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STATE OF MINNESOTA

COUNTY OF WINONA

DISTRICT COURT

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

ORDER

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

The above-entitled matter came on for a hearing before the Honorable Mary C. Leahy on October 3, 2017, at the Winona County Courthouse, in the City of Winona, State of Minnesota, upon Plaintiffs' Motions for Summary Judgment and Defendant Winona County's Cross Motion to Dismiss, or in the alternative, Motion for Summary Judgment.

Jay T. Squires, Esq., Elizabeth J. Vieira, Esq., and Kristin C. Nierengarten, Esq. appeared on behalf of Defendant Winona County. Gary A. Van Cleve, Esq. and Bryan Huntington, Esq., appeared on behalf of Plaintiffs Southern Minnesota Property Owners and Roger Dabelstein.

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Christopher H. Dolan, Esq. appeared on behalf of Plaintiff Minnesota Sands. Upon all the files, records and proceedings herein, the Court having heard the argument of counsel and being fully advised in the premises,

IT IS HEREBY ORDERED:

1. That the Motions of Defendant Winona County as to all claims of the Plaintiffs are **GRANTED**. All Plaintiffs' claims against Defendant Winona County are **DISMISSED WITH PREJUDICE**.
2. Enclosed is this Court's memorandum of law, incorporated herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

By: Leahy, Mary 2017.11.17 12:53:49 -06'00'
The Honorable Mary C. Leahy
Judge of District Court

I hereby certify that the foregoing Order constitutes the Judgment of the Court.

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MEMORANDUM

On April 26, 2016, The Winona County Board (hereinafter "Board"), in a 3-2 vote, directed the Winona County Planning and Environmental Services Department (hereinafter "PESD") and the Winona County Attorney's Office to prepare a review of a proposed amendment to the Winona County Zoning Ordinance that would ban all "frac" sand mining operations in Winona County. The Winona County Attorney created a revised version of the amendment which was submitted to the Board on June 3, 2016. The revised version of the amendment made no mention of frac or silica sand mining operations on its face. Instead, the proposed ordinance was drafted so as to regulate all mining operations in Winona County.

Specifically, the language distinguished between mining operations for industrial minerals versus mining operations for construction materials, as mirrored by the United States Geological Survey and the land use ordinance in place in nearby Florence Township. The proposed alternative language would disallow industrial mineral mining operations while allowing for construction mineral mining operations, provided such operations passed any and all other applicable regulations.

The Board voted to forward this language on the amendment to the Winona County Planning Commission for review and recommendation pursuant to the Winona County Zoning Ordinance. 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. At that hearing, seventy-six people testified about the Proposed Ordinance Amendment. The Planning Commission continued its discussion of the Proposed Ordinance Amendment at its July 21, 2016 meeting, discussing the additional information it needed before

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it could make a recommendation to the Board and setting a timeline for moving forward to allow adequate time to consider additional information.

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. Testimony continued at the August 11, 2016 Planning Commission meeting with another four individuals addressing the commission. These individuals included County employees; representatives of sand, aggregate, agricultural, environmental, township, and labor union organizations supporting and opposing regulation of industrial mineral mining as well as 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 Silica Sand Rulemaking Advisory Panel. In addition, 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.

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 any kind of mining operations planned for Winona County. The public's primary concern related to air and water quality, tourism and the natural landscape, noise and traffic, and economic impacts. Amy Nankivil, citizen and business owner in Winona County, wrote: "Both the short and long term negative effects of allowing frac mining far outweigh the financial benefit to a very few individuals. The mining, processing, and transporting of frac sand pose myriad problems: from environmental and infrastructure dangers to very real health concerns." Exhibit A to Affidavit of Karen Sonneman, 1. Ann Redig, another citizen wrote: "You know of

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the fragile karst topography in our beautiful SE MN. Also damage to roads, noise and dangerous silica dust make the ban important to our citizens." *Id*, 4. Winona County Citizen Audrey A. Luhmann Helstad also wrote:

> I have witnessed the heavy traffic, the ghastly noise levels, and dirty air for the last four years with the I – 90 road & bridge construction. The noise doesn't leave and it's awful. Horrible, but we knew we had to endure it for four years. No way I could live with that noise, dirt & dust a lifetime.

Id, 5. This is just a sampling of the litany of public comments requesting a ban on industrial mineral mining. The issue clearly resonated with the citizens of Winona County, and it appears the Planning Commission and the Winona County Board understood these concerns.

The Planning Commission received extensive substantive information regarding the known and anticipated impacts of industrial mineral mining, with the primary focus of the information being on the environmental, health, and economic effects of large-scale mining. The Environmental Quality Board provided a report as to the impact of industrial mining on Winona County. 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 industrial mineral mining; analysis conducted by County staff; and commentary from doctors, geologists, and environmental scientists.

After receiving this extensive information about mining operations, the Planning Commission discussed the merits of the Proposed Ordinance Amendment and options for moving forward. Following their discussion and debate, the Planning Commission voted to recommend a compromise zoning amendment for approval by the Board, which would allow for

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industrial mineral operations, but limit the number and size of industrial mines in the County ("Planning Commission Recommendation").

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. It also scheduled a public hearing on the Planning Commission Recommendation. On October 13, 2016, the Board held this public hearing, taking oral comments on the matter, and accepting written comments until October 18, 2016. Over one hundred people spoke at the public hearing and the Board received over one hundred and fifty written submissions. 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. 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 mining.

At its October 25, 2016 meeting, the Board considered its options for amending the mining provisions in the WCZO. 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. 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, findings, a conclusion, and an order for consideration at the following Board meeting. On November 22, 2016, the Board approved a document entitled "Procedural History, Findings of Fact,

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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").

The Ordinance Amendment sets forth definitions for construction minerals, industrial minerals, mining, and mineral processing. It prohibits all industrial mineral operations within the County because the Board found that industrial mining, particularly as it relates to silica sand mining, transportation, and processing operations, will likely have an undesirable impact on air quality, water quality, traffic, road conditions and safety, and natural landscapes.

Plaintiffs' contentions in this litigation are all derived from their belief that there is no difference between construction minerals and industrial minerals or construction mining and industrial mining, and the mineral processes involved in both other than their end use. Simply put, Plaintiffs' believe that the Ordinance Amendment is unlawful because the only difference between the allowed activity of construction mineral mining and the disallowed activity of industrial mineral mining is the end use and that the Ordinance was enacted as a political "anti-frac" measure that is unconstitutional.

The distinction between construction and industrial mining was derived from the information the County obtained from the outlined eight month-long process in crafting the ordinance. For example, in examining the distinction between industrial sand and construction sand for the sake of determining construction minerals and industrial minerals, the county took note and studied such distinction as described by the United States Geological Survey. The County also looked to a similar ordinance from a similarly situated township to their proposed ordinance in making the distinction between such mining operations. This ordinance, the Florence Township Ordinance, was created through a process that found "industrial mineral

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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." The Minnesota Department of Natural Resources also makes a distinction between industrial mineral operations and construction mineral operations.

According to an Environmental Quality Board report created for consideration by the County as to this matter, there are major differences between the operations for mining construction minerals versus industrial minerals. Construction mineral operations tend to involve small mines that engage in only periodic mining activities, which do not involve underground mining, blasting, or chemical processing. Industrial mineral operations involve larger mines in operation for long periods of time that use blasting, underground mining techniques and involve chemical treatment of the mined sand.

In applying these distinctions specifically to sand mining operations, the Environmental Quality Board report found industrial silica sand must meet particular standards for size, shape, purity, and intactness, which is achieved by mining largely through using a chemical flocculent processing and large amounts of water. When the sand does not meet the desired standards for industrial mining, the sand is commonly returned to the mine contaminated with flocculent. None of these issues were found to exist with construction mineral mining according to the same report. The report also took into consideration the boom-bust cycles of silica sand mining, demonstrating that the demand for construction minerals pales in comparison millions of tons of silica sand demanded during volatile boom periods. The associated hauling demands of industrial mines considerably outweigh those of construction mines as well.

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Lastly, the Environmental Quality Board report found that the sites for specifically industrial silica sand mining were located primarily in the karst formations known as the Jordon, Saint Peter Sandstone, and Wonewec Formations. The karst features in the area serve as a natural filtration system for groundwater, surface water and wells, making the region highly vulnerable to pollutants entering aquifers with limited filtration or treatment. Pollution resulting from such activities can travel to other wells and other water resources. The characteristics of the karst region make such pollution, if present, unpredictable and difficult to track, making possible sand pollution during industrial mining operations a grave concern.

The report was far from the only piece of evidence considered in making the distinctions and final decision on mining in Winona County. Analysis of average road use during industrial mining boom periods showed that roads wore down much quicker than comparable periods for construction mining. Two local doctors testified to Winona County as to scrutinizing industrial silica sand mining features under the U.S. Department of Labor's Occupational Safety and Health Administration's standards and the standards of the National Institute for Occupational Safety and Health. While these persons could only testify as to the effect of silica sand exposure as used in "frac" operations, the Board found that the same sand would be exposed to its workers and residents if industrial mining operations for silica sand were allowed, since the same sand is exposed in both operations. Winona County, having allowed for some silica sand mines to open prior to the passage of this ordinance revision, also took note of the changes the openings of those mines made within the County and other surrounding counties. Given the volatility of the demand for silica sand, the Findings noted that local economies and natural environments suffered due to this boom/bust cycle. Specifically, communities with silica sand mines open sometimes suffered from declining property values, community stress, diminished overall

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wellbeing, and unmet financial obligations. As far as this Court is aware, Winona County did not observe communities with construction mines open experiencing the same effects.

On July 24, 2017, Plaintiffs filed their motions for summary judgment as to all claims against Winona County for the implementation of the above mentioned ordinance. Specifically they request declaratory and injunctive relief declaring the County's ordinance amendment invalid and enjoin its enforcement and summary judgment as to all other claims listed in their complaint. Defendant Winona County filed a cross-motion to dismiss and motion for summary judgment requesting this Court find the ordinance valid.

LAW AND ANALYSIS

I. SUMMARY JUDGMENT MOTIONS

A. Standard of Review

Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to summary judgment as a matter of law. Minn. R. Civ. P. 56.03. 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. Summary Judgment is appropriate when the moving party identifies those portions of the pleadings, discovery, and affidavits, if any, which indicate the nonmoving party cannot support a central element of its claim. When a moving party has properly made and supported a summary judgment motion, the nonmoving party must show specific facts demonstrate there is a genuine issue for a trial. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). The nonmoving party must

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show that the record could support a finding by a rational trier of fact in favor of the nonmoving party. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp*. 475 U.S. 574, 587 (1986). Such a showing requires a material fact that will affect the result or outcome of the case. *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976).

B. Standard of Review of Legislative Land Use Decisions

Winona County was acting in a legislative capacity when amending its zoning ordinance to create distinctions between construction and industrial mining and prohibit industrial mining. When creating public policy affecting the general population through enacting or amending a zoning ordinance, a local government acts in a legislative capacity. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416-17 (Minn. 1981).

When a local government acts in a legislative capacity, it is given broad discretion in crafting the contents of its legislative act so long as such contents 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). This test is passed when the legislative act in question is 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).

Specifically as review applies to zoning ordinances, legislative zoning decisions are judged for "reasonableness" within the statutory framework delegating zoning authority to local governments. *Amcon Coport v. City of Eagan*, 248 N.W.2d 66, 72 (Minn. 1984). 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). As long as such an ordinance is supported by any rational basis related to the promotion of the

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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, 882-883 (Minn. App. 1985).

Plaintiffs argue that the burden is on the Defendant to show that the Ordinance Amendment has a rational basis. After an ordinance is adopted, it is presumptively valid. *City of St. Paul v. Kekkedakis*, 199 N.W.2d 151 (Minn. 1972). Challengers to the Ordinance Amendment must prove it is invalid. *State ex rel Lachtman v. Houghton*, 158 N.W. 1017 (Minn. 1916). Under this standard, Plaintiffs bear the burden of showing that there is no rational basis for the Ordinance Amendment based on the evidence presented to the Defendant at the time the Defendant considered passing the Amendment. Plaintiffs must make the demonstration of arbitrary, capricious, lacking in rational basis, and unreasonablness under this standard.

C. Even if Plaintiffs Did Not Bear the Burden, There is Still Rational Basis for the Ordinance Amendment.

Plaintiffs contentions that the Ordinance Amendment should be found invalid under this test rely largely on their assertion that there is no practical difference between industrial sand mining for silica sand and construction sand mining outside their end use. They attempt to make this showing by presenting pieces of evidence regarding the differences or lack thereof to this Court that demonstrated otherwise. Under this standard of review; however, it is not this Court's position to re-determine whether there is such a difference. Instead, it is this Court's position to determine, based on the evidence presented to the Defendant at the time the Defendant considered the Ordinance Amendment, if their decision was without rational basis. Given the many persons, experts, and reports testifying that there was a difference between the two types of mining, and these same persons testified that industrial mining was a greater detriment to the general welfare of Winona County, there was a rational basis for passing the Ordinance Amendment.

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As stated above, the Environmental Quality Board report specifically created for Winona County's consideration examined how industrial mining for silica sand would primarily occur in karst formation regions of Winona County. The Minnesota legislature has recognized such regions as unique and appropriate for special consideration in the regulation of industrial silica sand mining. Minn. Stat. § 116C.99, subd. 2(a). The Environmental Quality Board showed Winona County that silica sands in these regions serve as natural water filtration systems for groundwater, surface water, and wells. As stated above, the same report discussed how the region is vulnerable to pollution. Pollutants become difficult to track in the region. Industrial silica sand mining was shown to sometimes involve the dumping of contaminated materials back into the regions from which they were found according to the Environmental Quality Board report. Allowing industrial mining for silica sand in the region risks exposing these water sources to contamination in a way the report did not find for construction mining. Witnesses from counties that experienced industrial silica sand mining testified to the conditions of their natural landscapes, destroyed by massive open mining pits. Winona County cites the concern for preserving these areas as part of the reasoning for its Ordinance. This concern, as demonstrated above, was reasonably based on evidence presented to Winona County.

Winona County examined studies from other Wisconsin communities that experienced industrial silica sand mining operations. These studies showed Winona County that industrial mining routinely drained local resources, negatively impacted existing industries, and caused a downturn in the local economy due to boom/bust cycles that would require immediate, intense excavation, before shutting down soon after due to demand drying up. These boom/bust cycles are unique to industrial silica sand excavation. Persons from these counties also testified as to the same as well. Based on this evidence, Winona County found that industrial mining could also

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pose a problem to the welfare of the County. These same concerns did not appear correlated with or caused by construction mining operations.

The county found these same boom/bust cycles posed a problem to local infrastructure as well. Winona County's Highway Engineer testified that in places of heavy truck traffic due to mineral excavation, pavement designed to last for 20 years lasted only 2 years in areas around Williston North Dakota. Based on his estimates of deterioration during boom periods of industrial silica sand excavation, Winona County would experience similar wear. If the excavators failed or refused to pay for additional paving to compensate, Winona County would look at having to pay future paving at faster rates in order to maintain safe roads, a goal directly related to the public welfare and safety of Winona County. Again, because the boom/bust cycles were unique to industrial silica sand excavating, they did pose different problems to Winona County than construction sand excavating.

In addition, the County looked at how industrial silica sand mining impacted public health. As the Environmental Quality Board discussed, industrial silica sand mining would occur in regions that could be contaminated as a result of the mining. Because these regions provide water filtration, if polluted, they could contaminate drinking water. Two local doctors discussed how silica sand particles increase the risks of silicosis and lung cancer based on findings from "frac" sites. Other pollutants inherent to industrial silica sand mining include dust and diesel exhaust, both of which increase risks to public health. These risks were not presented to the County as inherent in construction sand mining.

Even if the burden were on Winona County to prove its ordinance met the "arbitrary and capricious" standard, the record shows Winona County consulted and considered an overwhelming amount of evidence regarding its Ordinance Amendment. This thorough

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consideration resulted in their decision to create the distinction between two different types of mining while prohibiting industrial mining. Winona County appears to not have made their decisions regarding the Ordinance Amendment solely on "end use". Instead, the wide variety of evidence presented to the County amply supports the County's actions.

D. Standard of Review for Challenging Legislative Activity On Constitutional Merit

The burden of proof for proving a facial challenge to an ordinance is on the party challenging the ordinance. *Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 73 (Minn. 2000). The party challenging must prove beyond a reasonable doubt that the Ordinance violates the Minnesota Constitution. *Id*. Every presumption is invoked in favor of the constitutionality of any statute. *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979). The challenging party must show that the legislation is unconstitutional in all of its applications. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 339 (Minn. 2001).

E. The Ordinance Amendment Does Not Violate Equal Protection.

By distinguishing between industrial mineral operations and construction mineral operations while prohibiting one in favor of another, Plaintiffs argue that the Ordinance Amendment violates their equal protection rights. 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. *State v. Richmond*, 730 N.W.2d 62, 71 (Minn. App. 2007). Because Plaintiffs do not argue otherwise, Plaintiffs must prove that the law is not rationally related to a legitimate government purpose. As stated above in the "arbitrary and capricious" analysis, they have not and cannot do so.

Nevertheless, Plaintiffs argue that the Ordinance Amendment creates arbitrary classes for the purposes of discriminating against "frac-sand" mining. Again, as stated above, these classes

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of mining are not arbitrary. Instead, they were modeled after already existing classifications based on analysis of differences between construction and industrial mineral mining. The Plaintiffs continue to argue under the erroneous belief that the County's distinction considers only end-use in its distinction, referring to *State v. Northwestern Preparatory School*, 37 N.W.2d 370 (1949). However, *State v. Northwestern Preparatory School* holds a prohibition based on ownership use rather than the actual effect on the residential neighborhood violates equal protection, which actually supports the Defendant's legislative and deliberative process. Defendant examined how the county as a whole would be impacted by industrial mineral mining and construction mineral mining. In its examination, the County determined there were several characteristics unique to industrial mineral mining that could be hazardous to the County in a way entirely different from construction mineral mines. The land owners; however, are treated equally in their land use. No owner is favored over another, rather uses are favored or disfavored. Plaintiffs' reliance on *Cleburne* also ignores how equal protection in that case was implicated based on a class of persons, rather than the actual use itself.

F. The Ordinance Does Not Violate Substantive Due Process.

Plaintiffs also argue that, because they perceive the Ordinance Amendment to be arbitrary and capricious and without a public purpose, it must violate their substantive due process rights. Again, regardless of whether or not this test should be the "egregious and irrational" test, because Plaintiffs cannot show the Ordinance Amendment was arbitrary and capricious and because the Ordinance Amendment is substantially related to a public purpose, this claim also fails.

G. The Dormant Commerce Clause Is Not Violated By the Ordinance Amendment.

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The Commerce Clause of the United States Constitution provides that states may not unduly burden or discriminate against interstate commerce. *Matter of Griepentrog*, 888 N.W.2d 478, 494 (Minn. App. 2016). Policy behind the dormant commerce clause reflects a desire to prevent states from implementing regulatory measures designed to benefit in-state interests by burdening out-of-state interests. *New Energy Co. of Ind. V. Limbach*, 486 U.S. 269, 273-74 (1988).

In determining whether a law violates the Dormant Commerce Clause, first the Court examines if the Dormant Commerce Clause is implicated, followed by determining if the law discriminates against interstate commerce or excessively burdens interstate commerce. *Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 94 (Minn. 2015). Challengers must demonstrate both beyond a reasonable doubt. *ILHC of Eagan, LLC. V. County of Dakota*, 693 N.W.2d 412, 421 (Minn. 2005). If the two parties divided by a legislative act are operators in distinct markets, the commerce clause is not implicated. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997).

To prove implication, Plaintiffs argue that industrial mineral mining, and, particularly silica mineral mining is a competitor in the same commercial market as construction mining, particularly construction sand mining. In this situation, Plaintiff's initial arguments regarding "end-use" discrimination undermine their argument here.

While Winona County found many differences between industrial mineral mining and construction mineral mining, both parties agree "end-use" is a large difference. In this case, the industrial sand mining would be used in "frac" markets, whereas construction sand mining would not. Regardless of the characteristics of the sand being mined itself, the two different types of mining fuel two different markets for the sand.

The U.S. Supreme Court addressed a similar matter in 1961 wherein the court examined a tax assessed for fish sent to freezer ships. *Alaska v. Arctic Maid*, 366 U.S. 199 (1961). The same

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tax was not assessed for fish sent to on-shore freezer facilities even though it came from the same water. Even though the product in both cases shared the same characteristics and was found from the same area, because the freezer ships served outside markets and the on-shore freezers served local markets, the commerce clause was not implicated.

The Plaintiffs' acknowledge their proposed industrial silica sand mining operations are not going to serve local markets. Mr. Frick of Minnesota Sands acknowledged as much by Affidavit. Indeed, Plaintiffs' argument regarding how this Ordinance Amendment violates the Commerce Clause rests partly on the idea that national markets that would not be serviced by construction sand mining would be hindered if industrial sand mining were prohibited. Meanwhile Plaintiffs argued both orally and by brief that construction sand mining exists solely to benefit local markets, rather than the national markets industrial sand mining would benefit. Because the statute does not benefit a local competitor in a market over an outside competitor in the same market, despite mining similar product in Winona County, the Commerce Clause is not implicated.

Plaintiffs fail to show the Ordinance Amendment discriminates against or excessively burdens interstate commerce as well. In order to make such a showing, Plaintiffs must demonstrate that there is a facially differential treatment of in-state and out-of-state interests. *Oregon Waste Sys., Inc. v. Dep't of Env. Quality of Oregon*, 511 U.S. 93, 99 (1994). Examples include higher fees levied against out-of-state operators versus in-state operators (*Oregon Waste Sys., Inc. v. Dep't of Env. Quality of Oregon*, 511 U.S. 93, 99 (1994), or bans on selling products outside a state (*Hughes v. Oklahome*, 441 U.S. 322 (1979).

Here, no such distinction exists. On its face, the Ordinance Amendment does provide language referring to construction mineral mining for "local construction purposes", but the

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"local" purposes are never defined any further and could include inter-state markets, such as Wisconsin. Even still, "local construction purposes" as a phrase speaks not as to who is or is not allowed to operate, rather it speaks to the purpose for the product, which, again, could still be inter-state rather than only in Winona County. Even if it did, the U.S. Supreme Court has upheld preservation of resources for use within a state to the detriment of interstate markets. *Sporhase v. Nebraska*, 458 U.S. 941 (1942). Because there is no implication of the Commerce Clause, and even if there were implication, no burden on interstate commerce, Plaintiffs' claim as to the Commerce Clause fails.

H. The Ordinance Amendment Effects No Taking.

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 (1992). When the land use regulation substantially advances a state interest, a taking is not effected. *Id*. In cases of reasonable land use regulations, a taking is not found. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1946 (2017). Policy behind such case law seeks to balance the individual's right to retain the interests and exercise the freedoms at the core of private property ownership and the government's power to adjust rights for the public good. *Id.*, at 1937. However in order for a party to allege a taking, there must first be a previously existing right to engage in the restricted activity. *Outdoor Graphics, Inc. v. City of Burlington Iowa*, 103 F.3d 690, 694 (8th Cir. 1996). In cases where no existing right to perform an activity ever existed, there is no taking. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 635 (Minn. 2007).

Here none of the Plaintiffs ever possessed any right to engage in industrial mineral

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mining. Mining in certain areas in Winona County, particularly the areas Plaintiffs proposed mining in, is conditional use. All parties agree that prior to obtaining such a right, the Plaintiffs must first pass the permit process before engaging in any mineral mining. Without such a right, a taking is not effected.

Additionally, Plaintiffs, specifically Minnesota Sands, fail to show that the property owned or leased is deprived of "all economic value". While industrial mineral mining is disallowed, construction mineral mining is allowed, provided a permit is granted. Through such a process, economic value still exists. While Minnesota Sands would not obtain as much money as they would have preferred from their leases through this process, their argument that their lease is now deprived of "all economic value" is disingenuous given these facts.

I. This Ordinance Does Not Violate Minn. Stat. § 394.25 Subd. 3.

Minn. Stat. § 394.25 Subd. 3 provides that all restrictions and protective measures applicable to each class of land or building for each type of zoning district be uniform across the entirety of the zoning district. Plaintiff Minnesota Sands argues that the Winona County ordinance violates this statute by exempting parties engaged in construction sand mining from the same restrictions as industrial sand mining. As explained above, the distinction between construction and industrial mineral mining is a uniform distinction that applies to the entirety of Winona County. Given the regulation is uniform for the applicable zoning districts, the Ordinance conforms to Minn. Stat. § 394.25.

Even if the Ordinance were to somehow violate Minn. Stat. § 394.25 Subd. 3, a Civil Statute does not give rise to a private cause of action for the damages Minnesota Sands seeks unless the statute expressly or implicitly creates a cause of action. *Mut. Serv. Casualty Ins. Co. v.*

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Midway Massage Inc., 695 N.W.2d 138, 142 (Minn. App. 2005). In determining whether a cause of action is implied by statute, the Court looks to 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; 3) whether implying a remedy would be consistent with the underlying purposes of the legislative enactment. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

Here, no such action is made available on the face of the statute. Plaintiffs make no attempt to show they belong to the class for whose benefit the statute is enacted. There exists nothing within the record indicating that the legislature intended to create or imply a remedy for violation under this statute. This Court's review of available precedent indicates that it can intervene under this statute for a private cause of action when a county's ordinance authorizes this Court to do so. *Toby's of Alexandria, Inc. v. County of Douglas*, 545 N.W.2d 54 (Minn. App. 1996). No such ordinance exists here. Without any showing otherwise, this Court must find that there is no private cause of action to enforce Minn. Stat. § 394.25.

M.C.L.