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A18-0090
STATE OF MINNESOTA
IN SUPREME COURT

Minnesota Sands, LLC,

Appellant,

vs.

County of Winona, Minnesota, a Political Subdivision of the State of Minnesota,

Respondent.

REPLY BRIEF OF APPELLANT MINNESOTA SANDS, LLC

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I. The County's Ban On Silica-Sand Exports Violates The Commerce Clause.

A. The County may Not Address Its Environmental Concerns by Discriminating Against Interstate Commerce.

The County spends considerable effort not in defending its export ban, but in trying to re-characterize the ban as an even-handed regulation of mining procedures. The plain text of the ordinance says otherwise. In fact the County considered and rejected just the type of even-handed regulation for which it now argues.

The County would have the Court believe that "[t]he Ordinance Amendment places restrictions on the *process* of mining, not the *product.*" (Br. 16.) That is transparently false. The County suggests that its regulations cover only "industrial-level mining" involving "larger mines," "long[er] periods of time," "blasting and underground-mining techniques," "chemical treatment of the mined sand," "significant water appropriation," and "storage of chemically-infested waters." (Br. 7.) Similarly, the Land Stewardship Project asserts that more intensive sand mining can impact air quality, road safety, and agricultural productivity. (Br. 8-11, 20.) The County has many options for directly regulating any of those issues, but the Ordinance Amendment does not do so. Instead it bans *all* mining for out-of-state "industrial" purposes—no matter how small-scale and low-impact the mining might be. Conversely, the ordinance *permits* mining the same minerals for "local" purposes—with no limits on the size, operating hours, or water

appropriations of "local" mines, and no regulations on their pollution or techniques for extraction, processing, or waste storage.[1]

The same is true for the County's concerns about the supposed dangers of processing silica sand for industrial use. (Br. 8; *see* LSP Br. 18-19.) As an initial matter, the County does not acknowledge that such processing is not always necessary—and when it is, it can be done hundreds of miles away from the mine site. (MN Sands Br. 4.) So concerns about *processing* silica sand do not justify the County's bans on mining and transporting the sand. But even the ban on processing itself is both over- and underinclusive. It is overinclusive because, as to "industrial minerals," the ordinance bans *all* "washing, cleaning, screening, filtering, [or] sorting" of sand—even by the gentlest, most environmentally-friendly methods. On the other hand, the amendment is underinclusive because it allows "local" mines to engage in *any kind* of sand processing, no matter how dangerous.

As Minnesota Sands has explained, Winona County has ample regulatory tools to address legitimate concerns in these areas. Two such options were presented in the very legislative process that led to the challenged ordinance: (1) caps on the number and size of mines or (2) codifying the County's conditional-use criteria. (MN Sands Br. 9-10.)

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[1] The record shows that some of the County's concerns are, at minimum, exaggerated. For instance, "underground mining techniques" (*See* Cnty. Br. 8; LSP Br. 5-8), are not used in Minnesota silica-sand mines (MN Sands Br. 3) and Minnesota Sands has never proposed them. Moreover, the areas of Wisconsin that allegedly have been negatively impacted by mining (Cnty. Br. 9; LSP Br. 2, 10, 29) host dozens, if not hundreds, of times more mined acreage than anyone has proposed for Winona County. (*See* MN Sands Br. 8-10.)

These proposals would have directly regulated mining intensity and scope, and could easily have addressed other similar concerns. But the County rejected these options. Instead it banned "industrial" mining outright, while placing no regulations or limits on the remaining "local" mining of the same sand.[2]

The Constitution does not allow that kind of discriminatory treatment of interstate commerce. If mining and processing silica sand for the interstate market were as inherently noxious as the County claims, then it could make such mining impracticable through facially-neutral, generally-applicable regulations on *all* sand mines. Minnesota Sands does not believe that to be the case. It remains committed to ensuring that its operations meet all appropriate criteria for environmental responsibility, and will work with the County to ensure that is so. The Commerce Clause entitles Minnesota Sands to make that effort without being discriminated against based on the interstate nature of its business. By contrast, this ordinance pursues the County's potentially-legitimate ends through the unconstitutional means of discriminating against interstate commerce.

B. The Ordinance Discriminates on Its Face and in Effect.

By its plain words, the ordinance bans mining silica sand for non-"local" use. And the practical effect is the same: the ordinance allows commerce in sand for an exhaustive list of local purposes, while prohibiting it for an equally-exhaustive list of interstate

[2] The LSP's protest about the expense and burden of the conditional-use criteria (Br at. 28) is irrelevant to the Ordinance's constitutionality. Government cannot justify unconstitutional discrimination on the ground that it is cheap.

purposes. (MN Sands Br. 12, 24.) Nevertheless, the County tries in various ways to deny that it is discriminating against interstate commerce. Its arguments fail.

1. The ordinance discriminates by definition.

The County claims that "the Ordinance Amendment does not distinguish between industrial silica sand based on the intended destination," but "prohibits industrial-mineral mining ... regardless of whether the mined material would be used in-state or out-of-state." (Br. 15, 18.) That is too clever by half. The discrimination lies in the ordinance's *definition* of the prohibited "industrial minerals." That definition expressly excludes "sand that is produced and used for local construction purposes"—and it defines "construction" to include essentially all local uses.

Having defined "industrial minerals" in this discriminatory way, the County cannot assert that it is even-handedly banning their mining for both intrastate and interstate purposes. If it could, the Commerce Clause would be toothless. Consider the paradigm Commerce-Clause violation in *Hughes v. Oklahoma*, 441 U.S. 322 (1979)**.** It would not have helped Oklahoma to re-draft its law to define minnows as "small fish that will be used outside of this state," and then claim that its ban on catching "minnows" was non-discriminatory. So here, the County's argument to that effect must fail.

2. The ordinance bans exports.

The County nonsensically states that "the Ordinance Amendment does not regulate where an existing product may or may not go." (Br. 16.) But that is exactly what the amendment does: its plain words allow silica-sand mining for "local" uses, but ban it

for non-local uses. It even specifically bans *transporting* silica sand for non-local uses. Under any reasonable reading, that is an export ban.

3. The ordinance directly prohibits interstate commerce.

It does not help matters that the ordinance bans *everyone* from engaging in interstate commerce, "regardless of whether that person or entity is from Minnesota, Wisconsin, or Canada." (Cty. Br. 15-16, *see id.* 18, 23.) Worse than discriminating against out-of-state companies, the ordinance directly discriminates against interstate commerce itself. The Supreme Court's export-ban and import-regulation cases have not involved discrimination based on the plaintiff's place of business. Instead they struck down regulations that impeded goods from crossing state lines. (*See* MN Sands Br. 24 (collecting cases).) And this must be so: accepting the County's argument would allow local laws stating that "all interstate commerce is prohibited in this jurisdiction," so long as it was prohibited to residents and non-residents alike. That certainly is not compatible with the Commerce Clause.

4. Allowing a few exports to a tiny sliver of Wisconsin would not cure the discrimination.

The County alleges (at great length) that the ordinance would permit shipping silica sand to whatever small area of Wisconsin might be "local" to Winona County. (Br. 19-21.)[3] Minnesota Sands has explained why that is mistaken. (*See* Br. 31.) But more

[3] The County even claims that "whether the ['local' exception] permitted the export of [silica sand] to Wisconsin" is a question of "fact" for the jury or for summary judgment. (Br. 19.) Of course that is wrong. The meaning of an ordinance is a question of law for the courts to decide.

importantly, this argument is irrelevant to the Commerce-Clause issue: state or local governments may not designate one small out-of-state location as the only one where their resources may be used. (*Id.* 31-32.) States could easily add a formalistic provision like that to any export ban. That would not meaningfully protect our nationwide common market, as the Commerce Clause does.

C. The Ordinance's Discrimination is Unconstitutional.

1. Many court decisions strike down export bans.

The County alleges that there are "no cases" other than water-rights disputes "prohibiting anything the courts have called an 'export ban'". (Br. 17.) That is difficult to take seriously. The same section of the County's brief identifies cases discussing bans on the export of minnows and of waste products. (*Id.* 16.) Minnesota Sands has identified many additional such cases (*see* Br. 23-24), and numerous opinions (from the U.S. Supreme Court on down) specifically disapprove "exportation bans" or "export bans." *E.g.*, *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982); *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Mgmt. Corp.*, 770 F. Supp. 775, 777 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991).

2. The "different markets" cases do not permit export bans.

Nor has the "different markets" exception to the Commerce Clause somehow overturned the rule against export bans. (Cty. Br. 25; *see* LSP Br. 18-19.) The County appears to argue that, while "industrial" silica sand is also suitable for "local" use, its particular characteristics allow it to command a higher price if it is processed for a different set of buyers on the national market. (Br. 27.) Even assuming that is true, the

County's legal conclusion does not follow. The "different markets" cases show that courts are slow to *infer* uncontitutional discrimination from facially-neutral regulations of activities that happen to occur in interstate commerce. They certainly do not justify laws that *overtly and expressly* discriminate against interstate commerce, as export bans do.

The caselaw bears this out. Winona County points to U.S. Supreme Court precedents that allowed states to impose higher taxes on fish that were preserved, and on natural gas that was distributed, by methods that were more prevalent in interstate commerce. *Alaska v. Arctic Maid*, 366 U.S. 199, 205 (1961); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997). But the Supreme Court has made crystal clear that this logic does not extend to facial export bans: the Court has struck down export bans on both fish and natural gas. (*See* MN Sands Br. 30.) And it has done so both before and after its "different markets" decisions. *Id.* Far from suggesting that one of these lines of cases has "impliedly overruled" the other, (*see* Cnty. Br. 25), Minnesota Sands' position is that they exist comfortably side by side, in two ways.

First, the "different markets" cases allow some regulations that distinguish between different kinds of *activities* (e.g., shore or ship freezing of fish; natural-gas wholesaling vs. retailing), even if one of the activities occurs more frequently in interstate commerce. But the export-ban cases show that this logic does not work backwards: laws that facially *prohibit interstate commerce* cannot be rationalized by pointing to alleged differences between the interstate and local markets. Since such differences exist for almost all goods, the County's contrary rule would yield absurd and unthinkable results. For just one example, consider fresh fruits and vegetables. *Arctic Maid* probably allows

local governments to place lighter taxes or regulations on produce that is grown for farmer's markets than on produce grown for supermarkets—even though supermarkets tend to be more involved in interstate commerce. But that does not mean that states may flatly *prohibit* exporting produce or allow growing produce only for "local consumption." The export-ban cases still prevent that.

Second, the "different markets" cases allow states to impose somewhat greater burdens on *existing* interstate trade. But the export-ban cases prevent them from categorically banning the same trade. This makes practical sense, since an outright ban is much more obviously discriminatory. Moreover, under any other rule, many prohibitions on interstate commerce would become self-justifying: governments could cause different "local markets" in goods to develop simply by prohibiting their citizens from participating in the interstate market. As Judge Johnson noted here, for instance, since local Winona-County quarries have lost the option of selling their sand on the interstate market, "local" customers will benefit from artificially-reduced demand and prices. The export ban creates, or at least perpetuates, the different "local market" that supposedly justifies its existence.

In sum, the "different markets" rule would arguably foreclose an existing interstate mining business from challenging some forms tax or regulatory burdens on its favored mining methods. But they do not permit a discriminatory and outright *ban* on mining for the interstate market. That violates the Commerce Clause.

3. The ordinance's burden outweighs its local purpose.

The Ordinance is also unconstitutional because it unduly burdens interstate commerce, even if the court finds it does not have a discriminatory purpose or discriminatory means.[4] *See Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447–48 (1978). The indisputable impact on interstate commerce has been described in sections 1.B.1 and 1.B.3, and the failure of the County's purported local purpose is described in section I.A. *supra*.

D. The County Mistakes a Claim of Facial *Discrimination* for a Facial *Challenge.*

Finally, the County appears to argue that it should win even if it *is* discriminating against interstate commerce because the ordinance is not "always unconstitutional in every application," and so it is not facially invalid. (Br. 21, 28.) This confuses a claim of facial *discrimination* with a claim of facial *invalidity*.

Facial discrimination, in the Commerce-Clause context, simply means that a law's very words treat intrastate and interstate commerce differently—as here, where the ordinance allows "local" commerce, but bans other kinds. Minnesota Sands can bring that claim without also arguing that the ban is facially *invalid* in the sense that every conceivable application of it would violate the Commerce Clause.[5] Rather, Minnesota

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[4] The Court of Appeals incorrectly stated that Minnesota Sands had not argued the *Pike* balancing test. *See* Index #82 at 36-38; Ct.App. Reply Br. 3 n.2 (discussing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447–48 (1978)), 8 ("[t]he Ordinance ...unduly burdens interstate commerce").

[5] Nevertheless, Minnesota Sands brought both facial and as-applied challenges in this case. Index #144 at 21 (facial); Index # 22 at 18. (Minnesota Sands seeking damages, an

(continued on next page)

Sands claims that the ordinance's facial discrimination prohibits interstate commerce *by Minnesota Sands*, and *that* violates the Commerce Clause.

It is not clear why the County thinks that Minnesota Sands is barred from seeking "an injunction [against] enforcement of [the] Ordinance Amendment itself." (Br. 28.) Minnesota Sands claims that enforcing the ordinance *against it* would violate the Commerce Clause so, of course, it seeks an injunction preventing that. To be sure, Minnesota Sands' legal arguments would apply equally to other silica-sand mining for interstate commerce, and so the courts likely would have discretion to craft a broader injunction as well.[6] But an as-applied injunction would equally grant full relief to Minnesota Sands.

Whether the Commerce Clause might allow the County to shut down other hypothetical silica-sand mining is not relevant to this case. Minnesota Sands need only show that it wishes to engage in the kind of interstate commerce that the County has facially discriminated against. There is no dispute that it does.

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as-applied remedy, for Winona County's violation of the commerce clause); *see also* Ct. App. Reply Brief at 3.

[6] The County points out that the Commerce Clause allows it to ban mining silica sand for use elsewhere in Minnesota. (Br. 24.) If the courts decide to enjoin the Ordinance as to all interstate commerce, then whether they should let it stand in this slim minority of its applications is a question of discretion and severability, to be decided under Minn. Stat. § 645.20. (*See* MN Sands Br. 18-20.)

II. The Ordinance Amendment Takes Minnesota Sands' Property.

"A zoning law effects a taking if (1) it does not substantially advance a legitimate governmental interest, *or* (2) it denies an owner economically viable use of land." *Naegele Outdoor Advert. Co. of Minneapolis v. City of Lakeville*, 532 N.W.2d 249, 252 (Minn. Ct. App. 1995) (emphasis added). So, in contradiction to Winona County's selectively cited case law, a zoning ordinance can effect a taking even if it is also substantially advancing a legitimate government interest.

Here, in addition to taking property, the Ordinance Amendment fails to substantially advance a legitimate state interest. If the County were truly interested in banning silica sand mining, it would have banned mining of all silica sand – not just that mining of silica sand where the end user is situated outside the "local" area. (*See* section I.A, *supra*.) While some zoning ordinances are reasonable, "other enactments are unreasonable and do not become less so through passage of time or title." *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (finding acquisition of title after the effective date of the regulations did not bar a takings claim). "Reasonable" land use regulations do not include those where the state has a non-discriminatory alternative, but fails to pursue it.

In Minnesota, a party who did not even gain an interest in their property until after the effective date of the regulation has a takings claim. *Miskowiec v. City of Oak Grove*, No. A04-82, 2004 WL 2521209, at *5 (Minn. Ct. App. Nov. 9, 2004) (finding "it is clear that a takings claim can pass with the property's title, even where the subsequent owner had notice of existing restrictions on the property"). Here, where Minnesota Sands had

obtained the property rights prior to the zoning ordinance, but simply had not begun to engage in the activity before the effective date of the zoning ordinance, the taking is even more clear.

A. This is a Case About More Than "Mere Desire."

1. Minnesota Sands had the right to mine.

Winona County explains that the U.S. Supreme Court in *Lucas* found that the denial of a permit to fill in a lakebed was not compensable in part because "[t]he use of these properties for what are now expressly prohibited purposes was *always* unlawful." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (quoted in Cty. Br. 31-32). That is not the case here. Sand mining was not unlawful until Winona County enacted the Ordinance Amendment and Minnesota Sands made significant investments in preparation to mine sand, to the tune of $2,595,500.00, including:

- invested millions of dollars sampling and testing Winona County sand, obtaining several mineral leaseholds;
- continued to pay taxes on the properties where it held these leaseholds as required by the leases;
- renewed leases;
- conducted environmental-review activities;
- developed operating plans;
- bought purchase options for transport and processing sites; and
- maintained purchase options for transport and processing sites.
  Index #s 92-93.

In addition, Minnesota Sands had engaged both the County and the State prior to the effective date of the zoning ordinance with respect to conditional use permits and environmental review. On August 17, 2012, Minnesota Sands submitted two CUPs to Winona County. (Index #93 ¶ 44.) These two permit applications were put on hold as environmental review work took place. (*Id.* ¶ 45.) Minnesota Sands worked with Winona County to prepare Environmental Assessment Worksheets for the mines, but it was directed by the County to seek an Environmental Impact Statement (EIS) prior to submitting the permit request due to other mining applications submitted by Minnesota Sands in two other counties in Southern Minnesota. (*Id.* ¶ 46.) Minnesota Sands began the EIS process for all of its proposed mines but temporarily suspended it due to disappointing and unfavorable market conditions for silica sand. (*Id.* ¶ 47.) As this environmental review work was pending, the County adopted the zoning amendment at issue in this case. This is not a case about "mere desire."

2. Minnesota Sands does not Need a CUP to have a Property Interest.

Winona County mischaracterizes Minnesota Sands' position when it claims that "[i]n short, without citing any law supporting such a proposition, Appellant claims a zoning ordinance creates a vested and compensable right in the perpetual option to engage in a conditional use." (Br. 33-34.) Minnesota Sands does not claim that the County has "taken" any right to engage in activity—it claims a regulatory taking *of its mineral rights.* The claim is straightforward: (1) Minnesota Sands owns mineral rights in the form of leases for mineral rights; (2) the Ordinance Amendment prohibits all or most economically-viable uses of the mineral rights; so (3) this regulation is a total or partial

taking of the leaseholds themselves. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'") (citation omitted).

The County goes to great lengths attacking a very different theory. It insists that the "property" at issue in a regulatory-takings case is "a *right* to engage in a specific activity" that the regulation prohibits. (Br. 30-31.) That is incorrect; property rights generally attach not to activities but to land or things. Suppose, for instance, that the government prohibited a person from sleeping in their bedroom or cooking in their kitchen. They would not bring suit alleging that the government had taken the "right to engage in [the] specific activity" of cooking or sleeping. But they *could* bring suit alleging that the regulations totally or partly took *the house itself*, by destroying or impairing its value. So here: the alleged taking is not of a right to activity, but of the leaseholds themselves.

Nor does it matter that Minnesota Sands owns leasehold rather than fee interests in the minerals. Though a lease does not convey title to the land, it creates an interest in the property for which compensation under the Takings Clause is due. *See Seabloom v. Krier*, 18 N.W.2d 88, 91-92 (Minn. 1945) (finding that where an award of $7,850 was made for the taking by the state for highway purposes of a small tract on which was situated a tavern operated by lessees under an $800 one-year lease, awarding them $800 of the total award for their interest in property taken was proper). "If there is a taking of a

leasehold interest, lessees are entitled to the fair rental value of the premises, less the amount of the rent, for the remainder of the term of the lease." *Naegele Outdoor Advert. Co. of Minneapolis*, 532 N.W.2d at 253; *see also* cases cited in Minnesota Sands' opening brief at 36-37.

Because the County wrongly focuses on an imaginary property right in an "activity," it misses the point in claiming that Minnesota Sands has a "mere expectancy" because it does not have a CUP to mine. (Br. 34.) The cases cited by Winona County do not support its point; none of them relate to mineral rights, and only one considers whether an underlying property interest was taken.

- *Continental Property Group* is not a takings case. The developer in *Continental Property Group* only had an option on the properties he wanted to develop; he did not own or lease them. The case was not analyzing whether he had a property interest that had been taken; they were analyzing whether he had a property interest in a CUP application that had been denied procedural due process. The court explicitly stated that "the property interest at stake in the context of a denial of due process relative to a land-use application is the application itself, not the title to the underlying property." *Cont'l Prop. Grp., Inc. v. City of Minneapolis*, No. A10-1072, 2011 WL 1642510, at *5 (Minn. Ct. App. May 3, 2011). In a takings case, the underlying property interest is at issue, and so *Continental Property Group* is inapplicable here.
- In *Snaza v. City of Saint Paul*, 548 F.3d 1178 (8th Cir. 2008), the party was not entitled to a CUP because it was *undisputed* that the party did not meet the

requirements of the zoning regulations to obtain one. No court has analyzed whether Minnesota Sands met the requirements to obtain a CUP before the zoning ordinance passed. Moreover, the *Snaza* court only considered whether the applicant had a protected property interest in her application for a CUP, because she had not raised her protected property interest in the land in the district court. So again, the *Snaza* court provided no analysis on whether her underlying property had been taken.

- In *Concept Properties, LLP v. City of Minnetrista*, 694 N.W.2d 804 (Minn. Ct. App. 2005), the takings question was whether appellant's property had been taken where appellant was not allowed to connect to the city sewer line until 2020 and had the alternative of building its own septic system to serve its property in the meantime. 694 N.W.2d at 823. In that case, there was no taking because Concept Properties could still develop its land as it desired. That is not true here.

As explained in its opening brief, Minnesota Sands did not need a CUP in order to have a property interest that could be taken.

If the County instead means to argue that the Zoning Ordinance did not really affect Minnesota Sands at all, because its proposed mining was already illegal due to the lack of a CUP, this is also incorrect. This argument would not be that Minnesota Sands lacks a property interest, but that the ordinance amendment does not materially *regulate* the property interest and so cannot qualify as a taking. In effect the argument would be that, for takings purposes, a regulation is not a regulation when it occurs in slow motion. If a zoning authority completely bans a land use that was legal the day before, of course

that is the kind of regulation that can qualify as a taking (if the other legal elements are satisfied). But the County seems to argue that, if it first makes the activity a conditional use and *later* completely bans it, no step in that process qualifies as the kind of regulation that could be a taking. That cannot be right.

Winona County thus gets things backwards when it says "[i]f this court were to conclude the Ordinance Amendment effected a taking …local zoning authorities could effectively lose all zoning power[.]" (Br. 35.) Landowners may not claim (and Minnesota Sands is not claiming) that every zoning amendment is a taking of the "right" to engage in the "activity" that it prohibits. What Minnesota Sands is claiming is that banning a previously-conditional use of a property is a *regulation* of property. The majority of property regulations are not regulatory takings, so the takings clause does not threaten zoning authority generally. It only means that landowners should receive compensation in the rare cases where a ban on a previously-conditional use satisfies the other criteria for a taking.

In *Eagle Lake*, the Court of Appeals found that the vested rights doctrine did not prohibit a County from considering a party's takings claim under a prior version of an ordinance. *Eagle Lake of Becker Cty. Lake Ass'n v. Becker Cty. Bd. of Comm'rs*, 738 N.W.2d 788, 795 (Minn. Ct. App. 2007) ("We decline to accept ELA's assertion that the vested-rights principle has an inverse quality: that by implication it requires application of the new ordinance unless there are vested rights. Nothing in the vested-rights principle gives it such a limiting affect [sic] on the county's discretion.").

Winona County cites several zoning ordinance cases in an attempt to misdirect the analysis away from the question of whether Minnesota Sands' property has been taken without compensation. *See Ridgewood Development Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980) (non-takings, non-mineral rights case rejecting an equitable estoppel argument); *State v. Iten*, 106 N.W.2d 366, 81-82 (Minn. 1960) (non-takings, non-mineral rights case in which a property owner began constructing a building in violation of a zoning ordinance, and the county sued to stop him); *Kiges v. City of St. Paul*, 62 N.W.2d 363, 537 (Minn. 1953) (non-takings, non-mineral rights case in which the property owner was prohibited by a zoning ordinance from erecting a certain type of building). These cases only establish that zoning ordinances can be changed. They do not establish that a county may enact an unconstitutional zoning ordinance or fail to provide compensation when a zoning ordinance takes property.

3. At the least, whether Minnesota Sands met the CUP requirements is a disputed question of fact.

Winona County unfortunately regards the loss of property rights of one of its local businesses as a lighthearted matter. (Br. 37.) This claim by Minnesota Sands is a very serious one. The district court erroneously found that because mining was a conditional use, without a permit "a taking is not effected." (Index #148 at 20.) This is directly contradicted by the case law Minnesota Sands cited in its opening brief (at 35-38). Thus, Minnesota Sands' statement that "[a]t the very least, whether Minnesota Sands was eligible for a conditional-use mining permit is a disputed issue of material fact[,]" is accurate. (*Id.* 38.)

Additionally, Winona County implies that the EQB environmental review was somehow part and parcel with a CUP, but does not point to record evidence supporting that assertion. Instead, the factual evidence on that point in the record is the affidavit of John Dustman, which established that "it is possible that Minnesota Sands would not be required to complete an EIS if its proposed mining plan did not meet the mandatory EIS categories outlined in state law and the RGU determined that the project did not have the potential for significant environmental effects." (Index #92 ¶ 31.) Again, at the very least, the trial court should have made a factual determination about this point.

4. Minnesota Sands' leases are compensable property interests.

Winona County states the rule that "[t]he court will determine if a leasehold interest has been subject to a taking by determining whether the lease terms were altered by the ordinance." (Br. 39.) In support of this rule, Winona County cites *Naegele Outdoor Advert. Co. of Minneapolis*, 532 N.W.2d at 253. But *Naegele* is a case about a party whose leasehold interest was properly terminated under the terms of its leases by the property owner, not the zoning ordinance. That is why the court found Naegele's property had not been taken. The same is not true here. The property owners have not terminated Minnesota Sands' leasehold interests; the Zoning Ordinance has simply made them valueless.

Winona County's assertion that Minnesota Sands does not have a direct ownership interest in the sand "as it exists in the ground" is misguided. (Br. 39.) It follows from Winona County's assertion that since the landowners do not have a permit to mine silica sand, they also lack an ownership interest in the silica sand at this moment. So Winona

County's argument leads to the absurd conclusion that because the county has banned silica sand mining, that no one owns the silica sand "as it exists in the ground on the property at this moment." (*Id.*) It is not possible, as Winona County apparently suggests, that no one has an ownership interest in the silica sand until someone obtains a permit to mine it. That would mean neither the landowners nor Minnesota Sands currently have a property interest to the mineral rights of the subject property. That cannot be the case. If the government can decide by issuing a permit when a party owns their property, that would allow government to circumvent not just takings law, but any area of law where property interests are protected.

B. Mineral Rights are Property.

Winona County claims that Minnesota Sands has no mineral rights because "[i]f the leases expire or Appellant fails to comply with the terms of the leases (such as by failing to obtain the required regulatory approvals to mine), Appellant has no claim of right to the sand." (Br. 42.) The fact that at some point in the future, Minnesota Sands may not hold the mineral rights for these properties is irrelevant to this court's analysis. Again, allowing future uncertainties to undermine property rights would be a free pass to the government to take property without just compensation. Winona County cites no case law to support this point.

Winona County again misrepresents Minnesota Sands' briefing when it claims that Minnesota Sands suggests the U.S. Supreme Court has not addressed the severability of property for taking analysis. (*Id.*) What Minnesota Sands instead stated was: "To the extent that the U.S. Supreme Court has not expressly addressed th[e] issue [of whether

mineral rights are a property interest independent of the surface estate], the lower courts have filled the gap." (Br. 43.) No case Winona County cites contradicts this statement. In addition, Winona County ignores the differences between the federal takings doctrines and the Minnesota test. The factors considered under Minnesota's constitutional test are similar, *see Wensmann Realty, Inc. v. Eagan*, 734 N.W.2d 623, 632 (Minn. 2007), but Minnesota's test applies the factors more leniently, making it easier to show a taking. *Interstate Cos. v. Bloomington*, 790 N.W.2d 409, 413 (Minn. Ct. App. 2010).

Winona County argues that the *Pennsylvania Coal* and *Keystone Bituminous Coal* cases "exhibit a change in the Court's approach to regulatory-taking claims, with the Court now demonstrating regular rejection of 'conceptual severance' of property in regulatory-taking claims." (Br. 42.) The Ninth Circuit case Winona County relies on to make this ambiguous claim about "conceptual severance" does not relate to mineral rights. Instead, *Tahoe-Sierra Pres. Council* rejected a *Lucas* categorical taking claim from property owners who had only temporarily been prevented from using their property due to a moratorium. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000), overruled on other grounds by *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012). On appeal, the U.S. Supreme Court found that petitioners could not define their property interest as ownership solely during the moratoria, but added, "[i]n rejecting petitioners' *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes a finding that it effects a taking[.]" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337 (2002).

Mineral rights are longstanding features of state property law, not prohibited "conceptual severance." In an opinion that references the U.S. Supreme Court's *Tahoe* opinion, for example, Ohio found that "coal rights are severable and may be considered as a separate property interest if the property owner's intent was to purchase the property solely for the purpose of mining the coal." *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1005-10 (Ohio 2002) (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)).

Winona County puzzlingly suggests that because the terms of Minnesota Sands' leases are not as broad as Minnesota's mineral rights framework would allow, that Minnesota Sands has no compensable property interest. (Br. 43.) As discussed above, leasehold interests are supported by Minnesota and federal case law as property that can be taken. *Phillips*, 524 U.S. at 164; *Seabloom*, 18 N.W.2d at 91-92; *Naegele Outdoor Advert. Co.*, 532 N.W.2d at 253. Winona County's assertion that fee ownership is required to hold mineral rights, (Br. 43), is misguided. A party does not need to own property either in the mineral context or elsewhere in order to have a property interest.

Winona County would propose the new rule that leaseholders have "artificially" divided property and are not entitled to just compensation for taken property. Because a lease is always only a part of the bundle of sticks of property rights, Winona County would encourage this Court to decimate the property rights of leaseholders. (Br. 44.) Instead, the *Naegle* court, cited by Winona County in another portion of its brief, states that, "If there is a taking of a leasehold interest, lessees are entitled to the fair rental value

of the premises, less the amount of the rent, for the remainder of the term of the lease." 532 N.W.2d at 253.

Winona County's concern with "gamesmanship" (Br. 45) is similarly misplaced. A lease of mineral rights is the standard way for parties to gain access to mine and has been for hundreds of years. "There is general consensus among the states that an oil and gas lease creates a property interest[.]" *Chesapeake Expl., L.L.C. v. Buell*, 45 N.E.3d 185, 194 (Ohio 2015) (citing Keeling & Gillespie, 37 St. Mary's L.J. at 7). In fact, states themselves often lease mineral rights. *See, e.g.*, *State v. Evans*, 99 Minn. 220, 108 N.W. 958 (1906); § 32 E. Min. L. Found. § 14.07. LEASING STATE OWNED MINERALS., 2011 WL 12450140.

Winona County then goes on to assert (without any support in the law) that "[l]eases are arguably less formal than lot lines" and that the U.S. Supreme Court in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) has rejected lot lines altogether. (Br. 45.) These are dubious policy propositions, but even if they were true, *Murr* is easily distinguishable; unlike here, the lots in *Murr* were owned by the same owners. The *Murr* Court could not have been suggesting that a property should always be considered together with the lot next to it, and that the two properties together, each owned by different owners, should be the denominator.[7] In addition to being an absurd interpretation of property law, it is

[7] In *Murr*, there were regulations preventing "the use or sale of adjacent lots under common ownership as separate building sites unless they have at least one acre of land suitable for development." *Murr*, 137 S. Ct. at 1936. There are no such regulations preventing landowners leasing their mineral rights here.

illogical, and would lead to the state never needing to pay for its takings. The two lots in *Murr* were considered together only because a single group owned both lots. *Id.* at 1946. But lessors and lessees are always different parties (otherwise no lease would be needed) and must be considered separately for purposes of a takings analysis. Thus, Winona County's attempts to pound the square *Murr* peg into the round hole of these facts is unavailing.

Winona County does not provide a citation when it asserts that Minnesota Sands would render "the surface unusable for other purposes." (Br. 47.) Minnesota Sands has made clear that its "reclamation efforts will ensure that the mined land will result in beautifully restored prairies and farmland that will serve the recreational and agricultural needs of the community for generations." (Index #93 ¶ 70.) The County has never bothered to find out how Minnesota Sands planned to mine the properties, but instead prefers to live in an echo chamber of worst case scenarios. Large open pits are not the only way to mine silica sand. As its Planning Commission proposed, Winona County could require mining of small sections of land at a time and reclaiming and replanting mined land a condition of the permit.

C. The Zoning Ordinance Constitutes a Partial Taking of Minnesota Sands' Property.

Minnesota Sands has provided a thorough analysis of its claims under the *Penn Central* test in its opening brief at pages 38-41 and will briefly respond to a few of Winona County's arguments here.

1. Economic impact

In arguing that the zoning ordinance does not have an economic impact on Minnesota Sands, Winona County disregards that Minnesota Sands only has leases to mine frac sand, and not sand that would be used for local construction purposes. But in any case, Winona County admits that the payments it maintains under the leases could be considered economic loss, (Br. 50); at the very least, this case should be remanded to the District Court to determine what that amount would be.

2. Investment backed expectations

Winona County's response to this argument is supported only by one citation to an unpublished case, *Continental Property Grp.* (Br. 51.) This non-takings case does not consider an interest in underlying real property (only an interest in a CUP) and is easily distinguished from the facts here, as described in section II.A.2, *supra*.

3. Character of the regulation

The County argues that banning mining for industrial purposes is unlike protecting land for a "road, park, or airport[.]" But in the same breath, Winona County praises the "valuable Karst formations" and states that "[t]he Ordinance Amendment was enacted to protect unique and sensitive karst formations in the County, as well as public health, agricultural operations, natural and scenic beauty, water sources, property values, and

County resources[.]" (Br. 53) The County is essentially requiring property owners and leaseholders to maintain acres of land as a private park at their own expense for the benefit of others. And as stated previously many times, if the County was concerned about these things, it could have written an ordinance limiting the number of mines or the size of mines, or the number of trucks that could drive on Winona County's roads. It did none of those things, but instead targeted a few property owners and leaseholders, depriving their property of value.

D. Total Taking

A total taking does not require 100% diminution as Winona County claims. (Br. 54.) For example, the *Lucas* appellant's property was a total taking, even though he arguably could have still used his beachfront properties for camping or rented them out to visitors who wanted to spend a day in the sun. *See* 505 U.S. at 1003. But even if 100% diminution were required by the law, Minnesota Sands' expert has opined that the market value of Minnesota Sands' leasehold interests is now "$0." Index # 100 ¶ 8. So at the least, there is a dispute over a material fact, and this case should be remanded to the district court.

Dated: February 1, 2019

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In Supreme Court

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Appellant,

v.

County of Winona, Minnesota,
a Political Subdivision of the
State of Minnesota,

Appellee.

Appellate Court Case No. A18-0090

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CERTIFICATION OF LENGTH OF DOCUMENT

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