STATE OF MINNESOTA

IN SUPREME COURT

A18-0090

Court of Appeals

Chutich, J.
Dissenting, Anderson, J., Gildea, C.J.
Concurring in part, dissenting in part, Thissen, J.

Minnesota Sands, LLC,

Appellant,

vs.

Filed: March 11, 2020
Office of Appellate Courts

County of Winona, Minnesota,

Respondent.

Christopher H. Dolan, Bruce G. Jones, Nicholas J. Nelson, Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota; and

Bethany M. Gullman, Faegre Drinker Biddle & Reath LLP, Washington, D.C., for appellant.

Jay T. Squires, Elizabeth J. Vieira, Kristin C. Nierengarten, Rupp, Anderson, Squires & Waldspurger, P.A., Minneapolis, Minnesota, for respondent.

Peder A. Larson, Gary A. Van Cleve, Bryan J. Huntington, Sonali J. Garg, Larkin Hoffman Daly & Lindgren Ltd., Minneapolis, Minnesota, for amici curiae Aggregate and Ready Mix Association of Minnesota and Minnesota Industrial Sand Council.

Scott W. Carlson, Lynn A. Hayes, Lindsay Kuehn, Farmers' Legal Action Group, Saint Paul, Minnesota; and

Edward J. Walsh, Walsh, Knippen & Cetina, Chtd., La Crescent, Minnesota, for amicus curiae Land Stewardship Project.

Susan L. Naughton, Saint Paul, Minnesota, for amicus curiae League of Minnesota Cities.

Harry N. Niska, Howse & Thompson, P.A., Plymouth, Minnesota; and

J. David Breemer, David J. Deerson, Sacramento, California, for amicus curiae Pacific Legal Foundation.

S Y L L A B U S

1. Appellant has standing to challenge the provisions of a zoning ordinance related to mining for "local construction purposes."

2. The challenged county zoning ordinance does not violate the dormant Commerce Clause on its face, in purpose, or in effect.

3. Appellant's mineral leases, which granted Appellant a speculative, contingent right to possess and use the land, did not create a compensable property interest under state law for the purposes of a takings claim under the Minnesota and United States Constitutions.

Affirmed.

O P I N I O N

CHUTICH, Justice.

In November 2016, the Winona County Board of Commissioners revised its comprehensive zoning ordinance to prohibit "[i]ndustrial mineral operations" within the county. *See* Winona County, Minn., Winona County Zoning Ordinance (WCZO) § 9.10.2

(2016). The ordinance continues to allow extraction of "construction minerals," provided that the landowner secures a conditional-use permit. Winona County, Minn., WCZO §§ 4.2, 9.10.3.a (2016). Appellant Minnesota Sands, LLC (Minnesota Sands) is a Minnesota mining company that seeks to mine and process silica sand in Winona County (County)—an industrial mineral operation under the zoning ordinance—and sell its product to out-of-state oil and gas producers for use in hydraulic fracturing. The company claims that the County's prohibition on its proposed land use violates the Commerce Clause. U.S. Const. art. I, § 8. It also contends that the ordinance is an unconstitutional taking of its property interests in five mineral leases that it holds within the County. *See* U.S. Const. amends. V, XIV; Minn. Const. art. I, § 13.

This appeal arises from the district court's order granting summary judgment to the County on all of Minnesota Sands' claims. A panel of the court of appeals affirmed, with one judge concurring in part and dissenting in part. *Minn. Sands, LLC v. Cty. of Winona*, 917 N.W.2d 775 (Minn. App. 2018). We granted Minnesota Sands' petition for further review, and we now affirm.

FACTS

The southeastern Minnesota region, where Winona County is located, contains rich deposits of silica sand. Because silica sand consists of nearly 95 percent quartz—a hard mineral—it is used in the extraction process for drilling oil and natural gas known as hydraulic fracturing, or "fracking." The recent upsurge in fracking in oil-producing states has created high demand for the raw silica sand found in southeastern Minnesota.

Before raw silica sand can be used as "frac sand," however, it must be processed to meet industry standards for purity, grain size, shape, and intactness. Although processing methods vary, the typical method involves washing, screening, and filtering raw sand in unlined sedimentation ponds located at the mines themselves. This process requires large volumes of water—up to 6,000 gallons per minute—and chemicals called flocculants that cause the sediments to aggregate so that the desired sand particles can be collected and removed. The leftover mixture of undesired sand, water, and flocculants is then returned to the mines untreated. Some of the flocculants that are used during this process are known hazards to human health.[1]

No end-user market for processed frac sand exists within Minnesota, because no significant reserves of oil or natural gas exist in this state. But the oil and gas industry is not the only industry that generates demand for raw silica sand. For example, silica sand is used in glass-making, in the abrasives industry, in agriculture as livestock bedding, and for sand traps on golf courses. It is also used in the construction industry. Unlike the market for frac sand, the silica sand that supplies these other markets is not necessarily bound to leave Minnesota. The record here shows that silica sand is used by Minnesota firms that manufacture countertops, glass, shingles, and more.

[1] Specifically, acrylamide, a common component of one prominent flocculant, is a neurotoxin and a probable carcinogen according to the Environmental Protection Agency.

The silica sand deposits in Winona County are located in an ecologically sensitive area. They are part of a large, geologically unique karst region in southeastern Minnesota.[2] Karst regions are areas with a shallow or unconsolidated layer of sediment covering a bedrock of limestone, dolostone, or sandstone. Below the surface, karst regions are defined by large, highly interconnected networks of caverns, sinkholes, springs, and disappearing and underground streams.

The County's efforts to manage industrial silica sand mining began in September 2011, when it received three conditional-use permit applications for silica sand mining operations. The county planning and environmental services department and county attorney raised concerns about the need to regulate silica sand mining operations. In January 2012, the Winona County Board of Commissioners (Board) denied the three applications and imposed a 3-month moratorium on silica sand mining operations to allow the County to conduct a land-use planning study. The moratorium was allowed to expire in May 2012, after the County adopted additional land-use regulations for silica sand mining.[3]

In February 2012—during the moratorium—Minnesota Sands acquired four leases to remove silica sand from property located within the County. It acquired a fifth lease in

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[2] Colloquially known as the "Driftless Area," this geologic landscape also extends to Illinois, Iowa, and Wisconsin.

[3] Only one of the initial three applicants re-applied for a conditional-use permit, which was granted in June 2013.

November 2015.[4] Each lease provides that, in exchange for a one-time payment of $1,000, royalties on any sand removed from the premises, and other conditions, Minnesota Sands was granted the right to use and possess the premises "solely to mine Frac Sand to be used by [Minnesota Sands] for commercial purposes."[5] The leases also grant Minnesota Sands permission to use the premises to "[p]rocess mined minerals . . . including the building of a processing plant and all accessories thereof." The company's obligations under the leases are expressly "conditioned upon . . . obtaining any zoning or other governmental approvals" required to permit silica sand mining operations.

Minnesota Sands submitted applications for conditional-use permits for two sites in August 2012, as required by the zoning ordinance then in effect. *See* Winona County, Minn., WCZO § 9.10.1.a (2010) ("A Conditional Use Permit shall be required for all extraction pits and land alteration operations."). At that time, any mining operation in Winona County required a conditional-use permit. *Id.* The County determined that the company was required to obtain an environmental impact statement before applying for a permit. According to the company's president, the frac sand market crashed as the

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[4] The first four leases were initially acquired in November 2011, by Minnesota Sands' founder and president, Richard Frick. Frick then assigned the leases to the company. The company contends that six leases are at issue in this litigation. It appears, however, that one of the company's leases relates to land located in Fillmore County and is therefore unaffected by the Winona County Zoning Ordinance. Accordingly, only five leases are actually at issue in this case.

[5] The leases define "Frac Sand" to mean "sand usable for hydraulic fracturing in the production of oil or natural gas without alteration," and specify that "[m]aterial less than 50% 'Frac Sand' shall not be included within the definition of 'Frac Sand.' "

company was pursuing the environmental review process. Consequently, the company abandoned its efforts to obtain the needed permits for the two sites. It never sought permits or environmental review for any of its other leased properties in Winona County. Effective June 1, 2013, moreover, the Legislature created additional environmental review requirements for all silica sand projects. *See* Act of May 23, 2013, ch. 114, art. 4, § 92, 2013 Minn. Laws 1653, 1752–53 (codified as amended at Minn. Stat. § 116C.991 (2018)).[6] After June 1, 2013, therefore, Minnesota Sands was required to complete the environmental review process before it could receive any conditional-use permits for silica sand mining facilities. *See* Minn. Stat. § 116C.991(a)(1). Nearly 4 years passed without any further action by Minnesota Sands.

In 2016, the Board considered an amendment to the zoning ordinance, which was proposed by the Land Stewardship Project, that would prohibit "[f]rac sand operations." After referring the proposal to the planning commission and county attorney's office for further analysis, the Board opened the amendment and several alternatives to public

[6] The Legislature also directed the Environmental Quality Board to create "model standards and criteria for mining, processing, and transporting silica sand" for use by local government "in developing local ordinances." Minn. Stat. § 116C.99, subd. 2 (2018). The Legislature stated that "[t]he standards and criteria shall be different for different geographic areas of the state. The unique *karst conditions and landforms of southeastern Minnesota shall be considered unique* when compared with the flat scoured river terraces and uniform hydrology of the Minnesota Valley." *Id.* (emphasis added). Model standards were published by the Environmental Quality Board on March 19, 2014. *See* Minn. Envtl. Quality Bd., *Tools to Assist Local Governments in Planning for and Regulating Silica Sand Projects* (2014).

comment and held public hearings. The County received hundreds of oral and written comments about these proposals.

At its October 25, 2016 meeting, the Board voted to adopt a version of the amendment recommended by the county attorney entitled "Large Scale Industrial Silica Sand Mining and Processing Prohibited." The amended provisions of the ordinance have remained unchanged since their adoption. As noted above, before adoption of the amendment, the ordinance required all proposed mineral extraction projects to obtain a conditional-use permit. Winona County, Minn., WCZO § 9.10.1.a (2010); *see also* Winona County, Minn., WCZO § 9.11.1 (2010) ("All Subsurface Mineral Exploration borings shall require a Conditional Use Permit in all zoning districts."). The current ordinance continues to require a conditional-use permit for "all extraction pits and land alteration operations." Winona County, Minn., WCZO § 9.10.3.a. But any "[i]ndustrial mineral operations, which includes excavation, extraction, mining, and processing of industrial minerals[,] are prohibited" within the County unless those uses were legally established operations before the amended ordinance was adopted. *Id.* § 9.10.2.

Central to the issues presented here are the definitions of "industrial minerals" and "construction minerals" set forth in the ordinance. The term "industrial minerals" is defined as:

> naturally existing high quartz level stone, silica sand, quartz, graphite, diamonds, gemstones, kaolin, and other similar minerals used in industrial applications, but excluding construction minerals as defined [elsewhere].
>
> . . .

> "Silica sand" has the meaning given in Minnesota Statutes, section 116C.99, subd. 1(d): " 'Silica sand' means well-rounded, sand-sized grains of quartz (silicon dioxide), with very little impurities in terms of other minerals. Specifically, the silica sand for the purposes of this section is commercially valuable for use in the hydraulic fracturing of shale to obtain oil and natural gas. Silica sand does not include common rock, stone, aggregate, gravel, sand with a low quartz level, or silica compounds recovered as a by-product of metallic mining."

Winona County, Minn., WCZO § 4.2 (2016). As the definition states, "construction minerals" are expressly excluded from the list of "industrial minerals" that may not be mined in the county. "Construction minerals" include:

> natural common rock, stone, aggregate, gravel and sand that is produced and used for local[7] 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 for livestock operations, sewer and septic systems, landfills, and sand blasting. The term "construction minerals" does not include "industrial minerals" as defined [elsewhere].

Id. Accordingly, under these definitions in the current ordinance, extracting "well-rounded, sand-sized grains of quartz (silicon dioxide), with very little impurities in terms of other minerals" is prohibited. Winona County, Minn., WCZO § 9.10.2. But extracting "natural common rock, stone, aggregate, gravel and sand that is produced and used for local construction purposes" is allowed, provided that the County issues a conditional-use permit for the activity. *Id.* § 9.10.3.a.

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7 The ordinance does not define "local."

Minnesota Sands sued the County in March 2017, requesting declaratory, injunctive, and monetary relief.[8] On appeal from the district court's order granting summary judgment to the County on all of Minnesota Sands' claims, a divided panel of the court of appeals concluded that the ordinance did not violate the dormant Commerce Clause or work an unconstitutional taking of the company's property interests. *Minn. Sands, LLC*, 917 N.W.2d at 789. This appeal followed.

ANALYSIS

Because the case comes to us on the district court's order granting summary judgment, we review that decision "de novo to determine (1) whether there are any genuine issues of material fact, and (2) whether the district court correctly applied the law." *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015). We review the evidence in the light most favorable to the party against whom summary judgment was granted—here, Minnesota Sands. *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 230 (Minn. 2019). In considering Minnesota Sands' constitutional claims, we presume that the challenged law is constitutional. *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 688 (Minn. 2009). We are mindful that our power to declare a law unconstitutional "is to be exercised only when absolutely necessary and with

[8] In addition to the Commerce Clause and Takings Clause claims addressed here, the company also alleged violations of its rights to equal protection and to due process under the Minnesota and United States Constitutions, as well as a violation of the state-law requirement that zoning ordinances apply uniformly under Minnesota Statutes section 394.25, subdivision 3. Minnesota Sands appealed only the dismissal of its Commerce Clause and Takings Clause claims.

extreme caution." *Caterpillar, Inc. v. Comm'r of Revenue*, 568 N.W.2d 695, 697 (Minn. 1997) (quoting *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979)).

I.

As an initial matter, we must address the court of appeals' conclusion that Minnesota Sands lacks standing to assert that the ordinance discriminates against interstate commerce by the County's use of the word "local" in the definition of "construction minerals."[9] *Minn. Sands, LLC*, 917 N.W.2d at 782–83. The court of appeals reasoned that, because Minnesota Sands has no interest in producing construction minerals, a challenge to the word "local" in the construction-minerals definition would not secure the company any relief because it would still be unable to engage in the industrial mining of silica sand. *Id.* at 782. We disagree that Minnesota Sands lacks standing to bring this case.

The standing doctrine requires only that a party "have a sufficient stake in a justiciable controversy to seek relief from a court." *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 338 (Minn. 2011) (quoting *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007)). Standing is a question of law that we determine de novo. *Glaze v. State*, 909 N.W.2d 322, 325 (Minn. 2018).

[9] Although the County does not press the standing argument, standing is a jurisdictional prerequisite that we can address sua sponte. *Glaze v. State*, 909 N.W.2d 322, 325 (Minn. 2018).

In Minnesota, a party has standing if it has suffered an injury-in-fact. *Webb Golden Valley, LLC v. State*, 865 N.W.2d 689, 693 (Minn. 2015).[10] For a party to establish an injury-in-fact, it must demonstrate that it suffered "a concrete and particularized invasion of a legally protected interest." *Id.* (quoting *Lorix*, 736 N.W.2d at 624). An allegation of a "merely possible or hypothetical" injury is inadequate. *McCaughtry*, 808 N.W.2d at 338. A litigant challenging the constitutionality of a law need only demonstrate that the litigant has "a legally cognizable interest that [] has suffered because of the State's action." *Webb Golden Valley, LLC*, 865 N.W.2d at 693.

Here, Minnesota Sands has demonstrated a colorable interest in producing silica sand under the leases that it holds within the County. The company alleges that it is prevented from doing so by an ordinance that violates the United States Constitution. Moreover, although Minnesota Sands seeks invalidation of the entire ordinance amendment (lifting the law's burdens from all affected), its alleged discrimination injury could conceivably be remedied by a narrowing construction that invalidated only the "local construction purposes" language of the ordinance (imposing any burdens on everyone equally). *See* Winona County, Minn., WCZO § 2.7 (2016) (declaring any provision of the ordinance separable if declared invalid).[11] This showing is more than enough to establish

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[10] A party may also have standing if it is "the beneficiary of a legislative enactment granting standing." *Webb Golden Valley, LLC*, 865 N.W.2d at 693. Statutory standing does not assist Minnesota Sands in this case.

[11] As we explain below, because of the way the term "local" interacts with the definitions of "construction minerals" and "industrial minerals," such a narrowing construction would not, in fact, grant Minnesota Sands any relief.

that Minnesota Sands has a "sufficient stake" in a "legally cognizable interest." *McCaughtry*, 808 N.W.2d at 338; *Webb Golden Valley, LLC*, 865 N.W.2d at 693. As a party disadvantaged by the ordinance, Minnesota Sands is a proper party to bring this constitutional claim. *See McKee v. Likins*, 261 N.W.2d 566, 569−70 n.1 (Minn. 1977) (stating that standing "is concerned with 'who' may bring a suit").

II.

The Commerce Clause states that Congress may "regulate Commerce . . . among the several states." U.S. Const. art. I, § 8. The Supreme Court has long understood that this affirmative grant of authority includes a "negative or dormant implication." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). The "dormant" Commerce Clause provides that state laws may not "unjustifiably discriminate on their face against out-of-state entities or . . . impose burdens on interstate trade that are clearly excessive in relation to the putative local benefits." *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (citations omitted) (internal quotation marks omitted). This prohibition applies to local ordinances and state-wide enactments alike. *See, e.g.*, *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 356 (1951) (invalidating city ordinance requiring all milk to be bottled within five miles of city limits). The burden to establish discrimination rests on the party challenging the validity of the law. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

The basic principle underlying the dormant Commerce Clause is that a state may not pursue "economic isolation" by placing "burdens on the flow of commerce across its

borders that commerce wholly within those borders would not bear." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179–80 (1995); *see also Am. Trucking Ass'ns*, 545 U.S. at 433; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978). At the same time, the Supreme Court has recognized that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *City of Philadelphia*, 437 U.S. at 623–24.

In light of this principle, the Supreme Court has articulated a three-part framework for analyzing dormant Commerce Clause issues. The first part asks whether the challenged law "discriminates on its face against interstate commerce." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). If not, the second part of the framework asks if the law discriminates against interstate commerce "on the basis of either discriminatory *purpose* or discriminatory *effect*." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (emphasis added) (citations omitted); *see also W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (" 'In each case it is our duty to determine whether the statute under attack . . . will in its practical operation work discrimination against interstate commerce.' " (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455–56 (1940))).

Laws that fall in the facial discrimination category, or the discriminatory purpose or effect categories, are "subject to a virtually *per se* rule of invalidity" as a violation of Congress's exclusive right to make such regulations. *United Haulers Ass'n*, 550 U.S. at

338 (quoting *City of Philadelphia*, 437 U.S. at 624). Unless the state demonstrates that it has no other means to achieve a legitimate local purpose, the law is unconstitutional. *Id.* at 338–39 (citing *Maine v. Taylor*, 477 U.S. 131, 138 (1986)).

The third part of the framework establishes a more flexible standard of scrutiny for a state law that "regulates 'evenhandedly,' and imposes only 'incidental' burdens on interstate commerce." *Clover Leaf Creamery Co.*, 449 U.S. at 471. Laws in this category are upheld unless the burdens that they impose on interstate commerce are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

A.

Applying this framework here, the first question is whether the Winona County Zoning Ordinance "discriminates on its face against interstate commerce." *United Haulers Ass'n*, 550 U.S. at 338. A law is facially discriminatory if it expressly provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dept. of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994).

The operative provision of the ordinance states that "[i]ndustrial mineral operations, which includes excavation, extraction, mining, and processing of industrial minerals are prohibited in Winona County." Winona County, Minn., WCZO § 9.10.2. Industrial mineral operations encompass "any process or method of digging, excavating, mining, drilling, blasting, tunneling, dredging, stripping or removing industrial minerals from the

land surface or underground," as well as the processing, storage and stockpiling, and hauling or transport of industrial minerals. Winona County, Minn., WCZO § 4.2. As noted above, the term "industrial minerals" includes silica sand, as the latter term is defined by statute. *Id.*; *see* Minn. Stat. § 116C.99, subd. 1(d) (2018).

Minnesota Sands argues that the ordinance is essentially a ban on the export of silica sand. It notes that the Supreme Court has applied strict scrutiny review to state laws that banned the export of minnows and natural gas. *See Hughes*, 441 U.S. at 337 (minnows); *Pennsylvania v. West Virginia*, 262 U.S. 553, 595–600 (1923) (natural gas); *Haskell v. Kan. Nat. Gas Co.*, 224 U.S. 217, 218 (1912) (natural gas). Minnesota Sands contends that because the ordinance is also an export ban, it must meet strict scrutiny.

As a land-use regulation, the ban on industrial mining operations is foremost a restriction on the rights of Minnesota landowners, not an "export ban." Specifically, the ordinance restricts the rights of any landowner who wishes to engage in industrial mining operations within the County. Unlike a typical export embargo that confers a home-state advantage by denying outsiders equal access to some in-state market, the ordinance is evenhanded on its face. It pays no regard to whether the person or entity who wishes to engage in industrial mining resides in-state or out-of-state or wishes to sell the industrially mined sand to in-state or out-of-state consumers.

In contrast to the types of embargos invalidated by the Supreme Court as effectively banning exports, the ordinance here does not, on its face, confer any benefit to in-state economic interests. *See Hughes*, 441 U.S. at 336; *Pennsylvania*, 262 U.S. at 596–97;

Haskell, 224 U.S. at 220. In *Hughes*, for example, the embargo on transporting minnows harvested in Oklahoma was facially discriminatory because in-state consumers benefited at the expense of out-of-state consumers. 441 U.S. at 336–38. But the terms of this ordinance confer no benefit to in-state consumers of silica sand. To be sure, the out-of-state firms that would buy industrially mined silica sand that might otherwise be produced within the County must look elsewhere. But the same barrier exists for any in-state purchaser of industrially produced silica sand, including those that would re-sell to out-of-state interests.[12] Without express discrimination between in-state and out-of-state economic interests, Minnesota Sands' facial discrimination theory fails. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) (stating that "any notion of discrimination assumes a comparison of substantially similar entities"); *City of Philadelphia*, 437 U.S. at 624 (noting that a law is facially discriminatory if it "overtly blocks the flow of interstate commerce at a State's borders"); *see also Zenith/Kremer Waste Sys., Inc. v. W. Lake Superior Sanitary Dist.*, 572 N.W.2d 300, 305 (Minn. 1997).

Minnesota Sands attempts to bolster its theory by citing to the ordinance's definitions of industrial and construction minerals. It contends that facial discrimination arises from the exception for the mining of "sand that is produced and used for *local* construction purposes." *See* Winona County, Minn., WCZO § 4.2 (definition of

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[12] Indeed, at oral argument, counsel for Minnesota Sands acknowledged that the ordinance was not an "*interstate*" embargo. As we explain, this concession undermines the company's argument. Unless an embargo is an "interstate" embargo, it is not discriminatory on its face.

"construction minerals") (emphasis added). By banning all industrial sand mining within the County, but allowing mining for "local" construction minerals, the company argues that the County has facially discriminated between local and out-of-state markets. This argument is not convincing for two reasons.

First, "local" is not synonymous with "in-state." The word "local" is not defined in the ordinance. And dictionary definitions do not suggest that "local" always or predominantly distinguishes between in-state and out-of-state areas. *See, e.g.*, *The American Heritage Dictionary of the English Language* 1029 (5th ed. 2011) ("Of, relating to, or characteristic of a particular place"); *The Oxford Dictionary of English* 1037 (3d ed. 2010) ("relating or restricted to a particular area or one's neighbourhood"); *Merriam-Webster's Collegiate Dictionary* 730 (11th ed. 2014) ("of, relating to, or characteristic of a particular place: not general or widespread").

Here, the term "local" can be interpreted to include, at the very least, the neighboring parts of Wisconsin located across the river from Winona County. And assuming that "local" denotes an in-state geographical restriction would be inconsistent with our duty to invalidate a law as unconstitutional "only when absolutely necessary and with extreme caution." *Caterpillar, Inc.*, 568 N.W.2d at 697 (quoting *Miller Brewing Co.*, 284 N.W.2d at 356).

In any event, the Supreme Court has generally held that laws falling expressly along state lines are facially discriminatory. *See, e.g.*, *Or. Waste Sys., Inc.*, 511 U.S. at 108 (invalidating a state statute imposing a surcharge on waste generated out of state); *Sporhase*

v. Nebraska, 458 U.S. 941, 943 (1982) (invalidating a state law restricting withdrawal of groundwater "from any well within Nebraska intended for use in an adjoining State"); *Hughes*, 441 U.S. at 337 (invalidating a state law that banned transporting "minnows for sale outside the state" which were procured within the state's waters); *City of Philadelphia*, 437 U.S. at 618 (invalidating a state law that banned waste originating "outside the territorial limits of the State"); *cf. Taylor*, 477 U.S. at 138 (upholding, under strict scrutiny, a ban on importing out-of-state baitfish). The absence of any express distinction between in-state and out-of-state interests causes Minnesota Sands' claim of facial discrimination to fail. Because the zoning ordinance is facially neutral in its treatment of in-state and out-of-state interests, we hold that it is not facially discriminatory.

The dissent seeks a different result, concluding that a municipal law is invalid on its face if it mentions the word "local" because such a law "shield[s] local interests—even if not statewide interests—from interstate commerce." We disagree. As discussed above, the ordinance in this case does *not* shield local interests from interstate commerce: the "local" restriction *includes* some interstate markets in Wisconsin. In addition, the cases cited by the dissent do not support its conclusion. Although those cases acknowledge that some laws that draw merely local, rather than statewide, distinctions may run afoul of the dormant Commerce Clause, none of them state that the use of the word "local" makes an ordinance facially invalid.

For example, *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349 (1951) predates the Supreme Court's three-part dormant Commerce Clause framework. *Dean Milk* held

that an ordinance requiring milk to be pasteurized within five miles of city limits "imposes an undue burden on interstate commerce" and that "reasonable and adequate alternatives [were] available" to the city. *Id*. at 353–54. The Court remanded the case to the Wisconsin Supreme Court to consider whether a second-tier limitation of 25 miles was "inconsistent with the principles announced in this opinion." *Id.* at 356–57. The Court's reasoning and its disposition of the case suggest that the Court considered the ordinance under a balancing test akin to the one announced almost 20 years later in *Pike v. Bruce Church*—namely, that laws imposing an incidental burden on interstate commerce will be upheld unless the burden on commerce is "clearly excessive in relation to putative local benefits." 397 U.S. at 142. Given these developments in the law, the dissent's reliance on *Dean Milk* is inapt.

Similarly, the Court's decision in *Sprout v. City of South Bend, Ind.*, 277 U.S. 163, 167–71 (1928), did not distinguish between local and non-local interests or traffic, relying instead on other factors. Likewise, the Court in *C & A Carbone, Inc. v. Town of Clarkstown, N.Y*, 511 U.S. 383 (1994), did not hold that a distinction between local and non-local interests made a restriction discriminatory on its face. *See, e.g.*, *id.* at 390–91. Further, the Michigan statute at issue in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992), unlike the zoning ordinance in this case, allowed counties to impose restrictions on all out-of-county commerce. *Id*. at 356−57. And the deficiency of the statute at issue in *Chemical Waste Management* was that it explicitly imposed an additional fee on waste "generated outside of Alabama."

504 U.S. at 338. Accordingly, these cases do not demonstrate that distinctions between local and non-local interests are facially discriminatory against interstate commerce.

Second, even if Minnesota Sands and the dissent were correct that the zoning ordinance's use of the term "local" is facially discriminatory—or, for that matter, discriminatory in practical effect—that conclusion would not lead to a different result in this case. If the "local" restriction were invalid, we would not invalidate the entire ordinance, but would "attempt to retain as much of the original [ordinance] as possible while striking the portions that render the [ordinance] unconstitutional." *State v. Melchert-Dinkel*, 844 N.W.2d 13, 24 (Minn. 2014) (noting that severance is permissible unless the remaining provisions are "incomplete" or "incapable of being executed in accordance with legislative intent").

In this case, if the definition of "construction minerals" were altered to eliminate the "local" restriction—defining "construction minerals" in relevant part as "sand that is produced and used for [*any*] construction purposes"—the resulting ordinance would be sensible and capable of being executed. *See id.* But the silica sand that Minnesota Sands intends to mine would still fall within the zoning ordinance's ban. Minnesota Sands admits that it has no interest in mining sand to be used for "construction purposes," and therefore the sand it intends to mine would continue to be classified as "industrial minerals" under the ordinance, even if the local restriction were absent. Accordingly, Minnesota Sands would not be entitled to relief even if we concluded that the local restriction is invalid because the ordinance does not discriminate on its face against interstate commerce.

B.

Even if not discriminatory on its face, a state law is invalid under the dormant Commerce Clause if it has the purpose or practical effect of favoring in-state interests and burdening out-of-state interests. *Bacchus Imports, Ltd.*, 468 U.S. at 270; *see also W. Lynn Creamery, Inc.*, 512 U.S. at 201; *Clover Leaf Creamery Co.*, 449 U.S. at 471 n.15. Laws in this category are unconstitutional unless the government shows that it has no other means of advancing a legitimate, non-protectionist purpose. *W. Lynn Creamery, Inc.*, 512 U.S. at 192–93; *see also United Haulers Ass'n*, 550 U.S. at 338–39; *Taylor*, 477 U.S. at 138.

Although Minnesota Sands contends that the County's ordinance was motivated by animus toward the primarily out-of-state fracking industry, it has not pointed to any concrete evidence to support that claim. Instead, the company bases its animus theory on the alleged motivation of actors who lobbied in favor of the amendment, namely, the initial proposal by the Land Stewardship Project and statements of private citizens during the public comment period at the zoning hearings.

The initial proposal, however, was rejected by the Board; tellingly, none of the comments that were critical of the fracking industry were credited by the Board in its findings adopting the amendment. These sources therefore have "little (if any) probative value in demonstrating the objective of the [Board] as a whole." *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 303 (D. Me. 2018) (quoting *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 39 (1st Cir. 2005) (discussing statements by a law's private proponents concerning a dormant Commerce Clause challenge)). The connection

between the motives of the ordinance amendment's proponents and the Board is speculative at most. Speculative assertions are insufficient to create a genuine issue of material fact on a motion for summary judgment. *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

Turning to the practical effect of the ordinance, the "crucial inquiry" is whether the ordinance is "basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[13] *City of Philadelphia*, 437 U.S. at 624. For the ordinance to be considered as discriminatory in practical effect, Minnesota Sands must demonstrate that the ordinance "favors in-state economic interests over out-of-state interests." *IESI AR Corp. v. Nw. Ark. Reg'l Solid Waste Mgmt. Dist.*, 433 F.3d 600, 605 (8th Cir. 2006) (citing *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1066 (8th Cir. 2004)). "Negatively affecting interstate

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[13] Some commentators have noted the Supreme Court's inconsistent guidance on whether, absent any discriminatory purpose, strict scrutiny is appropriate. *See* John M. Baker & Mehmet K. Konar-Steenberg, *"Drawn from Local Knowledge . . . and Conformed to Local Wants": Zoning and Incremental Reform of Dormant Commerce Clause Doctrine*, 38 Loyola U. Chi. L.J. 1, 6–8 (2006) (discussing the absence of a bright line rule and contradictory statements concerning discriminatory effect and incidental burden). Moreover, at least one commentator suggests that applying strict scrutiny without a showing of discriminatory purpose would conflict with the Supreme Court's equal protection jurisprudence. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1166 (1986) ("It is ironic that if we engage in effects review under the dormant commerce clause, we will be giving out-of-state economic interests *more* protection than the Supreme Court has deemed appropriate for racial minorities and women under the equal protection clause."). An answer to this question would not change our analysis, however, because we conclude that the ordinance was neither motivated by a discriminatory purpose nor has the practical effect of discriminating against interstate commerce.

commerce is not the same as discriminating against interstate commerce." *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995); *see also Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978) ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.").

Minnesota Sands' effects-based claim fails to show that the County's ordinance functions to discriminate between in-state and out-of-state interests. Minnesota Sands maintains that discrimination occurs because the market for frac sand exists only in interstate commerce as there are no known oil or natural gas reserves in Minnesota. This argument ignores the ordinance's entire scope. The prohibition here is not limited to sand destined for use in hydraulic fracturing; it applies to *all* industrial-scale silica sand mining operations that produce "well-rounded, sand-sized grains of quartz (silicon dioxide), with very little impurities in terms of other minerals," no matter the ultimate consumer.[14] Winona County, Minn., WCZO § 4.2.

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[14] According to the dissent, the ordinance is invalid because it draws a distinction that is based only on the end use for an article of commerce. We are unaware of any authority that holds such a law per se invalid. Even so, the dissent's conclusion that construction minerals and industrial minerals are in reality "the same sand" is not supported by the ordinance or the record. The ordinance defines "construction minerals" far more broadly than "industrial minerals," and the expert affidavit relied upon by the dissent candidly admits that the two are not always the same. The statement that silica sand extracted in a construction mineral operation "can be, and often is, the same" as industrial silica sand implies that, at least some of the time, construction minerals are *not* the kind of raw silica sand that is needed to produce processed frac sand.

Moreover, that distinction is sensible, as the record shows that industrial minerals often must be processed to be useful, causing pollution that may affect the groundwater in the geologically unique karst area of which Winona County is a part.

Consequently, not only is the out-of-state market for frac sand deprived of the County's supply of silica sand, so are Minnesota consumers of silica sand, which according to the record includes the manufacturers of countertops, glass, and shingles. That the ordinance affects these two groups in the same manner obviates any concern that the County acts to "isolat[e itself] from the national economy," or to "saddle those outside the State with the entire burden" imposed by the ordinance. *City of Philadelphia*, 437 U.S. at 627–29. Instead, the adverse impact of the zoning ordinance on in-state consumers of silica sand is a "powerful safeguard against legislative abuse." *Clover Leaf Creamery Co.*, 449 U.S. at 473 n.17 (citing *S.C. State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 187 (1938)).

In evaluating a dormant Commerce Clause claim, courts must assuredly be on alert for pure economic protectionism. *See id.* at 471. But the dormant Commerce Clause does not protect "the particular structure" of a given market from laws that do not discriminate against interstate commerce on their face, in purpose, or in practical effect. *See Exxon Corp.*, 437 U.S. at 127–28 (rejecting the argument that the Commerce Clause "protects the particular structure or methods of operation in the retail market" and noting that it "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations"); *cf. Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[The] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.")

Because the County's ordinance does not further economic protectionism in the sense that in-state interests benefit at the expense of out-of-state interests, we conclude that it does not discriminate against interstate commerce in purpose or in practical effect. Accordingly, we hold that Winona County's ordinance does not violate the dormant Commerce Clause on its face, in purpose, or in effect.[15]

III.

Minnesota Sands' second claim is that the County's prohibition, in the ordinance, of industrial mineral operations amounts to an unconstitutional taking of the rights that it acquired under five property leases located within the County. The district court and the court of appeals concluded that Minnesota Sands' takings claims failed because the property interests that it claims were taken by the County had not yet accrued. For the reasons explained below, we agree with this conclusion.

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[15] We need not consider whether under *Pike v. Bruce Church*, the County's ordinance imposes a burden that "is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. As confirmed by counsel for Minnesota Sands at oral argument, this question is not before us because it was not raised on appeal. The only reference to this argument in either court comes in Minnesota Sands' reply brief, by way of a single citation to a Supreme Court case that applied the *Pike* analysis, *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 447–48 (1978). We do not consider arguments that lack full development in the briefs and that, for lack of thorough argument, "may have inhibited the respondent's ability to argue the issue to our court." *State v. Myhre*, 875 N.W.2d 799, 806 (Minn. 2016) (citing *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 757 (Minn. 2005)). We also will not consider arguments that are first raised in a reply brief. Minn. R. Civ. App. P. 128.02, subd. 3 ("The reply brief must be confined to new matter raised in the brief of the respondent."). *See also Webb v. Downes*, 101 N.W. 966, 968 (Minn. 1904) (declining to "give any weight" to a claim raised for the first time in a reply brief).

The Takings Clause states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *see also Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (concluding that the Takings Clause applies to the states via the Fourteenth Amendment). The Minnesota Constitution, which also provides protection against the taking of property without just compensation, is slightly broader in scope, stating that "[p]rivate property shall not be taken, *destroyed or damaged* for public use without just compensation therefor, first paid or secured." Minn. Const. art. I, § 13 (emphasis added). Whether the county's action amounts to a taking is an issue of law that we review de novo. *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631 (Minn. 2007).

Minnesota Sands raises its claims under both the state and federal constitutions. Unless a property owner contends that the Minnesota Takings Clause provides greater protections than the federal constitution, however, we may rely on cases interpreting the federal Takings Clause when interpreting our own. *See id.* at 633. Minnesota Sands does not maintain that the language in the Minnesota Takings Clause, or any decision of this court, gives it greater constitutional protection here than that afforded by the federal Takings Clause. Accordingly, we treat the company's federal and state takings claims together.

The first question in any takings analysis is to determine what, if any, property interest is at stake. *See Hall v. State*, 908 N.W.2d 345, 352 (Minn. 2018); *see also Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998); *Ruckelshaus v. Monsanto Co.*,

467 U.S. 986, 1000 (1984). The Takings Clause does not "compensate property owners for property rights they never had." *Wensmann Realty, Inc.*, 734 N.W.2d at 635 (citation omitted). Unless the party has a property interest, no takings claim arises. Property interests that are protected by the Fifth Amendment "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (citation omitted); *see also Phillips*, 524 U.S. at 164.

Initially, we note that if the owners of the land affected had not partitioned their property rights, separating (at least part of) the mineral rights from their remaining rights in the land, this case would be relatively easy to decide. "[I]n instances in which a state tribunal reasonably concluded that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land," the Supreme Court "has upheld land-use regulations that destroyed or adversely affected recognized real property interests." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (citation omitted) (internal quotation marks omitted). "Zoning laws are, of course, the classic example, which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property." *Id.* (citations omitted). Of course, "if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Supreme Court has recognized that regulation goes "too far" when

it "denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

That scenario is clearly not the case here. Before enactment of the zoning ordinance amendment that Minnesota Sands challenges, a landowner in Winona County was required to apply for a conditional-use permit "for all extraction pits and land alteration operations," Winona County, Minn., WCZO § 9.10.1.a (2010). That requirement was without regard to whether the extraction involved "industrial minerals" or "construction minerals," a distinction drawn only by the amendment. That is, the previous zoning ordinance generally prohibited a land use—extraction of minerals—but allowed a potential exception to the prohibition by way of a conditional-use permit.

After the amendment to the ordinance, the extraction of construction minerals was regulated in the same way—a general prohibition, with the possibility of an exception, by a conditional-use permit—but concerning the specific extraction of industrial minerals, the possible exception was eliminated. Winona County, Minn., WCZO §§ 9.10.2, 9.10.3.a (2016). We are unaware of any authority that would make such a restriction unlawful. Certainly the amendment did not deprive the landowners of "all economically beneficial or productive use of [the] land." *Lucas*, 505 U.S. at 1015. When viewed as a land regulation in relation to the entire "bundle of rights"[16] that the landowners held before the zoning ordinance amendment, the relatively limited regulation that the amendment

[16] *See generally Lucas*, 505 U.S. at 1027.

provides would not qualify as a taking. *See generally Penn Cent. Transp. Co.*, 438 U.S. at 125–27 (discussing zoning ordinances that had been sustained against takings challenges).

Our analysis is complicated, however, because in Minnesota the right to subsurface minerals is separable from the rest of the land. *Washburn v. Gregory Co.*, 147 N.W. 706, 707 (Minn. 1914). And takings jurisprudence has historically recognized that such partitions must be respected. In *Pennsylvania Coal*, a landowner had conveyed the surface rights to certain land but reserved the right to remove coal from the land. 260 U.S. at 412. The Court held that a statute prohibiting the removal of coal in such a way as to cause the subsidence of surface structures—thereby making it commercially impracticable to mine the coal—was a taking. *Id.* at 414–15. In this case, Minnesota Sands alleges that it has leased the right to remove certain minerals. We therefore assume, for this takings-clause analysis, that the right to remove frac sand is a separate, concrete interest in land, the deprivation of which could be a taking.

Even granting that assumption, Minnesota Sands must still have a sufficiently concrete interest in the right to remove frac sand to be recognized as a property interest under Minnesota law. And of course, that Minnesota Sands has alleged that it holds a property right does not settle the issue of whether a taking has occurred. Indeed, as we set out below, we hold that Minnesota Sands' interest in the right to remove frac sand is, under Minnesota law, inchoate and therefore cannot sustain a takings claim.

Minnesota Sands maintains that because it owns leases that afford it the right—under certain conditions—to remove and process frac sand, it has a compensable property

interest. Leasehold interests may support a takings claim. *See Metro. Airports Comm'n v. Noble*, 763 N.W.2d 639, 643 (Minn. 2009) ("The established rule is that both the lessor and the lessee have a constitutionally protected property interest when leased property is taken by condemnation."). The mere existence of a property lease, however, is not enough for a lessee to establish the property-interest element of a takings claim.

The very nature of a lease is the granting of some subset of the fee owner's so-called "bundle of rights." *Cf. Gates v. Herberger*, 279 N.W. 711, 712 (Minn. 1938) ("The relation of landlord and tenant exists where one person occupies the premises of another in subordination to that other's title and with his consent."); 6A Steven J. Kirsch, *Minnesota Practice—Methods of Practice* § 51.41 (3d ed. 1990) ("Generally, the term [of a tenancy] is limited only by the desires of the parties and the power of the lessor to make a lease, depending on the extent of the lessor's interest in the premises."). The property interests, if any, belonging to a lessee therefore depend upon the terms of the lease. *Hous. & Redev. Auth. of St. Paul v. Lambrecht*, 663 N.W.2d 541, 546–47 (Minn. 2003) (noting that a tenant's right to just compensation depends on the specific terms of the lease agreement); *see also Ruckelshaus*, 467 U.S. at 1003 (noting that the term "property" as used in the Takings Clause may "denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it" (citation omitted)).

Looking to the five leases at issue here, we are unpersuaded that the property interests purportedly conveyed to Minnesota Sands by the fee owners were affected by the County's ordinance amendment. The leases cover the essential terms of a lease: they

identify the parties, define the premises and durational term, and the consideration to be paid to the landlord. *See, e.g.*, 6A Steven J. Kirsch, *Minnesota Practice—Methods of Practice* § 51.1 (3d ed. 1990) (noting that the essential terms of a lease include, among others, "[t]he names of the parties," "a description of the property," "the amount and terms of rent payments," and "the commencement, duration and termination of the rental period"); *see also* Restatement (Second) of Prop.: Landlord & Tenant § 2.2 (1977) (noting similar formal requirements of a written lease).

But the essential terms of these leases are subject to specific conditions that govern Minnesota Sands' rights to use and to possess the leased premises. The leases are confined to "the sole purpose of removing sand only." Under paragraph 5, entitled "Use and Condition of Premises," the leases state that the company "may use the Premises solely to mine Frac Sand to be used by [it] for commercial purposes." The leases grant possession of the premises to Minnesota Sands "on the commencement date,"[17] yet virtually annul the right to possession in a clause that reserves to the landowners the "absolute right to continue to complete cropping and farming activities on the portion of the premises not affected by the mining operation."[18] As a consequence of this reservation clause, Minnesota Sands

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[17] The first four leases were entered into in November 2011 "for a term commencing Nov. 1, 2011." The commencement date of the fifth lease was the date the agreement was signed by the parties, November 18, 2011.

[18] The dissent disagrees with this characterization, contending that the leases gave Minnesota Sands "the right to enter the land, clear the land, and exclude others from the land." The leases did give Minnesota Sands the right to enter the land (to explore for materials) and to clear portions of the land (to explore for materials and otherwise prepare for mining) before extraction began. But they did not give Minnesota Sands the right to

had no right to use or possess the land until it was able to engage in silica sand mining. Until that condition was met, the leases reserved the rights to use and possess the premises to the lessors in absolute terms.

These lease terms are the fatal defect in Minnesota Sand's takings claim as a matter of Minnesota law. A transfer of the right to possession of the leased property is the defining feature of a leasehold interest. *See Gates*, 279 N.W. at 712 ("No particular form of words is necessary to create a tenancy. Any words that show an intention of the lessor to divest himself of the possession, and confer it upon another, but in subordination of his own title, is sufficient."); *see also* Restatement (Second) of Prop.: Landlord & Tenant § 1.2 (1977) ("A landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property.") The right of possession, we have said, "is transferred when the lease agreement gives the tenant control over the property and the power to exclude all

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exclude others—not even the landowners—except from portions of the land "affected by the mining operation." At the "commencement date," the existence of any mining operation—and therefore full rights to possession and to exclude others—was both highly contingent, and in the distant future.

The highly contingent nature of Minnesota Sands' interests under the leases is demonstrated by other terms in those leases. Under paragraph 11, entitled "Zoning," the leases state that Minnesota Sands' obligations "are conditioned upon [it] obtaining any zoning or other governmental approvals required to permit the use set forth in paragraph 5," yet give the lessors "the right to object to any approvals or permits at or before any type of zoning, planning, county or township or commissioning authority." Minnesota Sands paid the lessors a one-time sum of $1,000.00 upon execution. Beyond this initial sum, however, Minnesota Sands' remaining obligations to the landlord are all contingent upon the possibility that mining occurs: it promises to pay an additional $9,000.00 "on obtaining a Conditional Use Permit" from the County, pay royalties for any sand that it later removes, maintain a stockpile of sand for "miscellaneous use" by the landlord, and restore the surface condition of the premises once mining concludes.

others." *Cocchiarella v. Driggs*, 884 N.W.2d 621, 626–27 (Minn. 2016) (citing Restatement (Second) of Prop.: Landlord & Tenant § 1.2). For the leasehold interest to arise therefore requires a transfer of possession and control.

Here, the conditions precedent to acquiring possession and control under any of the leases demonstrate that Minnesota Sands does not have a fully-fledged leasehold interest under Minnesota law. Rather, the agreements at most grant Minnesota Sands expectancy interests that are too speculative to support a takings claim.[19] The steps that Minnesota Sands had to have taken to make choate its inchoate rights under the lease agreements illustrate this point.

First, Minnesota Sands would have had to obtain a conditional-use permit for each silica sand mining operation. Under the County's zoning ordinance, a conditional-use permit applicant must submit "[a] statement of reasons warranting the intended use in the zoning district to insure compatibility of the proposed use with the County Comprehensive Plan." Winona County, Minn., WCZO § 5.5.3.3 (2016); *see also* Winona County, Minn., Winona County Comprehensive Plan (2014) (a document created to preserve and enhance

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[19] The dissent's claim that our decision affords the government immunity to regulate the leases "out of existence" is incorrect. Our decision proceeds on the uncontroversial premise that the government cannot "take" property rights that a party never had. *See Murr v. Wisconsin*, __ U.S. __, __, 137 S. Ct. 1933, 1951 (2017) (Roberts, C.J., dissenting) (noting that the first question in a Takings Clause claim is "what 'private property' the government's planned course of conduct will affect"). Likewise, the government does not regulate out of existence a leaseholder's rights that terms of the lease never granted. It bears emphasizing that the rights granted under the terms of the lease agreements were determined by the parties. The decision to limit Minnesota Sands' rights to a contingency interest that would not become definite unless the government granted a conditional-use permit was the company's.

"the area's culture, customs and economy along with its unique topography, natural resources and environment"). Among other procedural requirements, the application, with a detailed site plan, must first be submitted to the county planning director, who then files the application with the county planning commission for review. Winona County, Minn., WCZO § 5.5.4.1–.2 (2016); *see id.* § 5.5.3.4 (setting forth numerous site plan requirements including, but not limited to, the location of proposed structures, geological features, architectural plans, water table, landscaping plans, utilities, topography, adjacent land use, water supply systems, and storage of materials).

The application must include a Township Acknowledgment Form, which documents the "concerns, observation, and/or recommendation" of the town board of the subject property for the Planning Commission to consider. *Id.* § 5.5.3.5. An applicant only receives this form after contacting the town board "to seek a place on their agenda as a means to advise the [board] of the proposal." *Id.* A recommendation from the relevant township is also required, along with "[a]ny other relevant information and material requested by the Planning Director or the Planning Commission." *Id.* §§ 5.5.3.5–.7.[20]

[20] Even assuming that Minnesota Sands completed all of the foregoing steps, its eligibility for a permit on any project proposal could still be subject to the approval of the property owners. The leases contain contradictory provisions; the landowners are obliged to support approval, but they retain the right to "object to any approvals or permits at or before any type of zoning, planning, county or township or commissioning authority." The record does not shed any light on whether the property owners were inclined to give their approval, or give up their right to object, before Minnesota Sands had even developed individual site plans.

Next, assuming that Minnesota Sands met the conditional-use permit requirements, it was simultaneously required to undergo the environmental review process set forth in Minnesota Statutes section 116C.991. Depending on the size of the proposed project, an environmental review entails the preparation of either an environmental assessment worksheet or a more detailed environmental impact statement. *See* Minn. Stat. § 116C.991(a) (environmental review for silica sand projects). The environmental review process is extensive. *See generally* Minn. Stat. § 116D.04 (2018) (laying out procedures and requirements for environmental assessment worksheets and environmental impact statements); Minn. R. 4410.1000–.9910 (2019) (same).[21] As demonstrated by Minnesota Sands' own decision in August 2012 to abandon its conditional-use application for two projects in the County after being told by the County that environmental review was required, an applicant's completion of this process depends upon many variables.

[21] A detailed overview of the environmental review process is not necessary. Suffice it to say that the process has many potential steps that begin with an environmental assessment worksheet. Minn. R. 4410.0200, subp. 24. The worksheet is "a brief document which is designed to set out the basic facts necessary to determine whether an [environmental impact statement] is required for a proposed project." *Id.* The project's "responsible governmental unit" is established, which in turn reviews the worksheet and solicits public comment. *See* Minn. R. 4410.0500 (2019) (responsible governmental unit selection procedures); Minn. R. 4410.1600 (public comment period). If an environmental impact statement is needed, the process follows four additional steps: (1) "scoping" the environmental assessment worksheet to determine what issues and alternatives will be covered in the environmental impact statement, Minn. R. 4410.2100; (2) preparing the draft statement, which includes an analysis of project alternatives, mitigation measures, and cumulative potential effects, Minn. R. 4410.2600; (3) public review of the draft statement and preparing a final statement in response to public comments, Minn. R. 4410.2700; and (4) review of the statement's "adequacy" by the responsible governmental unit, Minn. R. 4410.2800.

But even if Minnesota Sands met all the foregoing criteria, the County was empowered to grant a conditional-use permit subject to "conditions it considers necessary to protect the public health, safety and welfare." Winona County, Minn., WCZO § 5.5.4.6. This provision raises another contingency. Whether Minnesota Sands would find it profitable to mine silica sand under potential additional conditions imposed by the County—and, therefore, obtain the right to possession—is, at this point, pure speculation.

Only after Minnesota Sands obtained the conditional-use permit could it engage in mining silica sand—the only activity for which it had the right to enter upon and use the premises that it leased. Until Minnesota Sands actually began that activity, the property owners retained "the absolute right to continue to complete cropping and farming activities on the portion of the premises." Thus, for example, if the company received a permit from the County to mine sand, but decided to wait until market conditions were optimal to do so, its right to possession and control of the premises would remain inchoate.[22]

For a variety of understandable reasons—including a downturn in the hydraulic fracturing industry—Minnesota Sands never came close to securing the possessory rights described in its lease agreements. When the ordinance was passed that prohibited industrial mineral operations, Minnesota Sands' interest was, at most, a contingent-use interest under Minnesota law, for which it paid $1,000.00 to keep that interest open for a term of years.

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[22] This conclusion accords with the common law rule as expressed by section 1.8 of the Restatement (Second) of the Law of Property. According to the Restatement, "[w]hen a stipulated event must occur before an otherwise validly created landlord-tenant relationship is to commence, the relationship is not established until such event occurs." Restatement (Second) of Prop.: Landlord & Tenant § 1.8 cmt. a (1977).

See Interest, *Black's Law Dictionary* (10th ed. 2014) (defining "contingent interest" as an "interest that the holder may enjoy only upon the occurrence of a condition precedent"). A contractual interest that is contingent upon the discretionary decision of a governmental unit is not a property interest protected by the Fifth Amendment. *See, e.g.*, *Conti v. United States*, 291 F.3d 1334, 1342 n.5 (Fed. Cir. 2002) (declining to recognize a property interest in "the government's discretionary decision not to exercise its explicitly granted authority to revoke, suspend, or modify [a] permit" (citing *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986))); *see also Campbell v. United States*, 134 Fed. Cl. 764, 778 (Fed. Cl. 2017) (stating that "when a property interest is contingent on a favorable decision of a federal agency, it is not a cognizable property interest under the Takings Clause" (citing *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 858 (Fed. Cir. 2009))), *aff'd*, 932 F.3d 1331 (Fed. Cir. 2019).[23]

Because under Minnesota law Minnesota Sands never had a present, or even non-contingent, possessory right to use, or to possess and control, the premises described in its lease agreements, we conclude that it did not have a property interest protected by

[23] The dissent implies that the Takings Clause forbids the government from requiring that a property owner seek its permission to make whatever use of her property that she wants. This view of the government's authority to regulate property rights is both misguided and wrong. The regulation of land use is "perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982). And while a government cannot eliminate *all* productive use of the land, *Lucas*, 505 U.S. at 1026, the exercise of regulatory power—including zoning regulations—is squarely within constitutional bounds. *See Penn Cent. Transp. Co.*, 438 U.S. at 125.

the Fifth Amendment. Accordingly, Minnesota Sands' takings claims under the United States and Minnesota Constitutions fail.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

D I S S E N T

ANDERSON, Justice (dissenting).

Respondent County of Winona passed an ordinance that allows silica sand to be mined and used for local purposes, but prohibits the export of that sand from Minnesota if the intended use of the sand outside the state is hydraulic fracturing of shale. Because protecting local mining and use of silica sand at the expense of out-of-state uses of that sand violates the Commerce Clause, and also because the analysis of the court defeats the purpose of the Takings Clause, I respectfully dissent.

I.

I first address whether the Winona County ordinance is valid under the Commerce Clause of the United States Constitution.

"The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests." *C & A Carbone, Inc. v. Town of Clarkstown*, N.Y., 511 U.S. 383, 393 (1994); *see H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–39 (1949) (noting that the "economic unit is the Nation," and production is encouraged "by the certainty that [the producer] will have free access to every market in the Nation, [and] that no home embargoes will withhold [its] exports"). The Commerce Clause "circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce," *Hicklin v. Orbeck*, 437 U.S. 518, 533 (1978), and precludes local protectionist measures, *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (stating that the state's export ban on energy "is precisely the sort of protectionist regulation that the Commerce

Clause declares off-limits to the states"). Thus, "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (citations omitted).

"If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994). The law "must be invalidated" unless " 'it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' " *Id.* at 100–01 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)). "The virtually *per se* rule of invalidity applies not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade." *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992) (citations omitted) (internal quotation marks omitted).

In simple terms, Winona County's ordinance prohibits all excavation, mining, and processing of "industrial minerals." *See* Winona County, Minn., Winona County Zoning Ordinance (WCZO) § 9.10.2 (2016). But the details of this ordinance show a very specific distinction between permitted "local" uses of "sand" as opposed to an export ban for one narrow use: sand, specifically silica sand, intended "for use in the hydraulic fracturing of shale to obtain oil and natural gas." *Id.* § 4.2 (2016) (definition of "Industrial Minerals"). No one contends—and the record certainly does not establish—that there are any local or Minnesota uses of silica sand for hydraulic fracturing of shale to obtain oil and natural gas;

thus, the plain terms of the ordinance can be read only as a ban on the export of silica sand when the intended out-of-state use is for hydraulic fracturing.

It is on this point that I part ways with the court. The potential barrier constructed by the court for a hypothetical in-state purchaser of silica sand ignores the *benefit* conferred by the ordinance on permitted "local" uses of sand.[1] Winona County admits that the permitted "construction minerals" under the ordinance includes silica sand that is "identical" to the silica sand that is a prohibited "industrial mineral." The ordinance creates no barrier for an in-state purchaser of silica sand and imposes differential treatment only with respect to an intended out-of-state use for silica sand. *See Or. Waste Sys., Inc.*, 511 U.S. at 99 (explaining that the Supreme Court uses the term "discrimination" to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"). The term "industrial minerals" includes "silica sand" but then excludes that same sand when it would be used as "construction minerals." Winona County, Minn., WCZO § 4.2. I cannot agree with the court that there is no discrimination between the economic interests of in-state users versus out-of-state users when the plain terms of the ordinance draw distinctions based only on the intended use.

Despite the mutual exclusions in the definitions, the record suggests that one mineral is different from another only to the extent that its use is either local or nonlocal. One county official, who is charged with administering the zoning ordinance, recognized that

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[1] Although the court refers to this as "industrially produced silica sand," the ordinance does not. The ordinance prohibits the "excavation, extraction, mining, and processing of industrial minerals," and those minerals are defined as "silica sand," which is not a "construction mineral[]" used for "local" purposes.

" 'sand and gravel' considered [by the zoning ordinance as] a construction mineral may include 'silica sand,' as silica sand is found throughout the County and used for construction purposes and animal bedding." And in an affidavit, a consultant for appellant Minnesota Sands stated that "the composition of the two types of sand can be, and often is, the same" and that "[t]he process to mine silica sand, when used as a proppant in hydraulic fracturing, and silica sand, when used . . . as a construction or bedding material[,] does not differ in any material way."

These facts, which we must accept as true for summary judgment purposes, *see Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015), establish that end use alone defines the mineral. If sand were to be used for "local" purposes—for construction purposes or animal bedding, for example—then it would be mined as a "construction mineral," which is permissible. But if the same sand were "commercially valuable for use" in fracking that cannot occur locally (the court and the parties agree that fracking does not occur in Minnesota) and used as a fracking proppant, then the sand would be mined as an "industrial mineral," which is not permissible under the ordinance. This differential treatment, which allows local mining to proceed without impairment, while selectively banning the mining of the same resource for nonlocal uses, violates the Commerce Clause.

The ordinance "preserves local commerce, to the benefit of local consumers of silica sand, who are insulated from the effects of unrestricted trade in silica sand," *Minn. Sands, LLC v. Cty. of Winona*, 917 N.W.2d 775, 789 (Minn. App. 2018) (Johnson, J., concurring in part and dissenting in part), giving locals a "preferred right of access," *City of*

Philadelphia, 437 U.S. at 627, to sand located within the county borders. This "is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits." *New England Power Co.*, 455 U.S. at 339. The Supreme Court of the United States correctly overturned another Minnesota law over a century ago, stating that "[o]ur duty to maintain the Constitution will not permit us to shut our eyes to [the] obvious and necessary results of the Minnesota statute." *Minnesota v. Barber*, 136 U.S. 313, 323 (1890) (striking down a Minnesota law that required a Minnesota inspector to certify meat within 24 hours before slaughter, because, in effect, it was an absolute ban on the sale of out-of-state meat).

Because the discrimination appears on the face of the ordinance by way of an affirmative distinction drawn between local and nonlocal uses of sand, the ordinance is subject to per se invalidation. *See Or. Waste Sys., Inc.*, 511 U.S. at 99. Winona County does not explain why the ordinance "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 100–01 (quoting *New Energy Co. of Ind.*, 486 U.S. at 278). The ordinance, therefore, should be invalidated.[2] I would reverse the district court's summary judgment in favor of Winona County.

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[2] The court concludes that this ordinance does not confer any benefit to in-state economic interests. But on its face, the ordinance allows Winona County to hoard more sand for local construction purposes. And although it may not be a proclaimed purpose, it cannot be overlooked that the effect specifically harms the out-of-state fracking industry—an industry that groups who advocated for this ordinance have animus towards—by depriving it of sand from Winona County.

Regardless of how much or how little sand is removed, the ban is effective whenever out-of-state fracking occurs. It is, of course, conceivable that the County, using its police powers, could constitutionally ban sand mining activities altogether. But what the County cannot do is what the County did here—tailor a local ordinance to shield and protect local interests while using its ordinance power to devastating effect against the out-of-state fracking industry.

The court disagrees, concluding that "[t]he absence of any express distinction between in-state and out-of-state interests causes Minnesota Sands' claim of facial discrimination to fail." To be sure, as the court describes, many laws invalidated by the Supreme Court have employed an express distinction between in-state and out-of-state interests. But those laws were enacted by a legislative body with statewide authority; there is no talismanic significance to the words "in-state" or "out-of-state" because we consider here an ordinance enacted by a *local* legislative body that does not have statewide authority.[3] The Supreme Court has invalidated ordinances enacted by a local legislative authority to shield local interests—even if not statewide interests—from interstate commerce. *See, e.g.*, *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951) (concluding that a city ordinance that restricted milk sales in the city unless processed within a 5-mile radius from the city center "erect[s] an economic barrier protecting a major *local* industry against competition from without the State" and "plainly discriminates against interstate commerce" (emphasis added)); *Sprout v. City of South Bend, Ind.*, 277 U.S. 163, 167–71 (1928) (finding a city ordinance that required a city license to conduct bus services without making distinctions between interstate and intrastate services invalid

[3] *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353 (1992), undermines the court's rationale that discriminating against other in-state interests saves Winona County's ordinance. In *Fort Gratiot*, a state law allowed individual counties to burden other in-state counties, in addition to other states, by refusing to receive trash from either. The state law violated the Commerce Clause because it allowed each of the state's counties to "isolate itself from the national economy." *Id.* at 361. Here, the fact that the term "local" can be stretched to mean that Winona Country burdens other counties in addition to other states does not make the ordinance constitutional. The ordinance isolates the local sand industry from the national economy for frac sand.

under the Commerce Clause and stating that the "privilege of engaging in [interstate] commerce is one which a State cannot deny"); *see also C & A Carbone*, 511 U.S. at 391–92 (summarizing cases where "offending *local* laws [that] hoard[ed] a *local* resource . . . for the benefit of *local* businesses" were struck down (emphasis added)); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 361 (1992) (holding that a county "evenhandedly" discriminating against other counties in addition to other states does not save the law banning acceptance of solid waste because a state "may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself"); *Chem. Waste Mgmt.*, 504 U.S. at 344 n.6 (stating that "[t]he virtually per se rule of invalidity applies not only to laws motivated solely by a desire to protect *local* industries from out-of-state competition, but also to laws that respond to legitimate *local* concerns by discriminating arbitrarily against interstate trade" (emphasis added) (citations omitted) (internal quotation marks omitted)).

The court also decides that local commerce is somehow transformed into interstate commerce because the local uses of construction sand might extend into neighboring counties that happen to be located in Wisconsin. The court's narrow view of interstate commerce is not supported by fundamental principles of the dormant Commerce Clause; longstanding case law also rejects this limited view of interstate commerce. *See H.P. Hood & Sons, Inc.*, 336 U.S. at 539 ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, [and] that no home embargoes will withhold

his exports . . . ."); s*ee also Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) ("Our negative Commerce Clause jurisprudence grew out of the notion that the Constitution implicitly established a national free market . . . ."). A Minnesota meat inspection ordinance, invalidated by the Supreme Court under the dormant Commerce Clause, *Barber*, 136 U.S. at 323, was not saved by the plausible fact (although not explored by the Supreme Court) that some butchers in western Wisconsin were able to bring their meat to Minnesota for inspection within 24 hours before slaughtering. The focus of the dormant Commerce Clause is the national economy; Winona County's ordinance protects local users of sand and burdens users of sand located outside of Minnesota. This Winona County cannot do.

In sum, Winona County's ordinance erects a facially discriminatory ban on silica sand mining when intended for hydraulic fracturing that is per se invalid. Minnesota Sands is entitled to relief, and the court of appeals should be reversed.

II.

But even if we concluded that the local ordinance at issue here does not fall on Commerce Clause grounds, Minnesota Sands has protected constitutional interests in its leasehold property under the Takings Clause. The court concludes otherwise, in the process defeating the constitutional protection of private property that the Takings Clause extends and reaching a result that is inconsistent with controlling Supreme Court decisions.

The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *see also* Minn. Const. art. I, § 13. "A property owner has an actionable Fifth Amendment takings claim when the government

takes his property without paying for it." *Knick v. Twp. of Scott, Pa.*, ___ U.S. ___, ___, 139 S. Ct. 2162, 2167 (2019).

When determining the scope of "property" subject to the Takings Clause, we must be "mindful of the basic axiom that property interests are not created by the Constitution" but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (citations omitted) (internal quotation marks omitted).[4] The "existing rules or understandings" to which we must look are traditional property law rules. We may not "sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998).

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[4] Indeed, the right to own property is not created by the government; rather, it predates our Constitution and is properly thought of as belonging to the natural rights all people possess. *See, e.g.*, John Locke, *Second Treatise of Civil Government and a Letter Concerning Tolerance* ¶ 27 (J.W. Gough ed. 1948).

> Though the earth, and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.

Id.; *see also* 1 William Blackstone, *Commentaries on the Laws of England* 138 (1771) (identifying property as an absolute right).

We have long recognized that mineral leases are protectable property interests under Minnesota law. "It is well settled in this state, as elsewhere, that the owner of land may segregate the mineral estate from the rest of the land, and convey either interest without the other." *Washburn v. Gregory Co.*, 147 N.W. 706, 707 (Minn. 1914). We have acknowledged that "[t]he customary method of developing, working, and obtaining profits from mineral lands, at the time of the adoption of our Constitution, was, by means of mineral leases." *State v. Evans*, 108 N.W. 958, 960 (Minn. 1906); *see also Sehlstrom v. Sehlstrom*, 925 N.W.2d 233, 238 (Minn. 2019) (" 'For what,' says Lord Coke . . . 'is the land, but the profits thereof.' " (citation omitted)); *Evans*, 108 N.W. at 960 ("The contention . . . that iron ore in place is a part of the land, that there may be a separate ownership of the surface and the minerals of land, [and] that the mineral leases in question create an interest in the land . . . must be, and is, conceded.").

Because mineral leases, including the leases at issue here, have been "long recognized" as property, *Phillips*, 524 U.S. at 167, the protected property interest defined by those leases may not be regulated out of existence by the government, *see Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (explaining that regulation will be recognized as a Fifth Amendment taking if it "goes too far").[5] Put another way, leasehold interests are

[5] Prior to its decision in *Lucas v. South Carolina Coastal Council*, the Supreme Court had been unclear about what constitutes the denominator in determining whether a taking should be analyzed as a total taking or a diminution in value. 505 U.S. 1003, 1016–17 n.7 (1992). In determining the denominator, *Lucas* clarified that a protectable property interest is "shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.*

protected by the Takings Clause of the United States Constitution. Because Minnesota Sands argues that its mineral leases were taken by the county ordinance, this case should, at a minimum, be remanded to the district court for an inquiry that considers factors "such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Horne v. Dep't of Agric.*, ___ U.S. ___, ___, 135 S. Ct. 2419, 2427 (2015) (discussing the takings factors to be considered under *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

The court disagrees, rejecting the takings claim because it concludes that Minnesota Sands does not have a vested property interest protected by the Takings Clause. The court offers several reasons why this is so. First, Minnesota Sands has not obtained conditional-use permits, which may entail "potential additional conditions" that may not be acceptable to Minnesota Sands. Nor has Minnesota Sands pursued environmental review, which would involve "many potential steps" and "many variables." Last, the court speculates that Minnesota Sands might not "find it profitable to mine silica sand" after all these steps are completed.[6] Thus, the court holds that, "[b]ecause under Minnesota law Minnesota

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In Minnesota, as recognized in *Washburn* and *Evans*, severed mineral rights are a recognized property interest. Minnesota Sands holds those rights, and only those rights. These rights were nearly completely extinguished by Winona County's ordinance, and thus, under Supreme Court precedent, it is necessary to analyze the facts here using the framework of full deprivation (i.e., as a deprivation of all economically viable use), rather than treating these circumstances as a deprivation in value.

[6] In addition to these contingencies, the court also suggests that Minnesota Sands would need "approval of the property owners" to mine sand but then states that "[t]he record does not shed any light on whether the property owners were inclined to give their approval, or give up their right to object, before Minnesota Sands had even developed individual site plans." But the court is incorrect on the record: Each landlord also expressly

Sands never had a present, or even non-contingent, possessory right to use, or to possess and control, the premises described in its lease agreements, . . . it did not have a property interest protected by the Fifth Amendment."

The court's reasoning presents both factual and legal difficulties. Factually, the court's conclusion requires that we simply ignore lease provisions that cut against a vesting theory. For example, the leases expressly state that Minnesota Sands "shall be entitled to possession on the commencement date." With that entitlement to possession, Minnesota Sands also has "the right to make use of all roadways presently existing on the Property" and the right to "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." The leases also give Minnesota Sands an exclusive right to mine the leased premises. Each lessor "represent[ed] that it has not previously leased or assigned the mineral rights to the premises to any other party" and "covenant[ed] not to lease, grant or assign the mineral rights to the premises described above, during the term of this lease." Thus, under the terms of the leases, Minnesota Sands has the right to enter the land, clear the land, and exclude others from the land, demonstrating that it has the required "immediate, fixed right of present or future enjoyment" of the property to have a vested leasehold. *Vest*, *Black's Law Dictionary* (11th ed. 2019).

Legally, even if we could accept the court's abridged take on the leases, I disagree with its abridged take on the Fifth Amendment. Under the court's view of this

promised, in the relevant leases, "to assist and cooperate in obtaining any such approvals or permits."

constitutional protection, it does not matter how significant the interference of a regulation is with the "reasonable investment-backed expectations" of a property owner. *Horne*, ___ U.S. at ___, 135 S. Ct. at 2427 (discussing the *Penn Central* factors). Indeed, according to the court, it does not matter if the government subjected the owner's private property to a total regulatory taking, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992), if the owner's property was not sufficiently "vested" before the regulation became effective. An owner's regulatory takings claim, partial or total, may proceed only *after* the owner has a "vested interest to use" the property as expected. Here, according to the court, that means that Minnesota Sands has no constitutionally protected property interest until Winona County approves mining silica sand for hydraulic fracturing, which is the proposed use of Minnesota Sands' leaseholds. Therefore, under the court's logic, Minnesota Sands may not bring a Takings Clause challenge to Winona County's frac sand mining ban until Winona County first permits frac sand mining.[7]

This vesting analysis defeats the very purpose of the Takings Clause. If a government regulation reduces private property to the point where it is only "contingent," "speculative," and "inchoate" (as the court variously describes the postregulation leases of Minnesota Sands), it has not gone "too far," *Pa. Coal Co.*, 260 U.S. at 415, as one might

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[7] The court contends that a governmental unit can insulate itself from the Takings Clause by relying on the ability of the government to manipulate zoning and land use controls. This is not, and cannot be, the law; the Takings Clause cannot be voided by local ordinance, no matter how eager Winona County is to limit out-of-state interests. I agree with amici, "the inability to get a [conditional-use permit] is properly analyzed as a *taking* of property, not a flaw in the property interest." (Emphasis added.) The fact that a takings claim, either partial or total, could have arisen under the prior regulations cannot now mean that a takings claim cannot arise from a more absolute and total ban on mining frac sand.

expect. But under the court's analysis, the regulation does not even trigger Takings Clause protection. The court thus gives confiscatory government regulation immunity from the Takings Clause.

The court's logic is at odds with several Supreme Court decisions. *See Lucas*, 505 U.S. at 1026, 1032 (reversing the South Carolina Supreme Court, which took a Takings Clause approach that "would essentially nullify *Mahon*'s affirmation of limits to the noncompensable exercise of the police power"); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 626–27 (2001) (rejecting a "sweeping" rule of the Rhode Island Supreme Court that "absolve[d] the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable"); *Phillips*, 524 U.S. at 167 (forbidding state efforts to "sidestep the Takings Clause").

There is not now, nor has there ever been, a vesting requirement under the Takings Clause. The Supreme Court has not required that a claimant obtain vested rights in a prohibited use before bringing a regulatory takings challenge. *See, e.g.*, *Palazzolo*, 533 U.S. at 614–15, 632 (allowing a regulatory takings claim to proceed despite claimant never having obtained authorization to fill a salt marsh); John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 Wash. U. J. Urb. & Contemp. L. 27, 37 n.38 (1996) (noting that "in *Lucas*, there is no indication that the successful plaintiff possessed vested rights, because plaintiff did not possess a building permit, and under South Carolina law, vesting occurs only upon issuance of a building permit and expenditures in reliance thereon"). Nor have we adopted the vesting requirement imposed today. *See Hubbard*

Broad., Inc. v. City of Afton, 323 N.W.2d 757, 759, 766 (Minn. 1982) (analyzing the merits of a takings claim even though the claimant's property interest was "conditioned upon the granting . . . of a special-use permit").

The decisions on which the court relies add little weight to its vesting theory. In *Conti v. United States*, the federal government banned the use of gillnets for harvesting swordfish. 291 F.3d 1334, 1337 (Fed. Cir. 2002). A fisherman who used gillnets argued that the ban was a taking of his swordfishing permit. *Id.* Rejecting this argument, the *Conti* court looked to the fact that the fisherman "could not assign, sell, or otherwise transfer the permit" and that he "lacked the authority to exclude others from the Atlantic Swordfish Fishery," both traditional hallmarks of property. *Id.* at 1341. Therefore, the court held, "[t]he absence of crucial indicia of a property right, coupled with the government's irrefutable retention of the right to suspend, revoke, or modify [the fisherman's] swordfishing permit, compels the conclusion that the permit bestowed a revocable license, instead of a property right." *Id.* at 1342.

An interest in a revocable, nonexclusive, swordfishing permit is nothing like, and indeed is substantially less than, the interest of Minnesota Sands in its mineral-rights leases. These leases bear traditional hallmarks of property; for example, the right of quiet enjoyment as well as the right to alienate—after all, Minnesota Sands acquired its leasehold interests by assignment. Each lease gives Minnesota Sands an exclusive right to mine the leased premises. Not only did each lessor "represent[] that it has not previously leased or assigned the mineral rights to the premises to any other party[,]" but also expressly "covenant[ed] not to lease, grant or assign the mineral rights to the premises described

above, during the term of this lease." Nor do the leases of Minnesota Sands suggest that they are revocable at will by the government. Most importantly, Minnesota recognizes severable rights in minerals. Minnesota Sands holds that right, to the exclusion of the rest of the world, for the leased premises.

Moreover, the fact that the contract specified that certain payments under the lease were not due to the lessor until a conditional-use permit was obtained does not make the interest of Minnesota Sands in the right to mine sand, as the court states, "inchoate." The court does not understand the effect of a conditional-use permit on property rights. A conditional-use permit allows the owner of a property to put his property to use in a manner that the ordinance expressly permits. *Westling v. City of St. Louis Park*, 170 N.W.2d 218, 221 (Minn. 1969) (stating that uses under a conditional-use permit are "legislatively [p]ermitted in a zone subject to controls" whereas uses requiring a variance are "legislatively [p]rohibited but may be allowed for special reasons" (citations omitted) (internal quotation marks omitted)). That Minnesota Sands temporarily chose not to pursue a permitted activity is a business decision driven by many factors, including the market price and demand for sand. When to actually extract sand is a business decision made by Minnesota Sands, not by our court. *See Janssen v. Best & Flanagan*, 662 N.W.2d 876, 882 (Minn. 2003) ("[C]ourts are ill-equipped to judge the wisdom of business ventures and have been reticent to replace a well-meaning decision by a corporate board with their own."). The fact that sand mining had not yet begun under the exclusive mineral lease held by Minnesota Sands at the time of the total taking by the ordinance does not mean that Minnesota Sands had abandoned its interests, but rather that the business conditions were

not ideal. A conditional-use requirement does not exempt Winona County from the Takings Clause.

Campbell v. United States, 134 Fed. Cl. 764 (Fed. Cl. 2017), is equally unpersuasive. In *Campbell*, the plaintiffs who brought the takings claim were "victims of accidents which occurred while driving General Motors vehicles." *Id.* at 767. After General Motors filed a bankruptcy petition, the plaintiffs' causes of action became unsecured claims. *Id.* at 768. The plaintiffs asserted that a taking of property occurred when "the United States took actions to obtain a particular restructuring" of General Motors that led the bankruptcy court to "extinguish[] plaintiffs' successor liability causes of action" against the reorganized General Motors. *Id.* Looking to "the powers accorded the bankruptcy court," the *Campbell* court found that plaintiffs' interest in successor-liability claims was "targeted for—and was subject to—extinguishment by the conditions that the government imposed." *Id.* at 776. Therefore, the court concluded, plaintiffs' asserted interest in their unsecured claims becoming successor-liability claims "was not a cognizable property interest under the Takings Clause." *Id.* at 779.

A mineral lease is nothing like an expectancy that an unsecured claim will survive bankruptcy. It is, as we have long recognized in Minnesota, a valuable property interest. *Washburn*, 147 N.W. at 707; *Evans*, 108 N.W. at 960. The leases here give current, fixed, possessory rights to Minnesota Sands—the right to enter the land, the right to clear and develop the land, and the right to exclude others from the land. Before this decision, long-recognized private-property interests like those of Minnesota Sands were not subject to extinguishment by the government in the same way that unsecured claims are subject to

extinguishment by a bankruptcy court. *Pa. Coal Co.*, 260 U.S. at 415. In short, neither *Campbell*, nor any other case the court cites, supports the court's result.

The novel analysis used by the court here has subtle, but serious, implications for Takings Clause jurisprudence. The court opines that environmental regulations, and regulatory schemes such as conditional-use requirements, are enough to deprive an owner of the full use of his property interests. This analysis starts at the wrong place; the analysis must start with the constitutionally protected interests. Both the United States Constitution and the Minnesota Constitution recognize that private property shall not be taken for public use without just compensation. U.S. Const. amend. V; Minn. Const. art. I, § 13. Unlike these constitutional protections for "private property," there is no equivalent constitutional protection for environmental regulation or for a requirement that the owner of property must approach the government on bended knee for permission to use his property as he sees fit.

I do not dispute that some regulation of sand mining is necessary, beneficial, and constitutionally permissible. But Minnesota Sands has a property interest in the use, possession, and control of its mineral leases protected by the Takings Clauses of the Fifth Amendment and the Minnesota Constitution. Mineral leases, which have been recognized as property at least since "the time of the adoption of our Constitution," *Evans*, 108 N.W. at 960, cannot be regulated out of existence with immunity.

I would reverse the grant of summary judgment and remand to the district court for further proceedings—at a minimum, for an analysis under the *Penn Central* factors. For

that reason, and also because the Winona County ordinance contravenes the Commerce Clause, I respectfully dissent.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Anderson.

THISSEN, Justice (concurring in part, dissenting in part).

I join in Part II of Justice Anderson's dissent.

C O N C U R R E N C E & D I S S E N T

THISSEN, Justice (concurring in part, dissenting in part).

I join in the opinion of the majority with respect to parts I–II. With respect to part III of the majority's opinion, I dissent. Because I join part II of Justice Anderson's dissent, I would reverse the district court's grant of summary judgment on Winona Sand's constitutional claim under the Takings Clauses.