MINNESOTA ENVIRONMENTAL QUALITY BOARD

520 Lafayette Road North, Saint Paul, MN 55155| www.eqb.state.mn.us
Phone: 651-757-2873 | Fax: 651-757-2343

October 18, 2017

Meeting Location:
Meeting Location: MPCA Board Room
St. Paul, Minnesota
1:00 p.m. – 4:00 p.m.

AGENDA

General
This month's meeting will take place in the Minnesota Pollution Control Agency board room at 520 Lafayette Road in St. Paul. The Environmental Quality Board (EQB or Board) meeting will be available via live webcast on October 18 from 1:00 p.m. to 4:00 p.m. You will be able to access the webcast on our website: www.eqb.state.mn.us

The Jupiter Parking Lot is for all day visitors and is located across from the Law Enforcement Center on Grove Street. The Blue Parking Lot is also available for all day visitors and is located off of University and Olive Streets.

Public comment is taken on all agenda items. Time allocated for discussion is at the discretion of the Board Chair.

I. *Adoption of Consent Agenda
Proposed Agenda for October 18, 2017 Board Meeting
July 19, 2017 Meeting Minutes

II. Introductions

III. Chair's Report

IV. Executive Director's Report

V. ** Request to Terminate the Minnesota Sands, LLC and/or Minnesota Proppant ("Project Proposers"), LLC Multi-Site Environmental Impact Statement ("EIS") for the Silica Sand Mines Proposed by the Project Proposers in Fillmore, Houston, and Winona counties and the Assignment of a Responsible Governmental Unit ("RGU") for the Environmental Assessment Worksheet ("EAW") for the Minnesota Sands, LLC and/or Minnesota Proppant, LLC Proposed Dabelstein Mine Project in Fillmore County.

VI. Adjourn

** Items requiring discussion may be removed from the Consent Agenda*
***Denotes action may be taken*

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Phone: 651-757-2873 | Fax: 651-757-2343

October 18, 2017

Meeting Location: MPCA Board Room
St. Paul, Minnesota
1:00 p.m. – 4:00 p.m.

ANNOTATED AGENDA

General
This month's meeting will take place in the Minnesota Pollution Control Agency Board Room at 520 Lafayette Road in St. Paul, MN. The Environmental Quality Board (EQB or Board) meeting will be available via live webcast on October 18, 2017 from 1:00 p.m. to 4:00 p.m. You will be able to access the webcast on our website: www.eqb.state.mn.us

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I. *Adoption of Consent Agenda
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* *Items requiring discussion may be removed from the Consent Agenda*
** *Denotes action may be taken*

Presenter: Erik Cederleaf Dahl, Staff
Environmental Quality Board
651-757-2364

Rick Frick, Project Proposer,
Minnesota Sands, LLC and/or Minnesota Proppant, LLC Representative

Materials enclosed:

- October 18, 2017 Draft EQB Resolution, Finding of Fact, Conclusions of Law, and Order
  - 2013 EQB Findings of Fact, Conclusions of Law, and Order
  - March 1, 2016 Letter to Mr. Rick Frick
  - June 19, 2017 Email from Mr. Rick Frick
  - July 28, 2017 Letter and Lease from Mr. Rick Frick
  - Exhibit A - August 25, 2017 Affidavit from Mr. Rick Frick
- State of Minnesota District Court County of Winona Third Judicial District Civil File No. 85-CV-17-771: Minnesota Sands, LLC, v. County of Winona, Minnesota, a political subdivision of the State of Minnesota
  - Defendant Winona County's memorandum in support of its motion to dismiss, or, in the alternative, for summary judgment, and memorandum in response to plaintiff' motions for summary judgment
  - Second Amended Complaint Civil File No. 85-CV-17-771

Issue before the Board:

Minnesota Sands, LLC and/or Minnesota Proppant, LLC (Project Proposers) request that EQB terminate the multi-site environmental impact statement (EIS) for potential silica sand mines in Fillmore, Houston, and Winona counties.

The EQB will assign a responsible governmental unit (RGU) for the environmental assessment worksheet (EAW) for the Minnesota Sands, LLC and/or Minnesota Proppant, LLC proposed Dabelstein mine project in Fillmore County.

Background:

On March 20, 2013, the EQB found that "the projects proposed by Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties are multiple projects that are phased actions, and therefore must be considered in total when preparing an EAW or EIS." And on March 20, 2013, the EQB assumed RGU status for the Minnesota Sands, LLC multi-site EIS.

Since 2013, EQB has not received the necessary data submittal from the Project Proposers and an EIS has not been completed. In August 2017, the Project Proposers requested that the multi-site EIS for potential silica sand mines in Fillmore, Houston, and Winona counties be terminated.

Discussion:

In order to terminate the Minnesota Sands, LLC and/or Minnesota Proppant LLC multi-site EIS for potential silica sand mines in Fillmore, Houston, and Winona counties, the EQB must look to Minnesota Rules Chapter 4410 to determine if single or multiple projects exist; whether the projects are phased actions and if the projects meet thresholds for environmental review.

Staff recommendation:

Staff recommends adopting the resolution and approving the Findings, Conclusions of Law, and Order to terminate the multi-site multi-county environmental impact statement for the silica sand mines proposed by Minnesota Sands, LLC and/or Minnesota Proppant, LLC in Fillmore, Houston, and Winona counties and assign Fillmore County as the responsible governmental unit for the environmental assessment worksheet for the Minnesota Sands, LLC and/or Minnesota Proppant, LLC proposed 56.26 acre Dabelstein Mine Project in Fillmore County.

VI. Public Comment

VII. Adjourn

MINNESOTA ENVIRONMENTAL QUALITY BOARD
MEETING MINUTES

Wednesday July 19, 2017
MPCA Room Board Room
520 Lafayette Road North, St. Paul

EQB Members Present: Dave Frederickson, John Saxhaug, Julie Goehring, Gerald VanAmburg, Kristin Eide-Tollefson, Mike Rothman, Matt Massman, Shawntera Hardy, Dr. Ed Ehlinger, Kate Knuth, John Linc Stine, Charlie Zelle

EQB Members Absent: Tom Landwehr, Tom Moibi

Staff Present: Will Seuffert, Claudia Hochstein, Kristin Mroz-Risse, Erik Dahl, Courtney Ahlers-Nelson, Mark Reigel, Katie Pratt

I. Adoption of Consent Agenda and Minutes

II. Introductions

III. Chairs Report
None.

IV. Executive Directors Report
Shared the highlights of the 2017 legislative session, talked about the Environmental Review Advisory Panel work, showed a new video on the Environmental Review program, informed the Board that the EQB brand transition will be completed by August 8th, and shared the upcoming schedule for the 25 x 25 water quality meetings.

V. Paris Climate Agreement
Presenters: Dr. Roopali Phadke, Macalaster College; J. Drake Hamilton, Fresh Energy; Eliza Clark, Andersen Corporation; David Thornton, Minnesota Pollution Control Agency

The presenters shared their perspectives on how state and local governments, as well as Minnesota institutions, non-profits, businesses and individuals can advance climate action.

The following people provided oral testimony:
- John Munter, MN for Pipeline Cleanup
- Laura Huepenbecker, Sierra Club
- Jean Ross, Climate and Guardians of the Commons

VI. Interagency Climate Adaptation Team Report
Presenters: Paul Moss, Minnesota Pollution Control Agency

In May 2017, ICAT released the updated report, “Adapting to Climate Change in Minnesota” which describes observed and projected climate impacts in Minnesota, outlines Minnesota state agency activities that are helping to adapt to climate change, and provides recommendations for future state action and interagency collaboration. Mr. Moss summarized the report and shared with the Board a couple of follow up activities that are planned.

The following person provided oral testimony:

- Andy Pearson

VII. GreenStep Cities Program

Presenters: Philipp Muessig, Minnesota Pollution Control Agency; Kristen Mroz, Environmental Quality Board, Jonee Kulman Brigham, University of Minnesota

The GreenStep Cities program began in 2010 following concept planning for a Green Star City program with the Legislature and with advisory and technical committee input. The presenters gave an overview of the program, shared results and deliverables for EQB, and discussed the next steps.

The video/audio recording of the meeting is the official record and can be found at this link: ftp://files.pca.state.mn.us/pub/EQB_Board/

RESOLUTION OF THE
MINNESOTA ENVIRONMENTAL QUALITY BOARD

In the Matter of a Request to Terminate the Minnesota Sands, LLC and/or Minnesota Proppant, LLC Multi-Site Environmental Impact Statement for the Silica Sand Mines Proposed by the Project Proposers in Fillmore, Houston, and Winona counties and review of the Assignment of a Responsible Governmental Unit for the Environmental Assessment Worksheet for the Minnesota Sands, LLC and/or Minnesota Proppant, LLC Proposed Dabelstein Mine Project in Fillmore County.

BE IT RESOLVED, that upon request, the Minnesota Environmental Quality Board will provide technical assistance to local units of government on silica sand projects through the Silica Sand Technical Assistance Team; and

BE IT RESOLVED, that upon request, the Minnesota Environmental Quality Board will provide assistance on the applicability of Minnesota Rules Chapter 4410 on all projects; and

BE IT RESOLVED, that the Minnesota Environmental Quality Board will consider all future requests for the designation of the responsible governmental unit for projects; and

BE IT RESOLVED, that the Minnesota Environmental Quality Board approves and adopts the attached and hereby incorporated Findings of Fact, Conclusions of Law and Order; and

BE IT FURTHER RESOLVED, that David J. Frederickson, Chair of the Board, is authorized to sign the adopted Findings of Fact, Conclusions of Law and Order.

STATE OF MINNESOTA
ENVIRONMENTAL QUALITY BOARD

In the Matter of a Request to Terminate the Minnesota Sands, LLC and/or Minnesota Proppant, LLC Multi-Site Environmental Impact Statement for the Silica Sand Mines Proposed by the Project Proposers in Fillmore, Houston, and Winona counties and review of the Assignment of a Responsible Governmental Unit for the Environmental Assessment Worksheet for the Minnesota Sands, LLC and/or Minnesota Proppant, LLC Proposed Dabelstein Mine Project in Fillmore County.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Based upon all of the proceedings herein and the entire record, the Environmental Quality Board ("EQB") makes the following:

FINDINGS OF FACT

1. On March 20, 2013, the Matter of Request to Designate a Different Responsible Governmental Unit for Environmental Review of Multiple Silica Sand Project Proposed by Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties came before the EQB, pursuant to requests from Fillmore and Houston Counties.

2. In the March 20, 2013, Findings of Fact, Conclusions of Law and Order approved and adopted by the EQB, attached hereto and incorporated by reference as "2013 Findings," the EQB found that "the projects proposed by Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties are multiple projects that are phased actions, and therefore must be considered in total when preparing an EAW or EIS."

3. In the 2013 Findings, the EQB found that, Minnesota Sands, LLC had voluntarily agreed to complete an environmental impact statement ("EIS") for their proposed projects spanning Fillmore, Houston and Winona Counties.

4. In the 2013 Findings, the EQB found that, "by application of Minnesota Rules 4410.0500, Subp. 1 and 5, local governments are commonly presumed to have greater responsibility for

approving, and greater expertise in analyzing potential impacts of nonmetallic mineral mining projects than other units of government. However, in this case, multiple projects are proposed in multiple counties and are phased actions. Based on Minnesota Rules 4410.1000, Subp. 4, paragraph 1, and 4410.2000, Subp. 4, paragraph 1, multiple projects that are phased actions must be considered in total in preparing and EAW or EIS. Additionally, state agencies may have greater expertise than local governments in analyzing certain potential impacts."

5. EQB finds that when multiple projects are proposed that phased and connected actions must be considered in total when determining whether environmental review is necessary and when preparing an environmental assessment worksheet ("EAW") or EIS.

6. Minnesota Rule 4410.4400, subpart 9 reads:

Nonmetallic mineral mining. Items A to C designate the RGU for the type of project listed:

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B. For development of a facility for the extraction or mining of sand, gravel, stone, or other nonmetallic minerals, other than peat, which will excavate 160 acres of land or more to a mean depth of ten feet or more during its existence, the local government unit shall be the RGU.

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Minn. R. 4410.4400, subpart 9.

6. In the 2013 Findings, the EQB found that "projects proposed by the Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties have potential cumulative environmental impacts on the same geographic area and review of the projects can be accomplished in a more effective and efficient manner through a single EIS."

7. In the 2013 Findings, the EQB found that "the EQB has greater expertise in analyzing the potential impacts of the multiple, phased-action, and cross-county projects than Fillmore, Houston, or Winona Counties."

8. On January 16, 2015, the Project Proposers entered into a contract with the EQB for scoping the multi-site EIS.

9. On March 1, 2016, the EQB sent a letter to the Minnesota Sands, LLC and/or Minnesota Proppant, LLC ("Project Proposers") representative, Mr. Rick Frick, stating that the EQB would suspend work on the multi-site EIS, due to the failure of the Project Proposers to provide the necessary data submittal to the EQB.

10. The March 1, 2016 letter from EQB stated "[i]f you [the Project Proposers] choose to proceed in the future and are able to provide the project data submittal, the EQB as the designated Responsible Government Unit, will take the necessary steps to arrange for a new income agreement, retain project management staff, and conduct the environmental review process for your project."

11. EQB received no data submittal from the Project Proposers.

12. The EQB finds that the Project Proposers have not completed environmental review for its planned silica sand mines in Fillmore, Houston and Winona, and has not sought any governmental approval for any mine sites requiring environmental review.

13. On June 19, 2017, the Project Proposers contacted EQB staff and requested that the Dabelstein mine in Fillmore County be removed from the multi-site EIS.

14. On July 28, 2017, the Project Proposers provided the EQB with a letter, which stated, "[i]n light of Winona County's amendment of its zoning ordinance on November 22, 2016 to ban on the (sic) mining, processing, and transportation of silica sand for use as a proppant, Minnesota Sands cannot proceed with its plans to mine and process sand from the Winona County properties on which Minnesota Sands has six leases."

15. The July 28, 2017 letter stated, "Minnesota Sands filed a lawsuit against Winona County on April 18, 2017. If and until the ban is struck by judicial process or withdrawn by Winona County, Minnesota Sands cannot mine sand on its leased property in Winona County and has no intention to do so."

16. The EQB finds that Winona County Board adopted the ban on silica sand mining operations in Winona County on November 22, 2016.

17. The EQB finds that on May 8, 2017, a lawsuit was filed in the State of Minnesota District Court County of Winona, Third Judicial District, Civil File No. 85-CV-17-771: Minnesota Sands, LLC, v. County of Winona, Minnesota, a political subdivision of the State of Minnesota.

18. The EQB finds that that should the Winona County ban on silica sand mining be overturned or rescinded, that upon seeking governmental approval for the Project Proposers' proposed mine sites, the sites would be evaluated for phased and connected actions and when applicable, considered in total when determining whether environmental review is necessary.

19. The July 28, 2017 letter stated "…Minnesota Sands' mining plan current mining plan is limited to a single site, the Dabelstein property in Fillmore County…"

20. The July 28, 2017 letter included a partially redacted copy of a lease between the Project Proposers and the Roger W. Dabelstein in Fillmore County for 56.26 acres.

21. On August 25, 2017, EQB staff received an email from the Project Proposers' attorney, William K. Weimer, with an affidavit, attached hereto and incorporated by reference as Exhibit A, from Mr. Rick Frick which requested that the "EQB take the necessary action to officially close out the Minnesota Sands EIS project."

22. The August 25, 2017 affidavit also included a list of properties affiliated with the Project Proposers, including information regarding the county, landowner, lease status, the Project Proposers' plans to mine, and reason. The table is included in Exhibit A.

23. The properties affiliated with the Project Proposers as provided in the August 25, 2017 affidavit are as follows:

County	Landowner	Lease Status	Plans to Mine	Reason
Houston	Erickson	No Lease	No	No Lease/Market Conditions
Houston	Tostenson	No Lease	No	No Lease/Market Conditions
Houston	Olson	No Lease	No	No Lease/Market Conditions
Houston	Chapel	No Lease	No	No Lease/Market Conditions
Houston	Johnson	No Lease	No	No Lease/Market Conditions
Winona	Detweiller	Active	No	Ban on Mining
Winona	Dan Yoder	Active	No	Ban on Mining
Winona	Campbell	Active	No	Ban on Mining
Winona	Ida Yoder	Active	No	Ban on Mining
Winona	Dabelstein	Active	No	Ban on Mining
Winona	Kessler	Active	No	Ban on Mining
Fillmore	Boyum	Active	No	Lack of Business Justification
Fillmore	Swiggum	Active	No	Lack of Business Justification
Fillmore	Wadewitz	Active	No	Lack of Business Justification
Fillmore	Kessler	Active	No	Lack of Business Justification
Fillmore	**Dabelstein**	**Active**	**Yes**	**Market Conditions**

24. The EQB finds that the table of affiliated properties provided by the Project Proposers in the affidavit, Exhibit A, lists sixteen properties. Fifteen of the sixteen properties are identified by the Project Proposers having "no" plans to mine for reasons due to "no lease/market conditions," a "ban on mining," or a "lack of business justification." The sixteenth affiliated property is known as the Dabelstein mine in Fillmore County.

25. *Houston County* - The EQB finds that the August 25, 2017 affidavit, Exhibit A, states that the Project Proposers "…have no plans to propose a new mine in Houston County. We no longer have leases in Houston County."

26. *Winona County* - The EQB finds that the August 25, 2017 affidavit, Exhibit A, states that the Project Proposers "…have no plans to propose the permitting of a new mine in Winona County because mining in the County is now illegal."

27. *Winona County* - The EQB finds that according to Winona County Zoning Ordinance Chapter 4: Rules and Definitions, the Winona County zoning ordinance prohibits "Industrial Mineral Operations" in "All Districts" of Winona County.

28. *Winona County* - The EQB finds that the local regulations in Winona County prohibits industrial mining operations and that the Project Proposers are currently unable to move forward with mine plans on the six properties affiliated with the Project Proposals in Winona County as described in the August 25, 2017 affidavit, Exhibit A.

29. *Fillmore County* - The EQB finds that the August 25, 2017 affidavit, Exhibit A, states that the Project Proposers have "no" "plans to mine" for four of the five affiliated properties in Fillmore County.

30. Minnesota Rule 4410.0200, subpart 65 reads:

    Project. "Project" means a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly. The determination of whether a project requires environmental documents shall be made by reference to the physical activity to be undertaken and not to the governmental process of approving the project.

    Minn. R. 4410.0200, subpart 65.

31. Based upon the Project Proposers' affidavit, Exhibit A, the EQB finds that fifteen of the sixteen properties affiliated with the Project Proposers do not meet the definition of a "project" because as stated by the Project Proposers, there is no pending plans to mine and therefore no "physical manipulation of the environment directly or indirectly," nor is there a pending "governmental approval" for any of those fifteen properties.

32. The EQB finds that the table provided by the Project Proposers in Exhibit A identifies one property, the Dabelstein site in Fillmore County, as having an active lease and the Project Proposers indicate they plan to mine this site due to "market conditions."

33. The August 25, 2017 affidavit, Exhibit A, also stated "[t]he primary basis for this request is that our current mining plan no longer proposes any phased actions. Instead our plan is to propose the permitting of a single 50-acre site, which we intend to be the Dabelstein property in Fillmore County."

34. The EQB finds that based upon the Project Proposers' affidavit, Exhibit A, the Dabelstein site in Fillmore County meets the definition of a "project" because as stated by the Project Proposers, there are plans to mine and therefore they plan the "physical manipulation of the environment directly or indirectly."

35. EQB finds that to mine in Fillmore County at the Dabelstein site a "governmental approval" in the form of a CUP would be required from Fillmore County.

36. Minnesota Rule 4410.0200, subpart 60 reads:

    Phased action. "Phased action" means two or more projects to be undertaken by the same proposer that an RGU determines:
    A. will have environmental effects on the same geographic area; and
    B. are substantially certain to be undertaken sequentially over a limited period of time.

    Minn. R. 4410.0200, subpart 60.

37. The EQB finds that a single project as proposed by the Project Proposers in Fillmore County does not meet the definition of "phased action."

38. As described above in finding 16, the July 28, 2017 letter from the Project Proposers included a partially redacted copy of a lease between the Project Proposers and Roger W. Dabelstein in Fillmore County for 56.26 acres.

39. Minnesota Statute §116C.991, part a (1), reads:

    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 of ten feet or more during its existence. The local government is the responsible governmental unit; or

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40. Based upon the Project Proposers' affidavit, Exhibit A, the EQB finds the Dabelstein site is greater than 20 acres and meets the mandatory threshold for an EAW established in Minnesota Statute §116C.991.

41. The EQB finds that in accordance with Minnesota Statute §116C.991, the local governmental unit ("LGU") is the responsible governmental unit ("RGU").

42. The EQB finds that the LGU for the 56.26 acre Dabelstein site in Fillmore County and that Fillmore County is the RGU for the proposed project.

Based on the foregoing Findings of Fact, the Minnesota Environmental Quality Board makes the following:

CONCLUSIONS OF LAW

1) Any of the foregoing Findings more properly designated as Conclusions are hereby adopted as such.

2) The EQB concludes that it has jurisdiction over the subject matter of this proceeding pursuant to Minnesota Statutes 116D.

3) The EQB concludes that the request for EQB to terminate the Minnesota Sands, LLC and/or Minnesota Proppant, LLC, multi-site EIS was properly brought before the Board.

4) The EQB concludes based on the affidavit provided by the Project Proposers, that one silica sand project, the Dabelstein Mine Project in Fillmore County meets the definition of a project in accordance with Minnesota Rule 4410.0200, subpart 65.

5) The EQB concludes that as of today's date, there is only one project moving forward in a single county and therefore, there is no longer a basis for a multi-site in multi-county EIS.

6) The EQB concludes that the proposed Dabelstein Mine Project requires mandatory EAW pursuant to Minnesota Statute §116C.991.

7) The EQB concludes that in the affidavit provided by the Project Proposers have no other plans to mine at all other affiliated properties in Winona, Houston, and Fillmore counties.

8) The EQB concludes that the LGU is the RGU for the Dabelstein Mine Project, pursuant Minnesota Statute 116C.991, and that the RGU for the proposed Dabelstein Project shall be Fillmore County.

9) The EQB finds that should changes occur to the local regulation of silica sand mining, market conditions or to the proposed mine sites identified in the Project Proposers' affidavit, that upon seeking governmental approval for a project, that the project will be evaluated for the applicability of Minnesota Rule Chapter 4410, including but not limited to phased and connected actions and environmental review thresholds.

Based on the Findings of Fact, Conclusions and the entire record of this proceeding, the Minnesota Environmental Quality Board hereby makes the following:

ORDER

The EQB hereby terminates the multi-site multi-county environmental impact statement for the silica sand mines proposed by Minnesota Sands, LLC and/or Minnesota Proppant, LLC in Fillmore, Houston, and Winona counties and assigns Fillmore County as the responsible governmental unit for the environmental assessment worksheet for the Minnesota Sands, LLC and/or Minnesota Proppant, LLC proposed 56.26 acre Dabelstein Mine Project in Fillmore County.

Approved and adopted this 18th day of October 2017.

_____

David Frederickson, Chair
Environmental Quality Board

STATE OF MINNESOTA
ENVIRONMENTAL QUALITY BOARD

In the Matter of Requests to Designate a Different Responsible Governmental Unit For Environmental Review of Multiple Silica Sand Projects Proposed by Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above-captioned matter came before the Minnesota Environmental Quality Board (EQB) at a special meeting on March 20, 2013, pursuant to requests from Fillmore and Houston Counties to designate a different responsible governmental unit (RGU) for silica sand mines proposed by Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties.

Based upon all of the proceedings herein, the Minnesota Environmental Quality Board makes the following:

FINDINGS OF FACT

1. The EQB received a letter from Fillmore County dated February 28, 2013, stating that Minnesota Sands, LLC "proposes to operate [silica sand] mines in at least the following: Fillmore County at the Boyum, Dabelstein, Kesler, and Wadewitz sites; Houston County at the Erickson site; and Winona County at the Dabelstein and Yoder sites."

2. The February 28, 2013 Fillmore County letter states that "Fillmore County understands the need to complete and Environmental Impact Statement (EIS) because the sites are located in close proximity, span across the three counties, and concern the same developer."

3. The February 28, 2013 Fillmore County letter states, "[i]n Fillmore County, Minnesota Sands planned to complete separate EAWs for the Boyum, Dabelstein, and Kesler sites, but has voluntarily agreed to complete an EIS for their proposed projects spanning Fillmore, Houston, and Winona Counties. Fillmore County agrees one comprehensive EIS is appropriate for the Minnesota Sands projects located in all three counties."

4. The February 28, 2013 Fillmore County letter states. "Fillmore County requests the Environmental Quality Board to designate a State agency to act as the regulatory government unit (RGU) to prepare an EIS for the Minnesota Sands projects…"

5. The EQB received a letter from Houston County dated March 5, 2013, stating, "…Houston County requests the Environmental Quality Board to designate a State

agency to act as the regulatory governmental unit (RGU) to prepare an EIS for the proposed frac sand mines [concerning Minnesota Sands, LLC]."

6. The EQB received a letter from Winona County, dated March 13, stating "... the Winona County Board has also requested that the EQB consider the State serving as the Responsible Government Unit for this EIS preparation..."

7. Based on discussions with Houston County staff, in addition to the Boyum, Dabelstein (Fillmore County), Kesler, Wadewitz; Erickson; Dabelstein (Winona County), and Yoder sites, there are also mines proposed by Minnesota Sands, LLC, in Houston County on land owned by Leonard and Kathleen Tostenson, Porteous Olson, James Chapel, and Thomas and Virginia Johnson.

8. Minnesota Rule 4410.0200, Subp. 68 reads:

> "Proposer" means the person or governmental unit that proposes to undertake or to direct others to undertake a project.
>
> Minn. R 4410.0200, Subp. 68 (2011).

9. The EQB finds that Minnesota Sands, LLC, as the entity proposing to operate silica sand mines in Fillmore County, Houston County, and Winona County, meets the definition of "proposer."

10. Minnesota Rule 4410.0200, Subp. 60 reads:

> "Phased action" means two or more projects to be undertaken by the same proposer that a RGU determines:
>
> A. will have environmental effects on the same geographic area; and
>
> B. are substantially certain to be undertaken sequentially over a limited period of time.
>
> Minn. R. 4410.0200, Subp. 60 (2011).

11. The EQB finds that the Boyum, Dabelstein (Fillmore County), Kesler, Wadewitz; Erickson; Dabelstein (Winona County), and Yoder sites are within an 8.5 mile radius. When the Tostenson, Olson, Chapel, and Johnson sites are included, all the sites together are within a 12.5 mile radius.

12. The EQB finds that the projects are in various stages of local approval and therefore are substantially certain to be undertaken over a limited period of time.

13. The EQB finds that the projects proposed by Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties:

a. are two or more projects to be undertaken by the same proposer;
b. will have environmental effects on the same geographic area; and
c. are substantially certain to be undertaken sequentially over a limited period of time.

14. The EQB finds that projects proposed by the Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties meet the definition of a phased action.

15. Minnesota Rule 4410.1000, Subp. 4 reads in relevant part:

> Connected actions and phased actions. Multiple projects and multiple stages of a single project that are connected actions or phased actions must be considered in total when determining the need for an EAW, preparing the EAW, and determining the need for an EIS.
>
> ***
>
> Minn. R. 4410.1000, Subp. 4 (2011).

16. Minnesota Rule 4410.2000, Subp. 4 reads in relevant part:

> Connected actions and phased actions. Multiple projects and multiple stages of a single project that are connected actions or phased actions must be considered in total when determining the need for an EIS and in preparing the EIS.
>
> ***
>
> Minn. R. 4410.2000, Subp. 4 (2011).

17. Minnesota Rule 4410.2000, Subp. 5 reads:

> Related actions EIS. An RGU may prepare a single EIS for independent projects with potential cumulative environmental impacts on the same geographic area if the RGU determines that review can be accomplished in a more effective or efficient manner through a related actions EIS. A project must not be included in a related actions EIS if its inclusion would unreasonably delay review of the project compared to review of the project through an independent EIS.
>
> Minn. R. 4410.2000, Subp. 5 (2011).

18. The EQB finds that projects proposed by the Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties are multiple projects that are phased actions, and therefore must be considered in total when preparing an EAW or EIS.

19. The EQB finds that projects proposed by the Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties have potential cumulative environmental impacts on the same geographic area and review of the projects can be accomplished in a more effective and efficient manner through a single EIS.

20. Minn. R. 4410.4300, Subp. 12 reads in relevant part:

> Nonmetallic mineral mining. Items A to C designate the RGU for the type of project listed:
>
> ***
>
> B. For development of a facility for the extraction or mining of sand, gravel, stone, or other nonmetallic minerals, other than peat, which will excavate 40 or more acres of land to a mean depth of ten feet or more during its existence, the local government unit shall be the RGU.
>
> ***

21. Minn. R. 4410.4400, Subp. 9 reads in relevant part:

> Nonmetallic mineral mining. Items A to C designate the RGU for the type of project listed:
>
> ***
>
> B. For development of a facility for the extraction or mining of sand, gravel, stone, or other nonmetallic minerals, other than peat, which will excavate 160 acres of land or more to a mean depth of ten feet or more during its existence, the local government unit shall be the RGU.
>
> ***
>
> Minn. R. 4410.4400, Subp. 9 (2011).

22. Minn. R. 4410.0500, Subp. 1 reads:

> RGU for mandatory categories. For any project listed in part 4410.4300 or 4410.4400, the governmental unit specified in those rules shall be the RGU unless the project will be carried out by a state agency, in which case that state agency shall be the RGU. For any project listed in both parts 4410.4300 and 4410.4400, the RGU shall be the unit specified in part 4410.4400. For any project listed in two or more subparts of part 4410.4300 or two or more subparts of part 4410.4400, the RGU shall be determined as specified in subpart 5.

Minn. R. 4410.0500, Subp. 1 (2011).

23. Minnesota Rule 4410.0500, Subp. 5 reads:

> For any project where the RGU is not listed in part 4410.4300 or 4410.4400 or which falls into more than one category in part 4410.4300 or 4410.4400, or for which the RGU is in question, the RGU shall be determined as follows:
>
> A. When a single governmental unit proposes to carry out or has sole jurisdiction to approve a project, it shall be the RGU.
>
> B. When two or more governmental units propose to carry out or have jurisdiction to approve the project, the RGU shall be the governmental unit with the greatest responsibility for supervising or approving the project as a whole. Where it is not clear which governmental unit has the greatest responsibility for supervising or approving the project or where there is a dispute about which governmental until has the greatest responsibility for supervising or approving the project, the governmental units shall either:
>
> (1) by agreement, designate which unit shall be the RGU within five days of receipt of the completed data portion of the EAW: or
>
> (2) submit the question to the EQB chairperson, who shall within five days of receipt of the completed data portions of the EAW designate the RGU based on consideration of which governmental unit has the greatest responsibility for supervising or approving the project or has expertise that is relevant for the environmental review.
>
> Minn. R. 4410.0500, Subp. 5 (2011).

24. The EQB finds that Minnesota Rule 4410.0500, Subp. 5, paragraph B is applicable to the projects proposed by the Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties because two or more governmental units have jurisdiction to approve the projects.

25. The EQB finds that Fillmore, Houston, or Winona Counties could be RGU for a single EIS on multiple sites in multiple counties pursuant to Minn. R. 4410.0500, Subp. 5, paragraph B.

26. Minn. R. 4410.0500, Subp. 6 reads:

> Notwithstanding subparts 1 to 5, the EQB may designate, within five days of receipt of the completed data portions of the EAW, a different RGU for

the project if the EQB determines the designee has greater expertise in analyzing the potential impacts of the project.

Minn. R. 4410.0500, Subp. 6 (2011).

27. The EQB finds that, in the instances of the Boyum, Dabelstein, Kesler, and Wadewitz sites in Fillmore County, and the Erickson, Tostenson, Olson, Chapel, and Johnson sites in Houston County, no EAW has been started, and therefore no completed data portion of the new EAW has yet been received by an RGU, or EQB.

28. The EQB finds that, in its history of applying Minn. R. 4410.0500, Subp. 6, in every known instance, no EAW data submittal had been made.

29. The EQB finds that, to designate a different RGU than Fillmore County, under Minn. R. 4410.0500, Subp. 6, the EQB must determine that the designee has greater expertise in analyzing the potential impacts of the project.

30. The EQB finds that local governments are the RGU for mandatory EAWs and EISs for nonmetallic mineral mining projects, with the exception of peat mines.

31. The EQB finds that by application of Minn. R. 4410.0500, Subp. 1 and 5, local governments are commonly presumed to have greater responsibility for approving, and greater expertise in analyzing potential impacts of nonmetallic mineral mining projects than other units of government. However, in this case, multiple projects are proposed in multiple counties that are phased actions. Based on Minn. R. 4410.1000, Subp. 4, paragraph 1, and 4410.2000, Subp. 4, paragraph 1, multiple projects that are phased actions must be considered in total in preparing an EAW or EIS. Additionally, Fillmore, Houston, and Winona Counties have requested the EQB to re-designate RGU status to the State, and state agencies may have greater expertise than local government in analyzing certain potential impacts.

32. The Minnesota Pollution Control Agency was RGU for the EIS for Hancock Pro Pork Feedlot Project, in Stevens and Pope Counties. The project consisted of feedlot facilities on multiple sites in two counties, Stevens and Pope.

33. The EQB finds that the MPCA has expertise regarding multi-site and multi-county EISs.

34. The EQB finds the projects proposed by Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties have potential impacts such as those on air quality, water resources, and transportation, where state agencies have greater expertise than local government.

35. The EQB finds that the potential impacts for the proposed projects encompass the responsibilities of several state agencies.

36. Minnesota Statutes, Section 116C.01, reads:

> FINDINGS.
>
> The legislature of the state of Minnesota finds that problems related to the environment often encompass the responsibilities of several state agencies and that solutions to these environmental problems require the interaction of these agencies. The legislature also finds that further debate concerning population, economic and technological growth should be encouraged so that the consequences and causes of alternative decisions can be better known and understood by the public and its government.
>
> Minn. Stat. Section 116C.01 (2011)

37. The EQB finds that its membership includes the heads of state agencies including the Departments of Administration, Agriculture, Commerce, Employment and Economic Development, Health, Natural Resources, and Transportation, the Pollution Control Agency, and the Board of Water and Soil Resources, and the EQB is able to draw upon the expertise of its member agencies.

38. The EQB finds the EQB has greater expertise in analyzing the potential impacts of the multiple, phased-action, and cross-county projects than Fillmore, Houston, or Winona Counties.

Based on the foregoing Findings of Fact, the Minnesota Environmental Quality Board makes the following:

CONCLUSIONS OF LAW

1. Any of the foregoing Findings of Fact more properly designated as Conclusions of Law are hereby adopted as such.

2. The Environmental Quality Board has jurisdiction over the subject matter of this proceeding pursuant to Minnesota Statutes chapter 116D and Minnesota Rules 4410.0500, Subpart 6.

3. The request for EQB to decide the question whether to designate a different RGU for the proposed projects were properly brought to the EQB Board.

4. The EQB concludes that the EQB has greater expertise in analyzing the potential impacts of the proposed project than Fillmore, Houston, or Winona Counties.

Based on the Findings of Fact, Conclusions and the entire record of this proceeding, the Minnesota Environmental Quality Board hereby makes the following:

ORDER

The EQB hereby reassigns the status and responsibilities of responsible governmental unit for silica sand mines proposed by Minnesota Sands, LLC, in Fillmore, Houston, and Winona Counties, from Fillmore, Houston, or Winona County to the Environmental Quality Board.

Approved and adopted this 20th day of March, 2013.

David J. Frederickson, Chair
Minnesota Environmental Quality Board

Environmental Quality Board
520 Lafayette Road North
Saint Paul, MN 55155

March 1, 2016

Mr. Rick Frick
14158 Addleman Drive
Houston, MN 55943

RE: Return of Deposit, Minnesota Sands, LLC Environmental Impact Statement

Dear Mr. Frick:

On January 16, 2015, you and the Environmental Quality Board (EQB) entered into an Income Agreement (Contract #7204) for a scoping process related to the Minnesota Sands, LLC Environmental Impact Statement (EIS). At this time, we are sending you a check of $76,450 and closing out this project. We are returning the unused portion of the original contract of $130,450 to you as the designated representative of Minnesota Sands, LLC. From March 2015 through June 30, 2015, EQB expended a total of 720 hours for preparatory work on the proposed project. Per the Income Agreement, these hours were funded by your original deposit.

On August 26, 2015, you received a letter from me, informing you that your account was suspended. We suspended our work at the end of the 2015 fiscal year because no additional preparatory work was warranted until your project data was submitted (see attached letter). Previously, you received e-mails and letters keeping you informed of project-related expenses and summaries of work performed. As you are aware, the Income Agreement expired on January 14, 2016, and because no data submittal has yet been received, we are no longer retaining the project staff which was only hired to complete the referenced EIS project.

If you choose to proceed in the future and are able to provide the project data submittal, the EQB, as the designated Responsible Governmental Unit, will take the necessary steps to arrange for a new income agreement, retain project management staff, and conduct the environmental review process for your project.

Mr. John Dustman is included on this letter, per your request, to designate him as the primary contact on the Income Agreement.

Sincerely,

Will Seuffert
Executive Director
Environmental Quality Board

WS:bt

Enclosures

cc: Mr. John E. Dustman

Dahl, Erik (MPCA)

From: Rick <fricksfindings@gmail.com>
Sent: Monday, June 19, 2017 10:41 AM
To: Dahl, Erik (MPCA)
Subject: Minnesota Sands LLC EIS

RE: Minnesota Sands, LLC's EIS

Hi Eric,

I left you a voicemail message mentioning that if you believe the Minnesota Sands EIS project is still in place, then on behalf of Minnesota Sands I hereby request that the Roger Dabelstein property in Fillmore County be removed from the project. If however the project is not in fact in place any longer, then the removal and my request for it is of course unnecessary and moot. Please confirm that you are granting the request or please let me know if you want to discuss it. Thank you in advance and best regards,

Rick

s/Richard Frick/
President, Minnesota Sands

Sent from my iPad

July 28, 2017

Mr. Eric Cedarleaf Dahl
Planning Director
Environmental Quality Board
520 Lafayette Road | St. Paul, MN 55155

Dear Mr. Dahl:

Thank you for your letter dated June 30, 2017. Please note that though dated June 30, the letter was not mailed until July 13. In either case, this response is being filed within the thirty (30) day period as set forth in the letter.

Please note our responses to your request for information:

Request for Information No. 1

Update on the status of current and proposed Minnesota Sands LLC and/or Minnesota Proppant proposed projects (please reference the March 20, 2013 Findings of Fact for sites initially identified) in Fillmore (including the 37-acre Dabelstein site), Winona, and Houston counties.

Minnesota Sands' Response to Request for Information No. 1

In light of Winona County's amendment of its zoning ordinance on November 22, 2016 to ban on the mining, processing, and transportation of silica sand for use as a proppant, Minnesota Sands cannot proceed with its plans to mine and process sand from the Winona County properties on which Minnesota Sands has six leases. Because the ban wiped away all of the value of those leases, Minnesota Sands filed a lawsuit against Winona County on April 18, 2017. If and until the ban is struck by judicial process or withdrawn by Winona County, Minnesota Sands cannot mine sand on its leased property in Winona County and has no intention to do so. Instead, Minnesota Sands' current mining plan is limited to a single site, the Dabelstein property in Fillmore County, which is why Minnesota Sands requested that the Dabelstein property be removed from the multi-site EIS to the extent the EIS is still pending. As previously indicated to the EQB, Minnesota Sands' mining plan was to mine 37 acres of this property. Minnesota Sands is now planning to mine 50 acres of the Dabelstein property because it believes doing so will improve the reclamation plan for that property. Minnesota Sands expects to submit its application to mine this property to Fillmore County on or about August 11, 2017.

Request for Information No. 2

Documentation on the relationship between Minnesota Sands LLC and/or Minnesota Proppant and Mr. Roger Dabelstein's Fillmore County 37-acre site referenced in your June 19, 2017 letter.

Finally, it is important to note that all governmental actions are prohibited for any of the Minnesota Sands LLC and/or Minnesota Proppant sites associated with the multi-site EIS until the environmental review process is complete.

Minnesota Sands' Response to Request for Information No. 2

Attached please find a partially redacted copy of the lease between Minnesota Sands, LLC and the Dabelstein property in Fillmore County that Minnesota Sands plans to mine.

We respectfully request that you confirm the removal of the Dabelstein property in Fillmore County from the multi-site EIS to the extent the EIS is in your opinion still in process. We also respectfully request that you inform Fillmore County that it may proceed with the consideration of Minnesota Sands' permit application to mine the Dabelstein Fillmore property once the application is filed.

Sincerely,

s/Richard Frick/

Richard Frick

President
Minnesota Sands, LLC

ASSIGNMENT AND ASSUMPTION OF LEASE

This Agreement is entered into this 24th day of February, 2012 by and between Richard Frick, and adult ("Assignor") and Minnesota Sands, LLC, a Minnesota limited liability company ("Assignee").

WHEREAS, Assignor is a member of Assignee and has agreed to assign certain leases for real property in the State of Minnesota for the purpose of allowing sand mining to Assignee as a capital contribution to Assignee;

WHEREAS, copy of a lease for sand extraction is attached as **Exhibit A** hereto ("lease"); and

NOW THEREFORE, IT IS AGREED AS FOLLOWS:

1. The Assignor hereby assigns, transfers and conveys to the Purchaser all of its right, title and interest as lessee under the Lease, and the Assignee hereby assumes the Lease obligations and agrees to perform and discharge such obligations in accordance with their terms.
2. The Assignee further agrees to indemnify and hold the Assignor harmless against any losses, claims, damages or liabilities (including the Assignor's reasonable attorneys' fees in arbitration, at trial, or in the appellate courts) to which either or both may become Assignee's performance of the Lease obligations.

ASSIGNOR

Richard Frick

Richard Frick

ASSIGNEE

Minnesota Sands, LLC

By: Richard Frick

Richard Frick its President

CONSENT

The undersigned Landowner hereby consents to Richard Frick Assigning his interest in the attached lease to Minnesota Sands, LLC

Subscribed and sworn before me by Richard Frick this 24th 28th day of February, 2012.

Notary Public

DAWN R. KRAUS
Notary Public-Minnesota
My Commission Expires Jan 31, 2013

RECEIVED
JUL 31 2017

LEASE AGREEMENT

THIS LEASE AGREEMENT, ("the Agreement") is entered into this ___ day of November, 2011 by, **Roger W. Dabelstein, Trustee of the Alice Dabelstein Revocable Trust under Agreement dated September 20, 2006 and Roger W. Dabelstein a single person**, ("Landlord") whose address for the purpose of this lease is 13125 County 6., St. Charles, MN 55972, and **Richard Frick,** ("Tenant"), whose address for the purposes of this lease is 3108 Co. Rd., 9, Houston, MN 55943

1. **PREMISES AND TERM.** The landlord, in consideration of the rent, agreements, and conditions contained herein, leases to the Tenant and Tenant leases from Landlord, for the sole purpose of removing sand only the following described real estate in Fillmore County, Minnesota:

   See Attached Exhibit A

   Parcel Id: 20.004.000, 20.0096.000, 20.0098.000
   This lease description is limited to the actual permitted area for a sand pit as well as all access roads to and from the sand pit, generally depicted on the attached Exhibit A.

The description of the leased area shall be modified to exclude any part of the above described real estate which is not encompassed by the actual permitted area.

for a term commencing November 1, 2011 and ending five (5) years after the issuance of a conditional use permit for the above described property.

2. **RENTAL.** Tenant agrees to pay to Landlord as rental for said Premises the sum of [redacted] to be paid in full on the execution of this lease. Tenant also agrees to pay Landlord [redacted] on obtaining a Conditional Use Permit from Fillmore County. If Tenant constructs access roads on the premises, Tenant shall pay Landlord fair agricultural rental rates for the total of land utilized for such access road. Currently, the rental rate per acre of agricultural land is [redacted]

3. **ROYALTIES.** In addition to the rental due under paragraph 2 above, Tenant agrees to pay Landlord royalties in the amount of [redacted] ("Royalty Rate") for each ton of Frac Sand removed from the premises. Said material shall be weighed across a scale provided and installed on the Premises by Tenant. [redacted] Royalty payments will be made on a monthly basis with the first Royalty payment due two months after the removal of the first material. For purposes of this Lease, the term "Frac Sand" shall mean and refer to sand usable for hydraulic fracturing in the production of oil or natural gas without alteration. Material less than 50% "Frac Sand" shall not be included within the definition of "Frac Sand." .

4. **POSSESSION.** Tenant shall be entitled to possession on the commencement date, and shall yield possession to the Landlord upon expiration of this Agreement. Landlord shall have the absolute right to continue to complete cropping and farming activities on the portion of the premises not affected by the mining operation and Landlord shall have the right to complete cropping and farming activities on the portion of the premises reclaimed from mining operations and not affected by mining operations. If Tenant disturbs any planted crops, Tenant shall compensate Landlord for said destroyed crops at fair value.

5. **USE AND CONDITION OF PREMISES.**

(a) Tenant may use the Premises solely to mine Frac Sand to be used by Tenant for commercial purposes.

(b) Tenant will use Tenant's best efforts to maintain a "good neighbor policy" with adjacent property owners and the public.

(c) Tenant may sub-contract, assign or sublease all or any part of this Lease of the Premises. Prior to sub-contract, assignment or sublease, of any amount of [redacted], Tenant shall provide Landlord written notice containing the name and description of the assignee. Within three (3) days of receipt of the notice, Landlord has the right to object to any sub-contractor or assignment. Landlord shall not unreasonably object, condition or delay said sub-contract or assignment. Landlord may not object to any sub-contract or assignment to any entity of which Rick Frick is an actual or beneficial owner . All provisions of this lease, including provisions relating to Royalties and the business manner of Tenant shall apply to any assignee or sub-lessee so no harm or distress is caused to Landlord.

(d) Pursuant to this Lease the Tenant shall have the right to utilize the Premises and any easements thereon to do each of the following:

i. Transport mined materials
ii. Weigh mined materials.
iii. Process mined materials (including the building of a processing plant and all accessories thereof). Tenant may place a washing facility on the premises so long as the facility is located within the permitted area.
iv. Building of roads in order to facilitate the transport of mined materials.
v. To take all steps necessary to comply with any reclamation plans.
vi. To install all utilities of any nature necessary to mine material or to operate a processing plant for material

6. **TERMINATION AND OPTION TO RENEW.** This lease shall terminate upon expiration of the original term; or if an option to renew is exercised by

the Tenant, then this lease will terminate at the expiration of the option term or terms.

7. **OPTION TO RENEW.** As long as Tenant has paid Royalties to Landlord of no less than [redacted] during the initial Lease term (or for the prior lease term as the case may be), this Lease shall automatically renew for an additional term of five years unless the Tenant provides the Landlord with written notice that the Lease will terminate at the end of its current term. The Tenant shall pay the Landlord [redacted] within 30 days of the commencement of each renewal term. The Tenant shall continue to pay Royalties as set forth in Section 3 of this Lease through the renewal term.

8. **QUIET ENJOYMENT.** Landlord covenants that its estate in said premises is in fee simple and that the Tenant, if not in default, shall peaceably have, hold and enjoy the premises for the term of this lease. Landlord represents that it has not previously leased or assigned the mineral rights to the premises to any other party and covenants not to lease, grant or assign the mineral rights to the premises described above, during the term of this lease.

9. **REAL ESTATE TAXES.** All real estate taxes and special assessments shall be paid by the Landlord. In the event the real estate taxes and special assessments due and payable with regard to the premise increase due to a reclassification or increase in valuation caused by Tenant's activities on the premises, Tenant shall pay 50% of such increase. Upon Landlord's failure to pay any real estate taxes or special assessments, Tenant shall have the right to make such payments and obtain reimbursement or contribution from Landlord for making such payments.

10. **INDEMNITY.** Except for the negligence of Landlord, Tenant will protect, defend and indemnify Landlord from and against all loss, costs, damage and expenses occasioned by, or arising out of, any accident or other occurrence, causing or inflicting injury or damage to any person or property, happening or done in, upon or about the premises, or due directly or indirectly to the tenancy, use or occupancy thereof, or any part thereof by Tenant or any person claiming through or under Tenant.

11. **ZONING.** Tenant's obligations under this Agreement are conditioned upon Tenant obtaining any zoning or other governmental approvals required to permit the use set forth in paragraph 5 above on or before the commencement date of this Agreement. Said approvals include, but are not limited to, any

permits or approvals required by the Minnesota Department of Natural Resources, the United States Mine Safety and Health Administration, any county permits, and any mining plans and reclamation plans as may be required. Landlord agrees to assist and cooperate in obtaining any such approvals or permits. Landlord shall have the right to object to any approvals or permits at or before any type of zoning, planning, county or township or commissioning authority.

12. **NOTICES AND DEMANDS.** Notices as provided for in this lease shall be given to the respective parties hereto at the respective addresses designated on page one of this lease unless either party notifies the other, in writing, of a different address. Without prejudice to any other method of notifying a party in writing or making a demand or other communication, such message shall be considered given under the terms of this lease when sent, addressed as above designated, postage prepaid, by certified mail deposited in a United States mail box.

13. **CHANGES TO BE IN WRITING.** None of the covenants, provisions, terms or conditions of this lease shall be modified, waived or abandoned, except by a written instrument duly signed by the parties. This lease contains the whole agreement of the parties.

14. **CONSTRUCTION.** Words or phrases herein, including acknowledgement hereof, shall be construed as in the singular or plural number, and as masculine, feminine or neuter gender according the context.

15. **CERTIFICATION.** Tenant certifies that it is not acting, directly or indirectly, for or on behalf of any person, group, entity or nation named by an Executive Order of the United States Treasury Department as a terrorist, "Specially Designated National and Blocked Person" or any other banned or blocked person, entity, nation or transaction pursuant to any law, order, rule or regulation that is enforced or administered by the Office of Foreign Assets Control; and it is not engaged in this transaction, directly or indirectly on behalf of, or instigating or facilitating this transaction, directly or indirectly on behalf of, any such person, group, entity or nation. Tenant hereby agrees to defend, indemnify and hold harmless Landlord from and against any and all claims, damages, losses, risks, liabilities and expenses (including attorney's fees and costs) arising from or related to any breach of the foregoing certification.

16. **SAND FOR TENANT.** Tenant agrees to maintain a sand stock pile for miscellaneous use. Landlord shall be entitled to utilize sand from the stock pile for his own purposes or processing or for sale to third parties for agricultural purposes in the maximum amount of 25 tons per year. Tenant shall not sell any sand from the stock pile or otherwise process sand.

17. **SURFACE RIGHTS OF TENANT.** Tenant may clear brush and undergrowth from such portions of the Property as may be reasonably necessary to explore for materials or to locate pits, quarries, roads and stockpile areas. Tenant shall have the right to make use of all roadways presently existing on the Property, and shall have the further right to build such additional roads as may be reasonably necessary for the production and removal of materials hereunder, provided that Tenant has obtained Landlord's prior approval for the location and character of such roads (which approval Landlord shall not unreasonably withhold). In building such roads, Tenant may use materials from the Property, and Tenant shall not be required to pay royalties to Landlord for materials so used. Tenant shall remove all roads constructed by Tenant and restore the property to a reasonably level condition when such roads are no longer in use.

18. **PROTECTION AND RESTORATION OF SURFACE.** At the termination of this Lease or any extension or renewal thereof the Tenant shall be obligated to remove all structures and equipment located on the Property, provided, however, that Tenant shall be allowed one (1) year from the date of termination of this Lease or any extension or renewal thereof to remove any or all structures or equipment. At the termination of this Lease or any extension or renewal thereof the Tenant shall remove all trash, junk and/or salvage located on the Property and shall leave the land surface of the Property in a reasonably level condition. Landlord and Tenant agree that, for purposes of this paragraph, a reasonably level land surface would be such that a farm tractor would be able to ride across the surface area. The provisions of this paragraph shall survive any termination of this Lease.

19. **RIGHT OF FIRST REFUSAL.** Landlord agrees and hereby grants to Tenant the right of first refusal to purchase the Property (hereinafter "Right of First Refusal" as long as Tenant is not in default under this lease. Under

this Right of First Refusal, any offer to purchase the property made by a third party during the term of this Lease or any extensions thereto, shall be first communicated to Tenant in writing. Tenant shall have the option to purchase at the same price and upon the same terms of said offer. Said refusal or exercise of option by Tenant shall be made within thirty (30) days from when written notice received from Landlord.

20. **SEVERABILITY.** If any portion of this Lease shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court finds that any provision of this Lease is invalid or unenforceable, but that by limiting such provision, it would become valid and enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited.

21. **INSURANCE.** Tenant shall maintain appropriate liability insurance covering the premises and the operations occurring on the premises, with minimum limits of $5,000,000 per occurrence. Said insurance policy shall name Landlord as an additional insured.

22. **GOVERNING LAW.** This agreement shall be governed by and construed in accordance with the laws of the State of Minnesota.

23. **PROVISIONS BINDING.** Each and every covenant and agreement herein contained shall extend to and be binding upon the respective successors, heirs, administrators, executors and assigns of the parties hereto.

LANDLORD:

Roger W. Dabelstein, Trustee of Alice Dabelstein Revocable Trust

Roger W. Dabelstein

TENANT:

Richard Frick

State of Minnesota

County of Fillmore

This instrument was acknowledged before me by Roger W. Dabelstein, Trustee of Alice Dabelstein Revocable Trust and Roger W. Dabelstein, individually this 17th day of November, 2011.

JED JACOB HAMMELL
Notary Public-Minnesota
My Commission Expires Jan 31, 2012

Notary Public

State of Minnesota

County of Houston

This instrument was acknowledged before me by Richard Frick this 17th day of November, 2011.

JED JACOB HAMMELL
Notary Public-Minnesota
My Commission Expires Jan 31, 2012

Notary Public

This instrument drafted by:

Jed J. Hammell
Rippe, Hammell & Murphy, P.L.L.P.
110 East Main St.
Caledonia, MN 55921
(507) 725-3361

CERTIFICATE OF SURVEY
PART OF SW1/4 SW1/4 SEC 1
PART OF W1/2 NW1/4 SEC 12, T104N, R10W
FILLMORE COUNTY, MINNESOTA

Legal Description

That part of the Southwest Quarter of the Southwest Quarter of Section 1 and that part of the West Half of the Northwest Quarter of Section 12, Township 104 North, Range 10 West, Fillmore County, Minnesota, described as follows:

Beginning at the southwest corner of said Southwest Quarter; thence North 00 degrees 13 minutes 50 seconds East along the west line of said Southwest Quarter 754.27 feet to the southwest corner of the north 50 acres of the west 70 acres of said Southwest Quarter; thence North 89 degrees 40 minutes 55 seconds East along the south line of said north 50 acres of the west 70 acres 1153.32 feet to the southeast corner of said north 50 acres of the west 70 acres; thence South 00 degrees 13 minutes 50 seconds West along the east line of said north 50 acres of the west 70 acres 756.57 feet to the southeast corner of the west 70 acres of said Southwest Quarter; thence South 03 degrees 31 minutes 21 seconds West 764.57 feet; thence South 20 degrees 00 minutes 33 seconds West 607.33 feet; thence South 37 degrees 19 minutes 30 seconds West 615.62 feet; thence North 82 degrees 39 minutes 54 seconds West 447.77 feet; thence North 13 degrees 02 minutes 52 seconds West 258.57 feet; thence North 04 degrees 39 minutes 35 seconds East 225.29 feet; thence North 52 degrees 04 minutes 21 seconds East 244.01 feet; thence North 08 degrees 25 minutes 17 seconds West 719.62 feet; thence North 32 degrees 15 minutes 12 seconds West 225.18 feet; thence North 01 degrees 57 minutes 20 seconds West 233.48 feet to the southwest corner of said Southwest Quarter and the point of beginning.

Said tract contains 56.26 acres more or less.

AND, Together with a 66.00 foot wide access easement for ingress and egress, construction and maintenance, over and across that part of the Southwest Quarter of the Northwest Quarter of Section 12, Township 104 North, Range 10 West, Fillmore County, Minnesota, the centerline of said easement described as follows:

Commencing at the northwest corner of said Northwest Quarter; thence South 01 degrees 57 minutes 20 seconds East 233.48 feet; thence South 32 degrees 15 minutes 12 seconds East 225.18 feet; thence South 08 degrees 25 minutes 17 seconds East 719.62 feet; thence South 52 degrees 04 minutes 21 seconds West 244.01 feet; thence South 04 degrees 39 minutes 35 seconds West 225.29 feet; thence South 13 degrees 02 minutes 52 seconds East 258.57 feet; thence South 82 degrees 39 minutes 54 seconds East 285.34 feet to the point of beginning of said centerline; thence South 00 degrees 00 minutes 00 seconds East 828.99 feet to the centerline of C.S.A.H. #30 and there terminating.

The side lines of said easement are prolonged or shortened to terminate on the south line of the above described parcel and the centerline of C.S.A.H. # 30.

SHEET 2 OF 2

I HEREBY CERTIFY THAT THIS SURVEY, PLAN, OR REPORT WAS PREPARED BY ME OR UNDER MY DIRECT SUPERVISION AND THAT I AM A DULY LICENSED LAND SURVEYOR UNDER THE LAWS OF THE STATE OF MINNESOTA.

CHAD J. NOLTE — 06/30/2012 LICENSE EXPIRES

DATE — 48632 NUMBER

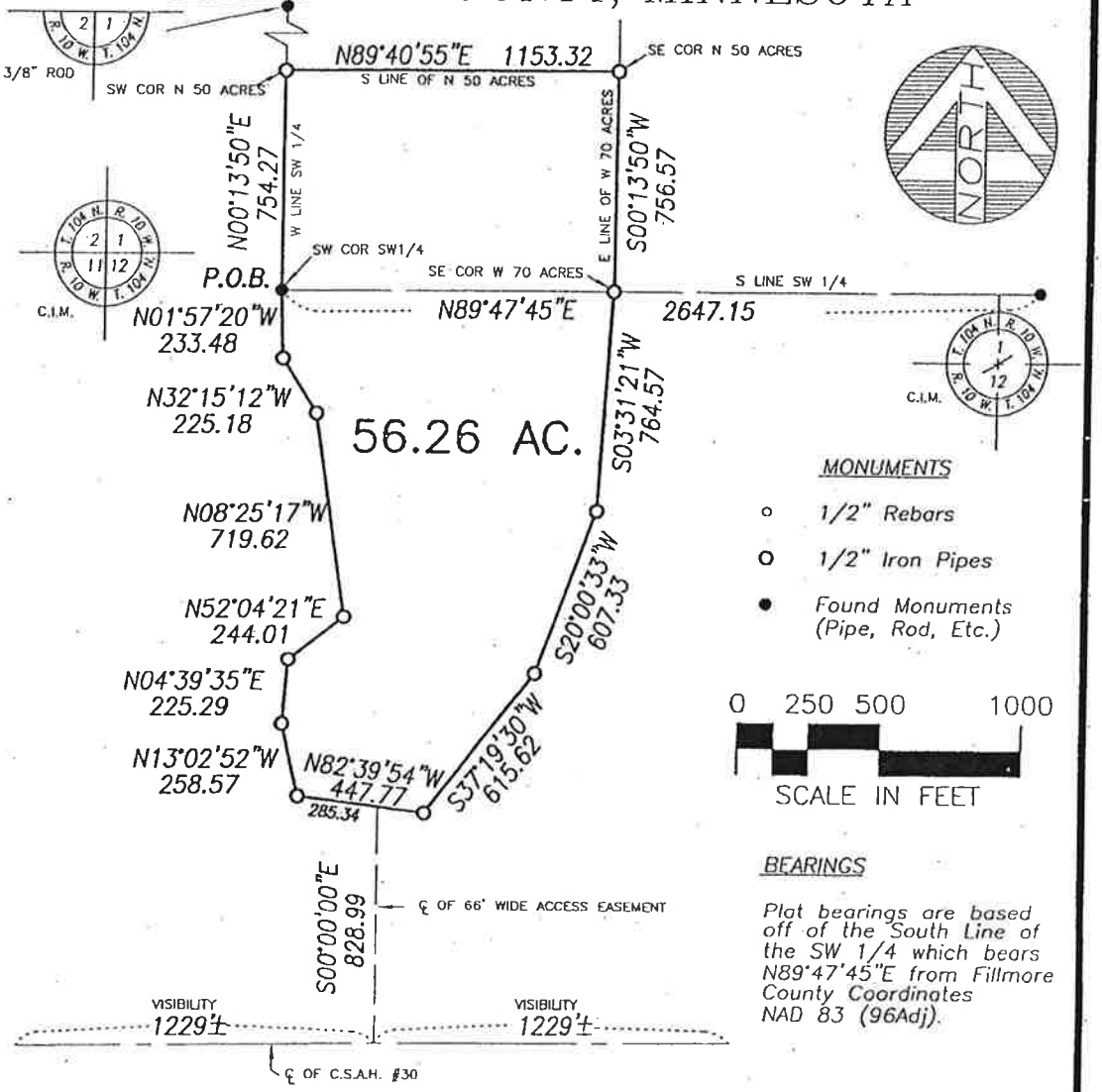
LICENSED LAND SURVEYOR
CHAD J. NOLTE
48632
MINNESOTA

NOLTE'S SURVEYING
17440 COUNTY 102
CHATFIELD, MN 55923
507-421-5427

DATE: 11/16/11 PROJECT #: R. Frick, Dabel COMPUTER FILE: Cer_1_Dabel SURVEYOR: C. NOLTE SURVEYED FOR: ROGER DABELSTEIN

EXHIBIT A

CERTIFICATE OF SURVEY
PART OF SW1/4 SW1/4 SEC 1
PART OF W1/2 NW1/4 SEC 12, T104N, R10W
FILLMORE COUNTY, MINNESOTA



Survey requested by Triple C Excavating.

SHEET 1 OF 2

I HEREBY CERTIFY THAT THIS SURVEY, PLAN, OR REPORT WAS PREPARED BY ME OR UNDER MY DIRECT SUPERVISION AND THAT I AM A DULY LICENSED LAND SURVEYOR UNDER THE LAWS OF THE STATE OF MINNESOTA.

CHAD J. NOLTE — 06/30/2012 LICENSE EXPIRES

DATE: 11/16/11 — 48632 NUMBER

LICENSED LAND SURVEYOR — CHAD J. NOLTE 48632 — MINNESOTA

NOLTE'S SURVEYING
17440 COUNTY 102
CHATFIELD, MN 55923
507-421-5427

DATE: 11/16/11 PROJECT #: R. Frick Dobel COMPUTED BY: S. Cor. 1 Dobel SURVEYED: C. NOLTE

(August 25, 2017)

Mr. Erik Dahl
Planning Director
Minnesota Environmental Quality Board
520 Lafayette Road
St. Paul, MN, 55155

Subject: Termination of Minnesota Sands EIS

Dear Erik:

In response to telephone conference on Friday, August 11, 2017 with the EQB Staff and your email the same day, Minnesota Sands is supplying the requested information. Please note that during the conference call, the discussion focused on Minnesota Sands' request that the EQB take the necessary action to officially close out the Minnesota Sands EIS project, however, your email referred to removal of the proposed Dabelstein Mine in Fillmore County from the Minnesota Sands EIS. To be clear, MN Sands respectfully requests the EQB to take the necessary action to close out the EIS project. This is consistent with the Mr. Seuffert's letter dated March 1, 2016 regarding the Minnesota Sands EIS project in which he stating that the EQB is "closing out this project." Based on our conference call on August 11, 2017, we now understand that to officially close out the EIS, the EQB must take official action.

The primary basis for this request is that our current mining plan no longer proposes any phased actions. Instead, our plan is to propose the permitting of a single 50-acre site, which we intend to be the Dabelstein property in Fillmore County.

We have no plans to propose the permitting of a new mine in Winona County because mining in the County is now illegal. As you know, Winona County amended its zoning ordinance in November 2016 to ban the mining, processing and transporting of industrial minerals, which includes sand for use as proppant in hydraulic fracturing. The ban, at least temporarily and possibly permanently, rendered worthless both our sand mining leases and our proposed rail site in Winona County. The Winona County leases represent the largest portion of our leased properties. The proposed Winona County rail site is the only property in which we have the contractual right to develop a transloading rail site. These effects alone have caused us to completely alter our prior mining plan in Winona County, Fillmore County and Houston County, the three counties included in our EIS project. We cannot justify the investment required to proceed with an EIS project as a result of the reduced return on that investment caused by the Winona County ban.

We have no plans to propose a new mine in Houston County. We no longer have leases in Houston County. In addition to the lack of business justification to carry out an EIS project, we do not believe current market conditions support mining in Houston County for at least the reason that the available sand in Houston County is relatively coarse, i.e., primarily 20/40 gradation, which is no longer a preferred gradation by hydraulic fracturing operators.

(August 25, 2017)

At this time, Minnesota Sands only has plans to submit a mining proposal, a CUP application, and reclamation plan to Fillmore County for a single 50-acre mine, which we intend to be the Dabelstein Property. The quantity of sand mineable from a single, new site over approximately a 5-year period matches well with our current business plan and with current market conditions. We anticipate that after that period we may evaluate market conditions and the regulatory climate for processing in Fillmore County to evaluate whether to pursue the permitting of any additional mines. Further, we believe the potential to purchase and resell from already permitted third party mines will enable us to augment our business.

As you requested, we are summarizing our current mining plan in the table you suggested:

County	Landowner	Lease Status	Plans to Mine	Reason
Houston	Erickson	No Lease	No	No Lease/Market Conditions
Houston	Tostenson	No Lease	No	No Lease/Market Conditions
Houston	Olson	No Lease	No	No Lease/Market Conditions
Houston	Chapel	No Lease	No	No Lease/Market Conditions
Houston	Johnson	No Lease	No	No Lease/Market Conditions
Winona	Detweiller	Active	No	Ban on Mining
Winona	Dan Yoder	Active	No	Ban on Mining
Winona	Campbell	Active	No	Ban on Mining
Winona	Ida Yoder	Active	No	Ban on Mining
Winona	Dabelstein	Active	No	Ban on Mining
Winona	Kessler	Active	No	Ban on Mining
Fillmore	Boyum	Active	No	Lack of Business Justification
Fillmore	Swiggum	Active	No	Lack of Business Justification
Fillmore	Wadewitz	Active	No	Lack of Business Justification
Fillmore	Kessler	Active	No	Lack of Business Justification
Fillmore	**Dabelstein**	**Active**	**Yes**	**Market Conditions**

(August 25, 2017)

As shown in the above table and explanation, Minnesota Sands no longer proposes multiple new mines in multiple counties, which was the basis for our EIS project.

We therefore reiterate our request that the EQB take action to officially close out the Minnesota Sands EIS project at the earliest time possible. We are happy to answer any additional information and will be available to appear in front of the Board at any time you designate. Please confirm our spot on the agenda at your earliest convenience.

Sincerely,

Richard Frick

President

Minnesota Sands, LLC

(August 25, 2017)

AFFIDAVIT

My name is Richard Frick. I am the president of Minnesota Sands, LLC. I reside at Valley View Road, Dakota, MN 55925.

I declare that, to the best of my knowledge and belief, the information in the attached letter dated August 25, 2017 is true and correct.

Richard Frick

Richard Frick

On AUGUST 25, 2017 before me, RICHARD FRICK personally appeared, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the foregoing Affidavit and acknowledged to me that he executed the same in his authorized capacity, and who, being first duly sworn an oath according to the law, deposes and says he has read the foregoing Affidavit subscribed by him, and that the matters stated herein are true to the best of his knowledge and belief

I certify under penalty of perjury under the laws of the State of Minnesota that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Cristal Adkins

Signature of Notary Public

CRISTAL ADKINS
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2020

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF WINONA | THIRD JUDICIAL DISTRICT

Southeast Minnesota Property Owners, a Minnesota Nonprofit Corporation, and Roger Dabelstein,

Plaintiffs,

v.

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

Defendant.

Case Type: Declaratory Judgment/Injunction

Court File No. 85-CV-17-516
Judge Mary C. Leahy

Minnesota Sands, LLC,

Plaintiff,

v.

County of Winona, Minnesota, a political subdivision of the State of Minnesota,

Defendant.

Case Type: Civil Other

Court File No. 85-CV-17-771
Judge Mary C. Leahy

DEFENDANT WINONA COUNTY'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Table of Contents

INTRODUCTION

After the Winona County Board ("Board") spent innumerable hours over multiple years considering the potential effects of silica sand mining on the health, safety, and public welfare of County citizens, the Board adopted an amendment to its zoning ordinance related to non-metallic mineral mining ("Ordinance Amendment"). The Ordinance Amendment distinguishes between small-scale mining for "construction minerals" and larger-scale mining for "industrial minerals." Well-established law holds that every presumption favors the legitimacy of this type of legislative determination made by elected officials following a deliberative process.

The overwhelming legal presumptions favor the County and Plaintiffs' disagreement with the County based on its unfounded assertions that the Ordinance Amendment interferes with their economic aspirations are insufficient to invalidate the County's legislative decision.

STATEMENT OF ISSUES

1. Have SMPO and Dabelstein failed to establish their declaratory judgment claims are justiciable?

2. Has Minnesota Sands failed to establish its claims are justiciable when a Court Order cannot grant effective relief?

3. Has Minnesota Sands properly pled a private cause of action pursuant to Minnesota Statutes Section 394.25?

4. Has SMPO failed to plead required elements of associational standing?

5. Have Plaintiffs proved the County lacked any basis for adoption of the Ordinance Amendment?

6. Have Plaintiffs established beyond a reasonable doubt that the Ordinance Amendment is unconstitutional because it violates their rights to equal protection

7. Have Plaintiffs established beyond a reasonable doubt that the Ordinance Amendment is unconstitutional because it violates their rights to substantive due process?

8. Have Plaintiffs established beyond a reasonable doubt that the Ordinance Amendment constitutes a compensable taking, even though they have never had the legal ability to mine the leased properties?

9. Have Plaintiffs established beyond a reasonable doubt that the Ordinance Amendment violates the dormant commerce clause?

STATEMENT OF UNDISPUTED FACTS

A. Silica Sand Operations and County History

The discussion of mining in Winona County ("County") dates back to 2011, when three conditional use permit ("CUP") applications were submitted to the County asking to engage in industrial mining of silica sand in the County's karst regions. Winona County Board of Commissioners Procedural History, Findings of Fact, Conclusions, and Adoption of Zoning Ordinance Amendment, ¶ 11.[1] The interest in industrial mining of silica sand was largely fueled by the increased demand for such sand to be used in domestic oil production through a process called hydraulic fracturing or fracking. Findings, ¶ 10.

In Minnesota, silica sand is primarily found in the Minnesota River Valley and the Paleozoic Plateau. Environmental Quality Board Tools to Assist Local Government in Planning for and Regulating Silica Sand Projects, 13.[2] Winona County is located in the Paleozoic Plateau, which covers a portion of Southeastern Minnesota, and the County's silica sand deposits are found primarily in the karst formations known as the Jordon, Saint Peter Sandstone, and Wonewec Formations. EQB Report, 13; WC1669. The Paleozoic Plateau landscape is characterized by flat plateaus and mesas separated by bluffs and narrow valleys. EQB Report, 13. The karst features in this area, including their silica sand makeup, serve as a natural filtration

[1] This document can be found attached as Exhibit H, pages WC3015-WC3037, in the legislative record produced by the County. Because this document is cited many times in this memorandum, for ease of reference, the County cites this document as "Findings" and page or paragraph citations refer to the number originally assigned in the Findings.
[2] This document can be found at WC2427-WC2627 in the legislative record produced by the County. Because this document is cited many times in this memorandum, for ease of reference, the County cites this document as "EQB Report" and page citations refer to the page number originally assigned in the document.

system for groundwater, surface water, and wells, and make this region highly vulnerable to pollutants entering aquifers with limited filtration or treatment. EQB Report, 14-16; WC2382; WC2387-WC2388. Pollution resulting from land use activities can travel great distances to wells and other water resources and is hard to track because water flow through karst features is unpredictable. EQB Report, 16; WC2387-WC2388.

Silica sand mining techniques in the Paleozoic Plateau vary depending on the slope of the karst landform being mined. EQB Report, 16. Silica sand mining can be conducted along hill slopes, within ridges, and by excavating buttes, and mining conducted on greater slopes would include contour and underground mining. EQB Report, 16. Silica sand mined for industrial uses, such as fracking, is commonly processed using a chemical flocculent, which accelerates the settling of the fine-grained materials from sand washing water. EQB Report, 50 & 87.

After receiving the CUP applications in 2011, the County tabled discussion of these permit requests in favor of pursuing a moratorium to allow for further study of industrial mining activities. Findings, ¶ 12-14. On January 10, 2012, the County Board of Commissioners ("Board") denied the pending conditional use permit applications for silica sand mining operations and enacted a three-month moratorium on silica sand mining to allow the County to study the issue more closely. Findings, ¶ 15.

At the end of the moratorium, County staff provided the Board with an application and recommended conditions of approval for silica sand mining sites. Findings, ¶ 16. The Board adopted a silica sand mining pre-application packet, a road use agreement, and various other documents related to silica sand issues. Findings, ¶ 16. The moratorium expired on May 1, 2012. Findings, ¶ 16. Extraction pits and land alterations associated with mining remained a

conditional use under the Winona County Zoning Ordinance ("WCZO") and subject to the standards set forth in WCZO § 9.10.[3]

Thereafter, in 2013, one of the previous CUP applicants, David Nisbit, reapplied for and was granted a conditional use permit to engage in industrial mining of silica sand. Findings, ¶¶ 17-18. This CUP and negative EIS determination were appealed to the Court of Appeals, and the Board's decision was upheld. Findings, ¶ 18. Since that time, the County has received no other CUP applications for industrial silica sand mining. Findings, ¶ 18.

B. Ordinance Amendment Procedure

The Land Stewardship Project ("LSP") submitted a proposed ordinance amendment in the spring of 2016, which renewed the conversation about industrial mining in the County. Findings, ¶ 1; WC0619-WC0631. Specifically, LSP asked the County to disallow any activities related to the mining or processing of silica sand meant to be used for fracking. WC0701. In response to the proposal, on April 26, 2016, the Winona County Board of Commissioners ("Board") voted to begin review of potential amendments to the WCZO with respect to mining activities in the County. Findings, ¶ 1.

At its June 14, 2016 meeting, the Board received analysis from the County Attorney regarding the ordinance amendment language proposed by LSP, as well as alternative language to regulate mining. Findings, ¶ 2. The alternative language was not specific to frac sand mining and, instead, distinguished between mining operations for industrial versus construction minerals. WC0633-WC0635. This distinction mirrored language used by the United States Geological Survey ("USGS"), which addresses construction minerals and industrial minerals separately, and a land use ordinance in place in nearby Florence Township. WC0655-WC0660;

[3] The WCZO in effect at the time the Ordinance Amendment was being considered and adopted can be found in the legislative record produced by the County, marked Exhibit V.

see, e.g., WC1033, WC0430. The County Attorney assessed that this alternative language was more legally viable and appropriate for the County than the language proposed by LSP. WC0619-WC0631. The Board voted to forward the County Attorney's alternative language ("Proposed Ordinance Amendment") to the Winona County Planning Commission ("Planning Commission") for review and recommendation pursuant to the WCZO. Findings, ¶ 3.

On June 30, 2016, the Planning Commission held its first public hearing on the Proposed Ordinance Amendment, considering written and oral public testimony and discussing the proposal. Findings, ¶ 4; WC0843-WC0850. At that meeting, 76 people testified about the Proposed Ordinance Amendment. Findings, ¶ 4. The Planning Commission continued its discussion of the Proposed Ordinance Amendment at its July 21, 2016 meeting, discussing the additional information it needed before it could make a recommendation to the Board and setting a timeline for moving forward to allow adequate time to consider additional information. WC856-WC0866.

At its August 8, 2016, meeting, the Planning Commission heard additional oral testimony in response to information it requested, with eleven individuals speaking about the Proposed Ordinance Amendment and answering the questions of the Planning Commission. WC0902-WC0907. This testimony continued at the August 11, 2016 Planning Commission meeting, with another four individuals addressing the Commission. WC0908-WC0915. The individuals who spoke at these meetings included County employees; representatives of sand, aggregate, agricultural, environmental, township, and labor union organizations supporting and opposing regulation of industrial mineral mining; members of Wisconsin county boards of supervisors where industrial silica sand mining is occurring; a doctor from Mayo Clinic; and a member of the Environmental Quality Board ("EQB") Silica Sand Rulemaking Advisory Panel. WC0902-

WC0915. In addition to the information presented at the meetings, the Planning Commission considered well over 200 written submissions, which amounted to thousands of pages of information and commentary both for and against the Proposed Ordinance Amendment. WC0916-WC3006.

The input received by the Planning Commission came from people with various interests and perspectives, with the vast majority of public comments supporting some form of additional regulation on mining operations in the County. The public's primary concerns related to air and water quality, tourism and the natural landscape, noise and traffic, and economic impacts. The Planning Commission received extensive substantive information regarding the known and anticipated impacts of industrial sand mining, with the primary focus of the information being on the environmental, health, and economic effects of large-scale mining. This information included studies and observations of industrial mineral operations occurring in nearby Wisconsin counties; studies conducted by and other information from state and local agencies; studies conducted by organizations that support mining; analysis conducted by County staff; and commentary from doctors, geologists, and environmental scientists. *See, generally*, WC0843-WC3006; Exs. J, K, L, M.

After receiving this extensive information about mining operations, the Planning Commission discussed the merits of the Proposed Ordinance Amendment and options for moving forward. WC0913-WC0914. Following their discussion and debate, the Planning Commission voted to recommend a compromise zoning amendment for approval by the Board, which would allow for industrial mineral operations, but limit the number and size of industrial mines in the County ("Planning Commission Recommendation"). WC0914.

On August 23, 2016, the Board received the Planning Commission Recommendation and directed the County Attorney and Planning Department to assess the recommendation and provide additional information and analysis. Findings, ¶ 6; WC0752-WC0756; WC0760. It also scheduled a public hearing on the Planning Commission Recommendation. WC0760. On October 13, 2016, the Board held this public hearing, taking oral comments on the matter, and accepting written comments until October 18, 2016. Findings, ¶ 7; WC0761. Over 100 people spoke at the public hearing and the Board received over 150 written submissions. Findings, ¶ 7; WC0761; WC0001-WC0586.

The positions expressed to the Board mirrored those presented to the Planning Commission, with the vast majority of comments favoring restrictions on silica sand mining and disfavoring the Planning Commission Recommendation. WC0761; *see, generally*, WC0001-WC0586; Ex. N. While the concerns about industrial mineral operations largely echoed those expressed during the Planning Commission hearing process, the Board received additional information, including photos and material related to industrial mineral operations in Wisconsin and elsewhere in Minnesota and information about the chemical flocculent used in the processing of industrial silica sand. *See, e.g.*, WC0078-WC0089; WC0109-WC0110.

At its October 25, 2016 meeting, the Board considered its options for amending the mining provisions in the WCZO. Findings, ¶ 8. In addition to considering the public comments and other information gathered throughout amendment process, the Board considered a memorandum from County staff, which laid out various options the Board had for moving forward. WC0767-WC0775. The Board voted to adopt the Proposed Ordinance Amendment as it was originally presented to the Planning Commission and directed County staff to draft the

final ordinance language and findings, a conclusion, and an order for consideration at the following Board meeting. Findings, ¶ 8; WC0760.

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

C. Construction Mineral Operations versus Industrial Mineral Operations

The Ordinance Amendment sets forth definitions for terms related to construction minerals, industrial minerals, mining, and mineral processing, and provides that industrial mineral operations are prohibited. Ordinance Amendment, § 4.2.[4] The record underlying the Ordinance Amendment is expansive, including thousands of pages of documents and many hours of oral testimony, much of which specifically addressed the industrial silica sand mining operations and anticipated negative impacts of such operations. Information in the record addresses this use from all angles on a variety of topics including health, geology, water quality, economic impacts, local infrastructure, tourism, and natural resources and landscapes. The full legislative record has been submitted for the court's review. *See* WC0001-WC3037; Recordings.

The Ordinance Amendment's distinction between industrial and construction mineral operations is at the heart of Plaintiffs' claims in this litigation. Evidence in the record demonstrates that the County did not create the distinction between industrial and construction minerals or the associated mining operations, but that these distinctions are recognized by other governmental entities and those in the mining industry. Industrial minerals, including industrial silica sand, are referenced throughout the studies and data submitted to the County, and the

[4] This document is included as Exhibit F, pages WC3007-WC3011, in the legislative record produced by the County. Because this document is cited many times in the memorandum, for ease of reference, the County cites this document as "Ord. Amend." and section citations refer to the section originally assigned in the document.

USGS addresses industrial sand and construction sand as separate minerals. *See, e.g.*, WC1033, WC0430. The Florence Township Ordinance, which the County found to be a useful guide given that area's similar experience with a surge in demand for industrial silica sand, also distinguishes between industrial mineral operations and construction mineral operations. Findings, ¶ 48. In its ordinance, Florence Township explains that "industrial mineral mining land use operations are larger-scaled industrial, consume more appropriated water, require more concentrated heavy truck hauling to single destinations, and embrace other differences than the mining of construction minerals." WC0656. It also explains that the Minnesota Department of Natural Resources distinguishes between industrial mineral operations and construction mineral operations. WC0656.

Other evidence in the County's legislative record also supports that construction and industrial mineral operations are in fact different in terms of their size, operations, and desired product. WC2389. Construction mineral operations tends to involve small mines that engage in only periodic mining activities, which do not involve underground mining, blasting, or chemical processing. EQB Report, 77; WC2389. Industrial mineral operations involves larger mines in operation for long periods of time that use blasting and underground mining techniques and involve chemical treatment of the mined sand. EQB Report, 77; WC2389.

Specific to sand mining, industrial silica sand must meet particular standards for size, shape, purity, and intactness, which is achieved by mining in the County's fragile karst region using a chemical flocculent processing and requires a significant amount of water. EQB Report, 87, 150; WC2389. Sand not meeting the desired standards is commonly returned to the mine contaminated with flocculent. WC2389. Construction sand is not subject to these standard or processing requirements. The interest in mining silica sand has been driven by the oil and gas

industry, with demand for silica sand more than quadrupling between 2008 and 2012. WC1422. The oil and gas industry is a large-scale consumer of this mineral, seeking millions of tons of silica sand during boom times, and carrying with it associated hauling demands. EQB Report, 77; WC1414-WC1432.

With the exception of the Nisbit mine, which obtained a CUP to engage in industrial silica sand mining operations prior to the Ordinance Amendment, mining operations in the County have been limited to construction mineral operations. Evidence in the record regarding industrial mineral operations in nearby Wisconsin counties clearly exemplifies the differences between the construction mineral operations the County has experienced and the size and impact of industrial mineral operations driven by a newfound demand for silica sand. *See, e.g.*, WC0078-0089; WC0905. It is these differences the County sought to regulate by adopting the Ordinance Amendment.

D. Purpose and Rationale for the Ordinance Amendment

The Ordinance Amendment revises the language in Chapters 9 and 10 of the WCZO, to input an explanation of the purpose for the County's regulations related to mining and establish that industrial mineral operations are prohibited in all zoning districts in the County. Ord. Amend. §§ 9.10, 10.11. The Ordinance Amendment describes the purpose for the County's mining regulations as follows:

> This section on excavation, extraction pits, and mining is to protect natural landscapes from excessive excavation and mining activity; protect water resources, aquifers, streams, and rivers from excessive contamination and appropriate; minimize soil erosion; protect agricultural land and farming activity; protect existing recreational and tourism businesses; protect residents' health, safety and general welfare; prevent the industrialization of agricultural, open space and residential communities; minimize road and bridge damages from high volume and heavy truck traffic hauling industrial minerals, and minimize land use conflicts.

Ord. Amend. § 9.10.A. It also references Minnesota Statutes Section 116C.99, subdivision 2(a), which provides that regulations on silica sand operations must be different based on region of the state, emphasizing the uniqueness of karst conditions and landforms in the southeastern part of the state, and requiring that this geographic difference be considered in mining regulations. *Id.*

The Board's Findings of Fact ("Findings") further detail the Board's considerations and rational in approving the Ordinance Amendment, addressing the policies established by the WCZO and Comprehensive Plan ("Comp Plan") for land use planning, other applicable law and legal guidance, and evidence in the record that supports the decision. In the Findings, the Board recognized that the primary concerns about industrial mining relate to industrial silica sand mining, transportation, and processing operations and the impact these activities will have on air quality, water quality, traffic and road conditions and safety, and natural landscapes. Findings, ¶ 11. It also found that the mining and processing of industrial minerals, including industrial silica sand, negatively affects the health, safety, and general welfare of the County's citizens and that its decision to enact the Ordinance Amendment is related to the specific impacts of industrial mineral operations within the County. Findings, ¶ 24.

The Findings address at length the connection between the Ordinance Amendment and the values of the County and purposes and policies for land use regulations as identified in the WCZO and Comp Plan. Findings, ¶ 40-54. The Board specified in its Findings that the Ordinance Amendment would serve community values established in the Comp Plan related to agriculture, natural resources, sustainability, pollution in agricultural and environmentally sensitive areas, source water and wellhead protection, and sand formations. Findings, ¶ 53. It also found that the following purposes prescribed by the WCZO would be particularly well served by the Ordinance Amendment: protecting public health, safety, order, convenience, and

general welfare; protecting and preserving agriculture; conserving the County's natural and scenic beauty; conserving the County's natural resources, including streams, wetlands, groundwater, recharge areas, bluffs, steep slopes, woodlands, and soils; and minimizing pollution. Findings, ¶ 32-33.

Throughout its Findings, the Board emphasized the connection between the Ordinance Amendment and the unique geographic conditions in the County. Specifically, the Board found that the karst landforms and topography in the County warrant particularized consideration with respect to mining. Findings, ¶ 29. The Findings emphasize that the Ordinance Amendment is important to protecting and maintaining groundwater resources in light of the karst conditions in the County, noting that the EQB Report states more information is necessary on the effects of this type of silica sand mining on groundwater in karst regions. Findings, ¶ 53.

The Board also addressed at length other health concerns related to silica sand mining, finding as credible the testimony from two local doctors on this issue and relying on standards and guidance issued by the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") and the National Institute for Occupational Safety and Health ("NIOSH"). Findings, ¶ 54. The Board acknowledged the OSHA and NIOSH guidance related to workers exposed to silica sand in hydraulic fracturing operations, and found that the sand that poses risks in those operations – silica sand – is the same sand that workers and residents in the County would likely be exposed to in high volumes during industrial mineral operations, further supporting the Ordinance Amendment. Findings, ¶ 54.

The Findings also addressed the change in conditions since the County first analyzed silica sand mining in 2011 and 2012, noting that a new Comp Plan had been adopted and there had been a dramatic fluctuation in demand for silica sand in the intervening years. Findings,

¶ 34. The Findings note that industrial mining and processing of silica sand has observable and documented negative impacts on local economies and natural environments based on information it received regarding counties with industrial silica sand mining in Wisconsin. Findings, ¶ 34. Specifically, the Findings point to declining property values, community stress and diminished wellbeing, and unmet financial obligations as some of the negative impacts experienced in those counties from industrial mineral operations. Findings, ¶ 34.

Based on the totality of the evidence submitted during its detailed study process, the Board concluded that the Ordinance Amendment should be adopted and is consistent with state and local law. Findings, p. 23.

ARGUMENT ON MOTION TO DISMISS

I. Standard of Review on Motion to Dismiss.

On a motion to dismiss, the court presumes the facts alleged in the complaint are true. Thus, solely for the purposes of this motion to dismiss, the County will also assume the facts in the complaints are true. *See Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010).

A motion to dismiss for failure to state a claim pursuant to Rule 12.02(e) is subject to the same analysis as a motion for judgment on the pleadings pursuant to Rule 12.03. *See Burt v. Rackner, Inc*., 882 N.W.2d 627, 629 (Minn. App. 2016). A party may move for judgment on the pleadings if a complaint fails to set forth a legally sufficient claim for relief. Minn. R. Civ. P. 12.03; *see, e.g., Williams v. Bd. of Regents of Univ. of Minnesota*, 763 N.W.2d 646, 651 (Minn. App. 2009).

A Rule 12.02(e) motion raises the question of whether the Complaint states a claim upon which relief can be granted. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000). Dismissal is appropriate "if it appears to a certainty that no facts, which could be

introduced consistent with the pleading, exist which would support granting the relief demanded." *Walsh v. U.S. Bank*, N.A., 851 N.W.2d 598, 602 (Minn. 2014), *quoting N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963). Although the court is bound by the *factual* assertions in the Complaint, the same is not true for legal conclusions. *See Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) (holding the court is "not bound by legal conclusions stated in a complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim.")

II. Plaintiffs' Claims are Not Justiciable.

Both Complaints seek declaratory and injunctive relief. These claims must be based on actual current controversy, not merely a remote contingency that the County may engage in unconstitutional conduct at some future date. *Seiz v. Citizens Pure Ice Co.*, 290 N.W. 802, 804 (Minn. 1940). The existence of a justiciable controversy is essential to a court's jurisdiction. *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273 (Minn. App. 2001).

The standard for justiciability has been articulated by Minnesota courts in a variety of ways, but the general rule is that a court will not inject itself into a dispute that involves events that may or may not occur at some point in the future. In *Seiz*, the Minnesota Supreme Court outlined the following standard:

> [A] controversy must be justiciable in the sense that it involves definite and concrete assertions of right and the contest thereof touching the legal relations of parties having adverse interests in the matter with respect to which the declaration is sought, and must admit of specific relief by a decree or judgment of a specific character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Mere differences of opinion with respect to the rights of parties do not constitute such a controversy.

Seiz, 290 N.W. at 804. An essential element of justiciability is the existence of a "genuine conflict in the tangible interests of opposing litigants," meaning the following requirements must be met:

> Complainant must prove his possession of a legal interest or right which is capable of and in need of protection from the claims, demands, or objections emanating from a source competent legally to place such legal interest or right in jeopardy.

State ex rel. Smith v. Haveland, 223 Minn. 89, 92, 25 N.W.2d 474, 477 (Minn. 1946).

Stated another way, a declaratory judgment action is only justiciable if it "(a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and (c) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Franck*, 621 N.W.2d at 273. Minnesota Sands, SMPO and Dabelstein fail to meet the justiciability requirements as they relate to their claims against the County.

A. There is no "definite and concrete assertion of right" by Plaintiffs because the right to own private property is limited by zoning regulations.

A local government has broad authority pursuant to its police powers to promote the "public health, morals, safety, convenience, or general welfare" of the population through legislative zoning actions. *City of St. Paul v. Dalsin*, 71 N.W.2d 855, 858 (Minn. 1955). Mining has traditionally been a highly regulated industry and Plaintiffs have never had the unmitigated right to mine their properties as they see fit. *See, e.g.*, *Murr v. Wisconsin*, 582 U.S. __, 137 S. Ct. 1933, 1948 (2017) ("Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land."). Plaintiffs have simply failed to identify any definite and concrete right to mine their properties to support their claims for declaratory or injunctive relief. Land use is always subject to restrictions and regulations by the state, and Plaintiffs must point to more than the existence of a property right to claim that they have a legitimate entitlement to engage in specific conduct on their property.

B. This matter is not capable of specific resolution and presents only hypothetical facts.

1. SMPO and Dabelstein

SMPO and Dabelstein seek only declaratory judgment and injunctive relief. As the parties challenging the constitutionality of a regulation, SMPO and Dabelstein "must show that [the statutes] affect [their] rights in an unconstitutional manner and not merely the rights of others." *Minn. Ass'n of Pub. Sch. v. Hanson*, 178 N.W.2d 846, 850 (Minn. 1970). Plaintiffs cannot merely allege harm "in some indefinite way in common with people generally." *Id*. However, there is nothing distinct about SMPO and Dabelstein's interest in this litigation that separates them from other County landowners. If the County Ordinance were declared invalid, SMPO members, Dabelstein, and any other landowner in the County would still not be able to mine their properties for silica sand because such use would require a CUP. SMPO members and Dabelstein are in an identical position to all other property owners in the County and do not have the type of unique interest in the outcome of this litigation that forms the foundation for a justiciable controversy.

2. Minnesota Sands

Regardless of this court's ruling on the presumptively-valid Ordinance Amendment, this court cannot give Minnesota Sands the relief it seeks: the ability to mine sand pursuant to the leases in Winona County. There are at least two additional obstacles Minnesota Sands must surpass in order to mine that cannot be resolved in this action: (1) if the court invalidated the Ordinance Amendment, Minnesota Sands would still need to obtain a CUP for its operations in the County and (2) Minnesota Sands would still need to complete its Environmental Impact Study with the Minnesota Environmental Quality Board. Generally, "when an event makes an award of effective relief impossible or a decision on the merits unnecessary," the matter is

dismissed as moot.[5] *Kottschade v. City of Rochester*, 760 N.W.2d 342, 350 (Minn. App. 2009), *citing In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). The court is to compare "the relief demanded and the circumstances of the case at the time of decision to determine whether there is a live controversy that can be resolved." *Id*.

Regardless of the validity or existence of the Ordinance Amendment, Minnesota Sands cannot mine silica sand in the County. If Minnesota Sands met the significant burden to invalidate the Ordinance Amendment, the Ordinance would revert to its previous form. Under the prior Ordinance, Minnesota Sands would be required to obtain a CUP in order to mine under its leases. WCZO § 9.10. There is plainly no guarantee that Minnesota Sands would be granted a CUP, and Minnesota Sands has no absolute entitlement to a CUP. *See Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984) ("A conditional or special use permit may be denied for reasons relating to public health, safety, and general welfare.") Because a court order declaring the Ordinance Amendment invalid would not grant Minnesota Sands the right to mine in the County, the court cannot grant effective relief and Minnesota Sands' claims must be dismissed.

More significantly, Minnesota Sands is prohibited from operating any mining operations in the County until it completes its Environmental Impact Study ("EIS") with the Minnesota EQB. Ex. W, 8.[6] To date, Minnesota Sands has not completed the EIS required by the EQB

[5] The County has considered whether the proper label for this argument is that Minnesota Sands lacks standing, that its claims are moot, or that its claims are not yet ripe. Ultimately, regardless of the label ascribed to the argument, it is clear that courts avoid making unnecessary rulings when the ruling would not grant effectual relief.

[6] "When evaluating a rule 12 motion to dismiss, a court may take judicial notice of opinions in an underlying action, or consider documents central to the claim alleged. *See In re Hennepin County 1986 Recycling Bond Litig.,* 540 N.W.2d 494, 497 (Minn. 1995) (court may consider contract central to claims alleged); *Rohricht v. O'Hare,* 586 N.W.2d 587, 589 (Minn. App. 1998) (court did not err in taking judicial notice of decisions in underlying action)." *Untiedt v. Schmidt*, No. C8-00-1272, 2001 WL 69482, at *2 (Minn. App. Jan. 30, 2001). The EQB is a State Administrative Agency that conducts public hearings and its documents are available as public records.

pursuant to the March 20, 2013 Order.[7] The EQB found that Minnesota Sands' proposed projects in Fillmore, Houston, and Winona Counties "meet the definition of a phased action" pursuant to Minnesota Rules. *Id*., at Findings ¶ 14. Because of the size of the projects, Minnesota Sands is subject to a mandatory EIS. *See id*., at Findings ¶ 21; Minn. R. 4410.4400, Subps.1 & 9. In a subsequent order,[8] the EQB stated plainly "[t]he EQB orders a[n] EIS for the Minnesota Sands, LLC multi-site project." Ex. X.

To date, the EQB has not completed its mandatory EIS of the Minnesota Sands leased properties. In fact, as of March 1, 2016, the EQB returned the unused portion of Minnesota Sands' deposit for the expenses of the EIS because Minnesota Sands had not submitted data required to complete the EIS after multiple unsuccessful attempted contacts from the EQB. Ex. Z . Stated simply, an Order from this court cannot grant Minnesota Sands effective relief because they will be unable to mine regardless of the outcome of this case.

Because this court cannot grant effective relief via declaratory or injunctive action, Plaintiffs' claims must be dismissed.

III. Minnesota Sands has Failed to State a Claim upon which Relief may be Granted Pursuant to Minnesota Statutes Section 394.25 because there is No Private Cause of Action to Enforce the Statute.

Minnesota Sands claims entitlement to relief alleging the County violated Minnesota Statutes Section 394.25. An essential prerequisite for maintaining any claim and surviving a motion to dismiss is that the plaintiff must be pursuing a cause of action which is recognized by law. *Larson v. Wasemiller*, 738 N.W.2d 300, 303 (Minn. 2007). When determining whether a

[7] Contrary to the assertions in John Dustman's Affidavit that Minnesota Sands might not meet the requirement for a mandatory EIS, the EQB as the Responsible Government Unit ("RGU") has already determined that Minnesota Sands must undergo an EIS. *See* Dustman Aff. ¶¶ 30-32 (Dolan Aff. Ex. 8).

[8] The June 18, 2014 Order was required after the EQB sought clarification from Minnesota Sands with respect to which properties it had contracts with that would be covered by the EQB Order. One property originally included in the Order was no longer under contract with Minnesota Sands and was thus removed via the June 18, 2014 Order. All other properties with which Minnesota Sands holds contracts are subject to the EQB EIS requirement.

cause of action is recognized by Minnesota law, a court looks to the common law and any statutes that might expand or restrict the common law. *Id*.

It is well recognized that a civil statute does not give rise to a private cause of action "unless the statute expressly or implicitly creates a cause of action." *Mut. Serv. Casualty Ins. Co. v. Midway Massage Inc.*, 695 N.W.2d 138, 142 (Minn. App. 2005) (citation omitted). "To determine whether a cause of action can be implied from a statute, courts must consider three factors: "(1) whether the plaintiff belongs to the class for whose benefit the statute was enacted; (2) whether the legislature indicated an intent to create or deny a remedy; and (3) whether implying a remedy would be consistent with the underlying purposes of the legislative enactment." *Flour Exch. Bldg. Corp.*, 524 N.W.2d at 499 (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)). However, notwithstanding this test, the Minnesota Supreme Court has stated that "the obvious conclusion must usually be that when the legislators said nothing about it, they either did not have a civil suit in mind at all, or deliberately omitted to provide for it." *Becker v. Mayo Found.*, 737 N.W.2d 200, 208 (Minn. 2007) (citation omitted).

There is nothing in Minnesota Statutes Section 394.25 that suggests an individual has a private cause of action to challenge an ordinance they claim violates this statute. None of the cases cited by Minnesota Sands in support of this claim were cases in which Section 394.25 was pursued as a separate cause of action. *County of Washington v. Stephen H. Nelson Land Co.*, CX-93-1169, 1993 WL 469143, at *1 (Minn. App. Nov. 16, 1993), is an unpublished appeal reviewing the denial of a requested variance. Section 394.25 was cited in support of the County's decision denying rezoning because, in the context of this variance request, the County was required to consider impacts beyond the scope of the individual request. Neither *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66 (Minn. 1984), nor *Prior Lake Aggregates, Inc. v. City of*

Savage, 349 N.W.2d 575 (Minn. App. 1984), involved a claim pursuant to Section 394.25, and both were appeals reviewing denials of rezoning or permit requests. And *Mendota Golf v. City of Mendota Heights*, 708 N.W.2d 162 (Minn. 2006), involved a claim for a writ of mandamus claiming a city had a mandatory duty to revise its Comp Plan and resulted in a decision explaining the propriety of the use of mandamus in zoning actions.

Minnesota Sands has made no attempts to show that Section 394.25 creates a private cause of action at all, and none of the cases it has cited permitted such an independent statutory claim. Minnesota Sands has failed to state a valid claim upon which relief may be granted because it does not have an independent cause of action pursuant to Section 394.25. Count VIII of Minnesota Sands' Second Amended Complaint should be dismissed with prejudice.

IV. SMPO has Failed to Plead the Required Elements for Associational Standing.

The doctrine of standing requires that each party has a sufficient stake to seek relief from a court. *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972). When an association, rather than an individual, seeks to assert legal rights, the association must meet particular requirements for standing. An association has standing when:

> "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in a lawsuit."

Blanding v. Sports & Health Club, Inc., 373 N.W.2d 784, 790 (Minn. App. 1985) (quoting *Hunt v. Wash. St, Apple Adv. Comm'n*, 432 U.S. 333, 342 (1977)).

Here, even when the court assumes that every statement in the SMPO Complaint is true, SMPO has failed to establish standing because it has failed to identify the organization's purpose. On the face of SMPO's pleading, the court cannot determine whether the interest SMPO seeks to protect in this litigation is germane to SMPO's purpose. *See Minn. Federation of*

Teachers v. Randall, 891 F.2d 1354, 1359 (8th Cir. 1989) ("nothing in the complaint or record demonstrates how these [asserted]... interests are germane to the organization's specifically stated purposes.") Accordingly, SMPO lacks standing and should be dismissed from this matter.

ARGUMENT ON SUMMARY JUDGMENT

I. Standard of Review on Summary Judgment.

Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Minnesota courts interpret this mean summary judgment must be granted if the moving party is entitled to judgment as a matter of law and a reasonable fact finder could not disagree with respect to any fact issues that may exist. *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989).

All a moving party filing a motion for summary judgment has to do to carry its burden is to demonstrate there is no admissible evidence to support the nonmoving party's case. *Celotex Corp. v. Catrell*, 477 U.S. 317, 323 (1986); *see also Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955). The burden is not stringent. It is satisfied by informing the trial court why summary judgment is appropriate and identifying those portions of the pleadings, discovery and affidavits, if any, which indicate the nonmoving party cannot support a central element of its claim. *Id.*; *see also Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002).

Once the moving party has properly made and supported a motion for summary judgment, the nonmoving party must come forward with specific facts showing that there is a genuine issue for a trial. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). The nonmoving party's burden is not satisfied by simply showing some "metaphysical doubt as to the material facts" and instead must show that the record could support a finding by a rational trier of fact in favor of the

nonmoving party. *Matsushita*, 475 U.S. at 586-87. Minnesota courts have consistently held that speculation and innuendo is insufficient to demonstrate the existence of a genuine issue of material fact. *Johnson v. VanBlaricom*, 480 N.W.2d 138, 141 (Minn. App. 1992). Statements of mere opinion, beliefs, and allegations are also insufficient. *City of Duluth v. P.F.L. Inc.*, 431 N.W. 2d 135, 137 (Minn. App. 1988).

The mere existence of a factual dispute does not make summary judgment improper. The factual dispute must be material. *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 64, 646 (Minn. 1974) (citing *Sauter*, 70 N.W.2d at 353). A material fact is one that will affect the result or outcome of the case. *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976). "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby*, 477 U.S. at 248. Similarly, the dispute about a material fact must be genuine.

II. County Land Use Authority.

Counties in Minnesota have the authority to carry on planning and zoning activities "[f]or the purpose of promoting the health, safety, morals and general welfare of the community." Minn. Stat. § 394.21, subd. 1. This power is often referred to as the "police power" of government. It is founded on utilitarian concepts of the greater good.

Chapter 394 of Minnesota Statutes constitutes the County Planning Act. The chapter empowers counties to prepare and adopt comprehensive plans. It also obligates counties to adopt "official controls" that implement the goals and objectives of a county's comprehensive plan.

A "comprehensive plan" is a compilation of:

> [T[he policies, statements, goals, and interrelated plans for private and public land and water use, transportation, and community facilities including recommendations for plan execution, documented in texts, ordinances and maps which constitute the guide for the future development of the county or any portion of the county.

Under Minn. Stat. § 394.23, a county board has the authority to adopt a comprehensive plan[9] and, once a plan is adopted, the plan "must be the basis for official controls."

A zoning ordinance is a type of official control. In particular, on "official control" is defined as:

> [L]egislatively defined and enacted policies, standards, precise detailed maps, and other criteria, all of which control the physical development of a municipality or a county or any part thereof or any detail thereof, and are the means of translating into ordinances all or any part of the general objectives of the comprehensive plan. Such official controls may include but are not limited to ordinances establishing zoning.

Minn. Stat. § 394.22, subd. 6; *see also* Minn. Stat. § 394.24, subd. 1 (official controls "shall further the purpose and objectives of the comprehensive plan").

Minnesota Statutes Section 394.25 prescribes the nature of zoning ordinance structure. Essentially, the statute provides for Euclidian-based zoning. That is to say, zoning ordinances create and establish zoning districts throughout the county. A zoning ordinance establishes the list of allowable uses within each district, which may be either permitted or conditional. A zoning ordinance goes on to establish performance standards for each allowable use.

Once a zoning ordinance is in place, administration of the ordinance requires occasional decisions on individual land use permits. These requests can take the form of conditional use permit requests, variances, or requests for other permits required by the ordinance. The decisions that result from such requests are "quasi-judicial" in nature, in contrast to the underlying adoption of the ordinance itself which, as pointed out below, is a legislative act.

In this case, Plaintiffs have challenged the *legislative* determination of the Winona County Board to adopt the challenged Ordinance Amendment. Consequently, this court's review

[9] Notably, in greater Minnesota, a county comprehensive plan must incorporate certain goals aimed at preservation of environmental resources, including goals that minimize fragmentation and development of agriculture, forest, wildlife and open space areas, and minimize development in or near wildlife and natural areas. *See* Minn. Stat. § 394.231.

must be undertaken through the lens of case law which establishes standards pertinent to review of challenged legislative decisions.

III. Standard of Review of Legislative Land Use Decisions.

A local government acts in its legislative capacity when it creates public policy affecting the general population by enacting or amending a zoning ordinance. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416-17 (Minn. 1981); *Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000). On the other hand, a local government acts in a quasi-judicial or administrative manner when it applies its zoning policy, most commonly in the context of granting or denying permits and variances. *Honn*, 313 N.W.2d at 417; *Interstate Power Co.*, 617 N.W.2d at 574. The County's adoption of the Ordinance Amendment, which is the subject of Plaintiffs' claims, again, constitutes a legislative zoning decision.

Counties are given broad legislative discretion to craft the contents of their ordinances as long as they are not incompatible with state law and are supported by a rational basis relating to promotion of public health, safety, morals, or general welfare. *Eagle Lake of Becker Cnty. Lake Ass'n v. Becker Cnty. Bd. of Comm'rs*, 738 N.W.2d 788, 792 (Minn. App. 2007); *City of St. Paul v. Dalsin*, 71 N.W.2d 855, 858 (Minn. 1955). Under this low threshold, the "test merely requires the challenged legislation… be supported by any set of facts either known or which could reasonably be assumed." *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 289 (Minn. App. 1996). Any rationale the legislative body could have had for enacting the ordinance can validate it. *Id.*

When any zoning action is challenged, whether it is legislative or quasi-judicial in nature, the court reviews that action for "reasonableness." *Honn*, 313 N.W.2d at 417. Given the distinct objectives and nature of legislative versus quasi-judicial decision making, however,

reasonableness is viewed differently in each context. For purposes of legislative zoning decisions, reasonableness is judged within the statutory framework delegating zoning authority to local governments. *Honn*, 313 N.W.2d at 417; *see also Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 72 (Minn. 1984); *Curtis Oil v. City of N. Branch*, 364 N.W.2d 880, 882–83 (Minn. App. 1985). This is in contrast to the reasonableness of quasi-judicial zoning decisions, which is judged within the framework of the zoning ordinance at issue. *Honn*, 313 N.W.2d at 417; *see also White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174 (Minn. 1982). Accordingly, legislative zoning is "less circumscribed by judicial oversight," than reviews of quasi-judicial zoning decisions. *Honn*, 313 N.W.2d at 417

A zoning ordinance is presumed valid, and the burden falls upon the party contesting the ordinance's validity to prove otherwise. *State ex rel. Lachtman v. Houghton*, 158 N.W. 1017 (Minn. 1916); *Dalsin*, 71 N.W.2d at 858; *DI MA Corp. v. City of St. Cloud*, 562 N.W.2d 312, 320 (Minn. App. 1997). Moreover, "it is presumed that the legislative body investigated and found conditions such that the legislation which it enacted was appropriate." *Kiges v. City of St. Paul*, 62 N.W.2d 363, 369 (Minn. 1953). As long as an ordinance is supported by any rational basis related to the promotion of the health, safety, morals, convenience, and general welfare of the public, a court must uphold the ordinance. *Curtis Oil v. City of N. Branch*, 364 N.W.2d 880, 882–83 (Minn. App. 1985).

Stated another way, the courts will not review the wisdom of legislative action; rather, in order to successfully challenge a legislative action, the complaining party must prove the action was in excess of the powers delegated to the legislative body, namely that it is unsupported by any rational basis related to promoting the public health, safety, morals, or general welfare. *Mendota Golf,* 708 N.W.2d at 180; *Sun Oil Co. v. Vill. of New Hope*, 300 Minn. 326, 334, 220

N.W.2d 256, 261 (1974). In fact, "[e]ven where the reasonableness of a zoning ordinance is debatable, or where there are conflicting opinions as to the desirability of the restrictions it imposes…, it is not the function of the courts to interfere with the legislative discretion on such issues" because "what best furthers public welfare is a matter primarily for determination of the legislative body concerned." *State ex rel. Howard v. Vill. of Roseville*, 70 N.W.2d 404, 407 (Minn. 1955). Thus Plaintiffs must show, with every presumption weighing in favor of the County and without asking the court to re-weigh evidence considered by the Board, that there is *no* reasonable basis for the Ordinance Amendment.

IV. The Ordinance Amendment is Valid and Plaintiffs have Failed to Meet Their Burden of Proving Otherwise.

Plaintiffs argue that the Ordinance Amendment is arbitrary, capricious, lacking in rational basis, and unreasonable, and therefore contend it should be invalidated by this court.[10] Plaintiff SMPO[11] approaches this claim with a flawed premise, arguing that the County carries the burden of proof in this litigation to establish a rational basis for the Ordinance Amendment by inexplicably relying on a 1978 case from Pennsylvania. *See* SMPO Memo., 20 & 24. This is not what the well-established law in Minnesota requires.

While a local legislative body must have a rational basis for adopting an ordinance at the time it does so, it is not required to continuously prove that its decision was rational. After an ordinance is adopted, it is presumptively valid. *City of St. Paul v. Kekedakis*, 199 N.W.2d 151 (1972). Plaintiffs, as those challenging the Ordinance Amendment, must prove it invalid. *See State ex rel. Lachtman*, 158 N.W.; *Dalsin*, 71 N.W.2d at 858; *DI MA Corp.*, 562 N.W.2d at 320.

[10] Minnesota Sands attempts to create a constitutional claim out of a simple claim that the Ordinance Amendment is arbitrary and capricious, and it does not raise an independent claim going to the Ordinance Amendment's invalidity. As will be discussed in more detail in response to Plaintiffs' substantive due process claims, both parties have applied the wrong standard to their substantive due process arguments. Because Minnesota Sands cites the standard applicable to a court's review of the validity of an ordinance, the County will address it here.

[11] References to Plaintiff SMPO refer to SMPO and Dabelstein collectively, unless otherwise specified.

Given the evidence in the record, the County's exhaustive rationale for adopting the Ordinance Amendment, the low legal threshold for upholding a legislative decision and resulting high burden of proof for those challenging an ordinance, the County is entitled to summary judgment on this claim and all claims that rely on similar arguments from Plaintiffs. Plaintiffs have not met their burden of proof and have failed to overcome the great deference given to local governments to enact local legislation.

A. Based on the evidence in the record, the Board reasonably concluded that the Ordinance Amendment is rationally related to the public health, safety, and welfare.

A legislative zoning decision is valid if it is supported by *any* rationale or set of facts. This is true even if there are some facts in the record that might appear to support a different decision. The law presumes the legislative body deliberated and weighed competing facts before reaching its decision, and a court reviewing the legislative decision will not invalidate the decision just because there are competing facts or rationale in the record.

In this matter, the County went above and beyond the minimal requirement that it identify any rationale or set of facts supporting it decision, and was extremely thorough in its legislative process, examining many different issues, arguments, and options before deciding to adopt the Ordinance Amendment. As addressed in the Board's Findings and the purpose statement adopted as part of the Ordinance Amendment, the Board adopted this measure because it determined the amendment reflects the values and principles for land use established in the Comp Plan and WCZO; it serves to protect natural landscapes, water resources, agriculture, recreation and tourism, open spaces and the public health, safety and welfare; and it minimizes damage to County infrastructure and land use conflicts. All of these rationale are supported by facts in the record and any one component of this rationale is sufficient to demonstrate the Ordinance Amendment's validity.

Industrial mining of silica sand would take place in karst regions of the County. WC1669. As stated previously, the Minnesota legislature has recognized karst conditions and landforms in Southeastern Minnesota as unique and appropriate for special consideration in the regulation of industrial silica sand mining. Minn. Stat. § 116C.99, subd. 2(a). In these karst regions, silica sand serves as a natural water filtration system for groundwater, surface water, and wells. EQB Report, 14-16; WC2382; WC2387-2388.[12] Evidence in the record demonstrates that the karst makeup of these formations make this area particularly vulnerable to pollution as a result of either a loss of this natural filtration system due to industrial mining or the introduction of pollutants associated with the processing of industrial silica sand. EQB Report, 14-16, 51, 59; WC2382; WC2387-2388. The record demonstrates that, among other pollutants, industrial sand mining operations utilize chemical flocculants, such as polyacrylamide and polydiallyldimethyl aluminum chloride, and residue from these chemicals pose potential risks to water. EQB Report, 50. The Board's determination that the Ordinance Amendment will protect water resources and wells reflects the guidance and policies set by the state, as well as the Comp Plan, which states that the County will insure potable water supply for residents, protect high-yielding aquifers, and preclude groundwater contamination. Comp Plan, 30-34.[13] Water protection is indisputably rationally related to the health, safety, and welfare in the County.

Evidence in the record regarding the demonstrable effects of industrial silica sand mining on nearby Wisconsin counties supports the County's rationale that the Ordinance Amendment is necessary to protect the public welfare, including the natural landscapes, agriculture, recreation,

[12] Note that the County's citations to evidence in the legislative record that supports each finding by the Board regarding the Ordinance Amendment are not exhaustive and other evidence exists in the record supporting each finding. The County is not waiving its rights to assert other record evidence supports the Board's rationale for the Ordinance Amendment by limiting the citations it sets forth in this memorandum. Given the volume of record evidence, citing each relevant piece of data is not practicable, nor is it required to establish the reasonableness of a legislative decision.

[13] The Comp Plan can be found in the legislative record produced by the County, marked as Exhibit U.

tourism, and open space. The record contains photos depicting decimated natural landscapes, which have been destroyed and blighted by massive open mining pits. WC0078-WC0089. It contains firsthand observations about the transformation of those counties. WC0905; WC2001; WC2068; WC2628-WC2657; WC2671-WC2817. Representatives from Pepin and Trempealeau Counties provided testimony about the negative impacts industrial mining has had on those counties, including the significant diversion of finite county resources to address mining-related issues, such as dedicated staff people and litigation to enforce mining company's obligations to the county, and straightforward explanations that social wellbeing had been hurt by the presence of industrial mineral operations. WC0905.

The record also contains studies regarding Wisconsin communities that have experienced and considered the boom and bust of industrial silica sand mining operations, which explain the potential negative impacts on the local economy as a result of industrial mining. WC0974-WC1010; WC2842-WC2845. These case studies demonstrate that the promised economic boost from new industrial mining routinely fails to deliver tangible benefits to the community impacted by the mining and, instead, commonly drains local resources, negatively impacts existing industries, and causes a downturn in the local economy. Winona County's economy relies on the agricultural and tourism industries, among others, and the Board's conclusion that the Ordinance Amendment will protect those industries is supported by the record and rationally related to the public welfare. WC1098-1116.

In fact, while the County's Comp Plan encourages economic development, it seeks to balance such development with the natural attributes in the County and the environmental impact of the development, and prioritizes development that will benefit the local economy and community. Comp Plan, 21-22. It also prioritizes the protection of agriculture and natural

resources, including by minimizing mining activities that impact environmentally sensitive areas. Comp Plan, 14-16. Further, it encourages the protection of natural, unique, and scenic areas of the County. Comp Plan, 35-36. The evidence in the record clearly demonstrates the risk posed to these priorities by industrial mineral operations in the County, highlighting the unpredictable and likely negative economic impact caused by silica sand mining, which would focus its mining operations in the sensitive karst regions of the County. Industrial mineral operations, particularly those seeking to extract silica sand, hinge on the disruption and destruction of unique and scenic regions of the County. As such, the Ordinance Amendment is rationally related to upholding the goals and priorities stated in the Comp Plan.

With regard to the issue of traffic and minimizing deterioration of local infrastructure, the record contains information from the County Highway Engineer about potential impacts on roads from industrial mineral operations. WC902-WC903; Ex. L. He explained that pavement designed to last for 20 years lasted only 2 years near Williston, North Dakota, due to high volumes of heavy truck traffic repeatedly traveling over local routes to oil extraction sites. WC902-WC903; Ex. L. He further stated that the County's calculation showed similar wear would happen in the County from the hauling of industrial minerals. WC0596-0598; WC902-WC903; Ex. L. He explained that the County calculated that under normal traffic conditions, 5% of the pavement life would be used up per year, whereas 52% of the pavement life would be used up in one year as a result of anticipated truck traffic associated with industrial mineral operations. WC0596-0598; WC902-WC903; Ex. L. The County Engineer stated that the County could use exactions to pay the incremental difference in road wear caused by trucks hauling industrial minerals, but the cost of road maintenance would be borne by the County if the mine was not assigned the cost or failed to pay. WC0596-0598; WC902-WC903. Likewise, the

inconvenience and safety concerns caused by constant road maintenance and increased truck traffic would be borne by the community as a whole. The Comp Plan states that safe and well-maintained roads is among the County's transportation goals. Comp Plan, 39-41. The evidence in the record supports the Board's rationale that the Ordinance Amendment is appropriate to address concerns about traffic and infrastructure and is rationally related to public health, safety, and welfare.

In addition to evidence relating to the impact of industrial mining on drinking water, the record contains significant information about other health concerns linked to industrial mineral operations, particularly the industrial mining of silica sand. Two local doctors provided testimony about the negative impacts of silica particles on human health, including the risk of silicosis and lung cancer. WC0905; WC1381-WC1394; WC2295. Dr. Wayne Feyereisn provided information about standards used by OSHA and NIOSH regarding occupational exposure to silica sand. WC0905; WC1381-WC1394. He explained that there are known risks in an occupational setting, which can reasonably be extrapolated to conclude the potential for adverse health impacts related to community exposure to industrial silica sand mining, particularly on children and vulnerable adults, and explained that the extent of ill effects may not be known for 50 years. WC0905; WC1381-WC1394. Both doctors also explained that increased exposure to other pollutants like dust and diesel exhaust, which is inherent in industrial mineral operations, increases health risks to the community. WC0905; WC1381-WC1394; WC2295. The County's Comp Plan encourages the County to consider health and wellbeing impacts in adopting land use regulations that are both reactive to community needs and preventative to potential adverse impacts. Comp Plan, 43. The Board acted in accordance with

this provision when it enacted the Ordinance Amendment in light of evidence in the record about potential adverse health impacts caused by industrial mineral operations.

The information discussed above are just a few examples of how the record evidence provides a rational basis for the Ordinance Amendment. The record, which has been provided in full to the court, is replete with evidence regarding known and potential adverse impacts of industrial mineral operations, but the law does not require exhaustive or expansive rationale to support a legislative decision. Nonetheless, the County engaged in a comprehensive and deliberative process prior to enacting the Ordinance Amendment, holding multiple public hearings and gathering copious amounts of information on all sides of the mining and processing issues; expending considerable public resources to evaluate the information provided, legal options, and ramifications of regulating mining operations; and considering various alternatives to the Ordinance Amendment. The County's focus throughout this entire process was identifying an option to address mining operations in the County that best serves the local health, safety, and welfare in light of the circumstances found in the County and nature of potential mining operations.

In short, nothing about the County's decision to adopt the Ordinance Amendment was irrational, arbitrary, capricious, or unreasonable. Instead, the County's decision was clearly made within the confines of its broad authority to enact land use regulations that serve the public health, safety, and welfare as supported by facts in the record. As such, the County must be afforded the well-established presumption of validity for the Ordinance Amendment and deference from the court, and is therefore entitled to summary judgment on Plaintiffs' claims that the Ordinance Amendment is invalid as having no rational basis.

B. Plaintiffs have failed to meet their burden of proving the Ordinance Amendment is arbitrary, capricious, or unreasonable.

Plaintiffs have not and cannot overcome every piece of the County's reasoning that the Ordinance Amendment rationally relates to the public health, safety, and welfare, as is their burden when asking the court to overturn a legislative decision. In fact, they have not even tried. Instead, they contend that the Ordinance Amendment is arbitrary, capricious, and unreasonable because it distinguishes between industrial minerals and construction minerals, which they assert relates only to the end use of the product. *See* Minnesota Sands' Memo, 34; SMPO Memo, 23-24. Plaintiff SMPO further contends the Ordinance Amendment is invalid because there is evidence in the record suggesting there is no health risk from airborne silica sand, because there are other regulatory schemes relating to silica sand mining, and because the Comp Plan would allow the County to permit industrial mining, rather than regulating it with the Ordinance Amendment. SMPO Memo, 24-27.

Plaintiffs are essentially asking this court to ignore or reweigh the evidence in the record and substitute its judgment for that of the County in determining how public health, safety, and welfare will best be served in the County. That is not the court's role. Even if a local government's decision was debatable, the court will not interfere as long as it is reasonably supported by a rational basis. *Honn*, 313 N.W.2d at 417; *Sun Oil Co.*, 220 N.W.2d at 261.

1. *The Ordinance Amendment regulates based on the use of land and impacts on the County, not on the end use of the product mined.*

Plaintiffs seek to distract the court and misrepresent the Ordinance Amendment by suggesting it regulates land use based solely on the end use of silica sand. In doing so, Plaintiffs ignore the record evidence regarding the differences between industrial and construction mining, as well as the County's authority to regulate the density and intensity of land uses.

Evidence in the record demonstrates that construction and industrial mineral operations are fundamentally different in many respects. WC2389. The end use is relevant to the extent it dictates the quantity, quality, and processing of the mineral extracted and thereby creates different local land use impacts. Construction mineral operations tend to involve small mines and use periodic and minimally invasive mining activities and minimal processing, whereas industrial mineral operations involve larger mines in operation for long periods of time that utilize blasting, underground mining, and other invasive techniques, along with chemical processing. WC0656; WC2389. Industrial sand operations require minerals that meet specific standards for size, shape, purity, and intactness and achieve this uniformity using flocculent processing. WC2389. Rejected sand is returned to the mine contaminated with flocculent. WC2389. Construction sand is not subject to these standard or processing requirements.

The focus on sand purity and uniformity in industrial mineral operations require mining operations to extract minerals from the County's most sensitive regions. While construction sand could involve silica sand from these areas, this is not central to construction mineral operations and has not historically been a source for construction minerals in the County in the past. Sand mined in construction mineral operations is found throughout the County, not solely in fragile and scenic areas. Minnesota Sands' Ex. 18, Answer to Interrogatory No. 1.

The differences in the size, frequency of operation, and processing between construction mineral operations and industrial mineral operations logically translates to other significant differences between these land uses. Because industrial mineral operations produce higher quantities of minerals and require more processing, the impacts on water quality, mineral deposit levels, and roads are significantly greater than those impacts created by construction mineral operations. Similarly, industrial mineral operations pose a far greater risk to landscape

aesthetics, natural resources, and public health than construction mineral operations. Industrial silica sand mines in Wisconsin highlight the aesthetic consequences and local detriments caused by industrial sand mining. These are impacts not historically felt in the County when mining has focused on construction mineral operations, prior to the dramatic uptick in demand for silica sand from its most sensitive and scenic geographic regions. Plaintiffs want to argue exclusively about mineral end use, but this misses the point. These significant tangible differences in mining and processing operations, which are recognized by other government entities, rationally support the Ordinance Amendment because industrial mineral operations and construction mineral operations are fundamentally different land uses with disproportionate impacts on the health, safety, and welfare of the County.

Plaintiff Minnesota Sands also asks this court to draw contrary conclusions about the differences between construction and industrial mineral operations by cherry-picking a few mining operations across the state to argue construction sand can come from big mines and industrial sand can come from small mines. *See* Minnesota Sands' Memo, 30-31. Plaintiff's reliance on information outside of the legislative record, however, does not establish that the Ordinance Amendment is invalid or unconstitutional. The large construction sand operations Plaintiff references are located in Dakota County, Washington County, and, vaguely, "in the region" of the County. *See* Minnesota Sands' Exs. 8, 9, 19. There is no evidence, however, that these operations are mining silica sand from sensitive karst regions or that they utilize the same type of chemical processing or landscape-destroying mining techniques associated with industrial mineral operations. Plaintiffs seek to oversimply the County's distinction between industrial and construction mineral operations as being about end use of sand by suggesting mine size is not a real difference between these uses, but the construction mineral operations

Minnesota Sands cites are inarguably distinct from the industrial mineral operations and associated local impacts the County seeks to regulate.

In enacting the Ordinance Amendment, the County had the benefit of hindsight to distinguish between these land uses. The Board used its own experience with typical small-scale, "mom-and-pop" construction mineral operations that have long existed in the County as a contrast with the large, invasive, and destructive industrial mineral operations happening just across the border in Wisconsin. The County knew that the industrial mineral operations taking place in Wisconsin were of the same type wanting to move into the County's sensitive karst regions, driven by an increased, and relatively newfound, demand for industrial silica sand. The County used its experience with construction mineral operations and its neighbors' experiences with industrial mineral operations to make a decision that best served the health, safety, and welfare of County residents.

The Ordinance Amendment reflects a density and intensity regulation, no different from typical land use controls. Regulations of the density and intensity of uses is fundamental to local governments' authority to zone, arising whenever a local government sets a minimum or maximum lot size; designates the number of one type of use that can exist within a zone; identifies a zone as residential, commercial, or industrial; limits a certain industrial use to a particular zone or bans it outright; or designates the number of residential units that may exist on one lot. Industrial mineral operations constitute a more intense use of land than construction mineral operations as they place more demands on the land and the surrounding area, as discussed above. By restricting mining operations to construction mineral operations only, the County is using its zoning authority to limit the size, number, and activities associated with mines in the County, particularly in sensitive geographic regions. This is well within the

County's authority to regulate and carry out planning and zoning activities for the purpose of promoting health, safety, and welfare, as established by Minnesota Statutes Section 394.21.

Plaintiffs' only real arguments against this distinction rely on their ill-conceived notion that the County is regulating mining operations simply based on end use and by citing to evidence in the record, as well as some outside the record, allegedly establishing that there are no differences in industrial and construction mineral operations. By doing so, Plaintiffs are again asking this court to reweigh the evidence and substitute its judgment for that of the Board. This is not the court's role. The record clearly supports as reasonable the County's decision to distinguish between these two types of mining operations. Plaintiffs have failed to establish that regulating industrial mineral operations differently from construction mineral operations is arbitrary, capricious, or unreasonable. The record before the County upon enacting the Zoning Ordinance clearly establishes that drawing this distinction was reasonable and rationally related the health, safety, and welfare of the County community.

2. *Plaintiff SMPO has failed to prove the County was barred from adopting the Ordinance Amendment as a result of other regulatory schemes or its past zoning decisions.*

Contrary to Plaintiff SMPO's contentions, it is inconsequential that other government agencies also regulate silica sand mining, that the County could use the CUP process to regulate industrial mineral operations, or that the County previously allowed industrial mineral operations. Again, without any explanation or basis, Plaintiff SMPO asks this court to overlook state law in favor of applying case law from Pennsylvania. This is Minnesota, not Pennsylvania, and SMPO's arguments based on inapplicable law must be disregarded.

Minnesota Statutes Section 394.21 allows the County to engage in the type of planning and zoning activity it undertook in enacting the Ordinance Amendment, and SMPO is not arguing that this authority has somehow been preempted by another agency. The County does

not lose its authority to regulate land use simply because other agencies can set environmental or other permitting standards too. In fact, Minnesota Statutes Section 116C.99 specifically acknowledges that counties, as the local government unit, must regulate silica sand mining.

To the extent SMPO argues that the County's decision to disallow the industrial mining of silica sand was unreasonable because such operations would be subject to certain regulations that may mitigate its detrimental effects on the County, SMPO fails to cite any authority requiring the County to rely on other agencies when assessing how best to protect the health, safety, and welfare of County residents. SMPO also fails to identify any authority requiring the County to undergo the expense of using a CUP process to make individual determinations on each proposed mining operation rather than adopting density and intensity standards for mining operations, as it did when it enacted the Ordinance Amendment.

The extensive evidence in the record shows that the County was aware of the many risks posed by industrial mineral operations, as well as the other mechanisms for addressing some of those risks, including through the CUP process. Yet, the County assessed public health, safety, and welfare would best be served by enacting the Ordinance Amendment. This decision was not arbitrary, capricious, or unreasonable, but rather rationally related to the evidence presented about the known and potential risks of industrial-scale mining operations and the experience of other counties that have incurred great expense using alternative regulatory schemes to address industrial mineral operations. It is outside the purview of the courts to tell the County it should have pursued one of these alternatives for regulating mining operations in its jurisdiction.

Plaintiff SMPO's reliance on the County's past land use decisions related to the industrial silica sand mining operations is also misplaced. There is simply no precedential value to these decisions. With regard to the County's decision about the environmental review appropriate for

the Nisbit mine, this was one project before the County for a quasi-judicial decision based on the zoning ordinance in effect at the time. The County's decision in that specific circumstance simply has no bearing on the regulatory scheme the County adopted for the entire County several years later based on an extensive review and evaluation process.

The Board's Findings articulate that circumstances have changed since the County last considered mining regulations both during the moratorium on silica sand mining and as part of the Nisbit CUP process, explaining that a new Comp Plan is now in place and the demand for industrial silica sand has gone through a boom and bust cycle. Findings, ¶ 34. This passage of time also provided insight into the impacts industrial silica sand mining has actually reaped on similar communities, allowing the County to consider the experiences of nearby Wisconsin counties that have now had several years of this type of land use. Findings, ¶ 34. In fact, the Board specifically found "observable and documented negative impacts of industrial silica sand mining and processing to the local economies and natural state in neighboring counties in Wisconsin," which were not present when the County originally addressed industrial silica sand operations. Findings, ¶ 34. Changing circumstances and the benefit of hindsight demonstrate that the Board's decision was reasonable. Ignoring these factors and all of the record evidence to invalidate the Ordinance Amendment would violate the traditionally strong deference granted to local governments in legislative actions and the presumption of validity those actions are afforded. Plaintiffs have failed to demonstrate that the County's decision to pursue a different option for regulating mining operations in the County renders the Ordinance Amendment arbitrary, capricious, or unreasonable.

3. *Plaintiff SMPO's misrepresentations about the Comp Plan and applicable law are insufficient to invalidate the Ordinance Amendment.*

Plaintiff SMPO argues that the County is required to permit all industrial mining of silica sand because of language contained in its Comp Plan. This argument both misrepresents the text and meaning of the Comp Plan and applicable law and does not support usurping the deference given to the County to enact official controls.

The Comp Plan adopted by the County in 2014 is a 121-page document that lays out a vision for future land use and planning in the County, identifying goals, policies, and strategies on a wide variety of topics including agricultural areas, economic and rural development, transportation, and natural resource and open space protection. Tucked in on page 31 of this plan, in a section related to natural resource protection, which highlights the importance of these assets and the sensitivity of certain areas in the County, are 11 goals relating to how the County can protect natural resources, including this one:

> 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 cost of impacts to road infrastructure and administration, requires careful consideration of traffic impacts, water impacts, natural resource conservation, and encourages planning of future land utilization and reclamation.

SMPO argues that because other sections of the Comp Plan acknowledge an interest in industrial sand mining in the County and this goal from natural resources protection section contains the words "review and permitting," the County was barred from adopting the Ordinance Amendment. Stated plainly, SMPO is grasping at straws.

Nothing in the plain language of this goal states that the County must or will allow industrial mineral operations in the County. To the contrary, it is silent on the topic of industrial mineral operations and clearly leaves open the possibility for regulation of mineral extraction to

mitigate negative impacts on the community. This is exactly what the County did when it enacted the Ordinance Amendment. The County reviewed the health, safety, welfare, and environmental impacts of various mining operations and concluded that construction mineral operations can occur with proper permitting, whereas industrial mineral operations pose too great of a risk to these considerations.

Moreover, the Comp Plan is a document that must be read as a whole, not simply one goal in isolation from the rest of the document. As addressed above and throughout the Board's Findings, the County's analysis and rationale centered heavily on the guidance provided by the Comp Plan, which focuses on a wide variety of considerations beyond simply the extraction of minerals. The County looked at the entire Comp Plan to craft an ordinance it determined reflects the values espoused in that document in light of evidence in the record about the negative impacts of industrial mineral operations. SMPO's contention that the County acted in violation of the Comp Plan is disingenuous.

Even if there were any modicum of validity to its contention, SMPO's argument is premised on inapplicable law. SMPO cites Minnesota Statutes Section 473.858, subdivision 1, to argue that an official control that conflicts with a Comp Plan is invalid. Section 473.858 regulates only local governments who are under the oversight of the Metropolitan Council. It has no applicability to the County or any county located outside the metropolitan area. *See, generally*, Minn. Stat. Ch. 473.

The County's land use planning activities are controlled by Minnesota Statutes Chapter 394, which contains no language similar to that cited by SMPO as authority to invalidate the Ordinance Amendment. In fact, Chapter 394 establishes that the Comp Plan is a guiding document without the authority of law held by official controls. *See* Minn. Stat. §§ 394.22, .23;

see also PTL, L.L.C. v. Chisago Cty Bd. of Comm'rs, 656 N.W.2d 567, 574 (Minn. App. 2003) (discussing the legal authority of comprehensive plans under Chapter 394). The Comp Plan itself states its purpose as merely a guide for the County to use in land use planning. Comp Plan, 9-10. While the Ordinance Amendment is completely in line with the guidance provided by the Comp Plan, even if the court is persuaded to the contrary, there is no legal authority for invalidating an official control enacted by the County that differs from the vision laid out by the Comp Plan. As such, Plaintiffs have not met their burden of proving the Ordinance Amendment is arbitrary or capricious based on the Comp Plan.

4. *Plaintiff SMPO's contention that the County erred by considering health data related to fracking operations is insufficient to invalidate the Ordinance Amendment.*

Plaintiff SMPO appears to argue that the Ordinance Amendment is invalid because the County considered health impact studies conducted in connection with silica sand use in fracking operations. Not only does SMPO misinterpret the County's use of these studies, it again improperly asks the court to reweigh evidence in the record in its favor and ignore all the other evidence supporting the County's determination that the Ordinance Amendment promotes public health, safety, and welfare.

As addressed at length above, the County gave extensive consideration to the issue of the potential negative health impacts of silica sand mining. While Plaintiff SMPO is correct that there is some evidence in the record that could be used to argue there would be minimal health impacts stemming from exposure to silica sand in industrial mineral operations, there is also plenty of evidence to the contrary. Plaintiff SMPO would like this court to read into the fact that some of the evidence supporting the potential for negative health impacts derives from studies related to silica sand use in fracking operations and assume the County made some error warranting the invalidation of the Ordinance Amendment. This is absurd.

At the time it received and considered the information, the County knew that some of the health data relating to silica sand derived from studies specific to its use in fracking. The Board weighed this fact and determined that the data was probative for its purposes because it related to exposure to the same type of silica sand. Findings, ¶ 54. It is left to the County to weigh and assign credibility to the evidence it receives and, even if the County's decisions are debatable, the court does not substitute in its own judgment. *Sun Oil Co.*, 220 N.W.2d at 261.

Moreover, contrary to SMPO's apparent contentions, the County's determination that the Ordinance Amendment will promote public health, safety, and welfare is not based solely on health studies related to fracking. On the issue of community health, the County received evidence related to the risks posed by increased exposure to dust and diesel exhaust associated with industrial mineral operations and the risk of contamination of groundwater and wells posed by these operations. Even if the court somehow determines the County erred by considering health data related to silica sand exposure in fracking operations, the record still clearly supports the County's determination that the Ordinance Amendment protects public health in the community, which is a rational basis for adopting it.

Further, the County's rationale relating to protection of public health was just one piece of the rationale underlying the Ordinance Amendment. Plaintiffs have failed to address the County's other findings, such as that the Ordinance Amendment serves to protect the environment, natural resources, and economic interests, and mitigates land use conflicts and damage to public infrastructure. Plaintiffs' failure to contest these issues serves as an agreement that the County's rationale for adopting the Ordinance Amendment based on these issues is sound. As stated previously, any singular rationale for adopting an ordinance based on public health, safety, and welfare is sufficient to validate the legislative action. Because Plaintiffs have

failed entirely to undermine, much less address, each piece of the County's rationale for adopting the Ordinance Amendment, they have failed to meet their burden of proving it invalid. As such, Plaintiffs' invitation for this court to declare the Ordinance Amendment invalid must be rejected and judgment entered in favor of the County.

V. Standard of Review for Overturning Legislation as Unconstitutional

Plaintiffs face a substantial uphill battle in this case with regard to their constitutional challenges to the Ordinance Amendment. They bear the heavy burden of proving "beyond a reasonable doubt" that the challenged ordinance violates the Minnesota Constitution. *Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 73 (Minn. 2000); *see also State v. Henning*, 666 N.W.2d 379, 382 (Minn. 2003). When a court reviews a constitutional challenge to a legislative decision, "[e]very presumption is invoked in favor of the constitutionality of a statute." *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979) (citing *Reed v. Bjornson*, 253 N.W. 102 (1934)). Declaring legislation unconstitutional is only used "when absolutely necessary and with extreme caution." *Id*., (citing *Schwartz v. Talmo*, 205 N.W.2d 318, 323 (1973) (superseded by statute on other grounds)). The County is entitled to dismissal of all claims against it because Plaintiffs fall woefully short of meeting this extremely high standard.

For a facial challenge to succeed, Plaintiffs must be able to show that the Ordinance Amendment is unconstitutional in all of its applications. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 339 (Minn. 2011), (quoting *Black's Law Dictionary* 261 (9th ed. 2009).) As the party challenging the constitutionality of a legislative decision, Plaintiffs bear "the heavy burden of proving that the legislation is unconstitutional in all applications." *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (Minn. 2013) (citation omitted).

VI. The Ordinance Amendment Does Not Violate Plaintiffs' Equal Protection Rights.

Plaintiffs contend that by distinguishing between industrial mineral operations and construction mineral operations, the County has violated their equal protection rights. This claim is not supported by the law or facts in this case and has no merit.

The Fourteenth Amendment of the U.S. Constitution provides equal protection under the law. U.S. Const. amend. XIV, § 1. This means the law must treat similarly situated people alike. *State v. Richmond*, 730 N.W.2d 62, 71 (Minn. App. 2007). A law is presumed to be constitutional unless it implicates a suspect classification or fundamental right, and it need only be rationally related to a legitimate government purpose to withstand equal protection scrutiny. *Id.*; *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 289 (Minn. App. 1996). Plaintiff Minnesota Sands acknowledges that the Ordinance Amendment does not implicate either category, and Plaintiff SMPO makes no argument to the contrary. *See* Minnesota Sands Memo, 27; SMPO Memo, 28-29. The Ordinance Amendment is thus entitled to a presumption of constitutionality. Plaintiffs, as the parties challenging the constitutionality of the Ordinance Amendment, bear the burden of showing that the law is unconstitutional beyond a reasonable doubt. *Scott v. Minneapolis Police Relief Ass'n, Inc.,* 615 N.W.2d 66, 73 (Minn. 2000).

As part of the equal protection analysis, the court must determine whether the complaining party and comparison group are actually similarly situated. In order to be similarly situated, two groups must be "alike in all relevant respects." *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 132 (Minn. 2014). The constitution "does not require the state to treat things that are different in fact or opinion as though they were the same in law." *State v. Behl*, 564 N.W.2d 560, 568 (Minn. 1997); *see also In re Welfare of M.L.M.*, 813 N.W.2d 26, 38 (Minn.

2012) (providing that the Equal Protection Clause does not require the government to treat people who are differently situated as though they are the same). Whether the challenging party is similarly situated to the comparison group is a threshold showing that must be met before the court will evaluate the challenged legislation. *State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011); *Richmond*, 730 N.W.2d at 71.

Plaintiffs contend that the Ordinance Amendment treats companies wishing to engage in industrial mineral operations differently than companies engaging in construction mineral operations. The Ordinance Amendment, however, is silent on the issue of who may engage in any particular mining operation. Instead, it merely regulates land use. Stated another way, the Ordinance Amendment does not create two classes of people and impose regulations based on those classifications; it identifies two types of land uses and regulates them differently. This is no different than a zoning ordinance that allows crop farming but not feedlots in a particular zoning district. Equal protection rights simply are not implicated by this type of regulation. Plaintiffs' attempt to make this about the people who may wish to engage in a particular land use, rather than the land use itself, is inappropriate and would open the door to unending equal protection challenges to land use regulations.

Even if the Ordinance Amendment could be read as creating two classes of people such that equal protection is implicated, Plaintiffs have not established that these classes are similarly situated in all relevant respects. Plaintiffs merely make vague and conclusory statements that there is no difference between construction and industrial mineral operations that seek to mine sand, making these operations similarly situated. Plaintiffs contend that the only distinction between industrial and construction mineral operations is the end use of the extracted mineral. While use of the mineral is referenced in the Ordinance Amendment as a way of distinguishing

between these land uses, the end use is indicative of the size, scope, and incumbent activities and impacts of the mining operation in the County.

Plaintiffs would like this court to focus only on the general category of mineral that might be extracted using these two different mining operations to determine that industrial mineral operations and construction mineral operations are similarly situated and invite this court to disregard the role the end use of the mineral plays in the local land use. This simply is not where the analysis stops. Extracting the same or a similar mineral does not make these uses alike in all relevant respects. Because this is a challenge to a land use ordinance, relevant characteristics for comparison in an equal protection analysis must include the impact the use has on the land and surrounding area. Such relevant inquiries must look at the extraction techniques used, the volume of mineral to be extracted, the mineral processing procedures, and the demand the use places on the land, environment, neighborhood, and infrastructure.

For example, there are no material fact disputes that silica sand mined as part of an industrial mineral operation would come only from the karst formations in the County and that a high volume of pure silica sand would be routinely extracted using underground mining and blasting techniques and chemically processed prior to being transported via truck across the same or similar route on County-managed road as part of this use. This is in contrast to sand mined as part of a construction mineral operation, which would periodically extract small volumes of sand from any number of locations in the County, without using invasive or exhaustive mining techniques or extensive chemical processing to guarantee purity and which would not entail the high volume of repetitive truck traffic on local roads.

Without addressing these differences, Plaintiff Minnesota Sand asks the court to simply consider the fact that the Nisbit mine sells silica sand for construction use and some construction

mineral operations in the state are larger than some industrial mineral operations in the state. Plaintiff contends that all mineral sales are a function of market fluctuation. These issues are inapposite for purposes of establishing industrial and construction mineral operations are similarly situated. There is no evidence in the record that construction sand is inherently the same as silica sand mined for industrial purposes. In fact, the specific large construction mineral operations Plaintiff identifies are in Washington and Dakota Counties, and do not mine silica sand. The mere fact that the Nisbit mine is choosing to sell its silica sand for construction purposes is not proof that other construction mineral operations would pursue that same route. The Nisbit mine originally set out to engage in industrial mineral operations. Notably, Rick Frick, owner of Minnesota Sands, stated that it is not worth the capital investment to mine silica sand for construction purposes. Frick Aff. ¶ 60. There is other sand available in the County that is more likely to be used in construction mineral operations and it is logical and rational for the County to conclude that the newfound interest in mining silica sand from fragile geographic areas in the County is driven by industrial purposes and not likely to be pursued in such a high volume for construction purposes.

Further, as previously noted, the record contains information about the negative economic consequences experienced by Wisconsin counties with industrial silica sand mining as a result of the boom and bust nature of that market and other characteristics specific to industrial mineral operations. Aside from making a vague, unsupported statement about market demand, Minnesota Sands has not established that similar swings and negative economic consequences result from construction mineral operations. Plaintiff's discussion also fails to address the differences in frequency, volume, or techniques for extraction or the level or type of processing required of the extracted sand. There is no evidence in the record that the construction mineral

operations place the same demands on land and surrounding area that industrial mineral operations cause or that they use the same chemical processing techniques, even if the mineral extracted is arguably the same. A review of all relevant characteristics makes it clear that construction and industrial mineral operations are not similarly situated uses and, therefore, are not entitled to similar treatment. As such, the Ordinance Amendment does not violate equal protection rights.

Even if the court determines that industrial and construction mineral operations are alike in all relevant respects, Plaintiffs have failed to meet their burden of proving the Ordinance Amendment is not rationally related to a legitimate government purpose and is unconstitutional beyond a reasonable doubt. As addressed at length throughout this memorandum, the County concluded based on an extensive review of information that industrial mineral operations would have adverse impacts on the environment, health, natural resources, the local economy, County infrastructure, as well as other facets of local life, and that the Ordinance Amendment limits these negative impacts and promotes public health, safety, and welfare. There is no evidence in the record that these negative impacts would result or have historically resulted from construction mineral operations, particularly to the same degree, therefore justifying the different treatment of these two uses.

Plaintiff Minnesota Sands' attempts to undermine this rationale fall far short of its burden of proof. Without any real analysis, Minnesota Sands attempts to equate the Ordinance Amendment to a zoning ordinance that distinguished between public and private schools, as addressed by the court in *State v. Northwestern Preparatory School*, 228 Minn. 363, 37 N.W.2d 370 (1949). This case does not support Plaintiffs' arguments. In that case, the City of Minneapolis's zoning ordinance was challenged on equal protection grounds because it allowed

public schools, but not private schools, to locate within a residential district. *Id.* at 364, 37 N.W.2d at 371. The court explained that this distinction had nothing to do with the school building or use itself. *Id.* at 364-65, 37 N.W.2d at 371. The court deemed the city's ordinance a violation of equal protection because it distinguished based on ownership of the use rather than the actual effect on the residential neighborhood. *Id.* at 365, 37 N.W.2d at 371. Contrary to Minnesota Sands' implications, the Ordinance Amendment does not contemplate business or property ownership, it relates solely to different uses and reflects the disparate impact those uses have on the surrounding community. As such, *Northwestern* has no applicability to this case.

Plaintiff Minnesota Sands' reliance on *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), is similarly misplaced. In that case, the court considered the constitutionality of a zoning ordinance that required a special use permit to locate a home for people with mental disabilities within an R-3 zoning district. No such permit was required to locate boarding houses, apartments, fraternities, sororities, hospitals, nursing homes, or other similar large residential facilities. The court concluded that the city's decision to deny a permit for this house violated equal protection because there was no rational basis for believing people with mental disabilities living in this type of residential facility would pose any special threat to the city's interests in a way the other listed residential facilities would not. The court held that the city's explanations for the differential treatment of those with mental disabilities did not serve as a rational basis for treating this group differently because the same concerns would apply to other residential facilities, and the city unjustifiably focused on the residents rather than the impact of the use. Again, unlike the Ordinance Amendment, the zoning decision challenged in *Cleburne* focused on *who* was using or occupying property, rather than how the land was being used and the impact that use would have on the community. As such, this case in unpersuasive.

In a haphazard attempt to equate *Cleburne* with the present case, Minnesota Sands argues that the *Cleburne* court's conclusion that limiting the number of occupants in a facility based solely on the identity of its residents violated equal protection demonstrates that the Ordinance Amendment is unconstitutional because it did not limit the volume of sand that can be extracted in construction mineral operations. Minnesota Sands' implication that the County's rationale for the Ordinance Amendment is solely about the volume of minerals extracted is a vast oversimplification of the County's rationale. Volume is not the only difference between industrial and construction mineral operations. The record demonstrates the process for extracting and processing the minerals is more invasive and damaging in industrial mineral operations. Further, with respect to volume, given the smaller market, lesser demand, and lower price of sand extracted in construction mineral operations, the County reasonably concluded the size of these mines is self-limiting and, to the extent that they are not, the County may impose size restrictions as part of the CUP process. Unlike in *Cleburne*, the remaining uses are still subject to County permitting. The decision by the County to not specifically include this type of regulation in the Ordinance Amendment does not support any equal protection argument.

In summary, Plaintiffs have failed to meet their burden of proving beyond a reasonable doubt that the Ordinance Amendment treats similarly situated people differently without any rational basis. The Ordinance Amendment makes no distinction between the people who own or use land; it distinguishes between land uses – industrial mineral operations and construction mineral operations. These uses are dissimilar in the demands they place on land and the way they impact the surrounding community, and regulating them different does not implicate or violate the equal protection clause. As such, Plaintiffs' equal protection claims must be dismissed and judgment entered for the County on these claims as a matter of law.

VII. The Ordinance Amendment Does Not Violate Plaintiffs' Substantive Due Process Rights.

Plaintiffs contend the Ordinance Amendment violates substantive due process on the basis that it is arbitrary and capricious and does not serve a public purpose. Plaintiffs cite the due process clauses contained in both the U.S. Constitution and the Minnesota Constitution, yet ask this court to apply the same test to evaluate this claim that it would apply to analyze a non-constitutional claim that the Ordinance Amendment is invalid. Regardless of the test applied, Plaintiffs cannot meet their burden of proving the Ordinance Amendment violates substantive due process beyond a reasonable doubt.

A. Plaintiffs have not argued the proper substantive due process test and, therefore, cannot prevail on this claim.

Contrary to Plaintiffs' assertions, the proper test for evaluating whether there has been a substantive due process violation in a zoning decision has two parts: (1) "whether there has been a deprivation of a protectable property interest" and (2) "whether the deprivation, if any, is the result of an abuse of governmental power sufficient to state a constitutional violation." *Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 689 (Minn. 1991) (citing *Littlefield v. City of Afton*, 785 F.2d 596, 603-08 (8th Cir. 1986)).

"In the zoning context, '[w]hether government action is arbitrary or capricious within the meaning of the Constitution turns on whether it is so "egregious" and "irrational" that the action exceeds standards of inadvertence and mere errors of law." *Id.* (quoting *Condor Corp. v. City. of Saint Paul*, 912 F.2d 215, 220 (8th Cir. 1990)). A substantive due process claim in this context "exists, if at all, only in extraordinary situations and will not be found in 'run-of-the-mill' zoning disputes." *Id.* at 690. The governmental action must be "egregious," "irrational," or "extraordinary." *Id.* at 691. Stated another way, there must be a showing that the County chose

truly irrational means to deprive a party of its protected property interest, such as by attempting to apply the ordinance only to people whose last names start with a certain letter. *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992). Establishing a constitutional violation under a claim of substantive due process has a significantly higher threshold than arbitrary-and-capricious action under Minnesota law. *See id.* at 690.

As Minnesota Sands acknowledged in its brief, Minnesota courts interpret the due process protections under the U.S. Constitution and Minnesota Constitution to be identical protections. *Boutin v. LaGleur*, 591 N.W.2d 711, 716 (Minn. 1999). While many Minnesota courts have ended their analysis of substantive due process claims by assessing that a zoning decision was not arbitrary and capricious, Plaintiffs have not identified a single case that has concluded there actually was a substantive due process violation by applying this same standard. As acknowledged in *Chesterfield Dev. Corp.*, the test for a substantive due process violations is much higher than the arbitrary and capricious standard, therefore explaining why Minnesota courts who have found no arbitrary or capricious zoning decision would not move on to address the applicable egregious, irrational, or extraordinary standard used to address substantive due process claims under federal law. That does not, however, exculpate Plaintiffs from having to meet this standard to prevail on their claims. Because they have not even alleged that the Ordinance Amendment is egregious, irrational, or extraordinary, Plaintiffs cannot prevail on their substantive due process claims.

B. Plaintiffs cannot establish that the Ordinance Amendment constitutes a substantive due process violation.

Though Plaintiffs have not offered any argument that the Ordinance Amendment violated substantive due process under the proper egregious, irrational, or extraordinary standard, the County will briefly address it for the sake of being thorough.

The first part of the applicable substantive due process test is whether the challenging party has a protectable property interest. *Northpointe Plaza*, 465 N.W.2d at 689. A protected property interest arises when an individual has "a legitimate claim to entitlement as opposed to a mere subjective expectancy." *Snaza v. City of Saint Paul*, 548 F.3d 1178, 1182 (8th Cir. 2008). "A mere expectation, desire, or intention to develop a property in a particular way is not sufficient to create a vested right." *Concept Properties, LLP v. City of Minnetrista*, 694 N.W.2d 804, 820 (Minn. App. 2005) (citation omitted).

To the extent Plaintiffs have identified themselves and the people they represent, there is no evidence in the record that any of those people have a legitimate claim to engage in industrial mineral operations. None of them had the entitlement to engage in such operations prior to the Ordinance Amendment's enactment, and even if they had, this new legislation would not impact that right. To the extent that they argue that they wanted or intended to engage in such operations, this subjective expectancy is insufficient.

As addressed at length in the County's argument on justiciability, Plaintiffs do not have a right to claim injury because an ordinance forbids them from doing something they were never entitled to do. Even if the Ordinance Amendment had not been adopted, Plaintiffs would have been required to obtain a CUP from the County and various permissions from other government entities prior to engaging in industrial mineral operations. The courts have held that where a property owner cannot engage in a particular land use as of right and does not otherwise have a permit to engage in that use, the party has no protected property interest sufficient to mount a substantive due process claim. *See, e.g.*, *Krummenacher v. City of Minnetonka,* 783 N.W.2d 721, 727 (Minn. 2010); *Continental Property Group, Inc. v. City of Minneapolis*, 2011 WL 1642510 (Minn. App. May 3, 2011); *Bituminous Materials, Inc. v. Rice Cty., Minn.*, 126 F.3d

1068, 1070 (8th Cir. 1997). Because Plaintiffs had nothing more than a mere expectancy to engage in industrial mineral operations prior to the County's adoption of the Ordinance Amendment, it cannot sustain a substantive due process challenge to this zoning decision.

Plaintiffs also cannot establish that the Ordinance Amendment is egregious, irrational, or extraordinary. There was nothing highly unusual or suspect about the County's action to adopt the Ordinance Amendment. It did not use truly flagrant means of assigning regulations. It did not flip a coin to make its decision or decide that only companies with the initials "M.S." could not engage in certain mining operations. Instead, it held a number of public hearings and gathered volumes of information both in favor of and against imposing additional regulations on mining operations in the County. It debated several iterations of ordinance language and contemplated changing nothing at all. The County simply did not act in any manner rising to the level of constitutional impropriety by enacting the Ordinance Amendment.

And even if the court concludes the lower arbitrary and capricious standard applies to this constitutional claim, Plaintiffs have not met their burden of proving that the Ordinance Amendment violates their substantive due process beyond a reasonable doubt. As addressed at length throughout this memorandum, the County adopted the Ordinance Amendment based on evidence in the record demonstrating that industrial mineral operations pose a risk to the natural landscape, water resources, agriculture, recreation and tourism, open spaces, infrastructure, neighboring land uses, and the public health, safety and welfare. The County reasonably concluded that limiting mining operations to construction mineral operations, which do not entail the same level risk and intensive use of land, would mitigate these risks and promote the health, safety, and welfare of the community. The regulation of mining operations corresponds with the values and authority set forth in the WCZO, Comp Plan, and state law. As such, the Ordinance

Amendment is not arbitrary, capricious, or unreasonable and rationally relates to the public purpose it seeks to serve. Plaintiffs cannot establish that the Ordinance Amendment constitutes a violation of substantive due process under this low standard.

In summary, because Plaintiffs cannot meet their burden of proving a substantive due process violation beyond a reasonable doubt, the court must dismiss their substantive due process claims and render judgment as a matter of law in favor of the County.

VIII. The Ordinance Amendment Does Not Violate the Dormant Commerce Clause.

Plaintiffs further claim the Ordinance Amendment is unconstitutional because it violates the dormant commerce clause. The Commerce Clause of the United States Constitution "has long been interpreted to contain an implied negative command, called the Dormant Commerce Clause, that states may not unduly burden or discriminate against interstate commerce." *Matter of Griepentrog*, 888 N.W.2d 478, 494 (Minn. App. 2016) (citing *Chapman v. Comm'r of Revenue*, 651 N.W.2d 825, 832 (Minn. 2002)). The dormant commerce clause "reflects concerns over economic protectionism: regulatory measures that are designed to benefit in-state economic interests by burdening out-of-state competition." *Id*. (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)).

Courts employ a two-part test to determine whether a legislative enactment violates the dormant commerce clause. First, the court examines "whether the challenged [regulation] implicates the Commerce Clause." *Id*. (citing *Chapman*, 651 N.W.2d at 832). If the regulation implicates the Commerce Clause, the court then examines whether it violates the Commerce clause by discriminating against interstate commerce or excessively burdening interstate commerce. *Id*. (citing *Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 94 (Minn. 2015)).

> If it discriminates against interstate commerce, it is not valid unless it furthers a legitimate local purpose that cannot be adequately served by reasonable

> alternatives that are nondiscriminatory. [*Swanson*] at 93. But if it "'regulates evenhandedly to effectuate a legitimate public interest'" and has only an incidental effect on interstate commerce, the law "'will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* at 94 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Id. As a dormant Commerce Clause challenge seeks to overturn a legislative decision on the basis that it is unconstitutional, Plaintiffs carry the heavy burden of demonstrating such unconstitutionality beyond a reasonable doubt. *Id*. at 486 (citing *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 421 (Minn. 2005)).

A. The Ordinance Amendment does not implicate the Commerce Clause because industrial sand producers and construction sand producers are not competitors in commercial markets.

This case falls under the category of Commerce Clause cases in which the regulated entities are "operators in arguably distinct markets." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). The very nature of "discrimination assumes a comparison of substantially similar entities." *Id*. at 298. Thus, there is a threshold question of whether the two entities are similarly situated in the interstate markets.

> This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. If in fact that should be the case, eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.

Id. at 299. Plaintiffs have failed to show that sand used in local construction projects is part of the same economic market as sand sold for use as a proppant in natural gas extraction. Because the competition occurs in different markets, the Commerce Clause is not implicated.

In conducting this threshold analysis, the U.S. Supreme Court has explained that products that serve separate markets "did not compete with one another, and thus could not properly be

compared for Commerce Clause purposes." *Gen. Motors Corp.*, 519 U.S. at 300 (citing *Alaska v. Arctic Maid*, 366 U.S. 199 (1961)). In *Arctic Maid*, the court examined a tax assessed for fish sent to freezer ships and frozen for transport to canning facilities that was not assessed on fish caught in the same water that was sent to on-shore freezer facilities for the domestic fresh-frozen fish market. Even though the basic product—Alaskan salmon—was the same, the court found the freezer ship operators were selling in a different market than the on-shore fresh-frozen distributors.

Similarly, in *General Motors Corp.*, the court considered natural gas that was provided to consumers as a bundled product via local distribution companies ("LDCs") and natural gas that was sold by national marketers. Once again, the court found that the LDCs serving a captive local market operated in a different market than the market for high-volume natural gas marketing companies. *Id*. at 302. The LDC's sold bundled products directly to consumers and were "not susceptible to competition by the interstate sellers." *Id*. at 303.

As in *General Motors*, the County has a legitimate interest in protecting its local captive market "from the effects of competition for the largest consumers" based on "the common sense of our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles." *Id*. at 306. Local buyers of construction minerals using sand for construction or animal bedding are simply not involved in the same significant scale of market transactions as oil producers looking for "monocrystalline silica sand that meets the American Petroleum Institute (API) specifications for use as a proppant in the hydraulic fracturing of oil and gas wells." Dustman Aff. ¶ 19 (Dolan Aff. Ex. 8). The silica sand in Winona County has "unusually high" crush resistance which "increases the demand for and value of the sand." *Id*. at ¶ 20. Mr. Frick acknowledges that Minnesota Sands suspended its

prior environmental review process "due to disappointing and unfavorable market conditions for silica sand," but Minnesota Sands has since renewed its interest because "the silica sand market has drastically improved and is forecasted to remain very strong for the foreseeable future." Frick Aff. ¶¶ 47-48 (Dolan Aff. Ex. 9).

Mr. Frick further acknowledges that he is not interested in participating in the separate market for local construction materials because "such mining is not economically viable given the anticipated capital investments needed to get these mines into operation." Frick Aff. ¶ 60. In making this observation, Mr. Frick effectively concedes that there are two markets at play—one nationwide market for silica sand in which he is willing to make capital investments, and one for local construction materials in which he is not interested in participating. This distinction between markets is further highlighted by John Manes' Affidavit, which only examines values of Industrial Sand Minerals. *See* Manes Aff. ¶ 7 (Dolan Aff. Ex. 24).

Because silica sand sold as a construction mineral and silica sand sold as an industrial mineral operate in separate commercial markets, the Commerce Clause is not implicated by the Ordinance Amendment.

B. The Ordinance Amendment does not burden interstate commerce.

Even if the court were to find that the Ordinance Amendment implicates the Commerce Clause, the next step would be to determine whether it violates the Commerce Clause by discriminating against or excessively burdening interstate commerce. *Griepentrog*, 888 N.W.2d at 494, *citing Swanson*, 870 N.W.2d at 94. Discrimination against interstate commerce occurs where there is "differential treatment of in-state and out-of-state economic interests." *Oregon Waste Sys., Inc. v. Dep't of Env. Quality of Oregon*, 511 U.S. 93, 99 (1994). Such facial discrimination has been found where out-of-state competitors are subject to higher fees than in-

state operators, *e.g. Or. Waste*, or where products are expressly prohibited from being sold outside a state, *e.g. Hughes v. Oklahoma*, 441 U.S. 322 (1979). Here, there is no such facial prohibition—the Ordinance Amendment does not prohibit or increase the burden on out-of-state operators who seek to mine sand within the County, nor does the Ordinance Amendment prohibit sand from leaving the state as suggested by Plaintiffs.[14] Thus, strict scrutiny is the improper standard to apply in evaluating the Ordinance Amendment.

Similarly, the Ordinance Amendment does not unduly burden interstate commerce in its effect. The Ordinance Amendment does not promote economic protectionism in the manner for which governmental entities have been reprimanded by the courts, such as preserving resources for use within a state to the detriment of interstate markets. *See, e.g., Sporhase v. Nebraska*, 458 U.S. 941 (1942) (prohibiting sale of groundwater out-of-state). The prohibition on industrial mining is not to preserve those resources for in-state use, but rather due to a multitude of local concerns about the extraction and processing of such resources.

C. If the Ordinance Amendment Burdens Interstate Commerce, such Burden is Only Incidental and has a Legitimate Local Purpose.

As addressed at length throughout this memorandum, the County had many reasons for adopting the Ordinance Amendment, including to protect natural landscapes, water and other natural resources, public health, and community wellbeing. Moreover, the Ordinance Amendment specifically permits industrial minerals to be transported through the County. Findings, ¶ 57. The Ordinance Amendment was adopted to promote the health, safety, and welfare of County citizens, while respecting interstate commerce. Findings, ¶ 58.

[14] Both Plaintiffs repeatedly assert that the Ordinance Amendment prohibits transportation of sand out-of-state. Although "local construction purposes" implies some geographic limitation, the term "local" is not defined in the Zoning Ordinance. Giving the term "local" its logical and plain meaning, the Ordinance Amendment permits construction materials to be used in Wisconsin, which directly borders the County. *See also* Johnson Aff. ¶14.

When a governmental entity makes a legislative decision in the interest of health, safety and welfare, such determinations are traditionally granted significant deference. This significant local purpose far outweighs any minimal effect on the out-of-state commercial mineral markets. Plaintiffs have fallen woefully short of proving beyond a reasonable doubt that the Ordinance Amendment violates the dormant Commerce Clause.

IX. The Ordinance Amendment Does Not Effect a Taking of Minnesota Sands' "Property."

The Ordinance Amendment does not effect a taking of Minnesota Sands' property.[15] "[T]he right to use property as one wishes is subject to and limited by the proper exercise of the police power in the regulation of land use." *McShane v. City of Faribault,* 292 N.W.2d 253, 257 (Minn.1980) (citing *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926)). Both the Minnesota and United States Constitutions prohibit the taking of private property for public use without just compensation. U.S. Const. amend. V; Minn. Const. art. I, § 13.

The U.S. Supreme Court has acknowledged that where a governmental regulation deprives an owner of real property of "all economically beneficial use," the owner is entitled to just compensation consistent with the Fifth Amendment. *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). However, such cases co-exist with holdings that "land use regulation does not effect a taking if it substantially advance[s] legitimate state interests." *Id*. at 1024, (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (alteration in original; additional quotations omitted)). "[R]easonable land use regulations do not work a taking." *Murr v. Wisconsin*, 582 U.S. __, 137 S. Ct. 1933, 1946 (2017) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001)). At its core, regulatory takings jurisprudence seeks "to

[15] SMPO asserts a facial takings claim as Count III of its Complaint, but did not brief the issue of a takings claim. The arguments the County makes against Minnesota Sands are equally applicable to SMPO and the County is entitled to summary judgment against all Plaintiffs on this claim.

reconcile two competing objectives central to regulatory takings doctrine: the individual's right to retain the interests and exercise the freedoms at the core of private property ownership, and the government's power to adjust rights for the public good." *Murr*, 137 S.Ct. at 1937 (internal citations and quotations omitted).

A. There has not been a compensable "total taking" pursuant to *Lucas*.

1. Minnesota Sands never had the right to mine the affected property.

Even if, as Plaintiff alleges, there has been a "complete deprivation of use" of their leased property, no compensation is required "if the challenged limitations 'inhere... in the restrictions that background principles of the State's law of property and nuisance already placed on land ownership.'" *Murr*, 137 S. Ct. at 1937 (quoting *Lucas*, 505 U.S. at 1029). In other words, a compensable taking only exists where the landowner's "bundle of rights," as it existed at the time of the alleged taking, "previously included the right to engage in the restricted activity." *Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690, 694 (8th Cir. 1996). For example, the owner of a lake bed who is denied a permit to fill in the land because such action would flood neighboring properties is not entitled to compensation because such nuisance activity was never permitted. *Lucas*, 505 U.S. at 1029. As the U.S. Supreme Court explained in *Lucas*:

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

Id. at 1029-20. Stated another way, "[t]he takings clause was never intended to compensate property owners for property rights they never had." *Wensmann Realty*, 734 N.W.2d at 635.

In this case, Minnesota Sands has *never* had the right to mine on *any* of its leased properties. Prior to adopting the Ordinance Amendment, mining was a conditional use in certain areas. WCZO § 9.10 This means that, although Minnesota Sands had the ability to *apply* for a conditional use permit, it never actually had the ability to mine these properties. More critically, Minnesota Sands is subject to environmental review by the EQB prior to being able to mine.[16] Minnesota Sands never had the required EQB approval to mine the affected properties either. *See* Minn. Sands Ans. to Int. No. 9 ("Minnesota Sands intends to mine all of its leased properties in Winona County… as soon as practicable upon completion of required environmental review and permitting requirements.")

Moreover, courts do not engage in the practice of severing portions of property to determine whether a taking has been effected. In *Penn Central*, the U.S. Supreme Court declined to consider the property owner's air rights as distinct from the property itself, noting:

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a specific segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses both on the character of the action and on the nature of the interference with rights in the parcel as a whole.

Penn Central Transp. Co v. New York City, 438 U.S. 104, 130-31 (1978). Similarly, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987), the court refused to consider coal that had not yet been mined as a "separate parcel of property." If courts allowed property owners to slice property into discrete parts for takings analysis, then ordinary zoning measures such as setback requirements and impervious surface percentages would be deemed takings. *See id.* ("[O]ne could always argue that a setback ordinance…constitutes a taking because the footage represents a distinct segment of property for takings law purposes."). Similarly, courts

[16] Pursuant to Minnesota Statutes Section 116D.04, subd. 2b, if an EIS is required, "a project may not be started, and a final government decision may not be made to grant a permit, approve a project, or begin a project, until…the environmental impact statement has been determined adequate."

will not carve out portions of time during which a temporary taking occurred and order compensation for such a taking.[17] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002). In asking the court to analyze the leased property as a separate slice of property distinct from the parcel as a whole contradicts the theory behind a takings analysis regarding other, potentially less economically viable, uses of a property.

2. *In the alternative, the Ordinance Amendment has not deprived Minnesota Sands of "all economic value."*

Under the challenged Ordinance Amendment, and with proper approvals, Minnesota Sands could engage in construction mineral operations under its current leases. Minnesota Sands attempts to address this legal hurdle by devoting exactly one sentence in its memorandum to baldly assert that it can only conduct "industrial mining" as defined by the Ordinance Amendment under its current leases. This assertion is patently false. Each of the six leases allows Minnesota Sands to mine "frac sand for commercial purposes." Minnesota Sands has failed to offer any explanation why this provision in its leases would prohibit it from mining "frac sand," which it identifies as silica sand, as a "construction mineral." Minnesota Sands repeatedly asserts that "silica sand" defined as an industrial mineral is identical to sand permitted to be used for construction purposes, which means that such sand for construction purposes may be mined pursuant to the leases.

Minnesota Sands appears to believe that "commercial purposes" is automatically equated with "industrial mining," but there is absolutely no basis for this conclusion. Black's Law Dictionary contains seven definitions for the adjective "commercial," and the definitions

[17] The *Lucas* total-takings analysis has only been applied where the person seeking compensation has a fee-simple interest in the entire parcel of property. "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U. S. 51, 65-66 (1979). Here, the fact that Minnesota Sands has placed itself into the position that any taking must constitute a "total" taking should not be construed against the County by the Court declaring the silica sand as a separate resource from the land itself.

overwhelmingly rely on an interpretation that "commercial" means "[o]f, relating to, or involving the buying and selling of goods." Black's Law Dictionary, 10th Ed. 2014.[18] Mining and selling silica sand, as a construction mineral, would plainly fulfill the contract requirement of mining frac sand for commercial purposes.

B. Under the *Penn Central* test, Minnesota Sands did not have distinct investment-backed expectations when it entered into its mining leases.

Because Minnesota Sands has asserted a "total" taking, *Lucas* is the proper test to apply. However, if the court chooses to analyze Minnesota Sands' claim as a partial taking, Minnesota courts apply the three-part *Penn Central* test. *See Wensmann Realty, Inc.*, 734 N.W.2d at 632. Under *Penn Central*, the result is largely dependent "upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005). In "limited circumstances" government regulation "goes too far" and results in a taking. *Wensmann Realty*, 734 N.W.2d at 632 (*citing Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1996)). This is plainly not a case where the Ordinance Amendment have gone "too far."

1. The Economic Impact of the Regulation Favors the County.

The first *Penn Central* factor considers the economic impact of the regulation. *Wensmann Realty*, 734 N.W.2d at 634. There has been no alteration in Plaintiffs' economic position because Minnesota Sands never had permission to mine the property in the first place. *See McNulty Const. Co. v. City of Deephaven*, A09-1625, 2010 WL 2899142 at *4 (Minn. App. July 27, 2010) (finding the economic value factor to favor the municipality when the result of its zoning action was that a previously unbuildable lot remained unbuildable). And in considering

[18] Only the sixth definition could even potentially be considered as support for Plaintiffs' position, as it states "[p]roduced or sold in large quantities." Black's Law Dictionary, 10th Ed. 2014. However, as Plaintiffs point out, "construction minerals" may be mined in large quantities.

the economic impact of the regulation, the court can consider the possibility that Minnesota Sands "could have disposed of the property and mitigated the severity of the regulatory action." *Wensmann Realty*, 734 N.W.2d at 637 (quoting *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 903 (Fed. Cir. 1986)). Here, Minnesota Sands has minimal obligations under the property leases until it begins mining operations. If it never obtains approval to mine, it is responsible only for minimal payments made to secure each lease. And, since Minnesota Sands never had the right to mine the leased property, only these minimal payments should be considered economic loss – not the potential minerals to which Minnesota Sands never had legal access.

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

The second factor examines whether the County Ordinance interferes with Plaintiff's "distinct investment-backed expectations." *Wensmann Realty*, 734 N.W.2d at 637 (citing *Penn Central*, 438 U.S. at 124). "[T]he existing and permitted uses of the property when the land was acquired generally constitute the 'primary expectation' of the landowner regarding the property." *Id*. When an owner acquires property with "knowledge of restrictions upon development of the property, he assumes the risk of any economic loss." *Id*. at 638 (quoting *Atlas Enters. Ltd. P'ship v. United States*, 32 Fed. Cl. 704, 708 (Fed. Cl. 1995)) (internal quotation omitted).

In support of its investment-backed expectations, Minnesota Sands asserts that at the time Mr. Frick entered into the original leases, "a CUP was being submitted to Winona County on behalf of what eventually became the Nisbit mine." Minnesota Sands' Memo, 43-44. As the sole asserted basis for and its proof of reasonable "distinct investment-backed expectation," this justification is laughable. First, the mere fact that a CUP application has been submitted by another party on a different parcel of property has absolutely no bearing on whether it will be granted. *See Continental Property Grp. v. City of Minneapolis*, 2011 WL 1642510, at *4 (Minn.

App. May 3, 2011) (opining that an applicant "was not entitled to a CUP simply because it otherwise complied with the ordinance and filed an application" because such an automatic right would render the distinction between conditional and permitted uses meaningless). Second, and more importantly, the public record shows that Mr. Frick knew at least as early as October 20, 2011 that a CUP for sand mining would be difficult to obtain in the County.[19]

On October 20, 2011, the Planning Commission considered requests for three CUP applications for sand mining operations. *See* Ex. AA. At this meeting, the Planning Commission discussed the possibility of a moratorium on silica sand mining. Ex. AA, 5. All three of those CUP applications were tabled to the following meeting to allow staff more time to answer questions. Ex. AA, 9, 11, and 13. Mr. Frick was present for at least part of this meeting as an "agent" for the sites. Ex. AA, 10.

At the following Planning Commission meeting on November 17, 2011, the Planning Commission moved to table all three of the CUP applications for an additional ninety days. Ex. BB. At this point in time, no CUP had been issued to *anyone* seeking to mine silica sand in Winona County. Johnson Aff. ¶5. Despite this uncertainty, Mr. Frick entered into leases on November 16, 2011 (Dolan Ex. 14); November 17, 2011 (Dolan Ex. 11); November 18, 2011 (Dolan Ex. 15); November 21, 2011 (Dolan Ex. 12); and November 23, 2011 (Dolan Ex. 10). Based on these leases, to date Minnesota Sands has invested minimal funds in the properties.

Moreover, with respect to Minnesota Sands' purchase agreements for property on which to operate a transloading facility, there can be absolutely no argument that Minnesota Sands expected to use such properties for processing silica sand. The purchase agreements were entered into in May 2017 – long after the Ordinance Amendment had been adopted.

[19] By 2011, Mr. Frick had already faced public backlash to his silica sand mining proposals in Houston and Fillmore Counties.

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

The final *Penn Central* factor considers the "character of the government action." *Wensmann Realty*, 734 N.W.2d at 639. This factor examines "whether the regulation is general in application or whether the burden of regulation falls disproportionately on relatively few property owners." *Id*. Here, the Ordinance Amendment applies to the entire County and does not single out a few landowners. This factor weighs in favor of the Ordinance Amendment's validity.

All in all, Plaintiffs have failed to meet the significant burden to show beyond a reasonable doubt that the Ordinance Amendment has effected a taking of their property without just compensation.

CONCLUSION

For the reasons set forth above, the County's Motion to Dismiss, or, in the Alternative, for Summary Judgment should be granted and all claims against it dismissed with prejudice.

RUPP, ANDERSON, SQUIRES AND WALDSPURGER, P.A.

Dated: August 21, 2017

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RASW: 92281

Filed in Third Judicial District Court
5/8/2017 1:24:46 PM
Winona County, MN

STATE OF MINNESOTA

COUNTY OF WINONA

DISTRICT COURT

THIRD JUDICIAL DISTRICT

Case Type: Civil Other

Minnesota Sands, LLC, Plaintiff, v. County of Winona, Minnesota, a political subdivision of the State of Minnesota, Defendant.	Civil File No. 85-CV-17-771 The Honorable Mary C. Leahy **SECOND AMENDED COMPLAINT**

Pursuant to Minn. R. Civ. P. 15.01, Plaintiff Minnesota Sands, LLC, for its Second Amended Complaint against Defendant County of Winona, states and alleges as follows:

THE PARTIES

1. Plaintiff Minnesota Sands, LLC ("Minnesota Sands") is a Minnesota limited liability company with its registered address at 30544 Valley View Road, Dakota, MN 55925–4122, USA.

2. Defendant County of Winona (the "County") is a political subdivision of the State of Minnesota, organized under the laws of the State of Minnesota.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action under Minn. Stat. § 484.01, which gives district courts original jurisdiction over all civil actions in their districts, and Minn. Stat. § 555 *et seq.*, the Uniform Declaratory Judgments Act, under which district courts may determine "any question of construction or validity arising under … statute, ordinance, [or] contract." Minn. Stat. § 555.02.

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4. Venue is proper in Winona County District Court because the Defendant County is a political subdivision of the state located in Winona County and Plaintiff owns leases for property in Winona County containing industrial silica sand resources and seeks to mine and process industrial silica sand resources in Winona County. *See* Minn. Stat. § 542 *et. seq.*

BACKGROUND FACTUAL ALLEGATIONS

A. Silica Sand

5. Silica sand, commonly referred to by the oil and gas industry as "frac sand," is used as a proppant in oil and gas production activities.

6. In recent years, technology has advanced to the point where oil and gas wells can use a combination of a hydraulic fracturing process (commonly known as *fracking*) and directional drilling to take previously unproductive tight geologic formations (e.g., sandstone, shale, and carbonate) and convert them into large, productive reservoirs.

7. In these formations, the fracking process pumps a mixture that includes water and sand into formations under high pressure to release trapped reserves of hydrocarbons.

8. The pressurized "hydraulic" mixture "fractures" portions of the formation and the sand props or keeps the fractures open so that gas and oil flow from the formation to the wellhead. Sand and man-made materials used to prop these fractures open are known as "proppants."

9. According to the Minnesota Department of Natural Resources, silica sand has been mined in Minnesota and Wisconsin for more than 100 years.

10. The sand under lease by Minnesota Sands is unique because it has high crush resistant, sphericity and roundness, low turbidity, and a preferred grain size, making it extremely valuable for use in energy production.

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11. While the regional silica sand is an excellent proppant in the hydraulic fracturing process, the oil and gas production activities in which Minnesota silica sand is ultimately used are out-of-state, as there is not a significant oil or gas reserve in Minnesota.

B. The Winona County Ordinance

12. On April 26, 2016, the Winona County Board ("Board") voted 3-2 to direct the County Planning and Environmental Services Department ("PSED") and County Attorney's office to prepare an amendment to the Winona County Zoning Ordinance ("WCZO") banning silica sand mining operations in Winona County based on model language that had been included in the Board's meeting agenda.

13. The model language for the silica sand ordinance amendment, submitted by the Land Stewardship Project, proposed banning all mining of silica sand that would be used for exploration, drilling, and recovery of oil and gas, but allowing mining of silica sand that would be used for construction, agriculture, or other uses (the "LSP Amendment"). A true and correct copy of the LSP Amendment is attached as **Exhibit 1**.

14. On June 3, 2016, the Winona County Attorney submitted to the Board a memorandum entitled "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" ("County Attorney's June Memo"). A true and correct copy of the memorandum is attached as **Exhibit 2**.

15. Included in the County Attorney's legal analysis was a model ordinance that modified the LSP Amendment "for greater viability" (the "Proposed Amendment"). *See* **Ex. 2** at Appendix B. The Proposed Amendment, however, like the LSP Amendment, banned all silica sand mining and processing for industrial purposes within Winona County.

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16. The County Attorney's Proposed Amendment also essentially retained the distinction in the LSP Amendment between silica sand to be used in oil and gas operations and silica sand to be used in construction and agriculture. *See* **Ex. 2** at App. B.

17. The County Attorney's Proposed Amendment provided more nuanced distinctions and sophisticated definitions, but ultimately, whether silica sand could be mined, processed, or transported within Winona County depended on the end use of the sand, which could be hundreds or thousands of miles away.

18. On June 30, 2016, the Winona County Planning Commission ("WCPC") met for the purpose of hearing public testimony on the proposed changes to the WCZO related to certain silica sand mining operations.

19. On August 11, 2016, the WCPC recommended in a 5-3 vote that the Board adopt a modified form of the Proposed Amendment (the "WCPC Recommendation").

20. The WCPC Recommendation would limit any new or proposed expanded project for the excavation or mining of industrial minerals to 40 acres in total boundary size of the property to be excavated or mined, without reclamation of previously mined acreage.

21. The WCPC Recommendation would also prohibit any more than six mining sites for the excavation and mining of industrial minerals, from operating at any one time in Winona County. If six mining sites for the excavation and mining of industrial minerals were in operation, no permit would be issued to any proposed new projects for the excavation and mining of industrial minerals until at least one of the existing mining sites became officially inactive.

22. On August 23, 2016, the Board received the WCPC Recommendation and voted to forward it to the County Attorney for review.

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23. An October 4, 2016, memorandum from the County Attorney to the Board was included in the Board's October 11, 2016 Agenda (the "October Memorandum"). A true and correct copy of the October Memorandum is attached as **Exhibit 3**.

24. The October Memorandum discussed four ordinance options: (1) a blanket ban, like the Proposed Amendment, (2) a plan that would limit the number of mines and the size of the mines, like the WCPC Recommendation, (3) a "hybrid option" that would create a new chapter in the WCZO on mineral extraction, and (4) no action. *See* **Ex. 3** at 28-30.

25. On October 13, 2016, the Board held a public hearing on the proposed changes to the WCZO. Members of the public spoke out against and in favor of the proposed changes.

26. On October 25, 2016, the Board rejected the other alternatives presented by the County Attorney and voted to adopt a blanket ban on silica sand mining for so-called "industrial purposes."

27. On November 22, 2016, the Board formalized the ban and approved and adopted the "Procedural History, Findings of Fact, Conclusions, and Adoption of Zoning Ordinance Amendment" (the "Board's Findings"). A true and correct copy of the Board's Findings is attached as **Exhibit 4**.

28. A copy of the adopted ordinance (the "Ordinance") is included in the Board's Findings. *See* **Ex. 4** at 138-140.

29. The Ordinance prohibits the excavation, processing, storing, and hauling of so-called "industrial minerals" mined in Winona County but does not prohibit these activities for so-called "construction minerals". **Ex. 4** at 138-139. The Ordinance further prohibits the processing and storing of "industrial minerals" regardless of where the silica sand was originally mined. *Id.*

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30. Industrial minerals are defined in the Ordinance as including: "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 as defined above." **Ex. 4** at 138 (emphasis added).

31. Of the "industrial minerals" identified in the Ordinance, silica sand is the only industrial mineral known to exist in Winona County in significant enough volumes to create a significant demand to mine.

32. The Ordinance defines "silica sand" as "well-rounded, sand-sized grains of quartz (silicon dioxide), with very little impurities in terms of other minerals" and "commercially valuable for use in the hydraulic fracturing of shale to obtain oil and natural gas." **Ex. 4** at 138.

33. "Construction minerals" are defined in the Ordinance as including: "natural common rock, stone, aggregate, gravel and **sand that is produced and used for local construction purposes**, including road pavement, unpaved road gravel or cover, concrete, asphalt, building and dimension stone, railroad ballast, decorative stone, retaining walls, revetment stone, riprap, mortar sand, construction lime, agricultural lime and bedding sand for livestock operations, sewer and septic systems, landfills, and sand blasting." **Ex. 4** at 138 (emphasis added). The term also explicitly excludes "industrial minerals" from the definition of "Construction minerals."

34. Other than their end uses, "silica sand" and sand identified as a "construction mineral" do not differ in any material way. The composition of the two types of sand and the methods used to mine, process, and transport both types of sand are in all relevant respects the same.

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C. Impact of the Ordinance on Minnesota Sands

35. Minnesota Sands was founded in 2012 by Richard Frick. Before founding the company, Mr. Frick worked in farming, trucking and, most recently, in agricultural transportation, logistics, and facilities operations. In his role in transloading trucks and railcars, Mr. Frick became aware of the value certain types of silica sand have in the oil and gas industry.

36. Based on his knowledge of local geology, Mr. Frick began locating and testing potential sand mine sites in 2011. His extensive testing and evaluation found sand from certain sites in the area to have qualities and characteristics that makes it ideal for use in hydraulic fracturing. To take advantage of these qualities and characteristics, Mr. Frick created Minnesota Sands.

37. Minnesota Sands acquires, owns, and develops silica deposits to produce custom sand proppants using high quality Minnesota quartz and substrates for customers in the energy industry.

38. Minnesota Sands currently holds leases to over 3,732 acres of land in southern Minnesota with over 250 million tons of high quality, monocrystalline silica sand that meets the American Petroleum Institute (API) specifications for use as a proppant in the hydraulic fracturing of oil and gas wells.

39. The sand includes 20/40 (425-850μm), 30/50 (300-600μm), and 40/70 (212-425μm) sand that can be used in both shallow and deep settings and has crush resistance as high as 12,000 psi in some instances. This crush resistance is unusually high and increases the demand for and value of the sand.

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40. Typically, the mineral leases held by Minnesota Sands allow the company to use the leased premises solely to mine silica sand to be used by Minnesota Sands for commercial purposes.

41. In Winona County alone, Minnesota Sands holds six leases to mine approximately 1,946 acres of land with over 144 million tons of high quality silica sand.

change from seven in original complaint

42. At the recent average market price of $25 per ton, the silica sand under lease by Minnesota Sands in Winona County alone has a present market value of at least $3.60 billion. Industry experts anticipate demand will push the average market price of silica sand to $40 per ton over the next 18 months, resulting in an anticipated market value of $5.76 billion.

43. The demand for silica sand has risen dramatically in recent years as an increasing number of oil and natural gas wells use the hydraulic fracturing process. A single well using hydraulic fracturing can use a few thousand tons of silica sand. The surge of specialized drilling has created a multi-billion dollar silica sand industry in just a few years.

44. The Ordinance prohibits the excavation, extracting, and mining of all silica sand under lease by Minnesota Sands in Winona County. Accordingly, Minnesota Sands now has no economically viable use for any of its leases in the County.

45. In addition to its leases, the company's assets include agreements to use and/or purchase sites for rail transloading purposes.

46. Primary among these is a 304-acre farm in Winona County that was previously designed and approved as an agricultural rail transloading site and is directly adjacent to the Canadian Pacific main line.

47. The Company has worked diligently with the Canadian Pacific Railroad to design a track that will support Minnesota Sands' anticipated sand production. The designed unit

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train-capable outbound facility has expandability and can support high volume loading to maximize locomotive and railcar utilization to improve velocity on the Canadian Pacific Railroad.

48. Minnesota Sands' business plan identifies this rail transloading site as the most cost-effective and efficient location to process and transport all sand mined or purchased by Minnesota Sands, including, but not limited to, silica sand mined in Winona County. This site in Winona County is the most cost-effective and least intrusive transportation option given its proximity to the company's leased assets and the Canadian Pacific Railroad.

49. The Ordinance also prohibits the processing, storing, and stockpiling of silica sand owned or mined by Minnesota Sands, regardless of its source. Accordingly, Minnesota Sands will either be unable to process, store, or stockpile silica sand mined outside of Winona County or it will incur significantly higher costs to do so.

50. Although the Ordinance permits "sand that is produced and used for local construction purposes" to be transported through Winona County, the same sand cannot be transported through the County if it is mined in the County and is not produced or used solely for these local purposes. *See* **Ex. 4** at 138.

COUNT I
Denial of Right of Equal Protection
(United States Constitution, Fourteenth Amendment; 42 U.S.C. § 1983)

51. Plaintiff incorporates the foregoing paragraphs as if fully stated herein.

52. Defendant, acting under color of state law, has deprived Plaintiff of the rights, privileges, or immunities secured by the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, in that the Defendant, without justification, has treated Minnesota Sands differently than other similarly situated sand mining companies.

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53. Defendant's Ordinance arbitrarily singles out entities that mine, process, and transport silica sand for industrial applications, including hydraulic fracturing. These entities, including Minnesota Sands, are subjected to differential and adverse treatment on the basis of Defendant's disapproval of hydraulic fracturing that takes place hundreds or thousands of miles away.

54. Defendant has no rational basis for treating Minnesota Sands differently than a similarly situated mining operations producing sand for local construction purposes.

55. As an actual and proximate result of Defendant's conduct, Minnesota Sands has been injured and suffered damages exceeding $50,000 to be determined according to proof.

56. Plaintiff is entitled to damages and a declaratory judgment from the Court that the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Minnesota Sands requests judgment in its favor against Defendant as set forth in the Request for Relief.

COUNT II
Denial of Right of Equal Protection
(Minnesota Constitution, Article 1, Section 2)

57. Plaintiff incorporates the foregoing paragraphs as if fully stated herein.

58. Defendant, acting under color of state law, has deprived Plaintiff of the rights, privileges, or immunities secured by the Equal Protection Clause of Article 1, Section 2, of the Minnesota Constitution, in that the Defendant, without justification, has treated Minnesota Sands differently than other similarly situated sand mining companies.

59. Defendant's Ordinance arbitrarily singles out entities that mine, process, and transport silica sand for industrial applications, including hydraulic fracturing. These entities, including Minnesota Sands, are subjected to differential and adverse treatment on the basis of

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Defendant's disapproval of hydraulic fracturing that takes place hundreds or thousands of miles away.

60. Defendant has no rational basis for treating Minnesota Sands differently than a similarly situated mining operations producing sand for local construction purposes.

61. As an actual and proximate result of Defendant's conduct, Minnesota Sands has been injured and suffered damages to be determined according to proof.

62. Plaintiff is entitled to damages exceeding $50,000 and a declaratory judgment from the Court that the Ordinance violates the Equal Protection Clause of the Minnesota Constitution. Minnesota Sands requests judgment in its favor against Defendant as set forth in the Request for Relief.

COUNT III
Denial of Right to Due Process
(United States Constitution, Fourteenth Amendment; 42 U.S.C. § 1983)

63. Plaintiff incorporates the foregoing paragraphs as if fully stated herein.

64. The Due Process clause of the Fourteenth Amendment to the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Canst. amend. XIV, §l.

65. The United States Supreme Court has recognized that "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005).

66. The County's distinction in its Ordinance between "construction materials" and "industrial minerals" is arbitrary and capricious and fails to serve any legitimate government objective. As for quartz sand found in the County, this distinction is based solely on the mineral's ultimate use.

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67. Prohibiting the mining, processing, and transportation of sand based solely on its ultimate end use is also an arbitrary and irrational restriction on Plaintiff's property rights in a manner that violates the Due Process Clause of the United States Constitution.

68. Plaintiff is entitled to damages exceeding $50,000 and a declaratory judgment from the Court that the Ordinance violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Minnesota Sands requests judgment in its favor against Defendant as set forth in the Request for Relief.

COUNT IV
Denial of Right to Due Process
(Minnesota Constitution, Article I, Section 7)

69. Plaintiffs incorporate herein by reference the allegations made in all preceding Paragraphs set forth above.

70. Article I, Section 7 of the Minnesota Constitution provides that "[n]o person shall be . . . deprived of life, liberty and property without due process of law."

71. The County's distinction in its Ordinance between "construction materials" and "industrial minerals" is arbitrary and capricious and fails to serve any legitimate government objective.

72. Prohibiting the mining, processing, and transportation of sand based solely on its ultimate end use is also an arbitrary and irrational restriction on Plaintiff's property rights in a manner that violates the Due Process Clause of the Minnesota Constitution.

73. Plaintiff is entitled to damages exceeding $50,000 and a declaratory judgment from the Court that the Ordinance violates the Due Process Clause of the Minnesota Constitution. Minnesota Sands requests judgment in its favor against Defendant as set forth in the Request for Relief.

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COUNT V
Violation of Interstate Commerce Clause
(United States Constitution, Article I, Section 8; 42 U.S.C. § 1983)

74. Plaintiff incorporates the foregoing paragraphs as if fully stated herein.

75. The Ordinance unjustifiably discriminates and/or burdens the interstate flow in violation of the Commerce Clause of the United States Constitution because it prohibits the excavation, processing, storing, and hauling of silica sand within Winona County based on the ultimate intended use of that sand. The Ordinance further cites Minn. Stat. 116C.99, subd. 1(d) in its definition of "silica sand," explaining that such sand is generally used for oil and gas applications (which are in other states).

76. The Ordinance also on its face unjustifiably discriminates and/or burdens the interstate flow of commerce in violation of the Commerce Clause of the United States Constitution because it allows the excavation, processing, storing, and hauling of certain sands for "local construction purposes," mostly in-state, but explicitly prohibits these activities for the same sand for industrial applications that are mostly outside the state.

77. There is no valid local purpose for this discrimination, as the same sand is allowed to be mined for non-oil and gas purposes.

78. Plaintiff is entitled to damages exceeding $50,000 and a declaratory judgment from the Court that the Ordinance violates the Commerce Clause, Article I, Section 8, of the United States Constitution. Minnesota Sands requests judgment in its favor against Defendant as set forth in the Request for Relief.

COUNT VI
Inverse Condemnation
(Article I, Section 13 of the Minnesota Constitution;
Fifth and Fourteenth Amendments of the United States Constitution)

79. Plaintiff incorporates the foregoing paragraphs as if fully stated herein.

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80. As alleged herein, Defendant's Ordinance is not lawful or proper. However, if it is determined that Defendant's Ordinance is lawful and/or proper; Minnesota Sands asserts this inverse condemnation claim.

81. Defendant has the power of eminent domain to acquire property for a variety of public purposes.

82. Defendant's actions as alleged herein constitute a legal and substantial interference and invasion of Plaintiff's use, possession, and enjoyment of its property interests. Defendant's actions also constitute an exercise of dominion and control over Defendant's property interests.

83. Defendant's taking of Plaintiff's property interests without the payment of just compensation is in violation of Article I, Section 13 of the Minnesota Constitution and the Fifth Amendment of the United States Constitution, applicable to the Defendant pursuant to the Fourteenth Amendment.

84. Article 1, Section 13 of the Minnesota Constitution provides that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured."

85. According to the Minnesota Supreme Court, "government regulation of private property may result in a taking even though the government has not directly appropriated nor physically invaded the property." *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 305 (Minn. 2011).

86. The Fifth Amendment to the United States Constitution, applied to Minnesota and its political subdivisions through the Fourteenth Amendment, provides "nor shall private property be taken for public use, without just compensation."

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87. The United States Supreme Court has held that a taking categorically occurs when a regulation "denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

88. Minnesota Sands has a property interest in its leases held in Winona County.

89. Minnesota Sands also has a property interest in its proposed transloading facility in Winona County.

90. Through its Ordinance, the County has denied Minnesota Sands of all economically viable use of its Winona County assets.

91. Through its Ordinance, the County has severely interfered with Minnesota Sands' expectations for development and mining of the leased properties in Winona County.

92. The County did not pay just compensation to Minnesota Sands.

93. The County violated the constitutional rights of Minnesota Sands in taking the value of its leases and other assets without just compensation.

94. As a direct and proximate result of Defendant's unconstitutional taking of Plaintiff's property interests, Plaintiff has experienced substantial loss of value of its property interests in excess of $50,000.

95. Plaintiff is entitled to a writ of mandamus from the Court ordering Defendant to commence condemnation proceedings for the taking of the property rights described above and to provide just compensation to Plaintiff for its regulatory taking pursuant to the Takings Clauses of the Minnesota and United States Constitutions. Minnesota Sands requests judgment in its favor against Defendant as set forth in the Request for Relief.

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COUNT VII
Taking of Property without Compensation
(United States Constitution, Fifth and Fourteenth Amendments; 42 U.S.C. § 1983)

96. Plaintiff incorporates the foregoing paragraphs as if fully stated herein.

97. As alleged herein, Defendant's Ordinance is not lawful or proper. However, if it is determined that Defendant's Ordinance is lawful and/or proper; Plaintiff asserts this claim for damages.

98. Even where private property is taken and/or illegally exacted by the County to serve public purposes, the United States Constitution requires the payment of just compensation.

99. Minnesota Sands has a property interest in its leases held in Winona County.

100. Minnesota Sands also has a property interest in its proposed transloading facility in Winona County.

101. Through its Ordinance, the County has denied Minnesota Sands of all economically viable use of its Winona County assets.

102. The County did not pay just compensation to Minnesota Sands.

103. The County violated the constitutional rights of Minnesota Sands in taking the value of its leases and other assets without just compensation.

104. As a direct and proximate result of Defendant's unconstitutional taking of Plaintiff's property interests, Plaintiff has experienced substantial loss of value of its property interest in excess of $50,000.

105. Pursuant to 42 U.S.C. § 1983, Minnesota Sands is entitled to damages due to Defendant's violation of the Takings Clause of the Fifth Amendment to the United States Constitution, applicable to Defendant pursuant to the Fourteenth Amendment. Minnesota Sands requests judgment in its favor against Defendant as set forth in the Request for Relief.

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COUNT VIII
Violation of Minn. Stat. § 394.25, Uniformity in Zoning Ordinances

106. Minnesota requires uniformity in county zoning ordinances. Minn. Stat. § 394.25, Subd. 3 states, "[a]ll such [zoning] provisions shall be uniform for each class of land or building throughout each district[.]"

107. The principle of uniformity is offended when a zoning ordinance denies a resident use of its property that is expressly permitted as to other property owners in the zoning district.

108. The County enacted a zoning ordinance that prohibits the mining of sand for "industrial" uses while allowing mining of the very same sand for "construction" purposes.

109. The County, in enacting the Ordinance, violated Minn. Stat. § 394.25 by denying county residents, including Minnesota Sands, a use of its property, mining sand, that is expressly permitted as to other residents in the zoning district.

110. The County's enactment of the Ordinance is unreasonable, discriminatory, arbitrary, and bears no relationship to the purpose or purposes sought to be accomplished by the Ordinance.

111. As an actual and proximate result of Defendant's conduct, Minnesota Sands has been injured and suffered damages to be determined according to proof.

112. Plaintiff is entitled to a declaratory judgment from the Court that the Ordinance violates Minn. Stat. § 394.25. Minnesota Sands requests judgment in its favor against Defendant as set forth in the Request for Relief.

WHEREFORE, Plaintiff Minnesota Sands requests relief from the Court as follows:

1. Pursuant to Minn. Stat. § 555.01 and Minn. R. Civ. P. 57, a declaratory judgment that the Ordinance is unlawful and unenforceable as a matter of law because it lacks a rational basis in violation of the equal protection clauses of the Minnesota and United States Constitutions;

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2. Pursuant to Minn. Stat. § 555.01 and Minn. R. Civ. P. 57, a declaratory judgment that the Ordinance is unlawful and unenforceable as a matter of law because it is arbitrary, capricious, and irrational in violation of the due process clauses of the Minnesota and United States Constitutions;

3. Pursuant to Minn. Stat.§ 555.01 and Minn. R. Civ. P. 57, a declaratory judgment that the Ordinance is unlawful and unenforceable as a matter of law because it violates the principle of uniformity set forth in Minn. Stat. § 394.25.

4. An order granting an injunction restraining and enjoining Defendant from enforcing the Ordinance;

5. A judgment awarding damages, in an amount to be determined at trial, for violations of the Equal Protection and Due Process Clauses of the Minnesota Constitution and the Fourteenth Amendment, United States Constitution, pursuant to 42 U.S.C. § 1983;

6. A judgment awarding damages, in an amount to be determined at trial, for violations of the Interstate Commerce Clause, United States Constitution, Article I, Section 8, pursuant to 42 U.S.C. § 1983;

7. A writ of mandamus ordering Defendant to commence condemnation proceedings for the taking of the property rights described above and to provide just compensation to Plaintiff for its regulatory taking pursuant to the Takings Clauses of the Minnesota and United States Constitutions;

8. A judgment awarding just compensation, in an amount to be determined at trial, for a regulatory taking in violation of the Takings Clauses of the Minnesota Constitution and the Fifth Amendment of the United States Constitution, pursuant to 42 U.S.C. § 1983;

9. An award to Minnesota Sands of reasonable attorneys' fees and expert fees for bringing and maintaining this action, including under 42 U.S.C. § 1988 and Minn. Stat. § 117.045 ; and

10. An award to Minnesota Sands of any other and further relief that the Court deems just and proper under the circumstances of this case.

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DATED: May 8, 2017

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ACKNOWLEDGMENT

I hereby acknowledge that sanctions may be awarded pursuant to Minn. Stat. § 549.211, subd. 3, if the court determines that this document violates Minn. Stat. § 549.211, subd. 2.

/s/ Christopher H. Dolan
Christopher H. Dolan