NO. 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.

WINONA COUNTY'S PRINCIPAL BRIEF

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The lower courts properly concluded that because Appellant did not have a right to mine silica sand at the time the Ordinance Amendment was adopted, it did not suffer a taking. The district court also properly concluded that Appellant retains reasonable and economically beneficial use of its mining leases under the Ordinance Amendment.

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STATEMENT OF THE CASE

This dispute arises out of Appellant's challenge to an ordinance amendment (the "Ordinance Amendment") adopted by Respondent Winona County (the "County"). The appeal arises from a consolidated case proceeding before the Honorable Mary C. Leahy in the Third Judicial District Court involving separate lawsuits filed against the County by Southeast Minnesota Property Owners ("SMPO") and Roger Dabelstein (Case No. 85-CV-17-516) and Appellant Minnesota Sands, LLC (Case No. 85-CV-17-771) challenging the same legislative action by the County.

The district court considered cross motions for summary judgment by all parties in the consolidated matter. Appellant and SMPO argued a number of theories challenging the validity of the Ordinance Amendment. Appellant asserted varied constitutional violations, seeking declaratory relief and damages. The district court granted summary judgment in favor of the County, finding the Ordinance Amendment valid and constitutional.

Appellant appealed the district court's ruling on only two of its claims. Appellant did not appeal the district court's determination that the County's legislative determination to adopt the Ordinance Amendment was reasonable, and based on legitimate local health, safety, and welfare considerations. The court of appeals determined the Ordinance Amendment did not violate the Commerce Clause and did not constitute a "taking" of a protected property right.

On October 24, 2018, this Court granted Appellant's petition for review.

STATEMENT OF THE FACTS

This appeal relates to the County's legislative determination to change the way the County regulates mining. Appellant asserts a desire to engage in silica-sand mining in the County, which is subject to regulation under the revisions to the ordinance.

A. Silica Sand Operations and County History

Historically, discussions regarding the potential effects of silica-sand mining in Winona County began in 2011, when the County received three conditional-use permit ("CUP") applications. The applicants sought to engage in industrial-level silica-sand mining in the County. Add. 3, ¶11.[1] Interest in industrial silica-sand mining was fueled by increased demand for such sand for domestic oil production through hydraulic fracturing or "fracking." Add. 3, ¶10.

After receiving the CUP applications in 2011, the County tabled discussion of these requests in order to study the community and environmental impacts of industrial-mining activities. Add. 4, ¶¶12-14. On January 10, 2012, the County Board of Commissioners ("Board") denied the pending CUP applications for silica-sand-mining operations and enacted a moratorium on silica-sand mining to allow the County to study the issue. Add. 4, ¶15.

At the end of the moratorium, the Board adopted a silica-sand-mining pre-application packet, a road-use agreement, and various other documents related to silica-sand mining. Add. 4-5, ¶16. The moratorium expired on May 1, 2012. *Id.* Extraction

[1] This document can be found in the appellate record at Document Index Number (hereinafter, "Doc.") 134, at pages WC3015-WC3037.

pits and land alterations associated with mining remained a conditional use under the Winona County Zoning Ordinance ("WCZO") and subject to the standards in WCZO § 9.10.[2]

In 2013, one of the previous CUP applicants, David Nisbit, reapplied for and was granted a silica-sand-mining CUP. Add. 5, ¶¶17-18. Upon appeal to the court of appeals, this CUP and a parallel negative EIS determination were upheld. Add. 5, ¶18. The County has received no other CUP applications for silica-sand mining. *Id*.

B. Ordinance Amendment Procedure

In spring 2016, the Land Stewardship Project ("LSP") submitted a proposed ordinance amendment which renewed conversations about the effects of industrial-level mining in the County. Add. 1, ¶1; Doc. 123, WC0619-WC0631. Specifically, LSP asked the County to disallow activities related to the mining or processing of silica sand. Doc. 124, WC0701. On April 26, 2016, the Board voted to begin a review of potential WCZO amendments with respect to mining activities in the County. Add. 1, ¶1.

At its June 14, 2016 meeting, the Board received analysis from the County Attorney regarding the proposed ordinance, as well as alternative language to regulate mining, and voted to forward the County Attorney's alternative language ("Proposed Ordinance Amendment") to the Winona County Planning Commission ("Planning Commission") for review and recommendation. Add. 1, ¶2-3. On June 30, 2016, the Planning Commission held its first public hearing on the Proposed Ordinance

[2] The WCZO in effect at the time the Ordinance Amendment was adopted can be found in the appellate record at Doc. 136.

Amendment. Add. 2, ¶4; Doc. 126, WC0843-WC0850. The Planning Commission continued its discussion at its July 21, 2016 meeting, identifying additional information it needed before it could make a recommendation to the Board and setting a schedule to allow adequate time to consider additional information. Doc. 126, WC856-WC0866.

At its August 8, 2016 meeting, the Planning Commission took additional testimony, which continued at its August 11, 2016 meeting. Doc. 126, WC0902-WC0915. In addition to the information presented at the meetings, the Planning Commission considered over 200 written submissions, which amounted to thousands of pages of information and commentary for and against the Proposed Ordinance Amendment. Docs. 122, 125, 127, 128, 130, 131, 140. Commentary was received not only from ordinary citizens who had concerns about the effects of mining on their daily lives, but also from experts, including physicians concerned about the effects of industrial-level mining on public health. *See, e.g.*, Doc. 126, WC0902-WC0915.

After receiving extensive information about mining operations, the Planning Commission discussed the merits of the Proposed Ordinance Amendment. Doc. 126, WC0913-WC0914. The Planning Commission voted to recommend a different zoning amendment, which would allow for industrial-mineral operations, but limit the number and size of industrial mines in the County ("Planning Commission Recommendation"). Doc. 126, WC0914.

Both the Planning Commission and the Board had the benefit of reviewing a report prepared by the Environmental Quality Board ("EQB") dated March 19, 2014. Add. 8, ¶22. That report was prepared in response to a legislative directive to study the

effects of silica-sand mining. The report contained specific information about mining in fragile karst regions of the state, including the County. *Id.*

On August 23, 2016, the Board received the Planning Commission Recommendation and directed the County Attorney and Planning Department to assess the recommendation and provide additional information and analysis. Add. 2, ¶6; Doc. 124, WC0752-WC0756, WC0760. It also scheduled a public hearing on the Planning Commission Recommendation on October 13, 2016, and accepted written comments until October 18, 2016. Add. 2, ¶7; Doc. 124, WC0760- WC0761. Over 100 people spoke at the public hearing and the Board received over 150 additional written submissions. Add. 2, ¶7; Doc. 124, WC0761; Docs. 121, 129.

At its October 25, 2016 meeting, the Board considered options for amending the mining provisions in the WCZO. Add. 3, ¶8. The Board considered the information gathered throughout the amendment process and a memorandum from County staff. Doc. 124, WC0767-WC0775. The Board voted to adopt the Proposed Ordinance Amendment as it was originally presented to the Planning Commission and directed County staff to draft the final ordinance language and findings, conclusions, and an order for consideration at the following Board meeting. Add. 3, ¶8; Doc. 124, WC0760.

On November 22, 2016, the Board approved the "Procedural History, Findings of Fact, Conclusions, and Adoption of Zoning Ordinance Amendment," which formally adopted the Winona County Zoning Ordinance Amendment Regarding the Mining and Processing of Industrial Minerals in Winona County ("Ordinance Amendment"). *See* Add. 1-23.

The Ordinance Amendment's distinction between industrial and construction-mineral operations is at the heart of Appellant's claims in this litigation. The County did not itself create this distinction; rather, these distinctions are recognized by other governmental entities and those in the mining industry. Industrial minerals, including industrial silica sand, are referenced throughout the studies and data submitted to the County, and the U.S. Geological Survey addresses industrial sand and construction sand as separate minerals. *See, e.g.*, Doc. 128, WC1033; Doc. 129, WC0430. The Florence Township Ordinance, which the County found to be a useful guide, also distinguishes between industrial-mineral operations and construction-mineral operations. Add. 15, ¶48. In its ordinance, Florence Township explains that "industrial mineral mining land use operations are larger-scaled industrial, consume more appropriated water, require more concentrated heavy truck hauling to single destinations, and embrace other differences than the mining of construction minerals." Doc. 123, WC0656. It also explains that the Minnesota Department of Natural Resources distinguishes between industrial-mineral and construction-mineral operations. Doc. 123, WC0656.

Other evidence in the County's legislative record supports the proposition that construction and industrial-mineral operations are different in terms of size, operations, and desired product. Doc. 125, WC2389. Construction-mineral operations tend to involve small mines engaging in periodic mining activities and do not involve

underground mining, blasting, or chemical processing. EQB Report,[3] 77; Doc. 125, WC2389. Industrial-mineral operations involve larger mines in operation for long periods of time that use blasting and underground-mining techniques and involve chemical treatment of the mined sand and significant water appropriation and storage of chemically-infested waters. EQB Report, 77; Doc. 125, WC2389.

Specific to sand mining, industrial silica sand must meet particular standards for size, shape, purity, and intactness, which is achieved by mining in the County's fragile karst region using chemical-flocculent processing and requires a significant amount of water. EQB Report, 87, 150; Doc. 125, WC2389. Sand not meeting the desired standards is commonly returned to the mine contaminated with flocculent. Doc. 125, WC2389. Construction sand is not subject to these standards or processing requirements. The interest in silica-sand mining has been driven by the oil and gas industry, with demand for silica sand more than quadrupling between 2008 and 2012. Doc. 127, WC1422. The oil and gas industry is a large-scale consumer of this mineral, seeking millions of tons of silica sand during boom times, and carrying with it associated increased and intense hauling demands. EQB Report, 77; Doc. 127, WC1414-WC1432.

With the exception of the Nisbit mine, mining operations in the County have been limited to construction-mineral operations. Evidence in the record regarding industrial-

[3] This document entitled Environmental Quality Board Tools to Assist Local Government in Planning for and Regulating Silica Sand Projects can be found in the appellate record at Doc. 125, WC2427-WC2627. Because this document is repeatedly cited, the County cites this document as "EQB Report," and page citations refer to the number originally assigned in the document.

mineral operations in nearby Wisconsin counties clearly exemplifies the differences between the construction-mineral operations the County has experienced and the size and impact of industrial-mineral operations driven by a newfound demand for silica sand. *See, e.g.*, Doc. 121, WC0078-0089; Doc. 126, WC0905.

C. Purpose and Rationale for the Ordinance Amendment

The Ordinance Amendment revises the language in Chapters 9 and 10 of the WCZO, explaining the purpose for the County's regulations related to mining and establishing that industrial-mineral operations are prohibited in all County zoning districts. Add. 26-27,[4] §§ 9.10, 10.11. It incorporates state law, which requires regulations on silica-sand operations be different based on state region, emphasizing the uniqueness of karst conditions in southeastern Minnesota. *Id.*

The Board's Findings further detail the Board's rationale in approving the Ordinance Amendment, addressing the policies established by the WCZO and Comprehensive Plan ("Comp Plan") for land use planning, other applicable legal guidance, and evidence in the record that supports the decision. The Findings explain the primary concerns about industrial mining relate to the impact industrial silica-sand mining, transportation, and processing operations will have on air and water quality, traffic and road safety, and natural landscapes. Add. 3-4, ¶11. The Board also found the mining and processing of industrial minerals negatively affects the health, safety, and general welfare of the County's citizens, and its decision to enact the Ordinance

[4] This document is included in the appellate record at Doc. 132.

Amendment is related to the specific impacts industrial-mineral operations would have within the County. Add. 9, ¶24.

Throughout its Findings, the Board emphasized the connection between the Ordinance Amendment and unique geologic conditions in the County. Specifically, the County's karst landforms and topography warrant particular consideration with respect to mining. Add. 10, ¶29. Relying on the EQB Report, the Findings emphasize that the Ordinance Amendment is important to protecting and maintaining groundwater resources given the County's karst conditions and more information is necessary on the effects of this type of silica-sand mining on groundwater in karst regions. Add. 17, ¶53. The Findings recognize that industrial mining and silica-sand processing has observable and documented negative impacts on local economies and natural environments as shown by industrial silica-sand mining in Wisconsin counties, including declining property values, community stress and diminished wellbeing, and unmet financial obligations. Add. 12, ¶34. Nowhere do the findings indicate the Ordinance Amendment was adopted based on concerns about end-use, i.e. hydraulic fracturing.

Based on the evidence submitted during its detailed study process, the Board concluded the Ordinance Amendment should be adopted, is consistent with state and local law, and was adequately supported by public health, safety, and welfare concerns. Add. 23. Importantly, neither the rationality of the Ordinance Amendment nor its record support has been challenged on appeal.

D. District Court Proceedings

After the County adopted the Ordinance Amendment, Appellant and SMPO filed separate challenges to the Ordinance in district court, which were consolidated by the parties' agreement. Docs. 30, 32. The parties brought cross motions for summary judgment, agreeing there were no issues of material fact. App. Add. 53. On November 17, 2017, the district court granted summary judgment in favor of the County and dismissed Appellant's and SMPO's claims. App. Add. 45.

The court issued a 19-page memorandum explaining its decision, examining the County's extensive deliberation process and detailing the support in the legislative record demonstrating the County's adoption of the Ordinance Amendment was reasonable and based on legitimate health, safety, and welfare considerations. App. Add. 46-53. The court specifically rejected the plaintiffs' invitation to reweigh record evidence to conclude there is no distinction between industrial and construction-mineral operations and their assertion that the County was attempting to regulate the end use of silica sand mined in the County. App. Add. 55-58. It ruled the County's distinction has a rational basis, which supports a determination that industrial-mineral operations cause a greater detriment to the general welfare of the County, including significant environmental, health, and economic concerns. *Id.* Appellant has not challenged these district court findings on appeal.

The district court rejected the plaintiffs' claims of constitutional violations premised on the interstate-commerce and takings clauses. App. Add. 60-63. With respect to the interstate-commerce claims, the district court concluded the Ordinance

Amendment was not discriminatory, noting that construction and industrial-mineral operations serve two different markets. App. Add. 60. It found that the Ordinance Amendment does not benefit a local competitor in one of those markets over an outside competitor in the same market and, therefore, does not implicate the interstate-commerce clause. App. Add. 61.

On Appellant's takings claim, the district court noted Appellant never had the right to engage in its contemplated mining activity because it never went through the required local permitting processes (and, in fact, was prohibited from doing so by the pending, but incomplete, environmental review) and, therefore, the County's adoption of the Ordinance Amendment did not affect any previously held property right. App. Add. 62-63. It also explained that, regardless, the Ordinance Amendment did not deprive the plaintiffs of all economic value in an owned or leased property because they could still engage in construction-mineral operations. App. Add. 63.

Appellant appealed to the court of appeals asserting the district court's decision to grant summary judgment on Appellant's interstate commerce and takings claims were erroneous. It has conceded the validity of the district court's determination that the Ordinance Amendment is reasonable and rationally related to a legitimate government purpose.

E. Court of Appeals Proceeding

Before the court of appeals, Appellant argued the Ordinance Amendment violated the dormant commerce clause by facially discriminating against interstate commerce and

constituted a taking of Appellant's property without compensation. The Court of Appeals rejected both of these claims and affirmed the district court.

ARGUMENT

This matter is appealed from the district court's grant of summary judgment on two constitutional challenges to the County's legislative enactment. The court reviews the district court's application of the law *de novo*. *White v. City of Elk River*, 840 N.W.2d 43, 48 (Minn. 2013).

Appellant ignores the extraordinarily heavy burden it faces in asking the court to overturn a legislative decision as unconstitutional. When a court reviews a constitutional challenge to a legislative decision, "[e]very presumption is invoked in favor of the constitutionality of [the legislation]." *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979) (citing *Reed v. Bjornson*, 253 N.W. 102 (1934)). Declaring legislation unconstitutional is only done "when absolutely necessary and with extreme caution." *Id*., (citing *Schwartz v. Talmo*, 205 N.W.2d 318, 323 (1973) (superseded by statute on other grounds)). Appellant bears the heavy burden of proving "beyond a reasonable doubt" that the challenged ordinance violates the Constitution. *Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 73 (Minn. 2000); *see also State v. Henning*, 666 N.W.2d 379, 382 (Minn. 2003).

Regardless of whether the Court agrees with the basis for a lower court decision, the Court should affirm a decision that is correct.

I. APPELLANT HAS NOT SHOWN BEYOND A REASONABLE DOUBT THAT THE ORDINANCE AMENDMENT VIOLATES THE DORMANT COMMERCE CLAUSE.

Appellant asserts the Ordinance Amendment is unconstitutional because it violates the Commerce Clause. The Commerce Clause of the United States Constitution "has

long been interpreted to contain an implied negative command, called the dormant Commerce Clause, that states may not unduly burden or discriminate against interstate commerce." *Matter of Griepentrog*, 888 N.W.2d 478, 494 (Minn. App. 2016) (citing *Chapman v. Comm'r of Revenue*, 651 N.W.2d 825, 832 (Minn. 2002)). In approaching a dormant Commerce Clause challenge, the Court "first determine[s] whether the challenged law discriminates against interstate commerce." *Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 94 (Minn. 2015).

A. The Ordinance Amendment does not discriminate against commerce.

In order to implicate the Commerce Clause, and therefore require analysis of it, a regulation must discriminate against commerce. "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys. Inc. v. Dep't of Environmental Qual. of State of Or.*, 511 U.S. 93, 99 (1994). There is no such discrimination here because the Ordinance Amendment does not distinguish between industrial silica sand based on the intended destination or the location of the entity seeking to mine it. Industrial silica-sand mining is prohibited regardless of whether the sand is destined for Minneapolis, North Dakota, or Texas. No person or entity can conduct industrial silica-sand mining regardless of whether that person or entity is from Minnesota, Wisconsin, or Canada. In other words, the Ordinance Amendment "does not create any distinction or difference between competitors from different... states, which means it creates no relative difference in treatment that implicates the dormant Commerce Clause." *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 302 (D. Me. 2018), *amended*, No. 2:15-CV-

00054-JAW, 2018 WL 4901162 (D. Me. Oct. 9, 2018), *appeal docketed*, No. 18-2118 (1st Cir. Nov. 13, 2018).

Appellant asserts the Ordinance Amendment discriminates against interstate commerce simply because it wishes to perform industrial mineral mining and sell the sand for use outside of Minnesota. However, the mere "fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978). Under the Ordinance Amendment, "there is no reason to suspect the gainers will be Minnesota firms, or the losers out-of-state firms," because the challenger to the legislation is a Minnesota company. *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981).

1. The Ordinance Amendment does not impose an "export ban."

An export ban involves a regulation of articles that prohibits them from leaving a specified area. For example, in *Hughes v. Oklahoma*, individuals were prohibited from removing minnows from Oklahoma, while they could fish for minnows to use within the state. 441 U.S. 322 (1979). Similarly, in the context of waste flow-control ordinances, an export ban consists of a municipality "direct[ing] all citizens within its jurisdiction to dispose of their garbage in its landfill." *See Barker Bros. Waste v. Dyer Cty. Legislative Body*, 923 F. Supp. 1042, 1054-55 (W.D. Tenn. 1996).

Unlike an export ban, the Ordinance Amendment does not regulate where an existing product may or may not go, such as minnows out of state or waste into a state. The Ordinance Amendment places restrictions on the *process* of mining, not the *product*.

Hughes did not regulate *how* minnows were caught or whether they could be caught at all, but rather where they went. And waste flow-control cases do not regulate the generation of waste, but the disposition of the product *after* it is collected.

The County has found no cases specifically prohibiting anything the courts have called an "export ban." The only time such "bans" have been addressed in dormant-commerce-clause litigation has involved export of water. Other cases involving natural resources have involved state regulations regarding local processing that affected commercial transactions later. *See, e.g. South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 96 (1984) (finding local timber processing requirements prior to export unconstitutional). The County is entitled to a presumption of constitutionality and Appellant has not come close to overcoming that presumption.

2. The Ordinance Amendment does not facially discriminate.

Appellant hopes that by repeatedly referring to the Ordinance Amendment as a "facial ban," the Court will avoid looking at the text of the Ordinance to determine what it actually does. A facially discriminatory statute is one that, on its face, treats in-state and out-of-state economic interests differently. *Chapman*, 651 N.W.2d at 834. For example, in *Chapman*, a statute was discriminatory on its face because the challenged tax provisions provided a deduction for contributions to a charity operating within the state, but no deduction for contributions to a charity operating outside the state. *Id*. In *Oregon Waste*, a state statute charged $0.85 per ton for disposal of solid waste and an additional $2.25 per ton for waste generated out of state. 511 U.S. at 96. In *Hughes*, the statute "on

its face discriminates against interstate commerce" because "[i]t forbids the transportation of natural minnows out of the State for purposes of sale." 441 U.S. at 336-37.

Plainly, the Ordinance Amendment is not in the same category as these statutes which explicitly distinguish between in-state and out-of-state entities. Indeed, Appellant does not identify any language in the Ordinance Amendment that distinguishes between in-state and out-of-state economic interests. Appellant cannot do so because there is no language on the face of the Ordinance Amendment that does so. Appellant asserts that "[o]n its face, Winona County's zoning amendment bans mining except for 'local' purposes." App. Br. 24. Unsurprisingly, Appellant cannot find support for this assertion in the record because that is not what the Ordinance Amendment says. The Ordinance Amendment prohibits industrial-mineral mining for all entities, regardless of whether the entity is based in-state or out-of-state and regardless of whether the mined material would be used in-state or out-of-state.

In pertinent part, the Ordinance Amendment adds Section 9.10.B. to the WCZO, which states "Industrial-mineral operations, which includes the excavation, extraction, mining and processing of industrial minerals are prohibited in Winona County." Add. 27. The Ordinance Amendment also inserts a definition of "Industrial-mineral operations," which defines those operations as including excavation, extraction, procession, storing or stockpiling, and hauling or transporting industrial minerals. Add. 25-26. Nothing within the text of the Ordinance Amendment distinguishes between in-state and out-of-state interests in industrial-mineral operations because the Ordinance Amendment does not do so on its face.

Appellant implies the use of the word "local" in the Ordinance Amendment's separate definition of "construction minerals" creates a facial distinction between in-state and out-of-state destinations for silica sand. But this definition is not applicable to Appellant's operations because Appellant seeks only to engage in mining for industrial minerals, not construction minerals.[5]

Moreover, Appellant and the court of appeals Dissent ignore the fact that there was no dispute of material fact at the district-court level over whether the Ordinance Amendment permitted the export of construction minerals to Wisconsin. The district court noted that "'local' purposes are never defined any further and could include inter-state markets, such as Wisconsin." App. Add. 61-62. The County introduced an unchallenged factual affidavit from the County Official with the authority to interpret the Ordinance Amendment explaining that his interpretation of the term "local" included Wisconsin. Doc. 115 at ¶14. At the district court, Appellant did not offer *any* evidence regarding the term local or that the Zoning Administrator did not have the authority to interpret the Ordinance Amendment. Thus, there was no genuine dispute over this material fact at the trial court.

It was only once this matter reached the appellate level that Appellant asserted for the first time that the Zoning Administrator's interpretation was incorrect. Issues raised

[5] The court of appeals correctly noted Appellant does not have standing to challenge the definition of "construction minerals" because Appellant does not seek to mine construction minerals. App. Add. 12-13. Although the parties cannot raise new issues on appeal, the Court may consider standing because it is essential to jurisdiction. *Id.* (quoting *In re Guardianship of Tschumy*, 853 N.W.2d 728, 733-34 (Minn. 2014)).

for the first time on appeal are not considered. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Additionally, Appellant attempts to define the word "local" as it is used in the Ordinance Amendment by introducing a definition of the phrase "local government" as meaning "counties, towns, and cities." App. Br. 31. Appellant asserts that any time the word "local" is used by a governmental entity, it means only its own jurisdiction. There are numerous flaws with this argument. Notably, the House Research definition cited by Appellant includes the following: "Sometimes, absent a definition, only the context of the law will indicate what entities are meant to be included." Deborah A. Dyson, House Research: Terms Used in Local Government Legislation, Oct. 2016, *available at* https://www.house.leg.state.mn.us/hrd/pubs/ss/sslgterms.pdf. Thus, Appellant's own source acknowledges context is important to determining the meaning of the phrase "local government." Second, the definition applies to the phrase "local government," not to the word "local." Third, there is nothing within that definition that justifies Appellant's assertion that "local" when used by a government must only refer to "its own" jurisdiction. Even if the Court adopted this definition, it does nothing to clarify the geographic limitations of the Ordinance Amendment because it still allows local use to include construction minerals used in "counties, towns, and cities" in Wisconsin.

The Dissent's interpretation regarding the use of the word "local" is similarly flawed. First, the Dissent ignored the fact that Appellant failed to raise the issue below, and therefore, it should not be considered. Second, the Dissent failed to acknowledge the undisputed fact that the Zoning Administrator has authority to interpret the Ordinance Amendment. *See* Doc. 115 at ¶¶3, 11 ("Part of my responsibilities as Zoning

Administrator include interpreting and enforcing ordinances."). This undisputed authority means a dictionary definition carries less weight because the Zoning Administrator has explained the manner in which he would exercise enforcement authority. Third, the Dissent's analysis flips the burdens imposed on the parties by requiring the County to show sand is exported to Wisconsin. Since Appellant bears the burden of proof of showing unconstitutionality in all circumstances and "every inference is invoked in favor of constitutionality," Appellant bears the burden of showing sand *cannot* be exported to other states.[6] Fourth, no court has adopted the interpretation that weighing "relatively small quantities" of commercial activities versus "a substantial amount of interstate commerce in silica sand" is the appropriate test to apply to a facial commerce-clause challenge. *See* App. Add. 28. The Dissent seeks to impose significantly higher burdens on the County to justify its Ordinance Amendment than courts require for a facial challenge.

The Zoning Administrator's interpretation leaves open the possibility that "local construction use" includes construction sand exported to Wisconsin because the fact of out-of-state use is not, alone, a violation of the Ordinance. For a facial challenge to succeed, Appellant must show the Ordinance Amendment is always unconstitutional in every application. Since the Ordinance Amendment permits some interstate commerce, Appellant cannot establish beyond a reasonable doubt that the Ordinance Amendment is always facially unconstitutional.

[6] There is no authority for the assertion that the Court *should* look at existing operations rather than the text of the Ordinance.

In short, there is no differential treatment between in-state and out-of-state economic interests in the Ordinance Amendment because all industrial mineral mining is prohibited and that is the only activity Appellant seeks to engage in.

3. The Ordinance Amendment does not discriminate in its effects.

At the outset, this Court should ignore any argument by Appellant or its Amici asserting the Ordinance Amendment is discriminatory in its effects. Appellant did not brief this issue to the court of appeals. *See* App. Add. 12, n. 3. Although Appellant may have discussed the issue at oral argument, the standard this Court has enforced is that issues "not argued *in the briefs*" are waived. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (emphasis supplied). The County has found no case in which this Court approved an exception for an issue addressed at oral argument before the court of appeals that was not briefed. Nonetheless, if the Court chooses to address this issue, the County provides the following argument.

Appellant asserts the "County has prohibited mining for the 'industrial' uses that occur in other states, while carving out a convenient exception for the 'construction' and agricultural uses that occur in Minnesota." App. Br. 24. As with Appellant's assertion regarding facial discrimination, this is not true.

A regulation is discriminatory in its effects "when, in practice, it affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests." *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 10 (1st Cir. 2010). Discriminatory effects are found where the regulation results in a benefit to certain in-state interests at the expense of

parallel out-of-state interests. For example, *Family Winemakers* involved a Massachusetts statute that permitted different means of distribution for "small" wineries versus "large" wineries. In practice, all of the wineries in Massachusetts were "small" and therefore had less restrictive distribution channels, while "large" wineries, which were all located out-of-state, were subject to more onerous regulations. *Id*. Similarly, *Hunt v. Washington State Apple Advertising Commission* concerned a North Carolina law that prohibited apples sold within the state from having any grade on them other than one designated by the federal government. 432 U.S. 333 (1977). Other states, including Washington, had their own grades of apples which producers typically marked on boxes in addition to the federal grade. North Carolina's law required producers to stop shipments to North Carolina, or create different packaging solely for sale to the state.

Once again, these examples are a far-cry from the County's regulation. The Ordinance Amendment creates no distinction between in-state and out-of-state interests. It is not as if Minnesota Sands, an in-state company, can perform industrial-mineral mining and a corporation from outside the state cannot without additional burdens, as was the case in *Family Wineries*.

Under the Ordinance Amendment, industrial-mineral operations are prohibited in the County. This means no company or entity, regardless of where it is located, can conduct industrial-mineral operations in the County.[7] The Dissent argues the Ordinance Amendment discriminates against silica-sand consumers in other states, while benefiting

[7] The Nisbit mine is the sole exception because it is a legal nonconforming use.

those within the local market. This argument is flawed for two reasons. First, Appellant has not raised an argument that it is a "consumer" of silica sand, and has not established standing to assert claims on behalf of consumers. Second, "silica sand" is not a construction mineral under the Ordinance Amendment, only "sand" is. So a consumer seeking sand for animal bedding usage may purchase sand that might contain silica sand because all sand in the County may contain silica sand, but will not be purchasing processed silica sand because processing operations are prohibited. Third, regardless of whether fracking occurs in Minnesota, the record establishes there are other uses for industrial silica sand that do occur in Minnesota. Silica sand is used in many in-state businesses, such as glass made in Faribault, Cambria countertops made in St. Peter, and shingles made in St. Paul. *See* WC1310. In addition, Appellant's Amicus representing the silica-sand-mining industry noted silica sand is "sold for a variety of industrial uses including petroleum production, construction, water filtration, metal casting and manufacturing a wide variety of products including glass, abrasives, and shingles." Aggregate Ready Mix Br. 4. Industrial-mineral mining is prohibited in the County for *any* of these purposes and cannot be provided to either Minnesota or out-of-state companies.

4. Industrial-sand and construction sand are not competitors and therefore the Commerce Clause does not apply.

This case falls under the category of cases to which the Commerce Clause does not apply because the regulated entities are "operators in arguably distinct markets." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). The very nature of

"discrimination assumes a comparison of substantially similar entities." *Id*. at 298. Thus, there is a threshold question of whether the two entities are similarly situated in the interstate markets. *See id.* at 299. Appellant has failed to show sand which may contain silica sand used in local construction projects is part of the same economic market as pure processed silica sand sold for use as a proppant in natural-gas extraction. Because the competition occurs in different markets, the Commerce Clause is not implicated.

In conducting this threshold analysis, the U.S. Supreme Court has explained that products serving separate markets "did not compete with one another, and thus could not properly be compared for Commerce Clause purposes." *Gen. Motors Corp.*, 519 U.S. at 300 (citing *Alaska v. Arctic Maid*, 366 U.S. 199 (1961)). Appellant asserts these cases are inapplicable because they involve taxes, but Appellant does not explain why the type of regulation makes precedent inapplicable. App. Br. 30. Commerce-clause cases, including those cited by Appellant, analyze a variety of regulatory tools, including prohibitions (*Hughes*), labeling requirements (*Hunt*), waste-flow-control ordinances (*Philadelphia v. New Jersey*, 437 U.S. 617 (1978)). Appellant has not explained why taxation is such a unique form of regulation that it is improper to apply that precedent to other commerce-clause cases. Additionally, Appellant seems to suggest *Hughes* impliedly overruled *Arctic Maid* merely because it was not cited. App. Br. 30-31. But *Arctic Maid* and *General Motors* have not been overruled and remain good law.

In *Arctic Maid*, the Supreme Court examined a tax assessment for fish sent to freezer ships and frozen for transport to canning facilities that was not assessed on fish caught in the same water that was sent to on-shore freezer facilities for the domestic

fresh-frozen fish market. Even though the basic product – Alaskan salmon – was identical, the court found the freezer ship operators were selling in a different market than the on-shore fresh-frozen distributors. This holding eviscerates Appellant's position that a regulation must affect "different products" in order to be analyzed differently.

Similarly, in *General Motors*, the court considered natural gas provided to consumers as a bundled product via local distribution companies ("LDCs") and natural gas sold by national marketers. Once again, the court found the LDCs serving a captive local market operated in a different market than the market for high-volume natural gas marketing companies. *Id*. at 302. The LDCs sold bundled products directly to consumers and were "not susceptible to competition by the interstate sellers." *Id*. at 303. In both *Arctic Maid* and *General Motors*, the specific products (Alaskan salmon and natural gas) were the exact same, yet sale in different markets permitted different government regulatory schemes. Here, the product (silica sand) may be the same in commercial and industrial mining,[8] but the difference in markets permits different regulatory schemes without affecting the Commerce Clause. As in *General Motors*, the County has a legitimate interest in protecting its local construction market "from the effects of competition for the largest consumers" based on "the common sense of our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles." *Id*. at 306.

[8] Appellant asserts the sand is the same in construction and industrial-mineral mining. The County disagrees. Construction sand may contain silica sand, but is not identical to the pure silica sand Appellant seeks to mine.

Appellant's own evidence provides support for the existence of two distinct construction and industrial markets for silica sand. *See* App. Add. 17. Local buyers of construction minerals using sand for animal bedding are simply not involved in the same significant scale of market transactions as oil producers looking for "monocrystalline silica sand that meets the American Petroleum Institute (API) specifications for use as a proppant in the hydraulic fracturing of oil and gas wells." Doc. 89, ¶19. The silica sand in Winona County has "unusually high" crush resistance which "increases the demand for and value of the sand." *Id*., ¶20. And Appellant suspended its prior environmental-review process "due to disappointing and unfavorable market conditions for silica sand," but Appellant has since renewed its interest because, as Appellant noted, "the silica sand market has drastically improved and is forecasted to remain very strong for the foreseeable future." Doc. 90, ¶¶47-48.

Frick further acknowledged he is not interested in participating in the market for local construction materials because "such mining is not economically viable given the anticipated capital investments." Doc. 90, ¶60. In making this observation, he concedes there are two markets – one nationwide market for silica sand in which he is willing to make capital investments, and one for local construction materials in which he is not interested in participating. This distinction between markets is further highlighted by Appellant's valuation specialist, who only reported on values of "Industrial Sand Minerals." *See* Doc. 97, ¶7.

Based on Appellant's admissions, it is not economically viable for Appellant to participate in the separate economic market for construction minerals, so Appellant

delayed environmental review and further investment until it determined the national market was economically profitable.

A regulation challenged on commerce-clause grounds simply does not violate the commerce clause when it distinguishes between different products, or the same products operating in different markets. This is the case here.

B. Appellant has not proven the Ordinance Amendment is unconstitutional in all its applications.

To succeed in such a facial challenge, Appellant must show the Ordinance Amendment is unconstitutional in all of its applications. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 339 (Minn. 2011); *see also Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 96 n.1 (Minn. 2015) (holding that challenging company's "facial challenge fails because it cannot show that all applications of the [appealed] law are unconstitutional."). Although Appellant has occasionally taken the position that it has not brought a facial claim, such an argument is inconsistent with Appellant's pleadings. Doc. 41 at 18. In fact, in arguing standing, Appellant acknowledges it is seeking an injunction preventing enforcement of Ordinance Amendment itself. *See* App. Br. 17.

Because Appellant cannot show the Ordinance Amendment is unconstitutional in all its applications, as discussed above, Appellant has failed to meet this burden.

II. THE ORDINANCE AMENDMENT DOES NOT EFFECT A TAKING OF APPELLANT'S PROPERTY.

Appellant contends the Ordinance Amendment effected a taking of its property and the lower courts erred by concluding otherwise. The Minnesota and U.S. Constitutions prohibit the taking of private property for public use without just

compensation. U.S. Const. amend. V; Minn. Const. art. I, § 13. But "the right to use property as one wishes is subject to and limited by the proper exercise of the police power in the regulation of land use." *McShane v. City of Faribault*, 292 N.W.2d 253, 257 (Minn.1980) (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

The U.S. Supreme Court has acknowledged that where a governmental regulation deprives an owner of real property of "all economically beneficial use," the owner is entitled to just compensation consistent with the Fifth Amendment. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). It has held that "land use regulation does not effect a taking if it substantially advance[s] legitimate state interests." *Id*. at 1024, (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (alteration in original) (quotations omitted)). In fact, it recently reiterated that "reasonable land use regulations do not work a taking." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1946 (2017) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001)). At its core, regulatory-takings jurisprudence seeks "to reconcile two competing objectives central to regulatory takings doctrine: the individual's right to retain the interests and exercise the freedoms at the core of private property ownership, and the government's power to adjust rights for the public good." *Id.*, at 1937 (citations and quotations omitted).

On appeal, Appellant contends the lower courts improperly concluded the Ordinance Amendment did not effect a total or partial regulatory taking of its property. Appellant argues the courts erroneously concluded Appellant does not have a compensable property interest, even though Appellant had no right to engage in industrial-mineral operations before the Ordinance Amendment was enacted. Appellant

further contends its right to mine under its leases should be considered in isolation from the remaining portions of the leased properties in analyzing the taking claim. And it asserts that any money it could generate from the construction-mineral operations allowed under the Ordinance Amendment would not meet its expectations because it entered into and contemplated acting on its mining leases when the County allowed other mining uses. Appellant further contends there are material fact disputes that precluded summary judgment on its taking claim, despite failing to raise fact issues before the district court.[9]

Appellant's arguments before this court do not overcome the complete lack of law or facts needed to establish beyond a reasonable doubt that the County effected a taking of any of its alleged property rights.

A. Appellant's mere desire to engage in industrial-mineral operations does not constitute a compensable property interest subject to a taking claim.

Because the premise of a takings claim is that government took property from its private owner, identifying the recognized property right at issue is central to any taking analysis. *See Naegele Outdoor Advert. Co. of Minn. v. Vill. of Minnetonka*, 162 N.W.2d 206, 214 (1968) (to find the application of an ordinance on the complainant is unconstitutional, "there must have been a taking from [the complainant] of some valuable property interest without the payment of just compensation."). Stated another

[9] Such arguments should be disregarded, as the court will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

way, there must be a *right* to engage in a specific activity that is recognized by law as a property right.

Appellant's main complaint is that the Ordinance Amendment allows only construction-mineral operations, excluding industrial-mineral operations. Therefore, the relevant "property right" purportedly taken by the Ordinance Amendment is the alleged property right to engage in industrial-mineral operations. Appellant contends the court of appeals erred by concluding Appellant's failure to obtain required regulatory approvals to engage in this mining use, coupled with language in the leases requiring such approvals prior to engaging in mining operations, means Appellant does not have a compensable property interest to support its taking claim. While Appellant wants this court to focus on contract principles to overturn the court of appeals' decision, the law clearly supports the conclusion that there is no compensable property interest present here.

1. Appellant has never had the right to engage in mining operations.

No taking of property occurs "if the challenged limitations 'inhere... in the restrictions that background principles of the State's law of property and nuisance already placed on land ownership.'" *Murr*, 137 S. Ct. at 1937 (quoting *Lucas*, 505 U.S. at 1029). In other words, a compensable taking only exists where the landowner's "bundle of rights," as it existed at the time of the alleged taking, "previously included the *right* to engage in the restricted activity." *Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690, 694 (8th Cir. 1996) (emphasis added). In holding a denial of a permit to fill in a lakebed was not compensable, the U.S. Supreme Court explained in *Lucas*:

> Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful.

Id. 505 U.S. at 1029-30. Stated succinctly, "[t]he takings clause was never intended to compensate property owners for property rights they never had." *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 635 (Minn. 2007).

Here, Appellant has never had – and even in the absence of the Ordinance Amendment would not have – the right to engage in industrial-mineral operations on its leased properties in the County. Prior to adopting the Ordinance Amendment, mining was a conditional use in certain areas. Doc. 137, § 9.10. Although Appellant had the option to apply for a conditional-use permit, it never pursued a CUP and never actually had the right to mine these properties under the law.

More critically, Appellant is subject to environmental review ordered by the EQB on March 20, 2013 prior to being allowed to mine. *See* Add. 28-35. State law clearly explains that if an EIS is required, "a project may not be started, and a final government decision may not be made to grant a permit, approve a project, or begin a project, until…the environmental impact statement has been determined adequate." Minn. Stat. § 116D.04, subd. 2b. While Appellant started the environmental-review process, Appellant's inaction caused the process to go dormant before the Ordinance Amendment was adopted. Doc. 119, Ex. Z; Doc. 94, Pl.'s Answer to Interrog. 1. As such, Appellant was prohibited by state law from engaging in mining activity at the time the Ordinance

Amendment was adopted and continues to be prohibited from doing so because it never completed the EIS process.

In short, as the district court correctly concluded, Appellant has never had a property right to engage in industrial-level mining in the County. Absent a CUP and successful completion of the EIS process, mining on Appellant's leased properties was unlawful. The right to engage in industrial-mineral operations was never among Appellant's own bundle of property rights, notwithstanding the mining leases. Therefore, Appellant does not have a valid taking claim.

2. The option to apply for a CUP does not create a compensable property interest.

On appeal, Appellant does not dispute the district court's conclusion that it has never had the right to actually engage in industrial-mineral operations in the County. Instead, it speciously contends it had a legal right to mine in compliance with the CUP requirements – hypothetically, had it actually applied for a CUP – and that by eliminating the opportunity to legally engage in industrial-mineral operations at some future point, the County effected a taking. App. Br. 37.

Appellant essentially claims a constitutionally protected property right in the opportunity to apply for an industrial-mineral-operations CUP in the future. Appellant suggests the terms of the earlier ordinance granted it a compensable property interest in a contemplated conditional use, even though Appellant did not actively seek to act on its alleged right to engage in such use and only assumes it might have met the CUP standards under the ordinance. In 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. This contention is antithetical to the zoning authority granted to local governments.

While a granted CUP creates a recognized property interest and an application for a CUP might give rise to a takings claim if a CUP is improperly denied under the terms of the ordinance, neither is the situation here. Contrary to Appellant's contentions, the mere theoretical option to apply for and engage in a conditional use if that person proves they could have complied with the ordinance requirements, without more, does not create a property interest. In fact, a party that does not have a CUP and cannot obtain one as of right has a mere expectancy, not a protected property interest. *See Snaza v. City of Saint Paul*, 548 F.3d 1178, 1182 (8th Cir. 2008) ("A protected property interest is a matter of state law involving a legitimate claim to entitlement as opposed to a mere subjective expectancy."); *Continental Property Group, Inc. v. City of Minneapolis*, 2011 WL 1642510 (Minn. App. May 3, 2011) (finding an applicant did not have a protected property interest in a CUP application because the applicant could not receive a CUP as of right); *see also Concept Properties, LLP v. City of Minnetrista*, 694 N.W.2d 804, 820 (Minn. App. 2005) ("A mere expectation, desire, or intention to develop a property in a particular way is not sufficient to create a vested right."). To hold that the unacted-upon option or desire to apply for a discretionary quasi-judicial permit to use land in a certain

way under more favorable zoning regulations creates a compensable property right under a takings claim would upend zoning law.[10]

Zoning ordinances are not meant to be inflexible laws that afford rights to use property in a certain way in perpetuity. The U.S. Supreme Court routinely recognizes such laws can be adjusted for the public good. *Murr*, 137 S. Ct. at 1943. This is exactly what the County did by enacting the Ordinance Amendment. If this court were to conclude the Ordinance Amendment effected a taking of Appellant's property because it forecloses Appellant's option to apply, at some future time, for a CUP under the earlier ordinance language, local zoning authorities could effectively lose all zoning power and, in particular, the power to modify land-use regulations. They would be opened to endless takings claims, draining public resources for the pipedreams of land-use options lost by virtue of routine zoning amendments.

As a general matter, there are no vested rights acquired in an existing zoning ordinance that cannot be cut off by a subsequent zoning amendment. *See Ridgewood Development Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980); *State v. Iten*, 106 N.W.2d 366, 81-82 (Minn. 1960); *Kiges v. City of St. Paul*, 62 N.W.2d 363, 537 (Minn. 1953). In fact, the law of nonconforming uses provides a useful frame of reference for Appellant's

[10] Citing language regarding legal nonconforming uses in the County's legislative record, Appellant contends the Ordinance Amendment is a new land-use restriction to suggest a change in the way Appellant's "property rights" are treated under the law. App. Br. 37. There can be no dispute, however, that Appellant could never legally engage in industrial-mineral operations. Had it nonetheless done so, the County and the state could have taken enforcement action against Appellant to suspend such operations without implicating the Fifth Amendment.

suggestion that it has a compensable property interest in an option to engage in a use. Those owning nonconforming uses (i.e. uses prohibited under current zoning regulations that were legal when they came into existence) are afforded constitutional protections, including just compensation if a change in law requires termination of such use, but not eternal or inalienable rights. *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 726 (Minn. 2010); *see* Minn. Stat. § 394.36 (nonconforming uses may not be expanded and must cease when discontinued or destroyed). This approach is meant to balance the lawful state of affairs at the time the law changed with the zoning authority's right to change the law and seek uniformity. *Freeborn Cnty v. Claussen*, 203 N.W.2d 323, 99 (Minn. 1972). Here, in contrast, Appellant is not seeking to continue exercising a once-lawful property right, but rather to scuttle or prevent changes in zoning regulations. This far exceeds the rights afforded to those with legal nonconforming uses, and there is no support for this broad definition of compensable property. Instead, the County may constitutionally require Appellant to comply with the terms of the Ordinance Amendment without regard to any prior land-use options.

In short, there is no support in the law to suggest one acquires a property right in perpetuity to engage in a use once contemplated or allowed by a zoning ordinance. Appellant does not have a compensable property interest to engage in a future use it is not now undertaking.

3. The district court was not required to consider whether Appellant hypothetically could have obtained a CUP prior to the Ordinance Amendment.

Appellant laughably asserts the district court erred by not engaging in a fact-finding exercise to determine whether Appellant might have qualified for a CUP prior to the Ordinance Amendment, had it actually applied for one. App. Br. 38. Appellant argues the County cannot prove Appellant would not have met the standards for a CUP, therefore this court should find a taking or at least a material-fact dispute. Essentially, Appellant contends its speculative hope to, at some point, engage in industrial-mineral operations somehow shifted the burden to the County and the court to engage in exercises not otherwise required by law.

The relevant inquiry in this challenge to a legislative zoning decision is not whether Appellant could have met the CUP criteria – that is a quasi-judicial determination. And Appellant never asked the district court to decide this issue, nor argued a dispute of material fact on these grounds. This issue, therefore, is not properly before this court. *Thiele*, 425 N.W.2d at 582.

Moreover, the district court plays no role in making determinations about compliance with CUP criteria. When a party actually applies for a CUP, the County makes a determination about whether the proposed use meets CUP standards in the zoning ordinance, and any review of that decision is conducted by the appellate courts via a writ of certiorari. *See* Minn. Stat. § 394.301; *Neitzel v. County of Redwood*, 521 N.W.2d 73, 76 (Minn. App. 1994). And, had Appellant actually applied for a CUP, Appellant – not the County – would have carried the burden of showing compliance with

the CUP standards. *Yang v. Cty. of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003). To suggest this case should be reversed because the district court did not wade into this issue or shift the burden of proof to the County is entirely without merit.

Finally, whether Appellant could have complied with the CUP criteria at some future, unspecified time is simply immaterial and needlessly speculative. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) ("there is no genuine issue of material fact… when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue."). In fact, the level of conjecture required to address this issue would be multifold. To reach the question of whether Appellant could have satisfied the CUP standards under the prior ordinance, the court first would have needed to determine Appellant could have successfully completed the EQB's environmental review. Without a completed EIS, the question of compliance with the CUP criteria is irrelevant, as the County was barred from issuing a CUP. *See* Minn. Stat. § 116D.04, subd. 2b. In fact, whether Appellant would have qualified for a CUP is irrelevant because, under the statute, it could not even apply. *Id*.

Appellant's invitation to engage in guesswork has no basis in law and does not support overturning the district court's proper grant of summary judgment in this matter.

4. Appellant's leases do not create a compensable property interest.

Because Appellant does not have a property right in the right to mine or the option to apply for a CUP, this leaves only its mining leases as potential property taken by the

Ordinance Amendment.[11] The court will determine if a leasehold interest has been subject to a taking by determining whether the lease terms were altered by the ordinance. *Naegele Outdoor Advert. Co. of Minneapolis*, 532 N.W.2d at 253. If the leasehold interest is not altered, there can be no taking. *Id.* In this case, the Ordinance Amendment had no impact on the lease terms or Appellant's rights. In fact, Appellant acknowledges its rights under the leases remain intact. App. Br. 34.

Appellant's leases provide it may mine "frac sand for commercial purposes" on the subject properties. Appellant can only occupy the leased property for this use. The leases acknowledge that the right to mine granted by the leases is contingent upon Appellant obtaining the required approvals and permits, including zoning approvals. Docs. 107-114, ¶11. The plain language of the leases do not give Appellant the *right* to mine – only state and local law could do so. As discussed at length above, Appellant never obtained these regulatory approvals. As such, it never had the right to act under the leases irrespective of the Ordinance Amendment. To find a leasehold interest in a land use that is not and was not allowed under the applicable laws could still give rise to a taking is simply illogical.

Moreover, Appellant's leases, on their faces, allow Appellant to mine silica sand for construction-mineral operations, which remain a conditional use under the Ordinance Amendment. The Ordinance Amendment did not alter the plain terms of Appellant's leases and, as such, it did not implicate Appellant's leasehold interests.

[11] Appellant does not have a direct ownership interest in the silica sand as it exists in the ground on the property at this moment. The leases only afford it mining-related rights.

In summary, Appellant has failed to identify any compensable property interest sufficiently existing or impacted by the Ordinance Amendment to underlie its taking claim. The district court and court of appeals rightfully concluded that the fact that Appellant has never had the right to engage in industrial-mineral operations in the County is dispositive of its taking claim. As such, this court should affirm the grant of summary judgment to the County and need not consider further taking analysis or theories.

B. The Proper Unit of Property for a Takings Analysis is the Entirety of Each Parcel of Property.

Even if this court determines Appellant has a compensable property interest in the right to mine the leased properties, the next relevant inquiry the court must undertake is to determine the proper unit of property for evaluating Appellant's takings claim. Appellant contends its rights under its mining leases are the relevant unit of property and the court should consider only the most profitable use of these leases – industrial-mineral operations – in evaluating its claim. App. Br. 42. In doing so, Appellant asks this court to ignore the law.

1. The law does not support severing Appellant's mineral leases from the properties subject to the leases.

It is well established that courts do not engage in the practice of severing portions of property to determine whether a taking has been effected. In declining to consider a property owner's air rights as distinct from the rest of the property, the U.S. Supreme Court noted:

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a specific segment have been entirely abrogated. In deciding

> whether a particular governmental action has effected a taking, this Court focuses both on the character of the action and on the nature of the interference with rights in the parcel as a whole.

Penn Central Transp. Co v. New York City, 438 U.S. 104, 130-31 (1978). In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987), the court refused to consider coal that had not yet been mined as a "separate parcel of property." Similarly, courts will not carve out portions of time during which a temporary taking occurred and order compensation for such a taking. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002). Stated succinctly, the courts will not "limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation." *Murr*, 137 S. Ct. at 1933.

"[W]here an owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U. S. 51, 65-66 (1979). If courts allowed property owners to slice property into discrete parts for takings analysis, ordinary zoning measures such as setback requirements and impervious surface percentages would be deemed takings. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 498. It logically follows that a property owner should not be allowed to segment off portions of its fee interest – through leases or the grant of a right to mine – to support a taking claim.

Appellant supposes mineral interests or rights should be treated differently from other property interests, suggesting this court should look solely at cases involving minerals. Appellant, however, does not have a fee interest in this case, nor a full bundle

of sticks for the court to consider. Its leases only give Appellant the right to mine sand, engage in related operations, and share revenues with the fee owners, not an ownership interest in the sand that remains in the earth on the leased properties. If 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. Appellant's decision to position itself, through its private contracts, such that any mining regulation could constitute a "total" taking should not be used against the County by declaring the mining leases separate property from the land itself.

Ignoring clear case law to the contrary, Appellant suggests the U.S. Supreme Court has not addressed the severability of property for taking analysis. App. Br. 43. Appellant cites *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) to contend that the Court, however, is willing to treat mineral rights separately from surface rights on this type of claim. Contrary to Appellant's suggestions, however, the Court has rejected attempts to sever property interests in cases involving regulatory-taking claims. In fact, as noted by the 9th Circuit Court in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 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. 216 F.3d 764, 774 (9th Cir. 2000), *aff'd,* 535 U.S. 302 (2002).

More recently, in *Murr* (a case Appellant tellingly ignores), the Supreme Court laid a framework for determining the property denominator at issue in a regulatory-taking

claim. The Court explained there are a variety of factors that go into identifying the proper unit of property to consider, which are meant to determine "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holding would be treated" as part of a unified parcel or as a separate parcel. *Murr*, 137 S. Ct. at 1945. Such factors include how the land is treated under state and local law, the physical characteristics of the land, and the land's prospective value as regulated, with the first factor being given "substantial weight." *Id.* Applying the analysis laid out in *Murr*, it is clear the relevant property denominator in this case – assuming any taking analysis is even appropriate – is the entirety of the properties subject to Appellant's mining leases.

2. The law does not support treating Appellant's leases separately from the leased property for purposes of analyzing Appellant's regulatory-taking claim.

State and local law does not support Appellant's invitation to find that its contractual agreements with landowners amount to a separate and distinct property interest appropriate for analysis under a total regulatory-taking claim. While Appellant contends state law recognizes mineral and surface estates as being separate interests, allegedly supporting its takings theory, the law Appellant cites for this proposition does not arise in a taking context. App. Br. 44, n. 8. More importantly, such law contemplates that these estates have been formally severed and are held in fee ownership by different parties. *See, e.g.*, *Wichelman v. Messner*, 83 N.W.2d 800 (Minn. 1957); Minn. Stat. § 93.02, 94.14. That is not the case here.

Appellant also has not cited any controlling federal law supporting its position that its mining leases should be treated separately from the underlying property in this taking analysis. Appellant attempts to discredit or explain away the federal cases cited by Judge Johnson's concurrence in concluding the leased parcels must be considered as a whole, but such attempts fall flat. On page 43 of its brief, Appellant contends the U.S. Federal Claims Court has "special expertise" in takings, citing allegedly relevant cases from 1979 and 1989. And then, on page 45, Appellant contends the same court's 2002 decision applying the U.S. Supreme Court's "parcel as a whole" rule and specifically rejecting its earlier jurisprudence, cited by Appellant, is inexplicably worthy of disregard. *See Cane Tennessee, Inc. v. United States*, 54 Fed. Cl. 100 (2002). In addressing *Apollo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004), Appellant suggests the court left open the possibility that mineral leases could be considered separately from surface rights, ignoring that the court specifically stated it need not consider this issue because there was no regulatory taking even if the relevant mining leases were looked at in isolation. Appellant's attempts to distinguish the other cases cited by the concurrence are similarly unpersuasive. And they do nothing to suggest the U.S. Supreme Court precedent regarding the appropriate unit of property for consideration on a regulatory-taking claim should not apply in this case.

Murr instructs the court to consider how property is bounded or divided in considering how it is treated under the law. 137 S. Ct. at 1945. In this case, the property is artificially divided by Appellant and the landowners, such that Appellant can utilize the property only to engage in a specific enumerated use (mining). Appellant does not hold a

fee interest in the mineral estates and has not established the mineral and surface estates have been severed in the eyes of the law. Any division of the leased properties has been completed by private agreement only, which does not support severing Appellant's lease interest for purposes of analyzing a taking claim.

In *Murr*, the Court rejected the idea that lot lines defined the relevant property interests in the regulatory taking analysis, noting such property divisions have "varying degrees of formality," which are sometimes adjusted by owners with minimal government oversight. *Id.* at 1948. The court explained that because these property interests are relatively easy to modify, it "creates the risk of gamesmanship by landowners" to alter property interests to capitalize on anticipated regulation. *Id.* This pinpoints the issue that would arise if the court accepts Appellant's arguments in this case.

Leases are arguably less formal than lot lines. The leases at issue in this case are not subject to any standards beyond general contract principles and are not subject to government oversight. The landowners did not need a permit to enter a lease allowing their properties to be rented for mining uses, and the leases were not required to be recorded. The government is not entitled to notice of the content of property leases, and Appellant has not occupied the leased properties such that there is any sort of constructive notice of its rights thereunder. In short, there is nothing that would keep property owners from using leases to segment off portions of property interests or uses in order to sustain a total regulatory-taking claim.

To accept Appellant's theory on how the law of regulatory taking should be applied, anyone who holds a lease to engage in a specific use that was once allowed at some point in history on another person's property – whether a nuclear-power plant, strip club, or zoo – should be able to recover for a total taking from the local zoning authority banning that use, even if the lease has never been acted upon or known to anyone other than the alleged parties. This could bankrupt zoning authorities or otherwise cripple their ability to undertake zoning activities.

In short, the facts surrounding Appellant's use leases and related law do not support treating Appellant's leases as the relevant unit of property for purposes of evaluating its regulatory-taking claim.

3. The intertwined nature of the use leases and leased properties supports treating these as unified property for takings purposes.

In looking at the issue of the physical characteristics of the land in the taking claim, *Murr* instructs that considerations like the physical relationship between the allegedly separate properties, the land's topography, the surrounding environment, and actual or likely regulation in the area are relevant. 137 S. Ct.1945-46. *Murr* also instructs the courts to examine the relationship between the loss in value of the regulated property and an increase in value of the allegedly separate property, "such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty," explaining this symbiotic relationship favors treating the land as a unified property. *Id.* at 1946.

In this case, if properly permitted, Appellant would access silica sand by removing the top soil and vegetation, digging and blasting down into the earth, and forming a pit, rendering the surface unusable for other purposes. The contemplated mining use is invasive and the physical relationship between the leased property and the use allowed under the lease are inextricably intertwined. Further, the karst formations that are key to Appellant's contemplated mining use are central to the environment on the leased properties. And given the sensitivity of karst geology, regulation regarding land uses affecting both the surface and the minerals in these areas should reasonably have been anticipated. Mining in these areas was already highly regulated at the time the Ordinance Amendment was adopted, on both a local and state level.

For these same reasons, the values of the contemplated mining use and the leased properties are interlocked. The properties cannot be mined while preserving the karst formations that makes them valuable and scenic. They cannot be used for recreation, farming, or other uses, nor can their natural beauty be preserved, while allowing them to be mined.

Appellant's use leases and the leased properties themselves are intertwined in every way. One cannot be used without impacting the other. As such, it would not be objectively reasonable for anyone to anticipate that the leases and leased properties would be treated as anything other than unified property for a taking analysis. Under the framework set out in *Murr*, and years of case law rejecting conceptual severance for the purpose of analyzing regulatory-taking claims, there can be no dispute that the relevant unit of property in this case is each leased property as a whole.

C. The Ordinance Amendment does not constitute a partial taking of Appellant's property.

Given that the proper property unit at issue is the entirety of the leased parcels, Appellant can only – at most – set forth a partial regulatory-taking claim allegedly arising from the County's adoption of the Ordinance Amendment. Minnesota courts apply the three-part *Penn Central* test to analyze partial taking claims. *See Wensmann Realty, Inc.*, 734 N.W.2d at 632. Under *Penn Central*, the result is largely dependent "upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005). In "limited circumstances" government regulation "goes too far" and results in a taking. *Wensmann Realty*, 734 N.W.2d at 632. In this case, as recognized by the district court's unchallenged conclusion that the Ordinance Amendment is rational, reasonable, and supported by public health, safety, and welfare, the Ordinance Amendment plainly has not gone "too far."

1. The Ordinance Amendment has minimal economic impact on Appellant.

The first *Penn Central* factor considers the economic impact of the regulation. *Wensmann Realty*, 734 N.W.2d at 634. The courts will not find a taking under this analysis simply because the property may not be put to its most profitable use. *Id.* at 635. Instead, the court will determine whether the challenged decision "leaves any reasonable, economically viable use of the property." *Id.*

Appellant contends the Ordinance Amendment has an "enormous" economic impact on its interests because the economics of using silica sand for construction-

mineral operations are less lucrative than using it for industrial-mineral operations. App. Br. 39-40. And it contends the district court erred by failing to consider these economic differences, asserting this creates a fact issue precluding summary judgment. But the fact of the matter remains that Appellant's economic position has not been altered; just as it does not have the right to mine today, it never had the right to mine under the leases before adoption of the Ordinance Amendment.[12] *See McNulty Const. Co. v. City of Deephaven*, A09-1625, 2010 WL 2899142 at *4 (Minn. App. July 27, 2010) (finding the economic value factor to favor the municipality when the result of its zoning action was that a previously unbuildable lot remained unbuildable). Appellant never completed the EIS process necessary to engage in an industrial-mining use. Moreover, Appellant retains the option to pursue a construction-mineral-operation use under its leases. While this may not be the use that makes Appellant the most money under its leases, it is reasonable and economically viable.

Further, in analyzing the regulation's economic impact, the court can consider that Appellant "could have disposed of the property and mitigated the severity of the regulatory action." *Wensmann Realty*, 734 N.W.2d at 637 (quotation omitted). Appellant has minimal obligations under the property leases until it begins mining operations. If it never obtains approval to mine, it is responsible only for nominal

[12] In an analogous situation, when government physically takes part of an estate, the proper measure of damages is determined using a before/after valuation analysis. *Cty. of Anoka v. Blaine Bldg. Corp.*, 566 N.W.2d 331, 334 (Minn. 1997). Here, value is unaffected because Appellant had no right to mine either before or after the Ordinance Amendment was adopted.

payments made to secure each lease. And, since Appellant never had the right to mine the leased property, only these payments could be considered economic loss – not the minerals that Appellant never had the legal right to access and not any exploratory costs it incurred *prior* to deciding to enter into the leases.

2. Appellant had no reasonable investment-backed expectations when it entered into its mining leases.

The second *Penn Central* factor examines whether the Ordinance Amendment interferes with Appellant's "distinct investment-backed expectations." *Wensmann Realty*, 734 N.W.2d at 637 (citing *Penn Central*, 438 U.S. at 124). The "permitted uses of the property when the land was acquired generally constitute the 'primary expectation' of the landowner regarding the property." *Id*. When an owner acquires property with "knowledge of restrictions upon development of the property, he assumes the risk of any economic loss." *Id*. at 638 (quotation omitted).

As the sole asserted basis for the reasonableness of its "distinct investment-backed expectation," Appellant asserts that at the time the original leases were signed, the County was considering an application for the Nisbit silica-sand mine, which was ultimately granted. App. Br. 40. This assertion of reasonableness is ludicrous.

The Nisbit mine and Appellant's contemplated operations are not one in the same, nor comparable. The mere fact that a CUP application had been submitted by another party on a different parcel of property has absolutely no bearing on whether Appellant's hoped-for CUP would be granted. The CUP process allows for fact-specific inquiry into the proposed use to determine whether the specific operation is appropriate in the

specified location. *See Continental Property Grp.*, 2011 WL 1642510, at *4 (explaining an applicant "was not entitled to a CUP simply because it otherwise complied with the ordinance and filed an application" because such an automatic right would render the distinction between conditional and permitted uses meaningless). Appellant's assumption it would be handed a CUP in the future simply because another person had applied for a permit for a similar use is absurd.

More importantly, mining is a heavily regulated industry. Rick Frick of Minnesota Sands knew by at least October 2011 that a CUP for sand mining would be difficult to obtain in the County, when he attended a meeting where the Planning Commission considered three CUP applications for sand-mining operations and discussed the possibility of a moratorium on such use. Doc. 119, Ex. AA, 5, 10. All three applications were tabled to allow staff more time to answer questions. Doc. 119, Ex. AA, 9, 11, 13. At the following Planning Commission meeting in November 2011, the Planning Commission moved to table the CUP applications for another ninety days. Doc. 119, Ex. BB. At that point, no CUP had been issued to anyone seeking to mine silica sand in Winona County. Doc. 119, ¶5. Despite clear knowledge and understanding that silica-sand mining's future in the County was, in fact, far from certain, Frick entered into mining leases in November 2011. *See* Docs. 107-109, 111-112. Appellant has invested minimal funds and had every reason to know his ability to actually mine under these leases was speculative, at best.

To find Appellant's "distinct investment-backed expectations" were reasonable under the above circumstances would lead to unsustainable results. It would essentially

give rise to a taking claim anytime someone considers a development project and does not follow through on a project (or make any tangible strides toward doing so) in the years before the ordinance allowing the contemplated use is amended. Appellant's interests in mining in the County have never been anything more than a gamble that could have fallen apart based on any number of factors, including environmental review, County permitting, and/or market volatility. This court should reject the idea that Appellant's risky investment amounted to reasonable investment-backed expectations that have now been "taken" by the County's decision to amend its ordinance six years after Appellant entered into its leases.

3. The character of the government regulation favors the County.

The final *Penn Central* factor considers the "character of the government action." *Wensmann Realty*, 734 N.W.2d at 639. Appellant erroneously contends the district court improperly suggested an ordinance can never effect a taking if it is reasonable or substantially advances a state interest. App. Br. 40. The district court made no such suggestion. Instead, it disposed of Appellant's baseless taking claim upon its analysis that Appellant never had the right to mine. Appellant further contends that, reasonableness aside, the nature of the Ordinance Amendment constituted a taking of silica sand, equating it to taking property to build a road, park, or airport. App. Br. 41. This comparison fails.

This factor in the *Penn Central* test examines "whether the regulation is general in application or whether the burden of regulation falls disproportionately on relatively few property owners." *Wensmann Realty*, 734 N.W.2d at 639. The courts have made clear

that when the challenged land use regulation is reasonable, it does not work a taking. *Murr*, 137 S. Ct. at 1947. The challenged Ordinance Amendment is unlike a road, park, or airport acquisition, which require appropriation of specific private lands for public use. Instead, the Ordinance Amendment provides that neither in-state nor out-of-state interests may engage in industrial-mineral operations, applying uniformly across the entire County. No one is singled out by the Ordinance Amendment. Further, the reasonableness of the Ordinance Amendment cannot be overstated; even Appellant does not challenge this point or the district court's finding that this legislative decision was reasonable. The 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.

In summary, Appellant has failed to meet its significant burden of proving beyond a reasonable doubt that the County's adoption of the Ordinance Amendment effected a taking of it use leases.

D. The Ordinance Amendment does not effect a total taking of Appellant's property.

Even if the court finds Appellant's use leases could be subject to a total-taking analysis, no such taking occurred. A total taking occurs only when the property owner experiences deprivation of all economically beneficial use. *Lucas*, 505 U.S. at 1019.

Contrary to Appellant's supposition, it is not being called upon to leave its alleged property interest in mining "economically idle" as required to establish a total regulatory taking. *Lucas*, 505 U.S. at 1019, 112 S. Ct. at 2895. As discussed above, under the

challenged Ordinance Amendment, and with proper approvals, Appellant could engage in construction-mineral operations under its current leases. Notwithstanding its arguments to the lower courts, Appellant does not now dispute this fact and has therefore waived any such argument and concedes it maintains this mining option. Instead, it contends construction-mineral operations would not be a viable economic option and, at a minimum, a trial on this issue is necessary.[13] App. Br. 46.

Economic unfavorability or the unavailability of the best or most profitable use resulting in a decline of the property's value is insufficient to support a total-taking claim. *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 553 n. 4 (Minn. 1996). Instead, Appellant has to show 100% diminution in value of its property value, nothing less, to support a total taking claim. *Sierra Preservation Council*, 535 U.S. at 330; *Wensmann Realty*, 734 N.W.2d at 633 n. 6. Because Appellant's options for using its mining leases in an economically productive way, even if not the most productive way, have not been entirely foreclosed, there is no basis for Appellant's total taking claim.

In summary, the adoption of the Ordinance Amendment does not constitute a total deprivation of all economically beneficial use of property. Appellant has not been deprived of the right to mine in the County nor rights it may have under its mining leases. The Ordinance Amendment only prohibits Appellant – and the rest of the world – from

[13] Appellant did not submit any expert testimony as to the valuation of the construction-mineral operations – only industrial-mineral operations – and, to the extent he addressed this issue in his affidavit, Frick opined only that such operations are not economically viable. *See* App. Br. 12. Economic viability is not the test for analyzing a total regulatory-taking claim.

engaging in industrial-mineral operations in this sensitive geological region of the state. Appellant's assertion that a total taking has occurred must be rejected and the district court's grant, and court of appeals' affirmation, of summary judgment on this claim should be affirmed.

CONCLUSION

For the reasons set forth above, Respondent Winona County respectfully requests this Court affirm the district court's well-reasoned and proper grant of summary judgment in favor of the County.

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Dated: January 15, 2019

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STATE OF MINNESOTA
IN SUPREME COURT

APPELLATE COURT CASE NO. A18-0090

Minnesota Sands, LLC,

Appellant,

vs.

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

Respondent.

CERTIFICATION OF LENGTH OF DOCUMENT

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