. 319:23-25. Similarly, Mr. Vasgaard also agreed he “did not look at odor; is that correct?” Tr. 331:6-8. So, too, did Mr. Austin. Tr. 357:16-18 (answering “Correct” to “you didn’t consider how the odor would affect the neighbors?”).

This Court has explained that a local government board’s decision is arbitrary

if the [board] has relied on factors which [the Legislature] has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the [board], or is so implausible that it could not be ascribed to a difference in view or the product of ... expertise.

State Dep’t of Game, Fish & Parks v. Troy Twp., Day Cty., 2017 S.D. 50, ¶ 33, 900 N.W.2d 840, 853 (alterations in original). Here, the Ordinances explicitly

required the Board to consider the presence and effects of odor and, at the very least, implicitly obligated the Board to also consider whether the proposed CAFO would negatively affect neighboring property values. Yet, according to a majority of the Board's members, they did not believe the evidence on these topics was even relevant.

In *Adolph*, the board of adjustment was required to consider environmental violations of the applicant, but it failed to do so. 2017 S.D. 5 at ¶¶ 17-18. This Court held that the board's failure to consider environmental violations as required by the ordinances was an error of law, making the board's decision illegal. *Id.*, at ¶ 19. Just as ignoring environmental violations was an error of law rendering the decision illegal in *Adolph*, the Board's failure to consider the impact of odor and negative effects on neighboring property values was an error of law. The Board's decision was illegal, "[b]ecause the Board applied an incorrect legal standard." *Id.*

In addition, this is not a case where the parties presented competing evidence and the Board made a judgment call about which evidence was more convincing. Rather, the Board simply ignored the expert reports submitted by Petitioners entirely and chose only to hear and then rely on the opinions of Intervenor's expert, Dr. Nicolai. As the Circuit Court found, both of Petitioners' experts were well qualified and their opinions were deemed

credible. *Findings of Fact*, ¶¶ 1, 3, 16, 19. While the Circuit Court went on to find “[t]he Board was presented with conflicting evidence concerning what level of odor officially constitutes odor annoyance,” the Circuit Court was incorrect to extent its findings suggest the Board ever considered the evidence submitted by Petitioners. *See id.*, ¶ 20. As detailed above, the Board did not. In any event, the fact that the Circuit Court found Petitioners’ experts to be persuasive further shows Petitioners were also prejudiced by the Board’s failure to consider those opinions before granting the 2020 Permit. The Board’s failure to consider this evidence as required by the Ordinances warrants reversal. *See Tibbs*, 2014 S.D. 44, at ¶ 22 (explaining a board’s decision cannot stand if the board “did some act forbidden by law or neglected to do some act required by law”); *Hines*, ¶ 16, 675 N.W.2d at 236.

Notably, too, is that the Board’s decision was not tabled until it could review Petitioners’ materials. *See* Tr. 155:24 – 156:4. Unlike Intervenors who had virtually unlimited time to submit their application and supporting documents to the Board, Petitioners received very little notice in advance of the December 8, 2020, hearing, which was provided on November 17, 2020, and thus near the Thanksgiving holiday. Tr. Ex. 14, p. 311. Nonetheless, Petitioners’ expert reports were timely submitted, and there is no requirement for the Board to announce its decision on the same day of the hearing, as it did

here. Accordingly, if the Board needed additional time to consider and weigh the information submitted by Petitioners, then the Board easily could have availed itself of the opportunity. Yet, the Board chose not to.

This is all the more egregious with respect to Mr. Shaykett's report, as it was the only expert evidence presented concerning the diminution of Petitioners' property values. But again, the Board simply ignored it. For all these reasons, the Court should conclude the Board acted arbitrarily and that it failed to follow the Ordinances by refusing to consider Petitioners' expert opinions and their reports. Thus, the Board's decision must be reversed.

CONCLUSION

For each and all of these reasons, the Court should reverse the Board's decision to grant the 2020 Permit. Alternatively, the Court should direct this matter be remanded to the Board for further hearings consistent with the Ordinances and the Board's duties under South Dakota law.

Dated at Sioux Falls, South Dakota, this 13th day of May, 2022.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

/s/ Michael L. Snyder

Mitchell A. Peterson
Michael L. Snyder
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Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellants

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument.

Dated at Sioux Falls, South Dakota, this 13th day of May, 2022.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

/s/ Michael L. Snyder

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Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellants complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2016, this Brief contains 8,407 words and 44,464 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 points) and was prepared using Microsoft Word 365.

Dated at Sioux Falls, South Dakota, this 13th day of May, 2022.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

/s/ Michael L. Snyder

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Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing “Brief of Appellants” was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on the 13th day of May, 2022.

The undersigned further certifies that an electronic copy of “Brief of Appellants” was served electronically to the attorneys set forth below, on the 13th day of May, 2022.

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Attorneys for Intervenor

Dated at Sioux Falls, South Dakota, this 13th day of May, 2022.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

/s/ Michael L. Snyder

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Attorneys for Appellants

APPENDIX

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IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

62CIV21-000003

NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent,

STEVE AND ETHAN SCHMEICHEL, and
NORWAY PORK OP, LLC,

Intervenors.

PLEASE TAKE NOTICE that Findings of Fact and Conclusions of Law, a true and correct copy of which is attached hereto, was entered in the above-entitled action by the Honorable Chris Giles, Circuit Court Judge, on the 29th day of November, 2021, and was filed with the Turner County Clerk of Court on the 29th day of November, 2021.

Dated this 30th day of November, 2021. DONAHOE LAW FIRM, P.C.

/s/ *Brian J. Donahoe*

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Attorneys for Intervenors

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of November, 2021, a true and correct copy of the foregoing **Notice of Entry of Findings of Fact and Conclusions of Law** was served electronically using the Odyssey File & Serve system upon the following individuals:

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Attorneys for Turner County Board of Adjustment

/s/ Brian J. Donahoe
Brian J. Donahoe

STATE OF SOUTH DAKOTA

COUNTY OF TURNER

FILED

NOV 27 2021

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

**JEFFREY K. POWERS and VICKY
URBAN-REASONOVER,**

Petitioners,

v.

**TURNER COUNTY BOARD OF
ADJUSTMENT,**

Respondent,

and

**STEVE AND ETHAN SCHMEICHEL,
and NORWAY PORK OP, LLC,**

Intervenors.

62CIV21-0003

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

The above-entitled matter having come on for a trial to the Court before the Honorable Chris Giles, Judge of the Circuit Court, in the courtroom of the McCook County Courthouse, Salem, South Dakota, by agreement of the parties to hold the trial for this Turner County case in Salem on the 6th day of August, 2021 at the hour of 5:00 p.m. The Petitioners appearing by their attorney, Mr. Mitchell A. Peterson of the law firm Davenport, Evans, Hurwitz & Smith, L.L.P. of Sioux Falls, South Dakota; the Intervenors appearing by their attorney Mr. Brian J. Donahoe of the Donahoe Law Firm, P.C. of Sioux Falls, South Dakota. The attorney for the Respondent, Mr. Douglas M. Deibert or Cadwell, Sanford, Deibert & Garry of Sioux Falls, South Dakota was present for the trial but was not present for the Court's ruling. The Court, having heard the testimony and argument of counsel, and for good cause shown, enters the following:

FINDINGS OF FACT

1. The Court finds the Petitioner's real estate expert, Mr. Shaykett, is very qualified. He is a clearly an expert in his field.
2. This is the first time in his experience that Mr. Shaykett was asked a hypothetical question involving the future impact a newly constructed concentrated animal feeding operation (CAFO) would have on the property values of adjacent real estate.
3. The Court finds that Mr. Shaykett's analysis reviewing the cost approach, income approach, and sales approach, to valuation are appropriate.
4. The Court finds that Mr. Shaykett correctly determined that a sales comparison approach is the best approach to be considered in determining a real estate value analysis concerning the subject property and the surrounding properties.
5. Mr. Shaykett testified to finding three comparable sales to use in his analysis; they were in the Hurley area, Chancellor area, and Davis area, all within Turner County.
6. The Court finds that none of the comparable sales in the area used by Mr. Shaykett were near CAFOs.
7. Mr. Shaykett claimed that he could not find any comparable sales to use that were near CAFOS in the immediate market area, nor did he present any information of comparable sales near CAFOs within the state of South Dakota or the state of Iowa; which are areas he testified to being a licensed appraiser in for numerous years.
8. Since he was unable to find applicable comparable sales, Mr. Shaykett looked at properties that sold which were adjacent to sewer lagoons.
9. Mr. Shaykett also reviewed the odor report and information provided by the Petitioners' expert, Dr. Bakhtari and his company, Scentroid.

10. The Court noted that Mr. Shaykett did not update and research the data he utilized since he originally prepared his report in 2019.
11. Mr. Shaykett testified that the mere presence of a hog facility of this nature can impact the perception of a prospective buyer. The Court finds this to be a legitimate concern.
12. Mr. Shaykett looked at and reviewed sales effected by odor nuisances other than CAFOs and considered factors involving the distance the real estate which was selling were from the CAFO and the number of animal units in the CAFO. The Court believes these are valid considerations.
13. Mr. Shaykett, however, did not factor in or give consideration to the specific type of facility that is to be constructed in this case and compare that to the types of facilities that were involved in the comparable sales he analyzed.
14. In spite of Mr. Shaykett's experience and knowledge as an appraiser, offering an opinion concerning the diminution in and value to a property close to a proposed CAFO facility is very speculative.
15. The Court also finds it to be very concerning that Mr. Shaykett was not able to find comparable sales near CAFOs to use in his analysis. The Court further finds the use of comparable sales near open sewer lagoon systems to be inappropriate based on the type of proposed facility at issue here.
16. The Court finds that Dr. Bakhtari is a qualified and experienced expert in the field of odor detection and analysis. His use of the AERMOD data and information was impressive, based on the testimony in his deposition.
17. The Court finds that a determination for the level of odor annoyance is subject to speculation and conjecture. Different government entities have made different

determinations as to what level of odor, in odor units, rises to the level of being an annoyance.

18. Dr. Bakhtari's opinion is that a level of odor annoyance at ten odor units or higher is problematic. However, the Intervenor's expert, Dr. Nikolai, presented testimony to the Board of Adjustment (the Board) at the time of the hearing that seventy-five odor units is a more appropriate level before the odor becomes an annoyance.
19. Dr. Nikolai testified telephonically before the Board at the time of the hearing. He also appears to the Court to have expertise and experience in the field of odor analysis, but his expertise and experience do not appear to rise to the same level as Dr. Bakhtari's. However, it appears the Board found Dr. Nikolai's opinion to be more persuasive.
20. The Board was presented with conflicting evidence concerning what level of odor officially constitutes odor annoyance.
21. Dr. Bakhtari was of the opinion that at ten odor units there is a level of odor annoyance and Dr. Nikolai's opinion was that you have to reach seventy-five odor units to reach the level of odor annoyance.
22. The Court finds that odor is not regulated at an odor unit level in Turner County or in South Dakota.
23. The Court finds that odor is a factor to be considered by the Board under the applicable ordinance when reviewing a proposed CAFO application.
24. The Court finds that Dr. Bakhtari's testimony from his deposition discussed regulations in Canada, Europe, Australia, and even some states in the United States but those regulations are not applicable here.
25. In Dr. Nikolai's telephonic testimony to the Board, he commented that he believed that

the Petitioners' property could be affected by the proposed facility. He disagreed with the opinion of Dr. Bakhtari, as to the extent that the Petitioners' property would be affected by the proposed facility.

26. The Court finds that the Petitioners do have a right to express their opinions as to the value of their own property.
27. The Petitioners testified that before the Court and the Board that it was their opinion that they believed their property will be affected and the value of their property would be diminished by the construction of the proposed facility. The Petitioners clearly expressed and articulated their positions and made their concerns apparent to the Board.
28. The Court found the four Board of Adjustment members and Ms. Dubbelde to be credible.
29. This particular facility is a hybrid facility that does not neatly fit within one of the categories set forth in the zoning ordinances.
30. In order to determine the proper setback distance this type of facility should be from nearby residences, the number of animal units that are going to be in the facility needs to be determined.
31. Ms. Dubbelde, the Turner county administrative official, reviewed the information submitted with the permit application and calculated the setback distance.
32. All four Board of Adjustment members agreed with how Ms. Dubbelde calculated the setback distance.
33. No evidence was presented, either directly or through cross examination, to show that the setback calculations used by Turner County were erroneous.
34. The Court did not find any evidence of undue influence being exerted by Intervenor

Schmeichel towards any of the members of the Board.

35. The Intervenor's agreed to assign any funds they might receive from the State Office of Economic Development in connection with this facility to Turner County.
36. It is not certain if any funds would be assigned by the State to Turner County, and if so, no amounts were determined or known at the time the Board of Adjustment made its decision. If funds would become available from the State, they would be used to help Turner County with the additional wear and tear on the local roads that would be caused by the construction of this facility.
37. It does not appear the Board of Adjustment members received materials from the Petitioners in advance of the hearing held on Tuesday, December 28, 2020.
38. It does appear that the Board of Adjustment received materials from the Petitioners on the morning of the hearing. In spite of not receiving the material in advance, the Board did hear the Petitioner's arguments. The Petitioners testified regarding their concerns with the proposed project and the effect that odor would have on their property, on their lifestyle and use of enjoyment of their property.
39. It is very clear, based on the testimony of the Board members, that the Petitioners arguments and concerns did not have significant merit.
40. All four Board members testified that they believed the proposed project was outside of the appropriate setback distance and therefore, they did not believe odor should be a significant concern. All four Board members indicated that they had a knowledge of farming, lived in a rural area themselves, and some of them actually had experience in the past or were currently involved in the production of hogs. That the Board members applied their personal knowledge and experience in making their decision to approve the

project.

41. The Board heard telephonic testimony from Dr. Nicolai that supported their beliefs that there would be a minimal impact on the Petitioners because of odor due to the construction of this project.
42. It is clear to the Court that the four Board members were the only ones who made the decision to grant the permit for this project.
43. It is also clear to the Court that the Board understood what their decision-making ability was and the discretion they had in issuing a permit or not issuing a permit.
44. Ms. Dubbelde was the one who calculated the setback distance because of her years of experience and expertise on performing the calculation, determining the appropriate number of animal units to be used, and then determining the appropriate setback.
45. No evidence was presented that the Board engaged in any act forbidden by law.
46. The Board properly held a hearing, which complied in all respects with applicable law and regulations; and listened to and considered the Petitioners' position, including testimony from the Petitioners and argument from their counsel.
47. It is very clear to the Court that after having heard the testimony from all four Board members, that all four of them took their responsibility and decision-making authority very seriously. The Board members reviewed the testimony and material presented and made their own individual decisions concerning the granting of the permit.
48. The Court finds that the Board members were knowledgeable concerning the ordinance requirements for a permit of this nature.
49. The Court finds that the Board members were aware of the guidelines to be followed and the extent of their authority in considering the approval of this permit.

50. Testimony was presented from a couple of the Board members outlining that a permit would be denied if it did not meet all of the requirements. The Board members also testified that they understood they could add additional conditions in conjunction with the approval of a permit.
51. No evidence was presented that the Board members were biased or that there was an unacceptable risk of actual bias. No evidence was presented that the Board members were closed minded in reviewing the permit application or in listening the Petitioners' objections.
52. No evidence was presented that the Board members had any conflicts of interest, were partial, or because they were disinterested in the proceedings.
53. No evidence was presented that there were any prohibited ex parte communications concerning this permit.
54. No evidence was presented that the Board misapplied the applicable law or made an error of law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the persons and subject matter of this litigation.
2. While the Court has concerns with the strength of Mr. Shaykett's analysis, the Court agrees with him in that there could be a diminution in value because of this proposed facility. The Court finds that these Petitioners have a personal, distinct, and potential injury that could come about because of this proposed facility.
3. The Court believes the Petitioners have met their burden as to standing, in that they do have standing to challenge this petition.
4. The decision made by the Board was not the product of any undue influence.

5. The Court does not find there to be any inappropriate pecuniary interest in connection with the decision made by the Board.
6. The Court reviews the legality of the underlying decision under SDCL 11-2-61.
7. The Court does not find that the Board arbitrarily or willfully disregarded undisputed proof.
8. The Court does not find that the Board's decision was based on fraud.
9. The Court does not find that the Board exceeded its jurisdiction in issuing the permit.
10. The Court does not find that the Board failed to regularly pursue its authority and did not improperly designate their decision-making authority to anyone else.
11. The Court does not find that the Board engaged in any act forbidden by law.
12. The Court does not find that the Board neglected to do any act required by law.
13. The Court does not find that the Board failed to engage in independent thought.
14. The Court does not find that the Board failed to follow the guidelines or requirements of the applicable ordinances.
15. The Court does not find that the Board exceeded its authority.
16. The Court does not find that members of the Board were disqualified due to actual bias, or unacceptable risk of bias, or because they had unalterably closed minds, or that they had conflicts of interest, or because of partiality, or because they were not being disinterested in the proceedings, or because there were prohibited ex parte communications, and that they were not being free from bias or predisposition.
17. The Court does not find that the Board made any errors of law.
18. The Court does not find that the Board applied an incorrect legal standard.
19. The Court does not find the Board's decision to be illegal.


20. The Petitioners did not meet their burden on establishing any illegality concerning the Board's decision in granting the application.

21. Petitioners are not entitled to any relief regarding the matters and allegations set forth in their Petition.

DONE BY THE COURT this 29th day of November, 2021.

BY THE COURT:

ATTEST:


Clerk of Courts
(SEAL)


Judge of the Circuit Court



IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

62CIV21-000003

NOTICE OF ENTRY OF ORDER

Intervenors.

Brian J. Donahoe
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Facsimile: (866) 376-3310
Email: brian@donahoelawfirm.com
Attorneys for Intervenors

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of November, 2021, a true and correct copy of the foregoing **Notice of Entry of Order** was served electronically using the Odyssey File & Serve system upon the following individuals:

Mitchell A. Petersen
Reece M. Almond
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ddeibert@cadlaw.com
Attorneys for Turner County Board of Adjustment

/s/ Brian J. Donahoe
Brian J. Donahoe

STATE OF SOUTH DAKOTA

FILED


IN CIRCUIT COURT

COUNTY OF TURNER

NOV 29 2021

FIRST JUDICIAL CIRCUIT

**JEFFREY K. POWERS and VICKY
URBAN-REASONOVER,**


Turner County Clerk of Courts
1st Judicial Circuit Court of South Dakota

22CIV21-0003

Petitioners,

v.

ORDER

**TURNER COUNTY BOARD OF
ADJUSTMENT,**

Respondent,

and

**STEVE AND ETHAN SCHMEICHEL,
and NORWAY PORK OP, LLC,**

Intervenors.

The above-entitled matter having come on for a trial to the Court before the Honorable Chris S. Giles, Judge of the Circuit Court, in the courtroom of the McCook County Courthouse, Salem, South Dakota, by agreement of the parties to hold the trial for this Turner County case in Salem on the 6th day of August, 2021 at the hour of 5:00 p.m. The Petitioners appearing by their attorney, Mr. Mitchell A. Peterson of the law firm Davenport, Evans, Hurwitz & Smith, L.L.P. of Sioux Falls, South Dakota; the Intervenors appearing by their attorney Mr. Brian J. Donahoe of the Donahoe Law Firm, P.C. of Sioux Falls, South Dakota. The attorney for the Respondent, Mr. Douglas M. Deibert or Cadwell, Sanford, Deibert & Garry of Sioux Falls, South Dakota was present for the trial but not present for the Court's ruling. The Court, after considering the evidence presented at trial, documents submitted in reference to said matter, the documents on record herein, and the arguments of counsel, for good cause shown, rules as follows. It is hereby

ORDERED that the Petitioners have standing to challenge the actions of the Turner

County Board of Adjustment in this matter. The Court agrees there could be diminution in value because of this proposed facility and that the Petitioners meet the burden as to standing because they have a personal, distinct, and potential injury that could come about as a consequence of this proposed facility. It is further

ORDERED that the Board's decision in granting the application at issue was appropriate, proper, and legal, complied with all South Dakota laws and applicable ordinances; and is in all effects approved and affirmed. It is hereby

ORDERED that Petitioners are entitled to none of the relief set forth in their Petitioner.

Dated this 29th day of November, 2021.

BY THE COURT:

Chris S. Files
Judge of the Circuit Court

ATTEST:

Jane M. Walker
Clerk of Courts
(SEAL)



STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF TURNER)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

JEFFREY K. POWERS, and VICKY
URBAN-REASONOVER,

Petitioners,

vs.

TURNER COUNTY BOARD OF
ADJUSTMENT,

Respondent,

and

STEVE AND ETHAN SCHMEICHEL, and
NORWAY PORK OP, LLC,

Intervenors.

62CIV21-00003

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Petitioners, Jeffrey K. Powers and Vicky Urban-Reasonover, appeal to the South Dakota Supreme Court from:

1. The Trial Court's November 29, 2021, Order, notice of entry of which was served November 30, 2021;
2. The Trial Court's November 29, 2021, Findings of Fact and Conclusions of Law, notice of entry of which was served November 30, 2021;
3. The Trial Court's refusal to enter Petitioners' Proposed Findings of Fact, Conclusions of Law, and Final Judgment filed and served November 19, 2021;
4. The Trial Court's refusal to sustain Petitioners' Objections to Court's Proposed Findings of Fact, Conclusions of Law, and Order filed and served November 19, 2021; and

5. If adverse to Petitioners, the Trial Court's forthcoming adjudication of the currently pending Motions for Attorneys' Fees and Costs filed by Respondent, Turner County Board of Adjustment, and by Intervenors, Steve and Ethan Schmeichel and Norway Pork Op, LLC, respectively.

Dated at Sioux Falls, South Dakota, this 28th day of December, 2021.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.



Mitchell Peterson | Michael L. Snyder
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mpeterson@dehs.com | msnyder@dehs.com
Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date indicated above, a true and correct copy of the foregoing document was served electronically upon: Douglas Deibert (ddeibert@cadlaw.com); Brian Donahoe (brian@donahoelawfirm.com).



Mitchell A. Peterson

1	STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	:SS	
2	COUNTY OF TURNER)	FIRST JUDICIAL CIRCUIT
3	* * * * *	
		*
4	Jeffrey K. Powers and	* 62CIV21-000003
	Vicky Urban-Reasonover,	*
5		*
	Petitioners,	* COURT TRIAL
6		*
	-vs-	* Volume 1 of 2
7		* (Pages 1 - 249)
	Turner County Board of	*
8	Adjustment,	* August 5, 2021
		*
9	Respondent,	*
	-and-	*
10		*
	Steve and Ethan Schmeichel,	*
11	and Norway Pork OP, LLC,	*
		*
12	Intervenors.	*
		*
13	* * * * *	
14	BEFORE:	The Honorable Chris S. Giles
		Judge of the Circuit Court
15		For the First Judicial Circuit
		Salem, South Dakota
16	APPEARANCES:	Mr. Mitchell A. Peterson
17		Davenport, Evans, Hurwitz & Smith, L.L.P.
		Sioux Falls, South Dakota
18		Attorney for Petitioners.
19		
		Mr. Douglas M. Deibert
20		Cadwell, Sanford, Deibert & Garry
		Sioux Falls, South Dakota
21		Attorney for Respondent.
22		
		Mr. Brian J. Donahoe
23		Donahoe Law Firm, P.C.
		Sioux Falls, South Dakota
24		Attorney for Intervenors.
25		

1 PROCEEDINGS: The above-entitled matter came on
 2 for a Court Trial on the 5th day of
 3 August, 2021, commencing at the hour of
 4 9:00 a.m. in the courtroom of the McCook
 5 County Courthouse, Salem, South Dakota.

* * * * *

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1 THE COURT: Please be seated. We are here for court on
2 August 5th, 2021. We are proceeding in Salem in
3 connection with a Turner County action by agreement of the
4 parties.

5 In this case we have the Petitioners Jeffrey Powers
6 and Vicky Urban-Reasonover represented by Mr. Peterson.
7 We have Turner County Board of Adjustment represented by
8 Mr. Deibert. And then we have our intervenors represented
9 by Mr. Donahoe.

10 At this point are the parties ready to proceed,
11 Mr. Peterson?

12 MR. PETERSON: Yes, Your Honor. Due to the construction
13 on Highway 81, my client, Dr. Jeff Powers, is on his way
14 here, but we do not need to wait for him.

15 THE COURT: Okay. Very good. Mr. Deibert, are you ready
16 to proceed?

17 MR. DEIBERT: Yes, Your Honor.

18 THE COURT: Mr. Donahoe, are you ready to proceed?

19 MR. DONAHOE: Yes, Your Honor.

20 THE COURT: All right. At this point the parties can
21 proceed. Are we going to start with Mr. Deibert
22 presenting what took place, or are we going to start with
23 Mr. Peterson challenging what took place?

24 MR. DEIBERT: I assume Mr. Peterson.

25 MR. PETERSON: Yeah, we have the burden of proof so I

1 think we ...

2 THE COURT: I've done it both ways in different counties
3 so ...

4 All right. Mr. Peterson, you can call your first
5 witness then.

6 MR. PETERSON: Judge, the first person I'd like to call is
7 our appraisal expert, Steve Shaykett. He is in the
8 courtroom.

9 THE COURT: Mr. Shaykett, if you'd come forward, please.
10 If you'd raise your right hand.

11 STEVE SHAYKETT,
12 called as a witness, having been first duly sworn, was
13 examined and testified as follows:

14 THE COURT: Please be seated.

15 DIRECT EXAMINATION

16 Q (BY MR. PETERSON) Good morning.

17 A Good morning.

18 Q Would you please introduce yourself to the Court.

19 A Yes. My name is Steve Shaykett. It's spelled

20 S-H-A-Y-K-E-T-T.

21 Q And, Mr. Shaykett, what is your trade or profession?

22 A I'm a real estate appraiser.

23 Q And have you been identified as an expert witness on
24 behalf of the petitioners in this case?

25 A Yes, I have.

1 Q And is that with respect to the valuation of the home
2 owned by Petitioner Vicky Urban-Reasonover both with the
3 hog facility and without the hog facility?

4 A That's correct, yes.

5 Q And you generated a report that sets forth your analysis,
6 opinions and credentials?

7 A Yes, it does.

8 MR. PETERSON: Your Honor, I brought a binder with all of
9 the exhibits; one for Your Honor with the originals, one
10 for the witness. Would it be helpful to go ahead and
11 distribute those at this time?

12 THE COURT: That would be fine with me. Any objection
13 from counsel?

14 MR. DONAHOE: No objection.

15 MR. DEIBERT: None, Your Honor.

16 THE COURT: All right. Please do so.

17 MR. PETERSON: Judge, here are the exhibits.

18 THE COURT: Thank you.

19 MR. PETERSON: And then here's a copy of that deposition
20 transcript. I brought it four-to-a-page and
21 one-to-a-page, not that we need it now, but -- and I can
22 put it at my desk, too, if that's --

23 THE COURT: No. I was hoping you would give me a hard
24 copy. I saw the electronic version, and I was debating if
25 I would print it or I was waiting to see if you brought me

1 a hard copy. So I made the right choice, I waited. Thank
2 you.

3 MR. PETERSON: All right. Sounds good. I also have a
4 couple thunderized -- there's three audio recordings,
5 there's a transcript of the exhibit and there's the video
6 deposition, but we can take care of that later, if that's
7 okay.

8 THE COURT: That would be fine.

9 Q (BY MR. PETERSON) Mr. Shaykett, could you turn to Exhibit
10 3 in the book just to confirm that that is your report in
11 this case?

12 A Yes. It appears to be a copy of the report, yes, sir.

13 Q And did you bring your own copy today, too?

14 A Yes, I did.

15 Q You're free to work with either one that would be more
16 convenient for you.

17 A The big book is a little bulky.

18 Q Okay. Mr. Shaykett, do you believe that your testimony
19 will be helpful to the Court in understanding the impact
20 of the proposed hog barn on Vicky's property?

21 A Yes, I do.

22 Q Do you believe you have sufficient data, facts and
23 information in which to render opinions about the impact?

24 A In the report, yes.

25 Q Did you use reliable principles and methodologies in

1 determining the financial or appraisal impact on Vicky's
2 property?

3 A Yeah, it's -- the report was completed similar to other
4 properties that we've appraised for other types of impacts
5 that affect the real estate value of properties.

6 Q And the principles and methodologies that you used in this
7 particular case, are they the same principles and
8 methodologies you use in the ordinary course of your
9 appraisal work?

10 A Yes, they are.

11 Q Did you apply the principles and methodologies reliably to
12 the information that you had in this case?

13 A Yes, I believe so.

14 Q Mr. Shaykett, could you turn to Page 34 of your report?

15 A Yes.

16 Q And does that begin the section that sets forth -- does
17 that begin the section that sets forth your
18 qualifications, credentials, professional and educational
19 background?

20 A Yes, it does.

21 Q If you would, just describe your educational history for
22 the Court as it relates to the work that you did in this
23 case.

24 A Okay. Well, I graduated from the University of South
25 Dakota in 1975, and at that point was employed by a real

1 estate appraisal company in Kansas City, Missouri. And so
2 right out of college I started my appraisal, full-time
3 appraisal career, and worked for that appraisal company
4 for five years; and then for about four and a half years
5 had my own appraisal company in Kansas City.

6 During that time I took classes, special education --
7 special classes in appraisal, a variety of classes and
8 courses to obtain a designation through the Appraisal
9 Institute. So I hold the MAI designation since 198 --
10 1981.

11 Q Mr. Shaykett, I'm going to stop you for just a moment.
12 What is the Appraisal Institute?

13 A Well, the Appraisal Institute is the most widely
14 recognized appraisal profession association and it
15 grants -- well, it grants a couple of designations, but
16 the MAI is the most widely recognized as being the upper
17 required -- requirement of education and experience to get
18 that designation.

19 Q And since first obtaining that in 1981, have you
20 maintained that MAI designation?

21 A Yes, I have. It requires continuing ed to maintain that
22 as well as continuing ed for my state license.

23 Q And you still hold that certification as you sit here
24 today?

25 A Yes, I do.

1 Q Where are you -- in terms of states, what states are you
2 certified to do appraisal work in?

3 A I currently hold license, appraisal license, in
4 South Dakota, Minnesota, and I just released my Iowa one
5 as of the 1st of August, but I have been licensed in Iowa
6 for 20 years.

7 Q What other training or continuing education have you had
8 that would be relevant to the work that you did in this
9 case?

10 A Well, part of the education that I tend to obtain is in
11 regard to types of litigation, condemnation cases,
12 training in how to develop theory and expertise in
13 litigation appraisals.

14 Q And most of the appraisal work you do, is it in connection
15 with litigation or is it in connection with other
16 contexts?

17 A Well, I would say probably -- well, it kind of depends on
18 to what level. My experience over the 40 some years is a
19 lot of appraisal work for cities, states, in acquisition
20 of right-of-way, flowage easements, that sort of thing.
21 So a lot of my appraisal work over the 40 years has been
22 where potentially it would be litigation appraisal
23 assignments. So they were completed with that aspect in
24 mind.

25 Q All right.

1 A As far as the actual cases that went to court, it's a
2 small part of my appraisal practice, but the appraisal
3 assignments are probably 10 to -- 10 to 15 percent that
4 could potentially go to litigation.

5 Q How would you describe your experience with respect to
6 appraising property such as Vicky's that's sort of a rural
7 acreage context?

8 A Well, you know, again, kind of going back to my
9 background, when -- when we moved from Kansas City to
10 Sioux Falls in 1984, set up an appraisal company that was
11 basically three disciplines: the commercial appraisal,
12 the agricultural appraisal and single-family residential
13 appraisals.

14 So, during that time either myself or staff, we had
15 the -- we were available for all three types of
16 appraisals, and at that time I was supervising each of
17 those appraisals. And so we completed considerable number
18 of appraisals for residential properties, commercial
19 properties and agricultural properties.

20 So -- and that has all changed over the years some.
21 We did -- we divested ourselves of the single-family
22 residential side that was mainly commercial -- or I mean,
23 mainly mortgage-related probably about 15 years ago, but
24 have continued doing residential appraisals for
25 non-mortgage lenders, any -- kind of anything that dealt

1 with some sort of litigation problem.

2 Probably the most recent one is -- I'm trying to
3 remember -- I think there was four houses up at Renner
4 that last -- no, two, maybe it's now three springs ago,
5 the State changed the drainage culvert across Highway 115,
6 and that spring the ice and snow plugged those culverts
7 and flooded, when water came, it flooded four houses
8 there. So, again, that's an example of an appraisal
9 assignment where I had to obtain the value of the property
10 as if it wasn't damaged and then as -- how the damages
11 actually impacted the value.

12 I did a similar assignment about 10 years ago on, I
13 think there was six houses down on, oh, Shindler, down
14 south of Sioux Falls. I think that's Highway 115, too, if
15 I remember right. And it had a similar problem where,
16 again, the DOT had changed a culvert system, and a flood
17 came through and backed up water and caused damages to
18 some residential properties.

19 So, those are probably the most recent ones that I
20 would say would be similar to this type of assignment with
21 a rural acreage and trying to determine how the market
22 would react to the impact of -- of an event.

23 Q In short, are you one of the most experienced appraisers
24 in the State of South Dakota?

25 A Well, I've got 40 some years, and a big portion of it is

1 related to some type of litigation so I -- I think I am,
2 yes.

3 Q And do you believe your education, training, professional
4 background and actual experience provides you a sufficient
5 basis to evaluate what impact this particular hog barn
6 would have on Vicky's property?

7 A Yes. I feel very comfortable with how I -- in completing
8 the appraisal report and recognize the correct appraisal
9 assignment contingents.

10 Q A final question on your background: Page 36 of your
11 report, does that identify the continuing education
12 courses that you've completed in recent years?

13 A Yes. And I must say this appraisal report was completed
14 in '19, and I apparently didn't update that past 2016, but
15 there were additional courses since 2016.

16 Q What information did you need and obtain in order to
17 perform your appraisal work in this case?

18 A Well, just like every other appraisal assignment, one of
19 the primary things is to actually meet with the owner of
20 the property to obtain the legal description for the
21 property and then make an inspection of the property so I
22 could obtain the information regarding the actual subject
23 property in order to develop comparable sales from the
24 market.

25 In addition to that, we would check the zoning as

1 well as develop information regarding what we call market
2 trends, you know, what -- how is the real estate market
3 for that particular type of property and the influences,
4 the economic influences, that impact the real estate
5 market for that particular type of property.

6 Q In your report you mention or called this thing a
7 hypothetical condition, which is the hog facility. In
8 this context, what is a hypothetical condition?

9 A Well, let me turn to the report. A hypothetical condition
10 is a condition that's contrary to know -- to what actually
11 exists. And so, like, in this case the hypothetical
12 condition is that the hog barn does not -- is not
13 currently physically there, but the second value is based
14 on the idea that it is in operation.

15 Q Your report also references that your work is done in
16 conformity with the Uniform Standards of Professional
17 Appraisal Practice or the USPAP.

18 What does that mean?

19 A Well, as a licensed appraiser in the State of South
20 Dakota, we are required to complete our appraisals
21 according to USPAP, and every licensed appraiser in the
22 State is -- has to meet that requirement.

23 Q And in this case is your report and your opinions in your
24 appraisal consistent with USPAP?

25 A Yes, I believe so.

1 Q And if you had had insufficient information in order to
2 conduct your work, would you have noted that -- that, I'm
3 sorry, I can't appraise your hypothetical condition
4 because I don't know?

5 A Yeah, I wouldn't have been able to complete the
6 assignment.

7 Q Near the beginning of your report you've signed what's
8 called an Appraiser's Certification?

9 A Yes.

10 Q Do you have that in front of you?

11 A Yes.

12 Q And is this a standard certification or is there anything
13 unique about this particular certification?

14 A There -- this Appraiser Certification is similar to one
15 that goes out into every one of our appraisal reports.

16 Q Did you have an opportunity to actually personally
17 physically visit Vicky's property?

18 A Yes, I did.

19 Q Were you able to inspect it?

20 A Yes, I did. Yes.

21 Q Your appraisal work, is it contingent upon any particular
22 result or conclusion?

23 A No, it's not.

24 Q Mr. Shaykett, if you would, please, go to Page 5 of your
25 report. It's entitled "Scope of Work," and it identifies

1 three different approaches to valuation, and you've listed
2 the cost approach, the income capitalization approach and
3 the sales comparison approach.

4 Can you just explain what those are in plain English?

5 A Okay. Well, those are the three generally accepted
6 appraisal approaches to estimate the value of a particular
7 property. The cost approach, it's a matter of estimating
8 the land from comparable sales to -- to obtain the value
9 of the site, and then to that we add the depreciated value
10 of the improvements.

11 And typically in the cost approach, to get the value
12 of the improvement we utilize a cost service to help us
13 determine what the replacement cost is. And in this case
14 if I'd have done one, it would be the replacement cost of
15 a single-family-home; the replacement cost of a garage; I
16 think there was two outbuildings and another detached
17 garage, and through that develop what the replacement cost
18 would be. And then utilizing market evidence, apply a
19 depreciation to those improvements to get to the current
20 depreciated value of the improvements, adding that to the
21 value of the land to get a value by the cost approach.

22 Due to the age of the improvements and the variety of
23 them, I didn't really feel like they would -- the cost
24 approach was really applicable in this case. It just
25 didn't really -- I don't think added anything to the

1 overall support of the final value.

2 In the income capitalization approach, as the
3 appraiser we would estimate what the net income is to the
4 property, and utilizing a capitalization rate develop a
5 value indication by the income capitalization approach.
6 Single-family homes, especially in rural areas, aren't
7 necessarily purchased to rent out, and so there isn't a
8 lot of market-supported information as to what the
9 potential rent is. And -- and because of that, there
10 isn't a lot of market-supported capitalization rates as
11 well. And so, again, I didn't feel like an income
12 approach would really add anything to support a
13 supportable value.

14 And the -- you know, not utilizing either one of
15 those approaches is not unusual when an appraiser is doing
16 an assignment of a single-family home, whether it's in the
17 metropolitan area or whether it's in a rural acreage. So
18 it's pretty standard to rely mainly on the sales
19 comparison approach when doing single-family homes and
20 acreages.

21 So, that left the sales comparison approach, which in
22 this case is not only just a single-family home, but we
23 also had some significant outbuildings with a large garage
24 and this party room and then there was some additional
25 improvements, the original farm-type improvements. And so

1 all of that information I utilized in making my comparison
2 to the comparable sales that I found in the market that
3 had hopefully as many, if similar, aspects, but still
4 required adjustment as shown in my report. So, the scope
5 of work in this case did boil down to just pretty much the
6 sales comparison approach.

7 Q You mentioned a large garage and a party room. What is
8 the -- what is what you're describing as the party room?

9 A Yeah. Well, and I don't know whether you want to actually
10 get into a description of the property at this point or
11 just a brief discussion.

12 Q Yeah, absolutely. Where in your report would best
13 describe the particular property --

14 A Yes.

15 Q -- in question?

16 A That's found on Page 16. And this is the -- this is the
17 result of my actually viewing the property, doing the
18 inspection, gathering the data from the owners as well as
19 from the county courthouse assessment office.

20 Q And you certainly don't need to just read verbatim, but
21 describe the property in question.

22 A Sure. You know, first kind of looking on Page 18, you can
23 see how the property sits along the paved road, that it
24 has a mature farm -- the tree strip along the north side
25 of the property and continuing along the west side of the

1 property. And on the south side they have planted some
2 newer pine trees; I think there's just a single row of
3 pine trees.

4 And then the home is towards the south end of the
5 site. It's a seven and a half or 7. -- or 6.75-acre site
6 with the house pretty much on the south end of the site.
7 The house itself is -- the county didn't have the exact
8 date of construction as far as I could determine and, you
9 know, with my experience, I would guess it was probably in
10 the '30s when it was built and so it's, you know, 80 some
11 years old.

12 But, after the owners purchased the property they did
13 a considerable amount of work updating it: new
14 electrical, new plumbing, furnaces and kitchen, bathrooms.
15 So, there was considerable improvements to the property
16 after they purchased it. There's a -- they added a deck
17 on the south side of the property -- of the house, off the
18 kitchen, with the sliding glass doors out to the deck.

19 The second major improvement is the garage itself,
20 and probably the pictures back in the Exhibit Number 2 on
21 Pages 11, 12 and 13 show the garage that I mentioned and
22 the party -- party room. And it's basically just a pole
23 shed type construction with the garage area for -- I think
24 it was called a three-stall garage, oversized. And then
25 on the west end of it is the -- this party room. You can

1 see that considerable finish on the walls, and it is open
2 ceiling, but they've got two overhead doors that really
3 open it out to -- to an outdoor setting and along with the
4 patio out there as well. So -- so it was really set up to
5 enjoy the outdoors in a rural setting.

6 Q Mr. Shaykett, I just want to clarify on the record, when
7 you referenced the pictures that are in Exhibit 2, that is
8 Exhibit 2 to your report; correct?

9 A Oh. Yes.

10 Q Okay.

11 A Sorry about that.

12 Q So this party room then, it's got the wood wall finish,
13 it's -- the intent of the room is to let the outside air
14 in and spend -- enjoy that outside summertime warm weather
15 in a partially outdoor way?

16 A Yeah. The building was constructed in 2016, so it was
17 fairly new and you could -- I mean, that's exactly what it
18 was built for.

19 Q Overall, how would you describe the desirability of this
20 property?

21 A Well, that certainly my conclusion in my discussion of
22 the -- of the description of the property is that it meets
23 today's standards as a modern floor plan acceptable by
24 today's standards, and with all the updating and
25 everything, average to good condition in quality.

1 MR. PETERSON: Your Honor, I should probably go ahead and
2 I'll offer Exhibit 3. I don't think that I did that
3 before.

4 THE COURT: Any objection?

5 MR. DONAHOE: No objection.

6 MR. DEIBERT: None, Your Honor.

7 THE COURT: It will be received.

8 Q (BY MR. PETERSON) Mr. Shaykett, I'll kind of lead and
9 summarize a bit just to save some time, but starting at
10 about Page 7 of your report, is this where you look at
11 population trends in the area, economics, unemployment,
12 labor force, those sort of things that affect demand in
13 the market?

14 A Yes, that's a summary of things that we look at for market
15 trends.

16 Q And from a big picture, what kind of demand is there for
17 the type of property that Vicky has right now?

18 A There's been strong demand ever since about 20 -- 2012,
19 2013, once we kind of came out of that recession, and then
20 you get -- one of the things that impacts a rural house
21 demand is the price of gas. And so, you know, we've seen
22 that go down over the last few years and certainly since
23 2019 even stronger demand.

24 Q If you would, summarize your valuation and appraisal of
25 Vicky's property as is, as it currently sits without the

1 hog barn, just, you know, how you valued it and what your
2 approach was.

3 A Okay. Well, as I mentioned earlier, of the three
4 approaches that we typically use, I utilized just the
5 sales comparison approach, and with that I developed three
6 sales from the -- and I don't remember, it's been two
7 years now -- how many comparable sales I actually looked
8 at, but from the sales research concluded these three
9 sales were probably the most similar that were in the
10 general area and made the adjustments very similar to any
11 appraisal assignment on a rural acreage to conclude the
12 value of the property based on those three sales.

13 Q And are those three comparable sales shown on Page 24 of
14 your report?

15 A Yes, they are, and showing the adjustments to those.

16 Q And the process of making adjustments, what are you doing
17 there?

18 A Well, we call those elements of comparison, and they're
19 things that over the years we have found that the market
20 makes adjustments for differences in the, potentially, the
21 location of the property, the age of the property, as well
22 as the physical condition. And on rural acreages the size
23 of the -- of the acreage makes a difference and then any
24 of the other characteristics that we find at the property
25 such as the outbuildings, garages, that sort of thing.

1 Any of those features that are found at the subject
2 property are, most of them, are listed there on that page,
3 and then they're either adjusted for if the comparable
4 does not have them or if it has it and the subject
5 doesn't. And so those adjustments are developed not only
6 just based on these three sales, but other sales and
7 analysis over the years.

8 Q And does your experience and training provide you the
9 education to make those adjustments, that if this property
10 has a three-car garage, but the other is a two, that's a X
11 dollar adjustment?

12 A Yes, that's how we do it.

13 Q And is that the approach that you applied with this
14 assignment?

15 A Yes, I did.

16 Q What did you determine to be the market value of Vicky's
17 property without the hog facility to the south?

18 A \$320,000.

19 MR. PETERSON: May I approach, Your Honor?

20 THE COURT: You may.

21 MR. PETERSON: Your Honor, Exhibit 17 is a page from the
22 return that the county provided. This is a color version.
23 The black and white in the return is almost unreadable,
24 which I saw as I was going through my notes. I thought
25 I'd pull out a color photo. So I would offer Exhibit 17.

1 THE COURT: Any objection?

2 MR. DONAHOE: No objection.

3 MR. DEIBERT: No, Your Honor.

4 THE COURT: It will be received.

5 Q (BY MR. PETERSON) Now, Mr. Shaykett, if you look at
6 Exhibit 17, does this depict where the hog barn would be
7 located?

8 A Yes.

9 Q And Vicky's home, is it just -- would it be just north out
10 of sight from this intersection of 280th Street and 450th
11 Avenue?

12 A Yes. It's north of that 280th Avenue.

13 Q And it looks from this line that the measurement according
14 to Midwest Land Surveying from the corner of the nearest
15 hog facility to the nearest corner of Vicky's house is
16 3,020 feet. Are you able to read that?

17 A Yes, I see that.

18 Q That's just a little over a half mile; it's .57 miles?

19 A Correct.

20 Q And is that where you assumed for hypothetical purposes
21 where the hog barn would be located?

22 A Yes, it is.

23 Q How did you determine what effect the proposed hog barn in
24 this case would have on Vicky's property?

25 A Well, first of all, try to understand what all was going

1 to be at that location. And I know I was provided some of
2 the information I think -- I can't remember exactly
3 whether it was through the permit or other information
4 provided to me -- as to the number of -- the types of
5 structures, the number, the head, number of head of hogs
6 that would be at that site, the utilization of the site,
7 and then certainly the distance to the subject property.

8 Then taking that into account, I tried to obtain
9 sales of similar residential properties in proximity to
10 hog confinement facilities, and I didn't really find any
11 in the area of -- around Sioux Falls in -- in any of the
12 opportunities I had in doing some of the ag properties we
13 were doing at that time either in Minnehaha County,
14 Lincoln, Turner, Clay County. Doing those assignments, I
15 would be looking for examples of this type of property.
16 I'm not saying that there aren't similar properties, but
17 they weren't -- they hadn't sold once the hog confinement
18 facility was developed. So -- so in the immediate market
19 area I did not find a real example of a similar situation.

20 So, as part of what I would do with any sort of
21 assignment like this, I researched what I could through
22 some of the appraisal journals and other information
23 through appraisal sources. And this is a topic that has
24 been reviewed and analyzed considerably over in Iowa, even
25 Illinois and somewhat into Minnesota. So there are some

1 articles that have been done by other appraisers, other
2 Ph.D.s and that sort.

3 And so I reviewed those articles and then as, again,
4 as an alternative to not having the perfect similar
5 situation, looked at some of the assignments that I've
6 worked on over the years in regard to, like, expansion of
7 sewer lagoons and things like, primary sewer lagoons, and
8 looked at examples that I was able to develop in the
9 general area. And those are, you know, in my report as
10 well. And what those kind of indicated was similar to any
11 loss that -- those actual examples in the market area,
12 those impact was similar to what I was seeing in the
13 articles that I did review from the appraisal sources that
14 I had.

15 Also, looked at a report that was provided to me in
16 regard to kind of the frequency and duration of any odor
17 coming from the -- the facility that was proposed.

18 And so that was the -- those are the three kind of
19 general areas that I reviewed in order to -- to finalize
20 my opinion as to the impact that this facility would have
21 on the subject property.

22 THE COURT: Can I interject a question. What was the odor
23 report information sources?

24 THE WITNESS: This was the Scentroid Research Center
25 report that I believe was completed on the subject

1 property at the request of the owners.

2 THE COURT: Thank you. Proceed.

3 MR. PETERSON: Thanks, Judge.

4 Q (BY MR. PETERSON) Mr. Shaykett, I want to back up just a
5 moment here. This particular facility, hog facility, is
6 that described beginning on Page 28 of your report?

7 A Yes, it is.

8 Q And the facility is 7400 head of swine; correct?

9 A Yes.

10 Q And under the ordinances that is a, quote, large CAFO.
11 But even setting aside sort of legally what it is under
12 the ordinances in Turner County, just, you know, sort of
13 colloquially, how would you describe this, you know, a
14 7400 head facility compared to the kind of hog barns you
15 ordinarily see out in the country?

16 A Well, you know, it's larger than what we see a lot of
17 going in around the -- the area, especially in the last
18 couple years, probably the last four or five years. I'm
19 familiar with another facility over in Douglas County that
20 was 2,499 head, and it was a feeder operation where they
21 put the pigs in after they get to a certain age and, you
22 know, grow them to a certain weight. And those are the
23 primary ones we see because it's below the necessary
24 permitted size for the larger facilities, and so you see a
25 lot more of those around.

1 And then so this is going to be three times that size
2 and -- and also, you know, the sows would have the piglets
3 as well as -- as the gilts and then the gestation building
4 as well. So you've got basically three stages of the hog
5 production.

6 Q In your experience appraising rural properties, have you
7 had occasion to smell whether a half a mile away you can
8 smell the hog barns?

9 A Yes, certainly. As I mentioned, you know, in doing ag
10 properties over the years, and I am -- or I was licensed
11 in Iowa, you know, it seemed like that -- driving around
12 in that area it was more prevalent because they just had
13 more. But also just in -- in my driving various areas of
14 South Dakota, southeast South Dakota, if there's a hog
15 confinement, you know, there is some smell.

16 I experienced it personally on the one that I
17 mentioned over there in Douglas County. It was 2,499
18 head. It was probably three-years-old construction. And
19 I was doing the appraisal on the house, on an acreage,
20 that was probably about a quarter of a mile south. And
21 just in the hour that I was there the -- the smell came,
22 and it wasn't -- there wasn't any activity going on at the
23 facility. I mean, it wasn't like they were cleaning it
24 out. It wasn't like they were bringing the hogs in or
25 out. I don't know whether the fans kicked on or just

1 what, but, yeah, it was there.

2 MR. DONAHOE: Your Honor, I'm going to object at this
3 point to that question and response. There was no
4 disclosure in his expert witness report, nor was there any
5 testimony to establish foundation, nor was there any
6 explanation in the report itself that Mr. Shaykett would
7 be testifying based on his personal experience or previous
8 appraisals from a one-quarter mile distance on a 2499 head
9 hog unit.

10 THE COURT: The objection is sustained. The answer will
11 be stricken.

12 Q (BY MR. PETERSON) Mr. Shaykett, regardless of whether this
13 proposed hog facility emits odor or doesn't or it spreads
14 one way or another way, does the presence of a hog barn
15 affect the perception of a buyer?

16 A Yes, in my opinion it does.

17 Q And what is the perception impact that this hog barn will
18 have on Vicky's property?

19 A Well, again, it's one of those things where it may not
20 emit an odor today or any -- for any real duration if it
21 is, but I think in everybody -- every buyer's mind, if you
22 see a facility like that, it's just like being next to
23 a -- the lagoon and -- and it may not smell today, but you
24 know that it's going to have an unpleasant odor at some
25 point during the year.

1 Q You had mentioned reading appraisal articles that
2 researched the impact of hog barns on property?

3 A Yes.

4 Q Do you list those sources in your report?

5 A Yes. The main source, yes.

6 Q And I want to make sure we understand the nature of it.
7 This isn't like a *Time Magazine* article. Is this a
8 professional research, you know, peer kind of periodical
9 that we're talking about?

10 A Yes. In most cases it was completed by a method that --
11 that, if given the adequate information locally, I would
12 have done it by a paired sales analysis. Professional
13 appraisers looking at properties that are removed from an
14 area, comparing them -- or comparing those to properties
15 that are next to hog facilities and developing impact
16 studies on a paired sales analysis which is -- as I said,
17 if they would have been available in our market, I would
18 have done that very same thing.

19 Q So the research upon which you relied, did that research
20 itself use the sales comparison methodology?

21 A Yes. Paired sales, yes.

22 Q And when you're in a situation where you don't have a
23 comparable sale with and without a hog barn down the road
24 from Vicky, do you believe it's reasonable for an
25 appraiser to rely on research in the manner that you did?

1 A Yes. I mean, that's really, you know, part of the
2 training as an appraiser is you still try and research the
3 market for any sort of evidence and whether -- whether it
4 is removed locally from your assignment, it still is I
5 think valid support which, again, with the information
6 that I personally have developed with certain other types
7 of nuisance influences, I felt that the -- it was
8 reasonable to rely on it.

9 Q You also mentioned looking at actual comparable sales
10 involving lagoons?

11 A Yes.

12 Q Explain that, how that's applicable.

13 A Well, I have in my report I looked at sales of properties
14 that, in my mind, were examples of potential influence
15 from a nuisance-type influence and, you know, again, this
16 also came to some of the same types of impact on value as
17 I saw in those other reports so ...

18 Q Ultimately, the peer research you looked at, the
19 comparable sales that were available involving other odor
20 nuisances, did that line up with sort of your common sense
21 on what you would expect the impact to be?

22 A Yes, I -- that's why I concluded what I did.

23 Q Did you summarize some of the key points from your peer
24 research on Page 28 of your report?

25 A Page 28, yes.

1 Q Okay. What, roughly, was the range of impact on value
2 that the research supports?

3 A Well, it really varied, you know, depending on the
4 distance as well as the, if I remember right, the number
5 of -- of -- how large the facility was. But, you know,
6 the bottom of Page 28, you know, it -- I concluded that,
7 from these articles, that in the most recent one was
8 3.7 percent to 26 percent and that some of them were as
9 high as 88 percent. Those are the ones that had to be
10 right, like, right next door.

11 And in my research of looking at the -- the other
12 nuisance types, I saw that the loss at over 30 percent was
13 possible, up to some of them showing no -- no impact. So,
14 like I say, there's a wide variety, wide range, and so it
15 really gets down to looking at all the factors. And since
16 the subject was a larger -- or the proposed facility was a
17 little bit larger than most of the data for the other
18 sale -- or the other studies, I concluded at the
19 15 percent.

20 Q And that's my next question: Taking into account all of
21 the research, all of your analysis, all of the information
22 available, what in your opinion is the impact that this
23 hog facility will have on the value of Vicky's property?

24 A Yeah. Like I say, there was pretty wide range and that
25 this property, again, you know, they took an older

1 farmhouse, updated it, remodeled it, have the deck off
2 the -- the south there, and then they put this party room
3 together. And so to me it's reasonable that there's got
4 to be some impact on it the way that they have -- have
5 influenced the value that I came up with. I mean, these
6 are factors that really make it marketable, and I see that
7 there would be an impact on the overall enjoyability,
8 livability of the house, and so that's why I concluded
9 15 percent.

10 Q Okay. 15 percent reduction in value?

11 A Reduction in value, yes.

12 Q And in particular you mentioned the, you know, the updates
13 and the way this property is used. This property is, I
14 mean, it's -- when you're outdoors in the summer enjoying
15 your limited good weather in South Dakota, when there's a
16 south wind it's coming right from the hog facility right
17 to Vicky's property?

18 A Yes.

19 Q And is that part of what you considered as well?

20 A Yeah. And, you know, also, you know, it is a half mile
21 away. Obviously, it's out in the country where they'll be
22 growing corn and within the distance between the subject
23 house and -- and the facility. So those things kind of
24 influence how even any odor would travel to the north.

25 But the other thing, too, is the way that the site is

1 set up. You know, as I mentioned before, they've got that
2 tree strip along the north and the west, and so as the
3 wind comes from the south it's going to kind of trap it in
4 there, and I took that all into account.

5 Q And a 15 percent reduction in value, does that translate
6 to approximately a \$48,000 loss in value?

7 A Yes.

8 MR. PETERSON: All right. Mr. Shaykett, those are all of
9 my questions. Thank you for your time.

10 THE WITNESS: Thank you. Would it be possible to get some
11 water?

12 THE COURT: We can take a five minute recess.

13 And just procedurally, Mr. Deibert, do you want
14 Mr. Donahoe to go first or do you want --

15 MR. DEIBERT: Yes.

16 THE COURT: -- to go first?

17 MR. DEIBERT: Yes.

18 THE COURT: Okay. Let's just take a short five minute
19 recess or so. You can get a drink, bring that back up
20 with you if you would like. So, we'll be in recess.

21 (Recess at 9:58 a.m. to 10:07 a.m.)

22 THE COURT: Please be seated. We didn't lock you out.

23 MR. DONAHOE: Sorry, Your Honor. I was looking for a
24 bottle of water so I don't spill it, but I couldn't find
25 one so ...

1 THE COURT: That's fine. All right. We are going into
2 the cross-examination with Mr. Shaykett. Mr. Donahoe, you
3 can proceed.

4 MR. DONAHOE: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 Q (BY MR. DONAHOE) Mr. Shaykett, you and I have worked
7 together before; correct?

8 A Yes, we have.

9 Q And in fact you've got a case with me that's still not yet
10 resolved in which you've provided an expert appraisal for
11 an agricultural property just outside the city limits of
12 Sioux Falls; correct?

13 A Yes.

14 Q And that's the Eckert property?

15 A Yes.

16 Q Okay. Could you tell me where the Sioux Falls wastewater
17 treatment plant is located from the Eckert property?

18 A I would say it's probably a mile southwest.

19 Q Did you take any kind of measurement of the distance
20 between the Eckert property, particularly the home that's
21 located there, and the Sioux Falls water treatment plant
22 when you did your appraisal for me?

23 A No, I did not.

24 Q Is it accurate to say that that property that the
25 Sioux Falls water treatment plant sits on is directly to

1 the southwest of that property that you appraised?

2 A Southwest of the Eckert property, yes.

3 Q You mentioned I believe the newer building that has the
4 three-stall garage that is converted for outdoor use, it
5 has a party room. That's directly to the west of the main
6 house at the subject property; correct?

7 A Yes, it is.

8 Q When was that built?

9 A My understanding was 2016.

10 Q And that's a brand-new building; that did not exist prior
11 to the construction in 2016?

12 A That's my understanding, yes.

13 Q And in regard to the requirements that you reviewed for
14 building in Turner County, that would have required at
15 least a building permit under the zoning ordinance;
16 correct?

17 A I would assume so, yes.

18 Q Did you check and see what was required to get approval in
19 2016?

20 A No, I did not.

21 Q I want to draw your attention to the provisions of the
22 Turner County zoning ordinance that you have in your
23 report. I'm sorry, that's in the addendum. I went over
24 that and I got to get back to it.

25 It is Exhibit 1 of your report, and you've just got

1 the agricultural district provisions from the zoning
2 ordinance; correct?

3 A Yes, that's in the report.

4 Q Okay. And the first page of that Article 3.0 for the
5 agricultural district there's a significant section with a
6 bold title "Right to Farm Notice Covenant"; correct?

7 A Yes.

8 Q And that's identified for single-family dwellings for
9 building eligibility; correct?

10 A Yes.

11 Q And it says under Subsection B.1.d., quote: Prior to any
12 building permit being issued for any new single-family
13 residence located in the A Agricultural District, a Right
14 to Farm Covenant shall be filed on the parcel of land upon
15 which the new structure will be located. Only the
16 following shall constitute a Right to Farm Covenant":

17 And then it cites the actual covenant; correct?

18 MR. PETERSON: I just want to make an objection for the
19 record on the Right to Farm Covenant examination. I
20 believe this legal theory was rejected in the 2018 case;
21 therefore, I think it's irrelevant and inadmissible under
22 403.

23 THE COURT: Overruled. You may proceed.

24 MR. PETERSON: May I have a standing objection on that
25 issue?

1 THE COURT: You do.

2 MR. PETERSON: Thank you.

3 Q (BY MR. DONAHOE) Now, Mr. Shaykett, that's obviously for a
4 new single-family residence, and in this case the property
5 owner completely remodeled the existing residence and then
6 built a new structure; correct?

7 A Yes. The remodeling of the existing house was completed
8 shortly after they bought it, which was 1993, I believe.
9 '98.

10 Q '98?

11 A Yeah.

12 Q And how much did they pay for it when they bought it in
13 1998?

14 A 65,500.

15 Q And so between the improvements that they've made and the
16 general rise in home prices, there's been a significant
17 increase in the value of that property; correct?

18 A Absolutely.

19 Q And what is the general trend for rural housing in Turner
20 County right now?

21 A Continuing up.

22 Q You indicated in your testimony that you are not aware and
23 could not locate any sales of rural residences that were
24 close to a completed hog facility like the one proposed
25 here; correct?

1 A At that time, yes.

2 Q Have you found some since then?

3 A No, I have not.

4 Q Are you aware of the fact that many of these rural homes
5 that existed prior to the construction of a hog facility
6 are oftentimes very valuable to the people who work at the
7 new facility?

8 A I guess I would have to ask you to expand on when you say
9 "valuable" to them, you mean as convenient to work or
10 increase in property values?

11 Q Well, wouldn't the convenience to work also impact their
12 willingness to pay more for a property than they might for
13 something farther away?

14 A If they're working at the facility. I believe -- I
15 believe in one of those studies, that's what it said is
16 that it could actually increase for that particular
17 market.

18 Q And that's what I was getting at. It's right there in the
19 literature. In fact, in South Dakota isn't it common that
20 the facility would oftentimes purchase any of the
21 neighbors that would want to sell at market price?

22 A I -- I don't know about that.

23 Q Okay. So you don't have any experience with that?

24 A No.

25 Q Do you know if the client in this case -- well, I guess I

1 shouldn't say client. Let me just back up.

2 Who hired you; was it the property owner or the
3 attorney that hired you?

4 A I believe -- well, I was first contacted by the attorney.

5 Q And you're also a real estate agent or broker; correct?

6 A That's true.

7 Q Were you asked by the Urban-Reasonovers or anyone on their
8 behalf to market and potentially look to see if this
9 property could be sold to someone?

10 A No, I did not.

11 Q And, of course, by that response I'm assuming you didn't
12 talk to the Schmeichels to see if they would be willing to
13 purchase the property?

14 A No, I did not.

15 Q Now, do you know much about the housing eligibility
16 requirements under the Turner County zoning ordinance?

17 A The housing eligibility?

18 Q Yes. I'm specifically talking about the zoning
19 requirements to allow someone to take farm ground and
20 build a new house.

21 A For Turner County, not that familiar, no.

22 Q And are you familiar with what the property that's
23 immediately north of the proposed Schmeichel facility sold
24 for recently?

25 A No, I do not.

1 Q If I told you it was \$11,400 an acre, would that sound
2 like it's in the ballpark for Turner County?

3 MR. PETERSON: I'm going to object as an incomplete
4 hypothetical and vague because it lacks details.

5 THE COURT: Overruled. If he can answer, he can answer.
6 But based on the grounds set forth in your objection, he
7 may not be able to answer.

8 A I haven't heard of any sale that high.

9 Q (BY MR. DONAHOE) Are you aware of the fact that that
10 property sold recently?

11 A No, I'm not.

12 Q Have you done anything to update your report since 2019?

13 A No, I have not.

14 Q And your report is based on the Scentroid -- that's
15 S-C-E-N-T-R-O-I-D -- the Scentroid Odor Report; correct?

16 A It's not based on that. It's part of -- of what I looked
17 at, but it's not -- certainly not the sole basis.

18 Q Okay. And you mentioned the extent or frequency of an
19 odor being detected at the Urban-Reasonover home. That's
20 based on the Scentroid report; correct?

21 A That information is in that report, yes.

22 Q Okay. The testimony at the public hearing or the
23 statements that were made at the public hearing regarding
24 the fact that these new modern facilities using the
25 techniques and pit additives that would be employed at the

1 Schmeichel facility do not cause significant odor more
2 than half a mile away; are you familiar with that?

3 A I'm not familiar with that testimony, no.

4 Q Did you review the record in this case?

5 A No, I did not.

6 Q Are you familiar with any of the facilities that have been
7 built recently in Iowa that would be similar to the
8 Schmeichel facility?

9 A No, I've not seen those.

10 Q You mentioned you just recently gave up your Iowa
11 appraisal license; is that correct?

12 A Yes.

13 Q And have you done appraisals for rural residences located
14 in Lyon or Sioux County where there's significant number
15 of hog units?

16 A No, I've not.

17 Q Have you ever done an appraisal to determine the loss for
18 a rural property for a new hog facility in the last eight
19 years?

20 A I -- you need to explain a little bit. When you say
21 "new," are you talking about the facility is -- is
22 existing and it's been there for a year or two or that
23 it's proposed?

24 Q That it is proposed.

25 A That is proposed?

1 Q Yes.

2 A No, I have not.

3 Q You mentioned the Douglas County matter. What was the
4 facility there? Was that a brand-new facility?

5 A It was less than three years old.

6 Q And that was operating at the time you were there?

7 A Yes.

8 Q As to the facility that is being proposed here, do you
9 have any expertise or knowledge as to how it might compare
10 with other facilities that are already in existence?

11 A No, I've not made any sort of comparison.

12 Q And are you familiar with how a feeder pig unit might be
13 different from this facility?

14 A Well, to some degree. Just the fact of the different type
15 of -- of use, you know, the feeder versus the sow
16 operation with the other -- the other 2,000 head being the
17 gilts and the gestation period.

18 Q Yeah, and those gestation pigs are actually smaller than
19 feeder pigs; correct? Or don't you know?

20 A Well, I don't think they're smaller than the feeder pigs.
21 Yeah, I guess I shouldn't say.

22 Q Okay. As to the comparison that you've made for sales
23 that you were able to identify, those were located near
24 municipal wastewater sewage lagoons; correct?

25 A Which sales are you talking about?

1 Q Well, you said that you were looking for the closest
2 actual sales comparisons to something that had an odor,
3 and you went to properties that were located near sewer
4 lagoons; correct?

5 A That's correct.

6 Q Are you familiar with the city wastewater treatment lagoon
7 for the City of Valley Springs?

8 A No.

9 Q Have you been out there to look at any of the new
10 development there that's being built right around it?

11 A No, I have not.

12 Q Are you aware that there's a hog confinement less than a
13 half a mile away from it?

14 A No.

15 Q Are you aware that John Zomer's place has a cattle yard
16 less than a mile away from it?

17 A No, I'm not.

18 Q Under the zoning ordinance in Turner County, isn't it
19 possible for someone to have a small number of animals
20 without even having to get a conditional use permit?

21 A I believe so.

22 Q And if there's building eligibility that would be directly
23 across to the south of the Urban-Reasonover place, they
24 could have animals right next door without any setback;
25 correct?

1 A Yes.

2 Q Okay. And so there would be some odor and some problems
3 that would affect their use of that outdoor facility;
4 correct?

5 A Well, it depends upon the number of -- of -- and the type
6 of animals.

7 Q Sure. And, of course, all those things would probably be
8 considered by a rational, prudent person prior to making
9 the investments they made in this property; correct?

10 A Yes.

11 MR. DONAHOE: No further questions.

12 THE COURT: Mr. Peterson -- or Mr. Deibert, sorry.

13 MR. DONAHOE: Your Honor, excuse me. I did forget
14 something. Could I reopen very quickly?

15 THE COURT: Go ahead.

16 MR. DONAHOE: My apologies.

17 CROSS-EXAMINATION (Resuming)

18 Q (BY MR. DONAHOE) Mr. Shaykett, in reading your report it
19 struck me that you based your damages' calculation on the
20 fact that this is similar to or the equivalent of an
21 inverse condemnation; correct?

22 A Yeah, that's how I thought of it, yes.

23 Q And it would be the same process you'd go through to
24 determine the amount of damage or whether there is damage;
25 correct?

1 A Yes.

2 Q And isn't it true that, for example, if a person was
3 subject to a road being converted from a paved road to a
4 gravel road, they'd suffer inconvenience like dust and
5 other problems, washboard and inconvenience and things
6 like that, which some people might consider to be damage
7 to their property. Are you familiar with that?

8 A I've heard of that case, yes.

9 Q You've heard of the *Krier* case?

10 A Yeah.

11 Q And the Supreme Court said that wasn't an inverse
12 condemnation; correct?

13 A I don't remember how it resolved, but I remember the
14 case --

15 Q Okay.

16 A -- hearing of the case.

17 Q And the issue was the fact that that homeowner suffered
18 damages that are similar to what others in the area or
19 other general taxpayers might suffer; correct?

20 A Yes.

21 MR. DONAHOE: Okay. No further questions.

22 THE COURT: Mr. Deibert.

23 CROSS-EXAMINATION

24 Q (BY MR. DEIBERT) Two, hopefully, short subjects, Mr.

25 Shaykett. First of all, near the end of your testimony

1 you expressed the opinion regarding a 15 percent
2 diminution in value because of the proposed hog facility
3 in this case; correct?

4 A Yes.

5 Q Prior to this engagement, have you ever expressed an
6 opinion regarding a percentage diminution in value because
7 of a proposed animal facility operation?

8 A Not a proposed, no.

9 Q Is there an accepted methodology within your area of
10 expertise, that is, real estate appraisal, for determining
11 such a percentage of diminution in value in a case such as
12 this?

13 A Well, yeah, as I've explained, it's part of, you know, the
14 appraisal practice to develop your opinion on market --
15 whatever market information is available, and that's what
16 I've done in my report.

17 Q And what is the source of that methodology? I mean, are
18 there books, are there seminars?

19 A Well, it's -- yeah, I mean, it's all part of all of the
20 condemnation classes that I've taken, the books that I've
21 read on eminent domain, as to how you determine any loss
22 in value due to whatever the problem is.

23 Q And those tell you how to calculate a percentage?

24 A Well, they show you the method. They don't tell you, you
25 know, you multiply X by Y.

1 Q Okay. Other subject. As I understand some of the claim
2 here, Ms. Urban-Reasonover may be giving some thought to
3 vacating the property into a bed and breakfast.

4 Have you had any experience with bed and breakfasts
5 in eastern South Dakota, let's say?

6 A No, but that's not, in my opinion, the highest and best
7 use of the property.

8 Q I'm sorry, you said what?

9 A I said no, that I don't have any experience with bed and
10 breakfasts in the eastern part of South Dakota, but in my
11 opinion, that's not the highest and best use of the
12 property at the time I did the appraisal.

13 MR. DEIBERT: All right. That's all. Thank you.

14 THE COURT: Mr. Peterson.

15 MR. PETERSON: Thank you, Judge.

16 REDIRECT EXAMINATION

17 Q (BY MR. PETERSON) Mr. Shaykett, Mr. Donahoe asked you
18 about that Douglas County facility during his
19 cross-examination. Was that a three-year-old facility?

20 A Yes, it was.

21 Q And what was the head count for the number of swine at
22 that facility?

23 A 2,499.

24 Q The one we're talking about here is, in rough numbers,
25 three times the size?

1 A Yes.

2 Q Were you able to smell that Douglas County facility when
3 you were out there?

4 A Yes, I did.

5 Q How far away were you?

6 A It was about a little over a quarter of a mile.

7 Q You had also been asked a question by Mr. Donahoe about
8 whether homes nearby CAFOs or hog barns may have some
9 value to the folks working at the facility.

10 Do you remember that line of questioning?

11 A Yes.

12 Q Given what you know about the market trend and labor
13 information which is in your report, is someone earning a
14 wage that is shoveling manure likely to have the resources
15 to buy a 300,000 plus dollar house?

16 MR. DONAHOE: I'll object as to foundation.

17 THE COURT: Overruled. I'll allow it if he has an
18 opinion.

19 A Well, yeah, I would certainly -- and I don't know the wage
20 scale for farm labor, but it's always certainly reported
21 as being very low.

22 Q (BY MR. PETERSON) Would you be skeptical about a worker in
23 this hog barn wanting to buy a house for \$300,000?

24 A Certainly.

25 Q You were also asked whether your belief that odor from

1 this proposed facility would be experienced at Vicky's
2 home, whether that was based on the Scentroid report that
3 you reviewed. Do you remember those questions?

4 A Yes.

5 Q Was that your only grounds for concluding that odor is
6 likely to be smelled at Vicky's house?

7 A No, just my own experience over the years, not -- just
8 over the years of doing agricultural properties.

9 Q And aside from whatever the reality may be in terms of how
10 much odor spreads, how often does the perception affect
11 value?

12 A I think the perception more than the actual physical
13 smelling of the -- of the odor and just the perception of
14 that facility being a hog confinement at 7500 head and --
15 and as a real estate broker, I would certainly have to
16 advise them, if they were ever to list the property, to
17 actually put that as part of the notice of the listing.

18 Q By the notice, they would need to put that in the seller's
19 disclosure statement?

20 A I would believe so, yes.

21 Q Is that because it materially affects the value of the
22 property?

23 A In my opinion, yes.

24 MR. PETERSON: Those are all my questions.

25 THE COURT: Mr. Donahoe.

1 MR. DONAHOE: Thank you, Your Honor.

2 RECROSS-EXAMINATION

3 Q (BY MR. DONAHOE) Mr. Shaykett, in regard to that last line
4 of questioning, the perception issue is really more of a
5 marketing matter more so than value if the property is
6 solid and maintains its structure and it's kept up;
7 correct?

8 A Well, no, I would disagree. It definitely is -- the
9 marketability of a property is directly related to the
10 physical condition of the property and its surroundings.

11 Q Right. That's what I said is that if you've got a good
12 property and you've got six plus acres with it, and it's
13 well maintained, there are people in the world who might
14 not have that much of a problem with hog manure smell;
15 correct?

16 A I would agree there's people -- some people out there,
17 yes.

18 Q And so that right person who might come along and buy this
19 might take longer to get there, but they'd still be
20 willing to pay the same price that you would want for top
21 dollar on this house?

22 MR. PETERSON: I'm going to object. Speculative.

23 THE COURT: Overruled. He can try to answer.

24 A I guess, again, I would -- I would disagree that looking
25 at how this rural home has been improved to be really

1 outdoor activity, I really believe that -- that in this
2 case it would suffer the loss in value that I've estimated
3 because of the marketability is certainly impacted.

4 Q (BY MR. DONAHOE) Well, I can make things simple. If
5 Schmeichels come in and buy this for their manager or for
6 somebody who wants to rent it or a couple of people who
7 might work there and they pay top dollar, there's no
8 damage to the Vicky Urban-Reasonover home; correct?

9 A Well --

10 MR. PETERSON: Objection. Speculative.

11 MR. DONAHOE: I can make it nonspeculative, Your Honor.

12 THE COURT: All right. I'll sustain the objection.

13 Rephrase your question.

14 Q (BY MR. DONAHOE) Let's use this as a hypothetical. I just
15 spoke with Mr. Schmeichel. He has recognized that this
16 could be a potential problem and would have certainly been
17 willing to and will testify that they would be willing to
18 make an offer on the Vicky Urban-Reasonover home at the
19 appraised value, today's appraised value.

20 If that happens, as a hypothetical, if that were to
21 happen and they were to buy it at the market price
22 determined by an independent appraisal, they have no
23 damages; correct?

24 MR. PETERSON: I'm going to object. Statute of frauds.

25 It's not an enforceable offer. It's speculative. 403.

1 THE COURT: Overruled. It's a hypothetical. There is
2 some speculation, but so is an appraisal analysis, which
3 is the scope of this expert's testimony. So the question
4 is allowed.

5 A To answer your question, I think, we don't appraise
6 property to one buyer. We look at the overall market.
7 And if there is an individual that is motivated to
8 purchase it, then I guess at whatever price they want to
9 pay, I don't necessarily see that as the market value of
10 the property. We -- we base our appraisal and the value
11 on the typical buyer out there, not a speculative,
12 hypothetical buyer.

13 Q (BY MR. DONAHOE) That wasn't my question, though. My
14 question was: If they receive the full price, which would
15 mean there is no 15 percent reduction, they suffer no
16 damage; correct?

17 MR. PETERSON: The same objection and also asked and
18 answered.

19 THE COURT: No, it's overruled. It hasn't been asked and
20 answered in that format.

21 A You are correct, yes.

22 Q (BY MR. DONAHOE) And again, using that inverse
23 condemnation example or process, if they're paid the full
24 amount, that's just compensation and therefore they
25 receive everything they're entitled to under the law;

1 correct?

2 A As far as my opinion of the value of the property, yes.

3 MR. DONAHOE: No further questions.

4 THE COURT: Mr. Deibert.

5 MR. DEIBERT: Nothing, Your Honor.

6 THE COURT: Mr. Peterson.

7 REDIRECT EXAMINATION

8 Q (BY MR. PETERSON) Following up on that hypothetical, so if
9 Vicky were to cash out and get full market value, she and
10 her husband would have to leave, they'd have to abandon
11 their plans to have a bed and breakfast and find another
12 home to go buy; correct?

13 A Yes. And my opinion is as of August 2019. Purchasing it
14 today I think would be at a higher price.

15 MR. PETERSON: Those are all my questions.

16 THE COURT: Mr. Donahoe.

17 RECROSS-EXAMINATION

18 Q (BY MR. DONAHOE) Just to be clear, my hypothetical assumed
19 that it would be today's market price.

20 A Oh. See, you didn't make that clear.

21 Q Well, my point is whatever you would say is the damage, if
22 it's paid by the Schmeichels or the owner of the facility,
23 they have no damage; correct?

24 A In my opinion about the real estate, yes.

25 MR. DONAHOE: Okay. That's all I have. Thank you.

1 THE COURT: Mr. Deibert.

2 MR. DEIBERT: No, Your Honor.

3 THE COURT: Mr. Peterson.

4 MR. PETERSON: He already asked the question I would have.

5 THE COURT: All right. You can step down. Thank you.

6 THE WITNESS: Thank you.

7 (Witness excused.)

8 THE COURT: We have 17 and 3. My court reporter is going
9 to have to help be responsible for exhibits at this point.

10 I just want to make sure, the binder that the
11 witnesses are using, generally, is that the original to be
12 submitted?

13 MR. PETERSON: No, Your Honor. The originals are with
14 you.

15 THE COURT: Okay.

16 MR. PETERSON: The one with the witness is just an extra
17 copy. That way, if they happen to write on it or it gets
18 misplaced.

19 THE COURT: So I'll make sure I don't write on the copy
20 you gave me so ...

21 All right. So I have --

22 MR. PETERSON: I do have one backup just in case.

23 THE COURT: All right. So I have the originals, so
24 between the court reporter and I, we'll make sure 3 and 17
25 are provided to the Turner County Clerk of Courts Office

1 at some point and time, and I'll continue to keep track of
2 what's been offered and received.

3 All right. Mr. Peterson, you can call your next
4 witness.

5 MR. PETERSON: I'd call Vicky Urban-Reasonover.

6 THE COURT: Ma'am, if you'd raise your right hand.

7 VICKY URBAN-REASONOVER,
8 called as a witness, having been first duly sworn, was
9 examined and testified as follows:

10 THE COURT: Please be seated.

11 DIRECT EXAMINATION

12 Q (BY MR. PETERSON) Good morning.

13 A Good morning.

14 Q Would you please introduce yourself to the judge.

15 A My name is Vicky Lynn Urban-Reasonover.

16 Q What is your address?

17 A 27979 450th Avenue, Parker, South Dakota 57053.

18 Q You were present during Mr. Shaykett's testimony earlier
19 this morning?

20 A My husband was. I was actually at a hearing for this when
21 he was doing the appraisal.

22 Q No, I mean, you were sitting right next to me this
23 morning?

24 A No. I mean on the morning that he went out and did the
25 appraisal, I was at a hearing on a previous hearing in

1 2018 or '19, whenever he did it, so my husband met with
2 him.

3 Q Okay. But you heard Mr. Shaykett testify this morning?

4 A Yes, I did. Oh, I'm sorry.

5 Q Okay. And the property that was the subject of his
6 appraisal, is that the home that you just described?

7 A Yes, it is.

8 Q How long have you and your husband lived at this property?

9 A We bought it in May of 1998. We've been there 23 years
10 two months.

11 Q And do you have a copy of Exhibit 17? It's the colored
12 map.

13 A Yes.

14 Q And this map depicts the proposed location of the hog
15 barn. Do you see that?

16 A Uh-huh.

17 Q And there's a line that goes to the north and west that
18 says 3020 feet to nearest structure?

19 A Yes.

20 Q Do you see that line?

21 A I do.

22 Q Is your home the nearest structure that would be on the
23 other end of that line?

24 A Yes.

25 Q You are about .57 miles from where this hog facility would

1 be going?

2 A That is correct.

3 Q Vicky, please describe, not in elaborate detail, but just
4 your educational and work background, a little bit about
5 who you are.

6 A I am a retirement plan administrator. I've been doing
7 that for roughly 12 years. Currently, I work remotely so
8 I'm going to -- I work at home all the time, but for the
9 previous 22 years I drove to Sioux Falls every day to go
10 to work.

11 Q Describe some of the updates or remodeling that you and
12 your husband have done to your home.

13 A There's not an inch of the place that we have not touched.
14 We've recarpeted, redone wood floors. We've remodeled the
15 whole kitchen. We've added -- we actually added the patio
16 doors that Mr. Shaykett discussed because the kitchen was
17 on that side when we bought it. We moved it to the other
18 side so that we could build a deck so we could enjoy the
19 outdoors. We've added a -- he called it a three-car stall
20 garage, which is actually each stall can hold two cars and
21 a car deep, too.

22 In 2016 we added another shed on the outside. He
23 called it the party room. We call it our hang-out shed.
24 We have two doors there so we can watch our German
25 Wirehairs run through the yard and play so we can keep

1 them in our -- on our property so they don't go out and
2 bother anyone else.

3 Q Generally, are you and your husband folks who, when the
4 weather is good, that you like to be outside?

5 A We're outside all the time.

6 Q Is that one of the reasons you moved to the country?

7 A It is.

8 Q Vicky, do you have Exhibit 16 in the book in front of you?
9 It's probably all the way at the bottom.

10 A I see the tab. Yes, I have it.

11 Q And are the first three pictures of your home at the time
12 you and your husband bought it back in '98?

13 A Yes. It was -- we actually put the bed in and then we
14 took pictures of it before we even moved in because this
15 was in, it looks like March, and we bought it in May.

16 Q And the remaining pictures in Exhibit 16, would that --
17 does that show the current state of the house?

18 A Yes. These pictures were just taken -- just taken last
19 week.

20 MR. PETERSON: Your Honor, I'd offer Exhibit 16.

21 THE COURT: Any objection?

22 MR. DONAHOE: No objection.

23 MR. DEIBERT: No objection.

24 THE COURT: 16 will be received.

25 Q (BY MR. PETERSON) Describe the -- you can see some of it

1 in the pictures, but describe sort of the outdoor layout
2 of your property, the amount of land, trees, just kind of
3 what's out there.

4 A We've got six and three-quarters acres. We've got the
5 trees outlining the property. This year we planted a few
6 more on the front so that it will block a little bit of
7 the road. And the hang-out shed is towards the back of
8 it, and like I said earlier, we have the double doors on
9 that so that we can watch our dogs when we're outside.

10 Q Vicky, near the end of Mr. Shaykett's examination he was
11 asked some questions about what, you know, what if the
12 Schmeichels were to pay you full market value for your
13 property. Do you recall hearing those questions?

14 A Yes, I do.

15 Q Are you and your husband wanting to move from your house?

16 A No. We want to retire there. We want to put a bed and
17 breakfast in when we retire so that we can have some
18 retirement income just as there was one there prior.

19 Q Do you have Exhibit 15 in the binder in front of you?

20 A I see it.

21 Q And is this a brochure for the West Towne Guest Inn that
22 is your house before you bought it?

23 A This is my house before we bought it, and this is the
24 brochure for the bed and -- the bed and breakfast that was
25 there prior to us moving there.

1 MR. PETERSON: Your Honor, I'd offer Exhibit 15.

2 THE COURT: Any objection?

3 MR. DONAHOE: Well, object as to relevance.

4 THE COURT: Overruled. Mr. Deibert, any objection?

5 MR. DEIBERT: No, Your Honor.

6 THE COURT: It will be received.

7 Q (BY MR. PETERSON) Vicky, at some point did someone from
8 the county ask you about some sort of a designation for
9 your home with respect to it being a B&B?

10 A Yes. When I was in the Turner County Court -- or the
11 Courthouse, I guess I'm not sure of the exact date, but
12 they asked me -- they told me that the bed and breakfast
13 was on my property and did -- should I -- and was it okay
14 if they removed it, and I told them no because we had
15 plans to do a bed and breakfast when we retired.

16 MR. DONAHOE: Objection. Hearsay.

17 THE COURT: That's sustained.

18 MR. PETERSON: We're not offering it for the truth of the
19 matter asserted. We're offering it to show just the
20 interaction that she had. She wouldn't be asked to remove
21 it if it wasn't there, and it explains her response and
22 her understanding of her ability to operate a B&B.

23 MR. DONAHOE: Which goes to the truth.

24 THE COURT: The objection is still sustained. She's
25 testified as to her intentions, but what someone from

1 Turner County said about the status of it would be hearsay
2 at this point.

3 MR. PETERSON: I would also offer it as a statement of a
4 party as the county is a party here.

5 THE COURT: Lay a little more foundation.

6 MR. DONAHOE: Your Honor, at this point may I interject a
7 standing objection as to relevance because of the expert
8 appraiser saying that this is not the highest and best use
9 of the property; therefore, there's not damage that has to
10 be pecuniary under the law to be considered for standing.

11 THE COURT: The Court will note the standing objection.
12 The Court is aware of the testimony from Mr. Shaykett that
13 that's not the best and highest valued use of the
14 property, but it's her property. If that's her intent of
15 what she would like to do with it, it is relevant so ...

16 The standing objection is noted. Lay some additional
17 foundation because if it's a statement against a party's
18 interest or of a party, I need a little bit more as to
19 which county official or person this may have come from.

20 Q (BY MR. PETERSON) Vicky, do you remember, even if not by
21 name, what office you were in, what the setting was for
22 where this conversation happened regarding the bed and
23 breakfast designation remaining on your property?

24 A I could walk you to the office, but I -- to -- it's on --
25 it was the office furthest to the -- on the one side

1 (indicating). I want to say it was the ones for permits
2 and stuff, but I'm not -- I mean, I can't -- I can't be
3 certain. I could walk you to it, but --

4 Q Was it a Turner County employee with whom you spoke?

5 A I would assume since they were behind the desk and they
6 were in the file cabinet so, yes, I would assume that it
7 was a Turner County employee.

8 Q Either an employee or an intruder?

9 A Yes, exactly.

10 Q And were you there dealing with some real estate-related
11 matter?

12 A I believe it was for a permit, but like I said, I can't be
13 certain. It was several years ago.

14 Q And in interacting were you asked by the county what you
15 wanted to do with the bed and breakfast designation?

16 MR. DONAHOE: The same objection.

17 A They actually --

18 THE COURT: Just -- just wait, ma'am. I'm going to
19 overrule the objection. It has minimal relevance, but
20 I'll allow him to ask the question. Mr. Deibert.

21 MR. DEIBERT: A couple of voir dire questions on the
22 foundation, please?

23 THE COURT: I would allow that, Mr. Deibert.

24 VOIR DIRE EXAMINATION

25 Q (BY MR. DEIBERT) Ma'am, you don't know who the person was

1 that you talked to; correct?

2 A No, I don't.

3 Q Do you know if the person you talked to had any authority
4 to state any opinions regarding the use of your property?

5 A They didn't offer an opinion of what I could use my
6 property for. What they did was they said that there was
7 a permit that allowed a bed and breakfast there and could
8 they remove it, and I told them no.

9 MR. DEIBERT: Move the answer be stricken under the
10 hearsay objection. There's still no identification of the
11 person or -- and/or whether that person had the authority
12 to say what was supposedly said and bind the county.

13 THE COURT: I'm going to have to grant that request.
14 There's not enough specificity with her answer of who she
15 spoke with. Mr. Peterson, your client's intent has become
16 apparent, but I don't think there's enough to bring in and
17 hold the county responsible for what a unnamed, unknown
18 county official and then unnamed office might have said.
19 So Mr. Deibert's request to strike that response is going
20 to be granted at this point.

21 Let's move on to another area.

22 MR. PETERSON: Okay. I guess for the record, I would just
23 offer it as -- for the limited purpose of showing that her
24 intention of doing a bed and breakfast isn't something
25 she's just recently making up. There was an inquiry and a

1 conversation earlier. So I would offer it just for that
2 limited purpose as well.

3 THE COURT: And that's her opinion, and her testimony
4 regarding that is allowed.

5 DIRECT EXAMINATION (Resuming)

6 Q (BY MR. PETERSON) Vicky, moving on here. I guess to sum
7 up where we're at, you and your husband have no desire to
8 leave your property?

9 A No.

10 Q Do you enjoy living there?

11 A Yes, every day. Well, maybe not during a big blizzard,
12 but pretty much.

13 Q Now, do you know the gentleman to my left, Dr. Jeff
14 Powers?

15 A Yes, I do.

16 Q How do you know Dr. Powers?

17 A He's my -- one of my neighbors.

18 Q Where is his home from your home?

19 A It's about three-quarters of a mile to the north.

20 Q And does he -- I mean, is he there regularly?

21 A I see him drive by a lot and we talk on the phone
22 frequently.

23 Q Vicky, what is your experience with smelling odor from hog
24 barns?

25 A Well, in my 22 years of driving back and forth to

1 Sioux Falls, I would drive by the hog confinement outside
2 of Chancellor, and that one is one that you need to roll
3 up your windows, hold your breath, because it's a eye
4 water. And I drove that path every day to and from work
5 for many years. That -- there's also new ones that have
6 been put out in Turner County within the last couple of
7 years, and I drive by those and I can smell them, too.

8 Q And are you able to smell the odor from a distance that's
9 similar to the distance between your home and where this
10 Schmeichels' facility would be going?

11 MR. DONAHOE: Objection. Foundation.

12 THE COURT: Sustained.

13 Q (BY MR. PETERSON) How far away from these hog confinements
14 were you when you were able to smell the odor?

15 A I would say at least quarter mile to a half a mile, and
16 they're much smaller than the proposed location.

17 Q Did you consider buying a home in Chancellor many years
18 ago instead of the one that's in Turner County?

19 A We actually -- there was several houses on the edge of
20 town, and we decided not even to look at the house because
21 of the hog confinement that was outside of Chancellor.

22 Q How far away was that hog confinement from the Chancellor
23 house?

24 A That's about a mile away.

25 Q In the summertime when you and your husband enjoy the

1 outdoors, from which direction have you experienced the
2 wind typically comes?

3 A It -- from that facility, it will go right into my yard,
4 and I know that because we've been watching our flag, and
5 the flag blows the way that it's going to -- it's going to
6 invade my property.

7 Q How will this hog confinement, if constructed, affect you?

8 A It's going to affect me every day and the odor -- that my
9 property value is going to go down; there's going to be
10 additional traffic; there's going to be flies, rodents,
11 more predators. I have dogs. I don't need them close to
12 my property.

13 Q Why do you believe there will be more predators?

14 A Because there's going to be -- in every hog confinement or
15 any agriculture, things die. They're on the property.
16 That brings predators there looking for food.

17 Q The smell of fresh meat?

18 A Yes.

19 MR. DONAHOE: I'll object as to foundation.

20 THE COURT: Sustained.

21 Q (BY MR. PETERSON) Have you observed predators desiring to
22 eat?

23 MR. DONAHOE: Objection. Relevance.

24 THE COURT: Sustained in that context.

25 Q (BY MR. PETERSON) Vicky, why do you believe that you will

1 have increased predators because of the hog confinement?

2 A I --

3 MR. DONAHOE: The same objection.

4 THE COURT: No. I'll allow that form of the question.

5 MR. DONAHOE: Speculation as well, Your Honor.

6 THE COURT: It's overruled. It's her belief so she can
7 testify.

8 A On our property last year we had several fox. They had
9 babies in our tree grove. I hear coyotes outside. I
10 mean, they're near. They'll come nearer if they smell the
11 possibility of a free meal.

12 Q (BY MR. PETERSON) Is that your common-sense observation --

13 A That's --

14 Q -- after living in the country for a quarter century?

15 A Yeah, that -- that is my -- my common sense.

16 Q How do you as the owner of your home believe that the hog
17 confinement will affect the value?

18 A In my personal belief, as a home buyer 23 years ago I
19 wouldn't even look at a place because there was a hog
20 confinement near it. To me, it won't be sellable. That's
21 my opinion. And if I do -- if we did want to move and
22 sell it, we would get a little of nothing for it.

23 Q What are some of the outdoor activities that you presently
24 enjoy that you will not be able to enjoy at all or to the
25 same extent if this hog confinement goes in?

1 A Well, even from the inside, I won't be able to open up my
2 windows because it will smell up my house. I won't be
3 able to hang my clothes out on the line because they will
4 stink. I'm outside. We do barbecues. Our dogs are out
5 running and playing. We throw balls for them. I mean,
6 all of this entertainment that we truly like to do will be
7 limited because of the smells, the excess flies. They're
8 already a problem. I can't imagine it with a hog facility
9 so close.

10 Q And what you've discussed here today as how this facility
11 will affect you, is that unique to you compared to general
12 taxpayers?

13 A No, it's not. I'm closer. I'm going to have more smell,
14 more flies, more rodents from it. I'm going to be
15 directly affected much more than somebody that's two miles
16 away from me.

17 Q Or people that are five miles, ten miles away?

18 A Exactly.

19 Q I want to make sure I -- I might have asked the question
20 in a double negative kind of way, but do you believe the
21 impact to you will be unique or the same as every other
22 taxpayer?

23 A It will be unique.

24 MR. PETERSON: May I approach, Your Honor?

25 THE COURT: You may.

1 Q (BY MR. PETERSON) Vicky, is Exhibit 18 a picture you took
2 of a public notice in the local paper from February of
3 this year?

4 A Yes, it is. It was out of *The New Era*.

5 Q And does it relate to the assignment grant money that
6 flows through the intervenors, the Schmeichels and their
7 company, Norway Pork, to be assigned back to Turner
8 County?

9 A That is correct.

10 MR. PETERSON: I'd offer Exhibit 18.

11 MR. DONAHOE: No objection.

12 MR. DEIBERT: No objection.

13 THE COURT: 18 will be received.

14 Q (BY MR. PETERSON) Vicky, were you personally at the permit
15 hearing that was held in December of 2020 for the very
16 permit that's the subject of this case?

17 A Yes, I was.

18 Q Were you present for the entire hearing?

19 A I wasn't present for the entire hearing.

20 Q Did you observe the members of the Board of Adjustment
21 during the hearing?

22 A Yes, I did.

23 Q What was your observation of the board members with
24 respect to fairly considering the information presented?

25 MR. DONAHOE: Objection. Speculation; foundation.

1 MR. DEIBERT: Furthermore, no expertise on the part of
2 this witness.

3 THE COURT: Sustained for all of the above.

4 Q (BY MR. PETERSON) What behaviors, outward behaviors of the
5 board members, did you observe while at the hearing?

6 A In my opinion, they let me talk, but they didn't listen.
7 I think they had their minds made up prior to even having
8 the hearing.

9 MR. DEIBERT: Objection. Move that the answer be stricken
10 on the grounds -- the same grounds as the objections
11 previously made.

12 THE COURT: The answer will be stricken. It's
13 nonresponsive to the question that was asked. He asked
14 you what behaviors of the board members you observed.
15 That's the question.

16 A I guess, they didn't seem interested in what I had to say
17 when I was talking. They let me talk.

18 MR. DEIBERT: The same objection and motion to strike.

19 THE COURT: No, that's overruled.

20 Q (BY MR. PETERSON) Vicky, I assume like any other human
21 being, you've had a variety of conversations with a
22 variety of people in your lifetime?

23 A That is true.

24 Q Can you tell when someone is not interested in what you
25 have to say?

1 A Yes, I can.

2 Q And is that what you observed by the board members in this
3 case?

4 A Yes, I did.

5 MR. DEIBERT: Objection, Your Honor. Foundation;
6 expertise.

7 THE COURT: Overruled.

8 Q (BY MR. PETERSON) What is your answer, Vicky?

9 A I said -- can you read -- can you tell me the question
10 again?

11 Q (BY MR. PETERSON) Yeah. What was your observation about
12 whether the board members truly listened to you?

13 A I observed that they -- they were not listening to me.

14 Q After the presentation of information by both sides at the
15 hearing, did the board deliberate and discuss and weigh
16 that evidence, in your view?

17 A In my view, no.

18 Q Did it appear to you that their minds were made up based
19 on what you observed?

20 A Yes.

21 MR. PETERSON: Vicky, those are all of my questions.

22 Thank you.

23 THE COURT: Mr. Donahoe.

24 MR. DONAHOE: Thank you, Your Honor.

25 CROSS-EXAMINATION

1 Q (BY MR. DONAHOE) In regard to Exhibit 18, there was no
2 discussion of any amounts set forth in that notice;
3 correct?

4 A Yes, there's no amounts listed.

5 Q And there was no discussion of any amount of money that
6 would be available to the county at the public hearing
7 when the conditional use permit was granted; correct?

8 A Not that I recall.

9 Q They just represented that they would apply for and allow
10 the county to have whatever funds would be available
11 through the State; correct?

12 A That is correct.

13 Q And there wasn't any significant time spent discussing the
14 possibilities or whether that would be a significant
15 factor in their decision; correct?

16 A No.

17 Q And no one objected to the fact that they might be
18 considering monetary compensation from either the State or
19 through some other facility, grants or government
20 programs; correct?

21 A That was not --

22 MR. PETERSON: I'm going to object for a moment because
23 there's not a process for objecting in front of the Board
24 of Adjustment so I think that's an unfair question.

25 THE COURT: Can you repeat your question.

1 Q (BY MR. DONAHOE) No one objected to the fact that the
2 county might obtain funds from the State or other sources
3 if this was built, therefore, somehow influencing their
4 decision; correct?

5 MR. PETERSON: The same objection.

6 THE COURT: I'm going to overrule the objection. I'll let
7 you follow up with a question, otherwise you're testifying
8 at this point. You can answer that.

9 A That -- that was not brought up.

10 Q (BY MR. DONAHOE) And you were represented by counsel at
11 that public hearing; correct?

12 A Yes.

13 Q You had your attorney there as legal counsel?

14 A Yes, we did. And he was --

15 Q Okay.

16 A -- and he was limited at the time he could talk. They
17 stopped him.

18 Q And they submit -- "they" being your attorney's law firm
19 -- submitted materials to the Board of Adjustment prior to
20 the public hearing; correct?

21 A I believe so.

22 Q And at no time did they object to any consideration of
23 funds that were public knowledge at that time as far as
24 their availability as a program; correct?

25 A That subject was not brought up, no.

1 Q And as to the limits on time that were used at the public
2 hearing, your attorneys were able to present a significant
3 amount of documentation, including the appraisal and the
4 odor model report from your expert, prior to the public
5 hearing; correct?

6 A That is correct.

7 Q All right. I want to switch gears now and talk about
8 Exhibit 17.

9 A Okay.

10 Q I believe your earlier testimony was that you thought that
11 most of the time the prevailing winds were going to be
12 from the facility to your house; is that correct?

13 A By -- by the flag in our yard the wind blows towards our
14 place, yes.

15 Q And that would mean the wind is blowing from the southeast
16 to the northwest; is that correct?

17 A I'm just going by what the flag is telling me the wind is
18 in our yard so ...

19 Q And what direction is the flag pointing when it's blowing
20 in the wind?

21 A It's facing the north.

22 Q Okay. So straight north, basically a south wind; correct?

23 A Basically, yes.

24 Q Okay. If you look at Exhibit 17, is there a rural
25 residence that's located to the north and east of the

1 facility?

2 A Yes.

3 Q And can you read the distance that's shown on that line?

4 A 2,965 and a half it looks like.

5 Q And that's closer than your facility or house; correct?

6 A It is, and that was a rental.

7 Q You're talking about the one that's to the northeast being
8 a rental?

9 A The one that I just described, it was a rental, yes.

10 Q Okay. Do you know if it's a rental now?

11 A It was just purchased recently.

12 Q And do you know how much that was purchased for?

13 A I do not know.

14 Q And do you know whether the land, the open ground, sold
15 recently to the north of the proposed facility?

16 A I heard it did, yes.

17 Q And do you know how much that sold for?

18 A I believe you mentioned \$11,000 earlier.

19 Q \$11,400 an acre. Do you have any idea if that's accurate?

20 A I -- personally, I do not know.

21 MR. PETERSON: I'm going to object as to foundation.

22 THE COURT: Overruled. She may or may not know. Do you
23 have any idea if that's accurate?

24 A I -- I don't know.

25 Q (BY MR. DONAHOE) Okay.

1 A I'm going based on what you said earlier.

2 Q That's fine. I won't ask you any more questions on that
3 subject.

4 In regard to the zoning ordinance, did you take a
5 look at that prior to getting a building permit or
6 permission to remodel your house?

7 A I did not.

8 Q And you mentioned that you put on the addition, which is
9 described as your hang-out shed or hang-out building?

10 A That's attached to the -- to the large garage, yes.

11 Q Right. And that was built in 2016?

12 A Yes.

13 Q Excuse me. Were you required to get a building permit for
14 that?

15 A I did.

16 Q I'm sorry, what?

17 A Yes, we received a building permit.

18 Q And did you go to the Turner County Zoning Office to do
19 that?

20 A Yes.

21 Q Did you review the zoning ordinance prior to getting that
22 building permit?

23 A No, I did not.

24 Q Are you aware of how the housing eligibility rules work
25 under the zoning ordinance?

1 A No, I do not.

2 Q Do you have any idea whether someone could build a house
3 directly to the south of you?

4 A I -- I don't know.

5 Q Do you know if anyone could build a small hog facility
6 directly to the south of you?

7 A I guess, I don't know. I haven't read those ordinances.

8 Q I'm sorry?

9 A I haven't read that ordinance.

10 Q And so you also wouldn't know if someone could open a
11 cattle feedlot, an open-air cattle feedlot, directly south
12 of you?

13 A Yes, I don't know. I'm assuming they can if they got a
14 permit.

15 Q And in driving by hog barns for a number of years, you're
16 aware that there may be smells or other things that come
17 from those facilities if they are built; correct?

18 A I -- I assume. I guess I don't know for sure.

19 Q And you're aware that they're generally going to be
20 located out in agricultural land usually zoned for
21 agricultural use; correct?

22 A That is correct.

23 Q And you would have known that when you bought your
24 property back in 1998; correct?

25 A Yes, and we -- and we made sure that there was nothing of

1 that sort around that we would be able to smell.

2 Q Before I forget, when you were aware that that place to
3 the northeast sold, did you bring that to your appraiser's
4 attention?

5 A I did not. I found out after the fact.

6 Q Well, did you tell him about that before he testified
7 today?

8 A No, I did not talk to him.

9 Q Did you tell your attorney about that?

10 MR. PETERSON: Objection. Attorney-client privilege.

11 THE COURT: Sustained.

12 Q (BY MR. DONAHOE) Did you tell anyone about that who might
13 have something to say about the evidence regarding
14 property values in your case?

15 A No. I don't even know what it went for.

16 Q Well, usually that becomes public record; correct?

17 A I guess. I never looked it up.

18 Q Well, you saw how your appraiser made his report based on
19 comparable sales; correct?

20 A That is correct. I'm not an appraiser.

21 Q Did you request that the Turner County Assessor reduce the
22 property value and lower your taxes when the conditional
23 use permit was approved?

24 A I did not.

25 Q Do you plan to do that?

1 MR. PETERSON: Object. 402, 403.

2 THE COURT: Overruled. She can try to answer.

3 A I guess I haven't even considered that yet. It's not
4 built.

5 Q (BY MR. DONAHOE) Well, in regard to this perception, your
6 appraiser indicated that he would have you give anybody
7 who might want to purchase this notice on a seller's
8 disclosure's statement that this facility is being
9 planned; isn't that correct?

10 A Yes, he did. And if I was going to sell it, I would have
11 to disclose it.

12 Q So you consider that to be impacting your value today;
13 correct?

14 A Yes, I do.

15 Q You talked about all the ways you thought this hog
16 facility was going to impact your daily activities at your
17 house; correct?

18 A I did.

19 Q And that is specific to doing things outdoors like hanging
20 the laundry, participating with the things that you've
21 done before like barbecues or watching the dogs play or
22 being outside with the dogs or your family and friends;
23 correct?

24 A That is correct.

25 Q And you didn't think you'd be able to have your windows

1 open because of the odor and flies; is that correct?

2 A The windows because of the smell, yes.

3 Q Are you aware of other facilities that have been
4 constructed in the last three years that are located
5 within a half a mile of other residences in Turner County?

6 A I guess not right offhand.

7 Q Have you talked to anybody who owns a house like that?

8 A I have not.

9 Q And whether it's in Turner County or elsewhere, did you
10 seek out anybody who lives in a house less than half a
11 mile from a new hog facility?

12 A No, I haven't.

13 Q Have you ever lived near a hog facility?

14 A No, I haven't.

15 Q Did you grow up on a farm?

16 A No, I did not.

17 Q Are you aware of the fly controls and other requirements
18 in the conditional use permit for this facility?

19 A I have not read the entire documentation.

20 Q Are you aware of the use of pit additives to reduce odor
21 from the manure?

22 A That was mentioned in the December 8th hearing.

23 Q And did they indicate that they would use pit additives to
24 help reduce odor?

25 A They said they would.

1 Q Now, you said that you completely remodeled the house and
2 that basically no part was untouched; correct?

3 A Pretty much.

4 Q So basically this is almost a brand-new house other than
5 the bones, so to speak; is that correct?

6 A Well, we -- we have the same walls and everything, but
7 we've painted. We redid the floors, added -- we put
8 geothermal in it. We added a sump pump downstairs and
9 recemented the floor down in the basement. So it -- we
10 still have the same brick walls down in the basement that
11 were there when we started, and we've added a lot of
12 electricity to it. So it's an older home with updates.

13 Q You indicated that you put in some trees recently on the
14 front. That would be to the east; correct?

15 A They were right along the road. We added three trees this
16 year.

17 Q Do you plan on adding other trees to your property?

18 A Not -- we have no intention of that as of now.

19 Q Are you aware of the number of trees that we planted
20 around the hog facility?

21 A Yes. That was brought up.

22 Q And that's required under the conditional use permit as
23 one of the conditions they have to meet to operate the
24 facility; correct?

25 A Yes. That's what they said.

1 Q Do you have any experience or know anything about whether
2 those trees are effective in assisting to reduce the wind
3 flow or direction or disperse the air that would be coming
4 from the facility towards your house?

5 A I do not have any expertise in that, no.

6 Q Have you done any research on that?

7 A No, I haven't.

8 Q Have you done any kind of appraisal or other determination
9 of the value of your home for any of the improvements that
10 were made like a home equity loan or a construction loan?

11 A We did take a loan out when we re-sided it which --

12 Q How long ago?

13 A Oh, that must have been five, ten years ago.

14 Q You haven't had anything done in the last two years after
15 the conditional use permit was initially granted?

16 A Oh, I've relandscaped around the back of my porch, and I
17 just recently had my floor -- my wood floors in the house
18 redone, so those are updated now, too.

19 Q But you didn't get a loan to do that?

20 A No.

21 Q So you haven't had a bank or a separate third party look
22 at the value of your home under the conditions of the
23 potential facility being built at the Schmeichel property?

24 A No, I haven't.

25 Q Well, when you did those recent updates including the

1 refinishing of the floor, that was after you knew that the
2 Schmeichels intended to build the hog facility; correct?

3 A Yes.

4 Q Did you review the deposition of your odor expert, Dr.
5 Bakhtari?

6 A I -- I did review it, but a lot of it I didn't understand.

7 Q Are you aware that he said that he would not consider it
8 appropriate to use a open sewer wastewater lagoon as a
9 comparison for odor regarding real estate value?

10 A I did not know that.

11 MR. DONAHOE: No further questions.

12 THE COURT: Mr. Deibert.

13 CROSS-EXAMINATION

14 Q (BY MR. DEIBERT) Ma'am, I want to ask you some questions,
15 a few questions about this potential plan to make the
16 property into a B&B, or bed and breakfast.

17 It's my understanding that, from the document, that
18 it was a B&B before you bought the property; correct?

19 A Yes.

20 Q And it was called West Towne -- two words, both capitals,
21 E at the end of Towne -- West Towne B&B; is that right?

22 A Yes.

23 Q Do you know who owned that?

24 A Bernice Miller.

25 Q When it was a B&B, and I guess from the literature it

1 indicates from '95, meaning around three years, was that
2 strictly a B&B or did an owner or someone else live on the
3 premises?

4 A I don't know that personally, but I would assume she lived
5 there.

6 Q All right. Do you know how many B&B units there were,
7 meaning how many rooms to rent?

8 A I do not know how she ran it.

9 Q And just following up, you don't know how many square feet
10 of the structure were dedicated to the B&B?

11 A I do not.

12 Q Do you know if each room had its own bathroom?

13 A They did not.

14 Q So you know, but the answer is they did not have their own
15 bathrooms?

16 A They did not. There was no bathroom -- I mean, well,
17 there -- it's a bath and a half there. So, depending on
18 how she divided up the house, each could have had their
19 own bathroom.

20 Q Well, that --

21 A I wasn't -- I wasn't there so I --

22 Q I understand, and if you don't know the answer, just tell
23 me that, that's fine.

24 A Okay. I don't know.

25 Q Okay. So, back to my question: Do you know how many

1 rooms there were to rent?

2 A No, I don't.

3 Q Okay. Do you know how many bathrooms there were or
4 however many rooms there were?

5 A I don't know.

6 Q And I'm sorry to have to ask you this, but because of the
7 nature I do: What is your age?

8 A I'm 59 and a half.

9 Q How old is your husband?

10 A He's 61.

11 Q How long -- well, what does your husband do?

12 A He works at Sioux Falls Kenworth in Sioux Falls. He's a
13 service manager.

14 Q Do the two of you or -- well, do the two of you have a
15 plan for when you will retire, that is, how many years?

16 A My husband is planning on retiring at 62 and I plan on
17 working to 65.

18 Q Have you done a business plan for this proposed B&B?

19 A No, we have not.

20 Q Do you know how many units you plan to have?

21 A I'm thinking we would rent out two bedrooms.

22 Q And would you and your husband continue to live there?

23 A Yes, we would.

24 Q Have you done any investigation into what you would need
25 to do to make the plumbing appropriate for a B&B?

1 A I have not.

2 Q How about electricity?

3 A I have not done any research on that.

4 Q Have you done any kind of cost analysis to see what you
5 would charge and what kind of occupancy rate you would
6 need to have to make this much money?

7 A We have not. It would just be supplemental income. We
8 don't want to put a price on the rooms until we know what
9 the going rate is when we retire.

10 MR. DEIBERT: That's all I have. Thank you.

11 THE COURT: Mr. Peterson.

12 REDIRECT EXAMINATION

13 Q (BY MR. PETERSON) Vicky, you were asked questions about
14 our odor expert, Dr. Bakhtari. Have you read his report?

15 A I did read it, but like I said, a lot of it I didn't
16 understand.

17 Q And lawyers use legal words. Have you seen the transcript
18 of his deposition that he gave?

19 A I have not.

20 Q Okay. Because that just came in, like, late last night or
21 this morning. You've not read it, have you?

22 A No. No, I have not.

23 Q So do you know if Dr. Bakhtari said what Mr. Donahoe
24 stated or whether he said he wouldn't get into speculating
25 about what an appraiser should and shouldn't be doing?

1 A You are correct. I -- I do not know if that was said in
2 the report or not.

3 Q Regarding the grant money, at the hearing the Schmeichels
4 or their representative indicated that they would apply
5 for grant money through the State?

6 A I do not recall them saying -- mentioning anything like
7 that.

8 Q You've seen the newspaper notice --

9 A Yeah.

10 Q -- about the grant?

11 A Yes.

12 Q And it doesn't state the amount; correct?

13 A No.

14 Q But whatever the grant money is, did the Schmeichels offer
15 to pay that to the county if the permit is granted?

16 A Nothing was mentioned at the hearing.

17 Q Did you read the hearing -- excuse me, the permit
18 application submitted by the Schmeichels that talks about
19 the grant money being assigned?

20 A I have not.

21 Q Your attorney, Mr. Almond, was stopped from presenting
22 everything he wanted to at the hearing?

23 A Yes.

24 Q The Schmeichels and their representatives, were they able
25 to talk for as long as they wanted to?

1 A Yes, they were.

2 Q The written information, specifically the odor dispersion
3 report and Mr. Shaykett's appraisal that were submitted
4 prior to the hearing, do you know if any board member
5 actually read those?

6 A I do not, no.

7 Q I want to clarify one question about prevailing winds. My
8 questions to you were specifically for the summertime.

9 When you are outside and wanting to enjoy the
10 summertime, are the winds typically out of the south?

11 A Yes, they are.

12 Q This rental property that is about 50 or 60 feet closer to
13 the proposed hog site than your property, that was a
14 rental until recently?

15 A Yes.

16 Q Do you know if the folks who bought it, if they received a
17 disclosure statement that said anything about the proposed
18 hog barn going in?

19 A I did talk to them. They knew nothing about the proposed
20 hog barn going in.

21 MR. DEIBERT: Objection. Move it be stricken as hearsay.

22 MR. PETERSON: That fits an exception.

23 THE COURT: No, the objection is sustained at this point.

24 Q (BY MR. PETERSON) Were the new owners, when you talked to
25 them, surprised to learn about the hog barn going in?

1 A Yes, they were.

2 MR. DEIBERT: Objection, Your Honor. Hearsay.

3 MR. PETERSON: That's an 803 exception.

4 THE COURT: That will be overruled. She testified they
5 were surprised, not specifically what they said. So, the
6 objection is overruled for that question.

7 A Yes, they were surprised.

8 MR. PETERSON: All right. Those are all my questions.

9 THE COURT: Mr. Donahoe.

10 RECROSS-EXAMINATION

11 Q (BY MR. DONAHOE) I just want to make sure I'm clear on
12 this. You talked to the new owners and they didn't know
13 about the hog unit, but you didn't ask them what they paid
14 or whether they paid less because they didn't know about
15 it?

16 A I don't think that's any of my business to ask them how
17 much they paid for a house. So, no, I did not.

18 Q Okay. And again, you didn't mention it to your appraiser
19 and ask him to look into it to see if --

20 A No, I did -- no, I did not.

21 Q As to the surprised nature of their reaction, what exactly
22 do you mean by that? Tell me how you think they were
23 surprised or why you think they were surprised.

24 A After I told them, they mentioned that they've worked
25 around hogs and how bad it could get as far as smell,

1 predators, rodents.

2 Q Is that in regard to their reaction, how you said that
3 they were surprised? That was my question, not what they
4 said.

5 A Yes, I feel that they were surprised. They did not know
6 it was there, that it was going to be put there.

7 MR. DONAHOE: I'm going to move to strike the previous
8 response and that response as nonresponsive.

9 MR. PETERSON: That's exactly what he asked her to say,
10 what do you mean by surprise, explain why you say that.
11 She just did.

12 THE COURT: The objection is overruled. You went there.
13 She's trying to describe it. She's not describing the
14 reaction, which is what you're asking, very well.
15 Perhaps, if you word the question differently.

16 MR. DONAHOE: Well, I asked for the reaction, and she's
17 telling me what they said. That's the basis for my
18 objection. It's continuing hearsay.

19 Q (BY MR. DONAHOE) So, again, what did you observe them to
20 do that you believed was a reaction that you interpret as
21 surprise?

22 A They were -- their reaction of surprise was based on what
23 they said and how they -- how they said it.

24 Q Okay.

25 MR. DONAHOE: The same objection. Move to strike.

1 THE COURT: Overruled. She's not saying what they said in
2 that part of it. She's saying that's how she felt they
3 were surprised. So, it's overruled as far as that goes.
4 Again, it has minimal relevance at this point.

5 MR. DONAHOE: And just to be clear, Your Honor, what we're
6 talking about is not the truth; in other words, that they
7 actually said that, but her interpretation and their
8 perceived reaction.

9 THE COURT: The only thing that the Court is taking from
10 that line of testimony is the new owners appeared to be
11 surprised.

12 MR. DONAHOE: Thank you.

13 Q (BY MR. DONAHOE) As to your testimony about the bed and
14 breakfast and your plans, it sounds more like this would
15 be along the lines of an Airbnb.

16 Do you know what that phrase means, Airbnb?

17 A No, I do not.

18 Q Okay. Just to be clear, in regard to whatever these plans
19 are, do you intend to get a conditional use permit for
20 permission to have a bed and breakfast under the zoning
21 ordinance?

22 A When we retire we will go through all the proper channels
23 and elect to get all the proper permits before we do that.

24 Q You indicated that you didn't read the transcript of the
25 deposition of your odor expert; correct?

1 A I have not, no.

2 Q Did you look at the exhibits that were included with that
3 examination?

4 A I have not seen that.

5 Q Okay. Just so we're clear, in regard to the prevailing
6 winds in the winter, the winds are going be to from the
7 north; correct?

8 A I'm sorry, I didn't hear you.

9 Q In regard to the prevailing winds in your area by your
10 house, in the wintertime they'll be from the north;
11 correct?

12 A Generally, they are.

13 Q North or northwest, generally?

14 A I -- I guess I thought they came from the north, but --

15 Q Either way it's from the direction of your house towards
16 the facility and not the other way around?

17 A Generally.

18 Q As part of this bed and breakfast, do you intend to have
19 any kind of additional facilities or activities outdoors
20 beyond what you have now?

21 A Not beyond what we have. We will use the hang-out area
22 as -- so that they can be outside. There will be sitting
23 areas, but nothing -- no building.

24 Q And that's to the west of your existing house?

25 A Yes, it is.

1 Q And that's even farther away from the proposed facility?

2 A Correct.

3 Q And the distance that we've been talking about that's
4 measured for the setback is to the closest structure on
5 your property; correct?

6 A That is the house, yes.

7 MR. DONAHOE: Okay. No further questions.

8 MR. DEIBERT: I have nothing further, Your Honor.

9 THE COURT: Mr. Peterson.

10 MR. PETERSON: No questions, Your Honor.

11 THE COURT: You can step down, ma'am. Thank you.

12 THE WITNESS: Thank you.

13 (Witness excused.)

14 THE COURT: I'd like to get started with the next witness.
15 My plan is to recess approximately noon. I am going to
16 have to conduct a telephone conference call on a juvenile
17 who's detained at 1:00 o'clock, but it should only take 15
18 minutes. And so my plan is after our lunch break to
19 resume at approximately 1:20. I think we'll take the
20 conference call in chambers so you can come back after
21 lunch and be in here, and then we'll start back as soon as
22 I've concluded that telephonic hearing.

23 With all that being said, Mr. Peterson, you can call
24 your next witness.

25 MR. PETERSON: Thank you, Judge. We'd call Dr. Jeff

1 Powers.

2 THE COURT: If you'd please raise your right hand.

3 JEFFREY POWERS,

4 called as a witness, having been first duly sworn, was
5 examined and testified as follows:

6 THE COURT: Please be seated.

7 THE WITNESS: Hello.

8 DIRECT EXAMINATION

9 Q (BY MR. PETERSON) Good morning. Please introduce
10 yourself.

11 A My name is Jeff Powers.

12 Q What is your address?

13 A 27906 450th Avenue, Parker, South Dakota.

14 Q And is your home just a little bit north of Vicky's home?

15 A Yes. When we've measured it, it's between one-half to
16 three-quarter mile north.

17 Q Of Vicky's place?

18 A Yes. It's just over half a mile.

19 Q How long have you owned that property?

20 A I purchased it September 2012.

21 Q Is that your sole residence?

22 A Yes.

23 Q Who else lives there?

24 A Sister, my mother. I'm in a elder care situation where I
25 have my mother for a few weeks and then my sister takes

1 care of her for a few weeks, so we kind of use it as a --
2 as a situation like that, but it's primarily myself and
3 then maybe one to two weeks a month my sister and my
4 mother.

5 Q Do you do some work from home as well from that property?

6 A I do a large amount of my work from home.

7 Q What kind of work do you do?

8 A I'm a radiologist. I do diagnostic x-rays.

9 Q Dr. Powers, just tell the Court a little bit about your
10 background, you know, schooling, work, a little bit about
11 who you are.

12 A Well, I graduated from medical school in 1992 and then did
13 residencies. I've also based my entire life primarily in
14 small towns. So when I say "small towns," agricultural
15 communities. For the past 12 years I've done work at
16 Cherokee Regional Medical Center in Cherokee, Iowa; also
17 Mankato, Minnesota.

18 And I'm currently in the process of applying for
19 hospital privileges throughout South Dakota. Over the
20 past eight years I've achieved my South Dakota medical
21 license. I've moved my complete business there, doing
22 diagnostic exams for various facilities. And most people
23 don't understand what that entails. It entails having
24 what we call a radiology workstation or, you know, a
25 specialized office, if you will.

1 Q And you have that set up in your home?

2 A Oh, yes. Oh, yes.

3 Q Do you still travel back to Cherokee?

4 A Yeah, I go there about two days a week, two to three days
5 a week and -- but then I usually come back because this is
6 where I live so ...

7 Q What --

8 A My entire business is there, so that's --

9 Q What draws you to sort of the small-town acreage --

10 A Well --

11 Q -- country living?

12 A Well, I had always wanted farmland, and I purchased this
13 acreage in 2012, tried to purchase farmland concerning the
14 local regional area directly around my acreage, but it was
15 pretty well bought out, if you will, by one or two larger
16 farmers.

17 So, by 2014 I was able to achieve a second farm, if
18 you will, farm acreage, at 455th Avenue, which is exactly
19 five miles straight due east. And between 2014 and 2017,
20 I was able to put together a family farm in that area,
21 meaning I was able to put together 130 acres.

22 And I ended up using my place, which is of concern
23 today at 450th Avenue, I used that residence for starting
24 the other farm. So, in other words, I keep farm machinery
25 there because I have assistance with custom farming. And

1 then custom farmers that work on my other property, they
2 park their equipment and use this property that I have at
3 450th Avenue, and we've kind of tied both places together,
4 if you will. But my place of residence is 27906 450th
5 Avenue, just north of Reasonovers.

6 Q During the times when you've been commuting from Parker to
7 Cherokee, do you drive by hog barns?

8 A That is all I do. It doesn't matter whether I take
9 Highway 3, it doesn't matter whether I take C-38. There's
10 limited access going from Iowa to South Dakota based on,
11 everybody knows, passage of the river. But it's also all
12 the times that I've spent in small towns. So the answer
13 is yes, extensively.

14 Q In your opinion, how will the Schmeichels' proposed hog
15 confinement affect you and your property?

16 A Well, first --

17 MR. DONAHOE: Objection. Foundation; speculation.

18 A Okay. First --

19 THE COURT: Oh, just wait. The objection is overruled,
20 but a little more foundation would probably be best.

21 Q (BY MR. PETERSON) Well --

22 A I'm sorry. I just had a cramp in my leg.

23 Q Sure.

24 THE COURT: He's entitled to give his opinion, but let's
25 maybe lay it out with some better questions.

1 MR. PETERSON: Follow up with some why do you think that
2 or --

3 THE COURT: Please.

4 MR. PETERSON: Okay.

5 Q (BY MR. PETERSON) Go ahead and tell us what you think the
6 impact would be, and then I'll have some follow-ups for
7 you.

8 A Well, anything I say, I cannot speak as a medical
9 specialist. I have to put that out there. Everybody
10 knows I'm a physician. So I'm not speaking as a
11 physician, as a medical specialist, just as somebody that
12 has common knowledge.

13 So, your question is how would it affect? First of
14 all, you have to start with it's not farming. It's
15 industrial. This is industrial farming. I mean, it's not
16 500 hogs; it's not 100 free-range hogs; 300 free-range
17 hogs. We're talking over 5 to 6,000 hogs in tight
18 confinement with up to probably, what, two litters -- two
19 litters, each hog, per year. That's an enormous amount of
20 waste. Anybody -- anybody in this room knows that, that
21 that's an enormous amount of waste, flies, impact on the
22 area, environmental concerns. We know that.

23 I have passed through these farms, passed past these
24 farms or these, what they call hog facilities, and this
25 one is going to be larger. And I have passed by them and

1 seen the -- or smelled, I should say, the odor. It's
2 incredible.

3 And my basic question is: When somebody says we're
4 going to vent the odor, vent it where? When somebody says
5 we're going to plant some trees, what does that mean? You
6 plant a tree. There's trees past all of the so-called
7 industrial hog facilities, these C-A-F-O-s. There's trees
8 at every single one. It doesn't stop the odor a bit. It
9 looks pretty. It doesn't stop the odor a bit.

10 Next, the flies. Is anybody actually going to tell
11 me that we're not going to see flies, decaying animals,
12 predators, waste material, industrial truck traffic? How
13 are you going to vent? How are you going to get rid of
14 the manure?

15 Oh, I saw the plans. I read the plans. I listened
16 to how they were going to do it. When I asked at a
17 meeting -- on the December 8th meeting I asked, and I
18 asked each of the commissioners, I asked them as a group,
19 and they wouldn't answer. They just looked away.

20 Q What did you ask them?

21 A I asked them, I said, based on what we've heard here today
22 and based on this permit, my question to you is: How
23 would you all want to plan your retirement office or your
24 retirement house and then suddenly have the value of it
25 decreased? Many of them just looked away. They wouldn't

1 answer. They didn't answer. I asked it as a direct
2 question. There was no answer.

3 Q Back to the subject of the impact of --

4 A Okay.

5 Q -- this facility. The hog barns that you've observed over
6 the decades of living in the country, how do those compare
7 in size to the Schmeichels' hog confinement?

8 A My understanding is the proposed confinement to be built
9 probably -- and I shouldn't say probably -- I think, and
10 correct me, I want to be told so that I don't make a
11 mistake, there were going to be six buildings, five or six
12 buildings to be built. Many of the facilities I go past,
13 two buildings, three buildings. This is going to be an
14 enormous hog confinement, an enormous, when only two and a
15 half to three miles away is another confinement that is
16 going up for cattle, for -- it's going to be for dairy
17 cows.

18 And that's my point. All of a sudden, eight, ten, 12
19 years ago, whatever, I buy a house, my neighbor buys a
20 house, we never anticipated industrial farming. We are
21 all used to farming. We moved there because of farming.
22 I engage in farming. I have eight cows that go on my
23 other property. I've had cows, four to five cows, before.
24 Oh, at least -- out of the last eight, nine years, at
25 least three years I've had cows breeding on my property at

1 450th Avenue, right next to Vicky. I have no aversion
2 toward farm animals, but this is not that. This is
3 different.

4 Q And the negative impact that you've talked about, is that
5 based on your life experience?

6 A Based on life experience, yes, both perception and ability
7 to smell. And again, I say that, I'm no expert. I am in
8 no way trying to pass myself off as one. Nor am I an
9 agricultural expert.

10 Q Dr. Powers, you touched on this before. You were present
11 at the December 8, 2020, hearing where the Board of
12 Adjustment granted this permit; is that correct?

13 A Yes.

14 Q Were you there for the entire --

15 A Yes.

16 Q Were you able to observe the board members the entire
17 time?

18 A Completely, yes.

19 Q What were your observations with respect to their level of
20 interest in hearing information contrary to the
21 Schmeichels' plan?

22 A When you say "observation," it wasn't just observation, or
23 when you asked about observation. I asked them. We were
24 given a -- a impact statement time, if you will, where
25 both Vicky and I were allowed to get up and give our

1 assessment as to why we opposed the permit.

2 During that time frame I asked each one of the
3 commissioners: How would you feel if you had purchased a
4 home eight years ago, greater than eight years ago, and
5 all of a sudden -- you had put extra work into it, you'd
6 put sweat equity, poured cement, put a new roof, fixed
7 buildings, increased the value -- and suddenly somebody
8 comes in and puts in an industrial hog farm. And then you
9 know what this is going to do to any resale value, any
10 value of your property. I asked that very statement.

11 And you asked me what was my impression or how they
12 looked. They -- they just looked away. That's a fact.
13 They just looked away. Their mind was -- why would their
14 mind not be made up if they just looked away and would not
15 answer it? They thanked me for my time, like thanking
16 somebody for their service, and then let's move on was the
17 inference I perceived.

18 Q Do you believe their minds were made up?

19 A Completely. And if their minds weren't made up, why were
20 we there? In other words, why -- this was all almost as
21 if it was staged. I was -- I'm speaking honest -- I was
22 stunned. I did not know I was going to be speaking before
23 the board at that time. I was surprised I was even called
24 or given a chance to give an impact statement. I never
25 knew. And it's a lot like today. I did not know I was

1 going to be called here today, meaning I have not been
2 prepped, if that's what you're asking.

3 Q After both sides presented their material, did the board
4 think about it, deliberate, weigh the pros and cons; is
5 that something you observed?

6 A Oh, yes. Let's give the board credit. Yes, they did.
7 They weighed truck traffic, they weighed land usage, but
8 the questions were asked and answered as if, oh, yes, it's
9 already in a report. And so that just moved rather
10 quickly as a proceeding and then it was just move on.

11 Q When you say they weighed truck traffic, land usage --

12 A Uh-huh.

13 Q -- I'm not sure what you mean by that.

14 A Okay.

15 Q Can you explain that?

16 A Very good. If these trucks for manure dispersal, or
17 manure disposal is a better term, if they're going to be
18 hauling this manure away and hauling away, if you will,
19 animals, waste material, whatever, these trucks are going
20 to be going on county roads. And if they're going on
21 county roads, the county commissioners wanted to make sure
22 that there would be appropriate weight limits and that
23 there would be appropriate usage. I -- I was impressed by
24 that. I was very impressed, except that there was no care
25 or concern, in my opinion, given toward my financial

1 concerns or Vicky's concern.

2 Q So the discussion and the deliberation related to taking
3 care of the county roads that would be used?

4 A Correct. And I have not read the minutes recently so I
5 have to go on my recollection, but I think that there was
6 also concerns raised on water usage and disposal of waste
7 material and hauling away of animal carcass because we all
8 know there will be a certain set amount of carcass from
9 just a generalized process of hog confinement.

10 MR. PETERSON: All right. Those are all of my questions.

11 THE COURT: Mr. Donahoe.

12 MR. DONAHOE: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 Q (BY MR. DONAHOE) Dr. Powers, have you reviewed the audio
15 recording of the December 8th, 2020, public hearing?

16 A No, I have not reviewed it because I was there. So the
17 answer is no, I have not reviewed it.

18 Q And have you reviewed the transcribed written document
19 that is representative of what a court reporter heard and
20 took down?

21 A From the December 8th meeting?

22 Q Yes.

23 A No, I have not reviewed that. That's why I said to the
24 best of my -- the best of my remembrance.

25 Q Well, I was going to have you point out in the transcript

1 where you brought up this question that you said wasn't
2 answered by the board, and I'm not finding it anywhere.

3 A Can you -- do you have a copy of that? It should be where
4 I asked in my statement. Do you have a copy of my
5 statement, my impact statement? If you have that, I'll
6 show it to you because I specifically remember, I looked
7 at all the four board members and I asked: How would you
8 -- quote: How would you feel if you had worked hard on
9 your property and all of a sudden your property values --
10 and I forget what percentage I said -- was decreased? If
11 you would read that to me, it would refresh my memory and
12 probably bring it back more clear to my understanding.

13 MR. PETERSON: I'm going to interject, too. The
14 transcription is admittedly not complete because not
15 everything was transcribable, which is why we have the
16 audio recordings and the transcript of what could be heard
17 well enough to be transcribed.

18 THE COURT: Does the transcript reflect when there were
19 portions that were inaudible?

20 MR. PETERSON: You can see that, especially at the
21 beginning of Part 2. It picks up right in the middle of
22 Reece Almond talking and there's nothing before it.

23 THE COURT: But does the transcript reflect that in what
24 the court reporter typed? Oftentimes the court reporter
25 will type a line that said "Portion of conversation

1 inaudible." Does it reflect that in the transcript?

2 MR. PETERSON: There's just a big gap in the transcript,
3 but I don't know that she typed that.

4 THE COURT: Okay.

5 MR. DONAHOE: She did, Your Honor. It's in parentheses
6 with the word "Inaudible." This is in regard to the page
7 of Exhibit 12 that starts off with Mr. Powers making a
8 statement, and it's in his statement where we have that
9 word "Inaudible" in parentheses. Wherever that would
10 occur, I would assume that she would have put that --

11 THE COURT: But does that appear to occur often in the
12 portion where she tried to transcribe what he was saying?

13 MR. DONAHOE: I'm only seeing it once in Mr. Powers'
14 statement.

15 MR. PETERSON: I'm going to also say for the record on
16 Exhibit 12 where it says "Mr. Powers," that is actually
17 Mr. Almond. It's Mr. Powers' attorney. Go back and
18 listen to it. Vicky and Dr. Powers' statement, they're
19 not -- they were not transcribed, but they should be on
20 the audio recording.

21 THE COURT: All right. So counsel has kind of pointed out
22 the situation. I understand Mr. Donahoe's question,
23 trying to look for the record of what you said.

24 THE WITNESS: Sure.

25 THE COURT: I'm hearing it may not be in the written

1 transcript. It should be in the audio copy of it. Okay.

2 Let's move on, I guess, at this point.

3 MR. DONAHOE: Absolutely, Your Honor. That's why I asked
4 if he listened to the audio portion. That's where I
5 started.

6 THE WITNESS: No, I have not.

7 Q (BY MR. DONAHOE) And so if the people that you would have
8 asked this question to are witnesses in this case and they
9 have a different recollection of what happened, do you
10 have anything that would establish the statements that you
11 say you made or questions you presented to them that were
12 ignored?

13 A Without having to rephrase that, because I'm trying to
14 collect the whole question the way you're asking it,
15 you're asking if they said or if they recollected a
16 different idea, would I remember that recollection better,
17 is that --

18 Q No.

19 A -- what you're asking?

20 Q No. I'm asking if you have something else besides your
21 recollection that you could point to that would show --

22 A No. No, I do not, meaning I have no personal record, no
23 other audio and, no, I have -- I have not seen a
24 transcript of that meeting. That meeting was, as we said,
25 December 8, so that would have been nine months ago or so.

1 Q Sure. And you had already sued for the exact same issues
2 in a previous case so you were aware of the legal matters
3 that would be at issue on December 8, 2020; correct?

4 A As far -- I would be aware of the legal issues as far as
5 not being a lawyer, yes.

6 Q Sure. And you had a lawyer there for you, Mr. Reece
7 Almond?

8 A Yes.

9 Q And in fact he was given some additional time to address
10 some things, assuming that he's the person on Exhibit 12
11 that's listed as being the one who is Mr. Powers?

12 A I would assume so, yes.

13 Q He asked for a little more time and he was given that; do
14 you recall that?

15 A I'd have to read the -- I -- I'll admit to it. I mean, I
16 don't -- I don't fully recall it, but the answer is
17 probably yes, yes. I'll answer yes.

18 Q And your attorney had submitted materials to the Board of
19 Adjustment prior to the hearing?

20 A My understanding is yes, yes.

21 Q And they fully understood, the board members, fully
22 understood that you and Vicky Urban-Reasonover were
23 opposed to the approval of this conditional use permit?

24 A Not for the specific reasons we were opposed.

25 Q And in what way did you feel you needed to make them aware

1 of additional or different reasons?

2 A The board members have never, to my recollection, never
3 addressed our loss in property value that we perceive will
4 occur, loss in ability to resell our property, just -- not
5 the value, but the ability to resell, and that is my
6 opinion.

7 Q We're getting close to the time for the Court's lunch
8 break here, but I just want to make sure we're clear. In
9 regard to the information provided by your attorney and by
10 you or other people at the hearing --

11 A Uh-huh.

12 Q -- there was concern about loss of property value that was
13 part of the appeal that went to the South Dakota Supreme
14 Court and was understood by everyone involved in that
15 prior to your hearing on December 8th of 2020; correct?

16 MR. PETERSON: I'm going to object. That's speculative as
17 to what board members actually knew, particularly because
18 all the property loss came during the appeal and not the
19 hearing because we had to establish standing. So I
20 don't --

21 MR. DONAHOE: That's the point.

22 THE COURT: Well, at this point the objection is going to
23 be sustained. The question is everyone knew. It's the
24 Court's recollection the board that considered this permit
25 on December 8th, 2020, was composed of some different

1 people that considered the very first permit originally
2 that was appealed.

3 So, let's ask this witness about his knowledge or
4 what he knows. Let's not ask about everyone's knowledge
5 because that's problematic.

6 Q (BY MR. DONAHOE) Well, the point is you had an attorney
7 from the same firm that represented you on the appeal.
8 The appeal addressed the issue of property loss and the
9 need to show that for standing, and that was something
10 that would have been presented by your attorney at the
11 December 8, 2020, hearing; correct?

12 A It would have been presented and questioned, but it was
13 never opened up or discussed further by the county
14 commissioners as I addressed it to them.

15 Q And you're aware that there are certain requirements for a
16 person to make an application for a conditional use permit
17 set forth in the zoning ordinance; correct?

18 A What would you mean by that? I'm not sure I understand
19 what you're -- what you're asking.

20 Q There's a process that you have to follow including an
21 application and providing information for their proposed
22 land use. You understand that; correct?

23 A Yes.

24 Q And did you review the materials that were provided by the
25 applicants for the December 8th, 2020, public hearing?

1 A Yes.

2 Q And did you have your attorney review those materials?

3 A That would be yes.

4 Q Isn't it true that the Board of Adjustment also had the
5 assistance of a planning consultant who looked at this
6 application to determine whether it met the requirements
7 under the zoning ordinance?

8 A I'm not sure how that zoning ordinance was calculated so
9 I'm -- I'm not sure that I was completely understanding of
10 that.

11 Q Well, in regard to property values for those who are in
12 the area of a proposed conditional use, that's not
13 something that's listed as a specific criteria that has to
14 be addressed by the applicant or the board under the
15 zoning ordinance; correct?

16 MR. PETERSON: I'm going to object. That misstates the
17 ordinances. It calls for a legal conclusion. He's
18 already denied that he knows what the ordinances require
19 so I would also say that there's no foundation.

20 THE COURT: I'm going to overrule. He's asking if he
21 knows what's in the ordinance, and if he has already said
22 no, the answer will probably be no again, but he can
23 attempt to answer.

24 A The answer would be no.

25 Q (BY MR. DONAHOE) No, you don't know or, no, it's not in

1 the ordinance?

2 A No, I do not know.

3 Q The ordinance is in the record so we can address that, but
4 there is no requirement that your attorney argued was not
5 met because this would decrease your value a certain
6 amount and that exceeded what is allowed under the
7 ordinance; correct?

8 MR. PETERSON: I'm going to object as misstating the
9 record and also compound and confusing.

10 A I'm -- I'm not understanding the question.

11 THE COURT: I am a little confused by the question as well
12 so the objection is sustained.

13 Q (BY MR. DONAHOE) Let's start over. You had an attorney
14 who was representing you at the hearing; correct?

15 A Yes.

16 Q Did your attorney tell the Board of Adjustment, you cannot
17 approve this because the decrease in value of my client's
18 real estate is something you have to consider in the
19 zoning ordinance because it's set forth at a specific
20 section and you cannot approve it because it violates that
21 section?

22 A I would have to read the transcript to remember that exact
23 wording. The answer is I do not recall that exact
24 wording.

25 Q Can you point to anything that you would say definitively

1 sets forth an obligation of the Board of Adjustment to
2 consider a specific real estate value diminution or loss
3 in regard to approving or denying a conditional use permit
4 for a swine facility?

5 MR. PETERSON: Objection. Foundation; legal conclusion.

6 THE COURT: Overruled. He asked him if he could point to
7 anything.

8 A No.

9 Q (BY MR. DONAHOE) Just to be clear, you're claiming that
10 they exceeded their authority, and that would be one of
11 the specific things that you seem to be arguing, and I
12 don't understand that.

13 How do you say they exceeded their authority?

14 A Well, I never said that they exceeded their authority. I
15 said that I asked them and they would not answer.

16 Q Your petition was signed by you under oath; correct?

17 A Yes. Which petition, which --

18 Q The petition that started this lawsuit.

19 A I would assume if that's the process. I -- I don't
20 recall, but I would have to say yes, I mean if that's --

21 Q Did you review that petition at any point prior to your
22 testimony today?

23 A I've read it in the past. Do I recall the exact wording,
24 the answer is no. I don't understand a lot of legal
25 issues that are going in there. I mean, I'm not quite

1 sure how I should, you know --

2 THE COURT: You've answered. You're fine.

3 MR. DONAHOE: I was about to move on to a different
4 subject, Your Honor. I don't know if this is a good time
5 for a lunch break.

6 THE COURT: It's probably a good time for a break. We'll
7 come back here and resume at this point. I'd ask the
8 parties to try to be available at 1:15, 1:20, assuming my
9 other hearing only takes the 15, 20 minutes. The
10 courtroom should be open again. There should be no one
11 else coming and going. I think you can leave all your
12 material here if you want, or you can take it with you if
13 you want, that's your choice.

14 We'll be in recess until approximately 1:15.

15 MR. DONAHOE: Thank you, Your Honor.

16 THE COURT: Thank you.

17 (Noon recess at 12:06 p.m. to 1:23 p.m.)

18 THE COURT: Please be seated. Mr. Powers, you can come
19 back up on the stand. I'll remind you, you're still under
20 oath.

21 This morning there was reference to the 2018 case
22 involving interpretation of Right to Farm Covenants, and I
23 looked through the material the parties provided because I
24 thought it was handy somewhere, and I couldn't locate it.
25 And so if I had the law clerk here, this would be a law

1 clerk project, but at some point later today, tomorrow
2 morning, if counsel would get me the cite, I'll find the
3 case, or better yet get me a copy of the case because it
4 does have some relevance because there is a Right to Farm
5 Covenant in this ordinance.

6 I'm familiar with the 2018 case, and it's I would say
7 not dispositive completely, but I need to review how much
8 weight, what weight, can still be considered with those
9 covenants. So, I'll let you folks provide me at least
10 with the cite, if not even a copy of the case, hopefully,
11 by tomorrow or something like that.

12 MR. PETERSON: I think the cite actually is in my pretrial
13 brief.

14 MR. DONAHOE: Your Honor, I have it right in front of me.
15 I could email it to you right now if you'd like.

16 THE COURT: All right. Why don't you just send it to my
17 email. I thought it was in your pretrial brief, and I was
18 trying to skim it, but I was also trying to listen to
19 witnesses, and I didn't see it right offhand so ... Just
20 make sure you include Mr. Peterson on the email of
21 anything you send me so ...

22 All right. We're back to Mr. Powers on the stand,
23 and Mr. Donahoe had additional questions at this point and
24 time so we'll go back to that when he's done sending me
25 the email.

1 MR. DONAHOE: Thank you, Your Honor.

2 (Pause.)

3 MR. DONAHOE: That should be sent, Your Honor. Thank you.

4 THE COURT: Thank you.

5 Q (BY MR. DONAHOE) Dr. Power, we were -- or Powers, excuse
6 me -- we were just about to change to a different subject
7 from the previous discussion, and I wanted to just touch
8 briefly on your experience in purchasing real estate in
9 Turner County. It's my understanding that you said you
10 did buy a separate acreage which would, I assume, be some
11 crop ground. Is that what that is?

12 A I bought a 20-acre acreage, and then immediately within
13 six, eight months, I was able on a contract for deed to
14 buy another 44 acres adjoining. And then -- and I hope I
15 have the numbers right -- and then, like, within a year
16 after that 67 acres adjoining came up for sale. So it
17 went one, two, three. And I put it together as one
18 complete tract of land. So the answer is yes.

19 Q And in regard to that particular property, those parcels
20 that are separate from the place that you reside, that's
21 about five miles to the east?

22 A Exactly.

23 Q Okay.

24 A In other words, if I'm on 450th Avenue and those -- that
25 acreage is 455th, you would walk out my door and go

1 straight-line exactly five miles.

2 Q And I'm understanding that based on your testimony, you're
3 not claiming that that land is affected or --

4 A No.

5 Q -- or damaged?

6 A No, no.

7 Q It's just strictly --

8 A No, I was just trying to describe why I use the other, the
9 450th Avenue, for storage, and I use it with the other
10 farmers that are with it.

11 Q And as to the land that is closer to your home, have you
12 paid attention to any real estate sales in that area
13 recently?

14 A I've heard -- I don't always read the newspapers, but I --
15 I heard about it. The answer is, yes, especially what was
16 spoken of today, I had heard about it and the answer is
17 yes.

18 Q So you're aware of the parcel that's immediately north of
19 the Schmeichel property being sold recently?

20 A Yes, and I'd heard that price. And again, that was for
21 farmland, not for property, but for farmland.

22 Q Certainly. That's all crop ground?

23 A That's what I was told, yes.

24 Q And it's nonirrigated?

25 A Yeah, I -- yeah, I don't know the details of that because

1 I don't -- I assume so if you say so, yes.

2 Q Okay. And you don't dispute that it was \$11,400 per acre?

3 A No. I -- I -- I heard the word 11,000 and that was it. I
4 mean, I didn't -- I don't know the exact amount.

5 Q Okay. Do you know how many housing eligibilities would be
6 available on that property?

7 A No, but what I was under the impression was housing
8 eligibility was, what, one house per 40 acres. I don't --
9 I don't have the exact knowledge, but that's what I'm
10 thinking.

11 Q Do you have any idea how many people currently reside
12 within two miles, if we were to draw a circle from the
13 center -- with the center, excuse me, being the Schmeichel
14 proposed facility, if we were to make a two-mile radius,
15 do you know how many people live within that?

16 A If you took the -- starting with the very first family
17 immediately from the west of the corner where, if you
18 will, Schmeichels' land is on the south and kitty-corner
19 is the Reasonover land. We'll use that as the point of
20 that -- let's just say the proposed CAFO. There's a
21 family with young kids first farm immediately to the --
22 first acreage immediately to the west. So we'll name it
23 as four people. I'm just going to estimate four, five
24 people.

25 And then you would immediately -- coming closer to

1 the center of what we're all discussing would be Vicky
2 Reasonover. So that would be two. I'm in very close
3 proximity immediately north. That would be three.

4 And then as we discussed this morning, the family
5 that just purchased the land, not knowing what was all
6 transpiring here because it wasn't disclosed to them
7 during the sale, that would be four people. There's a
8 husband and wife and I think there's two children.

9 And then you would have to have south of the proposed
10 CAFO, immediately south and to the west would be the
11 Desmond Miller property.

12 So if I've kept all those numbers correctly, I don't
13 know, 10, 11, 12 people. And that's because over the
14 years acreages -- people have sold farms and then sold off
15 the acreage, but coalesced the farmland. So things have
16 changed over 20, 30 years. That's the best I know of it.

17 Q That's fine. In your opinion -- well, first of all, let
18 me back up. Have you talked to the people who bought the
19 place that was to the -- that was rented --

20 A Yes.

21 Q -- directly to the north --

22 A Yes.

23 Q -- east?

24 A Spoke to them, yes.

25 Q Okay. Have you spoken to any other people who live in the

1 area in regard to the Schmeichel property and its impact
2 on their --

3 A Yes.

4 Q Okay. And what have they told you, not exactly what they
5 say, but just what have they told you in general as to
6 whether they are concerned about the facility and its
7 odor?

8 A I can -- I can tell you rather -- I'd have to say exactly
9 what they said. They said, and this would be --

10 Q Well, let me just stop you there. My point is probably
11 better taken if I ask it in this way: Would you agree
12 that the odor that you have concerns about would affect
13 anyone who lives within a certain area of the Schmeichel
14 facility?

15 A Absolutely.

16 Q And that odor dissipates as it goes -- as the location is
17 further away from the Schmeichel facility?

18 A No.

19 Q Okay.

20 A The odor does not dissipate. It depends on the drift of
21 the wind, the -- obviously, we all know this. It's just
22 common knowledge. It depends on the concentration of
23 moisture within the air. It's the same as somebody
24 smoking a cigarette during the dead of cold winter.

25 Q So that wouldn't impact people that are further away than

1 the two miles that we just described?

2 A Yes. And that was told to me by that first family, the
3 west -- as I said when I said -- you asked me if they --
4 if I remembered what they said or how they felt, and they
5 said: We are against this CAFO, but because
6 Mr. Schmeichel and us go to the same church, quote, it's
7 complicated, but we support everything you're doing, and
8 if we can stand behind you, we will. And then nothing
9 more was said.

10 Q But I want to stay on the questions that I'm asking.

11 A Right. Well, you did ask that. That's -- that's my
12 point.

13 Q Actually, I didn't. I was asking you about farther away.
14 They're within the two miles so --

15 A Yes, they are. So you mean further --

16 THE COURT REPORTER: Excuse me. You need to talk one at a
17 time, please.

18 THE COURT: Yeah, let him finish asking.

19 THE WITNESS: Sure.

20 THE COURT: Okay. Go ahead.

21 Q (BY MR. DONAHOE) So, I asked you if it would impact people
22 beyond the two miles. Do you remember that?

23 A Yes.

24 Q And it will, in your opinion, impact people beyond two
25 miles, and we're talking about the odor from the

1 Schmeichel facility?

2 A It would impact less than the people closer.

3 Q But it will impact people because they will have a
4 negative reaction, and it may harm them because odor will
5 reach them even further away than two miles; correct?

6 A On some days, yes.

7 Q And it may be as far as three or four miles away that
8 people are --

9 A That I cannot say for sure on three to four miles. It
10 might, but I -- I can't say that for sure, no. I can't
11 say that, no.

12 Q And it would impact anyone who was driving through the
13 area as you described on your way from your home to
14 Cherokee, Iowa?

15 A Yes.

16 Q And it will impact anyone who decides that they want to
17 build out in the country and is able to get a conditional
18 use permit on the housing eligibility; correct?

19 A By both actual odor and perception.

20 Q Sure. And that's within whatever distance that perception
21 might be --

22 A Yes.

23 Q -- so if someone were to say, I don't want to be within
24 five miles of a hog confinement, they wouldn't live in
25 that area; correct?

1 A I can't speak for them, but based on generalized
2 perception, if that is the way they feel, that is probably
3 the way they would state so.

4 Q Sure. We're talking about the general public and there's
5 going to be people with different likes and dislikes, and
6 it's all just going to depend on who the right person is
7 in order to buy property in that area if this facility is
8 built; correct?

9 MR. PETERSON: Object as vague and speculative.

10 THE COURT: Overruled.

11 THE WITNESS: May I answer?

12 THE COURT: Yes, you may.

13 THE WITNESS: Okay.

14 THE COURT: Sorry.

15 A I would probably say so. If you're asking me again -- can
16 you just run that by me one more time.

17 Q (BY MR. DONAHOE) Well, let me ask you a different
18 question: Isn't it true that we have no idea who might
19 want to buy property in this area and wouldn't mind the
20 smell?

21 A There would be no way we would know who would, right, who
22 would want to other than people like myself that are
23 agricultural -- desiring to be under normal agricultural
24 conditions.

25 Q And under normal agricultural conditions people know that

1 there probably will be smell from animal operations;
2 correct?

3 A They would know the difference between industrial farming
4 and regular farming.

5 Q Sure, but that's a difference in degree, not kind. Do you
6 understand what I mean by that?

7 A There's a massive difference between 6,000 hogs and 500
8 hogs, 1,000.

9 Q Well, you were here when Mr. Shaykett was talking about a
10 2499 head operation; correct?

11 A Yes.

12 Q And he said he could smell it within a quarter of a mile?

13 A Yes.

14 Q And I decided we're going to just roll with that
15 testimony, even though I objected to it and got it
16 stricken first, now I'm going to run with it.

17 Tell me about why that's different in degree than it
18 would be for the Schmeichel property.

19 A In how are you asking? You're saying --

20 Q I'm asking if you can put a quantity on it?

21 A A quantity.

22 Q You got 2499 head. He says it smells at a quarter of a
23 mile. Do you have any idea what it means to scale up to
24 the Schmeichels' size? And remember, it's the specific
25 type of hogs that are going to generate that manure.

1 A Exactly. If you have a, let's just say, a housing project
2 of 100 people, and they're using a septic system. And
3 then all of a sudden in the same confinement and level you
4 put 1,000 people using the same septic system. There's
5 going to be a change in odors and system right there.

6 It's just obvious. If you're putting 10 times the amount
7 of waste, you obviously would see a difference.

8 Q But you don't know how to actually quantify that?

9 A Well, I can tell you just from life's experience if there
10 are -- if there's one dead animal decaying, okay, but if
11 there are five or six animals that have recently been
12 placed in one area, the odor is going to be five to six to
13 seven times greater or even compounded greater. It's just
14 common sense.

15 Q Well, I'm not disputing that. I just want to know if
16 there's a way for you to tell me exactly where this cutoff
17 would be as far as the place where you're not going to be
18 expecting to have any influence or injury from the
19 facility?

20 A I'm not an odor expert on that, I admit that, and I would
21 have to probably defer to experts on -- on the exact level
22 and change between 6,000 hogs and 2,000.

23 Q Well, we strongly disagree with your odor expert's
24 opinions.

25 A I would assume so.

1 Q But, have you reviewed the information that he provided
2 for testimony in this case?

3 A I have looked at it, to the best of my ability.

4 Q Are you aware that under one of his, what he calls
5 moderate scenarios, the smell would impact people farther
6 away than four miles?

7 A I don't remember the exact details of reading the report,
8 I mean, every word. I -- if that is what he says, I mean,
9 you would know better than me.

10 Q And all the people that would be impacted by that would be
11 either a resident, someone traveling through or someone
12 who had business in the area; correct?

13 A Or somebody hanging wash out, or somebody inviting people
14 over to sell a house is what I would assume.

15 Q Sure. They would probably live there if they were doing
16 that; correct?

17 A Well, I would assume they would live there if they're
18 trying to sell a house or hang wash, yes.

19 Q And so when we talk about how this is different, it would
20 be different in degree and not kind. They still have an
21 odor that they're dealing with that they don't care for,
22 but they have less exposure of it either on a timeline or
23 amount; is that fair?

24 MR. PETERSON: Object as vague.

25 THE COURT: Overruled.

1 A I think the human sense of smell can tell the difference
2 on general smell and when it becomes offensive. I think
3 it -- I think the average human can tell.

4 Q (BY MR. DONAHOE) But the question is: For someone who's
5 farther away that does perceive the offensive smell --

6 A Okay.

7 Q -- they get the same injury as you who are closer, they
8 just may have less of it; correct?

9 A No. As I said, the average person can tell when something
10 becomes really bad versus just smelling it.

11 Q Well, I'm talking about when someone perceives it to be
12 offensive. If they perceive it to be offensive and
13 they're four miles away, they have the same injury as you
14 when you're closer at something less than a mile away?

15 A I think that would be common sense with all senses whether
16 it be hearing system or sense of smell, olfactory system.
17 I think it would depend on -- we're all as that, as
18 humans, able to perceive a distance change in perception
19 of what is coming forth.

20 Q I think you're missing what I'm asking. The person who
21 perceives an offensive odor, even if they're four miles
22 away, perceives an offensive odor.

23 A Okay.

24 Q And you're saying you have damage at your property because
25 you perceive an offensive odor. It's the same injury; you

1 just have more of it you claim because you're closer?

2 A No. The intensity of the offense changes a person's
3 thinking. I know as a human being, the intensity changes.
4 It changes on the way I -- the way I perceive things. So
5 there would obviously be a difference in intensity between
6 a quarter mile, as you've so asked me, versus four miles.
7 There has to be a difference in intensity. It's basic
8 physics.

9 Q Well, let me put it to you this way: You're a
10 radiologist. If I break my leg four miles away from your
11 house, I've got a broken leg; right?

12 A Correct.

13 Q If I break my leg in your yard, I've got a broken leg;
14 right?

15 A Right.

16 Q Assume they're the exact same injury, fractured tibia.
17 Both places exact same modality, exact same type of
18 injury, exact same severity. It's the same injury;
19 correct?

20 A Under that set of circumstances, yes.

21 Q So let's put it in terms of odor. If I smell a certain
22 number of odor units, let's hypothetically say I smell ten
23 odor units --

24 A Uh-huh.

25 Q -- four miles away, and that's considered offensive under

1 what your expert has said would trigger a complaint.

2 If you get the same amount and have ten odor units at
3 your house, you've suffered the exact same injury;
4 correct?

5 A No. I would have suffered more because I would have
6 perceived it to a greater degree.

7 Q Okay. So you are basically introducing a psychological
8 element into the injury?

9 A Well, when we discuss property we use the word
10 "perception," whether you sell a property or not. So I
11 would have to answer, yes, because psychology and
12 perception are the same.

13 Q Well, in regard to property values, do you have any
14 evidence of any houses that have been sold in the same
15 situation as yours in relation to the Schmeichel property,
16 whatever distance that is, and a new hog barn, any
17 evidence that you have that a house has sold for
18 15 percent or less of its previous value once a new hog
19 barn is put in?

20 A No. That perception of process has not been brought to
21 me, no. I do not know of one in the area. I -- I have to
22 admit it, I do not.

23 Q Are you aware of any lawsuits in Turner County under which
24 someone has claimed that a hog operation is a nuisance and
25 they've been able to collect money damages for someone

1 causing property loss or diminution in value?

2 A No, I am not.

3 Q Do you have any unique features to your property in regard
4 to water like a creek, a stream or a lake, and that's your
5 house where you live is what I'm talking about?

6 A Drainage, drainage issues. We all do around the area.

7 Most everybody, I guess, is tiled. Obviously, I don't own
8 the land that was tiled, but when it plugs up it fills the
9 ditches and it fills the farmland and then the water
10 comes, to be blunt, it comes into our yard and comes under
11 the house and --

12 Q I'm asking about a feature.

13 A What do you mean?

14 Q So, you were talking about real estate values?

15 A Right.

16 Q A lot of people might pay a little bit more because there
17 is water --

18 A I understand.

19 Q -- on a property that they would use --

20 A No, I have no stream, pond. I -- to answer your question
21 succinctly, no.

22 Q And the same with the property owned by Vicky Reasonover
23 -- excuse me, Urban-Reasonover?

24 A I'm not aware of a stream or pond other than normal ground
25 water spread that we all know occurs, I'm not.

1 Q And there wouldn't be anything between the Schmeichel
2 facility and those two residences, yours and Vicky's;
3 correct?

4 A Farmland.

5 Q Right.

6 A I mean --

7 Q Road ditches, farmland, regular surface water drainage?

8 A Correct. Correct.

9 Q And in regard to the prevailing winds, we've talked about
10 them being mostly out of the south during the summer.

11 Do you experience much southeast breeze in the
12 summer; in other words, the wind coming from the southeast
13 and flowing northwest?

14 A Yes, because I -- I don't differentiate really between
15 southeast and southwest. South just comes at me. I don't
16 really -- I just know it's south. I don't -- I don't
17 really look to see which cross-directional.

18 Q Well, you've got Turkey Ridge to the west, kind of
19 southwest of you; correct?

20 A Turkey -- I'm not sure I understand, I apologize.

21 Q How long have you lived in Turner County?

22 A Nine -- nine to ten years, nine years or greater.

23 Q And you don't know where Turkey Ridge is?

24 A You mean Turkey Ridge Oil or --

25 Q I mean Turkey Ridge, the geological feature.

1 A I confess, I -- I confess, I do not.

2 Q There's no high ground to the south and east beyond the
3 Schmeichel property that would be prominent from your
4 house; correct?

5 A You mean from my house down to the Schmeichel property, is
6 there any high ground or hills, is that what you're
7 asking?

8 Q Right. Just to make it crystal clear, if you walked out
9 to the front part of your property along that paved
10 road --

11 A Okay.

12 Q -- and looked towards the Schmeichel property --

13 A It's flat.

14 Q It's totally flat?

15 A Flat, that's correct.

16 Q And it's flat even beyond that to the south and east;
17 correct?

18 A I -- if you're asking me to go to the south of the
19 Schmeichel land, I -- as far as I can see, as far as my
20 eyesight will allow, it looks flat. Then there's ridges
21 or maybe a few hills to the immediate southeast maybe a
22 little bit. Best as I can recollect. I -- I don't really
23 go on the Schmeichel land. I mean, I don't --

24 Q No, I'm talking about just in general, anyplace you might
25 drive around or see to the horizon from your house. I

1 think we've covered that.

2 Let me ask you this: Don't most of the weather
3 fronts come through from the west to the east in Turner
4 County?

5 A I guess you'd have to say probably, yeah. Yes.

6 Q Are you looking to purchase any more farm ground or other
7 property in Turner County?

8 A If I can find it. It's not an easiest thing to find.

9 Q And to the extent that you have been looking, have you
10 paid attention to the trends for the land sales?

11 A Well, as somebody that bought land in 2012, 2014, I think
12 2015 and 2017, I mean, I guess you could say I -- I mean,
13 I'm trying to explain to you that over the last -- I mean,
14 I look at the trends, yes.

15 Q And what would you perceive the trend to be as far as the
16 movement of prices; are they stable, up, down or what?

17 A Well, and no disrespect is meant, you keep mentioning this
18 \$11,000 sale. When you say that, land is usually bought
19 and sold based on desirability and need and also what it
20 can complement. So if an \$11,000 piece of property can
21 tie two pieces of property together, well, then I guess it
22 would be worth 11.

23 But overall have prices dramatically increased? I --
24 I guess you could say it's gone from maybe 6,000 to 8,000
25 on average. Again, when I say that, it's average. You

1 know, some are 9,000, some are 5,000. I'm not a property
2 expert. I -- to be blunt, I don't know, but I assume with
3 what you're asking, yes. I mean, you're asking me have
4 they gone up, is that what you're asking?

5 Q I didn't actually ask that. I said steady, up, down or
6 otherwise. So, you tell me.

7 A You said study?

8 Q Steady, like, flat or up or down or otherwise. You tell
9 me. And for the record, I was gesturing with my hands
10 motioning up or down.

11 A Sure, I understand. Well, I don't know how to answer
12 that. I bought one piece of land for 4,400. I bought
13 another piece of land for 9,000 plus just based on who
14 would sell at the time. I mean, one person was selling,
15 one person didn't want to sell so I had to up the price.
16 So, to answer your question, I guess it's gone slowly
17 higher, I mean, 7 percent per year. I don't know.

18 Q And have you marketed your home as if you were going to
19 sell it at any time in the last two years?

20 A No.

21 MR. DONAHOE: No further questions.

22 MR. DEIBERT: I have no questions.

23 THE COURT: Mr. Peterson.

24 MR. PETERSON: I will be brief, Your Honor.

25 REDIRECT EXAMINATION

1 Q (BY MR. PETERSON) Dr. Powers, you were asked about sort of
2 your surrounding area, and whatever the numbers are,
3 within a couple miles of the proposed facility there's a
4 finite number of people that live there?

5 A Yes.

6 Q And while you're not an odor expert to say exactly when
7 the smell starts and stops, under what conditions, what
8 wind, at some point there's no odor once you get far
9 enough away from the facility; is that fair?

10 A Yes.

11 Q Compared to someone who is driving through the area to get
12 from Point A to Point B, they might smell an odor, the
13 same odor that you're smelling; is that fair?

14 A Yes.

15 Q But they get to leave because they're in their car?

16 A Yes.

17 Q You have to stay?

18 A Yes.

19 Q And that odor doesn't affect that driver's property, it
20 just affects what they're smelling for that moment in
21 time?

22 A Correct.

23 MR. PETERSON: Those are all my questions.

24 THE COURT: Mr. Donahoe.

25 RECROSS-EXAMINATION

1 Q (BY MR. DONAHOE) I asked you a lot of questions about the
2 distance and what people might perceive in regard to these
3 odors just to make sure that we don't have a question.

4 You are very clear here that you're not an expert and
5 you don't know how far that distance would be; correct?

6 A Correct.

7 Q And so you don't know whether the large dairy that's
8 already in construction is going to cause the same types
9 of issues that you claim will come from the Schmeichel
10 property in that area near your house; correct?

11 A I have not smelled large beef CAFOs or dairy CAFOs,
12 C-A-F-O. All I've ever really smelled are pork. So, I
13 guess I could not answer that correctly. I mean, I --
14 MR. DONAHOE: I have no further questions.

15 THE COURT: Mr. Deibert.

16 MR. DEIBERT: No questions, Your Honor. Sorry.

17 THE COURT: Mr. Peterson.

18 REDIRECT EXAMINATION

19 Q (BY MR. PETERSON) On the very last question: Have you
20 been by cattle facilities and they just -- they don't --
21 they're not offensive, or you just haven't even been
22 around them?

23 A No, I've driven past them and you -- you smell them, and
24 it doesn't linger as much and they don't seem to be as
25 large as thousands. I mean, it's -- you know, 6,000, I --

1 I don't drive past a 6,000-level facility all the time.

2 MR. PETERSON: No more questions.

3 THE COURT: Does that prompt anything else, Mr. Donahoe?

4 MR. DONAHOE: No, Your Honor.

5 THE COURT: Mr. Deibert.

6 MR. DEIBERT: Nothing.

7 THE COURT: All right. You can step down. Thank you.

8 THE WITNESS: Thank you.

9 (Witness excused.)

10 THE COURT: Mr. Peterson, you can call your next witness.

11 MR. PETERSON: We'll be calling folks affiliated with the
12 county. Mr. Deibert sort of has them coming in a
13 staggered fashion.

14 MR. DEIBERT: I think they're all here now.

15 MR. PETERSON: They're all here?

16 MR. DEIBERT: Yes.

17 MR. PETERSON: We'll call Mick Miller first.

18 (Pause.)

19 THE COURT: If you'd come forward, sir. And if you'd
20 raise your right hand.

21 MICK MILLER,
22 called as a witness, having been first duly sworn, was
23 examined and testified as follows:

24 THE COURT: Please be seated.

25 MR. PETERSON: Your Honor, before I start questions, I

1 think the record already includes the return from the
2 county, but I have also marked it as an exhibit for
3 examination purposes. It's Exhibit 14, and I would offer
4 it at this point.

5 THE COURT: Any objection?

6 MR. DONAHOE: No objection.

7 MR. DEIBERT: No objection.

8 THE COURT: It will be received.

9 DIRECT EXAMINATION

10 Q (BY MR. PETERSON) Good afternoon, sir.

11 A Hi.

12 Q Would you please introduce yourself.

13 A Yeah. My name is Mick Miller. I live in Viborg,
14 South Dakota, 200 North Washington Street.

15 Q And, Mr. Miller, were you the Chairman of the Board of
16 Adjustment that made the decision to issue the permit in
17 this case?

18 A I was.

19 Q And you were present at the hearing back on December 8 of
20 2020, for the entire hearing?

21 A I was.

22 Q Did Vicky and Dr. Powers speak at the hearing?

23 A They both did.

24 Q Did you have conversations with anybody outside of the
25 hearing prior to the hearing about the subject matter of

1 the permit?

2 A No.

3 Q Did you do any reading or investigation on your own prior
4 to the hearing?

5 A Yes. I reviewed our ordinances.

6 Q You reviewed all of the ordinances or the ones that
7 we're --

8 A The ones pertaining to this.

9 Q What other information, if any, did you read before the
10 hearing besides the ordinances?

11 A That would be it.

12 Q And if you would go to Exhibit 14 in the binder in front
13 of you. There's a few preliminary pages.

14 A I'm there.

15 Q Do you see on the bottom right corner there are numbers
16 TC 0001 and so forth?

17 MR. PETERSON: Your Honor, may I approach the witness?

18 THE COURT: You may.

19 A Oh, yep. No, I -- yeah, I see it.

20 Q (BY MR. PETERSON) So there's just this first few here are
21 kind of the preliminary pages.

22 A Okay.

23 Q And then starting here you can see 1, TC 2 and so forth?

24 A Yeah.

25 Q Okay. The first group of documents, are these the current

1 ordinances that you reviewed, the 2008 version?

2 A Yes.

3 Q Would you go to Section 13, which is 13.09 that's
4 applicable to the CAFOs.

5 A I am there.

6 Q And under 13.09, Part D, there is a chart that spans two
7 pages. Do you see that?

8 A Yep. Yes.

9 Q Okay. And it appears to me this chart identifies various
10 types of animal feeding operations and how many head of
11 that particular type of operation qualify for a small,
12 medium or large classification?

13 A Yes.

14 Q Is that a fair description?

15 A Yes.

16 Q And if you go to the next page, this is TC 45, are there
17 three different types of swine facilities that are
18 identified?

19 A Yes.

20 Q And what are those facility types?

21 A Finisher swine weighing over 55 pounds; nursery swine
22 weighing less than 55 pounds; farrow-to-finish sows.

23 Q What type of facility is Mr. Schmeichel's?

24 A He would have the farrow-to-finish where the factory is
25 and then up to the nursery swine weighing less than

1 55 pounds.

2 Q So, like, what -- which category do we use then?

3 A The farrow-to-finish.

4 Q The farrow-to-finish.

5 A Yeah.

6 Q And is that what you used in this case to determine

7 whether --

8 A No, I -- I said that wrong. No, it's not

9 farrow-to-finish. That was -- that was -- it's

10 farrow-to-feeder pig to the nursery swine, those two.

11 Q Okay. So which one applies?

12 A Both.

13 Q So, how many head does he have, like, what -- how do you

14 work that then if you've got two separate requirements,

15 how many can he have -- I mean, how many does it take to

16 trigger a large or a medium or a small when you've got a

17 mixed operation?

18 A I believe that we did the farrow number to give us a

19 cushion.

20 Q The farrow-to-finish number?

21 A I believe that's what we did.

22 Q Okay. Did you calculate the setback yourself?

23 A Did I? No. Our administrator does that for us.

24 Q At the hearing did the attorney for the petitioners

25 question the manner in which the setback was calculated?

1 A I believe there was comment about it.

2 Q After those comments were made that there was an error in
3 the way Mr. Schmeichel was calculating the setback, did
4 you do anything to resolve that discrepancy?

5 A I didn't believe there was an error.

6 Q How can you make a determination when there's no error if
7 you've never done the math yourself, never looked at it
8 yourself?

9 A Because that's the job of our administrator, and she does
10 her job very well.

11 Q So you just blindly trust that the administrator is
12 correct even when there's a challenge to that calculation?

13 MR. DONAHOE: Objection. Argumentative.

14 THE COURT: Sustained.

15 Q (BY MR. PETERSON) So what you're saying is you didn't
16 yourself actually consider the setback and whether it was
17 satisfied?

18 MR. DONAHOE: Objection. Misstates the testimony. It's
19 also been asked and answered.

20 THE COURT: Sustained.

21 Q (BY MR. PETERSON) Other than accepting Faye's calculation
22 as being correct, did you do anything else to determine
23 the setback?

24 A Did I personally, no.

25 Q Can you turn to the definition section. It's 27.02 and

1 it's Definition Number 12.

2 MR. DEIBERT: Page number?

3 MR. PETERSON: It's around TC 88 and onto TC 89.

4 A I'm there.

5 Q (BY MR. PETERSON) And do you see the definition of animal
6 unit is 12 and then there's a chart of sorts on the next
7 page?

8 A I do.

9 Q Okay. So, this particular facility is 5400 sows; is that
10 correct?

11 A Yes.

12 Q And 2,000 pigs over 55 pounds?

13 A I believe that was under 55 pounds.

14 Q Are you sure about that?

15 A No. I said "I believe."

16 Q If you could maybe hold your place there, but turn in
17 Exhibit 14 to TC 114, or I could just show it to you, too,
18 if you'd like.

19 Is this the application or part of it submitted by
20 Mr. Schmeichel?

21 A Appears so.

22 Q And on TC 114, is it 5400 sows and 2,000 swine greater
23 than 55 pounds?

24 A Yes.

25 Q All right. And I understand we're testing your memory

1 from eight months ago --

2 A Yeah.

3 Q -- so --

4 A It doesn't bother me.

5 Q -- if at any point, if you say you don't know but you
6 could look at a document, let me know, we'll try to help
7 you out with that.

8 A Sounds good.

9 Q Okay. So, if we look at this chart then, you start -- you
10 used the farrow-to-finish to give a cushion; is that
11 correct?

12 A Yeah.

13 Q So, we had 5400 farrow-to-finish and we've got 2,000 --
14 would they be considered finisher swine because they're
15 over 55 pounds?

16 A That's what it says.

17 Q Let's step through the math on this just a little bit. If
18 we go to that 13.09(D) chart for the farrow-to-finish,
19 it's 540 that classifies it as a large CAFO; is that
20 correct?

21 A Yeah.

22 Q And then under the setbacks -- and do you know what the
23 setbacks are in particular for the large facility?

24 A Every time this gets brought up I use my book, so it would
25 take me a minute to find it, yeah, because I never want to

1 make an answer and try to make it wrong.

2 Q Sure. So TC 46 is -- Section 13.09(E)(1) is the setback
3 chart.

4 A The setback from what were you asking?

5 Q The setback from nearby dwellings.

6 A Three-eighths of a mile plus 100 feet per additional
7 500 --

8 THE COURT REPORTER: I'm sorry. Repeat that, please.

9 THE COURT: Slow down.

10 THE WITNESS: Oh.

11 A Three-eighths of a mile plus 100 feet per additional 500
12 animal units.

13 Q (BY MR. PETERSON) Okay. Now, when it's talking about the
14 additional animal units, would that be the number of
15 animal units above the amount that qualifies as the large
16 CAFO?

17 A Yes.

18 Q Okay. So we would start with three-eighths of a mile, and
19 there might be additional feet added depending on the
20 animal unit calculation?

21 A Yes.

22 Q And the farrow-to-finish sow is 3.7 animal units?

23 A Yes.

24 Q And the finisher swine are swine that are above 55 pounds
25 are .4 animal units; is that correct?

1 A Yes.

2 Q Okay.

3 MR. PETERSON: I'm going to, Judge, mark this as I believe
4 19 that we're on.

5 (Petitioners' Exhibit Number 19 marked for
6 identification.)

7 MR. PETERSON: May I put a sticker on Your Honor's copy?

8 THE COURT: Am I going to be the original? Just put it
9 right over there. Thank you.

10 Q (BY MR. PETERSON) Mr. Miller, Exhibit 19, does this
11 contain some mathematical calculations?

12 A It appears to.

13 Q Okay. And does it have the 5400 head multiplied by the
14 3.7 units?

15 A Yes.

16 Q And you're welcome to use a calculator, but I believe that
17 adds up to 19,980 animal units?

18 A That's what it shows here, yeah.

19 Q And the 2,000 swine that are over 55 pounds, you multiply
20 that by the .4 animal units, is that 800?

21 A Yes.

22 Q So if you add those together we get 20,780 animal units in
23 total.

24 A Okay.

25 Q Then we need to subtract off the 540, because that's what

1 qualifies, so we need to figure out how much above 540
2 we're working with.

3 A Yeah.

4 Q Is that correct? So when you look at the overage, it's
5 almost an additional 4,000 feet that you need to add to
6 the three-eighths of a mile setback; is that correct?

7 A That's what this shows.

8 Q Okay. And if you add that to the three-eighths of a mile,
9 we're talking about a setback that's close to 6,000 feet
10 for a setback?

11 A According to this.

12 Q And Vicky's house is 3,020 feet away, but you approved the
13 permit anyway; correct?

14 A I approved the permit. I voted yes on the permit based
15 off the information I got from our zoning administrator,
16 yes.

17 Q Has Faye ever been just honestly incorrect in a
18 calculation?

19 A I can't imagine there's not a single one of us that hasn't
20 ever been incorrect on something.

21 Q Humans make errors; correct? Would you acknowledge an
22 error was made here --

23 A No.

24 Q -- with the setback? Despite going through the very math
25 that we just did?

1 A Despite that, yes.

2 Q And I used all the numbers you told me to use?

3 A Yeah. Maybe I'm human and made a mistake.

4 Q Well, we can go through it again. But do you think we got
5 it right today as we went through it?

6 A No.

7 Q Okay. What -- where's the error?

8 A On what I said we were using for basis on animal units,
9 whether it was a farrow-to-finish or 2,000 over 55.

10 That's where the error was made because I'm not sure what
11 that was. I don't have a permit in front of me.

12 Q Okay. Well, let's look at the permit application.

13 A Yeah, the application or otherwise.

14 Q Let's go to the permit application you referenced earlier.
15 This is Exhibit 14, Page TC 120, and this is what the
16 Schmeichels submitted for their calculation. And there's
17 handwriting in the margin that says: "How did you get
18 this?" Do you see that?

19 A Yeah.

20 Q Is that Faye's handwriting based on your experience
21 working with her?

22 A I'm not going to answer that because I don't know.

23 Q Well, somebody questioned what the Schmeichels submitted,
24 but you don't know?

25 A I don't.

1 Q And Line 1 of the distance equation here, the Schmeichels
2 are using the 540 animal unit which is -- that matches up
3 with the farrow-to-finish; does it not?

4 A Yep.

5 Q If, in fact, the setback is greater than 3,020 feet, the
6 distance from Vicky's house to the facility, do you agree
7 that the permit should not have been issued?

8 A If the setback is greater than 3,280 feet?

9 Q Greater than 3,020 feet --

10 A 3,020 feet.

11 Q -- the distance from Vicky's home to the facility, if the
12 correct calculation is actually greater than that --

13 A I agree that the permit should not have been issued if it
14 didn't fall within the rules of our ordinance.

15 Q And after this discrepancy was raised, no further analysis
16 was performed by you or anybody else on the board; is that
17 correct?

18 A I'm not going to speak for anybody else, but not by me.

19 Q Did anybody else do calculations while you were sitting
20 there in the hearing with them?

21 A You'll have to ask them.

22 Q What did you observe? Did you see that happen?

23 A I did not see it happen.

24 Q There was a break during the facility (sic) where folks
25 needed to have a biology break and I think check into have

1 an executive session to get some guidance from the State's
2 Attorney about the 2018 permit. And I'm not going to get
3 into that, but there was a short break during the hearing;
4 correct?

5 A Correct.

6 Q Did anybody do any calculations on the setback or look at
7 the setback during that break time?

8 A I'll speak for myself and say no.

9 Q Did you see anybody else do any?

10 A No.

11 Q Now, at the time that the board approved this permit, the
12 Schmeichels' 2018 permit was still issued and live;
13 correct?

14 A Yes.

15 Q Under Section 20.11 of the ordinances can a party reapply
16 for a conditional use permit only if the original one was
17 denied?

18 MR. DONAHOE: Objection. Calls for a legal conclusion.

19 MR. PETERSON: He's --

20 THE COURT: Overruled, because he's responsible for the
21 ordinances.

22 A Section -- what was that again?

23 Q (BY MR. PETERSON) 20.11.

24 MR. DEIBERT: Page number?

25 MR. PETERSON: TC 75.

1 MR. DEIBERT: Thank you.

2 A I believe it was different applicants.

3 Q (BY MR. PETERSON) Oh, is -- that's not what they told you
4 at the hearing, was it? They formed an LLC, but it's
5 still Ethan and Steve Schmeichel?

6 A It was different applicants.

7 Q So, if it's different applicants, then after issuing the
8 permit you have permitted two facilities to be on-site,
9 one operated by the first applicant and the second
10 permit --

11 A Our only issue that day in December was the applicant that
12 was brought forth that day.

13 Q But don't you have to take the facts as they come to you,
14 like, another applicant had been permitted for a 7400-head
15 facility at the same site?

16 A You'll have to talk to somebody with more legal knowledge
17 than I do.

18 Q There was discussion at the hearing about the manner in
19 which odor from this proposed facility would affect folks
20 living nearby.

21 Do you remember hearing that issue being raised?

22 A Yeah.

23 Q And did the ordinances in your view require the board to
24 include methods to control odor?

25 A Yes.

1 Q What methods did you require to control odor?

2 A Trees around the facility.

3 Q What evidence was presented that trees would have any
4 impact on odor?

5 A I don't remember.

6 Q Anything else that you required or the board required in
7 order to control odor from the facility?

8 A Just good management practices.

9 Q Okay. Which management practices were required?

10 A Just good management practices. Not any specific
11 management practices in specific, but just who they are.
12 They're -- yeah. Good management practices, that's all
13 that's been put in there.

14 Q So how do you verify if somebody is doing a good job or
15 not?

16 A That's not my job.

17 Q So what's the standard by which you measured compliance
18 with a do-a-good-job standard? You can't, can you?

19 A No.

20 Q Right. How long -- were you a colleague of
21 Mr. Schmeichel?

22 A A colleague?

23 Q Yeah. He was on the board with you at one point; right?

24 A Yeah.

25 Q On the planning commission?

1 A Yeah.

2 Q How long have you guys worked together?

3 A I don't remember. A few years.

4 Q Did you know him before that?

5 A I knew of him.

6 Q Would it be a little awkward sitting next to him if you
7 denied his permit?

8 A Not at all if he -- if he fell into every category of our
9 ordinance that needed to be in compliance with. I said
10 that backwards. If there was a part of that ordinance
11 that he didn't comply with, it wouldn't bother me at all.
12 Right is right.

13 Q But on the setback you didn't dig into it, you just --

14 A I personally did not.

15 Q Did you read the hundred some pages of information
16 submitted by the petitioners in this case as part of the
17 hearing?

18 A No. We just got it that morning.

19 Q So the odor dispersion report saying that at Vicky's
20 property, 70 plus percent of the day she would be
21 negatively affected by odor, you didn't even need to look
22 at that?

23 A I listened to -- yeah. But we got it that morning. There
24 was no way any one of us could read it before that
25 meeting. And we actually had somebody on the phone that

1 talked the exact opposite of that way. We had -- yeah.

2 Q But you didn't actually read the expert report?

3 A There was not a chance to read it.

4 Q And you didn't read the affidavit from the expert either
5 that was only a few pages long?

6 A Yeah.

7 Q You did --

8 A I believe I did.

9 Q You did read the affidavit?

10 A I believe I did.

11 Q When did you do that?

12 A I believe before the meeting that day.

13 Q I thought you told me you only looked at the ordinances.

14 A Okay. You got me.

15 Q You didn't, did you?

16 A Yeah, I did. But when you asked me what I read through,
17 I -- yeah. We had another -- there was a letter that was
18 brought forth -- so I mean, you're trying to catch me on
19 stuff here -- but there was a letter that was brought in
20 that I read. There was this affidavit thing. There was
21 the ordinances that I looked prior to the meeting. We
22 have our books in front of us as we're doing the meeting.
23 Sorry.

24 Q Can you just table the decision so you could study all the
25 material?

1 A I personally didn't feel a need to.

2 Q Could you have tabled it so that you could have Faye dig
3 into the setback calculation?

4 A I personally didn't feel a need to.

5 Q You were committed to approving the permit?

6 A Not true at all.

7 THE COURT REPORTER: Pardon me?

8 THE WITNESS: Not true at all.

9 Q (BY MR. PETERSON) You were being sued by the very people
10 who were challenging the application in 2020; is that
11 correct? You as a board member, not you personally.

12 A Right now being sued?

13 Q At the time of the 2020 hearing, Vicky and Dr. Powers had
14 a lawsuit pending against the board?

15 A I don't know that for sure.

16 Q Did the Schmeichels and their LLC offer to assign grant
17 dollars to the county as part of receiving their permit in
18 this case?

19 A No.

20 Q When did that first become an issue?

21 A I think you brought that up earlier. That was in February
22 and our meeting was in December.

23 Q Exhibit 14, Page TC 119, this is the application from the
24 Schmeichels submitted to obtain their permit. That
25 obviously was submitted before the hearing; correct?

1 A Not to the planning and zoning board. What page are you
2 on?

3 Q You don't get a hearing unless you apply for a permit;
4 right?

5 A Right.

6 THE COURT: Which TC page are you on, counsel?

7 MR. PETERSON: TC 119.

8 Q (BY MR. PETERSON) And did the Schmeichels' application on
9 Number 12 state that they will pursue State sales tax
10 rebate for economic development paid to Turner County?

11 A I'm not even -- yeah, it's -- yeah. Is that the
12 application or is this -- because those two are different.
13 What you just showed me and this one right here is
14 different.

15 Q You can compare them. It's TC 119 and TC 119.

16 A Okay. Oh, yeah. It's in there.

17 Q So in their first move to apply for a permit in 2020, the
18 applicant offered to assign money to the county as part of
19 getting the permit; true or false?

20 A You'll have to ask them. I didn't do it.

21 Q And in fact that was approved earlier this year that the
22 county will accept that assignment of the grant money?

23 A Yes.

24 Q And that is money the county would not have received
25 without approving the permit?

1 A I assume so.

2 MR. PETERSON: Your Honor, at this time I'd offer Exhibits
3 11, 12 and 13, which are transcriptions of the portions of
4 the hearing that were audio recorded, along with Exhibits
5 11A, 12A and 13A, which are the corresponding audio
6 recordings.

7 THE COURT: Any objection?

8 MR. DONAHOE: I guess I have a question as to whether
9 there's going to be any attempt to correct what counsel
10 was offering the exhibits identified as errors in the
11 transcript to identify the speakers. If not, then it may
12 be necessary to do that for them to be properly admitted.

13 THE COURT: Mr. Peterson.

14 MR. PETERSON: I think they can be admitted and we can
15 just note on the record -- in fact, I talked to Doug about
16 this during the break -- that in the third transcript, 13,
17 it's not Mr. Powers talking. It's Mr. Powers' attorney,
18 Reece Almond, who is the person identified by the
19 transcriptionist. It's readily apparent from the content
20 and listening to the audio. I think the Court can make
21 that notation and read it accordingly.

22 THE COURT: Do the parties have any objection or concern
23 with the corrections that have been discussed that need to
24 be made to these exhibits?

25 MR. DONAHOE: I'm only aware of that identification error.

1 I don't believe there are others, but that's the reason
2 why I would say I don't have an objection. If they later
3 claim that something else is wrong, I'll have a problem.

4 THE COURT: Understood.

5 MR. DONAHOE: Without that, that concern, I would have no
6 objection as long as we can identify the speaker as
7 Mr. Reece Almond, counsel for Mr. Powers, on that section.

8 THE COURT: Mr. Deibert, do you agree with that?

9 MR. DEIBERT: Right. And specifically, as I discussed
10 with Mr. Peterson, Exhibit 12, Page 1, we would agree that
11 Lines 1 through 24 are all Reece Almond's statements
12 rather than several from a board member; is that correct?

13 MR. PETERSON: 1 through 18?

14 MR. DEIBERT: No. That's what I thought. You said 1
15 through 24.

16 THE COURT: All right. Let's do this.

17 MR. PETERSON: I think that is a board member there and
18 that's Reece Almond.

19 THE COURT: All right. Just wait. This is probably a
20 good time to take a break, but let's do this: So we're
21 considering portions of the transcript that are Exhibits
22 11, 12, 13, the corresponding audio recordings that go
23 with those that are 11A, 12A, 13A. I would have the
24 parties look at -- if I have the official binder with the
25 exhibits -- let's look at this and have the parties agree

1 upon making a correction to the exhibit so instead of it
2 being Mr. Powers, we're writing in that it's Mr. Almond on
3 the actual exhibit.

4 I'd like counsel to look at that, hopefully, agree
5 upon that. Mr. Donahoe says he's only aware of the one.
6 We're kind of talking about a second as to whether it's a
7 commission member or what. But, we'll take a 10 to 15
8 minute recess. I'm going to give Mr. Peterson the binder
9 he gave me, and then when we come back Mr. Peterson will
10 point out what's been amended and corrected. I'll make
11 sure we're in agreement, and then we can go back to
12 offering and considering those exhibits.

13 So, good time for a short recess.

14 (Recess at 2:29 p.m. to 2:46 p.m.)

15 THE COURT: Please be seated. All right. I see the
16 exhibit book is back on the bench. Does that mean the
17 parties worked things out?

18 MR. PETERSON: We have, Your Honor.

19 THE COURT: And so can you tell me just for my record what
20 aspects of Exhibit 11, 12, 13 were agreed upon to be
21 amended?

22 MR. PETERSON: So the transcript that's Exhibit 12, we
23 believe is an accurate transcription of 12A, which is the
24 corresponding audio recording. It's just that where it
25 says "Mr. Powers," every single time it says that, it's

1 actually Mr. Almond. It was just misidentified by the
2 transcriptionist.

3 THE COURT: And do the parties want me to make a notation
4 on the official exhibit? I don't want -- assuming one
5 side wins and one side loses and whoever loses takes it to
6 the Supreme Court, they're going to look at the exhibit.
7 They're not going to dig back in the transcript to find
8 out how we fixed it.

9 So, Page 1 of Exhibit 12 says "Mr. Powers." That's
10 Mr. Almond?

11 MR. PETERSON: Correct.

12 THE COURT: And it's Mr. Almond throughout?

13 MR. PETERSON: Correct.

14 THE COURT: Any objection if I make a note on the official
15 exhibit that properly reflects that?

16 MR. PETERSON: No objection.

17 MR. DONAHOE: No objection and we would request that, Your
18 Honor.

19 MR. DEIBERT: That's correct, Your Honor.

20 THE COURT: I think that's the cleanest way to make our
21 record. So, I am going to cross out "Powers." Is it
22 A-L-M-O-N-D?

23 MR. PETERSON: Correct.

24 THE COURT: And then in parentheses up above there I'm
25 also writing: "(Almond not Powers throughout.)" And

1 that's based on what you're telling me.

2 So, Mr. Peterson, are you satisfied with that?

3 MR. PETERSON: Yes, Your Honor.

4 THE COURT: Mr. Donahoe.

5 MR. DONAHOE: I am, Your Honor. I also would like to just
6 make a brief record on the source for the transcript and
7 audio recording once we're done.

8 THE COURT: All right. That would be good, but we'll get
9 to that.

10 Mr. Deibert, are you in agreement with that language?

11 MR. DEIBERT: Yes, Your Honor.

12 THE COURT: All right. Mr. Peterson, let's go back to you
13 asking Mr. Miller questions.

14 MR. PETERSON: Thank you, Your Honor.

15 THE COURT: Well, let's go back to offering.

16 MR. PETERSON: We would offer 11 and 11A, 12 and 12A, 13
17 and 13A, with the amendments to 12 as previously
18 discussed.

19 THE COURT: Any objections?

20 MR. DONAHOE: No objection.

21 MR. DEIBERT: No objection, Your Honor.

22 THE COURT: Those will all be received.

23 All right. Now, we can continue.

24 MR. PETERSON: Did I offer Exhibit 19? I don't think that
25 I did. I'd offer it as a demonstrative, not as evidence

1 itself.

2 THE COURT: I do not believe you offered that.

3 MR. PETERSON: I would offer that as a demonstrative.

4 THE COURT: Any objections?

5 MR. DONAHOE: No objection as to demonstrative.

6 MR. DEIBERT: The same, Your Honor.

7 THE COURT: It will be received as a demonstrative
8 exhibit.

9 MR. DEIBERT: Meaning that we're not necessarily in
10 agreement with the calculation.

11 THE COURT: Understood. And we really haven't had anybody
12 say they did this calculation or how that would be right
13 or not. It's just been used as a demonstrative exhibit to
14 ask Mr. Miller if that was right or wrong.

15 So it's received for those limited purposes at this
16 time.

17 Q (BY MR. PETERSON) Mr. Miller, Exhibit 14, if you could go
18 to Page TC 310 and 311, please.

19 THE COURT: Counsel, what was the number?

20 MR. PETERSON: 310 and 311.

21 THE COURT: Thank you.

22 A I'm there.

23 Q (BY MR. PETERSON) Okay. And 310 looks like what started,
24 at least the typewritten part, as proposed summaries and
25 findings by Faye Dubbelde, the zoning administrator.

1 Is that something ordinarily that she prepares before
2 a hearing?

3 A Yes.

4 Q And is that what she did for this hearing, too?

5 A Yes.

6 Q And then the handwritten notes at the bottom, would that
7 indicate any changes that were approved by the board in
8 this case?

9 A Yes, because we only require four rows. They volunteered
10 six. The road haul agreement is another thing we put in
11 there that we'd like to mirror as the county has theirs.

12 Q And then did you sign that the same day of the hearing,
13 December 8, 2020?

14 A Yes.

15 Q And then the next Page TC 311, is that the more formal
16 minutes of the board that were prepared sometime after the
17 hearing and then approved at a subsequent meeting?

18 A It appears so, yes.

19 Q And do these represent a summary of what the board decided
20 in this case?

21 A Yes.

22 Q Exhibit 12 and 13 are transcriptions of the hearing, at
23 least a portion of the hearing. If you would, I'd like to
24 start on Exhibit 12, and if you'd go to Page 13, please.

25 A There.

1 Q And it appears that approximately Line 20 of Page 13, the
2 public comment was closed for the hearing?

3 A Yes.

4 Q Then over the next couple of pages there is some
5 discussion amongst the board members; is that correct?

6 A Correct.

7 Q And it appears that the focus -- and the Court can read
8 this -- but the focus appears to be on the road haul
9 agreement and what to do with the roads; is that fair?

10 A Yeah.

11 Q And then near the end of it this issue of the preexisting
12 permit arises and a short break is taken?

13 A Yes.

14 Q And Exhibit 13 appears to be the transcript immediately
15 following that short break?

16 A Yep.

17 Q So would I -- what we have here is about nine or ten pages
18 of what the board is talking about on the record after all
19 the information is in; is that correct?

20 A It looks like it, yes.

21 Q And aside from the executive session with the State's
22 Attorney, which I'm not going to get into but --

23 A I'm going to stop you there. We didn't have an
24 executive --

25 Q Oh.

1 A -- session with the State's Attorney.

2 Q Okay. During the break did you get a satisfactory answer
3 about the impact of the 2018 permit?

4 A Yes.

5 Q Other than getting an answer on legally how to proceed in
6 light of the prior permit, was there any other discussion
7 or deliberation among the board members that's off the
8 record?

9 A Not that I'm aware of.

10 Q So the sum total of the on-the-record discussion and
11 deliberation by the board is reflected in those nine or
12 ten pages that are in Exhibit 12 and 13; is that correct?

13 A Yes. Nothing on recess. All in front of the public
14 hearing.

15 Q And is there -- reading through this, do you believe
16 there's any portion of deliberation that actually happened
17 that didn't get recorded, that didn't get part of the
18 transcript, or do you think this nine or ten pages
19 reflects everything the board discussed and deliberated
20 on?

21 A I think it pretty generally reflects everything we've
22 discussed.

23 Q Do you understand that if an applicant for a conditional
24 use permit does not meet all of the minimum requirements
25 that you have to deny the application?

1 A I do.

2 Q Do you understand that if the applicant meets all of the
3 minimums that you can still say no if you want to?

4 A I do.

5 Q What would it take for you to say no to a CAFO? If they
6 met all the minimums, but you still have this discretion
7 and judgment call --

8 MR. DEIBERT: Objection.

9 Q (BY MR. PETERSON) -- what would it take to say no?

10 MR. DEIBERT: Objection, Your Honor. It would call for
11 speculation and conjecture. The question is way too broad
12 for anyone to answer.

13 THE COURT: I'm going to have to sustain the objection.

14 MR. PETERSON: If I can be heard. He's literally the only
15 one on the planet who can answer that then.

16 THE COURT: I understand, but it's not necessarily the
17 facts we have before us. It does call for speculation as
18 to what the CAFO might be that would give rise to meeting
19 minimum qualifications that still give rise to concerns.
20 There can be a broad spectrum of things, but that's not
21 necessarily our case here.

22 MR. PETERSON: Maybe I can go about it a little bit
23 differently to make it less speculative.

24 THE COURT: You can try.

25 Q (BY MR. PETERSON) Mr. Miller, if a large CAFO -- let's

1 just use this -- this CAFO. This CAFO, if you determine
2 it meets all the minimums, is there any information that
3 could have been presented to convince you to say no to the
4 permit?

5 MR. DEIBERT: The same objection as that previously
6 stated.

7 THE COURT: I'm going to overrule that as to if there was
8 something with this that might have caused him not to
9 approve the permit, essentially, is the question, a
10 concern that he might have had.

11 A I think there's always factors that could determine a no
12 vote or deny a permit.

13 Q (BY MR. PETERSON) What would be some of those situations
14 or factors that would cause you to say no even though all
15 the minimums were met?

16 A I think that that would have to be answered on a
17 permit-by-permit basis. I can't say just sitting here.
18 There's a lot goes into every meeting we have.

19 Q Have you ever said no to a CAFO permit based on exercise
20 of discretion?

21 A Yes.

22 Q Okay. What was the situation?

23 A I believe we did one for Sonstegard Foods and we denied.

24 Q Did they actually meet all the minimums, in your view, or
25 do you believe there were --

1 A You know, I'd have to go back and look so I can't answer
2 that honestly, but I believe probably they did not. I'm
3 just guessing, but I can't answer it for sure.

4 Q Okay. So what I'm interested in is a situation where in
5 your mind all the minimums are met, have you ever said no
6 to a CAFO using your discretion to say no?

7 A I can't remember. I've been there a long time.

8 Q Do you recognize that ordinances, because they're
9 complicated and drafted by humans, sometimes there's a
10 conflict between how to resolve what one section says and
11 another section might say?

12 A Between people? Yes.

13 Q Do you understand that under Section 26.04 of the
14 ordinances that if you've got two ways to look at
15 something, you've got to go with the more stringent,
16 strict, restrictive approach?

17 MR. DONAHOE: Objection. Calls for a legal conclusion.

18 THE COURT: I'm going to overrule. He's the one that
19 enforces these codes. He may or may not understand that,
20 but it's a fair question.

21 A Do I understand -- say it again.

22 Q (BY MR. PETERSON) If there is two ways to look at an issue
23 where something you're deciding is part of a conditional
24 use permit, that you have to take the more stringent,
25 strict or restrictive approach in resolving that conflict?

1 A Yes.

2 Q And that's set forth -- and you can look at it, it's on
3 Page TC 86, but Section 26.04 instructs you to do just
4 that; is that correct?

5 A What -- what page again, TC --

6 Q TC 86.

7 THE COURT: Exhibit 14.

8 A Oh. And if it says it, yeah. Yeah.

9 Q (BY MR. PETERSON) I've got a little confusion here. The
10 minutes of the meeting, that's TC 311 from Exhibit 14.
11 I'll bring it up. It might just be easier. It looks like
12 the board members who made this decision were -- is it
13 Champa?

14 A Champa.

15 Q Champa, Alternate Austin, Alternate Vasgaard and you,
16 Mr. Miller?

17 A Right.

18 Q Was there a fifth board member?

19 A In our meeting during that, no.

20 Q It was just -- that was just the four of you; is that
21 correct?

22 A Yeah.

23 Q And you were all personally present in the room; correct?

24 A Correct.

25 MR. PETERSON: Mr. Miller, I appreciate your time. Those

1 are all of my questions.

2 THE COURT: Mr. Donahoe.

3 MR. DONAHOE: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 Q (BY MR. DONAHOE) In regard to that last provision of the
6 zoning ordinance, that's found at TC 86 in Exhibit 14.

7 You just had that. I'm sorry.

8 A It's all good. I'm there.

9 Q Okay. We're talking about an interpretation in that
10 situation, and I just want to make sure I understand what
11 you meant with your answer to the questions put to you by
12 Mr. Peterson.

13 Section 26.04 talks about when any, quote: Other
14 regulations, easements -- easement, covenant or deed
15 restriction conflict or overlap, whichever imposes the
16 more stringent restrictions shall prevail, end quote.

17 Did I read that right?

18 A Yeah, I followed it, yeah.

19 Q And did anyone bring to your attention that there was some
20 restriction in a regulation, easement, covenant or deed
21 restriction that conflicted or overlapped with what the
22 Schmeichels were claiming met the requirements of the
23 ordinance?

24 A No.

25 Q In other words, this issue about calculation of animal

1 units, the fact of the matter is that the application that
2 was made at this permit hearing was the same plan, the
3 same structures, the same number of animals, the same type
4 of animals in the same location of the facility as had
5 been previously approved by the board and was on appeal;
6 correct?

7 A Yes.

8 Q And isn't it also true that at the December 2020 hearing,
9 it was made clear that pursuant to that previous permit
10 they had applied for and had received approval under the
11 State general permit from the DENR, Department of
12 Environment and Natural Resources?

13 A Yes.

14 Q And in that application for the December 8, 2020, hearing,
15 did they include the information on nutrient management
16 that had been approved by the DENR?

17 A Yes.

18 Q And that would include calculations based on the estimated
19 waste production of those animals at that facility;
20 correct?

21 A Yes.

22 Q And the engineers would have to make a submission and get
23 that approved by the DENR; correct?

24 A Yes.

25 Q Based on soil tests to determine how much nutrients the

1 soil will be able to use out of that manure as fertilizer
2 and how much fertilizer is going to be available for those
3 soils; correct?

4 A Yes.

5 Q So, in that regard someone did calculations and determined
6 how much manure was going to be produced by this facility;
7 correct?

8 A Yes.

9 Q And there's a provision in your ordinance that allows you
10 to make a determination on setbacks based on the amount of
11 manure that's produced by the facility; correct?

12 A Yes.

13 Q And in fact that's what they did in the Sonstegard case
14 with chickens because they didn't quite fit in with the
15 definitions or the specific animal unit equivalencies that
16 were in your ordinance; correct?

17 A That's correct.

18 Q And who helps do the calculations for the board; is that
19 Faye Dubbelde, the zoning director?

20 A It was at that time, yes.

21 Q Okay. And she's since retired?

22 A Yes.

23 Q And in regard to this particular application, do you know
24 if Faye Dubbelde opened the meeting by talking about
25 whether the setback requirements were met; do you recall

1 that?

2 A I do not recall.

3 Q Yeah. I think I misspoke earlier, if you were here. I
4 think I said something about a consultant. What I meant
5 was Faye.

6 She did, in fact, in the transcript talk about the
7 fact that the application had been reviewed -- and the
8 transcript speaks for itself -- but she does talk about
9 the setbacks, and she determined that they were all
10 appropriate for what the application had presented.

11 MR. PETERSON: I'm just going to object as leading. I
12 know it's cross, but it's really -- it's an allied
13 witness. It really ought to be treated more like a
14 direct so ...

15 THE COURT: I understand the objection, but at this point
16 it will be overruled. But Mr. Donahoe will try not to ask
17 questions in quite that leading form. It does save time,
18 but let's try not to do that.

19 MR. DONAHOE: Understood, Your Honor.

20 Q (BY MR. DONAHOE) I was just trying to set this up to the
21 point where once it was questioned about the calculation
22 later in the meeting, there would already have been
23 someone who presented and said engineers have looked at
24 this and these are the setbacks; correct?

25 A That is correct.

1 Q So it wasn't just that you were relying on the say-so or
2 the credibility of the applicant, Steve and Ethan
3 Schmeichel; correct?

4 MR. PETERSON: Object. This is leading and nodding along
5 with the process. This is not testimony.

6 MR. DONAHOE: Well, I can ask it slightly differently.

7 THE COURT: All right. The objection will be sustained.
8 Rephrase your question.

9 Q (BY MR. DONAHOE) Did Steve or Ethan Schmeichel present to
10 you the specific calculations for the setback or did they
11 rely on engineers?

12 A Engineers and Faye.

13 Q Okay. And in regard to the requirements for the setback
14 that were presented by the petitioners, so that's Vicky
15 Urban-Reasonover and Dr. Powers, did they argue for a
16 different setback?

17 A Yes.

18 Q And did you consider that along with the other board
19 members?

20 A During the meeting, yes.

21 Q And do you have to make a judgment call on what's the
22 correct interpretation?

23 A We did.

24 Q Do you have authority to do that under your ordinance?

25 A Yes.

1 Q In regard to the grant that is available through a sales
2 tax rebate, is that something that was talked about much
3 at all at the public hearing?

4 A No.

5 Q Is that something that was important or would not have
6 been -- excuse me. Was that something important?

7 A Yeah.

8 Q And in regard to the amounts, was there any discussion
9 about any amount?

10 A Nobody knows that amount.

11 Q Okay. And so it's something that will be determined
12 later, and it's basically free money for the county; is
13 that correct?

14 A Correct.

15 Q Was there any consideration given to the fact that that
16 particular grant would make up some of the costs incurred
17 by the county for increased use of the roads or other
18 things that come with a new project like this?

19 A Not to my knowledge.

20 Q Did anybody tell you, you shouldn't approve this unless
21 you're going to get money from the State?

22 A Never.

23 Q Did Steve Schmeichel promise any additional money other
24 than what might be available depending on the amount from
25 the State on a rebate?

1 A Not to me.

2 Q Did anyone on behalf of the applicants make an offer to
3 provide anything other than this State grant through a
4 program that was publicly available?

5 A No.

6 Q Is it fair to say that because of the previous permit
7 approval and appeal, you were a little more careful than
8 you might otherwise be to ensure that you did things right
9 on this particular hearing?

10 A More than fair.

11 MR. DONAHOE: No further questions.

12 THE COURT: Mr. Deibert.

13 MR. DEIBERT: I have no questions.

14 THE COURT: Mr. Peterson.

15 REDIRECT EXAMINATION

16 Q (BY MR. PETERSON) At the time you made the permitting
17 decision in 2020, the litigation about the 2018 permit was
18 already pending and in court; correct?

19 A As far as I know, yes.

20 Q It would be pretty awkward for you and the board to say no
21 to the permit in 2020 when you've got litigation pending
22 about the exact same project as Mr. Donahoe was
23 questioning --

24 A That wasn't on our agenda at all and it was never an
25 issue.

1 MR. DONAHOE: Objection.

2 THE COURT: Just wait. I'm going to overrule the
3 objection. I think he's got an answer here that -- go
4 ahead. Continue.

5 A That wasn't on our agenda at all. That wasn't nothing
6 that was -- that was nothing that needed to be talked
7 about at all for that day. It was not a consideration of
8 mine, and if it was of somebody else, you'll have to ask
9 them.

10 Q (BY MR. PETERSON) But the litigation on the 2018 permit
11 was on your mind, as you told Mr. Donahoe?

12 A The litigation for the 2018?

13 Q Yes.

14 A We knew about it. It had no -- it had no judging factor
15 on how I felt about that -- the 2020 meeting.

16 Q Well, I thought you said it made you more careful?

17 A No. The question was, were we more careful. And you
18 asked me if it was on my mind.

19 Q It had an impact on you, didn't it?

20 A We were very careful.

21 Q And it would put the county in a tough spot if you said no
22 to the permit in 2020?

23 A Why?

24 Q Because wouldn't that be the best evidence that an error
25 was made in 2018?

1 A I don't believe that.

2 Q You were asked about some of the submission that the
3 applicants did in this case regarding their DENR State
4 permit, that that information was provided to the county.

5 Do you remember those questions?

6 A From Mr. Donahoe?

7 Q Yes.

8 A Yes.

9 Q You didn't look at any of that, though, did you?

10 A Paged through them, yes.

11 Q When did you do that?

12 A Probably at the 2018 meeting.

13 Q And you remembered it more than two years later?

14 A They said it was the same report, which it was.

15 Q So, what do you remember from that information from back
16 in 2018?

17 A That they had all their nutrient management plan --
18 nutrient management plan in order, that it was approved.

19 Q Now, under the ordinances -- I think you talked about this
20 with respect to the chicken facility, the Sonstegard
21 chicken facility, that they didn't fit comfortably into a
22 box so you could make a judgment call on what the setback
23 ought to be based on the manure produced.

24 Do you remember talking about that --

25 A I do.

1 Q -- with Mr. Donahoe? You didn't actually make that kind
2 of a decision in this case, though, did you?

3 A No.

4 Q Okay. While you could have, the board just didn't do that
5 here; correct?

6 A I'm not saying I agree with that.

7 Q Did anybody do that in your presence?

8 A You'd have to ask them.

9 Q We've got a 10-page transcript. I don't see any -- even
10 see the word "setback" even mentioned in the deliberation
11 phase.

12 Did anyone do that in your presence, say: Hey, I
13 know this doesn't really fit the box, but because of the
14 manure production rates we think by judgment we ought to
15 go with this setback; nobody did that, did they?

16 A In Schmeichels?

17 Q Yes.

18 A No.

19 Q Okay. You were asked about that Section 26.04 that deals
20 with applying the more stringent restriction?

21 A Uh-huh.

22 Q In fact, there was a conflict brought to your attention, a
23 conflict in how to view the setbacks, and that was on the
24 record at the hearing; correct?

25 A Yes.

1 Q And did you apply the more stringent setback?

2 A My personal belief is we applied the setback that was
3 correct.

4 Q How can you determine it's correct when you never did the
5 calculation yourself?

6 A Because of what Faye does, and she does it well, she knew
7 what she was doing, and because of the DENR report for the
8 waste that came from the facility in question.

9 Q So when contrary information was presented about the
10 setback, you gave it no further thought; is that fair?

11 A No.

12 Q That's not fair?

13 A No.

14 Q Well, other than just trusting Faye, what else did you do
15 then to resolve that conflict?

16 A That's what I did.

17 Q That's it, nothing else?

18 A That's enough.

19 Q And of the two views, you applied the less stringent
20 restriction, a shorter setback?

21 A I applied the one that I believed was correct.

22 MR. PETERSON: Those are all my questions.

23 THE COURT: Mr. Donahoe.

24 MR. DONAHOE: Just very briefly.

25 RECROSS-EXAMINATION

1 Q (BY MR. DONAHOE) There was a lot of discussion about
2 calculating the setbacks. You didn't talk about the fly
3 and odor control that was set forth in the application
4 during the deliberations either, did you?

5 A I can't remember, but I would guess that we probably would
6 have at some point, somehow.

7 Q Yeah, but during the deliberations?

8 A Oh, no.

9 Q So, the transcript speaks for itself. In other words,
10 what was talked about and recorded is transcribed, and we
11 believe it's fairly accurate so I'm not going to go
12 through that line by line.

13 Is it a correct statement to say that in general,
14 what gets discussed is what's important to someone in
15 regard to the specific issues that they feel will make
16 the additional conditions that may be required important?

17 MR. PETERSON: I'm going to object as speculation, and
18 there's no way he can speak for the other four. He
19 doesn't have foundation.

20 THE COURT: I'll sustain the objection. Rephrase your
21 question.

22 Q (BY MR. DONAHOE) When you get to the deliberations stage,
23 what's one of the things that you're specifically looking
24 to do?

25 A One of the things?

1 Q Well, maybe I should say what do you consider to be the
2 most important thing?

3 A I don't know that we weigh them up as individual
4 specifics. I think everything that's in our conditions
5 that we put on there are all important to us.

6 Q And so you look at everything to make sure that they've
7 been met?

8 A Correct.

9 Q And you can impose additional conditions at that point;
10 correct?

11 A We sure can.

12 Q Do you consider that as well?

13 A Yes.

14 Q And you did impose some additional conditions on this
15 particular application?

16 A Everything we -- we deemed, yeah, necessary.

17 Q Again, I'm not going to go through all of them, but there
18 were complaints that there would be additional flies,
19 there would be additional things besides odor.

20 All of those things were looked at and applied to the
21 ordinance by your individual deliberations in this case;
22 correct?

23 A I believe so.

24 MR. DONAHOE: No further questions.

25 THE COURT: Mr. Deibert.

1 MR. DEIBERT: I have none.

2 THE COURT: Mr. Peterson.

3 MR. PETERSON: No questions, Your Honor.

4 THE COURT: You can step down.

5 THE WITNESS: Thanks.

6 THE COURT: Thank you.

7 (Witness excused.)

8 THE COURT: Mr. Peterson, you can call your next witness.

9 (Pause.)

10 THE COURT: Ma'am, if you'd please raise your right hand.

11 FAYE DUBBELDE,

12 called as a witness, having been first duly sworn, was

13 examined and testified as follows:

14 THE COURT: Please be seated.

15 DIRECT EXAMINATION

16 Q (BY MR. PETERSON) Good afternoon.

17 A Good afternoon.

18 Q Please introduce yourself.

19 A Faye Dubbelde.

20 Q Do you prefer Faye, Ms. Dubbelde, what's your preference?

21 A Faye is fine.

22 Q Faye. Faye, are you retired now?

23 A Yes.

24 Q At the time of the December 2020 Schmeichels' Norway Pork
25 conditional use permit hearing, were you the zoning

1 administrator in Turner County?

2 A Yes.

3 Q And did you, I guess, process the application and prepare
4 the materials for the board prior to the hearing?

5 A Yes.

6 Q In front of you there is a binder.

7 MR. PETERSON: May I approach the witness, Your Honor?

8 THE COURT: You may.

9 Q (BY MR. PETERSON) I'll probably spend the most time with
10 Exhibit 14. So Exhibit 14 is the record from the county,
11 and after the first few pages there are these numbers TC
12 or Turner County 1, 2 and so forth.

13 A Okay.

14 Q That will help us get around in there. Can you go to TC
15 112 in Exhibit 14, please.

16 Is this the application that the applicant submitted
17 for the permit?

18 A This was turned in, yes.

19 Q Okay. On Page TC 120 there is a setback calculation
20 that's part of the application. Do you see that there
21 under Section -- well, kind of near the top where it says
22 "Distance Equation"?

23 A I do.

24 Q In the margin it says: "How did you get this?" Is that
25 your handwriting?

1 A Yes.

2 Q So you at some point had a question about how the number
3 of animal units was calculated?

4 A Yes.

5 Q And what did you do to get that question answered?

6 A I redid my math and I talked to the applicant.

7 Q Now --

8 MR. PETERSON: Call this 20.

9 (Petitioners' Exhibit Number 20 marked for
10 identification.)

11 Q (BY MR. PETERSON) Faye, Exhibit 20 is in front of you, and
12 I thought versus flipping back and forth between various
13 sections of the ordinances, I would pull out the sections
14 that relate to calculating animal units, sizing for large
15 CAFOs and setbacks from dwellings.

16 If you would, could you do what is necessary by
17 looking at the ordinances to confirm this is accurate?

18 A That this is accurate (indicating)?

19 Q Yeah.

20 A (Witness complies.) For what's there it appears to be.

21 Q Okay. So at least as I understand, determining the size
22 of the CAFO, we look to Section 13.09 Part D. That has a
23 chart of various types of animals and how many head of
24 each kind it takes to be classified as small, medium and
25 large.

1 Is that a fair summary of what that section includes?

2 A The center section of your page is that.

3 Q 13.09(D) --

4 A Okay.

5 Q -- of the ordinance.

6 A What was your question, sir?

7 Q Yeah. So if you -- let me help you get to the page here.

8 A Right here (indicating)?

9 Q So I believe 13.09 Part D has a multipage chart.

10 THE COURT: Mr. Peterson, do you have the TC reference
11 offhand?

12 MR. PETERSON: Yeah. I apologize, Your Honor. It would
13 be TC 44 and 45.

14 THE COURT: Thank you.

15 Q (BY MR. PETERSON) And does that include a chart of various
16 types of animal feeding operations and how many head of
17 that particular type of animal qualifies as a small,
18 medium and large CAFO?

19 A Yes.

20 Q And the ones specific to swine are pulled out and put onto
21 Exhibit 20; is that correct?

22 A Yes.

23 MR. PETERSON: Your Honor, I'd offer Exhibit 20 at this
24 time. I think it would make all examinations more
25 convenient.

1 THE COURT: Any objection?

2 MR. DONAHOE: No objection.

3 MR. DEIBERT: No objection.

4 THE COURT: 20 will be received.

5 Q (BY MR. PETERSON) What are the three types of swine animal
6 feeding operations that are identified in the sizing
7 chart?

8 THE COURT: And, ma'am, we've accepted 20. You can look
9 at the book if you want, but if it's easier to look at 20,
10 I think that's why we just offered and accepted it just to
11 make it easier than paging back and forth, but if you want
12 to page back and forth, by all means you can look in the
13 book, too.

14 THE WITNESS: Okay.

15 A Finisher swine, nursery swine and farrow-to-finish.

16 Q (BY MR. PETERSON) And the facility in question here for
17 Schmeichels and Norway Pork, which one is it?

18 A None of those.

19 Q In your report to the board, did you identify that what
20 Mr. Schmeichel and Norway Pork were asking for didn't fit
21 into any of these categories?

22 A I would have to see my report to see what I called it.

23 Q What does your report look like? Would that be the
24 proposed summary and findings or something different?

25 A It would be on that or it would be on the minutes,

1 whatever -- what he had applied for -- or it would be on
2 the notice.

3 Q Staying in Exhibit 14 --

4 A Okay.

5 Q -- Page TC 310 and 311, I believe these are your proposed
6 summary and findings, which were then amended, and then
7 the minutes, if that helps you at all.

8 A That's what this 310 is?

9 Q Yes.

10 A Okay.

11 Q Is that the report you were -- is one of those the report
12 you were referencing that you make to the board, or are we
13 talking about a different document?

14 A No, that's what I was referencing.

15 THE COURT: Which TC number are you looking at right
16 there?

17 THE WITNESS: I have 308 and 310 and 09 actually. They're
18 all three there.

19 THE COURT: Thank you. I just wanted to follow along on
20 the same page.

21 Q (BY MR. PETERSON) Okay. So, 308 appears to be a meeting
22 notice or a hearing notice from November 17 of 2020; is
23 that correct?

24 A Yes.

25 Q And does that have anything in it about -- that identifies

1 what the applicants are requesting doesn't fit into any of
2 these recognized animal feeding operations that are on
3 that chart?

4 A He was asking for a large concentrated animal feeding
5 operation for a swine farrowing facility.

6 Q And the next document TC 309, is that another notice of
7 the hearing?

8 A That's the agenda page.

9 Q The agenda.

10 A Yes.

11 Q Gotcha. And then 310 is your proposed summary And
12 Findings?

13 A Yes.

14 Q 311 would be the meeting minutes that were prepared after
15 the hearing?

16 A Yes.

17 Q And anywhere in the information you provided to the board,
18 did you make the board aware that what Mr. Schmeichel and
19 Norway Pork were requesting was not in a recognized animal
20 feeding operation box on the chart?

21 A His operation is farrow-to-wean so you would separate the
22 boxes and use one box to figure that amount and the other
23 box for the other amount.

24 Q How do you do that? I mean, how -- which one triggers
25 which count? Do you -- the 5400 sows, does that go under

1 the farrow-to-finish box and then the 2,000 heavy ones go
2 under finisher?

3 MR. DEIBERT: There's a document that Ms. Dubbelde just
4 prepared in the hallway within the last hour that would
5 probably help her to answer that question.

6 MR. PETERSON: Is this while she was sequestered from
7 testimony in the courtroom?

8 MR. DEIBERT: No, it was during -- oh. Yeah. Yes.

9 MR. PETERSON: Okay. Well, I mean, respectfully, the
10 point of sequestering a witness is so they're not
11 influenced by the testimony going on in the courtroom.

12 THE COURT: Obviously, the scope of her testimony was
13 going to be apparent as to what she prepared.

14 MR. PETERSON: In our view, Judge, I mean, there's a lot
15 of issues I think we've raised. The setback is I think by
16 far and away our -- I mean, it's what we've got left.

17 Q (BY MR. PETERSON) Ms. Dubbelde, did you become aware that
18 your calculation was challenged?

19 A My calculation was right.

20 Q Okay. How did you calculate the number of animal units?

21 A A certain number of them were at the -- the swine, the sow
22 level, and then a certain number of them were the wean,
23 the smaller pigs and the wean size. Two different
24 calculations with two different animal units.

25 Q Was that explained to the board?

1 A At our hearing?

2 Q Yeah.

3 A They're all aware of that. They -- we do it all the time.

4 Q So, in fact, under 13.09(D) there are thresholds for these
5 three different types of swine-related animal feeding
6 operations; correct?

7 A Thresholds as far as large, medium and small, yes.

8 Q Okay.

9 A Okay.

10 Q And then at the bottom of the chart the ordinances
11 recognize that there might be some other types of animal
12 feeding operations that don't fit comfortably into one of
13 the boxes; fair?

14 A Fair.

15 Q And in that situation it's the board that is supposed to
16 analyze the amount of manure produced by the particular
17 type of animal and then make a judgment call itself about
18 the type of setback to apply.

19 Is that how you understand 13.09(D)?

20 A It is broken down by animals, the number of animals. And
21 the applicant, generally, when they turn in an applicant,
22 they -- application, they say there's so many of this type
23 of animal, so many of this, if it would be beef or dairy
24 or certain sizes, and in this it would be hogs.

25 Q Right. But the way the setback works from dwellings at

1 least, when you have a large CAFO you start at
2 three-eighths of a mile. That's your starting point;
3 correct?

4 A Yes.

5 Q And then you need to determine two things: the total
6 number of animal units and subtract out what's already
7 counted as part of that beginning three-eighths of a mile
8 point?

9 A Yes.

10 Q So, were you subtracting out two things from that because
11 you're using two different boxes thereby reducing the
12 setback?

13 A No.

14 Q Okay. Explain in detail your setback calculation.

15 A In detail, that would be difficult for me because it was
16 from last December, and I always have my cheat sheet in
17 front of me when I'm doing it to review. I can't probably
18 do it from the stand without --

19 Q Okay. Let's at least step through it even if not
20 quantitatively. I just want to understand the process.
21 So, let's start with just step one of calculating the
22 number of animal units.

23 So we have 5500 farrowing sows and we have 2,000 head
24 of swine that are over 55 pounds.

25 THE COURT: Is it 5500 or 54?

1 MR. PETERSON: 5400, I believe. Is that -- 5400.

2 THE COURT: You just said 55. That's why I was asking.

3 MR. PETERSON: Oh, my -- my mistake, Judge.

4 Q (BY MR. PETERSON) So 5400 farrowing swine and 2,000 --
5 just call them large swine, it's over 55 pounds.

6 So if we go to Exhibit 20, the 5400 farrowing swine
7 are -- are they the 3.7 unit?

8 A .4.

9 Q The farrowing swine are being counted as finisher swine in
10 your calculation?

11 A No, wait. Farrowing swine. Farrow-to-finish, the one on
12 the bottom that you're looking at on your 13.09(D).

13 Q So the farrow --

14 A Oh, I'm sorry, you're up at the top. I'm sorry.

15 Q So you're in the middle on the chart?

16 A Yes. I was in the wrong place.

17 Q Your starting -- let me back up a little bit.

18 A Okay.

19 Q Your starting point was let's pick a box, and you went
20 with farrow-to-finish sows. Is that -- if it's not
21 correct, please -- I'm just trying to understand.

22 THE COURT: Is that how you started your calculation, you
23 picked the box first?

24 A I did start with -- I started with finisher swine over
25 55 pounds.

1 Q (BY MR. PETERSON) Okay. And that's an easy one. We have
2 2,000 of those; right?

3 A Yes, we do.

4 Q So we'll do 2,000 times .4, that's 800; correct?

5 A Correct.

6 Q Okay. What do we do with the 5400 farrowing sows?

7 A .4.

8 Q They're counted as finisher swine?

9 A On the bottom you have swine production unit: sows,
10 breeding, gestation and farrowing.

11 Q So that's .47?

12 A .47.

13 Q So then where are the 54,000 piglets being counted? If
14 each sow has roughly 10 in a litter, sometimes it's 12,
15 sometimes it's eight, where are they being counted?

16 A We were counting, what did you say, 5,000 for the big
17 animals?

18 Q If there's 5400 sows that are giving birth each to a
19 litter, and just for easy math let's just say there's 10
20 to a litter, that's 54,000 other pigs.

21 Where are they being counted?

22 A Under your swine production you take your number of sows
23 times your .47. That will give you your number to begin
24 working with, and then I -- the other 2,000 head I use a
25 .4, less than 55 pounds.

1 Q Right. So I'm following you on the farrowing swine, on
2 .47. Where are there piglets being accounted for in the
3 setback? And if they're not, you can just say they're
4 not.

5 A I feel they're counted under the swine production because
6 it's breeding, gestation and farrowing. That includes
7 piglets.

8 Q Isn't that the farrow-to-finish when you're counting the
9 litter along with the mother and that's the sow
10 calculation of 3.7?

11 A Farrow-to-finish would be you've got those sows, you're
12 going to finish them out to a fat weight and then sell
13 them. It's -- it's different.

14 Q But there's a calculation for nursery swine right here.
15 They don't come free. You got to count them. They're
16 creating manure.

17 A I did count them.

18 Q Where in the calculation?

19 A I counted them and gave them a setback.

20 Q And what did you determine an appropriate setback would
21 be?

22 A The setback was 880 animal units with five -- adding an
23 extra 100 feet for every 500 animal units. You would add
24 100 for the 500. You still had 380. I added another
25 100 feet so you had extra. It was an extra 200 feet for

1 those pig -- those little guys.

2 Q Where do the ordinances give you the instructions that you
3 just described? Because I don't see them anywhere in the
4 ordinances.

5 A You learn it. It's the math. It's how I was taught.

6 Q But it's not here. Because what we have -- we have a type
7 of facility that doesn't really fit neatly in a box and
8 it's complicated.

9 A But you have your --

10 Q And the ordinances say it's the board that's supposed to
11 be making that decision, and they never even did that in
12 this case.

13 MR. DONAHOE: Objective -- objection, I mean.
14 Argumentative.

15 THE COURT: The objection is sustained. You can rephrase
16 your question.

17 Q (BY MR. PETERSON) Faye, do you agree when it doesn't fit
18 neatly in a box, it's supposed to be the board that's
19 making a determination based on the amount of manure that
20 the swine produce; it's not your determination?

21 A It's not what?

22 Q It's not your determination. It's the planning commission
23 serving as the Board of Adjustment that is charged with
24 making those judgment calls.

25 Do you understand that to be the case under 13.09(D)?

1 A I did not make the decision.

2 Q You just said you gave them this, you gave them that and
3 we hear you're making judgment calls that -- you can't --
4 you can't follow your math based on what's in the
5 ordinances?

6 A You can follow my math perfectly if you have my sheet of
7 paper. I did not make a judgment decision. And the board
8 got it before the hearing, they reviewed it.

9 Q Where did you even provide them a calculation?

10 A I usually have a separate sheet with that.

11 Q You just told the board the setback is good, and they
12 accepted that as true?

13 A I told them they had ample setback.

14 Q Did you even give them a number to say the setback is X
15 and the closest house is Y; therefore, it's satisfied?

16 A Yes.

17 Q You did that?

18 A It's in your Exhibit 11.

19 Q In the Exhibit 11. Did you explain how you calculated
20 this facility that doesn't fit neatly in a box?

21 A If I was asked that question, I did.

22 Q So if you were, it should be in the transcript. If you
23 were actually asked by any board member to explain how you
24 calculated this, that should be in the transcript, if that
25 in fact happened?

1 A I would say so.

2 Q And if they didn't ask you, then it wouldn't be in the
3 transcript?

4 A Assuming, yes.

5 Q And you say you can follow the math and under -- back to
6 Exhibit 20 here.

7 A Okay.

8 Q The swine production unit, it's sows, breeding, gestating
9 and farrowing. It doesn't say anything about the piglets
10 are counted for free, does it?

11 A It doesn't say the piglets are counted for free --

12 Q Yeah.

13 A -- you're asking?

14 Q It doesn't say the piglets are included?

15 A They're covered under the swine production.

16 Q Where does it say anything about a piglet there?

17 A If you've got a gestating piglet, you've got a pregnant
18 sow.

19 Q Right. So now once the piglets are on the outside, it
20 doesn't say that you don't include that as part of the
21 setback. You've got to account for the manure that
22 they're producing while they get up to weaning weight.
23 And there's something to do that right here, nursery
24 swine.

25 You've got to give them each .1; right?

1 A That's a different situation.

2 Q Where does the ordinance say that's a different situation?

3 A Nursery swine at a .1 less than 55 pounds are, if you are
4 that facility over there, you're bringing in nursery pigs,
5 they're 10 or 11 days. They're coming to you. That's
6 when they're the .1 and less than that weight.

7 Q All right. But here they're staying on-site until they're
8 weaned. So they're staying on-site, and I think some are
9 turning into the finisher swine, but most are being
10 shipped to the next stop.

11 So, if we actually count the nursery swine and
12 there's 54,000 of them, that adds an awful lot of feet to
13 the setback; does it not?

14 A I don't believe it's correct.

15 Q Do you recognize there's a couple of ways to look at this?

16 A No.

17 Q Do you recognize that with the type of complications we
18 have here with a facility that isn't expressly designated,
19 that it is supposed to be the Board of Adjustment that's
20 making these judgment calls?

21 A Yes, and they did.

22 Q Did your setback calculation line up with the applicant's
23 setback calculation?

24 A What was the applicant's?

25 Q 2580, according to Page TC 120 of Exhibit 14.

1 A I think I was at 2400-ish.

2 Q As part of the applicant's submission, did they also
3 include the information they submitted to the DENR for
4 their State permit?

5 A Yes.

6 Q And did that actually have a higher head count than what
7 the county permit included?

8 A I don't remember that.

9 Q Do you know if anybody looked at that?

10 A What was the question?

11 Q Did anybody look at that?

12 A I don't know that.

13 (Petitioners' Exhibit Number 21 marked for
14 identification.)

15 Q (BY MR. PETERSON) Faye, Exhibit 21 is a setback
16 calculation which appears to follow what you've described,
17 but it actually counts the litters, too, at the bottom, at
18 the .1 number that's in Exhibit 20.

19 My question: If you in fact count the
20 nursery pigs, would the setback be increased by 1700 feet?

21 A You're asking me that?

22 Q Yes.

23 A Who -- who did this?

24 Q I did.

25 A Okay. I think it might be a little high.

1 Q Okay. Just for ease of flipping back and forth, TC 120 is
2 the setback calculation in the application and they
3 calculated -- is it 3338 animal units. It's right here if
4 you want to -- did the application calculate 3,338 animal
5 units?

6 A Yes. On here they did, yes.

7 Q And that corresponds, according to that, to a setback, an
8 adjusted setback of 2,580 feet?

9 A Yes, that's what you've highlighted.

10 Q Okay. And the calculation you ran yourself was a little
11 different, but pretty close to that?

12 A Pretty close, a little different.

13 Q So regardless of whether we use your calculation or the
14 applicant's calculation, if we actually count the nursery
15 pigs, both of them would be increased by .1 per head?

16 A If you would count them.

17 Q Okay. So if, in fact, the nursery pigs have to be counted
18 as part of adjusting the setback, there would be an extra
19 8,198 animal units.

20 Would that -- is that what the math shows?

21 A That's what your sheet -- yes.

22 Q And I mean, you can calculate 54,000 times .1 pretty
23 easily?

24 A Yes.

25 Q And that's going to add, if they're in fact counted, that

1 would add enough feet that that would put Vicky's house
2 inside the setback, which is only 3,020 feet away?

3 A Can I ask you a question --

4 Q Yeah.

5 A -- on this? What is your plus 600?

6 Q Good question. So that comes from the 2798 extra animal
7 units --

8 A Okay.

9 Q -- above the 540 starting point, and that rounds up
10 closest to 3,000. And it's 100 feet per extra 500 animal
11 units.

12 A So that's your extra 600 feet.

13 Q That's how you get your 600, yeah.

14 A And so you're saying -- you're saying here based on if
15 you'd add those baby pigs in, you would add 1700 square
16 feet -- or 1700 feet?

17 Q If you the extra 2798 that we know we have and you also
18 add the extra 5400 animal units from the pigs, you'd have
19 to add 1700 to the setback, not 600.

20 A Okay.

21 Q Do you follow that now?

22 A So you're adding 1700 additional, not 600 and 1700?

23 Q It's 1700 plus 1980.

24 A Okay.

25 Q 1980 is the three-eighths of a mile?

1 A Yes.

2 Q So it's showing 1700 feet instead of 600 feet when you
3 count the nursery pigs?

4 A According to this, yes.

5 Q And I mean, just even using kind of round head math, if
6 you add another 5400 animal units from the nursery pigs,
7 however you want to do the math, Vicky's house is going to
8 be inside of the setback if you count the nursery pigs;
9 fair?

10 A Not knowing how far her house is away, if you say it's
11 fair.

12 Q It's 3,020 feet.

13 A How many?

14 Q 3,020 feet. It's 5400 rounds to 5500 animal units.
15 That's 1100 extra feet. So it's 500 per extra animal
16 unit.

17 A Correct.

18 Q So you've got to add 1100 feet.

19 A I understand.

20 Q And it was already pretty close. She was just barely
21 outside of what you calculated for the setback. So if we
22 add 1100 to it, she's clearly inside the setback.

23 Would you agree with that logically, if the nursery
24 pigs are counted?

25 A If the nursery pigs are counted that way.

1 Q Were you at the entire hearing on December 8, 2020?

2 A Yes.

3 Q Did Vicky and Jeff speak at the hearing?

4 A They were both there so I'm assuming.

5 Q I'm not going to ask you to quote what they said, but --

6 A Right.

7 Q -- do you recall they had something to say?

8 A Yes, they did.

9 Q Do you remember Jeff, Dr. Powers, asking the board
10 members, you know, basically how they'd feel and how
11 they'd like, you know, a big hog unit put right next to
12 their house or something to that effect?

13 A I don't remember that.

14 Q The prehearing submissions included roughly -- and it's in
15 the record -- roughly 100 pages of information from the
16 petitioners in this case that included an odor dispersion
17 model, an appraisal.

18 Was that information provided to the board members by
19 you?

20 A I don't know that I provided it to them. They all had it.

21 Q Do you know how it got to the board, to the board members?

22 A I don't remember.

23 Q Ordinarily, if there are prehearing submissions from the
24 public, do you gather those in a file and pass them along
25 to the board or is that somebody else who does that?

1 A No. If they come to me, I make sure the board gets them.

2 Q With this particular hearing, do you know how far in
3 advance the board would have been provided information
4 that was submitted before the hearing?

5 A The board gets everything from me at least 10 days prior
6 to a hearing.

7 Q And whether they read it is up to each board member?

8 A Yes.

9 MR. PETERSON: Your Honor, I'd offer Exhibit 21 -- I don't
10 think that I did that -- as a demonstrative similar to 19.

11 THE COURT: Any objection as a demonstrative exhibit?

12 MR. DONAHOE: Your Honor, I am going to object to this as
13 a demonstrative exhibit. I think it misstates the
14 evidence. If he wants to present that in a different
15 form, that would perhaps be appropriate, but the 1700 is
16 wrong and misleading. It's only 1100 feet different. The
17 1700 feet is inaccurate and I don't think it's --

18 MR. PETERSON: Brian, it's the 11 plus it's the other
19 extra animal units that are already there.

20 MR. DONAHOE: Well, there's going to be a dispute about
21 all of that, so we'll object on the basis that it
22 misstates the evidence. 403 as well, Your Honor. It's
23 more prejudicial than probative.

24 THE COURT: The Court will receive it as a demonstrative
25 exhibit. I understand the objection because it is

1 confusing as to the 1100 that was discussed during the
2 questioning. It seems to be rolled into the 600 that's at
3 the bottom, but it doesn't appear as a separate figure on
4 the exhibit. It's demonstrative. I don't know how much
5 weight the Court is really going to give it.

6 So, for the purposes of the record I am going to
7 receive it as a demonstrative exhibit only.

8 MR. PETERSON: All right. Those are all of my questions.

9 THE COURT: Mr. Donahoe.

10 MR. DONAHOE: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 Q (BY MR. DONAHOE) Ms. Dubbelde, I think I can make this
13 very simple. We've got just three separate categories on
14 Exhibit 20 for a large concentrated animal feeding
15 operation for swine. You've got finisher swine weighing
16 more than 55 pounds.

17 Those finisher swine are weaned; correct?

18 A Yes.

19 Q And nursery -- excuse me, nursery swine weighing less than
20 55 pounds. Those are all weaned; correct?

21 A Yes.

22 Q Farrow-to-finish sows are the third category, and that's
23 the one with the smallest number, meaning the smallest
24 number of head before you're a large concentrated animal
25 feeding operation, and that's 540.

1 Farrow-to-finish sows, that is the category that is
2 at 3.7 animal units per animal; correct?

3 A Yes.

4 Q Okay. And those are not small pigs. Those are considered
5 to be the adult pigs. They're piglets and then piglets
6 growing until they are adults; correct? That's what
7 farrow-to-finish means?

8 A Yes.

9 Q This is a wean-to-finish facility; correct?

10 A Yes.

11 Q And that means these sows that are on-site will produce
12 litters of pigs that will be weaned and immediately
13 removed, for the most part, other than the 2,000, once
14 they get to that stage that are set forth in the
15 application at over 55 pounds; correct?

16 A Yes.

17 Q Okay. And in the definition section you were asked about
18 these animal units, and that's on Page -- or Exhibit 20,
19 under Ordinance Section 27.02(12) at the top. I want you
20 to take a look at that bottom category: Swine Production
21 Unit. What does that say in the parentheses after that?

22 A Sows, breeding, gestation and farrowing.

23 Q Okay. So these are sows that are in the condition of
24 being bred. Once they are bred they become pregnant and
25 that's gestating. Once the baby pigs are born, that's

1 farrowing; correct?

2 A Yes.

3 Q And so these baby pigs that he keeps talking about and
4 saying that they have to be counted in addition to these
5 numbers that you've already calculated, they're included
6 because you're looking at .47 for these sows instead of
7 the finisher swine at .4 at the top; correct?

8 MR. PETERSON: I'm going to object. Leading and also
9 misstates the evidence.

10 THE COURT: The objection will be sustained. Rephrase
11 your question.

12 Q (BY MR. DONAHOE) So, we've got .47 there for these sows
13 for their condition, which includes when they are pregnant
14 with baby pigs inside them and also when the pigs are
15 born; correct?

16 A Yes.

17 Q And the pigs get to be a certain stage nursing on the
18 mother, staying with her during that time; correct?

19 A Yes.

20 Q And then with this being a wean-to-finish, most of those
21 piglets are going to go someplace else; correct?

22 A Yes.

23 Q And so the .47 animal unit equivalency, that counts the
24 piglets when they're born and even when they're preborn
25 and the pig has more inside her and produces manure;

1 correct?

2 MR. PETERSON: Objection. Leading and it misstates the
3 very language in the ordinance.

4 THE COURT: It is leading so I'll sustain it on that
5 objection. Rephrase your question.

6 Q (BY MR. DONAHOE) What does gestating mean?

7 A That sow has pigs inside of her, the little ones.

8 Q And what does farrowing mean?

9 A Giving birth; she's had babies.

10 Q And so after the piglets are born there is a period of
11 time when they are considered to be farrowing and still on
12 the mother taking milk from her teats; correct?

13 A Correct.

14 Q And so where we look at a finisher swine, that is 0.4;
15 correct?

16 A Yes.

17 Q So it says over 55 pounds. The nursery swine are less
18 than 55 pounds; correct?

19 A Yes.

20 Q So there's some period when the piglets are in between
21 55 pounds and their birth weight; correct?

22 A Yes.

23 Q What is that? Is that considered farrowing?

24 A Yes.

25 Q So again the question was: Where are the pigs that are

1 born? They're counted in the farrowing number at the 0.47
2 instead of being at 0.4?

3 A Yes.

4 Q And in regard to the calculations that are in TC 120, the
5 amounts that were determined, or I should say that were
6 used by the applicant, were intentionally what I call more
7 conservative. They were intended to extend the setback
8 distance a little bit further to create a cushion beyond
9 what they could have calculated these to be; correct?

10 A That's what I understand, yes.

11 Q And the calculation talks about how they do that, and they
12 subtracted 540 animal units in order to determine how to
13 divide up any additional animal units over 500; is that
14 correct?

15 A Correct.

16 Q Okay. Now, they could have looked at this and said the
17 540 is farrow-to-finish. We're not farrow-to-finish. We
18 could use some other number such as the finisher swine
19 weighing over 55 pounds, that's 2500. We could have
20 subtracted 2500 instead of 540.

21 They didn't do that, did they?

22 MR. PETERSON: I'm going to object. Is counsel
23 stipulating there's multiple ways to make this
24 calculation?

25 THE COURT: The objection is sustained. He's asking a

1 legitimate question on the calculation. Perhaps, repeat
2 your question.

3 MR. DONAHOE: I'm sorry, Your Honor, the objection is
4 sustained?

5 THE COURT: I'm sorry. Overruled. Repeat your question.

6 Q (BY MR. DONAHOE) So, in regard to the subtraction of 540,
7 an applicant could say this is actually not
8 farrow-to-finish; therefore, we would like you to use
9 finisher swine weighing over 55 pounds and subtract 2,500
10 from the total number of animals instead of 540.

11 But they did not do that; correct?

12 MR. PETERSON: Object as compound and speculative and
13 calls for a legal conclusion, which a board member can
14 answer. I'm not sure --

15 THE COURT: I can sustain that objection. It is compound
16 and it does call for a conclusion and it's leading. So,
17 try to rephrase your questions, please.

18 Q (BY MR. DONAHOE) Well, you have to determine whether an
19 application is complete and correct in regard to the
20 setbacks that are claimed on a large concentrated animal
21 feeding operation application; correct?

22 A Yes.

23 Q And so you have to determine whether you subtract a
24 specific number from those animal units to determine any
25 extra setback that's required; correct?

1 A Yes.

2 Q And this particular operation does not fit within any of
3 the three categories clearly that are -- or I should say
4 does not clearly fit within any of the three categories
5 listed in Section 3.09(D); correct?

6 A Yes.

7 Q So we've got a wean-to-finish operation, which is not
8 farrow-to-finish, it's not nursery swine and it's not
9 finisher swine; correct?

10 A Correct.

11 Q With that situation, did the applicant's choice of using
12 the 540 units to subtract present the most conservative
13 way of calculating the animal unit for setback purposes?

14 A Yes.

15 Q And I think you've already explained how you did your
16 calculation. I don't think there's any dispute about the
17 2,000 head that are going to be over 55 pounds. Those are
18 considered to be 0.4 for animal units, and you come up
19 with -- I'm going to mess this up. I'm not going to go
20 through all the calculations.

21 A Thank you.

22 Q Instead, I'm just going to ask, you went through your
23 calculations and you came up with a number that's actually
24 lower than what the applicant had; correct?

25 A Correct.

1 Q And so they asked for a larger setback or were accepting a
2 larger setback than what would have technically been
3 required under your calculation?

4 A Yes.

5 Q And did you feel that your calculations were made
6 consistent with the zoning ordinance that you had been
7 using for years?

8 A Yes.

9 Q And have you also used that same calculation to look at
10 the DENR general permit nutrient management plan to make
11 sure that they've got enough acres?

12 A Yes.

13 Q And do they have to at least account for the number of
14 animal units in their DENR application as they claim
15 they're going to raise in their conditional use permit?

16 A Yes.

17 Q Does DENR calculate the animal units in a way similar to
18 what the Turner County ordinance uses?

19 A I would assume so.

20 Q In fact, isn't there a reference to the fact that these
21 are supposed to be the DENR animal unit equivalencies?

22 A Yes.

23 Q And so when it comes down to a calculation, if the number
24 of head that are put into a nutrient management plan are
25 actually greater than the number that are being housed; in

1 other words, if you tell the DENR, we've got 5,000 head,
2 but we're going to do our nutrient management plan for
3 6,000 just in case. That way we'll have extra land in
4 case something happens and we can't get to Field A that's
5 in our plan, we've got extra.

6 Have you ever heard of anybody doing that?

7 A I don't recall.

8 Q Okay. Well, hypothetically, if that did happen, that
9 would actually just, again, be another conservative step
10 to ensure that there was adequate number of acres
11 available for application of manure; correct?

12 MR. PETERSON: I'm going to object. Speculation.
13 Foundation for this witness. I don't think she has
14 expressed any familiarity with the State permitting
15 process.

16 THE COURT: The objection will be sustained at this point.

17 Q (BY MR. DONAHOE) So this is just math. If you ask for
18 more than what you are required from the DENR, you're
19 going to have extra acres; wouldn't that be correct?

20 A Yes.

21 Q And if you in fact have a conditional use permit for a
22 certain number of head, you can only build the building
23 for that size and it's not going to house anything more
24 than that; correct?

25 A Correct.

1 Q And now you're retired so I'm not going to get into the
2 whole issue that we're facing in the history today, but
3 they're actually going to need more room in the buildings
4 and have less pigs per building.

5 Do you know about that?

6 A No.

7 Q That's a California regulation that's going to be
8 impacting the entire industry.

9 So let's just talk about what we do know. In this
10 particular instance the DENR had approved their nutrient
11 management plan for this facility; correct?

12 A Yes.

13 Q And the DENR looks at the facility to ensure that it's not
14 one that is built in such a way that it could house so
15 many more animals that it would be under -- or excuse me,
16 that they would have insufficient acreage for the manure?
17 MR. PETERSON: Objection. Foundation. She's not part of
18 the State permitting process.

19 THE COURT: The objection will be sustained.

20 Q (BY MR. DONAHOE) Well, doesn't DENR look at the facility
21 size --

22 THE COURT REPORTER: Excuse me. Excuse me.

23 THE COURT: Slow down. Slow down.

24 MR. DONAHOE: I'm sorry.

25 THE COURT REPORTER: We need to slow it down just a little

1 bit.

2 MR. DONAHOE: Sorry.

3 THE COURT REPORTER: Go ahead.

4 Q (BY MR. DONAHOE) Doesn't DENR look at the facility size to
5 make sure that it's consistent with the number of head
6 being proposed?

7 MR. PETERSON: The same objection; lacking foundation
8 being laid.

9 THE COURT: The objection as to foundation is sustained.
10 She may have this knowledge and be able to answer your
11 question, but you need to lay some additional foundation
12 to get there.

13 Q (BY MR. DONAHOE) So, Faye, have you -- or, Ms. Dubbelde,
14 excuse me -- do you know how the DENR does their review of
15 an application for approval of a general permit?

16 A No, I really don't very well.

17 Q All right. The county requires in certain cases that the
18 large concentrated animal feeding operations get approval
19 from DENR and provide a copy of that nutrient management
20 plan; correct?

21 A Yes.

22 Q And is that one of the requirements here?

23 A Yes, it was.

24 Q So the Schmeichels are required to provide a copy of their
25 nutrient management plan?

1 A Yes.

2 Q And does that change from year to year?

3 A Your acres may change, your locations.

4 Q So they have to get approval each -- each crop and
5 calendar year; correct?

6 A I would assume.

7 Q So basically they need to do soil testing and make sure
8 that whatever they're doing is going to be compliant with
9 the state and federal regulations?

10 A Yes.

11 Q And you may not know those specific regulations, but
12 there's some way that the DENR determines whether an
13 applicant's proposal is appropriate considering the
14 information provided in the application; correct?

15 MR. PETERSON: I'm going to object. She's already said
16 she's not familiar with the DENR process.

17 THE COURT: I'm still going to sustain the objection.

18 Q (BY MR. DONAHOE) Okay. But you know that they have to
19 apply for a DENR permit using basically the same
20 information the engineers provide to you; correct?

21 A Yes, and they had that before the hearing.

22 Q Right.

23 A Yes.

24 Q And there was some discussion in some previous testimony
25 that you weren't here to hear or understand, but there was

1 a comment about the fact that there's going to be six
2 buildings here on this particular site.

3 Do you recall the application including the number of
4 buildings?

5 A Six sounds right.

6 Q Yeah. And those aren't all buildings that have pigs in
7 them, though; correct?

8 A Correct.

9 Q And the plan that was presented wasn't just a sketch that
10 was hand-drawn by somebody. This actually was set forth
11 in Exhibit 17, if you have that.

12 THE COURT: Look in your book. Actually, that's a
13 separate page. Is it sitting on the side loose? I'll
14 make it easier, here's mine.

15 MR. DONAHOE: Thank you.

16 A Is that what you're referring to (indicating)?

17 Q (BY MR. DONAHOE) It is. Do you recall seeing that?

18 A Yes.

19 Q And is that part of the application for the permit that's
20 at issue in this case?

21 A Yes.

22 Q And does that in fact present a scale drawing from Midwest
23 Land Surveying, Incorporated?

24 A Yes.

25 Q And does it set forth the separate buildings and their

1 proposed location?

2 A It does.

3 Q And then does it calculate the setbacks based on the
4 location of those buildings?

5 A Yes.

6 Q And so despite the fact that there are six buildings,
7 they're laid out and we know exactly what's going to be
8 presented here for the proposed facility; correct?

9 A Correct.

10 THE WITNESS: (To the Court) Thank you.

11 Q (BY MR. DONAHOE) Have you applied this same determination
12 on animal units to determine setbacks in other cases
13 involving swine facilities that are wean-to-finish?

14 MR. PETERSON: I'm going to object as vague. I'm not sure
15 if just generally she does it or the kind of math that's
16 done here with something that doesn't fit in one of the
17 boxes.

18 THE COURT: I'll sustain the objection. Redefine your
19 question.

20 Q (BY MR. DONAHOE) Have you calculated setbacks for a
21 wean-to-finish operation prior to the Schmeichels?

22 A I would say yes.

23 Q And did you do that calculation in the same way that you
24 did the calculations for Schmeichels?

25 A Yes.

1 Q Have you talked to the members of the Board of Adjustment
2 and planning commission in regard to how you determine the
3 setbacks using the animal unit calculations?

4 MR. PETERSON: Object as hearsay.

5 MR. DONAHOE: It's her statement.

6 THE COURT: Overruled. It's her statement. It's not
7 hearsay. He didn't ask what they said. He asked if she
8 talked to them regarding her calculations.

9 MR. DONAHOE: Correct.

10 A I do talk to them about the calculation if they bring up
11 that question.

12 Q (BY MR. DONAHOE) And have you in the past explained to
13 them what you would do to determine the setbacks if it's a
14 situation that doesn't fit clearly -- or doesn't clearly
15 fit or there is a dispute about how to interpret the
16 animal unit calculations?

17 A Yes. We just lay it out from top to bottom then.

18 Q And have you done that calculation for this case in the
19 same way as you have done it in the past where you've had
20 those discussions?

21 A Yes.

22 Q Did anyone specifically ask you if these calculations were
23 done in the same way that you'd done them in the past for
24 the Schmeichels?

25 A Not that I recall.

1 Q If they had asked you, would you have explained it in the
2 same way you've explained it to the Court today?

3 MR. PETERSON: Objection. Speculation.

4 THE COURT: Overruled. I'll allow her to answer.

5 A If someone would ask, I'd walk them through it. Was that
6 your --

7 Q (BY MR. DONAHOE) Well, another way of asking it is: Did
8 you come up with a different calculation today than what
9 you would have done in the past to make sure that it met
10 the setback, or did you calculate it the same way you did
11 back in the day before the hearing?

12 A The same as during the hearing.

13 Q In this particular case the proposal included the fact
14 that they would use a pit additive.

15 Are you familiar with what that is?

16 A Somewhat familiar.

17 Q Is that anything you have personal experience with?

18 A No.

19 Q Based on the applicant's submissions, would a pit additive
20 or was a pit additive intended to reduce odor?

21 A Yes, it is.

22 Q And does the applicant include conditions and a plan to
23 control flies and odor?

24 A Yes.

25 Q And are there other requirements that are set forth in the

1 zoning ordinance that they have to meet to be approved?

2 A Yes, there are.

3 Q And did you review those to determine whether they met
4 those requirements?

5 A Yes.

6 Q Did you find that it met those requirements?

7 A Yes.

8 MR. PETERSON: Objection. Calls for a legal conclusion
9 and also relevance. It's what the board determined.

10 THE COURT: Overruled. She's the assistant that prepares
11 the information for the board so I think her testimony is
12 relevant.

13 Q (BY MR. DONAHOE) Does the board expect for you to make
14 some initial determinations on meeting the criteria prior
15 to the presentation of a concentrated animal feeding
16 operation at a public hearing?

17 A Did you say to make a determination or a recommendation?

18 Q Well, either one. I'm trying not to be leading. Tell me,
19 are you asked to do anything to report or to indicate
20 whether an application meets the criteria before it goes
21 to a public hearing?

22 A On letter F., if they meet those things that are required,
23 if they have turned all of those in, I let the board know
24 that, and then in my findings I say that has all been met,
25 but it's still the board's determination to approve or

1 disapprove.

2 Q Sure. And if there was something that was clearly not in
3 that; for example, if someone came in with a proposal that
4 was for a use that was prohibited, for example, a shallow
5 aquifer --

6 THE COURT REPORTER: For a what?

7 MR. DONAHOE: A shallow aquifer.

8 THE COURT: For use over a shallow aquifer?

9 MR. DONAHOE: Yes.

10 THE COURT: Okay.

11 Q (BY MR. DONAHOE) That would be prohibited, would you have
12 indicated to the board that this particular application
13 did not meet those requirements?

14 A I would tell the applicant that probably in the first
15 place; that he could not apply for that because it's
16 prohibited in that section.

17 Q And it just would never even get to the board?

18 A Correct.

19 Q Is it also accurate to say that if you identify issues
20 that are either unclear or unmet on those requirements, if
21 somebody doesn't meet the requirements, would you advise
22 the applicant that they are going to have a problem in
23 getting those things approved?

24 A Yes.

25 Q When it comes to Mr. Schmeichel, did the fact that he had

1 been on the Board of Adjustment and was currently on the
2 Board of Adjustment impact your calculations of the
3 setbacks in this case?

4 A No.

5 Q Did the fact that he was on the Board of Adjustment
6 influence your decision on whether the criteria for a
7 conditional use permit had been met?

8 A Nope.

9 Q It's my understanding that the board feels that they have
10 discretion to deny a conditional use permit even if the
11 criteria set forth in the zoning ordinance are met.

12 Is that your understanding?

13 A That the board has the discretion to deny a permit if
14 everything has been met?

15 Q Correct.

16 A No, I don't feel that.

17 Q Okay. And is that -- well, why is that?

18 A If that applicant has met everything that is required of
19 them and first has a complete file, has met everything
20 that was required, I would believe they would be granted
21 the conditional use permit.

22 Q In regard to things like general health or safety, is that
23 covered by the criteria in the permitting -- in the
24 ordinance for conditional use permits?

25 A I would think that would fall under your setbacks, your

1 fly and odor, the things that are required that you do,
2 and then DENR would also have their recommendations and
3 requirements.

4 Q And in this particular case, if there was a judgment call
5 on whether or not any of the criteria or requirements for
6 approval of the conditional use were met, who makes that
7 decision?

8 A If there were -- will you restate that, please.

9 Q Sure. I'm trying to be as efficient as possible and
10 finish up.

11 A Uh-huh.

12 Q What I'm asking is: Who makes the final decision on
13 whether or not the criteria are met?

14 A When they turn in their application, I do.

15 Q And then what's the next step after that for a conditional
16 use permit?

17 A They've turned in the application, paid the fee. I
18 publish it in the papers that are required. I put
19 together the material for the Board of Adjustment. It's
20 posted on the website, on the front door. And then the
21 material is given to the board in a timely manner.

22 Q And so when you say you publish it, that's a public notice
23 that's published in these newspapers; correct?

24 A Yes.

25 Q And in this particular case, did the applicants request

1 that it be published in some specific newspapers?

2 A Yes, they asked for more publication than normal.

3 Q And so was it published in several newspapers?

4 A Yes, three I believe.

5 Q As to the final decision on the information presented at
6 the public hearing, who makes the decision?

7 A The Board of Adjustment.

8 Q And if there's discretion to be exercised, how is that
9 exercised, do you know?

10 A What do you mean?

11 Q Well, there was a suggestion that the ordinance requires
12 that the most restrictive interpretation be applied.

13 Do you know anything about that?

14 A No.

15 Q Okay. Then I don't need to ask you.

16 A Okay.

17 Q In regard to the animal unit equivalencies here, do you
18 know if the ordinance sets forth the basis for determining
19 those animal units on animal waste or manure?

20 A That is what they're based on.

21 Q And was your method of calculating the animal units and
22 the setback in this case consistent with what you
23 understood would be the waste production for this
24 facility?

25 A Yes.

1 MR. DONAHOE: No further questions.

2 THE COURT: Mr. Deibert.

3 MR. DEIBERT: I have nothing, Your Honor.

4 THE COURT: Mr. Peterson.

5 MR. PETERSON: I do have some follow-up.

6 REDIRECT EXAMINATION

7 Q (BY MR. PETERSON) I want to clarify, Exhibit 17, which is
8 that overhead map by the engineering company?

9 A Yes.

10 Q That doesn't calculate setbacks. It just shows the
11 measurements between structures; correct?

12 A It's their setback, their measurement.

13 Q Right. It doesn't describe how they're coming up with the
14 setback?

15 A No.

16 Q Okay. On Exhibit 20, if you have it, it pulls out the
17 swine-related information from the ordinance.

18 Now, when a sow is gestating and growing pigs, they
19 eat more than they would if they were not pregnant;
20 correct?

21 A I would assume.

22 Q Like any -- not to get too personal, but any pregnant
23 mammal tends to eat more because they are gestating and
24 growing a living thing inside of them, or in the case of
25 sows, growing 10 living things in inside of them.

1 And does that phenomenon explain why a large sow is
2 at .47 instead of a .4, because they eat more and they
3 poop more?

4 A That would be an assumption.

5 Q Farrowing is the act of giving birth; correct?

6 A Yes.

7 Q Okay. And newborn piglets aren't producing swine, are
8 they?

9 A They aren't what?

10 Q A newborn piglet is not itself producing swine?

11 A No.

12 Q That doesn't come for --

13 A Right.

14 Q -- a year or later. So when we look at 27.02(12), the
15 definition of animal units for a swine production unit,
16 does that mean a swine, a sow, that is in some stage of
17 producing more swine?

18 A That's swine production, the bottom.

19 Q Yes.

20 A The last one.

21 Q And would that be the common interpretation of a swine
22 production unit; it's swine that is producing other swine?

23 A Yes.

24 Q And they might be at a different stage; they might be
25 breeding, the mother might be gestating, or the mother may

1 be in the act of giving birth, farrowing?

2 A Yes.

3 Q But the piglets that come out themselves are not swine
4 production units because they're not even capable of
5 producing swine, not for a good long time; correct?

6 A That statement is correct, but the pigs are still under
7 the swine production unit.

8 Q Well, it doesn't say that, does it?

9 A Is that not the gestating thing?

10 Q Gestating means the pigs are still on the inside; correct?

11 A Right.

12 Q Once they're out, they're making their own poop, they're
13 eating their own food; correct?

14 A They are doing both those things.

15 Q And there is in fact an animal unit equivalency for any
16 hog, any swine, that's under 55 pounds. That's right in
17 the chart?

18 A That's the pigs that are going somewhere. They've reached
19 that date, they're leaving to another unit.

20 Q But it doesn't say that, does it? It doesn't say that?

21 A It doesn't.

22 Q Near the end of the questioning from Mr. Donahoe you were
23 asked if an applicant meets all the minimum requirements,
24 they've submitted an application, they've got a setback,
25 whatever specific use requirements there are, you were

1 asked whether the board can deny a permit.

2 And you thought about that question for a while and
3 you said they can't do that. That is your belief;
4 correct?

5 A That's how I understand it, yes.

6 Q And is that based on your years of working with the board,
7 that that's how things are done?

8 A The book and the years of experience.

9 Q And how many years have you -- were you working with the
10 Board of Adjustment in Turner County, approximately?

11 A Twenty, 21.

12 Q If an applicant meets all of the minimum specific use
13 requirements, have you ever seen the board deny the
14 permit?

15 A Was your question specific to a type of -- or just a
16 conditional use permit?

17 Q Look at any animal feeding operation-related permit. If
18 they've met all the use requirements that are specific
19 under 13.09, have you ever seen the board deny the permit?

20 A I don't recall a specific one.

21 Q Do board members ever express to you the notion that,
22 look, if the minimums are met, we've got to approve this
23 thing?

24 A No.

25 Q But that's what you've observed even though they haven't

1 said that?

2 MR. DONAHOE: Objection. Leading; argumentative.

3 THE COURT: Overruled. It's cross. Well, no, it's not,
4 but it's an adverse witness to some extent. The question
5 is allowed. Repeat your question.

6 MR. PETERSON: Yes, Your Honor.

7 Q (BY MR. PETERSON) My question is: While no board member
8 has told you that, that we got to approve if all the
9 minimums are met, that is in fact what you have observed
10 over a couple of decades of working with the board?

11 A No one has ever said that. And if they have approved
12 them, they can add conditions, which many and most of the
13 time they do add numerous conditions to a permit.

14 Q Do you know if the ordinances say anything about when
15 there's two ways to look at something and there's a
16 conflict, that you need to apply the most stringent
17 restriction of the two?

18 A I don't recall that.

19 Q Is that kind of a foreign notion to you?

20 A Ask me that again, please.

21 Q Yeah. I mean, is that -- if I were to tell you the
22 ordinances say if there's two ways to look at something,
23 you have to do the most stringent approach; would that be
24 news to you?

25 MR. DONAHOE: I'm going to object as assuming facts in

1 evidence. It also calls for a legal conclusion.

2 THE COURT: Overruled. She's been in that job 20 to 21
3 years. It's just a question concerning her knowledge of
4 the ordinance that's she's applied during that time.

5 MR. DONAHOE: Can I ask a foundational question, Your
6 Honor?

7 THE COURT: You may.

8 VOIR DIRE EXAMINATION

9 Q (BY MR. DONAHOE) If you were presented with something on
10 the specific legal application or interpretation of an
11 ordinance provision, would you seek advice of counsel?

12 A Yes, I would.

13 Q Is that something you'd do on your own, or would that be
14 something that you'd rely upon the interpretation of the
15 State's Attorney or some other legal counsel?

16 A I would go to the State's Attorney first.

17 MR. DONAHOE: I would object as to foundation.

18 THE COURT: Overruled. That's not the question that was
19 asked. It was involving interpretation.

20 MR. DONAHOE: I'd make a further objection because that's
21 counsel's interpretation, and that's not what the
22 ordinance says, and he's not giving her the language of
23 the ordinance. It misstates the ordinance, Your Honor.

24 MR. PETERSON: Well --

25 THE COURT: Based on that, the objection will be

1 sustained, but he can rephrase the question if it's
2 accurate based on what the ordinance is.

3 MR. PETERSON: Number one, the ordinance does state that
4 but --

5 MR. DONAHOE: I disagree, Your Honor, and that's
6 argumentative, and I would like to move to strike that.
7 It's influencing the witness.

8 THE COURT: Counsel's comment will be stricken at this
9 point. It may be his opinion. But, counsel, direct the
10 specific question as to based on the language of the
11 ordinance.

12 MR. PETERSON: I will.

13 REDIRECT EXAMINATION (Resuming)

14 Q (BY MR. PETERSON) Ms. Dubbelde, if I were to tell you that
15 if the regulations in the ordinances conflict or overlap,
16 whichever imposes the more stringent restrictions shall
17 prevail; wouldn't that be news to you?

18 MR. DONAHOE: Objection. That's incomplete, Your Honor.
19 That doesn't describe the specific things that may be in
20 conflict. He needs to read the entire sentence.

21 THE COURT: The objection will be sustained at this point
22 and time.

23 MR. PETERSON: I'll read the entire sentence.

24 THE COURT: Why don't you point her to the language and
25 then she can review the language, then you can ask your

1 question.

2 Q (BY MR. PETERSON) Would you go to Page TC 86 in Exhibit
3 84 (sic), Section 26.04 of the ordinance.

4 THE COURT: 26.04.

5 THE WITNESS: Okay.

6 A (Witness reviews document.)

7 THE COURT: All right. So, it's getting a little heated.
8 Maybe it's the temperature in the room or where we're at
9 and the time of day.

10 The Court will ask the witness: Did you get the
11 opportunity to thoroughly review Section 26.04 of the
12 applicable Turner County ordinance?

13 THE WITNESS: I did read it, yes.

14 THE COURT: All right. Now, you can ask your question.

15 Q (BY MR. PETERSON) I'll just be a little more general.
16 Have you read this section before?

17 A Yes.

18 Q And if there are two ways to look at an ordinance, one
19 that would provide less protection and one that would
20 provide more protection, how would you resolve that
21 conflict?

22 THE COURT: Ma'am, do you have an answer? I know you've
23 been thinking. I don't want to rush you, but are you able
24 to answer that question?

25 A Well, 26.04, the first sentence says, you know, you go by

1 the minimum requirements that are held here for public
2 safety, health, convenience, et cetera. And then it
3 says -- then the question he asked me, were the
4 regulations -- it says the most stringent restrictions
5 shall then prevail.

6 MR. PETERSON: I'll move on to a new subject, Judge.

7 THE COURT REPORTER: Pardon me?

8 MR. PETERSON: I'll move on to another subject.

9 THE WITNESS: Great.

10 THE COURT: I think we all appreciate that.

11 THE WITNESS: I'm sorry.

12 THE COURT: You're fine, ma'am.

13 Q (BY MR. PETERSON) I think this is my last question or two.
14 You were asked by counsel, you know, this is a -- he
15 called it a wean-to-finish operation.

16 Whatever it is, however you want to label it, it's
17 not one of the three that's in the chart in 13.09(D);
18 correct, I think we've established that?

19 A Correct.

20 Q And do you see at the bottom of 13.09(D), this is on Page
21 TC 45 of Exhibit 14, it says: "Note: Other animal types
22 not listed in the above table may be considered on a
23 case-by-case basis."

24 Did I read that correctly?

25 A Yes.

1 Q And do you view that as -- is that up for you to consider
2 on a case-by-case basis or the board to consider?

3 A It would be for the -- I mean, it would still be an
4 application. The board would consider it.

5 Q So if there's an animal type -- type of animal feeding
6 operation that does not meet one of the categories, the
7 board is supposed to make a case-by-case determination.

8 Do you understand that to be what was required here?

9 A That's how it reads, yes.

10 MR. PETERSON: Those are all my questions.

11 THE COURT: Mr. Donahoe.

12 MR. DONAHOE: Thank you, Your Honor.

13 RECROSS-EXAMINATION

14 Q (BY MR. DONAHOE) In regard to that case-by-case
15 determination, that would include applying a more
16 conservative lower number, 540 instead of the 2,500, to
17 decide which of the categories for determining the extra
18 500 animal units for setbacks; correct?

19 A Yes.

20 Q And in regard to the questions about the interpretation of
21 the ordinance and the application of the most strict
22 interpretation, that only applies if there's a conflict
23 with an easement, a covenant, a regulation or some other
24 law; correct?

25 A That's how it read.

1 Q Correct. And you didn't have that in this situation;
2 correct?

3 A Correct.

4 MR. PETERSON: Objection. Leading and legal conclusion.

5 THE COURT: Overruled.

6 Q (BY MR. DONAHOE) Let me ask it this way: Did you --

7 THE COURT: I'll sustain it.

8 MR. DONAHOE: Sorry.

9 THE COURT: Rephrase it. Go ahead.

10 MR. DONAHOE: I apologize, Your Honor.

11 THE COURT: Go ahead.

12 Q (BY MR. DONAHOE) Did you encounter a conflict in the
13 Schmeichel application between a covenant, an easement, a
14 regulation or other law in interpreting the setbacks for
15 the animal units in this case?

16 A No.

17 MR. DONAHOE: Thank you. No further questions.

18 THE COURT: Mr. Deibert.

19 MR. DEIBERT: No questions, Your Honor.

20 THE COURT: Mr. Peterson.

21 MR. PETERSON: No questions, Your Honor.

22 THE COURT: You can step down.

23 THE WITNESS: Thank you.

24 (Witness excused.)

25 THE COURT: Mr. Peterson, do you still have one of these

1 board members here?

2 MR. PETERSON: I believe so, Judge. We could start with
3 that. I will tell you my examination of the remaining
4 members will be substantially shorter. Just because I've
5 covered so much ground I don't -- particularly with it not
6 being a jury.

7 I don't know if it makes sense now to talk about
8 tomorrow's logistics. There's a couple other exhibits I
9 wanted to address. I could call the next person.
10 Whatever Your Honor tells me to do, I will do it.

11 THE COURT: They're here. It would be nice to get through
12 them, but at the same time, depending upon how long it
13 takes, I don't know if I want to start to go down that
14 road with the new witnesses. Why don't you bring up your
15 logistical questions now.

16 MR. PETERSON: So, I still think we're going to have no
17 problem getting all the evidence in on time and getting
18 arguments in tomorrow. Obviously, there's a complicating
19 factor with a fairly lengthy video deposition of our
20 expert witness. I don't know if Your Honor wants to take
21 time to watch that in the morning and then we report at
22 10:30, 11:00, if you want to read the transcript and then
23 watch portions of the video where the witness's demeanor
24 is particularly important, if you want to watch it after.
25 I'm just spitballing ideas.

1 THE COURT: My intention would be to watch the video and
2 follow along with the transcript as I watch it so that I
3 can review the witness's demeanor and response to
4 questions. So, you're telling me it's two hours and 52
5 minutes?

6 MR. PETERSON: That is the run time on it.

7 THE COURT: All right. So we have two more board members?

8 MR. PETERSON: I think there were three. I would expect
9 my examination to be somewhere in the 20, maybe 30 minute
10 range at the outside depending, you know, it depends a
11 little on the witness, but I am going to aim for about 20
12 minutes with each. I don't know what counsel will do.

13 THE COURT: Well, let's just say a half hour, roughly, for
14 each of these three witnesses, so that's an hour and a
15 half.

16 What other witnesses did you plan to call?

17 MR. PETERSON: I want to give it some thought in light of
18 testimony. I may want to call Ethan Schmeichel briefly.
19 He would be, perhaps, a 10 minute witness for my
20 examination. Again, I don't know what they would do with
21 him, but it would be brief if anything is covered.

22 THE COURT: Well, let's go back. In order to make
23 disclosure easier, Mr. Donahoe, did you plan on calling
24 Mr. Schmeichel?

25 MR. DONAHOE: No, Your Honor. The intervenors will call

1 no witnesses.

2 THE COURT: Okay.

3 MR. DONAHOE: We will make Mr. Schmeichel available unless
4 he has a conflict.

5 THE COURT: He's having such a good time, he wants to come
6 back tomorrow. I think that would be best, if you're not
7 going to call him, then there's been full disclosure that
8 the petitioners want to call him, make himself available.
9 I was just wondering whether or not Mr. Peterson needed to
10 call him, technically, could treat him as an adverse
11 witness if he were so inclined. Depending upon how the
12 questioning went, it may not be necessary.

13 The board members technically could be adverse
14 witnesses, but it hasn't been to the point that it's been
15 requested to treat them as adverse witnesses even though
16 we get into leading versus not leading, and for the most
17 part there haven't been that many objections even though
18 there's been leading somewhat back and forth just to
19 expedite the matter. The Court understands that, and I
20 think counsel is trying to do it for those purposes. And
21 it's not a jury, so we get the information out, we get to
22 the point. That's been the whole scope of things.

23 So -- all right. So now you're up to an hour and a
24 half, let's say, 15, an hour and 45. Anybody else you
25 might want to call?

1 MR. PETERSON: I can't think of anybody, Your Honor.

2 THE COURT: And at some point I got to watch two hours and
3 52 minutes of video and follow along on the transcript
4 before we're done.

5 Okay. And Mr. Donahoe is not calling any witnesses?

6 MR. DONAHOE: That is correct.

7 THE COURT: Mr. Deibert.

8 MR. DEIBERT: Nor am I, Your Honor.

9 THE COURT: So the parties are indicating it might be best
10 for the Court to watch the video before we resume with
11 these witnesses, perhaps, Mr. Peterson?

12 MR. PETERSON: Yeah, we could. The expert is exclusively
13 on the issue of standing so I think Your Honor could slot
14 the time in whenever, but there's a few exhibits we'll
15 probably need rulings on that came up, you know, that I'm
16 going to want to offer from that deposition, but that will
17 be a pretty short process.

18 THE COURT: So after the review of the video deposition,
19 then we can address the housekeeping on any exhibits that
20 would be accepted or not be accepted.

21 MR. PETERSON: I think before we leave today we should
22 make sure that the thumb drive works for Your Honor to
23 play the video. If it does not, I will figure out a Plan
24 B that --

25 THE COURT: All right. So, I'm just trying to decide how

1 early I want to try to be here tomorrow to start the
2 process, but yet still get you here in an appropriate
3 manner of time to try to get through some of this.

4 It gets complicated because I'm also on call, so if I
5 don't get two or three calls in the middle of the night
6 like I did last night I might be more receptive to being
7 here early. Right now I'm not thrilled to be here real
8 early tomorrow in light of the way the week has already
9 gone.

10 Nonetheless, let's have everybody here to resume with
11 witnesses at 10:30. We will be close to being done, if
12 it's an hour and a half, hour and 45 minutes. We would
13 try to get through all the witnesses then by lunch, maybe
14 take a little later break, come back slightly later, but
15 then we'd come back and it would be time to argue.

16 Mr. Peterson, do you agree with that schedule?

17 MR. PETERSON: Yes, Your Honor.

18 THE COURT: Mr. Donahoe.

19 MR. DONAHOE: Yes, Your Honor. Thank you for your
20 accommodations.

21 MR. DEIBERT: Good by me, Your Honor.

22 THE COURT: I'm still not sure it's good by me, but I
23 think in light of it that's probably our best game plan at
24 this point, so then the witnesses are here in the morning.
25 Even though I'm going to make them come back, I think

1 that's the best way to proceed.

2 Before we leave, Mr. Peterson and Mr. Donahoe and
3 Mr. Deibert, if you would like to come into chambers, let
4 me see if that flash drive is easily playable on the
5 Court's laptop. And I always got to use the right term
6 because IT and the Help Desk clarify between I have a
7 tablet that leaves here, I have a laptop that's in there
8 plugged in all the time. So if I use the wrong term they
9 get mad at me for, well, what do you want fixed, what's
10 the problem. Anyway ...

11 So before you folks leave we'll see if I have the
12 right program, if it pulls up, if I get to steal
13 Mr. Peterson's laptop and watch it on his, we'll figure it
14 out before the parties leave. It will be off the record
15 in chambers. So that if I get here by 7:30, I can start
16 the process and be done by the time everybody gets here or
17 very close thereto.

18 Mr. Peterson, any other comments or anything else for
19 the record at this time?

20 MR. PETERSON: The only other thing for the record,
21 Exhibits 11A, 12A and 13A are the audio recordings. I
22 have those on a separate flash drive so I will just slap a
23 sticker on it.

24 THE COURT: All right. Label them. Make sure the court
25 reporter has those or we put them up here on the desk.

1 We've made our record with the submission of the
2 transcripts and the audio tapes. I believe counsel has
3 highlighted for the Court the portions of those that you
4 felt were relevant or pertinent that you wanted the Court
5 to consider.

6 I guess I'm going to ask: Did you want me to review
7 those as well or is that maybe not necessary at this
8 juncture?

9 MR. PETERSON: I think probably the most critical parts
10 would be the last three pages of Exhibit 12 and Exhibit
11 13. It's about nine or ten pages. And that would be the
12 deliberations of the board as they are deciding what to
13 do.

14 THE COURT: How about if we do this: When you argue,
15 because they're already going to be into evidence, you
16 highlight again the portions that you want me to focus on.

17 MR. PETERSON: Will do.

18 THE COURT: Mr. Donahoe, is that fair to you?

19 MR. DONAHOE: Yes, Your Honor.

20 THE COURT: Because I really don't want to watch and
21 listen to more tape and look at another transcript if I
22 already have three hours to look at so ...

23 All right. As long as you feel that's fair to you?

24 MR. PETERSON: Absolutely, Judge. Thank you.

25 THE COURT: Okay. All right. Anything else you can think

1 of, Mr. Peterson?

2 MR. PETERSON: No, Your Honor.

3 THE COURT: Mr. Donahoe.

4 MR. DONAHOE: Yes, Your Honor. One thing related to the
5 transcript of the audio recording of the December 2020
6 hearing. The parties agreed to use a recording that was
7 made by the local newspaper called *The New Era*, and that
8 was simply a recording that was made by one of the
9 reporters, and there are areas that the recording didn't
10 pick up what was being said, and the parties have all
11 acknowledged that. So I want to make sure that that's in
12 the record and that no one is disputing that it does not
13 contain all of the things that were stated at that
14 hearing, but in light of that, it's the best information
15 that we have on the specific things that are recorded.

16 So there will be areas that were testified about by
17 the petitioners that are not in the transcript, and I
18 don't think there's any dispute about that. It just
19 didn't get recorded.

20 THE COURT: And you've confused me because you said the
21 hearing on December 20th, 2020. The only hearing I've
22 heard so far is December 8th, 2020. Was there another
23 hearing 12 days later?

24 MR. DONAHOE: No. I must have been punchy, Your Honor. I
25 meant December of 2020.

1 THE COURT: All right. And the only hearing was on
2 December 8th of 2020?

3 MR. DONAHOE: That is correct.

4 THE COURT: Okay. I was just making sure I wasn't missing
5 something.

6 Mr. Deibert, do you agree with the comments
7 Mr. Donahoe has made on the record concerning the
8 audiotape and the situation surrounding that?

9 MR. DEIBERT: Yes, Your Honor.

10 THE COURT: Mr. Peterson, do you also agree?

11 MR. PETERSON: Yes, and I would just add one just to be a
12 little more specific. There was a gap somewhere either at
13 or near the end of the applicant's presentation where the
14 recording stopped, and then the next recording picks up in
15 the middle of Mr. Almond talking so ...

16 Some of the public comment, including that from my
17 petitioner, my clients, just was not recorded so ... That
18 is the missing gap based on I think just an easy read of
19 the transcript.

20 THE COURT: The Court will note the problems with the
21 audiotape and the gap in the record that exists from the
22 proceeding that was conducted before the Board of
23 Adjustment, but it is the best record we have so we'll
24 have to go with that.

25 It does not appear it's going to make a significant

1 impact on the Court's determination in this matter because
2 the parties have all testified or alluded to or brought
3 out things that may not show up in the transcript or on
4 that recording, but you've been given every opportunity to
5 discuss those, present that to the Court, and I don't
6 think there's been any objections. I think the only thing
7 that came up would be witnesses' recollections whether
8 things were said or not, which is standard so ...

9 All right. Mr. Peterson, anything else?

10 MR. PETERSON: No, Your Honor.

11 THE COURT: Mr. Donahoe.

12 MR. DONAHOE: No, Your Honor. Thank you.

13 THE COURT: Mr. Deibert.

14 MR. DEIBERT: No, Your Honor.

15 THE COURT: All right. Unfortunately, I guess,

16 Mr. Deibert, you get to tell the remaining three board
17 members they have to come back and be here by 10:30, and
18 we'll resume in the courtroom at 10:30 tomorrow.

19 We will go see if we can make the flash drive play.
20 I'll have to decide if I want to stay longer now or come
21 in the morning early, one way or the other, so let's see
22 if we can make it work.

23 We'll be in recess.

24 (Proceedings recessed on August 5, 2021, at
25 4:57 p.m.)

COUNTY OF McCOOK)

<p>MR. DEIBERT: [53] 4/17 4/24 6/15 21/6 24/3 34/15 34/17 48/13 54/5 55/2 59/23 61/5 63/21 64/9 70/12 71/1 71/9 71/18 72/5 87/10 89/21 90/2 94/8 135/22 137/16 138/6 138/14 138/16 139/7 144/2 151/24 152/1 159/9 159/14 161/19 162/11 162/21 163/6 163/9 167/8 167/10 168/5 177/13 184/1 188/3 191/3 191/8 228/3 238/19 242/8 243/21 247/9 248/14 MR. DONAHOE: [104] 4/19 6/14 21/5 24/2 29/2 34/23 35/4 45/11 45/13 45/16 46/21 49/16 51/1 52/11 54/3 54/25 59/22 61/3 61/16 61/23 62/6 63/16 66/11 67/19 67/23 68/3 68/5 70/11 70/25 72/24 84/11 91/7 91/16 91/25 92/5 92/12 94/7 98/17 105/12 107/5 107/13 108/3 110/21 115/3 115/15 116/14 117/1 117/3 135/21 137/14 138/4 139/6 143/13 143/18 151/18 158/8 158/25 159/5 161/17 162/5 162/20 163/5 169/17 171/3 174/19 175/6 177/11 178/1 181/24 183/24 188/2 197/13 206/12 206/20 207/10 212/3 216/24 217/2 219/15 221/5 221/9 224/7 224/9 228/1 232/2 232/25 233/5 233/17 233/20 234/5 234/18 237/12 238/8 238/10 238/17 240/25 241/3 242/6 243/19 245/19 246/4 246/24 247/3 248/12 MR. 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<p>yep [4] 140/19 141/8 150/4 165/16</p> <p>yes [368]</p> <p>yet [4] 35/9 80/3 116/3 243/2</p> <p>you [1122]</p> <p>you agree [1] 197/17</p> <p>you'd [20] 5/9 5/10 45/23 56/6 80/25 95/2 103/5 116/15 134/5 138/19 138/19 144/18 164/24 180/8 184/10 203/15 203/18 221/23 233/13 233/14</p> <p>you'll [4] 150/21 152/16 157/20 178/8</p> <p>you're [69] 7/15 18/8 30/22 33/14 40/5 74/7 76/7 78/15 78/19 91/14 104/2 108/14 108/15 108/19 111/15 111/19 111/19 114/9 115/2 115/19 118/2 118/18 122/7 124/15 125/19 126/6 126/17 128/14 128/20 128/24 129/1 129/9 133/6 133/18 135/3 135/3 135/4 136/6 136/13 137/4 143/15 147/16 155/18 162/1 169/23 176/21 182/23 193/11 194/12 194/14 194/15 196/8 196/11 198/3 199/13 200/4 201/21 203/14 203/14 203/22 207/24 209/6 215/18 216/1 219/16 236/12 240/4 241/6 241/23</p> <p>you've [46] 13/12 15/7 16/1 28/4 35/9 35/10 36/25 43/22 46/9 51/11 51/12 69/10 71/21 80/20 87/21 88/8 98/6 101/5 102/4 115/2 129/6 130/3 132/18 142/14 142/16 143/7 169/14 169/15 177/21 196/11 199/17 199/17 199/21 199/25 201/16 202/9 204/18 207/15 209/5 213/15 221/19 222/2 231/25 235/22 246/20 248/4</p> <p>young [1] 119/21</p> <p>your [378]</p> <p>yours [2] 130/15 132/2</p> <p>yourself [11] 5/18 56/14 95/10 139/12 142/22 143/7 143/8 143/16 181/5 184/18 202/10</p>	<p>Zomer's [1] 44/15</p> <p>zoned [1] 78/20</p> <p>zoning [26] 13/25 36/15 36/22 37/1 40/16 40/18 44/18 77/4 77/18 77/21 77/25 92/20 111/17 112/7 112/8 112/15 113/19 148/15 157/1 163/25 171/6 173/19 184/25 214/6 223/1 225/11</p>			

1	STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	:SS	
2	COUNTY OF TURNER)	FIRST JUDICIAL CIRCUIT
3	* * * * *	
		*
4	Jeffrey K. Powers and	* 62CIV21-000003
	Vicky Urban-Reasonover,	*
5		*
	Petitioners,	* COURT TRIAL
6		*
	-vs-	* Volume 2 of 2
7		* (Pages 250 - 470)
	Turner County Board of	*
8	Adjustment,	* August 6, 2021
		*
9	Respondent,	*
	-and-	*
10		*
	Steve and Ethan Schmeichel,	*
11	and Norway Pork OP, LLC,	*
		*
12	Intervenors.	*
		*
13	* * * * *	
14	BEFORE:	The Honorable Chris S. Giles
		Judge of the Circuit Court
15		For the First Judicial Circuit
		Salem, South Dakota
16	APPEARANCES:	Mr. Mitchell A. Peterson
17		Davenport, Evans, Hurwitz & Smith, L.L.P.
		Sioux Falls, South Dakota
18		Attorney for Petitioners.
19		
		Mr. Douglas M. Deibert
20		Cadwell, Sanford, Deibert & Garry
		Sioux Falls, South Dakota
21		Attorney for Respondent.
22		
		Mr. Brian J. Donahoe
23		Donahoe Law Firm, P.C.
		Sioux Falls, South Dakota
24		Attorney for Intervenors.
25		

1 PROCEEDINGS: The above-entitled matter came on
 2 for a Court Trial on the 6th day of
 3 August, 2021, commencing at the hour of
 4 10:55 a.m. in the courtroom of the McCook
 5 County Courthouse, Salem, South Dakota.

* * * * *

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1 THE COURT: Please be seated. The Court had the
2 opportunity to review the videotape deposition of
3 Dr. Bakhtari from Scentroid, and so I did get that
4 opportunity this morning. I do note the flash drive is
5 not marked. We're going to need to mark this at some
6 point here.

7 It's my understanding there are probably some
8 procedural and housekeeping matters to address at this
9 time.

10 Mr. Peterson, you can go first.

11 MR. PETERSON: Your Honor, there are two exhibits
12 referenced in Dr. Bakhtari's deposition. It's basically
13 his two reports, Exhibits 5 and 6, and we would offer
14 those at this time.

15 THE COURT: Any objection?

16 MR. DONAHOE: No objection.

17 MR. DEIBERT: No objection, Your Honor.

18 THE COURT: Exhibits 5 and 6 will be received.

19 MR. PETERSON: Our petition should be part of the court
20 record, but we did mark it as an exhibit, Exhibit 1. So
21 I'd offer that just to probably make it easier to keep
22 everything together.

23 THE COURT: Any objection?

24 MR. DEIBERT: No objection.

25 MR. DONAHOE: No objection.

1 THE COURT: It will also be received.

2 MR. PETERSON: I think those are all the housekeeping
3 matters. There were a few objections made during
4 Mr. Donahoe's questioning of Dr. Bakhtari, but I don't see
5 a need to make any further legal argument, and Your Honor
6 can exercise discretion in giving the answers to those
7 questions whatever weight the Court deems appropriate, in
8 my view.

9 THE COURT: Mr. Donahoe, any questions on that or
10 comments?

11 MR. DONAHOE: No, Your Honor. We'll stand on the
12 objections as made.

13 THE COURT: Mr. Deibert.

14 MR. DEIBERT: That's fine.

15 THE COURT: I do want to make sure we have all of our
16 exhibits. So, we now have 1.

17 Exhibit 2 is petitioners' expert disclosures. Do you
18 officially want to offer that? I don't think it has been
19 offered or received.

20 MR. PETERSON: I don't -- you know, with any trial you
21 don't know exactly, you know, I didn't know if there would
22 be an issue about timeliness or adequacy of disclosure so
23 I marked some things. I don't think 2, 4 or 7 are needed
24 in light of what's come out at trial.

25 THE COURT: All right.

1 MR. PETERSON: So I will not be offering those.

2 THE COURT: All right. We'll pull 2, 4 and 7 from the
3 binder of the official exhibits. I just wanted to make
4 sure I have the accurate information. Otherwise, I think
5 everything else in the binder has been offered and
6 received.

7 MR. PETERSON: There's a couple sandwiched in the middle,
8 Judge, before the transcript and audio recordings. 9 and
9 10, I don't anticipate offering.

10 THE COURT: All right.

11 MR. PETERSON: 8, I have not offered, but I would offer.
12 It's the county's discovery responses, and I'll probably
13 cover that with a couple of the witnesses today.

14 THE COURT: All right. We'll probably get to those then
15 this morning.

16 And then we do have 17, 18, 19, 20 and 21 have been
17 offered and received.

18 Are we going to mark the video deposition as 22?

19 MR. PETERSON: I think that's appropriate, Judge.

20 THE COURT: You have the stickers so why don't you grab a
21 sticker and take care of that.

22 (Petitioners' Exhibit Number 22 marked for
23 identification.)

24 MR. PETERSON: Thank you.

25 THE COURT: Thank you. The parties stipulated previously

1 to the Court reviewing that. Officially, at this time,
2 Mr. Peterson, do you wish to offer Exhibit 22, the
3 videotape deposition of Dr. Bakhtari?

4 MR. PETERSON: Yes, Your Honor.

5 THE COURT: Any objections?

6 MR. DONAHOE: No objection.

7 MR. DEIBERT: No objection, Your Honor.

8 THE COURT: All right. It's officially received.

9 All right. I think for housekeeping wise, that takes
10 care of everything until we get to 8, 9 or 10.

11 MR. PETERSON: The only other question I'd have just for
12 review purposes, I don't know if it needs to be an
13 exhibit, but I did bring a physical copy of Dr. Bakhtari's
14 deposition transcript, and maybe we ought to just mark
15 that just so it's easy to find later in the record.

16 THE COURT: All right. You put that in a binder for the
17 Court, and I didn't need to follow along because it was
18 pretty clear to understand. There are the four-to-a-page
19 version and the larger version. Do you want to mark one
20 of these as 22A?

21 MR. PETERSON: I think that would be appropriate.

22 THE COURT: Preference on which one you want to mark?

23 MR. PETERSON: Why don't we -- why don't we mark the
24 single page. The reviewing Court may like the bigger
25 print. It might be a little easier to read for some

1 folks.

2 THE COURT: Why don't you prepare an exhibit sticker that
3 says 22A. Probably should put it on the front page
4 inside.

5 (Petitioners' Exhibit Number 22A marked for
6 identification.)

7 THE COURT: Do you wish to offer Exhibit 22A to supplement
8 Exhibit 22?

9 MR. PETERSON: Yes, Your Honor.

10 THE COURT: Any objections?

11 MR. DONAHOE: No objection.

12 MR. DEIBERT: No objection.

13 THE COURT: It will be received.

14 Any other housekeeping matters on exhibits or
15 otherwise that we need to address?

16 MR. PETERSON: Not from my perspective, Your Honor.

17 THE COURT: Mr. Donahoe.

18 MR. DONAHOE: Yes, Your Honor. I had two exhibits that
19 were mentioned in the deposition of Dr. Bakhtari. Exhibit
20 A is a part of the spreadsheet that is referenced
21 regarding the Purdue setback model.

22 And Exhibit B is a publication from the Internet that
23 was produced by Purdue University in a publication called
24 "Swine Today," dated December 28th, 1997.

25 And we would offer Exhibit A and Exhibit B. Copies

1 have been provided to counsel in conjunction with the
2 deposition.

3 THE COURT: Mr. Peterson, any objection?

4 MR. PETERSON: Well, Exhibit A, I would object to because
5 it's a portion of the spreadsheet so it's incomplete; but
6 additionally, I think it's misleading. The percentage
7 that this spreadsheet is calling, quote, odor-free is not
8 defined at what level it's odor-free. Is it the 75 odor
9 units, is it 10, is it seven. So, I'm not sure if it
10 really has any meaning lacking that information. So I
11 think it would not be admissible under 403.

12 THE COURT: Mr. Deibert, any objection?

13 MR. DEIBERT: I will join in whatever position Mr. Donahoe
14 takes.

15 THE COURT: A and B will be received.

16 MR. DONAHOE: Your Honor, for completeness I have prepared
17 an exhibit marked as C, which produces the rest of the
18 spreadsheet from which Exhibit A was taken, and it would
19 show that particular part's position on the first page and
20 then carries over on the second page for the entire page.
21 I would offer Exhibit C as well.

22 THE COURT: Any objection?

23 MR. PETERSON: Well, I'm going to object based on
24 foundation. There's no witness to lay the foundation for
25 this.

1 Additionally, timeliness and then ultimately even
2 with the full sheet we still have the same problem of it
3 doesn't define what odor-free means or annoyance-free
4 means. So it's not relevant. Under 403 it's not
5 admissible.

6 THE COURT: The Court acknowledges the objections. It
7 will be received to make a more complete record. I do
8 think it has minimal relevance. It does relate, however,
9 to the questions that counsel asked Dr. Bakhtari. I
10 understand, Mr. Peterson, your issue with what are we
11 measuring, is it an annoyance complaint level at 10 odor
12 units or is it 75 odor units, are we talking 99 percent,
13 are we talking 91 percent. So I did pay attention to the
14 deposition. I do have the right terminology I think
15 that's at issue here.

16 But to make a more complete record, I think it's
17 appropriate to include it because there were questions
18 asked regarding that data. So it will be received.

19 Mr. Donahoe, any other housekeeping aspects?

20 MR. DONAHOE: Just one last thing on Exhibit C, Your
21 Honor, to make sure we have a complete record. So that
22 everyone understands, what I did was I emailed a link to
23 the spreadsheet that is available on the Internet for
24 Exhibit C. And so anyone who wanted to look at that --
25 this was emailed to both Mr. Deibert and Mr. Peterson for

1 them to review to see where I took the information that
2 was discussed with Dr. Bakhtari, and they could also see
3 what's included in Exhibit C. So just to put that on the
4 record. Thank you.

5 THE COURT: It is so noted.

6 All right. Are we to a point to resume calling our
7 witnesses?

8 MR. PETERSON: Yes, Your Honor.

9 THE COURT: Does counsel agree?

10 MR. DONAHOE: Yes, Your Honor.

11 MR. DEIBERT: Yes.

12 THE COURT: All right. Mr. Peterson, you can call your
13 next witness.

14 MR. PETERSON: We will call the next board member who's
15 available.

16 MR. DEIBERT: I have three other board members available.

17 (Pause.)

18 THE COURT: Sir, if you'd please come forward.

19 MR. DEIBERT: This is Tony Champa. Mr. Champa may want to
20 spell his last name for the court reporter.

21 THE COURT: We will get there in a moment. Thank you.

22 Sir, if you'd please raise your right hand.

23 ANTHONY CHAMPA,

24 called as a witness, having been first duly sworn, was
25 examined and testified as follows:

1 THE COURT: Please be seated.

2 DIRECT EXAMINATION

3 Q (BY MR. PETERSON) Good morning. Please introduce
4 yourself.

5 A Good morning. My name is Anthony Champa.

6 Q Do you want me to call you Anthony, Mr. --

7 A You can call me Tony.

8 Q Tony?

9 A Yes, sir.

10 Q Tony, were you one of the members of the Board of
11 Adjustment who voted to approve the permit at issue in
12 this case?

13 A I was.

14 Q And are you an appointed member of the planning commission
15 or are you an elected county commissioner?

16 A I'm an elected county commissioner.

17 Q I don't know that I asked Mr. Miller this, but is he
18 appointed or is he elected?

19 A Mr. Miller?

20 Q Yeah.

21 A He is an elected official.

22 Q Were you present during the entire hearing on December 8
23 of 2020, related to this permit?

24 A Yes.

25 Q What did you do prior to that hearing in terms of visiting

1 with anyone, any communications orally?

2 A As far as who?

3 Q The subject matter of the permit.

4 A No.

5 Q I mean, other than, hey, we're going to have a meeting,
6 are you available?

7 A Right.

8 Q The substance of the hearing and the substance of the
9 permit, you didn't discuss with anyone prior to the
10 hearing; is that correct?

11 A No, sir.

12 Q Did you read anything to prepare for the hearing?

13 A Right. We receive a packet at least a month ahead of
14 time, two weeks ahead of time, and you go through the
15 packet to make sure that -- and do your homework.

16 Q How far ahead of the meeting did you receive the packet
17 for this case?

18 A I can't be for certain, but within a week.

19 Q There was approximately 100 pages of information in the
20 form of expert reports or appraisal reports, odor
21 dispersion modeling report.

22 Did you read that prior to the hearing?

23 A I'm not familiar with those.

24 Q How much time do you think you spent reviewing materials
25 prior to the permit hearing?

1 A Probably a couple hours.

2 Q When is the first time, if ever, that you made your own
3 determination as to what the appropriate setback would be
4 for this particular CAFO?

5 A After I received the information from Faye Dubbelde on the
6 calculations of what it should be.

7 Q Okay. What information did she provide to you that
8 explained what the setback was and how it was determined?

9 A It's explained in the ordinance that if you have a large
10 CAFO, what the setbacks are for that.

11 Q Okay. So --

12 A After she did the calculations for the CAFO and it's
13 spelled out that it's, you know, the half-mile distance
14 for it.

15 Q So, did Faye actually provide her calculation to you?

16 A As far as?

17 Q How she determined what the setback was?

18 A I don't remember that.

19 Q Would that be in the packet of materials that you were
20 provided if it in fact exists?

21 A I assume so. But it does exist, the packet.

22 Q Well, I know the packet does. I had a difficult time --

23 A But I -- I can't be for sure whether it's in that packet
24 or not.

25 Q Okay. And it's in the records, Exhibit 14. I couldn't

1 find any sort of calculation done by Faye anywhere.

2 A Uh-huh.

3 Q Do you think she actually did that and provided it to you?

4 A I'm not for sure that it was in the packet. That's all I
5 can tell you.

6 Q Did you do your own calculation of what the setback --

7 A No.

8 Q -- should be?

9 A I did not do my own calculation.

10 Q At any point and time, have you calculated what the
11 setback is supposed to be?

12 A No, sir.

13 Q Okay. Do you have Exhibit 11 in the binder in front of
14 you? It's the first part of the transcript of the
15 December 8th hearing. I'll help you find it.

16 Could you turn to Page 4, please.

17 A (Witness complies.)

18 Q And at Line 22 it says: "Board Member: I did work the
19 animal unit numbers. I worked the setbacks. Going
20 through their material and then using our animal unit
21 pages, they meet the setbacks to -- for the items that are
22 described in the report."

23 Did I read that correctly?

24 A You read it correctly.

25 Q Is that Faye that's talking there?

1 A I believe that there's a lot of times throughout these
2 transcripts that it's Faye and not a board member.

3 Q Right. In the transcript where it says "Board Member,"
4 based on your view, that just means somebody on behalf of
5 the board is talking. It might be a member, it might be
6 Faye?

7 A Yes, sir.

8 Q And it doesn't distinguish between the precise person?

9 A Correct.

10 MR. PETERSON: Okay. And to be clear, this transcription
11 that starts at Line 22 on Page 4 of Exhibit 11, is at
12 approximately the 7:20 or 7:25 mark of Exhibit 11A, the
13 actual recording. So I'd like to play just that portion
14 there to confirm that it is Faye who's talking. Let me
15 try to make sure everybody can hear.

16 (Portion of Petitioners' Exhibit 11A published in
17 open court.)

18 Q (BY MR. PETERSON) Were you able to hear that, Tony?

19 A I was.

20 Q Was that Faye talking?

21 A Yes, sir.

22 Q Okay.

23 MR. DEIBERT: I couldn't hear that, counsel. So was that
24 at Page 4, Line 22?

25 MR. PETERSON: Correct. And it goes through Page 5, Line

1 1.

2 MR. DEIBERT: Okay. Thank you.

3 Q (BY MR. PETERSON) So, Tony, at the hearing Faye tells you
4 and the other members and everyone at the hearing that she
5 did the workup, figured out the setback and everything was
6 good to go, basically?

7 A Yes, sir.

8 Q But in that particular testimony we just looked at and
9 listened to, she doesn't explain the calculation at least
10 at that point; correct?

11 A No, sir.

12 Q Do you know at any point in the hearing if she actually
13 went through the details of how she calculated the
14 setback?

15 A I don't remember.

16 Q Okay. And I didn't see it anywhere in the transcripts
17 that we have available.

18 A Yeah, for what I've read through this stuff that -- I
19 don't see that either.

20 Q Okay. And you don't remember that happening either, do
21 you?

22 A No, sir.

23 Q Do you have Exhibit 20? It's probably loose in the
24 binder.

25 A Okay.

1 Q Okay. So Exhibit 20 extracts three portions of the
2 ordinances related to animal feeding operations and just
3 puts them together for a little bit easier reference, and
4 the ordinance sections are referenced there.

5 As we use this today for questioning, if you have any
6 hesitation about the accuracy, the actual ordinances are
7 in the book, too, if you want to look at that. So I just
8 would offer that to you as you're answering questions
9 today. Understood?

10 A Yes, sir.

11 Q Okay. Under Section 13.09(D), my understanding of the
12 ordinances is that's a big chart that shows all sorts of
13 different types of animal feeding operations and how many
14 head of each type it takes to get to a small, medium or
15 large. Is that a reasonable description?

16 A Yes, sir.

17 Q And on Exhibit 20 we've pulled out the three swine-related
18 animal feeding operations and they're listed there, and
19 they are finisher swine, nursery swine and
20 farrow-to-finish. Do you see that?

21 A Yes, sir.

22 Q What type of facility is this permit for?

23 A For a farrow-to-wean.

24 Q Is that listed in this chart?

25 A I don't see that.

1 Q And if you go to the full ordinance -- let me get a page
2 number for you -- in Exhibit 14 it's the big one kind of
3 at the back of the binder. In the bottom right corner as
4 you flip through you'll see page numbers, TC for Turner
5 County?

6 A Right.

7 Q Section 1309(D) starts on TC 44 and goes onto Page 45.
8 Would you please let me know when you get to that?

9 A I'm there, sir.

10 Q Okay. On 45, so after this animal feeding operation
11 sizing chart, there are some notes below. Do you see
12 those?

13 A On the end of it?

14 Q Yes.

15 A One, two and three notes?

16 Q Correct. And there's something that says "Note" as well;
17 right?

18 A Right, sir.

19 Q And under 1309(D) it says: "Note: Other animal types not
20 listed in the above table may be considered on a
21 case-by-case basis." Do you see that?

22 A I see what you wrote -- read, yes, sir.

23 Q And this case-by-case determination, that didn't happen in
24 this case; did it?

25 A Not that I'm aware of, sir.

1 Q Basically, when Faye said, hey, they meet whatever
2 requirements on the setbacks, just given her longevity,
3 you took that to be true?

4 A We took her expertise, as we always do.

5 Q And the petitioners at that hearing challenged whether the
6 setback was being calculated correctly.

7 Do you remember the petitioners making that
8 challenge?

9 A Yes, sir.

10 Q And once the public comment was closed we've got about 10
11 pages of deliberations among the board members, and I
12 don't see setback being discussed anywhere.

13 Do you recall actually resolving that conflict about
14 the setback calculation at the hearing?

15 A As far as any -- doing any calculations or anything like
16 that?

17 Q Right.

18 A No, sir.

19 Q And was there any -- I guess, did you -- were you aware
20 that what was being asked for isn't something on the
21 chart, this farrow-to-wean operation?

22 A I'm not aware of what the verbiage is as far as what falls
23 up under each of those -- those line items in the -- in
24 the ordinance. The distinction of it is, you know,
25 different no matter how you perceive it.

1 Q And in your view when an applicant asked for a permit for
2 a type of facility that's not on the 13.09(D) chart and
3 there needs to be a case-by-case consideration, is that
4 something that Faye is supposed to do or something that
5 the board is supposed to do?

6 A I can't answer that, sir.

7 Q Do you have Exhibits 19 and 21 available to you?

8 A I don't know that I have 19. I see 21 here. Is this what
9 you considered 19 (indicating)? 20 and 21 are marked.

10 Q Yes. I'm just going to go ahead and write 19 on your copy
11 just to keep it clear. So Exhibits 19 and 21 demonstrate
12 some different ways to calculate the setback under the
13 ordinances that result in a setback where Vicky's home is
14 within the setback.

15 Are you aware of these calculations being discussed
16 with Faye and Mr. Miller at the trial in this case
17 yesterday?

18 A Am I aware that her house was discussed within the
19 setback?

20 Q Yeah. Are you aware of the testimony that took place in
21 this court even though that you've been sequestered?

22 A I'm not aware of it, no, sir.

23 Q So, after the first break with Mr. Miller, did all the
24 commissioners, Faye and Mr. Schmeichel sit around a table
25 out there doing calculations for a setback?

1 A I wasn't involved in it, sir.

2 Q Did you hear about that?

3 A I saw that they were around the table, but being a
4 professional that I am, I walked away from the table
5 because I didn't want to be involved in it. So I can't
6 tell you what was being discussed.

7 Q Would you agree that if, in fact, the proper setback
8 calculation puts Vicky's house within the setback, that
9 you can't grant the permit?

10 A Would you rephrase the question.

11 Q Sure. If, in fact, the correct calculation of the setback
12 puts Vicky's house within the setback, too close to the
13 CAFO, are you able to grant a permit?

14 A I believe that you have the correct setback already.

15 Q Right. So I'm just saying if -- particularly given that
16 you haven't calculated it yourself -- if the Court
17 determines a different setback is applicable and Vicky's
18 house is too close, do you believe you have authority to
19 grant the permit anyway?

20 A Do I believe that if -- if -- let's say it's not Vicky.
21 Let's say that it's something else. If it doesn't fall
22 within the setbacks, if it's not beyond the setbacks, you
23 cannot grant the permit.

24 Q There would not be authority to grant a permit --

25 A Right.

1 Q -- if there's a house in violation of a setback?

2 A Right.

3 Q Or any other item that's on the setback list?

4 A I'm not -- I'm not going to say anything whether it's
5 Vicky or not. I'm saying that if something comes before
6 the board and it doesn't meet the setbacks, we can't
7 approve it.

8 Q On the other hand, if an animal feeding operation meets
9 all the setbacks and all of the other specific
10 requirements related to animal feeding operations, so
11 they've met them you think, do you believe you have the
12 authority to deny the permit anyway?

13 A I believe we do, yes.

14 Q Have you ever actually done that?

15 A I've only sat in three and, no, they were not denied.

16 Q Are you aware of any situation in which the Turner County
17 Board of Adjustment has exercised its discretion to deny
18 an animal feeding operation conditional use permit when
19 all of the minimums have been met?

20 A In -- in a time frame of what, 10, 15 years?

21 Q Whatever your memory is.

22 A Yeah, I -- I don't -- I wasn't around here. I was in the
23 military for 30 years, so during that time frame had there
24 been -- I know that there is large CAFOs that were never
25 built because there was -- you know, that were denied. Do

1 I know anything about them? I do not, sir.

2 Q So, within your personal memory, have there been animal
3 feeding operation permits denied for one reason or
4 another?

5 A Yes.

6 Q And of the ones that have been denied, are they because
7 they've not met a setback or some other minimum
8 requirement specific to that particular use?

9 A I can't answer that.

10 Q For a large animal feeding operation, do you believe the
11 board needs to ensure that odor is controlled?

12 A I think that the board needs to take the certain steps
13 that are outlined in the ordinance to make sure that it's
14 done such as trees and stuff like that, yes.

15 Q So, do you believe it is your obligation and a requirement
16 under the ordinances to make sure that odor is controlled
17 from an animal feeding operation that's being permitted?

18 A At the time before the permit or during the whole time
19 that the facility is in operation?

20 Q Well, your one time to take action and oppose conditions
21 is at the permit phase; correct?

22 A Right.

23 Q So, when someone is asking you for a permit, do you
24 believe that the board is required as part of issuing that
25 permit to make sure odor is controlled?

1 A By imposing certain conditions.

2 Q Correct.

3 A Yes, sir.

4 Q How did the board control odor in this case?

5 A I believe one of the things was that it's a deep pit.

6 That was one of the -- that was brought to us that it was
7 going to be that way, and another thing is the six rows --
8 they came with the six rows of trees.

9 Q What basis did you have to determine that trees and a deep
10 pit would control odor?

11 A On the deep pit, I don't have any -- any expertise
12 knowledge on the deep pit. And I'm just going off of what
13 the ordinance requires. It requires four, but they came
14 with six.

15 Q So, that's what I'm asking you is how do you -- do you
16 have any other basis for believing that you controlled
17 odor other than what you just told me?

18 A I'm not an expert on odor.

19 Q Did the board require this applicant or these applicants
20 to use pit additives?

21 A I don't believe that we required them to do anything such
22 as that. There's -- I think there's three conditions that
23 we wanted them to do, and not one of the conditions I
24 believe that, to my memory, that we said you have to use
25 pit additive.

1 Q Just to be clear, Exhibit 14, Page TC 310, I'll just pull
2 it out. Does that contain the conditions that were
3 imposed by the board?

4 A It does, sir.

5 Q Okay. Thank you. What if planting a few rows of trees
6 and having a deep pit doesn't control the odor, then what?

7 A I can't answer that for you, sir.

8 Q Who are the owners of the Norway Pork entity that received
9 a permit in this case?

10 A The owners of the -- of the -- that are getting it are
11 Steve and Ethan Schmeichel.

12 Q Who else are owners of the LLC?

13 A I have no idea who they are.

14 Q Do you know that there are other owners, though?

15 A I believe that there's other investors. I don't know that
16 they're named as owners.

17 Q Did you consider any of the past violations of any of the
18 other folks other than the Schmeichels who were involved
19 in this project?

20 A I've seen no violations.

21 Q Do you even know the names of the other people involved?

22 A I do not know them.

23 Q So if you don't know who they are, you can't know if
24 they've got violations?

25 A It's never been brought to my attention.

1 Q And you didn't go ask them either, did you?

2 A No, sir.

3 Q If you want to take a look at Exhibit 12, which is the
4 transcript of the second recording of the permit hearing
5 from December of 2020.

6 A It starts with "Mr. Powers"?

7 Q If you would go to Page 13 of Exhibit 12.

8 A I'm there.

9 Q And it appears at that point near the bottom of Page 13,
10 the public comment phase closes.

11 A Okay. On what line are you?

12 Q That is starting on 11 there's an entertainment for a
13 motion to close. It's then voted. And then on Line 20 of
14 Page 13 it says "Motion passed."

15 A Okay.

16 Q Would that indicate at that point whatever information the
17 board is going to be looking at, it has been presented
18 already and it's time to make a decision?

19 A And your question is again, sir?

20 Q Yes. It appears to me that the public comment phase where
21 either the applicant, opponents or proponents can offer
22 information, testimony, it looks like that closed on
23 basically Line 20 of Page 13 of Exhibit 12?

24 A Right, it closed at that time.

25 Q And I'm asking these questions because we've got good

1 recordings of three chunks and we've got transcriptions,
2 but there are earlier portions that just -- they weren't
3 recorded by the person doing the recording. So I want to
4 make sure I understand everything that transpired and that
5 we've got a record that's, at this phase, that's accurate.
6 So that's why I'm asking these questions.

7 After the public comment phase closed as we just
8 discussed, was it ever reopened?

9 A Not to my knowledge, sir.

10 Q And then if you look at Page 13 through 15 of Exhibit 12,
11 there's a couple of pages where there's some discussion
12 that seems to focus on the road haul agreement?

13 A Yes, sir.

14 Q And then the board takes a break on Page 15. Do you
15 recall that there was a short break taken?

16 A I do remember that, sir.

17 Q If you go to Exhibit 13, that's the next transcript we
18 have of the hearing, and at the top it says: "Board
19 Member: Everybody back in?" It looks like it's right
20 after the break, but I want to ask you:

21 Did anything transpire during that time with respect
22 to discussion of the decision, deliberations, or was it
23 just it was a break time and that's it?

24 A As far as I know, sir, it was a break. I stayed in my
25 chair during that time.

1 Q And then starting on Page 1 of Exhibit 13 going through
2 the end of Page 6 --

3 A Are you talking about 13?

4 Q Yes, sir.

5 A Okay.

6 Q There is some discussion and then ultimately a vote and a
7 closing of the hearing.

8 So my question to you would be: Those last few pages
9 of Exhibit 12 and these pages of Exhibit 13, do you
10 believe that is a complete record of the deliberation
11 phase of the hearing?

12 A I've read this a couple times and I don't -- I don't see
13 that I see anything that would be missing.

14 Q And on the record here before us it appears that there's
15 no discussion or deliberation regarding setbacks.

16 Do you recall discussing or deliberating setbacks
17 among the board members?

18 A I don't recall.

19 Q And I don't see any discussion about viewing this on a
20 case-by-case basis because it doesn't fit into the animal
21 feeding operation chart.

22 Do you believe that was actually discussed and
23 deliberated?

24 A No, sir.

25 Q At the time the board was making its decision, were you

1 aware that there was litigation pending between the
2 petitioners and the county and the Schmeichels related to
3 the 2018 permit?

4 A I really don't know a lot about it, sir.

5 Q Were you aware there was a lawsuit pending?

6 A Yes, sir.

7 Q And did you understand that the 2018 permit was
8 effectively the same as the 2020 permit just with the
9 addition of this Norway Pork, LLC?

10 A I think that was spelled out in the beginning, sir.

11 Q And if in the 2018 case the county is being sued with an
12 allegation that the issuance of the permit was illegal,
13 inappropriate, outside of the authority, if you had voted
14 no in 2020, do you think that would reflect negatively on
15 the county?

16 A If you're asking if it had any ways of changing my vote as
17 for a yes or no, I don't believe it has anything to do
18 with it.

19 Q So if the county is getting sued asserting that the 2018
20 permit was illegal and the same decision is before the
21 board in 2020, if you and the board had voted no in 2020,
22 do you think that would have any effect on the 2018 case?

23 A I don't know that, sir, because I wasn't involved in the
24 2018 case, and I didn't use that in any consideration in
25 any of the facts or anything that I was involved with in

1 the 2020 case.

2 Q At any point prior to voting on December 8, 2020, to
3 approve this permit, did you review the expert reports
4 submitted by the petitioners?

5 A No, sir.

6 Q At the time the board made its decision in this case, was
7 Mr. Schmeichel a member of the Board of Adjustment?

8 A Was he a sitting member?

9 Q Yeah.

10 A Was he sitting on the board?

11 Q Yeah. I get he recused himself because it's his permit.

12 A Right.

13 Q But was he a board member at the time?

14 A During the -- during the thing he was not a board member
15 during his -- during his hearing or during his board or
16 his application. Is he -- is he during other ones, yes.

17 Q And I'm really not trying to trick you with this. I get
18 he was not acting as a board member on December 8 of 2020,
19 but he was a board member at the time?

20 A Yes.

21 Q Okay. And Mr. Schmeichel, was he at the whole hearing as
22 an applicant on December 8, 2020?

23 A Yes.

24 Q Did he talk at all?

25 A If he did, it was very little.

1 Q The record indicates that Richard Nicolai, Mr. Brian
2 Donahoe and Ethan Schmeichel talked, that's in the
3 transcripts, but I didn't see anywhere that Steve
4 Schmeichel talked. But there's admittedly a gap that is
5 not recorded so I'm just wondering --

6 A Did Steve Schmeichel get up at any time during this and
7 give a statement, no.

8 Q Okay. Do you know why he was there then if he never
9 talked?

10 MR. DEIBERT: Calls for speculation and conjecture.
11 Objection.

12 THE COURT: Sustained.

13 MR. PETERSON: I'm just asking if he has the knowledge.

14 Q (BY MR. PETERSON) Do you have knowledge of why he was
15 there?

16 A No.

17 Q Will Turner County be receiving grant money as a result of
18 issuing this permit?

19 A What kind of grant money, sir?

20 Q From the State that Mr. Schmeichel or his company would be
21 assigning to the --

22 A The sales tax money, is that what you're talking about?

23 Q It's a sales tax rebate.

24 A Yes. Will they be receiving it?

25 Q Yes.

1 A That's yet to be seen.

2 Q Is it your expectation that there will be --

3 A There's no expectation with grants. You can file for it.

4 It doesn't mean you're going to get it.

5 Q At the time of the hearing, did you know that

6 Mr. Schmeichel and the applicants were offering to --

7 A I don't believe there was --

8 Q -- to make an effort to assign grant money?

9 A I don't believe there was any -- sorry about talking over

10 -- I don't believe there was any offering to it. I think

11 it was stated during the transcript that they were going

12 to be applying for it.

13 Q So that was stated on the record at the hearing?

14 A I believe in the first page of it, Mr. Donahoe, when he

15 spoke he talked about it.

16 Q And is that also in the application that was submitted?

17 A I'm not aware of that.

18 Q Exhibit 14, Page TC 119, you can look at it in the book.

19 This is a page from the application. It looks like point

20 Number 12 states that the applicant "will pursue State

21 sales tax rebate for economic development, paid to Turner

22 County."

23 A This --

24 Q Did I read that correctly?

25 A This is out of the ordinance or this is -- you're saying

1 that this is from their application?

2 Q Yeah. If you want to go and look at the pages around it.

3 A Okay.

4 Q I don't want you to just believe me. I want --

5 A TC 00 what?

6 Q TC 119 is this page. I believe the first page is around

7 110. It might be just a little bit earlier than that.

8 Starting on 112, is this the application?

9 A It is.

10 Q Okay. And it looks like there's some portions that aren't

11 underlined are pulled from the ordinance and then the

12 underlined parts are maybe what the applicant filled in.

13 A Okay.

14 Q Is that how you read it, too?

15 A Yes, sir.

16 Q And in the time that you spent preparing for the hearing,

17 did you already know going in that the applicants were

18 going to try to shift grant money to the county even

19 before Mr. Donahoe stood up and talked at the hearing?

20 A That the applicants were going to do what?

21 Q Try to apply for grant money and have it assigned to the

22 county?

23 A It's -- it's right here that they were going to try and

24 apply for it.

25 Q Right. That was my question: Did you already know that

1 even before the hearing started?

2 A That they were going to apply?

3 Q Yes.

4 A Yes.

5 Q And then, in fact, in February of this year, did the
6 county board vote to complete assignment of payment
7 paperwork with respect to the grant money for this permit?

8 A I don't remember what day it was, sir.

9 Q Okay. Do you have Exhibit 18? It's a newspaper clipping.

10 THE COURT: It's a separate page.

11 A Yes, sir.

12 Q (BY MR. PETERSON) And that was February of this year?

13 A Yes, sir.

14 Q Do you have Exhibit 8 in the binder?

15 A Okay.

16 Q And is this entitled Respondent's, meaning the county's,
17 Respondent's Responses and Objections to Petitioners'
18 Discovery Requests?

19 A Okay.

20 Q And if you go to the second to last page, Mick Miller
21 signs on behalf of Turner County Board of Adjustment
22 June 15 of 2021. Do you see that?

23 A Yes, sir.

24 Q And on Page 8, Question Number 9 asked: "Fully describe
25 all money, grants, funds, or consideration Intervenors

1 have agreed or otherwise intend to assign, give, provide,
2 or transfer, directly or indirectly, to the Board or any
3 other department, board, division, member, or official
4 associated with Turner County which relates in any way to
5 the CAFO you propose to build on the property."

6 Did I read that question correctly?

7 A You did.

8 Q And was the county's answer: "None"?

9 A I don't remember that, sir.

10 Q Well, I mean, am I reading that --

11 A You're reading it, yeah. It's written in here and it says
12 "None."

13 Q Okay. And that's not accurate, is it, because four months
14 before this we've got this newspaper article about the
15 assignment?

16 A I'm not aware of it, sir.

17 MR. PETERSON: Those are all my questions.

18 THE COURT: Mr. Donahoe.

19 MR. DONAHOE: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 Q (BY MR. DONAHOE) Mr. Champa, where did you grow up?

22 A Most of my life in Hurley, South Dakota.

23 Q And I understand you were in the military. What branch?

24 A Army.

25 Q And you said 30 years?

1 A Yes, sir.

2 Q Well, thank you for your service. Did you live in
3 Hurley -- or excuse me -- did you live in Turner County
4 immediately after you left the army; did you return there?

5 A I've always returned home to Hurley, South Dakota, Turner
6 County.

7 Q Okay. And the reason why I'm asking you these questions
8 is I just want to make sure you're familiar with the
9 county even though you've been gone for a while.

10 A I -- I own and operate a business that operates in the
11 county, and I know practically everybody in the county.

12 Q And does that business -- well, let me just ask you, what
13 is your business?

14 A I own a heating and air-conditioning business.

15 Q Do you get around to the rural parts of the county?

16 A Everywhere, sir.

17 Q And so you'd know about other concentrated animal feeding
18 operations of all types that are in the county; correct?

19 A Yes, sir.

20 Q And are you familiar with how far they are from other
21 existing dwellings or residences?

22 A All of them?

23 Q Just in general.

24 A Yeah, I would say that most of them are a large distance
25 away from anybody's personal property.

1 Q And the ordinance sets forth how far they have to be from
2 any existing dwelling before they can be approved for a
3 conditional use permit; correct?

4 A Right, sir.

5 Q But it also has provisions for a person to give a waiver,
6 a person who lives in a dwelling, to give a waiver if they
7 didn't want to exercise any kind of protection from that
8 setback; correct?

9 A Yes, sir.

10 Q And in regard to the ordinance itself there's also a
11 provision that allows those setbacks to be adjusted if the
12 applicant can show, I'll just paraphrase and say a good
13 reason through technology or some other specific thing
14 like soil conditions or something else to reduce that
15 setback; correct?

16 A I'm not aware of that part, sir.

17 Q I'll draw your attention to the ordinance itself and that
18 is Exhibit 14. If you look at Page TC 0046 --

19 A Okay, sir.

20 Q -- and below the table, and just for the record the table
21 sets forth the setbacks from things like the first item
22 being dwellings, churches, schools, businesses, designated
23 state or county parks.

24 Immediately below that could you just read the two
25 paragraphs that are immediately below it?

1 A "These setback and separation distances shall be
2 calculated from the manure or waste storage area, animal
3 housing building, or the edge of a feedlot of the facility
4 to the nearest structure or use.

5 The minimum separation listed above shall be used in
6 siting a concentrated animal feeding operation. When a
7 proposed operation does not meet the minimum separation
8 criteria, the applicant shall submit to the Board of
9 Adjustment sufficient documentation of one of the
10 following or a combination thereof."

11 Q And that's the end of that page, and then on the second --
12 or the next page, I should say, TC 47, it talks about what
13 can be submitted; correct?

14 A Yes, sir.

15 Q And we don't need to have you read that. But having now
16 read that, would you agree with me that there are ways
17 that the applicant can reduce the setbacks if they provide
18 the information that's on TC 47?

19 A Yes, sir.

20 Q Okay. In this particular case the information that's
21 provided to the members of the Board of Adjustment in the
22 packet that you described, does that also include any kind
23 of a report from the zoning director?

24 A I don't know at this time, sir, on this packet.

25 Q Okay. Do you recall what was in the packet?

1 A Not right now, sir.

2 Q Dr. Nicolai talked about the different issues that he took
3 into consideration or factors that he took into
4 consideration in giving his opinions about what would be
5 an appropriate setback or how far away someone would
6 perceive odor from this facility; correct?

7 A Yes, sir.

8 Q And he talked about the specific facility here and had run
9 some calculations or had been provided calculations from
10 the South Dakota Odor Footprint Tool; correct?

11 A Yes, sir.

12 Q Has the board relied on information from the South Dakota
13 Odor Footprint Tool before in determining whether
14 additional odor controls or things are needed?

15 A I don't know, sir.

16 Q Are you familiar with that at all?

17 A No, sir.

18 Q In this case there was also discussion about -- and this
19 was from Dr. Nicolai -- about how these facilities in
20 general should be sited or if they are sited at least half
21 a mile away from dwellings, it's typically not an
22 annoyance or problem for people who live in those
23 dwellings; do you recall that?

24 A I believe that's what -- and I reread that -- that that's
25 what the doctor said.

1 Q And in this particular case the applicants had provided
2 what's marked as Exhibit 17 in the packet, if you want to
3 take a look at that, for the application.

4 A It might be a loose page.

5 Q It is a loose page like this (indicating).

6 THE COURT: It looks like this one (indicating).

7 A Okay. Yes, sir.

8 Q (BY MR. DONAHOE) Do you recognize that?

9 A Yes, sir.

10 Q Is that something you reviewed and considered during the
11 public hearing?

12 A Yes, sir.

13 Q Was there a discussion about the fact that those
14 calculations that resulted in the setback claimed by the
15 applicant were incorrect by the Attorney Reece Almond for
16 the petitioners here?

17 A I can't remember that, sir.

18 Q In regard to the initial transcript or the transcript that
19 shows what was said at the beginning of the meeting, we
20 talked about that, and you identified the audio recording
21 as being Faye Dubbelde, the zoning director, who discussed
22 the setback. Do you recall that?

23 A Yes, sir.

24 Q And she determined that the setback was in fact met in
25 this case?

1 A Yes, sir.

2 Q And have you relied on Faye Dubbelde to do calculations
3 for setbacks in the past?

4 A Yes, sir.

5 Q What happens if someone comes into Faye's office with an
6 application and she determines that their setbacks are not
7 going to be met?

8 MR. PETERSON: Objection. Foundation, unless he's there.

9 THE COURT: I'll sustain the objection.

10 Q (BY MR. DONAHOE) Are you aware of whether Faye Dubbelde
11 will discuss whether -- or discuss the determination of
12 the setbacks with the applicant prior to setting a public
13 hearing?

14 MR. PETERSON: I'm going to object. That's hearsay, and
15 the only foundation would be through hearsay.

16 THE COURT: No, it will be overruled. He can answer if
17 he's aware.

18 A I'm not aware, sir.

19 Q (BY MR. DONAHOE) Do you know how she does any type of
20 screening to determine what should be given at a public
21 hearing?

22 A I just -- after what I based it -- what is outlined in
23 Faye's --

24 THE COURT REPORTER: I'm sorry, can you repeat that
25 answer, please.

1 A I'll rephrase. Go ahead and ask the question again, sir.

2 Q (BY MR. DONAHOE) Do you know how she does any screening to
3 determine whether a public hearing should be allowed?

4 A No, sir.

5 Q Are you aware of the application process and what's
6 involved in that?

7 A Yes, sir.

8 Q Could you just describe what you do know about it in
9 general?

10 A That the people have to -- that if you're applying for the
11 permit, you come in and you bring in your site plan, you
12 fill out the application, you pay what you want -- you pay
13 the cost of the application. And then you go before Faye
14 or Faye will sit down and do the calculations with those
15 people and determine whether it's going to fit before it
16 goes before the board.

17 Q Those were the types of things I was trying to get at. In
18 regard to this application, that all goes through the
19 zoning office in the courthouse at Parker; correct?

20 A The planning and zoning, yes, sir.

21 Q And is there any -- well, let me just back up. Are you
22 aware of how long Faye Dubbelde had been in her position
23 as zoning director prior to December of -- December 8th,
24 2020?

25 A The exact years, no, sir.

1 Q Had it been some time?

2 A Quite a few years, sir.

3 Q Did you rely on Faye Dubbelde and her experience in making
4 a determination of whether this particular application met
5 the setbacks?

6 A Yes, sir.

7 Q And how did you rely on it?

8 A Just by her knowledge and the years of service.

9 Q And you had Exhibit 17 at the hearing, which is a map with
10 an actual scale and the --

11 A This was in our packet, sir.

12 Q Right. And so you were able to identify exactly what the
13 applicant was claiming was evidence to show that they met
14 the setbacks; correct?

15 A Yes, sir.

16 Q As far as the actual calculation of the setbacks, you were
17 asked a question about the fact that the wean-to-finish
18 operation here was not one of the three categories that
19 are listed for the setback from dwellings. Do you recall
20 that?

21 A Farrow-to-wean or wean-to-finish?

22 Q What did I say?

23 A You said wean-to-finish.

24 Q That's not what I meant, I apologize. Farrow-to-wean.

25 A Okay.

1 Q So, if you have a situation -- well, let me just back up.

2 What did you understand this facility to be?

3 A Farrow-to-wean.

4 Q Okay. What does that mean?

5 A That means you'll have pigs that are impregnated pigs that
6 will carry the pigs until they're weaned, in which they'll
7 be moved to a different facility.

8 Q And in this case they were listing certain ones that would
9 remain there and be finished; do you understand that?

10 A I believe up to 2,000 head.

11 Q Right, 2,000 head. And those ones were identified as
12 being over 55 pounds that they would consider to be ones
13 that would be finished?

14 A Yes, sir.

15 Q Okay. Then it was 5,400 that were in what I would call a
16 sow production part of the operation?

17 A Yes, sir.

18 Q And does that term "sow production" mean anything to you?

19 A As far as?

20 Q Well, there's a animal unit equivalency table, if you look
21 at Exhibit 20.

22 A Okay.

23 Q We've got part of the ordinance there.

24 A I'm there.

25 Q On the top of Page (sic) 20 you've got Ordinance Section

1 27.02 and then in parentheses it's (12), so Subsection
2 (12). There are four different type of swine animal unit
3 equivalencies.

4 A Okay.

5 Q And swine production unit is the last of the four.

6 A Correct.

7 Q Okay. Does that term "swine production unit," is that
8 something you understand or would be able to define?

9 A No, sir.

10 Q And so who would you rely on to determine whether a
11 particular animal operation fit under that swine
12 production unit label?

13 A Mrs. Dubbelde.

14 Q Are you familiar with the term "farrowing"?

15 A Yes, sir.

16 Q What does that mean to you?

17 A To me it means impregnated pigs go into a farrowing house
18 or in this, a different circumstance, they give birth to
19 the pigs. And then the pigs, once they're weaned, they're
20 moved onto a different facility or another barn.

21 Q Is that what you understood the 5400 head listed in this
22 application would be doing?

23 A Yes, sir.

24 Q I want you to look at the first category on Exhibit 20
25 under Sub -- or under Ordinance Subsection 27.02(12),

1 that's finisher swine and then in parentheses it says over
2 55 pounds. What does that mean to you?

3 A To me that means any pig that's over 55 pounds would be in
4 that facility.

5 Q Do you see the animal unit equivalency to the right on
6 those categories?

7 A Yes, sir.

8 Q What's the difference between the finisher swine over
9 55 pounds and the swine production unit?

10 A One is 0.4 and one is 0.47.

11 Q Now, just so we're clear on the number of animals that
12 would be in the Schmeichels' facility, the 5400 swine that
13 are farrowing are females; correct?

14 A Yes, sir.

15 Q And the way this works is you count the females, and the
16 number is bigger, it's .47, than you would have for
17 finisher swine over 55 pounds.

18 First of all, the swines that are farrowing are going
19 to be more than 55 pounds; correct?

20 A Yes, sir.

21 Q Is an adult swine who is a sow similar to, in size, an
22 adult finisher; do you know?

23 A I would have to say that a sow is larger.

24 Q Okay. And the sow when it is pregnant, what's that
25 called; do you know?

1 A I don't, sir.

2 Q There's a term used in parentheses in the swine production
3 unit category under Exhibit 20, it's sows, and then it
4 says breeding, gestating and farrowing.

5 Do you know what they mean by gestating?

6 A It's --

7 MR. PETERSON: I'm going to object. This witness has
8 already disclaimed his knowledge of this term in previous
9 testimony.

10 THE COURT: Overruled. He has pointed out to the specific
11 term and asked if he knows what that means.

12 A The question again?

13 Q (BY MR. DONAHOE) Do you know what the term "gestating"
14 means within the sow production unit category?

15 A Pregnant pig.

16 Q And in regard to breeding, do you know what that would be?

17 A As far as?

18 Q Well, let me just back you up. Maybe it's easier to go
19 through it this way.

20 If these sows are there to be bred and then have
21 babies and the babies are taken away, that's a swine
22 production unit; correct?

23 A Okay. Yes, sir.

24 Q So, at some point after the babies are taken away, what we
25 call weaned, the sow is going to have a period before she

1 becomes pregnant again. Do you understand that?

2 A Right, sir.

3 Q Is that the breeding period when she's going to be bred
4 and then becomes pregnant?

5 A After the time frame of when she's set aside before she's
6 able to be bred again, yes.

7 Q Okay. Thank you. So, in this particular case have you
8 ever been told that it's required that you count the baby
9 pigs that are born as separate from the mother in a swine
10 production unit?

11 A No, sir.

12 Q Do you know what a farrow-to-finish operation is?

13 A Yes, sir.

14 Q And is that one of the four categories under Ordinance
15 Section 27.02 Subsection 12?

16 A Yes, sir.

17 Q And describe that for me, please.

18 A Farrow-to-finish is you bring in pregnant pigs, they're
19 farrowed, the baby pigs are born, they're weaned. When I
20 was a kid they were brought to -- we brought them to a
21 different barn as feeder pigs, they were raised there, and
22 then into a different barn where they were finishers.

23 Q All in the same -- excuse me. All in the same place?

24 A All in the same place.

25 Q Okay. So there may be more than one building, but they'd

1 be physically located in the same --

2 A Yes, sir, same farm.

3 Q Go ahead. I'm sorry to interrupt.

4 A And when they -- after they were done finishing they were
5 sold at market.

6 Q How many pigs on average would a sow have back then?

7 A If you had good sows, I would imagine that the most that
8 would make it would probably be 10.

9 Q Thank you. And in regard to the animal unit equivalent
10 that is listed on Page -- or excuse me, on Exhibit 20,
11 what is the farrow-to-finish animal unit equivalent?

12 A 3.7.

13 Q Do you have any idea why it's 3.7?

14 A You'll have a larger number of full adult -- of full adult
15 pigs.

16 Q And that's because the sow would have these babies and the
17 babies would grow to be adults?

18 A Right.

19 Q Once they're adults, then they go to market or someplace
20 else?

21 A Yes, sir.

22 Q And when we say farrow-to-finish, a finished hog is the
23 adult that's ready to go off the farm to either slaughter
24 or someplace else?

25 A Yes, sir.

1 Q Just in general, did you have any concern about a facility
2 with 5,400 breeding sows and 2,000 finishers being a
3 little over a half a mile away from the nearest
4 residences?

5 A Concern as far as --

6 Q Well, did you feel that there was a -- I'm going to back
7 up and just start over. If you look at the criteria here,
8 and the determination is made that under the animal unit
9 equivalencies one-half mile setback is appropriate, did
10 you feel that that one-half mile was inconsistent with
11 your experience for animal feeding operations of that
12 size?

13 A No, sir.

14 Q Okay. So 5400 sows and 2,000 finishers, if it's going to
15 adulthood, that's not something that you felt should
16 trigger a higher setback that you were concerned or raised
17 a red flag about?

18 A No, sir.

19 Q Are you familiar with Purdue University?

20 A As a university?

21 Q Yeah, just --

22 A Yes, sir.

23 Q And have you had occasion in the past to look at any
24 information that Purdue University has provided in regard
25 to setbacks for swine operations?

1 A No, sir.

2 Q What about South Dakota State University, are you familiar
3 with that?

4 A Yes, sir.

5 Q And have you had occasion to obtain information about
6 setbacks for swine operations other than this case?

7 A No, sir.

8 Q From South Dakota State?

9 A No, sir.

10 Q Okay. But Dr. Nicolai is a, what we call professor
11 emeritus, who's no longer actively at South Dakota State,
12 but had been there before and taught.

13 Are you familiar with Dr. Nicolai?

14 A I -- I've heard him speak during this -- during the
15 application process, and I believe he left South Dakota
16 State and went to the University of Minnesota.

17 Q And do you know anything about any of the studies that
18 were conducted to determine the amount of odor that's
19 perceived from a swine operation?

20 A No, sir. I'm not an odor expert.

21 Q Okay. Is it fair to say you'd rely on the expertise of
22 others for that?

23 A Yes, sir.

24 Q You were asked about the report from the expert witness
25 for the folks who are opposed to this, Vicky Reason --

1 Urban-Reasonover and Dr. Powers.

2 Is that something that you considered for this
3 particular facility?

4 A The report that they brought forward?

5 Q Right. The fact that they were saying that these --

6 A No.

7 Q -- that the expert had said that there was going to be
8 more odor at their facility?

9 A I'm not an odor expert and I can't rely on that, no, sir.

10 Q Okay. I want to just make sure that I'm clear on this.

11 You did understand that they were saying that Dr. Nicolai
12 was wrong and that there would be more odor than what he
13 was saying; correct? "They" being the attorney for the
14 petitioners here today and the folks themselves.

15 A Yes, sir.

16 Q Okay. And part of that was perception, but the bottom
17 line is they were saying this is going to destroy our real
18 estate value and make it very uncomfortable for us, as a
19 generalization or paraphrasing what they said.

20 They got across the information or made you aware
21 that they thought this was going to be bad for their
22 property; correct?

23 A Yes, sir.

24 Q Did you consider that before granting or voting to grant
25 the conditional use permit in this case?

1 A It doesn't fall within the ordinance, sir.

2 Q Okay. Is that because they're beyond the immediate
3 requirements for that ordinance?

4 A It meets the setback, sir.

5 Q And do the setbacks take into account things like odor?

6 A That's why the setbacks are there.

7 Q Right. So, it would also take into account noise, dust or
8 other things --

9 A Yes, sir.

10 Q -- that might impact a neighboring property; correct?

11 A Yes, sir.

12 Q Are you familiar with this particular area where the
13 project is proposed?

14 A Yes, sir.

15 Q Are you familiar with Petitioner Vicky Urban-Reasonover's
16 house?

17 A Is it all right if I ask -- if I know what house it is, if
18 I can ask? I know the previous owner.

19 THE WITNESS: Was the previous owner Mrs. Miller?

20 MS. VICKY URBAN-REASONOVER: Yes.

21 THE WITNESS: Is that it?

22 A Yes, then I'm aware of it.

23 (Intervenors' Exhibit D marked for identification.)

24 MR. DONAHOE: May I approach, Your Honor?

25 THE COURT: You may.

1 Q (BY MR. DONAHOE) I'm going to show you what we've marked
2 as Exhibit D. I'll tell you that that's also part of one
3 of the exhibits in the binder, which is an appraisal. We
4 just put them on a separate page and made them a little
5 bigger.

6 Do you recognize that property?

7 A Yes, sir.

8 Q The second page will show you the house.

9 A Yes, sir.

10 Q Okay. And what is that property?

11 A This is -- this is, to me, this is the Claude Miller house
12 which Mrs. Miller lived in which Mrs. Reasonover -- I've
13 not been to the property as far as in the property when
14 Mrs. Reasonover bought it, since she's bought it, but when
15 it was owned by the Millers I was in the property.

16 Q Did you ever know it to be a bed and breakfast?

17 A I did not know that.

18 Q And for the record, we see the street there. That's 280th
19 Street; correct? If you look at the second page, you'll
20 see reference to 280th Street.

21 A Okay.

22 Q And is that a paved road?

23 A Yes.

24 Q And are you familiar with the larger building that's not
25 shown in these pictures that would be to the west behind

1 the house; behind meaning farther from 280th Street? It's
2 not really shown on Exhibit D. That's why I'm asking.

3 A And your question was again, sir?

4 Q Are you familiar with that building?

5 A The garage building?

6 Q Yes.

7 A Yes, sir.

8 Q Okay. It's my understanding it was built in 20 -- or
9 excuse me, it was added to, remodeled, in 2016. Did you
10 happen to work on that?

11 A No, sir.

12 Q Do you know if you have ever been in it?

13 A No, sir.

14 Q I know you mentioned you hadn't been in the house since it
15 had been purchased.

16 A I have not been in the house since it was purchased by
17 Mrs. Reasonover, only when Mrs. Miller moved into the
18 house many years ago.

19 Q Okay. In this particular case there's an argument that
20 that property has some features that were specifically
21 intended to be used with people who are either enjoying
22 the outdoors or would be coming in and out.

23 Are you familiar with that at all?

24 A No, sir.

25 Q Well, let's just assume that's the case. And if that is

1 the case, is that something that changes the way you
2 consider whether the facility needs to have changes to the
3 setback?

4 A No, sir.

5 Q In other words, there's nothing in the ordinance that
6 requires you to consider how much someone uses their
7 outdoor areas when you consider whether a project meets
8 the setback; is that correct?

9 A No, sir.

10 THE COURT: Let me clarify that answer for our record.
11 You agreed with his comment; is that correct? You said
12 "No," but I think you were agreeing with the question he
13 asked.

14 THE WITNESS: Right. There's nothing in the ordinance
15 that states that it relies on how much somebody spends
16 outside.

17 THE COURT: Okay. So you were agreeing with the question?

18 THE WITNESS: Yes, sir.

19 THE COURT: But you said, "No, sir." So, the record is
20 going to look like you didn't agree so I just wanted to
21 clarify.

22 THE WITNESS: Okay.

23 THE COURT: Thank you.

24 MR. DONAHOE: Thank you, Your Honor. That saved a lot of
25 time. I was about to go back into that.

1 Q (BY MR. DONAHOE) So, moving to a different subject. In
2 regard to the fly control and other requirements in the
3 ordinance, what was done in this particular case is the
4 sections of the ordinance were actually set forth in the
5 application and then the underlying part addresses that
6 part of the ordinances.

7 Do you understand that; correct?

8 A Yes, sir.

9 Q Did you feel that there were adequate provisions to meet
10 all the requirements that are set forth in the ordinance
11 for this facility?

12 A Yes, sir.

13 Q Did you consider that and make sure that it met those
14 requirements before you decided to vote yes?

15 A Yes, sir.

16 Q In regard to these claims that there would be additional
17 odor beyond the setback, is that something that you would
18 consider to be a factor or something that had to be
19 addressed as part of your determination on whether to vote
20 yes in favor of the applicant?

21 A No, sir.

22 Q Why is that?

23 A I'm not an odor expert, and I'm just going by the
24 guidelines that are put in the ordinance, that once it's
25 to the setback that I don't -- I don't know what it does

1 after that, what the odor does.

2 Q So you're going to rely on the setback as providing the
3 appropriate protection for the general public and
4 whatever --

5 A Yes, sir.

6 Q And as to the calculation of that setback, what did you
7 consider in this case before you decided to vote yes on
8 the application?

9 A That the setbacks were met by the criteria that -- from
10 the calculations from Faye Dubbelde; that in accordance
11 with the map, that all the properties are, outlined, are
12 further than the half mile that is -- that is brought
13 forth in the ordinance, and that that's what I used to
14 consider it.

15 Q And based on your experience out in the county and the
16 other animal feeding operations that are in existence, did
17 you feel that this particular site had an adequate setback
18 from Vicky Urban-Reasonover's home?

19 A Yes, sir.

20 MR. DONAHOE: No further questions.

21 THE COURT: Mr. Deibert.

22 MR. DEIBERT: No questions, Your Honor.

23 THE COURT: Mr. Peterson.

24 REDIRECT EXAMINATION

25 Q (BY MR. PETERSON) Tony, are there any other facilities in

1 Turner County that have something in the neighborhood of
2 5400 sows and 2,000 finishers?

3 A There is other large facilities. I can't tell you how
4 many pigs are in those facilities. However, I know there
5 is a large farrowing facility south of Hurley.

6 Q But "large" is a very large definition. It's --

7 A It's a very large building.

8 Q You have no idea how many head are in there?

9 A I do not know that, sir.

10 Q Even without getting specific on the numbers, do you know
11 even generally how it compares to the proposed barn in
12 this case?

13 A I -- it's very large, sir.

14 Q But --

15 A That's all I can tell you. I don't know the numbers of
16 pigs that are in it. It's been there for years, but I
17 don't know how many pigs are in it.

18 Q And how close is the nearest dwelling to that other large
19 facility you mentioned?

20 A How close is -- there's a dwelling built right on site.

21 Q For the owner?

22 A For the workers.

23 Q How about, what's the closest dwelling for somebody who is
24 not affiliated with the facility?

25 A I couldn't tell you that, sir.

1 Q And I want to be clear: Your basis for determining the
2 setback was met was Faye's bare statement that we read
3 from the record that the setbacks were met?

4 A Yes, sir.

5 Q Okay. Mr. Donahoe asked you whether, you know, if there's
6 houses that are closer to an animal feeding operation,
7 they can waive the protection of the setback if they
8 choose to do that?

9 A Yes, sir.

10 Q And I guess the other side of that coin is would you agree
11 that the purpose of a setback is to protect homeowners --

12 A Yes, sir.

13 Q -- that are nearby the facility?

14 A Yes, sir.

15 Q And prior to Mr. Donahoe reading that section of the
16 ordinance today, did you know you could decrease setbacks?

17 A What's that, sir?

18 Q Before Mr. Donahoe read that section of the ordinance
19 earlier this morning, were you aware that the board could
20 decrease setbacks?

21 A I wouldn't have decreased a setback, sir.

22 Q Right. But did you know you had the power to do that
23 before it was read to you?

24 A Yes, sir.

25 Q You did know that?

1 A Yes, sir.

2 Q Okay. Would you agree that farrowing is literally the
3 birthing of piglets, it's giving birth?

4 A Yes, sir.

5 Q And you can go to Exhibit 20 if you want, but under Swine
6 Production Unit it lists in parentheses: "Sows,
7 breeding, gestating and farrowing."

8 Did I read that completely?

9 A Sow Production Unit: "Sows, breeding, gestating and
10 farrowing."

11 Q And does it make sense to you that a swine production unit
12 is a sow that is in some phase of producing swine?

13 A Your question again?

14 Q Yeah. Does it make sense to you logically that a swine
15 production unit is a swine that is in some phase of
16 producing more swine?

17 A I don't know, sir.

18 Q And the swine production unit definition that's here, it
19 does not include piglets within that, does it?

20 A It does not.

21 Q But right above it there is a animal unit equivalency for
22 any pig that's under 55 pounds; correct?

23 A Under finisher swine?

24 Q Under nursery swine less than 55 pounds, .1 animal unit?

25 A Correct, sir.

1 Q You were asked long ago what sort of a litter size would
2 be. Is 10 piglets a good average number for today's
3 modern swine production?

4 A I don't have that knowledge, sir.

5 MR. PETERSON: Okay. Those are all my questions.

6 THE COURT: Mr. Donahoe, any further questions?

7 MR. DONAHOE: Yes, Your Honor, just to follow up.

8 RECROSS-EXAMINATION

9 Q (BY MR. DONAHOE) The category on Exhibit 20 that's listed
10 as nursery swine, that would be the pigs separated from
11 their mothers; correct?

12 A Correct.

13 Q So they would be weaned at that stage; correct?

14 A Yes, sir.

15 Q And is there a separate category for counting piglets for
16 the period prior to their weaning to birth; in other
17 words, once they're born they're going to be with the
18 sows nursing on --

19 A No, sir.

20 Q Okay. So they nurse on the mother, and there's no
21 separate category that counts them until they're weaned?

22 A No, sir.

23 Q But once they're weaned, if they're in a different
24 facility, then they're counted as nursery swine?

25 THE COURT REPORTER: Excuse me. You have to repeat that

1 question.

2 MR. DONAHOE: I'm very sorry.

3 THE COURT REPORTER: That's okay. "Once they're
4 weaned ..."

5 Q (BY MR. DONAHOE) Once they're weaned, then they're counted
6 as nursery swine if they're in a separate facility?

7 A Yes, sir.

8 Q Okay. Have you ever heard of the Turner County ordinance
9 being used to count separately the number of piglets with
10 sows prior to weaning?

11 A Never, sir.

12 Q Did you do anything to ignore or -- let me start over.
13 Did you ignore anything intentionally that was presented
14 by the attorney for the two petitioners here in court
15 today at the December 8th, 2020, hearing?

16 A No, sir.

17 Q Did you intend to listen and learn about what they were
18 claiming in that hearing?

19 A Yes, sir.

20 Q Did you deliberate and weigh the considerations that you
21 thought were appropriate to determine whether their
22 concerns were valid?

23 A Yes, sir.

24 Q Did you feel that their concerns were valid?

25 A To them, yes, sir.

1 Q And so you considered whether or not that would be
2 appropriate to determine to grant or deny the permit;
3 correct?

4 A Yes, sir.

5 MR. PETERSON: I'm going to object. That's been asked and
6 answered. It was answered differently.

7 THE COURT: I guess it's --

8 MR. PETERSON: I can clean it up on redirect.

9 THE COURT: I guess it's overruled. You can ask your
10 question.

11 Q (BY MR. DONAHOE) As to the calculation of the setbacks, I
12 want to make sure that we're clear. If you could look at
13 Exhibit 14, TC 120.

14 A Okay, sir.

15 Q I'll represent to you that that's part of the application
16 that would have been considered on December 8, 2020.

17 MR. PETERSON: I'm going to object based on scope.

18 THE COURT: It's a valid objection. I'm going to overrule
19 it because I don't want him coming back and recalling him
20 for the purposes of asking his question. So, proceed.

21 MR. DONAHOE: Thank you, Your Honor.

22 Q (BY MR. DONAHOE) I'll represent to you that this is part
23 of the application that was considered on December 8th,
24 2020.

25 Do you understand that to be a calculation for the

1 setback or the setback for this facility?

2 A Yes, sir.

3 Q And was there reference made to Exhibit A in the
4 presentation by the applicants; in other words, did they
5 say you can look at Exhibit A and that's how we calculated
6 the setbacks?

7 A Not that I'm aware of, sir.

8 Q If that's set forth in the transcript, would you refer to
9 the transcript?

10 A If it was?

11 Q Yes.

12 A Yes.

13 Q I'm not going to take the time to refer you to that, but I
14 talked about it in the transcript.

15 A Okay.

16 Q Do you have any reason to believe that we wouldn't have
17 talked about the fact that Exhibit A sets forth the
18 setbacks?

19 A What's your question again?

20 THE COURT: Counsel, let me go back because I think you
21 confused the witness. You asked if the applicants
22 addressed that, and now you're questioning, you're saying
23 you addressed it?

24 MR. DONAHOE: Well, that's true, Your Honor. Yeah, it
25 wouldn't have been Ethan or Steven Schmeichel.

1 THE COURT: I think the witness was confused by your
2 question because I was confused by your question because
3 -- followed by your next question.

4 MR. DONAHOE: I'm sorry.

5 Q (BY MR. DONAHOE) Do you recall in the transcript a part
6 where I as the attorney for the applicants made reference
7 to Exhibit A as being the calculation for the setbacks?

8 A Yes.

9 Q Okay. My apology. And so the board was aware that that
10 was how it was calculated, and if there was a question
11 about that calculation we could have gone through that;
12 correct?

13 A Yes.

14 MR. PETERSON: I'm going to object. If I could voir dire
15 on his foundation on this?

16 THE COURT: Go ahead.

17 VOIR DIRE EXAMINATION

18 Q (BY MR. PETERSON) When Exhibit A was mentioned by Mr.
19 Donahoe at the hearing as supporting the calculation, did
20 you go look at it?

21 A No, sir.

22 Q Did you see anybody go look at it?

23 A I can't answer that.

24 MR. PETERSON: I don't think he's got a foundation to
25 answer what the board thought.

1 THE COURT: Well, let's keep moving on.

2 RECROSS-EXAMINATION (Resuming)

3 Q (BY MR. DONAHOE) So in regard to these setback
4 calculations, did you have sufficient information to
5 determine whether you felt that the setbacks were
6 appropriate in this case?

7 A Based on Faye's knowledge, yes.

8 MR. DONAHOE: Okay. No further questions.

9 THE COURT: Mr. Deibert.

10 MR. DEIBERT: No questions.

11 THE COURT: Mr. Peterson.

12 MR. PETERSON: I'll keep it to the scope and I'll keep it
13 brief.

14 REDIRECT EXAMINATION

15 Q (BY MR. PETERSON) Exhibit 20, which lays out the
16 definition of a nursery swine, defines it as less than
17 55 pounds; correct?

18 A Nursery swine, parentheses, less than 55 pounds. Yes,
19 sir.

20 Q Piglets are under 55 pounds; correct?

21 A They are, sir.

22 Q You were asked if you, I think it was intentionally
23 ignored anything the applicants -- or excuse me, the
24 petitioners presented at the hearing. Do you remember
25 that question?

1 A Yes, sir. From Mr. Donahoe, yes.

2 Q And while you are not an odor expert, in a report from
3 someone who was an odor expert, you didn't read it;
4 correct?

5 A I didn't have it until -- until then, sir.

6 Q Well, it was in the packet, though; correct?

7 A Not that I'm aware.

8 Q And during Mr. Donahoe's initial examination, not the one
9 that just happened, you were asked: Do you consider
10 things such as reduction of property value, how this will
11 affect the neighbors. And I think your answer was: It's
12 not under the ordinances, I don't look at it; is that
13 correct?

14 A I -- I don't believe I said I don't look at it.

15 Q You said -- I think your answer was: It's not under the
16 ordinances?

17 A It's not in the ordinance.

18 Q You look at the setbacks and the other things that are in
19 Section 13.09 to determine whether the requirements are
20 met or not?

21 A Yes, sir.

22 Q Okay. But you don't look at how this might affect the
23 neighbors because that's not on the list in 13.09?

24 A I think that's based on your own opinion.

25 Q Well, I'm asking you.

1 A Do I have -- are you asking me do I have an opinion of
2 will it bother them?

3 Q I'm asking you here -- you were asked, do you consider
4 things such as reduction of property value to Vicky that
5 was presented and the other complaints they had about how
6 they're not going to be able to enjoy their property as
7 much, and I think your answer was -- do you consider it --
8 you said: It's not under the ordinances?

9 A I don't have an expertise in what property values are
10 going to do versus having a confinement near them.

11 Q Right, but you had an appraisal report from Steve
12 Shaykett, who is a 40-year long, well-known -- I mean, you
13 know Steve Shaykett, don't you?

14 A I don't know him.

15 Q Have you heard of his name before, Shaykett?

16 A Never.

17 Q Yes?

18 A Never.

19 Q Never. Well, he's been a certified appraiser for almost
20 40 years and his report was there, too. You didn't look
21 at it, did you?

22 A I didn't, sir.

23 Q Because you don't consider that to be something you need
24 to look at under the ordinances; fair?

25 A It doesn't fall within the ordinance.

1 MR. PETERSON: Those are all my questions.

2 THE COURT: Mr. Donahoe.

3 MR. DONAHOE: I'm sorry, I didn't hear that last answer.

4 What was that?

5 A It doesn't -- an appraiser -- what an appraiser says, any
6 given appraiser, says about a property doesn't fall within
7 the ordinance. Why would I take it into consideration?

8 MR. DONAHOE: I just have one quick question.

9 RECROSS-EXAMINATION

10 Q (BY MR. DONAHOE) Even if you didn't read the reports, were
11 you aware that they had said we provided a written report
12 of an odor expert and an appraiser?

13 A I was aware of it when it was brought up at the meeting,
14 yes, sir.

15 Q At the December 8th --

16 A Yes, sir.

17 Q -- 2020, public hearing?

18 A Yes, sir.

19 MR. DONAHOE: No further questions.

20 THE COURT: Mr. Deibert.

21 MR. DEIBERT: Nothing, Your Honor.

22 THE COURT: Mr. Peterson.

23 MR. PETERSON: No, Your Honor.

24 THE COURT: You can step down. Thank you.

25 (Witness excused.)

1 THE COURT: Well, Mr. Peterson, that was a little more
2 than 20 to 30 minutes. We have two other experts. Do we
3 want to take a break for lunch or -- not experts, board
4 members, sorry.

5 MR. PETERSON: Well, I mean, obviously, I don't control
6 the scope of questions. Mr. Donahoe -- and it's fair -- I
7 mean, it's his clients' chance in court here, too, and
8 that's reasonable.

9 THE COURT: And the only hope with that is and why I
10 didn't sustain the one objection is I don't know that we
11 need to go through and have him recall on his side of the
12 case because we're getting all the information at one
13 time.

14 We can proceed with calling the next board member. I
15 had indicated I was more than happy to take a later lunch
16 break. It's just going to be even later than I
17 anticipated at this juncture. Let's do one more board
18 member, and then we're going to take a break for lunch and
19 it's going to be an hour, hour and 15 minutes. We're not
20 going to get to the second board member, we're not going
21 to get to Mr. Schmeichel until after lunch.

22 MR. PETERSON: Yeah, and I guess two requests. One, if I
23 may have a short bathroom break.

24 THE COURT: If you really need one, we will --

25 MR. PETERSON: I don't need more than a minute.

1 The other thing is I will not be calling either of
2 the Schmeichels so we will have fewer witnesses today than
3 anticipated.

4 THE COURT: Based on that assertion, you can have a
5 bathroom break. So, let's just take five minutes and
6 let's come back and keep going.

7 Okay. We'll be in recess.

8 (Recess at 12:33 p.m. to 12:41 p.m.)

9 THE COURT: Please be seated. Mr. Peterson, you can call
10 your next witness.

11 MR. PETERSON: We would call the next board member who's
12 available.

13 (Pause.)

14 MR. DEIBERT: Board Member Richard Vasgaard is available.

15 THE COURT: Sir, if you'd come forward. And if you'd
16 raise your right hand.

17 RICHARD VASGAARD,
18 called as a witness, having been first duly sworn, was
19 examined and testified as follows:

20 THE COURT: Please be seated.

21 DIRECT EXAMINATION

22 Q (BY MR. PETERSON) Good afternoon.

23 A Good afternoon.

24 Q Please introduce yourself.

25 A My name is Richard Vasgaard, Centerville, South Dakota,

1 28746 462nd Avenue.

2 Q Would you like me to call you Rich, Richard, Mr. Vasgaard?

3 A I'm comfortable with whatever.

4 Q Were you one of the Board of Adjustment members who
5 attended the hearing on December 8, 2020, and voted to
6 approve the permit that is the subject of this litigation?

7 A Yes, I was.

8 Q And are you an elected county commissioner or an appointed
9 member of the board?

10 A Appointed member of the board.

11 Q How long have you served in that capacity?

12 A Oh, it was prior to 2018. I don't remember exactly,
13 but ... I'm an alternate.

14 Q Were you in attendance for the entire duration of that
15 December hearing?

16 A Yes.

17 Q Prior to the hearing, did you talk with anybody about the
18 subject matter of the hearing or the permit?

19 A No, I did not.

20 Q Other than just logistics, can you be available, can you
21 be an alternate --

22 A Correct.

23 Q -- but in terms of the substance, no discussion before?

24 A No discussions, no.

25 Q Did you do any reading, study, investigation, anything

1 else prior to the hearing to get ready?

2 A Well, when Faye sends the material I go through it, try to
3 get an idea of what's going on, yeah.

4 Q Do you recall what materials were sent to you prior to the
5 hearing?

6 A Not exactly, no. There was a packet of information
7 regarding the permit.

8 Q Did Faye provide to you prior to the hearing any of the
9 expert reports submitted by the petitioners in this case;
10 reports from Scentroid or Shaykett appraisals?

11 A No. No.

12 Q Are those documents you've ever reviewed?

13 A Are you referring to the odor study?

14 Q Yeah, I'll be more specific. Prior to voting on
15 December 8, 2020, did you review the odor dispersion
16 report from Scentroid?

17 A That was provided right before the meeting, so, no, I did
18 not get to go through that.

19 Q And before voting to approve the permit, did you review
20 the appraisal from Steve Shaykett?

21 A I don't recall that.

22 Q Did you calculate yourself what the setback is for this
23 proposed CAFO?

24 A No, I did not.

25 Q Have you at any point calculated the setback?

1 A No, I did not.

2 Q How did you determine whether the setback was met in this
3 case?

4 A I rely on Faye. She's the expert and does this
5 frequently. So at the meeting she explained the animal
6 units and calculated the setbacks, and I relied on her
7 expertise.

8 Q All right. There's a binder in front of you. It might be
9 easier if I just walk this up, but from Exhibit 11, this
10 is a transcription of the first portion of the hearing,
11 and I'll just read from the bottom of Page 4 starting on
12 Line 22:

13 It says: "I did work the animal unit numbers. I
14 worked the setbacks. Going through their material and
15 then using our animal unit pages, they meet the setbacks
16 to -- for the items that are described in the report."

17 Did I read that okay?

18 A Yes.

19 Q And we do have an audio recording as well, but do you
20 believe that was Faye Dubbelde talking at that point?

21 A I would believe so, yeah.

22 Q Okay. And I didn't see, at least in that particular
23 portion that I read, where Faye explains the details of
24 how she came up with whatever setback she came up with.

25 Would you agree that's not included in what I just

1 read?

2 A Yes, that's not in there.

3 Q At any point do you recall Faye Dubbelde or anyone at the
4 hearing explaining how the setback was calculated?

5 A I guess I don't recall that. We have the charts available
6 that explains that and we rely on that information.

7 Q Right. If you could -- do you have Exhibit 20? It's a
8 loose document. Make sure you have the right one. Okay.

9 Exhibit 20 pulls out from the ordinance some of the
10 sections relevant to determining setbacks for animal
11 feeding operations, and if you go to the middle part, it's
12 13.09(D), there's a chart that identifies different types
13 of swine-related animal feeding operations. Do you see
14 that?

15 A Yes.

16 Q And it shows how many head of the particular type of
17 operation triggers a small, medium or large
18 classification. Do you see that?

19 A Right. Yeah, correct.

20 Q And then below that under 13.09(E)(1) it shows that a
21 setback for a large animal feeding operation from a nearby
22 dwelling is -- the base is three-eighths of a mile. Do
23 you see that?

24 A Yeah.

25 Q Okay. But then you got to figure out total number of

1 animal units because for every 500 animal units over the
2 base amount you got to add an extra hundred feet?

3 A Correct.

4 Q Okay. So, at any point do you recall Faye going through
5 that calculation about what her starting number is, how
6 she determined the additional animal units, if any, and
7 how that translated into whatever calculation she came up
8 with?

9 A I don't recall that, no, sir.

10 Q Was that ever provided to you in writing, the calculation
11 of here's how it's determined?

12 A It is in our ordinances. I mean, explains in the --

13 Q Well, the ordinances tell you how to do it; right?

14 A Yes.

15 Q So, then you need to apply that to the facts of the
16 particular permit?

17 A Correct.

18 Q And have you ever seen a calculation, a written
19 calculation, that takes the particular facts of this
20 facility and applies it to the rules in the ordinance to
21 come up with the setback?

22 A I don't recall for sure.

23 Q And that's never something you actually looked at yourself
24 either; correct?

25 A I'm not sure how to answer that because, like I say, we

1 look at the ordinance from time to time and all the
2 information is there.

3 Q Right, but you yourself never took the particulars of the
4 Schmeichel animal feeding operation and did the math --

5 A No.

6 Q -- yourself to determine --

7 A I did not myself, no, sir.

8 Q You relied on Faye Dubbelde's bare statement that the
9 setbacks were met?

10 A Correct.

11 Q If, in fact, there was a house within whatever the setback
12 is determined to be, can you grant the permit anyway?

13 A There would have to be a variance issued, I believe, or
14 a -- that individual could waive the right, I think, and
15 our ordinance would allow them to do that.

16 Q So in situations where there's a dwelling that's too
17 close, there's a process to deal with that unique
18 situation?

19 A Yes.

20 Q And nothing like that came up here --

21 A No.

22 Q -- to your memory?

23 A No, not that I recall.

24 Q Back to Exhibit 20. There are three types of animal
25 feeding operations that are listed on the sizing chart,

1 and they're finisher swine operation, nursery swine and
2 farrow-to-finish. Do you see those three?

3 A Yeah.

4 Q What type of facility is the Schmeichel Norway Pork CAFO?

5 A It is a farrowing barn.

6 Q Is it any one of these three, or is it something that's
7 not really on the chart?

8 A Well, it's strictly a farrowing facility and -- I guess
9 that's not listed separately on here.

10 Q Okay. So to be clear, the type of facility that was
11 permitted in this case is not on the chart that is in
12 13.09(D) of the ordinance, in your opinion?

13 A I guess at this point I'd have to go back and look at the
14 definitions of our ordinance, but ...

15 Q At the time you were making your decision at the hearing
16 in this case, were you aware you had sort of a one-off
17 facility that wasn't on this chart as you were making the
18 decision or is that news today?

19 A Well, I guess that would be news today.

20 Q And in Exhibit 14, it's the big -- about 400 pages at the
21 back. I can bring up a copy, it might be easier. Page TC
22 45. Let me slide that out of there.

23 Okay. Here we go. We're on Page TC 45. This is the
24 complete chart in 13.09(D) for all the different types of
25 animal feeding operations be they dairies, chicken or

1 swine.

2 Do you have that in front of you?

3 A Yes, sir.

4 Q And below the chart it says: "Note: Other animal types
5 not listed in the above table may be considered on a
6 case-by-case basis." Do you see that?

7 A Yes.

8 Q And if there's an animal type that's not listed and it's
9 one of these one-off case-by-case basis, do you believe
10 it's Faye who is supposed to make that consideration about
11 whether to approve it and what the setback should be or is
12 that the board's decision?

13 A Case-by-case basis, I would assume the board's decision,
14 but we rely on Faye's information to get to that point.

15 Q In this particular case, I might have already asked it,
16 but you weren't making a case-by-case determination in
17 this situation, at least you didn't think you were; fair?

18 A I guess that would be a fair statement.

19 Q Do you believe that one of the obligations of the board
20 when it is approving an animal feeding operation permit is
21 to ensure that odor is controlled?

22 A I don't believe odor is part of our ordinance.

23 Q You don't believe odor is one of the considerations you
24 need to look at when determining whether to permit a large
25 CAFO?

1 A I don't believe that's in our ordinance.

2 Q Okay. And you didn't look at that factor in this case --

3 A No.

4 Q -- because it's not in the ordinance?

5 A No.

6 Q I asked a double negative. You agree with me, you did not
7 look at odor; is that correct?

8 A Correct.

9 Q Okay. If all of the specific use requirements are met,
10 so, for example, the large animal feeding operation, if
11 everything under 13.09 is met, do you believe you have the
12 discretion to deny the permit anyway?

13 A Well, there would have to be a significant reason for
14 doing so if everything is met.

15 Q If all the minimums are met for a specific use, do you
16 believe you have the authority to deny the permit?

17 A I guess we have the authority, but again a reasonable
18 reasoning would have to apply as well.

19 Q Are you aware of any situation in which the Turner County
20 Board of Adjustment has denied an animal feeding operation
21 permit on a discretionary basis even though all the
22 minimums were met?

23 A Not that I'm aware of. As an alternate, I don't sit on
24 all -- in on all of the meetings, but not that I'm aware
25 of.

1 Q At the time you were making your decision, were you aware
2 of the fact that there was litigation pending regarding
3 the board's issuance of the 2018 permit for the same site,
4 the same plan?

5 A Yeah, I knew there was litigation involved. I did not
6 know at what stage it was or where it was at, at that
7 time.

8 Q At the time of making your decision, did you believe that
9 the permit request before you in 2020 was basically the
10 same permit request from 2018?

11 A No.

12 Q How, if at all, do you believe they differed?

13 A They had formed an LLC so different type ownership.

14 Q Any other differences that you believe exist between the
15 2018 permit and the 2020 permit?

16 A Not that I'm aware of.

17 Q The location was the same in both permits?

18 A Correct.

19 Q The Schmeichels were involved with both permits, but now
20 there was an LLC that they formed?

21 A Correct.

22 Q And the particulars of the buildings, the operation, the
23 number of head, what they'd be doing, was that all the
24 same, or do you believe anything in that category changed?

25 A I guess we did not compare the two. I -- I was under the

1 impression that the majority of it was the same, but I
2 can't say that it all was exactly the same.

3 Q If there was litigation pending on the 2018 permit where
4 the petitioners were asserting the board illegally granted
5 the 2018 permit, if you had voted no in December of 2020,
6 how do you think that would make the county look?

7 MR. DEIBERT: Object to the form of the question.
8 Furthermore, it calls for speculation and conjecture.

9 THE COURT: Sustained.

10 Q (BY MR. PETERSON) Do you believe you would have put the
11 county in an awkward or tough spot if you had said no to
12 the permit in 2020 because of the pending litigation?

13 MR. DEIBERT: Objection. Argumentative.

14 THE COURT: It's overruled. He can attempt to answer
15 that. You can try to answer it.

16 A Okay. I guess being it wasn't a consideration, from my
17 opinion we were looking at a new permit and that was what
18 I was solely basing my decision on.

19 Q (BY MR. PETERSON) The existence of the 2018 permit was a
20 matter of discussion at the hearing; is that fair?

21 A Not that I'm aware of.

22 Q In fact, right before the break after there was only a
23 short amount of deliberation, I believe Mr. Miller called
24 for a break to look into the issue of the effect of the
25 permit, the prior permit.

1 Do you remember that at all?

2 A I'm not recalling that.

3 Q Do you recall there being a break, a short break, during
4 the deliberation?

5 A No, not with any certainty, no, sir.

6 Q If there was in fact a break, would you have deliberated
7 or discussed the subject matter off the record during the
8 break time?

9 A Well, I don't think so. I don't know for sure.

10 Q Are you aware of efforts by the applicants here to apply
11 for some type of grant money from the State that would be
12 assigned to Turner County --

13 A No, sir.

14 Q -- as a result of issuing the permit?

15 A No, sir.

16 Q Did you read the application for this permit that the
17 Schmeichels and Norway Pork submitted?

18 A I don't -- I can't say for sure that I read it totally. I
19 did look through the information and --

20 MR. PETERSON: May I approach for expediency, Your Honor?

21 THE COURT: You may.

22 Q (BY MR. PETERSON) Mr. Vasgaard, I'm going to have you look
23 at Page TC 119 from Exhibit 14. It's from the middle of
24 the application, and it says that the applicant "will
25 pursue State sales tax rebate for economic development,

1 paid to Turner County."

2 First of all, did I read that okay?

3 A Yeah, yeah.

4 Q When you were preparing for the hearing, would you have
5 read the application from the applicant?

6 A I can't say for sure that I read that in the application,
7 but being involved in agriculture, Ag United, I am aware
8 of the bill that was passed in the legislature which
9 allowed counties to benefit from animal facilities in
10 their county. So I am aware of it from that aspect.

11 Q And were you aware that that financial incentive would be
12 in play here if you approved a permit?

13 A Yes, it was a possibility, certainly.

14 Q And was that discussed by Mr. Donahoe at the hearing that
15 they'd do their part in trying to apply for the grant?

16 A I don't recall that.

17 Q Okay. Would you rely on the recording of the transcript
18 as to what was actually said at the hearing?

19 A Yeah, if it was said. I'm not recalling it, but it
20 certainly could have been.

21 MR. PETERSON: Those are all of my questions, Your Honor.

22 THE COURT: Mr. Donahoe.

23 MR. DONAHOE: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 Q (BY MR. DONAHOE) I want to ask you briefly if you recall a

1 discussion during the December 8th, 2020, hearing about
2 the dispute over the calculation of the setbacks.

3 Do you recall that the people opposed to the
4 application said that the setbacks were calculated
5 incorrectly?

6 A I'm not recalling that, no, sir.

7 Q Did you review the transcript of the hearing that had been
8 prepared for this -- the December 8th, 2020, hearing that
9 had been prepared for this case?

10 A I did look through it, yes. I didn't study it thoroughly,
11 but I did look through it.

12 Q If it was raised as an issue by the opponents, would you
13 have -- did you willfully ignore that or intentionally
14 ignore that?

15 A No, sir, I wouldn't ignore it. We had numbers -- we had
16 the numbers presented to us as the setbacks were adequate.

17 Q So that was, if it was contested, that was disputed;
18 correct?

19 A Correct.

20 Q And in regard to the odor, you were asked if that was
21 something that was part of the requirements or
22 consideration in the ordinance. Do you remember that?

23 A I just previously was asked.

24 Q The questioning today from Mr. Peterson?

25 A Yeah, yeah. Yes, sir.

1 Q And isn't it correct that for a concentrated animal
2 feeding operation there is a part of the ordinance that
3 requires the applicant to show fly and odor controls?

4 A Yes. We require them to plant shelterbelts and to control
5 that, yes, sir.

6 Q Okay. In this particular case were there other things
7 that were promised over and above what's required in the
8 ordinance to control flies and odor?

9 A I know they had said they were going to plant extra rows
10 of trees than what was required.

11 Q And in your opinion, would that help with wind and the
12 odor dispersal?

13 A Yes.

14 MR. PETERSON: Objection. Object to the foundation of
15 this witness to answer that as to what effect the trees
16 would have on odor dispersion.

17 MR. DONAHOE: We can back up and start over.

18 THE COURT: It's sustained. Go ahead and back up.

19 Q (BY MR. DONAHOE) As to the tree requirement that you
20 mentioned, what is the purpose for planting trees at a
21 concentrated animal feeding operation?

22 MR. PETERSON: I'm going to object to the form. I'm going
23 to object to foundation. The purpose of the Schmeichels
24 is outside of his knowledge. They're the ones doing the
25 planting.

1 THE COURT: Overruled. He's on the board and he oversees
2 the provisions. So if he knows if that's required,
3 because it is I believe in the ordinance a requirement.
4 So, he can answer the question.

5 A Yes, the trees are there as shelterbelts to mitigate wind,
6 dispersing odors.

7 Q (BY MR. DONAHOE) Do you have an agricultural background
8 yourself?

9 A Yes, sir.

10 Q Are you familiar with how trees would impact the
11 dispersion of odors from a livestock facility?

12 A Yes.

13 Q Do you raise livestock or have you raised livestock
14 yourself?

15 A I was around livestock most of my life until I retired
16 from them.

17 Q In addition to two extra rows of trees, did the applicants
18 indicate that they would undertake other control measures
19 to help reduce odor on this facility?

20 A If I remember right, they were talking about putting
21 additives in the pit to help control the odors, which many
22 do.

23 Q And in fact that's part of the application where they said
24 they would use the pit additives; correct?

25 A Correct.

1 Q And Dr. Nicolai testified or called in to address the odor
2 issues here, and he talked about pit additives as well;
3 correct?

4 A Correct.

5 Q As to these odor and fly controls that were addressed in
6 the ordinance, is there a specific requirement that they
7 have a odor expert or some objective measure of what their
8 facility will produce for odors?

9 A The only thing that I can recall is that with the dairy we
10 worked with SDSU specialists and did some research and
11 studies there as to odor control, et cetera.

12 Q And in that case did they use the South Dakota Odor
13 Footprint Tool?

14 A I don't recall that for sure.

15 Q Okay. Do you feel it was within your discretion to make a
16 decision on whether to accept the South Dakota Odor
17 Footprint Tool that was described by Dr. Nicolai at the
18 December 8th, 2020, hearing?

19 A I'm not sure I can recall that was part of the discussion.
20 I suppose it was, but I don't remember it.

21 Q Okay. He talked about how they measure the appropriate
22 distance for a site to help ensure that the neighbors are
23 not subject to annoyance. Do you recall that?

24 A I -- I recall the discussion about the distances, et
25 cetera, but I certainly don't know the specifics.

1 Q Okay. Are you familiar with the South Dakota Odor
2 Footprint Tool?

3 A Familiar -- I know -- I mean I've heard of it, but not an
4 expert on it or have any expertise on it, no.

5 Q And are you familiar with the fact that the people who are
6 opposed to this application thought that there was going
7 to be excessive odor at their homes?

8 A Yes.

9 Q And was that made clear at the hearing?

10 A Yes.

11 Q And did you consider that in determining whether to
12 approve or deny the conditional use permit?

13 A It was part of the discussion so it was considered, yes.

14 Q And did you make a determination as to whether to consider
15 their arguments or their testimony and statements at the
16 hearing when you decided on your vote?

17 A Restate that again, please.

18 Q Well, one way we typically would ask this is: Did you
19 balance or weigh the fact that they had presented the
20 arguments and facts that this was going to cause more odor
21 at their place than they should have to bear?

22 A Certainly. We take that under consideration, yes, try to
23 balance it.

24 Q And did you also consider the fact that they're saying the
25 setback was not adequate; that they were going to be

1 subject to an inappropriate and unacceptable amount of
2 odor at their house?

3 A Okay. Yes. Okay.

4 Q I'm sorry? That was a yes?

5 A Yes, yes.

6 Q Okay. You were asked about these categories in Exhibit
7 20?

8 A Yes.

9 Q And the representation was made that the facility by
10 Schmeichels is not one that fits within the four
11 categories that are listed at the top.

12 MR. PETERSON: Object. I didn't state that.

13 THE COURT: The objection is sustained.

14 Q (BY MR. DONAHOE) Okay. Do you recall that there was a
15 question about whether this particular facility fit into
16 one of the categories on Exhibit 20?

17 A Yes.

18 Q And what was that testimony; what did you say?

19 A The specific farrowing operation is not listed
20 specifically in those categories.

21 Q Okay. I want you to look at number four, or I should say
22 the fourth category under the top section, Ordinance
23 27.02(12) .

24 A Okay.

25 Q And it says animal species and then it's got four things

1 listed, and then to the right is animal unit equivalent?

2 A Correct.

3 Q What does that mean?

4 A That would mean the number of animals it would take to
5 equal one animal unit.

6 Q Okay. And I want to draw your attention to the fourth
7 one, which is swine production unit. Do you see that?

8 A Yes.

9 Q And what is that as you understand it?

10 A Okay. That would be a farrowing unit, sows breeding, yes,
11 farrowing.

12 Q Does that include the piglets when they're born?

13 A Yes.

14 Q And until they're weaned, is that still going to be part
15 of the same animal unit equivalent?

16 A Yes.

17 Q What is a nursery swine, the second category?

18 A Nursery would be where the pigs are taken once they're
19 weaned.

20 Q And the third category is farrow-to-finish; correct?

21 A Correct.

22 Q And what does that include?

23 A Well, farrowing is the birth of the pigs. Finish would be
24 finishing them to market weight.

25 Q So is it correct to say that that would be the sow and

1 piglets that are born to her until -- being all in the
2 same facility or site, not perhaps in the same building,
3 but on the same farm until they're finishers and leave to
4 be marketed or sold for breeding or some other purpose?

5 A Correct.

6 MR. DONAHOE: Okay. No further questions.

7 THE COURT: Mr. Deibert.

8 MR. DEIBERT: No questions, Your Honor.

9 THE COURT: Mr. Peterson.

10 MR. PETERSON: I do.

11 REDIRECT EXAMINATION

12 Q (BY MR. PETERSON) Exhibit 20, do you still have that out?

13 A Yes, sir.

14 Q Where it says swine production units, do you understand
15 that to be swine that are in some stage of the process of
16 producing more swine?

17 A "Some stage of the process of producing" -- yes, farrowing
18 unit, yes.

19 Q And those different stages include breeding, gestating and
20 farrowing?

21 A Correct.

22 Q And farrowing, I think you just said it's the birth of the
23 piglets; correct?

24 A Correct.

25 Q Gestating is naturally when the piglets are still inside

1 the mother before they are born?

2 A Correct.

3 Q Is a newborn piglet capable of producing more swine?

4 A No.

5 Q And the swine production unit definition doesn't say
6 anything about the piglets being considered part of the
7 swine production unit, does it?

8 A No.

9 Q But there is a definition that are called nursery swine,
10 less than 55 pounds, right up above there; correct?

11 A Correct.

12 Q And piglets are under 55 pounds; correct?

13 A Correct.

14 Q I'm a little confused because I asked you twice during my
15 examination whether you consider odor as part of your
16 permitting decision, and you said no because it's not part
17 of the ordinances.

18 Is that what you told me?

19 A Yes, sir, I did.

20 Q So, when Vicky and her attorney and her expert witness are
21 talking about we think we're going to have a lot of excess
22 odor, you didn't really consider that, did you?

23 A It was part of the discussion. I have swine barns located
24 close to my farm, and I guess I do not consider odor a
25 problem.

1 Q But you're the one making money from it; right?

2 A No, they're not my barns.

3 Q Okay. Do you raise hogs?

4 A I do not personally raise hogs. I'm part of Pipestone
5 Systems. I own shares in a farrowing operation.

6 Q So while you were present at the hearing, when it came
7 time to weigh the competing interests of Vicky and
8 Dr. Powers and other folks in the area and how they might
9 be affected by the odor, you didn't consider that as part
10 of saying yes or no to the permit?

11 A I definitely -- well, it's considered, but again, being
12 around hog barns I know that with manure additives and
13 trees around that odor is not a big issue unless they're
14 pumping the pits.

15 Q Did you even look at the expert report that was submitted
16 from Scentroid?

17 A No.

18 Q And you just talked about additives. The applicant never
19 agreed to use additives, did they?

20 A I don't recall that.

21 Q We can get the application out, but I think it says they
22 would consider using additives as long as they're cheap
23 enough, or cost effective I think was the verbiage.

24 So they'd think about it; right?

25 A I guess most producers that I'm familiar with utilize

1 them.

2 Q But they didn't agree to it and you didn't require it?

3 A No, I don't believe it was required.

4 Q And by "you," the board did not require the use of
5 additives?

6 A No.

7 MR. DEIBERT: Object to the form of the question.

8 Furthermore, it asks for information that the witness read
9 minds or some other such phrase.

10 THE COURT: It's overruled. It's on the permit. It's not
11 required in the permit language.

12 Q (BY MR. PETERSON) And I want to be very clear because in
13 the answer to one of Mr. Donahoe's questions regarding
14 setbacks, I think you said, we had the numbers. So I want
15 to ask you about that.

16 A Okay.

17 Q You didn't actually have numbers, did you? You had a bare
18 statement from Faye Dubbelde saying that the setbacks were
19 met?

20 A The numbers were there, included, and there was a radius
21 circle drawn showing the distance from the facility
22 (indicating).

23 Q Was that Exhibit 17?

24 A Yes, I believe so.

25 Q All that shows is measurements between points; correct?

1 A Yes, the measurements are on here.

2 Q And it has a circle at a half a mile, but it doesn't say
3 anything about how they came up with a half a mile?

4 A No, there is no explanation for that.

5 Q And there was a challenge that the calculation wasn't done
6 right, and you just didn't look at it, you just took
7 Faye's word for it that the setbacks were met?

8 A Correct.

9 MR. PETERSON: Those are all my questions.

10 THE COURT: Mr. Donahoe.

11 RECROSS-EXAMINATION

12 Q (BY MR. DONAHOE) How long have you been an alternate?

13 A It was before 2018. I don't recall exactly the time
14 frame.

15 Q Okay. How many, approximately -- approximately, how many
16 Board of Adjustment hearings have you sat on for Turner
17 County, do you have any idea?

18 A No. Numbers wise, I couldn't tell you.

19 Q Have you previously been on a Board of Adjustment that had
20 to determine whether to grant or deny a large
21 conditional use -- a large concentrated animal feeding
22 operation conditional use permit?

23 A With the county?

24 Q Yes.

25 A Yes, I have.

1 Q Okay. And in regard to information that's presented at
2 the hearing, do you sometimes get brand-new information
3 from opponents of these projects?

4 A Yes.

5 Q And sometimes they present documents at the hearings; is
6 that also correct?

7 A Correct.

8 Q How would you describe your authority in regard to
9 considering or rejecting information that's presented at
10 the public hearing; have you thought about that and can
11 you describe it?

12 A Again, as was stated by Mr. Peterson, we tried to balance.
13 We look at all aspects of it. We make sure that the
14 ordinances are followed as we have them written and try to
15 balance it out to come up with our results.

16 Q Did you consciously try to consider all of the things that
17 were presented by the opponents of this Schmeichel
18 application on December 8th, 2020?

19 A Yeah, I believe so.

20 MR. DONAHOE: No further questions.

21 THE COURT: Mr. Deibert.

22 MR. DEIBERT: No questions, Your Honor.

23 THE COURT: Mr. Peterson.

24 MR. PETERSON: No questions, Your Honor.

25 THE COURT: You can step down. Thank you.

1 THE WITNESS: Thank you.

2 (Witness excused.)

3 THE COURT: Let's call our last Board of Adjustment
4 committee member.

5 (Pause.)

6 THE COURT: Sir, if you'd come up here. If you'd raise
7 your right hand.

8 DEAN AUSTIN,
9 called as a witness, having been first duly sworn, was
10 examined and testified as follows:

11 THE COURT: Please be seated.

12 DIRECT EXAMINATION

13 Q (BY MR. PETERSON) Good afternoon.

14 A Good afternoon.

15 Q Please introduce yourself.

16 A Dean Austin.

17 Q Do you want me to call you Dean or Mr. Austin?

18 A Dean is fine.

19 Q Okay. Dean, were you one of the board members who voted
20 to approve the permit at issue in this case at the hearing
21 on December 8, 2020?

22 A Yes, sir.

23 Q And are you an elected commissioner or appointed member?

24 A Appointed.

25 Q Did you serve as an alternate?

1 A Yes.

2 Q Were you present for the entire hearing?

3 A Yes.

4 Q Prior to the hearing, did you have conversations with
5 anybody regarding the subject matter of the hearing or the
6 permit that would be considered?

7 A No, sir, I didn't.

8 Q Did you read anything before the hearing?

9 A No.

10 Q So whatever you heard or read was at the hearing?

11 A At the meeting, yeah, at the meeting.

12 Q How was the setback determined in this situation?

13 A We went by the paperwork that was given to us that day,
14 and so the setbacks were determined, and Faye did most of
15 it that I know of and that I'm aware of.

16 Q Was this paperwork from Faye that did a calculation or did
17 Faye just tell you it was that or --

18 A We took it out of the ordinance.

19 Q I'm sorry, say again.

20 A Took it out of the ordinance.

21 Q Okay. So the ordinances set forth the various rules, if
22 you will, about how to calculate a setback?

23 A Correct.

24 Q Do you have Exhibit 20 available to you? Let me help you
25 find it.

1 THE COURT: I think it's right there.

2 Q (BY MR. PETERSON) Excellent. That's 20.

3 A Okay.

4 Q Dean, Exhibit 20 are a few sections of the ordinances that
5 we pulled out that relate to swine animal feeding
6 operations, determining category and sizing and that sort
7 of thing.

8 Is this generally familiar to you?

9 A Yes.

10 Q All right. So, did you see any calculation that applied
11 the particular facts from the Schmeichel or Norway Pork
12 facility to these rules to determine the setback is X?

13 A I am not following what you're asking. Did I see anything
14 in --

15 Q Yes. This is just the ordinance. So these are the rules;
16 right?

17 A Yeah, right, I understand that.

18 Q Every permit is different; right?

19 A Correct.

20 Q A permit might have -- each permit has a different number
21 of head of a different type of swine or cattle or whatever
22 it might be. So you need to take that information, how
23 many animals, what kind of operation they're doing, run it
24 through these numbers to come up with what the setback is;
25 right?

1 A Right.

2 Q Okay. And at the bottom of 20, this is from 13.09(E)(1),
3 for example, a dwelling has to be, the base, has to be
4 three-eighths of a mile away from a large CAFO.

5 Is that the starting point?

6 A Correct.

7 Q And then depending on how many animal units over the base
8 is, you might have to add some to that setback?

9 A Correct.

10 Q Did you ever see any calculation for this particular
11 permit that showed the math of this is how we came up with
12 the setback and the setback is X?

13 A Not prior to, if that's what you're asking, but ...

14 Q So is the first time you actually saw a calculation
15 describing how the setback was determined after
16 December 8, 2020?

17 A During -- during the hearing.

18 Q You saw it during the hearing?

19 A Yeah.

20 Q Explain that. What was laid out?

21 A Well, it was -- it was what we -- we got handed to us and
22 we went -- we went over this so ...

23 Q So you believe there's a calculation somewhere in the
24 information you were provided that explains how the
25 setback is calculated?

1 A I -- I don't -- I -- we're going off the ordinances.

2 That's what we were doing, correct, I mean, that's what
3 you're asking?

4 Q Right, but this is just the ordinance.

5 A Yeah.

6 Q You don't know how Mr. Schmeichel's plan applies to it;
7 that's my question?

8 A Oh, no then. I'd say no.

9 Q Okay. So you had the --

10 A Correct.

11 Q -- ordinance?

12 A I'm understanding what you're saying now, yeah, okay.

13 Q Just -- I want to make sure we have a clear record. We're
14 talking over one another a little bit.

15 You had the ordinance in front of you or available to
16 you at the hearing?

17 A Right.

18 Q What you didn't have was the calculation of how
19 Mr. Schmeichel's particular operation, how you come up
20 with the setback for that particular CAFO; is that a
21 correct statement?

22 A Yes.

23 Q Okay. And in fact if you look at Exhibit 11, Page 4,
24 starting at Line 22 --

25 (Interruption of phone ringing.)

1 MR. PETERSON: Judge, do we need to pause? Okay.

2 Q (BY MR. PETERSON) I'll read from Page 4 of Exhibit 11
3 starting at Line 22, it says: "I did work the animal unit
4 numbers. I worked the setbacks. Going through their
5 material and then using our animal unit pages, they meet
6 the setbacks to -- for the items that are described in the
7 report."

8 Did I read that correctly?

9 A Correct.

10 Q And do you believe that was Faye --

11 A Yes.

12 Q -- Dubbelde saying that?

13 A Yes.

14 Q So we've got a bare statement here from Faye saying: Hey,
15 I did the work, the setback is met. But she doesn't
16 explain any of the math, what the number is or how the
17 calculation was met; correct?

18 A Correct.

19 Q And aside from the one section I read, do you recall at
20 any point during the hearing Faye explaining the
21 calculation of how she came up with whatever setback she
22 came up with?

23 A I don't recall. I don't remember. I just don't recall
24 it. I --

25 Q Do you recall there being an assertion by the petitioners

1 or their attorney, Mr. Reece Almond, that there was an
2 error in how the setback was being calculated; do you
3 recall that issue being raised?

4 A No, sir. No.

5 Q And you can certainly look if you'd like, but at the end
6 of Exhibit 12, which is the transcript of a portion of the
7 hearing, on Page 13 it looks like public comment was
8 closed. And then we've got about two, three pages of
9 discussion. And then we go to Exhibit 13 for another six
10 pages of transcript. Those nine, ten pages appear to be
11 the sum total of the deliberations by the board after
12 public comment.

13 Do you believe that is the entirety of the
14 deliberations?

15 A Yes.

16 Q And there was a short break taken there. Were there any
17 deliberations during the break?

18 A No, sir.

19 Q So anything you weighed, other board members weighed,
20 considered and resolved conflicts, it would be in those
21 ten pages or so?

22 A I believe that, yes.

23 Q Did you read the odor expert report submitted by the
24 petitioners; it's by a company called Scentroid?

25 A I'm aware of it. I didn't read it, no, sir.

1 Q Even to this day you've never read it; is that --

2 A No.

3 Q -- fair?

4 A No.

5 Q And are you aware that the petitioners submitted an
6 appraisal report from Steve Shaykett of Shaykett
7 Appraisals identifying a property loss to Vicky if this
8 barn is erected?

9 A No, I didn't. I'm not aware of that, no.

10 Q Not aware of it, didn't read the report?

11 A No.

12 Q Do you believe as part of considering an animal feeding
13 operation permit that it's appropriate for you to consider
14 how the odor might affect a neighbor or how a neighbor's
15 property may be devalued because of the CAFO?

16 A Yes, I do, but we went by DGNR, and the State is
17 regulating that so that's what we go by, you know, that --
18 the odor, you know.

19 Q So you went by --

20 A The D -- the State's regulating that.

21 Q The DENR?

22 A Yeah, yeah. I said DGNR. DENR, yeah.

23 Q So, you rely on the State to look at odor issues?

24 A And ours, yes, and our ordinances, too.

25 Q Are you aware the State doesn't regulate odor? They only

1 look at the Clean Water Act, which has to do with water
2 safety?

3 A No, I didn't know that. I do now, but I didn't know that
4 then.

5 Q Well, I guess my question to you is: As part of making
6 your decision in this case to approve this CAFO permit,
7 did you weigh and consider how the odor might affect the
8 neighbors?

9 A No, I didn't. I -- I guess I'm not -- I don't recall what
10 you're -- I don't understand what you're asking me. Was
11 it -- I'm not an odor expert so I --

12 Q You're not an odor expert, but there was a report
13 submitted from an odor expert and you didn't read it; is
14 that right?

15 A Right.

16 Q And for whatever the reasons are, you just -- you didn't
17 consider how the odor would affect the neighbors?

18 A Correct.

19 Q Did you consider how this project might affect the
20 property value of neighbors?

21 A I -- I don't know how to answer that. What -- what --
22 what do you -- do you want me to know -- do you want to
23 know if I considered it?

24 Q Yeah.

25 A Yeah. Yes, I think we did consider it. That's part of my

1 job, but -- being on the board.

2 Q So you did consider --

3 A I think so.

4 Q I thought you said you weren't even aware of the appraisal
5 report?

6 A I'm saying that, but I -- I think I considered it myself,
7 if that's what you're asking.

8 Q And how did you consider it?

9 A Well -- well, I've farmed all my life. I know that odor,
10 you know, manure stinks, and it's just part of life, you
11 know.

12 Q So if the neighbor's property is devalued, tough, you're
13 living in the country, basically?

14 A The Right to Farm Act type stuff, yeah.

15 Q Can we go back to Exhibit 20 --

16 A Yes.

17 Q -- the ordinances.

18 A I got it right here.

19 Q Great. In the middle there's a chart from 13.09(D), and I
20 guess the way I would describe this is it shows the three
21 different types of swine-related animal feeding operations
22 and then how many head of each type it takes to be small,
23 medium or large.

24 Is that a reasonable description of the chart?

25 A Right.

1 Q And the three types of facilities that are recognized in
2 the sizing chart would be finisher swine, nursery swine
3 and farrow-to-finish.

4 Do you see those three types?

5 A Yes.

6 Q What type of facility is the one you voted to approve?

7 A I would say the finishing weighing over 55 pounds.

8 Q So this is a finisher operation?

9 A No, but it -- well, it's -- it's farrow, he's farrowing
10 and he's --

11 Q Do you know what type of operation this facility is that
12 you approved?

13 A Farrow-to-finish. Well, he's not -- he's not finishing.
14 I'm saying it wrong. But I would say the finishing swine
15 weighing over 55 pounds. Let me look at this again.

16 (Witness reviews document.)

17 The nursery swine, that's what he's got. He's got --
18 he's farrowing. It doesn't really address that, does it,
19 farrowing-to-finish.

20 Q That was going to be my next point. This is a
21 farrow-to-wean operation that isn't on the chart; right?

22 A Yeah, right.

23 Q But under 13.09(D), if you go to the full ordinance --
24 that's Exhibit 14, I think it's Page TC 45 -- if there's
25 an animal feeding operation that isn't on the chart, you

1 can look at it on a case-by-case basis.

2 A Okay. Yeah.

3 Q Did you know you could do that?

4 A No.

5 Q Okay. And that was going to be my next question: In this
6 particular case did you know you were being asked to make
7 a one-off case-by-case decision because the chart doesn't
8 fit with what's being asked; were you aware you were
9 making that kind of decision at the time?

10 A No.

11 Q Do you believe it's an obligation of the board as part of
12 approving an animal feeding operation to ensure that odor
13 is controlled?

14 A Yes, except as -- as long as everything -- all the i's are
15 dotted and the t's are crossed and -- I think it's good to
16 go.

17 Q So if all of the specific use requirements are met --

18 A Correct.

19 Q -- so in this case it's a large CAFO, there's setbacks,
20 you've got a nutrient management plan and there's a
21 laundry list of things that have to be provided under
22 13.09; do you understand that to be the case?

23 A Yeah.

24 Q Is that a yes?

25 A Yes. I'm sorry. I'm sorry.

1 Q If the applicant demonstrates compliance with everything
2 under 13.09(D), do you believe you can deny the permit?

3 A Yes.

4 Q You can deny it anyway even if they've met everything?

5 A Correct. We -- we could have, yes.

6 Q Have you ever done that before?

7 A Not that I'm aware of. I -- I -- I wasn't on at the time,
8 you know. If something was denied, I wasn't there so ...

9 Q What did the board do in this case to ensure odor would be
10 controlled from this facility?

11 A I guess I don't know how -- what kind of question
12 you're -- how to -- I don't know how to answer that, put
13 it that way, I --

14 Q Well, if the board is supposed to ensure that odor is
15 controlled, I'm asking what did you do to accomplish that?

16 A I -- I guess all we went by is what we had to go by and
17 our ordinances.

18 Q Well, and that's my question is what was there to go by.
19 What is it that Schmeichels are being required to do in
20 order to control odor, or are they just not required to
21 control odor?

22 A I think all of -- every -- all the CAFOs are required to
23 control odor. And like I said before, I thought it was
24 governed by the State, but -- you know, the permits,
25 but --

1 Q So from your perspective, at least at that time based on
2 what you knew, the entity that should be responsible for
3 controlling odor is through the State permitting process?

4 A Yeah. We -- we have our setbacks for that, you know, that
5 that --

6 Q And you have the discretion to increase the setbacks; do
7 you not?

8 A Yes.

9 Q And you have the authority and in fact the obligation that
10 even if a setback is met, the odor needs to be controlled?

11 A Yes.

12 Q Were you aware at the time of making your decision to
13 approve this permit that there was pending litigation
14 related to the 2018 permit for the same site?

15 A No.

16 Q You were not aware of --

17 A No.

18 Q -- litigation at all?

19 A No. No.

20 Q Do you remember there being discussion on the record at
21 the hearing about the 2018 permit?

22 A We did talk about it, but I don't -- I mean, it was --
23 where -- where it was at was -- I was not aware of, you
24 know.

25 Q Did you have any knowledge of how this 2018 permit

1 compared to the 2020 permit?

2 A No. No.

3 Q Let me -- I saw a look on your face -- let me ask it a
4 little bit differently.

5 Did you know there was a 2018 permit for the same
6 site?

7 A Yes.

8 Q And were you under the impression that in 2020,
9 Schmeichels and Norway Pork were asking for the same thing
10 or were they asking for a different kind of project?

11 A Was I aware of if they're asking for the same thing, is
12 that what you're asking me? I --

13 Q Yeah. What, if anything, did you know about the 2018
14 permit at the time you were making your decision for the
15 2020 permit?

16 A Really, I didn't know where the 2018 permit was even at, I
17 mean, what was going on with it.

18 Q Did you believe the two permits were for the same piece of
19 property?

20 A Yes.

21 Q And for the same type of facility?

22 A Yes.

23 Q Did that seem odd to you that there's a permit for a piece
24 of property and then there's a second permit for the same
25 thing at the same property?

1 A I -- like I said before, I don't -- I didn't know where
2 that other, that first permit, what even happened to it,
3 you know, what -- where it was at, where it was going,
4 what -- I just thought they were refiling for the same
5 permit.

6 Q At the time you were making your decision, did you
7 understand that the applicant would be making an effort to
8 apply for State grant money that would be assigned to
9 Turner County?

10 A No. I'm not aware of that.

11 Q You don't remember that being discussed --

12 A No.

13 Q -- at the hearing?

14 A No. I don't, no.

15 Q Do you remember seeing that in the application submitted
16 by the applicants?

17 A No.

18 MR. PETERSON: Those are all of my questions.

19 THE COURT: Mr. Donahoe.

20 MR. DONAHOE: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 Q (BY MR. DONAHOE) Mr. Austin, could you please take Exhibit
23 20 and 21 and read through those?

24 THE WITNESS: Have I got the right one, 20?

25 THE COURT: 20, and then 21 is another page. It looks

1 like this. It might be there somewhere.

2 MR. DONAHOE: It may be in the back.

3 THE COURT: Do you want to use the original or did you
4 find it?

5 MR. DONAHOE: I think we just found it.

6 THE COURT: All right.

7 MR. DONAHOE: It was stuck inside Exhibit B.

8 Q (BY MR. DONAHOE) Okay. This is Exhibit 21. That's
9 Exhibit 20. I'm also going to ask you about this page
10 which is TC 120.

11 A Okay. (Witness reviews documents.)

12 Q I'm going to start with Exhibit 20 and ask you if you
13 understand what a swine production unit is as listed under
14 Ordinance Section 27.02(12) near the top.

15 A Okay. Yes.

16 Q It says: "Swine Production Unit (sows, breeding,
17 gestating and farrowing)."

18 What does that mean to you?

19 A That he's got the pigs and -- or the sows and is going to
20 farrow.

21 Q Okay. And what does farrowing mean?

22 A Baby pigs.

23 Q So, in this situation if this is called a wean-to-finish
24 operation or a -- well, I'm going to just back up.

25 Section 27.02, sets forth the animal species and the

1 animal unit equivalent; correct?

2 A Correct.

3 Q And what's that for? What is it used for in the
4 ordinance?

5 A Which one is it again are you talking?

6 Q I'm just talking about all of the things under Ordinance
7 Section 27.02. We've got the four for swine that are
8 listed there?

9 A Yeah.

10 Q What do you use the animal unit equivalent to do for your
11 ordinance?

12 A To determine how big the things are, I mean, the size
13 of -- yeah.

14 Q So it's either a small --

15 A Correct.

16 Q -- medium or large operation; correct?

17 A Correct.

18 Q And these are concentrated animal feeding operations?

19 A Correct.

20 Q And a small has to be less than 1,000 animal units; do you
21 understand that?

22 A Yes.

23 Q Okay. Medium, they've got a category for that. Large is
24 the biggest so it's anything over a medium; correct?

25 A Correct.

1 Q And in regard to the swine production unit you told me
2 what you thought that meant. What is a finisher swine?

3 A They're -- they're growing the pigs.

4 Q Okay. What is a nursery swine?

5 A The baby pigs kept in the nursery.

6 Q Okay. What about the baby pigs before they're weaned,
7 where do they go, what's that counted as?

8 A They're in the nursery.

9 Q So that would be part of the swine production?

10 A Yes.

11 MR. PETERSON: Objection. He just said it's part of the
12 nursery.

13 THE WITNESS: Yeah.

14 MR. DONAHOE: I'm sorry.

15 MR. PETERSON: Misstates his testimony.

16 THE COURT REPORTER: Excuse me, I'm sorry.

17 THE COURT: All right. The objection is --

18 THE COURT REPORTER: Wait, wait. Repeat your objection.

19 MR. PETERSON: He answered that they're part of the
20 nursery. That question misstated the testimony.

21 THE COURT: The objection is sustained. Reask your
22 question.

23 MR. DONAHOE: Thank you, Your Honor.

24 Q (BY MR. DONAHOE) The baby pigs when they're born, the day
25 they're born until they're weaned, what category does that

1 fall under?

2 A Baby pigs would be in the farrowing house at that time
3 with the sow.

4 Q Okay. Is that based on your experience?

5 A Yes.

6 Q And what about in regard to the way that these particular
7 animal unit equivalents are used in the zoning ordinance,
8 has that been done in the past where you considered the
9 sow and the baby pigs until they're weaned part of the
10 farrowing?

11 A Yes, I'm following -- yes, it is, yes.

12 Q Okay. So in regard to the calculations that are set forth
13 on Exhibit 21, I want you to ignore the bottom part and
14 just look at the top --

15 THE COURT: You want him to look at 21?

16 MR. DONAHOE: 21.

17 THE COURT: There you go.

18 Q (BY MR. DONAHOE) On the left side it's got a category that
19 says type and it says sows. The next column to the right
20 says head and it's 5,400.

21 Do you understand that the Schmeichels were proposing
22 to have a 5,400 sow operation to raise baby pigs?

23 A Yes, I do, yes.

24 Q Okay. And then there's a third column that says greater
25 than 55 pounds. Does a sow weigh more than 55 pounds?

1 A Yes.

2 Q The fourth column is animal units and it's got Section
3 27.02(12). Do you see that?

4 A Yes.

5 Q And the first line there for sows is 0.47. What is that
6 0.47 under the animal unit equivalencies from Exhibit 20,
7 what category?

8 A On -- breeding and gestation and farrowing.

9 Q Okay. So that would be the swine production unit;
10 correct?

11 A Correct.

12 Q And then it's got total animal units. Is it correct to
13 say you calculate the total animal units by taking the
14 animal unit equivalent and multiply it by the number of
15 head?

16 A Yes.

17 Q And in this case the calculation is 2,538; correct?

18 A Correct.

19 Q Then the second line under those types of swine there,
20 it's got swine greater than 55 pounds off to the left;
21 then it has head, the second column, it's got 2,000.

22 Do you understand that they were going to finish out
23 2,000 head at the Schmeichel facility?

24 A Yes.

25 Q So there was going to be a total of 7,400 animals there

1 that were counted for animal units; correct?

2 A Correct.

3 Q Okay. So back up to the swine greater than 55 pounds,
4 2,000 head, the animal units for equivalency under Section
5 27.02 in the fourth column over is 0.4.

6 Does that correlate with finisher swine over
7 55 pounds on Exhibit 20?

8 A Yes.

9 Q Okay. And then the calculation would be multiply 2,000
10 head times 0.4 and that's 800 in Column 5; correct?

11 A Correct.

12 Q So the total animal units if you add 2,538 from the 5400
13 head at 0.47, and the 800 from 2,000 at 0.4, is 3,338, and
14 that's the third item in Column 5, total animal units?

15 A Correct.

16 Q Now, I want you to look at TC 120 in that binder there.
17 It's Exhibit A.

18 THE COURT: Why don't you help him with that.

19 Q (BY MR. DONAHOE) So I'm beside you here at the witness
20 stand. Exhibit A says A.U. and setback calculations;
21 correct?

22 A Correct.

23 Q And this was part of the application submitted by
24 Schmeichels; correct?

25 A Correct.

1 Q So, does that number 3,338 appear on that page circled?

2 A Yes.

3 Q And there's a note to the side. Do you know whose note
4 that is?

5 A No, I don't.

6 Q Okay. Does the 3,338 on Exhibit (sic) 120 correlate with
7 the 3,338 on Exhibit 21?

8 A Yes.

9 Q The same number; correct?

10 A Yes.

11 Q All right. So the dispute here is over what's added to
12 the base number for the setback when you have the
13 calculated animal units.

14 Do you understand how they do the setback
15 calculation?

16 A Yes.

17 Q Okay. And that's set forth in Exhibit A; correct?

18 A Correct.

19 Q I don't think there's a real dispute about the calculation
20 based on the numbers that we've discussed so far. It ends
21 up being a little less than half a mile, but they
22 considered that all of the residences in the area were
23 more than half a mile away. That's in Exhibit 17, the
24 map; correct?

25 A Correct.

1 Q Okay. And didn't Dr. Nicolai also explain to everyone at
2 the public hearing by phone that in his experience, based
3 on what he had done at South Dakota State University and
4 the University of Minnesota, that more than half a mile
5 away from a facility of this size with these pigs there
6 should not be a significant amount of annoyance and it
7 shouldn't bother the neighbors?

8 A Yes.

9 Q Okay. And is that something you considered when you made
10 your determination on whether to approve or deny this
11 permit?

12 A Yes. Yes.

13 Q Now, on the bottom of Exhibit 21 there's an additional
14 calculation that adds 10 piglets for each litter for each
15 sow. So that's taking 5,400 head of sows, multiplying it
16 by 10. Showing that they're less than 55 pounds, they
17 then applied 0.1 animal unit equivalencies to come up with
18 an additional 5,400 animal units for this facility.

19 Do you see that?

20 A Yes.

21 Q Okay. Now, I want to just break this down. If a sow has
22 10, on average, piglets, for how long would those piglets
23 be weaning -- or excuse me -- would be in the farrowing
24 barn before they're weaned and taken off the pig, the sow?

25 A I would guess three weeks.

1 Q Okay.

2 A Two to three weeks.

3 Q It's a relatively short period of time --

4 A Yeah.

5 Q -- correct?

6 A Yeah.

7 Q And this is based on your own personal experience;

8 correct?

9 A Correct.

10 Q And then once they're out of the farrowing barn, are they
11 normally put in a separate facility away from the mother?

12 A Correct.

13 Q And is that what we call a nursery?

14 A Correct.

15 Q In this particular instance we're using from Section
16 27.02, 0.1 in Exhibit 21, times these piglets, but those
17 0.1 units are actually for the nursery swine that are
18 weaned and separated from the mother; correct?

19 A Correct.

20 Q Okay. And in this case not all of the pigs are going to
21 be maintained on the property. They're going to be moved
22 away from this facility once they're at that point where
23 they're weaned. Do you understand that?

24 A Yes.

25 Q Okay. But they are keeping a set that's going to be 2,000

1 swine that are considered to be finisher swine that are
2 going to go until they're adult; correct?

3 A Correct.

4 Q All right. I want to approach this a little differently
5 so we understand this and we're all clear. This is a
6 hypothetical:

7 If you had someone come to you and you're an
8 alternate sitting on the Board of Adjustment, and this
9 person wants a large concentrated animal feeding operation
10 for a brand-new facility that's going to have two separate
11 things in the same place by having two buildings next to
12 each other or within the appropriate distance, but close
13 to each other. One is going to have a farrow-to-finish
14 hog operation in it, and the other one is going to have
15 a facility that's only going to house dairy cattle. Okay.
16 Two separate types of facilities.

17 How would you calculate the setback for that
18 facility?

19 A The other build -- one is pigs and the other one is dairy?

20 Q Yes.

21 A Boy, I -- that's -- I don't know how. I --

22 Q Would you ask somebody for help?

23 A Yes.

24 Q Who would you ask?

25 A Well, it would be -- I would start out with the

1 administrator, director of the -- it would be Faye.

2 Q That would be Faye at the time --

3 A Correct.

4 Q -- this permit was considered?

5 A Correct.

6 Q Right. And if Faye told you, we would take the number of
7 hogs times -- for a farrow-to-finish to do the animal unit
8 equivalencies, and then we would take the number of dairy
9 cows for the dairy unit and add the total number of animal
10 units and then apply that as a setback, would that make
11 sense?

12 A That would -- yes.

13 Q Isn't that what we did here, we took swine production unit
14 and added the finishers that are over 55 pounds?

15 MR. PETERSON: I'm going to object, what you just did
16 here, because he testified he never calculated this before
17 today. So I don't know what the "here" means, back at the
18 hearing or at this trial.

19 MR. DONAHOE: What we just did here today on Exhibit 21.

20 THE COURT: The objection is overruled. Go ahead and try
21 to ask that and then he'll answer so ...

22 Q (BY MR. DONAHOE) When I walked you through Exhibit 21,
23 isn't that what we just did today?

24 A Yes.

25 Q Now, you were also asked about odor control. I want to

1 direct your attention to Exhibit 11. In that binder which
2 you have there, there will be a tab that says 11, and then
3 there's going to be page numbers at the top here. We're
4 going to go to Page 8.

5 I want to draw your attention to -- these are line
6 numbers at the side here. We're starting at Line 10.

7 MR. PETERSON: Which page, Brian?

8 MR. DONAHOE: Page 8 of Exhibit 11 starting at Line 10.

9 Q (BY MR. DONAHOE) I want you to just read that to yourself
10 silently all the way through Page 9 and onto Page 10.
11 Actually, we're going to go to Page -- we're going to go
12 to the first line on Page 12, okay -- or 11, excuse me,
13 Page 11. So I want you to read all the way from Line 10
14 until you get to Page 11, the first line you can stop.

15 A (Witness complies.)

16 Q Mr. Austin, did you get a chance to read that and review
17 it?

18 A Yes.

19 Q And does that comport or does that -- is that consistent
20 with what you recall being presented at the December 8th,
21 2020, hearing?

22 A Yes.

23 Q Okay. Isn't it correct -- and I'm going to move quickly,
24 and these are called leading questions, but I'm going to
25 walk you through this as quickly as I can because I think

1 the transcript speaks for itself -- but isn't it true that
2 there was a discussion about fly and odor control and how
3 the plan is --

4 THE COURT REPORTER: Excuse me. Start over with "Isn't it
5 true ..."

6 THE COURT: Slow down.

7 THE COURT REPORTER: Go ahead. "Isn't it true ..."

8 Q (BY MR. DONAHOE) Isn't it true that there's a discussion
9 on fly and odor control and how the application meets that
10 criteria?

11 A Yes.

12 Q Does that also talk about the fact that it is subject to a
13 DENR permit application that has been approved?

14 A Correct.

15 Q And does that plan approved by the DENR include the fact
16 that there is no outside manure storage for outside
17 animals?

18 A Yes.

19 Q And is that also something to control odors?

20 A Yes.

21 Q Is there also a discussion about the composting shed and
22 the fact that any mortalities, if they are composted, will
23 be inside?

24 A Yes.

25 Q Does that help control odor?

1 A Yes.

2 Q Is there also a discussion about the planting of
3 additional trees to help, quote, reduce wind movement of
4 odors away from buildings near storage ponds and/or
5 lagoons, end quote?

6 A Yes.

7 Q Now, we don't have storage ponds or lagoons here, but we
8 still have trees and that's a requirement; correct?

9 A That is a requirement, yeah.

10 Q And it's still for the dispersal of odors; correct?

11 A Correct.

12 Q All right. A minimum of four rows of trees was required.
13 Six were proposed here, but they also proposed in addition
14 to mix those with faster growing trees and fill-in
15 varieties to make sure that they were as quickly full
16 grown as possible; correct?

17 A Correct.

18 Q So previously when you were asked about the odor control,
19 in regard to the considerations you did look at issues
20 and heard the presentation of the applicants, which would
21 be from me as their attorney, talking about these things
22 that we just described in this transcript; correct?

23 MR. PETERSON: Objection. That's compound. That's two
24 questions.

25 THE COURT: It is sustained. Break it down.

1 Q (BY MR. DONAHOE) So, you heard about the odor control that
2 was addressed by the applicant at the hearing pursuant to
3 what we just described in the transcript; right?

4 A Yes.

5 Q And did you consider that as part of your deliberation and
6 you personally deciding what you were going to do in
7 voting to approve or deny this permit?

8 A Yes.

9 Q Did you ignore or intentionally disregard any evidence
10 that was presented by Vicky Urban-Reasonover or Dr. Powers
11 or their attorney regarding odor and the lack of adequate
12 control?

13 A No.

14 Q Did you intentionally disregard or ignore their claims
15 that the setback was improperly calculated?

16 A No.

17 Q I'm going to switch over to Exhibit 12. I want you to
18 look at Page 10, starting at Line 23. Actually, it's Line
19 21. Did you find that?

20 A Yeah.

21 Q Okay. So, this is again myself who is speaking at the
22 time of the transcript here. Is there a reference to an
23 Exhibit A?

24 A Yes, there is.

25 Q And is that talking about setbacks?

1 A Yes.

2 Q And is that an argument that disputes their claim that the
3 setbacks are inadequate?

4 A Yes.

5 Q Okay. Now, I want to bring you back to Exhibit 14 at
6 TC 120. So, TC 120, what's at the top?

7 A It's setback calculations.

8 Q And does it say Exhibit A?

9 A Yes.

10 Q And is that what was referenced in Exhibit 12?

11 A Yes.

12 MR. PETERSON: If I can voir dire the witness?

13 THE COURT: Go ahead.

14 VOIR DIRE EXAMINATION

15 Q (BY MR. PETERSON) At the hearing you didn't get out and
16 look at Exhibit A, did you?

17 A I don't recall. I'm sorry, I -- I don't remember.

18 Q So whether this is the Exhibit A that's referenced in the
19 hearing transcript, you just don't know that, do you?

20 A I just don't remember. I --

21 MR. PETERSON: I would object to that question. He says
22 he doesn't remember.

23 THE COURT: At this point the objection is relevant.

24 Let's go back to what the question was. I think

25 Mr. Donahoe was trying to compare whether Exhibit A in the

1 transcript was the same as Exhibit A on TC 120 of Exhibit
2 14.

3 The Court will ask a question: Sir, do you know if
4 this Exhibit A is the same as what was referred to in the
5 transcript as Exhibit A?

6 THE WITNESS: I'm not sure, but I am -- I'd say, yes,
7 because it -- I think it is. I really do.

8 THE COURT: All right. Ask your next question. I guess
9 the objection will be overruled based on that response.

10 MR. DONAHOE: Thank you, Your Honor.

11 CROSS-EXAMINATION (Resuming)

12 Q (BY MR. DONAHOE) And just so the record is complete, the
13 transcript actually says "Exhibit A on the application."

14 Mr. Austin, is TC 120 Exhibit A of the application?

15 A Yes.

16 Q And in regard to your consideration of whether to approve
17 or deny this permit, did you intentionally ignore or
18 disregard evidence that was presented or arguments that
19 were made that that setback was inadequate?

20 A No. No.

21 Q Mr. Austin, you were asked about relying on Faye
22 Dubbelde's calculations of that setback.

23 Is there any reason for you to believe that Faye
24 Dubbelde incorrectly calculated setbacks for the
25 Schmeichel application?

1 A No.

2 MR. DONAHOE: No further questions.

3 MR. DEIBERT: I have no questions.

4 THE COURT: Mr. Peterson.

5 REDIRECT EXAMINATION

6 Q (BY MR. PETERSON) Do humans make errors?

7 A Yes.

8 Q Is Faye human?

9 A Yes.

10 Q And when I first started my questions we went through this
11 Exhibit 20, and you fumbled around, what kind of facility
12 this is and what kind of animal unit that is.

13 This is hard stuff, isn't it?

14 A Yes.

15 Q And this Exhibit A, you didn't look at that at the
16 hearing, did you?

17 A I, like I said, I -- I don't recall. I think I did, but
18 I -- I don't really recall. I'm -- I'm not sure, put it
19 that way.

20 Q When an issue was raised by the petitioners about there
21 being an error in the setback calculation, you did not
22 independently look at how to calculate the setback;
23 correct?

24 A I don't remember that. I -- I -- like I said, I think we
25 did, but --

1 Q I thought you told me before that you just -- you took
2 Faye's word that she did the work, the setback was met,
3 and that was the end of your thought on the subject --

4 A On the calculation.

5 Q -- because you trust her.

6 A On the calculations.

7 Q On the calculation of the setback. You were asked about
8 whether you disregarded or I think intentionally ignored
9 information regarding the effect of odor on Vicky and her
10 property; do you remember that question?

11 But you did ignore it. You didn't look at our odor
12 report at all, did you?

13 MR. DONAHOE: Objection. Argumentative.

14 THE COURT: Sustained.

15 Q (BY MR. PETERSON) Did you look at the odor report that was
16 submitted at any point and time?

17 A No.

18 Q And that was your decision to ignore that; correct?

19 A Correct.

20 Q Back to Exhibit Number 20 that has the pull-outs from the
21 ordinances. Farrowing is giving birth to piglets;
22 correct?

23 A Correct.

24 Q And piglets are under 55 pounds?

25 A Yes.

1 Q And piglets are not producing swine, are they?

2 A No.

3 Q Under swine production unit in the Ordinance Section
4 27.02(12), does it say anything about piglets being part
5 of the swine production unit?

6 A No.

7 Q Piglets are a part of the farrow-to-finish calculation,
8 though; correct?

9 A Correct.

10 Q And I think your first answer is a piglet would be
11 considered a nursery swine because it's under 55 pounds;
12 correct?

13 A It depends on when you take them out of the nursery or out
14 of -- excuse me -- when you wean them, put it that way.

15 Q Would they ever be weaned at heavier than 55 pounds?

16 A No.

17 Q So a piglet before they're weaned, they're always going to
18 be under 55 pounds in your experience?

19 A Yes.

20 Q And there's an animal equivalency, is there not, for any
21 swine that's under 55 pounds and it's .1 animal unit?

22 A Under 55 pounds, yes.

23 Q And on Exhibit 21, the top calculation simply replicates
24 what's from Exhibit A, and I think Mr. Donahoe walked you
25 through that; correct?

1 A Yes.

2 Q And that sort of analysis and thinking about that, this is
3 the first time you've done that; correct, right here
4 today?

5 A Correct.

6 Q And at the bottom what this adds is the piglets from the
7 swine production units. Fair?

8 A Do you want to just repeat that again. I --

9 Q Yeah. The bottom part of this, what it includes is the
10 piglets that are part of this operation?

11 A That's -- yes.

12 Q And the top calculation isn't counting the piglets?

13 A The top one where it says 5400 head?

14 Q We just talked about it. Piglets aren't part of the swine
15 production unit; correct?

16 A Correct, yeah.

17 Q For any large animal feeding operation there's a certain
18 number of head that make it large; correct?

19 A Correct.

20 Q What is the base number for Mr. Schmeichel's operation
21 here to make it large; what's our starting point?

22 A The 5400 head.

23 Q Right, but the animal units. If you look at, for example,
24 Exhibit 20, where we have listed types of facilities, if
25 you have a finishing barn, do you need 2500 head to be

1 called large?

2 A Yes.

3 Q And then if it's a really big operation that has more than
4 2500 head, now we need to start potentially adding some
5 feet to the setback?

6 A Right. Correct.

7 Q And that's a similar process for nursery swine in a
8 farrow-to-finish operation; correct?

9 A Correct.

10 Q And those have a starting number as well that is your
11 base, and then you need to analyze how much bigger it is?

12 A Correct.

13 Q So for this farrow-to-wean operation, what did you
14 determine, if at all, what the starting point was for the
15 base?

16 A I -- I think it was under the large category, the 5400
17 head, but --

18 Q Right. But is the answer you didn't make a determination
19 as to what the base amount was because this type of
20 facility isn't on the chart?

21 A I -- I -- yes, I guess.

22 Q So, whatever determination was made for what the base
23 amount was and then how many more you add to it, that was
24 done by Faye; correct?

25 A Correct.

1 Q Okay. And the board never made that determination, just
2 accepted Faye's --

3 A Calculation.

4 Q -- calculation. Without explanation; correct?

5 A She walked through it, but we accepted it.

6 Q Well, you read that. She didn't mention one single number
7 in her explanation, did she?

8 A No.

9 Q Okay.

10 MR. PETERSON: Those are all my questions.

11 THE COURT: Mr. Donahoe.

12 RECROSS-EXAMINATION

13 Q (BY MR. DONAHOE) Mr. Austin, Faye talked about meeting the
14 setbacks, and then the presentation by the applicant that
15 I gave talked about how we actually had a cushion built
16 into that; correct?

17 A Correct.

18 Q Looking back at Exhibit 20 that you were just asked about,
19 for a large farrow-to-finish operation you have to have
20 540 or more sows; correct?

21 A Correct.

22 Q Okay. And that's farrow-to-finish meaning the sow and an
23 average of let's say 10 pigs, until those 10 pigs are
24 adults, and they're often going to be a lot more than
25 55 pounds when they're adults; correct?

1 A Correct.

2 Q Okay. But at some point they're going to be a pig that is
3 nursing on the sow, and I don't know if you consider that
4 a piglet or a nursery swine, but I've always heard that as
5 a piglet. It's a nursery swine when they're weaned. Is
6 that your understanding?

7 A Yes.

8 Q Okay. For nursery swine you'd have to have 10,000 head to
9 be a large concentrated animal feeding operation; correct?

10 A Yes.

11 Q And for finisher swine weighing more than 55 pounds you
12 have to be at 2500; correct?

13 A Correct.

14 Q Okay. And in this case the 2500, if we look up above, for
15 finisher swine weighing more than 55 pounds, that's 0.4
16 for the animal unit equivalent in Section 27.02 Subsection
17 12; correct?

18 A Correct.

19 Q And in farrow-to-finish they don't break out the piglets
20 separate, they're just included in that overall number for
21 the animal unit equivalent of 3.7; correct?

22 A Correct.

23 Q And the swine production unit has a sow and considers that
24 at 0.47, and that's different from the 0.4 on a finisher
25 swine over 55 pounds; correct?

1 A Correct.

2 Q So it's only a difference of .07, which is of course less
3 than a nursery swine .01.

4 Is there a difference between the manure that's
5 produced by a piglet when it's born to the period of when
6 it is weaned, in that two to three-week period or whatever
7 that would be, and the nursery swine up to 55 pounds?

8 A So you're -- you're asking is there more waste coming out
9 of the bigger pig?

10 Q Yes.

11 A Yes.

12 Q That's what I should have asked.

13 A Yeah.

14 Q Is there more waste that comes out of a bigger pig?

15 A Correct, that --

16 Q And do the baby piglets eat anything other than nurse on
17 their mother before they're weaned?

18 A If you get them started they will, but not -- not
19 necessarily. I mean, you know, most of it is mother's
20 milk.

21 Q You were asked about whether piglets were included in any
22 of these categories, and you said they were included in
23 the farrow-to-finish; correct?

24 A Correct.

25 Q At some point you were asked about nursery swine, and it

1 wasn't clear to me, you seem to have said that the
2 piglets -- what I'm calling piglets are ones that are not
3 weaned -- would be included in the nursery swine.

4 Just so we're clear, are they considered nursery
5 swine if they're not yet weaned?

6 A No.

7 Q Now, when did you get this information regarding the odor
8 model and their expert's report from the opponents of the
9 Schmeichel project?

10 A The day of the hearing.

11 Q And when did you get the information about their
12 appraiser's claim that they had property damage because of
13 this operation?

14 A I don't remember seeing that.

15 Q Okay.

16 A I --

17 Q Would that have also been in a packet if there was any?

18 A It sure could have been, yes.

19 Q Again, if you were presented with information that was
20 detailed at a hearing, is it your practice to stop and
21 read through all of that before you make a determination
22 on a hearing matter, or do you continue with the hearing
23 and go with what's been said?

24 A Yes.

25 Q Okay. So you'd go with what's been said at the hearing

1 rather than reading through things?

2 A No.

3 Q Okay. When did you read through things in this hearing?

4 A I didn't get a chance to because it -- it wasn't there.

5 Q Did you feel that you needed additional time to read
6 through things before you could make your decision?

7 A Sure could have, yes.

8 Q Okay. Did you feel that you were making a decision
9 without having adequate consideration for the statements
10 and the issues that were argued by the opponents in this
11 case?

12 A You -- yes.

13 Q Did you -- I'm sorry, you said yes?

14 A I -- are you talking about in reference of the odor
15 issues, is that what you --

16 Q Well, all of the issues.

17 A All the issues.

18 Q So -- I asked you if you felt like you needed additional
19 time to read through the materials before you made your
20 decision.

21 Maybe I didn't ask it very well, but did you feel
22 that you needed to stop and read through all the materials
23 or table this and come back later and then decide it?

24 A No. At that time we wouldn't, yeah.

25 Q Is that something you could have done?

1 A Yes.

2 Q And did you feel that at the time you were making your
3 deliberation and making your decision that you had
4 adequate time to review the issues, consider the arguments
5 and the issues raised by the opponents who didn't want
6 this built and make a decision considering what they had
7 raised?

8 A We -- yes. I did that job the way I'm supposed to or the
9 way I thought best, okay.

10 Q Did anyone ask you to give any additional consideration to
11 the fact that Mr. Schmeichel was on the Board of
12 Adjustment or had experience being in the position you
13 were in making decisions on these things?

14 A No.

15 Q And I'm talking about Steve Schmeichel when I say --

16 A Correct.

17 Q -- a person on the board. Did anyone tell you that it
18 would be inappropriate for you to consider how he has
19 managed his existing operation?

20 A No.

21 Q And is that in fact something that you do consider when
22 you decide whether to grant or deny a permit?

23 A On anybody's, yes.

24 Q And does Mr. Schmeichel's existing operation give you any
25 concern about the ability to meet what he promised in the

1 hearing?

2 A No.

3 Q And I used the word "promise." There was an application
4 and there was a presentation of information about what
5 they expected to do.

6 Do you have any reason to believe that
7 Mr. Schmeichel, his son Ethan, and the company, the LLCs
8 that they talked about -- there's one that would operate
9 it possibly -- do you have any concern about them having a
10 reputation for not being able to live up to what they've
11 said they would do?

12 MR. PETERSON: Objection. It's character evidence. It's
13 also speculative and lack of foundation.

14 THE COURT: Overruled. He said he was familiar with his
15 other operation and information about it. He can answer.

16 A No.

17 Q (BY MR. DONAHOE) Did anyone suggest that there had ever
18 been any violations of zoning ordinances or environmental
19 laws by Schmeichels?

20 A No.

21 Q Did you feel that you did anything unusual or failed to
22 follow the regular process for deciding this permit?

23 A No.

24 Q Did you feel like you did anything here that you weren't
25 allowed to do?

1 A No.

2 Q Did you feel that you neglected or ignored anything that
3 you were required to consider to grant or deny the permit?

4 A No.

5 Q Did you use independent thought and think about what you
6 were going to do before you voted yes or no, approve or
7 deny, on this permit?

8 A Yes.

9 Q Is there any guideline or requirement in the ordinance
10 that you feel wasn't followed in making the decision to
11 grant this permit?

12 A No.

13 MR. DONAHOE: I have no further questions.

14 THE COURT: Mr. Deibert.

15 MR. DEIBERT: No questions, Your Honor.

16 THE COURT: Mr. Peterson.

17 REDIRECT EXAMINATION

18 Q (BY MR. PETERSON) You did not apply independent thought to
19 determining the setback, did you?

20 MR. DONAHOE: Objection. Argumentative.

21 THE COURT: Sustained.

22 A Yes.

23 Q (BY MR. PETERSON) You accepted Faye's bare statement that
24 the setback was met. That is your basis for determining
25 the setbacks?

1 A The setbacks, correct.

2 Q And you did not independently give thought to what the
3 setback should be and calculate it yourself?

4 A Oh. No.

5 Q And you did not give any independent thought to what the
6 base amount should be because the farrow-to-wean isn't on
7 the chart?

8 A Yes.

9 Q I want to touch on one last subject on timing. Do you
10 understand the public is given notice of a permit hearing
11 maybe a week and a half before the hearing?

12 A Yes.

13 Q The applicants can take as many weeks or as many months as
14 they want to get their ducks in a row and their paperwork
15 in a row, and then they submit it with the application,
16 but everybody else has to scramble; correct?

17 MR. DONAHOE: I'll object to the characterization.

18 THE COURT: Sustained. I wasn't even sure if you were
19 going to get to a question. Why don't you rephrase it.

20 Q (BY MR. PETERSON) Do the applicants have as much time as
21 they want in order to get all of their paperwork ready
22 before submitting an application?

23 A I -- I don't know how to answer that. Do they -- in
24 compared to what -- what are you saying? What --

25 Q The Schmeichels did not have a deadline by which they

1 needed to submit this application for the 2020 permit, did
2 they?

3 A No.

4 Q So, when they were fully ready, they made a choice to
5 apply for the permit?

6 A Correct.

7 Q And then notice was given with roughly 10 days' notice
8 before the hearing?

9 A Okay. I'm following you, yeah.

10 Q And that was around Thanksgiving time?

11 A Yes.

12 Q And you can verify on TC 428 in Exhibit 14, but the
13 Scentroid odor report and related affidavit and the
14 appraisal report from Steve Shaykett and his affidavit
15 were sent to Faye on December 4 at noon. But you're
16 saying you didn't get it for another four days; is that
17 correct?

18 A That's correct.

19 Q Did the petitioners have any control over how quickly Faye
20 gets information to you?

21 A No, I -- not that I know of. Not that I'm aware of, put
22 it that way, but ...

23 Q Knowing everything you know now, do you wish you had taken
24 more time to take a look at everything before making a
25 decision?

1 A I think -- I think I did my job the best I could and
2 that's what we did.

3 Q Do you wish you'd have taken more time given everything
4 you know now?

5 MR. DONAHOE: I'll object as to relevance and improper
6 legal standard.

7 THE COURT REPORTER: I'm sorry, what was the last?

8 MR. DONAHOE: I'll object to relevance and improper legal
9 standard.

10 THE COURT: Sustained.

11 MR. PETERSON: I have no further questions.

12 THE COURT: Mr. Donahoe.

13 MR. DONAHOE: Thank you, Your Honor. Just very briefly.

14 RECROSS-EXAMINATION

15 Q (BY MR. DONAHOE) I will represent to you that I'm looking
16 at a 2020 calendar. December 4th was the Friday before
17 the Tuesday, December 8th hearing.

18 Do you have any recollection of receiving any
19 information regarding the hearing, of any kind, from Faye
20 Dubbelde prior to the December 8th meeting?

21 A I didn't get any.

22 Q Okay. So you got information that morning?

23 A Yes.

24 Q And this is a hearing that took place in the morning;
25 correct?

1 A Correct.

2 Q You were asked about exercising independent thought, and I
3 just want to make sure that we're clear. Relying on Faye
4 or other information as presented or summarized took place
5 at this hearing; correct?

6 A Correct.

7 Q Does your reliance on presentation of a summary or someone
8 else's expertise, in your mind, constitute a failure to
9 exercise independent thought?

10 MR. PETERSON: Objection. That calls for a legal
11 conclusion.

12 THE COURT: It's overruled. He can answer.

13 A Just explain again, just go through the question again.

14 Q (BY MR. DONAHOE) Sure.

15 A I lost --

16 Q One of the legal standards is whether you failed to use
17 independent thought; in other words, if you didn't follow
18 through with your obligation to consider and independently
19 determine the issues that were presented.

20 I'm asking if you feel that using the summary of
21 certain facts or information, or reliance on Faye or some
22 other expert, fails to do that engaging in independent
23 thought necessary to weighing these issues?

24 MR. PETERSON: Objection. Legal conclusion and the
25 relevance of his feelings.

1 THE COURT: At this point I'm going to sustain the
2 objection. Let's move on.

3 Q (BY MR. DONAHOE) Is there anything you feel that you
4 failed to independently consider and weigh in this case?

5 A No.

6 Q I just want to make sure that we're clear. Do you recall
7 someone saying that these folks who were opposed to the
8 Schmeichel permit felt that they were unfairly being
9 exposed to excessive odor and that it would harm them at
10 their residence?

11 A No.

12 Q "No" meaning that you do or you do not recall that?

13 A I do not recall that.

14 Q Okay. So, if you don't recall that and it's in the
15 transcript, is that -- well, let's move on to a different
16 area.

17 Did you review the transcripts of the presentation on
18 December 8th, 2020, that are in the record?

19 A No, I didn't, no.

20 Q Did you do anything to refresh your recollection or try to
21 remember exactly what happened on December 8th, 2020,
22 before you came to testify today?

23 A No.

24 MR. DONAHOE: No further questions.

25 THE COURT: Mr. Deibert.

1 MR. DEIBERT: No questions, Your Honor.

2 THE COURT: Mr. Peterson.

3 MR. PETERSON: No questions.

4 THE COURT: You can step down. Thank you.

5 (Witness excused.)

6 THE COURT: Mr. Peterson, did you have any additional
7 witnesses?

8 MR. PETERSON: No additional witnesses. I would just like
9 to confirm the admission of exhibits before closing the
10 evidence, and I'd also ask that judicial notice be taken
11 that the Turner County Board of Adjustment had possession
12 of our expert reports more than a year prior to this
13 hearing as part of the 2018 litigation.

14 THE COURT: I don't know that I can take judicial notice
15 of that. I don't have -- I don't have --

16 MR. PETERSON: It's in the court file. It's part of the
17 summary judgment opposition from the 2018 litigation. It
18 is a matter of public record.

19 THE COURT: I don't know that I'm going to take judicial
20 notice of it. They're two separate proceedings. There's
21 two separate applications. This witness testified he
22 didn't have much of any information concerning 2018. I
23 heard what you have questioned and what Mr. Donahoe has
24 talked about, December 4th. I'm not going to take
25 judicial notice of anything.

1 As far as exhibits, 8 was not offered even though it
2 was referred to. That was the county's discovery
3 responses.

4 MR. PETERSON: I would offer that, Your Honor.

5 THE COURT: Any objection to 8 being received?

6 MR. DEIBERT: No, Your Honor.

7 THE COURT: Mr. Donahoe.

8 MR. DONAHOE: I probably would have asked a different
9 question of at least one of the Board of Adjustment
10 members to clarify that.

11 THE COURT: Give me an objection or no objection.

12 MR. DONAHOE: No objection, Your Honor. There's going to
13 be an argument about what it means.

14 THE COURT: I understand.

15 MR. DONAHOE: We'll have to have that with our
16 presentations later.

17 THE COURT: Exhibit 8 will be received.

18 9 and 10 have not been offered?

19 MR. PETERSON: Correct.

20 THE COURT: And is it your desire not to offer them at
21 this time?

22 MR. PETERSON: Correct, Your Honor.

23 THE COURT: Okay. And, Mr. Donahoe, you did not offer D
24 even though it was referred to.

25 MR. DONAHOE: It is cumulative to what is in the record.

1 If it would help to be clear as to what was addressed by
2 the witness, we would offer it, otherwise it's really only
3 being offered to help the witnesses in this case. So, it
4 would be a demonstrative exhibit.

5 THE COURT: Mr. Peterson, any objection?

6 MR. PETERSON: No, no objection.

7 THE COURT: It will be received. Officially, it will be
8 considered as a demonstrative exhibit, but it will be
9 received and in the record:

10 The Court will make sure that 9 and 10 are pulled
11 from the binder. I think everything else in there has
12 been offered and received.

13 Does that take care of the housekeeping side of that?

14 MR. PETERSON: It does, Your Honor.

15 THE COURT: Okay. All right. We'll come back at 3:30,
16 and the Court will allow argument. I'm going to break it
17 down. You do not have to be lengthy by any means, but I
18 will give you the opportunity for argument.

19 First we're going to address standing. The parties
20 will give an argument concerning standing. Within that,
21 if you want to argue about the expert witnesses and
22 whether *Daubert* applies or not, knock yourself out. If
23 you also want to talk about landowner opinion and value,
24 fine, you can do that.

25 Depending upon the Court's ruling on standing, then

1 we would after that move on to whether there was any
2 illegality concerning the board's actions. And I do
3 appreciate Mr. Peterson in his petitioners' prehearing
4 brief setting forth the appropriate standards and the 13
5 different factors that can be applicable that must be
6 established. So, thank you for giving me your burden of
7 what must be established there.

8 We'll deal with standing first. If standing is
9 found, we'll move on to whether the actions were legal or
10 not. And again, you don't have to be lengthy. I've heard
11 more than I needed to hear already today. So, you did a
12 very good job of making your points. It was interesting
13 to hear from the Board of Adjustment members and their
14 different perspectives.

15 So, we're going to come back at 3:30. We'll get
16 started at that time.

17 MR. PETERSON: Judge, I might just make one note. I think
18 for preservation of the record, I think if we could roll
19 in judgment as a matter of law arguments with closing
20 argument and just make one legal argument, I think that
21 would be appropriate for preserving the record on appeal
22 versus having two sets of arguments.

23 THE COURT: That's fine. Any objection to that?

24 MR. DONAHOE: No, Your Honor.

25 MR. DEIBERT: No, Your Honor.

1 THE COURT: All right. Also, I guess procedurally,
2 Mr. Peterson, have you rested?

3 MR. PETERSON: Yes, Your Honor.

4 THE COURT: Mr. Donahoe, I never asked, did you have any
5 witnesses? And it's probably not necessary at this
6 juncture unless you have something brand-new, but I don't
7 know if there's anybody out there that we haven't heard
8 from at this point. So, it's up to you.

9 MR. DONAHOE: Your Honor, the only thing I'm considering
10 is calling Steve Schmeichel to address a few things very
11 briefly, but I'm not going to do that. The specific issue
12 would be in regard to the missing parts of the transcript.

13 THE COURT: I don't know that that's necessary. The
14 parties have all kind of pointed out and agreed that there
15 are missing parts, and the Court doesn't take any
16 positives or negatives one way or the other from where
17 we're at from that, I guess.

18 So, I'm not sure if there's a major item that was
19 presented that has not been addressed or brought up from
20 the other witnesses that you're concerned didn't appear in
21 the transcript. I can understand if there was something
22 completely missing that has not been addressed.

23 MR. DONAHOE: That's my concern, but if it comes up in
24 argument, I'll address it and move to strike the argument.

25 THE COURT: So you're more concerned with what

1 Mr. Peterson is going to argue and say than something you
2 wanted to argue about that's not in the record?

3 MR. DONAHOE: That is correct.

4 THE COURT: Well, I guess, Mr. Peterson, you're on fair
5 notice about that.

6 MR. PETERSON: I think I know what it is, and if we just
7 want to address the issue out in the open. I think it's
8 the assertion that Dr. Powers asked the board members how
9 they would feel about a hog barn down the street, and it
10 was off record. I don't know if that's the particular
11 issue, but all of the board members were called. They
12 could have been asked, hey, did Dr. Powers ask you that.

13 THE COURT: The Court is not concerned about that
14 question. It has minimal relevance.

15 MR. PETERSON: Yeah, that was going to be my closing
16 anyway, but I think that's the issue, but maybe I'm wrong.

17 MR. DONAHOE: No, Your Honor, that was the issue. And the
18 problem is that the board -- and because Mr. Schmeichel is
19 on the board he'd be able to address the fact that the
20 board does not engage in question and answer in these type
21 of proceedings. And that was a question from him to the
22 board: What would you do if it was in your situation?

23 THE COURT: I found Dr. Powers to be credible as to what
24 he thought he said and what he asked. I have no doubt he
25 may have asked them. At the same time, I did not find it

1 inappropriate that no one claimed there was any response
2 elicited, because it would be very appropriate for the
3 board not to respond to a question of that nature. So,
4 the Court puts minimal significance on that whole area.

5 MR. DONAHOE: With that, Your Honor, we rest.

6 THE COURT: All right. Mr. Deibert.

7 MR. DEIBERT: Nothing, Your Honor.

8 THE COURT: All right. We still are going to be back at
9 3:30 and we'll present arguments.

10 MR. DEIBERT: One matter, Your Honor. On behalf of the
11 board, I would waive oral argument and adopt and join with
12 anything Mr. Donahoe argues. And unless the Court wants
13 me here, I will leave.

14 THE COURT: Mr. Peterson, any objection to that?

15 MR. PETERSON: I have no objection.

16 THE COURT: Mr. Donahoe, any objection?

17 MR. DONAHOE: No objection.

18 THE COURT: And that's kind of been the county's position
19 of having a similar position to what the intervenors have
20 had. So, Mr. Deibert, you will be excused.

21 MR. DEIBERT: Thank you, Your Honor.

22 THE COURT: I think the rest of us are jealous, but you
23 are excused. So we'll be -- the rest of us will be back
24 at 3:30. Thank you for appearing.

25 (Recess at 2:43 p.m. to 3:32 p.m.)

1 THE COURT: Please be seated. Mr. Peterson, you can start
2 with your closing arguments.

3 MR. PETERSON: Thank you, Judge. I will just be
4 addressing the standing and related issues at this point
5 per Your Honor's directions.

6 Standing is a pretty low bar. It's not proving
7 damages to some reasonable, specific amount. It's a low
8 bar, and it's meant to keep true strangers, people with
9 trivial litigation interests without any actual impact on
10 their lives, it's meant to keep those folks out.

11 I think it defies common sense to suggest that
12 minimally, Vicky, who's .57 miles away from a 7400-head
13 hog unit isn't going to be impacted in some way, in some
14 way negatively. Whether it's hanging clothes out, having
15 friends over, enduring odor, decrease in her property
16 value, I think it defies common sense to say she's not
17 going to be negatively affected.

18 We can debate about the extent, but that's not what
19 standing is about. Standing is we get over this low
20 threshold, this low bar, and I think we're pretty clearly
21 there just with Vicky's testimony alone, common sense
22 alone, and Dr. Powers' testimony as well.

23 Ultimately, 11-2-61 requires a grievance. That is a
24 term of art under the law. The injury in this case must
25 be unique, not from everyone on the planet, not from

1 everyone on the injury, not from everyone in Turner
2 County. It simply needs to be unique from the type of
3 grievance a general taxpayer would have. And the point of
4 that is people can't come in and say: Gosh darn it, I'm a
5 taxpayer. This project might damage the roads and some
6 incremental amount of my tax dollars might go up. That's
7 what standing is meant to stop.

8 Here there is a unique injury that is redressable by
9 a favorable decision of this Court. A reversal of the
10 permit will stop this facility from being built and from
11 Vicky and Dr. Powers from being injured.

12 Ultimately, recent decisions from our Supreme Court
13 have recognized that odor is enough. If we can establish
14 that odor will affect Vicky or Jeff's property, that is
15 enough to establish standing. That was Paragraph 18 of
16 the *Powers* case and Paragraph 27 of the *Sierra Club* case,
17 both from this year. They're cited in our pretrial brief.

18 And *Sierra Club* also added, in addition to decreased
19 property value, there's also odor and air quality. Those
20 are things that because of the proximity of the landowner
21 to the project they are affected in a way that general
22 taxpayers are not.

23 In this case the Supreme Court in Paragraph 23 in the
24 *Powers* decision -- I already commented on the evidence
25 that we have before us so I think *stare decisis* should be

1 an important influencer when they found that the very
2 facts we're presenting here from our experts and from
3 Vicky showed a personal and pecuniary loss not suffered by
4 taxpayers in general falling upon them in an individual
5 capacity and not merely in the capacity as a taxpayer and
6 member of the body politic of the county. And that was
7 notwithstanding the argument regarding the Right to Farm
8 Covenant.

9 So the evidence that's been presented is enough to
10 get there, and there really hasn't been anything to the
11 contrary, not in terms of admissible, reliable evidence
12 regarding the odor impact and property value. The
13 evidence is one-sided in this case about the impact that
14 this will have on my clients' properties and their
15 enjoyment of those properties.

16 Specifically, both Vicky and Jeff are qualified as
17 landowners to talk about the effect this will have on
18 their property value. That's recognized in the *Coyote*
19 *Flats* case, and there's one other case in our pretrial
20 brief. Landowners are uniquely qualified to talk about
21 that.

22 Additionally, Steve Shaykett -- I mean, there was a
23 *Daubert* challenge on the front end of this, but I don't
24 know that those objections were renewed. So I think the
25 evidence is in the record, it's been considered by Your

1 Honor.

2 But aside from that, Steve Shaykett testified about
3 his experience, his credentials, the methodologies he
4 employed being those that all appraisers employ, and
5 specifically he used studies that rely upon and repeat
6 within them comparative sales to show the impact that hog
7 barns have on properties depending on their proximity.
8 And he reliably applied that methodology and those
9 principles to this case to determine that Vicky's property
10 will be reduced in value by 15 percent or \$48,000.

11 And our final witness on the issue of standing was
12 Dr. Ardevan Bakhtari from Scentroid. I think he's
13 unquestionably one of the world's leading experts on odor
14 dispersion. It's what he does. He has a Ph.D. that's
15 applicable. His company is the number one supplier of
16 scientific odor-related equipment. He provides
17 consultation to companies throughout many different
18 countries. He trains other people.

19 And he talks about the methodology that he employs,
20 and what he's using is the United States EPA AERMOD
21 system, which shows how gases and other emissions
22 dissipate and disperse based on atmospheric condition. He
23 used NOAA, N-O-A-A, certified data from the United States
24 government to determine wind directionality in this case.
25 He studied 20 plus years of emissions data to show how

1 much manure is produced by the types of swine facilities
2 we have in this case, and he looked at both the lowest
3 emission rate and a more typical moderate rate.

4 And under all of those scenarios when the proper data
5 is considered, Vicky will suffer. Anywhere from 15 to
6 91 percent of the day she will have an annoyance level of
7 odor at her home. That is not true for other people in
8 this county. That is unique to her and she will be
9 impacted.

10 For all of these reasons, we believe there clearly is
11 standing in this case and we should proceed to the merits.

12 THE COURT: Thank you. Mr. Donahoe.

13 MR. DONAHOE: Thank you, Your Honor. In regard to
14 standing the *Powers* case was immediately addressed by the
15 South Dakota legislature when they amended the county
16 conditional use and other zoning requirements in Chapter
17 11-2, and the current requirement for appeal is that the
18 petitioner show under SDCL 11-2-1.1 that they are a person
19 aggrieved, as defined there. And the last item, Number 4
20 in that definition, is they have to show that, quote, the
21 injury is unique or different from those injuries suffered
22 by the public in general, end quote.

23 You'll note that that doesn't talk about taxpayers.
24 You'll note that that doesn't talk about some other
25 standard that would apply. It has to be injuries suffered

1 by this particular petitioner different from or unique
2 from those that the public in general would endure.

3 Where does that come from? Well, it comes from *Cable*
4 and from inverse condemnation cases. We mentioned the
5 *Krier* case, that's *Krier v. Dell Rapids Township*, when we
6 talked to the appraiser, Mr. Shaykett. And in that case
7 the South Dakota Supreme Court said that the damages being
8 claimed there are not different in kind from those
9 suffered by the public in general; and therefore, that's
10 not compensable. We have to have something different or
11 unique. He did not.

12 Therefore, because Mr. Shaykett used the same
13 methodology by analogy to inverse condemnation in
14 determining that there were damages unique to this
15 property, he was using odor and other inconveniences as
16 the determining factor for that unique or different
17 damage. None of the testimony provided in this case
18 establishes anything other than the same type of injury
19 that will be suffered by those who are exposed to odor in
20 agricultural areas in Turner County.

21 That brings us to the Right to Farm Covenant, which I
22 understand does not apply to this particular operation or
23 to the residences of the petitioners. But, that is
24 nonetheless something that should be considered when we
25 look at what it means to be injured by or damaged from a

1 zoning decision in Turner County because all residences in
2 Turner County have to be in a zone of one type or another.

3 Those that are in the Agricultural District A-1 are
4 subject to those provisions that are set forth in Article
5 3.0. We find that Article 3.02(B), that one of the
6 permissive uses is a single-family dwelling. The Right to
7 Farm Covenant only applies for brand-new single-family
8 residences, but the language that it uses explains what
9 people should expect and what the general public will be
10 enduring in that particular district.

11 They list, among other things, the fact that, quote,
12 you may be subject to inconvenience or discomfort from
13 lawful agricultural or agricultural processing facility
14 operations. Agricultural operations may include, but are
15 not limited to, the following: The cultivation,
16 harvesting and storage of crops; livestock production;
17 ground rig or aerial application of pesticides or
18 herbicides; the application of fertilizer, including
19 animal waste; the operation of machinery; the application
20 of irrigation water; and other accepted and customary
21 agricultural activities conducted in accordance with
22 federal, state and county laws.

23 Discomforts and inconveniences may include, but are
24 not limited to: Noise, odors, fumes, dust, smoke,
25 burning, vibrations, insects, rodents, and/or the

1 operation of machinery (including aircraft) during any
2 24-hour period. If you live near an agricultural area,
3 you should be prepared to accept such inconveniences or
4 discomforts as a normal and necessary aspect of living in
5 an area with a strong rural character and an active
6 agricultural sector, end quote. That's what the general
7 public is expected to endure in an agricultural area.

8 What was actually said in *Powers*, using a different
9 standard, was that in the particular case presented, the
10 injury that they were looking at from the *Cable v. Union*
11 *County* case was whether it was a diminution in value of
12 the real property or damage to their quiet rural lifestyle
13 shared by all taxpayers or electors, but to a greater
14 extent by those in closer proximity to the proposed
15 refinery.

16 They went on in a footnote in that same paragraph to
17 say: Proximity is not necessarily enough. Some
18 jurisdictions do allow that, but other jurisdictions
19 noted -- are noted, excuse me, to require that a plaintiff
20 show a particularized injury in addition to proximity.

21 Now, in this particular case there is a statute that
22 came into place directly after that decision, and it
23 doesn't use language that would be limited to the
24 taxpayers or electors. Granted, it also doesn't talk
25 about proximity, but the clear intention here is that it

1 be aligned with the *Cable* case and other cases, especially
2 inverse condemnation cases that talk about the need for a
3 showing of a type of damage that is different in kind and
4 not just degree.

5 The argument here is that this particular set of
6 petitioners suffers a unique or different injury because
7 they are closer and they will endure more odor or more
8 other inconveniences that are recognized to exist in the
9 agricultural district and they already have to put up
10 with.

11 As we indicated with our cross-examination
12 questioning and some of the other things that were
13 presented here, it's 9,000 -- or excuse me, it's 999
14 animal units before you get to the categorizations that
15 are in the chart that has been thoroughly discussed here.
16 There are many people who have operations that are not
17 required to obtain conditional use permits in Turner
18 County.

19 Someone could move in next door or across the road,
20 have an open cattle feedlot or something else, and they
21 would also produce odor from animals, and that would not
22 be regulated or controlled by the Turner County zoning
23 ordinances. That's an example of what could be occurring
24 in the country and why the general public should expect to
25 be exposed to such things as odor.

1 I understand the perception is that that type of odor
2 from a swine operation is different from and more
3 offensive than dairies or other operations, but that's not
4 the law. The law requires that it be something different
5 in kind, and odors from swine operations or dairy barns or
6 other things are still odors. And this is not unique.
7 It's still odors from agricultural operations. There's
8 nothing in the ordinance here that differentiates between
9 a species or in the Right to Farm Covenant that says if
10 you have additional protections because of swine.

11 Based on that and the fact that we have here an
12 appraiser who admitted that he was basing this on the
13 inverse condemnation analogy, it should be clear that
14 these are not persons aggrieved under our new definition
15 at South Dakota Codified Laws 11-2-1.1.

16 I want to just briefly touch on the odor footprint
17 issues or odor model issues in the case. Dr. Bakhtari is
18 clearly testifying about something that he believes should
19 be regulated down to a two-minute interval. He goes
20 through an exhaustive calculation to get down to that
21 interval, and it greatly expands the number of
22 opportunities or days in which he claims a person might
23 encounter and perceive an odor at a level sufficient for
24 them to register a complaint.

25 But, if you go back to the basics using the AERMOD

1 model that he recognizes as the standard here in the
2 United States, that's a one-hour weather or climate
3 report. He says in his testimony that because these other
4 jurisdictions require that you go down to a ten-minute or
5 a five-minute or a two-minute interval, you have to expand
6 what they originally calculated, which was zero days of
7 complaints over ten -- or excuse me, over ten odor units
8 for an hour or even the half hour, under the most
9 conservative means, less odorous situation.

10 And then there's absolutely no explanation of why he
11 feels it's appropriate in a jurisdiction like the United
12 States, which has no requirement for this ten-minute,
13 five-minute or two-minute interval, to go ahead and
14 calculate it down to that level. Frankly, I still don't
15 understand why that should be the case, why it should be
16 measured in the two-minute intervals. It simply -- it
17 makes it a whole different type of measurement.

18 And if we're going to look at that, we're looking at
19 the possibility that on many given days, based on that
20 percentage, you may have the possibility of smelling the
21 operation from a particular distance, but that doesn't
22 mean that you're going to suffer a harm or damage that's
23 different from what the general public experiences
24 because if we're going to break it down to that two-minute
25 interval, then you are talking about the person who drives

1 by and has to endure the smell for a couple hours. So
2 that in and of itself is additional proof that this is not
3 different or unique from harm or injury suffered by the
4 general public.

5 And finally, I do believe that it is within the
6 Court's power to go ahead and determine that neither one
7 of the experts, the retained experts, have sufficient
8 foundation to establish that the methodology that they
9 have claimed here is appropriate for the issue in the
10 case, and that issue is again SDCL 11-2-1.1: Is this
11 injury or damage unique or different from that suffered by
12 the general public. They did not.

13 Under *Daubert* the Court could reject them; the Court
14 can also accept them and give them no weight. The Court
15 can determine the appropriate way to handle that. It
16 wasn't necessary for me to renew that particular motion
17 based on the fact that this is a writ of certiorari
18 proceeding and it's not a trial. There's no provision
19 that would require us to raise that issue again. We did
20 raise it in pretrial motion, and I would rest on that
21 motion regarding the remainder of our arguments on the
22 expert witnesses.

23 I'll wrap up quickly on standing by also relying on
24 the arguments we've set forth in our brief, but I want to
25 mention one thing very quickly. When it comes to the

1 Cable case, and that's *Cable v. Union County*
2 *Commissioners*, that was a rezoning decision. The
3 arguments that were presented by the complaining parties
4 here -- you've got Ed Cable himself, some other
5 individuals and then an association -- and I just want to
6 make sure that we're clear that Mr. Cable had asthma, and
7 he testified and submitted affidavits that he was
8 concerned that fumes and other particulates from the
9 refinery would cause his asthma to flare up and that he
10 was going to have adverse health impacts from this
11 particular operation.

12 That was a summary judgment decision. The Court said
13 at Paragraph 18, again, of that case that Cable's argument
14 on appeal is that he had standing to bring the appeal as
15 a, quote, person aggrieved, end quote, because he will
16 suffer a personal injury unique and distinct from that of
17 other taxpayers living farther away from the proposed
18 refinery site.

19 The county contends on appeal that the Circuit Court
20 was correct when it concluded as a matter of law that it
21 lacked subject matter jurisdiction to hear the suit
22 because Cable lacked standing. The county argues Cable's
23 injuries were not different or unique as compared to other
24 taxpayers, and thus he lacked standing as a person
25 aggrieved. As we know, the Court, the Supreme Court,

1 affirmed that decision, and that's just taxpayers.

2 After *Cable*, after *Powers* was decided, the
3 legislature steps in and made sure that they used the
4 language "different or unique from injury suffered by the
5 public in general." Now we're talking about the transient
6 person driving by who's not a taxpayer of Turner County.
7 We're talking about people who as Dr. Bakhtari, their
8 expert, said would still be impacted by this under their
9 moderate scenario four miles or more away.

10 We also looked at the fact that in the Purdue
11 screening tool and spreadsheet, they use 91 percent. The
12 South Dakota Odor Footprint Model, which they reject at
13 Scentroid, uses 94 or higher, and there's an argument
14 about exactly what that means when they talk about zero
15 odor or no odor in the Purdue matter. That's in Exhibit
16 A. We're not arguing about whether one part of that test
17 is the same as the South Dakota Odor Footprint Model or
18 any part of it. The 91 percent odor-free or 94 percent
19 odor-free doesn't matter.

20 What matters is that they categorize that as
21 agricultural areas with few residences. Then the next
22 step up is rural residential, then small residential,
23 which is less than 50 homes.

24 So, the point being if you've got very few
25 residences, which is clearly the case here around the

1 Schmeichel property, the level of odor annoyance is going
2 to be determined to be less invasive or more accepted by
3 those who live in that rural area. It's another example
4 of how the general public should expect that they're going
5 to be exposed to odors from animal operations.

6 Exhibit B on the last page has a very interesting
7 chart, again, from Purdue. This is back in 1997, and we
8 freely admit that things have been changed since then.
9 But, that particular chart has concentric circles: The
10 red outside circle is one mile, the black inside circle is
11 one-half mile. There are three figures: Figure (a),
12 which is the directional setback distance calculated for
13 1,000 head using their footprint model; (b) is 4,000 head;
14 and (c) is 10,000 head, all finishing units. Now, Figure
15 2(c) with 10,000 head barely exceeds the half mile, and
16 that's in the prevailing wind directions of that
17 particular location.

18 When we look at the chart in the ordinance as
19 summarized on Exhibit 20, if we're looking at a finisher
20 unit, that's 0.4, for the animal unit equivalencies. If
21 we have a 10,000 head finishing unit at that level, we're
22 talking about a comparable area to what we've discussed
23 here.

24 And I say that because you've got sows at 5,400 in
25 total number, who will have piglets. What I call piglets

1 are those animals born, and from the day they're born
2 until they're taken off of the sow and weaned in about a
3 three-week period, they are removed from that facility.
4 2,000 may stay, or 2,000 of what we're showing to be
5 finisher swine over 55 pounds going to adulthood at that
6 0.4.

7 So, if we're really going to look at this and
8 compare, you can use a higher number for the 5,400, which
9 we did at 0.47, but keep the finisher swine at 0.4, you're
10 still going to be less than what they have here for 10,000
11 swine. The reason why you don't count the piglets in is
12 because they're already in the .47, and they're removed
13 after three weeks, and this is for an entire year.

14 So, I've already gotten into some of the arguments on
15 the merits, but it has to be said on the issue of standing
16 because it goes back to how this is a matter properly
17 determined to be something that the public in general
18 would endure in an agricultural area. The reason why I
19 say that is because the Purdue information, albeit
20 different now, started in 1997, the same place where we're
21 at here, and if we had 10,000 head it would be okay to
22 have a half-mile setback according to that map.

23 And you heard the testimony from the other folks.
24 Dr. Bakhtari says you have all of these days when you're
25 going to have annoyance. Well, the people who are on the

1 Board of Adjustment, including people who have been out in
2 the country raising animals themselves or experiencing it
3 because they go to people's homes to do repairs or other
4 things, they recognize that these half-mile setbacks
5 didn't raise an alarm for them on this particular site.

6 Besides the fact that it did meet the setbacks, they
7 also said even with 2,000 head of finishers and 5,400
8 sows, this is not such a large operation that we think
9 that this half-mile setback caused us to have a problem
10 with what we were looking at. The reason for that is
11 because the general public expects that, yes, you may have
12 some odor, but you're not going to have that much over
13 half a mile.

14 Therefore, they have not shown that they're suffering
15 from a unique or different injury. They have not shown
16 standing despite the experts and despite the claim that
17 there was a pecuniary loss based on the property value --
18 property value decrease according to the appraiser.

19 I just want to say one final thing on the property
20 value, and that is the appraiser is determining that based
21 on what he thinks the market would bear, but there's
22 absolutely no showing of any home in the State of South
23 Dakota that has ever suffered diminution of value because
24 a hog barn was built in the way that this one will be
25 built or similar to this, and we've had lots of hog barns

1 built in the last ten years.

2 The same thing in Iowa, especially in northwest Iowa.
3 Mr. Shaykett was an appraiser in Iowa as well until
4 recently. There's no reason why if that stuff really was
5 happening, there wouldn't be some record of it.

6 And to the extent that it would apply to an
7 individual situation, Schmeichels would have been able to
8 step in and purchase this if it had been offered. I
9 realize that's different from what they're claiming. They
10 don't want to move. But when you're talking about what's
11 an appraisal, you're talking about what the normal market
12 price would be and determining whether the person who is
13 selling it would be able to get that on the open market.
14 Willing buyer, willing seller. These properties are very
15 valuable when they're nearby an operation like this for
16 the manager or for the operation to buy and to rent to the
17 workers. That evidence is in the record as well, Your
18 Honor.

19 And for those reasons we don't believe that there's
20 been a sufficient showing of standing, and based on that
21 the Court would not have jurisdiction. However, we're
22 prepared to argue on the merits as well, and I would like
23 to have the opportunity to do that even if the Court does
24 determine that there is no standing just to make a final
25 record for the case.

1 THE COURT: Understood. All right. As to standing, the
2 Court is aware of the standard. The parties have
3 articulated that well. You have to look at a unique
4 personal injury distinct to the petitioners in order for
5 them to be aggrieved.

6 I'm going to break down my analysis first by talking
7 about Mr. Shaykett's testimony. The Court does recognize
8 that Mr. Shaykett is a very qualified and experienced
9 appraiser. He is clearly an expert in this field.

10 We do have an interesting situation, and Mr. Shaykett
11 called it a hypothetical condition. And I had written
12 words in my notes prior to him giving it that term that
13 here we are speculating on what the future impact may be
14 of the proposed CAFO being built adjacent to the
15 petitioners' property. The Court agrees with
16 Mr. Shaykett's analysis. He looked at cost approach,
17 income approach and sales approach. The Court agrees
18 sales comparison approach is the best approach to consider
19 to be utilized in this analysis. The Court also noted
20 that Mr. Shaykett had three comparable sales in the Hurley
21 area, Chancellor area and Davis area, all within Turner
22 County.

23 The Court was concerned, however, that Mr. Shaykett
24 didn't find any comparable sales in the area near CAFOS,
25 not here within southeast South Dakota, the immediate

1 market area, nor did he present any information within the
2 State of South Dakota or the State of Iowa, which the
3 Court did note that he was a licensed appraiser there for
4 numerous years.

5 So Mr. Shaykett did research to determine how to come
6 up with comparables. He then looked at properties that
7 were adjacent to sewer lagoons. He also did review the
8 odor report and information from Dr. Bakhtari and
9 Scentroid. The Court did take note that he did not update
10 his research and data since he originally prepared the
11 report in 2019. I don't know if he could have added or
12 looked at additional comparable properties that may have
13 assisted him, but he did not do that.

14 He did testify that the presence of a hog facility of
15 this nature can affect the perception of the buyer, and
16 the Court does understand that and believes that's a
17 legitimate concern. The testimony was that he could have
18 sought out other information to help him. However, he
19 chose the sewer lagoons as his analysis, and I again am
20 very concerned that he did not make a better effort to
21 come up with acreage sales near CAFOs from other locations
22 outside the market area.

23 The Court also looked and thought hard about he
24 looked at sales affected by other odor nuisances, but the
25 factors he was considering were distance from the facility

1 and the number of animal units, which are valid
2 considerations. He did not factor in or give
3 consideration to the type of facility, and again, he did
4 not look at comparable facilities. At this point the
5 Court does find that Mr. Shaykett's analysis is seriously
6 flawed, and the Court has concerns with the errors in his
7 methodology.

8 Now, I also want to talk or make the comment also --
9 and this was in response to one of Mr. Deibert's
10 questions -- Mr. Shaykett testified never before had he
11 offered an opinion concerning the diminution in value
12 regarding a proposed CAFO facility being constructed near
13 a property like this. So this is not ground that has been
14 covered previously. And if it had been, based on
15 Mr. Shaykett's experience, it's most likely he would have
16 been the one to have been involved. But this is a new
17 analysis, and the Court has some concerns about how he
18 came up with it.

19 I want to jump over to Dr. Bakhtari. Similar to
20 Mr. Shaykett, the Court does recognize Dr. Bakhtari as a
21 qualified and experienced expert in the area of odor
22 detection and analysis. It's very clear he understands
23 this field and this area. His use of the AERMOD data and
24 information was impressive in his deposition.

25 We start to get into a little, though, of he wants to

1 look at a level of odor annoyance at 10 odor units, where
2 it's in the transcript, it's in the previous material
3 presented to the Court that the board reviewed from
4 Dr. Nicolai, that it appears Dr. Nicolai is more
5 comfortable with 75 odor units before you get to a level
6 of odor annoyance. And basically Dr. Nicolai felt that it
7 was not going to be harmful or a detriment to the
8 petitioners if they were outside that half-mile radius
9 from the facility. But again, he's looking at 75 odor
10 units before he felt that there was a level of odor
11 annoyance, and Dr. Bakhtari is looking at 10 odor units
12 before he feels there's a level of odor annoyance.
13 Dr. Bakhtari was using that 99 percent figure, and it
14 appears Dr. Nicolai was using a 91 percent figure.

15 The Court takes specific note that odor is not truly
16 regulated at an odor unit level in Turner County or in
17 South Dakota. Odor is in the ordinance and it is a
18 factor, but it is not truly regulated. And Dr. Bakhtari
19 testified about regulations in Canada, in Europe, in
20 Australia, and even in some states of this country, but we
21 don't have that situation here.

22 Now, I also want to talk about, as landowners, the
23 petitioners do have the right to express their opinions as
24 to the value of their property. It is their opinion that
25 they believe their property will be affected and the value

1 of their property diminished by the construction of this
2 facility as proposed. The Court acknowledges that's their
3 opinion and that's how they feel, and they expressed it
4 very well. They have a right to give that, and the Court
5 does give that some consideration. That's one factor.

6 Going back to Dr. Bakhtari and Dr. Nicolai, it
7 appears odor will affect the petitioners' property. To
8 what level is not determined by this proposed facility.
9 And I believe it's in the record, Dr. Nicolai even made
10 comments that he believed the petitioners' property could
11 be affected by the proposed facility. He disagrees, it
12 appears, with to what extent their property would be
13 affected from what Dr. Bakhtari said.

14 So in spelling all this out and also in looking at
15 Mr. Shaykett's analysis, which he comes up with a solid
16 figure for what he believes the diminution in value is,
17 and I don't know that that's necessarily accurate, but the
18 Court would agree that there could be a diminution in
19 value because of this proposed facility. The Court does
20 find that these petitioners have a personal, distinct,
21 potential injury that could come about because of this
22 proposed facility.

23 Now, the Court believes they have met their burden as
24 to the standing; that they do have standing to challenge
25 this petition. And I know Mr. Donahoe went through a lot

1 of time and questions to talk about the average person
2 coming through the area and being at these distances. The
3 Court believes it's separate and distinct when you own the
4 property, that's where you reside, that's where you're
5 going to be. You're not a person traveling through the
6 area, and that helps make it separate and distinct, the
7 potential damage to the petitioners.

8 Now, I want to make another point, and maybe this is
9 the bigger picture. The Court has to determine standing
10 by this evidence. The Court doesn't have to determine any
11 actual damages. That is very speculative in my mind at
12 this point, but the Court believes there is the potential
13 that they could be damaged.

14 This is not a nuisance case. And depending upon the
15 Court's ruling on the permit, there could be a private or
16 public nuisance action where these petitioners may try to
17 bring an action to pursue a loss in the value of their
18 property if this facility is constructed. That's a whole
19 different case. It's also a very difficult case. And I'm
20 optimistic that if it gets to that point ever, it's not
21 necessarily my case, it's back to Judge Knoff.

22 But at the same time, we've got different odor
23 experts and we have different standards that are being
24 talked about as to what is being utilized and would there
25 be additional or real data of sales in the area and

1 whether or not it's been affected. It was discussed that
2 there was a sale on an adjacent property, but the
3 testimony was they may not have known about the proposed
4 facility. So how useful is that? Then we also have a
5 factor of what today's market has been and the increased
6 values in property. There's a lot of factors that play
7 into that.

8 This is kind of the dicta part. I already kind of
9 said I'm going to rule they have standing, Mr. Donahoe,
10 for the factors and reasons I set forth, but I'm
11 expressing a lot of concerns about how you would actually
12 make a determination on any damage, but that's not my job
13 today. So, they meet the threshold. I think Mr. Peterson
14 described it fairly well as it is a lower bar at this
15 point, but I do feel that they have met that.

16 So now, Mr. Peterson, you've meant the lower bar.
17 Now, we're looking at the legality of the actions, and on
18 your writ of certiorari challenge under SDCL 11-2-61, you
19 and the petitioners would be need to prove and establish
20 one of the 13 criteria you have listed is met. So I'll
21 let you turn your argument to that.

22 MR. PETERSON: Thank you, Judge. We would right off the
23 bat incorporate our petition which sets forth what we
24 expected to prove, which I think we have, and how that
25 implicates one or several grounds for illegality; more

1 specifically, it's Paragraph 4, a. through h. of our
2 petition, which Your Honor has had.

3 As Your Honor stated, in our pretrial brief there are
4 13 different grounds for demonstrating illegality. It is
5 disjunctive, so if we prove any one, we're out, that's
6 enough. If Your Honor thinks we've proved more than that,
7 then that just provides extra cushion on the opinion, I
8 suppose.

9 But our Supreme Court has had a variety of
10 circumstances within which to review the writ of
11 certiorari standard and, you know, if there's a willful
12 disregard of evidence, going beyond one's authority, which
13 would include if the ordinances say you need to consider
14 X, Y and Z or you've got to do A, B and C, the board has
15 to do those things, and if they don't, then you get a
16 reversal. If the ordinances say you can't do something
17 and the board does it anyway, then there's a reversal.
18 It's illegal. So that's the scope. I think there are
19 many examples of that as we get through this.

20 Aside from that, if there's a bias, which is defined
21 as in the quasi-judicial setting, which is a higher
22 standard than other settings, if there's an unacceptable
23 risk of bias, that is enough. That is enough for a due
24 process violation, an unacceptable risk of bias. That's
25 from the *Armstrong v. Turner County* case.

1 If there's a pecuniary interest that influenced the
2 decision, that disqualifies the board. If the board was
3 predisposed and had their minds made up already and didn't
4 listen to evidence and didn't consider the information
5 presented, that's enough to get it reversed and remanded
6 back down.

7 Additionally, if the board doesn't apply its own
8 independent thought and just, as in the *Hines* case, put it
9 up for a public vote, or if you just blindly accept what
10 the applicant is saying or someone other than the board is
11 saying, that is a failure to exercise independent thought.
12 And under *Hines* that's enough for it to be reversed and
13 remanded back to the board.

14 I'll observe one of the problems in this case is not
15 a great record. There's not a great record, and it's the
16 board that's charged with creating the record, but they
17 don't do a good job of laying out what they considered,
18 how they considered it, how they went through the
19 different factors. Often you see that in county boards
20 where they will go through it one by one, they'll talk
21 about things and put their thought process out there.

22 I would suggest that a remand with further
23 consideration of appropriate directions from this Court
24 would yield a better record for this Court to review, and
25 I think that would be one appropriate remedy in this case.

1 I'll start on the specific arguments for illegality.
2 There's a big one. It was discussed thoroughly. It's
3 13.09(D) in the ordinance. It is the chart that defines
4 the various types of animal feeding operations. There are
5 three that are applicable to swine: It's finisher,
6 nursery and farrow-to-finish. All four board members and
7 the zoning administrator admitted on the record that the
8 particular facility that Mr. Schmeichel and the
9 intervenors here have a permit for is not on that chart.
10 It isn't. There's no evidence that it is. Every single
11 witness and common-sense reading shows it is not on the
12 chart.

13 The board never made a determination on a
14 case-by-case basis on what sort of setback would be
15 appropriate and what starting point, what's the base
16 amount that would be included for a head count or an
17 animal unit count from which we would measure the overages
18 to figure out how many additional 100-foot sections need
19 to be added to the three-eighth of a mile setback.

20 That is a determination that is capable of being
21 made, but the board needs to make it, and the board
22 admittedly did not do that in this case. That is a
23 straight-up failure to follow the ordinance. They did not
24 apply the correct legal standard. They completely punted
25 on their decision making. They didn't actually make any

1 decision on that.

2 And under the *Hines* case, particularly Paragraph 13
3 it talks about -- and that case had to do with a variance,
4 that there was a process and certain considerations the
5 board would need to go through in order to issue a
6 variance. And here the Court found, and I'll just read
7 from Paragraph 13 because I think it's poignant: "There
8 is no question that the Board of Adjustment was bound to
9 follow this test. Logically then, its failure to follow
10 the test mandates the conclusion that the board exceeded
11 the scope of authority granted to it by" the ordinances.

12 Here the ordinances say if the type of facility is
13 not on the chart, the board has to make a case-by-case
14 determination. They admittedly did not do that. That
15 justifies a reversal or, minimally, a remand for them to
16 go actually make a decision and then put it on the record
17 as to why they're making the decision that they are.
18 That's enough right there for illegality. But I would
19 suggest that the Court need not remand this case; the
20 Court should reverse this case because of the setback.

21 There is no other way to read the setback in this
22 case that the piglets are not being counted. They are not
23 part of swine production unit. They're not listed in the
24 definition. Piglets are not capable of producing swine.
25 Piglets are clearly, under the ordinances, would fall

1 under the under 55-pound category, and that's .1 animal
2 units each. There's been no evidence to the contrary that
3 5400 sows are going to produce approximately 54,000
4 piglets. Multiplied by .1 animal unit, that's 5,400 more
5 animal units than whatever the board calculated, whatever
6 Mr. Schmeichel calculated. There's another 5400 animal
7 units on top of whatever was calculated.

8 Under the ordinances for every 500 animal units
9 extra, you've got to add 100 feet to the setback. 5400
10 extra animal units translates to an extra 1100 feet. So
11 even if the Court thinks the half-mile setback was the
12 right amount, you have to add 1100 feet to that, which
13 puts Vicky's house well inside of the setback.

14 MR. DONAHOE: Your Honor, I have to object. It's not a
15 half-mile setback, it's a one-third mile setback before
16 you add the additional, just to clarify that that's an
17 improper --

18 MR. PETERSON: It is not. Judge, I'm absolutely right on
19 this because you've got to add it on top of the other
20 animal units that are already in excess of the base
21 amount.

22 THE COURT: Mr. Donahoe, your point is noted. You'll get
23 your chance to argue. Mr. Peterson, I understand your
24 argument. You can proceed.

25 MR. PETERSON: So what was determined here by the

1 applicant is that they were about 27, 2800 animal units
2 above what they thought the base was, and because that
3 rounds closest to 3,000 they added 600 feet to the
4 three-eighths mile. What that fails to include is the
5 additional 5400 animal units from the piglets. That is
6 another 1100 feet. You've got to take the 600 that they
7 admit is above the base, the 1100 from the piglets that
8 nobody counted, add them together, that is 1700 feet extra
9 beyond the three-eighths mile starting point. That is
10 well beyond Vicky's house. She is hundreds of feet within
11 the setback.

12 There is no authority to just grant a permit in that
13 situation. They've got to go through another process.
14 There is a way, through a variance and some of the things
15 that were discussed this week, but nobody did that.
16 That's not the process. That's not the record we have.
17 That's not the decision that we have.

18 So, the board could not just simply issue the
19 conditional use permit here. They did not have the
20 authority. For that reason, it has to be reversed.

21 Regarding the setback and determination of the base,
22 aside from this violating the ordinances, all four board
23 members, the only four people that made the decision, all
24 admitted they never looked at it. They never calculated
25 the setback. They never even, at the time of the hearing,

1 never even saw calculations. They just took Faye's bare
2 statement, naked statement, that we're good to go on
3 setbacks.

4 And when there was a challenge, a question, not a one
5 of them looked at it. Not a one of them looked at the
6 calculations. Not a one of them looked at the math. Not
7 a one of them cared. In addition to being illegal, I
8 think it demonstrates the bias and predisposition of the
9 four board members.

10 They didn't look at the Odor Footprint Study. They
11 didn't look at Mr. Shaykett's appraisal. Some of them, at
12 least two of them, when I was questioning, and one of them
13 when I asked him twice didn't even consider the odor
14 impact on the neighbors. They didn't think it was part of
15 the ordinance. One of them said odor control, oh, that's
16 the job of the DENR. That was Dean Austin.

17 The board didn't do its job in this case, and that in
18 itself is grounds for reversal under *Hines* because they
19 didn't go through the process required by the ordinance.
20 But separate and apart from that it also demonstrates
21 bias, predisposition, a closed mind and an unwillingness
22 to even consider, to seriously consider any of the
23 evidence presented by my clients, by Mr. Almond, by our
24 experts, or anybody else at that meeting that was opposed.
25 They don't want to hear it. They didn't care. Their

1 minds were made up, and that much is clear by their
2 attitude, their decisions, their dismissal of evidence and
3 the refusal to do the bare minimum that the ordinances
4 require.

5 I want to address briefly the implication and impact
6 of that 2018 permit. Well, ultimately that permit was --
7 I don't remember the exact wording in our stipulated
8 agreement, but the permit was effectively torn up. But it
9 was in effect at the time that the 2020 permit was granted
10 on December 8 of 2020.

11 First of all, under the ordinances Mr. Schmeichel and
12 Norway Pork were not allowed to reapply. They even
13 described this on the record in the hearing. It's in the
14 transcript. Folks, this is the same thing you already
15 approved. It's the same project -- the Schmeichels formed
16 an LLC for whatever the reasons were -- but it's the same
17 project. They're not allowed to reapply unless a permit
18 is denied and then they wait six months. So there's no
19 authority to even consider this in the first place.

20 Additionally, at the time that they granted the
21 second permit in 2020, the 2018 was also there. What they
22 effectively did is authorized 10,800 swine and 4,000
23 finishers. That puts the setback probably a mile past
24 Vicky's house even just doing a little quick head math.

25 But additionally, too, there's no way that did not

1 influence these board members. How were they supposed to
2 say no in 2020 when they're getting sued for saying yes in
3 2018? It defies common sense that that did not play a
4 role. When you look at all of the other factors and
5 behaviors, it's clear that my clients didn't get a fair
6 shake. Due process was not followed.

7 With respect to the requirement of the ordinances,
8 it's in a couple of different places that were referenced,
9 and I believe all four board members acknowledged that the
10 board has a responsibility to ensure that odor is
11 controlled when granting a permit. They all had slightly
12 different answers, and Your Honor certainly was here to
13 hear all of that, but they didn't do anything to control
14 odor. They put in no requirement that the odor actually
15 needs to be controlled to the point that Schmeichels
16 represented at the hearing it would be. They did nothing
17 to do that. Plant some trees. That is not ensuring odor
18 control at all.

19 Regarding the issue of bias and predisposition, the
20 *Armstrong* case makes clear this is -- because it's
21 quasi-judicial and they talk, in *Armstrong*, they talk
22 about the standard in a regulatory or legislative setting,
23 and that's a higher standard to show that someone is
24 biased and disqualified. It is much lower in a
25 quasi-judicial, and they state in Paragraph 23 of

1 *Armstrong*: "The due process standard for disqualification
2 in a quasi-judicial proceeding is that an official must be
3 disinterested and free from bias or predisposition of the
4 outcome and the very appearance of complete fairness must
5 be present."

6 And *Armstrong* goes on to state that it's -- I'm not
7 finding it now, but it's in the case that it's an
8 unacceptable -- yeah, here it is, Paragraph 21: It's
9 either actual bias or an unacceptable risk of actual bias
10 or prejudice.

11 I'm not going to go back over all the testimony, but
12 I think it was clear from all four board members that we,
13 minimally, we at least showed that there's a risk that
14 they came in with their minds made up. My clients were
15 never going to get a fair shake. They weren't ever really
16 going to consider things. They didn't even read the
17 evidence that was presented.

18 The big issues that were raised about odor, this
19 disagreement on the setback, that's not anywhere in the
20 deliberations. They talked for about nine pages. Most of
21 it was voting, talking about taking a break, or a road
22 haul agreement. There was zero discussion and zero
23 deliberation to resolve these conflicts on the setback,
24 any issues with odor. That demonstrates two things: One,
25 a failure to follow the ordinances, which is grounds for

1 reversal and remand; but it also demonstrates an
2 unacceptable risk of bias.

3 Additionally, what further colors this mix, and Your
4 Honor is in a unique position hearing from everybody in a
5 short period of time, although the days probably seemed
6 pretty long, to get a good view of sort of what went on
7 inside their heads, how they came to the decisions, what
8 their attitudes were. And what further colors that is
9 their relationship with another board member, Steve
10 Schmeichel. He didn't talk. There's no reason to be
11 there other than to watch and be an influence.

12 We also had pending litigation from the 2018 case.
13 We add to that the demonstrative attitude of these folks
14 with respect to the issues presented by my clients, which
15 are issues they have to look at under the ordinance. Even
16 though they disagree with that, they need to look at those
17 things.

18 And then finally the pecuniary interest tainted these
19 proceedings. In the application and at the hearing the
20 county was told, hey, we're the applicants. We're going
21 to do what we can to make sure we assign money to you from
22 the State grant project. That is a pecuniary interest in
23 the outcome of the proceeding.

24 All of these things line up to a due process
25 violation, a lack of impartiality, bias, pecuniary

1 interest in the outcome, and ultimately a due process
2 violation that requires either reversal or an alternative
3 remand for the board to dig into all the issues they need
4 to and issue a decision that is more capable with a
5 detailed record for review by this Court.

6 For all these reasons we ask that Your Honor reverse
7 the permit or alternatively remand for further proceedings
8 before the board.

9 THE COURT: Thank you. Mr. Donahoe.

10 MR. DONAHOE: Thank you, Your Honor. I want to just first
11 of all clear up the issue of the allegedly missing 5,400
12 animal units, which is basically what's driving this case.
13 Unfortunately, when people get the idea that there's going
14 to be a huge facility here, it means there's going to be a
15 huge amount of manure. Well, that's not true in this
16 case. You have a big facility, you will have 5,400 head
17 of sows, but they're producing piglets that are very small
18 and will only be with them until they're weaned and then
19 they go off-site, except for 2,000.

20 And the allegation is that there isn't sufficient
21 calculation of animal units because you've got those pigs
22 listed in three categories for the zoning ordinance and
23 this doesn't fit in it, and because it doesn't fit in it
24 you have to do a case-by-case evaluation, and they've come
25 up with numbers different than what the applicant and the

1 zoning director came up with here.

2 Those piglets aren't missing. They're either there
3 on the site and they're counted within the 5,400 head at
4 the .047; or, they're counted as finishers as if they were
5 adults at the .4, or I should say, as if they were going
6 to be grown to be adults, at the 0.4.

7 And so the 5,400 head, they're there year-round, have
8 babies. Those are taken off the farm within three or four
9 weeks. We'll give them even four weeks. You've still got
10 the 2,000 head that are there, but they go directly from
11 the swine production unit calculation to being within the
12 .4 -- we skipped the 0.1 -- but they didn't go anywhere,
13 and they would only be a small percentage of the total
14 production.

15 You have to understand that -- there wasn't any
16 testimony about this -- but it defies logic to suggest
17 that the 5,400 sows are going to have babies all at the
18 same time. They're going to have these staggered,
19 obviously, and produce them at different times. And you
20 heard the testimony that the sows aren't pregnant or
21 giving birth all the time. There's a period before they
22 become breeding -- before they become ready to breed again
23 and then would be pregnant and gestate.

24 But all of that is covered in the swine production.
25 The category is clear under the ordinance. It says swine

1 production units are sows, breeding, gestating and
2 farrowing. Breeding is included in there, which means
3 that that's a period of time when the sows are not yet
4 pregnant, but are able to take a break and then are bred,
5 and then would be pregnant and gestating.

6 The testimony was farrowing means the pigs that are
7 born and the sow until the piglets are weaned, and then
8 they would go to a nursery. In this particular case
9 they're going to go off-site, or if they don't go off-site
10 they're going to be counted in our 2,000 at 0.4, and we
11 don't get the benefit of the fact that they'd be at 0.1
12 for a period of time, until they're 55 pounds. We skipped
13 that part to be more conservative and increase the
14 setbacks.

15 The same thing with the 540, by the way. That's for
16 farrow-to-finish sows. Finisher swine at 2,500 would be a
17 much bigger deduction and much closer to the reality here
18 if we're just talking about looking at manure production
19 and what's really going to take place at this facility.
20 We didn't do that either. We subtracted 540, and then we
21 rounded it up to the nearest next 100 additional feet and
22 came up with the setback for residences, as explained at
23 TC 120 in Exhibit A of the application.

24 Now, Faye didn't have her notes. I don't know what
25 happened to them. What I do know is that she testified

1 that she actually came out with a lower animal unit
2 number. I disagree with the characterization of the
3 testimony. This isn't something that requires some unique
4 for individualized new test on a case-by-case basis. This
5 is just simply Faye determining that this met the swine
6 production unit category and the finisher unit category
7 and that those two categories adequately represented the
8 animal units that would be on the facility. She took the
9 number of head times the animal unit equivalents,
10 multiplied it out, determined the animal units and applied
11 that to the setback requirements above the one-third base,
12 one-third mile base, for a large animal unit or large
13 confined animal unit.

14 In doing that, she applied the ordinance. The board
15 was told that the calculations done by Faye indicated that
16 this was indeed a facility that would meet the setback
17 requirements under the ordinance. They didn't
18 specifically deliberate on that, but there was discussion
19 about it. It was debated. The transcript shows the
20 attorneys argued about whether or not Exhibit A was
21 accurate.

22 I don't know what happened with information that was
23 provided the Friday before the Tuesday hearing, but they
24 did have information at the hearing. The applicant can't
25 control what the Board of Adjustment does. What they can

1 do is argue how the interpretation of certain things
2 should be made, which is what we did. We summarized
3 facts. We made legal arguments. Both sides did that.
4 The board has authority under the law to consider that.

5 They can decide that they're not going to take the
6 time and look at some specific piece of evidence just like
7 when they have a large number of opponents at a public
8 hearing who bring them things from the Internet or other
9 places and want them to look at that. I'm not trying to
10 belittle these expert reports. What I'm saying is when
11 you have a summary of them that's presented, the board has
12 discretion on whether to consider them or not.

13 The board in this case determined that they had an
14 adequate professional who had done the calculations on the
15 setback, and they relied on that. That's not the same
16 thing as the *Hines* case where they didn't follow the
17 rules. They did. They looked at the rules and said,
18 okay, Faye has checked this. We're going to go with that.

19 This is also unlike the *Hines* case because there
20 wasn't a showing that they didn't exercise or -- didn't
21 exercise independent thought or intentionally ignored the
22 things that were being told to them by the attorneys. In
23 the *Hines* case, Attorney Michelle Hines brought up the
24 fact that they had to consider the criteria for the
25 variance and they couldn't just go on the complaints of

1 the neighbors. They didn't want that mobile home facility
2 in that town.

3 There was evidence in that case of a list of things
4 that were specific grievances or reasons why the allowance
5 of a variance to build a mobile home park in Miller,
6 South Dakota, would be a problem or would violate the
7 requirements under the ordinance such that they wouldn't
8 be able to get a variance. The testimony in that case was
9 that the Board of Adjustment there set that aside and
10 didn't consider that at all because they were going to use
11 the different criteria, which was the fact that the
12 neighbors didn't want that particular land use.

13 Now, this is a completely different situation.
14 You've got competing arguments that were made and the
15 board had the information. They chose that they would
16 instead rely on the arguments and the summaries. They did
17 apply the ordinance.

18 Now, there's a claim that this was all subject to
19 some prejudgment or there was an unacceptable risk of bias
20 or prejudgment here. They did the things that they were
21 required to do. They provided the public notice. They
22 did have the hearing. They did ask questions. They were
23 told ahead of time that there were certain things that
24 would be addressed because we put it in the application;
25 for example, the setback calculation. Now, we didn't

1 break it down and do a separate calculation on how we came
2 up with the 3,338 animal units, but that's very clear from
3 Exhibit 21 how we came up with it.

4 There was disclosure that if there would be grant
5 money available, we'd make the effort to get that and
6 allow that to go to the county. That's very common,
7 whether it's this particular sales tax rebate program or
8 other programs that have been in existence in the past.
9 This one just happens to be available now and is, perhaps,
10 more generous than others in the past.

11 But that doesn't mean that they were biased. What it
12 means is that they were sure that this person or persons
13 making the application were going to follow through with
14 what they had suggested in regard to making this a better
15 area of Turner County economically and would improve the
16 property and would also provide economic benefits to
17 farmers who were going to sell them grain and all of the
18 other things that were said in support of the project.

19 The reason for the board to go through the discussion
20 about the specifics on a road haul agreement was due to
21 the fact that there is a paved road. It's in Exhibit D.
22 It's also in the appraisal. You're going to have to have
23 some coordination with the county and the township in
24 order to ensure that everything is buttoned down, and they
25 wanted to make sure that was covered properly.

1 They could have brought up the other issues. They
2 did not, but that's not evidence that they didn't
3 deliberate or consider them. They talked about the fact
4 that this particular site -- and they talked about it in
5 their testimony here -- was something that they knew
6 people were opposed to because of odor and other issues.
7 That doesn't mean that they ignored odor as one of the
8 criteria in the ordinance. They looked at that. They
9 determined that this was not something that would be a
10 harm to others outside of the setbacks. They said in
11 their testimony that the setbacks considered the odor, and
12 that's one of the odor controls that are in the ordinance.

13 There's additional evidence of odor control by the
14 parts of the permit application that were described in the
15 transcript where we would put in additional trees, and the
16 applicant was going to make sure that -- and not only
17 would there be six rows of trees instead of four rows as
18 required by the ordinance, but they would do a mix of
19 trees to ensure that some faster growing trees and some
20 trees that would fill in would be used. They would be all
21 planted under the standard required by the Natural
22 Resources Conservation Service, and they would also
23 include facilities to ensure that any composting or
24 mortalities that were going to be picked up by a rendering
25 facility would be inside a building.

1 There was also discussion about the fact that there
2 was a deep pit for this particular type of facility for
3 all the buildings. Although the DENR does not
4 specifically regulate odor, they do look at the capacity
5 of these pits. They have to in order to determine whether
6 or not the nutrient management plan is going to work.
7 They have to look at how many times the fields that are in
8 the plan will be subject to the manure application. So as
9 part of the process the DENR does look at the facility,
10 and they do look to see that there is adequate storage.
11 They also look to see that it's also going to make sure
12 that they meet those requirements that this be a zero
13 discharge facility. So they have to see how the manure is
14 being stored.

15 So under that State general permit, even though it's
16 under the Clean Water Act, the task at hand for the State
17 Department of Environment and Natural Resources back then,
18 now the Department of Agriculture and Natural Resources,
19 is to find out what this is going to be for manure storage
20 and application and ensure that it doesn't get into the
21 ground water or surface water of the State. That also, of
22 course, impacts odor because the deep pit is going to
23 provide more protection from any type of emissions because
24 you have the ability to store it inside and not in a
25 lagoon or other things.

1 Now, there was some talk about the odor from a hog
2 operation near Chancellor. They didn't talk about that as
3 a deep pit and it's not. There's no talk about other
4 places that had these odor problems and what type of
5 facility they were. But this is a deep pit and they were
6 going to use pit additives. Now, no, there's no
7 conditional requirement that they have pit additives in
8 the actual permit, but it's also not required under State
9 or federal law.

10 But, the fact is they were able to consider the fact
11 that the Schmeichels had no previous violations, they were
12 known to be good operators. When they say they're going
13 to use pit additives, it's probably based in part on the
14 assumption that they're already using them. They already
15 raise hogs elsewhere. So the fact of the matter is this
16 is a facility that is likely going to be using pit
17 additives, which will also control the odors.

18 We can go through a number of other things that were
19 discussed at the hearing, but all of them were discussed.
20 The fact that we got into the deliberations and what they
21 considered and what they didn't consider is actually
22 beyond what should be the appropriate analysis on an
23 appeal like this.

24 The Supreme Court has said we don't get into how they
25 deliberated or why they made their decision. We look at

1 whether they had authority to do that and whether they
2 exercised their decision. We didn't object. We let this
3 all go into the record because we want to make sure that
4 we don't have an issue about this alleged bias or
5 prejudgment or predetermination.

6 The fact is they did not, apparently, take the time
7 to go through some of the specific things that they were
8 asked about on written submissions, but that doesn't
9 change the fact that they were told: Odor is going to be
10 a lot worse than what Dr. Nicolai says; odor is going to
11 be really bad here; the setbacks aren't calculated right;
12 it's too close to the houses that these two petitioners
13 own that are within this area.

14 Based on that, they still looked at the requirements
15 under the ordinance, they applied those requirements, and
16 they determined that it did meet them based on the
17 information that was provided by the applicant. They had
18 the right to weigh evidence or testimony or documents that
19 are submitted in the application.

20 There is no evidence that they ignored the claims
21 that there was excessive odor that would come from this
22 facility. All of them testified that this size facility
23 did not present them with concerns about the fact that it
24 was a half-mile setback that was being used. So with that
25 being said, there's no evidence that they failed to

1 deliberate or that they failed to apply the ordinance or
2 that they did anything else unlawful or failed to do
3 something they were required to do.

4 The Court cannot make a determination of whether they
5 got it right. The determination of whether this does in
6 fact meet the criteria is not before the Court, nor is the
7 question of whether this particular operation is one that
8 should be determined in the best use or within the public
9 interest. That's part of the ordinance enactment process.
10 And when the county does adopt an ordinance like this, if
11 they determine that a one-third mile setback plus the
12 additional amounts over a certain animal unit is
13 appropriate, that's the public protection that is
14 provided. That determines what is in the public's best
15 interest. It also provides safety for other concerns for
16 the general public.

17 And based on that, again, we could have come in and
18 argued for a lower setback. We didn't need to. We showed
19 how on a conservative basis this would not be a problem
20 beyond half a mile. There is a basis for that in the
21 record. The board had that information, and the board was
22 able to make its decision based on that evidence.

23 Therefore, they regularly exercised their authority.
24 They did not fail to consider the matters that are set
25 forth as requirements in the ordinance. They did consider

1 additional requirements and they imposed additional
2 conditions. Based on that, there's no legal basis for the
3 board to be reversed in this situation.

4 And we could go back and do this over again. We're
5 going to have the same arguments. We can spend hours
6 talking about specific things or specific evidence, but
7 the Court is not supposed to go back and do this in a way
8 that puts itself in the shoes of the board and says, you
9 didn't make this adequate decision. You can only look at
10 this and determine whether or not they regularly exercised
11 their authority.

12 There's no evidence that they ignored the issues.
13 The evidence is they determined that they wouldn't
14 consider certain issues or evidence because in their
15 experience they believed that the criteria in the
16 ordinance had been met.

17 For those reasons the board should be affirmed.
18 There's no reason to remand this or to reverse. Thank
19 you.

20 THE COURT: Thank you, Mr. Donahoe.

21 Mr. Peterson, Mr. Donahoe, I want to thank you for
22 your work and your efforts. You've both been before me
23 before. You're both very competent, qualified,
24 experienced attorneys. You conduct yourself, both of you,
25 very well, and I appreciate that. It does make it go a

1 little smoother even though it's a long process,
2 especially these last two days, and so I do appreciate
3 your efforts. I also appreciated that Mr. Deibert didn't
4 feel like he had to double up on anything since he was
5 taking a similar position.

6 Now, this is not a trial de novo where the Court
7 reviews the evidence and makes its own decision regarding
8 the issuance of the permit. The Court reviews the
9 legality of the underlying decision, reviews the legality
10 under SDCL 11-2-61. And in order for the petitioners to
11 prevail, they must show that there was something improper
12 under one of the 13 areas set forth. And as Mr. Peterson
13 rightfully stated, you just have to prove one of those.
14 If there are multiple ones, that would add to the reasons
15 why the decision was illegal.

16 Now, I definitely want to make the record that the
17 Court found the four Board of Adjustment members and
18 Ms. Dubbelde to be very credible. The Court had the
19 opportunity to hear and review their testimony and see
20 them testify live. The Court finds them to be extremely
21 credible in their presentation of what they recounted
22 yesterday and today concerning the procedures in making
23 this decision.

24 Now, initially the Court had some serious concerns
25 with the setback issues and arguments that Mr. Peterson

1 was making, and the Court also had some concerns with the
2 grant funds from the State that were brought up, and I
3 will get to those issues, but overall those concerns were
4 resolved.

5 Now, this particular facility is a hybrid facility.
6 It does not neatly fit within one of the categories set
7 forth in the zoning ordinances. It has components of two
8 of the categories.

9 Use of the number of animal units that is used is for
10 the purpose of calculating the setback. You figure out
11 the animal units, you figure out the setback. You've got
12 a minimum setback because it's a large facility. So then
13 you get into this analysis of what is the total number of
14 animal units; do you add 100 feet for every additional
15 500. And so that's the purpose of the number of animal
16 units is to determine the setback.

17 All four Board of Adjustment members were consistent,
18 as was Ms. Dubbelde, on how you count these swine. She
19 did the math and the calculation. It was very clear that
20 none of the four board members did the calculation. She
21 did the calculation, and they agreed upon it. She had 20
22 to 21 years of experience doing these type of
23 calculations.

24 I listened very carefully to Mr. Peterson's
25 arguments, but the Court takes note that there was no

1 evidence, absolutely no evidence, to support
2 Mr. Peterson's method of calculating these animal units.
3 The calculation here and the difference really dealt with
4 where and how do you count the piglets. And
5 Mr. Peterson's argument was that you need to count these
6 piglets as .1 of an animal unit. Again, it was only
7 Mr. Peterson's argument, and the exhibits were allowed for
8 demonstrative purposes only.

9 The board members, I think all four of them, made it
10 clear -- and especially the three that I can recall from
11 today, as well as Ms. Dubbelde yesterday -- they made it
12 clear that the history and manner of counting these animal
13 units in the application of the Turner County Zoning
14 Ordinances, the piglets, prior to being weaned, are not
15 counted separately. And that was Mr. Peterson's argument
16 as to why they should each be given a .1 animal unit
17 factor.

18 The history of applying and implementing these
19 ordinances and how these calculations have been done does
20 not support Mr. Peterson's argument. When Mr. Peterson
21 attempted to get the board members or Ms. Dubbelde to
22 agree to the manner that he was counting, none of them
23 agreed; none of them agreed with his calculation. And I
24 have no other evidence, no other witness came forward and
25 said: Mr. Peterson is right, you need to count these

1 piglets. So, I have no evidence to support that the
2 setbacks were wrong because the counting of the animal
3 units was inaccurate.

4 All of the evidence supports Ms. Dubbelde's
5 calculation. And the Board of Adjustment members, several
6 of which have their own personal knowledge and experience,
7 said you don't count the piglets until after they're
8 weaned, then they go into the different category. And the
9 Court, again, found those board members to be very
10 credible. I believe they made every effort to consider
11 the facts surrounding this and the entire permit process.
12 I believe they attempted to fairly and honestly consider
13 this application.

14 The Court does not find any evidence presented to
15 prove any illegality with the board's decision. The
16 petition met the requirements in the ordinance for it to
17 be approved, and the Board of Adjustment approved it.

18 I don't find any undue influence because of
19 Mr. Schmeichel's connection to the Board of Adjustment,
20 and the four board members were clear that that did not
21 have an impact in their decision making. And there was no
22 evidence presented to the contrary. It's argument, it's
23 speculation, but there is no evidence to support any undue
24 influence.

25 The pecuniary interest argument all comes back around

1 primarily to the grant funds from the State Office of
2 Economic Development in areas that approve facilities of
3 this nature. This did initially cause the Court concern,
4 but no amounts are set, no funds are certain, and the
5 funds would be used to help the county with the additional
6 wear and tear on the roads that would be caused by the
7 construction of this facility. The Court does not find
8 that to be an inappropriate pecuniary interest in
9 connection with the decision that was made.

10 Now, the Board of Adjustment heard from the
11 petitioners themselves, heard from counsel at the time as
12 well. I am a little concerned that the board didn't
13 receive the material from the petitioners' experts until
14 the morning of the hearing, but -- it's not evidence --
15 but I believe Mr. Peterson's comment was something along
16 the lines it being sent out Friday, the 4th, before the
17 Tuesday, December 8th meeting. That helped alleviate any
18 concerns the Court had.

19 I believe almost all of them indicated they got the
20 material the morning of the hearing. Only one,
21 Mr. Austin, couldn't recall receiving Mr. Shaykett's
22 report, but he did recall receiving the odor material.
23 They received it. It was not kept from them. They
24 received it. Now, did they have sufficient time to review
25 100 pages? No, they did not. And I can understand

1 frustration on behalf of the petitioners with that.

2 However, the board did hear the petitioners'
3 arguments. They did hear the petitioners' concerns as to
4 the effect that odor would have on their property, on
5 their lifestyle and use of enjoyment of their property.
6 It is very clear to the Court that the Board of Adjustment
7 members did not find the petitioners' arguments and
8 concerns to have significant merit.

9 It appears very clear to the Court that the Board of
10 Adjustment members, all four of them, clearly indicated
11 that if a property was outside of the appropriate setback
12 distance, then the odor should not be a significant
13 concern, and they testified based on their personal
14 knowledge and experience. All of them indicated having
15 knowledge of farming, living in a rural area, and several
16 of them actually raising or being involved in the
17 production of hogs themselves.

18 They also heard from Dr. Nicolai through the
19 telephone part of it, who also supported their beliefs as
20 to a minimal impact on the petitioners because of odor if
21 they were outside of the half-mile setback.

22 That's the record the Court heard and saw in
23 connection with this. I'm going to specifically walk
24 through the 13 factors because I probably didn't give
25 facts specific to all of these, but the Court is

1 considering all 13 factors.

2 First, number one, the Court does not find that the
3 board arbitrarily or willfully disregarded undisputed
4 proof because there was no undisputed proof to start with.

5 Second. The Court does not find the decision was
6 based on fraud. There's no evidence of any fraud being
7 presented in these proceedings.

8 The Court does not find any evidence that the board
9 exceeded its jurisdiction. Issuing of this permit was
10 within their jurisdiction.

11 The Court does not find that the board failed to
12 regularly pursue its authority. It is very clear to the
13 Court that the four board members were the ones that made
14 the decision. It's also clear to the Court that they
15 understood what their decision-making ability was and the
16 discretion they had in issuing a permit or in not issuing
17 a permit. And just because Ms. Dubbelde was the one that
18 came in with the calculation does not mean they delegated
19 any decision-making authority to her. They relied on her
20 expertise in coming up with a calculation and the number
21 of animal units and then the appropriate setback.

22 The Court does not find that the board engaged in any
23 act forbidden by law and there was no evidence presented
24 of that.

25 The Court does not find that the board neglected to

1 do any act required by law. It is clear to the Court that
2 they properly held a hearing, they listened to the
3 petitioners' position and that they then followed through
4 with their decision, but I don't find that they neglected
5 to do any act required by law.

6 The Court does not find that the board failed to
7 engage in independent thought. It is clear to the Court
8 -- and I viewed the credibility of these witnesses and
9 heard their testimony -- they all four took their
10 responsibility seriously, viewed the actions and material
11 at issue individually and made their own decisions. So I
12 do believe they exercised independent thought.

13 The Court does not believe that the board failed to
14 follow the guidelines or requirements of the ordinance.
15 It appears to the Court that they followed the guidelines
16 and requirements of the ordinance.

17 The Court does not believe that the board exceeded
18 its authority.

19 And the one that has a lot to it, and I'll walk
20 through it, Factor Number 10: The Court does not feel
21 that the members of the board voting in favor of this
22 decision were disqualified due to actual bias, or
23 unacceptable risk of actual bias, or because they had
24 unalterably closed minds, or that they had conflicts of
25 interest, or because of partiality, or because they were

1 not being disinterested in the proceedings, or because
2 there was prohibited ex parte communications, and that
3 they were not being free from bias or predisposition.
4 None of those factors were present. There was attempts
5 and argument made concerning whether any of those factors
6 applied. The Court did not hear any evidence that
7 supports that any of those factors applied.

8 I think much was made about Mr. Schmeichel's role as
9 a member of the Board of Adjustment. There were two
10 alternate members called in to participate in this
11 decision because of his conflict in being involved. There
12 were also two other members who were elected county
13 commissioners. So the Court does not feel there was any
14 evidence established to create any issues under any of
15 these factors.

16 Under Number 11, the Court does not find that the
17 board made any errors of law.

18 Under Number 12, the Court does not find that the
19 board applied an incorrect legal standard.

20 And Number 13, the Court does not find that this
21 decision was otherwise illegal.

22 So the Court is going to find that the petitioners
23 did not meet their burden on establishing any illegality
24 concerning the Board of Adjustment's decision in granting
25 the application at issue here.

1 Now, Mr. Donahoe, you get to prepare findings of fact
2 and conclusions of law consistent with the Court's
3 decision including the part you didn't like where I found
4 that there was standing. I expect that to be included in
5 what you're going to prepare. Now, if you want to, I
6 guess, prepare a slightly different version. What I'm
7 asking is you prepare findings and conclusions consistent
8 with the Court's decision.

9 MR. DONAHOE: I understand that, Your Honor, and I will do
10 exactly as you ruled and then provide a separate proposed
11 findings of fact and conclusions of law on the standing
12 issue to preserve our record.

13 THE COURT: And you are entitled to that to preserve your
14 record, and that was the point I wanted to make. I would
15 expect you to do that, as I expect Mr. Peterson to prepare
16 his own proposed findings and conclusions when the time
17 comes fully supporting my decision on the standing part of
18 this, but disagreeing with my decision on the legality
19 part of this.

20 And if nothing else, that's a good job for a law
21 clerk to cut and paste from what the two of you would send
22 so I get something consistent. But that's why I'm asking
23 you, Mr. Donahoe, try to prepare it like I ordered it.

24 We are in that transition of a new law clerk starting
25 Monday; old law clerk moving yesterday and today,

1 otherwise he would have been here with me. And I don't
2 want to saddle the new law clerk with working on this when
3 she didn't have the opportunity to sit in. And so I trust
4 both of you to prepare what you need to prepare.

5 I think the statute sets forth the timelines for when
6 you need to submit. You get to wait until after he
7 submits, and I have to wait until he submits everything
8 before I do anything with it.

9 MR. PETERSON: I can't remember if the statute is five or
10 ten business days. I guess I would ask for ten business
11 days.

12 MR. DONAHOE: I think it's ten. We're fine with ten, Your
13 Honor.

14 THE COURT: The Court always waits at least 15 days so we
15 avoid any issues with holidays and weekends and so forth,
16 because I do think it's a ten-day window, and I always
17 wait a little longer to give everybody the opportunity to
18 submit what they need to. So you go first, and I suppose
19 you should probably maybe submit both sets of yours at the
20 same time.

21 MR. DONAHOE: Your Honor, may I make a suggestion?

22 THE COURT: Yes.

23 MR. DONAHOE: I will prepare everything as I understand it
24 to be directly stated by the Court. And as to the part
25 that addresses the standing decision, I'll make sure to

1 get that to Mr. Peterson on Monday for his review. And if
2 we have a disagreement about that, any disagreement will
3 go into my proposed findings and conclusions, and we will
4 accept his and put that in the record as the initial set
5 for objections.

6 Because I think the way it works is that as the
7 prevailing party, we would submit it, and then he has the
8 ten days to object. We'll submit our proposed alternative
9 findings and conclusions at the same time as the initial
10 triggering set so we don't have a duplicate of ten days
11 after the ten days.

12 THE COURT: And that's what I was kind of asking. We're
13 on the same page. You're going to submit at the same
14 time, then he gets his ten plus days, he'll submit his
15 proposed. That's why yours are already in. But one will
16 be labeled your proposed. So your proposed, the second
17 half will be exactly what you're submitting to me as to
18 reflecting my decision.

19 You'll consult with Mr. Peterson to try to make sure
20 the first issue of my set is agreeable overall with him.
21 If not, I'll cut and paste, put some of his argument in
22 it. I don't want to do that extra work if I don't have
23 to. That's why I'm trying to make the two of you do all
24 the work. That's why at this point I get to do that. I
25 get to make you two do the work.

1 MR. PETERSON: I think we can note maybe at the beginning
2 that it's as directed by the Court and not because Brian
3 agrees with it.

4 THE COURT: I understand, and that's why -- I understand
5 he has his opportunity to do his own set.

6 MR. DONAHOE: Right. And I also wanted to make sure we
7 discuss this on the record so that there can't be any
8 technical argument because Mr. Deibert is not here, and I
9 can't speak for him, and I don't want to have something
10 done later by the board saying that because Mr. Peterson
11 had an opportunity to see the proposal beforehand, that
12 that somehow would trigger a ten-day period for him to
13 respond. That's not the case. We waive that, and it's
14 our intention that we get that done most efficiently by
15 consulting with him, and he does not have any obligation
16 to submit anything until after we file both our sets.

17 THE COURT: The ten days doesn't start until after they're
18 filed.

19 MR. PETERSON: I understand.

20 THE COURT: Keep Mr. Deibert in the loop with everything.
21 I can't imagine he's going to object one way or the other.
22 He'll piggyback your arguments anyway. He'll join in
23 whatever you're doing is -- most likely he won't be
24 submitting his own set, and unless he gets the transcript
25 and wants to read through the decision part, he's not with

1 a great ability to draft his own set until he gets that.

2 Mr. Donahoe, any questions at this time?

3 MR. DONAHOE: No, Your Honor. Thank you for all your
4 assistance today in coming in early and staying late.

5 THE COURT: No problem. Mr. Peterson, any questions?

6 MR. PETERSON: No, Your Honor. Understood.

7 THE COURT: All right. As I said before, thank you. You
8 both do a very good job. Don't take the Court's comments
9 critical. You did a very good job in making an argument
10 with, in my opinion, no real evidence to support that, and
11 that's my opinion based on what I heard. And you had me
12 thinking. But as I thought about it, I thought, you're
13 the only one saying that based on what was in the
14 demonstrative exhibits, and that played a part in my
15 decision. You couldn't get them to agree with you so ...
16 And I articulated that already.

17 MR. PETERSON: No, there's no personal offense taken, Your
18 Honor.

19 THE COURT: All right. We will be in recess. Thank you,
20 everyone.

21 MR. DONAHOE: Thank you, Your Honor.

22 (Proceedings adjourned at 5:16 p.m. on August 6,
23 2021.)

24

25

1 STATE OF SOUTH DAKOTA)
2 : ss CERTIFICATE
3 COUNTY OF McCOOK)

4 THIS IS TO CERTIFY that I, Carol Johnson, Official
5 Court Reporter for the Circuit Court, First Judicial Circuit,
6 Salem, McCook County, South Dakota, took the proceedings of
7 the foregoing case, and the foregoing pages 250 - 469
8 inclusive, are a true and correct transcript of my stenotype
9 notes.

10

11 Dated at Salem, South Dakota, this 28th day of February,
12 2022.

13

14 /s/Carol Johnson

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Carol Johnson, Official Court Reporter, RPR

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Carol Johnson, Official Court Reporter, RPR

<p>MR. DEIBERT: [29] 253/17 253/24 254/14 256/7 257/12 258/13 260/11 260/16 260/19 265/23 266/2 281/10 308/22 317/10 320/21 322/14 333/7 333/13 343/8 346/7 348/22 382/3 394/15 400/1 401/6 403/25 406/7 406/10 406/21 MR. DONAHOE: [66] 253/16 253/25 254/11 256/6 257/11 257/18 258/16 259/20 260/10 285/19 303/24 306/24 308/20 312/7 313/2 314/21 315/24 316/4 317/8 320/3 320/8 320/19 335/23 337/17 343/6 348/20 364/20 365/2 365/5 365/7 367/14 367/23 368/16 375/19 376/8 381/10 382/2 383/13 394/13 394/20 395/17 397/5 397/8 397/13 399/24 401/8 401/12 401/15 401/25 403/24 404/9 404/23 405/3 405/17 406/5 406/17 411/13 436/14 443/10 465/9 466/12 466/21 466/23 468/6 469/3 469/21 MR. 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VICKY URBAN-REASONOV ER: [1] 303/20</p>	<p>THE COURT REPORTER: [8] 291/24 312/25 313/3 367/16 367/18 377/4 377/7 397/7 THE COURT: [160] 253/1 253/15 253/18 253/23 254/1 254/9 254/13 254/15 254/25 255/2 255/10 255/14 255/20 255/25 256/5 256/8 256/16 256/22 257/2 257/7 257/10 257/13 257/17 258/3 258/12 258/15 258/22 259/6 260/5 260/9 260/12 260/18 260/21 261/1 281/12 284/10 285/18 290/6 291/9 291/16 297/10 303/25 306/10 306/17 306/19 306/23 308/21 308/23 312/6 314/7 314/9 314/18 315/20 316/1 316/16 317/1 317/9 317/11 320/2 320/20 320/22 320/24 321/1 321/9 321/24 322/4 322/9 322/15 322/20 333/9 333/14 334/21 335/22 337/18 338/1 341/13 343/7 343/9 346/10 347/10 348/21 348/23 348/25 349/3 349/6 349/11 351/1 364/19 364/25 365/3 365/6 367/17 367/21 368/15 368/17 370/18 375/20 377/6 378/25 380/13 380/23 381/8 382/4 383/14 387/11 393/14 394/14 394/16 394/21 395/18 397/10 397/12 398/12 399/1 399/25 400/2 400/4 400/6 400/14 400/19 401/5 401/7 401/11 401/14 401/17 401/20 401/23 402/5 402/7 402/15 403/23 404/1 404/4 404/13 404/25 405/4 405/13 405/23 406/6 406/8 406/14 406/16 406/18 406/22 407/1 411/12 425/1 436/22 443/9 455/20 465/13 466/14 466/22 467/12 468/4 468/17 468/20 469/5 469/7 469/19 THE WITNESS: [9] 303/19 303/21 306/14 306/18 306/22 349/1 364/24 367/13 381/6 \$ \$48,000 [1] 410/10</p>	<p>- -and [1] 250/9 -vs [1] 250/6 . .01 [1] 389/3 .047 [1] 444/4 .07 [1] 389/2 .1 [6] 311/24 384/21 436/1 436/4 458/6 458/16 .4 [2] 444/5 444/12 .47 [2] 296/16 422/12 .57 [1] 407/12 .57 miles [1] 407/12 / /s/C Carol [1] 470/14 0 0.1 [5] 372/17 373/16 373/17 444/12 445/11 0.4 [11] 296/10 370/5 370/10 370/13 388/15 388/24 421/20 422/6 422/9 444/6 445/10 0.47 [6] 296/10 369/5 369/6 370/13 388/24 422/9 00 [1] 283/5 000003 [1] 250/4 0046 [1] 287/18 1 1,000 [2] 366/20 421/13 1.1 [3] 411/18 416/15 418/10 10 [25] 252/8 255/9 256/10 258/9 259/11 269/10 272/20 299/8 312/2 372/14 372/16 372/22 376/6 376/8 376/10 376/13 379/18 387/23 387/23 396/7 401/18 402/10 428/1 428/11 463/20 10,000 [6] 388/8 421/14 421/15 421/21 422/10 422/21 10,800 [1] 439/22 100 [3] 262/19 445/21 460/25 100 feet [2] 436/9 457/14 100-foot [1] 434/18 10:55 [1] 251/2 11 [13] 264/13 265/11 276/12 325/9 353/23 354/2 376/1 376/2 376/8 376/12 376/13 376/14 464/16 11-2 [1] 411/17 11-2-1.1 [3] 411/18 416/15 418/10 11-2-61 [3] 407/23 431/18 456/10</p>	<p>110 [1] 283/7 1100 [1] 437/7 1100 feet [3] 436/10 436/12 437/6 112 [1] 283/8 119 [3] 282/18 283/6 334/23 11A [2] 265/12 265/16 12 [20] 276/3 276/7 276/23 277/10 278/9 282/20 295/1 295/2 295/25 298/15 341/23 355/6 365/14 369/3 376/12 379/17 380/10 384/4 388/17 464/18 120 [9] 314/13 365/10 370/16 371/6 380/6 380/6 381/1 381/14 445/23 12:33 p.m [1] 322/8 12:41 p.m [1] 322/8 13 [20] 276/7 276/9 276/14 276/23 277/10 277/17 278/1 278/3 278/9 355/7 355/9 403/4 431/20 432/4 435/2 435/7 456/12 461/24 462/1 464/20 13.09 [15] 267/11 270/2 318/19 318/23 326/12 326/20 329/12 329/24 331/11 352/2 358/19 359/23 360/22 361/2 434/3 1309 [2] 268/7 268/19 14 [12] 263/25 268/2 275/1 282/18 287/18 314/13 329/20 334/23 359/24 380/5 381/2 396/12 15 [7] 272/20 277/10 277/14 284/22 321/19 411/5 466/14 15 percent [1] 410/10 17 [5] 255/16 290/2 293/9 346/23 371/23 1700 feet [1] 437/8 18 [4] 255/16 284/9 408/15 419/13 19 [6] 255/16 270/7 270/8 270/9 270/10 270/11 1997 [3] 257/24 421/7 422/20 2 2,000 [17] 294/10 294/11 300/2 300/14 309/2 369/21 369/23 370/4 370/9 370/13 373/25 422/4 422/4 423/7 443/19 444/10 445/10 2,500 [1] 445/16 2,538 [2] 369/17 370/12</p>	<p>20 [42] 255/16 266/23 267/1 267/17 270/9 276/13 276/23 294/21 294/25 295/24 297/3 299/10 305/8 311/5 312/9 317/15 321/2 326/7 326/9 328/24 341/7 341/16 343/12 350/24 351/2 351/4 352/2 358/15 364/23 364/24 364/25 365/9 365/12 369/6 370/7 382/11 383/20 385/24 387/18 410/25 421/19 457/21 2016 [1] 305/9 2018 [27] 279/3 279/7 279/11 279/19 279/22 279/24 323/12 332/3 332/10 332/15 333/3 333/5 333/19 347/13 362/14 362/21 362/25 363/5 363/13 363/16 400/13 400/17 400/22 439/6 439/21 440/3 442/12 2019 [1] 426/11 2020 [39] 261/23 276/5 279/8 279/14 279/21 279/21 280/1 280/2 280/18 280/22 292/24 313/15 314/16 314/24 320/17 323/5 324/15 332/9 332/15 333/5 333/12 336/1 336/8 339/18 348/18 349/21 352/16 363/1 363/8 363/15 376/21 396/1 397/16 399/18 399/21 439/9 439/10 439/21 440/2 2021 [4] 250/8 251/2 284/22 469/23 2022 [1] 470/12 21 [21] 255/16 270/7 270/8 270/9 270/11 364/23 364/25 365/8 368/13 368/15 368/16 371/7 372/13 373/16 375/19 375/22 379/19 384/23 441/8 449/3 457/22 22 [11] 252/10 255/18 255/22 256/2 257/8 264/18 265/11 265/24 325/12 353/24 354/3 22A [5] 252/11 256/20 257/3 257/5 257/7 23 [3] 379/18 408/23 440/25 24-hour [1] 414/2 250 [2] 250/7 470/7 2500 [4] 385/25 386/4 388/12 388/14 252 [1] 251/24 253 [4] 251/20 251/24</p>
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1	STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
	:SS	
2	COUNTY OF TURNER)	FIRST JUDICIAL CIRCUIT
3	* * * * *	
4	Jeffrey K. Powers and	* 62CIV21-000003
	Vicky Urban-Reasonover,	*
5		*
	Petitioners,	* INTERVENORS' AND
6		*
	-vs-	* RESPONDENT'S MOTIONS
7		*
	Turner County Board of	* FOR ATTORNEY'S FEES
8	Adjustment,	*
		* AND COSTS
9	Respondent,	*
	-and-	* January 3, 2022
10		*
	Steve and Ethan Schmeichel,	*
11	and Norway Pork OP, LLC,	*
		*
12	Intervenors.	*
		*
13	* * * * *	
14	BEFORE:	The Honorable Chris S. Giles
		Judge of the Circuit Court
15		For the First Judicial Circuit
		Salem, South Dakota
16	APPEARANCES:	Mr. Mitchell A. Peterson
17		Davenport, Evans, Hurwitz & Smith, L.L.P.
		Sioux Falls, South Dakota
18		Attorney for Petitioners.
19		
		Mr. Douglas M. Deibert
20		Cadwell, Sanford, Deibert & Garry
		Sioux Falls, South Dakota
21		Attorney for Respondent.
22		
		Mr. Brian J. Donahoe
23		Ms. Jennifer L. Doubledde
		Donahoe Law Firm, P.C.
24		Sioux Falls, South Dakota
25		Attorneys for Intervenors.

1 PROCEEDINGS: The above-entitled matter came on for a
2 hearing on the 3rd day of January, 2022,
3 commencing at the hour of 3:33 p.m. in
the courtroom of the McCook County
Courthouse, Salem, South Dakota.

4 * * * * *

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1 THE COURT: Please be seated. We are here this afternoon
2 holding a hearing in Salem in connection with a Turner
3 County case. This is Civil Case 21-03. We're here this
4 afternoon on the intervenors' motion for attorney's fees
5 and costs.

6 So, Mr. Donahoe, did you want to address that or you
7 brought help today, your turn to proceed.

8 MR. DONAHOE: Thank you, Your Honor. Brian Donahoe here
9 on behalf of the intervenors, and with me is Jennifer
10 Doubleddee. She's a new associate in our office. I will
11 be arguing on the motion.

12 THE COURT: All right.

13 MR. DONAHOE: In order to give the Court a little bit of
14 background here to explain some of the language in the
15 statutes that apply, I thought it would be appropriate to
16 just mention that we haven't really talked about the
17 details of the statutory structure that provides for
18 disbursements of attorney's fees, but essentially the
19 State statutes here provide for a recovery of attorney's
20 fees under SDCL 11-2-65. Attorney's fees are considered
21 to be disbursements, as are other expenditures that are
22 allowed under SDCL 15-17-37, and that statute uses the
23 permissive term "may" rather than "shall."

24 The reason for that just like SDCL 11-2-65 is because
25 there are two other statutes that allow for the Court to

1 make exceptions, and it's possible that even the dictates
2 of 15-17-37 would be essentially set aside and
3 expenditures could be completely denied by the Court in
4 certain circumstances, but those are typically only under
5 15-17-52 or 15-17-53.

6 I'll start with 15-17-53 and just note that those are
7 situations in which disbursements granted to the
8 prevailing party would be oppressive or work a hardship.
9 That's not been claimed in this case.

10 15-17-52 allows the Court to modify or deny the
11 requested disbursements, quote, in the interests of
12 justice, end quote. And it seems that that's the argument
13 that's being made here.

14 Specifically, there are claims that the allowance of
15 attorney's fees and costs as a disbursement in this
16 particular type of appeal, that being a zoning appeal, is
17 unconstitutional. We've made arguments that have set
18 forth the reasons why that's not the case. Specifically,
19 in our brief we've mentioned the fact that this is
20 something that applies both to a petitioner who is an
21 aggrieved party as a landowner or other interested party
22 in the county of where the zoning appeal takes place, but
23 it could also apply to a permit applicant who's denied and
24 who seeks the Court's intervention to address that denial
25 and reverse that decision by the county.

1 In that kind of a situation it really doesn't arise
2 to anything that gives the type of chill or the type of
3 interference with the constitutional rights that have been
4 claimed in this case. One is a claim for the protection
5 under what's called the Noerr, N-O-E-R-R, dash Pennington
6 doctrine, which only applies to the type of third-party
7 action that seeks damages or other types of claims against
8 those who would use the court system. We're not doing
9 that here, and it's certainly not applicable in a
10 situation where the appeal has been completed and the
11 petitioners have had their day in court.

12 Similarly, this is not a situation in which there is
13 any kind of a constitutional harm under the open courts
14 provision of the South Dakota Constitution, nor is there
15 any other constitutional violation shown here. And it's
16 important to note that in the context of zoning appeals,
17 the particular county chooses whether or not to have
18 zoning at all. In our state it's not necessary that every
19 county adopt a comprehensive plan and a zoning ordinance.
20 Therefore, those counties that do only do so pursuant to
21 the statutes that authorize that type of proceeding or
22 that type of a structure and framework for the county to
23 govern those individuals who own land in the county.

24 That is a derogation of the common law as has been
25 noted by the South Dakota Supreme Court. In those

1 counties that don't have zoning there wouldn't be any kind
2 of protections for the landowners who opposed a project
3 like this. And in that situation where the Court is being
4 asked to decide these issues on appeal, it is not unusual
5 for limitations or other requirements to be put in place
6 by statute for the appeal to take place.

7 Here South Dakota has recently enacted restrictions
8 to require a specific type of person who is, quote, an
9 aggrieved person, end quote, as defined by SDCL 11-2-1.1,
10 and we have made a claim here that the petitioners did not
11 meet that standard. This is one of the first cases to
12 address that particular definition and that standard, but
13 we would argue that that's an example of a restriction on
14 appeals and that many people will not be able to meet that
15 standard and won't have any right to appeal at all.

16 As such, it would be improper for the Court to
17 determine that the award of attorney's fees to a
18 prevailing party would somehow be a constitutional
19 violation in that context where there may not be a right
20 to appeal at all. But here there is a right. It was
21 something that was recognized well in advance of the
22 filing of this particular petition.

23 And it's also interesting and important to note that
24 if we're talking about in the interests of justice under
25 SDCL 15-17-52, the appeal that brought this particular

1 matter to the Court is the second permit for this
2 particular project. The first one resulted in an appeal
3 that was appealed to the -- what resulted in dismissal on
4 summary judgment, but then was sent up to the South Dakota
5 Supreme Court and reversed and remanded.

6 Well, we took care of the issues that were raised in
7 that particular case, we thought, by simply applying for a
8 new permit and going through the appropriate notice and
9 other requirements that were raised as an issue the first
10 time around. We tried to address everything that the
11 concerns of the petitioners were specifically raised in
12 that particular prior appeal. And subsequently, there was
13 this appeal regardless of the fact that we thought we had
14 fixed the notice or publication issues and other things
15 that were raised on the first appeal.

16 So having said all of that, this is a situation in
17 which, without arguing about the merits or who was an
18 appropriate party to bring this, we brought this
19 particular claim under SDCL 11-2-65. We're not making a
20 claim that this was a frivolous or malicious appeal under
21 15-17-51, but it's important to note that that would have
22 been an option had we felt that that was appropriate.

23 Instead, the legislature has recently in 2020 amended
24 15 -- or excuse me -- amended 11-2-65 to allow for
25 recovery of attorney's fees in situations, obviously,

1 where it is not a situation where you have a frivolous or
2 malicious appeal.

3 So, for those reasons it would appear that these
4 attorney's fees are another type of disbursement, which if
5 proven and established as reasonable, would be subject to
6 the award under 15-17-37 as a matter of course. And in
7 the usual course oftentimes when there is either a statute
8 or a contract that allows recovery of attorney's fees,
9 those are allowed and the only question is whether they're
10 reasonable or not.

11 In this situation we've set forth an itemized
12 statement. We will provide additional information if
13 necessary. We didn't know whether this case was going to
14 be appealed. It will be. And therefore, because it will
15 be, we'll have some specific requests for redaction of an
16 invoice, if that needs to be provided to the Court, but we
17 had set forth what we believed was a sufficient itemized
18 list for the Court to determine whether the amount of fees
19 that were being requested was reasonable. And on that
20 basis we have asked for either the grant of the attorney's
21 fees as requested or the ability to make a subsequent
22 additional submission with specific redactions on itemized
23 invoices.

24 THE COURT: Mr. Donahoe, one thing I want you to address,
25 and I don't know that you did yet because it's going to

1 come up in Mr. Peterson's argument: How do you respond to
2 their position that you're the intervenors, you're not the
3 petitioner or the respondent, and how that affects your
4 ability to ask for the attorney fees under 11-2-65?

5 MR. DONAHOE: Certainly. The specific language in 11-2-65
6 is that -- well, attorney's fees can be awarded against a
7 non-prevailing party. And as an intervenor, that was the
8 risk that this particular set of people and a company took
9 when they intervened. And so it doesn't matter whether
10 it's the petitioners or the intervenors who end up being
11 non-prevailing parties, the statute would apply because
12 once an intervenor is granted the authority to become part
13 of the case, they are in fact treated as a party, and
14 there's no statute or other case law that would hold that
15 an intervenor is not a party when it comes to language
16 like SDCL's 11-2-65, allowance of attorney's fees against
17 the non-prevailing party.

18 THE COURT: Thank you. Mr. Peterson, on behalf of the
19 petitioners, how do you respond to their motion for
20 attorney's fees, costs and disbursements?

21 MR. PETERSON: Well, Judge, I think we start with the
22 language of 11-2-65, and importantly it uses the word
23 "may" award fees, which implies discretion on the part of
24 the Court.

25 If you look at the case of *Center of Life Church v.*

1 Nelson, which did not warrant any sort of response from
2 either the respondent or the intervenor, that's a seller's
3 nondisclosure as part of a residential home sale that if
4 you don't put accurate information on the form, the buyer,
5 if they're successful in showing that they are entitled to
6 attorney's fees, it says the Court may award the fees.

7 I was on the unfortunate end of that one where we
8 prevailed. We got, you know, a judgment for \$192,000 in
9 favor of our buyer/client. I asked for attorney's fees.
10 Judge Salter said you don't get any. The thought being
11 there wasn't -- that it was a close call, it was fairly
12 debatable, and he wasn't going to stick it to the sellers
13 on top of the relief already granted.

14 I argued, you know, look, "may" is just -- you can --
15 am I charging too much per hour, did I spend too much on
16 this task, you know, the eight factors that are laid out
17 and, you know, I argued that you don't have the discretion
18 just to say you get nothing.

19 Our Supreme Court disagreed. The Court said that's
20 exactly the discretion the trial court has is to look at
21 the interests of justice, the fairness to the parties, are
22 the issues fairly debatable. Those are all fair-game
23 issues to look at. So that's where we start here is Your
24 Honor has discretion on whether to award fees.

25 Next is the remaining language of 11-2-65, and it

1 says that attorney's fees can be awarded against the
2 non-prevailing party relative to the petition for writ of
3 certiorari. It doesn't say that they're awarded -- to
4 whom they're awarded. The natural implication of 11-2 is
5 you've got the county and you've got whoever is
6 challenging the decision. It might be in this case, you
7 know, opposing landowners that don't like a permit being
8 granted, or it could be another case where the permit
9 holder is denied and the permit holder appeals.

10 So naturally, there's the negatively affected party
11 and the county, and in that situation the non-prevailing
12 party can be -- attorney fees can be awarded against that
13 party, but it doesn't say anything about intervenors.
14 Intervenors are just that. They're an intervening party.
15 They have an interest in the outcome, but they're not
16 winners or losers. They're not prevailing or
17 non-prevailing parties. They are intervenors that invited
18 themselves in, and now have the audacity to ask for
19 attorney's fees when they didn't have to be a participant
20 in the first place, which is exactly the issue I raised,
21 if Your Honor recalls, on the front end of the intervenors
22 trying to get into this case.

23 What's unfair about this statute and what makes it
24 both unconstitutional and just unfair purely is that the
25 non-prevailing party, if it's not the county, can be stuck

1 for attorney's fees. If the contrary is true that the
2 county either, you know, granted a permit they shouldn't
3 have or that they were obligated to grant a permit and
4 they didn't, and the permit holder appeals and wins, when
5 the county is on the losing side of it, they don't have to
6 pay attorney's fees unless there's gross negligence or bad
7 faith involved with their decision.

8 That is the crux of the unfairness and the
9 unconstitutionality of the statute. What we have is the
10 government is exercising a police power. The government
11 has set up a very narrow channel through which those
12 decisions can be appealed under 11-2-61, and the
13 government has also set up a mechanism where if you file a
14 nonfrivolous appeal and exercise your open court rights,
15 your First Amendment rights, your right to assemble and
16 your right to petition, literally petition the government
17 is what we're doing here, if you exercise those rights to
18 challenge the police power under these narrowly construed
19 rules and make a nonfrivolous, but ultimately unsuccessful
20 argument, you're going to pay the county's attorney's
21 fees.

22 But the converse isn't true. The county has to act
23 in bad faith in order for the converse to be true. That
24 is the crux of the problem with this statute. It makes it
25 unfair even if it doesn't -- I think it is

1 unconstitutional as set forth in our brief because it does
2 limit the petition rights and the open court rights. But
3 even if Your Honor says it's not quite to the
4 constitutional level, you can avoid that constitutional
5 problem to say this just isn't fair in this situation.

6 Fair arguments, reasonable arguments, have been
7 weighed; ultimately, arguments that Your Honor found not
8 to be persuasive. But arguments that essentially have
9 been conceded are nonfrivolous arguments that we made to
10 raise important issues about this permit, a 7,000 head
11 permit, going a little more than a half mile from Vicky's
12 house and close to Jeff Powers' house. It's important
13 issues. They deserve to have their voice heard in this
14 case.

15 And I think what's particularly important is the
16 amount of time and money wasted on issues raised by the
17 intervenors. Every single issue that they uniquely
18 raised, they lost. They challenged our experts under the
19 *Daubert* challenge. They lost that. They challenged
20 whether we had standing. They lost that.

21 We had to file a motion to compel to get a basic
22 piece of evidence that was referenced in the underlying
23 record, and Your Honor did not award us attorney's fees
24 finding that that was a fairly debatable issue. But now,
25 they're asking us to subsidize their unsuccessful *Daubert*

1 challenge, their unsuccessful challenge to standing and
2 their unsuccessful opposition to basic discovery. Why
3 should we have to subsidize their losing efforts?

4 What the Court ought to do, if the Court believes
5 that the statute is constitutional, the Court should
6 reduce the county's attorney's fees by at least half
7 because at least half of the issues had to do with issues
8 where we prevailed. I mean, just think about the volume
9 of testimony Your Honor heard between a three-hour
10 deposition from one expert and about 90 minutes from
11 Mr. Shaykett, testimony from my client, my clients, about
12 how this would affect them. Somewhere between a third and
13 maybe half of the trial time in this case related to the
14 actual merits of the case. Everything else were these
15 collateral issues that were injected by the intervenors
16 and are issues that they lost, we prevailed.

17 And now to ask the intervenors to be awarded
18 attorney's fees for their losing effort seems not in the
19 interest of justice, not at all what 11-2-65 contemplated,
20 and it injects constitutional problems that Your Honor
21 could avoid in other ways.

22 Ultimately, we rely on our brief including
23 application of the board -- excuse me, the
24 Noerr-Pennington doctrine, which admittedly started in the
25 context of challenging antitrust laws that companies were

1 getting sued for petitioning legislators to try to pass
2 laws to assist their business, so they got sued for
3 saying, hey, you're advocating for something that is
4 anticompetitive. So that's where that doctrine was born,
5 but it has been exported to many other situations
6 including zoning and permit appeals as set forth in our
7 brief.

8 What we don't have is a statute like 11-2-65 anywhere
9 in the United States that I've been able to find. There's
10 lots of times where statutes are passed, think about Title
11 VII, for example, that if someone brings a discrimination
12 claim, you know, against a government entity and they
13 prevail, they can get their attorney fees. There's many
14 other situations where there's fee shifting.

15 I'm not aware of any statute anywhere in the United
16 States like we have here where the government says, if you
17 want to petition and challenge the government decision,
18 and you lose, even if you're not bringing a frivolous
19 claim, you're going to pay the government's attorney's
20 fees. I think our State might well be in a singular
21 position, and there's probably good reason for that
22 because it's so facially unconstitutional and ridiculous
23 for that to be an enforceable law.

24 And in this case it is being expanded even farther
25 than that by an intervenor inviting themselves into the

1 party, raising issues they lose on, and then asking us to
2 pay the bill. That's unfair, it's unconstitutional, and
3 Your Honor should deny entirely the intervenors'
4 application; and if constitutional, substantially reduce
5 the county's for the reasons we've set forth in our brief.

6 THE COURT: Thank you. Mr. Deibert.

7 MR. DEIBERT: Your Honor, I'm here on behalf of the Board
8 of Adjustment. I've submitted a motion for attorney fees
9 and costs. I believe Mr. Donahoe has covered everything I
10 need to cover. The Court has the brief, and I have no
11 additional argument.

12 THE COURT: And, perhaps, I missed this along the way, but
13 on behalf of the county, did you submit your motion for
14 attorney's fees and costs, or you were just in support of
15 the intervenors? I didn't see a separate motion for
16 attorney's fees and costs on behalf of the county.

17 MR. DEIBERT: I am -- I am very certain that I did.

18 THE COURT: I'm not saying I couldn't have missed it, but
19 I didn't see it.

20 MR. DEIBERT: I see my application dated December 14th.

21 THE COURT: So did you ask before Mr. Donahoe asked or was
22 yours at the same time?

23 MR. DEIBERT: No, it was a day or two later.

24 THE COURT: Okay. All right. I think I see it. It's
25 December 16th.

1 MR. DONAHOE: I believe that's correct, Your Honor.

2 MR. DEIBERT: Oh, here it is.

3 MR. DONAHOE: The 14th, Your Honor.

4 MR. DEIBERT: 14th, right. It's a two-page document.

5 THE COURT: I see it, because it was filed in Odyssey on
6 the 16th.

7 MR. DEIBERT: Right.

8 THE COURT: Basically, you're just asking for costs and
9 disbursements?

10 MR. DEIBERT: And attorney fees.

11 THE COURT: But you haven't itemized what those would be.
12 You'd have to do an affidavit in support of that.

13 MR. DEIBERT: That's correct, Your Honor. I just had that
14 open to the page. There is a provision that one asking
15 for attorney fees can submit that after this motion, if it
16 is granted. 15-6-54(d)(2)(C) is the statute that permits
17 a detail at a later date should the motion be granted.

18 THE COURT: All right. Any further comments at this point
19 other than what's been argued in response by the other two
20 parties?

21 MR. PETERSON: I only have one with respect to the
22 county's motion, Judge. In addition to everything we've
23 said before, it's also untimely. Under the statute they
24 have 14 days from entry of judgment to make the
25 application. That deadline was November 13th. They filed

1 a motion for attorney's fees the next day, on November 14,
2 and they did their application for costs and disbursements
3 on November 16th. So, that is untimely, and there's a
4 case we cited in our brief that a failure to timely file,
5 that waives the right to attorney's fees.

6 THE COURT: I believe Mr. Deibert responded as to when the
7 actual order was signed was not until November 30th?

8 MR. PETERSON: No, that was notice of entry. So, an
9 appeal under Appellate Rule 6 runs from notice of entry.
10 The obligation to file a motion for attorney's fees under
11 the statute runs from entry of judgment, not the
12 subsequent notice of entry that is filed thereafter.

13 So November 29 was the trigger date. Fourteen days
14 brings us to the 13th, and the motion was not filed until
15 the 14th. It is waived.

16 THE COURT: Mr. Deibert, any response to that?

17 MR. DEIBERT: The only response is that I'm asking the
18 Court to treat this as every other rule under Chapter
19 15-6, meaning the trigger date is the notice of entry of
20 judgment, and that is my only argument.

21 THE COURT: Mr. Peterson, any response to that?

22 MR. PETERSON: Yeah, that's not the rule in 15-6. The
23 plain language is clear. The notice of entry is a magic
24 requirement under Rule 6 under 15-26A-6. It was a rule
25 that changed actually after I made an appeal in a prior

1 case, *Lebert v. Johnson*, that exposed a gray area and
2 loophole with respect to when notice of entry is not given
3 and there's action pending by the Circuit Court.

4 So, the Court cleared that up more than a decade ago,
5 and it is a hard black-and-white line when it comes to
6 Rule 6 and filing a notice of appeal. But, it is not
7 notice of entry that triggers the obligation to file for
8 attorney's fees. It is entry of the judgment.

9 THE COURT: You don't have the same timeliness issue
10 concerning the intervenors' request?

11 MR. PETERSON: Correct. The intervenors' request, if
12 allowed, is timely. I think it was filed on the 14th day.

13 THE COURT: Mr. Donahoe, any other comments?

14 MR. DONAHOE: Yes, Your Honor. I just want to go back and
15 address one matter that was raised by the petitioners, and
16 that is in regard to the permissiveness and apparently an
17 inference that if there is some injustice, that the Court
18 should not allow attorney's fees or disbursements in a
19 case.

20 That does not align with one of the more recent
21 South Dakota Supreme Court decisions, and that being
22 *Graff, G-R-A-F-F, v. Children's Care Hospital and School*,
23 2020 S.D. 26 at Paragraph 24, which is 943 N.W.2d 484, at
24 Page 492. In that case the South Dakota Supreme Court
25 specifically said, quote -- well, let me just shorten this

1 up. The Court allowed for disbursements to be granted
2 against two parents who were guardians ad litem for their
3 child, but who later dismissed individual claims that they
4 had. And so their only involvement in the case at the
5 time of the final judgment was actually as guardians ad
6 litem, but the Circuit Court granted disbursements in part
7 against them as individuals and not against their son or
8 in their capacity as guardians ad litem for the son.

9 The reason why the Court did that was because they
10 did bring some claims in that particular case, and they
11 were later no longer parties at the end, but there was
12 nothing in statutes or in the provisions under SDCL
13 Chapter 15-17 that prevented the Court making that kind of
14 apportionment for these disbursements.

15 And, of course, as I already have indicated under
16 15-17-53, if it was oppressive or worked a hardship, the
17 Court wouldn't have done that. There was no showing in
18 that particular case on behalf of the parents. Under
19 15-17-52, under the interests of justice, the Circuit
20 Court did have authority to go forward with those
21 disbursements in the way that it felt was appropriate.

22 By the same manner, it would be appropriate for
23 intervenors in this case to be awarded their disbursements
24 when they were not named as parties but had specific
25 pecuniary interests that were important to defend in this

1 case. They were named as parties in the original matter
2 that was appealed to the South Dakota Supreme Court and is
3 reported at 2020 SD 60, which is also 951 N.W.2d 284.
4 That decision from the Supreme Court came down in November
5 of 2020, November 4th of 2020, in fact, and at that point
6 and time the statutes had already been amended and were
7 effective.

8 So, therefore, when the new permit was filed and the
9 new decision came out from the Board of Adjustment, the
10 petitioners would have been aware that any action that
11 they brought to appeal that particular case would involve
12 11-2-65, as amended, and the potential for the recovery of
13 attorney's fees. They chose specifically not to include
14 the intervenors in this particular matter, whereas before
15 in the previous case they had named Steven and Ethan
16 Schmeichel as parties.

17 There are a number of cases that hold that the holder
18 of a permit that is subject to appeal by opponents in a
19 zoning matter are actually real parties in interest. We
20 went through all that when we argued on our motion to
21 intervene.

22 So for those reasons it would be appropriate for the
23 Court to take a look at this, but it would also be
24 appropriate for the Court when looking at the interests of
25 justice to see that the issues raised initially in that

1 first appeal carried over in regard to standing. Nothing
2 changed in that regard. And this Court determined that
3 the opinion of the appraiser and the expert witness were
4 not credible or believable. That was reversed and
5 remanded. There's no reason to believe that the
6 intervenors brought that claim in bad faith or didn't have
7 an appropriate basis to make that argument.

8 There was some discussion about whether it was
9 reasonably debatable to make those claims. That was very
10 obvious in this situation, that they were in fact
11 reasonably debatable. And more importantly, they were all
12 intertwined with the actual defenses that were raised in
13 regard to setbacks and other requirements or conditions
14 that were imposed on this particular facility.

15 The biggest issue, and the Court knows it's the
16 biggest issue for the petitioners, was odor. It was all
17 about the odor, and in fact Dr. Powers stated if it was
18 cows, he wouldn't have a problem with it. You can't say
19 that it wasn't appropriate to attack some of the issues
20 they raised in regard to the qualifications of their
21 experts or the application of setbacks or other
22 requirements or conditions for people who lived more than
23 half a mile away when our expert at the hearing on these
24 actual zoning decisions stated that anything more than
25 half a mile away wouldn't have a problem with odor or

1 other alleged externalities.

2 So on that basis we would state that it's very
3 clearly a relatively or reasonably debatable issue, and it
4 also was intertwined with those other matters, and it was
5 also intertwined with a potential claim later for nuisance
6 which could be brought against my clients. And therefore,
7 they had every reason to have to protect those interests
8 in this case and become intervenors and present those
9 issues on this particular appeal.

10 THE COURT: Thank you. In connection with this matter,
11 and I'm not sure if Mr. Peterson is baffling the Court
12 with the petitioner versus respondent as opposed to
13 intervenor language, but he may have a point. But during
14 trial the Court felt like, to some extent, he made a very
15 good argument, but it didn't have merit as to the setbacks
16 and the distances because in the end there was not
17 evidence and testimony to support what his position was.
18 It was a very creative argument that the Court really paid
19 attention to as we went through that.

20 I'm not saying you're wrong, Mr. Peterson, on the
21 petitioner versus respondents and the award of the
22 attorney's fees under 11-2-65, but it does cause the Court
23 a little bit of concern because that statute is not as
24 clear as it could be. I also understand Mr. Donahoe's
25 position that the intervenors are treated as parties.

1 They had aggrieved status. They had a right to the permit
2 that was granted. They had a right to be in this action,
3 and the Court allowed them to intervene. The Court wishes
4 the statute were a little clearer, though, on as
5 intervenors, it doesn't specifically say they can request
6 and require the other side to pay their attorney's fees.

7 The same would be true with our blackletter line and
8 are we going from the date of the notice of entry or is
9 Mr. Deibert a day off. It's another debatable issue, I
10 think.

11 As the Court reviewed this and we held our trial, it
12 was very clear there were legitimate and debatable issues,
13 and the Court listened to the testimony and did determine
14 that the petitioners had standing because of their
15 location and how this could affect them. And the Court
16 believes that was clearly the correct ruling, that they
17 had a right to have their day in court to be heard.

18 However, the Court's ultimate finding was that the
19 County Board of Adjustment acted properly. I know
20 Mr. Peterson and his clients disagree with their final
21 determination, but this Court was firmly convinced after
22 hearing the testimony from the different Board of
23 Adjustment members that they carefully and properly
24 considered the rules, they understood the regulations,
25 they understood what the issues were.

1 I had no issue with the fact that they did rely
2 somewhat upon Ms. Dubbelde's calculation on the setback,
3 but as Mr. Peterson pressed them, the Court felt they did
4 clearly understand what the setback was, what the rules
5 were and how it applied. And they also felt like if the
6 petitioners were more than a half mile away, the odor
7 shouldn't be a factor. That was their opinion and that's
8 how they applied it to their decision. Obviously, the
9 petitioners don't agree with that necessarily, but they
10 stuck to their guns under cross-examination as to why they
11 did what they did and how they did it. We definitely had
12 debatable issues.

13 Mr. Donahoe I'm sure disagrees with my determination
14 that the petitioners had standing, but his own expert in
15 what he commented to the board at the time of the hearing
16 even appeared to the Court, if I recall correctly,
17 admitted that they could be affected by it, and that did
18 weigh in the Court's determination when the intervenors'
19 own expert said they could be impacted. Granted, the
20 Court found it problematic with some of the material that
21 was presented in the area of odor and found it somewhat
22 hypothetical on how Mr. Shaykett was trying to look at
23 things because he didn't have apples to apples. But,
24 there was a legitimate and contested and debatable issue
25 on both sides.

1 Leave no doubt, I do feel the intervenors prevail.
2 That is not the issue in this Court's mind. But I do
3 think the petitioners had a right to bring the matter on
4 for a further review and determination.

5 All that being said, the award of the attorney's fees
6 for both the county and the intervenors is discretionary,
7 and the Court is going to decline to award attorney's fees
8 to either the intervenors or the county because I do
9 believe we had a legitimate issue that was in controversy
10 and needed to be resolved.

11 Now, whether that changes on appeal, whether the
12 Supreme Court rules that any attorney's fees to either
13 side, if they prevail, is appropriate, that's a whole
14 other issue, but I'm going to decline to grant the county
15 and the intervenors motion for attorney fees, costs and
16 disbursements. I gave some serious thought to whether or
17 not it was applicable and whether or not I should or
18 whether or not I should just grant costs and
19 disbursements.

20 I'm not going to go down the road of whether or not
21 11-2-65 is unconstitutional for attorney's fees. That has
22 not really been properly noticed to be an issue, because
23 if you're going to declare a statute unconstitutional
24 there is a little more process in my mind that goes with
25 that. I understand you're raising it as an issue, and it

1 is a newer statute. Again, I wish they'd make it a little
2 clearer on how they worded that, but unfortunately it's
3 not always a group of attorneys that drafts legislation
4 that gets made into law so sometimes it's not as clear as
5 the Court would like to see it.

6 Since this is discretionary, it's going to be denied.
7 Mr. Peterson, you get to draft one order with two
8 paragraphs that reflects the Court's decision.

9 Mr. Peterson, any questions on that?

10 MR. PETERSON: No, Your Honor. I'll get the form of that
11 to Doug and Brian to see if they object to form and then
12 send it to Your Honor.

13 THE COURT: Mr. Donahoe, any questions or comments at this
14 point?

15 MR. DONAHOE: No, Your Honor.

16 THE COURT: Mr. Deibert.

17 MR. DEIBERT: I have none, Your Honor. Thank you.

18 THE COURT: All right. Thank you, gentlemen. We'll be in
19 recess.

20 (Proceedings adjourned at 4:11 p.m.)
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25

1 STATE OF SOUTH DAKOTA)
2 : ss CERTIFICATE
3 COUNTY OF McCOOK)

4 THIS IS TO CERTIFY that I, Carol Johnson, Official
5 Court Reporter for the Circuit Court, First Judicial Circuit,
6 Salem, McCook County, South Dakota, took the proceedings of
7 the foregoing case, and the foregoing pages 1 - 27 inclusive,
8 are a true and correct transcript of my stenotype notes.

9
10
11 Dated at Salem, South Dakota, this 28th day of February,
12 2022.

13
14 /s/Carol Johnson
15 _____
16 Carol Johnson, Official Court Reporter, RPR

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Carol Johnson, Official Court Reporter, RPR

<p>MR. DEIBERT: [11] 16/7 16/17 16/20 16/23 17/2 17/4 17/7 17/10 17/13 18/17 27/17</p> <p>MR. DONAHOE: [7] 3/8 3/13 9/5 17/1 17/3 19/14 27/15</p> <p>MR. PETERSON: [6] 9/21 17/21 18/8 18/22 19/11 27/10</p> <p>THE COURT: [22] 3/1 3/12 8/24 9/18 16/6 16/12 16/18 16/21 16/24 17/5 17/8 17/11 17/18 18/6 18/16 18/21 19/9 19/13 23/10 27/13 27/16 27/18</p> <hr/> <p>\$</p> <p>\$192,000 [1] 10/8</p> <hr/> <p>-</p> <p>-and [1] 1/9 -vs [1] 1/6</p> <hr/> <p>/</p> <p>/s/Carol [1] 28/14</p> <hr/> <p>0</p> <p>000003 [1] 1/4 03 [1] 3/3</p> <hr/> <p>1</p> <p>1.1 [1] 6/9 11-2 [1] 11/4 11-2-1.1 [1] 6/9 11-2-61 [1] 12/12 11-2-65 [13] 3/20 3/24 7/19 9/4 9/5 9/16 9/22 10/25 14/19 15/8 21/12 23/22 26/21 11-2-65 to [1] 7/24 13th [2] 17/25 18/14 14 [2] 17/24 18/1 14th [5] 16/20 17/3 17/4 18/15 19/12 15 [1] 7/24 15-17 [1] 20/13 15-17-37 [3] 3/22 4/2 8/6 15-17-51 [1] 7/21 15-17-52 [4] 4/5 4/10 6/25 20/19 15-17-53 [3] 4/5 4/6 20/16 15-26A-6 [1] 18/24 15-6 [2] 18/19 18/22 15-6-54 [1] 17/16 16 [1] 2/8 16th [3] 16/25 17/6 18/3 17 [2] 2/7 20/13 18 [2] 2/7 2/8 19 [1] 2/9</p>	<p>2</p> <p>2020 [5] 7/23 19/23 21/3 21/5 21/5 2022 [3] 1/9 2/1 28/12 21-03 [1] 3/3 23 [1] 2/10 24 [1] 19/23 26 [1] 19/23 27 [1] 28/7 284 [1] 21/3 28th [1] 28/11 29 [1] 18/13</p> <hr/> <p>3</p> <p>30th [1] 18/7 37 [3] 3/22 4/2 8/6 3:33 [1] 2/2 3rd [1] 2/1</p> <hr/> <p>4</p> <p>484 [1] 19/23 492 [1] 19/24 4:11 [1] 27/20 4th [1] 21/5</p> <hr/> <p>5</p> <p>51 [1] 7/21 52 [4] 4/5 4/10 6/25 20/19 53 [3] 4/5 4/6 20/16 54 [1] 17/16</p> <hr/> <p>6</p> <p>60 [1] 21/3 61 [1] 12/12 62CIV21-000003 [1] 1/4 65 [13] 3/20 3/24 7/19 9/4 9/5 9/16 9/22 10/25 14/19 15/8 21/12 23/22 26/21</p> <hr/> <p>7</p> <p>7,000 [1] 13/10</p> <hr/> <p>9</p> <p>90 [1] 14/10 943 [1] 19/23 951 [1] 21/3</p> <hr/> <p>:</p> <p>:SS [1] 1/1</p> <hr/> <p>A</p> <p>ability [2] 8/21 9/4 able [2] 6/14 15/9 about [12] 3/16 6/24 7/17 11/13 11/23 13/10 14/8 14/10 14/11 15/10 22/8 22/17 above [1] 2/1 above-entitled [1] 2/1 accurate [1] 10/4 act [1] 12/22 acted [1] 24/19</p>	<p>action [4] 5/7 19/3 21/10 24/2 actual [4] 14/14 18/7 22/12 22/24 actually [3] 18/25 20/5 21/19 ad [3] 20/2 20/5 20/8 addition [1] 17/22 additional [3] 8/12 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around [1] 7/10 aside [1] 4/2 ask [4] 9/4 11/18 14/17 16/21</p>	<p>asked [4] 6/4 8/20 10/9 16/21 asking [5] 13/25 16/1 17/8 17/14 18/17 assemble [1] 12/15 assist [1] 15/2 associate [1] 3/10 attack [1] 22/19 attention [1] 23/19 attorney [9] 1/18 1/21 9/4 11/12 15/13 16/8 17/10 17/15 26/15 attorney's [39] attorneys [2] 1/25 27/3 audacity [1] 11/18 authority [2] 9/12 20/20 authorize [1] 5/21 avoid [2] 13/4 14/21 award [9] 6/17 8/6 9/23 10/6 10/24 13/23 23/21 26/5 26/7 awarded [7] 9/6 11/1 11/3 11/4 11/12 14/17 20/23 aware [2] 15/15 21/10 away [3] 22/23 22/25 25/6</p> <hr/> <p>B</p> <p>back [1] 19/14 background [1] 3/14 bad [3] 12/6 12/23 22/6 baffling [1] 23/11 basic [2] 13/21 14/2 Basically [1] 17/8 basis [3] 8/20 22/7 23/2 be [51] because [15] 3/24 8/14 8/25 9/11 13/1 14/7 15/22 17/5 20/9 23/16 23/23 24/14 25/23 26/8 26/22 become [2] 9/12 23/8 been [13] 4/9 5/3 5/10 5/24 7/22 13/6 13/9 15/5 15/9 17/19 21/6 21/10 26/22 before [4] 1/14 16/21 17/23 21/14 behalf [6] 3/9 9/18 16/7 16/13 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19/14</p> <p>yet [1] 8/25</p> <p>you [38]</p> <p>You'd [1] 17/12</p> <p>you're [10] 9/2 9/2 12/20 15/3 15/18 15/19 17/8 23/20 26/23 26/25</p> <p>you've [2] 11/5 11/5</p> <p>your [25] 3/7 3/8 9/3 10/23 11/21 12/14 12/15 12/15 12/16 13/3 13/7 13/23 14/9 14/20 16/3 16/7 16/13 17/1 17/3 17/13 19/14 27/10 27/12 27/15 27/17</p> <p>yours [1] 16/22</p> <p>Z</p> <p>zoning [9] 4/16 4/22 5/16 5/18 5/19 6/1 15/6 21/19 22/24</p>
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13.07 Reserved.

13.08 Reserved.

13.09 Concentrated Animal Feeding Operations.

- A. Intent. It is the intent of this section to provide for a viable livestock industry within agriculturally zoned areas of Turner County, protect ground and surface waters and ensure that concentrated animal feeding operations are properly sited, maintained, and managed.
- B. Conditional Use Permit for Concentrated Animal Feeding Operations Required. Any person who owns, proposes to own, manages, or operates a Large Concentrated Animal Feeding Operation, as those terms are defined in these Ordinances, shall be required to obtain a Turner County Conditional Use Permit for Concentrated Animal Feeding Operation whenever a new Concentrated Animal Feeding Operation is proposed where one does not exist, or when a change in operation occurs as defined within these regulations. A change of ownership between family members does not constitute a change in operation. The burden of proof shall be on the Applicant to show they should be granted a Turner County Conditional Use Permit for a Concentrated Animal Feeding Operation.
- C. Aggregation of Commonly Owned Concentrated Animal Feeding Operations for the Purposes of Classification of Such Operations. For the purposes of considering Building Permits or Conditional Use Permits for the placement of animals and livestock within the agriculturally zoned areas of Turner County and determining the number of animals necessary to meet the criteria for a Large, Medium, or Small concentrated animal feeding operations, any person, company, business, or entity which owns or operates more than one building, location or site which has for its purpose the feeding or housing of animals within one mile of another building, location, or site which also has for its purpose the feeding or housing of animals also owned or operated by that same person, company, business, or entity shall be counted as one site and shall count toward the number of animals which are considered in determining whether the proposed building, location, or site is a Large, Medium, or Small concentrated animal feeding operation.
- D. Number of Animals for Concentrated Animal Feeding Operations: For the purpose of these regulations, Concentrated Animal Feeding Operations are divided into Large, Medium, and Small operations. The following table defines each type of animal confinement (species) with the number of animals indicated. All animal classifications are based upon the standard animal numbers incorporated into the SD Department of Environment and Natural Resources (SD DENR) General Permit for feedlot operation.

Type of Concentration Animal Feeding Operation	<u>Large</u> Animal Numbers Equal to or More Than:	<u>Medium</u> Animal Numbers Equal to:	<u>Small</u> Animal Numbers Less Than:
Dairy cows (mature -- milked or dry)	700	200 to 699	200

Veal Calves	1,000	300 to 999	300
Cattle other than mature dairy cows or veal calves ¹	1,000	300 to 999	300
Finisher Swine (weighing over 55lbs)	2,500	750 to 2,499	750
Nursery Swine (weighing less than 55lbs)	10,000	3,000 to 9,999	3,000
Farrow-to-Finish (sows)	540	270 to 539	270
Horses	500	150 to 499	150
Sheep or Lambs	10,000	3,000 to 9,999	3,000
Turkeys	55,000	16,500 to 54,999	16,500
Laying hens or broilers ²	30,000	9,000 to 29,999	9,000
Chickens, other than laying hens ³	125,000	37,500 to 124,999	37,500
Laying hens ³	82,000	25,000 to 81,999	25,000
Ducks ²	5,000	1,500 to 4,999	1,500
Ducks ³	30,000	10,000 to 29,999	10,000
Geese	30,000	10,000 to 29,999	10,000

¹ Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs.

² Concentrated animal feeding operation uses a liquid manure handling system.

³ Concentrated animal feeding operation uses other than a liquid manure handling system.

NOTE: Other animal types not listed in the above table may be considered on a case-by-case basis.

- E. Standards to be Utilized by the Board of Adjustment for Conditional Use Permits for Concentrated Animal Feeding Operations. The Turner County Board of Adjustment may, in its discretion, approve or deny applications for Conditional Use Permits for Concentrated Animal Feeding Operations. The decision of the Board of Adjustment shall be based on the standards for approval set forth below.
1. Required Minimum Setbacks and Separation Distances for New Concentrated Animal Feeding Operations; Exemption from Setback and Separation Distances Under Certain Limited Circumstances:

There shall be minimum setback and separation distances for all new concentrated animal feeding operations and changes in operation in any existing concentrated animal feeding operation. No concentrated animal feeding operation shall be permitted that is closer than the separation distances set forth in this Ordinance, unless that operation falls within the specific exception set forth in this Ordinance. The required minimum setbacks and separation distances shall be as follows:

	Large	Medium	Small
Dwellings, Churches, Schools, Businesses, Designated State or County Park	3/8 mile plus 100 ft. per additional 500 animal units	1/4 mile	1/4 mile
Incorporated Municipalities	1 mile plus 400 ft. per each additional 1,000 animal units	1 mile	1/2 mile
Existing Swine Feeding Operation over 300 AU – only related to new swine feeding operations	1 mile	1 mile	1/2 mile
Public Water Supplies	1,000 feet	1,000 feet	1,000 feet
Private Wells (other than owner's or operator's)	250 feet	250 feet	250 feet
Private Wells (owner's or operator's)	150 feet	150 feet	150 feet
Lake, Rivers and Streams classified as Fisheries	500 feet	200 feet	200 feet
Designated 100 Year Flood District	Prohibited	Prohibited	Prohibited
Designated Aquifer Protection Dist.	Prohibited, unless the Applicant can show by appropriate soil borings that the site is appropriate or State Permitted.	Prohibited, unless the Applicant can show by appropriate soil borings that the site is appropriate or State Permitted.	Prohibited, unless the Applicant can show by appropriate soil borings that the site is appropriate or State Permitted.

These setback and separation distances shall be calculated from the manure or waste storage area, animal housing building, or the edge of a feedlot of the facility to the nearest structure or use.

The minimum separation listed above shall be used in siting a concentrated animal feeding operation. When a proposed operation does not meet the minimum separation criteria, the applicant shall submit to the Board of Adjustment sufficient documentation of one of the following or a combination thereof:

- a. A signed waiver from each landowner located closer than the minimum separation criteria. No building permit shall be issued until the waivers are filed with the County Register of Deeds.
 - b. In the absence of a waiver, documentation shall be presented on new technology, management practices, topographic features, soil conditions or other factors which substantiate a reduction in the minimum separation criteria.
2. Fly and Odor Control. Large Concentrated Animal Feeding Operations shall dispose of dead animals, manure and wastewater in such a manner as to control odors or flies. The County Board of Adjustment will review the need for control measures on a site-specific basis, taking into consideration prevailing wind direction and topography. The Applicant shall provide the Board of Adjustment with a Fly and Odor Control Plan that will provide sufficient information for the Board of Adjustment to determine whether adequate safeguards exist to protect the public from flies and odors. Information in the Fly and Odor Control Plan shall contain the information necessary to allow the Board of Adjustment to determine what conditions may be necessary to reduce fly and odor problems, as set forth below.
3. Conditions on Permit Allowed. Any Turner County Conditional Use Permit for Concentrated Animal Feeding Operations may be approved by the Board of Adjustment, subject to any reasonable conditions, including, but not limited to, the following:
 - a. Demonstration of, or requiring, adequate methods to be utilized to dispose of dead animals.
 - b. Demonstration of, or requiring, trees and shrubs to be planted to reduce wind movement of odors away from buildings, manure storage ponds and/or lagoons. A minimum of four rows of trees, with each row being at least ten feet apart, according to the generally accepted practices and recommendations of NRCS, or its successor or equivalent agency, must be planted and maintained. The planting of trees must be within one year of the start of the use of the facility.
 - c. Demonstration of, or requiring, adequate slope and drainage at the proposed site to remove surface water from pens and keep the pen area dry so odor production is minimized.
 - d. Demonstration of, or requiring, manure storage in containment areas having good drainage to minimize odor production.
 - e. Demonstration of, or requiring, removal of manure from open pens as frequently as possible to minimize odor production.
 - f. Consider the use of covers on open storage systems for liquid manure systems to reduce odor production.

- g. Consider alternatives to the spreading of manure on weekends, holidays and evenings during warm seasons when neighbors may be involved in outdoor recreation activities. Consider alternatives to spreading manure in such situations whenever possible.
 - h. Requiring the application of liquid manure to be completed by an injection or knifing in process.
 - i. Requiring the proper maintenance of the facility, including, but not limited to, the completion of dirt work, proper handling of garbage and waste, and proper drainage.
4. Large and Medium Concentrated Animal Feeding Operations shall obtain a General Water Pollution Control Permit. The Turner County Conditional Use Permit for Concentrated Animal Feeding Operations may be approved for owners, operators or applicants contingent on receiving a State permit.
5. Manure Application Setbacks. No person, owner, employee, contractor, agent, or similar person associated in any way with the holder of a Turner County Conditional Use Permit for a Concentrated Animal Feeding Operation shall apply manure to any location in Turner County unless the application of manure is performed in accordance with the minimum manure application setbacks set forth in this Ordinance. The following manure application setbacks apply to all Concentrated Animal Feeding Operations.

COUNTY MANURE APPLICATION SETBACKS

CATEGORY	SURFACE OR IRRIGATION APPLIED	INCORPORATED OR INJECTED
Lakes, Rivers, and Streams Classified as Fisheries	300 feet (lakes) 50 feet (river & stream)	100 feet (lake) 50 feet (river & stream)
Stream & Lakes classified as Drinking Water supplies	1,000 feet	300 feet
Public Wells	1,000 feet	1,000 feet
Private Wells	250 feet	250 feet
Residence (other than the operator)	300 feet (surface) 1,000 feet (irrigation)	300 feet
Natural or Manmade Drainage Ditch or Canal	200 feet	50 feet
Municipality	1,000 feet	1,000 feet

6. Additional Standards Allowed. The County Board of Adjustment may impose, in addition to the standards and requirements set forth in these regulations, additional conditions which are reasonable and related to the use being controlled.

7. **Sufficient Land for Manure Application Required.** Conditional use permits for Concentrated Animal Feeding Operations shall be in effect only as long as sufficient land specified for manure management purposes is available for such purposes and other provisions of the permit are being adhered to.
 8. **Consideration of Past Violations.** When considering an application, the County Board of Adjustment shall take into consideration any current and past violations of any local, State, or Federal permit or similar approval for the operation of a concentrated animal feeding operation, or any local, State, or Federal law relating to Concentrated Animal Feeding Operations that the applicant has an interest in. Evidence of any such violation shall be documented by some action on the part of any public entity to enforce any local, State, or Federal law, or by any evidence that would typically be deemed to be admissible in a court of law in the State of South Dakota.
 9. **Additional Standards.** Those standards found in Section 20.09.
- F. **Information Required for Large Concentrated Animal Feeding Operation Permit.** Any applicant for a Turner County Conditional Use Permit for Concentrated Animal Feeding Operations shall provide the following information to the Planning Director prior to consideration by the Board of Adjustment:
1. The owners', managers', management company's, or similar entities' name, address and telephone number.
 2. Legal descriptions of site.
 3. The number and type of animals to be housed.
 4. A fly and odor control plan.
 5. Information on ability to meet designated setback requirements.
 6. Plans and Specifications of the proposed site and a Nutrient Management Plan.
 7. Information on the types of soils at the site, and whether there are any shallow aquifers, designated wellhead protection areas, and 100-year floodplain designations at or within one half mile of the proposed site.
 8. Site Plan of the land utilized for manure application.
 9. Site Plan of all existing and proposed buildings and structures.
 10. Provide Farm Service Agency wetland map.
 11. Test boring location and test boring results, which must be supplied to the Board at least five days before any hearing on an application.
 12. The County Board of Adjustment or the Planning Director may request information relating to a Concentrated Animal Feeding Operation not contained in these regulations.
 13. Information on whether the applicant has ever violated any of the conditions or provisions of any Turner County Conditional Use Permit, Turner County Conditional Use Permit for Concentrated Animal Feeding Operation Permit, or similar permit in any other county in the State of South Dakota, or any state in the United States.
- G. **Inspection of a Concentrated Animal Feeding Operation to Verify Compliance.** To assist the Planning Director in these inspections, the holder of the Permit shall provide any

relevant information requested by the Planning Director. When granted a Conditional Use Permit for Concentrated Animal Feeding Operation, or their successors-in-interest, shall provide reasonable information to the Planning Director, at least once per year, to show their compliance with the terms and conditions of the Permit. After such information is provided the Planning Director may conduct an inspection of the site. Additional information shall be provided to the Planning Director at his or her request, if reasonably related to the purpose and intent of the Conditional Use Permit for Concentrated Animal Feeding Operations, the intent of the Board in approving the Permit, or if such information is in the public interest. Any delay in providing such information, or a refusal to provide such information is grounds for the suspension or revocation of the Conditional Use Permit for Concentrated Animal Feeding Operations. This provision will apply to any Conditional Use Permit issued after January 15, 2004.

13.10 Temporary Uses.

- A. **Intent.** The requirements of this section are intended to provide for the regulation and permitting of uses and associated improvements on private property which are not so recurring in nature as to constitute a permanent use. These requirements are not intended to regulate temporary uses on public property, including public rights-of-way.
- B. **Permit Required.** No person shall operate a temporary use without first obtaining a permit therefore from the Office of Planning and Zoning as prescribed in this section. If an objection is filed pursuant to Section 13.10 (E) or if the Office of Planning and Zoning determines that a hearing should be held due to the scope of the proposed use, the Office of Planning and Zoning shall refer the temporary use application to the Planning Commission for action.
- C. **Applications.**
 - 1. **Submission deadline.** All applications for a temporary use permit shall be made at least 60 days prior to the proposed commencement date of the use, provided that the Office of Planning and Zoning may approve a lesser time consistent with the requirements of this section.
 - 2. **Temporary use plan.** All temporary uses shall be subject to approval of a temporary use plan. The plan shall describe the nature and location of all temporary improvements and activities, the location of any permanent buildings intended to be used, the time period for which the temporary use permit is requested, and such other information in sufficient detail as the Office of Planning and Zoning determines is reasonably necessary to adequately review the application and to ensure the use will be conducted in a manner consistent with the requirements of this section.
- D. **Standards for review.** The following standards shall be used in determining the suitability and compatibility of a temporary use:

Article 20.00
Conditional Use Permits

20.01 Procedure. The Board of Adjustment may authorize by conditional use permit the uses designated in this ordinance when located in a zoning district allowing such use. The Board of Adjustment shall impose such conditions as are appropriate and necessary to insure compliance with the Comprehensive Plan and to protect the health, safety, and general welfare in the issuance of such conditional use permit.

20.02 Application. To obtain a conditional use permit, the applicant shall file an application with the Office of Planning and Zoning on a form as provided. Every application shall contain the following information:

- A. Legal description of the land on which such conditional use is requested.
- B. Name, address and phone number of the owner of the property which is the subject of such application.
- C. Name, address and phone number of the person making the application if made by anyone other than the owner.
- D. Zoning district classification under which the property is regulated at the time of such application.
- E. Any other information concerning the property as may be requested by the Office of Planning and Zoning.

20.03 Fees. Upon the filing of any application for conditional use with the Office of Planning and Zoning, the applicant shall pay to the County the appropriate fee as designated in Article 25.00.

20.04 Information on Site Plan. In addition to the following information, plans shall be drawn to scale upon substantial paper or cloth and shall be of sufficient clarity to indicate the location, nature, and extent of the work proposed and show in detail that it will conform to the provisions of this ordinance and all relevant laws, rules, and regulations.

Exception: The Planning Director may waive the submission of plans, if he finds that the nature of the work applied for is such that reviewing of plans is not necessary to obtain compliance with this title.

- A. The address of the property and the legal description.
- B. The name of the project and/or business.
- C. The scale and north arrow.

- D. All existing and proposed buildings or additions.
- E. Dimensions of all buildings.
- F. Distance from all building lines to the property lines at the closest points.
- G. Building height and number of stories.
- H. Dimensions of all property lines.
- I. Parking lots or spaces; designate each space, give dimensions of the lot, stalls, and aisles.
- J. Screening; show height, location, and type of material to be used.
- K. The landscaped setback and trees; indicate species of trees and material to be used for landscaping.

Approved plans shall not be changed, modified, or altered and all work shall be done in accordance with the approved plans.

20.05 Board of Adjustment Hearing. Upon the filing of an application for a conditional use permit, the Planning Director shall set a date for public hearing on such requested conditional use, at which time and place the Turner County Board of Adjustment shall meet to consider the conditional use request.

- A. Notice. No less than ten (10) days before the scheduled public hearing, the Planning Director shall publish notice of the public hearing in a legal newspaper of general circulation in the area affected. The Planning Director shall post notices of the public hearing at the Turner County Courthouse and on or near the property at least five days prior to the scheduled public hearing.
- B. Action. The Board of Adjustment shall decide whether to grant the conditional use with such conditions and safeguards as are appropriate or to deny a conditional use when not in harmony with the purpose and intent of these regulations. The decision of the Board of Adjustment shall be final unless an appeal is filed in accordance with Section 20.06.

20.06 Appeals from Decision of Board. Appeals may be taken to the Circuit Court by any person or persons, jointly or severally, aggrieved by any decision of the Board of Adjustment, or any taxpayer, or any officer, department, board or bureau of the County, aggrieved by any decision of the Board of Adjustment, in the manner and form provided by the statutes of the State of South Dakota, in such cases made and provided.

20.07 Amendments. Amendments shall be processed in the same manner as required for a separate conditional use permit.

20.08 Expiration. A conditional use permit which has been approved shall expire by limitation and become null and void if the building, work or use authorized by such conditional use permit is not commenced within one year from the date of approval. This provision shall not apply to a conditional use permit approved for a residential use in the A-1 or F zoning districts. Upon written request to the Planning Director and prior to the conditional use permit expiration date, a one-year time extension for the conditional use permit may be granted by the Planning Director, subject to the following conditions:

- A. There was no public objection presented during the public hearing process for the original conditional use permit;
- B. The land uses for the surrounding properties have not significantly been altered since the original approval date for the conditional use permit.

20.09 Conditional Use Criteria. The following considerations shall be employed when acting upon requests for conditional uses:

- A. The effects of noise, odor, traffic, air and water pollution, and other negative factors shall be controlled through the use of screening, setbacks, and orientation.

20.10 Preexisting Uses. An existing use eligible for a conditional use permit which was lawfully established on the effective date of this ordinance shall be deemed to have received a conditional use permit as herein required and shall be provided with such permit by the County upon request, and it shall not be a nonconforming use; provided, however, for any enlargement, extension, or relocation of such existing use, an application in accordance with this ordinance shall be required.

20.11 Reapplication. No applicant requesting a conditional use permit whose application includes the same or substantially the same requirements for the same or substantially the same property as that which has been denied by the Board of Adjustment shall be again considered by the Board of Adjustment before the expiration date of six (6) months from the date of the final action on the petition.

20.12 Review of Permit by Board of Adjustment. The following procedures shall be employed when acting upon reviews of conditional use permits:

- A. **Basis for Review.** Noncompliance with any of the terms, conditions or requirements placed on a conditional use permit by Turner County is sufficient cause to subject such permit to review by the Turner County Board of Adjustment.
- B. **Procedure.** If the Planning Director is reasonably satisfied there exists any noncompliance with the terms, conditions or requirements of a conditional use permit, the Director shall give written notice of such noncompliance to the person, firm, corporation or entity to which the permit was granted. Additionally, the Director shall advise the Board of Adjustment of such noncompliance at its next regularly scheduled meeting. Upon such

advisement, the Board of Adjustment shall set a time for review of the permit at a subsequent regularly scheduled meeting. Such review will be open to the public.

- C. **Notice of Review Hearing.** At least ten (10) days prior to the hearing, the following shall occur:
1. The Planning Director shall give written notice of the review hearing to the person or entity for whom the permit was authorized.
 2. The Planning Director shall be responsible for posting sign(s) on the property in such a manner so as to be clearly visible from the street, road or other public right-of-way from which entrance or access to the property is gained.
- D. **Hearing.** In the event the Board of Adjustment determines by substantial evidence that such compliance has not been established, it may do any of the following:
1. Revoke said permit.
 2. Amend said permit.
 3. Postpone action for a period of time it deems appropriate to allow the permit holder to comply with all terms, conditions and requirements of the permit in question.
 4. Require any other such action it deems appropriate and in accordance with the provisions of this Section.
- E. **Effect of Revocation.** Any person, firm, corporation or entity to which a conditional use permit has been granted and subsequently revoked by the Board of Adjustment may not apply for a conditional use permit pursuant to Section 20.02 for a period of six months.
- F. **Appeal.** Appeals from decisions made by the Board of Adjustment pursuant to this section shall commence and proceed in accordance with Section 20.06.

2. Live performances that are characterized by the exposure of specific anatomical areas or specific sexual activities.
3. Films, motion pictures, videocassettes, slides or other photographic reproductions that are characterized by the depiction or description of specific sexual activities or specific anatomical areas.
06. **ADULT MOTION PICTURE THEATER.** A commercial establishment in which, for any form of consideration, films, motion pictures, videocassettes, slides, or other similar photographic reproductions that are characterized by the depiction or description of specific sexual activities or specific anatomical areas are predominantly shown.
07. **ADULT ORIENTED BUSINESS.** Any adult arcade, adult bookstore or video store, cabaret, adult live entertainment establishment, adult motion picture theater, adult theater, massage establishment that offers adult service, or nude model studios.
08. **ADULT SERVICE.** Dancing, serving food or beverages, modeling, posing, wrestling, singing, reading, talking, listening, or other performances or activities conducted for any consideration in an adult oriented business by a person who is nude or seminude during all or part of the time that the person is providing the service.
09. **ADULT THEATER.** A theater, concert hall, auditorium, or similar commercial establishment that predominantly features persons who appear in a state of nudity or who engage in live performances that are characterized by the exposure of specific anatomical areas or specific sexual activities.
10. **AGRICULTURE.** The use of land for agricultural purposes including farming, dairying, raising, breeding, or management of livestock, poultry, or honey bees, truck gardening, forestry, horticulture, floriculture, viticulture, and the necessary accessory uses for packaging, treating or storing the produce providing that the operation of any such accessory use shall be secondary to the normal agricultural activities. This definition shall not include intensive agricultural activities such as concentrated animal feeding operations and agribusiness activities.
11. **AIRPORT.** A place where aircraft can land and takeoff, usually equipped with hangers, facilities for refueling and repair, and various accommodations for passengers, including heliports.
12. **ANIMAL UNIT.** A unit of measurement based on the amount of waste produced by the animal. For the purposes of this ordinance animal units (AU) shall be calculated according to the following chart. Animal units relate to inventory rather than annual production. Animal units are computed by multiplying the number of head of a particular animal times the corresponding animal unit equivalent. Other animal species equivalent which are not listed will be based on species' waste production.

ANIMAL SPECIES

ANIMAL UNIT EQUIVALENT (AU/HEAD)

Feeder or Slaughter Cattle	1.0
Mature Dairy Cattle	1.4
Veal Calves	0.5
Finisher Swine (over 55 lbs.)	0.4
Nursery Swine (less than 55 lbs.)	0.1
Farrow-to-Finish (sows)	3.7
Swine Production Unit (sows, breeding, gestating and farrowing)	0.47
Horses	2.0
Sheep	0.1
Turkeys	0.018
Laying Hens and Broilers (continuous overflow watering)	0.01
Laying Hens and Broilers (separate liquid handling system)	0.033
Ducks	0.2

13. ANIMAL WASTE, INCORPORATED. Animal waste applied to the land surface and mechanically mixed into the soil within 24 hours.
14. ANIMAL WASTE, INJECTED. Animal waste injected or tilled into the soil at the time of application.
15. ANIMAL WASTE, SURFACE APPLIED. Animal waste applied to the land surface without benefit of incorporation or injection. This shall not include the use of animal waste in irrigation waters.
16. ANTENNA. Any structure or device used for the purpose of collecting or radiating electromagnetic waves including but not limited to directional antennas such as panels, microwave dishes, satellite dishes, and omni-directional antenna such as whip-antenna.
17. ANTENNA SUPPORT STRUCTURE. Any existing structure that supports wireless communications facilities, such as but not restricted to, telecommunications and broadcast towers, buildings, clock towers, steeples, and light poles.
18. AQUIFER. A zone stratum or group of strata that can store and transit water in sufficient quantities for specific use.
19. AQUIFER, SHALLOW. Any aquifer having the following characteristics:
 1. The aquifer is within fifty (50) feet or less below the land surface with fifteen (15) feet or less of continuous, overlying, extremely low permeability material, such as

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF TURNER)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

JEFFREY K. POWERS, and VICKY
URBAN-REASONOVER,

Petitioners,

vs.

TURNER COUNTY BOARD OF
ADJUSTMENT, STEVE SCHMEICHEL, and
ETHAN SCHMEICHEL,

Respondents.

62CIV18-000102

**STIPULATION FOR ENTRY OF FINAL
JUDGMENT**

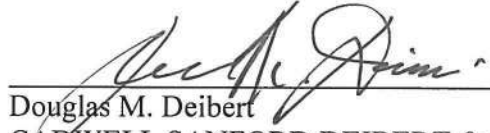
Due to Respondent Turner County Board of Adjustment issuing a new conditional use permit on December 8, 2020 ("the 2020 permit"), to Respondents Steve Schmeichel and Ethan Schmeichel ("the Schmeichels"), the Schmeichels have chosen not to use the conditional use permit issued on April 10, 2018 ("the 2018 permit"), which is the subject of this civil action. Accordingly, due to the Schmeichels' voluntarily withdrawal and relinquishment of the 2018 permit and resulting mootness of this civil action (without application of *res judicata*), the Parties stipulate the Court should enter the attached Final Judgment.

Dated this 1st day of April, 2021.




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Attorneys for Petitioners

Dated this 5 day of April, 2021.



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Dated this 7th day of April, 2021.



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FILED

APR 07 2021

STATE OF SOUTH DAKOTA

COUNTY OF TURNER

James M. Galt
Turner County Clerk of Courts
1st Judicial Circuit Court of South Dakota

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

JEFFREY K. POWERS, and VICKY
URBAN-REASONOVER,

Petitioners,

vs.

TURNER COUNTY BOARD OF
ADJUSTMENT, STEVE SCHMEICHEL, and
ETHAN SCHMEICHEL,

Respondents.

62CIV18-000102

FINAL JUDGMENT

Based on the stipulation of the parties and due to the Schmeichels' voluntary withdrawal and relinquishment of the 2018 permit and resulting mootness of this civil action, the Court orders that Schmeichels shall not use the 2018 permit, and hereby dismisses this civil action as moot with no decision on the merits, no prevailing party, no prejudice to the 2020 permit or any issues for the appeal of that permit (all claims and defenses herein not being subject to *res judicata*), and no award of costs or attorney's fees to any party.

BY THE COURT:

Chris L. Miles
Circuit Court Judge

4/7/2021

ATTEST:

Clerk

By

Deputy



IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

Appeal Nos. 29865, 29870 and 29871

JEFFREY K. POWERS, AND VICKY URBAN-REASONOVER,

Petitioners/Appellants,

vs.

TURNER COUNTY BOARD OF ADJUSTMENT, STEVE SCHMEICHEL, AND
ETHAN SCHMEICHEL,

Respondents/Appellees.

**APPELLEE TURNER COUNTY BOARD OF ADJUSTMENT=S
JOINER IN BRIEF OF INTERVENORS/APPELLEES STEVE
AND ETHAN SCHMEICHEL AND NORWAY PORK OP, LLC**

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
TURNER COUNTY, SOUTH DAKOTA

HONORABLE CHRIS S. GILES, Presiding Judge

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Notice of Appeal filed December 28, 2021

Respondent/Appellee Turner County Board of Adjustment, by counsel of record, joins in the Brief submitted by Intervenor/Appellees Steve and Ethan Schmeichel, and Norway Pork OP, LLC, for all the reasons and authorities set forth therein. This includes the attorney fee claim of Turner County Board of Adjustment.

Dated at Sioux Falls, South Dakota, this ____ day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Appellee Turner County Board of Adjustment Joinder in Appellees Steve Schmeichel and Ethan Schmeichel, and Norway Pork OP, LLC's Brief with the Clerk of Court at SCClerkBriefs@ujs.state.sd.us pursuant to Rule 13-11 and served by e-mail to the following:

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this ____ day of May, 2022;

The undersigned further certifies that the original and two (2) copies of the foregoing Respondent/Appellee Turner County Board of Adjustment Joinder in Appellees Steve and Ethan Schmeichel, and Norway Pork OP, LLC's Brief were mailed to:

Shirley Jameson-Fergel
Clerk of the Supreme Court
State Capitol Building
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by U.S. Mail, postage prepaid, this ____ day of May, 2022.

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

Appeal Nos. 29865, 29870, and 29871

JEFFREY K. POWERS AND VICKY URBAN-REASONOVER,

Petitioners/Appellants,

vs.

TURNER COUNTY BOARD OF ADJUSTMENT,

Respondent/Appellee,

and

STEVE AND ETHAN SCHMEICHEL, and NORWAY PORK OP, LLC,

Intervenors/Appellees.

Appeal from the Circuit Court
First Judicial Circuit
Turner County, South Dakota
The Honorable Chris S. Giles, Presiding Judge

**BRIEF OF INTERVENORS STEVE AND ETHAN SCHMEICHEL,
and NORWAY PORK OP, LLC**

Notice of Appeal filed December 28, 2021

Transcripts filed February 28, 2022

Oral Argument Requested

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PRELIMINARY STATEMENT

Petitioners/Appellants Jeffrey K. Powers and Vicky Urban-Reasonover are referred to by their names individually and collectively as “Petitioners.”

Respondent/Appellee the Turner County Board of Adjustment are referred to as “the Board.” Intervenors/Appellees Steve Schmeichel, Ethan Schmeichel, and Norway Pork Op, LLC are referred to by their names individually and collectively as “Schmeichels.”

Citations to the transcript of the bench trial held August 5-6, 2021, is included in the Appellants’ Appendix and is cited as “Trial Tr.” followed by the page and line numbers as they appear in the transcript. Citations to the transcript of the hearing on attorneys’ fees held on January 3, 2022, is included in the Appellants’ Appendix and is cited as “Hearing (Fees) Tr.” followed by the page and line numbers as they appear in the transcript.

Exhibits introduced during the bench trial are denoted as “Tr. Ex.” followed by the exhibit number. Excerpts from the relevant Turner County Zoning Ordinances are included in the Appellants’ Appendix and are cited as “Appellant Appx.” followed by the page number and are referred to as “TCZO” or “the Ordinances.”

References to the Circuit Court’s Findings of Fact and Conclusions of Law, dated November 29, 2021, are included in the Appellants’ Appendix and is cited as “Findings of Fact” and “Conclusions of Law” as appropriate followed by the paragraph number and “Appellant Appx.” followed by the page number.

JURISDICTIONAL STATEMENT

Schmeichels appeal from the Findings of Fact and Conclusions of Law, dated November 29, 2021, Order, dated November 29, 2021, and the Order Denying Motions for Attorney's Fees and Costs, dated January 11, 2022, in the matter numbered 62CIV21-000003, in the First Judicial Circuit Court of South Dakota, the Honorable Chris S. Giles, Circuit Court Judge, presiding, following a bench trial. Appellant Appx. 1-16. Notice of Entry of the Circuit Court's Findings of Fact, Conclusions of Law, and Order were entered on November 30, 2021. Notice of Entry of the Circuit Court's Order Denying Attorneys' Fees and Costs was entered on January 12, 2022. Appellants' Notice of Appeal was filed on December 28, 2021. Appellees' Notice of Review was filed on January 13, 2022. Appellant Appx. 1-18. Matters presented are determined by final orders and judgment. *Id.* This Court has jurisdiction pursuant to SDCL 15-26A-3(1), (2) and/or (4).

STATEMENT OF THE ISSUES

1. Did Petitioners/Appellants establish standing as "persons aggrieved" under SDCL 11-2-1.1?

The trial court ruled in the affirmative.

- SDCL 11-2-1.1
- *Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 2009 S.D. 59, 769 N.W.2d 817
- *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 113 S. Ct. 1138, 1147, 185 L. Ed. 2d 265 (2013)
- *Sierra Club v. Env'tal Protect. Agency*, 925 F.3d 490, 494-97 (D.C. Cir. 2019)

2. Was the Petition for Writ of Certiorari properly denied?

The trial court denied certiorari relief.

- *Holborn v. Deuel Cnty. Bd. of Adjustment*, 2021 S.D. 6, 955 N.W.2d 363

- *Dunham v. Lake Cnty. Comm’n*, 2020 S.D. 23, 943 N.W.2d 330
- *Croell Redi-Mix, Inc. v. Pennington Cnty. Bd. of Comm’rs*, 2017 S.D. 87, 905 N.W.2d 344

3. Were attorneys’ fees under SDCL 11-2-65 improperly denied as disbursements?

The trial court denied attorneys’ fees to Respondent and Intervenors.

- SDCL 11-2-65
- *Welsh v. Centerville Twp.*, 1999 SD 73, 595 N.W.2d 622
- *Pourier v. S. Dakota Dep’t of Revenue & Regul.*, 2012 S.D. 11, 811 N.W.2d 327
- *McLaren v. Sufficool*, 2015 S.D. 19, 862 N.W.2d 561
- *Dunham v. Lake Cnty. Comm’n*, 2020 S.D. 23, 943 N.W.2d 330

STATEMENT OF THE CASE

A conditional use permit (CUP) was approved with conditions for Intervenors to construct and operate a large, concentrated animal feeding operation (CAFO) for swine. Tr. Ex. 14, p. 314. Petitioners timely appealed and challenged that decision through a duly verified petition to the Circuit Court for a writ of certiorari under SDCL 11-2-61. The matter proceeded to a bench trial. The Circuit Court received evidence and opinions over Intervenors’ and Respondent’s objections and took evidence on the merits of the appeal. At the conclusion of trial, the Circuit Court ruled Petitioners had standing to appeal based on potential injury or harm, but the Board’s decision was affirmed under the writ of certiorari standard. See Trial Tr. 429:19-25 (standing); 464:22-25 (legality). Findings of Fact, Conclusions of Law, and an Order to this effect were each dated November 29, 2021, with Notice of Entry collectively given on November 30, 2021. Appellant Appx. 1-16. Notice of Appeal was filed on December 28, 2021. Appellant Appx. 17-18.

Intervenors and the Board each filed separate motions seeking attorneys' fees and costs under SDCL 11-2-65 on December 13, 2021, and on December 14, 2021, respectively. SR. 1634-39; 1654-56. Those motions were brought on for a hearing before the Circuit Court on January 3, 2022. *See* Hearing (Fees) Hrg. Tr. 1. The Circuit Court denied both motions. Hearing (Fees) Tr. 23:10- 27:8. An Order was filed on January 7, 2022, and Notice of Entry was filed on January 12, 2022. SR. 1780-81; 1783-86. Notice of Review was filed on January 13, 2022. SR 1787.

STATEMENT OF FACTS

The Court reversed summary judgment dismissing appeal of a 2018 CUP for a family farm swine facility in Turner County issued to Steve and Ethan Schmeichel. *See Powers v. Turner Cnty. Bd. of Adjustment*, 2020 S.D. 60, 951 N.W.2d 284, 285. In 2020, the South Dakota Legislature amended statutory appeals of county CUP zoning decisions and defined "person aggrieved" for appeal. SDCL 11-2-1.1. Schmeichels (now with their LLCs) brought a new permit application after those statutes became effective and upon obtaining a state general permit for the operation from the SD Department of Agriculture and Natural Resources. Tr. Ex. 14, pp. 115-127. The facility plans did not change from the 2018 CUP and the Turner County Zoning Ordinance (TCZO) was not amended. Petitioners' dwellings, their experts, and evidence on standing likewise did not change. *Id.* The Zoning Administrator for the county determined that the application met requirements for issuance of the CUP under the TCZO, including the calculations for the setbacks from dwellings. *See* Tr. Ex. 14, p. 314. The new CUP application was approved with the same conditions as before. *Id.* In this

appeal, the Board was the sole Respondent, and Schmeichels intervened over Petitioners' objection. Other details of the case are set forth in Appellants' Statement of Facts and will not be repeated here.

THRESHOLD ISSUE OF STANDING AND INTERVENORS' APPEAL

By Notice of Review, Intervenor (Schmeichels and their LLC entities, collectively "Schmeichels") appeal the standing of Petitioners Vicky Urban-Reasonover and James Powers (Petitioners) to litigate the grant of a conditional use permit (CUP) by the Turner County Board of Adjustment (Board). Standing determines the authority of the courts to address the statutory appeal in this case, and Schmeichels therefore present that issue prior to the merits of the Petitioners' appeals to this Court. *Powers v. Turner Cnty. Bd. of Adjustment*, 2020 S.D. 60, ¶ 13, 951 N.W.2d 284, 290 (standing required to exercise subject-matter jurisdiction). If dismissed for lack of standing or affirmed on the merits, Schmeichels further appeal denial of attorneys' fees as disbursements.

APPELLEE INTERVENORS' MERITS BRIEF APPEAL NO. 29870

STANDARD OF REVIEW

Standing is contested by notice of review, and is presented first, under de novo review:

"Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing." *Lippold v. Meade Cnty. Bd. of Comm'rs*, 2018 S.D. 7, ¶ 18, 906 N.W.2d 917, 922. In consideration of this principle, we first address the question of standing raised by the State on notice of review. "Whether a party has standing to maintain an action is a question of law reviewable by this Court de novo." *Howlett v. Stellingwerf*, 2018 S.D. 19, ¶ 11, 908 N.W.2d 775, 779.

Pickereel Lake Outlet Ass'n v. Day Cnty., 2020 S.D. 72, ¶ 7, 953 N.W.2d 82, 86; accord *Matter of Estate of Calvin*, 2021 S.D. 45, ¶ 22, 963 N.W.2d 319, 326 (affirming result due to lack of standing; circuit court dismissed for a different reason) (citation omitted).

Also raised by notice of review is denial of attorneys' fees and costs against Petitioners under SDCL 11-2-65. The Circuit Court's ruling is reviewed under an abuse of discretion standard, but interpretation of the law is reviewed de novo. *Pourier v. S. Dakota Dep't of Revenue & Regul.*, 2012 S.D. 11, ¶ 7, 811 N.W.2d 327, 329. Erroneous interpretation or misconstruction of the law constitutes an abuse of discretion. *Doe v. Nelson*, 2004 S.D. 62, ¶ 7, 680 N.W.2d 302, 305 (error interpreting law, if prejudicial, is abuse of discretion by definition; no deference given conclusions of law); *S. Dakota Trucking Ass'n, Inc. v. S. Dakota Dep't of Transp.*, 305 N.W.2d 682, 685 (S.D. 1981) (misconstruction of law is abuse of discretion) (citation omitted).

1. The Circuit Court Erred in Finding Standing to Appeal.

In 2020, the South Dakota Legislature amended statutory appeals of county CUP zoning decisions and defined "person aggrieved" for appeal. SDCL 11-2-1.1. Schmeichels (now with their LLCs) brought a new permit application after those statutes became effective, making them apply here. Schmeichels, joined by the Board, challenged the admissibility of opinion testimony and standing. After discovery, the Circuit Court held a court trial and found standing but ruled for the Board and Schmeichels on the merits.

Chapter 41 of the Session Laws of 2020 adopted the standard found in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L.

Ed .2d 351 (1992) (*Lujan II*) used by this Court in *Cable v. Union Cnty. Bd. of Cty. Comm’rs*, 2009 S.D. 59, 769 N.W.2d 817. It is codified in SDCL 11-2-1.1:

11-2-1.1. Aggrieved persons--Requirements.

For the purposes of this chapter, a person aggrieved is any person directly interested in the outcome of and aggrieved by a decision or action or failure to act pursuant to this chapter who:

- (1) Establishes that the person suffered an injury, an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent, not conjectural or hypothetical;
- (2) Shows that a causal connection exists between the person’s injury and the conduct of which the person complains. The causal connection is satisfied if the injury is fairly traceable to the challenged action, and not the result of the independent action of any third party not before the court;
- (3) Shows it is likely, and not merely speculative, that the injury will be redressed by a favorable decision, and;
- (4) Shows that the injury is unique or different from those injuries suffered by the public in general.

“Something other than speculation and legal argument must be offered to overcome a motion for summary judgment on standing to show that the plaintiff was a ‘person aggrieved’[.]” *Cable*, 2009 S.D. 59, ¶ 40, 769 N.W.2d at 830. In this case, the matter went to final disposition, not summary judgment. “[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan II*, 504 U.S. at 561, 112 S. Ct. at 2136. At trial Petitioners must prove standing “supported adequately by the evidence adduced at trial.” *Id.*, 112 S. Ct. at 2137 (citation omitted). This record supports conjecture but not standing.

A. The Circuit Court erred in applying SDCL 11-2-1.1.

The Circuit Court found, at most, that the Petitioners *could* suffer a diminution in value of their property. Appellant Appx. 10, Conclusion of Law, ¶ 2

(finding there was a “personal, distinct and *potential injury that could come about* because of this proposed facility”) (emphasis added). The trial court then found this sufficient to establish standing to appeal under SDCL 11-2-1.1. *Id.* ¶ 3.

But this potential or possible future injury was found as “injury in fact” for standing without a required finding of imminent harm. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409, 113 S. Ct. 1138, 1147, 185 L. Ed. 2d 265 (2013) (quoting *Lujan II*, 504 U.S. at 565 n.2 and *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S. Ct. 1717, 109 L. ed. 2d 135 (1990)) (“Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending.’ Thus, we have repeatedly reiterated that ‘threatened injury must be certainly impending to constitute injury in fact,’ and that ‘[a]llegations of possible future injury’ are not sufficient.”).

The Findings of Fact show that the alleged injuries are, at most, “possible future injury,” which are conjectural and cannot be “certainly impending.”

14. In spite of Mr. Shaykett’s experience and knowledge as an appraiser, offering an opinion concerning the diminution in and value to a property close to a proposed CAFO facility is *very speculative*.
15. The Court also finds it to be very concerning that Mr. Shaykett was not able to find comparable sales near CAFOs to use in his analysis. *The Court further finds the use of comparable sales near open sewer lagoon systems to be inappropriate based on the type of proposed facility at issue here.*
16. The Court finds that Dr. Bakhtari is a qualified and experienced expert in the field of odor detection and analysis. His use of the AERMOD data and information was impressive, based on the testimony in his deposition.

17. *The Court finds that a determination for the level of odor annoyance is subject to speculation and conjecture.* Different government entities have made different determinations as to what level of odor, in odor units, rises to the level of being an annoyance.
18. *Dr. Bakhtari's opinion is that a level of odor annoyance at ten odor units or higher is problematic.* However, the Intervenor's expert, Dr. Nikolai, presented testimony to the Board of Adjustment (the Board) at the time of the hearing that seventy-five odor units is a more appropriate level before the odor becomes an annoyance.
- ...
24. The Court finds that Dr. Bakhtari's testimony from his deposition discussed regulations in Canada, Europe, Australia, and even some states in the United States but those regulations are not applicable here.
25. In Dr. Nikolai's telephonic testimony to the Board, he commented that he believed that the Petitioners' property could be affected by the proposed facility. He disagreed with the opinion of Dr. Bakhtari, as to the extent that the Petitioners' property would be affected by the proposed facility.

Findings of Fact and Conclusions of Law, Appellant Appx. 5-6 (emphasis added).

Dr. Nikolai's testimony to the Board explained the following findings from his analysis:

When we did the analysis for the facility and the -- looking at the distances away, we have determined that approximately -- would you get beyond half a mile, you're 94, 95 percent -- yeah, you'd be greater than 95 percent annoyance-free. In other words, what I'm trying to say is that 94, 95 percent of the time, more than half a mile away, you would have odors less than annoyance. Petitioners' Ex. 11, Tr. 24:23-25:5.

The model that has been -- run and shown is not -- does not contain any odor-controlling factors such as pit additives or anything else such as biofilters or whatever. And so this would be a unit that does not have any pit additive in it. If a pit additive that is shown that is effective, yes, then that will be reduced. Petitioners' Ex. 11, Tr. 27:25-28:6.

You could expect something more than 95. Maybe 97, 98 percent of the time, depending upon, you know, the management and the kind of technology being applied. Petitioners' Ex. 11, Tr. 28:18–21.

Dr. Nicolai did no more than recognize that a rural residence may experience occasional minor annoyance from the facility in amounts accepted by a reasonable person. Petitioners' Ex. 11, Tr. 25:2–5. That the property *could be* harmed by the facility is “conjectural or hypothetical[.]” SDCL 11-2-1.1(1).

In Conclusion of Law paragraph 2, the Circuit Court simply states:

2. While the Court has concerns with the strength of Mr. Shaykett's analysis, the Court agrees with him in that there *could be* a diminution in value because of this proposed facility. The Court finds that these Petitioners have a personal, distinct, and potential injury that *could* come about because of this proposed facility.

Appellant Appx. 10 (emphasis added). The conclusion that “*there could be a diminution in value because of the proposed facility*” presumes too much. Surely such buyer behavior in the marketplace would have resulted in some impact on actual real estate sales. But the record shows none. Trial Tr. 38:22–39:3. Not a single comparable sale supports this conjecture or hypothetical.¹ *Id.*

This conclusion presumes annoyances, plus their intensity, frequency, and incompatibility. It speculates that buyers will not trade potential periodic annoyances over other attributes of the property they value (such as proximity to farms they work on, or because they desire to incorporate a bed and breakfast with agri-tourism or use the property for other agriculture-related business).

¹ CONJECTURE is defined as “A guess; supposition; surmise.” Black's Law Dictionary (11th ed. 2019). HYPOTHETICAL is defined as: “A proposition or statement that is presumed true for the sake of logical analysis or debate.” Black's Law Dictionary (11th ed. 2019).

Stacking such “speculation upon hypothetical upon speculation” is not threatened injury. *Sierra Club v. Env’tal Protect. Agency*, 925 F.3d 490, 497 (D.C. Cir. 2019) (citation omitted). Potential or “abstract injuries” may come to fruition somewhere, but “we should not speculate concerning the existence of standing.” *Miccosukee Tribe of Indians of Florida v. Florida State Athletic Comm’n*, 226 F.3d 1226, 1229 (11th Cir. 2000).

An opinion that is speculative is, by definition, conjectural or hypothetical. *See* Black’s Law Dictionary (11th ed. 2019) (defining speculation as “[t]he practice or instance of theorizing about matters over which there is no certain knowledge”). Here, the trial court took the statement *by Schmeichels’ expert* at the Board of Adjustment hearing regarding the potential for occasional odor (below annoyance level or what a reasonable person would complain about) and used that statement to determine the Petitioners had actual injury because the facility *could* cause diminution in property value. This is supposition: “An assumption that something is true, without proof of its veracity; the act of supposing.” *Supposition*, Black’s Law Dictionary (11th ed. 2019). Assuming diminution of value may happen is not supported by any actual evidence. That is conjectural injury by definition. *See supra* n.1 (conjecture is supposition). The expert appraiser could not locate a single appropriate comparable sale to establish diminution in value as noted above. Trial Tr. 38:22–39:3. In Finding of Fact No. 17, the trial court specifically found “that a determination for the level of odor annoyance is subject to *speculation and conjecture*” (emphasis added), but then used that evidence to establish actual injury. Appellant Appx. 5, ¶ 17. SDCL 11-2-1.1(1) simply does not allow this. *See, e.g., Wallace v. ConAgra Foods*,

Inc., 747 F.3d 1025, 1031 (8th Cir. 2014) (“Time and again the Supreme Court has reminded lower courts that speculation and conjecture are not injuries cognizable under Article III.”).

In addition, there is no showing that any alleged injury is unique or different from those suffered by the public in general. SDCL 11-2-1.1(4). The public is exposed to odor and noise from farming activities, including neighbors who live in the A-1 Agricultural District in Turner County. *See* TCZO § 3.01 (Intent of Agricultural A-1 District “shall be ... to provide for a vigorous agricultural industry” and noting residential subdivisions and agricultural operations “are generally poor neighbors.”). Modern CAFO facilities generally produce little annoyance (or at a level acceptable to the public in general or those who choose to live in rural areas). Sales data shows no rural residential property lost value due to construction of a modern CAFO. That is consistent with CAFO acceptance by the general public or a large group of county residents.

Schmeichels’ expert Dr. Nicolai did not expect odor issues more than one-half mile from the proposed facility. Petitioners’ Ex. 11, Tr. 24:23–25:3. One-half mile is 2,640 feet. The closest is Petitioner Vicky Urban-Reasonover’s home, located 3,020 feet from Schmeichels’ proposed CAFO site. Trial Tr. 57:11-24. The Board required use of an effective pit additive (a compound added to the manure storage pit that acts to reduce manure odor). Petitioners’ Ex. 11, Tr. 10:6-10; 28:9-14. Trees for screening and odor reduction are also conditions of the CUP. Petitioners’ Ex. 11, Tr. 10:15-25. Dr. Nicolai’s one-half mile distinction does not include such annoyance control or mitigation. The dwellings at more than one-half mile would be greater than 95% annoyance-free, and with conditions will be

as high as 98% (meaning even less annoyance). Petitioners' Ex. 11, Tr. 28:18-21. It is conjecture to state the Petitioners would suffer actual damage on this record.

The zoning ordinance presumes some level of annoyance relating to agriculture in that district. TCZO § 13.09.E., Appellant Appx. 591-95. The public in general may be subject to odor from animal husbandry either in raising livestock or application of manure as fertilizer. TCZO § 3.09.E., Appellant Appx. 591-95 (application of manure allowed up to setback distance); TCZO § 3.02.B.e. (right to farm covenant for new residential construction listing potential annoyances). Petitioners' dwellings amid the working farms in Turner County's A-1 Agriculture District have a setback from a new or expanded livestock operation. *Id.* The existence of a setback and recognized potential externalities do not, however, establish standing as a person aggrieved by the zoning decision whenever an appellant disputes interpretation of the setback. SDCL 11-2-1.1(1) (evidence must establish actual or imminent injury).

Although Petitioners claim unique injury not suffered by others who live farther away, they failed to show actual injury. "It is not enough to gain standing as an aggrieved person by suffering a loss that is 'common in nature to a similar grievance suffered by all or *many* other electors or taxpayers.'" *Cable*, 2009 S.D. 59, ¶ 29, 769 N.W.2d at 828 (quoting *Barnum v. Ewing*, 53 S.D. 47, 220 N.W. 135, 138 (1928) (emphasis in original)).

Here, the Board had authority to grant a CUP that waived or reduced the setback at issue based on new technology or other factors. *See infra Appeal No. 29865 Part 2* (citing TCZO § 13.09.E.1.b). The setbacks proposed by the Zoning Administrator and applicants is adequate to protect Petitioners. *Id.* There is no

standing to appeal when the zoning ordinance allows an alternate basis for granting the permit at issue. *See Noyes v. City of Bangor*, 540 A.2d 1110 (Me. 1988) (no standing for zoning appeal; property owners failed to show that they were aggrieved where they alleged that two of the criteria for granting a special exemption to a halfway house were vague because even if those provisions were vague, the use could still have been permitted under the other criteria). This rural area is zoned for agriculture, not “park district” or “rural residential,” and disputes over acceptable level of annoyance are a legislative issue for amendment of the comprehensive plan or the zoning ordinance.

B. The Circuit Court erred in considering inadmissible opinions as evidence.

Additionally, the trial court erred in even considering the evidence above. Schmeichels moved to exclude the testimony of Petitioners’ experts and the landowners. As the trier of fact, the Circuit Court can take their testimony and determine whether the opinions offered meet the requirements of SDCL 19-19-701 or SDCL 19-19-702 as evidence in the case. Here, however, the Circuit Court did not make any analysis of the opinions offered or a determination of the admissibility of this evidence.

Misapplication of the law is subject to de novo review as set forth above. Retained experts produced opinions that the trial court found to be speculative. *See supra* Part 1.A; Findings of Fact Nos. 14-17. Petitioners testified as landowners, but the Petitioners’ claims of diminution of value were based on speculation as to odor and annoyance. Such opinions must be stricken or ignored.

The claimant relying on a showing of diminished property values to establish special damages must present actual proof and not rely on

speculation. Even expert testimony must be properly founded. For example, in a Massachusetts case, the court ruled that the expert testimony presented by neighbors of a cemetery was qualitatively insufficient to support a finding that a proposed crematorium would affect air quality and property values, as would be necessary to establish standing to challenge zoning board decision approving the crematorium. The expert on property values based her testimony and report on shaky research, methodology unaccepted by the appraisal profession, and unfounded assumptions. An expert must have an adequate basis from which to form an opinion.

116 Am. Jur. Proof of Facts 3d *Special Damages Sufficient to Give Standing to Enjoin Zoning Violation* § 8 (2010) (footnotes omitted).

Here, the appraiser's methodology (comparable sales) is accepted in the industry, but the evidence shows that the alleged injury *is not supported by a single actual comparable sale in proximity to a concentrated animal feeding operation anywhere in the state of South Dakota or the adjacent state of Iowa.* Findings of Fact ¶ 7, Appellant Appx. 4. When an expert appraiser looks but cannot find a single comparable sale showing diminished value of a rural residence because of the construction of a new CAFO or expansion of an existing one, there is simply no evidence of property value diminution. The opposite may be true. *See, e.g., Thomas v. Blackford Cnty. Area Bd. of Zoning Appeals*, 907 N.E.2d 988, 991 (Ind. 2009) (evidence insufficient to establish standing on claims that dairy farm construction would have significantly impaired the value of neighboring property; expert's data showed properties adjacent to CAFOs in a nearby county "sold faster and at a higher price per square foot than other properties in that same county").

Schmeichels and similar CAFOs do not use open lots or manure lagoons. It is not surprising that Petitioners' expert appraiser was not able to find a single

sale supporting a claim of diminution of rural residence value due to a modern CAFO approval. *See, e.g., Thomas*, 907 N.E.2d at 991 (actual sales data show faster sales and higher price; neighboring landowner testimony not supported). Here, the trial court was the finder of fact and declared the odor annoyance to be speculative (and specifically found the appraiser’s opinion of diminution of value to be “very speculative” at Findings of Fact No. 14). The comparable sales used by appraiser were for houses built near open sewage lagoons based on odor. Trial Tr. 26:6-9; 31:9-17. The trial court found this comparison to CAFOs inappropriate. Findings of Fact ¶ 15, Appellant Appx. 5. The opinion is not admissible under SDCL 19-19-702. The same is true of the odor analysis expert, Dr. Bakhtari, who based his determination of the level of annoyance triggering injury on standards that are not accepted in the United States or not applicable. Findings of Fact ¶¶ 17-18, 24, Appellant Appx. 5. Furthermore, Dr. Bakhtari’s opinion is conjecture because it was based on the likelihood of many days when some minor odor annoyance *might* occur. *Id.* (level of annoyance “speculation and conjecture”). There is no foundation for the odor expert’s opinion of actual damage.

Likewise, no sufficient foundation supports landowner opinions here.

[O]wners of realty are presumed to be acquainted with the value of their property and are allowed to testify to its value. However, they are held to the same rules concerning the measure of damages as expert witnesses. Where any witness testifies to improper elements of damages, it is proper for the trial court to strike that testimony.

City of Sioux Falls v. Johnson, 1999 S.D. 16, ¶ 13, 588 N.W.2d 904, 908, (quoting *State v. Henrikson*, 1996 SD 62, ¶ 20, 548 N.W.2d 806, 810-11) (internal citations omitted). Petitioners testified as to conjectural or hypothetical damages, contrary to SDCL 11-2-1.1(1) and *Lujan II*. “While it is certainly possible—perhaps

even likely—that one individual will meet all of these criteria, that speculation does not suffice. ‘Standing,’ we have said, ‘is not “an ingenious academic exercise in the conceivable” . . . [but] requires . . . a factual showing of perceptible harm.’” *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S. Ct. 1142, 1152, 173 L. Ed. 2d 1 (2009) (quoting *Lujan II*). Petitioners failed to cite an instance of actual diminished value and had no basis to establish actual or imminent injury upon their personal experience, knowledge, or training. Their opinions are inadmissible or cannot establish actual injury. *Steineke v. Delzer*, 2011 S.D. 96, ¶ 12, 807 N.W.2d 629, 632 (landowner cannot give an opinion on the value of their real estate using improper measure or standard).

C. The Petitioners are not “persons aggrieved” under SDCL 11-2-1.1.

No findings establish imminence for actual injury and no conclusion of law establishes that the potential injury was “not conjectural or hypothetical.” SDCL 11-2-1.1(1). Unsupported opinions or supposition of diminution of value are simply insufficient as a matter of law to establish harm unique or different from the public in general. SDCL 11-2-1.1(4). If affirmed, standing requires nothing more than a subjective fear that an approved facility *could* cause diminution in value for the appellant’s property. Virtually every property owner or long-term lessee will have standing to appeal a zoning decision. That result thwarts the Legislature’s intention in adding SDCL 11-2-1.1 in 2020 after removing the provision allowing “taxpayers” to appeal county zoning decisions in 2016. *See* S.L. 2020, Ch. 41 § 11; S.L. 2016, Ch. 71 § 6; *Powers*, 2020 S.D. 60, ¶ 11 n.4, 951 N.W.2d at 288 n.4 (discussing 2016 legislation).

2. The Circuit Court Erred in Denying Attorneys' Fees and Costs.

A. The Circuit Court abused its discretion.

SDCL 11-2-65 states, in part: “On motion, the court may award reasonable attorneys’ fees and costs of the action in an action brought to the court under this chapter against any non-prevailing party relative to the petition for writ of certiorari.”

All that being said, the award of the attorney’s fees for both the county and the intervenors is discretionary, and the Court is going to decline to award attorney’s fees to either the intervenors or the county because I do believe we had a legitimate issue that was in controversy and needed to be resolved.

Hrg. (Fees) Tr. 26:5-10, Appellant Appx. 581. SDCL 11-2-65 provides no “safe harbor” if the Appellants’ issues were considered legitimate. This error of law in interpreting a statute is an abuse of discretion. *Pourier v. S. Dakota Dep’t of Revenue & Regul.*, 2012 S.D. 11, ¶ 7, 811 N.W.2d 327, 329 (de novo review of statutory provision for award of attorneys’ fees).

A denial of attorneys’ fees will be upheld absent an abuse of discretion, when “the circuit court’s decision based on such factors was not a ‘fundamental error of judgment, a choice outside the range of permissible choices, [or] a decision, which, on full consideration, [was] arbitrary or unreasonable.’” *Ctr. of Life Church v. Nelson*, 2018 S.D. 42, ¶ 41, 913 N.W.2d 105, 116 (quoting *Gartner v. Temple*, 2014 S.D. 74, ¶ 7, 855 N.W.2d 846, 850). Denial when there is a “legitimate issue that was in controversy” is an erroneous interpretation of the law and an abuse of discretion. *Doe*, 2004 S.D. 62, ¶ 7, 680 N.W.2d at 305; *S. Dakota Trucking Ass’n*, 305 N.W.2d at 685 (S.D. 1981). No language in SDCL

11-2-65 suggests the award is inappropriate where the appealing party has a colorable claim or an interpretation of the ordinance that is made in good faith. This reads far too much into the statute at issue. All claims are to be non-frivolous and set forth in good faith. *See* SDCL 15-6-11; SDCL 15-17-51. Furthermore, the position of the Circuit Court fails to balance the interests at stake.

Schmeichels intervened over the objections of Appellants to address the competing interpretations of the law, both as to standing to bring an appeal and, more importantly, to address the proper calculation of the setback from dwellings at issue here. *Four years* after the project was initially approved, a land use critical to the economic success of the Schmeichels' family farm is prevented from construction by appeal. Schmeichels incur ongoing delay costs, legal expense, and lost opportunity costs during the pendency of appeal.

Petitioners have substantial real estate assets, and Dr. Powers is operating a farming business and radiology home medical office. Trial Tr. 96:18-98:15. Courts may reduce attorneys' fees and costs only "in the interests of justice." SDCL 15-17-52. Courts may also limit or disallow oppressive disbursements or those that work a hardship. SDCL 15-17-53. But Petitioners did not raise these objections or defenses, and the trial court neither cited these statutes nor applied them. The lack of appropriate findings of fact and conclusions of law addressing the elements of SDCL 15-17-52 and SDCL 15-17-53 requires reversal. *Michlitsch v. Meyer*, 1999 S.D. 69, ¶ 20, 594 N.W.2d 731, 735 ("We have previously stated that when a trial court is ruling on the application for attorney fees, it must, for meaningful appellate review, enter findings of fact and conclusions of law.")

(citations omitted). This is particularly appropriate on a case of first impression, interpreting the newly amended SDCL 11-2-65. *McLaren v. Sufficool*, 2015 S.D. 19, ¶ 12, 862 N.W.2d 557, 561.

On remand, the delay costs to Schmeichels and the Board's interests in avoiding additional costs and delays (and losing tax revenue from the delay in improvements from the approved facility) must be considered. South Dakota law allows recovery of attorneys' fees when incurred as damages in clearing the title or otherwise litigating to exercise full dominion and control over property. *See, e.g., Brown v. Hanson*, 2011 S.D. 21, ¶¶ 37-38, 798 N.W.2d 422, 432 (attorneys' fees as a pecuniary loss directly caused by party's conduct in title slander and as damages in other cases). Other property rights actions allow for recovery of attorneys' fees such as mortgage foreclosure and eminent domain (compensation exceeding twenty percent of final offer). SDCL 15-17-38; SDCL 21-35-23. Fee shifting is also found in other areas of the law. Petitioners did not challenge the validity of the statute and no authority establishes a presumption for denial of attorneys' fee awards that are allowed by statute.

The Legislature amended SDCL 11-2-65 to allow producers and others subject to zoning appeals to recover at least attorneys' fees incurred. S.L. 2020, Ch. 41 § 14. That same legislation streamlined the zoning appeal process, which should reduce the risk of larger attorneys' fees awards. Existing statutes (SDCL 15-17-52 and 15-17-53) already provide protection from inequitable attorneys' fee award, and SDCL 15-17-51 allows such fees in frivolous or malicious suits. Thus,

the trial court’s interpretation of SDCL 11-2-65 thwarts legislative intent.² *Welsh v. Centerville Twp.*, 1999 SD 73, ¶ 7, 595 N.W.2d 622, 624 (must interpret statutes “in accord with legislative intent”) (citation omitted). The position of the trial court essentially places the burden on the prevailing party to establish some basis for recovery in addition to SDCL 11-2-65’s plain language. *Abdulrazzak v. Bd. of Pardons & Paroles*, 2020 S.D. 10, ¶ 17, 940 N.W.2d 672, 677, reh’g denied (Mar. 31, 2020), *cert. denied sub nom. Abdulrazzak v. S. Dakota Bd. of Pardons & Paroles*, 141 S. Ct. 290, 208 L. Ed. 2d 47 (2020) (interpretation cannot “add key textual provisions to the statute that simply do not exist”).

Upon Petitioners’ initial appeal on standing, the Legislature codified the standard of actual injury and authorized an award of attorneys’ fees against the non-prevailing party. *See* Session Laws 2020, Ch. 41, § 14 (effective 7/1/2020). But nearby landowners or others can address concerns in ways other than appeal of a zoning decision. They may seek a declaratory judgment action or amendment of the local county zoning ordinance to provide the protections or limitations they desire. But even if the trial court had discretion to deny or limit the award of attorneys’ fees as a disbursement, the failure to specifically undertake the proper analysis and make findings and conclusions requires remand. *McLaren*, 2015 S.D. 19, ¶ 12, 862 N.W.2d at 561.

Schmeichels pray for dismissal on standing and award of their attorneys’ fees and costs as disbursements under SDCL 11-2-65, with remand for proper consideration of trial court attorneys’ fees.

² A decision denying attorneys’ fees in this case actually encourages appeals of zoning decisions because the trial court’s reasoning would apply to any non-frivolous appeal.

ARGUMENT AND AUTHORITIES ON APPELLANTS' APPEAL NO. 29865

STANDARD OF REVIEW

The Legislature requires this appeal “be determined under a writ of certiorari standard regardless of the form of the approving authority.” SDCL 11-2-61.1. Therefore, this Court’s “review of a board of adjustment’s decision is limited.” *Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment*, 2015 S.D. 54, ¶ 10, 866 N.W.2d 149, 154.

We do not determine whether the Board’s decision was right or wrong. Our consideration of a matter presented on certiorari is limited to whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it.” *Wedel v. Beadle Cnty. Comm’n*, 2016 S.D. 59, ¶ 11, 884 N.W.2d 755, 758 (cleaned up). We will sustain a board’s decision “unless it did some act forbidden by law or neglected to do some act required by law.” *Armstrong [v. Turner Cnty. Board of Adjustment]*, 2009 S.D. 81, ¶ 12, 772 N.W.2d at 648 (citation omitted).

Miles v. Spink Cnty. Bd. of Adjustment, 2022 S.D. 15, ¶¶ 30-31, 972 N.W.2d 136, 147.

1. Appellants’ Due Process Claims Were Not Violated.

Appellants allege due process violations in three ways, but prove none. The evidence does not support a claim that granting the permit at issue was a violation of Appellants’ right to due process of law.

A. The current CUP addressed Petitioners’ previous claims.

Petitioners alleged a 2018 CUP was improperly granted due to notice deficiencies and participation by certain Board members. That case was initially dismissed for lack of standing but remanded by this Court on appeal. During the pendency of the 2018 CUP appeal, the state granted a general permit for the

operation. Meanwhile, Norway Pork OP, LLC, an operating entity, became part of the Schmeichel family plan for the proposed facility, and state statutes addressing county zoning were amended.

Schmeichels did not want to risk litigation over modification of the 2018 CUP and sought a new permit and Board hearing. It was more efficient to simply apply for a new CUP that included Schmeichels' LLCs. Petitioners' previous allegations regarding the 2018 CUP were addressed by published notices in both legal newspapers for the County, and other hearing requirements were met. Petitioners already had their experts and written reports, referred the Board to them, and had time to prepare and appear at the hearing. The Board listened to the presentation of the applicants for the CUP and proponents who supported the application, then considered the statements and materials presented by the Petitioners and others opposed to the CUP. Petitioners' Tr. Ex. 11, 36:12-38:18.

This Court has said that the "decision to grant or deny a conditional use permit is quasi-judicial and therefore is subject to due process constraints." *Holborn v. Deuel Cnty. Bd. of Adjustment*, 2021 S.D. 6, ¶ 21, 955 N.W.2d 363, 374. "To establish a procedural due process violation, a plaintiff must demonstrate that he [or she] has a protected property or liberty interest at stake and that he [or she] was deprived of that interest without due process of law." *Morris Fam., LLC ex rel. Morris v. S.D. Dep't of Transp.*, 2014 S.D. 97, ¶ 14, 857 N.W.2d 865, 870 (citations omitted).

The Schmeichels' application met all criteria for approval and the CUP was granted at the hearing on December 8, 2020. The application was presented by counsel and the engineer for applicants. South Dakota State University Professor

Emeritus Dr. Nicolai, an expert in the study of Confined Animal Feeding Operation odor issues, testified telephonically for Schmeichels. Ethan Schmeichel addressed any questions asked by the Board. The basis for the CUP approval is in the record. Petitioners' Ex. 12, Tr. 13:20-14:23; Petitioners' Ex. 13, Tr. 1:1-5:11.

Petitioners were represented by legal counsel who argued the Turner County Zoning Ordinance required setbacks from a residence greater than those considered by applicants and the Turner County Zoning Administrator, Faye Dubblede. Petitioners presented this same argument in the 2018 CUP appeal.

The Board was not concerned with the previous permit or appeal and addressed the application on its merits without consideration of the previous decision, other than to note that the permit sought was for the very same facility at the same location. The Board accepted the dwelling setback calculation determined by the Zoning Administrator and concluded that the application exceeded the setback required under the ordinance. Conditions were imposed that required the facility to use pit additives and to plant trees for screening and for air dispersal to control flies and odor.

Setbacks from existing residences are legislatively determined. These setbacks allow for producers to add or expand livestock facilities and rural residents must expect some measure of impact or "annoyance" from others' use of their property in the area. In fact, new residences cannot be built without accepting a Right to Farm Covenant that runs with their land:

RIGHT TO FARM NOTICE COVENANT

You are hereby notified that the property on which you are constructing a structure is in or near agricultural land, agricultural operations or agricultural processing facilities or operations. You may

be subject to inconvenience or discomfort from lawful agricultural or agricultural processing facility operations. *Agricultural operations may include, but are not limited to, the following:* the cultivation, harvesting, and storage of crops; *livestock production*; ground rig or aerial application of pesticides or herbicides; *the application of fertilizer, including animal waste*; the operation of machinery; the application of irrigation water; and other accepted and customary agricultural activities conducted in accordance with Federal, State, and County laws. *Discomforts and inconveniences may include, but are not limited to: noise, odors, fumes, dust, smoke, burning, vibrations, insects, rodents, and/or the operation of machinery (including aircraft) during any 24-hour period. If you live near an agricultural area, you should be prepared to accept such inconveniences or discomforts as a normal and necessary aspect of living in an area with a strong rural character and an active agricultural sector.* You are also notified that there is the potential for agricultural or agricultural processing operations to expand. This notification shall extend to all landowners, their heirs, successors or assigns and because it is required pursuant to the issuance of a building permit, may not be removed from the record title without consent of the Turner County Planning Commission.

TCZO § 3.02.B.e. (emphasis added).

While Petitioners' dwellings were in existence and are not new construction, both are alleged to have been purchased with future retirement plans in mind. Consistent with the Comprehensive Plan, the TCZO allows livestock development and inconveniences such as noise, odors, fumes, and dust. As set forth in Section 2 below, the Board acted within its authority and did not prejudge the outcome. *Miles*, 2022 S.D. 15, ¶ 29, 972 N.W.2d at 147 (prior knowledge and statements did not preclude finding board maintained an open mind and continued to listen to all the evidence before final decision). The Board did not fail to consider evidence or concerns raised by Petitioners but chose instead to approve the CUP with conditions that adequately addressed them. Petitioners' Ex. 12, Tr.13:20-14:23; Petitioners' Ex. 13, Tr. 1:1-5:11. There is no due process violation here.

B. There is no showing that State incentives created a “probability of unfairness.”

Schmeichels pledged to pursue and turn over an unspecified amount of state Sales and Use Tax rebates available for livestock production, which the State of South Dakota provides. Like any other financial consideration, Petitioners must show a grant or tax rebate creates some influence over specific Board members to establish a due process violation. *Holborn*, 2021 S.D. 6, ¶ 28, 955 N.W.2d at 376 (no showing any Board member stood to financially benefit, directly or indirectly, from the approval and therefore no constitutional due process violation). Petitioners present no evidence this influenced the Board in making its decision, which dooms the claim. *Miles*, 2022 S.D. 15, ¶ 46, 972 N.W.2d at 151 (no conflict or prejudgment shown by evidence that is “merely speculative or theoretical.”). Clear and convincing evidence of actual prejudice or an “unacceptable risk of bias” under SDCL 6-1-21 is required. *Holborn*, 2021 S.D. 6, ¶ 42, 955 N.W.2d at 379. No such evidence exists.

C. Steve Schmeichel did not participate in the Board of Adjustment hearing.

The record is devoid of any evidence that Steve Schmeichel participated in the Board of Adjustment hearing. Steve Schmeichel is a member of the Board but did not participate, other than to be available for questions. Trial Tr. 281:1-7. An alternate served in his place. Counsel for Petitioners later admitted there was no evidence that Steve Schmeichel said or did anything at the hearing. Trial Tr. 442:8-10. To suggest otherwise is simply not true and shows Petitioners’ lack of candor with the Court. *Id.*

2. The Board Lawfully Approved the CUP.

The Board had authority to consider and grant the CUP application based on evidence presented and a reasonable interpretation of the TCZO. *Dunham v. Lake Cnty. Comm’n*, 2020 S.D. 23, ¶ 10, 943 N.W.2d 330, 333 (authority to interpret ordinance to allow oversize use as a CUP); *Ehlebracht v. Deuel Cnty. Plan. Comm’n*, 2022 S.D. 18, ¶ 13, 972 N.W.2d 464, 470 (Board will be sustained “unless it did some act forbidden by law or neglected to do some act required by law.”). The Board did not exercise its authority in an irregular or improper way. It had authority to consider and adjust the setback from dwellings, which is the dispute here. *Dunham*, 2020 S.D. 23, ¶ 29, 943 N.W.2d at 338 (Board was within its discretion to “modify or relax zoning requirements under the Ordinance.”).

The County enacted specific setbacks for CAFOs, and the Board has authority to relax that distance under the provisions of TCZO § 13.09.E.1.b.; *Id.* ¶ 30, 943 N.W.2d at 338. Petitioners unreasonably interpret the TCZO. Consistent with the Comprehensive Plan, the TCZO allows the construction or expansion of a livestock production facility in the A-1 Agricultural District with conditions. The County has considered those aspects of livestock production that impact dwellings in setting those setbacks.

This Court misunderstood Schmeichels’ position in the initial appeal regarding the Board’s lack of authority to impose a longer setback than set forth in the tables relating to CAFOs. Here, the county zoning ordinance has set forth specific setbacks based on animal units or manure production. *See* Appellant Appx. 601, “Animal Unit.” This Court found “the Turner County ordinance does in fact authorize the Board to impose additional conditions, including setbacks,

to control such things as odor, air, and water pollution.” *Powers*, 2020 S.D. 60, ¶ 12, n.5, 951 N.W.2d at 289 n.5. While TCZO § 20.09 alludes to such authority, any “additional conditions” are only necessary where it is shown existing conditions or standards are lacking. Through provisions of TCZO §§ 13.09.E.6, 13.09.E.9 and the 20.09, we find that § 20.09 does not apply here (with emphasis added):

13.09.E6. Additional Standards Allowed. The County Board of Adjustment may impose, in addition to the standards and requirements set forth in these regulations, *additional conditions which are reasonable and related to the use being controlled.*

...

13.09.E9. Additional Standards. *Those standards found in Section 20.09.*

...

20.09 Conditional Use Criteria. The following considerations shall be employed when acting upon requests for conditional uses:

A. The effects of noise, odor, traffic, air and water pollution, and other negative factors shall be controlled through the use of screening, setbacks, and orientation.

Upon analysis of the specific provisions at issue,³ setbacks mentioned in TCZO § 20.09 are standards to be applied when setbacks are not already determined in the provisions of TCZO § 13.09.E. Otherwise, the conditions are not “reasonable and related to the use being controlled” under § 13.09.E.6.

TCZO § 20.09 “fills in the gaps” if there was no setback for the CAFO class at issue, but in this case, there is no gap. The proposed use is a Large CAFO under

³ As noted by the Court in the first CUP appeal, Schmeichels failed to parse specific provisions of the TCZO showing why the Board lacks authority to increase setbacks. *Powers*, 2020 S.D. 60, ¶ 12, n.5, 951 N.W.2d at 289 n.5. The analysis is provided here.

the TCZO classification, and the dispute is over calculating animal units for the setback that applies.⁴ Here, the only provisions of the Ordinance that allow adjustment of the setbacks for CAFOs are presented in TCZO § 13.09.E.1.a-b. *for reducing the setbacks* (with emphasis added):

E. Standards to be Utilized by the Board of Adjustment for Conditional Use Permits for Concentrated Animal Feeding Operations. The Turner County Board of Adjustment may, in its discretion, approve or deny applications for Conditional Use Permits for Concentrated Animal Feeding Operations. *The decision of the Board of Adjustment shall be based on the standards for approval set forth below.*

1. Required Minimum Setbacks and Separation Distances for New Concentrated Animal Feeding Operations; Exemption from Setback and Separation Distances Under Certain Limited Circumstances:

There shall be minimum setback and separation distances for all new concentrated animal feeding operations and changes in operation in any existing concentrated animal feeding operation. No concentrated animal feeding operation shall be permitted that is closer than the separation distances set forth in this Ordinance, unless that operation falls within the specific exception set forth in this Ordinance. The required minimum setbacks and separation distances shall be as follows:

[Table provides that a Large CAFO must be “3/8 mile plus 100 ft. per additional 500 animal units” from “Dwellings, Churches, Schools, Businesses, Designated State or County Park”]

These setback and separation distances shall be calculated from the manure or waste storage area, animal housing building, or the edge of a feedlot of the facility to the nearest structure or use.

⁴ The TCZO applies specific setbacks for CAFOs under TCZO § 13.09.E.1 (subject to reduction) and requires a Fly and Odor Control plan under TCZO § 13.09.E.2, to meet minimum standards to control odor set forth in TCZO § 13.09.E.3. Although TCZO § 13.09.E.6 authorizes additional standards, TCZO § 13.09.E.9 limits those standards to TCZO § 20.09, only applicable if “reasonable” to control negative factors. Critically, the county did not authorize the Board of Adjustment to increase setbacks within those CAFO requirements. *See, e.g., Adolph*, 2017 S.D. 5, ¶ 20, 891 N.W.2d at 384 (quoting ordinance: the Board “reserves the right to increase or decrease the minimum required setbacks and separation distance on a site specific review, based on one or more [enumerated] considerations.”). It is axiomatic that setbacks in TCZO § 13.09.E.1 are presumed reasonable to effect control of odors.

The minimum separation listed above shall be used in siting a concentrated animal feeding operation. *When a proposed operation does not meet the minimum separation criteria, the applicant shall submit to the Board of Adjustment sufficient documentation of one of the following or a combination thereof:*

a. A signed waiver from each landowner located closer than the minimum separation criteria. No building permit shall be issued until the waivers are filed with the County Register of Deeds.

b. In the absence of a waiver, documentation shall be presented on new technology, management practices, topographic features, soil conditions or other factors which substantiate a reduction in the minimum separation criteria.

Because TCZO § 13.09.E.1 determined appropriate setbacks for CAFOs based on animal units in inventory, TCZO § 20.09 does not provide for increased setbacks on CAFOs as they are already set to control odor and “other negative factors.”

However, if somehow additional setbacks could be imposed, TCZO § 13.09.E.1.b. allows for reduction. Appellant Appx. 592-93. Standards already control the negative factors Petitioners specifically claim as injury, and specific odor control plans are considered in conjunction with the setbacks. *See* TCZO §§ 13.09.E.1-3. Petitioners claim harm that other property owners farther away will not incur. *Powers*, 2020 S.D. 60, ¶ 20, 951 N.W.2d at 292-93. But there is absolutely no evidence that the Board did not apply its standards or had no authority to interpret minimum setbacks. *Dunham*, 2020 S.D. 23, ¶ 30, 943 N.W.2d at 338. The Board had “jurisdiction over the matter and . . . it pursued in a regular manner the authority conferred upon it.” *Id.* (citations omitted).

Petitioners dispute “Swine Production Units” animal unit equivalencies include piglets born in the farrowing facility until they are weaned and become feeder pigs or “Nursery Swine” under 55 pounds. The general encyclopedia cited

by Petitioners for swine breeding operation definitions clarifies the process of when piglets are weaned and sold. From the same online version of Encyclopedia Britannica:

Farrow-to-feeder operations have the highest labour requirements, and many producers specialize in this part of the production cycle. *It includes the management of the breeding herd, gestating sows, and piglets until they reach the growing (feeder) stage.* The farmer retains control of the piglets until they are sold to another entity for feeder-to-market production. *There are two common sale times—at early weaning, when a piglet weighs 5 to 7 kg (11 to 15 pounds), and at the start of the growing pig stage, when it weighs 18 to 25 kg (40 to 55 pounds) at about eight weeks. Most of these pigs are sold on a long-standing contract with a person involved in the final stage of production, feeder-to-market.*

Feeder-to-market production has the lowest labour and management requirements. The producer in this stage purchases the feeder pigs and raises them to market weights in about 16 weeks. This part of the cycle requires the most feed and produces the most manure; therefore, it fits well with grain producers who have a lot of grain for feed and farmland that can use the pigs' manure as fertilizer. It is the least profitable per head, however, and two or three times as many pigs must be produced to earn as much as a farrow-to-finish producer.

Encyclopedia Britannica, Livestock farming: Production systems, <https://www.britannica.com/topic/livestock-farming/Production-systems> (last visited May 24, 2022) (emphasis added).

In other words, piglets are part of the farrowing operation until they are weaned. The term “farrowing” in regard to the “Swine Production Units” category of animal unit equivalencies would include pre-weaned piglets in that facility. They are not a separate category of animals to be counted in addition to the sows. The equivalency table factor of 0.47 presumes the piglets stay with their mother until weaned and the 0.47 factor reflects manure production until those piglets are moved into a nursery or sold off the farm as this facility proposes. Appellant Appx. 602. In the same way, a farrow-to-finish operation counts the total

number of sows and uses an equivalency table factor calculated on the number of sows only. That factor includes sows plus offspring and adult males housed for breeding.

This calculation provides inclusion of an average number of production animals of all ages and genders while avoiding the level of detail that can lead to disputes like that presented here about actual production or details of a specific operation. The table uses inventory—not annual production. Appellant Appx. 601 “Animal Unit.” The interpretation of the County is appropriate. *Croell Redi-Mix, Inc. v. Pennington Cnty. Bd. of Comm’rs*, 2017 S.D. 87, ¶ 20, 905 N.W.2d 344, 350 (interpretation of those administering the ordinance is entitled to deference unless the ordinance is unambiguous).

Had it been necessary, the swine facility CUP application could have sought a reduction in the setback under TCZO § 13.09.E.1.b. on the basis of new technology or other reasons. Schmeichels provided evidence through Dr. Nicolai that one-half mile (2,640 feet) from this facility will be greater than 95% annoyance free without regard to pit additives or other odor mitigation actions. Petitioners’ Ex. 11, Tr. 24:23-25:2. The CUP specifically requires pit additives and trees for odor mitigation and screening. Dr. Nicolai explained that certain additives are very effective now. Petitioners’ Ex. 11, Tr. 26:23-28:6. The Board had discretion to adjust the setbacks lower but had no need in this case. *Dunham*, 2020 SD 23, ¶ 30, 943 N.W.2d at 338. At 3,020 feet from the facility, the nearest residence, Petitioner Vicky Urban-Reasonover’s home, should be well beyond what the County already considers to be appropriate protection from most odor annoyance *before* use of technology like pit additives.

Any additional setback required under Petitioners' reading of the ordinance simply does not hold up. The Petitioners allege the piglets must be added for setback calculation. However, the piglets would only be in the facility for the period from birth to weaning, which is a total of three weeks. Trial Tr. 372-75; *see also* Encyclopedia Britannica cited by Petitioners. Not all sows will be giving birth during any month. "Sows have a gestation period of 110–120 days with a 21-day interval between periods of estrus, the time during which they will accept mating by a boar." Encyclopedia Britannica, Livestock production: Breeding and growth, <https://www.britannica.com/topic/livestock-farming/Diseases-of-beef-and-dairycattle#ref272271>. This source states that sows have two litters per year on average. *Id.* Animal units are based on inventory, not annual production. That inventory of piglets is the amount physically present in the facility on any given day throughout the year, not the total number born. Viewed this way, it makes no material increase in the setback calculation, even if Petitioners' incorrect interpretation requiring a piglet inventory is applied.

The 5,400 head of sows would be bred in groups to space the production over the entire calendar year, and new piglets are only on the site for three weeks from birth. The piglets at issue are separate from the 2,000 finisher swine already counted. Assuming *arguendo* that Ms. Dubblede was incorrect and piglets are not included in the animal equivalency factor, the inventory of the piglets must be determined. Petitioners' use of ten piglets per sow is appropriate based on the record and consistent with Petitioners' chosen encyclopedia article (twelve piglets per litter with 15-20% death loss results in approximately ten piglets per litter).

Using the Encyclopedia Britannica article, each sow produces two litters per year, for production of a total of $5,400 \times 10 \times 2 = 108,000$ piglets per year. But because the Ordinance refers to inventory, not total production, the calculation is based the number of piglets in the facility within a given unit of time. Appellant Appx. 601 “Animal Unit.” Again, farrowing is spread over the entire year.

Since the piglets are weaned at three weeks, the inventory should simply be the average number of piglets on site per week, as no piglet should be on site for a full month. Trial Tr. 372-75. Dividing 108,000 piglets total production over 52 weeks in one year results in a weekly inventory of 2,077 new piglets. At 0.1 per piglet, the animal unit equivalency is 208 ($2,077 \times 0.1 = 207.7$), not 5,400. Those piglets leave the facility at three weeks, so even multiplying 208 Animal Units times three weeks provides no more than 624 additional Animal Units by inventory. The setback table for a Large CAFO requires $\frac{3}{8}$ mile (1,980 feet) setback from dwellings plus 100 feet per additional 500 animal units. Appellant Appx. 592. This would only add 125 more feet ($624/500 = 1.248 \times 100 \text{ feet} = 124.8 \text{ feet}$). If another 125 feet is added to the 2,540 foot undisputed setback Petitioners admit applies to the facility, the total setback is still only 2,665 feet.⁵ The Urban-Reasonover residence is 3,020 feet from the facility, which is well outside that expanded setback. The Powers’ residence is further away. Even

⁵ Petitioners correctly note that the application materials set forth Schmeichels’ conservative calculation of 2,580 feet without additional animal units for new piglets. Br. Appellant p. 25; Appellant Appx. 601-02. Adding another 125 feet still results in 2,705 feet for the setback. The closest dwelling is 315 feet (approximately an entire football field) beyond that.

though the new piglet inventory is already included in the factor used to calculate animal unit equivalency for Swine Production Units, if counted separately as the Petitioners suggest, the *inventory*, when properly counted, would never reach the level claimed by Petitioners.

It was certainly within the Board's authority to approve this facility as proposed. The appeal was properly denied, and that decision should be affirmed. The matter should be remanded for consideration of attorneys' fees and costs. Schmeichels will file a motion and submit an affidavit and itemized statement for attorneys' fees on appeal under SDCL 15-26A-87.3 and respectfully request the Court award those fees pursuant to SDCL 11-2-65.

CONCLUSION

Petitioners did not establish standing for appeal and failed to meet their burden under the writ of certiorari standard. Schmeichels are entitled to their attorneys' fees and costs under SDCL 11-2-65. Upon prevailing herein, they are entitled to attorneys' fees and costs on appeal. This Court should reverse the trial court's attorneys' fees decision and either award attorneys' fees or remand for further consideration by the Circuit Court consistent with this Court's ruling on appeal.

Dated this 31st day of May, 2022.

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REQUEST FOR ORAL ARGUMENT

Intervenors/Appellees respectfully request oral argument.

Date this 31st day of May, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Intervenors Steve and Ethan Schmeichel, and Norway Pork Op, LLC complies with the type volume limitation set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word, this Brief contains 9,738 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and any certificates of counsel. This Brief is typeset in Georgia (12 point) and was prepared using Microsoft Word 365.

Dated this 31st day of May, 2022.

Jennifer L. Doubledde

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of **Brief of Intervenor Steve and Ethan Schmeichel, and Norway Pork Op, LLC** was filed and served electronically using the South Dakota Supreme Court email address, and the original and two hard copies sent by U.S. Mail to the Clerk of the Supreme Court, and that an electronic copy of the same was emailed upon the following individuals:

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

Nos. 29865, 29870, and 29871

JEFFREY K. POWERS and VICKY URBAN-REASONOVER,

Petitioners/Appellants,

vs.

TURNER COUNTY BOARD OF ADJUSTMENT,

Respondent/Appellee,

and

STEVE AND ETHAN SCHMEICHEL, and NORWAY PORK OP, LLC

Intervenors.

Appeal from the Circuit Court
First Judicial Circuit
Turner County, South Dakota
The Honorable Chris S. Giles, Presiding Judge

**REPLY BRIEF OF APPELLANTS JEFFREY K. POWERS
and VICKY URBAN-REASONOVER**

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Oral Argument Requested

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ARGUMENT

I. Petitioners Established Standing

The Circuit Court correctly held Petitioners established standing under SDCL 11-2-61, as they were “aggrieved” by the Board’s decision. In 2020, the Legislature clarified what it meant to be “aggrieved” by enacting SDCL 11-2-1.1. This statute incorporates Article III standing requirements articulated by the United States Supreme Court in *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992), which this Court has also applied in zoning cases like this. *See Cable v. Union Cnty. Bd. of Cnty. Comm’rs*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825 (applying *Lujan*). While SDCL 11-2-1.1(4) is not found in *Lujan*, it merely codifies this Court’s directive that a petitioner cannot assert an injury shared by taxpayers or the public in general. *Powers v. Turner Cnty. Bd. of Adjustment*, 2020 S.D. 60, ¶ 23, 951 N.W.2d 284, 294 (citing *Cable*, 2009 S.D. 59, at ¶ 26). Thus, SDCL 11-2-1.1 does not materially alter prior practice in zoning disputes.

Intervenors challenge only the first and fourth criteria under SDCL 11-2-1.1, *i.e.*, the injury-in-fact requirement and whether Petitioners’ injuries are shared by the general public.

A. Petitioners established an injury in fact

There is no dispute Petitioners asserted invasions of legally protected interests that are concrete and particularized. This Court and the United States Supreme Court have recognized that a diminution in property value “is a sufficiently concrete injury for [standing] purposes.” *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 n.1 (2018); *Sierra Club v. Clay Cnty. Bd. of Adjustment*, 2021 S.D. 28, ¶ 27, 959 N.W.2d 615, 625. This Court also recognized an invasion of property interests is sufficient for standing, *Benson v. State*, 2006 S.D. 8, ¶ 23, 710 N.W.2d 131, 142, and that the intrusion of

noxious odors can also suffice. *Sierra Club*, 2021 S.D. 28, ¶ 27; *Huber v. Hanson Cnty. Plan. Comm'n*, 2019 S.D. 64, ¶ 18, 936 N.W.2d 565, 571.

Intervenors dispute only whether these injuries are “actual or imminent” enough. They claim Petitioners’ injuries are speculative, as their CAFO has not been built. Intervenors ignore the limits of what standing requires.

Standing is not a high bar and does not approach the merits of a dispute, but simply “helps to ensure that the plaintiff has a personal stake in the outcome of the controversy” to warrant judicial involvement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). A party is not required to prove its entitlement to damages or to quantify its losses empirically. *See, e.g., Lujan*, 504 U.S. at 564, n.2 (explaining standing does not require “detailed descriptions of damages” and that even if a plaintiff faces “no actual harm . . . its imminence (though not its precise extent) must be established”); *Massachusetts v. E.P.A.*, 549 U.S. 497, 52, n.21 (2007) (finding Massachusetts established standing even though it did not quantify the amount of land it claimed would be lost due to global warming).

Here, however, Intervenors conflate justiciability with success on the merits. For example, the Circuit Court correctly concluded Petitioners “do have a right to express their opinions as to the value of their properties,” and that Petitioners were legitimately concerned their properties and quality of life would be adversely affected by the construction and operation of Intervenors’ CAFO. *Findings of Fact*, ¶¶ 26-27; *Coyote Flats, LLC v. Sanborn Cnty. Comm'n*, 1999 S.D. 87, ¶¶ 22-25, 596 N.W.2d 347, 352-53 (recognizing a landowner can testify to devaluation of property and concerns of noxious odors). The Circuit Court further found Mr. Shaykett supported Petitioners’ concerns, such as how “the mere presence of a hog facility of this nature can impact the perception of a prospective buyer,” as well as

the relation between distance and odor and their effects on potential property sales. *Findings of Fact*, ¶¶ 11-12.

Mr. Shaykett then estimated that Petitioner Urban-Reasonover's home would lose approximately \$48,000.00 in value if Intervenor's CAFO was built as planned. Tr. 32:20-33:11; 34:5-7. However, the Circuit Court disagreed with this estimation because the CAFO had yet to be built and because Mr. Shaykett was unable to find comparable home sales following the erection of a nearby CAFO. *Findings of Fact*, ¶¶ 14-15. For context, Mr. Shaykett explained there simply were no sales of residential properties following the completion of a nearby CAFO in Minnehaha, Lincoln, Turner, or Clay Counties in recent years, so he used what, in his professional judgment, was a reasonable analogue: sewer lagoons. Tr. 25:8-19.

Intervenor's highlight the Circuit Court did not adopt Mr. Shaykett's diminution figure as proof that Petitioner's claims are not justiciable. But "one must not confuse weakness on the merits with absence of Article III standing," which is much lower hurdle. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015).

Had Petitioner's sought money damages from Intervenor's, then they may have a point. *See Weekley v. Wagner*, 2012 S.D. 10, ¶ 13, 810 N.W.2d 340, 343 ("Damages must be reasonable and must be proved with reasonable certainty"). But standing does not require proof of the precise extent of Petitioner's losses, *Lujan*, 504 U.S. at 564, n.2, and Petitioner's are not required to "to await the consummation of threatened injury," such as the construction of Intervenor's CAFO. *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, n.5, (2013) (explaining plaintiffs are not

required “to demonstrate that it is literally certain that the harms they identify will come about”).

However, as the CAFO will be built, there is no question its construction is “certainly impending” or that there is a “substantial risk that the harm will occur.” *Susan B. Anthony List*, 573 U.S. at 158. Here, the Circuit Court clearly agreed Petitioners could be harmed once the CAFO was built, but it simply disagreed as to the extent of the harm now.

This does not, however, render Petitioners’ claims non-justiciable. *Cf. Bond v. United States*, 564 U.S. 211, 219 (2011) (cautioning against conflating arguments on the merits with justiciability). Rather, for purposes of standing, all that is required is that Petitioners have “a personal stake in the outcome of the controversy,” which the Circuit Court correctly concluded that they do. *Susan B. Anthony List*, 573 U.S. at 158; *see Conclusions of Law*, ¶¶ 2-3.

While the aforementioned is sufficient, the Circuit Court also correctly found Dr. Bakhtari’s odor impact analysis persuasive and noted that even Intervenor’s expert, Dr. Nikolai, agreed Petitioners’ properties could be affected by odor once the CAFO was built. *Id.*, ¶¶ 16, 25. The Circuit Court did not resolve the differences in expert opinions as to how often odor reaches the level of “annoyance.” *See id.*, ¶¶ 17-18, 21-22. But establishing the percent of time during which odor is “annoying” is not required for standing. Rather, the Circuit Court correctly concluded Petitioners possessed a personal stake in the outcome of the controversy worthy of the use of judicial resources, and nothing more is required. *Susan B. Anthony List*, 573 U.S. at 158; *Arizona State Legislature*, 576 U.S. at 800.

B. Petitioners' injuries are different than those of the public in general

This Court earlier observed that, unlike in *Cable*, Petitioners “did not assert in their petition that all or many other Turner County residents would be aggrieved in a similar manner.” *Powers*, 2020 S.D. 60, at ¶ 20. This remains true.

Petitioner Urban-Reasonover owns the nearest home to Intervenor's proposed CAFO, which will be separated by only 3,020 feet. Tr. 57:14-24. She testified that her and her husband intend to run a bed and breakfast there to earn retirement income. Tr. 60:15-18. However, due to the CAFO and based on her own personal experience, she feared the facility will adversely affect their use and enjoyment of the property, its value, and their ability to open a bed and breakfast. Tr. 67:8-16; 68:16-9. She also testified she would adversely affected in ways unique or different from the general public. Tr. 69:10-23. Neither Intervenor's nor the Board contradicted this, nor did they call anyone from the general public who claimed they would share these same injuries, much less someone else whose intentions to operate a bed and breakfast were similarly impacted.

Mr. Shaykett supported these assertions, concluding “there would be an impact on the overall enjoyability, livability of [Vicky's] house,” and that her property would lose approximately \$48,000 in value. Tr. 33:5-9. Again, the Circuit Court agreed with Mr. Shaykett that the very presence of Intervenor's CAFO could diminish the value of Petitioner's properties once built, although the Circuit Court disagreed with his conclusions as to the amount of harm. While the latter goes to the merits of Petitioner's claims, neither Intervenor's nor the Board introduced any evidence contrary to the former. Similarly, neither Intervenor's nor the Board introduced any evidence suggesting Petitioner's injuries would be shared by members of the public generally. Intervenor's simply claim, without evidence, that “[s]ales data shows no rural residential property lost value due to construction of a modern

CAFO. That is consistent with CAFO acceptance by the general public or a large group of county residents,” *Intervenor’s Brief*, at 12, which is improper.

Finally, Dr. Bakhtari and Intervenor’s odor expert, Dr. Nikolai, further supported Petitioner Urban-Reasonover’s testimony concerning the presence and effects of noxious odors. Again, while the Circuit Court was unable to resolve to its satisfaction when odor becomes “annoying,” that does not mean Petitioners’ injuries are automatically shared by the general public, as Intervenor’s claim.

In sum, Petitioners introduced sufficient evidence that their injuries are different from those of the general public. *Powers*, 2020 S.D. 60, at ¶ 17. These injuries are concrete and particular, causally related to Intervenor’s proposed CAFO, and would be redressed by a favorable ruling. Accordingly, the Circuit Court did not err when it held Petitioners establishing their standing.

C. Petitioners have procedural standing

Additionally, Petitioners have asserted a violation of their due process rights. This Court earlier declined to accept a procedural standing argument, due the Legislature’s definition of when a person was “aggrieved.” *Powers*, 2020 S.D. 60, at ¶ 11, n.4. However, the Legislature since enacted SDCL 11-2-1.1 which grafted Article III requirements for standing onto zoning cases. As stated in *Lujan*, “[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” 504 U.S. at 572. No other members of the general public claim to share Petitioners’ due process injuries. Thus, the Court should conclude Petitioners have also established procedural standing.

II. The Circuit Court Did Not Err by Admitting Expert Witness Testimony

The admissibility of expert opinions is governed by SDCL 19-19-702. Evidence rules are interpreted “liberally with the general approach of relaxing the traditional barriers to ‘opinion’ testimony.” *Burley v. Kytect Innovative Sports Equipment, Inc.*, 2007 SD 82, ¶ 24, 737 N.W.2d 397, 405. Rule 702 reflects “an attempt to liberalize the rules governing the admission of expert testimony.” *Id.*, at ¶ 24, n.4 (“The rule clearly is one of admissibility rather than exclusion.”). Therefore, a party who offers expert testimony is not required to prove the expert’s opinion is correct. *Id.*, at ¶ 24. Rather, “all that must be shown is that expert’s testimony rests upon good grounds, based on what is known.” *Id.* “Any other deficiencies in an expert's opinion or qualifications can be tested through the adversary process at trial.” *Id.*

This Court “review[s] a circuit court’s evidentiary rulings under an abuse of discretion standard with a presumption that the rulings are correct.” *State v. Kryger*, 2018 S.D. 13, ¶ 13, 907 N.W.2d 800, 807. “Abuse of discretion is the most deferential standard of review available with the exception of no review at all.” *In re S. Dakota Microsoft Antitrust Litig.*, 2003 S.D. 19, ¶ 27, 657 N.W.2d 668, 678.

A. Mr. Shaykett

Intervenors do not dispute Mr. Shaykett is qualified or that his methodology is valid, as the Circuit Court found. *Findings of Fact*, ¶¶ 1, 3-4. Intervenors also do not contradict Mr. Shaykett’s conclusion that the mere presence of their CAFO could diminish the value of Petitioners’ properties once built, which the Circuit Court also found credible. *Id.*, ¶¶ 11-12. Rather, Intervenors claim that because Mr. Shaykett used what, in his professional judgment, was a reasonable analogue for a CAFO (*i.e.*, sewer lagoons) to accommodate for

the lack of recent, in-market sales involving residential homes following the construction of a nearby CAFO, that the Circuit Court was obligated to strike his opinion entirely.

As Mr. Shaykett explained, there were no home sales following the completion of a nearby CAFO in Minnehaha, Lincoln, Turner, or Clay Counties in recent years, hence the need to use a surrogate. Tr. 25:8-19. True, the Circuit Court was not convinced that sewer lagoons were sufficiently comparable, and so it did not adopt Mr. Shaykett's conclusions on the extent Petitioners' properties would be harmed. *Finding of Fact*, ¶¶ 14-16. But this merely goes to the weight the Circuit Court gave these aspects of Mr. Shaykett's opinion, not the admissibility of his testimony. *State Highway Comm'n v. Anderson*, 242 N.W.2d 674, 676 (S.D. 1976) (holding comparable sales opinions were admissible at least for foundational purposes as to expert's overall opinions); *Hous. Auth. of City of Atlanta v. Goolsby*, 220 S.E.2d 466, 468 (Ga. Ct. App. 1975) ("Exact similarity [of properties] is not generally attainable, and any dissimilarities in the lands or their transfer are matters which go to the weight to be given by the jury to the evidence of the transfer"). Thus, the Circuit Court did not abuse its discretion by admitting Mr. Shaykett's opinions.

B. Dr. Bakhtari

Intervenors likewise do not dispute Dr. Bakhtari is qualified, indeed more qualified than their expert, as the Circuit Court found. *Findings of Fact*, ¶¶ 16, 19. Rather, Intervenors claim the Circuit Court concluded his methodology so unreliable that it was obligated to strike his opinions.

Intervenors' argument is misleading at best. The Circuit Court observed Dr. Bakhtari and Dr. Nikolai each sought to scientifically determine when odor becomes an "annoyance." Dr. Bakhtari testified odor became "annoying" at exposure to ten odor units, whereas Dr. Nikolai opined annoyance did not occur before seventy-five odor units. *Id.*, ¶¶ 18, 21. The

Circuit Court expressed no opinion as to the scientific accuracy or reliability of their respective methodologies. The Circuit Court also did not endorse one expert's opinion over the other. Rather, the Circuit Court could not reconcile the differences in their opinions to its satisfaction and concluded "that a determination for the level of odor annoyance is subject to speculation and conjecture. Different government entities have made different determinations as to what level of odor, in odor units, rises to the level of being an annoyance." *Id.*, ¶ 17. In other words, unlike an exercise in math, the Circuit Court did not determine for itself when a particular odor reached the level of annoyance. The Circuit Court then deferred to the Board's decision to credit Dr. Nikolai's testimony, much in the way an appellate court defers to a trial court's ability to assess a live witness. *See id.*, ¶ 19. While the Circuit Court was incorrect the Board ever considered Dr. Bakhtari's opinions at all, *id.*, ¶ 20, the Circuit Court never stated that his opinion was the product of unreliable methods. More importantly, how the Board viewed odor evidence for purposes of approving the permit has no bearing on standing – the inquiry and issues are different. The Circuit Court did not abuse its discretion by admitting Dr. Bakhtari's opinions.

III. The Board's Decision to Grant the 2020 Permit Violates Petitioners' Due Process Rights

A. The previously approved 2018 Permit

Intervenors do not dispute the 2018 Permit and 2020 Permit concern the same facility, the latter of which Intervenors applied for while the former remained subject to pending litigation. Intervenors also do not dispute all members of the Board were aware the two Permits concerned the same CAFO, and that the Board was aware of the ongoing litigation associated with its decision to grant the 2018 Permit.

As Petitioners argued, there was no way the Board could deny the 2020 Permit without implicitly admitting the 2018 Permit should have also been denied. Intervenors do

not dispute this, and baldly assert the Board was “unconcerned with the previous permit or appeal” and addressed the matter with complete fairness. *Intervenors’ Brief* at 24.

Petitioners are not required to show actual bias, but only “an unacceptable risk of actual bias or prejudgment inhered” with the Board’s decision. *Armstrong v. Turner Cnty. Bd. of Adjustment*, 2009 S.D. 81, ¶ 21, 772 N.W.2d 643, 651 (assessing the “probability of unfairness”) (emphasis added). Here, given the conflict presented by the identical Permits, the Board was not “free from bias or predisposition of the outcome” and the Board could not “consider the matter with the appearance of complete fairness.” *Id.* Thus, the Court should conclude Petitioners’ due process rights were violated, and *Armstrong* requires “a new hearing before a neutral Board[.]” *Id.*, at ¶ 32.

B. Assignment of tax rebate funds

Intervenors acknowledge telegraphing an assignment of tax rebate dollars to Turner County as part of their application, and that the Board was aware of their pledge. Intervenors do not dispute that § 13.09(E)(1) – (9) of the Ordinances confines the standards within which the Board’s permitting decision “shall” be made, or that those metrics intentionally focus the Board’s attention solely on health and safety concerns in the local community. It is also undisputed the Ordinances do not direct the Board to consider the potential financial incentives of granting a permit.

Rather, according to Intervenors, without an admission of influence from the Board, parties are free to offer any incentive, financial or otherwise, to obtain a permit. Clearly, had the Legislature (or Turner County) intended the Board to be influenced by such offerings, the Ordinances would say so. Regardless, fewer things have—or at least can outwardly appear to have—a greater corrupting effect than money. Consequently, the Court should conclude the “probability of unfairness” here was unacceptably high, and that Petitioners’

due process rights were violated. *Armstrong*, 2009 S.D. 81, at ¶ 21 (quotation omitted) (emphasis added). Thus, remand is warranted.

C. Participation of Steve Schmeichel

As a portion of the December 8, 2020, hearing was unrecorded, it is unclear whether Intervenor Steve Schmeichel spoke there, but it is undisputed he was present the entire time and was also a member of the Board who had merely recused himself from voting. Tr. 280:6-25. Just like Lyle Van Hove in *Armstrong*, his membership on the Board conceivably carried weight with the other Board members, and his presence at the hearing also potentially influenced their votes. There was also no reason for Steve’s participation, given that his counsel was present and capable of representing his interests. Other than debating whether Steve spoke or not, Intervenors do not dispute the foregoing.

For this reason, as well as those previously discussed, the December 8, 2020, hearing was not conducted with the appearance of complete fairness. Rather, the Court should find the proceeding carried with it an unacceptable risk of bias or prejudgment by the Board. Thus, as in *Armstrong*, the matter should be remanded and reconsidered at a new hearing without Steve’s attendance.

V. The Board Failed to Adhere to the Ordinances and Thus Improperly Granted the 2020 Permit

A. The Board improperly delegated its decisional authority to Faye Dubblede

Intervenors make little effort defending the Board’s failure to follow the Ordinances, as no response was provided to the following:

- That all permitting information is submitted only for “consideration by the Board of Adjustment[.]” Appellant Appx. 595 (Ordinances § 13.09(F)).

- That no member of the Board independently calculated the number of animal units for Intervenor's CAFO, or the appropriate setback;
- That while Ordinances § 19.04(D) required the Board to make a case-by-case basis assessment of Intervenor's application, each member of the Board who was asked about this provision was unaware of it and confirmed the Board did not follow it;
- That the Board unknowingly ceded its responsibility for making the case-by-case determination, the base setback, and the additional 100-foot increments to the setback to Ms. Dubbele, and then deferred to her judgment and calculations; and
- That no member of the Board knew how Ms. Dubbele made her calculations, or made an independent attempt to verify them once those calculations were challenged.

See Brief of Appellants, 19-21.

These failings are far more egregious than those condemned by this Court in *Hines v. Bd. of Adjustment of City of Miller*, 2004 S.D. 13, 675 N.W.2d 231 and *Adolph v. Grant Cnty. Bd. of Adjustment*, 2017 S.D. 5, 891 N.W.2d 377. Therefore, the Court should conclude the Board exceeded its jurisdiction, acted illegally, and thus its decision must be reversed.

B. The Board failed to follow the Ordinances with respect to the setback calculation

Intervenor does not dispute the setback calculated by Ms. Dubbele is unrecorded. Thus, the actual setback for Intervenor's CAFO is unknown, as is whether Petitioner Urban-Reasonover's home is impermissibly within that unknown setback.

Rather, Intervenor attempts to defend Ms. Dubbele's claim that the Ordinances' "Swine Production Unit" definition, which plainly ends at "farrowing," encompasses the tens of thousands of piglets that will be born to Intervenor's 5,400 sows. According to

Intervenors, “farrowing” continues beyond the point at which a sow gives birth, even though the source cited by both parties directly contradicts Intervenors’ reading of it: “[f]arrowing refers to a sow giving birth.” Encyclopedia Britannica, *Livestock farming: Production systems*, <https://www.britannica.com/topic/livestock-farming/Production-systems> (last visited June 9, 2022). Indeed, the section cited by Intervenors states these piglets should receive a separate animal species category, such as “feeder” pigs:

There are two common sale times [for piglets]—at early weaning, when a piglet weighs 5 to 7 kg (11 to 15 pounds), and at the start of the growing pig stage, when it weighs 18 to 25 kg (40 to 55 pounds) at about eight weeks. *Most of these pigs are sold on a long-standing contract with a person involved in the final stage of production, feeder-to-market.*

Encyclopedia Britannica, *Production systems*, <https://www.britannica.com/topic/livestock-farming/Production-systems> (emphasis added) (last visited June 9, 2022).

While the Ordinances do not have a “feeder” category, they do contain a category applicable to young pigs that weigh less than 55 pounds, such as a piglet: “Nursery Swine.” It is undisputed that Ms. Dubblede did not account for the piglets as “nursery swine,” or otherwise. Thus, the Court should conclude the Board / Ms. Dubblede’s setback calculation is arbitrary and contrary to the Ordinances.

Intervenors also speculate the Board reduced the setback applicable to their CAFO pursuant to Ordinances § 13.09E(1)(a)-(b). Conspicuously absent is any citation to testimony or section of the record supporting this contention, an omission compounded by Ms. Dubblede’s failure to document the setback she calculated in the first place.

Finally, Intervenors posit alternative methods of including the piglets as “Nursery Swine,” but only partially so and in ways Ms. Dubblede never endorsed. Notably, Ms. Dubblede agreed with Petitioners’ method of counting the piglets as “Nursery Swine,” and that Petitioner Urban-Reasonover’s home would be within the setback if they were counted.

Tr. 204:5-25. Nonetheless, Intervenor's argue the piglets should only be included for the portion of the year while the animals are present.

While this would mean Intervenor's' setback would fluctuate by the day, Intervenor's have demonstrated why remand is necessary. That is, how to accommodate and factor in these piglets under the Ordinances requires judgment, and a judgment that must be made by the Board. It is undisputed, however, that the Board did not exercise that judgment (and neither did Ms. Dubblede). Thus, the Board's failure to follow the Ordinances was legal error, which resulted in the approval of a setback that does not comport with the Ordinances.

C. The Board failed to consider the effects of odor and/or diminution of Petitioners' property value

Intervenor's again offer little defense of the Board. It is undisputed the Ordinances require the Board to consider the presence and effect of odors for any proposed CAFO, and at least implicitly require the Board to consider the diminution of property values suffered by those nearby the proposed facility. It is also undisputed Petitioners submitted copies of their expert reports on these subjects to the Board prior to the December 8, 2020, hearing, but it is undisputed that none of the members of the Board read or considered those materials before granting the 2020 Permit.

In addition, a majority of the Board testified they would not consider Petitioners' concerns regarding odor and/or a diminution of their property values. Tr. 307:16-21 and 319:23-25 (Champa); Tr. 331:6-8 (Vasgaard); Tr. 357:16-18 (Austin). As this Court's decision in *Adolph* holds, the Board's failure to follow the Ordinances renders the Board's decision illegal, "[b]ecause the Board applied an incorrect legal standard." *Adolph*, 2017 S.D. 5, at ¶ 19. Thus, the Board's decision must be reversed.

IV. The Circuit Court Did Not Abuse its Discretion in Denying Attorneys' Fees

In the proceedings below, Petitioner objected to Intervenor's and the Board's motions for attorneys' fees on numerous grounds, which are set forth in *Petitioners' Objection to Intervenor's Motion for Attorneys Fees and Costs on Appeal*. Petitioners also objected to the Board's motion for attorneys' fees because it was untimely, as the Circuit Court's Order was entered on November 29, 2021, and under Rule 6(a) and 54(b), the Board's motion was due "no later" than December 13, 2021, but was not filed until December 14.

Ultimately, the Circuit Court simply exercised its discretion to deny both motions. There is no dispute SDCL 11-2-65's use of "may" signifies an award of attorneys' fees is discretionary. *See Ctr. of Life Church v. Nelson*, 2018 S.D. 42, ¶ 38, 913 N.W.2d 105, 115. Thus, this Court's review of the matter is extremely limited, as "[a]buse of discretion is the most deferential standard of review available with the exception of no review at all." *In re S. Dakota Microsoft Antitrust Litig.*, 2003 S.D. 19, at ¶ 27. To the extent this Court concludes the Circuit Court did abuse its discretion, then Petitioners' rely on their other objections to these fee requests as forth in the aforementioned *Objection*, including but not limited to the constitutionality of SDCL 11-2-65.

In *Nelson*, the plaintiff was awarded \$192,047.91 in damages and requested an award of attorneys' fees. 2018 S.D. 42, at ¶ 15. The applicable fee-shifting statute stated "the court may award costs and attorney fees to the prevailing party." *Id.*, at ¶ 34 (citing SDCL 43-4-42). This Court observed "[t]he Legislature's use of the word 'may' clearly requires the use of discretion in awarding fees." *Id.*, at ¶ 38. Although the plaintiff was undeniably the prevailing party, the trial court denied its request for attorneys' fees entirely. *Id.*, ¶ 16. This

Court affirmed, noting the trial court found the non-prevailing party's position at trial was "fairly debatable" and that it did not act in bad faith. *Id.*, at ¶ 39.

Unlike in an ordinary civil lawsuit, such that in *Nelson*, the burden on Petitioners to prevail in this matter was far higher, as the Court's "review of a board of adjustment's decision is limited." *Adolph*, 2017 S.D. 5, at ¶ 7. Thus, while the Circuit Court affirmed the Board's decision to issue the permit, persons in Petitioners' position start at a disadvantage by the time they are ever afforded their day in court.

Also, in *Nelson* an award of attorneys' fees arguably would have served a remedial purpose, namely, as a form of additional liability imposed on the defendant-seller for failing to complete a statutorily required disclosure statement. *See Nelson*, 2018 S.D. 42, at ¶ 39. In contrast, an award of attorneys' fees under SDCL 11-2-65 would have no such remedial purpose. Rather, it would penalize property owners whose concerns were recognized as legitimate for asserting their statutorily guaranteed rights and for attempting to protect the use and enjoyment of their properties from offensive, outside interference.

Here, the Circuit Court resolved a number of significant issues in Petitioners' favor, including their standing and the credibility of their experts. The Circuit Court also observed the hog facility "is a hybrid facility that does not neatly fit within one of the categories set forth in the zoning ordinances" which, among the other evidence presented at trial, necessarily added to the uncertainty of the Board's decision to issue the permit. *See Findings of Fact*, ¶ 29. At the hearing on the motions for attorneys' fees, the Circuit Court found "it was very clear there were legitimate and debatable issues" presented by the parties and that Petitioners "had a right to have their day in court to be heard." Fees Tr. 24:11-17. Thus, the Circuit Court exercised its discretion to deny attorneys' fees and costs in favor of

Intervenors and the Board, noting again it “believe[d] we had a legitimate issue that was in controversy and needed to be resolved.” Fees Tr. 26:5-10.

On this record and for all the reasons detailed above, this Court should conclude Intervenors have failed to show the Circuit Court abused its discretion. Thus, the Circuit Court should be affirmed on this point.

CONCLUSION

The Court should conclude the Circuit Court correctly held Petitioners established standing, and that it did not abuse its discretion by admitting Petitioners’ expert opinions. The Court should also conclude the Circuit Court did not abuse its discretion denying Intervenors’ and the Board’s motions for fees and costs. However, the Court should reverse the Board’s decision to grant the 2020 permit or, alternatively, remand the matter to the Board for further hearings consistent with the Ordinances and South Dakota law.

Dated at Sioux Falls, South Dakota, this 29th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply Brief of Appellants complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 360, this Brief contains 4,949 words and 26,286 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 points) and was prepared using Microsoft Word 360.

Dated at Sioux Falls, South Dakota, this 29th day of July, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing “Reply Brief of Appellants” was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on the 29th day of July, 2022.

The undersigned further certifies that an electronic copy of “Reply Brief of Appellants” was served electronically to the attorneys set forth below, on the 29th day of July, 2022.

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