No. 20-441

In the Supreme Court of the United States

Minnesota Sands, LLC,
Petitioner,

vs.

County of Winona, Minnesota,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court correctly held that the dormant Commerce Clause does not prohibit a local government from adopting a land-use regulation that differentiates between different materials and different extractive processes and restricts only the extractive process that poses far greater risks to the land and surrounding environment.

2. Whether the Minnesota Supreme Court correctly held that under Minnesota law and the terms of the specific leases here, which were acquired by Minnesota Sands during a moratorium and contingent on events that never came to pass, Minnesota Sands has no property interest in the relevant mineral estates because it has not fulfilled the conditions precedent that the leases impose.

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INTRODUCTION

Minnesota Sands' petition for certiorari presents two questions, each of which mischaracterizes the decision below. In reality, the decision below is factbound, implicates no division of authority, and is entirely correct. The petition should be denied.

The Minnesota Supreme Court's decision below upheld a land-use regulation enacted by the Winona County Board of Commissioners that prohibits mining industrial silica sand in Winona County in ways that pose grave environmental risks, but permits mining construction sand in a manner and scale that traditionally has not created serious risks to the surrounding land and environment. Minnesota Sands challenges that decision on two grounds, claiming the ordinance violates the dormant Commerce Clause and works an unconstitutional taking. Neither challenge warrants this Court's review.

First, Minnesota Sands asks this Court to decide whether a local government violates the dormant Commerce Clause if it prohibits mining a certain mineral for industrial purposes, but permits mining "the same mineral in the same way" for local construction. Pet.i. But that question does not even purport to implicate a split among lower court authority and depends on factual (mis)characterizations that the courts below squarely rejected. In particular, Minnesota Sands' first question presented depends on its repeated factual assertion that mining for industrial silica sand and mining for construction

sand involve mining "the same mineral in the same way." The courts below rejected that assertion twice over, finding that industrial silica sand and construction sand are neither the same mineral nor mined in the same way. As a result, Minnesota Sands' first question is not actually presented by the decision below, and its ongoing disagreement with the Minnesota courts over the underlying facts does not warrant this Court's review. Regardless, the Minnesota Supreme Court's decision faithfully applied this Court's precedent, and its alternative holding that Minnesota Sands would not be entitled to relief in any event makes this case a particularly unattractive candidate for certiorari.

Second, Minnesota Sands asks this Court to decide whether the Minnesota Supreme Court erred by holding that "permitting requirements eliminate the existence of a federally protected property interest" for takings purposes. Pet.i. But the Minnesota Supreme Court held nothing of the kind. Instead, it held only that under Minnesota law and the terms of the particular leases involved here, which were highly contingent, Minnesota Sands never satisfied the "specific conditions that govern [its] rights to use and possess the leased premises," thus as a contractual matter Minnesota Sands never acquired the rights that it claims were taken. Pet.App.36. That fact-specific state-law holding does not conflict with any other lower-court decision, does not conflict with this Court's precedent, and poses no threat to property rights more broadly. This Court should deny certiorari.

STATEMENT OF THE CASE

I. Factual Background

Winona County is located in southeastern Minnesota, directly across the Mississippi River from Wisconsin. The County is part of a geologically unique and ecologically sensitive karst region, defined by large interconnected networks of underground caverns, sinkholes, springs, and streams. Pet.App.5. These features make the area particularly vulnerable to groundwater pollution, which can spread easily through the karst region's porous underground structure.

The County contains significant underground deposits of silica sand, a hard-mineral sand that is used for a variety of purposes. Those purposes include manufacturing glass, abrasive materials, shingles, countertops, livestock bedding, and sand traps on golf courses. Pet.App.5. They also include various uses in the construction industry, including in buildings and road paving. Pet.App.5.

In the last twenty years, silica sand has also been used in the extraction process for drilling oil and natural gas known as hydraulic fracturing, or "fracking." Pet.App.4. As a hard-mineral sand, silica sand can be used in fracking to prop open geological fractures and allow oil and gas to seep out. This use has led to boom-and-bust cycles in the demand for silica sand, with sudden increases in demand during the fracking boom followed by decreases during subsequent industry downturns. Pet.App.4, 42.

Before silica sand can be used for fracking, it must be processed to meet industry standards, which is generally done at the extraction site. Pet.App.4. The typical method involves washing and filtering raw sand in unlined sedimentation ponds located at the mines. Pet.App.4. This process requires large volumes of water—up to 6,000 gallons per minute—and chemicals called flocculants used to remove the unwanted sediments. Pet.App.4. The leftover mixture of unwanted sediments, water, and flocculants is then returned to the mines without treatment, even though some flocculants are known to be hazardous to human health, including at least one known neurotoxin and probable carcinogen. Pet.App.4-5 & n.1; Pet.App.129. Industrial mining of silica sand is also associated with numerous adverse environmental impacts, including effects on air and water quality and the natural landscape, as well as negative effects on tourism, noise levels, traffic, health, and the local economy. *See* Pet.App.124-25.

Contrary to what Minnesota Sands suggests throughout its brief, there are significant differences between industrial silica-sand mining for uses like fracking as compared to mining for construction purposes. To begin with, as the Minnesota Supreme Court explained, Minnesota Sands' claim that the underlying sand is "the same" is "not supported by the record." Pet.App.27 n.14. On the contrary, a wider variety of sand can be used for construction purposes, so "at least some of the time, construction minerals are *not* the kind of raw silica sand that is needed to produce processed frac sand." Pet.App.27 n.14; *see* Pet.App.127-28 (noting U.S. Geological Survey's distinction between industrial and construction sand).

More important, there are "major differences between the operations for mining construction materials versus mining industrial materials" that go both to the scale and to the nature of the extractive process. Pet.App.128. Industrial mining operations "involve larger mines in operation for long periods of time that use blasting, underground mining techniques and involve chemical treatment of the mined sand," while construction mining operations "tend to involve small mines that engage in only periodic mining activities, which do not involve underground mining, blasting, or chemical processing." Pet.App.128-29. And unlike construction mining, industrial mining of silica sand (especially for fracking purposes) is exposed to unpredictable boom-and-bust cycles, which can exacerbate the risks to the local environment by producing unmet financial and environmental obligations. Pet.App.130-31. Industrial mining operations also require more water, increasing the risk of groundwater pollution. Pet.App.128-130. The latter concern is especially serious in Winona County, since the sites for "specifically industrial silica sand mining" are located primarily in the County's ecologically sensitive karst formations. Pet.App.129-30.

II. Winona County's Regulation of Industrial Silica-Sand Mining

In September 2011, Winona County received three conditional-use permit applications seeking permission to engage in industrial silica-sand mining in the County. Pet.App.6. In January 2012, the County Board of Commissioners denied those

applications and enacted a three-month moratorium on silica-sand mining to allow the County to study the potential impacts on the community and the environment of industrial mining activities. Pet.App.6. The Board ultimately adopted additional land-use regulations for silica-sand mining, which included requiring a conditional-use permit for all extraction pits and land alteration operations. Pet.App.6-7.

In 2016, the Board faced renewed conversations about the potential effects of industrial silica-sand mining. The Board referred the issue to the Winona County Planning Commission, which held multiple public hearings and received hundreds of oral and written comments (amounting to thousands of pages of information) supporting and opposing regulation of industrial mineral mining, including comments from County employees, industry representatives, environmental organizations, officials from other counties where industrial silica-sand mining is occurring, and the public at large. Pet.App.122-25. The vast majority of those comments supported some form of additional regulation on any kind of mining operations planned for Winona County. Pet.App.124. The Planning Commission also received a report from the Minnesota Environmental Quality Board on the impact of industrial mining on Winona County, based on studies of industrial mining operations in nearby counties and other information from state and local agencies, geologists, doctors, organizations that support industrial mining, and environmental scientists. Pet.App.125. The County then held another public hearing on the issue, at which over 100 people spoke and over 150 written comments were submitted. Pet.App.125. Based on

that eight-month process of review, comment, and deliberation, the Board adopted the amended ordinance challenged here. Pet.App.8-9, 122-27.

That ordinance, like other authorities, distinguishes between mining for industrial minerals and mining for construction minerals. Pet.App.9-10; *see* Pet.App.128 (noting the Minnesota Department of Natural Resources' distinction between industrial and construction mining); U.S. Office of Mgmt. & Budget, North American Industry Classification System at 112 (2017) (distinguishing Construction Sand and Gravel Mining from Industrial Sand Mining), *available at* https://bit.ly/2Ky4Xkw. The ordinance permits mining for "construction minerals" with a conditional-use permit, but prohibits mining for "industrial minerals" in the County except for operations that existed when the ordinance was passed. Pet.App.9-11, 200-01. The ordinance defines "industrial minerals" as "naturally existing high quartz level stone, silica sand, quartz, graphite, diamonds, gemstones, kaolin, and other similar minerals used in industrial applications, but excluding construction minerals." Pet.App.9, 195. It also adopts the definition in Minnesota Statues §116C.99(1)(d) of "silica sand" as "well-rounded, sand-sized grains of quartz (silicon dioxide), with very little impurities in terms of other minerals," which the statute notes "is commercially valuable for use in the hydraulic fracturing of shale." Pet.App.10, 196. Conversely, the ordinance defines "construction minerals" as "natural common rock, stone, aggregate, gravel and sand that is produced and used for local construction purposes," including a variety of listed examples. Pet.App.10, 195.

The Board's findings explain in detail the Board's rationale for the challenged ordinance, including the distinction between industrial-mineral operations and construction-mineral operations. As they show, the Board's primary concerns were to prevent the negative impact that industrial silica-sand mining would have on air and water quality, traffic and road safety, and natural landscapes in the County, as well as the health and general welfare of the County's citizens. App.6-7, 25-26; *see* Pet.App.199-200. The Board also particularly emphasized the unique geologic conditions in the County, and the importance of protecting the County's groundwater in light of those conditions. App. 21-22, 34-35; *see* Pet.App.200. By contrast, nothing in the record indicates that the Board acted based on any animus against out-of-state fracking or any form of local economic protectionism. On the contrary, "none of the comments that were critical of the fracking industry were credited by the Board in its findings adopting the amendment." Pet.App.25.

III. The Present Dispute

In February 2012 – during the County moratorium on any silica-sand mining – Minnesota Sands acquired four leases for silica-sand mining in the County. Pet.App.6. It acquired a fifth such lease in November 2015. Pet.App.6. While Minnesota Sands portrays these as valuable, unconditional leases rendered worthless by regulation, the reality is quite different. Consistent with the reality that four of the five leases were obtained by Minnesota Sands while a moratorium was imposed, the leases involved almost no immediate expense and were highly contingent. Each lease provides that for a one-time

payment of $1000 to the landowner, plus royalties on any sand eventually removed from the premises, Minnesota Sands obtained the right to use and possess the premises "solely to mine Frac Sand [i.e., silica sand] to be used … for commercial purposes." Pet.App.6-7. Minnesota Sands' rights and obligations under the leases are expressly "conditioned upon…obtaining any zoning or other governmental approvals" required to engage in silica sand mining. Pet.App.7; *see* Pet.App.36-37 (explaining that under the leases, Minnesota Sands had "no right to use or possess the land until it was able to engage in silica sand mining").

In August 2012, Minnesota Sands sought conditional-use permits for two sites in Winona County. Pet.App.7. However, the silica sand market crashed due to a fracking downturn, and Minnesota Sands abandoned its pursuit of permits and never completed the required environmental review process. Pet.App.7. Minnesota Sands never sought permits or environmental review to mine any of its other leases in Winona County, and indeed took no further action at all for more than four years. Pet.App.7-8.

In March 2017, a few months after the Board passed its amended ordinance prohibiting industrial-minerals mining in Winona County, Minnesota Sands sued the County in Minnesota state court, claiming *inter alia* that the ordinance violated the dormant Commerce Clause and was an unconstitutional taking. Pet.App.11. In a detailed opinion, the trial court rejected all of Minnesota Sands' claims and granted summary judgment for the County.

Pet.App.120-46. The Minnesota Court of Appeals affirmed. Pet.App.69-119.

IV. The Minnesota Supreme Court's Decision

The Minnesota Supreme Court likewise affirmed. On Minnesota Sands' dormant Commerce Clause claim, the court rejected the argument that the ordinance facially discriminated against out-of-state interests by allowing mining for construction minerals for "local construction purposes," explaining that the term "local" did not limit permissible mineral uses to in-state construction and that the ordinance made no express distinction between in-state and out-of-state interests. Pet.App.20-23. Even if the term "local" were discriminatory, the court held, the ordinance should be cured by invalidating only that word—allowing mining for *any* "construction purposes," but continuing to prohibit the industrial mining that Minnesota Sands wants to conduct. Pet.App.23-24.

The Minnesota Supreme Court also found the ordinance had no discriminatory purpose, explaining that Minnesota Sands had "not pointed to any concrete evidence" to support its argument that the Board acted out of anti-fracking animus rather than the legitimate environmental, economic, safety, and welfare concerns that the Board detailed. Pet.App.25. The court likewise found no discriminatory effect, explaining that the ordinance did not impermissibly favor in-state economic interests over out-of-state interests, and instead applied equally to all industrial-mineral mining operations and their in-state and out-of-state

consumers. Pet.App.25-29. The court specifically rejected the dissent's claim that the ordinance was discriminatory because construction minerals and industrial minerals are "the same sand," finding that claim "not supported by the ordinance or the record." Pet.App.27 n.14.

The Minnesota Supreme Court also rejected Minnesota Sands' takings claim, agreeing with the trial court and the Minnesota Court of Appeals that, as a matter of state law, Minnesota Sands had not yet acquired any concrete property interest under its leases. Pet.App.30-44. As the court explained, the property interests (if any) belonging to a lessee "depend upon the terms of the lease." Pet.App.35. Looking specifically at the terms of Minnesota Sands' leases, the court held that "the essential terms of these leases are subject to specific conditions that govern Minnesota Sands' rights," and in particular that "Minnesota Sands had no right to use or possess the land until it was able to engage in silica sand mining." Pet.App.36-37. "Until that condition was met, the leases reserved the rights to use and possess the premises to the lessors in absolute terms." Pet.App.37. Because Minnesota Sands never satisfied that condition by obtaining the necessary permission to begin mining, "the conditions precedent to acquiring possession and control under any of the leases" were never met, and so Minnesota Sands "does not have a fully-fledged leasehold interest under Minnesota law." Pet.App.38. Instead, Minnesota Sands "at most" held "expectancy interests that are too speculative to support a takings claim." Pet.App.38.

REASONS FOR DENYING THE PETITION

Neither of Minnesota Sands' questions presented warrants this Court's review. As to its first question presented, regarding the dormant Commerce Clause, Minnesota Sands does not claim that the decision below conflicts with the decisions of any other lower court; instead, it asserts only that the Minnesota Supreme Court misapplied this Court's precedent. Pet.16-23. That is precisely the kind of purported "misapplication of a properly stated rule of law" that does not warrant certiorari. S. Ct. R.10. Still worse, Minnesota Sands' question presented depends on its factual assertions that industrial silica-sand mining and construction sand mining involve "mining the same mineral in the same way," Pet.i—assertions that the courts below rejected. Pet.App.27 n.14, 78-80, 122-31, 141. Minnesota Sands' factual dispute with the Minnesota courts does not warrant this Court's review. The decision below is fully consistent with this Court's precedent, and the Minnesota Supreme Court's alternative holding that Minnesota Sands cannot obtain the relief it seeks in any event makes this case an exceptionally poor candidate for further review. Finally, nothing supports Minnesota Sands' exaggerated assertion that the decision below will lead to a flood of politically motivated land-use restrictions, *contra* Pet.24-27—especially when the record is clear that the restriction here was *not* adopted out of political animus, *see* Pet.App.25, 122-31. The absence of any *amicus* support for Minnesota Sands' petition underscores the point; after all, if the decision below really were a grave threat to the fracking industry (or any other industry), one would

expect that at least some *amici* would have appeared to urge further review.

Minnesota Sands' second question presented, regarding its takings claim, fares no better. That question rests on a profound mischaracterization of the decision below, asserting the Minnesota Supreme Court held that local permitting requirements "eliminate the existence of a federally protected property interest unless and until the permits are granted." Pet.i. In fact, the Minnesota Supreme Court held nothing of the kind, and indeed specifically rejected that view. Instead, the court held only that under the terms of the particular leases here and under Minnesota law, Minnesota Sands never acquired the mineral rights that it now claims were taken, because it never fulfilled the contractual conditions precedent that the leases impose. That narrow decision does not implicate any conflict in the lower courts, does not contravene this Court's precedent, and does not warrant further review. Certiorari should be denied.

I. This Court Should Deny Certiorari On Minnesota Sands' Splitless, Factbound, And Meritless Dormant Commerce Clause Claim.

Minnesota Sands' first question presented asks this Court to review a splitless question, based on factual assertions that the courts below rejected, and to overturn a decision that faithfully applied this Court's precedent, on an issue that is not outcome-determinative. It comes nowhere near warranting this Court's attention.

A. Minnesota Sands' Dormant Commerce Clause Claim Rests On Factual Assertions That The Courts Below Rejected.

Minnesota Sands' first question presented asks whether a local government violates the dormant Commerce Clause if it generally prohibits mining a certain mineral, but permits "mining the same mineral in the same way" for certain local uses. Pet.i. That question, and Minnesota Sands' entire dormant Commerce Clause claim, rests on two factual assertions that the courts below rejected: that industrial silica sand and construction sand are "the same mineral," and that they are mined in "the same way."

First, Minnesota Sands repeatedly asserts that the ordinance here prohibits mining silica sand for fracking and other industrial purposes, but allows mining "the very same sand" for local construction purposes. Pet.16; *see* Pet.1 ("the very same sand"), Pet.11 ("the very same sand"), Pet.12 ("the same sand"), Pet.22 ("the very same sand"), Pet.23 ("the same sand"). That factual assertion—that industrial silica sand and construction sand are "the very same"—is critical to Minnesota Sands' dormant Commerce Clause argument, as Minnesota Sands does not try to argue that the ordinance here violates the dormant Commerce Clause by prohibiting mining for some minerals (such as diamonds and kaolin) while allowing mining for others (such as natural common rock and gravel). *See* Pet.App.9-10.[1]

[1] That is for good reason, as this Court has repeatedly held that the dormant Commerce Clause does not prohibit states and local governments from discriminating among

That critical factual assertion—that industrial silica sand and construction sand are identical—was squarely rejected by the Minnesota Supreme Court, which dismissed the idea that the two "are in reality 'the same sand'" as "not supported by the ordinance or the record." Pet.App.27 n.14. Indeed, as the Minnesota Supreme Court recognized, a wider variety of sand can be used for construction purposes and Minnesota Sands' own expert "candidly admit[ted] that the two are not always the same," recognizing that "at least some of the time," construction sand is "*not* the kind of raw silica sand that is needed to produce processed frac sand." Pet.App.27 n.14; *see* Pet.App.80 ("The ordinance's differentiation between silica sand—an industrial mineral—and other types of sand—construction minerals—is consistent with the record."); Pet.App.128 (noting the U.S. Geological Survey's distinction between industrial sand and construction sand). Nothing in the dormant Commerce Clause prohibits local governments from treating different minerals differently, and Minnesota Sands makes no attempt to argue otherwise. The question of whether a local government can impose varying restrictions on mining "the same mineral," Pet.i., simply is not presented here.

Second, Minnesota Sands is not only wrong to say that industrial silica sand and construction sand are "the same mineral," but also wrong to claim they

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entities that are not "substantially similar" because they operate in "arguably distinct markets." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298, 300 (1997); *see, e.g.*, *Alaska v. Arctic Maid*, 366 U.S. 199 (1961).

are mined in "the same way." Pet.i.; *see, e.g.*, Pet.1, 8. On the contrary, the record below shows (and the courts below recognized) that there are "major differences between the operations for mining construction materials versus mining industrial materials," with the former generally involving small mines, gentler extraction techniques, and only periodic mining, while the latter involves larger mines that use blasting, underground mining techniques, and chemical processing. Pet.App.128-29; *see* Pet.App.27 n.14 (noting the "sensible" distinction between industrial and construction mining given the risk of groundwater pollution from chemical processing). Industrial mining is also far likelier to strain the environment, local resources, and infrastructure, Pet.App.128-30, and create negative economic and environmental effects on the surrounding community from boom-and-bust mining cycles, Pet.App.130-31. The Board properly took those facts into account in regulating the two kinds of mining differently. *See* Pet.App.128-31, 198-200. The fact that Minnesota Sands' expert disagrees with the Board on whether industrial mining and construction mining differ, *see* Pet.8 (citing Pet.App.165, 170), is hardly a license for Minnesota Sands to ignore the clear facts in the record, let alone a reason for this Court to grant review.[2]

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[2] Minnesota Sands is equally wrong to suggest that the ordinance allows silica sand to be mined for "all uses that are common locally" but not uses that occur "only in other States." Pet.i. As the record makes clear, silica sand has numerous industrial uses in Minnesota, including glassmaking, countertops, shingles, and other manufacturing. Pet.App.5. The ordinance prohibits mining silica sand in Winona County for all of those local uses.

In short, Minnesota Sands' purported question presented—whether a county can prohibit mining a mineral for out-of-state uses but permit "mining the same mineral in the same way" for local uses, Pet.i—is not actually presented here. That question, and Minnesota Sands' entire dormant Commerce Clause claim, depends on factual assertions that the courts below rejected. Even if Minnesota Sands had some basis for challenging those factual issues (and it does not), that factbound dispute would hardly warrant this Court's review. That alone is sufficient reason to deny certiorari on the first question presented.

B. Minnesota Sands' Dormant Commerce Clause Claim Is Meritless.

Minnesota Sands' dormant Commerce Clause claim fails not only on the facts, but on the law. That claim relies on a "peculiar" doctrine that "cannot be found in the text of any constitutional provision but is (at best) an implication from one." *Tenn. Wine & Spirits Ass'n v. Thomas*, 139 S. Ct. 2449, 2477 (2019) (Gorsuch, J., joined by Thomas, J., dissenting); *see Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."). Minnesota Sands then stretches that doctrine far beyond its existing bounds, seeking to use it to strike down a local land-use regulation (a step that this Court has never taken) even though that regulation implicates the most classic concerns of local government (concerns about the extraction of resources and the effect on the surrounding

environment) and does not discriminate against interstate commerce on its face, in its purpose, or in effect. The Minnesota Supreme Court correctly rejected Minnesota Sands' dormant Commerce Clause claim.

1. The ordinance is not discriminatory on its face.

First, the Minnesota Supreme Court correctly concluded that the County's land-use ordinance does not discriminate against interstate commerce on its face. Pet.App.17-24. As the court explained, the ordinance is not an "export ban" prohibiting any out-of-state shipment of a particular resource. Pet.App.18. Instead, "[a]s a land-use regulation," the ordinance "is foremost a restriction on the rights of Minnesota landowners." Pet.App.18. The primary burden of the regulation falls on local landowners who are fully represented in the local government. More important, that restriction "is evenhanded on its face"; it "pays no regard to whether the person or entity who wishes to engage in industrial mining resides in-state or out-of-state or wishes to sell the industrially mined sand to in-state or out-of-state consumers." Pet.App.18. Because the ordinance imposes no "express discrimination between in-state and out-of-state economic interests, Minnesota Sands' facial discrimination theory fails." Pet.App.19.

Minnesota Sands claims that reasoning conflicts with this Court's precedent, relying on two export-ban cases from nearly a century ago. Pet.18-19 (discussing *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (shrimp); *Pennsylvania v. West Virginia*, 262 U.S. 553, *aff'd on reh'g*, 263 U.S. 350

(1923) (natural gas)). Neither is remotely on point. Unlike the ordinance here, the statutes in those cases literally discriminated on their face between in-state and out-of-state interests, drawing explicit lines at state borders. *Haydel*, 278 U.S. at 5 n.1; *Pennsylvania*, 262 U.S. at 582 n.1.[3] As the Minnesota Supreme Court recognized, no comparable facial discrimination exists here; the ordinance bans *all* industrial mining in the County, for both in-state and out-of-state producers and consumers. Pet.App.17-19.

Minnesota Sands nevertheless suggests that the ordinance facially discriminates against out-of-state interests by allowing mining for "construction minerals," including "sand that is produced and used for local construction purposes." Pet.11-12 (quoting Pet.App.195). But as already explained (and as the Minnesota Supreme Court recognized), construction sand and industrial silica sand are not the same thing and pose different risks to the local environment, *supra* pp.4-5; Pet.App.27 n.14, and nothing in the dormant Commerce Clause requires a county to treat different minerals the same. In any event, as the Minnesota Supreme Court also recognized, "'local' is not synonymous with 'in-state'"; here, the term "can be interpreted to include, at the very least, the neighboring parts of Wisconsin located across the river from Winona County," obviating any claim that the ordinance facially discriminates along

[3] So too for *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 249-50 (1911) (gas pipelines), which Minnesota Sands cites only in a footnote and which likewise involved explicit state-line discrimination.

state lines. Pet.App.20.[4] Minnesota Sands cites no case from this Court or any other holding that such an ordinance, which on its face applies equally to in-state and out-of-state interests, is nevertheless facially discriminatory. Indeed, Minnesota Sands' position would mean that any state or local regulation that uses the word "local" faces "a virtually *per se* rule of invalidity," *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007)—a proposition this Court has never adopted.

2. The ordinance is not discriminatory in purpose or effect.

The Minnesota Supreme Court also correctly concluded that the ordinance does not discriminate against out-of-state economic interests either in purpose or in effect. As to purpose, the court explained that Minnesota Sands had "not pointed to any concrete evidence" to support its claim that the ordinance was motivated by "animus toward the primarily out-of-state fracking industry." Pet.App.25. "[T]ellingly, none of the comments that were critical of the fracking industry were credited by the Board in its findings adopting the amendment." Pet.App.25. Instead, those findings showed that the Board was motivated by legitimate concern for the County's environment, economy, and general welfare, based on a detailed record showing the negative effects of

[4] Indeed, the term "local construction purposes" could easily be read to cover any construction that occurs at the local level (as opposed to interstate or international construction projects), wherever that construction may be—a reading that would eliminate any claim of facial discrimination.

industrial mining in other communities. *See supra* pp.6,16.

Minnesota Sands' petition repeats (and repeats, and repeats) its claim that the Board was motivated by anti-fracking animus, *see, e.g.*, Pet.2 (claiming the Board acted "for the express purpose of choking off" fracking); Pet.24 ("to force other States to follow its policy views on fracking"); Pet.25 (to "squelch" fracking), but again points to no evidence whatsoever to support that claim. Instead, as below, Minnesota Sands relies solely on "the alleged motivation of actors who lobbied in favor of the amendment," and whose comments were not credited by the Board. Pet.App.25; *see* Pet.10. As the Minnesota Supreme Court explained, those sources—the equivalent of county-level legislative history, by public commenters with no decision-making authority—have "little (if any) probative value in demonstrating the objective of the Board as a whole." Pet.App.25 (brackets omitted).

Minnesota Sands' claim of discriminatory effect is equally unpersuasive. As the decision below recognized, the "crucial inquiry" in assessing discriminatory effect is whether the ordinance is "basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." Pet.App.25-26 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Here, the overwhelming evidence shows that this land-use ordinance was enacted not to address out-of-state fracking operations, but to address genuine and legitimate local concerns over the negative local environmental, economic, safety, and

welfare impacts of industrial silica sand mining. *See supra* pp.6,16. By contrast, *nothing* in the record suggests that the ordinance was enacted to provide in-state entities an economic advantage against out-of-state entities—to the contrary, it is in-state property owners who bear the brunt of the burdens. *See* Pet.App.29 (explaining that the ordinance "does not further economic protectionism in the sense that in-state interests benefit at the expense of out-of-state interests"); *cf.* Pet.24 (recognizing that the ordinance was not "motivated by economic protectionism").

Instead, Minnesota Sands argues that the ordinance creates a discriminatory effect simply because it bans mining for industrial silica sand, which has a significant out-of-state use, but does not ban mining for construction sand for local use. Pet.22-23; *see* Pet.App.27. That argument fails for two reasons. First, as already explained, mining for industrial silica sand and mining for construction sand are not the same, *see supra* pp.14-15, and nothing in the dormant Commerce Clause requires a county to treat them as if they were. Regulating different activities differently does not give rise to a claim of discriminatory effect. *See, e.g.*, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) ("[A]ny notion of discrimination assumes a comparison of substantially similar entities." (footnote omitted)). Second, as the Minnesota Supreme Court explained, the ordinance applies equally to both in-state and out-of-state consumers of industrial silica sand, both of whom are deprived of silica sand from Winona County. Pet.App.27-28. The ordinance prohibits mining industrial silica sand not only for out-of-state industrial uses such as fracking, but also for in-state

industrial uses such as manufacturing glass, shingles, countertops, and other products. Pet.App.28. That even-handed treatment of in-state and out-of-state interests "obviates any concern that the County acts to 'isolate itself from the national economy,' or to 'saddle those outside the State with the entire burden' imposed by the ordinance.'" Pet.App.28 (brackets omitted) (quoting *City of Philadelphia*, 437 U.S. at 627-29).

The decision below does not conflict with any of the cases from this Court that Minnesota Sands cites. *Contra* Pet.20-23 (discussing *Brimmer v. Rebman*, 138 U.S. 78 (1891); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Ft. Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.*, 504 U.S. 353 (1992)). Each of those cases involved precisely the kind of discriminatory economic protectionism that this Court's dormant Commerce Clause doctrine has been developed to prevent, favoring local economic interests at the expense of out-of-state interests. In that context, the Court has found dormant Commerce Clause violations in cases where a discriminatory regime harms out-of-state economic interests *and benefits in-state economic interests*, even if that discriminatory regime may harm some in-state interests as well. *See, e.g.*, *Brimmer*, 138 U.S. at 80 (statute benefiting local meat producers); *Dean Milk*, 340 U.S. at 350 (statute benefiting local milk producers); *Bacchus*, 468 U.S. at 265 (statute benefiting local alcohol producers); *Ft. Gratiot*, 504 U.S. at 355 (statute benefiting local waste producers). Here, by contrast, there is no claim that the ordinance benefits *any* in-state economic interest; instead, it burdens primarily local property owners in

order to protect the local environment and general welfare. Pet.App.27-29. That is fatal to Minnesota Sands' claim of discriminatory effect.

C. Minnesota Sands' Dormant Commerce Clause Arguments Are Not Dispositive.

Even if there were any merit to Minnesota Sands' dormant Commerce Clause arguments, this case would still be a poor vehicle for considering them, because none of those arguments is outcome-determinative. On the contrary, the Minnesota Supreme Court specifically held below that ruling for Minnesota Sands on its dormant Commerce Clause claim "would not lead to a different result in this case." Pet.App.23. That alternative holding makes this case a particularly unattractive vehicle for reviewing Minnesota Sands' novel dormant Commerce Clause arguments.

As the Minnesota Supreme Court explained, even if Minnesota Sands could show that the "use of the term 'local'" in the County's ordinance was discriminatory and violated the Commerce Clause, the proper remedy for that defect would be to strike only "the portions [of the ordinance] that render [it] unconstitutional." Pet.App.23 (quoting *State v. Melchert-Dinkel*, 844 N.W.2d 13, 24 (Minn. 2014)). Thus, even if there were some impermissible discrimination in defining "construction minerals" to include sand used for "local construction purposes," the remedy would simply be to strike the word "local," such that the ordinance would permit mining construction sand for *all* construction purposes (whether local or not). Pet.App.24.

That remedy, however, would do Minnesota Sands no good at all. As Minnesota Sands admitted below, it "has no interest in mining sand to be used for 'construction purposes,'" whether local or otherwise. Pet.App.24. Even if the "local" restriction on mining construction sand that Minnesota Sands claims is discriminatory were removed (allowing entities to mine construction sand for local or non-local construction), Minnesota Sands would still be prohibited from mining industrial silica sand for industrial purposes. Pet.App.24. As such, even if this Court were to rule for Minnesota Sands on its dormant Commerce Clause claim, Minnesota Sands still "would not be entitled to relief." Pet.App.24. This Court should not squander its limited resources on a question whose resolution cannot affect the outcome of the case.

D. Minnesota Sands' Assertion That Review Is Needed To Prevent Economic Conflict Is Baseless.

Minnesota Sands ends its dormant Commerce Clause argument by claiming that review is needed to "prevent a proliferation of similarly destructive economic conflicts," portraying the decision below as an invitation to local governments to "export their policy views by constraining exports of their natural resources." Pet.24-27. That portrayal has no basis in reality. As already explained (and as the Minnesota Supreme Court recognized), nothing in the record in any way supports Minnesota Sands' baseless assertion that Winona County enacted the challenged ordinance to "force other States to follow its policy views on fracking" because the County "disapprove[s] of" that practice. *Contra* Pet.24; *see* Pet.App.25. On

the contrary, the record makes abundantly clear that the Board adopted the ordinance not to regulate out-of-state fracking but based on serious and legitimate concerns about the negative effects of in-county industrial silica-sand mining. *Supra* pp.6,16; App.1-48; *see* Pet.App.25, 122-31. That classic effort to regulate locally to protect the local environment poses no grave threat to the national economy.

Minnesota Sands similarly fails to substantiate its claim of a "recent and concerning trend" of local governments "discriminat[ing] against interstate commerce in order to squelch disfavored economic activity occurring in a sister State." Pet.25. If that claim had any basis in reality, one would expect Minnesota Sands to have more evidence of its purported "trend" than three barely-relevant cases over the past seventeen years. An occasional case every five years is hardly a trend, let alone evidence of a pressing need for this Court's attention. If anything, those cases (two of which struck down the challenged laws) only confirm that courts already have the requisite tools to address any local regulations that do in fact discriminate against interstate commerce. The only "threat to the federalist underpinnings of our republic" that this petition raises, Pet.25-26, is the risk that petitioners like Minnesota Sands will continue trying to expand the judge-made contours of the dormant Commerce Clause to strike down legitimate, nondiscriminatory state and local regulations designed to address unique local circumstances and concerns. That is a threat this Court should reject, not encourage.

II. This Court Should Deny Certiorari On Minnesota Sands' Splitless, Factbound, And Meritless Takings Claim.

Minnesota Sands' second question presented is just as uncertworthy as its first. Once again, Minnesota Sands distorts the decision below almost beyond recognition, claiming the Minnesota Supreme Court held that a local government can use "permitting requirements" to "eliminate the existence of a federally protected property interest." Pet.i. In fact, the decision below simply holds that under Minnesota law and the plain terms of Minnesota Sands' leases, which were acquired by Minnesota Sands during a moratorium and were highly contingent on events that never came to pass, Minnesota Sands never acquired the property interest that it now claims was taken. That splitless, factbound, and correctly decided issue does not warrant this Court's review.

A. The Decision Below Held Only That The Specific Terms Of Minnesota Sands' Leases Gave It No Property Interest Here, Not That Permitting Requirements Eliminate Otherwise Protectable Property Interests.

Minnesota Sands claims that review of the decision below is needed because, it says, the Minnesota Supreme Court held that "a mineral estate in land cannot qualify as 'property' under the Fifth Amendment unless and until the owner has obtained all necessary mining permits." Pet.28; *see* Pet.32-33 (claiming the decision below "interpreted the Fifth Amendment to mean that a mineral estate

is not 'property' in the absence of a mining permit"). Minnesota Sands suggests that it invested substantial resources to acquire valuable mineral leases rendered worthless by subsequent regulation. That description of the decision below is patently false. In fact, Minnesota acquired the highly-contingent leases here, which paid the original landowners a pittance ($1000 in upfront payments), in the wake of a moratorium on industrial mining. The resulting leases were entirely contingent on long-shot regulatory approvals that never came to pass. The Minnesota Supreme Court came nowhere near claiming that mineral estates *generally* do not qualify as property (under either Minnesota law or the Fifth Amendment) until all required permits have been obtained; instead, it held only that under the terms of Minnesota Sands' leases, Minnesota Sands never satisfied the "specific conditions that govern Minnesota Sands' rights to use and possess the leased premises," and so never acquired the mineral estate that Minnesota Sands claims was taken. Pet.App.36; *see* Pet.App.36-39. That fact-specific state-law question about the terms of Minnesota Sands' particular leases does not warrant certiorari.

The Minnesota Supreme Court could not have been clearer about the limited nature of its holding. The court specifically recognized that Minnesota law *does* acknowledge mineral leases as a valid property interests that are protected against governmental takings. Pet.App.33-34. But while mineral leases generally may grant property interests, the court explained, "[t]he property interests, if any, belonging to the lessee … depend upon the terms of the lease." Pet.App.35. Here, the leases that Minnesota Sands signed did not grant Minnesota Sands any immediate

property interest in the mineral estates involved. Instead, the Minnesota Supreme Court concluded, "the essential terms of these leases are subject to specific conditions that govern Minnesota Sands' rights to use and to possess the leased premises" and under those conditions, "Minnesota Sands had no right to use or possess the land until it was able to engage in silica sand mining." Pet.App.36-37. That is, unless and until Minnesota Sands acquired the permits necessary to begin mining silica sand, "the leases reserved the rights to use and possess the premises to the lessors in absolute terms." Pet.App.37.

As the decision below carefully explained, it was "[t]hese lease terms"—not the county's permitting requirements—that were "the fatal defect in Minnesota Sand[s'] takings claim." Pet.App.37. Because "the conditions precedent to acquiring possession and control under any of the leases" were never satisfied, the court concluded that Minnesota Sands "does not have a fully-fledged leasehold interest under Minnesota law." Pet.App.38; *see* Pet.App.43 (explaining that "under Minnesota law Minnesota Sands never had a present, or even non-contingent, possessory right to use, or to possess and control, the premises described in its lease agreements"). Instead, "the agreements at most grant Minnesota Sands expectancy interests that are too speculative to support a takings claim." Pet.App.38.[5] The problem with Minnesota Sands'

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[5] In particular, because Minnesota Sands never actually satisfied the conditions in its leases, it held at most a tenuous contingent interest in *acquiring* the underlying mineral estate *if* it eventually satisfied those required contractual conditions. As

takings claim, in other words, is not that the County's permitting requirements somehow deprived it of a protectable property interest; it is that Minnesota Sands never satisfied the conditions in its leases that would have given Minnesota Sands a protectable property interest in the first place. *See* Pet.App.42 (explaining that "[f]or a variety of understandable reasons," Minnesota Sands "never came close to securing the possessory rights described in its lease agreements").[6]

Notably, the Minnesota Supreme Court *specifically rejected* the idea that its decision would mean that local permitting requirements could deprive property owners of protectable property interests. As the court explained, its decision rested instead on "the uncontroversial premise that the government cannot 'take' property rights that a party never had." Pet.App.38 n.19. Because Minnesota Sands was attempting to assert "rights that the terms of the lease never granted," it had no takings claim. Pet.App.38 n.19. And as the court emphasized, "the rights granted under the terms of the lease agreements were determined by the

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the Minnesota Supreme Court explained, that interest "was, at most, a contingent-use interest under Minnesota law" that Minnesota treats as an "expectancy" rather than a property right. Pet.App.38, 42-43. Minnesota Sands does not challenge that state-law holding.

[6] Minnesota Sands' contrary claim that the Minnesota Supreme Court "recognized that Minnesota Sands owns valid mineral estates under Minnesota law," Pet.32, is simply not true. In fact, the Minnesota Supreme Court's opinion says the exact opposite. Pet.App.34-38 ("Minnesota Sands does not have a fully-fledged leasehold interest under Minnesota law."); Pet.App.42-43 ("Minnesota Sands never came close to securing the possessory rights described in its lease agreements.").

parties"; it was Minnesota Sands' own contracts, not county regulation, that "limit[ed] Minnesota Sands' rights to a contingency interest." Pet.App.38 n.19.

Put simply, Minnesota Sands' second question presented, like its first, is not actually presented by this case. Nothing in the decision below holds that local permitting requirements "eliminate the existence of a federally protected property interest," *contra* Pet.i.; it simply holds that under the terms of Minnesota Sands' leases, Minnesota Sands never acquired any such property interest from the lessors because Minnesota Sands never fulfilled the necessary conditions precedent. That state-law question about the proper interpretation of these specific leases hardly merits this Court's review.

B. The Decision Below Does Not Conflict With Decisions From Other Courts Or With This Court's Precedent.

Minnesota Sands' attempt to portray the decision below as conflicting with other courts or with precedent from this Court is equally misguided. There is no split between the Minnesota Supreme Court's decision and the scattered handful of lower-court opinions from the past 30 years that Minnesota Sands cites, and the judgment below in no way contravenes any of this Court's prior rulings.

To begin with, the limited nature of the decision below makes clear that there is no lower-court split here. The Minnesota Supreme Court did not hold that there can be no protectable property interest in a mineral estate subject to permitting requirements, *contra* Pet.28, 32-33; in fact, it

specifically rejected that conclusion, *see* Pet.App.33-34, 38 n.19. Instead, the Minnesota Supreme Court held only that under the terms of Minnesota Sands' particular leases, Minnesota Sands has not acquired any such property interest. *Supra* p.11. The fact that other courts reviewing different leases and applying different state law have reached different decisions does not create any conflict, much less one warranting this Court's review.

Even if the decision below could be read as a broader statement about the kind of property interests that Minnesota law recognizes, it still would not be in tension with the other decisions Minnesota Sands cites. This Court has been clear that the federal Constitution does not create property interests; instead, those interests "stem from an independent source such as state law." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)); *see, e.g.*, *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 115, 161 (1980). In that context, it is hardly surprising that courts applying different states' laws may reach different conclusions about whether a particular interest constitutes property under state law, and whether as a result the purported property-owner has a valid takings claim.

In any event, the cases Minnesota Sands cites are readily distinguishable. Minnesota Sands leads with *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990), where the Federal Circuit found a regulatory taking of mineral leases when the Secretary of the Interior delayed approving a uranium mining plan—based on an invented "tribal approval" requirement that "was not adopted or

included in any regulation"—for so long that the leases expired. *Id.* at 1436. Unlike Minnesota Sands, the plaintiff in *United Nuclear* had already satisfied the necessary preconditions for its leases to "become effective," *id.* at 1434, and so already had an existing and undisputed mineral leasehold interest that was arbitrarily destroyed by the government's unlawful delay. No similar circumstances exist here.

Minnesota Sands turns next to a vacated trial-court decision from the Court of Federal Claims, *John R. Sand & Gravel v. United States*, 62 Fed. Cl. 556 (2004), *vacated*, 457 F.3d 1345 (Fed. Cir. 2006), *and vacatur aff'd*, 552 U.S. 130 (2008). That vacated decision not only has no precedential force, and not only depended on Michigan law rather than Minnesota law, *id.* at 564, but also specifically noted that the defendant there was *not* arguing the only question Minnesota Sands claims is relevant: whether any existing property interest was "voided by the lack of permits." *Id*. at 568.

Minnesota Sands has no more luck with its state-court cases. It begins with a decision from an intermediate Pennsylvania appellate court on which the Pennsylvania Supreme Court has granted further review. *PBS Coals, Inc. v. Dep't of Transp.*, 206 A.3d 1201 (Pa. Cmwlth. Ct.), *review granted* 218 A.3d 373 (Pa. 2019) (table). That decision appears to turn entirely on Pennsylvania law, and does not even mention the Fifth Amendment. And once again, the claimants there (unlike Minnesota Sands here) had effective leases that "made them the owners of the coal estate" that was allegedly taken. *Id.* at 1223. As for the Ohio Supreme Court' decision in *Ohio ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998 (Ohio 2002), it

says nothing about whether permitting requirements may affect a takings claim; instead, it addresses how to define the relevant parcel for a regulatory takings analysis where only part of the property was affected by the alleged taking. *Id.* at 1006-09. Finally, the intermediate Utah appellate decision in *Diamond B-Y Ranches v. Tooele County*, 91 P.3d 841 (Utah App. 2004), is entirely irrelevant. That case addressed whether the denial of a conditional-use permit was a regulatory taking, not whether an entity that lacks any existing leasehold interest in the underlying minerals can claim such a taking.

In fact, the only litigation Minnesota Sands mentions that actually addressed a similar question agrees with the decision below. *See* Pet.31 (citing *Seven Up Pete Joint Venture v. Montana*, 2002 WL 34447228 (D. Mont. Dec. 9, 2002)). The relevant decision in that litigation came three years later from the Montana Supreme Court, which reviewed the leases at issue in that case and found they "ma[d]e clear that the [plaintiff] was obligated by contract to secure an operating permit … before it would acquire any 'right' to mine." *Seven Up Pete Venture v. State*, 114 P.3d 1009, 1019 (Mont. 2005). Because the plaintiff there "had not secured an operating permit as required by the [leases] … it likewise had not obtained a right to mine," and so could not claim any unconstitutional taking of a right it never held. *Id.* That reasoning precisely (and correctly) mirrors the Minnesota Supreme Court's reasoning here.

There is not only no "confusion among the lower courts," but also no conflict with this Court's precedent. *Contra* Pet.33. Nothing in the Minnesota Supreme Court's decision undermines the settled

principle that the mere existence of a permitting requirement is not itself a taking, *contra* Pet.33 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)), or that the denial of a permit can be a taking under appropriate circumstances, *contra* Pet.33 (citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013). On the contrary, the Minnesota Supreme Court specifically recognized that land-use regulations like zoning laws do not necessarily constitute takings, but that they may become a taking if they "go too far." Pet.App.32 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Nor does the decision below remotely suggest that these principles do not apply to mineral estates. *Contra* Pet.34 (citing *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981)). Instead, the Minnesota Supreme Court specifically recognized that a mineral estate is a valid and separable property interest under Minnesota law, and that "such partitions must be respected." Pet.App.33 (citing *Washburn v Gregory Co.*, 147 N.W. 706 (Minn. 1914)). The court held only that under the terms of the specific leases at issue, that property interest had not yet been conveyed to Minnesota Sands, because Minnesota Sands had not yet satisfied the "specific conditions that govern Minnesota Sands' rights to use and to possess the leased premises." Pet.App.36; *see* Pet.App.30 (agreeing with the Minnesota Court of Appeals and the trial court that "the property interests that [Minnesota Sands] claims were taken by the County had not yet accrued"). That holding—a plain-text application of the specific terms of the specific leases

here—comes nowhere near contravening this Court's precedent.

For the same reasons, Minnesota Sands is plainly wrong to claim that the decision below creates a "shell game" that "seriously endanger[s]" Minnesota property rights and "opens the door for local governments to eliminate immensely valuable mineral rights without paying any compensation at all." *Contra* Pet.34-35. Minnesota Sands is quite correct to say that a mineral-rights owner is not likely to succeed on a facial takings challenge to a land-use regulation that requires a permit for industrial mining; but it is quite wrong to claim that the decision below categorically forecloses any takings challenge to a subsequent decision denying such a permit or banning mining altogether. Instead, the decision below holds only that such a challenge cannot be brought by a mineral lessee who has not actually acquired the right to mine the property under the terms of its own lease. Pet.App.35 ("The property interests, if any, belonging to a lessee … depend upon the terms of the lease."). That holding is entirely correct, poses no conflict with any decision from this Court or any other, and does not warrant review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted this December 7, 2020.

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WINONA COUNTY BOARD OF COMMISSIONERS
WINONA COUNTY, MINNESOTA

IN THE MATTER OF AN AMENDMENT TO THE WINONA COUNTY ZONING ORDINANCE TO RESTRICT THE MINING AND PROCESSING OF INDUSTRIAL MINERALS IN WINONA COUNTY

PROCEDURAL HISTORY, FINDINGS OF FACT, CONCLUSIONS, AND ADOPTION OF ZONING ORDINANCE AMENDMENT

The above-named matter came before the Winona County Board of Commissioners (hereinafter referred to as the "Board") for consideration of a proposed amendment to the Winona County Zoning Ordinance (hereinafter referred the as the "WCZO") to restrict the mining and processing of industrial silica sand in Winona County.

Based upon the Board's consideration of the entire record in this matter which included the preparation of a viability analysis of the proposed amendment; the Winona County Planning Commission's (hereinafter referred to as the "WCPC") review of the matter, which included the WCPC's public hearings and receipt of written comments on the proposed amendment; the recommendation to the Board by the WCPC to adopt a modified version of the proposed amendment; subsequent public hearing held before the Board, and written comments submitted to the Board on the matter, the Board makes the following decision:

PROCEDURAL HISTORY

1. On April 26, 2016, the Board voted 3-2 to forward to the Winona County Planning and Environmental Services Department (hereinafter referred to as the "Planning Department") and the Winona County Attorney for review as to viability pursuant to WCZO Ch. 4, Sect. 4.3 and Ch. 2, Sect. 2.6, a proposed amendment to the WCZO put forward by the Land Stewardship Project (hereinafter referred to as "LSP"). The LSP proposed amendment was titled: "Winona County Zoning Ordinance Amendment Regarding Industrial Frac Sand".

2. On June 14, 2016, in response to its direction for a viability analysis of the LSP proposed amendment, the Board received from the Winona County Attorney, her opinion, dated June 3, 2016, and titled: "A LEGAL ANALYSIS OF THE VIABILITY OF THE PROPOSED AMENDMENT TO THE WINONA COUNTY ZONING ORDINANCE TO RESTRICT CERTAIN MINING AND PROCESSING OF SILICA SAND IN WINONA COUNTY, MINNESOTA" (hereinafter referred to as the "June 3rd Opinion"). The June 3rd Opinion determined that the LSP proposed amendment was minimally viable. The June 3rd Opinion provided and recommended a modified form of the LSP proposed amendment that would be more viable in terms of meeting the legal requirements for amending an ordinance. That modified

form of the proposed amendment was entitled "Appendix B. Model Ordinance Language from Land Stewardship Project Modified for Greater Viability by Winona County Attorney's Office after Viability Review Directed by Winona County Board: WINONA COUNTY ZONING ORDINANCE AMENDMENT REGARDING INDUSTRIAL MINERAL OPERATIONS" (as attached to the June 3rd Opinion and hereinafter referred to as the "Proposed Ordinance Amendment")

3. At that same June 14, 2016 Board meeting, the Board directed that the Proposed Ordinance Amendment be referred to the WCPC for review and recommendation, pursuant to WCZO Ch. 4, Sect. 4.3 and Ch. 2, Sect. 2.6.

4. Starting on June 30, 2016, and for multiple hearings afterwards, the WCPC met, heard public testimony, reviewed public written comment, and discussed the Board-referred Proposed Ordinance Amendment. Seventy-six (76) persons testified at the June 30, 2016 public hearing. 203 written comments were submitted to the WCPC and 35 additional documents were submitted in response to requests by the WCPC for info1mation.

5. On August 11, 2016, the WCPC voted 5 to 3 to recommend that the Board adopt a modified form of the Proposed Ordinance Amendment (hereinafter referred to as "WCPC's Recommendation") that would allow

up to six new industrial mineral mines to operate in Winona County at any one time. Each site could not exceed 40 acres in size without there being reclamation of previously mined acreage.

6. At its August 23, 2016 meeting, the Board received the WCPC's Recommendation. The Board then directed the Winona County Attorney to review the WCPC's Recommendation, provide legal analysis, and discuss the procedure to follow going forward regarding consideration of amending the WCZO to address industrial mining and processing in Winona County. The Board also directed the Planning Department to work together with the County Attorney to assist in preparing a memorandum to the Board regarding options and process going forward. That memorandum, dated October 4, 2016, was submitted to the Board for its review (hereinafter referred to as the "October 4th Memo").

7. The Board held a public hearing on October 13, 2016 to receive public hearing comment on the WCPC's Recommendation. Written public comment was also accepted by the Board up until October 18, 2016. One hundred and nine (109) individuals spoke at the October 13, 2016 public hearing. 151 written comments were received and 5 other documents were submitted for the Board's consideration.

8. At its regular meeting on October 25, 2016, the Board took up the matter of considering the various proposed amendments to the WCZO on industrial mineral operations in Winona County. The Board's October 25th agenda materials included the October 4th Memo, which contained legal analysis and options for the Board to consider regarding the decision before it. After extensive discussion, the Board voted 3-2 "to adopt County Attorney's Recommendation Option A. Large Scale Industrial Silica Sand Mining and Processing Prohibited". October 25, 2016 County Board Minutes. This was the Option A contained in the October 4th Memo. The Board also voted 3-2 "to direct the County Attorney to include paragraph 1 (page 42 County Board Meeting Packet) into the ordinance language and to submit the ordinance on the November 22, 2016 County Board agenda." October 25, 2016 County Board minutes. The referenced paragraph 1 read: *"Once the Board makes its decision, whatever that decision is, the County Attorney and Planning staff recommend that the Board, prior to final vote, direct us to draft the ordinance language to be adopted and an order containing findings, conclusions and order which supports and memorializes the Board's decision. If no ordinance amendment is adopted, there still needs to be an order containing findings, conclusions and order which supports that decision."* October 4th Memo at page 3.

FINDINGS OF FACT

9. The Board finds that the issues before it regarding the policy decisions it must address in determining whether to adopt an amendment and what form of amendment to the WCZO regarding the mining and processing of industrial minerals and specifically silica sand mining and processing, are not new to the Board and to Winona County.

10. The historical record of silica sand mining and processing before the Board goes back to 2011 when much of the southeastern Minnesota region's local governments from Goodhue County south along the Mississippi River corridor through Wabasha and Winona Counties on down to Houston County and west into Fillmore and Olmsted Counties were faced with dealing with an explosion in the demand for silica sand to be used in the hydraulic fracturing and horizontal drilling process using pressurized liquids and silica sand to extract gas and oil from rock formations. See: https://www2.usgs.gov/ hydraulic fracturing/.

11. In Winona County, the issue was brought forward to the Board after several conditional use permits for silica sand mine operations were filed. Then as now, the primary concerns relating to silica sand mining, transport and processing operations within Winona County are related to air quality, water quality, trucking and road

impact, traffic safety, and landscape aesthetics. In September 2011, three separate sites in Saratoga Township, Winona County, filed petitions for the issuance of conditional use permits to allow silica sand mining operations.

12. In working with the applicants to prepare their requests, Planning Department staff had concerns about the WCZO in regard to regulation of silica sand mining operations. As a result, a meeting among county officials was held on September 26, 2011, and the Winona County Attorney's Office prepared a memorandum evaluating the issues raised and recommended a one-year moratorium to study the impact of silica sand mining on the public health, safety, and welfare as well as the financial impact on the County public works.

13. The three conditional use pe1mits were initially considered at the October 20, 2011, WCPC meeting and, after extensive public hearing and discussion, the applications were tabled to a future meeting. At the November 17, 2011, WCPC voted to not hold a public hearing on a moratorium regarding silica sand mining and related operations.

14. On November 29, 2011, the Board discussed silica sand mining conditional use permits and moratorium options, authorizing two public hearings-one before the WCPC and one before the Board. At its December 15, 2011 meeting, the WCPC heard public

comment regarding whether a moratorium on silica sand mining should be imposed, but took no action after two motions failed. The Board held a public hearing on January 3, 2012, regarding the possible imposition of a silica sand mining moratorium.

15. On January 10, 2012, the Board denied the three pending conditional use permit requests for silica sand mining operations and enacted a three-month moratorium on silica sand mining operations, to allow for the completion of a land use planning study by County staff. This moratorium became effective upon its publication on February 1, 2012. During the moratorium, the Planning Department completed a land use study analyzing and referencing current land use policies in Winona County and their applicability for silica sand mining. At the same time and working together with the Planning Department, the Winona County Attorney's Office analyzed the policy and legal considerations relating to Environmental Work Sheet (EAW) or Environmental Impact Statement (EIS) necessity for silica sand sites, roadway pavement impact policy, fee assessment options, and the conditional use permit process.

16. The Board reviewed these analyses at its April 24, 2012 meeting along with the application and recommended conditions from the Planning Department for future use requests. The Planning Department provided

a list to the Board of recommended Conditions of Approval for silica-sand mining. The WCPC and the Board retained discretion about whether an environmental review, either an Environmental Assessment Worksheet (EAW) or Environmental Impact Study (EIS), would be required. State and federal requirements were also required to be met for the Board to grant a Conditional Use Permit (CUP). Out of that study came the adoption of the County's Silica Sand Mining and Processing Pre-Application packet, the Road Use Agreement, and numerous other documents that covered legal and technical analysis of the silica sand issue. The moratorium was allowed to expire on May 1, 2012.

17. On July 20, 2012, one of the previous applicants, David Nisbit, resubmitted a petition for a conditional use permit allowing a 19.1 acre silica sand mining operation on his property in Saratoga Township. The WCPC heard the petition at its August 16, 2012 meeting and recommended the Board approve the conditional use permit, with conditions recommended by staff plus an additional two conditions. The petition was then considered by the Board on October 2, 2012, at which time it was tabled pending the completion of an EAW. At the direction of the Board, a public hearing was held on March 21, 2013, regarding the Nisbit EAW. Following that hearing, the Board on a 3-2 vote issued a negative declaration regarding the need for an EIS. Concerned citizens then

petitioned the Minnesota Court of Appeals for a writ of certiorari, challenging the negative declaration for an EIS.

18. On June 4, 2013, the Board approved the Nisbit conditional use permit, with the conditions recommended by the Planning Department and WCPC as well as two additional conditions. The concerned citizens subsequently petitioned the Minnesota Court of Appeals for a writ of certiorari, challenging the issuance of the conditional use permit. The Court of Appeals consolidate the two appeals. In a decision issued on June 16, 2014, the Court of Appeals affirmed the Board's decisions regarding the EIS and the conditional use permit, finding that the Board considered all appropriate factors in making both decisions. Since the expiration of the moratorium in May 2012, no other petitions for conditional use permits for silica sand mining operations have been received in Winona County.

19. In 2013, legislation was passed and signed into Minnesota law to address silica sand mining, processing and transportation operations in Minnesota. See Minnesota Statutes Sections 116C.99 through 116C.992. The legislation directed state agencies to provide local units of government with technical assistance on regulation and permitting. The legislation also set new thresholds for environmental review of silica sand related operations and required development of a number of new regulations.

The agencies involved in implementing the legislation included the Minnesota Environmental Quality Board (hereinafter the "EQB"), Minnesota Pollution Control Agency, Minnesota Department of Natural Resources, Minnesota Department of Transportation, Minnesota Department of Health, and Minnesota Department of Agriculture. See: http://silicasand.mn.gov/

20. The legislation also established silica sand mining model standards and criteria and defined terms, including "silica sand" and "silica sand project":

116C.99 SILICA SAND MINING MODEL STANDARDS AND CRITERIA.

Subdivision I. Definitions.

The definitions in this subdivision apply to sections 116C.99 to 116C.992.

(a) "Local unit of government" means a county, statutory or home rule charter city, or town.

(b) "Mining" means excavating silica sand by any process, including digging, excavating, drilling, blasting, tunneling, dredging, stripping, or by shaft.

(c) "Processing" means washing, cleaning, screening, crushing, filtering, sorting, processing, stockpiling, and storing silica sand, either at the mining site or at any other site.

(d) "Silica sand" means well-rounded, sand-sized grains of quartz (silicon dioxide), with very little impurities in terms of other minerals. Specifically, the

silica sand for the purposes of this section is commercially valuable for use in the hydraulic fracturing of shale to obtain oil and natural gas. Silica sand does not include common rock, stone, aggregate, gravel, sand with a low quartz level, or silica compounds recovered as a by-product of metallic mining.

(e) "Silica sand project" means the excavation and mining and processing of silica sand; the washing, cleaning, screening, crushing, filtering, drying, sorting, stockpiling, and storing of silica sand, either at the mining site or at any other site; the hauling and transporting of silica sand; or a facility for transporting of silica sand to destinations by rail, barge, truck, or other means of transportation.

(f) "Temporary storage" means the storage of stockpiles of silica sand that have been transported and await further transport.

(g) "Transporting" means hauling and transporting silica sand, by any carrier:

(1) from the mining site to a processing or transfer site; or

(2) from a processing or storage site to a rail, barge, or transfer site for transporting to destinations.

Subd. 2. Standards and criteria.

(a) By October 1, 2013, the Environmental Quality Board, in consultation with local units of government, shall develop model standards and criteria for

mining, processing, and transporting silica sand. These standards and criteria may be used by local units of government in developing local ordinances. *The standards and criteria shall be different for different geographic areas of the state. The unique karst conditions and landforms of southeastern Minnesota shall be considered unique when compared with the flat scoured river terraces and uniform hydrology of the Minnesota Valley. The standards and criteria developed shall reflect those differences in varying regions of the state. [emphasis added.]*

(b) The standards and criteria must include:

(1) recommendations for setbacks or buffers for mining operation and processing, including:

(i) any residence or residential zoning district boundary;

(ii) any property line or right-of-way line of any existing or proposed sheet or highway;

(iii) ordinarily high-water levels of public waters;

(iv) bluffs;

(v) designated trout streams, Class 2A water as designated in the rules of the Pollution Control Agency, or any perennially flowing tributary of a designated trout stream or Class 2A water;

(vi) calcareous fens;

(vii) wellhead protection areas as defined in section 103I.005;
(viii) critical natural habitat acquired by the commissioner of natural resources under section 84.944; and
(ix) a natural resource easement paid wholly or in part by public funds;
(2) standards for hours of operation;
(3) groundwater and surface water quality and quantity monitoring and mitigation plan requirements, including:
(i) applicable groundwater and surface water appropriation permit requirements;
(ii) well-sealing requirements;
(iii) annual submission of monitoring well data; and
(iv) storm water runoff rate limits not to exceed two-, ten-, and 100-year storm events;
(4) air monitoring and data submission requirements;
(5) dust control requirements;
(6) noise testing and mitigation plan requirements;
(7) blast monitoring plan requirements;
(8) lighting requirements;
(9) inspection requirements;
(10) containment requirements for silica sand in temporary storage to protect air and water quality;
(11) containment requirements for chemicals used in processing;

(12) financial assurance requirements;
(13) road and bridge impacts and requirements; and
(14) reclamation plan requirements as required under the rules adopted by the commissioner of natural resources.

Subd. 3. Silica sand technical assistance team.

By October 1, 2013, the Environmental Quality Board shall assemble a silica sand technical assistance team to provide local units of government, at their request, with assistance with ordinance development, zoning, environmental review and permitting, monitoring, or other issues arising from silica sand mining and processing operations. The technical assistance team may be chosen from representatives of the following entities: the Department of Natural Resources, the Pollution Control Agency, the Board of Water and Soil Resources, the Department of Health, the Department of Transportation, the University of Minnesota, the Minnesota State Colleges and Universities, and federal agencies. A majority of the members must be from a state agency and all members must have expertise in one or more of the following areas: silica sand mining, hydrology, air quality, water quality, land use, or other areas related to silica sand mining.

Subd. 4. Considering technical assistance team recommendations.

(a) When the technical assistance team, at the request of the local unit of government, assembles findings or makes a recommendation related to a

proposed silica sand project for the protection of human health and the environment, a local government unit must consider the findings or recommendations of the technical assistance team in its approval or denial of a silica sand project. If the local government unit does not agree with the technical assistance team's findings and recommendations, the detailed reasons for the disagreement must be part of the local government unit's record of decision.

(b) Silica sand project proposers must cooperate in providing local government unit staff and members of the technical assistance team with information regarding the project.

(c) When a local unit of government requests assistance from the silica sand technical assistance team for environmental review or permitting of a silica sand project, the local unit of government may assess the project proposer for reasonable costs of the assistance and use the funds received to reimburse the entity providing that assistance.

History: *2013 c 114 art 4 s 91*

21. Minnesota Statutes Section 116C.992 was also adopted which reads:

TECHNICAL ASSISTANCE, ORDINANCE, AND PERMIT LIBRARY.

By October 1, 2013, the Environmental Quality Board, in consultation with local units of government, shall create and maintain a library on local government ordinances and local government permits that have been approved for regulation of silica sand projects for reference by

local governments.

22. In response to the 2013 silica sand mining law, the EQB created a "Toolkit" for Local Governments to Use in Developing Silica Sand Policies and Ordinances". See: https://www.eqb.state.nm.us/sites/default/files/documents/Tools%20for%20Local%20Govt%20approved%20March%2019 with Errata.pdf

23. The EQB and the other state agencies charged with working on silica sand mining issues in Minnesota continue their work, but a check of the EQB website shows that no rules have been issued. The 2015 Minnesota Legislature in a special session modified Section 116C.991 of the 2013 law (Minnesota Statutes 116C.991-2013) to extend the rulemaking time period. The law now reads as follows:

> **116C.991 ENVIRONMENTAL REVIEW; SILICA SAND PROJECTS.**
> (a) Until a final rule is adopted pursuant to Laws 2013, chapter 114, article 4, section 105, paragraph (d), an environmental assessment worksheet must be prepared for any silica sand project that meets or exceeds the following thresholds, unless the project meets or exceeds the thresholds for an environmental impact statement under rules of the Environmental Quality Board and an environmental impact statement must be prepared:
> (1) excavates 20 or more acres of land to a mean depth often feet or more during its existence. The local government is the

responsible governmental unit; or

(2) is designed to store or is capable of storing more than 7,500 tons of silica sand or has an annual throughput of more than 200,000 tons of silica sand and is not required to receive a permit from the Pollution Control Agency. The Pollution Control Agency is the responsible governmental unit.

(b) In addition to the contents required under statute and rule, an environmental assessment worksheet completed according to this section must include:

(1) a hydrogeologic investigation assessing potential groundwater and surface water effects and geologic conditions that could create an increased risk of potentially significant effects on groundwater and surface water;

(2) for a project with the potential to require a groundwater appropriation permit from the commissioner of natural resources, an assessment of the water resources available for appropriation;

(3) an air quality impact assessment that includes an assessment of the potential effects from airborne particulates and dust;

(4) a traffic impact analysis, including documentation of existing transportation systems, analysis of the potential effects of the project on transportation, and mitigation measures to eliminate or minimize

adverse impacts;
(5) an assessment of compatibility of the project with other existing uses; and
(6) mitigation measures that could eliminate or minimize any adverse environmental effects for the project.

2013 *14 art 4 s 92; 1Sp2015* c *4 art 4 s 121*

24. The Board finds that it has the authority to enact amendments to the WCZO. Zoning authority is derived from the general police powers possessed by the State. See Village of Euclid v. Ambler Realty Company Co., 272 U.S. 365 (1926); Dean v. City of Winona, 843 N.W.2d 249 (Minn. Ct. App. 2014). Local units of government (e.g. counties, cities, townships, etc.) are not "constitutional" entities but rather legislatively created entities. Zoning authority is granted to counties within the State of Minnesota by Minn. Stat. § 394.21, which provides that counties may canyon planning and zoning activities to promote public health, safety, morals and general welfare. The Board finds that the record of this matter demonstrates more than adequately that the mining and processing of industrial minerals, and particularly, industrial silica sand, as "silica sand" and "silica sand project" are defined in Minn. Stat. Section 116.99 Subd. 1 (d) and (e) affects the public health, safety and general welfare of the citizens of Winona County.

25. The Board finds that counties have only such power and authority as has been granted to them by the State Legislature, which is confined to the limits of their borders. The Board finds that it

has the authority to enact zoning regulations to govern land uses within the borders of Winona County, outside of incorporated cities. The basis for any land use decision must be related to the specific impacts of activities within Winona County, not on external activities or uses. The Board finds that the decision it is making here is related to the specific impact of industrial silica sand mining and processing on Winona County as it affects land use and the public health, safety and general welfare of Winona County citizens.

26. Minn. Stat. § 462.357 provides similar zoning authority for cities, which may extend their zoning authority to unincorporated areas within two miles unless the county or town has adopted zoning regulations. Townships are granted concurrent authority with counties over zoning outside of cities. Townships may implement zoning regulations consistent with county regulations, but may also be more restrictive. Minn. Stat. § 394.33. In practice, this means that counties have the authority to enact zoning regulations for all areas of a county other than incorporated cities. The townships included in those unincorporated areas may elect to enact more restrictive zoning regulations, but not be less restrictive than the regulations enacted by a county. Thus, any amendment to the WCZO would impact the townships in unincorporated areas, but incorporated cities would not be bound by any amendments.

27. Minnesota Statutes Chapter 394.23 requires a county to adopt both a comprehensive plan and a

zoning ordinance, which should work together. The comprehensive plan should serve as the policy basis for the regulations contained in the zoning ordinance, and the zoning ordinance regulations should implement the comprehensive plan. The Board adopted the Winona County Comprehensive Plan in 2014 (hereinafter "2014 Comp Plan") which replaced the previous Comprehensive Plan adopted in 2000. The 2014 Comp Plan was "intended to ... provide a framework within which more specific implementation strategies and programs may be developed." 2014 Comp Plan, p. 5.

28. The general goals set by the Board and the WCPC as part of the comprehensive plan update process were to provide for:

    a. An open process which encourages broad-based citizen participation and intergovernmental cooperation which will give meaning and suppo1t for the Plan;
    b. The continued education of citizens on County land use planning and regulation;
    c. The promotion of civic involvement by all citizens;
    d. The protection of natural resources;
    e. A sustainable and diverse economy which recognizes the value of our citizens, the Mississippi River, agriculture, natural resources and natural beauty; and
    f. The provision of affordable housing throughout the County. 2014 Comp Plan p.4.

29. The Board and the WCPC land use philosophy as

stated in the 2014 Comp Plan is to "recognize the area's culture, customs and economy along with its unique topography, natural resources and environment, by guiding present and future County development and decision-making. The purpose of the Comprehensive Plan is to sustain and enhance these features by guiding present and future County development and decision making through on-going effective, efficient and dynamic planning." 2014 Comp Plan, p.4. The Board finds that the unique topography and subsurface of Winona County as part of the driftless area of southeastern Minnesota is characterized by the "unique karst conditions and landforms of southeastern Mim1esota [and] shall be considered unique when compared with the flat scoured river terraces and uniform hydrology of the Minnesota Valley." Minn. Stat. Section 116C.99 subd. 2 (a). The Board finds that Winona County topography and subsurface is recognized by Minnesota Statutes as such and that standards and criteria which the Board is adopting here for land use zoning ordinance purposes meets the requirements of the statute that "the standards and criteria developed shall reflect those differences in varying regions of the state."

30. The 2014 Comp Plan describes goals, policies and implementation strategies for general growth, agricultural areas, urban expansion areas, economic development, rural development, rural industrial, rural residential development, natural resource protection, source water/wellhead protection, open space and recreation, community facilities, transportation,

citizen involvement, and community health and well-being.

31. The Board finds that no single goal, policy, or strategy described in the 2014 Comp Plan will, or should, govern what land use regulations should be established. Rather, the 2014 Comp Plan must be read as a whole. The various goals, policies, and strategies in the 2014 Comp Plan must be weighed by the Board when crafting regulations and considering the adoption of the Proposed Ordinance Amendment. As the 2014 Comp Plan states, it "is first and foremost a statement of community values reflected in the plan as goals. These goals are quite broad and serve as a guide for decision-making, operating and capital budgets, land use measures that encourage or discourage growth, economic development measures and steps for guiding community growth and change. Understanding the features of the County as well as past, present and future trends are important considerations for any comprehensive plan." 2014 Comp Plan at page 9.

32. The Board finds that the WCZO has the following prescribed purposes for regulating the use of land within Winona County (WCZO, Chapter 2, Section 2.1):
    a. Protecting the public health, safety, order, convenience and general welfare.
    b. Protecting and preserving agriculture.
    c. Conserving the natural and scenic beauty of the County.
    d. Conserving natural resources in the County such as streams, wetlands,

groundwater, recharge areas, bluffs, steep slopes, woodlands and soils.

e. Minimizing pollution.
f. Protecting existing businesses and facilities.
g. Conserving energy by allowing solar and earth sheltered housing and wind conversion structures.
h. Promoting orderly development and redevelopment of the residential, commercial, industrial, and public areas as well as the preservation of agricultural areas.
i. Providing for the compatibility of different land uses and most appropriate use of land throughout the County.
j. Encouraging cooperation among governmental agencies to help achieve land use goals.
k. Fair and efficient enforcement of land development regulations including the discontinuation of existing uses.
l. Promoting in a financially responsible manner orderly development of the community to insure adequate levels of service in areas of public safety, utilities, transportation and administration.
m. Ensuring the fair and non-discriminatory administration of this Ordinance by allowing administrative decisions rendered by the Planning Department to be appealed through a recognized process.

33. The Board finds that in particular, a restriction on the mining and processing of industrial mineral operations in Winona County as the

term "industrial mineral operations" is defined in the Proposed Amendment Ordinance would meet the purposes of the WCZO and particularly, Chapter 2, Section 2.1 and those parts listed as a., b., c., d., and e. above.

34. The WCZO allows for amendments to the official controls. WCZO Chapter 5, Section 5.4.1(1) provides that such amendments "shall not be issued indiscriminately, but shall only be used as a means to reflect changes in the goals and policies of the County as reflected in the Comprehensive Plan or changes in County conditions." When the Board first took up the issue of applications for silica sand mining permits in 2011, the County's Comprehensive Plan in effect at that time was one adopted by the Board in the year 2000. The Board finds that much has changed in Winona County since the year 2000 regarding many issues, including the dramatic increase in demand for silica sand for industrial purposes and then a precipitous drop in that demand. In addition, the Board finds there is observable and documented negative impacts of industrial silica sand mining and processing to the local economies and natural state in neighboring counties in Wisconsin across the Mississippi River in Pepin, Buffalo and Trempealeau Counties based on comments received at the WCPC August 8, 2016 Public Hearing from William Mavity, a former Pepin County Board Supervisor, and Jon Schultz, a Trempealeau County Board Supervisor, District 5 as to their respective counties' experience with industrial silica sand mines and the effect on the local economy, including declining land

values, community stress and social well-being, and unfulfilled financial obligations and promises of economic development boom for the local communities from the silica sand mine operations.

35. The decision of a county board to amend its official controls such is considered here by Board is a legislative decision of the Board as opposed to a quasi-judicial decision of a county board such as was the Board's review of the three conditional use permit applications for silica sand mining in 2011.

36. The Board finds that with respect to review of legislative decisions, reviewing courts employ a *"rational basis test"*. To overturn a legislative decision of a county board, the challenging party must demonstrate that there is "no rational basis related to promoting the public health, safety, morals or general welfare" supporting the decision. State, by Rochester Association of Neighborhoods v. City of Rochester, 268 N. W. 2d 885 (Mim1. 1978). The rational basis test is the most deferential standard of review applied to local land use decisions. Legislative decisions establish public policy. Unless the decision is unconstitutional on its face or in application, exceeds the scope of statutory authority, is preempted or is procedurally defective, any reason plausibly given to promote the public interest is likely sufficient to support a legislative decision and withstand legal challenge.

37. The WCPC's role is in the review of proposed

amendments or changes to the WCZO is an advisory one to the Board. When a proposed amendment to the WCZO is referred by the Board to the WCPC for review and recommendation, the WCPC can only return to the Board with one of three recommendations: to recommend approval; disapproval; or modified approval of the proposed amendment. WCZO Chapter 5, Section 5.4.3 (4). The WCPC recommended to the Board a modified version of the Proposed Ordinance Amendment sent to it by the Board, which is referred to in this document as the WCPC's Recommendation.

38. As found previously above, the Board's decision on a proposed amendment to the WCZO is a legislative decision, not a quasi-judicial one. To be supportable under the law in this context, the Board's decision must be reasonably related to the goals, policies and strategies of the 2014 Comp Plan, the purpose of the WCZO, and has a rational basis related to promoting the health, safety, morals, and general welfare within Winona County.

39. Winona County has the delegated authority to regulate silica sand mining and processing operations under its jurisdiction since these operations affect land use.[1] Under that statute, counties may create zoning ordinances that identify land uses that should be "encouraged, regulated, or prohibited."[2] Zoning must occur

[1] Minn. Stat. § 394.21 (2015).

[2] § 394.25, subd. 2.

through a comprehensive plan.[3] A county's zoning authority is not unlimited, and remains subject to statutory and constitutional limitations. It is therefore important to sustaining the legislative decision of the Board that a proposed amendment be tied to the values of the County espoused in the Winona County Comprehensive Plan and the current WCZO.

40. The Board has examined the various amendment proposals offered for the Board's consideration in this matter, including the LSP proposed amendment, the WCPC's Recommendation, and the Proposed Ordinance Amendment. The Board finds that adoption and enactment of the Proposed Ordinance Amendment with some additions to the language for clarification and added references to Minnesota law is consistent with the values of the County espoused in the 2014 Comp Plan and the WCZO.

41. The Board finds that the LSP proposed amendment does not directly establish the necessary nexus between the values espoused in the 2014 Comp Plan and purpose of the WCZO, i.e. the rational basis, for restricting land use.

42. The main parts of the LSP proposed amendment are the following:
    a. The proposed amendment would add the words "Frac Sand" and "Frac Sand Operations" to the definitions section of Chapter 4: Rules and Definitions of the WCZO. Currently, the WCZO has no

[3] § 394.23.

definition for "silica sand" or "frac sand".

b. The proposed amendment would also add a section 10.11 to the WCZO to specifically prohibit in all zoning districts "frac sand operations".

43. The Board finds that an internet search of the phrase "frac sand" will result in multiple references to that phrase, but for the purposes of the Board's consideration of the LSP proposal, it used the Minnesota Department of Natural Resources (DNR's) definition of "frac sand". The DNR website page on "silica sand" describes silica sand as consisting "of well-rounded sand composed of almost pure quartz grains. Quartz, or silicon dioxide (SiO2), is the most common mineral found on the Earth's surface and is in rocks like granite, gneiss, and sandstone. The value of silica sand can be significantly higher than sand and gravel used in the construction industry. *Silica sand is processed into frac sand, a product used by the oil and gas industry."* [Emphasis added]. See http://www.dnr.state.mn.us/silicasand/index.html.

44. The DNR website on silica sand states that "over the past decade, a sharp increase in demand for silica sand corresponded with a rapid expansion of shale oil and gas development. An extraction method called hydraulic fracturing is used to access oil and gas from shale and limestone bedrock which can require approximately 10,000 tons of frac sand per well" See http://www.dm.state.mn.us/silicasand/index.html.

45. The LSP proposed amendment would prohibit

the use of "frac sand operations" in all zoning districts in the county; meaning it would prohibit extraction of silica sand, that when processed, is suitable for use as a proppant for the exploration, drilling, production, and recovery of oil and gas and that is intended to be sold or used as such according to the LSP proposed language.

46. The LSP proposed amendment also lacks any language in the amendment provisions that describes the purpose of the restrictions as they relate to the purposes of the 2014 Comp Plan and the WCZO. For these reasons, the Board finds the LSP proposed amendment will not be adopted by the Board.

47. The Board also examined the WCPC's Recommendation which would limit the number of new mining sites for the excavation or mining of industrial minerals to six sites. It would also limit the acreage size of new or proposed expanded projects for the excavation or mining of industrial minerals to not exceed 40 acres, without the reclamation of previously mined acreage. Like the Proposed Ordinance Amendment, the WCPC's Recommendation borrows language from the Florence Township (in Goodhue County Minnesota) Zoning Ordinance regarding the 6 mining site limit and the 40 acre size limit. The Board finds that there is nothing from the record of the WCPC's hearings to support the 6 mining site limit and the 40 acre size limit other than citing that the Florence Township ordinance imposed these limits. However, the Board finds that the Florence Township ordinance's 6 mines and 40

acre limits were applied to construction mine projects, not industrial mineral mine projects. Therefore, those number and size restrictions are not relevant to, nor do they support, using the same restrictions for industrial mineral mine projects were the Board to adopt the WCPC's Recommendation.

48. The Board, however, does find that the Florence Township Ordinance is a good example to follow and is one from a local government jurisdiction that was also faced with the surge in demand for industrial silica sand in the early part of the 2010 decade forward. Florence Township adopted a zoning ordinance that restricts excavation and mining of silica sand for industrial uses by setting out the purpose of doing so by tying it to their comprehensive land use plan and by using clear and concise definitions that distinguish construction minerals from industrial minerals, the latter of which includes silica sand. As part of the County Attorney's viability analysis of the LSP proposed amendment which was directed by the Board, other jurisdictions' ordinances including the Florence Township Zoning Ordinance was reviewed. The Florence Township Ordinance declares that "industrial minerals mining land use operations are larger-scaled industrial, consume more appropriated water, require more concentrated heavy truck hauling traffic to single destinations, and embrace other differences than the mining of construction materials." The ordinance goes on to state that the "Minnesota Department of Natural Resources recognizes this mining land use process difference in its different rules for the

leasing of state-owned lands for mining industrials minerals and construction minerals." Florence Township Zoning Ordinance.

49. The Board finds that the Proposed Ordinance Amendment which contains language borrowed from the Florence Township Zoning Ordinance and modified to make it Winona County specific com1ects the purpose of the ordinance to the Winona County's Comprehensive Plan and the WCZO as it relates to supporting the restriction on the mining and processing of silica sand in Winona County is a legally viable ordinance amendment.

50. The Proposed Ordinance Amendment establishes a clear rational basis for the amendment related to the values espoused in the 2014 Comp Plan and the purpose of the WCZO by:

    a. Describing the purpose of the ordinance provisions as they relate to the 2014 Comp Plan, and;
    b. Describing the reasons for restricting land use as to mining of "industrial minerals" and "processing of industrial minerals" in Winona County as those terms are defined in the Proposed Ordinance Amendment with the addition of the statutory definitions of "silica sand" and "silica sand projects" from Minnesota Statutes 116C99, subd. 1 (d) and (e), and;
    c. Providing clear distinctions of restrictions on certain mineral excavation, extraction, and land alteration through the use of the definitions of "Construction Minerals" as

compared to "Industrial Minerals".

d. Adding language to clarify that the Proposed Ordinance Amendment does not intend to regulate interstate commerce (including rail, barge, and truck traffic hauling silica sand) or intercounty rail and truck traffic hauling silica sand excavated from other states or counties outside of Winona County that is headed for the terminal port in the City of Winona or elsewhere, or processing of silica sand in municipalities not under the zoning authority of the County is also appropriate.

For the complete June 3, 2016 County Attorney Legal Viability Analysis, which contains the Florence Township Zoning Ordinance and the original Proposed Ordinance Amendment, go to the following link: http://www.co. winona.mn. us/sites/winonacounty.new.rschooltoday.com/files /files/Private User/AISE N/Legal%20Analysis %20of0/o20Viability%20of0/o20Proposed %20Amendment- June%203%202016.pdf

51. Specifically, the listed purposes of the WCZO that are of particular relevance to the Board's consideration of the Proposed Ordinance Amendment are the following:

WCZO Chapter 2: Intent and Purpose

2.1 **Purpose**. This is an ordinance regulating the use of land within Winona County [...] for the purpose of:

1. Protecting the public health, safety,

order, convenience and general welfare.
2. Protecting and preserving agriculture.
3. Conserving the natural and scenic beauty of the County.
4. Conserving natural resources in the County such as streams, wetlands, groundwater, recharge areas, bluffs, steep slopes. Woodlands and soils,
5. Minimizing pollution.
And

2.2 Relation to Land Use Plan

52. The Winona County Zoning Ordinance recognizes Winona County's Comprehensive Land Use Plan as the policy to regulate land use and development in accordance with the policies and purpose herein set forth. WCZO Chapter 2, Sections 2.1 and 2.2.

53. The 2014 Comp Plan sets out the following provisions that the Board finds are particularly relevant to how the Proposed Ordinance Amendment is related to the purpose of both the 2014 Comp Plan and the WCZO. The Board makes the general findings that each of these community values are served by adopting the Proposed Ordinance Amendment, and provides specific findings as are noted in italics below:

The value statement regarding community values as to:

Agriculture: Winona County recognizes the

cultural and economic importance of agriculture to the community. Local decisions should reflect the importance of maintaining agricultural practices that are recognized as approved best management practices and are conducted in accordance with federal and state laws. Furthermore, local decisions should support, maintain and sustain the vitality of family farms, promoting policies that support Winona County's strong tradition of locally owned agricultural operations and the administration of best management practices that consider the conservation of soil, water quality, economic viability, innovative practices, the promotion of local food systems and the stewardship of the land and its resources to retain the viability of agriculture for future generations. Page 12 of 2014 Comp Plan.

Resources: Winona County values the importance of sound environmental practices that promote the efficient use of all natural resources. The use of resources should promote responsible stewardship through sound conservation practices, consideration of threats proven by peer review and scientific research, the use of sensible and economically reasonable solutions, and concern for the aesthetics of the County. Page 12 of 2014 Comp Plan.

Sustainability: Winona County promotes a sustainable community through the encouragement of sustainable development. A sustainable community uses its resources to meet current needs while ensuring that adequate resources are available for future generations. A sustainable community seeks a better quality of life for all its residents while maintain nature's ability to function over time by minimizing waste, preventing pollution, promoting

efficiency and developing local resources to revitalize the local economy. Page 13 of 2014 Comp Plan.

Policies: Regulate exploration and drilling operations to minimize pollution problems and the impact on agricultural areas and environmentally sensitive areas. Page 15 and 33 of 2014 Comp Plan.

Source Water/Wellhead Protection: Maintain, protect and improve the quality of groundwater resources particularly the high-yielding aquifers used for drinking water and connected to surface hydrological features. Page 34 of 2014 Comp Plan. 18.

The Board finds that the Proposed Ordinance Amendment will protect groundwater resources in Winona County's unique karst conditions and landforms in -what the State has recognized through Minn. Stat. Section 116C.99, Subd. 2 is unique -when compared with the flat scoured river terraces and uniform hydrology of the Minnesota Valley. The Board also finds that according to the most recent EQB's report on silica sand (dated March 20, 2013), "the cumulative impacts to water quality (and quantity) of multiple silica sand mines in close proximity are not well understood. "EQB Report on Silica Sand at page 29. See file:///C:/Users/atkls/Downloads/23.%20March%20Final%20Silica%20Sand%20report.pdf

The EQB report continues on to state that" [d]epth to groundwater has not been widely documented in southeastern Minnesota" and that regarding "Long Term Effects in Karst Regions: More information is needed on the long-term implications

for groundwater of mines in karst-prone regions of the state. "Report at 61. For these reasons, the Board finds that the Proposed Ordinance Amendment will help to "maintain, protect and improve the quality of groundwater resources in Winona County.

Industrial Sand Deposits: Discussion of Winona County's geology would not be complete without recognizing the growing interest in industrial sands in the County. In recent years, greater speculation relative to industrial sand mining in Winona County has revolved around the growing hydraulic fracturing process for oil and gas wells. Winona County has three known high quality sand types, attractive to these industries. They include the St. Peter, Jordan and Wonewoc sand formations. Page 60 of 2014 Comp Plan.

Natural Resource Protection: Winona County is unique in that a substantial propo1iion of its land can be classified as natural resource area. Page 30 of 2014 Comp Plan.

Policies: Promote land management practices by all levels of government that protect the natural resources in the County, including streams, rivers, wetlands, aquifers recharge areas, woodland and forests, bluffs and agricultural areas. Page 31 of 2014 Comp Plan.

54. The 2014 Comp Plan recognizes and discusses industrial sand mining in Winona County:
    a. Regarding the goal to "ensure thorough review and permitting in the extraction of mineral resources which recognizes sound mining management practices, mitigates adverse

public health, safety, welfare and environmental impacts, recognizes and accounts for the costs of impacts to road infrastructure and administration, requires careful consideration of traffic impacts, water impacts, natural resource conservation, encourages planning of future land utilization and reclamation" at page 31 of 2014 Comp Plan;

b. Regarding the policy to regulate exploration and drilling operations in environmentally sensitive areas at page 33 of the 2014 Comp Plan;
c. Regarding recognition of Industrial Sand Mining speculation on the rise in the County due to high quality silica sand in surface and subsurface locations, access to rail and port facilities); at page 49 of the 2014 Comp Plan;
d. Regarding water impact, air quality, transpo1iation safety and quality of life impacts to neighbors); at page 51 of the 2014 Comp Plan; and,
e. Regarding recognition of Industrial Sand Deposits in Winona County) at page 60 of the 2014 Comp Plan.

The Board made findings above regarding water impact and water quality. Air quality and adverse effects from particulates from silica sand mining and processing were addressed by many persons both in written and oral comment. Of note, Dr. Frank Bures, a county resident and retired dermatologist from Winona Health and Dr. Wayne Feyereisn, a county resident and Mayo Medical Center physician (who testified on his own behalf, not on Mayo's) spoke about the adverse effects of silica particles to human health. Dr. Feyereisn provided documented evidence

of the effects of silica particles that are so small they pass into the lung tissue and can cause, among other things, silicosis and lung cancer. The Board also takes legislative policy notice of recently issued the U S. Department of Labor's Occupational Safety and Health Administration's (OSHA) standards as well as the National Institute for Occupational Safety and Health (NIOSH), "field studies [that] identified overexposure to airborne silica as a health hazard to workers. Large quantities of silica sand are used during hydraulic fracturing. Sand is delivered via truck and then loaded into sand movers, where it is subsequently transferred via conveyer belt and blended with other hydraulic fracturing fluids prior to high pressure injection into the drilling hole. Transporting, moving, and refilling silica sand into and through sand movers, along transfer belts, and into blender hoppers can release dusts containing silica into the air. Workers can be exposed if they breathe the dust into their lungs. NIOSH identified seven primary sources of silica dust exposure during hydraulic fracturing operations: • Dust ejected from thief hatches (access ports) on top of the sand movers during refilling operations while the machines are running (hot loading). • Dust ejected and pulsed through open side fill ports on the sand movers during refilling operations. • Dust generated by on-site vehicle traffic. • Dust released from the transfer belt under the sand movers. • Dust created as sand drops into, or is agitated in, the blender hopper and on transfer belts. • Dust released from operations of transfer belts between the sand mover and the blender; and • Dust released from the top of the end of the sand transfer belt (dragon's tail) on sand movers.

The Board notes that the sand referenced in the NIOSH studies is the same sand that would be mined, processed and transported from silica sand mines in Winona County (and is currently mined and processed in Wisconsin and in other parts of Minnesota), thus exposing workers and residents in Winona County to the same silica dust in the air that workers in the oil and gas-fields are exposed to when delivering that sand from sand movers to transfer belt for use in the hydraulic fracturing process to extract oil and gas.

See: https://www.osha.gov/silica/ and https://www.osha.gov/dts/hazardale1st/hydraulic_frac_hazard_alert.pdf

55. As described previously above, amending the zoning ordinance is a legislative, not quasi-judicial, decision of the County Board. There is great deference to a County Board's decision by the courts as long as the record supports that the decision is consistent with the County's Comprehensive Plan and the purpose of the County's Zoning Ordinance. The Proposed Ordinance Amendment, with modifications as attached hereto references the 2014 Comp Plan and ties it and the general health, safety, and welfare of the Winona County citizens to the purpose of the ordinance restricting the mining and processing of industrial minerals in Winona County. It also makes a clear distinction between land use restrictions on the excavation, extraction, and land alteration for *construction mineral* mining purposes versus *industrial mineral* mining purposes. The amendment would apply only to future industrial mineral

mining operation requests, not existing permitted operations, such as the *Nisbit* mine in Saratoga Township. Mining for construction and agricultural bedding purposes would not be affected by the amendment. The amendment language as attached hereto is also modified to clarify that the provisions will not affect interstate commerce.

56. On the issue of "takings" that was raised by individuals during the public hearing process, the Board finds that whether a proposed ordinance amendment, if adopted, would be a federal and state constitutional violation of the takings clause, can only be decided by a court, if such a challenge to the action is put before it. There is no set formula or firmly established test to determine what constitutes a "taking", but U.S. Supreme Court case law has identified several factors that have particular significance in consideration of the question. In reviewing a takings claim, a court must review (1) the economic impact of the regulation on the person(s) suffering the loss, (2) the extent to which the regulation interferes with distinct investment backed expectations, and (3) the character of the government action to assess whether the complained of action effected a taking of private prope1iy for public use. See Penn Cent. Transp. Co. v. City of New York, 438 U. S. 104 at 124 (1978), 98 S. Ct. 2646 at 1026, [other citations omitted for space considerations].

    The Minnesota Supreme Court in the McShane v. City of Faribault, 292 N. W. 2d 253 (1980) held the "[t]he United States Supreme Court

recognized this distinction between "arbitration" and "enterprise" regulations" in the Penn Central case. McShane at 258. The Minnesota Supreme Court defined enterprise regulations as those governmental actions that are for the sole benefit of a governmental enterprise, such as in the McShane case, the Faribault Municipal Airport. The government is involved in an enterprise when it provides for or maintains programs or facilities for which it must acquire money, equipment, or real estate. In contrast, when a government acts to resolve conflicts among private interests by defining standards in the community, it functions in an arbitration capacity. Regulation that involves ordinances design to effect a comprehensive plan are called the "arbitration function" of government. McShane at 258 - 259. In McShane, the Minnesota Court also reiterated the U.S. Supreme Court's Euclid decision as the one establishing *"that 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, and such regulation does not constitute a compensable taking unless it deprives the property of all reasonable use." [emphasis added J* McShane at 257.

The Minnesota Supreme Court also acknowledged in Zeman, a case decided after McShane, that to determine an answer to a taking question before it in that case, the court had to "attempt the unenviable task of sorting through the complex law of takings. Zeman v. City of Minneapolis, 552 N. W. 2d 548 (1996) at 552at 552, quoting from Armstrong v. United

States, 364 U.S. 40, 49 (1960). In Zeman, the Minnesota Court analyzed the question looking at the Penn Central factors and held that *"[a] reviewing court must look to the nature of the regulation with an eye on its purpose and the probability of achieving that purpose with this regulation. If the regulation is drawn to prevent harm to the public, broadly defined, and seems able to achieve this goal, then a taking has not occurred." [emphasis added]* Zeman at 554, citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U. S. 470, 488-93 (1987). In Keystone, the U.S. Supreme Court reiterated the long ago recognized principle that *"all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," [emphasis added]* Keystone at 491 quoting from Mugler v. Kansas, 123 U.S. 623 (1887), *"and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." [emphasis added]* Keystone at 491. See Mugler at 664.

57. The Board finds that on the issues raised regarding jurisdiction and interstate commerce. The U. S. Constitution provides that Congress has the power to regulate commerce with foreign Nations, and among the several States. U.S. Constitution, Article I § 8, cl. 3. This clause is more than an affirmative grant of authority to the federal government, it also prohibits certain state actions that interfere with interstate commerce. Quill Corp. v. North Dakota By and Through Heitkamp, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed. 91 (1992). Most often this clause is invoked

when a state attempts to shield in-state businesses from out-of-state competition- a challenged law is virtually per se invalid when it discriminates against interstate commerce and only survives when there is a legitimate local purpose that cannot be served by reasonable non-discriminatory alternatives.

Although states ate not precluded from imposing reasonable restraints and restrictions on interstate commerce, and although states and local jurisdictions have the authority to enact zoning ordinances under the state's police power, it has also been established that a state may not exercise that police power where the necessary effect would be to place a substantial burden on interstate commerce. *Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Development Commission,* 464 F.2d 1358, 1362 (U.S. Court of Appeals, 3rd Dist., 1983). In Pike v. Bruce Church, Inc. the U.S. Supreme Court suggested a three-stage test: first, the state or local legislation must serve a legitimate local public interest; second, it must affect interstate commerce only incidentally; and third, if the first two stages are met, whether the legitimate local purpose justifies the law's impact on interstate commerce. *Tobacco Road v. City of Novi,* 490 F.Supp. 537 (U.S. District Court, E.D. Michigan, Southern District, 1979), citing *Pike v. Bruce Church,* 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 164 (1970). Thus, making the record as to the local purpose and findings of fact in support of that purpose is crucial to withstanding constitutional scrutiny.

The Board finds that from a practical point of view, the Proposed Ordinance Amendment, as attached hereto with modifications, has a significant local purpose, but one that does not affect commerce within the port of the City of Winona since the County's jurisdiction regarding zoning and planning does not extend to municipalities within the County except in those townships that have delegated their zoning authority to the County. It has been modified to clarify that the provisions do not apply to the interstate and intercounty transport of industrial minerals coming into Winona County by rail, barge or truck, or other means of transport. The Board finds that it has been written so that it does not affect commerce within the port of the City of Winona or any other municipality where silica sand is transported either by river barge, train or truck, or processing facilities therein, since the County's jurisdiction regarding zoning and planning does not extend to municipalities within the County except in those townships that have delegated their zoning authority to the County.

58. Regarding the due process concerns raised by individuals during the public hearing process, the Board finds that the 14th Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The right to devote land to any legitimate use is "property" within this clause. State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 49 S.Ct. 50,278 U.S. 116,

73 L.Ed. 210 (1928). This clause protects against the arbitrary restriction of lawful use of land. Southern Co-op Development Fund v. Driggers, 527 F.Supp. 927, affirmed 696 F.2d 1347, rehearing denied 703 F.2d. 582, certiorari denied 103 S.Ct. 3539, 463 U.S. 1208, 77 L.Ed.2d 1389 (1981).

In testing the constitutionality of a zoning ordinance, the sole question is whether there is a rational relationship between the ordinance and the promotion of some aspect of a government exercising its police power, a label which describes the full range of legitimate public interests. Stone v. Maitland, 446 F.2d 83 (Court of Appeals, 5th Dist., 1971). Unless it is based upon a suspect classification or unless it infringes upon a fundamental right, zoning legislation may be held unconstitutional only if it is shown to bear no possible relationship to the government's interest in securing health, safety, morals or general welfare of the public and is, therefore, manifestly unreasonable and arbitrary. City of Highland Park v. Train, 519 F.2d 681 (Court of Appeals, 7th Dist., 1975). The Board finds that the record suppo1is that the ordinance is rationally related to protecting the health, safety, and general welfare of Winona County citizens.

CONCLUSIONS

1. The Winona County Board of Commissioners has jurisdiction over the subject matter of this proceeding pursuant to Minnesota Statutes Chapters 116D, 375, and 394, and the Winona

County Zoning Ordinance.

2. Based on the findings made herein, the Winona County Board of Commissioners concludes that adopting and enacting the Proposed Ordinance Amendment with modifications as noted herein and as attached hereto amending the Winona County Zoning Ordinance to restrict industrial mineral mining and processing in Winona County is reasonably related to the goals, policies and strategies of the 2014 Winona County Comprehensive Plan and the purpose of Winona County Zoning Ordinance.

3. The Winona County Board of Commissioners concludes that adoption and enactment of the Proposed Ordinance Amendment with modifications as noted herein and as attached hereto complies with Minn. Stat. Section 116C.99 subd. 2(a) in that the amendment establishes standards and criteria for mining, processing, and transporting silica sand that are different from other geographic areas of the state and reflects the unique karst conditions and landforms of southeastern Minnesota which exist in Winona County.

ADOPTION OF AMENDMENT TO WINONA COUNTY ZONING ORDINANCE

1. On voice vote, motion carried 3 (Commissioners Kovecsi, Pomeroy, Olson) to 2 (Commissioners Ward, Jacob) in favor of adopting and enacting the attached Winona County Zoning Ordinance Amendment Regarding the Mining and Processing of Industrial Minerals in Winona County.

I certify that the above Ordinance was adopted by the Board of Commissioners of the County of Winona on November 22, 2016.

SIGNED:	WITNESSETH:
s/	s/
Marie Kovecsi	Kenneth Fritz
Chair	County Administrator
Winona County Board of Commissioners	
ll-22-16	ll-22-16
Date	Date

Drafted and Approved as to Form
On November 15, 2016 by

s/
Karin L. Sonneman
Winona County Attorney

Approved as to Execution on November 22, 2016 by
s/
Karin L. Sonneman
Winona County Attorney