

2. Our zoning regulation at 3.07(3) states that the applicant shall obtain a letter opinion from the Natural Resource Conservation Service (NRCS) to determine whether a proposed operation would be an AFO or CAFO. Mockler attempted to obtain this letter but Jeffrey Loof, District Conservationist encouraged Mockler to get this determination from the SDDENR (letter dated March 22, 2019). Previously, Mockler and I contacted Kent Woodmansey at the South Dakota Department of Environment and Natural Resources (SDDENR) and obtained an opinion that the proposed operation would be considered a Medium Animal Feeding Operation (AFO) and would not require a General Water Pollution Control Permit (See email dated February 27, 2019). Further, Clay County Zoning Regulations state in Article 1 Title and Application, Section 1.07 Separability Clause “Should any section or provision of this Ordinance be declared to be unconstitutional or invalid, such decision shall not affect the validity of the Ordinance as a whole, or any part other than the part so declared to be unconstitutional or invalid.” Therefore, the denial of an opinion from NRCS does not preclude approval of the conditional use.

3. Mockler’s application is for an expansion of an existing animal feeding operation, not a new operation, so it has always been considered one operation. Mockler’s request does not exceed the maximum number of animals as defined in Section 3.07 (4) Table 1 for a Medium AFO. Therefore, Mockler meets the requirements of the Clay County Zoning Ordinance in this instance.

4. The determination by Woodmansey was not “tentative” nor is it a substituted letter as claimed by the Sierra Club. There will be no discharge to the waters of the state as defined by the SDDENR. No pollutants will be discharged into waters of the state through a man-made ditch, flushing system, or other similar man-made device; or discharged directly into waters of the state which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operations. As stated in the application, the animals will be housed in hoop barns and there will not be liquid manure or other discharge from the barns. Obviously, enough details were provided to allow Woodmansey to make his determination that the operation would be an AFO. Mockler meets the requirement that no discharge will be made directly into the waters of the state.

5. Mockler will spread manure only on his own property and has provided aerial photos and locations of the possible sites. Some are near the Vermillion River, some are not. Mockler has stated that he will comply with all rules regarding setbacks for spreading manure and meets the requirements of the ordinance.

The Sierra Club’s appeal letter dated May 6, 2019 also has some complaints. I complied with the requirements of Section 11.05 Planning Commission Hearing in providing notice to the public. Notices of the public hearing were posted March 15, 2019 at the Courthouse, on the Clay County webpage, in the Plain Talk newspaper and on Mockler’s property. At no time did any member of the Sierra Club contact me to request copies of any information or documents relating to this matter. Copies of the application and attachments were made available to the public as required and those same documents are attached to this memo. None of the documentation is misleading or inaccurate. The Sierra Club has failed to state precisely what information they feel is misleading, inaccurate or missing.

Article 9 of the Clay County Zoning Regulations states that the Board of Adjustment shall hear appeals. The appeal is to determine compliance or non-compliance with the specific rules governing the action. In this case, the Board of Adjustment must determine if the Clay County Planning Commission followed the requirements of the zoning regulations in granting the Conditional Use permit to Mockler. The Hearing Decision and memo from the Zoning Administrator dated April 29, 2019 show all applicable zoning regulations and how Mockler's application meets those rules. Therefore, the Board of Adjustment must confirm the Planning Commission's decision to approve the conditional use permit.

PUBLIC NOTICE

Clay County Board of Adjustment to Hold Public Hearing On Appeal of Conditional Use Permit

Notice is hereby given that a Public Hearing will be held before the Clay County Board of Commissioners, acting as the Board of Adjustment, at 9:30 am on June 11, 2019 at the Clay County Courthouse to consider the following: An appeal by the Living River Group, Sierra Club of the approval by the Clay County Planning Commission of a Conditional Use permit granted to Travis Mockler for expansion of an Animal Feeding Operation from Small to Medium.

All interested persons are encouraged to attend this public hearing. Those interested persons not able to attend are invited and encouraged to send written comments before June 11, 2019 to the Clay County Zoning Administrator, 211 W. Main Street, Suite 203, Vermillion, SD, 57069.

**Cynthia Aden
Zoning Administrator
Carri Crum
Clay County Auditor
Publish: May 31, 2019**

AFFIDAVIT OF PUBLICATION

PLAIN TALK

CLAY COUNTY AUDITOR
211 W MAIN ST #200
VERMILLION SD 57069

STATE OF SOUTH DAKOTA
COUNTY OF CLAY

JACKIE LAMMERS, BEING FIRST DULY SWORN ON OATH DEPOSES AND SAYS THAT (S)HE IS THE CLASSIFIED MANAGER OF YANKTON MEDIA INC, A CORPORATION, THE PRINTER AND THE PUBLISHER OF THE PLAIN TALK, A LEGAL WEEKLY NEWSPAPER PUBLISHED AND CIRCULATED IN THE CITY OF VERMILLION, SAID COUNTY AND STATE, AND ONE OF THE OFFICIAL NEWSPAPERS OF THE SAID COUNTY OF FACTS STATED IN THIS AFFIDAVIT; THAT THE ANNEXED PUBLIC NOTICE CLAY COUNTY

TAKEN FROM THE PAPER, IN WHICH IT WAS LAST PUBLISHED IN THE NEWSPAPER ON THE 31st DAY OF May, 2019 THAT THE FULL AMOUNT OF THE FEE CHARGED FOR THE PUBLICATION OF SAID NOTICE TO WIT \$12.51 ENSURES TO THE BENEFITS OF THE PUBLISHER OF SAID NEWSPAPER AND THAT NO AGREEMENT AND UNDERSTANDING FOR THE DIVISION THEREOF HAS BEEN MADE WITH ANY OTHER PERSON, AND THAT NO PART THEREOF HAS BEEN AGREED TO BE PAID TO ANY PERSON WHOMSOEVER.

PUBLISHED ON: 05/31/2019

FILED ON: 05/31/2019



SUBSCRIBED AND SWORN TO BEFORE ME THIS 31st DAY OF May, 2019



NOTARY PUBLIC, SOUTH DAKOTA
MY COMMISSION EXPIRES 08/19/2021

Ad text : PUBLIC NOTICE
Clay County Board of
Adjustment to Hold Public Hearing On Appeal of
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Cynthia Aden
Zoning Administrator

Carri Crum
Clay County Auditor

Publish: May 31, 2019

Published once at the total approximate cost of \$12.51.

Published May 31, 2019.

6/11/2019

Please Sign In:

Jan Andenberg
Susanne Sly
Norma Weir

Barbara Yelwath
Charles Yelwath

Cindy Stuedeman-Johnson

Dee Ann Johns

Jane Brown

Mark Sweeney

Sharon Gray

Kelly Dillard

Jill Miller-Smit

Dandra L. Strom

Say Bottolfson

Jungmilee

Cindy Beha

TIM SCHREIBER

GREG REDLIN

Janice Berg

PUBLIC MEETING GUIDE AND AGENDA

Clay County Board of Adjustment Appeal June 11, 2019

1. Call the Meeting to Order 9:30am

Purpose

Clay County Board of Adjustment to Hold Public Hearing On Appeal of Conditional Use Permit by the Living River Group, Sierra Club of the approval by the Clay County Planning Commission of a Conditional Use permit granted to Travis Mockler for expansion of an Animal Feeding Operation from Small to Medium.

Introductions

- Board of Adjustment
- States Attorney or County's Legal Counsel –
- Zoning Administrator
- Permit Applicant Representative -
- The Parties Appealing Representative
-

Meeting Procedure

Note the Zoning Administrator (ZA) has provided the Board Of Adjustment with all pertinent information concerning the request.

Record keeping. . Written minutes – PC Commission had ZA maintain minutes; Auditor will maintain minutes of this Appeal Hearing

- a. This will be an open public hearing
- b. Those who wish to speak will be allowed up to five minutes to do so.

Public Comment Expectations

Sign-up list and note if you wish to speak

Speakers are instructed to:

- a. Stand and Address the Chair to be recognized
- b. **Each speaker must state their name and address**
- c. Speak Loud enough for all to hear
- d. Each speaker is to be allowed one time

A time limit of up to 5 minutes per speaker. Please:

- ✓ **Respect each other's time**
- ✓ **One does not have to speak the full time**
- ✓ **May not give time to others.** (Unless someone has an attorney they wish to speak on their behalf)

Each person is accountable for what they say

- ✓ **No personal attacks**
- ✓ **Keep to merits of application/appeal**
- ✓ **All Shall be directed to the chairperson.**

No talking/debate amongst audience members, applicant, etc.
All statements and questions should be as factual as possible.
Refrain from repeating what has been said.

Order of Business Once the meeting is opened as the PUBLIC HEARING

The Board of Adjustment reserves the right to question any speaker.

Please maintain 5-minute rule unless otherwise stated

1. **The appellant (Living rivers) representative signatures (or their attorney) will have up to 15 minutes** to comment and state clearly their grounds for appeal of PC's decision
2. **The zoning administrator and those in support of permit application will have up to 15 minutes** to respond.
3. Those in **support of the appeal** request will have a total of up to **30 minutes to testify**,
4. The **Board of Adjustment** shall read any written comments received prior to the meeting by those unable to attend or those who have provided written comments. (Long treaties may require a continuance).
5. Those in **Support of the Permit** application shall have **up to 30 minutes**
6. **BOA may take time to make comments and Ask Questions up to 30 minutes.**
7. Comments will then be taken from those wishing to provide **additional testimony** for a **maximum of 30 minutes**. Keeping to a maximum of up to five minutes each speaker.

All other testimony such as petitions, written comments, maps, drawings, photos, and detail environmental information will be made part of the hearing record. **Anything referenced or noted by any presenter such as a report or study must be immediately provided to the Board of Adjustment to be entered into the official record.** If there are numerous items, then adopt a numbering / lettering system.

8. Close the Public Hearing.

- a. After the close of the public hearing, no additional testimony/comments may be offered, except those comments in response to questions from the Board of Adjustment. Document for will be made available for public inspection.
- b. No additional written or digital evidence may be submitted.

9. Board Of Adjustment Open Discussion.

- a. **BOA Motion of a summation "findings of fact" or reasons as consensus.**
10. Opportunity for the applicant = Petition Signatory response.

11. Board/Commission member propose motion is a summation of the appeal –

Vote _____ **yes** to deny permit;

amend = state correction and requirements

or no = permit approved

June 11, 2019 Hearing by Clay County Commission (Board of Adjustment) of Sierra Living River Group's appeal of the April 29, 2019 decision by the Clay County Planning and Zoning Commission to approve Mr. Travis Mockler's application for a Conditional Use Permit for a Medium Animal Feeding Operation in Section 12-94N-52W, Clay County, SD.

The Appellants find that critical information was not provided to the public in advance of the Planning and Zoning Commission Hearing; that information provided in the Application and at the Hearing was incomplete, and in some cases misleading or inaccurate; and that there were failures to follow required public notice and procedure. Never did the applicant make a formal presentation about his proposed project and take questions. Instead, the zoning administrator acted as his advocate.

As to the substance of the Conditional Use Permit, Appellants find serious problems not only with the Application and the lack of adherence to required Procedures, but with the proposal itself and with approval of two Medium Animal Feeding Operations in an environmentally sensitive site:

1. Mr. Mockler's March 25, 2019 Conditional Use Permit Application lacked details required by the Clay County Ordinance, including details pertaining to the site plan, buildings, manure storage and management, information on soils, floodplain designation and methods of preventing discharges into Waters of the State. As of the April 29 meeting at which the application was approved, there was still no detailed site plan, not even a sketch of proposed buildings in which animals would be confined along with their urine and manure, and no details of a manure management plan beyond the statements that manure would be "piled," and that there would be "no discharge." When asked whether the zoning administrator or any member of the Commission had personally inspected the proposed site, nobody answered in the affirmative.
2. The Application lacked a basic requirement of the Clay County Ordinance, a "letter opinion from the Natural Resource Conservation Service District (NRCS) to determine whether the operation will be considered an Animal Feeding Operation (AFO) or a Concentrated Animal Feeding Operation (CAFO). The letter shall state how the NRCS made that determination." In fact, NRCS District Conservationist Jeff Loof's one sentence, March 22 letter not only declined to make such a determination, but suggested that Mr. Mockler seek a determination from the SD Department of Environment and Natural Resources.

At the April 29 Planning and Zoning Commission meeting at which the Application was approved, the zoning administrator implied in her written summary that the applicant had followed up on this suggestion. In fact, the email from DENR's Feedlot Permit Program manager, Kent Woodmansey, is dated February 27, 2019, and there is no indication that the applicant or the zoning administrator followed through on Loof's suggestion by supplying the details that DENR suggested might help make an "accurate" determination of the AFO/CAFO question. This issue alone, the failure to comply with the Clay County Zoning Ordinance 3.07.3, means that this Conditional Use application has not complied with the Ordinance, and cannot be legally approved.

On April 15, citizens supplied to SD DENR much of the information that agency said was necessary to make an "accurate" determination of whether the proposed AFO

should be regulated as a CAFO, including topographical maps and photographs of the proposed site; yet, citing its prescribed role, DENR declined to intervene.

3. Based on the number of animals in the proposed dual operations, one Medium swine facility and one Medium cattle facility, which combined would clearly meet the threshold of a Large Animal Feeding Operation, and hence, a CAFO, the proposed facility should require regulation as a CAFO. The Clay County Ordinance states that “Two or more animal feeding operations under common ownership are a single animal feeding operation if they...use a common area or system for the disposal of manure,” which the proposed operation would do.
4. In lieu of the letter from the Natural Resources Conservation Service that is required by the Clay County Ordinance, the applicant substituted the email from DENR’s Kent Woodmansey. That letter was cited as a determination that the proposed operation should be considered an AFO, even though the letter clearly stated that this conclusion was based solely on the applicant’s assertion that there would be “no discharge to Waters of the State,” a claim that defies logic, topography, gravity, and this spring’s weather. DENR’s letter stated that any “accurate” determination would require submission of numerous additional critical details, including “information about the presence of vegetation during the normal growing season, information about where runoff from existing or proposed open areas will be directed...and information about runoff controls and manure containment measures for existing and proposed operations.” But those details were not provided. Furthermore, at the April 29 Planning and Zoning meeting at which the application was approved, the Planning and Zoning Administrator falsely implied that the DENR opinion was based upon information she presented at the April 29 meeting, information that was not included in the Conditional Use application dated February 28, 2019.
5. Manure application maps are incomplete. They fail to note that much of the targeted land is designated flood plain and Natural Resources Conservation District, and they fail to delineate required setbacks from the Vermillion River.
6. The applicant made false or misleading representations at two public hearings. At the January 3, 2019 Public Hearing at which a portion of the proposed AFO site was rezoned at his request from the Natural Resources Conservation District, where the proposed operation would be prohibited, to the Agricultural District, Mr. Mockler stated that his pasture grass would stop runoff to Waters of the State, thus admitting the obvious, that runoff would occur, but simultaneously misrepresenting the condition of his grassland, which as March 18, 2019 photographs illustrate, was grazed to the ground.
At the March 25 Public Hearing, Mr. Mockler stated that the proposed facility is about 150 feet above the floodplain. As readily accessible topographical maps—maps in which the Planning and Zoning Commission showed little interest—illustrate, the site is approximately 50 feet above the floodplain of the Vermillion River. The land slopes precipitously west to the river and steadily south to a tributary which flows directly to the Vermillion River approximately ¼ mile south of the Mockler property.
7. As a Clay County Commissioner and as the Commission representative on the Planning and Zoning Commission, Mr. Mockler pushed through changes to the Clay County

Ordinance that would allow expansion of a Small AFO to a Medium AFO without required setbacks. He then got a portion of the proposed site rezoned from Natural Resources Conservation District to Agricultural District, since the proposed operation would not be allowed in NRCS. This is arguably a conflict of interest and an abuse of power, and sets a precedent that might tie the hands of Commissioners regarding any similar requests in the future.

8. Failures to follow due process and failures of transparency: A member of the public asked that the March 25 Public Hearing be recorded, but the zoning administrator said that was not feasible.

As of the April 26 deadline for the public to request inclusion on the agenda for its April 29 meeting, the Planning & Zoning website still listed its “next meeting” as April 8, 2019, three weeks past. Only after the deadline for inclusion on the agenda had passed was the notice of the April 29 meeting posted. Beyond questions of the suitability of the proposed site and the merits or lack thereof of the Conditional Use Permit Application, the lack of adherence to public notice and transparency is not acceptable.

9. The March 25 Public Hearing ended with a referral to the State’s Attorney for a determination of whether the Application and the process adhered to requirements of the Clay County Ordinance. A week later, the State’s Attorney announced that she lacked authority to make such a judgment, a position she elaborated upon at the April 29 meeting. However, she proceeded to undercut that position by repeatedly referring to the Planning and Zoning Commission and the zoning administrator as “the experts,” and she subtly implied that she saw no problems with the application or the process.
10. Article 7.01 of the Clay County Ordinance states that the zoning administrator is “authorized and directed to enforce all the provisions of the Zoning Ordinance.” The role of the zoning administrator is to impartially apply the rules of the Zoning Ordinance, based on facts, and in the case of animal feeding operations, to ensure that they meet the requirements of the Ordinance, including to “protect ground and surface waters.” The zoning administrator said publicly more than once that she simply relies on applicants’ statements, no independent verification needed. Whether this is her habitual process, or whether efforts to verify information depend upon the situation and the applicant, her job is not to “trust,” but to “verify.”

Interestingly, at the March 25 Public Hearing, she said that this was the first AFO/CAFO application she had worked since adoption of the 2017 revisions to the Ordinance, so two years later, they were still working out the bugs. Yet at the April 29 meeting, one commissioner said that this was the third such application considered, so it should be approved, just as the others had. The discrepancy was not explained.

11. The Zoning Administrator stated to the Sierra Club chair on April 1, 2019, when the original letter of Appeal was delivered, that no new information would be added to the Application as it stood after the March 25 meeting. But new information was submitted at the April 29 meeting, including a new map and the zoning administrator's elaborated responses to requirements of the Ordinance in defense of the Application.

Clay County citizens should and must expect full adherence to all features of the Clay County Ordinance by public officials, as that relates to regulations, to transparency, and to processes. We believe that the aforementioned concerns are among the reasons that the Planning and Zoning

Commission's action should be reversed by the Board of Adjustment, the Clay County Commission.

But equally important, the proposed site is not appropriate for an Animal Feeding Operation of this size, at least not as proposed. If the Applicant wishes to pursue such development, it should require at a minimum the state-of-the art runoff controls and manure management safeguards stipulated by SD DENR for Concentrated Animal Feeding Operations. Thus, any further consideration of this proposal should begin with an application to SD DENR for a General Water Pollution Control Permit.

We sincerely hope that the Board of Adjustment will address our concerns, since the only remaining option would be legal action in circuit court.

Sincerely yours,

Susanne Skyrn and Kelly Dilliard, Co-chairs, Living River Group, South Dakota Sierra Club

Handwritten signatures of Susanne Skyrn and Kelly Dilliard. The signature for Susanne Skyrn is on the left, and the signature for Kelly Dilliard is on the right.

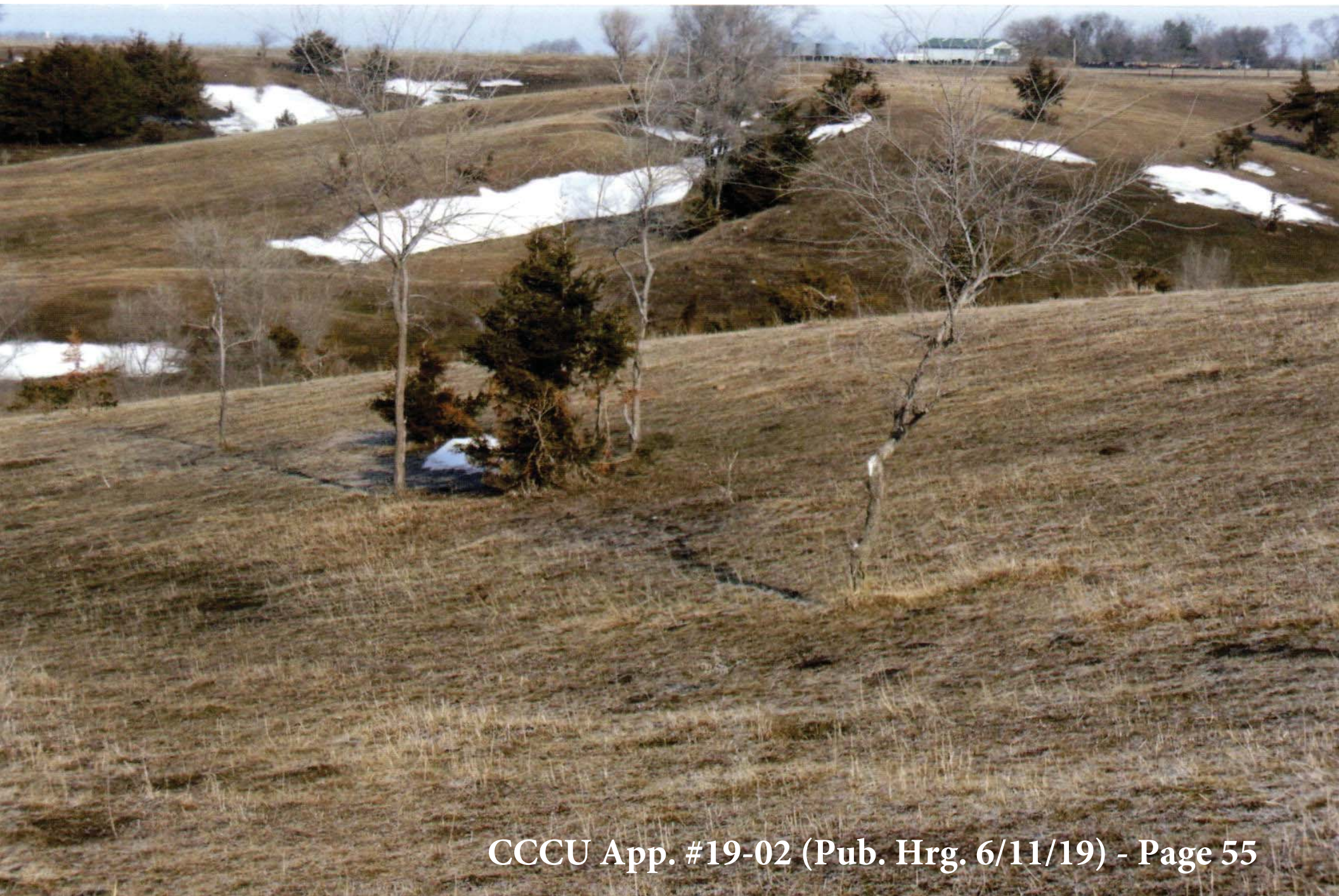
624-3444

624-1984



Looking North from 305 St. R.O.W. → 3/18/19
#5 - AFO site is at top of bluff $\frac{1}{4}$ mi. North

JPG 5282



Looking N/NW to proposed AFO site from 305 ST R.O.W

#1 (Note overgrazed condition)

3/18/19

NOTE:

It was noted for the record by Travis Mockler at the July 30, 2019 public hearing that this photo labeled "CCCU App. #19-02 (Pub. Hrg. 06/11/19) - Page 55" is not his pasture, but rather it is his neighbor's pasture.



Looking N/NW from 305 St. R.O.W 3/18/19

#3

Received during public hearing 6/11/19.

To: Hearing by Clay County Commission (Board of Adjustment)

From: Mary Begley

6/11/2019

Clay County Commission

As a citizen of Clay County I am voicing my concern and desire for the Board of Adjustment to not grant Travis Mockler's permit for two Animal Feeding Operations in Clay County. Based on combined size and the proximity of these operations to the Vermillion River, the drainage from them will cause pollutants to go into the river.

Clean water is vital to the well-being and future survival of our community. I appreciate your commitment and the work you do for Clay County.

Sincerely,

A handwritten signature in cursive script that reads "Mary Begley".

Mary Begley

Commissioner Hammond finds that the proposed Conditional Use Permit for expansion of an existing Animal Feeding Operation in the E 700' of the N 1440' of SW1/4 of T94n R52w S12 is incomplete or incorrect in the following manner: Pertaining to Article 11:04 Site Plan.

1. Cite Article 11:04: "Plans should be **drawn to scale....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 and shall include the following information"
 - a. Contrary to claims by appellants, all of the map/drawing submittals displayed scale and north arrows except the excerpt from the zoning map (APO Zones A&B). That map indicates APO zone B underlies approximately 1/5 of the property proposed to host the Animal Feeding Operations. A replacement zoning map at a proper scale and clearly showing APO zone B, the Agriculture zone, the Natural Resource Conservation District, the 23 acre property designated for this conditional use, and individual existing and proposed features/structures to carry out this Conditional Use shall be drawn.
 - b. It is not known if an aquifer underlies the property designated in the Proposed Conditional Use application. The Lower Vermillion Aquifer may project under adjacent bluffs at shallow depths. The applicants should provide evidence to establish that an aquifer does not exist at less than 50' below land surface (shallow aquifer definition, Clay County Zoning Ordinance) at the location of the proposed buildings.
 - c. The floodplain map provided in the application did not identify the applicant's property location in any manner. A more appropriate localized 100 yr. floodplain map is attached to this document (figure 1).
 - d. The location, design, and size of all proposed and existing buildings associated with the feeding operation is necessary to evaluate this conditional use permit application. The Applicant shall provide scale maps/air photos showing the location and footprint of each of the structures planned, including the location of any planned and existing manure containment structures, dead animal storage areas, as well as existing or planned drainageways originating in or traversing the planned operation. Existing and proposed structures should be located at least 144 feet ((1 year flow @ .2"/hour perc test flow for Ethan soils (Soil Survey of Clay Co. SD, p. 337) underlying area south of existing buildings)) away from the sloped ground descending to the Vermillion River floodplain and tributary valleys.
 - e. The design and size of the proposed hoop building and pole shed, including floor and roof design, manure containment, and seepage control measures for each such structure in the production area shall be described.
2. Manure application maps should be redrawn to exclude areas of setback from streams and exclude other acreage not suitable or not planned for application. Though adequate acreage appears to be available, accurate application maps and typical seasonal application timing shall be specified.
3. Number of animal units for each animal species is at the upper limit for a Medium AFO. Woodmansey's letter, paragraph 2 states that the cattle operation and the swine operation would **each** be considered a medium AFO. Since our ordinance follows DENR animal unit guidelines, the two operations should require either 2 medium AFO permits or 1 large based upon animal unit counts.