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Clark County Board of Adjustment
c/o Jarvis Reidburn, Clark County Zoning Officer
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Re: Lamar Hutterian Brethren, Inc. — Conditional Use Permit Application
Public Hearing May 19, 2026

Greetings:

This firm represents Garret Meier, Scott Campbell, and Bruce Nelson, who own property in Clark County, including some owned or rented parcels near the area proposed for development by Lamar Hutterian Brethren, Inc. ("Lamar") under the conditional use permit ("CUP") application set for public hearing before the Clark County Board of Adjustment ("the Board") on Tuesday, May 19, 2026, at 9:00 a.m. Please consider the comments below in advance of the hearing in accordance with the May 6, 2026, published notice.

The published notice describes the application as "A Conditional Use Permit pursuant to Section 2.04.04.7 Institution farms, including religious farming communities." The application materials themselves, however, describe a substantially broader development — including a domestic sanitary sewer treatment plant/facility regulated separately under Section 2.04.04.9 and Chapter 4.31 of the Clark County Zoning Ordinance ("the Ordinance"), a school regulated separately under Section 2.04.04.27, a church and cemetery regulated separately under Section 2.04.04.2, on-site animal production self-classified as a Class E Concentrated Animal Feeding Operation, a grain handling, storage and processing facility, and (as the application itself discloses) future light-industrial manufacturing, a concrete batch plant, and a commercial feed mill. The purpose of this letter is to make my clients' position clear on the record and to set out the legal grounds on which the Board must deny the pending application.

The message of this letter is simple. ***First, the Board cannot approve the application on the record Lamar has submitted.*** The public was given notice of only one conditional use — the religious-farming-community CUP under Section 2.04.04.7 — yet the bundled application requires Board action on multiple separately enumerated conditional uses, none of which is properly before the Board on the May 19 notice. The proposed domestic sewage treatment plant/facility is, on the face of the applicant's own site plan, in violation of the mandatory 1,320-foot setback in Chapter 4.31.2.f, and the application is facially incomplete under the mandatory site-plan requirements of Chapter 4.31.2. Approval on the present record would be an act "forbidden by law" and would be reversed on certiorari review.

Second, even if the application were in technical compliance with every specific Ordinance criterion — and it is not — the Board would not be required to grant the CUP. Under SDCL 11-2-17.3 and the Ordinance itself, ***the Board has broad discretion*** — indeed, an affirmative obligation — to consider the comprehensive plan, the purpose of the Ordinance, and the character of the Agricultural District, and ***to deny the application if the proposed use is not compatible*** with those considerations. Our Supreme Court has held that ***there is no such thing as automatic approval of conditional use permits*** — the county always has discretion to deny them. Our Supreme Court wrote the following:

> **Compliance with the set-back provisions did not require the Board to automatically approve the application.** In its deliberation, **the Board was charged with considering** whether the facility was "sufficiently separated from **other land uses so as not to unreasonably interfere with or burden the enjoyment of other neighboring lands**," which is exactly the task the Board undertook.

Miles v. Spink Cnty. Bd. of Adjustment, 2022 S.D. 15, ¶ 52, 972 N.W.2d 136, 153. The undisputed record on incompleteness, the 1,320-foot sewage-facility setback, the applicant's self-disclosed future industrial uses, and the concentration of incompatible uses on a single site supply ample independent grounds for denial, and the Board has broad discretion to deny Lamar's requested permit.

Third, a properly reasoned denial backed by written findings is nearly bulletproof on appeal. An approval in the face of the violations identified below is not. SDCL 11-2-65 (as amended in 2020) now provides for an award of attorneys' fees against a non-prevailing party in a certiorari action under chapter 11-2, and federal fee-shifting under 42 U.S.C. § 1988 remains a secondary risk. The risk profile facing the Board is asymmetric, and is set out fully in Section IV.

I. THE BOARD IS NOT AUTHORIZED TO APPROVE THE APPLICATION.

A. The Application Bundles Multiple Separately Enumerated Conditional Uses Under a Single Section 2.04.04.7 Notice.

The May 6, 2026 notice published in the Clark County Courier states that the Board will consider "A Conditional Use Permit pursuant to Section 2.04.04.7 Institution farms, including religious farming communities," and that "[t]he applicant seeks to establish a Religious Farming Community." That is the entire scope of the noticed application. Section 2.04.04 of the Ordinance, however, enumerates thirty-six distinct conditional uses in the Agricultural District, each separately listed and each independently requiring its own application, its own findings, and (as applicable) its own chapter-specific performance standards. Among them:

- **§ 2.04.04.2** Church or cemetery.
- **§ 2.04.04.7** Institution farms, including religious farming communities.
- **§ 2.04.04.9** Domestic sewage treatment plant/facility provided they meet the requirements of Chapter 4.31.
- **§ 2.04.04.27** School.

The Lamar application asks the Board to approve too much in a single proceeding. The Ordinance does not provide an umbrella mechanism by which Section 2.04.04.7 absorbs the separately enumerated conditional uses at Section 2.04.04.2, 2.04.04.9 and 2.04.04.27 and dispenses with their separate notice, separate findings, and separate chapter-specific performance requirements.

The deficiency is not a technicality. The Board's jurisdiction depends on the validity of the underlying notice. *See Wedel v. Beadle Cnty. Comm'n*, 2016 S.D. 59, ¶ 11, 884 N.W.2d 755, 758 (on certiorari, the reviewing court considers "whether the board of adjustment had jurisdiction over the matter" and "whether it pursued in a regular manner the authority conferred upon it"); *Lake Hendricks Imp. Ass'n v. Brookings Cnty. Planning & Zoning Comm'n*, 2016 S.D. 48, ¶ 26, 882 N.W.2d 307, 315 ("[t]he test of jurisdiction is whether there was power to enter upon the inquiry"). Adjoining landowners who would otherwise object to a domestic sewage treatment plant, a school, or a church/cemetery were not given notice that those uses are within the scope of the May 19 hearing. The application as bundled cannot lawfully be approved.

B. The Proposed Sewage Treatment Plant/Facility Violates the Mandatory 1,320-Foot Setback in Chapter 4.31.2.f.

Among the conditional uses bundled into the application is a domestic sanitary sewer treatment plant/facility. The applicant's own engineer describes a gravity sewer network draining to a lift station and two-cell stabilization pond "sized for total retention and disposal by evaporation," serving a maximum population of 150 people. That facility is a "domestic sewage treatment plant/facility" under Section 2.04.04.9 and Chapter 4.31 of the Ordinance, and it is independently a conditional use.

Chapter 4.31 of the Ordinance sets out the mandatory performance standards for any sewage treatment plant/facility approved under Section 2.04.04.9. Subsection (f) is unambiguous:

> No sewage treatment plant/facility will be allowed within one thousand three hundred twenty (1,320) feet from the property line of the sewage treatment plant/facility to the nearest residence; excluding: the residence of the sewage treatment plant/facility operator.

Ordinance, Ch. 4.31.2(f). Article V of the Ordinance defines the operative term: "the word 'shall' is mandatory and not discretionary." Ordinance, § 5.01. The phrase "will be allowed" in 4.31.2(f) is mandatory and not discretionary in exactly the same way; the Board has no power to approve a sewage treatment plant/facility that fails the 1,320-foot setback in the absence of a properly granted variance.

Lamar's own site plan demonstrates the violation. The plan shows the wastewater treatment facility (the two-cell stabilization pond) set back only 370 feet from the eastern property line, with additional setbacks of 100 feet and 150 feet from interior site features. The plan then depicts a "1,320′ RESIDENCE SETBACK FROM WWTF" — expressly measured from the wastewater treatment facility (the structure), not from the property line, as the Ordinance requires. The narrative accompanying the application compounds the error: "The included site plan also indicates the required perimeter of 1320 feet from the parcel containing the wastewater treatment facility. No residences are located within this perimeter." Vantage Point Solutions ltr. (Apr. 16, 2026) at § 4.31.2(f).

The applicant's phrasing does not save the application. Chapter 4.31.2(f) does not measure from the "parcel containing the wastewater treatment facility" generally; it measures "from the property line of the sewage treatment plant/facility to the nearest residence." On the applicant's own site plan, the true 1,320-foot measurement from the eastern property line extends approximately 950 feet beyond the WWTF-centered ring the applicant has drawn. Lamar's application simply fails to meet the minimum requirements and must be denied.

C. The Application Is Facially Incomplete Under the Mandatory Site-Plan Requirements of Chapter 4.31.2.

Chapter 4.31.2 requires "A site plan is provided indicating the following information" — followed by an enumerated list of mandatory submissions. The Article V "shall is mandatory" definition applies. The application falls short on at least two of those mandatory submissions.

First, subsection 4.31.2(a) requires the site plan to indicate "[p]resent topography, soil types, and depth to groundwater." Lamar's submission supplies only a published-data summary based on the 1986 SD Geological Survey Bulletin 29 and the 2001 DENR "First Occurrence of Aquifer Materials in Clark County" map. Lamar concedes that "[s]oil borings will be performed within the area of the proposed site as required by the DANR for approval of plans and specifications," and that "local perched water conditions may occur." Site-specific depth to groundwater — what 4.31.2(a) actually requires — is not in the record before the Board. Lamar asks the Board to defer to DANR for that determination at the plans-and-specifications stage, after the CUP has issued. Chapter 4.31.2(a) does not permit that deferral.

Second, subsection 4.31.2(e) requires the site plan to indicate "[p]roposed monitoring wells, etc." Lamar's submission states: "No monitoring wells are proposed. Plans and specifications will be reviewed by the DANR and evaluated for the need for monitoring." That, again, defers to DANR what the Ordinance requires of the applicant before the Board acts. The absence of a site-specific monitoring proposal is particularly concerning in light of Lamar's own admission that "local perched water conditions may occur" at the proposed pond site.

An incomplete record is not a record on which the Board can lawfully act. *Cf. In re Frawley*, 2002 S.D. 2, ¶ 6, 638 N.W.2d 552, 554 (when interpreting an ordinance, courts must give the ordinance's words and phrases their plain meaning and effect). The Board's jurisdiction extends only to the application before it; it does not extend to provisional approvals dependent on the future DANR review of materials that the Ordinance requires the Board itself to see first.

D. DANR Permitting Does Not Bind the Board.

Lamar will likely argue that DANR's plans-and-specifications review of the proposed wastewater facility, and any DANR general-permit coverage for the on-site animal operation, ties the Board's hands. They do not. DANR's jurisdiction is limited to engineering and water-quality matters under specific jurisdictional statutes; the Board reviews land-use compatibility, setbacks, and public interest under the Ordinance. *City of Rapid City v. Schaub*, 2020 S.D. 50, 948 N.W.2d 870 (state administrative regulation does not preempt more stringent local zoning).

Chapter 4.31.2(f)'s 1,320-foot setback is a Clark County requirement; it does not appear in any DANR rule, and DANR does not enforce it. Similarly, Chapter 4.31.2(a) and 4.31.2(e) require site-specific submissions to the Board, not to DANR. Lamar's repeated reference to deferral to DANR throughout its narrative is, on the present record, a request that the Board abdicate its independent review obligations under the Ordinance — which it cannot lawfully do.

II. INDEPENDENT GROUNDS FOR DENIAL.

Even if the Board could find its way past the aforementioned shortcomings — and it cannot on this record — the application still should not be approved. Section 3.04.01.5 of the Ordinance requires the Board, before granting any CUP, to make a finding "that the granting of the conditional use will not adversely affect the public interest." Section 3.04.01.6 requires "written findings certifying compliance with the specific rules governing individual conditional uses and that satisfactory provision and arrangements have been made" as to (among other things) general compatibility with adjacent properties, screening and buffering, and adequacy of access roads. The application's own submissions foreclose those findings on at least four independent grounds.

A. The Application Concedes Future Industrial and Commercial Uses on the Same Site Without Public Notice.

The application narrative is unusually candid. It lists, under the heading "Future Conditional Uses not included in this application," three substantial industrial and commercial uses that Lamar intends to develop on the same site: (1) light-industrial manufacturing of roll-formed steel sections to be moved from the Fordham Colony; (2) a concrete mixing and batching plant for "internal use by the colony"; and (3) a commercial feed mill for sale of feed products.

Each of these is a separately enumerated conditional use under the Ordinance (manufacturing and concrete batching falling under § 2.04.04.4 and § 2.04.04.23, and the commercial feed mill requiring its own conditional use authorization as the application concedes). The application admits each "will require a Conditional Use authorization at the time of addition" — yet places each future facility on the very site plan now before the Board.

The applicant simultaneously concedes that these future uses "will not be likely to be initiated within the two-year timeframe required." That is an acknowledgment of Section 3.04.01.8 of the Ordinance, which provides that "A conditional use permit shall expire two years from the date upon which it becomes effective if the construction related to the project requiring the conditional use has not been completed." The applicant's strategy is plain: obtain a broad religious-farming-community CUP now, on a single Section 2.04.04.7 notice, then return piecemeal in future years to seek separate approvals for industrial manufacturing, concrete batching, and a commercial feed mill — each of which would, on its own, trigger separate notice and separate adversarial proceedings before the Board.

This litigation-staging approach is not consistent with the Section 3.04.01.6 requirement of written findings on "general compatibility with adjacent properties" or with the public-interest finding required by Section 3.04.01.5. The Board cannot make a not-adverse-to-the-public-interest finding while looking at a site plan that depicts a future light-industrial roll-formed steel manufacturing operation, a concrete batch plant, and a commercial feed mill, all immediately adjacent to the Colony's housing area and near existing uses that would be harmed .

B. The "Self-Classified" Class E Animal Operation Asserts No Pollution Hazard Without Board Review.

Lamar's narrative states that on-site cattle, chickens, and ducks "will not exceed 299 AU at any time" and "[t]his will classify the onsite animal production activities as a Class E Concentrated Animal Feeding Operation, as there are no potential water pollution hazards present." Two problems.

First, the distinction between Class D (10 to 299 AU with "[p]otential water pollution hazard") and Class E (10 to 299 AU with "[n]o pollution hazard") under § 4.24.02 is not Lamar's to make by ipse dixit. The determination of "significant contributor of pollution," defined at § 5.01 of the Ordinance, depends on objective site-specific factors — proximity to surface and groundwater, drainage, manure handling, slope and soil permeability — not on the applicant's self-assessment. The application contains no analysis of those factors and offers no engineered manure containment for the animal-barn area depicted immediately adjacent to housing on the site plan.

Second, the application has placed the animal barn on the site plan in close proximity to the proposed school, the cemetery, the community building, multiple dwellings, and (as drawn) future manufacturing, concrete batching, and a commercial feed mill. The Section 4.24.05.6 minimum setback table for Class D and Class E operations requires 1,320 feet from established residences — a setback the applicant's site plan does not attempt to demonstrate, presumably because Lamar takes the position that its own dwellings do not count as "established residences" subject to its own setback. The Board need not, and should not, accept the self-classification on the present record.

C. Concentration of Residential, Educational, Religious, Industrial-Adjacent, and Animal-Production Uses on a Single Site Is Not Compatible With the Agricultural District.

Section 2.04.01 of the Ordinance establishes the purpose of the Agricultural District: "This district is established to preserve open space and maintain and promote farming and related activities within an environment which is generally free of other land use activities. … Residential development, other than single-family farming dwelling units, will be discouraged to minimize conflicts with farming activities and reduce the demand for expanded public services and facilities." Ordinance, § 2.04.01 (emphases added). The Lamar application proposes the opposite — a high-density residential, institutional, educational, religious, animal-production, and (as the site plan shows) industrial-ready development packed onto a quarter-section between 420th Avenue and 421st Avenue at 170th Street in Garfield Township.

Under SDCL 11-2-17.3, the Board "shall consider the stated criteria, the objectives of the comprehensive plan, and the purpose of the zoning ordinance and the relevant zoning districts when making a decision to approve or disapprove a conditional use request." The purpose of the Agricultural District is, by the Ordinance's own words, to keep this kind of intensive, multi-use, near-industrial development out. A finding of general compatibility under Section 3.04.01.6(g) cannot be squared with that stated purpose on this site plan.

D. The Application Concedes Substantial Per-Capita Wastewater Loadings Without Engineered Site-Specific Containment Analysis.

The wastewater section of Lamar's narrative reports that the stabilization pond was sized using a 75-gallon-per-capita-per-day flow rate for a maximum population of 150 people — yielding a peak design loading of 11,250 gallons per day, with annual disposal exclusively by evaporation from a two-cell pond located 370 feet from the property line, in soils the applicant describes as overlying glacial drift with potential perched water. The applicant offers no engineered evaporative-balance analysis, no site-specific seepage analysis, no monitoring well program, and no commitment to engineered liner design — instead deferring all of those questions to a future DANR review. The Board cannot make the public-interest finding required by Section 3.04.01.5 on a record in which the central wastewater containment question has been deferred to another agency that does not enforce the Ordinance.

E. The Cumulative Record Does Not Support a Finding of No Adverse Effect on the Public Interest.

Before the Board may grant this CUP, it must make a written finding that "the granting of the conditional use will not adversely affect the public interest." Ordinance, § 3.04.01.5. Taken together, the defects identified above — multiple bundled uses on a single notice, mandatory setback violation, incomplete site-plan submissions under Chapter 4.31.2, self-classification as Class E without site-specific review, concentration of incompatible uses, deferral of central wastewater questions to DANR, and admitted future industrial development on the same site — defeat that finding. Any one of them, standing alone, is a legitimate basis on which the Board may deny.

III. THE BOARD HAS BROAD DISCRETION TO DENY IN ALL SITUATIONS.

A conditional use permit is not a right; it is a privilege subject to the exercise of the Board's judgment. The Ordinance itself makes the point plain: "A conditional use is a use that would not be appropriate generally or without restriction throughout the zoning division or district, but which, if controlled as to number, area, location, or relation to the neighborhood, would promote the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity, or general welfare. Such uses ***may*** be permitted in such zoning division or district as conditional uses, as specific provisions for such uses is made in this zoning Ordinance." Ordinance, § 5.01 (definition of "Conditional Use") (emphasis added).

State law confirms and expands that discretion. SDCL 11-2-17.3 provides that the approving authority "shall consider the stated criteria, the objectives of the comprehensive plan, and the purpose of the zoning ordinance and the relevant zoning districts when making a decision to approve or disapprove a conditional use request." That is a mandatory direction to look beyond the technical checklist to (1) comprehensive-plan objectives and (2) the character and purpose of the zoning district. An applicant who clears every specific criterion has not earned a permit; the applicant has merely cleared the first hurdle.

Our Supreme Court has firmly held that counties have the power and discretion to deny CUP applications, even when every setback and specific use requirement is satisfied, and that the Board has a duty to consider all factors, current uses, and the impact on the community. *See Miles*, 2022 S.D. 15, ¶ 52, 972 N.W.2d at 153 ("***Compliance with the set-back provisions did not require the Board to automatically approve the application***.").

On this record, the bases on which the Board may exercise its statutory discretion to deny include, at a minimum, each of the following:

- The application bundles multiple separately enumerated conditional uses under a single Section 2.04.04.7 notice;
- The proposed sewage treatment plant/facility, as drawn on the applicant's own site plan, fails the mandatory 1,320-foot setback in Chapter 4.31.2(f);
- The site-plan submissions required by Chapter 4.31.2(a) and 4.31.2(e) are incomplete on their face;
- The applicant's self-classification of the on-site animal operation as Class E (no pollution hazard) is not supported by any site-specific analysis;
- The applicant has affirmatively disclosed future light-industrial manufacturing, concrete batching, and a commercial feed mill on the same site, none of which is within the scope of the noticed CUP;
- The concentration of residential, educational, religious, animal-production, and industrial-ready uses on a single site is incompatible with the stated purpose of the Agricultural District under Section 2.04.01;

- The wastewater design relies on a 75-gpcd, evaporation-only stabilization-pond approach without site-specific evaporative-balance, seepage, or monitoring-well analysis in the record;
- DANR plan-and-spec review at the post-CUP stage does not satisfy the Board's independent obligation to make written findings under § 3.04.01.6 before granting the permit.

Any one of these is a legitimate, record-supported basis on which the Board may exercise its statutory discretion to deny.

IV. A PROPERLY REASONED DENIAL IS BULLETPROOF ON APPEAL.

The Board's decision on a CUP is reviewable only by "writ of certiorari." SDCL 11-2-61; SDCL 11-2-61.1 (2018) (specifying that any appeal of a CUP decision is "determined under a writ of certiorari standard regardless of the form of the approving authority"). The Supreme Court has repeatedly described the certiorari standard as a narrow and deferential one:

> A board's actions will be sustained unless it did some act forbidden by law or neglected to do some act required by law.

Adolph v. Grant Cnty. Bd. of Adjustment, 2017 S.D. 5, ¶ 7, 891 N.W.2d 377, 381 (quoting *Grant Cnty. Concerned Citizens v. Grant Cnty. Bd. of Adjustment*, 2015 S.D. 54, ¶ 10, 866 N.W.2d 149, 154); *accord Wedel*, 2016 S.D. 59, ¶ 11, 884 N.W.2d at 758 (A reviewing court does not determine whether a county permitting decision was right or wrong, but only whether the board of adjustment had jurisdiction over the matter and whether it pursued in a regular manner the authority conferred upon it); *Schafer v. Deuel Cnty. Bd. of Comm'rs*, 2006 S.D. 106, ¶ 16, 725 N.W.2d 241, 249 (a CUP decision is quasi-judicial and is afforded the deference quasi-judicial decisions receive).

Under that standard, a denial backed by written findings is extraordinarily difficult to overturn. The Board has wide latitude under *Miles* to find that this application, on this record, is not in the public interest and is not compatible with the Agricultural District. A reviewing court will not substitute its judgment for the Board's on that determination.

We raise one final point, because the Board is entitled to a complete picture before it acts. South Dakota law (SDCL 11-2-65, as amended in 2020) now allows attorneys' fee-shifting in certiorari actions under Chapter 11-2, and federal fee-shifting under 42 U.S.C. § 1988 can come into play where a CUP approval implicates § 1983 — see *Freeman v. Clay Cnty. Bd. of Cnty. Comm'rs*, 706 F. Supp. 3d 873 (D.S.D. 2023). We simply note that a reasoned denial on the present record protects the Board and the County, and leaves Lamar free to come back with a properly noticed, properly bundled, setback-compliant application in a future cycle — an outcome that serves everyone's interests.

V. CONCLUSION AND REQUEST.

For the reasons set out above, we respectfully request that the Clark County Board of Adjustment deny the pending conditional use permit application of Lamar Hutterian Brethren, Inc. at the May 19, 2026, hearing. We appreciate the time the Board gives to this application.

Best regards,

Mitchell Peterson
For the Firm

cc: Clients (via email)
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